THE LGBT BAR ASSOCIATION OF GREATER NEW YORK

LGBT LAW 2016
YEAR IN REVIEW CLE

THURSDAY, JANUARY 26, 2017 | 6:30-8:30 P.M.

DAVIS POLK & WARDWELL LLP | NEW YORK, NY

A CLE PROGRAM PRESENTED BY THE LGBT BAR ASSOCIATION OF GREATER NEW YORK IN COLLABORATION WITH THE DAVIS POLK LGBT AFFINITY GROUP

FACULTY

Professor Arthur Leonard – Professor of Law at New York Law School, editor of *LGBT Law Notes*, contributing writer for *Gay City News*, and co-author of the casebook *Sexuality Law*

Susan Sommer, Esq. – Associate Legal Director and National Director of Constitutional Litigation at Lambda Legal

Joshua Block, Esq. – Senior Staff Attorney at the ACLU's LGBT and HIV Project

Matthew Skinner, Esq. (Moderator) – Executive Director of LeGaL

CLE CREDITS

2.0 Credits in Areas of Professional Practice

This free course is appropriate for both newly admitted and experienced attorneys.

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CLE Certificate Information

Thank you for attending our program. Your CLE certificate, if applicable, will be distributed via e-mail to the e-mail address you used to register for the program.

Please allow up to two weeks for distribution of your certificate.

2017 Annual Dinner

Please consider joining us at LeGaL's upcoming annual dinner, where we will be honoring Matt Coles (formerly the director of the ACLU's LGBT & HIV Project), Susan Sommer of Lambda Legal (one of tonight's panelists), and Blank Rome LLP. More information, sponsorship options, and tickets are available at le-gal.org/2017-annual-dinner/.

LGBT LAW 2016 YEAR IN REVIEW

Annual CLE program presented by LeGaL & the Davis Polk LGBT Affinity Group
Thursday, January 26, 2017, 6:30 to 8:30 p.m.
Davis Polk & Wardwell LLP | New York, NY

AGENDA

I. Introduction, 6:30 - 6:35 (Skinner)

II. Relationship recognition post-*Obergefell* and important family law developments, 6:35 - 7:00 (Sommer)

III. Title VII developments and attempts to use religious liberty claims to chip away at LGBT rights, 7:00 - 7:30 (Leonard)

IV. High-profile transgender rights litigation, 7:30 - 8:00 (Block)

V. How Donald Trump becoming President has changed the landscape (Panel), 8:00 – 8:15 (Panel)

VI. Q&A / What to expect in 2017, 8:15 – 8:30 (Panel)

LGBT Law 2016 Year In Review

Faculty Biographies

Professor Arthur Leonard

@asleonard1

Professor Arthur Leonard of New York Law School graduated from Cornell University (1974) and Harvard Law School (1977). He started the LGBT Bar Association of Greater New York (under its previous name) in 1978 and served as its first formally elected president from 1984 to 1988. He still edits and largely writes the Association's monthly substantive newsletter, *LGBT Law Notes*, which circulates directly to nearly one hundred law schools across the country and has an international readership by subscription and online. A monthly podcast discussing leading cases reported in *Law Notes* can be found in iTunes or at legal.podbean.com. Professor Leonard also writes for *Gay City News*, a New York City community newspaper, and is co-editor of the first law school casebook on AIDS and a casebook on Sexuality Law (2nd edition published July 2009). He provides timely commentary on LGBT and HIV-related legal issues on his blog, http://www.artleonardobservations.com/.

Professor Leonard has been a director or trustee of Lambda Legal Defense and Education Fund, The Center for Lesbian and Gay Studies at City University of New York, The Society of American Law Teachers, Congregation Beit Simchat Torah (the world's largest LGBT synagogue), The Jewish Board of Family and Children's Services, and Howard House Owners Corporation (a New York City co-operative apartment building). At the New York City Bar Association, he is past chair of the Committee on Sex and Law and was a founding co-chair of the Special Committee on Lesbians and Gay Men in the Legal Profession (predecessor to the present-day LGBT Rights Committee), and served for many years on the Association's Special Committee on AIDS. He has also served as a member of the Task Force on Children, Youth and Families at UJA-Federation of New York from 2005 to 2011.

His courses at New York Law School have included Contracts, Torts, Labor Relations Law, Employment Law, Employment Discrimination Law, Professional Responsibility, and Sexuality and the Law, and he has published widely in law journals and other media on LGBT law, AIDS law, and labor and employment law.

He and his partner of more than three decades, Tim Nenno, married in Connecticut in 2009.

Susan Sommer, Esq.

@SusanLSommer

Susan Sommer is Associate Legal Director and National Director of Constitutional Litigation for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and people with HIV. She handles groundbreaking litigation and also oversees the work of several attorneys in all areas of Lambda Legal's work, including fighting for equal recognition of same-sex relationships, securing the rights of gay and lesbian parents, and battling antigay discrimination in employment, housing, public accommodations, and law enforcement.

Sommer was the lead attorney on Lambda Legal's New York marriage litigation seeking the right to marry in New York and recognition of out-of-state marriages of same-sex couples, and also has worked extensively in the area of parenting rights of gay and lesbian New Yorkers. She argued both the *Debra H.* and *Brooke S.B.* cases before the New York Court of Appeals, efforts that resulted in a chipping away and then a full overruling of the unnecessarily

restrictive and discriminatory *Alison D.* interpretation of New York's parental visitation and custody statute.

Outside of New York, she played a key role in *Lawrence v. Texas*, Lambda Legal's landmark U.S. Supreme Court case that struck down Texas's "Homosexual Conduct" law, participated at the U.S. Supreme Court and lower court levels in litigation to strike down Section 3 of the federal Defense of Marriage Act and then fought for *United States v. Windsor* to be implemented broadly, and led the Lambda Legal team handling one of the Ohio marriage recognition cases that the U.S. Supreme Court ultimately decided as part of *Obergefell v. Hodges*.

A seasoned litigator, Sommer came to Lambda Legal from Lankler Siffert & Wohl in New York, where she specialized in commercial, securities, antitrust, not-for-profit federal and state civil litigation, white collar criminal defense, and regulatory and attorney disciplinary proceedings. Earlier, Sommer taught at Brooklyn Law School and was a litigation associate at Davis Polk & Wardwell. She clerked for U.S. District Court Judge William Schwarzer in the Northern District of California. A 1986 graduate of Yale Law School, Sommer served as Notes Editor at the *Yale Law & Policy Review*. She also received her bachelor's degree in American Studies from Yale, graduating Phi Beta Kappa and summa cum laude.

Joshua Block, Esq. @JoshACLU

Joshua Block is a senior staff attorney with the ACLU's national Lesbian Gay Bisexual Transgender & HIV Project. He is lead counsel in *G.G. v. Gloucester County School Board*—the first federal court of appeals decision recognizing that Title IX protects the rights of transgender students to use restrooms consistent with their gender identity, now before the U.S. Supreme Court. Josh was a member of the legal teams that litigated *Obergefell v Hodges* and *United States v. Windsor* at the U.S. Supreme Court and has litigated cases seeking marriage for same-sex couples in Kansas, Missouri, Utah, and Virginia. Josh's litigation docket covers a wide range of issues, including employment discrimination, attempts to use religion to discriminate, access to healthcare for transgender people, military service, and censorship and free speech. In 2012, he was named one of the "Best LGBT Lawyers Under 40" by the National LGBT Bar Association. Josh is a graduate of Amherst College and Yale Law School. He clerked for Judge Robert D. Sack on the U.S. Court of Appeals for Second Circuit.

Matthew Skinner, Esq. (Moderator)

Matthew Skinner is Executive Director of The LGBT Bar Association and Foundation of Greater New York (LeGaL), a bar association and related foundation dedicated to serving the local LGBT legal community and the public. In his role as Executive Director, Matt oversees and directs all of LeGaL's events, communications, advocacy efforts, fundraising, and other activities. Prior to assuming his current position with LeGaL, Matt litigated at Proskauer Rose LLP and clerked for the Honorable Richard K. Eaton at the U.S. Court of International Trade. He graduated magna cum laude from Albany Law School and the University of Notre Dame. He was named to the 2015 class of the "Best LGBT Lawyers Under 40" by the National LGBT Bar Association.

LGBT Law 2016 Year in Review

January 26, 2017

Compiled by Professor Arthur S. Leonard, New York Law School

Based on reporting in *LGBT Law Notes*

With assistance from law student research assistant Timothy Ramos, NYLS '19

Prepared for a CLE program presented by
LeGaL — The LGBT Bar Association of Greater New York in collaboration with the Davis Polk LGBT Affinity Group

This compilation focuses mainly on appellate decisions of particular interest (with the most significant bolded for emphasis) for LGBT and HIV/AIDS law, with selective inclusion of particularly noteworthy trial court opinions, administrative rulings, and legislative developments. It is not an exhaustive list of all LGBT-related decisions from 2016, and in certain cases, it includes developments from the first three weeks of 2017.

Outline of Topics Covered

I. U.S. Supreme Court Activity

A. Merits Rulings

V.L. v. E.L., 136 S. Ct. 1017 (U.S. March 7, 2016). (Supreme Court of the United States unanimously reversed the Alabama Supreme Court in a short per curiam opinion that restored a lesbian mother's parental rights to children she had previously raised with an ex-partner and adopted.)

B. Certiorari Petitions Granted

G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016), stay granted, 136 S. Ct. 2442, petition for certiorari granted, 137 S. Ct. 369 (Oct. 28, 2016). (The 4th Circuit held that U.S. District Judge Robert G. Doumar erred by not using the U.S. Department of Education's interpretation of Title IX to require schools to let transgender students use restrooms consistent with their gender identity. The transgender male student was required to use only restrooms designated for girls or unisex single-user restrooms.)

C. Certiorari Petitions Pending

Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16-111 (U.S. Supreme Court, petition for certiorari filed, July 25, 2016), seeking review of Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272 (Colo. Ct. App., Div. I, 2015), cert. denied, 2016 WL 1645027 (Colo. Supreme Ct., April 25, 2016). (The cake shop, represented by Alliance Defending Freedom, filed a Petition with the U.S. Supreme Court, seeking reviewing of the Colorado Court of Appeals' 2015 decision which rejected the shop owner's appeal of a ruling by the Colorado Civil Rights Commission holding that he violated the state's Anti-Discrimination Act by declining service to a gay may couple seeking a wedding cake. The petitioner contends that his 1st Amendment free speech and free exercise rights were violated, that the ruling conflicts with cases from the 9th and 11th Circuit regarding the free speech protection of art, and that there is conflict among the circuits about where to draw the line between speech and conduct in determining the regulatory power of the state.)

Welch v. Brown, petition for certiorari filed, No. 16-845, January 5, 2017, seeking review of 834 F.3d 1041 (9th Cir. 2016). (The 9th Circuit upheld a decision by U.S. District Judge William B. Shubb that found that California's S.B. 1172, which prohibits state-licensed mental health providers from engaging in conversion therapy with minors, did not violate mental health providers' 1st Amendment religious freedom rights.)

D. Vacancy on the Court

President Donald Trump said on January 24, 2017 that he would announce his nominee to the Supreme Court, for the vacancy caused by the death of Associate Justice Antonin Scalia in February 2016, next week. Politico reported he has narrowed his shortlist of potential nominees to three men appointed by President George W. Bush to federal courts of appeals, namely Tenth Circuit Judge Neil Gorsuch, Third Circuit Judge Thomas Hardiman, and Eleventh Circuit Judge William Pryor.

II. Whether Federal Statutes Prohibiting Discrimination "Because of Sex" Apply to Claims of Discrimination Because of Sexual Orientation or Gender Identity

Mainly Title VII and Title IX cases. Do current statutory prohibitions cover discrimination because of sexual orientation and/or gender identity? This is the number one question in LGBT law during 2016, leaving courts to question precedent that foreclosed sexual orientation and gender identity discrimination claims under Title VII and playing out in the bathroom wars under Title IX.

A. At the U.S. Supreme Court (Gender Identity)

G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016), stay granted, 136 S. Ct. 2442, petition for certiorari granted, 137 S. Ct. 369 (Oct. 28, 2016). (The 4th Circuit held that U.S. District Judge Robert G. Doumar erred by not using the U.S. Department of Education's interpretation of Title IX to require schools to let transgender students use restrooms consistent with their gender identity. The transgender male student was required to use only restrooms designated for girls or unisex single-user restrooms.)

B. In the Lower Courts (Sexual Orientation)

Note: The EEOC's Annual Report for FY 2016, released in January, showed 1,768 charges were filed with the agency alleging employment discrimination because of sexual orientation or gender identity, up from 1,412 charges in FY 2015. Federal FY 2016 ended on September 30, 2016. EEOC conciliation and litigation efforts recovered $4.4 million for complainants during FY 2016, up from $3.3 million in FY 2015. EEOC first began breaking out such claims from the overall sex discrimination category in its record-keeping partway through FY 2013.

Ashford v. Danberry at Inverness, 2016 WL 4615782, 2016 U.S. Dist. LEXIS 119835 (N.D. Ala., Sept. 6, 2016). (Judge R. David Proctor reaffirmed that Title VII's protections against sex discrimination extend to gender stereotyping, under which a gay male plaintiff may assert a claim. Ashbury filed a harassment claim against his former employer under this interpretation. However, his claim fell short due to insufficient evidence of severe or pervasive harassment, failure to file a formal grievance with designated personnel, and Judge Proctor's suggestion that LGBT employees are required to put up with some negative workplace chatter before they can expect Title VII protection.)

Bellisle v. Landmark Medical Center, 2016 WL 4987119, 2016 U.S. Dist. LEXIS 130392 (D.R.I., Sept. 15, 2016). (District Judge John J. McConnell, Jr. granted the employer's motion for summary judgment on a claim by the lesbian plaintiff that she was discharged and subjected to a hostile work environment because of her sexual orientation, and her union's motion for summary judgment for a claim asserted they did not properly represent her. The judge stated that under 1st Circuit precedent, Title VII doesn't proscribe harassment because of sexual orientation. Furthermore, the plaintiff failed to meet the high bar set by the 1st Circuit for a hostile environment claim. The plaintiff still has a supplementary state law claim, and the state's anti-discrimination law covers sexual orientation discrimination.)

Boutillier v. Hartford Public Schools, 2016 U.S. Dist. LEXIS 159093, 2016 WL 6818348 (D. Conn., Nov. 21, 2016). (District Judge Warren W. Eginton rejected an employer's motion to dismiss a Title VII sex discrimination claim brought by a lesbian plaintiff who alleged she suffered discrimination and retaliation because of her sexual orientation and physical disability in violation of the Connecticut Fair Employment Practices Act, the Americans with Disabilities Act, and Title VII. Judge Eginton concluded that the plaintiff failed to allege sufficient facts to qualify as a person with a disability, but held that her sexual orientation discrimination survives summary judgment. He sharply disputed the 2nd Circuit's prior rulings, finding that straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex.)

Brown v. Subway Sandwich Shop of Laurel, 2016 WL 3248457, 2016 U.S. Dist. LEXIS 76526 (S.D. Miss., June 13, 2016). (District Judge Keith Starrett bowed to 5th Circuit precedent in Brandon v. Sage Corp., dismissing the sexual orientation discrimination claims under Title VII.)

Burrows v. College of Central Florida, 2015 WL 4250427 (M.D. Fla., July 13, 2015), reconsideration denied, 2015 WL 5257135 (Sept. 9, 2015). (The case was settled for $82,500, two days after both parties filed a joint motion to dismiss the appeal. It was one of the cases in which the EEOC supported private litigation to establish that sexual orientation discrimination is actionable under Title VII.)

Cargian v. Breitling USA, Inc., 2016 WL 5867445, 2016 U.S. Dist. LEXIS 139206 (S.D.N.Y. Sept. 29, 2016). (District Judge George B. Daniels found in favor of the defendant employer in a claim brought by a 52 year-old gay former employee alleging gender stereotyping under Title VII and discrimination under the ADEA. Judge Daniels stated that the plaintiff conflated a sexual orientation discrimination claim with a gender-stereotyping claim. Furthermore, his age discrimination claim fails because most sales representatives promoted or retained after he was dismissed were over 40.)

Christiansen v. Omnicom Group, 167 F. Supp. 3d 598 (S.D.N.Y., March 9, 2016), appeal argued before three-judge panel of the Second Circuit on January 20, 2017. (U.S. District Judge Failla dismissed the gay plaintiff's sexual orientation discrimination claim because

she was bound by Simonton v. Runyon, 232 F.3d 33 (2000) to reject the claim under Title VII. The facts did not provide the basis for a sex stereotyping claim, which could be recognized under 2nd Circuit precedents.)

Clemens v. City of Memphis, 2016 U.S. Dist. LEXIS 179037, 2016 WL 7471412 (W.D. Tenn., Dec. 28, 2016). (In light of 6th Circuit precedent rejecting sexual orientation discrimination claims under Title VII, district court was bound to grant employer's motion to dismiss.)

D.B., Estate of v. Thousand Islands Central School District, 169 F. Supp. 3d 320 (N.D.N.Y. 2016). (Judge Suddaby allowed an amendment for a Title IX claim for sex discrimination by an educational institution. Though 2nd Circuit precedent, Simonton v. Runyon, 232 F.3d 33 (2000), prevents sexual orientation discrimination claims, it does not prohibit a "gender stereotyping" claim of sex discrimination, provided that the plaintiff is not gay.)

Dollinger v. N.Y. State Ins. Fund, 2016 U.S. Dist. LEXIS 160086, 2016 WL 6833993 (N.D.N.Y. Nov. 18, 2016). (U.S. District Judge Mae A. D'Agostino rejected the pro se gay plaintiff's amended complaint, expressing that it cannot be upheld under Title VII because sexual orientation discrimination is not recognized, and because ADA jurisdiction applies only when a person is regarded to have a disability by his employer, and that the plaintiff did not allege that the employer here regarded him as having HIV/AIDS.)

EEOC v. Pallet Companies, No. 1:16-cv-00595-CCB (D. Md. June 28, 2016). (District Judge Catherine Blake approved the first settlement agreement for a sexual orientation discrimination case under Title VII initiated by the EEOC. The case was initiated by the EEOC on behalf of a lesbian complainant who was harassed for her sexual orientation and discharged in retaliation.)

EEOC v. Scott Med. Health Ctr., P.C., 2016 U.S. Dist. LEXIS 153744, 100 Empl. Prac. Dec. (CCH) P 45,675 (W.D. Pa. Nov. 4, 2016). (District Court Judge Cathy Bissoon dismissed the defendant's motion to dismiss, and held that Title VII's "because of sex" provision prohibits discrimination on the basis of sexual orientation. The EEOC filed a claim on behalf of Dale Baxley, a gay man who was employed as a telemarketer before quitting due to homophobic comments made by his manager. Judge Bissoon held that but for Baxley's sex, he would not have been subjected to the manager's discriminatory and harassing statements. She also grounded her ruling in the Price Waterhouse decision, which predated the precedent cases brought by the defendant.)

Evans v. Georgia Regional Hospital, No. 15-15234 (11th Cir.) (appeal from S.D. Ga., argued before three-judge panel of the Eleventh Circuit on December 15, 2016.)

Gaff v. Indiana-Purdue University of Fort Wayne, 51 N.E.3d 1163 (Ind. 2016). (The Indiana Supreme Court summary judgment for defendant. The Court ruled that the plaintiff's claim of harassment because of his sexual orientation does not state a claim under Title VII. The Court

did not discuss whether sexual orientation discrimination was a form of sex discrimination, and only asserted that the plaintiff did not bring a sex discrimination claim.)

Garvey v. GMR Marketing, 2016 U.S. Dist. LEXIS 139928 (N.D.N.Y., Oct. 6, 2016); Garvey v. Connect Wireless, 2016 U.S. Dist. LEXIS 139939 (N.D.N.Y., Oct. 6, 2016); Garvey v. Shoppingtown Mall & Moonbeam Capital Investment, 2016 U.S. Dist. LEXIS 140239 (N.D.N.Y. Oct. 6, 2016); Garvey v. Childtime Learning Center, 2016 U.S. LEXIS 143152 (N.D.N.Y., Oct. 17, 2016); Garvey v. Childtime Learning Center, 2016 U.S. Dist. LEXIS 145618 (N.D.N.Y., Oct. 29, 2016). (Federal magistrate judges found Garvey, representing himself pro se, to be qualified to proceed in forma pauperis. They also recommended that his amended complaints under Title VII be dismissed since the 2nd Circuit does not recognize sexual orientation discrimination, but suggested proceeding under a gender-stereotyping claim.) * * * Garvey v. GMR Marketing, 2016 U.S. Dist. LEXIS 163215 (N.D.N.Y., Nov. 28, 2016); Garvey v. Connect Wireless, 2016 U.S. Dist. LEXIS 163214 (N.D.N.Y., Nov. 28, 2016). (U.S. District Judge Brenda K. Sannes accepted the Magistrate's recommendation to dismiss the Title VII claims because the 2nd Circuit does not recognize the validity of sexual orientation and gender identity discrimination claim under Title VII.)

Gaspari v. FMC Technologies, 2016 U.S. Dist. LEXIS 34536 (S.D. Tex. Feb. 4, 2016). (U.S. Magistrate Judge Frances H. Stacy recommended that summary judgment be granted to the defendant employer. She believed the plaintiff, a homosexual male, did not allege severe or pervasive harassment to constitute a sex-stereotyping claim. She also noted that sexual orientation discrimination claim was not actionable under Title VII.)

Hamilton v. Henderson Controls, Inc., 2016 U.S. Dist. LEXIS 161672, 2016 WL 6892799 (W.E. Tex., Austin Div., Nov. 22, 2016). (U.S. Magistrate Judge Andrew W. Austin released a Report & Recommendation to U.S. District Judge Lee Yeakel, recommending that the court grant the defendant's motion to dismiss the complaint of a gay Texas inmate, because the 5th Circuit does not recognize Title VII as covering sexual orientation discrimination. The plaintiff alleged he was discriminated against when dismissed from employment in a work release program.)

Hansen v. Skywest Airlines, 2016 U.S. App. LEXIS 22991, 2016 WL 7387139 (10th Cir., Dec. 21, 2016). (Reversing district court, reviving gay employees claim under Title VII for hostile environment sexual harassment by other gay employees and a supervisor, as well as state law intentional infliction of emotional distress. Federal courts have long held that employees suffering unwanted sexual propositions and touching by gay harassers can bring hostile environment sexual harassment claims under Title VII, since they were targeted because of their sex.)

Hinton v. Virginia Union University, 185 F. Supp.3d 807 (E.D. Va. May 4, 2016). (District Judge Robert E. Payne found he was bound by 4th Circuit precedent to reject a sexual orientation discrimination claim under Title VII. The plaintiff clearly evidenced anti-gay discrimination by

the university president. The EEOC's judgment in Baldwin v. Foxx was not binding.); 2016 U.S. Dist. LEXIS 95049, 2016 WL 3922053 (E.D. Va. July 19, 2016). (Senior U.S. District Judge Robert E. Payne rejected Hinton's motion for entry of final judgment on his Title VII sexual orientation discrimination claim, concluding that this was not a first impression issue that required urgent attention from the court of appeals. Hinton alleged anti-gay animus from the university's president.)

Hively v. Ivy Tech Comm. College, 830 F.3d 698 (7th Cir. 2016), vacated for rehearing en banc, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), argument en banc held November 30, 2016. (Three-judge panel rejected the EEOC's position that Title VII's prohibition against sex discrimination extends to sexual orientation discrimination because of contrary binding precedent from the 7th Circuit. Judge Ilana D. Rovner, in a separate part of the opinion joined by one other panel member, acknowledged that district courts are beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination, and that the current legal landscape is unsustainable after Obergefell v. Hodges.)

Igasaki v. Illinois Department of Financial and Professional Regulations, 2016 U.S. Dist. LEXIS 6209, 2016 WL 232434 (N.D. Ill., Jan. 20, 2016). (Judge Wood dismissed the plaintiff's sex discrimination claim, having concluded that it is really a sexual orientation discrimination claim, and thus "must be dismissed because sexual orientation is not a protected class under Title VII," citing a 7th Circuit holding from 2000.)

Kazar v. Slippery Rock University, 2016 WL 1247233 (W.D. Pa., March 30, 2016). (District Judge Alan N. Block granted summary judgment against the lesbian plaintiff's Title IX sex and sexual orientation discrimination claim, due to scant evidence that administrators knew she was a lesbian. The plaintiff claimed she was denied reappointment to her faculty position because of her sexual orientation. Rather, she was not offered her position because she had not finished for PhD until after the non-renewal.)

Koke v. Baumgardner, 2016 WL 93094 (S.D.N.Y. Jan. 5, 2016). (In a complaint alleging discrimination because of sex and actual or perceived sexual orientation under Title VII and New York local law which employer removed to federal court, district court declined to remand to state court, noting that the sex discrimination claim gives the court federal question jurisdiction under Title VII, regardless of how the question of sexual orientation discrimination is determined.)

Luna v. Bridgevine, Inc., 2016 U.S. Dist. LEXIS 3523, 2016 WL 128460 (S.D. Fla., Jan. 12, 2016). (Felix L. Luna, a gay man, filed suit in federal court against his former employer, Bridgevine, Inc., asserting a variety of claims but failing to identify any specific statute that he alleged had been violated; Judge cited to Espinosa v. Burger King Corp., 2012 U.S. Dist. LEXIS 135162, 2012 WL 4344323 (S.D. Fla. 2012), noting parenthetically that the court in Espinosa

had cited to "various federal cases wherein courts held that Title VII does not provide protection for discrimination based on sexual orientation.")

Magnusson v. County of Suffolk, 2016 WL 2889002, 2016 U.S. Dist. LEXIS 64897 (E.D.N.Y., May 17, 2016). (U.S. District Judge Sandra J. Feuerstein dismissed the lesbian custodial worker's Title VII claims that she was discriminated against because she did not conform to her supervisor's stereotypes on how female employees should dress. The claims were time-barred, precluded by Title VII's lack of coverage for sexual orientation discrimination, lacked severity and pervasiveness, and/or failed to exhaust internal remedies.)

McKeny v. Middleton, 2016 U.S. Dist. LEXIS 126499, 2016 WL 4944763 (S.D. Ohio, Sept. 16, 2016). (District Judge James L. Graham agreed with the individual defendants that the gay male plaintiff's state law claims of breach of contract, sex discrimination, civil conspiracy, and infliction of emotional distress were barred by official immunity, and that he could only maintain his Title VII claim of sex discrimination against Ohio University. The plaintiff is an assistant professor who claims he was denied tenure because he is gay. Judge Graham will allow the suit to proceed under Title VII and § 1983 against the university and individual defendants in their official capacities, pending the defendants' motion for summary judgment.)

Pelletier v. Purdue Pharma, 2016 WL 3620710, 2016 U.S. Dist. LEXIS 84099 (D. Conn. June 29, 2016). (District Judge Jeffrey Alker Meyer held that the gay male plaintiff failed to allege facts sufficient to fit within the sex-stereotyping theory that the 2nd Circuit may recognize under Title VII. He alleged his employer fired him after discovering he was in a long-term relationship with another man.)

Phipps v. Housing Authority of New Orleans, 2016 U.S. Dist. LEXIS 4714, 2016 WL 164916 (E.D. La., Jan. 13, 2016). (U.S. District Judge Martin L. C. Feldman, one of the few federal district judges who ruled against a marriage equality claim after the Supreme Court's decision in U.S. v. Windsor (2013), also rejects the proposition that sexual orientation discrimination claims can be brought under Title VII's ban on sex discrimination.)

Smith v. City of Pleasant Grove, 2016 U.S. Dist. LEXIS 139575, 2016 WL 5868510 (N.D. Ala., Oct. 7, 2016). (U.S. Magistrate Judge John E. Ott denied the city's motion to dismiss a Title VII claim by an openly gay man asserting he was discriminatorily discharged from the police department. Judge Ott referred to Price Waterhouse v. Hopkins to support the view that employees who suffered adverse consequences because of their failure to comply with an employer's sex-stereotypical views could sue for sex discrimination under Title VII.)

Somers v. Express Scripts Holding, 2016 WL 3541544, 2016 U.S. Dist. LEXIS 84268 (S.D. Ind., June 29, 2016). (The plaintiff avoided dismissal of his Title VII discrimination claim by never mentioning his sexual orientation. District Judge Jane Magnus-Stinson held that the plaintiff's

factual allegations based on his sex are both plausible on its face and gives Express sufficient notice of the nature of his claims.)

Thompson v. CHI Health Good Samaritan Hospital, 2016 U.S. Dist. LEXIS 132331 (D. Neb., Sept. 27, 2016). (U.S. Magistrate Judge Cheryl R. Zwart granted the gay male plaintiff's motion to amend his Fair Labor Standards Act complaint to include a claim of sex discrimination under Title VII, because he was waiting for a Right to Sue letter from the EEOC when he originally filed. Though Title VII and the Nebraska Employment Act do not recognize sexual orientation discrimination, the 8th Circuit recognizes sex stereotyping when it influences employment decisions. Here, the plaintiff was discriminated against for not conforming to the employer's stereotype of how men should present themselves, and was shortly terminated after appearing at a social event with a male.)

Tinory v. Autozoners, LLC, 2016 U.S. Dist. LEXIS 8760, 2016 WL 320108 (D. Mass., Jan. 26, 2016). (Employer's motion for summary judgment granted in case in which a male Massachusetts store manager for a national car part retailer and distributor claimed to have been subjected to discrimination and a hostile environment because of his perceived sexual orientation in violation of Massachusetts' anti-discrimination law and Title VII.)

Villanova v. Henry County Board of Education, 2016 U.S. Dist. LEXIS 125563, 2016 WL 4993389 (E.D. Ky., Sept. 15, 2016). (U.S. District Judge Gregory F. Van Tatenhove assessed whether the lesbian plaintiff's Title VII claim of sexual orientation discrimination may survive summary judgment despite the lack of acknowledgement of such claims by the 6th Circuit following Baldwin v. Foxx. The plaintiff was not able to withstand summary judgment because she failed to prove any genuine issue of material fact such that a jury could find in her favor. She was an elementary school teacher who claimed she was wrongfully terminated and discriminated against on the basis of her gender, sexual orientation, and her same-sex marriage.)

Winstead v. Lafayette County Board of County Commissioners, 2016 U.S. Dist. LEXIS 80036, 2016 WL 3440601 (June 20, 2016). (District Judge Mark E. Walker, noting that the 11th Circuit has not issued precedential rulings, refused to dismiss a perceived sexual orientation discrimination claim under Title VII. He notes that the basis of sexual orientation discrimination is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination.)

Zarda v. Altitude Express, Inc., No. 15-3775 (2d Cir.) (appeal from E.D.N.Y., argued before three-judge panel of the Second Circuit on January 5, 2017.)

C. In the Lower Courts (Gender Identity)

Includes many cases concerning restroom facility access for transgender students under Title IX.

Board of Education v. U.S. Department of Education, 2016 U.S. Dist. LEXIS 131474, 2016 WL 5239829 (S.D. Ohio, Sept. 26, 2016). (U.S. District Judge Algenon L. Marbley issued an order against the Highland Local School District on behalf of an eleven year-old elementary school student who is a transgender girl, allowing her to use restrooms consistent with her gender identity. Judge Marbley agreed with the federal government that the court did not have jurisdiction over the school district's attack on the Obama Administration's interpretation of Title IX; the school district's attack must be done in the context of appealing an adverse decision by the Department of Education ordering it to comply with the interpretation or risk losing federal funding. Furthermore, Judge Marbley applied heightened scrutiny applied to this case, drawing support from Obergefell's emphasis on the immutability of sexual orientation and the long history of anti-gay discrimination.) * * * Board of Education of the Highland Local School District v. U.S. Department of Education, 2016 U.S. Dist. LEXIS 145560, 2016 WL 5372349 (S.D. Ohio, Oct. 20, 2016), further motion to stay denied sub nom. Dodds. V. U.S. Department of Education, 2016 U.S. App. LEXIS 22318, 2016 WL 7241402 (6th Cir., Dec. 15, 2016). (U.S. District Judge Algenon L. Marbley denied Highland's motion to stay his injunction requiring the district to all a transgender girl to use the girls' restroom at an elementary school. The 6th Circuit has previously recognized that discrimination against transgender employees is actionable under Title VII's ban on sex discrimination. Furthermore, Title IX sex discrimination claims in federal court typically follow Title VII precedent. A 6th Circuit panel voted 2-1 to deny the school district's further motion to stay, despite the pendency of Gloucester County v. G.G. in the U.S. Supreme Court, over a dissenting opinion find this case on all fours with Gloucester.)

Carcano v. McCrory, 2016 U.S. Dist. LEXIS 114605, 2016 WL 4508192 (M.D.N.C., August 26, 2016). (District Judge Thomas D. Schroeder granted a motion for preliminary injunction brought by the attorneys of three transgender plaintiffs asserting a Title IX challenge to North Carolina's H.B.2. The injunction allows them to use bathrooms consistent with their gender identity in the University of North Carolina. The judge found that the plaintiffs were likely to succeed on their merits given the 4th Circuit's ruling in G.G. v. Gloucester County School Board.)

Carr v. North Shore-Long Island Jewish Health Systems, Inc., 2016 U.S. Dist. LEXIS 81994, 2016 WL 3527585 (E.D.N.Y., June 23, 2016). (District Judge Joanna Seybert ruled that the plaintiff, a transgender woman part of the Unitarian Universalist Church, could move forward with discovery on her claim that she was discriminatorily denied employment because of her sex and religion under Title VII and NY Human Rights Law. The judge also granted the defendant's

motion to dismiss that the plaintiff was subject to unlawful discrimination during the externship, because the relevant statutes do not consider unpaid externs as employees.)

Chavez v. Credit Nation Auto, 641 F. App'x 883 (11th Cir. 2016). (The 11th Circuit Court of Appeals partially reversed a decision by the U.S. District Court for the Northern District of Georgia, which had granted summary judgment to the employer on a transgender employee's claim that she had been discharged because of her gender identity in violation of Title VII.)

Deneffe v. Skywest Inc., 2016 U.S. Dist. LEXIS 55496, 2016 WL 1843061 (D. Colo. April 26, 2016). (District Judge Michael E. Hegarty granted summary judgment to the employer for a Title VII claim because the plaintiff, a gay pilot, failed to show he was discriminated against because he was gay or because of failure to conform to gender stereotypes.)

Doe v. Arizona, 2016 U.S. Dist. LEXIS 36229 (D. Ariz. Mar. 21, 2016). (U.S. District Judge Campbell wrote that the EEOC and courts have held that Title VII's sex discrimination ban prohibits workplace discrimination based on gender identity. Campbell rejected the state's argument that the plaintiff, a transgender man, failed to state a claim.)

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 2016 U.S. Dist. LEXIS 109716, 2016 WL 4396083 (E.D. Mich., August 18, 2016). (U.S. District Judge Sean F. Cox granted summary judgment to the funeral home on a transgender funeral director's Title VII claim, based on defendant's religious objections under the Religious Freedom Restoration Act (RFRA), finding that the EEOC failed to show that requiring the employer to allow the transgender employee to wear the approved female outfit under employer's dress code was the least restrictive alternative to achieve the government's compelling interest in preventing sex stereotyping discrimination in the workplace. The judge noted that if the employee had sued the funeral home on her own behalf, the defendant would not have been able to raise its RFRA defense.)

Fabian v. Hospital of Central Connecticut, 2016 U.S. Dist. LEXIS 34994, 2016 WL 1089178 (D. Conn., March 18, 2016). (U.S. District Judge Stefan R. Underhill ruled that gender identity discrimination is actionable under Title VII of the Civil Rights Act of 1964 and Connecticut statute. Sex discrimination includes discrimination because of characteristics and properties by which an individual may be classified as male or female, not just distinctions between male and female or maleness and femaleness. The plaintiff, a transgender doctor, was allowed to move forward with her sex discrimination claim against a hospital she sought employment from.)

Franciscan Alliance v. Burwell, Civ. Action No. 7:16-cv-00108-O (N.D. Tex., Dec. 31, 2016). (U.S. District Judge Reed O'Connor preliminarily enjoins federal government for enforcing part of new HHS regulations under Affordable Care Act forbidding gender identity discrimination by insurers and health care providers.)

Mickens v. General Electric Company, 2016 U.S. Dist. LEXIS 163961 (W.D. Ky. Nov. 28, 2016). (Chief U.S. District Judge Joseph H. McKinley, Jr. rejected GE's argument that Title VII does not extend to the plaintiff's claim that he was subjected to harassment and disparate treatment due to being a transgender black man who does not conform to gender stereotypes.)

Roberts v. Clark County School District, 2016 U.S. Dist. LEXIS 138329 2016, WL 5843046 (D. Nev., Oct. 4, 2016). (U.S. District Judge Jennifer A. Dorsey granted partial summary judgment to Roberts, a transgender male police officer, for his Title VII and state law gender-identity discrimination claims. State law already explicitly recognizes such discrimination. Judge Dorsey held that in light of overwhelming 9th Circuit precedent, she rejected the defendant's contention that Title VII does not prohibit sex stereotyping and gender-identity discrimination within "sex discrimination.")

Robinson v. Dignity Health, 2016 U.S. Dist. LEXIS 168613, 2016 WL 7102832 (N.D. Cal., Dec. 6, 2016). (Stays proceedings in transgender employee's claim that employer's refusal to cover transition procedures under employee benefit plan violates Title VII and anti-discrimination requirements of Affordable Care Act, pending U.S. Supreme Court ruling on Title IX claim in Gloucester County v. G.G.)

State of Texas v. United States of America, 2016 WL 4426495 (N.D. Texas, August 21, 2016). (District Judge Reed O' Connor issued a nationwide preliminary injunction against the Obama administration's enforcement of Title IX of the Education Amendments Act to require schools to allow transgender students to use restroom facilities consistent with their gender identity or risk their eligibility for funding from the Department of Education. He rejected the 4th Circuit's conclusion in G.G. v. Gloucester County School Board that the existing state and regulations are ambiguous and thus subject to administrative interpretation, and that Congress had not contemplated outlawing gender identity discrimination when it passed sex discrimination laws.)

Students and Parents for Privacy v. United States Department of Education, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016). (U.S. Magistrate Judge Jeffrey T. Gilbert recommended that District Judge Jorge Alonso reject the plaintiff's motion for a preliminary injunction to enjoin the settlement between the school district and federal government of a Title IX case concerning transgender students' access to restrooms. The plaintiffs failed to show a likelihood of success on their assertion that Title IX's ban on sex discrimination unambiguously excludes gender identity discrimination. The EEOC's rule is interpretive, so it did not need to be promulgated under the notice-and-comment process. Furthermore, the mere presence of transgender students in restrooms is not severe, pervasive, or objectively offensive enough to create a hostile environment.)

Whitaker v. Kenosha Unified School District No. 1, 2016 U.S. Dist. LEXIS 129678, 2016 WL 5372349 (E.D. Wis., Sept. 22, 2016). (U.S. District Judge Pamela Pepper issued an

order against the Kenosha Unified School District on behalf of a transgender boy to use restrooms consistent with his gender identity. Unlike U.S. District Judge Marbley in Board of Education v. U.S. Department of Education, Judge Pepper applied a rational basis test.); Whitaker v. Kenosha Unified School District No, 1 Board of Education, 2016 U.S. Dist. LEXIS 136940 (E.D. Wis., Oct. 3, 2016). District Judge Pamela Pepper denied the District's new motion for a stay pending appeal to the 7th Circuit of the judge's dismissal the District's motion to dismiss the case, and her grant of a preliminary injunction requiring the District to allow a transgender boy use the boy's restroom at his high school.)

White v. City of New York, 2016 WL 4750180 (S.D.N.Y., Sept. 12, 2016). (U.S. District Judge Gregory H. Woods granted the city's motion to dismiss the transgender man's claim that his 14th Amendment rights were violated by police who failed to respond to continued verbal harassment of the plaintiff by Napoleon Monroe, a man who frequented White's neighborhood and made various threats against him. The court concluded that though the police officers were blatantly transphobic, the 2nd Circuit has yet to hold that transgender discrimination is a form of sex discrimination, and thus subject to heightened scrutiny review. Under rational basis review, the officers' inaction was merely a discretionary decision not to arrest Monroe, who had yet to commit a violent crime; therefore, they still retained a shield of qualified immunity. Furthermore, under Due Process jurisprudence, the officers had no obligation to stop Monroe as long as they were enabling or encouraging actual harm to White.)

III. LGBT Families After the U.S. Supreme Court's 2015 Decision in *Obergefell v. Hodges*

To what extent have lower courts taken Obergefell*'s "fundamental rights" and "equal dignity and respect" ruling to heart in addressing controversies involving LGBT families? When is* Obergefell *retroactive in effect? How are courts treating non-marital LGBT family claims? How are courts treating same-sex marital public accommodations claims?*

A.A. v. B.B., No. SCAP-15-0000022, 2016 Haw. LEXIS 280 (Nov. 3, 2016). (The Supreme Court of Hawaii reversed and remanded a decision by the Family Court of the 3rd Circuit, which previously denied A.A.'s petition for joint custody. The parties involved were gay men who were previously in a committed relationship and raised B.B.'s biological granddaughter together.)

A. H. v. W. R. L. & M., 482 S.W.3d 372 (Ky. 2016). (Lesbian fighting for joint custody of a child borne by her ex-partner when they were still together won a unanimous ruling from the Kentucky Supreme Court that lets her petition for shared custody and visitation go forward on the merits.)

Blumenthal v. Brewer, 2016 IL 118781, 2016 Ill. LEXIS 763 (August 18, 2016), petition for rehearing denied, 2016 Ill. LEXIS 1236 (Oct. 20, 2016). (The Illinois Supreme Court ruled that the state's statutory prohibition of common law marriage still precludes unmarried same-sex couples from bringing claims against one another to enforce mutual property

rights. Blumenthal and Brewer are lesbians who lived together since 1981, raised children, and pooled their resources to buy property and invest in Blumenthal's medical practice before breaking up in 2010, before the state passed its civil union law and before Obergefell.)

Brenner v. Scott; Grimsley v. Scott, Case Nos. 4:14cv107-RH/CAS; 4:14cv138-RH/CAS (N.D. Fla. March 30, 2016). (U.S. District Judge Robert Hinkle granted summary judgment to the plaintiffs, finding that the state agencies failed to comply with Obergefell v. Hodges by refusing to list both parents on the birth certificate of a child born to a same-sex spouse. The statutory reference to 'husband' cannot prevent equal treatment, especially when a non-biological opposite-sex spouse can be listed on a birth certificate.)

Brooke S.B. v. Elizabeth A. C.C., 2016 NY LEXIS 2668, 2016 WL 4507780 (NY Court of Appeals, August 30, 2016). (Overruled Alison D. v. Virginia M. and established a new rule for determining when somebody who is neither a biological nor an adoptive parent can seek custody of a child. The new rule provides that a non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70 where he/she shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together. The parties here decided to have and raise a child together, raising their son together between 2009 and 2010. After their relationship ended, Elizabeth permitted Brooke to continue her visits until 2013. Denial of continued visits triggered the litigation.)

Campaign for Southern Equality v. Mississippi Department of Human Services, 2016 U.S. Dist. LEXIS 43897 (S.D. Miss., Northern Div. March 31, 2016). (Finding that the ability of a couple to adopt a child is a "benefit" of marriage, U.S. District Judge Daniel P. Jordan, III, ruled that Mississippi's statutory ban on adoptions by same-sex couples probably violates the 14th Amendment under the Supreme Court's ruling in Obergefell v. Hodges.)

Conde-Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279 (D.P.R. 2016), mandamus granted sub nom In re Conde-Vidal, 818 F.3d 765 (1st Cir., April 7, 2016). (U.S. District Judge Juan M. Perez-Gimenez of the U.S. District Court in Puerto Rico, ruled that the U.S. Supreme Court's ruling on June 26, 2015 in Obergefell v. Hodges does not necessarily apply to Puerto Rico; 1st Circuit granted petition for writ of mandamus and case was remanded to a different federal judge, who entered an order the same day holding Puerto Rico's ban on same-sex marriage unconstitutional) See Conde-Vidal v. Padilla, Civil No. 14-1253 (GAG) (D. P.R., April 7, 2016). (U.S. District Judge Gustavo A. Gelpi issued an order declaring that Puerto Rico's ban on same-sex marriage was unconstitutional.)

Conover v. Conover, 448 Md. 548 (2016). (Maryland's Court of Appeals overruled 2008 precedent of Janice M. v. Margaret K. The Court now finds that the same-sex spouse of a birth mother, who gave birth shortly before they were married, has a standing as a "de

facto parent" to pursue custody and visitation in the context of the present divorce proceedings even though she never adopted the child.)

Cooper v. Coulter, 335 Ga. App. 827, 783 S.E.2d 350 (2016). (Holding that the fact that a woman had a female partner did not matter regarding a change of custody argued by the teenage boy's father in this case.)

Cressy v. Proctor, 2016 U.S. App. LEXIS 21973, 2016 WL 7195814 (2nd Cir., Dec. 12, 2016). (Former non-marital same-sex partner not entitled to compensation for services on farm, but entitled to compensation for services in partner's business, as to which court found he was an "employee" although he was never compensated for his work or formally denominated as such.)

D.G. & S.H. v. K.S., 44 N.J. Super. 423, 133 A.3d 703 (N.J. Superior Ct. 2015). (That a child's birth parents, a gay man and a straight woman who conceived the child through assisted reproductive technology, should share joint legal custody together with the father's same-sex spouse, who was found by the court to be a psychological parent of the child.)

Ferrand v. Ferrand, 2016 La. App. LEXIS 1600 (Aug. 31, 2016). (Writing for the Louisiana 5th Circuit Court of Appeals, Judge Fredericka Homberg Wicker found that the trial court abused its discretion in dismissing Vincent's custody petition and denying his request for a court-appointed psychologist to determine whether continued custody of the young twins born to his former female partner Paula was harmful to them. Vincent identified as female at birth, but then as a male by the time he met Paula. She gave birth to twins through in vitro fertilization, and Vincent signed and was designated as the twins' father on their birth certificates. He testified that between September 2012 and February 2014, he was the primary provider and caregiver.)

Frank G. v. Renee P.-F., 2016 NY Slip Op 05946, 142 A.D.3d 928, 37 N.Y.S.3d 155 (N.Y. App. Div., 2nd Dept., Sept. 6, 2016). (Ruled that a gay man, who was parenting twin children conceived through in vitro fertilization using his same-sex partner's sperm, had standing to seek custody of the children after the couple split up. The case will go back to Family Court to determine whether an award of custody is in the best interest of the children. Though the conception occurred pursuant to an illegal surrogacy contract with the man's sister, testimony of the couple's verbal agreement was bolstered by the written agreement. Thus, there was sufficient evidence that he and his partner entered into a pre-conception agreement to conceive the children and raise them together as their parents, and that they equally shared the rights and responsibilities of parenthood, and were equally regarded by the children as their parents.)

Gardenour v. Bondelie, 60 N.E.3d 1109 (Ind. Ct. App. 2016). (The Court of Appeals of Indiana found that Judge Stephanie LeMay-Luken of the Hendricks Superior Court had acted appropriately when dealing with the dissolution of the California-registered domestic partnership between two lesbians, Kristy and Denise. The court also concluded that Denise is the legal parent

of the child conceived and raised within the partnership, under Indiana law, and that the trial court did not err in awarding Denise joint legal custody and parenting time and ordering her to pay child support.)

Gifford v. McCarthy, 2016 NY Slip Op 00230, 137 A.D.3d 30, 23 N.Y.S.3d 422 (N.Y. App. Div., 3rd Dept.). (Upheld a decision by the State Division of Human Rights (SDHR) that Liberty Ridge Farm LLC, an upstate business corporation that rents facilities for wedding ceremonies and other life-cycle events, violated the state's Human Rights Law (HLR) in 2012 when the business turned away a lesbian couple looking for a place to hold their wedding ceremony and reception, rejecting owners' religious objection to hosting the ceremony.)

Henderson v. Adams, 2016 U.S. Dist. LEXIS 84916, 2016 WL 3548645 (S.D. Ind., June 30, 2016). (District Judge Tanya Walton Pratt found that Obergefell's mandate to afford equal marriage rights to same-sex couples included a requirement that the "parental presumption," applied to husbands of women who give birth, should also be applied to their wives. The ruling applies to cases brought by same-sex couples that were married before their children were born.)

Husk v. Adelman, 281 Or. App. 378, 383 P.3d 961 (2016). (Oregon's Court of Appeals upheld the lower court's finding that Adelman did not act in the best interests of her child when she curtailed Husk's visitations. Husk is Adelman's former same-sex partner, and her current status in relation to the child is "non-parent.")

Jones v. Wall, 2016-Ohio-2780 (Ct. App., 12th Dist.). (Upheld the Warren County trial court's decision to transfer custody of a teenage girl from her mother to her father. The girl struggled with her sexual orientation. Under her mother's strict care, she experienced depression, engaged in self-harm, and performed poorly in school. Meanwhile, she appeared to thrive in visits with her father.)

K.Y. & B.Y., In re, 2016-Ohio-604 (Ct. App., 2nd Dist.). (Rejected an argument that custody of the children should be given to Plaintiff's transgender brother, D.S., and his lesbian partner, M.S., as opposed to placement with foster parents under the custody of the Clark County Department of Job and Family Services.)

Kelly S. v. Farah M., 2016 NY Slip Op 02656 (App. Div., 2nd Dept.). (Affirmed the decision by Suffolk County Family Court Judge Deborah Poulos recognizing the parental status of a lesbian co-parent. Kelly was seeking visitation rights for the two children who were conceived by her legal partner while they were together.)

L., Matter of, 2016 NY Slip Op 31868(U) (Fam. Ct.). (Retired New York State Judge Richard Ross ruled that a person who is already a legal parent of a child in the state, but who asserts parentage as the same-sex spouse of the biological mother, could be granted a second-parent

adoption. The opinion covers adoption petitions from five parents involving six children. The judge held it would serve the best interests of the children to approve these adoptions, even if there was no need under state law for same-sex parents to adopt the child borne by their spouses during the marriage.)

Lake v. Putnam, 2016 Mich. App. LEXIS 1297 (Ct. App. July 5, 2016). (The Court of Appeals ruled that a lesbian co-parent, seeking visitation with the biological child of her former same-sex partner, is merely a third party who does not come within the standing requirements of the state's Child Custody Act.)

Luttrell v. Cucco, 784 S.E.2d 707 (Va. Apr. 28, 2016). (The Virginia Supreme Court ruled that a man could stop paying alimony to his ex-wife now that she lives with another woman as a gay couple.)

Mabry v. Mabry, 499 Mich. 997, 882 N.W.2d 539 (2016). (The Supreme Court of Michigan denied an appeal from an unpublished decision by the state's Court of Appeals in a lesbian custody dispute. The appellate court found lack of standing for the non-biological mother to seek custody, even though the women had a formal domestic partnership and took repeated steps to solidify their relationship. During the entire period of their relationship, Michigan prohibited same-sex marriages.)

Marie v. Mosier, 2016 WL 3951744, 2016 U.S. Dist. LEXIS 96245 (D. Kan., July 22, 2016). (U.S. District Judge Daniel D. Crabtree granted the plaintiffs' request for an injunction requiring Kansas officials to comply with Obergefell fully or risk being subject to contempt proceedings. The state had initially refused to issue appropriate birth certificates for children of lesbian couples.)

McLaughlin v. Jones, 382 P.3d 118 (Ariz. Ct. App. 2016). (The Court of Appeals of Arizona ruled that in light of Obergefell v. Hodges, Arizona courts must construe the state's paternity statute in a gender neutral way so that the same-sex spouse of a woman who gives birth enjoys the presumption of parental status.)

Munson & Beal, In re, 146 A.3d 153 (N.H. 2016). (The New Hampshire Supreme Court adopted a new interpretation of the divorce statute in order to accommodate a lesbian couple seeking to divide up their "marital assets." The couple was together for 21 years, and was only able to become civil union partners in the state after the first fifteen years; their civil union was converted into a marriage after the state's law took effect in 2011. The court rejected Munson's argument that this was a short-term marriage that began in 2011, and adopted Beal's contention that the 2008 date of their civil union should be used as the start of their marriage for the purposes of their divorce proceeding.)

Newland v. Taylor, 2016 OK 24, 368 P.3d 435. (The Oklahoma Supreme Court's decision in Ramey v. Sutton, regarding Obergefell's intention to recognize the shared parental

responsibilities of unmarried same-sex couples, requires the district court to grant the plaintiff's petition for a "best interest" hearing, after her relationship with her co-parent ended.)

Neyman v. Buckley, 2016 Pa. Super. LEXIS 805, 2016 PA Super 307, 2016 WL 7449227 (Dec. 28, 2016). (Extending comity to Vermont civil union for purpose of an action in the Family Court seeking dissolution of the civil union.)

P.S., In the Interest of, A Child, 2016 Tex. App. LEXIS 11657 (Ct. App., 2nd Dist. Oct. 27, 2016). (Held that a man who donated sperm to his lesbian friend could seek parental rights, including visitation, because they did not use a doctor to perform the artificial insemination. He was not held to be a "donor" within the meaning of a statute that cuts off parental rights when a doctor performs the procedure. Instead, the mother provided sterile cups and syringes, and inseminated herself. The man also participated throughout the pregnancy, was at the hospital during the birth, and signed an acknowledgement of paternity and birth certificate.)

Partanen v. Gallagher, 475 Mass. 632, 59 N.E.3d 1133 (2016). (The Massachusetts Supreme Judicial Court held that the former same-sex partner of a woman who gave birth to two children through donor insemination during their relationship can seek to establish full legal parentage under the state's statute concerning children born out of wedlock. This is the Court's first time taking advantage of a law providing that words of one gender may be construed to include the other gender and the neuter.)

Pidgeon v. Turner, 59 Tex. Sup. Ct. J. 1625 (2016). (Texas Supreme Court Justice John P. Devine issued a dissent from the court's denial of a petition to review the Court of Appeal's decision to vacate a temporary injunction against Houston's 2014 policy directive to provide employee benefits to the same-sex spouses of public employees. The Justice wrote that Obergefell is narrowly focused on the right to marry, and that although the U.S. Supreme Court incidentally mentioned the various rights and benefits that flow from marriage, it did not hold there was a fundamental right to all of those rights and benefits. Motion for rehearing of Court's original denial of petition for review granted on January 20, 2017.)

R.A.B., Jr., In re Adoption of, 2016 WL 7387884, 2016 Pa. Super. LEXIS 779 (Dec. 21, 2016). (Holding Orphans' Court has jurisdiction to dissolve a same-sex adult adoption so that the parties can marry, in light of Obergefell's recognition of a fundamental constitutional right for same-sex couples to marry.)

Sandoval, In re, 2016 Tex. App. LEXIS 754, 2016 WL 353010 (Tex. Ct. App., 4th Dist., Jan. 27, 2016). (Reaffirming a ruling issued on August 12, 2015, that a transgender man who had been parenting children adopted by his long-time former female partner lacked standing to seek custody and visitation rights, because he didn't assert such a claim promptly after the couple broke up.)

Schuett v. FedEx Corporation, 2015 U.S. Dist. LEXIS 244, 2015 WL 39890 (N.D. Cal. Jan 4, 2016). (Holding that the Supreme Court's 2013 decision in U.S. v. Windsor striking down Section 3 of the Defense of Marriage Act (DOMA), could be applied retroactively to allow Stacey Schuett, a lesbian widow, to sue her late spouse's employer for a survivor annuity.)

Smith v. Pavan, 2016 Ark. 437, 2016 WL 7156529 (Dec. 8, 2016). (Obergefell does not require state to extend parental presumption to same-sex spouse of a birth mother for purposes of birth certificates.)

Solomon v. Guidry, 2016 VT 108, 2016 Vt. LEXIS 111, 2016 WL 5338492 (Sept. 23, 2016). (The Vermont Supreme Court unanimously ruled that its law—providing couples legally united in Vermont and living elsewhere, who sought to dissolve their unions but could not do so in the courts of their domiciliary state, could obtain dissolution in Vermont without meeting any residency requirement—remains relevant. Though Obergefell held that all states must recognize legally contracted same-sex marriages, there is still no uniformity about interstate recognition of civil unions. The parties here entered into a civil union in 2001, and currently reside in North Carolina.)

Strawser v. Strange, 2016 U.S. Dist. LEXIS 111400, 2016 WL 3199523 (S.D. Ala. Aug. 22, 2016). (Senior U.S. District Judge Callie V. S. Granade granted the plaintiffs' request for entry of a permanent injunction making clear that the state's statutory and constitutional bans on same-sex marriage are unconstitutional. The injunction also enjoined all relevant defendants and defendant class members from enforcing the law. Defendants included Attorney General Luthor Strange and Judge Don Davis.)

Summers v. Whitis, 2016 U.S. Dist. LEXIS 173222, 2016 WL 7242483 (D. Ind., Dec. 15, 2016). (Discharge of deputy county clerk for refusing to process marriage license applications for same-sex couples did not violate her right to Free Exercise of Religious under the 1st Amendment.)

Swicegood v. Thompson, 2016 WL 192045 (Jan. 13, 2016). (In a case in which the Family Court had dismissed Cathy J. Swicegood's complaint against Polly A. Thompson for an order of separate support and maintenance on May 5, 2014, on the ground that a same-sex marriage could not be recognized under South Carolina law so the Family Court did not have jurisdiction to entertain the complaint, the appeals court remands for reconsideration in light of Obergefell.)

Torres v. Seemeyer, 2016 WL 4919978, 2016 U.S. Dist. LEXIS 124736 (W.D. Wis., Sept. 14, 2016). (District Judge Barbara Crabb granted summary judgment to the plaintiffs, a married lesbian couple who sought to have both their names listed on their child's birth certificate.) * * * Torres v. Rhoades, 317 F.R.D. 85 (W.D. Wis., April 4, 2016). (District Judge Barbara Crabb granted the plaintiffs' motion to certify a plaintiff class, but limited to similarly situated parents who conceived a child through donor insemination after

marrying. The case challenges state officials who refuse to extend equal treatment to lesbians when issuing birth certificates without listing both women as parents.)

Waters v. Ricketts, 2016 WL 447837, 2016 U.S. Dist. LEXIS 13515 (D. Neb. February 4, 2016). (The U.S. District Court for the District of Nebraska has declared Nebraska's state constitutional amendment banning same-sex marriage to be unconstitutional, issued a permanent injunction prohibiting its enforcement, and ordered all state officials to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations, or benefits of a marriage.)

Willis v. Mobley, 136 S. Ct. 805 (2016). (Denying certiorari in Willis v. Mobley, 171 So.3d 739 (Table) (Fla. 5th Dist. Ct. App. July 24, 2015). (The U.S. Supreme Court declined to review a decision by the Florida courts rejecting the parental rights claims of a woman against her former partner who bore their child.)

IV. Sexual Conduct and the Law

Tracing the scope of Lawrence v. Texas *and Constitutional Issues Raised by Treatment of Sex Offenders, plus Other Criminal Litigation and Appeals.*

Anbessa v. Riddick, Civil Action No. 3:15CV212, 2016 U.S. Dist. LEXIS 58375 (E.D. Va. May 2, 2016). (Pro se heterosexual inmate Anbessa was found guilty of violating prison rules by "masturbating off of" a correction officer. Lawrence v. Texas does not apply to the prison setting, and Bowers v. Hardwick remains alive in correctional facilities.)

Arias v. State of Texas, No. 04-15-00753-CR, 2016 Tex. App. LEXIS 10087 (Ct. App., 4th Dist., Sep. 14, 2016). (Rejected the 24 year-old defendant's argument that the state's Romeo and Juliet law was unconstitutional because it did not protect him from a statutory rape charge. He believed his partner, a seventeen year-old boy, was of age to consent. The court held that the law did not violate his 14th Amendment rights because Lawrence v. Texas did not protect all consenting sex as a fundamental right.)

Clayton v. Michigan Department of Corrections, 2016 WL 7173356 (W.D. Mich., Dec. 9, 2016). (HIV-positive state prison inmate is entitled to a trial for his claim that his civil rights are violated by being placed in isolation because he has engaged in penetrative sex with other inmates without disclosing his HIV status. Plaintiff's claim that due to treatment he is not infectious and thus should not be placed in segregation is "suspect" but should not be resolved through screening, but rather through summary judgment or trial, according to the court.)

Doe v. Cooper, 2016 U.S. App. LEXIS 21412 (4th Cir., Nov. 30, 2016). (Affirmed a ruling by Senior U.S. District Judge James A. Beaty that some provisions of the North Carolina sex offender registration laws were unconstitutionally vague or overbroad. The laws applied whether the offenses involved minors or adults, restricted where offenders can live,

work, or travel, and were not narrowly tailored to meet 1st Amendment requirements when they restricted activities that would enjoy 1st Amendment protections.)

Doe v. Kerry, 2016 U.S. Dist. LEXIS 130788, 2016 WL 5339804 (N.D. Cal., Sept. 23, 2016). (District Judge Phyllis J. Hamilton granted the U.S. government's motion to dismiss a facial challenge to a 2016 federal statute requiring U.S. passports to carry information about the holder's status as a registered sex offender. The plaintiff's compelled speech claim failed because passports are deemed government speech and property of the federal government. The judge also found that sex offenders do not have a fundamental right to be free from registration and notice requirements, nor do they have a fundamental right to avoid publicity when the information is accurate, public, and necessary to protect children and others from sexual abuse and exploitation.)

Doe v. Miami-Dade County, 838 F.3d 1050 (11th Cir. 2016). (The 11th Circuit reversed and remanded the district court's dismissal of the three plaintiffs' constitutional challenge to the Lauren Book Child Safety Ordinance's residential restrictions as applied to persons convicted of sex offenses prior to the ordinance's passage. The county's extended restrictions prohibited the plaintiffs from living within 2,500 feet of a school, as opposed to 1,000 feet, for as long as they live. The 5th Circuit held that the punitive restriction violated the ex post facto clauses of the federal and Florida Constitutions.)

Doe v. Rector and Visitors of George Mason University, 179 F. Supp. 3d 583 (E.D. Va., Feb. 25, 2016). (U.S. District Judge Thomas Selby Ellis, III, has rejected the argument that a consensual BDSM relationship is protected against government regulation by the 14th Amendment.)

Doe v. Snyder, 834 F.3d 696 (6th Cir. 2016). (A unanimous panel ruled that Michigan's 2006 Sex Offender Registration Act [SORA] violates the Ex Post Facto prohibition in the Constitution regarding plaintiffs whose offenses predate the act's provisions.)

Erotic Service Provider Legal Education & Research Project v. Gascon, 2016 WL 1258638, 2016 U.S. Dist. LEXIS 44178 (N.D. Cal., March 31, 2016). (U.S. District Judge Jeffrey S. White reaffirmed that Lawrence v. Texas does not support a claim purporting the unconstitutionality of state laws prohibiting prostitution under either the California Constitution, or the 1st and 14th Amendments of the federal constitution.)

Flanigan's Enterprises v. City of Sandy Springs, 831 F.3d 1342 (11th Cir. 2016). (The 11th Circuit panel found no subsequent developments after 2004 case Williams v. Attorney General that would change its position that a ban on commercial distribution of sex toys does not violate the 14th Amendment's Due Process Clause. However, it encouraged the plaintiffs, who own an adult bookstore, to seek en banc reconsideration.)

Gilbert v. State, 2016 WL 1084731 (Ala. Ct. Crim. App., March 18, 2016). (The court held that the facts that the defendant pled guilty to—sexual misconduct and sodomy with a seventeen year-old boy—did not come under the sphere of protected conduct under Lawrence v. Texas. Alabama has not revised its sodomy law in response to Lawrence.)

Haynes v. State of Tennessee, 2016 Tenn. Crim. App. LEXIS 147 (Crim. App. Feb. 26, 2016). (Denied the defendant's petition for post-conviction relief. The defendant raped nineteen year-old twin brothers who had the mental development of a child. The trial court had rejected his claim that his act was consensual and protected by Lawrence v. Texas because he too was mentally impaired. Furthermore, the court rejected the defendant's argument that the rape statute was too broad.)

Hoyle v. United States, 2016 U.S. Dist. LEXIS 51317 (E.D. Tenn., April 18, 2016). (District Judge Ronnie Greer ruled that Obergefell had nothing to do with a man who enticed a teenage boy to have sex through Facebook messages. The sexual conduct was proscribed by a statute because of the victim's status as a minor, not because of sexual orientation.)

Merithew v. Klee, 2016 WL 6927451 (W.D. Mich., Nov. 28, 2016). (U.S. District Judge Robert Holmes Bell rejected the publication of a July 2016 partner study as a basis for waiving the time limit for filing a habeas corpus conviction on a charge of illegally exposing somebody to HIV through sexual penetration. The study found that a person on antiretroviral therapy with an undetectable viral load of HIV is non-infectious.)

People of California v. DeSisto, 2016 WL 5848714 (Cal. 2d Dist. Ct. App., Oct. 6, 2016). (Upheld the trial court's order that the defendant, convicted of sexual penetration by foreign object, submit to HIV testing. The court stated that the evidence was sufficient to cause a person of ordinary care and prudence to entertain an honest and strong belief that the defendant transferred bodily fluid, despite his claim otherwise. The victim was not fully conscious, had reported pain and soreness, and a swab contained DNA for which the defendant was a possible contributor.)

People of California v. Munoz, 2016 Cal. App. Unpub. LEXIS 3820 (Ct. App. May 24, 2016). (Upheld an order by the Contra Costa County superior court requiring the defendant to submit to HIV testing. The defendant is a man who took advantage of a thirteen year-old girl by rubbing her vagina through her running shorts.)

People of Colorado v. Graves, 2016 CO 15, 368 P.3d 317 (Colo. Sup. Ct.). (State Supreme Court unanimously reversed the Adams County District Court's holding that the state's public indecency statute violated due process under the 14th Amendment for vagueness of "lewd," "fondling," "caress" and "body." The statute was not vague as applied to the defendant, who stroked the clothed penis of another man in a pornographic movie theater.)

People of Illinois v. Minnis, 2016 IL 119563. (The Illinois Supreme Court held that the Internet disclosure provisions of the state's sex offender registry law did not violate the defendant's 1st Amendment rights. As a minor, he was adjudicated a sex offender upon conviction of criminal sexual abuse. The online registry is accessible by the public, and is intended to put them on notice of the presence of sex offenders so they can protect themselves and their children. However, the defendant argues that he will face significant problems as prospective employers and landlords use the Internet to screen applicants.)

People of New York v. Williams, 2016 WL 2602503 (N.Y. App. Div., 4th Dept., May 6, 2016). (Unanimously rejected HIV-positive defendant's appeal of an order determining that he is a dangerous sex offender requiring confinement under the N.Y. Mental Hygiene Law. He is an HIV-positive man who was convicted for using charm and/or force to engage in sexual relations with 42 females above and below legal age. He failed to complete sex offender treatment. Furthermore, two inmates and two corrections officers testified that Williams stated he intended to continue his behavior upon release.)

P.R. v. State of Florida, 183 So. 3d 1163 (Fla. 4th Dist. Ct. App. 2016). (Judge Dorian K. Damoorgian held that the Broward County Circuit Judge improperly ordered the juvenile defendant, who spit on a bus driver, to be required to submit to HIV and hepatitis tests. The tests was not requested within 48 hours after the defendant was charged, and there was no opportunity to do so since there was no conviction or delinquency adjudication.)

Rhoades v. State of Iowa, 880 N.W.2d 431 (Iowa 2016). (The Iowa Supreme Court found that Rhoades, whose guilty-plea conviction of criminal transmission of HIV was reversed in 2014, could not bring an action for damages against the state under the Wrongful Conviction Statute because he had pleaded guilty.)

Smith v. Commonwealth of Kentucky, 2016 WL 5247712 (Ky. Supreme Ct., Sept. 22, 2016). (Upheld a murder conviction against a transgender woman who fatally stabbed a man 72 times after he sexually accosted her during a New Year's Eve party. On appeal, the Court rejected the defendant's objections concerning evidence admitted or excluded at trial, including her doctor's expert testimony concerning hypervigilance that transgender women have around sexually aggressive men. The Court rejected the argument because the doctor did not relate that opinion to the defendant specifically, and found that the jury had enough untainted evidence to support the verdict.)

State of Minnesota v. Moser, 884 N.W.2d 890 (Minn. Ct. App. 2016). (Judge Lucinda E. Jesson of the Minnesota Court of Appeals held that the strict liability approach of the state's criminal statute, which makes it a crime to solicit a minor to engage in sex even though the defendant was mistaken or had a sincere belief concerning the minor's age, does not apply to internet solicitations where there is no face-to-face contact, and where the child had represented herself

to the solicitor as 16 or older. The district court erred because the defendant should have been able to raise such a defense at trial.)

State of Missouri v. Johnson, 2016 WL 7388617 (Mo. App., East. Dist., Dec. 20, 2016). (Reversing jury conviction of college athlete accused of transmitting HIV to sexual partners without disclosing his HIV status, finding prosecution violated discovery rules resulting in unfair trial ambush of defendant with selective excerpts from jailhouse phone conversations.)

State of Missouri v. S.F., 483 S.W.3d 385 (Mo. 2016). (Rejected female defendant's argument that § 191.677 of the Revised Statutes of Missouri infringed on her free speech and privacy rights by requiring her to disclose to potential sexual partners that she is HIV-positive. Judge Mary R. Russell wrote in the Court's opinion that that statute regulates conduct rather than speech, and that Lawrence v. Texas does not apply here because the statute does not criminalize consensual, non-harmful sexual conduct.)

State of Montana v. Theeler, 2016 Mon. LEXIS 1019, 2016 MT 318, 2016 WL 7109676 (Dec. 6, 2016). (Montana Supreme Court rejects equal protection challenge by unmarried straight man to application of domestic violence law to unmarried different sex couples when it failed to apply to unmarried same-sex couples.)

State of Nebraska vs. Duncan, 293 Neb. 359, 878 N.W.2d 363 (Neb. Supreme Ct. 2016). (Affirmed the hate crime conviction against the defendant, who hit a straight man in the face outside a gay bar. The victim was with two gay friends dressed in drag. The defendant had contended on appeal that he did not know the sexual orientation of the victim or his friends, and that "sexual orientation" is a vague term that required jury instruction.)

State of New Jersey v. Ravi, 447 N.J. Super. 261, 147 A.3d 455 (N.J. App. Div. 2016). (Threw out Dharun Ravi's 2012 bias intimidation conviction following the Supreme Court of New Jersey's declaration that a key provision of the statute was unconstitutional because it could impose liability without proof of unlawful intent. Ravi was the former roommate of Tyler Clementi, a Rutgers University freshman who committed suicide in 2010 after learning that Ravi had rigged up computer equipment in their dorm room to broadcast Clementi's intimate activities with a male companion. Ravi was convicted of bias intimidation because of the victim's sexual orientation. The court found that the trial was tainted by extensive testimony about Clementi's reactions to Ravi's conduct.)

State of Ohio v. Batista, 2016-Ohio-2848, 2016 Ohio App. LEXIS 1735, 2016 WL 2610027 (Ohio App., 1st Dist., May 6, 2016). (Rejected a First and Fourteenth Amendment challenge to the state's HIV exposure law making it unlawful to knowing engage in sexual conduct with another person without disclosing one's HIV-positive status.)

State of Washington v. Music, 193 Wash. App. 1039 (2016). (The Court of Appeals rejected a state prison inmate's contention that Lawrence v. Texas invalidated the state's former criminal

sodomy law under which he was convicted in 1974. Lawrence did not forbid sodomy prosecutions for non-consensual conduct. The defendant was involved in a prison gang rape in 1969.)

Stevens v. State, 2016 Iowa App. LEXIS 405 (Iowa Ct. App. Apr. 27, 2016). (Reinstated the defendant's post-conviction relief petition, stating that on remand, the trial court should determine whether the Rhoades decision applies retroactively. The defendant here was convicted under an Iowa statute that did not require actual transmission of HIV so long as a defendant exposed a victim to the virus through intimate contact.)

Strzyzewski v. Deal, 2016 WL 7423407 (D. Nev., Nov. 16, 2016). (Magistrate Judge recommends dismissing claim by HIV+ inmate that his rights are violated by keeping him in segregation. He was alleged to have engaged in sexual behavior with other inmates that could transmit HIV; magistrate opined that defendants had shown a legitimate penological reason to place him in administrative segregation to protect other inmates as well as him.)

Toghill v. Clarke, 2016 U.S. Dist. LEXIS 21521 (W.D. Va., Feb. 23, 2016). (US District Judge Urbanski denied a petition for habeas corpus, finding that despite federal court decisions declaring Virginia's overly-broad sodomy law unconstitutional in light of Lawrence v. Texas, the Virginia Supreme Court's ruling affirming the petitioner Adam Toghill's conviction for soliciting oral sex from a minor was not "contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts.")

United States v. Hill, 2016 U.S. Dist. LEXIS 54455, 2016 WL 1650767 (E.D. Va., April 22, 2016). (U.S. District Judge John A. Gibney, Jr. granted the defendant's motion to dismiss a federal hate crime indictment because it did not meet the commerce requirement of the Matthew Shepard-James Byrd, Jr. Hate Crimes Prevention Act. The defendant punched the gay victim repeatedly while working in an Amazon Fulfillment Center. Virginia's hate crime statute does not extend to sexual orientation hate crimes.)

United States v. Lewis, 2016 CCA LEXIS 256 (A.F. Ct. Crim. App. Apr. 20, 2016). (The Court of Criminal Appeals upheld the conviction of Staff Sergeant Jeffrey L. Lewis for performing oral sex on a sleeping lieutenant, since the court concluded that sleepers can't consent to sex. The court rejected the appellant's theories on why the sleeping lieutenant might have lied about being asleep at the time.)

United States v. Mahannah, 2016 WL 3675569 (N.D.N.Y., June 22, 2016). (District Judge David N. Hurd acquitted the defendant for a charge for attempting to induce a young boy into having sex with him. The young boy was actually a government agent, whom the inducement came from. As "induce" is not defined in the statute, its plain and ordinary meaning was used.)

United States v. Pinkela, 2016 CCA LEXIS 8 (A. Ct. Crim. App. Jan. 7, 2016). (The Army Court of Criminal Appeals has resentenced Lt. Colonel Kenneth Pinkela to dismissal and confinement for eleven months for the offense of committing an assault on First Lieutenant CH "by exposing him to the Human Immunodeficiency Virus (HIV)," by having unprotected anal sex with First Lieutenant CH. Ruling reflects new understanding by criminal appellate courts of the reduced risk of HIV transmission where the infected party's viral load is suppressed from treatment.)

United States v. Sosa, ARMY 20140869, 2016 CCA LEXIS 635 (U.S. Army Ct. Crim. Appeals, Oct. 28, 2016). (The U.S. Army Court of Criminal Appeals vacated Sosa's aggravated assault conviction and only affirmed the bad conduct discharge, finding the legal and factual basis of the aggravated assault conviction to be insufficient. Sosa had tested positive for HIV in August 2012, and had unprotected sex with S.S. in the months following. At issue during the appeal was whether the panel erred in finding that Sosa's conducting constituted a means likely to inflict grievous bodily harm or death to S.S. Col. R. Tideman Penland, Jr. cited United States v. Gutierrez to hold that the transmission risk was insufficient to establish Sosa engaged in conduct likely to inflict grievous bodily harm or death, that S.S.'s HIV status should have been excluded from evidence as highly prejudicial, and that the instruction on the definition of risk was erroneous and amounted to a denial of due process.)

United States v. Williams, 2016 WL 1072904 (A.C.C.A., March 17, 2016) (not reported in M.J.). (The military appeals court found that a service member was guilty of a lesser included offense of assault, rather than aggravated assault with a means likely to produce death or grievous bodily harm, for failing to disclose his HIV-positive status before engaging in sex with several partners.)

Valenti v. Hartford City, Indiana, 2016 U.S. Dist. LEXIS 15165618, 2016 WL 7013871 (N.D. Ind., Dec. 1, 2016). (application of sex offender regulation ordinance was unconstitutional as applied to plaintiff, as an ex post facto law that provided no mechanism to contest the classification or scope of restrictions, and because broad and vague restrictions offended due process.)

Wilhelm v. Department of the Navy, 2016 WL 3149710, 2016 U.S. Dist. LEXIS 72884 (E.D. Wash., June 3 2016). (Chief U.S. District Judge Thomas O. Rice granted the government's motion to dismiss the plaintiff's lawsuit challenging the denial of his petition to correct his court martial record by the Board of Correction of Naval Records. The plaintiff confessed to being gay and engaging in gay sex during "don't ask, don't tell," and before Lawrence v. Texas and U.S. v. Marcum were decided.)

V. Religious Exemption Battles

Parsing the balance between religious liberty and anti-discrimination principles.

Barber v. Bryant, 2016 U.S. Dist. LEXIS 86120, 2016 WL 3562647 (S.D. Miss, June 30, 2016), refusal to stay preliminary injunction, 2016 U.S. Dist. LEXIS 100218, 2016 WL 4096726 (S.D. Miss. Aug. 1, 2016), stay pending appeal denied, 833 F.3d 510, (5th Cir., Aug. 12, 2016), appeal on the merits pending. (District Judge Carlton W. Reeves issues a preliminary injunction against Mississippi Bill H.B. 1523 in its entirety because it probably violated both the First Amendment's Establishment of Religion Clause and the Fourteenth Amendment's Equal Protection Clause by privileging religious views opposed to same-sex marriage and gender transition.)

Campaign for Southern Equality v. Bryant, 2016 U.S. Dist. LEXIS 83036, 2016 WL 3574410 (S.D. Miss., June 27, 2016), on remand from 791 F.3d 625 (5th Cir., 2016). (District Judge Carlton W. Reeves ordered Mississippi officials not to enforce part of H.B. 1523, which allowed circuit court clerks to recuse themselves from issuing marriage licenses to same-sex couples based on their religious beliefs, because it would circumvent the Supreme Court's ruling requiring states to afford equal marriage rights to same-sex couples.)

Collette v. Archdiocese of Chicago, 2016 U.S. Dist. LEXIS 99886 (N.D. Ill. July 29, 2016). (U.S. District Judge Charles P. Kocoras denied the church's motion to dismiss the gay plaintiff's charges that he was terminated because of his sex, sexual orientation, and marital status in violation of Title VII, the Illinois Human Rights Act, and the Cook County Human Rights Ordinance. The court needs to determine whether the defendant qualifies for the ministerial exception, which requires a factual record focused on the plaintiff's functional role as Director of Worship and Music Director.)

Drumgoole v. Paramus Catholic High School, Docket No. BER-L-3394-16 (Aug. 22, 2016). (Bergen County Superior Court Judge Lisa Perez Friscia denied a motion of summary judgment filed by the school. The plaintiff claims she was discriminated against in violation of the New Jersey Law against Discrimination when the religious school learned she had married her same-sex partner. The judge found there was a material dispute as to whether the plaintiff's employment as a basketball coach and guidance counselor brought her within the ministerial exemption.)

Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 2016 U.S. Dist. LEXIS 109716, 2016 WL 4396083 (E.D. Mich., August 18, 2016), appeal pending (6th Cir., filed Oct. 13, 2016). (U.S. District Judge Sean F. Cox granted summary judgment to the funeral home's defense under the Religious Freedom Restoration Act (RFRA), finding that the EEOC failed to show that requiring the employer to allow the transgender employee to use the approved female outfit was the least restrictive alternative

to achieve the government's compelling interest in preventing sex stereotyping discrimination in the workplace. The judge noted that if the employee had sued the funeral home on her own behalf, the defendant would not have been able to raise its RFRA defense.)

Gifford v. McCarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422 (N.Y. App. Div., 3rd Dept.). (Upheld a decision by the State Division of Human Rights (SDHR) that Liberty Ridge Farm LLC, an upstate business corporation that rents facilities for wedding ceremonies and other life-cycle events, violated the state's Human Rights Law (HLR) in 2012 when the business turned away a lesbian couple looking for a place to hold their wedding ceremony and reception, rejecting owners' religious objection to hosting the ceremony.)

Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16-111 (U.S. Supreme Court, petition for certiorari filed, July 25, 2016), seeking review of Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272 (Colo. Ct. App., Div. I, 2015), cert. denied, 2016 WL 1645027 (Colo. Supreme Ct. 2016). (The cake shop, represented by Alliance Defending Freedom, filed a Petition with the U.S. Supreme Court, seeking reviewing of the Colorado Court of Appeals' 2015 decision which rejected the shop owner's appeal of a ruling by the Colorado Civil Rights Commission holding that he violated the state's Anti-Discrimination Act by declining service to a gay may couple seeking a wedding cake. The petitioner contends that his 1st Amendment free speech and free exercise rights were violated, that the ruling conflicts with cases from the 9th and 11th Circuit regarding the free speech protection of art, and that there is conflict among the circuits about where to draw the line between speech and conduct in determining the regulatory power of the state.)

Miller v. Davis, 2016 U.S. App. LEXIS 13048, 2016 WL 3755870 (6th Cir. July 13, 2016). (The 6th Circuit dismissed Rowan County Clerk Kim Davis's appeal from the district court's holding that she violated the law by refusing to issue marriage licenses for same-sex couples. The court also refused to vacate her contempt judgment.)

Summers v. Whitis, 2016 U.S. Dist. LEXIS 173222, 2016 WL 7242483 (D. Ind., Dec. 15, 2016). (Discharge of deputy county clerk for refusing to process marriage license applications for same-sex couples did not violate her right to Free Exercise of Religious under the 1st Amendment.)

Welch v. Brown, petition for certiorari filed, No. 16-845, January 5, 2017, seeking review of 834 F.3d 1041 (9th Cir. 2016). (The 9th Circuit upheld a decision by U.S. District Judge William B. Shubb that found that California's S.B. 1172, which prohibits state-licensed mental health providers from engaging in conversion therapy with minors, did not violate mental health providers' 1st Amendment religious freedom rights.)

Vejo v. Portland Public Schools, 2016 WL 4708534 (D. Ore., Sept. 6, 2016). (The plaintiff, a Russian-born orthodox Christian with conservative cultural views on homosexuality, was

previously terminated from her internship as a counselor at Madison High School based on her statements on homosexuality. This prevented her from completing her degree in counseling at the Lewis & Clark College's Graduate School of Education and Counseling. District Judge Ann Aiken upheld some of Vejo's claims asserting discrimination because of religious and nationality, finding that the high school was a place of public accommodation under the state's anti-discrimination laws. The judge also allowed Vejo to maintain her breach of contract claim against the university based on its own non-discrimination policy.)

VI. LGBT/HIV Refugee Cases

Asylum, Withholding of Removal, and Protection under the Convention Against Torture.

Bibiano v. Lynch, 834 F.3d 966 (9th Cir. 2016). (Mexican transgender woman's petition for withholding of removal or protection under the Convention against Torture should be remanded to the BIA, despite the finding that the 9th Circuit was not the proper forum for the petitioner's appeal under venue rules. She was harassed, beaten, and sexually assaulted in Mexico before fleeing to California.)

Bringas-Rodriguez v. Lynch, 835 F.3d 891 (9th Cir. 2016). (The court voted to grant en banc rehearing of an appeal by a gay HIV-positive Mexican man whose petition to review the Board of Immigration Appeals' denial of his application for asylum, withholding of removal, or protection under the Convention against Torture, was denied in November 2015. He had a lengthy history of sexual abuse by male family members. The court found that the question of whether he had a reasonable fear of persecution is supposed to be judged based on the conditions in the country at the time he left in 2004, not conditions in Mexico today.)

Brown v. Lynch, 2016 U.S. App. LEXIS 17747 (2d Cir. Sep. 29, 2016). (The U.S. Court of Appeals for the 2nd Circuit granted a petition by Brown, a bisexual man from Jamaica, to reopen his case seeking protection under the Convention against Torture. The Court suggested that Immigration Judge Michael J. Straus who ordered Brown to be removed based on controlled substances offenses, may be biased against gay or bisexual petitioners. Here, the IJ denied Brown's claim for CAT relief based on the fact that he was not harmed during the three years he previously lived in Jamaica and had a relationship with a man. However, the IJ failed to take into consideration that Brown had to hide his relationship and went to underground meetings where LGBTQ persons discussed how to act in public to avoid discovery. The IJ also overlooked that the Jamaican government acquiesces in the torture of gay and bisexual men.)

Ceron-Martinez v. Lynch, 654 Fed.Appx. 278 (Mem), 2016 U.S. App. LEXIS 10380, 2016 WL 3212256 (9th Cir. June 8, 2016). (Denied a gay HIV-positive Mexican man's petition to review the Board of Immigration Appeals' decision denying withholding of removal. Senior Judge

Dorothy Nelson, appointed by Carter, was the sole dissenting judge. The other two, Consuelo Callahan and Randy Smith, were appointed by George W. Bush.)

Chuan Wu Pang v. Lynch, 647 F. App'x 812 (9th Cir. 2016). (The 9th Circuit upheld the Board of Immigration Appeals' finding that the petitioner, a HIV-positive gay male, failed to show he would be persecuted or subject to torture if removed to China.)

Elizondo v. Lynch, 652 F. App'x 308 (5th Cir. 2016). (A gay HIV-positive Mexican lost his appeal of the Board of Immigration Appeals' denial of his request for asylum, withholding of removal, or relief under the Convention against Torture. His evidence about his experiences in Mexico did not show he was persecuted because of his membership in that class.)

Fajardo v. Lynch, 649 F. App'x 594 (9th Cir. 2016). (The HIV-positive gay petitioner's request for asylum was denied because the Immigration Judge found that the specific incidents in Honduras cited by Fajardo did not amount to the reasonable fear of persecution or likelihood of torture or serious physical injury that would qualify someone as a political refugee. Incidents were more likely to be due to personal revenge by Fajardo's former boyfriend, whom he infected with HIV. Furthermore, Honduran gangs were deemed to target all types of people, and Fajardo was simply targeted because they believe he was a vulnerable victim.)

Feitosa v. Lynch, 651 F. App'x 19 (2d Cir. 2016). (The 2nd Circuit rejected the gay Brazilian's contention that hundreds of murders of gay men in Brazil would support his claim that he would have the necessary reasonable fear of persecution sufficient to justify withholding of removal from the U.S.)

Fuller v. Lynch, 833 F.3d 866 (7th Cir. 2016). (The 7th Circuit affirmed a decision by the Board of Immigration Appeals to deny relief under the Convention against Torture to a Jamaican man who claims to be bisexual. Judge Diane Pamela Wood found that under the deferential standard for reviewing administrative decisions, the evidentiary record—leading the Immigration Judge to conclude that the petitioner failed to prove he was bisexual—did not compel a contrary conclusion and therefore could not be overturned.)

Izquierdo v. Lynch, 2016 U.S. App. LEXIS 20860 (9th Cir. Nov. 21, 2016). (The 9th Circuit reversed and remanded a gay Mexican man's application for withholding of removal and protection under the Convention against Torture. The agency must address whether the government has rebutted the presumption that the man's life and freedom would be threatened it returned to Mexico. Following Maldonado v. Lynch, the man is also not required to establish that he could not relocate.)

Jara v. Lynch, Jara v. Lynch, 647 F. App'x 39 (2d Cir. 2016). (The 2nd Circuit denied the petitioner's request to review the Board of Immigration's decision. The petitioner is a lesbian Peruvian. She failed to provide evidence of past persecution because of sexual orientation.)

Jeune v. U.S. Attorney General, 810 F.3d 792 (11th Cir. 2016). (Plaintiff, a gay (or perhaps transgender) person from Haiti did not achieve refugee status in the US; the IJ found reports that homophobia was less of a problem in rural areas, so Jeune could avoid these problems by settling in one of those rural areas.)

Lopez v. Lynch, 810 F.3d 484 (7th Cir. 2016). (The U.S. Court of Appeals for the Seventh Circuit has affirmed the Board of Immigration Appeals' denial of asylum, withholding of removal, and Convention Against Torture (CAT) relief to an HIV-positive Mexican man.)

Martinez-Gonzalez v. Lynch, 647 F. App'x 778 (9th Cir. 2016). (The 9th Circuit upheld the Board of Immigration's denial of relief under the Convention against Torture. The petitioner is a gay man from Mexico, who had three felony convictions since coming to the U.S. and was deportable by the Department of Homeland Security.)

Moiseev v. Lynch, 630 F. App'x 725 (9th Cir. 2016). (The court affirmed a decision of the Board of Immigration Appeals denying the plaintiff, a native of Russia, her petition to reopen her asylum proceedings because Moiseev's own declaration showed that she claimed to have suffered persecution because of her transgender identity since her youth in Russia, long before her original asylum application, so she could have raised this issue in her original application.)

Moran-Castillo v. Attorney General, 2016 U.S. App. LEXIS 16190 (3d Cir. Sep. 1, 2016). (Denied a petition to reopen an adverse ruling by the Board of Immigration Appeals from 2008. The defendant arrived in the U.S. in 2004 without inspection, and was ordered removed to Guatemala after applying for asylum, withholding of removal, and protection under the Convention against Torture. In November 2015, he filed a motion to reopen his case after realizing he was bisexual and that feared he would be subject to persecution. The BIA denied his motion because it was untimely—he missed the 90-day deadline by approximately five years.)

Oghagbon v. Attorney General, 640 F. App'x 171 (3d Cir. 2016). (The 3rd Circuit denied a petition for review of the Board of Immigration Appeals' final order of removal directed to Kenneth Ifueko Oghagbon, a Nigerian citizen who entered the U.S. in 2014 and was found to be removable for lacking valid entry documents and seeking to procure admission through fraud or willful misrepresentation.)

Pang v. Lynch, 647 F. App'x 812 (9th Cir. 2016). (The 9th Circuit upheld the Board of Immigration's rejection of the petitioner's argument that his due process rights were violated. He is a gay male who came to the U.S. to study, and had suffered no harm before leaving China.)

Quinonez v. Lynch, 648 F. App'x 634 (9th Cir. 2016). (The 9th Circuit upheld the Board of Immigrations decision to reject a motion to reopen the petitioner's case and file a new asylum petition. The petitioner is a lesbian from Guatemala who entered a same-sex relationship.)

Ramos v. Lynch, 636 F. App'x 710 (9th Cir. 2016). (BIA had denied Jaime Ramos, a/k/a Jasmine Ramos, a transgender woman from El Salvador, asylum, withholding of removal, and relief under the Convention against Torture. BIA acknowledged that Ramos is transgender, but its opinion offers no indication that it actually considered whether she is entitled to withholding or CAT relief as a result. Reversed and remanded for reconsideration.)

Silva v. Lynch, 654 F. App'x 508 (2d Cir. 2016). (Denied Silva's refugee petition, finding that the Board of Immigration Appeals could plausibly resolve the question against the claims of the gay Angolan who argued that his homophobic father and the general population would persecute him.)

Toolsie v. Lynch, 638 F. App'x 74 (2d Cir. 2016). (A native and citizen of Suriname seeking withholding of removal and relief under the Convention against Torture failed to convince an Immigration Judge that he is gay, and the 2nd Circuit ruled that it was without authority to second-guess the credibility determination of the judge.)

Walker v. Lynch, 2016 WL 4191844, 2016 U.S. App. LEXIS 14554 (August 9, 2016). (The 2nd Circuit remanded to the Board of Immigration Appeals for reconsideration of a claim for relief under the Convention against Torture by a gay Jamaican man. The 2nd Circuit found that IJ conclusion overlooks the record evidence of torture and the Jamaican government's refusal to investigate, and that the BIA misapplied the applicable standard by conflating the CAT's specific intent requirement with the concept of state acquiescence. It is enough to show that the government knew or remained willfully blind to acts of torture against LGBT individuals.)

Zavada v. Lynch, 645 F. App'x 482 (6th Cir. 2016). (Upheld the Board of Immigration Appeals' decision to reject the application for asylum for a gay Ukrainian man. The Court cited the inconsistencies between his two applications in support of its holding to defer to the BIA's determination. Furthermore, the petitioner failed to show more likely than not that he would be tortured if removed to the Ukraine.)

Zubcu v. Lynch, 653 F. App'x 879 (9th Cir. 2016). (The 9th Circuit denied a gay man's appeal of the Board of Immigration Appeals' denial of his petition for asylum from Moldova, withholding of removal, or protection under the Convention against Torture. He submitted two asylum applications: the first one for persecution for his political opinion and religion, and the other was for sexual orientation. The BIA found he lacked credibility because he did not include sexual orientation in his first application, and did not substantiate the allegations of political persecution.)

VII. Gender Transition Issues

Changes on Birth Certificates, Drivers' Licenses, and Other Official Documents; Coverage for Transition under Insurance/Employee Benefits Plans.

Cruz v. Zucker, 2016 U.S. Dist. LEXIS 87072, 2016 WL 3660763 (S.D.N.Y., July 5, 2016). (District Judge Jed Rakoff ruled on pre-trial motions, granting summary judgment to the transgender plaintiffs on their claim that a Medicaid regulation's categorical ban on "cosmetic surgery" in connection with gender transition violates the requirement under Medicaid to fund medically necessary treatment.) * * * Cruz v. Zucker, 2016 U.S. Dist. LEXIS 161887, 2016 WL 6882992 (S.D.N.Y., Nov. 14, 2016). (U.S. District judge Jed Rakoff directed entry of final judgment on a ruling that New York Medicaid officials must provide appropriate coverage for gender transition therapy for transgender persons under age 18 following the state's Department of Health's Notice of Proposed Rulemaking on October 5.)

J.A.L., Jr., Matter of Application … for Leave to Assume the Name of G.L., 2016 WL 7234140 (N.Y. Supreme Ct., Suffolk Co., Nov. 21, 2016). (Dispensing with publication requirement for name change of transgender applicant, in light of privacy concerns.)

Love v. Johnson, 2016 WL 106612, 2016 U.S. Dist. LEXIS 2647 (E.D. Mich. January 10, 2016). (U.S. District Judge Nancy G. Edmunds, who refused in November 2015 to dismiss a lawsuit by a group of transgender plaintiffs challenging the constitutionality of the state's policy concerning changes of sex designation on driver licenses, rejected the state's motion asking the court to rule on the merits of various legal theories of the complaint as to which the court had abstained.) * * * Love v. Johnson, 2016 U.S. Dist. LEXIS 112035 (E.D. Mich. Aug. 23, 2016). (U.S. District Judge Nancy G. Edmunds granted summary judgment to Attorney General Johnson because the latter effectively mooted the central issue in the case by changing the state's policy on amended driver's licenses and state-issued identification cards. The lawsuit was brought on behalf of transgender plaintiffs by the state's ACLU, and challenged Johnson's policy that changes of gender designation on state-issued documents required presentation of an amended birth certificate.)

McDannell, In re Petition of Jennifer Rose, 2016 WL 482471 (Del. Ct. Common Pleas, Feb. 5, 2016). (Chief Judge Alex J. Smalls of the Delaware Court of Common Pleas concluded that his court had jurisdiction to certify to the Division of Public Health that a transgender person was entitled to get a new birth certificate.)

McReynolds, In re Brandon Groves, 502 S.W.3d 884 (Tex. Ct. App., 5th Dist., Oct. 11, 2016). (Held that Texas Code § 2005(b)(8) does not authorize state courts to issue orders to judicially change a person's gender identifier. The plaintiff is a transgender male who underwent "surgical reconstruction." § 2005(b)(8) only deals with issuing marriage licenses, and provides that the county clerk shall requirement proof of identity and age of

each applicant. One way to establish proof is an original or certified copy of a court order relating to the applicant's name change or sex. The court stated that the legislature did not intend to create a new justiciable right of action for a sex change order.)

Rocher, In re, No. 14-15-00462-CV, 2016 Tex. App. LEXIS 8266 (Ct. App., 14th Dist. Aug. 2, 2016). (Upheld a trial judge's denial of a transgender man's request for a gender designation change on the basis that there are no Texas statutes or regulations specifically authorizing courts to grant such requests.)

State of Missouri ex rel. N.N.H. v. Wagner, 2016 Mo. App. LEXIS 1233 (Mo. Ct. App. Nov. 29, 2016). (Cass County Circuit Judge Michael Wagner exceeded his authority by refusing to grant a name change petition for a transgender minor unless the minor agreed to submit to a mental examination. The transgender boy's mother previously consented to the name change, and testified that the change was in the minor's best interest and would not be detrimental to the interests of any other party.)

Tate v. Wexford Health Source, 2016 U.S. Dist. LEXIS 20391, 2016 WL 687618 (S.D. Ill., Feb. 18, 2016). (U.S. District Judge Nancy J. Rosenstengel found that a transgender inmate's medical treatment claims survived screening under 28 U.S.C. § 1915A when: (1) facility-level defendants denied treatment for "gender dysphoria"; and (2) statewide defendants did not hire and train facility-level providers or refer such patients to outside specialists.)

VIII. Other Discrimination Issues

Including cases under state and local laws forbidding sexual orientation or gender identity discrimination expressly and constitutional equal protection claims.

Garcia v. Tractor Supply Company, 154 F. Supp. 3d 1225 (D.N.M. 2016). (U.S. District Judge William P. Johnson ruled on January 7 that a man living with HIV who is using medical marijuana under New Mexico's Compassionate Use Statute could not contest his discharge under his employer's drug use policy, finding that the employer was not required to accommodate the man's disability by waiving its requirement that its employees refrain from using marijuana.)

Hammel v. Marsh USA, Inc., 2016 U.S. Dist. LEXIS 119698 (D.D.C., Sept. 6, 2016). (U.S. District Judge Colleen Kollar-Kotelly dismissed the defendant's motion for summary judgment, finding that the lesbian plaintiff alleged enough evidence for her Title VII and DC Human Rights Act claims of discrimination because of sex, sexual orientation, marital status, parental status and pregnancy. The claim arises from Hammel's negative relationship with managing partner Andrea Lieberman, who made disparaging comments about Hammel's marriage, status as a gay woman, style, and pregnancy, wrongfully denied salary increases and promotions, and subjected her to a hostile work environment.)

Harrington v. City of Attleboro, 172 F. Supp. 3d 337, 2016 U.S. Dist. LEXIS 34004 (D. Mass., March 16, 2016). (U.S. District Judge Denise Casper refused to dismiss a female student's Title IX sex discrimination claim against school officials who failed to respond appropriately to her bullying by other students, embraced sexual stereotyping cause of action under Title IX where harassment was because of victim's appearance, mannerisms or sexual orientation.)

J.D., by and through his parent Shawna DiCintio v. Hillsboro School District, 2016 WL 3085900, 2016 U.S. Dist. LEXIS 70413 (D. Ore., May 31, 2016). (U.S. District Judge Michael H. Simon refused to dismiss certain First and Fourteenth Amendment constitutional claims asserted by a gay student against school administrators and teachers. Here, the plaintiff asserts that he was subjected to hostile and discriminatory conduct after an incident with Brett Trosclair, a teacher, led to the latter's administrative leave.)

James v. City of New York, 144 A.D.3d 466, 41 N.Y.S.3d 221 (N.Y. App. Div., 1st Dept. 2016). (Gay corrections officer adequately stated a prima facie case of discrimination in violation of the New York City Human Rights Law, in alleging that there was an ongoing policy of preventing gay officers from searching inmates who objected to being searched by homosexuals.)

Johnson v. McAdams, 2016 U.S. Dist. LEXIS 101043 (N.D. Miss. Aug. 2, 2016). (U.S. Magistrate Judge Jane M. Virden ruled that a married gay couple failed to state a constitutional claim when they alleged a police officer treated them dismissively and offensively when they sought help from an assailant, and they were "blown off" by the mayor as well, but gave leave to amend if they could articulate a valid federal theory of liability.)

La Manna v. City of Cornelius, 276 Or. App. 149, 366 P.3d 773 (2016). (Reversed a summary judgment that had been entered against a gay employment discrimination plaintiff, Richard C. La Manna, III, who claimed that he was forced to withdraw his application to be a police officer in Cornelius, Oregon, for discriminatory reasons.)

Lopez v. City of New York, 2016 WL 2858890, 2016 U.S. Dist. LEXIS 6356 (S.D.N.Y., May 12, 2016). (U.S. District Judge Naomi Reice Buchwald denied the plaintiff's request for a preliminary injunction to compel the New York City Police Department and the not-for-profit corporation operating the city-subsidized housing facility in which she resides to take seriously her complaints of anti-transgender harassment by neighbors. The plaintiff failed to show she was likely to succeed on her Equal Protection claim due to lack of factual allegations of the police department's motivation. Furthermore, the privately owned facility was not rendered subject to constitutional claims by the fact that the city was subsidizing tenants' rents. The judge however indicated that the ruling is only limited to the preliminary injunction, and that the court would be contacting the parties to schedule a pre-trial conference.)

Louisiana Department of Justice v. Edwards, No. 652,283 (La. 19th Judicial District, Dec. 14, 2016). (Governor Edwards violated separation of powers and exceeded his authority to

issue executive orders when he prohibited sexual orientation and gender identity discrimination in state employment and by state contractors.)

Martinez v. Northwestern University, 173 F. Supp. 3d 777 (N.D. Ill., March 29, 2016). (U.S. District Judge Robert W. Gettleman dismissed the plaintiff's claims of sexual harassment, retaliation, and pay discrimination under the Illinois Human Rights Act and Equal Pay Act because she—a lesbian police officer—failed to show that a male heterosexual officer's reference to others as "fag" or "pussy" met the test for "sexual harassment" under state law, that she was treated worse than male and/or heterosexual employees in regards to assignments, and that she was being paid less than a male employee who was promoted to a similar rank after a shorter time period.)

Mikell v. Cutting Edge Elite, 2016 U.S. Dist. LEXIS 133732, 2016 WL 5415095 (S.D.N.Y., Sept. 28, 2016). (Magistrate Judge recommended granting a motion dismissing the plaintiff's discrimination claim against an individual defendant. The pro se plaintiff is suing a catering service, claiming that it stopped sending him assignments due to him not being transsexual or gay. The 2nd Circuit has yet to accept the argument that anti-gay or anti-trans discrimination always involves sex stereotyping.)

Moore v. Lift for Life Academy, 489 S.W.3d 843 (Mo. Ct. App. 2016). (Held that a charter school is entitled to sovereign immunity from any imposition of liability for discharging a bus driver because of her sexual orientation. Sexual orientation discrimination does not violate the sex discrimination provision of Missouri's Human Rights Act.)

Mounsey v. St. Louis Irish Arts Inc., 2016 WL 4124113 (E.D. Mo., Aug. 3, 2016). (U.S. District Judge Audrey G. Flessig granted the employer's motion for summary judgment against the pro se gay white male employee who claimed he was terminated and his sponsorship for his work visa was withdrawn because he was dating an African-American man. Because 42 USC 1981 and the Missouri Human Rights Act do not recognize sexual orientation discrimination, the complaint was based solely on race.)

Protect Fayetteville v. City of Fayetteville, CV 2015-1510-1 (Ct. of Washington County, AR, 1st Div., March 1, 2016). (Circuit Court Judge Martin ruled that Ordinance 5781, which prohibits discrimination on the basis of sexual orientation and gender identity, did not run afoul of Act 137, an Arkansas statute barring ordinances that prohibits discrimination on a basis not contained in state law. Both classes were previously protected by other state statutes.)

Tinory v. Autozoners, LLC, 2016 U.S. Dist. LEXIS 8760, 2016 WL 320108 (D. Mass., Jan. 26, 2016). (Employer's motion for summary judgment granted in case in which a male Massachusetts store manager for a national car part retailer and distributor claimed to have been subjected to discrimination and a hostile environment because of his perceived sexual orientation in violation of Massachusetts' anti-discrimination law and Title VII.)

Urchasko v. Compass Airlines, 2016 Cal. App. Unpub. LEXIS 4836 (Calif. Ct. App., 2nd Dist. June 27, 2016). (Reversed a decision by Los Angeles County Superior Court Judge Michael L. Stern. The court held that the plaintiff, who alleged sexual orientation discrimination in violation of state law, must submit his claim to arbitration. Even though there was a computer glitch that prevented the visibility of a check box on the screen, the application's text clearly stated that the applicant agreed to an arbitration clause.)

Velasquez v. State of Connecticut Department of Corrections, 2016 WL 3265950 (Ct., Judicial Dist. of Fairfield at Bridgeport, May 18 2016). (Superior Court Judge William J. Wenzel denied the defendant's motion to dismiss a sexual orientation discrimination claim by its male employee. Although Velasquez did not expressly state sexual orientation discrimination in his form complaint filed with the state's Commission on Human Rights, the verbal harassment detailed in his Affidavit prevents the defendant's motion to dismiss based on the doctrine of exhaustion.)

Walters v. Nieslit, 647 F. App'x 759 (9th Cir. 2016). (The 9th Circuit found that the district court erred in granting summary judgment to the City of San Diego and several police officers. Will X. Walters, a gay man, was arrested during the 2011 Pride event for violating the city's public nudity ordinance, which defines "nude" as devoid of an opaque covering which covers the genitals or anal region. He was wearing a black leather loincloth that blew up in the wind; underneath was a g-string, leaving his buttocks partially exposed. He sued the municipality for discriminatory enforcement. A subsequent jury verdict against him on December 13 led to his suicide late in December.)

Zzyym v. Kerry, 2016 U.S. Dist. LEXIS 162659, 2016 WL 6879827 (D. Colo. Nov. 22, 2016). (District Judge Richard Brooke Jackson rejected the government's motion to dismiss Zzyym's challenge to the Passport Office's gender binary requirement under the Administrative Procedure Act. The Office refused to process Zzyym's passport application because Zzyym is an intersexual applicant who declined to check either M or F on the application. Judge Jackson found that the agency's refusal was arbitrary and capricious, concluding that the Department was not so much concerned with accuracy, but rather with being able to fit into its predetermined formal classifications.)

IX. Miscellaneous Issues

Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Florida, 2016 WL 7099781, 2016 U.S. App. LEXIS 21702 (11th Cir., Dec. 6, 2012). (Middle school that offered courses for high school credit was providing "secondary education" within the meaning of the Equal Access Act, and thus had to extend recognition to a student Gay-Straight Alliance.)

Eaton, In re J. Michael, Justice of the Supreme Court of Pennsylvania, 2016 Pa. Jud. Disc. LEXIS 24 (Pa. Ct. Jud. Disc., March 24, 2016). (The Court of Judicial Discipline ordered Justice

Eaton to pay a $50,000 fine due to his homophobic and transphobic email comments, which could cause members of the public to perceive bias.)

Jallow v. Kraft Foods Global, Inc., 2016 WL 3893181 (W.D. Wis., July 14, 2016). (U.S. District Judge William M. Conley held that a person with HIV does not automatically have a chronic serious health condition that would qualify him for leave under the Family and Medical Leave Act. That person bears the burden to demonstrate he was entitled to FMLA leave. Here, the plaintiff's viral load was virtually undetectable and he was not suffering opportunistic infections associated with HIV.)

John-Charles v. Roosevelt Univ., 2016 IL App (1st) 142696-U. (The court affirmed a ruling by Cook County Circuit Judge Thomas R. Mulroy that the private university's dismissal of the plaintiff from its doctoral program in Educational Leadership did not violate any contractual obligation that the school had to the student, nor deprived the student of whatever procedural rights she enjoyed under the school's policies. At one point, she had voiced her opinion that individuals are not born gay, leading an instructor to accuse her of having negative and disparaging views of gay people.)

Mayhugh, Ex parte, 2016 Tex. Crim. App. Unpub. LEXIS 1057, 2016 WL 6903794 (Tex. Crim. App. Nov. 23, 2016). (The Texas Court of Criminal Appeals announced that the felony child abuse and indecency convictions of four lesbian plaintiffs arising from alleged incidents in 1994 must be set aside. Newly-discovered scientific evidence supported the women's habeas corpus petition by establishing their actual innocence. Here, an ex-husband seeking to wrest custody of his children from his ex-wife intimidated two girls into inventing a story of sexual assault against the children's' lesbian sister, her sister's partner, and two other friends.)

Leyton, In re Estate of; Latorre v. Hunter, 135 A.D.3d 418, 22 N.Y.S.3d 422 (N.Y. App. Div., 1st Dept., 2016). (Agreed with New York County Surrogate Nora S. Anderson to deny a petition to revoke letters testamentary that had been issued to David Hunter, a former same-sex domestic partner of decedent Mauricio Leyton, with whom Leyton had separated prior to his death.)

Moore, In the Matter of Roy S., Chief Justice, Supreme Court of Alabama, Court of the Judiciary Case No. 46 (Sept. 30, 2016). (The Alabama Court of Judiciary unanimously held that Justice Moore was guilty of all six ethics charges against him by the Judicial Inquiry Commission in connection with actions he took in response to federal marriage equality litigation in the state and Obergefell v. Hodges. These charges include willfully issuing an order directing/appearing to direct all state probate judges to follow the state's marriage laws and disregard a federal court injunction; demonstrating his unwillingness to follow clear law; abusing his administrative authority by addressing/denying substantive legal issues while acting in his administrative capacity; substituting his judgment for that of the Alabama Supreme Court; interfering with legal process and remedies in the United States District Court and/or Alabama Supreme Court; and

participating in further proceedings of a case after placing his impartiality into question and disqualifying himself. Justice Moore has been suspended without pay for the duration of his elected term, without pay.)

Pickup v. Brown, 2016 U.S. Dist. LEXIS 105156, 2016 WL 4192406 (E.D. Cal. Aug. 8, 2016). (U.S. District Judge Kimberly J. Mueller granted the defendants' motion to dismiss the plaintiffs' first amended complaint. The plaintiffs alleged that laws, forbidding licensed health care professionals from providing conversion therapy to minors, violated their 1st Amendment rights, were unconstitutionally vague, and does not survive any level of judicial review.)

Reed v. Schofield, 2016 U.S. Dist. LEXIS 46434, 2016 WL 1369589 (W.D. Tenn., April 6, 2016). (U.S. District Judge James D. Todd allowed pro se inmate Reed's protection from harm case to proceed. Reed is a gay man "with feminine characteristics," who was threatened and assaulted on a daily basis. He was placed with the general population despite the District Attorney's letter that he would be in danger if housed there. The judge did not allow the case to proceed under the Equal Protection Clause, finding that Reed is not a member of a protected class.)

Spence v. Cherian, 135 A.3d 1282 (Del. Super. Ct. 2016). (Superior Court Judge Paul Wallace dismissed Cherian and Rite Aid's third party complaint against David Spence, the plaintiff's father, in a suit based on several negligence theories, invasion of privacy, intentional infliction of emotional distress, breach of contract, and promissory estoppel. The plaintiff's claims arose after speaking with his mother, who discovered his HIV status from David. David had previously learned of his son's medications during a visit to a Rite Aid pharmacy on behalf of the plaintiff's mother. The judge found that David's disclosure to the plaintiff's mother did not meet the level of publicity defined in the Restatement of Torts. Furthermore, the judge did not find an intentionally or reckless act, or extreme and outrageous conduct on behalf on David, and he had not violated any duty or promise to the plaintiff.)

Stephenson v. Prudential Insurance Co., 2016 U.S. Dist. LEXIS 144521 (M.D. Fla., Oct. 19, 2016). (The dispute arises from a Prudential life insurance policy in which Rigby named his domestic partner, McGriff, as his sole beneficiary. In self-defense, McGriff had caused Rigby to fall and hit his head; Rigby's injuries led to his death. During proceedings between McGriff and Rigby's sister, who filed a claim for the proceeds on behalf of Rigby's estate, McGriff died. Stephenson represented McGriff's estate, and sought to dismiss the sister as a plaintiff. District Judge Susan C. Bucklew refused the motion, holding that the sister was a potential beneficiary if Florida statute would preclude McGriff from receiving the life insurance proceeds.) * * * Stephenson v. Prudential Ins. Co. of Am. (In re Estate of McGriff), 2016 U.S. Dist. LEXIS 153299 (M.D. Fla. Nov. 4, 2016). (District Judge Susan C. Bucklew found that Florida's Slayer Statute, which prohibits awarding death benefits to a beneficiary who intentionally and unlawfully caused the death of the insured, does not apply to the case because the evidence does

not prove that it was more likely than not that the beneficiary acted unlawfully when he pushed the insured.)

X. Legislative Developments

New state and local laws enacted. [Note: With Republicans in charge of both houses of Congress, but President Obama likely to veto any anti-LGBT measures, there were no federal laws enacted during 2016 on LGBT issues.]

Alabama – Oxford City Council enacted what was called the toughest anti-transgender "bathroom bill" in the country. The ordinance outlaws the use of a public bathroom different from the gender indicated on a person's birth certificate, providing for either a $500 fine or imprisonment for 6 months for violators. It does not specify which restroom facilities those imprisoned for its violation will use. After the enactment led to national ridicule and threatened boycotts, the Council held a special meeting and "recalled" it.

Alaska – Juneau Assembly approved a non-discrimination ordinance that covers sexual orientation and gender identity.

Arkansas – Texarkana Board of Directors passed an anti-discrimination ordinance that bans sexual orientation or gender identity discrimination in public employment and services. Voters repealed the measure on June 28.

California – Newly enacted: a bill requiring that all businesses, government buildings and places of public accommodation that have single-occupancy restrooms make them universally accessible by all genders by March 1, 2017; a measure restricting official state travel to states in which anti-LGBT discrimination is the law, such as North Carolina; a measure requiring counseling about prophylactic medication to prevent HIV transmission to be offered to all those who get HIV testing and test negative; and a measure requiring higher education institutions that receive public funds to disclose whether they have been granted a religious exemption from compliance with Title IX of the federal Education Amendments Act by the U.S. Department of Education, and thus may discriminate because of sex, sexual orientation or gender identity without violating the federal law.

California – Palm Springs City Council approved an ordinance to convert all single-stall restrooms in public buildings to being gender-neutral. The ordinance also applies to businesses accessible to the public, such as bars, restaurants, and retail stores.

Colorado – City and County of Denver amended its building code to require that all new and existing single-stall restrooms provide signs designating them as gender-neutral.

Florida – The state's new Pastor Protection Act provides that religious organizations and clergy cannot be sued for refusing to perform same-sex marriages. The measure creates a new Section 761.061, Florida Statutes. * * * S.B. 242 establishes a pilot program to be run by the University

of Miami with private funding to provide clean needles and syringes for drug users as part of a campaign to reduce the spread of HIV infection. * * * Florida repealed its 148 year-old ban on unmarried cohabitation, which was treated as a misdemeanor incurring a fine and short jail time, but which hadn't been enforced in a long time.

Florida – Lake Worth City Commissioners updated city procurement policy to require contractors to ensure equal opportunity based on sexual orientation and gender identity, amended the city's merit services policy to prohibit discrimination on these grounds in municipal employment, and updated the local fair housing law to add those categories as well. * * * Miami Beach Commission voted to adopt a ban on "conversion therapy" offered by licensed health care providers to minors.

Hawaii – A new law regulating insurance companies prohibits "denying, canceling or limiting coverage based on a person's gender identity."

Illinois – Chicago City Council voted to delete a provision of the city's Human Rights Ordinance that allowed operators of public accommodations to require patrons to present government-issued identification if their use of sex-designated facilities such as restrooms or locker rooms was questioned.

Indiana – Evansville City Council gave additional authority to the city's Human Relations Commission to investigate claims of discrimination because of sexual orientation and gender identity and to enforce a city anti-bias ordinance. Before these amendments, compliance with the city's antidiscrimination ordinance was voluntary. * * * Kokomo Common Council added sexual orientation and gender identity to the city's human rights ordinance. * * * Howard County Commissioners approved an amendment to the county's fair housing ordinance to add sexual orientation, gender identity and marital status as prohibited grounds of discrimination, in order to be sure that the county would be able to receive pending grants from the U.S. Department of Housing and Urban Development. Whether those HUD requirements will continue in the Trump Administration is unknown but, presumably, doubtful. * * * Tippecanoe County Commissioners amended the county's anti-discrimination ordinance to add "gender identity" to prohibited grounds for discrimination. * * * West Lafayette City Council added sexual orientation, gender identity and expression, and veteran status to the city's human rights ordinance, giving the Human Relations Commission various enforcement options. Lafayette also recently added gender identity to its ordinance.

Kansas – S.B. 175 allows public educational institutions to recognize and fund student organizations that exclude people from participation or membership based on the "sincerely held religious beliefs" of the organization. * * * The State Board of Education voted to "ignore" the federal Education Department's directive to school systems that receive federal money concerning their obligation under Title IX of the Education Amendments Act to afford appropriate restroom access for transgender students.

Kentucky – The legislature approved revisions to the forms used for marriage licenses to accommodate both same-sex and different-sex couples and to remove the requirement that the county clerk sign or have their name printed on the form. * * * Bowling Green City Commission approved a syringe exchange program as a public health measure to combat the spread of disease, including HIV.

Maryland – Under the Equal Pay for Equal Work Act of 2016 the state's law requiring equal work for equal pay regardless of sex has been extended to cover claims based on gender identity.

Massachusetts – The Law Against Discrimination's public accommodations provision was amended to add "gender identity or expression" as forbidden grounds, and the attorney general was directed to adopt prosecution guidelines for cases in which cisgender men, falsely declaring themselves to be women, gained access to women's public restrooms for improper purposes, apparently such a frequent problem in the state that the legislature saw fit to specially address it in this statute.

Michigan – City Councils of Howell and Portage voted to approve antidiscrimination ordinances that prohibits employment and housing discrimination on various grounds, including sexual orientation and gender identity. The Portage measure also covers public accommodations.

Mississippi – H.B. 1523 incorporates a variety of measures intended to privilege those with anti-gay and anti-transgender religious beliefs, such as allowing clerks to recuse themselves from issuing marriage licenses and insulating from state law liability people who discriminate or deny services because of religious beliefs about same-sex marriages, transgender identity and homosexuality. Ironically, Mississippi is a state that has never provided protection against discrimination for LGBT people, so the measure seemed to be largely symbolic. The bill essentially says that the government cannot do what it, in fact, does not desire to do: punish anti-gay and anti-transgender people for refusing to open their workplaces, residential facilities or places of business to same-sex couples and LGBT individuals. A federal district judge quickly issue a preliminary injunction against it going into effect, which the 5th Circuit refused to stay while the state appeals.

Mississippi – Jackson City Council voted to include sexual orientation and gender identity in the city's anti-discrimination ordinance covering housing, public accommodations and employment, and also to expand the hate crimes ordinance to encompass these categories.

Missouri – The legislature approved Senate Joint Resolution No. 39, which will put on the ballot an amendment to Article I of the Missouri Constitution intended to shelter religious organizations and individuals from suffering any penalties at the hands of the state "because of their sincere religious beliefs or practices concerning marriage between two persons of the same sex." The main impact if the amendment is approved by the voter would arguably be in a dozen communities where local law prohibits sexual orientation discrimination, as the proposed

amendment would arguably require religious exemptions from their enforcement. If enacted, it will attract immediate attack under the 1st Amendment Establishment Clause.

New Hampshire – Manchester City Alderman approved a measure that offers transgender-inclusive health benefits to municipal employees under the city's group health insurance plans. This will include coverage for sex reassignment procedures.

New York – Long Beach City Council voted to add gender identity to the city's anti-discrimination policy for its employees. The policy covers both discrimination and harassment. The city's anti-discrimination ordinance does not cover use of bathrooms or other facilities.

North Carolina – Charlotte City Council voted to add sexual orientation, gender identity, marital status, familial status, and gender expression covering commercial non-discrimination, public accommodations and passenger vehicle for hire ordinances of the city, and specifically providing that transgender people could use sex-designated facilities consistent with their gender identity. This provoked the state legislature and Governor Pat McCrory to enact H.B. 2, a measure preempting states and localities from including in their anti-discrimination ordinances categories not covered in federal law, prohibiting anybody from suing on a discrimination claim in state court, and also providing that in all government buildings sex-designated facility use be restricted to persons based on their biological sex as designated on birth certificates. Litigation ensued. Boycotts of North Carolina by businesses, sports leagues, entertainers and others exerted pressure. Governor McCrory, attempting to refute the widespread criticism of H.B. 2 hostility on his part against LGBT people, issued an executive order banning sexual orientation and gender identity discrimination within the state government but at the same time reiterating the bathroom access restrictions of H.B. 2, which he insisted were not discriminatory. McCrory also noted in his Order that private businesses were free to establish their own policies, and suggested that the legislature consider repealing the portion of H.B. 2 that prohibited individuals from suing for discrimination in the state courts. Gov. McCrory was defeated for re-election by Attorney General Roy Cooper, who was opposed to H.B. 2 and refused to defend it in court. Cooper sought an agreement with the legislature to repeal H.B. 2, a prerequisite for which was the Charlotte City Council repealing its ordinance. The Council repealed its ordinance, but the Republicans in control of the legislature were unable during a special session to agree on a repeal bill. At year's end, no resolution had been reached and H.B. 2 was still in effect, although a federal district court had enjoined its application to several transgender plaintiffs at the University of North Carolina.

Ohio – Newark City Council amended its equal employment opportunity, fair housing and ethnic intimidation laws to add "sexual orientation," "gender identity," and "gender expression" as protected categories. * * * Cleveland City Council repealed a provision in its anti-discrimination ordinance that had allowed limitations on restroom access by transgender individuals and approved an amendment adding gender identity or gender expression to the prohibited grounds for discrimination in public accommodations.

Oklahoma – The Oklahoma City Council approved an ordinance that will forbid sexual orientation and gender identity discrimination in housing.

Pennsylvania – Pittsburgh City Council approved a ban on mental health professionals practicing conversion therapy on minors. * * * Carlisle Borough Council approved a proposed Human Relations Ordinance encompassing sexual orientation and gender identity and expression, becoming the 37th municipality in the state to pass such an ordinance.

South Dakota – Voters in Sioux Falls approved revisions to the City Charter, including codifying a city policy banning discrimination against LGBT people in city hiring.

Tennessee – Nashville Metro Council eliminated the requirement that businesses with single-toilet restrooms have separate facilities labeled as being exclusively for men or women. The Council voted to broaden exceptions for unisex restrooms, which are only allowed in Nashville businesses that fall below a square-footage threshold.

Utah – Utah County Board of Commissioners voted to add gender identity, sexual orientation, and pregnancy/pregnancy-related conditions to the county's non-discrimination policy, which makes the County's personnel rules and regulations match up with those of the state government. * * * Ogden City Council created a Diversity Commission to serve as an advisory body to the mayor and the council on issues of concern to minorities in the city, including LGBTQ people.

Vermont – S.B. 132 prohibits licensed health care professionals from performing "sexual orientation change efforts" on minors.

Washington – Seattle City Council approved an ordinance that will impose a fine of up to $1,000 on any licensed mental health providers in the city who practice "sexual orientation change efforts" on minors, and misdemeanor charges on those advertising such services.

West Virginia – Lewisburg City Council approved a measure amending the city's existing anti-discrimination policy by establishing a Human Rights Commission and prohibiting discrimination in employment, housing and public accommodations because of race, religion, color, national origin, ancestry, sex, age, blindness, handicap, sexual orientation or gender identity. * * * Wheeling City Council adopted a ban on discrimination in employment and housing because of sexual orientation or gender identity. The measure does not address public accommodations, thus avoiding some of the controversy about transgender bathroom access. Religious institutions are exempt from compliance with these provisions. Private clubs are exempt as to their membership policies, but not exempt as to their employment policies. The ordinance applies only to companies with 12 or more employees. The city's Human Rights Commission is authorized to issue cease-and-desist orders in response to complaints.

Wisconsin – Stevens Point City Council approved a policy banning discrimination because of sexual orientation and gender identity by the city government in its employment policies. * * *

Janesville, the hometown of Republican House of Representatives Speaker Paul Ryan, enacted a nondiscrimination ordinance including public accommodations and employment that covers sexual orientation and gender identity, as well as just about every other classification that one could imagine. * * * The board that oversees worker health benefits for state employees reversed a decision from July and voted to provide coverage for gender reassignment surgery beginning January 1, but the state Department of Justice, at Governor Scott Walker's request, asked the board to reconsider. The measure was adopted in response to federal ACA regulations scheduled to go into effect January 1, but the Trump Administration intends to obtain repeal of the ACA, so the future of measures intended to comply with the ACA regulation is uncertain.

Wyoming – Gillette City Council passed a symbolic resolution "affirming the rights and protection of city employees from discrimination based on sexual orientation and gender identity." The resolution is merely an assertion to clarify the city's personnel policies, and has no legal enforcement mechanism. * * * Cheyenne City Council approved an anti-discrimination resolution, committing the city to a policy of equal protection for lesbian, gay, bisexual and transgender residents, but the resolution does not have the same binding authority as an ordinance, creating no private right of action or enforcement mechanism.

XI. Administrative Developments

New regulations and significant administrative decisions.

A. Federal

Department of Defense – On June 30, DoD issued Release No. NOR-246-16, titled "Secretary of Defense Ash Carter Announces Policy for Transgender Service Members." The policy establishes "a construct by which service members may transition gender while serving, sets standards for medical care, and outlines responsibilities for military services and commanders to develop and implement guidance, training and specific policies in the near and long-term." "Effective immediately, service members may no longer be involuntarily separated, discharged or denied reenlistment solely on the basis of gender identity. Service members currently on duty will be able to serve openly."

Department of Health & Human Services– Medicare Appeals Council upheld a transgender beneficiary's claim that an insurance company providing coverage through the Medicare program must provide coverage for sex reassignment surgery. * * * HHS released a final rule on May 13 implementing the non-discrimination provisions of the Affordable Care Act. The provisions include a ban on denial of health care or health coverage based on an individual's sex, including discrimination because of pregnancy, gender identity and sex stereotyping, to go into effect January 1, 2017. The final rule "does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination," said the HHS release announcing the rule, but indicated that the agency would accept complaints from lesbian,

gay or bisexual individuals who allege they have been discriminated against because of sex stereotyping by a health care provider or insurer subject to the regulations. On December 31, a federal district judge preliminarily enjoined the gender identity portion of the rule from being enforced by the government.

Department of Housing and Urban Development – HUD published a final rule intended to "ensure that all individuals have equal access to many of the Department's core shelter programs in accordance with their gender identity," according to HUD's official news release about the rule, which was published in the Federal Register and will at Section 5.106 to 24 CFR part 5. Whether this will be repealed by the Trump Administration is unknown.

Federal Aviation Administration – Guidance for Aviation Medical Examiners "designed to standardize our policies on gender dysphoria and ensure pilots receive medical certification as quickly as possible." Under the new policy, the agency "updated its medical guidelines" to provide that transgender pilots are not identified as having a "gender identity disorder," but instead "gender dysphoria."

Department of Labor – Social Security Administration – The Social Security Administration issued a policy under the Supplemental Security Income (SSI) program, excusing any demand for "back payments" from people as a result of retroactive recognition of same-sex marriages pursuant to the Supreme Court's decision in U.S. v. Windsor. * * * Office of Federal Contract Compliance Programs published final regulations instructing federal contractors how to comply with E.O. 112146, as amended by President Obama to extend the ban on discrimination by federal contractors to sexual orientation and gender identity. This was the first time since the 1970s that the Department updated its sex discrimination guidelines. The fate of this EO in the Trump Administration is unknown. * * * The Labor Department published a final rule expanding nondiscrimination and affirmative action requirements in apprenticeship programs that are registered with the Department or state apprenticeship agencies. Staggered implementation of the new rules was to being on January 18, 2017. The final rule includes sexual orientation and gender identity as prohibited grounds of discrimination in such programs, as an interpretation of federal statutory bans on sex discrimination. Whether the Trump Administration will seek to repeal the rule is unknown.

Office of Personnel Management – OPM published a final rule in the Federal Register on April 8, 2016, changing the definition of "spouse" under the Family and Medical Leave Act as it relates to federal employees. The definition permits federal employees with same-sex spouses to use FMLA leave in the same manner as federal employees with opposite-sex spouses, and ensures that they can take family leave in response to the medical needs of their children.

Department of the Treasury – Internal Revenue Service – The IRS published final regulations explaining how same-sex marriages will be dealt with under federal tax law. 81 Fed. Reg. (No. 171) 60609 (Sept. 2, 2016). The regulation amended 26 CFR Parts 1, 20, 25, 26, 31, and 301,

effective September 2, to bring tax regulations into compliance with Obergefell v. Hodges and United States v. Windsor. A same-sex marriage that would be recognized in any U.S. jurisdiction will be recognized by the I.R.S. for purposes of federal tax law, and will be treated the same as a legally recognized different-sex marriage.

Agency for International Development – AID published a final rule in the Federal Register announcing the new version of 48 CFR Part 752, which bans foreign contractors receiving U.S. government funds from discriminating in the provision of services under US-funded programs, including discrimination because of sexual orientation or gender identity.

B. State and Local

Delaware – Department of Insurance issued Bulletin No. 86 pursuant to the Gender Identity Nondiscrimination Act of 2013, providing guidance to insurance companies. It is an unlawful practice in Delaware to discriminate because of gender identity, including refusing to issue policies or charging differential rates due to a person's gender identity or refusing to cover medically necessary procedures.

Kentucky – Department of Corrections ended a policy that allowed prison wardens to ban incoming sexually-oriented mail for inmates if they concluded that it would "promote homosexuality." The ACLU of Kentucky had challenged the policy on First Amendment grounds. Corrections Commissioner Rodney Ballard issued a revised inmate mail policy to prison staff, stating that all "sexually explicit materials" (defined as "pictorial depictions of nudity" or "actual or simulated sexual acts") would be prohibited, regardless of whether it has anything to do with homosexuality.

Louisiana – Governor John Bel Edwards issued Executive Order No. JBE 2016-11, rescinding an anti-gay Order issued by his predecessor, and establishing an anti-discrimination policy for his administration that includes sexual orientation and gender identity. The measure applies to government employment and the practices of government contractors, as well as the provision of government services and benefits. The governor is appealing a ruling by a state trial judge that the measure violates the state constitution as a usurpation of legislative authority.

Michigan – Michigan Board of Education approved guidelines intended to protect LGBTQ students, including allowing students to use restrooms consistent with their gender identity, requiring training of staff on issues faced by LGBTQ students, and supporting students who want to form Gay-Straight Alliances at their schools. The measure responded to the U.S. Department of Education's "Dear Colleague" letter on Title IX responsibilities.

Montana – Governor Steve Bullock signed an executive order to prohibit discrimination because of sexual orientation and gender identity for state employees, state contractors and their subcontractors.

New Hampshire – Governor Margaret Hassan signed Executive Order 2016-04, expanding the state's existing anti-discrimination executive order to include gender identity or gender expression. The order applies to state agencies in their employment practices and provision of services, and requires that executive branch contracts and grants include anti-discrimination provisions that cover gender identity or expression.

New York – A regulation by the Division of Human Rights to interpret the state's Human Rights Act to ban discrimination because of gender identity or expression in employment, housing, public accommodations and services was published at 9 New York Code of Rules and Regulations (NYCRR) Sec. 466.13.

New York – Under new regulations, public and private health care insurers are prohibited from covering "sexual orientation change efforts" under their insurance policies, and various mental health facilities licensed and regulated by the state are prohibited from conducting such therapy on minors. The state's Medicaid program will exclude coverage for such therapy. The regulations are found at 11 NYCRR 52.16(n), 14 NYCRR Section 527.8, and a bulletin posted on the health department's Medicaid website. * * * The State Department of Health adopted a rule adding psychiatric nurse practitioners to the list of health care professionals who can recommend sex reassignment surgery under the state's Medicaid program.

New York – New York City Mayor Bill de Blasio signed an Executive Order that provides people access to public single-sex restroom facilities consistent with their gender identity in all city structures, without any need to show ID or other proof of gender.

Pennsylvania – Governor Tom Wolf issued two executive orders on April 7 to fill gaps in anti-discrimination coverage resulting from the state legislature's continued refusal to pass a law banning sexual orientation and gender identity discrimination. Under E.O. 2016-04, the governor orders that no agency under his jurisdiction discriminate against any employee or applicant because of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability. The order also requires "fair and equal employment opportunities" at "every level of government," and expressly prohibits "sexual harassment or harassment based on any of the factors" listed in the Order. The Order includes detailed directions for its implementation, charging particular agencies with compliance responsibility. Under E.O. 2016-5, the governor establishes a Contract Compliance Program to ensure that the states contracts and grants are administered in a non-discriminatory manner, including in the employment practices of government contractors. The Department of General Services is charged with developing standards to implement the Order, and the non-discrimination requirements apply to all the categories spelled out in E.O. 2016-04.

Texas – Attorney General Ken Paxton issued A.G. Opinion KP-0100, advising that the Fort Worth Independent School District's superintendent violated chapters 11 and 26 of the Texas

Education Code by unilaterally adopting a policy providing that school officials will not advise parents about the gender identity of their children without the children's permission.

Washington – The state's Human Rights Commission published a rule providing that bathroom, shower, and locker room use in public accommodations be based on "gender identity," not on anatomical sex. Opponents failed to obtain enough petition signatures to put a repeal initiative on the ballot.

Washington – Seattle Mayor Ed Murray signed an executive order intended to make public spaces safer for transgender people by authorizing the establishment of guidelines and training programs to assist in enforcement of the state's public accommodations law, which covers gender identity.