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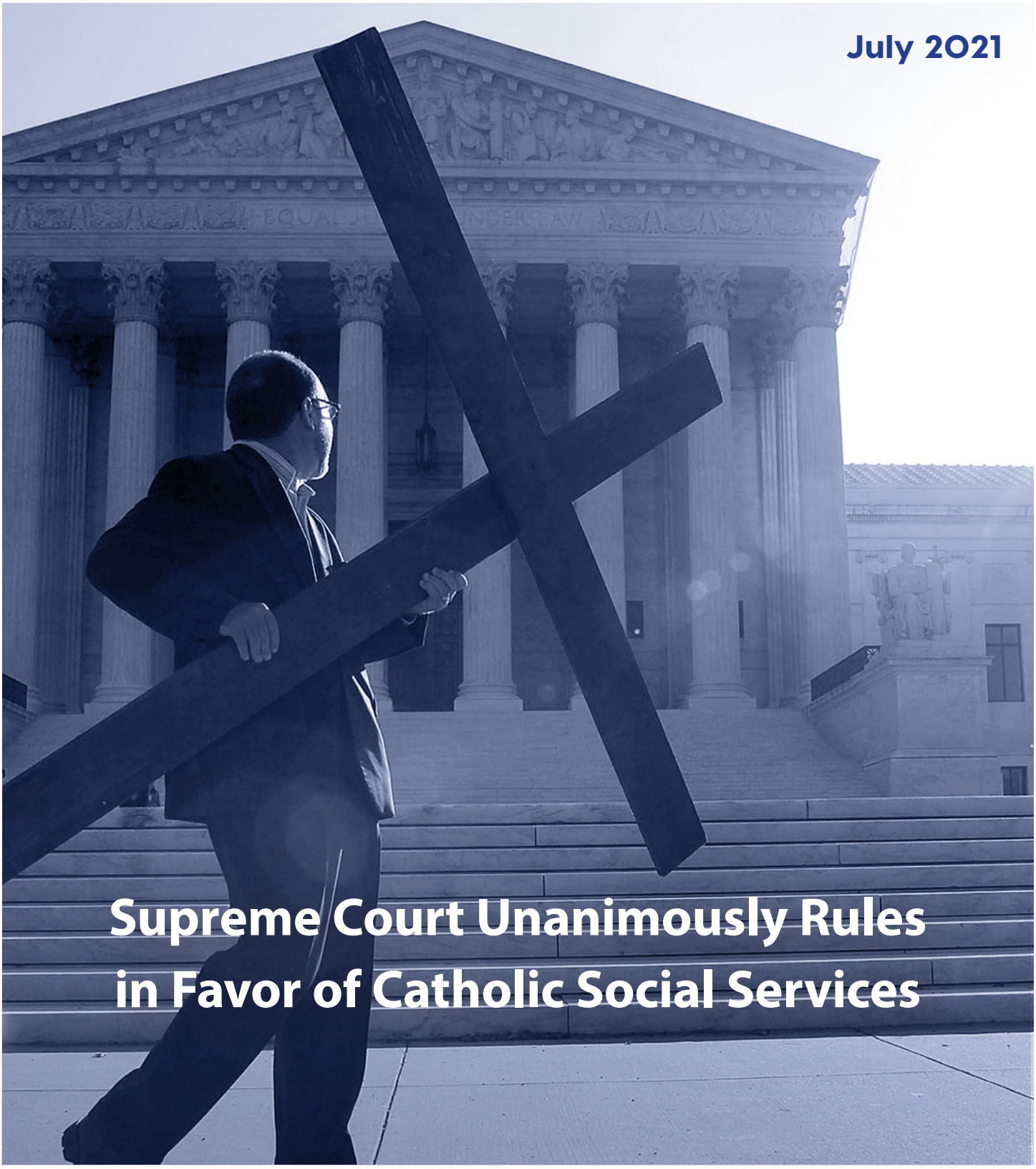
July 2021



Supreme Court Unanimously Rules in Favor of Catholic Social Services

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ISSN 8755-9021

Cover Photograph by Mark Wilson / Getty

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EXECUTIVE SUMMARY

Supreme Court Unanimously Rules That Philadelphia Violated the Free Exercise Rights of Catholic Social Services by Conditioning Foster Care Contract on Providing Services to Married Same-Sex Couples

By Arthur S. Leonard

The U.S. Supreme Court unanimously ruled in *Fulton v. City of Philadelphia*, 2021 WL 245923, 2021 U.S. LEXIS 3121 (June 17, 2021), that the City of Philadelphia violated the 1st Amendment Free Exercise of Religion by Catholic Social Services (CSS), a non-profit agency affiliated with the Archdiocese of Philadelphia, when the City ceased referring children in need of foster care to CSS and refused to renew the agency's foster care contract because CSS refused on religious grounds to evaluate and certify married same-sex couples to be prospective foster parents. The Court found determinative that the city had no compelling justification to require CSS to abide by the non-discrimination provision in its contract with the City, when the contract reserved to the City sole discretion to allow exceptions to the non-discrimination policy, and there were at least twenty other foster care agencies in Philadelphia that were willing to evaluate and certify same-sex couples for foster placements.

Chief Justice John R. Roberts, Jr., wrote the opinion for the Court, which was joined by Justices Stephen Breyer, Sonia Sotomayor, Elena Kegan, Brett Kavanaugh, and Amy Coney Barrett. Justice Samuel Alito filed an opinion concurring in the judgement, which was joined by Justices Clarence Thomas and Neil Gorsuch. Justices Alito and Thomas also joined an opinion concurring in the judgment by Justice Gorsuch. Justice Barrett filed a concurring opinion, joined in full by Justice Kavanaugh, and in part by Justice Breyer. Because Chief Justice Roberts' opinion was joined by five of the justices, it is a "majority opinion" for the Court in terms of its analysis and holding.

All nine justices agreed that the City's failure to allow an exception was subject to "strict scrutiny," and that the City had failed to provide compelling reasons for its actions that were sufficient to support the rulings by the 3rd Circuit and the district court, which had rejected CSS's motion for preliminary injunctive relief. Six members of the Court got to this result by finding that its precedent of *Employment Division v. Smith*, 494 U.S. 872 (1990), did not apply to this case; three joined the judgment but not the Court's opinion, finding that *Smith* should be overruled, and strict scrutiny applied under pre-*Smith* Free Exercise precedents.

Although the ultimate result – a ruling in favor of CSS – was not unexpected among Supreme Court watchers and commentators in light of both the oral arguments and the Court's trend in favor of an expansive view of the Free Exercise Clause, it was notable and surprising to many that the six-member majority opinion spanned the ideological spectrum to include the Court's remaining Democratic appointees, the conservative Chief Justice, and two of President Donald J. Trump's conservative appointees, and that the three justices who were eager to use this case as a vehicle to overrule the Court's three decades' precedent of *Smith*, were unable to secure the votes of Justices Kavanaugh and Barrett, who are both strong advocates of free exercise of religion.

Under *Smith*, government laws or actions that are neutral with respect to religion and have general applicability are, assuming they serve a rational purpose, generally immune from attack under the Free Exercise Clause. Justice Antonin Scalia's opinion for the Court in *Smith* reversed four decades of Free Exercise precedents, under which laws incidentally burdening free exercise of religion were subjected to strict scrutiny. Four justices concurred in the judgment in *Smith* but wrote separately to disavow the Court's overruling of existing Free Exercise precedents. Congress sought to overrule the decision with its first enactment of the Religious Freedom Restoration Act (RFRA). When the Court subsequently ruled that Congress was without power to override its constitutional rulings, Congress passed a narrower version of RFRA under which individuals could raise a free exercise defense to attempts by the federal government to enforce general federal laws that incidentally burdened their religious practices, putting the government to the burden of showing a compelling justification for the challenged law. Many states passed similar laws, and the Court itself subsequently ruled that laws otherwise sheltered under *Smith* could be attacked under the Free Exercise Clause where the religious objectors showed that the challenged law had been passed specifically to impair religious freedom.

Chief Justice Roberts assembled his majority of six justices by finding a way to rule for CSS without overruling *Smith*. In order to get there, he found that the City's Fair Practices Ordinance (FPO) did not apply to this case – thus eliminating a legal authority that would fall within the range of *Smith*'s "neutral laws of general applicability" – and that the action being challenged at this point by CSS – the City's insistence that CSS had to agree not to discriminate against same-sex couples – reduced the question at issue to why the City's Commissioner of Human Services did not exercise the sole discretion reserved to her under the City's form contract to grant an exception to CSS from complying with the non-discrimination requirement. Because of the discretionary exception clause in the contract, Roberts concluded, the case did not involve a rule of "general

applicability," thus rendering *Smith* irrelevant and subjecting the City's action to the "strictest scrutiny," as described in *dicta* in the *Smith* opinion for challenged laws that either were not neutral with respect to religion or were not of general applicability.

In recounting the history of this case, Chief Justice Roberts reported that the Catholic Church in Philadelphia has been providing services to "needy children" since 1798, when a yellow fever epidemic prompted a priest to start an organization to "care for orphans" whose parents were felled by the disease. During the 19th century, "nuns ran asylums for orphaned and destitute youth." During the 20th century, the Church established a Children's Bureau to "place children in foster homes." CSS, licensed as a foster-care agency by the State of Pennsylvania, has had a series of contracts with the City dating back half a century to evaluate and certify adults as qualified, under standards prescribed by a state statute, to be foster parents. The City compensates CSS for performing this service. When the Department of Human Services has a child in need of foster placement, it sends a request to the various agencies with which it contracts, the agencies then "report whether any of their certified families are available," and the Department then "places the child with what it regards as the most suitable family." The agency then provides supportive services during the foster placement. The City's compensation to the agency is a major source of revenue for CSS.

As a Catholic agency, CSS has long had a policy of placing children with single foster parents or married couples, but not with unmarried couples regardless of whether they are same-sex or different-sex. CSS maintains that because Catholic doctrine does not recognize marriages of same-sex couples, same-sex couples are not qualified to be certified as foster parents even though now they can legally marry under state law. And, of course, Catholic doctrine disapproves unmarried cohabitation. According to CSS's allegations in this case, "no same-sex couple has ever sought certification from CSS," and if CSS is approached by a same-sex couple, CSS would refer them to a nearby agency that would provide those services that CSS could not provide consistent with Catholic Church doctrine. There are at least twenty such agencies in the Philadelphia metropolitan area. CSS is presently the only such agency that refuses to evaluate and certify same-sex couples.

This became an issue after the Supreme Court ruled in 2015 in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples have a right to marry under the 14th Amendment's Due Process and Equal Protection Clauses. After *Obergefell*, controversies arose around the country when Catholic and some Protestant adoption and foster care agencies indicated they would not provide their services to married same-sex couples and encountered opposition from state and local governments that maintained non-discrimination policies covering sexual orientation. Reporters for the *Philadelphia Inquirer* investigating the issue locally determined that only two agencies in the city, CSS and Bethany Christian Services, would not evaluate and certify same-sex couples. After the newspaper reported this finding in 2018, the Philadelphia City Council passed a resolution calling on the City's civil rights agency to investigate, and the Department of Human Services contacted Bethany and CSS seeking a resolution to the issue. Bethany capitulated to the City's pressure, but CSS stood firm, upon which DHS stopped referring children to CSS for foster placement and allowed its annual contract with the agency to lapse.

This lawsuit was begun by some individuals who were foster parents through CSS and the Archdiocese of Philadelphia, represented by Alliance Defending Freedom (which we have sometimes referred to as "Alliance Defending Freedom to Discriminate Against LGBTQ People," since that appears to be one of the central missions of the organization). They filed suit in the U.S. District Court of the Eastern District of Pennsylvania, alleging that the City's action violated both the Free Exercise and Free Speech Clauses of the 1st Amendment, and seeking preliminary injunctive relief to require the City to resume referring children and compensating CSS for evaluating and certifying prospective foster parents while the case was pending. Among other things, CSS argued that it was not a "public accommodation" within the meaning of the City's Fair Practices Ordinance (which bans sexual orientation discrimination expressly), and that the City's action was subject to strict scrutiny under the 1st Amendment, so CSS was likely to prevail on the merits as required to get preliminary relief. (Pennsylvania's state anti-discrimination law does not include "sexual orientation" as a prohibited ground of discrimination, and this case arose years before the Supreme Court's *Bostock* ruling of 2020, after which many state agencies and courts have found that their sex discrimination laws will now cover sexual orientation claims.)

The District Court found that the Ordinance *did* cover this situation, and that as the Ordinance was a neutral law of general applicability under *Smith*, CSS was unlikely to prevail on its constitutional claim and was thus not entitled to preliminary injunctive relief. CSS appealed this ruling to the 3rd Circuit, which affirmed the District Court as to both issues – coverage under the City statute and applicability of *Smith*. In its cert petition, in addition to asking the Supreme Court to reverse on the two 1st Amendment theories, CSS asked the Court to "revisit" its decision in *Smith*, as several of the justices had indicated in past cases that the Court should do. The Court granted cert on all three questions: free exercise of religion, freedom of speech, and whether *Smith* should be "revisited (a euphemism for "overruled").

If *Smith* remains valid as a precedent *and* is applicable to this case, the denial of preliminary relief by the district court would be correct, if one assumes that the City's reliance on the FPO brought this case within the sphere of a "neutral rule of general applicability." However, overruling *Smith* in this case would be quite problematic, as Justice Barrett pointed out in her concurring opinion, raising a host of questions and likely

stimulating a barrage of litigation to settle those questions. The way to avoid this problem, as Roberts explained, was to find that *Smith* does not apply to this case, which the Court could do by narrowing down the question presented through its interpretation of the City ordinance and the language of the standard contract the City used to contract with foster care agencies.

In *Smith*, Roberts explained, the Court said that a "law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" In addition, he wrote, a "law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Thus, if an ordinance does not embody an across-the-board rule without exceptions or exemptions, it does not constitute a "generally applicable" rule. As to the FPO, the solution was to find that CSS, as it has consistently argued throughout the litigation, is not a "public accommodation." CSS also argued that "the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place," wrote Roberts. "We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications."

He reached this result by a close reading of the definition of a public accommodation in the ordinance. A public accommodation is an entity "which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Roberts insisted, "Certification is not 'made available to the public' in the usual sense of the words." Turning to the concrete examples of covered businesses in the similar Pennsylvania state anti-discrimination law – hotels, restaurants, drug stores, swimming pools, barbershops and public conveyances – he wrote that "the 'common theme' is that a public accommodation must 'provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire," citing a Pennsylvania intermediate appellate decision construing the state law, *Blizzard v. Floyd*, 149 Pa. Commw. 503, 506, 613 A.2d 619, 621 (1992). (Why the state law should be deemed relevant, when it did not forbid sexual orientation discrimination at the time the case arose, is not explained by Roberts, as Justice Gorsuch notes in his concurring opinion.) But, Roberts wrote, "Certification as a foster parent, by contrast, is not readily accessible to the public," since it requires a "customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus." After describing the evaluation process in detail, he wrote, "All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system." He asserted that the district court had not taken account of "the uniquely selective nature of the certification process" in reaching its conclusion, agreeing with CSS's position that the ordinance does not apply to this function. And, he found, it was therefore not necessary to examine CSS's alternative argument that the ordinance did not establish a generally applicable rule since the City did allow exceptions to its requirements for various secular reasons.

Of more immediate moment, however, was how Roberts chose to characterize the question before the Court once the ordinance was deemed inapplicable. Now the focus was on the contractual anti-discrimination clause that the City insisted CSS must sign if the City was to resume referring children and honoring (and paying for) CSS's certifications of foster parents and families. Section 3.21 of the contract, titled Rejection of Referral, states: "Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." This, found the Court, "incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner. The City has made clear that the Commissioner 'has no intention of granting an exception' to CSS." But, since a system of discretionary exceptions means, as described in *Smith*, that this is not a rule of "general applicability," *Smith* does not apply to the question whether the City's refusal to grant an exception violates CSS's right to free exercise of religion in conducting its mission. CSS did allege in its complaint that the City has allowed departures from the categorical anti-discrimination provision by allowing agencies, for example, to take account of factors such as race in suggesting qualifications for foster families for particular children, but Roberts asserted that it did not matter whether the City had ever allowed an exception, so long as it had reserved the right to do so in its contract with CSS. And, the Court deemed irrelevant a general non-discrimination provision elsewhere in the contract which did not have discretionary exception language, holding that the more specific non-discrimination provision concerning placement of foster children with its discretionary exception language took priority.

The City attempted to argue that it was entitled to a relatively free hand when "setting rules for contractors when regulating the general public," and that individuals "accept certain restrictions on their freedom as part of the deal" when they contract to perform a function on behalf of the government. The Court was not buying this argument, noting that the City's brief in this case "rightly acknowledges, 'principles of neutrality and general applicability still constrain the government in its capacity as manager.'" And, Roberts observed, "We have never suggested that the government may discriminate against religion when acting in its managerial role. And *Smith* itself drew support from cases involving internal

government affairs . . . No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable." The Court also rejected the City's argument that a more general anti-discrimination provision elsewhere in the contract, which does not have the exception language, is the only relevant provision, finding that the language of Section 3.21 sweeps "more broadly" than the limited scope suggested by its title, "Rejection of Referral," as it expressly applies to rejection of "prospective foster parents."

Having found that *Smith* doesn't apply to this case, the Court turned to its traditional Free Exercise analysis, finding that the City's action must be examined "under the strictest scrutiny regardless of *Smith*," and that there was no need to consider whether to modify or overrule *Smith* as a result, thus dashing the hopes of Alito, Gorsuch and Thomas, as expressed in the concurring opinions by Alito and Gorsuch.

The City put forth three "compelling interests" that it claimed were served by the non-discrimination provision: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children." Roberts criticizes these as being stated at too high a level of generality for a strict scrutiny analysis, stating that the question "is not whether the city has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exemption to CSS," and that "once properly narrowed, the City's asserted interests are insufficient." He argued that including CSS in the foster care program "seems likely to increase, not reduce, the number of available foster parents," and that it was only "speculation" that the City "might be sued over CSS's certification practices."

"That leaves the interest of the City in the equal treatment of prospective foster parents and foster children," wrote Roberts. "We do not doubt that this interest is a weighty one, for 'our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,'" quoting from Justice Anthony Kennedy's opinion for the Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). "On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise," he wrote. "The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."

Left unspoken in the opinion but discussed during the oral argument and alluded to in concurring opinions, was the fact that there are numerous other foster care agencies in Philadelphia that would readily provide the service of evaluating and certifying same-sex couples to be foster parents. That could undermine the argument that the City has a compelling reason not to grant an exception to CSS, other than the City's more general objection to spending taxpayer money to pay for a service that is discriminatorily denied to some of its citizens because of their sexual orientation. As to that, there is the continuing question, never mentioned by the Court, of whether expending taxpayer funds in support of a religious organization that relies on religious doctrine to discriminate against members of the public offends the Establishment Clause. The Supreme Court majority as currently constituted has slight regard for the Establishment Clause, the originalists among them no doubt construing it to have the limited meaning that states may not have established churches directly supported out of public revenues, because that is arguably what people thought it meant in 1791, having been liberated through independence from the established Church of England. At the time of independence, there were established churches in some of the states, and because the Bill of Rights as adopted in 1791 was binding only on the federal government, some states continued for a time to have established churches. The fear that the 1st Amendment addressed, it can be argued, was that Congress would attempt to establish a church for the nation that would be funded by the federal government and that would supplant the established state churches under the Supremacy Clause.

"CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs," concluded Roberts; "it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the First Amendment."

Because the Court had resolved the appeal in favor of CSS under the Free Exercise clause, he wrote, "we need not consider whether they also violate the Free Speech Clause." The Court reversed the 3rd Circuit's decision affirming the district court's denial of preliminary injunctive relief and remanded the case "for further proceedings consistent with this opinion." What that means is not elucidated further. Since this case came up to the Court without a record on the merits as an interlocutory appeal from a denial of a preliminary injunction, there needs to be further litigation to determine the relevant facts, unless the City decides to settle the case by resuming its contractual relationship with CSS without insisting that it comply with the non-discrimination policy, presumably by the Commissioner exercising discretion to make an exception for CSS. One anticipates that then it would also be approached by Bethany Social Services for permission to resume that agencies policy regarding same-sex couples, and perhaps as well by other agencies seeking similar permission. Of course, as Alito and Gorsuch suggest in their concurrences, the City might just revise its contract to remove the discretionary exception language, or amend the FPO to expressly bring social service agencies within the definition of public accommodations, to bring the case back within the ambit of

Smith. That would presumably support the City's refusal to contract with CSS under the *Smith* precedent, and the case would make its way up the appellate ladder once again, giving the Court a new vehicle to "revisit" *Smith* if four justices were persuaded to do so.

Justice Barrett's brief concurrence devotes its first paragraph to casting doubt on the validity of *Smith*, but then poses the question of what would "replace *Smith*" in the Court's jurisprudence, posing a series of questions about how to apply the Free Exercise Clause in *Smith*'s absence. She was concerned, for example, with whether a one-size-fits-all strict scrutiny approach would be appropriate, regardless of the severity of the burden imposed on free exercise in a particular case. "We need not wrestle with these questions in this case," she wrote, "because the same standard applies regardless of whether *Smith* stays or goes." Accepting Roberts' conclusion that the discretionary exception feature of the contract takes this case outside the general applicability standard of *Smith*, she noted, this becomes a strict scrutiny case, so there is no need in this case to reconsider *Smith*. Justice Kavanaugh concurred with all of this, while Justice Breyer did not join the first paragraph casting doubt on *Smith*, while joining the rest.

Chief Justice Roberts' opinion was 15 pages long. Justice Alito's concurrence ran on for 77 pages, excoriating *Smith*, pointing out the problems of line-drawing it creates and hypothesizing numerous cases where *Smith* would shield the government from challenges to potentially severe burdens imposed on individual religious freedom. Alito's lengthy opinion, which delves deep into the history leading to the adoption of the Free Exercise Clause and the jurisprudence developed under it leading eventually to *Smith*, reads as if it was drafted to be a majority opinion justifying overruling *Smith*. But Alito could not recruit a majority to go along, and he was contemptuous of the opinion endorsed by the majority evading the question. One suspects that few other than ardent Free Exercise proponents will struggle through Alito's extended discourse, although it will provide fodder for litigants in future cases seeking to persuade the Court to overrule *Smith*.

"This decision might as well be written on the dissolving paper sold in magic shops," Alito wrote of Roberts' opinion, pointing out that by rewriting its contract to eliminate the discretionary exception feature, Philadelphia could bring the case back within the ambit of *Smith*. "If it does that, then, voila, today's decision will vanish – and the parties will be back where they started," litigating this all over again. "The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?" he asked. "After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed – as am I."

By contrast, in a little more than ten pages Justice Gorsuch eviscerated the Court's explanation of how this case was not subject to the precedent of *Smith*, contending that Roberts' method of dealing with the FPO was inappropriate, probably wrong, and something the Court should not have been doing, since the court ordinarily defers to district courts' interpretations of state and local laws. Furthermore, he disparages how Roberts reconciles the two antidiscrimination provisions in the contract, asking why the Court is engaging in the common law task of contract interpretation, and he points out that the extended analysis in which Roberts engaged was not argued in the parties' briefs or in the hearing, but seems to have been invented by the majority solely for the purpose of escaping *Smith* and thus not having to confront the precedent head-on. "Given all the maneuvering," he wrote, "it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no 'need' or 'reason' to revisit *Smith* today. But tell that to CSS. Its litigation has already lasted years – and today's (ir)resolution promises more of the same. Had we followed the path Justice Alito outlines – holding the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable – this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers can rewrite the City's contract to close the Sec. 3.21 loophole. Once any of that happens, CSS will find itself back where it started."

Gorsuch concludes enumerating the many costs to the system, the parties, and society in general in not resolving the problem of *Smith* in this case. "*Smith* committed a constitutional error," he wrote. "Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today."

The Court's action in this case immediately brings to mind its action in *Masterpiece Cakeshop*. In both cases, the Court sought to avoid having to decide whether to abandon the principle of *Smith* and to open up any government action or policy that incidentally burdens somebody's free exercise of religion to strict scrutiny attack under the 1st Amendment. In both cases, the Court found an "off-ramp" by which it could rule in favor of the Petitioner without having to overrule *Smith*. In so doing, the Court sent mixed signals to the lower federal courts and the bar, reinforcing the general view that the Court will strain to find a way to rule in favor of individual Free Exercise petitioners without formally abandoning *Smith* and doing what Congress sought

to achieve with its first iteration of the Religious Freedom Restoration Act: return Free Exercise law to where it was before *Smith* was decided.

The Court had another opportunity to address the question next term, in *Arlene's Flowers v. State of Washington*, No. 19-333 (petition filed 9/11/2019). The day after the Court announced its decision in *Fulton*, Alliance Defending Freedom filed a Supplement to its cert petition (which had not been listed for discussion at the Court's conferences in more than a year, according to the Court's docket listings), renewing its call for a grant of cert and quoting from the concurring opinions in *Fulton*. The Supplement asserted a 4-2 split in lower federal and state courts about how to deal with the clash between anti-discrimination laws and First Amendment freedom of expression or religious exercise claims, as well as a split over whether the "hostility to religion" holding in *Masterpiece Cakeshop* applies only to adjudicatory bodies, or as well the to elected officials and prosecutors in making decisions whether to proceed on discrimination claims. But the Court did not take the bait, announcing on July 2 that it was denying the petition, with only Alito, Thomas and Gorsuch indicating they would have granted it (no surprise there).

Alliance Defending Freedom represented the Petitioners in *Fulton*, with Lori H. Windham arguing at the telephonic hearing. The Trump Administration argued in support of CSS as an amicus, with Hashim M. Mooppan appearing from the Solicitor General's Office. Neal K. Katyal and Jeffrey L. Fisher argued for Respondents, Fisher for the City of Philadelphia and Katyal for the Intervenor organizations – Support Center for Child Advocates and Philadelphia Family Pride – who defended the City's action to terminate CSS's participation in the foster care system in the district and circuit courts. The ACLU was also listed as a counsel of record for the Intervenors. ■

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U.S. Department of Education Doubles Down on Applying *Bostock* Reasoning to Title IX to Protect LGBT Students

By Arthur S. Leonard

President Joseph R. Biden, Jr., issued an Executive Order on January 20, 2020 (Inauguration Day), directing that Executive Branch agencies should apply the Supreme Court's reasoning in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), to interpret statutes forbidding discrimination because of sex to cover claims of discrimination because of sexual orientation or gender identity "so long as the laws do not contain sufficient indications to the contrary." The EO specifically referenced Title IX of the Education Amendments of 1972 as one such law. The president followed up with an EO on March 8 specifically concerning equality in education, again referencing Title IX, and a March 26 Memorandum issued by the Civil Rights Division of the Department of Justice reiterated its view that Title IX should be interpreted to ban discrimination based on sexual orientation or gender identity.

The Office of Civil Rights of the U.S. Department of Education (OCR) announced on June 16 that it was sending a "Notice of Interpretation" to the Federal Register for publication formally confirming that Title IX, which prohibits educational institutions that receive federal funding from discriminating against students "on the basis of sex," applies to discrimination because of sexual orientation or gender identity (transgender status).

This announcement came just a year and a day after the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of sex," to include discrimination because of sexual orientation or transgender status, in *Bostock*. In that case, the Court combined appeals from the 2nd, 6th and 11th Circuit Courts of Appeals involving two gay men and a transgender woman alleging wrongful discharge under Title VII and voted 6-3 that any discrimination against an employee because they are gay, lesbian or transgender is necessarily at least in part because of their sex and thus covered by the statute. President Donald J. Trump's first appointee to the Court, Justice Neil Gorsuch, wrote the opinion by assignment from Chief Justice John Roberts, who joined the opinion together with Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor. Justice Gorsuch premised his ruling on a textual interpretation of the language of Title VII, focusing on the ordinary meaning that would attach to the words and phrases of the statute when it was enacted in 1964, and found that the result was "clear."

Although the *Bostock* decision directly interpreted only Title VII, its reasoning clearly applied to any law that prohibits discrimination "because of sex" or "on the basis of sex," as the Education Department's Acting Assistant Secretary for Civil Rights, Suzanne B. Goldberg, explained in the Notice issued on June 16.

"After reviewing the text of Title IX and Federal courts' interpretation of Title IX," wrote Goldberg, "the Department has concluded that the same clarity [that the Supreme Court found under Title VII] exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discrimination based on sexual orientation and gender identity in their education programs and activities. The Department has also concluded for the reasons described in this Notice that, to the extent other interpretations may exist, this is the best interpretation of the statute."

The Notice listed "numerous" lower federal court decisions that were issued over the past year taking this position, including the most recent ruling by the 4th Circuit Court of Appeals in *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020), *rehearing*

en banc denied, 976 F. 3d 399 (4th Cir. 2020), *cert denied*, June 28, 2021, concerning a transgender boy who was denied access to restroom facilities at a Virginia high school. The Supreme Court denied the cert petition after the Education Department's Notice was announced.

Reversing the position taken by the Education and Justice Departments during the Trump Administration, the Notice announces that OCR will investigate sexual orientation and gender identity discrimination allegations by students. "This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity," wrote Goldberg. She also pointed out that a determination whether Title IX was violated will depend on the facts of individual cases, and of course Title IX applies only to schools that receive federal funds.

In a footnote, Goldberg stated that "educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets," citing 20 U.S.C. section 1681(a)(3). There is a pending federal lawsuit against the Department of Education by a group of students from such religious schools claiming that this section violates the 1st Amendment Establishment Clause. Religious schools have moved to intervene as defendant-parties in that lawsuit, claiming that the government may not sufficiently defend their exemption. The Justice Department has opposed their motion in a court filing, asserting that the government will "vigorously" defend the challenged provision. The religious exemption was obviously a politically necessary compromise to get Title IX adopted by Congress.

While the June 16 Notice states that its interpretation of Title IX "supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation or gender identity," it goes on to say that this "interpretation does not reinstate any previously rescinded guidance documents." This comment is significant, because during the Obama Administration the Education Department issued guidance documents on Title IX compliance requirements that took positions on many of the controversial issues that have been subjected to litigation. Those guidance requirements were cited by school boards and administrators in defending actions they took, even after the guidances were formally rescinded by the Education and Justice Departments shortly after Betsy DeVos was confirmed as Secretary of Education, when the Trump Administration prevailed on the Supreme Court to cancel a scheduled argument in an earlier stage of the *Grimm* case on the ground that the rescission of these policies required the lower courts to reevaluate their ruling. Secretary DeVos took the position, later bolstered by a memorandum by Attorney General Jeff Sessions in October 2017, that Title IX did not cover sexual orientation or gender identity discrimination.

Miguel Cardona, Biden's Secretary of Education, told *The New York Times* in an interview published on June 16 that "Students cannot be discriminated against because of their sexual orientation or their gender identity," but left unclear the question whether his department would be challenging state laws that ban transgender girls from competing in school sports. (This ambiguity was cleared up a few days later when the Justice Department filed a statement of interest in a lawsuit challenging such a state statute, taking the position that the statute violates the Equal Protection Clause and Title IX. DOJ also filed a statement of interest in a pending challenge to Arkansas's new law banning provision of gender transition services to minors.) Cardona stated, "We need to make sure we are supporting all students in our schools," but he did not get specific about particular challenged policies in his public statement accompanying the release of the Notice on the DOE webpage. However, making clear that "all" really means "all," the Notice says that the Department's Office of Civil Rights "carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways."

The U.S. Court of Appeals for the 9th Circuit recently heard arguments in the State of Idaho's appeal in *Hecox v. Little* from a district court decision finding that the state's ban on transgender girls playing sports, the first such ban to be enacted, violates the constitutional rights of the transgender girls as well as Title IX. If this issue ends up in the Supreme Court, the Biden Administration will have to take a position one way or the other. A federal court in Connecticut recently dismissed a lawsuit by a group of cisgender female high school athletes challenging a state policy of allowing transgender girls to compete in athletics, finding that the plaintiffs lacked standing to bring the issue to the court.

The Education Department's interpretation of Title IX is not binding on the federal courts but is entitled to deference under principles of administrative law. After DeVos and Sessions "rescinded" the Obama Administration's interpretation and guidance documents, many federal courts continued to rule in favor of transgender students and school administrators who had adopted policies allowing transgender students to use restroom facilities, despite the "rescission" of the Obama Administration's position to that effect. The lower federal courts have been united up to now in rejecting claims by parents and students that allowing transgender students to use restroom and locker room facilities violates the constitutional privacy rights of non-LGBTQ students, and the Supreme Court has so far refrained from hearing those cases. The *Bostock* ruling, President Biden's Executive Orders, and the new Notice of Interpretation

to be formally published in the Federal Register, will reinforce that position in the courts.

The Department of Education has posted a document on its website titled "Confronting Anti-LGBTQI+ Harassment in Schools" providing examples of situations that would justify investigation and providing information about where to file complaints with DOE and the Justice Department's Civil Rights Division.

As President Biden has boasted about how many LGBTQ people he has appointed, it is worth noting that both the Justice Department Civil Rights Division March 26 Memo and the June 16 OCR Notice were authored by out lesbian appointees, Pamela Karlan and Suzanne Goldberg. ■

Historic Ruling in India Grants Widespread Protections to LGBTQIA+ Community

By Eric Wursthorn

In an order dated June 7, 2021, Justice N. Anand Venkatesh of the High Court of Madras issued a ruling that granted sweeping protections to the LGBTQIA+ community in India (*S. Sushma vs Commissioner of Police*, W.P. No. 7284 of 2021). In doing so, the Justice went well beyond the relief requested by the petitioners in the underling proceeding – a lesbian couple who sought an order protecting them from interference by their parents or the police.

The petitioners are S. Sushma and U. Seema Agarval, aged 22 and 20 years respectively. This case arose from their parents' opposition to their relationship. In the face of that opposition, the petitioners fled to Chennai from their homes in Madurai. In Chennai, they found support and accommodations with the help of several NGOs and LGBTQIA+ persons while they continued their education and sought to obtain employment. Meanwhile, the petitioners' parents filed "missing-girl" complaints with the police. The police located and interrogated the petitioners who filed the instant proceeding due to fear and concern for their safety and security. The petitioners specifically sought an order from the court directing the police not to harass them as well as a protective order against their parents.

The case was assigned to Justice N Anand Venkatesh of the Madras High Court, who held an *in camera* hearing on March 29, 2021. The petitioners, their parents and the police appeared in person. Police representatives indicated that the missing-girl complaint would be closed, and the police would no longer interfere in the underlying dispute between the petitioners and their parents. The Justice ordered one-on-one interactions between the parents and their respective children, which led to the court directing the parties to attend counseling with a psychologist. Justice Anand Venkatesh expressed empathy with the petitioners, writing: "I am also trying to break my preconceived notions about this issue and I am in the process of evolving, and sincerely attempting to understand the feelings of the Petitioners and their parents. . . "

On April 28, 2021, after petitioners and their parents underwent counseling, the court issued another order. Justice Anand Venkatesh summarized the psychologist's findings as follows: "[i]nsofar as the petitioners are concerned, the psychologist has opined that both the petitioners perfectly understand the relationship they have entered into and there is absolutely no confusion in their minds about the same. It is also observed that they have lot (sic) of love and affection for their parents and their only fear is that they may be coerced into separation. . . . Insofar as the parents of the petitioners are concerned, it is observed that they are more concerned about the stigma attached to the relationship in the society and the consequences it may ensue on their family. They also apprehend that they will be looked down upon by the society and their own community. The parents are also very much concerned about the safety and security of their respective daughters. . . . the parents would rather prefer their daughters to live a life of celibacy, which according to them will be more dignified than having a partner of the same sex."

After summarizing the psychologist's findings, Justice Anand Venkatesh not only ordered the parents to undergo another round of counseling, but, in an extraordinary move, indicated that he would "subject" himself for "psycho-education" with the counselor. The Justice explained: "I honestly feel that such a session with a professional will help me understand same-sex relationships better and will pave way for my evolution". Justice Anand

Venkatesh further noted that the police department had still failed to close the missing girl complaint as of the date of the 4/28/21 order.

In the June 7 decision, the Justice granted the petition in addition to issuing a number of mandates to the police and other governmental agencies seeking to root out discrimination against the LGBTQIA+ community. The Justice's decision noted that while the parents were "ready to let go of [petitioners] to live as they wish," they still did not accept petitioners for who they are. Justice Anand Venkatesh concluded that "there is no substantial or marked change noticed in the attitude of the parents during the second counseling session."

Justice Anand Venkatesh also quoted the entire report of his counseling session with the psychologist in the decision "for the sake of transparency, and understanding and awareness of all stakeholders." Essentially, the Justice acknowledged the prejudices he held and identified ways to move towards acceptance and understanding of the lived experiences of same-sex couples.

After his counseling session, the Justice decided to meet with members of the LGBTQIA+ community "to help [him]self understand the ground realities, the emotions, social discrimination and exclusion, and several other difficulties faced by the community." The report of this meeting is also cited in the decision, wherein the persons the Justice met with described their own experiences and Justice Anand Venkatesh explained that it was "another psycho-educational session which actually cleared a lot of [his] personal misconceptions on the issue."

As an offer of explanation for why the Justice took the extraordinary steps of undergoing counseling and meeting the LGBTQIA+ community members, Justice Anand Venkatesh noted that he "belong[s] to a majority of commoners who are yet to comprehend homosexuality." However, "[i]gnorance is no justification for normalizing any form of discrimination." The Justice explained that in undergoing counseling and educating himself to understand same-sex couples and the prejudices they face, he was able to overcome his own prejudices: "I must change all my preconceived notions and start looking at persons belonging to the LGBTQIA+ community as they are. I must frankly confess that the Petitioners, Ms. Vidya Dinakaran, and Dr. Trinetra, became my gurus who helped me in this process of evolution and pulled me out of darkness (ignorance)."

Turning to the substantive aspects of the decision, the Justice outlined the mandates of Articles 14 and 15(1) of the Constitution of India, which guarantee equal protection/equality before the law and prohibit discrimination, respectively. Justice Anand Venkatesh further cited a number of other courts, both in India and outside, including the U.S. Supreme Court in *Bostock v. Clayton County, Georgia* (140 S. Ct. 1731 [2020]). On this basis, the court directed the police and various governmental organizations to adopt measures "for proper recognition of the rights of the LGBTQIA+ community and to ensure their safety and security to lead a life chosen by them."

As one of 24 High Courts in India, the Madras High Court has broad authority. Indeed, Justice Anand Venkatesh directed the police to close any missing person complaints involving consenting adults belonging to the LGBTQIA+ community and directed various governmental departments to report back with the steps taken to eliminate discrimination against the LGBTQIA+ community.

The Justice made a number of additional recommendations, including the prohibition of "any attempts to medically 'cure' or change the sexual orientation of LGBTIQA+ people to heterosexual or the gender identity of transgender people to cisgender," and to revoke the licenses of medical professionals who provide conversion therapy. The Justice further recommended that schools and universities educate their students on LGBTQIA+ issues, provide gender neutral restrooms, change name and gender on academic records for transgender persons, and include transgender in addition to M and F gender on application forms.

Noting that his rulings "require[d] regular monitoring and follow up", Justice Anand Venkatesh adjourned the case to August 31, 2021, for the various governmental agencies to implement measures and file reports on those measures taken.

Petitioners are represented by S. Manuraj. In a statement to *NewsClick.in* about the case, Manuraj posited: "The judiciary can recognize same sex marriage. Why only can a man and woman marry, why can't people with same sex or a man marry a transgender woman?" (https://www.newsclick.in/Resolve-2-Girls-Love-Live-Together-Led-Landmark-Ruling-Favour-LGBTIQA%2B, last accessed 6/30/21). With decisions like Justice Anand Venkatesh's, one can only hope that same-sex marriage will come to India in the not-too-distant future. ■

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.

9th Circuit Grants Mexican Transgender Woman's Convention Against Torture Claim

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the 9th Circuit has remanded to the Board of Immigration Appeals (BIA) and ordered a Convention Against Torture (CAT) claim to be granted for a Mexican transgender woman, finding that her prior rape and torture had been "acquiesced to" by the Mexican police, in *De La Luz Ramos v. Garland*, 2021 WL 243357 (9th Cir., June 15, 2021).

Petitioner, who was found ineligible for asylum because of a "particularly serious" manslaughter conviction, testified credibly that had been raped and tortured in Mexico and that "she repeatedly sought help from the police, but the police repeatedly refused to investigate." She claimed the police made "dehumanizing comments" including: "Oh, they're just those fags, they're not important." While waiting in a police station making a report, Petitioner received a "threatening phone call" from a "gang member" to a telephone number that only the police and Petitioner's employer knew, and that Petitioner therefore assumed that the police had given the gang her number.

The Immigration Judge (IJ) and on appeal the BIA found that the Petitioner had failed to satisfy her burden of proving government acquiescence in torturing her, and both the IJ and the BIA failed to discuss in their opinions the phone call she received from the gang while at the police station. Petitioner sought review from the 9th Circuit, alleging legal error in the IJ and BIA decisions.

The 9th Circuit panel issued a decision approving in part the petition for review and remanding and ordering that the CAT claim be granted, which means that the Petitioner can remain in the United States as a refugee.

First, the panel upheld the Board's analysis of Petitioner's manslaughter conviction, agreeing that it was a "particularly serious crime" rendering her ineligible for asylum. However, in assessing Petitioner's torture claim, the panel noted that both the IJ and the BIA found that Petitioner's rape and assault rose to the level of torture and the 9th Circuit panel affirmed that aspect of the decisions. With respect to the Mexican government's acquiescence, however, the panel found that the IJ and the BIA erred, finding the lack of consideration of the police's anti-LGBTQ statements and their failure to consider the threatening phone call received from the gang in police presence were in error and were supported in the record, which included the U.S. Department of State's report finding that authorities "often" "failed to investigate crimes" against the LGBTQ community. The panel noted reports showed "three killings of transgender individuals in a space of 13 days" and 120 murders of transgender people during the three years following Mexico's 2010 adoption of same-sex marriage.

The panel recognized that a backlash of Mexican society against progress in LGBTQ rights had led to "an epidemic of unsolved violent crimes against transgender persons," and ruled that Petitioner's case should be remanded for approval of the CAT claim based upon Petitioner's prior rape and assault and the Mexican police's acquiescence of those acts. A Court of Appeals decision ordering the BIA to grant such a claim is extremely rare. More often such a case would be remanded for "reconsideration" consistent with the court's opinion, but this case the correct result evidently appeared clear-cut to the court. ■

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

5th Circuit Affirms Dismissal of Sexual Orientation Discrimination Claim on Exhaustion of Remedies Grounds

By Joseph Hayes Rochman

On June 8, 2021, in *Ernst v. Methodist Hosp. Sys.*, 2021 U.S. App. LEXIS, 17015, 2021 WL 2328146, a three-judge panel of the U.S. Court of Appeals for the 5th Circuit upheld a partial dismissal and partial summary judgment of a hospital employee's sexual orientation discrimination claims brought under Title VII of the Civil Rights Act of 1964. Circuit Judge Jerry Smith, writing for the court, ruled that James Ernst's claim for sexual orientation discrimination was properly dismissed for failure to exhaust administrative remedies.

Ernst was fired from his job as a senior transportation analyst at Houston Methodist Hospital for sexual harassment after a job applicant alleged that Ernst made sexually suggestive gestures towards him. Specifically, the applicant alleged that Ernst, a married gay man, rubbed his penis and winked at him. Ernst strongly denied the allegations.

After several attempts to appeal his termination through the hospital's internal process, on June 27, 2016, Ernst filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging employment discrimination based on race and sexual orientation. However, Ernst only checked the box for race on the EEOC Charge of Discrimination Form. At the time, there was no box for sexual orientation discrimination. Instead, Ernst included his claim based on sexual orientation discrimination on an EEOC intake questionnaire that was never verified. Ernst received a

dismissal and right to sue letter from the EEOC in December 2017. He then filed suit in the United States District Court for the Southern District of Texas in May 2018, alleging discrimination because of race and sexual orientation under Title VII.

The district court initially granted a partial dismissal of Ernst's sexual orientation discrimination claim in May 2019 for failure to exhaust administrative remedies. District Judge Lynn N. Hughes found that even if Ernst had charged Houston Methodist with sexual orientation discrimination, that claim would be dismissed because it is not actionable under Title VII. Then, in May 2020, Judge Hughes granted United Methodist's motion for summary judgment on Ernst's race discrimination claim and dismissed his amended sexual orientation discrimination claim for failure to exhaust administrative remedies. Notably, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) was not decided until a month later.

Ernst, who is white, did not have a strong claim for race discrimination, and that claim need not be addressed here. However, the merit of his sexual orientation discrimination claim is an open question. According to Ernst's complaint, he wrote on the EEOC intake questionnaire: "I believe my sexual orientation has been an on-going concern with management as I have been asked by other employees whether or not I am homosexual, leading to my boss singling me out as a trouble maker over others, making my daily work intolerable."

The only evidence the hospital relied on for Ernst's termination was a video taken from behind Ernst. Ernst's complaint stated that he was never able to see the video and that it was more likely he had simply put his hand in his pocket. He further noted that the alleged incident happened in front of a receptionist and two other employees who were not interviewed. Ernst's appellate brief states that the HR director in charge of his termination in fact never watched the video until her deposition in the instant case and never saw the alleged head nod.

It is unclear whether the EEOC ever requested Ernst to verify the intake questionnaire, but whether he failed to exhaust administrative remedies turned on the verification requirement, according to the court. Ernst contended that he exhausted his administrative remedies. In his view, the intake questionnaire satisfied the EEOC's charge-filing requirements and could "be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *citing Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008). Accordingly, he argued that he did exhaust administrative remedies. Ernst relied on *Equal Employment Opportunity Commission v. Vantage Energy Services, Inc.*, 954 F.3d 749 (5th Cir. 2020). But the *Vantage* Court found that a *later-verified* intake questionnaire for claims arising from the Americans with Disabilities Act qualified as a charge for exhaustion purposes.

Houston Methodist argued that an intake questionnaire is not considered a charge unless it is verified because the hospital was not put on notice of the existence and nature of charges. The 5th Circuit agreed with Houston Methodist. The court noted that even though Ernst's intake questionnaire included a statement of facts, it was not signed and verified. Thus, it was not a "formal" charge and Ernst did not exhaust his administrative remedies.

Neither the district court nor the 5th Circuit panel took note that the EEOC Charge of Discrimination Form did not include boxes to check for gender identity or sexual orientation discrimination in 2016 when Ernst filed his charge in this case. Although the circuits are in general agreement about the verification requirement, some courts have been more lenient on the exhaustion doctrine for gender identity and sexual orientation claims asserted prior to the *Bostock* ruling. For example, in *Squire v. FedEx Freight, Inc.*, 2018 WL 3036474, 2018 U.S. Dist. LEXIS 101923 (D. Md., June 19, 2018), U.S. District Judge Marvin J. Garbis denied FedEx's motion to dismiss based on the failure to mention sexual orientation discrimination in the Charge Form, noting that "[c]ourts are to view EEOC charges very liberally, especially because the complainant often is not represented by a layer." *See* Arthur S. Leonard, *Civil Litigation Notes*, 2018 LGBT L. NOTES 376 (Summer 2018).

Ernst was presumably unrepresented when he initially filed his complaint. The EEOC Charge of Discrimination Form does not explain the legal significance of the usually *pro se* plaintiff's claims or the consequences for checking certain boxes but not others. Professor Kate Sablosky Elengold argued that the system both fails complainants in complex discrimination cases and significantly impacts the development of doctrine. Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 473 (2018). For Ernst, he likely was not aware that he could check the box for sex discrimination for a claim of discrimination based on sexual orientation. The strict requirements for verification of formal charges with the EEOC are intended to protect employers. In reality, however, the procedural injustice falls more harshly on the employee.

Houston Methodist is a nonprofit hospital affiliated with the Texas Medical Center. Although the hospital has a Diversity Equity and Inclusion program, gender identity and sexual orientation are excluded from its express coverage. The Human Rights Campaign does not have an Equality Score for Houston Methodist—unlike several nearby hospitals—because the Hospital System has no non-discrimination policy, training, or policy for LGBTQ patients or employees.

James Ernst was represented by Ellen Sprovach of Rosenberg & Sprovach based in Houston, Texas. Houston Methodist was represented by Daniel Patton and Michael Twomey of Scott Patton PC, also based in Houston. ■

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

Iowa Supreme Court Reverses Gay Workers' Compensation Commissioner's Jury Verdict and $1.5 Million Damage Award

By Arthur S. Leonard

Christopher J. Godfrey, an out gay man who served as Iowa's Workers Compensation Commissioner beginning in 2006, won a jury verdict in 2019 of $1.5 million dollars on claims of sexual orientation discrimination and retaliation by Governor Terry Branstad, Branstad's legal counsel, and the state government. The jury found a violation of the state's statutory ban on sexual orientation discrimination in employment, and a violation of Godfrey's constitutional due process rights. But on June 30, the Iowa Supreme Court reversed the jury verdict in *Godfrey v. State of Iowa*, 2021 WL 2671324, 2021 Iowa Sup. LEXIS 92, finding that the trial judge should have ruled that the defendants, now-former Governor Branstad, his Legal Counsel Brenna Findley, and the State of Iowa were entitled to judgment as a matter of law, and that the judge should not have submitted the case to the jury for decision. Justice Christopher McDonald wrote the opinion for the court.

Godfrey was appointed to a full six-year term as Commissioner of Workers Compensation by Governor Chet Culver, a Democrat, and was confirmed unanimously by the state Senate in 2009. He was openly gay at the time. He had previously received interim appointments to that position beginning in 2006 from prior Governor Tom Vilsack, also a Democrat who served as Secretary of Agriculture in the Obama Administration (a position to which he was appointed again this year by President Biden), and Godfrey was reappointed to an interim vacancy as Commissioner by Governor Culver, before receiving the full-term appointment.

In 2010, Republican Terry Branstad, a former Iowa governor who had taken a position as a university president, came out of political retirement and defeated Governor Culver's bid for reelection. As was customary with a change of administration, his staff notified all Commissioners who had been appointed by Branstad's Democratic predecessors to submit letters of resignation, leaving the decision to the governor-elect whether to continue them in office.

Godfrey refused to submit such a letter, telling Governor-Elect Branstad (in the only in-person meeting he ever had with Branstad) that he was appointed and confirmed for a full six-year term and intended to serve the full term through 2015. Under Iowa law, Governor Branstad could not replace Godfrey on his own initiative, but Godfrey could be removed by the Executive Council of the state, made up of the governor and several other top executive branch officials, for causes specified by statute which were not present in this situation. So Branstad was stuck with Godfrey if Godfrey would not resign.

Upon taking office, Branstad turned his attention to other matters, but at the end of the legislative session on June 30, 2011, he returned to the Godfrey situation, having received complaints about Godfrey's perceived "anti-business" stance from the leadership of the Iowa Association of Business and Industry (ABI), the state's chamber of commerce, who told Branstad that the Commission was creating an adverse climate for business in the state. In consultation with his staff, Branstad determined that he could reduce Godfrey's salary, hoping that would induce him to quit. State law specified a salary range for Commissioners and Godfrey was being paid at the top of the range at $112,070. Branstad decided to reduce his salary to the bottom of the range, $73,250, if he rejected another request to resign. Two members of the governor's staff met with Godfrey to reiterate the governor's demand for his resignation, which Godfrey refused. He was then told the Governor had decided to reduce his salary to the bottom of the statutory range.

Godfrey quickly let others know about his salary reduction, contacted the attorney general seeking possible intervention, and contacted legislators to see if they would intervene. Senator William Dotzler phoned one of Branstad's aides, saying "you guys might want to consider the action you're taking on Chris Godfrey. He is an openly gay man, and that can be an issue down the road." When Godfrey announced publicly the next day that he was being subjected to sexual orientation discrimination, Branstad claimed that he, the sole decision-maker in reducing Godfrey's salary, had not known that Godfrey was gay until the day after the salary reduction was communicated to Godfrey, when Godfrey leveled his public accusation.

Godfrey sued the State, Branstad and other executive branch officials in January 2012, asserting claims under the Iowa Civil Rights Act, which bans employment discrimination because of sexual orientation, and the Iowa Constitution. Before the case came to trial, various pretrial motions came up to the Supreme Court involving immunity claims by particular state officials and the question whether Godfrey could sue for damages against Branstad and other officials on his constitutional claims. One question that did not come up in those proceedings was whether the Iowa Civil Rights Act's ban on employment discrimination and retaliation applied to a state agency commissioner who was appointed by the governor and confirmed by the Senate for a fixed term.

Much of the focus of the trial, which is described in great detail in Justice McDonald's opinion, went to the question whether Branstad personally knew that Godfrey was gay when he took action to pressure Godfrey to resign by reducing his salary. Branstad insisted that he had not known, but evidently the jury did not believe him, relying on testimony from numerous

witnesses about how Godfrey's sexual orientation was known and reported in the press when he was appointed by Vilsack and Culver, was known to the Senators who voted to confirm him (and even came up at one point in a confirmation hearing), was known by the lieutenant governor (now Governor Reynolds since Branstad's retirement to become Ambassador to China in the Trump Administration), who had actually been introduced to Godfrey's husband, and was known by members of Branstad's staff and the staff of the ABI.

Godfrey also put in plenty of evidence about the anti-LGBT stance of the Iowa Republican Party, about the vicious campaign against members of the Iowa Supreme Court who were denied retention by the voters after they had unanimously ruled in favor of same-sex marriage under the state constitution, about the party's platform in Branstad's election campaign seeking to amend the constitution to overrule the court's marriage decision and to amend the Civil Rights Act to remove sexual orientation and gender identity as prohibited grounds of discrimination. There was also substantial evidence, which was not contested by the defendants, about the emotional distress that Godfrey suffered as a result of the pressure campaign to get him to resign.

At the end of the trial, the defendants moved for judgment as a matter of law, but Jasper County District Judge Brad McCall denied the motion. The jury awarded Godfrey $500,00 in emotional distress damages on his claims for sexual orientation discrimination and retaliation against the state, and $1 million in emotional distress damages against Governor Branstad and one of his aides on Godfrey's constitutional claims. The defendants appealed to the state Supreme Court.

The court concluded that the trial record showed no direct evidence that Branstad was personally aware that Godfrey was gay. Branstad had served as governor before Vilsack. When he left office, he became president of Des Moines University, an "osteopathic school of medicine," and, wrote Justice McDonald, "At the time he was hired, Branstad committed to the trustees of the university that he would stay out of and away from politics while serving in the position." He claimed that he paid no attention to whom Vilsack or Culver was appointing as Commissioners, and that he was personally unaware of Godfrey until during his campaign to defeat Culver for re-election, when ABI officials first complained to him about Godfrey's anti-business bias, but that they did not mention that Godfrey was gay. Indeed, although he was surrounded by people who knew Godfrey was gay, Branstad swore that the first he heard of that was when Godfrey accused him of sexual orientation discrimination after the salary reduction was communicated to Godfrey.

The court decided that all of Godfrey's evidence on this point was circumstantial, none of it directly showing that Branstad knew Godfrey was gay, and therefore, since Branstad was the sole decision maker on dealing with Godfrey, the case should have been dismissed as a matter of law for lack of evidence of discriminatory motive. The court also rejected the constitutional due process claim, finding no denial of Godfrey's procedural due process rights.

Dissenting Justice Brent Appel objected to the court substituting its judgment for that of the jury. He agreed with the court's disposition of the constitutional claim, but pointed out that under the Civil Rights Act a plaintiff can win a discrimination case based on circumstantial evidence, and it was up to the jury to weigh all the evidence and decide whether the defendants violated the statute. Appel conceded that it was possible that a jury could find for Branstad, but taking account of all the evidence, it was also possible that a reasonable jury could decide for Godfrey, and it was inappropriate for an appellate court to make that determination. Contested questions of fact are supposed to be decided by juries, unless it would be impossible for a reasonable jury to resolve such questions in favor of the plaintiff. Appel argued that the evidence about the Republican Party's anti-LGBT stance was relevant to the jury's determination of the motive for attempting to force Godfrey from his position.

Chief Justice Susan Christensen and Justice Matthew McDermott, while also agreeing with the majority as to the ultimate outcome of the case in favor of defendants, argued in an opinion by McDermott that the claims under the Civil Rights Act should have been dismissed on the ground that Godfrey, as an appointed and Senate-confirmed officer of the state government, was not an "employee" within the meaning of the Act, and thus that the Act's employment discrimination provisions did not apply to him.

Godfrey did not serve out his full term as Commissioner, eventually resigning to take a position in the Obama Administration at the Employees' Compensation Appeals Board (ECAB), where he continued to serve until January 20, 2021, when he was sworn in to his current position as Director of the Office of Workers' Compensation Programs in the U.S. Department of Labor.

Godfrey is represented by Roxanne Conlin, Devin Kelly, and Jean Mauss of Roxann Conlin & Associates, Des Moines. ■

Colorado High Court Finds Lawyer's Punishment for Using Anti-Gay Slur to Describe Judge to be Constitutional

By Eric Lesh

On June 7, 2021, the Colorado Supreme Court upheld as constitutional a provision of the state's professional code of conduct, ruling against a challenge from an attorney who was disciplined for using an anti-gay slur to describe the presiding judge in an email to his clients. *In the Matter of Robert E. Abrams*, 2021 CO 44; 2021 Colo. LEXIS 405; 2021 WL 2303408 (Colorado, 2021).

In 2015, a married couple hired a Colorado attorney, Robert Abrams, to bring a lawsuit against their former builder for issues with their construction contract. Despite an ultimate win in the underlying case, Abrams and his clients had a rocky relationship which caused Abrams to withdraw from representation, and his clients to subsequently file a disciplinary grievance against him. The client grievance alleged that Abrams used a derogatory term in response to a client question about a case management conference. Specifically, Abrams referred to the presiding judge as a "gay, fat, fag."

In 2017, well after the relationship with his clients deteriorated, the Office of Attorney Regulation (OARC) notified Abrams that a request for an investigation into billing practices had been initiated on request from the couple. Then, in 2019, OARC filed a complaint alleging Abrams violated the professional code of conduct, RPC 8.4(g), by describing the judge using an anti-gay slur in a communication to his clients.

During the initial hearing, Abrams argued that he could only have been found to violate the rule if OARC could demonstrate that he harbored "actual bias against homosexual people and that he used the anti-gay slur in his email to display that bias." OARC, on the other hand, argued that violating the rule did not require proof of actual bias, since the code of conduct regulated conduct, not thoughts. The hearing board agreed with OARC that "the rule does not regulate bigotry; it regulates behavior." As a result, Abrams' license was suspended for three months among other penalties, which included mandated cultural competence and sensitivity training.

Abrams appealed the conduct ruling claiming constitutional violations. First, Abrams claimed that the rule violated the First Amendment for being overly broad and unconstitutionally vague. He also appealed based on his argument above regarding actual bias and some evidentiary findings.

In analyzing the question, the Colorado Supreme Court first articulated Colorado's compelling interest in regulating the conduct of attorneys during the representation of their clients. The court noted that "lawyer speech that advances client interests, checks governmental power, or advocates on matters of public concern is provided the utmost protection under the First Amendment." However, in evaluating the constitutionality of a professional code of conduct, the court balanced the free-speech concerns with the vital role that the justice system plays in our society and the state's "unique interests in regulating the legal profession." The court noted that the State's "interest in regulating attorney speech is at its strongest when the regulation is necessary to preserve the integrity of the justice system or to protect clients."

In order to prevail in a challenge alleging that a government action is overbroad, Abrams was required to show that the regulation's "overbreadth is real and substantial in comparison to its legitimate reach" and "there is no adequate limiting construction that sufficiently narrows the regulation's application." In order to win on vagueness, Abrams needed to establish that the challenged law fails to "provide adequate notice" and that a reasonable person would not know that their conduct puts them at risk.

The court concluded that the Rule served several compelling interests, among them, the need to protect clients and other participants in the legal process from harassment and to promote confidence in the justice system. The Rule did not reach speech that "legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial," nor did it prohibit legitimate criticism of judicial officers. As such, the Rule was narrowly tailored. The court noted in response to the charge of overbreadth, that in 30 years, only four other lawyers had been sanctioned for violating this rule and each of these instances involve conduct like that at issue in this case, obvious in its inappropriateness. In dealing with the contention that the Rule was vague, the court held that "any objective person would find that Abrams' specific use of an anti-gay slur in communicating with his clients about the presiding judge violated the Rule. The word is pervasively understood as an anti-gay slur."

The Court quickly dismissed several other claims by Abrams relating to application of the Rule, which did not require the demonstration that an attorney actually harbors bias against persons on the basis of the protected classification, as well as claims relating to underlying evidentiary rulings. The court closed by quoting the hearing board's explanation that, "[i]n his private life, [a lawyer] is free to speak in whatever manner he chooses. When representing clients, however, [a lawyer] must put aside the schoolyard code of conduct and adhere to professional standards." ■

Eric Lesh is the Executive Director of the LGBT Bar Association of New York (LeGaL).

West Virginia's Highest Court Rules Assistant Principal's Alleged Harassment of Transgender Student May Subject School Board to Liability

By Wendy C. Bicovny

In *C.C. and J.C. as Next Friends of the Minor Child M.C. v. Harrison County Board of Education*, 2021 WL 2472279 (June 17, 2021), Judge Christopher J. McCarthy of the Supreme Court of Appeals, West Virginia's highest court, affirmed the circuit court's order dismissing the parents of a transgender teen (M.C., who identified as male) as to claims for negligent hiring and negligent supervision, affirmed, in part, and reversed, in part, the circuit court's order dismissing the Petitioners' claim for negligence per se, reversed the circuit court's order dismissing the Petitioners' claim for negligent retention, and remanded the case to the circuit court for further proceedings consistent with this opinion.

Prior to M.C.'s first year of public high school, his parents and school officials met, and the parents informed the school officials of the student's identification as male and intention to use the boys' restrooms at school. In late November 2018, after the instructional day had ended, M.C. was preparing for a band trip later that afternoon, checked a boys' restroom at the school and, upon determining that it was empty, entered it. While M.C. was in a stall in the restroom, the school's Assistant Principal[4] entered the restroom; demanded that M.C. exit the stall, expose his genitalia, and use a urinal; and blocked the student's exit from the restroom. After M.C. escaped from the restroom, the Assistant Principal followed him into the hallway and said, loudly, "You freak me out." This exchange was overheard by the parent of another band member, who consoled the student after this incident.

The next day, M.C.'s parents met with school and Board officials about this encounter and received assurances that the student and the Assistant Principal would not share the same space at school.[5] Following this incident, the Assistant Principal was suspended, but later reinstated. Approximately two weeks later, M.C. stayed in the school's concession stand with his mother until a band performance time because they had observed the Assistant Principal to be in attendance at the game. Despite the "stay away" agreement, the Assistant Principal stayed in close proximity to the concession stand, repeatedly stared at the student, and then escorted the band into the gymnasium for their performance. Thereafter, the Assistant Principal continued to be present in the school cafeteria during the student's lunch period.

In March 2019, after the bathroom and concession stand incidents had occurred, the Board voted not to renew the Assistant Principal's contract for the following school year; but eventually, the Board reversed its decision and voted to renew the Assistant Principal's contract. The Petitioners claimed that the Assistant Principal's presence in the school cafeteria during M.C.'s lunch period continued throughout the remainder of the school year. They further alleged that M.C. has suffered emotional and physical illnesses, including anxiety, as a result of his interactions with the Assistant Principal, but that his extracurricular activities require him to attend school in person rather than being home-schooled. Therefore, the student remains enrolled at the same public high school for which the Board renewed the Assistant Principal's employment contract.

Petitioners ultimately filed suit against the Board, seeking damages for the student's injuries caused by the Assistant Principal's actions and the Board's response thereto. The Board moved to dismiss and the circuit court granted its motion. This instant matter required the Supreme Court of Appeals to consider only whether the circuit court erred in dismissing the Petitioners' claims alleging negligence per se, negligent retention and hiring, and negligent supervision. Judge McCarthy considered each of these claims in turn.

Two allegations of negligence per se came within the statutory immunity afforded to political subdivisions by the West Virginia Tort Claims Act. However, in a third claim of negligence per se, the Petitioners alleged that the Board had a duty to the student under state law to adopt an anti-harassment policy; the Board breached that duty by allowing the Assistant Principal's conduct in relation to the student to continue and that such actions constituted a violation of its duties vis-à-vis its anti-harassment policy. M.C. suffered injuries and the Board's actions were a cause of his injuries. If accepted as true, these allegations were found to be sufficient to state a claim for negligence *per se*, and also to place the Board on notice as to the Petitioners' claim of negligence per se against it. And, the Petitioners' contentions further presented an issue of whether the Board violated the statute, which required the Board's anti-harassment policy to include "[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report," in light of the ongoing lunch room contact between the Assistant Principal and the student following the bathroom and concession stand incidents and the parties' alleged agreement that such interactions would cease. Therefore, Judge McCarthy reversed the portion of the circuit court's order that dismissed the Petitioners' complaint in its entirety and remanded for the reinstatement of alleged negligence per se based upon the Board's alleged violation of its anti-harassment policy.

The second error assigned by the Petitioners concerned the circuit court's dismissal of the Petitioners' complaint in which they alleged causes of action for negligent retention, hiring, and supervision. Judge McCarthy found that each component had its own discrete elements.

As to negligent hiring, the complaint failed to allege any facts regarding the Board's initial decision to hire the Assistant Principal or any irregularities attendant to the Assistant Principal's hiring. Likewise, as to negligent supervision, the Petitioners failed to allege any conduct whatsoever that is negligent as "all conduct performed by [the Assistant Principal] was intentional."

However, as to negligent retention, Judge McCarthy found that Petitioners' complaint did establish the elements, despite the circuit court's finding to the contrary. Here, the Petitioners claimed that the Board had a duty to employ school personnel who "demonstrated appropriate behavior, treated others with civility and respect, and refused to tolerate harassment, intimidation or bullying." Further, the Petitioners claimed that the Board breached this duty by "vot[ing] to renew [the Assistant Principal's] contract," which allowed the Assistant Principal to "continuously appear during [the student's] lunch period to further intimidate, harass, and bully [the student]." Finally, the Petitioners averred that, "[a]s a direct and proximate result of [the Board's] negligent . . . retention . . . , [the student] suffered personal injuries and damages," such as "suffering and mental anguish, past and future lost enjoyment of life, past and future humiliation, embarrassment, indignity, and shame[.]" Accordingly, Judge McCarthy reversed and remanded for reinstatement the circuit court's order to the extent that it dismissed the Petitioners' negligent retention claim.

Unfortunately, the dissenting opinions all are strangled by the fact that the Act provides immunity to the Board when the employee's acts are intentional. The semantics are far beyond the scope of *Law Notes*. But, we can hope for victory for the Petitioners upon remand, as well as change to the Act's definition of immunity.

Petitioners are represented by Teresa C. Toriseva, Joshua D. Miller, Jacob J. Polverini, Toriseva Law, Wheeling, West Virginia and Loree Stark, American Civil Liberties Union of West Virginia Charleston. ■

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

Oregon Appeals Court Rules Against Parental Claims of Egg Donor in Surrogacy Case

By Matthew Goodwin

On June 3, the Oregon Court of Appeals resolved, for now, questions of an egg donor's claim of parentage to a child born through surrogacy. *In re Parentage of Schnitzer*, 2021 Ore. App. Lexis 749, 312 Ore. App. 71. Although not explicitly an LGBTQ rights case, it is of significance for gay men and lesbian women seeking to have children using assisted reproduction insofar as it involves the extent of parental rights of gamete donors—i.e., egg or sperm donors. All three judges on the panel wrote opinions.

The case is factually complex. The child, identified in the opinion only as S, was born in December 2015. A successful Oregon businessman, Jordan Schnitzer, who had fathered only daughters with his ex-wife, wanted to have a son. He undertook multiple, unsuccessful attempts to produce a son through assisted reproduction, including sourcing anonymous egg donors and contracting with a gestational surrogate.

In the midst of his already ongoing efforts at having a son, Schnitzer became romantically involved with a woman named Cory Sause – although at trial the parties hotly contested the nature and extent of their relationship. Nevertheless, in the course of their association, Sause and Schnitzer agreed that she would donate to him some of her previously retrieved and frozen eggs to be fertilized with Schnitzer's sperm. Any embryos that tested as male would be Schnitzer's sole property.

The parties also discussed custody of any male child born to Schnitzer from the embryos using Sause's eggs. At trial, Sause testified Schnitzer " . . . had made it clear that he wanted to have sole physical custody and wanted to raise the child . . . although it was clear that the child would not live with her, it had never occurred to her that she would not be known as the child's mother. Rather she understood that she would be actively involved and that Schnitzer welcomed the thought of her as a part of the child's life."

Following these discussions but before creation of any embryos, the parties entered into a written agreement (Agreement) at Schnitzer's request. Oddly and perhaps foolishly, the Agreement was drafted by Schnitzer's business attorney rather than a lawyer with any background in assisted reproduction technology law. The Agreement provided that Schnitzer would relinquish any claim to any female embryos from Sause *and any resulting female offspring*; Sause relinquished custodial rights over the future disposition of male embryos created from her eggs but, crucially, did not relinquish any claim to male offspring of the embryos. Much of the controversy in the case revolved around the absence of mirror provisions respecting claims to the offspring and whether this was intentional or the result of poor drafting.

Three embryos were created, all of which turned out to be male. Thereafter Schnitzer entered into another surrogacy contract to which Sause was not a party, and a successful pregnancy by the surrogate resulted in the birth of S.

Sause and Schnitzer's relationship began to deteriorate shortly after Sause learned about the pregnancy. "Sause did not believe that she and Schnitzer were meant to be in a long-term romantic relationship. Schnitzer, on the other hand," [and, parenthetically, quite confusingly], "continued to hope that they would marry and raise the child together."

When the child was born, Sause and Schnitzer remained close. Schnitzer had sent Sause updates throughout the pregnancy. Sause and her family came to the hospital to see the baby. But the parties had a serious disagreement over Schnitzer's decision that the baby would

return home with the surrogate for some time after the birth.

Sause sent hostile messages to Schnitzer and Schnitzer cut off all contact with Sause at this juncture and refused her access to the child. Sause commenced litigation against Schnitzer.

The trial court characterized the issue to be decided as "whether Sause intended to relinquish legal control of just male *embryos* to Mr. Schnitzer or also all rights whatsoever to male *offspring*." In December 2017, the trial court ruled Sause to be S's mother " . . . by virtue of being his undisputed female genetic parent. It is true, as both sides to this dispute have acknowledged, that genetics alone do not a parent make. A person linked to a child only by genetics must take 'an affirmative step to accept the responsibilities associated with parenthood.'" The court viewed Sause's actions before and after Schnitzer cut off access to the child as that requisite "affirmative step."

A three-judge panel of the Court of Appeals heard argument in October of 2019, prior to issuing three separate opinions constituting the decision on June 3, 2021. However, despite their differing legal rationales, two of the three judges ruled in Schnitzer's favor.

Judge Roger DeHoog's opinion can best be summarized to stand for the proposition that a genetic connection to a child provides an opportunity for a would-be parent to create parental rights to that child, and that ultimate creation of parental rights depends on the would-be parent demonstrating a commitment to the responsibilities of parenthood by coming forward to participate in the rearing of the child. Thus, Judge DeHoog appeared to broadly agree with the legal standard employed by the trial court in evaluating Sause's claim, but then disagreed with the trial court that Sause had undertaken the requisite steps to become a parent despite the opportunity afforded her by genetic connection to the child.

In arriving at this conclusion Judge DeHoog undertook a thorough and exhaustive review of applicable Oregon and Supreme Court case law concerning parental rights of sperm donors and genetic fathers in a number of contexts involving adoption. The Supreme Court cases considered included *Lehr v. Robertson*, 463 US 248 (1983), *Quilloin v. Walcott*, 434 US 246 (1978), and *Stanley v. Illinois*, 405 US 645 (1972). A discussion of these cases as thorough as the one provided in Judge DeHoog's opinion is beyond the scope of this article.

Lehr bears some attention, however, as its legal standards for when parentage may arise seemed arguably to prove most persuasive to DeHoog as well as to the dissenting judge. "In *Lehr*, the Court considered whether a biological father of a child born out of wedlock had an absolute right to receive notice prior to the child's adoption by the mother . . . In holding the father had not established a right to such notice, the Court explained that '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he acts as a father toward his children. But the mere existence of a biological link does not merit equivalent constitutional protection . . . The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children . . . as well as from the fact of blood relationship."

DeHoog explained that, in Schnitzer's view, each of the Supreme Court cases required reversal because "each of those cases conditioned its recognition of a protected parental right on a far more substantial showing than Sause [made]. *Lehr,* Schnitzer observes, would require a custodial, personal, or financial relationship of some duration, whereas *Quilloin* would require daily contribution to the child's education, protection, and care. Schnitzer contends that the showing that Sause has made as to S in this case falls far short of the showings that the Supreme Court deemed sufficient to establish a protected parental right in its own decisions."

To the consternation of the dissent, Judge DeHoog confined examination of Sause's efforts to "grasp the opportunity to develop a parent-child relationship" to the time period before she pursed court action " . . . as any legal or equitable claim that she might have had would necessarily have been premised on rights that she had at the time of her filing."

Judge DeHoog noted that the decision to have S was Schnitzer's, not a joint decision, and was already underway when Sause and Schnitzer met. That the parties may have discussed putting Sause's name on the birth certificate was insufficient to show Sause was seeking to accept responsibility for parenting S. DeHoog characterized Sause's argument respecting her and Schnitzer's written agreement to be not that the Agreement conferred parental rights to her but, rather, that it did not terminate parental rights.

Nor was DeHoog persuaded by Sause's arguments that the egg-retrieval procedure she underwent or the discussions between her and Schnitzer about a "maternal role" for her in S's life were a sufficient showing to confer parental rights. As to the former, the trial court found the egg retrieval was for Sause's own fertility preservation purposes and unrelated to conception of S; as to the latter, DeHoog described such discussions as vague and "neither reflected a commitment on [Sause]'s part to the responsibilities . . . nor, given their timing, appear to have served as an incentive for Sause to donate her eggs in the first place."

Judge Josephine Mooney's concurrence relied instead on a statute, ORS 109.239, referred to in the opinion as SB 512, which was not effective when Sause brought her petition but became effective before entry of the trial court's judgment. The new statute in question directly addressed female gamete donation. Because of Judge Mooney's focus on the application of the statute, this opinion is the only one that focused primarily on the effect of contractual agreements in the case. SB 512 states in pertinent part "[i]f the donor of gametes used in assisted reproduction is not the mother's spouse: [t]he donor

shall have no right, obligation or interest with respect to any child conceived as a result of the assisted reproduction." The predecessor statute to SB 512 addressed only sperm donors whereas this version was broadened to include egg donors as well.

Judge Mooney wrote, "Schnitzer and Sause were simply gamete donors. In fact, there is nothing terribly complex about that. Neither had any parental rights when S was born. Schnitzer's status as S's legal parent came from his agreement with the gestational carrier and her husband, not from his genetic link to S. He is a man who is also S's legal parent. ORS 109.239 bars any claim by Sause as a gamete donor for parental rights."

Judge Mooney observed that the trial court knew and was aware of SB 512, having written that it was reflective of "where the future is headed," but " . . . nevertheless issued a ruling that is inconsistent with SB 512 . . . [T]he court signed its written findings and conclusions of law on December 6, 2017, 26 days before SB 512 took effect. But as it happened, the judgments, which incorporated the court's rulings, were not entered into the court's register until after SB 512 became effective."

Judge Mooney pointed to certain statutes and cases for the proposition that the date a judgment is entered is crucial for determining what law is in effect at the time of judgment. Because SB 512 was in effect when the trial court's judgment was entered, it should have applied *nunc pro tunc* and could not be ignored.

Judge Jacqueline Kamins dissented. The dissent agreed with Judge DeHoog that a genetic connection only presented Sause with an opportunity to develop a parent-child relationship with S. However, Judge Kamins would have found that Sause's actions did, indeed, rise to the necessary level for formation of that relationship. Broadly, what mattered to Judge Kamins were Schnitzer and Sause's conversations concerning the role Sause would play in the child's life after the child's birth. It was also important to Kamins that Sause filed her petitions as soon as the role Schnitzer and Sause had discussed for Sause was threatened by Schnitzer's termination of her contact with the child; i.e., Kamins, unlike Judge DeHoog, did not want to confine the relevant period for evaluating Sause's actions to prior to S's birth.

It is unknown at this time whether Sause plans to appeal the ruling, however some news outlets reporting on the case indicated that she would.

The Academy of Adoption and Assisted Reproduction Attorneys filed an amicus brief supporting Schnitzer's position. Robin Pope, who filed the amicus brief, has been quoted elsewhere as saying, "I am delighted with the outcome of this case, as it confirms that ART law is alive and well in Oregon. Intent matters."

Schnitzer was represented in the appeal by James N. Westwood, Stoel Rives LLP, Davis Wright Tremaine LLP, Stahncyk Kent & Hook PC, and Laurel Parrish Hook. Sause was represented by Jay W. Beattie, Lindsay Hart LLP, Thomas E. McDermott, Erin Gould, and Charles D. Gazzola. ■

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6th Circuit Rejects Transgender Detroit Employee's Hostile Environment Complaint

By Arthur S. Leonard

A 6th Circuit panel consisting of two G.W. Bush appointees (Gibbons and Kethledge) and one Trump appointee (Murphy) was notably unsympathetic to a transgender plaintiff-appellant who claimed to have been subjected to a hostile environment due to her gender transition and retaliation because of her complaints about it. *Doe v. City of Detroit*, 2021 WL 2673137 (June 30, 2021).

"Jane Doe 'lived and presented as a male' when she started working for the City of Detroit in January 2016," wrote Circuit Judge Julia Smith Gibbons. Five months after starting work, she notified her employer that she would be transitioning, and sought time off for medical procedures. The City gave her the requested time, and she returned to work beginning to dress and groom as female. Her supervisor told her that she had received an anonymous complaint about how Doe was dressing, but the supervisor assured her that her attire was "appropriate."

When she returned from another medical leave after additional surgery, she found that someone had defaced her office nameplate by "scrawling the word 'Mr.'" After she complained to her supervisor, the supervisor's assistant removed, cleaned, and replaced the nameplate. But this was just the beginning . . .

Somebody left a gift bag on her desk a few weeks later, containing a phallic toy and an illiterate handwritten noted that quoted the ban on cross-dressing from Deuteronomy 22:5 and said: "You were born a Man, No make-up or weave will change that. Even getting rid of your Penis wont [sic]. Spot [sic] shaming yourself. We don't wont [sic] People like

you working here." She reported this to her supervisor, who told her to file a complaint with HR.

She did not know who was responsible, but it later developed that her supervisor had kept from her the identity of the "anonymous" complainer about her attire (who had made a second complaint after she returned from her first medical leave).

HR undertook an investigation but said it could not identify who left the gift bag and the note, even though it asked employees for handwriting samples to compare to the note.

After the Christmas break, Doe asked about putting a lock and installing a camera on her office door, but there was no action in response, even when Doe offered to pay for the lock.

A co-worker on her floor became "increasingly hostile" towards Doe after her transition and made disparaging remarks about her to co-workers. Finally, the supervisor told Doe that this co-worker was the source of the attire complaints, although he had denied any involvement in the gift bag incident.

Five months later, Doe found a typewritten note in her office mailbox, quoting from Leviticus 20:13, which is generally interpreted as imposing the death penalty for sodomy. She reported the new note, considering it a threat, and suspected the same co-worker, but she did not convey these suspicions to the police or her employer. The police refused to get involved investigating an internal office matter, and the City finally initiated a requisition for a lock for Doe's door, but then two weeks later (no lock having been installed) she found another note on her office chair, again typed: "You were warned! Now I will show you better than I can tell you. GOD HAVE MERCY ON YOUR SOUL!"

Now Doe was really panicked, feeling threatened, filing a complaint with the EEOC and the Michigan Civil Rights office, and telling city officials she suspected this particular co-worker, but they said there was no "hard evidence" against him. HR interviewed various employees (but not this particular co-worker) and did not inform other employees about the notes.

Doe was moved to a vacant office on another floor at her request, but a few days later a lock was put on her original office door and her supervisor moved her things back to her old office, even though she had asked to remain on the other floor.

Two employees in Doe's Department then informed HR that the suspected co-worker had viewed Doe's Facebook page the previous year and made disparaging comments about her and HR finally took some action, suspending the co-worker without pay for three days and moving him to a different floor.

But HR informed Doe it was unable to determine who left the notes, and referred the matter to the police department for further investigation. Dissatisfied, Doe contracted a reporter, and a local news station ran the story. Then the police investigated, but never interviewed the suspected co-worker and did not reach a conclusion as to who left the notes. But that was the last of the incidents. Perhaps the harassing co-worker was deterred once the matter became a public story in the media.

Doe claims that her supervisor became hostile to her in various ways while this was going on, and that when the supervisor left her job with the City, she recommended somebody less qualified than Doe to fill her position, even though Doe had applied. The City officer responsible for making the promotion decision selected neither Doe nor the person her former supervisor had recommended, and Doe claims that the new supervisor also subjected her to a hostile environment.

The EEOC issued her a right-to-sue letter and she filed suit under Title VII and Michigan's civil rights law, but she suffered summary judgment, which the 6th Circuit panel affirmed.

The City did not dispute Doe's factual claims, but contended that it had responded reasonably to every complaint and thus should not suffer any liability for a hostile environment. The district judge and the 6th Circuit agreed, rejecting Doe's claim that the City's responses, including the inept, inconclusive investigations, and delayed placement of a lock on her office door, were sufficient to hold the City liable to Doe.

One reads Judge Gibbons' opinion with mounting exasperation – not just with the court's resolution of every judgment call against Doe, but also with the Supreme Court's precedents largely shielding employers from liability for hostile environments generated by co-workers. In essence (to simplify greatly), if the employer is not at fault in some way, the employer is not liable for the hostile environment.

In a footnote, Judge Gibbons recognized that in light of the *Bostock* decision, harassment on the basis of transgender identity is sex discrimination under Title VII, but she wrote that because a supervisor was not "responsible for the incidents," Doe "does not dispute that we should use the test for co-workers." An employer is not liable for a hostile environment generated by co-workers unless it responds unreasonably to complaints. The 6th Circuit agreed with the district court that the City's response was reasonable, even though it didn't really resolve the problem. After all, eventually the harassment from the co-worker stopped after the media reported what was going on. Why should the City get the credit for that, when it was Doe who finally decided to take direct action by contacting the reporter when the City proved unable to protect her?

Doe is represented by Carol A. Laughbaum, Sterling Attorneys at Law, P.C., Bloomfield Hills, MI. ■

Pennsylvania U.S. District Court Allows Part of Transgender Hospital Patient's Suit to Survive Motion to Dismiss

By Arthur S. Leonard

"Jane Doe," a transgender woman, alleges that she was grossly mistreated by the staff at the University of Pennsylvania Hospital (of which she was an employee as a Certified Nurse Assistant) when she was there for a diagnostic colonoscopy, and when she was ultimately discharged from her job due to a disabling condition which she attributed to defendants' misconduct. She filed a multicount complaint against the Hospital and various individual personnel (some identified in the complaint as "Medical Personnel John Does 1-10" and "Penn Police Officers 1-10"), asserting tort and statutory claims. On June 29, 2021, U.S. District Judge Karen Spencer Marston issued two decisions, one granting in part and denying in part defendants' motion to dismiss, the second denying plaintiff's motion for leave to file a second amended complaint. *Jane Doe v. The Hospital of the University of Pennsylvania*, 2021 U.S. Dist. LEXIS 121312, 2021 WL 2671791 (E.D. Pa., June 29, 2021) (ruling on partial motion to dismiss); 2021 U.S. Dist. LEXIS 121268, 2021 WL 2661501 (E.D. Pa., June 29, 2021) (denying motion for leave to file second amended complaint).

Doe, a hospital employee, needed to undergo a diagnostic colonoscopy to be performed under general anesthesia. Things started to go bad as she was checking in and the receptionist and medical staff persisted in misgendering her, even though as an employee her hospital records had been previously changed to show her correct name and gender identity, and both she and the friend who accompanied her corrected them several times.

She alleges that although she informed the medical staff about her particular sensitivity to anesthesia, they ignored what she told them, as a result of which she had a severe reaction and was seriously disoriented when she attained consciousness, resulting in some acting out and screaming for attention and help which the staff apparently ignored, as they called in the university police to physically remove her from the hospital (which they did in a rather rough manner resulting in bruises, etc.), leaving her sitting in a wheelchair on the street partially naked. Her psychological reaction to this experience caused her gender dysphoria to "flare" in a disabling way. Although the hospital approved several short leaves as she struggled to recuperate, when she was not ready to come back to work after the last leave expired, they terminated her employment. Of course, the allegations of the complaint, related by Judge Marston in her opinions, are more detailed and colorful than this brief summary can include.

Doe's initial complaint, filed July 2, 2019, asserted claims for assault, battery, intentional infliction of emotional distress, false imprisonment, violation of the right of privacy, and medical malpractice against all defendants. She also claimed discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, and violations of Title III of the American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, as well as wrongful termination in violation of Title I of the ADA. She also alleged that the hospital and its police officers violated Title II of the ADA. She filed an amended complaint on October 3, 2019, removing the medical malpractice claim but adding claims for reckless conduct, gross negligence, and negligence against all defendants.

The defendants filed a partial motion to dismiss, moving against the newly asserted tort claims, the ADA Title I and III claims and the Rehabilitation Act claim, and the invasion of privacy claim. The case sat without the motions being decided for a considerable time but was then reassigned from another district judge to the newly-seated Judge Marston on February 27, 2020. While the motion to dismiss was still pending, Doe filed a motion for leave to file a second amended complaint on May 22, 2020. Oral argument on the motion to dismiss was held on June 24, 2021, and a few days later, Judge Marston issued her two decisions.

The defendants argued that Doe had correctly identified her negligence and recklessness claims in the initial complaint as medical malpractice claims, and that these claims should now be dismissed because she had not followed the prescribed Pennsylvania procedures for bringing such claims, involving going through an administrative process to obtain a certificate of merit before filing suit. Ruling on this required the court to explore the somewhat shady line between medical malpractice and ordinary tort claims, requiring an extensive discussion of Pennsylvania case law, since the 3rd Circuit has characterized Pennsylvania's prescribed procedures for medical malpractice claims to be rules of decision that must be applied by federal courts as part of the substantive law of the state.

"In her reckless conduct, gross negligence, and negligence counts against all Defendants," wrote Judge Marston, "Doe asserts that Defendants owed 'duties to her, including but not limited to treating her sensitivity to anesthesia competently, respecting the information she conveyed regarding her recovery, treating the difficult recovery completely and to do all that without further harming her or destroying her employment." The judge found that these allegations "indicate that Doe is relying on a professional standard of care. This is so because an ordinary, non-medical professional would not have a duty to treat Doe's sensitivity to anesthesia completely or treat her difficult recovery completely. Treating a patient's sensitivity to anesthesia necessarily implicates questions of medical judgment and transcends common knowledge or experience. Likewise, Doe's allegations that Defendants failed to diagnose and treat her sensitivity to anesthesia call for

expert testimony." Thus, the court found that these were medical malpractice claims that had to be dismissed, as Doe had not filed the requisite certificate of merit required by Pennsylvania law before she could assert such claims.

However, the court rejected the defendants' argument that ADA and Rehabilitation Act claims should be dismissed because Doe "fails to plead that she has been limited in one or more major life activities." Under these statutes, the definition of a person with a disability is somebody who has a medical or mental impairment that limits them in one or more major life activities. "In this case," wrote Marston, "Doe has pled that she suffers from GD; that GD 'is a medical and therapeutic diagnosis associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning,' and that GD is a disability because 'it substantially impairs one or more major life activities, including, but not limited to, neurological, brain, social, and occupational functions.' Doe also alleges that her GD flared up after the February 20 incident at HUP and she experienced difficulty in returning to her workplace." This was enough to satisfy Judge Marston, who wrote: "Although a close call, this Court finds that Penn Defendants fail to draw all inferences in Doe's favor and construe her complaint too narrowly . . . In any event, even setting aside Doe's more general allegations about trans people who suffer GD and the impairments they face, the Court observes that Doe has made at least one specific allegation that, when viewed in the light most favorable to her, allows us to draw the inference that GD substantially limited Doe's occupational functioning. Specifically, Doe alleges that, after the incident, her 'GD flared up and she experienced difficult in returning to HUP, her workplace.' Although Doe must prove far more to survive a future summary judgment motion, we find that this is sufficient for her ADA and Rehabilitation Act claims to withstand a motion to dismiss."

As to Doe's state law invasion of privacy claim, the court noted that Pennsylvania courts accept four categories of privacy torts described in the Restatement (2nd) of Torts, and that Doe's allegations appeared to invoke two of them: intrusion upon seclusion, and publicity given to private life. As to the first, the court found that Doe's allegations were sufficient to state an intrusion upon seclusion claim. "When read in the light most favorable to Doe," wrote the judge, "Doe's complaint pursues two alternative theories for intrusion upon seclusion: first, the Defendants intruded upon her seclusion by revealing her confidential information to the EEOC, and second, that Defendants intruded upon her seclusion when she was disoriented in the recovery room by sitting on her and wheeling her topless through the hospital." Judge Marston found that the first theory didn't work in this case, but the second did. "Drawing all reasonable inferences in Doe's favor," she wrote, "Doe has adequately pleaded that Defendants committed highly offensive conduct that would cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Because Doe alleges that the police forcibly entered and that she begged the men to leave the room while she was naked, to no avail, Doe has also sufficiently pled that the police officers did not have her personal permission to commit the intrusion." Thus, this claim survives the motion to dismiss.

As to publicity given to private life, Judge Marston wrote, "To the extent that Doe's publicity given to private life claim is based on Defendants' unauthorized disclosure of her personal information to the EEOC, Doe's claim must fail because the EEOC is a single entity," as this was not a disclosure to the public at large. "Likewise," wrote the judge, "to the extent Doe bases her unreasonable publicity given to private life claim on Defendants revealing her partially naked body to the general public, the Court finds that Doe fails to state facts sufficient to satisfy the element of publicity. Doe pleads that the Penn police wheeled her partially naked through the hospital and left her on the street, topless. Without question, this constitutes highly offensive conduct. However, without an allegation that members of the public – either in the hospital and/or on the street – viewed Doe's partially naked body, the Court is thus unable to find Doe has sufficiently pled the element of publicity to survive Defendants' motion to dismiss." This conclusion strikes the writer as odd, since on a motion to dismiss the court is supposed to draw reasonable inferences from the pleadings in the plaintiff's favor, as the judge commented earlier. How likely is it that a bunch of hospital security officers pushing a semi-clad loudly complaining transgender woman through a hospital and out on to the sidewalk would not attract any attention from bystanders? Is the court assuming that the entire route was deserted of onlookers, and refusing to draw the reasonable inference that there were people around who would notice what was happening?

At any rate, at least one of Doe's invasion of privacy claims survives the motion to dismiss, as do her discrimination claims under the ADA and the Rehabilitation Act.

However, the court refused to grant leave for filing a second amended complaint, because Doe's attempt to do so blatantly failed to meet the time limits specifically set by the court. Without asking the court for an extension of time, Doe just blithely filed the motion several days late, and the proposed amended complaint specifically violated subject matter restrictions imposed by the court by seeking to add new defendant parties and asserting new substantive claims, including seeking to escape the court's ruling on the malpractice issue by restating tort claims as constitutional due process claims. The court was unwilling to go down that route.

Doe's counsel is Jolie Chovener of Philadelphia. Judge Marston was appointed by President Donald J. Trump in 2019, the same year that she joined the Federalist Society. (We note with some amusement that several of Trump's judicial appointees seem to have discovered an affinity for the Federalist Society around the time of their judicial nominations, thus checking off one of the qualifications high on Trump's list for judicial appointments.) ■

"Illinois Goddam": Federal Judge Denies Summary Judgment, Sends Shocking Case of Transgender Prisoner Abuse to Jury

By William J. Rold

Nina Simone's civil rights anthem "Mississippi Goddam" resounds today for transgender prisoners trapped in brutally abusive institutions that reject their humanity and against the governments that defend them. This is at least the seventh time since 2017 that Law Notes has reported on the saga of Illinois transgender prisoner Deon Hampton. She is no longer in prison, so her claims are limited to damages. In *Hampton v. Kink*, 2021 WL 2580267 (S.D. Ill., June 23, 021), Chief U.S. District Judge Nancy J. Rosenstengel denies summary judgment and sets the case for trial. Trial will begin on October 5, 2021, per PACER.

Hampton is not yet thirty years old chronologically, but she has suffered more than a lifetime's worth of pain. She has both severe gender dysphoria and serious bipolar disorder. Having been on hormones since 2016, she is now "in the female range" for estrogen levels. Before her release, on the order of Judge Rosenstengel, she was moved to a women's prison. But she was in men's prisons at times relevant to her damages claims, which focus on Illinois' Lawrence and Dixon institutions.

Hampton has been in general population, disciplinary segregation, protective custody, and administrative segregation. For an entire year she was kept in solitary confinement while officials documented her mental deterioration. Frequently she was charged with misconduct when other inmates (according to her and sometimes on videotape) forced her to perform sexual acts. Officers observed sexual abuse and took no action. Supervisors, including Lawrence's Warden Kink (really), often enhanced her punishment time. She was left with assailants even after Internal Affairs substantiated her complaints and issued a separation order.

There is documentation of sexual assault by eight other inmates over nine months at Dixon Correctional Facility. Officials found her complaints "unsubstantiated," but the PREA hotline had records. Hampton says her allegations were not genuinely investigated and that she often was issued "tickets" for complaining.

In June of 2018 Hampton was pepper-sprayed. There is a dispute as to how the incident escalated, but eight officers eventually became involved as Hampton was "extracted" to segregation. Defendants apparently conceded that Mental Health was not consulted as required by PREA and Illinois DOC protocol.

Hampton's mental health deteriorated over her incarceration, and she attempted suicide repeatedly, including after the pepper spray incident. There is a factual dispute about whether Mental Health "approved" her solitary confinement despite her deterioration in suicidal ideation.

Hampton, when in population, was subjected to threats of violent rape and death and extorted for sex to obtain food. These complaints were "substantiated," and they resulted in more "separation" orders – but no further steps to prevent similar threats/extortion by others.

Judge Rosenstengel notes both Lawrence and Dixon facilities misgendered Hampton and permitted officers "constantly" to refer to her as a "fag." The wardens insisted that staff were trained.

In a discovery fight, both sides were forced to disclose their e-mail and Facebook accounts. Hampton, after release, had to produce postings related to her continued mental distress. Defendants at the subject prisons had to produce their transphobic postings in "Behind the Walls," a Facebook group composed of Illinois DOC employees.

One can readily see why a trial was needed here – and, indeed, wonder how Illinois DOC thought it could get summary judgment from a federal judge who had already issued an affirmative preliminary injunction against them because of the threats to Hampton's safety in men's prisons. The law is a straightforward application of *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), on protection from harm; and *Hudson v. McMillian*, 503 U.S. 1, 6 (1992), on excessive force.

The officers who allegedly tolerated abuse or used excessive force were identified. The wardens' pattern and practices were sufficient for a jury question by the time of the preliminary injunction. There is also a jury question as to whether the wardens were deliberately indifferent to the effect of prolonged isolation on Hampton's mental health.

The decision includes a discussion of the relation-back doctrine as to one of the wardens. Claims raised for the first time in the second amended complaint relate back to the first complaint for statute of limitations purposes, because they arose from the same set of operative facts under F.R.C.P. 15(c)(1)(B). This discussion may be useful for advocates who have this issue. A discussion of qualified immunity has no new law. Given the material facts in dispute, qualified immunity is not a basis for summary judgment in this case.

Judge Rosenstengel allows an intentional infliction of emotional distress claim to go to the jury. This is rare. Defendants tried to argue that this claim could only be brought in the Illinois Court of Claims. This is a sovereign immunity argument. But: "Sovereign immunity affords no protection when agents of the state have acted in violation of statutory or constitutional law or in excess of their

authority." *Leetaru v. Board of Trustees*, 32 N.E. 3d 583 (Ill. 2015); see also, *Murphy v. Smith*, 844 F.3d 653, 658 (7th Cir. 2016) (sovereign immunity does not protect Illinois officials acting "outside the scope" of their authority). "Each of Hampton's federal claims involve Defendants' alleged violation of her constitutional rights. If proven, the claims fall squarely within the exception to the sovereign immunity bar."

This case should settle. Again, Illinois, goddam! Hampton is ably represented by MacArthur Justice Center and Uptown People's Law Center (Chicago). ■

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.

Four More Denials of Compassionate Release for COVID-19 Risks; National Statistics Reported

By William J. Rold

Law Notes continues to report on petitions by prisoners with HIV or who are LGBT (and sometimes both) who seek release from federal custody. Here are four more, all unsuccessful. They show a slight trend toward assuming, *arguendo,* that HIV may qualify as a risk – but denying release on discretionary factors, usually severity of crime. Because this slice may not be representative of all petitions for compassionate release under COVID, we report on *Buzzfeed's* recent release (6/14/21) of statistics for federal prisoners in 2020. Of more than 12,000 petitions, over 2,500 (roughly 21%) were granted. Success varied widely from a high of 68.5% in Oregon (63 of 92) to zero in the Virgin Islands. Significant health problems and advanced age seemed to be the most important factors but neither guarantees success. *Buzzfeed* reports 238 people having died of COVID-19 in federal prison, and 45,000 having contracted the disease. Readers are reminded that compassionate release petitions go back to the federal district of sentencing (and to the same judge, if still sitting). In this writer's overview, this reduces the likelihood of success for a prisoner recently sentenced who cannot show overwhelming risk in the current institution.

CALIFORNIA – Senior U.S. District Judge Larry A. Burns denied compassionate release to Corina Duran, a transgender man, in *United States v. Duran,* 2021 WL 2453127 (S.D. Calif., June 15, 2021). Duran, age 23, has served 26 months of 120 months for conviction of conspiracy to import methamphetamine. He is currently incarcerated in FCI Dublin (California), a BOP facility for women. Judge Burns notes his trans status and his taking of testosterone injections (a masculinizing hormone), but he refers to him with feminine pronouns. That said, his trans status seems to have little to do with the disposition of the petition. The only medical factor giving Judge Burns pause is Duran's obesity (BMI 36, or Class II obesity), which the Government concedes is a COVID-19 risk factor. Duran has had COVID-19 and has recovered. Judge Burns notes that most of FCI Dublin's inmates have been vaccinated, reducing the risk to Duran, even if he has not been vaccinated, because he has already had COVID. Duran supported his petition with a medical declaration from an infectious disease doctor, but "it was not specific to Duran," and Judge Burns notes that it was written before the introduction of vaccines. Judge Burns finds no "extraordinary or compelling circumstances" – and, even if he did, the Section 3553 factors outweigh them.

ILLINOIS – Toshiro Luttrell was sentenced to 258 months on a plea to seven counts of robbery and firearms offenses in August of 2020. He is HIV-positive, a fact known when he was sentenced. In *United States v. Luttrell,* 2021 WL 2434025 (C.D. Ill., June 15, 2021), U.S. District Judge Sue E. Myerscough denied his motion for compassionate release. Currently incarcerated at FCI Hazelton (West Virginia), Luttrell has a release date in 2037. Luttrell sought release after serving 8 months. He did not present medical evidence that his HIV placed him at unusual COVID-19 risk, and he admitted that his HIV is under control. The medical evidence is sealed, as is the Government's opposition to release. This is a case where sentencing occurred after the First Step Act and where COVID-19 was already widely identified as a health risk. While the Sentencing Commission "Guidelines" for compassionate release have not been updated since the First

Step Act, they provide a "working definition" for such motions under *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020). Judge Myerscough considered the application to be one for reconsideration of her sentence, and she was not persuaded to change it – questioning, in fact, whether she could jurisdictionally modify the sentence "downward" as part of a compassionate release application under 18 U.S.C. § 3582(c)(1)(A). The opinion includes a discussion of multiple "stacking" of consecutive sentences (reduced but not eliminated under the First Step Act) for advocates who have this issue. Luttrell is represented by the Federal Public Defender (Springfield).

INDIANA – U.S. District Judge Sarah Evans Barker denies compassionate release to Justin M. Roberts in *United States v. Roberts,* 2021 WL 2446073 (S.D. Ind., June 14, 2021). Roberts, 43, is HIV-positive, but the opinion has little about his medical condition. He is serving 156 months on a guilty plea to two counts of distributing methamphetamine, with an anticipated release in 2027. He is incarcerated at FCI Gilmore (West Virginia), which has had about 300 COVID cases among its 1500 inmates. BOP says that 67% of the population is now "fully inoculated." Judge Barker "assumes" that Roberts meets threshold consideration for compassionate release. To the extent he seeks "home confinement," she rules that she has no jurisdiction to order same under *United States v. Saunders*, 986 F.3d 1076, 1078 (7th Cir. 2021) (district court lacks authority to order transfer to home confinement). She focuses on her discretion to order "time served" as compassionate release. She starts with the Sentencing Guidelines, but finds she is not ""curtailed" by them after the First Step Act, under *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020). "Here, Mr. Roberts suffers from a medical condition that increases his risk of experiencing severe symptoms if he contracts COVID-19 . . . , [but] the risk that Mr. Roberts will actually contract COVID-19 has been significantly reduced" by vaccinations. Ultimately, the Section 3553 factors weigh against release. Roberts has a long criminal history (some violent) and is "a high risk for recidivism." He has not yet served half his sentence. "[T]he Court finds that releasing Mr. Roberts early would not: reflect the seriousness of the offense; promote respect for the law; provide just punishment for the offense; afford adequate deterrence to criminal conduct; or protect the public from further crimes" – citing *United States v. Saunders*, 986 F.3d 1076, 1078 (7th Cir. 2021) (affirming denial of motion for compassionate release where district court found that § 3553(a) factors weighed against release despite COVID-19 risk because defendant committed serious offense and had only served one-third of sentence). Roberts is represented by the Indiana Federal Public Defender (Indianapolis).

NEW YORK – It is not a good sign for the criminal defendant when a judge begins the discussion about compassionate release with a detailed account of the death of one of the defendants' victims. The death of an addict from an overdose of heroin that defendant Anthony Dodaj smuggled into a rehab hospital where the addict was detoxing was a key lead in the investigation of a drug conspiracy in which Dodaj was a participant and for which he eventually plead guilty. Senior U.S. District Judge Vernon S. Broderick sentenced Dodaj to 65 months incarceration, which was a downward departure from the 240 months recommended by the Sentencing Guidelines. In *United States v. Dodaj,* 2021 WL 2414854 (S.D.N.Y., June 11, 2021), Judge Broderick denies compassionate release. Dodaj exhausted his administrative application by seeking the warden's consent to compassionate release and waiting thirty days, but the opinion addresses the issue anyway. It notes that there is a circuit split on whether such exhaustion is jurisdictional or non-jurisdictional, presenting annotated string citations of circuit decisions and noting that the Second Circuit has not "weighed in." All of this is *dicta,* but it may be useful to someone who has a case (or is assigned one) with an exhaustion issue. On the merits, Dodaj, age 43, has HIV, is hypertensive, and has a long history of heavy smoking. Judge Broderick says these factors may constitute "extraordinary and compelling" threshold grounds for consideration of compassionate release under 18 U.S.C. § 3582(c)(1)(A). He assumes (without deciding) that they do. Dodaj, however, fails the discretionary factors under Section 3553(a), even with the Court's broadened authority under *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020), to exercise its own discretion in the absence of the Sentencing Commission's actions after the passage of the First Step Act. The Government argued that Dodaj would be safer at FCI Allenwood, where he is incarcerated, than if he went home to New Jersey, which has a higher COVID-19 rate than Pennsylvania. Judge Broderick rejects this argument, noting that half of the inmates tested at FCI Allenwood were COVID-positive. Noting that he had already given Dodaj a "substantial reduction" in sentence, that his crime was serious and led to a death, and that his release date (given total time served) was November 2021, Judge Broderick declines compassionate release. He does order the BOP to report to the court within ten days whether Dodaj has received the COVID vaccine, or when he is scheduled to receive it. ■

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. SUPREME COURT – The Court denied cert petitions in two important pending cases at the end of its October 2021 Term. First, the court denied a petition for certiorari on June 28 in *Gloucester County School Board v. Grimm*, 2021 WL 2647992, declining to review *Grimm v. Gloucester County School Board*, 972 F.3d 586, *motion for rehearing en banc denied*, 976 F.3d 399 (2020). The ACLU represents Gavin Grimm, a transgender boy who sued under Title IX and the Equal Protection Clause, claiming the School Board violated his rights by barring him from using the boys' bathrooms at the high school and refusing to correct his school records to reflect his legal change of name and gender. (Grimm obtained a court-ordered name change and the state issued him a new birth certificate after he had top surgery as part of his transition.) The district court granted summary judgment in his favor on both claims, and was affirmed in a 2-1 panel decision last August. Later in 2020 the 4th Circuit denied the School Board's motion for *en banc* review. Justices Clarence Thomas and Samuel Alito indicated that they would have granted the cert petition. The Court's action is consistent with its refusal to grant review in other cases concerning the "bathroom" issue, some of which have been brought by parent groups claiming that Schools violated privacy rights of cisgender students by allowing transgender students to use bathrooms consistent with their gender identity, while others, as in this case, were suits by transgender students seeking appropriate facilities access. The case was scheduled for argument in the Supreme Court in 2017 on the issue of deference to administrative interpretation, but the change of presidential administrations resulted in cancellation of the hearing and a remand to the 4th Circuit when the Trump Administration "rescinded" an Obama Administration interpretation of Title IX to which the 4th Circuit had ruled the district court should have deferred. President Biden's Executive Orders and interpretations issued by the Justice and Education Departments in recent months place the new administration on the side of transgender students in these cases. * * * Second, on July 2, the last day before the Court recessed for the summer, it announced denial of cert in *Arlene's Flowers v. Washington*, 2021 WL 2732795, leaving in place the Washington Supreme Court's second decision affirming the trial court's ruling against Barronelle Stutzman, who refused to make floral arrangements for the same-sex wedding of Robert Ingersoll and Curt Freed, co-Respondents in this case with the Washington Attorney General, who had initiated the lawsuit in response to media reports. *See State of Washington v. Arlene's Flowers*, 441 P. 3d 1203 (Wash. 2019). The ACLU represents the gay couple, and Alliance Defending Freedom represents Stutzman and her florist shop. This case had been on the Court's cert list since September 11, 2019. ADF supplemented its petition the day after the *Fulton* ruling, urging the Court to use this case as a vehicle to "revisit" *Employment Division v. Smith*, but only won three votes: Alito, Thomas and Gorsuch indicated they would have granted the petition. The Court will have future opportunities to reconsider *Smith*, as a petition is pending in a case involving a Catholic hospital's refusal to perform a hysterectomy on a transgender man. As the Court has recessed, a decision on the cert petition is not expected until the Court resumes deliberations at the end of September. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a petition for review of the Board of Immigration Appeals (BIA) decision denying the Petitioner, a bisexual native of Jamaica, protection under the Convention against Torture (CAT), and rejecting Petitioner's claim of derivative citizenship through the naturalization of his adoptive mother. *McPherson v. Garland*, 2021 WL 256207 (June 23, 2021). Petitioner asserted that he . . . derived U.S. citizenship from his adoptive mother who naturalized in 1989, before he came to the United States, and that to the extent the relevant citizenship statute at that time did not support his claim, it violated Equal Protection. He contended that the distinction between biological and adopted children born out of wedlock in the former INA provision violated the Equal Protection requirement of the Fifth Amendment. However, his argument was not based on a distinction between legitimated and non-legitimated children but between non-legitimated biological children and non-legitimated adopted children. In this regard, the 2nd Circuit's precedent foreclosed his constitutional challenge to the former INA provision at issue. The Petitioner also contended that he is likely to be tortured in Jamaica because he is bisexual and will be perceived as gay. An applicant for CAT relief must show that it is "more likely than not" that he will be tortured. The agency concluded that Petitioner failed to establish a likelihood of torture by or with the acquiescence of Jamaican officials. The record does not compel a contrary conclusion. The evidence before the agency reflected that gay or bisexual individuals suffer discrimination and, sometimes, physical violence in Jamaica. However, as the agency noted, the country condition evidence in the record demonstrated that efforts were underway in Jamaica

to combat this discrimination, and the Jamaican government did not appear to be deliberately targeting gay or bisexual individuals. Furthermore, Petitioner did not show that his sexual orientation was or would become known in Jamaica. He testified that no one in Jamaica knew he is bisexual other than a pastor he spoke to as a child. Considering his personal circumstances, the agency reasonably concluded that the country conditions evidence of general discrimination and some violence toward gay or bisexual individuals did not establish that McPherson would more likely than not face torture. McPherson is represented by Afshan J. Khan, The Law Office of Delmas A. Costin, Jr., Bronx, N.Y.-– *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a petition for review of an order of the Board of Immigration Appeals (BIA) that refused to extend refugee status to a man from Belize who claimed to be bisexual. *Bonilla v. Garland*, 2021 U.S. App. LEXIS 16817, 2021 WL 2308794 (June 7, 2021). The petitioner entered the U.S. lawfully, lived here for 16 years, and had pursued permanent residency "since his mother's Violence Against Women Act application," however, he has a "criminal history" and "failure to take responsibility for his actions. The court found that the Immigration Judge (IJ) and the BIA "came to reasonable conclusions, and provided a 'rational explanation' for the agency's decision" to deny asylum in this case. The Petitioner argued that he should be entitled to withholding of removal or protection under the Convention against Torture because of his bisexual orientation, but, wrote the court, the IJ "properly highlighted his concerns with [Petitioner's] inability to recall specific details about his relationships with men as well as [his] failure to provide sufficient corroboration to support his identification as bisexual. The agency also properly concluded that [he] failed to show a pattern or practice of persecution of bisexual men in Belize; while the IJ acknowledged that Belizean law does not expressly prohibit discrimination based on sexual orientation, the agency reasonably found that the Belize government is taking active steps to promote equality for the LGBTQ community, and that [Petitioner's] fear of persecution based on his sexual orientation was too speculative to support his application." The court concluded on this point: "Because we cannot say that any reasonable adjudicator would be 'compelled' to conclude the contrary, we uphold the agency's factual determination." The court also found that Petition misstated when he alleged that the agency applied a "heightened government acquiescence standard by requiring [Petitioner] to prove 'that Belizean authorities would themselves torture him' upon his return," quoting from the IJ's opinion, which found that [Petitioner] "was not only unlikely to 'suffer harm rising to the level of torture' generally, but that [he] failed to show 'that such harm would occur with the participation or acquiescence of the government.'" – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Khamis v. Attorney General*, 2021 WL 2433141, 2021 U.S. App. LEXIS 17769 (June 14, 2021), the 3rd Circuit rejected a Tanzanian citizen's argument that he was wrongly denied protection under the Convention against Torture (CAT) because his HIV-positive status subjected him to the likelihood of torture as the Tanzanian government conflated HIV-positive status with homosexuality and was engaged in a crackdown against homosexuals. The petition, who entered the U.S. lawfully and was a lawful permanent resident, was nonetheless subject to removal because of his conviction on a charge of conspiracy to import and distribute heroin, for which he was sentenced to 18 months in prison. Thus, he could not seek asylum or withholding, and had to depend entirely on possible protection under the CAT. The petitioner argued that his case before the Immigration Judge and the Board of Immigration Appeals had been prejudiced by the faulty performance of his former counsel, but the court rejected his argument in an opinion by Circuit Judge Anthony J. Scirica. The court found no evidence was presented confirming that the Tanzanian government considers anyone who is HIV-positive to be gay, and so the petitioner's contention that he would be subjected to forced anal examinations, imprisonment, and deprivation of HIV medications, was not substantiated. The court noted that the government in Tanzania was making efforts to provide testing and medication for HIV to its residents, and that there was no evidence to support the petitioner's theory that the reason the government closed down all non-governmental HIV clinics in the country was to direct all the suspected homosexuals to government clinics. Instead, the evidence showed that the non-governmental clinics were shut down because they supported homosexual activity. Counsel listed for the appeal to the 3rd Circuit were Anthony C. Kaye, Isiuwa J. Mabatah, and Lisa B. Swaminathan, of Ballard Spahr, Philadelphia and Salt Lake City. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 7TH CIRCUIT – Karen Krebs is a transgender woman who is a convicted sex offender. She wanted to legally change her birth name from Kenneth to Karen, in order, among other things, to be able to get a driver's license in the name Karen, which she can't do in Wisconsin without a legal change of name. Unfortunately, Wisconsin has a statute that prohibits legal name changes for convicted sex offenders. Under Wisconsin's registry

law, convicted sex offenders have a lifetime registration requirement. Prior to enactment of the law forbidding name changes in 2003, convicted sex offenders were required to disclose all names by which they are known for the registry, and Krebs had done so, but since the prohibition was passed, the registry has been purged to show only legal names of registered sex offenders, since they are forbidden to use other names and there are penalties attached if they do. Krebs transitioned more than twenty years ago and has used the name "Karen" in her everyday life. She fears enforcement of the law against her. She filed suit in the U.S. District Court, Eastern District of Wisconsin, seeking a ruling that the statute forbidding name changes to convicted sex offenders violates her freedom of speech, and she wants the court to bar the local prosecutor from charging her. Although she is represented by counsel, according to both the District Judge and the 7th Circuit panel her filings in the district court failed to advance any legal authority for her contention that the Wisconsin statute violates her freedom of speech. The only citation was to a student-written law review article that examines the issue but concludes that there is no First Amendment violation. See Julia Shear Kushner, The Right to Control One's Name, 57 UCLA L. Rev. 313 (2009). The defendant, local prosecutor Michael Graveley, moved for summary judgement, which was granted by District Judge J.P. Stadtmueller, not ruling on the merits but deciding that plaintiff failed to meet her burden of proving a constitutional violation. In the absence of any authority, he wrote, "Plaintiff cannot present a viable First Amendment claim at all, irrespective of the level of scrutiny to be applied. The Court stresses the limitations of this holding. It is based entirely upon the briefing presented in this case by these parties. The Court takes well the instruction from the Court of Appeals that it should not conduct a party's research or invent arguments on a party's behalf." Judge Stadtmueller comment, "Plaintiff's claim presents important and evolving issues for our society. To be unable to address the matter because of poorly constructed and researched arguments seems waste of time for all involved. But as explained in *Kay v. Board of Education of City of Chicago*, 547 F.3d 736, 738 (7th Cir. 2008), when a 'district judge acts *sua sponte*, the parties are unable to provide their views and supply legal authorities. The benefit of adversarial presentation is a major reason why judges should respond to the parties' arguments rather than going off independently.' It is for the parties, not the Court, to carefully select and craft the arguments they will present to support their position." In its unsigned order affirming the summary judgment, the 7th Circuit panel notes that on appeal, the burden was on the plaintiff to address the basis on which the district court granted summary judgment, but rather than do that, they just reproduce verbatim about 25 pages of the briefing below, so the appellate brief "predominantly addresses issues that were never reached by the district court and are not before us on appeal. Most disconcertingly, nothing in this brief on appeal addresses the actual basis for the district court's decision." Instead, the appellate brief "adds a section which sets for the legal argument that was missing below," but the court finds that irrelevant to the issue on appeal. *Krebs v. Graveley*, 2021 WL 2477022 (7th Cir., June 17, 2021), affirming 2020 WL 1479189 (E.D. Wis., March 26, 2020). Counsel for Krebs are Mark G. Weinberg and Adele D. Nicholas, Law Office of Mark G. Weinberg, Chicago. The 7th Circuit panel consisted of Circuit Judges Ilana Diamond Rovner, Michael B. Brennan, and Amy J. St. Eve. – *Arthur S. Leonard*

ARIZONA – U.S. Magistrate Judge Leslie A. Bowman is supervising discovery in *Toomey v. State of Arizona*, 2021 U.S. Dist. LEXIS 120202, 2021 WL 2651125 (D. Ariz., June 28, 2021), and issued this ruling rejecting a privilege claim by defendants regarding written advice of their legal counsel upon which they purportedly relied in deciding to exclude coverage for "gender reassignment surgery" under the state's health plan for its employees. Russell Toomey, a transgender professor at the University of Arizona, was denied coverage for a hysterectomy recommended by his physician in treating his gender dysphoria, due to this exclusion in the health plan, and sued under Title VII and the Equal Protection Clause. His first discovery demand was, naturally, for all documents relevant to the defendants' decision to exclude "gender reassignment surgery" from coverage. Their articulated reason in response to interrogatories has been that they excluded these procedures because it was legal to do so, but they claimed privilege for the legal communications upon which they appeared to rely, claiming that they were privileged lawyer-client communications. Judge Bowman found that privilege had been waived implicitly. "In this case," Bowman wrote, "the State Defendants maintain that the Exclusion is not the product of intentional discrimination. It exists in large part, they say, because the State Defendants were advised that it is legal and nothing in the law requires the Plan to cover gender reassignment surgery. By allegedly relying on this legal advice to explain their actions, the State Defendants have waived by implication their attorney-client privilege as to that advice. The State Defendants argue generally that they never raised an 'advice of counsel defense.' The record, however, indicates otherwise," Bowman concluded, referring to Defendants' answer to Toomey's interrogatories. What is not being spoken here, but is probably a contributing factor in the state's refusal to release the legal memos in question, is that they predate

the *Bostock* decision, and probably rest their conclusion, at least in part, on the contention that Title VII and the Equal Protection clause would not extend to claims of discrimination because of gender identity or transgender status. If that is part of the rationale for the legal advice upon which they were acting, it is clearly superseded by events and its disclosure would severely weaken their defense to this lawsuit. Toomey is represented by the ACLU and Arizona cooperating attorneys at Aiken Schenk Hawkins & Ricciardi PC, Phoenix. – *Arthur S. Leonard*

COLORADO – Denver District Judge A. Bruce Jones ruled that baker Jack Phillips violated Colorado's law against discrimination because of gender identity when he declined an order to bake a birthday cake for transgender attorney Autumn Scardina, according to the *Denver Post* (June 16). *Scardina v. Masterpiece Cakeshop Inc*., No. 19-CV-32214 (Denver Dist. Ct. June 17, 2021). Phillips, who was the winning petitioner in the Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), received a telephone call on the day when the press was reporting that the Supreme Court had granted his cert petition to review the Colorado Court of Appeals ruling affirming a decision by the Civil Rights Commission that Phillips had violated the statute's ban on sexual orientation discrimination when he refused to bake a custom-designed wedding cake for a same-sex couple. At issue in the Supreme Court appeal was whether Phillips had a 1st Amendment right, either as a matter of free exercise of religion or freedom of speech, to decline the cake order. Media prominently reported Phillips' position that his business did not discriminate against anybody because of their sexuality, but that because of his religious beliefs he could not engage in expression that approved of same-sex marriages. Attorney Scardina decided to test this by ordering a birthday cake, informing Phillips that she wanted the cake to celebrate her gender transition by having a pink cake with blue frosting, to symbolize that she identified as female on the inside despite her external appearance as male prior to her transition. Her order was accepted until she explained the significance of the colors, but then it was declined, with Phillips taking the position that his religious beliefs could not support celebrating "gender transition," which he did not believe in. Judge Jones rejected his contention that this was a freedom of religion or expression issue, saying it was about the refusal by a business to sell a product to somebody because of their gender identity, and imposed a $500 fine. Of course, Alliance Defending Freedom represents Phillips and announced that the verdict would be appealed. – *Arthur S. Leonard*

FLORIDA – In the May issue of *Law Notes* we reported on a decision by the Florida 1st District Court of Appeal, dismissing a public accommodations discrimination claim by a transgender woman who alleged discriminatory treatment when attending a performance by a male Chippendale's dancing group at a lodge venue that had been rented for the occasion by the presenting group. One judge agreed with the trial judge that because of the sexual nature of the performance, the dancers had a right to insist that no person whom their perceived to be male should be attending their event which was advertised as being for women only. One of the judges agreed to affirm the trial court on the alternative ground that he did not consider the venue to be a public accommodation subject to non-discrimination law. The court did not expressly rule on whether gender identity discrimination is actionable under the Florida Civil Rights Act through a *Bostock*-type analysis. *Love v. Young*, 2021 WL 1558825 (April 21, 2021). On June 22, the Court unanimously denied a motion for rehearing *en banc* in a *Per Curiam* with no written opinion for the panel. *See* 2021 WL 2547912. However, Judge Ross Bilbrey, who had dissented from the panel opinion on April 21, wrote a concurring opinion to point out that the opinions written by his colleagues in this case were not precedential, with each of them rejecting Nevaeh Love's discrimination claim on different and separate grounds. "I do not agree that the FCRA contains an exception for the sexually related nature of the public performance as the primary opinion contends," he wrote. "And I do not agree that the lodge hall where the unlawful discrimination occurred was not a public accommodation, as the concurring in result opinion contends. But I agree we are correct to deny *en banc* consideration of the case because of the lack of any binding precedent created by the three opinions here." He explained, "Here, the two separate opinions for affirming, with no shared rationale, are the same as an unelaborated affirmance. The two judges could have issued a brief *per curiam* opinion affirming followed by two concurring opinions had they chosen to do so . . . Either way, no precedent is created because there was no opinion joined by a majority . . . . In conclusion, Love's concern that this court has approved the trial court's creation of a judge-made defense to the FCRA is misplaced." – *Arthur S. Leonard*

FLORIDA – Loren Bowen, a gay man who began working as a Logistics Supervisor for Quest Diagnostics in 2014, claimed that his treatment by his supervisor, Karen Van Doren, created a hostile environment because of his sexual orientation, and that he was wrongfully terminated in violation of Title VII and denied reasonable accommodations for a disability in violation of the

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Americans With Disabilities Act (ADA). *Bowen v. Quest Diagnostics*, 2021 U.S. Dist. LEXIS 104883 (S.D. Fla., June 2, 2021). The court granted the employer's motion for summary judgment on these claims, finding that Van Doren's action in frequently calling Bowen "Becky" was not sufficient to support the hostile environment claim. Bowen also complained of disputed critical job evaluations and of being placed improperly on improvement plans and harassed because of his attendance record. His problem is the strict "comparator" requirement endorsed by the 11th Circuit and applicable in Florida district courts for discrimination claims. It is not enough for a plaintiff to show that he suffered adverse actions from management; he must also show discrimination by putting forth an appropriate "comparator" treated better than he was. Bowen put forth a fellow Logistics Supervisor, Collins, as a comparator, but the court found that Collins was significantly senior to Bowen, thus not strictly comparable, and as well that Collins was also subjected by Van Doren to write-ups and discipline because of his attendance record (although he was not the target of name-calling, apparently). A significant point in the opinion by U.S. District Judge Aileen M. Cannon is the judge's noting that Florida courts generally follow Title VII precedents in interpreting their state anti-discrimination law, and in this case, as Bowen's sexual orientation claim under Title VII is covered per *Bostock*, similarly his state law sexual orientation claim is covered under the Florida statute's ban on sex discrimination. But in the absence of a non-gay comparator who was treated better than Bowen, his discrimination claim evaporated. Furthermore, although he was notified of his termination after several medical leaves, he had already accepted a job with another company (and represented to that company that he did not have a disability, even though part of his claim against Quest was failure to accommodate his disability under the ADA.) This is all rather complicated, but the conclusion is that Bowen suffered summary judgment under his federal statutory claims. Quest had filed state law counterclaims against Bowen, but the court refused to grant summary judgment to Quest on those, instead giving the defendant a week to show cause why the court had subject matter jurisdiction over the counterclaims, "both as a matter of traditional diversity and supplemental jurisdiction." Bowen is represented by Sarah E. Waters and Lauren Marie Tobin, of Derek Smith Law Group PLLC, Miami, and Caroline Hope Miller of Derek Smith's Philadelphia office. – *Arthur S. Leonard*

FLORIDA – Herewith a puzzle. In *Long v. City of Orlando*, 2021 U.S. Dist. LEXIS 103268, 2021 WL 2226606 (June 2, 2021), U.S. District Judge Wendy Berger dismissed several counts in a complicated employment discrimination case because the amended complaint failed to cure deficiencies the court had identified in the original complaint – specifically, the complaint as described is apparently a bit of a jumble, not laying out a clear roadmap of the specific claims and the factual allegations in support of each. Going through the amended complaint, Judge Berger was able to discern the elements of claims under the Family and Medical Leave Act and the Equal Pay Act but was unable to disentangle claims of hostile work environment and disparate treatment in what she described as a case of "shotgun pleading." One more chance is given to the plaintiff to file a new amended complaint to try to revive those claims that are dismissed without prejudice. Among other things, plaintiff Nivea Long cites "offensive comments" by her female supervisor regarding her "perceived sexual orientation" and imposition of restrictions on her "work attire" because her supervisor did not find it "feminine enough." Long also alleges that her supervisor "openly accused her of being in a sexual relationship with her former female supervisor in front of other members of the department and threatened Plaintiff's job due to her alleged sexual relationship with her former supervisor." The puzzle here is that plaintiff is represented by counsel, according to the report of the opinion. Is it possible that the initial complaint was *pro se*, and counsel was engaged to prepare the first amended complaint? If so, why did counsel produce a complaint that the court finds perpetuates many of the defects of the original complaint? We have decided not to list the counsel named in the report of the opinion and hope that they have more success with their amended complaint, because from the allegations recounted by the court and the two counts that were upheld, it sounds like Nivia Long has a serious case that needs effective presentation. – *Arthur S. Leonard*

KANSAS – Here is a case of a U.S. Magistrate Judge throwing her weight around. Supervising discovery in *Rodriguez v. Safeco Insurance Company of America*, 2021 WL 2290808, 2021 U.S. Dist. LEXIS 105078 (D. Kans., June 4, 2021), in which the plaintiff, injured in an auto accident with an underinsured driver, is seeking to recover benefits from her own insurance company, Judge Angel D. Mitchell was asked to approve a document titled "Order Authorizing Inspection and Reproduction of Medical and Protected Health Information and Waiver of Physician-Patient Privilege." In effect, the form submitted by the parties for approval authorizes the court to direct that the plaintiff's complete medical records be turned over to Safeco, save for substance abuse records, with blanket authorization for Safeco's counsel to interview all her health care providers. Judge Mitchell says no. There are statutory and regulatory protections for certain kinds of medical information, and there

are relevancy limits on discovery, she points out. Why is Safeco demanding all records, including those predating the accident? The judge observes that the proposed Order refers to waiver of patient-physician privilege "that existed with Shannon Lower-Kirker," but does not explain who this person is, or his or her relationship to the plaintiff. No other health care professional is mentioned by name. On the other hand, points out the judge, once a plaintiff has put her physical and/or mental health at issue in a lawsuit, privilege disappears regarding medical information that is relevant to her claims, so there is no need to mention this in the Order (unless, of course, the defendant seeks to go off on a fishing expedition ranging far beyond the specific claim at issue in the case). Thus, says the judge, the proposed order is "inaccurate." Furthermore, there are particular statutory prerequisites for the disclosure of HIV/AIDS information, if any, in the plaintiff's medical records (mention of which brought this case up in this Editor's regular Westlaw searches). "The court appreciates the potential efficiencies that can be gained by a court order authorizing the release of medical records," wrote the judge. "But these types o f orders must be narrowly tailored to target relevant information. Rarely would a recycled form order fit the bill." Back to the drawing board for counsel. No recycled forms. A proposed Order must be drafted narrowly to request information pertinent to the plaintiff's claims and must meet any statutory or regulatory requirements pertinent to specific kinds of particularly protected information. Good for Judge Mitchell, no pushover she! – *Arthur S. Leonard*

MARYLAND – U.S. 4th Circuit Court of Appeals Judge Julius Richardson's introductory summary in *Doyle v. Hogan*, 2021 WL 2424800 (June 15, 2021), is so direct, informative, and concise, that we quote it instead of paraphrasing: "Christopher Doyle, a professional counselor in Maryland, seeks to provide talk therapy to reduce his minor clients' same-sex attractions. But Maryland law allegedly proscribes this practice. *See* Md. Code Ann., Health Occ. Sec. 1-212.1. Doyle claims that in doing so, Maryland has infringed his First Amendment rights by preventing him from engaging in the type of counseling he wants to do. So he sued the Governor and the Attorney General of Maryland. But Doyle sued the wrong defendants. He argued that he can sue the Governor and the Attorney General under *Ex parte Young*, 209 U.S. 123 (1908), which provides an exception to their immunity from being sued in federal court. But neither the Governor nor the Attorney General have the necessary connection to enforcing Sec. 1-212.1 that permits Doyle's suit against them. So because of Doyle's choice of defendants, we may not consider the interesting First Amendment issues he raises. We therefore reverse the district court's judgment finding that the Governor and the Attorney General lack immunity and vacate the rest of its rulings in this case." District Judge Deborah K. Chasanow had rejected the defendants' immunity arguments but then had dismissed the case on the merits, finding no 1st Amendment violations. *See Doyle v. Hogan*, 411 F.Supp.3d 337 (D. Md. 2019). Mat Staver at Liberty Counsel, who argued for Doyle, failed to get the law struck down, but at least achieved the vacating of Judge Chasanow's decision against his client. But they'll be back, this time suing the head of whatever agency is in charge of enforcing the statute, as they would have done in the first place if they had done their homework adequately. An all-star roster of *amici* rose to the defense of Maryland's ban on conversion therapy, including National Center for Lesbian Rights, Lambda Legal, Freestate Justice (Maryland's LGBTQ advocacy group), the American Psychological Association, a large group of relevant Maryland professional associations, and the National Association of Social Workers. The unanimous 4th Circuit panel included the Circuit's most conservative judge and frequent dissenter from its LGBT rights decisions, Judge Paul V. Niemeyer, a G.W. Bush appointee. Judge Richardson was appointed by Donald Trump. The other member of the panel, Judge Diana G. Motz, was appointed by Bill Clinton. – *Arthur S. Leonard*

MARYLAND – The Department of Juvenile Services discharged Justin Hershberger from his position as Case Management Specialist Supervisor after investigating complaints from a lesbian employee that Hershberger had subjected her to sexual harassment. The investigation included four meetings of supervisors and HR staff with Hershberger at which he was posed questions arising from the victim's complaint and given an opportunity to respond to them, although he wasn't given a complete itemization of her allegations until the end of the process when he received his dismissal notice. He did not necessarily deny the key allegations, although he did put a different spin on many of them, and he expressed surprise that nobody had complained directly to him and that he hadn't intended to make anyone feel uncomfortable. An Administrative Law Judge sustained the discharge and Hershberger appealed to the courts. In *Department of Juvenile Services v. Hershbergber*, 2021 WL 2434241 (Md Ct. Special App., June 15, 2021), the Court of Special Appeals (an intermediate appellate court) rejected the Circuit Court's conclusion that Hershberger had not been accorded adequate due process prior to his termination, finding that the four meetings held with him as part of the investigation were sufficient to satisfy due process. Without addressing the merits of the case, the Circuit Court had remanded upon its finding that

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Hershberger had not been accorded adequate pre-termination due process. Wrote Justice Stewart Berger, "In the context of this case where Hershberger was afforded four separate meetings and interviews which allowed him to respond and reference specific allegations of sexual harassment, we conclude that Hershberger received adequate pre-termination due process. Accordingly, the trial court erred in reversing the ALJ's determination, and instead, should have considered the merits of Hershberger's other claims he raised in his petition for review." Thus, the case was remanded to the Circuit Court without addressing the merits of the ALJ's decision. From Justice Berger's summary of the factual allegations, it sounds like Hershberger became obsessed with the victim's sexual orientation, asking intrusive personal and sexually-related questions and making her feel uncomfortable in front of other employees in a variety of ways. – *Arthur S. Leonard*

MICHIGAN – *Bloomberg Daily Labor Report* (June 30) reported that a settlement has been reached in *Bean v. Sprint*, pending in the U.S. District Court for the Western District of Michigan. Carl Bean, a former construction manager for Sprint, was discharged for comments he posted on Sprint's iConnect message board in response to an article that summarized how Sprint employees had supported LGBTQ events. Bean, a member of the United Church of God, referred to various Bible verses and asked, "has anyone considered these verses," telling readers to "read, learn, repent, and be baptized." A member of the company's Pride Employee Resource Group complained to management about Bean's post, which led to the discharge. Bean filed a diversity action in federal court invoking Michigan's Elliott-Larsen Civil Rights Act, which forbids employment discrimination because of religion. On March 31, District Judge Paul L. Maloney ruled that a trial was required to determine whether the discharge violated the state law. This incentivized the employer to enter into serious settlement negotiations, which concluded an agreement on June 29 that must be submitted to the court for approval. The terms of the agreement were not released to the press, as it had yet to be finalized in writing and submitted to the court. – *Arthur S. Leonard*

MISSOURI – On February 11, the U.S. Department of Housing & Urban Development (HUD) issued a Memorandum titled "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act," which explained that HUD would follow President Biden's direction to apply the reasoning of the *Bostock* decision in its enforcement of the ban on sex discrimination in the FHA, to encompass sexual orientation and gender identity discrimination claims. On April 15, The School of the Ozarks, Inc., alleging that its housing accommodations are governed by the FHA and subject to investigation and enforcement action by HUD, filed suit in the U.S. District Court for the Western District of Missouri, raising constitutional objections to the Memorandum and seeking a temporary restraining order or preliminary injunction to bar HUD from enforcing the FHA in response to sexual orientation or gender identity discrimination claims while the case proceeds. In *The School of the Ozarks v. Biden*, 2021 U.S. Dist. LEXIS 105775, 2021 WL 2301938 (W.D. Mo., June 4, 2021), U.S. District Judge Roseann A. Ketchmark denied the motion and dismissed the case. Judge Ketchmark found that the plaintiff lacked standing to bring this case. "The Court recognizes the sensitivity and significance of the underlying societal issue of this case," she wrote. "It is this recognition that warrants the Court's caution in making its ruling here and illustrates the importance of employing judicial restraint. Exceeding the case and controversy limitations set forth in Article III of the Constitution constitutes judicial activism and is not the proper role of this Court. While value judgment can play a part in legislation, it is not the place of judges, whose role is to interpret the law. In keeping with the boundaries limiting the role of the courts, this Court is unwilling to decide a Constitutional issue not before it to invalidate legislative or executive actions." The complaint alleged that Biden and HUD had exceeded their authority by applying *Bostock*, a Title VII case, to the FHA. But the court pointed out that the Plaintiff had not suffered any concrete injury as a result of HUD's issuance of the Memorandum, and that neither Biden's EO nor HUD's Memorandum specifies "how HUD will determine FHA liability based on *Bostock* in any specific factual setting or consider potential exemptions." Furthermore, a TRO or preliminary injunction would not shelter the Plaintiff from FHA liability, which would ultimately be up to the courts to decide. To nobody's surprise, Plaintiff is represented by Alliance Defending Freedom, whose agenda includes actively opposing any government policy to protect LGBTQ civil rights. Judge Ketchmark was appointed by President Barack Obama. – *Arthur S. Leonard*

NEVADA – U.S. Magistrate Judge Elayna J. Youchah screened a *pro se* employment discrimination complaint in *Dickson v. State of Nevada*, 2021 U.S. Dist. LEXIS 106236, 2021 WL 2324353 (D. Nev., June 7, 2021). Lyle E. Dickson filed a complaint in federal court alleging violations of Title VII and Nevada's employment discrimination law by his former employer, the state's Housing Division, as well as various individuals (presumably Division

officials, although the court's opinion does not further identify them). The failings of his federal complaint well illustrate the procedural and substantive pitfalls awaiting unrepresented plaintiffs without legal training. Dickson had filed a charge with the Nevada Equal Rights Commission alleging violations of Title VII, specifically charging "discrimination based upon gender, disparate treatment, and retaliation," as well as charging violations of Nevada's civil rights law. The Magistrate's opinion does not discuss the factual allegations or mention the date the charge was filed. As is standard procedure, the Nevada agency evidently cross-filed his charge with the Nevada office of the federal Equal Employment Opportunity Commision (EEOC), and Dickson subsequently received a right-to-sue letter from the EEOC on April 6, 2021, about five weeks before the Supreme Court decided *Bostock v. Clayton County*. After receiving the EEOC letter, he filed his *pro se* federal complaint, in which he alleges Title VII violations as per his original charge, but also alleges discrimination in violation of Title VII because of race and of the Age Discrimination in Employment Act (ADEA), as well as discrimination because of color, religion, sexual orientation, gender identity or gender expression under the Nevada state law as supplementary claims. Magistrate Judge Youchah found that the failure to mention race or age discrimination in his original charge that was cross-filed with the EEOC meant that he failed to exhaust administrative remedies as to those claims, and that in any event Nevada enjoys sovereign immunity from suit under the ADEA. Furthermore, he could not sue his Nevada state government employer in federal court under the Nevada state law due to sovereign immunity, which Nevada has not waived as to such state law discrimination claims, for which it has its own administrative process for dealing with discrimination claims by state employees. (This man really needed a lawyer experienced in Nevada and federal employment discrimination law to advise him what to file with which agency, and what to put in his federal claim, if he decided to file one after being properly advised as to his possible actions in the state courts, which would have concurrent jurisdiction over federal claims. One suspects that a Nevada state agency would be unlikely to remove a discrimination claim against it to federal court.) At any event, the Magistrate's Report & Recommendation concluded that Dickson could pursue his sex discrimination and retaliation claims under Title VII in federal court, but that his ADEA claim and his pendent state law claims against both the agency and individual named defendants (who are not subject to suit under Title VII) should be dismissed with prejudice, as well as his claims for monetary damages and retroactive injunctive relief against the State and its Housing Division. However, the Magistrate recommended dismissal without prejudice of his Title VII race discrimination claim and his state law claims "such that if Plaintiff choose to file a complaint in state court based on these allegations, he may do so." On June 23, U.S. District Judge Jennifer Dorsey adopted the Magistrate's recommendations in their entirety, noting that Dickson had not filed any objections to the R&R within the time limit, and that Dickson had filed a timely amended complaint, which Judge Dorsey referred back to the Magistrate Judge for screening. *See* 2021 WL 2582819 (D. Nev., June 23, 2021). As of the filing of this opinion, Dickson is apparently still representing himself. Judge Dorsey does not describe the allegations of the amended complaint. An interesting side question: Whether his specifying "sex" in his original Title VII allegation from his original charge filed with the state agency and then cross-filed with EEOC might now be found to have exhausted remedies under Title VII regarding sexual orientation or gender identity discrimination, inasmuch as *Bostock* should be considered retroactive and the EEOC was construing Title VII to cover such claims well before the Supreme Court's ruling in *Bostock*. – *Arthur S. Leonard*

NEW YORK – Jeremy Roenick retired from the National Hockey League and joined NBC Sports as a "studio analyst." In late 2019, he made "sexually explicit comments" about a female co-worker while appearing on a "Barstool Sports" podcast, and was subsequently suspended and then discharged by NBC, which cited a "morals clause" in his contract that privileged NBC to fire him if he did anything to bring them into disrepute. Roenick filed a 12-count complaint raising entirely state and NYC law claims in state court in Manhattan, which NBC removed to federal court under diversity jurisdiction. Among other things, Roenick, a heterosexual man, claimed in effect a double standard by NBC, which also employed Johnny Weir, an out gay man and former professional skater, and, according to Roenick, allowed Weir to make similar "sexually explicit comments" on the air without any consequences, thus constituting sexual orientation discrimination against Roenick. He made similar allegations concerning a female on-air commentator, asserting that there was effectively a double standard at NBC between what straight men and women (or gay men) could say on the air. U.S. District Judge John P. Cronan was not convinced, granting motions to dismiss the claims of discrimination because of sex or sexual orientation under the New York State and City Human Rights Laws. *Roenick v. Flood*, 2021 U.S. Dist. LEXIS 108165, 2021 WL 2355108 (S.D.N.Y., June 9, 2021). Judge Cronan pointed out that Roenick's comments were not really comparable to comments by Weir or the female commentator, and

were considerably more serious, and that a "stray remark" two years earlier by Roenick's boss at NBC that Weir, a gay man, could say whatever he wanted on the air, was not sufficient evidence to support Roenick's claim. What remains of Roenick's case are claims for breach of contract, and retaliation (and aiding and abetting retaliation) in response to complaints he had made to his boss about the treatment of a female colleague. Excepting the contract claim, the remaining claims are all stated under the New York State and City Human Rights Laws. The contracts claim call for interpretation of the morals clause in Roenick's written contract. The aiding and abetting claim under state and local law is aimed at his former boss, Sam Flood. Roenick is represented by Jon Choate and Scott William Clark of Shegerian & Associates, New York. – *Arthur S. Leonard*

NEW YORK – There was a time when we reported extensively on decisions denying or granting Social Security Disability benefits to persons living with HIV, but once treatments emerged that made HIV infection a manageable condition, such cases became rare and we generally stopped reporting them. On the other hand, we see decisions from time to time where an applicant alleges that severe gender dysphoria has disabled them from working. For example, in *Haydn S. v. Commissioner of Social Security*, 2021 WL 2592364 (W.D.N.Y., June 24, 2021), the applicant, age 24 at the time of filing, claimed disability due to insomnia, social phobia with anxiety, and gender dysphoria. The plaintiff had been working at a Youth Center on an overnight shift and was able to get along with her sole co-worker during that shift, but she had difficulty during the part of the shift when she had to interact with significant numbers of people. An Administrative Law Judge (ALJ) concluded that she was not disabled within the meaning of the statute, finding that "the claimant has residual functional capacity (RFC) to perform light work . . . , except the claimant can perform low stress jobs, defined as simple routine work, make simple workplace decisions, not at a production rate (assembly line) pace. She can maintain attention and concentration for two-hour blocks of time. She can tolerate minimal changes in workplace processes and settings. She can tolerate occasional interaction with supervisors but only incidental contact with coworkers and the public. She cannot perform tandem or teamwork." The ALJ concluded that "there are jobs that exist in significant numbers in the national economy that the claimant can perform," the Commissioner affirmed the ruling, and she was denied SSI benefits. She appealed to the district court, where the case was referred (as customary) to a magistrate judge, Don D. Bush, who affirmed the Commissioner's ruling. The appeal focused on the opinion of medical and vocational experts, including the plaintiff's treating physician, who testified that Plaintiff's gender change 'affects ability to be treated fairly and appropriately by others and potentially makes her a distraction in the workplace." The ALJ gave this opinion "limited weight" because the statement "suggests that his opinion is based on factors unrelated to Plaintiff's functional capacity." The other medical experts and a vocational expert all opined that the plaintiff was capable of working. A treating physician's opinion is usually given the most weight, but in this case, wrote Judge Bush, "the ALJ properly afforded limited weight to Dr. Ashton's opinion and reasonably concluded that the weight of the overall record supported a finding that Plaintiff retained the capacity to sustain full-time employment in a very low contact job, consistent with the limitations assessed in the RFC. While Plaintiff may disagree with the ALJ's RFC finding, Plaintiff has not shown that no reasonable factfinder could have reached the ALJ's conclusions based on the evidence in the record." A very deferential "substantial evidence" test is used for judicial review of these administrative decisions. "Thus, Plaintiff must show that no reasonable factfinder could have reached the ALJ's conclusions based on the evidence in the record," wrote Judge Bush, and plaintiff failed to meet that burden. Haydn S. is represented by Justin David Jones and Kenneth R. Hiller, Law Offices of Kenneth Hiller, PPLC, Amherst, NY. – *Arthur S. Leonard*

NEW YORK – A unanimous 4-judge panel of the N.Y. Appellate Division, 1st Department, denied petitioner's remaining family member grievance in an eviction proceeding in a June 8 opinion. *Cadalzo v. Russ*, 2021 WL 2323793. The determination that petitioner failed to establish that he was a remaining same-sex family member (RFM) as defined by New York City Housing Authority (NYCHA) rules was supported by substantial evidence showing that the deceased tenant of record neither requested nor received permanent permission from NYCHA for petitioner to be added as a member of the household. While this court has not required NYCHA's written consent where a remaining family member grievant "demonstrate[d] that NYCHA knew or implicitly approved of" his occupancy, the panel perceived no reason to overturn the Hearing Officer's finding that petitioner's evidence that NYCHA knew of his occupancy was insufficient. Here, petitioner provided no evidence that he and the tenant registered a domestic partnership; hence, their relationship was not included in the category of immediate relatives who were eligible under NYCHA rules to obtain permanent permission to occupy an apartment and succeed to the deceased tenant's lease. Personal hardships to petitioner resulting from the denial of RFM status were not a ground on which to annul NYCHA's

determination, according to the court. Petitioner's contention that NYCHA discriminated against him on the basis of sexual orientation, family status, and disability was not reviewable, as he failed to raise these issues at the hearing. In any event, the panel said, these arguments failed on the merits. Petitioner's alleged comparator with respect to sexual orientation was not similarly situated as NYCHA "validly limit[s] occupancy to only those in a legal, family relationship with the tenant." – *Wendy C. Bicovny*

PENNSYLVANIA – In *Delaware Valley Aesthetics, PLLC v. Doe*, 2021 WL 2681286, 2021 U.S. Dist. LEXIS 122257 (E.D. Pa., June 30, 2021), Dr. Kathy Rumer, a surgeon who performs gender reassignment procedures, is suing individuals who she claimed posted defamatory statements about her on a website called "Kathy Rumer's Anonymous." These statements impugned her professionalism and prompted questions from prospective patients. The statements purported to be based on the experience of the those who posted them as patients of Dr. Rumer. After filing her complaint against John Doe 1 and John Doe 2, Dr. Rumer figured out the identity of John Doe 1 – at least to her satisfaction, and amended her complaint to include the Defendant's name and home address, prompting a motion by Defendant to strike her name and address and allow her to proceed pseudonymously. Dr. Rumer does not oppose the motion, but District Judge Chad Kenney stated that he could not decide it without analyzing the criteria used by courts within the 3rd Circuit to determine whether to allow parties to be anonymous, inasmuch as the Federal Rules of Civil Procedure require that all parties be named in the title of a complaint, justified by a strong public interest in knowing who is using the court and promoting access to civil judicial records. But this case is unusual in that usually it is a plaintiff who seeks anonymity, and applying most the case law analyzes the issue from the perspective of whether a particular plaintiff should be allowed to institute legal proceedings anonymously. In a thoughtful discussion, Judge Kenney repurposes the criteria and concludes that John Doe 1 should be allowed to remain John Doe 1 for now, although it is a close call, as about half of the factors leaned against allowing anonymity to this defendant. One suspects that Dr. Rumer's willingness to let the defendant remain anonymous was a crucial factor. "Considering the public and private interests at play and the fact that Dr. Rumer does not oppose the motion, the Court will grant the motion to strike and proceed anonymously to alleviate Defendant's concern. However," he continued, "the Court reserves the right to *sua sponte* change the Court's ruling in this regard should facts relating to confidentiality come to light." Judge Kenney was appointed by President Donald J. Trump. – *Arthur S. Leonard*

TENNESSEE – U.S. District Judge Aleta Trauger's opinion in *Pitchford v. Metro Nashville Police Department*, 2021 WL 2474461 (M.D. Tenn., June 17, 2021), fails to provide a full exposition of the facts, but one infers the following: Brent Pitchford was a pretrial detainee in the Hill Detention Center in Nashville when he filed a *pro se informa pauperis* action claiming a violation of his constitutional privacy rights by the Nashville Police Department and two named officers, who, on a date not specified, "went to Loves Truck Stop to interview an "employee" and during the interview "disclosed to that employee that the plaintiff has HIV. The plaintiff did not give the defendants permission to disclose this information." The judge dismissed the case against the Police Department and allowed Pitchford to file an amended complaint against the officers. Because the initial complaint was filed when Pitchford was in jail, it was subject to screening under the Prison Litigation Reform Act, even though he has since been released from jail without being prosecuted. Pitchford claimed that the officers' disclosure of his HIV status without his consent violated his constitutional right of privacy. Judge Trauger rejected the claim, finding that the 6th Circuit "has repeatedly rejected claims asserting a constitutional right to nondisclosure of personal information" by government officials. She went on to explain: "Indeed, the Sixth Circuit has recognized an 'informational-privacy interest of constitutional dimension' in only two instances: (1) where the release of personal information could lead to bodily harm . . . and (2) where the information [that] was released was of a sexual, personal and humiliating nature." And she found that a 6th Circuit opinion, *Doe v. Wigginton*, 21 F. 3d at 740, "appears to foreclose the plaintiff's claim that disclosure of his HIV status under the circumstances described implicates a Fourteenth Amendment privacy right." She also rejected Pitchford's attempt to sue under HIPAA, a federal statute that forbids disclosure of information contained in medical records, finding that HIPAA does not afford a private right of action. Judge Trauger was appointed by Bill Clinton. – *Arthur S. Leonard*

TENNESSEE – A tragedy and a bungled statute of limitations. Will Bannister, a high school student who was allegedly perceived by the school administration as being gay or gender-nonconforming and supportive of LGBT right, committed suicide shortly after composing a short essay in response to a school assignment in which he labeled his life as "Probably a tragedy because I have many flaws that will eventually be the end of me." This writing was graded by his English teacher and returned as failing to conform with formatting requirements that had been

announced earlier in the semester when the student was out on a suspension. His parents had been in touch with the school previously to complain about harassment and inequitable treatment of their son, but nobody contacted them or sounded the alarm about the content of this essay, and his parents hadn't seen it before he shot himself in the head in the basement of their house. In the ensuing litigation, they filed claims in state court intending to invoke only state law, but referred to their son's constitutional rights, and the defendants sought to remove it to federal court, but plaintiffs succeeded in persuading the federal court that they were not intended to invoke any federal claims, so the case was remanded. The matter set for two years with nothing much happening, due to ill health of plaintiff's counsel. They changed counsel and filed an amended complaint, this time invoking 42 USC 1983 and Title IX of the Education Amendments of 1972, and once again the defendants sought to remove the case to federal court, this time successfully. Then defendants promptly moved to dismiss on various grounds, including statute of limitations. Since the federal claims had not been asserted in the earlier claim, the amended complaint did not relate back to the earlier filing, and, after the plaintiffs had withdrawn their state law claims, the federal court determined that the federal claims were time-barred and dismissed the entire case. *Bannister v. Knox County Board of Education,* 2021 WL 2685193, 2021 U.S. Dist. LEXIS 122295 (E.D. Tenn., June 30, 2021). Counsel for plaintiffs on the amended complaint is Arthur F Knight, III, Taylor & Knight, GP, Knoxville, TN. District Judge Travis R. McDonough was appointed by President Barack Obama. – *Arthur S. Leonard*

WEST VIRGINIA – In the June issue of *Law Notes*, we reported on *Fain v. Crouch*, 2021 WL 2004793, 2021 U.S. Dist. LEXIS 95241 (S.D. W. Va., May 19, 2021), in which U.S. District Judge Robert C. Chamber denied dismissal motions by several of the defendants in a lawsuit challenging the refusal of West Virginia to cover gender affirmation treatment for transgender people under the state's health insurance plan and Medicaid program. On June 28, Judge Chambers issued another decision in the case, *see Fain v. Crouch*, 2021 U.S. Dist. LEXIS 119448, rejecting an argument by the Health Plan of West Virginia (Health Plan) that a rule adopted by the Trump Administration in 2020 exempted it from the non-discrimination requirement (Section 1557) of the Affordable Care Act because it is essentially an insurance company and not a health care provider. The ACA applies its nondiscrimination requirement to any "health program or activity" that receives federal financial assistance. The Trump Administration rule says that an "an entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing health care." The Health Plan asserted that under this rule, it was not subject to Sec. 1557's anti-discrimination requirements, because the court should "defer" to the administrative rule. Plaintiffs argued that deference to the rule was inappropriate here because, among other things, the coverage of the statute cannot be reduced by an administrative rule, and Judge Chambers agreed. "By extending nondiscrimination protections to individuals under 'any health program or activity,'" he wrote, "Congress clearly intended to prohibit discrimination by any entity acting within the 'health' system. Here, The Health Plan's role as a health insurance provider undoubtedly implicates the health of persons falling within the scope of ACA protections. For example, in the instant case, Plaintiff Martell alleges that The Health Plan's exclusion has limited his access to health care by virtue of its authority to design health benefits. Therefore, as the gatekeeper to Martell's health services, The Health Plan qualifies as a 'health program' that Congress intended to rid of discrimination." The court also agreed with plaintiffs that The Health Plan's argument was contradicted by the overall statutory scheme and was contradicted as well by the sloppily-drafted rule which was internally contradictory. "In essence," he wrote, "The Health Plan asks this Court to grant *Chevron* deference to the 2020 Rule by adopting an interpretation that contradicts the same. Such a position is untenable and must be rejected." Since The Health Plan receives federal financial assistance under the Medicare Advantage program, the court concluded that it must comply with Section 1557 "under its entire portfolio," and the motion to dismiss was rejected. Lambda Legal and cooperating attorneys represent the plaintiffs. One suspects that the Biden Administration will take steps to rescind the Trump Administration rule, if it hasn't done so already. – *Arthur S. Leonard*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – In yet another reflex action by a California trial judge ordering HIV testing of a man convicted of committing a lewd act on a child, when the conduct involved presented no risk if HIV infection, the 'California 4th District Court of Appeal ruled on June 29, 2021, in *People v. Medina*, 2021 WL 2658358 that, as agreed by the Attorney General, the order requiring defendant to submit to "AIDS testing" was erroneous. Penal Code section 1202.1 states that upon a conviction under Penal Code Sec. 288(a), the trial court "shall" order HIV testing to take place within 180 days of a conviction, but it applies only "if the court finds that there is probable cause to believe that

blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." Penal Code Sec. 288(a) is a very broad provision basically covering any situation where the defendant gratifies his sexual desires by touching a minor. In this case, Medina confessed that he had twice fingered the vagina of a 7-year-old girl who was sleeping over in his house, and was ultimately convicted by a jury. Fingering a child's vagina is not a known method of transmitting HIV. Defendant Medina raised numerous issues on appeal, including that he should not have to submit to an HIV test. He lost as to all of his issues except this one. "Here, the trial court made no inquiry or finding there was probable cause to believe appellant had transferred bodily fluid to Jane Doe," wrote Justice William W. Bedsworth for the appellate panel. "As such, it was unlawful to order testing. The proper remedy for this mistake is to remand the matter for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. (*People v. Butler* [2003] 31 Cal. 4th 1119, 1123.)." The court rejected Medina's suggestion that it just order the trial court to strike the testing order. Butler is controlling precedent from the California Supreme Court. But given the facts described in the opinion, such a remand strikes this writer as a waste of everybody's time, but the likelihood somebody is going to appeal this issue back to the California Supreme Court seeking a more nuanced remedy seems slim. A lawyer appointed by the Court of Appeal, Alexis Haller, represented Medina on this appeal.

CALIFORNIA – Derek James Rudd, a gay man in his 40s, had a "personal encounters" advertisement on Craig's List in June 2016, stating that he was a "38-year-old bisexual male" who was seeking a "compact submissive" male that was "smooth young," and "If not young, don't reply." The ad included pictures but none clearly showing Rudd's face. A man assisting the Sutter County District Attorney's Office in running a "sting operation" responded to the ad, playing the part of "Timmy," a 13-year-old boy uncertain about his sexuality, but "pretty sure" he was attracted to guys. There ensued 10 hours of messages back and forth, including one from Rudd describing in great specificity how he would sexually initiate Timmy by expert rimming and anal sex. When the advertiser showed up at the appointed place he was arrested. By alleged coincidence, it turns out that an Assistant D.A. who was at the "sting house" at the time of the arrest was a woman who attended the same church as Rudd's parents and who had made critical marks in the past about him, a "flamboyant" gay man (not bisexual). All witnesses for the prosecution swore that they had no idea of the advertiser's identity until Rudd showed up at the "sting house," despite evidence that in the past this Assistant D.A. had tried to entrap Rudd through efforts by "Timmy" to "friend" him on his Facebook page, which were unsuccessful because Rudd did not respond to the friend request. Rudd claimed that he was not actually intending to have sex with Timmy, but to be more of a mentor or teacher to a troubled boy, and Rudd's father testified to a phone call with Rudd that night in which Rudd said he was communicating with a boy on Craig's List and was worried that the boy, troubled about his sexuality, might hurt himself. At trial, the judge rejected defense counsel's request to use a questionnaire about attitudes towards homosexuality during *voir dire*, stating a preference for *voir dire* in open court where the judge could observe questioning and make credibility determinations. In the event, the issue of homosexuality was explored by counsel during *voir dire*. The jury convicted Rudd of "attempted lewd or lascivious actus upon a child under the age of 14 years (Cal. Penal Code sections 664, 288, subd. (a)), and two counts of contacting a minor with the intent to commit a sexual offense (sections 288.3, subd (a) and 288.4 (subd (b))." The trial court put Rudd on probation for three years with "various terms and conditions, including the condition he serve 364 days in jail." On appeal, the panel unanimously rejected Rudd's argued defenses, found no problem with the judge's handling of *voir dire*, and dismissed as irrelevant evidence that the A.D.A. who was present seemed delighted that the man they were arresting was Rudd, as well as the evidence of the prior attempt to get at Rudd specifically through Facebook. The court rejected Rudd's attempt to prove discriminatory enforcement, noting that the Craig's List sting that the D.A.'s office was running had mainly apprehended men seeking to have sex with under-age girls, catching only a few men seeking boys. The sexually explicit email that Rudd sent to "Timmy," quoted in full in the court's opinion, reads like he has a literary flare for gay porn. The evidence included email transcripts that clearly showed that Rudd was aware that "Timmy" was underage. We question the judgment of any adult man who would make a date with a self-advertised thirteen-year-old boy on-line without suspecting it is a sting set-up, but there are plenty of gullible folks out there, and the fact pattern in this case is a recurring one – as to which see under Oklahoma, below . . . *People v. Rudd*, 2021 Cal. App. Unpub. LEXIS 3643 (Cal. 3rd Dist. Ct. App., June 2, 2021).

CALIFORNIA – Michael John Coleman, an Air Force veteran, was convicted in a jury trial of 78 sex offenses against a child victim (actually two victims: a boy he was mentoring through a Big Brother program and the boy's cousin, both of whom testified that he "would molest them every time he saw them"). He was sentenced to a total of 126 years in prison. He petitioned for resentencing

under Cal. Penal Code Section 1170.91, which authorizes courts to take account of possible trauma or substance abuse stemming from military service in imposing sentences. The trial judge denied the petition, stating that Coleman's allegations in the petition were insufficient to invoke the statute, and that his allegations regarding military service and the rest had not been documented in the petition. In *People v. Coleman*, 2021 WL 2472954 (Cal. 4th Dist. Ct. App., June 17, 2021), the court of appeal disagreed with the trial judge, finding Coleman's testimony sufficient on both grounds of trauma and substance abuse, although one member of the panel thought that only the trauma ground had been sufficiently pleaded. In effect, the court found that the trial judge was asking for more detail in the petition than the statute required, and that it was reasonable to infer the statutory grounds from what Coleman said, although it would still be necessary for him to provide evidentiary proof at the hearing to which he was entitled under the statute. And, the court pointed out, it is still up to the trial court to decide whether to reduce Coleman's sentence on these grounds, but it should not have flatly rejected the petition on pleading grounds and denied Coleman the statutorily authorized hearing. Coleman is represented on appeal by appointed counsel, Erica Gambale of Irvine.

NEW JERSEY – Brittany Burnett, an African-American lesbian, had dropped off some friends to attend a concert at MetLife Stadium and returned to pick them up. She stopped her car on an off-ramp blocking traffic and was not responsive to a request to move from State Trooper Michael Delgaizo, who was directing traffic. He heard her say into her cell phone that "a cop" was talking to her, but she was not "fucking moving" until she knew where to go. The officer told her to stay in place because he was going to issue her a summons, at which she started moving the car, he reached in over the driver's window, which was part way down, she stepped on the gas and took off like a shot, dragging him along with her until he tumbled free, suffering leg injuries. Another off-duty officer who was driving his family home from the concert gave chase and got her license number before losing sight of her, but she was subsequently apprehended when she reentered the stadium lot in search of her passengers, although she did make an unsuccessful attempt to escape. It later developed that she knew at the time that her driver's license was suspended, which may have prompted her reflex to flee rather than get a summons. She was subsequently prosecuted in Bergen County Superior Court and appealed the jury's conviction on charges of 3rd degree aggravated assault on a law officer, disorderly person resisting arrest, and second-degree eluding. *State v. Burnett*, 2021 WL 2226614, 2021 N.J. Super. Unpub. LEXIS 1047 (N.J. App. Div., June 2, 2021). One of her complaints on appeal related to *voir dire*. Her counsel was late in submitting proposed questions to the juror pool regarding race and sexual orientation, so at first the judge was not going to use her questions, but ultimately, he agreed to pose relevant questions after some of the panel was seated (but he posed them to those seated as well). Later there was an incident in the rear of the courtroom when an officer ejected the defendant's same-sex partner, who was recording the *voir dire* without authorization, and she made a noisy exit. Burnett claimed the judge should have declared a mistrial and started over, even though only one of the seated jurors noticed what was happening, and that juror was dismissed for cause. Burnett did not claim that any of the police officers she dealt with were biased against her due to her race or sexual orientation. The court did find that some recalculation of sentencing was required but affirmed the jury's decision to convict Burnett and remanded for resentencing. Burnett is represented by Michael Confusione, Hegge & Confusione, LLC.

OHIO – The 3rd Appellate District Court of Appeals of Ohio affirmed the Allen County Common Pleas Court's decision to impose consecutive sentences of 8 years in prison plus life with the possibility of parole on Avery E. Ward, who was convicted by a jury on counts of rape and felonious assault on a nine-year-old victim. *State of Ohio v. Ward*, 2021 WL 2317617, 2021-Ohio-1930, 2021 Ohio App. LEXIS 1885 (June 7, 2021). The separate count of felonious assault was based on Ward having committed the act knowing that he was HIV-positive. There is no discussion by the court about whether Ward restricted himself to "safer sex," whether he was effectively non-contagious because of medical treatment, or, for that matter, of the gender of the victim, which the court was careful not to identify in the opinion for the panel by Judge John R. Willamowski. On appeal, Ward "accepts" the jury verdict but argues that the trial court should have merged the convictions and imposed just one sentence, that his counsel was ineffective in dealing with this issue, and that the overall sentence is excessive. Judge Willamowski concluded that Ohio rules concerning merger of criminal convictions supported the trial judge's action, because the harms identified with rape and with sexual exposure to HIV are distinct. "Here," wrote the judge, "Ward was convicted of raping a child under the age of thirteen and of doing so after he knew he tested positive for HIV. To prove the rape, the State was required to prove that Ward engaged in sexual conduct with one who was not his spouse and who was under the age of thirteen. To prove the felonious assault, the State was required to prove that Ward, knowing that he had tested positive for HIV, knowingly engaged in

sexual conduct with a person under the age of 18. The facts of this case were that Ward engaged in anal intercourse with a nine-year-old victim after he knew he was positive for HIV. Thus, he did engage in sexual conduct with a child who could not give consent due to the child's age, which supports the rape conviction. He did this conduct knowing he was HIV positive which supports the felonious assault conviction . . . Offenses are considered to be of dissimilar import [and thus not subject to merger] when the harm that results is separate and identifiable. In this case, the harm that could result from sexual conduct with a minor under the age of 13 has considerable psychological and certain potential physical ramifications. However, that sexual conduct when one knows they are HIV positive implicates a new category of concerns in that it may result in an incurable disease that the victim will be forced to deal with during the victim's lifetime and could result in the victim's death. It can also necessitate that the victim be on medication for the victim's lifetime at great expense. The harm caused by the felonious assault in this case was separate and identifiable from the harm caused by the rape. Thus, the offenses were of dissimilar import and do not merge for the purposes of sentencing." The court found that any errors committed by defense counsel did not affect the outcome, that the seriousness of the two offenses justified making the sentences consecutive, and that the length of the sentences could not be attacked on appeal as excessive when they fell within the statutory range, which they did. Judge Stephen R. Shaw concurred separately, in order to express some differences with the court's analysis on the merger issue, but expressed agreement with the outcome. "In sum," he wrote, "Ward's conduct and animus in committing the Felonious Assault offense in this case are each clearly additional, separate and distinct from anything required for the Rape offense. Although it does not affect the outcome of our decision in this particular instance, I believe the unique and separate nature of the elements of these two offenses are important and should remain clarified for future merger cases that come before this court." Ward's counsel on the appeal is William T. Cramer.

OKLAHOMA – Timothy Alan Larson moved to set aside a Magistrate Judge's detention order pending trial in *U.S. v. Larson*, 2021 WL 2222737 (N.D. Okla., June 2, 2021). U.S. District Judge John E. Dowdell denied the motion. Larson was apprehended in a sting operation similar to that described above in *People v. Rudd* (*see* California in Criminal Litigation Notes). He was using an online messaging service known as KIK when he made an assignation for sex with an undercover officer whom he believed to be a minor child. When he was apprehended, police officers found condoms, personal lube, and a bottle of Coca-Cola in his car, the last of which had been requested by his "date." It turned out that he was a married father, separated from his wife, living with HIV (but medicated sufficiently to be nondetectable and thus not contagious, he claimed). He was charged with soliciting sexual conduct or communication with a minor by use of technology in violation of an Oklahoma statute, and released on bond with the condition of not having any contact with minors. Shortly thereafter he was indicted for violating a federal statute, 18 U.S.C. sec. 2422(b), for attempted coercion and enticement of a minor. U.S. Marshalls went to arrest him, discovering upon arrival at his address that he was having unprotected sex with an 18-year-old man he met on-line (whom they mistakenly thought at the time was a minor). The U.S. Magistrate decided he should be detained pending trial. Judge Dowdell noted that there is normally a presumption in favor of release pending trial, but the presumption runs the other way when the charge is a crime "involving a minor victim." Larson argued that because all his communications were with an undercover police officer, no minor was involved or endangered by the conduct for which he was arrested, and the man with whom he was having sex when the Marshalls arrived to arrest him was not a minor. The court found case law on how to deal with the presumption in such a situation is divided, but found more persuasive cases holding that a situation like this does involve a minor because that's who the defendant thought he was soliciting and meeting in the conduct for which he was charged. Regardless, the court found upon weighing the factors relevant to pre-trial detention determinations, on balance it was appropriate to detain Larson, instructing that he was to be detained "in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." Yet another grown man whose suspicions of a sting were not aroused by a "minor male" soliciting him to have sex through an on-line communication.

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 – NINTH CIRCUIT – Transgender plaintiff Marco A. Santiago loses her damages case for delay in providing hormones in *Santiago v. Gage,* 2021 U.S. App. LEXIS 17485, 2021 WL 2395917 (9th Cir., June 11, 2021). The court notes that Santiago is "now known as Ashley Raelynn; the Court refers to her as such, as does this reporting. The case was before Senior Circuit Judges Atsushi

Wallace Tashima (Clinton) and Danny J. Boggs (Reagan, of the Sixth Circuit, sitting by designation), and Circuit Judge Mary H. Murguia (Obama). It is a memorandum decision, not for general publication, affirming summary judgment granted by U.S. District Judge Ronald B. Leighton (W.D. Wash). The court begins by reaffirming its decision about deliberate indifference to the health care of transgender prisoners in *Edmo v. Corizon, Inc*., 935 F.3d 757, 786 (9th Cir. 2019). [Note: *Edmo* involved denial of gender affirming surgery, the Ninth Circuit affirmed an injunction from the D. Idaho ordering same, and the Supreme Court denied the State's petition for certiorari.] Here, the issue is one of delays in provision of hormones. Although it is not completely clear from the opinion, it appears that the aggregate delay was about seven months. Raelynn had approval for hormones from the Washington DOC's gender dysphoria "committee," but the treating physician wanted an additional clearance from an endocrinologist because of some elevated lab values. Even assuming that the treating physician used excessive caution, this does not violate the Eighth Amendment and at most constitutes a "difference of opinion." Once Raelynn got a green light from the endocrinologist, it took another six weeks for a return appointment with the treating physician. The court finds this delay "reasonable," and Raelynn presented "no evidence" that she should have "bumped" other patients ahead of her in line for a doctor's appointment. (Comparison of "urgent" case delays omitted.) Ultimately, the court finds that there is no jury question here, on which a reasonable trier of fact could find deliberate indifference in the delays, given their length and the explanations for them. While this delay may exceed the World Professional Association for Transgender Health (WPATH) Standards of Care, the WPATH standards are "flexible," and "a simple deviation from those standards does not alone establish an Eighth Amendment claim." *Edmo,* 935 F.3d at 789. Similarly, deviation from the Washington DOC "protocol" by asking for another consultation after the "committee" has passed on the care plan does not violate the Constitution. [Note: This writer observes that damages cases for delays of 6-9 months for hormones often fail for just these reasons. Most frequently, the delay is at the "committee" level, but a provider's request for an "outside" specialist's review is also upheld under the Eighth Amendment. It seems that, under most case law, the patient must wait for: the treating provider, the "committee," and the specialist – whichever takes longer.] There is a caveat to the court's holding: "Our decision should not be read as suggesting that long delays, such as those Raelynn encountered in obtaining medically necessary treatment, will never violate the Eighth Amendment. We hold only that, on the sparse evidence presented in this case, Raelynn has not shown that these defendants violated her Eighth Amendment rights." Because the panel also mentions qualified immunity, this writer assumes it was in the case below. The panel finds it unnecessary to reach qualified immunity because of its disposition of the Eighth Amendment claim on the merits. "Given this basis for our decision, we need not reach Raelynn's argument that qualified immunity is 'inapplicable outside of contexts where officials are forced to act in exigent circumstances, without the benefit of time or guidance.' We do note, however, that we have previously considered the appropriateness of qualified immunity in Eighth Amendment cases not involving exigent circumstances. *See, e.g., Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009)." This *dictum,* buried in a footnote, involved a case that reversed summary judgment on qualified immunity where meals were denied during an extended lockdown. Raelynn is represented on the appeal by the University of Washington (Seattle), and the court acknowledges the assistance of the advisors and student participants of the University of Washington School of Law's Ninth Circuit Appellate Advocacy Clinic. Appearing as amici for Raelynn are Legal Voice, Ingersoll Gender Center (Seattle) and Lambda Legal Defense and Education Fund, Inc. (New York).

DELAWARE – Proceeding *pro se,* transgender inmate La'Vhey Jadhea Wayman petitioned the Delaware Court of Common Pleas to change her name in In the *Matter of Wayman,* 2021 WL 2255017 (Del. Ct. Comm. Pleas, June 2, 2021). Judge Robert H. Surles denied her petition. There is a common law right of adults to change their names in Delaware, but they can also petition for the change in the Court of Common Pleas. For prisoners, however, the common law was abrogated by statute, requiring a special showing, and the right of the Department of Corrections to be heard. This statute apparently followed the decision in *Muhammad v. Keve,* 479 F. Supp. 1311, 1321-28 (D. Del. 1979), giving Muslim inmates the right to change their names for religious reasons. While *Muhammad* recognized the slavery genesis of some African-American names, the court based its decision on the Free Exercise Clause of the First Amendment, finding a Quranic basis for the change, which some adherents to Islam find to be a Holy Imperative. The original statute allowed inmates to change their names, with Corrections' opportunity to object, if they had a "sincerely held religious belief." In 2015, the Delaware legislature added "or gender identity" to the religious grounds. 80 Laws of Del., Ch. 52 (6/25/2015). This was the only change, and there is no statement of reasons – so this writer chooses to attribute it to good advocacy by the LGBTQ community in Dover. None of this appears in Judge Surles' opinion.

PRISONER LITIGATION *notes*

His reasoning: Wayman had already received a name change nine months earlier, for her transition – from Keith Orlando Wayman, Jr. to La'Vhey Jadihea Wayman. Corrections objected to changing their records a second time and to possible confusion, when Wayman sought a change to Sakani La'Vhey Waymen – adding a new first name and making her "old" first name her middle name. Judge Surles held a hearing, at which Wayman testified that she wanted the new change because "Sakani" means "full of joy and laughter" and "aligns with her African origin and ethnicity." Unfortunately, "ethnic alignment" is not a ground upon which a prisoner can change her name in Delaware.

HAWAII – Appointed by President Obama, U.S. District Judge Derrick Kahala Watson is the only native Hawaiian currenting serving as a federal judge. In *McGinnis v. Halawa Correctional Facility,* 2021 WL 2460604 (D. Hawaii, June 16, 2021), Judge Watson dismissed the Third Amended Complaint of *pro se* inmate Thomas Kelly McGinnis. [Warning to litigants: if you believe you have been subjected to anti-gay discrimination, do not wait until your fourth pleading to mention it.] McGinnis raised numerous claims, but it seems clear that either he could not explain them well or Judge Watson found them something akin to inherently incredible. McGinnis said that an officer "pushed" him in the chest, causing skull fractures and hepatitis-C. In this Third Amended Complaint, McGinnis said the officer called him a "fag" when pushing him, but the allegations of injuries and "causation" remain the same. Having given McGinnis four opportunities to explain why the force was "excessive" under the Eighth Amendment, Judge Watson dismisses the last complaint with prejudice, citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992), and *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020). McGinnis also alleged that calling him a "fag" threatened his safety. McGinnis fails to allege that the comments were made with animus or with a subjective deliberate indifference to his safety or that he was injured or even threatened. He provides no context to the claim, raised for the first time in his last pleading. This fails the subjective element of deliberate indifference to safety under *Farmer v. Brennan,* 511 U.S. 825, 833-5 (1994), *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (en banc). Judge Watson also dismissed claims of denial of medical care and interference with mail as too conclusory and general. He assesses a "strike" under 28 U.S.C. § 1915(g).

INDIANA – *Pro se* inmate Willie Alsanders, an openly gay black man, is allowed to proceed by Senior U.S. District Judge Robert L. Miller, Jr., on equal protection claims in *Alsanders v. Martain,* 2021 WL 2453945 (N.D. Ind., June 16, 2021). Alsanders was in the St. Joseph County Jail as a sentenced inmate. [Note: Judge Miller does not say whether Alsanders was in the jail as a sentenced misdemeanant or as a convicted felon awaiting transfer to a state prison. Either way, he was not a jail "detainee," which affects the Eighth Amendment analysis, as discussed below.] Alsanders alleges that, after he complained about another inmate sexually harassing him, he (Alsanders) was the one punished. He was moved, placed in a strip cell, and lost his job, while the other white cisgender inmate remained in the same pod and still has his job. Salsanders said the sergeant who directed the move made "rude and disrespectful" remarks about gay people, including calling him a "black gay ass mutherfucker." Judge Miller applies Seventh Circuit law on racial and sexual orientation discrimination under *Lisle v. Welborn,* 933 F.3d 705, 719 (7th Cir. 2019), and *Harris v. Farris*, 809 F.3d 330, 334 (7th Cir. 2015). He also cites *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020), thereby applying to equal protection the Supreme Court's Title VII ruling that sexual orientation discrimination includes discrimination on the basis of sex. Judge Miller rejects an Eighth Amendment challenge on verbal abuse, finding words insufficient, however insulting. [Note: the language will presumably be admissible anyway to show racial and homophobic animus.] Finally, Judge Miller rejects a deliberate indifference to health care claim based on a single denial of a request to see a psychiatrist. In so doing, he applies a subjective element to deliberate indifference intent, noting that the standard would be "objective" had Alsanders been a detainee, thus applying *Kingsley v. Hendrickson,* 576 U.S. 389, 396-398 (2015) (a use of force case, that makes this distinction between detainees and prisoners) to Eighth Amendment deliberate indifference to health care cases, citing *Hardeman v. Curran*, 933 F.3d 816, 821-22 (7th Cir. 2019). Judge Miller was appointed by President Reagan.

NEW YORK – U.S. District Judge Nina Gershon grants summary judgment to Suffolk County Jail defendants in *Alvarino v. DeMarco,* 2021 WL 2571231 (E.D.N.Y., June 23, 2021). Plaintiff Joshua Alvarino was sixteen at the time of the events underlying the suit, and he was in custody awaiting trial on sex charges involving children. He states that he was targeted because of his "perceived" sexual orientation. Although he was in protective custody the entire time, he states that he was "assaulted" by another inmate who placed his penis next to Alvarino's butt on one occasion and "dry humped" him through clothing on another occasion. Alvarino complained about the second incident, and the harasser was moved the same day as the complaint. Alvarino sued numerous people on

numerous claims, including excessive use of force, denial of medical care, sexual harassment, failure to supervise, retaliation, deliberate indifference to his safety, and municipal liability. Judge Gerson finds that Alvarino never filed a grievance about any of his claims prior to commencing his federal suit – so she dismisses almost everything for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act [PLRA]. Citing a provision of the inmate grievance program at the Suffolk County Jail, Judge Gershon finds that the rules at the Suffolk County Jail do not require inmates to grieve "complaints about other inmates." She concludes: "Defendants have not met their burden of demonstrating that plaintiff was required to exhaust his administrative remedies before bringing his claims of deliberate indifference to his welfare relating to his assaults by [harasser] in this court." Judge Gershon cites no other case where a judge has made a similar ruling – and this writer is not aware of one. But exempting inmate against inmate squabbles from the grievance system is not uncommon. If a lawsuit against staff for failing to protect a victim from harm can be exempted from PLRA exhaustion in this fashion, this is indeed news. Judge Gershon proceeds to find that the jail defendants were not personally involved in the harassment and that they acted promptly when they were put on notice. Similarly, Alvarino failed to show that the Jail itself (Suffolk County) had a pattern or practice of denying protection to prisoners perceived to be gay. In light of her rulings, she finds it unnecessary to determine whether the rubbing and "dry humping" were nonactionable as *de minimus*.

TEXAS – This is not an LGBT case. Because it represents a nearly complete abdication of reasonable access to Court and contains gratuitous homophobic language, it is reported briefly. *Pro se* inmate Roberto Barrientos complained in August of 2018 that he had been denied due process at a prison disciplinary hearing. His case would not be screened for almost three years. In May of 2019, he filed a "motion for status," which a magistrate judge dismissed because screening was "pending." In August of 2019, the case was assigned to newly appointed U.S. District Judge Matthew J. Kacsmaryk, a Federalist Society member and a former Deputy General Counsel to First Liberty Institute, an anti-LGBT religious group. In June of 2020, Barrientos reported his change of confinement address. A year later, Judge Kacsmaryk screened the case and dismissed it in *Barrientos v. Davis,* 2021 U.S. Dist. LEXIS 103845 (N.D. Tex., June 2, 2021), with three paragraphs of "analysis." First, he says that Barrientos cannot state a claim for *habeas corpus* relief (which he never sought) because he did not claim loss of good time, citing *Malchi v. Thaler*, 211 F.3d 953, 958 (5th Cir. 2000). This is merely a Fifth Circuit recognition of the interplay of *Heck v. Humphrey,* 512 U.S. 477 (1994) (which held that § 1983 could not substitute for *habeas* when the relief sought affects the conviction) – and *Edwards v. Balisok,* 520 U.S. 641 (1997) (which applied *Heck* to § 1983 suits seeking restoration of good time) – both of which preceded *Malchi*. Apparently forgetting that Barrientos is not seeking restoration of good time, Judge Kacsmaryk then rules that § 1983 cannot apply here, since *Edwards* bars using § 1983 in "a state prisoner's claim for damages in a challenge to the validity of the procedures used to deprive him of good-time credits." This is circular. Judge Kacsmaryk ends by holding that "verbal abuse" alone is not actionable in the Fifth Circuit. The published cases are legion. He picks this unpublished one: "*White v. Gutierez*, 274 Fed. Appx. 349 (5th Cir. 2008) (inmate alleged that prison guards sexually harassed him by calling him names concerning his sexual orientation; Fifth Circuit held that verbal abuse and threatening language and gestures do not give rise to a cause of action under Section 1983)." Barrientos never claimed discrimination based on sexual orientation – as he never asked for *habeas* or restoration of good time.

VIRGINIA – Transgender inmate Kesha T. Williams sued the sheriff, a deputy, and various health care providers for her treatment in the Fairfax County Jail in *Williams v. Kincaid,* 2021 WL 2324162 (E.D. Va., June 7, 2021). Senior U.S. District Judge Claude M. Hilton granted the sheriff's motion to dismiss on all counts, leaving the deputy, the health defendants, and numerous "John Does." Williams complained chiefly about her housing with male inmates per lower genitalia classification policy, when she has presented as a woman for over fifteen years. Williams agreed to dismissal of the § 1983 claims against the Sheriff, who was sued only in her official capacity. Under Virginia law, sheriffs are state constitutional officials and damages actions against them in their official capacity are barred by the Eleventh Amendment. [Note: Georgia jail plaintiffs have the same problem.] An injunctive claim would be cognizable, but it is moot because William is no longer in the Jail. The other defendants are sued in both their official and individual capacities, and they stay in the case. But the claims against them may be limited. Williams sought relief under the Americans with Disabilities and Rehabilitation Acts. Judge Hilton ruled that the exclusion from the definition of "disability" of all "gender identity disorders not resulting from physical impairments" – 42 U.S.C. § 12211(b)(1) – precludes relief. This is a highly-litigated point, and it is not well-developed here. The judge writes: "Plaintiff argues that her disorder is alleviated by medical treatment and that, without hormone therapy, the disorder would substantially limit her major life activities. But the Amended Complaint

LEGISLATIVE & ADMINISTRATIVE *notes*

fails to demonstrate that gender dysphoria is the result of a physical impairment. The Amended Complaint's definition of gender dysphoria only references physical features when it mentions genitalia not corresponding to a person's perception of her own gender. The Amended Complaint does not assert that Plaintiff's genitalia is an impairment." Presumably, Judge Hilton will also apply this "reasoning" to the other defendants. Judge Hilton finds that Williams does not state a claim of gross negligence against the Sheriff because Virginia law requires "an utter disregard of prudence that amounts to a complete neglect," citing *Elliott v. Carter,* 791 S.E.2d 730, 732 (Va. 2016). Here, there was "some degree of care" in classification, and Williams merely disagrees with it. There is no discussion of liability of Fairfax County itself under *Monell* theory. Since the real party in interest was already before the court moving to dismiss on behalf of the Sheriff, perhaps this is worth considering. Williams is represented by Erlich Law Office, PLLC (Arlington, VA).

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

THE WHITE HOUSE – The Biden Administration has formed an interagency working group focused on safety, inclusion, and opportunity for transgender people. The new group was launched with a nationally webcast "convening" with transgender rights advocates held at the White House on June 30. Also towards the end of June, the White House hosted a Pride Month even at which Secretary of Transportation Pete Buttigieg and a transgender activist spoke, and President Biden made remarks of support for the LGBTQI+ community and called once again for passage of the Equality Act.

U.S. CONGRESS – Both houses of Congress overwhelming supported a resolution to designate the site of the Pulse Night Club in Orlando, Florida, as a national memorial on the fifth anniversary of the Pulse Massacre. However, just days earlier, Florida Governor Ron DeSantis had removed funding for services for survivors of that event from the state budget. See below under Florida. President Biden signed the bill into law on June 25, and later addressed an assembly of LGBTQ leaders and government officials at a Pride Reception in the East Wing of the White House. This was the first White House Pride observance since 2016, when President Obama held his June Pride Reception. The Trump Administration observed Pride by instructing government installations to desist from Pride events and prohibiting the exhibition of Pride banners.

U.S. HOUSE OF REPRESENTATIVES – Thirty-nine Democratic members of the House led by Rep. Jimmy Panetta (D-Calif.) introduced the Armed Forces Transgender Dependent Protection Act on June 1. If enacted, this measure would prohibit stationing military personnel in jurisdictions where transgender dependents would be deprived of appropriate health care. The particular concern, explained co-sponsor Rep. Jerry Nadler (D-N.Y.), is that several states and some foreign countries have moved to prohibit provision of transitional health care to minors. "Ensuring that transgender children and spouses of active-duty service members can access medically necessary treatment is a question of dignity, fairness, and civil rights," said Nadler. *The Hill*, June 2. This measure might pass the House but would be doomed in the Senate so long as the filibuster rule is in effect.

U.S. DEPARTMENT OF STATE – Secretary of State Antony Blinken issued a Press Statement on the Department's website on June 30, stating that "we will be updating our procedures to allow applicants to self-select their gender as 'M' or 'F' and will not longer require medical certification if an applicant's self-selected gender does not match the gender on their other citizenship or identity documents. The Department has begun moving towards adding a gender marker for non-binary, intersex, and gender non-conforming persons applying for a passport or CRBA." He characterized this process as "technologically complex" stating that it "will take time for extensive systems updates." He indicated that the Department would provide "updates on the process and any interim solutions" on the Department website and intended to make the process of travel abroad as smooth as possible for individuals in the interim before all these changes have gone into effect. "In line with the Administration's commitment to re-engage with allies and partners," he wrote, "the Department is taking these steps after considerable consultation with like-minded governments who have undertaken similar changes We also value out continued engagement with the LGGBATQI+ community, which will inform our approach and positions moving forward. With this action, I express our enduring commitment to the LGBTQI+ community today and moving forward."

U.S. DEPARTMENT OF VETERANS AFFAIRS– Secretary Denis McDonough announced that by direction of President Joseph R. Biden, Jr., the Veterans Administration Hospital System would provide gender confirmation surgery for transgender veterans. "That decision will carry out now over many, many months," McDonough explained, "but at the end of the day this is in the President's authority to do. He's made clear it's time to do it and that's precisely what we'll do." *Lgbtqnation*.

com reported on June 21 that the rollout of a new VA healthcare policy requires considerable administrative action, so "it could be years before it actually takes effect." Said McDonough, "We want this important change in policy to be implemented in a manner that has been thoroughly considered to ensure that the services made available to veterans meet VA's rigorous standards of quality health care."

CALIFORNIA – As a result of recent enactment of anti-LGBTQ legislation in various states, California officials have expanded the list of states for which state employees will not be funded for official travel to include Arkansas, Florida, Montana, North Dakota, and West Virginia. Already on the list are Alabama, Idaho, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas. A group of states led by Texas sought to sue California in the Supreme Court, invoking that Court's original jurisdiction for suits between the states, but the Supreme Court rejected the attempt, instructing the Clerk not to let them file the lawsuit. *Texas v. California*, No. 153, Orig., 593 U.S. ___ (April 26, 2021). The Original Jurisdiction is normally invoked for border disputes, water rights disputes, etc., not for challenges by one state to the internal government policies of another state. Justices Alito and Thomas dissented from the Court's refusal to allow the Clerk to accept the Complaint for filing.

FLORIDA – On June 1, Governor Ron DeSantis signed into law a statute that provides that only people identified as female at birth can participate in sports competition offered in the state's public education system for girls and women. Individuals can be requested to prove that they were identified as female at birth in order to participate, and a cause of action is created for lawsuits for violation of this requirement. Individuals identified as female at birth but whose gender identity is male are not prohibited from participating in sports activities provided for boys and men. *Advocate.com*, June 2. Human Rights Campaign (HRC) promptly announced that it would file a lawsuit challenging the statute. The 9th Circuit Court of Appeals is presently considering an appeal by the state of Idaho from a district court ruling holding a similar statute in that state unconstitutional. * * * The next day, reports Equality Florida, Governor DeSantis removed all funding for LGBTQ-related programs from the state's budget, including mental health services that the state had been funding for survivors of the Pulse shooting and supportive programs for LGBTQ youth. This despite a large budget surplus because of federal COVID-19 recovery money received by the state. DeSantis is clearly gunning for the Republican presidential nomination in 2024 and his actions should be viewed through that lens. He knows that the overwhelming majority of committed Republicans who vote in primaries don't want taxpayer funds to go to the programs for LGBTQ people. (This is the same overwhelming majority who claim to believe the myth that Trump won the 2020 presidential election.)

KENTUCKY – The Augusta Council voted 5-1 on June 16 to approve a Fairness Ordinance, adding sexual orientation and gender identity to discrimination protections in employment, housing, and public accommodations. Augusta's latest population count is 1,204, but it's the thought that counts. Enactment of this ordinance made Augusta the 22nd municipality in Kentucky to ban such discrimination, putting to continuing shame the state legislature for refusing to enact statewide protection. A bill has been prefiled to provide such protection for the 2022 legislative session. Hope springs eternal. * * * The Kentucky Commission on Human Rights amended the FAQ section on its website to indicate that the Commission will, pursuant to the *Bostock* decision and President Biden's January 20 Executive Order, accept and investigate claims of sexual orientation and gender identity discrimination under its "sex discrimination" jurisdiction. * * * For the first time in state history, the governor has formally issued a Pride Month proclamation. But Gov. Andy Beshear waited until the end of the month to do it.

LOUISIANA – Governor John Bel Edwards vetoed Senate Bill 156, which would have forbidden transgender girls and women from participating in sports aligned with their gender identity. The bill passed the legislature with enough votes to override a veto, but the legislature is not in session and has generally not held special sessions to consider veto overrides. In his veto statement, the governor pointed out that proponents of the bill could not identify any situation in which a transgender girl or woman had sought to participate in athletic competition in Louisiana. "As I have said repeatedly when asked about this bill, discrimination is not a Louisiana value, and this bill was a solution in search of a problem that simply does not exist in Louisiana," Edwards tweeted. "Even the author of the bill acknowledged throughout the legislative session that there wasn't a single case where this was an issue." He also wrote that this bill would "make life more difficult for transgender children . . . While there is no issue to be solved by this bill, it does present real problems in that it makes it more likely that NCAA and professional championships, like the 2022 Final Four, would not happen in our state. For these and for other reasons, I have vetoed the bill." *The Hill* (June 23).

LAW & SOCIETY *notes*

NEW JERSEY – On June 29, Attorney General Gurbir S. Grewal formally apologized on behalf of the state for enforcement actions that harassed and closed down bars serving the LGBT community during the "bad old days." LeGaL member Tom Prol, a former president of the New Jersey State Bar Association, uncovered enforcement records as part of a research project, which were brought to the AG's attention by Garden State Equality, the LGBT political group, according to a June 29 article in *The New York Times*. "For 35 — probably more — years, this had a chilling effect on bars letting in gay patrons," Mr. Grewal said in an interview with *The Times*. "It was really just revolting . . . . The public," he added, "needed to know that we hold ourselves accountable for our own failings." *The Times* also reported: "In addition to apologizing and releasing the agency records, New Jersey will also symbolically vacate the penalties against the bars, none of which are believed to still be in business. Inspectors at the state's alcoholic beverage control division will also now be required to participate in training to safeguard against implicit bias." New Jersey attorney Bill Singer commented that this action was incomplete: the state should also vacate criminal convictions under sex crimes laws that are now considered to have been unconstitutional and apologize to those who were prosecuted.

NEW YORK – The state legislature approved a Gender Recognition Act early in June that dispenses with the requirement that a doctor certify gender identity in order to get official documentation of changes for birth certificates, driver's licenses, and other state identification documents. In addition, the measure authorizes such changes for minors, dispenses with publication requirements, and accepts the use of "x" for nonbinary individuals who do not identify as entirely male or female. Lead sponsors of the legislation are out gay Senator Brad Hoylman (who later in the month lost his Democratic primary race for Manhattan borough president) and out gay Assemblymember Daniel O'Donnell. Governor Andrew Cuomo signed it into law on June 24. Enactment may moot aspects of pending cases against the state challenging various aspects of existing law, including denial of "x" markers on driver's licenses.

OHIO – On June 30, Governor DeWine signed into law a budget bill that had been amended late in the process to include a provision allowing people with religious, ethical, or moral objections to refuse to provide or pay for health care to patients. The measure applies to health care workers, health care institutions, and health insurance companies. While it is likely that this is mainly aimed to giving the covered entities permission to deny abortions, birth control and the like, it also purports to give people an "out" from providing or paying for gender-affirming care to transgender individuals. Under the Supremacy Clause of the U.S. Constitution, this measure should be preempted by the anti-discrimination provisions of the Affordable Care Act, which many courts (although not yet the Supreme Court) have ruled, for example, that the failure of insurance plans to cover gender-affirming care violates the ACA's anti-discrimination provisions. Expect litigation about this down the line.

WISCONSIN – Governor Tony Evers signed three executive orders on June 1 during a ceremony raising the Gay Pride Flag over the state capitol. One order authorizes the Pride Flag to fly over the capitol for the entire month of June and allowing other state facilities to fly the Pride Flag for the duration of the month as well. The second order directs state agencies to use gender-neutral pronouns wherever appropriate, and a third forbids various state agencies from using state or federal funds to provide conversion therapy to minors. *Wisconsinexaminer.com*, June 1. As an application of the Order on gender neutral pronouns, the governor and the Department of Human Services announced on June 28 that henceforth parents will have the option of using gender-neutral language on birth certificates, identifying themselves as "parent" rather than "mother" or "father" if that is their preference. *UrbanMilwaukee.com*, June 28.

LAW & SOCIETY NOTES

By Arthur S. Leonard

THE WHITE HOUSE – President Joseph R. Biden, Jr., issued the first presidential Gay Pride Proclamation since June 2016 on June 1, 2021, noting, among other things, that 14% of the people he has appointed to executive branch positions since taking office self-identify as LGBTQ+, including the first out gay cabinet secretary, several out-gay subcabinet appointees, and the first out trans subcabinet appointee. Former President Donald J. Trump did not issue Pride Month Proclamations, and his administration prohibited federal installations from flying Pride Flags in the U.S. or overseas. Biden's proclamation called for passage of the Equality Act and noted various executive orders the president had issued during his early days in office affirming LGBTQI+ rights and reversing Trump Administration policies that were adverse to the interests of LGBTQI+ people. And Pride flags were flown at many U.S. embassies and consulates for the first time since 2016. * * * President Biden signed into law on June 25 a bill designating the Pulse Nightclub as a national memorial. He also announced that Jessica Stern, who has been a leading figure in advancing LGBTQ rights international as Executive Director of OutRight Action

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International for more than a decade, will fill the State Department position of U.S. special envoy to advance the human rights of LGBTQI+ persons. The position was first occupied by Ambassador Randy Berry during the Obama Administration, then was left vacant during the Trump Administration as the State Department backed away from advancing LGBTQI+ rights. The Special Envoy's task is to implement the human rights policy articulated by President Biden in his executive order about promoting LGBTQI+ rights internationally.

THE VICE PRESIDENT – In what is a historic first, Vice President Kamala Harris and her First Gentleman, Doug Emhoff, showed up and marched in the District of Columbia Gay Pride Parade on June 12. Media reports all claimed this as the first time a serving Vice President has personally participated in a Pride March. Judging by the photographs that appeared in various media, she seemed to be having a swell time! *NBC4.com*, June 12.

JUDGES – The Office of Court Administration of New York has published demographic data about the state's judiciary based on a 2020 survey of judges. Of 997 judges sent the survey, 120 preferred not to respond to a question about their sexual orientation. But of those who answered, 25 identified as gay men, 17 as lesbians, 5 as bisexual, 1 as queer, and 2 as not in any listed category (transgender? non-binary?). Longtime (very longtime) readers of this newsletter and its predecessors can remember when the first out gay and lesbian judges took the bench half about four decades ago, each appointment a landmark of sorts. Now, in just one state, and not the largest one at that, we find forty judges who self-identify as other than heterosexual in response to an official survey by the court system. How times change!

STATISTICS – The Williams Institute (UCLA Law School) published a study on June 25 that calculates based on surveys and population estimates that there are approximately 1.2 million people in the United States who identify as non-binary.

INTERNATIONAL NOTES

By Arthur S. Leonard

INTER-AMERICAN COURT OF HUMAN RIGHTS – The Court published to its website (in Spanish only) a decision from March 21, 2021, in the case of *Hernandez v. Honduras*, in which the Court told the government of Honduras that they are responsible for the protection of LGBTQ people in their country. The case was sparked by the murder a decade ago of Vicky Hernandez, a transgender woman. According to press reports, more than 300 LGBTQ people have been murdered since then in an epidemic of hate crimes that the government has done little to combat. The New York Times reported on June 28 that the Court stated that the government must take affirmative steps to protect transgender people, keep track of incidents of hate crimes, train security forces appropriate, adopt procedures under which transgender people can obtain legal recognition of their gender identity, and pay reparations to the Hernandez family while continuing to investigate the circumstances of her murder. Although decisions of the Inter-American court have only persuasive power, not binding legal effect, the opinion may be cited in other countries that are parties to the Inter-American human rights convention. It is now up to the government of Honduras to respond appropriately. (The Court normally withholds publication of decisions for several months after notifying the country involved, to give it a chance to initiate compliance measures.)

ARGENTINA – The *Buenos Aires Times* published an English translation of a new government decree reserving 1% of government jobs for transgender people. "Every transvestite, transsexual or transgender person has the right to decent and productive employment in equal and satisfactory working conditions and protected against unemployment without discrimination for motives of gender identity or its expression," reads the text of the decree, which outlines that government officials must be trained in recognizing discriminatory behavior. "It is established that, in the national public sector, personnel positions must be occupied by a proportion of not less than one percent of all of them by transvestites, transsexuals and transgender people who meet the conditions of suitability for the position", according to the text.

CANADA – On June 22, Canada's House of Commons overwhelmingly approved a bill to outlaw the practice of conversion therapy, *Reuters* reported. However, an attempt to get agreement on extra sittings of the Senate over the summer to take up the bill failed, so it will not be considered in the Senate until that body reconvenes in September. And if Prime Minister Justin Trudeau goes ahead with a proposal to call a snap election in the fall, the measure will die and need to be considered afresh by the newly-elected Parliament. Conservatives who opposed the extra sittings characterized the anti-conversion bill as a political measure for election purposes, which they did not want to give to Trudeau's party as a campaign tool.

CHILE – Rex Wockner reported on June 2 that the conservative president of Chile, Sebastián Piñera, stated on June 1 that the time had come for marriage equality in his country, and that he would proceed with a "sense of urgency" to getting a marriage equality bill, which

was first introduced in 2017, through the Congress. The courts in Chile had not endorsed marriage equality, despite the country's obligations to adopt such a policy as a signatory to the Pan American Convention on Human Rights.

CHINA – HONG KONG – Justice Anderson Chow Ka-ming ruled in favor of Henry Li Yik-ho and Edgar Ng Hon-lam (now deceased), concluding that "the Housing Authority's policies on adding occupants and transferring ownership of Home Ownership Scheme (HOS) flats constituted unlawful discrimination on the basis of sexual orientation." The Authority had ruled that the same-sex couple could not live together in subsidized housing. The judge said that both policies were "unlawful and unconstitutional" violating equality provisions in the Basic Law and the Hong Kong Bill of Rights, according to a report in the *South China Evening Post*, June 25.

EUROPEAN UNION – At a summit meeting of the European Union, Hungarian President Viktor Orban came in for heavy criticism about anti-LGTB legislation in his country, with some opining that Hungary should leave the EU if it was unwilling to abide by EU human rights standards. European Commission Chief Ursula von der Leyen said that a formal written complaint will be made to Hungary, and the issue may be pressed at the Commission. Orban's rejoinder is that he is just trying to protect traditional Christian values of the Hungarian people by preventing minors from being exposed to LGBTQ-related material.

FRANCE – The Parliament has approved legislation to make in vitro fertilization available to single women and lesbians. The law restricting the availability of this procedure to married women only, long on the books, was out of sync with the approach in other western European countries and has posed a significant barrier to motherhood for many. *Reuters*, June 29.

HUNGARY – On June 14, the Parliament approved an anti-pedophilia bill that was amended at the last minute to add anti-LGBTQ content, a restriction on any discussion of LGBTQ issues, including gender transition, in schools. The pretext for this was the calumny that LGBTQ sexual predators use sex education in the schools to groom children to participate in sexual activity with adults. By attaching the amendment to the anti-pedophilia bill, Prime Minister Orban's party was able to make it very difficult for anybody to vote against the bill without being accused of tolerating or encouraging pedophilia. Political opportunism by Orban in the face of a pending election. *Reuters*, June 14.

MEXICO – Reuters reported that at least 117 out LGBT candidates were standing for election to the Mexican legislature on June 6, about 2% of all the candidates running but the largest number ever reported. * * * Rex Wockner reported on June 15 that the Congress of the Mexican state of Sinaloa passed a marriage equality measure on June 15. The vote was unanimous, 23-0, but only because the opposition stayed away (17 legislators) and the supporters of the measure were numerous enough to make a quorum. The vote responded to recent developments at the Supreme Court of Justice of the Nation, which has repeatedly ruled in favor of marriage equality. With this vote, there are 20 Mexican states plus Mexico City that have marriage equality, although technically a same-sex couple desiring to marry in the remaining 11 states can go to court to get an order (called an amparo) directing local officials to allow them to marry, due to the national precedent. Also, due to rulings by the Supreme Court, same-sex marriages legally contracted must be recognized throughout the country. * * * Baja California's legislature passed a marriage equality bill by a substantial margin on June 26, according to Rex Wockner's report. And, reported Wockner, the state legislature has also banned conversion therapy and passed a transgender identity law by unanimous vote.

UNITED KINGDOM – The Methodist Church, the U.K's fourth largest Christian denomination, voted in Conference to endorse same-sex marriages overwhelmingly on June 30, reported BBC News. However, as a matter of conscience, it will be up to individual ministers whether to perform such ceremonies. The largest denominations in the U.K., the Church of England and the Roman Catholic Church, do not allow clergy to perform same-sex marriages.

PROFESSIONAL NOTES

By Arthur S. Leonard

NATIONAL LGBT BAR ASSOCIATION announced that it will present its 2021 Leading Family Law Practitioner Award Winner to **CARRINGTON "RUSTY" MADISON MEAD** of Florida. The Association will present its 2021 Legal Services Justice Award to **VICKIE NEILSON**. The Frank Kameny Award will be presented to **JAMISON GREEN**. And the Dan Bradley Lifetime Achievement Award will go to **CATHY SAKIMURA**.

The **CALIFORNIA ENDOWMENT**, a statewide non-profit foundation concerned with access to health care issues, has announced the appointment of **KATE KENDELL** as Chief of Staff. Kendell is the former Executive

Director of the National Center for Lesbian Rights.

The **LGBTQ RIGHTS COMMITTEE OF THE NEW YORK CITY BAR** held its annual **ART LEONARD AWARD CEREMONY** virtually, recognizing "compelling commitment to LGBTQ Equality through the law," on June 17. Since no ceremony was held during 2020 Pride Month due to the pandemic, awards were presented for both 2020 and 2021. The 2020 awardees at **CHINYERE EZIE**, Senior Staff Attorney at the Center for Constitutional Rights, and **CHASE STRANGIO**, Deputy Director for Transgender Justice at the ACLU LGBT & HIV Project. 2021 awardees are **THE HONORABLE MARCY L. KAHN**, Justice of the N.Y. Appellate Division, 1st Department (retired), and **JANSON WU**, Staff Attorney, the Legal Aid Society. A recording of the ceremony will become available on the NYC Bar's website.

GAY LEGAL ADVOCATES AND DEFENDERS (GLAD) has retained the search firm of *Positively Partners* to assist in the national search for a new **CHIEF LEGAL STRATEGIST**. The organization, originally named Gay & Lesbian Advocates and Defenders, is based in Boston and focuses on LGBTQ+ and HIV-related legal issues throughout the New England states. According to the search announcement: "GLAD'S work continues with a commitment to racial justice and a focus on the discrimination that occurs at the intersection of race and LGBTQ+ identity. GLAD is tracking the counter-movements that are fighting hard to roll back critical achievements. It's a pivotal time and an important opportunity for a Chief Legal Strategist to join GLAD as the team leader behind their legal strategy and our plans for mobilizing resources for its achievement. It will take an experienced and collaborative executive to lead the GLAD Legal Team. Qualified applicants will have a proven track record of achieving excellence personally and by mobilizing the effort, creativity, and perspectives of others. Direct legal experience isn't required, however a keen understanding of the ways in which litigation, legislation and public education are used to shape public policy and protect civil rights is key to success in the role." Those interested should check out the GLAD website without delay:. https://www.gladjobs.org/

David Lat (the "Judicial Notice" blog) reports that upon New Jersey Attorney General Gurbir Grewal becoming head lawyer at the U.S. Securities & Exchange Commission, New Jersey's Acting Attorney General for the remainder of 2021 will be First Assistant Attorney General **ANDREW BRUCK**, a Princeton and Stanford Law graduate who served as an Assistant U.S. Attorney in New Jersey before joining the Attorney General's Office in 2018. According to Lat, Bruck is "the first known openly gay attorney general in the history of New Jersey." If Governor Phil Murphy is re-elected, perhaps he will appoint Bruck to continue without the "Acting" before his name.

EDITOR'S NOTES

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

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