

L E S B I A N / G A Y
LAW NOTES

January 2015

SUNSHINE STATE BRIGHTENS

*Marriages Set to Begin in Florida as U.S. Supreme Court
Justices Send Another Strong Signal of Support
in Declining Extension of Stay*

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The LeGaL Foundation

of the LGBT Bar Association
of Greater New York
<http://le-gal.org>

ISSN

8755-9021

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Supreme Court Sends an Affirmative Message on Marriage Equality by Denying Florida Stay

On December 19, the United States Supreme Court issued an order denying a motion by Florida Attorney General Pam Bondi seeking an extension of a stay issued by the U.S. District Court in Florida of its ruling striking down the state's ban on same-sex marriages in *Armstrong v. Brenner*, 2014 WL 7210190. As usual, the Court issued no explanation for its decision, but it did indicate that Justices Clarence Thomas and Antonin Scalia would have granted the motion. This doesn't necessarily signify that the vote to deny the motion was 7-2; it does signify that there was not a majority among the Justices for granting the

federal government from recognizing same-sex marriages that had been validly contracted under state law. While the state of Utah scrambled to seek relief from the U.S. Court of Appeals for the 10th Circuit, same-sex couples began marrying in that state. The 10th Circuit quickly issued its refusal to stay the decision, and the state applied to the Supreme Court for a stay. Meanwhile, hundreds of Utah same-sex couples and couples from neighboring states were getting married. By the time the Supreme Court issued a stay on January 6, 2014, about 1,300 couples had married.

The Supreme Court's stay, unexplained, nevertheless sent a

for marriage equality in cases from Nevada and Idaho. Since October 6, the Supreme Court had received stay requests from several other states located in these four circuits, and all such requests were denied, even though the district court rules were being appealed to the relevant circuit courts. At first the denials were not accompanied by any indication of dissension within the Court, but late in the year Justices Thomas and Scalia were noted as being in favor of granting the stays, Thomas indicating in a dissent from a denial of certiorari in an unrelated case his belief that the Court should have granted certiorari in response to the marriage equality

While the Court did not explain its action, the signal it sent seems clear. There is a majority on the Supreme Court to strike down state bans on same-sex marriage.

motion, and that Justices Thomas and Scalia felt strongly enough about the issue to have their positions noted for the record. While the Court did not explain its action, the signal it sent seems clear. There is a majority on the Supreme Court to strike down state bans on same-sex marriage. That is the only explanation for this ruling that makes sense, and the story of marriage equality developments during 2014 tells why.

In December 2013, the U.S. District Court in Utah struck down that state's ban on same-sex marriage, and the trial judge refused to stay his decision pending appeal. The decision relied heavily on the Supreme Court's June 2013 ruling in *U.S. v. Windsor*, which declared unconstitutional Section 2 of the federal Defense of Marriage Act, a provision that prohibited the

message to lower federal courts. Although there were a few gaps along the way during which same-sex couples were able to marry briefly in some states, on the whole pro-marriage equality decisions by federal district courts were stayed pending appeal unless state governors decided not to appeal them (as in Oregon and Pennsylvania). Then, the Circuit Courts of Appeals started weighing in, with three circuits ruling for marriage equality over the summer and the defendant states filing petitions for review in the Supreme Court. On October 6, the Supreme Court denied petitions to review the pro-marriage equality rulings from the 10th, 4th and 7th Circuits, thus lifting the stays in Virginia, Utah, Oklahoma, Indiana and Wisconsin, and the next day the 9th Circuit ruled

petitions on October 6.

Meanwhile, marriage equality was gradually expanded to all the remaining states in the 4th, 7th, 9th, and 10th circuits, bringing the number of marriage equality states to 35, containing more than 60% of the nation's population.

In Florida, the federal district court and several state trial courts struck down the state's same-sex marriage ban during the summer, and the state filed appeals in both state and federal courts. U.S. District Judge Robert Hinkle stayed the order in his August 21 preliminary injunction ruling in *Brenner v. Scott*, 999 F.Supp.2d 1278 (N.D. Fla.), for a brief time, mainly to see what would happen on the pending certiorari petitions in the Supreme Court. After the Supreme Court denied the petitions on Oct. 6, Judge Hinkle

extended his stay through 5 p.m. on January 5, 2015, to give the state time to seek a further stay from the 11th Circuit and/or the Supreme Court. The 11th Circuit declined to extend the stay, stating that Hinkle's order would go into effect at 5 pm on January 5. Florida Attorney General Pam Bondi then filed a motion with Justice Clarence Thomas, who handles such requests from states in the 11th Circuit, and it seemed from his recent statements that he would be inclined to grant the stay if he were acting on his own. But as every justice who has received such a motion has referred it to the full Court for decision, Thomas did so and was evidently outvoted, because on December 19 the Court denied the motion without explanation, other

trial judge had imposed sua sponte without any request from the state in the *Jernigan* case.

Meanwhile, petitions for review are pending at the Supreme Court from a ruling by the 6th Circuit in *DeBoer v. Snyder*, 772 F.3d 388 (Nov. 6, 2014), the only Court of Appeals decision to reject marriage equality claims during 2014, and a petition is also pending from an adverse trial court ruling in Louisiana, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La., Sept. 3, 2014), appeal pending in the 5th Circuit, where Lambda Legal asks the Supreme Court to let the case skip the 5th Circuit and go directly to review at the highest level. The 5th Circuit Court of Appeals is poised to hear oral arguments in marriage equality cases from Texas, Louisiana,

some counties in Missouri, in the 8th Circuit, as a result of some local court rulings that have not been stayed, and will begin marrying in Florida on the evening of January 5, since at least one clerk had indicated that the office would stay open past business hours to accommodate the anticipated demand for marriage licenses at the earliest possible time. (However, disputes about the scope of the Florida district court's order created some doubt about how many clerks would be issuing licenses come January 6. Judge Hinkle attempted to quell that confusion on January 1, clarifying that while not all clerks in the state were named parties to the lawsuit, they all are still constitutionally required to issue licenses to qualified applicants.)

In light of this one-year history, it seems clear that at least five members of the Supreme Court are comfortable with the idea of marriage equality going into effect in Florida without the authorization of an appellate ruling on the merits, which seems a very clear signal of the ultimate outcome — an outcome that Justice Scalia predicted in his dissent in *United States v. Windsor*. Scalia said that the Court's ruling told plaintiffs what to argue and the lower courts how to rule in favor of same-sex marriage, and his comments (as well as similar comments in his dissent from the Texas sodomy law ruling in 2003, *Lawrence v. Texas*) have been frequently cited and quoted in lower federal court rulings during 2014.

The outcome appears overwhelmingly probable. The only questions remaining are when the Court will decide, and which constitutional theories it will embrace. Some of the courts of appeals have relied on due process freedom to marry arguments, others on equal protection arguments, and some on a combination of the two. The choice of theory is mainly of interest to legal scholars and pundits. The bottom line is what interests the general population, and that bottom line is becoming increasingly clear. ■

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than to state that Thomas and Scalia would have granted the motion.

This is the first time that the Supreme Court has voted affirmatively (albeit without releasing the vote breakdown to the public) to allow a same-sex marriage order go into effect within a circuit whose court of appeals has not yet spoken on the merits. This sends a message to federal district judges within the 5th, 8th and 11th Circuits that they need not stay marriage equality rulings, and to those circuit courts of appeals as well about the likely outcome if they issue rulings opposed to marriage equality on appeals from those states. Indeed, the day after the Supreme Court's action, counsel for plaintiffs in Missouri requested that the 8th Circuit lift a stay that the

and Mississippi on January 9, 2015. It seems overwhelmingly likely that the Supreme Court will grant one or more of the pending certiorari petitions, placing the issue of marriage equality directly on its agenda without the complication of standing or ripeness issues to provide an "out" from a ruling on the merits. If the Supreme Court grants review early enough to make a ruling by June 2015 likely, it also seems likely that the 5th Circuit would refrain from ruling until the Supreme Court has spoken.

With the denial of a stay extension in Florida, marriage equality will spread to its 37th state by the time the Court meets to discuss the pending petitions on January 9 (the same date as the 5th Circuit argument). Same-sex couples can marry in

Divided En Banc 1st Circuit Rejects Transgender Prisoner's Claim for Reassignment Surgery

A sharply divided *en banc* First Circuit ruled that transgender prisoners have no constitutional right to sex reassignment surgery (SRS) in *Kosilek v. Spencer*, 2014 U.S. App. LEXIS 23673, 2014 WL 7139560 (1st Cir., December 16, 2014). A decision of the entire active First Circuit was widely anticipated after the court granted *en banc* review of the 2-1 decision of a panel affirming the injunction for SRS granted by District Court Judge Mark L. Wolf in *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014). The 3-2 decision reversing the District Court did not include participation by Judge David J. Barron, whose appointment by President Obama and confirmation last May raised the number of active non-senior jurists in the First Circuit to six. It appears that Judge Barron is not considered a member of the *en banc* court for purposes of this case under First Circuit Rule 35(a)(2)(A); in any event, any further re-hearing would require a majority of the now six active judges.

Transgender inmate Michelle Kosilek's litigation has occupied the federal court in Massachusetts for twenty years – see, e.g., *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002) – and the case attracted more than twenty amicus briefs, all but one supporting Michelle Kosilek's claim for SRS. Anticipation of the ruling also caused some other federal courts to wait for the *en banc* decision before proceeding. See, e.g., *Norsworthy v. Beard*, 2014 U.S. Dist. LEXIS 41519 (N.D. Calif., March 26, 2014) (surveying status of transgender prisoner litigation, as reported in *Law Notes* of May 2014 at 194).

Despite jurisprudential packaging, the *en banc* decision in *Kosilek* effectively did to First Circuit transgender prisoners' medical rights what *Bowers v. Hardwick*, 478 U.S. 186 (1986), did to gay rights nationally in 1986: the transphobic majority in *Kosilek*, like the homophobic

majority in *Bowers*, used legerdemain to cast the ultimate expression of the plaintiffs' sexuality outside the protection of the law. The stage is not yet set for a clear circuit split, however, even though *Kosilek* goes the farthest in its denial by banning prisoners' SRS. Compare *De'lonta v. Johnson*, 708 F.3d 520, 525-26 (4th Cir. 2013) (holding that complaint that officials refused to evaluate prisoner for gender reassignment surgery despite continuing compulsion to self-mutilate sufficiently alleged deliberate indifference); and *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S.Ct. 1810 (2012) (striking categorical statutory ban on hormone and surgical treatment for transgender prisoners). The Supreme Court has yet to take a case presenting the issue of medical treatment for transgender inmates.

First Circuit Judge Juan R. Torruella's opinion (for himself, Chief Judge Sandra L. Lynch and Judge Jeffrey R. Howard) continues for 71 pages. Separate dissents by Judges O. Rogerie Thompson and William J. Kayatta (who comprised the majority in the three-judge panel) run another 46 pages. Much of the discussion analyzes "expert" testimony and what the court characterizes as "mixed" questions of law and fact under the Eighth Amendment, of which a full account is beyond the scope of this article.

Judge Wolf's District Court decision contained voluminous findings resulting from years of testimony and evidence from nineteen witnesses, including experts, prison officials, and Kosilek herself, as well as Kosilek's medical and prison records, DOC policies and manuals, reports of experts in SRS and security, medical literature, correspondence, meetings notes, and deposition testimony. The circuit majority largely repeats this effort, with contrary results. Unfortunately, although the opinions refer to updated community standards

for transgender services, most of the evidence of record is at least seven years old (testimony was concluded in 2008, and the District Court's opinion is from 2012) while transgender law and professional practice is evolving rapidly.

During this time, Kosilek has resided as a presenting female in an all-male medium security prison, serving a life sentence for the murder of her former wife. Her litigation history shows that she first fought for the right for recognition of her condition as "serious," then for hormone treatments and female presentation, and finally (but now unsuccessfully) for SRS. She has secondary female characteristics, including breasts. She is slight of build and wears long hair, female clothing, and make-up. Per the opinions, this presentation has been accommodated in the all-male institution without active self-destructive behavior by Kosilek or security problems from other inmates.

It is undisputed that Kosilek has completed the first two-thirds of transgender triadic treatment and that she is a candidate for SRS. The issues in the case, as framed by the First Circuit are: (1) whether SRS is the only appropriate treatment for Kosilek; and (2) whether the DOC's refusal to provide it constitutes deliberate indifference to her serious medical needs, in violation of the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); and *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

All judges agree that Kosilek has a "serious medical need" within the meaning of the Eighth Amendment. The *en banc* panel found that there was no clear medical consensus for SRS and that the DOC's treatment of Kosilek by providing transgender triadic services, up to but not including SRS, was not deliberately indifferent. In so doing, the majority ruled that Judge Wolf erred in finding that Kosilek had "real life" experience living as a woman, because the prison environment could not

provide same in the view of the majority of the panel. Judge Torruella also re-marshaled Judge Wolf's weighing of the evidence, holding that the DOC's experts' testimony created a bona fide dispute about whether the proper course of treatment included SRS that precluded a finding of deliberate indifference and amounted to no more than a disagreement between patient and doctor, which is not actionable under the Eighth Amendment as a matter of law.

The majority found Judge's Wolf's rejection of DOC's experts' opinions as biased to be erroneous, even though their chief expert had never recommended SRS for a patient and their second expert, who (despite never examining Kosilek) disagreed with Kosilek's treating physicians in DOC that SRS was the only viable treatment, had a history of defending corrections departments in transgender cases. The majority also relied upon a court-appointed "expert," who testified that multiple approaches exist for treating transgender patients, with and without SRS, and that patient choice is entitled to great weight. It rejected Judge Wolf's finding that Kosilek herself had "intense mental anguish" from continuing to have male genitalia, substituting a finding that her stress was "greatly diminished" by DOC's treatment.

The majority also faulted Judge Wolf's finding that DOC's security concerns were mostly pretextual and politically-based on this record (in which DOC had fought Kosilek's every attempt to advance her care), holding that Kosilek's history of violence against women (based on her conviction) and her transfer to a female institution would make her a "target" after SRS. The majority does not explain why Kosilek has not been a "target" in a male institution despite her presentation, nor does it address DOC's admission that it would have to house a post-SRS defendant somewhere should one be convicted and remanded to its custody in the future. The majority found inadequate weight was given to security concerns under *Whitley v. Albers*, 475 U.S. 312,

321-22 (1986); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); and *Battista v. Clarke*, 645 F.3d 449, 453, 454 (1st Cir. 2011). Ironically, in *Battista*, a different panel of the First Circuit (including former Justice Souter, by designation) found that a deliberate indifference claim was stated by a transgender prisoner desiring hormone treatment, despite security concerns. Apparently the court now believes that looking female but retaining male genitals presents an entirely different legitimate security concern than looking female but not retaining male genitals.

The judges who comprised the majority of the affirming panel, whose decision was vacated by the en banc court, each dissented separately. Both criticized the majority for its standard of review, allowing findings of fact that were not clearly erroneous to be overruled by converting them to questions of law subject to *de novo* review. Both assert that the majority bent the law to avoid a politically difficult outcome.

Judge Thompson wrote that "by upholding the adequacy of the DOC's course of treatment, the majority in essence creates a 'de facto' ban on sex reassignment surgery for inmates in this circuit." Even though DOC insisted it did not have a "blanket policy" denying SRS, "[t]he issue is not whether correctional departments will voluntarily provide the surgery, it is whether the precedent set by this court today will preclude inmates from ever being able to mount a successful Eighth Amendment claim for sex reassignment surgery in the courts." Judge Thompson observed that, under the majority's legal analysis, any DOC would defeat a claim for SRS merely by calling experts who disagree, departing from the state of mind analysis usually left to a trier of fact, and affording DOCs "serious leeway with the Eighth Amendment," as they are now free to seek "a more favorable medical opinion" that justifies the denial of treatment their own doctors have recommended.

Judge Thompson specifically compared the majority's ruling to discarded precedents like *Plessy v. Ferguson*, 163 U.S. 537 (1896), and

Korematsu v. United States, 323 U.S. 214 (1944). Judge Thompson said that the decision "paves the way for unprincipled grants of *en banc* relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary."

Judge Kanyatta wrote that "by deciding the facts in this case as an appellate court essentially finding law, the majority ends any search for the truth through continued examination of the medical evidence by the trial courts. It locks in an answer that binds all trial courts in the circuit: no prison may be required to provide SRS to a prisoner who suffers from gender dysphoria as long as a prison official calls up [DOC's experts]. I suspect that our court will devote some effort in the coming years to distinguishing this case, and eventually reducing it to a one-off reserved only for transgender prisoners."

In reply, the majority insisted that it was not establishing a *per se* rule or suggesting that "correctional administrators wishing to avoid treatment need simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary." It maintained that it was ruling solely "on the particular record on appeal." It is difficult to imagine, however, as the dissents agree, how a transgender inmate could make a better record than this one.

After reading all of this ink, this writer cannot help but wonder which is more surreal: appellate judges and their dueling law clerks pondering if Michelle Kosilek's twenty-year odyssey is a "real life" experience and how great her pre-SRS stress really is; or her actual life and stress as a pre-SRS woman in a man's prison thinking the constitution offers her hope. – William J. Rold

William J. Rold is a civil rights attorney in NYC and a former judge. He previously represented the ABA on the National Commission for Correctional Health Care.

European Court of Justice Rules on Permissible Inquiries of Gay Asylum Claimants

In *A, B, C v. Staatssecretaris*, Joined Cases C-148/13 to C-150/13 (ECJ, Dec. 2), the European Court of Justice ruled on the minimum standards for granting refugee status to homosexuals, essentially providing further protection for homosexuals during the asylum process under European Union Law and treaties.

A, B and C each filed an application for asylum in the Netherlands stating that they feared persecution in their respective countries of origin due to their homosexuality. A filed two applications for asylum, declaring that he was willing to take part in a “test” that would prove his homosexuality or perform a homosexual act to demonstrate the truth of his sexual orientation, however the application was rejected by the Staatssecretaris. The Staatssecretaris also rejected B’s application on the ground that the statements concerning his homosexuality were “vague, perfunctory and implausible,” despite B being from a country where homosexuality is not accepted. C’s application for asylum was rejected because he had not clearly explained how he became aware of his homosexuality and had not been able to reply to questions about Netherlands organizations for the protection of rights of homosexuals. Included in this application, C even gave authorities a video recording of intimate acts with a person of the same sex.

Following the rejections, A, B and C appealed to the Rechtbank’s-Gravenhage. The Rechtbank’s-Gravenhage rejected all appeals. A, B and C further appealed, landing them before the Raad van State (Council of State), the advisory body to the Netherlands Government.

On appeal, A, B and C stated that because it is impossible to objectively determine the sexual orientation of asylum applicants, the authorities carrying out the assessment of an application should base their decisions

solely on the assertions made by those applicants regarding their declared sexual orientation. They further challenged authorities who ask questions in respect of their declared sexual orientation as a breach of the applicant’s right to human dignity and respect for private life.

The Raad van State was uncertain whether there are limits imposed by Article 4 of Directive 2004/83 and Articles 3 and 7 of the European Charter on the method of verification of the sexual orientation of applicants for asylum, so the proceeding was stayed in order for the European Court of Justice to determine those limits.

The court stated that the methods

and personal circumstances of the applicant.

The court found that assessments based on questioning as to the knowledge on the part of an applicant for asylum concerning organizations for the protection of the rights of homosexuals, and details of those organizations suggests that authorities base their assessments on stereotyped notions as to the behavior of homosexuals, and not on the basis of the specific situation of each asylum applicant, which is required. The court stated, “The assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not,

A, B and C each filed an application for asylum in the Netherlands stating that they feared persecution in their respective countries of origin due to their homosexuality.

used by the competent authorities to assess the statements, documentary, or other evidence submitted in support of an application must be consistent with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity and respect for private and family life. The court broke the assessment into two stages, the first concerning the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence. The court found that during the first stage, it is the duty of the Member State to cooperate with the applicant at the stage of assessing the relevant elements of an application; the assessment must be made on an individual basis and must take account of the individual situation

nevertheless, satisfy the requirements of the provisions because it does not allow authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.” The court held that the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility on the question of his sexual orientation.

The court further held that while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances regarding the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed

by the Charter and, in particular, to the right to respect for private and family life. Further, the court stated as to the submission by the applicants to possible “tests” in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, that “...it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity.”

Member States may consider it the duty of the applicant to submit “as soon as possible” all elements needed to substantiate the application for international protection. The court further found however, due to the sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

The court concluded that in light of the Articles, the Charter must be interpreted as precluding, in the context of that assessment; (A) the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum, (B) the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to ‘tests’ with a view to establishing his homosexuality or, yet, the production by him of films of such acts, and (C) the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution. – Anthony Sears

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

9th Circuit Rejects Constitutional Challenge to Los Angeles Condom Ordinance

On December 15th, the U.S. 9th Circuit Court of Appeals rejected a constitutional challenge to a Los Angeles voter-initiated ordinance known as Measure B, which imposes a requirement on adult film producers to require their actors to use condoms during scenes of anal or vaginal sex while filming in Los Angeles County. *Vivid Entertainment v. Fielding*, 2014 U.S. App. LEXIS 23560, 2014 WL 7332764 (9th Cir., Dec. 15, 2015). The ruling affirmed a District Court decision denying a pretrial motion by the film industry plaintiffs to enjoin its operation pending a final merits decision by the court. Prior to denying the motion the District Court judge struck certain parts of the ordinance. In the instant case, the film industry plaintiffs are appealing the denial of the injunction and the proponents of Measure B are objecting to the judge striking out of various portions of the ordinance.

In November 2012, Los Angeles County voters approved the Measure B ordinance and it took effect the next month. Measure B required the use of condoms during oral sex scenes and anal or vaginal sex scenes. Measure B also imposed additional restrictions on adult film producers like paying a registration fee for a permit to film and requiring evidence that certain employees completed training courses. Lastly, Measure B permitted surprise inspections during filming to ensure compliance with the initiative. If a production was not in compliance the film could be shut down in its entirety.

As mentioned above, the District Judge agreed to strike certain portions of the ordinance as there was a severability clause. The requirement that condoms be used during oral sex scenes was blocked by the judge and he also limited the definition of adult films to mean those in which a penis penetrating a vagina or an anus was filmed. Lastly, the judge struck the requirement that producers pay a fee to get the permit to

film. All of the changes to the ordinance made by the District Court Judge were in compliance with the severability clause of Measure B. The parties arguing on behalf of Measure B were permitted as interveners in the case and they of course objected to the revisions of the ordinance. The municipality involved, Los Angeles County, did not appeal the ruling.

The film industry plaintiffs argue that their First Amendment rights to freedom of expression are being unconstitutionally limited by Measure B. Their argument was that Measure B regulated content-based speech and there is no compelling state interest. Both the District Court and the 9th Circuit Court of Appeals agreed that generally the regulation of the adult film industry is content-based regulation of speech, but that type of speech is only subject to heightened scrutiny, not strict scrutiny. The court made this determination based on the primary motivation for Measure B being to prevent the secondary effects of unprotected sex during adult films. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The compelling state interest was preventing sexually-transmitted diseases, specifically HIV, from being transmitted during the production of adult films. Voters who voted for Measure B were not trying to interfere with the constitutional rights of adult film makers, but instead trying to protect the actors in these adult films.

The film industry plaintiffs further argued that the “mandate” to wear a condom equates to a constitutional violation of their freedom of expression. The court disagreed. The film industry plaintiffs wanted the court to adopt their belief that the First Amendment extends the right to freedom of expression to the expression of depicting condom-less sex. According to the plaintiffs, unprotected, condom-less sex conveys a particular message associated with a world with no risks. In the alternative, protected

sex reminds the audience about the risks of pregnancy and disease. The court did not adopt this argument nor did it find the argument relatable to the general audiences of adult films.

Measure B survived the intermediate scrutiny analysis because the limitation on freedom of expression was narrowly tailored and minimal and there was a legitimate government purpose for its imposition. The purpose was to protect adult film actors. In her decision for the three-judge panel, Judge Susan P. Graber wrote that the requirement that actors in adult films wear condoms might have some minimal effect on a film's no-risk message, but that effect is certainly no greater than the effect of pasties and G-strings on the erotic message of nude dancing. Restrictions on nude dancing has been upheld by the Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

The 9th Circuit Court of Appeals found that the District Court did not abuse its discretion in striking some portions of Measure B and also in declining to enjoin the enforcement of the condom mandate. The Court of Appeals concluded that the condom mandate survived intermediate scrutiny because its effect on speech was so minimal.

The issue of HIV and other sexually-transmitted diseases are a serious concern and the minimal effect here is well worth the potential prevention of disease for actors in the adult film industry. — *Tara Scavo*

Tara Scavo is an attorney in Washington, D.C.

[Editor's Note: The California Health Department issued a report on December 29 that a gay porn actor who had gone out of state to film without using condoms had been infected during that film shoot. The source of the infection was verified by investigation. The actor had tested negative for HIV upon returning to California, but tested positive two weeks later after developing symptoms of infection, and DNA testing of blood samples from the actors on the film confirmed that he was infected by one of them.]

Rhode Island Supreme Court Rules Catholic Firefighters' Constitutional Rights Not Abridged by Assignment to Staff Fire Truck in Gay Pride Parade

The Rhode Island Supreme Court unanimously ruled on December 19 that two Providence fire fighters with religious objections to homosexuality did not enjoy a First Amendment right to decline an assignment to staff a fire truck participating in the 2001 Pride Parade in their city. *Fabrizio v. Providence*, 2014 R.I. LEXIS 158. The court reversed a decision by Providence County Superior Court Justice Brian Van Couyghen, who had denied a motion for summary judgment filed by two of the defendants, the former mayor

protested the assignment, but Chief Rattigan directed them to comply and they reluctantly did. They allege that they had heard that Mayor Cianci had ordered the company's participation. After stewing about their experience for a few years, they both filed lawsuits against Cianci, Rattigan, and the City of Providence, asserting various claims of discrimination, infliction of emotional distress, and violation of their constitutional rights.

The fire fighters allege that they were subjected to various kinds of verbal harassment from parade

Two of the assigned firefighters, Theodore J. Fabrizio, Jr., and Stephen J. Deninno, protested the assignment.

and former fire chief of Providence, who had asserted qualified immunity from liability in the case.

According to the opinion for the court by Justice William R. Robinson III, the Providence Fire Department received numerous requests each year for fire trucks to participate in parades and other public events. In 2001, Fire Chief James Rattigan, apparently in consultation with Mayor Vincent A. Cianci, Jr., decided to respond affirmatively to such a request from the Rhode Island Pride Commission, and they ordered that a fire truck and associated crew from Engine Company 7, the company stationed closest to the parade route, take part. Two of the assigned firefighters, Theodore J. Fabrizio, Jr., and Stephen J. Deninno, self-described Roman Catholics with moral objections to homosexuality,

onlookers, received threatening and obscene phone calls after the event, and suffered harassment as well from fellow fire fighters.

The case has gone back and forth between the state and federal courts, and substantial discovery has taken place. Over the course of the litigation, several of the counts have fallen out of the case. Cianci and Rattigan, who no longer occupied their official positions, filed a motion for summary judgment on grounds of qualified immunity from claims that they had deprived the plaintiffs of freedom of religion, speech and association in violation of the Rhode Island Constitution. The trial judge denied their motion, ruling that there needed to be more factual development of the case before he could rule for them as a matter of law. Because appeal as of right is not



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available under Rhode Island court practice from a denial of a summary judgment motion, the appellants had to petition the Rhode Island Supreme Court for a writ of certiorari, arguing that they enjoyed qualified immunity and should be dropped from the case as defendants.

The Supreme Court took the position that it was unnecessary to decide on the issue of immunity if the plaintiffs had failed to state a valid constitutional claim against the defendants, and it concluded that this was indeed the case. "Here, respondents received an order to participate in the parade because their engine company was assigned to the task; it is uncontested that such orders were common,

He continued, "The individuals chosen to carry out that assignment cannot be said to have engaged in personal speech by carrying out their work as public servants," so they had no constitutional claim to raise.

Given that conclusion, there was no occasion to consider whether the mayor and fire chief were entitled to immunity.

The case stands for a broader principle, not specifically articulated by the court but present nonetheless. Public employees at work are carrying out the directions of their superiors and are not, as such, free actors. The same principle underlies numerous rulings, from the Supreme Court on down, that public employee speech

The case stands for a broader principle, not specifically articulated by the court but present nonetheless.

as evidenced by Chief Rattigan's reference to receiving 'numerous' requests from parade organizers for Fire Department participation and as reflected in the standard form for such requests used by the Department. After receiving this work assignment from their employer (the regularity of which has not been questioned), respondents participated in the parade merely as relatively anonymous public servants. We are unaware of any pertinent legal authority in support of the proposition that, in such specific circumstances, employees' rights are violated if they happen to possess religious objections to the beliefs of the group with which an otherwise legitimate work assignment requires brief interaction," wrote Justice Robinson. The court found that the fire fighters' participation in the parade did not present a case of compelled speech on their part; staffing a fire truck in a parade is not a political statement when it is done by assignment of superiors.

enjoys no protection when it is "official speech," that is, speech undertaken as part of the employee's job. When a public employee within the scope of his or her employment speaks or engages in conduct that might be seen as expressive and thus falling within the realm of speech, it is officially the speech of the government, not the employee. The same principle underlies the proposition, now frequently contested, that government clerks cannot rely on their personal religious views or ethical objections to refuse to issue marriage licenses to same-sex couples in jurisdictions where legal bans on same-sex marriage have been struck down. As such, this Rhode Island Supreme Court decision may stand as an important precedent as religious exceptionalists step forward to challenge the obligation of objecting clerks to issue such licenses or, in jurisdictions where clerks routinely do so, to preside over such marriage ceremonies. ■

Indiana Appeals Court Rules that Trial Court Can Order Gender Change on Birth Certificate

On December 4, 2014, a three-judge panel of the Court of Appeals of Indiana, the state's midlevel appellate court, unanimously found that current Indiana law allows for transgender individuals to file a petition to change the gender markers on their birth certificates. *In re Change of Birth Certificate*, 2014 Ind. App. LEXIS 589, 2014 WL 6843414. Judge Ezra H. Friedlander wrote the opinion, joined by Chief Judge Nancy H. Vaidik and Judge Melissa S. May.

Judge Friedlander begins by recounting that the appellant was born in 1988 as a genotypical female, but, since 2008, had received ongoing treatment for a gender dysphoria diagnosis. He had begun living as a male in 2011, legally changed his name in 2012, and later underwent sex reassignment surgery in 2013. "According to his surgeon, Appellant's true gender, based upon psychological and medical testing, is male." He had changed his name and gender marker on his driver's license and Social Security card, leaving his birth certificate as "the only significant life document that remains to be changed."

On March 26, 2013, the appellant, via a petition, asked the Tippecanoe Circuit Court for a change of gender "so that his birth record 'may be more congruent with his appearance and social role.'" Later appearing pro se at an uncontested hearing, he presented evidence from his doctors and a letter from the Indiana State Department of Health stating their need for a court order "to change the gender on a birth record for a person who has gone through Gender Reassignment Surgery."

However, the Circuit judge, Donald L. Daniel, denied the petition in an order dated February 14, 2014, believing that the court did not have authority to grant the request because the Indiana General Assembly had not yet spoken on the issue. The appellant filed an uncontested appeal,

relying upon Indiana Code § 16-37-2-10(b), which provides that "[t]he state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence," as well as the inherent equitable authority of Indiana courts, as sources of legal authority the trial court overlooked.

Judge Friedlander and his colleagues wholeheartedly agreed with the appellant, writing: "I.C. § 16-37-2-10 provides general authority for the amendment of birth certificates,

identifying documents conform to his current physical and social identity is apparent."

Judge Friedlander closed by remanding the case to the trial court to grant the appellant's petition and issue an order directing the Indiana State Department of Health to amend the birth certificate to reflect the appellant's male gender.

Jon Laramore and Harmony A. Mappes of Faegre Baker Daniels LLP in Indianapolis represented the appellant on appeal. – *Matthew Skinner*

"In light of this statute, as well as the inherent equity power of a court of general jurisdiction, we conclude that the trial court had authority to grant the petition at hand."

without any express limitation (in the statute or elsewhere) regarding gender amendments. In light of this statute, as well as the inherent equity power of a court of general jurisdiction, we conclude that the trial court had authority to grant the petition at hand."

He also addressed the trial court's concerns about the lack of guidance in the current statutory scheme about what is required to support such a petition. "The legislature is free to craft specific requirements. Without such guidance, however, it is our view that the ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose." With that in mind, he concluded that "[t]here can be no question in this case that Appellant made an adequate showing in support of his petition. He presented ample medical evidence regarding his gender transition, which culminated in sex reassignment surgery. Moreover, Appellant's genuine desire to have all

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

[Editor's Note: Subsequent to this ruling, Allen County Judge Thomas Felts granted an application by a transgender man, Patrick Ren Ray, to change his birth certificate, as the certificate designates him as female and he wanted to marry a woman, according to the *Journal Gazette* in Fort Wayne (Dec. 18). However, by the time the court got around to ruling, Ray had called off the engagement, and the 7th Circuit's marriage equality decision had removed any gender-based impediment to his marriage in any event. Judge Felts had initially allowed a name change but not a change on the birth certificate in the absence of statutory authorization to make such a change, but then granted the certificate change in light of the new appellate ruling.]

Appellate Court of Illinois Recognizes Unjust Enrichment Cause of Action on Behalf Same-Sex Former Domestic Partner

The Appellate Court of Illinois ruled in *Blumenthal v. Brewer*, 2014 IL App (1st) 132250, 2014 Ill. App. LEXIS 904 (Dec. 19, 2014), that a state court judge who is the former same-sex partner of a physician can maintain a legal claim on the theory of unjust enrichment to seek compensation for her financial contributions towards the home they shared and the physician's professional practice. The court found that legislative and common law developments since 1979 had rendered the Illinois Supreme Court's leading decision against lawsuits between former unmarried partners, *Hewitt v. Hewitt*, 394 N.E.2d 1204, obsolete.

Jane Blumenthal and Eileen Brewer

a partition action in 2010, seeking to divide the value of the house the women had purchased together to reclaim her share. Brewer counterclaimed, seeking sole title to the property to "equalize" the parties' assets, as she had been a stay-at-home mom for their kids until they were old enough for her to resume her legal career. Blumenthal's medical partnership had been purchased with joint funds, and Brewer had carried the financial burden of the house since Blumenthal had moved out. Blumenthal argued that under *Hewitt v. Hewitt* Brewer could not maintain such a counterclaim, and Cook County Circuit Judge LeRoy K. Martin agreed, dismissing her claim. Brewer, represented by the National Center for

court agreed in an opinion by Justice Margaret Stanton McBride. The judge prefaced a detailed discussion of the historical evidence by stating: "We find that the public policy to treat unmarried partnerships as illicit no longer exists, that Brewer's suit is not an attempt to retroactively create a marriage, and that allowing her to proceed with her claims against her former domestic partner does not conflict with this jurisdiction's abolishment of common law marriage."

In addition to agreeing that changes in the law had rendered *Hewitt* obsolete, the court pointed out that the decision "may have had unintended consequences. The court acknowledged its intention to enforce legislative policies that intentionally penalized unmarried couples and their children as a means of discouraging cohabitation and encouraging marriage," wrote McBride. "The ruling, however, may have the contrary effect – refusing to hear claims between unmarried cohabitants creates an incentive for some to not marry. A cohabitant who by happenstance or design takes possession or title to jointly-acquired assets is able to retain them without consequence when their 'financially vulnerable' counterpart is turned away by the courts." She found support for this argument in a law review article by Candace Saari Kovacic-Fleischer, "Cohabitation and the Restatement (Third) of Restitution and Unjust Enrichment," 68 Wash. & Lee L. Rev. 1407, 1424 (2011), from which she quoted at length.

"After having reviewed the legislation that was enacted during the years that Brewer and Blumenthal were together, buying a house, having children, dividing up their domestic responsibilities and pursuing their legal and medical careers, we conclude that although Brewer and Blumenthal were not legally entitled to marry in this jurisdiction, the legislature no longer disfavors their 26-year cohabitation or Brewer's claims against Blumenthal," wrote Justice McBride. "Furthermore, Brewer does not allege an agreement with Blumenthal based on

The court found that legislative and common law developments since 1979 had rendered the Illinois Supreme Court's leading decision obsolete.

met and became domestic partners in 1981 or 1982 when they were both graduate students at the University of Chicago. Their partnership ended in 2008, after they had raised three children together. By then, Blumenthal was a doctor in a lucrative partnership practice, and Brewer was an elected Illinois Superior Court judge. They had merged their finances during their partnership, and had registered as domestic partners when that option became available in Cook County in 2003. They had cross-adopted each other's children. They had purchased real estate together, and Blumenthal had used joint funds to buy into the medical partnership. After Blumenthal moved out, Brewer assumed the continuing financial responsibilities of the house. The children are now all grown up and emancipated adults. Blumenthal filed

Lesbian Rights (NCLR) and Chicago Attorney Angelika Kuehn, appealed with amicus support from the ACLU of Illinois and Lambda Legal.

When the Illinois Supreme Court decided *Hewitt*, there were strong legislative policies in effect supporting that court's view that such a lawsuit could not be brought by an unmarried cohabitant, including a statute criminalizing unmarried cohabitation, the state's statute abolishing the doctrine of common law marriage in Illinois, and court decisions disfavoring child custody for parents who were cohabiting outside of marriage. Brewer argued successfully to the appellate court that the legislative and judicial landscape in Illinois had changed so drastically since 1979 that *Hewitt* no longer represented an accurate view of how Illinois law should treat such a claim today, and the

illicit consideration of sex, which was the primary historical rationale for rejecting cohabitation agreements. Instead, Brewer, who never had the option of marrying Blumenthal in Illinois, alleged that the couple intentionally comingled and shared their assets based on a mutual commitment and expectation of a lifelong relationship, that they divided their domestic and work responsibilities to best provide for the three children they had together, and that neither partner intended for their decisions and family roles to leave Brewer at a financial disadvantage later in life.” The court also noted, of course, that after the couple split up, Illinois passed first a civil union law and then a marriage equality law, further confirming the view that Illinois does not consider same-sex relationships to be “illicit” in the sense that term was used by the Illinois Supreme Court in *Hewitt*.

The court also noted that its decision was in line with developments in other states, including the leading California case of *Marvin v. Marvin*, the nation’s most celebrated “palimony” case, the revision of the common law summary in the Restatement (Third) of Restitution and Unjust Enrichment, and the changed view embraced in Corbin’s Contracts treatise, which identified the *Marvin* decision as having decisively influenced courts in other states to become receptive to palimony claims. The Illinois Supreme Court had relied on previous editions of these two published sources in *Hewitt*.

McBride concluded that in light of the court’s determination that *Hewitt* no longer controlled the outcome, it was unnecessary for it to address Brewer’s argument that a contrary decision would violate the Illinois and federal constitutional guarantees of due process and equal protection of the laws. The court vacated the circuit court’s dismissal order and remanded the case “with directions to consider the parties’ remaining arguments,” as to which the court expressed no opinion. As part of her opposition to Brewer’s counterclaim, Blumenthal had contested some of Brewer’s factual assertions, but the trial court had not resolved that dispute when it determined that the counterclaim had to be dismissed as a matter of law. ■

Federal Court Orders Trial on Transgender Inmate’s Equal Protection Claim in Transfer to Dangerous Cell Block

Applying “heightened scrutiny,” United States District Judge William M. Conley allowed pro se transgender plaintiff Roy Mitchell to proceed to trial on equal protection claims regarding her safety in *Mitchell v. Sheriff*, 2014 U.S. Dist. LEXIS 171561, 2014 WL 6982280 (W.D. Wisc., December 10, 2014). Judge Conley had earlier permitted Mitchell to proceed through discovery on claims of harassment by multiple officers, but he granted all but one summary judgment before trial.

Judge Conley’s “heightened scrutiny” relied on *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2012) (and collected cases), requiring: (1) intentionally different treatment from others similarly situated; and (2) a substantial relationship between this difference and a sufficiently important government interest. He also cited the Seventh Circuit’s ruling in *Nabozny v. Podlesny*, 92 F.3d 446, 453-54 (7th Cir. 1996) (equal protection violation implies that “a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group”).

Judge Conley dismissed claims against a number of officers because they did not meet the standard that discrimination be based on Mitchell’s transgender status, including verbal abuse, because: “Even if true, verbal harassment, even mocking her transgender status, does not violate the Constitution in and of itself,” citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). He allowed an equal protection claim to be tried against one officer, Sergeant Carl Koehler, who called Mitchell a “hermaphrodite,” because there was a jury question as to whether this officer (Sergeant Carl Koehler) knowingly transferred Mitchell from a safe cell block back to a pod where she had been taunted and threatened because of her transgender status.

Interestingly, Judge Conley uses equal protection, not protection from harm theory under *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), in shaping the triable issue, noting the “low threshold” of harm needed to sustain an equal protection claim, compared to an Eighth Amendment claim. The conduct was potentially actionable, because a jury could infer state of mind for discriminatory intent from the slur, followed by discriminatory conduct – even though the slur itself was not a constitutional tort – because the “trier of fact might reasonably infer that Mitchell was treated differently from other similarly-situated prisoners.” Nominal damages would suffice to maintain the action under *Carey v. Piphus*, 435 U.S. 247 (1978). “Intentionally placing an inmate in a situation where she will be taunted or threatened for her transgender status, despite evidence suggesting the defendant knew there to be a better placement readily available, would seem sufficient to prove an equal protection violation, at least where the decision bears no relation to a sufficiently important government interest.”

Judge Conley denied injunctive relief because Mitchell is no longer at the jail and the pertinent events occurred in 2006. He also stayed proceedings pending appointment of trial counsel. Finally, Judge Conley granted defendants summary judgment on the excessive force claim (handcuffing “too tight” during cell extraction) under *Whitley v. Albers*, 475 U.S. 312, 320 (1986), because Mitchell failed to establish: (1) who cuffed her; and (2) that the force was applied “maliciously and sadistically for the very purpose of causing harm.”

The opinion includes lengthy discussion of whether the slur was actionable defamation under state law, including “per se slander,” truth as a defense, and special damages. Mitchell ultimately lost to summary judgment on this point. – William J. Rold

District Court Rejects Same-Sex Class Action Claim on California Public Employee Benefits Plan

The U.S. District Court for the Northern District of California has granted summary judgment to the U.S. Department of Treasury and the Board of Administration of California Public Employees' Retirement System in a class action suit brought against them by same-sex couples challenging a provision of the Health Insurance Portability and Accountability Act (HIPAA) and its impact on California's Public Employees' Long-Term Care Act. *Dragovich v. United States Dep't of the Treasury*, 2014 U.S. Dist. LEXIS 168539, 2014 WL 6844926 (Dec. 4, 2014).

Congress enacted the HIPAA in 1996. It provides favorable federal tax treatment to participants in qualified state-maintained long-term care insurance plans for state employees. The qualifying relatives whom a taxpayer may claim as a dependent was established by referencing an already-existing section of the tax code. Congress incorporated many qualifying relatives (including spouses) from that list, but omitted a person who was "an individual... who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household." Therefore, in California at that time, couples where one partner was a state employee and who were in domestic partnerships but who were not married were not eligible to qualify under the HIPAA benefits.

Prior to the Supreme Court's decisions in *United States v. Windsor* and *Hollingsworth v. Perry* upholding same-sex marriages in California and finding unconstitutional the Defense of Marriage Act, individuals who had been in same-sex domestic partnerships and accordingly found to be ineligible for the HIPAA benefits brought a class-action lawsuit challenging this exclusion. While the case remained pending, in 2013, the California Legislature enacted the Public Employees' Long-Term Care Act to permit enrollment of members "and their spouses, domestic partners, parents, siblings, adult children, and spouses' parents... except as prohibited by the Internal Revenue Code, including but not limited to [the relevant HIPAA

provisions of the code which did not include domestic partners]."

After much procedural and appellate activity, judgments for certain claims and cross-claims were entered in 2013, and the remaining claims were considered by the District Court. Plaintiff's claims included an argument that the HIPAA provisions violated the Equal Protection Clause and violated Substantive Due Process. They also argued that the State's refusal to provide coverage by amending their own provisions to comply with the HIPAA provisions made them liable under federal Civil Rights laws. Plaintiffs sought to compel production of documents that would provide them with names and contact information of registered domestic partners who, if married, would be eligible for the benefits, arguing that there could be retired class members who moved to states that don't recognize same-sex marriage, or were unable to travel elsewhere to marry, or had become disabled and could no longer legally consent to marriage. Further, they moved for class notice to be sent to advise that same-sex spouses may apply for benefits but that same-sex registered domestic partners of members could not. Finally, Plaintiffs sought to supplement their claim and add a charge under Title VII. The Defendants filed cross-motions for summary judgment on all claims.

U.S. District Judge Claudia Wilken issued an order denying Plaintiffs' motions and granting Defendants' cross motions. With respect to Plaintiffs' request to compel production of documents, Judge Wilken held that the "unlikely potential benefit of the proposed discovery does not outweigh the burden associated with the discovery, particularly in light of the privacy rights that would be implicated by a mass mailing to all domestic-partner members." She declined to exercise discretion and allow Plaintiffs to supplement their complaint, but gave "no opinion regarding whether Plaintiff's proposed Title VII claim could be filed as a new complaint and whether it would be appropriate for class treatment."

With respect to Defendants' cross motions for summary judgment, she

ruled that the Plaintiffs' equal protection argument that the HIPAA provisions discriminate on the basis of sexual orientation could not stand "because same-sex couples can now get married in California and the federal government is no longer enforcing the DOMA, any couple may get married and then apply for [coverage]." With respect to the Substantive Due Process claim that the government "selectively burdens and penalizes the Plaintiffs' exercise of their right to family autonomy and decision making on the basis of sexual orientation, and in doing so demeans their lives and intimate decisions," Judge Wilken ruled that following *Perry*, "same-sex registered domestic partners can choose to marry, just as heterosexual registered domestic partners can."

Judge Wilken found that Plaintiffs' motion for class notice arguing that such notice "will permit class members the opportunity to, inter alia, intervene in the action, submit comments, and contact class counsel" could not stand, because "there are no fact-based remedies, such as disability accommodations, that require feedback from class members" and that there is no ongoing violation of federal law following *Windsor* and *Perry*.

Finally, Judge Wilken considered Plaintiffs' argument that the court should exercise "its equitable powers and to provide full relief to class members by placing them in the position they would have occupied absent the discriminatory conduct" by allowing class members to purchase insurance for the premiums they would have paid in the year they originally sought to enroll their same-sex partner. She noted that the Eleventh Amendment would only be invoked if there was an ongoing federal constitutional violation to justify prospective relief. Judge Wilken concluded that here she had already ruled that there was no such violation, and further noted that the grant of injunctive relief sought would require complicated individualized inquiries, and accordingly held the claim could not stand and granted summary judgment to Defendants. — *Bryan C. Johnson*

New York Appellate Division Finds Lesbian Birth Mother “Judicially Estopped” From Denying Former Partner’s Parental Status

A unanimous panel of the N.Y. Appellate Division, 2nd Department, ruled on December 24 that a birth mother who successfully sued her former same-sex partner for child support was “judicially estopped” from arguing that the partner lacked standing to seek visitation rights with the child. *Arriaga v. Dukoff*, 2014 WL 7332764.

Estrellita Arriaga and Jennifer Dukoff lived together in a romantic relationship beginning in December 2003 and registered as domestic partners in New York City in 2007. They decided to have a child together and Dukoff became pregnant with sperm from an anonymous donor, giving birth to their daughter in November 2008. The women shared parental responsibilities, but Arriaga never legally adopted the child. Their relationship ended in May 2012, and Arriaga moved out in September of that year, when the child was almost four years old. Arriaga continued to visit with the child several days a week.

In October 2012, Dukoff filed a petition in the Family Court seeking child support from Arriaga. In the petition, she described Arriaga as “a parent to the child” who was “chargeable with the support of the child.” While the support proceeding was pending, Arriaga filed her own lawsuit against Dukoff, seeking custody or visitation with the child. After the Family Court issued an order on January 16, 2013, requiring Arriaga to pay child support, she amended her petition, pointing out that the Family Court had adjudicated her as a parent of the child, and thus she was entitled to seek custody and/or visitation as an adjudicated parent. Dukoff moved to dismiss Arriaga’s petition, arguing that under the N.Y. Court of Appeals precedents of *Alison D. v. Virginia M.*, 77 N.Y.2d 651, and *Debra H. v. Janice R.*, 14 N.Y.3d 576, which had reaffirmed the *Alison D.* ruling, Arriaga was a “legal stranger” to the child who did not have standing under New York law to seek custody or visitation.

Suffolk County Family Court Judge Theresa Whelan denied Dukoff’s motion to dismiss, finding that the prior adjudication of Arriaga’s parental status in the child support proceeding was binding in this later proceeding under the doctrine of judicial estoppel. Once an issue has been adjudicated in favor of a party, judicial estoppel precludes that party from asserting a contrary view in a later proceeding. When it was in her financial interest for the court to consider Arriaga a mother with support responsibilities, Dukoff argued in favor of Arriaga’s parental status; she could not now turn around and deny that status when it was in her interest to do so in defending against a possible custody or visitation order.

The Appellate Division panel consisting of Justices Reynaldo E. Rivera, Sheri S. Roman, Colleen D. Duffy, and Betsy Barros issued a unanimous decision not attributed to any of the individual judges, which means it was most likely drafted by a court attorney and approved collectively by the panel. The decision affirms Judge Whelan’s order awarding visitation rights to Arriaga.

The court noted that in the *Debra H.* case, while reaffirming *Alison D.*, the Court of Appeals had found that a lesbian co-parent, who was a Vermont civil union partner of the birth mother at the time the child was born, would be recognized as a parent by a New York court as a matter of comity to Vermont law. In that case, the Court of Appeals found that recognizing *Debra H.* as a parent “did not conflict with the public policy of New York and would not ‘undermine the certainty that *Alison D.* promises biological and adoptive parents and their children,’ since ‘whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption. And both civil union and adoption require the biological or adoptive parent’s legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish *de facto* or

functional parentage.” In other words, the Appellate Division panel found that the concerns animating the *Alison D.* decision were “not implicated in the present case,” since the judge would not have to hold a hearing or make any sort of factual investigation to determine whether Arriaga should be deemed a parent, as that decision had already been made in the support proceeding. Furthermore, the court pointed out, that support award was made at the request of Dukoff, who “was the party who sought to have Arriaga adjudicated a parent.”

Although the Court of Appeals has rejected the use of “equitable estoppel” to find that a same-sex partner is a parent, the Appellate Division pointed out that this use of the doctrine of judicial estoppel “differs from establishing parentage by equitable estoppel.” Dukoff tried to argue that Arriaga should be precluded by judicial estoppel from asserting her parentage in this proceeding when she had taken the position in the support proceeding that her lack of parental rights under New York law precluded the court from requiring her to pay child support. The Appellate Division found that “the doctrine of judicial estoppel is not applicable to Arriaga because she did not obtain a favorable judgment in the support proceeding.” Only a party who has argued a point successfully in one proceeding is bound by that ruling in a subsequent proceeding under the doctrine of judicial estoppel.

During the course of this case, Arriaga dropped her request for custody, seeking only a visitation order, which Judge Whelan had granted. The Appellate Division affirmed that order.

Jeffrey Trachtman and Andrew Estes of Kramer Levin Naftalis & Frankel LLP (New York City) and Susan G. Mintz of Gervase & Mintz P.C. (Garden City) represented Arriaga, and Margaret Schaeffer of Huntington represented Dukoff. Robert C. Mitchell of Central Islip appeared as counsel representing the interests of the child. ■

MARRIAGE EQUALITY

MARRIAGE EQUALITY SCORECARD AS OF DECEMBER 31, 2014

At year's end, same-sex couples could marry either by court order, referendum, or legislative action in 35 states that are home to about 64% of the population of the United States, although in one of those states, Kansas, a recalcitrant state government was still fighting against full compliance, despite pro-marriage-equality circuit authority in the 10th Circuit. Same-sex couples could also marry in two counties and the city of St. Louis in Missouri, and the state was also required by a trial court order to recognize such marriages performed elsewhere, although an appeal of federal and state cases was pending before the 8th Circuit and the Missouri Supreme Court. The ban on same-sex marriage was imminently to be breached in Florida as a district court order was slated to go into effect at 5 pm on Monday, January 5, 2015, after the 11th Circuit and the Supreme Court refused to stay the Order, although a last-ditch effort by opponents of marriage equality (who probably lacked standing to sue) was filed in two Florida state courts on December 30 seeking to enjoin the Order from going into effect outside of Washington County. Marriage equality litigation was pending in Alabama, Georgia, Nebraska, and North and South Dakota, with argued and briefed summary judgment motions awaiting decision in some of those states and argument on a motion for a preliminary injunction scheduled in Nebraska for January 29. (There were multiple cases pending in several of these states.) Affirmative marriage equality decisions in Texas and Mississippi and an adverse decision in Louisiana were pending on appeal before the 5th Circuit Court of Appeals, where oral argument was scheduled for January 9. An appeal of an adverse ruling by the federal district court in Puerto Rico was pending on appeal in the 1st Circuit. The Florida marriage equality ruling was pending on appeal in the 11th Circuit. Federal and

state trial court pro-marriage equality rulings in Arkansas were pending on appeal before the Arkansas Supreme Court and the 8th Circuit Court of Appeals. Petitions for certiorari were pending in the U.S. Supreme Court from the 6th Circuit's adverse ruling affecting Ohio, Michigan, Kentucky and Tennessee and an adverse district court ruling in Louisiana; Ohio, Michigan, Kentucky and Louisiana had asked the Court to grant review, while Tennessee opposed review. The Supreme Court was scheduled to consider these petitions at its January 9 conference and was widely expected to grant review, although depending on timing, it was uncertain whether the case would be decided during 2015 or 2016.

1ST CIRCUIT COURT OF APPEALS

The 1st Circuit Court of Appeals issued a notice on December 16 setting a due date of January 26 for plaintiffs-appellants' briefs to be filed in *Lopez-Aviles v. Rius-Armendariz*, No. 14-2184, Lambda Legal's appeal of an adverse ruling on marriage equality by the U.S. District Court in Puerto Rico. Depending whether or when the U.S. Supreme Court grants one or more of the pending motions for certiorari seeking review of the 6th Circuit's ruling in *DeBoer* or the Louisiana District Court's ruling in *Robicheaux*, it is possible that this case will not be decided by the 1st Circuit, since the court would most likely put the case on hold if it appears that the Supreme Court will be addressing the issue of same-sex marriage on the merits before the end of its current term, and that a resulting marriage equality ruling by that court would allow the 1st Circuit to deal expeditiously with this appeal. If a cert grant comes too late for decision this term by the Supreme Court, the 1st Circuit might move forward if inclined to be bold. Of course, the most expeditious disposition of this case could be a determination by the assigned 1st Circuit panel that

in light of the Supreme Court's recent refusal to stay the Florida marriage equality ruling, there is no need for oral argument and the district court can be summary reversed and ordered to enter judgment and award injunction relief to the plaintiffs, but it is probably too much to expect such logical efficiency from a federal court of appeals that has not yet had cause to pronounce on the issues in this case.

4TH CIRCUIT COURT OF APPEALS

The 4th Circuit issued an order on December 15 consolidating appeals by North and South Carolina from district court marriage equality rulings in several cases. However, with petitions for certiorari pending before the U.S. Supreme Court seeking review of *DeBoer v. Snyder*, the court stated that "both cases are now in abeyance" and directed the parties to notify the court when the Supreme Court has issued its rulings on the petitions. Presumably the 4th Court would continue to hold these appeals in abeyance if the Supreme Court grants certiorari from the 6th Circuit ruling in *DeBoer*. Even if the Court refused to review *DeBoer* (or *Robicheaux* from Louisiana), the 4th Circuit might decide just to summarily affirm the district courts, in light of its prior ruling on the only contested issues in the case in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir., Va.), cert. denied (2014). Otherwise, oral argument before a three-judge panel, which would be bound by *Bostic*, would be a waste of everybody's time. Of course, the 4th Circuit might go to an *en banc* review if enough judges were interested, but given the current disposition of the circuit (2-1 Democratic appointees), that seems unlikely.

5TH CIRCUIT COURT OF APPEALS

A three-judge panel of the 5th Circuit U.S. Court of Appeals will hear oral argument on January 9

MARRIAGE EQUALITY

in cases from Texas, Louisiana and Mississippi challenging state bans on same-sex marriage. The 5th Circuit remains one of the most conservative in the country, with two-thirds of its judges being appointees of Republican presidents. The panel that will hear the argument consists of two judge appointed by Ronald Reagan (Patrick E. Higginbotham and Jerry Smith) and one by Barack Obama (James E. Graves, Jr.), reflecting the 2-1 Republican-Democrat balance of the full circuit bench. But it may turn out that the oral argument to be held that day will be rendered insignificant if the Supreme Court announces that afternoon or the following Monday that it is granting certiorari in one or more marriage equality cases, since a grant as early as January 9 would make it highly probable that the Supreme Court will decide a marriage equality case by the end of its term in June, which might lead the 5th Circuit panel to delay issuing a decision.

ARKANSAS – Arkansas Attorney General Dustin McDaniell filed a notice of appeal on December 23 with the U.S. District Court for the Eastern District of Arkansas, indicating that the defendants will appeal the U.S. District Court's November 25 marriage equality ruling in *Jernigan v. Crane* to the 8th Circuit Court of Appeals. It is entirely possible that this case will never be decided by the 8th Circuit, however. If the Supreme Court grants certiorari to review the 6th Circuit's decision in *DeBoer v. Snyder* in time for a decision by June 2015, it is likely that the 5th, 8th and 11th Circuits will refrain from deciding pending marriage equality appeals until the Supreme Court has ruled.

FLORIDA – After the Supreme Court announced that it would not stay the District Court's order in *Brenner v. Scott*, under which the District Court's own

stay would expire on January 5, 2015 at 5 pm, marriage equality opponents in Florida struggled to limit the effect of the ruling by arguing that the Order was binding only on the clerk in Washington County, the only official who actually issues marriage licenses who was named as a defendant in the case. The state's county clerk association obtained an opinion from its counsel at the firm of Greenberg Traurig stating as much, leading most of the county clerks in the state to tell reporters that they would not issue marriage licenses when the stay expired, for fear of being prosecuted under state statutes making it a crime to issue licenses to same-sex couples. Marriage equality proponents in the state sharply contradicted that legal opinion, and no prosecutors actually threatened to go after clerks for issuing marriage licenses. Meanwhile, the Washington County clerk expressed uncertainty whether the district court's Order required her to issue a license just to the plaintiff couple that had sued her, or to any same-sex couple that applied. She sought clarification from District Judge Robert Hinkle, who ordered all parties to file responses with him by December 29. Attorney General Pam Bondi, representing the state defendants, argued in a response written by her solicitor general that technically only the Washington County clerk was bound under a strict interpretation of the language used by Judge Hinkle in his Order, but, she wrote, "This Court is best situated to determine the reach of its own order." She suggested that if the court meant the order to apply to all clerks statewide, "the Court may wish to provide appropriate clarification." In her papers seeking a stay from the 11th Circuit and the Supreme Court, Bondi had been careful not to concede that the Order would have statewide effect at the level of the clerks, although it clearly has statewide effect at the level of state officials. Bondi argued that under Florida law a county clerk is "an independent constitutional officer,"

and thus would not be considered a subordinate to or agent of state officials in performing such functions as issuing marriage licenses. Judge Hinkle ruled on January 1, making it clear that all clerks were constitutionally required to issue licenses to qualified applicants. His words are worth quoting at length:

"History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law. Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. There should be no debate, however, on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees. The Clerk has acknowledged that the preliminary injunction requires her to issue a marriage license to the two unmarried plaintiffs. The Clerk has said she will do so. In the absence of any request by any other plaintiff for a license, and in the absence of a certified class, no plaintiff now in this case has standing to seek a preliminary injunction requiring the Clerk to issue other licenses. The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction."

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FLORIDA – At the request of Orange County Clerk Tiffany Moore Russell for guidance from Florida Circuit Court Judge Timothy R. Shea, Judge Shea issued an order on December 31 granting Russell’s “Emergency Petition for Declaratory Judgment.” Characterizing Judge Hinkle’s rulings in *Brenner v. Scott* as “an excellent, well-thought-out, legally sound decision that controls the law in the state of Florida,” he declared that Russell could rely upon it “and in so doing issue a same-sex marriage license commencing on the expiration of the temporary stay issued by Judge Hinkle in *Brenner* (January 6, 2014).” (In his haste to get the ruling out, Judge Shea didn’t notice that the year should be 2015, but he’s not the first person who will mistakenly write 2014 on documents after the clock strikes the New Year.) He declared that Moore would not be violating any Florida laws by doing so, and “would not be engaging in any element sufficient to justify a conclusion that there was any intent to engage in any criminal act nor was there any violation of any oath of office.” He wrote that his Order would be in effect unless it was modified “by a subsequent ruling from the Federal District Court in the *Brenner* case or subsequently modified by a court of competent jurisdiction.” * * * Florida media reported on December 31 that clerks in Duval, Clay and Baker Counties had decided to avoid having to confront the question of performing same-sex marriages by ending the long-standing tradition of courthouse weddings in their counties – for anybody. While the clerks’ offices may be required to issue licenses to same-sex couples, those seeking to conduct marriages of any kind will have to seek other facilities beginning January 1, 2015. *Savannahnow.com*

KANSAS – On December 2, the 10th Circuit rejected a petition by Kansas for direct *en banc* review of the district

court’s ruling in *Marie v. Moser*, 2014 WL 5598128 (Nov. 4, 2014), that the Kansas same-sex marriage ban probably violates the 14th Amendment. (This was a ruling on a motion for preliminary injunction.) The 10th Circuit provided no explanation, other than that “no judge in regular active service on the Court requested that the Court be polled on the motion,” so it died for lack of enthusiasm by the judges. After all, they were probably happy to let the three-judge panel take any guff that comes with a marriage equality decision, and this was, after all, just an interlocutory appeal from a preliminary injunction that directly applies to just a few counties. * * * After plaintiffs in *Marie v. Moser* filed an amended complaint asking the U.S. District Court to expand the reach of relief in the case by adding more state officials as co-defendants, the Westboro Baptist Church renewed its previously-rejected motion to intercede as a defendant, again arguing that its participation was necessary because state officials would not make all the arguments in defense of banning same-sex marriage that Westboro would make. Westboro is desperately striving to save the state of Kansas from eternal damnation, which will likely ensue of same-sex marriage takes hold throughout the state. District Judge Daniel D. Crabtree did not find Westboro’s arguments any more convincing the second time around. In an opinion issued on December 18 in *Marie v. Moser*, 2014 U.S. Dist. LEXIS 174757, he again rejected Westboro’s arguments, commenting that “WBC’s argument for intervention as a matter of right does not rely on the issues at stake in the current litigation. Instead, their arguments focus on issue that might be at stake if same-sex couples continue to litigate civil rights claims based on sexual orientation.” Westboro claimed that if plaintiffs prevailed in their same-sex marriage claims, they would eventually “include claims that the

government should require all churches to marry them upon demand” and that Westboro had to intervene to protect its interest against such compulsion. This argument is, of course, absurd, as no court could order any church to perform any marriage to which it objected on theological grounds – at least as long as the Free Exercise Clause of the 1st Amendment is in effect. No gay rights litigant has ever argued to the contrary. “Based on the case’s current state,” wrote Crabtree, “the Court finds that existing defendants who seek to uphold Kansas same-sex marriage and recognition bans adequately represent WBC’s interest on the issues currently before the court.” * * * On December 31, Judge Crabtree directed attorneys in *Moser* to narrow their factual disputes and propose a schedule at the end of January for him to hear the remaining legal issues so that he could issue a final ruling on the merits, according to an Associated Press report relayed by KSN.com.

MISSISSIPPI – In *Campaign for Southern Equality v. Bryant*, 2014 U.S. Dist. LEXIS 165913 2014 WL 6680570 (S.D. Miss., Nov. 25, 2014), U.S. District Judge Carlton W. Reeves found the state’s ban on same-sex marriage unconstitutional, but temporarily stayed his decision to give the state a chance to ask the 5th Circuit for a longer stay pending appeal. The 5th Circuit granted the state’s motion on December 4, and as both parties agreed to expedite things, the 5th Circuit added this case to those being argued on January 9, 2015, although it denied a request to consolidate the cases. Roberta Kaplan of New York, who was counsel to Edith Windsor in *U.S. v. Windsor*, leads the litigation team, and will be confronting a 2-1 Republican appointee conservative panel at the Court of Appeals, the same panel that will hear appeals from Texas and Louisiana.

MARRIAGE / CIVIL LITIGATION

MISSOURI – On December 10, the plaintiffs in *Lawson v. Missouri* and *Lawson v. Kelly*, marriage equality cases pending before the U.S. Court of Appeals for the 8th Circuit, filed a motion to vacate a stay which at present confines the issuance of same-sex marriage licenses in Missouri to two counties and the City of St. Louis. On December 20, Anthony E. Rothert, an attorney for the plaintiffs, wrote the court to supplement the motion, pointing out that the Supreme Court had just refused to extend a temporary stay in *Armstrong v. Brenner*, Florida Attorney General Pam Bondi's motion seeking such relief in a Florida marriage equality ruling pending on appeal before the 11th Circuit. Wrote Rothert, "This denial is relevant because, in the case before this Court, the district court believed that the Supreme Court's previous denials of stays in cases like this one were inapposite because the decisions of which stays were sought were by district courts located in circuits where the court of appeals had already issued a decision. The Supreme Court's denial of a stay requested by the State of an order granting interlocutory relief indicates that a stay of the final judgment in this case, where no stay has been requested, is no longer appropriate." In effect, plaintiffs are arguing that any new district court pro-marriage-equality decision by district courts in the 5th, 8th or 11th Circuits should not be stayed, inasmuch as the Supreme Court did not believe that a stay was warranted in the Florida case. * * * The *Kansas City Star* (Dec. 9) reported that Jackson County Circuit Judge J. Dale Youngs had rejected a motion by state legislators to intervene and oppose his earlier marriage equality ruling in *Barrier v. Vasterling*, 2014 WL 5469888 (Mo. Cir., amended Oct. 27, 2014), stating that they had applied too late as the case was already on appeal. Kansas City officials had refused to defy Judge Youngs' order, instead allowing same-sex couples to obtain marriages,

infuriating state legislators who were opposed. The city's Law Department actually filed papers opposing the legislators' attempt to intervene and appeal the case to the state Supreme Court. The newspaper speculated that the judge's ruling would open the way for the Kansas City Council to move on a proposal to amend the city's pension plans to apply to same-sex marriages.

NEBRASKA – Senior District Judge Joseph F. Bataillon of the U.S. District Court in Nebraska, an appointee of President Bill Clinton, will hear oral arguments on January 29 on the plaintiffs' motion for a preliminary injunction in *Waters v. Heineman*, a marriage equality suit filed in November 2014 by the ACLU of Nebraska, the law firm of Koenig Dunne, and the national ACLU LGBT Rights Project. The plaintiffs are seven same-sex couples, some of whom want to marry and other who seek recognition of their out-of-state marriages. * * * During December, an additional couple, Harold Wilson and Gracy Sedlak, filed a request to join as co-plaintiffs. Wilson is serving a long prison sentence, having been convicted of attempted first-degree murder, attempted first-degree sexual assault, and attempted kidnapping and robbery; Sedlak, a transgender woman now undergoing hormone treatment, was released from prison on parole in 2012, after serving a five-year term for theft and burglary. They were denied a marriage license by the Lancaster County Clerk, and their own lawsuit filed in April 2013 was dismissed by U.S. District Judge Richard Kopf in November. The ACLU is opposing their intervention motion, arguing that it introduces additional issues that would slow down the case and that the current set of plaintiffs are adequately representing the interests of Wilson and Sedlak, who would be entitled to a marriage license if plaintiffs prevail in establishing that Nebraska may not limit

marriages to different-sex couples. In a marriage equality jurisdiction, where the gender of the parties is irrelevant to their qualifications for marriage, transgender people can marry with no need for any legal determination of their gender status. *Omaha World-Herald*, Dec. 31.

CIVIL LITIGATION NOTES

SUPREME COURT – Liberty Counsel has filed a petition for certiorari in the Supreme Court, seeking review of the 3rd Circuit's ruling rejecting a constitutional challenge to New Jersey's statute banning sexual orientation change efforts (SOCE), also known as conversion therapy, for minors. *King v. Governor of New Jersey*, 767 F.2d 216 (3rd Cir. 2014), affirming 981 F.Supp.2d 296. The court of appeals, affirming a district court decision, had ruled that the statute fell within the state's traditional regulatory power over health care practice, and that the legislature's fact findings supported a legitimate state interest in banning the procedure, despite any incidental effect the ban had on free speech rights of practitioners. The cert petition seems a stab in the dark, since there is no circuit split on the issue, the 9th Circuit having reached a similar conclusion, albeit through somewhat different reasoning, in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), cert. denied, 134 S. Ct. 2881 (2014), and the Supreme Court refused to review that case.

1ST CIRCUIT COURT OF APPEALS

– In *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), U.S. District Judge Michael Ponsor refused to dismiss a lawsuit by a gay rights organization from Uganda against Rev. Scott Lively, a Springfield, Massachusetts, minister who is alleged to have promoted

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repression of gay people in Uganda by urging and supporting the passage of virulently anti-gay legislation there. Lively sought a writ of mandamus from the 1st Circuit to order the district court to dismiss the case, but on December 5 the 1st Circuit denied his request, while acknowledging that his petition “raises a number of potentially difficult issues” under the Alien Tort Statute and the First Amendment. “Although it is debatable whether the district court has properly parsed the petitioner’s protected speech from any unprotected speech or conduct,” wrote the court, “his right to extraordinary relief is not clear and indisputable. Further development of the facts will aid in the ultimate disposition of the case.” Lively is represented by the anti-gay organization Liberty Counsel, which argues that the case is “frivolous” and an attempt to “subvert the U.S. Constitution and replace it with international law.” The plaintiffs are represented by the Center for Constitutional Rights, which disputes Lively’s contention that his activities were limited to protected advocacy under the 1st Amendment. *National Law Journal*, Dec. 5.

NEW YORK – The 2nd Circuit Court of Appeals issued a summary order in *Roe v. Empire Blue Cross Blue Shield*, 14-1759-cv (unpublished opinion, Dec. 23, 2014), upholding a ruling by the U.S. District Court for the Southern District of New York finding that an employee benefit plan’s exclusion of same-sex spouses and domestic partners did not violate the federal Employee Retirement Income Security Act (ERISA), a federal law regulating employee benefit plans. The case arose when the Jane Doe plaintiff sought to add her same-sex spouse as a covered dependent for a health plan sponsored by her employer, St. Joseph’s Medical Center, and administered by Empire Blue Cross Blue Shield. The plan

document expressly excludes coverage for same-sex partners of employees. Doe alleged that this violate her rights under Section 510 of ERISA, and constituted a breach of fiduciary duty by the plan administrators under Section 404. The district court granted the defendants’ motion to dismiss. The unpublished Order stated: “Plaintiffs have failed to adequately allege any right to which they are entitled or may become entitled under the plan at issue with respect to which defendants discriminated against them or with which defendants otherwise interfered.” The problem, evidently, is that it is up to the plan sponsor to determine the terms of an employee benefit plan unilaterally, in the absence of a union representing the employees, and the employer is not considered a fiduciary under ERISA when acting as the framer of an employee benefits plan. The non-discrimination provisions of ERISA concern discriminatory acts in interpreting or applying the plan as written, and the fiduciary duties imposed on employers and administrators extend to the same actions, not the action of devising the plan in the first place. Although there are certain anti-discrimination provisions governing the substance of plans, they have to do with discrimination in favor of highly-compensated employees. In the absence of a federal statute expressly prohibiting employment discrimination against same-sex couples in terms and conditions of employment, ERISA preemption prevents the court from applying state non-discrimination law. (ERISA applies to private sector employers. In New York, public employers are bound by the state’s anti-discrimination and marriage equality laws to treat married same-sex spouses the same as married different-sex spouses under their employee benefits plans.) Finding no basis for an ERISA claim, the court didn’t have to address any argument St. Joseph’s might make for a religious exemption.

7TH CIRCUIT COURT OF APPEALS –

The Diocese of Fort-Wayne-South Bend, Inc., jumped the gun in asking the 7th Circuit to overrule the district court’s denial of its summary judgment motion in *Herx v. Diocese*, 2014 WL 6734843 (Dec. 1, 2014), since the question whether Title VII religious exemptions or the Religious Freedom Restoration Act applied to protect the defendant from Title VII liability for sex discrimination could be considered upon appeal from a final ruling on the merits. Plaintiff Herx was discharged as a language-arts teacher at a Diocese school because she became pregnant through in vitro fertilization, a procedure considered immoral by the Catholic Church. She and her husband could not otherwise conceive a child. She sued under Title VII’s Pregnancy Discrimination Act and the Americans with Disabilities Act. The district court granted the defendants’ motion for summary judgment on the ADA claim, but denied as to the Title VII claim, finding that a jury could conclude upon trial that Herx was a victim of sex discrimination if it was shown that male employees who resorted to in vitro fertilization would not be dismissed, and that the statutory and constitutional defense claims raised by the defendant were not applicable to the case because Herx’s duties were wholly secular. This case presents a question of first impression in the 7th Circuit: Whether Title VII’s religious exemption extends beyond religious discrimination claims to encompass claims of discrimination based on other forbidden grounds under Title VII, such as sex, a question that becomes of particular interest to LGBT people as the Justice Department, the EEOC and the courts have moved to recognize gender identity discrimination claims under Title VII and efforts pick up to add bans on sexual orientation discrimination to federal law. Outside of the realm of the ministerial exemption, which the district court thought inapplicable because Herx was not employed as a teacher of

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religion, there is an open question, not yet resolved by the Supreme Court or the 7th Circuit, about how far the statutory exemption extends. In this case, the defendant did not ask the district court to certify the question, instead appealing directly, claiming that being forced to go through a trial would unduly compromise its rights under these exemptions and the Constitution. The 7th Circuit was not persuaded, agreeing with Herx's argument that this was not the sort of unusual case in which the defendant should not be required to go through a trial before getting appellate review of the district court's ruling if it lost at trial. Wrote Judge Diane S. Sykes for the court, "The district court has not ordered a religious question submitted to the jury for decision. To the contrary, the judge promised to instruct the jury not to weigh or evaluate the Church's doctrine regarding in vitro fertilization. The judge would do well to be quite explicit in these instructions. The pattern jury instructions can be adapted to the particular facts of a given case, and in light of the sensitive context here, this case is an appropriate one for customized instructions."

9TH CIRCUIT COURT OF APPEALS

– In a brief memorandum that recites none of the relevant factual allegations by the pro se petitioner, a gay man from Russia, the U.S. Court of Appeals for the 9th Circuit granted a petition for review of the Board of Immigration Appeals' order dismissing Peter Kanin's application for asylum and withholding of removal. *Kanin v. Holder*, 2014 U.S. App. LEXIS 22357 (Nov. 26, 2014). Kanin, whose Russian name is reported as Petr Aleks Kanin, did not dispute the denial of his claim under the Convention against Torture. The court said that "substantial evidence does not support the agency's determination that Kanin failed to establish that the harm he suffered in Russia as a result of his sexual orientation rose to the

level of persecution. Accordingly, we grant the petition and remand Kanin's asylum and withholding of removal claims to allow the BIA to determine whether he is entitled to a presumption of future fear in the first instance. In light of this disposition," concluded the court, "we need not reach the issue of whether Kanin had an objectively reasonable fear of future persecution." Although Kanin was able to win a new hearing representing himself, he would be well advised to obtain competent representation to ensure a positive outcome on the reconsideration of his claim.

CALIFORNIA – U.S. Magistrate Judge Dale A. Drozd has recommended granting a motion by Governor Jerry Brown and Attorney General Kamala Harris to dismiss a lawsuit by a citizen who claimed that it was a violation of the equal protection clause for Brown and Harris to fail to defend Proposition 8 on the merits in *Perry v. Schwarzenegger* and *In re Marriage Cases*. *Wooten v. Brown*, 2014 U.S. Dist. LEXIS 171090, 2014 WL 6982245 (E.D. Cal., Dec. 10, 2014). Wooten alleged in his complaint that allowing same-sex marriage is a "violation of the constitutional proscription against licentiousness" and that the state violated its own constitution when Brown was allowed to run for a third term. (He had served two terms several decades ago, before pursuing other pastimes and offices – including Mayor of Oakland and Attorney General of California – before running anew successfully for Governor.) Wooten also alleged that it was illegal for the U.S. District Court to have conducted a trial on Proposition 8, and asked the court to make "a determination on the meaning and intent of the sponsors of the Fourteenth Amendment." Wooten filed his complaint in state court and it was removed to federal court by defendants, who then moved to dismiss it under Rule 12(b)(1) for lack of

jurisdiction. Magistrate Drozd agreed with defendants that they were immune from suit on these claims, and that the 11th Amendment barred suit against the state of California on these claims. He also found that "in light of the nature of plaintiff's allegations and the clear lack of subject matter jurisdiction over plaintiff's claims, the undersigned finds that granting leave to amend would be futile." He advised Wooten that he can file objections to the recommendation to dismiss, which will be submitted to District Judge Morrison C. England, Jr., together with Drozd's Order and Findings and Recommendations. Needless to say, Wooten proceeds *pro se*. It is unlikely that anybody who did well enough on the California bar exam to be admitted to practice in the state could or would have filed such a complaint. . .

FLORIDA – The 3rd District Court of Appeals, finding that there was nothing for it to decide, dismissed a lesbian couple's appeal of the Miami-Dade Circuit's Court's sua sponte dismissal of their divorce case in *Oliver v. Stufflebeam*, 2014 Fla. App. LEXIS 20831, 2014 WL 7331241 (Dec. 24, 2014). Perhaps this ruling means little in light of the U.S. Supreme Court's denial of a stay in the Florida marriage equality decision, since one presumes that Sarah Oliver can file a new divorce petition on or after January 6, 2015, at which time the circuit court will be bound to recognize her Iowa marriage to Heather Stufflebeam for purposes of granting a divorce. However, Circuit Judge George A. Sarduy dismissed the divorce petition with prejudice on July 12, 2012, citing Fla. Stat. Sec. 741.212, which provides that marriages between persons of the same sex are not recognized in Florida "for any purpose." Stufflebeam had not opposed the divorce petition on this ground, as she also wanted the marriage to be dissolved. The parties did not challenge the constitutionality

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of Sec. 741.212, instead arguing that it could be construed to allow recognition of their marriage for the limited purpose of granting a divorce. Oliver appealed Judge Sarduy's dismissal, and Stufflebeam supported her appeal. This, apparently, doomed the case in the eyes of the court of appeal panel. Chief Judge Shepherd wrote for the court, "It is quite apparent on the face of the record in this case that there is no controversy over the point on appeal between these parties. For this reason, we affirm the dismissal of this case in that the petition for dissolution of marriage lacks a case or controversy requiring the expenditure of judicial labor." Well, yes, but not for the reason stated; there is no need for the court to expend its labor on this controversy because the statute has been held invalid in several other proceedings, with some appeals pending in the Florida court and an appeal on the underlying same-sex marriage ban pending in the U.S. Court of Appeals for the 11th Circuit, a panel of which refused to stay the trial judge's decision striking down the ban. In a helpful bit of dicta, Judge Shepherd pointed out that if Oliver and Stufflebeam are really desperate to get unhitched, they could file an action for an annulment, under which a Florida court could rule that their marriage doesn't exist. Of course, there might be questions about the effect of that should either or both relocate to a state that recognizes their Iowa marriage and doesn't recognize the Florida annulment. Quite a mess, actually, and quite clear that the July 2012 dismissal, almost a year prior to the Supreme Court's ruling in *U.S. v. Windsor*, would likely have been decided differently today.

FLORIDA – In a contrary ruling to the above, Broward Circuit Judge Dale C. Cohen issued an order December 8 in *Brassner v. Lade*, Case No. 13-012058(37), declaring the marriage ban unconstitutional and ultimately

dissolving the 2002 Vermont civil union of Heather Brassner and Megan E. Lade. Brassner sought to end it, having long since split up with Lade, because she wants to marry her current same-sex partner. Brassner has been a Florida resident for fourteen years, and has long since lost touch with Lade, who could not be located for purposes of this proceeding. Judge Cohen had ruled in favor of Brassner on August 4, but then revoked his ruling when the state protested that it had not been informed of the pendency of a proceeding that placed in question the constitutionality of the state's marriage ban. Upon entering the case, the state argued that the court could not recognize a Florida civil union for purposes of granting a dissolution. Brassner cited the Massachusetts Supreme Judicial Court's 2012 ruling, *Elia-Warnken v. Elia*, 463 Mass. 29, in which that court said that a Massachusetts court could recognize a Vermont civil union as equivalent to marriage for the purpose of granting a dissolution sought by a Massachusetts resident, even though Massachusetts law, as such, did not provide for civil unions. The state argued that no Florida court had issued a similar ruling equating civil unions and marriage, but Cohen, pointing out that the State was merely "stating the obvious," commented that "no appellate court has ruled that a civil union is not the equivalent of a marriage, rendering this issue one of first impression," and analogizing the situation concerning common law marriages. Florida abolished common law marriages in 1968, but still recognizes out-of-state common law marriages for purposes of divorces, applying the full faith and credit clause of the U.S. Constitution. Reiterating his earlier opinion, now bolstered by *Brenner v. Scott*, 999 F. Supp. 3d 1278, Cohen found Florida's marriage recognition ban unconstitutional and said Florida's refusal to recognize Brassner's civil union for purposes of dissolving it was "tantamount to

banning her from marrying someone of the same sex" and thus violated the Equal Protection and Due Process Clauses of the 14th Amendment.

FLORIDA – Here's an interesting ripple effect from the U.S. District Court's decision in *Brenner v. Scott*, 999 F.Supp.2d, 1278, supra. A different federal district judge, James S. Moody, Jr. (M.D. Fla.), has refused to dismiss a marital status discrimination claim brought by a lesbian employee who suffered adverse consequences when she went out of state to Iowa to marry her same-sex partner. *Burrows v. College of Central Florida*, 2014 U.S. Dist. LEXIS 174122 (Dec. 17, 2014). Barbara Burrows was hired in July 2008 to be Vice President for Instructional Affairs at the College, which had adopted a non-discrimination policy that includes sexual orientation. After she married her partner, the College revised its policy to exclude sexual orientation and forced her to resign her position as Vice President and to transfer to a teaching position. She claims she was not provided the appropriate salary for that position under the College's salary schedule and that her pay was not equivalent to that provided similarly situated male individuals (administrators who transferred to teaching positions). She filed discrimination claims with the Florida Commission on Human Relations and the EEOC, neither of which found a statutory violation. A month after the Florida Commission issued its "no cause" determination, she was fired. Several months later, the EEOC issued her a right to sue letter, and she brought this lawsuit. Judge Moody granted the College's motion to dismiss her claim of religious discrimination in violation of Title VII, finding that this was just an attempt to assert a sexual orientation discrimination claim under a statute that had repeatedly been construed not to cover such claims. However, he

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refused to dismiss the supplementary marital status discrimination claim under Florida law. If Florida's ban on same-sex marriages is unconstitutional, as the *Brenner* opinion holds, then firing somebody for marrying their same-sex partner could be conceived as marital status discrimination. The College's motion depended heavily on the Florida Marriage Amendment, which bans the state from recognizing same-sex marriages for any purpose. In light of *Brenner*, wrote Moody, "the Court concludes that it is appropriate at this time to allow Plaintiff's claim for marital discrimination under the FCRA to proceed beyond the motion to dismiss stage. The Court will revisit the issue, if necessary, upon summary judgment."

IDAHO – U.S. Magistrate Candy W. Dale, who ruled earlier this year that same-sex couples in Idaho are entitled to marry, has awarded attorney fees and costs to the plaintiffs in the amount of \$397,300.00 in fees and \$4,363.08 in costs. *Latta v. Otter*, 2014 U.S. Dist. LEXIS 176103, 2014 WL 7245631 (D. Idaho, Dec. 19, 2014). The state had disputed the amount of fees proposed by the plaintiffs, and Judge Dale cut down the award a bit, but nonetheless found that the plaintiffs were entitled to most of what they had requested. In a relatively lengthy and detailed opinion, Judge Dale described the credentials of plaintiffs' counsel and the rigorous demands of the litigation justifying a high fee award.

INDIANA – The ACLU of Indiana filed a federal lawsuit in Terre Haute on December 23 on behalf of students at North Putnam High School whose application for approval of a Gay-Straight Alliance at their school was denied by vote of the North Putnam Community School Corporation, the governing body, in a tie vote taken on November 20. Denial of the application

means that the group is not allowed to meet at the school during designated non-instructional time, not allowed to promote and publicize its activities at the school, or to be associated with the school in any way. The case, *Gay-Straight Alliance v. North Putnam Community School Corporation*, No. s:14-cv-398, treads a well-worn path, as numerous federal courts, mainly in more conservative parts of the country where local elected school boards have prohibited formation of such clubs, have ruled that any school denying official recognition or status to a Gay-Straight Alliance constituted in compliance with the rules of the school district for non-curricular student clubs has violated the Equal Access Act, 20 U.S.C. Section 4071. The EAA was originally passed mainly to safeguard the right of students to form religious clubs at public schools. The underlying theory of the Act is that when a school allows non-curricular clubs to meet on its campus, it has created a limited public forum in which it may not engage in viewpoint discrimination. As such, the EAA is a statutory mechanism for enforcing the First Amendment rights of speech and association of public school students. The statute is applicable to all public schools that receive any form of federal financial assistance, which essentially means all of them. The failure of the Board to approve this GSA application suggests either that the Board was provided with incompetent legal advice, chose to ignore competent legal advice, or decided to vote on this question without obtaining any legal advice. No competent lawyer reviewing existing precedents would advise the Board that they are free to reject the GSA's application without legal consequences. Absent unusual circumstances not revealed in press coverage accompanying the filing of the lawsuit, it seems likely that the federal district court will grant GSA's request for a preliminary injunction and that the defendant will ultimately have

to pay the plaintiffs' litigation costs as prevailing parties under 42 U.S.C. section 1988. It is time for somebody on the receiving end of this complaint to WAKE UP and do the right thing. Plaintiffs are represented by Kenneth J. Falk and Kelly R. Eskew of ACLU of Indiana and Chase Strangio of ACLU's national LGBT Rights Project.

LOUISIANA – U.S. District Judge Lance M. Africk granted a motion by the plaintiff in an AIDS-related housing discrimination case to proceed anonymously as "Jane Doe" in *Doe v. Griffon Management LLC*, 2014 U.S. Dist. LEXIS 171779 (E.D. La., Dec. 11, 2014). The plaintiff alleges that her landlord, who knows her HIV status, retaliated against her by disclosing her status to an employee of the landlord, who questioned her about it, causing her emotional distress. When she sought help from AIDS Law of Louisiana, a legal assistance group, they wrote to her landlord on her behalf, which led the landlord to provoke a new confrontation with the employee and to evict the plaintiff for late rental payments, even though he had accepted late payments in the past. In the present action she is represented by attorney Peter Franklin Theis and Aurora Bryant of the Greater New Orleans Fair Housing Action Center. Judge Africk granted the motion to proceed anonymously, writing: "The Court has considered both the public interest in open proceedings and plaintiff's asserted interest in maintaining the confidentiality of her HIV-positive status. In this case, plaintiff alleges that she has experienced discrimination and retaliation on the basis of her status, including eviction from her housing and a confrontation in which an employee of defendant pulled a knife. On the basis of the record at this preliminary stage of the proceedings, the Court concludes that plaintiff should be allowed to proceed with this lawsuit under a pseudonym."

CIVIL LITIGATION

MAINE – In *Doe v. Regional School Unit 26*, 86 A. 3d 60014 (2014), the Maine Supreme Judicial Court ruled in January that a transgender girl was entitled to use the girl's bathroom at her public school. On remand, the Maine trial court has awarded \$75,000 damages in settlement of her discrimination suit. *iOwnTheWorld.com*, Dec. 3.

MICHIGAN – The *Michigan Lawyers Weekly* (Dec. 12) reported that Kent County Family Court Judge G. Patrick Hillary ruled in *Stiles v. Flowers*, MiLW No. 14-87225, that a lesbian co-parent was the “equitable parent” of the child she had with her same-sex partner, and thus was entitled to joint legal and physical custody of the child. Judge Hillary distinguished adverse precedent, *Van v. Zahorik*, 460 Mich. 320 (1999), by pointing out that the plaintiff had signed a co-parenting agreement, cared for and supported the child, and had intended to adopt the child but could not under existing law. Michigan's refusal to allow co-parent adoptions was challenged in the *DeBoer* case, which was expanded at the federal district judge's suggestion to encompass the issue of marriage equality, but the 6th Circuit's reversal of the trial court's ruling in that case has the result of leaving intact Michigan's ban on co-parent adoptions, at least for now. The child in this case was conceived with sperm from an anonymous donor, so the only biological parent in the picture is the child's birth mother. Grand Rapids attorney Christine A. Yared represents the lesbian co-parent. She called the decision “ground-breaking” in its willingness to distinguish *Van* and decide the case in the best interest of the child.

OKLAHOMA – U.S. District Judge Terence C. Kern found that a male pro se employment discrimination plaintiff had alleged sufficient facts to justify

denying a motion to dismiss his same-sex harassment claim in *Callahan v. Communication Graphics*, 2014 WL 7338768 (N.D. Okla., Dec. 22, 2014). Plaintiff Dan Callahan alleged that male co-workers spread rumors that he was gay, engaged in sexually offensive conduct around him, and that at least one had touched him in a sexual way and invited him to view pornography. He alleged that when he reported this to company officials, they were not interested in investigating and subsequently discharged him. The defendant argued that Callahan could not satisfy the requirement to plead facts sufficient to sustain the contention that he was harassed “because of sex,” but Judge Kern disagreed. “In the Amended Complaint and his response to the motion to dismiss,” he wrote, “Plaintiff alleges that he suffered an unwelcome touching that ‘may have been a sexual assault or battery’ by a male co-worker, and that the same co-worker showed him pornography and invited him to his house. This raises an inference that this harasser was homosexual and/or motivated by sexual desire. Plaintiff also explicitly alleges that he believes some of his harassers were homosexual or bisexual. Accepting these facts as true, it is at least plausible that Plaintiff could satisfy the third element requiring the harassment to be because of his sex.” Furthermore, Kern found that Callahan's allegations were also sufficient to defeat the motion to dismiss his claim that he was retaliated against for reporting these issues to management. It is unusual for a pro se plaintiff to be able to navigate the difficult waters of pleading a same-sex harassment claim. Judge Kern, by the way, ruled for marriage equality last year in a decision that was subsequently affirmed by the 10th Circuit and denied review by the Supreme Court.

OREGON – U.S. District Judge Marco A. Hernandez ruled that a transgender plaintiff filed suit prematurely in

her battle to win coverage for gender reassignment surgery under the Oregon Health Plan (that state's Medicaid program), and adopted a magistrate judge's recommendation to dismiss the case in *Johnson v. U.S. Dept. of Health and Human Services*, 2014 WL 6862496 (D. Ore., Dec. 2, 2014). In a lengthy opinion focused entirely on procedural issues, Judge Hernandez points out that plaintiff Michelle Aryellah Johnson had failed to pursue administrative appeals to their conclusion before filing her federal suit challenging the refusal of the program to cover her proposed surgery. As a result, he held, the court lacked jurisdiction over some of her claims, and others were not ripe for judicial resolution. Also, certain claims asserted against state agency defendants were barred by sovereign immunity.

PENNSYLVANIA – Last year marriage equality came to Pennsylvania when the governor decided not to appeal a federal district court ruling. At the time, most Pennsylvanians told pollsters that they did not support same-sex marriage. Since then, however, support has grown dramatically, and press reports on December 23 indicated that more than 60% of Pennsylvanians now indicate support or approval for marriage equality. *Allentown Morning Call*, Dec. 23.

WISCONSIN – In a rare reversal of a denial of Social Security Disability benefits, U.S. District Judge Rudolph T. Randa eviscerated an administrative law judge's opinion denying benefits to an HIV-positive man, finding that the judge's decision, which had been upheld by the Commissioner, failed to accord appropriate weight to the treating physician's opinion and, in fact, failed on several grounds of logic. *Jones v. Colvin*, 2014 U.S. Dist. LEXIS 174157 (E.D. Wis., Dec. 16, 2014). We used to report on every district court decision

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concerning Social Security disability claims by HIV+ claimants that came across our desk, but after a time decided to stop reporting the routine denials of benefits that were affirmed by the district court (or magistrate judges). We report decisions that might provide useful to practitioners, especially those reversing denials of benefit claims such as this one. Judge Randa's opinion is worth reading, as it may prove helpful to practitioners representing such individuals in formulating grounds to challenge an administrative law judge's refusal to defer to the opinion of the treating physician. If Judge Randa has correctly characterized what was done in this case, the administrative law judge needs some re-education about how to apply the relevant regulations in a contested case.

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GEORGIA – A man convicted of attempting to entice a male minor to engage in illegal sexual activity was sentenced to 324 months in federal prison. He argued in a motion challenging his sentence that his attorneys provided ineffective assistance by “failing to argue that Petitioner disclosed his HIV-positive status by listing is at ‘undetectable’ on his online profile and that Petition posed very little risk of transmitting HIV to his intended victims.” The magistrate judge characterized this argument as “absurd,” since the defendant did not dispute that he failed to mention his HIV status during his emails, phone calls and personal meetings with the undercover agent who was setting the sting in this case. Furthermore, the 11th Circuit has stated that “the HIV-positive status of a child sex offender whose conduct exposed his minor victims to a risk of HIV infection was relevant to his offense conduct, even if the risk of infection was minimal,

and that the district court properly considered the sex offender's HIV-positive status in imposing a sentence.” The court concluded that counsel's failure to make the argument suggested by the defendant was not deficient, and he could not obtain relief based on this claim. *Anderson v. United States*, 2014 U.S. Dist. LEXIS 166799 (N.D. Ga., Dec. 2, 2014).

ILLINOIS – A man who was a card-holding member of the Chicago Recovery Alliance (CRA), a needle-exchange program that provides research data on HIV prevention to a program at DePaul University, was wrongly convicted of criminal possession of hypodermic injecting equipment, according to the Appellate Court of Illinois in *People v. Presa*, 2014 Il. App. (3d) 130255, 2014 Ill. App. LEXIS 900 (3rd Dist., Dec. 18, 2014). Bruno Presa was apprehended with a large quantity of used and uncapped hypodermic syringes in a cardboard box in his bedroom, and was convicted at a bench trial, despite his defense that he was enrolled in a needle exchange program and had a card entitling him to possess the equipment in this quantity. The appellate court rejected Will County Circuit Judge Carmen Goodman's interpretation of the state's criminal law, which exempts “a person engaged in chemical, clinical, pharmaceutical, or other scientific research” from the statutory prohibition of possession of more than 20 hypodermic syringes or needles without a prescription or direct supervision of a licensed health care worker or institution. According to Justice Schmidt, writing for the appellate court, the legislature intended to protect participants in needle exchange programs from prosecution. “The State conceded – and the evidence overwhelmingly established – that CRA was an entity engaged in scientific research,” wrote Schmidt. “The legislature decided that it was sound

public policy to allow the possession of up to 20 syringes for anyone and more than 20 syringes for those engaged in scientific research. It is not the role of the courts to question that policy decision. Clinical scientific research, by definition, requires not only scientific researchers, but also participants or patients. Dan Bigg, the director of CRA, testified that defendant possessed a valid CRA card; Bigg considered defendant a current participant in CRA's research program. On appeal, the State concedes that defendant was, for purposes of the Act, engaged in scientific research. No reasonable trier of fact could have found defendant guilty based upon the evidence presented at trial. The State confesses error. We reverse defendant's conviction.”

ILLINOIS – U.S. District Judge Staci M. Yandle granted a motion *in limine* sought by a teenage male John Doe plaintiff who is suing his public school on claims of sexual abuse by a male employee of the school district, excluding defendants' proffer of evidence that the plaintiff had engaged in consensual sexual acts in the past with other males prior to the alleged nonconsensual sexual activity at issue in the case. *Doe v. Cahokia School District #187*, 2014 U.S. Dist. LEXIS 175455 (S.D. Ill., Dec. 19, 2014). The defendants argued that such evidence was relevant to the defense that any sexual activity with defendant Mario Hunt was consensual, as it would demonstrate that “John Doe” had previously consented to sexual relationships with men, making it likely that he would consent to have sex with Hunt. Defendants also offered this evidence on the issue of Doe's capacity to consent, and claimed that the evidence would also be relevant to the issue of damages, as Doe's past consensual activities would diminish the plausibility of his claims for pain, suffering and emotional injuries. Relying on Federal Rule of Evidence 412, Judge Yandle

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rejected these arguments, finding the purposes articulated by defendants for offering the evidence to be “in direct contravention of the language and policy behind Rule 412. Evidence that Plaintiff engaged in consensual sexual acts with other males is irrelevant to establishing that he consented to any sexual contact with Hunt, and to the extent that it is relevant, its probative value does not substantially outweigh the danger of harm to any victim or of unfair prejudice to any party. Further,” Judge Yandle continued, “the statutory age of consent in Illinois is 17, or 18 where the accused is a family member or a person in a position of trust or authority. Evidence that Plaintiff consented to sexual acts with other males is not necessary to establish that Plaintiff was able to consent given the statutory age of consent.” Even if the evidence might be pertinent to plaintiff’s damage claim, “evidence of prior consensual sexual acts to mitigate damages caused by non-consensual acts would be of minimal probative value due to the nature of the acts,” the judge wrote. “Allowing Plaintiff’s sexual history into evidence would promote precisely the type of stereotypical thinking Rule 412 was meant to prevent and would lead to prejudice to Plaintiff. The probative value of the evidence does not substantially outweigh the danger of harm to any victim or of unfair prejudice to any party.” The John Doe plaintiff is represented by Belleville attorney Jarrod P. Beasley. The school district is represented by Heather L. Mueller-Jones and Hunt is separately represented by Michael L. Wagner.

KANSAS – A trial court did not commit error when it allowed the prosecutor to elicit testimony from a witness that he had a sexual relationship with the defendant, the Court of Appeals of Kansas ruled in *State v. Shugart*, 1014 Kan. App. Unpub. LEXIS 958 (Dec. 5, 2014). Darrius Shugart was

convicted by a jury of multiple counts of kidnapping, burglary, aggravated robbery, aggravated assault, criminal possession and discharge of firearms, criminal threat, damage to property and theft. During the testimony of Wendy Eustache, the prosecutor started a line of questioning that was clearly leading to whether Eustache and Shugart had ever had a sexual relationship. Shugart’s counsel objected, but the court agreed with the prosecutor that a witness’s relationship to a defendant is relevant and allowed the prosecutor to continue. The prosecutor asked, “At any point has Mr. Shugart been your boyfriend?” and Eustache answered, “Something like that. Yes, we had a relationship. He had a key to my house, and he used to stay at my house.” Shugart raised this questioning as error, arguing that evidence of his own homosexuality “has a prejudicial character” that outweighed any relevance. The state argued it was relevant for the jury to evaluate whether Eustache might be biased in favor of Shugart. The court of appeals ruled that the trial court did not abuse its discretion in allowing this questioning. “The evidence was admissible to show that Eustache’s testimony might be influenced by bias.” The court emphasized that the prosecutor did not stress this, just touching on it briefly, and did not make anything of the fact that it was a homosexual relationship. The court also pointed out that Shugart’s attorney went back to the issue on cross-examination and stated during closing argument: “Shugart goes to see Wendy, this is – this is that guy who he has had a relationship with, who cares about him, who brings money to him, said, I put money on his books. Wendy cares about Darrius.” The court found that these references during closing argument lend “support to the position that Eustache would be biased toward Shugart. As a result, we conclude that the trial court properly admitted evidence of Eustache’s relationship with Shugart.”

PENNSYLVANIA – The Pennsylvania Supreme Court rejected the last-ditch attempt by a man convicted of beating a gay man to death with a tire iron and then setting fire to corpse to avoid the death penalty in *Commonwealth v. Williams*, 2014 Pa. LEXIS 3329, 2014 WL 7102767 (Dec. 15, 2014). Defendant Terrance Williams managed to persuade a lower court to postpone his scheduled execution based on his allegation of a Brady violation by the prosecution in presenting “sanitized” versions of witness statements that suppressed evidence about the victim’s homosexuality. Williams’ defense was that he had been sexually abused as a boy by the defendant and that the murder was committed out of rage. However, at his trial, he testified that he did not know the victim, had never seen him before, and had no reason to be angry with him or wish to harm him. The jury convicted him and he was sentenced to death. His co-conspirator was also convicted and is serving a life sentence. A federal defender assigned to deal with Williams’ post-conviction litigation interviewed the co-conspirator on January 9, 2012, after which the co-conspirator signed an affidavit stating that he told detectives and the prosecution prior to trial that the victim was a homosexual and was in a relationship with Williams. The affidavit claimed that the prosecutor “wanted the motive to be a robbery and kept coming back to that. That’s how they wanted me to testify, that it was a robbery.” The federal defender then discovered other files in the possession of the prosecution tending to confirm that the victim liked to have sex with adolescent boys, leading to Williams’ claim in the present proceeding that his defense had been compromised by the prosecution’s failure to disclose this evidence, which might have been used to convince the jury not to sentence him to death. Justice Eakin wrote for the court that “the proper questions for our review are whether the Commonwealth interfered with the appellee’s ability to present a claim that

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Norwood [the victim] was a homosexual with a sexual attraction to teenage males, and whether appellee was duly diligent in obtaining such information.” The court responded in the negative, stating that “appellee would have known well before trial of any sexual relationship or abuse between Norwood and himself. In fact, the Commonwealth argues, if anyone knew about Norwood’s homosexual proclivities toward teenage males, it was appellee himself. The Commonwealth points to the evidence of appellee’s statements during the murder, taunting Norwood for ‘liking boys,’ and appellee’s plan to extort Norwood by threatening to expose his homosexual activities.” Under the circumstances, the court was unwilling to brook further delay in executing Williams, vacated the lower court’s order, dismissed the petition as time-barred, and reinstated the death sentence.

WASHINGTON – The Benton Superior Court exceeded its authority when it ordered HIV testing for a man convicted of distribution of a controlled substance to a minor, communication with a minor for unlawful purposes, and unlawful possession of a controlled substance. *State v. French*, 2014 Wash. App. LEXIS 2896 (Wash. App., Div. 3, Dec. 16, 2014). The defendant’s charge involved methamphetamine and marijuana. He argued that there was no record evidence that hypodermic needles were used in connection with these drugs, and the statute authorizing testing requires that the defendant be found guilty of a drug offense that is “associated with the use of hypodermic needles.” RCW 70.24.340(1)(c). The court reiterated its recent ruling in *State v. Mercado*, 326 P.3d 154 (2014), in which it held that HIV testing “may not be ordered unless the trial court enters a finding that the defendant used or intended use of a hypodermic needle at the time of committing the crime.” Other aspects of this case required a remand for a

new trial, and the court said that the appropriate thing to do about the testing was to allow the trial court to determine whether hypodermic needles played a role in French’s offense before deciding whether to order HIV testing.

WASHINGTON – A lesbian employee of the King County Metro fell short under federal civil pleading standards in her attempt to assert sexual harassment and discrimination claims in *Rispoli v. King County*, 2014 U.S. Dist. LEXIS 166765 (W.D. Wash., Dec. 2, 2014), as Judge Ricardo S. Martinez found that her allegations were conclusory. “The Court agrees with the County that Plaintiff’s Complaint is subject to dismissal for failure to plead sufficient facts to support a plausible claim to relief. Plaintiff’s pleading consists entirely of conclusory allegations and recitation of the elements of causes of action she asserts, which do not suffice to establish facial plausibility” as required by the *Iqbal* decision by the Supreme Court. Rispoli claims that she has been “the recipient of unwelcome and inappropriate sexual comments from male coworkers” and that she “has been harassed, including sexually harassed, and discriminated against based on her gender and sexual orientation” and subjected to a hostile work environment, but according to Judge Martinez, the complaint lacks any detail to back up these claims. Rispoli is represented by counsel, which makes dismissal on this ground a bit surprising. The complaint was dismissed without prejudice and with leave to amend, but Judge Martinez gave her only 30 days to do this. If a new complaint with sufficient factual allegations is not filed, the claims will be dismissed with prejudice.

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ARKANSAS – Chief United States District Judge P. K. Holmes, III, found

that the administratrix of the estate of an HIV+ inmate, who died in custody following shocking medical neglect, could proceed on both state and federal claims in *Charlotte Ann Robinson As Adm’x of the Estate of Faith Denise Whitcomb v. Huskins*, 2014 U.S. Dist. LEXIS 174627 (W. D. Ark., Dec. 16, 2014). Robinson sued physicians at the Benton County Jail, the county sheriff, other officials and medical staff, as well as Benton County. After arrest, Whitcomb, who was disabled, HIV-positive and mentally ill, was placed in solitary confinement. Four months later, a state judge found her unfit to proceed to trial and ordered her transferred to a mental hospital, but the order was ignored for six months until she was found dead in her cell. Although Whitcomb requested medical attention for weight loss, skin discoloration, swollen limbs, back pain and intestinal burning, she received only Tylenol and Pepto-Bismol. Per Judge Holmes, “Whitcomb also screamed in pain and pleaded for help while in her cell,” but she was “never given a physical exam, blood test, x-ray, or other scan.” For a month of this period, Benton County did not even employ a physician for the jail. Robinson brought claims for intentional infliction of emotional distress, negligence, “willful and wanton conduct,” and medical malpractice – as well as federal claims based on the same facts. Defendants claimed immunity under state law, citing Arkansas Code Annotated, § 21-9-301, which is an affirmative defense and limited by case law to negligence claims. See *Vent v. Johnson*, 303 S.W.3d 46, 53 (Ark. 2009); *City of Farmington v. Smith*, 237 S.W.3d 1, 5 (Ark. 2006). It is also only available to those “who were performing their official duties at the time the alleged acts of negligence occurred.” *Carlew v. Wright*, 148 S.W.3d 237, 242 (Ark. 2004). Except for Benton County, Judge Holmes found the state law defense unavailable for the intentional torts and not clearly

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applicable for the other claims under these circumstances. As to the federal claims, he held that the estate could proceed on the same facts regardless whether state law claims remained. He did not discuss the seminal federal case of *Estelle v. Gamble*, 420 U.S. 979, 103-4 (1976), regarding prisoners' right to medical care. Robinson was represented by Jonathan D. Nelson, of Norwood and Norwood, P.A., Rogers, AR. *William J. Rold*

CALIFORNIA – U.S. Magistrate Judge Dennis L. Beck denied pro se prisoner Naymond Bob Trotter's request for an injunction to require jail officials to provide him with an HIV test in *Trotter v. Aw*, 2014 U.S. Dist. LEXIS 166959 (E. D. Calif., Dec. 2, 2014). Trotter alleged that "he was feeling weak and unable to eat, and that he believed he may have contracted HIV due to his sexual interaction with a HIV-positive woman earlier." According to the complaint, "Plaintiff submitted several medical requests, but he was informed that he would have to wait six months. After six months passed, he was advised that HIV screening was not given in [the jail]. As a result, Plaintiff states his health is deteriorating." Judge Beck found these allegations insufficient to survive 28 U.S.C. § 1915A screening as a plausible constitutional claim under the Eighth Amendment, citing mostly boilerplate and quoting *Gibson v. Cnty. of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002): "If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk." Judge Beck omits the next sentence, which states: "But if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a prisoner's serious medical needs on the basis of either his action or inaction." Moreover, in *Gibson*, 290 F.3d at 1193, the 9th Circuit reversed the district court's dismissal of claims

against the county jail, finding a jury question on whether the jail's screening policies for mentally ill inmates created a serious risk of harm. From the paucity of the record here, it is impossible to ascertain whether Trotter had a claim against the jail for refusing all HIV testing, regardless of medical necessity, and whether Trotter was harmed by such failure. Trotter apparently sued only "Dr. Aw," not the county jail. Trotter is identified as a "state prisoner," and the reason for his presence in the county jail is not explained. [Note: California has been placing state prisoners in county jails for several years, since the Supreme Court affirmed a release order to reduce overcrowding in *Brown v. Plata*, 131 S.Ct. 1910 (2011)]. Having ordered Trotter to file one amended complaint on this claim, which he still found insufficient, Judge Beck denied Trotter further opportunity to amend. *William J. Rold*

CALIFORNIA – After an exhaustive recitation and consideration of factual accounts, United States Magistrate Judge Stanley A. Boone found disputed issues precluding summary judgment and necessitating trial in *Taylor v. O'Hanneson*, 2014 U.S. Dist. LEXIS 177347 (E. D. Calif., December 24, 2014), in which a pro se self-declared bisexual inmate claimed excessive use of force. Tracy Taylor alleged that three officers assaulted him after calling him a "fucken as homo," causing him bodily injury and stopping the beating only after superior officers arrived. Judge Boone found a claim under *Hudson v. McMillian*, 503 U.S. 1, 5 (1992), from which a jury could find that force was not applied in a "good faith effort to maintain or restore discipline" but was used "maliciously and sadistically to cause harm." While "de minimus" force does not violate the Constitution, Judge Boone declined to find the allegations here were "de minimus" force as a matter of law, given, inter alia, the wide disparity in the accounts and the physical size

of the plaintiff relative to the officers. Claims against two of the officers were also allowed to proceed on a theory of "failure to intervene/intercede" to stop the underlying constitutional tort. Judge Boone rejected the defense that the civil rights claim was precluded by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) and *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) – which forbid using a civil rights case to imply the invalidity of a criminal conviction, since Taylor faced criminal charges in state court arising from the same incident. Judge Boone found that Taylor could be guilty of resisting correction officers and still be a victim of the officers' excessive use of force in restraining him. Thus, the case would not necessarily invalidate any underlying conviction. Finally, Judge Boone denied qualified immunity, because the law on excessive use of force was clear. *William J. Rold*

FLORIDA – United States District Judge Richard Smoak approved Magistrate Judge Gary R. Jones' Report & Recommendation [R & R], dismissing under 28 U.S.C. § 1915(e) all claims by a Muslim transgender detainee, Matilda Jean Renfro, in *Renfro v. Carroll*, 2014 WL 6886059 (N. D. Fla., Dec. 8, 2014). Proceeding pro se under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Renfro argued that a United States Marshal violated her constitutional rights when he inquired as to her gender as she appeared in full burqa following her arrest for misconduct at a Veterans Administration facility. Judge Jones found that the inquiry was "far short" of a "search" under the Fourth Amendment, nor did it violate Renfro's First Amendment religious rights, given the balancing need for the inquiry in the correctional setting under *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), even given that Renfro had documentation from a Muslim court that she was female. *William J. Rold*

PRISONER LITIGATION

ILLINOIS – U.S. District Judge Harold A. Baker dismissed a *pro se* lawsuit brought by two male residents seeking to be roommates at a detention center for sexually violent persons in *Loupe v. IDHS*, 2014 U.S. Dist. LEXIS 173215 (C.D. Ill., December 16, 2014). Applying “merits review” under 28 U.S.C. § 1915(d)(2), Judge Baker noted that the request of Steven L. Loupe and Timothy Bohannon was denied because “Loupe is HIV+ and the rooming committee fears that Plaintiff Loupe will act out sexually with Plaintiff Bohannon.” The Complaint alleged that the committee allows other residents to room together even though it knows that they will sexually “act out” together. Judge Baker also noted: “Plaintiff Loupe is moved around frequently because no resident wants him as a roommate because Loupe is homosexual and HIV positive.” Judge Baker wrote that “the Court cannot discern a constitutional claim on these allegations,” holding that detainees do not have a constitutional right to choice of roommates and the court must defer to the facility, citing *Beard v. Banks*, 548 U.S. 521, 528 (2006). Judge Baker dismissed the plaintiff’s equal protection theory with a single sentence: “Because the facility has a rational reason for denying the rooming request: fear of HIV transmission.” There is no discussion of safe sex or the facility’s treating heterosexual or detainees not infected with HIV differently. [Note: *Beard* had nothing to do with choice of prison cellmates, the point for which it is cited. It concerned withholding of literature from single-celled high security prisoners under continuous lockdown 23 hours per day for incorrigibility.] *William J. Rold*

PENNSYLVANIA – The efforts of a post-operative male-to-female transgender person to make a federal case out of her default on a traffic ticket were dismissed by United States District Judge Joel H. Slomsky in *Maier v. Lehman*, 2014

U.S. Dist. LEXIS 173349 (E.D. Pa., December 16, 2014). *Pro se* plaintiff Michael Maier sued: Officer John A. Lehman for issuing a traffic ticket for improper license tag and missing paperwork without reading Miranda rights; a state judge and the state motor vehicles department for suspending her license without due process after she failed to appear on the ticket; and the physician and contractual medical care provider at the county jail for denying her hormone and lubrication treatment for two days while she was incarcerated in the matter. Judge Slomsky found that the state judge had absolute immunity and the state agency had Eleventh Amendment immunity. Officer Lehman did not engage in custodial interrogation invoking Miranda warnings, the absence of which does not create a cause of action in any event under these circumstances. Maier was not denied due process because she had an opportunity to appear to contest the ticket, but she failed to do so. Maier also failed to serve the physician or medical company, but Judge Slomsky dismissed these claims anyway, because they did not rise to an Eighth Amendment violation under *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976). Two days of discomfort, even with a bout of vomiting, do not constitute “serious” medical conditions under the case law; and the failures were not shown to be more than “inadvertent.” Moreover, the physician was not personally involved in the alleged denial of treatment, and the company was not shown to have a policy or custom resulting in such denials. [Note: This kind of *pro se* litigation and its burden on the courts is frequently cited to support the backlash against inmate litigation that was used to justify the restrictions in the Prison Litigation Reform Act.] *William J. Rold*

VIRGINIA – United States District Judge Leonie M. Brinkema denied a transgender inmate’s request for an

injunction allowing her to receive particular hormone therapy and to wear make-up in *Arnold v. Wilson*, 2014 U.S. Dist. LEXIS 177133 (E.D. Va., December 23, 2014). *Pro se* plaintiff Ashley Jean Arnold, a/k/a Steven Roy Arnold, brought an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against various officials of the Federal Bureau of Prisons [FBOP]. Initially, Arnold waited for two years for evaluation by an endocrinologist prior to initiation of hormone treatment. Judge Brinkema found that this delay was due to unavailability of such specialists, not because of deliberate indifference by prison officials, even though the FBPO dispensed with such referrals for transgender inmates who were already receiving hormone treatment upon FBOP arrival. Arnold eventually received hormones and a sports bra, mooting these claims, but she now sues to allow make-up and the specific hormone Finasteride. Judge Brinkema found that the FBOP’s “plausible” security concerns about possible escape and risk of assault were entitled to weight, justifying denial of make-up, even though Arnold apparently was allowed to use homemade make-up. Her request for Finasteride was merely a dispute about medically unnecessary care, which is not actionable under the Eighth Amendment under *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even if these denials violate the guidelines of the World Professional Association for Transgender Health Standards, the same are not binding for Eighth Amendment purposes, where, as here, the care was deemed adequate by the court without the additional treatments. Arnold’s condition was “serious” and some treatment was required – see *DeLonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) – but, because Arnold received some treatment, there was no deliberate indifference, despite her dissatisfaction and claimed distress. Judge Brinkema noted that the

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plaintiff in *DeLonta* had been receiving estrogen therapy in the custody of the Virginia Department of Corrections for two years when her treatment was “abruptly terminated” pursuant to a policy directive. Since neither *DeLonta* nor any Supreme Court decision has established a constitutionally minimum standard of treatment for transgender inmates, defendants are also entitled to qualified immunity even if Arnold is correct, under *Pearson v. Callahan*, 555 U.S. 223, 225 (2009). [Note: In the middle of discussion of qualified immunity, Judge Brinkema also finds that the defendants lacked personal involvement in Arnold’s care, conflating an essential element of civil rights liability with an affirmative defense. If the named defendants were not involved, discussion of qualified immunity was unnecessary.] Judge Brinkema’s grant of summary judgment to defendants was without prejudice to Arnold pursuing claims of retaliation against new defendants after exhaustion of administrative remedies. *William J. Rold*

WISCONSIN – A state prisoner was permitted to proceed on a federal claim that his privacy was violated when a nurse shouted his HIV-positive status in the hallway within hearing of other inmates, in *Spates v. Bauer*, 2014 U.S. Dist. LEXIS 172232 (E. D. Wisc., December 12, 2014). Upon screening under 28 U.S.C. § 1915A, United States District Judge Lynn Adelman ruled that *pro se* plaintiff Scott E. Spates stated a claim for relief under *Anderson v. Romero*, 72 F.3d 518, 522-24 (7th Cir. 1995). The judge also cited *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001); and *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999). Oddly, while *Doe* and *Powell* support Judge Adelman’s ruling, *Anderson*, which should be controlling in the Seventh Circuit, specifically declined to apply constitutional protection to inmates’ medical information. Spates

was allowed to proceed even though his HIV privacy was at issue in a previous lawsuit during his incarceration in a jail in 2012. Judge Adelman dismissed Spates’ claims against other defendants for lack of personal involvement. *William J. Rold*

LEGISLATIVE NOTES

CONGRESS – Although passage in the next Congress seems hopeless in light of Republican majorities in both houses, U.S. Senator Jeff Merkley (D-Ore.) announced that he will introduce comprehensive federal legislation to amend all civil rights statutes to add sexual orientation and gender identity as prohibited grounds for discrimination. Such comprehensive legislation was a goal of the gay rights movements during the 1970s and 1980s, until the eruption of debate over ending the gay ban on military service that broke out after Bill Clinton was elected president in 1992 on a pledge to do that. In the ensuing controversy, it appeared that members of Congress might be open to prohibiting sexual orientation discrimination in civilian workplaces, and a narrow bill, the Employment Discrimination Act, was crafted to pursue what appeared an achievable goal. The measure fell just short of passage in the Senate in 1996, and was approved by the House in 2007 and, expanded to add gender identity protection, in the Senate a few years later. But no version of the measure has ever passed both houses, and during 2014 it came under increasing fire from LGBT rights advocates for being too narrowly focused on employment and having picked up too broad a religious exemption. Merkley’s Dec. 10 announcement suggested that he would be advancing a measure that would tighten up on the religious exemption, provide coverage for sexual orientation and gender identity, and drop various restrictive aspects of the Employment

Non-Discrimination Act that had aroused criticism. Rep. David Cicilline (D-R.I.) is expected to be lead sponsor in the House. A last-minute attempt to get a floor vote on ENDA in the House before the end of the 113th Congress died quickly in December. *Washington Blade*, Dec. 10.

DEPARTMENT OF DEFENSE – The Defense Department announced that the U.S. Bureau of Prisons has refused a request to transfer Chelsea Manning from a military prison to a civilian prison so that she could receive treatment for gender dysphoria. Manning, then serving in the Army as male-identified Bradley Manning, was convicted in a court martial proceeding of leaking classified documents to the Web site WikiLeaks and received a lengthy prison sentence. Manning declared that she was transgender and sought treatment in prison, but the Army has taken the position that its military prison system does not have medical expertise sufficient to manage this, as the ban on military service by transgender people has meant that the system has not had to deal with them. However, a Defense Department spokesperson told the Associated Press late in December that in light of the denial of a transfer, the military system will attempt to provide some sort of treatment to Manning, which might include hormone therapy and allowing her to dress consistently with her gender identity. Manning has already obtained a legal name change. Assuming that normal 8th Amendment guarantees apply to military prisoners, hormone therapy would be required if competent medical experts believe that it is a necessary treatment for Manning’s gender dysphoria – a conclusion that has been endorsed by many federal courts over the past few years. *WashingtonPost.com*, Dec. 30. * * * For the first time, the Army Board for Correction of Military Records has granted permission to change records for two veterans to

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recognize their correct gender identity. The veterans were represented by the ACLU of New Jersey in negotiating this change, with consultation from the National LGBT Bar Association, which publicized this change in policy. Perhaps it will be a prelude to the Defense Department's reconsideration of its policy against military service by transgender individuals. No Congressional action would be required to change the policy, which is embodied in a regulation rather than a statute.

DEPARTMENT OF JUSTICE

– Attorney General Eric Holder, Jr., sent a memorandum to all U.S. Attorneys and heads of Department Components within the Justice Department on December 15, informing them that DOJ now interprets Title VII of the Civil Rights Act of 1964 to prohibit discrimination in employment because of gender identity and expression. After reviewing the history of this issue in the courts and the Equal Employment Opportunity Commission, Holder wrote: “I have determined that the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination because of an employee’s gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination ‘because of ... sex’ includes discrimination because an employee’s gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.” Holder expressed his hope that this “clarification” of DOJ’s position “will foster consistent treatment of claimants throughout the government, in furtherance of this Department’s commitment to fair and impartial justice for all Americans.” In a footnote, he observed that the “sex-stereotyping” theory, as discussed by the Supreme Court in *Price Waterhouse* (1989), “remains an available theory under which to bring a Title VII claim, including a claim by a transgender

individual, in cases where the evidence supports that theory.” *** DOJ has also issued a document titled “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Or Gender Identity,” intended to combat “profiling” of suspects based on these characteristics in federal law enforcement activities. In brief, the DOJ position is that a person’s sexual orientation or gender identity is not generally a basis for imputing suspicions of criminality or security problems.

DEPARTMENT OF LABOR

– The Labor Department’s Office of Federal Contract Compliance Programs announced regulations to enforce President Obama’s Executive Order 13,672, banning sexual orientation and gender identity discrimination by federal contractors, published in the Federal Register on Dec. 9. The regulations are scheduled to go into effect on April 8, 2015. From that date forward, contractors will be required to include sexual orientation in the nondiscrimination provisions of their contracts; a prior order on gender identity discrimination is already in effect. Some Congressional Republicans objected to OFCCP’s publication of the regulations without public hearings or comment, asserting a violation of the Administrative Procedure Act, but the administration took the position that regulations providing procedures for administering executive orders do not have to go through the APA procedure for regulations issued pursuant to statute, and rejected requests from Republicans to delay enforcement of the EO pending Congressional inquiry. The regulations can be found at 79 Fed. Reg. 72,985.

FOOD & DRUG ADMINISTRATION

– The U.S. Food & Drug Administration (FDA), which promulgates regulations of blood banks and other institutions

that collect blood for medical use, announced on December 23 that it would abandon a policy adopted during the early days of the AIDS epidemic that automatically disqualified as blood donors any men who had sex with other men, even once, since 1977. However, the agency announced that it would substitute a ban on blood donations by any man who had sex with another man within one year of proposing to be a donor. While most LGBT and AIDS policy organizations hailed the decision to rescind the effective lifetime ban on blood donations by gay men, there was near universal condemnation from those groups, as well as some public officials such as U.S. Senators Elizabeth Warren of Massachusetts and Chris Coons of Delaware, with the retention of a categorical ban on donations by gay men who were sexually active within the preceding year. The one-year ban was deemed unscientific and discriminatory. Current testing of all donated blood would clearly identify anybody infected with HIV more than two months previously, so a ban of one year is not technologically justified, as all donated blood is tested for a variety of blood-borne infectious agents. Furthermore, the FDA does not categorically disqualify non-gay men who have engaged in unprotected sex, even though they also present a risk for transmission. Evidently the FDA is comfortable with relying on the universal screening of donated blood to deal with the risks non-gay men pose to the blood supply, but for some unarticulated reasoning are unwilling to do the same for potential gay blood donors. Critics of the policy called for the agency to drop any categorical ban and instead adopt procedures that would allow for individual assessment of the risks presented by individual potential donors.

ARIZONA – The City Council in the City of Glendale voted 7-0 to approve a Unity Pledge proposed by the human

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rights group One Community, asking business and government entities to support equal treatment in housing, employment and hospitality for LGBT people. This is a symbolic step, the next step being an ordinance that would create enforceable rights, which is being pushed by at least one member of the Council, Gary Sherwood. Scottsdale has previously approved the Unity Pledge, while Tempe passed an anti-discrimination ordinance during 2014 after Governor Jan Brewer vetoed a bill that the legislature approved which would have allowed religious objectors to deny goods and services to same-sex couples. *Arizona Republic*, Dec. 24.

ARKANSAS – Little Rock Police Chief Kenton Buckner issued General Order 327 at the annual Transgender Day of Remembrance event held on November 19 at Philander Smith College. The Order sets policy for the Little Rock Police Department in dealings with transgender citizens. They require officers to address transgender people using their adopted name and appropriate pronouns, prohibit considering transgender status as reasonable suspicion or prima facie evidence of criminality, prohibit police officers from stopping, detaining or searching a person wholly or in part to determine the person's gender or to call attention to their gender expression, requiring the use of appropriately-gendered personnel when performing searches of transgender suspects, and forbidding the use of language with transgender persons that a reasonable person would consider demeaning or derogatory because of their gender identity. These policies could provide a useful model for law enforcement officials throughout the nation. *Arkansas Times*, 2014 WLNR 36550964.

ARKANSAS – Voters in Fayetteville repealed a Civil Rights Ordinance

in a special election on December 9, repudiating the City Council's August vote to ban discrimination, including on the basis of sexual orientation and gender identity. 52% of the voters favored repeal, after a brutal, high stakes media campaign funded by religious opponents of gay rights. Duncan Campbell, a local minister who was president of Repeal 119, the organization formed to win repeal of the ordinance, claimed that he sought repeal because he "didn't believe it made Fayetteville a fairer city or a freer city." According to Campbell, by criminalizing "civil behavior," it took away civil rights and freedom from people who should be allowed to decide with whom they will associate. The campaign manager for Keep Fayetteville Fair, which campaigned to keep the ordinance, said that they had to go back to work to persuade the people of the city of the need for the ordinance. *KFSM-TV*, Dec. 10.

CALIFORNIA – Several new laws enacted by the legislature and approved by Governor Brown will go into effect during 2015. Under the Respect after Death Act, death certificates for transgender people will record their lived identities, not their recorded gender at birth. The law takes effect on July 1. A.B. 2501 prohibits the use of the "gay panic" defense in criminal proceedings to reduce murder charges to manslaughter. The law is the first of its kind in the U.S. A.B. 496 expands "existing cultural competency training requirements in continuing medical education curriculum to include a discussion of LGBT-specific issues," according to a memo from legislative sponsor Assemblyman Rich Gordon (D-Menlo Park). A.B. 1678, also proposed by the openly-gay Gordon, expands a Supplier Diversity Program applicable to public utilities so that LGBT-owned businesses will enjoy the same treatment as businesses owned by women, disabled veterans or minorities.

AB. 2344, sponsored by retiring Assemblymember Tom Ammiano (D-San Francisco), simplifies the use of reproductive technology in ways that should be helpful to same-sex couples seeking to have children. A.B. 966 will take on the issue of HIV transmission in prison facilities by mandating the Department of Corrections to develop a plan for condom distribution. These legislative accomplishments reflect the overwhelming Democratic majorities in both houses of the legislature abetted by the gay-friendly administration of Governor Jerry Brown. *Bay Area Reporter Online*, Jan. 1.

DISTRICT OF COLUMBIA – On December 22, Mayor Vincent Gray signed into law an ordinance approved by the City Council banning the performance of "sexual orientation change efforts" – so-called conversion therapy – on minors in the District of Columbia. The new law follows in the steps of state laws in California and New Jersey that have been upheld against constitutional challenges in the federal courts, although the final fate of the New Jersey law still hangs in the balance as a plaintiff SOCE practitioner has petitioned the U.S. Supreme Court to review the 3rd Circuit's ruling upholding the law. Like all D.C. legislation under the city's home rule law, the measure is subject to Congressional override, and it will be interesting to see whether the incoming Republican majorities in both houses of Congress will take any action to strike it down. Although these laws have been passed by Democratic legislative majorities thus far, the New Jersey measure was signed into law and defended in the courts by the Republican administration of Christopher Christie, a putative presidential candidate in 2016. Perhaps that is enough to make it a bipartisan measure, despite its lack of popularity among conservative religionists. * *

* The District of Columbia Council

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passed an amendment to the District's Human Rights Act on December 2 that would end an exemption from compliance with the sexual orientation and gender identity provision by religious educational institutions. On December 17, the Council passed a measure intended to prohibit employers, employment agencies and labor organizations from bias based on an individual or dependent's reproductive health decisions, including using contraception or fertility controls or having an abortion. A spokesman for Mayor Gray announced that both bills were being subjected to legal review from the Office of the Attorney General, which probably would not be concluded before his successor, Muriel Bowser, takes office on January 2. However, Bowser voted for both measures as a member of the Council, so presumably would be disposed to sign them unless serious objections are raised by the Attorney General. Such objections are possible to the schools measure, of course, in light of the Supreme Court's decision finding a constitutionally-required ministerial exemption for religious institutions (including schools).

FLORIDA – The Miami-Dade County Board of Commissioners voted 8-3 on December 2 to add gender identity as a prohibited ground of discrimination in housing, employment and public accommodations under the county's non-discrimination ordinance. *Buzzfeed.com*, Dec. 3. The ordinance has prohibited such discrimination because of sexual orientation for many years. Equality Florida reports that Miami-Dade is the 28th Florida municipality to provide such anti-discrimination protection. Unfortunately, there is no statutory protection against sexual orientation or gender identity discrimination at the state level in Florida, where the Republican Party has controlled the legislature and the governor's office for many years.

MICHIGAN – Although the state's lower legislative house approved a proposed Religious Freedom Restoration Act (RFRA) that would have allow religious objectors to deny goods and services to same-sex couples, the measure stalled during the lame duck session of the state Senate, which never took a vote. A massive lobbying campaign by the state's gay community organizations, the ACLU, and the business community, undoubtedly contributed to convincing legislative leaders not to bring the measure to a vote in the Senate. The lack of protection against discrimination because of sexual orientation or gender identity under Michigan state law would have made the RFRA largely symbolic outside of those municipalities that ban such discrimination under local law, however many of the state's most populous cities have long banned such discrimination, and the RFRA would have torn a major hole in their protection for LGBT Michiganders. * *

* An attempt to add sexual orientation and gender identity to Michigan's civil rights law stalled in the legislature. The House Speaker's office contended that the measure failed to move because Democrats insisted on including gender identity in the bill, suggesting that a narrower ban on sexual orientation discrimination might have been enacted. House Speaker Jase Bolger contends that including "gender identity" is unnecessary, as transgender plaintiffs can, in his view, seek protection under the existing ban on sex discrimination. *Detroit News*, Dec. 4. If that's the case, it's hard to see what harm would be caused by including "gender identity" in this bill – unless it is political harm as perceived by legislators who don't want to be on record voting to support civil rights for transgender people.

MONTANA – Coming off a 2013 victory in getting the legislature finally to repeal the state's unconstitutional sodomy law and a 2014 victory in the federal district

court in a marriage equality case, as a result of which same-sex couples can marry in Montana (which is in the 9th Circuit), the Montana Human Rights Network is now plotting to prod the legislature into amending the state's Human Rights Act to include sexual orientation and gender identity. This is a vital step after having achieved marriage equality, because LGBT people in Montana who marry a same-sex partner have no protection from discrimination once their marriage brings their sexual orientation or gender identity to the attention of co-workers, employers, and businesses. The main opposition comes from religious groups who want to preserve the right of their members to refuse to provide services to, employ or associate with gay people on religious grounds. So far, the municipalities of Missoula, Helena, Butte and Bozeman have amended local civil rights ordinances to add sexual orientation and gender identity, although a similar proposal in Billings was defeated on a 6-5 vote, after opponents argued that the amendment was "unnecessary." Ironically, Billings is the county seat of Yellowstone County, where a local clerk refused to issue marriage licenses to same-sex couples despite the court rulings. *Great Falls Tribune*, Dec. 30.

NEBRASKA – The mayor of Lincoln, Nebraska, has approved providing health insurance and other benefits to same-sex spouses of municipal employees, even though Nebraska does not officially recognized same-sex marriages. The *Lincoln Star* reported that Mayor Chris Beutler decided to comply with a definition of marriage adopted by Blue Cross and Blue Shield, which provides insurance coverage for city workers, which was changed to include same-sex spouses in response to the Supreme Court's *Windsor* decision. Spouses seeking the benefits have to document a valid marriage performed out of state. 12/19 AP State News 14:05:17.

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NEW YORK – Governor Andrew Cuomo announced changes to state insurance regulations that will require health insurers in the state to cover gender reassignment surgery. The *New York Times* reported on December 10: “In a letter set to insurance companies this week, the governor said that because state law requires insurance coverage for the diagnosis and treatment of psychological disorders, people who are found to have a mismatch between their birth sex and their internal sense of gender are entitled to insurance coverage for treatments related to that condition, called gender dysphoria. ‘An issuer of a policy that includes coverage for mental health conditions may not exclude coverage for the diagnosis and treatment of gender dysphoria,’ the governor’s letter says.” New York became the ninth state to require insurers to include such coverage, after California, Colorado, Connecticut, Illinois, Massachusetts, Oregon, Vermont and Washington, in addition to the District of Columbia. Achieving this regulatory change had been a major goal of transgender rights groups in the state. At the same time, the state is negotiating a settlement to a lawsuit that seeks Medicaid coverage for such procedures. A review board of the U.S. Department of Health and Human Services previously ruled that transgender people can no longer be automatically denied coverage for sex reassignment surgery under Medicare.

NEW YORK – The New York City Council voted 39-4 on December 8 to approve a bill that will make it easier for transgender people to obtain accurate birth certificates, updating current policies to dispense with onerous medical requirements that had previously been imposed, including the requirement of surgical transition. Under the new law, applicants for such a change will have to provide a certified letter from a physician stating that the person consistently lives in their

authentic gender and that such a change in the birth certificate designation of gender is warranted. A lawsuit brought by the Transgender Legal Defense and Education Fund, filed in March, will be mooted by the passage of this legislation, at least as to prospective relief, although claims for damages by the individual plaintiffs may remain. The city’s Board of Health was expected to adopt appropriate regulations for enforcement of the new law soon after enactment. *Advocate.com*, Dec. 8.

NEW YORK – The Shenendehowa School District has adopted a policy to accommodate transgender students, offering all students access to single-user bathrooms and alternative areas to change clothes, so students will not have to use a facility that conflicts with their gender identity or makes them uncomfortable. High school students may request either the building administrator or the schools superintendent to use facilities that correspond to their gender identity. The policy was adopted in response to requests by students for alternative facilities. “School Board President William Casey said the policy was created to protect students from being stigmatized,” reported the *Albany Times Union* (Dec. 9), and it was also touted as a measure intended to avoid legal liability for the school district.

RHODE ISLAND – Gay & Lesbian Advocates & Defenders succeeded in persuading the Social Security Administration to provide survivor benefits to Deborah Tevyaw, who had been denied benefits despite her same-sex marriage to the decedent because at the time of death Rhode Island did not recognize the marriage. While a lawsuit was filed, this negotiation proceeded independently of the court proceedings. On December 1, the agency paid more than \$30,000 in back benefits to Tevyaw. Her spouse, Patricia Baker, died in 2011,

and Social Security, citing the Defense of Marriage Act, refused to pay benefits. After the Defense of Marriage Act was struck down by the Supreme Court, Social Security continued to deny the claim despite the couple’s 2005 Massachusetts marriage, because Rhode Island did not recognize the marriage at the time of death. The agency has now accepted the argument that the Rhode Island recognition date should be moved back to 2007, when the state’s attorney general issued an opinion that Rhode Island would extend comity to same-sex marriages contracted in other states by Rhode Island residents. *Washington Blade*, Dec. 4.

OHIO – Reacting to a horrific assault on a transgender woman, the Toledo City Council voted 12-0 to strengthen the city’s hate crimes ordinance to specifically protect transgender people. Candice Rose Milligan, the victim, struggled to speak at the Council hearing because the beating left her with a jaw wired shut. Christopher Temple has been arrested and charged with robbery to inflict, attempt to inflict, or threaten serious physical harm on another, according to a Dec. 3 report by the *Toledo Blade*.

TEXAS – Plano’s city council approved a revised ordinance prohibiting discrimination because of a resident’s sexual orientation or gender identity, but the ordinance exempts religious and political groups and non-profit organizations from any obligation to comply with this prohibition. The ordinance also includes a waiver provision that allows business owners to claim an exemption if their personal religious beliefs require them to discriminate against gay and transgender people. In other words, this provides minimalist protection in some circumstances, with great deference for those who ground their bigotry in

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religious belief. Is it better than nothing?
joemygod.blogspot.com, Dec. 9.

VIRGINIA – In response to a formal inquiry by the virulently anti-gay Robert G. Marshall, a member of the Virginia House of Delegates, Attorney General Mark Herring issued a letter on December 9, opining that Virginia's bigamy laws are constitutional and remain enforceable despite the 4th Circuit's decision in *Bostic v. Schaefer* striking down the state's ban on same-sex marriage. Herring also informed Marshall that as a result of *Bostic*, Virginia's marriage law is now truly gender neutral and provides no impediment to transgender individuals who wish to marry, regardless of the sex, sexual orientation or gender identity of their intended spouse. See 2014 WL 7236160 (Dec. 9, 2014).

WASHINGTON – The North Mason School District has adopted a policy that recognizes transgender students as a protected group, reports the *Kitsap Sun* (Dec. 20), a newspaper published in Bremerton. The report noted that several other districts in the state have recently adopted such policies. The policy allows transgender students to use restrooms and locker rooms consistent with their gender identity, and was passed over the objection of some school board members who were concerned that other students might be uncomfortable sharing locker room facilities with transgender students. Of course, that is exactly why a policy is needed! The policy was not adopted as a result of any particular incident, but was the response of an alert school district to an emerging issue.

WISCONSIN – The Baraboo Board of Education voted 4-3 after heated debate to adopt a Transgender Participation Policy for students, in line with non-

discrimination standards recently adopted by the Wisconsin Interscholastic Athletic Association and the Minnesota State High School League. The policy allows transgender students to participate in school sports "consistent with their gender identity," and was strongly advocated by the Baraboo High School GSA together with supportive faculty members and local clergy. Under the policy, "trans male students undergoing testosterone therapy may only play on male teams. Trans female students who have undergone hormone therapy for a year may only play on female teams. If a school in the Baraboo district rejects a trans student's participation on a team, the student can go through an appeals process," report *Advocate.com* (Dec. 17) in a summary of the policy. Opponents raised religious objections, and argued that the policy would violate the privacy rights of other students required to share locker room and bathroom facilities with transgender students.

LAW & SOCIETY NOTES

SPOUSAL BENEFITS – Publix, a dominant grocery chain in the Southeastern U.S., announced on December 31 that beginning January 1, 2015, it would offer health benefits to legally married same-sex couples among its employees, regardless where employed, provided they were legally married in a marriage equality state. Because of its Southeast location, Publix does business in several states that do not recognize same-sex marriages, although its headquarters state, Florida, will be compelled by court order to recognize such marriages after 5 pm on January 5, 2015. Several major national employers joined in an amicus brief filed in the 11th Circuit, which is considering Florida's appeal of the marriage equality that goes into effect January 5, arguing that the continued refusal by states in the 11th Circuit to allow

or recognize same-sex marriages is detrimental and imposes a hardship on major employers doing business in those states. Now that the federal government recognizes legally contracted same-sex marriages for purposes of various tax and regulatory statutes, even in states that do not recognize the marriages, the discordance between federal and state law imposes complications on businesses required to comply with differing marriage recognition regimes in administering their benefits plans and retirement programs. It also interferes with the willingness of employees in same-sex marriages to transfer to locations in non-recognition states.

OLYMPICS – The International Olympic Committee voted on December 8 to adopt several changes to its operating rules, including adding "sexual orientation" to the Olympic Charter's declaration on non-discrimination. It was uncertain whether this action was mere window-dressing, or whether the IOC might take into account whether potential host countries actually ban such discrimination in their national laws when selecting the sites for future games.

FLORIDA – Florida House of Representatives Democrats voted to make Rep. David Richardson, the state's first openly-gay state legislator, their Floor Leader for the 2015 legislative session. In addition to managing debates on bills and amendments, and serving as intermediary between the Speaker of the House, a Republican, and the Democratic minority, Richardson will serve as ranking member of the House Rules, Calendar & Ethics Committee. *VictoryFund.org*, Dec. 1.

OHIO – The apparent suicide of Leelah Alcorn, a transgender girl from Kings Mills, Ohio, has led to a movement for

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legislation seeking to ban “transgender conversion therapy.” Alcorn, whose legal name was Joshua Ryan Alcorn, encountered disapproval and scorn from her parents when she told them about her gender identity at the age of 14, and they sought for her to submit to religious counseling to “cure” her condition. She left a “Suicide Note” to be posted to her blog after she deliberately stepped in front of a tractor trailer on the highway in the early hours of Sunday, December 28, in which she wrote, “People say ‘it gets better’ but that isn’t true in my case. It gets worse. Each day I get worse.” Her Suicide Note went viral on the internet, and thousands of people signed petitions calling on the president and Congress to pass legislation banning “transgender conversion therapy,” which the petitioners sought to be called Leelah Alcorn’s Law.

INTERNATIONAL NOTES

AUSTRALIA – Openly gay Andrew Barr has been elected as the new Chief Minister of the Australian Capital Territory (ACT). In his first press conference as Chief Minister, he said that he would continue to advocate for same-sex marriage, stating “It is quite ironic that you can be elected Chief Minister but you can’t marry your partner of 15 years. It’s time that this discrimination is ended in this country and I will continue to be a loud and passionate voice for that change.” He asserted that the overwhelming majority of Canberra residents support same-sex marriage, and that the Australian public in general is ahead of the parliament on this issue. *ABC Premium News*, Dec. 11.

CANADA – The province of Saskatchewan has amended its human rights code to add protection against discrimination because of gender identity, bringing the province in

line with other provinces in Canada. *Canadian Press – Broadcast Wire*, Dec. 9.

CHILE – A bill has been introduced on December 6 in the national legislature that would authorize same-sex marriages by amending existing marriage law to change the definitions. The measure comes as a debate is already ongoing over a legislative proposal for civil unions, which was advanced in a vote by the Senate in October. The House of Deputies has yet to vote on that proposal. A case is pending before the Inter-American Court of Human Rights brought by the Movement for Homosexual Liberation and Integration, arguing that same-sex couples in Chile have the right to marry, but no decision has been issued yet. *Washington Blade*, Dec. 8.

CHINA – The Haidian District People’s Court in Beijing ruled on December 19 that a clinic that had subjected a gay man to electric shock treatments attempting to “cure” his homosexuality must pay him compensation for costs he incurred. The court also ordered China’s leading internet search engine to remove the advertisement that led Yang Teng to the Xinyupiaoxiang Counseling Center. Yang sued the clinic with the assistance of the Beijing LGBT Center. He had sought treatment last February, after his parents discovered his sexuality and pressured him to seek a “cure.” This was reportedly the first time that a Chinese court had imposed liability on a provider of such treatments. In a telephone interview with a reporter for the *New York Times*, Yang said that he thought the verdict “has inspired a lot of gay people. It shows them that we don’t need to be cured, and when things like this happen and we look to protect our rights from being violated, we can get a fair result.” *NY Times*, Dec. 19; *China Real Time*, Dec. 19.

FINLAND – The Finnish Parliament voted 101-90 in favor of a citizen’s initiative for marriage equality. The December 12 vote initiates a process that is expected to eventuate in the passage of formal legislation that will go into effect on March 1, 2017. (The Finnish legislative process is evidently quite protracted, even when the legislature has formally approved a proposal in substance.) The Legal Affairs Committee had voted to reject the citizen’s initiative in November, but the full body decided to move forward.

GAMBIA – The Obama Administration has reacted to anti-gay developments in Gambia, a small West African nation, by suspending the country from special trade status under the African Growth and Opportunity Act of 2000. The action came on December 23, after Gambian human rights activists met with federal officials. A spokesperson for the White House noted Gambia’s passage of new anti-gay legislation, and a law enforcement crackdown on gay people in the country, as reasons for suspending the country’s preferred trade status with the U.S. Under the AGOA trade arrangement, Gambia had been exporting goods to the U.S. duty-free. The U.S. has rarely suspended such trade status in the past. *Buzzfeed.com*, Dec. 23.

GERMANY – Despite a legal ban on surrogacy, the high court in Germany ruled that a German male couple who had a child through surrogacy in California, and who are registered and recognized as the child’s parents under California law, must have their family recognized by German authorities as well. The court premised its ruling on comity towards California law, as “part of a child’s welfare to be able to rely on the parents to have continuous responsibility for its well-being.” While the ruling does not upset the ban on

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surrogacy within Germany, it suggests that Germans seeking to have children using a surrogate mother can do so in a jurisdiction that allows such procedures and then require Germany authorities to respect their parental rights upon return to the country. *PinkNews.co.uk*, Dec. 19.

GREECE – The government announced on December 2 that it would not consider allowing same-sex marriages, despite a ruling by a European Court last year that the country was violating European law by providing no legal status for same-sex couples. Justice Minister Haralambos Athanasiou told an interviewer for a Greek television station that he would establish a committee to explore the possible terms of civil unions. “We are limiting ourselves to issues concerning social security insurance, pensions and inheritances,” he said, and perhaps “adoption and custody matters.” The Greek governor was required by the European court to pay the plaintiffs in that case 5,000 euros in damages. Reacting to the court ruling, Athanasiou said “we cannot turn a blind eye but we need to look at the issue from a religious, political and societal perspective.” (12/2/14 dpa Int’l Serv in English 13:00:02.)

IRELAND – The Republic of Ireland will hold its referendum on same-sex marriage in May 2015. At the end of 2014, public opinion polls showed that an overwhelming majority of voters say they will vote in favor of opening up marriage to same-sex couples. * * * On December 24, the government published its proposed Gender Recognition Bill, which will give formal recognition to the preferred gender of transgender persons through gender recognition certificates to be issued by the Department of Social Protection. Prerequisites for obtaining a certificate including being born in Ireland or ordinarily resident in the country, a statutory declaration that the

individual intends to live permanently in the new gender, and a certification by the applicant’s primary treating physician that the person has transitioned or is transitioning to the preferred gender. The provision that a person who is married or is in a civil partnership cannot apply was immediately controversial. The procedure is ordinarily open only to those of age 18 or older, although waivers can be arranged in certain circumstances for younger people. In light of the age at which some people have been transitioning, there was also some criticism of this age restriction. Persons who have obtained recognition of a gender change in another jurisdiction can present that documentation in lieu of certification by an Irish physician. Press reports suggest that transitioning need not include sex-reassignment surgery, and the bill doesn’t mention surgery. *European Union News*, Dec. 24. * * * The *Irish Times* (Dec. 27) reports that the government is planning to amend the Employment Equality Act 1998, which bans sexual orientation discrimination in employment but specifically exempts religiously-run schools and hospitals from complying with this requirement, to narrow the exemption, with the particular intention of seeking to protect teachers employed by religiously-run schools. The Dec. 27 provides an interesting behind-the-scenes look at the Irish government’s defense of its sodomy law against a challenge under the European Convention on Human Rights during the 1980s, and the subsequent government debate about proposals to ban sexual orientation discrimination, which finally produced legislation in 1998. * * * Meanwhile, in Northern Ireland, the last part of the United Kingdom that does not have marriage equality, Amnesty International’s Programme Director, Patrick Corrigan, announced the likelihood that a lawsuit would be filed during 2015 to secure marriage rights for same-sex couples there. He commented, “We have long predicted that, should Northern Ireland’s politicians fail in their

duty to end such discrimination, then gay people will resort to the legal system to have their human rights as equal citizens vindicated.” *Belfast Telegraph Online*, Dec. 31.

ISRAEL – The Israel Defense Forces will provide support and assistance for transgender soldiers, according to a report published on Dec. 25 in the official magazine of the armed forces. Since most of the Israeli population is required to do military service, receiving first draft notices at age 16, this means that such services will be widely available. An on-line report by *ynetnews.com* (Dec. 26) indicates that five “acknowledged transgender soldiers” are presently actively serving in the IDF. Prior to this new policy, such individuals had to deal individually with their commanders on such issues as uniforms, hormone therapy, and appropriate sleeping quarters. The new policy is intended to insure uniformity of response and support for transgender soldiers. * * * Openly gay Knesset Member Nitzan Horowitz, a member of the left-wing Meretz Party, announced that he would not stand for re-election in the upcoming national elections this spring. “After nearly six years in the Knesset, it is time for me to move onto other things,” he told *Arutz Sheva* (Dec. 31).

NEW ZEALAND – Attorney Matthew Muir became New Zealand’s first openly-gay High Court judge when he was sworn by Chief Justice Sian Elias on December 5 in Auckland. According to a report by *gayexpress.co.nz* on Dec. 6, “Chief Justice Elias spoke about Muir’s sexuality and the significance that his swearing in has for New Zealand’s LGBT community,” noting his active role during the 1980s in advocating for gay rights legislation and his continuing leadership in the country’s LGBT community.

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POLAND – The city of Slupsk has elected Poland's first openly-gay mayor, Robert Biedron. Biedron previously made history in 2011 as the first openly-gay person to be elected to the Polish Parliament. There were several other gay or bisexual candidates running in local elections this year, but Biedron was the only one elected. *Canadian Press*, Dec. 1. Slupsk has a population of almost 100,000. * * * the Polish Parliament voted 235-185 on December 17 to reject a proposal to allow gender-neutral civil unions, which would have conferred a range of benefits that are currently available only to married heterosexual couples. The range of benefits proposed was quite limited, not including joint tax benefits or adoption rights. This is the third time such a proposal has been rejected by the Parliament. The 1997 Polish Constitution defines "marriage" as a union of a man and a woman. *GayStarNews.com*, Dec. 19.

SCOTLAND – The first same-sex weddings took place in Scotland late in December, as marriage equality legislation passed in February 2014 finally went into effect. December 31 was the first day that new same-sex marriages could take place, although those who had previously entered into registered civil partnerships could begin converting them to marriages beginning on December 16. *The Belfast Telegraph Online* (Dec. 31) reported that more than 250 couples had converted their civil partnerships by the end of December. Although Scotland is part of the United Kingdom, the previously-enacted British marriage equality law applied only to Britain and Wales, out of deference to the home rule afforded to Scotland through its own parliament.

TAIWAN – The legislature's plenary session gave unanimous support to a measure that will suspend the requirement the transgender people

undergo sex-reassignment surgery in order to be able to register their change of gender. Instead, applicants to register a change will go before a committee consisting of specialists on gender issues, psychiatrists and transgender representatives, who will confirm that the applicant is transgender, and the changed registration will go into effect after a six-month "hesitation" period, so that the applicant is absolutely certain that they want to register the change, according to the *Taipei Times* (Dec. 26).

UNITED KINGDOM – The annual New Year Honors List issued by Queen Elizabeth II on advice of the government honors five advocates for LGBT rights. Nigel George Warner, advisor to the International LGBTI Association's Council of Europe, is named an Officer of the Order of the British Empire for LGBT rights work. Carol Ann Duffy, the first openly lesbian person to serve as the U.K.'s poet laureate in 2009, was made Dame Carol! Jerry Broughton was named to the Order of the British Empire for founding the U.K.'s Families and Friends of Lesbians and Gays organization. Dr. Jay Stewart was named to the Order of the British Empire for founding the organization Gendered Intelligence and service to the transgender community. Jenny-Anne Christine Bishop was also honored with an OBE for work on behalf of transgender people. *Advocate.com*, Dec. 31. * * * On December 10, same-sex couples in the U.K. who had entered into civil partnerships prior to the passage of the Same-Sex Marriage bill finally got their opportunity to convert their partnerships to marriages, and hundreds were expected to take advantage of this option.

PROFESSIONAL NOTES

On December 16, the U.S. Senate confirmed President Obama's

nomination of **ROBERT PITMAN** to the U.S. District Court for the Western District of Texas. Judge Pitman became the first openly gay judge to sit on the federal bench in Texas, according to a press release from Lambda Legal celebrating the confirmation and also noting that the seat in question had been vacant for six years.

Philadelphia Mayor Michael Nutter has appointed Assistant District Attorney **HELEN L. NELLIE FITZPATRICK** to be the city's new director of lesbian, gay, bisexual and transgender affairs, effective January 20. Fitzpatrick will fill the seat vacated by the death of city's first such director, Gloria Caesarez, who died from breast cancer in October. Fitzpatrick has worked as a Philadelphia prosecutor for six years, the last two with the role of LGBT community liaison for the District Attorney's Office, in which role she focused on strengthening ties between the LGBT community and the Philadelphia Police Department. *Executive Appointments Worldwide*, 2014 WLNR 36482387 (Dec. 24).

California Governor Jerry Brown has appointed **KEVIN KISH**, the openly-gay director of the Employment Rights Project at Bet Tzedek Legal Services and an adjunct professor at Loyola Law School in Los Angeles, to be the new head of the California Department of Fair Employment and Housing, which is responsible for investigating complaints and enforcing the state's employment and housing discrimination statute, which prohibited discrimination, *inter alia*, because of sexual orientation or gender identity. Kish is a graduate of Yale Law School and clerked for U.S. District Judge Myron Thompson (M.D. Alabama), an appointee of President Carter who is described in his Wikipedia bio as the "first African-American employee of the state of Alabama who was not a janitor or a teacher."

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