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Supreme Court Agrees to Consider Whether 14th Amendment Requires Marriage Equality and Recognition This Term

EXECUTIVE SUMMARY

LESBIAN/GAY LAW NOTES

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Supreme Court Grants Four Petitions to Review 6th Circuit's Marriage Ruling

The U.S. Supreme Court announced on January 16, 2015 that it was granting four petitions to review the 6th Circuit Court of Appeals ruling in *DeBoer v. Snyder*, 772 F.3d 388 (Nov. 6, 2014), which had rejected the claim that same-sex couples have a constitutional right to marry and to have such marriages recognized by other states. The 6th Circuit's ruling, issued on November 6 on appeals by four states from district court pro-marriage equality decisions, had opened up a split among the circuit courts, as the 4th, 7th, 9th and 10th Circuits had all ruled in favor of marriage equality claims during 2014, and the Supreme Court had refused on October 6 to review the rulings by the 4th, 7th and 10th Circuits. (The 9th Circuit ruled the day *after* the Supreme Court announced the three cert. denials, and only one of the two states involved in that case, Idaho, has filed cert. petitions, on which the Court has not yet taken action.) *DeBoer v. Snyder*, No. 14-571, cert. granted, 2015 WL 213650 (Jan. 16, 2015); *Obergefell v. Hodges*, No. 14-556, cert. granted, 2015 WL 213646 (Jan. 16, 2015); *Tanco v. Haslam*, No. 14-562, cert. granted, 2015 WL 213648 (Jan. 16, 2015); *Bourke v. Beshear*, No. 14-574, cert. granted, 2015 WL 213651 (Jan. 16, 2015). Attorney General Eric Holder, Jr., quickly announced that the Justice Department would file a brief with the Court urging reversal of the 6th Circuit. If the Supreme Court lines up the cases in the order of their cert. filings, it is possible that its decision, expected by June, will be known as *Obergefell v. Hodges*.

The Court's announcement of the cert. grant was accompanied by an announcement that the cases have been consolidated for the Court's consideration, and that the grant was limited to the following two questions: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state? The Court allotted 90 minutes for oral argument on Question 1 and 60 minutes for oral argument on Question 2. Presumably these time allocations were made to assure that attorneys representing each of the four states involved – Ohio, Michigan, Kentucky and Tennessee – would have time to argue, and that representatives of each of the Petitioners would also have sufficient time. Also, presumably, the questions were phrased this way and the argument divided into two parts because some of the cert. petitions address only marriage recognition, while others asked whether states are required to let same-sex couples marry.

Three of the cases were decided on pretrial motions while the Michigan decision (*DeBoer*) followed a full trial on the merits, providing the Court with a trial record and detailed factual findings by the district court. The Court limited the parties to briefing on the merits and presenting oral arguments on the questions presented in "their respective petitions." Thus the parties in the Ohio (*Obergefell*) and Tennessee (*Tanco*) cases could be arguing on Question 2, while the parties in the Michigan (*DeBoer*) case could address Question 1, and the parties in the Kentucky case (*Bourke*) case could be arguing on both questions. Presumably the Court scheduled a separate argument on the recognition question because it implicates some different doctrinal issues from the marriage argument and two of the petitioning parties can only argue on that question. Indeed, the recognition question might be decided by an extension of *U.S. v. Windsor* without addressing whether states are required to issue marriage licenses to same-sex couples, since the states are not really presenting significantly different arguments from those raised by the defenders of DOMA as reasons for the federal government to refuse to recognize same-sex marriages, although, of course, these cases don't raise the same federalism concerns that Justice Kennedy acknowledged, but explicitly did not rely upon, in *Windsor*. The Court's announcement did not specify how the time would be divided between the parties, but presumably Petitioners will get half the time and Respondents will get half the time and perhaps be left to work out among themselves how to allocate the time within their share. Several LGBT litigation groups are among the attorneys representing Respondents,

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and it was unclear how they would determine who would argue which points.

The Court's announcement included a tight briefing schedule calculated to get the case argued and decided before the end of the Supreme Court's term in June. Petitioners' merits briefs are due by 2 p.m. on Friday, February 27, Respondents' briefs by 2 p.m. on Friday, March 27, and all reply briefs by 2 p.m. on Friday, April 17. Potential amici would be subject to the same tight briefing schedule. The last scheduled argument date on the Court's calendar for the October 2014 Term is April 29, 2015, so it seems likely the arguments will be held on April 27, 28 or 29, which would give the Court two months to settle on opinions if it wants to release them before the term ends. According to the Court's posted calendar, the last date for announcing decisions is June 29, but the Court has been known to extend the end of the term by a few days to dole out end-of-term opinions as they are ready.

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The Court's actions since October 6 may provide some insight in trying to forecast how the Court will ultimately rule. After it denied certiorari in the cases from the 4th, 7th, and 10th Circuits on October 6, the Court denied all subsequent motions from other states in those circuits to stay subsequent marriage equality rulings issued by district courts there. The Court similarly denied all motions to stay district court rulings from states in the 9th Circuit after that circuit's October 7 ruling. Most significantly, the Court issued an order on December 19, denying a motion by Florida Attorney General Pam Bondi to stay a U.S. District Court marriage equality ruling in that state, pending the state's appeal to the 11th Circuit Court of Appeals. That a majority of the Supreme Court was *not* willing to stay the Florida ruling, even though the case was yet to be decided by the 11th Circuit, spoke volumes about the likely outcome of its decision on the merits. If a majority of the Court was not willing to stay the Florida ruling pending appeal, it seems likely that a majority of the Court is ready to rule on the merits in favor of marriage equality. Only Justices Antonin Scalia and Clarence Thomas were announced as disagreeing with the Court's denial of a stay. Although it is always hazardous to predict what the Supreme Court will ultimately do on an issue as to which it is likely to be sharply divided, it is also likely that there will be some consistency between the Court's actions on stay motions after October 6 and its final ruling. It is worth noting that prior to October 6, the Court granted every stay motion presented by a state seeking to delay lower court marriage equality decisions pending appellate review.

Over two years ago, the Court announced in December 2012 that it would review a decision by the 9th Circuit Court of Appeals that struck down California's Proposition 8, a state constitutional amendment enacted by voter initiative in 2008 that banned the performance or recognition of same-sex marriages in California. At that time, the Court added a question to those posed by the defenders of Prop. 8 in their petition for review of the lower court decision striking it down: whether the Petitioners had "standing" to appeal the original ruling by the district court in San Francisco? As none of the California officials named as defendants in *Perry v. Schwarzenegger* was willing to defend Proposition 8 on the merits, the district court had allowed the proponents of the initiative to intervene, and it was they who were appealing the ruling. During the oral argument in that case, titled *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), some of the time was taken up by arguments about the Petitioner's standing, but the remaining time was devoted to arguing the merits. Those curious about the types of questions the Supreme Court justices might pose to attorneys on Question 1 in the *DeBoer* case can access the audio recording of the oral argument on the Supreme Court's website. (The oral argument in *Hollingsworth* did not focus on the recognition question.)

Based on the *Hollingsworth* oral argument, there were predictions that the Court might vote 5-4 to strike down Proposition 8, but ultimately the Court concluded, in an opinion by Chief Justice John G. Roberts, Jr., that the Petitioners did not have standing, thus leaving the district court's ruling in place and effectively striking down Proposition 8 without a Supreme Court ruling on the merits, on June 26, 2013. Same-sex marriages resumed in the nation's most populous state a few days later. The dissenting opinion in *Hollingsworth* was written by Justice Anthony M. Kennedy, Jr., who argued that the Court had erred in finding lack of standing but who carefully limited his opinion from expressing any view as to the constitutionality of Proposition 8.

Justice Kennedy was the author of the other momentous marriage equality decision issued on the same day, *United States v. Windsor*, 133 S. Ct. 2675 (2013), in which the Court voted 5-4 to declare unconstitutional the federal definition of marriage in the Defense of Marriage Act. In common with Kennedy's earlier gay rights opinions in *Romer v. Evans* and *Lawrence v. Texas*, his *Windsor* opinion was not ideally clear about its doctrinal grounding, never expressly stating that the case involved a

fundamental right or a suspect classification, or merited heightened scrutiny, thus spawning a variety of views from legal commentators and lower court judges about the precedential meaning of the opinion. The 9th Circuit construed *Windsor* to be a suspect classification case, and decreed "heightened scrutiny" as the standard to apply in subsequent equal protection cases brought by gay plaintiffs. *See Smithkline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, *motion for rehearing en banc denied*, 759 F.3d 990 (9th Cir. 2014). On this basis, the 9th Circuit subsequently struck down the Nevada and Idaho same-sex marriage bans in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *motion for rehearing en banc denied*, 2015 WL 128117 (Jan. 9, 2015), petitions for cert. pending. Some other courts ducked these issues, instead striking down bans on same-sex marriage by finding that none of the alleged justifications for the bans survived some form of rational basis review, or that the bans were products of unconstitutional animus. Some commentators have suggested that Kennedy's decision is most explicable as being based on his view that DOMA was an expression of animus against gay people by Congress. Justice Antonin Scalia, dissenting from the Court's decision, argued, as he had in his *Lawrence* dissent ten years earlier, that the majority opinion would support claims for the right of same-sex couples to marry, and many of the lower court decisions cited and quoted from one or both of his dissents in support of their conclusions.

The *Windsor* ruling led to an avalanche of marriage equality lawsuits in every state that did not allow same-sex couples to marry. The avalanche of lawsuits soon turned into an avalanche of court opinions. Within weeks of *Windsor*, the federal district court in Ohio had ordered preliminary relief in *Obergefell v. Kasich*, 2013 WL 3814262 (S.D. Ohio, July 22, 2013), a marriage recognition case, and in December the district court in Utah issued a ruling on the merits striking down that state's same-sex marriage ban in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah, Dec. 20, 2013). Dozens of district court rulings and rulings by four circuit courts of appeals followed during 2014, so that by the time the Court granted cert. to review the 6th Circuit decision on January 16, 2015, same-sex couples could marry in 37 states and the District of Columbia. (In two of those states, Kansas and Missouri, disputes about the scope of lower court rulings made marriage available only in certain counties while the litigation continued.) There were also district court decisions pending on appeal before the 1st, 5th, 8th and 11th Circuits. The only federal courts to have rejected marriage equality claims after *Windsor* were district courts in Louisiana and Puerto Rico and the 6th Circuit Court of Appeals, in the consolidated case from four states that the Supreme Court will review. A week before granting cert. in the 6th Circuit case, the Court rejected an attempt by Lambda Legal to get direct review of the Louisiana decision, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), cert. denied, 2015 WL 133500 (Jan. 12, 2015). The Court denied that petition just days after the 5th Circuit heard oral arguments in that appeal as well as state appeals from marriage equality rulings in Texas and Mississippi.

The most pressing question presented by the cert. grant, of course, is whether the Court will use this case to declare a constitutional right to marry throughout the United States, and to have those marriages recognized wherever a married couple might travel or reside. But to those following the course of gay rights in the courts, the question of what rationale the Court uses to decide the case will also be pressing, especially as the various circuit court decisions have adopted different theories that might have a different impact for litigation about other issues. This case may also give the Court an opportunity to clarify the circumstances under which lower federal courts are bound to follow an old Supreme Court decision whose rationale appears to have been eroded by subsequent legal developments.

The 6th Circuit opinion by Circuit Judge Jeffrey Sutton held that the Supreme Court's dismissal of a constitutional challenge to Minnesota's same-sex marriage ban in *Baker v. Nelson*, 409 U.S. 810 (1972), precluded a ruling for the plaintiffs, as the Supreme Court had never overruled or disavowed that decision, in which the Court had stated that the issue of same-sex marriage did not present a "substantial federal question" with no further discussion or explanation. That ruling was also cited by the Louisiana and Puerto Rico district courts in their rejection of marriage equality claims, and it played a prominent role in a lengthy dissenting opinion issued just a week earlier by 9th Circuit Judge Diarmuid O'Scannlain, protesting his court's refusal to reconsider its marriage equality ruling as requested by Idaho Governor Butch Otter. *See Latta v. Otter*, 2015 WL 128117 (January 9, 2015).

The question of the continuing precedential authority of *Baker v. Nelson* came up during the oral argument at the Supreme Court in *Hollingsworth*, the Proposition 8 case, when counsel for the Prop. 8 proponents argued that the district court should not have ruled on the merits in that case because of *Baker*. At that time, Justice Ruth Bader Ginsburg dismissed *Baker*'s significance, pointing out that when *Baker* was decided, the Court had not yet issued its rulings holding that heightened scrutiny applied to sex discrimination claims. Because the 6th Circuit put such weight on *Baker v. Nelson*, it is likely to be discussed again during the *DeBoer* argument, and might also be addressed in the Court's subsequent opinion.

The 4th, 7th, 9th and 10th Circuits all held that *Baker* was no longer a binding precedent, noting that since 1972, the Court had expanded its view of the fundamental right to marry in a series of cases building on its historic 1967 decision striking down Virginia's criminal law banning interracial marriages, *Loving v Virginia*; that it had struck down an anti-gay state constitutional amendment on an equal

protection challenge in *Romer v. Evans* in 1996; that it had struck down anti-gay sodomy laws in *Lawrence v. Texas* in 2003; and, of course, that it had struck down as violating both due process and equal protection the federal ban on recognizing same-sex marriages in *Windsor* in 2013. In light of all these developments, even though the Court had never expressly overruled *Baker*, it would be ludicrous to suggest that same-sex marriage does not present a "substantial federal question" after June 26, 2013. Even the Court's most outspoken opponent of gay rights, Justice Antonin Scalia, might concede to that point, since his dissenting opinions in *Lawrence v. Texas* and *U.S. v. Windsor* both proclaimed that the rationale of the majority opinions in those cases would open up claims for same-sex marriage, rendering the Court's ipse dixit in *Baker* irrelevant. The *Windsor* majority opinion did not even mention *Baker v. Nelson*, which the court below, the 2nd Circuit, dismissed as not relevant to the questions presented in that case.

The courts that have rejected marriage equality claims relying on *Baker* have stressed that the Court's summary dismissal in *Baker* followed by several years its ruling in *Loving v. Virginia*. They argue that this makes clear that the fundamental right to marry, as identified in *Loving*, could not extend to same-sex couples; if it did, they argued, the Court would not have dismissed the *Baker* appeal. This argument treats *Loving* as entirely a race discrimination case, but it conveniently ignores the way *Loving* was expanded by the Supreme Court in subsequent cases, including *Turner* and *Zablocki*, which spoke broadly of the fundamental right to marry as transcending the narrow issue of procreation and didn't turn on racial issues.

In the marriage equality decisions during 2014 from the 4th and 10th Circuits, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied, sub nom Rainey v. Bostic*, 135 S. Ct. 286 (Oct. 6, 2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (Oct. 6, 2014), the courts held that same-sex couples were being deprived of a fundamental right to marry, and that the states had failed to show that they had compelling justifications for abridging that right. Hedging their bets, these courts also found that the state's justifications failed to meet rationality review. A Supreme Court ruling on this ground would not disturb the Court's continuing reluctance to find explicitly that sexual orientation is a suspect classification, which would raise a presumption of unconstitutionality every time the government adopts a policy that discriminates on that basis and would put the burden on the government to prove an important, even compelling, policy justification to defend its position. On the other hand, the 7th and 9th Circuits, in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied sub nom. Bogan v. Baskin* and *Walker v. Wolf*, 135 S.Ct. 316 (Oct. 6, 2014), and *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *motion for rehearing en banc denied*, 2015 WL 128117 (Jan. 9, 2015), premised their decisions on equal protection, with the 9th Circuit, in line with its earlier ruling in a jury selection case, holding that sexual orientation discrimination calls for heightened scrutiny and the 7th Circuit following a similar path without articulating the "suspect classification" terminology. A Supreme Court ruling based on equal protection that overtly applies heightened scrutiny would have a more far-reaching effect in other gay rights cases outside the marriage issue, which is why it seems more likely that the Court would take the due process route, or, as some argue that Justice Kennedy did in *Windsor*, attribute the same-sex marriage bans to unconstitutional animus and avoid any overt expression as to the other doctrinal issues. The Court might be leery about reaffirming too broad a fundamental marriage right, for fear that it would put in play constitutional challenges to laws penalizing polygamy, adultery, and incest (as Scalia argued in his *Lawrence* dissent). A ruling premised on finding animus as the prime motivator of same-sex marriage bans would end the bans without necessarily altering Supreme Court doctrine applicable to any other gay-related or marriage-related issues that might come before the Court.

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Most predictions about how the Court may rule presume that the *Windsor* majority will hold together and that the *Windsor* dissenters would dissent. That would make Justice Kennedy the senior member of the majority who would likely assign the opinion to himself, as he did in *Windsor*. (Now-retired Justice John Paul Stevens was the senior justice in the majority in *Romer* and *Lawrence* and assigned those opinions to Justice Kennedy, who returned the favor in *Lawrence* by prominently citing and quoting from Stevens' dissenting opinion in *Bowers v. Hardwick*.) Nobody is predicting that Justices Scalia, Thomas or Samuel Alito would abandon their dissenting votes in *Windsor* to join a marriage-equality majority, so they are unlikely to have any role in determining the Court's doctrinal path in the case. Indeed, Judge Sutton's opinion for the 6th Circuit defiantly embraced the "originalism" approach advocated by Justices Scalia and Thomas for

construing the 14th Amendment (an approach never endorsed by a majority of the Court), under which a claim for marriage equality would founder on the argument that the mid-19th century framers of that amendment could not possibly have intended or understood that its provisions would require states to license marriages by same-sex couples. Justice Kennedy, whose opinions in *Lawrence* and *Windsor* clearly disavowed an originalist approach to interpreting the scope of liberty protected by the due process clause, would never agree to these arguments. However, there has been speculation that Chief Justice Roberts might join the majority, which would give him control of the opinion assignment. In that case, one might expect a narrowly-focused opinion intended to keep together a doctrinally diverse majority of the Court, and intended to have as little effect on other cases as possible.

In the wake of the cert. grant, several media commentators tried to find particular significance in the Court's wording of the questions and division of the argument, suggesting that the majority of the Court might have a plan to rule for the gay plaintiffs on marriage recognition while ruling for the states on the question whether states must license same-sex marriages. Such an approach was floated by 5th Circuit Judge James Graves in his questioning on January 9 during oral arguments of the appeals from Texas, Mississippi and Louisiana, but strongly refuted by counsel for the plaintiffs in those cases. One suspects that the 5th Circuit may hold off on issuing a ruling now that the Supreme Court has granted cert. to decide these questions, in which case we may never find out whether Judge Graves is committed to that course. However, in light of the procedural and substantive posture of the cert. petitions coming up from four different states, the Court's organization of the questions and division of the argument appears more a logical response to a complicated appellate situation than a strategic move to produce a "split the baby" decision. ■

Italian Supreme Court Recognizes "A Right to One's Sexual Orientation"

On January 22, 2015, the Italian Supreme Court of Cassation decided *M.D.G. v. Ministero delle Infrastrutture e dei Trasporti & Ministero della Difesa* (No. 1126/2015). The case, started in 2001, involved a young man from Catania who, at the preliminary medical appointment for mandatory military service, declared himself a homosexual. As a consequence, as was usual under military regulations in force at the time (cf. art. 15(i) of the Decree of the Ministry of Defence March 26, 1999, considering "paraphilia and gender-identity disorders" grounds for dismissal), he was immediately dismissed. The military authority, however, transmitted this information to other offices of the public administration. As a result, the man was served with an order to stay his driver's license and to present himself to a medical commission because, due to the declared psychiatric disorder, he allegedly lacked the requirements to drive a motor vehicle. He sued for damages for violation of privacy and discrimination based on sexual orientation.

At first instance, the Tribunal of Catania granted the applicant's petition, awarding € 100,000 as compensation for the harm suffered. Considering this amount insufficient, the applicant appealed to the Court of Appeals of Catania, which reduced the damages to € 20,000, finding that the amount liquidated by the Tribunal was "exhorbitant and unmotivated." In particular, the court minimized the episode, stating that the violation of privacy and the discrimination based on sexual orientation, while certainly present, "resulted only in the opening of a driving license review procedure," was "circumscribed in a restricted context" and, finally, that the applicant could in some way predict the effects of his action.

The Supreme Court found these remarks unacceptable and found that the applicant's complaints in this respect were "totally grounded." It noted, first, that "both public administrations have heavily offended and outraged the personality of [the applicant] in one of his most sensitive aspects and have marked him with a grave feeling of distrust towards the State, perceived as vexatious, in expressing and realizing his personality vis-à-vis the external world." The court added that the applicant is entitled to "a constitutionally protected right to freely express his own sexual identity […] that this Court has acknowledged as an individual fundamental right." The Court therefore concluded that, since "the right to one's sexual orientation, crystallized in its three elements of conduct, orientation and expression (so-called coming out), is specifically and undoubtedly protected by the European Court of Human Rights since the case *Dudgeon v. United Kingdom* of 1981, […] the attempt of the Court of Appeals to diminish the gravity of the circumstances […] cannot conceal the fact that the applicant was that victim of an authentic (and intolerably reiterated) homophobic attitude." The court remanded to a different Court of Appeals for a calculation of further damages. – *Matteo M. Winkler*

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Matteo M. Winkler is an Assistant Professor at HEC Paris.

Michigan Appeals Court Finds That Fired State Attorney's Homophobic Rants Are Not Protected Speech

On January 8, 2015, a three-judge panel of the midlevel appellate court in Michigan unanimously concluded that former assistant attorney general Andrew Shirvell's unhinged online vitriol against openly gay then-University of Michigan student body president Chris Armstrong in 2010 was not protected under the First Amendment. *Shirvell v. Department of Attorney General*, 2015 Mich. App. LEXIS 8, 2015 WL 114608 (Court of Appeals of Michigan). Based on this key conclusion, the panel also affirmed a circuit court (the name of the state trial court in Michigan) order denying Shirvell's civil service grievance following his termination, and reversed a circuit order reinstating his unemployment benefits, after they were initially denied at the administrative level. Judge Stephen L. Borrello wrote the opinion joined by Judges Christopher M. Murray and Peter D. O'Connell.

The case arose out of the highly publicized blog Shirvell created in 2010, called the "Chris Armstrong Watch."

The case arose out of the highly publicized blog Shirvell created in 2010, called the "Chris Armstrong Watch," where he let loose his incredibly dismayed and obsessive reactions to the election of an openly gay student body president, with what he characterized as a "radical gay agenda," at his own beloved alma mater. On the blog, his public ruminations ranged from describing Armstrong as a racist and a liar to comparing him to a Nazi leader with a proclivity for hosting gay orgies, even going so far as to superimpose a swastika over a picture of Armstrong's face in one post. He also went beyond merely adding posts to the blog by personally stalking Armstrong at events and appearing on national television shows to defend his views. After then-Michigan Attorney General Mike Cox and other superiors in the office finally had enough of the negative swirl of publicity and Shirvell's refusal to back down, they initiated a disciplinary hearing and Shirvell was dismissed on November 8, 2010 for "conduct unbecoming a state employee."

Shirvell filed a grievance challenging the termination and a claim for unemployment benefits. He struck out at the administrative level on both. While a circuit court affirmed that Shirvell was fired for just cause, a different circuit court reversed the Michigan Compensation Appellate Commission's finding that Shirvell was disqualified from benefits for "misconduct," on the ground that he had engaged in "protected speech." Shirvell appealed the grievance order and the state appealed the unemployment benefits order. The Court of Appeals of Michigan consolidated the appeals so as to review both decisions together.

After Judge Borrello extensively set out the history of the proceedings, he turned to the core question for the court to decide: whether the First Amendment protected Shirvell's speech, because "[i]n the event that Shirvell's activities were protected under the First Amendment, then the government entities involved could not penalize Shirvell—i.e. either terminate him or deny him unemployment benefits—because of his speech."

Undertaking that analysis, the court turned to the precedent of the U.S. Supreme Court on the question of the free speech rights of a public employee speaking as a private citizen on a matter of public concern. The relevant test, according to Judge Borrello, holds that "an employee is entitled to protection under the First Amendment if he or she spoke as a private citizen on a matter of public concern and where the state cannot show that its interest in the efficient provision of public services outweighs the employee's interest in commenting on the matter of public concern." *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

After recalling the facts of several leading cases in the area, the court found the most pertinent one to be *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), where the U.S. Court of Appeals for the 2nd Circuit agreed that the New York City Police Department could dismiss a police officer after discovering his racist and anti-Semitic diatribes. The court found that the NYPD's interests in maintaining its reputation and relationship with the public outweighed the officer's interests in distributing racist literature.

With that in mind, the court looked at the governmental interests asserted by Michigan in this case and found that they similarly outweighed Shirvell's speech interests. His speech "interfered with the Department's internal operations and adversely affected the efficient provision of government services," had "a detrimental impact on close working relationships and harmony among co-workers within the office," "undermined one of the Department's specific missions—i.e. the integrity of its anti-cyber-bullying campaign," and "damaged both Shirvell's ability to perform his responsibilities and the Department's overall ability to perform its mission." Taken together, then, "the Department could have reasonably concluded that Shirvell compromised his ability to

appear in court as a representative of the entire citizenry of the state when . . . Shirvell had lost all credibility and become the 'paradigm of the bigot.'" In conclusion, his "speech was not protected under the First Amendment for purposes of these proceedings and neither the termination nor the denial of unemployment benefits offended the Constitution."

The First Amendment issue resolved in the state's favor, the court easily dismissed Shirvell's objections to the statutory and administrative grounds for his termination and the denial of his unemployment benefits. "[E]vidence at the grievance hearing supported that Shirvell engaged in conduct unbecoming a state employee in that his speech and speech-related conducted undermined his professional character and reputation, adversely affected the Department's internal operations, and had a tendency to destroy public respect for the Department and confidence in the Department's ability to provide services." The discharge was also neither arbitrary nor capricious because the evidence showed that the internal departmental investigation was not preordained and that his superiors went to great lengths to try and protect Shirvell before it all proved to be for naught. Finally, there was also sufficient "misconduct" underlying his termination so as to disqualify him from unemployment benefits because "[w]hen viewed in totality, Shirvell's behavior evinced a willful disregard of the Department's interests and he disregarded standards of behavior that the Department had a right to expect of him."

In the wake of the decision, Shirvell promised an appeal to the Michigan Supreme Court. Separately, a federal court jury in 2012 awarded Armstrong $4.5 million in damages against Shirvell for defamation, stalking, intentional infliction of emotional distress, and invasion of privacy. An appeal remains pending in that case as well. – *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGaL.

California Supreme Court Revives Mandatory Sex Offender Registration for Non-Vaginal Sex with Minors

The California Supreme Court ruled 5-2 on January 29, 2015, that the state's sex offender registration law does not violate equal protection when it gives courts discretion whether to impose a registration requirement on adults who engage in vaginal intercourse with minors age 16 or 17, but mandates registration for other sexual acts involving minors of those ages. *Johnson v. Department of Justice*, 2015 WL 363184, 2015 Cal. LEXIS 557. The decision overruled a 2006 case, *People v. Hofsheier*, 37 Cal.4th 1185, in which the court had ruled that all adults who had sex with 16 or 17 year olds were similarly situated and that there was no rational basis for the differential treatment, so that judges should be able to exercise discretion about whether to require registration in all cases.

The dissent, by Justice Kathryn Werdegar with the concurrence of Justice Goodwin Liu, argued that the distinction had a homophobic origin and would disparately harm gay people. Justice Werdegar argued that the court's departure from its general rule of not overruling recent decisions was not warranted in this case. The court's opinion was written by Justice Marvin Baxter, who had dissented in 2008 when the court ruled that same-sex couples were entitled to marry and that sexual orientation is a suspect classification for purposes of equal protection under the California Constitution.

Justice Werdegar's dissent sets out the background for the distinction in registration requirements, dating back to 1947, when the sex offender registration statute listed oral sex and sodomy with a minor as registerable offenses, but did not list sexual intercourse with a minor. (Sexual intercourse is defined for purposes of the statute as vaginal intercourse.) At the time, the statute required registration for all oral sex, even if it involved only consenting adults. Back then, the only lawful sex act in California was vaginal intercourse involving a married couple. Subsequent liberalization of the sex crimes laws led to passage of the Brown Act in 1975, which decriminalized consensual sex between adults, including gay sex. The legislature also gave the courts discretionary authority to order sex offender registration in cases involving vaginal intercourse between adults and minors, but retained mandatory registration for all other sex acts involving minors. One of the results of this change was that men who faced multiple charges including both oral and vaginal sex with a minor could plea bargain their cases down to avoid mandatory registration. This option was not available to gay men charged with sexual activity with teenage boys in the specified age range, for whom registration was mandatory.

Justice Baxter asserted that the 2006 case in which the court found the equal protection violation had been intended to make a narrow exception, involving a young man who had consensual oral sex with a teenage girl, but that the lower courts in California had run with it to reject mandatory registration in cases involving much wider age gaps. Painting a picture of disarray in the lower courts, a majority of the Supreme Court decided to reexamine its prior ruling.

The starting point for that analysis is that there is no constitutionally protected liberty interest for adults to have sex with minors, as the U.S. Supreme Court implied in *Lawrence v. Texas* when it emphasized that its ruling striking down the Texas Homosexual Conduct Law was focused on sexual activities of consenting adult same-sex couples. Since no fundamental right is involved, wrote Baxter, the legislature's policy choice is reviewed under the rational basis test. Any legitimate reason for the distinction in treatment that the court might hypothesize could serve to uphold the law.

In the 2006 case, the court had ruled

that there was no practical difference between vaginal intercourse and other forms of sex that would justify a different treatment, as they were all equality outlawed if minors were involved but legal as between adults. Baxter disagreed, writing for the court that because vaginal intercourse could lead to pregnancy and other forms of intercourse could not, the legislature could rationally treat it differently. The state is concerned with the welfare of children, and children born as a result of consensual intercourse between a man and a 16 or 17 year old girl could be disadvantaged if their father, stigmatized as a registered sex offender, was restricted as to where he could live and might be excluded from a wide range of employment opportunities. Thus, ruled the court, it was rational for the legislature to authorize judges to exercise their discretion about whether to mandate registration in such cases.

In her dissent, Justice Werdegar contended that this avoided the important question whether such discretion should be afforded in all cases so that judges could consider whether mandatory registration would be appropriate in cases involving oral or anal sex as well. There might be many reasons to distinguish among cases, especially where the adult and the teen are relatively close in age and their relationship was consensual. She noted that most of the enforcement of the "statutory rape" laws, under which otherwise legal sex is outlawed because of the age of a participant, tends to be targeted against gay men, and that mandatory sex offender registration could just as severely affect them as it might affect straight men who get teenage girls pregnant. And this targeting was originally because of moral disapproval of homosexuality, as exemplified by a 1974 California court decision, rejecting a constitutional challenge to the mandatory registration requirement, which said that "the defendant's arguments were those of 'the congenital homosexual to whom that is natural which the vast majority of the population deems unnatural.'"

She observed that a 1966 UCLA Law Review study of sex crimes enforcement practices "found that police officers, when they had a choice of statutes under which to arrest gay men, consciously chose those offenses requiring registration. . ., the 'predominant view' being that 'homosexual offenders should be registered.' In interviews, officials gave various reasons for wanting to register homosexuals, including the beliefs that they were prone to commit forcible sex offenses or offenses against children and that requiring registration would discourage homosexual conduct."

In the 2006 case, the court had ruled that there was no practical difference between vaginal intercourse and other forms of sex.

The differential registration requirements, she wrote, perpetuate the old distinction between heterosexuality as "normal" and homosexuality as "abnormal." "Indeed, as the majority notes, when the prohibition on sexual intercourse with underage girls was removed from California's rape statute and designated as the new offense of 'unlawful sexual intercourse,' the principal goal was to eliminate the social stigma of labeling offenders as 'rapists,'" she observed. This reflected legislators' views that apart from the age of the younger sex partner, there was nothing abnormal or necessarily immoral about heterosexual men having vaginal intercourse with teenage girls.

"What is clear," she wrote, "is that even in 1970, when all oral copulation was still banned as a sexual perversion, sexual intercourse with a minor was deemed unworthy of social stigma. The difference in attitude towards oral copulation and sexual intercourse reflected in [the] differential registration requirement is thus a continuation of historical attitudes: while sexual intercourse with minors was an offense, the act itself was a normal one not considered deserving of any social stigma; oral copulation, in contrast, was an unnatural act typically engaged in by homosexuals."

Criticizing the majority for its proposed "rational basis" for the continuing distinction, she wrote: "Careful attention to whether a posited reason is plausible and realistic is particularly appropriate here given that our registration law's differential treatment of oral copulation and sexual intercourse has origins in irrational homophobia, continues to impact gay people in a differentially harsh way (as those in a same-sex relationship cannot plead to the discretionary registration offense of unlawful sexual intercourse) and involves severe restrictions on liberty and privacy. We should hesitate to approve a statutory discrimination that may still bear the taint of irrational prejudice against homosexuals."

Of course, there is a ready solution to this problem. The California legislature, which has a large majority of gay-friendly Democrats in both houses, could immediately end this discrimination by giving judges discretionary authority in all cases of sexual contact between adults and minors to determine whether sex offender registration is an appropriate response to the charged offense, taking into account the age of the parties and the circumstances under which the activity occurred. Justice Werdegar's dissent is a clear call for legislative reform, as she explains that by overruling the 2006 decision, "the majority reinstates a scheme that had a disproportionately adverse effect on gay and lesbian youth and unnecessarily saddled nonpredatory offenders of either sexual orientation with the stigma and restricted liberties attendant on sex offender registration. Adherence to stare decisis is not a rigid command, but in this instance it is the wiser course; *Hofsheier* should not be overruled." ■

Federal Court Orders Recognition of Michigan Same-Sex Marriages

U.S. District Court Judge Mark Goldsmith has ruled in *Caspar v. Snyder*, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741(E.D. Mich., January 15, 2015), that even though the U.S. Court of Appeals for the 6th Circuit reversed a trial court marriage equality ruling last year, more than 300 couples who married in the brief period time between that overruled decision and the 6th Circuit's grant of a stay pending appeal are entitled to have their marriages recognized by the state. Rejecting the state's argument that the 6th Circuit ruling effectively invalidated the marriages, Judge Goldsmith declared: "what the state has joined together, it may not put asunder."

A different district judge, Bernard Friedman, ruled late on Friday, March 21, 2014, in *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich.), that Michigan's ban on same-sex marriages violated the 14th Amendment. Several county clerks then announced that they would open their offices on Saturday, March 22, to issue marriage licenses to same-sex couples and perform wedding ceremonies, and several hundred couples rushed to take advantage of the opportunity. Later on that day, the 6th Circuit Court of Appeals granted the state's motion to stay Judge Friedman's ruling pending an appeal. Subsequently, on November 6, the 6th Circuit reversed Judge Friedman's decision, holding that same-sex couples do not have a constitutional right to marry. *See* 772 F. 3d 388. The plaintiffs in that case petitioned the Supreme Court for review, which was granted on January 16, 2015, with a ruling expected on the merits by June 29, 2015.

After the 6th Circuit issued its stay, Michigan Governor Rick Snyder issued a statement acknowledging that the more than 300 marriages that were performed that Saturday were legal marriages, but in his view the stay meant that Michigan's marriage amendment and statutory ban were back in effect, so the state could not and would not recognize those marriages unless the litigation was finally concluded in favor of the plaintiffs. This state of affairs was obviously unsatisfactory to the people who had gotten married. Several of those couples represented by the ACLU of Michigan filed a lawsuit seeking to compel the state to recognize their marriages. A second lawsuit was filed on behalf of people who were married in other states but live in Michigan, claiming that their marriages were also entitled to recognition. As part of his January 15 ruling, Judge Goldsmith rejected a motion to consolidate the two cases, asserting that they presented distinctly different issues.

Judge Goldsmith concluded that "the continued legal validity of an individual's marital status is a fundamental right comprehended within the liberty protected under the Due Process Clause of the Fourteenth Amendment. Even though the court decision that required Michigan to allow same-sex couples to marry has now been reversed on appeal, the same-sex couples who married in Michigan during the brief period when such marriages were authorized acquired a status that state officials may not ignore absent some compelling interest — a constitutional hurdle that the defense does not even attempt to surmount."

In other words, the state's main argument in opposing this lawsuit was not that there was some compelling reason not to recognize these marriages. Rather, the state was arguing, among other things, that it was premature to recognize them until there is a final conclusion to the original marriage case by the Supreme Court. But to Judge Goldsmith, once a clerk had issued a license and the marriage had been solemnized it was a legal marriage, and the married couple had a right to be treated the same as all other married couples unless the state had a compelling justification for treating them differently.

The state also mounted a barrage of procedural objections, including claiming that withholding recognition did not impose any harm that could not be remedied later on by monetary damages if the Supreme Court eventually reverses the 6th Circuit decision, obviating the need for the court to issue an injunction requiring recognition now. But Judge Goldsmith did not agree that the plaintiffs' claim to recognition for their marriages turned on that eventual outcome. To be sure, if the Supreme Court reverses the 6th Circuit and holds that same-sex couples have a constitutional right to marry, the state's continuing refusal to recognize these marriages would be unconstitutional. On the other hand, Goldsmith asserted, even if the Supreme Court upholds the 6th Circuit, those marriages would still be valid, because at the time the clerks were issuing those licenses and performing those ceremonies pursuant to a duly issued federal district court decision that had not yet been stayed or reversed on appeal.

Furthermore, held Goldsmith, the plaintiffs had adequately shown that the harms they suffered were not just monetary. There is a dignitary harm in being denied recognition of a lawfully-contracted marriage that cannot be compensated entirely by money, thus the plaintiffs are suffering an irreparable injury every day that the state denies recognition to their marriages, apart from the concrete refusal to allow certain of the couples to adopt a partner's child or enroll in an employee benefits plan. In this connection, it is worth remembering that the *DeBoer* case originated in a refusal to allow a same-sex co-parent to adopt, and that monetary damages cannot possibly fully compensate somebody for being prevented from obtaining a legal status for their family.

Judge Goldsmith also rejected the state's suggestion that requiring recognition of the marriages while the ultimate outcome of the *DeBoer* case remained in doubt might lead to the awkward and difficult process of having to unravel these marriages if the 6th Circuit's decision is upheld. The judge rejected the notion that the state would be entitled to try to recoup benefits or rescind insurance coverage retroactively in such a case, or that an affirmance of the

6th Circuit's decision would necessarily mean that the marriages in question are invalid. A reversal of the original trial court ruling in by the 6th Circuit (or even ultimately by the Supreme Court) did not mean that district court's ruling was of no effect, he wrote, characterizing the state's argument to that effect as "an oversimplified misstatement." He pointed to other cases whether overturned trial court orders were nonetheless viewed retroactively as having legal effect until they were overruled.

As to Governor Snyder's original statement that the 6th Circuit's stay and subsequent merits ruling had "resurrected" the state's marriage ban, Judge Goldsmith said, "Nothing in the *DeBoer* opinion addresses the right to retain one's marital status in the face of the solemnizing state's effort to invalidate it. That question was never argued in *DeBoer* or decided." He wrote, "Plaintiffs acquired a marital status that Michigan bestowed upon them, and which Defendants – Michigan officials – themselves acknowledge was lawfully acquired at the time, pursuant to validly issued Michigan marriage licenses."

However, realizing that the state might want to exercise its right to appeal his order, Judge Goldsmith granted a 21-day stay to give the state an opportunity to request a further stay pending appeal from the 6th Circuit and, if need be, the Supreme Court. So although he has ordered the state to recognize these marriages, the order may not actually go into effect until the Supreme Court decides the marriage question, rendering the order a bit academic at this point. Furthermore, the Supreme Court's grant of certiorari in *DeBoer* is a factor that the 6th Circuit would probably take into account in deciding whether to extend this stay further.

ACLU attorneys representing the plaintiffs in this case include Jay D. Kaplan, Daniel S. Korobkin, Brook A. Merriweather-Tucker, and John A. Knight. Also participating for plaintiffs is Andrew W. Nickelhoff, a Detroit attorney at Sachs Waldman P.C. A team of attorneys led by Michael F. Murphy, an Assistant Attorney General, represents the state of Michigan. News reports about this decision suggest some uncertainty about whether the state would seek an appeal. ■

Two Federal District Court Marriage Equality Victories on Different Theories

The U.S. District Court for the District of South Dakota, Southern Division, and the U.S. District Court for the Northern District of Georgia, Atlanta Division, have each ruled against State officials who were seeking to uphold same-sex marriage bans, in *Rosenbrahn v. Daugaard*, 2015 WL 144567, 2015 U.S. Dist. LEXIS 4018 (D.S.D., Jan. 12, 2015), and *Inniss v. Aderhold*, 2015 WL 300593 (N.D. Ga., Jan. 8, 2015).

In *Rosenbrahn*, six same-sex couples adversely affected by South Dakota's marriage laws (both a statutory ban on same-sex marriage and a state constitutional amendment recognizing only opposite-sex marriages) brought suit against state officials arguing that the marriage ban deprives them of their constitutional rights to equal protection, due process, and the right to travel, and sought declarative and injunctive relief. Both plaintiffs and defendants filed for summary judgment, arguing that no genuine dispute of fact exists, and requested judgment as a matter of law.

U.S. District Court Judge Karen E. Schreier conducted an analysis with respect to Plaintiffs' due process arguments.

After concluding that the court had jurisdiction over the case, U.S. District Court Judge Karen E. Schreier conducted an analysis with respect to Plaintiffs' due process arguments, stating that the Due Process Clause "forbids the government to infringe certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Judge Schreier began her analysis by stating: "Neither side disputes that the right to marriage is a fundamental right. Instead, defendants contend that the right to marriage is distinct from a right to same-sex marriage because marriage has traditionally been understood to be between a man and a woman."

Both plaintiff and defendants argued that the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), supported their position and resolved the case. Judge Schreier held that *Windsor* "recognizes that the sexual and moral choices of homosexual citizens enjoy constitutional protection" but spoke nothing of marriage. Instead, Judge Schreier stated she must "turn to other Supreme Court precedent for guidance." The three cases cited were *Loving v. Virginia*, 388 U.S. 1 (1967) (state could not ban persons of different race to marry), *Zablocki v. Redhail*, 434 U.S. 374 (1978) (state could not ban persons owing child support to marry), and *Turner v. Safley*, 482 US 78 (1987) (state could not bar prison inmates to marry). Judge Schreier noted that a majority of courts that have addressed the constitutionality of same-sex marriage bans found that same-sex marriage bans deprive homosexual couples of their fundamental constitutional right to marriage.

With respect to Defendants' arguments, Schreier held that Defendants' framing of the issue as "whether there is a right to same-sex marriage" rather than "whether there is a right to marriage from which same-sex couples can be excluded" was precisely the question-framing mistake made by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which they subsequently reversed in

Lawrence v. Texas, 539 U.S. 558 (2003). She further ruled that Defendants' argument that a decision would remove the question of same-sex marriage from public debate would force plaintiffs to "resort to public opinion to secure their fundamental constitutional rights" and that the very purpose of the Bill of Rights was to protect fundamental rights from popular vote. Judge Schreier rejected Defendants' argument with respect to tradition, reminding Defendants that *Loving* overturned Virginia's anti-miscegenation statute "even though such laws were part of the traditional definition of marriage in some states." Finally she dispensed with Defendants' "slippery slope" argument, stating: "In the years following *Loving*, *Zablocki*, and *Turner*, states have maintained laws on polygamy, incest, age of consent, and other marriage-related issues despite the Supreme Court's classification of marriage as a fundamental right."

Having ruled marriage to be fundamental right, Judge Schreier examined South Dakota's laws under strict scrutiny. Defendant's justifications for the laws were 1) to channel procreation into marriage; and 2) proceeding with caution. Schreier held that Defendants had essentially conceded that the laws are not narrowly tailored because they do not explain why infertile or otherwise non-procreative heterosexual couples are allowed to marry, or why children adopted or conceived by same-sex couples would not be better off if raised by a marriage same-sex couple, and held that "proceeding with caution" was not a compelling state interest.

Having ruled that the right to marriage is a fundamental right, Judge Schreier held that the Equal Protection Clause of the Fourteenth Amendment requires the state to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest, and that as discussed in her Due Process analysis, the same-sex marriage ban violates the Equal Protection Clause. Accordingly, she granted the Plaintiffs' motion for summary judgment and denied the Defendants' motion. However, she stayed her decision pending appeal to the 8th Circuit, holding that "there is a substantial public interest in having stable marriage laws and avoiding uncertainty produced by a decision that is issued and subsequently stayed by an appellate court or overturned."

In *Inniss*, U.S. District Judge William S. Duffey, Jr., issued a decision in a case nearly factually identical: five same-sex couples adversely affected by Georgia's marriage laws (both statute and constitutional amendment) brought suit against state officials arguing that the marriage ban deprives them of their constitutional rights to equal protection and due process. Defendants moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Judge Duffey ruled that the Plaintiffs' Amended Complaint "sufficiently alleged a basis of subject matter jurisdiction."

Defendant argued that the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), summarily dismissing an appeal of a Minnesota Supreme Court ruling that the Due Process Clause of the Fourteenth Amendment is "not a charter for restructuring [the institution of marriage] by judicial legislation because a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," was binding on the court. Judge Duffey noted that a summary dismissal binds lower courts unless "doctrinal developments indicate otherwise." After a long analysis, Judge Duffey concluded that the landmark LGBT cases subsequent to 1972, including *Lawrence v. Texas*, *Romer v. Evans*, and *United States v. Windsor*, constituted "doctrinal developments" that impact the summary dismissal in *Baker*, and ruled that *Baker* did not require dismissal of Plaintiffs' claims.

With respect to Plaintiffs argument that Georgia's laws deprive them of "the fundamental right to marry," Judge Duffey stated that "the fundamental right claimed by Plaintiffs is the right to marry a person of the same sex." In his analysis of *Loving*, *Zablocki*, and *Turner*, unlike Judge Schreier, Judge Duffey noted that *Loving* was pronounced five years prior to *Baker*, and quoted *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), which stated that "had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question?" Ruling that the right to marry a person of the same sex was not "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty," Judge Duffey held that "Georgia's marriage laws do not implicate a fundamental right to marry a person of the same sex."

With respect to whether Georgia's laws should be examined under rational basis or "heightened scrutiny," Judge Duffey held that while *Windsor* applied a heightened scrutiny review, the reason for such review was because "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision," and that the court "simply [did] not hold that sexual orientation is a suspect class subject to heightened scrutiny." Accordingly, he stated that "the court declines to divine from *Windsor* a fundamental right to same-sex marriage or import *Windsor*'s balancing test, applied to the unique impact of DOMA, on a state's marriage statute."

Judge Duffey rejected Plaintiffs' Equal Protection arguments that Georgia's marriage laws discriminated on the basis of sex, sex stereotypes, and sexual orientation, stating that they do not discriminate on the basis of sex because they do not discriminate against men or women as a class, that with the exception of a concurring opinion from the Ninth Circuit, sexual orientation discrimination is not viewed as a form of "sex stereotyping," and that in the 11th circuit, sexual orientation "is not a suspect class."

Therefore, as no argument by Plaintiffs mandated any heightened review, Judge Duffey examined Georgia's marriage laws under rational basis review. Defendants argued that Georgia's prohibition on same-sex marriages, and its refusal to recognize same-sex marriages performed in

other States, "is rationally related to the State's interests in encouraging procreation and child welfare." Judge Duffey noted that defendants must at minimum describe the "relation between the classification adopted and the object to be obtained" and ruled that Defendant's motion to dismiss "does not address how Georgia's asserted interests in child welfare and procreation are advanced by the State's prohibition on same-sex marriages, and the State's refusal to recognize lawful marriages performed in other states."

Moreover, since Plaintiffs' Amended Complaint alleged that "prohibiting same-sex marriages harms the State's interest in child welfare", that "scientific consensus shows that children raised by same-sex couples are as well-adjusted as those raised by opposite-sex couples," and that "excluding same-sex couples from marriage humiliates their children, and denies those children the ability to understand the integrity and closeness of their own families without offering any conceivable benefit to the children of opposite-sex couples," and, since Plaintiffs were facing dismissal, the court was "required to accept these facts as true and consider the allegations in the Amended Complaint in the light most favorable to Plaintiffs." Judge Duffey accordingly ordered the Defendant's motion to dismiss to be denied.

Following Judge Duffey's ruling, Defendants filed a motion to stay the proceeding in light of the Supreme Court's grant of certiorari in *Obergefell v. Hodges*, 2015 U.S. LEXIS 618 (U.S. Jan. 16, 2015). On behalf of Plaintiffs, on January 27, 2015, Lambda Legal filed a response to the stay request, stating that *Obergefell* is likely to be briefed, argued, and decided in less time than discovery would take in this case, and that "Since *Obergefell* will likely significantly reshape the issues for discovery, and may decide this case, and given the discovery that Defendants believe is necessary, Plaintiffs believe that proceeding with the case before *Obergefell* is decided would not serve the interests of efficiency or judicial economy," and requested that Judge Duffey grant the requested stay.

– Bryan C. Johnson

Federal Judge Voids Alabama Same-Sex Marriage Ban

U.S. District Judge Callie ("Ginny") V. S. Granade ruled on Friday, January 23, that Alabama's constitutional and statutory ban on same-sex marriage violates the 14th Amendment. Her ruling in *Searcy v. Strange*, 2015 U.S. Dist. LEXIS 7776, 2015 WL 328728 (S.D. Alabama), did not make any mention of a stay pending appeal, but the public announcement of its release came too late on that Friday afternoon for same-sex couples to apply for licenses at the Probate Courts, which were closed for the weekend.

Anticipating the possibility that same-sex couples would seek licenses when offices opened on Monday morning, Attorney General Luther Strange immediately filed a motion seeking a stay, arguing that the state should not be required to issue marriage licenses to same-sex couples unless the Supreme Court ruled in favor of same-sex marriage in a decision that is widely-expected to be issued late in June. Judge Granade determined that a stay pending appeal was not warranted under the usual factors, but that in light of the nature of the case a brief stay of 14 days should be given so that the state could apply to the 11th Circuit. Her stay, announced on January 25 was set to expire on February 9 if it was not extended by an appellate court.

Anticipating the possibility that same-sex couples would seek licenses when offices opened on Monday morning, Attorney General Luther Strange immediately filed a motion seeking a stay.

Complicating the situation was an action by the Alabama Probate Judges Association. Taking a leaf from the Florida clerks association, which had raised doubts about the scope of the district court ruling in that state, the Association quickly issued a press release claiming that the press had misinterpreted the judge's ruling, which it claimed applied only to the plaintiff couple seeking an adoption and was binding only on the Attorney General, the only named defendant, and nobody else. In Alabama, the elected Probate Judges in each county are charging with issuing and recording marriage licenses, and none of them were sued in this federal action, the lone defendant being the Attorney General, sued in his official capacity as chief law enforcement officer of the state. As a result, Probate Judges around the state varied in their responses to media inquiries about whether they would issue licenses, and a few hopeful same-sex couples who showed up at the court on Monday, January 26, seeking licenses, were turned down in any event due to the district court's brief stay. On January 28, Judge Granade issued an "Order Clarifying Judgment," in which she quoted two paragraphs from Florida U.S. District Judge Hinkle's Order, observing that although only the named defendant was bound by her injunction, all public officials in Alabama were bound by the Constitution, and anybody refusing a marriage license to a same-sex couple if the stay is lifted would be exposing themselves to liability. The Probate Judges Association quickly announced that if the stay is lifted, their members would comply throughout the state.

On Monday, January 26, Judge Granade issued an Order granting a preliminary injunction in *Strawser v. Strange*, another pending marriage equality case in which a gay male

couple sought to marry so that they could execute effective powers of attorney in advance of surgery, but she also stayed that decision until February 9. In her *Strawser* opinion, according to a report on *al.com*, Granade noted the different factual situations of the two cases, but said that the legal issue is the same. "Although the Plaintiffs in this case seek to marry in Alabama, rather than have their marriage in another state recognized," she wrote, "the court adopts the reasoning expressed in the *Searcy* case and finds that Alabama's laws violate the Plaintiffs' rights for the same reasons." Strawser said that he and his partner, John Humphrey, had applied for a marriage license but that the clerk "had a fit" and turned them down. Strawser wears a pacemaker for a heart condition and wants to be sure that Humphrey will have the same rights as spouse in case of medical emergencies. Granade's January 26 Order is more detailed than in her January 23 ruling, ordering "that the Alabama Attorney General is prohibited from enforcing the Alabama laws which prohibit same-sex marriage. This injunction binds the defendant and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage." Presumably this will dispose of the argument by the Probate Judges Association that they are not bound by rulings against the Attorney General.

Alabama is in the same federal circuit as Florida, where a federal court declared that Florida's same-sex marriage bans are unconstitutional last August 21 but twice stayed its ruling, first to see what the Supreme Court would do with several pending petitions in marriage equality states (which were denied on October 6), and then to allow the state to seek a stay of the ruling from the 11th Circuit. In December, a panel of the 11th Circuit refused to stay the Florida ruling and the Supreme Court also refused to stay it, with two justices, Antonin Scalia and Clarence Thomas, noting that they would have granted the stay. As a result, the Florida ruling went into effect on January 5, even though the 11th Circuit has not yet ruled on a marriage equality case. This sequence of events suggests that Alabama should not be able to get a stay pending appeal. The one intervening event that might suggest otherwise, argued Attorney General Strange, is the Supreme Court's announcement on January 16 that it was granting petitions from plaintiffs in four states to review the 6th Circuit's decision rejecting constitutional challenges to same-sex marriage bans in Ohio, Michigan, Tennessee and Kentucky, *DeBoer v. Snyder*, thus creating an argument that any new developments in lower federal courts on marriage equality should wait for the Supreme Court's ruling in that case. However, although the Supreme Court had not yet conferenced the various petitions from the 6th Circuit at the time it denied the Florida stay request on December 19, the justices were certainly aware of those petitions and the likelihood that they would be reviewing the 6th Circuit ruling, when at least a majority of the Court voted to deny that stay. Since the Supreme Court does not explain its decisions on stay motions, lower courts are left to guess at what they should mean for subsequent stay requests.

The Attorney General's motion for stay relied heavily on the many stay decisions that were issued by lower federal courts during 2014 on the ground that the possibility of Supreme Court review required maintaining the "status quo" rather than allowing a marriage ruling that might ultimately be reversed go into effect. Attorney General Strange repeated the arguments of his colleagues from other states, asserting that allowing same-sex marriages prior to a final definitive ruling could lead to "confusion" about the status of the marriages. A few courts have now ruled, however, that there is no confusion about the status of such marriages, upholding the validity of same-sex marriages performed in Utah and Michigan under analogous circumstances.

Judge Granade was appointed to the bench by President George W. Bush in 2001 and took office in 2002. She wrote a brief but decisive opinion, shorter than almost all the marriage equality opinions released by federal district judges since the first in Utah in Dec. 2013. Her bottom line was that the state had not articulated a rational basis for excluding same-sex couples from marriage, much less the compelling interest that would be necessary to sustain a deprivation of the fundamental constitutional right to marry.

The case was brought on behalf of Cari D. Searcy and Kimberly McKeand by private counsel, and is one of several marriage equality cases pending in Alabama. The women were legally married in California. McKeand bore a son through donor insemination and the couple wanted to have the child formally adopted by Searcy under a provision of Alabama's adoption law that allows a person to adopt their "spouse's child," but she was turned down by the Mobile County Probate Court, which ruled that Alabama's "Sanctity of Marriage Amendment" and "Marriage Protection Act" barred the court from treating Searcy as McKeand's "spouse." This denial was upheld by the Alabama Court of Civil Appeals and the women turned to federal court, seeking both a ruling that the state's marriage ban is unconstitutional and an order prohibiting the state from enforcing it.

In blatant defiance of the 1st Amendment of the U.S. Constitution, the Alabama marriage amendment refers to marriage as "a sacred covenant," and thus belies the religious motivations of its framers, but the lawsuit by Searcy and McKeand did not attack it on that basis. Instead, building on the wave of marriage equality rulings issued by district courts in the wake of the Supreme Court's 2013 decision striking down the Defense of Marriage Act, *U.S. v. Windsor*, they asserted a violation of the 14th Amendment Due Process and Equal Protection Clauses.

The state's first line of defense was to argue that the lawsuit must be rejected because of *Baker v. Nelson*, in which the Supreme Court summarily dismissed a challenge to Minnesota's ban on same-sex marriage in 1972, saying that it did not raise a "substantial federal question." Judge Granade rejected this argument, pointing out that almost all of the federal courts that have ruled in marriage cases since 2013 have found it to have been superseded

by later "doctrinal developments." At the appellate level, the only outlier from this virtual consensus has been the 6th Circuit Court of Appeals, whose November 7 ruling will be reviewed by the Supreme Court. The 2nd, 4th, 7th, 9th, and 10th Circuits have all agreed that Baker is no longer a binding precedent on lower federal courts.

Turning to the 14th Amendment, the judge acknowledged that in the 11th Circuit she was bound to apply the rationality test in equal protection cases involving sexual orientation discrimination because of prior decisions. She observed, however, that "the post-*Windsor* landscape may ultimately change the view" that the 11th Circuit had previously expressed, although "no clear majority of Justices in *Windsor* stated that sexual orientation was a suspect category." (The 9th Circuit has disagreed with that assertion, ruling last year that because of *Windsor* lower federal courts must apply "heightened scrutiny" to sexual orientation discrimination claims.)

In a case involving deprivation of a fundamental right, however, a higher level of scrutiny is applied both under due process and equal protection theories. "Numerous cases have recognized marriage as a fundamental right," wrote the judge, "describing it as a right of liberty, of privacy, and of association." She quoted from a series of Supreme Court decisions describing the "strict scrutiny" that must be applied in reviewing laws that deprive individuals of this liberty. Under that approach, the defendant "cannot rest upon a generalized assertion as to the classification's relevance to its goals," she wrote, quoting from a 1989 Supreme Court opinion concerning racial preferences in government contracting. Instead, the government's burden is to show that the law is "narrowly tailored" to achieve a "compelling interest."

The state's policy argument in support of its ban was based on its asserted "legitimate interest in protecting the ties between children and their biological parents and other biological kin." This did not impress Judge Granade. She wrote, "The Court finds that the laws in question are not narrowly tailored to fulfill the reported interest. The Attorney General does not explain how allowing or recognizing same-sex marriage between two consenting adults will prevent heterosexual parents or other biological kin from caring for their biological children. He proffers no justification for why it is that the provision in question singles out same-sex couples and prohibits them, and them alone, from marrying in order to meet that goal. Alabama does not exclude from marriage any other couples who are either unwilling or unable to biologically procreate. There is no law prohibiting infertile couples, elderly couples, or couples who do not wish to procreate from marrying. Nor does the state prohibit recognition of marriages between such couples from other states."

"The Attorney General fails to demonstrate any rational, much less compelling, link between its prohibition and non-recognition of same-sex marriage and its goal of having more children raised in the biological family structure the state wishes to promote," she continued. "There has been no evidence presented that these marriage laws have any effect on the choices of couples to have or raise children, whether they are same-sex couples or opposite-sex couples. In sum, the laws in question are an irrational way of promoting biological relationships in Alabama."

The judge also observed that if the state's goal is "promoting optimal environments for children," it was defeating its goal. "Those children currently being raised by same-sex parents in Alabama are just as worthy of protection and recognition by the State as are the children being raised by opposite-sex children," she asserted. She quoted from Supreme Court Justice Anthony M. Kennedy's opinion in *U.S. v. Windsor*, where he asserted that a law denying recognition to same-sex marriages "humiliates thousands of children now being raised by same-sex couples" and "brings financial harm" to them. "Additionally," she wrote, "these laws further injure those children of all couples who are themselves gay or lesbian, and who will grow up knowing that Alabama does not believe they are as capable of creating a family as their heterosexual friends."

Having found the bans unconstitutional, Judge Granade granted the plaintiffs' motion for summary judgment and denied the state's contrary motion, ordering that the defendant, Attorney General Luther Strange, who was sued in his capacity as the state's chief legal officer, be enjoined from enforcing those laws. Strange was the sole named defendant. Since the plaintiffs were not seeking a marriage license and had not applied for one, they did not sue any officials responsible for the issuance of such licenses, thus the court's Order, by its terms, only specified the defendant – a point that was seized upon by the Probate Judges Association to contend that it was not binding on its members.

According to the organization "Freedom to Marry," the Alabama ruling is the 60th decision in favor of marriage equality that has been rendered since the Supreme Court's 2013 DOMA decision, mostly by federal trial judges. On the other side of this equation are a mere handful of state and federal trial-level rulings.

An interesting side show developed on January 27 when Alabama Chief Justice Roy S. Moore sent a letter to Governor Robert Bentley, on the court's letterhead, encouraging the governor to join with him in defying the federal court's order, based on his view that the state's definition of marriage is Biblical and beyond the reach of any federal court ruling as superior to the Constitution, which Moore argues does not empower federal courts to interfere with Alabama's definition of marriage. Moore's letter evoked a storm of criticism, and the Southern Poverty Law Center filed a disciplinary complaint against him with the Judicial Inquiry Commission of Alabama. That Commission had years ago forced Moore from the bench when he defied a federal court order to remove a 10 Commandments monument from the premises of the Alabama Supreme Court. Moore's theocratic views seem to be in sync with the voters of Alabama, who returned him to the Supreme Court in a subsequent election. ■

Gay Ex-Gang Inmate Granted Trial on Claims of Failure to Protect from Assault

Sometimes persistence pays off for litigious prisoners. Jeremy Pinson, whose troubles as a gay inmate and a former gang member did not prevent his transfer to a high security federal facility in Alabama in *Pinson v. Samuels*, 2014 U. S. App. LEXIS 15000 (D.C. Cir., August 5, 2014), as reported in Law Notes (September 2014) at 391-2, has filed over a hundred civil actions since his incarceration. In this new case, he succeeds *pro se* in taking claims to trial against a correctional counselor, a lieutenant, and the warden, for failure to protect him in *Pinson v. Prieto*, 2014 WL 7339203 (C.D. Calif., Dec. 19, 2014). United States District Judge Philip S. Gutierrez adopted the Report and Recommendation [R & R] of United States Magistrate Judge Sheri Pym that summary judgment be denied three of five defendants who failed to place Pinson in protection, resulting in his assault by other inmates.

The R & R has exhaustive discussion of the facts and involvement of each defendant as to triable issues and qualified immunity, and it bears study for any lawyer looking to sift the facts of a protection-from-harm case under *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994). Judge Pym found that Pinson stated claims against all five defendants under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for subjectively knowing and disregarding a serious risk to Pinson's safety.

The facts to be tried are extreme. The failures to protect occurred after the Department of Justice allegedly warned the Federal Bureau of Prisons [FBOP] that Pinson was in danger as a government witness against whom there was a "Luz Verde" (or "hit") ordered by an inmate gang, the "Mexican Mafia." Pinson was almost killed (sustaining stab wounds and broken bones) and then was returned to housing with his assailants. He was a well-known "snitch" and had been assaulted at two previous federal prisons. Pinson claimed that one defendant, the counselor Pablo Prieto, acted in collusion with the gang's prison extortion activity and with arranging the instant assault. The lieutenant (Josh Halstead) and the warden (Joseph Norwood) allegedly "knew" about the warnings, the history, and the return of Pinson to danger. Halstead was also charged with falsifying documents to cover up the incident.

Judge Pym found that the evidence tended to show that Pinson was "thrust into violent confrontations with other inmates from 2008 to 2011." She nevertheless ruled that two defendants (Richard Bourn, a captain; and Robert McFadden, a FBOP Regional Director) were entitled to qualified immunity. Judge Pym applied *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), requiring: (1) that Pinson's right to be protected was "clearly established" at the time of the constitutional tort; and (2) that the risk of harm be objectively "sufficiently substantial." While citing *Estate of Ford v. Ramirez–Palmer*, 301 F.3d 1043 (9th Cir.2002), for this latter point, Judge Pym notes that "no prior United States Supreme Court or Ninth Circuit case has addressed the more particularized inquiry: 'at what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes.'"

Judge Pym had little trouble finding that the law was clearly established on these facts. She then proceeds to discuss (again at length) whether each defendant (already found to be subjectively on notice) was sufficiently on notice objectively of the "substantial risk" to Pinson that their conduct was unlawful when the assault occurred. Judge Pym found that the letters to the Regional Director, although creating subjective notice, were insufficient to alert McFadden objectively that the risk was sufficiently "substantial" to make his failure to intervene unlawful. McFadden was not at the prison; and, although the notice was explicit, it was "received in a vacuum," and was not sufficient to inform a reasonable official that Pinson was in substantial danger. By contrast, the information to on-site warden Norton was sufficient to establish substantial risk objectively.

Pinson was almost killed (sustaining stab wounds and broken bones) and then was returned to housing with his assailants.

The defendant captain (Halstead) knew of Pinson's history, allegedly participated in a cover-up, and insisted that Pinson be placed in a zone of danger despite his own investigation of prior assaults "until he was actually assaulted" again – a "plainly unconstitutional policy." The information available to the lieutenant, by contrast, was limited and "raised only general concerns of harm," making it "reasonable" for him objectively to "misjudge" the severity of the risk.

This seemingly anomalous result (defendants having subjective knowledge of risk but escaping liability under qualified immunity because an objective analysis of the risk made the

subjective knowledge unreasonable), took this liability issue from the jury. Although *Estate of Ford* (involving an inmate death after double-celling with a psychiatric patient about whom the defendants who were dismissed had "little knowledge") is widely cited by District Courts in the Ninth Circuit, it has not been revisited by the Court of Appeals generally in a published decision; and it has not been endorsed by the Supreme Court. The Supreme Court did mandate separate analysis of constitutional violations and qualified immunity questions in *Saucer v. Katz*, 533 U .S. 184 (2001); and *Wood v. Moss*, 572 U.S. ___ (2014) (involving objective review of known facts by Secret Service in making decisions for protection of the Vice-President and President, respectively, against claims of subjective bad faith to suppress dissidents); but nothing in those decisions, or in *Estate of Ford*, approaches the application of this bifurcated approach as done here – which does not involve executive protection or the double-celling of psychiatric patients in population. Judge Pym does not explain how an "objective" defendant would necessarily conclude as a matter of law that no substantial risk of safety was posed to correction officials dealing an inmate who was notorious and the subject of a warning from the Department of Justice about the need for witness protection.

Practice pointer: Judge Pym allowed admission of many of Pinson's exhibits over defendants' "blanket" hearsay and other objections – including letters from his former attorney and his family warning about his danger – because they were offered for notice, not for the truth of the matter asserted. – *William J. Rold*

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

Federal Court Says Anti-Gay Group Can Leaflet on Public College Campus

In *Lela v. Board of Trustees*, 2015 U.S. Dist. LEXIS 8932, 2015 WL 351243 (N.D. Ill., Jan. 27, 2015), U.S. District Judge Robert W. Gettleman held that two students' First Amendment rights were violated when their public college denied them the right to distribute anti-gay flyers on campus.

Plaintiffs Wayne Lela and John McCartney were students at Waubonsee Community College ("WCC") and members of a student-run organization called Heterosexuals Organization for a Moral Environment (H.O.M.E.). They contacted WCC for permission to distribute anti-gay flyers on campus, labelled "The Uncensored Truth About Homosexuality" and "Gay' Activism and Freedom of Speech and Religion." In response, Lela received a letter from WCC's Executive Vice President of Finance and Operations, David Quillen, denying her request, stating that WCC "is not an open public forum" and that "the college consistently limits campus activities to events that are not disruptive of the college's educational mission, also referencing violation to WCC's Solicitation Policy and Use of College Facilities and Services Policy." The Facilities Policy provides that the facilities on campus may be made available to college and non-college programs, provided the use does not interfere with normal operations, and is consistent with the philosophy and goals of the college.

Soon thereafter, a staff attorney at The Rutherford Institute sent a letter on behalf of Lela to Quillen, asserting that the school's refusal to allow Lela to pass out the anti-homosexual flyers was in violation of his First Amendment rights, demanding rescission of the denial. The letter further stated that WCC's Solicitation Policy was unconstitutional and that the school had engaged in impermissible viewpoint discrimination. Outside counsel for WCC responded, arguing that solicitation of any kind is prohibited on campus and that the organization's message is in direct conflict with and disruptive of the College's mission to uphold and adhere to the legal requirements of maintaining a non-discriminatory educational enforcement, free of unlawful hostility.

Defendant contended that the denial to distribute the flyers did not violate the Plaintiffs' First Amendment rights because WCC is not an open public forum, also arguing that the decision was based on WCC's Solicitation and Anti-Discrimination policies. The court disagreed, mainly relying on the fact that WCC permits outside groups to engage in speech activities on its campus. The court stated regarding this practice, "While this does not make the college an open public forum, it does require that WCC not discriminate against outside groups based on the content of their speech. See, e.g., *Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007) (holding that a university that decides to permit its open spaces to be used by some outsiders cannot exclude others just because it disapproves of their message)."

In defense, WCC also claimed that the Plaintiffs' speech was political and therefore banned by WCC's Solicitation Policy, however the court disagreed, stating that the Plaintiffs' leaflets did not discuss any actual particular political ideology or align with a political party. WCC then argued that the decision was based on safety and disturbance concerns for H.O.M.E. because years prior, groups of students protested their presence and members of H.O.M.E had to be escorted by police off campus. The court scoffed, stating "This argument flies in the face of First Amendment jurisprudence . . . as has been repeatedly held, 'yielding to a heckler's veto infringes a speaker's

free speech.'" *Blanchard*, 477 F.3d at 471. The court further stated "First Amendment rights cannot be vetoed by listeners who, in disapproving of the message, create a disturbance, thereby silencing the speaker. As the Supreme Court held more than half a century ago, free speech may best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949)."

Finally, WCC unsuccessfully argued that their Anti-Discrimination Policy permissibly bars Plaintiffs from leafleting an anti-homosexual message on campus, stating it is "demeaning to a protected class" and "contrary to the College's mission." This was contradicted by paperwork evidence in the record that demonstrated that Plaintiffs were permitted to leaflet on WCC's campus on two prior occasions. The court stated that, reliance on WCC's Anti-Discrimination Policy to bar Plaintiffs from leafleting controverted Defendant's argument that the decision to reject Plaintiffs' request was content-neutral. Instead, the content of Plaintiffs' speech, which the school considered to violate its Anti-Discrimination Policy, was the precise basis for WCC's decision. The court found that Defendant discriminated against Plaintiffs based on the content of their speech. The court explained, "As has been stated numerous times in a variety of forums, it is not popular ideas, accepted by all, that need protecting. It is unpopular, even offensive, ideas that our most closely held constitutional right seeks to shelter." See generally, *Terminiello*, 337 U.S. at 4 (overturning city ordinance that banned speech that stirred people to anger, invited public dispute, or brought about a condition of unrest.). The court granted Plaintiffs' motion to preliminarily enjoin Defendant from denying Plaintiffs access to WCC for purposes of leafleting. – *Anthony Sears*

Anthony Sears studies at New York Law School ('16).

Federal Judge Allows Some Claims to Proceed by Gay Inmate Subjected to Hostile Environment

A gay pro se prisoner's civil rights case survived screening as to some defendants under the Prison Litigation Reform Act (see 28 U.S.C. §§ 1915(e)(2), 1915A), in a ruling by U.S. District Judge R. Allen Edgar in *Kohn v. Unknown Myron*, 2015 U.S. Dist. LEXIS 1165 (W. D. Mich., Jan. 7, 2015). Plaintiff Floyd E. Kohn sued more than a dozen defendants, claiming harassment, discrimination, and assault on the basis of his sexual orientation at Alger Correctional Facility, in a rural area of Michigan's Upper Peninsula. It is difficult to ascertain the job duties of the various defendants from the opinion, but Judge Edgar proceeds to differentiate who stays in the case based solely on the allegations of what appears to be a rather widespread course of homophobic group behavior.

Those defendants who merely called Kohn a "fag" and said he would "rot in hell" are dismissed, because slurs are not actionable as constitutional violations.

Those defendants who merely called Kohn a "fag" and said he would "rot in hell" are dismissed, because slurs are not actionable as constitutional violations. Defendants who merely failed to respond to Kohn's grievances are likewise dismissed, because they were not personally involved in the actionable conduct. Judge Edgar also dismissed claims against a number of defendants who referred Kohn for evaluation under regulations pertaining to "Gender Identity Disorder," finding that they acted in good faith, based on Kohn's behavior and presentation (which included the extorted wearing of a bra), even though Kohn alleged prior evaluation by a prison psychiatrist who found him without any disorder.

The five defendants who remain include: (1) a counselor who bought Kohn a bra and forced him to wear it on pain of segregation, moved him to the front of the cell block because "your [sic] homosexual and we have to watch your every move," and repeatedly harassed him; (2) an officer who bribed another inmate with cigarettes to assault Kohn; (3) two employees who sexually assaulted Kohn, one by pinching his nipples and rubbing his penis against Kohn's back; (4) another officer who forced Kohn to bunk with a sexually aggressive inmate because they were "both homosexuals," resulting in Kohn's assault; and (5) a defendant who sent a memo "specifying all the ways that Plaintiff could be discriminated against and sent it to every officer in the unit."

Although Judge Edgar does not clearly explain which claims are stated under the Eighth Amendment and which are under the Equal Protection Clause, his Equal Protection analysis of Kohn's claims applies "rational basis" scrutiny, citing *Romer v. Evans*, 517 U.S. 620, 632 (1996), but not the more recent cases of *United States v. Windsor*, 570 U. S. ___ (2013), and *Lawrence v. Texas*, 539 U. S. 558 (2003). It relied on older Sixth Circuit

law – *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); and *Gay Inmates of Shelby County Jail/ Criminal Justice Complex v. Barksdale*, 1987 WL 37565, at *3 (6th Cir. June 1, 1987) – and omitted the recent Ninth Circuit case of *Buckner v. Toro*,740 F.3d 471, 487 (9th Cir. 2014) (applying heightened Equal Protection scrutiny to sexual orientation classifications), citing instead the now obsolete Ninth Circuit decision in *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (9th Cir.2003). Judge Edgar nevertheless sustained an Equal Protection claim against the remaining defendants under the rational basis test, without suspect or quasi-suspect scrutiny, because Kohn's allegations of mistreatment as a member of an "identifiable minority subjected to discrimination in our society" – citing *Davis v. Prison Health Services et al.*, 2012 WL 1623216, at *6-7 (6th Cir. May 10, 2012) – were "not clearly frivolous" for screening purposes.

It is apparent that Kohn was alleging a hostile environment, fostered by the behavior of many participants and the tacit allowance of others. It is difficult to believe that the case would have been balkanized like this had the hostility been based on race or gender or religion. Having decided that Kohn could proceed, counsel would plainly have been warranted to flesh out the role of executive staff, for example, in forcing Kohn to wear a bra or in disseminating to staff a laundry list of targeted discrimination against Kohn. If Kohn was forced to wear, in effect, a pink triangle, and if he was subjected to daily ridicule because he is gay or he is (or was thought to be) transgender, his claims should have survived at the screening stage against those alleged to have taunted him, ignored his pleas for help, and made bogus medical referrals in one of the remotest prisons in the country. Judge Edgar, appointed by President Reagan, assumed senior status in 2005, and he moved from Tennessee to Michigan, where he remains on the bench.

– *William J. Rold*

North Carolina Appeals Court Dismisses Same-Sex Partner Custody Case for Lack of Standing

On December 31, 2014, the North Carolina Court of Appeals affirmed the dismissal of Deborah J. Toney's claim for custody of the adoptive daughter of her former partner, Lee Anna Edgerton, in an unpublished decision. *Toney v. Edgerton*, 2014 WL 7472947. Judge Dennis Redwing of Rutherford County District Court had dismissed Plaintiff's claim for lack of standing. Court of Appeals Judge Chris Dillon wrote for the panel.

Toney (Plaintiff) and Edgerton (Mother) were in a same-sex relationship for many years. During this time, Mother adopted a child from Guatemala. Plaintiff and Mother eventually began having relationship problems, partly due to Plaintiff's explosive temper. Mother obtained a protective order against Plaintiff and Plaintiff was forced to leave the home they shared. After a hearing in June 2012, the trial court awarded temporary custody to Mother and granted Plaintiff visitation. When temporary custody expired, Plaintiff attempted to pick up the child but no one was home at Mother's house. Plaintiff filed an action seeking custody and Mother filed an answer.

In October 2012, the trial court entered another temporary custody order in favor of Mother, and Plaintiff was again allowed visitation. During the next year, there were multiple hearings and a two-day trial resulting in a number of orders being entered on the record culminating in the October 2013 order determining that Plaintiff lacks standing to claim custody. Plaintiff filed appeals of multiple orders, however, she only argued the order dismissing her custody claim for lack of standing before the Court of Appeals.

In custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). The Court of Appeals reviews de novo whether the trial court's findings support its conclusions of law. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

Plaintiff argued that the trial court wrongly concluded that Plaintiff failed to demonstrate through clear and convincing evidence that Mother took inconsistent positions as to Plaintiff's role as "legal parent" of the child. The Court of Appeals disagreed.

The Court of Appeals cited two recent cases in support of their decision and relevant to the present case. First, in *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), the Court of Appeals held that "a third party has no standing under the United States Constitution or the North Carolina Constitution to assert a claim for custody against a legal parent unless the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally protected status as a parent." *Estroff v. Chatterjee*, 190 N.C. App. 61, 63-64, 660 S.E.2d 73, 75 (2008). Plaintiff relies on this case and argues her case is similar to Mason. The Court of Appeals disagreed. The facts in Mason were only similar in that there were two same-sex partners. However, in Mason the couple raised a child together and jointly supported the child. During the child's third year of life, the couple reached an agreement that the partner had "de facto" legal parent status. Just from those brief facts the cases are not similar. Plaintiff did not have an agreement with Mother nor did she jointly support the child. The Court of Appeals relied on *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), a North Carolina Supreme Court case in which the issue was whether a family unit was created by both partners (biological and legal). In *Mason*, the biological mother had created a family unit with her same-sex partner and they raised that child together. The court ruled that the biological mother could not terminate the partner's relationship with the child after allowing her to have parental status via documented agreement.

Another decision was issued on the

same day as the Mason decision. The *Estroff* case is more like the present case of Plaintiff and Mother. In *Estroff*, the court concluded contrarily to the *Mason* decision after applying the same principles. *See* 190 N.C. App. at 63-64, 660 S.E.2d at 74-75. The court affirmed the trial court's dismissal of a former partner's action for custody of children born during her relationship with the children's mother for lack of standing. In that case the biological mother did not choose to create a family unit nor forced her partner to participate in raising the child.

Here, Mother never intended for Plaintiff's relationship with the adopted child to be permanent. Mother also supported the child and was legal parent to the child. This case is more like *Estroff* in that there was never an agreement between the parents and never an intention to form a family unit or create a permanent relationship between the child and the other parent.

Plaintiff also attempted to argue that the trial court focused too much of its attention on Mother's "intent," but that argument was overruled. The court took into consideration all of Mother's actions as evidence in determining whether Mother acted consistently with regards to the adopted child. Plaintiff also takes issue with a number of facts in the findings by the trial court. The record was filled with evidence of Mother's intentions with regard to the adopted child and evidence that Plaintiff had a quick temper and that a restraining order against Plaintiff was needed. The Court of Appeals concluded that there was sufficient competent evidence for each finding of fact.

The Court of Appeals ultimately found Mother's testimony to be the most credible, and affirmed the trial court's decision that Plaintiff lacked standing to seek custody of Mother's adopted daughter. This is not going to be the last same-sex custody case we see, now that more and more same-sex couples are having children and forming family units. Hopefully, as the case law develops so will the preparation of couples for the unlikely event of a break-up with children involved. – *Tara Scavo*

Tara Scavo is an attorney in Washington D.C.

Military Appeals Court Voids Sodomy Conviction Due to Erroneous Exclusion of Evidence about Penis-Measuring Contest Among Navy Men at Guantanamo Bay

A military judge sitting on a forcible sodomy charge erred in refusing to let the defense present evident that might be used to impeach the "victim's" claim that he was not gay and had given the defendant no reason to believe his sexual advances were welcome. So ruled the military appeals court in setting aside the conviction of Ship's Serviceman Second Class Jim D. Villanueva in *U.S. v. Villanueva*, 2015 CCA LEXIS 24 (U.S. Navy-Marine Corps Court of Criminal Appeals, Jan. 29, 2015).

Villanueva and the "complaining witness," identified as HN P, were stationed at the Navy base at Guantanamo Bay in 2011. Villanueva had expressed "a romantic interest in HN P to a mutual friend," who told Villanueva that HN P was not gay, but later told HN P of Villanueva's interest. Although HN P responded that he was not gay, he subsequently agreed to meet Villanueva, who was "known for his extravagant parties." (Ah, Navy life….) A week later, HN P joined Villanueva and MA 2 at their lunch table. During this conversation, "HN P described things he had done while drunk, including placing his penis in another man's hand during a penis measuring contest." (Now we know how these macho Navy men pass the boring time!) "Later that night," wrote Judge Holifield for the court, "the appellant, HN P, MA2 R and a group of others met for a barbecue at a block of trailers used as a barracks. Shortly thereafter, they proceeded to an on-base bar, where they consumed various alcoholic beverages until the bar closed. HN P then invited the group back to his trailer to continue drinking." HN P would consume at least five more drinks in the next 90 minutes, according to his testimony. As the others left, HN P continued conversing with Villanueva, and his last memory of the party "involved taking off his shirt to show the appellant his tattoos. His next recollection is a brief moment of lucidity when he realized the appellant was attempting to anally penetrate him as he lay in his trailer. Although he recalls being in pain, he does not remember saying anything. He also has a brief memory of the appellant fully penetrating him and kissing him on the lips. HN P remembers nothing else until he awoke alone, naked and in pain the following morning." He reported this event the next day. His trailer-mate, Sergeant B, "heard what he described as 'sexual noises' coming from HN P's room. Among these noises, Sgt. B testified that *he heard HN P say*, "Oh, baby, that feels good."

Although HN P responded that he was not gay, he subsequently agreed to meet Villanueva, who was "known for his extravagant parties."

Before the trial, Villanueva's attorney filed a motion to admit evidence of HN P's statements at the lunch before the assault to impeach HN P's expected testimony that he was not gay, but the military judge denied the motion, limiting the defense as follows: "The defense MAY ask ONE QUESTION of [HN P] as to confirm his sexual orientation, under MRE 608[c] to demonstrate bias, prejudice or motive to misrepresent. . . Pursuant to MRE 412[c],

the defense MAY NOT inquire as to [HN P's] prior act with another male in which he exposed his penis in some sort of 'penis measuring' contest." The court of appeals found this exclusion of evidence to be erroneous.

"Here, the Government was required to prove beyond a reasonable doubt that the appellant did not hold a reasonable and honest, although mistaken, belief that HN P was consenting to sexual activity. One relevant factor on this point was whether the appellant reasonably believed HN P was amenable to engaging in a homosexual act. On this point, the members [of the jury] were left with an incomplete picture of what the appellant believed about HN P's sexual predisposition, that is, only that he had been told that HN P 'doesn't swing that way.' The Government sought the benefit of this incomplete picture, arguing the appellant's knowledge of HN P's sexual orientation did not support that the appellant 'was reasonably mistaken somehow.' Given the unique nature of sexual orientation, the appellant's knowledge of whether HN P was at all willing to engage in same-sex intimate contact was a critical question for the members in deciding whether the appellant's purported mistake of fact as to consent was objectively reasonable. Accordingly, the statement made by HN P to the appellant regarding the measuring contest was both relevant and material. That HN P told the appellant that he did this while drunk, combined with HN P's accelerated drinking as the party wound down and the others left the pair alone, was also relevant and material to an assessment of the appellant's state of mind."

The court found that the probative value of this evidence outweighed any dangers of unfair prejudice, since consent was the "primary, if not sole, issue in this case, and HN P's credibility was the key to that issue." The prosecution had warned that letting this evidence in would be a "distraction" but the court found those fears to be "unfounded," commenting, "The only issue relevant to the appellant's belief was whether and in what context the appellant heard HN P make the statement; it does not matter whether the statement was true." By excluding this evidence, the judge had denied Villanueva "his right to mount a defense, and allowed the Government to meet its burden based on an incomplete description of events. In its opening statement, the Government described HN P as someone who 'was all about meeting whoever knew the good looking girls,' and was 'not into [homosexual activity]. HN P testified during the trial that he 'was straight.' This could only have left the members with the impression that, since HN P was not gay, he would not have consented to sodomy. Compounding the problem, the military judge's ruling only served to further hamstring [defense counsel's] ability to impeach HN P's statement that he was not homosexual. The likely result of asking the one question allowed by the military judge would have been to reinforce HN P's earlier, incomplete testimony to the members."

The court stated its agreement with defense counsel's argument that the excluded statement "reflects [Villanueva's] understanding of the interactions. I mean, it speaks to consent. It speaks to mistake of fact." The court pointed out that since HN P made this statement to Villanueva after learning about his "romantic interest," "it would not have been unreasonable for the appellant to take the statement as an indication that HN P was receptive to his attention." Thus, admission of the statement was constitutionally required. Since HN P's testimony was the only evidence presented by the prosecution at trial and defense counsel was precluded from cross-examining him about his claim of exclusive heterosexuality, the judge effectively defanged the defense. The court also observed that the government's case was "far from overwhelming, there being little, if any, evidence to corroborate HN P's description of events in the trailer."

As the court found that this error "was not harmless beyond a reasonable doubt," the guilty verdict and sentence were set aside and the case was returned to the Judge Advocate General of the Navy "for remand to an appropriate CA with a rehearing authorized." The decision was unanimous. A notice on the opinion states that it does not serve as binding precedent, "but may be cited as persuasive authority." ■

MARRIAGE EQUALITY

5TH CIRCUIT – A panel of the 5th Circuit heard oral arguments on January 9 in marriage equality cases from Texas and Mississippi, where the states were appealing pro-marriage equality rulings, and Louisiana, where plaintiffs were appealing a rare anti-marriage equality ruling. Most commentators who attended the argument or listened to the audio recording posted on the court's website agreed that a 2-1 pro-marriage equality ruling was a likely result, although one judge raised the possibility of ruling for the plaintiffs on marriage recognition while ruling for the states on the question whether they had to issue marriage licenses. The question came up during oral argument whether the court should refrain from deciding the case if the Supreme Court granted cert to review the 6th Circuit's anti-marriage equality ruling. Counsel for plaintiffs advocated strenuously against any such delay, pointing out that their clients were suffering irreparable injury every day their constitutional right to marry was denied. The court gave no indication whether they found that argument persuasive, but the action of the panel of holding the argument, even though the Supreme Court was conferencing the cert petitions the same morning, might be taken as a sign that they would go ahead and decide the case on their own timetable, which had been expedited to include the Mississippi appeal, where the district court issued its ruling just weeks earlier.

8TH CIRCUIT – The 8th Circuit issued an Order in *Lawson v. Kelly*, No. 14-3779, a pending marriage equality appeal from the Western District of Missouri, on January 22, rejecting the plaintiffs' motion to vacate the district court's stay of its pro-marriage equality decision. Plaintiffs had argued that since the Supreme Court denied Florida's motion to stay a marriage equality decision in that state, there was no reason to continue the stay on the Missouri marriage decision. The court rejected this motion without explanation. At the same time, it rejected a motion by the state to stay the appeal until after the Supreme Court rules in the appeals from the 6th Circuit's *DeBoer* decision. Instead, the court granted the plaintiffs' motion to expedite the appeal and set an abbreviated briefing schedule, under which the state's brief is due by February 17, the plaintiffs' brief by 30 days later, with another two weeks for the state's reply and a further week for any other reply. That would set up an argument for April, perhaps around the same time that the Supreme Court hears arguments in the 6th Circuit appeals.

9TH CIRCUIT – On January 9 the 9th Circuit Court of Appeals announced that Idaho Governor Butch Otter's request for en banc review of the three-judge panel decision in *Latta v. Otter*, 771 F.3d 456 (Oct. 7, 2014), had been circulated to all the active non-recused judges of the circuit, but there was no majority in support of granting en banc review, so the motion was denied. The staunchest defender of bans of same-sex marriage on the circuit, Judge Diarmuid O'Scannlain, issued a dissenting opinion joined by Judges Rawlinson and Bea, strenuously arguing for 25 pages that the Supreme Court had decided this issue in *Baker v. Nelson* in 1972 and it was inappropriate for the court to fail to honor that precedent. He also referred frequently to 6th Circuit Judge Jeffrey Sutton's decision to that effect, arguing that "we should have reheard these cases in order to consider the arguments of our colleagues on the Sixth Circuit, who, reviewing the same question raised here, arrived at the opposite result." O'Scannlain's dissent can be read at 2015 WL 128117, 2015 U.S. App. LEXIS 400 (January 9, 2015). ***On January 16, reacting to the grant of certiorari in appeals from the 6th Circuit's *DeBoer* ruling to the Supreme Court, Alaska Attorney General Craig Richards announced that he would ask the 9th Circuit to stay the state's appeal in *Hamby v. Parnell* pending a ruling by the Supreme Court. Such a stay would have no immediate impact in Alaska, where same-sex marriages have been taking place pursuant to District Judge Timothy Burgess's ruling because the 9th Circuit and the Supreme Court refused to stay the ruling. The state's appeal on the merits appears doomed in the 9th Circuit unless the Supreme Court affirms the 6th Circuit, because the 9th Circuit has been refusing to take new marriage equality appeals en banc and any three-judge panel would be bound by the Idaho/Nevada decision, *Latta v. Otter*, as noted above.

U.S. CONGRESS – Senator Patrick Leahy introduced S. 23, the "Copyright and Marriage Equality Act," which would amend 17 U.S.C. Sec. 101, which concerns the rights of surviving spouses of copyright holders. As presently written, it uses the terms "widow" and "widower" and only protects the rights of individuals whose marriages were recognized under the law of their domicile state. Leahy would insert the following language: "An individual is the 'widow' or 'widower' of an author if the courts of the State in which the individual and the author were married (or, if the individual and the author were not married in any State but were validly married in another jurisdiction, the courts of any State) would find that the individual and the author were validly married at the time of the author's death, whether or not the spouse had later remarried." In light of *U.S. v. Windsor*, passage should be simple, but ideological opposition to same-sex marriage by Republican members of Congress may delay enactment.

ARIZONA – The state did not appeal a marriage equality ruling, and so same-

sex couples can marry in Arizona and their out-of-state marriages are being recognized. However, because of the state constitution's marriage amendment, adopted by popular vote in 2008, the legislature cannot amend the marriage statutes to accord with the new reality. Thirteen members of the legislature are co-sponsoring a measure to put a repeal of the 2008 amendment on the ballot. Only if the amendment is repealed, it is argued, can the legislature then address the task of conforming the state's law. Regardless whether the repeal is approved, same-sex couples will be entitled to marry pursuant to the federal court's order. *Phoenix Business Journal*, Jan. 14.

ARKANSAS – The Arkansas Supreme Court heard oral argument in a marriage equality case, *Wright v. Smith*, months ago, having granted expedited review to a ruling by the trial court that the state's ban on same-sex marriage was unconstitutional. However, no opinion has been forthcoming, and in the meantime the composition of the court has changed as a result of retirements and newly elected judges taking office in January. This has prompted the state defendants to file a motion seeking a new oral argument before the newly constituted court. In the motion, they pointed out that the panel that heard oral argument was a reduced panel, with the chief justice away at a conference and the justice then presiding having since retired. Another justice had recused himself from the case, and was replaced for the argument by a special appointee, but now a new justice has taken office to occupy that position. Although a decision could still be issued in the name of the justices who hear argument last year, the defendants-appellants requested that the court schedule a second oral argument "for the benefit of Chief Justice Hannah, Justice Wynne, and Justice Wood." Scheduling such an argument would be disadvantageous to the plaintiffs, because the election campaigns for the new justices suggested that they will be even less receptive to marriage-equality arguments than their predecessors. The motion also point out that the Supreme Court's cert grant in *DeBoer* will not necessary settle all the questions in *Wright v. Smith*, which was decided on dual state and federal constitutional grounds. Even if the Supreme Court were to affirm *DeBoer*, the Arkansas Supreme Court could still decide that same-sex couples have a state constitutional right to marry in Arkansas. Of course, if the Supreme Court reverses *DeBoer*, there might be no need for the Arkansas Supreme Court to rule, as the trial court's decision would be vindicated and upheld on federal constitutional grounds. * * * Meanwhile, the state's appeal of the District Court's ruling in *Jernigan v. Crane*, 2014 WL 6685391 (E.D. Ark., Nov. 25, 2014), notice of appeal filed, No. 15-1022 (8th Cir.), briefly seemed in doubt, as the Clerk of the 8th Circuit entered an Order on January 26, stating that the Appellant "has failed to pay to the Clerk of the United States District Court the requisite docketing fees" and that the appeal could be dismissed "for failure to prosecute" if they don't hop to it within 14 days of the Order. However, upon receiving the notice, the Attorney General's office dispatched payment on January 27, blaming the late payment on a "clerical error," not a failure to pursue the appeal.

FLORIDA – On January 1, U.S. District Judge Robert Hinkle issued a brief Order in *Brenner v. Scott*, 2015 WL 44260 (N.D. Fla.), clarifying the scope of his prior decision ruling that Florida's ban on same-sex marriages was unconstitutional. Some state officials and clerks had taken the position that the Order, whose stay had been denied by the 11th Circuit and the Supreme Court, was binding only on the clerk sued in the case and provided relief only to the same-sex couple that had sued for a marriage license. While acknowledging that his Order was limited in that sense, Hinkle left no doubt that all clerks in the state were bound to issue marriage licenses to qualified same-sex couples. "History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law," he wrote. "Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. There should be no debate, however, on the question whether a clerk of court *may* follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statues and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees." Thus, although the specific order in this case literally binds one clerk to issue a license to one couple, "as set out in the order that announced issuance of the preliminary injunction, *the Constitution* requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction." Thus instructed, clerks throughout the state bowed to the inevitable and started issuing marriage licenses once the stay was lifted by its own terms at 5 p.m.on January 5, and Florida became the 36th marriage equality state.

FLORIDA – Palm Beach County Circuit Judge Lisa Small has ruled that the lesbian spouse of a woman who gave birth in Florida through in vitro fertilization is entitled to be listed as a parent of the child on its birth certificate.

MARRIAGE EQUALITY

The ruling came three weeks after Florida was compelled by federal court order in *Brenner v. Scott* to recognize foreign same-sex marriages. Small based on her ruling on prior Florida cases involving assisted reproductive technology and parental rights, merely moving beyond prior law to recognize the legal implications of treating same-sex marriages as valid. Small wrote that the child is far "better off having two loving parents in her life, regardless of whether they are of the same sex, than she would be by having only one parent" that would have legal authority to act for her in a parental capacity. Although the Attorney General could try to intervene, a spokesperson for her office showed no indication that they would do so. The happy parents are Lisa Maxwell and Christine Stephens-Maxwell, who married in New York in 2012. *Palm Beach Post*, Jan. 23.

GEORGIA – The state filed a motion on January 20 with U.S. District Judge William S. Duffey, Jr., asking him to stay proceedings in *Inniss v. Aderhold*, in which the court had denied the state's motion to dismiss the case entirely on January 8. The state's lawyers suggested that the court should wait to see what the Supreme Court does with the 6th Circuit appeal, as to which cert was granted on January 16, before proceeding to rule on the pending motions for summary judgment in the Georgia case. Duffey's opinion is discussed in a separate article above.

KANSAS – Even though U.S. District Judge Daniel Crabtree's preliminary injunction in *Marie v. Moser* orders the state to allow same-sex marriages, and the 10th Circuit and Supreme Court refused to stay it, state officials remain obstinately opposed. By late January, clerks in 59 of the state's 105 counties were issuing licenses to same-sex couples, and the Department of Health and Environment, whose head is a defendant in the case, was accepting marriage registrations, but no other state agency was recognizing the marriages, per the dictates of Governor Sam Brownback and Attorney General Derek Schmidt. Tenth Circuit precedent dictates the outcome of this case on the merits, and late in the month Judge Crabtree conferred with counsel for the parties on scheduling the next step in the case, which would presumably be either a trial on the merits or a summary judgment motion. Given circuit precedent, it's hard to know why there would need to be a trial, or why Kansas would obstinately remain the last state in the 10th Circuit without full marriage equality. One speculates that the governor and attorney general are delaying in hopes that the Supreme Court will affirm the 6th Circuit's *DeBoer* decision, thus allowing their state's ban on same-sex marriage to go back into effect. Over 75% of the state's population resides in the counties that are issuing licenses, with the sparsely-populated rural counties being the main holdouts, and of course any couple that obtains a marriage license can then hold their ceremony anywhere in the state. However, as tax filing season begins, there are questions whether the state will accept joint filings from the married couples. More litigation seems likely between the ACLU attorneys representing the plaintiffs and the obstructionist Attorney General.

KENTUCKY – Even though the 6th Circuit reversed a ruling that Kentucky's ban on same-sex marriage is unconstitutional, Jefferson Family Court Judge Joseph O'Reilly approved a divorce for a same-sex couple that had married in Massachusetts. Ruling on the divorce petition in *Romero v. Romero*, O'Reilly wrote that denying a married same-sex couple a divorce would violate the state's equal protection requirement, since different-sex couples who were married out of state but resided in Kentucky were eligible to obtain divorces. O'Reilly noted that the state's divorce law provides that it be "liberally construed" to promote "amicable settlements" of spousal disputes. The state did not intervene to contest the court's jurisdiction to grant the divorce, as state governments have done in some other jurisdictions. O'Reilly issued his decision on December 29, but the petitioner's lawyer, Louis Waterman, did not make it public until January 12 so that it would be final and unchallengeable, according to a report on January 12 in the *Louisville Courier-Journal*. Alysha and Rebecca Sue Romero married in 2009 and moved to Kentucky in 2011, where one of the women had obtained a job in the University of Louisville radiology department. They filed for divorce in 2013, and concluded a property settlement in spring of 2014.

MISSISSIPPI – While gay Mississippians awaited a ruling from the 5th Circuit on the state's appeal of a federal marriage equality decision, the state's Supreme Court was hearing arguments in a same-sex divorce case involving a couple who married in California in 2008. The attorney general argued that the state can't open its divorce court to Lauren Czekala-Chatham and Dana Ann Melancon because their marriage is "void" under Mississippi law. According to a report in the Jackson *Clarion-Ledger* (Jan. 22), Presiding Justice Jess Dickinson repeatedly asked during the argument why, since Mississippi opposes same-sex marriage, the state would want to keep a same-sex couple from dissolving their marriage? The state's answer is that under its laws, only marriages can be dissolved, so recognition of the marriage, forbidden under the state constitution, is a prerequisite to granting a divorce. It was pointed out, of course, that the 5th Circuit and ultimately the Supreme Court could resolve the problem if they

rule that Mississippi is constitutionally obligated to recognize the marriage. Counsel for the state and the couple agreed that it would be appropriate for the court to wait until the Supreme Court of the United States issues its ruling to decide this case.

NEBRASKA – U.S. District Court Senior Judge Joseph F. Bataillon had scheduled oral argument on motions for summary judgment in *Waters v. Ricketts*, a marriage equality lawsuit, to take place on January 29. However, Nebraska Attorney General Pete Ricketts filed a motion to stay the proceedings after the Supreme Court announced its cert decision on January 16 to review the 6th Circuit's *DeBoer* decision. Ricketts argued that the court should put the case "on hold" until after the Supreme Court's anticipated ruling, arguing that the Supreme Court's ruling could resolve or clarify the issues in the pending Nebraska case. Counsel for the plaintiffs filed a brief opposing any delay, pointing out the continuing harms to their clients every day their constitutional right to marry or get recognition for out-of-state marriages is denied. Ricketts also had filed a brief on the merits in support of his motion for summary judgment, relying on the 6th Circuit's ruling as well as a 2006 8th Circuit ruling that did not directly decide the "right to marry" question but had rejected a constitutional challenge to the enactment of Nebraska's marriage amendment. Judge Bataillon put off the hearing while considering the motion. He had previously ruled, in *Waters v. Heineman*, 2015 WL 106377 (D. Neb., Jan. 7, 2015), against a motion to intervene as co-plaintiffs filed by Harold Wilson and Gracy Sedlak. Wilson and Sedlak had previously filed a pro se action challenging the state's constitutional marriage ban, which had been rejected by the district court; their attempt to appeal had been dismissed as untimely. The court found that this determination was res judicata as far as their attempt to intervene in this case was concerned, and that there was no showing that the existing plaintiff class could not adequately represent their interest in obtaining a ruling striking down the state's ban on same-sex marriage.

NORTH CAROLINA – Political pandering? North Carolina's Republican legislative leaders have filed a petition for certiorari with the Supreme Court on January 9, seeking to bypass the 4th Circuit to gain review of district court marriage equality rulings in their state. *Berger v. Fisher-Borne*, No. 14-823, 2015 WL 164866. Those rulings have gone into effect because neither the 4th Circuit nor the Supreme Court was willing to stay them, sending a message that these legislators don't want to hear. The named petitioners are Phil Berger, President Pro Tempore of the state Senate, and Thom Tillis, former Speaker of the House and newly-elected U.S. Senator. They are appealing all three merits rulings from federal courts in North Carolina. Their petition concedes that they are presenting the same questions that are raised by several petitions already on file with the Court, and they concede that the Court has already denied a petition for review of the 4th Circuit's decision in *Bostic v. Schaefer*, 760 F.3d 352 (2014), but they suggest that their appeal presents additional questions: whether the marriage equality rulings issued thus far constitute an "erroneous and an impermissible intrusion on the authority of States over domestic relations law that this Court recognized and reaffirmed in *United States v. Windsor*" and whether, even if "strict scrutiny" applies, the state's "compelling interest in fostering the optimal family structure for the rearing of children that result from the unique biological complementarity of men and women" will save the day for their marriage ban because "it is as narrowly tailored as privacy concerns permit." They are represented by Counsel of Record John C. Eastman and Anthony T. Caso of the Center for Constitutional Jurisprudence at Chapman University's Fowler School of Law, together with attorneys from ActRight Legal Foundation (one guess as to its political orientation) of Plainfield, Indiana, and Charlotte attorney Robert D. Potter, Jr.

NORTH DAKOTA – U.S. District Court Chief Judge Ralph Erickson (D. N.D.) has placed a stay on two marriage equality cases pending before him, *Ramsay v. Dalrymple* and *Jorgensen v. Montplaisir*, indicating that he will not take further action in the cases until after the Supreme Court has decided the 6th Circuit appeals. An attorney for the *Ramsay* plaintiffs, Josh Newville, expressed disappointment, pointing out that the pending summary judgment motions were presented to the court on September 5, and they had been waiting four months for a ruling. National Center for Lesbian Rights is co-counsel on the *Ramsay* case, and Lambda Legal is co-counsel on the *Jorgensen* case with another group of private attorneys. Erickson's action came just a week after the federal district court in South Dakota granted summary judgment to plaintiffs in a marriage equality case, but stayed its ruling pending appeal to the 8th Circuit.

OKLAHOMA – State Rep. Todd Russ is so concerned about court clerks who are required to issue marriage licenses to same-sex couples in violation of their personal (religious) beliefs that he has proposed legislation to do away with civil marriage licenses in Oklahoma. Under his proposal, marriage would no longer be performed by judges. A religious officiant authorized by the state could perform marriages and sign certificates that could be filed with a

clerk. Any couple who did not want a religious wedding could execute an affidavit of common law marriage. Russ calls H.B. 1125 an example of "conscience legislation" to let people exercise their religious values. Another legislator has introduced a superfluous bill that would protect religious officials from any obligation to perform marriages that would violate the person's conscience or religious beliefs. Since the 1st Amendment would clearly protect a religious marriage officiant from such an obligation, the measure is clearly intended solely to pander to the sponsor's religious political base. Legislators acting badly? *Daily Oklahoman*, Jan. 22.

VIRGINIA – The parties in *Bostic v. Rainey*, the successful Virginia marriage equality case, have agreed upon an award of attorney's fees and costs. In a Joint Notice of Settlement filed with the district court on January 28, they specific that Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C., local counsel who originally filed the case, will receive $61,000, and Gibson Dunn & Crutcher LLP, the major national firm that came in under the auspices of the American Foundation for Equal Rights with partner Ted Olson arguing to defend the victory in the 4th Circuit, will receive $459,000, a substantial write-down of its usual rates. Finality of this settlement depends upon ratification by the state which, if withheld, would lead to litigation that could result in a different fee award, possibly larger.

CIVIL LITIGATION NOTES

11TH CIRCUIT COURT OF APPEALS – A gay man from Hungary lost his appeal seeking withholding of removal from the United States in *Acs v. U.S. Attorney General*, 2015 U.S. App. LEXIS 84, 2015 WL 64127 (11th Cir., Jan. 6, 2015). The court found that substantial evidence supported a determination by an immigration judge and the Board of Immigration Appeals that Acs, who applied too late to be considered for asylum, was not entitled to withholding of removal. "Acs's testimony does not compel a finding of past persecution because he testified that the cut he suffered during an attack at a gay pride parade did not require medical attention, and apart from that single attack, he only testified to isolated incidents of verbal harassment. The record also lacks physical evidence corroborating Acs's physical injury. Further, substantial evidence supports the determination that Acs did not establish a clear probability of future persecution, as the Country Report for Hungary reported that Hungary prohibits employment discrimination and hate crimes based on sexual orientation." It sounds like a losing case for gay people from Hungary to seek refugee status in the U.S. without evidence of serious persecution in their individual case.

CALIFORNIA – San Bernardino County Superior Court Judge Brian S. McCarville rejected a motion by the Hesperia Unified School District to dismiss all of the counts of a discrimination complaint brought by Lambda Legal on behalf of Julia Frost, a lesbian teacher who was faculty advisor to the Gay/Straight Alliance at the school but whose contract was not renewed. *Frost v. Hesperia Unified School District*, CIVDS 1313980 (Jan. 13, 2015). The court denied the defendant's motion to strike the complaint in its entirety, and specifically rejected the demurrer to nine of the ten causes of action asserted in the complaint. In a press advisory, Lambda noted that the complaint includes an unprecedented claim that the discrimination protections contained in the state's Education Code would apply to teachers as well as students; the defendants argued for a more restricted reading, but the court will allow this claim to go to trial. The complaint alleges a hostile environment as well as retaliation against Frost for her advocacy on behalf of lesbian, gay and gender non-conforming students attempts' to counter the harassment and discrimination they encounter in the schools.

COLORADO – Various public health and law enforcement officials enjoyed qualified immunity from constitutional claims brought by a gay HIV+ man who claimed of harassment, wrongful imprisonment, and violation of his rights by defendants' actions in response to their conclusions that he was engaging in unprotected sex with "young men." *C.M. v. Urbina*, 2015 U.S. Dist. LEXIS 9097 (D. Colorado, Jan. 27, 2015). C.M. pled guilty to two counts of sexual assault in 2002, and was sentenced to probation for 25 years, a condition of which was to complete sex offense specific therapy. He also lost his license to practice law. In 2005 he tested HIV+ as a result of having unprotected sex with a partner who did not disclose his HIV status to C.M. His HIV+ status was reported to the Colorado public health authorities. He subsequently tested positive in 2006 for chlamydia, which turned out to be drug resistant, requiring several courses of treatment, with each subsequent positive test being reported to authorities. Due to the repeated positive tests, C.M. alleges, public health officials wrongly assumed that he was continuing to engage in unprotected sex, which he claimed he was not doing, and they took various steps to try to restrict his activities, including charging violations of his probation leading to imprisonment more than once. C.M. claimed that this series of events involved unauthorized disclosures concerning his medical condition, as well as inappropriate attempts to get him to waive confidentiality in exchange for mandated counseling

required by his probation officers. In this lawsuit, C.M. sought remedies for alleged constitutional violations. But U.S. District Judge R. Brooke Jackson concluded that because none of his various constitutional claims were established as a matter of 10th Circuit or Supreme Court precedent, and his charges related to actions by government officials carrying out their job functions, the defendants enjoyed qualified immunity. This brief summary can't begin to do justice to the lengthy, detailed recitation of factual allegations in Judge Jackson's opinion, to which interested readers are directed.

COLORADO – In what might be called a "set up man bites dog scenario," a customer calling himself Bill Jack wandered into Denver's Azucar Bakery in March 2014, requesting several Bible-shaped cakes with phrases like "God hates gays" written in icing on them. He also requested an image of two men holding hands with an X on at least one of the cakes. Proprietor Marjorie Silva says she told him they would make the cakes but would not do these inscriptions, but they would probe him with extra frosting so he could write whatever he wanted on the cakes. But evidently Mr. "Jack" was seeking only to provoke a discrimination lawsuit against the bakery, claiming that he was denied services because of his religious beliefs and setting the conservative blogosphere alight. He sent a press release to Denver's NBC affiliate television station, stating "I believe I was discriminated against by the bakery based on my creed. As a result, I filed a complaint with the Colorado Civil Rights Division." Silva responded to this on the bakery's official Facebook page: "It's unfair that he's accusing me of discriminating when I think he was the one that is discriminating." It will be interesting to see how the Civil Rights Division will play this one. Clearly, Mr. "Jack" is seeking to vindicate the claims of oppressed religious believers who feel that they are being improperly attacked for refusing to provide goods or services to same-sex couples, by trying to show that gay-friendly businesses are hostile to Christian customers.

FLORIDA – Palm Beach County Circuit Judge Lisa Small ruled on January 21 that a lesbian couple who were married in New York in 2012 were both legal parents of the child born to one of them through in-vitro fertilization in Florida. Same-sex marriage has been legal in Florida since early in January, when a federal district court stay of a marriage equality ruling expired after the 11th Circuit and the Supreme Court refused to extend it pending appeal. Lisa Maxwell and Christine Stephens were declared legal parents of Satori, born seven weeks earlier. Under Florida law, a baby born to a married couple after in vitro fertilization of the wife is the child of both spouses, and Judge Small found the principle applicable to this same-sex couple. Before the ban on same-sex marriage recognition was lifted, Lisa would have had to adopt the child. *miami.CBSlocal.com*, Jan. 22.

ILLINOIS – In *Austin v. Federal Reserve Bank of Chicago*, 2015 WL 110076 (N.D. Ill., Jan. 7, 2015), a former federal bank examiner lost his Title VII claims of race and sex discrimination and retaliation. Among his differences with his employer was the employer's community outreach program, which included providing volunteer opportunities for bank employees at the Center for Halsted, a gay social services agency. Austin sent an email voicing disapproval of the inclusion of Center for Halsted in the agency's program, stating: "I don't agree or support the activity offered for the Center for Halsted; upon reading the description of the activity, it appears the bank is supporting a program whose focus is on someone's personal sexual preference, be it in accordance with, or not with someone's personal religious values. Although, I have not led a devout Christian life, based upon my religious background, I would be uncomfortable if I was required to attend this activity." He also protested about a team leader posting a "7FLAG emblem," identified by the court as a "rainbow flag emblem of the LGBT community" outside his office, Austin stating his belief that the flag "was an intimidation factor that anybody who didn't agree with it could possibly face the consequences of whatever his wrath would be given that it wasn't a consistency that he displayed this emblem before he got promoted." Of course, the bank was not requiring Austin to attend any activity at the Center for Halsted. Austin encountered various problems with supervision, incurred some disciplinary notices and requirements to take remedial action, and he claimed that he was discriminated against because of his race, his sex, and in retaliation for engaging in protected activity, including, presumably, protesting about the Center for Halsted and the flag emblem, although the opinion by District Judge Rebecca Pallmeyer is not ideally clear about how the sexual orientation-related facts related to his discrimination complaint. The court rejected the claim that he had been subjected to a hostile environment or retaliation that would cause a reasonable person to quit the job, or that could be actionable under Title VII.

NEW JERSEY – In a case decided on March 12, 2014, but released for publication on January 20, 2015, New Jersey Superior Court Judge Lawrence R. Jones ruled that a civil union could be dissolved on grounds of irreconcilable differences, even though this was missing from the list of grounds for dissolution under the state's civil union statute. *Groh v. Groh*, 2014 WL 7647544 (N.J. Super. Ct., Ocean Co., March 12,

2014). The parties contracted a civil union in New Jersey in 2008. Five years later, Lacey Groh filed a complaint and Rachel Groh filed a counterclaim, each seeking dissolution on the no-fault ground of irreconcilable differences. They had negotiated a settlement of all pending issues and appeared before the court on March 12, 2014, seeking a joint judgment, but the court noted that the statute did not provide for dissolution on those grounds. After considering the arguments of the parties, the court produced this decision. It seems that at the time the legislature enacted the Civil Union Act, in response to the N.J. Supreme Court's decision in *Lewis v. Harris*, 908 A.2d 196 (2006), it intended to provide the same grounds for dissolution of a civil union as were provided for divorce under the marriage laws. At that time, N.J. did not allow for no-fault divorce, so the civil union law did not provide for no-fault dissolutions. Since then, New Jersey has amended its divorce law to allow for such divorces, but has neglected to amend the civil union law similarly, and now that New Jersey has marriage equality, tinkering with the civil union law is not a high legislative priority. The court concluded that as the legislature's intent was to comply with *Lewis v. Harris* by treating civil unions as equal to marriages for purposes of state law, it would be appropriate, noting the public policy in favor of allowing dissolution on no-fault grounds as evidenced in the change to the divorce laws, to allow for no-fault dissolutions of civil unions as well. "As the divorce statute now applies equally to both opposite-sex and same-sex marriages, family courts have clear statutory authority to dissolve same-sex marriages on the grounds of irreconcilable differences," wrote Judge Jones. "There is no legal logic in statutorily interpreting our laws to permit same-sex couples to amicably dissolve marriages based on irreconcilable differences, while simultaneously prohibiting same-sex couples in pre-existing civil unions from dissolving their relationships." Thus, he concluded that "under the most reasonable interpretation of existing statutory law, the family court has authority to dissolve a civil union based upon the no-fault ground of irreconcilable differences. In the present case, the court hereby grants such relief by entering a dual judgment of dissolution, and wishes both parties well in their respective future." No explanation was given for the long delay in releasing the opinion for publication.

NEW YORK – Finding that an employer had successfully rebutted the inference that an employee was dismissed because of his sexual orientation, the Appellate Division, 3rd Department, unanimously affirmed a decision by Justice Gilpatrick of Supreme Court, Ulster County, granting summary judgment to the employer in *Miranda v. ESA Hudson Valley, Inc.*, 2015 N.Y. Slip Op. 00670, 2015 WL 358151 (Jan. 29, 2015). Miranda was employed as an ambulette driver beginning in February 2009 and subsequently as a paramedic. His job gave him access and responsibility for security of the "narcotic box" at ESA's facility. Miranda testified that as early as July 2009 he had notified his superiors about inappropriate sexual comments by some co-workers and had advised "certain of his superiors" that he was gay. Miranda was the subject of various disciplinary complaints in October ("inappropriate touching of another employee') and December 2009, but the employer took no action against him. However, after an incident concerning a security lapse regarding the narcotics box, he was terminated in January 2010. Miranda claimed he was fired because he was gay. While the court conceded that he might establish a prima facie case, it affirmed the trial court's conclusion that any inference of discriminatory intent had been effectively rebutted by the employer's evidence that although supervisors knew he was gay, he was not discharged after various infractions, but only when the employer concluded that he had failed properly to secure the narcotics box. Miranda argued that the employer was mistaken; that a co-worker was responsible for the lapse in question. The court deemed that irrelevant. The issue is whether the employer dismissed Miranda because he was gay, and as to that there was no proof. "As defendant's director of human resources succinctly stated, 'If we wanted to terminate [him] due to his sexual orientation, clearly we could have done so when we received the employee complaint of [inappropriate touching]' in October 2009. Accordingly," continued the court, "we are satisfied that defendant demonstrated its entitlement to summary judgment dismissing the complaint." Miranda is represented by Russell A. Schindler of Kingston.

NORTH CAROLINA – U.S. District Judge Terrence W. Boyle denied the employer's motion to dismiss a Title VII sex discrimination claim brought by a transgender plaintiff in *Lewis v. High Point Regional Health System*, 2015 U.S. Dist. LEXIS 5813, 2015 WL 221615 (E.D.N.C., January 15, 2015). Xyaira Lewis, anatomically male with a female gender identity who is undergoing hormone therapy in anticipation of sex reassignment surgery in the future, is a certified nursing assistant who applied for three open positions with High Point. She was interviewed for all three positions, given a tour of the facilities, and introduced to various employees. At her third interview, she was interviewed by a bunch of nurse assistants who she claims harassed and ridiculed her about her "status as a transsexual," in the words of Judge Boyle's opinion. She returned to the facility for a follow-up interview, and alleges that by this point in the process the unit charge nurse was aware of her transgender status. However, she was not awarded any of the jobs, being told that the unit charge nurse "wanted someone

with more experience." She filed a sex discrimination charge with the EEOC and subsequently filed suit. The employer's motion to dismiss crossed with her motion for summary judgment, which she based on the findings of the EEOC investigation. The EEOC filed an amicus brief in her support. The employer, citing a 1996 4th Circuit case, *Wrightson v. Pizza Hut*, 99 F.3d 138, argued that "sexual orientation" claims could not be brought under Title VII. Lewis responded that she was not bringing a sexual orientation claim; she was claiming sex discrimination. Judge Boyle clearly understood the difference, observing that neither the 4th Circuit nor the Supreme Court has ruled on whether a transgender plaintiff can bring a sex discrimination claim alleging discrimination because of her gender identity or status. He pointed out the Senate's passage of ENDA in 2013, using the distinct terminology of sexual orientation and gender identity, which, wrote Boyle, "underscores the fact that the two are different concepts. Nowhere in her complaint does plaintiff allege discrimination on the basis of her sexual orientation. Accordingly, defendant's motion to dismiss is denied." Boyle never discussed the accumulating body of administrative and judicial precedent supporting the assertion of gender identity discrimination claims under Title VII, presumably because such discussion would be unnecessary because of the ignorant wording of the defendants' motion to dismiss. However, Boyle wrote that Lewis "may not use the EEOC's determination letter as undisputed evidence of intentional discrimination by the Hospital," so he denied her motion for summary judgment. Lewis had not presented any direct evidence that her gender identity was a reason for the rejection of her application. Judge Boyle pointed out that there had been no discovery yet, and that Lewis's motion lacked a supporting factual affidavit, merely attaching the EEOC letter as an exhibit. She is representing herself *pro se*. The employer is represented by James M. Powell and Jillian M. White of Womble Carlyle Sandridge & Rice LLP, Greensboro, NC, who will have to hit the books and educate themselves about transgender law before this case goes much further. Jennifer Goldstein filed the amicus brief on behalf of the EEOC.

OKLAHOMA – Finding that claims of sexual orientation discrimination are not actionable under Title VII of the Civil Rights Act of 1964, U.S. District Judge Joe Heaton granted an employer's motion to dismiss a sexual orientation discrimination claim brought by a female employee in *Gordineer v. Chuy's Opco, Inc*., 2015 U.S. Dist. LEXIS 9633 (W.D. Okla., Jan. 28, 2015). Two female former employees of the defendant asserted claims for sexual harassment/gender discrimination and retaliation, and one of the plaintiffs, Erin Pratt, also alleged that she "experienced unwelcome comments and actions against her because of her sexual orientation." The dismissal motion pertained solely to the sexual orientation claim. "As plaintiff appears to concede," wrote the judge, "Congress has not designated sexual orientation as a protected class. The Tenth Circuit has explicitly so held," citing a 2005 decision. "Plaintiff suggests she really just mislabeled her claim and that it is really one based on same-sex harassment. Though same-sex harassment is a cognizable legal theory, it nonetheless protects those who are harassed by someone because of their sex, not because of their sexual orientation. The complaint in this case includes nothing to suggest some separate basis for a claim based on same-sex harassment. It alleges various acts by male managers directed to plaintiffs, who are female." The court similarly rejected a claim of retaliation motivated by the plaintiff's sexual orientation. The court noted that the plaintiffs' "claims for sexual harassment/discrimination based on their sex and for retaliation based on their objection to such discrimination are not challenged by the present motion and remain for resolution." Thus, in the view of this court, Title VII's ban on sex discrimination provides protection to a lesbian employee if she can establish she was targeted because of her sex, but not if she was targeted because of her sexual orientation. Plaintiffs are represented by Scott F. Brockman and several other attorneys from Ward & Glass LLP, Norman, Oklahoma.

TENNESSEE – In *Joyner v. Bellsouth Communications, LLC*, 2015 U.S. Dist. LEXIS 7881, 2015 WL 328206 (M.D. Tenn., Jan. 23, 2015), U.S. District Judge Todd Campbell granted summary judgment to the defendant on almost all of the plaintiff's allegations of discrimination because of disability and race under the Americans With Disabilities Act and Title VII of the Civil Rights Act. The plaintiff, an HIV+ African-American man, was frequently absent, in part due to complications of his HIV infection, and was ultimately discharged for excessive absenteeism. The court found that many of his claims were not actionable in court for failure to exhaust administrative remedies, given the undue reticence of the complaints he filed with administrative agencies. He alleged, among other things, that the employer violated ADA confidentiality requirements regarding information about his HIV status, but the court found that he had not exhausted this claim in his EEOC charges. The one charge on which summary judgment was denied was his hostile work environment claim under the ADA, which the court found had been adequately pled and as to which summary judgment was inappropriate due to disputes about material facts. "It may be that at trial, the factfinder will conclude that Plaintiff was not subjected to harassment that was sufficiently severe or pervasive to create a hostile work environment and/or that

no alleged harassment was because of his disability," wrote Judge Campbell. This inquiry, however, involves factual disputes, and the Court cannot find that Defendant is entitled to judgment as a matter of law on this claim."

TEXAS – Saks Fifth Avenue stirred up a storm of controversy when it filed a motion to dismiss a pending Title VII case brought by a transgender former employee of its Houston store, asking the court to rule that gender identity discrimination is not illegal under that statute, and arguing that this is "settled law." *Jamal v. Saks & Co.*, Case No. 4:14:-cv-02782 (S.D. Tex.). The defendant's position was inconsistent with the views of the Equal Employment Opportunity Commission, the Justice Department, and several federal courts, although the Supreme Court has not yet spoken to the issue. The defendant relied on older cases that predate recent developments. The Justice Department filed a statement of interest with the court, affirmatively stating that Title VII does protect transgender plaintiffs, and Human Rights Campaign and the National Center for Lesbian Rights filed a joint amicus brief arguing against the motion, supplementing the response filed by Leyth Jamal's attorneys, Jillian T. Weiss of New York and Mitchell Katine of Houston. Saks then withdrew its motion, stating that it felt that it had adequate grounds for dismissing Jamal and would ultimately prevail on the merits, even if Title VII was construed to prohibit discrimination because of gender identity. Saks has a written non-discrimination policy that includes sexual orientation and gender identity, and rejects the charge that its reasons for firing Jamal were a pretext for gender identity discrimination. Its withdrawal of the motion to dismiss was prudent lawyering, but also provided an interesting demonstration of changing social views, as the heat it was taking for its legal argument proved overwhelming.

VIRGINIA – Richmond Designate Judge T. J. Markow ordered the Virginia Department of Health's Office of Vital Records to amend the birth certificates of twins born to a lesbian couple through alternative reproductive technology, under which one mother, Joanie Hayman, provided the eggs that were fertilized in vitro from a sperm donor who waived parental rights, and the fertilized eggs were gestated by her wife, Maria Hayman. Under Virginia law, the donor of eggs in this circumstances would have no parental rights, but the women filed suit seeking to have both of them recognized as legal parents. Markow's order provides that the Haymans are the only parents of the children, who were born in June 2013. Same-sex marriage became available and recognized in Virginia on October 6, 2014, when the Supreme Court denied review of a 4th Circuit decision affirming a district court ruling from earlier in the year. The newspaper report about this ruling did not mention when and where the Haymans married, and certainly their marriage was not recognized in Virginia at the time the twins were born. Their lawyer used a variety of legal theories, but the article did not mention which ones the court embraced. *AP State News*, January 26 (based on reporting in the *Richmond Times-Dispatch*.

WASHINGTON STATE – The *Associated Press* reported on January 7 that Benton County Superior Court Judge Alex Ekstrom ruled on January 7 that Barronelle Stutzman and her shop, Arlene's Flowers, can be prosecuted under the state's Consumer Protection Act and the Washington Law Against Discrimination for refusing "to do the flowers for a gay wedding" in 2013. The court held that Stutzman can be held personally liable under the Consumer Protection Act. Still to be resolved is whether the facts show that she actually violated both statutes. The Attorney General is prosecuting the case, seeking a permanent injunction requiring Stutzman and her shop to comply with the law.

CRIMINAL LITIGATION NOTES

ARIZONA – Law enforcement officials in Phoenix suffered a setback in their enforcement of an anti-solicitation statute against Monica Renee Jones, a transgender woman, who was arrested by a police officer who didn't like the way she was walking. She was hauled into municipal court on the misdemeanor charge, where she demanded a jury trial, which she was not entitled to get, according to the judge. Her attorney asked the court to rule out evidence of prior acts, but the judge refused, stating that since it was not a jury trial, he could hear whatever was presented and make a decision about which evidence to consider. After the undercover police officer testified, Jones's lawyer moved for acquittal and was denied. Jones testified and was open about her past sex work, arrests and convictions, while insisting that she was not soliciting at the time she was arrested. The trial judge explained his verdict, including stating that as Jones had admitted "a record of not too long ago, less than 2 years ago, of a – of prior conviction, the – a motive to avoid a mandatory 30-day sentence would be something that I can't ignore. When evaluating the credibility of the witnesses in front of me, I do find that the State has met its burden," and found Jones guilty. The Superior Court in Maricopa County reversed the conviction on January 22 in *State of Arizona v. Jones*, LC2014-000424-0001 DR, finding that it was inappropriate for the trial judge to attribute a "motive to lie" to Jones in discounting her testimony. The court referred to an explanation provided by the U.S. Court of Appeals for the 2nd Circuit in *U.S. v. Gaines*, 457 F.3d 238 (2nd

Cir. 2006), which elucidated that there was no necessarily correlation between a defendant's guilt and defendant's motivation to deny guilt when testifying in her own defense. Although defendants "frequently have a motive to lie," the court explained, indulging a presumption that a defendant will falsely testify she is innocent "undermines the presumption of innocence." A defendant always has a deep personal interest in the outcome of a case, whether she is innocent or guilty. Thus, the instruction is, in a sense, always accurate. However, "a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify truthfully. As the government candidly acknowledged at oral argument, the district court's charge that Gaines's 'interest created a motive for false testimony' was true only if Gaines was, in fact guilty." The same holds for this case, wrote the Arizona court: "For the trial court to have concluded Defendant was not credible and thus guilty because she was facing conviction and sentence deprived Defendant of a fair trial," so the conviction had to be reversed and the case sent back to the municipal court for a new trial. The court found, on another point, that Jones's attorney failed to object when the state presented its evidence of her past criminal record, but that this problem could be cured on retrial. It also found that the trial court's rejection of the defendant's constitutional challenge to the statute was not in error; as there were past appellate rulings upholding the constitutionality of the solicitation statute, it was not within the authority of the municipal court to declare it unconstitutional. Such a ruling would have to await an appeal of a conviction to the Arizona Court of Appeals or Supreme Court.

CALIFORNIA – A man on trial for forcible rape argued that prosecutors tainted his conviction when they raised questions about past homosexual conduct during the cross examination of his leading character witness: his wife. *People v. Simpson*, 2015 WL 340685 (Cal. Ct. App., 3rd Dist., Jan. 27, 2015). Jason Simpson was convicted by a jury on a charge of forcible rape of a woman, an act of drug-fueled violence. His wife Judith appeared as a character witness, testifying that he "was a good husband and their sex life was normal and sometimes gentle. In the bedroom, Judith never had a problem with appellant wanting or forcing her to do something she did not want to do, and he had never been overly aggressive with her" or violent with her, she testified. On cross-examination, she was asked if her husband told her anything about her boyhood when dating her, and she said no. The prosecutor then asked, "You weren't aware of him being involved in any homosexual activities as a teenager?" Simpson's counsel objected on relevancy grounds, but the judge said "You did bring up the issue of the normalcy of the sexual relationship." The judge allowed the prosecutor to restate the question, and the prosecutor asked, "Did your husband ever tell you about any homosexual relationships or activities he had when he was a teenager?" Judith responded no. On appeal, Simpson claimed that posing these irrelevant questions was prosecutorial misconduct, intended to bias the jury against him. But the court asserted that "there is no need to decide appellant's claim. Judith answered no to each of the above questions. The jury heard no testimony from Judith as to any alleged homosexual relationships or activities by appellant as a teenager" and "the court… gave appropriate limiting instructions concerning the prosecutor's questions, telling the attorneys that they must tell the jurors that 'questions did not imply answers,'" and rejected Simpson's argument that jurors in Torrance were conservative. The trial judge had responded to that contention by stating that Torrance jurors were incredibly tolerant and intelligent and followed judges' instructions. Something sounds fishy here to us.

CALIFORNIA – Defendant Manuel Diaz, then age 30, who has a history of drug abuse, was prosecuted for approaching a 14-year old girl and trying, unsuccessfully, to kiss her. "He was unsuccessful," wrote the court. "Not an iota of appellant's bodily fluids came in contact with the victim. Nevertheless, when appellant was sentenced to state prison, the trial court ordered that a sample be provided. Appellant did not object and a blood sample for AIDS testing was taken from appellant while incarcerated in state prison. The issue, however, is not moot." *People v. Diaz*, 2015 Cal. App. Unpub. LEXIS 351 (Cal. Ct. App., 2nd Dist., Jan. 20, 2015). The court stated that it was compelled by California Supreme Court precedent to vacate the testing order and cancel the authorization to release test results to the "victim," and to remand the case to give the prosecutor a chance to offer evidence, if any, that would justify requiring an HIV test. This is just one of numerous cases where California trial judges, many of who seemingly cannot be bothered to learn the rules governing HIV testing, reflexively order such testing in any sex-related criminal case, even though the law restricts testing to cases where the court finds on the record that the offense involve circumstances where HIV might be transmitted. In light of the defendant's history as a drug abuser, it is distinctly possible that he would test positive for HIV, but there is no reason why that should be disclosed to the "victim" in this case, who he never touched! It is long past time for some serious judicial education in California about the rules governing HIV testing of defendants and the limitations on disclosure of test results.

IOWA – The Court of Appeals of Iowa rejected the appeal of convicted

murderer Bruce Darnell Pollard, Jr., who asserted a "gay panic defense" in suggesting that he was justified in killing Kenneth McDaniel in an adult movie theater in Ottumwa on March 11, 2012. *State of Iowa v. Pollard*, 2015 Iowa App. LEXIS 35 (Jan. 28, 2015). It didn't help Pollard's case that he was caught on surveillance film carrying a crowbar into the theater, and that stolen property from the theater was found at a drop-in center for adults with mental illnesses where Pollard spent time, as well as a crowbar resembling the one picked up in the video that had matched up forensically with the alleged murder weapon. Although he didn't testify at his trial, his confession to police was entered into evidence, in which he claimed he acted in self- defense, having "panicked" when McDaniel, the elderly proprietor of the theater, sat next to him and allegedly put his hand on Pollard's knee after Pollard protested this unwanted proximity. Pollard denied that he killed McDaniel in the course of a robbery, and said he took $30 and some DVDs from the cinema after killing McDaniel to make it look like a robbery. He was sentenced to life imprisonment on the murder charge and twenty-five years on the robbery charge, to run consecutively. On appeal, he claimed he was denied competent representation because his defense lawyer failed to object to the trial judge's felony murder instruction to the jury and failure to ask the judge to supplement the charge on "justification" with an additional sentence from the Iowa Criminal Jury Instruction book. The court rejected both claims. "On this record," wrote the court, Pollard cannot prove he was prejudiced by counsel's failure to ask for Iowa Criminal Jury Instruction No. 400.10. We find no reasonable probability the outcome of the trial would have been different had counsel requested the instruction explaining an exception to the alternate-course-of-action requirement. Initially, we note the instruction defining justification conveyed much the same information as the omitted instruction, i.e., a defendant may use reasonable force to avoid injury or a risk to his life or safety. Moreover, the State presented strong evidence Pollard started or continued the struggle which resulted in McDaniel's death, having entered the theater armed with a crow bar and by his own admission leveled the first blow to McDaniel's head. The State also presented strong evidence that Pollard did not reasonably believe that McDonald, who was much older and unarmed, posed an imminent danger of death or injury" and the court pointed out that the State's evidence "overwhelmingly established Pollard used an unreasonable level of force." "To support the theory that a sexual advance occurred," wrote the court, "the defense pointed to the victim's unzipped pants, an abrasion on McDaniel's penis, and a white stain on a pair of pants. No evidence was presented that McDaniel was gay or sexually violent."

PRISONER LITIGATION NOTES

UNITED STATES SUPREME COURT – A unanimous Supreme Court ruled that Arkansas prison regulations that restricted a devote Muslim from growing a half-inch beard must yield to his free exercise rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq., in *Holt v. Hobbs*, 135 S. Ct. 33 (2015) (No. 13-6827) (January 20, 2015). Justice Samuel Alito's opinion adopted the reasoning construing a "sister" statute (the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq.) at issue in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), which allowed religious imperatives to trump compliance with contraceptive coverage requirements under Obamacare. This writer reported *Holt v. Hobbs* in the April 2014 issue of *Law Notes* (at 167) because of the growing concern in the LGBT community that religious objections might be interposed to counter civil rights protections in laws otherwise of general applicability. This concern prompted part of Justice Ruth Bader Ginsburg's dissent in the 5-4 *Hobby Lobby* decision. She concurred in the *Holt* case, in an opinion joined by Justice Sonia Sotomayor, expressing the same reservation. Justices Stephen Breyer and Elena Kagan, who joined Justice Ginsburg's dissent in *Hobby Lobby*, did not write separately in *Holt*. *William J. Rold*

ALABAMA – A gay Alabama inmate who was the victim of an assault by another inmate – followed by delay in medical care, an assault by a corrections sergeant, a stint in the infirmary, and a MRSA (antibiotic resistant) infection – collects damages after a bench trial for the portion of his injuries caused by the sergeant in *Shropshire v. Johnson*, 2015 U.S. Dist. LEXIS 6406 (S.D. Ala., January 21, 2015). Senior United States District Judge Charles R. Butler, Jr., found that Donnie Shropshire was maliciously and intentionally "bammed" in his injured foot with a mop handle wielded by Sergeant Chandra Johnson at an Alabama State Prison, believing Shropshire's account over Johnson's. Butler found that Johnson's memory of the incident was "very selective" and that she (as a "lay minister") had previously expressed objections to Shropshire's "homosexuality" as "morally wrong," once trying to rid him of "the devil" with "holy oil." Shropshire's credibility was helped because: he had not previously sued during his life sentence; and the chief focus of his case was his claim about his medical treatment (which he lost on a motion). Judge Butler found that the force used by Johnson was "excessive" under the Eighth Amendment, in violation of 42 U.S.C. § 1983, and that she acted "maliciously and sadistically to cause harm" under *Hudson v. McMillian*, 503 U.S. 1, 5-9 (1992). While not causing the need for

the infirmary or the MRSA, Johnson's blow to an open wound did cause "excruciating" physical pain and mental distress, justifying a compensatory award of $1,000. Judge Butler also awarded punitive damages under *Smith v. Wade*, 461 U.S. 30, 56 (1983), in the amount of $1,000, suggesting that the punitive damages were lower because of the limitations of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A), which requires the court to "narrowly draw[]" such awards and "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief," even though in cases like this one "there may not be much to say about the[m]." [In most jurisdictions, punitive damages are not subject to indemnification, and the errant officer pays out of pocket. Here, Judge Butler noted that "requiring an officer who intentionally violated a prisoner's constitutional rights to pay a small punitive damages award" actually "serve[d] those goals." Judge Butler also awarded attorneys' fees as part of the costs. Although there are no appearances in the opinion, and the case was filed pro se, counsel must have helped at trial, since pro se litigants are not generally eligible for attorneys' fees.] *William J. Rold*

CALIFORNIA – United States Magistrate Judge Dennis L. Beck dismissed Marcelino Moises Michel's pro se complaint that he was subjected to verbal, physical, and sexual abuse by a cellmate with defendants' knowledge because of a failure to link the allegations to conduct by any of the named defendants in *Michel v. Floyd*, 2015 U.S. Dist. LEXIS 7484 (E.D. Calif., January 21, 2015). Michel sued for events that occurred at a substance abuse facility, and she named three officers and a psychologist, claiming that her higher-security cellmate was the abuser. Judge Beck described Michel as "a transsexual who projects feminine characteristics and receives hormonal therapy" and a Level II inmate housed with a Level IV inmate. Michel claimed that defendants turned a "blind eye" to requests for protection. On screening under 28 U.S.C. § 1915A(a), and using masculine pronouns throughout, Judge Beck found that housing Michel with another inmate of higher security did not "alone" state a claim but that Michel "may" have a claim for failure to protect if she can "link" any of the defendants to the violation. He therefore grants leave to amend. The "Conclusion" of the Opinion, which has boilerplate about timing and effect of an amended pleading, contains the following language: "Plaintiff may only amend his claim regarding the due process challenge to his initial gang validation. The remaining claims cannot be cured by amendment." The opinion otherwise does not mention "gang" activity or a "due process" violation. This error, apparently the result of sloppy cut-and-paste and poor law clerk proof-reading, could have devastating consequences for this pro se plaintiff. *William J. Rold*

CALIFORNIA – An inmate health porter who was exposed to bodily fluids from an HIV+ inmate stated claims against two prison nurses who intentionally delayed his prophylactic treatment following the incident in *Winkleman v. California Department of Corrections and Rehabilitation*, 2015 U.S. Dist. LEXIS 4465 (E.D. Calif., January 14, 2015). John Patrick Winkleman, proceeding pro se, sued for violation of his medical rights under the Eighth Amendment, guaranteed under 42 U.S.C. § 1983 – see *Estelle v. Gamble*, 429 U.S. 97 (1976) – after an open wound on his elbow was exposed to HIV+ fluids, including feces, when he cleaned after an HIV+ infirmary patient was transferred without proper usage of his colostomy bag, in violation of health care protocols. A physician later provided treatment, which needed to be more aggressive because of the delay and caused serious side effects (including extreme nausea and exhaustion). Winkleman alleged that the nurses caused the delay in part to try to conceal their violation of protocols regarding infectious disease, although they offered appropriate treatment to a transportation officer who had the same occupational exposure. Winkleman sought injunctive relief and damages. United States Magistrate Judge Dale A. Drozd dismissed claims against the State of California under the Eleventh Amendment, and he denied injunctive relief on the authority of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because the plaintiff was no longer in a position to be at risk for a repeat occupational exposure of this nature. Judge Drozd declined to dismiss Winkleman's damages claims against the nurses for ignoring his serious medical complaints and their accompanying risk, citing *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006), and noting their alleged greater concern about "covering up their failure to comply with prison policies and procedures" that prohibited transferring an inmate patient without a prescribed colostomy bag, leaving Winkleman with a "reasonable opportunity" to prevail on the merits. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc) (and string cite). Judge Drodz also found that the nurses were not entitled to qualified immunity on these facts because Winkleman's rights were clearly established, and the nurses allegedly "intentionally failed to act in response to plaintiff's serious medical needs in order to cover-up their own misconduct." See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (and another string of citations). *William J. Rold*

GEORGIA – A prisoner's claim that he was threatened and then assaulted because of his HIV+ status was dismissed on "preliminary review" under 28 U.S.C.

PRISONER LITIGATION

§ 1915A(a) by United States District Judge Hugh Lawson in *Stafford v. Hamm*, 2015 U.S. Dist. LEXIS 667 (M. D. Ga., January 6, 2015). *Pro se* plaintiff, Zabriel Anthony Stafford, initially sued two correction officials (an officer and a counselor) after he was assaulted in 2014, referring to events in 2012. At the court's request that Stafford clarify his claims, Stafford named the warden and private corrections company running the prison for failure to protect him. Finding that the new complaint provided "little clarification," Judge Lawson held that, although "inciting other inmates to harm a prisoner" is actionable under *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984), Stafford made "no attempt to specify when the inciting statements were made or to whom" – unable even to narrow the time period within two years or to state whether there was one or more than one assault. While not holding Stafford to "exact date and time," it was "simply unclear whether Plaintiff is attempting to bring claims against Defendants based on conduct occurring in 2012 or 2014 or both." Judge Lawson also dismissed the new claims: against the warden, for failure to show any personal involvement beyond denying a grievance; and, against the corporation, for failure to allege that the constitutional violations were caused by a "policy and custom" of the defendant under *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997) (holding that private companies performing incarceration functions are responsible for "policy and custom" constitutional torts similar to municipalities under *Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 701 (1978)). Judge Lawson also dismissed claims of discrimination against Stafford because of his HIV status under the Americans with Disabilities Act (42 U.S.C. § 12132) for failure to provide factual detail about the alleged discriminatory treatment beyond vague references to clippers, shaves, haircuts, and unspecified "certain details" – although he found that the warden and the corporation would be proper defendants on a properly detailed claim. Stafford remained obligated to pay the deferred filing fee of $350, in increments of 20% of the balance in his prison commissary account in each month when it exceeded $10. *William J. Rold*

ILLINOIS – United States District Judge Nancy J. Rosenstengel found pro se plaintiff Ryan W. Church's allegations that prison officials disregarded a positive jail HIV test and refused to confirm or treat his illness in state prison were sufficient to survive initial scrutiny under 28 U.S.C. § 1915A in *Church v. Ill. Dep't of Corr.*, 2014 U.S. Dist. LEXIS 179150 (S. D. Ill., December 31, 2014). Suing for violation of his civil rights under 42 U.S.C. § 1983, Ryan stated a claim against two prison doctors for deliberate indifference to his serious health care needs under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), in not confirming his diagnosis and in ignoring his decreased t-cell count. Judge Rosenstengel accorded an unusually generous reading to Ryan's allegations that these defendants' failures "left him afraid and vulnerable," finding that he "sufficiently pleads Eighth Amendment claims," even as he "confusingly links the lack of a proper diagnosis and treatment to an inability to wear the hairstyles that other people want, an inability to sleep when he wants, and an inability to eat food like other people, without suffering grief or loss." Judge Rosenstengel wrote: "At this early stage, the Court need not delve deeper into the factual circumstances and whether Plaintiff actually faced a serious health risk." Judge Rosenstengel also allowed Ryan's claims to proceed against the Director of the Illinois Department of Corrections – in his official capacity – for injunctive relief; and in his individual capacity, for failure to grant Ryan a "second opinion" and for "concurring" in the denial of his two grievances, relying on *Pyles v. Fahim*, 771 F.3d 403, 411-12 (7th Cir. 2014). [Note: In *Pyles*, the court affirmed a screening dismissal for refusing to refer an inmate to a specialist for back pain, noting only an "obdurate refusal" to refer was actionable under the Eighth Amendment.] Judge Rosenstengel also directed that Corrections provide the Clerk of Court with the home address of any defendant who avoided service. *William J. Rold*

ILLINOIS – United States District Judge Nancy J. Rosenstengel permitted a transgender inmate to proceed following initial screening under 28 U.S.C. § 1915A on five of her ten claims arising from a course of conduct that included her being handcuffed to a door by corrections officers and penetrated by an unknown assailant in *Edwards v. Godinez*, 2015 U.S. Dist. LEXIS 2569, 2015 WL 134186 (S.D. Ill., January 9, 2015). Pro se plaintiff Frank Edwards, a/k/a Tracey Edwards, sued under 42 U.S.C. § 1983; and Judge Rosenstengel allowed claims to proceed (without discussion of case law) on the following: (1) an Eighth Amendment excessive force claim against corrections officers Massey and Stoner "for dragging Plaintiff from the dayroom and pinning her down while she was allegedly sexually assaulted"; (2) an Eighth Amendment claim against the same officers "for failing to protect Plaintiff from the sexual assault"; (3) an Eighth Amendment claim against the same officers "for failing to secure medical treatment for Plaintiff following the alleged sexual assault"; (4) a First Amendment retaliation claim against two other defendants (corrections officers Johnson and Mohr) "for issuing Plaintiff a disciplinary ticket because Plaintiff did not 'keep her mouth shut' about the sexual assault"; and (5) a Fourteenth Amendment Equal Protection claim against all four defendants "for targeting Plaintiff for mistreatment based on her transgender status." Judge Rosenstengel wrote at length about the law concerning the claims she dismissed, finding

no separate causes of action: under the Fourth Amendment, a claim for dragging Edwards to the day room or exposing her naked to the gallery; under the Fourteenth Amendment, a claim for confining her in segregation for 3 months or for denying her grievances; or under the Eighth Amendment, a claim for prescribing her excessive medication after she reported the incident. Among the remarks allegedly made by the defendants who remain in the case were the following: "since you wanna be a woman, now you['re] treated as such"; [you are a] "sickly fag*ot son of b*tch"; and "if you were raped[,] how in the hell did you feel it considering how many times you've been f*ucked in the *ss?" [asterisks from opinion]. While not linked specifically, since slurs are not themselves actionable, these comments plainly influenced Judge Rosenstengel to allow Edwards to proceed against these officers, including on the Equal Protection claim. Judge Rosenstengel denied Edwards' request for a preliminary injunction, because there was insufficient showing of likelihood that she would ever be transferred back to the institution (nicknamed "Big Muddy") where the events occurred. She referred a request for appointment of counsel to a United States Magistrate Judge, who will supervise further proceedings, including service of process at government expense (to include, if necessary, production of individual defendants' addresses in camera). *William J. Rold*

ILLINOIS – Pro se inmate Robert L. Green filed a civil rights case under 42 U.S.C. § 1983, alleging that several corrections officers violated his civil rights and retaliated against him because he had sued some of them in another lawsuit. United States District Judge Nancy J. Rosenstengel, screening the case under the Prison Litigation Reform Act 28 U.S.C. § 1915A [PLRA], allowed two of the claims to proceed, and severed two others to proceed separately, if a second filing fee were paid, in *Green v. Goodwin*, 2015 U.S. Dist. LEXIS 4286 (S. D. Ill., Jan. 14, 2015). Judge Rosenstengel found that Green stated a claim for violation of his rights to Equal Protection when an officer forced him to take shorter showers, alone, because of his sexual orientation, on threat of segregation. She found that Green could proceed with the Equal Protection claim as a member "of an identifiable class," citing *Meriwether v. Faulkner*, 821 F.2d 408, 415 n.7 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987), and *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982)—or as a "class-of-one" under *Swanson v. City of Chetek*, 719 F.3d 780, 783-84 (7th Cir. 2013). Judge Rosenstengel also allowed claims against the same defendants to proceed on a theory of retaliation for the earlier lawsuit, finding that Green had identified the triggering event and several specific acts of "retaliation," citing *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009), and a string of other Seventh Circuit cases. Judge Rosenstengel found that Green stated claims against another defendant for retaliation for the same prior lawsuit and for making him vulnerable to assault from other inmates, ("presumably because of his sexual orientation"), but she ordered these claims severed under the PLRA, citing *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). In George, the Seventh Circuit criticized the joining of a "morass" of some 24 claims by a single inmate, suing officers, nurses, and over twenty other defendants (including the warden) for unrelated claims involving his medical care, mail, parole consideration, etc. – holding that the PLRA does not allow avoidance of multiple filing fees and application of "three-strikes" rules by frivolous joinder of "unrelated" claims. Judge Rosenstengel's use of George to require separate filing of a lawsuit for retaliation against a single defendant arising from the same triggering event is not consistent with permissive joinder under F.R.C.P. 20(a)(2), or a fair reading of George, in this writer's view. *William J. Rold*

ILLINOIS – United States District Judge Sue E. Myerscough dismissed the pro se complaint of gay inmate Larry Horton on "Merits Review" under 28 U.S.C. § 1915A in *Horton v. Krumweide*, 2015 U.S. Dist. LEXIS 2098 (C.D. Ill., January 6, 2015). Horton alleged that two correction officers violated his Eighth and First Amendment rights under 42 U.S.C. § 1983 by revealing his past "homosexual activity," subjecting him to risk of assault, and by retaliating against him for filing a grievance by denying him soap and "other necessities." Judge Myerscough found that "constant fear of being assaulted," while causing psychological injury, is not itself a "substantial risk of serious harm" under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), since it was based on an incident at another facility and no assault occurred at the instant prison. Relying on *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996), Judge Myerscough ruled that the "failure to prevent exposure to risk of harm does not rise to a constitutional violation absent a showing that the threat materialized and physical harm resulted therefrom." By comparison, a defendant who behaves "in a harassing manner intended to humiliate and inflict psychological pain" "could potentially be liable" under *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003), so Horton was granted leave to amend. On retaliation, while noting that retaliatory actions need not themselves violate the constitution and that Horton's denials of soap and "necessities" could "potentially" be actionable under *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009), Judge Myerscough found that Horton failed to allege sufficient causation to indicate his grievance was "at least a

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motivating factor" in the denials. Leave to amend was also granted on this point. Judge Myerscough ordered that the full filing fee of $350 be charged against Horton's inmate account (to be paid in installments), regardless of whether he amends or the outcome of the case. *William J. Rold*

NEBRASKA – An inmate's attempt to sue a corrections officer in federal court for $10,000 because he "said I was a homosexual and said I was gay. . . [when] I never have been gay or a homosexual" failed in *Abram v. Rempel*, 2015 U.S. Dist. LEXIS 7464 (D. Nebr., January 22, 2015). Senior United States District Judge Joseph F. Bataillon found that *pro se* plaintiff Eddie E. Abram's claim (one of 18 cases he has filed) was "frivolous" because: (1) he failed to show that the remark was intended to cause injury; (2) calling someone gay (true or false) is at most "verbal harassment," which is not actionable as a constitutional tort; and (3) he suffered no injury. While dismissing on initial screening under 28 U.S.C. §§ 1915(e)(2) and 1915A, Judge Bataillon, on his "own motion," granted Abram thirty days to file an amended claim on which relief could be granted by showing the remarks were intended to "incite or invite" other inmates to inflict physical harm. *William J. Rold*

OHIO – United States Magistrate Judge Terence P. Kemp issued a Report & Recommendation [R & R] that claims against two doctors for denial of pain medication to an HIV+ inmate be allowed to proceed in *Mason v. Ayres*, 2015 U.S. Dist. LEXIS 7287 (S.D. Ohio, January 22, 2015). Judge Kemp's lengthy opinion is a good primer on basic "deliberate indifference" law concerning prisoners' health care rights under the Eighth Amendment enunciated in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In short, pro se plaintiff Robert Henry Mason – a patient with severe peripheral neuropathy housed in the prison infirmary – was suspected of hoarding medication – a charge of which he was found innocent. At about the same time, the Ohio corrections officials adopted restrictions on the amount of Neurontin that could be prescribed inmates as a cost decision, allowing a maximum of 600 mg, three times daily. (Mason had been prescribed 1200 mg, three times a day.) When Mason was suspected of hoarding, all pain medication was stopped for about a month, even though he was cleared after two days. Thereafter, other medicines were prescribed for the brand name Neurontin, before it was re-prescribed at one-half of the maximum (and ¼ of Mason's earlier prescription). Judge Kemp's R & R recommended dismissal of claims against two medical providers who wrote new, limited, or substitute pain prescriptions, but he sustained claims for denying all pain medication for the 28 days against the physician who wrote the discontinuation order and against the prison's medical director, who was personally involved in the decision. Judge Kemp rejected their effort to justify their current denial, despite Mason's clearance of hoarding, on the grounds that he was found to have hoarded medicine in previous years. Judge Kemp rejected Mason's request for appointment of counsel and for production of his medical records, saying the case did not warrant "exceptional" appointment of counsel and Mason should proceed in the first instance with ordinary discovery to obtain his chart. It is unclear from the opinion whether there was a less-expensive, generic form of Neurontin – chemically called gabapentin – available to Ohio prison officials. Judge Kemp's decision does not address legal issues connected to administrative decisions to restrict brand name drugs for prisoners, without individualized determinations of efficacy, treating the issue as one of disagreement with the form of treatment, which is generally not actionable under the Eighth Amendment. *William J. Rold*

TENNESSEE – Although gay prisoner Steven L. Hill made sufficient allegations to survive initial scrutiny under the Prison Litigation Reform Act [PLRA] that Corrections Counselor Yoshi Quezergue violated his privacy rights by disclosing his sexual orientation to other prisoners, as reported in Law Notes (October 2014) at 439, United States Magistrate Judge Juliet Griffin now recommends that he lose on summary judgment in *Hill v. Quezergue*, 2015 U.S. Dist. LEXIS 3186 (M. D. Tenn., January 12, 2015). Still pro se, Hill was unable to marshal sufficient facts to sustain claims against Quezergue's motion for summary judgment because: (1) he submitted no admissible evidence on the disputed facts, not even his own affidavit, to counter the defense exhibits; (2) he never sustained physical injury, as required by § 1997e(e) of the PLRA (42 U.S.C.) as a prerequisite for awarding damages for emotional distress; (3) even assuming the existence of a constitutional right to privacy in this context, the claimed disclosure was a "de minimus" event and "there are no facts showing that the violation of this right rose to the level of supporting a constitutional claim." In light of this, Judge Griffin found it unnecessary to determine whether Hill had exhausted his administrative remedies under the PLRA before bringing suit. The first point could have been dispositive, making the rest dicta. The third point seems contrary to the law of the case, in light of the earlier District Judge's decision. Nevertheless, the second point bears additional comment. In holding that declaratory and injunctive relief and damages cannot be awarded prisoners for constitutional torts under the PLRA, absent physical injury, Judge Griffin relies on two published Sixth Circuit decisions that refer to the requirement. In the first, *Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010), the court actually found physical injury in the inmate's claim that denial of access to dental care for almost a year

caused a tooth extraction. The inmate won the second case also, *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008), on the question of whether three years in solitary confinement without due process was actionable (the court reversing dismissal under the PLRA, without mentioning the "physical injury" requirement). The Second Circuit has held that physical injury is not a prerequisite under the PLRA for constitutional torts. *See Kerman v. City of N.Y.*, 374 F.3d 93, 125 (2d Cir. 2004). This point was discussed in the reporting of the inmate "outing" case of *Rosado v. Herard*, 2014 U.S. Dist. LEXIS 40172 (S.D.N.Y., March 25, 2014), in *Law Notes*, (May 2014), at 189-90. The Fifth Circuit applies the limitation regardless of the underlying tort theory. *See Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005) (surveying cases). *William J. Rold*

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U.S. CONGRESS – U.S. Senator Dianne Feinstein (D-Cal.) and Representatives Jerry Nadler (D-N.Y.) and Ileana Ros-Lehtinen (R-Fla.) have reintroduced the Respect for Marriage Act in the new Congress. This measure would fully repeal the Defense of Marriage Act and would substitute a regime of federal recognition of same-sex marriages lawfully contracted in a state, regardless where the couple was living. Although the Obama Administration has generally adopted the "place of celebration" rule for determining the validity of marriages under federal laws, there are some programs whose governing statutes use the "place of domicile" rule in determining eligibility for benefits, so a statutory change is necessary to effect universal recognition for same-sex marriages under federal law. The Supreme Court declared Section 3 of DOMA unconstitutional in 2013, but did not address the constitutionality of Section 2, which purports to relieve states of any "full faith or credit" obligation to recognize same-sex marriages contracted in other states. Passage of the RMA would remove both provisions from the U.S. Code, but is generally considered unlikely in the current Congress, given the expressed opposition to same-sex marriage by most Republican legislators. * * * Rep. Alan Lowenthal and Sen. Edward Markey have re-introduced the International Human Rights Defense Act on January 30. This measure was first introduced in the prior session of Congress, but was not voted upon. It would make LGBT rights a State Department priority, empowering the Department to response to anti-gay discrimination in its dealings with other countries, and will require the Department to add an LGBT section to its annual human rights report, a document that plays a particularly significant role as evidence in asylum cases. The Act would also charge Congress with creation of a "global plan" to tackle discrimination against sexual minorities. *Advocate.com*, Jan. 30.

U.S. NAVY BOARD FOR CORRECTION OF NAVAL RECORDS – For the first time, the Board for Correction of Naval Records has agreed to issue an amended discharge form (DD Form 214) for a transgender veteran, showing the veteran's new name. *DailyKos.com* reports that Paula Neira received the official approval of her request for the amended form on January 23. The Board's decision, in the form of a Memorandum from the Board to the Secretary of the Navy, is heavily redacted to remove any identifying information. It recites that the individual served "without disciplinary incident," was honorably discharged, and then was reappointed to the Naval Reserve, resigning some time later. Subsequently, the individual obtained a court-approved name change and, after gender reassignment procedures, a court-ordered amended birth certificate changing the designated sex from male to female. "Transgender veterans encounter substantial burdens in obtaining post-service benefits because their names, and the gender implied by them, recorded on discharge documents no longer match their legal names," found the Board. "Because of this inconsistency, they may be denied access to benefits and services, or, even if they are ultimately provided the benefit or service, the veteran may have been subjected to delay or invasive questions requiring that he or she provide personal, confidential, and/or medical information to explain the discrepancies between the documents. Without a DD Form 214 that conform to other identity documents, transgender veterans may also be subjected to an increased risk of employment discrimination because of their gender identity, denial of access to healthcare, and harassment and physical harm." The Board noted that normally a different form, DD Form 215, would be issued in a proceeding to correct records, but that in this kind of case a substitute DD Form 214 should be issued to "eliminate the possibilities of invasive questions and other potential discrimination against the Petitioner." The Board concluded that no other changes need be made to the Petitioner's service record, and both forms would be retained in the Navy's service records "for historical purposes." Neira is a former Navy lieutenant who granted from the Naval Academy in 1985 and served for six years before resigning her commission. She expected a prolonged battle when she applied for this change, but approval came relatively quickly and marked a new step in the Navy's relationship with its transgender veterans. The *Daily Kos* article reported the estimate that out of 26 million veterans, approximately 140,000 might be transgender. As part of this process, the National LGBT Bar Association prepared a "white paper" on the subject that was the source of arguments made

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by ACLU attorneys in support of Neira's application. Although this does not indicate a change in the current policy against transgender people serving in uniform, it begins to break down the stereotypes held by military officials about the identity of people serving in the military. Comments made by outgoing Defense Secretary Chuck Hagel last year indicated that serious consideration was being given to changing the policy.

U.S. DEPARTMENT OF STATE – Now that the federal government recognizes same-sex marriages contracted under state law, regardless where the couple resides, and at least 36 states have marriage equality, the State Department is considering ending its domestic partner benefits program for unmarried gay employees. A management official told representatives of the Department's gay employee group at a
December 22 meeting that "the agency plans to move forward the proposed elimination of the Same-Sex Domestic Partner program," the *Washington Blade* reported on January 14. The president of the employee group, Selim Ariturk, told the *Blade* that there was still a need for the program, especially as foreign-born same-sex partners of State Department employees could encounter problems if they had to enter a marriage of public record in order to keep benefits coverage. Records of such marriages "could be used to convict the foreign partner of homosexuality the next time he travels home," said Ariturk. "The danger is real." Said one entry-level Foreign Service officer, who spoke on condition of anonymity, "While it's great that we can get married much more easily now, my partner and I are not looking forward to being forced into a shotgun marriage due to a policy change that takes away the benefits we were promised." The program was adopted in 2009 under the auspices of then-Secretary of State Hillary Clinton. The gay employees group had actually recommended that the Department extend the program to include different sex unmarried couples, but the Department responded negatively, saying that the program had been adopted to benefit same-sex couples who could not marry.

CALIFORNIA – West Hollywood has adopted a law prohibiting gender identifications in various public accommodations. The immediate impact is to require the removal of gender-specific signs from single-stall restrooms, and to encourage businesses to plan for gender neutral facilities in new construction and remodeling of existing facilities. West Hollywood officials claimed that theirs was the first city in California to adopt such a policy, although similar rules have been adopted in municipalities in a few other states. *Chicago Tribune*, Jan. 18.

CALIFORNIA – The California Supreme Court voted unanimously to amend the ethical rules for judges to prohibit them from belonging to non-profit youth organizations that discriminate because of sexual orientation. Judges are generally prohibited from belonging to organizations that discriminate in ways that violate state law, but in the past the California Supreme Court had rejected the argument that the Boy Scouts are a public accommodation forbidden to discriminate against gay people under the state's Unruh Act, and there had been a "carve out" under the ethics rule allowing judges to affiliate with non-profit youth organizations without regard to their discriminatory policies. An advisory committee had recommended ending that carve out in a report submitted to the court almost a year ago, but the court didn't vote to accept the recommendation until mid-January, 2015. According to a report about the decision in the *Los Angeles Times* on January 25, 47 states bar judges from membership in discriminatory organizations, but only 22 states specifically identify sexual orientation as a forbidden ground of discrimination, and California was the only one of those 22 that had made an exception for non-profit youth organizations. The committee stated that amending Canon 2C to end the carve-out would "promote the integrity of the judiciary."

DISTRICT OF COLUMBIA – The District of Columbia amended its Human Rights Act to prohibit discrimination against employees of religious-affiliated educational institutions on the basis of sexual orientation and gender identity by repealing the 1989 Armstrong Amendment, which had specifically shielded such institutions from having to comply with the ordinance's non-discrimination requirements on these grounds. D.C. also amended its Human Rights Act to prohibit employers from discriminating on the basis of an employee or dependent's reproductive health decisions, when the employer has religious objections to birth control, extra-marital sex or in vitro fertilization procedures. The amendments will go into effect if they survive a 30-day review period by Congress. They sound like red meat for the Tea Party wing of the Republican Party, so their fate is uncertain.

IDAHO – The House State Affairs Committee voted 13-4 along party lines on January 29 against bringing to the floor a bill that would add "sexual orientation and gender identity" to the state's Human Rights Law. Now that same-sex couples can marry and have their marriages recognized in Idaho as a result of federal litigation, they need for such protection is even more pressing than previously, since employers and businesses with religious objections to same-sex marriage face no state law restriction on discriminating against

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newly-married same-sex couples, although several municipalities have added these categories to their local laws. The increasing pace at which such local legislation has been advancing had given some hope of progress on the state level, but the overwhelming Republican majority in the legislature made that impossible, even though leaders of the Mormon Church, a major presence in the state, have rescinded their opposition to such legislation (provided, of course, that there is a broad religious exemption which might vitiate meaningful protection). * * * Members of the Driggs City Council voted to pass a non-discrimination ordinance prohibiting discrimination because of sexual orientation or gender identity on January 6. The vote was unanimous, according to a blog post on *Huckleberries Online*, 2015 WLNR 811307 (Jan. 10). Driggs, on the eastern border of the state in Teton County, had a population of 1660 in the 2010 Census. It is near major ski resorts, including Jackson Hole. Every little bit counts.

ILLINOIS – Governor Bruce Rauner, a Republican, announced that he would keep Rocco Claps, the first openly gay Illinois state agency director, as head of the Illinois Department of Human Rights, according to a January 25 report in the *Chicago Tribune*. Former Governor Rod Blagojevich, now doing time in federal prison, appointed Claps in 2003, and Governor Pat Quinn kept him in the post. At the same time, Rauner outraged gay rights advocates by appointing an outspoken homophobe, Rev. James Meeks, to head the Illinois Board of Education.

KENTUCKY – Responding to news reports that a Louisville High School had adopted a gender access policy under which students could use the restrooms that accorded with their gender identity, Sen. C. B. Embry, Jr. (R-Morgantown), who evidently has too much time on his hands, has introduced the "Kentucky Student Privacy Act" to prohibit students from using a restroom that doesn't "correspond" to their anatomical sex, and gives students a right to sue the school for up to $2,500 if they encounter a person of the "wrong" sex when they use a restroom. Wrote Embry in S.B. 76, "Parents have a reasonable expectation that schools will not allow minor children to be viewed in various states of undress by members of the opposite biological sex." His measure has the backing of the Family Foundation of Kentucky, which is dedicated to protecting sheltered youth from learning about the big bad world in the public schools. Embry claims that he was responding to complaints by parents after Atherton High School Principal Thomas Alberli allowed a transgender woman to use the girls' bathrooms and locker rooms at the school. *Cincinnati Enquirer*, Jan. 20.

GEORGIA – The City Council of Smyrna, Georgia, voted 5-2 on January 5 to approve a change to the insurance policy for city workers, allowing spouses of gay employees to qualify for coverage if the couple was married in a state that allows same-sex marriages. The vote followed more than a year of debate. Mayor Max Bacon said that Smyrna would be the first city in Cobb County to extend health benefits to same-sex partners of their employees, according to the *Marietta Daily Journal* (Jan. 6). Bacon commented that there were other cities that had adopted such policies in the wake of the Supreme Court's *Windsor* ruling and interpretations of employer obligations pursuant to the Employee Retirement Income Security Act, a federal law regulating employee benefit plans.

ILLINOIS – State legislators are considering H.B. 217, the Conversion Therapy Prohibition Act, introduced by State Rep. Kelly Cassidy (D-Chicago), which would make it illegal for mental health care providers to engage in "sexual orientation change efforts" with anyone under age 18. The measure is modeled on statutes enacted in California and New Jersey that have survived constitutional challenges in the 9th and 3rd Circuit Courts of Appeals. The District of Columbia has enacted a similar measure. * * * The Chicago City Council voted unanimously on January 21 to add gender identity and national origin to the list of forbidden grounds for police profiling, which already include sexual orientation.

MICHIGAN – The Southfield City Council voted on January 26 to approve an ordinance that prohibits discrimination in employment, housing and public accommodations based on a person's sexual orientation or gender identity. Southfield is a suburb of Detroit. *AP State News*, Jan. 28.

MASSACHUSETTS – The legislature voted on January 6 to approve a new law on parental leave that Governor Deval Patrick signed on January 7, his last day in office, which will replace the Massachusetts Maternity Leave Act. As its name implies, the Maternity Leave Act gave female employees up to eight weeks of job-protected maternity leave for the birth or adoption of a child. The legislature concluded that fathers also needed leave, and there was concern that the existing law might violate the state's constitutional obligations of equal protection of the laws. BloombergBNA *Daily Labor Report*, 09 DLR A-7 (Jan. 14, 2015). Although it was not specifically debated as a gay rights measure, the immediate impact is that male same-sex couples would come within its coverage and be entitled to job-protected leave upon the addition of a new child to their household.

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MISSISSIPPI – The City Council in Starkville, Mississippi, voted on January 6 to repeal the city's equality resolution and to end the city's employee benefits policy under which employees could designate a same-sex partner for insurance coverage. Mayor Parker Wiseman, who had advocated adoption of these policies last year, threatened to veto the action, but the passage by 5-2 indicated that if members held to their votes, the veto could not be overridden. Starkville had been the first municipality in the state to adopt such policies. The measures had originally been adopted amidst much controversy. The vote to repeal took place without public discussion or specific advance notice, and caught the mayor and the press by surprise. *The Dispatch*, Jan. 13.

MONTANA – The Senate Judiciary Committee voted 7-5 along party lines on January 30 to table S.B. 179, a measure that would have added sexual orientation and gender identity and expression as prohibited grounds of discrimination under the state's Human Rights Act. Opponents had testified during a brief hearing that the measure would lead to discrimination against religious believers with conscience objections to associating with gay and transgender people in the workplace or places of public accommodation. This is the new mantra of religious opponents of gay rights laws. They rarely argue that gay people should be subject to discrimination; rather, they argue that bans on anti-gay and anti-transgender discrimination are actually a form of suppression of religious liberty. *Great Falls Tribune*, Jan. 31.

NEBRASKA – Local press reported that a "large crowd" turned out for legislative hearings January 21on a series of bills pending in the Nebraska Senate that would ban sexual orientation and gender identity discrimination in employment, would authorize second parent adoptions, and would ban discrimination in foster parenting. *DailyNebraskan.com*, Jan. 22.

NEVADA – State health officials are considering extending barrier contraception rules that are now applicable to licensed brothels to apply to the adult film industry. This responds to news reports that producers of adult films have relocated their filming activities from Los Angeles to Nevada in order to escape a municipal ordinance requiring the use of condoms during filming of sexual intercourse, and that there is already at least one report of a gay actor becoming infected during a Nevada film shoot involving "unprotected" sex. *Business Wire*, January 6.

NEW YORK – In the written version of his State of the State address, Governor Andrew Cuomo called on the legislature to pass the Gender Identity Non-Discrimination Act (GENDA). As other states have routinely included gender identity when enacting their human rights laws, and some, such as Maryland and Massachusetts, have specifically amended state civil rights laws to add gender identity, New York has been relegated to outlier status, one of the few states that prohibits sexual orientation discrimination but does not expressly forbid gender identity discrimination. Although some lower courts construe the existing ban on sex discrimination to extend to gender identity, and there is increasing acceptance of that theory under federal sex discrimination laws, the lack of an express ban in New York state poses problems. Local ordinances in several municipalities cover gender identity, so a majority of the state's population actually lives in jurisdictions that expressly forbid such discrimination, but there is no coverage in the rural areas of the state. The Democratic-controlled Assembly has passed GENDA several times, but the Senate has not brought it to a vote. Cuomo's omission of this issue from his spoken text was a bit troubling, however, raising questions about how seriously he was committed to work to pass the bill during a session when Republicans hold clear majority of the Senate seats.

NORTH CAROLINA – The City Council in Greensboro voted unanimously on January 6 to amend three existing non-discrimination ordinances to add sexual orientation, gender identity and gender expression to prohibited grounds of discrimination. The first ordinance prohibits discrimination in city programs, services or activities, and the city is making a commitment to add gender neutral rest rooms or changing rooms in city buildings that would be open to all genders, gender identities and expressions, as well as to families. The second ordinance codifies the existing city policy forbidding sexual orientation discrimination in city employment and adds gender identity or expression. The third ordinance forbids discrimination in "buying, renting, selling , or advertising of real estate." The city of Charlotte is considering similar proposals. *Greensboro News & Record* (Jan. 7).

OHIO – Springfield, Ohio, concluded a new collective bargaining agreement with the firefighters union that will for the first time forbid discrimination because of sexual orientation. The contract covers working conditions for 125 member of the union, effect retroactively to Nov. 1, 2014, and ending Oct. 31, 2017. City Personnel Director Jeff Rogers said that the inclusion of sexual orientation was "the first for any Springfield union." City Commissioners had voted 3-2 in February 2012 against a proposed ordinance to ban sexual orientation

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and gender identity discrimination in the city. The commissioners approved a factfinder's report at its Dec. 23 meeting, thus effectively approving the contract. *Dayton Daily News*, Jan. 4. Ohio has no state law forbidding such discrimination, and the state government is fighting to defend its ban on marriage equality before the Supreme Court this term.

OKLAHOMA – In a bizarre storm of legislative gay-bashing, state legislators have introduced eight anti-gay measures for consideration by the legislature. Rep. Sally Kern, a noted and outspoken homophobe, introduced the "Freedom to Obtain Conversion Therapy Act," which would protect the right of parents to subject their children to sexual orientation change efforts (SOCE), which have been outlawed in some other jurisdictions based on evidence that this is harmful to the kids. Another bill filed by Kern specifically authorizes businesses to refuse to provide goods or services to any "lesbian, gay, bisexual or transgender person, group or association." Any such measure would clearly be unconstitutional, but that is not a concern of Kern. Another bill seeking the same result through less overt means, the Oklahoma Religious Freedom Reformation Act, was introduced by Sen. Joseph Silk and Rep. Chuck Strohm, allowing businesses to refuse to provide goods or services if based on their proprietor's religious beliefs. Rep. Kern also filed the Preservation of Sovereignty and Marriage Act, which forbids state employees to issue marriage licenses to same-sex couples or to recognize their marriages in any way, even though the 10th Circuit has ruled that the state's ban on same-sex marriages is unconstitutional and the Supreme Court has refused to review that ruling. The bill denies any salary, pension or employee benefit to any state employee who violates its strictures, and requires courts to dismiss any challenge to any of its provisions. Sen. Corey Brooks has introduced the Protection of Religious Freedom in Sanctity of Marriage Act of 2015, which allows individuals and religious organizations to refuse to "provide any services, accommodations or facilities," solemnize, or even recognize any marriage or civil union, based on their "sincerely held religious beliefs regarding sex or gender." Rep. Todd Russ introduced a bill, H.B. 1125, doing away entirely with marriage licenses in Oklahoma. Instead, religious officials would conduct weddings and the state would file their certifications that a marriage was performed, and otherwise people who did not want a religious ceremony could fall back on the doctrine of common law marriage, which would not encompass same-sex couples. Finally, at least for now, Rep. Mike Ritze, concerned that somebody might be fooled otherwise, issued a measure that requires that any transgender person entering into a marriage have their transgender status indicated on any marriage application or license.

TEXAS – Opponents of a local ordinance forbidding discrimination because of sexual orientation or gender identity in Plano, Texas, announced that they had gathered enough petition signatures to require the city council either to repeal the measure or place it on the ballot. They claimed to have gathered more than 7,000 signatures, as against a requirement of 3,822. Verification of signatures was expected to take until the end of January, and the first time the Council might meet to consider its course of action would be February 9. The next municipal election would be on May 9. *Dallas Morning News*, Jan. 21, 2015. Because of its broad religious exemptions, there was some doubt about whether national LGBT rights groups would provide any assistance in defending it.

TEXAS – The City of Fort Worth announced that effective February 1, 2015, spousal survivor benefits will be extended to same-sex spouses of city employees. Even though a federal district court order requiring Texas to allow same-sex couples to marry and to recognize out-of-state same-sex marriages has been stayed while the state appeals the case to the 5th Circuit, the city government decided to embrace the new definition of "spouse" for purposes of federal income tax treatment of survivor benefits, and will recognize marriages contracted out-of-state in a marriage equality jurisdiction. A 75% survivor benefit will be available to same-sex spouses married at least one year prior to the employee's retirement for general city employees hired before July 1, 2011, for police officers hired before January 1, 2013, and for firefighters hired before January 10, 2015. All employees, regardless of hiring date, will be eligible for a 75% spousal survivor benefit if they are vested and die while actively employed, beginning February 15, according to a notice posted on the city government's website.

UTAH – Although the Mormon Church did not oppose the adoption of a ban on sexual orientation by the local government in Salt Lake City, it has opposed any statewide measure. However, at the end of January some church leaders called a press conference to announce that the church would no longer oppose a statewide anti-discrimination bill, provided that it included a broad religious exemption for believers who have religious objections to employing, renting housing or providing services for gay and transgender people. The church, which provided heavy funding for the California campaign to enact Proposition 8, has been toning down its language in reaction to the criticism it received, but is unwilling to concede the principal that the public commercial

sphere should be non-discriminatory. Mormon church leaders characterized their attitude as a "balanced approach" under which others would be prohibited from discriminating, but not them. Some balance!! *Chicago Tribune*, Jan. 28.

VIRGINIA – The Senate Education and Health Committee voted 7-8 on January 22 to table S.B. 988, which would have banned health care workers from providing sexual orientation change efforts (SOCE, popularly known as "conversion therapy") to gay minors. The measure had been introduced by Sen. Louise Lucas (D-Portsmouth) on January 12. *Washington Blade*, Jan. 22. By the same margin, the Senate Rehabilitation and Social Services Committee voted January 23 to reject a measure to allow second-parent adoptions by unmarried same-sex couples. Same-sex couples have been able to marry in Virginia, or have their out-of-state marriages recognized, since October 6, 2014, when the Supreme Court refused to review a 4th Circuit decision affirming a trial court ruling from earlier in 2014, and they can jointly adopt or undertake step-parent adoptions as married couples. This measure was intended to make adoptions available for unmarried couples, but the Republicans who control the legislature were unwilling to adopt it. Governor Terry McAuliffe, a Democrat, had endorsed the bill, which was introduced by Sen. Janet Howell (D-Fairfax County). *AP State News*, Jan. 23. Both rejections resulted from party-line votes. * * * A legislative subcommittee unanimously rejected a bill that would have barred any discrimination claim by gay people against public accommodations where a denial was based on "religious and moral convictions." H.B. 1414, introduced by Delegate Bob Marshall (R-Prince William County), the legislature's leading homophobe, was rejected on January 29. *Washington Blade*, Jan. 29. * * * ON January 26, the Senate General Laws and Technology Committee voted 8-7 to approve a measure proposed by Sen. Donald McEachin (D-Henrico County), to prohibit discrimination in public employment because of sexual orientation or gender identity. One Republican, Sen. Jill Holtzman Vogel (R-Fauquier County), crossed the aisle to join the Democratic minority in approving the measure. Similar bills have been approved in the Senate in the past but died in the House of Delegates, according to *AP State News*, Jan. 27.

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DISTRICT OF COLUMBIA – After the November 2014 elections, it seemed that the District of Columbia would lack an openly gay person in any high local government position, as openly-gay candidates for mayor and several city council seats were defeated. However, the D.C. State Board of Education voted on Jan. 22 to elect Jack Jacobson, an openly gay member of the Board from Ward 2, to be the new President, making him the highest openly gay elected officials in the District. *MetroWeekly*, Jan. 27.

EXXONMOBIL – After the merger of Exxon and Mobil resulted in formation of the world's largest energy corporation, Mobil's LGBT discrimination policy was rescinded, and ExxonMobil refused to include an express ban on sexual orientation and gender identity discrimination in its published corporate policy, despite intensive lobbying, criticism, consumer boycotts and shareholder proposals. ExxonMobil's announced position was that it did not discriminate, but would only list categories covered by federal law. President Obama's executive order requiring federal contractors to affirm non-discrimination policies including sexual orientation and gender identity made ExxonMobil's position untenable. The EO goes into effect this spring. ExxonMobil issued a press release on January 30, announcing that it had "updated" its anti-discrimination policy to include sexual orientation and gender identity, which, it said "is consistent with ExxonMobil's longstanding practice of listing enumerated protected classes as defined by federal law." *Buzzfeed.com*, Jan. 30.

UNITED METHODIST CHURCH – The church is settling a complaint against retired Bishop Melvin G. Talbert, who performed a same-sex wedding in Alabama, according to *AP Worldstream*, Jan. 6. In the settlement agreement, Bishop Talbert expresses regret to any who felt harmed by his performance of a religious wedding ceremony for Joe Openshaw and Bobby Prince in Birmingham in October 2013, but he asserts that he believes his actions were correct, because he asserts that the Bible teaches that pastors should perform ministry services for everyone. The settlement does not require him to refrain from performing such services in the future.

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AUSTRIA – Austria's highest court issued a ruling on January 14 striking down a law that prevents same-sex couples from adopting children. The statute provides that only married couples can adopt children, but Austria does not allow same-sex couples to marry, providing only civil unions (called registered partnerships) that do not include adoption rights. The constitutional court reportedly said that there was "no factual justification for having different rules based on sexual orientation that rule out the adoption of children by those in a civil partnership." *Agence France Presse English Wire*, Jan.

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14. Helmut Graupner, a Vienna attorney who heads a gay rights organization, represented the two women who are in a registered partnership and were seeking to effect a co-parent adoption of the biological child of one of the women. They are hoping to adopt additional children. According to a press notice from Graupner's group, this is the first ruling by a European court to strike down a ban on joint adoption by same-sex couples. Several European countries allow same-sex couples to marry, but not all with full adoption rights.

CANADA – The Supreme Court of Nova Scotia ruled in *Trinity Western University v. Nova Scotia Barrister's Society*, 2015 NSSC 25 (Jan. 28, 2015), that the Nova Scotia Barrister's Society had exceeded its authority when it said that it would recognize law degrees granted by TWU's new law school "only if the institution changes its policy on student conduct," which prohibits homosexual conduct and all other sexual conduct outside of heterosexual marriage. Canada has been a marriage equality jurisdiction for more than a decade, and long ago repealed criminal penalties for gay sex while outlawing sexual orientation discrimination, but TWU, a self-identified Christian university, purports to enforce religious restrictions on extra-marital sex for its staff and students, and refuses to recognize same-sex marriages as valid on religious grounds. The court found that the Barrister's Society had given inadequate weight to the University's religious freedom claim. The court said that the case was about "whether the NSBS had the authority to do what it did. It is also about, even if it had that authority, whether the NSBS reasonably considered the implications of its actions on the religious freedoms of TWU and its students in a way that was consistent with Canadian legal values of inclusiveness, pluralism and the respect for the rule of law. In that sense, it is a value judgment. I have concluded that the NSBS did not have the authority to do what it did," wrote Justice Jamie S. Campbell. "I have also concluded that even if it did have that authority it did not exercise it in a way that reasonably considered the concerns for religious freedom and liberty of conscience." The court's ruling is consistent with the approach taken in the United States, where accrediting authorities for law schools have not challenged the sexual conduct policies adopted by some religiously-affiliated law schools, even though they could be seen as discriminatory and oppressive to gay students and staff and otherwise violative of the non-discrimination requirements generally required of accredited law schools.

CHILE – Legislators gave final approval on January 28 to a measure authorizing legally recognized civil unions open to all couples, including same-sex couples, and sent the measure to President Michelle Bachelet, who was widely expected to approve it, as she is a proponent of marriage equality as a long-term goal and has stated support for civil unions as a "stepping stone" in that direction, according to a January 30 report by the Bilerico Project blog.

CHINA – The Nanshan District People's Court in Shenzhen held a hearing in January in a sexual orientation discrimination case filed by a man who claimed to have been discharged after a video went viral online showing him arguing with another gay man on a Shenzhen street. The man, suing under the pseudonym of Mu Yi, claimed he was fired for being gay, while the employer said it fired him because of his "poor service attitude" and improper attire. Mu is seeking an apology and damages, but apparently not reinstatement. China decriminalized gay sex in 1997, but continued to label it a mental illness for four more years before repealing that provision. There is no legislation specifically prohibiting discrimination because of sexual orientation. The case, believed to be the first lawsuit challenging employment discrimination against gay people in China, was reported in English by *NewsPoint* (India), 2015 WLNR 2461735 (Jan. 26), based on a report by the *Yangcheng Evening News*.

EGYPT – On January 26 a court of appeals upheld the acquittal of 26 defendants who had been charged with "debauchery" as part of a crackdown against gay people by local law enforcement authorities. The security forces arrested them based on an anonymous tip that they were involved in a "gay bathhouse org," and they were arrested in a raid at the Ramses bathhouse in Cairo in December. They were acquitted on January 12, but the local prosecutor appealed the acquittals. Press reports indicated that the tip came from a journalist who discovered the bath house when researching an article about the spread of HIV in Egypt. Five men had been charged with running the bath house and 21 with participating in "debauchery" and violating "public decency." *AllAfrica.com*, Jan. 26.

FRANCE – The nation's highest appeals court ruled on January 28 that a French-Moroccan gay couple could marry in France, despite a government circular providing that nationals from various countries, including Morocco, could not marry in France due to agreements that the French government had signed with eleven countries that forbid same-sex marriage. The couple appealed the refusal of local authorities in Chambery to allow them to marry to the courts, winning at every level, and the local prosecutors brought the case to the Court of Cassation, which found that an agreement between France and Morocco on the issue was "obviously incompatible

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with public order." The court ruled that pursuant to France's marriage equality law, the right to marry was a fundamental right in France. *Agence France Presse English Wire*, Jan. 28. The ruling would presumably apply to all eleven countries, a diverse list that includes Poland and Laos! * * * A Paris court convicted three people of hate crimes for using the hashtag "let's burn the gays" on Twitter. Comite Idaho, a French pro-gay charity, brought the case to court upon filing a complaint against the Twitter users for inciting hatred and violence on the basis of sexual orientation. The court assessed fines against the defendants, but declined to impose prison terms. *Independent.co.uk*, Jan. 22.

IRELAND – Minister for Health Leo Varadkar came out publicly as gay on January 18, and urgently endorsed the upcoming referendum by which voters will be asked whether the Republic of Ireland should embrace marriage equality. Varadkar is the first openly gay minister in the history of the Irish state, although there have been openly gay members of the parliament. *IrishTimes*, Jan. 18. The government has announced that prior to the referendum it will seek to enact legislation allowing for adoption of children by gay couples. The measure anticipates and hopes to avoid the likelihood that issues about adoption will cloud the debate on the marriage equality proposition. *IrishTimes*, Jan. 21. * * * Justice Aileen Donnelly became Ireland's first openly gay serving member of the High Court upon her appointment last July, but the press only got wind of the landmark recently, resulting in a flurry of stories in January. * * * The government announced the text of the proposed marriage equality amendment: "Marriage may be contracted in accordance with law by two persons without distinction as to their sex." The provision will be added to the existing Article 41 as a new section number 41.4, and will clearly apply to section 41.3, which obligates the state to provide special care and protection for families. *IrishTimes*, Jan. 22.

ITALY – The Rome City Council approved the establishment of a civil union registry, and provided that same-sex couples married abroad would be "automatically transcribed into the newly created civil union register," according to *ANSA English Media Service* (Jan. 28). As several other European Union nations allow same-sex marriages, well-heeled Italian same-sex couples can now obtain a status that is at least recognized in the municipality by going out of the country to marry. Debate continues in Italy about attempts by various municipalities to embrace some form of legal recognition of same-sex couples against the will of the national legislature, which is more conservative than many local legislative bodies. * * * However, officials in Turn refused to transcribe the birth certificate of a baby born to a lesbian couple in Spain, reported *ANSA English Media Service* (Jan. 7). One of the women is a Spanish national, the other Italian. They conceived the baby through donor insemination, and both mothers are recognized as such under Spanish law. Although a court of appeals granted their petition to have their child's birth certificate transcribed in Italy in a ruling said to be the first time that an Italian court had made such a ruling, the local officials are balking, awaiting further instructions from the national government. *Reuters* (Jan. 7) reported that the ruling in effect confers Italian citizenship on the child, whose birth-mother was the Spanish member of the couple. The women are divorced. A Barcelona court awarded joint custody, and the Italian mother wants to be able to have her parental status recognized in Italy. Interior Minister Angelino Alfano has stated that local councils cannot transcribe birth certificates of children born to same-sex couples. ***An appeals court in Brescia upheld the conviction on hate speech charges of a lawyer who stated in a 2013 radio interview that homosexuals "are against nature" and that he would never hire an openly gay person and had taken steps to prevent that from happening, according to a report by *ANSA English Media Service*, January 23. The court upheld a ruling by a trial court that ordered Carlo Taormina to pay a fine of 10,000 euros to the Lawyers Association for LGBT Rights-Lenford Network, the organization that brought the discrimination suit against him.

KENYA – The High Court at Nairobi, Constitutional and Human Rights Division, has issued a ruling recognizing the rights of intersex persons, ruling on Petition 266 of 2013. A child was born with both male and female genitalia and a lab report put a question mark in the gender column on the birth document, with no birth certificate being issued. The child's mother filed an action claiming that the question mark violated the baby's legal right to recognition, and urging that the baby was entitled to a birth certificate. Judge Isaac Lenaola declared that the baby is intersex, but that existing law in Kenya provides no solution to the problem of how to classify the child for a birth certificate. However, he found, there was no instance of documented discrimination against the child, but decreed that the birth should be registered despite the lack of a gender designation at present. He also found that the Parliament should adopt appropriate laws to recognize and provide for the human rights of intersex people. *AllAfrica.com*, Jan. 19.

KYRGYZSTAN – The European Parliament approved a resolution on January 15 urging Kyrgyzstan to refrain from adopting a proposed anti-gay propaganda bill that is modeled on the one enacted in Russia. The bill would

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outlaw the dissemination of any gay-affirmative material, imposing prison terms of up to a year for violations. The resolution also urges the country to adopt non-discrimination protections similar to those prevalent in Europe. *AKIpress News Agency*, Jan. 16.

MACEDONIA – The Parliament adopted a constitutional definition of marriage as "a life union of one woman and one man" and providing that "legal regulations in marriage, family, and civil unions are to be regulated by a law adopted by a two-thirds majority of the total number of Members of Parliament," thus creating a substantial barrier to the enactment of the kind of registered partner system that has been adopted in several European countries that are resistant to just opening up marriage to same-sex couples. The Parliament voted 72-4 for this measure on January 20.

MEXICO – After much on-again, off-again drama, a same-sex marriage was performed in Baja California on Jan. 17. Despite a series of rulings by the Supreme Court of Mexico granting the necessary approval for same-sex marriages in various parts of the country, there are still some local authorities who are resisting the trend. Victor Fernando Urias Amparo and Victor Manuel Aguirre Espinoza had been seeking to marry for nearly two years, and had been rejected by local authorities three times, despite having obtained an order from the Supreme Court last June. The very public refusals on spurious grounds, questioning the sanity of the two men, went viral on public media, ultimately apparently shaming the local officials and generating protests in front the City Hall in Mexicali. *UTSanDiego.com*, Jan. 17.

NEPAL – Nepal has added a third gender category to their passports, finally implementing a 2007 Supreme Court ruling ordering authorities to include a third gender choice for those who do not with to be identified solely as male or female. *Reuters News*, Jan. 7.

PORTUGAL – The Parliament voted on January 19 to include gender identity as a protected ground in the country's employment discrimination law, which already covers sexual orientation. The approval on first reading required further discussion in committee before a final form of the legislation was to be sent to the President for approval. *ILGA Portugal*, Jan. 19. * * * However, just days later, on January 22, the Parliament rejected a proposed law to allow same-sex couples to adopt children. Similar measures have been presented several times in recent years, each time receiving a higher vote, but not yet a majority.

RUSSIA – In what turned out most likely to be a misunderstanding of official announcements posted on a government website, there was a brief media sensation about the proposition that Russia was banning transsexuals and transvestites from driving. A clarification from the government dispelled this conclusion, but Russian government policy has been so hostile to LGBT people in recent years that virtually nobody had attacked the credibility of the early reports.

THAILAND – The proposed new constitution will definitely include the term "third gender" according to a member of the drafting panel who spoke to the Thai News Service on January 16. Kamnoon Sittisamarn said that the measure would ensure all sexual identities were protected under the constitution and treated equally by the law, according to the news report. Details of the draft will be released to the National Reform Council by April, for approval by the National Council for Peace and Order, the official name of the military junta now in charge of the government. However, there is no active proposal to authorize same-sex unions.

VIETNAM – The Vietnamese National Assembly voted to remove any prohibition of same-sex marriage from the nation's laws, but any marriages performed for same-sex couples will not receive government recognition or legal protection. The government had previously abolished the imposition of fines for performance of same-sex weddings in 2013. Abolition of the express prohibition is seen as a step towards a policy of marriage equality sometime in the future. *Bloomberg News*, Jan. 7.

PROFESSIONAL NOTES

THE LGBT BAR ASSOCIATION OF GREATER NEW YORK (LeGaL) announced that **MEREDITH R. MILLER** has been elected President of the organization. The other newly-elected officers are **JANICE GRUBIN** (1st Vice President), **M. FRANK FRANCIS** (Secretary and 2nd Vice President), **CAPRICE BELLEFLEUR** (Treasurer), and **K. SCOTT KOHANOWSKI** (Ass't Treasurer). Other directors for 2015 are **EDWARD AUGUSTINE**, **JOSEPH CLARO**, **CARLENE JADUSINGH**, **THOMAS MALIGNO**, **KARL RIEHL** (the immediate Past President), and **RICHARD E. WEBER, JR**. The association's annual dinner honorees will be **ALPHONSO DAVID**, the new Counsel to Governor Andrew Cuomo, **CARMELYN P. MALALIS**, recently appointed Commissioner and Chair of the New York City Human Rights Commission, and **HBO**. David and Malalis are the highest ranking openly-gay officials of the New York State and New York City governments.

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SPECIALLY NOTED

Scholars at Columbia University have started a project to assemble scientific studies on controversial topics in order to document the state of scientific knowledge. For their first project, they tackled the question of children raised by gay parents, assembling 73 studies published since 1980 that met their criteria in terms of being peer-reviewed articles published in academic journals. They concluded that the studies show overwhelming support for the view that same-sex children are not harm from being raised by gay parents. To see for yourself, check out http://whatweknow.law.columbia.edu/ Their next study subject will be so-called conversion therapy. * * * Retired U.S. Congressman Barney Frank, the first member of Congress to "come out" voluntarily back in 1987, is publishing his memoirs, titled simply "Frank." Official publication date is March 17, 2015. Frank, a Harvard Law School graduate, played a key role in obtaining repeal of the federal statutory ban on gay people immigrating to the United States, led in blocking the worst anti-gay amendment proposals on federal funding bills, was a primary sponsor of legislative proposals to ban anti-gay discrimination, and achieved wide public recognition as a House committee chair piloting legislation through Congress in response to the 2008 Great Recession to enhance federal regulation of the financial services industry, the Dodd-Frank Act. As an outspoken political pragmatist, he also generated controversy in the LGBT political community by removing coverage of "gender identity and expression" from the version of the Employment Non-Discrimination Act approved by the House of Representatives in 2007 after he concluded that the measure could not pass if it included that category, although he introduced a broadly inclusive version of ENDA after Barack Obama was elected president.

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Prof. Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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