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ALISON D.(EMOLISHED)

A Biological or Adoptive Connection to a Child Will No Longer Be Required to Award Custody and Visitation in New York

EXECUTIVE SUMMARY

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New York Court of Appeals Overrules *Alison D. v. Virginia M.*, Sets New Test for Same-Sex Co-Parent Standing on Custody/Visitation Claims

The New York Court of Appeals has overruled a quarter-century-old precedent, establishing a new rule for determining when somebody who is neither a biological nor an adoptive parent can seeking custody of a child with whom they have a parental bond. The opinion for New York's highest court by Judge Sheila Abdus-Salaam in *Brooke S.B. v. Elizabeth A. C.C.*, 2016 N.Y. LEXIS 2668, 2016 WL 4507780 (August 30, 2016), provides that "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law Section 70."

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The court was ruling on two cases that originated with similar facts, but then developed in different directions. According to the plaintiff's petition in *Brooke B. v. Elizabeth C.C.*, the women began their relationship in 2006, announced their "engagement" the following year, and then decided to have and raise a child together. Elizabeth became pregnant through donor insemination and bore a son in June 2009. Brooke and Elizabeth lived together with the child, sharing parental duties, until their relationship ended in 2010, the year before the New York legislature enacted marriage equality for the state. Elizabeth permitted Brooke to continue visiting with their son until the relationship between the women deteriorated further, and Elizabeth terminated Brooke's contact with the child in 2013. Brooke sued for joint custody and visitation rights, but the trial court and the Appellate Division agreed with Elizabeth's argument that by virtue of the Court of Appeals ruling in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), Brooke could not bring the lawsuit because she was neither the biological nor the adoptive parent of the child. Brooke appealed to the Court of Appeals, asking it to overrule *Alison D.*

Although the term "parent" is not defined in the Domestic Relations Law provision that authorizes lawsuits for custody and visitation, it was defined by the Court of Appeals in *Alison D.* to be limited to biological or adoptive parents. At that time, New York did not allow same-sex marriages or second-parent adoptions, so the ruling effectively precluded a same-sex co-parent from seeking joint custody or visitation after a break-up with the biological parent, in the absence of "extraordinary circumstances" recognized in some other cases decided by the Court of Appeals. The court specifically ruled that the facts of *Alison D.* (similar to the *Brooke B.* case) did not constitute such "extraordinary circumstances."

In the other case, *Estrellita A. v. Jennifer L. D.*, the women began their relationship in 2003, registered as domestic partners in 2007, and then agreed to have a child together, with Jennifer becoming pregnant through donor insemination. They agreed that they would obtain sperm from a Latino donor, matching Estrellita's ethnicity. Their daughter was born in November 2008. They lived together as a family for the next three years until the women's relationship ended and Estrellita moved out in September 2012. Estrellita continued to have contact with the child with Jennifer's permission. In October 2012, Jennifer started a proceeding in Family Court seeking child support payments from Estrellita. Estrellita responded by petitioning for legal visitation rights. The Family Court granted Jennifer's petition for support, finding that "the uncontroverted facts established" that Estrellita was "a parent" of the child, and so could be held liable to pay child support. However, responding to Estrellita's petition for visitation, Jennifer argued that the *Alison D.* precedent should apply to block her claim. The Family Court disagreed with Jennifer, finding that having alleged that Estrellita was a parent in order to win child support, she could not then turn around and deny that Estrellita was a parent in the visitation case. The Family Court applied the doctrine of "judicial estoppel" to preclude Jennifer from making this inconsistent argument, and concluded after a hearing that ordering visitation was in the child's best interest. The Appellate Division affirmed this ruling, and Jennifer appealed.

Judge Abdus-Salaam's decision refers repeatedly to the dissenting opinion written by the late Chief Judge Judith S. Kaye in the *Alison D.* case. Judge Kaye emphasized that the court's narrow conception of parental standing would adversely affect children being raised by unmarried couples, thus defeating the main policy goal of the Domestic Relations Law, which was to make decisions in the best interests of the child. By adopting this narrow decision, the court cut short legal proceedings before the child's best interests could even be considered. Unfortunately, Judge Kaye passed away in January before learning that her dissent would be vindicated in this new ruling. However, her dissent from the Court of Appeals' refusal in *Hernandez v. Robles* to rule for same-sex marriage rights was vindicated in 2011 when the legislature passed the Marriage Equality Act, and she also lived to see her legal reasoning vindicated by the U.S. Supreme Court in *Obergefell v. Hodges*, which referred to her *Hernandez* dissent. Judge Kaye's dissent in *Alison D.* was widely quoted and cited by courts in other states in subsequent rulings supporting co-parent standing to seek custody or visitation.

Judge Abdus-Salaam pointed out that Judge Kaye's arguments in 1991 were even stronger today, with the growth of diverse families and the large number of children living in households headed by unmarried adults. She referred to a concurring opinion in a case decided by the court six years ago, *Debra H. v Janice R.*, in which then Chief Judge Jonathan Lippman and Associate Judge Carmen Beauchamp Ciparick (both since retired from the court) had argued that the *Alison D.* ruling "had indeed caused the widespread harm to children predicted by Judge Kaye's dissent," and asserted that *Alison D.* was inconsistent with some subsequent rulings of the Court of Appeals in cases that did not involve same-sex couples. That concurring opinion called for a "flexible, multi-factored" approach to decide whether there was a parental relationship between a child and an adult outside the narrow definition of *Alison D.* In that same case, Judge Robert Smith (also now retired) argued in concurrence that an appropriate test for parental status would focus on whether "the child is conceived" through donor insemination "by one member of a same-sex couple living together, with the knowledge and consent of the other."

Acknowledging a body of court precedent recognizing the strong constitutional rights of biological parents, the Court of Appeals decided in its August 30 decision to take a cautious approach. Although some of the parties to the case urged the court to adopt an expansive, one-size-fits-all test for determining the standing of persons who are not biological or adoptive parents, the court decided to focus on the facts of these two cases, in both of which the plaintiffs had alleged that they had an agreement with their same-sex partner about conceiving the child through donor insemination and then jointly raising the child as co-parents. The court left to another day resolving how to deal with cases where a biological parent later acquires a partner who assumes a parental role towards a child, or where a child is conceived without such an advance agreement.

Another sign of the court's caution was its decision that the plaintiff would have to show by "clear and convincing evidence" that such an agreement existed. The normal standard of proof in civil litigation is "preponderance of the evidence," which means the plaintiff would have to show that it was "more likely than not" that such an agreement existed. Demanding "clear and convincing evidence" was an acknowledgment of the strong constitutional rights that courts have accorded to biological parents in controlling the upbringing of their children, including determining who would have visitation rights. The U.S. Supreme Court emphasized this several years ago, when it struck down a Washington State statute that allowed anybody, regardless of legal or biological relationships, to petition for visitation upon a showing that it was in the best interests of the child. Judge Abdus-Salaam emphasized the necessity of showing that there was an agreement, such that the biological parent had consented in advance to having a child and raising the child jointly with her partner.

The court decided this case without the participation of the recently-appointed Judge Eugene Fahey. Four other members of the court signed Judge Abdus-Salaam's opinion. All of these judges were appointed by Governor Andrew Cuomo, a Democrat. The other member of the court, Judge Eugene Pigott, who was appointed by Governor George Pataki, a Republican, and whose term expires this year, wrote a separate opinion, concurring in the result but disagreeing with the majority about overruling *Alison D. v. Virginia M.*

Judge Pigott pointed out that the *Alison D.* decision had been reaffirmed several times by the court, most recently just six years ago in a ruling that praised *Alison D.* as creating a "bright-line rule" that avoided unnecessary litigation and uncertainty about parental standing. In *Debra H.*, the court decided on alternative grounds that a co-parent could seek visitation because the women had entered into a Vermont civil union before the child was born, thus giving equal parental rights under Vermont law to which New York could extend comity. (In her opinion for the court, Judge Abdus-Salaam questioned the efficacy of bright-line tests in matters as nuanced as custody and visitation.)

Judge Pigott argued that New York now has marriage equality and co-parent adoption, and the Marriage Equality Law requires that same-sex marriages get equal legal treatment with different-sex marriages (including application of the presumption that a child born to a married woman is the legal child of her spouse), same-sex couples stand on equal footing with different sex couples and have no need for any modification of the definition of "parent" established by *Alison D.* Nonetheless, he joined the court's disposition of these two cases. In *Estrellita v. Jennifer*, he agreed that it was appropriate to apply judicial estoppel and hold that Estrellita's status as a parent had been

established in the support proceeding and could not be denied by Jennifer in the visitation proceeding. In the case of *Brooke v. Elizabeth*, he would apply the doctrine of "extraordinary circumstances," under which the trial court can exercise equitable powers to allow a non-parent who has an established relationship with a child to seek custody. The "extraordinary circumstance" here would be one of timing and the changing legal landscape between 2006 and 2013, making it appropriate to allow Brooke to seek joint custody and visitation if she can prove her factual allegations about the women's relationship. Judge Pigott apparently sees this case as presenting a transitional problem that is resolved by changes in the law after these women had their children, and would allow the extraordinary circumstances exception to be applied in cases occurring during this shifting period of legal doctrines governing marriage and parentage, rather than abandon the "bright-line" test of *Alison D.*

In the *Brooke* case, Susan Sommer of Lambda Legal represents Brooke with co-counsel from Blank Rome LLP (partners Margaret Canby and Caroline Krauss-Browne) and the LGBT Bar Association of Greater New York (Legal Director Brett Figlewski), Sherry Bjork represents Elizabeth, and Eric Wrubel serves as court-appointed counsel for the child. In the *Estrellita* case, Andrew Estes and Jeffrey Trachtman represent Estrellita, Christopher J. Chimeri represents Jennifer, and John Belmonte is appointed counsel for the child. The court received amicus briefs on behalf of the National Association of Social Workers, the National Center for Lesbian Rights, the New York City and State Bar Associations, the American Academy of Adoption Attorneys, Sanctuary for Families, and Lawyers for Children. By interesting coincidence, Lambda Legal had represented the plaintiff in *Alison D. v. Virginia M.* twenty-five years ago, with its then Legal Director, the late Paula Ettelbrick, arguing the case before the Court of Appeals. ■

7th Circuit Panel Concludes Prior Circuit Precedent Holding that Title VII Does Not Cover Sexual Orientation Discrimination Binds Its Hands

On July 28, 2016, a clearly conflicted three-judge panel of the U.S. Court of Appeals for the 7th Circuit rejected the current position of the Equal Employment Opportunity Commission (EEOC) that Title VII of the Civil Rights Act of 1964's prohibition on firing or refusing to hire an employee "because of . . . sex" extends to discrimination based on sexual orientation. *Hively v. Ivy Tech Comm. College*, 2016 WL 4039703, 2016 U.S. App. LEXIS 13746. As the first federal appellate court to squarely address the EEOC's July 2015 *Baldwin v. Foxx* ruling that Title VII does cover such claims, the panel found the development, as persuasive and rational as it might be, could not alone overcome the 7th Circuit's overwhelming contrary prior precedent. *See* 2015 WL 4397641 (EEOC, July 16, 2015).

Kimberly Hively, a part-time adjunct professor at Ivy Tech Community College in South Bend, Indiana, for fourteen years, alleges that the school repeatedly denied her a promotion to full-time employment and eventually terminated her because she is a lesbian, even though she never had a negative evaluation. Although she applied for six full-time positions between 2009 and 2014, school administrators never invited her for a single interview.

With a 2012 local human rights ordinance exempting state universities and no state antidiscrimination law in Indiana covering sexual orientation, federal law was her only hope of redress, and she proceeded to file a *pro se* federal lawsuit. On March 3, 2015, U.S. District Court Judge Rudy Lozano of the Northern District of Indiana granted the school's motion to dismiss for failure to state a claim, with prejudice. *See* 2015 WL 926015. Gregory Nevins of Lambda Legal then assumed her legal representation and filed an appeal with the 7th Circuit.

Judge Ilana D. Rovner wrote the opinion to affirm for the unanimous panel, joined by Senior Judges William J. Bauer and Kenneth F. Ripple. The judges were appointed by Republican Presidents George H. W. Bush, Gerald Ford, and Ronald Reagan, respectively. Senior Judge Ripple, however, only joined in the short initial portion of Rovner's decision reviewing the unbroken line of 7th Circuit precedent from 1984 through 2014 concluding that Title VII does not include sexual orientation protection and the failure of Congress for decades to pass bills that would explicitly address the well-known problem.

Judge Rovner and Senior Judge Bauer felt leaving it there would "make short shrift of [the court's] task," though, and she added another thirty-two pages of extended analysis to explore the rationales of *Baldwin* and the differing views on the viability of drawing a distinction between gender non-conformity or sex-stereotyping claims, found to be cognizable Title VII sex discrimination under the 1989 U.S. Supreme Court decision of *Price Waterhouse v. Hopkins*, and pure sexual orientation discrimination claims. "The idea that the line between gender non-conformity and sexual orientation claims is arbitrary and unhelpful has been smoldering for some time, but the EEOC's decision in *Baldwin* threw fuel on the flames," wrote Rovner. With that quandary in mind, she noted that "the district courts, which are the front line experimenters in the laboratories of difficult legal questions, are beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination and coming up short on rational answers."

Despite the difficulty of completely separating the two categories of discrimination, Rovner wrote, the court "cannot conclude that it is impossible. There may indeed be some aspects of a worker's sexual orientation that create a target for discrimination apart from any issues related to gender. Harassment may be based on prejudicial or stereotypical ideas about particular aspects of the gay and lesbian 'lifestyle,' including ideas about promiscuity, religious beliefs, spending habits, child-rearing, sexual practices, or politics. Although it seems likely that most of the causes of discrimination based on sexual orientation ultimately stem from employers' and co-workers' discomfort with a lesbian woman's or a gay man's failure to abide by gender norms, we cannot say that it must be so in all cases."

The "odd state of affairs in the law," noted by countless advocates previously and conceded by Judge Rovner, is that gay, lesbian, and bisexual employees who actually conform to employers' gender norms are accorded less job protection under Title VII than their colleagues who are more boundary-pushing in dress and behavior. She aptly highlighted the "paradoxical legal landscape" in which a person can be married to a same-sex partner on Saturday, in any state now under *Obergefell v. Hodges*, "and then fired on Monday for just that act" under the current 7th Circuit interpretation of Title VII. In other words, "[w]e are left with a body of law that values the wearing of pants and earrings over marriage."

Rovner closed the opinion by admitting that the current legal landscape is unsustainable, but leaving it to the highest court in the land or Congress to remedy this situation. "Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry . . . . But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent . . . ."

To avoid the current eight-member U.S. Supreme Court, likely deadlocked on this issue without a ninth Justice (which could produce a non-precedential affirmance of the panel decision), Lambda Legal decided to first see if the full bench of the 7th Circuit is interested in reviewing its prior precedent. On August 25, Lambda Legal filed a petition for rehearing and rehearing *en banc* on behalf of Ms. Hively. The petition points out that a majority of the panel suggests in Part II of its opinion that if the panel was not bound by prior 7th Circuit precedent, it should rule in favor of Hively that her sexual orientation claim can be brought under Title VII, that this is the first time the 7th Circuit has faced a sexual orientation claim under Title VII since the EEOC's *Baldwin* decision, so an *en banc* reconsideration and overruling of the circuit's older precedents is "both exceptionally important and judicially efficient," and that this petition "compares favorably" with the 7th Circuit's "recent *en banc* history in cases involving statutory interpretation." The petition also makes an effort to persuade that the 7th Circuit's existing precedent is out of step with Supreme Court decisions. The EEOC, keenly watching how *Baldwin* fares in the courts, filed an amicus brief supporting the petition, as did the other major LGBT legal advocacy organizations (National Center for Lesbian Rights, GLBTQ Legal Advocates & Defenders, and the ACLU) and five members of Congress (U.S. Senators Jeffrey A. Merkley, Tammy Baldwin, and Cory A. Booker and U.S. Representatives David N. Cicilline and Mark Takano). – *Matthew Skinner*

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York (LeGaL).

Colorado Wedding Cake Baker Seeks Supreme Court Review of State Court Discrimination Ruling

On July 22, Jack C. Phillips, proprietor of Masterpiece Cakeshop, Ltd., a Colorado business, filed a Petition with the U.S. Supreme Court, seeking review of the Colorado Court of Appeals decision rendered on August 13, 2015, which rejected his appeal of a ruling by the Colorado Civil Rights Commission that Phillips and his business had violated Colorado's Anti-Discrimination Act (CADA) by declining service to a gay male couple seeking to purchase an appropriately-decorated cake for their wedding reception. The Petition for Certiorari in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* was filed by lawyers from Alliance Defending Freedom (ADF), a self-described "Christian" law firm, with local counsel Nicolle H. Martin of Lakewood, Colorado. The Colorado Supreme Court had issued an order on April 25 refusing to review the case, which set the 90-day clock running for filing a certiorari petition.

The Petition positions this as a First Amendment free speech and free exercise case. Arguing that the creation of a wedding cake is an expressive act signaling the baker's approval of the marriage for which it is being created, Phillips' attorneys argue that penalizing him under the state's public accommodations law for declining an order for a wedding cake from Charlie Craig and David Mullins is, in effect, government-compelled speech. Furthermore, they argue, since Phillips is a devout Christian who is compelled by his faith to withhold any expression of approval from same-sex marriages, application of the public accommodations law to him violates his right to free exercise of religion. Furthermore, the Petition asserts, when it became public that Phillips had refused to bake a wedding cake for Craig and Mullins, another bakery provided one at no charge, so the men were not deprived of this important component of their wedding celebration. At the time Craig and Mullins sought to order the cake, same-sex marriage was not yet available in Colorado. Their intention was to marry in another jurisdiction and then hold their wedding reception in Colorado so that their family and friends could easily attend.

In arguing that the Supreme Court should review the case, the Petition contends that there is a division of authority in lower courts about the underlying constitutional issues. The Petition contends that the Colorado Court of Appeals ruling conflicts with cases from the 9th and 11th Circuit courts of appeals "regarding the free speech protection of art," that it "deepens an existing conflict between the 2nd, 3rd, 6th, and 11th Circuits as to the proper test for identifying expressive conduct," and that it "conflicts with free exercise rulings by the 3rd, 6th, and 10th Circuits." None of the cases mentioned, of course, involves the issue of a baker refusing to make a wedding cake for a same-sex couple. Of course, the contention that this is about "art" depends upon the Court accepting the Petition's characterization of Phillips as a "cake artist," not just a "baker" who happens to design and execute wedding cakes.

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As part of his argument, of course, Phillips goes to great lengths to endow wedding cakes with heavy symbolic importance, insisting that a wedding ceremony is incomplete without one and that the spouses feeding each other pieces of cake is, in effect, the high point of the event. Not to denigrate the creativity and artistic talent that may go into producing a custom-designed wedding cake, but there might be some question as to whether the baker who designs and executes the cake is an "artist practicing in a visual medium," the phrase lifted from the 9th and 11th Circuit cases. As to the cases upon which the Petition relies, *see Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015) and *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), where the issue was whether a person denied a permit to operate a tattoo parlor in a particular location had thereby suffered a violation of his 1st Amendment free speech rights. The Petition argues, based on these cases, "Applying the 9th and 11th Circuit's analysis to the facts at hand leads to the inevitable conclusion that Phillips' custom wedding cakes and artistic design process are pure speech." The Petition argues that those circuit courts "would reject any artificial separation between Phillips' artistic process and the custom wedding cakes that result." The Petition suggests that only the Supreme Court can resolve the logical conflict between these tattoo cases and the wedding cake case.

The Petition also argues that there is conflict among the circuits about where to draw the line between speech and conduct in determining the regulatory power of the state. The Supreme Court

has tangled with the issue of expressive conduct in some cases, but not so precisely as to avoid disagreements among lower courts about where to draw the line for purposes of applying free speech doctrine, argues the Petition. Ironically, the leading case upon which the Petition relies to argue for a broad reading of expressive conduct is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Supreme Court unanimously held that a parade is an inherently expressive activity, thus privileging the organizers of Boston's St. Patrick's Day Parade under the First Amendment to determine its message and whether inclusion of a particular group, the Irish-American Gay, Lesbian and Bisexual Group of Boston, would add a message that the organizers did not want to express as part of their parade. The Petition argues that baking a wedding case is also an inherently expressive activity, signaling the baker's message of approval and congratulations to the marrying couple, which should not be compelled by the government.

Virtually the same issue was posed to the Supreme Court just a few years ago in *Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014), *denying certiorari*, 309 P.3d 53 (N.M. 2013), where the Court refused to review a ruling by the New Mexico Supreme Court that applying the state's public accommodations law to a wedding photographer who objected to providing her services to a lesbian couple for their commitment ceremony did not violate the 1st Amendment rights of the photographer. It would be difficult to argue that a wedding photographer is less of an "artist working in a visual medium" than a wedding cake baker, but there was not sufficient support on the Court to take that case, where the petition was presented after the Court had ruled in *U.S. v. Windsor* that the federal government must recognize same-sex marriages, but had not yet ruled in *Obergefell v. Hodges* that the states must afford the same marriage rights to same-sex couples that they do to different-sex couples. So far, lower courts around the country have unanimously rejected claims by small businesses that their refusals to comply with public accommodations laws because of their religious or free speech objections to same-sex marriages enjoy constitutional protection.

Turning to the other First Amendment issue raised by the petition, Free Exercise of Religion, the Petition argues that because the Colorado anti-discrimination law allegedly allows for case-by-case religious exemptions depending on the reason for the exemption, the determination by the Colorado Civil Rights Commission whether Phillips and his cake-shop are entitled to a religious exemption in this case should be subjected to strict scrutiny by the Court. Thus, argues the Petition, the state should have to show a compelling interest justifying this imposition on Mr. Phillips' religious beliefs. Phillips' cake-shop is an incorporated business, so the argument also relies on the Court's ruling in the *Hobby Lobby* case that businesses are entitled to claim religious free exercise rights based on the beliefs of their owners. (The 5-4 ruling in *Hobby Lobby* depended on the vote of Justice Scalia, since deceased, and this would seem to be a decision very vulnerable to overruling depending on who is eventually confirmed for that seat on the Court.) The Petition's argument on this point seems curiously twisted, since the Supreme Court decisions it relies upon involve a state imposing criminal penalties for somebody engaging in a religious act, rather than, as in this case, somebody declining to provide a service in a business context based on his religious beliefs.

In both arguments, the Petition refers to counterexamples, stating: "It is undisputed that the Colorado Civil Rights Commission does not apply CADA to ban (1) an African-American cake artist from refusing to create a cake promoting white-supremacism for the Aryan Nation, (2) an Islamic cake artist from refusing to create a cake denigrating the Quran for the Westboro Baptist Church, and (3) three secular cake artists from refusing to create cakes opposing same-sex marriage for a Christian patron." One suspects the first two are hypotheticals addressed during argument before the Colorado court, while the third seems to stem from a stunt that was undertaken in reaction to the filing of the civil rights charge in this case. In each of these instances, whether hypothetical or real, the customer was asking the "cake artist" to create a particularized political statement on the cake, which would seem distinguishable from requesting the creation of a wedding cake that merely congratulations the couple on their wedding without making any overt political statement.

Disputes of this type continue to arise around the country in states and localities that ban sexual orientation discrimination in places of public accommodation, generating litigation in state courts when civil rights agencies rule against the businesses. Eventually this issue is likely to get to the Supreme Court if a genuine split of authority emerges. It seems unlikely that the Court will take up the issue when there is no direct split among lower courts about how to handle the particular issue of business refusals to provide goods or services for same-sex weddings, especially when the Court is shorthanded and seems inclined to avoid granting review in cases where the Justices are likely to be evenly divided, but one can never say "never" with the Supreme Court. ■

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Supreme Court Stays Injunction against Gloucester School District in Title IX Transgender Restroom Case

On August 3, the U.S. Supreme Court granted an application by the Gloucester (Virginia) County School Board to stay a preliminary injunction that had been issued by U.S. District Judge Robert Doumar (E.D. Va.) on June 23; *see* 2016 WL 3581852. *Gloucester County School Board v. G.G.*, 136 S. Ct. 2442 (No. 16A52), granting stay. The injunction ordered the school board to allow Gavin Grimm, a transgender boy, to use the boys' restroom facilities at his high school while the trial court determined whether the school's policy denying such access violates Title IX of the Education Amendments Act of 1972. What was unusual about the Supreme Court's action was the brief concurring statement from Justice Stephen Breyer explaining that he had voted to grant the application as a "courtesy." The Court indicated that Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan "would deny the application." With the vacancy created by the death of Justice Scalia last winter, the four members of the Court appointed by Republican presidents – Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, and Clarence Thomas – could not issue the stay, which requires a majority of the Court, without the cooperation of at least one Democratic appointee.

The court specified that the injunction was stayed "pending the timely filing and disposition of a petition for a writ of certiorari." If the Court denies the writ (that is, refuses to review the lower court's ruling on the merits), the injunction will go into effect. If the Court votes to grant review, the stay would end when the Supreme Court issues its ruling on the merits of the appeal. The Gloucester County School Board filed its petition for certiorari on August 29, early enough so it is at least possible that it will be among those considered by the Court in its annual pre-term conference, with a decision on review announced early in October.

The lawsuit involves the hotly disputed question whether Title IX's ban on discrimination "because of sex" by educational institutions that benefit from federal funds (including federally-guaranteed loans to students) prohibits a school from denying transgender students access to restroom and locker-room facilities consistent with their gender identity. It is undisputed that when Congress enacted Title IX several decades ago, there was no consideration or discussion about whether it would require such a result, and it was made clear in the legislative history and subsequent regulations and guidelines that Title IX did not prohibit educational institutes from designating access to such facilities as male-only or female-only. (Indeed, many states have statutory requirements that educational institutions provide separate restroom and locker-room facilities for males and females.) Furthermore, a series of cases under the various federal sex discrimination laws over several decades had rejected claims that they extended to gender identity discrimination. As to Title IX, it was not until relatively recently, when teens and even younger children began to identify as transgender and to begin transitioning while in public primary and secondary schools, that the issue has heated up, and it was not until 2015 that the U.S. Department of Education, charged with interpreting and enforcing Title IX, affirmatively took the position that the ban on discrimination "because of sex" included discrimination because of gender identity, following the lead of the Equal Employment Opportunity Commission, which had taken a similar position under Title VII of the Civil Rights Act of 1964.

The Education Department's interpretation, expressed first in an unpublished letter sent to the parties in connection with litigation over restroom access in the suburban Arcadia, Illinois school district, was also in line with rulings by several lower federal courts, which have ruled in a variety of contexts that discrimination because of gender identity is a form of sex discrimination. These include the San Francisco-based 9th Circuit, in a case under the Violence against Women Act (VAWA), the Boston-based 1st Circuit, in a case under the Fair Credit Act, the Atlanta-based 11th Circuit, in a case interpreting the Equal Protection Clause of the 14th Amendment, and the Cincinnati-based 6th Circuit, in a case under Title VII of the Civil Rights Act of 1964 concerning employment discrimination. However, challengers to the Education Department's interpretation have argued that it is, in effect, a "changing of the rules" that can only be effected through a formal regulatory process under the Administrative Procedure Act, and not through a position letter in a pending case or an informal "guidance" memorandum.

In the Gloucester County case, Gavin Grimm had been using the boys'

What was unusual about the Supreme Court's action was the brief concurring statement from Justice Stephen Breyer explaining that he had voted to grant the application as a "courtesy."

facilities without incident after his gender transition until some complaints by parents to the school board resulted in a vote to adopt a policy requiring Grimm and any other transgender students to use either the facilities consistent with the gender indicated on their birth certificates (sometimes called "biological sex") or to use single-user facilities designated for use by either sex, such as the restroom in the school nurse's office. Since medical authorities will not perform "sex-reassignment surgery" on minors, it is impossible for a transgender youth to qualify for a change of gender designation on their birth certificate in most states, and some states rule out such changes altogether. Grimm, who presents as male, sued under Title IX, claiming that the school district's new access rule violated his rights under Title IX and the Equal Protection Clause. Judge Doumar initially rejected his Title IX claim and reserved judgement on the Equal Protection claim, disagreeing with the Education Department's interpretation of the statute. 132 F.Supp.3d 736 (E.D. Va., Sep. 17, 2015). This ruling was reversed on April 19 by the Richmond-based 4th Circuit Court of Appeals, 822 F.3d 709, which ruled that Doumar should have deferred to the Education Department's interpretation of its own regulations and the statute, because they were ambiguous on how to deal with transgender individuals in the context of single-sex facilities. The 4th Circuit subsequently voted to deny *en banc* review of this ruling, 824 F.3d 450 (May 31, 2016). The 4th Circuit sent the case back to Judge Doumar, who then issued the preliminary injunction, and refused to stay it. The 4th Circuit also refused to stay it, on July 12, 2016 WL 3743189. The school district's application to the Supreme Court indicated that it would be filing a petition for review but in the meantime wanted to preserve the "status quo" until there was a final ruling on the merits of the case. Most pressingly, it wanted to ensure that its existing access rule would be in place when classes resumed at the high school for the fall term in August.

At the heart of the disputes about Title IX restroom access is a fundamental disconnect between those who reject, based on their religious views or other beliefs, the idea that a transgender man is actually male or a transgender woman is actually female. (This is expressed in the controversial Mississippi HB 1523, which seeks to privilege those whose religious beliefs reject the concept of gender identity being discordant with anatomical sex at birth, by allowing individuals and businesses holding such beliefs to refuse to recognize transgender identity.) Based on their political rhetoric and the arguments they make in court, it is clear that these critics believe that gender is fixed at birth and always coincides with anatomical sex, rejecting the whole idea of gender transition. Thus, their slogan: No men in women's bathrooms, and no women in men's bathrooms. Some premise this opposition on fears about safety, while others emphasize privacy, arguing that people have a "fundamental" constitutional privacy right not to confront transgender people in single-sex facilities.) On the other side of the issue are those who accept the experience of transgender people and the findings of scientific researchers who have detected evidence that there is a genetic and/or biological basis for individuals' strong feeling that they are misclassified as to sex.

This is, of course, not the only pending case placing in issue the Education Department's interpretation of Title IX (which has also been endorsed by the Justice Department as it has represented the Education Department in court), or the broader question of whether federal sex discrimination laws are limited to instances of discrimination against somebody because of their "biological sex." A three-judge panel of the 7th Circuit Court of Appeals recently ruled that circuit precedent required dismissal of a sexual orientation employment discrimination claim under Title VII, and the plaintiffs in that case will be seeking rehearing by the full 7th Circuit "en banc." There are also two appeals pending in the New York-based 2nd Circuit appealing dismissals of sexual orientation discrimination claims under Title VII, as well as an appeal in the Atlanta-based 11th Circuit by an employer seeking reversal of a district court's refusal to dismiss such a claim.

There are also multiple lawsuits pending in North Carolina and Mississippi, and cases involving multiple states as plaintiffs in Texas and Nebraska, challenging the federal government's interpretations of "sex discrimination" in either or both of the sexual orientation and gender identity contexts. Early in August, federal district judges held hearings in several of these cases where litigants were seeking preliminary injunctions, either to bar enforcement of state laws or to block enforcement of Title IX by the Education Department, and a federal judge in Texas has preliminarily enjoined federal agencies from initiating investigations or enforcement actions under Title IX pending a ruling on the merits of the case initiated by Texas (see below). The district court in Mississippi has refused to stay its injunction against the Mississippi law, and has been backed up by the New Orleans-based 5th Circuit Court of Appeals. Mississippi will seek a Supreme Court stay, and in light of the Gloucester County stay, may well receive one.

Justice Breyer cited in support of his "courtesy" vote a 2008 case, *Medellin v. Texas*, where the four liberal members of the Court had voted to grant a stay of execution of a Mexican national while important issues concerning the consular treaty rights of foreign nationals being tried on criminal charges in U.S. courts were unsettled, but no member of the conservative branch of the Court was willing to provide a fifth vote as a "courtesy" to put off the execution until the underlying legal issues could be resolved. In the Gloucester County case, the four conservative members of the Court clearly believed that the school district should not have to comply with the injunction until the underlying legal issues are settled, and Justice Breyer was willing to extend to them the courtesy that none of them would extend in *Medellin*, perhaps laying the groundwork for future exercises of "courtesy" in making such decision in light of the possibility that the Court will be operating with only four members for

some considerable part of the October 2016 Term, in light of the refusal of Senate leaders to hold hearings or call for a vote on President Obama's nomination of D.C. Circuit Court of Appeals Chief Judge Merrick Garland to fill the seat vacated by the death of Justice Scalia last winter.

Gloucester County's petition for certiorari positions this more as an administrative law case, and only secondarily as a case about interpretation of Title IX. The first question presented to the Court is whether it should retain the deferral doctrine upon which the 4th Circuit relied in holding that in the event of an ambiguous regulation, the courts should defer to an administrative agency interpretation so long as it was a "reasonable" construction of the statute and regulation. This question notes that several Justices had recently urged that the *Auer* doctrine be reconsidered. The second question posed was whether the *Auer* doctrine, if retained should apply to something as informal as an "unpublished agency letter" that is not purported to "carry the force of law" and was generated in the course of litigation. This question may seem moot, however, since the Education Department has during the course of this case issued a formal "Guidance" distributed to all public school districts embodying its interpretation of Title IX. Finally, almost as an afterthought, the petition asks the Court to consider whether the Department's interpretation of Title IX and its restroom regulation should be given effect apart from any issue of deference to agency interpretation. Counsel of record on the petition is S. Kyle Duncan of Schaerr/Duncan LLP, Washington, D.C., with co-counsel from Harman, Claytor, Corrigan & Wellman of Richmond, Virginia, and James Otis Law Group LLC of St. Louis, Missouri. A bit surprisingly, the petition does not ask the Court to consider the Administrative Procedure Act issue raised by Alliance Defending Freedom in its lawsuit challenging the settlement in the Arcadia (Illinois) School District case. That issue is also central to the cases challenging the Title IX Guidance pending in North Carolina, Texas, and Nebraska. ■

Denial of Refuge to Jamaican Who Claims to Be Bisexual Sparks Disagreement on 7th Circuit Panel

By a 2-1 vote, a panel of the U.S. Court of Appeals for the 7th Circuit affirmed a decision by the Board of Immigration Appeals (BIA) to deny relief under the Convention Against Torture to a Jamaican man who claims to be bisexual. *[Petitioner] v. Lynch*, 2016 WL 4376516, 2016 U.S. App. LEXIS 15127 (August 17, 2016). The majority of the panel, in an opinion by Judge Diane Pamela Wood, found that under the deferential standard for reviewing administrative decisions in the immigration system, the evidentiary record that led the Immigration Judge to conclude that the petitioner had failed to prove he was bisexual did not compel a contrary conclusion and so could not be overturned.

Dissenting, Judge Richard Posner contended that the Immigration Judge had "fastened on what are unquestionable, but trivial and indeed irrelevant, mistakes or falsehoods in [petitioner's] testimony," and, furthermore, "The weakest part of the immigration judge's opinion is its conclusion that [petitioner] is not bisexual, a conclusion premised on the fact that he's had sexual relations with women (including a marriage). Apparently the immigration judge does not know the meaning of bisexual. The fact that he refused even to believe there is hostility to bisexuals in Jamaica suggests a closed mind and gravely undermines his critical finding that [petitioner] is not bisexual."

According to Judge Wood's decision summarizing the record in the case, the petitioner, who was born and grew up in Jamaica, claims to have begun having sex with both men and women while a teenager. He fell in love with an American woman visiting Jamaica and they married and moved to the U.S., where she sponsored him for resident status. However, the marriage didn't last and their failure to attend a required interview with immigration officials resulted in termination of his status, after which they divorced. Around the same time, he pled guilty to an attempted criminal sexual assault charge, was sentenced to probation, violated his probation and was resentenced to prison time. After his release from prison, he was swooped up by Homeland Security and processed for deportation. In the course of those proceedings, he raised the horrendous conditions for gay and bi people in Jamaica, seeking protection under the Convention against Torture (CAT).

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The Immigration Judge concluded that his criminal record prevented granting him withholding of removal, and most of the attention in the case focused on the CAT claim. A person who is otherwise deportable may win relief under the CAT by showing that they would likely be subjected to torture or serious harm at the hands of the government or those the government is unable to control. While numerous

sources, including State Department Human Rights reports from 2012 and 2013, document the fierce homophobia in Jamaica and the failure of the government to address it effectively, the BIA continues to dither about whether LGBT refugees from Jamaica are entitled to CAT relief. The U.S. Court of Appeals for the 2nd Circuit recently remanded another Jamaican case to the BIA for reconsideration in light of this information (see the story immediately above).

In this case, the IJ, following the BIA line, rejected the claim, but most of the attention was focused on the credibility of petitioner's claim to be bisexual and that he would be known as such in Jamaica and thus likely to encounter serious harm there. The IJ focused on the numerous inconsistencies in his testimony about his experiences in Jamaica, in which he mixed up dates, places, and names to such an extent that the IJ found his claims to be not credible. The IJ rejected the submission of letters from various people attesting to his bisexuality (including two letters signed by former boyfriends now living in other states), doubting their validity.

The BIA "found no clear error in the IJ's findings that [petitioner] 'did not credibly testify and did not establish that he has ever been bisexual.'," wrote Judge Wood, "And because [petitioner] had not established that he was bisexual or that he would be perceived in Jamaica as bisexual – the basis of his purported fear of torture – he had not met his burden of proof under the CAT."

In refusing to upset this ruling, the majority of the 7th Circuit panel focused on its limited authority to review factual findings by an IJ, stating that the question is "whether the facts compel a conclusion contrary to the one that the IJ reached. While we might wish it were otherwise, there is no exception under which plenary review is available for factual questions of enormous consequence, as this one is for [petitioner]."

"We are not insensible to the fact that immigration judges sometimes make mistakes, and that the costs of such errors can be terrible," wrote Wood. "A mistaken denial of asylum can be fatal to the person sent back to a country where persecution on account of a protected characteristic occurs; a mistaken denial of deferral of removal under the Torture Convention can have ghastly consequences. If we could balance the magnitude of the risk times the probability of its occurrence against the cost of offering a few additional procedures, or a few more years in the United States, we would."

While admitting that this result is harsh, Judge Wood dangled hope that if the petitioner could come up with more credible evidence, he might be able to persuade the IJ to grant a motion to reopen his case.

This did not satisfy Judge Posner, who really ripped into the majority in his dissenting opinion. Posner pointed out that the merits of the petitioner's claim "depend on how two issues are resolved: whether [petitioner] is bisexual and whether bisexuals are persecuted in Jamaica. The rejection of the second point by the Immigration Judge, upheld by the Board of Immigration Appeals, is cursory and unconvincing; but if he isn't bisexual the error is harmless. But the rejection of his claim to be bisexual is also unconvincing. The immigration judge emphasized such things as [his] lack of detailed recollection of events that go back as far as 1983 and a supposed lack of 'proof' of bisexuality. Well, even members of this panel have forgotten a lot of 33-year-old details. And how exactly does one prove that he (or she) is bisexual? Persuade all one's male sex partners to testify, to write letters, etc.? No, because most Jamaican homosexuals are not going to go public with their homosexuality given the vicious Jamaican discrimination against lesbian, gay, bisexual, and transgender ("LGBT") persons, which is undeniable . . . ."

Posner recited at some length information easily available on-line and from the State Department, and asserted that the immigration judge's opinion "is oblivious to these facts." He pointed out that the court's opinion "does not explain" how many of the consistencies of testimony "could have any bearing on the question of [his] sexual orientation." Posner ripped to shreds the IJ's rationale for rejecting the various letters offered by the petitioner, including those from his ex-lovers, and criticized the immigration judge for failing to ask a psychologist to provide input on the question. "Immigration judges are authorized to do this," he wrote, "authorized to select and consult, which they may and usually do on the phone, an expert with expertise relevant to the case at hand."

Most tellingly, however, wrote Posner, "Nor had any reason been given, either by the immigration judge or by the majority opinion in this court, why if [petitioner] is not bisexual he would claim to be in an effort to remain in the United States, knowing that if he failed in this effort to remain he would be in grave danger of persecution when having lost his case he was shipped off to Jamaica. No doubt once back in Jamaica he could deny being bisexual – but no one who was either familiar with this litigation, or had been one of his persecutors before he left Jamaica for the United States, would believe (or at least admit to believing) his denial."

Posner also threw in his insight that "homosexuals are often antipathetic to bisexuals," for which he cited some articles from the internet. Posner seems to be an avid googler, judging by his on-line references in this and other cases. "This is not to say that they would be likely to attack [petitioner] physically when he returned to Jamaica, but they might well talk about his return to the island – the return of a bisexual – and some of the persons to whom they talked might well be heterosexual and want to harm [him] physically. Word is likely to spread quickly in an island of fewer than three million inhabitants." Posner's parting shot, as noted above, was to suggest that the IJ was ignorant about bisexuality and had a "closed mind" on the subject.

At this point, the petitioner, who has been representing himself without a lawyer (and thus, statistically, never had a particularly good chance of winning his case), likely faces imminent deportation. We have withheld his name in this account of the case to avoid spreading it on the internet and exposing him to further potential harm. ■

Louisiana Appeals Court Revives Transgender Father's Custody Claim

In a most unusual opinion for the court by Judge Fredericka Homberg Wicker, the Louisiana 5th Circuit Court of Appeal ruled in *Ferrand v. Ferrand*, 2016 La. App. LEXIS 1600 (Aug. 31, 2016), that an order by District Judge Stephen D. Enright dismissing a custody petition by C. Vincent Ferrand and refusing Ferrand's request that the court appoint a psychologist to determine whether continued custody of the young twins born to his former female partner was harmful to them should be vacated, and the case remanded for appointment of the expert. What makes this opinion so unusual is that Judge Wicker devoted a major part of the opinion to a detailed review of the statutory and case law in all the Southern States concerning custody claims brought by same-sex co-parents.

Vincent, identified as female at birth but by then living as male, began dating Paula in 2000. In April 2003, they participated in a "ceremony" in Tennessee, "in which they together exchanged vows and 'wedding rings.'" In 2005, Paula legally changed her last name to Ferrand, Vincent's last name. According to Vincent, they decided to have children after going through the experience of surviving Hurricane Katrina. At that time, Vincent owned a very successful construction company, making the cost of fertility treatment affordable for them without insurance coverage, and Vincent paid for the in vitro fertilization process resulting in Paula's pregnancy. Their twins were born on July 5, 2007, a girl and a boy. A C-section was required for delivery. The girl was healthy, but the boy was developmentally challenged and had to remain in the hospital for some time. Vincent signed and was designated as their father on the birth certificates. Throughout their continued partnership, Vincent played a major parental role, at times being the primary caregiver for the children. Indeed, from Vincent's testimony, the children were more tightly bonded with him than with Paula, who eventually separated from Vincent and married a man named Robert, who she began dating in 2012. Vincent claimed that Paula had largely abandoned the children for a period of time, as she had also largely abandoned children from her marriage prior to her relationship with Vincent. Vincent testified that between September 2012 and February 2014, he was the primary provider and caregiver and Paula had only sporadic contact with the children.

On February 21, 2014, Vincent dropped the children off at school, as per his routine, and that afternoon received an email from Paula telling him that "she had removed his name from the children's birth certificates and changed the children's last names." She instructed him not to contact her or "her family" and threatened that she would contact the police if he attempted to contact the children. He consulted an attorney and filed a petition for custody a few days later. The last time he saw the children was in July 2015, during the course of this litigation. He retained a psychologist, Dr. Marianne Walsh, to examine the children and opine on the relationships with the parents, as would be necessary under Louisiana law which limits the ability of a non-parent to seek custody. Under the pertinent statute, a non-parent must show that it is harmful to the children to be in the custody of their biological parent and that it is in the best interest of the children to award custody to the non-parent. In the course of litigation, Vincent requested the court to appoint a psychologist to examine the parties and opine on these questions, but Judge Enright decline the request, granting Paula's motion to dismiss the case on the ground that Vincent was a non-parent who lacked standing. Paula had also petitioned for a protective order, forbidding Vincent to contact her or her family (including the children). Judge Enright granted the protective order.

The court's opinion is too long and detailed to recount at length here. Judge Wicker wrote: "We find, under the unique set of facts presented in this case, the trial court abused its discretion in denying Vincent's request for a court-appointed evaluator to assist in the custody determination under La. R.S. 9:331. Accordingly, we vacate the judgment of the trial court as it relates to the denial of Vincent's petition for custody and remand this matter to the trial court for the purpose of appointing a mental health evaluator pursuant to La. R.S. 9:331 to perform a comprehensive custody evaluation." As to the protective order, which prohibits Vincent from contacting the twins before they turn 18, the court said, "because we find there are no allegations of physical abuse against the children and, importantly, in light of our holding herein to vacate the denial of Vincent's petition for custody, we vacate the protective order as it relates to the minor children." However, it remains in effect as to Paula.

Judge Wicker devoted a major part of the opinion to a detailed review of the statutory and case law in all the Southern States concerning custody claims brought by same-sex co-parents.

Judge Wicker explained, "Under the facts of this case, we find that a comprehensive custody evaluation by a court-appointed evaluator is necessary to properly determine whether 'substantial harm' would result to these children if sole custody is granted to Paula. Further, a comprehensive evaluation may assist the trial judge in his consideration of the children's mental and emotional well-being – i.e., their best interest. Under the facts of this case, we find that the trial judge abused his discretion in making a custody determination without a comprehensive evaluation performed by an independent, court-appointed custody evaluator pursuant to La. R.S. 9:331."

A concurring opinion by Judge Robert M. Murphy is scathing about Paula's credibility. "In an email dated August 9, 2010, which was attached to a Petition for Protection from Abuse filed by Paula on November 15, 2011, Paula wrote that she discovered Vincent is biologically a female several years after she started living with Vincent. Given this most hard to believe assertion, which certainly raises questions as to Paula's credibility, it is difficult to understand how the trial judge accepted Paula's version of the school yard altercation" (referring to an incident when Vincent showed up at the children's school for their first day of classes as he had done in prior years and ended up in a physical altercation with Paula and her husband Robert). It appears that the trial judge ignored the expert testimony of Dr. Walsh and used the school yard altercation to prohibit Vincent from having contact with the minor children until they are 18 years old. For all of these reasons, the trial court abused his discretion in failing to order a comprehensive custody/visitation evaluation as provided for in La. R.S. 9:331." Judge Murphy found insufficient evidence in the record to support the trial court's involuntary dismissal of Vincent's custody petition or his protective order banning contact with the children.

Martha J. Maher represents Vincent in the litigation. Judge Robert A. Chaisson sat on the Court of Appeal panel together with Judges Wicker and Murphy. ■

Funeral Home Wins Summary Judgment Motion in Transgender Discrimination Case with RFRA Defense

U.S. District Judge Sean F. Cox ruled on August 18 that a funeral home that discharged a transgender funeral director because of her intention to dress according to the employer's dress code for women was not liable for sex discrimination under Title VII of the Civil Rights Act of 1964. The ruling, granting the employer's motion for summary judgment, stemmed from the court's conclusion that the employer prevailed on a religious free exercise defense raised under the federal Religious Freedom Restoration Act (RFRA), because the plaintiff in the case, the Equal Employment Opportunity Commission (EEOC), a federal agency that enforces Title VII, had failed to show that requiring the employer to allow the employee to use the approved female outfit was the "least restrictive alternative" to achieve the government's compelling interest in preventing sex stereotyping discrimination in the workplace. The case is *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 U.S. Dist. LEXIS 109716, 2016 WL 4396083 (E.D. Mich.).

Importantly, Judge Cox made clear in his opinion that had the employee, Aimee Stephens, sued the funeral home on her own behalf, the funeral home would not have been able to raise the RFRA religious freedom defense.

Importantly, Judge Cox made clear in his opinion that had the employee, Aimee Stephens, sued the funeral home on her own behalf, the funeral home would not have been able to raise the RFRA religious freedom defense, and she would most likely have won her Title VII case. Within the 6th Circuit (the states of Michigan, Ohio, Kentucky and Tennessee), the controlling circuit precedent states that a RFRA defense may only be raised in a case where "the government" is either the plaintiff or the defendant.

There are similar controlling precedents in the 7th and 9th Circuits, according to the opinion in the 6th Circuit case on which Judge Cox relied, *General Conference of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (2010). In the 2nd Circuit, which includes New York, there is a contrary precedent by a three-judge panel which has been questioned by a different three-judge panel, so the issue is a bit muddled. The Supreme Court has never made clear whether RFRA is so limited in employment discrimination cases, but in the *Hobby Lobby v. Burwell* case, in which the Court ruled that business corporations may claim protection from government actions under RFRA, Justice Samuel Alito wrote for the Court in dicta (non-precedential language) that an employer would not be able to rely on RFRA to defend against a Title VII race discrimination charge. He made this statement in response to Justice Ruth Bader Ginsberg's statement in her dissent that the majority's approach would endanger the enforcement of Title VII and other anti-discrimination laws. Alito's statement did not mention

any distinction between cases brought by the EEOC and cases brought by individual employees.

Aimee Stephens – then known as Anthony Stephens – was hired by the Harris Funeral Home in October 2007. Stephens was identified as male on the Funeral Home's employment records. Stephens worked as a funeral director and embalmer for nearly six years under that name. On July 31, 2013, Stephens sent a letter to her boss, Thomas Rost (who owns over 90% of the stock in Harris Funeral Homes, Inc.) and to her co-workers, telling them about her female gender identity and her determination to transition. She wrote, "The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire." Stephens stated in the letter that eventually she would be undergoing "sex reassignment surgery."

The Funeral Home has a dress code specifying dark suits for men and "a suit or plain conservative dress" for women. In the letter, of course, Stephens indicated that she would wear "appropriate business attire" as a woman. In response to the letter, Rost fired Stephens on August 15, telling her, according to his deposition testimony, "Anthony, this is not going to work out. And that your services would no longer be needed here." Stephens testified that her understanding was that the way she proposed to dress was the immediate issue leading to her discharge. (In his opinion, Judge Cox pointed out that there was no discussion in the depositions about other aspects of Stephens' proposed appearance, such as grooming or hair style.)

Stephens filed a sex discrimination charge with the EEOC, alleging that she was fired due to her sex and gender identity. After investigating the charge, the EEOC concluded that there was "reasonable cause" to believe that Stephens' "allegations are true." The EEOC also concluded, as a result of its investigation, that the Funeral Home was discriminating against its female employees because it provided appropriate suits and ties for male employees but required female employees to assume all expenses of complying with the dress code.

After the EEOC concludes an investigation resulting in a finding of "probable cause" without any kind of settlement being achieved, the case can go in either of two directions. The agency can decide to initiate a lawsuit against the employer, or it can notify the employee, in a "right to sue" letter, that the agency will not be bringing a lawsuit, but that the employee may do so directly. In 2014, the EEOC had begun an effort to establish that gender identity claims can be litigated under Title VII, and chose this as one of its first cases for direct litigation, so the EEOC filed suit in the U.S. District Court for the Eastern District of Michigan on September 25, 2014.

As expected, the Funeral Home filed a motion to dismiss the case, claiming that gender identity discrimination claims are not covered under Title VII. Responding to the motion, Judge Cox agreed with the Funeral Home that gender identity discrimination claims are not covered, as such, but refused to dismiss the Title VII claim, finding that it was covered by 6th Circuit precedents involving transgender public employees who sued on a theory of "sex stereotyping," derived from a Supreme Court decision called *Price Waterhouse v. Hopkins*.

The EEOC's complaint had presented the court with alternative theories in this case, including sex-stereotyping. If an employer discharges an employee for failing to conform to the employer's stereotyped views as to how employees of a particular sex should dress, that may violate the ban on sex discrimination unless the employer can prove that dressing in a particular way is a bona fide occupational qualification necessary to perform the essential functions of the job. Such potential employer defenses are generally irrelevant in deciding a motion to dismiss a claim, which is based entirely on whether the allegations in the plaintiff's complaint are sufficient to "state a claim" under the statute, so Cox's decision denying the motion to dismiss did not address this potential defense. The Funeral Home did not mention any religious freedom claim under RFRA in its motion to dismiss, either, and it would have been irrelevant at that point.

After the motion to dismiss was denied, the case proceeded to discovery, during which the attorneys conducted depositions of the parties. After discovery, the EEOC and the Funeral Home filed motions for summary judgment, contending that there were no contested facts requiring trial and the court could rule as a matter of law. After the Funeral Home had lost its motion to dismiss, the Funeral Home got new legal representation from the Alliance Defending Freedom (ADF), a so-called Christian public interest law firm, which raised for the first time the claim that the Funeral Home was privileged to discharge Stephens regardless of Title VII because Mr. Rost's objection to her proposed mode of dress was based on his religious views against transgender status.

Rost asserted his belief that gender and biological sex are created by God and immutable. During discovery ADF presented evidence, not questioned by the EEOC, that this was Rost's sincere religious belief and, furthermore, that he had consistently expressed that he sought to operate this family-owned corporate business in line with his religious beliefs. There is relevant language about this on the Funeral Home's website and in its literature.

Judge Cox's August 18 ruling was presented in three parts. In the first, he found that the Funeral Home had violated Title VII by discharging Stephens over the anticipated dress code violation. In the view of Rost, Stephens was immutably a man, regardless of what Stephens asserted about her gender identity, and thus was required to dress as a man consistent with the business's dress code. There are many precedents under Title VII upholding the right of employers to adopt reasonable dress codes that do not impose greater burdens on employees of one or the other sex. The Funeral Home relied on these precedents, especially one from the 9th Circuit upholding the right of an employer to require women to wear makeup. Judge Cox noted, however, that a 6th Circuit

case had specifically differed with that 9th Circuit case, and had rejected the idea that a dress code would necessarily insulate an employer from a charge of sex stereotyping. Referring to the 6th Circuit's ruling in an early gender identity sex stereotyping case, Judge Cox wrote, "It appears unlikely that the *Smith* court would allow an employer like the employer in *Jesperson* [the 9th Circuit make-up case] to avoid liability for a Title VII sex-stereotyping claim simply by virtue of having put its gender-based stereotypes into a formal policy. Accordingly . . . the Court rejects the Funeral Home's sex-specific dress code defense to the Title VII sex-stereotyping claim asserted on behalf of Stephens [by the EEOC] in this case."

However, in the second part of his opinion, Judge Cox found that the employer should prevail based on a RFRA defense. The Funeral Home argued that requiring it to allow a funeral director identified as male in its employment records to wear clothing specified for a woman presented an unacceptable burden on Rost's right to operate his business consistent with his religious views. Assuming the sincerity of Rost's religious belief, which the EEOC did not challenge, Cox found that the EEOC had failed to show that requiring the Funeral Home to let Stephens dress as a woman was the "least restrictive alternative" to achieve the government's compelling interest in preventing sex stereotyping in the workplace.

Indeed, Cox pointed out, the EEOC's own theory of the Title VII case was that requiring a particular mode of dress based on gender was a form of sex stereotyping, so its argument that the Funeral Home had to let Stephens dress as a woman under the employer's dress code in order to achieve the EEOC's compelling interest in opposing sex-stereotyping was contradictory. Cox noted that the EEOC had not presented any evidence of an attempt to negotiate with the Funeral Home about some sort of gender-neutral dress code that might be acceptable to both Stephens and Rost, and there was deposition testimony by Rost suggesting that a pants suit might be an acceptable compromise. The real problem, from this point of view, was Rost's insistence that Stephens could not wear a skirt or dress.

Thus, the court concluded that the Funeral Home had a valid defense to the Title VII claim under RFRA, and granted summary judgment to the Funeral Home on that claim.

Cox found that the EEOC had failed to show that requiring the Funeral Home to let Stephens dress as a woman was the "least restrictive alternative" to achieve the government's compelling interest in preventing sex stereotyping in the workplace.

However, at the end of this part of the decision, responding to an argument by the EEOC that this ruling would severely undermine enforcement of Title VII, Cox pointed out that under 6th Circuit precedent the Funeral Home would not have been able to raise the RFRA defense if Stephens had filed suit against it directly. "In the vast majority of Title VII employment discrimination cases," he wrote, "the case is brought by the employee, not the EEOC. Accordingly, at least in the Sixth and Seventh Circuits, it appears that there cannot be a RFRA defense in a Title VII case brought by an employee against a private employer because that would be a case between private parties."

The 6th Circuit's opinion is based on a close reading of RFRA, which can be construed to extend only to cases in which the government is either the plaintiff or the defendant. That reading is controversial, but so far it seems to have been accepted in several of the circuits. Thus, although in this case the Funeral Home was able to raise a RFRA defense because the lawsuit was brought by the EEOC, in the vast majority of cases, such a defense would be unavailable to it.

Since Judge Cox had rejected all of the other defenses offered by the Funeral Home under Title VII, consequently, it seems that Stephens would have won on the motion for summary judgment had she sued directly, leaving RFRA out of the picture.

In the last part of the opinion, Judge Cox granted summary judgment to the Funeral Home on the EEOC's claim that the dress code violated Title VII because the employer provided suits for men but required women to purchase their own work clothes without subsidy. He found that this claim did not relate to the issues in Stephens' complaint, so it should have been dealt with in a separate lawsuit. In any event, it seems that the Funeral Home had reacted to the EEOC's investigation by changing its dress policy to provide financial assistance to female employees, so this issue might be moot.

Judge Cox was appointed to the court by President George W. Bush. He was previously a Michigan state court judge and before that had been a partner in a Michigan law firm. He is the older brother of former Michigan Attorney General Mike Cox.

Early press coverage of the ruling failed to note Judge Cox's explanation that the RFRA defense could be raised by the employer only in a case brought by the government, thus making it sound, incorrectly, as if Cox had ruled that employers with religious objections to transgender employees are exempt from any non-discrimination obligation under Title VII. Cox made clear that, at least in the 6th Circuit, the RFRA exemption is only available in an employment discrimination case as a defense to a lawsuit by the government. ■

Texas Federal Court Issues Nationwide Injunction to Stop Federal Enforcement of Title IX in Gender Identity Cases

A federal district judge in Wichita Falls, Texas, has issued a "nationwide preliminary injunction" against the Obama Administration's enforcement of Title IX of the Education Amendments Act to require schools to allow transgender students to use restroom facilities consistent with their gender identity. Judge Reed O'Connor's August 21 ruling, *State of Texas v. United States of America*, 2016 WL 4426495 (N.D. Texas), is directed specifically at a "Dear Colleague" letter dated May 13, 2016, which the Department of Justice (DOJ) and Department of Education (DOE) jointly sent to all the nation's schools subject to Title IX, advising them of how the government was now interpreting federal statutes forbidding discrimination "because of sex" to include gender identity discrimination cases. The letter advised recipients that failure to allow transgender students' access to facilities consistent with their gender identity would violate Title IX, endangering their eligibility for funding from the DOE.

The May 13 letter was sent out shortly after the U.S. Court of Appeals for the 4th Circuit, based in Richmond, had ruled in April that this interpretation by the Administration, previously stated in filings in a Virginia lawsuit, should be deferred to by the federal courts. *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016). That lawsuit is about the right of Gavin Grimm, a transgender boy, to use boys' restroom facilities at his Gloucester County, Virginia, high school. The ACLU had filed the case on Grimm's behalf after the school district adopted a rule forbidding students from using single-sex-designated facilities inconsistent with their "biological sex" as identified on their birth certificates, a rule similar to that adopted by North Carolina in its notorious H.B.2, which is itself now the subject of several lawsuits in the federal district courts in that state. After the 4th Circuit ruled, the federal district judge hearing that case, Robert Doumar, issued a preliminary injunction requiring that Grimm be allowed access to the boys' restrooms while the case is pending, and both Judge Doumar and the 4th Circuit Court of Appeals refused to stay that injunction. However, the U.S. Supreme Court voted 5-3 to grant the school district's request for a stay on August 3. Judge O'Connor prominently mentioned the Supreme Court's action in his opinion as helping to justify issuing his preliminary injunction, commenting that the case presents a question that the Supreme Court may be resolving this term. (See story above.)

Underlying this and related lawsuits is the Obama Administration's determination that federal laws banning sex discrimination should be broadly interpreted to ban discrimination because of gender identity or sexual orientation. The Administration adopted this position officially in a series of rulings by the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in the workplace. This interpretation was in line with prior decisions by several federal circuit courts, ruling in cases that had been brought by individual transgender plaintiffs to challenge discrimination under the Violence against Women Act (VAWA), the Fair Credit Act (FCA), and Title VII. These are all "remedial statutes" that traditionally should receive a liberal interpretation in order to achieve the policy goal of eliminating discrimination because of sex in areas subject to federal legislation. Although the EEOC and other federal agencies had rejected this broad interpretation repeatedly from the 1960s onward, transgender people began to make progress in the courts after the Supreme Court ruled in 1989 that sex-stereotyping by employers – disadvantaging employees because of their failure to comply with the employer's stereotyped view of how men and women should act, groom and dress – could be considered evidence of sex discrimination, in the case of *Price Waterhouse v. Hopkins*. While some of these courts continue to reject the view that gender identity discrimination, as such, is automatically illegal under these statutes, they have applied the sex-stereotype theory to uphold lawsuits by individual transgender plaintiffs, especially those who are discharged in response to their announcement that they will be transitioning or when they begin their transition process by dressing in their desired gender.

The Education Department built on this growing body of court rulings, as well as on the EEOC's rulings, when it became involved in cases where transgender students were litigating over restroom and locker room access. DOE first expressed this view formally in a letter it sent in connection with a lawsuit against an Illinois school district, participated in negotiating a settlement in that case under which the school district opened up restroom access, and then began to take a more active approach as more lawsuits emerged. By earlier this year DOE and DOJ were ready to push the issue nationwide after the 4th Circuit's ruling marked the first federal appellate acceptance of the argument that this was a reasonable interpretation of the existing regulation that allows school districts to provide separate facilities for boys and girls, so long as the facilities are comparable. DOE/DOJ argue that because the regulation does not specifically state how to resolve access issues for transgender students, it is ambiguous on the point and thus susceptible to a reasonable interpretation that is consistent with the EEOC's position on workplace discrimination and the rulings that have emerged from the federal courts under other sex discrimination statutes. Under a Supreme Court precedent, agency interpretations of ambiguous regulations should receive deference from the courts if those interpretations are reasonable.

The May 13 letter provoked consternation among officials in many states, most prominently Texas, where Attorney General Ken Paxton took the lead in forming a coalition of about a dozen states to file this joint lawsuit challenging the DOE/DOJ position. Paxton aimed to bring the case in the federal court in Wichita Falls before Judge O'Connor, an appointee of George

W. Bush who had previously issued a nationwide injunction against the Obama Administration's policy of deferring deportation of undocumented residents without criminal records and had also ruled to block an Obama Administration interpretation of the Family and Medical Leave Act favoring family leave for gay employees to care for same-sex partners. Paxton found a small school district in north Texas, Harrold Independent School District, which did not have any transgender students but nonetheless adopted a restrictive restroom access policy, to be a co-plaintiff in the case in order justify filing it in the Wichita Falls court. Shortly after Paxton filed this case, Nebraska Attorney General Doug Peterson put together another coalition of nine states to file a similar lawsuit in the federal district court in Nebraska early in July.

These cases rely heavily on an argument that was first proposed by Alliance Defending Freedom (ADF), the anti-gay "Christian" public interest law firm, in a lawsuit it brought in May on behalf of some parents and students challenging the settlement of the Illinois case, and a "copycat" lawsuit filed by ADF in North Carolina. The plaintiffs argue that the DOE/DOJ position is not merely an "interpretation" of existing statutory and regulatory requirements under Title IX, but rather is a new "legislative rule," imposing legal obligations and liabilities on school districts. As such, they argue, it cannot simply be adopted in a "guidance" or "letter" but must go through the formal process for adopting new regulations under the Administrative Procedure Act. This would require the publication of the proposed rule in the Federal Register, after which interested parties could submit written comments, perhaps one or more public hearings being held around the country to receive more feedback from interested parties, and then publication of a final rule, which would be subject to judicial review in a case filed in a U.S. Court of Appeals. (This is referred to as the "notice and comment" process.) Neither DOE nor any other agency that has adopted this new interpretation of "sex discrimination" has gone through this administrative rulemaking process. Additionally, of course, the plaintiffs contend that this new rule is not a legitimate interpretation of Title IX, because Congress did not contemplate this application of the law when it was enacted in the 1970s.

In his August 21 ruling, O'Connor concluded that the plaintiffs had met their burden to show that they would likely succeed on the merits of their claim, a necessary finding to support a preliminary injunction. As part of this ruling, he rejected the 4th Circuit's conclusion that the existing statute and regulations are ambiguous and thus subject to administrative interpretation. He found it clear based on legislative history that Congress was not contemplating outlawing gender identity discrimination when it passed sex discrimination laws, and that the existing regulation allowing schools to provide separate facilities for boys and girls was intended to protect student privacy against being exposed in circumstances of undress to students of the opposite sex. In the absence of ambiguity, he found, existing precedents do not require the courts to defer to the agency's interpretation. He found that the other prerequisites for injunctive relief had been met, because he concluded that if the enforcement was not enjoined, school districts would be put to the burden of either changing their facilities access policies or potentially losing federal money. He rejected the government's argument that the lack of any imminent enforcement activity in the plaintiff states made this purely hypothetical. After all, the federal government has affirmatively sued North Carolina to enjoin enforcement of the facilities access restrictions in H.B.2.

Much of O'Connor's decision focuses on the question whether the plaintiffs had standing to challenge the DOE/DOJ guidance in a district court proceeding and whether the court had jurisdiction over the challenge. He found support for his ruling on these points in a recent decision by the 5th Circuit Court of Appeals (which has appellate jurisdiction over cases from Texas) in a lawsuit that Texas brought against the EEOC, challenging a "guidance" about employer consideration of applicant arrest records in deciding whether to hire people. *Texas v. EEOC*, 2016 WL 3524242. Noting disparate enforcement of criminal laws against people of color, the EEOC took the position that reliance on arrest records has a disparate impact on people of color and thus potentially violates Title VII. A 5th Circuit panel divided 2-1 in determining that the state had standing to maintain the lawsuit and that the district court had jurisdiction to rule on the case. This suggests the likelihood that the Administration may have difficulty persuading the 5th Circuit to overrule O'Connor's preliminary injunction on procedural grounds if it seeks to appeal the August 22 ruling.

The Administration argued in this case that any preliminary injunction by O'Connor should be narrowed geographically to the states in the 5th Circuit, even though co-plaintiffs included states in several other circuits, but O'Connor rejected this argument, agreeing with the plaintiffs that the injunction should be nationwide. He emphasized the regulation allowing schools to have sex-segregated restroom facilities. "As the separate facilities provision in Section 106.33 is permissive," he wrote, "states that authorize schools to define sex to include gender identity for purposes of providing separate restrooms, locker rooms, showers, and other intimate facilities will not be impacted" by the injunction. "Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognized the permissive nature" of the regulation. "It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate." This reference is directed mainly to the plethora of lawsuits pending in North Carolina, in which the federal government is contending that H.B.2 violates Title IX and Title VII, and in which on August 26 (see below) a U.S. District Judge issued a preliminary injunction requiring the University of North Carolina to refrain from enforcing a Section 1 of H.B.2, which would prohibit the three transgender plaintiffs in the case from using campus restroom facilities consistent with their gender identity. ■

District Judge Enjoins Enforcement of H.B. 2 against Transgender Plaintiffs by the University of North Carolina

U.S. District Judge Thomas D. Schroeder granted a motion for preliminary injunction brought by attorneys for three transgender plaintiffs asserting a Title IX challenge to North Carolina's "bathroom bill," H.B.2. *Carcaño v. McCrory*, 2016 U.S. Dist. LEXIS 114605, 2016 WL 4508192 (M.D. N.C., August 26, 2016). Finding that the plaintiffs were likely to succeed on the merits of their Title IX challenge in his district court because he was bound by the 4th Circuit Court of Appeals' ruling in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (2016), to defer to the Department of Education's interpretation of Title IX as banning gender identity discrimination and requiring restroom access consistent with gender identity by transgender students, Judge Schroeder concluded that satisfaction of the first test for preliminary injunctive relief, likelihood of success on the merits under 4th Circuit case law, was easily satisfied. Judge Schroeder noted that the Supreme Court has stayed a preliminary injunction that was issued in the *G.G.* case while the school district petitions the Supreme Court to review the 4th Circuit's ruling, but observed that the stay did not vacate the 4th Circuit's decision, so the requirement for deferral remains the "law of the circuit," binding on the district court.

Lambda Legal announced on Aug. 29 that an attempt would be made to get the court to broaden its preliminary injunction so as to protect all transgender people in North Carolina from the "bathroom" provision in H.B. 2, not just the named plaintiffs in this case. The notice of appeal filed with the district court, however, does not spell out the grounds for the appeal, which could relate to the scope of the injunctive relief or, just as well, to the court's refusal to premise the preliminary injunctive relief on a finding of likelihood of success on the constitutional claims. With this appeal pending, however, Texas Attorney General Ken Paxton, having just won a preliminary injunction against enforcement of Title IX by the federal government from U.S. District Judge Reed O'Connor (N.D. Tex.), filed an *amicus* brief with Judge Schroeder on August 31, urging him to stay his preliminary injunction pending the Supreme Court's decision on whether to grant the Gloucester County School District's petition seeking review of the 4th Circuit's ruling in *G.G. v. Gloucester County School District*. The amicus brief was filed on behalf of the assemblage of plaintiffs (state attorneys general and governors) who are co-plaintiffs in Paxton's case. This is odd. One would think a request for a stay would come from the only party affected by the injunction, the University of North Carolina, but that institution announced that it was not enforcing the bathroom provision in any event and saw no need to appeal or seek a stay of the injunction. Which make Paxton and his crowd officious intermeddlers . . . .

This case arose after the North Carolina legislature held a special session on March 23, 2016, for the specific purpose of enacting legislation to prevent portions of a recently-passed Charlotte civil rights ordinance from going into effect on April 1. Most of the legislative comment was directed to the city's ban on gender identity discrimination in places of public accommodation, which – according to some interpretations of the ordinance – would require businesses and state agencies to allow persons to use whichever restroom or locker room facilities they desired, regardless of their "biological sex." (This was a distortion of the ordinance which, properly construed, would require public accommodations offering restroom facilities to make them available to transgender individuals without discrimination.) Proponents of the "emergency" bill, stressing their concern to protection the privacy and safety of women and children from male predators who might declare themselves female in order to get access to female-designated facilities for nefarious purposes, secured passage of Section 1 of H.B. 2, the "bathroom bill" provision, which states that any restroom or similar single-sex designated facility operated by the state government (including subsidiary establishments such as public schools and the state university campuses) must designate multiple-user facilities as male or female and limit access according to the sex indicated on individuals' birth certificates, labeled "biological sex" in the statute.

Another provision of the law preempted local civil rights legislation on categories not covered by state law, and prohibited lawsuits to enforce the state's civil rights law. This would effectively supersede local ordinances, such as the recently-enacted Charlotte ordinance, wiping out its ban on sexual orientation and gender identity discrimination as well as several other categories covered by Charlotte but not by the rather narrow state civil rights law, such as veteran status. This had the effect of lifting Charlotte's mandate that places of public accommodation not discriminate in their restroom facilities based on gender identity or sexual orientation, and limited the ordinance's sex discrimination prohibition to distinctions based on "biological sex." Although private sector facilities could, if their owners desired, adopt policies accommodating transgender individuals, they would not have to do so.

A furious round of litigation ensued, with cases brought in two of the three North Carolina federal districts by a variety of plaintiffs, including the three individuals in *Carcaño* (represented by the ACLU of North Carolina and Lambda Legal), who are all transgender people covered by Title IX by virtue of being students or employees of the University of North Carolina. Equality North Carolina, a statewide lobbying group, is co-plaintiff in the case. Governor McCrory and state Republican legislative leaders sued the federal government, seeking declaratory judgments that H.B. 2 did not violate federal sex discrimination laws, while the Justice Department sued the state officials,

seeking a declaration that H.B. 2 *did* violate federal sex discrimination laws and the Constitution. A religiously-oriented firm, Alliance Defending Freedom, sued on behalf of parents and students challenging the validity of the Justice Department's adoption of its Guidelines on Title IX compliance. There has been some consolidation of the lawsuits, which are at various stages of pretrial maneuvering, discovery and motion practice. Judge Schroeder's ruling responded solely to a motion for preliminary relief on behalf of the three plaintiffs in the case against UNC, Governor McCrory and other state officials, including Attorney General Roy Cooper, a candidate for governor against McCrory who is refusing to defend H.B. 2, requiring McCrory to resort to other defense counsel.

The University of North Carolina's reaction to the passage of H.B. 2 has been curious to watch. At first University President Margaret Spellings announced that UNC was bound by the state law and would comply with it. Then, after a storm of criticism and the filing of lawsuits, Spellings pointed out that H.B. 2 had no enforcement provisions and that the University would not actively enforce it. Indeed, in the context of this preliminary injunction motion, the state argued that there was no need for an injunction because the University was not interfering with the three plaintiffs' use of restroom facilities consistent with their gender identity. Thus, they argued, there was no harm to the plaintiffs and no reason to issue an order compelling the University not to enforce the bathroom provisions. Judge Schroeder rejected this argument, pointing out that "UNC's pronouncements are sufficient to establish a justiciable case or controversy. The university has repeatedly indicated that it will – indeed, it must – comply with state law. Although UNC has not changed the words and symbols on its sex-segregated facilities, the meaning of those words and symbols has changed as a result of [the bathroom provisions], and UNC has no legal authority to tell its students or employees otherwise." In light of those provisions, he wrote, "the sex-segregated signs deny permission to those whose birth certificates fail to identify them as a match. UNC can avoid this result only by either (1) openly defying the law, which it has no legal authority to do, or (2) ordering that all bathrooms, showers, and other similar facilities on its campuses be designated as single occupancy, gender-neutral facilities. Understandably, UNC has chosen to do neither." Since UNC has not expressly given transgender students and staff permission to use gender-identity-consistent facilities and has acknowledged that H.B. 2 is "the law of the state," there is a live legal controversy and a basis to rule on the preliminary injunction motion.

Perhaps the key factual finding of Judge Schroeder's very lengthy written opinion was that the state had failed to show that allowing transgender people to use restroom facilities consistent with their gender identity posed any significant risk of harm to other users of those facilities, and he also found little support for the state's privacy claims, although he did not dispute the sincerity with which those claims were put forward by legislators. Indeed, as described by the judge, the state has been rather lax in providing any factual basis for its safety and privacy claims in litigating on this motion, and had even failed until rather late in the process to provide a transcript of the legislative proceedings, leaving the court pretty much in the dark as to the articulated purposes for passing the bathroom provision. According to the judge, the only factual submission by the state consisted of some newspaper clippings about men in other states who had recently intruded into women's restrooms in order to make a political point. This, of course, had nothing to do with transgender people or North Carolina. The judge also pointed out that North Carolina has long had criminal laws in place that would protect the safety and privacy interests of people using public restroom facilities. In reality, these "justifications" showed that the bathroom provision was unnecessary. For purposes of balancing the interests of the parties in deciding whether a preliminary injunction should be issued, Schroeder concluded that the harm to plaintiffs in deterring them from using appropriate restroom facilities was greater than any harm to defendants in granting the requested injunction, and that the public interest weighed in favor of allowing these three plaintiffs to use restroom facilities consistent with their gender identities without any fear of prosecution for trespassing. (Since the bathroom provision has no explicit enforcement mechanism, Judge Schroeder found, its limited effect is to back up the criminal trespassing law by, for example, designating a "men's room" as being off-limits to a transgender man.)

However, Judge Schroeder, commenting that the constitutional equal protection and due process claims asserted by the plaintiffs were less well developed in the motion papers before him, refused to premise his preliminary injunction on a finding that the plaintiffs were likely to succeed in proving that H.B. 2's bathroom provision violates the 14th Amendment. Accepting for purposes of analysis that the plaintiffs were asserting a sex discrimination claim that invoked "heightened scrutiny" of the state's justification for the bathroom provision, he concluded that it was not clear that the state could not meet that test, referring to 4th Circuit precedents on individual privacy and the state's interest in protecting the individual privacy of users of public restroom facilities. He reached a similar conclusion regarding the due process arguments, putting off any ruling on them to the fall when he will hold a hearing on the merits. There will be pre-trial motions to decide in the other cases that were consolidated with this one for purposes of judicial efficiency, so this ruling was not the last word on preliminary relief or on the constitutional claims.

Judge Schroeder explained that his injunction directly protects only the three plaintiffs and not all transgender students and staff at UNC. "The Title IX claim currently before the court is brought by the individual transgender Plaintiffs on their own behalf," he wrote; "the current complaint asserts no claim for class relief or any Title IX claim by ACLU-NC on behalf of its members. Consequently, the relief granted now is as to the individual transgender Plaintiffs." Despite that

technicality, of course, this preliminary injunction puts the University on notice that any action to exclude transgender students or staff from restroom facilities consistent with their gender identity has already been determined by the district court to be a likely violation of Title IX, which could deter enforcement more broadly. Given the University's position in arguing this motion that it was not undertaking enforcement activity under the bathroom bill anyway, there was no immediate need for a broader preliminary injunction in any event.

Judge Schroeder was appointed to the court in 2007 by President George W. Bush.

On September 3, the Associated Press reported that U.S. Magistrate Judge Joi Elizabeth Peake of the Middle District of Virginia had granted a request from the state government's attorneys to delay the trial in these consolidated cases on the chance that the Supreme Court may grant the Gloucester County School District's petition for certiorari in the *G.G.* case. The trial, which was to take place later this fall, will now be pushed back to next spring. Given the difficulties of scheduling civil trial time, especially for trials that may consolidate several cases, that makes it likely that even if the Supreme Court denies certiorari in *G.G.*, the trial on H.B.2 will not be taking place any time soon.

On July 25, Judge Schroeder denied a motion by Steven-Glenn Johnson, a New Bern, North Carolina, father and expecting grandfather, to intervene as a defendant *pro se* in the action brought by the federal government against the state. Johnson argued that the state officials defending H.B. 2 would not adequately represent his interests as a father and grandfather because they are not legitimate representatives of the state, as they "failed to perform a proper oath of office and therefore lack constitutional authority." Judge Schroeder found Johnson's arguments to be frivolous and denied his alternative motions to intervene as of right or by permission of the court. *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 96478, 2016 WL 4005839 (M.D. N.C., July 25, 2016). ■

Federal District Court Rejects Kansas' Narrow Interpretation of *Obergefell* Decision

U.S. District Judge Daniel D. Crabtree, who had ruled on November 4, 2014, that the Kansas constitutional amendment and statutes banning same-sex marriage were unconstitutional, has issued a final ruling in that case, *Marie v. Mosier*, 2016 WL 3951744, 2016 U.S. Dist. LEXIS 96245 (D. Kan., July 22, 2016), effectively finding that Kansas officials cannot be trusted to comply voluntarily with the Supreme Court's marriage equality ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), without the prod of an injunction that would subject them to contempt proceedings if they fail to comply fully. In light of the initial refusal by the state to issue appropriate birth certificates for children of lesbian couples, and continuing ambiguity about how state officials will handle such situations, the court rejected the state's argument that the lawsuit should be dismissed as "moot" or that its prior rulings should be vacated as unnecessarily in light of *Obergefell*.

When Judge Crabtree issued his preliminary injunction in 2014, the 10th Circuit Court of Appeals, which has jurisdiction over Kansas, had already issued rulings prohibiting Oklahoma and Utah from enforcing their laws against same-sex marriage, and the U.S. Supreme Court had refused to review those rulings on October 6, 2014, so they had gone into effect. Shortly afterward, however, the 6th Circuit had ruled against marriage equality, and in January 2015 the Supreme Court announced it would review that decision. On June 26, 2015, the Supreme Court ruled in *Obergefell* that same-sex couples were entitled to the *same* marriage rights under state law as different-sex couples. After *Obergefell*, the Kansas defendants moved to dismiss *Marie v. Mosier* as "moot," but the plaintiffs moved instead to have the court issue a declaration that the Kansas ban on marriage equality was unconstitutional and to issue an injunction requiring the state to comply with *Obergefell*. This responded to an argument that was being made by some marriage equality resisters that the Supreme Court's decision applied only to states in the 6th Circuit, and to the announced opposition to the Supreme Court's decision by Kansas Governor Sam Brownback and other Kansas officials. The plaintiffs feared that Kansas would not give full effect to the "equality" requirement of the Supreme Court's decision, despite assurances by the state's attorney that it would do so.

At that time, Judge Crabtree decided to give the state the benefit of the doubt. On August 10, 2015, he issued a declaratory judgment, but withheld injunctive relief to give the state time to comply voluntarily. Voluntary compliance did follow in many respects, such as issuing marriage licenses, but the plaintiffs responded to the state's contention that it had complied voluntarily by bringing to the court's attention two instances in which state officials had refused to issue birth certificates listing both mothers of children born to married lesbian couples. Indeed, in one of those cases the mothers had gone into state court to get an order to issue an appropriate birth certificate, and the state initially resisted the state court order. Subsequently both of those cases were resolved by the state issuing appropriate birth certificates, but contradictory statements issued from officials of the Kansas Department of Health and Environment, one suggesting that in future same-sex couples would be treated the same as different-sex couples when children were conceived through donor insemination, but the other stating that same-sex couples would have to alert the department in advance so that a case-by-case determination could be made about whether a birth certificate listing both women would be issued.

Judge Crabtree concluded that the case was not "moot" and an injunction

was necessary. In this case, there was clear evidence that state officials were complying reluctantly with *Obergefell*, sometimes only under the prodding of court orders, so the court could not conclude that there was no longer an issue of whether same-sex couples in Kansas could expect to receive equal treatment from all instrumentalities of the state government in all circumstances.

"Exercising its remedial discretion," wrote Crabtree, "the court has decided to grant a permanent injunction forbidding defendants (and their successors) from enforcing or applying any aspect of Kansas law that treats same-sex married couples differently than opposite-sex married couples. As the court noted last August, a significant value exists in giving public officials a reasonable opportunity to comply voluntarily with a mandate by the Supreme Court. The record here shows that defendants have said they will comply with *Obergefell* and, in many instances, they have acted to implement the changes that compliance requires. But even after *Obergefell* and even after this court's declaratory judgment, the record also demonstrated one defendant's department deliberately refused to treat two same-sex married couples in the same fashion it routinely treats opposite-sex couples. This disparate treatment did not result from oversight, inadvertence, or decisions made at lower levels of the department. To the contrary, the conduct involved officials who the court would expect to know about *Obergefell*, this court's preliminary injunction [from 2014], and the defendants' assurances that they intended to comply with *Obergefell*. This conduct required one same-sex couple to file an action in state court to get something that an opposite-sex couple would have received as a matter of course."

In reaching this conclusion, Judge Crabtree listed the decisions by judges in numerous other states who issued permanent injunctions against those states after the *Obergefell* decision upon finding that the cases were not "moot" because of actual or potential failures of those states fully to comply with *Obergefell*'s equality mandate. These included decisions from Alabama, Florida, Nebraska, Arkansas, South Dakota, Idaho, and Louisiana. The only court to reach a contrary conclusion was in South Carolina, where the state government had quickly fallen into line after the Supreme Court refused to review the 4th Circuit's decision in the Virginia marriage equality case. Given the birth certificate contretemps in Kansas, the case was clearly distinguishable.

Crabtree sympathized with the plaintiffs' concern about "whether defendants will comply voluntarily with *Obergefell* without the judicial oversight that an injunction permits." His response to this concern was to provide that the court will maintain supervisory oversight for three years, which means that at the first sign that a government official in Kansas is denying equal treatment to a same-sex couple, direct application can be made to Judge Crabtree for relief without the need to run into state court and start a new lawsuit. "The court finds that permanent injunctive relief could prevent future same-sex married persons from having to do what the Smiths had to do," he wrote: "initiate a separate lawsuit and incur expenses to secure the equal treatment that *Obergefell* promises."

In rejecting the defendants' argument that *Obergefell* was a narrow ruling that did not address the issue of birth certificates for children born to same-sex couples, Crabtree pointed out that Justice Anthony Kennedy's opinion for the Supreme Court specifically mentioned this issue! "The Supreme Court found that the rights, benefits, and responsibilities of marital status include 'taxation; inheritance and property rights; spousal privilege; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; health insurance; and child custody, support, and visitation rules.'" By quoting from the *Obergefell* opinion, Crabtree made clear that Kansas may not impose any different treatment on same-sex couples regarding any of these issues without running afoul of *Obergefell*.

He also rejected the bizarre argument made by Kansas that one lesbian married couple that encountered birth certificate issues was not entitled to recognition of their marriage under *Obergefell* because they were married in Canada and the Full Faith and Credit Clause refers on to other states. Judge Crabtree pointed out that Kansas's own marriage recognition statute provides that "all marriages which would be valid by the law of the country in which the same are contracted, shall be valid in all courts and places in this state." If Kansas automatically recognizes different-sex marriages contracted in other countries, *Obergefell*'s equality requirement would mandate application of this rule to same-sex marriages.

"In sum," wrote Crabtree, "defendants' argument that *Obergefell*'s holding was narrow is unpersuasive," and he quoted Justice Kennedy's comment that a "slower, case-by-case determination of the required availability of specific public benefits to same-sex couples would deny gays and lesbians many rights and responsibilities intertwined with marriage." "Perhaps defendants will provide the voluntary compliance with *Obergefell* that they promise," Crabtree wrote. "But the court cannot assign plaintiffs' constitutional rights to such uncertainty. In short, defendants' assurances of future compliance do not provide the reliability that those rights deserve."

The last issue before the court was an award of attorneys' fees to the plaintiffs. He ordered them to submit their fee bill promptly, and if Kansas disputes the amount (which they will likely do, since the state's budget has been decimated by Governor Brownback's unrealistic tax-cutting measures, which have led, among other things, to a crisis in school funding that caused a confrontation with the state's Supreme Court), Judge Crabtree will address the issue promptly.

Plaintiffs are represented by a large team of lawyers, many employed by or affiliated with the American Civil Liberties Union's Kansas affiliate and the ACLU's LGBT Project and pro bono attorneys from Dentons US LLP. ■

2nd Circuit Remands CAT Claim by Gay Jamaican Man

A three-judge panel of the U.S. Court of Appeals for the 2nd Circuit has remanded to the Board of Immigration Appeals (BIA) for reconsideration a claim for relief under the Convention Against Torture (CAT) by a gay man from Jamaica who was subject to deportation based on some state law convictions in Connecticut. *Walker v. Lynch*, 2016 WL 4191844, 2016 U.S. App. LEXIS 14554 (August 9, 2016). The panel, consisting of Circuit Judges Pierre N. Leval, Reena Raggi, and Raymond J. Lohier, Jr., found that the BIA had misapplied the law and inexplicably failed to respond to strong evidence from the U.S. State Department's Human Rights Report on Jamaica as well as from a former leader of a Jamaican gay rights group about the dangers facing men known to be gay in Jamaica.

The court designated this decision as an "unpublished summary order," so it does not include a detailed account of what the petitioner claimed to have happened to him growing up in Jamaica, but it mentions his claim that he was raped by an uncle, who allegedly threatened to "slit his throat for revealing the rapes and spreading rumors" that the uncle is gay, and that a cousin (the son of this uncle) had threatened to kill him "for levying accusations of homosexuality" at the cousin's brother and father, who were "the two individuals responsible for his childhood sexual traumas." The petitioner claimed that he was widely known to be gay in Jamaica.

The petitioner is resorting to a CAT claim because his criminal record in the U.S. precludes an application for asylum or withholding of removal. A non-citizen can be deported by the government, even if there is a probability that he would be subjected to persecution in his home country, if he is convicted of a serious crime in the U.S. The court in this case is not specific about the crimes for which the petitioner was convicted, merely commenting in passing that he was found to be removable "by reason of having been convicted of, inter alia, an aggravated felony and a controlled substance offense." In order to claim protection against deportation to his home country under the CAT, the petitioner has to show that (1) "it is more likely than not that he or she would be tortured if removed to the proposed country of removal" and (2) "government officials would inflict such torture, or otherwise acquiesce in it." In this context, torture is defined as being "subjected to acts 'by which severe pain or suffering is intentionally inflicted for any reason based on discrimination of any kind.'" Acquiescence by the government describes a situation where the government "knows of or is willfully blind to anticipated acts of torture and breaches its legal responsibility to prevent it."

The main evidence presented to the Immigration Judge (IJ) in addition to the petitioner's credible claims about sexual assault and threats from relatives was a 2013 Human Rights Report published by the U.S. State Department, the kind of document that is supposed to carry great weight in these kinds of proceedings. The court wrote that this document "states that, in Jamaica – where laws criminalize 'acts of gross indecency … between persons of the same sex' – lesbian, gay, bisexual, and transgender ("LGBT") individuals suffer 'serious human rights abuses, including assault with deadly weapons, 'corrective rape' of women accused of being lesbians, arbitrary detention, mob attacks, stabbings, harassment . . . by hospital and prison staff, and targeted shootings." The Report "further states that 'brutality against [gay men], primarily by private citizens, was widespread in the community,' and that 'gay men hesitated to report such incidents against them because of fear for their physical well-being.' Moreover, 'although individual police officers expressed sympathy for the plight of the LGBT community and worked to prevent and resolve instances of abuse, the police force in general did not recognize the extent and seriousness of violence against members of the LGBT community, and failed to investigate such incidents."

The court also referred to a letter from "the former director of the Jamaica Forum for Lesbians, All-Sexuals & Gays ('J-FLAG')," placed in evidence before the IJ, which stated that while "there have been improvements in the overall response of the police in the past year, the police frequently refuse to investigate crimes against gay individuals." As a result, said the letter, "gay Jamaicans are not simply subject to violent persecution, but also are understood as safe targets for robbery, extortion and murder because of their outcast status."

The IJ concluded based on this evidentiary record that the petitioner had failed to show "government acquiescence" because there was "insufficient evidence that the Jamaican government 'indirectly condones the torture' of gay individuals," and the BIA approved this based on its conclusion that the evidence "does not describe whether the failure to investigate in most cases was purposeful and because of the victim's sexuality." The 2nd Circuit panel found that the IJ's statement "appears to have 'totally overlooked' the contrary record evidence, and the BIA's statement "appears to have misapplied the applicable standard by 'conflating' the CAT's 'specific intent requirement with the concept of state acquiescence." In other words, it is not necessary for the petitioner to show that the government wants people to torture gays or intends to leave gays at the mercy of the mob; it is enough to show that the government "know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." In short, if gays in Jamaica can't depend on the government to bring to bear reasonable law enforcement efforts to combat anti-gay persecution amidst an environment that is extreme hostile to gay people, the standard set by the CAT has been met.

In this regard, the CAT standard resembles the "deliberate indifference"

standard the courts use in 8th Amendment cases challenging prison living conditions that pose serious risk of harm to inmates. The plaintiff has to show that government officials are aware of the situation and effectively refusing to deal with it, leaving the plaintiff in danger of serious harm. This sounds very much like what the State Department found in Jamaica. (As a matter of political note, it is worth observing that during the Bush Administration the State Department itself seemed willfully blind to anti-gay persecution in many of its Human Rights Reports, while the Obama Administration, with Hillary Clinton and John Kerry heading the State Department, provided much more inclusive and accurate reporting about anti-gay conditions around the world.)

"Accordingly," wrote the court, "we remand for the agency to consider, consistent with the controlling precedent referenced, whether it is more likely than not that [Petitioner] will be tortured if removed to Jamaica and that the government will acquiesce in such torture, particularly in light of (1) the evidence discussed herein regarding the general failure of the Jamaican police to investigate crimes against gay individuals, and (2) [Petitioner's] testimony regarding threats he received from family members."

The ruling is an effective bench-slap against the BIA for ignoring the strongly-worded State Department Human Rights report on Jamaica – a report that is regularly confirmed by press accounts of anti-gay activity in the country – and a major victory for the Petitioner's attorney on appeal, Jon Bauer of the Legal Clinic at the University of Connecticut School of Law. New research from faculty of the University of London, published in the Journal of Sex Research recently, found that as a result of efforts by LGBT rights advocates in Jamaica, the public has become more reception to law reform efforts (sodomy law repeal, anti-discrimination protection), but that over recent years heterosexual Jamaicans have become "more likely to say they do not trust or like gay people, or that they would threaten, hurt and insult them." Still lots of work to do there. ■

9th Circuit Rejects Religious Freedom Challenge to California Law Banning Conversion Therapy for Minors

California's S.B. 1172, which prohibits state-licensed mental health providers from engaging in "sexual orientation change efforts" (commonly known as "conversion therapy") with minors, withstood another 1st Amendment challenge in a new decision by the U.S. Court of Appeals for the 9th Circuit in the case of *Welch v. Brown*, 2016 U.S. App. LEXIS 15444, 2016 WL 4437617, announced on August 23.

A unanimous three-judge panel of the court of appeals affirmed a ruling by U.S. District Judge William B. Shubb that the law does not violate the religious freedom rights of mental health providers who wish to provide such "therapy" to minors or of their potential patients.

In a previous ruling, the court had rejected the plaintiffs' claim that the law violated their free speech rights. They had argued that such therapy mainly involves talking, making the law an impermissible abridgement of freedom of speech. The court had countered that this was a regulation of health care practice, which is within the traditional powers of the state. As such, the court found that the state had a rational basis for imposing this regulation, in light of evidence in the legislative record of the harms that such therapy could do to minors.

In this case, the plaintiffs were arguing that their 1st Amendment religious freedom claim required the court to apply strict scrutiny to the law, putting the burden on the state to show that the law was narrowly-tailored to achieve a compelling state interest. They contended that the law "excessively entangles the State with religion," but the court, in an opinion by Circuit Judge Susan P. Graber, said that this argument "rests on a misconception of the scope of SB 1172," rejecting the plaintiffs' claims that the law would prohibit "certain prayers during religious services." Graber pointed out that the law "regulates conduct only within the confines of the counselor-client relationship" and doesn't apply to clergy (even if they also happen to hold a state mental health practitioner license) when they are carrying out clerical functions.

"SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship," she wrote, a conclusion that "flows primarily from the text of the law." Under a well-established doctrine called "constitutional avoidance," the court was required not to interpret the statute in the manner suggested by the plaintiffs. This conclusion was bolstered by legislative history, ironically submitted by the plaintiffs, which showed the narrow application intended by the legislature. Thus, "Plaintiffs are in no practical danger of enforcement outside the confines of the counselor-client relationship."

Plaintiffs also advanced an Establishment Clause argument, contending that the measure has a principal or primary purpose of "inhibiting religion." Graber countered with the legislature's stated purpose to "protect the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth, and to protect its minors against exposure to serious harm cause by" this "therapy." The court found that the "operative provisions" of the statute are "fully consistent with that secular purpose." A law that has a secular purpose with a possible incidental effect on religious practice is not subject to strict scrutiny under Supreme Court precedents. Again, the court pointed out, religious leaders acting in their capacity as clergy are not affected by this law.

The court also rejected the contention that a minor's religiously-motivated intent in seeking such therapy would be thwarted by the law, thus impeding their free exercise of religion. The court pointed out that "minors who seek to change their sexual orientation – for religious or secular reasons – are free to do so on their own and with the help of friends, family, and religious leaders.

If they prefer to obtain such assistance from a state-licensed mental health provider acting within the confines of a counselor-client relationship, they can do so when they turn 18."

The court acknowledged that a law "aimed only at persons with religious motivations" could raise constitutional concerns, but that was not this law. The court said that the evidence of legislative history "falls far short of demonstrating that the primary intended effect of SB 1172 was to inhibit religion," since the legislative hearing record was replete with evidence from professional associations about the harmful effects of SOCE therapy, regardless of the motivation of minors in seeking it out. Referring in particularly to an American Psychiatric Association Task Force Report, Judge Graber wrote, "Although the report concluded that those who seek SOCE 'tend' to have strong religious views, the report is replete with references to non-religious motivations, such as social stigma and the desire to live in accordance with 'personal' values." Thus, wrote the court, "an informed and reasonable observer would conclude that the 'primary effect' of SB 1172 is not the inhibition (or endorsement) of religion."

The court also rejected the argument that the law failed the requirement that government be "neutral" concerning religion and religious controversies. It also rejected the argument that prohibiting this treatment violates the privacy or liberty interests of the practitioners or their potential patients, quoting from a prior 9th Circuit ruling, *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000): "We have held that 'substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.'"

Attorneys from the Pacific Justice Institute, a conservative legal organization, represent the plaintiffs. The statute was defended by the office of California Attorney General Kamala D. Harris. Attorneys from the National Center for Lesbian Rights, with pro bono assistance from attorneys at Munger, Tolles & Olson LLP, filed an amicus brief defending the statute on behalf of Equality California, a state-wide LGBT rights political organization. ■

Illinois Supreme Court Rejects Equitable Distribution Rights in Breakup of Unmarried Lesbian Couple

Reversing a ruling by the state's court of appeals, the Illinois Supreme Court ruled on August 18 that the state's statutory prohibition of common law marriage, enacted a century ago, still "precludes unmarried cohabitants [including same-sex couples] from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties." Although two different panels of the state's intermediate court of appeals have rejected this view as outmoded, in this and another case recently reported (*In re Allen*, 2016 Il. App. (1st) 151620 (App. Ct. Il., 1st Dist., Aug. 16, 2016)), the Supreme Court voted 5-2 in *Blumenthal v. Brewer*, 2016 IL 118781, 2016 Ill. LEXIS 763, to reaffirm a 1979 decision that had refused to follow the then-recent trend in some other states to allow "implied contract" and other common law claims when an unmarried couple breaks up.

Justice Lloyd Karmier wrote the opinion for the court. Justice Mary Jane Theis dissented in relevant part, joined by Justice Anne M. Burke.

Dr. Jane E. Blumenthal and Judge Eileen M. Brewer had lived together since 1981 as domestic partners, sharing a home, raising children, and pooling their resources to buy property and to invest in a medical practice for Dr. Blumenthal. They broke up in 2010, before Illinois passed a civil union law and, of course, before the ultimate arrival of marriage equality in Illinois. At the time of their breakup, Dr. Blumenthal filed a petition in the circuit court in Chicago for "a fair division and partition of property to be made between the parties according to their respective rights and interests," including the possibility that the property be sold and the proceeds divided "according to their respective rights or interests in such proceeds as ascertained and declared" by the court.

Brewer responded with a counterclaim, reciting the women's past relationship as "identical in every essential way to that of a married couple," asking the court in effect to handle the assets like the joint assets of a married couple, taking into account such things as the value of the medical practice (as would be done in a divorce case involving a doctor) and the value of services rendered and decisions made within the scope of the relationship, such as Brewer having sublimated her own career in supporting Dr. Blumenthal in establishing her medical practice.

The trial court rejected Brewer's claim and divided up the real property along non-marital equitable lines based on the financial contributions for acquisition of the property. That court relied on the Illinois Supreme Court's 1979 ruling in *Hewitt v. Hewitt*, 77 Ill. 2d 49, which had rejected a similar claim by a woman who had cohabitated with her male partner for many years and sought to be treated like a spouse in distributing assets upon their break-up. Brewer's appeal was received favorably by the court of appeals which, while acknowledging that the Illinois Supreme Court had never overruled *Hewitt v. Hewitt*, nonetheless concluded that the decision had become obsolete due to subsequent developments. The appeals court pointed out that many of the legal principles relied on by the Supreme Court in *Hewitt*, such as a statute criminalizing unmarried cohabitation, had changed over the intervening thirty-plus years, also including such statutory developments as adoption of no-fault divorce, a statute providing inheritance rights for children of unmarried couples, enactment of the civil union law and, ultimately, marriage equality (which was achieved legislatively in Illinois after the Supreme Court struck down the federal Defense of Marriage Act). The court of appeals ordered that the case be sent back to Cook County Circuit Court to reconsider Brewer's claims.

This time Blumenthal appealed, winning a majority of the state Supreme Court, which observed as a starting point that the court of appeals does not have the authority to overrule a decision by the Supreme Court. Its proper path would have been to apply *Hewitt*, accompanied by a suggestion that Brewer appeal, and perhaps urging the Supreme Court to reconsider its ruling.

Justice Karmeier pointed out that *Hewitt* had continued to be cited and relied upon by Illinois courts throughout the intervening period. Karmeier noted that in *Hewitt* itself the court had stated that it was up to the legislature to decide whether some legal rights should be made available to unmarried co-habitants. As the court of appeals pointed out, the legislature had indeed passed several statutes updating Illinois domestic relations law in various ways, but it had never actually overruled the *Hewitt* decision or rescinded the state's absolute ban on common law marriage, even though the legislature was clearly aware of the *Hewitt* ruling.

In an ironic move, Karmeier quoted from U.S. Supreme Court Justice Anthony Kennedy's marriage equality opinion, *Obergefell v. Hodges*, which emphasized the importance and centrality of marriage as a social and legal institution. Karmeier observed that Illinois' ban on common law marriage was passed to bolster marriage by requiring people to marry if they wanted access to marital rights. If anything, he asserted, *Obergefell* encouraged the majority of the court to resist extending marital rights to an unmarried couple, which would be contrary to the policy of encouraging and bolstering the institution of marriage by preserving that rights that it afforded to couples who married.

The court of appeals emphasized that throughout the duration of the Blumenthal-Brewer relationship, Illinois had not allowed same-sex couples to marry, which that court contended would justify treating them differently from the opposite-sex couple in the *Hewitt* case, who could have married. Karmeier found this argument unavailing, pointing out that the record in this case shows that Blumenthal and Brewer actually obtained a marriage license in Massachusetts in 2005, but never went through with the ceremony. Furthermore, he pointed out, Edith Windsor and her lesbian partner went to Canada in 2007 to marry at a time when New York would not allow them to do so, with Edith then suing the federal government for refusing to treat her as a surviving spouse for tax purposes. That is, for several years towards the end of their relationship, there were ways that Blumenthal and Brewer could have married – even if Illinois would not then have recognized the marriage – but they didn't do so. Had they done so, Brewer might have raised a constitutional argument in support of her property rights claim, but in the absence of any such attempt, the court would not recognize her argument that denying her this recognition now violated her due process or equal protection rights.

In dissent, Justice Theis argued that the majority had mischaracterized *Hewitt*, an outmoded precedent that should be overturned. *Hewitt* "etched into the Illinois Reports the arcane view that domestic partners who choose to cohabit, but not marry, are engaged in 'illicit' or 'meretricious' behavior at odds with foundational values of 'our family-based society,'" she wrote. "'Meretricious' means 'of or relating to a prostitute' [Webster's Third New International Dictionary 1413 (1986)], so this court labeled such people as prostitutes. The majority's attempt to distance itself from *Hewitt*'s sweeping and near-defamatory statement is unconvincing." She went on to show how the majority opinion "perpetuated the most offensive and outmoded assumptions underlying the *Hewitt* decision."

Also, characterizing *Hewitt* as an "outlier" among the states, she included a long string of citations to cases from other states in which courts had developed the common law to protect legitimate property interests of unmarried cohabitants when parties of unequal means ended their relationships. She asserted that only Georgia and Louisiana have rulings similar to *Hewitt* still in effect. "Courts in a vast majority of the remaining states, as well as the District of Columbia, that have chosen not to recognize common-law marriages also have chosen to recognize claims between former domestic partners like Blumenthal and Brewer," she wrote. Furthermore, "the recognition of claims between domestic partners has not revived the doctrine of common-law marriage in jurisdictions that have abolished it."

"*Hewitt* must be overruled because the legal landscape that formed the background for our decision has changed significantly," she wrote, reciting the lengthy list of the changes that the Illinois legislature and courts had made to the framework of law surrounding unmarried couples since 1979. She rejected the majority's holding that claims like Brewer's would be inappropriate under existing Illinois marriage statutes or would undermine the institution of marriage.

Because Brewer did attempt to assert federal due process and equal protection claims in this appeal, she could seek review from the U.S. Supreme Court. However, that Court would abstain from deciding any questions of state law, as to which the Illinois Supreme Court has the last judicial word. Justice Karmeier did mention that in *Hewitt*, the Court implicitly invited the state legislature to consider whether the legal rights of unmarried cohabitants should be expanded. This new decision effectively reiterates that invitation.

Ironically, just two days before the Supreme Court ruling, as noted in the first paragraph of this story, the Appellate Court had in *Allen* defended at some length its holding that *Hewitt* should not be construed to apply to same-sex couples.

Attorneys for the National Center for Lesbian Rights and Chicago Attorney Angelika Keuhn represented Judge Brewer in her quest for equitable treatment in the wake of end of her relationship with Dr. Blumenthal. Professor Nancy Polikoff of American University Law School, a leading advocate for the legal recognition of non-traditional families, filed an amicus brief in support of Brewer's claims on behalf of Lambda Legal and the ACLU. ■

9th Circuit Denies On-Line Newspaper's Anti-SLAPP Motion against Porn Star's Libel and False Light Lawsuit

A unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit affirmed a decision by District Judge George H. Wu to deny an anti-SLAPP motion by Associated Newspapers LTD, publishers of Daily Mail Online, which is being sued by "Danni Ashe," a straight porn diva whose real name is Leah Manzari, over the use of her picture to illustrate an article about HIV in the porn industry. *Manzari v. Associated Newspapers LTD*., 2016 U.S. App. LEXIS 13488, 2016 WL 3974178 (July 25, 2016). Manzari, who asserts without contradiction that she is not and has never been HIV-positive, claimed that the publication would lead viewers to believe that she was infected, and sought $3 million in damages for libel and "false light" invasion of privacy. The 9th Circuit agreed with Judge Wu that Manzari was likely to prevail on the merits of her tort claims. Judge M. Margaret McKeown wrote the opinion for the court of appeals.

According to its legislative history, California's anti-SLAPP statute (SLAPP stands for "strategic lawsuit against public participation") was passed in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." It is intended to protect those who want to comment or publish on issues of public importance from nuisance suits intended to discourage their exercise of free speech. When a defendant responds to a tort suit with an anti-SLAPP motion, the burden falls on the plaintiff to establish that "there is a probability that the plaintiff will prevail on the claim." In a non-SLAPP situation, a plaintiff can survive a motion to dismiss merely by alleging facts sufficient to suggest a plausible legal claim. Thus, the anti-SLAPP device, putting a greater burden on the plaintiff, is supposed to protect free speech by nipping non-meritorious lawsuits in the bud, before the defendant incurs significant expenses in discovery and summary judgment litigation defending against a non-meritorious case.

This case arose when Daily Mail Online published a story about a "shutdown of the Los Angeles-area porn industry" in 2013 after a female performer, whose identity was not then disclosed, tested positive for HIV. The author of the article, James Nye, asked the photo desk to supply "some pictures representative of the pornographic film industry that contained no nudity" that could be used to illustrate the article. He was provided with several "stock" photographs selected from the Corbis Images database, one of which was identified in that database as follows: "Soft porn actress Danni Ashe, founder of Danni.com, poses in front of a video camera connected to the Internet in one of her studios in Los Angeles in 2000."

Judge McKeown described the article in her opinion. "The headline read 'PORN INDUSTRY SHUTS DOWN WITH IMMEDIATE EFFECT AFTER 'FEMALE PERFORMER' TESTS POSITIVE FOR HIV.' After a few lines of text, the article contained a picture of Manzari lying suggestively across a bed with 'In Bed With Danni" written in neon lights behind her. Under her photograph was the caption: 'Moratorium: The porn industry in California was shocked on Wednesday by the announcement that a performer had tested HIV positive.'"

Somebody reading further into the article would learn that the actress who tested positive was "new to the industry" and that "the performer was not immediately identified." Other "stock" photos depicting other porn actresses also appeared in the article. Neither Danni Ashe nor Manzari was named in the text of the article.

Manzari's attorney contacted Daily Mail Online when the article was published, demanding that the photograph be removed. Daily Mail made the change on their website, but the damage had been done, according to Manzari. The original version of the article had been syndicated on the Internet. She claimed that a Google search returned the original version with her picture from websites around the world. Worse, the version that showed up on a search screen would have the headline and her photograph, without any of the explanatory text as to the actress being "unknown." Consequently, she alleged, most of those who saw the article on line or as part of a search would conclude that "Danni Ashe" was HIV-positive.

She alleged most of those who saw the article on line or as part of a search would conclude that "Danni Ashe" was HIV-positive.

Daily Mail argued that this was a frivolous lawsuit intended to chill their publication of a newsworthy story, and that the "stock" photograph was an appropriate illustration for the article. They pointed out that they never named Manzari (or "Ashe") in the article or stated that the model in the picture was HIV-positive. Furthermore, they pointed out, the article was a true news story on an item of public interest, thus entitled to strong First Amendment

protection. "There is no serious dispute that the libel and false light suit targeted speech protected by the anti-SLAPP statute," wrote McKeown, so "the burden shifts to Manzari to show a reasonable probability of prevailing on the merits." Daily Mail also argued that Manzari, in the guise of Danni Ashe, should be treated as a "public figure," which means that Daily Mail could be held liable to her only if it was shown that they had published the picture with "actual malice," which in this case would mean with actual knowledge that it communicated a false meaning or with reckless disregard as to the truth.

Manzari is making two claims. The libel claim contends that an untrue publication that she is HIV-positive would be damaging to her personal or professional reputation, and the "false light" claim contends that the photograph provides an inaccurate depiction of her to the public in the context in which it is presented. In any tort case, the plaintiff has to prove actual injury, although libel law traditionally presumes "actual injury" if a person is falsely depicted as having a "loathsome" disease, and sexually-transmitted diseases such as HIV generally fall into that category, or is falsely described in a way that would be harmful to their standing in the profession. Interestingly, the court's opinion contains no discussion whatsoever about whether falsely implying or communicating that somebody is HIV-positive would harm their reputation or professional status. This is silently assumed, perhaps because it struck the court that it would be obvious to anybody that saying that a porn actress is HIV-positive would adversely affect her ability to work in her chosen profession.

The court focuses instead on other factors in the legal analysis. For example, it makes a difference whether the plaintiff is a "public figure." People who have achieved sufficient fame or notoriety that they are recognizable to the public at large are deemed to be "public figures" whose activities are inherently newsworthy, and thus they face a high burden in trying to hold the press liable for reporting about them. The court found that although Danni Ashe's fame might be somewhat specialized, she nonetheless qualifies as a public figure. "Manzari is a pioneer in the online adult entertainment industry," wrote the court. "Her website www.Danni.com, which she designed and launched in 1995, began generating multimillion dollar revenues in the early 2000s. During this time, 'Danni Ashe' was one of the most well-known and popular soft-core porn actresses in the world, as well as a highly successful entrepreneur, with one of the most visited websites on the Web. She retired from the adult entertainment industry in 2004 and sold www.Danni.com, but the website remains active under that name." The court found that press references to Ashe supplied by Daily Mail Online supported its contention that the public figure rules should apply, which means that in order to deny the motion to dismiss her case, the court would have to find that she could probably win on the issue whether the false representation was made with "actual malice" to meet the constitutional standard.

Next, the court confronted Daily Mail's argument that the article never mentioned Danni by name. Actually, that wasn't true, as the picture itself had her first name in neon lights as background to her image. "The bold headline and its content, juxtaposed with her photograph and yet another caption under her picture that said the industry was 'shocked' that a 'performer had tested HIV positive,' was sufficient for a reasonable reader to infer that Manzari was the performer who had tested positive for HIV," wrote Judge McKeown, treating this as an "implied" defamation case.

Daily Mail argued that "this case is different from the classic defamation by implication case because it did not make *any* statement by including a stock photograph selected as a 'good, nonobscene photograph to illustrate the article.'" McKeown characterized this argument as "disingenuous," saying that it "overlooks the fact that a photograph itself can convey both an implicit and an explicit message and that the headline, caption and photograph taken together are also a statement." The court found that when it considered the article "as a whole" and in its full context, "a reasonable reader could infer that the article is about Manzari."

As to the "actual malice" requirement, it was clear that the Daily Mail Online had done nothing to determine whether the person in the photograph, who was clearly a porn actress, was HIV-positive. "This case rests on the 'reckless disregard' prong of actual malice," wrote the court. "Recognizing that California law requires only 'minimal merit' to withstand initial dismissal under the anti-SLAPP statute, we hold that Manzari has raised sufficient factual questions for a jury to conclude that the Daily Mail Online acted with reckless disregard for the defamatory implication in its article on the Los Angeles porn industry shutdown. Manzari's evidence is sufficient to support her claim that the Daily Mail Online placed her photograph in the article, juxtaposed with the incendiary headline and caption, knowing or acting in reckless disregard of whether its words would be interpreted by the average reader as a false statement of fact."

Not only was it likely that readers would infer Manzari was the subject of the article, but Daily Mail's editorial staff "actively removed key contextual information from the 'Danni Ashe' photograph as it was presented in the Corbis database," replacing the database description, quoted above, with the language about the industry being "shocked" about an actress testing positive. "The publishers also failed to include any explanation or disclaimer adjacent to the 'Danni' photograph, which would have informed readers that she was not the subject of the article."

Furthermore, the court gave little weight to the publisher's denial of any intention to communicate to readers that Manzari was HIV-positive. "If all a publisher needed to do was to deny

the allegation, all implied defamation suits would be dead on arrival," said the court. "If, for instance, a newspaper ran the headline: 'High Profile Figure Accused of Murder' alongside a photograph of the Mayor of New York City, or 'Industry Shocked that Grocery Sprayed Veggies with Pesticide' alongside an image of a nationally-known grocery chain, the publishers would be hard-pressed to plausibly claim that they had simply selected a 'stock' photograph. The same holds true for a story about the pornography industry, featuring a picture of a world-famous pornographic actress with her name written in neon lights." In a sarcastic footnote, McKeown added, "One need only look to the Daily Mail's own evidence of Manzari's public figure status to confirm the ubiquity of her image and her identity. Her image can hardly be relegated to the status of a 'stock' photograph."

"This sort of willful blindness cannot immunize publishers where they act with reckless disregard for the truth or falsity of the implication they are making," concluded McKeown. "Manzari meets the 'minimal merit' threshold to avoid outright dismissal of her complaint," so the district court "properly denied the Daily Mail's motion to strike Manzari's complaint."

The usual consequence of denial of an anti-SLAPP motion would be for the defendant to offer a settlement to the plaintiff, since the court has already concluded that there is a reasonable probability that the plaintiff would win the case before a jury. If Daily Mail wants to pursue its motion further, it could seek reconsideration by a larger panel of the 9th Circuit or petition the Supreme Court for review, but neither of those routes seems likely to result in a reversal of the panel's logical and unanimous decision. It's time for Daily Mail's liability insurer to step in.

Los Angeles attorney Steven L. Weinberg represents Manzari. Katherine M. Bolger of the New York firm Levine Sullivan Koch & Schulz LLP and California local counsel Louis P. Petrich of Leopold, Petrich & Smith PC, represent Daily Mail. ■

New Hampshire Supreme Court Rules on Equitable Distribution Dispute in Lesbian Divorce Case

The New Hampshire Supreme Court ruled on August 19 that a judge deciding a divorce case for a lesbian couple could take into account the couple's many years of cohabitation before the state made it possible for them to become civil union partners and then spouses, in deciding how to divide up their "marital assets." The decision in *Matter of Deborah Munson and Coralee Beal*, 2016 N.H. LEXIS 180, 2016 WL 4411308, adopts a creative (and pragmatic) interpretation of the divorce statute in order to get around the limiting concept of "marital property" usually applied in such cases.

The ruling follows the lead of several other states in confronting what is likely to be a recurring issue during this transitional period following the adoption of marriage equality in the United States. Divorce statutes normally include "the length of the marriage" as a factor to take into account when the court decides how to divide up assets as part of a divorce proceeding following a brief marriage. Many long-term same-sex couples married over the past few years after lengthy periods of non-marital cohabitation, and spouses of unequal income within a relationship could be seriously disadvantaged if the court could not take account of the entire length of their relationship in deciding on a fair asset distribution.

In this case, Deborah Munson and Coralee Beal lived together as a couple for fifteen years before they were able to become civil union partners as a result of new legislation in New Hampshire in 2008. When the state subsequently passed a marriage equality bill that took effect on January 1, 2011, their civil union was automatically converted into a marriage. On March 28, 2012, Munson filed a petition for divorce. At trial, she took the position that this was a short-term marriage, a factor that would cut against Beal's potential distribution of assets.

Beal countered by arguing that prior to the legalization of "gay marriage" the couple "did what the law allowed them to do as any other married couple to provide for each other, including, but not limited to executing estate plans that left respective estates to the other, [Munson] providing life and health insurance for her partner's benefit, having joint accounts, sharing duties within the home and finally joining together in a civil union and legal marriage." Beal argued that the court "must consider the parties' lengthy twenty-one year relationship when ordering a distribution of the marital property in this matter."

However, the court marked October 8, 2008 (the date of their civil union) as the start of their marriage for purposes of this case, holding that "the issues in their divorce will be determined using that as the start date." As a result, the court departed from the usual presumption of equal distribution of assets and ordered distribution of only about 12% of the marital estate to Beal in addition to ordering Munson to pay her alimony of $500 per month for five years. Beal appealed.

Justice Gary Hicks, writing for the court, quoted the statute's definition of the "marital estate" as including "all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties," and the statute "assumes that all property is susceptible to division." Normally, an equitable distribution involves a relatively equal distribution of the assets. However, the statute permits a court to find that an equal distribution "would not be appropriate or equitable after considering one or more of" fifteen factors listed in the statute, including "the length of the marriage."

In the case of a "short-term marriage" where one spouse brings substantially greater assets than the

other to the marriage, a court may decide that it is inappropriate to redistribute to the spouse who brought much less to the marriage a significant share of what the wealthier spouse brought to the marriage. This seems quite logical. If a rich person marries a poor person and the marriage quickly breaks down, would it be proper to total up all their assets and divide them in half? Such an approach might lend itself to undesirable fortune-hunting schemes. Pointing to the court's past rulings on this issue, Hicks wrote, "We have observed that in a short-term marriage, it is easier to give back property brought to the marriage and still leave the parties in no worse position than they were in prior to it." However, he pointed out, duration of the marriage is only one of many factors to consider, and "marital property is not to be divided by some mechanical formula but in a manner deemed 'just' based upon the evidence presented and the equities of the case."

In this case, the trial court applied the "short-term marriage" approach and specifically stated in its ruling that it "declined Beal's invitation to declare the parties married upon their cohabitation in the 1990s." On appeal, Beal argued that the court's approach erred in failing to consider the "commingling of assets before 2008," and that by focusing on the shortness of their legal marriage, "the trial court ignored the substantial and uncontroverted evidence developed at trial that the parties had a committed romantic and financial partnership long before 2008."

After referring to decisions taking into account pre-marital cohabitation from courts in Oregon, Michigan, Hawaii, Indiana, Montana, and Connecticut, the New Hampshire court decided that it could not totally ignore the statutory factor of "length of the marriage" and explicitly treat this marriage as having been 21 years long. However, the list of factors in the statute includes a final catch-all category: "any other factor" that the court "deems relevant." As courts in those other states had recognized, "premarital cohabitation may be relevant to the distribution of marital property" in cases where a couple had commingled their assets.

"The couple may have become depend upon the assets that they shared prior to marriage," wrote Hicks, "such that it may not be just for a court in divorce proceedings to ignore their cohabitation period when determining what constitutes an equitable property distribution." He specifically noted arguments submitted in support of Beal's appeal by the ACLU of New Hampshire and Gay & Lesbian Advocates & Defenders, contending that "when a divorcing couple's relationship has included 'years of economically interdependent cohabitation followed by a "short" marriage, the notion of returning the parties to their original premarital position is unrealistic' because 'the relationship was not, in any relevant way, short-term.'"

Thus, the New Hampshire Supreme Court could see "no reason" why the statute, "which broadly permits the trial court to consider 'any other factor that it deems relevant,' would not permit the court to consider premarital cohabitation. We therefore hold that premarital cohabitation is a factor that the court may consider in divorce proceedings when determining whether to depart from the presumption that 'an equal division is an equitable division of property.'"

In this case, the trial court made detailed factual findings relevant to this issue, and then apparently ignored them in declaring that it would treat this as a "short-term marriage" as to which it would depart from the equal division presumption. "We conclude," Hicks wrote, "that, by not taking these findings into account, the court did not exercise the full breadth of its discretion under the statute." Thus, the case would have to be remanded for a reconsideration of the property division.

Furthermore, in making the alimony award, a trial court is supposed to take into account whatever property division it has made. Since the property division will have to be reconsidered, so will the alimony award.

The court rejected Munson's argument that because the couple could have married early than 2008 as same-sex marriage was available in a few other states and Canada prior to that date, Beal's argument that civil unions were not available prior to 2008 should be rejected. "Whether Munson and Beal could have entered into a civil union or married earlier does not affect our analysis," wrote Hicks. "Had they done so, their period of premarital cohabitation would have been shorter, but, for the reasons previously discussed, it would have still remained a relevant factor in the determination of an equitable property division."

The court also noted that the logic of its ruling would apply as well to different-sex couples who divorce shortly after marrying but after cohabiting for a long time, pointing out that long-term cohabitation has become much more common, and quoting one study showing that in 2008, "6.2 million households were headed by people in co habiting relationships . . . . They included 565,000 same-sex couples." Thus, this holding applies in all divorce proceedings.

The court rejected Munson's argument that its ruling would violate a New Hampshire constitutional provision barring "retroactive enforcement of laws that affect substantive rights or impose new duties or obligations," finding this argument "unavailing" because it was not in any way changing the definition of "marital assets" or deeming the cohabitation to consist of a "marital status," but merely giving a reasonable interpretation to the "other factors" provision in the statute.

Beal is represented by Kysa M. Crusco of Bedford. Paul R. Kfoury, Sr., Andrea Q. Labonte and Courtney M. Hart of Manchester and Saco, Maine, represented Munson. The amicus brief was filed by Gilles R. Bissonette of the ACLU of New Hampshire and Mary Bonauto of GLAD, based in Boston. Bonauto argued on behalf of the plaintiffs in the Supreme Court's 2015 marriage equality case, *Obergefell v. Hodges*. ■

Texas Appeals Court Denies Constitutional Challenge to "Online Impersonation" Statute in Manhunt.net Case

Who knew? It is potentially a crime in Texas, and apparently several other states, to pose as somebody else on social media sites like Manhunt.net, and this does not violate anybody's 1st Amendment rights, held a panel of the Texas 5th District Court of Appeals in *Ex parte Bradshaw*, 2016 Tex. App. LEXIS 9203, 2016 WL 4443714 (Aug. 23, 2016).

According to the opinion by Justice Robert M. Fillmore, Michael Dwain Bradshaw has been charged with violating Texas Penal Code Sec. 33.07(a), titled "Online Impersonation." The statute provides that a person "commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to (1) create a web page on a commercial social networking site or other Internet website; or (2) post or send one or more messages on or through a commercial social networking site or other Internet website, other than on or through an electronic mail program or message board program." The indictment charges Bradshaw with "intentionally or knowingly using Joel Martin's name or persona to post or send one or more messages on or though manhunt.net, an Internet website, without obtaining Martin's consent, and with the intent to harm Martin." Justice Fillmore does not get any more specific about the factual allegations against Bradshaw, devoting the entire balance of the opinion to rejecting his constitutional claims. Bradshaw, represented by attorneys Mark W. Bennett and Toby L. Shook, filed a pretrial application for writ of habeas corpus, seeking to get the indictment quashed on the ground that the statute is facially unconstitutional. A Dallas County Criminal Court judge denied the petition, and Bradshaw appealed to the 5th District court.

Bradshaw's first argument was unconstitutional overbreadth, claiming that as worded the statute has the effect of "restricting a substantial amount of protected speech based on the content of the speech." The state argued that the statute regulates only conduct and unprotected speech, and that any incidental effect on protected speech "is marginal when weighed against the plainly legitimate sweep of the statute." Justice Fillmore noted Supreme Court precedents describing the overbreadth doctrine as "strong medicine that is used sparingly and only as a last resort," reserved for statutes presenting a "realistic" danger of inhibiting constitutionally protected speech. The level of judicial scrutiny in such cases depends on whether the statute is content-based – that is, coverage triggered by the substance of the speech involved. The court concluded that the "vast majority" of speech covered by the statute is not protected by the 1st Amendment, and agreed with the state's argument that the statute is mainly about regulating conduct.

"Impersonation is a nature-of-conduct offense," wrote Fillmore, which "does not implicate the First Amendment unless the conduct qualifies as 'expressive conduct' akin to speech." Bradshaw contended that "using another's name or persona to create a webpage, post a message, send a message" is inherently expressive conduct, but the court did not buy this argument, finding that the focus of the statute was on how somebody used another's name or image: "Any subsequent 'speech' related to that conduct is integral to criminal conduct and may be prevented and punished without violating the First Amendment," wrote Fillmore. As such, the level of judicial review of the statute would not be strict scrutiny – reserved for content-based speech restrictions – but rather "intermediate review" requiring the government to show that the statute advances a significant state interest. Contrary to Bradshaw's argument, the court found the statute to be content-neutral. It didn't matter whose name or persona was being appropriated; it was the fact of appropriation of identity, which the court saw as conduct, that was being punished, and then only if it was being done for purposes specified in the statute.

Looking to the legislative history of the statute, Justice Fillmore found Texas House committee hearings generating a report that the purpose of the statute was "to 'deter and punish' individuals who assumed the identity of another and sent false, harassing, or threatening electronic messages to the victim or a third party who was unaware of the perpetrator's true identity. The committee noted that online harassment had resulted in suicide, threats of physical or mental abuse, and more, but 'current Texas law does not provide a means of prosecuting some of the most egregious of these acts. There is nothing in the legislative history," wrote Fillmore, "that would suggest the legislature was targeting or expressing its disagreement with any particular topic or viewpoint by enacting section 33.07(a)." And the court concluded that addressing this problem did involve a significant governmental interest of "protecting citizens from crime, fraud, defamation or threats from online impersonation."

"It also serves a significant First Amendment interest in regulating false and compelled speech on the part of the individual whose identity has been appropriated," wrote Fillmore, dismissing the "hypotheticals" posed by Bradshaw in his argument as insubstantial "in comparison to the statute's plainly legitimate sweep over unprotected speech and conduct."

Bradshaw also attacked the law under the 14th Amendment Due Process Clause as unduly vague, not giving specific enough warning to people about what conduct crossed the line of legality. In this case, the court found, the legislature had avoided any vagueness problem by including elsewhere in the Texas Penal Code a definition of "harm" generally as

"anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." More specifically, Chapter 33 of the Penal Code, which contains the challenged statute, has its own definition of "harm" that includes harm to computer data and "any other loss, disadvantage, or injury that might reasonably be suffered as a result of the actor's conduct." Noting that harm is a word in common use, the court also cited to dictionaries, concluding that a "person of ordinary intelligence" would have "fair notice of what the statute prohibits."

Finally, Bradshaw contended that Texas could not regulate conduct involving the internet because this "unduly burdens interstate commerce by attempting to place regulations on Internet users everywhere." Fillmore rejected the contention that the Texas law burdens interstate commerce. "Evenhanded local regulation intended to effectuate a legitimate local public interest that has only incidental effects on interstate commerce will be upheld," he wrote, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Here, he observed, the court had found that Texas has a significant interest in protecting its citizens. "It is difficult to envision how interstate commerce is benefitted by the conduct proscribed by section 33.07(a)," wrote Fillmore, "and we believe the burden of the statute on interstate commerce is small." Thus, the writ was denied and the prosecution can proceed.

Which leads the reader to speculate about the facts of this case. Did Bradshaw use Martin's picture or name to cruise on Manhunt.net, to lure people into compromising situations, or to engage in conduct that would damage Martin's reputation or subject him to liability or prosecution if attributed to him? If this case goes to trial and produces written opinions or attracts media attention, perhaps we will find out. If, as is true in the overwhelming majority of criminal prosecutions, Bradshaw accepts a plea bargain offered by the prosecution, we may never find out. ■

Federal Judge Struggles Over Sentencing Gay Sex Offender with History of Mental Illness and Victimization; Imposes Conditions Enforceable in Habeas Corpus

After nearly 48 years on the bench, the "indomitable" Judge Jack B. Weinstein (as Justice Ruth Bader Ginsburg calls him) shows that he can still command the legal world's attention in a 200-page sentencing decision in *United States v. D.W.*, 2016 WL 4053173, 2016 U.S. Dist. LEXIS 98741 (E.D. N.Y., July 28, 2016). D.W. pled guilty to sexual exploitation of a child and to possession of child pornography (without distribution), with a fifteen-year mandatory minimum under the statute. Judge Weinstein wrote that such time, "if served under the routine harsh and dangerous prison conditions D.W. faces, would be destructive to him, dangerous to society, and unconstitutional." It would deny him treatment for his severe mental problems, and expose him to sexual abuse and risk of suicide, include "long, debilitating" protective custody.

The opinion includes extensive discussion of D.W.'s background of abuse and neglect, starting by age four and continuing through successive foster care placements, leaving him "deeply traumatized," with "abysmal" self-esteem. By age 20, he was incarcerated for sex offenses in New York, where he was repeatedly raped. D.W. has attempted suicide repeatedly. The instant federal offenses occurred during parole.

Judge Weinstein summarized scores of psychiatric and psychological reports, which documented at least eight Axis I diagnoses, including bipolar disorder, PTSD, pedophilia, and "addiction" to child pornography (with thousands of images found on D.W.'s computer). Finding D. W. to be "seriously troubled, exceptionally passive, and deeply depressed" – *see United States v. D.W.*, 2015 WL 3892643, at *2 (E.D.N.Y. June 25, 2015) – Judge Weinstein ordered a hearing on his "capacity" to plead and whether sentencing him to a fifteen-year mandatory prison term would amount to cruel and unusual punishment in violation of the Eighth Amendment. Despite misgivings, he accepted the plea; but he conducted an extensive evidentiary hearing on sentencing that included prison site visits.

Judge Weinstein wrote that such time, "if served under the routine harsh and dangerous prison conditions D.W. faces, would be destructive to him, dangerous to society, and unconstitutional."

Medical experts testified about treatment options, the conditions under which D. W. would be incarcerated, and the effect of a fifteen-year sentence on risk of recidivism and danger to the public. Federal Bureau of Prisons experts detailed information on its policies and practice on solitary confinement and the protection of

highly vulnerable inmates. Judge Weinstein reviewed the requirements of the Prison Rape Elimination Act, 42 U.S.C. §§ 15601-15609 (2003), and its implementing regulations, 28 C.F.R., Part 115, and he accepted a report from "Black & Pink" on the experiences of LGBT people in prison. [Note: This report was summarized in *Law Notes* (November 2015 at page 516).]

Judge Weinstein found that, "while D. W. has been a sex abuser, he has lived most of his life as a victim." D. W. was "severely and chronically scarred" and "exceptionally vulnerable" in prison because of multiple factors (age, size, sexual orientation, mental illness, prior rapes, and a sex offender conviction involving children) which combined to exacerbate risk of harm from other inmates and staff. The opinion includes a lengthy discussion of the lack of alternatives to isolation for this inmate and the deleterious effects of long term solitary confinement, relying in part on the comprehensive findings in *Peoples v. Annucci*, 2016 WL 1464613, at *2-3 (S.D.N.Y. Apr. 14, 2016).

Judge Weinstein found that D. W. lacked community support and presented a high risk of relapse, from which society needed protection. The experts disagreed about D. W.'s empathy and amenability to treatment and whether a long prison term might actually increase D. W.'s risk of reoffending, but they agreed that length of incarceration bore little relationship to recidivism.

The opinion's factual and expert analysis tees up three legal questions: (1) should the court depart from sentencing "Guidelines"?; (2) can the court impose less than the statutory minimum?; and (3) what is the effect of a specific recommendation about incarceration? Here, the Guidelines (given D.W.'s circumstances and history) prescribe 24-30 years; the statutory minimum on the more serious offense (exploitation) is fifteen years; and a court recommendation about imprisonment is "considered" but "non-binding" on the Bureau of Prisons under 18 U.S.C. § 3621(b)(4).

The court found the Guidelines' term of 24-30 years to be "absurdly excessive" on these facts, noting that the court had ample authority to depart from the Guidelines through "individualized assessment" under *Kimbrough v. United States*, 552 U.S. 85, 101 (2007); *Gall v. United States*, 552 U.S. 38, 49 (2007); and 18 U.S.C. § 3553(b); and under numerous Second Circuit decisions, including *United States v. Gonzalez*, 945 F.2d 525, 527 (2d Cir. 1991) (adjustment where a defendant's physical appearance and demeanor, or his actual or perceived sexual orientation, increase susceptibility to prison abuse); and *United States v. Lara*, 905 F.2d 599, 601 (2d Cir. 1990) (departure where Guidelines' sentence is "unduly severe" due to the "the vulnerability, the appearance, the sexual orientation" of the defendant).

Judge Weinstein struggled about whether a court could ever invoke the Eighth Amendment to sentence an offender to less than the statutory minimum, noting that the Amendment proscribes sentences that are "grossly disproportionate" to the crime committed, citing *Solem v. Helm*, 463 U.S. 277, 284 (1983), but he also cited *Ewing v. California*, 538 U.S. 11, 28-31 (2003) (rejecting Eighth Amendment challenge to prison term of 25-to-life under California's "three strikes law" for a recidivist who was convicted of stealing golf clubs worth $1,200). He noted that, outside of the capital punishment context, successful proportionality challenges are "extraordinary," *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003); and "exceedingly rare," *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *United States v. Caracappa*, 614 F.3d 30, 44 (2d Cir. 2010).

Ultimately, Judge Weinstein sentenced D. W. to fifteen years, if certain recommendations are followed, finding that "without the protections suggested by the court, [a 15-year sentence] would likely be a condemnation to a decade and a half of unconstitutional physical, sexual, and psychological violence, as well as extended periods of debilitating solitary confinement." He wrote that the court "is prepared to declare such a sentence a violation of the Eighth Amendment prohibition against cruel and unusual punishment."

Judge Weinstein recommended that D. W. be sentence to a federal prison such as FMC in Devens, Massachusetts, where sex offenders comprise about 40% of the population and with which he is familiar. *See United States v. C.R.*, 792 F. Supp. 2d at 520-522, App. B. The court told the Bureau of Prisons to "structure" the fifteen years sentence "to avoid unconstitutional cruelty" and to recognize D. W.'s "humanity."

He wrote: "Should the BOP be unable to comply with this court's recommendations, it is requested to explain in writing to this court the reasons that it is unable to do so…" "Should this court's recommendations not be followed, defendant may raise a challenge to the constitutionality of the sentence," under 28 U.S.C. § 2255(a): *habeas corpus* for federal prisoners.

This decision – imposing sentencing conditions, with an advance declaration of eligibility for *habeas* relief if they are not followed – is extraordinary. The opinion is a *Perfect Storm* of factors, including a willing judge, not likely to be replicated. It can be mined, however, for ideas whenever a vulnerable LGBT sex offender faces long incarceration; and it contains an annotated glossary of experts.

D.W. was represented by Federal Defenders of New York, Brooklyn. Amici were: Lambda Legal Defense & Education Fund, Inc., National Center for Lesbian Rights, National Center for Transgender Equality, the Sylvia Rivera Law Project, and Washington Lawyers' Committee for Civil Rights and Urban Affairs. – *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.

Texas Appeals Court Refuses to Issue a Change of "Sexual Designation" for Transgender Petitioner

The Texas 14th District Court of Appeals in Houston upheld a trial judge's denial of a transgender man's request for a "gender designation change" embodied in a court order on August 2. *In re Rocher*, 2016 WL 4131626, 2016 Tex. App. LEXIS 8266. The court's ruling turned on the absence of any Texas statute or regulation specifically authorizing courts to grant such requests.

According to the opinion for the three-judge panel by Justice Martha Hill Jamison, the petitioner, "formerly known as Aidyn Rocher," filed an Original Petition for Change of Name of Adult in the Harris County District Court on January 28, 2015, almost exactly six months before the U.S. Supreme Court issued its marriage equality ruling of *Obergefell v. Hodges*. At the time, same-sex marriage was not available in Texas, so a sexual designation would be important for somebody who sought to get married. The Petition in this case sought not only a legal change of name to Alex Winston Hunter, but also a change of "sexual designation" from female to male. The petitioner was represented by a lawyer, who is not named in the court's opinion.

The court's ruling turned on the absence of any Texas statute or regulation specifically authorizing courts to grant such requests.

The lawyer presented two prior Texas court opinions to the trial judge to support the request for the change: *In re Estate of Araguz*, 443 S.W.3d 233 (Tex. App. 2014 – petition for review denied), and *In re N.I.V.S.*, 2015 WL 1120913 (2015). Then Hunter testified briefly, with all the testimony relating to the name change request, satisfying the requirement that the court make findings about the date and place of birth, the lack of a felony criminal record (felons may not legally change their names in Texas), and evidence that a name change is not being sought to evade creditors. At the end of the hearing, petitioner's lawyer pointed out to the court that under the Texas Family Code "proof of an order relating to a sex change could be used to prove identity for purposes of an application for a marriage license." At the end of the hearing, the trial judge granted the name change but denied the request for a "change in gender designation," finding that there was no specific authority under Texas law authorizing a court to make such a change in designation.

Texas, in common with most (but not all) states, has a statutory procedure for changing the gender designation on a birth certificate. The petitioner in this case, however, was born in Pennsylvania, and Texas courts have no authority to order another state to issue a new birth certificate. Furthermore, Texas law does not authorize issuance of a birth certificate for somebody who was not born in Texas. The petitioner could try to get a new birth certificate from Pennsylvania, but he argued that this would be unduly burdensome, and that since Texas law does, in a broad sense, recognize the reality of gender transition by allowing such changes on birth certificates, the court should be able to issue such a declaration in the context of a name-change case.

The court discounted the precedential value of the cases that petitioner's lawyer had presented. In *Araguz*, the court was dealing with a dispute about inheritance rights of a transgender woman who had married a Texas man, and the court of appeals had concluded, citing a Texas statute authorizing county clerks to accept a copy of a "court order relating to the applicant's name change or sex change" in processing a marriage license application, that "Texas law recognizes that an individual who has had a 'sex change' is eligible to marry a person of the opposite sex." But, wrote Justice Jamison, "The *Araguz* court did not, however, suggest that the section authorized a trial court to order a change in a person's gender designation." In the other case, *N.I.V.S.*, although the court of appeals had noted that "one of the parties had 'obtained a court order changing his identity from female to male,'" citing the same section of the marriage statute, the court in that case had stated, "because it is not necessary to the disposition of this appeal, we do not comment on the effect, if any, of such an order."

Thus, although some past Texas court opinions had intimated that court might, or actually had, issued orders recognizing changes of sex designation, this court found that none of those cases directly answered the question whether a Texas court has authority to do such a thing, and this panel of judges was unwilling to take that step without some direct prior precedent or statutory authorization.

The petitioner had also argued on appeal that in light of *Obergefell*, it would be unconstitutional for the courts of Texas to refuse to issue such an order if presented with appropriate evidence. Unfortunately, however, the trial hearing took place before *Obergefell*, so this claim had not been presented to the trial court, and appeals courts generally refuse to consider arguments that were not raised at trial and thus "preserved" for review. A good argument can be made that the Supreme Court's commentary in that case, and in the prior cases of *Lawrence v. Texas* and *United States v. Windsor*, would support a claim that the liberty protected by the Due Process Clause of the 14th Amendment would include a right of self-determination in matters of gender identity, as a matter of respect for individual dignity. But this

court ruled out any consideration of that argument.

Indeed, in a footnote the court also stated that because it had found lacking any authority to issue such an order, it "need not in this case take any position regarding what type of evidence could suffice to demonstrate a gender change." This is a much-contested issue in other jurisdictions, especially focusing on whether and the degree to which a transgender person must undergo surgical alteration before they can claim to have transitioned sufficiently to change their sex for legal purposes.

Of course, after *Obergefell* it is unnecessary for a transgender person to get a legal designation of sex in order to marry the person with whom they are in love, because the gender of the parties has been rendered irrelevant. But sex still matters for other purposes, and particularly for legal identification documents such as driver's licenses and voter identification card for non-drivers, so the unavailability of a mechanism in Texas for transgender residents born in other jurisdictions to obtain such a declaration from a Texas court is another unnecessary stumbling block to getting on with one's life.

Many years ago, a more empathetic court, the Maryland Court of Appeals, ruled in *In re Heilig* (2003) that a Maryland trial court could draw upon its general equitable powers to declare a change of sex designation for a transgender applicant who was born, coincidentally, in Pennsylvania. And, interestingly, as of August 8, 2016, new regulations in Pennsylvania allow a transgender person born in that state to obtain a new birth certificate by providing certain documentation to the Health Department, including a declaration under oath by a doctor that the individual has received appropriate clinical treatment to be considered male or female, as the case may be, without getting into specifics. The necessary information is easily available on several websites. So the petitioner in this case can download the necessary forms and obtain a new birth certificate from Pennsylvania with minimal expense and fuss. Unfortunately, not every state is so accommodating, and some still refuse to issue new birth certificates for this purpose. ■

New York Federal District Judge Permits Anti-Gay Protestor at Central New York Pride Festival

On June 8, U.S. District Judge Lawrence E. Kahn granted James Deferio's request for a preliminary injunction prohibiting the enforcement of a 40-foot buffer zone around the entrance to the 2016 Central New York Pride Festival and Parade (CNY Pride). *Deferio v. City of Syracuse*, 2016 U.S. Dist. LEXIS 74515 (N.D.N.Y.). The festival took place ten days later on Saturday, June 18. Thousands of LGBT supporters, galvanized by the mass shooting in Orlando on June 12, attended CNY Pride. Deferio and one other protestor were also present at the festival, where he referred to the Orlando victims as sexual deviants.

Deferio is no stranger amongst the Syracuse community. In 2009, the self-described Christian evangelist was featured in the local news for his anti-gay protests at Syracuse University's Schine Student Center. When questioned why he and his daughter singled out homosexuality, Deferio responded that his goal was to plant seeds of doubt amongst SU students. During this protest, he carried signs stating, "Homosexuality is a sin," and "Thousands of ex-homosexuals have experienced the life-changing love of Jesus Christ."

Concerning CNY Pride, Deferio stated that he planned to rain on the "uncivil parade." His previous attempts to do so in 2014 and 2015 were thwarted by the police, who told Deferio to move away from the sidewalk adjacent to the festival's entrance, and go to the sidewalk on the opposite side of the street. The police believed that CNY Pride's exclusive permit for the sidewalk on the northern side of the street created a 40-foot buffer zone outside the festival's entrance; protestors like Deferio, who used sound-amplification devices, were prohibited from that zone.

Within one year after the 2015 CNY Pride Festival and Parade, Deferio filed his lawsuit against the City of Syracuse and its police. He claimed that the buffer zone infringed upon his constitutional right to free speech under the First Amendment. In addition to other remedies, Deferio requested a preliminary injunction to prevent the police from enforcing the buffer zone during his planned protest at the 2016 festival.

A plaintiff seeking a preliminary injunction must establish four factors: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Since the City of Syracuse already conceded that Deferio's speech was entitled to the First Amendment's protection, the District Court was left to decide whether Deferio's claim was likely to succeed on its merits by determining whether the buffer zone was a permissible restriction of Deferio's right to free speech—apparently, it was not. A sidewalk is a prototypical traditional public forum. Therefore, the City's prior restrictions against Deferio infringed upon his constitutional rights. Referencing *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), in which the U.S. Supreme Court ruled on buffer zones around reproductive health clinics, the District Court similarly found that the City's buffer zone was not content neutral, narrowly tailored to promote a substantial government interest, nor designed to permit alternative channels of communication. Though the City had a legitimate government interest in maintaining peace and order, preventing violence, and avoiding congestion, there was no evidence that Deferio blocked pedestrian traffic or presented a significant risk. The court then stated that the City could not infringe on Deferio's constitutional rights merely because his speech could possibly garner a hostile response, and that there were other less restrictive ways for the city to protect its interests.

Interestingly, the Court does not distinguish Deferio's goals from the petitioners' in *McCullen*. In *McCullen*, the petitioners — self-described "sidewalk

counselors" — succeeded by arguing that the buffer zone prevented them from engaging in "close, personal conversations" with women entering clinics for abortions. Here, Deferio used a loudspeaker and protested with the objective to rain on the parade, so it is highly unlikely that he planned to engage in one-on-one discussions with festival goers this way. Furthermore, CNY Pride and its attendees are also public demonstrators asserting their constitutional rights to free speech—why else hold a parade focused on a major social issue? Therefore, the City had a legitimate interest to protect their ability to express themselves freely in the public space…in the area they had legally obtained an exclusive permit for.

Moving away from the merits of Deferio's claim, the court also determined that Deferio would be irreparably harmed if the City enforced its buffer zone during this year's festival because it would prevent Deferio from exercising his right to demonstrate there. Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed. *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003). Such an interpretation of the Constitution suggests that the actual, psychological harm caused by Deferio's anti-gay statements pales in comparison to the presumed harm Deferio would experience if he and his loudspeaker were forced to move approximately 36 feet across the street.

Lastly, because the court already determined that the City's buffer zone was unconstitutional, it concluded that the right to free speech clearly tipped the balance of equities in Deferio's favor, and that the issuance of the requested injunction served the public interest by protecting Deferio's First Amendment rights. This decision once again highlights the ongoing obstacles that the LGBT community specifically faces against anti-gay bigotry disguised as religious freedom. Deferio's right to free speech consequently infringes upon CNY Pride's right to free expression. Even so, the thousands of attendees at this year's festival exemplify that community-wide support and acceptance of LGBT rights continue to grow stronger. – *Timothy Ramos, NYLS '19*

Minnesota Supreme Court Holds Man Accused of Soliciting Child for Sex Over the Internet May Raise Mistake-of-Age Defense

A Minnesota criminal statute makes it a strict liability crime to solicit a minor to engage in sex. What if the solicitation is made over the internet to somebody who misrepresents themselves to be 16 or older (the age of consent in Minnesota)? Traditionally, courts have treated sex offenses involving minors as coming within the realm of strict liability; as the statute is intended to protect the minor from sexual exploitation and injury, the defendant can't raise a claim of mistake of age or of his sincere belief that the person who he was inviting to engage in sex was old enough to consent, even if the minor misrepresented his or her age. In *State of Minnesota v. Moser*, 2016 Minn. App. LEXIS 59 (Aug. 8, 2016), however, the Minnesota Court of Appeals decided that this strict liability approach could not be used for internet solicitations where there was no face-to-face contact between the solicitor and the child, and where the child had represented to the solicitor that she was 16 or older.

Police received a report that a 14-year-old girl had been solicited for sex on-line, and she identified the defendant, age 42, as the solicitor. The solicitation took place on Facebook. Moser and the child never met in person. Early in their on-line dialogue, the girl told Moser she was 16. Although Moser repeatedly asked her to send pictures, she kept putting him off. They discussed masturbation, and Moser referred to meeting for sex. At one point, he said: "What are you doing tonight?" and then "When can I meet you and fuck that awesome pussy of yours?"

Based on this on-line conversation, he was charged with violating the statute. He sought to argue in defense mistake of age, moving to have the strict-liability statute declared unconstitutional and to allow him to raise the affirmative defense. He contended that precluding a mistake of age defense on these facts and failing to require the state to prove that he knew he was soliciting a minor imposed strict liability and violated substantive due process and his right to a have a fair trial and present a complete defense. Dismissing his motion, the trial court held that the state's compelling interest in protecting minors justified strict liability, even in the case of an internet solicitation whether the minor had lied about her age and the parties had never met.

Traditionally, courts have treated sex offenses involving minors as coming within the realm of strict liability.

In a lengthy opinion for the court, Judge Lucinda E. Jesson provided a thorough historical review of the requirements of *mens rea* in criminal prosecutions and the narrow circumstances where courts have accepted imposition of penalties in its absence. She found Moser's challenge to the statute to be rooted in the fundamental right to a fair trial, finding this to be infringed by the preclusion of a mistake-of-age defense, putting the state to the burden of showing a compelling interest that could only be achieved by precluding this defense – i.e., that the law was "narrowly tailored" to achieve this interest with the least imposition on the defendant's fundamental rights that are possible.

She referred as precedent to the Minnesota Supreme Court's decision in *State v. Guminga*, 395 N.W.2d 344 (1986),

where the court ruled against strict liability criminal penalties, as opposed to a civil fine, for a bar owner whose employee had sold alcoholic beverages to minors, normally a strict liability offense in Minnesota. Wrote the court in that case, "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits imposition of a monetary penalty in cases where strict liability has been imposed."

Given the serious penalties for violation of the child-solicitation statute (felony punishable by up to three years in prison and a $5,000 fine), the court felt that the statute went too far, imposing penalties "not consistent with the theory of public welfare offenses" and imposing an "unreasonable duty on defendants to ascertain the relevant facts. In cases where the defendant encounters the victim in person, it is reasonable to require the defendant to ascertain the victim's age," wrote Judge Jesson. "For example, it does not offend due process to charge the child pornography producer, in-person child solicitor, or child rapist, with knowledge of the victim's age. Where solicitation occurs solely over the internet, however, it is extremely difficult to determine the age of the person solicited with any certainty. Moser solicited the child solely over the Internet and never met her in person." The court found the statute "over-inclusive, as applied to Moser" and ruled it could not survive strict scrutiny.

The court concluded: "There are weights and balances in the scales of justice. Sexual solicitation of children is a grave concern. But the concept that wrongdoing must be conscious in order to be criminal and subject an offender to years of imprisonment has long been a foundation of our justice system. When the person solicited represents that he or she is 16 or older, the solicitation occurs over the Internet, and there is no in-person contact between the defendant and the person solicited, the prohibition in Minnesota Statutes section 609.352, subdivision 3(a), on a person charged under the child solicitation statute raising the affirmative defense of mistake of age violates substantive due process. The district court erred by denying Moser's motion to raise that defense." ■

Australian Federal Court Rules on Refugee Claim of Man with Varied Sexual Experiences

In *AXD15 v Minister for Immigration and Border Protection*, [2016] FCA 880, the appellant, from Egypt, had received a protection visa based on his claim of being homosexual and that he was not married and feared being killed by his family, his community and the authorities if he returned to Egypt. He claimed to be in a relationship with a man in Australia and to have engaged in sex with other men in Australia.

The appellant came undone when, bizarrely, he applied for a partner's visa for a woman in Egypt whom he said was his wife. It turned out this was true and that he had married her before coming to Australia and applying for his protection visa. It also turned out that 3 weeks after receiving his protection visa, rhe had returned to Egypt and stayed there for a number of months. And had done the same the following year. In addition, there were inconsistencies in his accounts of the homosexual relationship he claimed to have in Australia.

Unsurprisingly, the appellant was called on to show cause why his protection visa should not be cancelled. In response, amongst other things, the appellant said he had been forced into the marriage by his family and that he had engaged in sex with men in Australia which meant that he was homosexual.

The Refugee Review Tribunal concluded the appellant was not a witness of truth. Nor was he homosexual, and that he had engaged in sex with men only to fortify his claim to a protection visa. The fact that he had concealed his marriage told against the appellant when trying to justify his claims as to his fears if he returned to Egypt. The fact that he twice returned to Egypt, for lengthy periods, also counted against him.

AXD15 (individual migration litigants are anonymised in Australia) appealed the decision to two courts. The claimed error of law was illogicality or irrationality in that the Tribunal accepted as plausible that he had engaged in male to male sex in Australia, yet on the other hand refused to accept that such activities meant that he was homosexual. Consequently, AXD15 submitted, there was an insufficient logical evidentiary basis for the Tribunal to conclude both that he was not homosexual or bisexual and that there was not a real risk that he would suffer harm on the basis of his homosexuality or bisexuality if he were refouled to Egypt.

The Tribunal explicitly accepted that sexuality was complex and there may be a spectrum in one's sexual behaviour and preferences. It also accepted that there may be times of personal uncertainties and confusion about one's sexual orientation.

In his first appeal, the judge said that AXD15 did not rely on any evidence to establish the truth of the premise underlying his submission: all men who have sex with other men are homosexuals. Rather, the judge said, AXD15's counsel stated the proposition as though it were axiomatic. The primary judge said the proposition was not axiomatic and, in truth, sexuality and sexual activity were two different things. On the appellant's own case, the judge said, the appellant had sex with a woman (his wife) even though he was homosexual. That did not mean, the primary judge said, that the appellant was heterosexual or bisexual. The primary judge said that the appellant's argument was based on a false premise and must fail.

The Federal Court dismissed an appeal from that decision. The Federal Court held that the question of whether or not AXD15 was homosexual was a conclusion of fact which was open to the Tribunal on the evidence. Unsurprisingly, the Federal Court rejected as a matter of law or jurisdictional error the proposition that a person's sexual orientation may be determined by reference only to sexual activity with members of the same sex without any regard to the circumstances or frequency of that activity or without any regard to sexual activity with members of the opposite sex.

The decision can be accessed at austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2016/880.html. – *David Buchanan*

David Buchanan is a Sr. Counsel Barrister for Forbes Chambers in Sydney, Australia.

CIVIL LITIGATION

FIFTH CIRCUIT COURT OF APPEALS – The 5th Circuit issued an unpublished *per curiam* decision on August 3, upholding a decision by the U.S. District Court for the Eastern District of Louisiana to dismiss Title VII claims of hostile environment discrimination and retaliation brought by a gay man against the company where he was working as a "temp to perm" employee in a call center. *Stewart v. BrownGreer, P.L.C.*, 2016 WL 4136932. The plaintiff, a heavy gay African-American man, alleged that while working at the call center "he was subjected to harassment due to his sexual orientation, race, and disability" in violation of Title VII and the ADA. "In particular, Stewart claimed that a coworker harassed him based on his sexual orientation by making comments in a high-pitched voice, using a stereotypical hand gesture, and making homophobic comments. Stewart alleged that the discriminatory remarks included coworkers' derogatory comments about 'fat people,' which Stewart interpreted as coded statements about homosexuals. He also stated that his coworkers made discriminatory comments about his race when they stated that 'everyone knows that Martin Luther King Street runs through 'bad' neighborhoods in almost every city in America' and about his disability when they stated that 'some people will not get health insurance no matter what.' Stewart ultimately filed a written complaint regarding the harassment with BrownGreer. Shortly thereafter, Stewart was placed in remedial training and was not offered permanent employment," and initiated his Title VII case for discrimination and retaliation. The district court, assuming without deciding that the anti-gay stuff came under Title VII for purpose of ruling on the motion to dismiss, determined that "the periodic incidents and isolated comments were not sufficiently severe or pervasive to make a prima facie showing of harassment." In other words, the district judge lacked empathy for the plaintiff, most likely. The district judge also decided that Stewart "failed to show that he engaged in a protected activity because no reasonable person could have believed that the comments reported by Stewart would amount to a violation of Title VII." Stewart appealed only the dismissal of the retaliation claim to the 5th Circuit, which affirmed the district court. The court endorsed the trial judge's view that Stewart had failed to allege facts in his hostile environment complaint sufficient to ground a retaliation claim based on his complaining to the employer. "Even assuming, arguendo, that sexual orientation is a protected class for Title VII claims," wrote the court, "Stewart has failed to show that a 'reasonable person could have believed' that the actions by his coworkers constituted a violation of Title VII," going on to cite a case that stated that "simple teasing, offhand comments, and isolated incidents (uncles extremely serious)" were not enough to constitute a hostile environment. The court said that "many of the coworkers' statements that Stewart relies on to support his claims are facially innocuous, and he has failed to present evidence supporting his interpretation of those statements as discriminatory." In a footnote linked to its "arguendo" comment, the court quoted a prior 5th Circuit decision, *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015), stating, "Title VII in plain terms does not cover 'sexual orientation,'" and we decline to decide here whether plaintiff "may claim some protection under Title VII."

SIXTH CIRCUIT COURT OF APPEALS – A unanimous panel of the 6th Circuit ruled in *Does v. Snyder*, 2016 WL 4473231, 2016 U.S. App. LEXIS 15669 (Aug. 25, 2016), that Michigan's draconian Sex Offender Registration Act (SORA) violates the Ex Post Facto prohibition in the Constitution regarding plaintiffs whose offenses predate the most stringent and invasive provisions of SORA enacted in 2006 and 2011. Although the Supreme Court held in *Smith v. Doe*, 538 U.S. 84 (2003) that Alaska's "first-generation" SORA statute did not constitute an Ex Post Facto law as retroactively applied to convicted sex offenders because, in the Supreme Court's view, it did not impose "punishment" as such, the 6th Circuit panel found that the extreme requirements imposed by the Michigan SORA as amended amounted to punishment. Among the restrictions imposed retroactively on convicted sex offenders are substantial limitations on where they can live that are so extensive as to make it difficult for them to find a residence, restrictions on their movements that substantially interfere with their ability to carry on a normal family life and employment, and requirements of periodic personal reporting of even trivial changes in their status that are quite burdensome. Although the legislature premised these restrictions mainly on the need to protect children, they apply to a wide range of offenses, some having nothing to do with children and slight connection if any to sexual misconduct, and the SORA regime does not involve any individualized assessment of dangerousness, merely roughly sorting offenders into three tiers based solely on the statutory provisions under which they were convicted. The court found that SORA "resembles, in some respects at least, the ancient punishment of banishment. True, it does not prohibit the registrant from setting foot in the school zones, and it certainly doesn't make the registrant 'dead in law [and] entirely cut off from society,' which is how Blackstone described the banished. But its geographical restrictions are nevertheless very burdensome, especially in densely populated areas." Furthermore, the court found that in many cases SORA's impositions are counterproductive. While it is intended to prevent recidivism by sex offenders, the court found that data show very

low rates of recidivism for most sex offenders (apart from pedophiles), and that the impact of the restrictions, making it difficult for offenders who have completed their prison terms to reintegrate into society, are more likely to increase than decrease criminal behavior. Commenting that "the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals," the court asserted: "SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information." Thus, the court concluded that SORA "imposes punishment," violating the principle that "punishment may never be retroactively imposed or increased." Although this cases challenged SORA on many grounds, the appeal concerned the trial court's rejection of plaintiffs' Ex Post Facto argument. "These questions, however, will have to wait for another day because none of the contested provisions may now be applied to the plaintiffs in this lawsuit and anything we would say on those other matters would be dicta." The court's opinion was written by Circuit Judge Alice M. Batchelder. The John and Mary Doe plaintiffs are represented by the ACLU of Michigan and the Michigan Clinical Law Program. The court also received amicus briefs from various law school clinical programs and pro bono counsel.

SEVENTH CIRCUIT COURT OF APPEALS – The 7th Circuit rejected a nurse's challenge to his discharge for an unorthodox approach to diagnosing male genital warts in *Riano v. McDonald*, 2016 U.S. App. LEXIS 15097 (August 17, 2016). James Riano, who worked as a registered nurse for the Veterans Administration (VA), had previously worked as a hospital corpsman in the Navy. In 2004, he began working as an RN at the VA medical center in Milwaukee. Beginning in the summer of 2007, he began working at a new clinic specializing in treating genital warts in men. He lost his job after a patient complained that Riano sexually assaulted him while giving him an examination. Subsequent investigation disclosed that Riano's usual routine in examining men for genital warts was to apply moisturizing cream to the penis and then applying pressure by hand until at least partial erection was achieved. Riano accompanied this with crude language which he said was intended to put the men at ease, using words like "pecker" and "balls." Riano insisted that this technique was used in the Navy for such examinations, because, he claimed, it was easier to detect genital warts on a hard penis than a flaccid one. In some cases Riano's technique (perhaps overly energetic, or dealing with somebody suffering from "premature ejaculation"?) led to patients experiencing orgasm. The VA's Office of the Inspector General interviewed many men who were examined by Riano and concluded that his methods (and the sexually-oriented language he was using during examinations) were inappropriate, "not standard and not medically necessary," and he was discharged. He pursued an administrative appeal, producing statements from some patients who were quite satisfied with how they were treated by Riano (some of them clearly appreciated the "happy ending"), and some were even critical of the investigator, saying his questions were "too aggressive" and that their answers were taken out of context. Some objected that the investigator "raised an inappropriate consideration by asking if they believed Riano was gay." Riano wanted the appeals board to receive live testimony from these patients, but the board denied his request, citing patient privacy, "potential emotional harm, and the adequacy of the patients' written statements." The board also excluded as irrelevant Riano's proffer of testimony from a former corpsman who had trained and worked with him in the Navy, where Riano claimed to have learned and applied this examination technique without complaints. (Those Navy boys just want to have fun during those long excursions at sea!) Riano also denied some patient reports about the language he used during their examinations and the allegation that he was actually masturbating patients for his own sexual gratification. The hearing board received expert testimony refuting Riano's contention about the desirability of provoking an erection to facilitate an exam for genital warts, in response to which Riano presented testimony from a female nurse practitioner that a partial erection could be beneficial in this context, but that it was not medically necessary and that she had never purposefully induced a patient's erection for this purpose. However, she opined that Riano's technique was "within the scope of practice for a nurse" and that his use of sexually crude language in dealing with male patients was not necessarily outside the scope of normal practice. Another testifying nurse confirmed Riano's contention that using "moisturizing cream to create a sheen" made warts easier to detect. Ultimately, the board found that "Riano had used language and an examination technique that was medically inappropriate," and the board's contention was upheld in Riano's subsequent appeal to the federal district court. Circuit Judge Ann Claire Williams, writing for the panel, found no due process errors and concluded that the evidence in the hearing record was sufficient to support the board's conclusion, inasmuch as Riano did not

"dispute the relevant details about his technique and language" and so "he has failed to show that he was harmed by the lack of live patient testimony." Furthermore, she endorsed the board's determination that the expert testimony provided was sufficient to support the board's conclusion that Riano's behavior departed from "appropriate professional conduct." Riano's counsel are Martin E. Kohler and Geoffrey R. Misfeldt of Milwaukee. The court's decision says nothing about Mr. Riano's sexual orientation, and he did not raise any issue of sexual orientation discrimination.

NINTH CIRCUIT COURT OF APPEALS – Sorting through a bit of a procedural quagmire, a panel of the 9th Circuit Court of Appeals ruled in *Bibiano v. Lynch*, 2016 WL 4409351, 2016 U.S. App. LEXIS 15260 (Aug. 19, 2016), that a petition for withholding of removal or protection under the Convention Against Torture presented by a transgender Mexican should be remanded to the BIA, despite the finding that the 9th Circuit was not the proper forum for petitioner's appeal under the venue rules. Writing for the panel, Circuit Judge Harry Pregerson's summary of the facts is chilling. Petitioner's name has been redacted for obvious reasons. "Because of her sexual orientation and gender identity, [petitioner] did not conform to gender norms in Mexico. As a result, [she] was harassed, beaten, and sexually assaulted. After one persistent tormenter threatened to kill her in 1994, she fled to California and sought asylum. An asylum officer denied her application and referred her to an [Immigration Judge (IJ)] for removal proceedings. She moved to North Carolina but did not notify the court of her change of address and failed to receive notice of her subsequent immigration hearing. Because she did not appear for her hearing in Los Angeles, an IJ issued an in absentia removal order against her in 1995. Years later, in 2009, while living in South Carolina, she was arrested for driving without a license and placed in the custody of immigration officers. She was removed to Mexico under her 1995 in absentia removal order. Two months later, she illegally re-entered the U.S., and in June 2011, following a traffic stop, she was again placed in immigration custody. On June 16, 2011, officials from [DHS] in Hendersonville, North Carolina, filed a Notice of Intent to reinstate the 1995 removal order. While in custody in Georgia, she stated that she did not want to return to Mexico for fear of persecution . . . , and an immigration officer conducted a reasonable fear assessment. The officer concluded that she 'established a reasonable fear of persecution in Mexico' and referred her case to an IJ in Atlanta. On October 14, 2011, she applied for withholding of removal and CAT protection based on her sexual orientation and gender identity. She appeared pro se before an IJ in multiple hearings during November 2011. On November 30, 2011, the IJ denied her applications for relief. On appeal, the BIA upheld the IJ's denial of relief under Eleventh Circuit law. She filed her petition for review of the BIA's decision with the Ninth Circuit where her in absentia removal order originated." The pressing question for the 9th Circuit panel was whether it had jurisdiction of petitioner's appeal from a BIA decision that stemmed from an IJ ruling in Atlanta, when she had been taken into custody in South Carolina and detained in Georgia. The statute provides that a BIA decision can be appealed to the court of appeals "for the judicial circuit in which the immigration judge completed the proceedings." Petitioner argued this would be the 9th Circuit, because these proceedings really stemmed from the original IJ removal order from Los Angeles, and the more recent proceedings were to determine whether to revive that original removal order. The government argued that the most recent IJ order from Atlanta was the relevant one for applying the jurisdictional statute, noting as well that the petitioner was most recently apprehended on the East, not the West, Coast. The 9th Circuit panel, deciding a question of first impression for the Circuit, found that the provision in question is not actually jurisdictional, and the question of where this appeal should be decided was rather one of proper venue. As to that, the court concluded that venue was proper in the 11th Circuit. However, in the interest of justice, it made sense to decide this appeal in the 9th Circuit, because the government was now asking for a remand to the BIA rather than a ruling on the merits, so regardless which Circuit heard the appeal, a remand to BIA was likely. As background information, it is useful to note that the 9th Circuit has issued a string of decisions concluding that transgender people from Mexico are entitled to withholding of removal or CAT protection, based on the accumulated documentation of the extremely hostile reactions in Mexico to transgender people. By now, it appears, the message may have gotten through to the BIA, if not uniformly to the IJ corps, that transgender people who have endured persecution causing them to flee Mexico are qualified for protection as refugees in the U.S. Since the government has asked for a remand, wrote Judge Pregerson, transferring this case back to the 11th Circuit, after it has been briefed and argued in the 9th Circuit, makes no sense. "As the interests of justice do not counsel transfer, we deny the government's motion to transfer this matter to the 11th Circuit. We grant the request to remand this matter to the BIA to revisit the merits of [petitioner's] reasonable fear of persecution should she be returned to Mexico. Our remand is not intended to foreclose the BIA from considering any further issues which the parties may properly raise. We also leave it to the BIA to decide, in the first instance, which circuit's law governs this case on remand." BIA's decision on circuit law

could be outcome determinative, since the 11th Circuit lacks the 9th Circuit's recent history of strong support for transgender Mexicans to be allowed to stay in the U.S. For this complicated appeal, petitioner was represented by attorneys with the National Immigrant Justice Center in Chicago.

ELEVENTH CIRCUIT COURT OF APPEALS – An 11th Circuit panel, referencing the position the circuit previously took in *Williams v. Attorney General* [*Williams IV*], 378 F.3d 1232 (2004), found that no subsequent developments authorized it to retreat from its position that a ban on commercial distribution of sex toys does not violate the 14th Amendment Due Process Clause, but "encouraged" the plaintiffs to seek *en banc* reconsideration in this case. *Flanigan's Enterprises v. City of Sandy Springs*, 2016 WL 4088731, 2016 U.S. App. LEXIS 14016 (Aug. 2, 2016). The plaintiffs run "adult bookstores" in Sandy Springs that sell sexually-related materials, including sex toys. A co-plaintiff in the case suffers from multiple sclerosis and uses sex toys with her husband "to facilitate intimacy." She wants to purchase them from at one of the plaintiff stores. Another co-plaintiff is an artist who wants to buy sex toys for use in his artwork, as well as his own "private, sexual activity." However, the City passed a law in 2009 prohibiting their commercial distribution. "The Appellants urge this panel to overrule *Williams IV* in light of the Supreme Court's subsequent decisions in *United States v. Windsor* and *Obergefell v. Hodges*," wrote Circuit Judge Charles Wilson for the panel. "Their strongest argument is that time has shown that *Williams IV* erred in concluding *Lawrence [v. Texas]* did not announce a constitutional right to engage in acts of private, consensual sexual intimacy, and the Court has changed its analysis of privacy-based constitutional rights such that the remainder of *Williams IV* cannot stand. To the extend *Lawrence* was ambiguous, the Appellants explain, *Windsor* clarified that *Lawrence* announced a new constitutional right and that that right could be implicated directly or indirectly. In *Windsor*, the Court assessed the constitutionality of the Defense of Marriage Act (DOMA), a federal law that, in relevant part, amended the Dictionary Act to define 'marriage' as 'a legal union between one man and one woman as husband and wife.' The Court explained that DOMA's definition was unconstitutional, inter alia, because it impermissibly interfered with the federal constitutional right to 'private, consensual sexual intimacy' – a right the court indicated it had articulated in *Lawrence*. This holding made clear that the Texas sodomy statute and DOMA's definitional provision implicated the same liberty interest and that the scope of this liberty interest could extend to invalidate a law that did not directly regulate sexual conduct …" A similar argument was made referencing *Obergefell*, which was also premised on a due process fundamental rights analysis. "Although we are persuaded that *Windsor* and *Obergefell* cast serious doubt on *Williams IV*," continued Wilson, "we are unable to say that they undermine our prior decision to the point of abrogation," pointing out that attempts to bring *Williams IV* to the Supreme Court were rejected and "the Court has not expressly held in a subsequent decision that there is a right to engage in acts of private, consensual sexual intimacy, within which would fall a right to buy, sell, and use sexual devices." Thus, the panel concluded, short of *en banc* reversal or a more explicit ruling from the Supreme Court, an 11th Circuit panel was not empowered to overrule a prior panel decision, "although we are sympathetic to the Appellants' Fourteenth Amendment claim." The panel encouraged plaintiffs to seek *en banc* review so they can put their arguments before the full 11th Circuit.

ALABAMA – It was a misunderstanding, insists Alabama Chief Justice Roy Moore, who asserts that he did not instruct Alabama Probate Judges to defy federal law when he circulated a memorandum earlier this year telling them that the Alabama Supreme Court's injunction against same-sex marriage issued a year earlier was still in effect. In new papers filed in the ethics case against him, Moore insists that he issued his memo in response to questions from probate judges about how they should proceed in light of conflicting rulings from the state and federal courts. The U.S. Supreme Court had ruled that same-sex couples have the right to marry, while the Alabama Supreme Court had previously rejected the argument that the state's ban on same-sex marriage violated the constitution. Although Moore had taken the position publicly that the U.S. Supreme Court's decision was binding only on the respondent states from the 6th Circuit, the only states that were named parties to the lawsuit, and thus was not binding on state probate judges in Alabama, he did not assert that argument in the memorandum he sent to the probate judges (as a result of which several of them still to this day are not issuing marriage licenses). Moore now argues that he was urging the Alabama Supreme Court to rule in that case, but that the other justices were stalling (and he had recused himself due to his prior rulings), and thus he should not be sanctioned for sending out the memo. After he sent the memo, the Alabama Supreme Court, acting without his participation, dismissed the case before it, which had been brought by an anti-gay organization and a probate judge, as moot, over some dissenting opinions reiterating disagreement with the *Obergefell* ruling. The Court of the Judiciary scheduled oral arguments on the ethics charges against Moore for August 8. On August 4, U.S. District Judge Harold Albritton dismissed Moore's lawsuit against the Judicial Inquiry Commission, stating that the

state judicial ethics proceeding against Moore should proceed without federal judicial interference, according to an Associated Press report posted that day. Moore had contended that the automatic removal provision blocking him from his duties as Chief Justice while the ethics proceeding was pending violated his federal due process rights. "The Supreme Court of the United States has long recognized the importance of federal courts not interfering with ongoing state court proceedings, except under very limited circumstances," wrote Albritton in a brief memorandum opinion.

ALABAMA – Given ongoing judicial resistance to marriage equality in Alabama, it is not surprising that Senior U.S. District Judge Callie V. S. Granade was receptive to plaintiffs' request in *Strawser v. Strange*, 2016 U.S. Dist. LEXIS 111400 (S.D. Alabama), for entry of a strongly worded permanent injunction, making clear that the state's statutory and constitutional bans on same-sex marriage are unconstitutional and enjoining all relevant defendants and defendant class members from enforcing the law. Plaintiffs pointed out that the court's previous "final order" in the case had neglected to make the preliminary injunction against Attorney General Luther Strange permanent. He opposed, claiming that after *Obergefell* the issue was moot and no permanent injunction was needed. On August 22, the judge issued a new order embodying a permanent injunction, specifically stating that if state officials are carrying out their normal procedures to issue licenses to different-sex couples, they must do the same for same-sex couples. The attorney general and all other relevant officials are specifically enjoined against denying same-sex couples marriage licenses "on the ground that they are same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order, including any injunction or mandate issued by the Alabama Supreme Court pertaining to same-sex marriage." Take that, Roy Moore!! The next day, she issued another order, granting a motion to award costs to plaintiffs, *Strawser v. Strange*, 2016 U.S. Dist. LEXIS 112656 (S.D. Alabama, Aug. 23, 2016).

CALIFORNIA – In the continuing saga of challenges by practitioners of "sexual orientation change efforts" to laws forbidding licensed health care professionals from providing such "therapy" to minors, U.S. District Judge Kimberly J. Mueller issued a new decision in *Pickup v. Brown*, 2016 U.S. Dist. LEXIS 105156, 2016 WL 4192406 (E.D. Cal.), on August 9, granting defendants' motion to dismiss the plaintiffs' first amended complaint, which was filed after the 9th Circuit upheld the judge's denial of plaintiffs' motion for a preliminary injunction to keep the California law from going into effect while litigation was pending. The 9th Circuit had ruled in *Pickup v. Brown*, 740 F.3d 1208 (2013), that the law did not "violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights." The Supreme Court denied a petition for certiorari, 134 S. Ct. 2871 (2014), in both this case and the companion case of *Welch v. Brown*, in which a different judge of the same district court had granted a preliminary injunction and was reversed by the 9th Circuit. Judge Mueller subsequently granted the defendants' motion to dismiss that complaint, with leave to the plaintiffs to file an amended complaint. One would have thought that these litigation results would discourage plaintiffs from litigating further, but instead they filed their amended complaint, reiterating and expanding their 1st Amendment claims, arguing that the law is unconstitutionally vague and does not survive any level of judicial review, and further that it places a substantial burden on the religious beliefs of the plaintiffs and would not survive strict scrutiny on this ground. The plaintiffs claim to have sought clarification from the California Board of Behavioral Sciences as to how the law would be construed, and received back a response that they found unenlightening: that the law "prohibits a California mental health provider from engaging in sexual orientation change efforts with any patient under the age of 18 years old." They didn't need the Board to tell them that, since the statute is written in plain language. In any event, in this ruling Judge Mueller granted a motion to dismiss Governor Jerry Brown as a defendant on the basis of 11th Amendment immunity, finding that the complaint was factually deficient in establishing any sort of connection between the governor and enforcement of the statute. Turning to the 1st Amendment Free Speech and Free Exercise (as applied) challenges, the judge found that there was no allegation that the statute had actually been applied to the plaintiffs in any enforcement action. "Plaintiffs have not pointed to any action by defendants and alleged that defendants applied SB 1172 differently to plaintiffs than to others. Simply alleging in conclusory fashion that defendants' application of SB 1172 to plaintiffs is hostile is insufficient," she wrote. "Thought plaintiffs allege that they sought clarification with respect to the scope of the statute from the defendants but were ignored, unanswered requests for clarification do not amount to unequal enforcement, enforcement at all or differential application by defendants, especially in light of the Ninth Circuit's decision on the scope and application of SB 1172. Furthermore, defendants did respond to plaintiffs' request, informing them that it would be unlawful to provide SOCE to children under eighteen years old." Judge Mueller did not expressly address

the free exercise claims in her opinion, instead dismissing without leave to amend. Enough already, seems to be her attitude.

CALIFORNIA – An HIV-positive man's claim that his livelihood had been damaged when a public hospital employee inappropriately disclosed his HIV status to "multiple third parties" suffered summary judgment in *Doe v. Kaweah Delta Hospital*, 2016 WL 4381870 (E.D. Cal., Aug. 15, 2016). The John Doe plaintiff alleged that the employee who was his "discharge planner" from the hospital after he was treated for HIV-related pneumonia in 2002 spread the information without his authorization, and that he had kept his HIV status "to himself," not revealing it to "his friends and associates." Doe owned a hair salon and found that his business began declining in 2005 and "fell apart by 2006," leading him to believe that this was due to the discharge planner's unauthorized disclosures. He filed a California Tort Claims Act notice on October 10, 2007, which was rejected by the hospital. He then filed suit on January 24, 2008, bringing a 42 USC Sec. 1983 action alleging that hospital failed to take appropriate steps to safeguard confidential patient information and also included state law claims against the employee. His main problem on the summary judgment motion was one of timing, as the court ultimately found that all his claims were time-barred. Although he was initially represented by counsel, at some point his counsel quit and he was proceeding *pro se*. As to the substance, his claim that the hospital was indifferent to the necessity to safeguard patient medical information from disclosure was confounded by the evidence that the hospital required employees to sign a declaration affirming that they would keep required confidences of patient information and "observe that confidence in all matters whenever [their] service with [the hospital] ends." The hospital also presented evidence that it admonished employees to keep patients' medical information in "complete and absolute confidence." A signed declaration by the discharge planner was produced by the hospital. U.S. District Judge Anthony W. Ishii concluded that even assuming that the employee disclosed the confidential information, "there is no evidence to suggest that it was because she did not understand her obligation to keep it confidential. Although Plaintiff identifies a constitutionally protected informational privacy, taking the evidence in the light most favorable to Plaintiff, he has failed to establish a claim for failure to train." Furthermore, of course, a government hospital cannot be held vicariously liable for tortious conduct by an employee, absent evidence of such failure to train evincing deliberate indifference to patient privacy rights.

CALIFORNIA – U.S. District Judge William H. Orrick refused to grant summary judgement to the employer in a hostile environment harassment case brought under the California Fair Employment and Housing Act by a self-described "butch" lesbian who asserted that she had been subjected to "a long, sustained pattern of severe and pervasive harassment and inappropriate conduct directed at her" beginning in 2008 and continuing into 2014. *Lindsey v. Costco Wholesale Corporation*, 2016 U.S. Dist. LEXIS 107850 (N.D. Cal., August 12, 2016). Laurie Lindsey's complaint sets out seven distinct incidents over the course of her employment, focusing on the misbehavior of one supervisor, but adding in misconduct by other supervisors that was not covered in her administrative complaint to the FEH Commission. (The case was originally filed in California Superior Court and removed by Costco to federal court under diversity jurisdiction, as Lindsey did not assert any federal Title VII claims.) While approving Costco's request to narrow the case to the allegations concerning the one supervisor, Judge Orrick found the factual allegations sufficient to raise material fact issues on whether the conduct was sufficiently severe and pervasive to constitute a hostile environment. He also found that there were fact issues to be developed on the question whether earlier incidents were time-barred as proof. He rejected Costco's request to dismiss the claim of "failure to prevent harassment," find that this motion "meritless" because it is tied to the main motion that he had denied. However, Judge Orrick did grant the motion to reject Lindsey's claim for punitive damages, finding that her pleadings did not meet the standard set by California's statutory provision on the circumstances under which such damages could be sought in a discrimination case, under which she would be required to prove that her harassing supervisor met the statutory definition of a "managing agent" of the company. Orrick found that she had failed to assert that somebody with sufficient independent managerial authority and judgment to redress the situation was aware of what was going on, so that the corporate employer could be charged with "conscious disregard" of her rights under the statute as required to impose punitive damages on the employer. Lindsey's counsel are Bailey Bifoss (lead attorney) and Stephen R. Jaffe, The Jaffe Law Firm; Adam Seth Cashman and David Mittmann Jolivet, both of Singer/Bea LLP (all of San Francisco). Costco is represented by attorneys from the Sacramento office of Seyfarth Shaw LLP, a Chicago-based national labor law firm.

CALIFORNIA – Under federal civil pleading standards, plaintiffs have to allege facts from which one might believe that they have a plausible legal

claim before they can survive a motion to dismiss. Conclusory allegations of discrimination won't suffice, as plaintiffs Esperanza Corral and Diana Balgas, domestic partners who jointly own property encumbered by loans they would like to refinance, undoubtedly learned to their dismay in *Corral v. Bank of America, N.A.*, 2016 U.S. Dist. LEXIS 99726, 2016 WL 4070132 (N.D. Cal., July 29, 2016). They sued a phalanx of lenders who hold mortgages on their properties, alleging that they had discriminated against the plaintiffs in rejecting their "attempts to satisfactorily modify their loans, instead offering them unsustainably high modification rates and terms." They asserted that their attempts were stymied because of their sexual orientation, gender and race. But that's it, as far as factual allegations go. Their complaint recites a litany of frustration common to most folks seeking to modify their home loans – being placed on hold, constantly getting customer service representatives who can't handle their issues, receiving no timely responses to their inquiries, and so forth. They claimed violations of the federal Fair Housing Act, the Equal Opportunity Credit Act, the California Fair Employment and Housing Act, the state's Unfair Competition Law, the Unruh Civil Rights Act, and the state's Homeowner Bill of Rights. But they didn't allege any specific facts that would tend to show they were treated any worse than others in their position because of their race, sex or sexual orientation. And it is common knowledge that most people find it frustrating dealing with their creditors in attempting to modify home loans, regardless of the applicants' race, sexual orientation and so forth. And so District Judge Edward M. Chen granted the defendants' motion to dismiss. "However," he wrote, "because this is the first motion to dismiss to be heard by the Court, the Court – with reluctance – dismisses the complaint without prejudice." If the plaintiffs, represented by counsel as they are, can come back with an amended complaint alleging sufficient facts to back a plausible discrimination claim within thirty days, they will be allowed to proceed. "In so alleging," wrote Judge Chen, "Plaintiffs' counsel is firmly reminded of their Rule 11 obligations," referring in a footnote to the fact that plaintiffs had filed at least nine other cases and had engaged in "highly questionable" behavior.

CALIFORNIA – John Trapper, suspended and then terminated from employment by Associated Students, Inc., an association that provides various services and facilities to the students of California State University at Long Beach, has won a new trial on his claims that he suffered unlawful retaliation for complaining about discrimination against him because of his sexual orientation and age, upon a finding by the California 2nd District Court of Appeal that the special verdict issued against Trapper by the jury resulted from a misunderstanding and misapplication of the law. *Trapper v. Associated Students, Inc.*, 2016 WL 3919294, 2016 Cal. App. Unpub. LEXIS 5268 (July 18, 2016). Trapper made internal complaints concerning sexual orientation and age discrimination and was subsequently suspended and discharged. However, since he was approaching the age at which he could retire with a pension under ASI's employee benefits plan, his suspension was extended so that the discharge would be effective after he so qualified. Trapper then filed his discrimination claim under the California Fair Employment and Housing Act, which explicitly forbids sexual orientation and age discrimination, and retaliation against an employee for complaining about such discrimination. The trial judge, Los Angeles County Superior Court Judge Michael L. Stern, denied ASI's motion for summary judgment and the case went to a jury trial. After trial, Trapper withdrew his discrimination claims and asserted only his retaliation claims, which went to the jury for deliberation. Judge Stern gave the jury a special verdict form with 10 questions, as agreed by counsel. The first question asked whether Trapper complained to ASI about discrimination because of his sexual orientation, and the fifth asked whether he complained to ASI about discrimination because of his age. The second and sixth questions asked whether ASI engaged in "adverse employment actions" against Trapper when it place him on administrative leave and/or discharged him. The third and seventh asked whether Trapper's complaints were a "substantial motivating reason" for ASI's decision to suspend and/or discharge him. The fourth and eighth asked whether ASI's conduct was a substantial factor in "causing harm" to Trapper. The ninth asked what Trapper's damages were, and the tenth asked whether he had proved by "clear and convincing evidence that conduct constituting malice or oppression was committed" by ASI, which would be a prerequisite for the judge imposing punitive damages. The form instructed the jury that if it answered "no" to questions 2 and 6, it was not to answer any of the remaining questions. The jury sent a question to the court during deliberations: "The information before Question 9 does not clearly state whether we need to proceed with determining answers on damages. Please provide an answer on proceeding with Question 9 for every scenario." In discussion with counsel, ASI's counsel said, "If they answered 'No', for example, to Question 2 and 6, it doesn't get them to damages . . ." but Trapper's counsel, disagreeing, said "the instruction on the form is accurate the way it is, and perhaps we need to clarify what they are asking for." The court of appeal commented, "The point raised by ASI's counsel – the jury would not reach the damages questions if it answered 'no' to Questions 2 and 6 –

was lost in the discussion." Judge Stern sent back a modified instruction, agreed between counsel: "The second sentence to the instructions immediately before Question 9 are modified to read: If you answered 'no' to either Question 3 or 4 and your answers to Questions 7 or 8 is 'no,' stop here and answer no further questions and have the presiding juror sign and date this form." The jury answered only questions 1, 2, 5, and 6, finding that Trapper had complained about sexual orientation and age discrimination to ASI but that ASI did not engage in an "adverse employment action" against Trapper when it suspended and/or discharged him. Since the jury followed the earlier instruction not to answer any other questions if it answered no to questions 2 and 6, and had not answered questions 3, 4, 7 or 8, the jury answered no further questions and sent out the signed jury form. Neither counsel objected to the special verdict responses. Judge Stern then entered judgment for ASI and Trapper appealed, *pro se*, arguing that suspension and discharge are, as a matter of law, adverse employment actions, so the instructions were flawed because the jury never determined whether his suspension or discharge were substantially motivated by his filing complaints, which was the key legal issue on his retaliation claims. Agreeing with Trapper, Justice Norman Epstein wrote for the court of appeal, "Because it was undisputed at trial that Trapper was placed on administrative leave and terminated, whether these constituted adverse employment actions presented a question of law for the court to decide. Simply stated, Questions 2 and 6 should not have gone to the jury, and the special verdict findings – that ASI did not subject Trapper to an adverse employment action by placing him on administrative leave and terminating him – are erroneous as a matter of law." The fundamental error made by counsel and trial judge was to submit to the jury a factual question that was not disputed between the parties, and then having the verdict turn on how the jury answered that question, which the jury evidently misinterpreted. One speculates that because ASI allowed Trapper to remain on suspension until he was qualified to retire with a full pension, the jury concluded that ASI did not "engage in an adverse employment action" against him. New trial ordered for Trapper. And, we would suggest, remedial judge school should be ordered for Judge Stern, who clearly mishandled the issue of charging the jury and responding to its question. Trapper's trial counsel, not named in the court of appeal decision, could probably use a refresher course as well, since counsel agreed with ASI's counsel on the content of the special verdict form that was submitted to Judge Stern.

CALIFORNIA – BloombergBNA *Daily Labor Report* (July 20) reports that Dignity Health has moved to dismiss a lawsuit brought by the ACLU on behalf of a transgender Dignity Health staff member employed in the company's Chandler, Arizona, facility, who was denied coverage for gender transition surgery under the company's self-funded employee health plan last year. *Robinson v. Dignity Health*, Case No. 3:16-cv-3035 (N.D. Cal., motion to dismiss filed July 15, 2016). This is reportedly the first such case to be filed after the Department of Health and Human Services issued its final rule implementing the non-discrimination provisions of the Affordable Care Act to require that employer-provided health coverage not discriminate because of an employee's gender identity, a part of the larger effort by the Obama Administration running across numerous agencies to establish that statutory bans on sex discrimination extend to claims of gender identity discrimination. As worded, the final rule, published in 81 Fed. Reg. 31,376, did not expressly state that coverage of gender transition surgery is required, and the non-discrimination provision of the Affordable Care Act, Section 1557, does not mention gender identity explicitly as a prohibited ground of discrimination. The dismissal motion argues that the rule does not apply because the denial of coverage happened in June 2015, almost a year before the final rule was published, and the rule by its own terms does not take effect until 2017. The plaintiff alleges, of course, that the rule merely codifies an interpretation of Section 1557 and should not be held to limit interpretation of the Act, which went into effect in 2014. Dignity Health also argues that neither the statute nor the regulations require it to cover unnecessary medical procedures, and it deems gender transition surgery not to be medically necessary. (This used to be the position of the Department of Health and Human Services, but it has changed its position in response to evolving views in the medical profession about the necessity of transition surgery in cases of severe gender dysphoria. There is a growing body of case law, in both the insurance context and, within the 9th Circuit, the transgender inmate context, rejecting the view that gender transition surgery is never medically necessary.) The defendant filed a separate motion on July 15 seeking transfer of the case to the U.S. District Court in Arizona, where the plaintiff is employed. The defendant is subject to suit in the Northern District of California where its headquarters are located and corporate level policy decisions are made. Clearly they are trying to escape the relatively liberal federal district court in San Francisco for the more conservative judicial climate of Arizona.

CALIFORNIA – Attorney Gloria Allred announced a settlement in the lawsuit she filed on behalf of Rose Trevis, a transgender man, who was denied service by Hawleywood's Barber Shop, which advertises itself as a "male sanctuary" and declined to cut

Trevis's hair on the grounds that it was "women's hair." Under the settlement Hawleywood's will pay damages and attorneys' fees in an undisclosed amount to Trevis. The settlement incorporates a judicial order that prohibits the shop from selecting customers based on their actual or perceived gender, which violates California's public accommodations law. The order also prohibits the shop from marketing itself as a "men's only" barbershop." *Long Beach Press Telegram*, Aug. 22.

COLORADO – The Boulder City Council voted on July 19 to approve a $64,000 settlement with Sally Dieterich, a former employee in the city's Parks & Recreation Department, who filed a sexual orientation discrimination and retaliation claim under Title VII in U.S. District Court in March. Dieterich had alleged that her relationship with a new supervisor suddenly soured after Dieterich participated on a panel training department directors on being an ally to gay, lesbian and transgender employees, after which Dieterich told the supervisor that she had recently married her same-sex partner. Dieterich alleged that she was subsequently subjected to unfounded allegations of work rule violations and even a wrongful termination after Dieterich had been diagnosed with breast cancer. Her complaint alleged both sex discrimination and retaliation. Under the terms of the settlement negotiated with city attorneys, Dieterich agreed to withdraw her discrimination charges in exchange for a cash settlement. Dieterich died on July 7. At the Council meeting when the vote was taken, the city attorney and the city manager both asserted that the discrimination claims against the supervisor were "baseless." Nonetheless, the Council voted to approve the negotiated settlement, a vote that was required because the settlement was for more than the $10,000 limit that city officials were authorized to approve on their own. Under the settlement, the money was to cover an emotional distress claim and Dieterich's attorneys' fees. *Boulder News*, March 21; *Insurance Journal*, June 28; *U-Wire*, July 20.

DISTRICT OF COLUMBIA – The *National Law Journal* reported on August 1 that the D.C. Board on Professional Responsibility issued a report on July 29 finding a member of the D.C. Bar, Kelly Cross, had committed a crime of "moral turpitude" carrying a penalty of disbarment when he videotaped another man in the locker room of his gym without the man's consent. The Board disagreed with a hearing committee that had recommended a three-year suspension from practice. When the incident occurred in August 2009, Cross was an associate at Freshfields. He testified that he thought the man was someone he had exchanged messages with on Craigslist about meeting for sex at the gym, but the hearing committee rejected this account of what happened. The man saw Cross's bag with the video camera and took it, testifying to the committee that Cross tried to assault him to get the bag back and that Cross offered him $1,000 to return the bag. Cross denied assaulting the man or offering money, but the hearing committee resolved the credibility issue against Cross. Cross was charged with voyeurism shortly after the incident and sentenced by a D.C. court to 180 days in jail, suspended in favor of three years' probation. He left Freshfields and law practice, and now works on real estate development and consulting on electronic discovery issues. He also made an unsuccessful run for election to the Baltimore City Council this year. He has been representing himself *pro se* in the disciplinary process, telling the *Law Journal* that the case had been "blown out of proportion," and he criticized the Office of Disciplinary Counsel for taking so long over the case, with charges being filed in December 2012, the hearing committee taking testimony in 2013, and the Board issuing its report on July 29, 2016, with the case next going to the D.C. Court of Appeals, which has final say on lawyer discipline issues, so the entire proceeding will have stretched out well over seven years before it is resolved.

FLORIDA – U.S. District Judge Darrin P. Gayles rejected a claim by James L. Turner, a former Miami Dolphins coach, that he was defamed in a report issued by the defendant law firm, which had been tasked to investigate charges of bullying and harassment by Miami Dolphin players and staff. *Turner v. Wells*, 2016 WL 4187486 (S.D. Fla., July 29, 2016). In his suit against Ted Wells and his law firm, Paul, Weiss, Rifkind, Wharton & Garrison, Turner contended that the report caused him to be fired by the Dolphins because of the conclusions it articulated, including that Turner had participated in homophobic harassment of one of the Dolphins players. Judge Gayles concluded that the portion of the report discussing this issue did not include any actionable statements, because the conclusions were matters of opinion drawn by the authors of the report from their interpretation of facts that were not demonstrably false. The main focus of the report was on why offensive lineman Jonathan Martin had quit the team, and not on this issue involving Turner's alleged participation in homophobic taunting of another player. Judge Gayles' opinion goes into great detail on Florida defamation law and its application to the allegations in this complaint, including other issues that do not relate to the subject focus of this newsletter.

FLORIDA – A gay plaintiff has suffered dismissal of his sexual orientation and sex discrimination claims asserted under the Florida Civil Rights Act. *Gonzalez v.*

Envoy Aid, Inc., 2016 U.S. Dist. LEXIS 116979, 2016 WL 4539942 (M.D. Fla., Aug. 31, 2016). Adalberto Gonzalez began working as a flight attendant for Envoy Air in January 2011 and was discharged in July 2015. In his complaint he stated that he is a gay Hispanic male. Beginning in July 2013, he alleged, co-workers and supervisors began to subject him to slurs and mockery because of his sexual orientation, and his complaints to the Human Resource Department brought no relief. He also claimed that around the same time he was subjected to ethnic slurs and derogatory remarks and mocking accents, about which he also fruitlessly complained to HR. He claimed to have suffered various acts of retaliation for filing these internal complaints, culminating in his July 2015 discharge. He filed two charges with the EEOC, the first on December 2, 2014, alleging violations of Title VII, claiming he was being "discriminated against because of my sex, male for not conforming to sex stereotypes about how men are expected to present themselves in my physical appearance, actions and/or behaviors." In a second charge, he added allegations of discrimination because of sexual orientation, national origin, retaliation, age and disability, then amended this charge to assert a "hostile working environment towards me based on my sexual orientation, gender, sex, accent, national origin and disability." None of his factual allegations in this charge, however, related to national origin or retaliation. All of these EEOC charges pre-dated his discharge. The EEOC issued a right-to-sue letter on July 1, 2015, and he was terminated about two weeks later. He filed his lawsuit on April 1, 2016, in state court, asserting claims *only* under Florida's Civil Rights Act (which does not mention sexual orientation). Envoy removed the case to federal court under diversity jurisdiction and moved to dismiss, arguing that Florida's act does not ban sexual orientation discrimination and that all of the plaintiff's claims are time-barred. What ultimately defeated Gonzalez's case was the court's conclusion was that under the applicable statute of limitations of 300 days (since Florida is a deferral state under Title VII), his complaint could relate only to events alleged to have occurred *since* August 19, 2014, and all the events he identified by date in his complaint came earlier, the latest on July 26, 2013. Having found the case to be time-barred, District Judge Paul G. Byron commented that the court need not address Envoy's argument that sexual orientation claims are not actionable under Florida's statute. Gonzalez had argued in opposition to the motion that he was seeking relief for "gender discrimination," which Byron noted was contradictory to the factual allegations in his complaint. While dismissing the complaint for now, Byron gave Gonzalez until Sept. 12, 2016, to file an amended complaint, presumably to give him an opportunity to assert post-August 19, 2014, facts that could be the basis of a viable claim. Gonzalez is represented by Jay F. Romano of Boca Raton and Heather M. Meglino of Orlando.

GEORGIA – The Fulton County Commission voted to approve a payment of $475,000 to Walter Tisdale, formerly a senior public health educator specializing in HIV/AIDS education, screening and prevention for the county health department, to settle his claim that he was fired in retaliation for his complaints to the county and the Equal Opportunity Commission about anti-gay statements by his supervisor and "inappropriate sexual touching" by another supervisor. In his complaint, Tisdale alleged that his supervisor called him a "sissy" and told him to "grow a set of balls" so she could "cut them off," and also criticized him for his "gay voice." The County denied the allegations. As part of the settlement, it amended his personnel file to indicate that he was eligible for rehiring by the county. The lawsuit was filed in 2014. The settlement was reported by the *Atlanta Journal and Constitution* on August 13. The newspaper also reported that the director of the county health department at the relevant time had resigned last year "amid scrutiny of the way the county's HIV prevention program was handled," stating that "the program was so poorly managed that the county was forced to return millions of dollars" that had been received from the U.S. Centers for Disease Control and Prevention.

ILLINOIS – We previously reported about Senior U.S. District Judge Milton I. Shadur's decision to put off ruling on whether a sexual orientation discrimination claim could be pursued under Title VII until the 7th Circuit Court of Appeals decided the *Hively* case (see above). On July 28, one day before the date set by Judge Shadur to take up the employer's motion again, the 7th Circuit issued its decision, the three-judge panel holding it was bound by circuit precedent to reject the complaint in that case. On Aug. 1, Judge Shadur issued his ruling on the motion to dismiss in *Matavka v. Board of Education*, 2016 U.S. Dist. LEXIS 100108, 2016 WL 4119949 (N.D. Ill.). "With this Court of course bound to follow our Court of Appeals' precedential decision," he wrote, "it could well say, as *Hively* at 9 did immediately following its Part II.A, "We could end the discussion there' and simply grant Morton High's motion to dismiss. But something more must be said in light of the quite remarkable 33-page exposition and analysis set out in *Hively*'s Part II.B by Judge Rovner, joined by panel member Judge Bauer." Rovner and Bauer called for the Circuit to reconsider its precedent, and Judge Shadur joined the call, agreeing with those judges that it was time to reconsider the old view that

Title VII's ban on sex discrimination would not extend to a sexual orientation discrimination case. He referred, for example (albeit acknowledging it was a digression) to Justice Scalia's departure from "original intent" in his Second Amendment opinion for the Supreme Court defining "arms" to include modern weapons, that "could well have reflected a recognition that amending the Constitution is far more difficult in real world terms than amending a statute." "What has just been said here might be viewed as a digression because it is not necessary to this opinion's earlier announced outcome," he wrote. "But it has been occasioned by the thoughtful and extensive discussion in *Hively*'s Part II.B of the dilemma reflected in the struggles of District Courts such as this one, and by Courts of Appeals as well, in addressing the problems exemplified by this Case. For the reasons stated here, Morton High's Rule 12(b)(6) motion is granted and the Complaint is dismissed. And because this Court finds unpersuasive the earlier effort by Matavka's counsel to reshape the straightforward allegations of the Amended Complaint, which describe the disgusting conduct to which Matavka was subjected, into a different mold that might perhaps survive the flat-out holding in *Hively*, Matavka's action is dismissed as well." In other words, in light of *Hively*, if it is clear that the adverse conduct imposed on a plaintiff is due entirely to his sexual orientation, he has no case under Title VII in the three states comprising the 7th Circuit, at least for now, in the view of Judge Shadur.

ILLINOIS – In *John-Charles v. Roosevelt University*, 2016 Il App. (1st) 142696-U, 2016 Ill. App. Unpub. LEXIS 6592 (App. Ct. Il, 1st Dist., Aug. 3, 2016), a panel of the appellate court affirmed a ruling by Cook County Circuit Judge Thomas R. Mulroy that the private university's dismissal of the plaintiff from its doctoral program in Educational Leadership did not violate any contractual obligation that the school had to the student, and did not deprive the student of whatever procedural rights she enjoyed under the school's policies. In an early session of the Fall 2010 semester course "Seminar in Ethics and Leadership," during a discussion involving sexual orientation issues, the student voiced the opinion that individuals are "not born gay," leading the instructor to accuse her of having a "negative and disparaging view of gay people," wrote Justice Aurelia Pucinski for the appellate panel. The classroom exchange led to a follow-up meeting with the professor and an associate dean, and subsequently the student filed a formal internal complaint against the professor, alleging discrimination and harassment, which was found in the disciplinary process to be "unsubstantiated." The professor subsequently filed a formal complaint against the student for taping a class without permission, and assigned her a C+ for the course, which within the handbook rules for the graduate program was considered a failing grade. (Two C-range grades would be grounds for dismissal from the program, according to the handbook as revised.) The student declined an offer to let her retake the class with a different professor; instead, she appealed the grade through several levels of administrative appeal without success. The student responded to these developments by sending antagonistic emails to the professor, which were deemed "unprofessional" and later cited in the decision to dismiss her from the program. She also sent an intemperately worded email to another professor after getting a C- grade from her for a spring term course. Among other things, the email labeled the two professors as "the most racist and socially unjust people I have ever encountered in my life" and threatened to "see to it that the academic world is made aware of the discrimination, harassment and racism that is rampant at Roosevelt University via pseudo professors like you." The program decided to dismiss her after a hearing in which she was represented by legal counsel, a decision sustained through two levels of internal administrative appeals. The court observed that disputes of this kind were not treated under Illinois law as routine contract actions, because dismissal decisions involve exercises of professional academic judgment to which courts will normally defer if they are not arbitrary or capricious in light of the record. In this case, the court found that the student's claim that the university wrongfully changed some of the rules in the student handbook were unavailing, since there is clear language in the handbook reserving to the university the right to change rules, and that the decision to dismiss her was not arbitrary or capricious. Furthermore, all procedural rights specified in the school's formal policies had been accorded to the student. The court also rejected her claim that the school should have allowed her to present evidence at the hearing that her views on homosexuality were shared by others in the profession. The school pointed out that the trial judge determined that the student "had not been dismissed based on her personal or professional opinion, and any testimony demonstrating that her personal opinion had some backing in the professional community would have had no impact on the court's ruling." The court upheld the trial judge's conclusion that the student was dismissed "based on her failure to satisfy academic and professional requirements," so there was no abuse of discretion when the court also barred her "from presenting irrelevant evidence at trial intending to demonstrate that her belief had support in the professional community."

ILLINOIS – Religious employers enjoy a "ministerial exception" from the

requirements of anti-discrimination laws under the 1st Amendment, but it is an affirmative defense which, according to courts within the 7th Circuit, means that when an employee sues a religious organization for discrimination and the defendant wants to rely on the "ministerial exception," the court will *not* grant a motion to dismiss unless it appears from factual allegations *in the Complaint* that the plaintiff is clearly an employee covered by the "exception." Otherwise, application of the exception relies on resolving factual issues requiring discovery and should be reserved for a summary judgment motion or trial. So the Archdiocese of Chicago learned to its regret, one suspects, when U.S. District Judge Charles P. Kocoras denied the motion to dismiss a discrimination action by John Colin Collette, who was discharged as Director of Worship and Director of Music at Holy Family Parish in Inverness, Illinois, when church authorities learned that he was engaged to and planning to marry a same-sex partner. *Collette v. Archdiocese of Chicago*, 2016 U.S. Dist. LEXIS 99886, 2016 WL 4063167 (N.D. Ill., July 29, 2016). Collette alleges that he was employed at the church for seventeen years, had "concurrent titles of Director of Worship and Director of Music" and that "his employment was 'without incident and he always met or exceeded the expectations of his employer.'" After the Archdiocese learned of his planned nuptials he was asked to resign, and when he refused he was terminated on July 27, 2014. Emails from the Cardinal indicated that Collette was terminated because he planned to enter into a "non-sacramental marriage," but, asserts Collette, the Archdiocese has many heterosexual employees who have entered "non-sacramental marriages" but have not been discharged, and "many gay and lesbian employees who have not married same-sex partners." Thus, Collette charges, he "was terminated because of his sex, sexual orientation, and marital status" in violation of Title VII, the Illinois Human Rights Act, and the Cook County Human Rights Ordinance. The Archdiocese argued that Collette's job titles made clear that he was covered by the exception, since a "Director of Worship" is "by definition" a minister, and that the Music Director title was "established as ministerial" in a 2006 7th Circuit ruling, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036. But the "formal title" an employee has is not dispositive on this issue; the actual job duties and responsibilities determine whether the exception applies. "Collette's Complaint lacks sufficient information regarding these points and instead alleges what his role as Director of Worship and Music Director did not include: 'he was not responsible for planning the liturgy or selecting the music played during masses and services'; he 'never planned the liturgy for masses'; and he 'never selected nor approved music for masses.'" In other words, Collette alleges that his duties involved managing logistics and musical performances, but not directly deciding liturgical matters or actual acting as a minister of the gospel. "A factual record focused on Collette's functional role as Director of Worship and Music Director is therefore needed to determine whether that role was ministerial," wrote Judge Kocoras, rejecting the Archdiocese's reliance on *Tomic*, pointing out that in that case there was careful scrutiny of the actual job duties to determine whether the Music Director was a ministerial employee, so it is not a precedent for the idea that the title is dispositive. On a motion to dismiss the Complaint is controlling as to the facts before the court, and nothing the Archdiocese alleges in its motion to dismiss can be considered on that score, as it is not yet evidence. The judge set the matter for a status conference "to set a limited discovery and dispositive motion schedule on Defendants' ministerial-exception defense, in order to resolve that issue at the earliest opportunity." Judge Kocoras did reject, however, Collette's attempt to make this case about his constitutional right to marry pursuant to *Obergefell*. The question in this case is not whether Collette has a right to marry his same-sex partner; it is whether he has a right as a spouse in a same-sex marriage to serve as Director of Worship and Music Director in a Catholic Church when the Church finds his marriage inconsistent with its religious beliefs.

ILLINOIS – On July 21, DuPage County Judge Ronald Sutter granted a motion to dismiss with prejudice Jennifer Cramblett's suit against Midwest Sperm Bank in Downers Grove, Illinois, after Cramblett's attorney did not file an amended complaint by April 25. Judge Sutter had dismissed portions of the complaint in March, setting an April 25 deadline for filing an amended complaint. Cramblett, a lesbian who sought to raise a child with her partner, order sperm from the defendant on the understanding that the donor was Caucasian. An error at Midwest Spermbank resulted in her being sent sperm from an African-American donor. She bore a healthy mixed-race daughter. The sperm bank apologized and sent her a partial refund. Her "wrongful birth" suit was dismissed without prejudice in September 2015. An amended complaint alleged, *inter alia*, negligence in fulfilling the contract, but Judge Sutter dismissed several of the counts in March, with leave to file an amended complaint by April 25. In April Cramblett filed a separate lawsuit arising from the same facts in federal court, asserting claims of consumer fraud, negligence and breach of warranty. She lives in southern Ohio and the Midwest Spermbank is in Illinois, setting up diversity jurisdiction for the federal case. *Chicago Tribune*, July 21. Cramblett is represented by John R. Ostojic of Ostojic & Scudder LLC, Chicago. She alleges in her federal suit: "Plaintiff, Jennifer L. Cramblett,

is now facing numerous challenges and external pressures associated with an unplanned transracial parent-child relationship for which she was not, and is not, prepared . . . . [She] has consulted with a sociologist and a social worker. Both the sociologist and the social worker agree, at a minimum, both she and Payton [the daughter] will require long-term individual and family counseling as well as a change of domicile to a place that is more racially and culturally diverse. [Her] current and upcoming challenges with transracial parenting would not have materialized but for Defendant Midwest Sperm Bank LLC's failure to deliver sperm from the correct donor."

ILLINOIS – On July 18, the Equal Employment Opportunity Commission (EEOC) filed suit against Rent-A-Center East, Inc., in the U.S. District Court for the Central District of Illinois, alleging that defendant had violated Title VII's ban on sex discrimination by discharging a transgender employee on a pretext. *EEOC v. Rent-A-Center East, Inc*., Civil Action No. 16-cv-2222 (C.D. Ill., filed July 18, 2016). This case is part of the EEOC's affirmative effort to establish federal court jurisdiction over gender identity discrimination claims. The complaint alleges that after Megan Kerr notified her supervisor of her intent to transition male to female, a manager ordered the supervisor to come up with a reason to fire Kerr. When the supervisor refused, she was discharged and a new person was placed in the supervisory position with the same mandate. This supervisor allegedly set up a situation where Kerr would be discharged for violating a company policy. Kerr maintains that she had authorization from the supervisor for the conduct that was cited as the reason for her discharge. The case has been assigned to District Judge Colin S. Bruce, who was nominated by President Obama and took the bench in 2013.

ILLINOIS – On August 11, a group of Christian ministers filed a federal lawsuit against the Attorney General of Illinois, claiming that they should be exempted from a recently-enacted state law banning the provision of conversion therapy to minors. *Pastors Protecting Youth v. Madigan*, Case No. 1:16-cv-08034 (N.D. Ill., filed Aug. 11, 2016). They claim a First Amendment right to continue to preach and teach against homosexuality and to provide counseling to minors to persuade them not to accept a gay sexual orientation. Although federal courts have rejected 1st Amendment challenges to New Jersey and California anti-conversion therapy laws, the Illinois law is different, in that it applies not just to licensed health professionals but more broadly to any person who disputes the legislature's finding that homosexual orientation is not a mental disorder that can be "cured" by therapy, and subjects those seeking to provide such counseling or therapy to potential liability. As such, the plaintiffs seek a judicial declaration that they cannot be sued for consumer fraud under the statute if they continue to maintain and advocate for their religiously-dictated anti-gay beliefs. According to Steven Stultz, one of the pastors who is participating in the lawsuit, "We want to make sure that young people in particular have access to pastoral and Biblical-based counseling if they want it, and that pastors are able to provide Bible-based counseling without any fear of legal repercussions." The legislature stated findings in the statute that such "therapy" and counseling imposes harm on minors, and that banning it is necessary to protect them against such harm. *Associated Press*, Aug. 11.

ILLINOIS – U.S. Magistrate Judge Jeffrey Gilbert announced on Aug. 15 that he would not issue an immediate ruling on whether to temporarily ban a transgender student at High School District 211 (Palatine, Illinois) from using the girls locker room and restroom at the high school, but would prepare a report and recommendation for District Judge Jorge Alsonso at a later date. Oral argument was held that date on a motion by lawyers from Alliance Defending Freedom and the Thomas More Society, representing a group calling itself Students and Parents for Privacy, who are contesting the validity of a settlement entered into by the U.S. Departments of Education and Justice and the school district to resolve a Title IX claim. The school year actually began on August 15, the plaintiffs had hoped to get a temporary injunction in place before classes began. The plaintiffs' argument, articulated at the hearing by ADF attorney Jeremy Tedesco, was: "It would be discrimination to say, 'You don't look male enough, you don't talk male enough to use the male restrooms, so we're going to exclude you.' But recognizing someone as scientifically male or female is not sex discrimination." Responding on behalf of the federal agencies, attorney Shiela Lieber argued, "Title IX does not define 'sex,' and the Department of Education is not required to adhere to plaintiffs' one-dimensional definition of 'sex.' There are many forms of sexual discrimination that Congress did not have in mind when Title VII (which bans workplace discrimination) and Title IX were enacted forty years ago." She argued that there was no emergency requiring temporary relief, rejecting the allegations in the complaint that female students "live in constant anxiety, fear and apprehension that a biological boy will walk in at any time while they use the locker rooms and showers and see them in a state of undress or naked." *Chicago Tribune*, *Associated Press*, August 15 & 16.

INDIANA – Resolving a transitional issue that should fade in the aftermath of *Obergefell v. Hodges*, the Court of

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Appeals of Indiana ruled in *Gardenour v. Bondelie*, 2016 Ind. App. LEXIS 290, 2016 WL 4268708 (Aug. 15, 2016), that Judge Stephanie LeMay-Luken of the Hendricks Superior Court had acted appropriately in dealing with the dissolution of a California registered domestic partnership and making child custody, visitation and support rulings concerning a child conceived and raised within that partnership. The parties, Kristy and Denise, entered their California registered domestic partnership in 2006 and subsequently moved to Indiana, where they agreed to co-parent a child who was born to Kristy as a result of donor insemination in 2012. Early in 2015, Kristy filed a petition in the Hendricks Superior Court to terminate the domestic partnership. Judge LeMay-Luken ordered termination of the partnership, awarded Denise joint legal custody of their son together with parenting time, and ordered Denise to pay child support to Kristy. Kristy appealed raising multiple issues, contending, among other things, that the trial court erred in treating their California registered partnership as a spousal relationship under Indiana law, in treating Denise as a legal parent of their son (which she would be by operation of law under California DP statute), and in awarding Denise joint legal custody and parenting time and ordering payment of child support. Wrote Judge Margret Robb for the appellate court, "We conclude Kristy and Denise intended to enter into a RDP agreement in accordance with California law. Pursuant to California law, Kristy's and Denise's RDP established a relationship virtually identical to marriage, and under the principle of comity, we recognize their relationship as a spousal relationship. We further conclude Denise is [the child's] legal parent under Indiana law, and the trial court did not err in awarding Denise joint legal custody and parenting time and ordering her to pay child support."

KANSAS – In *Fox v. Pittsburg State University*, 2016 U.S. Dist. LEXIS 109861, 2016 WL 4382733 (D. Kan., Aug. 17, 2016), District Judge Julie A. Robinson found that material fact disputes required her to deny defendant's summary judgment motion on a same-sex hostile environment harassment claim brought by plaintiff Martha Fox, a heterosexually-married custodial employee at the University. Fox claimed that another female employee, apparently a lesbian, had generated a hostile environment through verbal comments and unwanted touching that had caused severe emotional distress to the plaintiff. There are issues in the case about when and how Fox brought her complaints to the employer's attention, and whether the employer's response seeking to ameliorate the situation was timely and adequate to relieve it of potential liability under Title VII and Title IX, both of which come into play in a sex discrimination dispute in an educational institution. Judge Robinson found that these issues could not be resolved in a summary judgment proceeding. She did rule, however, that proposed expert testimony by an internal medicine specialist with degrees in pharmacology and toxicology should be excluded. The defendant sought to present this testimony to bolster its argument that the plaintiff's emotional distress was attributable to medications she was taking rather than to the alleged hostile environment. The court found that the proposed expert, who had not examined the plaintiff and was proposed to testify based on reference materials that emotional distress could be caused by the plaintiff's specific combination of medications, would be "contrary to the principle behind allowing generalized expert testimony. Where courts have permitted generalized expert testimony, they have not allowed the general principles to be applied by the expert to the facts of a particular case," as defendants were proposing to do here. Furthermore, "General information about prescription medications might be admissible in some other form, but expert testimony about such information is not necessary or helpful for the jury to understand Defendant's argument Plaintiff's emotional distress may have been caused by something besides sexual harassment."

KENTUCKY – Finding that the pending lawsuit against Rowan County Clerk Kim Davis brought by several Rowan County couples back in 2015 had been mooted by events, U.S. District Judge David Bunning ordered on August 18 that the case be dismissed. Davis, stating religious objections to the Supreme Court's marriage equality ruling, had determined that her office would not issue marriage licenses to same-sex couples, and out of concern that she not be seen as discriminatory, she also ordered that the office issue no marriage licenses to different sex couples. She argued that because Kentucky law required the county clerk to "certify" the qualifications of license applicants and sign the license, she had a 1st Amendment free exercise and free speech right to refrain from so doing. In the first significant ruling of many in this case, Judge Bunning granted a preliminary injunction on August 12, 2015, see *Miller v. Davis*, 123 F.Supp.3d 924 (E.D. Ky.), ordering Davis to issue licenses to all legally qualified couples regardless of gender, but her continued defiance ultimately led to jail time for contempt until a compromise was negotiated under which a deputy in her office would issue licenses and she would not have to sign them. She violated the terms of her release from jail, however, by tampering with the forms to indicate that licenses were being issued pursuant to an order of the federal district court, but the problem was ultimately smoothed over after a new Republican governor, sympathetic to her cause, was elected, who ordered a

change in the state forms to remove the requirement of a written certification by the county clerk, which was subsequently ratified by the legislature. Davis's various appeals of Bunning's injunctions were rebuffed in two 6th Circuit decisions. Ultimately, however, Judge Bunning concluded that with the changes in the state forms and things getting back to normal in the clerk's office, including no problem for same-sex couples to get marriage licenses, there was no longer reason to keep this case alive, and he granted Davis's most recent motion to dismiss. *Associated Press*, August 19.

LOUISIANA – *Taylor v. McDonald*, 2016 U.S. Dist. LEXIS 113249 (W.D. La., Aug. 23, 2016), is a same-sex harassment and retaliation case brought by Melanie Taylor, a licensed practical nurse, against the Veterans Administration, which runs the medical facility where she is employed. Taylor alleges that a female co-worker created a hostile environment by saying inappropriate things about Taylor, including that Taylor was gay, having an affair with a female co-worker, and engaging in sexual activity with patients for pay. The co-worker didn't make these statements in Taylor's presence, but she learned about them from other co-workers. A complaint followed up by a confrontation meeting did not totally resolve the problem, and Taylor filed a formal complaint, which the VA's Administrative Investigative Board (AIB) adjudicated in her favor, finding that she had been subjected to a hostile environment. The agency transferred the co-worked to another facility, but did not impose any other discipline for her conduct. Taylor subsequently filed a complaint against her second-level supervisor, who allegedly "wrote her up for taking pre-approved disability leave." After she filed the grievance, her immediate supervisor gave her an "excellent" performance evaluation, but then the second-level supervisor "had unilaterally-and without justification, lowered Taylor's performance evaluation from 'excellent' to 'fully successful,' thus disqualifying her for a bonus. This provided the basis for Taylor's retaliation claim, although subsequently the Nurse Executive for the facility awarded her a bonus anyway, stating that the second-level supervisor did not have the authority to change the evaluation unilaterally. Ruling on defendant's motion to dismiss, U.S. Magistrate Judge Rebecca F. Doherty focused on the shortcomings of the argument offered by the U.S. Attorney's Office in support the motion, as well as shortcoming in the complaint. The basically reiterated the conclusions stated by the AIB, which would ordinarily be insufficient under federal civil pleading requirements, but on the other hand the arguments offered in support of the motion failed to meet the movant's burden of addressing all the elements of the cause of action on hostile environment, as a result of which Judge Doherty denied the motion. However, on the retaliation claim, Doherty pointed out that a retaliation claim requires a showing that the plaintiff suffered an adverse employment action, but since she actually got the bonus when the Executive reversed the supervisor's revision of her evaluation, Taylor had not suffered an adverse action and could not sue on that claim.

MASSACHUSETTS – The parties in pending litigation over the operation of a needle exchange program in the Town of Barnstable are hoping to bypass lower courts and get the purely legal questions in the case resolved by the Massachusetts Supreme Judicial Court, reported *Cape Cod Times* on July 21. A year ago the Barnstable Board of Health issued a cease and desist order to the AIDS Support Group of Cape Cod, which was operating a needle exchange program in Hyannis. The order was premised on lack of local regulatory approval for the operation of this program out of a "Cape-style house" on South Street. The order prompted a lawsuit by the AIDS Support Group, represented by, among several groups, Gay & Lesbian Advocates & Defenders, against the Town of Barnstable. In December, 2015, Barnstable Superior Court Judge Raymond Veary Jr. ruled that the needle exchange program could keep operating until the case went to trial. A trial date has not been set, but the newspaper reported that both parties agreed that whoever lost would be appealing the case, thus the joint motion to transfer the case directly to the Massachusetts Appeals Court, with the idea of then getting the Supreme Judicial Court to take up the case directly, rather than have this litigation string out over many months or years without a final resolution. Among the questions to be decided are which of two different laws governing needle distribution in Massachusetts would apply to this operation. Opponents of the program have complained that "improperly discarded needles found strewn throughout Hyannis are creating a safety hazard for residents and visitors." Proponents argue that the program is "a necessary service for preventing the spread of HIV and hepatitis C in the community." As part of his decision in December, Judge Veary had ordered the parties to meet monthly to discuss issues of mutual concern as the program keeps operating. Attorney Bennett Klein from GLA told the newspaper, "Both parties have been meeting, and it's been going smoothly and has been very productive. It's a good example of the best way an agency and a municipality can work together."

MICHIGAN – On August 2, the Michigan Supreme Court announced that it would not allow an appeal from an unpublished decision by the state's

Court of Appeals in a lesbian custody dispute "because we are not persuaded that the questions presented should be reviewed by this Court." This drew a lengthy dissent from Justice Bridget Mary McCormack, who wrote, "I would grant leave to appeal to address whether *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married." *Mabry v. Mabry*, 882 N.W.2d 539 (Mem.), 2016 Mich. LEXIS 1610 (August 2, footnoted corrected, Aug. 3, 2016). The court of appeals had found lack of standing for the non-biological mother to seek custody, even though the women had a formal domestic partnership and "took repeated steps to solidify their relationship and demonstrate their commitment to one another," wrote Justice McCormack. The women, who were Jewish, even held a commitment ceremony during which they entered into "a marriage covenant in the form of a ketubah" (Jewish wedding contract) and the defendant "took the plaintiff's last name." During the entire period of their relationship, Michigan prohibited same-sex marriages. The women had their children after taking these steps and the plaintiff fulfilled a parental role until after their break-up and continuing unresolved difficulties led the defendant to prohibit her from seeing the children. The plaintiff's complaint for custody was filed after *Obergefell* was decided, asserting the state's equitable-parent doctrine as a basis for her to seek custody. The court of appeals "peremptorily vacated the trial court's denial of summary disposition" on grounds of standing. "The plaintiff's constitutional challenges merit further review from this Court," asserted McCormack, suggesting that "the Constitution might require that the children born and adopted into same-sex families be able to access the same benefits that children born into opposite-sex families have under Michigan law when they arrive at our courthouse doors. At the very least, this question deserves this Court's considered analysis." Justice Richard Bernstein joined McCormack's dissenting statement, adding his view that the argument advanced by the plaintiff "would extend only to the small group of same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in *Obergefell* and have a custody dispute." There is a strong sense, reflected by McCormack's lengthy dissent from the denial of review, that the majority of the court is shirking its responsibility to the children in this case.

MICHIGAN – U.S. District Judge Nancy G. Edmunds granted summary judgment in favor of Michigan Attorney General Ruth Johnson in *Love v. Johnson*, 2016 U.S. Dist. LEXIS 112035, 2016 WL 4437667 (E.D. Mich.), on August 23, accepting Johnson's argument that she had effectively mooted the central issue in the case by changing the state's policy on amended driver's licenses and state-issued identification cards after Judge Johnson had refused to dismiss the case on November 16, 2015. This lawsuit, brought by the ACLU of Michigan on behalf of transgender plaintiffs in Michigan, challenged Johnson's newly-announced policy that changes of gender designation on state-issued documents would only be allowed if people presented an amended birth certificate – an impossibility for those born in states that don't allow gender changes on birth certificates, and difficult for those born in states that require a complete transition including surgical alteration of genitals before such a change can be made (including Michigan). In refusing to dismiss the case, Johnson found that the plaintiffs had made a plausible claim that the policy unduly abridged their liberty interest under the 14th Amendment. In response, Johnson amended her policy to allow for ID-changes based on a U.S. Passport or Passpost Card. The State Department will issue these documents based on a letter from a doctor certifying that the individual "has had appropriate clinical treatment for gender transition," a standard that does not require proof of surgical alteration and could be based entirely on hormone treatment. After announcing the new policy, Johnson moved for summary judgment, contending that the new policy was sufficient to meet the plaintiffs' liberty interest. Edmunds agreed, and rejected the argument by plaintiffs that only a final ruling on the merits and a legally binding order to the state would suffice to protect their constitutional rights. Edmunds wrote that there was no indicating that Johnson intended to change the policy again after the case was dismissed, and noted that under 6th Circuit precedents the normal skepticism exhibited when a private plaintiff changes its conduct in reaction to a lawsuit is not normally applied when the defendant is a government agency that has taken some official action. "Indeed, as the Sixth Circuit has noted," she wrote, "cessation of illegal conduct by 'government officials has been treated with more solicitude by the courts than similar action by private parties; self-correction provides a secure foundation for a dismissal based on mootness as long as it appears genuine." Thus, the "case and controversy" requirement for federal jurisdiction has disappeared. She wrote that "accepting Plaintiffs' argument would, in effect, render voluntary governmental compliance meaningless outside of the legislative sphere. Surely this is not what the Sixth Circuit intended by specifically distinguishing self-corrective measures adopted by government officials from private parties." She also noted that Johnson had submitted a "sworn declaration to this

Court." She found that the plaintiffs' arguments to keep the case alive had included implicit agreement that the new policy "which essentially mirrors the federal government's position on amending identity documents, is reasonable." Pro bono attorneys from Proskauer Rose LLP's Chicago office are assisting the ACLU in representing the plaintiffs.

MISSISSIPPI – On August 1, U.S. District Judge Carlton Reeves issued an opinion explaining his refusal to stay a preliminary injunction he had previously issued against the state of Mississippi enforcing House Bill 1523, which would have gone into effect on July 1, 2016. *Barber v. Bryant*, 2016 WL 4096726, 2016 U.S. Dist. LEXIS 100218 (S.D. Miss.). HB 1523 privileges three religious beliefs against marriage equality, gay rights, and gender identity. Reeves found it likely that the law would be held unconstitutional under the Equal Protection and Establishment Clauses in his prior ruling issuing the preliminary injunction. In this ruling on August 1, he systematically dismantled every argument advanced by Governor Bryant & Company as to why the law should be allowed to go into effect while the litigation was pending. He rejected their argument that the plaintiffs lacked standing to bring their 14th Amendment Equal Protection claim, showing that among the plaintiffs were those who would lose the protection of the recently-enacted Jackson anti-discrimination ordinance and others would lose the protection of anti-discrimination policies at various campuses of the state university. He similarly found adequate standing to assert the Establishment Clause claim, adverting to cases involving school prayer and the display of the Ten Commandments on public property. "It is difficult to see why a person has standing to challenge a moment of silence or a monument, but somehow does not have standing to challenge a law which tangibly and materially affects his or her legal rights," he wrote. As to the burden on the state imposed by the injunction, "issuing a marriage license to a gay couple is not like being forced into armed combat or to assist with an abortion," wrote Judge Reeves. "Matters of life and death are sui generis. If movants truly believe that providing services to LGBT citizens forces them to 'tinker with the machinery of death,' their animus exceeds anything seen in *Romer*, *Windsor*, or the marriage equality case." He also rejected their argument that he should have severed various provisions of the bill and enjoined just some of them. "Every section of the bill explicitly incorporated Sec. 2," he wrote. "Since Sec. 2 was enjoined, the entire bill was rendered inoperable. Movants' theory may apply in the future, though, depending on the appellate court's ruling and reasoning." Having found it unlikely that the movants would success on the merits, he found that "enjoining this particular piece of legislation results in no injury to the State or its citizens. A Mississippian – or a religious entity for that matter – holding any of the beliefs set out for special protection in Sec. 2 may invoke existing protections for religious liberty, including Mississippi's Constitution, Mississippi's Religious Freedom Restoration Act, and the First Amendment to the United States Constitution. HB 1523's absence does not impair the free exercise of religion." He found movants' claim that a stay would not substantially injury the plaintiffs as being "inconsistent with the hearing testimony," and asserted that the public interest would not be served by a stay. "In this case, the public interest is better served by maintaining the status quo – a Mississippi without HB 1523. To the extent the preliminary injunction will help alleviate the damage wrought on this State by an HB 1523-caused economic boycott, moreover, that too supports denying a stay of the injunction." Having denied the motions for a stay, he wrote, "The baton is now passed," realizing that Governor Bryant had already anticipated this result and petitioned the 5th Circuit. The 5th Circuit did not seem eager to pick up this baton. On August 13, the Associated Press reported that the court of appeals had announced on August 12 that it "would not immediately remove the block that U.S. District Judge Carlton Reeves put on House Bill 1523 moments before it was to become law July 1." The court also said it would not grant the governor's request for an expedited appeal of Reeves' ruling, but would consider it in the normal course. One suspects the court may be waiting to see what the U.S. Supreme Court does with a pending certiorari petition from the Gloucester County, Virginia, School District seeking review of a determination by the 4th Circuit Court of Appeals that federal courts should defer to the U.S. Department of Education's interpretation of Title IX's sex discrimination ban as covering gender identity discrimination and requiring schools to let transgender students use facilities consistent with their gender identity. If the Supreme Court grants review, we are likely to see some stays of lower court injunctions pending the outcome of that case. If review is not granted, other courts might decide it prudent to follow the 4th Circuit's lead . . . .

MISSISSIPPI – U.S. Magistrate Judge Jane M. Virden ruled that a married gay male couple who claimed to have been treated dismissively and offensively by a police officer when they sought help against an assailant and then to have been blown off when they complained to the mayor about the police officer's conduct had failed to state a constitutional claim. *Johnson v. McAdams*, 2016 WL 4126491, 2016 U.S. Dist. LEXIS 101043 (N.D. Miss., Greenville Div., Aug. 2, 2016). Kenyon

and Xavien Johnson alleged in their *pro se* complaint that Kenyon called the police department "about an unknown male subject who was trying to fight my husband." When the police officer arrived on the scene and Kenyon tried to tell him what was happening, the officer "said that he didn't care about our gay ass and that someone needs to kill our gay ass. Then I went to the Mayor office to do a complaint with her and she told me to leave her office that she will support her police officer." The complaint went on to allege that since moving to Greenwood in 2014, Kenyon had been harassed by the police department "and have nothing been done about it. The police officer tried to force us to have sex with them." Dealing first with allegations against the police officer, Judge Virden found that case law rejects liability of government officials just for making anti-gay statements. "Plaintiffs herein do not allege the threats and insults were accompanied by any wanton acts of cruelty," she wrote, quoting from a decision by a district court in Texas. So the police officer's "verbal conduct," she concluded, "does not state a claim for a constitutional violation in either an official or individual capacity." Most of the precedents she cited involved complaints by prison inmates concerning verbal harassment by corrections officers. Query whether this really equates to comments by police officers to civilians. Further, the court found that the mayor would have no *respondeat superior* liability for statements by a police officer. "Thus, Mayor McAdams is responsible only if the Johnsons allege her personal involvement in an alleged constitutional violation or a causal connection between an alleged constitutional violation and some other wrongful act. Such wrongful conduct must evince 'deliberate indifference' and can be shown by a failure to train or supervise employees or that she implemented a policy clearly repudiating citizens' constitutional rights." Judge Virden found that the complaint failed to allege facts meeting this test. Further, the allegation that police officers forced the Johnsons to have sex with them is "conclusory and completely devoid of factual support." Although she concluded that their complaint must be dismissed, "because of the Plaintiffs' pro se status, the court will permit the Plaintiffs a further opportunity to amend their allegations as concern events occurring on September 30, 2015, so as to actually state a cause of action over which this Court has jurisdiction." In particular, she wrote, "This Court instructs Plaintiffs to describe in detail the facts and circumstances surrounding the events of September 30, 2015, including, but not limited to, who was present, what precisely were the efforts to force them to have sex, who made those efforts, were the efforts carried out, was there touching, if so, who touched whom and under what circumstances and where, etc. Plaintiffs much file such motion to amend within twenty-one days from today's date." We are unaware whether the Johnson filed an amended complaint by Aug. 23. Anyone think that a gay married couple in Greenwood, Mississippi, denied assistance by a police officer accompanied by statements of this sort and then blown off by the mayor when they complained about it may have been deprived of equal protection of the law??? We suspect that competent counsel might have been able to frame a viable complaint for these gentlemen.

MISSOURI – U.S. District Judge Audrey G. Fleissig granted an employer's motion for summary judgment in a case brought by a gay white male employee (*pro se*) who alleged that his employment was terminated and sponsorship for his work visa was withdrawn because he was dating an African-American man in violation of 42 USC 1981 and the Missouri Human Rights Act. *Mounsey v. St. Louis Irish Arts Inc.*, 2016 WL 4124113 (E.D. Mo., Aug. 3, 2016). (The discrimination claim is not premised on sexual orientation or sex, only on race. Sexual orientation is not a prohibited ground for discrimination under Sec. 1981 or the MHRA.) Mounsey, an Irishman, was lecturing at University of Missouri-St. Louis under a J-1 visa about to expire when he hooked up with SLIA, which agreed to sponsor him for an H-1B visa if he taught courses at SLIA. Under that arrangement, he could also continue to lecture at UMSL and teach as an adjunct faculty member at other area institutions. Judge Fleissig's opinion sets out in detail the story of James Mounsey's relationship with SLIA and its president, Helen Gannon, which ultimately deteriorated until the organization decided not to continue employing Mounsey to teach courses, resulting in withdrawal of its support for his H-1B visa. From the details set out, it appears that Gannon had some discomfort about the degree to which Mounsey's boyfriend, Napoleon, showed up at the employer's premises and became known to Mounsey's students. One email in particular affirms such discomfort: "Your relationship with Napoleon is causing a distraction in your work and in the school. I am having second thoughts on your future involvement with the school for many reasons. This is a new situation for me. I have a lot of home schooled families who are very conservative and may want to explain sexually [sic] when they are ready and not because they see or hear something around the school. You have made some grave decisions very very quickly which will affect every aspect of your life. Flaunting them and forcing us to accept them will have consequences out of your control. We love you dearly like a son and that gives me the liberty of telling you how I feel." The problem for Mounsey was that he failed to present evidence that the ultimate termination of his relationship with the school and

its withdrawal of visa sponsorship could be shown to stem from his relationship with Napoleon, as there were a variety of non-discriminatory grounds that SLIA could credibly allege as reasons for its actions. Not least, it seems, was the very small enrollment in the one course he was teaching there during his last semester, which they might believe he was trying to conceal by failing to turn in class rosters or attendance records, together with a message exchange he had on Facebook with a former student which they found objectionable due to explicit sexual references. The school also pointed out that some of the adverse things cited by Mounsey, such as underpayment of him in violation of the Fair Labor Standards Act (as adjudicated in response to his complaint to the US Department of Labor) occurred *before* Gannon was aware of his boyfriend, and that it had completed and submitted the paperwork supporting his H-1B visa *after* Gannon learned about Napoleon. Judge Fleissig found that Mounsey's factual allegations fell short, and he failed to submit evidence under oath in response to the defendant's summary judgment motion, which the judge felt she could not overlook just because he was proceeding without counsel. There was also some question whether SLIA had enough employees to be covered under the MHRA, since all the other teachers were deemed by the school to be independent contractors except for Mounsey, since an employment status was necessary for him to qualify for the visa.

MISSOURI – A mootness dismissal by the Missouri Court of Appeals leaves an incomplete story in *In the Interest of T.J. & W.J., Plaintiff, Juvenile Officer, Respondent, v. V.L.C. (Mother), Appellant*, 2016 WL 4035673, 2016 Mo. App. LEXIS 719 (Mo. Ct. App., W.D., July 26, 2016). T.J. and W.J. were born during the marriage of J.J. and V.L.C. The marriage was dissolved in 2007 when the children were still pre-school age and Mother got physical custody, with a parenting plan requiring consultation with each other about medical treatment, although Mother had final say on medical care decisions. In March 2014, V.L.C. began taking T.J. to Dr. Jacobson at Children's Mercy Hospital for the initiation of gender reassignment therapy. T.J. was nine years old at the time. Father disapproved of this course of treatment, and got the circuit court to modify the parenting plan to require each parent to obtain explicit written consent from the other for any medical treatment. Responding to allegations of parental neglect, Children's Division staff visited mother's home on January 29, 2015 to investigate. Mother said she would kill herself and the children if the Division attempted to remove the children from her custody. Bad move, Mom!! The next day a County Juvenile Officer filed a petition alleging the children were without proper care, custody and support due to Mother's neglect and sought protective custody. An adjudication hearing was held in circuit court on April 17, the court entering a judgment on April 23 asserting jurisdiction over the children because of Mother's threat, and because the Mother sought medical treatment of T.J. to which Father had not agreed. The court found that Mother had "abusively encouraged" T.J. to engage in gender reassignment therapy "through the use of irrational and frightening communication," and had "unreasonably exposed T.J. to risk of harm by publicly posting photos and transgender reassignment information regarding her children on Facebook." Hey, Mom, bad judgment there! Don't post this kind of stuff on Facebook! After holding a disposition hearing, the circuit court entered a temporary order placing the children in Father's custody under Children's Division supervision. A final judgment was entered on August 7 leaving the children in Father's custody. Mother filed a notice of appeal on August 28, 2015. On September 17, the Circuit Court entered a "Judgement Releasing from Jurisdiction," finding that the children "are no longer in need of the services of this Court," and terminating the prior orders, releasing and discharging the children from the Court's jurisdiction." (Does that include the prior order giving Father a veto on medical decisions? Unclear.) The August 28 appeal, still pending, sought reversal of the circuit court's order that the children remain in the Father's custody, but in this new ruling on July 26, 2016, the Court of Appeals observed that Mother already obtained this relief in the September 17, 2015, Circuit Court judgment, which would automatically terminate any of its prior orders. "Even if Mother's appeal raised a recurrent legal issue of general importance," wrote Judge Alok Ahuja for the court of appeals, "there is no indication that the issue would evade appellate review in a future case. Neither of the mootness exceptions justifies addressing the merits of Mother's appeal." So we don't know whether the Circuit Court erred in awarding custody to the Father due, in part, to his objections to Mother's conduct respecting her son's gender identity. This is a recurrent theme we've seen in some other cases: Mother accepts a son's wish to transition and Father fights it… Steven G. Sakoulas represents Mother.

MONTANA – The Montana Supreme Court upheld a ruling by 18th Judicial District Judge John C. Brown (Gallatin County) that citizens of Bozeman who were unhappy with the city government's enactment of a law prohibiting discrimination because of sexual orientation or gender identity by landlords, providers of public accommodations and parties engaged in residential real estate transactions lacked standing to seek a judicial declaration that the law was invalidly

enacted. *Arnone v. City of Bozeman*, 2016 WL 4089171, 2016 MT 184, 2016 Mont. LEXIS 511 (Aug. 2, 2016). The district court had denied a motion by the petitioners for summary judgment, dismissed their complaint, and denied their motion for reconsideration. The Supreme Court found dispositive Judge Brown's conclusion that the jurisdiction of the court did not extend to this lawsuit because the petitioners were seeking, in effect, an advisory opinion because (quoting Brown) "the hypothetic facts are posited by the Petitioners as if they were currently subject to a complaint alleging a violation of the [Ordinance] filed in Municipal Court. In fact, none of the [Petitioners] are susceptible to such an action." "Violation of the Ordinance requires third-party action," wrote Justice James Jeremiah Shea for the Supreme Court, in order for there to be an actual case to adjudicate. Somebody has to seek housing or public accommodations, be turned down because of their sexual orientation or gender identity, and then seek redress under the Ordinance. In the context of such a case, the defendant could raise a question about the validity of the ordinance. Lacking that, the plaintiffs could not just run into court and challenge an ordinance without credibly alleging that they were at risk of enforcement against them. "Here, the Petitioners have not alleged facts indicating that they have engaged or are about to engage in any concrete transaction that would violate the Ordinance, or that a potential aggrieved party has sued or threatened to sue them under the Ordinance. It is entirely possible that none of the Petitioners will ever be confronted with a situation in which they must decide whether to refuse accommodation to a person the Ordinance was designed to protect." The court contrasted its 1997 decision striking down the state's sodomy law, *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997). Although it did not arise out of an actual prosecution, the plaintiffs in that case "were three homosexual couples who acknowledged their past violations" of the sodomy law "and their intent to violate the statute in the future." Thus, they had a direct, not merely hypothetical, interest in whether the law was valid. The court's ruling was unanimous.

NEW JERSEY – Bergen County Superior Court Judge Lisa Perez Friscia denied a motion for summary judgment filed by Paramus Catholic High School in opposition to a discrimination case brought under the New Jersey Law Against Discrimination (LAD) by Kathryn Drumgoole, who was discharged in January 2016 after the school learned that she had married her same-sex partner. *Drumgoole v. Paramus Catholic High School*, Docket No. BER-L-3394-16 (Aug. 22, 2016). Although the marriage occurred on August 2, 2014, evidently Drumgoole did not publicize it at school. Drumgoole also sued Elaine Vanore on tort claims of intentional infliction of emotional distress and torturous interference with Drumgoole's employment, so one infers that Vanore had something to do with bringing the marriage to the school's attention, leading to the discharge. The s.j. motion was brought only on behalf of the school. Drumgoole started working for Paramus Catholic, which is owned and operated by the Archdiocese of Newark, in 2005 as assistant varsity coach for the girls' basketball team, and was hired full-time as a guidance counselor at the school in 2010, at which time she signed and acknowledged receipt of the Archdiocese of Newark's "Policies on Professional and Ministerial Conduct" that included a "Code of Ethics" requiring employees to conform to the "highest Christian ethical standards and personal integrity" and to "conduct themselves in a manner that is consistent with the discipline, norms and teachings of the Catholic Church." She received a faculty handbook that, inter alia, prohibits harassment and/or sexual harassment because of marital status, civil union status and domestic partnership status. She claims that her discharge violates the LAD, which prohibits discrimination because of sexual orientation and marital status, and at the same time allows religious organizations to premise employment on religious affiliation as a "uniform qualification" for those "engaged in the religious activities of the association or organization." The state law also allows a religious organization to follow "the tenets of its religion in establishing and utilizing criteria for employment of an employee." Paramus Catholic maintains she was not fired because of her sexual orientation, but rather because her same-sex marriage violates the tenets of the Catholic Church, which it claims it is privileged to observe under both the religious exemption in the LAD and the ministerial exemption found in the 1st Amendment of the federal Constitution by the U.S. Supreme Court. Rather than file a motion to dismiss, the defendant filed a motion for summary judgment, even though discovery has yet to take place. In rejecting the s.j. motion, Judge Friscia found that it was premature when there was a material factual dispute as to whether Drumgoole's employment as a basketball coach and guidance counselor brought her within the ministerial exemption. She wrote, "The New Jersey Supreme Court has refused to 'adopt a per se rule that courts may not entertain employees' suits against religious instructions or leaders," and that in its case recognizing a "ministerial exemption," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the U.S. Supreme Court limited its holding to "ministerial employees" and did not decide whether "the exception bars other types of suits, including action by [non-minister] employees alleging breach of contract or tortuous conduct by their religious employers." The Supreme Court did

not set out a clear test for determining who is a "ministerial employee" in *Hosanna-Tabor*, rather just deciding with that the exception covered the employee in that case, "given all the circumstances of her employment," and leaving it to lower court to make such determinations on a case-by-case basis. Judge Friscia concluded that in this case "discovery is mandated so that the court examine whether the plaintiff's employment qualifies as ministerial. To undertake such a review, discovery must be conducted." The Church generally takes the position that just about anybody who has student contact responsibilities in a Catholic school should qualify for the "ministerial exemption," but courts are leery about applying it to persons who have neither clerical functions, ordination, or responsibilities to instruct on religious doctrine. In addition, wrote Friscia, the court has to determine "whether the dispute is sexual or ecclesiastical," which cannot be determined based solely on allegations accompanying the complaint, since the parties differ on the reason why the plaintiff was discharged. Drumgoole also included in her complaint an allegation against a Vanore for "aiding and abetting" the discrimination against her by the school, as noted above. The court refused to grant summary judgment for the named employee until discovery can be held. In concluding, the court pointed out that since the case was filed on April 28, 2016, the statutory date for completing discovery is September 3, 2017. "As no discovery has occurred, parties are to undertake the discovery process." The judge also noted "that plaintiff does not dispute that counts two and three of the complaint [the tort claims] are only alleged against defendant Venore."

NEW YORK – In *Viteritti v. Colvin*, 2016 U.S. Dist. LEXIS 109358, 2016 WL 4385917 (E.D.N.Y., Aug. 17, 2016), Senior District Judge Dennis R. Hurley rejected an HIV-positive gay man's claim that he had been wrongly denied Social Security disability benefits. Administrative Law Judge Bruce MacDougall rendered a detailed decision, ultimately concluding that Viteritti was still capable of performing the type of hotel housekeeping work in which he was previously employed and thus was not disabled within the meaning of the statute. Most of the opinion is devoted to lengthy recitation of doctor's reports and hearing testimony and a description of the ALJ's application of the five-part analytic test to determine whether a claimant is disabled from working. The point of particular interest in the context of *Law Notes* is that in reviewing evidence about the claimant's ability to function socially, the ALJ had referred to his dating activity: "As to social functioning, plaintiff had mild difficulties based on his 'frequently meeting men and engaging in casual sex' and no other significant difficulties reported, outside of 'some anxiety in dealing with customers in his current part-time job.'" Commented Judge Hurley, "Plaintiff contends that the ALJ inappropriately alluded to plaintiff's sexual orientation. He is correct that a claimant's sexual orientation is irrelevant. However, the record evidence that plaintiff was dating, socializing with others, and traveling was appropriately relied upon in determining whether plaintiff was disabled because he was limited in his social functioning. Under the guidelines for assessing the intensity, persistence, and limiting effects of a mental impairment, an ALJ is required to consider 'all the available evidence.'"

NEW YORK – Plaintiffs Mr. and Mrs. John Doe sued several physicians and Mount Sinai Medical Center, claiming that delay in properly diagnosing Mr. Doe's HIV infection resulted in him unnecessarily contracting pneumocystis pneumonia, thus shortening his likely lifespan. *Doe v. Schwarzwald*, 2016 WL 4371749 (N.Y. App. Div., 2nd Dept., Aug. 17, 2016). Nassau County Supreme Court Justice Galasso had granted the motions of the defendant physicians and the medical center for summary judgment. The Appellate Division affirmed the summary judgment for two of the physicians, but reversed as to one other and the medical center. It found that uncontroverted expert testimony showed that the first two physicians, an internist and a gastroenterologist, had not failed to meet the standard of care in failing to detect Doe's HIV infection as part of their treatment, but that the remaining physician, an immunologist, and the medical center, might ultimately be held liable for injury to Doe. Although expert testimony was submitted that "none of [Dr. Corn's] acts or omissions was a proximate cause of Doe's alleged injuries," the court found, "In opposition, however, plaintiffs, through the affirmations of their two unnamed medical experts, which the Supreme Court properly considered, raised triable issues of act, inter alia, as to the stage of Doe's HIV infection in early 2009 and whether the delay in diagnosing Doe's HIV infection was a proximate cause of his pneumocystis pneumonia. Accordingly, the Supreme Court erred in granting the motion of Corn and Mount Sinai for summary judgment," since there was a battle of the experts to be conducted at trial on this issue. Although the court did not go into detail about the material factual dispute, presumably the experts differ over whether earlier detection of HIV-infection followed by prophylactic treatment would have prevented the debilitating onset of pneumonia, which can cause permanent lung damage leading to reduced life expectancy. Since the pneumonia is an opportunistic infection which expresses itself in the presence of a compromised immune system and anti-retroviral treatment can maintain immune function in HIV-infected individuals, thus preventing

the pneumonia's occurrence, the key focus at trial would likely be on whether Dr. Corn was medically negligent in failing to order HIV testing when Doe first presented based on whatever information could be disclosed by a competent medical examination in response to whatever symptoms Doe was reporting at that time.

NEW YORK – In *Daskalakis v. Forever 21, Inc*., 2016 WL 4487747 (E.D.N.Y., Aug. 25, 2016), U.S. District Judge Roslynn R. Mauskopf granted the defendant-employer's motion to stay the litigation pending arbitration of the transgender plaintiff's claim that her discharge from employment violates Title VII and the New York State and City Human Rights Laws. Alexia Daskalakis presented as male when hired by Forever 21 in May 2011 to work in the defendant's Kings Plaza retail store. She was required to sign a contract that included an agreement to arbitrate "any dispute" that might arise between employee and employer. She claims that when she began transitioning in January 2014 she was subjected to discriminatory treatment, culminating in her discharge in January 2015. She filed her complaint on July 15, 2015, alleging discrimination because of gender, gender expression, gender identity and/or failure to conform to gender stereotypes in violation of federal, state and local law, and the employer moved to stay arbitration. Daskalakis claimed that the arbitration agreement she signed was not enforceable under the state contract law doctrine of "definiteness", pointing out that the agreement "does not identify the arbitral forum or location, the identity of or method for selection of an arbitrator, the arbitration procedures, or the choice of law," and thus did not show the requisite "meeting of minds" required for formation of a contract in New York. Rejecting this argument, Judge Mauskopf wrote, "In cases where the identity or method for selecting an arbitrator are not specified, the parties can ask the Court to appoint an arbitrator if they cannot agree on one themselves," and that once appointed, an arbitrator can determine "the procedural aspects" of the case. Thus, she found, this rather generalized agreement to arbitrate was not lacking any "essential terms" and could be enforced. Furthermore, it is clear from case law under the Federal Arbitration Act that Congress is content to have employment discrimination claims decided by arbitrators. Since the court was granting the employer's motion to refer all of plaintiff's claims to arbitration, the civil action was stayed "pending arbitration."

NORTH CAROLINA – U.S. District Judge Max Cogburn rejected a motion by state Republican legislative leaders to intervene as co-defendants in a suit challenging the state's law allowing magistrates to refuse to perform same-sex marriages. Cogburn wrote, "The fact that the attorney general may dislike S.B. 2 has not dissuaded him from vigorously defending this case." The measure lets magistrates who have religious objections excuse themselves from performing marriages entirely. Attorney General Roy Cooper, a Democrat who is running for election to be governor against incumbent Pat McCrory, had voice opposition to the bill when it was proposed, but has not declined to defend it, in contrast to his refusal to defend H.B. 2, the so-called bathroom bill. The legislative leaders have contended that Cooper's announced opposition to S.B. 2 would constrain Department of Justice attorneys in defending the measure. *Citizen-Times* (Asheville, N.C.), August 15.

OHIO – U.S. District Judge Algenon L. Marbley granted a motion by a transgender elementary school student and her parents to intervene as co-defendants pseudonymously in a suit brought by a public school board against the U.S. Department of Education (DOE), contesting the Department's finding that the school district had violated the student's rights under Title IX of the Education Amendments Act of 1972. *Board of Education of the Highland Local School District v. U.S. Dep't of Education*, 2016 U.S. Dist. LEXIS 107614 (S.D. Ohio, Aug. 15, 2016). DOE construes the Act's ban on sex discrimination by educational institutions to encompass the issue of discriminatory treatment of a transgender student, including denial of access to sex-designated facilities consistent with a student's gender identity, as allegedly occurred in this case. The plaintiff school board, represented by Alliance Defending Freedom (ADF), an anti-LGBT "Christian" litigation group, is contending that DOE's actions violate the Administrative Procedure Act, the Spending Clause of Article I, constitutional principles of federalism and separation of powers, and the Regulatory Flexibility Act, and seeks a preliminary injunction barring enforcement by DOE against the plaintiffs pending a final ruling on the merits. The Does seek to intervene to protect the student's Title IX rights, but also to assert her own constitutional claims against the school district under the 14th Amendment's Due Process (privacy) and Equal Protection Clauses. The school district, opposing intervention, contended that DOE would provide adequate representation as to the student's rights, but Judge Marbley noted DOE's concession that it would not be asserting constitutional claims on behalf of the student, only Title IX claims. The court determined that the Does could intervene as of right under Rule 24(a) and, hedging its bets in the event of possible appeal, that intervention was also permissible under Rule 24(b). The Does are also seeking

a preliminary injunction protecting the student's Title IX rights pending a final ruling on the merits. The court noted that in other litigation brought by ADF in the Northern District of Illinois challenging a Title IX settlement involving a transgender student of a suburban school district, the court had granted a motion for permissive intervention on behalf of transgender students whose interests would be affected by the litigation. *See Students and Parents for Privacy v. United States Department of Education*, 2016 WL 3269001 (N.D. Ill., June 15, 2016).

OKLAHOMA – Ruling on a discovery request in *United States & Dr. Rachel Tudor v. Southeastern Oklahoma State University*, 2016 WL 4250482, 2016 U.S. Dist. LEXIS 105492 (W.D. Ok., Aug. 10, 2016), a gender identity discrimination case, District Judge Robin J. Cauthron rejected defendant's request for "all facts and records supporting Plaintiff's claim that Intervenor 'is a male-to-female transgender." Judge Cauthron found that the defendant had "failed to demonstrate any relevance for those discovery requests." As the judge explains, "Defendant's Answer to Plaintiff's Complaint in this matter contains sufficient admissions regarding Intervenor's transition status to overcome Defendant's current suggestion that it is unaware of Intervenor's transition from male to female. Further, Defendant has at no time raised or suggested as a defense to Plaintiff's claims in this matter that Intervenor was not, in fact, undergoing a transition in her gender. Thus, there is no basis to find that the documentation sought by Defendant has some tendency to either prove or disprove a fact in dispute. Nor is it likely to lead to information relevant to a matter in dispute." In other words, intrusive discovery requests concerning a person's gender identity transition process in the context of a gender identity discrimination dispute will be held to a strict standard of relevance, and will normally be deemed irrelevant unless the fact of gender transition itself is in dispute. The Justice Department sued on behalf of the EEOC in this case. Intervenor Plaintiff Rachel Tudor is represented by Brittany M. Novotny or Oklahoma City and Ezra I. Young, of the Law Office of Jillian T. Weiss PC, Tuxedo Park, N.Y. Since these papers were filed, of course, Jillian Weiss has become executive director and Ezra Young a staff attorney at the Transgender Legal Defense & Education Fund, headquartered in New York City.

PENNSYLVANIA – In *A.S. v. Pennsylvania State Police*, 2016 WL 4273568 (Aug. 15, 2016), the Pennsylvania Supreme Court affirmed a ruling by the Commonwealth Court that the State Police could not impose a lifetime sex offender registration requirement on a convicted sex offender unless he re-offended after his conviction. The court held that the statute requires an act, a conviction, and a subsequent act, to trigger lifetime registration for multiple offenses; otherwise, lacking a subsequent act, the statute provides for a ten-year period of registration. A.S. was 21 when he met "the sixteen-year-old female victim on-line late in 1999." Their sexual relationship was legal, because the age of consent is 16 in Pennsylvania, but he offended by persuading her to "take and transmit sexually explicit photographs of herself and he also photographed the two engaging in sexual acts," which violated 18 Pa. C.S. sec. 6312(d), because she was a minor at the time. The victim's father found the photographs on the victim's computer and reported them to the police, leading to a criminal complaint, pursuant to which subsequent investigation turned up child pornography on his computer and evidence of unlawful contact with minors and criminal solicitation. A.S. pled guilty to several of the charges and received a 5-23 month prison sentence on one charge and a 5-year probationary charge on another. The parties and trial court believed he would be subject to a ten-year registration period, and he registered after serving his prison term. At the end of the ten years, he requested removal of his name from the registry but the State Police refused, contending that his guilty plea to multiple offenses triggered lifetime registration since he had "two or more convictions" on listed offenses. The court found that the position taken by the State Police was inconsistent with the registration statute's distinction between first-time offenders and recidivists – i.e., those who offended after having been convicted. On the same date, the Court ruled in *Commonwealth v. Lutz*, 2016 WL 427355, that a similar interpretation applies to the state's Sex Offender Registration and Notification Act, setting aside a lower court's imposition of lifetime registration on a person who pled guilty to three counts of possessing child pornography.

SOUTH CAROLINA – South Caroline Equality, a state-wide gay rights organization, announced that it filed its first Title VII discrimination case on September 1 on behalf of Trevor Simpson, a former employee of SouthernCare's Myrtle Beach office. According to the complaint, filed in the U.S. District Court in Charleston against "one of the nation's largest hospice providers with over 75 offices in 15 states," the branch manager of the Myrtle Beach office deemed Simpson's mannerisms and perceived sexual orientation as "Biblically unacceptable." Simpson's complaints to management were met by retaliatory measures which led him to quit. When he sought new employment, SouthernCare sued to enforce a non-compete provision against him, causing him to lose his new

job. Simpson filed a complaint with the EEOC, which found reasonable cause under Title VII on Simpsons charge of constructive discharge and retaliation, issuing him a right-to-sue letter. SC Equality attorney Nekki Shut, part of a team of pro bono attorneys represented Simpson, described this case as "one of the most egregious cases of blatant discrimination I have ever seen." *SC Equality Press Release*, September 1.

TEXAS – Always vigilant to protect the rights of people with religious objections to complying with federal regulations, Texas Attorney General Ken Paxton put together a coalition of states and organizations to file a new federal court complaint challenging the final regulations issued by the U.S. Department of Health and Human Services last spring to implement the non-discrimination requirements of the Affordable Care Act. The case was filed on August 22. In those regulations, HHS prohibited health care providers receiving ACA funds from discrimination in the provision of health care because of the gender identity of patients. The plaintiffs include the states of Texas, Wisconsin, Nebraska, Kentucky and Kansas, as well as Christian Medical & Dental Associations and the Franciscan Alliance, a Catholic hospital system. The complaint says that these organizations object to providing services or referrals for transition-related care or providing insurance that covers such care, based on their religious beliefs. In effect, this is another version of the *Hobby Lobby* case, under which a for-profit corporation won from the Supreme Court the right to refuse to cover female contraception based on the owners' religious objections. Of course, Paxton filed the suit in the U.S. District Court for the Northern District of Texas in Wichita Falls, so that it would be assigned to the only Northern District judge who sits in that remote courthouse, Reed O'Connor. The suit was filed the day after O'Connor issued a nationwide preliminary injunction barring federal agencies from enforcing their interpretation of Title IX to ban gender identity discrimination by schools that receive federal funding. The same legal question lies at the heart of both cases: whether federal statutory bans on sex discrimination include discrimination because of a person's gender identity. In his opinion in the Title IX case (see above), O'Connor rejected the Education Department's interpretation, and it is anticipated that he will similarly reject HHS's interpretation of sex discrimination under the ACA. Both of the organizational plaintiffs assert their religious belief that sexual identity "is an objective fact rooted in nature as male or female persons" and that "social movement which contend that gender is decided by choice are mistaken in defining gender, not by nature, but according to desire." *Thinkprogress.org*, Aug. 22.

VIRGINIA – On May 5, Senior U.S. District Judge Robert E. Payne dismissed a sexual orientation discrimination claim asserted under Title VII by Terry Hinton, an employee of Virginia Union University, holding that 4th Circuit precedent dictated such a result. *Hinton v. Virginia Union University*, 2016 WL 2621967 (E.D. Va.). Judge Payne also ruled in the alternative that Hinton had failed to plead sufficient adverse actions against him to sustain a Title VII discrimination claim or one of his retaliation claims. Other claims concerning retaliation and pay remain in the case. Hinton then moved the court for entry of a final judgment on his Title VII discrimination claim and one of his retaliation claims so that he can appeal to the 4th Circuit, or alternatively, for the court to certify an interlocutory appeal to the 4th Circuit, raising the question whether sexual orientation may be actionable in light of the EEOC's *Baldwin v. Foxe* decision, and noting that the 4th Circuit precedent on which Judge Payne had relied, *Wrightson v. Pizza Hut*, had mentioned this point in dicta but was not a direct ruling on the merits. (Payne had noted *Wrightson*'s subsequent citation by district courts for this point, as well as its citation by other circuit courts of appeals.) In support of his motion, Hinton argued that this presented a question of "first impression" for the 4th Circuit, which supported the view that an interlocutory appeal should be allowed. On July 20, Judge Payne rejected the motion. *Hinton v. Virginia Union University*, 2016 WL 3922053 (E.D. Va.), rejecting Hinton's argument that this was a first impression issue that required urgent attention from the court of appeals. He also asserted other reasons why he concluded that an interlocutory appeal was not appropriate at this point in the case, and opined, without further explanation, that the EEOC's analysis in *Baldwin* was "not persuasive." Review of Hinton's factual allegations, summarized in our report of the prior ruling, show that Hinton appeared to have alleged direct evidence of anti-gay animus by the University's president. Lacking relevant state or local laws prohibiting sexual orientation discrimination by the University, however, Hinton's only likely cause of action would be under Title VII if he can persuade the federal court that anti-discrimination is sex discrimination prohibited by that statute.

VIRGINIA – In another case that will test whether Title VII applies to blatant sexual orientation discrimination (see *Hinton*, above), John M. Murphy, who was discharged as Executive Director of an assisted living facility after one week of work because he is married to a same-sex partner, has filed suit in the Eastern District of Virginia. *Murphy v. St. Francis Home, Inc.*, Case No. 3:16-cv-654-REP (E.D. Va., filed

August 8, 2016). Unfortunately, his case was randomly assigned to Senior District Judge Robert E. Payne who, as reported above, dismissed Count I of the *Hinton* complaint, asserting that 4th Circuit precedent bars sexual orientation discrimination claims under Title VII. Murphy's case presents the additional twist that the employing institution was founded by the Roman Catholic Diocese of Richmond, which remains its sponsor, with the Bishop DiLorenzo as Chairman of the Board. Consequently, it is likely that the defendant can easily win a motion to dismiss, propelling Murphy's case to the 4th Circuit, where it may arrive prior to Hinton's case because Murphy's is a straightforward employment discrimination claim presenting no other claims to the court. St. Francis Home engaged an executive search firm to fill its executive director position, and Murphy, replying to a listing for a "non-profit executive director," emerged as the top candidate based on his credentials and experience. He was not asked about his sexual orientation or marital status during the recruitment process, either by the search firm or by the lay board of St. Francis, which twice interviewed him, offered him the position, and proffered a written contract which he signed and returned. (The board was accustomed to operating autonomously, as the Bishop rarely attended meetings or participated in its deliberations.) It was only after Murphy began working that the fact of his sexual orientation and marriage (in 2008 in Connecticut to his long-time same-sex partner) came to the attention of the Diocese when the question arose about his attendance "with his spouse" at a major fund-raising dinner. (The issue had come up late in the search process for the same reason, but neither the search firm nor the lay board expressed any concern about this, apparently being blissfully unaware of how Catholic institutions nationwide have responded upon discovering employees planning to marry or marrying their same-sex partners.) A week after Murphy began working, two representatives of the Diocese showed up at his office. The Chief Financial Officer, Michael McGee, said, "We at the Diocese understand that you are a partner in a same-sex marriage." When Murphy confirmed that, McGee then stated that "same-sex marriage is antithetical to Roman Catholic Church doctrine and this makes you unfit and ineligible to be Executive Direct of Saint Francis Home. We are here to advise you that your employment is terminated effective today." His request to meet with Bishop DiLorenzo was denied. The lay board members reacted with shock and informed Murphy that the Executive Committee of the Board was unanimous in refusing to terminate him during a meeting the previous day with the Bishop. Some board members resigned over this issue. The position for which Murphy was hired has no religious duties and involves only administration and fund-raising,. The Home describes itself as "non-sectarian." Only about 25% of the residents are Catholic, no religious test was stated for this position during the hiring process, and the Home derives the overwhelming majority of its income from government sources (Medicare, Medicaid), insurance proceeds, and fees paid by residents. There can be no question of the "ministerial exception" applying to this case. So the issue purely boils down to two questions: whether discharging an employee for engaging in a same-sex marriage violates Title VII, and whether a "Catholic" institution describing itself as "non-sectarian" and dependent heavily on government financing can hide behind the First Amendment or the limited religious exemption articulated in Title VII (allowing religious institutions to favor adherents of their own religion in hiring) to discharge an executive whose marital status is deemed "antithetical" to the religious doctrine of the sponsoring faith. If it makes any difference, Murphy was raised Catholic and is a graduate of Notre Dame, a Catholic university. His attorney is H. Aubrey Ford, III, of Cantor Stoneburner Ford Grana & Buckner, Richmond, Virginia.

WISCONSIN – A person with HIV infection does not automatically have a "chronic serious health condition" that would qualify him for leave under the Family and Medical Leave Act, ruled U.S. District Judge William M. Conley in *Jallow v. Kraft Foods Global, Inc.*, 2016 WL 3893181 (W.D. Wis., July 14, 2016). The burden is on an employee seeking to escape disciplinary consequences for absenteeism to demonstrate that he was entitled to FMLA leave. In this case, the employer claimed that it was unaware of the employee's HIV status at the time it made its termination decision, and the employee failed to show that his absences were due to complications from HIV infection. Indeed, his records showed that his viral load was virtually undetectable and he was not suffering opportunistic infections associated with HIV infection. He argued that a "cold" that kept him out of work might be related, but the court was not persuaded. Wrote Judge Conley, "In concluding that Jallow failed to come forward with sufficient evidence to support a reasonable jury finding that he suffers from a chronic serious health condition, the court stresses that this holding in no way should be read broadly to apply to HIV diagnoses more generally. In other words, nothing about this holding casts doubt on whether HIV could constitute a chronic serious health condition. Here, however, plaintiff has failed to put forth medical documentation to support such a finding, and the limited medical evidence in the record supports a finding that his HIV is well-controlled and virtually undetectable. Perhaps, plaintiff's case is representative of advancement in treatment of HIV/AIDS. Regardless of the reason, the

undisputed record does not support a finding of eligibility under the FMLA." The court also rejected plaintiff's argument that a retaliation claim under FMLA could be premised on the fact that he was discharged for absenteeism shortly after the employer's HR Department received medical records indicating he was HIV-positive. "Notably," wrote Conley, the plaintiff "fails to cite any other FMLA requests during this period of time," and went on to quote 7th Circuit precedent that "mere temporal proximity is not enough to establish a genuine issue of fact." The court granted summary judgment to the employer, dismissing the plaintiff's FMLA claims.

CRIMINAL LITIGATION NOTES

GEORGIA – A Fulton County jury convicted Martin Blackwell, 48, of aggravated assault and battery on a charge that he poured scalding water on a gay male couple sleeping on the floor in his girlfriend's home. Blackwell could not be charged with a hate crime under state law because Georgia is one of a handful of states that does not penalized anti-gay crimes under that rubric. Blackwell was sentenced to 40 years in prison. The case was referred to the Federal Bureau of Investigation for consideration of a federal hate crime prosecution, but in light of the severity of the sentence imposed the FBI decided not to proceed with the investigation. (Proving a federal hate crime is difficult because of the requirement of proof that the crime involved some nexus with interstate commerce, and it is unlikely that a federal hate crime prosecution, if successful, would result in a sentence more severe than that imposed by the state court proceeding.) The victims include Anthony Gooden, the son of Blackwell's now-former girlfriend, and Marquez Tolbert. Gooden had come out to his family as gay shortly before the attack. Both men suffered extensive burns requiring multiple surgeries and may have permanent injuries. They could bring civil actions for damages against Blackwell, but the truck-driver is probably judgement-proof in financial terms. *Washington Post*, August 24; *Associated Press*, Aug. 28.

HAWAII – The Intermediate Court of Appeals of Hawaii ruled in *State of Hawaii v. Diego*, 2016 Haw. App. LEXIS 377 (Aug. 25, 2016), that the trial court did not err in refusing to let defense counsel question the Complaining Witness (CW) in a case of Attempted Murder in the Second Degree and Robbery in the First Degree about the CW's sexual orientation. The trial judge, Greg K. Nakamura of the 3rd Circuit Court, denied the request to inquire because "the issue is the conduct of [the CW] to the extent that Mr. Diego seeks to assert self-defense, not [the CW's] sexuality," and Judge Nakamura opined that such questioning potentially violates the CW's right of privacy. Wrote the appeals court in a summary disposition order, "Diego testified at trial that he struck the CW with a hammer because he was scared due to the CW's alleged sexual advances and that his first thought was that the CW was going to sexually assault or hurt him. Diego was not, however, permitted to ask the CW about the CW's sexual orientation. We conclude that a person's sexual orientation has no bearing on and is not relevant to whether the person would be more likely to commit or attempt a sexual assault. Diego cites no authority indicating that the CW's sexual orientation is relevant to whether Diego's actions constituted self-defense, and there is persuasive authority to the contrary." The court cited *U.S. v. Bautista*, 145 F.3d 1140 (10th Cir. 1998), *U.S. v. Whalen*, 940 F.2d 1027 (7th Cir. 1991), and *Maiorino v. Scully*, 746 F. Supp. 331 (S.D.N.Y. 1990), in support of this assertion concerning authority. "Thus," concluded the court on this point, "whether the CW identifies as gay was irrelevant." The court also rejected other points raised by Diego on appeal and affirmed his conviction.

KENTUCKY – On August 11 a Louisville jury convicted Henry Richard Gleaves, II, of second-degree manslaughter in the shooting death of Papi Edwards, a transgender woman, which took place on January 9, 2015. The charges asserted by the prosecution also included intentional murder, first degree manslaughter, and first degree manslaughter with intent to injure, as well as an evidence-tampering charge. The jury decided to convict on the lowest manslaughter charge, and subsequently the prosecution and defense attorneys agreed to a sentence of seven years on the manslaughter charge and five years on the evidence tampering charge. Kentucky's Fairness Campaign criticized the verdict and sentence. Direct Chris Hartman said, "Were Papi Edwards not transgender, she would still be alive today. The evidence presented over the nine-day trial clearly proved that Gleaves was angered when he discovered Edwards was not biologically female, made an intentional decision to go to his car, obtain a gun, pursue Papi Edwards and her friends, wait for Papi Edwards to come within his range, and shoot her. Unfortunately, transgender prejudice persists, and it has led to a more lenient sentence for Gleaves." *Fairness Campaign* News Release, Aug. 11.

NEW JERSEY – The Appellate Division affirmed the murder conviction of Wilfredo Sanchez for the bloody murder and dismemberment of a gay man, rejecting Sanchez's contention that various rulings by the trial court had tainted the verdict, in *State v. Sanchez*, 2016 N.J. Super. Unpub. LEXIS 1930 (Aug. 19, 2016). The court's detailed

recitation of the evidence at trial sounds at times like a plot summary from an episode of "The Sopranos" (minus the organized crime element), detailing how Sanchez and co-defendant Pedro Garcia, who testified against him, stabbed and cut the victim severely, decided they had to "finish him off" to prevent him from calling the police, and then cut up his body, put the body parts into garbage bags together with the cleaning materials they used to tidy up the apartment and cover up the signs of struggle, and dumped them at various locations around town to avoid detection. This murder occurred in the aftermath of a party in the victim's apartment, where the co-defendants and many others (including some other gay men) had been present, but ultimately only the co-defendants and the victim were left. Sanchez had passed out and was sleeping on the victim's bed. Garcia testified, according to the *per curiam* opinion: "Garcia was sitting on the bed where defendant was sleeping. The victim turned the lights out in the room 'and he lied down on the bed quickly and he began to sort of like want to unbutton [defendant's] pants.' Defendant moved. Garcia told the victim 'to leave the guy asleep because he was sleeping and was going to hit you.' The victim became furious, started screaming, and told Garcia to leave. The screaming woke defendant, who asked Garcia what was going on with the victim. When Garcia responded that the victim was acting crazy, the victim told defendant, 'you get out of here too, you asshole. I don't want to see you here.' That is when the violence began." The court rejected Sanchez's argument that the trial judge should have charged the jury on lesser-included offenses, particularly manslaughter, emphasizing that the coroner had determined that the particular stab wound that was the cause of death was inflicted by Garcia, not by him. The Appellate Division agreed that the trial record would not support such a plea, focusing on Garcia's testimony. "Garcia did not, however, testify the victim actually unbuckled defendant's pants," wrote the court. "Nor was there any evidence defendant was aware of what had occurred. Rather, Garcia testified the victim's subsequent screaming woke defendant. In fact, Garcia told the victim 'to leave the guy asleep because he was sleeping and he was going to hit you.'" Based on this testimony, the court found, "The evidence simply does not support defendant's argument that he participated in the homicide while in the heat of passion resulting from a reasonable provocation. Moreover, defendant made no such argument. He denied participating in the homicide." Proof of his participation was based on forensic evidence and the testimony of Garcia. Although Garcia struck what ultimately proved to be the fatal stab wound, defendant subsequently inflicted new stab wounds. "The State's proofs established defendant had formulated the specific purpose of taking the victim's life, . . . telling Garcia after the victim requested an ambulance and begged for life: 'Well, if we call the ambulance the police are going to come as well and this asshole is going to fuck us up. We have to finish him off." As noted, a Sopranos-style script…

NEW YORK – New York city newspapers reported that Kings County (Brooklyn) Supreme Court Justice Danny Chun had sentenced Pinchas Braver and Abraham Winkler, members of an Orthodox Jewish "neighborhood watch group" called Shomrim, to three years of probation and 150 hours of community service after they pled guilty to wrongful imprisonment in response to charges that they had beaten a gay African American man, Taj Patterson, on December 13, so severely that he suffered a broken orbital socket and torn retina, and is still blind in his left eye. The defendants allegedly yelled anti-gay slurs as they beat Patterson. Prosecutors allowed them to plea down from hate crime charges when witnesses changed statements upon which the indictment relied. There were also allegations that police investigators had prematurely closed their investigation. (There are recurrent charges that the police tolerate questionable tactics by Shomrim and shy from investigating them due to pressure from the politically-influential Orthodox community leaders.) The defendants asked to be allowed to do their community service at Chai Lifeline, an Orthodox community organization for sick Jewish children, but prosecutors demanded that they choose another organization more consistent with the guidelines of their plea agreement. The *New York Post* headlined its article on the sentencing "Gay-bash wrist slap," and *Gay City News* emphasized the deficiencies in the police investigation leading to a mild plea bargain.

OHIO – An HIV-positive woman who pled no contest to a charge of engaging in sexual solicitation after a positive HIV test failed in her attempt on appeal to win a reversal of the trial court's rejection of her motion to suppress evidence concerning her HIV-status in *State v. Givens*, 2016 WL 3858728 (Ohio 2nd Dist. Ct. App., July 15, 2016). After reviewing the record on appeal, the court of appeals concluded that the defendant had voluntarily spoken with the arresting police officers and detectives when she admitted to being HIV-positive and told them where and when she had been diagnosed, and that there was probable cause for the subsequent issuance of a search warrant that turned up confirmatory medical records at the hospital in question. The police had been tipped off to an HIV-positive prostitute soliciting at a particular location. An undercover officer drove to the location, saw

the defendant engaged in typical solicitation conduct (gesturing to passing drivers, etc.), parked his car and allowed her to get in. After satisfying herself that he was not a police officer, she agreed to provide oral sex for a fee and was busted. The defendant argued that her subsequent statements to the detectives who questioned her at the site were not voluntary, because the detective told her that it was against the law to work as a prostitute after testing HIV-positive or to "lie to the police about HIV." This, she argued, constituted a threat, not just a question. But the court of appeals concurred with the trial court that a correct statement of the law by the detective did not make the statement involuntary, the defendant having been properly advised of her Miranda rights prior to the questioning. The court quoted from Ohio Supreme Court precedent stating that "the making of an unsworn false oral statement to a public official with the purpose to mislead, hamper or impede the investigation of a crime is punishable conduct" under two Ohio statutes. "Considering the totality of the circumstances," wrote Judge Jeffrey Froelich for the court of appeals, "the trial court did not err in concluding that Givens's statements to the police about her HIV status were made voluntarily. Given that conclusion, the trial court also did not err in denying Givens's request to suppress evidence subsequently obtained based on those statements."

TEXAS – The Texas 12th District Court of Appeals affirmed the conviction of a college football player accused of murdering a transgender woman whom he had been dating, in *Champion v. State of Texas*, 2016 Tex. App. LEXIS 8938, 2016 WL 4379473 (Aug. 17, 2016). The defendant was sentenced to life in prison by the jury. The most damning evidence against Carlton Champion was a jailhouse confession to another jail inmate who was familiar with the deceased and asked Champion on the jail recreation yard if he did "it," to which Champion replied, "Yeah, you know, we had problems." Champion's sole issue on appeal was that there was not sufficient corroborating evidence of this "confession" to sustain the conviction. The court carefully reviewed the trial record and found substantial circumstantial evidence, including credible testimony that Champion and the decedent had been dating each other, that there had been a falling out, that Champion was placed in the vicinity where the decedent was found dead in her car, that Champion's DNA was found in the vehicle, and so forth. Some of the evidence was retrieved from Champion's tablet in the form of stored text messages documenting the sexual relationship. Indeed, from the court's recitation, it sounded as if Champion could easily have been convicted without introduction of the "confession." The court concluded that "the inculpatory evidence raises more than a mere suspicion of Appellant's guilt" and "rational jurors could find that the inculpatory evidence sufficiently tends to connect Appellant to the offense." Since the confession itself was admissible, there was more than enough evidence to uphold the conviction.

TEXAS – Whether the "victim" in a prosecution for "sexual abuse of a child" is a lesbian is irrelevant, held the Texas Court of Appeals, Fort Worth, in *Harper v. State of Texas*, 2016 WL 4045203, 2016 Tex. App. LEXIS 8089 (July 28, 2016), rejecting Scott Harper's contention that the trial court abused its discretion by prohibiting him from putting in evidence of the complainant's sexual orientation. In this case, Harper was accused of sexually abusing a minor girl. The victim was the principal witness against him. He wanted to show that she was biased against him due to her sexual orientation, providing a reason for her to testify falsely. During opening statements, Harper's counsel stated that the victim "wanted to 'come out' and be like her mom." The State's objection to this being presented to the jury was sustained. Counsel requested a hearing before cross-examination, again arguing to allow testimony that the victim had told a girlfriend of her mother that the victim wanted to live with her mother because Harper and her grandmother (with whom she was living) are "very anti-homosexual." Counsel sought again to present this testimony on the issues of motive and bias in the victim's making sexual assault allegations against Harper. The victim's grandmother, testifying outside the presence of the jury, confirmed that the victim was a lesbian, had gone to pride parades and made statements about her sexual orientation on Facebook, and knew that her grandmother disapproved. But she also testified that she had no knowledge about whether the victim went to live with her mother because of her sexual orientation, and defense counsel decided against pursuing this line of questioning with grandmother before the jury. Defense counsel also chose not to call the mother's "girlfriend" who allegedly hear the victim make this statement. Justice Sue Walker, writing for the court of appeals, said, "Grandmother's testimony about [the victim's] sexual orientation, which was excluded, constitutes reputation or opinion evidence about a victim's past sexual behavior that is not admissible. No exceptions exist to rule 412(a)(1)'s automatic exclusion of reputation or opinion evidence of a victim's past sexual behavior. Accordingly, we hold that the trial court properly excluded evidence of Kelly's sexual orientation under rule 412(a)(1)." Harper sought to raise other legal arguments on this point, but the court found them to have been waived by the failure to raise them at trial.

PRISONER LITIGATION

PRISONER LITIGATION NOTES

FEDERAL BUREAU OF PRISONS – Transgender inmate Marius (formerly Marie) Mason is reportedly the first female-to-male prisoner to be permitted to begin hormone treatment in the federal prison system, according to the *Dallas Morning News* (Aug. 19, 2016), 2016 WLNR 25346472. Mason is confined at the Carswell Federal Medical Center in Fort Worth, a women's facility with all levels of security. Citing inmate privacy, the Bureau of Prisons declined to comment. Mason began his transition in 2013, and he will not be permitted to develop "secondary male sex characteristics," according to the article. *William J. Rold*

ALABAMA – This case is an unusual example of a federal magistrate taking charge at a very early stage in a "protection from harm" proceeding involving a gay inmate. Within days of receiving allegations that prison officials revealed Carlos Carey's sexual orientation, causing his repeated assaults and rapes, U.S. Magistrate Judge Susan Russ Walker ordered state officials to file responsive affidavits and issued an order to show cause why preliminary relief for Carey's protection should not be granted – all without formal screening of the allegations themselves (which she found she could not evaluate without a response) – in *Carey v. Richie*, 2016 U.S. Dist. LEXIS 108560 (M. D. Ala., August 15, 2016). Alabama officials denied the allegations, but they represented that Carey was no longer in general population and that his alleged assailant had been "moved" so as to have no contact with Carey. On this basis, Judge Walker denied preliminary relief. Carey plead the Prison Rape Elimination Act (with which Alabama officials claimed they had complied), but she does not say whether the statute could have been the basis for preliminary injunctive relief, finding Carey not entitled to same under these circumstances. Judge Walker retained jurisdiction for further proceedings. *William J. Rold*

ARKANSAS – *Pro se* inmate John Wendell Whitt sued for violations of his civil rights to health care and environmental safety in *Whitt v. Cradduck*, 2016 U.S. Dist. LEXIS 92931 (W.D. Ark., July 18, 2016). Chief U.S. District Judge P. K. Holmes, III, dismissed all claims. He first dismissed on motion the claims against a contractual physician (Dr. Saez); he then screened and dismissed the remaining claims under 28 U.S.C. § 1915(e)(2). Whitt alleged that Dr. Saez subjected him to medical risk by allowing him to be housed in general population with inmates with tuberculosis ("TB"), HIV/AIDS, and Hepatitis C, where he could become infected through communal showering, fights, etc. Plaintiff did not allege he had any of these conditions, although he had not been tested for TB or Hepatitis C. Chief Judge Holmes granted Dr. Saez's motion to dismiss because Whitt did not show he had a "serious medical need" or that he "suffered any injuries or damages as a result of Dr. Saez's actions or inactions," citing *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). He dismissed the medical claims against the other defendants on the same basis. He analyzed the conditions of confinement claims under *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993), finding that "mingling of inmates with serious contagious diseases with other inmates" was not unconstitutional on the facts alleged. Prisoners with "active TB" were segregated until no longer contagious, and merely being housed with someone with inactive TB did not pose a substantial risk. Regarding casual transmission of HIV/AIDS or Hepatitis C, Judge Holmes cited Eighth Circuit law on low risk from showers, fights, sweat, sneezes, mosquitoes, etc. – *see Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988) (no claim based on "unsubstantiated fears and ignorance"); *Marcussen v. Brandstat*, 836 F. Supp. 624, 628 (N.D. Iowa 1993) (transference of AIDS through everyday contact is too remote); *see also, Robbins v. Clarke*, 946 F.2d 1331 (8th Cir. 1991) (failure to segregate HIV+ inmates not constitutional violation). He also cited Centers for Disease Control and Prevention guidelines on unlikely transmission of Hepatitis C through casual contact. After Southern Health Partners, Inc. (the provider for Benton County) moved to dismiss on behalf of Dr. Saez, the claims against the sheriff and the county were dismissed as "screening" dispositions. The opinion discusses inadequate allegations of practice and policy liability concerning the local government defendants, but the opinion does not indicate they ever appeared in the action. *William J. Rold*

CALIFORNIA – In 2015, U.S. Magistrate Judge Dennis L. Beck dismissed prisoner Frank Lee Dearwester's complaint of false HIV+ diagnosis, with leave to amend, holding that the claim sounded in negligence, not violation of the Eighth Amendment. *See Dearwester v. CDCR*, 2015 WL 6537351 (E.D. Calif., October 28, 2015), reported in *Law Notes* (December 2015 at pages 553-4). Now, Judge Beck dismisses the amended complaint in *Dearwester v. CDCR*, 2016 WL 3753264 (E.D. Calif., July 13, 2016), for essentially the same reasons. Dearwester alleged that absence of appropriate policies kept officials from notifying him of possible false results, although he admitted that he was told the samples may have been mixed up and that he should report for retesting in six months. Judge Beck rejected Dearwester's argument that the passage of time for confirmation with "no end date(s)" constituted deliberate indifference, noting that officials were

responsive (albeit not necessarily to Dearwester's anxiety) and thus lacked the "requisite state of mind" needed to state a claim, noting that "even gross negligence" was inadequate, citing *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). Judge Beck relied on Dearwester's initial pleading to support the "defense" of "mixing" records, even though it was not alleged in the amended pleading, saying that "Plaintiff cannot contradict his prior statements in an attempt to state a claim" – even though an amended complaint is usually held to supplant earlier pleadings completely. "While Plaintiff may have believed that the situation should have been handled differently, there was no failure to reasonably respond." Judge Beck found that further leave to amend was "not warranted," but he left open the possibility that Dearwester could proceed in a malpractice case in California Superior Court. The earlier discussion of this case in *Law Notes* included case law on failures in post-test HIV counseling. *William J. Rold*

CALIFORNIA – In May, a federal magistrate judge dismissed gay HIV+ inmate Carlo Antonio DelConte's *pro se* complaint about his health care, safety, and other conditions of confinement, because he filed it as a *habeas corpus* petition. *DelConte v. Bordera*, 2016 U.S. Dist. LEXIS 69983 (N.D. Calif., May 26, 2016), reported in *Law Notes* (June 2016 at page 251). Now DelConte is back, with civil rights claims under 42 U.S.C. § 1983, but United States District Judge William H. Orrick dismissed the case again in *Del Conte v. County of Santa Clara*, 2016 WL 3916315, 2016 U.S. Dist. LEXIS 94825 (N.D. Calif., July 20, 2016), because DelConte named the wrong (supervisory) defendants, when his allegations sound at the operational level against line defendants. DelConte claims he was subjected to homophobic attacks and denial of HIV medications at the Santa Clara County Jail, which Judge Orrick said "could certainly form the basis of plausible causes of action," but DelConte did not link his injuries to the "high-ranking supervisors" he sued. Judge Orrick granted leave to file a Second Amended Complaint, writing: "Del Conte may wish to focus his allegations on the persons he had direct contact with, such as prison guards or medical staff. He is encouraged to consider the following when amending his complaint: 'A person deprives another of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains],'" quoting *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). He added: "The inquiry into causation is individualized and focuses on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." The opinion includes discussion of potential liability: (1) of the county for policy failures under *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978); and (2) of individual line defendants under Title II (discrimination) of the Americans with Disabilities Act, 42 U.S.C. § 12132, if DelConte can show causation and intent to discriminate (necessary for damages) on repleading, citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187-88 (9th Cir. 2003); and *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998). Claims of "verbal harassment" were dismissed with prejudice as not actionable under *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997). Judge Orrick noted that a Second Amended Complaint will be subject to "the next stage of review" should DelConte go forward. This *pro se* plaintiff is plainly foundering, but he seems to allege actionable conduct. In this writer's view, the court should consider appointment of counsel if the pleadings are not going to bounce again as DelConte tries to reconstruct liability for his injuries at the county jail over two years ago. *William J. Rold*

FLORIDA – Transgender inmate Justin Lee Naber, a/k/a Stacy Lorraine Naber, filed a pro se lawsuit challenging Florida officials' refusal to permit her to change her name in *Naber v. Florida Department of Correction*, 15-cv-14427 (S.D. Fla.). The ACLU Foundation of Florida appeared on her behalf in February, challenging a Florida statute prohibiting inmates (whose civil rights are suspended) from changing their names – stating facial and as-applied claims under the First, Eighth and Fourteenth Amendments. The Amended Complaint asserted that a name change was "psychologically therapeutic," and denial of same was deliberately indifferent to her serious medical needs. The pleading also alleged that denial of a name change imposed speech and violated her right to freedom of expression. There are no reported decisions, but the Florida Attorney General moved to dismiss on various grounds. According to the *Associated Press* (August 16, 2016), Naber killed herself by hanging on August 6, 2016. The motion to dismiss, in sur-reply at the time, was mooted when the case was voluntarily dismissed after Naber's death. *William J. Rold*

GEORGIA – *Pro se* jail inmate Timothy C. West, Sr., sued for damages for violation of his civil rights after various officials in a county jail misdiagnosed him as HIV+ when he was not, apparently based on a low CD4 count. United States Magistrate Judge Brian K. Epps dismissed the case – *West v. Roundtree*, 2016 WL 3791122 (S.D. Ga., June 16, 2016) – on screening under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim, because the allegations sounded only in medical negligence, not

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deliberate indifference under the Eighth Amendment. Magistrate Epps held that the "unintentional misdiagnosis" does not amount to deliberate indifference even if it caused West depression, citing *Simpson v. Holder*, 200 F. App'x 836, 839 (11th Cir. 2006). Absent diversity of citizenship, the court had no jurisdiction to rule on a malpractice case. There are no allegations that deficiencies in policies or procedures led to the misdiagnosis. United States District Judge J. Randal Hall accepted Magistrate Epps' recommendations on July 12, 2016. *William J. Rold*

ILLINOIS – This is at least the fourth *pro se* lawsuit by Illinois prisoner Dannel Maurice Mitchell, who is gay and HIV-positive. He has been allowed to proceed in the Southern District of Illinois before Judges J. Phil Gilbert and Staci M. Yandle, as previously reported in *Law Notes* (June 2016 at page 252; and Summer 2016 at page 307-8), in separate cases challenging his HIV treatment and alleging public humiliation and retaliation for his litigation. He also has a case before the Illinois Court of Claims, of unspecified status. Now, U.S. District Judge Nancy J. Rosenstengel dismisses his current case upon screening under 28 U.S.C. § 1915A(a), in *Mitchell v. Baldwin*, 2016 U.S. Dist. LEXIS 104873 (S.D. Ill., August 6, 2016). Here, Mitchell claims that failure to rehabilitate him has caused his recidivism (some 13 incarcerations for theft-related offenses), in violation of the Eighth Amendment and the Due Process Clause. Although Mitchell "eloquently" explains his feelings of "helplessness and hopelessness" after successive releases without means to survive, Judge Rosenstengel finds no constitutional right to rehabilitation in prison – or even to programming (citing 7th Circuit authority to that effect). Other claims, such as retaliation, are duplicative of allegations in the other pending matters. *William J. Rold*

IOWA – This summer, the *Des Moines Register* has published a series of remarkable and positive articles on "Trans in Iowa" (sometimes subtitled "The Fight for Visibility"), reporting on law and policy but also sharing the individual stories of some twenty transgender and intersex Iowans, ranging from teens to elders. (Iowa has had statewide gender identity civil rights protection since 2007 – Iowa Code, Chapter 216). In July, the *Register* reported on a long-term prison nurse, Jessie Vroegh, who complained that as a female-to-male transgender employee, he was denied access to male showering facilities at the prison where he worked. His claim, supported by the union local (Council 61 of American Federation of State, County & Municipal Employees), is pending before the Iowa Civil Rights Commission. More recently, on August 24, the *Register* reported that the Iowa Department of Correction has adopted policies for transgender inmates on use of pronouns, strip search procedures, individualized diagnosis and treatment plans (including hormones, which two inmates are receiving), and case-by-case decisions on assignment to gender-based institutions. The policies (which do not apply to county jails or community-based facilities) were drafted over the last year by a medical team of physicians, nurses, psychiatrists, psychologists, and pharmacists under the direction of Iowa DOC Medical Director Harbans Doel; and they declare that they were designed to ensure appropriate treatment for transgender prisoners "in a humane and safe correctional environment that is sensitive to their unique adjustment issues." Dr. Doel said that it is "too soon" to draft policies on sex-reassignment surgery because none of the six transgender inmates in their custody has yet progressed that far in transition. Donna Red Wing, executive director of One Iowa, the state's largest LGBTQ organization, praised the new policies: "At One Iowa, we believe it is imperative to treat transgender and intersex individuals with respect within the correctional system." One Iowa also supported Nurse Vroegh's civil rights claim and endorsed "cultural competency training" for all staff. Iowa has been the forum for some of the worst appellate case law on transgender inmate services remaining on the books. *See Long v. Nix*, 86 F.3d 761 (8th Cir. 1996); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988). It is gratifying to see a rural state with a small transgender inmate population address these issues without the club of recent federal litigation. *Compare* constitutional challenge to Missouri's "freeze frame" policy on transgender inmates in *Hicklin v. Lombardi*, No. 16-cv-01357 (E. D. Mo.), reported below in this issue of *Law Notes*. *William J. Rold*

MARYLAND – Prisoner cases sometimes provide a view of human behavior not typically encountered in the non-incarcerated world. *Levy v. Davenport*, 2016 WL 4083363 (D. Md., August 1, 2016), is an example. *Pro se* plaintiff Shawante Ann Levy was involuntarily committed to a state psychiatric hospital for the second time after being found not criminally responsible for a murder committed while released after her first psychiatric hospitalization. Although born biologically male, during the second hospitalization, she was diagnosed with "gender identity disorder," "transvestic fetishism," paraphilia, polysubstance dependence, and anti-social personality. Levy claims that hospital staff "ignored" her repeated requests for treatment for gender identity disorder and auditory hallucinations in 2010 (although apparently she was given anti-psychotic medication, including lithium). She began to consume the excrement and urine of another patient, hoping it would help her "become biologically female." Apparently this continued for months in 2010 – in view of security cameras, but

without staff intervention – before Levy murdered the other patient. She was found "competent" to stand trial in 2012, convicted, and sentenced to life in state prison. In 2015, she sued the hospital staff, claiming their failure to intervene deprived Levy of her constitutional right to treatment and led to her committing homicide. United States District Judge Theodore D. Chuang dismissed the case on statute of limitations grounds. Since federal civil rights statutes do not have their own statute of limitations, federal courts adopt the most analogous state limitations and tolling rules: in Maryland, three years. Levy commenced her lawsuit more than three years after the denial of treatment and the homicide, and she could not take advantage of a Maryland tolling rule for insanity, since she was found competent for criminal trial more than three years before she sued. Judge Chuang notes that accrual (as opposed to limitations and tolling) is a matter of federal law, but this theory does not save the case either. "Under federal law, a 'cause of action accrues either when the plaintiff has knowledge of his claim or when he is put on notice – e.g., by the knowledge of the fact of injury and who caused it – to make reasonable inquiry and that inquiry would reveal the existence of a colorable claim,'" quoting *Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995). Here, Levy "was aware of the alleged deficiencies in her treatment at the time they occurred because she made repeated complaints to [hospital] staff about her treatment in the months preceding the September 2010 murder." Hence, the claim had "accrued" beyond the limitations period. Apparently, only psychiatric patients who are too crazy to complain can make an accrual argument. This "Catch-22" reminds this writer of the due process prohibition on imposing capital punishment on the truly insane, because they cannot appreciate the event. Anyone who has seen the rantings of Aileen Wuornos (convicted of Florida serial murders and subject of the film *Monster*) in the videotaped interview the day before her execution knows that criminal justice "competence" has a very low threshold. Levy has another case before Judge Chuang, wherein the court allowed her to proceed on claims of need for current transgender treatment. *Levy v. Wexford Health Sources*, 2016 U.S. Dist. LEXIS 28384 (D. Md., March 7, 2016), reported in *Law Notes* (April 2016, pages 165-6). He denied preliminary relief (although Levy presented a "substantial argument" based on Maryland's prior use of a "freeze frame" approach to transgender care, in which nothing "new" is initiated in prison) because the state had begun to address her transgender needs. He kept jurisdiction and directed prison officials to report on progress every sixty days. Stay tuned. *William J. Rold*

MISSOURI – Lambda Legal announced on August 22, 2016, that it has filed a lawsuit on behalf of transgender inmate Jessica Hicklin, currently incarcerated at the Missouri Potosi Correctional Center. *Hicklin v. Lombardi*, 16-cv-01357 (E.D. Mo., 2016), names Missouri's correctional director (and deputies) and numerous executive and health care officials at the prison as defendants, and challenges Missouri's "freeze frame" policy (under which inmates are not given transgender treatment unless they were receiving it prior to incarceration), as unconstitutional under the Eighth Amendment. Hicklin, now 37, has been incarcerated since she was 16. In 2015, Missouri prison health professionals confirmed a diagnosis of "gender dysphoria" per DSM-V criteria, noting Hicklin's history of gender identity issues since her youth. Although the professionals have strongly advised hormone therapy, access to gender-affirming canteen items, electrolysis, and other treatments and services – according to standards of the World Professional Association for Transgender Health ["WPATH"] and the National Commission on Correctional Health Care ["NCCHC"] – Hicklin has been offered only psychotherapy and anti-anxiety medication, according to the detailed Complaint. She has exhausted all administrative grievances, only to have her providers' recommendations for medically necessary remedies overruled. Lambda Legal Transgender Rights Project Attorney Demoya Gordon said: "This policy, like similar policies in place in correctional systems across the country, flies in the face of current medical standards." Standards like those of WPATH and NCCHC prompted the United States Department of Justice to file a Statement of Interest that Georgia's similar "freeze frame" policy was facially unconstitutional, leading to the state's abandonment of same, in *Diamond v. Owens*, previously reported in *Law Notes*: "Georgia Allows Individualized Treatment of Transgender Inmates after Department of Justice Files 'Statement of Interest'" (May 2015 at page 208). Georgia paroled Diamond during the course of her litigation and then argued mootness, but she was allowed to proceed on damages claims. *See* "Transgender Prisoner Allowed to Proceed on Damages Claims for Denial of Medical Care and Failures to Protect and Train" (October 2015 at pages 435-6). Hicklin does not seek damages in her current Complaint (and there are no horrific allegations of years of rape and assault plead as by Diamond), but Hicklin may be eligible for parole in a few years. After serving 21 years, she also may qualify for resentencing under current Supreme Court decisions. *See Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016), making retroactive the holding of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), that mandatory sentencing of juveniles to life imprisonment

without possibility of parole violates the Eighth Amendment. Missouri's intransigence in *Hicklin* stands in stark contrast to Iowa's voluntary adoption of prevailing standards for transgender treatment, reported above in this issue of *Law Notes*. Hicklin is represented by Lambda's Transgender Rights Project Attorneys in New York and Chicago and by Kevin L. Schriener of Law & Schriener, LLC, St. Louis. *William J. Rold*

NEW YORK – A transgender inmate who claimed she was denied adequate mental health services despite warning signs, leading to her hoarding medication and suicide attempt, is going to have a trial on a claim of deliberate indifference to her serious health care needs in *Outman v. Waldron*, 2016 U.S. Dist. LEXIS 110412, 2016 WL 4435234 (N.D.N.Y., August 19, 2016). This opinion deals with housekeeping issues incident to trial. Judge Mae A. D'Agostino directed "sensitivity" to Outman's transgender presentation, including use of female pronouns and wearing of civilian clothing (without shackles) before the jury, although the opinion is silent on whether women's civilian clothing will be allowed. The decision also limits testimony of prison medical providers to "treatment" issues only, granting a motion *in limine* to prevent the all-too-common effort to slip in expert testimony through medical fact witnesses without complying with expert witness restrictions involving qualification, disclosure, etc., as required by F.R.C.P. 26(b). Judge D'Agostino reserves ruling until trial on whether the defense can disclose Outman's homicide conviction to the jury. It may or may not be relevant to Outman's state of mind on the date of the suicide attempt, which happened on the anniversary of the death of the victim; and defendants may or may not have known about its role in increasing Outman's risk of self-harm. The opinion has a good discussion of the balancing of probative value versus prejudice in use of the substance of criminal convictions in civil cases under F. R. Evid. 609. [Note: Outman's attempt to obtain special housing for transgender inmates in New York was denied last year in an Article 78 proceeding in state court in *Matter of Outman v. Annucci*, 2015 WL 5658669 (N.Y. Sup. Ct., Albany, Co., Aug. 26, 2015), reported in *Law Notes* (October 2015 at page 467).] Judge D'Agostino appointed counsel for trial, and she granted leave for limited depositions of three defense witnesses after close of discovery. Outman is represented by Whiteman, Osterman & Hanna, Albany. *William J. Rold*

NORTH CAROLINA – Chief United States District Judge Frank D. Whitney allowed transgender inmate Terrell Battle, *pro se*, to proceed past initial screening under 28 U.S.C. §§ 1915(e) and 1915A in her claim that North Carolina's "freeze frame" policy (denying hormone treatment to inmates not receiving it prior to incarceration) was unconstitutional under the Eighth Amendment standard of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), which requires that prisons provide treatment for serious medical conditions. *Battle v. Perry*, 2016 U.S. Dist. LEXIS 114031, 2016 WL 4487888 (W.D. N.C., Aug. 25, 2016). Despite her history of gender identity issues, the state refused requests for hormones or evaluation by a specialist (endocrinologist) because its written policy precludes prescribing hormones unless authorized by a state "review panel," which will not consider the same unless it was first ordered in the community "prior to incarceration." Judge Whitney found the claim sufficient under *Estelle*, without consideration of other legal bases, including the state constitution (which theories are reserved for future development). The pleadings were sufficient to establish both a "serious need" and deliberate indifference to it, under general Fourth Circuit precedent applying *Estelle*, as well as numerous out-of-circuit cases applying the same analysis to treatment claims by transgender inmates. Oddly, Judge Whitney does not cite the leading Fourth Circuit transgender prisoner case of *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013). Although the statewide corrections chief was dismissed as a defendant, the proceedings continue against the statewide correctional medical care and mental health administrators. Judge Whitley also noted that the U.S. Department of Justice has issued a statement that policies such as the one challenged here are unconstitutional, citing and quoting Federal Bureau of Prisons Program Statement 6031.04 (June 3, 2014 at 42): "prisoners in Bureau custody with a possible diagnosis of gender dysphoria 'will receive a current individualized assessment and evaluation' and '[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration,'" available at *http://www.bop.gov/policy/progstat/6031_004.pdf. William J. Rold*

PENNSYLVANIA – Jamie ("Jayden") Hensley, a female-to-male transgender inmate, sued numerous custodial and administrative/executive staff for civil rights violations at the Bucks County Correctional Facility ["BCCF"] in *Hensley v. Bucks County Corr. Facility*, 2016 U.S. Dist. LEXIS 106095, 2016 WL 4247637 (E.D. Pa., August 11, 2016). The opinion by United States District Judge Anita B. Brody recites the factual background in detail before dismissing all claims except a *Monell* action (see below) against BCCF. Hensley's allegations included: taunting by other inmates and staff, including incidents where his cell was opened by officers so that other inmates could inspect his genitalia; denial of male hormones he received for years prior

to incarceration (as well as a breast "binder"); and failure to protect him against self-harm (at least two suicide attempts). Judge Brody found that the individually named defendants lacked personal involvement in the alleged violations during Hensley's eleven-month incarceration either because they had no involvement with them or did not know about them. The warden-level defendants referred Hensley's medical and mental health complaints to health care staff, who apparently were not named as defendants. Judge Brody allowed Hensley to continue his case against BCCF, however, under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978), concerning the jail's lack of policies and procedures to prevent the alleged violations of civil rights and its failure to train staff in same as required by *City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989). This should allow Hensley to obtain discovery and file a second amended complaint with sufficient personal involvement allegations against individual defendants. The opinion seemed to recognize that civil rights had been violated (even if not by these defendants), noting: failure to deliver medication for almost a year; absence of suicide "watch" procedures in light of the "serious" risk posed at least by the second attempt; and removal of the transgender "section" from the jail's inmate handbook (mentioned twice). Judge Brody found no Equal Protection claim on the basis of "verbal harassment" alone, but she wrote: "When read as a whole, the allegations in the Amended Complaint suggest that Hensley may have been treated differently than similarly situated individuals because of his failure to conform to gender norms. Hensley fails, however, to allege that any Individual Defendant was personally involved in a violation of his rights under the Equal Protection Clause." There is no discussion of staff's involvement in the forced genitalia display as presenting separate claims under the Fourth or Fourteenth Amendments for violation of unreasonable searches or privacy, respectively. *See* "Second Federal Judge Dismisses Claim that a Transgender Inmate Was Forced to Strip as Sport," reported in *Law Notes* (May 2015 at page 203) – discussing possible approaches to addressing this all-too-common problem facing transgender inmates. *William J. Rold*

TENNESSEE – Openly-gay Davidson County Jail inmate H. C. Brown, Jr., sued alleging that other inmates were "harassing him for sexual favors" at the jail, in *Brown v. Hall*, 2016 WL 4060928 (M.D. Tenn., July 28, 2016). Chief U.S. District Judge Kevin H. Sharp dismissed the case on screening under 28 U.S.C. § 1915(e)(2), because Brown alleged "nothing more than verbal harassment." Although Brown was entitled to protection from harm under *Farmer v. Brennan*, 411 U.S. 825, 832-3 (1994), he did not allege that he had "suffered or been threatened with any physical violence or other serious harm," and thus failed to satisfy the "substantial risk of serious harm" element of a claim for deliberate indifference to his safety. Judge Sharp also found the pleadings insufficient to satisfy the second arm of the "deliberate indifference" test (subjective disregard of the risk), noting that officials conducted some investigation and moved Brown on at least one occasion to reduce his risk, even if they ultimately returned him to the verbally-harassing setting. In a footnote, Judge Sharp observed that the Supreme Court recently lowered the burden of proof by looking at objective instead of subjective intent for pretrial detainees in use of force cases (under the Fourteenth Amendment's Due Process Clause; as opposed to prisoners, who must litigate under the Eighth Amendment) in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73 (2015). [This case was reported in *Law Notes* (Summer 2015 at page 323)]. He wrote, however, that *Kingsley* "has not been held to apply to deliberate indifference cases" involving health care or safety, for which he cited (wait for it): nothing. [Note: This writer has found no controlling post-*Kingsley* Sixth Circuit cases, and District Court Judge James D. Todd (W.D. Tenn.) has requested "guidance" in well over a dozen unpublished cases; *see also, Johnson v. Clafton*, 2015 WL 5729080, at *4 (E.D. Mich. Sept. 30, 2015) (collecting cases and stating that "[a]fter *Kingsley*, it is unclear whether courts should continue to use the Eighth Amendment's deliberate-indifference standard). The only non-use-of-force appellate decision seems to be the fractured panel (3 different opinions) in *Castro v. City of Los Angeles*, 797 F.3d 654 (9th Cir. 2015), which declined (2-1) to apply *Kingsley* to deliberate indifference standards in a protection from harm case.] Judge Sharp held also that, even though "sexual orientation constitutes an 'identifiable group' for equal protection purposes," citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012), Brown failed to indicate that jail officials "treated him less favorably than other similarly situated inmates due to his sexual orientation." Judge Sharp found that an appeal would not be taken in "good faith," thus denying Brown *in forma pauperis* status for any appeal. *William J. Rold*

TEXAS – *Pro se* inmate Gerald Cain sued for alleged violation of his right to be free from danger, after prison officials placed him in general population following ten years of confinement in "safekeeping." Suing the Director of the Texas Department of Criminal Justice – Correctional Institutions Division, Cain sought an injunction removing him from general population, which United States District Judge Melinda Harmon denied in *Cain v. Stephens*, 2016 U.S.

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Dist. LEXIS 115116 (S.D. Tex., Aug. 26, 2016). Cain claimed a serious of life-threatening assaults in several different settings, but he did not plead particulars of assailants or place, except to tie the incidents to gang enemies from prior to his safekeeping. Cain had already accumulated "three strikes" under the Prison Litigation Reform Act (meaning he had to pay a filing fee in full and would be denied *in forma pauperis* status), but Judge Harmon allowed him to proceed under the exception for life-threatening allegations under 28 U.S.C. § 1915(g). Cain failed, however, to allege any personal involvement or knowledge by the Director in the alleged danger or indifference to it. The opinion has a survey of Fifth Circuit law applying the protection from harm standard of *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Cain failed to allege a "causal connection" between the supervisor's actions/inactions and the alleged deprivations, and "isolated incidents" do not establish policy or procedure errors sufficient to withstand pleading review. His claim of assault "because he is transgender" was noted but disregarded because he raised the issue for the first time only in his reply papers. Cain also tried to allege violation of his right to access to court, but Judge Harmon rejected such "creative joinder" to the "life threatening" exception to the "three strikes" rule. *William J. Rold*

WISCONSIN – Last April, U.S. Magistrate Judge Stephen L. Crocker allowed *pro se* inmate Joel Scott Flakes to proceed on civil rights claims including sexual orientation discrimination and deliberate indifference to his safety in *Flakes v. Wall*, 2016 U.S. Dist. LEXIS 53317 (W.D. Wisc., April 21, 2016), reported in *Law Notes* (May 2016 at page 208). Now, Judge Crocker dismisses the case on summary judgment under the Prison Litigation Reform Act for failure to exhaust administrative remedies per 42 U.S.C. § 1997(e)(a). Judge Crocker sustained Wisconsin officials' claims that Flakes failed to confine his grievances to one subject or to state the claim clearly, as required by state grievance procedure, in *Flakes v. Wall*, 2016 U.S. Dist. LEXIS 110589, 2016 WL 4435300 (W.D. Wisc., August 19, 2016). Proper exhaustion required Flakes to trim his grievances, not to appeal the denial of the overbroad and vague ones. The actual grievances, submitted by defense counsel and reviewed by this writer in PACER, focus not so much on sexual orientation discrimination as on disability discrimination because Flakes is confined to a wheelchair. They also mention race and previous assaults, of unclear motivation. Judge Crocker found that the officials properly returned the grievances "because they contained multiple issues that were not clearly identified." One part of the decision bears reporting in particular, however, since it includes dicta about danger created from "outing." Judge Crocker noted that Flakes refers to danger and discrimination from "outing" in his grievances, but he found it vague because Flakes "does not state that he is homosexual," and it "would require speculation" to "guess" that plaintiff was referring to "outing" of gay inmates. He wrote that "outing" could have referred to membership in a gang or to revealing that Flakes was black or disabled. [Really? – a gang member, maybe; but inmates are not "outed" for being black or in a wheelchair.] The grievance itself says in the same passage as "outing" that Flakes' "alternative life style" was causing him problems "based solely on the homophobic beliefs of the employees" in the prison. In context, use of "outing" as protesting targeted sexual orientation discrimination requires neither a "guess" nor "speculation." Judge Crocker dismissed without prejudice, since Flakes could properly exhaust and re-file if discrimination or danger persists. *William J. Rold*

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UNITED STATES DEPARTMENT OF THE TREASURY – Internal Revenue Service – The IRS has published final regulations explaining how same-sex marriages will be dealt with under federal tax law. 81 Fed. Reg. (No. 171) 60609 (Sept. 2, 2016). The regulation amends 26 CFR Parts 1, 20, 25, 26, 31, and 301, effective Sept. 2, to bring tax regulations into compliance with the Supreme Court's decisions in *Obergefell v. Hodges* and *United States v. Windsor*. A same-sex marriage that would be recognized in any U.S. jurisdiction will be recognized by the I.R.S. for purposes of federal tax law, and will be treated the same as a legally recognized different-sex marriage. (This would include, of course, foreign same-sex marriages that would be entitled to comity under the law of any state or territory of the U.S.) An earlier version was published as a proposed regulation on Oct. 23, 2015, and attracted a fair amount of comment. The publication in the Federal Register goes through various substantive comments and explains why the I.R.S. did or did not make changes in the proposed regulation to meet issues raised by the comments. The full text of the amended regulatory language begins at page 60616. It was approved for final publication on August 12, 2016. "The rules of this section apply to taxable years ending on or after September 2, 2016," but of course the I.R.S. began to recognize lawfully-contracted same-sex marriages when the *Windsor* decision went into effect after June 26, 2013, on an ad hoc basis and in accord with various formal and informal opinions that have been circulated since then. Embodying these provisions in a formally adopted regulation published in the C.F.R. locks them in and would impede a subsequent administration from changing them without going through the time-consuming process

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for amending regulations under the Administrative Procedure Act. (That means, if elected, Donald Trump could not "repeal" them on Day 1!)

UNITED STATES GENERAL SERVICE ADMINISTRATION – The GSA announced in the Federal Register that it was issuing a Federal Management Regulation to clarify the requirements for federal agencies in implementing the president's executive order designating gender identity as a prohibited ground of discrimination, consistent with rulings by the EEOC, the Education Department, and the Justice Department. 81 Fed. Reg. No. 160, at page 55148 (Aug. 18, 2016). The GSA's Bulletin 2016-B1 makes clear that agencies must accommodation transgender people by allowing the use of restrooms and other gender-designated facilities by persons consistent with their gender identity. Expect the Republican leadership in Congress to go ballistic and attempt to overrule this legislatively, decrying it as more "overreach" by the Obama Administration. But it is consistent with rulings from several federal courts of appeal, some predating this administration.

UNITED STATES FOOD & DRUG ADMINISTRATION – The FDA last year modified blood-banking regulations to allow gay men (called "men who have sex with men" or MSM in the regulations) to donate blood if they have been abstinent for at least a year prior to the donation date. The previous ban had been life-long, but FDA accepted arguments that the current state of HIV blood testing made it highly unlikely that infected blood would get into the system with the one-year deferral rule. Critics pointed out that the current state of testing would justify a much shorter deferral period. On July 28, the FDA sought public comments on the question whether a different method of blood screening that did not turn on the sexual orientation of prospective donors could be safely adopted. See 81 Fed. Reg. No. 145, at p. 49673 (July 28, 2016). "Interested persons are invited to submit comments, supported by scientific evidence such as data from research, regarding potential blood donor deferral policy options to reduce the risk of HIV transmission, including the feasibility of moving from the existing time-based deferrals related to risk behaviors to alternative deferral options," said the announcement, "such as the use of individual risk assessments. Additionally, comments are invited regarding the design of potential studies to evaluate the feasibility and effectiveness of such alternative deferral options." Comments can be submitted up to the deadline date of Nov. 25, 2016. Electronic submissions may be made to http://www.regulations.gov. Written comments can also be submitted by mail, hand delivery or courier to: Division of Dockets Management (HFA-305), FDA, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Any submission should include the Docket No. FDA-2016-N-1502 for "Blood Donor Deferral Policy for Reducing the Risk of HIV Transmission by Blood and Blood Products; Establishment of Public Docket; Request for Comments." There is also a procedure for submitting confidential comments to preserve the anonymity of commenters who don't want their information to be posted for public inspection, by including a cover page or cover note stating that the document contains confidential information.

ALASKA – The Juneau Assembly approved a non-discrimination ordinance that covers sexual orientation and gender identity, Human Rights Campaign reported on August 23. Juneau is the second city in Alaska to take such a step, following the action a year ago by the Anchorage Assembly.

ARIZONA – Phoenix will be the first Arizona city to provide trans-inclusive health care benefits to city workers and their families, according to an announcement by Mayor Greg Stanton on August 18. This will include hormone therapy and surgical procedures, including reassignment surgery. *Arizona Republic*, August 20. * * * Efforts to pass non-discrimination ordinances covering sexual orientation and gender identity in Scottsdale, Mesa and Glendale have stalled in the city councils. In Scottsdale, the proposed ordinance died when members could not reach agreement on an exemption for small businesses. *Arizona Republic*, Aug. 24.

CALIFORNIA – The legislature has approved a bill that would require private universities to publicly disclose if they discriminate against students and staff because of gender identity or expression or sexual orientation. Senate Bill 1146 would require universities that have applied for and been granted an exemption from compliance with Title IX by the U.S. Department of Education to notify the California Student Aid Commission and disseminate the information to students and staff. Governor Brown had not signified whether he would sign it as we went to press. The legislative action was completed on August 31, according to a press release from Equality California.

CONNECTICUT – The West Hartford Police Department adopted a new policy "designed to help officers navigate cases and situations involving members of the town's LGBT community," reported the Associated Press on Aug. 15. The policy provides guidance and directors to officer "who may find themselves working in unfamiliar territory," told Chief Tracey Gove to the local newspaper. Officers are advised to use an individual's preferred name, which

might not be their legal name or the name on a government-issued ID, and should honor a request by a transgender person to be searched by an officer of a specific gender.

FLORIDA – The Brevard County School Board voted 3-2 on July 19 to enact a non-discrimination policy for lesbian, gay, bisexual, and transgender students, faculty and staff, prohibiting employment discrimination and harassment, overhauling the district's anti-harassment rules, equal employment rules, and grievance procedures. The vote followed a six-hour meeting that drew more than a hundred members of the public and involved heated debate and statements from the public. *Florida Today* (Melbourne), July 20. * * * The Palm Beach County Commissioners decided to put off a vote on a proposed ordinance that would condemn the performance of "conversion therapy" on minors. Attorneys from Liberty Counsel, an anti-gay litigation group, advised the Commissioners that such a ban would be unconstitutional and Liberty Counsel would sue to block it. Of course, several appellate courts have now ruled that such policies do not violate the constitutional rights of health care practitioners, parents, or potential patients for the therapy, so the advice seems questionable. The County Attorney, who had been asked to advise on the legality of the proposal, said she was not yet ready to report to the Council's August 16 meeting, so the matter won't be taken up until the September 13 meeting. *Palm Beach Post*, Aug. 15.

INDIANA – The Lafayette City Council voted 8-0 on first reading to approve an amendment to the city's Human Relations Ordinance, adding gender identity to the list of prohibited grounds of discrimination. (The city added sexual orientation 23 years ago.) The proposal also would add age and veteran status to the list of prohibited grounds, which already includes race, sex, religion, color, handicap, familial status and national origin. The ordinance covers housing, employment and public accommodations. It is enforced through the city's Human Relations Commission, which usually seeks to mediate claims that appear meritorious, but has authority to impose fines of up to $300 on parties who refuse to participate in the mediation process. The Commission ultimately does not have authority to punish recalcitrant discriminators, however, as that is beyond the city's legislative power. A second vote at the Council's September meeting is necessary for final approval of the amendment. *Journal and Courier*, Aug. 2.

MASSACHUSETTS – Opponents of the recently-enacted amendment to the state's anti-discrimination law to expand the prohibition of gender identity discrimination to places of public accommodation are seeking to put a measure on the ballot to repeal it, having made a formal request to the Attorney General's Office for approval of a petitioning campaign for that purpose on July 18. Attorney General Maura Healey, a lesbian who is an outspoken supporter of the law, is charged with deciding whether the petition is allowable under state constitutional provisions governing ballot measures. *Boston Globe*, July 19. Given the timing of the petition, the measure would be placed on the ballot in November 2018 if sufficient signatures were obtained.

NEW JERSEY – The Bloomfield Board of Education voted on Aug. 23 to adopt a transgender policy in compliance with the May 13 Guidance sent to the all school districts by the U.S. Departments of Education and Justice. The policy provides equal access for transgender students to all educational opportunities and facilities, consistent with their gender identity. *Bloomfield Life*, Sept. 1.

NEW MEXICO – Responding to the U.S. Department of Education's May 13 guidance on the rights of transgender students and staff under Title IX, the San Juan College Board (Farmington, New Mexico) approved changes to the colleges non-discrimination policy to add gender identity to the forbidden grounds for discrimination, which already include sexual orientation. The policy protects equal access to all educational programs, activities and facilities at the college. Reported the *Daily Times* on Aug. 3, "the college will respond to a student's gender identity as the student's sex and that students can update their records to reflect their gender identity, a move that does not require identification." Students will be allowed to use restrooms that conform with their gender identity.

NEW YORK – The Malone Central School District board of education voted without dissent on August 9 to approve a policy on student gender identity that allows students to use facilities consistent with their gender identity. This was a second reading vote. Students who feel uncomfortable using a gender-designated facility can seek an accommodation. The policy also commits the district to maintaining the confidentiality of student records if a student has changed his or her name to conform with their gender identity. The district's student dress code was also updated to prohibit dress restrictions or any mandate on clothing or appearance on the basis of gender. *Malone Telegram*, Aug. 12.

NORTH CAROLINA – As a result of the Supreme Court's decision to stay a district court injunction against

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a Virginia school district regarding restroom access for a transgender student, the Charlotte-Mecklenberg schools decided to put a "temporary hold" on a new regulation adopted in June 2016 that would have allowed transgender students to use restroom and locker room facilities matching their gender identity. *Legal Monitor Worldwide*, Aug. 8.

OHIO – Cleveland Mayor Frank Jackson signed into law an amendment to the city's anti-discrimination ordinance adding gender identity or gender expression to the prohibited grounds for discrimination in public accommodations. The measure was approved by the city council on July 13, shortly before the Republican National Convention, meeting in Cleveland, endorsed a platform provision urging that transgender people be required to use public restrooms consistent with their birth certificates, regardless of their gender identity or expression. The new measure is codified in Ordinances of Cleveland Section 667.01, according to a July 28 article in the *National Law Review*. * * * The Cincinnati and Hamilton County Public Library Board announced that the library will not add a rider to its health plan to cover gender transition surgery for Rachel Dovel, a ten-year employee. The board cited the additional costs. Dovel has filed a Title VII discrimination claim with the EEOC protesting the library's refusal to cover the procedure, after the library informed her in June 2015 that it was not covered under the existing health plan. *Library Journal*, August 1, 2016. * * * After extensive public debate, the Chillicothe City Council decided to put off voting on an anti-discrimination proposal that would have imposed fines on those who discriminate in housing, business or "other situations" because of sexual orientation or gender identity, reported the Associated Press on August 14.

PENNSYLVANIA – The Luzerne County Council voted 7-2 to reject a proposal to establish a county human rights commission that would have jurisdiction over complaints of discrimination, including discrimination because of sexual orientation or gender identity. Two council members abstained, stating they needed more information. The vote followed a lengthy meeting with heated debate. *Citizens Voice* (Wilkes Barre, Pennsylvania), Aug. 10. This was shortly followed by a vote by the Wilkes-Barre City Council on Aug. 11 to amend its anti-discrimination ordinance to add sexual orientation and gender identity as prohibited grounds of discrimination in employment, housing, public accommodations, and postsecondary educational institutions. The measure establishes a human relations commission with investigatory and conciliation authority, but no authority to impose penalties on violators, due to home rule limitations. The measure was passed unanimously, 5-0, on first reading, but must pass a second reading at a later meeting to be enacted.

TEXAS – The Fort Worth Independent School District modified its April 2016 guidelines concerning accommodations for transgender students. The new guidelines, released late in July, affirm the students' right to various accommodations, including using facilities consistent with their gender identity, but eliminate a controversial provision that told schools not to communicate with parents about their children's gender identity without the children's permission. "The new guidelines require parents to be involved with students and administrators in developing a 'student individual support plan,' including provisions for bathroom use," reported the blog Off the Kuff on July 25, quoting a spokesperson for the school district, who said that they "always intended to involve parents in the decision," contrary to the impression people drew from the guidelines issued in April referring to student confidentiality. * * * The Texas State Bar, responding to a complaint filed by "dozens of attorneys," stated that it found "no just cause to believe" that Attorney General Ken Paxton "has committed professional misconduct" by advising county clerks that they had a first amendment right to refuse to issue marriage licenses to same-sex couples based on their religious objections. Paxton had reacted to the Supreme Court's June 26, 2015, ruling in *Obergefell v. Hodges* by issuing a "nonbinding legal opinion" that county officials "may allow accommodation of their religious objections to issuing same-sex marriage licenses" but might face litigation if they refused to issue licenses. Attorneys complained that Paxton was encouraging local officials to break the law. The State Bar initially refused the complaint, but was ordered by a state appeals board to investigate and rule on it. *Dallas Morning News*, Aug. 10.

WASHINGTON – The Seattle City Council voted unanimously on August 1 to approve a new ordinance that will impose a fine of up to $1,000 on any licensed mental health providers in the city who practice "sexual orientation change efforts" on minors, and misdemeanor charges on those advertising such services. Seattle is the fourth municipality, after Cincinnati (Ohio), Miami Beach (Florida) and Washington, D.C., to enact such legislation. Because mental health practitioners are licensed by the state, the City Council cannot legislate as to revoking licenses or imposing professional discipline. A Washington state bill addressing the issue passed the state House in 2014, but failed to pass the Senate. *SeattlePI.com*, August 1.

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LAW & SOCIETY NOTES

The **DEPARTMENT OF THE NAVY** announced on July 14 that it would name a new ship after LGBT rights icon **HARVEY MILK**, who was a Navy veteran. Milk, the first openly-gay man to be elected to public office in California when he won a campaign for the San Francisco Board of Supervisors, was assassinated, along with Mayor George Christopher, by a politically conservative fellow Supervisor, Dan White, whose impulsive resignation from the Board had been accepted by the Mayor, who refused to allow White to rescind it. Milk had led the successful fight to defeat the Briggs Initiative, a state-wide referendum that would require the discharge of gay public school teachers. This ship will be the first Naval vessel to be named for somebody specifically because of their advocacy for LGBT rights. Milk is in good company. Other ships in the same class to be named will honor Supreme Court Chief Justice Earl Warren, U.S. Attorney General and Senator from New York Robert F. Kennedy, women's rights activist Lucy Stone, and civil rights activist Sojourner Truth.

The **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION**, reacting to the "bathroom bill" controversies, is requiring cities that express interest in hosting NCAA championship competitions to complete a questionnaire indicating how they will protect athletes, coaches and fans from discrimination in their facilities. The *Indianapolis Star*, noting that its city has an ordinance that bans sexual orientation and gender identity discrimination, inquired of the NCAA whether such an ordinance would satisfy its requirements, despite the lack of a corresponding state law, but had not received a reply by the time it published this article. Ironically, Charlotte, North Carolina, which also has such an ordinance, recently lost the NBA's 2017 All-Star Game, because the state's H.B.2 renders the local ordinance ineffective. Even though the Charlotte City Council wants to protect LGBT people from discrimination, its ordinance will not help it qualify to host future NCAA events. The Indianapolis ordinance remains effective, because the state legislature agreed to amend a recent Religious Freedom Restoration Act to provide that religious objections to homosexuality or same-sex marriage could not be a defense in a discrimination suit. *Indianapolis Star*, July 27.

PEPPERDINE UNIVERSITY, which had received an exemption from compliance with Title IX of the Education Amendments Act of 1972 in 1985 pursuant to an application it had filed in 1976, has long been considered a very gay-unfriendly institution. For example, it has refused formal recognition to an LGBT student group on campus, and has been sued for anti-gay harassment. But in a surprising development, it appears that Pepperdine has formally asked to withdraw its request for exemption, in a letter that University President Andrew K. Benton sent to the U.S. Department of Education on January 27, 2016. Pepperdine, while noting its affiliation with the Churches of Christ, state its commitment to complying with Title IX, and asked to be removed from any list of universities that are excused from compliance on religious grounds. *Huffington Post* reported on this on July 26, expressing some puzzlement about why the university was suddenly taking this position after so many years on the list. No public announcement had been made.

The **AMERICAN FEDERATION OF TEACHERS**, the nation's largest teachers union, passed a resolution stating support for "the safety and educational attainment of LGBTQ students" and also stated support for the May 13 Guidance issued by the Obama Administration on the rights of transgender students under Title IX. Human Rights Campaign issued a press release on July 21 publicizing the resolution and noting that the union's president, Randi Weingarten, "is openly lesbian."

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ANTIGUA & BARBUDA – The cabinet, meeting on Aug. 24, rejected a proposal to repeal the country's sodomy law, announcing that "the buggery law will remain unchanged," while acknowledging that if a lawsuit is filed challenging the law, the local courts are likely to follow the recent ruling in Belize (see below) and strike it down as applied to private, adult consensual sex. *Antigua Observer*, Aug. 26.

AUSTRALIA – The Tasmanian Upper House supported a motion giving "in-principle" support to marriage equality, at a time when the Australian press is flooded with commentary about the issue in response to indications by Prime Minister Turnbull that the government plans to put off holding the national plebiscite on the question until sometime next year. During the recent parliamentary election campaign, Turnbull had taken the position that a plebiscite would be held before the end of this year. Although he announced his support for marriage equality years ago, Turnbull's negotiations to take over leadership of his party and the Prime Minister position involved compromising with conservative elements and agreeing that Parliament would not take a vote on marriage equality until after the national electorate had a chance to weigh in through the non-binding plebiscite. Many marriage equality supporters have opposed the plebiscite as a waste

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of time and money and a process that is likely to degenerate into a terrible brawl, and have argued that marriage rights should not be put to the electorate, but rather decided like other public policy issues through the legislative process. Vote-counters have suggested that if a free vote were held now, there would be enough supporters for marriage equality to carry the measure with votes from all the major political parties. * * * The Australian Census has announced that announced that in the next upcoming Census it will provide a mechanism for those who identify neither as male or female to so indicate through a special procedure on-line. The paper census form will continue to have just the two categories, however. *SBS News*, July 24.

BELIZE – The Supreme Court of Belize ruled on August 10 that the nation's criminal sodomy statute, a holdover from the country's prior identity as the colony of British Honduras, violated the constitution. *Orozco v. Attorney General of Belize*, Claim No. 668 of 2010. Chief Justice Kenneth Benjamin found that the criminal statute violate++d the protection for "the dignity of the human person" affirmed in the Preamble and made operational in Section 3(c), which states that every person in Belize is entitled to recognition of his human dignity. The court referenced rulings of the highest courts of Canada and South Africa, also formerly ruled by Britain and part of the British Commonwealth, in striking down sodomy laws. The court also referenced the right of privacy, both as implicated in the protection of dignity and made concrete in Section 14(1), which prohibits subjecting a person "to arbitrary or unlawful interference with his privacy…," and found that the state's invocation of "public morality" as a justification for the law was insufficient, rejecting a contrary argument in briefs filed by the Churches. Justice Benjamin also found significant testimony from a public health practitioner that "decriminalization of anal intercourse between consenting males would greatly enhance the fight against HIV/AIDS and assist in VCT, treatment and education." Maintaining criminal penalties "hinder rather than aids testing and treatment as a matter of public health." While acknowledging overwhelming testimony about the religious sentiments of the population disfavoring homosexual sex, the court wrote that "from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral. The evidence may be supportive but this does not satisfy the justification of public morality. There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution." The court also found violations of the Constitution's protection for freedom of speech and equal protection of the law, as to the latter opining that "no evidence has been led to show that such discrimination is justifiable. The court ordered that the following language be added to the offending statute: "This section shall not apply to consensual sexual acts between adults in private." The court ordered the government to award the claimant "his costs fit for two Senior Counsels," an amount to be assessed by the Registrar unless the parties agreed to an amount.

BERMUDA – Winston Godwin and Greg DeRoche, who live in Toronto, have been given leave to argue in the Supreme Court of Bermuda that they are entitled to marry. The gay Bermudan and his fiancé are represented by Mark Pettingale, a "government backbencher" according to *The Royal Gazette* (Aug. 31), which reported that the Registrar-General had refused to process their marriage application in accordance with the Marriage Act 1944, which provides that a marriage is void if the parties are not male and female. The couple argues that the Registrar's refusal violates the Human Rights Act as discrimination because of their sexual orientation.

CANADA – In the ongoing controversy over accreditation of Trinity University's new law school, the Nova Scotia Court of Appeal affirmed a decision to allow graduates of the school to practice law in the province, rejecting the argument of the organized bar that the school should be denied accreditation because of the strict conduct code – including a total ban on gay sex – that it requires of its students. The Nova Scotia court took a position opposed to that recently taking by the Court of Appeal in Ontario, but consistent with the Supreme Court in British Columbia, a case that the law society of that province is appealing. It seems likely that this issue will come before the Supreme Court of Canada, given the different attitudes of the provincial appeals courts. The Nova Scotia court rejected the idea that the law society in that province should make a decision based on the policies of law school not located in the province, observing that Trinity Western, as a private school, was not subject to the Canadian Charter of Rights. The president of Nova Scotia's Law Society, Daren Baxter, said that counsel were reviewing the ruling to determine whether to seek review by the Supreme Court. *Globe & Mail*, July 27. However, the Law Society decided not to appeal, according to a *Canadian Press* report of August 15. The Society decided after obtaining legal advice to "take the matter no further. * * * Government sources told the *Globe & Mail*, Canada's leading daily newspaper, that Prime Minister Justin Trudeau was planning to apologize publicly on behalf of all Canadians to those who were imprisoned, fired from jobs or otherwise persecuted in the past due to their sexuality. This is to be a "key element"

in a range of reforms that the government plans to introduce. The government plans to take action on a list of reforms contained in a report released by Egale, a national LGBT rights organization, in June. Among other things, there will be a concerted effort to vacate and expunge past government actions, especially those imposing continuing harm such as criminal convictions and military dismissals. Other elements include targeted training for law enforcement officials about dealing with sexual minorities, equalizing the age of consent for gay sex, compensating victims of past discrimination, and reforming rules on immigration, asylum and criminal laws that have been used to stigmatize and penalize gay sex. Some actions can be achieved administratively, while others will need implementing legislation. Reported the newspaper on August 11, "The government's planned reforms place Canada at the forefront of countries that are moving to redress past wrongs committed against members of sexual minorities," noting that Germany and Australia are taking similar actions.****Postmedia News* (July 26) reported that a new law to protect transgender rights in British Columbia through amendments to the Human Rights Code took effect on July 25. * * * Christopher Karas, a Toronto-area LGBT rights activist, has filed a complaint with the Canadian Human Rights Commission, attacking Health Canada's new policy requiring gay male potential blood donors to be deferred from donating blood for at least one year after their last sexual contact, which in effect disqualifies sexually active gay men from donating blood, regardless of whether they would test positive for HIV. He argues that the policy remains discriminatory, is outdated in light of modern HIV testing technology, and must end. *CBC News*, Aug. 26.

EGYPT – The *Jerusalem Post* reported on Aug. 25 that Egyptian government authorities have reportedly been using online dating platforms, such as Grindr, to identify gay men, locate and detain them, and punish them for violating various criminal laws. Although homosexual conduct per se is not illegal in Egypt, various provisions of criminal law have been used to impose jail terms on gay men, including such charges as "inciting debauchery" for organizing a gay social event.

EL SALVADOR – Herbert Danilo Vega Cruz, a lawyer, has filed suit against the government in the Constitutional Chamber of the Supreme Court of Justice, seeking a declaration that the statutory and constitutional ban on same-sex marriage is unconstitutional as an interference with rights to marriage, family formation, legal security and sexual freedom. *El Mundo*, August 18.

GEORGIA – President Giorgi Margvelashvili announced opposition to a proposed referendum to amend the Constitution to define marriage solely as a union between a man and a woman. The Central Election Commission had given permission for the referendum, but it still required permission from the president and the prime minister to be placed on the ballot. Georgia's Civil Code already contains such a definition. The president's position is that the civil code provision is sufficient to preserve traditional marriage, and the question doesn't need to be addressed in the constitution. The Prime Minister, Giorgi Kvirikashvili, has stated that if the Georgian Dream Party wins a sufficient majority in the October 8 parliamentary elections, the parliament could introduce a constitutional ban on same-sex marriage without the need for a referendum. *dfwatch.net*, Aug. 9.

GIBRALTAR – The British Overseas Territory of Gibraltar will consider a government-sponsored parliamentary bill to amend the Civil Marriage Act to allow for civil marriage for same-sex couples. *Gibraltar Chronicle*, Aug. 16.

HONG KONG – The High Court heard arguments on August 8 that the Correctional Services Department erred in deciding to treat a transgender woman as a male prisoner. The court was told by counsel for the prisoner that she had received "partial gender reassignment surgery," including hormone treatment since age 12 and breast augmentation surgery at age 18. She was arrested for drug offenses in June 2014 and "paraded in front of male detainees at Central Police Station," then after an initial hearing at Eastern Court, she was sent to the all-male Pik Uk Correctional Institution and subsequently to a psychiatric center, where she was put into all-male detention facilities and subjected to strip searches by male officers. She was denied hormone treatment for eight months. Her attorney, Clive Grossman SC, argued that the prison rules are "unconstitutional" under Article 3 of the Hong Kong Bill of Rights, which prohibits "torture or inhuman treatment." *South China Morning Post Online*, Aug. 8.

INDIA – The cabinet approved the Transgender Persons (Protection of Rights) Bill 2016, intended to provide for the social, economic and educational empowerment of transgender people. The action responded to a ruling by India's Supreme Court recognizing the civil rights claims of transgender people. The draft bill still requires final legislative approval before it becomes effective. Among other things, it would authorize "provisions for stringent punishment" which can include imprisonment up to two years for somebody who takes action to subvert the legal rights of transgender people under the statute by "compelling a transgender person to beg, denying

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them access to a public place, forcing or causing a transgender person to leave his/her house or village, and harming or injuring their physical or mental well-being," according to an on-line summary. The bill proposes to establish a National Council of Transgender Persons to make recommendations to the government, and to amend the Penal Code to cover cases of sexual offenses against transgender people. * * * The cabinet has approved a proposed bill to outlaw commercial surrogacy and to limit the practice of surrogacy to married heterosexual couples when the wife has been unable to conceive. Proponents of the measure have stated alarm that India was becoming a mecca for foreigners (including same-sex couples) seeking surrogates to bear their children for a price.

INDONESIA – These are perilous times for the LGBT community in Indonesia. Human Rights Watch reported on August 11 that the community there is under "unprecedented attack" due to discriminatory laws and homophobic speeches by public officials. The Constitutional Court is considering whether to make gay sex criminal again, accepting judicial review of a petition from Islamic activists operating under the name Family Love Alliance, which contends that existing law that criminalize sex between adults and minors of the same gender should be construed to apply to acts involving consensual sex between adults. At present homosexuality is not illegal as such in the country, but there is intense social stigma and discrimination. Government leaders have announced that there is "no room" for an LGBT rights movement in the country in response to the HRW Report. Although LGBT people are "tolerated" in urban areas, they have faced a "backlash" since a government minister said in January that LGBT people should be barred from university campuses.

IRAQ – ISIS continues its active persecution of gay people. A recent press report recounted a video posted online in which a preacher from ISIS addresses a crowd of young men and boys in Mosul. In the video, a gay man is tossed off the top of a building to his death after the preacher tells him that he is "guilty" of being gay which requires execution under Sharia law. The execution is carried out in front of this crowd to make an example of the man and deter homosexual conduct. *News Chronicle* (Nigeria), Aug. 12.

MEXICO – Although Mexican President Enrique Pena Nieto has proposed amending the Constitution to make marriage equality effective throughout the country, political leaders in the Congress have indicated that this initiative is "not among [our] priorities," making it likely that marriage equality will come gradually through the state-by-state litigation and legislative process that has been under way for several years. At present, ten of the 31 states plus the federal capital district of Mexico City have marriage equality, and a Supreme Court ruling from June 2015 provides that applications by same-sex couples for court orders to local officials to allow same-sex marriages should be routinely granted. If enough cases are brought to appellate courts from any particular state, the rulings granting these orders become "jurisdictional" and create binding precedents for those states. Furthermore, a prior Supreme Court ruling held that same-sex marriages performed in jurisdictions where they are legal are valid throughout the country.

PHILIPPINES – On August 31 a Senate Committee conducted the first hearing on a proposed measure to ban discrimination because of sexual orientation and gender identity. Senator Risa Hontiveros, Chair of the Senate Committee on Women, Children, Family Relations and Gender Equality, filed S.B. 935, the Anti-Discrimination Bill. A similar bill was filed in the House of Representatives 17 years ago, but did not receive a hearing at that time. *Thai News Service*, Sept. 2.

ROMANIA – Opponents of marriage equality have won a ruling from the Constitutional Court that a proposal to change the constitution to state that marriage is only the union of a man and a woman is constitutional. Romania repealed penal sanctions for consensual gay sex in 2001 and also adopted gender neutral language on marriage in its post-communist constitution, but the government does not officially recognize same-sex marriages. The Court ruling opens the way to a parliamentary vote on a constitutional amendment. The ruling brought street protests organized by gay rights groups. *USNews.com*, July 20.

SERBIA – Prime Minister Aleksandar Vucic announced his new cabinet on August 9, including the first time an openly gay member, Ana Brnabic, who is to be appointed minister for state administration. Brnabic has worked as the head of the National Alliance for Local Economic Development, a private association. *AFP*, Aug. 8.

SOUTH AFRICA – The government has announced that henceforth it will provide free medical treatment to all people infected with HIV, regardless of the condition of their immune system. Prior to this announcement on September 1, free treatment had been reserved for those whose white blood cell count was sufficiently suppressed for a clinical diagnosis of AIDS. The change responds to World Health Organization guidelines from 2015, reflecting research showing that early

treatment of HIV infection improves health and prolongs life by prevent irreparable injury to the immune system and other internal organs affected by HIV. South Africa leads the world in the number of people infected by HIV, estimated by the U.N. as seven million as of 2015. *Associated Press*, Sept. 1.

TAIWAN – The nation's Centers for Disease Control has decided to seek a fine against the National Defense University for forcing an HIV-positive student out of the school in 2013. If it is issued, this will be the first time the CDC has fined an educational institution for discriminating against a student. The university is in the midst of an administrative proceeding with the Ministry of Health and Welfare regarding the case, and if a settlement is reached, the CDC will not seek to impose the fine. *Taiwan News*, Aug. 15. The proposed fine is equal to $32,000 in US dollars, and would be the largest ever imposed by CDC for violation of anti-discrimination laws. The student was expelled six months before his anticipated graduation. *EFE Ingles*, Aug. 16. The student's HIV status was discovered after testing HIV-positive in a regular health check. The University claims his suspension was "not because he had AIDS, but because of his bad behavior." In March the Taipei High Administrative Court ruled in favor the University, rejecting the discrimination claim brought on the student's behalf by the Health and Welfare Ministry, but settlement talks are in progress. *China Post*, Aug. 16.

TANZANIA – Health Minister Ummy Mwalimu provoked international outrage and ridicule when she announced a directive against the free distribution of sexual lubricants to gay men, on the ground that this would promote sodomy and the spread of HIV. She said that this ban was specifically to apply to NGO's operating in the country that were importing and supplying lubricants to gay men. She wrote on her "official" Facebook page, "I have not banned the use of the lubricants in the country" and that the media had misled the public about her action. *Citizen* (Tanzania), July 25.

TURKEY – A local gay rights group in Istanbul reported to the press the discovery of the decapitated body of a gay Syrian refugee who had "disappeared" in central Istanbul. The man, Muhammed Wisam Sankari, was reportedly trying to leave Turkey because he feared for his life, having been attacked by male gangs who terrorize gay people on the streets. Although homosexuality was decriminalized upon the founding of the Turkish Republic in 1923, and had been legal in the Ottoman Empire, press reports state that gay people in Turkey regularly complain about harassment and abuse in the conservative Muslim society, and authorities in Istanbul have banned the annual gay pride march for the past two years, on grounds of security and public order concerns. *Guardian.com*, Aug. 4.

UGANDA – The Associated Press reported on August 8 that the government announced that it "will continue to suppress" public activities by homosexuals, and that it had established a rehabilitation program to allow them to "lead normal lives again." Presumably this refers to an attempt, encourage by American Christian clerics, to provide conversion therapy, a treatment that has proven to be ineffective and psychologically dangerous, especially for minors. In 2009, a bill to impose the death penalty for "aggravated homosexuality" gained enactment but was struck down on technicalities by the nation's highest court. Although gay pride events had been held in Uganda in past years, an attempt to hold a parade this year outside of Kampala was shut down by police.

UNITED KINGDOM – The Supreme Court of the United Kingdom announced in *MB v. Secretary of State for Work and Pensions*, [2016] UKSC 53 (Aug. 10, 2016), that the judges of the court had failed to reach agreement on the question whether a transgender woman who had refused to divorce her wife was entitled to a pension under the rules governing women. MP had applied for her state pension at age 60 but was refused because she had not obtained an official "gender recognition certificate." The rules for obtaining such a certificate would have required her to divorce her husband, because the UK did not allow same-sex marriage at that time. Under the pension program, men have to wait until age 65 to be awarded a state pension. MP was told to wait and sued. "The Supreme Court is divided on the question," says the opinion, "and in the absence of Court of Justice authority directly in point considers that it cannot finally resolve the appeal with a reference to the Court of Justice," referring to the European Court of Justice. "The question referred is whether Council Directive 79/7 EEC precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognizing a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension." * * * The High Court in London ruled in favor of the National Aids Trust, which had sued the National Health Service over its determination that it did not have authority to fund pre-exposure prophylaxis for HIV/AIDS. NHS England took the position that it was not responsible for HIV prevention, just for treatment, but Mr. Justice Green ruled that NHS "has erred in deciding that it has no power or duty to commission the preventative drugs in issue. The potential victims of

this disagreement are those who will contract HIV/AIDS but who would not were the preventative policy to be fully implemented." *Independent Online*, Aug. 2. However, the NHS announced it would appeal the ruling, evidently seeing this as a budget-buster that could cost 10 to 20 million pounds per year. The judge did give NHS England permission to appeal to the Court of Appeal. Dr. Jonathan Fielden, the Deputy National Medical Director, said that the agency would be appealing against the judges conclusions as to the scope of NHS's authority under the National Health Service Act 2006, but meantime "we will set the ball rolling on consulting on PrEP so as to enable it to be assessed as part of the prioritization round." *Liverpool Daily Post*, Aug. 3. * * * The *Daily Telegraph* reported July 18 that the Pembertons, a "landed family with rights to Trumpington Hall, Cambs, has rewritten the inheritance rules of a trust in order to give gay partners of their descendants the same rights as heterosexual spouses. Richard Pemberton won approval from the High Court to modify the trust, having notified the court that lawyers for the family had recently considered the "financial, ethical and moral issues which can arise with settlements relating to substantial family wealth." The lawyers advised that the trust should be revised to extend the definition of spouse regarding inheritance rights over property to "any civil partner or spouse in a same-sex marriage." The newspaper did not indicate whether the Pembertons were the first "landed family" to take this step.

PROFESSIONAL NOTES

HILARIE BASS, co-president of the firm of Greenberg Traurig, is the new president-elect of the **AMERICAN BAR ASSOCIATION**. Among her pro bono projects was representation of a Florida couple in a case that led Florida courts to strike down the state's statutory ban on "homosexuals" adopting children.

The **AMERICAN BAR ASSOCIATION**'s House of Delegates voted to amend Rule 8.4 and associated comments of the ABA's Model Rules of Professional Conduct to make it an ethical violation for a lawyer to "engage in conduct that the lawyer knows or reasonable should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." However, the amendment provides that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16" and "does not preclude legitimate advice or advocacy consistent with these rules."

The **NATIONAL LGBT BAR ASSOCIATION** has given **KEVIN CATHCART**, recently retired Executive Director of Lambda Legal, its 2016 Dan Bradley Award, recognizing his outstanding contributions to the movement for LGBT rights. Cathcart served as ED of Lambda for 24 years, having previously held that position with Gay & Lesbian Advocates & Defenders in Boston. Under his directorship Lambda substantially expanded its operations through the opening of several regional offices and a greatly expanded legal staff from 5 to 26 full-time attorneys. At the time of his retirement, Cathcart was the longest-serving executive director of any of the country's major LGBT rights organizations. His successor at Lambda Legal is Rachel Tiven.

The **AMERICAN CIVIL LIBERTIES UNION** has announced the retirement of **MATTHEW COLES**, Deputy Legal Director and Director of the ACLU's Center for Equality. Coles has been an ACLU staff member for 29 years, beginning in the Northern California affiliate where he specialized in LGBT and HIV rights issues. He became Director of the ACLU's national LGBT & HIV Project in 1995, serving in that position for 15 years prior to becoming the ACLU's Deputy Director in 2010. As Director of the ACLU's Center for Equality, Coles remained in touch with the activities of the LGBT Project as it advanced its work on marriage equality and other pressing LGBT issues. Coles has been long respected as a strategic thinker and active player in the struggle for LGBT equality, beginning as a law student when he drafted the first proposal for a San Francisco anti-discrimination ordinance as a legal advisor to Supervisor Harvey Milk in the 1970s. He was a co-founder of Gay Rights Advocates, a public interest law firm established in San Francisco, before joining the ACLU of Northern California as a full-time gay rights staff attorney in 1987. Coles will be joining the faculty of Hastings College of the Law in San Francisco, where he has long taught as an adjunct faculty member.

LAMBDA LEGAL has announced that **NANCY MARCUS** is joining its Western Regional Office in Los Angeles as Law & Policy Project Senior Staff Attorney. She comes to Lambda from Indiana Tech Law School in Fort Wayne, where she was the school's founding constitutional law professor and worked closely with Lambda and other LGBT advocates in Indiana during last year's battles over religious exemption legislation. She has published widely on LGBT legal issues. Her practice experience includes staff attorney with Southeastern Ohio Legal Services, private practice in Cleveland, Ohio, and clerking for the Wisconsin Court of Appeals and Supreme Court. She earned her J.D. from Case Western Reserve Law School and her B.A. from Michigan State.

PUBLICATIONS NOTED

1. Altieri, Joseph, Andrew Cho, and Matthew A. Issa, Employment Discrimination against LGBT Persons, 17 Geo. J. Gender & L. 247 (2016) (annual review article).
2. Anderson, Linda S., Marriage, Monogramy, and Affairs: Reassessing Intimate Relationships In Light of Growing Acceptance of Consensual Non-Monogamy, 22 Wash. & Lee J. Civil Rts. & Soc. Just. 3 (Spring 2016) (the legal framework surrounding intimate relationships in the U.S. fails to reflect the reality of how people live and needs to be rethought . . . . Surprised?).
3. Appleton, Susan Frelich, The Forgotten Family Law of *Eisenstadt v. Baird*, 28 Yale J.L. & Feminism 1 (2016) (exploring the untapped liberatory potential of *Eisenstadt v. Baird*).
4. Bagenstos, Samuel R., Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after *Inclusive Communities*, 101 Cornell L. Rev. 1115 (July 2016).
5. Bhagwat, Ashutosh, Liberty Or Equality?, 20 Lewis & Clark L. Rev. 381 (2016) (2015 Anthony M. Kennedy Lecture – focus on *Obergefell v. Hodges*, how Justice Kennedy's emphasis on "liberty" was consistent with his overall jurisprudence, and why a decision premised on "equality" would have been preferable in the view of the speaker).
6. Boddie, Elise C., The Indignities of Color Blindness, 64 UCLA L. Rev. Discourse 64 (2016) (creative use of *Obergefell*'s dignity jurisprudence to argue against the Supreme Court's "color-blindness" approach to equal protection and affirmative action).
7. Bohm, Allison S., Samantha Del Deuca, Emma Elliott, Shanna Holako, and Alison Tanner, Challenges Facing LGBT Youth, 17 Geo. J. Gender & L. 125 (2016) (annual review article).
8. Bourcicot, Yvette K.W., and Daniel Hirotsu Woofter, Prudent Policy: Accommodating Prisoners With Gender Dysphoria, 12 Stan. J. Civ. Rts. & Civ. Liberties 283 (June 2016).
9. Calleros, Charles R., Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights, 2015 Mich. St. L. Rev. 1249 (2015).
10. Carroll, Andrea B., and Christopher Keith Odinet, Gay Marriage and the Problem of Property, 93 Wash. U. L. Rev. 847 (2006) (asserts that the Supreme Court's *Obergefell* decision leaves open many problems concerning the property rights of same-sex spouse that states will have to grapple with).
11. Casey, Jillian, Courtney Lee and Sartaz Singh, Assisted Reproductive Technologies, 17 Geo. J. Gender & L. 83 (2016) (annual review article).
12. Chang, Stewart, Gay and New Asian?: Marriage Equality and the Dawn of a New Model Minority, 23 Asian Am. L.J. 5 (2016) (Caution: Does *Obergefell* present a trap for the LGBT community, under which the non-married will be marginalized as failing to be part of a new "model minority"?).
13. Cianciarulo, Marisa S., Refugees in Our Midst: Applying International Human Rights Law to the Bullying of LGBTQ Youth in the United States, 47 Colum. Hum. Rts. L. Rev. 55 (Winter 2015).
14. Curtis, Aaron J., Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination, 53 Harv. J. on Legis. 459 (Summer 2016).
15. Day, Allison, Guiding Griswold: Reevaluating National Organizations' Role in the Connecticut Birth Control Cases, 22 Cardozo J.L. & Gender 191 (Winter 2016) (fascinating look at the role of national organizations in important sexual privacy test case litigation in relation to local counsel).
16. Donovan, James M., Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples, 49 Loy. L.A. L. Rev. 39 (2016) (surprisingly, published by the journal of a Catholic University law school).
17. Douglas, Jana, Kirk Eby and (Zhiying) Mikaela Feng, Marriage and Divorce, 17 Geo. J. Gender & L. 325 (2016) (annual review article).
18. DuFault, David T., The Intricacies of Estate Planning for Same-Sex Couples, 43 Est. Plan. 23 (August 2016).
19. Edwards, Linda H., Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy, 2015 Mich. St. L. Rev. 1327 (2015).
20. Eisner, Brian, Being a Transgendered Student: An Uphill Fight for Equality, 28 J. Civ. Rts. & Econ. Dev. 419 (Summer 2016).
21. Engle, Jill C., Comparing Supreme Court Jurisprudence in *Obergefell v. Hodges* and *Town of Castle Rock v. Gonzales*: A Watershed Moment for Due Process Liberty, 17 Geo. J. Gender & L. 575 (Spring 2016) (Can the Court's expansive treatment of liberty in the marriage equality context translate into the domestic violence context?).
22. Epps, Garrett, Public Funding and the Road to Damascus: The Legacy of *Employment Division v. Smith*, 94 Or. L. Rev. 659 (2016) (Interesting insights into a case that is profoundly important in the current controversies over demands for religious exemptions from compliance with anti-discrimination laws protecting sexual minorities).
23. Feinberg, Jessica, Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?, 81 Mo. L. Rev. 331 (Spring 2016).
24. Figueroa, Laura, The Slow, Yet Long-Anticipated Death of DOMA and Its Impact on Immigration Law – Where Are We Two Years Later?, 18 Scholar: St. Mary's L. Rev. & Soc. Just. 477(2016).
25. Ford, Candace B., Marriage, Religion, and the Art of Judging in Post-*Obergefell* Louisiana, 43 S.U. L. Rev. 291 (Spring 2016).
26. Franck, Matthew J., Origin Stories Matter: Getting Right with Religious Freedom, 7 Faulkner L. Rev. 1 (Fall 2015) (why, among other things, it is essential to let businesses discriminate against same-sex couples?).
27. Goessl, Susanne L., From Question of Fact to Question of Law to Question of Private International Law: The Question Whether a Person is Male, Female, Or… ?, 12 J. Private Int'l L. No. 2 (2016)
28. Goring, Darlene C., Premature Celebration: *Obergefell* Offers Little Immigration Relief to Binational Same-Sex Couples, 59 How. L.J. 305 (Winter 2016).
29. Haigney, Julia, Beyond Comparison: Practical Limitations of Implementing Comparative Juror Analysis in the Context of Sexual Orientation, 84 Geo. Wash. L. Rev. 1075 (July 2016).
30. Hamed-Troyansky, Ronny, Erasing "Gay" From the Blackboard: The Unconstitutionality of "No Promo Homo" Education Laws, 20 U.C. Davis J. Juv. L. & Pol'y 85 (Winter 2016).
31. Hammond, Jeffrey B., Kim Davis and the Quest for a Judicial Accommodation, 7 Faulkner L. Rev. 105 (Fall 2015) (In

this symposium law review article from a "Christian" law school, author argues that Kim Davis should have received an accommodation of her religious beliefs and allowed to refuse to issue marriage licenses to same-sex couples because religious faith trumps secular obligations. Are we oversimplifying?).

32. Ho, Jeremiah A., Once We're Done Honeymooning: *Obergefell v. Hodges*, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination, 104 Ky. L.J. 207 (205-2016).
33. Hoffman, Jan, Gay and Lesbian High School Students Report 'Heartbreaking' Levels of Violence, New York Times, August 11, 2016.
34. Jacobs, Melanie B., Parental Parity: Intentional Parenthood's Promise, 64 Buff. L. Rev. 465 (May 2016).
35. Jeang, Evie, Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples, 39-AUG L.A. Law. 12 (July/August 2016).
36. Kimmel, Adele P., Title IX: An Imperfect But Vital Tool to Stop Bullying of LGBT Students, 125 Yale L.J. 2006 (May 2016).
37. Lin, Elizabeth, Adult Entertainment Film Contracts: To Enforce or Not to Enforce?, 22 Cardozo J.L. & Gender 367 (Winter 2016) (Paying people to have sex – is there a "consideration" problem with enforceability of contracts between pornographers and their actors?).
38. Liu, Crystal, Elizabeth Macgill, and Apeksha Vora, Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964, 17 Geo. J. Gender & L. 411 (2016) (annual review article).
39. Matricardi, Danielle, Binary Imprisonment: Transgender Inmates Ensnared Within the System and Confined to Assigned Gender, 67 Mercer L. Rev. 707 (Winter 2016).
40. Mayeri, Serena, Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality, 125 Yale L.J. 2292 (June 2016).
41. Mergele-Rust, Derek, Splitting the Baby: The Implications of Classifying Pre-Embryos as Community Property in Divorce Proceedings and its Impacts on Gestational Surrogacy Agreements, 8 Est. Plan. & Community Prop. L.J. 505 (Spring 2016).
42. Merriman, Scott A., What Should the Scales of Justice Balance?: Historical Aspects of the Religious Liberty Debate, 7 Faulkner L. Rev. 79 (Fall 2015).
43. Moller, Mary Kate, Venturing into Hobby Lobby's Minefield: An Examination of Corporate Religious Freedom, Same-Sex Spouses, and ERISA Plans, 10 Ohio St. Bus. L.J. 267 (2016).
44. Monopoli, Paula A., Inheritance Law and the Marital Presumption after *Obergefell*, 8 Est. Plan. & Community Prop. L.J. 437 (Spring 2016).
45. Nadeau, Chantal, Courage, Postimmunity Politics, and the Regulation of the Queer Subject, 23 Ind. J. Global Legal Stud. 505 (2016) (read the Introduction and see if you can figure this one out).
46. Newman, Rebecca J., Two Sheriffs, One Town: The Problem of Prosecuting Transgender Hate Crimes in the District of Columbia, 17 Geo. J. Gender & L. 495 (2016) (annual review note).
47. Olivas, Michael A., Who Gets to Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building, 2015 Mich. St. L. Rev. 1617 (discusses selection process for oral advocates in *Obergefell v. Hodges*).
48. Panditaratne, Dinusha, Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform, 31 Am. U. Int'l L. Rev. 171 (2016).
49. Piatt, Bill, Opting Out in the Name of God: Will Lawyers be Compelled to Handle Same-Sex Divorces?, 79 Alb. L. Rev. 683 (2016) (Symposium: My Religion, My Rules: Examining the Impact of RFRA Laws on Individual Rights) (argues for an approach that accommodates the deeply-held religious beliefs against same-sex marriage by some lawyers with the need for legal representation by divorcing same-sex couples by allowing the lawyer to opt out; seems inconsistent with developing case law, if one considers a law office a place of public accommodation; writer asserts that divorce firms that only represent husbands or wives have not been charged with sex discrimination).
50. Puluka, Anne, Parent versus State: Protecting Intersex Children from Cosmetic Genital Surgery, 2015 Mich. St. L. Rev. 2095 (2015) (argues for restriction of the right of parents to consent to performance of genital surgery on intersex infants).
51. Russo, Charles J., Religious Freedom in Faith-Based Educational Institutions in the Wake of *Obergefell v. Hodges*: Believers Beware, 2016 B.Y.U. Educ. & L.J. 263 (2016).
52. Ryzner, Margaret, Recent Developments in Indiana Family Law: October 2014 to September 2015, 49 Ind. L. Rev. 1083 (2016) (Survey article – Discusses *Obergefell* impact in Indiana).
53. Satinoff, Jessica, Coming Out of the Venire: Sexual Orientation Discrimination and the Peremptory Challenge, 11 FIU L. Rev. 463 (Spring 2016).
54. Seidman, Louis Michael, The Triumph of Gay Marriage and the Failure of Constitutional Law, 2015 Sup. Ct. Rev. 115 (2015) (A desirable result achieved by an unsatisfactory majority opinion; dismantles the dissents but also the majority!).
55. Shell, Morgan, Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Times?, 48 Tex. Tech L. Rev. 1043 (Summer 2016).
56. Silverman, Bradley, The Legitimacy of Comparative Constitutional Law: A Modal Evaluation, 24 Mich. St. Int'l. L. Rev. 307 (2016).
57. Simons, Kenneth W., Discrimination is a Comparative Injustice: A Reply to Hellman, 102 Va. L. Rev. Online 85 (July 2016) (responding to Deborah Hellman, Two Concepts of Discrimination, 102 Va. L. Rev. 895, 897 (2016)).
58. Smith, Catherine, *Obergefell*'s Missed Opportunity, 79 Law & Contemp. Probs. 223 (2016) (Symposium: Race and Reform in Twenty-First Century America) (Supreme Court's missed the opportunity to acknowledge child-centered equal protection flaws of state bans on same-sex marriage).
59. Stern, Shai, When One's Right to Marry Makes Others "Unmerry", 79 Alb. L. Rev. 627 (2016) (Symposium: My Religion, My Rules: Examining the Impact of RFRA Laws on Individual Rights).
60. Strang, Lee J., State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations, 11 FIU L. Rev. 327 (Spring 2016) (one can beg to differ; originalism is just a theory of interpretation, not a textually based constitutional principle).
61. Wagnon, Brittanie, From Wedding Bells to Working Women: Unmasking the Sexism Resulting from "Illicit Concubinage" in Louisiana's Jurisprudence, 76 La. L. Rev. 1383 (Summer 2016).
62. Walpin, Gerald, Death of Morality: Does it Portend Death of America?, 32 Touro L. Rev. 607 (2016) (social conservative bemoans the decriminalization of conduct formerly deemed immoral).
63. White, Andrea E., The Nature of Taboo Contacts: A Legal Analysis of BDSM Contracts and Specific Performance, 84 UMKC L. Rev. 1163 (Summer 2016) (Believe it or not, this article includes, in its section analyzing the essential elements of a contract, uses the following section heading, not at all "tongue in check": "Consent to be Bound").
64. Widiss, Deborah H., Legal Recognition of Same-Sex Relationships: New Possibilities for Research on the Role of Marriage Law in Household Labor Allocation, 8 J. Fam. Theory & Rev. 10 (2016).

SPECIALLY NOTED

The Williams Institute at UCLA Law School has announced the winners of its annual Dukeminier Awards for published scholarship on LGBT issues: Michael Boucai, Associate Professor, SUNY Buffalo Law School, awarded the Michael Cunningham Prize for: Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J. L. & Humanities 1 (2015); James M. Oleske Jr., Associate Professor, Lewis & Clark Law School, awarded the Stu Walter Prize for: The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages, 50 Harv. C.R.-C.L. L. Rev. 99 (2015); Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School, awarded the Ezekiel Webber Prize for: Risky Arguments in Social – Justice Litigation: The Case of Sex Discrimination and Marriage Equality, 114 Colum. L. Rev. 2087 (2014). The Dukeminier Awards also recognizes this year's winner of the Williams Institute's annual student writing competition: Kayla Anne Baker, Case Western Reserve University School of Law, awarded the Jeffrey S. Haber Prize for student scholarship for: Never Quite the Woman that She Wanted to Be: How State Policies Transform Gender Marker Identification into a Scarlet Letter.

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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