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AND NOW NEW JERSEY

Marriage equality in NJ; HI could follow as 15th marriage equality state

EXECUTIVE SUMMARY

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LAW NOTES

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New Jersey Becomes the 14th Marriage Equality State; Hawaii Likely to Become the 15th

On September 27, Mercer County (NJ) Superior Court Judge Mary C. Jacobson ruled in *Garden State Equality v. Dow*, 2013 WL 5397372, that New Jersey civil unions fail to afford the state constitution's equal protection guarantee to same-sex couples, because only those who are deemed married by the state are entitled to federal marriage rights and benefits. Jacobson subsequently refused to stay her order that same-sex couples be allowed to marry beginning on October 21. Governor Chris Christie, who had previously vetoed a marriage equality bill approved by the legislature in 2012, directed the Attorney General to seek a stay from the Appellate Division and immediate review on the merits from the New Jersey Supreme Court. The Supreme Court agreed to review the case directly, and also transferred the stay appeal to itself. On Friday, October 18, the Supreme Court unanimously affirmed Judge Jacobson's ruling denying the stay, *Garden State Equality v. Dow*, 2013 WL 5687193, 2013 N.J. LEXIS 1091, stating that it would hold oral argument on the merits of the appeal the first week of January, 2014, and same-sex couples who had obtained marriage licenses on the 18th or over the weekend began marrying after midnight on Monday morning, October 21, 2013, making New Jersey the 14th U.S. marriage equality state (and 15th jurisdiction, counting the District of Columbia). Later that day Governor Christie announced that he was withdrawing his appeal to the Supreme Court, since that court had ruled on the 18th that it was neither probable nor likely that the state would prevail on the merits when the case was argued in January 2014.

Meanwhile, in Hawaii, the legislature convened in a special session called by Governor Neil Abercrombie (Democrat), a marriage equality supporter, on October 28, for the specific purpose of considering a marriage equality bill that the governor had introduced in August. After a busy hearing day, the requisite Senate committee approved the measure and sent it on to the floor, where it was given final approval by a vote of 20-4 on October 30 and sent to the House, where it survived preliminary maneuvering and was referred for a committee hearing to begin on October 31. It was anticipated at the end of October that the measure would probably clear the lower House, but with amendments fine-tuning the "religious exemptions," which would require an additional vote in the Senate before an amended bill would be sent to the governor. The religious exemptions may prove to be a sticking point between the two chambers, if their proponents achieve their goal of exempting small businesses with fewer than five employees of having to provide goods or services for same-sex weddings. Some legislators referred to the wedding photographer cases from the mainland, suggesting that they believe such businesses should not be compelled to provide services that would violate their religious beliefs. Some senators indicated that such amendments would not be accepted by the Senate, so it was not clear as of the end of October where compromise might occur. If the bill passes in some form, Hawaii could become the 15th marriage equality jurisdiction as early as November 18. As the governor had previously stated that he would not call a special session unless it appeared likely that the bill would be enacted, the signs were good for enactment, although it was expected to be a very close vote in the lower house.

The question whether the New Jersey legislature should still attempt to override Governor Christie's veto of its marriage equality bill from 2012 was not rendered merely academic by the judicial developments. The bill includes provisions concerning the status of civil unions and the procedure for converting them to marriages, as well as confirming protection for religious organizations that have faith-based objections to any involvement with same-sex marriages. Enactment of the former appeared useful as a matter of smoothing the state's transition from a civil union jurisdiction to a same-sex marriage jurisdiction. The latter, while probably legally superfluous in light of 1st Amendment free exercise protection that would presumably be recognized by the state's courts in any subsequent tangle over a refusal by a clergy member or religious institution to participate in a same-sex marriage ceremony, might particularly appeal to those legislators whose votes would be needed to provide the super-majority necessary to override a veto.

The deadline for an override vote would be the last day of the current session of the legislature: January 14, 2014. On the other hand, Democrats controlling the state legislature noted that an easier

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way to address these issues would be to craft a new implementation bill and pass it by majority vote through the lame duck session, with the expectation that Governor Christie would allow it to become law without his signature. Since the governor had accepted the finality of the Supreme Court's decision and nobody was suggesting a campaign to reverse it through a state constitutional amendment, presumably he would not bother to veto a new implementation bill, and this would end the need to find a supermajority to override the veto of the 2012 bill. In addition, it would give the Democrats an opportunity to refine the religious exemption provisions, which had been broadly drafted in anticipation of needing a supermajority to pass the bill, and which might be narrowed in a new implementation bill. *Burlington County Times*, Oct. 24; *Philadelphia Inquirer*, Oct. 24.

The Supreme Court's October 18 opinion, written by Chief Justice Stuart Rabner, strongly signaled that the state would most likely lose an appeal on the merits. "Because, among other reasons, the State has not shown a reasonable probability of success on the merits," Rabner wrote, "the trial court's order — directing State officials to permit same-sex couples, who are otherwise eligible, to enter into civil marriage starting on October 21, 2013 — remains in effect."

The underlying basis for the ruling can be found in *Lewis v. Harris*, 188 N.J. 415 (2006), in which the court unanimously held that under the New Jersey constitution same-sex couples were entitled to the same rights and benefits of marriage as different-sex couples, at least to the extent that the state could confer such rights. At that time, a bare majority of the court voted to leave it up to the legislature to decide whether to allow same-sex couples to marry or to provide some alternative status that would provide the same rights and benefits, while a minority, dissenting as to the remedy, would have authorized same-sex marriage. The legislature responded by passing the Civil Union Act, and established a Review Commission to study the implementation of the Act and report back on whether it was accomplishing what was required in terms of equal treatment. The Review Commission subsequently issued a report finding that civil union partners were not enjoying equal treatment, either from government officials or private actors.

Lambda Legal, which had represented the plaintiffs in *Lewis v. Harris*, petitioned the Supreme Court to reopen the case and order the state to allow same-sex marriages, submitting the Commission Report as its main evidence on unequal treatment. The court responded that a new case should be initiated in the trial court to establish a factual record showing unequal treatment as a basis for any new ruling by the Supreme Court. Lambda Legal then filed a new case, representing Garden State Equality, a gay rights organization, and several same-sex couples. Judge Jacobson of Mercer County Superior Court denied the state's motion to dismiss the case last year, holding that plaintiffs could proceed to discovery on their equal protection claim. In the meantime, on June 26, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), and the federal government announced that it would recognize lawfully contracted same-sex marriages. Various federal agencies made clear, however, that under *Windsor* only marriages would be recognized, not civil unions or domestic partnerships. Furthermore, under some federal statutes and regulations, only marriages that were recognized as such by a couple's domicile state would qualify them for a particular benefit, so same-sex couples married elsewhere but living in New Jersey would have access to some but not all of the federal benefits of marriage. Lambda Legal then filed a summary judgment motion, arguing that New Jersey Civil Unions clearly failed the state constitutional equal treatment requirement articulated in *Lewis v. Harris*, because they were not recognized for any federal purposes, and New Jersey's failure to recognize out-of-state same-sex marriages as such would deprive those New Jersey same-sex couples who married elsewhere from qualifying for some federal benefits that were premised on domicile-state recognition of the marriages.

Opposing Lambda's motion, the Christie Administration argued that it was not the state's fault or responsibility that the federal government was denying recognition to civil unions. The state argued that plaintiffs should be suing the federal government on a claim that failing to recognize civil unions violated the equal protection rights of civil union partners. As the state had not taken any action on this subject after the *Windsor* decision, the state argued that there was no "state action" to challenge in this case. Judge Jacobson decisively rejected this argument and all others advanced by the state in her September 27 ruling granting summary judgment to Lambda, and she subsequently rejected the state's application to stay her ruling, finding that none of the factors considered by New Jersey courts in determining motions to stay trial court rulings pending appeal favored the state in this case, and that the public interest would be better served by allowing her order to go into effect than by staying the order pending an appeal.

Although the grounds for granting or denying a stay and the grounds for an ultimate ruling on the merits are not the same, the Supreme Court's unanimous decision affirming Jacobson's denial of the stay made it very unlikely that the state would ultimately prevail on the merits. "Because State law offers same-sex couples civil unions but not the option of marriage," wrote the Chief Justice, "same-sex couples in New Jersey are now being deprived of the full rights and benefits the State Constitution guarantees." Chief Justice Rabner pointed out that the Civil Union Act no longer achieves the purpose that the court had specified in *Lewis v. Harris*. "The State's statutory scheme effectively denies committed same-sex partners in New Jersey the ability to receive federal benefits now afforded to married partners. The trial court therefore correctly found cognizable action by the State. We conclude that the State has not shown a reasonable probability or likelihood of success on the merits."

The court also rejected the state's argument that its sovereign rights would somehow be harmed if the order were not stayed, and on the question of balance of

harms, showed that staying the decision would be immediately harmful to same-sex couples who were denied the right to marry because of the long list of federal rights and benefits that would be denied to them. "Plaintiffs highlight a stark example to demonstrate the point," wrote Rabner. "If a civil union partner passes away while a stay is in place, his or her surviving partner and any children will forever be denied federal marital protections. The balance of hardships does not support the motion for a stay."

Judge Jacobson had noted that in cases presenting questions of significant public importance, the public interest also is considered. "What is the public's interest in a case like this?" asked the Chief Justice. "Like Judge Jacobson, we can find no public interest in depriving a group of New Jersey residents of their constitutional right to equal protection while the appeals process unfolds. . . We find that the compelling public interest in this case is to avoid violations of the constitutional guarantee of equal treatment for same-sex couples."

The court concluded, "The trial court's order dated September 27, 2013, remains in full force and effect. State officials shall therefore permit same-sex couples, who are otherwise eligible, to enter into civil marriage beginning on October 21, 2013." Early on Monday morning, the 21st, the governor threw in the towel, announcing withdrawal of the appeal on the merits, and instructing state agencies to implement the court's order.

Among the first same-sex weddings performed in New Jersey on October 21st were several conducted in Newark City Hall by Mayor Cory Booker, who was recently elected to fill the Senate seat vacated by the death of Senator Frank Lautenberg, who had himself been a firm supporter of marriage equality, as is Mayor Booker. (Booker was sworn in as a senator on October 31.)

In Hawaii, the impending vote on marriage equality caps a campaign running back more than two decades, as a group of same-sex couples filed suit in Honolulu against the advice of LGBT litigation groups, arguing that the state's constitution mandated allowing same-sex couples to marry. Although the circuit court dismissed their case, the Hawaii Supreme Court ruled in 1993 by a narrow majority that the complaint stated a potentially valid claim of sex discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The Hawaii Constitution includes an Equal Rights Amendment forbidding discrimination by the state on account of sex. In a ruling of first impression, the Supreme Court held that the ERA made sex a "suspect classification" in Hawaii, and that the ban on same-sex marriage was sex discrimination because the state was using a sex classification to decide which couples could marry. (The court rejected the argument that the ban was sexual orientation discrimination, pointing out that the sexual orientation of potential marital partners was legally irrelevant to their right to marry, for a gay man could marry a lesbian but not another gay man!) The court remanded the case to afford the state an opportunity to attempt to prove that it had a compelling interest to deny marriage to same-sex couples, a test it failed to meet at the trial in 1996. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct., 1st Cir. 1996).

After the New Jersey Supreme Court affirmed the ruling denying the stay, same-sex couples began marrying on October 21, 2013.

The Hawaii legislature reacted to the trial court's decision with a heated debate, ultimately reaching a compromise under which the state would enact the Reciprocal Beneficiaries Act, under which same-sex couples could achieve limited recognition for their relationships, and the voters would have a chance to amend the state constitution to take away jurisdiction over the issue of same-sex marriage from the courts. The amendment was adopted and the Hawaii Supreme Court, which had delayed ruling on the state's appeal in *Baehr*, declared that case moot. Significantly, the Hawaii Marriage Amendment, unlike the marriage amendments in other states enacted in opposition to same-sex marriage, did not adopt a definition of marriage for Hawaii. Instead, the amendment reserved to the legislature the power to determine whether same-sex couples can marry. As a result, subsequent proposals to enact a civil union law or a marriage equality law would not require a repeal of the marriage amendment.

After many years of political work towards attaining marriage equality, Hawaii did adopt a Civil Union Act, but by the time it did so, marriage equality had been achieved in several other states and the LGBT community in Hawaii considered the Civil Union Act insufficient, so new marriage equality litigation was instigated, this time in the federal district court under the 14th Amendment. The trial judge granted summary judgment to the state prior to the Supreme Court's ruling in *United States v. Windsor*, *Jackson v. Abercrombie*, 884 F.Supp.2d 1065 (D. Haw. 2012), and the case is pending on appeal before the 9th Circuit. But the *Windsor* decision lit a fire under Governor Abercrombie. Reflecting the widespread belief (abetted by Justice Scalia's fiery dissent in *Windsor*) that the 9th Circuit was likely to rule in favor of the plaintiffs in the Hawaii case, the governor introduced his bill in August, telling the legislature that it made more sense to embrace marriage equality through a statute that could anticipate and deal with a host of issues rather than to leave the result up to a broad court order. The legislature's reaction will be known shortly after this issue of *Law Notes* is published. ■

Missouri Supreme Court Rejects Benefit Claim from Surviving Partner of Highway Patrolman

Missouri law provides that the surviving spouse of a public employee who is killed in the line of duty be entitled to a death benefit equal to half of the deceased employee's final average compensation. The statute, adopted in 1969, did not define "spouse," but was supplemented in 2004 with a definition of "spouse" in accord with the newly-enacted state constitutional amendment banning same-sex marriage. When a Missouri state highway patrolman, Corporal Dennis Engelhard, was killed in the line of duty on Christmas Day, 2009, his surviving same-sex partner of fifteen years, Kelly Glossip, applied for the death benefit, but was turned down on the ground that he was not married to Engelhard. Of course, he could not be married to Engelhard in Missouri, where a constitutional amendment and a statute provide that same-sex marriages are neither valid nor recognized in the state. Engelhard was the main breadwinner in their household, which also includes the son they were raising together. On October 29, 2013, the Missouri Supreme Court, voting 5-2, rejected Glossip's claim that denial of the benefit violated his right to equal protection of the law. *Glossip v. Missouri Department of Transportation*, 2013 Westlaw 5799911, 2013 Mo. LEXIS 294. The court noted several times in its opinion that Glossip was not directly challenging the anti-gay marriage amendment or statute, and was not arguing that the state's definition of "spouse" was unconstitutional. His argument was that requiring a person to be a legal spouse in order to qualify for the benefit was itself a form of unconstitutional sexual orientation discrimination.

The majority of the court, issuing an unsigned per curiam opinion, said that this was not a sexual orientation discrimination case. The court pointed out that neither the sex nor sexual orientation of the surviving partner of a law enforcement officer was directly relevant under the benefits provision. The only relevant fact, according to the court, was whether at the time the officer died he was married to the benefits claimant. An unmarried partner of either sex would be equally disqualified from receiving the benefit, regardless of their sexual orientation. Having reached this conclusion, the court treated this as a case of differential treatment because of marital status, a ground whose legitimacy as a basis for government policy has rarely been successfully challenged.

Finding that a marital status distinction is entitled to a presumption of constitutionality and will only be invalidated if the legislature could have had no rational basis for imposing such a distinction, the court identified several possible justifications for limiting the survivor's benefit to legal spouses. "Here, the General Assembly reasonably concluded that limiting survivor benefits to spouses would serve the death benefit's intended purpose as well as the interests of administrative efficiency and controlling costs," wrote the court. "Providing survivor benefits to persons who are economically dependent on a deceased state employee is a legitimate state interest, and the General Assembly could have reasonably concluded that the spousal requirement would serve that purpose." In a "rational basis" review case, there does not have to be an exact fit between the purpose and the mechanism adopted by the state to achieve it. "It may be true," the court commented, "that there are spouses of highway patrol employees who are not economically dependent on the employee and that there are non-spouses who are economically dependent on the employee. Rational basis review, however, does not require that the fit between the classification and government interest be exact, but merely 'reasonable,' and this Court will not substitute its judgment for that of the legislature as to the wisdom, social desirability or economic policy underlying a statute."

The court pointed out that it was administratively efficient to condition the benefit on the survivor presenting proof of marriage, making unnecessary any sort of case-by-case factual inquiry into whether a non-marital claimant was actually dependent on the employee. The legislators "could have reasonably anticipated that expanding survivor benefits beyond surviving spouses and surviving children could create a risk of competing claims and subjective eligibility determinations and that such claims would increase the time and cost necessary to resolve benefits claims."

The court rejected Glossip's argument that the "spousal requirement must fail even rational basis scrutiny because the statute was motivated by a desire to harm gays and lesbians," pointing out that the statute was enacted in 1969, long before Missouri had adopted its statute and constitutional amendment banning same-sex marriage, at a time when no claim for a right to same-sex marriage had ever been made in the state. The court pointedly quoted from U.S. Supreme Court Justice Anthony Kennedy's statement in this year's ruling in U.S. v. Windsor that "it seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization," to further make the point that it was unlikely that the 1969 Missouri legislature had a specific intent to harm gay people by adopting this provision.

The court also rejected Glossip's argument that the survivor benefits statute was a prohibited "special law," under a provision of the state constitution that prohibits the legislature

from enacting "special laws" when a general law can be made applicable to a particular situation. A general law providing survivors benefits to dependents could cover this situation, argued Glossip, so limiting the benefit to surviving spouses was a forbidden instance of special legislation.

The court suggested the possibility that the outcome of this case could have been different had Glossip decided to take on directly the constitutionality of Missouri's marriage amendment and statutory same-sex marriage ban, or if he and Engelhard had married out of state and he was now arguing that their marriage should be recognized by Missouri for this purpose. Without hinting at how such claims might be decided, the court indicated that they would have squarely raised the issue of sexual orientation discrimination.

As to that, the court pointed out that Missouri precedents dictate applying the U.S. Supreme Court's equal protection analysis under the 14th Amendment to any equal protection issue raised under the parallel provision of the Missouri Constitution, which would require the court to treat U.S. v. Windsor as a controlling precedent. "The United States Supreme Court left open the question of what level of scrutiny should apply to sexual orientation discrimination in Windsor," said the court. "There, as in Lawrence v. Texas, it took a tangential approach to the constitutionality of the challenged statute and held that the statute failed even the most deferential level of scrutiny. Neither of these cases identified what level of scrutiny applies to cases alleging discrimination based on sexual orientation. This Court also need not reach that issue here because the survivor benefits statute does not discriminate on the basis of sexual orientation, and Glossip has elected not to challenge Missouri's statutory and constitutional proscription against same-sex marriage."

Writing for himself and Justice George Draper, Justice Richard B. Teitelman dissented, arguing that the court had mischaracterized this case. "For decades," he wrote, "indeed centuries, gay men and lesbians have been subjected to persistent, unyielding discrimination, both socially and legally. That shameful history continues to this day. The statutes at issue in this case, sections 104.140.3 and 104.012, RSMo Supp. 2001, bear witness to that history and help ensure that this unfortunate past remains a prologue to the continued state-sanctioned marginalization of our fellow citizens. The plain meaning and intended application [of these statutes] is to specifically discriminate against gay men and lesbians by categorically denying them crucial state benefits when their partner dies in the line of duty. This type of intentional, invidious and specifically targeted discrimination is fundamentally inconsistent with the constitutional guarantee of equal protection of the law."

The only relevant fact, according to the court, was whether at the time the officer died he was married to the benefits claimant. An unmarried partner of either sex would be equally disqualified from receiving the benefit, regardless of their sexual orientation.

Teitelman criticized the court's holding as overlooking "the fact that section 104.140.3 employs a definition of 'spouse' that operates to the unique disadvantage of gay men and lesbians, even when, like Corporal Engelhard, they devote their lives to the defense of the same rule of law that relegates them to the status of second class citizens."

Taking on the majority's conclusion that this is merely a marital status discrimination case, Teitelman criticized the majority's failure to consider the context and effect of its ruling. "By tying the payment of survivor benefits to a definition of 'spouse' that renders access to those benefits legally impossible to obtain only for gays and lesbians, the purported marital distinction is also necessarily a distinction based on sexual orientation," he asserted. "At some point, equal protection analysis requires an assessment of the practical reality of the case. In this case, the reality is that Mr. Glossip's sexual orientation made it legally impossible for him to obtain survivor benefits." Thus, the challenged statutes "turn the legal status of marriage into a proxy for discrimination on the basis of sexual orientation."

Furthermore, he wrote, "The fact that the State does not recognize same sex marriages does not mean that gays and lesbians are deprived of their other fundamental individual constitutional rights. Nothing in the short, simple text of article I, section 33 [the state's marriage amendment] in any way overrides the separate constitutional guarantee of equal protection by justifying other forms of discrimination on the basis of sexual orientation." Teitelman went on to argue that this should be a heightened scrutiny case in light of the "historic patterns of disadvantage" suffered by gay people at the hands of the state, and that the statutes would not withstand such heightened scrutiny. He found it "implausible" to argue that limiting benefits to legal spouses "will ensure that benefits are payable

only to those who are most financially dependent on the deceased trooper." He pointed out that the state had conceded that Engelhard and Glossip were financially interdependent. "Marriage simply cannot be a proxy for financial interdependence," he insisted, "when only gays and lesbians – a relatively small, readily identifiable and historically marginalized group – are categorically excluded from being legally married."

Because the decision was grounded by the majority of the court in its interpretation of the state constitution, further review by the U.S. Supreme Court appears unlikely, although, in light of U.S. v. Windsor, Glossip could mount a plausible argument that the denial of benefits violates his right to equal protection under the 14th Amendment. Since the Missouri Supreme Court construes the state's equal protection clause to be coextensive with the federal equal protection clause, one might treat this as a ruling under both provisions, raising a potential federal constitutional question. Were the Supreme Court inclined to take on a new gay equal protection case so soon after Windsor, this could provide a vehicle for doing so outside of a direct challenge to a state's decision to exclude same-sex couples from marriage.

Glossip is represented by a large team of Missouri lawyers together with staff and cooperating attorneys from the ACLU and Lambda Legal. The court received amicus briefs from a group of Missouri law professors, from a group of elected Missouri officials, and from The Law Enforcement Gays and Lesbians (LEGAL) International (whose brief was written by attorneys from the Chicago office of Lambda Legal).

Some facts in this article were sourced from the *St. Louis Post-Dispatch* (Oct. 31), which published an article decrying the court's failure to grapple with the same-sex marriage issue and stating agreement with Justice Teitelman's dissenting opinion. ■

Supreme Court Refuses to Review Some Pending LGBT-Related Cases

On October 7, the first day of its October 2013 Term, the Supreme Court announced that it had denied petitions for certiorari in two pending LGBT-related cases, *MacDonald v. Moose* from the 4th Circuit and *Dixon v. University of Toledo* from the 6th Circuit.

In *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert. denied sub nom Moose v. MacDonald*, No. 12-1490, 2013 WL 3211338, the 4th Circuit held that Virginia's sodomy law was facially unconstitutional in light of the Supreme Court's 2003 decision in *Lawrence v. Texas*, which had invalidated the Texas Homosexual Conduct Act. Unlike the Texas statute, which only applied to same-sex conduct, the Virginia sodomy law broadly applies to all acts of anal or oral sex, regardless of the genders or ages of the participants or the location of the activity. In this case, the state prosecuted and convicted William MacDonald for soliciting a young woman to engage in oral sex with him in a parked car. The solicitation statute applies only to criminal conduct, and thus incorporated by reference the sodomy law. MacDonald argued in defense that his conduct was protected under *Lawrence*, but the Virginia courts took the position that because the woman was only 17, and thus a minor, his conduct was not protected because *Lawrence* did not protect sexual conduct involving minors. After his conviction was upheld by the Virginia Supreme Court, he filed a federal *habeas corpus* action challenging the constitutionality of his conviction. The district court denied his petition, but a 4th Circuit panel voted 2-1 to reverse, finding that the broad Virginia sodomy law was facially unconstitutional under *Lawrence*. Attorney General (and now Republican candidate for governor) Ken Cuccinelli petitioned for certiorari, arguing that *Lawrence* was an "as applied" decision, and that the Virginia sodomy law should be construed to apply only to conduct not protected under *Lawrence*, including the conduct of Mr. MacDonald. His petition was denied without comment or recorded dissent. It will be interesting to see whether the Virginia legislature, which has stubbornly refused to amend or repeal the sodomy law to bring it into compliance with *Lawrence*, will take any action now that this case is over.

In *Dixon v. University of Toledo*, 702 F.3d 269 (6th Cir. 2012), *petition for rehearing en banc denied* (2013), *cert. denied*, No. 12-1402, 2013 WL 2357630, the 6th Circuit held that the University did not violate the 1st Amendment free speech rights of Crystal Dixon, an administrator who was discharged after she published a letter to the editor in a community newspaper articulating views about homosexuality that the University administration considered to be unacceptable for a person in her position. The district court and court of appeals rejected her 1st Amendment claim, having found that she was speaking as an employee of the public university, and thus her speech was not protected by the 1st Amendment and the University could discharge her if it found her statements to be inconsistent with its policies concerning sexual orientation. Her petition was denied without comment or recorded dissent. The decisions below seem consistent with the Court's precedents on public employee speech under the 1st Amendment. When an employee is speaking in her capacity as an employee, the public employer has a right to determine the content of her speech as representing the public employer, and to discharge the employee for disseminating a message contrary to the employer's policies. ■

NCLR Files Marriage Equality Lawsuit in Tennessee

A group of Tennessee lawyers backed by the National Center for Lesbian Rights filed a lawsuit in the U.S. District Court for the Middle District of Tennessee (Nashville) on October 21, claiming that the state's refusal to recognize the same-sex marriages of their clients violated the 14th Amendment. *Tanco v. Haslam*. The plaintiffs are four same-sex couples, each of whom married while residing in other states, and who have subsequently moved to Tennessee, mainly for employment purposes, finding themselves relegated to "unmarried" status under state law. They have quickly encountered specific instances of denial of their marriages, upon applying for benefits plans and seeking appropriate name designations on their Tennessee drivers' licenses as ready examples.

Tennessee has an anti-marriage amendment, Art. XI, sec. 18, of the state constitution, which, in addition to limiting the definition of marriage to different sex couples, states, *inter alia*, "If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state." Tenn. Code Ann., sec. 36-3-113, contains the same language. The complaint points out that these recent enactments are inconsistent with long-established Tennessee marriage recognition principles, under which the only foreign marriages denied recognition have been those that would have incurred criminal prosecution had they been attempted in Tennessee. The complaint points out that under the Supreme Court's ruling in *Lawrence v. Texas* and a prior Tennessee ruling in *Campbell v. Sundquist*, Tennessee could not make it a crime for same-sex couples to marry.

While arguing that the state's refusal to recognize foreign same-sex marriages should be subjected to strict or heightened scrutiny because it deprives the plaintiffs of important, indeed fundamental, rights, the complaint asserts that Tennessee's recognition ban would not satisfy rational basis review because both the language of the amendment and statute and their legislative history make clear that they were not adopted to achieve any legitimate legislative purpose, in light of the U.S. Supreme Court's recent decision in *United States v. Windsor*. Indeed, the history of adoption of the marriage amendment shows that the only justification articulated was to "preserve" the traditional definition of marriage for no other reason than it was the traditional definition of marriage. The introductory portion of the complaint quotes liberally from *Windsor* to show that the plaintiffs' complaint is well-grounded in the Supreme Court's recent 14th Amendment jurisprudence.

The plaintiffs are four same-sex couples, each of whom married while residing in other states, that now find themselves relegated to "unmarried" status under state law.

The complaint raises both due process and equal protection concerns, and invokes the right to travel. "Defendants' refusal, under color of state law, to respect the valid out-of-state marriages of Plaintiffs and other same-sex couples unconstitutionally burdens and infringes on Plaintiffs' right to travel throughout the nation and to resettle and make a new home in Tennessee. By conditioning Plaintiffs' move to Tennessee on relinquishment of all rights, benefits, and responsibilities of their marriages lawfully celebrated in other states, the state has imposed a penalty on Plaintiffs' exercise of their constitutionally protected right to travel," in violation of the due process requirements of the 14th Amendment. The complaint asserts that because the right to travel is a fundamental right, the challenged constitutional amendment and statute must be subjected to strict scrutiny, but that "the challenged statutes are not even rationally related to the furtherance of a legitimate government interest." The complaint ingeniously sets out several alternative due process and equal protection challenges to Tennessee's ban on recognition of same-sex marriages.

Interestingly, the complaint avoids any mention of Section 2 of the Defense of Marriage Act, the 1996 federal statute that provides that states are not required to extend full faith and credit to same-sex marriages contracted in other states. Section 2 is, as some argued when it was enacted, purely symbolic legislation, as marriage recognition has traditionally been a matter of comity and common law precedent rather than a constitutional command.

Tennessee counsel on the case include Abby R. Rubenfeld (the first Legal Director at Lambda Legal during the 1980s, and a leading figure in the Tennessee bar), The Nashville firm of Sherrard & Roe PLC, the Memphis firm of Holland and Associates PLLC, and Knoxville attorney Regina M. Lambert. NCLR Legal Director Shannon P. Minter and staff attorneys Christopher F. Stoll and Asaf Orr are working on the case. ■

New Mexico Supreme Court Considers Marriage Equality Case As Hundreds of Same-Sex Couples Marry in the State

The New Mexico Supreme Court heard oral argument on October 23 in *Griego v. Oliver*, No. 34,306, responding to a request by 33 county clerks for a definitive ruling on whether they are authorized or obligated to issue marriage licenses to same-sex couples. This case is one of several brought by same-sex couples against various country clerks (sometimes at the invitation of the clerks) to compel issuance of licenses. Rose Griego and Kimberly Kiel brought suit against Bernalillo County Clerk Maggie Toulouse Oliver, herself a supporter of marriage equality who said that she could not issue a license without the backing of a court, and in August 2nd Judicial District Judge Alan M. Malott issued the order, following up on September 3 with a final declaratory judgment, *Griego v. Kiel*, No. D 202 CV 2013 2757, which is formally the subject of the appeal. Albuquerque attorneys Peter S. Kierts and Lynn Mostoller, cooperating attorneys for the ACLU of New Mexico, were lead counsel in the trial court, and the National Center for Lesbian Rights joined with the ACLU of New Mexico in supporting the litigation, with various other cooperating attorneys providing support and Maureen Sanders providing appellate advocacy in the October 23 argument. Several other same-sex couples in Bernalillo County had joined as co-plaintiffs, so Sanders was representing six couples as clients in the argument.

Those attending the oral argument generally agreed that the five member court was likely to affirm Judge Malott's ruling, although the timing of their decision was the matter of much speculation. Press reports leading up to the argument had suggested that the court might rule from the bench, but it did not do so, with Chief Justice Petra Himenez Maes announcing at the end of the hearing that the court would deliberate and announce a decision "at a later time." Acknowledging the unprecedented public interest in the case, the court authorized live webcasting of the argument for the first time in the court's history. The main argument against marriage equality, made on behalf of a group of Republican state legislators who had been allowed to intervene as defendants in the case, was articulated by James Campbell, a lawyer affiliated with Alliance Defending Freedom, a conservative litigation group that opposes same-sex marriage mainly on religious grounds, although Campbell's argument relied heavily on the "channeling procreation" theory that has had mixed success in other appellate courts considering marriage equality claims. The justices' questioning was focused most heavily on Mr. Campbell, and signaled skepticism about his arguments. The state's attorney general had previously announced his view that the continued denial of the right to marry to same-sex couples violates the state and federal constitutions, so his office was not opposing the plaintiffs' case..

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In his September 3 opinion, Judge Malott found it "arguable" that despite some gender-neutral language, the state's marriage statute did not authorize same-sex marriages, but the state's statutes also do not explicitly prohibit them, and pursuant to an attorney general's opinion the state recognizes same-sex marriages contracted in other jurisdictions. The New Mexico constitution has never been amended to forbid same-sex marriage, as a deadlocked legislature has failed to put such a proposal on the ballot. Moving from the statutory issue, Judge Malott wrote: "It is, however, beyond argument that the People of the State of New Mexico considered, and spoke clearly to ensure 'equality of rights under the law' in 1972 by adoption of Article II, Section 18, Constitution of New Mexico." This section provides: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under the law shall not be denied on account of the sex of any person.'" Judge Malott emphasized the last line of the section, stating that the provision "clearly prohibits such discrimination against same-sex applicants and the Defendants' clear, non-discretionary duty to issue a license to 'each couple' otherwise qualified stands clearly and inexorably through all the rhetoric. Implying conditions of sexual orientation on one's right to enter civil contracts such as marriage is a violation of Article II, Section 18's mandate that 'equality of rights shall not be denied on account of the sex of any person.' Implying conditions of sexual orientation on one's right to enter civil contracts such

as marriage is a violation of Article II, Section 18's mandate that 'no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.' Whether based in statute, or Constitutional protections, Defendants have a non-discretionary duty to issue a Marriage License to 'each couple' otherwise qualified upon application for same and no valid excuse for not performing that duty has been asserted."

Judge Malott also saw no reason to delay the effect of his ruling while the appellate process plays out, writing: "There is a substantial public interest in vindicating the rights of all citizens under the law and in preventing the ongoing violation of our constitutional rights. There is no benefit to the parties or the public interest in having this matter progress through a lengthy path of litigation while basic constitutional rights are compromised or denied on a daily basis." His opinion anticipated a similar opinion issued early in October by New Jersey Superior Court Judge Mary Jacobson when she refused to stay her order that same-sex couples be allowed to marry – a refusal that was unanimous affirmed by the New Jersey Supreme Court. The New Mexico Constitution's explicit prohibition on sex discrimination makes the constitutional ruling even more obvious than the ruling in New Jersey, based on more general equal protection requirements. According to one press report about the Supreme Court argument, more than 1,450 same-sex couples had been issued licenses in New Mexico by the date of the argument. Although technically New Jersey became the 14th marriage equality state when Judge Jacobson's order went into effect statewide on October 21, New Mexico might legitimately dispute the numbering in light of the number of same-sex marriages concluded in various counties with district court authorization (as several other district judges issued similar orders) prior to that date. *Santa Fe New Mexican*, Oct. 24; *New York Times*, Oct. 24; *Christian Science Monitor*, Oct.23. ■

Nevada Supreme Court Answers Questions of First Impression in Lesbian Custody Dispute

The Nevada Supreme Court ruled unanimously on October 3 in *St. Mary v. Damon*, 2013 WL 5498828, 2013 Nev. LEXIS 84, that a child can have two mothers and that a co-parenting agreement made by two women before their child was conceived through anonymous donor insemination with one woman providing the egg and the other being the gestational mother, can be enforceable as an agreement by parents who are presumed to have the best interest of their child at heart. Reversing a trial court decision that treated one of the women as a mere surrogate mother with no legal rights, the court returned the case to the trial court for a new determination of parental rights.

Justice Nancy M. Saitta wrote the opinion for the unanimous court, settling several questions of first impression under Nevada law, and giving heavy weight to California decisions that interpret similarly-worded statutes.

Sha'Kayla St. Mary and Veronica Lynn Damon moved in together about a year after their relationship began, and decided to have a child together. According to St. Mary, they decided to have Damon contribute the egg for in vitro fertilization with sperm through an anonymous donor, the resulting ovum to be implanted in St. Mary, in order that both of the women would have parental status, St. Mary as the birth mother and Damon as the genetic mother. After the procedure was performed they both signed a co-parenting agreement, under which they agreed that if their relationship ended, they would "each work to ensure that the other maintained a close relationship with the child, sharing the duties of raising the child, and make a 'good faith effort to jointly make all major decisions" affecting the child.

St. Mary gave birth to the child in June 2008, and was listed on the birth certificate as the child's only parent, but the child was given a hyphenated last name to reflect both mothers. About one year after the child's birth, the women ended their relationship, St. Mary moved out of the home, and they disagreed about how to share their time with the child. However, St. Mary cooperated with Damon by signing an affidavit declaring that Damon was the biological mother of the child, which Damon used to get a court order to have the child's birth certificate amended to list her as a mother. The court declared that Damon was "the biological and legal mother" of the child, and ordered that the birth certificate be amended to add Damon's name as a mother. Then St. Mary filed the lawsuit seeking to establish custody, visitation, and child support, but Damon responded that as the biological mother she was entitled to sole custody, attaching the 2009 court order.

The trial judge treated St. Mary as a mere surrogate with no legal claim to parental status. Damon had filed a motion to limit the court's evidentiary hearing to the issue of whether St. Mary would have visitation, arguing that Damon's sole parental status had been established by the court's order. The trial judge agreed with Damon, excluding St. Mary's custody claim from the hearing, and focused solely on the visitation issue. At the conclusion of the hearing, the trial court found that St. Mary should have "third party visitation," finding that she "has no biological or legal rights whatsoever under Nevada law." Further, the trial judge found the co-parenting agreement unenforceable, concluding that it fell outside the scope of enforceable surrogacy agreements, which under Nevada law could be made only by a married couple with a surrogate. St. Mary appealed from the denial of her parental rights, and the Nevada Supreme Court unanimously reversed, finding that the trial judge was mistaken about Nevada law.

Following the lead of the California courts, the Nevada Supreme Court held that a child can have two legal mothers,

and that a co-parenting agreement such as the one made in this case could be enforceable. Most significantly, the court found that under Nevada statutes St. Mary could be deemed a parent to the child because she was its birth mother under circumstances where, as she claimed, the women had agreed that both were intended to be parents of the child. The trial judge had misconstrued the effect of Damon's prior legal action to establish her parental rights, said the court. Although the prior court order had established her status as a legal mother of the child, it had not ordered that St. Mary's name be removed from the amended birth certificate. That is, finding that the child had two legal mothers was not inconsistent with the prior decision.

The facts are contested however. Damon claims that St. Mary was intended to be a surrogate and not an intended parent, and that the "co-parenting agreement" was actually an invalid surrogacy contract that the women had signed because the clinic that performed the procedure required a written agreement. When the case goes back to the trial court, there will have to be an evidentiary hearing to determine whether St. Mary or Damon is more credible, but Justice Saitta's narration of the facts implicitly suggests that St. Mary's account of what happened makes more sense.

Nevada is now a domestic partnership state, but that development post-dates the relevant facts in this case, as the child was conceived in 2007 and born in 2008, and Damon's initial action seeking a declaration of her status took place in 2009, which is also when St. Mary filed her complaint in this case. Had the women been registered Nevada domestic partners at the relevant time, the law would have recognized both as parents of the child. But many lesbian couples have children without undertaking to register as partners or to marry, so the court's ruling remains important, and continues a trend in applying the up-to-date version of the Uniform Parentage Act as construed in California and followed in New Mexico to encompass the legal situation faced by non-traditional families. ■

Wisconsin Appeals Court Rules Discharge of Harassed Gay Employee Was Not Pretextual

The Wisconsin Court of Appeals, in a rather curt opinion, has affirmed a decision of the state's Labor and Industry Review Commission (LIRC) denying Christopher Bowen's claim that he was terminated from his job because of his sexual orientation and in retaliation for complaining about such discrimination. Bowen had previously appealed to the circuit court, which also upheld the LIRC decision. *Bowen v. Labor and Industry Review Commission*, 2013 WL 5433529 (Wis. App. 2013).

Although the opinion is light on detail, it appears that Bowen, a gay man, was employed as a die cast mold operator for Stroh Die Casting Company, Inc., for some time. During the course of his employment, Bowen contends he was subjected to sexual harassment in relation to his sexual orientation. As part of his initial Wisconsin Fair Employment Act complaint, Bowen alleged this discrimination, and the LIRC agreed, ordering Stroh to pay attorney's fees to Bowen. Simultaneously with the ongoing discrimination, Bowen was involved in two separate altercations while at work, the second of which Stroh claims led to Bowen's termination. Each incident involved disputes with other employees; the first concerned Bowen "yelling and screaming" and the second involved Bowen grabbing a fellow employee's shirt sleeve and "turning him."

Although these were seemingly minor infractions, Bowen was let go, ostensibly due to the written policy at Stroh that a second violation of this type is ground for termination. Bowen, however, contends that he was not actually terminated due to those incidents, but rather that his sexual orientation and prior complaints about harassment at work had led to the decision. Additionally, Bowen claims the supervisor who fired him "had a propensity for failing to tell the truth."

Nevertheless, the LIRC found that there was sufficient evidence to conclude that Bowen had anger management issues, and that termination was appropriate given his behavior, even considering the ongoing discrimination the agency previously had determined that Bowen was subjected to, which the agency found "troubling." LIRC, in examining the evidence, did not agree that that discrimination played a part in Bowen's firing, and in making that determination, found the witnesses and testimony from Stroh to be credible.

The Wisconsin Court of Appeals has affirmed a decision denying an employee's claim that he was terminated from his job because of his sexual orientation and in retaliation for complaining about such discrimination.

Bowen appealed to the circuit court, but the LIRC decision was upheld. Now the Court of Appeals examines the case and looks at the LIRC findings, judging whether the agency's findings are supported by substantial and credible evidence. This deference to the agency is the overarching theme of the entire

opinion and is repeated in nearly every paragraph of the discussion.

In one of the only arguments that the court actually addresses, Bowen contends that his first violation should have been stricken from his record after he completed a referral to Stroh's employee assistance program. The Court notes that while Stroh's policy does allow deletion of a violation, it does so only after 12 months have passed without another similar violation. Since the two incidents involving Bowen occurred only 10 months apart, his argument is not persuasive to the Court.

Bowen also contends that Stroh disciplined him "more harshly and unnecessarily than similarly situated employees who did not" complain about harassment, and that he was disciplined more severely because he is gay. The court completely sidesteps this argument, however, simply restating that they do not re-weigh evidence accepted by an agency. LIRC found that Bowen's argument did not hold water, and the court determines that there was substantial evidence to support that finding.

Bowen makes a few other arguments, including that at least one of the incidents was "staged," but all are brushed aside with the – by this time, well worn – assertion that the court does not reweigh the evidence, and only looks to whether that evidence was credible and substantial. Unsurprisingly, the court sides with LIRC, finding that its determination was adequately supported.

With so few facts set out in the opinion, it is difficult to gauge what exactly happened at the Stroh plant, or what Stroh's state of mind was in letting Bowen go. However, the court seems very eager to dismiss the appeal with little or no discussion, even after LIRC found that Bowen was discriminated against during his employment. One thinks the court would be more critical when examining whether that discrimination also played into his termination. *–Stephen Woods*

Stephen E. Woods is a Licensing Associate at Condé Nast Publications.

Lambda Legal Files Federal Marriage Equality Lawsuit in West Virginia

Attorneys from Lambda Legal, joined by local counsel of Tinney Law Firm, PLLC, and cooperating attorneys from Jenner & Block, filed suit in the U.S. District Court for the Southern District of West Virginia, Huntington Division, on October 1, representing three same-sex couples and the child of one of the couples in a challenge to West Virginia's refusal to allow or recognize same-sex marriages. The lawsuit, *McGee v. Cole*, invokes the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution, asserting a fundamental right to marry under the due process clause and an equal right for same-sex couples to marry under the equal protection clause, as well as asserting the due process and equality rights of a child being raised by a same-sex couples to have the benefits and status of a child of married parents.

The complaint states a multipronged equal protection claim of discrimination because of sexual orientation, sex, parental status and with respect to fundamental rights and liberty interests.

The complaint builds on the Supreme Court's decision in *U.S. v. Windsor*, which ruled that the different-sex-only definition of marriage adopted by Congress in Section 3 of the 1996 Defense of Marriage Act violated the 5th Amendment rights of same-sex couples who were married under state law. The Court found insufficient justification to deprive married same-sex couples of "equal liberty" guaranteed by that amendment. Many key phrases from Justice Anthony M. Kennedy's opinion for the Court are adopted for the complaint in *McGee*, including Justice Kennedy's memorable assertion that children being raised by same-sex couples are "humiliated" by the government's treatment of their marriage as second-class.

In addition to a straightforward due process fundamental rights claim, the complaint states a multipronged equal protection claim of discrimination because of sexual orientation, sex, parental status and with respect to fundamental rights and liberty interests. As to the sexual orientation discrimination claim, the complaint asserts that discrimination because of sex orientation merits strict or heightened scrutiny, arguing that sexual orientation qualifies for such treatment on all the bases identified by the federal courts in prior cases as the analytical requirements. By also invoking sex discrimination, the complaint seeks alternatively to ground the case in an equal protection classification that has already been held to merit heightened scrutiny, and makes a similar claim regarding the appropriate standard of review with respect to the claim of discrimination in the enjoyment of a fundamental right or liberty.

Lambda staff attorneys Beth Littrell and Camilla Taylor, Tinney Law Firm attorneys Jack Tinney and Heather Foster Kittredge, and Jenner & Block attorneys Paul Smith (who argued *Lawrence v. Texas* as a cooperating attorney for Lambda Legal in the U.S. Supreme Court), Luke Platzer and Lindsay Harrison are counsel for plaintiffs in the case. ■

Georgia Supreme Court Rejects Constitutional Challenge to Solicitation of Sodomy Statute

The Georgia Supreme Court has rejected a constitutional challenge to the state's Solicitation of Sodomy statute, OCGA sec. 16-6-15, but overturned the conviction of a male City of Nashville police officer who was convicted of soliciting gay sex from a 17-year-old high school student on the ground that the statute, as narrowly construed to preserve its constitutionality, had not been violated. *Watson v. State*, 2013 WL 5707978, 2013 Ga. LEXIS 860 (Oct. 21, 2013). The court had previously rejected a challenge to the law on free speech grounds in *Howard v. State*, 272 Ga. 242, 527 S.E.2d 194 (Ga. 2000), but this new case provided the first opportunity to reaffirm the law's constitutionality since the U.S. Supreme Court's decision in *Lawrence v. Texas*.

The Georgia Supreme Court has rejected a constitutional challenge to the state's Solicitation of Sodomy statute, but overturned the conviction of a male police officer who was convicted of soliciting gay sex from a high school student.

Police officer James Watson was dispatched to a house where a dog attack occurred. Chase Browning, a friend of an occupant of the house, was present. "After the incident," wrote Justice Carol Hunstein in the opinion for the court, "Watson gave Browning a ride home. Browning testified that, during the car ride, Watson told Browning that he 'wasn't supposed to be giving [Browning] a ride home' and insinuated that he deserved 'something to repay for the ride.' Also during the ride, Browning testified, Watson looked at him and made a lewd gesture, 'grabbing at his genitals and pulling down on his pants.'" The next day, Watson sent a Facebook message to Browning: "I guess we need to discuss my payment for yesterday. You asked what I wanted, so does that mean I get what I want, no matter what it is. I guess you know what I want I am just a little nervous about asking, because I am not sure you will go for it." Watson sent Browning a MySpace message the following day, asking Browning to respond. Browning responded with a text message, asking what Watson meant by "payment." Watson's response: "What about me and u getting 2gether sometime 2 have a little fun if u know what I mean." Browning responded, "Naw man I ain't like that," to which Watson replied, "Ok well if u change ur mind just let me know u may like it I didn't until I let someone talk me into it."

Browning, feeling "very awkward" about all this, reported it to his high school tennis coach, and the school contacted the police department. Browning then placed a call to Watson in the presence of a police agent, saying he was considering Watson's proposal and asking what to expect. Watson proposed an afterschool meeting at an unoccupied house of one of his relatives, then followed up with an invitation to his own house and then, in a phone conversation, for the first time Watson explicitly proposed "acts of sodomy." Watson repeatedly said in all these communications that "it was up to Browning as to what ultimately would happen an that Browning did not have to do anything he did not want to do." The phone calls were recorded and played for the jury at Watson's trial.

Watson was convicted of soliciting sodomy and of violating his oath of office as a police officer. He was sentenced to two concurrent terms of five years – two to be served in prison, the balance on probation – on the oath convictions, and two terms of twelve months for solicitation of sodomy, to be served concurrently. Throughout, Watson maintained that the solicitation law was an unconstitutional violation of his freedom of speech, since the underling acts that he was charged with soliciting were not criminal, and consequently that his conduct also did not violate his oath of office. The trial court rejected his post-trial motions, and his appeal went directly to the state supreme court.

In *Howard*, the court held that "this Court can narrowly construe the solicitation of sodomy statute to only punish speech soliciting sodomy that is not protected by the Georgia Constitution's right to privacy." This comment related back to *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (Ga. 1998), in which the court held that Georgia's right of privacy required construing the state's sodomy law narrowly so as not to penalize consensual sex between adults acting in private. "Though Watson invited us to overrule *Howard*," wrote Justice Hunstein, "we decline to do so, because we believe its holding is well-founded. As we have recent reaffirmed, even statutes that impose content-based restrictions on free speech will not be deemed facially invalid if they are readily subject to

a limiting construction. We therefore adhere to our holding in *Howard* and reaffirm that the solicitation of sodomy statute is constitutional to the extent it is construed to prohibit only that speech by which a person solicits another to commit the offense of sodomy as narrowly defined in *Powell*."

Under that standard, however, the court found that Watson's conviction must be reversed. The age of consent in Georgia is 16, so Browning was above the age of consent.

Watson did not force Browning to do anything. He repeated throughout his communications that he was just asking, and that it was up to Browning whether anything would happen. The court rejected the argument that the situation in which Watson made his initial solicitation took the case out of the consensual sphere. "Though the repeated suggestion that Browning owed Watson some thing in exchange for the car ride home was certainly inappropriate, particularly as directed from a uniformed, on-duty police officer to a 17-year-old boy, we do not find that such conduct rises to the level of intimidation or coercion that would give rise to a finding of sexual contact by force." Although the boy testified that Watson's repeated solicitations made him feel "very awkward," he did not testify that he felt threatened or compelled to do anything against his will. "Moreover, Browning actually declined Watson's overture, after which the parties had no further contact until Browning contacted Watson while in the presence of law enforcement. And the mere fact that Watson occupied a position of authority with respect to Browning is not sufficient to show 'force' in this context."

All of Watson's propositions to meet were to take place in private. Consequently, what he was proposing to Browning was conduct that would not be subject to prosecution under the sodomy statute. Furthermore, the court found, since the oath conviction was premised on Watson having committed a criminal act, it would also have to be reversed. ■

Iowa Appeals Court Affirms Conviction for HIV Exposure

On August 2, 2013, the Iowa Court of Appeals affirmed the conviction of Nick Rhoades, an HIV-positive man who was initially sentenced to 25 years in prison after a one-time sexual encounter with another man whom he first met in an online chat room. *Rhoades v. State of Iowa*, 2013 WL 5498141 (table). Lambda Legal, which represents Rhoades on appeal, has announced that it will file a petition for review in the Iowa Supreme Court.

Rhoades met Alex Plendl in an online chat room in 2008. They agreed after chatting to meet that same night. They engaged in unprotected oral sex and protected anal sex, according to Rhoades. (Plendl testified that the condom came off during anal sex, which Rhoades denied.) Later Plendl learned that Rhoades might be HIV-positive. He contacted local police and agreed to cooperate in the prosecution of Rhoades. Rhoades was arrested a few months later, and on the advice of his counsel pled guilty. Even though Rhoades used a condom and Plendl did not contract HIV, Rhoades was convicted under Iowa Code Section 709C.1 (2007). This is Iowa's HIV criminalization law, which provides that a violation occurs if a "person, knowing that the person's HIV status is positive, engages in intimate contact with another person." Informed consent is an affirmative defense. Under the law as previously construed by Iowa courts, Plendl did not have to contract HIV for Rhoades to be guilty of the crime.

Rhoades at first received the maximum sentence under the Iowa Code: 25 years in prison and classification as the most serious type of sex offender. Later, Rhoades had his prison sentence suspended by the court to supervised probation, but still carries the sex offender status with associated registration and reporting requirements.

The District Court denied his Application for Post-Conviction Relief in 2011. He had argued ineffective assistance of counsel, contending that the attorney who advised him to plead guilty failed to inform him of the specifics of the statute, resulting in his conviction for a crime he did not commit. To prove ineffective assistance of counsel, he must show that his attorney failed to perform an essential duty and prejudice resulted. Under the Iowa Code, he argued, he would have had to have intentionally exposed his bodily fluids to the body part of another for there to be a violation. He argues that his attorney should not have let him plead guilty because there was no factual basis for the charge, as he did not have the requisite intent to expose Plendl to HIV infection. The argument made on behalf of Rhoades was that he engaged in safe sex and did not have the intent required to support a conviction under Iowa's law concerning the criminal transmission of HIV.

Rhoades did not infect Mr. Pendl with HIV, but under Iowa case law that is irrelevant, so long as he did not disclose his HIV status before they had sex. He also contends he didn't intentionally expose Plendl to his bodily fluids. The court did not find this argument persuasive. It interprets the Code section as meaning that if one engages in unprotected sex with another that generally evidences one's intent to expose that other person to bodily fluid, so a factual basis existed to support Rhoades' guilty plea, since there is no dispute that they had oral sex without using a condom. Accordingly, the trial counsel was not ineffective by letting the guilty plea be entered, according to the Court of Appeals.

Thirty-nine states still have HIV-specific criminal statutes similar to Iowa's statute. There are still HIV-related prosecutions in the United States, which perpetuates the negative perceptions of individuals like Rhoades who have HIV. In Iowa, once convicted a person is marked as a sex offender for life. – *Tara Scavo*

Tara Scavo is an attorney in Wash., DC

Oregon Recognizes Same-Sex Marriages from Other Jurisdictions

Relying on an opinion letter from Oregon Deputy Attorney General Mary H. Williams (dated October 16), which concluded that in light of the Supreme Court's decision in *U.S. v. Windsor* and the 9th Circuit's vacated decision in *Hollingsworth v. Perry* it would violate the 14th Amendment for Oregon to decline to recognize same-sex marriages from other jurisdictions, the state's Chief Operating Officer and Director of the Department of Administrative Services, Michael Jordan, sent a memorandum to all of the state's Agency Directors, stating: "Oregon agencies must recognize all out-of-state marriages for the purposes of administering state programs. That includes legal, same-sex marriages performed in other states and countries." Summarizing the Deputy A.G.'s opinion, Jordan continues, "Although the Oregon constitution might be construed to prohibit recognizing out-of-state same-sex marriages, DOJ concludes that such a construction would violate the federal constitution." Jordan had requested an opinion from the state's Department of Justice about "whether Oregon agencies can recognize same-sex marriages from other jurisdictions for purposes of administering Oregon law."

The Williams letter analyzes what might happen were a federal court called upon to rule on this question. "We cannot identify any defensible state interest, much less a legitimate or compelling one, in refusing to recognize marriages performed between consenting, unrelated adults under the laws of another state — marriages that would be unquestionably accorded recognition if the spouses were of opposite sexes," wrote Williams. "Likewise, we cannot identify any legitimate (much less compelling) state interest in requiring that each marriage recognized in Oregon contain one partner of each sex; no benefit to Oregon results from that limitation, and no injury would result from recognizing the marriages." The letter also points out that same-sex couples already are allowed to form domestic-partnerships through a state registration statute, with provides all the state law rights and responsibilities of marriage. "To defend a refusal to acknowledge marriages, the state would have to articulate a state interest in allowing partnerships but refusing to recognize marriages — and, again, we cannot point to any such interest that would pass constitutional muster at even the lowest possible level of scrutiny, rational basis review."

The letter also concludes that a court reviewing this question would most likely apply a higher level of review than rational basis, inasmuch as the right to marry is a fundamental right under Supreme Court precedents, and if the existing refusal to recognize same-sex marriages could not satisfy rational basis review, it would definitely fall under heightened scrutiny or strict scrutiny normally applied when fundamental rights are at issue. In describing the scope of the question, the letter says: "For example, can state agencies treat a same-sex couple married in Washington and not registered as domestic partners in Oregon as married for purposes of administering tax laws and benefit programs such as providing health insurance. We conclude that state agencies can recognize these marriages as valid. To do otherwise would likely violate the federal constitution." *www.buzzfeed.com*, Oct. 17.

With this letter, the state's Department of Justice appears to be conceding in advance that a lawsuit filed just a few days ago in federal district court by two same-sex couples seeking the right to marry in Oregon (see short article below) and to have such marriages contracted elsewhere recognized in Oregon is meritorious under the 14th Amendment, so one could conclude that the Attorney General's representation of the state in opposing that lawsuit will be at most pro forma. The letter concedes that the state constitution's marriage amendment requires the state government, as a matter of state law, to deny recognition to such marriages. But, under the Supremacy Clause of the federal constitution, state law is preempted by federal law.

This turn of events sets up an interesting situation for LGBT Oregonians. Their state is bordered on the north and south by states that authorize same-sex marriages. The federal government now recognizes same-sex marriages, although depending upon the particular federal benefit or right at issue, such recognition may turn on where the couples live and whether their domicile state recognizes their marriage (e.g, social security survivor's benefits), or may just depend on whether the marriage was lawfully contracted where it was celebrated (E.G., federal employee spousal benefits, federal income and estate tax status). In light of the DOJ letter and Jordan's memorandum, Oregonians can obtain full marriage rights and benefits by heading north or south, crossing the state border to marry, and then coming back home.

In light of this, it would be folly for the Oregon legislature to hesitate about passing a marriage equality statute, were it not for the fact that the state's constitution, Article XV, section 5a, states: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." This blocks the legislature from addressing the issue directly by passing a marriage equality law. A federal court order could render the amendment a dead letter, and/or the legislature could take steps to put a repeal measure before the voters. As a matter of public policy, it now makes little sense for Oregon to fail to take the next step and allow their LGBT citizens to get married where they live, since it is highly likely that a federal court will order the state to do just that before too long. ■

Federal Judge Schedules February 25 Trial on Constitutionality of Michigan Marriage Amendment

U.S. District Judge Bernard Friedman heard arguments on October 16 from the state of Michigan and lawyers for a lesbian couple who want to jointly adopt each other's children, before announcing that he was denying each side's motion for summary judgment and scheduling a February 25 trial on the constitutionality of the Michigan Marriage Amendment. The Amendment's constitutionality is an issue in the case because Michigan's adoption statute only allows couples who are married to adopt jointly, and the Amendment prohibits same-sex marriages in the state. The case is *Deboer v. Snyder*, Civil Action No. 12-cv-10285.

In a brief opinion released after the hearing, Judge Friedman explained that there was a factual dispute that would have to be resolved based on trial evidence before he could determine whether the Amendment is constitutional. The dispute concerns the state's argument that "providing children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development" justifies denying same-sex couples the right to marry. Friedman quoted extensively from an affidavit by Dr. Jeanne Howard, Co-Director of the Center for Adoption at Illinois State University, which had been submitted by the plaintiffs in support for their motion for summary judgment. Dr. Howard's affidavit reviews studies showing that children raised by same-sex couples "show patterns of adjustment similar to those of heterosexual adoptive parents and their children," and that other studies have shown "no differences for children in psychological adjustment, gender identification" as between those raised by same-sex couples and by different-sex couples. "After reviewing the record, including Dr. Howard's affidavit, the Court concludes that a genuine issue of material fact exists with respect to defendants' gender role-modeling justification for the MMA," wrote Friedman.

The state had offered three other justifications, but Friedman noted that all of them "have been rejected by other courts in recent years," most significantly in the Supreme Court's decision in Edie Windsor's case on June 26, so this case will be a battle of expert witnesses about the psychological development of children raised by same-sex couples. There are no reputable studies showing that children are disadvantaged psychologically from being raised by same-sex couples, apart from the notorious Regnerus study, whose methodology and interpretation have been severely challenged. If the state calls Prof. Mark Regnerus as an expert witness, his cross-examination by plaintiffs' counsel will provide a first opportunity to question him under oath about the sharply disputed circumstances under which the study was produced and the disputed conclusions about what it purports to show.

If this scheduled trial sounds like a replay of an old show, that's because the Proposition 8 trial in California in 2010 was devoted almost exclusively to this issue, and so was the first-ever marriage equality trial, held in Hawaii in October 1996. In both of those cases, testimony by the state's witnesses ended up making the case for the plaintiffs, as they conceded under cross-examination that children have not been shown to be disadvantaged from being raised by same-sex parents, and that denying their parents the right to marry was actually disadvantaging the children materially and psychologically. In both of those cases, the trial judges produced lengthy opinions with detailed findings of fact, rejecting the state's argument that concern for the psychological welfare of children justified denying the right to marry to same-sex couples.

Judge Friedman announced that he would apply the "rational basis" approach to evaluating the constitutionality of the Amendment. Because the 6th Circuit Court of Appeals, whose precedents bind the district court in Michigan, "does not consider gays or lesbians a suspect or quasi-suspect class" for purposes of constitutional analysis, Judge Friedman concluded that heightened or strict scrutiny does not apply to this case. But he took note of the recent DOMA ruling from the 1st Circuit and the Supreme Court Windsor case, suggesting that something more than the highly deferential traditional rational basis test would apply, in light of the history of discrimination at the hands of the state government suffered by gay people.

Judge Friedman explained that there was a factual dispute that would have to be resolved based on trial evidence before he could determine whether the Michigan Marriage Amendment is constitutional.

While the trial before Judge Friedman is pending, legislative leaders in Michigan supportive of same-sex marriage has introduced bills to repeal the state's marriage amendment, legalize same-sex unions, and allow second-parent adoptions. The measures are given little chance of getting a hearing in the Republican-controlled legislature, but sponsors voiced hope that Republican legislators might respond positively when presented with evidence that the court is likely to rule for the plaintiffs. *Detroit Free Press*, Oct. 16. ■

Gay Man Arrested in Spurious Prostitution Bust Entitled to Trial against New York City

U.S. District Judge Shira Scheindlin has ruled that Robert Pinter, a gay man who claims to have been wrongly arrested on October 10, 2008, and wrongly prosecuted in a scheme by New York City officials to go after adult businesses by accumulating lots of prostitution arrests, is entitled to his day in court against the City. Denying a motion for summary judgment on most of Pinter's federal claims in *Pinter v. City of New York*, 2013 WL 5597545, 2013 U.S. Dist. LEXIS 147459 (S.D.N.Y., Oct. 10, 2013), Scheindlin scheduled a conference on October 31 with counsel to plan for the rest of the case.

This is a case that has already been to the 2nd Circuit, which ruled a year ago that the individual defendants (police officers, prosecutors, city officials) were entitled to qualified immunity, based on that court's conclusion that Pinter's factual allegations would support a finding that the arresting officers had "arguable probable cause" to make their arrest. *Pinter v. City of New York*, 448 Fed. App'x 99 (2nd Cir. 2011), cert. denied, 133 S.Ct. 191 (2012). The 2nd Circuit also said in that opinion that Pinter's claims against the City "are derivative of his claims against the individual defendants, and therefore any claims dismissed as against the individual defendants must also be dismissed as against the City." Relying on this, the City moved to dismiss all of his remaining claims.

But Judge Scheindlin found that the 2nd Circuit has recently issued another decision on municipal liability that contradicts its statement in the Pinter case, *Askins v. Doe No. 1*, 2013 WL 4488698 (2nd Cir., Aug. 23, 2013), and she decided it would be appropriate to follow the newer decision, rather than the earlier *Pinter* decision, as a more recent and authoritative statement by the 2nd Circuit of the circumstances under which a municipality can be held liable for constitutional torts committed by its employees, even though the employees themselves enjoy qualified immunity. She based her decision, in part, on a distinction between "arguable probable cause," as found by the 2nd Circuit, and actual probable cause, concluding that if a jury believed Pinter's account of what happened, it could conclude that there was not actual probable cause for his arrest.

It would not be surprising if a new City administration sees this as one of the pending lawsuits that should be settled without a trial.

According to Pinter, a gay man who was then 52, he was browsing in the pornography section of an adult establishment called "The Blue Door" when a young undercover police officer made eye contact with him and initiated conversation about what Pinter "liked to do." Oral sex came up. Although there was a part of the store where gay men engaged in sexual activity, Pinter said he was nervous about doing anything in the store. The undercover indicated his car was nearby, implying they could go and "do it" there. Pinter started to walk to the exit, followed by the undercover. "At the door but before leaving the store," the undercover said to Pinter, "I want to pay you $50 to suck your dick." Pinter says he was caught off guard by this, quickly decided that there was no possibility that he was going to have sex with this man, but said nothing at first, just continuing to walk toward his apartment, which happened to be in the same direction as the undercover's car. Pinter and the undercover continued to engage in "playful banter" as they walked, with no statement by Pinter that he would accept money for sex and no further mention of money by the undercover. Suddenly some other officers appeared, pushed Pinter against a fence, and arrested him. He was tightly handcuffed and placed in a police van, which drove around for several hours until depositing him at a police station. Although he complained about the tightness of the cuffs, the officers refused to loosen them, even though no other arrestees were in the van and Pinter was unarmed. Pinter subsequently required medical treatment for injuries sustained from this experience.

Pinter initially pleaded guilty to a reduced charge of disorderly conduct, but when he found out that other men were being arrested under similar circumstances he filed a motion to vacate his conviction, which was not opposed by the District Attorney's Office. The Assistant D.A. submitted a statement to the court, stating that it was unlikely Pinter went to the Blue Door intending to solicit money for sex, and that the D.A.'s office had already dismissed three pending cases with similar circumstances after concluding that "it would be difficult to prove the guilt of defendants in those cases beyond a reasonable doubt at trial."

Pinter's federal lawsuit charged the officers, prosecutors and city officials (including Police Commissioner Ray Kelly and Mike Bloomberg) with violations of his constitutional rights, contending that he was subjected to false arrest, malicious prosecution and malicious abuse of process, sexual orientation discrimination, violation of freedom of association, unreasonable detention and excessive force. The individual defendants sought to dismiss the claims against them based on a qualified immunity theory, which Judge Scheindlin rejected but the 2nd Circuit accepted on appeal, with the Supreme Court refusing Pinter's petition to review

that ruling.

In this new opinion, Scheindlin dealt with the City's argument that all the remaining claims should be dismissed. She found, as noted above, that the City could still be held liable for many — but not all — of Pinter's claims. She found that his allegations were not sufficient to support a sexual orientation discrimination claim, because he did not provide any evidence that there was selective prosecution of prostitution cases based on the sexual orientation of those arrested, noting that police records showed that heterosexual women were also being arrested for soliciting at adult businesses. She also found that federal precedents do not recognize a constitutional freedom of association claim based on interference with somebody's ability to shop at a particular commercial establishment.

But Judge Scheindlin found that a reasonable jury could conclude, based on Pinter's allegations in support of his claims, that there was no actual probable cause for his arrest, making it wrongful, that under the circumstances the District Attorney's decision to prosecute him could also be wrongful, and, if he proved the scheme that he was alleging about using spurious prostitution arrests to support nuisance claims against adult businesses, he would have proven abuse of process (the misuse of legal procedures for ulterior purposes). Furthermore, she found that his allegations were sufficient to support claims for excessive force and detention arising from his treatment in the police van, noting that some of the deposition evidence of city officials would support a claim that the City failed to train police officers about their obligations concerning treatment of arrestees.

In other words, the City may still be subject to significant liability in Pinter's case, and it would not be surprising if a new City administration sees this as one of the pending lawsuits that should be settled without a trial. Pinter is represented by attorneys James I. Meyerson and Jeffrey A. Rothman. One hopes they would push for a settlement that would include an agreement by the City to desist from these sorts of spurious arrests and to train police officers about appropriate treatment of arrestees. ■

Federal Court Approves Settlement of Long-Running Litigation over Alabama Prison Policies for HIV-Positive Inmates

U.S. District Judge Myron H. Thompson has signed an Order adopting a settlement agreement negotiated between class counsel and state authorities in *Henderson v. Thomas*, 2013 U.S. Dist. LEXIS 140098, 140094 (M.D. Alabama, Sept. 30, 2013), resolving litigation about the terms and conditions of incarceration of HIV-positive state prison inmates in Alabama.

Alabama began testing inmates for HIV as soon as screening tests became available in the 1980s and adopted a strict system of segregation, housing such inmates in a handful of facilities, requiring them to wear armbands making them immediately identifiable to prison guards as HIV+, and excluding them from the variety of opportunities and amenities made available to Alabama prison inmates generally. This policy had been upheld by the district court and subsequently the 11th Circuit in *Onishea v. Hopper*, 171 F.3d 1289 (1999), which found it justified "primarily based on the dangerousness of HIV," wrote Judge Thompson, recalling the fears of the 1980s and the time before new medications made it possible to control HIV-infection.

"Today," he wrote, "the prognosis for a person who contracts HIV has changed drastically. With proper treatment, a person with HIV can live as long as one without HIV, and the danger that he will infect another is much lower. In light of this changing medical reality for people with HIV, this court held that the ongoing policy of segregating HIV-positive inmates violated the Americans with Disabilities Act and the Rehabilitation Act" in *Henderson v. Thompson*, 913 F.Supp. 2d 1267 (M.D. Ala. 2012). Judge Thompson ordered the parties to negotiate a remedy, and they came back to him on August 1, 2013, with a joint motion asking the court to adopt two agreements: a "public" agreement embodying general policies, and a "private" agreement on detail to be enforceable as a contract under state law. Judge Thompson granted the motion to approve these agreements preliminarily, and then held fairness hearings in the Alabama prison system and solicited comments from inmates.

The September 30 opinion describes the public agreement, responds to the concerns expressed by inmates, and ultimately adopts the negotiated agreements as the remedy in this case. Segregation of HIV-positive inmates will end, the armbands policy will end, inmates will be integrated into general population and may be housed in any of the Alabama corrections facilities, training of staff will take place, appropriate medication will be made available throughout the system, either through on-site or telemedical facilities, and a zero-tolerance policy for harassment or breach of confidentiality will be established and enforced. Judge Thompson approved a $1.3 million fee award to class counsel. The complaint in this case did not seek monetary damages for inmates, but Judge Thompson commented that the final settlement of this litigation does not preclude individual inmates from bringing their own damage actions under the ADA.

Class counsel include Amanda C. Goad, Rose Saxe, American Civil Liberties Union Foundation Aids Project, New York, NY, Carl Takei, Gabriel B. Eber, Margaret Winter, Jennifer A. Wedekind, Washington, DC, Robert David Segall, Copeland, Franco, Screws & Gill, Montgomery, AL. ■

Federal Court Allows Some Parts of Jenkins Civil Rights Suit to Continue

In the long-running saga of *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846 (D. Vt., Oct. 24, 2013), U.S. District Judge William K. Sessions III ruled on pretrial motions concerning jurisdiction, change of venue, and a motion to dismiss for failure to state a claim. Significantly, Sessions found, relying on *U.S. v. Windsor*, that it may be possible to assert a conspiracy to deprive a person of civil rights because of their sexual orientation under 42 U.S.C. Section 1985(3), breaking some new ground in federal civil rights law.

This case arises out of the custody dispute between Janet Jenkins and Lisa Miller, her former Vermont Civil Union partner. Janet and Lisa had a child together while in their civil union. The child, named Isabella, was born in 2002. At the time, the women were living in Vermont, but they subsequently moved back to Virginia, their prior residence. When the relationship between the women ended, Miller filed an action in Vermont to terminate the civil union and determine custody and visitation rights. The Vermont court awarded custody to Miller with visitation rights for Jenkins, who moved back to Vermont.

After Jenkins exercised her visitation rights, Miller, who had become a conservative Christian and eschewed her prior lesbian identity, determined to cut off further contact and brought an action in Virginia seeking to extinguish Jenkins' visitation rights. The Virginia courts ultimately concluded that Vermont had jurisdiction over this case, because that's where Lisa filed the action to determine custody. After Miller and Isabella subsequently disappeared, the Vermont courts awarded custody to Jenkins and held Miller in contempt.

It then developed that various individuals and organizations assisted Miller in leaving the U.S. and eventually settling in Nicaragua under an assumed name to avoid detection. Jenkins has not seen her daughter since the end of 2007. Certain individuals were prosecuted, and one convicted, for assisting Miller in abducting Lisa and moving with her to Nicaragua.

In this action, the defendant Miller is not Lisa Miller but rather Kenneth Miller, not a relative of Lisa, but one of the accused conspirators, together with several organizations and other individuals. In his October 24 ruling, Judge Sessions dismissed the complaint against many of the individual and organizational defendants on jurisdictional grounds, finding that they did not have sufficient contacts with Vermont to ground jurisdiction by the court. However, the court found that at least for purposes of the pretrial motions, it has jurisdiction over Kenneth Miller, Philip Zodhiates, Victoria Hyden and Linda Wall, all of whom are alleged to have played a role in assisting Lisa Miller to flee to Canada with her daughter and then fly south, where she eventually settled with their assistance in Nicaragua.

Judge Sessions concluded that Jenkins could maintain an action for intentional interference with the custody of a minor child against these defendants.

After much analysis of Vermont precedents, Judge Sessions concluded that Jenkins could maintain an action for intentional interference with the custody of a minor child against these defendants. While dismissing Jenkins' RICO conspiracy charges, Sessions concluded that it would be possible for Jenkins to state a claim for a violation of 42 U.S.C. section 1985 – a conspiracy to violate civil rights, specifically premised on anti-gay discrimination. Here, the court found support in the Supreme Court's determination in *U.S. v. Windsor*, that sexual orientation discrimination could be actionable under that provision of federal law. "Although the Supreme Court avoided deciding whether gays and lesbians comprise a quasi-suspect class, triggering heightened or intermediate scrutiny of laws that single them out, at a minimum the Supreme Court acknowledged that same-sex couples constitute a class for purposes of an equal protection analysis. Such a class may invoke protection against invidious discrimination, whether it comes in the form of federal legislation, state legislation, or private conspiracy with a discriminatory purpose," wrote Sessions. "Plaintiffs have not pled such a claim. In contrast to their first count, which contained the elements of tortious interference with custodial rights although it was labeled an intentional tort of kidnapping, Count Four alleges a conspiracy to violate civil rights on the basis of gender, a claim foreclosed by *Bray*. This claim is therefore dismissed. Because it is likely that Plaintiffs will move to amend their Amended Complaint to allege discriminatory animus against same-sex couples, the Court will address Defendants' remaining argument for dismissal of this Count, that Plaintiffs have not shown state action."

Sessions pointed out that under Section 1985(3), state action is not required. This provision "provides

a remedy for persons injured by a conspiracy to deprive them of 'the equal protection of the laws, or of equal privileges and immunities under the law." The court found that thus fair Plaintiffs had failed to identify such a right. However, the court observed that it was possible that Plaintiffs could show a conspiracy to hinder the ability of the state of Vermont to enforce the visitation (and ultimately custody) rights of Jenkins. "When private individuals conspire for the purpose of arresting or impeding the State's power to protect or secure equal protection of the laws to a group of citizens," wrote Sessions, "those conspirators are supplanting the State's conduct with their own. It seems clear to us that such a conspiracy is precisely the type that the *Carpenters* Court was referring to when it discussed a conspiracy 'to influence the activity of the State' and thereby prevent it from securing equal protection of the laws to its citizens. When the State's conduct is thus arrogate, state action is clearly implicated, and rights protected only against official infringement are likewise implicated."

Concluded Sessions on this point, "Whether one concludes that a hindrance clause claim is not limited to right protected only against official encroachment, or that interfering with state officials necessarily implicates state action, a claim that private citizens have conspired against a protected class with invidiously discriminatory animus for the purpose of preventing State authorities from securing equal protection of the law states a valid cause of action. Plaintiffs may move to amend the Amended Complaint to allege a conspiracy to prevent or hinder State authorities from securing equal protection of the laws to same-sex couples, based on invidiously discriminatory animus against gays and lesbians."

The court rejected claims by the remaining defendants that the case against them should be dismissed for improper venue, or that venue should be shifted to Virginia. ■

Schizophrenic Michigan Family Law: Out-of-State Adoption is Stronger than Out-of-State Same-Sex Marriage in Custody Disputes

On October 17, two different panels of the Michigan Court of Appeals ruled in cases where lesbian co-parents were battling over child custody. In one, a birth mother prevailed because the court refused to recognize the couple's Canadian same-sex marriage. In the other, however, the court found that the state's full-faith-and-credit obligation required recognition of an out-of-state second-parent adoption that could not have been done in-state, and affirmed a sole custody award to the second parent adopter of some children from China who had originally been adopted by her former partner.

The juxtaposition of the two cases shows the unusual situation that Michigan's ban on same-sex marriage produces.

In the first case, *Stankevich v. Milliron*, 2013 WL 5663227, 2013 Mich. App. LEXIS 1684 (Oct. 17, 2013) (unpublished opinion), the court of appeals affirmed the Dickinson Circuit Court's award of summary judgment to the birth mother of the child who was conceived through donor insemination, on the ground that her spouse is not legally related to the child. The women married in Canada in 2007, at which time Milliron was pregnant. She gave birth after the marriage.

The parents separated in 2009 and ultimately disagreed on a visitation schedule. Stankevich then sought an order dissolving the marriage, affirming that she is a parent of the child, and making custody, parenting time and child support awards. Milliron moved for summary judgment, arguing Stankevich had no standing to bring the action as a legal stranger to the child.

The court of appeals, in a per curiam opinion, found that under the state's Child Custody Act a parent is either "a natural or adoptive parent" and that Stankevich was neither. "Here, there is no dispute that plaintiff is not related to the child by blood. Thus plaintiff is not a parent as defined by MCL 722.22(h)," wrote the court.

The court refused Stankevich's request to use the "equitable parent doctrine," finding that under Michigan precedents it would not apply to a situation involving a child who was not conceived during a marriage recognized by the state, and Michigan does not, as of now, recognize same-sex marriages.

Citing *U.S. Windsor*, the court said that the definition of marriage is a matter of state law, and Michigan has decided by statute and constitutional amendment to eschew recognition of same-sex marriages. "As we are bound by the Michigan Constitution and the plain statutory language, we agree with the trial court that plaintiff is not a parent as defined under the CCA or the equitable parent doctrine, and therefore lacks standing to bring this action," said the court, which also held

that it could not entertain Stankevich's constitutional equal protection argument, because it was bound by a prior decision of the Michigan Supreme Court and thus did not have authority to declare that such a refusal to recognize the marriage violates the equal protection clause.

On the same day, the Court of Appeals rejected the attempt by a lesbian mother who had entered into joint adoptions of children with her former same-sex partner in an Illinois court to argue in a subsequent custody dispute between them that the adoptions were invalid. *Giancaspro v. Congleton*, 2013 Mich. App. LEXIS 1701 (Oct. 17, 2013).

Diane Giancaspro and Lisa Congleton, Michigan residents, began living together in 1995. Subsequently, Congleton adopted children in China. After bringing the children back to the United States, Congleton and Giancaspro jointly adopted them through a second-parent adoption proceeding in Illinois. They went to Illinois for the adoptions because second-parent adoptions are not available in Michigan. (The pending marriage equality lawsuit in U.S. District Court in Michigan, Deboer v. Snyder, originally began as a 14th Amendment challenge to Michigan's refusal to allow second-parent adoptions.)

The parties' relationship subsequently broke down. In the resulting custody dispute, the trial court at first granted summary judgment to Congleton on her argument that it would violate public policy for a Michigan court to recognize an out-of-state second parent adoption, but the Court of Appeals reversed in an unpublished decision in 2009, finding that full faith and credit required Michigan to recognize the Illinois second-parent adoption judgment. The court of appeals then returned the case to the trial court for a 'best interest of the children' determination.

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Northern Ireland Trial Court Criticizes Health Minister on HIV Blood Donation Policy

The High Court in Belfast, Northern Ireland, ruled on October 11 that the Health Minister's decision not to adopt a new one-year deferral policy instead of the existing lifetime deferral policy on blood donations by men who have sex with men (MSM) was irrational. *Matter of an Application by JR65 for Judicial Review*, [2013] NIQB 101 (High Court of Justice, Belfast, October 11, 2013).

In the United States, men who have had sex with men (even once) since 1977 are permanently disqualified from donating blood. This rule, adopting by the Food and Drug Administration (FDA) in the mid-1980s shortly after epidemiological studies had demonstrated that whatever was causing AIDS was probably a blood-borne pathogen, but also shortly before the particular viral vector had been shown and well before there was detailed information about how it was transmitted and what the risk of transmission was, has persisted, even though scientific evidence was mounting that it was unnecessarily imposing a categorical stigma on a segment of the population that was unwarranted by public health concerns.

The lifetime deferral challenged in this case — and still in effect in the US due to the timorous Food and Drug Administration — is contrary to good public health policy.

Even though the vote was close, the most recent consideration of this issue by those empowered in the United States to recommend and make blood donation policy has failed to change the rule. In other countries where these decisions are grounded more firmly in science and less in politics, changes have been made. In Canada and Great Britain, the lifetime deferral policy has been abandoned and instead men who have had sex with men are placed in the same category as others whose sexual activities and behavior may subject them to heightened risk of contracting HIV and being able to transmit it through blood donations: such individuals may not donate blood within one year of their last risky behavior in England, Scotland and Wales, while Canada has adopted a five-year rule with some indication that it may be reconsidered in light of what the UK has done. (Debate continues about how to define risky behavior for this purpose. Should it include unprotected oral sex? Should it include anal sex with condoms?)

In the U.K., an Advisory Committee on the Safety of Blood, Tissues and Organs (SaBTO) recommended a one-year deferral rule, which was promptly adopted by the Health Ministers in England, Wales and Scotland. But the Health Minister for Northern Ireland, one Edwin Poots, dithered and punted and indicated that he needed more information. This was in the late fall of 2011. After the lifetime deferral policy was lifted elsewhere in the U.K., an Irish resident who would have been disqualified under the new rule but who had experienced a religious conversion and had abandoned a "gay lifestyle" was angered that he would be subjected to a lifetime deferral rule and brought suit anonymously in

the High Court of Justice in Northern Ireland, contending that the refusal of the Health Minister to adopt the new one year deferral rule recommended by the Advisory Committee was legally improper due to its irrationality in light of the scientific evidence, findings and recommendations of the SaBTO Report. He also maintained that it was motivated by anti-gay bias, in violation of the European Convention on Human Rights.

On October 11, 2013, Mr. Justice Seamus Treacy stated his agreement with the anonymous applicant, finding the Northern Ireland Health Minister's decision to leave the lifetime deferral policy intact to be irrational and beyond his authority to do on a unilateral basis. The applicant had suggested anti-gay animus, due to the Health Minister's political affiliations, but Justice Treacy did not have to go there to reach his conclusions. Having found that the Minister's failure to adopt the SaBTO's recommendations constituted a decision which could be challenged under judicial review, Justice Treacy reasoned that it was not totally irrational for the Health Minister to consider that men who had sex with men presented a higher risk of HIV transmission, in general, than other population groups subjected to non-lifetime deferral policies. On the other hand, noting that all the other jurisdictions in the UK had adopted the recommendation, and that every year Northern Ireland required blood in excess of that collected locally and obtained it from sources that were using the new one-year deferral policy, Treacy found reason to question the rationality of the decision to maintain the more stringent rule for Northern Ireland.

He wrote, "The Minister has decided that MSM behavior creates such a high risk of infection to the donor [I think he means to the recipient] that such donors must be permanently deferred with the result that such blood cannot enter the Northern Ireland Blood Stock. Importing blood from other places which do accept MSM donors, even in limited quantities, leaves the door open for MSM blood to do just that. There is clearly a defect in reason here. If there is a genuine concern about safety of MSM donated blood such the blood stock must be protected absolutely from such blood then the security of that blood must actually be maintained absolutely. Applying a different standard to imported blood defeats the whole purpose of permanent deferral of MSM donors. . . . [W]hen blood is imported from the rest of the U.K., the authorities in NI do not request that such blood is not derived from the MSM community." Thus, in this respect, the Health Minister's decision was irrational.

As to the charge of discrimination, Justice Treacy observed that the deferral category is based on behavior, not sexual orientation or identity. Population studies show that a much larger percentage of gay men are HIV-positive than non-gay men. "That male homosexual intercourse occurs mostly between men who are homosexual is unavoidable," he said.

But he went on to develop at length the argument that the Health Minister was exceeding his authority when he made the decision to maintain the current system in the face of the SaBTO Report and its recommendation to shorten the deferral period from lifetime to one year, inasmuch as various laws and rules suggested that this was a matter that should have been brought before other authorities and not decided unilaterally by the Health Minister. Indeed, the judge found a breach of the code of conduct binding on cabinet Ministers. "The issue at hand is both controversial (it has generated much publicity and public debate, and views on the issue are highly polarized) and cross-cutting (it is acknowledged in the SaBTO report that it touches on equality issues, it further deals with the implement of EU Directives) and as such the Minister had no authority to act without bringing it to the attention of the Executive Committee."

Thus, the court concluded that the "decision of the Minister was irrational" and "the application for judicial review is allowed."

When I saw the first headlines about this ruling emanating from the press in Ireland and Britain, I thought the decision had taken a different route than it actually took to get to its conclusion. Justice Treacy actually found that the decision could have been rationally and appropriately taken by the Executive Committee based on the scientific evidence to maintain the lifetime deferral if it were possible for Northern Ireland to get by without requesting additional blood supplies from other jurisdictions that have moved to the one-year deferral system. I part company with him on this. Based on the excerpts he quotes from the SaBTO report, it appears to me that the Report suggests that going from a lifetime deferral down to a 12 month deferral for men who have sex with men does not statistically increase the risk of HIV transmission through donated blood for a variety of reasons, including one that perhaps the Report does not even discuss: that HIV-positive men who are adhering to the current generation of anti-viral drugs can so reduce the incidence of HIV in their blood stream as to almost entirely eliminate the risk of transmitting it, even in unprotected anal sex. What the Report does show, through statistical analysis of cases of HIV transmission through blood donations, is that more such transmissions take place from heterosexual donors than from gay male donors, mainly from HIV-positive heterosexual women and IV-drug users of both sexes. Furthermore, a more workably short deferral period combined with major testing advances have reduced the dangerous "window" period during which recent infection does not trigger antigen tests to about nine days after exposure, during which a false negative test might occur. Taking all these factors together, reducing the deferral period to a year does not increase the risk sufficiently to outweigh the harm of deferring many potential donors who present almost no risk, at a time of continuing shortages of blood, as shown by Northern Ireland's need to import blood every year to make up the shortfall. As public policy, it's really not worthy of serious doubt; the lifetime deferral challenged in this case — and still in effect in the US due to the timorous Food and Drug Administration — is contrary to good public health policy. ■

Alabama Federal Court Rejects Harassment Claims Brought Against Gay Supervisor by Female Subordinate

In *Conner-Goodgame v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 139477 (Sept. 26, 2013), Judge Inge Prytz Johnson of the U.S. District Court for the Northern District of Alabama denied the sexual harassment and hostile work environment claims asserted by a heterosexual female bank employee, who claimed that her gay male supervisor harassed her by talking "about sex literally every day [she] worked" at Wells Fargo.

The court rather easily disposed of all of the plaintiff's claims, going so far as to label the supervisor's alleged comments about giving "good blow job[s]," getting "hit from the back" by his boyfriend, and the need for "bigger breasts" so his boyfriend could kiss them, as only perhaps being in "poor taste for the workplace" but certainly not actionable.

One of the more interesting parts of the decision was how unimpressed the court was by the notion that any of the comments allegedly made by the supervisor could be found objectively offensive.

The plaintiff, Kaneshia Conner-Goodgame, worked in Wells Fargo's home equity department in 2011. Anthony Washington was plaintiff's supervisor during her tenure, which ended with her termination less than two months after she began. Washington terminated Conner-Goodgame for the stated reason that she used her personal cell phone excessively at work and had a poor attitude illustrated, for example, by her refusal to participate in training because she insisted she already knew what she was doing.

Plaintiff recounts a different story. To Conner-Goodgame, her termination was a form of retaliation related to her discomfort with Washington's repeated sexual comments and the overall hostile work environment that she claimed such comments had fostered.

The allegations are worthy of some exposition. In addition to the comments briefly mentioned above, Washington allegedly talked about his desire to have sex with certain male celebrities; that he was the 'girl' and his boyfriend, Manny, was the 'man'; that Washington was denying sex on a given night because Manny was not paying the bills; and, upon seeing male family members pictured on plaintiff's screensaver, Washington commented about "some chocolate" and that he'd like to "bite that." (Author's reminder: these incidents, and others, all allegedly took place during the mere forty-three days that plaintiff worked with Washington). Washington consistently denies making any of these comments, but one colleague testified that Washington indicated the comments about the family members were just a joke.

With these allegations as the backdrop, plaintiff filed suit under a host of different theories, all of which the court rejected, awarding summary judgment in the bank's favor.

First, plaintiff brought a Title VII sexual harassment claim based on the theory 1) that she suffered a tangible employment action and (2) that she was subjected to a hostile work environment.

The court dealt with point one with ease: "Certainly, Conner- Goodgame's termination was not a result of the refusal to submit to any sexual demands."

Turning to the hostile work environment work claim, the court found that the claim failed as a matter of law for two reasons: (1) Plaintiff cannot establish that she was discriminated against on the basis of her sex, and (2) Plaintiff has failed to establish that the alleged sexual harassment she suffered was severe or pervasive. The critical issue, according to the court, is whether members of one sex are "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

The key problem for plaintiff's claims on this front is that nearly all of Washington's comments were not directed specifically at her or at other women in the office, but instead most were overheard comments. So, says the court, there is simply no evidence the comments were directed only at women.

But, even if they were directed at women, the court also ruled that the alleged harassment was not severe or pervasive enough to create an objectively hostile work environment. The court cited to precedent for equally obnoxious behavior that fell short of supporting a Title VII claim; "general vulgarity" is apparently a wide "out" for the truly obnoxious supervisor. Yet, this analysis does seem to ignore the rather compressed time frame in which all of this conduct allegedly occurred.

The court then turned plaintiff's own testimony against her: because she stated that her own performance never faltered as a result of hearing these comments, surely Washington did not unreasonably interfere with her work performance. This writer claims no expertise on the case law supporting that line of reasoning other than to note what an odd rule of law for someone to have to concede to being a less then stellar employee to advance a Title VII hostile work environment claim.

For similar reasons the court rejected the remainder of plaintiff's claims (too numerous to even mention all of them here).

Plaintiff's Title VII retaliation claim failed because, according to the court,

Conner-Goodgame could not in good faith believe that Washington's behavior was directed only at the women in the office, or, in other words, was discriminatory against women. Second, Conner-Goodgame's belief that Defendant was engaged in discriminatory activity was not objectively reasonable, in light of the nature of the alleged comments Washington made. And, finally, the two comments Washington made specifically to her were not so severe or pervasive as to alter the terms and conditions of her employment.

Plaintiff's final claim was that Defendant retaliated against her because she made a complaint about what she thought was Defendant's violation of the Genetic Information Nondiscrimination Act (GINA). Conner-Goodgame's mother contracted HIV from a blood transfusion, and died from AIDS when Plaintiff was sixteen years old. Plaintiff claimed she suffered from anxiety and depression as a result of her mother's death and that she informed Washington of her disability. Conner-Goodgame also alleged that Washington disclosed the information about her mother's death and was subjected to mistreatment by co-workers as a result.

Regardless, says the court, because "GINA's anti-retaliation provision tracks the language of Title VII's anti-retaliation provision," plaintiff's GINA claim fails for the same reason that her Title VII retaliation claim fails.

Thus, this ruling was a total victory for the defense.

One of the more interesting parts of the decision was how unimpressed the court was by the notion that any of the comments allegedly made by Washington could be found objectively offensive. One could be forgiven for imagining a time when many courts, perhaps especially one located in Alabama, might find nearly any comment about gay sex shocking. Perhaps the court's reliance on precedents finding that equally frequent or pervasive comments about heterosexual sex as not being sufficient to create a hostile environment shows that a rough equality of treatment is being recognized. – *Brad Snyder*

Brad Snyder is the Executive Director of LeGaL

Lesbian Flight Attendant Loses Employment Discrimination and Retaliation Case

On September 30, 2013, the U.S. District Court for the Northern District of Illinois, Eastern Division, granted United Air Lines' motion for summary judgment and dismissed a lesbian former flight attendant's federal and state employment discrimination and retaliation claims. *Rabe v. United Air Lines, Inc*. 2013 WL 5433251.

The plaintiff is Laurence H. Rabé, a French citizen who worked for United from 1993 until 2008, when she was terminated, purportedly because she had violated United's rules governing the use of employee travel tickets. After an extensive investigation, United determined that plaintiff had violated its rules by deviating from the travel pass's assigned routing, failing to cancel portions of her travel, and holding a positive space seat out of inventory (which takes a revenue seat out of inventory that could otherwise have been sold). Rabé contended that she had been terminated because of her age, national origin, sexual orientation and in retaliation for complaints about employee discrimination. District Judge Rebecca R. Pallmeyer held that plaintiff could not survive summary judgment on either a direct or indirect method of proof.

The only evidence that supported a direct method of proof pertained to plaintiff's former supervisor, Alwin Fernandes, who she claimed "intentionally guided and influenced" United's investigation against her due to his bias against her based on her sexual orientation. However, "[p]laintiff's only evidence of Fernandes' animus toward her, [was based upon] comments he allegedly made in 1997 about homosexuality in general and its status in India." The court rejected her argument because plaintiff failed to show that: [1] Fernandes was aware of plaintiff's sexual orientation at the time he made the comments; and [2] that Fernandes' could have influenced Elizabeth Jacobsen, the actual decision maker.

As for the indirect method, plaintiff was unable to meet her burden of proof, to wit: (1) that she is a member of a protected class; (2) that she received dissimilar—and more harsh—punishment than that received by a similarly situated employee who was outside the protected class"; and (3) that she suffered an adverse employment action (*Lucas v. Chi. Transit Auth*., 367 F.3d 714 [7th Cir. 2004]). Rabé established the first and third prongs of the prima facie case: "she is a member of multiple protected classes (she is over forty years of age, she is a lesbian, and she is a French national) and her termination constitutes an adverse employment action". But as for potential comparators, the court held that the forty-six employees whom she claimed had violated travel requirements were not alike in all material respects. These employees either did not commit the same violations and/or quantity thereof or plaintiff failed to show that they were otherwise outside her protected class.

Plaintiff's state law claims arising from the Illinois Human Rights Act were dismissed because she failed to exhaust her administrative remedies. However, since the IHRA claims are analyzed under the same framework as Title VII and the ADEA, the court reached the merits of plaintiff's arguments on these claims as well. – *Eric J. Wursthorn*

Eric J. Wursthorn is a Senior Court Attorney in the New York State Unified Court System

New York Family Court Issues a Heartbreaking Ruling against a Non-Biological Parent

In *Matter of A.F. v. K.H.*, V-00918-13, NYLJ 1202621759664, at *1 (Fam., RO, Decided August 05, 2010), the Rockland County (N.Y.) Family Court was forced to issue a heartbreaking decision in a child custody dispute this past summer. The family involves a lesbian couple, who had been in a domestic partnership since 2005, and their two young children. K.H., the respondent in this matter, is also the biological and birth mother of both children who were conceived by artificial insemination by an unknown sperm donor. The couple separated in 2011, and lived together until February of 2013, when K.H. moved with the children to New Jersey, and sometime later, to New York. The former couple initially had organized a visitation schedule for A.F. for weekly and alternate weekend visits. Soon, however, A.F. received a promotion to principal at the Bronx Latin School, and the weekday visitations came to an end.

K.H. then filed a petition in the Rockland Family Court seeking child support from A.F. for the two children, but for an undisclosed reason, K.H. and her attorney withdrew the petition in August 2012. Some months later, in April of 2013, K.H. and A.F. were involved in an altercation after which K.H. forbade all visitation between A.F. and the children. In the issue at hand, A.F. sought custody of the two children.

One of the most interesting parts of this dispute is that prior to the controversy, both parties viewed themselves and each other as "parents" of the children. The children were accustomed to both party's families, and in fact, both children were given the last name of A.F. Furthermore, after the couple actually separated, A.F. and K.H. each paid for half of the children's tuition, babysitting, and extracurricular activities, and A.F. provided insurance for both children.

The court first addressed the issue of whether or not there is some "extraordinary circumstance" that would allow the court to conduct a "best interest" inquiry between the biological parent and non-parent. New York precedents dictate that before a court may interject in the "right and responsibility of a natural parent to custody of her or his child" there must be a finding of "surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance." *Bennet v. Jeffreys*, 40 NY.2d 543, 387 N.Y.S.2d at 549. In this case, A.F. does not allege any of these which would make K.H. an unfit mother, but purports herself to be a good and responsible parent, as an extraordinary circumstance that would "drastically affect the welfare of the child." The court denied A.F.'s argument for failing to meet her burden that a triable issue of fact exists as to "extraordinary circumstances."

Both parties viewed themselves and each other as "parents" of the children.

The next issue is arguably the most heart-wrenching, because existing precedents on the matter bound the Rockland Family Court in denying A.F. her argument of doctrine of equitable estoppel. The Court of Appeals in *Alison D. v. Virginia M.*, 77 N.Y.2d, 569 N.Y.S.2d, held that "parental custody may not be displaced absent grievous cause or necessity…[and] would limit the parents' right to custody and control." The Court of Appeals affirmed this decision in 2013 in *Debra H. v. Janice R.*, 14 N.Y.3d 576, 904 N.Y.S.2d 263, ruling that "any change in the meaning of parent under our law should come by way of legislative enactment rather than judicial revamping of precedent." Most relevant to the issue at hand was the fact that the court also ruled that the doctrine of equitable estoppel might be permitted for child support, but not in situations involving visitation and custody rights. There are, unfortunately, many cases that followed in these decisions' footsteps, therefore essentially forcing the Rockland court to deny A.F.'s argument.

The last issue argued in this case is whether the doctrine of judicial estoppel could prevent the court from dismissing the entire case. The doctrine of judicial estoppel prevents litigants from taking a position in court that is directly opposed to one that he or she had taken before, purely out of change in interest. A.F. sought to enforce judicial estoppel, because K.H. had previously filed a legal petition seeking child support from A.F. and provided multiple examples arguing that A.F. was in fact, a parent, and now argues the exact opposite. Nevertheless, A.F.'s argument fails again because the doctrine presupposes that the party to be estopped has successfully litigated their prior claim. In this case, K.H. formally withdrew her child support petition before any judgment was announced upon it, and therefore it was never litigated. The court cites many case examples that have established and followed this precedent.

Ultimately, A.F. lost her petition for custody and K.H. succeeded on her motion to dismiss the claim. Presumably, and even hopefully, A.F. will appeal the decision and gain a higher court's determination on the matter of same-sex parentage and child custody disputes. Hopefully, the state legislature also takes notice of these cases denying parent and custody rights to deserving parents. Regardless of whether A.F. would be a fit mother (which it seems she would), she and others in her position should not be denied their right to claim because of biology. Continuing to allow these rights to only birth parents would drastically and negatively impact the rights of same-sex parents and their children across the country. – *Parul Nanavati*

Parul Nanavati is a law student at New York Law School ('15).

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DEPARTMENT OF DEFENSE – Defense Secretary Chuck Hagel announced during the summer that military members who needed to travel more than 100 miles from their assigned posting in order to marry a same-sex partner could take up to ten days special leave for that purpose, but press reports early in October suggested that there were problems in implementing this policy. Military personnel requesting the leaves discovered that some commanders were loathe to authorize them, in some cases claiming that they had not received direct authorization to do so, and in other determining that they could not spare the service-member from their assigned duties. As of the beginning of October, the only service that had adopted final written guidelines on the issue was the Marine Corps. The Army and Navy had issued "interim directives" and the Air Force had not adopted any formal guidelines. Press comment on the problems would hopefully build some pressure for the services to get their act together. *Baltimore Sun*, Oct. 2. There had also been blowback from Republicans in Congress, claiming that the Defense Department could not unilaterally adopt a new benefit for military personnel that had not been authorized by Congress, which provides benefits by statute.

NATIONAL GUARD BENEFITS - In addition to jurisdictions noted in last month's issue of *Law Notes*, the South Carolina National Guard announced on October 1 that members who sought to enroll same-sex spouses for employee benefits would have to go to federal installations to do so. The Guard took the position that under the state's constitutional ban on recognizing same-sex marriages, state facilities could not process such applications. However, since the federal government bears most of the expense for the benefits, National Guard members are entitled to obtain those benefits for the spouses they legally married in other jurisdictions. Adjutant General Robert Livingston explained that this approach allows the state to abide by its constitutional requirements while giving same-sex couples access to the benefits. *QNotes.com*, Oct. 1; *Greenville News*, Oct. 2.

FEDERAL TAX / EMPLOYEE BENEFITS GUIDANCE - *BloombergBNA Daily Labor Report* published an article on Oct. 28 about the guidance that had been issued by the Internal Revenue Service and the Department of Labor concerning the impact of the *U.S. v. Windsor* decision striking down Section 3 of DOMA. The article noted some "divergence" between the statutory schemes administered by the two agencies in their treatment of same-sex marriages. According to some of the expert practitioners quoted in the article, DOL's advisory that same-sex marriages would be recognized under ERISA, the federal law regulating employee benefit plans, may have been misleading to some people, because its impact would be mainly on death and survivor benefit s under employer-provided life insurance plans and provisions that are required to be in employee retirement plans, providing inheritance rights for surviving spouses. By contrast, it was asserted, employers are not under any particular obligation under ERISA to provide employee insurance benefits to same-sex partners of their workers, because ERISA in general does not mandate the provision of any benefits, but rather gives a regulatory framework for those benefits that employers extend to their employees either voluntarily or through collective bargaining. Practitioners advised that employers who want to avoid discrimination claims should treat all married employees the same, whether they are married to same-sex or different-sex spouses, but expressed skepticism at any argument that ERISA demands more than that. See K. R. Knebel, DOL Guidance on Same-Sex Spouses Mirrors IRS's, but Practitioners See Some Divergence, 209 DLR A-8 (Oct. 28, 2013).

STATE TAXES – Although the federal Internal Revenue Service announced that legally-married same-sex couples will be treated as married for purposes of federal income and estate tax obligations regardless of their domicile, states that do not recognize same-sex marriages have issued a stream of announcements in response to the IRS announcement, indicating that married same-sex couples in some jurisdictions will have to file their state taxes as single. In some jurisdictions that have civil union or domestic partnership laws, same-sex couples who have registered their relationship are also authorized to file joint returns in common with recognized married couples, so matters will be simplified for them. Some states do not levy individual income taxes or estate taxes, but those that do are in some cases creating special forms that married same-sex couples can use to report how they are allocating and dividing the income and deductions reported on their federal returns for purposes of their state filing. *See, e.g.*, North Dakota's new form ND-1S, described at *GrandForksHerald.com*, Oct. 14. So, ironically, these states' tax departments will necessarily have to "recognize" the existence of same-sex marriages to the extent of creating and publishing a special form to be used by those of their taxpayers who have same-sex spouses. *BloombergBNA Daily Tax Report*, 202 DTR G-4 (Oct. 18, 2013).

TEXAS – A San Antonio news website, *MySA.com*, reported on October 29 that a lawsuit was filed in federal district court in San Antonio on October 28 challenging the state's ban on same-sex marriage. The plaintiffs are two

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couples: Mark Pharris and Vic Holmes, seeking the right to marry, and Cleopatra De Leon and Nicole Dimetman, seeking recognition for their marriage that was formed in another jurisdiction. They are represented by Barry Chasanoff of Akin Gump Strauss Hauer & Feld, a large Texas-based law firm. The news report quotes the complaint: "In Texas, Plaintiffs cannot legally marry their partner before family, friends, and society – a right enjoyed by citizens who wish to marry a person of the opposite sex. And should they become married in a state that has established marriage equality, Texas explicitly voids their marriage." The complaint asserts that there is "no rational basis, much less a compelling government purpose, for Texas to deny plaintiffs the same right to marry enjoyed by the majority of society." *Pharris v. Perry* (W.D. Tex.).

KENTUCKY – The *Associated Press* reported on Oct. 2 that Attorney General Clay Barkley had filed a motion to dismiss a same-sex marriage recognition lawsuit pending before U.S. District Judge John G. Heyburn II. *Bourke v. Beshear* was filed in July on behalf of Gregory Bourke and Michael De Leon, who married in Canada in 2004 and live in Kentucky. The men contend that Kentucky's refusal to recognize their marriage violates the 14th Amendment. They are raising two children together, but because of the state ban one of them is designated a parent and the other a guardian. The A.P. report characterized the state's dismissal motion as "boilerplate legal language," and it would be absurd to contend in light of *U.S. v. Windsor* that a straightforward equal protection/due process claim for marriage recognition fails to state a claim. It seems more likely that this case would be resolved on summary judgment motions.

NORTH CAROLINA – Attorney General Roy Cooper, a Democrat, who is defending a marriage equality/second parent adoption lawsuit brought by the ACLU, *Fisher-Borne v. Smith*, Civ. Action No. 1:12-cv-589 (M.D.N.C.), announced on October 13 that he personally supports same-sex marriage, noting that he had opposed passage of the state's anti-marriage constitutional amendment in May 2012. At the same time, he said he would vigorously defend the amendment and North Carolina statutes in the lawsuit as representative of the state government. Inspired by Cooper's announcement, Buncombe County Register of Deeds Drew Reisinger announced on October 14 that he would accept marriage license applications from same-sex couples, although he would not issue actual licenses until he obtained clearance from the Attorney General's office. Eleven couples applied for licenses on October 15, but a spokesperson for the Attorney General's office issued a statement that "these marriage licenses cannot be issued. This is the law unless the Constitution is changed or the court says otherwise. This very issue is the subject of pending litigation against the State of North Carolina." Cooper's statements have created "apprehension" among the Republican legislative leadership and Governor Pat McCrory, also a Republican, about whether Cooper will provide adequate representation to the state in the pending case, where there is a motion to dismiss pending. A brief in support of the motion to dismiss, filed by the A.G.'s office, argues, "The right for a man and a woman to marry is fundamental, the right to other unions, including same-sex marriage, is not." *Associated Press*, Oct. 15; *Ashville Citizen-Times.com*, Oct. 14. Registrar Reisinger submitted a formal request for an opinion letter from the Attorney General, having received marriage applications from eleven same-sex couples, posing the following questions: Whether in light of *Windsor* the current North Carolina same-sex marriage ban violates federal and state equal protection requirements; whether in light of these legal developments Reisinger can provide marriage licenses to same-sex couples; whether North Carolina's marriage amendment, passed in 2012, violates state and federal equal protection requirements. *Morgantown News Herald*, Oct. 22.

OKLAHOMA – Why not? That was the response when Native Americans Jason Pickel and Darren Black Bear called the Cheyenne and Arapaho Tribe's courthouse and asked whether the men could get a marriage license and tie the knot courtesy of the tribal court. So they plan to do so on Halloween, according to a report by *KOCO.com*, October 22. That will make them the first same-sex couple to marry in Oklahoma, although they are not certain whether either the state or the federal government will recognize their marriage.

OREGON – A new battleground for marriage equality opened up in Oregon on October 15 when Portland lawyers Lake Perriguey and Lea Ann Easton filed an action in the U.S. District Court in Eugene on behalf of two same-sex couples, contending that the state's Measure 36 of 2004, which enacted to anti-gay marriage amendment to the state constitution, violates the 14th Amendment. *Geiger v. Kitzhaber.* Deanna Geiger and Janine Nelson argue that they have a right to marry, and Robert Deuhmig and William Griesar, previously married in Vancouver, Canada, assert that they are entitled to a declaration that Oregon must recognize their marriage. This introduces a parallel track to the marriage equality strategy in Oregon, where the organization Oregon United for Marriage is raising money for a campaign to repeal Measure 36 through an initiative. A prior attempt to challenge Measure 36 in the state courts was unsuccessful. *Willamette Week*, Oct. 15.

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PENNSYLVANIA – Lawyers retained by Governor Tom Corbett to defend against the ACLU's marriage equality lawsuit, *Whitewood v. Corbett*, No. 13-1861(M.D. Penna., filed July 9, 2013), filed a motion to dismiss the lawsuit for failure to state a claim on September 30. Corbett had to retain counsel because Attorney General Kathleen Kane declined to defend that state's mini-DOMA, calling it "wholly unconstitutional." In light of the ongoing litigation and decisions thus far in marriage equality, the contention that the complaint, which relies on 14th amendment due process and equal protection claims, fails to state a claim at the dismissal stage is absurd, and it is likely that this case will be resolved on cross-motions for summary judgment before too long. *Bloomberg.com*, Sept. 30. * * * After a meeting with counsel on October 9, U.S. District Judge John E. Jones 3d said that he would try to rule on the state's motions by mid-November. If Jones agrees that the court lacks jurisdiction to sue the governor and the state's Secretary of Health as a result of 11th Amendment immunity, the case may be over. Counsel for plaintiffs indicated that they would appeal any ruling to that effect to the 3rd Circuit. Meanwhile, plaintiffs' counsel indicated that they were not seeking a preliminary injunction, but rather a declaratory judgment after a trial on the merits. *Philadelphia Inquirer*, Oct. 10. * * * Montgomery County filed an appeal on October 1 of the decision by Commonwealth Court Judge Dan Pellegrini finding that County Register of Wills D. Bruce Hanes lacked the power to decide whether the state ban on same-sex marriage was unconstitutional. *Commonwealth of Pennsylvania v. Hanes*, No. 379 M.D. 2013 (Commonwealth Court, Sept. 12, 2013). Having made that determination, Hanes proceeded to issue 174 marriage licenses to same-sex couples until Judge Pellegrini issued an Order enjoining him from continuing to do so. In his appeal, Hanes argues that Pellegrini should have determined whether the state's marriage ban is constitutional, an issue Pellegrini avoided by focusing solely on the authority of Hanes' office to make such a determination. In separate litigation, some of the couples married pursuant to those licenses are suing for a declaration that their marriages are valid, and a same-sex couple married out of state has filed suit for recognition of their marriage. * * * Lesbian widow Barbara Baus has filed suit in Northampton County Orphan's Court against the Pennsylvania Department of Revenue, seeking a spousal exemption against taxation on the inheritance from her late spouse, Cathy Burgi-Rios. The women married in 2011 in Connecticut, and lived together for more than fifteen years. Burgi-Rios died in 2012. Baus sought the spousal tax rate of 0% on her inheritance, but was turned down by the Revenue Department on the ground that her married was not valid in Pennsylvania, and her inheritance was subject to a 15% tax. Baus's petition argued that the Department's failure to recognize her marriage violates the 14th Amendment. This makes at least the fourth pending lawsuit in Pennsylvania, some in state courts and some in federal courts, seeking marriage equality. *Lehighvalleylive.com*, Oct. 28.

TEXAS – The University of Texas at San Antonio has decided to allow the same-sex spouse of an Air Force captain to benefit from the reduced tuition rate available for spouses of military personnel, even though Texas does not recognize same-sex marriages. The University reached this decision after its initial denial of the tuition request was questioned by Lambda Legal, which pointed out that in-state reduced tuition was a benefit afforded to military personnel stationed in Texas as part of their federal marital status.

UTAH – Plaintiffs and defendants filed motions for summary judgment on October 11 in *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS, a lawsuit pending before U.S. District Judge Robert J. Shelby (D. Utah) asserting a claim for marriage equality. Plaintiffs, three same-sex couples, are represented by attorneys Peggy A. Tomsic, James E. Magleby, and Jennifer Fraser of Magleby & Greenwood, P.C., in Salt Lake City. Two of the plaintiff couples have applied for and been denied a marriage license by county clerks; the third couple was married in Iowa and is suing for recognition of their marriage in Utah. All the plaintiffs are Utah residents who have lived to together for several years. Their argument, simply put, is that Utah's anti-same-sex marriage constitutional amendment and statutes violate the 14th Amendment by denying due process and equal protection to LGBT Utahans. The memorandum in support for the motion for summary judgment draws upon the Supreme Court's recent decision in *U.S. v. Windsor* and the substantial body of Supreme Court decisions holding in various contexts that denial of the right to marry concerns a fundamental right. The plaintiffs argue that the state would be required to meet the burden of strict scrutiny or heightened scrutiny in defending the existing marriage bans, and that they could not do so under established federal constitutional precedents. A copy of the motion and memorandum in support can be found at 2013 WL 5761262. The state cites the inability of same-sex couples to procreate through sexual intercourse as a reason to treat them differently from different-sex couples, arguing that the restriction of marriage promotes the state's interest in "responsible procreation" and the "optimal mode of child-rearing." The state also argues that there is no discrimination because both men and women are equally forbidden to marry persons of the same sex, and that the question of marriage is a policy issue that is essentially not justiciable. "Plaintiffs are free to advocate for their

own version of marriage through the political process," argues the state, "but they are not entitled to have their views imposed by judicial fiat." *Salt Lake Tribune*, Oct. 12.

VIRGINIA – U.S. District Judge Michael F. Urbanski rebuffed a suggestion by the state government that the two pending marriage equality lawsuits in Virginia be consolidated or the second be put on hold while the first is litigated. The first case, *Bostic v. McDonnell*, was filed in the Eastern District of Virginia by private counsel, who have since been joined by Ted Olson and David Boies. *Harris v. McDonnell*, pending before Judge Urbanski in the Western District of Virginia, was filed by the ACLU, Lambda Legal, and cooperating local counsel. As filed, *Bostic* was an action by plaintiff couples seeking the right to marry. *Harris*, by contrast, was filed as a proposed class action, seeking both the right of same-sex couples to marry and the right of same-sex couples married elsewhere to have their marriages recognized in Virginia. After *Harris* was filed, the *Bostic* plaintiffs added another couple seeking recognition of their out-of-state marriage. The state argued that the first case to be filed should be litigated while the second was placed on hold, and that it should not be required to litigate two simultaneous summary judgment motions. Plaintiffs' counsel in *Harris* pointed out that the state could file identical papers in response to the summary judgment motions in both cases. Judge Urbanski, who sounds in his opinion of October 18 reluctant to cede the case to the Eastern District and eager to get on with the summary judgment motions, opined that in the 4th Circuit there is not any sort of strict adherence to a "first-to-file" rule, especially when the cases are filed within weeks of each other and are at the same stage. (In this case, summary judgment motions were filed in both cases at the same time.) Urbanski did grant the state's request to give it some more time to respond to the plaintiffs' massive summary judgment motion. *Harris v. McDonnell*, 2013 U.S. Dist. LEXIS 150330 (W.D. Va., Oct. 18, 2013). On October 29, Judge Urbanski heard arguments on the plaintiffs' motion to certify the case as a class action representing all same-sex couples similarly situated to the plaintiffs, and the defendants' motion to dismiss Gov. Bob McDonnell and Staunton Circuit Court Clerk Thomas E. Roberts as defendants, which would leave as sole defendant Janet Rainey, the state registrar of vital records. The state argues that Rainey is the only relevant official concerning the administration of the state's marriage laws for purposes of this federal constitutional litigation. Urbanski did not indicate when he would rule on the motions, but cancelled a previously scheduled January 3, 2014, hearing that would have been the first argument on the merits of pending motions for summary judgment, perhaps signaling that he expects to take longer than that resolving the motions that have just been argued. But the timing of all this raises an interesting political note that may also be weighing on the judge. While the current Republican Administration of Governor McDonnell is strongly defending the state's ban on same-sex marriage, the Democratic candidate for Governor, Terry McAuliffe, supports marriage equality, and might not be so strongly inclined to defend the lawsuit. As of the end of October, McAuliffe was leading his Republican opponent, the current Attorney General, Ken Cuccinelli, an opponent of marriage equality, but by a small enough margin that the outcome of the election cannot be forecast with certainty. Perhaps Urbanski does not want to commit to a hearing date for the argument on the merits before there is more certainty who will be serving as governor and attorney general. There may also be some strategy in delaying while the *Bostic* summary judgment motion is being decided, especially if it results in a New Jersey style scenario of a decision for the plaintiffs that a newly-elected pro-marriage-equality governor decides will not be appealed. . . In that case, the *Harris* suit could be dismissed as moot without Urbanski having to make a ruling on the merits.

WASHINGTON – The state's Judicial Conduct Commission has reprimanded Thurston County Superior Court Judge Gary Tabor for his statement that he would not perform marriages for same-sex couples but would refer them to colleagues who were not "uncomfortable" with performing such marriages. His comments leaked to the press, and Judge Tabor then reiterated his position in interviews. The State Judicial Commission pointed out that because Tabor had officiated at "traditional" weddings in the past, he was subject to anti-discrimination requirements. If he continued to officiate at weddings, he could not discriminate. Tabor's response was that he will stop performing weddings altogether. *Legal Monitor Worldwide*, 2013 WLNR 25624978 (Oct. 12, 2013).

CIVIL LITIGATION NOTES

U.S. 2ND CIRCUIT COURT OF APPEALS – A three-judge panel unanimously ruled in *Blackmore v. Holder*, 2013 WL 5433356 (Oct. 1, 2013), that a gay man from Guyana had failed to prove that he was likely to suffer torture at the hands of the government if he were removed from the U.S. to his homeland, and so denied review of a decision by an Immigration Judge and the Board of Immigration Appeals to deny him relief under the Convention Against Torture (CAT). "Even if Blackmore is correct that the agency failed to articulate its basis for finding that Guyana's law criminalizing

homosexuality was a lawful sanction within the meaning of the CAT, we decline to remand because the agency's finding that Blackmore failed to establish that he would likely be prosecuted under that law, or otherwise tortured, was reasonable." The court noted that the IJ found that Blackmore's testimony at his 2012 merits hearing concerning conditions for gay people in Guyana "was out of date," and that "the more recent reader submissions to the *Stabroek News* were entitled to diminished evidentiary weight because they contained unsubstantiated assertions by unknown authors." The court noted that neither Blackmore nor his mother (presumably a witness in the case) had visited Guyana in recent years so they "lacked first hand knowledge of current country conditions," and that the State Department's 2009 Human Rights Report on Guyana did not identify prosecution under the criminal homosexuality laws as a significant issue. "In light of the foregoing and the IJ's explicit finding that Blackmore failed to show he would likely be arrested on account of his sexual orientation, his argument that the agency failed to consider whether he would be prosecuted under Guyana's law criminalizing homosexuality is without merit." We have but two words for this kind of decision: willful blindness. Virulently anti-gay attitudes prevail in most of Africa at both the official and social levels, to the extent that it seems ridiculous to require gay Africans seeking refuge in the United States from anywhere other than South Africa to have to prove on an individual basis that they are likely to encounter persecution in their home country if they are known to be gay. Furthermore, a 2009 State Department country report generated during the Bush Administration is likely to paint a different picture from a later State Department report generated during the Obama Administration, which exhibited much more sensitivity to treatment of gay people in its data-gathering and evaluation for these annual reports.

U.S. 2ND CIRCUIT COURT OF APPEALS – A panel of circuit judges, obviously appalled at a requirement that a man would be subjected to the "penile plethysmograph" as a condition of probation, vacated this "challenged condition of supervised release" in *United States v. McLaurin*, 2013 U.S. App. LEXIS 20210 (Oct. 3, 2012). The opinion was jointly authored by Circuit Judges Guido Calabresi and Barrington Parker, and joined in full by Circuit Judge Jose Cabranes. The opinion is striking for the frequent reference to "penis" in a relatively short opinion. The defendant, McLaurin, had been convicted of producing child pornography ten years ago when he took photos of his then 13-year-old daughter with her breasts exposed, even though the child testified that she had requested the photos to "help in her modeling career." This made him a sex offender, subject to registration requirements when he was released after serving a prison term. Although he kept probation authorities advised of his address through several moves, he neglected to complete and file certain paperwork, which resulted in his being charged with violating the Sex Offender Registration and Notification Act, a federal statute. The federal judge sentenced him to 15 months in prison and five years of supervised release, imposing the condition of participation in a sex offender treatment program that could include submitting to the penile plethysmograph, presumably to determine whether he was erotically stimulated by images of nude teenage girls. He claimed a due process violation, and the 2nd Circuit judges agreed with him. "A person, even if convicted of a crime, retains his humanity," they wrote, and "He also retains his right to substantive due process, even if it is sharply diminished in many respects." They found the testing requirement to be "a sufficiently serious invasion of liberty such that it could be justified only if it is narrowly tailored to serve a compelling government interest," and they found that this test had not been met. The court stated that the government "cannot point to any consensus on the reliability of plethysmographic data. And even if we were to consider the purported correlation between increasing penis size and recidivism to be strong, the correlation would be irrelevant. The testing could not help to protect the public unless the results were used to justify further detention or more restrictive conditions of release. But that could not occur because McLaurin had already received a fixed term of incarceration followed by a fixed term of supervised release, neither of which could be altered by a poor test score." Continued the court, "Our criminal laws are intended to punish a mental state only when it accompanies an unlawful act. But unacted-upon prurient sexual thought, just like 'a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.' We see a clear distinction between penis measurement and other conditions of supervised release which are reasonably calculated to protect the public. These would includes restrictions on where sex offenders may live, their interactions with children, and their access to pornographic material. But we see no reasonable connection between fluctuating penis size and public protection – certainly none strong enough to survive the careful scrutiny that we give to unusual or severe conditions of supervised release." They also found that the government provided no evidence that the plethysmograph's use was therapeutic for the probationer, or had any direct relationship to the offense – failure to file registration forms – for which McLauren was being sentenced.

CIVIL LITIGATION

U.S. 2ND CIRCUIT COURT OF APPEALS – The 2nd Circuit affirmed a decision by U.S. District Judge Paul Engelmayer (S.D.N.Y.) to grant summary judgment to the employer in a hostile environment same-sex sexual harassment case, *Mendez-Nouel v. Gucci America, Inc*., 2013 WL 5584317, 2013 U.S. App. LEXIS 20676 (October 11, 2013) (to be published in Fed. Appx.). In its summary order, the court upheld the district court's conclusion that plaintiff had failed to show that his working environment was tainted by sufficiently severe or pervasive harassment to constitute a sex discrimination claim. "Viewed in the light most favorable to Mendez, the record indicates two instances of touching, the more significant being an incident in which Mendez's supervisor touched his lower back for four to five seconds. There was also workplace banter about a supervisor's sexual orientation and nightlife, and a single occasion where a supervisor told Mendez that he was gay but 'you just down know it.'" Mendez also lost out on his retaliation claim, the court finding that "the evidence of a legitimate, nondiscriminatory reason for Mendez's termination was abundant."

U.S. 5TH CIRCUIT COURT OF APPEALS – In a per curiam opinion issued on October 7, the 5th Circuit found that a gay man from Honduras could not rely on a county conditions report that predated his original removal hearing to provide the basis for a contention of "changed conditions" in support of a motion to reopen his case. *Garcia-Perez v. Holder*, 2013 U.S. App. LEXIS 20445. The petitioner attempted to enter the U.S. illegally at the Texas border in February 1999, but was apprehended by the border patrol and transported to Mexico, but Mexican authorities returned him across the border, advising the Border Patrol that he was not a Mexican, and he was released, only to be apprehended and detained by the Border Patrol in 2002 in New Orleans. He was served with a Notice to Appear for a removal hearing, but failed to appear and suffered an in absentia order of removal, which was mailed to him at his last known address but returned as undeliverable. Nine years later, he filed a motion to reopen and rescind the 2002 removal order, making various arguments about why is prior failure to appear should be excused. In addition, he asked that the proceedings be reopened to receive evidence in support of his claim that he had suffered persecution and torture in Honduras due to his sexual orientation, and was likely to be subject to such treatment if returned there. But the Immigration Judge denied his motion. Wrote the court, "Although the IJ noted that Garcia-Perez had provided 'chilling details,' the IJ concluded that, because the incidents recounted in the declaration and the Application happened before Garcia-Perez's entry into the United States in 1999, those incidents did not constituted 'changed country conditions' under 8 C.F.R. sec. 1003.23(b)(4)(i). The IJ also found that the evidence was not credible, noting that Garcia-Perez had a history of providing false information to the United States immigration authorities." The BIA affirmed. The court agreed with the BIA. "Read together with the declaration and the Application, these 'country conditions' reports – presumably, the secondary accounts attached to the motion – to not contain new facts that would support a grant of asylum. The alleged country conditions existed prior to the date of the removal rehearing, as explicated in detail by Garcia-Perez. The law requires a petitioner to show *changed* conditions in order to reopen a removal proceeding. Garcia-Perez had the opportunity to assert the basis for an asylum or withholding of removal for nine years before he filed his motion to reopen; he therefore cannot avail himself of Sec. 1229a(c)(7)(C)(ii). Accordingly, the IJ's decision was not 'without foundation in the evidence' or 'arbitrary rather than the result of any perceptible rational approach.'" Left unsaid, but implicit in this ruling, is that evidence of conditions in Honduras for gay people during the 1990s might have little relevance in considering the conditions gay people face in that country today, which would be most relevant to whether the removal of Garcia-Perez to that country would subject him to a high risk of persecution or torture on account of his sexual orientation.

U.S. 5TH CIRCUIT COURT OF APPEALS – The court rejected an appeal by a gay native of the former Yugoslavia (Kosovo) against a decision by the Board of Immigration Appeals (BIA) denying his bid for asylum, withholding of removal or protection under the Convention Against Torture (CAT). *Shala v. Holder*, 2013 U.S. App. LEXIS 20754 (October 14, 2013). The Immigration Judge made an adverse credibility determination based on inconsistencies in Shala's application and testimony, and also held that even if Shala was credible, he had failed to satisfy his burden of proof for obtaining relief, and the BIA dismissed Shala's administrative appeal. In a brief per curiam opinion, the court said, "The inconsistencies between Shala's applications and his testimony show that the adverse credibility determination was supported by the record. The opposite conclusion, that Shala was credible, is not compelled by the evidence. Thus, we may not reverse this finding." Shala sought on appeal to rely on "various handbooks, memoranda, and country reports as well as his recent marriage." (Presumably, that is a same-sex marriage.) But the court of appeals said it was not "bound by such materials" and, since Shala had not relied on them before the IJ or the BIA, he could not rely upon them before the court of appeals. The court pointed out that a specific statutory provision

"expressly strips this court of authority to order a remand for consideration of additional evidence." The court also rejected Shala's argument that the denial of his motions to change venue from Dallas to New York deprived him of due process, since he failed to show the result would be different. Shala never briefed his claim for protection under the CAT, so the court found that claim to be waived.

U.S. 6TH CIRCUIT COURT OF APPEALS – The court concluded that a psychiatrist working at a Michigan state prison as a contractor of a private company could not invoke the doctrine of qualified immunity to avoid liability to a gay prisoner for failing to follow up on the prisoner's request to be placed into protective custody. *Lee v. Willey*, 2013 WL 5645773, 2013 U.S. App. LEXIS 21197 (October 17, 2013)(not for publication in F.3d). According to the opinion for the court by Circuit Judge Bernice Bouie Donald, "In March 2007, prison officials brought Larry D. Lee, Jr., to the Jackson facility for inmate intake and processing. At the outset, prison officials subjected Lee to abusive verbal harassment on the basis of his sexual orientation." A prison psychologist referred Lee to Dr. Kameshwari Mehra, the psychiatrist, after his mental health intake screening. Lee expressed to Mehra "fears and phobias about being harassed by other prisoners and staff inside the prison." Merha's notes reflect his observation that Lee "appeared to be overly concerned about his safety in the prison system, because of his sexual orientation." Lee specifically expressed concern about being sexually assaulted, and asked Mehra to put him in protective custody, but Mehra took no action on this request, although he had authority to take action. "Three days later, two unidentified inmates raped Lee at knifepoint" but prison officials refused to let him file a grievance. Several days later, however, he was able to file a grievance against some prison officials for their homophobic remarks, but this grievance did not mention the assault. Lee subsequently saw Mehra and told him: "I can take it anymore. I am stressed out. Everyone is talking about my sexual orientation and making all kinds of bad remarks. I can't take it anymore. I need help." Mehra prescribed medication for Lee's anxiety, but again took no action on protective custody. Soon thereafter the Department of Corrections transferred Lee to another facility. Lee filed an 8th Amendment suit against many of the prison officials, including Mehra. A magistrate judge recommended summary judgment in favor of Mehra, except for the claim of "deliberate indifference arising from the psychiatrist's alleged failure to protect his patient-prisoner." Finding that a right to such protection was well-established, the magistrate concluded that Mehra did not enjoy qualified immunity. The district court accepted this recommendation, and Mehra filed an interlocutory appeal. The 6th Circuit panel concluded that under prevailing circuit precedent, Mehra would not enjoy qualified immunity in any event because he was not an employee of the Department of Corrections, and affirmed the district judge's refusal to grant summary judgment on immunity grounds.

U.S. 6TH CIRCUIT COURT OF APPEALS – In *Eden Foods, Inc. v. Sebelius*, 2013 U.S. App. LEXIS 21590 (October 24, 2013), another panel of the 6th Circuit reiterated the Circuit's precedent that a for-profit corporation is not a "person" for purposes of the Religious Freedom Restoration Act, and thus that the sole shareholder of the corporation is not entitled to a preliminary injunction against the Affordable Care Act's requirements that the corporation provide its employees with a health insurance plan that includes coverage for women's prescription contraceptives or face a financial penalty for failing to comply with the minimum coverage requirements of the ACA. The court noted that another 6th Circuit panel's decision in *Autocam Corp. v. Sebelius*, 2013 U.S. App. LEXIS 19152 (Sept. 17, 2013), remains the law of the circuit unless an en banc panel takes a different position, but the panel asserted that it would have reached the same conclusion even in the absence of the binding precedent. It is likely that the Supreme Court will address the question whether for-profit business corporations that are closely held or have only one shareholder enjoy 1st Amendment free exercise of religion rights (as codified in RFRA) before too long, in light of a circuit split on the question.

U.S. 9TH CIRCUIT COURT OF APPEALS – A divided panel of the 9th Circuit ruled in *Salazar v. Holder*, 2013 U.S. App. LEXIS 20047 (Oct. 1, 2013), that a gay man from Mexico waited too long to move to reopen his removal proceedings. Salazar filed his motion more than five years after the Board of Immigration Appeals ordered him removed. He claims the motion was timely because changed conditions in Mexico made it more dangerous for him to return there. The court wrote, "The Board did not abuse its discretion in rejecting Gonzales Salazar's changed country conditions claims. Gonzalez Salazar filed to put the agency on notice of the specific claim raised here, that conditions in Mexico have worsened for homosexuals. As the claim has not been exhausted, we lack subject-matter jurisdiction to review it." Judge Berzon filed a partial dissent, agreeing that the petitioner should have filed his motion within the deadline, but she felt that the BIA should be required to reconsider the changed country conditions ruling. "Gonzalez Salazar explicated argued in his motion to reopen that 'conditions in Mexico have

changed for the worse since 1997.' His original brief supporting that motion did not mention changed conditions for homosexuals; instead it referenced an attached declaration discussing conditions for homosexuals in Mexico, at length. That referenced declaration, together with articles and reports describing increased homophobia and hate crimes in Mexico submitted with Gonzalez Salazar's post-remand brief, sufficed to put the agency on notice of a changed country conditions claim." Berzon rejected the BIA's claim that the petitioner had not explicitly made such a claim. "In fact," she wrote, "much of Gonzalez Salazar's evidence submitted after remand, including recent articles and testimony regarding worsening conditions for homosexuals in Mexico over the past ten years, could not have been presented to the BIA during Gonzalez Salazar's 1999 removal proceeding." These cases take so long that sometimes the evidence on the hearing record is well out of date by the time the BIA considers an appeal, and even more severely out of date by the time a case gets to the court of appeals.

U.S. 9TH CIRCUIT COURT OF APPEALS – A 9th Circuit panel ruled on October 17 that substantial evidence supported an Immigration Judge's conclusion that an HIV-positive man from Bolivia had not shown he was likely to be subjected to persecution if he was deported to his home country. *Medina v. Holder*, 2013 WL 5651319, 2013 U.S. App. LEXIS 21041 (not selected for publication in Fed.3rd). However, the court remanded the case to the Board of Immigration Appeals on other grounds having to do with the BIA's failure to follow 9th Circuit precedent concerning the interpretation of 8 C.F.R. sec. 1003.2(d) on the question whether the Board was barred from reconsidering a removal case when a change of governing law occurred after the case was concluded.

U.S. COURT OF APPEALS FOR VETERANS CLAIMS – A man who was discharged from the Navy in October 1957 for homosexuality will get a second shot at his "claim for service connection for an acquired psychiatric disorder, to include post-traumatic stress disorder, schizoaffective disorder and bipolar disorder," which claim had been denied by the Board of Veterans Appeals. *White v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 1802 (Oct. 29, 2013). In his September 2009 claim, Gordon White "explained that during service his attacker and a second sailor reported that Mr. White was a willing participant in sexual activities that Mr. White stated were nonconsensual. Mr. White stated that the Navy believed the two other men and gave Mr. White a dishonorable discharge. He stated that while he was on a weekend pass a fellow sailor had sexually assaulted him and later, on base, the perpetrator reported that Mr. White was homosexual, which led to Mr. White's discharge." The Regional Office denied his claim, asserted that service records did not support his current allegations and "contradicts your personnel file and all evidence" which indicated he had engage in consensual homosexual activity while in the Navy. White disputed this, and also pointed out that a handwritten statement by him from 1957 that appeared in the file was partially illegible. Writing for the court, Judge Bartley submitted the RO's analysis to searching scrutiny and found it deficient. "The Board's analysis implies that if Mr. White were involved in 'consensual homosexual acts' in service, he could not also have been sexually assaulted during service. The Board failed to explain why the veteran's in-service statement [the 1957 statement] that certain sexual activity was consensual is inconsistent with his recent statement that he was sexually assaulted in service. The Court agrees with Mr. White that, 'for the veteran's statements to be inconsistent, the Board would have had to have found that all the acts constituting the alleged military sexual trauma were in fact the same acts the veteran consented to, a finding which has not been made here.'" The court also criticized other aspects of the RO's decision, including its failure to take account of the 1957 context, the likely failure at the time to report sexual assaults for fear of being dismissed for homosexual conduct. Also referring to the legibility issue, Bartley wrote, "the Board described the content of the 1957 handwritten letter but failed to discuss that significant parts of the letter are completely indecipherable. Although the Board reported to rest much of its credibility analysis on the fact that Mr. White's later statements conflict with this document, it is unclear to the Court how the Board determined that the statements conflict when large sections of the 1957 document, including portions that appear to relate to what happened in service, are indecipherable except for a few isolated words and phrases." Bartley also noted, "the decipherable parts of the letter appear to relate to sexual relations between 13-year-old Mr. White and an uncle. In arriving at its credibility determination, the Board refers to Mr. White's pre-service and in-service sexual activity as 'voluntary' and consensual, and implies that adolescent sexual relations with his uncle support the Board finding that all later in-service sexual activity with a male sailor was consensual. Remand will allow the Board to reassess this unfortunate analysis." The court also faulted the Veterans Administration for not satisfying its duty to assist in developing White's claim.

BOARD OF IMMIGRATION APPEALS – Lambda Legal and the Center for HIV Law & Policy have reported success in getting the Board of Immigration Appeals (BIA) to reverse and remand a ruling that had denied a claim for protection under the Convention Against Torture for a gay

man from Jamaica. According to a press release and amicus brief distributed by Lambda Legal, the man came to the U.S. as a teenager and went through a protracted period struggling with his sexuality until finally realizing he was gay at age 25. During this period of struggle, he had sexual relationships with both men and women, and fathered two children. The Immigration Judge found that the evidence of his sexual orientation was "inconsistent." While acknowledging testimony from former and present male romantic partners, the judge found this to be contradicted by evidence about past female partners and fathering a child and made an adverse credibility determination. The brief argued that the judge's conclusions rested on inaccurate stereotypes about the coming-out process of gay men, and failed to take account of the culture in which the applicant was raised. The BIA agreed with the petitioner that he should be able to put on his case that he would be subjected to potential torture if returned to Jamaica, where press accounts and personal testimony document a ferociously homophobic climate abetted by the government. The individual's name is being withheld because of his fear that if he is identified as gay in a public document, he would be tortured and killed if he is ultimately forced to return to Jamaica.

CALIFORNIA – In an unpublished opinion, *Latty v. Crosslin*, 2013 Cal. App. Unpub. LEXIS 7332 (October 11, 2013), the 1st District Court of Appeal rejected an appeal from the Superior Court's decision that granted a petition to reform a family trust under which the defendant-appellant, William J. Crosslin, an HIV-positive man, had been living in the family residence. Crosslin's mother, Mary, was the guardian of Rebecca Kinsfather, her mentally retarded granddaughter. Under the terms of the trust, Kinsfather was to continue living in the house after Mary's death, and the other trust beneficiaries, including William, could also live there as long as it was Kinsfather's residence. The trust provided that if Kinsfather stopped living there, the property would be sold and proceeds divided among the beneficiaries. After Mary died and some years had passed, other arrangements were instigated by Williams' sister, Darlene, and they made a settlement agreement under which William continued to live in the family home, subject to a notice to vacate within 30 days. But the following year, Darlene and Rebecca (through her guardian ad litem) petitioned the court to reform the trust, deleting the provision under which William could continue living there so long as Rebecca was in residence. William appealed the court's approval of the petition. William contended in his appellate brief that the trial court had "rewritten the Trust to remove [the settlor's] intent" even though "the only thing that has changed is the fact that Miss Latty does not want to live with someone who is HIV positive" due to "her unrealistic fears about how HIV is transmitted." However, the court said, William failed to direct the court to anything in the record "to demonstrate how the trial court erred." To judge by Judge Martin Jenkins' discussion for the court, William's brief was long on generalizations and short of facts and details. Without any grappling with the merits, the court found that William's deficient brief, and his failure to file a reply to the respondent's brief, required that his appeal fail. We could not tell from the first LEXIS report of the decision whether he was appealing pro se, or represented by counsel at trial. If he did have legal representation, the court's comments about the deficiencies in the briefing and the lack of a reply could have serious repercussions for counsel.

INDIANA – U.S. Magistrate Judge Roger B. Cosbey ruled that the Diocese of Fort Wayne-South Bend is not immune from almost all of the discovery requests made by Emily Herx, who is suing for sex discrimination (pregnancy) after being discharged from her teaching job at a Diocese school. Herx, an unmarried lesbian, notified her principal that she would need maternity leave. The response of the Diocese was that becoming pregnant violated the morals provision in her contract, requiring discharge. The Diocese did not back down when Herx explained that she was pregnant through donor insemination, not non-marital intercourse. Herx sued for sex discrimination under Title VII, and after surviving a motion by the Diocese for judgment on the pleadings, she served a discovery request, seeking to uncover evidence in support of her argument that unmarried male employees who got their girlfriends pregnant were not discharged. The Diocese resisted some of the discovery requests, in particular objecting to her demand for Diocese records showing the treatment of all male employees in such situations who might serve as comparators for her discrimination claim. In responding to the motion, she narrowed her request to cover all employees at Diocese schools who were required to sign the morals provision in their employment contract, and the court found this to be a reasonable request under federal discovery rules. The court rejected the Diocese's argument that it has a 1st Amendment privilege to avoid Title VII liability for sex discrimination, having previously concluded that the ministerial exemption does not apply to Herx's position. However, the court found it irrelevant to require the Diocese to affirm that it employs openly lesbian and gay staff, and excessively burdensome to ask the Diocese to specify "'all ways in which a male employee can commit an impropriety regarding Church teachings and laws' regarding infertility treatments and sterilization or birth control." Wrote Cosbey, "Because these Interrogatories

seemingly encompass innumerable scenarios, to require the Defendants to identify each possible event or factual subset places them in the position of trying to corral a virtually limitless universe of improprieties, many of which have no relevance to the instant dispute." *Herx v. Diocese of Ft. Wayne*, Case No. a:12-CV-122 (N.D. Indiana, Oct. 7, 2013).

INDIANA – A male high school student who had been subjected to sexual harassment by other male students, perhaps based on his perceived failure to conform to sex stereotypes, suffered summary judgment on his claims against the school district because school authorities suspended and expelled the identified perpetrators swiftly when the student, after much delay, brought the issue to their attention. U.S. District Judge Sarah Evans Barker's opinion in *Davis v. Carmel Clay Schools*, 2013 U.S. Dist. LEXIS 141888 (S.D. Ind., September 30, 2013), finds that M.D.'s allegations could support a Title IX claim for sex discrimination and denial of educational opportunities, but that liability could not be fixed on the school district in light of its prompt action. She rejected the plaintiffs' allegations that school authorities "must have known" that M.D., who is not gay, was being harassed, in default of any evidence demonstrating such knowledge prior to a meeting at which M.D., a student manager of the basketball team who claimed he was subjected to harassment by basketball players, communicated these problems to the basketball coaches. Judge Barker also rejected M.D.'s equal protection and due process claims against the school district, saying that M.D. could not premise those claims on actions by the students involved, since there was no evidence that the school reacted with deliberate indifference when the issue was brought to officials' attention. She also rejected a "failure to train" claim, stating that plaintiffs had "offered no evidence to demonstrate" that the school's policies "were so obviously deficient as to alert the School's policymakers that its employees would likely violated the constitutional rights of its students." The school district's summary judgment motion only addressed the federal claims in the case. M.D. also sued on state law negligence claims. Judge Barker decided, in light of the time and judicial resources that had been expended on the federal claims and their interrelationship with the state law claims, that she would retain supplemental jurisdiction over the state law claims, and that "the case will proceed accordingly."

IOWA – A group that specializes in litigating religious freedom cases, the Becket Fund for Religious Liberty, filed a lawsuit on October 7 in the Polk County, Iowa, District Court, seeking a declaratory judgment that an unincorporated business run by a Mennonite couple is not required to provide services for same-sex wedding ceremonies. *Odgaard v. Iowa Civil Rights Commission*. Betty Ann and Richard Odgaard purchased a building previously occupied by a church and have adapted it to their use as an art gallery, with a lunch "bistro," a flower shop, a gift shop and a framing shop. But their major revenue source is hosting wedding receptions and providing a backdrop for wedding photographs. According to a news report, their lawsuit was provoked when they turned down a same-sex couple from Des Moines who wanted to rent the hall for their wedding in August, and one of the men filed a complaint against them with the Iowa Civil Rights Commission, alleging a violation of the public accommodations law. Not waiting to see what the Commission would do with the case, they have run to court seeking a declaratory judgment that they had not discriminated based on sexual orientation within the meaning of the state's public accommodations law, and were in any event sheltered from any liability by the Iowa and federal constitution's protection for religious liberty. The Iowa constitution and statutes provide broad protection for free exercise of religion, apparently going beyond the scope of federal 1st Amendment protection. They allege that the Iowa Civil Rights Act, when amended to cover sexual orientation as a prohibited ground of discrimination, was also amended to "preserve the right not to facilitate same-sex wedding ceremonies on religious grounds" such that an adverse determination against them by the Commission "would violate the plain terms of the Iowa Civil Rights Act." They assert that the Iowa Supreme Court's subsequent marriage equality decision does not change this. One might well respond that these arguments should be made first to the Commission, not to the court. They also claim that they do not discriminate based on sexual orientation, that they welcome gay people as patrons of their business, but that their religious beliefs preclude them from any involvement in same-sex wedding ceremonies.

IOWA – U.S. Chief District Judge Linda R. Reade (N.D. Iowa) dismissed a sexual orientation employment discrimination claim that was file two days late in *Barrett v. Carlos O'Kelly's, Inc*., 2013 U.S. Dist. LEXIS 143338 (Oct. 2, 2013). Barrett claimed that he was forced to quit his job with defendant due to derogatory comments by his co-workers and the failure of management to take any action when he complained. He filed a complaint with the Iowa Civil Rights Commission, under the state law banning sexual orientation and sex discrimination, and received an Administrative Release on February 20, 2013, advising him that a court action must be initiated within 90 days. He filed suit on May 23, 2013, in Black Hawk County District Court, alleging violations of a city ordinance, the Iowa

Civil Rights Act, and Title VII of the Civil Rights Act of 1964. Including the Title VII claim gave the defendant the ability to remove the case to federal court. Defendants filed an answer to the complaint on June 26, then suddenly awakened to the obvious fact that they should really have filed a motion to dismiss on timeliness grounds and filed that motion on July 3, 2013. Barrett did not file any opposition to the motion. Judge Reade stated that since the motion was not opposed, she could just grant it without writing an opinion, but she decided to issue a few paragraphs, pointing out that Iowa law would govern this outcome-determinative motion, and Iowa law was clear in requiring that suit be filed within 90 days after the Commission issues an Administrative Release. The court's opinion lists counsel for Barrett, but we will refrain from naming them for obvious reasons.

IOWA – The Iowa Civil Rights Commission has recently issued decisions in three cases involving discrimination complaints by transgender women who were excluded from female-designated facilities, according to an October 27 article in the *Des Moines Register*. Jessica Smalley was unsuccessful in seeking to use women's facilities at the YMCA in Burlington. Administrative Law Judge Jeffrey Farrell wrote in her case, "The Iowa Civil Rights Act cannot be interpreted so broadly as to give a biological male, albeit one who identifies herself as a female, the right to change clothes with and shower in a female locker room." But Jodie Jones was successful in her claim to a right to use the women's restroom at the Johnson County Courthouse, and Charlene Adams also won a ruling on restroom use. Evidently the Commission's administrative judges are drawing a line between restrooms and locker rooms. In Jones' case, Commission Civil Rights Specialist Sara Stibitz wrote, "The new law does require that individuals are permitted to access (restrooms) in accordance with their gender identity, rather than their assigned sex at birth, without being harassed or questioned." The article reported that the number of gender identity discrimination claims filed with the Commission had increased from 6 in the fiscal year ending June 30, 2008, to 51 in the most recent fiscal year that ended June 30, 2013. The suggestion was that increased awareness of the statute rather than an increase in gender identity discrimination was behind the increased number of complaints. The Iowa legislature added "gender identity" to the statute in 2007.

KENTUCKY – The Court of Appeals of Kentucky affirmed an award of joint custody by Jefferson Circuit Judge Donna Delahanty in a contested lesbian partner custody case. *Druen v. Miller*, 2013 Ky. App. Unpub. LEXIS 842 (Oct. 18, 2013). Duren and Miller began their relationship in 1997, and began living together in 1998. They decided to have a child, with Miller becoming pregnant through donor insemination, and their child was born in 2003. They lived together as a family until Druen moved out in 2007; the child remained in the home with Miller, with Druen exercising liberal visitation rights. A few years later, Miller filed a petition, seeking joint legal custody of the child with Druen. Druen opposed the action, contending that Miller lacked standing to see custody because she "was not Child's biological parent and not a de facto custodian as described in Kentucky Revised Statutes 4003.270. However, Judge Delahanty found that Miller was a "person acting as a parent" under KRS 403.822, and that Druen's actions had waived her superior right as a biological parent to have custody. The trial court concluded it would be in the child's best interests for her two mothers to have joint custody, and Miller appealed. The Court of Appeals found no error by the trial court, asserting that the case was controlled by *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), in which the state supreme court ruled on a similar fact pattern involving a same-sex couple. The facts of the two cases lined up very well. "In the case at hand," wrote Judge Stumbo for the panel, "Druen wants sole custody, while Miller wants joint custody. Child is happy with the custody arrangement as it stood at the time of the custody hearing and wants to spend as much time with Druen and Miller as possible. Witness testimony indicated that both parties provide a loving and nurturing environment for Child and that Child is thriving. There is also no indication that Child is not adjusted to her current living situation." This was also the recommendation of the Guardian ad litem, appointed by the court to represent the child's interests. The court concluded that it was "evident that the trial court did not abuse its discretion in awarding Druen and Miller joint custody. The parties have already been living in a joint custody type situation since 2007. Furthermore, the Child is flourishing and is happy with her situation." And that's how we want it.

KENTUCKY – The Louisville Metro Human Relations Commission has ruled that the Audubon Park Police Department violated the county's human rights ordinance when it discharged Kile Nave, a gay police officer, last August. *Courier-Journal*, Oct. 9. Nave alleged that after he complained about a constant stream of harassment from department officials, he was subjected to retaliation, and when he continued to complain, he was investigated for "insubordination" and charged with violation department policies, then terminated. The Commission issued its probable cause finding in a letter to Nave's attorney, who is also representing him in a proceeding in Jefferson Circuit Court.

CIVIL LITIGATION

MASSACHUSETTS – Due to sloppy paperwork, a Massachusetts inmate was improperly subjected to anti-HIV retroviral therapy when he was not, in fact, HIV-positive. His attempt to claim redress against state officials suffered significant setbacks when District Judge Joseph Tauro dismissed many of his claims on immunity grounds or because the pleadings were not specific enough to implicate particular named defendants in responsibility for this mix-up. *Canales v. Gatzunis*, 2013 WL 5781285 (D.Mass., Oct. 28, 2013). However, a few tort claims remain in play against some defendants after this decision. Is unwarranted HIV therapy a compensable civil wrong? The inmate vociferously denied that he was HIV-positive, fruitlessly requested to see documentation, and unsuccessfully urged that he be tested to confirm his status, but officials at the Suffolk County House of Correction asserted over and over that he was HIV-positive, until somebody discovered the error in paperwork and concluded that the inmate was being given treatment that was intended for a different inmate, after which he was informed of the error and the termination of his treatment. In the meantime, he had told family and friends and was suffering the "stigma" of being mistakenly considered HIV-positive. The complaint is ambiguous about how long the unnecessary treatment continued, or the scope of physical side-effects he might have suffered from the medication. How this ultimately turns out will be quite interesting.

MASSACHUSETTS – U.S. District Judge Rya Zobel rejected a state prison inmate's claim that a new policy requiring HIV-positive inmates to stand in line with other prisoners to receive their medication at the prison Health Services, rather than to self-administer medications in their cells, violated their 8th Amendment rights. *Nunes v. UMass Correctional Health*, 2013 U.S. Dist. LEXIS 143292 (D. Mass., Oct. 3, 2013). Zobel found that the policy did not show deliberate indifference to serious medical conditions, but merely changed the method of providing medication. She also noted that the prison had accommodated protesting inmates by allowing them to stand on the less-heavily patronized evening line. Responding to the argument that requiring the inmates to stand on line would violate their right of privacy concerning their health condition, the judge pointed out that there was some question whether a privacy right in medical information was constitutionally protected, and noted various policy reasons that supported the hospital's policy change, including encouraging compliance with treatment regimens when Health Services staff observed inmates taking their medication. She also noted cost issues.

MINNESOTA – The Court of Appeals of Minnesota upheld a decision by a trial court that an HIV-positive infant is a "child in need of protection or services" because the persistent HIV denialism of his mother and grandparents, in *Matter of the Welfare of the Child of J.M. and L.N., Parents*, 2013 WL 5778225 (Oct. 28, 2013) (unpublished decision). The mother, who lives with her parents, is HIV-positive but concealed that fact from health care workers when she gave birth, and resisted having her son tested. As a result of mother's failure to disclose her status, she was not offered prophylactic treatment during pregnancy to prevent infecting her newborn, and after the birth, even when testing occurred as a result of the child's development of telltale symptoms, the mother and grandparents were not fully cooperative with the treatment regime, endangering the child's life in the opinion of the medical experts who testified to the court. With the CHIPS designation, the adults charged with caring for this child will have continuing supervision by health care authorities. Wrote Judge Stoneburner: "The record reflects that child's HIV infection and associated ailments puts his health in an exceedingly precarious position. There is evidence that even a five-percent noncompliance with his treatment regimen could have severe consequences and that, without treatment, child faces a significant risk of AIDS or death within 12 months. The district court's findings and conclusions that child is a CHIPS under Minn.Stat. sec. 260C.007, subd. 6(9) because he is in an environment that is dangerous to his health and that child is, as a result, in need of protection or services of the court are fully supported by the record."

MISSISSIPPI – U.S. Magistrate Judge Linda R. Anderson granted a motion for summary judgment in favor of Madison County Sheriff Randall C. Tucker in a lawsuit brought by Marcus Deonta Chapman, a former detainee at the County Detention Center, in claims relating to her sexual orientation and HIV treatment (or lack thereof). *Chapman v. Tucker*, 2013 U.S. Dist. LEXIS 140702 (S.D. Miss., September 30, 2013). Chapman, a cross-dresser, was arrested on September 20, 2010, and was housed at MCDC until February 11, 2011. He had previously been incarcerated there from 2006 until he was released in May 2010. During the prior incarceration, he was diagnosed HIV-positive and was receiving medication. He stopped taking medication while out in "the free world," but upon re-incarceration, he informed intake staff that he had been receiving HIV medications of various types, but could not remember what he was taking on the "outside." In his lawsuit, he claims he was deprived off HIV medication during his second incarceration, although the medical records indicate he was given the same meds he had been getting during his prior incarceration. He was put into segregation over his protest, Center

authorities indicating this was for his safety, noting his protests about the sexual advances he received from male prisoners. His lawsuit alleged he did not receive proper medical treatment, that he was segregated because of his sexual orientation, that the officers called him names and criticized him, and that the medical staff had improperly released his medical information. The judge found that the amount of attention he received about his medical condition totally undermined any claim of "deliberate indifference" to his medical needs, and that his prison records "confirm that when he was housed among other male prisoners he created a risk both to himself and other detainees." Furthermore, his allegations of breach of confidentiality were too non-specific, and "nowhere in his Complaint or his Testimony does he identify any detention center official who actually made derogatory remarks to him regarding his sexual orientation or his medical status." Judge Anderson asserted that the segregation was constitutional, finding that in this case the security concerns outweighed his interest in not being segregated, and that "abusive language of a custodial officer does not, even if true, amount to a constitutional violation." Finally, suing the Sheriff was improper because Chapman failed to allege any personal involvement be the Sheriff in any of the conduct he was protesting, and respondeat superior liability is not available in prisoner lawsuits.

NEW JERSEY – A Monmouth County Superior Court jury has awarded $800,000 in damages against the Holmdel Board of Education in a wrongful termination/hostile environment suit brought by Laurie A. Cancalosi, the district's former Supervisor of Helath, Physical Education and Athletics. Cancalosi, a lesbian, alleged that she was the victim of a hostile work environment, suffered discrimination because of her sexual orientation, and was wrongfully fired. She claimed that the Board failed to act on complaints she brought to its attention about her mistreatment. The district's Superintendent was also named as an individual defendant, but the jury only awarded damages against the District. New Jersey's civil rights law prohibits employment discrimination because of sexual orientation. The verdict was returned on October 8 after the jury had deliberated "between four and five hours over two days," according to a report in the *Asbury Park Press* (Oct. 9). Judge Thomas F. Scully presided over the trial. Cancalosi now works as K-12 Supervisor of Health and Physical Education for the Long Branch public school system.

NEW JERSEY – Is it actionable defamation for a plaintiff's lawyer to publicize the fact that it filed a lawsuit accusing an employer of discriminating against the plaintiff because of the plaintiff's race or sexual orientation? In *Perez v. Factory Direct of Secaucus, LLC*, 2013 U.S. Dist. LEXIS 152407 (D.N.J., Oct. 23, 2013), the defendant employer filed a third party defamation and false light claim against the law firm representing the plaintiff, The Ottinger Firm PC, claiming to have been defamed by a news release the law firm published on its website, as well as comments purportedly attributed to the firm in reports about the lawsuit in other media. Judge Dennis M. Cavanaugh granted the law firm's motion to dismiss the third party claims, finding that the statement in issue either were true (i.e., that the firm had filed a lawsuit alleging that the employer had discriminated on the specified grounds) or consisted of opinion statements that were not actionable. The law firm was careful to use the word "alleged" in its statements about the defendant. The opinion would provide interesting reading for any lawyer who contemplates making public statements about his client's case and would like enlightenment on the boundaries between defamation and non-actionable speech.

NEW JERSEY – U.S. District Judge Renee Marie Bumb has ordered the Social Security Administration to reconsider its denial of disability benefits to an HIV-positive man, finding fault with various aspects of the Administrative Law Judge's decision in *Richardson v. Comm'r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 154822 (D.N.J., Oct. 29, 2013) (not officially published). Judge Bumb found that the ALJ did not give adequate weight to the plaintiff's subject pain symptoms or the opinions of his treating physician, and that there were inconsistencies between the hearing record and the opinion. (For example, there was extended discussion between the ALJ and the plaintiff in the hearing record about the plaintiff's dizziness and side effects of his medication, but no discussion of these factors in the ALJ's decision despite their obvious relevance to a determination whether the plaintiff had sufficient residual functional capacity to be employable. For another example, the ALJ's finding about the plaintiff's durational capacity to sit or stand conflicts, without explanation by the ALJ, with his testimony in the hearing record.) The judge also noted that, depending how these medical issues play out on remand, a new analysis by the vocational expert could be necessary to determine whether the plaintiff is employable in available jobs in the economy.

PENNSYLVANIA – Philadelphia Common Pleas Judge Gregory Smith has granted an appeal to the Commonwealth Court from his ruling in *Wolf v. Temple University Health System*, in which he held that there was no loss of consortium claim by a same-sex couple in a medical malpractice suit.

In his order granting the appeal, Smith wrote: "This court is of the opinion that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate appeal from this order may materially advance the ultimate termination of this matter." *The Legal Intelligencer*, Oct. 2, 2013.

PENNSYLVANIA – Differences of opinion about how and when a person with HIV should receive particular medical treatments in a prison setting don't amount to an 8th Amendment deliberate indifference case except in extreme circumstances, which is why *pro se* prisoner cases making such claims usually fail. See, e.g., *Boone v. Daughtery*, 2013 U.S. Dist. LEXIS 148033 (W. D. Pa., Oct. 15, 2013). Plaintiffs in these cases also frequently come to grief for failing to allow the prison's internal grievance and appeal process to run its course before they file their federal law suits, since federal statutes require exhaustion of administrative remedies before suing about conditions of incarceration.

TEXAS – The Texas 1st District Court of Appeals (Houston) affirmed a Harris County trial judge's ruling that a gay former employee of the Harris County Hospital District could not maintain discrimination and retaliation claims against his former employer. *Lee v. Harris County Hospital District*, 2013 Tex. App. LEXIS 12778 (Oct. 15, 2013). The Texas Commission on Human Rights Act does not forbid sexual orientation discrimination, so even if Lee had alleged facts sufficient to support such a claim, it would not be actionable under state law. But his appeal placed more emphasis on his retaliation claim. Lee and two supervisors were returning to the hospital by car from a meeting when they drove over a stretch of highway where some bodies had been found, mutilated in such a way as to give rise to speculation about their sexuality. Lee alleges that these two supervisors who knew that he was gay and might be offended nonetheless made offensive remarks, and that when he subsequently complained about the remarks, he became the victim of "an aggressive campaign of intimidation" and was subsequently discharged. Although Lee went to see his supervisor and complained about the remarks, he had never filed a discrimination complaint with the hospital. Taking a narrow view of the ban on retaliation under the Texas law, the court said that Lee had not engaged in "protected conduct" of asserting a claim of discrimination in his conversation with his supervisor, and engaging in "protected conduct" was a prerequisite for a retaliation claim. "Lee argues that he was not required to use legal terms or buzzwords when opposing discrimination," wrote Judge Evelyn V. Keyes for the appellate court. "However, the employee's complaint must be specific enough to put the employer on notice that it was based on some form of discrimination the employee reasonably believed was prohibited by the TCHRA." In this case, though, "Lee did not suggest in his conversation with Carl that Carl's or Ron's conduct was related to his own sexual orientation or any characteristic protected by the TCHRA." Further, "Lee's statement to Carl that he was extremely offended by the story Ron told regarding the circumstances surrounding the football player's suicide is not sufficiently clear or detailed, or directly related to Lee's employment, for a reasonable employer to understand it as an assertions of rights under the TCHRA. . . The content of Lee's comments to Carl addressed a story regarding the suicide and apparent sexual orientation of a third person who was not known personally to any of the people involved in this lawsuit. Lee did not request that Carl take any action based on his complaint, nor did Lee himself take any further action based on his complaint until later, after he had been terminated." Lacking evidence that he had engaged in statutorily-protected activity, Lee could not maintain an action for retaliation under the statute.

TEXAS – The U.S. Justice Department has filed suit under the Fair Housing Act against George Toone and In Toone Services, a Texas recreational vehicle park, on a claim that the park violated against Roxanne Joganik, a transgender woman, because of her sex. *United States v. Toone*, filed Oct. 3, 2013, in the U.S. District Court for the Eastern District of Texas. The case continues the Justice Department's application of the developing case law recognizing discrimination against transgender people as a form of sex discrimination covered by existing federal statutes. Joganik and her roommate had moved into the park on a monthly lease in April 2011, because Toone purchased the facility. After Toone took over and learned that Joganik was transgender, Toone circulated new park rules, which said that management reserved the right to refuse entrance to anyone for any reason other than "race, religion, handicapped, color or national origin." These rules failed to list sex and familial status, categories protected under the federal Fair Housing Act. Toone then notified Joganik and her roommate that they would have to leave at the end of the month, and he initiated eviction proceedings when they did not leave, asking the local sheriff to remove them for trespassing. The sheriff refused to do so, telling him that a court order was necessary. A court ruled in Toone's favor at the eviction hearing in July 2012, awarding possession, fees and court costs. According to the Justice Department complaint, the trial judge told Joganik not to talk about the Fair Housing Act or use the word "transgender" in court. The eviction took place on August 18, 2012. Joganik filed charges with the Department of

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Housing and Urban Development, which issued a "cause" finding on August 15, 2013, which is the basis for the lawsuit. *Houston Chronicle*, Oct. 8.

HIV-RELATED SOCIAL SECURITY DISABILITY BENEFITS RULINGS – In *Hamlin v. Colvin*, 2013 U.S. Dist. LEXIS 140711 (N.D. Ohio, Sept. 30, 2013), U.S. Magistrate Judge Nancy A. Vecchiarelli affirmed a decision by the Commissioner to deny disability benefits to an HIV-positive applicant, finding that the record supported an ALJ's determination that the plaintiff is "capable of performing past relevant work as an assemble or a significant number of jobs in the national economy."

CRIMINAL LITIGATION NOTES

U.S. AIR FORCE COURT OF CRIMINAL APPEALS – Mistake of age is no defense to a sodomy charged under Article 125 of the Uniform Code of Military Justice, according to the U.S. Air Force Court of Criminal Appeals in its October 9 decision rejecting an appeal by Senior Airman Ryan A. Gibson, age 23, convicted of consensual sodomy with a 16 year old boy while on assignment at a base in Germany. *United States v. Gibson*, 2013 CCA LEXIS 850. Writing for the court, Judge Wiedie found that Gibson's claim not to know the boy's age was contradicted by much of the evidence, especially since they were Facebook friends and the boy listed his birthday in his Facebook profile. Also, there was evidence that the boy told Gibson how excited he was about his upcoming 16th birthday. So testimony by others that the boy looked older was irrelevant. Rejecting Gibson's due process challenge to his conviction, the court observed that although Congress had allowed for a mistake of fact defense in Article 120 cases involving other forms of sexual misbehavior, it "did not provide one in Article 125." Asserting that "due process only requires fair notice that an act is criminal before it can be prosecuted," the court wrote, "The language employed by Congress and the implementing language employed by the President make it clear that the defense of mistake of fact exists as to an Article 120 UCMJ charge but not to an Article 125 UCMJ charge." Thus, Gibson was on fair notice of the criminal nature of his acts, concluded the court.

FLORIDA – In the June 2013 issue of *Law Notes*, we reported on the split among Florida's district courts of appeal about whether the term "sexual intercourse" in a statute that makes it a crime for somebody who knows they are HIV-positive to engage in "sexual intercourse" without disclosing their HIV-status to their sexual partner applies to gay sex. Now another district court of appeal has weighed in, with a 2-1 ruling relying on current dictionary definitions of "sexual intercourse" and the presumed intention of the legislature to hold that gay sex comes within the coverage of the statute. *State v. Debaun*, 2013 Fla. App. LEXIS 17238 (Fla. 3rd Dist. Ct. App., Oct. 30, 2013). The *Debaun* court majority broadly agrees with the unanimous panel in *State v. D.C.*, 114 So.3d 440 (5th Dist. Ct. App., May 31, 2013), that the legislative intent to deal with sexually-transmitted HIV could not plausibly construed to apply only to vaginal intercourse. The conflicting precedent is *L.A.P. v. State*, 62 So.3d 693 (Fla. 2nd Dist. Ct. App. 2011), which involved lesbian sex, the court there finding that the penetration of a vagina by a penis is a necessary element of "sexual intercourse." We would have thought that a common sense definition of "sexual intercourse" would be any act involving the penis of one person penetrating any orifice of another person, but the "traditional" definition supported by earlier Florida case law seems restricted to heterosexual vaginal intercourse. (Thus, the term "sexual intercourse" would not traditionally apply to a woman performing fellatio on a man, a point relied upon by Bill Clinton when he told the press that he did not have sexual intercourse with Monica Lewinsky!) Both the 5th District and now the 3rd District have certified the question to the Florida Supreme Court. An interesting factoid about the newest decision: the panel consisted of two women and one man. The women constitute the majority, arguing for a construction of the statute that will effectuate the intention of the legislature to use criminal law to address the spread of sexually transmitted diseases. The man, dissenting, argued that by application of strict rules of statutory interpretation and precedent and stare decisis, the court should stick with the traditional definition. Now it's past time for the Florida Supreme Court to resolve this issue.

GEORGIA – A jury in Hall County Superior Court convicted Heather Nicole Nix of violating a state HIV disclosure statute for failing to disclose to her husband (who is not infected) that she is HIV-positive. Judge John Girardeau immediately sentenced Nix to ten years, two in prison and eight on probation, over the objection of her public defender, Travis Williams of the Northeastern Judicial Circuit Public Defender Office, who announced that he would appeal the conviction. Williams had filed an unsuccessful motion at the beginning of the trial to quash the indictment on the ground that the statute unconstitutionally denies equal protection to people with HIV by treating them differently from people with other infectious diseases. "Under this code section," argued Williams in his motion, "HIV, a recognized disability, is criminalized." Williams pointed out that questioning during voir

dire revealed that potential jurors were full of misinformation about how HIV is transmitted. The statute, Georgia Code sec. 16-5-60, is titled: "Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons." It states that information about HIV status must be disclosed "prior to" a sexual act, and sets a maximum penalty of ten years. Williams argues that his client, who has been positive since 1998, has remained healthy by complying with anti-retroviral treatment, making sexual transmission unlikely. Williams expressed concern about the ability of his client to remain healthy in prison. At trial, Nix's ex-husband, the complainant in the case, testified that he learned about her HIV status when she was hospitalized in 2009 for an unrelated medical condition, and he promptly divorced her. Nix testified that she had disclosed her HIV status to her ex-husband before they had sex, but he denied it, and evidently the jury did not believe her. *dailyreportonline.com*, Oct. 21, 2013.

MISSISSIPPI – A cautionary tale for those who try to "hook up" on line: The Court of Appeals of Mississippi upheld a life sentence imposed on a man convicted by a jury on charges of capital murder and arson in *Mack v. State*, 2013 WL 5789265, 2013 Miss. App. LEXIS 725 (Oct. 29, 2013). Presiding Judge Irving concisely described the evidence concerning the crime committed by James Lee Mack, Jr.: "Mack met Christopher Newsome over a chat line for homosexuals. Newsome contacted Mack and suggested that they meet to have sex. Mack agreed, but secretly intended to rob Newsome. The two met at a vacant house on Flag Chapel Road in Jackson, Mississippi. Mack arrived with a loaded .380 pistol. When Newsome arrived, Mack pulled out the pistol, pointed it at Newsome, and instructed him to go into the bathroom in the vacant house. Mack told Newsome to give him his keys and wallet, and Newsome complied. Soon after Newsome gave Mack his belongings, Mack killed Newsome. Mack drove Newsome's car to a nearby gas station and purchased gas. He returned to the house, poured gas in various rooms within the house, and set the house on fire." Mack later bragged about his exploits to a family friend, Walker, who called the police. An arrest warrant was issued, and Mack surrendered voluntarily, telling the police his side of the story. He said that after Newsome handed over his car keys and wallet, "He turned around and I felt like he was about to do something because he had that look in his eyes, and I turned around. The gun was cocked and there wasn't anything left to do but shoot him. When he gave me that look, I feared for my life and I pulled the trigger." On appeal, Mack challenged the trial court's refusal to let his counsel cross-examine Walker, who was the main witness against him, about Walker's 17-years-prior armed-robbery conviction. The trial court decided that this information had no probative or impeachment value, and the court of appeals found no abuse of discretion in this judgment. The court also pointed out that "there is no evidence that Walker's testimony was motivated by any animus against Mack."

LEGISLATIVE NOTES

FEDERAL – On October 28, Senate Majority Leader Harry Reid (D-Nev.) announced plans to bring the Employment Non-Discrimination Act (ENDA) up for a vote on the floor of the Senate prior to the Thanksgiving recess. After Reid's announcement, some remaining Democratic senators who had not previously signified their support did so (Nelson of Florida, Manchin of West Virginia, Pryor of Arkansas), and Cory Booker of New Jersey, set to be sworn in early in November, is also a supporter, so the Senate Democrats are now united in support of ENDA, meaning that only a handful of Republican votes would be needed to win a cloture motion to bring the measure to a vote (if any Republican senator objects to unanimous consent to cut off debate). Since some die-hard anti-gay Republicans are likely to object to unanimous consent, attention would focus on the two Republicans who voted for the bill in the Judiciary Committee (Hatch of Utah and Murkowski of Alaska), and perhaps the marriage equality supporter, Sen. Rob Portman of Ohio, whose gay son might be able to exert some influence. There was also speculation that John McCain (Arizona) might support allowing ENDA to come to a vote. Some other Republican senators indicated that they could support the bill if it did not cover transgendered individuals, thereby revealing their ignorance about judicial and administrative developments under Title VII. Thus, it was appearing increasingly likely by the end of October that a floor vote on ENDA could actually take place, and there was one press report that Sen. Reid expected to call for floor consideration during the first week of November. If all co-sponsors then voted for it, it would pass the Senate. This would be the first time the Senate has ever approved a bill that would outlaw discrimination in employment because of sexual orientation or gender identity or expression. ENDA is a limited civil rights bill, eschewing disparate impact claims or claims to equal benefits treatment for same-sex couples, prohibiting preferences, and incorporating the limited remedial scheme found in Title VII of the Civil Rights Act of 1964. However, its ban on disparate treatment discrimination would be particularly useful in hostile environment harassment cases – a major issue for employees who are LGBT or

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perceived as such by their harassers – as well as cases of outright, open adverse treatment in hiring, assignment, promotion and compensation decisions.

CALIFORNIA – On October 3 Governor Jerry Brown signed into law AB362, which will amend the state's tax code to treat as non-taxable the extra compensation that some employers had provided to gay employees to make up for the federal tax they have to pay on the value of domestic partnership employee benefits. This problem has not been entirely cured by the demise of the federal Defense of Marriage Act, because the federal government will only exempt from taxation the value of benefits provided to legal spouses, not domestic partners, and thousands of California same-sex couples are in domestic partnerships formed during the period of time when same-sex marriage was not available in that state, or live as partners without having undertaken a registered partnership. There have been employers who extended benefits to same-sex partners, regardless whether they registered their partnership with the state, and this law will also excuse from taxation any funds advanced by employers to reimburse employees for federal taxes exacted on the value of those benefits. The law expires in 2019, giving same-sex couples a window of opportunity to marry so as to qualify for favorable tax treatment from the federal government for the value of such benefits. *San Francisco Chronicle*, Oct. 4. * * * On October 4, the governor signed SB274, which provides that children can have more than two legal parents. Sen. Mark Leno introduced the measure deal with situations where same-sex couples have children with an opposite-sex biological parent and want to share parental rights and obligations. This can involve a lesbian couple with a sperm donor, or a gay male couple with a surrogate mother. The bill reacted in part to a court decision involving a lesbian couple whose relationship broke up, sending their child into foster care because her biological father was held not to have any parental rights. *Los Angeles Times*, Oct. 5. * * * On October 9, the governor signed AB1121, which liberalizes the procedures for transgender people to change the name on their birth certificate. Under the bill, the change can be obtained without a hearing in open court or publishing the request in a newspaper, thus providing confidentiality to the applicants. The process for changing the gender designation on a birth certificate will be an administrative proceeding, with required evidence in the form of a written statement from a physician indicating that the applicant has undergone a gender transition. There will be no requirement for the performance of surgery. The governor also signed AB460, which adds non-discrimination language to fertility coverage offered under some health plans, to ensure access of such plans to same-sex couples. * * * Previously signed legislation protecting the rights of transgender students to full participation and equal access to public school facilities has proven controversial, and efforts are underway by the usual anti-gay suspects to put a repeal measure on the ballot in 2014.

CALIFORNIA – The Berkeley City Council rejected a proposal to close the city's domestic partnership registry. The measure had been proposed in light of the restoration of same-sex marriage rights after the Supreme Court's ruling in *Hollingsworth v. Perry* on June 26, but opposition led to a substitute resolution, designating October 11, the 22nd anniversary of the Registry, as "Marriage Equality Day." Opposition to the original measure sprang from a desire to offer a non-marriage alternative to couples.

IDAHO – The city of Pocatello will hold a referendum to determine whether to keep a recently enacted ordinance that bans, inter alia, discrimination because of sexual orientation or gender identity in housing, employment and public accommodations. Opponents of the measure, claiming that it abridged their religious liberty, gathered more than 2,000 signatures to get the measure on the ballot. The vote will take place May 20. *East Idaho News*, Oct. 23.

ILLINOIS – The *Illinois Observer* (Oct. 31) reported that State Rep. Greg Harris, the chief sponsor of a pending marriage equality bill, had strongly hinted to reporters that he would call for a vote on the bill during the fall veto session of the legislature, which begins on November 5. Harris had abandoned calling for a vote during the regular legislative session when he determined that there were not sufficient votes to pass the measure, S.B. 10, despite its prior approval by the state Senate. According to the Oct. 31 article, Harris said he had been making calls to legislators and was "very happy" with the results. Another legislator, not wishing to be named, told the *Observer*, "Greg says he's calling the bill next week and that he's got the votes. I don't know who he has flipped." Another legislator commented that House Speaker Michael Madigan had "renewed interest" in the bill. During this veto session, a successful vote on the bill would require a super-majority; a substitute bill that would not take effect until June 2014 could be passed by a simple majority, but then would have to be approved by the Senate. Either way, Governor Pat Quinn has pledged to sign a marriage equality bill. Depending on what happens in the Hawaii legislature, Illinois and Hawaii could be vying for which would be marriage equality state number 15 and which number 16.

MICHIGAN – The Delhi Township's Board of Trustees voted unanimously

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on October 1 to pass an ordinance banning sexual orientation and gender identity discrimination. *Lansing State Journal*, Oct. 6. * * * The Delta Township board unanimously approved an ordinance prohibiting discrimination in housing, employment and public accommodations because of sexual orientation or gender identity on October 21. The board scheduled a discussion for its November 4 meeting of a resolution urging the Michigan legislature to adopt similar legislation on a statewide basis. *Lansing State Journal*, Oct. 27. * * * A similar measure adopted by Royal Oak's city commission by a vote of 6-1 will be put to the voters as a result of a petition campaign, with the vote taking place during the first week in November. Reports the *Detroit News* (Oct. 29), "The ordinance . . . features broad-ranging language and includes many groups in addition to the LGBT community."

MISSOURI – The Missouri State University Board of Governors unanimously voted on October 18 to provide domestic partnership benefits for full-time employees, effective January 1, 2014. The university's president, Clif Smart, told the *Springfield News-Leader* (Oct. 19) that he expected that about one percent of the university's employees would apply for the benefit, basing his estimate on the experience of the University of Missouri, which took a similar action in June. The benefits are characterized as "sponsored adult dependent" benefits, and apply to both same-sex and unmarried different-sex couples. The action came after the Faculty Senate had twice voted in support of extending the benefit. The sponsored dependent (i.e., domestic partner) must be at least 18 years old, share the same permanent residence and necessities of life with the employee for at least 12 months prior to applying for the benefit, not be legally married to anyone else, not be related by blood or degree of closeness sufficiently to preclude marriage, not be a renter, boarder or tenant of the employee, and have a "single, dedicated relationship with the employee for at least a 12-month duration." Children of domestic partners are included within the scope of benefits entitlement.

NORTH DAKOTA – The Grand Forks City Council voted 5-2 on October 7 to approve an ordinance banning housing discrimination because of sexual orientation or gender identity within the city. According to council members, Grand Forks is the first city in the state to pass such a measure. The law prohibits denying, withholding or refusing to conduct maintenance on rental property based on the sexual orientation or gender identity of the tenant. Churches and religious housing are exempt, in addition to single-family homes and apartment building with up to four units in which the owner resides. If a property owner is found in violation of the law, the council can deny, revoke, suspend or refuse to renew his or her rental license and certificate of occupancy. A property owner convicted of a violation in the municipal court can be subject to a fine up to $500 per violation. *Grand Forks Herald*, Oct. 8.

OHIO – A bill was introduced in the state legislature on October 11 with bi-partisan sponsorship to amend the state's hate crime law to add the characteristics of sexual orientation, gender identity and disability. Existing law lists only race, color, religion or national origin. *Cleveland Plain Dealer*, Oct. 13.

PENNSYLVANIA – State Representatives Brian Sims and Steve McCarter, Philadelphia Democrats, have introduced a marriage equality bill in the legislature on October 3, titled Pennsylvania Marriage Equality Act, H.B. 1686, with more than thirty legislators signing on as co-sponsors. The simple measure removes language in the current law defining marriage as between one man and one woman and substitutes the phrase "between two people," and also provides that all marriages performed outside Pennsylvania will be valid within the state. The introduction comes amidst multiple lawsuits in federal and state courts, including a pending appeal of a court order that stopped Montgomery County Register of Wills D. Bruce Hanes from continuing to issue marriage licenses to same-sex couples and an action by several couples who were married as a result of receiving licenses from Hanes' office, seeking a declaration of the validity of their marriages. *Philly.com*, Oct. 3; *Pittsburgh Post-Gazette*, Oct. 4.

PENNSYLVANIA – Philadelphia Mayor Michael Nutter signed into law on Oct. 24 a bill which he said was intended to make Philadelphia "one of, if not the most, LGBT-friendly cities in the world and a leader on equality issues." *Advocate.com* (Oct. 28) reported that the measure "mandates that all new or renovated city-owned buildings include gender-neutral restrooms in addition to men's and women's bathrooms," provide tax credits for companies that provide "LGBT-inclusive employee benefits," adds "gender identity" to the city's antidiscrimination ordinance (which already covered sexual orientation), and provides some relationship-recognition rights for same-sex couples. Philadelphia is situated in the only northeastern state that lacks any significant LGBT-supportive legislation, any state-level statutory protection against discrimination, or any form of partner recognition, and the state, as noted above, is fighting against a lawsuit challenging it ban

on same-sex marriage, despite the attorney general's position that the ban is unconstitutional.

TENNESSEE – Knoxville Mayor Madeline Rogero announced that she would extend domestic partner benefits to city workers, following soon after a decision by the City Commissioners in Collegdale, a suburb of Chattanooga, to do the same. Rogero asserted that she had authority to do this by executive action without any vote by the City Council. She estimated that this would add about $60,000 of expenses to the city's $13 million benefits budget. *Associated Press*, Oct. 16. * * * The city council in Chattanooga will hold a public hearing on a proposal to provide benefits to same-sex partners of city workers, which will be introduced as a legislative proposal on Nov. 12. The hearing, to be held on November 8, will include a statement by City Attorney Wade Hinton on the legality of the measure, and then will be thrown open to comments from the public. *Chattanooga Times*, Oct. 29.

TEXAS – Opponents of a recently passed non-discrimination ordinance in San Antonio have fallen short in their efforts to secure sufficient petition signatures to put a repeal measure on the ballot, according to an October 16 report in the *San Antonio Express-News*. Opponents needed signatures for 10% of eligible voters, over 61,000 signatures. As of the deadline for submitting signatures on October 15, they had collected about 20,000 signatures. Religious conservatives argued that the ban on sexual orientation and gender identity discrimination would impair their freedom of speech and conscience, and formed a coalition of 50 churches and ministries fanning out through the city to collect signatures, but evidently the folks in the pews didn't feel threatened by the new law.

TEXAS – The Dallas Area Rapid Transit board voted 10-3 on October 8 to offer health care benefits to domestic partners of unmarried employees. DART officials estimated that between 11 and 19 employees will apply for benefits for their partners when the policy takes effect in January 2014, at a cost to the agency of about $70,000 a year. *Dallas Morning News*, Oct. 9.

VIRGINIA – The Richmond City Council has approved an ordinance extending spousal benefits to same-sex partners of gay city employees, but the measure is deemed symbolic and won't go into effect without approval from the state, due to the very preemptive approach taken by Virginia's government on matters that are subject to state legislation. Virginia's law forbids recognition of same-sex couples as having any legal status – a constitutional provision so broad and ambiguous that at the time it was adopted, there was speculation that it would make unenforceable any sort of agreement between members of a same-sex couple, making LGBT "family planning" impossible as a legal matter in Virginia. Several council members who opposed the measure argued that a "symbolic ordinance" was not the appropriate way to send a message to the state's General Assembly. *Richmond Times-Dispatch* (Oct. 29).

LAW & SOCIETY NOTES

The **UNITED STATES OLYMPIC COMMITTEE** voted on October 11 to revise its non-discrimination policy to add sexual orientation to the list of prohibited grounds for discrimination in U.S. Olympic activities. The vote was a response to the continuing public uproar about anti-gay legislation in Russia, which is hosting the next Winter Olympics in Sochi in 2014. The International Olympic Committee has claimed that it has assurances from Russian government officials that gay athletes and spectators can safely attend the games in Sochi, but it seemed clear that anybody who might use the occasion to make public political statements or stage demonstrations about gay rights might find themselves subject to prosecution. *Toledonewsnow.com*, Oct. 11.

Same-sex couples who are debating whether to marry and want to be informed about potential tax consequences can use the **MARRIAGE PENALTY CALCULATOR** on the **TAX POLICY CENTER'S** website to determine whether filing their federal taxes as married will result in increasing their federal income tax liability. Be prepared with figures from the most recent tax return in order to calculate what the tax would have been last year for filing jointly as compared to single individuals.

B&W PANTEX, which operates a manufacturing plant near Amarillo, Texas, for the U.S. Department of Energy, announced that it would offer spousal benefits to legally-married same-sex couples on January 1, 2014. Although it is located in a state that does not allow or recognize same-sex marriages, the company will voluntarily extend such recognition to employees who married their same-sex spouses in a jurisdiction that allows such marriages. *Burnt Orange Report Blog*, Oct. 16.

INTERNATIONAL NOTES

EUROPEAN COURT OF HUMAN RIGHTS – In *I.B. v. Greece*, ECHR 283 (2013), a chamber of the European Court of Human Rights unanimously ruled on October 3 that an employer had violated

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the European Convention rights of an HIV-positive person by dismissing him in response to a petition from panicky co-workers. When I.B. revealed his fear that he might be HIV-positive to co-workers, they spread the word in the company, resulting in agitation for his dismissal. The employer brought in an occupational health doctor to speak with the employees, advising them about risk-reduction procedures and the unlikelihood of occupational transmission, but almost half the employees signed a petition to the employer demanding his discharged, to which the employer acceded, providing statutory termination page. I.B. eventually found employment with another company, but filed a discrimination charge against the employer. Although the lower Greek courts ruled in I.B.'s favor, finding his dismissal unjustified, the Court of Cassation ruled for the employer, finding legitimate its desire for harmony in the workplace. This violated I.B.'s rights under the Convention, ruled the ECHR Chamber, as he was fully qualified and able to work and entitled to equal treatment with other employees. The chamber awarded backpay and damages cumulatively totaling over 16,000 euros. The decision is subject to appeal to the Grand Chamber. The chamber decision is available only in French on the Court's website; if it becomes final, an English language translation will eventually be provided. This account is based on the English-language press release from the Court.

EUROPEAN PARLIAMENT – The Parliamentary Assembly of Europe adopted Resolution 1952 (2013) on October 1, 2013, dealing with Children's right to physical integrity. The Parliament expressed concern about non-medically justified operations on minors, and asked member states of the European Union to "condemn the most harmful practices, such as female genital mutilation, and pass legislation banning these," to "clearly define the medical, sanitary and other conditions to be ensured for practices which are today widely carried out in certain religious communities, such as the non-medically justified circumcision of young boys," and to "undertake further research to increase knowledge about the specific situation of intersex people, ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counseling and support." This is evidently one of the first pronouncements by a governmental body implicitly respecting the right of children born intersex not to be subjected to gender-defining surgery before they have determined their own gender identity so that they can give informed consent to any surgical alteration that might be required to conform their body to their gender identity. This responds to the position articulated by organizations of intersex people who oppose the practice, customary in some parts of the world, of performing such surgery in infancy on the theory that raising a child with genital ambiguity always presents some sort of medical emergency. Intersex people contend that frequently there is no real medical emergency and surgery can and should be delayed until the individual is in a position to determine whether they want it.

GULF COOPERATION COUNCIL – The GCC, a coordinating organization for the countries bordering on the Persian Gulf, will consider a proposal from Kuwait to introduce medical screening to avoid have transgender people enter the six Arab countries that are members of the GCC as migrant workers, according to an Oct. 12 report in *Guardian.co.uk*. This clarified earlier sensationalistic reports that Kuwait proposed to impose some sort of medical test to determine whether persons entering the country were gay, obviously an oversimplification of the issue, to judge by subsequent online commentary, but appeared to have arisen as a result of comments to the press by the director of public health at Kuwait's health ministry, who said the proposal was to take "stricter measures that will help us detect gays." Some of the member countries are already performing "gender tests" to avoid admitting transsexuals.

AUSTRALIA – The Legislative Assembly of the Australian Capital Territory voted on October 22 to pass a law authorizing "same-sex marriage," the first such legislative action in Australia. The measure passed by just one vote, with the single Greens member joining with the eight Labor members, and the Liberals in opposition in a party-discipline vote. (Party labels in Australia have different meanings than in the U.S.!) The passage came amidst warnings from the federal Attorney-General, George Brandis, that he would move quickly to challenge the validity of the law in the High Court. There is a sharp difference of opinion among Australian legal scholars about whether the issue of marriage has become one solely of federal legislative authority, or whether states (or the ACT, analogous to a state) can legislate on the matter. Attempts to get a federal bill on same-sex marriage through the national legislature have been unsuccessful, and a federal statute defines marriage as a union between a man and a woman. Some legislators in New South Wales and Tasmania have also been considering legislating for same-sex marriage, prompted by legal advice from their attorneys-general that it is within their legislative capacity. A bill was introduced in the New South Wales legislation on October 31. But

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Brandis and the nation's Eric Acting Solicitor-General take the opposite view. Several last minute amendments were made to the bill to try to avoid the various legal objections that have been voiced, including making clear that the measure deals only with same-sex marriage, and does not purport to address other kinds of marriages, in an attempt to be able to argue that it does not trench upon the subject matter of the federal legislation. In any event, the new ACT law was not expected to go into effect until mid-December, and Brandis moved quickly, filing a case in the High Court and asking for an expedited ruling, as Prime Minister Tony Abbott warned same-sex couples to hold back from marrying in the ACT until the court has ruled. It appeared that even if the ACT's legislative authority in this matter is upheld, the marriages may not be recognized by the federal government or in states outside of the ACT. *Sydney Morning Herald* (Oct. 23 & 24); *Australian* (Oct. 23); *The Age* (Oct. 23). On October 29, the *Australian Broadcasting Company* (ABC Premium News) reported that the upper house of the legislature in Tasmania had rejected a proposal to take up the question of same-sex marriage, opponents arguing that marriage was a matter for the federal government.

AUSTRALIA – The *Courier Mail* (Oct. 11) reported that the Refugee Review Tribunal rejected an asylum bid from a Lebanese man who claimed he would be persecuted because he is gay if he were returned to his home country. According to the Tribunal, the applicant failed to prove that he was gay. The Tribunal "found that he had failed to live in Australia as a gay man and did not accept his explanation that it was 'due to his lack of English and a car." "It seems illogical that he has not made any connections or lived openly as a gay man in the 21 months since he arrived in Australia," wrote the Tribunal. On October 3, a federal judge rejected his appeal of the Tribunal's decision. The man claimed that because he had revealed to his family that he is gay since coming to Australia, now he is known as gay in Lebanon, but the Tribunal found this argument to be too "convenient" to be believable.

BANGLADESH – The government has rejected a recommendation by the United Nations Human Rights Council that it abolish Section 377 of its Penal Code, making gay sex a crime, the provision being a holdover from British colonial rule common to many former British colonies. The country's permanent representative to the United Nations Office in Geneva said, "Bangladesh considers that the law of the land should be in conformity with prevalent socio-cultural norms and values of the country. Activities subject to the concerned article in the penal code are not generally accepted norm in the country." As the government has an extensive HIV/AIDS programme with particular outreach to men who have sex with men and transgender people, local LGBT rights activists have criticized the retention of the criminal provision as a failure to acknowledge human rights violations. They point as an example to a female couple who have been arrested and given life terms for attempting to marry. *Daily News & Analysis*, Diligent Media Corp., 2013 WLNR 25024850 (Oct. 7, 2013).

BRITAIN – The Human Dignity Trust, a non-profit gay rights organization seeking to challenge the legal of sodomy laws around the world, is appealing a determination by the Charity Commission that it cannot be registered as a charity because changing the law is not a "charitable purpose." The appeal goes to the Charity Tribunal. *Third Sector*, Oct. 8 (2013 WLNR 25152849).

BRITAIN – The Court of Appeal in London confirmed a jail sentence of 10 years imposed by the Warwick Crown Court last December on Michael Anthony Daniel, who was charged with singling out a lesbian for verbal abuse, "dragging her into a field and savagely raping her," reported the *Coventry Telegraph* on October 7. The ten-year prison term is to be followed by five years on probation. Lord Justice Laws wrote that the woman, in her mid-20s, had made clear to the man that she was a lesbian and "had no interest in men," but he was "undeterred" and carried out "a brutal and sustained attack in which he subjected her to degrading sex acts." "His purpose was to humiliate her sexually due to her sexual orientation," wrote Lord Justice Laws. A jury convicted him, and the appeals court rejected his argument that the sentence was excessive. The appeals court was unwilling to second-guess the trial judge's decision to charge him with a hate crime.

CANADA – The Ministry of Health in British Columbia is altering its requirements for a change of sex designation in B.C. Health Services records, to drop the requirement that gender assignment surgery be done as a prerequisite. The change in rules was expected to be implemented by the end of 2013. The change would bring B.C. in line with last year's change in Ontario, where a human rights tribunal had ruled that requiring surgery as a prerequisite was discriminatory. Surgery will still be required, however, for a change of sex designation on birth certificates. Since birth certificates are subject to statutory specifications, legislation would be needed to make a change as to them. *Victoria Times Colonist*, Oct. 6.

CHILE – A court in Santiago imposed a life sentence on Patricio Ahumada Garay, the ringleader of a group of four men who murdered a gay man in

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a Santiago Park in March 2012. Lesser sentences were imposed on the other three accomplices. According to press accounts, Daniel Zamudio, then 24, "was beaten unconscious, burned with cigarettes and had swastikas carved into his skin," and suffered a broken leg in the assault, and died three weeks later from his injuries. The shock from this brutal attack led the legislature to pass a hate crimes law, but a similar assault against a 21-year-old gay man during October has brought calls to toughen the law further. The man "is fighting for his life" in the hospital, after having been severely beaten and had one of his eyes cut out with a knife by his attackers. *BBC News*, Oct. 28.

COLOMBIA – *BuzzFeed.com* reported on October 9 that a battle is ongoing between the judiciary and an anti-gay family organization, Fundacion Marido y Mujer, about the directive from the courts that same-sex couples be allowed to marry. Although a few marriages have taken place with the blessing of trial court judges, Fundacion has filed suit challenging the marriages, seeking their annulment on grounds of invalidity, and has been successful in at least one case. Although the Constitutional Court had ruled in 2011 that same-sex couples were entitled to marry, it had not effectuated its ruling through an Order but instead provided that if the legislature did not act to authorize same-sex marriages by June 2013, lower courts could begin to authorize such marriages. This was reinforced by a judicial council statement this year and a statement by the Constitutional Court's president, calling on the inspector general (who is believed to be behind Fundacion's activities) to "observe the rulings of this tribunal and ensure strict and timely compliance." Meanwhile, same-sex couples face an unsettled legal landscape. Most notaries, who normally issue licenses and perform marriages, will not facilitate same-sex marriages, but many trial judges will do so. On the other hand, there are questions whether such marriages will be treated as valid, or be subject to annulment by higher courts. Stay tuned as the situation develops.

CROATIA – A parliamentary commission voted 10-3 on December 23 to place a referendum on the national ballot on December 1 asking whether the constitution would be amended to expressly limit marriage to the union of a man and a woman. At present, same-sex couples in Croatia can register their "cohabitation agreements" and have limited rights. *Buzzfeed.com*, Oct. 25.

CYPRUS – The *Cyprus Mail* (Oct. 12) reported that a British member of the European Parliament, Marina Yannakoudakis, had met with leaders of the leading political parties in Northern Cyprus, all of whom had committed to achieving repeal of the colonial-era sodomy law by the end of 2013. "The Turkish Cypriot LGBT community has waited long enough for decriminalisation," she commented. "When I next visit the island next year, I look forward to celebrating with my LGBT friends in the north part of Cyprus as they embark upon a new era of equality." The European Parliament had condemned the failure to northern Cyprus to repeal the old law "following reports that two inmates in a Turkish Cypriot prison had appeared in court on charges of having had homosexual sex in a prison cell."

FRANCE – Internet journalist Rex Wockner reported on October 18 that France's Constitutional Court rejected a petition by seven mayors seeking to be exempted from the requirement to conduct wedding ceremonies for same-sex couples. The court referred to "the good functioning and the neutrality of the public service of the civil state." The mayors may bring an appeal to the European Court of Human Rights, asserting their freedom of religious liberty and/or freedom of conscience. The ruling is Décision n° 2013-353 QPC [M. Franck M. et autres - Célébration du mariage - Absence de «clause de conscience» de l'officier de l'état civil].

HONG KONG – An attempt to move forward bills enabling transgender marriages and providing a statutory mechanism for gender recognition changes was voted down on October 30. The 18-29 vote (with 11 abstentions) came after a post-operative transsexual won the right to marry her male partner in a ruling by the Court of First Instance, which gave the government a year to adopt appropriate legislation about the issue, if deemed necessary. *South China Morning Post* (Oct. 31).

INDIA – On October 22, members of the Supreme Court stated from the bench that transgender individuals were citizens and could not be discriminated against on the basis of sex. The remarks came during a hearing on a petition filed by the National Legal Services Authority seeking a declaration that transgender persons are citizens "with a third category of gender" apart from male or female. The *Hindustan Times* (Oct. 23) reported; "Transgenders have remained untouchables with restricted access to facilities like education and much is needed to be done for them," said the bench. "They are not even admitted in schools and other educational institutions. Much remains to be done for them." The government subsequently appointed an "expert committee" to investigate the situation of transgender people in India and make policy recommendations to the government. "The committee will suggest suitable measures that can be taken by the government. The committee shall submit its report with recommendations within three months of its constitution,"

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stated the government order establishing the body on Oct. 22. *Mail Today*, Oct. 28.

IRELAND – Eamon Gilmore, the Deputy Prime Minister of the Irish Republic, announced that it was the intention of the government to hold a referendum on same-sex marriage before the end of the present government, which is set to run to 2015. At present, the Republic makes available civil unions for same-sex partners, providing most of the rights of marriage, but civil union partners are not considered to be married. *Irish Daily Mail*, Oct. 28.

ISRAEL – The centrist Yesh Atid Party has introduced a bill in the Knesset (parliament) that would create for the first time in Israel the concept of state-sponsored civil unions carrying all the rights and status of marriage, open to both different-sex and same-sex couples. At present, legal marriages in Israel require the involvement of religious authorities, and there is no civil marriage as such, although couples who reside in Israel can go outside the country to get married and their marriages will subsequently be registered by the government and respected for all civil purposes. The lack of civil marriages has incentivized couples who don't want religious marriages (or can't qualify for them) to live together without benefit of any recognized legal status, but there is also a flourishing business of different-sex couples going to Cyprus to have weddings. Israel is said to have the most restrictive marriage legal regime in the world, ranking with the strict Muslim nations in exerting a tight control over marriage by religious authorities. The bill introduced in the Knesset on October 29 was deliberately drafted to avoid using the word "marriage" so as not to upset the various compromises that accord religious authorities their monopoly over marriage. The proposal for civil unions would be a major change and open up something like marriage to much of the adult population for the first time since the establishment of the state in 1948. According to a report in *The New York Times* (Oct. 30), "The new law faces an uphill battle. It is opposed by the Jewish Home Party, which like Yesh Atid – Hebrew for 'There is a Future' – is a member of Prime Minister Benjamin Netanyahu's governing coalition. Mr. Netanyahu has not taken a public position on the issue." The article also points out that there is a 2010 law that provides civil unions for non-religious individuals, but "it is rarely used" and does not make such unions available to same-sex couples.

KUWAIT – Responding to criticism arising from news reports that Kuwait was planning to "test" potential immigrants for "homosexuality," several Kuwaiti parliamentarians protested that the story was being blown out of proportion, that the country was not proposing to "crack down" on homosexuals, and that the idea was just a proposal, not an accomplished fact. Furthermore, it seemed from some press reports that misunderstanding of terminology may have obscured the actual focus of the proposal, which was to screen out cross-dressers and transsexuals, not gay people per se. Which made the idea no less odious, of course.

NORTHERN IRELAND – The Supreme Court of United Kingdom has refused to review a court of appeal ruling that held that same-sex and unmarried couples can adopt children. Northern Ireland's Health Minister, Edwin Poots, reportedly spent considerable sums on the appeal, as well as on litigation intended to maintain a lifetime ban on gay men donating blood, which was deemed "irrational" in a recent High Court decision. The adoption lawsuit as initiated by the Northern Ireland Human Rights Commission, which argued that a ban on adoptions by unmarried couples violated the European Convention on Human Rights. *Belfast Telegraph Online*, Oct. 23; *Adv*ocate.com, Oct. 24; Irish Times, Oct. 23.

RUSSIA – On September 26 the Ryazan Regional Court issued an order canceling prior decisions against Irina Fedotova, an active member of Moscow Pride, who had been convicted of propagandizing for homosexuality in her protest activities in violation of a Moscow city ordinance. The court responded to the argument by Fedotova's lawyers that her conviction violated Russia's obligations under the International Covenant on Civil and Political Rights, as construed by the U.N. Committee on Human Rights in a decision concerning Fedotova that was issued on October 31, 2012. Fedotova's conviction violated Articles 19 (freedom of speech) and 26 (prohibition of discrimination) of the Covenant. As the national law adopted earlier this year was patterned in relevant ways on the Moscow ordinance, the court's ruling implicitly finds that prosecution of gay rights demonstrators under the law violates Russia's obligations as a signatory to the Covenant. *GayRussia*, Oct. 2; *Moscow Times*, Oct. 3.. * * * The Russian government's concern that Russian babies might fall into the hands of gay adoptive parents has led the country to ban adoptions of Russian children by Swedish parents, or parents from any other country that authorizes same-sex marriages and adoption of children by gay people. Russia will reportedly seek agreements with all these country to ensure that only heterosexual couples are allowed to adopt Russian children. A bill was also introduced into the Russian parliament authorizing removal of children from the homes of gay parents, but the international outcry against this helped to have it pulled off the table, although there were concerns that it might spring up against after the Sochi Olympics. * * * Russia's President,

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Vladimir Putin, reportedly assured the president of the International Olympic Council (IOC), Thomas Bach, that gay athletes and those accompanying them to the Winter Olympics in Sochi need have no fear of discrimination by the Russian government, despite the recent enactment of broadly worded legislation that would seem to authorize criminal prosecution against anybody who speaks openly about homosexuality in other than a disparaging way. *Asian News International*, Oct. 29 & 31.

SINGAPORE – For a second time, Justice Quentin Loh has dismissed a challenge to Section 377A of the Penal Code, a statutory survivor of British colonial rule penalizing sodomy between men. Counsel for Tan Eng Hong, M. Ravi, argued that the law was "absurd" because homosexuality is an immutable characteristic. Justice Loh rejected this argument as a factual premise, stating that his review of the literature showed the evidence divided on this point. "I am simply not in an appropriate position to pronounce on whether homosexuality is a human attribute or a result of nurture or a lifestyle choice," he wrote, "much less on whether it is immutable or not." He also referred to parliamentary debates when the measure was enacted in 1938 and repeal was rejected in 2007, on the ground that Singapore is a socially conservative society whose moral code supported the sodomy law. Loh conceded that law must evolve with changes in society's view of morality, "however, these changes, to varying degrees, take time." *Straits Times*, October 3.

TAIWAN (REPUBLIC OF CHINA) – There were press reports that tens of thousands of people marched in support of same-sex marriage on October 27 as the parliament was about to take up a bill to amend the Civil Code to allow same-sex marriages. The bill was proposed by the opposition Democratic Progressive Party, and was referred to the Judiciary Committee. The bill was drafted by an advocacy group, Taiwan Alliance to Promote Civil Partnership Rights. Their campaign at first focused on a court case, but then the plaintiffs withdrew their appeal from an adverse administrative ruling, one of them stating the he had "lost his faith in the judiciary" and that he and his parents had been the targets of death threats on Facebook.com. *The Age.com.au*, Oct. 26.

PROFESSIONAL NOTES

BRAD SNYDER, Executive Director of the LGBT Bar Association of Greater New York, announced that he would be resigning in mid-November in order to take a position with New York's LGBT Community Center as Director of Institutional Giving. **MATTHEW SKINNER** will be serving as Interim Executive Director while the LGBT Bar Association's Board considers applications for the position, which has been publicized to the organization's membership.

BARRETT L. BRICK, 59, who retired after thirty years as a staff attorney at the Federal Communications Commission, died on September 22 in Bethesda, Maryland. Brick was a co-founder of the LGBT student organization at Columbia Law School, and was active in LGBT rights causes throughout his career, including co-chairing the American Bar Association's Committee on Sexual Orientation and Gender Identity. He was also a past executive director of the World Congress of Gay and Lesbian Jewish Organizations. As a lobbyist for gay rights, he pressured the State Department to expand its annual country reports on human rights to include documentation of anti-gay incidents and homophobic violence, and led the effort to get the U.S. Holocaust Memorial Museum to include commemoration of gay victims of the Holocaust in its exhibits. On a more personal note, he was one of the ten individuals who met in your Editor's living room in 1978 at the first meeting of what was to become the New York Law Group, subsequently incorporated as the Bar Association for Human Rights of Greater New York, now known as the LGBT Bar Association of Greater New York.

GAY & LESBIAN ADVOCATES & DEFENDERS honored **MARGARET H. MARSHALL**, former Chief Justice of the Massachusetts Supreme Judicial Court, at its annual Spirit of Justice Dinner on October 25 in Boston. Justice Marshall wrote the nation's first state high court decision holding on the merits that same-sex couples are entitled to marry, as well as a subsequent opinion in response to a certified question from the Massachusetts Senate, stating that civil unions would not satisfy the Massachusetts Constitution's requirement of equal rights for LGBT people.

The U.S. Senate Health, Education, Labor and Pensions Committee voted 15-7 on October 30 to ratify President Obama's nomination of **CHAI FELDBLUM** to a second full term as a commissioner of the Equal Employment Opportunity Commission. Feldblum, the EEOC's only openly gay commissioner, has worked during her first term on getting the Commission to expand its interpretation of jurisdiction under Title VII to include gender identity discrimination, and has also worked for a more expansive reading of the sex discrimination jurisdiction to encompass more cases of anti-gay discrimination. Prior to her Commission service, she taught at Georgetown University Law Center and worked as legislative counsel for the ACLU AIDS

Project, in which capacity she played a leading role in the drafting of the Americans With Disabilities Act and the ADA Amendments Act of 2008. Three Republican members of the committee joined all of the Democratic members in voting to endorse her nomination. *BloombergBNA Daily Labor Report*, 211 DLR A-15 (Oct. 30, 2013).

GLENN GREENWALD, probably the most famous openly-gay lawyer in the world at present (famous as a journalist, however, not as a lawyer), told *New York Times* op-ed columnist Roger Cohen, in an article published in the print edition on November 1, that he would like to testify to the U.S. Senate about abuses of the surveillance state, but fears that he would be arrested if he entered the United States because of his ongoing role in publishing revelations based on classified information relayed to him by Edward Snowden, the former government contractor employee now living under a grant of political asylum in Russia.

On October 29, retired **SUPREME COURT JUSTICE SANDRA DAY O'CONNOR** performed the second same-sex marriage ceremony in the Supreme Court building, uniting Jeff Trammell and Stuart Serkin. Trammell and O'Connor had worked together as board chair and chancellor of the College of William and Mary. Following the ceremony, Trammell told a reporter from buzzfeed.com, "It was wonderful. It was everything you'd expect it to be: elegant, charming, very moving. She really was wonderful, in private just like she is in public." A few days earlier, **JUSTICE RUTH BADER GINSBURG** had performed a wedding in the Supreme Court building for one of her former Columbia Law School students and his partner. This was Ginsburg's second same-sex marriage ceremony, as she had previously officiated for a former clerk and his partner at a different location. As of the end of October, none of the other justices had been reported to have officiated at such ceremonies. *Associated Press*, Oct. 29.

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The Berrien Circuit Court then found that it would be in the children's best interest for Giancaspro to be their sole legal parent, with visitation rights for Congleton. The tense relationship between the former partners evidently precluded a joint custody award, and based on the factors considered by Michigan courts in deciding custody disputes between legal parents, Giancaspro won on points. During this stage of the litigation, Congleton attempted to discredit the Illinois adoption by offering evidence that the women were actually residents of Michigan at the time the adoption was granted, but the trial judge refused to admit the evidence, and rejected Congleton's motion to reopen the evidence or reconsider its decision after the court had announced its custody award.

On appeal, Congleton again attacked the validity of the Illinois adoptions, arguing that the women had defrauded the Illinois court by claiming to be Illinois residents when they were not, so the Illinois court did not actually have jurisdiction to grant the adoptions under Illinois law. The Court of Appeals, in a new per curiam opinion, held that Congleton had waived any argument as to the underlying validity of the Illinois adoptions by failing to raise the jurisdictional issue as an affirmative defense during the initial phase of this proceeding.

In addition, the court noted that even were the issue not waived, judicial estoppel would preclude Congleton from repudiating the position she took under oath in the Illinois adoption proceeding. "In this proceeding," wrote the court, "defendant now claims that she lied to the Illinois courts and that she and plaintiff were not actually residents of Illinois during the time before the entry of the adoption orders. This argument is disingenuous in that it allows defendant to enjoy the benefits of the adoption orders for as many years as she could while now attempting to nullify the effect of the adoptions because she deems it advantageous to her. This appears to be the exact type of 'fast and loose' play with the legal system judicial estoppel is designed to prevent."

The court observed that Congleton had voluntarily submitted to the jurisdiction of Illinois, had sworn that she was an Illinois resident in that proceeding, and had "requested from those very courts the adoptions which she and plaintiff were awarded." Taking together the findings of waiver and the application of judicial estoppel, the court of appeals held that Congleton "fails to show that the trial court made any error in refusing to allow defendant to advance the argument that the Illinois courts did not have jurisdiction over her at the time the adoptions were entered. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion to reopen proofs. Nor did the trial court abuse its discretion in denying defendant's motion for reconsideration." The court awarded Giancaspro her court costs.

The juxtaposition of the two cases shows the unusual situation that Michigan's ban on same-sex marriage produces. A woman who was legally married to the birth mother at the time the child was born is treated as a legal stranger to the child, barred from even seeking custody, while a woman who adopted the children of her unmarried same-sex partner in an out-of-state adoption proceeding is awarded custody "on points" due to the powerful full faith and credit obligation to recognize adoption judgments from sister states. If, as anticipated, the federal court rules in *Deboer* that Michigan's refusal to recognize out-of-state same-sex marriages violates the 14th Amendment, this anomaly of Michigan family law may be corrected, although the traditional family-law bias towards biological parents may still slant the outcome in any particular custody case. ■

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