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# LAW NOTES

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## Biden Administration Declares Pro-LGBTQ+ Policies

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## EXECUTIVE SUMMARY



**26** Notes **50** Citations

# Biden Administration Declares Pro-LGBTQ+ Policies from Day One; Moves Quickly to Repeal Transgender Military Service Ban

*By Arthur S. Leonard*

At midday on January 20, 2021, Joseph R. Biden, Jr., and Kamala Harris took their oaths of office as President and Vice-President of the United States. Later that afternoon, President Biden sat in the Oval Office of the White House and signed numerous executive orders and directives, two of which directly address the LGBTQ+ equality goals of his administration. One, titled "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," builds on the Supreme Court's June 15, 2020, decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, to proclaim a policy of protection from discrimination for LGBTQ+ people under every federal law banning sex discrimination, and staked out progressive policies on how that protection should be interpreted. In the second, titled "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," the President identified "lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons" as one of the "underserved communities" included in his administration's commitment to advance "equity." Just a few days later, on January 25, the President signed an Executive Order ending the Trump Administration's policy against transgender people enlisting or serving in the armed forces, titled "Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform." On January 26, the President signed a Memorandum to the Department of Housing and Urban Development, titled "Memo on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practice and Policies," which mentioned the LGBTQ+ community among those who have been the victims of such policies and charging HUD to seek ways to effectuate equitable housing policies. The identification of the LGBTQ+ community as an "underserved community" in a June 20 Executive Order also rendered relevant subsequent equity Orders and Memoranda, especially one concerning equitable access to health care under Medicaid.

The major Orders are worth extensive quotation, as they reflect a careful effort during the transition by the President and his staff to frame Orders that will set the tone from the top of this Administration. In describing the policies that he seeks to establish through the LGBTQ Anti-Discrimination Executive Order, the President stated:

"Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."

After referring specifically to *Bostock*'s holding that "Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on the basis of gender identity and sexual orientation," he asserted, "Under *Bostock*'s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary," referencing specifically three examples: the Fair Housing Act, Title IX of the Education Amendments of 1972, and the Immigration and Nationality Act. For those seeking a full list of federal laws affected, we can thank Supreme Court Justice Samuel Alito and his clerks for the Appendix attached to his *Bostock* dissent listing 100 federal law provisions that he suggested would be affected by the Court's holding, and which will be permanently memorialized with the opinion in Volume 590 of the U.S. Reports.

Biden's Order thus takes sides on some controversial issues in opposition to the positions taken by his predecessor, such as the right of transgender students to use facilities and participate in sports activities consistent with their gender identity. One consequence of the Order should involve the Justice Department changing its position in pending litigation and withdrawing briefing submitted during the prior Administration.

In another Order, President Biden directed that agencies withdraw proposed Trump Administration regulations that have not yet been published in final form in the Federal Register. As to those that have been published but have not yet gone into effect, agencies are directed to delay the effective dates while determining whether the regulations are consistent with Biden Administration policies. It is likely that the President will ask Congress to exercise its authority under the Congressional Review Act to repeal regulations that are within the 60-legislative-day window period, which are not subject to filibustering in the Senate and can be repealed by

simple majority votes. (During the early months of the Trump Administration, Congress repealed more than a dozen Obama Administration regulations under the CRA.) In some instances, the Administration will need to undergo Administrative Procedure Act requirements for revoking, amending or replacing promulgated regulations, which will require notice and comment periods that will take some time to accomplish.

Biden went beyond declaring policy in the LGBTQ+ Anti-Discrimination EO, setting a mandate for all the Executive Branch agencies that come under his leadership to "consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this Order." He gave agency heads 100 days to develop a plan of action, while noting that the "independent agencies" defined in 44 U.S.C. 3502(5) are not covered by this requirement, because they do not come under his authority as Chief Executive. But, of course there is nothing to stop those agencies from also taking steps, as appropriate, to effectuate the same policies, and within the first few years of his Administration, he will have appointed enough new commissioners, board members, etc., to those agencies to tip the majorities to Democrats and Independents, as the statutes establishing independent agencies generally require staggered terms and prohibit more than a bare majority of policy-making members to belong to the same political party.

The directive is clear: to revoke, rescind or replace the Trump Administration policies that foster discrimination against people because of their sexual orientation or gender identity and to replace them with LGBTQ+ affirmative policies. In quick response, the Justice Department removed from its website a memorandum that had been posted shortly before the Inauguration that had taken a narrow view of *Bostock*, cautioning against applying its reasoning outside of Title VII to statutes adopted at other times on other subjects. The acting head of the Civil Rights Division said the memorandum was inconsistent with the new Executive Order and seemed to be based more on Justice Alito's dissent than on the Court's opinion.

The second Order, establishing an equity policy inclusive of the LGBTQ+ community, is just as significant. In this Order, the President charges the Executive Branch to undertake a detailed self-examination to determine the extent to which "underserved communities" have not enjoyed full participation in the benefits of federal programs and programs funded by the federal government, and to apply the equity principle to take affirmative steps to see that such communities receive their fair share of the benefits of such programs. This is a mandate for outreach, public education, and efforts to assure that people are not excluded. Importantly, this Order expressly revokes President Trump's Executive Order 13950, the EO against any diversity training by executive branch entities or their contractors comprising training that addresses systemic racism, sexism, homophobia, etc. The agency heads are directed to review proposed and existing agency actions relating to that Order and, within 60 days of January 20, "shall . . . consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or grants pursuant to Executive Order 13950, as appropriate and consistent with applicable law."

After Trump had issued the now-revoked Order, there were reports of many people with contracts to provide consulting and diversity training for federal agencies and federal contractors being told that scheduled trainings were being cancelled and contracts were being suspended or terminated. These included diversity training programs provided to federal agencies and grantees by LGBTQ organizations. Those actions should be reversed in response to the Equity EO.

The third Executive Order, on transgender military service, issued on January 25, revoked Trump's Presidential Memorandum of March 23, 2018, which had accepted then-Secretary of Defense James Mattis's recommendations on how to implement the transgender ban, and stated that Trump's Presidential Memorandum of August 25, 2017, which had made more concrete the transgender ban that Trump had announced on Twitter a month earlier (which caught the Defense Department by surprise and had no implementation details), "remains revoked." Biden stated the Administration's policy: "All Americans who are qualified to serve in the Armed Forces of the United States should be able to serve. The All-Volunteer Force thrives when it is composed of diverse Americans who can meet the rigorous standards for military service and an inclusive military strengthens our national security. It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service." Biden referenced the "meticulous, comprehensive study" that had been undertaken in 2016 by the Defense Department, which resulted in then-Secretary of Defense Ashton Carter's announcement at the end of June 2016 lifting the formal bar on transgender military service in then-existing regulations, while deferring the opening of enlistment for a year. Biden stated his agreement with the conclusions of the 2016 study, and asserted: "Therefore, it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination." He charged the Secretaries of Defense and Homeland Security to take the necessary steps to implement this policy, and report back to him on their progress in 60 days. Among other things, military records are to be corrected concerning actions taken under the Trump policies, and those who were forced out of the service and want to return will be allowed to do so provided they currently meet the appropriate standards. The process that Secretary Carter had begun to establish procedures for enlistment will have to be completed, since Secretary

Mattis had deferred that issue to the end of 2017, and before then Trump's tweet established an absolute ban on enlistment of anybody who had been diagnosed with gender dysphoria. The Biden Order is full of detailed direction anticipating the various adjustments that need to be made in military procedures to implement the policy it announces.

In addition, on January 26 President Biden issued a memorandum titled "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," which references the LGBTQ+ community among those who have suffered from discriminatory housing practices, and charges the Department of Housing and Urban Development to review several Trump Executive Orders that had undermined prior policies for addressing housing discrimination, such as one that basically gutted the use of disparate impact theory to address housing practices that disadvantage minorities.

In addition to actions and Orders, of course, the President made history by nominating the first out gay person to be the head of a federal department: former South Bend, Indiana, Mayor Pete Buttigieg to be Secretary of Transportation. He nominated out transgender Dr. Rachel Levine to be Assistant Secretary of Health. She will be the first out transgender person to serve in a subcabinet position. He also nominated out lesbian Suzanne Goldberg to be Deputy Assistant Secretary of Education for Strategic Operations and Outreach and for the Office of Civil Rights, with an Acting Assistant Secretary appointment so she could start work immediately pending confirmation. Jesse Salazar was nominated as Deputy Assistant Secretary of Defense (Industrial Policy). The Victory Institute reported that as of Inauguration Day President Biden had announced appointments of more than a dozen out LGBTQ people to significant Executive Branch positions, including Jamal Bowman as Deputy Press Secretary in the Defense Department, Stuart Delery as Deputy Counsel to the President, and Ned Price as State Department Spokesperson. More out LGBTQ+ appointments were expected as the President nominates diplomats, judges, and agency and board members and commissioners. Among other announcements, newly-confirmed Secretary of State Antony Blinken announced that he would be reviving the position of Special Envoy for LGBTQ issues in the State Department, which the Trump Administration allowed to lapse, and Blinken indicated that he would countermand the policy of his immediate predecessors which had prohibited the display of Pride Flags by U.S. embassies and ended the practice of embassies holding Pride Month Receptions. ■

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# Federal Court Enjoins HHS & EEOC From Requiring Catholic Plaintiffs to Perform or Provide Gender Transition Services

*By Arthur S. Leonard*

Ruling on the last full day of the Trump Administration, one of the federal trial judges appointed by the outgoing president ruled that the Religious Freedom Restoration Act (RFRA) bars the federal government from enforcing the non-discrimination requirement of the Affordable Care Act (ACA) Section 1557 or Title VII of the Civil Rights Act of 1964 against a coalition of entities affiliated with the Catholic Church to require them either to fund or perform gender transition procedures. *Religious Sisters of Mercy v. Azar*, 2021 WL 191009, 2021 U.S. Dist. LEXIS 9156 (D.N.D., January 19, 2021). Chief Judge Peter D. Welte denied summary judgment to co-plaintiff the State of North Dakota, which sought a declaration that it is not required to provide such procedures in its state health institutions or to its employees or through its Medicaid program, and found that the Catholic Plaintiffs lacked standing on their claims concerning performance of abortions and sterilizations, as the court found that various provisions of the ACA and other federal laws already relieved them of obligations in that regard.

Judge Welte issued his opinion just a few days after hearing oral argument on the summary judgment motions, but the case has been pending for a long time and it is likely that he had most of the lengthy, analytical opinion drafted well in advance of the argument, based on the suit papers.

The case was complicated by the history of the federal government's positions on the issue in question, which changed to the extent of the Trump Administration withdrawing an Obama Administration regulation from 2016 and replacing it with a new regulation, formally announced just days before the Supreme Court's *Bostock v. Clayton County* decision. In *Bostock*, 140 S. Ct. 1731 (June 15, 2020), the Court determined that Title VII's ban on discrimination because of sex necessarily extended to claims of discrimination because of sexual orientation and transgender status.

The final regulation announced days before *Bostock* acknowledged that the case had been argued and indicated that its outcome could affect the scope of the ACA's non-discrimination requirement. In its explanatory Prologue to the regulation, HHS reiterated the Trump Administration's view – presented to the Court in *Bostock* by the Solicitor General – that discrimination because of sex does not encompass discrimination because of gender identity. Confident that they were going to win, their new regulation, intended to supplant the Obama Administration's regulation, removed the earlier regulation's definition of "sex" so that it no longer specified "gender identity." They went ahead and officially published the new regulation as previously schedule in the Federal Register a few days after *Bostock* was decided, making no effort to delay publication in order to take account of that decision. The result was peculiar: a regulation formally published just days after a Supreme Court decision that admittedly could affect the substance of the regulation, but utterly failing to grapple with that effect.

The Trump Administration's brazen decision to go ahead with final publication without taking *Bostock* into account persuaded several other federal district courts to conclude that the final regulation's definition of sex violated the Administrative Procedure Act as being inconsistent with the ACA statute's non-discrimination requirement and/or because it was adopted arbitrarily by failing to consider the *Bostock* decision. Other district courts have also criticized HHS's assertion in the regulation that Title IX's religious entity exemption was relevant to the ACA, inasmuch as the ACA's non-discrimination provision specifies that entities covered by it were subject to the kinds of discrimination prohibited by Title IX, which exempts religious schools from its sex discrimination requirements. The Trump Administration had also persisted in rejecting arguments that *Bostock*'s interpretation of Title VII necessarily applied to Title IX and other federal sex discrimination laws.

The day after Judge Welte issued his decision, President Biden included among his first Executive Orders one instructing the Executive Branch to apply *Bostock* to all federal sex discrimination laws. While EO's are not interpretively binding on the courts, they are binding on how Executive Branch agencies interpret and enforce their statutory mandates, so the new leadership in HHS and, eventually, the EEOC (where the president gets to appoint one new member of the Commission each year, relatively quickly tipping the balance to the new Administration's viewpoint regarding the definition of sex discrimination.

But that is neither here nor there regarding the central question in this case, at least as framed by Judge Welte in response to the Catholic plaintiffs, which is whether the government is precluded from enforcing any such non-discrimination requirement against the plaintiffs according to their religiously-based objections, in light of the Religious Freedom Restoration Act.

In *Bostock*, Justice Neil Gorsuch referred to RFRA as a "super statute" that may override non-discrimination requirements of Title VII (and by extension Title VII and the ACA) in an "appropriate case." Is this such an appropriate case? That turns on whether application of the non-discrimination requirement imposes a substantial burden on the free exercise of religion by the Catholic plaintiffs, in which case Judge Welte characterizes the level of judicial review to be applied to the government's policy as "strict scrutiny" such that the policy can only be applied if it is the least intrusive way to achieve a compelling government interest.

The court found that "compliance with the challenged laws would violate the Catholic Plaintiffs' religious beliefs as they sincerely understand them . . . In meticulous detail, the Catholic Plaintiffs have explained that their religious beliefs regarding human sexuality and procreation prevent them from facilitating gender transitions through either medical services or insurance coverage."

As to the compelling interest test, the court found that the Defendants "never attempt to make that showing here." Of course, Defendants are the Trump Administration's HHS (for the ACA) and EEOC (for Title VII). The rule HHS published in June 2020 "conceded to lacking a 'compelling interest in forcing the provision, or coverage, of these medically controversial [gender-transition] services by covered entities.'" By contrast, of course, when the Obama Administration opined on this in 2016, HHS specified a compelling interest in ensuring nondiscriminatory access to healthcare, and the EEOC asserted a compelling interest in ensuring non-discriminatory employee benefits plans. But Judge Welte noted Supreme Court authority that those interests are stated at too high a level of generality to meet the RFRA test, directing courts to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context." Responding to this command, wrote Welte, "Neither HHS nor the EEOC has articulated how granting specific exemptions for the Catholic Plaintiffs will harm the asserted interests in preventing discrimination . . . In short, the Court harbors serious doubts that a compelling interest exists. This issue need not be resolved, however," he continued, "because the Defendants fail to meet the rigors of the least-restrictive-means test."

The "least-restrictive means" test is the third part of the RFRA analysis. Even if the government's interest is compelling, the question is whether there is a way to achieve that interest without burdening the free exercise rights of the

plaintiffs. Is requiring Catholic entities to perform or finance gender transition the "only feasible means to achieve its compelling interest," asks the court. Here, resorting to the Supreme Court's *Hobby Lobby* case, Welte suggests that "the most straightforward way of doing this would be for the Government to assume the cost of providing gender transition procedures for those unable to obtain them under their health-insurance policies due to their employers' religious objections." And, he opined, "if broadening access to gender-transition procedures themselves is the goal, then 'the government could assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services,'" quoting *Franciscan Alliance*, a decision from the Northern District of Texas that had preliminarily enjoined the government from bringing enforcement actions under Section 1557 against religious objectors. (That injunction was dissolved when the Trump Administration indicated to that court that it did not intend to enforce Section 1557 against religious objectors and would replace the 2016 Obama Administration regulation with one that did not require such coverage.) And, said the court, the Defendants had not shown that "these alternatives are infeasible."

Thus, the court granted summary judgment and issued a permanent injunction against enforcement of Sec. 1557 or Title VII against the Catholic Plaintiffs in this case. The court did not issue a nationwide injunction, however, limiting its injunction to the plaintiff organizations in this case, and as noted finding that the state of North Dakota did not have standing on these questions, rejecting its Spending Clause argument that the government was wrongly coercing the state to fund gender transition through the Medicare and Medicaid programs.

It is worth noting that this litigation was not brought on by an actual case of a transgender individual seeking gender transition services from a Catholic health care organization, or the employee of a Catholic entity challenging the failure of the employer's health insurance to cover the procedures, or in response to a challenge to the state's failure to cover these procedures for its employees or Medicaid participants. This was affirmative litigation brought by the state and the Catholic plaintiffs preemptively, seeking to establish judicial cover for their discriminatory policies. As such, and significantly, the interests of transgender people were not directly represented in this case although the ACLU participated as amicus curiae. (Curiously, the Westlaw report of the case did not list the ACLU among counsel, but the Lexis report did as of January 23 when this account was written.) The Plaintiffs were represented by the North Dakota Attorney General's Office, The Becket Fund for Religious Liberty, and private counsel for several of the Catholic institutional plaintiffs. The government (i.e., the Trump Administration) was represented by the Justice Department and the U.S. Attorney's Office for North Dakota, which of course was happy to let the Plaintiffs win in light of the Administration's position opposing the *Bostock* ruling and their issuance of the 2020 Regulation (which the court could plausibly have found mooted the case, were it not for the fact that he was ruling the day before President Biden was to be inaugurated). Now it is up to the Biden Administration to take over and appeal this decision to the 8th Circuit in light of the President's January 20 Executive Order, as to which see the lead story of this issue of *Law Notes* for details. ■

# 11th Circuit Denies Withholding of Removal to Bisexual Macedonian Man

*By Bryan Johnson-Xenitelis*

The U.S. Court of Appeals for the 11th Circuit has upheld the Board of Immigration Appeals' decision to deny a gay man from Macedonia the relief of withholding of removal in *G.D. v. Attorney General*, 2021 WL 97343 (11th Cir., January 12, 2021).

Petitioner entered the United States lawfully as a tourist and overstayed his authorized period of time. After being placed in removal proceedings for his overstay and conceding removability, Petitioner sought asylum, withholding of removal, and protection under the Convention Against Torture, claiming the Macedonian government fails to protect the LGBTQ community and fails to prosecute perpetrators of violent crimes committed against this community.

In documents submitted with his applications and at his hearing, Petitioner claimed that he had been outed as bisexual, that his friends in Macedonia had warned him against returning, and that he received messages from former co-workers, neighbors, and friends in Macedonia threatening that he would "regret who [he was]" and that they would "break [his] nose." Petitioner claimed that "although same-sex relationships in Macedonia are not illegal, they remain extremely taboo and that the LGBTQ community is regularly abused, humiliated, and physically attacked," and "recounted a time when he visited an LGBTQ bar in Macedonia in 2012 where 'hooligans' attacked patrons, many of whom were injured, that resulted in little to no police investigation." He further cited the 2017 Department of State Human Rights Report which found "one of the most significant human rights issues in Macedonia included violence against LGBTQ persons."

Petitioner was denied all relief by the Immigration Judge and appealed to the Board, which remanded the case for further hearings. Upon further hearings, the Immigration Judge issued a written decision finding that Petitioner was time-barred from applying for asylum, found Petitioner credible, but ruled that Petitioner's "allegations of reported harassment and verbal threats do not rise to the level of persecution," and that while Petitioner had "a genuine, subjective fear of future persecution if he returned to Macedonia," he failed to meet his burden in demonstrating "an objective, well-founded fear of future of persecution."

The Immigration Judge ruled that "although the people of Macedonia have historically been 'intensely homophobic,'" activists and experts have indicated that "the mentality of people is slowly changing" and that the Macedonian government has been "more openly supportive of the LGBTQ community." Ruling that the evidence did not show the government of Macedonia would "acquiesce to any further abuse," the Immigration Judge denied Petitioner relief. Petitioner appealed to the Board, which affirmed the decision. Petitioner timely sought review with the 11th Circuit.

In a per curium opinion, a panel of the 11th Circuit reviewed the Immigration Judge's opinion directly, as the Board had merely expressly affirmed the Immigration Judge's decision with separate analysis. Petitioner argued that the Immigration Judge erred in finding no objective fear of persecution with respect to his withholding claim. The panel found the Immigration Judge's decision would stand if it was supported by "substantial evidence." Here, the panel found that persecution is "an extreme concept" that "requires more than mere harassment or intimidation," and that the Macedonian government in both constitution and law had prohibited discrimination based upon sexual orientation, proving that harassment and discrimination to LGBTQ people in Macedonia "is not condoned by the government and does not rise to the level of persecution."

Petitioner further argued that the Immigration Judge failed to give "reasoned consideration" to the specific threats against Petitioner; however, the panel ruled that the Immigration Judge did consider all the evidence in the record and had "heard and thought and not merely reacted" to the issues presented. Finding the Immigration Judge's ruling supported by substantial evidence, the panel denied the Petition for review. ■

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# Eighth Circuit Dodges Broad Ruling on Hormones for Transgender Prisoners

*By William J. Rold*

The United States Court of Appeals for the Eighth Circuit took a pass on two cases asking it to review its holding in *Reid v. Griffin,* 808 F.3d 1191 (8th Cir. 2015), which had been applied by district judges in Arkansas and South Dakota to rule, as a matter of law, that transgender prisoners – even those with a diagnosis of gender dysphoria – had no Eighth Amendment right to hormones. (The transgender prisoner in *Reid* did not have a such a diagnosis.) Full disclosure: This writer assembled a team to bring this appellate litigation in cases that were *pro se* in the district courts.

The Eighth Circuit disposed of both appeals on procedural grounds. It held the Arkansas case moot, because the state began giving Prowse hormones during the pendency of the appeal (announcing it at oral argument). *Prowse v. Payne*, ___ F.3d ___, 2021 WL 68065 (8th Cir., Jan 8, 2021) (for publication). It found that the South Dakota claim was not properly pleaded against the warden and his deputy. *Butterfield v. Young*, 2021 WL 71449 (8th Cir., Jan. 8, 2021) (not for publication). Neither decision cited *Reid*. More details about each follow.

The panel in both cases (argued back-to-back on the same day) consisted of presiding Circuit Judge Jane Kelly (Obama), Circuit Judge David R. Stras (Trump), and Senior Circuit Judge Roger L. Wollman (Reagan). Judge Wollman was also on the 2015 *per curiam* panel in *Reid*.

The Eighth Circuit encompasses a swath of the heartland from the Dakotas though Nebraska and from Minnesota through Arkansas. It is the only Court of Appeals with all but one of its judges appointed by Presidents of the

same political party. President Obama appointed Iowa Public Defender Jane Kelly 2013, in the middle of a gap in appointments to the Eighth Circuit that would span over ten years. Perhaps it crosses the fine line of impertinence, but this writer thinks Judge Kelly must find herself isolated at times, with ten Republican colleagues – thirteen, if one counts the senior judges still sitting.

*Prowse* was dismissed for failure to state a claim on defendants' motion after service. After argument of the appeal, the court ordered supplemental briefing on "mootness by voluntary cessation." With supplemental briefing, Arkansas submitted an affidavit from its transgender committee stating that an individual decision was made to grant Prowse hormones, which would continue so long as they were "medically indicated." Prowse submitted an affidavit averring in part that: (1) she could be denied hormones again without injunctive relief; (2) she had been denied hormones for years and wanted damages; (3) Arkansas was still withholding medically necessary therapies incident to her transition; and (4) her hormones were un-monitored and she had serious side effects. The court accepted both affidavits for the limited purpose of determining mootness.

The opinion is written by Judge Kelly. The court found that Prowse could not claim damages as a defense to mootness, since she did not ask for damages in her *pro se* complaint. The panel continued, writing that "[e]ven if we assume Prowse had adequately pleaded a request for nominal damages . . . , such a request cannot overcome mootness because she sued the prison administrators only in their official capacities," citing *Kentucky v. Graham,* 473 U.S. 159, 169 (1985).

This seems inconsistent with the Supreme Court's recent Second Amendment case, *New York State Rifle & Pistol Asso. v. City of New York,* 140 S. Ct. 1525 (2020), in which the defendant repealed its challenged firearms regulations after *certiorari* was granted, but the Court remanded to consider residual claims, including the possibility of damages, even though the plaintiffs did not seek damages in the complaint or in the court of appeals. *Id*. at 1526-7. Dissenting from a partial finding of mootness, Justice Alito (joined in part by three other justices) said the case was not moot at all and criticized the City's attempt to "manipulate" the Court's appellate jurisdiction by repealing the ordinance. *Id*. at 1527. [Note: this case – as well as the Eighth Circuit's declination to declare its own marriage equality appeals cases moot after *Obergefell* – was cited in support of remand here. The Court did not comment on these points.]

Mootness as to an injunction for hormones was a problem for the appeal once the state started them. Arkansas had maintained that it had a "policy" of considering hormones, while Prowse insisted that the "practice" was never to grant hormones, notwithstanding the "policy." The state's eleventh-hour epiphany granting Prowse hormone therapy undermined the force of this argument.

Judge Kelly's opinion "recognize[d] Prowse's understandable concern that a ruling that her claim is moot might result in prison administrators ceasing to provide her with hormone therapy." The court finds that the state's "assurances" establish that the "unconstitutional conduct Prowse alleges could not reasonably be expected to recur," citing *Friends of the Earth v. Laidlaw,* 528 U.S. 167, 189 (2000) (internal quotations omitted). In this writer's view, this is a "shot across the bow" should Arkansas ever try to withdraw hormone therapy.

Ordinarily, the granting of hormones without other transition support would not moot the claim for such support. *See Keohane v. Fla. DOC,* 952 F.3d 1257, 1276-78 (11th Cir. 2020). In fact, Arkansas asked the Circuit to reach this issue and hold (like the Eleventh Circuit did in *Keohane*) that there is no Eighth Amendment right to such support. But the panel ruled that the issue of other transitional therapies was not "meaningfully" presented. Although the absence of hormones was the thrust of the complaint and of the appeal, feminizing therapies were mentioned in the complaint and appear several times in the chief appellate brief and as an unresolved issue in the briefing opposing mootness. This writer suspects that Judge Kelly's keeping control of the case on mootness grounds may have saved the action from an adverse decision on this point.

The court said that damages were not adequately pleaded in the complaint. It also ruled that the issue of hormonal side-effects was not before it, stating "these factual allegations may form the basis of another lawsuit." The *dicta* seem to allow Prowse to commence another case if her treatment ceases and on untreated side-effects and feminizing therapies.

*Butterfield* was dismissed without prejudice before service of process, and South Dakota never appeared. The decision is *per curiam*. There are no "medical" defendants in the *pro se* complaint – just the warden, assistant warden, and a sergeant. The complaint sues the warden and assistant "officially" and the sergeant "individually." The panel is correct that it is "barebones." Respectfully, so is the ruling.

The court held that the complaint was deficient because it failed to plead government policy or custom: "we find nothing that can be read to allege that [the defendants were] responsible for creating a policy or custom of denying hormone therapy to inmates with gender dysphoria . . . . Because Butterfield did not allege the existence of any government policy or custom that caused the claimed constitutional violations, the district court's dismissal of these official capacity claims was proper." The court cites only damages cases against municipalities under *Monell* for this proposition, without explaining why Butterfield cannot seek an injunction to conform defendants' behavior to federal law under *Ex Parte Young,* 109 U.S. 123, 150-51 (1908) (Minnesota attorney enjoined to stop interfering with federal railroad regulation).

The question is not whether there is a "pattern or practice" – transgender inmates were not getting hormones in South Dakota when Butterfield sued. The record contains a statement from South Dakota's Secretary of DOC, saying that the state was "in the process of drafting a policy regarding transgender inmates." The decision thus begs the question of

who are the proper defendants when the suit is based on the *absence* of policy?

The Butterfield appeal followed the dismissal of the second of two *pro se* complaints Butterfield filed a year apart. In the interim between Butterfield's cases, South Dakota hired a consultant to help it "draft" transgender policy: Cynthia Osborne (who should be familiar to the transgender prisoner bar). After Butterfield's first case was dismissed, Osborne went to South Dakota at the state's request. She met with officials and interviewed several inmates, including Butterfield.

Osborne issued a Report on Butterfield, finding "severe" gender dysphoria and recommending hormone therapy. South Dakota concealed the Osborne report and its recommendations from Butterfield, as it continued to deny her grievances requesting hormones. This writer did not learn of the Osborne report until after briefing, when its findings almost jumped off the page.

The Court of Appeals granted a motion to enlarge the *Butterfield* record to include the Osborne report. Although it was discussed at length at oral argument, there is no reference to it in the appellate decision. During this appeal, two other things happened: Butterfield was released, and South Dakota adopted a transgender policy. Butterfield has a monetary claim for damages that survives, because the dismissal that was affirmed is without prejudice. The § 1983 limitations period in South Dakota is three years, and Butterfield was never given benefit of treatment under the new "policy." She is free to sue based on denial of treatment and the state's deception with the Osborne report. Exhaustion of administrative remedies and other rules of the Prison Litigation Reform Act do not apply to a new case filed after a prisoner is released, even if the events underlying the case arose in prison. *Doe v. Washington County,* 150 F.3d 920, 924 (8th Cir. 1998). ■

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# Colorado Supreme Court Revises Common Law Marriage Rules to Reflect Social Change and Same-Sex Marriages

*By Arthur S. Leonard*

In a trio of decisions issued on January 11, the Colorado Supreme Court revised the state's common law marriage rules to reflect the many changes that have occurred since it last dealt with this topic comprehensively in 1987 in *People v. Lucero*, 747 P.2d 660 (Colo. 1987). In *Hogsett v. Neale*, 2021 WL 79536, and *LaFleur v. Pyfer*, 2021 WL 79532, the court dealt with same-sex couples in divorce proceedings, while in the third case, *In re Estate of Yudkin*, 2021 WL 79542, the court dealt with a dispute between an intestate man's ex-wife and his alleged common law wife as to whom should be appointed administrator of the estate. Justice Monica Marquez wrote the opinions for the court. There were concurring and dissenting opinions in the cases of the same-sex couples, and concurrences in *Yudkin*. This report will focus on *Hogsett v. Neale* and *LaFleur v. Pyfer*, the cases involving same-sex couples. In *Yudkin*, the court remanded so the trial court could apply the newly-announced analysis to determine whether the ex-wife or the alleged common law wife your be appointed administrator.

Justice Marquez referred to *Hogsett* as the "lead opinion" of the three, since it focused on an issue common to all three: what factors should a court consider in determining whether there was a common law marriage? *LaFleur* focuses on an issue not contested in *Hogsett*: whether the *Obergefell* marriage equality decision can be applied "retroactively" to find a common law marriage was formed many years before *Obergefell* was decided?

Edi L. Hogsett and Marcia E. Neale were in a long-term relationship beginning in November 2001 and never formally married. Same-sex marriages became available in Colorado through judicial ruling in October 2014. The women jointly filed a *pro se* petition for dissolution of a claimed common law marriage in January 2015. "The parties mediated a separation agreement stating that they had entered a common law marriage on December 1, 2002, and that their marriage was irretrievably broken," wrote Justice Marquez. At a status conference, the trial judge explained that the court would have to determine that a marriage existed before it could address the petition for dissolution, but the parties decided that rather than go through that process, they would stipulate to dismissal as they had "fully settled all issues" through the mediation process.

But later Hogsett "sought certain retirement assets and maintenance she believed Neale owed her under their separation agreement," to which Neale responded that "no marriage existed between them." Hogsett then filed a new petition for dissolution and Neale moved to dismiss, claiming the parties had no common law marriage. The trial judge agreed with Neale. Although finding that it could recognize a common law same-sex marriage predating *Obergefell v. Hodges*, 576 U.S. 644 (2015), the court found that the *Lucero* factors and the trial record would not support a conclusion that there was a mutual agreement to marry, and the court of appeals affirmed, finding that although Hogsett may have thought she was married and the women had cohabitated, Neale had never acknowledge agreeing to marry Hogsett, even though there was an informal exchange of rings at a gay bar, although not any ceremony with invited guests at that time. The court of appeals did not reject the trial court's holding that it was possible to contract a same-sex common law marriage prior to *Obergefell* but accepted the trial judge's finding that the mutuality required to find such a legal relationship was lacking on this record. One of the appeals

judges argued, however, that common law marriage was an anachronism and that the Colorado Supreme Court should abolish the doctrine in that state. (Justice Marquez notes in her opinions that Colorado is one of only nine states [plus the District of Columbia] that still recognize the formation of common law marriages, the others being Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, Utah and Texas.)

By contrast, Dean LaFleur and Timothy Pfyer did have a formal ceremony in 2003, with vows before a clergyman, exchange of rings in the presence of family and friends, and a claim by Pyfer that he had proposed marriage to LaFleur and that LeFleur had accepted the proposal. The ceremony in Colorado was held shortly after the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941(2003), which recognized a right for same-sex couples to marry under that state's constitution, the first such decision in the United States. Justice Marquez found this significant, since it suggested that a same-sex couple in 2003 could believe that a same-sex marriage was a legal possibility. As with Hogsett and Neale, LaFleur and Pyfer did not enter a formal legal marriage in Colorado when that became possible in 2014, and as their relationship had cooled off and Pyfer had a new boyfriend, he filed a dissolution petition in January 2018, claiming they had a common law marriage dating from the 2003 ceremony. Pyfer sought a property division and maintenance award from the court, which was probably a substantial motivation to file the lawsuit.

LaFleur denied the possibility that the ceremony they held in 2003 could have created a common law marriage, since "same sex marriages were not recognized or protected under Colorado law" then. The trial judge ruled for Pyfer, finding that *Obergefell* recognized an existing constitutional right, that the men had manifested mutual intent to marry in 2003, and that Pyfer was entitled to seek a dissolution. However, Pyfer was disappointed in how the trial court distributed assets and appealed, as LaFleur cross-appealed, insisting that there had been no common law marriage. The Colorado Supreme Court had already granted petitions for certiorari in *Hogsett* and *Yudkin*, so LaFleur petitioned the court to take this case directly, bypassing the court of appeals.

In *LaFleur*, the Supreme Court agreed with the trial judge, rejecting LaFleur's argument that it was impossible for a common law marriage to be formed by a same-sex couple prior to October 2014. As the issue of *Obergefell*'s "retroactivity" was not contested by the parties in *Hogsett*, the Supreme Court's decision in that case focused on modifying the Lucero factors to reflect modern reality. Lucero was a criminal prosecution in which the issue of spousal testimonial privilege turned on whether the court found a common law marriage to exist. "In *Lucero*," wrote Justice Marquez, "we held that a couple could establish a common law marriage 'by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship.' We directed that evidence of such agreement and conduct could be found in a couple's cohabitation; reputation in the community as husband and wife; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; and use of the man's surname by the woman or by children born to the parties." The trial courts had expressed frustration that this list of evidentiary factors did not fit very well in an analysis of a same-sex couple, and the *Hogsett* court pointedly asked for the Supreme Court to revisit the issue in light of changes since 1987, including, of course, *Obergefell*.

Justice Marquez acknowledged the need for a more expansive approach. She wrote that "the gender-differentiated terms and heteronormative assumptions of the *Lucero* test render it ill-suited for same-sex couples. More broadly, many of the traditional indicia of marriage identified in *Lucero* are no longer exclusive to marital relationships. At the same time, genuine marital relationships no longer necessarily bear *Lucero*'s traditional markers. The lower court decisions in these cases reflect the challenges of applying *Lucero* to these changed circumstances."

"In this case," Marquez continued, "we refine the test from *Lucero* and hold that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The core query is whether the parties intended to enter a marital relationship — that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation. In assessing whether a common law marriage has been established, courts should accord weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement to enter a marital relationship may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant to the inquiry, but they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form."

However, under this new formulation, the court agreed with the trial judge that Hogsett had failed to prove a common-law marriage, mainly because Neale's credible testimony undercut the contention that there was a mutual agreement to marry (or to enter a spousal-type relationship as described by the court), and the ring exchange in the gay bar, when set against all the credible testimony, did not convey the same import of mutual agreement as the formal wedding ceremony of Pyfer and LaFleur. On the other hand, having set out this new formulation of the potentially relevant evidentiary factors, the court concluded that Pyfer had succeeded in proving a common law marriage with LaFleur. The court agreed with Pyfer, as well, that the trial judge had erred in dividing the assets upon dissolution, failing to make findings of fact that are normally

required and giving weight to factors that should not be relevant, so the case was remanded for reconsideration of the asset distribution.

The court was by no means unanimous in all the holdings in the same-sex couple cases. Justice Carlos S. Samour entered a vigorous dissent in *LaFleur*, agreeing with Dean LeFleur that *Obergefell* could not be applied retroactively in this way. "Is it possible for a same-sex couple in Colorado to have *mutually intended and agreed* to enter into a *legal* marital relationship when both parties were aware that Colorado law prohibited same-sex marriage at the time? The answer is clearly no," he asserted. "When Pyfer and LaFleur participated in their wedding ceremony in November 2003, they both understood that same-sex couples could not lawfully marry in Colorado because Colorado considered same-sex marriages unlawful, unenforceable, and invalid. Thus, Pyfer and LaFleur could not possible have *intended or agreed* to enter into the *legal* relationship of marriage. And because common law marriage in Colorado requires *mutual intent and agreement* to enter into the *legal* relationship of marriage, Pyfer and LaFleur cannot be deemed to have entered into a common law marriage." In *Hogsett*, Justice Samour concurred in the judgment only, finding that the women did not have a common law marriage.

Justice Melissa Hart, concurring in *Hogsett*, wrote that she was joining the majority opinions in the three cases "because the opinions offer helpful refinement of the common law marriage test to be applied to those common law marriages that have already been entered." But she offered a separate opinion to state her agreement with the judge in the court of appeals who thought that "Colorado should join the overwhelming majority of states" and abolish common law marriage going forward. "The historic conditions that once justified the need for the doctrine are no longer present," she wrote, "its application is often unpredictable and inconsistent, and it ties parties and courts up in needlessly costly litigation."

Chief Justice Brian Boatright also wrote separately, concurring in the judgments in both same-sex marriage cases, but expressing reservations about the majority's approach. As far as he was concerned, the key finding in a common law marriage case had to be mutual intent and agreement to enter a marriage, which he found lacking in *Hogsett* and present in *LaFleur*. But, he insisted, the revision of the *Lucero* factors offered by the majority was unnecessary to decide these two cases and potentially problematic. "Today," he wrote in *Hogsett*, "the majority announces new factors for establishing common law marriage even though those factors are ultimately irrelevant under the circumstances of this case." Since the testimony at trial indicated lack of mutual intent to marry, he felt the court should have stopped right there and affirmed the trial court's decision that the women did not have a common law marriage. "Thus, in my view," he continued, "the majority decides more than is necessary because the record clearly evinces – without considering any factors – that no common law marriage existed. And in deciding what it need not, the majority also potentially broadens the definition of marriage in a way that I fear will only further confuse the already complex concept of common law marriage. Because I agree with the majority's ultimate conclusion that Neale and Hogsett did not enter into a common law marriage, I respectfully concur in the judgment only." And, in *LaFleur*, his concurrence insisted that "application of any factors is unnecessary because, in my view, the fact that Dean LaFleur and Timothy Pyfer had a ceremony that was – in every way – a wedding evinces their mutual intent to be married. In the simplest of terms, LaFleur and Pyfer are married because they had a wedding. I do agree with the majority, however, that the fundamental right to marry as outlined in *Obergefell* . . . 'must be given retroactive effect.'" Thus, he agreed that *LaFleur* should be remanded only on the question of property division and spousal maintenance.

It will be interesting to see whether the Colorado legislature decides to enter the debate in this case by legislating to end common law marriage or, alternatively, codifying it in law with prescribed evidentiary requirements reflecting modern realities of family life. Chief Justice Boatright's concern about the revised factors making the process of judicial determination of a common law marriage even more complicated than it had previously been under *Lucero* may well strike a chord. But any repeal of common law marriage would of necessity be prospective only, so same-sex couples who had attempted to formalize their relationships prior to *Obergefell* should still be able to present claims to the courts. As an example of this phenomenon, although Pennsylvania abolished common law marriage early in this century, their courts have evaluated claims concerning common law marriages of same-sex couples formed prior to the repeal. To do otherwise would raise serious due process concerns, since it would be difficult to argue that a state could legislatively repeal existing common law marriages when the right to marry has been deemed "fundamental" by the U.S. Supreme Court in *Obergefell*.

Edi Hogsett is represented by Griffiths Law PC, Ann Gushurst, Littleton, CO; Radman Law Firm, LLC, Diane R. Radman, Denver, CO; and Aitken Law Firm, LLC, Sharlene J. Aitken, Denver, CO. Marcia Neale is represented by Plog & Stein, P.C., Jessica A. Saldin and Stephen J. Plog, Greenwood Village, CO. Dean LaFleur is represented by Antolinez Miller, LLC, Joseph H. Antolinez and Melissa Miller, Centennial, CO; and Azizour Donnelly, LLC, Katayoum A. Donnelly, Denver, CO. Timothy Pyfer is represented by Law Offices of Rodger C. Daley, Rodger C. Daley, Carrie Vonachen, and Dorian Geisler, Denver, CO; and Reilly LLP, John M. McHugh, Denver, CO. Amicus briefs were filed in both of these cases, including briefs from the Family Law Section of the Colorado State Bar and from LGBT rights groups: The Colorado LGBT Bar Association, the Colorado Women's Bar Association, Lambda Legal, and the National Center for Lesbian Rights, with numerous cooperating attorneys listed on the briefs. ■

# "Death of Asylum" Rule Blocked Nationwide by San Francisco U.S. District Court Judge

*By Matthew Goodwin*

An anti-LGBTQ asylum rule issued by the outgoing Trump administration in early December 2020 and set to go into effect on January 11, 2021 was enjoined nationwide by Judge James Donato of the United States District Court for the Northern District of California. (*Pangea Legal Servs. v. United States Dep't of Homeland Sec.* & *Immigration Equality v. United States Dep't of Homeland Sec.*, 2021 U.S. Dist. LEXIS 5093, 2021 WL 75756 (January 8, 2021). The rule in question is, in actuality, much more than just anti-LGBTQ; it imposes an incredible new array of obstacles, hurdles, and roadblocks for asylum-seekers from all walks of life. So impossible would the Rule make it to obtain asylum that it has been nicknamed the "death to asylum rule" by immigration groups opposed to it.

Some of the Rule's more egregious provisions include, among other things: new, more onerous requirements to pass a "credible fear" screening at the border; allowing immigration law judges to *sua sponte* reject an asylum application without a hearing; barring asylum for those seekers who spent "too long" in a third country before arrival in the U.S.; restricting definition of key terms like "political opinion," "persecution," and "particular social group"; new eligibility restrictions on asylum seekers asking for protections based on fear of torture in home countries.

Nevertheless, the Rule's potentially devastating impact on the ability of LGBTQ individuals to seek asylum is hard to overstate. Immigration Equality, one of the plaintiffs in the case, is a LGBTQ and HIV-positive immigrant rights advocacy organization. They have argued that the Rule would "make it virtually impossible for LGBTQ and people living with HIV fleeing persecution to secure asylum in the United States . . . " because it "eliminates eligibility for asylum to anyone with a gender-based claim."

The Department of Homeland Security (DHS) and Department of Justice (DOJ) published notice of proposed rulemaking for the Rule on June 15, 2020. The DHS and DOJ provided only thirty (30) days for public comments. According to the opinion, " . . . 87,000 comments were submitted, and they overwhelmingly opposed the proposed [R]ule, often with detailed reasoning and analysis . . . The tidal wave of responses barely made an impact on the government. The final Rule published on December 11, 2020, was 'substantially the same as the [proposed Rule]." The court noted that the government, up to the date of the court's opinion, still had not provided a reason or justification for why a "truncated" comment period was warranted. However, the Rule is widely understood as just one of many the Trump administration sought to finalize quickly on their way out the door; finalized rules that go into effect are difficult to "undo" and the process can be time-consuming and labor-intensive.

Immigration Equality, Pangea Legal Services, the TransLatin@ Coalition, the Transgender Law Center, Oasis Legal Services and the Black LGBTQIA+ Migrant Project and a number of other legal services organizations filed suit on December 21, 2020; on December 22 and 23, 2020, they filed applications for a temporary restraining order and preliminary injunction enjoining the rule form going into effect.

Named defendants in the suit include(d), among others, former Attorney General William P. Barr, Chad R. Mizelle, the "Senior Official Performing Duties of the General Counsel" for DHS, and Chad F. Wolf, Acting Secretary of Homeland Security.

The complaint and arguments in favor of the injunction "allege that the Rule should be invalidated because Wolf was not lawful Acting Secretary of Homeland Security with authority to sign off on the rulemaking, and that the Rule's many changes to the asylum system are arbitrary, capricious, unlawful, and procedurally improper under the Administrative Procedure Act (APA)."

Judge Donato's decision first sets forth the well-stablished four-part standard for granting a preliminary injunction—i.e. establish a likelihood of success on the merits; likelihood of irreparable harm in the absence of preliminary relief; the balance of equities tips in plaintiff's favor; and, that an injunction is in the public interest.

Through this lens, the court, in the first instance, concludes plaintiffs established a likelihood of success on the merits based on their argument that Wolf lacked lawful authority to enact the Rule. As such, the court's opinion never reaches the question of plaintiff's allegations of the Rule's substantive and lawful failures.

The argument that Wolf had no authority to sign off on the Rule arises from the resignation of former DHS Secretary Kristjen Nielsen in April of 2019. Nielsen was the last Secretary of DHS who met the requirements of Article II of the Constitution that cabinet secretaries be nominated by the President and confirmed by the Senate. "Wolf, the ostensible current Acting Secretary, claimed the position in November 2019 . . . "

Since that time, Wolf's rulemaking authority vis-à-vis immigration policy as "Acting Secretary" has been challenged in four different federal lawsuits, all of which "concluded Wolf was not a duly authorized Acting Secretary, and that his actions were a legal nullity."

Judge Donato spends a number of the opinion's paragraphs criticizing the government's re-litigation of the issue. He wrote, "[t]his Court is now the fifth federal court to be asked to plow the same ground about Wolf's authority *vel non* to change the immigration regulations. If the government had proffered new facts or law with respect to that question, or

a hitherto unconsidered argument, this might have been a worthwhile exercise. It did not. The government has recycled exactly the same legal and factual claims made in the prior cases, as if they had not been soundly rejected in well-reasoned opinions by several courts."

He continued, "[i]n effect, the government keeps crashing the same car into a gate, hoping that someday it might break through."

In sum and substance, the court held "the chain of succession the government invokes [to say Wolf had authority to sign off on the Rule] . . . does not hold together." The court's rationale in this respect is not treated in depth here. Suffice to say, the court agreed with the previous four courts that had weighed in on the subject that a man named Christopher Krebs was the individual with authority to assume the duties of acting DHS Secretary after Nielsen left. Instead, Kevin McAleenan, formerly Customs and Border Protection Commissioner, was "called" acting DHS secretary by Trump via a tweet, but this ran afoul of a December 16, 2016, executive order which laid out succession in the event of resignations. The government in this and the prior cases has argued that McAleenan was validly acting Secretary of DHS and that he was able, therefore, to "pass the torch" to Wolf. This reasoning was rejected by the court as it has been in the other cases.

The court also found in favor of the plaintiffs on the irreparable harm prong of the analysis. "Plaintiffs provide legal services and other assistance to those seeking asylum and similar protections from persecution or violence in their home countries. They have provided ample evidence that if enacted, the Rule would harm this mission. For example, plaintiffs have identified at-risk clients who might be prevented from attaining asylum status because, under the new provisions in the Rule, they spent too long in a third country before arriving in the United States, or were unable to timely file an application due to extraordinary circumstances. The potential double threat of pretermission and the expanded frivolousness bar – which prevents future applications – has also forced plaintiffs to devote significantly more time to developing their clients' cases in the early stages, limiting the number of asylum seekers they can effectively represent."

The Ninth Circuit has also held organizations are able to meet the requisite showing of irreparable harm to the extent they can establish that "'they will suffer significant change in their programs and a concomitant loss of funding absent a preliminary injunction . . . ' Economic injuries are deemed irreparable in APA cases because plaintiffs are unable to recover money damages . . . Plaintiffs have made this showing by demonstrating, among other evidence, that their staff have had to devote significant extra work time to retraining and to explaining the Rule's changes to their clients."

The court then turned to the balance of hardships and public interest prongs which are considered as a single factor when the government is a party. Here, too, the court sided with the plaintiffs. Succinctly, the court stated that promoting a "stable immigration system" is an important public interest as is ensuring compliance with the APA and protecting asylum-seekers from wrongful removal or death. In this connection the Court seemed to agree with plaintiffs' arguments that the actions of agencies—here DHS and DOJ—were likely undermining laws enacted by elected representatives.

Jennifer Carol Pizer of Lambda Legal was lead attorney for Immigration Equality, Oasis Legal Services, Black LGBTQIA, Translatin@ Coalition, and the Transgender Law Center. Also appearing on behalf of plaintiffs were Aaron M. Frankel, Kramer Levin Naftalis & Frankel LLP; Bridget A Crawford, Immigration Equality; Jason M. Moff, Jeffrey S. Trachtman, Kramer Levin Naftalis Frankel LLP; Omar Gonzalez-Pagan, Lambda Legal; Richard Saenz, Lambda Legal; Austin W Manes, Kramer Levin Naftalis & Frankel, LLP. Judge Donato was appointed to the District Court in 2014 by President Barack Obama.

(Editor's Note: President Joseph R. Biden issued Executive Orders and Memoranda during the opening weeks of his administration signaling an intention to countermand the Trump Administration's actions regarding the refugee/asylum process, drastically increasing the number of people who can seek refugee status annually, and directing the Departments of Homeland Security and Justice to review and revise all policies adopted during the Trump Administration that are inconsistent with the Biden Administration's policies as announced in a February 4 Memorandum on the human rights of LGBTQ+ people which specifically mentions the asylum process.) ■

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# Resentencing a Long Shot for Federal Inmates Seeking Release Due to COVID-19

*By William J. Rold*

*Law Notes* has reported dozens of cases of prisoners seeking release due to COVID-19 over the last year, arguing that HIV and other health risks, their inability to practice mitigation in custody, and the conditions of their institutions place them at risk from the severe outbreaks of COVID-19 in institutions. The cases have been raised in a variety of ways: from *habeas corpus*, to civil rights, to petitions for resentencing. They have also arisen in different contexts: by those convicted and serving sentences (in prison), by those awaiting trial (in jails), and by those facing deportation (in ICE facilities).

For LGBT advocates reading *LawNotes*, we have focused on HIV as a risk factor. If the HIV is well-controlled and the plaintiff has no other risk factors (e.g., age, obesity, COPD, diabetes, cancer, asthma, etc.), it does not meet CDC risk aggravation factors and is unlikely to convince a judge to grant relief. *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020), is commonly cited for this point. While there have been exceptions, most cases have not succeeded. Odds improve if the plaintiff has served most of a sentence and is at an institution with a conceded high incidence of COVID-19.

Most decisions involved federal prisoners, although some state courts (for example, Massachusetts and New York) have ruled (mostly unfavorably). For ICE detainees, there is a class action, which may lead to acceleration of releases because of COVID-19, including detainees with HIV: *Fraihat v. ICE*, 2020 WL 1032570 (C.D. Calif. 4/20/20), order enforced, No. 19-cv-1346 (10/7/20).

The federal agency data is not reliable or consistent, as noted for ICE facilities in the *Fraihat* litigation. Federal prisons do not tally COVID in their contractual "privately operated" institutions. For those operated by the Federal Bureau of Prisons, they report "testing" of staff and inmates, but not the percentage of such people who have been tested, or the criteria for testing. They also no longer count as "positive" those who have "recovered" from COVID-19. The absurdity of this reporting can be seen on the BOP website (1/29/21), which says: "There are 3,117 federal inmates and 1,782 BOP staff who have confirmed positive test results for COVID-19 nationwide. Currently, 42,671 inmates and 4,321 staff have recovered." [Note: in compassionate release cases, courts frequently only are told the first set of numbers – *see* below.]

The problem with federal resentencing is two-fold. First, petitions go back to the sentencing judge (unlike civil rights and *habeas*, which are brought in the district of incarceration). If this judge already granted a downward departure, she is unlikely to grant another one – although it has happened. The second problem is that the Sentencing Commission is currently defunct. Although Congress granted new grounds for resentencing in the First Step Act, 18 U.S.C. § 3624(c)(2), and authority in the CARES Act (§ 12003, along with an appropriation of almost a billion dollars) for the Attorney General to expand home release due to COVID-19, the Sentencing Commission has not acted to implement either statute, because six vacancies on the seven-member commission have precluded a quorum since at least 2018. Courts split on whether to follow the "old" sentencing guidelines or to fashion grounds consistent with the First Step and CARES Acts.

The split is shown in the cases that follow. Re-sentencing motions failed regardless of the test applied.

In **ALABAMA**, Chief U.S. District judge Kristi K. DuBose denied Justin James Nations' motion for reduction of sentence in *United States v. Nations*, 2021 WL 123382 (S.D. Ala., Jan. 12, 2021). Nations, 31 years old, is categorized as a "career offender" with drug conspiracy convictions, serving 151 months (which was a downward departure of more than 50% from sentencing guidelines). He has HIV, type-1 diabetes with neuropathy, hepatitis-C, and obesity. He is currently confined at Ft. Coleman Low (Florida). Before starting his current sentence, he was remanded after violating conditions of bail; he has served 54 months.

Judge DuBose applies the compassionate release standards of 18 U.S.C. § 3582(c)(1)(A)(i), "as amended by the First Step Act," but with the unamended Sentencing Guidelines. The Government concedes that Nations' ailments place him at increased risk of contracting and suffering from COVID-19. It argues, however, that his place of incarceration is relatively safe and that his resentencing would violate guidelines on society's safety. Judge DuBose accepts the Bureau of Prison's representations of only one COVID-positive inmate at Coleman Low. This is misleading. While the BOP website shows only one inmate positive test, it reports 203 inmates "recovered" from COVID at Coleman Low. It does not report the percentage tested. Judge DuBose finds that Nations' release would be incompatible with the society's safety.

In **VIRGINIA**, U.S. District Judge David J. Novak denied compassionate release to Joseph A. Prater, Sr., in *United States v. Prater*, 2021 WL 54364 (E.D. Va., Jan. 6, 2021). Prater (age unknown) has drug and firearm convictions. He was sentenced to 188 months in 2013, with a prospective release date in 2026. He is HIV-positive, with bladder and prostrate conditions. Judge Novak finds that his HIV is well-controlled (which removes him from HIV-related COVID-19 risk under CDC guidelines) and that his bladder and prostrate problems are not risk factors. There is no discussion of COVID-19 prevalence at Prater's institution of incarceration. Prater's HIV is not an "extraordinary and compelling" reason for release

under 18 U.S.C. § 3582(c)(1). Judge Prater applies the "old" sentencing guidelines, citing the pre-COVID-19 case of *United States v. Beck*, 425 F. Supp. 3d 573, 582 (M.D.N.C. 2019). Post-COVID-19, he relies on *United States v. Raia*, *supra*; and *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (inmate must show "both a particularized susceptibility to the disease and a particularized risk of contracting the disease at his prison facility"; "fear" is insufficient); *see also, United States v. Clark*, 451 F. Supp. 3d 651, 656 (M.D. La. 2020) (same). Even if criteria for release were met, the sentencing factors under § 3553(a) would not support it, because of Prater's recidivism and history of violence, including a drug-related shooting.

In **MICHIGAN**, U.S. District Judge Sean F. Cox denied compassionate release to James Michael Fizer, who was serving time for his fourth conviction of bank robbery, in *United States v. Fizer,* 2021 WL 129219 (E.D. Mich., Jan. 14, 2021). Judge Cox had already given Fizer a downward departure of 2½ years at sentencing because of childhood mitigating factors. Fizer is 53 years old and HIV-positive, but his condition is under control. He is set for release in March of 2023. Judge Cox notes that the First Step Act modifies the standards for release under 18 U.S.C. § 3582(c)(1)(A), as does concern "about the ongoing novel coronavirus pandemic."

Moreover, in light of the Sentencing Commission's failure to modify standards after the First Step Act, the court is not bound by the Commission's Guidelines. *United States v. Jones*, 980 F.3d 1098, 1101 (6th Cir. 2020). "Until the Sentencing Commission updates § 1B.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an 'extraordinary and compelling' reason justifies compassionate release." *Id*. at 1109. The court may, however, still deny release on a "balancing" of factors. *United States v. Ruffin,* 978 F.3d 1000, 1008 (6th Cir. 2020). Neither controlled HIV nor COVID-19 constitute by themselves "extraordinary factors." Fizer also failed to make his case about COVID-19 spread at St. Petersburg Medium (Virginia). [Note: the BOP website shows 11 positive inmates; and 251 inmates "recovered," from an inmate population of 1,463.] Fizer has clear recidivism and threatened to murder the teller at his last bank robbery. Judge Fox finds him to be a career criminal.

In **MASSACHUSETTS**, U.S. District Judge Nathaniel Matheson Gorton sentenced federal defendant Jose Rodriguez to 22 years for conspiracy to distribute heroin in 2006. Rodriguez has a release date in 2023. He filed a petition for compassionate release because of AIDS and COVID-19 in *United States v. Rodriguez,* 2021 WL 185225 (D. Mass., Jan 19, 2021). Judge Gorton appointed counsel, whose amended petition said that Rodriguez, incarcerated at FCI Schuylkill (Pennsylvania), was apparently receiving "excellent" HIV care. Rodriguez also has a history of hepatitis-C and chronic hypertension, which Judge Gorton does not mention. Judge Gorton also does not mention the Sentencing Guidelines, but he appears to apply the same ones he used in 2006, finding Rodriguez unqualified for compassionate release and still a danger to the community.

As to FCI Schuylkill, the U.S. Attorney told Judge Gorton in December 2020: "BOP has stated that there has been only one case where an inmate has tested positive and five cases where a staff member has tested positive," citing to an undated BOP website. (04-cr-10336, Docket # 675, page 5.) This BOP statement defies credibility. BOP's current website (1/29/21) shows 8 positive inmates and 14 positive staff – it says *245*_inmates and staff have "recovered."

Judge Gorton is known in Massachusetts for harsh criminal sentences for street crime. In 2019, he sentenced actress Lori Loughlin and her fashion designer husband Massimo Giannulli to two months and five months, respectively, for their involvement in a college admission fraud scandal.

In **NEW YORK**, U.S. District Judge David G. Larimer denied the compassionate release motion of Chris Kimbell in *United States v. Kimbell,* 2021 WL 210345 (W.D.N.Y., Jan 21, 2021). Kimbell is HIV-positive, well-controlled, with an "undetectable" viral load. His medical records do not show any other serious ailments. Judge Larimer did not consider Kimball's medical condition to warrant compassionate release. Kimbell has served 18 months of a 60-month sentence, which was a significant downward departure at sentencing (from the recommended 151-188 months). Judge Larimer considered a report from the U. S. Probation Office on conditions at FCI Cumberland (Maryland). It was apparently filed under seal.

Judge Larimer observes: "There does appear to have been a number of inmates testing positive at the facility, although there have been no recorded inmate or staff deaths. As noted by the Government, the Bureau of Prisons is taking appropriate steps to deal as best as possible in a prison setting with the virus." Respectfully, this is conclusory, at best. The BOP website shows an inmate population of 975, of whom currently (as of 1/29/21) 56 are COVID-positive and 320 are "recovered" – a 39% positivity rate – one of the highest in BOP. Judge Larimer applied the "old" sentencing Guidelines.

President Biden will have the opportunity to appoint six people to the Sentencing Commission, although the Act provides that no more than 4 of the 7 can be of the same political party. This is something to watch in the new Administration. ■

# Alabama Federal Court Rules State Policy on ID Violates Constitutional Rights of Transgender People

*By Joseph Hayes Rochman*

Fear, embarrassment, and shame are the emotions confronted by transgender people when they are forced to present identification that does not reflect their gender. A minority of states have passed laws or policies making it even more difficult for a transgender person to apply for a license or identification which shows their correct gender, placing residents in these states in the terrifying position of showing an incorrect ID or avoiding participation in everyday activities. An Alabama U.S. District Court, in *Corbitt v. Taylor*, 2021 U.S. Dist. LEXIS 8316, 2021 WL 142282 (M.D. Ala., Jan. 15, 2021), ruled that such a policy was unconstitutional. The court struck down Alabama Law Enforcement Agency (ALEA) Policy Order 63, requiring proof of gender-confirming surgery to accurately reflect a transgender applicant's gender, as unconstitutional under the 14th Amendment's Equal Protection Clause. Under "longstanding equal-protection jurisprudence," such sex-based classifications are analyzed under an intermediate version of heightened scrutiny. Senior District Judge Myron H. Thompson found that the State's asserted objectives were "thin ice over deep water."

Three transgender plaintiffs, Darcy Corbitt, Destiny Clark, and Jane Doe (represented by the ACLU) were denied licenses reflecting their accurate gender and sued Alabama, arguing that Policy Order 63 violated their privacy, due process, free speech, and equal protection rights. Because the court found that the policy violated the Equal Protection Clause, it did not address the other arguments.

Policy Order 63, adopted in 2012, required transgender Alabamians who sought to correct the gender marker on their identification to undergo complete gender-confirming surgery and submit a doctor's note to prove they completed the costly surgery. According to the court, whether the surgery was completed within the meaning of the policy was applied inconsistently. Judge Thompson noted that there appeared to be "no rhyme or reason" to its application.

The ACLU explained that transgender people may not undergo gender-confirming surgery, either for medical reasons or due to the cost, which may not be covered by insurance. Accordingly, many transgender Alabamians were forced to either go without an appropriate driver's license or to present identification indicating the wrong gender, exposing them to constant fear and feelings of embarrassment and shame.

That choice severely interferes with one's daily life. Alabamians must use their license for many daily activities taken for granted by most, such as voting, driving a car, renting a car, checking into a hotel, getting prescription medication, purchasing alcohol, ordering alcohol at a restaurant, and purchasing items with a credit card. Compelled to use identification showing the wrong gender, transgender people predominantly avoid or abstain from participating in these activities out of fear of harassment or public embarrassment. Indeed, the ACLU's filings quote one of the plaintiffs who finally received an accurate identification in another state. She no longer avoided daily activities and finally felt like a "full participant in life and that [her] government was accepting [her] as a human being worthy of being treated equally and with dignity."

Most states and the federal government do not require surgery to accurately reflect one's gender on their identification. The ACLU cited the American Association of Motor Vehicle Administrators (AAMVA), explaining that most states simply require a form filled out by any medical professional attesting to the individual's gender identity, and that modern policies do not require surgery. The AAMVA advises states that enact gender identification policies to work with interest groups and medical advisory boards. The ACLU noted that ALEA did neither when enacting Policy Order 63. The National Center for Transgender Equality has a dashboard on its website for users to find information about the current state policies. At the time the plaintiffs brought their case, 11 states required surgery.

Turning to the State's arguments, Judge Thompson rejected their contention that the plaintiffs are not harmed by Policy Order 63. "More concretely, carrying licenses with sex designations that do not match plaintiff's physical appearance exposes them to a serious risk of violence and hostility whenever they show their licenses." Judge Thompson explained that one-quarter of transgender people have been harassed after showing non-matching documents, one in six have been denied services, and more than half have been harassed or assaulted by law enforcement officers. Further, Judge Thompson wrote that the "risk is not hypothetical to these plaintiffs. Doe . . . was badly injured and nearly killed by her co-workers because of her transgender status."

After addressing the harm suffered by the plaintiffs, Judge Thompson explained that the policy is analyzed "as a sex-based classification not because it harms transgender people, but because it classifies driver license applicants by sex." Under intermediate scrutiny, the state must meet their burden that the classification served "important governmental objectives" and that the policy is "substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). The State may not rely on overbroad generalizations and the State's interests may not be "hypothesized or invented *post hoc* in

response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Alabama advanced two government objectives: (1) that the policy ensured consistency with Alabama's requirements for birth certificates, and (2) that the policy allowed for accurate identification by law enforcement officers. Judge Thompson, rejecting both arguments, wrote that "the path the court must take to answer that question is well worn."

First, the consistency with birth certificates explanation failed to meet the State's demanding burden. The State was unable to show evidence that applicants following Policy Order 63 also changed their birth certificate. Indeed, the chief of the agency's driver license division testified that inconsistency only resulted in extra documentation to track the applicant's information. Anyone who has spent time going to a DMV may surmise that less documentation has not been an obvious goal of the agency. Accordingly, the court found that "administrative ease and convenience is not a sufficiently important justification for a state policy based on sex."

Second, law enforcement identification also failed to meet their burden that it served an important government interest. The defendants contended that the policy aided law enforcement officers in enforcement and identification, for example during a traffic stop or booking procedures, and was contemporaneous with its goal of consistent documentation. The court easily rejected both arguments. Not only did the witness testimony not support this argument, but the defendants were unable to show why a sex designation that differed from an arrestee's gender identity would affect officers' identification needs. Judge Thompson elucidated that "licenses denoting the license-holder's genital status are wholly unhelpful for this purpose, as [the chief of the agency's license division] acknowledged that officers don't typically check a person's genitals when stopping or arresting them."

Thus, the Court found that the State's asserted interests were insufficient to meet the standards of intermediate scrutiny and were insubstantial or formulated *post hoc*. Policy Order 63 was unconstitutional under the Equal Protection Clause.

Counsel for plaintiffs include Brock Boone, ACLU of Alabama, Montgomery, AL; Randall C Marshall, ACLU of Alabama Foundation, Inc., Montgomery, AL; and Rose Saxe, ACLU LGBT Rights Project, New York, NY. Judge Thompson was appointed to the District Court by President Jimmy Carter, and he served as Chief Judge of the District from 1991 to 1998, taking senior status in 2013. ■

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# In Divorce Action, Texas Court of Appeals Continues to Punt Discussion of *Obergefell*'s Retroactivity

*By David Escoto*

On December 31, 2020, in an opinion by Judge Robbie Partida-Kipness, the Texas Fifth District Court of Appeals affirmed a trial court's judgment in a divorce action, finding that a same-sex couple had not met the requirements of either a formal marriage or informal marriage, also referred to as common law marriage in other jurisdictions. On appeal, the plaintiff raised the issue of the trial court's failure to adequately explain Texas's position regarding the retroactivity of *Obergefell v. Hodges*, 576 U.S. 644 (2015), after the jury inquired to the trial court about it. Despite acknowledging the debate on the issue, Judge Partida-Kipness dodges discussing this issue, perpetuating a degree of uncertainty over the status of some same-sex relationships in Texas. *Hinojosa v. LaFredo*, 2020 WL 8106614, 2020 Tex. App. LEXIS 10475 (Tex. App. Dec. 31, 2020).

Gustavo Hinojosa and Steve LaFredo met in New York City in November of 1997. After two years of dating, Hinojosa moved into LaFredo's co-op in 1999. They spent Christmas of that year with their friends in the Catskill Mountains. LaFredo gave Hinojosa a Christmas card during this trip with a handwritten note that read: "Will you Marry (commit) ME IN 2000? PLEASE!!!"

After the holidays, the couple began planning a commitment ceremony. They considered having a dinner in New York or a ceremony in Vermont, which had recently legalized civil unions. The couple ultimately decided to host the ceremony in Italy because Hinojosa had spent time in Rome during college and because of LaFredo's Italian heritage.

The couple invited forty-seven of their friends and family to a Tuscan villa in October 2000 for a week-long celebration. The invitation indicated that the commitment ceremony was to occur at the villa on October 26, 2000. The description of the actual ceremony is disputed. The video of the ceremony shows the officiant leading the couple and guests into the villa while burning sage to purify the room. The officiant described the ceremony as an "ancient pagan celebration of unity." The couple exchanged rings, lit a unity candle, and accepted each other as their life partner. The officiant did not use the words marriage or spouse at any point during the ceremony.

Hinojosa described the ceremony as a wedding because they exchanged vows and custom-designed rings. He said that at the reception, other wedding traditions, like cutting the cake together and pushing a piece of cake into each other's faces, occurred. Further, Hinojosa alleged that LaFredo never objected to referring to the ceremony as a wedding and that LaFredo referred to the ceremony as "their wedding" on multiple occasions.

On the other hand, LaFredo described the ceremony as only a commitment ceremony. LaFredo was adamant that he and Hinojosa took deliberate steps to ensure the ceremony did not look like a marriage. They purposely picked a location that did not recognize same-sex marriages or civil unions because they were not interested in "a piece of paper." LaFredo testified that he was unsure if the officiant was even licensed to perform a wedding ceremony and saw the officiant as more of a coordinator.

LaFredo testified that upon their return to New York, he had only referred to Hinojosa as his partner and that nothing had changed for the couple. Further, in 2003, after Massachusetts legalized same-sex marriage, the couple traveled to Cape Cod but never discussed marriage. LaFredo told the jury that he was unsure that even if same-sex marriage was legally recognized at the time that he would have proposed marriage to Hinojosa. Hinojosa testified that upon returning to New York, the couple referred to themselves as married in front of others and he would introduce LaFredo to others as his spouse.

The couple lived together in New York until 2005, when LaFredo's company transferred him to Dallas, Texas. The couple purchased property in Dallas and signed the purchase documents as "single men" who were co-owners of the property. Throughout their relationship they maintained separate bank accounts, filed separate tax returns, and split expenses evenly.

In 2006 and 2010, the relationship became rocky. LaFredo testified that by 2014 he had had enough of the relationship and decided to accept a job in Houston and move out. Hinojosa did not move with him to Houston. In an April 2014 phone call, LaFrdo told Hinojosa that he did not want to continue with the relationship.

Hinojosa has a different account of the couple's break-up. Hinojosa testified that LaFredo moved to Houston to see if the job would be a good fit for them. According to Hinojosa, they visited each other several times. The relationship became troubled around March 2015, which led Hinojosa to file for divorce in August 2015.

Hinojosa pleaded at trial that the couple was formally married on October 26, 2000, or established an "informal marriage" that should be recognized by Texas law as of March 1, 2005.

At trial, Hinojosa and LaFredo each had witnesses who testified to the validity of their respective position on their ceremony and relationship. Hinojosa's witness felt that the ceremony was a wedding and that the couple held themselves out as married when they socialized in New York and later in Texas. LaFredo's witnesses testified that the word "marriage" was never used throughout the ceremony and that the couple never referred to themselves as married, spouses, or husbands.

The trial court appeared to find the evidence LaFredo presented regarding a formal marriage more compelling because the jury charge did not include the question of whether the couple was formally married during the Italian ceremony. Instead, the jury charge was limited to whether the couple was informally married and when.

The special instructions for the jury charge explained that two people are informally married if they agree to be married, live with each other in Texas as spouses, and represent to others that they were married. The jury instruction included a statement that indicated that before *Obergefell*, Texas did not legally recognize same-sex marriage. Before delivering the verdict, the jury asked the judge: if a same-sex couple met the requirements of an informal marriage before June 26, 2015, does the *Obergefell* decision dictate whether the marriage date is the date of that decision or the date when the couple satisfied the conditions for an informal marraige?

The trial court responded, stating that the jury had "all the law and instructions to answer the question in the jury charge." The jury's verdict found that that the couple had not entered into an informal marriage. On October 31, 2018, the court signed a final order on the verdict, stating that no marriage existed between Hinojosa and LaFredo. After a motion for a new trial was denied, Hinojosa appealed.

On appeal, Hinojosa raised two issues regarding the trial court's abuse of discretion: first, the trial court's refusal to include a question in the jury charge regarding formal marriage; second, contending that the jury instruction indicating that Texas did not recognize same-sex marriage until *Obergefell* confused the jury and likely resulted in an improper verdict.

Judge Partida-Kipness disposed of the first issue, noting that the evidence on this issue is undisputed and that there was no way to satisfy the requirements of a formal marriage in the absence of a marriage license. Regarding this issue, Hinojosa contends that *Obergefell* retroactively removed the legal impediments to recognizing a formal marriage and that their ceremony, regardless of its character, should establish a formal marriage. Unfortunately, Judge Partida-Kipness punts the question of the retroactivity of *Obergefell*.

Regardless of whether retroactive application of *Obergefell* would have changed the outcome here, the deferral of this discussion perpetuates confusion

over what *Obergefell* means for same-sex couples. Judge Partida-Kipness points out that there is a debate among the courts about the retroactivity of *Obergefell* since the decision was issued five years ago, but then fails to contribute any discussion of substance on the matter. It is important that judges begin to provide clarity on the scope of *Obergefell* instead of deflecting, waiting for another judge to address the confusion.

Regarding the second issue on appeal, Judge Partida-Kipness does not find that the instruction to the jury about *Obergefell's* date was confusing or caused the jury to reach an improper verdict. The jury's request for clarification bore weight only on determining when the couple was married, held the court, a question that the jury did not even consider because they determined that Hinojosa and LaFredo were not married. Further, Judge Partida-Kipness points to procedural missteps that indicate that Hinojosa did not properly preserve either issue for appeal. Judge Partida-Kipness concluded that the trial court did not abuse its discretion in any respect and affirmed the trial court's judgment.

Hinojosa is represented by Patrick J. Clabby of The Law Office of Patrick J. Clabby, PLLC in Arlington, Texas. LaFredo is represented by Darlene G. Jones-Darensburg of The Law Office of Darlene Jones-Darensburg, Elizabeth Mary Johnson of the Law Office of Beth Johnson, Georganna L. Simpson of Georganna L. Simpson, P.C., and Jeremy C. Martin of Martin Appeals PLLC, all located in Dallas, Texas. ■

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

# Maryland District Court Finds a Secret Board Meeting May Have Led to Discriminatory Termination

*By Corey L. Gibbs*

Dr. Chloe Schwenke, an out transgender woman, was an Executive Director for the Association of Writers & Writing Programs (AWP). While many seemed excited to have her working at AWP, one Board member was particularly critical of her. Following the Board member's "wildly inappropriate" emails about Dr. Schwenke and a secret meeting, AWP's Board terminated her following a quick vote. Dr. Schwenke filed a complaint containing a single count of gender discrimination under both Title VII of the Civil Rights Act of 1964 and the Fairness for All Marylanders Act of 2014. U.S. District Judge Deborah K. Chasanow denied AWP's motion to dismiss in *Schwenke v. Ass'n of Writers & Writing Programs*, 2021 WL 22422; 2021 U.S. Dist. LEXIS 360 (D. Md., Jan. 24, 2021).

Dr. Schwenke began her job as Interim Executive Director for AWP in April 2018. Following an abundance of positive reviews and contract extensions, she was brought on as permanent Executive Director in early 2019. Only two Board members did not approve her hiring.

Mr. Trott, one of the Board members who did not approve of Dr. Schwenke's hiring, avoided interacting with her. Although her performance was never formally brought into question, Mr. Trott began harshly criticizing her through a series of emails. Dr. Schwenke and other Board members found the emails to be sexist, bullying, and wildly inappropriate, so she attempted to reach out to him to resolve any issues that he had with her. However, he simply continued to criticize her.

Unbeknownst to Dr. Schwenke, her staff was surveyed to see if she caused bad morale amongst the staff at AWP. Upon discovery of the survey, she sought to ensure moral remained high by planning a team-building intervention. As she worked to keep morale up, Mr. Trott and another Board member, Dr. Culver, called a secret Board meeting to vote on Dr. Schwenke's termination. She was terminated on September 7, 2019, allegedly due to concerns over AWP's finances, an erosion of morale, and a claim that she made unauthorized expenditures.

At a hearing for unemployment benefits, the Maryland Department of Labor, Licensing and Regulation found that her termination was not justified. Later, Dr. Schwenke filed a formal complaint with the U.S. Equal Employment Opportunity Commission. Finally, she filed the present action within the appropriate time period after receiving her right-to-sue letter from the EEOC.

AWP claimed that Mr. Trott and Dr. Culver could not single-handedly terminate Dr. Schwenke and that she failed to show that 'but for' her transgender status she would not have been terminated. Additionally, AWP relied on the grant of certiorari in *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019), instead of the actual decision that was issued prior to this action. However, Dr. Schwenke argued that she was not required to allege all of the elements of her prima facia case in the complaint and cited an actual case to support her argument. Judge Chasanow seemed to agree with Dr. Schwenke, writing, "Plaintiff describes emails from Mr. Trott that evince discriminatory animus toward Dr. Schwenke as a transgender woman and that, when coupled with the abrupt, secretive and atypical way in which she was terminated, demonstrate that but for her gender identity, she would not have been terminated."

Next, the judge considered whether the state law claim should be analyzed with or apart from the Title VII claim. In *Holland v. Washington Homes, Inc.*, the Fourth Circuit stated that the Maryland

law was analogous to Title VII. 487 F.3d 208, 214 (4th Cir. 2007). With this view of the Maryland law, Judge Chasanow concluded that the elements of both the state law claim and the Title VII claim were almost completely the same. However, Maryland explicitly protected transgender employees, while Title VII protected transgender employees under its definition of sex discrimination.

Judge Chasanow finished her analysis by stating that Dr. Schwenke sufficiently alleged that the reasons for her termination were pretextual, so her Title VII claim survived. The judge noted that the state law claim survived because the Title VII claim survived. AWP's motion to dismiss was denied.

Dr. Chloe Schwenke was represented by Denise M. Clark. The Association of Writers & Writing Programs was represented by Lynn Perry Parker. ■

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*Corey L. Gibbs is a law student at New York Law School (class of 2021).*

# Wisconsin Appeals Court Finds Banning Transgender Sex Offender From Legal Name Change is Constitutional

*By Arthur S. Leonard*

In *State of Wisconsin v. C.G (In the Interest of C.G.).*, 2021 WL 191606, 021 Wisc. App. LEXIS 18 (Ct. App. Wis., January 20, 2021), the Court of Appeals affirmed the trial court's rejection of a transgender teen's argument that the state's sex offender registry statute violates her constitutional rights by prohibiting her from legally changing her name.

Using the name "Ella," the transgender girl participated with another girl in holding down an autistic boy while performing oral sex on him over his protests. She was convicted and sent to a state institution for psychological treatment, as well as being required to register as a sex offender, a status that would disqualify her from legally changing her name – something she had hoped to do upon completion for her transition. She asked the court to stay the registration requirement, asserting that her 1st and 8th Amendment rights would be violated by imposing the name-change restriction on her, but Shawano County Circuit Judge William F. Kussel denied her request.

Wrote Judge Mark Seidl for the panel, "Ella argues that the name-change ban in the sex offender registry statute regulates her right to express female identity and is therefore an unconstitutional burden on her free speech. Ella contends that having a name consistent with her gender identity gives her 'dignity and autonomy that otherwise does not exist with her birth name.' She further contends that her ability to informally identify with a female-sounding name — as long as she notifies the registry that she uses such a name — is insufficient to protect her right to formally identify in that manner with a name other than her current legal name. This inability, according to Ella, prohibits her from truly identifying as a woman, and it also forces her to 'out herself as a male anytime she is required to present her legal name.'"

The court was not sympathetic, finding that the trial judge's refusal to stay the registration order was not an abuse of discretion, and specifically rejecting the argument that the denial of a name-change violates constitutional rights. "This court rejected a similar argument in *Williams v. Racine County Circuit Court*, 197 Wis. 2d 841 (Ct. App. 1995). There, the circuit court denied a prisoner's petition to change his name pursuant to WIS. STAT. § 786.36. On appeal, the prisoner argued that denying his requested name change violated his protected right to religious freedom and his First Amendment rights. We rejected that argument, reasoning that the prisoner had 'no positive right to a name change.'"

Seidl wrote that it was sufficient that Ella could use her preferred name informally, so long as her registration indicated that she was not using her legal name. The goal of registration of informing law enforcement and others of the whereabouts of convicted sex offenders would be undermined by allowing legal name changes. "Neither the fact that she may feel uncomfortable when having to use her legal name, nor that she feels 'outed' when she does use her legal name, renders the statute unconstitutional as applied to her," wrote Seidl. "Ella is capable of expressing herself and identifying herself consistent with her gender identity. Because the name-change ban in WIS. STAT. § 301.47 does not restrict Ella's ability to express herself, we need not utilize a First Amendment analysis because the statute does not implicate the First Amendment."

As to Ella's 8th Amendment challenge, Seidl wrote: "Ella's argument regarding the Eighth Amendment fails because our supreme court has held that Wisconsin's sex offender registration requirement does not constitute punishment at all."

The opinion does not indicate counsel for Ella. ■

# West Virginia Federal Judge Allows Class Action Challenge to Regional Jails' Medical Care, including HIV Treatment

*By William J. Rold*

West Virginia jails are organized on a regional basis, and this class action challenges their delivery of medical and mental health treatment, including HIV care. The long opinion is also useful to advocates for incarcerated LGBT clients with medical issues, because of its handling of mootness and exhaustion issues, the standard of proof for deliberate indifference in jails, the liability of supervisors for vendors' performance, the effect of accreditation, and the application of the Americans with Disabilities Act to inmates' health care. In *Baxley v. Jividen,* 2020 U.S. Dist. LEXIS 239699; 2020 WL 7489760 (S.D. W. Va., Dec. 21, 2020), U.S. District Judge Robert C. Chambers grants in part and denies in part defendants' motion for summary judgment.

The plaintiffs raised claims about initial screening for medical and mental health problems, access to physicians, continuity of care, denial of ordered care, failure to treat chronic illnesses, and general neglect. The HIV-positive patient claimed denials of anti-retroviral medication and spotty provision of only one of his medications, which was repeatedly out of stock.

Only two of the seven plaintiffs were still at their original jails at the time of summary judgment. Two were in other jails covered by the suit, and the remaining inmates had been released or transferred to state prisons. The class certification "relates back" to the plaintiffs' claims at filing, however, and saves the case from mootness under *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

Judge Chambers exhaustively discusses exhaustion under the Prison Litigation Reform Act. He finds the grievance system in West Virginia jails exists on paper, but it is not available in practice. Inmates made the usual allegations about complaints being discouraged, "lost," denied without explanation or simply "closed," and appeals disappearing. Judge Chambers found that paper grievances were not available and that inmates were required to enter their complaints into an electronic "kiosk" system, which also handled appeals. This largely confirmed the allegations of unavailability. He noted: "Determining what administrative remedies or procedures are available requires courts to look beyond what procedures are 'on the books.'" *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). He found that there was "no way" an "ordinary prisoner can discern or navigate" the Defendant's grievance process. *Id*. at 1860. Perhaps the most remarkable evidence concerned appeals: of 5,034 grievances tallied by the kiosks, defendants could produce only ten appeals in discovery, which Judge Chambers understatedly called "unlikely." "Defendant's exhaustion procedure was simply unavailable. *See Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1115-17 (M.D. Ala. 2016)."

Turning to the merits, Judge Chambers noted that the standard objective/subjective test for deliberate indifference under the Eighth Amendment was applicable to pre-trial detainees under *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992); but the use of the subjective test was undermined by Supreme Court's excessive force decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 391, 398 (2015). *Kingsley* applied Due Process Clause to detainees, using objective tests for state of mind requirements involving force against detainees. *See Seth v. McDonough*, 461 F. Supp. 3d 242, 259 (D. Md. 2020) (noting the tension between *Kingsley* and *Hill*). The circuits are split on the application of *Kingsley* to detainees' medical care claims, and the Fourth Circuit has not ruled. Judge Chambers finds it unnecessary to rule on the point, since the more exacting standards of the Eighth Amendment are satisfied.

The objective test is met because plaintiffs showed "a substantial risk of such serious harm resulting from the prisoner's exposure to the challenged conditions." *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (transgender inmate case). Here, the allegations of systemic violation overcome infirmities in some named plaintiff's cases, since the risk that they would be subject to unconstitutional conditions is objectively severe, citing *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011).

The subjective prong is satisfied, because the substantial risk of serious harm is "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official . . . had been exposed to information concerning the risk and thus must have known about it." *Scinto v. Stansberry*, 841 F.3d 219, 226 (4th Cir. 2016), quoting *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004); *De'Lonta,* 330 F.3d at 634.

The West Virginia regional secretary was a proper defendant, notwithstanding that all health care was provided by contractual vendors, Wexford and PrimeCare. The constitutional duty is not delegable – *Raynor v. Pugh*, 817 F.3d 123, 127 (4th Cir. 2016) – and contracting "does not permit [Defendant] to assume she has met her constitutional duty." Judge Chambers finds that the evidence "could support a finding that [Defendant] has willfully turned a blind eye to evidence that [jails'] current health care policies leave inmates at risk of harm," listing: no site inspections; no review of contractors' manuals and protocols; no utilization review; absence of statistical summaries; no review of reception screenings; no licensure checks; no reports on timely completion of health assessments; no audits or chart reviews; no formal performance reports; no contractual compliance review; and no review of subjects of inmate grievances. This is a road map for future supervisory litigation.

Defendants argued that accreditation by the National Commission on Correctional Health Care was a defense to deliberate indifference "as a matter of

law," citing *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999). In *Grayson*, however, accreditation was but one factor in affirming summary judgment in a case where the court found that no one could have predicted the individual drug withdrawal death of the inmate and it was not shown that any amount of training would likely have prevented it. "The Court declines to wholly cede to NCCHC's judgment in this case."

On the Americans with Disabilities Act [ADA] claim – 42 U.S.C. §§ 12131-12132 – Judge Chambers grants defendants summary judgment, except as to one plaintiff. The twin duties to accommodate and not to discriminate in the ADA apply to corrections under *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). Nevertheless, prisoners cannot use the ADA to state a claim for lack of medical treatment. "[T]he Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners." *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996); *see also Mondowney v. Balt. Cty. Det. Ctr.*, 2019 U.S. Dist. LEXIS 119566, 2019 WL 3239003, at *21 (D. Md., July 18, 2019).

One plaintiff, with orthopedic injuries, stated an ADA claim for deprivation of a lower bunk and a double mat for sleeping. This allegedly "exacerbated the pain she experienced due to her disabilities." *See Pierce v. Cty. of Orange*, 526 F.3d 1190, 1217-18 (9th Cir. 2008) (finding jails failed to accommodate disabled detainees by denying them physical access to wheelchair accessible toilets and sinks and excluding disabled inmates from rehabilitative and vocational opportunities); *Jarboe v. Md. Dep't of Pub. Safety & Corr. Servs.*, 2013 U.S. Dist. LEXIS 34808, 2013 WL 1010357 (D. Md. Mar. 13, 2013) (deaf and hearing impaired inmates denied accommodations); *Phipps v. Sheriff of Cook Cty.*, 681 F. Supp. 2d, 899, 904 (N.D. Ill. 2009) (paralyzed detainees denied wheelchair-accessible toilets, sinks, and showers). Whether transgender inmates can invoke the ADA for accommodation of transition is beyond the scope of this article.

Plaintiffs are represented by Mountain State Justice, Inc. (Morgantown). ■

# California Court Holds That YouTube Hasn't Discriminated Against LGBTQ+ Content Creators When It Flagged Their Videos as Age-Restricted or "Potentially Adult"

*By Filip Cukovic*

In *Divino Group v. Google*, multiple LGBTQ+ YouTube content creators joined forces and sued Google on the basis that its subsidiary, YouTube, discriminated against them by censoring or otherwise interfering with certain videos that plaintiffs uploaded to YouTube. Specifically, plaintiffs claimed that this censorship took the form of placing age restrictions on some of plaintiffs' videos and limiting access to their videos through YouTube's Restricted Mode setting. Moreover, YouTube also allegedly "demonetized" some of the plaintiffs' videos—by preventing advertisements from running on those videos—in a viewpoint-discriminatory manner. In a lengthy decision issued on January 1, 2021, U.S. Magistrate Judge Virginia K. Demarchi dismissed all 6 theories advanced by plaintiffs as she granted Google's motion to dismiss. *Divino Grp. LLC v. Google LLC*, 2021 WL 51715 (N.D. Cal. Jan. 6, 2021)

To fully understand this case, it's necessary to first understand how YouTube – the world's most popular video hosting platform – operates. Content creators who agree to YouTube's Terms of Service are allowed to upload for free as many videos to the YouTube platform as they wish. In return, YouTube generates profit by running ads that are displayed as the YouTube videos are played.

If users upload videos that are in violation of the Terms of Services, YouTube will take the videos down. Moreover, to accommodate "sensitive" viewers, YouTube offers a feature called Restricted Mode, which allows viewers to screen out content flagged as age-restricted or "potentially adult." Generally, YouTube employs Restricted Mode to limit viewer access by younger, sensitive audiences to video content that contains a reference to things such as conversations about drug use; overly detailed conversations about or depictions of sex or sexual activity; graphic descriptions of violence, violent acts, or natural disasters or tragedies, profane language, and so on. Of YouTube's daily views, 1.5% (or approximately 75 million of the nearly 5 billion daily views) are from viewers who have activated Restricted Mode.

YouTube also allows content creators whose channels meet certain minimum viewership requirements to earn revenue from, or "monetize," their videos by running advertisements with them as part of the YouTube Partner Program. To be eligible for monetization, content creators must agree to Partner Program Terms of Service. In Program Terms, YouTube provides that "YouTube is not obligated to display any advertisements alongside your videos and may determine the type and format of ads available on the YouTube Service."

This brings us to the case of *Divino Group v. Google*. All plaintiffs are members of the LGBTQ+ community and they are all content creators who use the YouTube platform. Some of the plaintiffs also monetize their content by participating in the YouTube Partner Program. Plaintiffs asserted in their complaint that despite YouTube's purported viewpoint neutrality, YouTube has discriminated against plaintiffs based on their sexual or gender orientation by censoring or otherwise interfering with certain videos that plaintiffs uploaded to YouTube. Specifically, plaintiffs allege that YouTube has restricted access to some of plaintiffs' videos based on

their discriminatory animus toward plaintiffs' sexual orientation.

Moreover, plaintiffs also claimed that YouTube has "demonetized" some of their videos by preventing advertisements from running on those videos. Plaintiffs also allege that YouTube itself has begun producing content that competes with plaintiffs' content and therefore YouTube has a financial motivation to behave in anticompetitive ways. Thus, plaintiffs argued that such behavior on the part of YouTube violated the First Amendment; the Lanham Act; Article I, section 2 of the California Constitution; the Unruh Act; California Business and Professions Code; and the implied covenant of good faith and fair dealing. Judge DeMarchi dismissed all those claims.

First, plaintiffs asserted a violation of their First Amendment rights under 42 U.S.C. § 1983. To prevail on this claim, plaintiffs had to show that a person acting under color of state law proximately caused a violation of their constitutionally protected right. To avoid an obvious objection to their First Amendment claim – namely that YouTube is part of a private entity which by extension means that they cannot violate anyone's First Amendment rights – plaintiffs argued that defendants have unreservedly "designated" YouTube as a public forum for free expression and have therefore taken on the traditional government function of regulating speech in that forum according to the requirements of the First Amendment.

The court easily dismissed this claim by citing a recent Ninth Circuit precedent which held that YouTube's hosting of speech on a private platform is not a traditional and exclusive government function. *See Prager University v. Google LLC*, 951 F.3d 991 (9TH Cir. 2020). In that decision, the Ninth Circuit noted that the Supreme Court has consistently declined to find that private entities engage in state action, except in limited circumstances not applicable here.

The court also dismissed plaintiffs' second theory regarding YouTube's alleged violation of plaintiffs' First Amendment rights. Namely, plaintiffs argued that the availability of protections under Section 230 of the Communications Decency Act (CDA) amounts to government endorsement of defendants' alleged discrimination. Section 230 generally provides immunity for website publishers from liability for third-party content. At its core, Section 230(c)(1) provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by third-party users. The problem with plaintiffs' theory that by virtue of this federal statute, the federal government endorsed YouTube's alleged discrimination, is that their 42 U.S.C. § 1983 claim applies only to action taken under color of state law, not federal law.

Moreover, while a private entity may be considered a state actor when the government compels the private entity to take a particular action, the court held that plaintiffs failed to plead any such compulsion. Specifically, in the court's view, there is nothing about Section 230 that can fairly be categorized as coercive. In fact, Section 230 reflects a deliberate absence of government involvement in regulating online speech, as the section was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum. Furthermore, plaintiffs never alleged that any governmental actor has encouraged or ordered any conduct by YouTube. Specifically, plaintiffs do not allege that YouTube applied Restricted Mode designations to some of plaintiffs' videos or demonetized them by compulsion of the federal government. Thus, plaintiffs' suggestion that the mere availability of Section 230 immunity demonstrated the government's encouragement of discrimination was rejected, and plaintiff's First Amendment claim was dismissed.

Plaintiffs also argued that Facebook violated the Lanham Act based on allegations of false advertising. In particular, plaintiffs say that defendants' improper application of Restricted Mode to their videos constitutes false advertisement, because it degraded and stigmatized plaintiffs' content by falsely labeling it as or implying that it contains "shocking," "inappropriate," "offensive," "sexually explicit," or "obscene" content or is otherwise unfit for minors.

To establish a claim for false advertising under the Act, plaintiffs had to allege that YouTube made a false or misleading representation of fact in commercial advertising or promotion about plaintiffs' goods, services, or commercial activities. The Ninth Circuit has explained that "commercial advertising or promotion" requires the showing of the following four elements: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Here, plaintiffs argued that by making their videos inaccessible to some YouTube users through application of Restricted Mode, YouTube falsely implied that the videos contained shocking or inappropriate content. Moreover, Plaintiffs alleged that YouTube has engaged in such behavior for purposes of diverting customers away from plaintiffs' videos. However, the court dismissed plaintiffs' claim on the basis that, like their First Amendment claim, the Lanham claim is also foreclosed by the Ninth Circuit precedent. More specifically, in the *Prager III* case, the Ninth Circuit already held that YouTube's statements about Restricted Mode were made to explain a user tool, not for a promotional purpose to 'penetrate the relevant market' of the viewing public. Thus, the fact that plaintiffs' videos were tagged to be unavailable under Restricted Mode did not imply any specific representation about those videos. Instead, the statements were simply explanations of the application of defendants' content review and monitoring procedures.

In addition to their unsuccessful federal claims, plaintiffs also pleaded several state claims. Specifically, plaintiffs asserted claims for: (1)

violation of Article I, section 2 of the California Constitution; (2) violation of the Unruh Act, California Civil Code § 51, et seq.; (3) unfair competition under California Business and Professions Code §§ 17200, et seq.; and (4) breach of the implied covenant of good faith and fair dealing. However, the court did not address any of the state claims, because it refused to exercise supplemental jurisdiction over those claims. In explaining its refusal to exercise jurisdiction, the Court cited to 28 U.S.C. § 1367(c)(3), stating that a court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it had original jurisdiction. Here, the court concluded that the factors of economy, convenience, fairness, and comity supported dismissal of plaintiffs' remaining state law claims.

Finally, plaintiffs were also unsuccessful in asserting a claim seeking a declaration that Section 230 of the CDA was unconstitutional for all the reasons outlined under the First Amendment analysis. Thus, the court granted defendants' motion to dismiss, but it allowed plaintiffs to file an amended complaint by January 20, 2021, if they could find an alternative federal claim supported by their factual allegations.

Plaintiffs were represented by Debi Ann Ramos and Eric Marc George from Browne George Ross LLP, Los Angeles, CA; and Peter Obstler from Browne George Ross LLP, San Francisco, CA. ■

*Filip Cukovic is a law student at New York Law School (class of 2021).*

# Romania's Refusal to Grant Gender and Name Change Applications from Transgender Men Absent Surgery Violated Article 8 of the European Human Rights Convention

*By Eric Wursthorn*

According to a press release issued by the Registrar of the European Court of Human Rights dated January 19, 2021, the Court found that Romania violated of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms by refusing to change gender markers and names on government documents for two transgender men because they had not undergone gender reassignment surgery *Case of X and Y v. Romania*, Applications nos. 2145/16 and 20607/16. The Judgment is available in French only, and this article is based on the detailed English-language press release.

The case was brought by two Romanian nationals, who are identified by the court as X and Y. X and Y were born in 1976 and 1982, respectively. Prior to bringing their applications in the domestic courts, both had undergone hormonal therapy and had mastectomies. However, neither had undergone gender reassignment surgery. In 2013 and 2011, X and Y applied to the Romanian District Court requesting the court to authorize gender reassignment from female to male, name changes and new birth certificates indicating their new forename and male gender. Y's initial application also requested authorization to undergo female-to-male gender reassignment surgery. Although the courts found that both X and Y were transgender, their applications were denied. The District Court stated that once gender reassignment surgery was performed, they could reapply. Y filed a second application with the District Court, this time omitting a request for authorization for surgery. That application was also denied as was Y's appeal.

X also appealed the denial of his application. He argued that the surgery requirement constituted a serious interference with his physical integrity. He further asserted that no doctor in Romania would perform a gender reassignment surgery without a court order authorizing it. X lost the appeal as well. In 2014, X moved to the United Kingdom, where he was able to obtain male forenames on government documents. He asserted that "he has suffered constant inconvenience owing to the mismatch between the female identifier on the papers issued by the Romanian authorities and the male identifiers on the various documents obtained in the United Kingdom."

Meanwhile, in 2017, Y underwent gender reassignment surgery. Thereafter, he brought another application for gender and name change in the District Court, which was granted in 2018.

X and Y filed complaints with the ECHR. They both argued that Romania violated Article 8 of the Convention. X further asserted that Romania had violated Article 3 as well as other provisions of the Convention. The applicants complained that the Romanian State had not established a clear framework for the legal recognition of gender reassignment and that "forcing them to undergo gender reassignment surgery – with the attendant risk of sterilization – as a prerequisite for a change in their civil status had breached their right to respect for their private life."

Ultimately, the ECHR found that Romania lacked a clear framework for gender and name changes and that the refusal to grant gender reassignment in the absence of surgery amounted to an unjustified interference with X and Y's right to respect for their private life.

The court relied upon recommendations made by international bodies including the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, as well as the United Nations High Commissioner for Human Rights and the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. These amici advocated for member states to adopt procedures allowing persons to have their name and gender changed on official documents in a quick, transparent and accessible manner. In addition, the Court observed that "an ever-smaller number of countries require gender assignment surgery as a prior condition for legal recognition of gender identity."

Thus, the court found that Romania's "rigid approach to the recognition of the applicants' gender identity" violated of Article 8 of the Convention. Specifically, the ECHR stated that Romania had presented X and Y with "an impossible dilemma: either they had to undergo the surgery against their better judgment – and thus forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of the right to respect for private life." The Court concluded that making X and Y choose between these two important competing interests thus "upset the fair balance to be struck by the States Parties between the general interest and the individual interests of the persons concerned." In finding an Article 8 violation, the court declined to rule on X's complaints that Articles 6, 13 and 14 had also been violated. The court granted both X and Y non-pecuniary damages in the amount of 7,500 Euros each as well as costs and expenses. ■

# Croatia Violated Article 3 of the Convention by Failing to Properly Investigate/Prosecute Hate Crime

*By Eric Wursthorn*

In a Judgment dated January 14, 2021, the European Court of Human Rights (ECHR) (First Section), held that the Croatian government violated Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms because it "failed to discharge adequately and effectively their procedural obligation under the Convention concerning the violent attack against the applicant motivated by her sexual orientation." *Case of Sabalić v. Croatia*, Application No. 50231/13.

The case was brought by Pavla Sabalić, a Croatian national who resides in Zagreb, the capital and largest city in Croatia. The underlying incident occurred on January 13, 2010, when Sabalić went to a nightclub in Zagreb with several friends. At approximately 5:45 a.m., Sabalić told a man who had been flirting with her that she had a girlfriend. In response, the man grabbed her, threw her against a wall and then began hitting and kicking her while shouting "You lesbian!", "All of you should be killed!", and "I will f… you lesbian!" One of Sabalić's friends managed to scare him off by shooting a gas pistol at him.

Two police officers from the local police department responded to the attack and generated a police report. The officers were able to identify the attacker via the license plates on his car. The attacker was immediately apprehended and interviewed. The attacker, identified as M.M. in the court's decision, claimed he observed a group of women fighting amongst themselves and simply tried to calm them down. M.M. further claimed to not remember any other details from that night because "he had been drunk".

Meanwhile, Sabalić went to the hospital and was diagnosed with "minor bodily injuries" such as contusions of the head and chest, abrasions on her face, palms and knees, neck strain and hematoma.

Thereafter, the police interviewed Sabalić, M.M. and other witnesses to the attack. On January 14, 2010, the police initiated minor offenses proceedings against M.M. for "breach of public peace and order." There was no mention in the indictment of the fact that Sabalić identified herself to M.M. as a lesbian or any of the anti-LGBT sentiments that he expressed while he attacked her. On April 20, 2010, M.M. confessed to the charges against him, was found guilty and fined 300 Croatian kunas (approximately 40 Euros).

When Sabalić learned that the police failed to initiate more significant criminal proceedings against M.M., she filed a complaint with the Zagreb Municipal State Attorney's Office on December 29, 2010. The State Attorney then directed the police to investigate Sabalić's allegations and on April 28, 2011, asked an investigating judge of the Zagreb County Court to conduct a further investigation "in connection with a reasonable suspicion that M.M. had committed the offences of attempted grave bodily injury and violent behavior, motivated by the hate crime element, and the criminal offence of discrimination against the applicant." The investigating judge interviewed both Sabalić and M.M., but upon learning that M.M. had been convicted in the minor offences proceeding, the judge held that the matter had been "finally adjudicated" which "excludes further criminal prosecution".

The State Attorney informed Sabalić that she could take over the criminal prosecution of M.M. as a "subsidiary prosecutor." Sabalić argued that the matter had not been finally adjudicated, but the Criminal Court rejected her indictment, and that decision was upheld on appeal.

Sabalić filed the instant proceeding before the ECHR complaining "of a lack of an appropriate response of the domestic authorities to the act of violence against her, motivated by her sexual orientation." Sabalić argued that there was no doubt that M.M. attacked her because of her sexual orientation. She further maintained that "the attack had made her feel humiliated and debased, which she could never forget."

The Croatian government argued that the attack was not severe enough to implicate Article 3 of the Convention, which reads: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Croatia further argued that Sabalić's injuries were minor, and that the government's response was appropriate because both she and her attacker were under the influence of alcohol, Sabalić could not remember all the details of the attack, and she "only thought that her sexual orientation had been the motive for the attack".

The ECHR held that there could be no dispute that M.M.'s attack was motivated by her sexual orientation. Further, the court found that Article 3 was implicated because the attack was "directed" at Sabalić's identity, "undermined her integrity and dignity", and "must necessarily have aroused in her feelings of fear, anguish and insecurity reaching the requisite threshold of severity to fall under Article 3 of the Convention."

The ECHR noted that at the heart of Sabalić's complaint was Croatia's failure to investigate and take into consideration the hate motives behind the attack. Zagreb Pride, a non-governmental organization which submitted arguments on behalf of Sabalić, asserted that "there was institutionalized and social violence against LGBT persons in Croatia which was principally a result of the authorities' neglectful approach towards combating homophobia and transphobia."

The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, the Advice on International Rights in Europe Centre, and the International Commission of Jurists also intervened in the proceeding. The Court explained that these organizations urged the Court to find that member states need "to put in place effective, robust procedures to deter, detect, investigate, prosecute and punish hate crimes perpetrated wholly or partly because of the victim's real or imputed sexual orientation and/or gender identity."

The ECHR appear to have been persuaded by the interveners. It found that Croatia had failed to meet its positive obligation to investigate the attack on Sabalić and the discrimination that motivated the attack. The Court reasoned that "[w]ithout a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes."

In the case against M.M., the Court rejected Croatia's position that double jeopardy principles barred criminal proceedings against him. Article 4 § 2 of Protocol No. 7 permits a member state to reopen a case where, inter alia, a fundamental defect is detected in the proceedings, i.e. the accused has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings.

Otherwise, the Court held that the 40 Euro fine against M.M. was "manifestly disproportionate to the gravity of the ill-treatment suffered by [Sabalić]." Sabalić was awarded 10,000 Euros for non-pecuniary damages plus 5,200 Euros for costs and expenses.

Sabalić was represented by by Ms A. Bandalo and Ms N. Labavić, lawyers practicing in Zagreb. ■

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*Eric J. Wursthorn is a Principal Court Attorney for the New York State Unified Court System, Chambers of the Hon. Lynn R. Kotler, J.S.C.*

# CIVIL LITIGATION *notes*

## CIVIL LITIGATION NOTES

*By Wendy Bicovny and Arthur S. Leonard*

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

**U.S. COURT OF APPEALS – 1ST CIRCUIT** – Ruling in *A.H. v. French*, 2021 WL 137340 (2nd Cir. January 15, 2021), a First Circuit panel held that students attending a private religious high school could not be excluded from participation in a state program that assists high school students who enroll in college courses by subsidizing their tuition. Under Vermont's Double Enrollment Program, in order to be eligible to the state tuition subsidy for cross-enrolling in up to two college courses while they are attending high school, the students must be enrolled either in a public high school or an approved private school that is not a religious school. In Vermont, some of the local school districts are so small that they can't sustain a high school, so the local school district pays for their high-school age students to attend public high schools in other districts or private non-religious schools. The two plaintiffs in this case are high school students who live in districts that don't have a public high school. Their parents decided to send them to religious high schools. When the students sought state funding through the DEP to take some college courses, they were turned down. The court held, consistent with the Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this this application of the DEP program violated the students' Free Exercise of Religion rights under the First Amendment by discriminating against them because they attend religious schools. The court emphasized that this would not violate the state constitution's prohibition on the use of taxpayer money to subsidize religion, since the money goes to pay for the students' tuition for the college courses, not for their religious school fees. – *Arthur S. Leonard*

**U.S. COURT OF APPEALS, 3RD CIRCUIT** – In *Garcia-Suchite v. Attorney General*, 2021 WL 128920 (3rd Cir., Jan. 14, 2021), an indigenous gay man from Guatemala was unsuccessful in appealing a ruling by the Board of Immigration Appeals that approve an Immigration Judge's denial of relief in the form of asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The petitioner relied on attempts by a gang to recruit him as proof of past persecution, but the IJ concluded that these attempts were not due to his indigenous identity or sexual orientation, noting his testimony that nobody outside of his family knew that he was gay. Furthermore, although U.S. State Department reports indicate that gay people suffer discrimination in Guatemala, that's not the standard for persecution. As to protection under the CAT, the court found that petitioner's claims were speculative. He evidently was disadvantaged by being in the 3rd Circuit, in light of its past rejection of a CAT claim by a gay Guatemalan: "Although the IJ in this case offered a general observation that 'individuals who are indigenous and gay are discriminated against in Guatemala' without rising to the level of torture, instead of making an individualized finding as to 'what is likely to happen to the petitioner if removed,' *Myrie*, 855 F.3d at 516, relief is still not warranted. The sporadic incidents of past abuse recounted by Garcia-Suchite did not constitute 'cruel and inhuman treatment' rising to the level of torture, 8 C.F.R. § 1208.18(a)(2), and he offered only speculation that such incidents would recur and increase in severity upon his return. In addition, the country reports on which he relied, while reflecting discrimination against LGBTQ persons in Guatemala generally, are 'insufficient to demonstrate that it is more likely than not that a particular civilian, in this case Petitioner, will be tortured.' *Tarrawally v. Ashcroft*, 338 F.3d 180, 188 (3d Cir. 2003)." The petitioner is represented by Alyssa M. Kane, Esq., Reading, PA. – *Arthur S. Leonard*

**U.S. COURT OF APPEALS – 6TH CIRCUIT** – In *Redmon v. Yorozu Automotive Tennessee, Inc.*, 2021 WL 245285 (6th Cir., Jan. 26, 2021), the court of appeals reversed the district court's dismissal of a gay man's sexual orientation employment discrimination claim under Title VII, noting the defendant's concession that in light of the Supreme Court's June 15, 2020, decision in *Bostock v. Clayton County*, decided while this appeal was pending, the 6th Circuit's prior precedent is no longer binding. The plaintiff had previously moved unsuccessfully to get the 6th Circuit to let the appeal go directly to an *en banc* panel to consider whether to overrule its prior precedent, *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), but that step was rendered unnecessary by *Bostock*. – *Arthur S. Leonard*

**U.S. COURT OF APPEALS, 7TH CIRCUIT** – In *Semmerling v. Bormann and United States of America*, 2020 WL 37527 (7th Cir. Jan. 5, 2021), a 7th Circuit panel unanimously affirmed the district court's dismissal of fired attorney Tim Jon Semmerling's tort claims against Cheryl Bormann for defamation, negligence, and intentional infliction of emotional distress, and claims against the United States under the Federal Tort Claims Act for negligence and intentional infliction of emotional distress. Semmerling was part of the legal defense team for

# CIVIL LITIGATION *notes*

Walid bin Attash, an al-Qaeda terrorist and mastermind of the 9/11 attacks. Semmerling is gay. Bormann, the lead defense attorney, instructed Semmerling not to disclose his sexual orientation to bin Attash. She feared that if bin Attash discovered Semmerling's sexual orientation, he would fire the entire team because of his strong political and religious views against homosexuality. Later, Bormann fired Semmerling, who responded with this lawsuit alleging that Bormann informed bin Attash of his sexual orientation and also told him that Semmerling was "pursuing a homosexual interest" and had become "infatuated" with him. The district court dismissed the claims against Bormann because they were barred by Illinois' absolute litigation privilege and dismissed the claims against the United States for failure to state a claim. At the outset, the panel stated that there was no need to even trace the highlights of the district judge's reasoning because Semmerlings's opening brief arguments were both incomprehensible and completely insubstantial. For Semmerling to win any relief on appeal, the panel wrote that it would have "to supply the legal research and organization to make sense of [his] arguments." In this regard, the panel explained its duty was solely to evaluate arguments that are presented before it. It was Semmerling's lawyer's task to develop and present factually and legally grounded arguments for review. The panel set forth two primary reasons under Rule 28 that Semmerling's lawyer failed at his task in every respect. First, Rule 28 mandated a litigant must include "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record." Semmerling's "Statement of the Case" *did not even come close to meeting these requirements*. Rather, it merely repeated his claims for relief and made no mention of the district court's order dismissing these claims, much less the reasons undergirding that order, the panel stated. Second, Rule 28 requires a litigant to include an argument section that contains the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relied. "Here, the oxymoronically labeled "Argument Section" of Semmerling's brief was devoid of any legal argument whatsoever, the panel determined. The brief merely made incoherent claims that the judge failed to consider "cultural context" and baldly asserts without support that discovery should have been permitted. A meager 2-1/2 pages, it neither identified nor critiqued the key points in the district judge's analysis, and it failed to cite any legal authority until the final paragraph when it cited disjointed sources for an utterly irrelevant proposition. The brief is "woefully deficient," the panel further said. It's also worth noting that the government had previously moved for summary affirmance based on the obvious inadequacy of Semmerling's opening brief. A judge of the 7th Circuit denied the motion and generously offered Semmerling's attorney an opportunity to file a new brief. Counsel passed on the chance for a fresh start, and he also did not file a reply brief. Because Semmerling's brief did not remotely comply with Rule 28 and offered no legal basis for disagreeing with the judge's dismissal order, the panel affirmed the district court's judgment. – *Wendy C. Bicovny*

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**U.S. COURT OF APPEALS – 9TH CIRCUIT** – A 9th Circuit panel denied a petition for review of the Board of Immigration Appeals (BIA) decision denying the Petitioner, a native and citizen from El Salvador, either asylum, withholding of removal, or protection under the Convention against Torture (CAT). *Montoya-Garcia v. Rosen*, 2021 WL 100205 (Jan. 12, 2021). The immigration judge's decision (IJ) and the BIA found the Petitioner not credible based on both omissions and inconsistencies in Petitioner's testimony. Petitioner omitted from his application and affidavit that: (1) his classmates physically harmed him on account of his sexual orientation; (2) his father physically abused him more than twenty times on account of his sexual orientation; and (3) gangs extorted him for more money than other business owners on account of his sexual orientation. Petitioner's testimony was inconsistent with his statements to a Border Patrol agent, to whom he had stated that he came to the United States to "live and work in Las Vegas," not to flee persecution. BIA also found that Petitioner's corroborating evidence failed to independently and reliably prove his claim of persecution and that the totality of the record evidence further failed to credibly establish a valid CAT claim. The panel explained the reasons for complete agreement with both the IJ and BIA in turn. First, the panel refuted Petitioner's position that his statement to border patrol was not an inconsistency. The Border Patrol question was: "Why did you leave your home country or country of last residence?" The IJ, and the BIA, reasonably determined that the "to work and live in Las Vegas" response was blatantly inconsistent with Petitioner's testimony that he came to the United States because he was "fleeing from threats from [his] country." The panel said there was no reason or evidence to compel it to conclude to the contrary. Second, Petitioner had an opportunity to explain any inconsistencies before the IJ relied on them in making his adverse credibility determination. For example, he was asked, "[W]hy didn't you tell the Immigration official that you were fleeing El Salvador because of your sexual orientation? . . . When they asked what your purpose was for coming to the United States, you said

# CIVIL LITIGATION *notes*

[you were] going to live and work in Las Vegas, Nevada." The IJ was not required to accept Petitioner's answer to this question, even if it was plausible. The panel also recognized that an omission often formed the basis for an adverse credibility finding. This was especially the case here, where previously omitted details "told a much different—and more compelling—story of persecution" than before. The panel concluded that the IJ properly considered omissions and inconsistencies in Petitioner's testimony in reaching his adverse credibility determination and correctly determined that Petitioner failed to establish persecution, a necessary element for his asylum and withholding of removal claims. The panel further agreed with the BIA that the lack of credible testimony was not rehabilitated by appropriate corroborating evidence. Finally, given the adverse credibility finding, the panel agreed that the totality of the record evidence did not credibly establish that Petitioner faced a clear probability of torture in El Salvador by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity, a necessary component of his CAT claim. – *Wendy C. Bicovny*

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**U.S. COURT OF APPEALS, 9TH CIRCUIT** – The 9th Circuit affirmed a ruling by the Board of Immigration Appeals rejecting petitioner's claims for withholding of removal and/or protection under the Convention against Torture. *Reyes v. Wilkinson*, 2021 WL 225587 (Jan. 22, 2021). The petition claims he will be subjected to persecution based on his perceived sexual orientation if removed back to his native country, Guatemala. "In his opening brief," wrote the panel, "[Petitioner] does not challenge the agency's conclusion that he failed to establish that he could not reasonably relocate within Guatemala to avoid future persecution . . . . As to [his] claim based on a fear of gangs, substantial evidence supports the agency's determination that [he] failed to establish the harm he fears was or would be on account of a protected ground." In other words, he failed to prove that the gangs were after him because they perceived him as gay. In terms of his CAT claim, the court said, "Substantial evidence also supports the agency's denial of CAT relief because [Petitioner] failed to show it is more likely than not he would be tortured by or with the consent or acquiescence of the government if returned to Guatemala." – *Arthur S. Leonard*

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**U.S. COURT OF APPEALS, 9TH CIRCUIT** – The Western Justice Center (WJC), a non-profit corporation in Pasadena, booked a speaking event by the Pasadena Republican Club to take place in WJC's building, which it rents from the City of Pasadena. "Shortly before the event, however, WJC learned about the speaker's association with a politically active group that, as WJC explained, holds 'positions on same-sex marriage, gay adoption, and transgender rights [that] are antithetical to [its] values.' WJC then rescinded the rental agreement," wrote Circuit Judge Carlos Bea in his opinion for the 9th Circuit panel. The Club sued WJC and some of its officials for violation of 1st Amendment freedom of speech. District Judge Wallace Tashima (C.D. Cal.) granted WJC's motion to dismiss the complaint, and the 9th Circuit affirmed, in an opinion by Circuit Judge Carlos Bea. "We reject the Club's assertions and hold that WJC is not a state actor for purposes of the Club's constitutional claims," wrote Judge Bea. "Neither the circumstances under which WJC rehabilitated the building and acquired the lease, nor the terms of the lease itself, convert WJC into a state actor. Similarly, the government does not, without more, become vicariously liable for the discretionary decisions of its lessee." The City had bought the property from the federal government and leases it to WJC for a nominal rent. The City does not receive any revenue from WJC's activities on the property and plays no role in deciding who can rent the space for public events. – *Arthur S. Leonard*

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**ALABAMA** – On January 25, U.S. District Judge Abdul K. Kallon granted a motion to dismiss a *pro se* suit filed by Dekorrie K. Bell against the Birmingham, Alabama, Board of Education, on the ground that Bell's *pro se* complaint failed to state a claim. *Bell v. Birmingham Board of Education*, 2021 WL 242864 (N.D. Ala.). The short opinion reflects the judge's frustration with a *pro se* complaint composed by somebody who apparently has little conception of how to state a legal claim. It appears that Bell was alleging that the Birmingham schools "provide unwelcoming conditions for LGBT youth and that certain discriminatory practices adopted by the defendants limited her employment and educational opportunities," but failed to allege with any particularity how she had suffered discrimination. Further, it appeared that there were serious timeliness issues with her filing, which the judge asserted appeared to be a second run at an earlier case that had been dismissed by a different federal judge. Judge Kallon was appointed by President Barack Obama. – *Arthur S. Leonard*

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**CALIFORNIA** – U.S. District Judge Lucy H. Koh granted in part and denied in part a motion to dismiss a lawsuit brought by the Fellowship of Christian Athletes (FCA) and two pseudonymous recent high school graduates, challenging a California school district's action withdrawing official recognition of FCA chapters at the district's high schools. *Roe v. San Jose Unified School District Board,* 202 WL 292035 (N.D. Cal., Jan. 28, 2021).

FCA requires that leaders of its student clubs adhere to a Religious Purity Code which eschews extra-marital and homosexual sex. When a teacher at one of the high schools drew this fact to the attention of the administration and aroused students to protest the FCA, the district, citing its ban on sexual orientation discrimination, revoked FCA's official status. Although it could continue holding events on the high school campuses, it would be without official sanction and denied benefits (including activity funding) accorded to recognized clubs. The lawsuit relies heavily on the argument that reliance on the non-discrimination policy is a pretext for religious discrimination, because the district "waives" its discrimination policy for various other recognized student groups that discriminate on grounds prohibited by the policy, such as all-male and all-female sports clubs and other groups that "deny membership or leadership opportunities on the basis of students' belonging to enumerated classes." The suit also claims that students were encouraged to "harass and intimidate FCA students." While upholding the facial validity of the non-discrimination policy, Judge Koh found that 9th Circuit precedent supports the plaintiffs' argument that they can mount an as-applied challenge to the discrimination policy, based on its non-uniform application. However, the court narrowed down the broadside nature of the lawsuit by finding that only the as-applied claim against certain named defendants in their personal capacity would survive the motion to dismiss, and that the complaint had to be dismissed without prejudice to filing an amended complaint if the pseudonymous plaintiffs agree to file under their own names (as the court found no basis under federal precedent to allow them to proceed anonymously) and FCA repleads with the necessary allegations to prove organizational standing to represent its members who possess individual standing. The court dismisses all claims against defendants in their official capacity and against the school district as a government entity. The court rejects the personal capacity defendants' qualified immunity argument, on the ground that 9th Circuit precedent clearly provides that non-uniform application of a facially valid non-discrimination policy may violate the constitutional rights of a student group denied official recognition. Lawyers from the Christian Legal Society and associated law firms represent the plaintiffs. Judge Koh was appointed by President Barack Obama. – *Arthur S. Leonard*

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**CALIFORNIA** – Section 230 of the Communications Decency Act, a federal statute, immunizes interactive internet service providers from liability for their decisions to allow or disallow material placed by third parties on their service. The old saying, "You can't sue City Hall," is not always correct, but "You can't sue Twitter" for taking down your posts or suspending your account for violations of its terms of service is usually accurate, as Meghan Murphy learned when the California Court of Appeal affirmed the San Francisco Superior Court's rejection of her various claims stemming from Twitter's action in removing her transphobic posts and then permanently suspending her account when she posted more of the same. Surprise! *Murphy v. Twitter, Inc.*, 2021 WL 221489 (Cal. Ct. App., 1st Dist., Jan. 22, 2021). – *Arthur S. Leonard*

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**HAWAII** – In *Scutt v. Dorris*, 2021 WL 206356 (Jan. 20, 2021), Chief Judge J. Michael Seabright of the U. S. District Court for Hawaii dismissed in part without leave to amend, but allowed in part to proceed, pro se transgender plaintiff Jason Scutt's (Scutt) second amended complaint (SAC) against Xiayin (Gaoquiang) Lin (Lin) and Charlene Chen (Chen) (collectively, Landlords), and a former co-tenant, Kelli Dorris (Dorris) (collectively, Defendants), alleging discrimination in violation of the Fair Housing Act (FHA). The facts that granted Scutt a second chance to amend her First Amended Complaint (FAC) deficiencies detailed in Law Notes, January 2021, remained the same. The SAC alleged two theories of liability. First, the SAC realleged that Dorris—acting as an agent of the Landlords—violated the FHA by harassing Scutt based on her status as Transgender/LGBTQ IA+ as well as her adherence to Jewish religious beliefs. Second, the SAC alleged that the Landlords violated the FHA by failing to prevent the hostile housing environment created by Dorris. Judge Seabright addressed each part in turn. As to Dorris, the SAC both failed to correct the FAC deficiencies and to state a claim against Dorris under the FHA. Since this was Scutt's third attempt to state a claim against Dorris, and further amendment appeared to be futile, the claim against Dorris was dismissed without leave to amend. However, Scutt's allegations were sufficient to demonstrate that the Landlords knew of the discriminatory action but failed to take remedial action. In this regard, Scutt plausibly pled each element of a hostile housing environment claim, as follows. First, Scutt adequately alleged that Dorris harassed her because of her transgender status. Dorris began harassing her shortly after discovering Scutt washing female clothing in the common area washroom and otherwise exhibiting features that were not normally associated with the male stereotype and became visibly upset as a result. This timing plausibly suggested that Dorris harassed Scutt because of her transgender status. Second, Scutt alleged harassment that was sufficiently severe or pervasive to deprive her of her right to enjoy her home. Here, Scutt alleged that throughout most of 2020, Dorris regularly made frivolous complaints about Scutt to the Landlords that bore no factual bases. Dorris

prevented Scutt from leaving her unit via the common area by approaching her without wearing a facemask during the COVID-19 pandemic. And, after Scutt was granted a state court temporary restraining order (TRO) against Dorris in July 2020, Dorris began positioning herself between the only legal exit and Scutt's vehicle, thereby preventing Scutt from legally exiting her unit for several days in order to try to force Scutt to violate her own TRO. This behavior impeded Scutt from leaving her unit to get food, and effectively barred her from using facilities in the common area, including laundry units. Dorris' harassment altered Scutt's housing conditions, preventing Scutt from leaving her apartment to acquire basic necessities and to access common resources. These allegations were sufficient, at this screening stage, to plausibly demonstrate offensive behavior that unreasonably interfered with the use and enjoyment of the premises, Judge Seabright concluded. Finally, Scutt plausibly demonstrated that Chen and Lin knew of Dorris' harassment and failed to take prompt remedial action. Chen ignored multiple written complaints about the discriminatory conduct and hostile housing environment carried out by Dorris. Yet, the Landlords took no action to correct the hazard. Instead, they actually aided Dorris by requiring Scutt to receive permission from Dorris to leave her own apartment, and then served her with a notice to vacate (placed on Scutt's door by Dorris) rather than attempting to address the harassment, Judge Seabright added. Judge Seabright further ordered Scutt's Complaint of a hostile housing environment to be served on Chen and Lin as directed and required both to file a response after service is effected. – *Wendy C. Bicovny*

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**IDAHO** – The Idaho state legislature is again considering various anti-transgender measures, similar to previously enacted measures that were declared unconstitutional by federal courts. Seeking to cut them off at the pass, so to speak, one Melissa Sue Robinson, describing herself as president of the National Association for the Advancement of Transgendered People (NAATP), filed suit *pro se* in the U.S. District Court in Idaho. "The Idaho State Legislature is trying to violate a federal court order that states transgender people can change their birth certificate to their perceived gender," says the complaint. Further, it asserts, "They are trying to deny playing sports with others of their perceived gender as well." The complaint seeks a cease and desist order from the court, and asks the court to impose a $10,000 fine for each violation, to be distributed among the state's schools. The complaint was referred to U.S. Magistrate Judge Ronald E. Bush to consider a motion to dismiss filed on behalf of the legislature. *National Association for the Advance of Transgendered People v. The State Legislature of Idaho*, 2021 WL 92808 (D. Idaho, Jan. 8, 2021). Judge Bush granted the motion, agreeing with the defendants' argument that the legislature was not amenable to suit on this claim in federal court due to sovereign immunity. Judge Bush pointed out that the plaintiff could file a lawsuit challenging a specific piece of legislation, but that the court did not have jurisdiction to issue an order to the legislature to refrain from considering any particular issue. We have not previously heard of NAATP and wonder why they apparently did not retain counsel or seek legal advice before filing this suit? Or did Ms. Robinson invent NAATP for purposes of filing this lawsuit? A quick on-line search failed to locate any such organization. – *Arthur S. Leonard*

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**MASSACHUSETTS** – The Appeals Court of Massachusetts ruled in *A.C. v. M.K.*, 2021 WL 233356 (January 25, 2021), that the trial court erred when denying the plaintiff's motion for an *ex parte* abuse prevention order against her former partner, in subsequently dismissing the action without giving plaintiff a chance to present evidence in a two-party proceeding at which defendant could participate. The plaintiff is a transgender woman whose former partner uses gender-neutral pronouns. At the *ex parte* hearing, she alleged that the defendant sexually assaulted her while she was sleeping, but in response to the judge's questioning indicated that the defendant had not contacted her since then. However, the defendant had shown up at a venue at which plaintiff was performing, causing her consternation and leading her to hide out of fear of further assault. The trial judge determined that plaintiff had not demonstrated the need for *ex parte* relief, and ultimately dismissed the petition. The Appeals Court agreed that the trial judge appropriately denied *ex parte* relief but concluded that the plaintiff's factual allegations were sufficient to entitle her to a two-party hearing. "In declining to set the matter for a two-party hearing, however, the judge essentially dismissed the plaintiff's complaint as a matter of law," wrote the court. "The plaintiff testified that the defendant had sexually assaulted her, and that she remained in fear of the defendant. Moreover, she described a relatively recent incident in which her fear was demonstrated by her compulsion to hide from the defendant in a public venue. Thus, the plaintiff made out a claim that she was suffering from abuse due to the defendant's past sexual assaults. She was entitled to an evidentiary hearing where the merits of her claim could be adjudicated 'in the ordinary course.'" The opinion does not identify counsel for the parties. – *Arthur S. Leonard*

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**NEW YORK** – The City of Ithaca won a summary judgment motion against Sarah Crews, an out lesbian who was discharged from the City's Police

# CIVIL LITIGATION *notes*

Department in 2019 after twelve years of employment. *Crews v. City of Ithaca*, 2021 WL 257120 (N.D.N.Y., Jan. 26, 2021). When she was first employed, Crews was the object of some ridicule from fellow officers due to her "more masculine form of dress than her female colleagues," but when she complained about the ridicule, the Department investigated and disciplined the employees involved. Crews had a running dispute with the Department about its policy concerning searching, transporting and supervising detainees in their custody, under which "an officer of the same gender should conduct all searches." Based on her initial experiences, Crews concluded that this policy left her vulnerable to false allegations of sexual assault by female detainees. District Judge Mae D'Agostino wrote that in response to her complaints, the Department did take some steps to modify their procedures, including installing cameras and making some modifications about where various activities were carried out. Crews was asked to suggest ways to deal with the situation other than to change the overall rule, which the Department said could not be changed consistent with governing law and regulations, but she offered no suggestions. Evidently the Department did a careful job of documenting disciplinary issues, and when it finally terminated Crews, it was able to provide documentation of numerous rules violations and disciplinary matters involving her. In the absence of express discrimination, Judge D'Agostino applied the familiar *McDonnell-Douglas* test under Title VII of the Civil Rights Act of 1964 to evaluate whether Crews had proved a prima facie case. Based on the undisputed facts, the judge found that Crews failed to prove she was "qualified" for the position in question, because of her disciplinary record. As to Crews' argument that the "searching" policy was discriminatory on the basis of sexual orientation, the judge wrote: "Defendants argue that it is Plaintiff – not Defendants – who seek differential treatment on the basis of sexual orientation. Specifically, Defendants argue that the policies at issue do not treat individuals differently because of their sexual orientation; rather, all individuals are treated the same, regardless of their sexual orientation. Alternatively, Defendants argue that the policies at issue are based on mandated state and federal regulations and that abrogation of those policies would force Defendants out of compliance with these regulations." As the judge saw it, "Plaintiff repeatedly, in a conclusory fashion and without citation, argues that Defendants' failure to treat Plaintiff differently because of her sexual orientation and gender non-conformity constitute discrimination. The Court believes this lack of argument as to the applicability of an inference of discrimination is because there can be no inference of discrimination on this record. Further, there is no evidentiary support for Plaintiff's conclusory allegations that she was ordered to comply with the policies at issue to highlight her gender non-conformity." Thus, the court granted judgment to the City on the discrimination claims, as well as retaliation claims. On a hostile environment claim, the court found that the most recent (third) version of the complaint had presented no new relevant factual allegations and stood by an earlier decision to reject the hostile environment claim, and ruled similarly regarding a Due Process claim. Although the complaint did not expressly allege an Equal Protection claim, Judge D'Agostino had construed it to do so, but she found that Crews did not oppose the Defendants' motion for summary judgment as to that claim, so it was granted. Crews is represented by Edward E. Kopko of Ithaca. – *Arthur S. Leonard*

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**NORTH CAROLINA** – Now that the U.S. Supreme Court has ruled in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that discrimination because of sexual orientation necessarily includes discrimination because of a person's sex, can somebody with a sexual orientation discrimination claim dating back to the 1990s attempt to revive her twice-rejected lawsuit by filing a new complaint immediately after the *Bostock* decision was announced, and thereby escape the bar of res judicata? No, writes U.S. District Judge Terrence W. Boyle in *Kirby v. State of North Carolina*, 2021 WL 149007 (E.D.N.C., Jan. 15, 2021). Kenda Kirby "alleges that as a Ph.D. student at North Carolina State University, she was subjected to discrimination on the basis of sex, sexual orientation, gender, gender identity, and sex-based stereotyping," wrote Judge Boyle. "She alleges that following her weekend attendance in 1993 at a lesbian, gay, bisexual, and transgender (LGBT) event, professors at the University changed her passing grades to failing and terminated her from the Ph.D. program because of her attendance," he continued. "Plaintiff further alleges that she was erroneously billed in 2013 for 1994 spring semester tuition and that in 2017 she learned that the North Carolina Education Authority had withheld overpaid student loan funds due to her. Plaintiff alleges that the 2013 tuition billing and the withholding of overpaid funds in 2017 amounted to disparate treatment and caused disparate impact. Plaintiff alleges claims of discrimination and retaliation under Title IX of the Educational Amendments Act of 1972." Kirby, *pro se*, argued that she could revive her twice-rejected lawsuit by filing immediately after the *Bostock* decision, as an intervening change in the law, but Judge Boyle was not buying this argument. Her previous lawsuits were dismissed, dismissals were affirmed by the 4th Circuit, and the U.S. Supreme Court denied petitions for certiorari. When the defendant did not file an answer to this new complaint, Kirby moved for

a default judgment, which was denied on grounds of improper service of the complaint. The defendant's motion to dismiss the complaint, contending that the new lawsuit was precluded by the prior rulings and is time-barred, was granted. "That plaintiff now relies on the recent *Bostock* opinion does not change the result," wrote Judge Boyle. "'[A]n intervening change in case law . . . almost never warrants an exception to the application of res judicata.' *Clodfelter*, 720 F.3d at 211. Moreover, even if plaintiff's claim under *Bostock* could be construed as a newly articulated claim which would be an exception to res judicata, any claim of sex discrimination under Title IX is barred by the applicable statute of limitations . . . . The latest date cited by plaintiff in her complaint, which relates to an allegedly wrongful refusal to refund a student loan overpayment, occurred in March 2017. Plaintiff's complaint was filed in June 2020, more than three years later." – *Arthur S. Leonard*

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**OHIO** – In *[T.H.] v. [N.H.]*, 2021 WL 287843 (Ohio Ct. App., 10th Dist., Jan. 28, 2021), the Ohio Court of Appeals found that the Franklin County Court of Common Pleas erred in rejecting a non-biological mother's request to be recognized as having shared legal custody of the three children born to her wife before they were married. T.H. and N.H. began their relationship in 2002 and jointly decided to have children together, with N.H., the younger and healthier of the two, to bear the children, which were all conceived with sperm from one donor jointly selected by the mothers. They had a written co-parenting agreement and, as summarized by Judge Julia L. Dorrian for the court of appeals panel, the weight of the evidence showed a mutual intent for T.H. to be an equal parent in every respect with N.H., the birth mother. The children were given T.H.'s surname, although only N.H. was listed on the birth certificate because Ohio would not at the time the children were born recognize same-sex co-parents. The opinion goes into great detail about all aspects of the relationship of the women and the children. The women married in 2015 after the *Obergefell* decision, but T.H. never initiated a stepparent adoption of the children, feeling it was unnecessary. Eventually, N.H. moved out of the marital home, although she continued to share visitation and parenting with T.H. However, seeking to protect her relationship with the children, T.H. filed a complaint in 2016 seeking shared legal custody. The trial court, inexplicably considering Judge Dorrian's summary of the record, decided that while T.H. was entitled to recognition as a parent of the children, concluded that N.H. had never intended to share legal custody with T.H., so she should have sole legal custody as the birth mother. "The totality of the record in this matter," wrote Dorrian, "including the credible testimony of the parties, the admitted documentary evidence, and the testimony of the guardian ad litem, overwhelmingly establishes that N.H., both during and after her relationship with T.H., consistently demonstrated, through her words and actions, her agreement to permanently share custody of the children with T.H. Therefore, weighting the totality of the evidence, considering all reasonable inferences and the credibility of the witnesses, as well as the trial court's seeming inconsistent weighing of the evidence, we find this to be the rare case where the court lost its way and created such a manifest miscarriage of justice that the judgment must be reversed." T.H. is represented by Amanda C. Baker and Kelly M. Wick, Baker & Wick, LLC. N.H. is represented by Kendra L. Carpenter, Carpenter Family Law, LLC. – *Arthur S. Leonard*

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**PENNSYLVANIA** – In *Benedict v. Guess, Inc., Guess? Retail, Inc., and, Guess Factory*, 2020 WL 37619 (E.D. Pa., Jan. 5, 2021), U.S. District Judge Joseph F. Leeson, Jr., granted defendants' motion to dismiss and to compel arbitration. In this employment discrimination action, out gay male Bryan Benedict alleged that he was subjected to a hostile work environment, discrimination, and eventual termination from his position as an assistant manager of a Bethlehem, Pennsylvania, Guess retail store on account of his sexual orientation. Defendants moved to dismiss the Complaint and to compel arbitration, alleging the existence of an enforceable arbitration agreement between Benedict and Defendants. The court first summarized Benedict's complaint. After his promotion to Assistant Store Manager, Benedict stated "his male subordinate employees acted as if they were completely disgusted with [him], hated [him], and never wanted to be associated with, let alone supervised by, a man known to be gay." Benedict claimed he reported the misconduct of one disrespectful and insubordinate male employee in particular. When there was no response from the main Store Manager, Benedict claimed the particular employee referenced above, "who hated [Benedict] on account of the fact [he] was gay, harassed and discriminated against [Benedict], then set [him] up for wrongful termination by falsely accusing [him] of sexual misconduct by digitally penetrating or 'fingering' the male employee in the anus." This allegation was ostensibly the reason for Benedict's suspension and eventual termination. Benedict stated this accusation was untrue, sexual harassment, and rank discrimination. Based upon these averments, Benedict asserted claims for hostile work environment, wrongful termination, and retaliation in violation of Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Rights Act, and the City of Bethlehem Human Relations and Non-Discrimination Ordinance. The Federal Arbitration Act (FAA)

enables the enforcement of a contract to arbitrate, upon the court's satisfaction that the making of the agreement for arbitration was not in issue before ordering arbitration. Here, Defendants attached to their motion to dismiss a copy of the arbitration agreement they claim required Benedict to arbitrate his claims. The court could find no dispute about the existence, authenticity, or enforceability of the arbitration agreement between Benedict and Defendants. Benedict did not dispute that he entered into the arbitration agreement. Nor had he raised any argument or factual assertions that would place the existence or authenticity of the arbitration agreement in dispute. Lastly, the arbitration agreement was executed by Benedict when he began his employment with Defendants. "[I] n deciding whether a party may be compelled to arbitrate under the FAA," wrote Judge Leeson, the court must "first consider (1) whether there is a valid agreement to arbitrate between the parties and, if so, (2) whether the merits-based dispute in question falls within the scope of that valid agreement." The court found both of these requirements were met. Benedict's complaint asserted claims for hostile work environment, wrongful termination, and retaliation in violation of Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Rights Act, and the City of Bethlehem Human Relations and Non-Discrimination Ordinance, based upon his sexual orientation. These claims fell squarely within the arbitration agreement's provision regarding "[c] laims for unlawful discrimination, retaliation or harassment (including, but not limited to, claims based on race, sex, religion, national origin, age, marital status, or medical condition, handicap or disability)." Benedict made no argument, nor was there any argument available of which the court was aware, supporting the position that Benedict's discrimination claims were not covered by the plain and unambiguous language of the parties' valid and enforceable arbitration agreement, so the court dismissed the complaint and ordered arbitration of the dispute. – *Wendy C. Bicovny*

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**PENNSYLVANIA** – In *Cherone v. Hicks v. Santiago*, 2021 WL 118886 (Pa. Superior Ct., Jan 13,2021), a three-judge panel affirmed an order sustaining Elizabeth Hicks's preliminary objections after the trial court determined that former same-sex partner Nicole Cherone (Cherone) did not stand *in loco parentis* to minor child, E.C (child). Hicks (Mother) is the birth mother. To summarize the detailed facts and procedural history: Cherone filed an underlying Complaint for Custody on Jan. 27, 2020, against Mother and Father, for shared legal and shared physical custody of E.C. by virtue of Cherone standing in loco parentis to the child. Cherone and Mother were involved in a romantic relationship beginning in July of 2014. Cherone and Mother were approached by Father, who offered to be a sperm donor for the couple to have a child. Father informed Cherone and Mother that he did not wish to be involved in the life of the child. Mother gave birth to the child in February of 2018. Cherone and Mother ended the relationship in September of 2018, at which time the parties operated off an informal custody schedule. Mother then withheld custody of the child from Cherone beginning in June of 2019. On or about February 14, 2020, Mother filed Preliminary Objections, wherein she alleged that Cherone lacked standing to sue for any form of physical or legal custody of the child. After the court held a full hearing on preliminary objections on April 27, 2020, Mother's Preliminary Objections were granted, and it was found that Cherone had not been in loco parentis of the child subject to the underlying custody matter for several reasons. Cherone filed a Petition for Permission to Appeal on June 11, 2020, and the Petition was allowed to be treated as a Notice of Appeal. Cherone presented four issues for the panel's review, as to whether the trial court erred as a matter of law and/or abused its discretion in finding: (I) Cherone did not have standing to pursue custody of the minor child having stood in loco parentis; (II) Mother did not consent to [Cherone] acting in loco parentis to the subject minor child; (III) Mother did not intend for Cherone to act in the parental role for the child; and (IV) The acting of Cherone in a parental role and performing parental duties from the conception of the child, through birth, and for a period of time following the parties' separation for a total of sixteen (16) months post-birth did not constitute a sufficient time period to establish in loco parentis standing. The panel considered Cherone's first three issues together, because the crux of Cherone's argument in these issues was that the trial court erred and abused its discretion in determining that Mother did not consent to Cherone acting in loco parentis to the child during the parties' relationship and after their separation. In her fourth issue, Cherone asserted the trial court erred and abused its discretion to the extent it found she performed parental duties, but for a short period of time which did not confer standing. After careful consideration, the panel found no error of law or abuse of discretion. The panel then examined the record in this case, which in relevant part discussed as follows, did not support a finding that E.C. recognized Cherone as "a significant person" with whom the child had a parent-child relationship. Moreover, there was no clear evidence that Mother intended Cherone to have a parent-child relationship with E.C., who was seven months old when Mother ended the relationship as a result of Cherone's coercive and abusive behavior. With respect to Mother acquiescing to E.C. having Cherone's surname, the panel discerned no abuse of discretion by the court in determining that Mother was fearful of repercussions by Cherone

if she resisted. Likewise, the record supported the court's determination that after the parties' separation in September of 2018, until June of 2019, Mother permitted Cherone to spend time with E.C. out of fear, and when Mother agreed to an informal custody arrangement from January until June of 2019, she did so because she needed a babysitter so that she — as E.C.'s sole source of financial support— could work. Based on this disposition, the panel said it need not consider Cherone's fourth issue regarding the "period of time . . . sufficient . . . to establish in loco parentis standing. – *Wendy C. Bicovny*

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**NEW YORK** – This is a puzzler. The John Doe plaintiff, a gay New York City police officer, alleges a hostile environment in violation of the state and city human rights laws, as well as retaliation in response to his complaints about the situation. The Appellate Division's decision reversing the trial court's grant of summary judgment to the City relates numerous factual allegations in support of its unanimous conclusion that Doe should be able to pursue his claim to trial. *Doe v. New York City Police Department*, 2021 WL 27523 (N.Y. App. Div., 1st Dept., Jan. 5, 2021). "Viewing the record in the light most favorable to plaintiff as nonmovant," wrote the court, "beginning within a short time after he joined defendant New York City Police Department (N.Y.P.D.), it became widely known that he was gay, because, among other factors, homophobic colleagues vindictively published that fact by calling officers wherever plaintiff was stationed and telling them to harass plaintiff because he was gay. When plaintiff began his assignment at NYPD's Internal Affairs Bureau's (IAB) Command Center beginning in the summer of 2007, plaintiff was immediately exposed to two sergeants who quickly surmised, based on his responses to their constant homophobic slurs directed at civilians and gay officers, that plaintiff was gay. Other officers joined in, condoned and encouraged by the sergeants, and plaintiff thereafter endured over a year of homophobic derision, harassment, and verbal abuse. The foregoing establishes a claim for employment discrimination, via hostile work environment, under the State and City HRLs," wrote the court. One wonders how New York Supreme Court Justice W. Franc Perry (N.Y County) could have concluded otherwise on a motion for summary judgment, assuming the City was not contesting Doe's allegations, since summary judgment would not be proper if material facts are contested. The decision also describes situations where Doe was assigned to do things on his own in hazardous situations that would not ordinarily be assigned to individual officers or would be done by other staff, and it seemed clear he was singled out because he is gay. After he was reassigned to the 77th Precinct, "plaintiff was repeatedly required to enter a holding cell, by himself, with prisoners still inside, while plaintiff carried metal and wooden cleaning implements. This was potentially dangerous, as plaintiff could have been overwhelmed and attacked by the prisoners. Other officers were not required to do it, as it was usually a task for the maintenance crew. Being singled out to do a task which peers are not required to do, and which is dangerous, is an adverse employment action under both the State and City HRLs. It can be inferred that plaintiff's supervisor knew that plaintiff was gay and was motivated by animus when she repeatedly directed him to enter the holding cells alone to clean them." With this reversal, Doe will get his day in court unless the City offers him a settlement tempting enough to take. But the mistreatment he alleges should be a red flag to NYPD brass: way past time to crack down on homophobia in the NYPD. (It is worth noting that the summary judgment against Doe was entered on October 12, 2017, and this opinion by the Appellate Division was issued on January 5, 2021. Should it really take this length of time to get an appellate ruling on what sounds like an open-and-shut case? One wonders what has been going on with John Doe in the interim?) Plaintiff Doe is represented by Ishan Dave, Derek Smith Law Group, PLLC. – *Arthur S. Leonard*

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**NEW YORK** – The Appellate Division, 1st Department, affirmed New York County Family Court Judge Patria Frias–Colon's finding that the mother of a gay boy was guilty of "neglect" in *Matter of Ibraheem K.*, 2021 WL 278071 (January 28, 2021). The court found that a "preponderance of the evidence supports the determination that the mother neglected the child by inflicting excessive corporal punishment, thereby placing the child at imminent risk of physical and emotional harm." Furthermore, "the mother threatened to send the child to the Middle East because of the child's sexual orientation with the implication that the child would be killed for that reason. The Family Court considered the child's mental health history and providently credited the allegations made by the child to the child's protective specialists that the child was beaten by the mother with a belt and broom and that the child was fearful of her, while discounting the child's later attempt to recant such allegations." The court found nothing in the mother's arguments on appeal that would justify setting aside the neglect finding. – *Arthur S. Leonard*

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**PENNSYLVANIA** – Part of the Families First Coronavirus Response Act (FFCRA) passed early in the pandemic is the Emergency Paid Sick Leave Act (EPSLA), which entitles employees to two weeks of paid medical leave if the employee's health care provider advised the employee to self-quarantine due to concerns about COVID-19. In *Doe*

*v. Dee Packing Solutions*, 2020 WL 2747357 (Complaint, filed May 27, 2020, U.S. Dist. Ct., E.D. Pa.), Senior District Judge John R. Padova denied the company's motion to dismiss two claims asserted under the EPSLA by the anonymous plaintiff, who was discharged for "abandoning his job" when he stayed home from work in response to a notification that he was in an "at risk group" for COVID-19 and should follow the state's directive to stay home. The plaintiff interpreted a text message from his supervisor as asking him to provide medical documentation for leave, and responded that he was doing so, but the supervisor then texted him that his failure to report to work was "abandoning" his job. He never received a formal discharge letter but did subsequently receive a notice dated March 27 that his life insurance was cancelled. The plaintiff is a gay man who is HIV-Positive. His complaint asserts seven causes of action under the Family and Medical Leave Act (denial of leave and retaliation), the EPSLA (denial of leave and retaliation), ERISA, and Intentional and Negligent Misrepresentation. On January 29, 2021, in an unpublished Order, Judge Padova responded to the company's partial motion to dismiss by denying the motion to dismiss the EPSLA claims but granting the motion to dismiss the negligent misrepresentation claim. The basis for the company's motion on the EPSLA claims was that the statute did not go into effect until April 2, and that Doe's dismissal occurred on March 27. Doe responded to the motion by reiterating that he never received a termination letter, and that the March 27 text from his supervisor was ambiguous: "The company has remained open. Not reporting to work as you have done is abandoning your job. HR will be sending you the necessary paperwork." Doe alleges that he received no "paperwork" from HR until after April 1, as well as never having received a formal termination letter. He argued that the date of his termination was thus "uncertain" and so it would be "inappropriate to dismiss his claims based on a premature conclusion that he was terminated on March 27, and that his complaint did not allege a precise date of termination." The court found "the allegation that Mr. Toner advised Plaintiff by text message dated March 27, 2020 that HR would send Plaintiff 'the necessary paperwork' raises a plausible inference that the text message did not effectuate Plaintiff's termination," so the court was unwilling to conclude at this point that Doe was discharged before EPSLA went into effect. On the negligent misrepresentation claim, the court accepted the company's argument that since Doe was an at-will employee, he could not maintain such a claim against the company on the theory that Toner's text messages to him were misrepresentations upon which he reasonably relied. Such reliance by an at-will employee would not be "reasonable." Doe is represented by Justin F. Robinette. – *Arthur S. Leonard*

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**TEXAS** – U.S. Magistrate Judge Richard B. Farrer has recommended that the district court deny a dismissal motion in a Title IX/Title VII case brought by a gay graduate medical student resident Fellow against the University of Texas Health Science Center at San Antonio based on sexual harassment of him by the male director of the program in which he was enrolled, Dr. Wang, and the allegedly deficient way in which the Center responded to his complaint and treated him through and beyond his graduation from the program. *Aguiluz v. United of Texas Health Science Center at San Antonio*, 2021 WL 148057 (W.D. Tex., Jan. 15, 2021). "Dr. Aguiluz alleges that almost immediately following his entrance into the program and continuing throughout 2017, Dr. Wang began sexually harassing him based on his status as a gay male who also didn't conform to typical male stereotypes," relates Judge Farrer, whose opinion goes into great detail about the forms of alleged harassment and the failure of the Center's Title IX staff to take appropriate effective action in response to Aguiluz's complaints. Even though an investigation substantiated his complaint against Dr. Wang, no action was taken against Dr. Wang, and ultimately Aguiluz's own education and professional development were compromised by the Center effectively excluding him from key aspects of the program to avoid having him confront Wang. The Title IX staff referred the matter to the head of plastic surgery at the Center, a doctor who was not trained in Title IX procedure and who alleged fumbled the ball. The exclusionary treatment even followed Dr. Aguiluz's graduation from the program, as the Center failed to list him among the graduates of the program on their website. Although he had an offer of a position with a San Antonio practice of one of the other doctors at the Center, he felt obliged to decline it, as he would be effectively unable to perform procedures at the University's hospital as they had consigned him to performing procedures at another institution to avoid him coming into contact with Dr. Wang. Judge Farrer rejected the Center's argument that the plaintiff's Title IX claims were somehow preempted by Title VII, pointing out that although Aguiluz was simultaneously a student and an employee of the Center, his complaint fell within the category of a student-professor relationship, although the restrictions placed on him after his complaint was investigated fell also within Title VII anti-retaliation territory. The judge also found that taking Aguiluz's factual allegations as true for purposes of the motion to dismiss, he had pleaded facts sufficient to sustain a hostile environment and retaliation charge against the Center. The plaintiff is represented by Julie E. Heath and Patricia Howery Davis, of Farrow-Gillespie Heath Witter LLP, Dallas, TX. – *Arthur S. Leonard*

# CRIMINAL LITIGATION *notes*

## CIVIL LITIGATION NOTES

*By Arthur S. Leonard*

**U.S. COURT OF APPEALS, 7TH CIRCUIT** – A 7th Circuit panel affirmed a ruling by District Judge Richard L. Young (S.D. Ind.) that "Indiana's Sex Offender Registration Act (SORA) as it applies to offenders who have relocated to Indiana from other states after the enactment of SORA, and who are forced to register under the law, but would not have been required to do so had they committed their crimes as residents of Indiana prior to the enactment of the relevant portions of SORA and maintained citizenship there" is unconstitutional. Circuit Judge Ilana Rovner wrote for the panel, which agreed with Judge Young that the law violates the plaintiffs' constitutional right to travel. H*ope v. Commissioner of Indiana Department of Correction*, 2021 WL 50172 (7th Cir., Jan. 6, 2021).

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**ILLINOIS** – You have to read the entire lengthy opinion, which summarizes the trial testimony in detail, to get the full flavor of *People v. Dunn*, 2021 IL App (4th) 180552-U, 2021 WL 225450, 2021 Ill. App. Unpub. LEXIS 76 (Ill. 4th Dist. Ct. App., Jan. 22, 2021) (unpublished decision), in which the court affirms the jury conviction of David J. Dunn, a former firefighter, for sexually assaulting a 22-year-old male firefighter trainee, T.C., in the course of a "farewell party" for Dunn, who was leaving to take a fire chief position in Alaska. T.C. had been drinking heavily, and it appears that Dunn had given him ketamine and he was barely conscious when Dunn performed oral sex on him while insert his fingers in T.C.'s anus. T.C., who is straight, could not consent to any of this, but was not so far "out of it" during the assault that he couldn't testify at trial about what he was feeling at the time. Dunn was convicted on two counts of criminal sexual assault, two counts of aggravated criminal sexual assault, and one count of aggravated criminal sexual abuse, and sentenced to two consecutive terms of 15 years in prison and a consecutive term of 6 years in prison, for a total aggregate sentence of 36 years. The appeals court affirmed, rejecting a variety of objections to various aspects of the trial. The unpublished opinions reported in Westlaw and Lexis do not identify counsel for Dunn.

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**MINNESOTA** – David Scott Bothe and his husband adopted four children. They brought their oldest child, a boy age 15, to the hospital, reporting that Bothe had sexually abused the child. Bothe had given his son gift cards and got him to agree not to tell anybody about their sexual activities, but the story came out and Bothe cooperated with the police. The son and his adoptive siblings were taken from Bothe and his husband and placed in foster care. Bothe entered into a plea agreement to one count of first-degree criminal sexual conduct in exchange for the state's agreement to drop another count and not seek an aggravated sentence. Bothe, citing his progress in rehabilitation and first offender status, asked the court to make a downward departure under the sentencing guidelines, but the court refused, sentencing him to the presumptive sentence of 172 months' imprisonment. Bothe appealed, arguing an abuse of discretion by the trial judge. The Court of Appeals rejected his argument, finding that the trial judge had conscientiously applied the various factors required and had not abused his discretion in denying the downward departure, especially noting the vulnerability of the victim due to his family situation before his adoption. The trial judge had commented that Bothe's conduct might affect public opinion about whether same-sex couples should be allowed to adopt children. This was objectionable, but the court found no indication that it was the basis of the trial judge's denial of Bothe's request. *State of Minnesota v. Bothe*, 2021 WL 79161 (Minn. Ct. App., January 11, 2021).

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**NEW JERSEY** – The New Jersey Appellate Division rejected an argument by a man convicted on charges of endangering the welfare of his niece, a minor, that the trial judge erred in excluding any testimony about the niece's sexual orientation. *State v. L.L.*, 2021 WL 19648 (Jan. 4, 2021). Defendant argued that the Rape Shield Law extends only to past sexual activity of a victim, not to her sexual orientation, but the Appellate Division's *per curiam* opinion said that the trial judge's decision to exclude the testimony was not erroneous. "An exception to the statutory exclusion exists if 'evidence offered by the defendant regarding the sexual conduct of the victim is relevant and highly material,' meets certain other statutory criteria, and has 'probative value' that 'substantially outweighs . . . the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim,'" wrote the court, summarizing N.J.S.A. 2C:14-7(a). "Whether evidence of a victim's prior sexual conduct is admissible 'is exquisitely fact-sensitive and depends on the facts of each case.' *State v. Perry*, 225 N.J. 222, 238 (2016)." The court continued that the Defendant's argument "that 'sexual orientation' does not fall within the ambit of 'sexual conduct' is belied by the inclusion of the term 'life style' within the statutory definition of sexual conduct. N.J.S.A. 2C:14-7(f). We agree with the State that 'the term, "life style" is a[n anachronistic] synonym for sexual orientation.' Clearly, Kendra's bisexuality fell squarely within the definition of sexual conduct." The court also rejected the Defendant's argument that Kendra's statement to her uncle

# PRISONER LITIGATION *notes*

about "losing her virginity" should have been admitted as relevant of his "state of mind and his defense on the endangering charges," stating that his "mental state is not relevant" under that provision of the New Jersey statute, concluding on this point: "In any event, defendant testified and explained his behaviors to the jury."

**TEXAS** – In *Cardoso-Reyna v. State of Texas*, 2021 WL 219303 (Tex. Ct. App., Jan. 22, 2021), the Court of Appeals of Texas in Austin rendered yet another in a virtually unbroken string of rulings by state courts going back to *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court's ruling striking down the Texas sodomy law as a violation of liberty under the Due Process Clause of the 14th Amendment, holding that the liberty to engage in private adult consensual sex protected in *Lawrence* does not extend to prostitution. In so holding, the court rejected the appellant-defendant's argument that the state's law against soliciting a prostitute, under which he was convicted, was unconstitutional. Cardoso-Reyna first argued that the law was an unconstitutional content-based restriction on speech, but the court noted that solicitation of illegal conduct is one of the types of speech repeatedly held to be unprotected by the First Amendment. Furthermore, it rejected appellant's argument that because the prostitution law is unconstitutional, soliciting somebody to engage in prostitution is not solicitation of unlawful conduct. In *Lawrence*, the Supreme Court stated that the case it was deciding did not involve prostitution, and to lower courts that has been the end of the story. It would be fair to interpret the *Lawrence* opinion as not taking a position on whether prostitution laws are unconstitutional, but just pointing out, by the way, that the case before the Court did not involve prostitution. But lower courts would just as well prefer to leave it to the Supreme Court to take the heat for declaring such laws unconstitutional . . .

## PRISONER LITIGATION NOTES

*By William J. Rold*

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

**U.S. COURT OF APPEALS – THIRD CIRCUIT** – Transgender inmate Evonca Sakinah Aliahmed (a/k/a Hermione K. I. Winter, a/k/a David Allen Allemandi) has been suing for years under various names for alleged violation of her civil rights by the Delaware DOC. In *Aliahmed v. Troxler*, 2021 WL 130952 (3d Cir., Jan. 14, 2021), the Third Circuit upheld denials of preliminary injunctive relief on medical care, safety, housing, and transfer to the women's prison. The panel for the unpublished *per curiam* opinion consisted of Circuit Judges Louis Felipe Restrepo (Obama) and Paul Brian Matey (Trump), and Senior Circuit Judge Anthony Joseph Scirica (Reagan), affirming U.S. District Judge Leonard P. Stark (D. Del.). The court noted that Aliahmed was receiving hormones, was housed in a single cell, was monitored for suicidal ideation, and had no right to a transfer, citing, respectively: *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004); *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997); *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983). Aliahmed was unlikely to prevail on the merits on any of these claims. The court dismissed a point of appeal regarding use of a Muslim woman's headscarf, finding that it lacked jurisdiction because Judge Stark had ordered more briefing on the point. *Def. Distributed v. Att'y Gen. of N.J.*, 972 F.3d 193, 199 (3d Cir. 2020).

**GEORGIA** – Gay *pro se* prisoner Jody Lee Raby sues correctional officials for failure to protect him from homophobic threats and harassment while in an open dorm. Although defendants placed him in protective custody on occasion, they allegedly returned him to an open dorm knowing of his danger, and he was raped twice. U.S. Magistrate Judge Benjamin W. Cheesbro recommended that Raby's official capacity claims be dismissed, along with his injunctive claims, while he proceeds on individual capacity damages claims, in *Raby v. Adams*, 2020 WL 8172707 (S.D. Ga., Dec. 22, 2020). Claims are stated against the warden and unit manager, who knowingly moved Raby to general population. Later, "all homosexual" inmates were transferred out of this facility, according to the pleadings. The transfer is fatal to Raby's claim for injunctive relief and to his proceeding against these defendants in their official capacity. He may continue to seek compensatory and punitive damages. U. S. District Judge R. Stan Baker adopted the magistrate's recommendation on January 13, 2021. Judge Baker referred Raby's request for appointment of counsel to Judge Cheesbro, who has denied it twice.

**ILLINOIS** – Chief U.S. District Judge Nancy J. Rosenstengel denies the second request of a class of transgender inmates that the court appoint a monitor to oversee the state's efforts to comply with a preliminary injunction that they take steps to improve conditions for transgender inmates in Illlinois. *Monroe v. Jeffreys,* 2021 WL 50490 (S.D. Ill., Jan. 6, 2021). At issue is the performance of the Illinois DOC "Transgender Care and Review Committee," which allegedly still has non-medical members making decisions about hormones, surgery, housing, transition support, and so forth. In response, defendants argue they are making progress, presenting plans to split the Committee into two Committees: one for "Health and Wellness" (to handle concerns about treatment and surgery) and one for Administration (to handle operational concerns, housing, PREA, and commissary). The state is also

consulting with Wendy Leach of the Moss Group and with Erica Anderson of USPATH. The state has new directives "in the works," including cross-gender search protocols, and it asks for more time, in light of COVID-19. [Note: PREA standards restricting cross-gender searches of transgender inmates, 28 C.F.R. § 115.15, were promulgated in 2012.] Judge Rosenstengel observed that "these changes will take time" and said she was satisfied with defendants' assurances that a monitor was not warranted currently. Defendants also made the argument that the preliminary injunction had "expired" under the Prisoner Litigation Reform Act. Judge Rosenstengel finessed this by reminding them that she had already renewed the preliminary injunction once, that their position is inconsistent with their assurances that they are complying the with order, and that the alternative is for them to move to vacate the order, which would trigger a merits hearing, which they have said they do not want. The denial of a monitor is without prejudice.

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**ILLINOIS** – Former inmate Deon Hampton has a remaining damages case for mistreatment as a transgender prisoner. This decision involves cross-motions to compel disclosure of the opposing parties' Facebook pages, in *Hampton v. Kink*, 2021 WL 122958 (S.D. Ill., Jan. 13, 2021). Chief U.S. District Judge Nancy J. Rosenstengel grants both motions, subject to a protective order. Hmpton is directed to produce her Facebook "handle" to give defendants access to her public postings about her lawsuit, her post-traumatic stress disorder, and her experiences in Illinois custody. Hampton was able to obtain, from an undisclosed source, postings of some of the defendants to a site called "Behind the Walls—Illinois Dep't of Corrections", a private group established in 2011 for correctional staff. These "sample" posts show transphobic and biased comments, some of which are about Hampton in particular. Judge Rosenstengel directs defendants who remain with the site to search for other postings about Hampton and transgender prisoners, including postings that any of the defendants marked "liked." Judge Rosenstengel extended deposition deadlines until after compliance.

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**INDIANA** – Transgender federal prisoner Colby A. Palmer, *pro se,* alleges that she was deliberately placed in danger when her cellmate, who threatened her and was removed, was returned to her cell and attacked her. All of this occurred in the protective custody unit at FCC Terre Haute. Palmer also alleges that she is about to be transferred to California, where she will be in further danger because there is no protective custody yard at that prison, and she seeks a restraining order. Finally, Palmer alleges severe mental health needs that are not being treated. U. S. District Judge James Patrick Hanlon allowed her to proceed in *Palmer v. Watson,* 2021 U.S. Dist. LEXIS 4356 (S.D. Ind., Jan. 8, 2021). The ruling is unusual because it was entered before determination of *in forma pauperis*. Judge Hanlon wrote: "There is no requirement that the Court resolve a motion to proceed *in forma pauperis* before screening a complaint and under the circumstances presented in this case it is appropriate." The "circumstances" involve the prison's failure to provide a copy of Palmer's inmate account statement. Palmer can proceed against the warden in his official capacity, under *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); and the claim against the director of the Federal Bureau of Prisons is dismissed without prejudice. Judge Hanlon allows Palmer to proceed with *Bivens* claims (*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)) against the prison officials who are allegedly responsible for deliberate indifference to her safety and her mental health. Judge Hanlon orders service by the U.S. Marshal, along with a copy of this Order. The defendants are directed to respond to the request to enjoin transfer when they respond to the complaint. U.S. Magistrate Judge Doris L. Pryor ordered the Warden defendant to provide an inmate account statement by January 27th, but, as of January 28th, it was not on the docket. The IFP remains pending. Judge Hanlon was appointed by President Trump in 2018.

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**IOWA** – Chief U.S. District Judge Leonard T. Strand granted summary judgment against nine Native American inmates on several issues involving their allegations that their rights were violated under the Free Exercise Clause of the First Amendment and under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, in *Tyndall v. State of Iowa,* 2021 WL 201782 (N.D. Iowa, Jan. 20, 2021). Iowa uses religious "consultants" to lead religious ceremonies of the consultants' faith and to provide advice to corrections about "difficult questions" concerning observance of particular religions in the prison setting. The consultant "for the Native American faith" is Judy Morrison, who "serves as a point of contact for all Native American issues that may arise in the IDOC." (Vesting such a sweeping role in one person is likely to make a Native American Rights Fund lawyer squirm.) Much of the prolix opinion of nearly 9,000 words concerns whether Morrison was acting under color of state law or in a protected religious capacity. It also balances First Amendment and correctional interests under *Turner v. Safley*, 482 U.S. 78, 89 (1987). This is fascinating stuff for advocates with a Native American client who has free exercise claims in prison. For the rest of our *LawNotes* readers, one of the plaintiffs (Langdeaux), a registered member of the Rosebud Sioux Tribe, identifies as "two-spirited" or "gender fluid." He claimed that Morrison

excommunicated him from the tribe because of her hostility to his sexuality. This appears in Langdeaux's affidavit in opposition to summary judgment, but it is not in the Second Amended Complaint. Thus, Judge Strand declines to consider it. Stripped of this gender identity claim, Langdeaux's argument loses to summary judgment as Judge Strand finds that Morrision's banning of Native American religious privileges to Langdeaux was a "clerical decision." [Note: This writer assumes Judge Strand used "clerical" in its second definition, as "relating to the clergy," rather than in its first definition, as "relating to office work."] Judge Strand found that prison officials did not take part in the decision to exclude Langdeaux, notwithstanding that it had consequences on rules about grooming and possession of certain objects normally considered "contraband." The plaintiffs are represented by the Wassmer Law Office, PLC (Marion, IA).

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**MARYLAND** – U.S. District Judge Richard D. Bennett granted summary judgment on failure to exhaust administrative remedies under the Prison Litigation Reform Act in *Hope v. Ritchie*, 2021 WL 307394 (D. Md., Jan. 29, 2021). Alyssa V. Hope, a transgender inmate, sued *pro se*, claiming excessive force and unconstitutional strip cell conditions after a dispute with officers that resulted in her commencing a hunger strike in 2020. The officers dispute the account. Hope admits she did not file a grievance through all steps of administrative appeals, but she claims she could not do so because of administrative restrictions relating to her hunger strike. Defendants counter that Hope was "off" hunger strike after four days and could have "exhausted" – to which Hope offers no response, according to Judge Bennett. Judge Bennett also finds no "hunger strike" exemption to exhaustion. Summary judgment is granted, but the dismissal is without prejudice. The statute of limitations for § 1983 cases in Maryland is three years.

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**MARYLAND** – U.S. District Judge Paula Xinis dismissed transgender inmate Tylee Dodson's harassment and discrimination claims for failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA] in *Dodson v. Nwagwu,* 2021 WL 288169 (D. Md., Jan. 28, 2021). Dodson alleged that she was subjected to continuous verbal harassment by defendants, denial of approved feminine commissary items, contaminating of her food, and deliberately left in unsupervised situations, where she could have been assaulted (but she does not allege an assault occurred). Defendants moved for summary judgment on several grounds, including PLRA exhaustion. Judge Xinis sent Dodson the warning and cautions about summary judgment required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), but Dodson never responded. She was granted one extension, which expired in November of 2020. Dodson attached to her complaint several grievances she filed in an attempt to buttress her claims. This was probably her undoing, since defendants filed an affidavit that she never appealed any of them – and Dodson did not contest this. One grievance concerned a complaint about being raped by another inmate in 2018, which Dodson said a non-defendant officer "helped her fill out." She alleges there was "no follow up." Judge Xinis dismisses for failure to exhaust without reaching the other issues presented by defendants in support of summary judgment.

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**MISSOURI** – In a mind-numbing 15,000-word PLRA screening of inmate Mikel R. Porter's *pro se* complaint, U.S. District Judge Stephen R. Clark finds that the pleading fails to state any claims in *Porter v. Correctional Case Manager,* 2021 WL 243563 (E.D. Mo., Jan. 25, 2021). It is apparent from Judge Clark's recitation of the "factual" pleadings (and from this writer's review of the complaint and its fourteen "supplements") that Porter has a tenuous grasp of reality. He writes all over the pages with religious slogans, uses nonsensical and non-existent words, and claims angels, devils, and "ungodly ugly" wicked people are tormenting him and contaminating his food with such things as a "cooked" human ear in his potatoes. He sent his fingernail clippings and his allegedly tainted oatmeal to the Clerk of Court. He filed crossword puzzles, word-finder games, and riddles. In one of the "supplements," Porter says that a cook tried to discipline him for his fingernail length, which he concedes averaged 3 cm. Porter alleges that the cook was discriminating against him as a transgender person. This is apparently only mentioned once, and Porter uses male pronouns. He also claims race discrimination as he identifies some of his harassers as white. Porter claims inmates and staff are staring "negative vibes," slamming doors, and stealing his clothing. Porter also claims sexual assault, but his descriptions seem like ordinary assault or minor fights (like slapping), and the PREA complaints were found "unsubstantiated." Over thirty defendants are named or described. Judge Clark repeats the allegations for pages, saying they are "somewhat confusing," as if they were normal pleadings and he were trying to make sense of them. He does not invoke F.R.C.P. 17(c)(2), regarding party competency. Porter alleges that mental health providers are trying to persuade him to take medication. Since Porter does not claim denial of mental health services and does not say psych medication is being forced upon him, Judge Clark says there is no constitutional mental health claim. [Pay no attention to the elephant in the living room . . . . ] Judge Clark continues for

pages about the difference between official and individual capacity – as if Porter would understand this. He finds no claim about the handling of Porter's sexual assault allegations. There was no known risk or disregard of it under *Vandevender v. Sass*, 970 F.3d 972, 976 (8th Cir. 2020). Porter's property claims fail under *Clark v. Kansas City Missouri Sch. Dist.*, 375 F.3d 698, 702 (8th Cir. 2004), because there is a post-deprivation remedy. Judge Clark finds no claim about transgender discrimination. For equal protection purposes, he requires that inmates show membership in a protected class or violation of a fundamental right, citing *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 815 (8th Cir. 2008). This is misleading, because equal protection claims can be stated without either; the difference is the level (or "height") of scrutiny. *Patel* cited *Weems v. Little Rock Police Department*, 3453 F.3d 1010, 1016 (8th Cir. 2006), which applied rational basis scrutiny to a sex offender registration equal protection challenge. Porter's race claims are too conclusory. As to gender identity, Judge Clark frames the class as between those who have fingernails 3 cm long and those whose nails are an "appropriate length." [No one can accuse him of framing an overbroad equal protection class.] Porter thus fails to make a "threshold" showing of being similarly situated to those receiving better treatment. Read favorably, Porter alleged that his fingernail length was used as a subterfuge for transgender bias. *See Lewis v. Heartland Inns of America*, 591 F.3d 1033, 1036 (8th Cir. 2010) (reversing summary judgment for employer on sex stereotype grounds after saying her "Ellen DeGeneres kind of look" was not desirable in their hotels). This writer has sympathy for the plight of a judge faced with this kind of *pro se* litigant. This opus was not the answer. And it will be back: Judge Clark dismissed without prejudice. Judge Clark was a Federalist Society appointment by President Trump, opposed by Democrats for his views on abortion and LGBT rights. He was in private practice as the "Runnymede Law Group," but apparently, he was the only member of this vainglorious firm.

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**NEW YORK –** As will become clear, Chief Judge Roslynn R. Mauskopf took an unusually good look at the *pro se* papers in the "fag-bashing" case of Naquan M. Leckie in *Leckie v. City of New York,* 2021 U.S. Dist. LEXIS 5165; 2020 WL 84234 (E.D.N.Y., Jan. 11, 2021). The events occurred in the Brooklyn Detention Complex [BDC], after Leckie was transferred there from the Manhattan Detention Center, where he was homophobically harassed. Leckie identified himself as "straight" upon arrival at BDC, but he said he was fearful because of previous gang affiliation. He was placed in protective custody. Afterwards, he claimed that he was still given "looks" and "stares" that made him fearful, but he received no specific threats and was not the victim of assault in protective custody prior to December 25, 2017. On that day, a unit supervisor (Jones) said to the men in Leckie's tier, "Come on, guys, let's have an exciting day." She then called several inmates into the hallway and spoke to them. Following this, they inmates returned to the tier and attacked Leckie violently, shouting: "faggot," "gay ass nigga," and "fucking homo." The officer in the control room (Ling) heard the commotion and saw the assault. He activated his body alarm, summoned the "Probe Team," and ordered the fighting to stop. He did not personally intervene in the altercation, which lasted from 1-4 minutes, before the attackers stopped. Leckie sued Jones and Ling for failure to protect him; and Ling, for failing to intervene. The defendants moved for summary judgment. Leckie did not file opposing papers, but Judge Mauskopf ruled that the court had an independent obligation to satisfy itself that the merits of the grounds for summary judgment were supported by the record, under *Giannullo v. City of New York*, 322 F.3d 139, 143 n.5 (2d Cir. 2003). Judge Mauskopf granted summary judgment to Jones and Ling on the protection from harm claims, because: "At no point did Leckie inform Ling, Jones, or any other correctional staff of his sexual orientation or alert them of any risks to his safety due to his sexual orientation." She found both the objective and subjective elements of deliberate indifference were absent. Leckie was in protective custody and did not inform defendants of any risk. On the failure to intervene, Ling was not deliberatively indifferent because he took action and it happened so fast. Then, Judge Mauskopf does something remarkable: she denies defendant Jones summary judgment on a claim under the due process clause for excessive force. Defendants did not brief this issue, and it was not articulated in the complaint – but Judge Mauskopf finds that the facts support a triable issue. A jury could impute to Jones the attack by the inmates, if they find that Jones incited them. Judge Mauskopf ruled that the standard test for excessive force under the Eighth Amendment articulated in *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) ("whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm") did not apply to pre-trial detainees in light of *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), which applied an objective state of mind test to excessive force against pre-trial detainees. The test is whether Jones' actions were "rationally related to a legitimate nonpunitive governmental purpose or . . . appear excessive in relation to that purpose." *Id.* at 398. "Defendants have failed to show that no reasonable juror could find in Leckie's favor with respect to his excessive use of force claim against Jones. In Leckie's deposition testimony, he states that after Jones announced they were going to have an exciting day, she brought several other inmates out

into the hallway and spoke to them, then brought them back into the day room where they immediately attacked Leckie while using homophobic slurs. Jones's own affidavit does not contradict this account." This is now set to go to trial. There is no qualified immunity because it is well settled that officers cannot behave to incite inmates to violence on the basis of sexual orientation.

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**NORTH CAROLINA** – Chief U.S. District Judge Martin Reidinger granted defendants summary judgment and dismisses with prejudice the civil rights case of transgender inmate Jennifer Ann Jasmaine in *Jasmaine v. Gazoo,* 2021 WL 243865 (W.D.N.C., Jan. 25, 2021). Jasmaine has been a frequent litigator – and not without cause. In 2019, she sued for fear of sexual assault in *Jasmaine v. Aaron,* 2019 U.S. Dist. LEXIS 168587 (W.D.N.C., Sept. 30, 2019). Then Chief Judge Frank D. Whitney dismissed this protection from harm case based only on "fear." In *Jasmaine v. Pitts,* 2020 U.S. Dist. Lexis 18186 (W.D.N.C., Feb. 3, 2020), when Jasmaqine was actually raped, Judge Whitney allowed her to proceed under protection from harm theory, but he minimized her situation: "Beyond the rape itself, Plaintiff does not allege any other injuries." Later, in 2020, new Chief Judge Martin dismissed a claim for private showering in *Jasmaine v. Engrime,* 2020 U.S. Dist. LEXIS 139230 (W.D.N.C., Aug. 5, 2020). The present case concerns failure to protect in later incarceration and denial of access to incarceration in another state through the Interstate Corrections Compact, whereby she would be protected from gangs dispersed throughout North Carolina prisons. The case survived initial screening. Judge Reidinger finds that Jasmaine did not complete her exhaustion of administrative remedies under the Prison Litigation Reform Act until a month after filing her lawsuit – not prior to filing, as required. Judge Reidinger proceeds to address the merits on summary judgment anyway. He finds that at all pertinent times, Jasmaine was in segregated housing (administrative, protective, or disciplinary), and therefore there was no deliberate indifference to her safety during such custody, regardless of history of prior assaults. Judge Reidinger notes that while threats may constitute enough in some cases where nothing is done, here actions were taken – and there were no new sexual assaults or injuries – citing *Brown v. Dep't of Public Safety and Correctional Services*, 383 F.Supp.3d 519, 548 (D. Md. 2019). Judge Reidinger finds that defendants are also entitled to qualified immunity because they could not have reasonably believed their conduct in "protecting" Jasmaine violated clearly established law. Judge Reidinger appointed North Carolina Prisoner Legal Services as counsel for discovery only, and they withdraw prior to summary judgment proceedings. These various cases strike this writer as recurring examples of failure in implementation of the Prison Rape Elimination Act.

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**TENNESSEE** – *Pro se* inmate Gerald Thurman Brown alleged that the White County (Tennessee) Jail denied mental health services to inmates and that Brown had a need for treatment of manic depression, PTSD, and gender dysphoria. Brown also alleges that the jail refused to transfer him to a facility where he could receive mental health treatment. There are other issues, including a rule limiting Bible-reading to one hour a day, which Chief U.S. District Judge Waverly D. Crenshaw allows to proceed under the First Amendment Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act in *Brown v. Page,* 2021 WL 288754 (M.D. Tenn., Jan 27, 2021). This report does not address these other issues, which consume most of the opinion. It appears that the White County Jail does not provide mental health treatment – or at least this is the reasonable inference from what is alleged to be omitted. [Note: it is a small jail, with a capacity of 172, in a county of 25,000.] Judge Crenshaw dismisses the mental health claim, because there is no allegation of denial of such services by a named defendant. Judge White then rules that, since there is no violation by a named defendant, there can be no *Monell* claim against the county. This analysis seems wrong for several reasons. Judge Crenshaw recognized that the sheriff was a proper supervisory defendant and a policy-setter for the county on the Bible issue. He remains in the case for that purpose. On mental health treatment, however – where the allegation is that the jail does not provide any mental health treatment, in what Judge Crenshaw calls a "policy" of no mental health treatment – he finds that the sheriff is neither personally responsible nor stands in the shoes of the county. This is circular: the claim that there are no mental health professionals at the jail is dismissed because there are no mental health professionals to sue for denying care. A sheriff's duty to provide medical care to inmates at county expense existed at common law and long predated *Estelle v. Gamble,* 429 U.S. 97 (1976). *See Spicer v. Williamson,* 132 S.E. 291, 293 (N.C. 1926) (sheriff's duty to transport wounded inmate out-of-county for surgery at county expense), cited with approval in *Estelle,* 429 U.S. at 104 n.9. Judge Crenshaw also erred in applying a subjective test to the defendants' state of mind on deliberate indifference in denial of mental health treatment. These events occurred in a jail setting, and *Kingsley v. Hendrickson,* 576 U.S. 389, ___, 135 S.Ct. 2466, 2475 (2015), requires an objective test for the second (deliberate indifference to risk) element of the claim for pre-trial detainees. *Griffith v. Franklin County,* 975 F.3d 554, 569 (6th Cir. 2020). Here, an objective assessment of the deliberate indifference posed by withholding of all mental health care should easily

state a claim against the sheriff and the county on initial screening. Judge Crenshaw grants Brown leave to amend on this point; but, respectfully, Brown is unlikely to succeed if Judge Crenshaw repeats the same errors.

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**VIRGINIA** – This case has an odd procedural history, resulting in a dismissal that seems both wrong on the law and unnecessarily harsh. In October of 2019, Billy Alexander Moore, *pro se,* sued for violation of his civil rights as a gay jail inmate in *Moore v. Southwest Virginia Regional Jail Authority,* 2021 WL 312336 (W.D. Va., Jan. 29, 2021). His case was accepted for filing "conditionally" (without PLRA merits screening). A Clerk's letter was "returned to sender" in March of 2020. In July, Chief U.S. District Judge Michael F. Urbanski dismissed Moore's case without prejudice for Moore's failure to keep the court informed of his address. The dismissal was also "returned to sender." During this time, Moore had been released and became homeless. By January of 2021, he was back in jail and wrote to Judge Urbanski, asking if his case could be opened. On January 29, 2021, Judge Urbanski both reopened the case and closed it, dismissing it with prejudice for failure to state a claim. Moore had argued that a misconduct report was issued against him for a petty matter (which he described as "about a couple of ibuprofen"), for which he received "ten days in the hole." Moore alleges the charging officer called him a "homo," "faggot," and "cocksucker" – and refused to give him forms to contest the charge. Moore alleged that the jail had a pattern of homophobia and that the supervisor who was also sued knew about it. Judge Urbanski balkanizes the claims, separating the misconduct charge from the sexual orientation discrimination. On the misconduct charge, he writes that Moore's ten day's punishment is not "atypical and significant" enough to implicate due process rights under *Sandin v. Conner*, 515 U.S. 472, 484 (1995). He reviews the slurs as "verbal abuse" under the Eighth Amendment, and he finds such statements, without more, insufficient to state a claim. *Henslee v. Lewis*, 153 F. App'x 179, 179 (4th Cir. 2005). Judge Urbanski then rules that there is no Equal Protection claim because Moore did not show that he was treated differently than other similarly situated inmates: "Moore alleges that [the defendant officer] called him slurs based on his sexual orientation when [he] denied Moore an appeal form. But Moore does not allege that any person with a different sexual orientation was treated differently with regard to appeal forms (or in any other way), and he must allege differential treatment to state an equal protection claim. *See Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)." Actually, *Veney* found an Equal Protection claim on behalf of gay male inmates, who were denied cellmates in Virginia prisons, while heterosexual men and all women were allowed cellmates. In 2002, however, the Fourth Circuit found that the state had a sufficiently serious security justification to sustain the distinction. The case does not stand for the proposition that such an equal protection claim can be dismissed *sua sponte* on the pleadings before service. *See Chappell v. Miles,* 2012 WL 1570020, at *5 (D.S.C., May 3, 2012) (homophobic remarks may state equal protection claim when accompanied by physical shoving not imposed on heterosexual inmates). It would be interesting to know how many straight inmates got ibuprofen tickets. In dismissing with prejudice, Judge Urbanski does not tie the sexual orientation claims with the decision to charge the petty offense, finding that the justification for the charge was irrelevant. Judge Urbanski also attacks the prayer for relief, saying that the "only relief Moore requests is the filing of a hate or discrimination case against defendants. He does not seek monetary damages or any other relief." In what seems deliberately obtuse, Judge Urbanski says that Moore's reference to "filing . . . a case" leaves it "unclear who[m] he believes should be compelled to bring such a lawsuit." Really? Is Moore not asking instead that this case be treated as such a lawsuit? Finally, Judge Urbanski dismisses without prejudice and without service, because none of the "noted deficiencies" could be cured by an amended complaint. This writer believes most of them could be cured, and Moore should have been given the chance under *King v. Rubenstein,* 825 F.3d 206, 225 (4th Cir. 2016) (reversing dismissal with prejudice because *pro se* prisoners should have at least one chance to amend deficient complaint).

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**WASHINGTON** – Transgender prisoner Victor Julian Turner, *pro se,* sues over her housing assignment, the handling of her grievances, and defendants' use of pronouns when addressing her. She seeks counsel, an expert witness (at defendants' expense), and the issuance of subpoenas to compel outside doctors to answer interrogatories and make admissions – in *Turner v. Ralkey,* 2021 WL 135855 (W.D. Wash., Jan. 13, 2021). U.S. Magistrate Judge David W. Christel denies counsel and an expert. Appointment of counsel in a civil case is discretionary upon a showing of exceptional circumstances under *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). That is not the case here in this early stage of litigation. There is no right to appointment of a party-identified expert under 28 U.S.C. § 1915. The court may appoint an expert to assist "the trier of fact" under F.R. Evid. 706 – and may even assess costs solely to one party under Rule 706(c) – *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir.1991), *aff'd on other grounds sub nom. Helling v. McKinney*, 509 U.S. 25 (1993) – but no such showing is made here. Turner seeks an expert to advance her own case, at least

on this showing. As to subpoenas, non-parties cannot be compelled to respond to interrogatories or requests for admissions. *Eichler v. Sherbin*, 520 Fed. Appx. 560, 562 (9th Cir. 2013); *United States v. Dollison*, 2017 WL 3873698, at *8 n.6 (D. Alaska, Sept. 4, 2017). F.R.C.P. 45 allows a party to subpoena a non-party to testify or to produce documents. The clerk is directed to furnish subpoenas to Turner in blank, with the understanding that, while the marshal may perform service, Turner is responsible for the costs incidental to compliance. *Tedder v. Odel,* 890 F.2d 210, 211-12 (9th Cir. 1989).

## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**U.S. DEPARTMENT OF STATE** – Antony Blinken, nominated by President Joseph R. Biden, Jr., to be Secretary of State, announced that he would be appointing a "special envoy for the human rights of LGBTI persons." This position was established under the Obama Administration, but none of the Secretaries of State during the Trump Administration saw fit to appoint anybody to the position. Indeed, during the Trump Administration U.S. embassies were instructed not to fly a gay pride flag during Pride Month, which many embassies had been doing during prior administrations, and Secretary of State Mike Pompeo adopted the view that it was not the policy of the U.S. to advocate for LGBT rights in other countries. The State Department's policy in the Biden Administration. will be to support LGBTI rights internationally.

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES** – A parting shot from the Trump Administration against LGBTQ families: HHS announced a "final rule" on January 12 proclaiming that federal social services contractors with religious or moral objections have no obligation to provide services to same-sex families. If the Biden Administration does not take action to reinstate the non-discrimination rule promptly, it is likely that litigation will ensue.

**U.S. DEPARTMENT OF EDUCATION** – Deputy General Counsel Reed Rubinstein issued a memorandum on January 8 to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights, advising on the effect of the Supreme Court's June 15, 2020, decision in *Bostock v. Clayton County* on the enforcement of Title IX of the Education Amendments of 1972, which forbids sex discrimination by educational institutions that receive federal funding. Issuance of this memorandum just weeks before the inauguration of President Joseph Biden was a terminally silly action since the new administration can immediately revoke and replace it. The memorandum took the position that *Bostock*, a Title VII case, does not require OCR to treat claims of discrimination because of an individual's sexual orientation or gender identity by educational institutions as sex discrimination claims under Title IX. While the memorandum is theoretically correct in stating that *Bostock* was dealing solely with the application of Title VII's ban on employment discrimination, the "advice" provided by Rubinstein was contrary to what courts have been doing since *Bostock* was issued: treating its textualist interpretation of the ban on sex discrimination under Title VII as methodologically applicable to other federal sex discrimination laws, including Title IX, as Justice Samuel Alito predicted would be done in his dissenting opinion. Most significantly, Rubinstein opined that despite *Bostock* OCR could continue to persist in the Trump Administration's view that schools don't have to respect a transgender student's gender identity when it comes to official records, restroom and locker room access, and sports participation. On the first day of his administration, President Biden signed an Executive Order directing all federal departments and agencies to follow *Bostock* in interpreting and enforcing laws banning discrimination because of sex. In *Bostock*, Justice Neil Gorsuch, writing for the Court, refrained from opining about how the decision would affect issues such as those, which were not directly presented to the court by Harris Funeral Homes' appeal of the 6th Circuit's ruling in Aimee Stephens' gender identity discrimination case. So far, lower courts seem to have been taking positions contrary to those espoused by the Trump Administration, generally in line with written guidelines issued by OCR during the Obama Administration.

**FLORIDA** – The Florida Commission on Human Relations, which enforces the state's anti-discrimination laws, voted to follow the Supreme Court's Title VII *Bostock* decision in interpreting the ban on sex discrimination in employment and public accommodations under the state's Human Relations Law, and will accept claims of discrimination because of sexual orientation or gender identity relating to employment and public accommodations. However, the Commission appears to have taken just a halfway measure when it comes to housing discrimination, which is covered by a separate statute, and announced that it would accept housing discrimination claims "based upon sex discrimination due to non-conformity with gender stereotypes," without further explanation about what that means. In addition, noting President Biden's January 20 Executive Order concerning enforcing all federal laws banning sex discrimination to include

sexual orientation and gender identity discrimination claims, the Commission announced that it "will be watching for guidance from its federal partners, the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development, that may revise, suspend, or rescind previous agency actions that would impact its current procedures or process." Well, that's perfectly clear?? And, of course, the Commission's ruling about what claims it will investigate is not necessarily binding on Florida courts.

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**MONTANA** – On January 27, the Montana House passed H.B. 112 by an overwhelming margin, seeking to exclude transgender students from competing in sports events consistent with their gender identity. The measure now goes to the Senate for consideration. Similar measures in some other states have been declared unconstitutional by federal courts.

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**NEW YORK** – The New York City Department of Small Business Services has formally moved on January 19, 2021, to add LGBTQ owned businesses to the list of minority-owned businesses that are entitled to the services provide by the Department and eligible to seek contracts with the City. This makes NYC the largest city to officially recognize LGBTQ owned businesses as "minority-owned businesses" according to Joseph Milizio, a founding member of the National LGBT Chamber of Commerce's Long Island Committee. The National LGBT Chamber of Commerce is authorized to certify business as being LGBT-owned for purposes of applying to the Department for services. Milizio is a partner in the law firm Vishnick McGovern Milizio LLP. Gay City News reported on the development on January 29, noting that it is based on an agreement between the Department and the LGBT Chamber of Commerce, which will have more details on its website about how to get certified. Prior to this action, the City only recognized businesses owned by people of color or women as "minority businesses."

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**NORTH CAROLINA** – As part of the legislative compromise that repealed the ban on transgender people using public facilities consistent with their gender identity, North Carolina imposed a moratorium on local governments banning discrimination because of sexual orientation and gender identity that finally expired on December 1, 2020. Within a month, three local municipalities had enacted bans on such discrimination: Hillsborough, Carrboro, and Durham.

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**SOUTH DAKOTA** – On January 27, the South Dakota House approved H.B. 1076, which would restrict the ability of transgender people to obtain corrected birth certificates as part of transitioning. The measure passed on a relatively narrow margin, and now goes to the Senate for consideration. Similar laws in other states have been found to violate the federal constitution in recent years.

## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

On February 2, the Senate confirmed **PETE BUTTIGIEG** as Secretary of Transportation by a bipartisan vote of 86-13, making him the first out sexual minority to be confirmed by the Senate for a position in the president's cabinet heading an executive branch department.

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**SARAH MCBRIDE** has become the first out transgender woman to serve as an elected state senator, upon being sworn in as a Delaware State Senator on January 11, 2020.

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A leading proponent and co-drafter of the Article of Impeachment of Donald J. Trump, approved by the House of Representatives on January 13, 2020, was U.S. Representative **DAVID CICILLINE**, an out gay lawyer. House Speaker Nancy Pelosi appointed Cicilline to be one of the House managers for the impeachment trial to be held in the Senate.

## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**CANADA** – *CTVNews* reported on January 28 that the Superior Court of Quebec had issued a historic decision invalidating several articles of the Civil Code of Quebec that discriminate against transgender and non-binary people. For example, the court struck down a provision that would not allow non-binary people to change their sex on their birth record to reflect their gender identity, the court determining that it "violates the dignity and equal rights of non-binary people." The court also rejected a provision that requires each parent on official records to be identified as either "father" or "mother." The decision also struck down a requirement that only Canadian citizens can change the gender designation on their identification papers, thus allowing refugees, permanent residents, and immigrants to make such changes as well. However, the court refused to strike down a provision that allows a parent to object to a name change for gender identity purposes for a child age 14-17. On the other hand, the court found that a requirement of a letter from a doctor, psychologist, sex therapist, psychiatrist, or social worker as a prerequisite for a teen to change their

name or gender status "does not serve a rational purpose." The court gave the provincial government a December 31 deadline to amend the Code to comply with its ruling.

**CAYMAN ISLANDS** – The UK Privy Council in London will hear an appeal on February 23 from a ruling by the Cayman Islands Court of Appeals rejecting a marriage equality claim by a lesbian couple. The trial judge had ruled in their favor, but the government appealed and secured a ruling that the Cayman Islands constitution limits marriage to different-sex couples. The Privy Council, which is the court of last resort for the former British colony, will consider whether marriage equality is required, or whether Cayman Islands is obligated to extend rights of marriage through a civil union or other device.

**INDIA** – A hearing in marriage equality cases pending in the Delhi High Court has been put off to February 25 to give the government a last chance to file papers detailing its position on the issue, after the government missed earlier deadlines to do so.

**SWITZERLAND** – The marriage equality law approved recently by the legislature goes into effect January 1, 2022, unless opponents generate enough petition signatures to mandate a referendum, in which case implementation may be delayed.

**TAIWAN** – The government is considering an amendment to its law allowing same-sex marriage that would expand recognition of international same-sex marriages. Under the law adopted in 2019, Taiwan only recognizes an international same-sex marriage if both spouses' countries would recognize the marriage. The new provision would recognize same-sex marriages regardless of the position of the home country, unless the home country is China.

## PROFESSIONAL NOTES

*By Arthur S. Leonard*

The **LGBT BAR ASSOCIATION OF NEW YORK**'s board has elected **SARAH FILCHER** to a term as President of the Association. Filcher is a Staff Attorney at the LGBTQ+ Legal Project at Legal Services of the Hudson Valley. Prior to being elected as President, Filcher served on the Board of Directors and as Vice President of the LeGaL Foundation. Since 2015, she has been an active member of the organization, from planning events and fundraising to extensively volunteering at the Manhattan Pro Bono Clinic.

**LAMBDA LEGAL**, the nation's largest and oldest LGBTQ rights organization, is in hiring mode, announcing the following positions for which it is accepting applications: Deputy Legal Director for Legal Management and Operations – http://bit.ly/2NsVtsp; Deputy Legal Director for Policy (Washington, DC) – http://bit.ly/3qJDDzD; Staff Attorney (Youth) – http://bit.ly/3iA3MhD; Staff Attorney (Western Region) (Los Angeles, CA) – http://bit.ly/39SBoDn; Daniel H. Renberg Law Fellow (Los Angeles, CA) (commencing Fall 2021) (2-year position) – http://bit.ly/3sQSpq3; Tyron Garner Law Fellow (commencing Fall 2021) (2-year position) – http://bit.ly/39YObE6. For information about applying, visit lambdalegal.org.

From the **WILLIAMS INSTITUTE AT UCLA LAW SCHOOL**: "The Williams Institute at UCLA Law is currently accepting applications for Summer Law Fellowships. Our fellowship programs provide law students with a unique opportunity to engage in LGBTQ law and policy work. We welcome your help in finding our 2021 summer law fellows. If you or your students have any questions, please reach out to Williams Institute Legal Director, Christy Mallory at mallory@law.ucla.edu." More information is available on the Williams Institute website.

**COLUMBIA UNIVERSITY LAW SCHOOL'S CENTER FOR GENDER AND SEXUALITY LAW** has launched a **NEW ERA PROJECT**, focused on achieving equal rights on the basis of sex. **PROF. KATHERINE FRANKE** is the Faculty Director, and they are accepting applications for a Project Director. See the ERA website in the Center for Gender and Sexuality Law for details.

## PUBLICATIONS NOTED

1. Abel, Edmund, It's Bullying That Killed Me: How to Combat Bullying in Indiana Schools Through Effective Legislation, 53 Ind. L. Rev. 633 (2020).
2. Adair, Locke, Freedom of Expression and Artistic Public Accommodations: The Right to Manifest One's Inner State, 15 Liberty U. L. Rev. 1 (Fall 2020) (Consider the publication; author argues for broad expressive freedom exemptions from compliance with public accommodation laws).
3. Antognini, Albertina, Nonmarital Contracts, 73 Stan. L. Rev. 67 (January 2021).
4. Bell, Mark, Bridging a Divide: A Faith-Based Perspective on Anti-Discrimination Law, 9 Oxford J. L. & Religion 56 (2020).
5. Berg, Thomas C., and Douglas Laycock, Espinoza, Government Funding, and Religious Choice, 35 J.L. & Religion 361 (Dec. 2020) (Free Exercise maximalist scholars on religious exceptionalism, including their argument why the Supreme Court should reverse the 3rd Circuit in *Fulton v. City of Philadelphia*).
6. Bonventre, Vincent Martin, Supreme Shift: What the 6-3 Conservative Majority Means Going Forward, 93-FEB N.Y. St. B.J. 8 (January/February 2021).
7. Braver, Samantha, Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals, 120 Colum. L. Rev. 2235 (Dec. 2020).
8. Chua, J.Y., The Strange Career of Gross Indecency: Race, Sex, and Law in Colonial Singapore, 38 Law & Hist. Rev. 699 (Nov. 2020) (gross indecency laws have traditionally been used to prosecute same-sex conduct).
9. Cole, David D., Defending Liberty in the Trump Era: Reflections from the Front, 100 B.U. L. Rev. 2413 (Dec. 2020).
10. Corren, Netta Barak, A License to Discriminate? The Empirical Consequences and Normative Implications of Religious Exemptions, 56 Harv. CR-CL L. Rev. No. 2 (2021) (empirical study documenting that recognizing religious exemptions from complying with anti-discrimination laws does result in increased discrimination against same-sex couples seeking wedding-related goods and services).
11. Crocker, Thomas P., The Fourth Amendment at Home, 96 Ind. L.J. 167 (Fall 2020) (argument for broad constitutional protection for the privacy of the home against state intrusion).
12. Dolgin, Janet, Psychiatry in the Courtroom: Relying on the American Psychiatric Association's Manuals to Resolve Disputes About Personal Status, 53 Ind. L. Rev. 545 (2020) (How the APA's successive editions of DSM have affected judicial treatment of gender identity/transgender issues, among other topics).
13. Fee, John, The Freedom of Speech-Conduct, 109 Ky. L.J. 81 (2020-2021) (ponders the freedom of speech claim that the Supreme Court did not address in *Masterpiece Cakeshop*, but that Justice Thomas would have resolved in favor of the recalcitrant baker).
14. Hart, James, Our Conflicting Liberty Heritage from England and France, 54 Creighton L. Rev. 19 (2020) (The French concept, channeled by Jefferson in the Declaration of Independence and underlying Justice Kennedy's LGBT rights decisions, contrasted with the English concept, articulated by Justice Thomas in his *Obergefell* dissent.)
15. Hodge, Samuel D., Jr., Primer on Property Owned as Tenancy by the Entireties, 37 No. 1 Prac. Real Est. Law. 21 (Jan. 2021) (explores impact of Obergefell on property ownership status of same-sex couples).
16. Inazu, John, Beyond Unreasonable, 99 Neb. L. Rev. 375 (2020) (pondering the difficulties posed by reasonable/unreasonable standards in the law).
17. Joslin, Courtney G., Surrogacy and the Politics of Pregnancy, 13 Harv. L. & Pol'y Rev. 365 (2020).
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## SPECIALLY NOTED

**Lambda Legal published a report during January titled "Courts, Confirmation & Consequences: How Trump Restructured the Federal Judiciary and Ushered in a Climate of Unprecedented Hostility Toward LGBTQ+ People and Civil Rights." This short, data-paced piece shows the unusual speed with which Trump proposed and the Senate confirmed federal judges – many of whom were young, relatively inexperienced, and carefully vetted by conservative advocacy groups to ensure ideological allegiance. Scary reading. Available on the organization's website: *LambdaLegal.org*.**

## 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. All comments in Publications Noted are attributable to the Editor. 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.**