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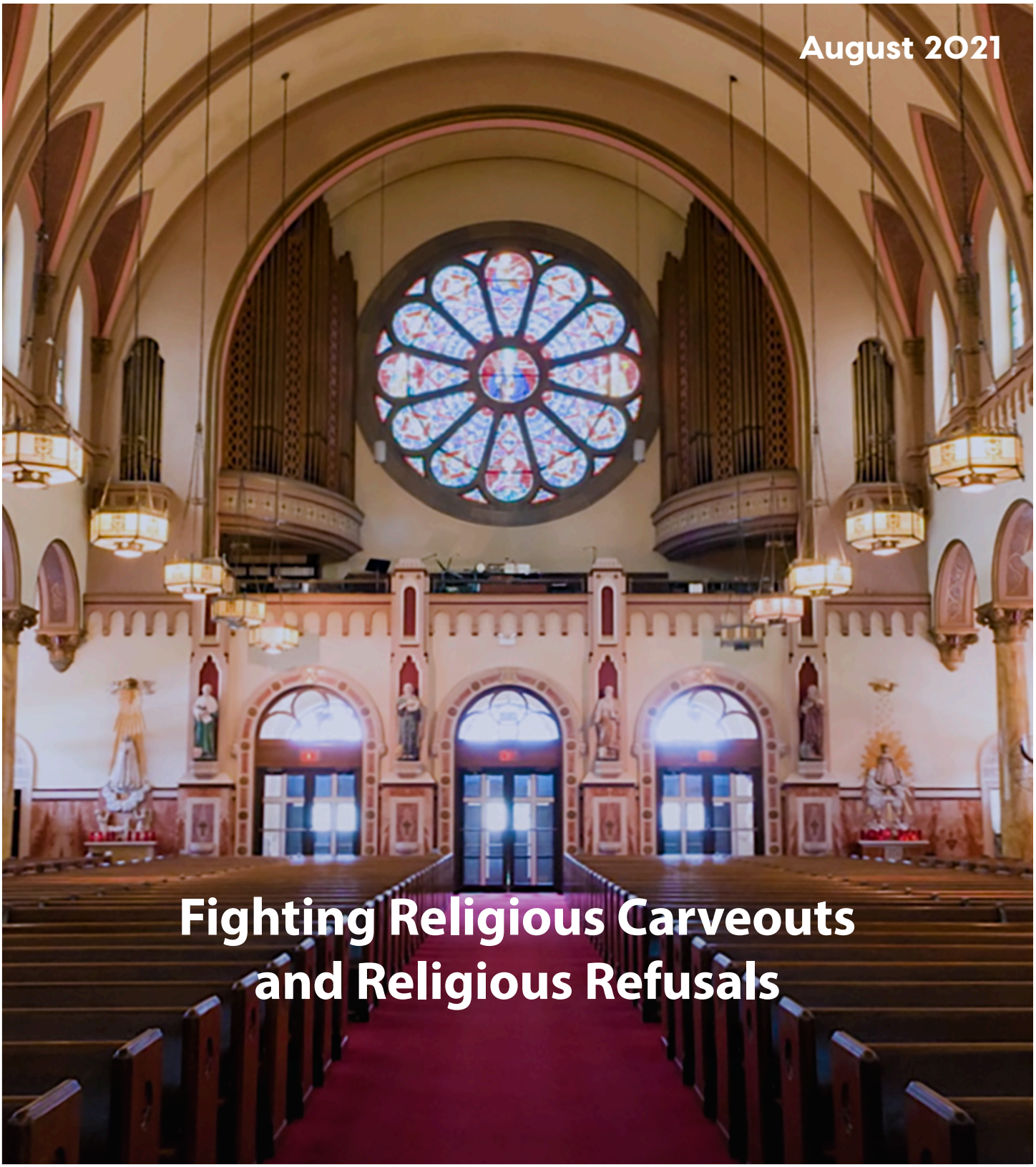

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Fighting Religious Carveouts and Religious Refusals

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Cover Photograph of St. Andrew the Apostle Parish by Jonathan Mercado

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EXECUTIVE SUMMARY

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En Banc 7th Circuit Categorically Exempts Religious Organizations from Hostile Work Environment Claims Brought by a Gay "Ministerial Employee"

By Joseph Hayes Rochman

In *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 2021 WL 2880232, 2021 U.S. App. LEXIS 20410 (7th Cir., July 9, 2021) the U.S. Court of Appeals for the 7th Circuit, sitting *en banc* after vacating a 2-1 panel opinion, held in a 7-3 decision that the ministerial exception to federal anti-discrimination laws under the Religion Clauses shields religious organizations from hostile work environment claims by any employee who qualifies as a 'minister' – in this case, a gay church music director.

The ruling expands the ministerial exception from the Supreme Court's rulings in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), where the Court held that religious employers are protected from civil suits over claims of discrimination in tangible work actions such as hiring, firing, and promotions. In *Demkovich*, the 7th Circuit said that the First Amendment Religion Clauses protect religious organizations from suits over conduct not necessary to control or supervise an employee. Indeed, an employer need not show a basis in faith and doctrine for its challenged actions to be shielded from liability by the exception.

Sandor Demkovich, a music director, choir director, and organist for St. Andrew the Apostle, was one of many LGBTQ employees of religious organizations who married after the Supreme Court's landmark decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), only to face discrimination and termination when their employers found out. Demkovich was with his partner for fourteen years before his marriage and hired by St. Andrew in 2012. His amended complaint describes a work environment where his supervisor Reverend Dada and staff repeatedly used hate speech such as racial slurs, sexist and homophobic comments, and discriminatory remarks about people who are disabled. Reverend Dada, for example, referred to Demkovich and his then partner as "bitches" and their ceremony as a "fag wedding." Demkovich, who suffers from diabetes and metabolic syndrome, was also subject to many rude comments about his disability from Reverend Dada. For example, Dada asked Demkovich to walk his dog to lose weight and told him that the church could not afford his insurance plan. Yet, the 7th Circuit ruled that the ministerial exception barred Sandor Demkovich's hostile environment claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA).

Demkovich originally filed suit in December 2016 at the Northern District of Illinois. He conceded that he was within the meaning of a 'minister' under Supreme Court precedent in *Hosanna-Tabor* and *Our Lady of Guadalupe*. Demkovich's amended complaint did not challenge that he was fired for marrying his husband. He challenged Reverend Dada's discriminatory treatment based on his sexual orientation and disability. On May 5, 2019, U.S. District Judge Edmond E. Chang, ruling on the Archdiocese's Rule 12(b)(6) motion to dismiss for failure to state a claim, held that Demkovich's disability-based discrimination claim may proceed but not his sexual orientation discrimination claim.

St. Andrew filed an interlocutory appeal not limited to the District Court's ruling on Demkovich's ADA claim. The church sought a broad certified question: "Under Title VII and the Americans with Disabilities Act, does the ministerial exception bar all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?" The 7th Circuit panel ruled on August 31, 2020, 2-1, that the ministerial exception does not categorically bar hostile work environment suits against religious employers.

St. Andrew, represented by The Becket Fund for Religious Liberty, petitioned for a rehearing *en banc* on October 5, 2020. St. Andrew's petition for rehearing argued that the panel had actually overruled a prior 7th Circuit opinion, placing the 7th Circuit on the other side of a circuit split. They also claimed that the panel's opinion conflicted with the Supreme Court precedents of *Hosanna-Tabor* and *Our Lady of Guadalupe*. The 7th Circuit granted rehearing *en banc* on December 9, 2020.

The Supreme Court confirmed the validity of the ministerial exception under both Religion Clauses of the First Amendment in 2012 in *Hosanna-Tabor*. The Court wrote that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." The exception was first applied after the passing of the Civil Rights Act of 1964 by a court of appeals in *McClure v. Salvation Army*, 460 F.2d 533 (5th Cir. 1972). *McClure* involved an ordained minister at the Salvation Army who sued under Title VII after she was fired for complaining that her male counterparts were paid more. But that court expressly rejected applying the exception to any church employee that was not an ordained minister.

In *Our Lady of Guadalupe*, the Supreme Court addressed the narrow question of whether a Catholic school teacher who was not an ordained minister was a 'minister' under *Hosanna-Tabor*. Holding that the plaintiff was a minister for purposes of the exception, the Court emphasized its rejection of a rigid formula in determining whether a church employee is a minister within the exception. In rejecting the 9th Circuit's interpretation of the teacher's duties, the Court emphasized that the teacher "prayed with her students, taught them prayers, and supervised the prayers led by students." *Our Lady of Guadalupe* placed importance on supervision as part of a court's analysis of whether a church employee has sufficient religious duties, and thus is a 'minister' for purposes of the exception. Thus, that inquiry is confined, without further guidance, to the narrow question of whether one is a minister.

The 7th Circuit previously addressed whether the ministerial exception bars Title VII claims in *Alicea–Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003). There, a Hispanic Communications Manager for the Catholic Bishop of Chicago filed a claim with the EEOC for gender and national origin discrimination after she was constructively discharged. Demkovich contended that not only did *Alicea-Hernandez* address only tangible employment actions but that the opinion merely held that once the ministerial exception applies, the reasons for the alleged discriminatory conduct are irrelevant. The *Alicea-Hernandez* court did not address specifically whether a hostile work environment claim, standing alone, would be barred under the exception. Conversely, the Archdiocese argued that *Alicea-Hernandez* held that the ministerial exception "applies without regard to the type of claims being brought." Notably, Judge Rovner, who was nominated to the 7th Circuit by President George H.W. Bush in 1992, was in the majority in *Alicea-Hernandez* but dissented in *Demkovich*.

Judge Brennan, writing for the *en banc* majority, broadly rejected the balancing approach of the panel majority. Judge Brennan was nominated to the 7th Circuit by President Trump first in 2017 and again in 2018. He was confirmed by a vote of 49-46. Judge Brennan is also the founder of the Milwaukee chapter of the Federalist Society.

The *Demkovich* majority concluded that the "First Amendment ministerial exception protects a religious organization's employment relationship with ministers, from hiring to firing and the supervising in between." Judge Brennan did not distinguish Reverend Dada's conduct from supervision of an employee that is necessary for the job. The majority reasoned first that even though *Hosanna-Tabor* and *Our Lady of Guadalupe* specifically concerned discriminatory discharges, they are not limited to tangible employment actions. Second, the majority emphasized the importance of protecting religious organizations from civil intrusion and excessive entanglement with the courts.

In the majority's view, litigating hostile work environment claims would necessarily intrude on a religious organization's autonomy. The majority feared such civil intrusion because hostile work environment claimants must prove that the "work environment was so pervaded by discrimination that the terms and conditions of employment were altered." Thus, they asserted that the "contours of the ministerial relationship are best left to a religious organization, not a court."

Next, the majority concluded that adjudicating hostile work environment claims would lead to impermissible intrusion into, and excessive entanglement with, the religious sphere. The majority feared the chilling of religious-based speech in the religious workplace. Reverend Dada's treatment of Demkovich, the majority asserted, "could constitute stern counsel to some or tread into bigotry to others." They asked, "[h]ow is a court to determine discipline from discrimination? Or advice from animus?" For the majority, the answer was simple: "to render a legal judgment about Demkovich's work environment is to render a religious judgment about how ministers interact."

Judges Hamilton, Rovner, and Wood, dissenting, urged a more cautious approach. Judge Hamilton, who had written the panel opinion and authored the dissent, was appointed to the 7th Circuit by President Obama in 2009. (His father was a Methodist minister.) Judge Hamilton noted that the majority plucked narrow language from *Our Lady of Guadalupe* out of context. The language referring to supervision was unrelated to what claims are barred by the exception. Judge Hamilton wrote that the majority took the 7th Circuit's "law beyond necessary protections for religious liberty. It instead creates for religious institutions a constitutional shelter from generally applicable laws, at the expense of the rights of employees."

The dissenters conceded that hostile work environment claims could implicate concerns of religious liberty, but that the First Amendment does not categorically bar such claims. In their view, courts are well-equipped to apply a cautious balancing approach when religious liberty concerns are raised. For example, the dissent analogized hostile work environment claims to contract and tort claims which are commonly brought against religious organizations and churches, which are not automatically exempt from being sued.

Judge Hamilton contended that the question should be "whether this particular legal immunity is necessary to comply with the First Amendment." (Internal quotations omitted). The balancing approach is more appropriate, Judge Hamilton reasoned, because the government has a compelling interest in preventing discrimination.

Judge Hamilton further noted that religious organizations have protected control over "tangible employment actions including decisions about compensation, benefits, working conditions, resources available to do the job, training, support from other staff and volunteers, and so on." Judge Hamilton reasoned that hostile work environment claims are based on conduct that is not necessary for effective supervision. Hostile work environment claims have different

elements and rules for employer liability. Accordingly, Judge Hamilton found that religious employers do not need a categorical exemption from federal anti-discrimination laws to select, supervise, or control their ministers. Instead of a categorical bar, the dissent would place a burden on the religious entity to show that the particular circumstances would require excessive entanglement by the court into the religious realm.

There is ample reason for concern over the consequences of *Demkovich v. St. Andrew the Apostle Parish*. For example, Judge Hamilton pointed to several hostile work environment cases in the 7th Circuit from which a religious organization would now be protected. Those cases included, for example, a Black employee who repeatedly had a noose left at his workstation and another case where a plaintiff was subjected to four years of groping, mimed sex acts, and racial slurs. Similar discriminatory behavior based on race, sex, gender, sexual orientation, disability, national origin and so on, would now be protected from statutory liability under the ministerial exception.

Moreover, the dissent cautioned that the expansion of the definition of a minister puts more employees at risk. This expansion places other employees such as teachers, nurses, and other healthcare workers outside the reach of Congressional power to protect employees from discrimination. Judge Hamilton cited several groups that are coaching religious organizations about how to further protect their organization from liability by assigning employees responsibilities in prayer and devotions in order to bring them within the exception. A quick online search yields many results from organizations providing resources for religious organizations to expand who is a 'minister' and law firms offering services to counsel the organizations about how to change their policies, job descriptions, and marketing materials so that the organization can avail itself of the ministerial exception.

For example, the Alliance Defending Freedom published a resource checklist and guide counseling organizations to require employees and volunteers to sign a faith statement and include how a job furthers the organization's religious mission in a job description. Alliance Defending Freedom and The Ethics & Religious Liberty Commission of the Southern Baptist Convention, *Protecting Your Ministry from Sexual Orientation Gender Identity Lawsuits: A Legal Guide for Southern Baptist and Evangelical Churches, Schools, and Ministries* (2015), https://files.lcms.org/wl/?id=K0o3QLegiAn8WRk2TrH2yon6E6yKxKKd. The guide even states that "Christian ministries include a broad spectrum of nonprofit, faith-based organizations such as pregnancy resource centers, religious publishers, campus ministries, relief agencies, mission groups, hospitals, counseling centers, adoption agencies, and food banks."

There is growing support to expand the ministerial exception to become its own separate cause of action and not simply an affirmative defense to discrimination suits. The *Harvard Law Review* published a Note in 2019 arguing that faith-based student organizations at public universities should be allowed to use it as a cause of action against the university when the student group is deregistered for violating the university's antidiscrimination policies. *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause Of Action for On-Campus Student Ministries*, 33 HARV. L. REV. 599 (2019).

The Courts of Appeals are divided, amongst the 7th, 10th, and 9th Circuits, on the question of whether the ministerial exception applies to intangible employment actions. The 9th Circuit in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), held that a Presbyterian minister's claims for sexual harassment and retaliation, unlike claims arising from her termination, were not barred by the ministerial exception absent a religious justification. The Tenth Circuit disagreed in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), *cert denied* 565 U.S. 1155 (2010). The *Skrzypczak* court held that a plaintiff's hostile work environment claims of gender and age discrimination were barred by the ministerial exception because not barring the claims would "improperly interfere with the church's right to select and direct its ministers free from state interference."

The circuit split makes the narrow question presented ripe for Supreme Court review. But it is unclear if Demkovich will petition for cert. The Court has increasingly expanded First Amendment protections under the Religion Clauses.

The majority opinion signers in *Demkovich* included Chief Judge Sykes, and Judges Flaum, Easterbrook, Kanne, Brennan, St. Eve, and Kirsch. Chief Judge Diane Sykes was nominated by President George W. Bush in 2003 and confirmed by the Senate in 2004. Judge Joel Flaum, originally nominated to the District Court for the Northern District of Illinois by President Ford, was nominated by President Regan to the 7th Circuit and confirmed by the Senate in 1983. Judge Frank Easterbrook was nominated by President Reagan in 1984 and confirmed by the Senate in 1985. Judge Michael Kanne was also nominated by President Reagan and confirmed by the Senate in 1987 to the 7th Circuit. Both Judge Thomas L. Kirsch, II, and Judge Amy J. St. Eve were nominated by President Trump and confirmed in 2018 and 2020 respectively. Judge Diane Wood, the third dissenting judge was nominated by President Clinton and confirmed unanimously by the United States Senate in 1995. Judge Michael Scudder, Jr. did not participate in the opinion. The 7th Circuit is comprised of largely Republican appointees. President Biden nominated Judge Candace Jackson-Akiwumi, who was confirmed by the Senate in June 2021 but had not yet taken the bench before the decision. She is only the second Black judge to sit on the 7th Circuit Court of Appeals and was formerly a public defender.

Sandor Demkovich was represented by attorneys Kristina Alkass, Thomas Fox, David Franklin, and Patti Levinson from Illinois-based Lavelle Law.

St. Andrew the Apostle Parish was represented by attorneys Daniel Blomberg, Eric Rassbach, and Daniel

Benson from the Becket Fund for Religious Liberty, James Geoly from Archdiocese of Chicago Office of Legal Services, and Alexander Marks from the Chicago-based law firm Burke, Warren, Mackay & Serritella.

Amici curiae that argued for extending the ministerial exception included: the State of Indiana represented by the Office of the Attorney General; Robert F. Cochran Jr. from Pepperdine Caruso School of Law represented by attorneys at Jones Day; the Lutheran Church-Missouri Synod represented by First Liberty Institute in Plano, Texas; the Serbian Orthodox Diocese of New Gracanica-Midwestern America represented by the Center for Law & Religious Freedom; the Ethics And Religious Liberty Commission Of The Southern Baptist Convention represented by Williams Connolly; the Indiana Catholic Conference, Wisconsin Catholic Conference, and the Cardinal Newman Society, represented by Southbank Legal: Ladue Curran & Kuehn; and, Alliance Defending Freedom.

Amici curiae that argued against a categorical bar to discrimination claims included the Equal Employment Opportunity Commission, Catholics for Choice, represented by Lambda Legal, and Religious Entities, Civil-Rights Organizations, Unions, and Professional Associations, represented by Americans United for Separation of Church and State. ■

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

10th Circuit Panel Rejects Web Designer's Challenge to Colorado Anti-Discrimination Law

By Arthur S. Leonard

A panel of the U.S. Court of Appeals for the 10th Circuit issued a decision in *303 Creative LLC v. Elenis*, 2021 WL 3157635 (July 26), rejecting a website designer's First Amendment challenge to the Colorado Anti-Discrimination Act's prohibition of sexual orientation discrimination by public accommodations and to a provision prohibiting public accommodations from communicating that they will reject patronage based on sexual orientation. The panel consisted of two circuit judges appointed by President Bill Clinton, Mary Beck Briscoe and Michael Murphy, and the circuit's chief judge, Timothy Tymkovich, who dissented, appointed by President George W. Bush.

303 Creative LLC is Lorie Smith's graphic and website design company. Smith claims that she is "willing to work with all people regardless of sexual orientation," but she doesn't want to be involved in designing anything for a same-sex wedding, due to her Christian religious beliefs. According to the opinion by Judge Briscoe, Smith's company has not done any wedding design business yet, but she claims that she plans to do so, so long as she isn't legally required to do work for same-sex weddings. She would like to be able to put a notice on her website that she does not design websites for same-sex weddings because of her religious beliefs.

Smith is represented by Alliance Defending Freedom (ADF), an Arizona-based law firm that specializes in religious freedom cases and has initiated many legal challenges to anti-discrimination laws. They filed suit against the members of the Colorado Civil Rights Commission and the state's Attorney General in the U.S. District Court in Denver, seeking an injunction to block enforcement of the CADA against Smith and 303 Creative.

The court found that these were appropriate defendants because the method of enforcement is for rejected customers to file charges with the Civil Rights Division, followed by ALJ hearings and decision subject to review by the Commission, followed by judicial enforcement actions brought by the Attorney General's office.

Smith's Complaint alleges that requiring her to design websites for same-sex weddings violates her right to free exercise of religion, and that the provision prohibiting public accommodations from publishing any communication that indicates a person's patronage will be refused because of their sexual orientation violates her freedom of speech. She also claimed that the law is unconstitutionally vague and overbroad. And, she argued, refusing to design websites for same-sex weddings is not sexual orientation discrimination because she would refuse such business regardless of the sexual orientation of the customer seeking her design services. (For example, if a heterosexual parent of a gay person approached Smith to design a website for the marriage of her gay child to another person of the same-sex, she would reject the business, even though the customer is not gay, because her religious beliefs reject celebrating a same-sex marriage, which is what she contends is communicated by a wedding website.)

Senior District Judge Marcia S. Krieger found that Smith and her business lacked standing to challenge the Accommodation Clause of that Colorado Act, referred to throughout the opinion as CADA, since she had not begun designing wedding websites for customers, but that they did have standing to challenge the Communication provision. Judge Krieger then granted the state's motion for summary judgment on the merits of the 1st Amendment claim, and Smith

appealed to the 10th Circuit. Smith argued on appeal that she had standing to raise her claims against the potential application of both the Accommodations Clause and the Communication Clause. Throughout her opinion, Judge Briscoe refers to Smith and her business as "Appellants," even though she is the sole proprietor and employee of her business.

Writing for the panel majority, Judge Briscoe found that the Appellants have standing to challenge both the Accommodation and Communication parts of CADA, but on the merits she ruled that Judge Krieger was correct to grant the state's motion for summary judgment.

The court agreed with Lorie Smith that requiring her to design websites for same-sex marriages could be considered "compelled speech," because the Accommodation Clause "compels Appellants to create speech that celebrates same-sex marriages," in that it would "force" them to "create websites – and thus, speech – that they would otherwise refuse." And, she wrote, "because the Accommodation Clause compels speech in this case, it also works as a content-based restriction. Appellants cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages." As a result, the court must subject the provision to strict scrutiny, under which it is deemed unconstitutional unless it serves a compelling state interest and is narrowly tailored as necessary to achieve that interest.

As part of its analysis, the court rejected Smith's argument that she was not proposing to discriminate based on the sexual orientation of her customers, finding that refusing to provide website design services for a same-sex wedding necessarily discriminates based on sexual orientation.

In this case, the arguments that ADF advanced to convince the court that this is a compelled speech case came back to defeat their claim in the end. While it prompted the court to engage in strict scrutiny, the majority of the panel ultimately decided that this was the rare freedom of speech case that survives strict scrutiny. ADF emphasized the artistic creativity that renders Smith's services "unique" in arguing that requiring Smith to design a same-sex marriage website was compelling her to speak a message that she did not want to speak. But after the court concluded that Colorado's decision to include sexual orientation in its Accommodations provision signaled a compelling state interest to protect people from discrimination in obtaining goods and services due to their sexual orientation, the court's focus shifted to whether the provision was "narrowly tailored" to achieve that purpose.

Is it possible that customers who desired the "unique" website design services offered by Smith could obtain basically the same thing from any alternative vendor? ADF did such a good job at distinguishing Smith's unique talents that it persuaded the court that giving Smith an exemption from the statute would defeat the state's compelling interest, because these are not fungible services. In the court's view, somebody who provides a uniquely personal service has a virtual monopoly over provision of that service, so making an exception to the non-discrimination requirement effectively denies the service to the potential customer.

As to the Communication Clause, the court ruled that it does not violate Free Speech rights, agreeing with District Judge Krieger that "Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination." Here the court relied on a 1973 Supreme Court opinion that rejected a newspaper's First Amendment defense against the demand by the Pittsburgh Commission on Human Relations that it not publish "help wanted" classified advertising specifying "male" or "female" applicants wanted, where a statutory ban on sex discrimination in employment made such advertising unlawful, even though it was clearly speech. See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). The court found that the statement Smith proposed to put on her website "expresses an intent to deny service based on sexual orientation – an activity that the Accommodation Clause forbids and that the First Amendment does not protect."

Turning to ADF's religious freedom arguments, the court found that CADA is a neutral law of general applicability, and thus under the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), it easily survives judicial review. ADF argued that the Supreme Court's *Masterpiece Cakeshop* decision from 2018 should dictate a ruling in favor of Lorie Smith in this case, based on ADF's contention that the Colorado Civil Rights Commission is not "neutral" regarding religion. Rejecting this argument, Judge Briscoe wrote, "Appellants provide no evidence that Colorado will ignore the Court's instruction in *Masterpiece Cakeshop*, and thus provide no evidence that Colorado will enforce CADA in a non-neutral fashion."

The court reported that at a "public meeting held a few days after the Court's ruling in *Masterpiece Cakeshop*," the Director of the Commission (and lead defendant in this case), Aubrey Elenis, stated: "So in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration is given to sincerely – what is termed as sincerely-held religious objections." Furthermore, *Masterpiece* was a case in which the Division was prosecuting the baker for refusing to make a wedding cake for a same-sex couple, which the court found to be "dissimilar" from this case, in which Smith was affirmatively challenging the constitutionality of the statute in the absence of any prosecution ongoing against her.

The court also rejected ADF's arguments that the Communication Clause was overbroad and vague, finding that its "application to protected speech is not substantial relative to the scope of the law's plainly legitimate applications," quoting from *Virginia v. Hicks*, 539 U.S. 113 (2003), and that there was no vagueness issue in this case, because the Communication Clause clearly applied to the statement proposed by Smith for her website that she would refuse to provide her services for same-sex weddings.

"We agree with the Dissent that 'the protection of minority viewpoints is not only essential to protecting speech and self-governance, but also a good in and of itself,'" wrote Briscoe. "Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, 'essential' to our democratic ideals. We agree with the Dissent that a diversity of faiths and religious exercise, including Appellants', 'enriches' our society. Yet, a faith that enriches society in one way might also damage society in others, particularly when that faith would exclude others from unique goods or services. In short, Appellants' Free Speech and Free Exercise rights are, of course, compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting Appellants from CADA."

Chief Judge Timothy Tymkovich's dissent starts with a quote from George Orwell ("If liberty means anything at all, it means the right to tell people what they do not want to hear") and goes downhill from there, finding that the First Amendment protects Lorie Smith from having to compromise her beliefs in order to operate her business. He argues that "the majority takes the remarkable – and novel – stance that the government may force Ms. Smith to produce messages that violate her conscience. In doing so, the majority concludes not only that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs, but also that its public-accommodation law is the least restrictive means of accomplishing this goal. No case has ever gone so far." He asserted: "The Constitution is a shield against CADA's discriminatory treatment of Ms. Smith's sincerely held religious beliefs."

One might remember Judge Tymkovich's former role as Attorney General of Colorado defending Amendment 2, the initiative measure that forbade the state from protecting gay people from discrimination, which the Supreme Court declared unconstitutional as a violation of the Equal Protection Clause in *Romer v. Evans* in 1996.

What lies ahead for this case?

Because ADF represents 303 Creative and Smith, there are no financial constraints on requesting en banc review or attempting to get the case up to the Supreme Court. ADF is an issues organization with an agenda, and it routinely seeks further review in such cases. Indeed, it immediately announced that it would seek review. Given the composition of the full 10th Circuit, we suspect that ADF may attempt to petition the Supreme Court directly rather than seek *en banc* review, because this is one of the few circuits that was not significantly "rebalanced" toward a more conservative stance by Donald Trump's appointments.

Twelve seats are authorized for the 10th Circuit, of which two stood vacant on July 26, most recently when Judge Briscoe elected senior status earlier this year. President Joseph Biden has nominated Veronica Rossman to fill one of these vacancies, and her hearing before the Senate Judiciary Committee has taken place. Upon her likely confirmation, the Circuit will have six Democratic appointees and five Republican appointees – two by Trump and three by George W. Bush. Judge Briscoe and the other senior judge on the panel in this case, Michael Murphy, would be entitled under 10th Circuit rules to participate in an *en banc* review, tipping the balance to eight Democratic appointees. In what are widely seen as "culture war" cases, the political party of an appointing president frequently correlates with how the judges vote.

However, if this case gets to the Supreme Court, the chances of it being reversed seem greater, given the eagerness of several members of that court to overturn *Employment Division v. Smith* in their concurring opinions in *Fulton v. City of Philadelphia*. Furthermore, the general disposition of the Court's conservative wing is to expand constitutional protection for Free Exercise of Religion and for free speech for religious practitioners. While the Court's recent denial of review in the *Arlene's Flowers* case from the Washington Supreme Court suggests a lack of appetite to take up another same-sex wedding case so soon, the emboldened conservative majority on the Court might vote to take another crack at the issue as a vehicle for overruling *Smith* and taking a bite out of the impact of *Obergefell v. Hodges*, the Court's marriage equality case, in which Justice Samuel Alito, in dissent, predicted the kinds of clashes represented by cases such as this one. ■

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

8th Circuit Panel Denies Qualified Immunity to University of Iowa Officials Who Discriminated Against Homophobic Religious Student Organization

By Arthur S. Leonard

A unanimous panel of the U.S. Court of Appeals for the 8th Circuit ruled on July 16 in *InterVarsity Christian Fellowship/USA v. University of Iowa*, 2021 U.S. App. LEXIS 21127, 2021 WL 3008743, that University of Iowa officials could not claim qualified immunity as a defense against their discriminatory application of the University's Human Rights Policy to InterVarsity Christian Fellowship, whose registered student organization (RSO) status they revoked as part of an apparent campaign to strike at organizations that effectively barred LGBT students from leadership positions. Circuit Judge Jonathan Kobes (who was appointed by President Donald J. Trump), wrote for the panel, whose other members were James Loken (appointed by George W. Bush) and L. Steven Grasz (also appointed by Donald J. Trump). The court affirmed a ruling finding a First Amendment violation and denying qualified immunity by District Judge Stephanie Rose.

In previous unrelated litigation, also before Judge Rose, the University was sued by Business Leaders in Christ (BLinC), a student organization that had lost its RSO status after a student filed a complaint in 2017 under the University's Human Rights Policy, complaining that BLinC had denied him the opportunity to seek a leadership role despite his Christian faith because he would not formally subscribe to the group's belief that same-sex relationship were "against the Bible." In effect, he charged that gay people were effectively excluded from leadership positions. In the ensuing litigation, the Judge Rose issued a preliminary injunction, finding that BLinC was likely to prevail on its claim that its free speech rights had been violated by the University.

"In response to the preliminary injunction," wrote Judge Kobes, "the university through its Center for Student Involvement and Leadership, began a 'Student Org Clean Up Proposal' and reviewed all RSO constitutions to bring them into compliance with the Human Rights Policy . . . Reviewers were told to 'look at religious student groups first' for language that required leaders to affirm certain religious beliefs. Around the same time the reviewers turned their focus to religious groups, the University amended the Human Rights Policy to expressly exempt sororities and fraternities from the policy prohibiting sex discrimination. But the University did deregister 38 student groups – mostly for failure to submit updated documents – and several were deregistered for requiring their leaders to affirm statements of faith." Does it sound like the University was targeting religious organizations for enforcement? Does it sound like a case where there would likely be a slam-dunk ruling against the University in the U.S. Supreme Court as presently constituted, by at least a vote of 6-3 and possibly unanimously? Are these mere rhetorical questions?

One of the groups cut up in this targeted review was InterVarsity, which had been active at the University for over twenty-five years, and which is affiliated with a national ministry to "establish university-based witnessing communities of students and faculty who follow Jesus as Savior and lord, and who are growing in love for God, God's Word, and God's people of every ethnicity land culture." You guessed it: "God's Word" requires condemnation of homosexuality, so far as InterVarsity is concerned. When a student challenged InterVarsity's constitution under the Human Rights Policy in June 2018, the group's leader argued that the constitution did not prevent anyone from joining if they did not subscribe to the group's faith, as "only its leaders were required to affirm their statement of faith." The University's coordinator of Student Development responded that "having a restriction on leadership related to religious beliefs is contradictory" to the Human Rights Policy.

In other words, the University, which deregistered InterVarsity when it refused to back down, was proceeding as if the preliminary injunction requiring it to continue BLinC's registration pending a ruling in that case did not exist. No surprise, then, that the District Court concluded on a summary judgment motion that the University had violated the First Amendment Free Speech rights of InterVarsity, and that the University officials involved would not enjoy qualified immunity from personal liability for violating the organizations 1st Amendment rights.

What boggles the mind – considering that University officials presumably have access to legal counsel, and that legal counsel would do at least a minimum amount of research before advising them – is that any university situated in the states of the 8th Circuit would think they can get away with something like this. The 8th Circuit has eleven active judges. One was appointed by Barack Obama. All the rest were appointed by George H.W. Bush, George W. Bush, and Donald Trump (who appointed four of them). And, of course, the Supreme Court now has a super majority of religious free exercise and free speech enthusiasts, who would probably see no need to grant a cert petition by the University in this case, being deeply engaged in a program of widening the scope of the Free Exercise Clause.

The court makes it clear that this case is totally distinguishable from the Supreme Court's 2010 decision in *Christian Legal Society Chapter of UC Hastings College of Law v. Martinez*, 561 U.S. 661, in which Justice Ruth Bader Ginsburg, proceeding from a factual stipulation in that case that the Law School's antidiscrimination policy

provided that any student was entitled to join and seek to lead any registered student organization (the so-called "all comers policy"), rejected a 1st Amendment challenge by CLS to the Law School's withdrawal of recognition over this very issue. The University of Iowa does not have an "all comers" policy, found the 8th Circuit panel, as the University, ironically, had formally excused sororities and fraternities from complying with the ban on sex discrimination, and had allowed numerous other student organizations to categorically exclude students from membership based on characteristics listed in the Human Rights Policy.

On the issue of qualified immunity, the District Court had taken the position that denial of immunity was clear-cut as it had found in its prior ruling in BLinC that the Human Rights Policy as applied to a group whose constitution resembled InterVarsity's in relevant respects probably violated the 1st Amendment. The 8th Circuit panel rejected this reasoning, pointing out that a prior ruling by the same District Court could not be the basis for denying qualified immunity, since district court rulings are not binding as precedents. However, it pointed out, there was plenty of appellate precedent in the 8th Circuit, in sister circuits, and even recent Supreme Court cases that would justify denying qualified immunity to the University administrators involved in a decision regarding deregistering InterVarsity on these facts. "The Supreme Court has clearly stated that universities may not single out groups because of their viewpoint," wrote Kobes. "Our own precedent [in upholding the qualified immunity ruling in the BLinC case] clearly establishes this is a violation of the 1st Amendment. Out-of-circuit decision also define the selective application of a nondiscrimination policy against religious groups as a violation of the First Amendment."

And, while acknowledging that in some contexts, it may be difficult to deal with the intersection of the First Amendment and anti-discrimination principles, the court tellingly quoted Justice Clarence Thomas commenting on denial of cert earlier in July in *Hoggard v. Rhodes*: "Why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"

"Because the University and individual defendants violated InterVarsity's First Amendment rights, the question is whether their actions satisfy strict scrutiny," wrote Kobes, addressing the merits. "The University 'can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests,'" he continued, quoting from *Fulton v. City of Philadelphia*, 593 U.S. __ (2021), hot off the presses, having been decided just a month previously. In *InterVarsity*, the 8th circuit panel found the lack of a compelling government interest coupled with a lack of narrow tailoring, because the University "did not meaningfully consider less-restrictive alternatives to deregistration."

"On appeal," he continued, "the University and individual defendants do not try to argue their actions survive strict scrutiny. That is wise. Of course, the University has a compelling interest in preventing discrimination. But it served that compelling interest by picking and choosing what kind of discrimination was okay. Basically, some RSOs at the University of Iowa may discriminate in selecting their leaders and members, but others, mostly religious, may not." The court pointed out that the University could have adopted an "all comers" policy, but had not done so, and it offered no compelling reason for letting some RSOs discriminate on various grounds but denying an exception to religious RSOs. Again, the court cited *Fulton* on this point, in which the Supreme Court found that Philadelphia failed to presenting a compelling reason for not granting an exception to it's the contractual non-discrimination policy – for which the city retained sole discretion in its contract with Catholic Social Services – when there were two dozen other agencies in Philadelphia that would provide the services to same-sex couples and CSS had been operating without any complaints about its services for decades.

"What the University did here was clearly unconstitutional," Kobes reiterated in conclusion. "It targeted religious groups for differential treatment under the Human Rights Policy – while carving out exemptions and ignoring other violative groups with missions they presumably supported. The University and individual defendants turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven." ■

11th Circuit Holds Florida High School Bathroom Policy Based Solely on Sex Classification at Time of Enrollment Violates Equal Protection

By Wendy C. Bicovny

On July 14, 2021, a three-judge panel of the U.S. Court of Appeals for the 11th Circuit issued a revised opinion in *Adams v. School Board of St. Johns County, Florida*, 2021 WL 2944396, replacing an opinion from the same panel issued in August 2020 (see 968 F.3d 1286), affirming a district court ruling that the St. Johns County School District's policy that denied transgender student Drew Adams access to the boys' restrooms in the high school was unconstitutional and constituted sex discrimination. The court agreed that the District's policy violated the Constitution's guarantee of equal protection because the District assigned students to sex-specific bathrooms in an arbitrary manner. The panel further affirmed the District Court's award of damages because Adams undoubtedly suffered harm as a result of this violation. The facts are complex, and only summarized to comprehend the panel's two-fold decision. Circuit Judge Beverly Martin wrote both the 2020 opinion and this new revised opinion for the majority of the panel, joined by Circuit Judge Jill Pryor.

When Adams was born, doctors assessed his sex and wrote "female" on his birth certificate, but today Adams knows he is a boy. While Adams attended Nease High School, school officials considered him a boy in all respects but one: he was forbidden to use the boys' restroom. Instead, Adams had the option of using the multi-stall girls' restrooms, which he found profoundly "insult[ing]." Or he could use a single-stall gender-neutral bathroom, which he found "isolati[ng]," "depress[ing]," "humiliating," and burdensome.

This unwritten policy assigned students to use bathrooms based solely on the sex indicated on a student's enrollment documents. The bathroom policy came to be adopted in the context of the District's reexamination of its policies toward lesbian, gay, bisexual, transgender, and queer (collectively LGBTQ) students.

Many other school districts—in Florida and in other states—permit transgender students to use the restroom according to their gender identity, as opposed to the sex assigned to them at birth. This District took a different course, one that required that a student use either a designated single-stall restroom or the bathroom corresponding to the sex listed on the student's enrollment documents. Students who fail to abide by the bathroom policy could be disciplined for violating the student code of conduct.

Because Mr. Adams enrolled in St. Johns County schools in the fourth grade as "female," the District's policy barred him from using the boys' restroom, despite Adams's updated legal documents and verified course of medical treatment. In other words, the District rejected Adams's updated legal documents (new birth certificate) reflecting his gender identity in favor of the outdated information in his initial enrollment package.

The District conceded that, because of the policy's exclusive focus on documents provided at the time of enrollment, a transgender male student who provided documents showing his sex as male at the time of enrollment may use the boys' bathroom.

The policy here barred Adams from using the boys' bathroom. As a result, he felt "alienated and humiliated" every time he "walk[ed] past the boys' restroom on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him." Adams believed the bathroom policy sent "a message to other students who [saw Adams] use a 'special bathroom' that he is different."

The sole issue considered by the panel in this revised opinion was whether the District bathroom police violated the Equal Protection clause. To pass muster under the 14th Amendment, a governmental gender classification must be reasonable, not arbitrary. Before the panel was whether the challenged policy passed intermediate scrutiny in assigning students to bathrooms based solely on the documents the District received at the time of enrollment.

The panel saw two ways in which the District policy failed. First, the District policy relied on information provided in a student's enrollment documents to direct the student to use the boys' or girls' bathroom. This targeted some transgender students for bathroom restrictions but not others, thereby undermining all the reasons advanced by the District for its policy. Second, the policy unnecessarily rejected current government documents in favor of outdated documents in assigning students to bathrooms. The panel addressed each problem in turn.

To begin, the policy failed heightened scrutiny because it targeted some transgender students for bathroom restrictions but not others. In this way, the policy was arbitrary and failed to advance he District's purported interest of protecting the privacy of other students. The District directed students to use boys' and girls' bathrooms based on the sex indicated on the students' enrollment documents. Even if a student later provided the District with a birth certificate or driver's license indicating a different sex, the original enrollment documents controlled.

As the District Court expressly found, the School Board conceded at trial that if a transgender student *enrolled* with documents updated to reflect his gender identity, he would be permitted to use the restroom matching

his legal sex. The School District even itself acknowledged its policy did not fit its purported goal of ensuring student privacy, to the extent that some of the District's transgender students may be using school restrooms that match their legal sex. But transgender students like Adams, who transitioned after enrolling, were not allowed to use the boys' bathroom. In this way, the bathroom policy did not apply to all transgender students equally. This arbitrariness of the policy means it did not pass intermediate scrutiny. Thus, the panel decided that the statute violated the Fourteenth Amendment because its terms did not achieve its statutory objective.

Second, the bathroom policy required that a student's enrollment package prevail over current government records, even though those government-issued documents constituted controlling identification for any other purpose. Presumably, federal and state governments allowed for a process for updating or correcting this type of personal information for a reason: to reflect and promote accuracy. Yet, the District gave no explanation for why a birth certificate provided at the time of enrollment took priority over the same document provided at the time the bathroom policy was applied to the student. And the panel came up with no explanation of their own.

Adams had a birth certificate and a driver's license issued by the state of Florida stating that he is male. Bu, the District refused to accept, for the purposes of the bathroom policy, Adams's sex listed on those current government-issued documents. This kind of irrationality failed to satisfy intermediate review. The District failed to show a substantial, accurate relationship between its sex classification and its stated purpose. And the Fourteenth Amendment required a substantial, accurate relationship between a gender-based policy and its stated purpose.

Because the bathroom policy was arbitrary and did not do what it was designed to do coupled with the Board's failure to show the requisite substantial relationship. The panel concluded the School District's bathroom policy violated the Equal Protection Clause.

Sadly, in a scathing, verbose dissent, Chief Judge William Pryor stated, in summation, "[T]he new majority opinion is shorter [than the first], but it is no less wrong. Instead of merely misunderstanding the policy at issue, the majority now substitutes the policy it wishes Adams had challenged, misconstrues it, and continues to discount students' sex-specific privacy interests. But once again, for all of its errors, the majority opinion cannot obscure what should have been the bottom line of this appeal all along: there is nothing unlawful, under either the Constitution or federal law, about a policy that separates bathrooms for schoolchildren on the basis of sex." Fortunately, the majority panel decided other wise and enabled transgender plaintiff the respect he deserved!

[Editor's Note: The two panel members in the majority, Beverly Martin and Jill Pryor, are Obama appointees. The earlier decision which this one replaces (see 968 F.3d 1286) was a sweeping ruling that found a violation of Title IX of the Education Amendments of 1972 as well as Equal Protection on a broader theory than that embraced in the substitute opinion. Apparently Chief Judge Pryor blocked the issuance of the mandate for the earlier opinion, presumably in an effort to win support for an en banc review, which could have resulted in a reversal by the full circuit, but the majority's willingness to issue this narrower Equal Protection ruling saved the day for plaintiff Adams, who has long since graduated from Nease High School. Unfortunately, this means there is no precedential ruling by the 11th Circuit under either Title IX or the Equal Protection Clause that would apply outside the peculiar facts generated by the District's odd policy definition of gender identity. – Arthur S. Leonard] ■

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5th Circuit Rules Sovereign Immunity Bars Transgender Inmate's Equal Protection Lawsuit

By William J. Rold

In 1908, the Supreme Court ruled that the Fourteenth Amendment permitted suits against state defendants in their official capacities to conform their conduct to federal law. *Ex Parte Young,* 209 U.S. 123, 157-169 (1908). The Court ruled that federal courts were open to a challenge to the Minnesota Attorney General If he tried to enforce allegedly "confiscatory" taxes imposed by state regulators on the transcontinental railroad. This alleged violation of federal supremacy stripped the state of its sovereign immunity under the Eleventh Amendment insofar as the errant state official could be enjoined to conform future conduct to federal law. This principle has been the lifeblood of federal civil rights litigation for over 100 years – and it has been reaffirmed repeatedly. *See, e.g., Frew v. Hankins*, 540 U.S. 431, 437 (2004); *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985).

The *Ex parte Young* doctrine, which the Fifth Circuit insists on calling an "exception" to the Eleventh Amendment, is an attempt to reconcile the Eleventh Amendment's notions of sovereign immunity with the limitations imposed on the states by the Fourteenth Amendment after the Civil War. It is not an easy task. "Any step through the looking glass of the Eleventh Amendment leads to a wonderland of judicially created and perpetuated fiction and paradox." *Spicer v. Hilton,* 618 F.2d 232, 235 (3d Cir. 1980).

In *Haverkamp v. Linthicum,* 2021 U.S. App. LEXIS 22678, 2021 WL 3237233 (5th Cir., July 30, 2021), the Fifth Circuit refused to apply *Ex parte Young* to a *pro se* transgender prisoner's lawsuit seeking equal access to medical treatment and privileges, including hair length waivers and commissary. [Note:

Haverkamp had been on hormones, and her claims include surgical confirmation of her transition. Her case was stayed pending the Fifth Circuit's ruling in *Gibson v. Collier,* 920 F.3d 212, 215-16 (5th Cir. 2019), which, borrowing the First Circuit's limited ten-year-old record in *Kosilek v. Spencer,* 774 F.3d 63, 96 (1st Cir. 2014) (*en banc*), held that it was not deliberate indifference under the Eighth Amendment to deny confirmation surgery to transgender inmates.] Thus, an Eighth Amendment right to surgery was no longer in the case by the time of the appeal.

The decision in *Haverkamp*, however, goes much further than *Gibson,* which was a decision on the merits of the Eighth Amendment claim. *Haverkamp* is a *jurisdictional* decision that the equal protection claim as pleaded cannot be heard against the named defendants under the Eleventh Amendment. It is a refusal to apply *Ex parte Young*.

The panel for the *per curiam* unsigned opinion consisted of James L. Dennis (Clinton), Kurt D. Englehardt (Trump), and Samuel Maurice Hicks, Jr. (W.D. La., sitting by designation, Geo. W. Bush). Judge Dennis wrote a brief statement "specially concurring." The appeal was consolidated from two *pro se* cases pending before Senior U.S. District Judge Hilda G. Tagle (S.D. Tex.) (Clinton). To understand how far this opinion reached to find lack of subject matter jurisdiction, it is necessary to review briefly what happened below, because Judge Tagle rejected these defenses.

For health care, the Texas prison system uses a Correctional Managed Healthcare Committee (the Committee), a statutorily-created arm of the State. Tex. Gov't C. § 501.148(a)(1). Defendants in both appeals are all members of the Committee. In addition, Defendant Linthicum is the Director of the Health Services Division. The Committee "develops and approves" health care plans and "resolves disputes . . . in the event of a disagreement relating to inmate health care services." *Id*. § 501.148(a)(2).

Haverkamp understandably submitted the "Committee's" policy in effect when she was denied treatment in 2016. This 2012 policy was promulgated prior to the 2013 DSM-V revisions that changed vocabulary from "gender identity disorder" to "gender dysphoria" and specified a behavioral and affective rather than a categorical approach to diagnosis and treatment. Texas revised and replaced its policy in January of 2017, but apparently no one told Judge Tagle or the 5th Circuit Court of Appeals.

The Fifth Circuit quoted a "pertinent" excerpt from the superseded policy (G-51.11), which was vague as to responsibility for "approving" treatment for "Gender Identity Disorder," referring to the University of Texas Medical Branch, the regional or senior medical directors, the facility warden, and the health care "liaison." By contrast, the 2017 "Committee" policy said: "Only the designated GD Specialty Clinic consultant may make or confirm a diagnosis of GD . . . [or] routinely monitor the offender."

Instead of following the venerable rule that a court applies the law in effect when it renders its decision – *Bradley v. School Board of Richmond,* 416 U.S. 695, 711 (1974); *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801) – the Fifth Circuit used the obsolete version.

This matters because most of the opinion on jurisdiction and sovereign immunity turns on whether Haverkamp sued the correct defendants – which defendants themselves obfuscated by arguing that only certain "Committee" members were proper defendants on "policy" questions. Judge Tagle allowed "John Doe" pleading pending receipt of defendants' list. When the "Committee" defendants were listed, Judge Tagle ordered them all served. After Judge Tagle rejected their sovereign immunity argument, they took an interlocutory appeal, arguing that the Committee members on the list they provided were not the proper defendants for sovereign immunity purposes. The Fifth Circuit accepted this argument. Despite defendants' *legerdemain,* the Circuit ruled that estoppel cannot be applied to questions of subject matter jurisdiction, citing *Republic of Ecuador v. Connor*, 708 F.3d 651, 655 (5th Cir. 2013).

The Court found that, although the "Committee" defendants set policy, it was not alleged that they "enforced" it against Haverkamp or resolved "disagreements" about her care – or even that disagreements were presented to them. This seems illogical and contrary to the inferences supposed to be given to a *pro se* plaintiff on dispositive motions, since the court concedes that Haverkamp was told by her treating doctor that Texas would never pay for surgery or allow her the accommodations she sought.

Haverkamp's equal protection argument stated that she was denied surgical procedures (vaginoplasty) and accommodations (long hair, cosmetics, hygiene, and clothing) that cisgender inmates were permitted. Judge Tagle found this equal protection claim to be "plausible." The Court of Appeals stated that it was not reaching the merits of the equal protection claim.

The Court of Appeals found that Haverkamp failed to plead that the "Committee" members had "some connection with the enforcement of the [challenged] act" – that Haverkamp was "merely making [them parties] . . . as representative[s] of the state, and thereby attempting to make the state a party," citing *Ex parte Young,* 209 U.S. at 157-60; *Laufer v. Mann Hosp., L.L.C*., 996 F.3d 269, 271 (5th Cir. 2021); *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied,* 141 S. Ct. 1047, (2021).

None of these cases support what the 5th Circuit did here. The members of the Committee are far less attenuated from Texas inmates' health care than the Attorney General of Minnesota was from setting tariffs for rail freight in *Ex parte Young*. *Laufer* involved a "test" litigator who had filed over 500 bogus cases supposedly seeking handicapped accommodations in states she never intended to visit. *City of Austin* concerned a conflict between a municipal ordinance requiring all landlords to accept HUD rental vouchers as rent and a state law saying they were free to reject HUD vouchers. Neither case involved an actual disabled person seeking a real handicapped hotel room – or an individual subsidized tenant seeking to pay for an apartment with a HUD voucher. In fact, the Circuit candidly admitted that it was overlapping "sovereign immunity" and "standing" in these cases to determine whether there was a genuine case or controversy.

The court also cites *Laufer* for the proposition that, with 130,000 inmates in Texas, "it cannot be plausibly inferred that Linthicum [medical director] played any role in the decisions Haverkamp challenges as unconstitutional." She certainly had more to do with transgender policy as medical director than Texas Prison Director Estelle had with a work excuse for J. W. Gamble after a bale of cotton injured his back in *Estelle v. Gamble,* 429 U.S. 97 (1976). Yet, claims against him were remanded.

According to the court here, Haverkamp failed to allege: (1) whether her treating doctor took treatment decisions to the Committee; (2) whether the Committee adjudicated a dispute; or (3) whether the Committee enforced any decision to her detriment. With that, the panel apparently got Judge Dennis's vote. He wrote in concurrence "specially," because the rest of the panel did not join in his observation that Judge Tagle should freely allow amendment on remand and reconsider appointing counsel in the district court.

For the most part, this debate about *Ex parte Young* is a creature of the 5th Circuit. It recognized *Ex parte Young's* usefulness recently when it struggled to preserve it for a utility company in *Green Valley Spa Utilities District v. City of Schaz,* 969 F.3d 4670, 471-75 (5th Cir. 2020) (*en banc*). Taken together, in this writer's view, the arc from *Young* to *Green Valley* in the Fifth Circuit shows a disposition in favor of vested interests (from railroads in the Gilded Age, to landlords, hoteliers, utility companies, and prisons) and away from the less powerful (localities, tenants, transients, and prisoners – especially LGBTQ ones). Yet, these civil rights plaintiffs are those least able to protect themselves without the doctrine.

Haverkamp was represented on the appeal by Rights Behind Bars (Washington, DC) and Goldman & Russell, PC (Bethesda, MD). Public Citizen Litigation Group, Washington, DC, appeared as *amicus curiae*. ■

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Church Deemed a "Hate Group" by Southern Poverty Law Center Loses Its Battle with Amazon.com Over Exclusion from the AmazonSmile Program

By Arthur S. Leonard

The AmazonSmile Foundation, a tax-exempt corporation affiliated with Amazon.com, declined an application by Coral Ridge Ministries Media, a Christian ministry and media corporation, to participate in the AmazonSmile program, because the Southern Poverty Law Center (SPLC) listed Coral Ridge as a "hate group" on its website, due to Coral Ridge's expressed views about homosexuality. Under the Amazon Smile program, Amazon customers designate charities from a list approved by the Foundation to receive a donation from Amazon of 0.5% of purchases of qualifying goods and services from the Amazon.com website. Under the terms of the program, "hate groups" may not participate, even if they would otherwise qualify as tax-exempt charitable organizations.

On July 28, the U.S. Court of Appeals for the 11th Circuit rejected Coral Ridge's state law defamation claim against SPLC for labeling it a "hate group" and its religious discrimination claim against Amazon for excluding it from the Smile program. Circuit Judge Charles Wilson wrote for the three-judge panel in *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 2021 WL 3184962.

Senior U.S. District Judge Myron Thompson had dismissed the lawsuit on both claims in September 2019, concluding that Coral Ridge's allegations fell short of describing actionable defamation under Alabama law, and that the AmazonSmile program is not a public accommodation covered by Title II of the Civil Rights Act of 1964, which forbids discrimination because of religion. See 406 F. Supp. 3d 1258 (M.D. Ala.). He alternatively found that allowing Coral Ridge's claim would violate Amazon's First Amendment rights, and that Coral Ridge's factual allegations did not support a claim of discrimination because of religion. While agreeing that Thompson correctly dismissed the case, the three-judge Court of Appeals panel ruled more narrowly than had Thompson on both claims.

To win a defamation suit, a plaintiff must allege that the defendant made a damaging false statement of fact about the plaintiff. If the plaintiff is considered a "public figure," which Coral Ridge conceded that it is, the plaintiff has to show that the false statement was made with "actual malice" by the defendant. "Actual malice" is a term of art in defamation law. It means that defendant made the false statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

"Coral Ridge did not sufficiently plead facts that give rise to a reasonable inference that SPLC 'actually entertained serious doubts as to the veracity' of its hate group definition and that definition's application to Coral Ridge," wrote Judge Wilson, "or that SPLC was 'highly aware' that the definition and its application was 'probably false.'" In this case, Coral Ridge was quibbling with the definition of a hate group that SPLC stated on its website. Since SPLC states its own definition, however, "it is hard to see how SPLC's use of the term would be misleading," wrote Judge Wilson.

While conceding that Coral Ridge rejected homosexuality based on religious beliefs, the church alleged that it "has never attacked or maligned anyone on the basis of engaging in homosexual conduct," but even

accepting that allegation as true – which the court would have to do in ruling on a motion to dismiss the case as a matter of law – the court found that Coral Ridge's allegation provided no basis for finding that SPLC intentionally or recklessly mislabeled the church, so it upheld Judge Thompson's dismissal of this claim.

The discrimination claim against Amazon is more complicated. For one thing, it is not clear that Amazon.com or its affiliate AmazonSmile Foundation could be considered public accommodations in their dealings with applicants to participate in the Smiles program. While Judge Thompson had assumed without analysis that these defendants could be considered "places of public accommodation," he found that the AmazonSmile program "did not qualify as a 'service,' 'privilege,' or 'advantage' under the statute," or, alternatively, that it could violate the First Amendment for a court to order Amazon to donate to Coral Ridge.

Avoiding having to rule on the statutory issue, the court of appeals went directly to Amazon's constitutional defense, which it found to be valid. The Supreme Court has frequently ruled that donating money, whether to a charity or a political cause, is expressive conduct protected by the First Amendment. That's the basis, for example, for the Court's decision striking down various campaign finance reforms by Congress, such as the infamous Citizens United case. Judge Wilson quoted *Harris v. Quinn*, 573 U.S. 616 (2014), a Supreme Court ruling stating that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." The court found that this ruling "mapped on" to Amazon's constitutional argument.

Coral Ridge argued that because Amazon patrons select the charities to which 0.5% of their purchases would be donated, they are the real donors, treating Amazon as a mere conduit for their donations. But AmazonSmile makes clear in its application process that Amazon exercises judgment about which charities can participate, and specifically states that entities designated as "hate groups" by SPLC are disqualified. "We have no problem finding that Amazon engages in expressive conduct when it decides which charities to support through the AmazonSmile program," wrote the judge.

The court drew an analogy to the Supreme Court's ruling in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), that the South Boston Allied War Veterans Council had a First Amendment right to exclude the Irish-American Gay, Lesbian & Bisexual Group of Boston from the St. Patrick's Day Parade organized by the Council. The Supreme Court ruled that the state could not require the Council to let GLIB march, as that would be imposing on the Council a message that they did not wish to include in their parade. The Massachusetts Supreme Judicial Court had ruled that the Parade was a public accommodation and GLIB was entitled to participate, but the Supreme Court unanimously reversed that ruling to protect the free speech rights of the parade's organizers.

"In the same way that the Council's choice of parade units was expressive conduct," wrote Judge Wilson, "so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile. Applying Title II in the way Coral Ridge proposes would not further the statute's purpose of 'securing for all citizens the full enjoyment of facilities described in the Act which are open to the general public.'" Consequently, the court concluded that Coral Ridge's proposed interpretation of Title II "would infringe on Amazon's first Amendment Right to engage in expressive conduct and would not further Title II's purpose," so it affirmed Judge Thompson's decision to dismiss Coral Ridge's religious discrimination claim.

Judge Wilson was appointed to the Court by President Bill Clinton. Joining his decision were Circuit Judge Britt Grant, appointed by President Donald Trump, and Senior Circuit Judge Gerald Tjoflat, appointed by President Gerald Ford. Senior District Judge Thompson was appointed by President Jimmy Carter. ■

Federal District Court Blocks Tennessee Restroom Signage Law

By Matthew Goodwin

On July 9, 2021, Judge Aleta A. Trauger of the U.S. District Court for the Middle District of Tennessee issued a preliminary injunction against enforcement of a law passed by the Republican-controlled legislature in that state requiring and regulating signs outside restrooms of trans-friendly public and private spaces, including businesses. *Bongo Productions, LLC v. Lawrence*, 2021 U.S. Dist. LEXIS 128262; 2021 WL 2897301.

In May of 2021, Tennessee enacted H.B. 1182/S.B. 1224, which amended the state's zoning laws and building code. "The Act," as it is referred to throughout the opinion, went into effect on July 1, 2021 and requires any "public or private entity or business that operates a building or facility open to the general public . . . " to post a notice at the entrance to their public restrooms if they allow a member of either "biological sex" to use any public restroom within the building or facility. In other words, if a business allows customers to use the restroom consistent with their gender identity, that business must notify its customers of this policy through a posted sign stating as much.

However, not only does the Act require that a notice be posted, it also mandates certain language as well as what Judge Trauger termed " . . . a red-and-yellow, warning-sign color scheme, as if to say, Look Out: Dangerous Gender Expressions Ahead." The required notice must read in boldface, block letters: "THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM."

There are two plaintiffs in the case both represented by the ACLU: a Nashville coffeehouse and restaurant company known as Bongo Productions, LLC (Bongo) and a Chattanooga "performing arts venue, community center and safe haven" known as Sanctuary Performing Arts, LLC (Sanctuary) (collectively, "Plaintiffs"). Bongo runs a number of coffeehouses in the Nashville area and one in particular, Fido, caters extensively to the LGBTQ community. Sanctuary was "'founded by . . . members of the transgender community in December 2020 to serve the needs of transgender and intersex people of all ages, as well as other LGBTQ people and allies.'"

The defendants in the case are (1) the Commissioner of the Tennessee Department of Commerce and Insurance because, in Tennessee, this Commissioner is also the state's Fire Marshall with jurisdiction to enforce the state's building codes; (2) the state's Director of Codes Enforcement; and, (3) two District Attorneys General for applicable jurisdictions because violation of the Act if not remedied within an appropriate time-frame is a misdemeanor (collectively "Defendants").

Plaintiffs sued on June 25, 2021, seeking a preliminary injunction pending a full trial on the merits. Their complaint contains a single claim: the Act is an infringement of Plaintiffs' right to free speech under the First Amendment " . . . by compelling them, on pain of criminal penalty, to communicate a misleading and controversial government-mandated message that they would not otherwise display."

However, the Plaintiffs object to more than the possibility of criminal prosecution. For example, Bongo asserts "'posting the warning notice required by [the Act] will offend [Fido's] staff, customers, friends and family' . . . and that Bongo 'could lose staff and customers if forced to post this sign.'" "[Sanctuary] is 'concerned that the warning notice will make transgender and intersex people . . . feel that their presence is viewed as alarming, and that they will be offended by the term 'biological sex' because of the political controversy and anti-transgender animus surrounding that phrase."

Judge Trauger's opinion sets out the well-known four factors a court must analyze in deciding whether to grant a preliminary injunction: (1) showing of irreparable harm; (2) likelihood movant will succeed on the merits of their claim; (3) the balance of the equities; and (4) the public interest.

Judge Trauger first examines the merits of Plaintiffs' claim and finds them likely to succeed.

Defendants asserted in the first instance that Plaintiffs lacked standing and that their claim was not yet ripe for adjudication. Defendants pointed to statements by at least one of the Attorneys General, Funk, who was named in the suit, that he would not enforce the Act. Judge Trauger, in rejecting this argument, likened this to Defendants "seek[ing] to have it both ways — to pretend that no one knows how the act will be enforced, despite the fact that, of course, they know, because they will be among the ones doing the enforcing, and they are simply keeping their plans to themselves." She also pointed out that a state legislator had suggested DA Funk might be subject to criminal prosecution himself for not enforcing the Act.

Addressing the appropriate governing standard, Judge Trauger finds that strict scrutiny applies because the Act not only requires the posting of signs *but also* mandates specifically what exactly must be said. As such, the Act is treated as a content-based regulation of speech and therefore subject to strict scrutiny, i.e., " . . . 'presumptively unconstitutional,' only to be upheld 'if the government proves that [the law is] narrowly tailored to serve compelling state interests.'"

Defendants dodged by not forcefully arguing the Act could survive strict scrutiny—or as the court put it, " . . . did not put too many of their eggs in the 'surviving strict scrutiny' basket." Judge Trauger observes this was a "wise" choice on their part because " . . . there is (1) no evidence in either the legislative record or the record of this case, that there is any problem of individuals abusing private bathroom policies intended for that purpose, and (2) no reason to think that, if such a problem existed, the mandated signs would address it."

Instead, Defendants pressed the claim that the Act is " . . . merely [a] value-neutral, helpful [statement] of fact and that the [P]laintiffs are 'straining' to see some message they object to when none is actually there." The opinion notes that strict scrutiny rarely applies to laws mandating disclosures by businesses that are "factual and uncontroversial," which is why the government can require warning labels on harmful or potentially harmful products. If Defendants' argument were adopted that the Act was only requiring disclosure of factual and uncontroversial information, then the much lower standard of rational basis review would apply.

Wrote the court: "[t]there are at least two big, foundational problems with the [D]efendants' argument. First . . . courts, when considering First Amendment challenges, are permitted to exercise ordinary common sense to evaluate the content of a message in context to consider its full meaning . . . of course the signs required by the Act are statements about the nature of sex and gender and the role of transgender individuals in society. Justice is blind, but the court does not have to play dumb."

Second, " . . . to state the obvious, the people on one side of a disagreement do not get to unilaterally declare their position to be uncontroversial, because that is not how the concept of 'controversy' works . . . the key question is whether the alleged societal disagreement exists . . . "

Judge Trauger continues, "[o]n the current record, the only way to argue that the message mandated by the Act is uncontroversial is to argue that the plaintiffs are *simply lying* about both the social realities they have observed and their own disagreement with the required message. But the court sees no evidence that the plaintiffs have failed to tell the truth about that or anything else. To the contrary, the legislative history of the Act shows that it was devised quite consciously and explicitly, as a direct response to social and political trends

involving transgender people. It is only now, in the context of litigation, that officials of the State suggest otherwise."

Respecting the question of the merits, the court's analysis goes so far as to assume the Defendants are correct that rational basis applies and finds that, even if it did, the Act could not survive this level of review. Although not explicit, Judge Trauger's reasoning here arguably harkens back to an earlier and lengthy portion of the opinion examining Plaintiffs' submission of a declaration from an expert on gender identity, Dr. Shayne Sebold Taylor, M.D.

On this score, Judge Trauger points to evidence from Dr. Taylor that the Act might create issues of the sort it claimed to be trying to address. For example, a literal reading of the Act's required signage would seem to require a transgender man to use the women's restroom and a transgender woman to use the men's restroom and the opposite seems a goal, if only implicit, of the legislation.

The court easily found for Plaintiffs on the other three prongs of the analysis.

The opinion recites the oft-cited principle that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." "The irreparable harm posed by the Act, however, does not end with the abstract question of constitutionality . . . the [P]laintiffs have presented evidence that they have strived to be welcoming spaces for communities that include transgender individuals and that the signage required by the Act would disrupt welcoming environments that they wish to provide. That harm would be real, and it is not a harm that could be simply remedied by some award at the end of litigation."

As to the public interest, the court concludes that there is " . . . a low likelihood that the injunctive relief would intrude on any power legitimately retained by the State of Tennessee." The Defendants had complained that by enjoining the state from enforcing the Act it would suffer an irreparable injury because the Act was passed by duly elected representatives. Judge Trauger pointed out, however, that no harm was, in fact, being done in this regard because "[n]o legislature can enact a law it lacks the power to enact."

In balancing the equities, the court " . . . [had] little difficulty concluding the preliminary injunction should issue . . . " because without it, Plaintiffs would be irreparably harmed and requiring Tennessee to " . . . abide by the U.S. Constitution, sooner rather than later, vindicates the public interest in rule of law and the acceptance, by States, of constitutional government."

The opinion concludes with the simple order that Defendants "take no actions to enforce" the Act.

Judge Trauger was appointed by President Bill Clinton. The ACLU appeared on Plaintiffs' behalf by Emerson Sykes, Esq., Rose Sykes, Esq. Stella Yarbrough, Esq., and Thomas H. Castelli, Esq. ■

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Indiana Federal Court Rejects Public School Teacher's Religious Discrimination Claim Over Misgendering Discharge

By Arthur S. Leonard

U.S. District Judge Jane Magnus-Stinson ruled in *Kluge v. Brownsburg Community School Corporation*, 2021 WL 2915023, 2021 U.S. Dist. LEXIS 129122 (S.D. Ind., July 12, 2021), that the Brownsburg (Indiana) Community School Corporation did not violate music teacher John Kluge's statutory rights under Title VII of the Civil Rights Act of 1964 when it effectively discharged him for his refusal to comply with the School's requirement that he address transgender students by their preferred names and pronouns. Granting summary judgment in favor of the Corporation, the court rejected Kluge's assertion that his proposal to address all students by last name without using pronouns was a reasonable accommodate to his religious beliefs that the Corporation was obligated to accept.

The judge had previously dismissed Kluge's claims that the School violated his First Amendment rights of free exercise of religion and freedom of speech, but she had denied the School's motion to dismiss his Title VII reasonable accommodation claim at that time. See *Kluge v. Brownsburg Community School Corporation*, 432 F. Supp. 3d 823 (S.D. Ind., Jan. 8, 2020).

Kluge began working as a music teacher and orchestra leader at Brownsburg High School in August 2014, and by all accounts was a successful and effective teacher – at least until the issue of transgender names came up. In 2016, the U.S. Education Department sent a "Dear

Colleague" letter to public school officials advising them of the rights of transgender students under Title IX of the Education Amendments of 1972, including the right to be addressed by the students' preferred first names and pronouns. This letter was sparked by Gavin Grimm's lawsuit against Gloucester School District in Virginia, which had adopted a rule barring the transgender boy from using the boys' restrooms at the high school. The Obama Administration granted a request by Grimm's ACLU attorneys to notify the court of the Administration's position on Grimm's Title IX right and followed up with the "Dear Colleague" letter sent nationwide.

The Corporation came to grips with this issue in the spring of 2017, as some transgender students were expected to attend the high school. The Corporation used a database called PowerSchool to maintain student records. It implemented a "Name Policy" to take effect in May 2017, requiring all staff to address students by the name that appeared in the PowerSchool database. Under the policy, transgender students could change their first name in the database by presenting a letter from a parent and a letter from a health care professional concerning the need for a name change consistent with their gender identity. A change in gender marker and pronouns on the database could go along with the name change.

Kluge "identifies as a Christian and is a member of Clearnote Church, which is part of the Evangelical Presbytery," wrote Judge Magnus-Stinson. As a "church elder," he holds leadership positions in the church and is a worship group leader. "Mr. Kluge's religious beliefs 'are drawn from the Bible,' and his 'Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues,'" Kluge stated in a document filed with the court. "Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." Under his beliefs, he would be sinning if he encouraged a student's gender dysphoria by calling them by a name inconsistent with their sex as identified at birth.

Kluge notified the high school principal that he could not comply with the Name Policy, and was told he had three options: comply, resign, or be discharged. He proposed a compromise: that the school accommodate his religious beliefs by allowing him to call all students by their last name and avoid using pronouns. The school authorities agreed to let him do this, but at the end of the fall semester, they told him it wasn't working and although they would let him finish out the school year under that arrangement, he would be expected in future to comply with the policy or to resign. Kluge alleged that he was told that he could submit a conditional letter of resignation and it would not be acted upon until the end of the spring semester, but the letter that he submitted said nothing about it being conditional, and at the end of the semester, as he indicated continued unwillingness to comply with the Name Policy, his resignation was accepted. He contended that this was a constructive discharge.

Kluge claimed that he had been discharged for his religious beliefs and filed suit, claiming violations of the 1st Amendment (and analogous provisions of the Indiana Constitution) and Title VII and parallel state laws.

Judge Magnus-Stinson granted the School's motion to dismiss the constitutional claims in January 2020, finding that Kluge's 1st Amendment rights of free exercise of religion and freedom of speech were not implicated in the case. The Name Policy, she found, was a neutral, generally applicable policy, and he had no constitutional right under the religious freedom clause to refuse to comply with it. Similarly, she found, the language he was required to use in addressing students was not protected political speech of a private citizen, but rather was speech incidental to performing his duties as a public school teacher, and thus subject to regulation by the School. She also rejected his argument that the Name Policy violated the Due Process Clause on grounds of vagueness, pointing out that he was not required to make any judgment or interpretations, but just to use the names and gender designation as they appeared in the Corporation's database, as clearly specified by the policy.

But Judge Magnus-Stinson found, based on the allegations Kluge made in his complaint, that he had stated a claim of religious discrimination (failure to accommodate) and retaliation under Title VII, so the case proceeded to discovery. After discovery was completed, the School moved for summary judgement, which was granted on July 12, 2021.

The question under Title VII was whether the accommodation that Kluge sought would impose an "undue hardship" on the School. The judge decided that it would. "Mr. Kluge's religious opposition to transgenderism is directly at odds with BCSC's policy of respect for transgender students, which is founded in supporting and affirming those students," she wrote, finding that "the undisputed evidence in this case demonstrates that the last names only accommodation indeed resulted in undue hardship to BCSC as that term is defined by relevant authority."

Transgender students had filed declarations with the court showing that "Mr. Kluge's use of last names only – assuming, only for the purposes of this Order, that Mr. Kluge strictly complied with the rules of the accommodation – made them feel targeted and uncomfortable." One of the students stated that they "dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly. Other students and teachers complained that Mr. Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable." One transgender student "quit the orchestra entirely." According to news reports (but not the judge's opinion), students also complained that Kluge occasionally slipped up and misgendered trans students by using "Mr." or "Ms." to address them.

Thus, the court found, "this evidence shows that Mr. Kluge's use of the last

names only accommodation burdened BSCS's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." The court also noted the possibility that allowing Kluge to continue with this "accommodation" might subject the School to liability to the transgender students under Title IX, an issued which came into even clearer focus after the Biden Administration began in January 2021 by revoking the Trump Administration's position that Title IX does not protect transgender students, and then issuing a formal interpretation applying the Supreme Court's *Bostock* decision to the interpretation of Title IX, as several federal courts had done during 2020 despite the Trump Administration's position to the contrary. In addition, the 7th Circuit was the first federal appeals court to recognize a transgender high school student's right to use facilities consistent with their gender identity under Title IX, so the application of that statute to a gender identity discrimination claim is a binding precedent on the Indiana district court.

The judge also rejected Kluge's retaliation claim, finding that because his refusal to comply with the Name Policy was not a "protected activity" under Title VII, the School's discharge of Kluge for his opposition to the policy could not be the basis for a retaliation claim.

Judge Magnus-Stinson noted that between the time she issued her earlier order dismissing Kluge's constitutional claim and the date of this new decision, the U.S. Court of Appeals for the 6th Circuit had issued a ruling accepting a similar constitutional claim by a public university professor who was disciplined by the university's administration for actually misgendering transgender students in the classroom, after having agreed not to do so by adopting the same procedure that Kluge had proposed: avoiding using first names and pronouns in class. Indiana is in the 7th Circuit, so the 6th Circuit's ruling was not binding on an Indiana district court, and that court premised its ruling solely on the 1st Amendment.

"Interestingly," noted Judge Magnus-Stinson, "the case upon which Mr. Kluge so vehemently relies as to the objective conflict issue, could fairly be read to support the existence of an undue hardship" on the Corporation. "In describing the relevant facts, the Sixth Circuit called the university's suggestion that the professor eliminate all gendered language 'a practical impossibility that would also alter the pedagogical environment in his classroom' and noted that the professor was of the opinion that 'eliminating pronouns altogether was next to impossible, especially when teaching.'"

Press attention to Judge Magnus-Stinson's ruling may attract the attention of the anti-LGBTQ organizations that frequently take cases like this one, such as Alliance Defending Freedom or Liberty Counsel, which might result in an appeal to the 7th Circuit. Judge Magnus-Stinson was appointed by President Barack Obama in 2010. ■

California Appeals Court Strikes Misgendering Provision from Patient Bill of Rights

By Arthur S. Leonard

A three-judge panel of California's 3rd District Court of Appeal partially reversed a ruling by Sacramento County Superior Court Judge Steven M. Gevercer in *Taking Offense v. State of California*, 2021 Cal. App. LEXIS 583, 2021 WL 3013112 (July 16, 2021), holding that the state violated the 1st Amendment free speech rights of staff members in long-term-care facilities by making it a misdemeanor for such individuals to repeatedly and knowingly misgender a resident of such a facility. At the same time, however, the court rejected an equal protection challenge to a provision that protects transgender residents' rights to be housed consistent with their gender identity. Judge Elena Duarte wrote the opinion for the appellate panel. Judge Gevercer had rejected constitutional challenges to both provisions.

The misgendering provision is part of California's LGBT Long-Term-Care Facility Residents' Bill of Rights, passed in 2017 in response to evidence that LGBT people have suffered significant discrimination in such facilities. The plaintiff in this case, an "unincorporated association which includes at least one California citizen and taxpayer," calls itself "Taking Offence," and they "take offence" to the state making such speech a crime.

The court decided that the misgendering provision is a content-based regulation of speech by the government, which under both the state and federal constitutions would be presumptively unconstitutional unless it met the test of strict scrutiny. Under that two-part test, the government must have a compelling interest for

the law, and the law must be narrowly-tailored to achieve that interest without unduly burdening free speech rights. In this case, the court accepted Taking Offense's contention that the law failed the strict scrutiny test.

The court accepted the government's argument that there is a compelling interest in protecting the residents of LTC facilities from discrimination because of their gender identity. The court pointed out that under the state's Unruh Civil Rights Act, it is already illegal to discriminate in public accommodations, such as LTC-facilities, because of gender identity. But the Unruh Act is a regulatory statute, not a criminal statute, and requires individuals with complaints to file charges with a state agency and go through an administrative process, in which the facility may be subjected to a civil remedy. Because the LGBT Bill of Rights authorizes criminal penalties (fines and even imprisonment for violations) for offending individuals, it is not merely a duplication of the existing civil rights law but goes a step beyond it by imposing criminal penalties on individual staff members.

The court found that the policy oversteps by using the heavy hand of criminal sanctions and also notes that the measure is much more broadly worded than would be necessary to protect the dignity of transgender residents. Under a literal interpretation of the provision, a person could be found to commit a crime if they knowingly misgender somebody twice, even if the person in question doesn't hear them do it, and even if it is a slip-up by the staff member with no intention to cause offense. This, in the court's opinion, is not "narrow tailoring" of the type required by the strict scrutiny test when protected speech is at issue. The court suggested that the legislature could take an administrative approach with a civil remedy against the institution and avoid most of the 1st Amendment problem by absorbing the issue into the general concept of a hostile environment.

In a concurring opinion, Judge Ronald Robie strongly acknowledged the state's compelling interest to prevent misgendering of transgender residents. "One's name or the pronoun that represents that name is the most personal expression of one's self," he wrote. "To not call one by the name one prefers or the pronoun one prefers, is simply rude, insulting, and cruel. The impact of using inappropriate pronouns is even more offensive and hurtful when it occurs in an environment where once cannot choose the persons with whom one associates. The Legislature recognized this fact (as recounted in the opinion) but unfortunately chose a prophylactic remedy to eliminate misuse of pronouns that just went too far. Instead of mandating that employers ensure the proper use of pronouns in the workplace, the Legislature unwisely made misuse of pronouns a crime. When we rule this law cannot stand, we do not reject the need for persons to use appropriate pronouns but, in my opinion, are suggesting that the Legislature fashion a workable means of accomplishing the laudable goal of the legislation."

The "room assignment" provision says that if rooms are assigned using a gender-based system, it is unlawful to "assign, reassign, or refuse to assign a room to a transgender resident other than in accordance with the transgender resident's gender identity, unless at the transgender resident's request." Taking Offense argued that this gives "special rights" in the room assignment process to transgender residents, which are not accorded to cisgender residents, thus offending equal protection.

The court found that the "first prerequisite" for an equal protection analysis is "showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." And, wrote the court, "the 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." The court rejected the plaintiff's argument that "all sexes and genders are always similarly situated for equal protection purposes."

"We recognize that transgender residents possess a characteristic that non-transgender residents do not, namely, a biological sex at birth that differs from their express gender identity. Nevertheless," continued the court, "we conclude transgender residents of long-term care facilities are similarly situated to non-transgender residents for purposes of the room assignment provision. Within the context of the statute, both transgender and non-transgender residents of long-term care facilities are subject to a facility's gender-based rooming assignment system, and the law creates a classification based on whether a resident is transgender." The question, however, was whether the statute as worded "unconstitutionally favors transgender residents."

According to Taking Offense, its objection is that the provision does not, in their estimation, allow a cisgender female resident the right to decline to accept a roommate of the male sex, "whatever may be the other person's 'gender identity.'" The court was not persuaded by this argument. "Although we understand the point," said the court, "Taking Offense fails to explain how the room assignment provision provides any *rights* to transgender residents not also provided to non-transgender residents. We recognize that the provision establishes that it is *not unlawful* to assign a room to a transgender resident other than in accordance with the resident's gender identity where the resident has made such a request. But Taking Offense's assumption that this exception also establishes the *affirmative right* of transgender residents to insist any roommate requests be honored is not well taken. The provision at issue does not even require the facility to provide transgender residents with the ability make such a request, let alone require a facility or its staff to honor – or even consider – a transgender resident's room assignment request. The provision simply declares it *not unlawful* for a facility to accommodate a transgender resident's request." The court rejected the argument that the provision violates cisgender residents' rights of intimate association in any way.

In a concurring opinion, Justice Harry E. Hull, Jr., rejected the idea that roommate assignments involved a constitutional right of intimate association. "The mere fact that the roommates, presumptively unrelated, share a room at a long-term care facility is an insufficient basis on which a court could determine whether the relationship qualifies as a constitutionally protected intimate association," he wrote. After reviewing cases on intimate association, he asserted, "As the case authorities cited above demonstrate, whether the right of intimate association protects a relationship from state interference, particularly in a non-familial setting, requires a fact-based analysis," and he rejected Taking Offense's reliance on cases involving rental of bedrooms in residential buildings in which a record had been made of facts sufficient to persuade a court that intimate associate rights were implicated. In this case, he argued, Taking Offenses generic argument would not suffice to bring the question within the constitutionally protected sphere. "I understand the concerns set forth in plaintiff's complaint," he wrote, "but we must leave a solution to those concerns to an individual case and to another day."

Back to the drawing board for the Legislature, which could easily fix the misgendering problem by placing responsibility on the facility and more tightly defining the offense. On the other hand, perhaps the state can get its Supreme Court to take up the question whether the use of names and pronouns to deliberately misgender people should be considered speech subject to constitutional protection. ■

Maryland Federal Court Refuses to Dismiss ACA Suit Against University Hospital for Cancelling Transgender Plaintiff's Hysterectomy on Religious Grounds

By Arthur S. Leonard

Jesse Hammons is a transgender man whose surgeon scheduled him for a hysterectomy as medically necessary treatment for his gender dysphoria, to take place at the University of Maryland St. Joseph Medical Center. Hammons went through all the preparatory steps, but 7-10 days prior to the scheduled January 6, 2020, procedure, the Vice President/Chief Medical Officer of the Center cancelled the surgery, stating that it conflicted with the hospital's Catholic religious beliefs and Catholic Directives. Hammons' surgeon was able to reschedule the procedure at another hospital, but not until six months later, and Hammons had to go through the entire pre-surgical process again. Hammons sues for damages, claiming violations of the Establishment Clause of the 1st Amendment, the Equal Protection Clause, and the Affordable Care Act (ACA). *Hammons v. University of Maryland Medical System Corporation*, 2021 WL 3190492, 2021 U.S. Dist. LEXIS 140856 (D. Md., July 28, 2021). Senior U.S. District Judge Deborah K. Chasanow granted the defendants' motion to dismiss the constitutional claims on sovereign immunity grounds, but denied the motion to dismiss the ACA discrimination claim.

A word of explanation: St. Joseph was a Catholic hospital in desperate financial straits that was sold by the Archdiocese to the University of Maryland Medical System for $200 million, subject to the agreement that although it would be wholly owned by UMMS, it would continue to be run as a Catholic medical center consistent with the "Catholic Directives" of the U.S. Conference of Bishops. If not for such agreement, the consent of the Vatican and the Archdiocese to sell the hospital would be withheld.

The cancellation was purportedly because the Directives forbids performing operations to remove healthy organs or that would sterilize an individual without medical necessity. Hammons and his surgeon maintain that the hysterectomy is a medically necessary procedure for his gender dysphoria, but the Catholics won't accept that argument.

The defendants moved to dismiss the complaint on a variety of grounds. They argued as to the constitutional claims that the hospital was a private institution not subject to constitutional constraints, and because of the terms of its acquisition and the way it is run, its decision are "merely private conduct" rather than state action. But trying to have it both ways, the defendants also argued that if the court disagreed and found the hospital was a state actor as a unit of the University of Maryland, then it enjoyed sovereign immunity as a branch of the state government. After lengthy discussion, Judge Chasanow agreed that the two constitutional claims should be dismissed, premising her ruling on governmental immunity. Although it is run as a Catholic medical center, St. Joseph is wholly owned by the University of Maryland, whose board is appointed by the governor and which serves a public function of providing health care, so governmental immunity kicks in on the constitutional claims, despite any statements to the contrary in the documents and authorizations leading to the hospital's acquisition by the University. Thus, while it should be bound by the 1st Amendment and the Equal Protection Clause, this action is in federal court, and there was no clear

waiver of 11th Amendment sovereign immunity, which bars the federal court proceeding on a claim by a citizen of Maryland against his state government in the absence of a clear waiver. Hammons could bring his federal constitutional claims in state court, but not in federal court.

However, recipients of federal funding under the ACA are subject to suit under that statute, even if they are state institutions, due to a waiver of immunity.

Maryland is in the 4th Circuit, where the Court of Appeals ruled in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (2020), that Title IX's ban on sex discrimination by educational institutions should be construed consistent with *Bostock* to forbid gender identity discrimination. The ACA Section 1557 forbids discrimination in any health program or activity received federal funding on any ground prohibited by several listed federal statutes, including Title IX. Defendants do not deny that they are subject to the ACA, but they argued that the cancellation was not discriminatory on grounds of sex or gender identity because the policy they are applying is neutral with respect to either. Their justification for cancelling the surgery was that they do not remove healthy organs ("preservation of bodily integrity") or perform sterilizations (interfering with fertility) unless they are medically necessary, and they don't consider gender dysphoria to present a medically necessary reason for removing a healthy uterus and thereby render a person incapable of reproductive activity. The defendants also note that gender dysphoria is not mentioned in the Catholic Directives.

Judge Chasanow was not convinced, observing that "both the prohibition on sterilization and the imperative concerning bodily integrity permit exceptions," as they state: "Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available," and the Directives allow the "functional integrity of the person [to] be sacrificed to maintain the health or life of the person when no other morally permissible means is available." Hammons argued that his scheduled hysterectomy fell within the scope of these exceptions, but the hospital disagreed. Hammons was able to show that his medical need was considered differently from other situations where the hospital applied the exceptions, because he was transgender and the procedure was necessary to treat his gender dysphoria, thus this was gender identity and necessarily sex discrimination. (It is well established in federal litigation, especially in litigation over prisoner health care, but also in other contexts, that gender dysphoria is a serious medical condition.)

"Plaintiff alleges that his hysterectomy was cancelled and that therefore he was denied necessary medical treatment, purely because of his transgender status, and thus because of his sex," concluded the court. "Under the logic and instruction of *Bostock*, Defendants 'inescapably' intended to rely on sex in their decision-making. Mr. Hammons has stated a claim for sex discrimination under Sec. 1557 of the ACA." Thus, his case will proceed to discovery and he will undoubtedly be able to win a summary judgment motion, leaving only the factual question of the extent of his damages, which may include emotional distress as well as additional expenses incurred as a result of the six month delay and performance of the surgery in a different hospital.

Hammons is represented by the ACLU and cooperating attorneys from Patterson Belknap Webb & Tyler LLP, New York, with Maryland local counsel Louis J. Ebert of Rosenberg Martin Greenberg LLP, Baltimore; and Paul A. Warner of Sheppard Mullin Richter and Hampton, LLP, Washington, D.C. Judge Chasanow was appointed by President Bill Clinton. ■

Two Federal Judges Temporarily Block Anti-Trans Laws in Arkansas and West Virginia While Litigation Continues

By Arthur S. Leonard

On July 21, federal judges in Arkansas and West Virginia issued *preliminary* injunctions against the enforcement of anti-transgender state laws while the parties litigate over statutory and constitutional challenges to the laws. Issuing such preliminary injunctions requires the judges to determine that the plaintiffs are likely to win their cases on the merits eventually, but that irreparable injury will be done to the plaintiff if the defendants are not enjoined.

In *Brandt v. Rutledge*, 2021 U.S. Dist. LEXIS 135534 (E.D. Ark.), U.S. District Judge James M. (Jay) Moody, Jr., temporarily blocked a law that was enacted by the legislature over a veto by Republican Arkansas Governor Asa Hutchinson. The law, which was set to go into effect on July 28, would have made Arkansas the first state to prohibit doctors from providing gender-confirming hormone treatment or surgical procedures or puberty-blocking treatment to anyone under 18 years of age. The law also prohibits doctors from referring minors to =other health care providers to receive such treatment. The judge also denied the defendants' motion to dismiss the case.

In *B.P.J. v. West Virginia State Board of Education*, 2021 WL 3081883, 2021 U.S. Dist. LEXIS 135943 (S.D. W. Va.), U.S. District Judge Joseph R. Goodwin temporarily blocked the enforcement of a West Virginia law barring individuals identified as male at birth from competing in female athletic competition sponsored by public schools, colleges or universities in the state, but the order applies only to the plaintiff in the case, Becky Pepper-

Jackson, a transgender girl (identified through-out the court's opinion by her initials) who was informed that because of the recently-enacted law she would not be able to compete as a girl in middle school cross country races. The law was signed into effect on April 28, 2021, and is one of several such state laws enacted recently. The lawsuit brought on her behalf by Lambda Legal and the ACLU does not pose a facial challenge to the law, but argues that it is invalid as applied to her.

The first state law banning transgender girls from athletic competition, passed by Idaho, was declared illegal by a federal district court last year in *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho, 2020), and the state's appeal is pending before a three-judge panel of the U.S. Court of Appeals for the 9th Circuit.

Judge Moody, who was appointed to the court by President Barack Obama, ruled from the bench after hearing lawyers' arguments on July 21, announcing his reasoning on the record. The citation above is to a LEXIS report listing counsel and amici and a one-sentence Order: "For the reasons set forth on the record, Defendants' Motion to Dismiss is DENIED and Plaintiff's Motion for Preliminary Injunction is GRANTED." However, on August 2, Judge Moody issued a "Supplemental Order" setting out his reasoning, presumably reacting to the likelihood that the legislature and attorney general will want to appeal the decision. The Supplemental Decision can be found at 2021 WL 3292057.

The plaintiffs, Dylan Brandt, Sabrina Jennen, Brooke Dennis, Parker Saxton, Michele Hutchison, and Kathryn Stambough, represented by the ACLU and a large team of cooperating attorneys from Sullivan & Cromwell, LLP, and local Arkansas counsel, are transgender youths who have been undergoing treatments that would be cut off as of July 28 if the preliminary injunction had not been issued. Testimony about the impact this would have on the plaintiffs and others in their situation weighed heavily on Judge Moody, who said, "To pull this care midstream from these patients, or minors, would cause irreparable harm."

According to an Associated Press report of a news conference held after Judge Moody's decision was announced, lead plaintiff Dylan Brandt, a 15-year-old transgender boy, said "This care has given me confidence that I didn't know I had." ACLU attorneys argued to the court that the impending implementation of the law was forcing families with transgender children to consider moving to other states so that their children could continue treatment.

Reacting to the court's ruling, Governor Hutchinson issued a statement explaining that the reasons for his veto of the bill were the same that the court relied upon to stay its implementation. "The act was too extreme and did not provide any relief for those young people currently undergoing hormone treatment with the consent of their parents and under the care of a physician," he wrote. "If the act would have been more limited, such as prohibiting sex reassignment surgery for those under 18, then I suspect the outcome would have been different." If the act were limited in the way suggested by Governor Hutchinson, it would have been practically redundant, because the professional standard endorsed by the World Professional Association for Transgender Health (WPATH) provides that surgical gender affirmation should not take place before age 18.

In his Supplemental Decision, Judge Moody explained that "heightened scrutiny" was the standard to be used in evaluating the statute under the 14th Amendment's Equal Protection Clause, which would require the state to provide an "exceedingly persuasive" reason for the statute. The state was claiming that its intention was to protect "vulnerable children" from "experimental treatment" and to regulate "the ethics of the medical profession." Referring to numerous amicus briefs, the judge observed that the profession has taken the position that the treatments ruled out by the statute are medically necessary for some people under age 18 with severe gender dysphoria. He also found distinguishable the two cases on which the state purported to rely – *Bell v. Tavistock and Portman National Health Service Foundation Trust*, [2020] EWHC (Admin) 3274, a British case, and *Hennessy-Waller v. Snyder*, 2021 WL 1192842 (D. Ariz., March 30, 2021) – finding that neither was controlling as precedent or directly on point to the issues in this case. In *Bell*, a British court ruled on the issue whether children below age 16 can give consent to take puberty blocking medication, but the Arkansas statute forbids it for children below 18. *Hennessy-Waller* challenges the exclusion of coverage for gender reassignment surgery under a state's employee insurance plan, a completely different issue from the one before the court in *Brandt*. Judge Moody found that the state failed the "exceedingly persuasive" justification test, most notably holding that the statute "is not substantially related to protecting children in Arkansas from experimental treatment or regulating the ethics of Arkansas doctors," and that these justifications were a "pretext." "The State's goal in passing Act 626 was not to ban a treatment," he wrote; "It was to ban an outcome that the State deems undesirable." The court also faulted the statute on 14th Amendment Due Process grounds, finding that it interferes with the fundamental right of the parents to "seek medical care for their children . . . and make a judgment that medical care is necessary." He also found that the statutory ban on doctors making referrals for such treatment violated the 1st Amendment as a content-based regulation of speech, which invokes "strict scrutiny." Having found the state's justifications under the other grounds to fail the "exceedingly persuasive" test, they clearly failed the "compelling state interest" test as well.

As noted above, since the WPATH standards of care provide that such surgery should not be performed before age 18, the law is unnecessary to the point of irrelevance in its treatment of gender reassignment surgery, as the medical profession and most courts have accepted the WPATH standards as the authoritative guidelines for medical care for transgender people. The non-surgical treatments prohibited by the Arkansas statute – puberty blockers and hormones – that are actually sometimes provided to minors under 18 are reversible in their effects, but Republican proponents of

the measure in the legislature, as well as lead defendant Leslie Rutledge, the state's Attorney General, have argued that the measure was necessary to limit "permanent, life-altering sex changes to adolescents."

The state had argued that the measure fell within the traditional authority of the government to regulate the practice of medicine and was directed at the procedures involved, not specifically at transgender minors. On its face, they argued, the statute did not single out transgender minors, but prohibited the procedures for all minors, regardless of their gender identity. As noted above, the court found that state's arguments to be pretextual and insufficient to sustain the interference with the rights of minors and their parents to obtain and continue medically necessary treatment.

The Associated Press report of the hearing said that the judge "appeared skeptical of the state's argument that the ban was targeting the procedure, not transgender people. For example, he questioned why a minor born as a male should be allowed to receive testosterone but not one who was born female." Testosterone is sometimes administered to cisgender boys who suffer from hormone deficiencies delaying their development of secondary sex characteristics in puberty. "How do you justify giving that to one sex but not the other and not call that sex discrimination," asked the judge.

The court received amicus briefs from a long list of professional medical associations supporting the plaintiffs, as well as the Arkansas State Chamber of Commerce and the Walton Family Foundation. The Biden Administration also filed a Statement of Interest supporting the plaintiffs. On the other side, amicus briefs from seventeen Republican state attorneys general asked the court to allow the law to go into effect. Similar bills are under consideration or have passed in several of their states.

Attorney General Rutledge announced that she would appeal the preliminary injunction ruling to the 8th Circuit Court of Appeals, where she is almost certain to obtain a three-judge panel with a Republican-appointed majority, because out of the eleven active judges on the 8th Circuit, only one was appointed by a Democratic president. (Donald Trump appointed four judges to the 8th Circuit.) Even if a three-judge panel were to leave the preliminary injunction in place, Rutledge would have a good shot at getting a reversal from an en banc rehearing, but for now, this ruling is an important victory, and the strongly worded Supplemental Opinion issued on August 2 improves the chances that it will survive on appeal.

Judge Goodwin in West Virginia, who was appointed to the court by President Bill Clinton, had the easier task, since he was not the first to rule on a challenge to a law banning transgender girls from competing in women's athletics. Furthermore, both the Obama Administration and the Biden Administration had issued opinions on the subject that supported the plaintiffs' position. West Virginia is one of about half a dozen states that have passed such laws. (At the beginning of August, Human Rights Campaign announced it was filing suit to challenge a similar law in Tennessee.) In many cases the laws were passed even though there were no transgender girls seeking to compete in those states, supporting the contention that Republican state legislators and Governors are pressing this issue mainly to pander to socially conservative constituents.

Judge Goodwin found that the plaintiffs are likely to prevail both under the Equal Protection Clause of the 14th Amendment and under Title IX of the Education Amendments of 1972, a law forbidding sex discrimination by educational institutions that receive federal money.

"Essentially, the State contends that the Equal Protection Clause is not being violated because B.P.J. is being treated the same under this law as those she is similarly situated with: 'biological males'" as defined in the statute, wrote the judge. "But this is misleading," he responded. "Plaintiff is not most similarly situated with cisgender boys; she is similarly situated to other girls. Plaintiff has lived as a girl for years. She has competed on the all-girls cheerleading team at her school. She changed her name to a name more commonly associated with girls. And of the girls at her middle school, B.P.J. is the only girl who will be prevented from participating in school-sponsored athletics. Here, there is an inescapable conclusion that [the law] discriminated on the basis of transgender status."

West Virginia is within the 4th Circuit, so the court was bound to apply "heightened scrutiny," the standard adopted by the 4th Circuit in *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020). Gavin Grimm, a transgender boy sued his school district over its restroom policy, which the 4th Circuit found violated both Equal Protection under a heightened scrutiny test. This means that the state has to provide an "exceedingly persuasive justification" for the law. The state said that its objective was to provide "equal athletic opportunities for girls," but the court found that this statute was not "substantially related" to achieving that objective.

Judge Goodwin invoked NCAA and Olympic Committee policies recognizing that transgender women can fairly compete with cisgender women, and quoted testimony offered by Becky Pepper-Jackson's expert witness that "there is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." Since Pepper-Jackson, age 11, had been on puberty-blockers for over a year, she had not undergone puberty and thus had not enjoyed the "physical advantages" that pubescent boys experience as testosterone affects their growth and musculature.

Judge Goodwin found "unpersuasive" the contrary evidence introduced by the state. "Like Judge Nye in the District of Idaho," he wrote, "I find this opinion unpersuasive. While that argument might be relevant to a facial challenge of the statute, it is irrelevant in this as-applied analysis. B.P.J. has not undergone endogenous puberty and will not so long as she remains on her prescribed puberty blocking drugs. At this preliminary stage, B.P.J. has shown that she will not have any inherent physical advantage

over the girls she would compete against on the girls' cross country and track teams." He also noted that the law did not advance safety concerns argued by the state, that cisgender girls were at risk of harm competing physically with "biological males," because track is not a contact sport.

Turning to Title IX, the court found that the same analysis applies, noting the Supreme Court's ruling last year in *Bostock v. Clayton County*, 140 S. Ct. 1731, that discrimination against somebody for being transgender is "discrimination on the basis of sex" under Title VII, and that Title VII cases are generally relied on to interpret Title IX's sex discrimination ban. The Office of Civil Rights of the U.S. Department of Education recently published a formal interpretation in the Federal Register supporting the application of the *Bostock* ruling to Title IX.

Judge Goodwin found the other requirements for injunctive relief were easily satisfied. "Forcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma," he wrote, and "would also be confusing to coaches and teammates. And not only would B.P.J. be excluded from girls' sports completely; she would be excluded because of who she is: a transgender girl." He also found that it would be "clearly in the public interest to uphold B.P.J.'s constitutional right to not be treated any differently from her similarly situated peers because any harm to B.P.J.'s personal rights is a harm to the share of American rights that we all hold collectively."

"While this case is pending," concluded Goodwin, "Defendants are enjoined from enforcing Section 18-2-25d against B.P.J. She will be permitted to sign up for and participate in school athletics in the same way as her girl classmates."

An appeal by the state to the 4th Circuit is unlikely to upset Judge Goodwin's ruling. The 4th Circuit's decision in *Grimm* was issued less than a year ago, and Democratic appointees still make up a majority of the Circuit bench, even counting Trump's three appointees. ■

New Jersey Agrees to Settle Individual Transgender Inmate Lawsuit with Statewide Relief on Housing

By William J. Rold

This article marks the third time *Law Notes* has covered the individual lawsuit of transgender prisoner Sonia Doe (a pseudonym) in state court in New Jersey. The first time, she sued to be moved to the women's prison – which happened. The second time, she sued to reverse a disciplinary segregation of 270 days as excessive for "vulnerable inmates" (which include LGBT prisoners) under New Jersey's "Isolated Confinement Restriction Act." She won that one, too. *See Doe v. New Jersey DOC,* 2020 N.J. Super. LEXIS 1052, 2020 WL 2892395 (N.J. App., June 3, 2020).

Now, in *Doe v. New Jersey DOC,* Docket No. MER-L-1586-19 (Mercer Co. Super., June 29, 2021), she settles the original case. The agreement confirms the recission of her 270 days' punishment on remand from the appellate court and awards her $125,000 in damages for her ordeal while confined in men's prisons, plus $45,000 in attorneys' fees.

Although no class was certified, the New Jersey DOC agrees, without admitting liability, to change its transgender housing policy statewide. It adopts an annexed "Internal Management Procedure . . . on Transgender, Intersex, and Non-Binary Inmates," effective July 1, 2021 – and to keep it in effect for "at least one year." [In fact, the actual annexed policy is not "scheduled for review" until July 1, 2023.]

The settlement creates "a presumption that all inmates will be housed in line with their gender identity, rather than their sex assigned at birth," and sets forth implementing procedures in the policy. The settlement further provides that a "significant adjustment issue alone" cannot be deemed a reason to move an inmate from a gender appropriate facility to a gender inappropriate one, although it may justify a move within a gender appropriate facility. "[U]nder no circumstances will a transgender, intersex, or non-binary inmate's placement in line with their gender identity be considered a management or security problem solely due to their gender identity." Designated "facilities, units, or wings" based on gender identity are banned.

Inmates will be informed of the policy at intake, and inmate handbooks will be revised to summarize rights under the policy. Inmates may self-identify as transgender, intersex, or non-binary at "any time during their incarceration." A housing accommodation may be requested at that time. This process will begin by placement in a single cell, but not in "isolation or restrictive housing" unless the inmate "voluntarily requests" protective custody. Inmates will be moved to general population consistent with their gender identity, as part of placement.

There is a process for review of housing placement and case-by-case determinations. There is a procedure for determining whether an inmate is falsely asserting gender identity that relies on "substantiated, credible, and non-discriminatory" criteria. Inmates whose identification is neither male nor female require case-by-case determination consistent with health and safety, taking into account the inmate's own views. Inmates, generally, have the right to attend meetings on these meetings.

Inmates must be addressed by their preferred pronouns or honorifics but use of "Inmate (last name)" or just "(last name)" is approved. References to gender identity in non-medical records shall be redacted prior to any disclosures. Searches shall be conducted by staff of the same gender identity as the inmate, absent exigent circumstances. Searches shall not be conducted solely to determine an inmate's genital status. Inmates will be allowed undergarments and commissary items consistent with their gender identity.

The agreement requires all officers and civilian staff to be trained on the terms of the policy, regardless of rank, and mandates written acknowledgment of same by key employees. Violation of the policy is treated as staff disciplinary misconduct.

The policy deals mostly with housing. There are only two sentences on medical care. Transgender, intersex, and non-binary inmates will receive medical and mental health treatment, "including but not limited to medically appropriate gender-affirming care . . . as medically necessary." [Whatever that means.] And such inmates' requests shall not be handled "with any less urgency or respect because of actual or perceived gender identity or expression."

Obviously, this is not a medical or mental health directive. Its housing provisions, however, are among the best this writer has seen in the country. They represent a genuine effort to address housing for these inmates. The long-term success of the settlement will depend on cooperation and good will. It is refreshing to see a court resolution start with that.

The settlement is not a court order enforceable by contempt, but the case shows what can be done in state court, with a willing adversary. (Illinois has not been able to get this far in federal court, despite class certification.)

Perhaps not by coincidence, the New Jersey Attorney General was promoted on the day this settlement was finalized. Attorney General Gurbir S. Grewal was appointed to be Director of the Enforcement Division of the Securities and Exchange Commission and is leaving Trenton for Washington. He has a long history of positive LGBT civil rights work as Governor Phil Murphy's Attorney General in New Jersey since 2018. His acting replacement for the duration of Gov. Phil Murphy's current term, Andrew Bruck, is an out gay man, who will be the first out LGBT person to serve as Attorney General of New Jersey. If Governor Phil Murphy is re-elected, Bruck might be nominated to fill the position.

Doe is represented by the ACLU of New Jersey Foundation (Newark). ■

11th Circuit, over Dissent, Holds First Step Act Provides No Additional Discretion to District Courts on Prisoner Compassionate Release

By William J. Rold

Until the First Step Act, federal prisoners seeking "compassionate release" could be eligible for consideration for relief on the application of the Federal Bureau of Prisons [BoP] to the sentencing district court, if (generally) they had a terminal illness, had an illness that substantially interfered with self-care and daily living, were the sole caregiver of a disabled close family member, or had "other" compelling reasons within the discretion of the BoP. The statute was fleshed-out by Guidelines promulgated by the United States Sentencing Commission over some twenty years. These included age of the offender, details about degree of incapacity, amount of time served, and considerations of the offense and societal safety under 18 U.S.C. § 3553.

Congress passed the First Step Act in 2018 to promote rehabilitation, to give sentencing judges more discretion, and to redress some sentencing disparities (such as "stacking" of sentences in some cases). The Act also allows prisoners (defendants) to file petitions themselves after "exhausting" with the BoP, which exhaustion would be met if the prisoner submitted an application and received no response after thirty days. 18 U.S.C. § 3582(c)(1)(A)(i). The result has been thousands of applications by criminal defendants for compassionate release, compounded since 2000, because of COVID-19.

Unfortunately, the Sentencing Commission, having been without a quorum since 2018, has not revised its Guidelines to reflect the First Step Act or the advent of defendant-initiated petitions. Typically, the defendant files in court after thirty days without a "weigh-in" by the BoP. The "Guidelines" do not address risk of contracting COVID to people with various ailments – such as HIV, hypertension, asthma, COPD, etc., which place them at higher risk of COVID complications – but do not themselves meet the "Guidelines" for compassionate release due to terminal illness or an illness substantially interfering with self-care.

That leaves the last category: "other" compelling reasons, in the determination of the BoP. Seven circuits (Second, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth) have ruled that the "old" Guidelines are deficient, and that Congress could not have meant to defer to BoP for defendant-initiated petitions, since that would give BoP a veto over applications for "other" compelling reasons, defeating the new right of defendants to make an application to court without BoP. The courts have rules (variously) that district judges have discretion to review "other" reasons constituting compelling justification for release without being bound by Sentencing "Guidelines," although they should accord "deference" to the "Guidelines."

Last May, in *United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir. 2021), the Eleventh Circuit "respectfully" disagreed with its "sister circuits." Circuit Judges Robert J. Luck and Andrew l. Brasher (both appointed by President Trump) held that The First Step Act was capable of interpretation that applies to both defendant-initiated petitions and discretion remaining in the BoP. The BoP would be heard for the first time in court, since the "exhaustion" does not require them to have an opinion prior to the defendants' filings. Thus, district courts can hear the defendant-initiated petitions, but they must accept the pre-First Step Act (and pre-COVID) Sentencing "Guidelines" as to what BoP considers to be "other" compelling reasons for compassionate release. This analysis continues for 45 pages in the slip opinion. District Court discretion on "other" reasons for

compassionate release no longer exists in Florida, Georgia, or Alabama.

Circuit Judge Beverly B. Martin's (appointed by Obama) dissent runs twenty pages. She writes that the majority's construction makes little sense and renders portions of the First Step Act inoperative.

Like the Eleventh Circuit's transgender decision in *Keohane v. Florida DOC*, 852 F.3d 1257 (11th Cir. 2020), the opinions here proceed at a high level of abstraction. This writer had to read the opinions twice to tease out what Bryant's grounds were for compassionate release. It turns out that Bryant is in prison as a convicted corrupt police officer. He was sentenced in 1997 to 592 months (around 49 years), using consecutive "stacked" sentences on firearms offenses. His co-defendants (who plead guilty) were all released by 2008. His sentence would be illegal stacking today (because the charges were all in the same indictment), but he does not fit within the curative sections of the First Step Act, so he seeks compassionate release under "other" compelling circumstances, arguing that his cumulative sentence is now "unfair." The BoP disagreed, and the Eleventh Circuit said that is the end of it.

This is not an LGBT case, nor does it mention HIV or COVID. This writer found it because it was used to deny release to a federal inmate with HIV by a Florida judge. *See* "COVID Cases," below, in this issue of *Law Notes*.

Because the Sentencing Commission has been dysfunctional for so long, these compassionate release cases resemble a Rube Goldberg machine – *see "Self-Operating Napkin"* (1928). President Biden could nominate some people and put the Commission back to work adopting new up-to-date Guidelines reflecting the First Step Act and the pandemic.

In the meantime, Bryant filed a petition for *certiorari* on June 10, 2021. He was represented in the 11th Circuit by Hopwood & Singhal, PLLC (Washington, DC). Several amici appeared in the case and on the petition for *certiorari*. The Solicitor General has asked for an extension of time to collect its thoughts until next term of the Court. ■

New York County Family Court follows *Brooke S.B.* and Finds Non-biological/ Non-adoptive Lesbian Mother to be a Legal Parent

By Cory Epstein

On June 14, 2021, in the unpublished decision in *F.G. v. K.J.*, a non-biological/ non-adoptive lesbian mother won her battle for legal recognition after trial. Referee Stephanie Schwartz of the New York County Family Court issued a ruling based on the watershed *Brooke S.B.* case, 28 N.Y.3d 1 (2016), 2016 NY Slip Op 05903, 61 N.E.3d 488. The Petitioner had sought help from LeGaL and its legal Clinic. Her case was taken to trial by the law firm of Latham & Watkins, which has partnered with LeGaL to provide *pro bono* representation on a number of complex LGBT parentage cases.

The Petitioner in this matter sought visitation and an Order of Parentage for her second child after the 13-year relationship with her former partner ended and the former partner cut off all access to their child. During the course of their relationship, the two women had each conceived a child via sperm donation. The Petitioner had conceived their first child, but, due to health concerns, was advised against conceiving the couple's second child, and, consequently, the Respondent bore the couple's second child. After the child was born, the Petitioner assumed the responsibilities of a stay-at-home parent, caring for both children while the Respondent worked. The couple and their two children formed a cohesive family unit, participating together in daily life activities, holidays, and church services. The Petitioner was held out as a parent and was recognized as such by the community. After their relationship ended, the parties followed an informal custodial arrangement for approximately eight months. When the couple could no longer reach an agreement, the biological mother prevented all access to the child despite daily pleas from the Petitioner.

According to the *Brooke S.B.* case, a non-biological/non-adoptive parent must prove by clear and convincing evidence that the parties agreed to conceive and raise a child as co-parents in order to achieve standing to seek custody and visitation under Section 70(a) of New York's Domestic Relations Law. Subsequent New York case law has emphasized that a valid claim of parentage requires a showing that the biological/adoptive parent encouraged, condoned, recognized, or otherwise "held out" the non-biological/non-adoptive parent as a parent. See *K. v. C.*, 55 Misc. 3d 723 (Sup. Ct. New York County, 2017).

In the instant matter, the Family Court found that the evidence overwhelmingly demonstrated a preconception agreement between the former couple to find a sperm donor and raise their second child together. Written evidence, including Facebook posts, substantiated that claim and also showed compelling aspects of the couple's parenting, including admissions by the Respondent that the second child habitually called the Petitioner "Mommy." The Respondent also referred to their joint intentions and parenting with statements such as "We chose the donor" and "We hope to have at least one more child." Based on these and other evidentiary examples, the Family Court found that the Petitioner had standing to pursue custody and visitation and granted the Petitioner explicit parentage under Article 5, Section 511 of the Family Court Act.

As a victory for a non-biological/non-adoptive lesbian parent, this decision marks an important win not only for the Petitioner but also for the widespread and growing recognition and protection of the rights of LGBTQIA+ parents across New York State. ■

Cory Epstein is a law student at CUNY School of Law (class of 2023) and intern at LeGaL.

ECHR Rules That Russia Violated European Convention on Human Rights Regarding Trans Parent's Visitation Rights and Same Sex Marriage Recognition

By Eric Wursthorn

During July the European Court of Human Rights (ECHR) found that Russia violated the European Convention on Human Rights in two different decisions. The first, *A.M. and Others v. Russia* (application no. 47220/19, July 6, 2021), faulted Russia for denying a Russian transgender woman's application for visitation rights for her two minor children. The second, *Fedotova and Others v. Russia* (applications nos. 40792/10, 30538/14 and 43439/14, July 13, 2021), involves the Russian Government's refusal to register the notice of marriage for three same sex couples.

In *A.M.*, the applicant was a Russian national born in 1972. While still registered as "male", A.M. married a woman identified by the Court as Ms. N. in 2008. In 2009 and 2012, the couple had two children. In 2015, A.M. and Ms. N. divorced and later that year, A.M. was legally recognized as "female".

Although A.M. identified as female, she visited the children in male clothes and presented as male. The Court noted that "otherwise Ms. N. would have objected to the visits." In December 2016, Ms. N. began refusing to allow A.M. to see the children. On January 9, 2017, Ms. N. initiated court proceedings in Russia to restrict A.M.'s access to the children. Ms. N. argued that A.M.'s gender identity had caused irreparable harm to the mental health and morals of the children. She further contended that A.M.'s gender identity could distort their perception of family, lead to an inferiority complex and bullying at school, and expose the children to information on "non-traditional sexual relations," such information being prohibited by statute from distribution to minors. Meanwhile, A.M. lodged a counterclaim seeking visitation rights.

The Lyublinskiy District Court of Moscow ordered a forensic psychiatric, sexological, and psychological assessment of A.M. and the children. In their report, the experts concluded that A.M.'s gender identity and transition would have a negative impact on the mental health and development of the children due to "the anticipated reaction of the children." The experts, however, noted that there was a paucity of research regarding children and families where one of the parents had undergone gender transition.

Municipal social services opined that the restriction on A.M.'s parental rights was reasonable given "the social and individual circumstances of gender transition" and the expert's findings. The District Court held a hearing on March 19, 2018, where it heard the parties and other witnesses. That day, the court granted a judgment restricting A.M.'s parental rights and dismissing her counterclaim. The court stated: "transsexualism [] is not a ground for restricting her parental rights, but the resulting changes to Ms. A.M.'s personality and the disclosure of information on [the father's gender transition] will create long-term psychotraumatic circumstances for the children and produce negative effects on their mental health and psychological development. [This position is confirmed by the expert findings.]"

A.M.'s subsequent appeals of the District Court decision were unavailing. Since then, Ms. N. has moved and A.M. does not know where she and the children reside, nor has A.M. received any information about them or their well-being.

The ECHR found that Russia had violated Article 8 of the Convention (right to respect for private and family life) as well as Article 14 of the Convention (prohibition of discrimination) taken in conjunction Article 8. Specifically, the Court found that there had been no evidence of any potential damage to the children from the parent's gender transition, and that the domestic courts had not examined the particular circumstances of the family. The ECHR criticized the District Court's reliance on the expert report, which acknowledged the lack of research regarding families with a transitioning parent. Furthermore, it found that the decision had been clearly based on the applicant's gender identity, that this treatment had been disproportionate, and thus that it violated the prohibition of discrimination set out in Article 14 of the Convention.

The Court ordered Russia to pay EUR 9,800 to A.M. for non-pecuniary damages and EUR 1,070 for costs and expenses.

The applicants in *Fedotova* are Irina Fedotova, Irina Shipitko, Dmitriy Chunosov, Yaroslav Yevtushenko, Ilmira Shaykhraznova and Yelena Yakovleva. They are Russian nationals, born between 1977 and 1994, and they reside in Russia, Luxembourg, and Germany.

Each couple filed notice of their intended marriage at their local Register Offices. Fedotova and Shipitko filed their application with the Tverskoy Department of the Register Office on May 12, 2009. The remaining couples filed their applications with the Fourth Department of the Register Office in St. Petersburg on June 28, 2013.

Relying on Article 1 of the Russian Family Code, which referred to marriage as a "voluntary marital union between a man and a woman," the Register Offices dismissed or rejected the couples' applications. Each couple challenged those decisions in the Russian courts.

Fedotova and Shipitko argued before the Tverskoy District Court of Moscow that the refusal to accept their notice of intended marriage had violated their rights under the Russian Constitution and the Convention. In dismissing their case, that Tverskoy

District Court reasoned that marriage had to have the "voluntary consent of a man and a woman" and that neither the Constitution nor International Law required the recognition of same-sex marriage.

Both Chunusov and Yevtushenko, and Shaykhraznova and Yakovleva, made similar arguments before the Gryazi Town Court in the Lipetsk Region. That court determined, *inter alia*, that neither the Russian Constitution nor case-law granted a right to same-sex marriage, nor was one conferred by the Convention. Each of the decisions were upheld on appeal.

In finding in favor the applicants, the ECHR found that Russia had a positive obligation to respect the applicants' private and family life, "in particular through the provision of a legal framework allowing them to have their relationship recognized and protected under domestic law." The ECHR balanced the applicants' interests with those of the community as a whole, noting that popular sentiment in Russia against same-sex marriage, as asserted by the government, cannot outweigh the exercise of Convention rights by a minority group: "[i]t would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional in its being accepted by the majority."

The ECHR further noted the harms occasioned by Russia's failure to formally recognize same sex relationships: "without formal acknowledgment[,] same-sex couples are prevented from accessing housing or financing programs and from visiting their partners in hospital, [] they are deprived of guarantees in the criminal proceedings (the right not to witness against the partner), and rights to inherit the property of the deceased partner. That situation creates a conflict between the social reality of the applicants who live in committed relationships based on mutual affection, and the law, which fails to protect the most regular of 'needs' arising in the context of a same-sex couple. That conflict can result in serious daily obstacles for same-sex couples (internal citations omitted)."

The ECHR further rejected Russia's argument that the recognition of same sex relationships would harm "traditional marriage", "since it does not prevent different-sex couples from entering marriage, or enjoying the benefits which the marriage gives."

Thus, the Court found that Russia had violated Article 8 of the Convention. While the court did not grant the applicants an award for non-pecuniary damages or costs, the Court stated that the finding of a violation constitutes sufficient just satisfaction. The court left the choice of the most appropriate form of registration of same-sex unions to Russia, "taking into account its specific social and cultural context (for example, civil partnership, civil union, or civil solidarity act)."

Euronews reported on July 14, 2021 that Russian authorities had rejected the Court's recommendation: "Kremlin spokesman Dmitry Peskov has reaffirmed that same-sex marriages are "not allowed" under Russia's constitution" (https://www.euronews.com/2021/07/14/russia-rejects-european-court-of-human-rights-order-to-recognise-same-sex-unions). This report was confirmed by TASS, a state news agency in Russia (https://tass.ru/obschestvo/11894725). Euronews further reported that Vasily Piskarev, a Russian lawmaker who leads a parliamentary commission on foreign interference, also criticized the decision: "[t]he ruling, which tries to make Russia register same-sex marriages, contradicts the foundations of Russian rule of law and morality".

A.M. was represented by Ms. T. Glushkova and Mr. D. Khaymovich, lawyers in Moscow. The applicants in Fedotova were represented by Mr. E. Daci and Mr. B. Cron, lawyers in Geneva.

As an aside, this is not Irina Fedotova's first case against Russia. In *Fedotova v. Russian Federation* (UN Human Rights Committee, Communication No. 1932/2010, October 31, 2012), she challenged her conviction for displaying posters that stated "Homosexuality is normal" and "I am proud of my homosexuality" near a school in Ryazan. In that case, the UN Human Right Committee held that Russia had violated Fedotova's rights to freedom of expression and to be free from discrimination under Articles 19 and 26 of the International Covenant on Civil and Political Rights. ■

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Federal Judge Allows Gay Inmate to Proceed against Bystander Officer Who Did Not Intervene in Ongoing Sexual Harassment

By William J. Rold

Plaintiff Larry Ball is a gay man who was subject to severe sexual harassment by an officer (Zachary Perkins) in the Michigan DOC. In *Ball v. Evers*, 2021 U.S. Dist. LEXIS 139455 (E.D. Mich., July 27, 2021), U.S. District Judge David M. Lawson granted defendants summary judgment in part and denied it in part. Ball sued pro se, but after he was released, he obtained counsel, dismissed his case without prejudice, and re-filed as a non-prisoner, which exempted him from the strictures of the Prison Litigation Reform Act. [Note: Where feasible, this is highly recommended for all prisoners about to be released. The Sixth Circuit specifically approved this procedure in *Cox v. Meyer*, 332 F.3d 422, 424 (6th Cir. 2003); and it is widely available. "[E]very court of appeals to have considered the issue has held that the PLRA does not apply to former prisoners" – even if the case is about events that occurred while incarcerated. *Ahmed v. Dragovich*, 197 F.3d 201, 210 n.10 (3d Cir. 2002) (annotated string cite omitted).]

Ball was housed in a prison "pod" setting with groups of eight bunks in each pod and several pods in each unit. Ball's bunk was only a few feet from the unit officer's post, usually filled by defendant officer Udell (the bystander officer). Ball sued Perkins, Udell, the internal affairs investigator (Johnson), the counsellor for the unit, and the unit manager (Evers). Only the claims against Udell are going to trial.

Upon investigation into Perkins' behavior, Michigan DOC issued disciplinary charges, which resulting in barring Perkins from the institution and (ultimately) in terminating him. The Michigan Attorney General refused to represent Perkins, and he filed his own counter/cross complaint against the state for indemnification. [Practice note: The Attorney General had a clear conflict of interest after DOC fired Perkins, but plaintiff's lawyers should note that such conflicts can be more subtle. If a joint defense is mounted, and the higher-ups choose to blame a staff-level defendant (who has the same attorney), a judgment for plaintiff can be overturned on due process grounds on appeal. And the plaintiff's lawyer (even if she did not create the conflict) has a duty as an officer of the court to "call it to the attention of the court." *Dunton v. Suffolk County*, 729 F.2d 903, 909 (2d Cir. 1984).]

Judge Lawson paints a vivid picture of the harassment, continuing for months, with Perkins coming into Ball's block (although he was not assigned there) and spending time with Ball (talking to him about gay clubs in Detroit and the endowment of other inmates and staff) and touching himself in front of Udell. The behavior included "calling [Perkins] out in the yard" in front of other inmates and performing "searches" in which Perkins groped Ball's genitals. Perkins also stalked other gay inmates in the pod.

Ball settled with Perkins for undisclosed terms, and Perkins dropped his claim for indemnification. Ball also did not oppose granting summary judgment to the counsellor. This left the summary judgment motions of the unit manager (Evers), the investigator (Johnson), and the bystander officer (Udell).

These defendants sought summary judgment, on the merits and on qualified immunity. Judge Lawson ruled that Ball did not produce sufficient material facts in dispute on liability as to Evers or Johnson, but factual issues precluded summary judgment for bystander officer Udell.

From his control desk, Udell could see Perkins enter the unit "almost every day" to seek out Ball, even though Udell knew Perkins was not assigned to the unit – and he never made Perkins "sign in." Udell admitted he saw Perkins' activity, including the "searching," but he denied he heard the remarks. Other inmates' affidavits said the whole unit could hear what Perkins said.

Ball said he reported the sexual harassment to investigator Johnson in May of 2016. Johnson said he did not get the case until June when another gay inmate who complained about Perkins mentioned Ball to Johnson. In June, Johnson began interviews, and Ball concedes that Perkin's behavior stopped. Johnson reported that Perkins engaged in a non-consensual personal relationship with Ball, and he recommended discipline. Johnson found that Udell was trying to cover for Perkins: he was "clearly reluctant to provide truthful responses, but eventually did so." Michigan DOC reassigned Udell from Ball's pod but did not terminate him. Udell later accused Ball of being a "snitch" in front of other inmates in the yard, who then threatened Ball.

In July, Ball says that Investigator Johnson asked him to act as "bait" to get more information about Perkins and other staff members. Johnson denied this. In August, Ball alleges that the unit manager (Evers) accused him of "messing" with his staff and ordered a search of Ball's cube, which found "contraband cosmetics," causing Ball to be moved to higher security confinement. At summary judgment, Perkins dropped a retaliation claim against Johnson, but he maintained his First Amendment claim against Evers for the prison discipline.

Ball states an Eighth Amendment claim against Udell under *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), for doing nothing about sexual harassment occurring right in front of him. The objective element is met by repeated and targeted verbal abuse of a sexual nature even in the absence of touching.

Rafferty v. Trumbull Cnty., Ohio, 915 F.3d 1087, 1096 (6th Cir. 2019). The behaviors and risks were obvious and mostly uncontested, but questions of fact remain as to Udell's subjective intent, precluding summary judgment for either party. As to Johnson, however, the harassment concededly stopped shortly after he began "interviews" (including of Perkins) – so Johnson took action and was not subjectively deliberately indifferent.

As to the First Amendment, Ball's complaints about sexual harassment were protected speech. Calling an inmate a "snitch" presents a danger to an inmate and can constitute First Amendment retaliation. *Cantazaro v. Mich. Dep't Corr.*, 2011 WL 768115, at *5 (E.D. Mich. Feb. 10, 2011) (collecting cases). This is sufficient for trial against Udell, since (if said) the comments show subjective intent. Judge Lawson finds the subjective intent insufficient for trial against Evers (the unit manager, who ordered the cube search). Ball shows a temporal proximity between the protected speech and the search, but Evers maintains that cube searches were "routine" and that Ball's cube would have been searched regardless of the speech. Judge Lawson finds that Evers is entitled to summary judgment under *Thaddeas-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999), since a defendant "can avoid liability by showing 'that he would have taken the same action in the absence of the protected activity.'"

Thaddeas-X was an *en banc* decision in which sixteen judges fractured in four separate opinions. The quoted language is in the "court's" opinion of eight judges. The other eight concurred in part and dissented in part in three groups – but particularly relevant here, there are twelve votes to vacate summary judgment on retaliation for reassigning the First Amendment plaintiff to a more restrictive cell, but not a majority to find retaliation in cold food (from which the quoted passage is taken). 175 F.3d at 403, 408. The alleged bogus cell search, resulting in discipline – like the claim here – presented factual questions. Id. at 403. *See also, Bell v. Johnson*, 308 F.3d 594, 604 (6th Cir. 2002) (reversing district court's summary judgment on retaliatory cell search in reliance on Thaddeas-X). Judge Lawson writes that Ball "failed to rebut Ever's sufficient showing that he would have searched Ball's cube regardless." In this writer's opinion, Judge Lawson improperly adopted an inference in the moving party's favor at summary judgment that should have been left to the trier of fact.

The law was sufficiently clear to deprive Udell of qualified immunity. This ruling, of course, will permit defendants an interlocutory appeal. [Oh, well, it's only been five years.]

Judge Lawson also allows Ball to proceed on state law claims under the Michigan Elliot Larsen Civil Rights Act on aiding and abetting a hostile environment against Defendant Udell (bystander officer) but not against Defendant Johnson (investigator). For Michigan practitioners, there is a lengthy discussion of these protections, including quid pro quo analysis, which Judge Lawson finds not to present a jury question here (although it might have against Perkins, were he still in the case).

Ball is represented by Goodman and Hurwitz, P.C., and Thomas E. Kuhn, P.C. (Detroit). ■

COVID-19 Prisoner Compassionate Release Cases Reach Circuits; HIV-Positive Inmates Still Losing (Mostly) in District Courts

By William J. Rold

Senior U.S. District Judge Charles R. Breyer (N.D. Calif.) is the brother of Supreme Court Justice Stephen Breyer. Appointed by President Clinton to the District Court and by President Obama to the United States Sentencing Commission, his term at the Commission expires on October 31, 2021. Absent action by President Biden and the U.S. Senate, there will then be no Sentencing Commission members left – and it has not had a quorum since 2018.

The failure of the Sentencing Commission to act in response to the First Step Act or to the provisions of the CARES Acts that affect discretionary release by the Attorney General has resulted in circuit splits likely to be headed to the Supreme Court (see article this issue of *Law Notes*). It has also fostered a mish-mash of lower court authority on compassionate release related to COVID-19.

This month, inmate petitioners with HIV failed to persuade judges to grant release on a variety of grounds. Here are five more cases:

U.S. COURT OF APPEALS – THIRD CIRCUIT – HIV-positive federal inmate Gilbert Robinson lost his petition for compassionate release before U.S. District Judge John E. Jones, III (M.D. Pa.), and the Third Circuit affirmed in a not-for-publication decision in *United States v. Robinson*, 2021 WL 2978893 (3d Cir., July 15, 2021). The ruling was signed by Judge D. Michael Fisher (G.W.

Bush) and joined by Chief Circuit Judge D. Brooks Smith (also Bush) and Circuit Judge Paul Brian Matey (Trump). The court appointed the Federal Defender (Harrisburg) to represent Robinson, and a motions panel denied an application for summary affirmance by the government. Robinson's HIV is "asymptomatic," and his liver disease is "Stage 1" (least serious). The record supports a finding that his medical condition is being treated and that he does not have compelling medical reasons for release, under *U.S. v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020). The Circuit applies the Sentencing Guidelines of terminal illness or inability to "self-care" in the "old" Guidelines, unamended after the First Step Act. [The Third Circuit thus joins the Eleventh Circuit – see Article, this issue of *Law Notes* – in applying the "old" Guidelines – and adding to the Circuit split, albeit without any scholarly analysis.] In denying relief, Judge Jones used a "form" with boxes to check, although he completed a "balloon" field of "other factors" that explained his reasoning. The Circuit affirmatively approved use of such a decision form by district judges in compassionate release cases, citing *Chavez-Meza v. U.S.*, 138 S. Ct. 1959, 167-68, 1972 (2018) (form language sufficient for appellate review on resentencing when Sentencing Guidelines are amended and allow retroactive applications to reduce harsher sentences). Finally, this opinion affirms consideration of epidemiology at FCI Schuylkill (Pennsylvania) when it had only one active COVID-19 case. By December of 2020, the Bureau of Prisons [BoP] was reporting over a hundred cases at Schuylkill, and a compassionate release was granted in *United States v. Way*, 94-cr-279 (E.D. Pa., Dec. 12, 2020) (Docket No. 192), for a prisoner who had respiratory problems (pulmonary sarcoidosis) and hypertension and had served 65% of his sentence. BoP currently reports 511 inmates and 73 staff "recovered" at Schuylkill. If the district judge could judicially notice the BoP website, this writer sees no reason that the Court of Appeals cannot. See F.R.Evid. 201(b)(2); *In re Indian Palms Asso.*, 61 F.3d 197, 205 (3d Cir. 1995) (judicial notice on appeal). It probably would have made no difference in this case.

FLORIDA – U.S. District Judge Beth Bloom denied compassionate release to Andre Stafford in *United States v. Stafford*, 2021 WL 2661245 (S.D. Fla., June 29, 2021). The case was originally assigned to Senior U.S. District Judge Ursula Ungaro, who appointed Federal Defender (Miami) to represent Stafford in July 2020, and who retired in May 2021. Stafford was sentenced to life imprisonment in 1997 for assault with a deadly weapon committed while incarcerated for 151 months for bank robbery. He is now 64 years old. He has HIV, latent tuberculosis, obesity, hypertension, hyperlipidemia, and deteriorating mobility – arguing cumulatively that they "place him at risk of serious COVID-19 complications, including death, and his continued incarceration substantially diminishes his ability to provide self-care within the environment of the correctional facility." The problem with his argument is that Judge Bloom is bound by the Sentencing Guidelines – in particular, Guideline 1B1.13, which requires that the defendant is "not expected to recover" from his impairments to qualify for compassionate release. Under *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), Judge Bloom does not have independent discretion. Here, the BoP opposes compassionate release, using as an additional argument that Stafford has been vaccinated. Stafford does not have a terminal illness, he can self-care, and his condition is managed. Having thus ruled, Judge Bloom finds it unnecessary to consider the offense, safety of society and other factors under 18 U.S.C. § 3553. There will probably be a lot more of these in the Eleventh Circuit. Bryant is discussed in an article in this issue of *Law Notes*.

NEW YORK – Second Circuit Judge Denny Chin hears compassionate release cases by designation in the Southern District of New York when he sentenced the offender as a trial judge. He denied release to HIV-positive inmate Guillermo Negron, Sr., in *United States v. Negron*, 2021 WL 2952846 (S.D.N.Y., July 14, 2021). Currently 66 years old, Negron has served 24 years of a life sentence for heroin trafficking. Negron supervised an "operation" that distributed heroin with a street value of $100,000/day for several years. He was also guilty of firearms offenses and of "recruiting" his teenage son into the enterprise. Judge Chin applies the First Step Act, without deferring to Sentencing Guidelines, under *U.S. v. Brooker*, 976 F.3d 228, 230 (2nd Cir. 2020). Judge Chin notes the issue is disputed, but: "I assume, without deciding the issue, that I have the authority to transfer an inmate to home confinement." Judge Chin finds that Negron has conditions constituting compelling reasons for release: HIV/AIDS, insulin dependent diabetic, severe asthma, hypertension, and encephalomalacia (a rare life threatening brain condition), which together put him at "extreme risk" if he contracts COVID-19. Judge Chin finds this combination satisfies the criteria of 18 U.S.C. § 3582. Judge Chin concludes, however, that the discretionary factors under 18 U.S.C. § 3553(a) "weigh against his release, a reduction in his sentence, or a transfer to home confinement." Negron played a senior management role in a heroin distribution enterprise, that operated for almost a decade. He had eighteen prior convictions when sentenced. Judge Chin writes: "I considered a life sentence an 'appropriate' and 'just sentence' . . . [when he imposed it; and] "upon weighing all the factors, I am still of the view that a term of imprisonment of life is appropriate and just."

OHIO – U.S. District Judge Edmund A. Sargus, Jr., adopts the recommendation of U.S. Magistrate Judge Kimberly A. Jolson and denies immediate release through a writ of habeas corpus to state prisoner Derek Lichtenwalter, in *Lichtenwalter v. Warden*, 2021 U.S. Dist. LEXIS 121875; 2021 WL 2677791 (S.D. Ohio, June 30, 2021). Lichtenwalter is HIV-positive, with latent tuberculosis, hypertension, and a history of a partially collapsed lung.

He claims that his Ohio prison does not follow social distancing or take other COVID precautions, forcing him to live and sleep with 120 other inmates. Lichtenwalter has been fully vaccinated against COVID, and Judge Sargus finds this fatal to his claim for either habeas corpus or Eighth Amendment relief. Even if 50% of all inmates have refused a vaccine, Lichtenwalter remains 94% protected, so his claim fails. This was the recommendation of Magistrate Judge Jolson. Both sides appealed, and Judge Sargus accepted the recommendation on the merits. The state appealed on jurisdictional grounds, arguing that this was a conditions of confinement case that could not be brought under habeas corpus. Most of the opinion deals with this issue. Because Lichtenwalter argued that nothing short of release could cure the unconstitutionality of his confinement, he could proceed under habeas corpus, citing *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) (string cite of Sixth Circuit district court decisions omitted). The state next argued that Lichtenwalter failed to raise the COVID conditions claims before the Ohio Supreme Court, rendering them procedurally barred in federal habeas. Judge Sargus said that failure to exhaust is not jurisdictional and that the court can reach the "merits" under "unusual" or "exceptional" circumstances, citing *Rockwell v. Yukins*, 217 F.3d 421, 423 (6th Cir. 2000). The COVID epidemic is such a circumstance. *Blackburn v. Noble*, 479 F.Supp.3d 531, 539-40 (E.D. Ky. 2020); *Cameron v. Bouchard*, 462 F.Supp.3d 746, 768-69 (E.D. Mich. 2020). Judge Sargus declines to issue a certificate of appealability, necessary to appeal a habeas denial. Lichtenwalter is represented by Danielle Scoliere Rice and Vorys, Sater, Sayman & Pease, LLP (Columbus).

OHIO – Federal prisoner Quentin Blade sought compassionate release due to COVID-19 in *United States v. Blade*, 2021 WL 2940824 (N.D. Ohio, July 13, 2021). U.S. District Judge James S. Gwinn denied the application. Blade pled guilty to nine armed robberies in 2015, and he was sentenced to 190 months – a six-year downward departure from the minimum under sentencing guidelines. Blade is HIV-positive. Blade's other risk factors for COVID include hypertension and high cholesterol. The Sixth Circuit allows district judges discretion to define "compassionate release" without resort to Sentencing Commission Guidelines on defendant-initiated applications under *U.S. v. Elias*, 984 F.3d 516, 518-20 (6th Cir. 2021); and *United States v. Jones*, 980 F.3d 1098, 1011 (6th Cir. 2020). Judge Gwinn takes this sweepingly, and he dispenses with ("skips," as he puts it) reference to the Sentencing Guidelines compassionate release criteria entirely, because "[t]here are no applicable . . . . Policy statements." He finds that Blade does not warrant compassionate release because he refused to take a COVID-19 vaccination. Blade is now in a federal institution (Petersburg–Medium – in Virginia) where "the vast majority of the institution's population is fully vaccinated." The institution reports no active COVID cases presently, but 267 inmates (of a population of 1,516) are "recovered" per the BoP website. Judge Gwinn holds Blade's refusal to be vaccinated as a major factor in exercising discretion to deny consideration of release, since vaccination "would have substantially decreased his risk of infection." Judge Gwinn also considers Blade's offenses and community safety. Blade has not served even half of his reduced sentence, and the armed robberies were committed while he was on supervised release for prior offenses. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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 – On March 11, the 2nd Circuit issued an opinion (*see* 991 F.3d 66) affirming District Judge Stewart D. Aaron's dismissal of a lawsuit by James Domen and his organization, Church United, against Vimeo, Inc., which had terminated Domen's account on its platform and removed all its content, which included videos promoting conversion therapy. In July, the 2nd Circuit panel withdrew this decision, and on July 21 it issued a new decision in *Domen v. Vimeo, Inc*., 2021 WL 3072778, 2021 U.S. App. LEXIS 21533, to publish in place of the prior ruling. Our review of the new opinion suggests that nothing significant was changed. As before, the opinion by Judge Rosemary Pooler found that Vimeo was protected by Section 230(c)(2)(A) of the Communications Decency Act, which shields internet service providers from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Domen received a warning email flagging five videos that Vimeo considered objectionable, demanding that they be removed within 24 hours, and warning that Vimeo might remove the videos or Domen's entire account from its platform. When Domen did not remove the specified videos, Vimeo terminated his account. Domen, identifying himself as a "former homosexual" who had formed Church United to promote conversion therapy based on his religious beliefs, alleged that Vimeo's action discriminated against him because of his religion and sexual orientation and brought a diversity suit relying on the NY Human Rights Law and California's Unruh Civil Rights Act in the Southern District of New York. Vimeo successfully raised CDA Section 230(c)(2)(A) in defense. The 2nd Circuit agreed that regardless of continuing controversy about the existence and scope of Section 230 (President Trump had called for its repeal), and the lack of 2nd Circuit precedent specifically on point, Judge Aaron had appropriately construed and applied the statute and had correctly concluded that Domen's allegations failed to state a claim under either state statute upon which he relied.

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a petition for review of a Board of Immigration Appeals denial of an application for asylum, withholding of removal, and protection under the Convention against Torture for a native and citizen of Ghana, in *Mohammed v. Garland*, 2021 WL 3085141 (July 22, 2021). An Immigration Judge found petitioner's allegations not credible, and was affirmed by the Board. As is too frequently the case in these summary considerations, the court said little about the substance of the petitioner's allegations, other than to list the reasons why the issue of credibility was resolved against him, including that the Petitioner "completely omitted from his interview with border patrol agents that he was beaten by a mob and detained for two days after being caught kissing his boyfriend." Also, wrote the court, the Petitioner "challenges only the agency's reliance on his omission of his sexual orientation and does not deny or seek to explain away" the other inconsistencies and omissions from his border patrol interview or his testimony in this case. The court found that the other "inconsistencies and omissions" would themselves justify resolving credibility against him, and commented that the agency "reasonably relied on [his] failure to rehabilitate his testimony with sufficient corroborating evidence." The court found that denial of all three forms of relief was merited "because all three forms of relief are based on the same discredited factual predicate." In a footnote, the court commented: "Although we have cautioned against reliance on airport or border interviews as a basis for an adverse credibility determination because they 'take place immediately after an alien has arrived in the United States, often after weeks of travel, and may be perceived by the alien as coercive or threatening, depending on the alien's past experiences,' [the petitioner] does not dispute the reliability of the record." This is an odd comment to make. The issue isn't whether the record is reliable as to what was said by the Petitioner during the interview, it is whether it is appropriate to rely on it for an adverse credibility determination due to the circumstances under which it was held. The Petitioner was coming from a country where gays are treated as abominable outcasts to be persecuted and worse, which could predispose somebody to hide their sexuality when being questioned upon arrival in a strange country by official government agents, a procedure during which it is unlikely he had counsel to advise him about the prerequisites for winning refugee status under American law. The court's terse opinion lists counsel for Petitioner – Joshua Bardavid of New York – but there is no indication whether he was involved in this proceeding prior to Petitioner's appeal from the BIA decision.

U.S. COURT OF APPEALS, 6TH CIRCUIT – The 6th Circuit denied a petition for rehearing or rehearing *en banc* in *Meriwether v. Hartop*, 992 F. 3d 492 (6th Cir., March 26, 2021), rehearing *en banc* denied, 2021 U.S. App. LEXIS 20436 (July 8, 2021). In this case, the

CIVIL LITIGATION *notes*

6th Circuit panel held that a public university professor who was knowingly misgendering a transgender student in his class was merely exercising his protected free speech rights under the 1st Amendment, so the university could not take any disciplinary action against him for violating its rules in this regard. In its July 8 statement, the court wrote: "The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing *en banc*. There, the petition is denied." The court noted that Judge Eric Murphy, a 2019 Trump appointee, had recused himself from participating in this ruling. The political balance of the 6th Circuit is eleven appointees of Republican presidents and five appointees of Democratic presidents, with President Trump having appointed six of the active judges. By comparison, over an eight-year term, President Obama only got to fill two seats on the 6th Circuit.

ALABAMA – U.S. District Judge Corey L. Maze granted a motion to dismiss sexual orientation and disability discrimination claims asserted by Daniel Walker against his former employer, Prime Communications, LP, on grounds of timeliness. *Walker v. Prime Communications, LP*, 2021 WL 3144526 (N.D. Ala., July 26, 2021). Walker filed his discrimination charges with the EEOC in December 2019. After 180 days passed with no action on the charge by the EEOC, Walker asked the agency for a Right to Sue (RTS) letter, so that he could initiate an action in federal court. The EEOC, which had suspended using surface mail to send RTS letters as its staff was working remotely during the summer of 2020 due to the pandemic, emailed the RTS letter to Prime's in-house counsel and Walker's attorney of record, Eric Artrip. The in-house counsel received the email. Under Title VII, Walker would have 90 days to file suit after receiving the RTS letter. Walker claims that neither he nor his attorney received the RTS email that the agency's records show that it sent, using Attorney Artrip's email address. Artrip emailed the EEOC in October 2020 to request the RTS again, but received no response. Artrip sent a third email on November 13, 2020, to which EEOC responded that it had sent the RTS on July 7, attaching a copy to this response. Walker and Artrip claim that this was the first confirmation they had from the EEOC that it had sent an RTS, and they promptly filed suit, but Judge Maze granted the employer's motion to dismiss, asserting that Walker was at fault for letting the matter slide so long after submitting his request for an RTS. Since the statute says the agency must send an RTS if the charging party requests one after the statutory 180-day investigative period has ended, Maze relied on 11th Circuit precedent, *Kerr v. McDonald's Corp.*, 427 F.3d 947 (2005), a case in which the Circuit faulted a plaintiff for failing to follow up in a timely way when they claimed no RTS had arrived after they requested one. He quoted from *Kerr*, that Walker "failed to assume the minimal responsibility or to put forth the minimal effort necessary' to resolve his claim." "To hold otherwise," Maze concluded, "would allow the 'manipulable open-ended time extension' that the Eleventh Circuit warned against" in *Kerr*. Judge Maze was appointed to the district court by President Donald J. Trump.

CALIFORNIA – The Fellowship of Christian Athletes had chapters at several high schools in the San Jose Unified School District. A teacher at Pioneer High School, Peter Glasser, posted a copy of FCA's statement concerning "faith" and "sexual purity" on his classroom whiteboard and wrote beneath it: "I am deeply saddened that a club on Pioneer's campus asks its members to affirm these statements. How do you feel?" The statement described "heterosexual acts outside of marriage" and "any homosexual acts" as "alternative lifestyles" that are not "acceptable to God," and that any FCA student leader who engaged in these acts must "step down" from their leadership position." A week after Glasser's posting, the school advised FCA student leaders that the club was no longer recognized by the school because of its non-discrimination policies, and the District subsequently withdrew recognition from all FCA chapters at its schools. Two student leaders (now alumni) and FCA filed a federal suit alleging violation of their free exercise of religion rights under the 1st Amendment. They also alleged that Glasser and other defendants "coordinated with other students and student organizations to harass FCA student members and that the District "permitted this harassment." In a joint discovery dispute submission to Magistrate Judge Virginia K. DeMarchi, plaintiffs allege that Glasser referred to their religious beliefs as "bullshit" and that he suggested that FCA "faith" and "sexual purity" statements amounted to sexual harassment; plaintiffs characterize these statements as relevant to their allegation of religious discrimination, and allege that their complaints to the high school principal about Glasser's conduct prompted an "investigation" by the principal and the school district of Glasser. In discovery, demand "all findings and conclusions from any District investigations into Peter Glasser's misconduct concerning the matters at issue in this case and any documents and information used to develop such findings." The district objected on grounds of relevance and argued that discovery of "personnel investigations" of Glasser would be an

"undue invasion of his right of privacy." In an opinion issued by Magistrate DeMarchi on July 26 in *Sinclair v. San Jose Unified School District Board of Education*, 2021 U.S. Dist. LEXIS 138946 (N.D. Cal, San Jose Div.), she granted the discovery request, finding that the investigation, as described, was potentially relevant, and noting that the district's reliance on California privacy law was not binding on the federal court in the context of discovery under the Federal Rules. However, the judge issued a protective order "to protect such records and their contents from public dissemination." The case is evidently a *cause celebre* among the religious freedom crowd, given the participation of Becket Fund for Religious Liberty in support of plaintiffs and the amici listed on both sides in the court's opinion.

CALIFORNIA – In *N.B. v. Superior Court*, 2021 Cal. App. Unpub. LEXIS 4664, 2021 WL 3029674 (July 19, 2021), the California 3rd District Court of Appeal reversed a demurrer granted by Sacramento County Superior Court and revived harassment and retaliation charges under Title IX of the Education Amendments of 1972 by N.B., a former River Delta Unified School District high school student, who withdrew from the school as a result of the harassment and retaliation he suffered. There are actually two separate plaintiffs in this case, N.B. and J.D., but their appeals are being handled separately, although stemming from interrelated situations. The problem was sparked by the coach of the high school's football and basketball teams, who had the strange idea that he should be pushing his team members to have sex with their girlfriends and ridiculing those who purported to be virgins, demeaning them as "unmanly, not macho, something contemptible, and so worthy of mistreatment." And, not incidentally, in the case of N.B. and the basketball team, inspiring students to say, both directly and in on-line chat, that N.B. must be gay if he wasn't having sex with a girlfriend. "Several months into basketball season," wrote Judge Jonathan K. Renner for the court of appeal panel, "in an unsupervised locker room after practice, petitioner was held down by two teammates while a third, K.N., sat naked on petitioner and rubbed his penis all over petitioner's face. These teammates had also been members of the football team and the Brotherhood, and one of the teammates who held petitioner down, R.T., was the same individual who had been accused of repeatedly fondling J.D.'s testicles." (That's a story from the other case, but they interrelate in terms of the "deliberate indifference" issue subsequently discussed by the court.) These three teammates were reported to the administration by the coach, which led to law enforcement action against them – a felony against K.N, who was expelled from school, and misdemeanors against the students who held down N.B. These students were suspended for a few days. But, as one might imagine, the students who were suspended engaged in retaliatory conduct against N.B., labeling him a "snitch." "R.T. posted an image of a penis superimposed onto petitioner's face in the team group chat. Petitioner alleges that, during class time, students would reenact his assault and cry out in a 'baby voice' "Stop it! Stop it!" He was also called 'Slap-Dick-Face' and 'fag' during class." N.B. and his mother both reported these incidents to the principal, but the attitude of the school seemed to be students need to toughen up. "Petitioner alleges he reported to the principal's office, 'upset and distraught . . . on practically a daily basis.' He missed school, stopped playing sports, and became suicidal. Both plaintiffs allege they withdrew from the school before the end of the school year." The trial court sustained a demurrer in N.B.'s case without leave to amend. N.B. filed a writ of mandate, prohibition, or other appropriate relief, while J.D., who also lost out in the trial court, filed an appeal. The court of appeal revived N.B.'s case in this decision, finding that the facts alleged as to both discrimination and retaliation should have survived the demurrer, and rejecting the trial court's conclusion that a showing of "deliberate indifference" by school authorities was not sufficient to establish a retaliation claim under Title IX. The court opined that between the incidents involving J.D. and those involving N.B., the principal of the school was aware of the problems that she had a duty to address. The court does not specifically mention the sexual orientation of any of the students involved in this case. N.B. is represented by Rowena Javier Dizon, Pasadena; and Kenneth N. Meleyco, Stockton.

CONNECTICUT – In *Hart v. NB Health Care, LLC*, 2021 WL 3409338, 2021 Conn. Super. LEXIS 1180 (Ct. Super. Ct., New Britain, June 24, 2021), the plaintiff claimed that her HIV medications, which were shipped to her by commercial courier, were wrongly delivered to a neighbor's house on several occasions, "causing the neighbor to learn about her HIV status," wrong Judge Peter Emmett Wiese. She sued two corporate entities, NB Health Care LLC and Expressway Courier & Freight, LLC, alleging a violation of Connecticut's HIV/AIDS confidentiality law, negligent infliction of emotional distress, and negligence in violation of HIPAA. The Westlaw and Lexis reports of Judge Wiese's opinion do not indicate whether Ms. Hart was represented by counsel or pro se, although the rudimentary mistakes in her pleadings suggest a pro se effort. The court granted motions to strike all claims against the defendants. HIPAA does not provide a private right of action, and in any event would not apply to the facts alleged by plaintiff in the context of Connecticut case law that has recognized HIPAA as establishing a standard of professional practice that could ground a negligence

claim. The problem for Hart is that the Connecticut precedent relates to a doctor-patient relationship in which the doctor improperly discloses medical information to a third party. There is no basis to repurpose that precedent to the mistaken delivery of medication by an express company (and the opinion does not mention any allegation that NB Health Care mistakenly addressed the shipment to Ms. Hart's neighbor). The Connecticut HIV/AIDs privacy law provides a cause of action for willful disclosure of confidential HIV-related information, and the court viewed the facts alleged by plaintiff as insufficient to support a claim of willfulness. Indeed, the factual allegations are so conclusory that the judge was left to guess at how neighbors would learn about Hart's HIV status because a package addressed to her was delivered to them by mistake. She did not allege that the neighbors opened the package, or that the exterior of the package communicated the presence of HIV-related medications therein. As to the emotional distress claims, Connecticut negligence doctrine requires more than a barebones allegation of emotional distress. Here, plaintiff claimed that defendants by their negligence created "an unreasonable risk causing her emotional distress," but there is no pleading to support the requirement to show that the emotional distress and damage to her reputation, if any, was "severe enough that it might result in illness or bodily harm." In other words, Judge Wiese's ruling was a total wipeout against Ms. Hart.

CONNECTICUT – The Connecticut Supreme Court ruled in *State v. Bemer*, 2021 WL 2965368, 2021 Conn. LEXIS 205 (July 14, 2021), that a state statute authorizing courts to order HIV testing of criminal defendants charged with various sexual offenses would, as a matter of statutory interpretation, allow courts to order such testing without a finding that the test results would be of any benefit to the victims of the sex crime, but that as so construed, the statute violated Article First, Sec. 7, of the Connecticut Constitution. The court concluded that testing could not be ordered unless the trial court makes a finding that testing would "provide useful, practical information to a victim that cannot reasonably be obtained in another manner before it may order such examination or testing." The question arose in the case of Bruce John Bemer, who was charged with having had sex with several young men who had been "trafficked" for the purpose sexual exploitation. Wrote now-retired Justice Richard N. Palmer (who continued to participate on cases argued before he retired last year – this case being argued in October 2019), Bemer was charged with patronizing a prostitute after police officers interviewed him in an investigation of a "prostitution ring" involving sexual trafficking of "mentally disabled young men." "The defendant told police that, over the course of the previous twenty to twenty-five years, an individual by the name of Robert King had been arranging for young males to engage in sexual activities with him in exchange for money." Bemer told police that the last time he had sexual contact with one of these young men was four months prior to the interview, which took place on August 5, 2016. The state filed a motion seeking HIV testing of Bemer on October 18, 2017, which the trial court granted without making any finding on the record concerning whether Bemer's test result would be of any practical use to the young trafficking victims, and Bemer appealed the testing order. The Supreme Court pointed out that if the last sexual contact Bemer had with one of the trafficking victims was more than six months before the judge made the decision on the testing motion, Bemer's test result would not be of particular use to the victims, since by six months after sexual contact, their most reliable information about their HIV status would be for them to get tested themselves. The constitutional privacy right is not absolute, but the court opined that under the Connecticut constitutional provision, Bemer's privacy rights would be violated by nonconsensual HIV testing that would have no practical benefit for the young men. According to news reports about Judge Palmer's retirement, he served for an unusually long period of time and was noteworthy for a string of important liberal decisions, among others the court's historic marriage equality ruling and a ruling abolishing the death penalty on state constitutional grounds.

FLORIDA – U.S. District Judge Virginia M. Hernandez Convington's opinion in *Pagan v. Wal-Mart Associates, Inc.*, 2021 U.S. Dist. LEXIS 139508 (M.D. Fla., July 27, 2021), denying the employer's motion to dismiss plaintiff Jose Pagan's amended complaint, gives rise to the inference that the defendant employer's HR operation was quite deficient in dealing with employee complaints. Pagan, a gay man, worked as a sales floor associate at a Wal-Mart store from February 26, 2018, until he was terminated on March 13, 2020. According to Pagan's allegations, one of the co-managers of the store, Ms. Roselin, stated to Pagan that "she did not approve of your lifestyle," disparaged Pagan for "lacking stereotypical male characteristics," "being gay," and "dress[ing] like a girl." She told Pagan she wanted him to dress "more like a man." He finally was fed up and complained by calling the company's ethics hotline in November 2019, but with no result, which suggests that his complaint was not investigated by Wal-Mart's HR department. In December, he requested a "few days off" for his wedding with his male partner, which Roselin denied "because she said, 'In the eyes of God that is abominable.'" Pagan called the hotline again, complaining

about this unequal treatment, and he was told to "just fix the issue in the store himself." No competent HR department would say something like that in response to this type of complaint. He then went to the other store manager to complain, "but again nothing was done." After he called the ethics hotline again, somebody in upper management "outside the store location instructed Co-Manager Roselin to approve his days off for his same sex wedding." This was the first Roselin learned that Pagan had been complaining, which led to sustained harassment by her. In March, he received approval for medical leave from March 5 to March 14, 2020, but Roselin "demanded that he return to work prior to the expiration of the medical leave that was approved by the third-party administrators of [Wal-Mart's] medical leave policies." Although Pagan complied with Roselin's demand and returned early, she fired him anyway. (Noting the dates, this would be shortly before retail stores in many places closed because of the COVID-19 pandemic, but that is not mentioned in the opinion and, after all this was in Florida where the state government did not order retail closures.) Pagan filed suit in state court alleging discrimination and retaliation in violation of the Florida Civil Rights Act and Title VII. Wal-Mart removed the case to federal court and moved to dismiss on two grounds: criticizing the complaint as a "quintessential shotgun pleading that repeats every factual allegation under each count," and arguing that the retaliation claims must fail "because there is no causal connection between [plaintiff's] alleged engagement in protected activity and [his] termination." Judge Covington rejected both arguments. The four-count complaint repeated many factual allegations under each count (two counts under the FCRA and two counts under Title VII), but she found repeated only those allegations that were relevant to each count, and because the theories pursued under the state and federal laws were similar, it was natural that facts would be restated. As to retaliation, Wal-Mart argued that four months went by between Pagan's protected activity (his first call to the ethics hotline) and his termination. This was a stupid argument. Roselin, the retaliator, only learned of Pagan's complaints (the protected activity) after he made his *fourth* complaint, concerning the denial of leave for his wedding, and Roselin's harassing conduct began shortly thereafter and specifically questioned why he had called the ethics hotline on her. Wal-Mart is, of course, represented by counsel, but reading this opinion, one is prompted to ask "what were they thinking when they made this motion totally unmeritorious motion?" Pagan is represented by Alberto Naranjo, Jr., Miami Lakes, FL.

HAWAII – U.S. District Judge Jill A. Otake dismissed a pro se complaint and denied an application for plaintiff to proceed in forma pauperis in *Scutt v. UnitedHealth Insurance Co.*, 2021 WL 3195018 (D. Haw., July 28, 2021). This is a case where the *pro se* plaintiff, a transgender woman, submitted an utterly incompetent complaint. Her principal gripe is that defendants, UnitedHealth and Maui Community Clinic, denied insurance coverage and medical treatment for her gender dysphoria. Secondarily, she complains that UnitedHealth violated the ADA by failing to provide her accommodations for her hearing and speaking impairments – "namely, refusing to allow her to communicate with ground transportation drivers via text, thereby denying her the use of these services," and refusing to authorize a wrist brace for her broken wrist. She also sought to assert supplementary state law claims, including a defamation claim. On the principal claim, she invokes Title VI of the Civil Rights Act, which the court finds is irrelevant to her claim because it only forbids discrimination because of race, color, or national origin by programs or activities that receive financial assistance," and Scutt does not allege that she is being denied insurance or care because of her race or nationality. She also alleged an 8th Amendment claim, but the court noted that because she is not incarcerated, she cannot state an 8th Amendment claim. (After all, her defendants here are not in a position to impose punishment on her.) Furthermore, as to her ADA claim against UnitedHealth, the court doubts that a health insurance company is a place of public accommodation within the meaning of that statute. (The ADA's public accommodation provision is primarily focused on requiring covered entities to facilitate access to their facilities.) "Here, even if UnitedHealth has a physical office," wrote the judge, "it does not appear that UnitedHealth's purported refusal to facilitate text communication with ground transportation drivers or its unwillingness to provide a wrist brace affect her ability to access its office." But the court granted leave to amend this claim. Having found that all federal claims must be dismissed, the court did not opine as to state law claims. Scutt also sought to invoke diversity jurisdiction but failed to allege the necessary facts or amount in controversy for that, the court noting that the including the local clinic as a defendant likely destroys the necessary diversity. As to the IFP petition, the court noted that her annual income was too high to qualify, and pointed out that this is the tenth complaint that Scutt had filed, and questioned whether public assets should be allocated to funding her litigation. Judge Otake, who was appointed by President Donald J. Trump, omitted to comment that Scutt might have a federal discrimination cause of action under the Affordable Care Act, which would be more suitable for her case than ADA Title III. We really hate reading about *pro se* cases in which the plaintiff may

have a very valid legal claim but has no idea how to articulate it in a way that would survive a motion to dismiss.

LOUISIANA – Henry Rodrigue, Jr. sued his employer for sexual harassment and retaliation in violation of Louisiana discrimination law, and the case was removed to federal court under diversity jurisdiction, as the employer is owned by an out-of-state corporation Rodrigue is a salesman of tools and supplies for machine shops. He recounts two incidents, five years apart, in which his direct supervisor, apparently drunk, kissed him on the face, to which Rodrigue reacted with puzzled hostility. When he subsequently did not receive a salary raise that he thought he had been promised if he landed a major new account, he filed a complaint with the company, and cited these incidents. He claims that after the complaint, he was subjected to retaliatory mistreatment. In ruling on the company's motion for summary judgment in *Rodrigue v. PTS Management Group, LLC*, 2021 U.S. Dist. LEXIS 139125, 2021 WL 3183404 (W.D. La., Lafayette Div., July 26, 2021), U.S. District Judge Robert R. Summerhays granted summary judgment to the company on the hostile environment harassment claim, finding that under the 5th Circuit's same-sex harassment jurisprudence, Rodrigue's allegations fell short because there was no evidence that the supervisor was seeking sexual gratification or was coming on to Rodrigue sexually when he drunkenly kissed him, so a reasonable jury would not conclude that Rodrigue was singled out for this treatment because of his sex, and two such incidents over a period of several years fell short under the "severe or pervasive" hostile environment standard. However, the judge found material fact questions concerning the retaliation claim; specifically, as to some of the reasons given by the company for adverse actions towards Rodrigue, especially on the issue of pretext. Judge Summerhays was appointed by President Donald R. Trump.

MARYLAND – Travis Bruce, then a closeted gay man, started working as a sales associate at Cedar Hill Cemetery in October 2019. Shortly after he started working there, the female Sales Director, Shante Brown, subjected him to sexual harassment "in the form of sexual advances," followed by her repeatedly asking "are you gay?" He found this offensive, of course, and filed a sexual harassment complaint with the General Manager. He alleges that the harassment then stopped until the General Manager resigned, and then it started up again. He claimed that Ms. Brown made jokes about his sexuality in front of other staff, and came on to him in his office, so he contacted Human Resources to complain again. Shortly thereafter, he was suspended for "allegedly violating a policy and procedure regarding customer payments" and was discharged a few days later with "no reasonable explanation." He claims that the Assistant Manager then "prepared a letter accusing me of fabricating my harassment claims and sent it around to staff to sign in an effort to keep Ms. Brown from being discharged," but she was terminated after an HR investigation. More than eleven months after his discharge, Bruce filed a discrimination and retaliation claim against the employer with the EEOC, which he supplemented with additional factual allegations a year later, but EEOC dismissed his charges as time-barred, giving him the usual right-to-sue letter. He filed suit in federal district court, but the court granted the employer's motion to dismiss the complaint as time-barred. Under Title VII, a plaintiff has 300 days to initiate a charge with the EEOC after his claim accrues, so eleven months is too late. Alternatively, wrote District Judge Richard D. Bennett in *Bruce v. Stonemor Partners L.P.*, 2021 WL 2949780, 2021 U.S. Dist. LEXIS 131186 (D. Md., July 14, 2021), the complaint failed to state a claim for discriminatory discharge, hostile environment, or retaliation. As to the first, the court found that Bruce's EEOC charge states that he was suspended and terminated for "allegedly violating a policy and procedure regarding customer payments," and "his own factual allegations reveal that his supervisors did not believe that Bruce was performing his job satisfactorily." As to the hostile environment claim, wrote Bennett, "Bruce does not describe harassment that the Fourth Circuit has found to be severe or pervasive enough to plausibly allege an objectively hostile work environment," even though he subjectively found it to be such. As to the retaliation claim, the court found that "despite the temporal proximity of the protected activity [his complaints to management about Ms. Brown] and the adverse employment action, Bruce has alleged that the cause of his termination was not because of his report to Human Resources but because he allegedly violated a company policy and procedure." Bruce was, unfortunately, pro se, and apparently was ignorant of the statute of limitations for filing a charge with the EEOC and also apparently did not know how to frame a complaint that would not concede the case on the facts.

MICHIGAN – The Michigan Supreme Court voted 4-3 to by-pass the Court of Appeals and allow the state's Department of Civil Rights to appeal directly a court of claims decision that had enjoined the Department from investigating sexual orientation discrimination claims against two businesses. The state's Elliott-Larsen Civil Rights Act forbids discrimination because of sex in employment, housing, public accommodations and services, and education, but efforts to amend the law to add "sexual orientation" and "gender identity" to the prohibited

grounds of discrimination has stalled in the legislature, and the court of claims, in an unpublished decision, found that the statute did not apply to sexual orientation claims. The Department had begun to investigate sexual orientation discrimination claims years before the U.S. Supreme Court's *Bostock* decision, with the concurrence most recently of the state's elected Democratic Attorney General. Rouch World, LLC, and Uprooted Electrolysis, LLC, businesses being investigated on sexual orientation discrimination charges, were able to get the Court of Claims to issue injunctions against the investigations, and the Department, arguing (especially now in light of *Bostock*) that it is urgent to get a ruling from the state's highest court, has been granted permission to bring that question directly up. In the Order issued on July 2 in *Rouch World LLC v. Department of Civil Rights*, 961 N.W.2d 153 (Mem), 2021 WL 2775103, 2021 Mich. LEXIS 1117, the four Democratic appointees on the court granted the Department's application for leave to appeal prior to a decision by the Court of Appeals, and invited a long list of pro-LGBTQ organizations to file amicus briefs, while stating that "other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae." The appellees then moved the court to invite a list of anti-LGBTQ organizations to file amicus briefs, and the Chief Justice authorized the invitation. 961 N.W.2d 493 (Mem) (July 16, 2021). The three Republican appointees on the court, all appointed by former Governor Rick Snyder, announced they would deny the application, and Justice Elizabeth Clement wrote a dissenting opinion claiming that allowing the bypass in this case violated the rules governing circumstances when it was appropriate to by-pass the court of appeals. She also argued that it was inconsistent with the court's action last year when it refused to by-pass the court of appeals to take up directly the legislature's challenge to the governor's COVID-19 emergency regulations. Quoting one of the Democratic appointees who had concurred in last year's denial of the by-pass in the COVID case, she wrote: "I believe we should deny the bypass application, 'because I believe that a case this important deserves full and thorough appellate consideration. Cases of the ultimate magnitude . . . necessitate the complete and comprehensive consideration that our judicial process avails.'" And quoting her own concurrence from the previous year's decision, she wrote: "'Because I believe the Court neither can nor should review this case before the Court of Appeals does,' I dissent from the Court's order granting this bypass application." It seems likely that the court will rule, by a vote of at least 4-3, that *Bostock*'s interpretation of the federal ban on sex discrimination in Title VII to encompass claims of discrimination because of sexual orientation or gender identity should be followed by the Department and by Michigan courts in enforcing the Elliott-Larsen Act. Thus far, courts in several states whose civil rights laws do not expressly address sexual orientation or gender identity discrimination have applied the general practice of following Title VII interpretations by the U.S Supreme Court and have announced that sexual orientation and gender identity claims will be covered by their sex discrimination laws.

NEW JERSEY – On July 6 the New Jersey Appellate Division released a *per curiam* opinion affirming a decision by now-retired Superior Court Judge Peter F. Bariso that the conversion-therapy-promoting defendants in a consumer fraud case had brazenly violated a settlement agreement that had been incorporated into a court order and should be required to pay the damages that they had agreed would be due if the agreement was violated. *M.F. v. JONAH*, 2021 WL 2795427, 2021 N.J. Super. Unpub. LEXIS 1393 (N.J. App. Div., July 6, 2021). A Hudson County jury unanimously concluded that JONAH and its principal officers had engaged in "unconscionable business practices" toward the plaintiffs, individuals who had paid JONAH substantial sums to "cure" them of their unwanted sexual orientations. After several months of post-verdict negotiations, the parties submitted a settlement agreement to Judge Bariso, under which JONAH was to be terminated and the individual defendants were to refrain from any conversion therapy activities, including refraining from making referrals for clients to practitioners. The parties also agreed that the amount due to the plaintiffs in attorneys' fees and costs was $3.5 million, but plaintiffs agreed to accept $400,000.00 in exchange for the limitations on their activities to which the defendants agreed, that defendants waived the right to appeal the case, and provided that if the agreement was breached, the plaintiffs could seek breach damages of $3.5 million plus $400,000 from one of the co-defendants. In 2019, Judge Bariso, having concluded that defendants breached the agreement by forming an alter ego organization to carry on various conversion therapy activities and by making referrals to practitioners, granted the plaintiffs' application to enforce their rights under the settlement agreement. *See Ferguson v. JONAH*, 2019 WL 5459860 (N.J. Super., June 10, 2019). In affirming Judge Bariso's order, the Appellate Division found that the record supported his factual findings, that the amount awarded was not excessive (inasmuch as the defendants agreed to the amount in the settlement agreement), that a newly-introduced argument that banning conversion therapy violated the 1st Amendment rights of practitioners was raised too late in the day to be considered in this proceeding, and that Judge Bariso's order banning the individual defendants from incorporating or

serving with corporations in New Jersey was not an unconstitutional restriction on defendants' rights of free association and due process, inasmuch as they had agreed to these terms to settle the case. Judge Bariso had rejected defendants' argument that there was a virtual "loophole" in his Order under which defendants could make referrals for non-New Jersey clients to non-New Jersey conversion therapy practitioners, and he was also affirmed as to this. Counsel for Plaintiffs-Respondents on this appeal were Bruce D. Greenberg (Lite DePalma Greenberg, LLC), Luke A. Barfoot, Lina Bensman, and Thomas S. Kessler (Cleary Gottlieb Steen & Hamilton), and Scott D. McCoy (Southern Poverty Law Center). There were amici on both sides of the appeal. Defendants-Appellants' amici, as noted above, tried to raise new constitutional arguments, attempting to build on the 11th Circuit's ruling in *Otto v. City of Boca Raton, Florida,* 981 F.3d 854 (11th Cir. 2020), that bans on conversion "talk therapy" violate the 1st Amendment free speech rights of the "therapists."

NEW YORK – An outraged federal district judge, Katherine Polk Failla, issued an opinion on July 1 imposing sanctions on a John Doe plaintiff and his former legal counsel for conduct in connection with a lawsuit they filed against East Side Club, LLC – a gay bathhouse – and two of East Side's employees. *Doe v. East Side Club, LLC*, 2021 WL 2709346, 2021 U.S. Dist. LEXIS 123497 (S.D.N.Y.). The plaintiff, identified as John Doe 1 in the opinion, is a Russian emigre and was a student at Fordham Law School (expected to have sat for the bar in 2020) who was working as an attendant at the East Side Club from July 27, 2015, through April 7, 2017, when he quit his job, subsequently arguing that it was a constructive discharge because of sexual harassment by one of the club's employees, identified in the opinion as John Doe 2. As described by Judge Failla summarizing the complaint, "Plaintiff alleges that shortly after he began working at the Club, Doe 2 began sexually harassing him – making sexually explicit remarks, touching Plaintiff inappropriately, and propositioning Plaintiff for sex – and states that this harassment caused him to suffer from depression and anxiety." He claimed that he sought medical treatment the following October for emotional distress resulting from "Defendants' mistreatment." The bulk of his claim in this lawsuit was for emotional distress ($3 million) and punitive damages ($3 million), and $214,466 in economic damages. We cannot do justice to Judge Failla's opinion here – it runs almost 30 pages in Westlaw. It describes the protracted discovery battles that ensued after attempted mediation failed. Ultimately the Plaintiff sought on advice of counsel to abandon the case, but not until after lengthy discovery disputes, case conferences, and postponed trial dates, during the course of which Judge Failla concluded that plaintiff and his counsel had made various misrepresentations (both affirmatively and by omission) to the court and to the defendants in responding to discovery requests and relating the history of the Plaintiff's legal entanglements. While defendants agreed to dismissal of the case, they filed a motion for sanctions with the permission of the court, pursuant to FRCP 37. A majority of the opinion is devoted to Judge Failla's detailed findings concerning the misconduct of Doe's former counsel, Johnmack Coehn and the Derek Smith Law Group, and Doe. Just to give the flavor of the opinion: "While the misconduct of Plaintiff's former counsel may be attributable to a combination of recklessness and indifference, the record reveals a much more willful pattern of obstruction and deception carried out by Plaintiff. Plaintiff consistently and systematically concealed relevant and unfavorable facts and documents, first from his former counsel, and later from Dr. Siegel [a medical expert whose report on Plaintiff's condition was to be part of the case for emotional distress damages], Defendants, and the Court." The judge sanctioned both counsel and Plaintiff, authorizing Defendants to submit to the Court by the end of July "contemporaneous billing records, other documented expenses, and supporting papers in support of an award of fees and costs," and then giving Plaintiff and his former counsel 30 days to file any statement in opposition and Defendants 14 days to respond. Plaintiff and former counsel will be jointly liable for the amount ultimately awarded by the court. The case having previously been dismissed was ordered restored to the active docket for the purpose of ruling on this motion and making an award. LeGaL member Thomas Shanahan represents the East Side Club.

NEW YORK – James Bergesen, an out gay man, an adjunct professor at Manhattanville College, taught art and art-related courses. Adjacent to the College's campus is Keio Academy, a private high school for Japanese students, who were authorized to use the College's premises, libraries, art galleries, and running paths. A Keio student and cross-country team member, EF, passed the College's Environmental Center, where Bergesen taught a class, when out practicing for cross-country activities. Apparently, they had just a nodding acquaintance until October 29, 2018, when EF approached Bergesen as he was closing the Environmental Center after teaching a class. EF talked with Bergesen about Bergesen's class, environmental art projects, and art museums in NYC, EF expressing interest in contacting Bergesen to learn more about museums in NY, and Bergesen providing his telephone number. EF then continued on the running path and several minutes later, Bergesen noticed EF and several of his teammates walking back down the path and laughing.

According to EF's cross-country coach, Yumiko Bendlin, EF had joked with his teammates about speaking with Bergesen. Bendlin asked EF if he was touched or Bergesen touched himself in an inappropriate manner, and EF said no, and did not appear to be "shaken" by the "incident," but Bendlin reported the "incident" to campus security. Bergesen was then accused by Donald Dean, the College's HR Director, of soliciting a teenage boy for sex. Bergesen found himself suspended without pay and caught in the middle of a Title IX sexual harassment investigation, which was apparently bungled by Manhattanville's HR people. Despite no real evidence that he had done anything wrong, Bergesen was discharged. He complained that he was being stereotyped as a "gay pedophile,' presumed guilty without proof of wrongdoing, and that the discharge was discriminatory, filed a grievance, and a faculty panel vindicated him. Nonetheless, he temporarily lost his teaching position, had adverse conditions imposed as a prerequisite to getting reinstated (including requiring him to admit to misconduct), and then was not assigned the classes he had been teaching. He sued under Title VII and the NYS Human Rights Law for discrimination because of sexual orientation and retaliation for filing his complaints. Rather amazingly, U.S. District Judge Kenneth M. Karas granted the college's motion to dismiss the discrimination complaint, but denied, in part, the motion to dismiss the retaliation claims. *Bergesen v. Manhattanville College*, 2021 U.S. Dist. LEXIS 135033, 2021 WL 3115170 (S.D.N.Y., July 20, 2021). Although there were many procedural irregularities in this case, Judge Karas deemed them insufficient to support a claim of discriminatory intent by the College based on Bergesen's sexual orientation. Even though Bendlin's report of the "incident" was basically that nothing untoward happened, the College's HR director accused Bergesen of sexual misconduct without undertaking any further investigation, which Bergesen understandably alleges involves stereotypical thinking about gay men being pedophiles. Karas wrote that the complaint "does not plausibly allege that Dean [the HR director] was influenced by this stereotype," because he "cites no statements by Dean reflecting the stereotype that gay men are pedophiles. Nor does the Complaint allege any other facts to make plausible the view that Dean's accusation was driven by stereotypical thinking, even in part. The Court assumes without deciding that Dean's premature accusation reflected a procedurally irregular presumption of guilt, but while this irregularity may 'support the inference of bias, [it] do[es] not necessarily relate to bias on account of [sexual orientation].'" (Really??) We hope Bergesen appeals this dismissal. On the other hand, the court agreed that some of Bergesen's allegations of adverse personnel actions within reasonable proximity of when he filed complaints could be actionable as retaliation, denying the College's motion to dismiss retaliation claims as to those. Bergesen is represented by Justin Stedman Clark of Levine & Blitt, PLLC, New York City. Judge Karas was appointed by President George W. Bush.

PENNSYLVANIA – Sean Coary, an out gay man, was an assistant professor in the Business School at St. Joseph's University, a Jesuit Catholic university in Philadelphia, from 2013 until 2019, when he was the only assistant professor, out of 11 eligible for a tenure decision, to be denied a tenured appointment. He was informed that this denial meant he was off the tenure-track faculty but would be eligible for year-to-year appointments. The denial came, according to him, despite an affirmative vote by the University's Board of Rank and Tenure. Coary alleged that he had been subjected to a hostile environment by two of the five different individuals who were chairs of his department, and his complaint recites various remarks they made to him and others that would substantiate that claim. The two individuals in question both voted against his tenure application, as did the Dean of the School of Business. His application was denied in March 2019. He filed a complaint with the Pennsylvania Human Rights Commission, which was dual filed with the EEOC, alleging violations of Title VII, the Pennsylvania Human Relations Act, and the Philadelphia Fair Practices Ordinance, alleging discrimination and hostile environment harassment, and subsequently filed suit in the Eastern District of Pennsylvania. *Coary v. St. Joseph's University*, 2021 U.S. Dist. LEXIS 142057, 2021 WL 3223069 (E.D. Pa., July 29, 2021). The University moved to dismiss "those factual allegations in the Complaint" predating March 3, 2019, on the ground of time-bar. District Judge Gene Ellen Kaye Pratter treated the motion as a motion to strike and denied it. She found that the discrimination claim, aimed at the tenure denial, was clearly timely. Granting the motion would have ruled out most of the allegations having to do with the hostile environment claim, but Judge Pratter explained that hostile work environment claims "are based on continuing or repeated violations that are 'part of one unlawful employment practice," so, as long as some of the factual allegations relating to hostile environment were clearly timely, the court could take into account incidents occurring prior to the statute of limitations cut-off date "for the purpose of determining liability. So, an employer can be liable for all the incidents that constitute a hostile work environment even if some occurred outside the statutory filing period." This critically keeps in play before the court the homophobic remarks predating March 2019 by the two former department chairs who later voted against Coary's tenure application. Commenting that

"the Court can consider these allegations as pertinent background," the judge declined to strike the allegations that "describe events outside of the statutory time-period because they provide context for Mr. Coary's discrimination claim and may form part of his hostile work environment claim." Coary is represented by Daniel S. Orlow, Console Mattiaci Law, LLC, Philadelphia. Judge Pratter was appointed by President George W. Bush.

SOUTH CAROLINA – On December 1, 2015, Navy veteran "John Doe" went to the William Jennings Bryan Dorn Veterans Administration Medical Center for a primary care appointment, during which the physician, Dr. Theo Mwamba, trying to figure out the source of Doe's symptoms, went through his medical records and discovered a positive HIV test notation from 1995. Dr. Mwamba's notes of the appointment state: "I look at the patient and ask him who was his infectious disease doctor and patient state he did not have one and ask him if he knew that his HIV test was positive and he stated never was told it was positive." Dr. Mwamba told him he should be tested for HIV and for viral load so he could be treated, but Doe refused testing "and state my doubts is seeing that I was tested in 1995 at this hospital and no one ever told me that I was HIV positive UNTIL December 2015." There was back and forth without resolution. Several times over more than two years, Doe went to various medical providers at the VA "but continually refused to undergo additional HIV testing" and received no treatment for his possible HIV infection. It was only when he developed serious immune deficiency symptoms in September 2018 and was hospitalized at Maimonides Medical Center in New York City that he agreed to be tested, tested positive, and was diagnosed with full-blown AIDS. He started on antiretroviral therapy a year later at the VA Medical Center in New York. He submitted a claim to the Department of Veterans Affairs on January 10, 2019, which was denied in May 2020, then file this lawsuit, *Doe v. United States of America*, 2021 WL 2982865, 2021 U.S. Dist. LEXIS 132036 (D. S. Carolina, July 15, 2021), on September 8, 2020, four years and nine months after he claims to have first learned that he had tested positive in 1995. Doe sought to hold the government liable for failing to notify him of the 1995 positive test, as a result of which he eventually developed full-blown AIDS due to lack of treatment in the interim. The government won its motion to dismiss based on the Federal Torts Claims Act 2-year statute of limitations. The court found that the statute started to run on December 1, 2015, applying the "discover rule" commonly used in medical malpractice cases, and that Doe's stubborn refusal to be tested or seek treatment for HIV infection over the ensuing years was basically "on him" once two years had passed without a claim being filed. The court would not count Doe's new positive HIV test in September 2018 as the relevant date to start the clock. Wrote District Judge Sherri A. Lydon, "The court is sympathetic to the wrong inflicted on Plaintiff. But no matter how sympathetic the court is to Plaintiff's position, it cannot ignore that fact that his claims are barred because of his own inexcusable lack of diligence. The record reflects, and Plaintiff agrees, that on December 1, 2015, Dr. Mwamba told him that he tested positive for HIV in 1995. The record further reflects that Defendant encouraged Plaintiff to act – get another test, obtain his viral load, etc. – no less than four times. Plaintiff refused." And, concluded Judge Lydon, "The court cannot allow its sympathy for the Plaintiff to result in it turning a blind eye to the very purpose of the statute of limitations." Doe is represented by Chad A. McGowan, Eve Schafer Goodstein, and Jordan Christopher Calloway, of McGowan Hood Felder and Johnson, Rock Hill, SC. Judge Lydon was appointed by President Donald J. Trump.

TEXAS – Texas has a mandatory bar, which means attorneys who wish to practice in the state must be dues-paying members of the State Bar of Texas. On July 2, a unanimous panel of the U.S. Court of Appeals for the 5th Circuit held in *McDonald v. Longley*, 2021 U.S. App. LEXIS 19882, 2021 WL 2767443, that three Texas attorneys who sued the State Bar, claiming that the mandatory bar system violated their 1st Amendment associational and free speech rights, were entitled to a preliminary injunction preventing the Bar from requiring them to join or pay dues while the case was pending on remand to the district court to determine the full scope of relief to which plaintiffs are entitled for violation of their 1st Amendment rights found by the court. (The district court had granted summary judgment to the State Bar, which this decision reverses.) Among the things to which plaintiffs objected was the State Bar's lobbying for legislation that plaintiffs argued was not germane to the statutorily enumerated purposes for which the mandatory bar was legislatively established, and they specifically identified the State Bar's support of a measure to amend the Texas Constitution's definition of marriage and a measure to create civil unions as an alternative to marriage (both measures inspired by the marriage equality issue), as well as diversity programs by the bar that included a focus on professional interests of LGBTQ lawyers. Their concern, considering the overall nature of their objections, was that the State Bar was advocating to advance LGBTQ rights and other "liberal" or "progressive" causes. They also objected to aspects of the State Bar's annual meeting, when special interest sections subsidized by the State Bar present programs of what the plaintiffs characterized as an "ideological" nature.

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As a speaker at a program put on by the LGBT Section of the State Bar at the annual meeting several years ago, this writer can attest that such programs are presented, that the content is along the lines advocated by the section, and that travel and hotel expenses of speakers are covered by the Section's members with subsidy from the State Bar. The State Bar has a procedure under which members who object to their dues being spent on various activities that are not germane to the statutorily enumerated purposes can seek partial refunds, but the court found the procedure constitutionally deficient in various ways. The U.S. Supreme Court has upheld the existence of mandatory state bars in the past – most recently in *Keller v. State Bar of Colorado*, 496 U.S. 1 (1990) – but the relevant decisions predate *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018), in which the Supreme Court, overruling earlier decisions, found that a state violated the 1st Amendment by entering into a collective bargaining agreement with a union representing state employees that required all the employees either to join the union or to pay a representation fee to the union, and arguably if the *Janus* majority holds, a case such as this one might result in a Supreme Court decision extending *Janus*. For now, however, the 5th Circuit panel, relying on the pre-*Janus* mandatory bar decisions – particularly *Keller* – found that the State Bar of Texas is vulnerable to 1st Amendment challenge to the extent that it expends funds and supports activities that are not germane to the statutorily enumerated purposes of regulating the legal profession and advancing the administration of justice. 5th Circuit panel concluded that plaintiffs had correctly identified non-germane activities and expenditures of the State Bar that raise 1st Amendment association and free speech issues. The 5th Circuit is a very conservative circuit, and it is not surprising that the panel opinion is by Circuit Judge Jerry E. Smith, a Reagan appointee and staunch conservative, and the other two panel members, both Trump appointees, are Don Willet and Kyle Duncan. The State Bar is unlikely to win an *en banc* hearing, given the ideological balance of the Circuit (12 Republican appointees and only 5 Democratic appointees; Trump appointed half of the Republican appointees), so the question remains whether the State Bar will dare to seek Supreme Court review, putting in potential jeopardy the mandatory bars of 31 states and the District of Columbia, or will decide to foreswear its advocacy activities concerning substantive policy issue that do not directly relate to regulation of the legal profession or improving the administration of justice.

WASHINGTON – Senior U.S. District Judge Marsha J. Pechman ruled in *Beeman v. Mayorkas*, 2021 U.S. Dist. LEXIS 143005, 2021 WL 3207414 (W.D. Wash., July 29, 2021), that Arman Beeman, a bisexual former border patrol agent, may proceed on his Title VII claim concerning sexual orientation discrimination in his discharge from employment, but that hostile environment and discrimination claims for incidents predating a "Last Chance Agreement" that he had signed in order to be reinstated from a suspension, and a failure to exhaust certain claims through his EEOC charge, required dismissal of parts of his Complaint. "Beeman alleges that his termination occurred on account of his identification as bisexual," wrote Judge Pechman. "He alleges that his supervisor and division chief, Anthony Holladay, learned that Beeman is bisexual in July 2015. Beeman alleges that during the arbitration proceeding in November 2015 [concerning an earlier disciplinary issue], he overheard Chief Holladay say 'he was "not going to let some Northern Border Intern faggot work here" if he could help it.' Beeman also alleges that after his 2016 arrest, he believes that non-bisexual employees were not placed on unpaid administrative leave for off-duty misconduct." He claimed that the incident leading to his dismissal was a "set-up" to get rid of him because of his sexual orientation. Rather than contest the merits, the defendants moved to dismiss the entire Complaint based on the "Last Chance Agreement" and on failure to exhaust administrative remedies. Judge Pechman found that the "Last Chance Agreement" and the failure to exhaust remedies required dismissing Beeman's claims relying on pre-Agreement incidents, but that the Agreement did not apply to his subsequent discharge. Among the claims dismissed was a hostile environment claim that was effectively waived by the Agreement and also untimely, since Beeman's factual allegations concerning that claim related to events that occurred before the limitations period. Beeman is represented by Mark K. Davis, Dethlefs Sparwasser Reich Dickerson & Key, Edmonds WA, and Nolan Patrick Lim, Seattle.

WISCONSIN – Madison, Wisconsin, is a relatively liberal city and, as one might expect, the Madison Metropolitan School District adopted a very trans-affirmative policy that, among other things, according to plaintiffs in *Doe v. Madison Metropolitan School District*, 2021 WL 3084978, 2021 Wisc. App. LEXIS 3084978 (Wisc. Ct. App., July 22, 2021), allows students to "change gender identity" and select names and pronouns for themselves "regardless of parent/guardian permission." Plaintiffs, identified by Judge JoAnne F. Kloppenburg in her opinion for the court of appeals panel as ten parents of students in the District, claim that hits policy interferes with their "fundamental right" under Article I, Sec. 1 of the Wisconsin Constitution and the 14th Amendment of the U.S. Constitution to "direct the upbringing of their children." The dispute addressed by the court's July 22 decision concerns

a decision by Dane County Circuit Court Judge Frank D. Remington denying the parents' request to be allowed to proceed solely anonymously, not identifying themselves by name even in a single copy of a complaint to be filed under seal and protective order limiting who can know their identity. Judge Remington ruled that they had to submit a complaint naming the plaintiffs under seal and request a protective order, which he would be inclined to grant provided that counsel for defendants and intervenors get to know the identity of the plaintiffs, under strict orders not to reveal their identity to anybody else. The real sticking point is the intervenors, listed in the caption as Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School and Gender Sexuality Alliance of Robert M. LaFollette High School. The plaintiffs argued that adding in the intervenors' counsel, who they claim would number in the hundreds or even a thousand, there would be too many people privy to the information, enhancing the likelihood of a "leak," and suggests that this would pose a risk of harm to the plaintiffs if their identity were known. The plaintiffs argued that they would be allowed to proceed anonymously under federal practice, but the court indicated that Wisconsin law would govern this issue in a Wisconsin court, and that Wisconsin law strongly favors litigation to be conducted without anonymity absent very unusual circumstances involving danger to the public interest. Purely personal privacy concerns of plaintiffs who don't want to be embarrassed don't count. The court of appeals affirmed Judge Remington's decision to require the filing of a complaint with the names of the plaintiffs which could be sealed under the terms that he had approved, and would not deny plaintiff-intervenors' counsel the right to know these names subject to the strictures of a protective order. The version of the court's opinion on Westlaw and Lexis does not list the names of counsel, but one suspects they include public interest litigation groups representing the intervenors pro bono. The opinions list plaintiff-appellants as John Doe 1, Jane Doe 1, Jane Doe 3, Jane Doe 4, John Doe 5 and Jane Doe 5. However, the caption also lists John Doe 6, Jane Doe 6, John Doe 8, and Jane Doe 8 as plaintiffs but not appellants. So perhaps these parents are satisfied with the decree of protection for anonymity Judge Remington was willing to afford, and the case may go forward with fewer plaintiffs if the appellants are unwilling to have their names on the original filed complaint.

WISCONSIN – Here is a confusing lead sentence for an opinion by U.S. District Judge William C. Griesbach in *Lammers v. Pathways to a Better Life LLC*, 2021 U.S. Dist. LEXIS 133531, 2021 WL 3033370 (E.D. Wis., July 19, 2021): "Plaintiff James Lammers is a person who, in the language of the gender identity movement, identifies as non-binary, more commonly known as transgender, as well as intersexual and bisexual." Come again? Non-binary and transgender are not the same thing, we thought. We're not sure where "bisexual" comes into play, but "intersexual" might be accurate because Lammers has male genitalia but "possesses some secondary characteristics of a female, such as enlarged breast tissue and mammary glands, larger hip radius, and slower growing body hair." Lammers is married to a woman and has two children (presumably, although the court does not clarify this, of whom Lammers is the biological father?). At any rate, this is an employment discrimination case, in which Lammers claims to have been discharged in violation of Title VII and the Wisconsin Fair Employment Act on the basis of sex. When hired as a mental health counselor at an addiction treatment center, Lammers was presenting as male, but after three months of employment "following several months of self-administering non-prescription hormone supplements, Lammers began wearing female clothing to work and publicly disclosing that he was gender non-conforming." [In a footnote, the judge explains that Lammers would prefer neutral pronouns – they, them – be used. "The Court intends no disrespect to Lammer," wrote Griesbach, "but because the use of plural pronouns to refer to an individual is improper under standard rules of English grammar and is confusing to the reader, the Court will use the singular pronouns corresponding to his biological sex herein when necessary.] A month later, he was terminated "on the stated ground that he was making inappropriate self-disclosures about his gender identity to other staff members and clients." Lammers alleged that the discharge was because "he identifies as a transgender person." The case was put on hold while awaiting the *Bostock* decision from the Supreme Court, after which discovery commenced and the employer moved for summary judgment, which Judge Griesbach denies in this opinion. Central to Lammers' success in avoiding summary judgment were detailed factual allegations showing that a reasonable jury could conclude that this was a case of discrimination because of gender identity, not least because of allegations that other employees spoke about their personal lives as much as Lammers did, and Lammers was being singled out because their "transition" made some people uncomfortable.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. AIR FORCE COURT OF CRIMINAL APPEALS – In *U.S. v. Washington*, 2021 WL 3239903, 2021 CCA LEXIS 379 (July 30, 2021), an Air Force lieutenant who was convicted by a military court of abusive sexual contact, conduct unbecoming an officer,

and fraternization, managed to achieve a divided three-judge appellate panel, which affirmed as to the first two charges, but set aside the conviction and sentence on the fraternization charge, authorizing a rehearing and possible reduction of sentence. From the summary of the facts by Senior Judge Tom E. Posch, it sounds like Lt. Washington took a loose and easy attitude toward socializing (including heavy alcohol ingestion) with military personnel under his command, and in some situations made sexual passes (including touching) while he and others were significantly inebriated. The fraternization convictions divided the appellate panel because there was some dispute about what the "custom of the service" is for officers fraternizing with personnel of lesser rank in social settings, and the relevant provisions of the Uniform Code of Military Justice are construed to require courts to determine whether such socializing goes beyond the bounds of generally accepted conduct in the particular service. Some of the fraternization charges were remanded for rehearing to obtain more evidence as to that. Getting drunk and groping an officer, however, was deemed by a majority of the panel to support the convictions on abusive sexual contact and conduct unbecoming an officer, in circumstances where there was, in their view, no valid consent. Wrote Judge Posch, "The factual sufficiency of Appellant's conviction for abusive sexual contact turns on whether we are ourselves convinced the Prosecution proved beyond a reasonable doubt that CP's testimony that Appellant touched his genitals through the clothing without his consent was credible, and that Appellant did so with the intent to gratify his own sexual desires. We find CP's testimony about Appellant's conduct at the hotel was convincing and established the elements of the charged offense beyond a reasonable doubt." The sentence of dismissal from the service was set aside pending a rehearing as to the fraternization charges. One of the judges, dissenting in part, argued that the judge could not determine whether Washington received a fair trial on the sexually-related charges because the trial court struck portions of Washington's testimony concerning his prior relationship with CP, and the dissenting judge thought that was an abuse of discretion. This judge thought that a mistrial should have been declared and Washington should have had a chance to have his full testimony presented to a jury.

MARYLAND – Remedial education is needed for some law enforcement officials in Abington, Maryland, who have charged four men with violating the state's unconstitutional sodomy law for engaging in sexual activity in enclosed spaces in an adult bookstore, according to a report in the Washington Blade (July 21). The men were among nine arrested in a police raid sparked by community complaints, according to the police. Since the enclosed spaces were locked from the inside, the men had a reasonable expectation of privacy and thus their conduct clearly fell within the boundaries of 14th Amendment Due Process protection under *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court's decision holding unconstitutional the application of Texas' Homosexual Conduct Law to private, adult consensual same-sex oral and anal sex. Police gained access by demanding a passkey to the enclosed spaces from the bookstore operator. One house of the state legislature passed a measure to decriminalize conduct covered by the Supreme Court ruling, but it did not pass the other house. Several states have failed to repeal unconstitutional sodomy laws, and police sometimes still enforce them, although prosecutors usually don't press charges in light of the Supreme Court's ruling. Nonetheless, as in this case, several of the men were held in jail overnight before being released.

MICHIGAN – In *Kuzma v. Campbell*, 2021 WL 2820661, 2021 U.S. Dist. LEXIS 125993 (W.D. Mich., July 7, 2021), U.S. District Judge Halay Y. Jarbou considered a pro se habeas corpus petition by state inmate Michael W. Kuzma, a person living with AIDS who had been convicted of engaging in penetrative sex with an "uninformed" victim and whose state court appeals affirmed his conviction. The opinion explores in great detail the various grounds argued by Kuzma for setting aside his conviction, and explains why the court is not convinced that there were substantial constitutional errors in his trial. Among other things, Kuzma asserted an ineffective assistance of counsel claim, protested the refusal of the trial judge to allow him to substitute new defense counsel on the day the trial was to commence, and objected to testimony from a jailhouse informant because the prosecutor allegedly failed to disclose the informant's criminal history before the trial. In every instance, Judge Jarbou provided a rationale for finding no basis to grant the habeas petition, finding that what might seem to be potent objections to performance of counsel could be explained away. Anybody in the position of defending an HIV-positive person being tried on such a charge would do well to read the opinion. Judge Jarbou was appointed by President Donald J. Trump in 2020.

PENNSYLVANIA – The Pennsylvania Superior Court (an intermediate appellate court) affirmed the conviction of David John Croyle by a jury on charges of statutory sexual assault, involuntary deviate sexual intercourse, unlawful contact with minors, and corruption of minors. *Commonwealth v. Croyle*, 2021 WL 3259369 (July 30, 2021). Croyle, the owner of a local newspaper, the *Kittanning Paper*, hired 13-year-old C.S. to deliver newspapers to local businesses. C.S. had previously set up an account on Grindr (which purportedly

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denies membership accounts to minors), lying about his age, and began using the app for "exploring his sexuality and looking for an older "mentor" who would "give him gifts and money to buy things he wanted." C.S. ended up unknowingly messaging Croyle, who also had a Grindr account, which led to direct communications between the two off of Grindr, social contact, and eventually oral and anal sex in Croyle's apartment. In July 2018, by which time C.S. was about 15, he came to the attention of the Pennsylvania State Police, who were investigating "his sexual involvement with other individuals in the area," and Croyle's name came up in response to their questioning, although C.S. denied having sex with Croyle. However, forensic investigation of C.S.'s cellphone turned up compromising pictures and eventually Croyle was prosecuted, convicted, and sentenced to 5-10 years in prison plus three years of probation. His post-trial motion for acquittal was denied. Croyle raised numerous grounds of objection on appeal, several going to the admissibility and identification of a photo from C.S.'s cellphone, none of which persuaded the Superior Court.

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.

CALIFORNIA – *Pro se* inmate Joshua Davis Bland, a gay man, sues because a California prison confiscated pictures of adolescent boys in diapers (which he called "twinks in diapers" or "boys who appear to be minors and/or under 18 wearing diapers"), which he had previously been allowed to receive. In *Bland v. Jennings,* 2021 WL 3129193 (E.D. Calif., July 23, 2021), U.S. Magistrate Judge Dennis M. Cota dismisses due process claims about censorship as failing to state a claim, as plead, but he allows Bland leave to amend. On the substance of the First Amendment claim, Judge Cota finds, "without knowing more" that Bland states a colorable claim about censorship of the images. If he does not amend on due process, the case will proceed on this claim through service of process on the remaining defendants. The Ninth Circuit has upheld confiscation of Man/Boy Love Association literature, but sexual images must be "explicit" if they are to be censored. *Compare Harper v. Wallingford,* 877 F.2d 728, 733 (9th Cir. 1987), *with Frost v. Symington,* 197 F.3d 348, 355-6 (9th Cir. 1999). *See also, Pepperling v. Crist,* 678 F.2d 787, 790 (9th Cir. 1982) (may not prohibit "Hustler" if "Playboy" is allowed). Plainly, if Bland does nothing, Judge Cota will need to see the images, perhaps *in camera*.

CALIFORNIA – *Bohren v. San Jose Police Department*, 2021 WL 3052731, 2021 U.S. Dist. LEXIS 135264 (N.D. Cal., July 20, 2021), is a "walking while trans" case in which a trans woman who claims to have been arrested merely for walking outside at night seeks to vindicate her constitutional rights. Roxanne Bohren alleges that she "was arrested by Defendant Avila for walking at night, while men and cisgender women, or women who identify with their sex assigned at birth, are not arrested for walking at night, and the treatment she received was thus discriminatory." She claimed that the City of San Jose and its Police Department "have a longstanding policy of arresting transgender women who walk at night" and charging them without probable cause for soliciting for prostitution, and that the defendants' "customs, practices, and policies demonstrate a deliberate indifference to the constitutional rights of transgender women." She also asserted a *Monell* (municipal liability) claim against Santa Clara County based on a California law providing that transgender women are to be housed separately from men in "carceral settings," claiming that a policy of violating this law gave rise to a constitutional claim. She also asserted a claim of intentional infliction of emotional distress against Office Avila for the way she was treated incident to her arrest. While the court granted the defendants' motion to dismiss Bohern's second amended complaint, she sought to file a third amended complaint (perhaps after having acquired counsel?), and District Judge Beth Labson Freeman found that amendment was not futile as to all but one of the plaintiff's claims. Claims that survive the motion to dismiss under the third amended complaint are false arrest, discriminatory arrest, *Monell* claim against the City and the Police Department on the alleged policy of arresting transgender women walking after dark without probable cause, and intentional infliction of emotional distress against Officer Avila. However, the court found that Bohren could not rely on the California statute for her *Monell* claim against the County regarding carceral housing, as the law in question had not gone into effect at the time of her arrest, and a violation of a state statute would not necessarily constitute a federal constitutional violation, citing *West v. Atkins*, 487 U.S. 42 (1988). Judge Freeman also noted that "there does not appear to be any authority to support the argument that a transgender woman has a constitutional right to be housed in a separate jail from men." Her counsel is Bruce William Nickerson, San Jose. Judge Freeman was appointed by President Barack Obama.

CONNECTICUT – At over 14,000 words, *Johnson v. Cook,* 2021 WL 2741723, 2021 U.S. Dist. LEXIS 123147 (D. Conn., July 1, 2021), is not a typical screening decision. It took nearly two years for Senior U.S. District Judge

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Charles S. Haight, Jr. (formerly of the S.D.N.Y., who sits by designation in the D. Conn.) to produce it. Transgender plaintiff Isis M. Johnson, *pro se,* has since been released from custody, and only damages claims remain. The case involves verbal harassment (in jail and in state prison) and denial of transgender medical treatment. Johnson sued 26 defendants – none of whom have yet been served – and only eight will remain. This report discusses only those claims allowed to proceed, since they expand the law a bit on stating a claim for verbal harassment and deliberate indifference to health care. On verbal harassment, Judge Haight discusses two incidents: one in the jail, where an employee told other inmates and staff: "I have someone with big breasts downstairs, you guys can have the best of both worlds." The other, in state prison, involved transphobic statements by officers in the mess hall. While Judge Haight recognizes that the second (subjective) element of deliberate indifference may be different under *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), depending on whether the inmate is in a jail versus a prison (and the Fourteenth rather than the Eighth Amendment applies), he finds it unnecessary to reach the distinction for purposes of screening here. The seriousness of the verbal harassment (an "objective" first element of deliberate indifference claims) was not met in the jail, because the comments about Johnson's breasts resulted in no risk and she admitted she "tried to ignore" it. The transphobic comments in the prison mess hall, however, resulted in inmates' pelting Johnson with food – a predictable response – so this claim can proceed under *Crawford v. Cuomo*, 796 F.3d 252, 259 (2d Cir. 2015). As to medical care (which involves the prison), Johnson has been receiving hormones for years, before and during incarceration. She wanted surgical modification of her voice and facial contours and electrolysis body hair removal. Connecticut has a transgender committee, who upheld the "determinations" of the treating doctors, who said there was no "medical necessity." While many cases founder at this stage, Judge Haight allows Johnson's claim to proceed past screening. Johnson's medical needs are serious. In terms of individual defendants, Judge Haight dismisses claims against those (like nurses) who merely referred Johnson's complaints. The members of the transgender committee – who allegedly "flat out rejected" any of Johnson's requests, although "fully aware" of her gender dysphoria – stay in the case for now. This includes a Deputy Warden. Claims against the treating physicians and mental health director also stay in the case, for now. The pleadings present "more" than a mere disagreement about care. They allege that these providers are deliberately providing "*inadequate*" treatment [emphasis by the Court] that is "medically necessary," even though Johnson is receiving hormones. Judge Haight permits this argument to proceed to discovery, citing *Christensen v. Gadanski*, 2020 WL 509693 (D. Conn., Jan. 31, 2020), an orthopedic case, where knee treatment was allegedly so inadequate that the inmate's knee had to be replaced. There is discussion of equal protection and due process claims, but Johnson does not frame them well or use appropriate comparators, rendering them duplicative of her Eighth Amendment medical claims. Johnson has another case before Judge Haight, *Johnson v. Padin,* 2020 WL 4818363 (D. Conn., Aug. 16, 2020) (initial review order), which is proceeding on equal protection claims regarding transgender discrimination. Judge Haight dismisses state law claims of negligence and intentional infliction of emotional distress on these facts. A review of Johnson's half dozen changes of address in PACER shows that she was incarcerated for at least sixteen months of the 22 months it took to screen her case. Because of the delays on Judge Haight's watch, defendants were not served on a meritorious injunctive claim when it might have done some good. In this writer's view: (1) this case was allowed to be turned into some law clerk's obsessive treatise, while the plaintiff was left hanging and justice was unreasonably delayed; and (2) the medical claims (now reduced to damages claims) will probably not survive qualified immunity. Judge Haight was appointed by President Gerald R. Ford in 1976.

FLORIDA – This lengthy (nearly 8,000-word) opinion on exhaustion under the Prison Litigation Reform Act [PLRA] reads like a summer clerk's bench memo, with the parties' contentions, analysis, and alternative dispositions. HIV-positive plaintiff William T. Stephens seeks damages for delay in treatment for a co-morbidity (hepatitis-C), which he claims left him in worsened physical condition, including permanent liver damage. In *Stephens v. Corizon, LLC,* 2021 WL 2981317 (M.D. Fla., July 14, 2021), U.S. District Judge Brian J. Davis dismisses the case for failure to exhaust. Stephen's hepatitis-C allegedly remained untreated with generally accepted drugs for several years, until he benefitted from the court-ordered relief for Florida inmates with hepatitis-C in *Hoffer v. Jones*, 290 F. Supp. 3d 1292 (N.D. Fla. 2017). Stephens claims that the corporate health providers (Corizon and Centurion) deprived inmates of certain treatments to save costs, until the court intervened in *Hoffer*. Stephens began to receive the subject drugs in March of 2018, but he did not grieve his denial/delay of treatment until June of 2019. Florida has a fifteen-day deadline for grievances. The question is: when did it begin to run? At the institutional level, the DOC responded on the merits that it was "in compliance" with judicial orders. Stephens appealed, and the DOC Secretary returned the appeal "without action," as procedurally untimely when

filed. Stephens says that he did not know his denial of treatment was wrong until 2019, when he found out that he was damaged by the delay – arguing that the fifteen-day rule should run from his "discovery" of the injury because his cirrhosis had no fixed beginning day on which the tortious conduct occurred. Because exhaustion under the PLRA is an affirmative defense, the DOC has the burden of proof. In the Eleventh Circuit, the court first looks at the pleadings to see if exhaustion (or the lack of it) appears. If not, then the court must make findings. *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008). What constitutes exhaustion is set forth in state law: here, Florida Administrative Code § 33-103. "The FDOC Secretary's ruling that Plaintiff's grievance was untimely is all but controlling… [An] untimely grievance does not satisfy the exhaustion requirement of the PLRA." *Johnson v. Meadows*, 418 F.3d 1152, 1157 (11th Cir. 2005). It does not matter that the institution decided the grievance on the merits, since the Secretary is in a "superior" position on determining what is "timely" when filed. "[A] prison does not waive a procedural defect unless and until it decides the procedurally flawed grievance on the merits *at the last available stage of administrative review*." *Whatley v. Smith,* 898 F.3d 1072, 1083 (11th Cir. 2018) (emphasis by the court). Judge Davis engages in a lengthy analysis of what "occurred" means in terms of grieving an "occurrence." Ultimately, after pages of discussion and references to Miriam-Webster and Oxford's "OED," Judge Davis defers to the DOC's analysis of its own regulations to exclude a "discovery rule" for limitations purposes. In any event, the grievance was not filed within fifteen days of the commencement of the subject treatment in 2018. This leads to the "alternative" holding: Stephens "should have known" of the harm by then. Thus, once treatment started, Stephens should have filed a grievance. Judge Davis dismisses without prejudice, because Florida regulations allow an inmate to file a late grievance with DOC "permission," and Stephens is free to request same. [Right: as if DOC is going to grant permission at this point.] The "alternative" holding (that, to preserve their rights, inmates should file grievances within 15 days of when delayed treatment begins) has the perverse effect of giving both Corrections and inmates opposite incentives (to delay treatment, and to grieve treatment when it starts) – the antithesis of what PLRA exhaustion is supposed to encourage. The irony here is that "should have known" is enough for an affirmative defense on PLRA exhaustion, when the defendants have the burden of proof; but "should have known" is insufficient for an inmate to show an Eighth Amendment violation.

IILINOIS – The opinion in *Venson v. Gregson,* 2021 WL 2948817 (S.D. Ill., July 14, 2021), involving transgender inmate Kaabar ("Rabbit") Venson, focuses on exhaustion of administrative remedies under the Prison Litigation Reform Act [PLRA]. U.S. Magistrate Judge Mark A. Beatty, who has the case for all purposes, grants summary judgment to defendants in part and denies it in part in a lengthy decision that examines each of four grievances, twelve causes of action, and nine defendants. Illinois advocates who have specific PLRA exhaustion issues may wish to wade through this opinion, but a full recount is beyond the scope of this *Law Notes* report. Only points of more general application are discussed. Venson alleges failure to protect on multiple occasions, denial of medical and mental health treatment, failure to intervene, double-celling her with "straight" or "non-trans" cellmates, failure to prevent self-harm or to treat post-suicide-attempt ideation, violation of the Illinois Hate Crimes Act, and intentional infliction of emotional distress [IIED]. In general, the Illinois grievance regulations provide for filing grievances within 60 days of the incident, with as much information "as possible." Ill. Adm. Code §§ 504.800, *et seq*. Judge Beatty finds that all four grievances were "fully exhausted." In two of the cases the grievances were addressed on the merits at the warden level, but the appeals were dismissed for procedural technicalities. Applying Seventh Circuit law to the Illinois grievance system, Judge Beatty finds that "when the grievance officer and warden accept an untimely grievance and address it on the merits, the [Director] cannot then reject the grievance as being untimely filed with the grievance officer." The appellate level cannot deem the grievance as untimely "where the institution treats the filing as timely and resolves it on the merits." *Conyers v. Abitz,* 416 F.3d 580, 584 (7th Cir. 2005). [Note: Observant readers will recognize that the district judge, applying Eleventh Circuit law to Florida grievances, reached an opposite conclusion in *Stephens v. Corizon, LLC,* 2021 WL 2981317 (M.D. Fla., July 14, 2021) – above, this issue of *Law Notes*.] Judge Beatty then addresses each defendant and each claim. On general failure to protect claims, the warden and officers identified as serving in "IA" ["internal affairs"] stay in the case, but the grievance is insufficient to exhaust as to other officers named in the complaint but not described in the grievances. Venson's failure to mention in her grievances the failure of officers to intervene to quell her attack precludes her proceeding on this claim in court. She also fails to mention cell-mate problems in her grievances – in fact, she alleges at the time of her attacks that she did not have a cellmate. The claim of failure to treat Venson after the attack was exhausted. Venson loses her court claim of failing to treat her after attempted suicide, because she did not mention this in her grievances. The failure is not saved by a "continuing violation" theory because the incident

regarding the suicide attempt is a discrete event. *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013) (separate complaints about particular incidents are required "if the underlying facts or the complaints are different"). Venson's claims about another attack in August of 2018 involved not only failure to protect but also macing her because she is transgender (including a claim under the Illinois Hate Crimes Act). This event occurred after all relevant grievances had been filed, and it is also not saved by a "continuing violation" theory. The IIED claim need not be exhausted because it arises under state law, and the PLRA does not apply to pendent state law claims under *McDaniel v. Meisner*, 617 Fed. Appx. 553, 556 n.3 (7th Cir. 2015). [Note: Judge Beatty does not explain why this does not also save the Illinois Hate Crimes Act cause of action.] Venson is represented by Smith Amundsen, LLC (Chicago).

ILLINOIS – This is an initial screening decision of a transgender inmate's civil rights case. Cory Gregory, *pro se,* alleges that her rights were violated while she was a sentenced inmate returned to a county jail for resentencing, where she was subjected to harassment and punishment and denied hormones, mental health treatment, and safe confinement. In *Gregory v. Rock Island County Jail*, 2021 U.S. Dist. LEXIS 139674 (C.D. Ill., July 27, 2021), U.S. District Judge James E. Shadid allows her to proceed on most of her claims against the sheriff, supervisors, and officers. Gregory was diagnosed and placed on hormones in the Illinois state prison about 18 months before being returning to the county jail, when these events occurred. She says she suffered physical withdrawal from hormone cessation (including nausea, vomiting, and cramps), and that the harassment included placing her in punitive segregation without a hearing and subjecting her to other inmates masturbating outside her cell, while officers watched. She alleges that another officer told her that she had to "suck his dick" if she wanted to shower. Defendants refused to move her to a female cellblock. Gregory said she was also more vulnerable because she has diagnosed bipolar disorder and anxiety. Judge Shadid allows Gregory to proceed on equal protection claims on three theories: a policy and practice of placing transgender inmates in segregated (isolated) confinement; 2) a policy and practice of allowing officers and inmates to sexually harass transgender inmates; and 3) a failure properly to train staff to supervise transgender inmates. He also allows a *Monell* (supervisory) claim against the sheriff to proceed on these points. Judge Shadid allows a "failure to protect" claim under *Farmer v. Brennan,* 811 U.S. 825, 834 (1994), to proceed against the officers who failed to intervene in the masturbation and denied her transfer to a female unit. He also found a claim based on denial of mental health treatment. He allows a claim for discrimination under the Americans with Disabilities Act, for now, because of the "unsettled state of the law" as to whether gender dysphoria is a disability, citing *Venson v. Gregson*, 2021 WL 673371, at *3 (S.D.Ill. Feb. 22, 2021); and *Hampton v. Baldwin*, 2019 WL 3046332, at *1 (S.D.Ill. April 29, 2019). In a rare ruling, he allows a disciplinary due process claim to proceed because Gregory claims to have been placed in punitive segregation without any hearing. In another rarity, Judge Shadid permits a state law claim to proceed on intentional infliction of emotional distress, finding that the allegations plead that "defendants engaged in extreme and outrageous conduct…[and] either intended to inflict severe emotional distress or knew there was a high probability that their conduct would cause severe emotional distress… [and] the defendants' conduct in fact caused severe emotional distress," citing *McGreal v. Vill. Orland Park*, 850 F.3d 308, 314 (7th Cir. 2017).

NEW YORK – *Pro se* transgender inmate Lexi Avila alleged that she was repeatedly harassed verbally by a transphobic officer (Tenzie) on Rikers Island and that Tenzie uttered slurs and also spread rumors that Avila was having sex with another inmate, which put her at risk. Apparently mental distress was the only injury. U.S. Magistrate Judge Gabriel W. Gorenstein issues a lengthy Report and Recommendation [R & R] advising that the motion to dismiss filed by the New York City Corporation Counsel be granted in *Avila v. Tenzie,* 2021 U.S. Dist. LEXIS 128272, 2021 WL 2882445 (S.D.N.Y., July 9, 2021). Avila did not submit opposition papers, and Judge Gorenstein ruled that the motion was "submitted" without opposition with opinion to follow in May of 2021. [We will come back to this.] The R & R discusses the viability of verbal abuse claims under the standards of *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015), finding that what happened here (while unprofessional, etc.) did not rise to the level of a constitutional violation. There is a long discussion of types of verbal abuse found insufficient under similar circumstances, including extended treatment of *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997), which was largely superseded by *Crawford*. There is no discussion of the Prison Litigation Reform Act's prohibition of mental distress damages for claims unaccompanied by physical injury and 42 U.S.C. § 1997e(e). There is extended discussion of equal protection, but this claim fails for lack of allegations that Avila was "treated differently from other similarly situated individuals." It is not enough for equal protection purposes that comments were made based on racial, sexual, or religious animus. For example, Avila did not allege that she lost her job or was subjected to discipline because she is trans. Apparently, the verbal abuse got worse after Avila filed her initial complaint, because she amended to allege retaliation. This

claim also fails for failure to allege "concrete" adverse action. As stated, Avila did not file opposition, and the Corporation Counsel wrote the court three times asking for dismissal for failure to prosecute, as well as on the merits. When Avila last communicated with Judge Gorenstein, she was in state prison at the maximum-security facility for women at Bedford Hills. She asked for a "stay," because she was positive for COVID-19 and being transferred. The court's communications about the stay and the Corporation Counsel's letters were sent to Avila with an inmate number beginning "02-G-xxxx" instead of "20-G-xxxx." [Note: while this is a transposition, there are numerous inmates at Bedford Hills serving over 18 years, so this is not an obvious error. In this writer's experience, "name and number do not match" is a common reason for non-delivery of prison mail (including legal mail) – and the letters are not always returned to sender. In addition, Avila was transferred to Taconic Correctional Facility, according to the New York State "inmate locator" – something that takes no more than 30 seconds to look up.] So, the last the court had officially when it deemed the motion submitted was that Avila had COVID and was anticipating transfer – and everything subsequently was sent to the wrong inmate number at the wrong address. It may be that her problems at Rikers were no longer important to Avila. It may also be that she never got notice of the action on her request for a stay or of the default or even of this decision.

PENNSYLVANIA – Transgender inmate Sparkles Wilson was housed in the male section of the Lackawanna County Jail, when another inmate attacked her, fracturing bones in her face that required surgery. U.S. Magistrate Judge Joseph F. Saporito, Jr., granted her motion to compel pattern and practice discovery in *Wilson v. Lackawanna County,* 2021 WL 3054995, 2021 U.S. Dist. LEXIS 134575 (M.D. Pa., July 20, 2021). Among the materials ordered discovered are the following (unmentioned in the opinion but gleaned from PACER): staffing on her block; staff present on the day and time of the attack; training policies; other similar assaults in the previous two years; similar grievances; and the Jail's transgender policies and training. The defendants initially argued that the motion to compel should be denied because it was one day late under the case management order. Judge Saporito rejected this argument at a status conference and directed defendants to address the merits. They "extensively" briefed tardiness anyway and lost again. Their merits argument seems to amount to a flimsy insistence that the attack was unforeseen and had nothing to do with Wilson's gender identity. What Judge Saporito ordered is basic discovery in a trans-bashing case. [Advocates may wish to review the Prison Rape Elimination Act's regulations (28 C.F.R., Part 115, Sub-Part A (Adult Prisons and Jails), §§ 115.11-115.93) for a trove of documents required to be kept about training, assaults, investigations, audits, and the like, in cases involving transgender animus, including inmate-on-inmate assault. PREA protections are triggered by LGBTQ harassment, even without sexual assault – something most correctional defendants fail to recognize.] This case was filed in August 2019. Unfortunately, with COVID-19, it is still in discovery two years later. Wilson is represented by Comerford Law (Scranton).

TENNESSEE – U.S. District Judge Mark K. Norris dismisses the *pro se* complaint of gay inmate Phshawn Watts in *Watts v. Shelby County Criminal Justice Center,* 2021 WL 2932737 (W.D. Tenn., July 12, 2021). Although there are only six docket entries, the screening took over eight months. Watts alleged that an officer (Rodger) at the Shelby County Jail (Memphis) moved him from protective custody and placed him in a cell in general population with a cellmate and left him there unattended and cuffed. Watts says that the cellmate assaulted him, causing injury. He also says that he believes that Rodger did this because "I'm gay and he don't like who I am." Judge Norris finds that the Justice Center is not a suable entity, so he *sua sponte* adds Rodger as a party defendant before dismissing the case. (He finds no allegations of – or basis to infer – a pattern and practice against Shelby County under *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 691 (1978).) He pauses on claims against Rodger individually, which he construes as "a claim that Rodger failed to protect him by placing him in a general-population cell unsupervised for two hours in handcuffs." He finds that this is not an objective "serious risk" under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Watts also failed to show that Rodgers subjectively knew he was at risk (or even that he knew Watts was gay). Judge Norris grants leave to amend or face dismissal with a "strike" in 21 days. Judge Norris does not provide much guidance for an amended complaint, even as he seems to ignore salient facts in the record. First, Watts had been in protective custody, so it can be inferred that there were clearance issues for his placement in general population. Second, it is highly unusual for an inmate to be placed in a cell without removing cuffs, absent extraordinary circumstances – and not with a new cellmate, against whom the cuffed prisoner was made helpless. Third, this departure from procedure was recognized in the handling of Watts' grievance, which said Rodger was "counselled" pending further investigation – and when Watts appealed this disposition, the appeal said that Rodgers was "disciplined." In this writer's experience, such personnel action is unusual in response to a grievance – it is even more unusual to inform the inmate this was done. Judge

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Norris does not mention the personnel actions, but they could support a state law negligence case. The problem would be that, if Watts repleads and gets his case dismissed on the merits, he could face procedural hurdles on proceeding again in state court. Judge Norris was appointed by President Trump in 2018.

TEXAS – There is an 85% chance that a civil rights case filed in the Wichita Falls Division of the U.S. District Court for the Northern District of Texas will be assigned to U.S. District Judge Reed O'Connor (Geo. W. Bush). Special Order No. 3-310 (N.D. Tex., 11/29/16). (Judge O'Connor is the same judge who found the entire Affordable Care Act unconstitutional when Congress reduced the tax on the uninsured to $0, and who issued a nationwide injunction against enforcement of Title IX by the Education or Justice Departments on behalf of transgender students, based on his conclusion that gender identity discrimination was not prohibited by Title IX.) *Pro se* transgender inmate Richard Louis Butler, Jr., is incarcerated in Texas DOCJ's Alfred Unit in a suburb of Wichita Falls. She filed a civil rights case in 2018, claiming retaliation for complaining about a bias-related assault in a prior prison and ongoing discrimination because she is transgender. Judge O'Connor did not screen her case for over 2½ years – and no defendants had been served when he dismissed it with prejudice on June 10, 2021, in *Butler v. Holmes*, 2021 WL 3277442 (N.D. Tex., June 10, 2021). During the interim Butler communicated with the court over thirty times requesting attention to her case, providing documents, and answering questionnaires propounded by the court. Ruling that he had "the power to pierce the veil of a *pro se* plaintiff's allegations," Judge O'Connor dismissed everything. Butler asked for reconsideration, which Judge O'Connor denied on July 29, 2021; and Butler noticed a *pro se* appeal to the Fifth Circuit. [Good luck with that.] Judge O'Connor ruled that Butler has no protected interest in assignment to a particular prison, to a classification, or to a single or double cell. He found that, although she has been assaulted twice at Alfred, these assaults occurred some time ago; and her allegations do not amount to deliberate indifference to an ongoing risk. Judge O'Connor individually goes through numerous civil rights claims, without once using the phrase "equal protection." The opinion, which is nearly 7,000 words, does not, in this writer's opinion, warrant consideration by a serious litigator of these issues – except as a flashing red light to avoid the Wichita Falls Division of the Northern District of Texas, which is not something that a person who is incarcerated in that district is able to do, of course.

VERMONT – This is a discovery dispute about protection from harm claims by transgender inmate David "Cammie" Cameron, who was an inmate in the Vermont DOC. In *Cameron v. Menard,* 2021 U.S. Dist. LEXIS 125565 (D. Vt., July 6, 2005), she is suing the DOC commissioner, the warden of Southern State Prison (where she was severely beaten by another inmate, named Lajoice), and the Southern State security deputy. U.S. Magistrate Kevin J. Doyle denies most of Cameron's requests, but compels disclosures about Lajoice. This lengthy 8,000-word opinion is a useful and comprehensive treatment of discovery in a prisoner protection from harm case, particularly for practitioners in the Second Circuit. This report will only recap what Judge Doyle did. He denied disclosure of the personnel files of some twelve officers who responded to the beating, finding there was not an adequate showing that the files would contain information about prior risks to Cameron, since none of them are defendants. Judge Doyle overruled objections based on Vermont peace officer personnel file protections, finding it just one consideration in federal court and not mandatory, as it may be in state court. Nevertheless, there was no sufficient showing that the officers did anything other than respond to an incident to which they were called. Judge Doyle spends more time on the personnel file of the defendant security deputy, but he concludes that there is no sufficient showing that the deputy's files would contain information leading to evidence of deliberate indifference under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Cameron alleged two kinds of deliberate indifference: placing her as a transgender woman in a men's prison; and placing Lajoice in an adjoining cell. Judge Doyle notes that discovery is nearly completed, and the issues here are the only "sticking points." There is no discussion of other similar gay-bashings, but this writer assumes that such was already produced in some form prior to the impasse. As to Lajoice, Cameron wanted his "entire" correctional file. Judge Doyle declines to order it, but he directs production of any record of assaults by Lajoice on transgender people or women in the two years prior to the assault on Cameron. This information will be subject to a protective order. Judge Doyle quotes *Farmer*: "[I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." 511 U.S. at 837. Vermont state inmate privacy laws are overridden. Judge Doyle denies Cameron's counsel's request to inspect the incident scene at the prison, finding that diagrams, pictures, etc., will suffice. As a final

practice point, Judge Doyle found that the addressee defendants need not sign the discovery personally, if "defendants" are designated to include the whole of "DOC" "or their agents" in the demand instructions. A representative's signature will suffice. Cameron is represented by Kramer Law, PC (Brattleboro).

VIRGINIA – *Pro se* prisoner Alasia R. Fletcher (who identifies as "a part of the LGBT community") complains that a "keep separate" order between her and another inmate violated her civil rights and was imposed without due process. She also alleges that defendant's harassment and verbal abuse caused her to self-harm and to be knifed on two occasions. In *Fletcher v. LeFevers,* 2021 WL 2953678 (W.D. Va., July 14, 2021), Chief U.S. District Judge Michael F. Urbanski dismissed her case for failing to state a claim, with leave to file an amended complaint on her allegations about being knifed. The "keep separate" order "does not give rise to a constitutional violation, even if proper protocol was not followed in imposing it," citing *Pevia v. Hogan*, 443 F. Supp. 3d 612, 633-35 (D. Md. 2020) (collecting authority); *see also, Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (upholding prison prohibition on inmate-to-inmate correspondence). Fletcher fails to allege "any cognizable" property or liberty interest lost by the "keep separate" order. Even if the order caused her to lose her prison job, inmates have "no interest in employment," citing *Robles v. Sturdinvant*, 2014 WL 4853409, at * 1 (W.D. Va., Mar. 27, 2014); *Patel v. Moron*, 897 F. Supp. 2d 389, 400 (E.D.N.C. 2012). Fletcher's allegations about verbal abuse "without more" are not actionable under *Henslee v. Lewis*, 153 F. App'x 179, 179 (4th Cir. 2005); and *Morva v. Johnson*, 2011 WL 3420650, at *7 (W.D. Va. Aug. 4, 2011) (collecting authority). Judge Urbanski also dismisses Fletcher's claim that verbal abuse caused her to cut herself, citing *Nanez v. Creswell*, 2018 WL 3432830, at *2 (W.D. Wash., June 26, 2018) (recommending dismissal of plaintiff's claim that defendant's verbal abuse "triggered him into self-harm"), *report and recommendation adopted*, 2018 WL 3427843 (W.D. Wash., July 16, 2018). Furthermore, Fletcher did not allege that defendant knew she was at risk of self-harm. Fletcher's claim that defendant's abuse caused her "to be placed in danger multiple times… [and] getting stabbed twice" may state a claim. Judge Urbanski describes in detail what would need to be shown in terms of time, place, personal involvement, knowledge, intent, risks, etc. – altogether quite a good and accessible summary for a *pro se* litigant on deliberate indifference to risk of harm under *Farmer v. Brennan,* 511 U.S. 825, 833 (1994). Judge Urbanski's ruling on equal protection is brief and wrong legally. Although he recognizes the "LGBT community" to present an equal protection "class," he applies rational basis scrutiny under *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002), which upheld restricting gay inmates to single cells as rational state policy. The Fourth Circuit, however, in *Grimm v. Gloucester County School Board,* 972 F.3d 586, 613 (4th Cir. 2020), *cert denied sub nom. Gloucester County School Board v. Grimm,* No. 20-1163 (June 28, 2021), applied heightened scrutiny to equal protection classifications based on sexual orientation or gender identity. In *Grimm, t*he Fourth Circuit applied *Bostock v. Clayton County*, 590 U.S. ___ (2020), to the student plaintiff's Title IX and equal protection claims – and this was the controlling law in the Fourth Circuit when Judge Urbanski ruled. Recasting Fletcher's equal protection claims should warrant a second look at both the employment and "keep separate" rulings – although it probably will not happen.

WASHINGTON – In June, *Law Notes* reported that a group of "journalists" had filed a freedom of information request with the Washington DOC seeking identifying names and other data about transgender prison inmates (past and present) and their housing. (June *Law Notes* at pages 33-4). This report is an update on *Doe v. Washington Doc,* 2021 U.S. Dist. LEXIS 123643 (E.D. Wash., July 1, 2021). U.S. District Judge Thomas O. Rice previously entered a preliminary injunction prohibiting the disclosures. Judge Rice provisionally certified a class of past and present trans inmates, and he ordered notice to the class by publication at defendants' expense. Notice would occur by posting and publication to avoid "outing" class members with individual notice. The state appealed the preliminary injunction to the Ninth Circuit, No. 21-35483. There is not, as yet, a motion for a stay. In a new wrinkle, the state filed a motion with Judge Rice to "certify" to the Washington Supreme Court the question of whether gender identity is covered by the Washington Public Records Act. [Note: Washington law allows such referrals from any federal court under W.R.C. § 2.60.202.] Judge Rice declined to certify the question, stating that resolution of the state law question would not moot the federal privacy claims, which sound directly under the Fourteenth and Eighth Amendments and 42 U.S.C. § 1983. Certification is discretionary in any event, citing *Murray v. BEJ Minerals,* 924 F.3d 1070, 1072 (9th Cir. 2019). Certification here would also erode six decades of precedent that state judicial remedies need not be sought if there is a federal civil rights question. *See Monroe v. Pape*, 365 U.S. 167, 172-188 (*passim*) (1961). In this writer's view, the Ninth Circuit disposition depends largely on the panel assigned. The Doe plaintiffs and the class are represented by Antoinette M Davis Law PLLC, Disability Rights Washington, American Civil Liberties Union of Washington Foundation, and MacDonald Hoague & Bayless (Seattle).

LEGISLATIVE & ADMINISTRATIVE *notes*

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

THE CONVERSION THERAPY SCORECARD – *TheHill.com* reported on July 21 that half the states now ban conversion therapy performed on minors, either by statute, regulation, or executive order, and that more than 100 local governments have enacted such bans. In some cases, the bans are embroiled in litigation brought on behalf of conversion therapy practitioners who claim a violation of their 1st Amendment rights. Most federal courts have rejected such arguments to date, the outlier being the 11th Circuit, a three-judge panel of which concluded in *Otto v. City of Boca Raton, Florida*, 981 F.3d 854 (11th Cir. 2020), that municipal bans were unconstitutional as applied to "talk therapy" as a content-based regulation of speech. A motion for rehearing *en banc* is pending. The underlying theory of some cases that have rejected the 1st Amendment argument is that such bans are a regulation of professional conduct, only incidentally burdening speech, but this approach has been criticized in *dicta* in a Supreme Court opinion by Justice Clarence Thomas. As the number of such bans and litigation about them increases, the likelihood that the Supreme Court will eventually address this question increases as well. For the latest statewide action, see Minnesota, below.

ALASKA – In order to settle a lawsuit against the state, the Alaska Department of Health announced that the state's Medicaid program will henceforth cover gender-affirming healthcare, including "treatment, therapy, surgery, or other procedures related to gender reassignment," and for "transsexual surgical procedures or secondary consequences." The changes in coverage, posted by the Department at the end of June, were to go into effect as of July 25.

ILLINOIS – On July 28, Governor J.B. Pritzker signed into law S.B. 655, a measure that removes any mention of HIV from the state's criminal code, a long-sought law reform intended to end HIV exceptionalism in the state's criminal law. There has been no evidence that criminalization of HIV transmission has had any affirmative impact on the battle against the HIV/AIDS epidemic. Gov. Pritzker commented that HIV should be treated like any other communicable infection, and not singled out for criminalization. Some states had passed HIV criminalization laws and then in recent years revised them to reduce penalties to misdemeanors. One of the major flaws in many of the laws was to criminalize "exposure" without taking account of whether people were using barrier contraception or whether treatment had rendered their HIV level undetectable and thus virtually non-transmissible. According to an NPR report, Illinois was the first state in 27 years to completely repeal an HIV criminalization statute.

KENTUCKY – Fort Mitchell's City Council voted unanimously to approve an LGBT Fairness Ordinance on July 19, making it the 23rd Kentucky municipality to approve such a measure. Kentucky is rapidly becoming another exemplar (similar to Pennsylvania in this respect) in which a Republican-dominated state legislature, weighted by gerrymandering to conservative rural views, resists outlawing anti-LGBTQ discrimination, but municipalities large and small move in the opposite direction, resulting in a substantial minority of the state living in jurisdictions that wish to protect their LGBTQ residents from discrimination. Unfortunately, such efforts in some states have led the state legislatures to pass preemptive statutes barring municipalities from outlawing forms of discrimination that are not prohibited by state law. One hopes that LGBTQ rights lobbyists in Kentucky are able to help the state legislative minority block such efforts.

LOUISIANA – Human Rights Campaign reported on July 21 that the Louisiana House of Representatives voted 68-30 to sustain Governor John Bel Edwards' veto of Louisiana SB 156, a bill that would have banned transgender athletes from participating in sports consistent with their gender identity. The measure was specifically targeted at preventing person identified as male at birth but living as female consistent with their gender from participating in girls' and women's scholastic athletic competition. The measure probably violates Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational institutions that receive federal funding, as well as the Equal Protection Clause, or so a federal district court in West Virginia found the next day (see *B.J.P. v. West Virginia State Board of Education*, reported above).

MINNESOTA – On July 15, Governor Tim Walz, a Democrat, issued Executive Order 21-25, "Protecting Minnesotans from 'Conversion Therapy." The multi-pronged order begins with a basic policy statement: "All state agencies must pursue opportunities and coordinate with each other to protect Minnesotans, particularly minors and vulnerable adults, from conversion therapy to the fullest extent of their authority." Following are eight numbered sections directing specific action to do just about anything that could be done by executive branch efforts in the absence of specific legislation to counter the practice of conversion therapy within the state. The introductory section notes that the Department of Health had in 2015 already advised insurers

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that they could not discriminate based on gender identity in providing health care coverage, and noted that eleven municipal jurisdictions within the state as well as 23 other states, the District of Columbia, and Puerto Rico had already taken action against conversion therapy.

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LGBTQ APPOINTMENTS IN THE BIDEN ADMINISTRATION – *LGBTQNation* reported on July 6 that President Joseph R. Biden, Jr., announced the appointment of Chantele Wong to the ambassador-level position of U.S. Director of the Asian Development Bank, a position considered to be of ambassadorial rank in the State Department. The appointment requires Senate confirmation. If confirmed, Ms. Wong will be the first out lesbian confirmed to an ambassadorial level position, and also the first openly LGBTQ person of color to serve in a position of ambassadorial rank, according to the LGBT Victory Fund, which keeps track of these things. * * * NBCnews.com reported on July 23: "Gina Ortiz Jones will serve as undersecretary of the Air Force — the first out lesbian to serve as undersecretary of a military branch. Shawn Skelly will serve as assistant secretary of defense for readiness, becoming the first transgender person to hold the post and the highest-ranking out trans defense official in U.S. history." Both of these appointments have been confirmed by the Senate. Skelly is only the second out transgender person to be confirmed by the Senate for a subcabinet post, the first being Rachel Levine as Assistant Secretary of Health and Human Services. * * * President Biden's appointment of history-making judicial appointments announced early in August will be covered in the September issue of *Law Notes*.

OLYMPIC GAMES – At first, *Outsports* reported that at least 142 out LGBTQ athletes were listed as participants in the Tokyo Olympics, being held in July 2021. This was by a large margin the highest level of LGBTQ participation in the history of the games. It was also reported that at least 30 out LGBTQ athletes were part of Team U.S.A. But as word spread about the *Outsports* list, the website began to hear from increasing numbers of Olympic competitors who wished to be listed and the numbers mounted towards 200. One news source reported based on medals awarded by the end of competition on July 27 that if the LGBTQ competitors were deemed a country, they would rank in 14th place on the medal charts.

OUT LGBT ELECTED OFFICIALS IN THE UNITED STATES – The Victory Institute, the educational wing of the LGBT Victory Fund, published its annual status report on out LGBTQ elected officials in the United States from the period June 2020 to June 2021. It found that there are at least 986 "out" LGBT elected officials at all levels of government in the U.S.A., and that number is likely to increase above 1,000 after the general elections in November 2021. In comparative terms, the Victory Institute reported that over the space of one year: "LGBTQ elected officials of color increased by 51% nationwide; Black LGBTQ elected officials increased by 75% (from 52 to 91); Trans women elected officials increased by 71% (from 21 to 36); Bisexual elected officials increased by 37% (from 52 to 71) and; Out queer elected officials increased by 83%!" On the other hand, as a percentage of all elected officials, out LGBTQ officials comprised less than 0.2% of all elected officials, although the percentage of the population that is LGBTQ is estimated as 5.6%. Victory Institute suggested that to gain proportional representation, there would have to be more than 28,000 additional out LGBTQ elected officials.

INTERNATIONAL NOTES

By Arthur S. Leonard

ARGENTINA – On July 21, President Alberto Fernández announced a new policy that will allow non-binary and gender non-conforming Argentinians to use an "X" gender marker on identification documents.

CHILE – The Chilean Senate approved a marriage equality measure and sent it to the second chamber of the legislature for consideration.

CHINA – On July 2, *BBC World News* reported that China's most popular social media platform, WeChat, suddenly deleted the accounts of two major university LGBT student groups, claiming a violation of terms of service. The groups were posting advocacy of LGBT rights, not criticism of the government or the Chinese Communist Party. The U.S. State Department responded by stating "concern" about repression of free speech.

EUROPEAN COMMISSION – *Reuters* reported on July 15 that the European Commission had "launched legal action against Hungary over measure it said discriminated against LGBT people," and that the European Union's executive had opened a case against Poland after some regional governments declared themselves to be "LGBT-ideology free zones." The Commission issued a statement: "Equality and the respect for dignity and human rights are core values of the EU . . . The Commission will use all instruments at its disposal to defend these values." Prime Minister Orban (Hungary) has stated that his social policies are intended to protect "traditional Christian values from Western liberalism."

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HUNGARY – Prime Minister Viktor Orban called for a referendum on recently enacted anti-LGBTQ legislation, which has been targeted for a legal challenge by the European Commission as a violation of European Union anti-discrimination policies. The measures ban educational materials on LGBTQ issues from use in the country's public schools and ban "promoting" gender reassignment procedures for minors." International press attention during the last weekend of July focused on a massive Hungary Pride demonstration in Budapest, which enjoyed the participation of both LGBTQ and non-LGBTQ people protesting the government's homophobic activities. *Reuters* reported on July 30 that Hungary's National Election Committee had approved the proposed referendum questions, which will be on a ballot early in 2022, prior to a national legislative election in which the Orban Administration will face off against a unity ballot put up by six opposition parties. Reuters had reported earlier in the month that the European Commission had slow-walked approval of economic recovery aid to Hungary to try to pressure the government on this issue.

MEXICO – Last month we slipped up in attributing the passage of new laws concerning transgender identity and banning conversion therapy to the state of Baja California. The laws were passed unanimously by the legislature in the state of Baja California Sur. * * * But there was positive legislative activity in Baja California in July, when three of the state's five municipal councils approved marriage equality. Since that is a majority of the municipal councils, the decision carried for the state, so Baja California should be added to the list of marriage equality states in Mexico. But keep in mind that same-sex couples can marry anywhere in Mexico, since jurisprudence from the Supreme Court of the Nation bindings local courts to grant an "amparo" (a form of court order) to any same-sex couple that would be qualified to marry but for their being a same-sex couple, that would require local authorities to let them marry. Same-sex couples need not go through this process, of course, in states that have endorsed same-sex marriage voluntarily or as a result of litigation. Thanks to Rex Wockner who is closely tracking developments in Mexico.

PROFESSIONAL NOTES

By Arthur S. Leonard

The **AMERICAN CIVIL LIBERTIES UNION** is accepting applications for two staff attorneys with their **LGBT/HIV RIGHTS PROJECT.** Information can be found on the organization's website, ACLU.org: https://www.aclu.org/careers/apply/?job=5301808002&type=fulltime and https://www.aclu.org/careers/apply/?job=5301236002&type=fulltime. Project Director James Esseks says: "We are primarily looking for experienced litigators, but are also interested in hearing from anyone interested in the positions." Both positions will be based at the NYC headquarters.

The **WILLIAMS INSTITUTE** at University of California – Los Angeles, School of Law, announced its 2021 Law Teaching Fellows: **GREGORY DAVIS**, UCLA Law 2014, will be the 2021-23 Richard Taylor Law Teaching Fellow; **EMMANUEL MAULEON**, UCLA Law 2018, will be the 2021-23 Bernard A. and Lenore S. Greenberg Scholar Fellow; **SAPNA KHATRI**, Wash. U. Law 2017, will be the 2021-24 Sears Clinical Teaching Fellow. The Williams Institute is the premier university-affiliated research institute on LGBTQ law and policy in the United States.

The **TRANSGENDER LEGAL DEFENSE & EDUCATION FUND** has several open positions to fill: litigation staff attorney, communications director, institutional giving officer. According to Noah Lewis TLDEF's Trans Health Project Director, "For the litigation staff attorney (different from the staff attorney position posted earlier) we are looking for an early career attorney who is passionate about litigating cases around the country to advance justice and equity for trans and non-binary communities. Our impact litigation docket currently focuses on making sure trans workers have full and equal access to health insurance, trans people in jail do not experience mistreatment or abuse, and all trans people can change their name and gender markers on identification if they so choose. We may expand to more areas in the future." Information about all opening at TLDEF can be found at https://www.transgenderlegal.org/careers/.

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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.