

LESBIAN / GAY LAW NOTES

Summer 2015

THE CONSTITUTION GRANTS THEM THAT RIGHT

*Justice Kennedy and Court's Liberals Stick Together to Hold that
Fundamental Right to Marry Extends to Same-Sex Couples*

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Supreme Court Issues Historic Marriage Equality Ruling

The Supreme Court ruled on June 26, 2015 that “same-sex couples may exercise the right to marry” and that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” Writing for the Court, Justice Anthony M. Kennedy grounded these marital rights in the 14th Amendment’s guarantee that no State may deprive any person of “liberty” without due process of law or deny to any person the “equal protection of the laws.” He saw the claimed rights in this case as logical extensions of the rights recognized by the Court through his opinions in *United States v. Windsor* (2013) and *Lawrence v. Texas* (2003). *Obergefell v. Hodges*, 2015 WL 2473451, 2015 U.S. LEXIS 4250. By fitting coincidence, the opinion

dissenting opinions for themselves. Roberts and Alito were appointed by George W. Bush, Scalia was appointed by Ronald Reagan, and Thomas was appointed by George H. W. Bush. Scalia and Thomas signed on to each other’s dissenting opinions, and both also signed on to Roberts’ dissenting opinion and Alito’s dissenting opinion.

The Court had granted petitions filed by the plaintiffs in several cases emanating from the states of Ohio, Tennessee, Michigan, and Kentucky. In each of those states, federal district courts had ruled during 2014 either that state laws refusing to recognize same-sex marriages contracted in other states violated equal protection rights or that the refusals of the states to allow same-sex couples to marry violated due process and/or equal protection rights. Those rulings were consolidated for

review that ruling, the Supreme Court ordered argument on two questions: whether same-sex couples have a right to marry and whether states are obligated to recognize same-sex marriages performed in other states. A majority of the Court answered both of those questions in the affirmative. The four dissenters, each in his own way, insisted that the question was not properly before the Court.

This outcome was widely predicted because of the Supreme Court’s behavior since October 6, 2014, when it had declined to review pro-marriage equality decisions by the 4th, 7th and 10th Circuits, thus lifting stays and allowing marriage equality rulings to go into effect in Virginia, Indiana, Wisconsin, Oklahoma, and Utah, and eventually in all of the states in those circuits. After the 9th Circuit ruled

The effect of the ruling was to extend marriage equality to all jurisdictions subject to the 14th Amendment.

was issued on the second anniversary of *U.S. v. Windsor* (June 26, 2013) and the twelfth anniversary of *Lawrence v. Texas* (June 26, 2003). The effect of the ruling was to extend marriage equality to all jurisdictions subject to the 14th Amendment: the 50 states, the District of Columbia, and perhaps all of the U.S. territories, although it was expected to take a while for local compliance to be complete, depending on the state of play as to pending litigation and political opposition in various places.

Justice Kennedy was nominated to the Court by President Ronald Reagan in 1987. His opinion was joined by the four justices appointed by Democratic presidents: Ruth Bader Ginsburg and Stephen Breyer (appointed by Bill Clinton) and Sonia Sotomayor and Elena Kagan (appointed by Barack Obama). Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito all wrote

appeal before the U.S. Court of Appeals for the 6th Circuit, in Cincinnati. A three-judge panel voted 2-1 to reverse the trial courts in an opinion by Circuit Judge Jeffrey Sutton. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The court held that the U.S. Supreme Court’s ruling in *Baker v. Nelson* (1972), that a challenge to the Minnesota ban on same-sex marriage did not present a “substantial federal question,” remained binding as precedent on lower federal courts, requiring the court of appeals to reverse the lower courts and order dismissal of the lawsuits. However, the court went on to discuss the merits, rejecting the plaintiffs’ constitutional arguments and opining that the question whether same-sex couples could marry or have their marriages recognized was one to be resolved at the state level through the democratic process, not through federal constitutional litigation. In granting the plaintiffs’ petition to

for marriage equality in *Latta v. Otter* the day following the cert denials, the Supreme Court subsequently rebuffed every request by state officials in other states in the 9th Circuit to delay marriage equality rulings going into effect, and subsequently, the Court refused to stay marriage equality rulings from Florida and Alabama, even though the 11th Circuit had not yet ruled on the states’ appeals. The denial of Alabama’s stay motion, weeks after the Court had granted review of the 6th Circuit’s decision, decisively confirmed that there was a majority for marriage equality on the Supreme Court, to the consternation of Justice Thomas, as expressed in his dissent from the denial of Alabama’s stay petition (which was joined by Justice Scalia).

The outcome being highly predictable, the main questions arousing speculation were which constitutional theories the Supreme Court would use

to strike down the state marriage bans and whether any additional member of the Court — possibly Chief Justice Roberts — would join the anticipated majority of Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. In the end Roberts stayed put with his fellow conservative brethren, and commentators noted the vehemence of his dissent. Justice Kennedy's opinion took a route that could have been predicted based on his opinions in *Windsor* and *Lawrence*. Kennedy's preferred approach in gay rights cases (leaving aside his first such opinion, in *Romer v. Evans*, which is really a *sui generis* equal protection case) is to rely heavily on his broad conception of liberty protected by the Due Process Clause, and to treat equality arguments as secondary, but interwoven, with the liberty arguments. In this case, Kennedy refrained from discussing whether anti-gay discrimination is

ordinance, was “behavioral” and thus not cognizable as a characteristic for purposes of equal protection analysis. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001(1996), *reaffirmed on remand*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

Justice Kennedy began with a quick review of the situations of some of the plaintiffs, showing the deprivations they faced by not being allowed to marry or to have their marriages recognized, and then presented a historical overview of the changing nature of marriage. He wrote that “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and

Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.” This passage closely paraphrased a similar assertion in *Lawrence v. Texas*, where Kennedy had asserted that the lack of deep historical roots for constitutional protection of private sexual conduct was not fatal to the Petitioners challenge to the Texas sodomy law.

Kennedy premised his conclusion that the petitioners' due process claims involved deprivation of a fundamental right on “four principles and traditions” which he said “demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.” The first “is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” The second is “that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” The third is “that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” Finally, he wrote, “This Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.”

As to each of these four principles, Kennedy penned eloquent explanations that play into the themes he had developed in his earlier gay rights opinions. For example, he wrote, “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.” This sentiment was certainly familiar from his opinion in *Lawrence*. Speaking about marriage's “support” for the “two-person union,” he wrote, “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while

Kennedy's preferred approach in gay rights cases is to rely heavily on his broad conception of liberty protected by the Due Process Clause.

constitutionally suspect, focusing his analysis on the deprivation of a fundamental right. However, various statements in the Court's opinion could prove helpful to LGBT litigants in future cases seeking to expand protection under the Equal Protection Clause, most particularly the assertion that sexual orientation is an “immutable characteristic” and a reaffirmation of the history of discrimination suffered by gay people, factors that the Court has considered in past cases when it has identified “suspect classifications.” It is particularly interesting that Justice Kennedy would address the immutability issue, unnecessary to his ruling in this case, since it was the 6th Circuit that had rejected the immutable characteristic contention in the mid-1990s in a *Romer*-type case, insisting that “sexual orientation,” as used in *Cincinnati's* human rights

the judicial process. This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians.” After reviewing the growing recognition of gay rights by the courts, and referring to an amicus brief filed by the American Psychological Association, he wrote, “Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”

Kennedy's ensuing due process discussion aligned him with the members of the Court who have rejected “originalism” and a static view of constitutional rights, echoing similar comments he made in his opinions in *Lawrence* and *Windsor*. “The nature of injustice is that we may not always see it in our own times,” he wrote. “The generations that wrote and ratified the Bill of Rights and the Fourteenth

both still live there will be someone to care for the other.” After observing that “hundreds of thousands of children are presently being raised” by same-sex couples, he wrote: “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.” Again, a familiar sentiment, this time from his opinion in *U.S. v. Windsor*.

In explaining why the right to marriage is a fundamental right, Kennedy observed: “States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle.” As he had observed in 2003 when he wrote for the Court in *Lawrence* striking down the Texas sodomy law, he reiterated in this case: “The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.” Several times in the course of this part of his opinion, Kennedy referred to the “dignity” of same-sex couples being denied or disparaged by denying them the right to marry, also emphasizing the impact on their families and children.

Turning to the Equal Protection Clause as an alternative source of the marriage right, Kennedy avoided any explicit pronouncement about whether sexual orientation discrimination claims should be subject to heightened scrutiny. There are two different strands of equal protection theory: the classification strand and the fundamental rights strand. Under the former, the Court asks

whether the challenged law creates a classification that is “suspect” and thus subject to heightened or strict scrutiny. Under the latter, the Court asks whether the challenged law discriminates concerning a fundamental right, and thus will be struck down unless the government proves a compelling justification. Kennedy focused explicitly on the second strand.

Referring back to the Court’s equal protection rulings in earlier marriage cases, he wrote, “The equal protection analysis depended in central part on the Court’s holding that the law burdened a right of ‘fundamental importance.’ It was the essential nature of the marriage right, discussed at length in *Zablocki v. Redhail*, that made apparent the law’s incompatibility with requirements of equality.” He emphasized the interconnectedness of the liberty/due process and equal protection theories, referring to *Lawrence v. Texas*: “*Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State ‘cannot demean their existence or control their destiny by making their private sexual conduct a crime.’ This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.”

Thus, in the ongoing dispute over whether the plaintiffs were claiming a new constitutional right of “same-sex marriage” or access to an existing fundamental right to marry, the Court

in this case adopted the broader view, disclaiming any notion that this case was recognizing a “new” constitutional right of same-sex marriage. In the view of the Court, same-sex couples were asking to be afforded the same fundamental right to marry that was accorded to different-sex couples.

Although some commentators quickly criticized the Court for failing to invoke the classification strand of Equal Protection or to explicitly rule that heightened scrutiny applied to government policies that discriminate because of sexual orientation, careful review of the Court’s opinion would provide support for a heightened scrutiny argument. The Court acknowledged the history of sexual orientation discrimination in the United States, referred at least twice to “immutability” in connection with sexual orientation, and made clear that it did not consider a person’s sexual orientation to be indicative of his or her ability to contribute to society. Furthermore, the Court has never indicated that political powerlessness, the fourth factor in some equal protection analyses, is a sine qua non for a suspect classification. To make it such would be inconsistent with the Court’s recent equal protection jurisprudence, since the Court employs strict scrutiny in evaluating so-called “reverse discrimination” claims brought by white men, and nobody would dare argue that white men lack political power in contemporary American society. In this connection, the Court’s failure explicitly to invoke heightened scrutiny in its last major gay rights decision, *U.S. v. Windsor*, did not give pause to the 9th Circuit when it ruled, relying on *Windsor*, that sexual orientation claims merit heightened scrutiny. See, *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, rehearing en banc denied, 759 F.3d 990 (9th Cir. 2014).

Justice Kennedy rejected the states’ argument that this decision was being made without sufficient “democratic discourse,” pointing out that same-sex marriage has been a topic of debate for decades, at least since *Baker v. Nelson*, and asserting that “there has been far more deliberation than this argument acknowledges,” referencing referenda,

legislative debates, “countless studies, papers, books, and popular and scholarly writings.” Indeed, he pointed out, “more than 100 amici” had filed briefs with the Court presenting a wide range of perspectives on all sides of the issue. And, he pointed out, “the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.” Having found that the marriage bans abridge a fundamental right, he found that judicial action was justified. “The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.”

Kennedy also rejected the argument that the Court should refrain from this ruling because of possible adverse impact on traditional marriages, finding that the argument “rests on a counterintuitive view of opposite-sex

have arisen in recent years involving recalcitrant wedding photographers, florists, bakers and the like, eliding any mention of “free exercise” as such, a point emphasized in dissent by Chief Justice Roberts.

Kennedy briefly addressed the second question certified by the Court for argument, pointing out that all parties had acknowledged that if the Court found a right for same-sex couples to marry, the right to have those marriages recognized by the states would follow as of course. “It follows that the Court also must hold — and it now does hold — that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” Although Kennedy did not mention Section 2 of the Defense of Marriage Act, which purports to excuse states from according “full faith and credit”

in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.” Thus, at the end, Kennedy recurred to the same principle he had invoked two years ago in striking down Section 3 of the Defense of Marriage Act: equal dignity, which combines the concepts of equal protection and due process.

Chief Justice Roberts penned a “who decides?” dissent, along the lines previously articulated by Judge Sutton in the 6th Circuit opinion that the Court was reversing in this case. “The fundamental right to marry does not include a right to make a State change its definition of marriage,” he wrote, insisting that defining marriage was the state’s prerogative as a matter of democratic process. He found “the majority’s approach” to be “deeply disheartening.” His dissent ended up being slightly longer than Kennedy’s opinion for the Court, embracing simplistic notions of the history of marriage that were directly contradicted by the detailed amicus briefs submitted on behalf of the plaintiffs. For example, he referred to a “universal definition” of marriage as the “union of a man and a woman,” thus ignoring the numerous cultures in which plural marriage has long been accepted. He referred to several ancient civilizations as providing examples of the deeply-rooted traditional concept of marriage being the union of one man and one woman. (This quickly backfired, as an internet post debunking this claim as to the four civilizations he mentioned quickly went viral and was picked up by the mainstream press, most notably the *Washington Post*.) Rejecting Kennedy’s empathetic view of the plaintiffs’ claims, Roberts asserted, “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and

Having found that the marriage bans abridge a fundamental right, he found that judicial action was justified.

couples’ decision making processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”

The Court devoted just one paragraph to the potential clash over religious liberty, asserting that the 1st Amendment “ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” However, Kennedy shied away from opining about how the balance of rights might be struck in particular cases of the type that

to same-sex marriages contracted in other states, it is effectively a dead letter after this decision. At the time of its enactment in 1996, some constitutional experts had opined that it was merely symbolic, since the right of states to refuse to recognize marriages that violated their articulated public policies had been long recognized, and many of the marriage recognition decisions rendered by lower federal courts over the past two years had ignored Section 2 of DOMA entirely, premising their decisions on the 14th Amendment.

Justice Kennedy concluded with a paragraph integrating the main points of his analysis in eloquent fashion: “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners

Dignity” Clause in the Constitution.” He raised the question whether the Court’s opinion would open the issue of plural marriage, which is being litigated by fundamentalist Mormons, and insisted that Kennedy’s argument sounded more in moral philosophy than in law. He also sounded the alarm, as noted above, about Kennedy’s failure to expressly acknowledge the Free Exercise Clause as a potential protection for those would reject marriage equality on religious grounds, predicting that there would be lots of litigation on this issue.

In conclusion, Roberts wrote: “If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.” Justices Scalia and Thomas joined his dissent.

Justice Scalia, the self-proclaimed “originalist,” was in fine fulminating form, characterizing the majority’s holding as a “Putsch.” He was quick to observe that the generation that wrote and adopted the 14th Amendment would not have seen it as creating a right for same-sex couples to marry, and under his jurisprudence that should end the matter. As he had done in the *Windsor* and *Lawrence* cases, he sharply criticized the Court for short-circuiting political debate. Noting the “unrepresentative” nature of the Court, he questioned the legitimacy of its making such a policy decision. “This is a naked judicial claim to legislative – indeed, super-legislative – power; a claim fundamentally at odds with our system of government,” he exclaimed. “They have discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since.” He also criticized the opinion as being “couched in a style that is as pretentious as its content is egotistic.” As he has frequently done in past dissents, he decried Justice Kennedy’s conception of liberty, concluding, “The

stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.” Actually, many past decisions of the Court emanating from its conservative voices have already done that many times over. One need only cite *Bush v. Gore* and *Citizens United* for examples of decisions by the conservative Court majority inventing constitutional doctrines with no textual or historical basis to override popular democracy.

Scalia also indulged his habit of ridiculing Kennedy’s opinions for their rhetorical flights, in one footnote implicitly chiding the Democratic appointees for signing on to Kennedy’s opinion rather than concurring on their own grounds, stating in his footnote 22: “If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: ‘The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,’ I would hide my head in a bag.” Thomas joined Scalia’s dissent.

Justice Thomas has long contested the Court’s entire history of substantive due process doctrine, so this case was just one more example for him of illegitimate decision-making. He argued that refusing to let same-sex couples marry does not deprive them of any liberty, insisting that the reference to “liberty” in the due process clause should be restricted to its “original” historic meaning of restrictions on mobility. Thus, the state restricts your liberty when it locks you up, but not when it refuses to let you marry. He located the origins of this concept in Magna Carta, the 800-year old English document signed by King John in 1215 to settle disputes with the nobility about royal prerogative, and then traced the concept through English and American law up to the time of adoption of the 14th Amendment. “When read in light of the history of that formulation,” he wrote, “it is hard to see how the ‘liberty’ protected by the Clause could be interpreted to include anything other than freedom from physical restraint.” Even accepting a broader meaning, he held that it should be restricted to “individual freedom

from governmental action, not as a right to a particular governmental entitlement.” He insisted that “receiving governmental recognition and benefits has nothing to do with any understanding of ‘liberty’ that the Framers would have recognized.” He also dismissed Kennedy’s references to “dignity,” arguing that “dignity” is inherent in humanity and is not conferred by the government when it allows couples to marry. Indeed, in a passage that came in for considerable scorn from commentators, he asserted that the government did not withhold “dignity” from African slaves or Japanese detainees during World War II (even though, of course, it was restricting their mobility in both cases, and so were certainly deprived of liberty in the sense Thomas uses the term). Scalia joined Thomas’s dissent.

Finally, Justice Alito’s dissent rechanneled his dissent from two years earlier in *U.S. v. Windsor*, quoting from it extensively, arguing that there were various different legitimate concepts of marriage and that it was up to the people, through the democratic process, to decide which one to embrace through law. “Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage,” he insisted. He particularly bemoaned the likelihood that this ruling would lead to the oppression and vilification of people who oppose same-sex marriage, predicting many future disputes. “Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play,” he wrote. “But if that sentiment prevails, the Nation will experience bitter and lasting wounds.” Both Scalia and Thomas signed his opinion. Chief Justice Roberts and Justice Alito each contended that those with religious objections to same-sex marriage would find little comfort in Kennedy’s opinion, which appeared to recognize 1st Amendment protection for the objectors’ beliefs, but not explicitly for their actions effectuating those beliefs.

All of the dissents sounded like rearguard actions seeking to provoke public discontent with the Court’s

opinion. But in that sense they are well within the tradition — at least the recent tradition — of Supreme Court dissenting opinions from the very polarized Court. (For example, Scalia was just as scathing and bitter in criticizing Chief Justice Robert's opinion the previous day upholding the subsidy provision of the Affordable Care Act, and Justice Kennedy's opinion reaffirming the lower courts' broad reading of the Fair Housing Act to cover disparate impact claims.) A 5-4 ruling may be bitterly argued, but it is no less a precedential holding of the Court than a unanimous ruling. Although there had been rumblings in the weeks leading up to this ruling that some state officials might try to avoid complying with a pro-marriage equality decision, the immediate response of the governors and attorneys general in the four states of the 6th Circuit seemed to be prompt, if reluctant, compliance with the Court's decision, with no talk of petitioning for rehearing.

A long list of attorneys participated in representing the various plaintiffs in this case, culminating in the presentations by three oral advocates at the Supreme Court: two representing the plaintiffs — Mary Bonauto and Douglas Hallward-Driemeier — and one representing the Obama Administration in support of the Petitioners — Solicitor General Donald Verrilli, Jr. All of the nation's LGBT litigation groups played a part as co-counsel to one or more of the plaintiffs, as did numerous groups who submitted amicus briefs to the Court, many of which were cited in the opinions. There were media reports that this case attracted the largest number of amicus briefs ever filed with the Court. One group among all others will be particularly affected by this ruling: Evan Wolfson announced months ago that upon the achievement of marriage equality nationwide, his organization — Freedom to Marry — would wind up its affairs and cease to exist. After the opinion was announced, Wolfson stated that the organization would be winding up its operations within months, and announced a celebratory farewell event in New York City on July 9, at which Vice President Joseph Biden was the principal speaker.

IMPLEMENTATION

The sequel to the opinion was relatively swift in many places. Long before the Supreme Court would formally send its decision to the 6th Circuit to get the ball rolling officially on compliance after the time for filing motions for rehearing would expire on July 17, governors and attorneys general of the four states in the 6th Circuit — Michigan, Tennessee, Kentucky, and Ohio — had indicated that they would comply and same-sex couples began to get marriage licenses, in some cases beginning on the afternoon of June 26. As an example of swift compliance, the Michigan Civil Service Commission quickly posted an advisory on its website informing state employees who have same-sex spouses that they had one month from the date of the *Obergefell* decision to enroll their spouses for state employee benefits coverage. State employees who married same-sex spouses on and after June 26 would have 31 days to apply to enroll their spouses for benefits. *Detroit News*, July 3. A Michigan polling firm found that 56% of respondents approved the Supreme Court's ruling, while 68% supported a proposal to add sexual orientation and gender identity to the state's anti-discrimination law. *Kalamazoo Gazette* (July 2). In Tennessee, Governor Bill Haslam issued a directive on July 2 to executive branch departments requiring that same-sex marriages be recognized and treated the same as different-sex marriages, leading the University of Tennessee to post on its website after the Independence Day weekend an announcement that same-sex spouses of faculty and staff could enroll for health benefits. And, on July 9 U.S. Attorney General Loretta Lynch announced an important consequence of the ruling: federal benefits that depend on marital status would be available to married same-sex couples regardless of where they lived, as the universal requirement of marriage recognition adopted by *Obergefell* eliminated any problem arising from federal statutes or regulations using a place of domicile

rule to determine the validity of a marriage. *Washington Post*, July 9.

In Ohio, Governor John Kasich and Attorney General Mike DeWine indicated the state would comply and would not file a motion for rehearing, despite the urging of one group seeking to force Justices Kagan and Ginsburg to recuse themselves for a rehearing because they had both conducted same-sex marriage ceremonies before the case had come before the Court. Meanwhile, an Ohio state legislator, Rep. Ron Young, announced that he was seeking co-sponsors for a bill to protect businesses from any civil or criminal liability or adverse treatment by the state should they refuse to participate in same-sex weddings due to their religious objections. *Columbus Dispatch*, July 7.

Compliance was also swift in some other states where marriage equality litigation was pending in the district courts or at the appellate level. U.S. District Judge Orlando Garcia in Texas lifted the stay of his decision within hours of the Court's opinion being announced, according to the *Dallas Morning News* (June 26), posting a report on-line at 11:53 a.m. that day. Lambda Legal reported on July 2 that the Employee Retirement System of Texas had granted a request by Lambda's client, Deborah Leliaert, to enroll her wife for spousal health insurance. Leliaert had been employed at the University of North Texas for nearly 24 years, currently as Vice President for University Relations and Planning. Her wife had retired in 2011, busying herself in a variety of volunteer positions that do not provide health insurance. The women married in California in 2008, but ERS refused to recognize their marriage, even after Judge Garcia ruled early last year that the Texas ban on recognizing same-sex marriages was unconstitutional, as the judge had stayed his ruling pending appeal. ERS notified state employees on July 1 that they will be able to enroll their same-sex spouses. Lambda had previously filed suit in the U.S. District Court in Austin, *Leliaert v. Ragland*, CASE NO. 1:15-cv-00506 (W.D. Tex., filed 6/11/15).

There were some delays in Louisiana, Mississippi and Alabama, but those were being sorted out the following week as

recalcitrant state and local officials came around to the reality that the Supreme Court's decision was final and binding on them. The 5th Circuit issued a trio of opinions on July 1 formally reversing the adverse Louisiana decision and affirming the Texas and Mississippi decisions, with orders to the district courts to proceed accordingly and implement the *Obergefell* decision by July 17. *Robicheaux v. Caldwell*, 2015 WL 4032118, 2015 U.S. App. LEXIS 11375; *De Leon v. Abbott*, 2015 WL 4032161, 2015 U.S. App. LEXIS 11505; *Campaign for Southern Equality v. Bryant*, 2015 WL 4032186, 2015 U.S. App. LEXIS 11581. This seemed to settle the issue of the states being required to comply, which Texas and Mississippi had already begun to do with reasonable speed, but Louisiana's governor, "Bobby" Jindal, was determined to string things out, refusing to order state agencies to comply until the federal trial judge, Martin Feldman, issued an Order on July 2, accepting that his prior decision was reversed and specifically directing compliance by the named defendants. *Robicheaux v. Caldwell*, 2015 WL 4090353 (E.D. La.). Jindal's argument for delay was premised on the 5th Circuit having given the state until July 17 to comply, presumably based on the expiration on that date of time for the losing states in the 6th Circuit to file motions for rehearing with the Supreme Court, something none of them had indicated any intention to do. Thus, Jindal, a declared candidate for the Republican presidential nomination who has called for a federal constitutional amendment to overrule the Court's opinion, expressed hesitancy about the necessity to take action before then. Jindal was already defending a federal lawsuit brought by the Louisiana chapter of the ACLU, challenging an executive order he issued in May purporting to recognize religious exemptions for state employees who did not want to provide services for same-sex couples seeking marriage licenses and civil marriage ceremonies. By Thursday, July 2, the head of Louisiana's motor vehicle department had announced that people looking for name changes on drivers' licenses and car registrations could

begin applying for them on Monday, July 6. This announcement seems to have been provoked by a letter from the state's ACLU chapter, warning that refusal to accept and process such applications could lead to a lawsuit against the department. The first same-sex couple to marry in New Orleans, where the local clerks could not comply with the Supreme Court's decision until Gov. Jindal gave the signal in response to Judge Feldman's order, was Garth Beauregard and Robert Welles, who had their ceremony in New Orleans' Jackson Square on July 3. It is ironic, in light of recent developments, that one of the men bears the same surname as a famous Confederate general! *Times-Picayune*, July 3.

On July 7, the Louisiana Supreme Court issued an order in *Costanza v. Caldwell*, 2015 WL 4094655, dismissing as moot the state's appeal

Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples." Thus, under the state's law limiting the right to adopt children to single people and married couples, a same-sex couple that had married in California was entitled to adopt. Several members of the Louisiana court issued concurrences reiterating how they were constrained to take this action because of *Obergefell* and the rule of law, even though they were critical of the U.S. Supreme Court's ruling, some very harshly so. Some of these concurrences were evidently provoked by the sole dissenting opinion, issued by Justice Jefferson D. Hughes, III, who refused to accept the legitimacy of the U.S. Supreme Court's decision. Wrote Hughes: "Judges instruct jurors every week not to surrender their honest convictions merely to reach

The 5th Circuit issued a trio of opinions on July 1 formally reversing the adverse Louisiana decision and affirming the Texas and Mississippi decisions.

of a judgment by a Louisiana district court that the state's same-sex marriage ban was unconstitutional in the context of an adoption case. "In light of the United States Supreme Court's opinion in *Obergefell*," wrote the court *per curiam*, "and the action of the federal district court in *Robicheaux*, the issues presented in this appeal have been resolved. Through the action of the federal courts, plaintiffs have received all the relief they requested in their motion for summary judgment, which forms the basis for this appeal. Given these developments, there is no longer a justiciable controversy for this court to resolve." Addressing obliquely the adoption issue from which the case stemmed, the court stated that "insofar as plaintiffs seek the benefits of the civil effects of marriage, *Obergefell* compels the conclusion that the State of

agreement. I cannot do so now, and respectfully dissent. Marriage is not only for the parties. Its purpose is to provide children with a safe and stable environment in which to grow. It is the epitome of civilization. Its definition cannot be changed by legalisms. This case involves an adoption. The most troubling prospect of same-sex marriage is the adoption by same-sex partners of a young child of the same sex. Does the 5-4 decision of the United States Supreme Court automatically legalize this type of adoption? While the majority opinion of Justice Kennedy leaves it to the various courts and agencies to hash out these issues, I do not concede the reinterpretation of every statute premised upon traditional marriage." Thus, Hughes, broadly insinuating that same-sex couples might adopt young children of the same sex

for pedophilic purposes, would oppose allowing married same-sex couples to adopt such children, despite the U.S. Supreme Court's ruling that they are entitled to marry and have their marriages recognized by the state of their domicile. The concurring opinion by Justice Guidry specifically responded to Hughes' comments about adoption. After pointing out that Hughes had cited "no legal authority" for the proposition that the court could refuse to following the holding of the U.S. Supreme Court, he wrote, "I must also respond to the dissenting opinion's assertion that the 'most troubling prospect of same-sex marriage is the adoption by same-sex partners of a young child of the same sex.' The dissenting opinion appears to be unaware of the facts of the case before us, which involved the intra-family adoption of a boy by the female spouse of the boy's biological mother. See *In re Adoption of N.B.*, 14-314 (La. App. 3 Cir. 6/11/14), 140 So.3d 1263. In any event, the dissenting opinion cites no legal or scientific authority, nor does the record contain any evidence, that would support its insinuation."

In North Dakota, where U.S. District Judge Ralph Erickson had put a marriage equality case on hold pending the Supreme Court's ruling, the court issued a judgment and order on June 29 in *Jorgensen v. Montplaisir*, Case No. 3:14-cv-58 (D. N. D., Southeastern Div.), entering judgment for the plaintiffs and declaring North Dakota's constitutional and statutory bans on same-sex marriage unconstitutional. In South Dakota, where U.S. District Judge Karen Schreier had issued a marriage equality ruling in January (*Rosenbrahn v. Daugaard*, 2015 WL 144567, 2015 U.S. Dist. LEXIS 4018 (D. S. D.)) and the state had appealed to the 8th Circuit, plaintiffs' attorney Josh Newell filed a motion with the 8th Circuit asking the court to formally affirm Judge Schreier's decision and to lift the stay that had been placed on her order, to facilitate a claim to legal fees as the prevailing party. Newell had fronted all the costs of the litigation. He also represented the plaintiffs in North Dakota.

Implementation was swift in Georgia, where local probate judges began

issuing marriage licenses to same-sex couples soon after the Supreme Court's opinion was announced. On July 10, the *Atlanta Journal and Constitution* gave the back-story on this. It seems that in February, after the Supreme Court grant cert in *Obergefell* and it was widely predicted that the 6th Circuit would be reversed, a meeting was held in Decatur involving 20 state probate judges, vital records officials, and court staffers to prepare for the likelihood that same-sex marriage would become the law. Agreement was reached that probate judges would comply with such a Supreme Court ruling and would prepare appropriate forms in advance. Even though opponents of marriage equality were putting substantial pressure on Governor Nathan Deal and various probate judges to resist the ruling, the State Council of Probate Judges was prepared to respond quickly. In April, Governor Deal and Attorney General Sam Olens publicly announced that Georgia would comply with whatever the U.S. Supreme Court ruled. The Probate Judges Council established a line of communication with the Attorney General's Office, which agreed to issue its interpretation of the Supreme Court's decision promptly so that it could be quickly communicated to the probate judges. Shortly after the decision was announced on June 26, the Attorney General's office sent out its order to all the probate judges to comply, accompanied by appropriately revised license application forms, and the Probate Judges Council quickly responded to scattered reports of individual probate judges hesitating to issue licenses by answering questions and urging compliance. Governor Deal praised the way this had been handled, stating: "We don't want anything negative or bad to come out of that decision as it reflects on the state of Georgia and I'm proud the people of Georgia haven't allowed that to happen." The newspaper report contrasted the confused response in neighboring Alabama, where neither the state government nor the probate judges association had prepared to act decisively, leaving confusion that was fanned by the outspoken state Chief Justice, Roy Moore.

Things were dragging out in Kansas. Although Kansas is in the 10th Circuit, which ruled last year in cases involving Utah and Oklahoma that were denied review by the Supreme Court that same-sex couples are entitled to marry and have their marriages recognized, the state had refused to comply fully with marriage equality rulings by trial judges, filing obviously frivolous appeals that were still pending after *Obergefell* was decided. Governor Sam Brownback's response to the Supreme Court ruling was to criticize it and, apparently, to seek ways to further delay complying with the existing trial court orders. Although some local clerks began to issue marriage licenses, state agencies continued to refuse to recognize either the resulting marriages or out-of-state marriages, as inquiries to local officials drew the response that they were waiting for advice from the Attorney General's Office, where the matter was still "under study." This is, of course, ridiculous, since the Supreme Court's opinion was clear on its face and the local federal courts were bound by 10th Circuit precedent in any event. There was nothing to "study." *Wichita Eagle*, July 2. Within a few more days, however, the state had at least partially capitulated, although officials continued to state that the issue of spousal tax filing was "under study." Governor Brownback issued Executive Order 15-05, titled "Preservation and Protection of Religious Freedom," noting the 2013 passage of a state religious freedom restoration act in Kansas, sounding the alarm on the "potential infringements on the civil right of religious liberty" posed by the Supreme Court's "recent imposition of same-sex marriage," and then ordering that the state government not take any "discriminatory action" against clergy or religious organizations who refuse to be involved with same-sex marriages. Of course, under the 1st Amendment, the government has no right to impose any sort of penalty on religious actors or bodies in this connection, so to that extent the EO seemed to be merely symbolic. However, it also implied that social welfare organizations run by religious bodies would not suffer any penalty or disadvantage for refusing to

work with married same-sex couples, and that state tax exemptions would not be threatened as a result of such refusals. The EO prominently quoted the state constitution's religious liberty paragraph, but appeared to stretch it a bit to source the EO. Kansas is a jurisdiction that does not prohibit sexual orientation discrimination, and presumably the EO, which is an order to state officials, would have no effect on local officials in the three municipalities and one county that do ban such discrimination. Kansas Attorney General Derek Schmidt joined with 14 other state attorneys general in a letter to Republican leaders in Congress, urging passage of a federal law that would protect the tax exemptions of religious institutions that refused to sanction or recognize same-sex marriages. This was responding to a colloquy during oral argument of *Obergefell*, when Solicitor General Donald Verrilli responded to a question from Justice Alito that it was possible the precedent of the *Bob Jones University* case might apply to this situation. (In that case, the Supreme Court upheld a decision by the Internal Revenue Service to revoke the tax exempt status of the university because its rule against interracial dating by students violated an important federal policy against race discrimination.) These comments had set off horrified buzzing among some church-affiliated schools that have strict policies against homosexual conduct, some of which have discharged faculty and staff members upon learning that they had entered into same-sex marriages, and this fear escalated after the Supreme Court's opinion.

In Utah, Governor Gary Herbert, responding to press inquiries, expressed reluctance to take up modifications to the state's anti-discrimination law in response to the marriage ruling. The law was amended earlier this year to forbid sexual orientation and gender identity discrimination in employment and housing, with a broad religious exemption, but did not address public accommodations, the area in which it seemed likely that there would be most contention. Senate Majority Whip Stuart Adams (R-Layton) reported hearing "rumors" that some legislators would

be introducing bills addressing the conflict between "religious liberty" and nondiscrimination principles. Herbert said that his support for a religious freedom bill would depend on "what's in it," stating: "I think shoring up religious freedom is a good thing, certainly making sure at the same time we don't have any discrimination in violation of people's civil rights. They need to go hand in hand, and I think they can." *Deseret Morning News*, July 9. Same-sex couples were able to marry in Utah for a few weeks after the U.S. District Court's December 20, 2013, decision, and then again after the Supreme Court's denial of the state's cert petition on October 6, 2014, lifted a stay it had granted to the state in January 2014.

In Texas, where, as noted above, some county clerks began issuing licenses on June 26 after Judge Garcia lifted his stay,

rights in their personal capacities are irrelevant. (Consider the parallel issue under the 1st Amendment of freedom of speech. The Supreme Court has ruled in *Garcetti v. Ceballos*, 547 US 410 (2006), that when public employees speak as part of their job duties, what they say enjoys no 1st Amendment protection, because they are speaking for the government, not themselves.) Paxton subsequently announced that he planned to drop an appeal challenging a ruling by Travis County Probate Judge Guy Herman that rejected his motion to dismiss a case brought by a surviving same-sex partner of an Austin woman, seeking a determination that the women had a common law marriage for purposes of inheritance rights. Herman's ruling had led to the first same-sex marriage in Texas, performed on February 19 by another Travis County

In Texas, Attorney General Ken Paxton issued an "Opinion" on June 28 asserting that local officials with religious objections were privileged to refuse to issue licenses to same-sex couples or to officiate at their weddings.

Attorney General Ken Paxton issued an "Opinion" on June 28 asserting that local officials with religious objections were privileged under the 1st Amendment to refuse to issue licenses to same-sex couples or to officiate at their weddings. Some quick research by marriage supporters turned up an Attorney General Opinion from 1983 by Jim Mattox (Opinion No. JM-1, March 8, 1983) advising local officials that they could not invoke their personal religious beliefs to refuse to issue marriage licenses to mixed-race couples. Quite a few Texas clerks ignored Paxton and continued or began issuing licenses. Paxton's assertion was ridiculous on its face; after all, when public officials perform their duty, they are acting as the government, not as individuals. As such, constitutional provisions endowing them with constitutional

judge, David Wahlberg, on behalf of Sarah Goodfriend and Suzanne Bryant. The Texas Supreme Court had temporarily blocked rulings by Herman and Wahlberg in response to Paxton's petition, but at a July 6 hearing counsel for the Attorney General informed Judge Herman that the appeal would be dropped. Herman then scheduled an October 5 hearing to determine if the couple had a common law marriage. *Off the Kuff Blog*, 2015 WLNR 20184932 (reporting on Paxton dropping appeals). * * * Paxton's "Opinion" led to some local dramas. In Granbury City, capital of Hood County, the local clerk, Katie Lang, objected to the Supreme Court's ruling, stating that "marriage is for one man and one woman because it did derive from the Bible." (Presumably she was aware, or would not acknowledge, numerous polygamous marriages

by Biblical characters that are not condemned in the sacred text.) This led to dueling demonstrations pro and con outside her office on July 2, with threats to file a law-suit against her if she did not personally issue licenses to same-sex couples. Lang reacted by assigning some subordinates to issue licenses, but not until after a lawsuit had been filed, and even then her office said no licenses could be issued to same-sex couples for several weeks while she awaited new forms from the state. One couple, James Cato and Jody Stapleton, filed a federal lawsuit against Lang (complaint available at 2015 WL 4092474) in the U.S. District Court for the Northern District of Texas in Fort Worth, seeking a declaratory judgment, injunctive relief, costs and fees, and legal and equitable relief. They are represented by Jan Soifer of O'Connell and Soifer LLP, and Austin Kaplan of Kaplan Law Firm PLLC. * * * In Rusk County, County Clerk Joyce Lewis-Kugle submitted a resignation letter to the County Commission on July 9, stating that she could not in good conscience issue marriage licenses to same-sex couples, and the Commissioners were scheduled to vote to accept her resignation on July 13. Lewis-Kugle reportedly decided to resign after being advised by District Attorney Michael Jimerson that the Supreme Court ruling is the "law of the land" with which she must comply if she was to stay in her position. * * * A former Texas State Bar Director, Steve Fischer, was circulating a petition to file an ethics complaint against Paxton after the U.S. Supreme Court's 25-day period for rehearing motions expired. Fischer asserted that Paxton "needs to retract, and he needs to tell the clerks to just do their jobs." Former state legislator Glen Maxey was not inclined to wait 25 days, and filed his own complaint against Paxton, in which he stated: "Paxton has advised state government officials and employees that they may refuse to issue same-sex marriage licenses or conduct same-sex marriage ceremonies if doing so would 'violate their sincerely held religious beliefs.'" Thus, asserted Maxey, Paxton had "issued an opinion that advises state and county officials to violate the U.S. Constitution," which would in turn

violate their oaths of office. *EFE News Service*, July 3; *Abilene Reporter-News*, July 7.

In Alabama, where the state's elected Chief Justice, Roy Moore, had bitterly opined against marriage equality and his court had issued an order blocking probate judges from issuing licenses to same-sex couples, the state supreme court issued a notice to the parties in that suit, *Ex parte State of Alabama*, No. 1140460, on June 29, noting the 25-day period for filing petitions for rehearing in the U.S. Supreme Court and asking the parties to submit "any motions or briefs addressing the effect" of *Obergefell* "on this court's existing orders in this case" by July 6, 2015, which appeared to many to have been interposed for purposes of delay and confusion, but Moore subsequently appeared to back off and soon marriage licenses became available in some Alabama counties. By July 1, U.S. District Judge Callie Granade had issued a brief order lifting the stay she had imposed on her pre-*Obergefell* ruling requiring all Alabama probate judges to issue marriage licenses, and soon most of the other probate judges had fallen into line. By July 3, there were still at least half a dozen counties where probate judges either were issuing no marriage licenses at all or no same-sex licenses, all seeking shelter under Moore's opinion that compliance with the Supreme Court's decision would not be mandated until the time for rehearing petitions to be filed expired on July 17. *Press-Register*, July 3. On July 6, Mat Staver of Liberty Counsel, representing the petitioners against same-sex marriage in the pending Alabama Supreme Court case, filed an incendiary brief arguing that the U.S. Supreme Court's decision was illegitimate and unconstitutional and that the state supreme court should defy it. Staver's argument was constructed from bits and pieces of the four dissenting opinions in *Obergefell*, and sought precedential grounding in a pre-Civil War dispute between the Wisconsin Supreme Court and the U.S. Supreme Court over the enforcement of the Fugitive Slave Law by federal officials in Wisconsin. *In re Booth*, 3 Wis. 1 (1854); *In re Booth*, 2 Wis. 157 (1854);

Ableman v. Booth, 62 U.S. 506 (1858); *Ableman v. Booth*, 11 Wis. 498 (1859). The brief conveniently ignored that a Civil War was subsequently fought in part to vindicate the federal Supremacy Clause, and that the subsequently ratified 14th Amendment imposed federal constitutional constraints on the state governments through the Due Process and Equal Protection Clauses, which are the basis for the *Obergefell* decision. Staver also argued that the probate judges in Alabama who had religious objections to participation in same-sex marriages were entitled to 1st Amendment protection and should not be required to issue such licenses or conduct such ceremonies. The *Mobile Press-Register* reported on July 15 that Attorney General Luther Strange said that he would be filing a document in the marriage recognition case pending before U.S. District Judge David Proctor, stating that out-of-state same-sex marriages would be recognized for all purposes in Alabama, thus mooted that case to the extent it sought prospective injunctive relief.

The Supreme Court of Arkansas issued an order on June 26 dismissing the state's appeal in *Smith v. Wright*, No. CV-14-427, in which Pulaski County Circuit Judge Chris Piazza had ruled early in 2014 that same-sex couples were entitled to marry in that state. Many couples had married when Piazza refused to stay his decision pending appeal. The Supreme Court declared the appeal "moot" in light of *Obergefell*. The simple statement concealed more than a year of drama at the court. One local reporter, Max Brantley of the *Arkansas Times*, documented that an opinion had actually been drafted late in 2014 upholding Piazza's ruling, but had not been issued because the dissenters had asked for more time to work on their dissents and, at the end of the year, the terms of several members of the court had expired. In light of changes in membership, there was a controversy about who would decide the case. This dragged out for several months, but ultimately, there was a heavily-contested solution. The new majority drafted an opinion reversing Piazza's ruling, but again delays by dissenters working on their draft

stretched things out until the *Obergefell* ruling made the entire appellate process irrelevant. Brantley's article, published on July 2, is titled "A timeline of the Arkansas Supreme Court and the same-sex marriage case." In the meantime, a federal trial judge had also ruled for marriage equality in Arkansas, but that ruling was on hold pending the state's appeal to the 8th Circuit, which has been withdrawn in light of *Obergefell*, as were appeals from other states in that circuit. The state and the plaintiffs in that case differed on how the 8th Circuit should act. The state moved the court on July 8 to vacate the trial court's decision as moot, since the governor and attorney general had announced that the state would comply with the Supreme Court's ruling. Counsel for the plaintiffs, Jack Wagoner, disagreed, arguing that the court should summarily affirm the district court's ruling, making the plaintiffs prevailing parties for purposes of a subsequent motion for the award of attorney fees. The state countered that the district court's decision had been premised on different grounds from the Supreme Court's opinion. *Arkansas Times*, July 8. Also, Pam Bradford, the Van Buren County Clerk, circulated a memo to all the county clerks announcing that she would defy the Supreme Court order and refuse to issue marriage licenses to same-sex couples, having received an offer of legal assistance from Liberty Counsel, and calling on others to do the same. *Arkansas Times*, July 8.

In Missouri, Governor Jay Nixon issued Executive Order 15-04 on July 7, ordering "all departments, agencies, boards and commissions in the executive branch to immediately take all necessary measures to ensure compliance with the *Obergefell* decision in all aspects of their operations." He also rescinded his prior Executive Order 13-14, which he had issued in response to the *Windsor* decision in 2013, instructing the state tax authorities to allow married same-sex couples who filed their federal taxes jointly also to file their Missouri taxes jointly, opining that the state statute requiring married couples to file their state taxes in the same status as their federal taxes compelled this result. In light of *Obergefell* and the

new executive order, the prior one was effectively superseded.

In Puerto Rico, where a district judge had dismissed marriage equality litigation and the plaintiffs were appealing to the 1st Circuit, officials indicated that new license application and marriage certificate forms were being printed, and that same-sex couples could begin applying for licenses as of July 15. The 1st Circuit asked the parties to submit their responses to the effect of the *Obergefell* decision, which they promptly did. On July 8, the 1st Circuit panel issued a very brief Judgement in *Conde-Vidal v Rius-Armendariz*, No. 14-2184, which can be quoted in full: "Upon consideration of the parties' Joint Response Pursuant to Court Order filed June 26, 2015, we vacate the district court's Judgement in this case and remand the matter for further consideration in light of *Obergefell v. Hodges*, 2015 WL 2473451. . . We agree

appeal moot. *Alaska Dispatch*, July 2.

The question of whether county clerks and similar sorts of local officials who have religious objections to same-sex marriage will be held personally liable for refusing to issue licenses to same-sex couples may get an early test in Kentucky, where the ACLU of Kentucky filed suit on July 2 on behalf of four couples who were denied licenses by the Rowan County Clerk Kim Davis. The suit sought an injunction to order Davis to issue the licenses and punitive damages for violating the four couples' constitutional rights. *Miller v. Davis*. *Louisville Courier-Journal*, July 3. A hearing was to be held before District Judge Bunning on July 13. * * * A petition seeking a special session of the legislature to address the problem faced by county clerks who had religious objections was submitted on behalf of 57 of the state's 120 county clerks on July 8, but Governor Steve Beshear

The question of whether county clerks will be held personally liable for refusing to issue licenses may get an early test in Kentucky.

with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith." Thus, the government of Puerto Rico had judicial sanction to begin allowing same-sex marriages. Lambda Legal represented the plaintiff couples in this case together with local counsel.

Counsel for the state of Alaska and the same-sex couples who successfully challenged the state's marriage ban in the U.S. District Court filed a joint notice with the 9th Circuit on July 1 seeking dismissal of the state's appeal. District Judge Timothy Burgess had ruled for the plaintiffs and refused to stay the ruling, as did the 9th Circuit, so marriage equality went into effect in Alaska in October 2014. The 9th Circuit had suspended all action on the appeal after the Supreme Court granted certiorari in *Obergefell* in January. The Supreme Court's action on June 26 makes the

refused to call such a session, having published statements asking elected officials to comply with the Supreme Court's ruling. The petitioning clerks asserted that forcing them to issue licenses violated their 1st Amendment Free Exercise rights, and asked for the adoption of "commonsense legislation that would modify Kentucky's marriage laws to satisfy the concerns of the majority of Clerks, while still abiding by the *Obergefell* ruling." Beshear responded that it would cost the state at least \$60,000 to convene such a special session, an expense he felt was not justified. *The Daily Independent* (Ashland), July 9. Beshear met with one of the objecting clerks, Casey County Clerk Casey Davis (no relation to Kim Davis, apparently), and told Davis either to issue licenses or resign his position. Since Davis is elected, Beshear cannot dismiss

him. * * * State Representative Addia Wuchner (R-Burlington) announced that she had filed a bill to prevent the state from forcing religious figures and organizations to perform same-sex marriages, but her proposal would not excuse state officials from doing their duty. *The Gleaner* (Hendersonville), July 9.

There were also reports during the first week after the Supreme Court's opinion of a few local officials in a handful of states resigning their offices rather than comply with the decision. In Decatur County, Tennessee, it was reported that the entire staff of the county clerk's office resigned *en masse* (just three women, but that is apparently a *masse* for Tennessee) rather than issue licenses to same-sex couples. According to a news report, nobody had applied for a same-sex license in that county, and this was the only county in Tennessee where the local clerk had announced a refusal to issue them. *Jackson Sun*, July 3. Although nobody had been promoting an affirmative marriage equality ruling from the Supreme Court as a jobs-creating measure, it seems to have opened up some job vacancies around the country!

In Nebraska, only one county clerk, Sioux County Clerk Michele Zimmerman, stated that she would not issue licenses to same-sex couples, but the point seemed moot since she operates in a sparsely-populated county and rarely receives more than a handful of license applications each year; in other parts of the state, clerk's offices indicated that even if the county clerk personally would not issue such licenses, somebody in the office would be available to do so. The ACLU contacted the one recalcitrant clerk, suggesting that if she actually turned down an application, a lawsuit could result. Nebraska is in the 8th Circuit, where the court of appeals had put state marriage appeals on hold pending *Obergefell*, and the stay of a district court marriage equality decision in that state was dissolved in the wake of the Supreme Court's ruling. Several dozen same-sex couples promptly obtained marriage licenses from county clerks across the state. *Grand Island Independent*, July 2. On June 29,

responding to an inquiry from the Administrative Office of the Courts, the Nebraska Judicial Ethics Committee issued Opinion 15-1, concluding: "In summary, the Committee concludes that when the U.S. Supreme Court's decision in *Obergefell* takes effect, a judge or clerk magistrate may not refuse to perform a same-sex marriage notwithstanding the judge's or clerk's personal or sincerely held religious belief that marriage is between one man and one woman. A refusal to perform the ceremony but providing a referral to another judge willing to perform a same-sex marriage similarly manifests bias or prejudice based on a couple's sexual orientation and is prohibited. A judge or clerk magistrate may avoid such personal or religious conflicts by refusing to perform all marriages, because the performance of marriage ceremonies is an extrajudicial activity and not a mandatory duty. While a judge or clerk magistrate who chooses to only perform marriage ceremonies for close friends and relatives is not obligated to perform ceremonies for those who are not close friends and relatives, as such a practice is not based on a discriminatory intent, a judge or clerk magistrate who performs marriages only for close friends or relatives may not refuse to perform same-sex marriages for close friends or relatives." The Committee noted that its opinions were advisory only, based on the questions submitted to it.

In Colorado, where same-sex marriage has been in effect since last year as a result of the 10th Circuit's marriage equality rulings, anti-gay activists Gene and D'Arcy Straub filed two ballot measure on July 2, seeking to "revert all same-sex marriages to civil unions in Colorado" and protecting businesses that refuse to provide goods or services for same-sex marriages, according to a July 7 report on *Colorado Independent Blog*. The first actually declares that "marriage is recognized as a form of religious expression of the people of Colorado that shall not be abridged through the state prescribing or recognizing any law that implicitly or explicitly defines a marriage in opposition or agreement with any particular religious belief."

One wonders whether the Straubs have any knowledge of the 1st Amendment Establishment Clause. The Legal Director of the ACLU of Colorado, Mark Silverstein, described the Straubs' proposal as "incomprehensible" and could not withstand a court challenge in light of *Obergefell*.

Within days of the decision, the federal Department of Veterans Affairs announced the same-sex married couples were entitled to spousal benefits regardless of marriage recognition policy of their place of domicile, in light of the Court's holding that states are constitutionally obligated to recognize same-sex marriages that were lawful in the place of celebration. This effectively moots a pending lawsuit against the Department brought by the American Military Partners' Association on behalf of veterans whose same-sex spouses were being denied benefits, provided, of course, that the holding is treated as retroactive and the VA is willing to pay out on claims for benefits that were being unconstitutionally denied prior to the Court's ruling on June 26. *Boston Globe*, July 3, 2015.

As of Tuesday, June 30, the *New York Times* could report that marriage licenses had been issued to same-sex couples in every state, and the wheels were in motion to get compliance in the territories as well, although there might be some delays. Governors in Puerto Rico, the Virgin Islands, Guam, and the North Mariana Islands announced compliance, but the matter was still under study in American Samoa, where the peculiar legal status of the island in relation to the United States raised questions about whether the Supreme Court's ruling was binding there. A local newspaper interviewed some gay people who welcomed the Court's ruling, but expressed a preference against trying to implement it in American Samoa, a small, socially-conservative place with a population of about 50,000. One expert on the legal issues involved indicated that in order for same-sex marriage to be recognized in American Samoa, there would have to be either voluntary action by the government or litigation, since U.S. Supreme Court decisions are not automatically binding there. ■

9th Circuit Summarily Reverses Screening Dismissal of Transgender Prisoner's Suit Seeking Sex Reassignment Surgery

In a brief unsigned *per curiam* opinion, Ninth Circuit Judges Barry G. Silverman, Ronald M. Gould, and Andrew D. Hurwitz reversed a decision by Chief Judge Ralph R. Beistline (E.D. Calif., 2013 WL 1790157) that had dismissed at screening under 28 U.S.C. § 1915(e)(2)(B) transgender prisoner Philip Walker Rosati's civil rights complaint about medical care, and that had denied her leave to amend. *Rosati v. Igbinoso*, 2015 WL 3916977 (9th Cir. June 26, 2015). Now known as Mia Rosati, the plaintiff claimed that prison officials were deliberately indifferent to the serious medical needs presented by her gender dysphoria, for which sexual reassignment surgery ["SRS"] "is the medically necessary treatment."

The state conceded that Rosati's medical needs are "serious" under *Estelle v. Gamble*, 429 U.S. 97, 104–06 97 (1976), and that refusal to permit her to amend her pleadings "justifies reversal"; but the opinion did not stop there. The opinion found that Rosati stated an Eighth Amendment claim by "plausibly" alleging: (1) severe gender dysphoria; (2) "repeated episodes of attempted self-castration despite hormone treatment"; (3) prison officials' awareness of her medical history; and (4) a "blanket policy" against SRS. It compared *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir.2014), which held that "blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference."

Regardless of the legality of a "blanket policy," Rosati plausibly alleged that her symptoms and history "are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS solely on the recommendation of a physician's assistant with no experience in transgender medicine, citing *Pyles v. Fahim*, 771 F.3d 403, 412 (7th Cir.2014) ("if the need for specialized expertise. . .

would have been obvious to a lay person, then the... refusal to engage specialists permits an inference that a medical provider was deliberately indifferent to the inmate's condition"); and *Hoptowitz v. Ray*, 682 F.2d 1237, 1252–53 (9th Cir.1982) ("Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems."), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

The court found that Rosati plausibly alleged that "the state has failed to provide her access to a physician competent to evaluate her, citing *De'lonta v. Johnson*, 708 F.3d 520, 526 n. 4 (4th Cir.2013) ("Appellees. . . take pains to point out that, absent a doctor's recommendation, De'lonta cannot show a demonstrable need for sex reassignment surgery. However, we struggle to discern how De'lonta could have possibly satisfied that condition when, as she alleges, Appellees have never allowed her to be evaluated by a [gender dysphoria] specialist in the first place."). The opinion also found Rosati's claim supported by *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir.2014) (en banc); and *Norsworthy v. Beard*, 2015 WL 1478264, at *7–9 (N.D. Cal. Mar. 31, 2015); *see also, Fields v. Smith*, 653 F.3d 550, 554–59 (7th Cir. 2011) (affirming a district court's determination that a statute barring hormone treatment and gender reassignment surgery for prisoners was unconstitutional).

Rosati's complaint was supported by "copious citations" to medically accepted treatment for her dysphoria and her need for SRS under Standards of Care from the World Professional Association for Transgender Health ("WPATH"). The court found, however, that no finding about any consensus about WPATH standards should be made at the screening level (at which this case was dismissed), because it necessarily "would require consideration of matters outside the complaint."

The court directed the district court

on remand also to consider the merits of Rosati's Equal Protection claims. It did not elaborate on the claims or address the level of scrutiny to be applied.

This case should discourage summary dispositions of transgender prison treatment claims in the future. It is also a clear signal to correctional officials in the states throughout the Ninth Circuit that federal courts will expect to see opinions from physicians experienced in treatment of transgender patients in future Eighth Amendment transgender health care cases.

Although initially *pro se*, Rosati was represented on the appeal by Jon W. Davidson and Peter C. Renn, Lambda Legal Defense and Education Fund, Inc., Los Angeles; and by Alison Hardy, Prison Law Office, Berkeley. The World Professional Association for Transgender Health appeared as *amicus curiae*. – William J. Rold

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

[Editor's Note: If the *Rosati* opinion signals the 9th Circuit's likely direction in the state's appeal of *Norsworthy*, then this issue is likely headed to the Supreme Court, as it would create a circuit split on the merits between the 1st and 9th Circuits in what is becoming a frequently litigated issue in federal courts. Especially in light of recent developments on coverage for gender transition under Medicare and the federal employee benefits program, it should be difficult for states to defend the idea that this is not necessary medical treatment when a qualified physician concludes that a particular individual's gender dysphoria requires sex reassignment surgery.]

Federal Housing Discrimination Law May Cover Some Sexual Orientation Discrimination Claims

Although ultimately dismissing the suit because it was brought by a straight man conforming to gender stereotypes, an Alabama federal district court took the opportunity of a sexual orientation discrimination claim to examine the regulations of the federal Department of Housing and Urban Development (HUD), and find that the agency is within its bounds to interpret the Fair Housing Act (FHA) as prohibiting discrimination based on gender nonconformity. *Thomas v. Osegueda*, 2015 U.S. Dist. LEXIS 77627 (N.D. Ala. June 16, 2015). U.S. District Court Judge William M. Acker, Jr. concluded that “HUD’s narrow tailoring of jurisdiction for discrimination based on sexual

the local federal court. The exact details of his complaint are not specified in the opinion, but as Judge Acker described them, Thomas said he was refused service “because he is not gay” and that “he was discriminated against based on his conformity to male stereotypes, such as stereotypes regarding cooking and buying furniture.” The respondents argued that the FHA does not give them jurisdiction to investigate claims of sexual orientation discrimination.

Acker acknowledged the respondents’ argument would have easily won in an “earlier decade,” but adds that “HUD has taken an increasingly expansive view of its delegated authority under the FHA relating to discrimination based on sexual orientation.” He

on sexual orientation,” but rather as a limited one that only “rather discretely includes discrimination for gender nonconformity.” The seminal U.S. Supreme Court employment discrimination case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), supports this distinction, as the Supreme Court there found that discrimination based on gender stereotypes is cognizable sex discrimination under Title VII.

Acker cited another decision of his to buttress this point. In *E.E.O.C. v. McPherson Companies*, 914 F. Supp. 2d 1234 (N.D. Ala. 2012), he granted summary judgment to an employer because the gay slurs in the complaint were uttered to a masculine man and, therefore, outside the scope of *Price Waterhouse*.

The same problem doomed Thomas’s complaint here, as he “does not petition under a theory of gender non-conformity but rather relies on sexual orientation as the sole basis for discrimination.” Since he “alleges that he was discriminated against based on his conformity to male stereotypes,” HUD has no jurisdiction to act. Acker, therefore, granted the respondents’ motion to dismiss and denied Thomas’s motion for a ruling.

The end of the month, however, brought an even bigger victory for another expansive interpretation of the FHA. On June 25, in a ruling surprising to advocates who had feared the worse, the U.S. Supreme Court agreed 5-4 that the FHA not only bars intentional discrimination, but also forbids policies that have a “disparate impact” on housing opportunities. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 2015 WL 2473449. This, of course, makes Judge Acker’s upholding of FHA application to gender nonconformity claims even more consequential for LGBT complainants who might be able to fit their claims into that theory.

– Matthew Skinner

Acker found that HUD satisfies the second prong of *Chevron* by characterizing HUD’s policy as a limited one that only “rather discretely includes discrimination for gender nonconformity.”

orientation to protections for gender stereotyping in its interpretation of the FHA is a permissible reading of ‘sex.’”

The FHA is a federal statute signed into law by President Lyndon Johnson as part of the Civil Rights Act of 1968. Its primary prohibition, codified at 42 U.S.C. § 3604(b), makes it unlawful to refuse to sell, rent, or provide services to a housing buyer or renter because of that person’s inclusion in several protected classes, including “sex.” As with the other major federal antidiscrimination statutes, Congress did not define “sex.”

James Earl Thomas originally brought a discrimination complaint against Aletheia House, a federally subsidized housing facility in Birmingham, Alabama. When his complaint went unaddressed, he petitioned for a writ of mandamus against two local HUD officials, Carlos Osegueda and Christian Newsome, from

cited a 2010 guidance document, the 2012 promulgation of the Equal Access Rule, and a 2014 interpretative document as laying out HUD’s current policy of interpreting the FHA as also prohibiting discrimination based on sexual orientation or gender identity.

With this in mind, the question became whether “HUD’s interpretation of its authority squares with the statutory language of the FHA.” Acker admitted that an agency typically has deference in this kind of situation, and turned to the well-established *Chevron* test to analyze whether to grant that deference. Since Congress did not define sex, the second step of *Chevron* looks at whether an interpretation is “permissible.”

Acker found that HUD satisfies the second prong of *Chevron* by characterizing HUD’s policy as “not broadly includ[ing] all types of discrimination based

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Federal Court Allows Transgender Challenge to NY Medicaid Regulations to Continue

U.S. District Judge Jed Rakoff in Manhattan denied most of New York State's motion to dismiss a lawsuit challenging various limitations in the state's Medicaid program relating to treatment for gender dysphoria. Judge Rakoff did not immediately issue a written opinion supporting his June 26 ruling, indicating that one would be issued later. The case is *Cruz v. Zucker*, No. 14-CV-4456 (JSR)(GWG) (S.D.N.Y., June 26, 2015).

Medicaid is a joint federal-state program to provide health care coverage for medically needy people who lack the financial resources to pay for adequate health care. States are not required to have a Medicaid program, but if they do they must comply with federal standards in order to be eligible for federal money to help pay for the program. In general, the federal program requires coverage for medically necessary care.

The lawsuit was brought on behalf of a class of transgender Medicaid-eligible New Yorkers seeking various medical procedures as a part of their gender transition. It was originally filed in June 2014 to challenge a New York State Medicaid regulation banning all coverage for sex reassignment treatments and procedures, which had been adopted during the Pataki Administration in 1998. The lawsuit arose from frustration about lack of response by the Cuomo Administration to continuing demands to change the policy, in an environment where federal Medicaid and Medicare programs had been evolving towards greater coverage in this area. Indeed, the U.S. Tax Court ruled just a few years ago that costs for gender transition treatment could be tax deductible as medically necessary, reversing a long-time policy, and just weeks ago the federal Office of Personnel Management notified insurance companies covering federal employees that they were required to cover such expenses. This New York lawsuit soon triggered a response from the state, which adopted a new regulation effective on March 11, 2015.

However, the new regulation only went part way towards the plaintiffs'

goal of achieving complete coverage for sex-reassignment procedures under Medicaid. They quickly filed an amended complaint, attacking the failure of the new regulation to provide complete coverage.

The old regulation was a blanket prohibition, stating: "Payment is not available for care, services, drugs, or supplies rendered for the purpose of gender reassignment (also known as transsexual surgery) or any care, services, drugs, or supplies intended to promote such treatment."

The new regulation states that "payment is available for medically necessary hormone therapy and/or gender reassignment surgery for the treatment of gender dysphoria." Payment for hormone therapy is available even if the individual is not seeking surgical reassignment. Two qualified New York State licensed health care professionals must certify that the individual suffers from gender dysphoria and that surgery is medically necessary. The regulation excludes coverage for people under age 18, and will not cover gender reassignment surgery that would render somebody sterile unless they are at least 21. This is most significant for transgender women, since the removal of male genitalia and reproductive system organs incident to transition always produces sterility. The regulation explicitly excludes a long list of procedures that are deemed "cosmetic" and thus not "medically necessary," but that transgender individuals may need in order to accomplish a complete transition consistent with their gender identity.

The lawsuit challenges the exclusions of coverage for younger transgender people, and sharply disputes the contention that the various procedures labeled as "cosmetic" should be excluded. The mindset of those who drafted the regulation is exemplified by its explanation that "cosmetic surgery, services, and procedures refers to anything solely directed at improving an individual's appearance." Of course, Medicaid would cover these procedures

in other contexts, such as reparative and cosmetic surgery for somebody who has suffered disfiguring injuries in a fire, auto crash or similar catastrophe, even though in such circumstance "improving an individual's appearance" may be the primary goal of a particular procedure. The point is that these procedures are not sought by transgender individuals solely to improve their appearance, but rather to bring their appearance into more full accord with their gender identity.

The plaintiffs argue that these additional procedures can be centrally important for a successful gender transition process. The goal is not just to eliminate or modify unwanted genitalia and internal organs. It is rather to assist the individual in achieving a physical form that is consistent with their gender identity and how it is expressed to the world. The Complaint filed in this case spells out the problems encountered by some of the plaintiffs who were unable to access these procedures, which, they argue, are necessary for them to be able to present themselves in their desired gender. An incomplete transition makes their transgender status obvious, "outing" them and leaving them vulnerable to harassment or worse.

The legal theory behind the lawsuit is that denial of these services to those under 18, and the blanket denial of a range of procedures that are necessary to effectuate a successful gender transition, violates the state's obligations under the federal Medicaid statute to cover medically necessary care and also raises constitutional issues of unequal treatment, as transgender people are being excluded from access to treatments and procedures that are covered in other contexts. The Complaint also alleges a violation of the non-discrimination requirements of the Affordable Care Act (ACA).

The Attorney General's office quickly responded to the Amended Complaint by filing a motion to dismiss the case. The office's brief, submitted in the name of Attorney General Eric Schneiderman by Assistant Attorneys General John Gasior and Zoey S. Chenitz, argued that

the 11th Amendment bars the plaintiffs' constitutional claims, and that the Medicaid statute's requirements are not enforceable by individuals in a federal lawsuit. Furthermore, they argued, the exclusion of those under age 18 would not violate any provisions of the statutes that the plaintiffs rely upon, the denial of coverage for cosmetic procedures was not "ripe" for review based on the factual allegations in the Complaint, and, they argued, the Complaint did not even raise a plausible claim for violation of the specific Medicaid regulation upon which the plaintiffs are relying.

Judge Rakoff rejected most of the Attorney General's arguments, at least at this early stage of the lawsuit for purposes of determining whether the case should be thrown out or allowed to continue.

According to a summary of his ruling published by the New York Law Journal on June 30, he refused to dismiss the claims based on "refusal to fully fund the treatment of gender identity disorder or gender dysphoria" including "refusing surgery for those under 18." He also refused to dismiss a sex-based discrimination claim under the ACA, but granted the state's motion to dismiss an ACA claim for youth hormone therapy for those under 18. He also dismissed a claim under a section of the Medicaid law requiring the state to have reasonable standards for determining eligibility for the extent of medical assistance. Rakoff noted that the parties had agreed to dismiss the constitutional claim. An explanation for his rejection of the arguments made by the Attorney General's office in its brief awaits publication of an opinion.

The plaintiffs are represented by the Sylvia Rivera Law Project and the Legal Aid Society, with pro bono assistance from lawyers at the firm of Willkie Farr & Gallagher LLP. Sumani Lanka, a Legal Aid Society attorney, told the Law Journal, "The state doesn't really understand what gender identity is. Gender identity isn't just reassignment surgery – it has to do with how a person perceives themselves and identifies themselves. It shouldn't be that the state arbitrarily limits treatment that is medically necessary for gender dysphoria." ■

N.Y. 4th Department Rejects Custody & Visitation Petition From Same-Sex Co-Parent

Relying on a quarter-century old N.Y. Court of Appeals precedent under which a same-sex co-parent is considered a "legal stranger" to the child she was raising with her former partner, the New York Appellate Division, 4th Department has affirmed a decision by Chautauqua County Family Court Judge Judith S. Claire to dismiss a petition for custody and visitation filed by Brooke S. Barone. The ruling in *Barone v. Chapman*, 2015 N.Y. App. Div. LEIS 5226, 2015 WL 3797129,

child, arguing that the child's best interests should be "paramount" over the legal formalities, and that "the standing accorded to parents should extend to those who have a recognized and operative parent-child relationship, regardless of their sexual orientation." He further argued that the court should use the doctrine of equitable estoppel, arguing that a legal parent who has fostered and encouraged her unmarried partner to form a relationship with her child should be forbidden by the court to deny the reality of that relationship

In the absence of a second-parent adoption, the courts have adhered to the "legal stranger" rule, and the legislature has yet to modify the statutes on parental standing to take account of non-traditional families in New York.

was issued on June 19, 2015.

Brooke Barone and Elizabeth Chapman were same-sex partners and Barone had been co-parent of Chapman's son. They did not marry and Barone never adopted the child. After they ceased to be partners Barone filed this petition seeking to have the Family Court determine custody and visitation issues. The court appointed R. Thomas Rankin, an attorney in Jamestown, to represent the interest of the child. Barone represented herself in the proceeding.

Chapman filed a motion to dismiss the petition, arguing that Barone did not have standing to seek custody or visitation because she had no legal relationship to the child. Rankin opposed the motion on behalf of the

by raising an objection to standing. Judge Claire, finding herself bound by New York precedents, dismissed the petition.

The Appellate Division was equally dismissive of Rankin's argument. "Those contentions are without merit," it wrote, quoting from an Appellate Division ruling that "the Court of Appeals has recently reiterated that a nonbiological, nonadoptive parent does not have standing to seek visitation when a biological parent who is fit opposes it, and that equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some matter of control over the child with the parent's consent." The court noted earlier cases involving

same-sex couples, in which the Court of Appeals had stated that “parentage under New York law derives from biology or adoption” and the Court of Appeals’ 1991 ruling, *Alison D. v. Virginia M.*, 77 N.Y.2d 651, had created a “bright-line test” under which a person who was neither the biological or adoptive parent of a child is considered a legal stranger without standing to seeking custody or visitation. A few courts have departed from that more recently in the context of married same-sex couples, finding that when a married woman bears a child, her spouse should be presumed to be the child’s legal parent, but the Court of Appeals hasn’t yet ruled on such a case.

Concluded the Appellate Division panel, “We reiterate that, as the Court of Appeals unequivocally stated, ‘any change in the meaning of “parent” under our law should come by way of legislative enactment rather than judicial revamping of precedent.’ Finally, we note that petitioner ‘failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody’ as a nonbiological, nonadoptive parent.” The Court of Appeals has recognized that such special circumstances might justify bending the rules, but in the *Alison D.* case and subsequent cases relying upon it, the court have found that same-sex couples raising a child together do not automatically qualify under the “extraordinary circumstances” rule.

After *Alison D.* was decided, the Court of Appeals in a later case construed the Adoption Law to allow same-sex partners to adopt children they were co-parenting without terminating the parental rights of a child’s legal parent, providing a clear path for same-sex partners to avoid this result. However, in the absence of such an adoption, the courts have adhered to the “legal stranger” rule, and the legislature has yet to modify the statutes on parental standing to take account of non-traditional families in New York. ■

New York County Surrogate’s Court Rejects Challenge to Gay Man’s Will

New York County Surrogate’s Court Judge Nora Anderson has rejected a challenge to the will of Mauricio Leyton, a gay man who had designated his former lover as executor and a principal beneficiary under a will he made in 2001, a year before the men had a commitment ceremony and several years before they ceased to live together as partners. Leyton’s mother and sister had challenged the will, arguing that David Hunter was disqualified under a New York statute providing that a “former spouse” cannot inherit. On June 16, Surrogate Anderson granted Hunter’s motion

compromise, creativity and commitment that the world recognizes as marriage.” The officiant also noted that the state did not recognize this union, but commented, “Fortunately, this is of no importance.”

Leyton and Hunter did not register as New York City civil union partners and ceased to live together around 2008, but remained close friends, owning some property jointly and maintaining some joint accounts. They signed a document at the time of their breakup in which, according to the Law Journal account, Leyton “expressed interest in buying out Hunter’s ownership in a cooperative

Leyton’s mother and sister argued that but for New York’s unconstitutional refusal to allow same-sex marriage at the time, the men would have been married.

to dismiss the challenge. The case is *Matter of Mauricio Leyton, Deceased*, No. 2013-4842/A/B (N.Y. County Surrogate’s Court, June 16, 2015), NYLJ 1202730202742 (June 23, 2015).

Leyton and Hunter were longtime friends of ten years’ standing when Leyton signed his will on January 11, 2001. He appointed Hunter to be his executor and a major beneficiary, leaving him all of his personal property and one-half of the residuary estate, which ultimately included real property as well. The will referred to Hunter as “my partner David,” according to a June 23 report about the case in the *New York Law Journal*. In 2002 the men had a commitment ceremony at the Ritz-Carlton Hotel, which they described in printed invitations as a “Ceremony of Union and Commitment,” during which the officiant said that the couple was entering a “state of companionship,

apartment and lending Hunter \$40,000 to buy another apartment.” They also co-owned some property on Long Island as joint tenants with rights of survivorship. After New York passed its Marriage Equality Law in 2011 Leyton served as the official witness when Hunter married another man. In all this time Leyton never revoked the original will or signed a new one. Leyton suffered a fatal heart attack in December 2013 while traveling.

Hunter filed the will for probate in 2014, and Leyton’s mother and sister, residents of Chile, sought to contest Hunter’s appointment as executor and status as a beneficiary. They argued that the court should treat Hunter as a divorced spouse, emphasizing the words of the officiant at the commitment ceremony, and arguing that but for New York’s unconstitutional refusal to allow same-sex marriage at the time, the men

would have been married. They relied on a recent Connecticut Supreme Court decision, which had accepted such a “would have been married” argument in connection with a loss of consortium claim filed by the survivor of a lesbian relationship in the context of a medical malpractice claim.

Surrogate Anderson did not mention the Connecticut case in her opinion, focusing her analysis entirely on the New York statute. “Respondent (Hunter) points out that at the time the commitment ceremony was performed, it was not cognizable in State law as formalizing a marriage, and that his subsequent break with decedent therefore was not ‘separation,’ ‘abandonment,’ or ‘divorce’ within the meaning of the statutes cited by petitioners. Those statutes, EPTL 5-1.2 and 5-1.4, respectively spell out circumstances under which a spouse is disqualified as a ‘surviving’ spouse for the purposes of inheritance and other family rights and under which a disposition to or fiduciary appointment of a spouse under a will is revoked,” she wrote. She insisted that “it is the province of the Legislature to decide questions regarding same-sex marriage,” referring to the New York court decisions rejecting constitutional challenges to the pre-2011 marriage ban. “Here, petitioners seek to have this court apply the Marriage Equality Act retroactively to the commitment ceremony, deeming that ceremony as formalizing a marriage and the subsequent separation as a divorce. Given that the Legislature did not authorize same-sex marriage until 2011, this court cannot deem the commitment ceremony to have sanctified a marriage, so decedent and the executor cannot be deemed to be divorced.”

Thus, Surrogate Anderson ruled that the petition should be denied and Hunter’s motion to dismiss be granted.

Hunter is represented by Matthew Raphan, an associate of Brian A. Raphan P.C. in Manhattan. The mother and sister, Fidelisa Eliana Latorre Figueroa and Ana Marie Leyton Lattore, are represented by Stanley Ackert III, who is contemplating filing an appeal. ■

2nd Circuit Revives Transgender Welder’s Discrimination Case Against Ironworkers Union

A panel of the U.S. Court of Appeals for the 2nd Circuit, reversing the dismissal of a Title VII discrimination claim filed by a transgender welder against his union, ruled that failure to exhaust administrative remedies is not a jurisdictional bar and that the district court incorrectly failed to discern an alternative federal ground for the lawsuit under the National Labor Relations Act. As such, the district court must reconsider both its decision on the motion to dismiss and its decision not to assert jurisdiction over state and local law claims. *Fowlkes v. Ironworkers Local 40*, 2015 WL 3796386, 2015 U.S. App.

hall. In the construction industry in New York City, most union-represented jobs are obtained through hiring hall referrals. Although Fowlkes received a few referrals, he claims to have not received the number of referrals to which he was entitled by virtue of his position on the union seniority list and level of experience. He also recounted various remarks made to him by the union agents reflecting discriminatory attitudes because of his gender identity.

Fowlkes first filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging a violation of Title VII on May 29, 2007. EEOC issued a “right to sue” letter on

The decision is particularly notable in flagging the possibility that gender identity discrimination by a union hiring hall may violate the union’s duty of fair representation.

LEXIS 10339 (2nd Cir., June 19, 2015). The decision is particularly notable in flagging the possibility that gender identity discrimination by a union hiring hall may violate the union’s duty of fair representation under the National Labor Relations Act, a little-explored source of protection for sexual minority employees.

Cole Fowlkes, “who self-identifies as male but was born biologically female” according to Circuit Judge Susan L. Carney’s opinion for the court, alleges that his union and two of its business agents, Danny Doyle and Kevin O’Rourke, “discriminated against him on the basis of sex and retaliated against him for filing an earlier action against them.” Although various forms of discrimination are alleged, the most egregious is refusal to refer Fowlkes for work through the Local’s hiring

July 10, 2007, informing Fowlkes that it had decided not to take further action on his claims but he was free to sue on his own behalf. At the time, during the Bush Administration, the EEOC was set against sex discrimination claims by transgender complainants under Title VII. Fowlkes then filed an action *pro se* in the U.S. District Court for the Southern District of New York on January 25, 2008, unfortunately more than 180 days after the right to sue letter was issued, and the district court dismissed the case upon the defendants’ motion as time-barred, since the statute provides that a complainant has 90 days to file suit after receiving such a letter from the EEOC. As Fowlkes continued to experience discrimination, he filed a second federal court complaint *pro se*, also in the U.S. District Court for the Southern District of New York, in

July 2011, alleging that the defendants violated his “Civil Rights (involving Employment)” by subjecting him to harassment and refusing to refer him for work based on his sex. He did not file a new EEOC charge or obtain a new “right to sue” letter before filing this second complaint. He also asserted discrimination claims under the New York State and City Human Rights Laws. Again the defendants moved to dismiss, this time resting on the argument that Fowlkes’s failure to file a new EEOC charge deprived the court of jurisdiction to hear his federal claims. The District Court responded that because Fowlkes had not complained to the EEOC about conduct occurring after his earlier EEOC complaint was filed, the court’s jurisdiction was “uncertain.” The judge gave Fowlkes leave to amend his complaint to detail any state claims that weren’t raised in the prior, dismissed action, and to allege any facts relevant to his attempt to exhaust administrative remedies prior to filing this new lawsuit. Fowlkes filed an amended complaint in November 2011, but the court concluded that his Title VII claim “must be dismissed because he does not allege that he exhausted his administrative remedies,” so the court concluded it lacked jurisdiction over the Title VII claim and thus that it lacked jurisdiction to entertain his state law claims without any federal claim remaining in the case.

Fowlkes appealed to the 2nd Circuit, this time represented by counsel, Robert T. Smith of Katten Muchin Rosenman LLP, who in addition to arguing that the failure to exhaust was not necessarily fatal on the question of jurisdiction first advanced the idea that Fowlkes’ factual allegations could support a federal claim under the National Labor Relations Act for violation of the duty of fair representation. The 2nd Circuit found merit in both arguments.

First, Judge Carney pointed out, there is ample precedent for the argument that the statutory exhaustion requirement under Title VII may be waived on equitable grounds, and in this case there were two possible arguments to be made. One is that filing a second EEOC complaint would have been futile, since at the time Fowlkes filed his second complaint in federal court, the EEOC was still adhering to the position it had

taken in response to his first complaint: that gender identity discrimination is not actionable under Title VII. “When Fowlkes filed his 2011 complaint,” Carney explained, “the EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant’s transgender status. It was not until *Macy v. Holder*, NO. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. Thus, Fowlkes’s failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had ‘taken a firm stand’ against recognizing his Title VII discrimination claims.” Furthermore, the court noted that there was a second possible equitable defense for failure to file a new EEOC claim: that “his more recent allegations of discrimination may be ‘reasonably related’ to the discrimination about which he had filed an earlier charge with the EEOC.” In such a case, wrote Carney, citing the 2nd Circuit’s decision in *Terry v. Ashcroft*, 336 F.3d 128 (2003), “the failure to raise the allegations in the complaint before the EEOC may not bar federal court proceedings.” Judge Carney pointed out, based on the allegations in the most recent federal court complaint, that Fowlkes could plausibly make such an argument in this case, so the matter should be remanded in order for the district court to determine whether “futility” might be a cognizable equitable defense to the motion to dismiss “and, in this particular case, whether futility, ‘reasonable relatedness,’ or any other equitable doctrine excuses Fowlkes’s failure to exhaust his administrative remedies.”

But furthermore, the court was willing to entertain the argument, first raised on appeal but based on the factual allegations from the complaint, that Fowlkes might alternatively have a federal claim under the National Labor Relations Act. Because Fowlkes filed his complaint *pro se*, “he is ‘entitled to special solicitude,’ and we will read his pleadings ‘to raise the strongest arguments that they suggest,’” wrote

Carney, quoting from *Triestman v. Fed. Bureau of Prisons*, 470 F.2d 471, 477 (2nd Cir. 2006). “The duty of fair representation is a ‘statutory obligation’ under the NLRA, requiring a union ‘to serve the interests of all members without hostility or discrimination. . . to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct,” quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), in which the Supreme Court had definitely recognized that the Act’s conferral of exclusive representative power on unions implied a duty to exercise such power fairly. The Supreme Court has found that this duty applies to hiring hall operations. “A union breaches its duty of fair representation if its actions with respect to a member are arbitrary, discriminatory, or taken in bad faith,” wrote the Supreme Court in *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67 (1991).

“Although Fowlkes’s amended *pro se* complaint did not flag the NLRA, we nonetheless are persuaded, with the benefit of a counseled brief on Fowlkes’s behalf, that Fowlkes has stated a plausible claim for a breach of the duty of fair representation,” wrote Judge Carney. “In his amended complaint, Fowlkes alleges that the Local refused to refer him for work for which he was qualified because of his transgender status and in retaliation for instituting legal proceedings against the Local. Allegations that a union abused its hiring hall procedures to undermine a member’s employment opportunities warrant particularly close scrutiny when a union wields special power as the administrator of a hiring hall. . . Assuming, as we must, that Fowlkes’s allegations are true, the Local’s conduct was at the very least arbitrary, if not discriminatory or indicative of bad faith.” The defendants urged a six months statute of limitations as barring this claim, but Carney found that Fowlkes had adequately alleged discriminatory referral practices occurring within the six-month period before his *pro se* complaint was filed with the court. She also rejected the union’s argument that because Fowlkes received some referrals, he could not bring this claim, asserting that “the mere fact that Fowlkes was referred for

some work during the relevant period does not defeat a claim that he was subjected to arbitrary, discriminatory, or bad-faith treatment by a Local's overall distribution of work. A union need not completely eliminate a member's employment opportunities before the member may be entitled to relief." She also rejected the union's argument that it could defeat this claim with a motion to dismiss based on an argument that Fowlkes should have exhausted internal union grievance proceedings first, stating that "a cursory invocation of an intra-union exhaustion requirement in their appellate brief certainly does not suffice to bar the duty of fair representation claim from proceeding past the pleadings stage." Having concluded that Fowlkes "has stated a claim for breach of the duty of fair representation against the Local," the court found alternative grounds to "vacate the District Court's determination that Fowlkes stated federal claims under only Title VII, and we remand for further proceedings on his duty of fair representation claim."

Since the 2nd Circuit had identified an alternative ground for federal jurisdiction, it was also appropriate to have the district court reconsider its decision to dismiss the supplementary state and local law discrimination claims. "Because we have now concluded that (1) Fowlkes's failure to exhaust administrative remedies did not deprive the District Court of jurisdiction over his Title VII claims, and (2) Fowlkes has stated a claim under the NLRA for breach of the duty of fair representation, we vacate the dismissal of Fowlkes's pendent state- and city-law claims to allow the District Court to reconsider on remand whether exercising supplemental jurisdiction is appropriate given our conclusions regarding his federal claims."

If the defendants don't offer a decent settlement in response to this decision, they are missing a good opportunity to avoid lengthy and expensive litigation, since the panel clearly signaled its view that Fowlkes's allegations, if proven, would provide multiple grounds for liability by the union. The other members of the 2nd Circuit panel were Circuit Judges Pierre Leval and Denny Chin. ■

Disability Discrimination Action by HIV+ Woman Ticketed by Police Officer Will Continue

In *Jones v. Lacey*, 2015 WL 3579282 (E.D. Mich., June 5, 2015), an HIV-positive plaintiff partially survived a motion for summary judgement on her claim of discrimination under the ADA when a police officer admitted he issued her a citation because of her delay in revealing to him she was diagnosed with HIV. U.S. District Judge Laurie J. Michelson found that this admission was sufficient to ground a disability discrimination claim under the ADA.

Shalandra Jones was diagnosed with HIV in 2001, is treated with Atripla once a day and has a medical marijuana prescription. In order to cease the

them that he was "not worried about a dime bag" so Jones admitted that there was a bag of marijuana in the car but no other contraband. As P.O. Lacey was searching Jones's purse he came across some medications, to which Jones responded "I'm HIV Positive." P.O. Lacey replied; "Okay. That's probably something you want to tell a cop if they pull you out of a car. I'm here going through her purse, and she's got earrings and shit I'm touching, and I don't want to catch anything," and then continued telling them that he works a lot in the East End of Dearborn, where he deals with plenty of crackheads and

U.S. District Judge Laurie J. Michelson found that the admission was sufficient to ground a disability discrimination claim under the ADA.

rumors spreading throughout her neighborhood and to stop her children from bearing ridicule on her behalf, she made a flyer with her picture on it, and plastered it on every gas station and liquor store in her town, inviting people to come hear how she contracted HIV. Jones also wanted to dispel the stigma that people with HIV are drug addicts or prostitutes. Ultimately, about 200 people showed up. After this talk, Jones was offered a position at Voices of Detroit Initiative, which is a nonprofit healthcare-related organization.

On August 3, 2013, Jones and her boyfriend (now husband) were driving in Dearborn when they were stopped by Dearborn Police Officer David Lacey because their left brake light was out. On approaching the vehicle, P.O. Lacey claims to have noticed a strong smell of marijuana. Lacey told

heroin addicts...telling them he doesn't "want that shit." P.O. Lacey, after only writing them a "fix-it ticket," stated, "Honestly, if it wasn't for that (her status) I don't think I would have wrote anybody for anything, but that kind of really aggravated me, you know what I mean. . .You notice I walked back and got my gloves out and put them on, because I don't, you know, want to come into contact with anything at all." Jones testified that the incident reminded her of how she was treated when she was first diagnosed with HIV: "It ruined me. It crushed me. It made me start all over."

After the traffic stop, Jones's family friend contacted a reporter, Todd Heywood, who requested all the information available from the traffic stop under Michigan's Freedom of Information Act. Heywood published

the dashcam video on Youtube, and POZ, a site for HIV-positive people. After the matter attracted much attention, the Dearborn Police Department issued Lacey a written reprimand, and P.O Lacey received 10 days unpaid suspension.

Jones filed this case on Jan. 27, 2014, asserting violation of her constitutional right to privacy by Lacey under 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act, and Michigan privacy law. She alleged that Lacey violated her constitutional rights under the Fourth and Fourteenth Amendments, her rights under the ADA, and her Michigan statutory right to privacy in her HIV status. Against the City of Dearborn she asserted a *Monell* failure-to-train claim.

Plaintiff alleged that P.O. Lacey's actions during the traffic stop violated her "fundamental right to privacy as to the disclosure of a private individual's HIV positive status" and her "right to be free from unreasonable searches and/or seizures." In her Response to the summary judgment motion, however, Jones acknowledged that she "does not seek relief under the 4th Amendment for unreasonable search and seizure, so issues of probable cause do not apply," so the Court granted summary judgment for the defense on this issue.

Jones claimed her right to privacy was violated because the City granted Heywood's FOIA request to release the dashcam footage without redacting her admission of her HIV status. Lacey defended on the basis of only one qualified-immunity prong: he said that there was no constitutional violation. The court agreed and assumed, along with defendant's motion, that there is a constitutionally-protected privacy interest in a private individual's HIV status. (See *Moore v. Prevo*, 379 F. App'x 425, 428 (6th Cir.2010) ("We join our sister circuits in finding that, as a matter of law, inmates have a Fourteenth Amendment privacy interest in guarding against disclosure of sensitive medical information from other inmates subject to legitimate penological interests."). But see *Doe v. Wigginton*, 21 F.3d 733, 740 (6th

Cir.1994) (dismissing a prisoner's constitutional privacy claim against a guard who viewed the prisoner's HIV test results because "the Constitution does not encompass a general right to nondisclosure of private information"). Defendants argued that Jones cannot assert an informational privacy claim because Jones's community talk regarding her HIV status and her HIV activism had already placed her HIV status in the public domain. The court addressed these questions, relying on various case precedent, and held that Jones' HIV status was already information in the public realm by the time the Department released the dashcam footage due to her making her HIV status public on her own and therefore, there was no informational privacy violation.

Jones also asserted that the Dearborn Police Department has a practice or custom of failing to "prevent constitutional and ADA violations on the part of its police officers," however, Jones failed to show that there were any prior instances of unconstitutional conduct by Dearborn police officers, or that the Department was aware of any such incidents. Jones did in fact establish that there was at least a triable issue of fact as to whether a "single violation of federal rights" under the ADA occurred, however, the court also held that merely pointing to the shortcomings in P.O Lacey's interaction with Jones on the date in question will not serve to carry Jones' burden on summary judgment on the issue of deliberate indifference, so the court granted defendants' motion for summary judgement on this point.

Jones also asserted that Lacey violated her rights under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, relying on the Title II Retaliation and Coercion provision. Defendants asserted that "the mere classification of Plaintiff as a member of a disabled class does not constitute a protected act under this section of the ADA." Given that Plaintiff did not assert that she made a charge or participated in a proceeding or otherwise exercised her rights under Title II of the ADA, Defendants argued that her retaliation

and coercion claims must be dismissed. The court agreed with Defendants because Jones did not cite to evidence showing that she "opposed any act or practice made unlawful by this chapter..." and the mere fact that Jones fell within a protected class under the ADA does not constitute a protected activity under the ADA.

Further, Jones asserted that Lacey discriminated against her based on her HIV status. The Defendants did not dispute that Jones fell within the ADA's anti-discrimination protections due to her HIV status, but they argued that Jones could not make out a prima facie case of discrimination, that P.O. Lacey's actions were protected by qualified immunity, and that Lacey did not issue her a ticket "solely by reason" of her disability. Given *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 317 (6th Cir.2012), where the Sixth Circuit explicitly overruled the use of the "sole-cause" standard in ADA claims, making the standard a "but-for" cause, the court found the standard relied on by Defendants in this case was too high, and found that HIV was the sole reason Jones received the ticket. When Jones revealed her HIV status, P.O Lacey became agitated, and rather than "letting them go on their merry way," he admitted, "Honestly, if it wasn't for that, I don't think I would have wrote anybody for anything, but that kind of really aggravated me, you know what I mean. . ." Lacey's own comments also directly established that Jones's HIV status was a "but-for" cause of his decision to issue the citation. Jones met her summary-judgment burden to show that she received a citation solely because of her HIV status, so the motion for summary judgment on Jones' ADA discrimination claim against Lacey was denied.

Ultimately, the court found that Officer Lacey's statements in the video transcript could give rise to a finding of ADA discrimination, and granted and denied, in part, defendant's motion for summary judgement. – *Anthony Sears*

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

Divided Texas Supreme Court Evades Deciding Gay Divorce Issue

With a ruling on same-sex marriage from the United States Supreme Court just days away, the Texas Supreme Court finally acted on June 19, 2015, on a pair of appeals argued nineteen months earlier in November 2013, holding in *State v. Naylor*, 2015 Tex. LEXIS 581, 2015 WL 3852284, that the state's attorney general did not have standing to appeal an Austin trial judge's order granting a judgment "intended to be a substitute for a valid and subsisting divorce" to a lesbian couple who had married in Massachusetts, and granting a motion to dismiss an appeal in *In re Marriage of J.B. and H.B.*, in which the Texas Court of Appeals in Dallas had ruled in 2010 that Texas courts lack jurisdiction to rule on divorce petitions from same-sex couples married elsewhere. The court's opinion in *Naylor* by Justice Jeffrey V. Brown was joined by four other members of the court, one of whom also penned a concurring opinion. One member filed a dissenting opinion for himself and three others, arguing against the ruling on standing. One of the dissenters filed an additional dissenting opinion, arguing at length that the Texas ban on performing or recognizing same-sex marriages does not violate the 14th Amendment. One member did not participate in the case. The opinion may be primarily of historical interest – as an example of judicial timidity – in light of the Supreme Court's subsequent ruling in *Obergefell v. Hodges*, under which Texas undoubtedly will have to recognize same-sex marriages contracted out-of-state for purposes of its divorce laws.

The motion to dismiss the J.B. and H.B. appeal was actually filed by James Scheske, who represented the party seeking an uncontested divorce. The two men married in Massachusetts in 2006 and moved to Texas in 2008. Shortly after moving to Texas they ceased to live together, and J.B. filed a petition in Dallas County seeking a property division and that his last name be changed back to his original name as part of a divorce decree. The state intervened and argued that the court had no jurisdiction to decide the case, but the trial judge, Tena Callahan, issued a ruling on October 1, 2009,

holding that the Texas ban on same-sex marriage was unconstitutional and that she could decide the case. The state appealed that ruling, and the Texas Court of Appeals in Dallas ruled on August 31, 2010, that Judge Callahan was wrong. See 326 S.W.3d 654. An appeal to the Texas Supreme Court followed, and the case was argued, after much delay, in November 2013. But H.B. subsequently died, and Scheske filed an uncontested motion to dismiss the case, since his client's marriage had been terminated by death so a divorce decree was no longer needed. The court granted that motion on June 19 without explanation, but one of the judges noted in his concurring opinion in *Naylor* that J.B.'s appeal was moot as a result of the death of one of the parties.

Angelique Naylor and Sabina Daly, Texas residents, went to Massachusetts to marry in 2004. Naylor filed a divorce petition in Travis County a few years later. The women had a child and were operating a business together, so, as Justice Brown explained, "Naylor hoped to obtain a judgment addressing their respective rights, some of which they had already settled in a suit affecting the parent-child relationship." Although lawyers from the attorney general's office were aware of the case and were actively monitoring its progress, they didn't formally try to intervene until after the trial judge issued his bench ruling incorporating the parties' settlement agreement into a judgment, which the judge explained "is intended to dispose of all economic issues and liabilities as between the parties whether they are divorced or not." The following day, the state petitioned to intervene "to oppose the Original Petition for Divorce and to defend the constitutionality of Texas and federal laws that limit divorce actions to persons of the opposite sex who are married to one another." The trial judge rejected this petition as too late, and the Court of Appeals in Austin agreed, 330 S.W.3d 434 (2011). An appeal to the Texas Supreme Court followed, and it was consolidated with the J.B. appeal and argued on the same day, November 5, 2013.

There was widespread speculation that the Texas Supreme Court, observing all the marriage equality litigation going on in Texas and elsewhere in the wake of the U.S. Supreme Court's *U.S. v. Windsor* ruling, had decided not to rule on these appeals until the U.S. Supreme Court settled the constitutional questions around same-sex marriage one way or the other, so the Texas court's June 19 actions caught many by surprise. Writing for the majority of the court, Justice Brown agreed with the Court of Appeals that the state lacked standing to appeal the trial court's judgment. "Texas courts allow post-judgment intervention only upon careful consideration of any prejudice the prospective Intervenor might suffer if intervention is denied, any prejudice the existing parties will suffer as a consequence of untimely intervention, and any other circumstances that may militate either for or against the determination," he wrote. In this case, by implication, those considerations weighed against ordering intervention. Although Justice Brown left it unsaid, it seemed clear that the majority of the court saw little reason to litigate the underlying issue in this case when the U.S. Supreme Court was on the verge of ruling. He devoted most of his opinion to a close analysis of Texas laws governing post-judgment intervention, and almost none to the underlying question whether same-sex couples can get divorces in Texas, merely stating general agreement with Judge Devine's analysis described below.

In a concurring opinion, Justice Jeffrey S. Boyd explained further the underlying rationale for dismissing the appeal. "I write separately to emphasize a point on which everyone agrees: the State of Texas is not bound by the divorce decree at issue in this case." He continued, "The State lacks standing to appeal because it was not a party, it shared no privity or interest with any party, and the trial court's judgment is not binding on it. . . As a non-party who is not bound by the judgment, the State has no obligation to give any effect to the trial court's divorce decree. In fact, it may be, as the State contends, that

our laws prohibit the State and all of its agencies and political subdivisions from giving any effect to the decree.” Since the state did not recognize the marriage in the first place, and had been taking the position all along in both cases that such out of state same-sex marriages are considered “void” in Texas, the decree was of no consequence to the state. Judge Boyd’s opinion overlooks the plain fact that the trial judge had not even necessarily considered this to be a divorce decree, but rather a “judgment” incorporating a settlement agreement reached by the parties. Judge Boyd did comment that the dismissal of the J.B. appeal as moot “leaves the Dallas court’s opinion as the only currently existing Texas law” on the issue whether same-sex couples married elsewhere can get a divorce in Texas, and that ruling, of course, was negative.

Justice Don R. Willett’s dissent argued strongly that the court should have allowed the State to intervene because of the importance of the question. Justice John P. Devine’s dissent, quite lengthy, plunged into the constitutional merits and argued that the Texas ban on recognizing same-sex marriages from other jurisdictions did not violate the 14th Amendment. In addition to relying on Section 2 of the Defense of Marriage Act, the provision that was left untouched by the U.S. Supreme Court in *U.S. v. Windsor*, which provides that states are not constitutionally required to recognize same-sex marriages from other states, he argued that Texas had good policy justifications for refusing to allow same-sex couples to marry and treating out-of-state same-sex marriages as void in Texas.

Ignorant comments by the governor and attorney general in response to the Naylor ruling led to misleading media reports suggesting that the Texas Supreme Court had “upheld” a same-sex divorce sought by Naylor, but clearly the court had done no such thing, merely holding that it was itself without jurisdiction to rule on the state’s argument that the trial court lacked jurisdiction.

Ultimately, these actions by the Texas Supreme Court could be of only passing interest – except for civil procedure fans – after the U.S. Supreme Court’s ruling in *Obergefell v. Hodges*. ■

North Carolina Legislature Overrides Veto of Statute Allowing Religious Objectors to “Recuse” from Same-Sex Marriages

On June 11, the North Carolina House voted 69-41 to override Governor Pat McCrory’s veto of Senate Bill 2, which provides a mechanism for magistrates and registers of deeds to avoid having to perform marriages or to issue marriage licenses when their religious beliefs would be offended. The Senate had previously voted 32-16 to override. McCrory premised his veto on the proposition that public officials take an oath of office obligating them to perform their duties, and nobody should be exempted from complying with their oath of office. The legislature disagreed.

The measure adds a new Section 51-5.5 to Chapter 51 of the N.C. General Statutes. It states that “Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection.” The recusal must be made in writing by notice to the chief district judge, and will be in effect for at least six months, during which the magistrate may not perform any weddings. “The chief district judge shall ensure that all individuals issued a marriage license seeking to be married before a magistrate may marry.” Similarly, the provision states that “Every assistant register of deeds and deputy register of deeds has the right to recuse from issuing all lawful marriage licenses under this Chapter based upon any sincerely held religious objections.” Again, the objecting employee must issue a written notice that is to be in effect for at least six months, during which time they can’t issue any licenses to anybody, and the register for that county “shall ensure for all applicants for marriage licenses to be issued a license upon satisfaction of the requirements as set forth in Article 2 of this Chapter.” The measure also provides that in case all the magistrates in a particular jurisdiction seek to recuse, the chief judge has to make arrangements to have a magistrate

available to perform weddings. It protects recusing individuals from any liability or disciplinary action under the various statutes governing the performance of their duties.

Although this measure was clearly inspired by religious objections to same-sex marriages, it could on its face apply to a wide variety of religiously-based objections that magistrates or registers might have to particular marriages. One wonders whether any will recuse from performing interracial marriages, noting that when the constitutionality of state bans on interracial marriages was being litigated during the 1940s through the 1960s, states raised religiously-based objections to such marriages. Also, could a magistrate who disapproves of marriages between persons of different religions recuse from performing such marriages? The legislature makes this a high-stakes game, by requiring that recusing magistrates be disqualified from performing all marriages during a period of recusal. One wonders whether such a magistrate might be docked some of their pay if they are disqualified from performing one of the important functions of their job, since the government is going to have to pay somebody else to perform the function?

As the statute requires that alternative arrangements be made so that no qualified couple is deprived of a license or the performance of a civil marriage ceremony by a magistrate, the question arises whether anybody would have Article III standing to challenge the statute in federal court as unconstitutional. It appears on its face to raise serious Establishment Clause issues, since it authorizes religiously-based recusal but does not authorize to recuse on non-religious grounds. This clearly favors religion. Early reports indicated that only about a dozen magistrates had filed their intention to cease performing marriages, out of the hundreds of magistrates in the state. ■

Arkansas Trial Court Orders State Recognition of “Window Period” Marriages

An Arkansas trial judge ordered the state on June 9 to recognize and extend all rights and privileges of marriage to more than 500 same-sex couples who married during May 2014 while the state sought a stay of a trial judge’s order striking down Arkansas’s same-sex marriage ban.

On May 9, 2014, Arkansas Circuit Judge Chris Piazza ruled in *Wright v. State of Arkansas*, 60CV-13-2662, that the state’s ban on same-sex marriage was unconstitutional, granting summary judgment to the plaintiffs, and specifically holding unconstitutional Amendment 83 (the Arkansas marriage amendment) and Act 144 of 1997 (the statute defining marriage in Arkansas as between a man and a woman). While the state sought a stay from the Arkansas Supreme Court, same-sex couples began to obtain marriage licenses and get married pursuant to Judge Piazza’s decision.

Counsel for plaintiffs then brought to the judge’s attention that his order did not specifically mention all of the relevant statutes, and on May 15 he sent a letter to all counsel advising them that he was filing a new order clarifying the May 9 opinion and making clear that Act 146 of 1997, which specifically forbids issuing marriage licenses to or recognizing the marriages of same-sex couples, is also unconstitutional. This new order was issued *nunc pro tunc*, meaning that it was intended to relate back to the May 9 decision, in order to protect the reliance interests of those who had married after the May 9 decision was announced. On May 16, 2014, the Arkansas Supreme Court stayed Judge Piazza’s decision pending appeal. The appeal was argued later in 2014, but changes in membership of the Arkansas Supreme Court after the argument led to a period of delay and confusion in figuring out which judges should participate in deciding the appeal. Ultimately this confusion – apparently to a large extent manufactured by some members of the court to avoid ruling on the merits, according to a public letter issued by Justice Jim Hannah,

who recused himself from participating in a ruling by the court on delaying consideration – may ultimately delay things until after the U.S. Supreme Court issues its decision in *Obergefell v. Hodges*, obviating the need for the timorous Arkansas supreme court justices to have to rule in this case. Also, during 2014 a federal district court in Arkansas issued a similar decision striking down the state’s marriage ban, that was immediately stayed pending appeal, and the U.S. Court of Appeals for the 8th Circuit put the appeal “on hold” pending the Supreme Court’s ruling in *Obergefell*.

During the May 9-May 16 “window period” before Judge Piazza’s order was stayed, hundreds of same-sex couples married in Arkansas. However, the state refused to recognize those marriages as valid. This prompted a new lawsuit on behalf of two same-sex couples who married on May 12, but who were being denied the right to file joint tax returns and, in one case, to enroll a spouse in a state employee health insurance benefit program. The state’s argument was that these marriages were invalid *ab initio* because Judge Piazza lacked the power to make his clarifying opinion retroactive. According to the state, since Judge Piazza’s order was stayed, Act 146 remained in effect, precluding the state from recognizing these marriages.

On June 9, 2015, Circuit Judge Wendell Lee Griffen decisively rejected the state’s argument in *Frazier-Henson v. Walther*, No. CV-15-569 (Arkansas, Pulaski Co. Cir. Ct.). Judge Griffen found that Rule 60 of the Arkansas Rules of Civil Procedure specifically authorizes judges to “correct errors or mistakes” or “to prevent the miscarriage of justice” by modifying judgments that they have issued, including “errors therein arising from oversight or omission.” It was clear in this case that Judge Piazza’s omission of Act 146 from his original opinion was an oversight, as reflected in the overall opinion granting summary judgment to the plaintiffs and holding unconstitutional the state’s ban

on same-sex marriage. Further, Judge Griffen opined that it would constitute a miscarriage of justice not to accord recognition to the marriages contracted during the window period.

Judge Griffen used harsh language to characterize the position of defendant Larry Walther, Director of the Arkansas Department of Finance and Administration. “With shameless disrespect for fundamental fairness and equality, Director Walther insists on treating the marriages of same-sex couples who received marriage licenses between May 9 and May 15 as ‘void from inception as a matter of law’. Meanwhile, Director Walther asserts that ‘heterosexual marriages performed in the State of Arkansas between May 10, 2014 and May 16, 2014 are valid’. This Court categorically rejects Director Walther’s manifestly inaccurate and tortured misinterpretation of Rule 60 of the Arkansas Rules of Civil Procedure. If the position Director Walther asserts would not produce a ‘miscarriage of justice’ as that term is understood within the meaning of Rule 60(a), the words ‘miscarriage’ and ‘Justice’ have no meaning.” The court ordered Walther to recognize all of the marriages contracted during the window period, to allow joint tax filings by those couples, and to allow same-sex spouses married during the window period to enroll in the state’s employee benefits program.

Associated Press reported that Arkansas Attorney General Leslie Rutledge did not immediately state whether she would seek a stay of Griffen’s ruling. She asserted, “These marriages do not fall within the state’s definition of marriage as between one man and one woman. I am evaluating the ruling and will determine the best path forward to protect the state’s interest.”

Judge Griffen was among the trial judges who officiated same-sex marriages during the window period, according to the AP report.

Arkansas attorney Cheryl K. Maples represents the plaintiffs. ■

Federal Judge Allows Trial on Transgender Inmate's Claim of Assaults by Sheriff's Deputies, but Not on Civil Rights Conspiracy

United States District Judge Jesus G. Bernal adopted the Report and Recommendation [R & R] of United States Magistrate Judge Victor B. Kenton that granted summary judgment for defendants on most of transgender plaintiff Ramon Murillo's claims, including conspiracy to violate her civil rights, but permitted her claims of assault to proceed to trial in *Murillo v. Parkinson*, 2015 WL 3791450 (C.D. Calif., June 17, 2015).

Murillo, a state prisoner, was in the San Luis Obispo County Jail for 17 days in 2011 to attend a civil malpractice trial she brought against a prison doctor. During this time, she alleges that defendants (San Luis Obispo County, its sheriff, four deputies and a sergeant) violated her civil rights by denying her access to legal resources, depriving her of food, exercise, showers, and clean clothing, placing her in administrative segregation, subjecting her to humiliating strip-searches, discriminating against her "based on her transgender orientation", and assaulting her twice while uttering transphobic slurs.

Reporting the lengthy and detailed R & R is beyond the scope of this article. Judge Kenton found either that Murillo's constitutional rights were not violated or that the defendants were entitled to qualified immunity because the rights were not clearly established under *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); on Murillo's claims about denial of access to courts and of food, exercise, showers, and clean clothing – because she attended the malpractice trial, which was not about core criminal or civil rights issues – as protected by *Lewis v. Casey*, 518 U.S. 343, 346 (1996) and *Bounds v. Smith*, 430 U.S. 817, 828 (1977), and the other deprivations were intermittent and sporadic during her brief stay at the jail. Judge Kenton found no basis to sustain jury claims against the county or its sheriff officially because there were inadequate allegations of

policy or practice against them under *Monell v. Department of Social Service of the City of New York*, 436 U.S. 658, 690 (1978). Murillo also failed to show personal involvement of the sheriff in his individual capacity.

Judge Kenton found that the jail had merely continued the administrative segregation under which Murillo was classified by the state following her transgender identification in 1999 and that this brief continuation did not violate her rights under *Wilkinson v. Austin*, 545 U.S. 209, 221–23 (2005). He also found that the strip searches were reasonable under *Turner v. Safley*, 482

orientation discrimination, or its possible application to transgender plaintiffs. He does not even frame the rational basis claims: for example, could a jail reasonably provide three meals a day and laundry to straight inmates but only one meal a day and no clean clothes to transgender inmates? *See also, Glenn v. Brumby*, 663 F.3d 1312, 1315–1320 (11th Cir. 2011) (applying Equal Protection analysis to transgender government employee's termination, finding that "discrimination against a transgender individual because of gender-nonconformity is sex discrimination").

That the R & R balkanized Murillo's

Judge Kenton found either that Murillo's constitutional rights were not violated or that the defendants were entitled to qualified immunity because the rights were not clearly established.

U.S. 78, 89 (1897), and *Bell v. Wolfish*, 441 U.S. 520, 540 (1979), without discussing Murillo's claim that she was stripped "naked in the middle of the hall" or the reasonableness of the conditions of strip searches recognized in *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

On Equal Protection, Judge Kenton ruled that Murillo was not a member of a "protected" class, and therefore discrimination was subject only to a rational basis test under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). He cited two district court cases from 2012, but he did not refer to the Ninth Circuit decision in *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014), which applied intermediate scrutiny to claims involving sexual

claims is evident when the readers gets to the assaults. Murillo alleges that she was twice assaulted without any provocation when returning from court by deputies who called her a "faggot, queer with tits" and a "rat-ass faggot" and pushed her, smacked her in the face and head, punched her, and kicked her, leaving her bleeding and injured. The conduct on these occasions included refusing her food and public stripping. The denials by the deputies and sergeant created a jury issue under *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), and *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). [Editor's note: see *Kingsley v. Hendrickson*, 576 U.S. ___, No. 14-6368 (June 22, 2015), in this issue of *Law Notes*, for developments on the legal test for excessive use of force under *Hudson* and *Whitley*. Murillo's case

differs from *Kingsley*, in two respects: here, defendants deny any use of force, while in *Kingsley* they argued that the force was necessary and reasonable; and Murillo is a convicted prisoner in a jail on a civil writ, not a pre-trial detainee protected by the Fourteenth Amendment's Due Process Clause.]

Finally, the R & R falls apart when this discussion turns to conspiracy under 42 U.S.C. § 1985, and Judge Kenton conflates the section's two subparts: § 1985(3) and § 1985(2). Murillo's allegations establish the core elements of a conspiracy by two or more individuals to use excessive force against her under the Eighth Amendment. The questions are whether there is evidence that: (1) the conspiracy had racial or class-based animus under § 1985(3); or (2) the conspiracy sought to interfere with access to justice under § 1985(2), which does not require such animus under *Kush v. Rutledge*, 460 U.S. 719, 720 (1983).

In light of *SmithKline Beecham v. Abbott Laboratories* in the Ninth Circuit, which would be precedent for this district court, the slurs to which Murillo was subjected should have been sufficient evidence of animus based on sexual orientation under the Equal Protection Clause to allow a § 1985(3) conspiracy claim to go to a jury. Evidence that the beatings occurred upon returning from court should have allowed a jury to consider a § 1985(2) interference with justice claim, regardless of animus. Instead, Judge Kenton combines the two subparts of § 1985, confuses the separate elements and case law, ignores the context, and holds: "Plaintiff has failed to plead any facts that would suggest that Defendants acted with some sort of discriminatory animus."

Conspiracy law is important to LGBT plaintiffs. For example, admissions of a co-conspirator are subject to evidentiary exceptions; and joint and several liability attaches to each co-conspirator who engages in an overt act in furtherance of the conspiracy. The ability of LGBT plaintiffs to present conspiracy claims under either branch of § 1985 has litigation consequences.

— William J. Rold

Boy Scouts of America May Reverse Policy on Gay Adult Leaders

Fifteen years ago, the Boy Scouts of America (BSA) fought all the way to the U.S. Supreme Court to protect the organization's right to exclude gay people from adult leadership positions for Boy Scout and Cub Scout troops. They won that battle by a 5-4 vote in *Boy Scouts of America v. Dale*, 530 US 640 (2000), but they really didn't win the war, because there was quite a bit of blowback from the public, which tended to side with the New Jersey Supreme Court decision that was reversed by the Supreme Court's narrow ruling. Pressure on various public sector organizations (schools, police departments, etc.) to drop sponsorship of Scout troops became intense in some parts of the country, and an existing trend of declining enrollment in the Scouts seemed to accelerate. Also, of course, public attitudes about gay people were going through a rapid evolution during the period 2000-2015, responding to a national conversation about same-sex marriage that culminated in the June 26 ruling in *Obergefell v. Hodges*, which was very much in sync with evolving public opinion.

The Scouts saw the writing on the wall a few years ago, and took a halfway measure of voting to allow gay youth to participate, while continuing to maintain the ban on gay adult leaders. But pressure on the organization continued, and pro-gay Supreme Court rulings in *U.S. v. Windsor* as well as *Obergefell* undoubtedly contributed to concern by the Scouts that ultimately they might start to lose lawsuits under public accommodation laws. On July 10 the Executive Committee of the BSA's National Board voted unanimously to abandon the national policy against allowing adults to be Scout leaders and volunteers, instead approving a policy against discrimination because of sexual orientation. However, bowing to the reality that a large number of Scout troops are sponsored by religious organizations, they also voted to

preserve "local option" for such troops. Thus, the policy being recommended to the National Board when it meets on July 27 is to prohibit sexual orientation discrimination against gay adult leaders and volunteers, but to allow local Scout operations that are sponsored by religious organizations to make decisions consistent with their religious beliefs. Whether this compromise solution will work is anybody's guess.

Meanwhile, it seemed likely that a unanimous vote by the Executive Committee would presage approval by the National Board. It was disappointing, however, that an explanatory memorandum sent out to the various regional and area councils on July 13 attributed a major motivation for this action to fear of losing lawsuits rather than to wanting to do "the right thing" by refusing to discriminate against gay people. The BSA undoubtedly faces serious problems in some parts of the country where its exclusion of gay leaders is popular or where a substantial number of local operations are religiously-sponsored, so it sought to premise this action as something that had to be done for pragmatic reasons.

Major credit for both the earlier decision to allow gay youth to participate and the more recent recommendation to allow gay adults to participate is due to Dr. Robert M. Gates, National President of BSA and former U.S. Secretary of Defense. Gates presided over the adoption and implementation of the "Don't Ask Don't Tell Repeal Act" passed by Congress in 2010 and implemented by the Defense Department beginning in September 2011. That experience apparently armed Gates with persuasive arguments to lead the BSA into a reconsideration of its policies. As such, he is probably one of the best people to lead the organization during what might be a challenging implementation phase, having implemented a similar policy on a much broader scale in his prior job. ■

MARRIAGE EQUALITY

ALABAMA – A measure that would have eliminated marriage licenses in Alabama died in a House Committee on June 5 as the legislative session came to its end. The measure would have allowed couples to register their marriage contracts with the courts, and provided that a “ceremonial” marriage might be required, but as drafted was curiously ambiguous about what would and would not be required. The measure anticipated a U.S. Supreme Court decision holding that same-sex couples are entitled to marry, and a determination by sponsors of the legislation that their state not be complicit in issuing licenses to same-sex couples. *al.com*, June 5.

ARIZONA – The state’s defense of former Governor Jan Brewer’s move to end domestic partner benefits for state employees eventually was mooted when marriage equality arrived in Arizona pursuant to a federal court decision last year followed by a determination by the government not to appeal, in light of the 9th Circuit’s repeated reiteration of support for marriage equality. But that didn’t end the litigation entirely, since plaintiffs’ counsel sought to be paid. The state argued that no fees were due, claiming the plaintiffs were not prevailing parties as they had achieved only interim injunctive relief before the case became irrelevant, thus there was never a final ruling on the merits as to the constitutionality of the challenges statute revoking the benefits. Judge John W. Sedwick, who rendered the marriage equality decision last year, was not buying this argument. “The Ninth Circuit has specifically held that a plaintiff who wins a preliminary injunction but does not litigate the case to final judgment can nonetheless be considered the prevailing party,” he wrote. He noted that the 9th Circuit had “summarily granted Plaintiffs’ fee application for work done in relation to Defendants’ appeal of the preliminary injunction in this case. In doing so, the

Ninth Circuit necessarily concluded that Plaintiffs are the prevailing party and that the amount requested is reasonable.” The amount requested and awarded is \$305,049.95 in fees and \$1,036.67 in costs. Plaintiffs’ fee goes to Lambda Legal Defense Fund, which has been involved in the case since the revocation of benefits. *Diaz v. Brewer*, 2015 U.S. Dist. LEXIS 73355, 2015 WL 3555282 (D. Ariz., June 5, 2015).

ARKANSAS – A lawsuit was filed on July 13 in Pulaski County Circuit Court on behalf of three same-sex couples against state health officials who had refused to issue them birth certificates for their children listing both parents. The state continues to insist that only a biological mother can be listed, and that there needs to be an adoption proceeding for the co-parent to get listed. Two of the couples were married out of state, the other in state days after the *Obergefell* decision. All three conceived their children through donor insemination, and sought to apply the usual presumption that a child born to a married woman is the legal child of the birth mother’s spouse. Cheryl Maples represents the plaintiffs, arguing that the refusal to change the birth certificates to list both parents harms the children for no good reason, and that these couples should not have to expend resources and time on adoption proceedings. Under *Obergefell*, it is argued, they must be treated the same as different-sex married couples. *SFGate.com*, July 13.

GUAM – On June 5, Chief Judge Frances Tydingco-Gatewood of the U.S. District Court of Guam ruled in *Aguero v. Calvo* that the U.S. territory of Guam was obliged under the federal constitution to allow same-sex couples to marry. Ruling from the bench and citing the 9th Circuit’s decision in *Latta v. Otter* (as Guam is assigned to the 9th Circuit), the judge

granted summary judgment to the plaintiffs, making Guam the first U.S. territory to have marriage equality. The government quickly fell into line; indeed, the main argument advanced on behalf of the government during the hearing that morning was that because of a local statute the government could not issue marriage licenses unless the court ordered it to do so. The court made its order effective with the beginning of business on June 9, and marriages started taking place on that date. On June 8, the judge issued a brief written opinion restating what she had read from the bench on June 5: *Aguero v. Calvo*, 2015 WL 3573989, 2015 U.S. Dist. LEXIS 74590 (D. Guam). The plaintiffs, Kathleen Aguero and Loretta Pangelinan, had attempted to submit an application for a marriage license on April 8, but were turned down, even though Attorney General Elizabeth Barrett-Anderson and advised Governor Eddie Calvo that the existing ban was unconstitutional and that she would not defend it, leaving the governor to retain outside counsel for this purpose. Attorneys for the plaintiffs included local practitioners Bill Pesch, Mitch Thompson and Todd Thompson. They received assistance from Omar Gonzalez-Pagan, a staff attorney at Lambda Legal. The plaintiffs were waiting on line bright and early to get their license. *Lambda Legal* press advisory, June 5; *AP Worldstream*, June 8.

IDAHO – In light of *Obergefell v. Hodges*, the decision in *Taylor v. Brasuell*, 2015 WL 4139470, 2015 U.S. Dist. LEXIS 90034 (D. Idaho, July 9, 2015), seems obvious. Madelynn Lee Taylor is a 74-year-old veteran of the U.S. Navy. She married Jean Mixner in a religious ceremony in 1995, and then the women married again in a legal civil ceremony in California in 2008. Mixner passed away in 2012 and was cremated. Taylor kept the ashes, intending that

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when the time came she would be cremated as well and they would be buried together in a military cemetery. In December 2013, Taylor went to the Idaho State Veterans Cemetery in Boise to make the arrangements and filed an application. On June 4, 2014, she received a letter from the Director of the cemetery informing her that she could be buried there, but not together with her spouse, because the marriage was not recognized under Idaho law. Taylor filed suit on July 7, 2014, requesting an injunction to compel the cemetery to honor her request. A few months later, the 9th Circuit ruled in *Latta v. Otter* that Idaho's recognition ban was unconstitutional, on October 10, 2014, the Supreme Court denied a motion for stay pending appeal by Idaho, and on October 28, 2014, the cemetery allowed interment of Ms. Mixner's ashes, having concluded that Idaho's recognition ban was ended. The defendant in this case, David Brasuell, administrator of the cemetery, filed a motion to dismiss, claiming that the case was moot since Mixner's ashes had been interred and the Idaho Division of Veterans Services had granted Taylor's request. Taylor responded with a motion for summary judgment, asking the court to issue the requested injunction, just to be sure that her request to be buried with her spouse would be honored. Idaho subsequently filed a cert petition in *Latta v. Otter*, which the Supreme Court held without decision while the appeal in *Obergefell v. Hodges* was pending. That petition was denied on June 30, 2015, after the Supreme Court had issued its ruling on the merits in *Obergefell*. Meanwhile, the cross-motions in this case had been pending before U.S. Magistrate Judge Ronald E. Bush, who evidently held up on ruling until a decision was rendered in *Obergefell*. The defendants pressed their mootness argument in support of dismissal, but Judge Bush came down in favor of Taylor, issuing the requested injunction. "There is no question but that those on both sides of the argument

raised in the *Latta* and *Obergefell* cases have firm and deeply-felt convictions about the 'rightness' of their particular position," he wrote. "Further, the landscape left by *Latta* and *Obergefell* is still very warm to the touch. However, the remaining issues in this case must be decided against the judicial finish line of those cases, not against the arguments raised along the way. In that space, this Court is not persuaded that Veterans Services, via Mr. Brasuell, has borne its 'formidable' burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' *Concentrated Phosphate*, 393 U.S. at 203. Perhaps, even without an enforceable order ensuring that Ms. Taylor and Ms. Mixner will be permanently interred together at the Idaho Veterans Cemetery, they would nonetheless be so laid in perpetuity. But notwithstanding the rulings in *Latta* and *Obergefell*, a future director at Veterans Services or the Idaho State Veterans Cemetery (or some other applicable state actor) may come to view his or her role as being responsible for deciding what is/is not constitutional under the law on matters that may impact Ms. Taylor's claimed right to be interred there with her same-sex spouse. It is not unusual for legal precedent – even Supreme Court decisions – to be tested in such ways over time to 'settle the pond' on novel and evolving issues. Dismissal on the grounds of mootness would be justified only if this possibility was categorically foreclosed or, said another way, if it was absolutely clear that Ms. Taylor no longer had any need of the judicial protection that she seeks. The record now before the Court does not support such a conclusion. For this separate reason, Mr. Brasuell's Motion to Dismiss is denied." The court then concluded that, in light of *Latta* and *Obergefell*, it was clear that Taylor was entitled to summary judgment and the issuance of the injunction she was seeking. In a footnote, the judge explained the particular predicament that might arise

if the case were dismissed as moot and then after Taylor's death the cemetery's administration might change their mind and deny burial. At that point, it would be questionable whether her executor or administrator would have standing to bring an action under Section 1983, since only living persons have legal and constitutional rights to assert. The judge concluded that Taylor was entitled to the peace of mind of obtaining injunctive relief now.

MASSACHUSETTS – Gay & Lesbian Advocates & Defenders announced the filing of a class action against Walmart on July 14 in the U.S. District Court in Boston, charging a violation of Title VII's ban on sex discrimination on behalf of Walmart employees with same-sex spouses who had been denied the right to enroll for spousal employee benefits before January 1, 2014, even though same-sex couples working for Walmart have been marrying in Massachusetts since May 2004 and in an increasing number of other states leading up to January 1, 2014, when evidently Walmart finally made up its mind to recognize the marriages. The suit also alleges violation of the Equal Pay Act (sex discrimination in compensation) and the Massachusetts Fair Employment Practices Law. Lead plaintiff Jaqueline Cote, a Walmart employee in Massachusetts, was not allowed to add her spouse, Diana Smithson, whom she married in May 2004, to her health plan until January 1, 2014, which resulted in \$250,000 in medical debt when Diana developed cancer. The putative class will be represented by attorneys from GLAD and the Washington Lawyers' Committee for Civil Rights and Urban Affairs. Since the case is challenging a corporate policy, *Cote v. Walmart* should not encounter the problems that have prevented nationwide class certification in cases charging Walmart with sex discrimination in its assignment and promotion practices.

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The case hopes to build on several U.S. district court rulings around the country that have denied motions to dismiss Title VII sex discrimination claims that were asserted by gay or lesbian plaintiffs. The complaint makes the common-sense argument that Cote suffered intentional sex discrimination, as she would have been able to put her spouse on the benefits plan if they were a different sex couple; thus the denial was explicitly because of her sex and the sex of her spouse. Walmart allowed same-sex spouses to enroll beginning on January 1, 2014, so the damage claims asserted by this lawsuit are retrospective in nature.

TEXAS – The Texas Legislature adjourned its regular session, not expected to return until 2017, as it meets only in alternate years. The state's LGBT community breathed a sigh of relief, because apart from a resolution and some relatively harmless minor matters, the body did not debate and enact a slew of anti-gay measures, most notably one that would have required local officials to refrain from issuing marriage licenses or officiating weddings for same-sex couples. Although some right-wing pundits called for a special session of the legislature to consider and pass the anti-gay bills, Governor Greg Abbott said on June 1 that he did not anticipate calling a special session, stating, "They got their job done on time and don't require any overtime." *Texas Tribune*, June 8. The one substantive measure that they did pass, which is a prime example of legislation for dummies, is the so-called Pastor Protection Act (Senate Bill 2065), which goes into effect on Sept. 1, excusing religious authorities and organizations from performing any marriages to which they might have religious objections, allowing them to refuse to provide facilities and services in connection with such marriages, and shielding those organizations from any potential adverse consequences for such

refusals. Since the 1st Amendment's Free Exercise Clause already shields religious authorities from any such obligations, the legislation is totally unnecessary. Arguments to the contrary by such as Lt. Gov. Dan Patrick, who had stated that pastors might be sent to jail for refusing to perform same-sex marriages, were arrant nonsense, suggesting that Patrick – and those who argued that this statute is necessary – are ignorant of the law. The only part of the law that might have been debatable dealt with protection religious organizations from the loss of tax exemptions if they refused to perform such ceremonies or afford such facilities or services, but even that threat seemed highly unlikely. Perhaps somebody should take them at their word and sue a pastor who refuses to perform such a wedding or make their church building available for such a ceremony prior to Sept. 1. Just to see if this bill was really necessary... Although Texas has no state law banning sexual orientation discrimination, several of its major cities do, so this might provide an interesting test of the clash of rights.

CIVIL LITIGATION NOTES

CALIFORNIA – California Superior Court Judge Raymond M. Cadei awarded declaratory relief to Attorney General Kamala Harris, who sought to avoid circulating a proposed ballot initiative called the "Sodomy Suppression Act," which had been proposed by one Matt McLaughlin, an attorney of questionable taste. The measure purported to authorize people to kill gays and lesbians by "bullets to the head" or "any other convenient method." Normally, the Attorney General's office does not get to screen proposed initiatives for content, but Harris balked at writing a ballot title and summary and authorizing the circulation of petitions to put the proposal on the ballot. Instead, she filed a declaratory

judgement against McLaughlin arguing that the measure should be disqualified. After having filed his proposal and achieved whatever notoriety he was seeking, McLaughlin seems to have abandoned it, since he defaulted on responding to Harris's lawsuit. In an order signed on June 22, 2015, Judge Cadei wrote that Harris was entitled to the relief she requested, stating that the proposed initiative "is patently unconstitutional on its face," that preparing a title and summary would be "inappropriate, waste public resources, generate unnecessary divisions among the public, and tend to mislead the electorate," so Cadei held that Harris "is relieved of any obligation to issue a title and summary" for this proposed statute. *Harris v. McLaughlin*, Case No. 34-2015-00176006 (Cal. Super. Ct., Sacramento Co.).

CALIFORNIA – In *Harris v. McLaughlin*, California Superior Court Judge Raymond M. Cadei ruled that Attorney General Kamala Harris did not have to approve a proposed initiative submitted by Matt McLaughlin titled the Sodomy Suppression Act for petitioning to be placed on the ballot. The judge stated, in a brief order, that "Any preparation and official issuance of a circulating title and summary for the Act by the Attorney General would be inappropriate, waste public resources, generate unnecessary divisions among the public, and tend to mislead the electorate." He stated that Harris is "relieved of any obligation to issue a title and summary for the Act." McLaughlin's proposal would authorize Californians to execute gay people on sight.

CALIFORNIA – In *Johnston v. City of L.A.*, 2015 Cal. App. Unpub. LEXIS 4816, 2015 WL 4148341 (Cal. 2nd Dist. Ct. App., July 9, 2015), the court upheld the discharge of a Los Angeles police

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officer who was dismissed after an investigation of a complaint by a lesbian citizen about Johnston's treatment of her during a traffic stop of a car in which she was a passenger. A footnote in the court's decision summarizes Johnston's denial of the complaint against him: "Johnston denied being rude or discourteous, knowing of either Newman's or Boone's sexual orientation, referring to Newman as Boone's wife, asking whether Boone had an attitude, stating that Boone did not 'feel like a man,' referencing Boone's sexual orientation, or stating that she was harassing him. Neither Boone's nor Newman's race or sexual orientation were a factor in his decisions to make the traffic stop or issue the citation." Ultimately police officials concluded that Johnston had falsified his written report about the traffic stop, and that was the official reason for his discharge. The court of appeal noted the trial court's finding that Johnston was informed of the nature of the complaint against him before he prepared his written report on the traffic stop.

CALIFORNIA – U.S. District Judge Yvonne Gonzalez Rogers granted summary judgment to defendants in *Fidge v. Lake County Sheriff's Department*, 2015 WL 3919819 (N.D. Calif., June 25, 2015), finding that a man who hung out in a shopping mall coffee shop lecturing people against same-sex marriage did not have any valid constitutional or tort claims against mall employees or owners or police officers arising out of his arrest and expulsion from the premises. Judge Rogers recounts at length the story of Ronald Fidge's apparent obsession with convincing people – especially unaccompanied children – that same-sex marriage is unnatural, a proposition he illustrated using nuts and bolts "to suggest that two nuts or two bolts could not form a proper union." He was repeatedly told that parents were complaining to the mall management

about his approaching children and talking to them about same-sex marriage, and finally the proprietors got fed up after he brushed off repeated warnings to desist from harassing customers. In the ensuing confrontation involving a police officer and a mall managerial employee, Fidge resisted arrest and was physically subdued by the police officer using pepper spray. (The officer had threatened Fidge with a taser, and Fidge reportedly urged the officer to use it.) The court rejected Fidge's argument that his 4th Amendment rights were violated, rejected the idea that Fidge's speech enjoyed constitutional protection in this context (and avoided deciding whether the action of the mall owners constituted "state action" for constitutional purposes. The court also rejected Fidge's claim for false arrest or imprisonment.

CALIFORNIA – The 5th District Court of Appeal affirmed a decision by Kings County Superior Court Judge Donna L. Tarter to reject a motion by William Siegel to dismiss a defamation claim against him by Ed Martin. *Martin v. Siegel*, 2015 Cal. App. Unpub. LEXIS 4768, 2015 WL 4099840 (July 7, 2015). Siegel is the mayor of Lemoore, and Martin, assistant principal at Lemoore Union High School, is a former mayor of the city who contributes articles to a local newspaper in which he has been very critical of Siegel. Siegel allegedly sent an email in May 2013 to Lemoore Union High School District Superintendent Debbie Muro requesting that Martin be discharged. He allegedly followed up with a September 1, 2013, email to Martin that was also sent to several other people, in which he asserted that people in the community "speak of your homosexual tendencies and your infatuation with young boys" and insinuates that Martin had tried to kill himself ("self termination"). Siegel filed his motion under the SLAPP statute, alleging that Martin's lawsuit

was filed for the purpose of chilling Siegel's protected speech on issues of public concern. Upholding denial of the motion, the court found that the defamation cause of action did not arise from protected activity, as the court found that the email which is at the center of the case did not involve matters of public interest. "None of the evidence presented by appellant supports the claim that the referenced e-mail statements (homosexual tendencies, infatuation with young boys and self termination) pertain to issues involving the public interest or a public issue. Evidence that respondent wrote many articles crucial of appellant's performance as Mayor of Lemoore does not give appellant legal immunity to defame respondent about personal matters. The e-mail's content did not concern appellant's performance as Mayor nor did it relate to any article respondent wrote about appellant. Instead, they appear to be personal comments directed at respondent rather than addressing any public issue." The court also rejected Siegel's argument that the e-mail are "protected speech because the credibility and trustworthiness of respondent is a public concern," observing that Siegel never explains how "statements about homosexual tendencies or a past suicide attempt affects credibility or trustworthiness." Thus, Siegel's apparent attempt to escalate a feud with Martin in order to get Martin fired seems to have backfired, with the court of appeal giving the green light to Martin's defamation action.

CALIFORNIA – The National Center for Lesbian Rights announced on July 13 that the U.S. Department of Education's Office for Civil Rights and the Justice Department had approved a newly-announced policy by Arcadia Unified School District governing transgender students' rights as being in compliance with the school's obligation under Title IX of the Education Amendments of

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1972, 20 U.S.C. sections 1681-1688. This should settle litigation brought by NCLR on behalf of a transgender Arcadia student who had been denied facilities access consistent with the student's gender identity. Under the policy, students' gender identity as determined by the student will be respected, school personnel will respect privacy rights so as not to reveal, imply, or refer to a student's gender identity or expression, school personnel will use appropriate names and pronouns consistent with a student's gender identity, and access to all facilities (including restrooms and locker rooms) will be in accord with a student's gender identity. The policy was developed in response to the complaint NCR had filed in its lawsuit on behalf of the anonymous student. Interestingly, a petition is circulating in California seeking an initiative that would restrict facilities access by transgender students based on biological sex as identified at birth, but it seems clear that under the Supremacy Clause federal statutory rights would take priority over a state initiative statute. On the other hand, at this point there is not a definitive final appellate ruling firmly establishing that denial of access to such facilities violates Title IX, so a potential epic litigation battle may be looming on this issue if such an initiative is placed on the ballot and passes.

CALIFORNIA – The California 2nd District Court of Appeal ruled in *La Count v. Patina Restaurant Group*, 2015 WL 3814298 (June 18, 2015), that the company's grievance arbitration procedure was both procedurally and substantively unconscionable, so an employee's lawsuit alleging, inter alia, sexual orientation discrimination in violation of state law, was not subject to arbitration. The opinion, which is not officially published, unfortunately, goes into considerable detail about the procedural and substantive faults. Perhaps most significantly, at the time

of hiring the employee was not given enough time to be able to acquaint himself with the procedure that he was ostensibly agreeing to be bound by, the procedure was buried in a lengthy manual and was not made conspicuous, the employee was not given his own copy of the manual, and the company reserved the right to modify the procedure at any time unilaterally. As to substance, the procedure was very one-sided. While purporting to be binding on both employee and employer, the employee's rights were heavily circumscribed and restricted, with tight time limits and multiple steps for resolution of grievances, while the employer faced no such restrictions. The procedure was devised to give every advantage in the process to the employer. Under the circumstances, the court held that the procedure was not binding on the employee.

CALIFORNIA – The California 2nd District Court of Appeal ruled in *Conner v. Cedars-Sinai Medical Center*, 2015 WL 3767970 (June 17, 2015), that a hospital was not liable to a man for failing to inform him of his HIV+ test result. Mr. Conner was admitted to the hospital after feeling "discomfort" and "dizziness." As part of the diagnostic process he consented to an HIV test, which came back negative. A few days later, a second test using a different technique was run and came back positive. The lab communicated the test result to the doctors who were treating Conner, but nobody notified him, and he didn't learn that he had tested positive for HIV until three years later, when he returned to the hospital. Conner sued the doctors and the hospital, asserting negligence claims and seeking to hold the hospital vicariously liable for the failure of physicians to inform him. The hospital moved for summary judgment, successfully arguing that it had no duty to the patient because "a hospital's duty of care is to transmit laboratory results

to the physician who ordered the test," and disclaiming any vicarious liability for the failure of the patient's doctor to communicate the result to him. In affirming this ruling, the court of appeal pointed to prior California appellate rulings that supported the hospital's argument about the limited duties of hospitals in reporting test results. The court also rejected Conner's negligence *per se* argument, which he premised on statutes imposing a duty on hospitals to report positive HIV tests to public health authorities. The court found that the statutes were not intended to benefit patients, as they mandated reporting only to public health authorities. Furthermore, although Conner's doctor had admitting privileges at the hospital, he was not an employee, so his failure to notify Conner of the positive test result could not be imputed to the hospital under traditional *respondeat superior* doctrine governing employer liability for torts committed by employees in the scope of their employment. The court also rejected Conner's argument that the hospital was liable for "negligent credentialing" of his doctor or constructive fraud or concealment. Some duty is a prerequisite to imposing tort liability, and the court held that under California precedents the hospital had not violated any duties in connection with this case.

DELAWARE – The Supreme Court of Delaware affirmed the New Castle County Family Court's order slightly modifying child visitation terms and found that Charles Franklin, the father, who was disputing the modification sought by the ex-wife, Cassie Franklin, had failed to provide evidence supporting the allegation that the Family Court was biased against Charles due to Charles's gender transition. *Franklin v. Franklin*, 2015 Del. LEXIS 305, 2015 WL 3885834 (June 22, 2015). Justice Randy J. Holland wrote for the three-judge panel of the court. In a footnote to the opinion,

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he states: “The Court recognizes that Father is a transgender woman, but we use the term ‘Father’ for purposes of this order because that is the term used by the Family Court in its order. It also is the term used by both parties to identify Charles Franklin in their briefs on appeal.” Cassie, who has sole custody of their young daughter, sought to modify visitation terms because the child was beginning full-time kindergarten; she alleged that Charles “had not provided a consistent schedule for Ellen during her preschool years” and this would be disruptive of the school schedule. Both parents represented themselves and were the sole witnesses at the Family Court hearing. The Family Court did not grant Cassie the more extensive modifications she was seeking, but rather imposed a schedule that did not reduce the total amount of Charles’s visitation time but rearranged it to accommodate the school schedule. The court also noted the communications difficulties experienced by the parents, and testimony from both of them “reflecting Ellen’s confusion about Father’s gender transition, including an incident where Ellen refused to take medicine when she was sick because she was afraid it would turn her into a boy.” The Family Court decided that it would be in Ellen’s best interests if the parties obtained counseling for the child, at Charles’s expense, to help her understand the transition. In response to Charles’s argument that the Family Court was biased, the court pointed out that Charles “failed to provide this Court with a copy of the transcript of the Family Court hearing in order to support those claims. Without an adequate record, the Court has no sufficient basis to review Father’s challenge to any of the Family Court’s factual findings or credibility determinations.” The court observed that the Family Court had determined that “both parties were adequate caregivers for Ellen, but they had problems in communicating directly and civilly with one another. The Family

Court ordered that Father’s visitation with Ellen should be modified slightly so that visitation periods would begin on Wednesday each week to reduce any confusion and that non-school pickups and drop-offs would occur at the police station. In almost all other respects, the Family Court denied Mother’s petition to modify visitation.” The court found that “the allegation that the Family Court’s decision reflects discrimination against Father as a transgender person is completely unsupported by the record.”

FLORIDA – U.S. District Judge James S. Moody, Jr., granted summary judgment to The College of Central Florida, which was being sued by a lesbian professor on a claim of sex discrimination in violation of Title VII. *Burrows v. College of Central Florida*, 2015 U.S. Dist. LEXIS 90576 (M.D. Fla., July 13, 2015). Barbara Burrows was hired as Vice President for Instructional Affairs in July 2008 on an annual contract subject to renewal at the College’s discretion. Burrows subsequently married her same-sex partner in Iowa. She told some staff members about the marriage, but not her boss, College President Charles Dassance, although she believed that he had overheard staff talking about it. He alleges that although he knew she was gay, he did not know about her marriage. In any event, in March 2011 Dassance informed Burrows that he was not renewing her contract as VPIA for the 2011-12 academic year, assertedly because he had concluded in light of complaints about her management style that things were not working out. She was given the option to resign, and she accepted a transfer to a teaching position in the math department. The result was a large decrease in her salary, as the College treated her as the equivalent of a new hire and paid her consistent with what it asserted was the appropriate salary for a person of that rank. She alleged that the non-renewal of her contract

was discriminatory, as was the level of pay she received in her new position. She worked as a faculty member until 2013, receiving positive performance reviews, but then for budgetary reasons the College notified her that she was being laid off in a reduction in force that eliminated 17 vacant faculty positions and resulted in laying off 11 faculty members. She offered to teach courses for which she had been scheduled for the coming summer and fall terms as an adjunct, but her offer was declined. The court concluded that her discrimination claim was really a sexual orientation claim rather than a traditional sex discrimination claim, and thus not actionable under Title VII in the absence of factual allegations that would support a gender stereotyping theory. “Plaintiff’s claim,” wrote Judge Moody, “although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII or the FCRA [Florida Civil Rights Act]. . . Plaintiff’s theory of gender stereotyping is misplaced. Generally, gender stereotyping is concerned with characteristics ‘readily demonstrable in the workplace,’ such as behaviors, mannerisms, and appearances. Plaintiff’s relationship with a woman was not a characteristic readily demonstrable in the workplace, and Plaintiff provides no other evidence of discrimination based on her failure to conform to a feminine stereotype. Additionally, even assuming Plaintiff could establish a prima facie case of gender stereotype discrimination, Plaintiff’s claim fails for the same reasons as her claim for marital status discrimination [under state law], i.e., Plaintiff failed to demonstrate that Defendant’s proffered reason for setting her faculty salary was pretext for gender stereotype discrimination.” The court also found that the reduction in force was not carried out to retaliate or discriminate against Burrows. Burrows is represented by Christopher

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Wadsworth and Ronnie Guillen of Wadsworth Huott LLP, Pompano Beach, Florida.

INDIANA – Indiana legislators have very odd ideas about appropriate legislation under the 1st Amendment. In addition to passing a Religious Freedom Restoration Act that blew up in their faces over the issue of state-authorized discrimination against LGBT people, they also recently passed a law that bans registered sex offenders from attending any church located on the same property as a school. That means many churches, since churches frequently run pre-school and religious school programs on their premises. The ACLU of Indiana filed suit on July 1 in Elkhart County Superior Court on behalf of two registered sex offenders (“John Doe” plaintiffs), claiming the protection of the RFRA against the other statute, seeking an injunction against prosecutors and sheriffs in Allen and Elkhart Counties, arguing that they should be entitled to attend the church of their choice. A Republican legislator criticized the lawsuit as a misuse of the law, while a Democratic legislator who had opposed the new RFRA asserted that it was entirely on point. *Journal and Courier*, July 3 [Lafayette, IN].

KENTUCKY – A gay discrimination plaintiff won his motion to remand his lawsuit to state court on the ground of lack of federal diversity jurisdiction in *Wimsatt v. Kroger Co.*, 2015 U.S. Dist. LEXIS 74134 (W.D. Ky., June 9, 2015), upon a finding by Senior U.S. District Judge Charles R. Simpson, III, that Steven Wimsatt had stated “colorable” state-law claims against individual co-defendants who were, like him, residents of Kentucky, thus defeating the requirement for complete diversity in a case that did not assert any federal claim. Wimsatt began working for Kroger, a national grocery

chain, on Aug. 2, 2010, but has been on permanent suspension since Aug. 1, 2014. He claims that his suspension was due to a “scheme contrived by Defendants – Kroger Co., Kroger Limited Partnership, Kayla Adams, Naomi Newton, and Jamie Goings – to discriminate against him on the basis of gender and retaliate against him for engaging in protected activity.” He sued in Nelson County Circuit Court alleging a violation of the Kentucky Civil Rights Act. Kroger removed the case to federal court, asserting diversity jurisdiction, and alleged that Wimsatt’s claims against the non-diverse defendants were “fraudulent” for the purpose of preventing removal. To evaluate this argument, the court had to determine whether Wimsatt had asserted colorable state law claims against the non-diverse defendants. Kentucky’s Civil Rights Act authorizes employment retaliation claims against individuals as well as against companies and, after a careful analysis of Wimsatt’s allegations, the court found that his factual allegations were sufficient to ground such actions. Simpson rejected Kroger’s argument that this was a non-actionable sexual orientation discrimination claim. “We acknowledge that discrimination on the basis of sexual orientation is, simply put, a claim that is not cognizable under the KCRA,” wrote Judge Simpson. “And, indeed, Wimsatt references his sexual orientation throughout the Complaint. Yet, he explicitly accuses the defendants of ‘sex discrimination’ and ‘discrimination on the basis of sex,’ not on any other basis. ‘Sex,’ used in this sense, is [an] alternative way of saying ‘gender.’ Even federal courts use the terms ‘sex’ and ‘gender’ interchangeably. Hence, we are not surprised that Wimsatt’s Complaint explains that KRS 344 prohibits discrimination on the basis of sex, which it does, and then alleges that he was retaliated and discriminated against ‘because of his sex as a homosexual male.’ Never, however, does he allege that he was

discriminated against ‘because of his sexual orientation as a homosexual male.’ Thus, regardless of how he tried to dress them up, the operative words in Plaintiff’s allegations are ‘because of his sex as a [] male.’ And even if we were to entertain the argument that the Complaint is ambiguous as to whether it alleges discrimination on the basis of gender or sexual orientation, the law directs us to resolve any such ambiguity in Wimsatt’s favor,” because, after all, the burden is on the party seeking removal to establish diversity. The court further noted that Wimsatt’s “conspiracy-to-retaliate claim is, at most, tangentially related to his discrimination claim,” premised as it is on the defendants’ response to his alleged protected activity, rather than on his sexual orientation. Having concluded that “there is a ‘colorable basis’ for predicting that ‘state law might impose liability upon’ the non-diverse individual defendants for retaliation, Judge Simpson found that the defendants had failed to establish that the federal court could assert jurisdiction over this case based on diversity.

MAINE – A lesbian plaintiff who was discharged just days after filing a discrimination charge against her employer under the Maine Human Rights Act partially survived the employer’s motion to dismiss in *Adkins v. Atria Senior Living*, 2015 U.S. Dist. LEXIS 85392, 2015 WL 4041727 (D. Maine, July 1, 2015). The Maine Human Rights Act forbids, inter alia, sexual orientation discrimination. Adkins had filed a claim with the MHRC alleging such discrimination as well as sex and race discrimination, and she subsequently filed a Title VII claim with the EEOC, alleging sex and race discrimination and retaliation. She missed by two days her deadline for filing a lawsuit on the state law claims, because she was waiting for a right to sue letter from the EEOC on the federal claims. District Judge

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John A. Woodcock, Jr., granted the employer's motion to dismiss the state law claims, finding that they were time-barred. "Ms. Adkins presents a hard case because she missed the deadline by only two days and she was represented by counsel at the time," he wrote. "However, once the Court determines that she had not only failed to file on a timely basis but also that the three-day extension under Rule 6 was unavailable to her, the Court is required to apply the law as the Maine legislature enacted it and to conclude that Ms. Adkins has failed to comply with the statute of limitation in the MHRA." Thus, the court's attention turned to Adkins' Title VII allegations, as to which the employer argued that this was really a sexual orientation discrimination case that was not actionable under Title VII. Adkins tried to squeeze her allegations into a gender stereotyping theory, but the court found that her factual allegations did not suffice for that. However, the court concluded that her factual allegations were sufficient to support a more straightforward sex discrimination claim, since she had alleged specific instances when she claimed she was discriminated against because she was a woman, apart from any issue about her sexual orientation. Thus, the court refused to dismiss her Title VII sex discrimination claim. Furthermore, the court found that Adkins could maintain her retaliation claim. The employer argued that the retaliation claim really related back to her time-barred sexual orientation claim under the Maine HRA, and thus was not actionable under Title VII. But, Judge Woodcock pointed out, "Ms. Adkins complained to human resources about, among other things, race-based discrimination, filed a charge with the MHRC, and informed her manager of the complaint she filed with the MHRC; four days after notifying her manager of the charge, Atria terminated her employment." The court asserted that "her MHRC charge is protected activity," citing 1st

Circuit precedent on point that filing a discrimination charge with a state agency can be a prerequisite for a Title VII retaliation claim, "and the parties do not dispute that the termination of her employment is an adverse job action. Four days is sufficiently close to generate an inference that the two events were causally related. To the extent that Ms. Adkins complained about sexual orientation discrimination, it was not the only conduct she complained about. The Court need go no further; Ms. Adkins' retaliation claim survives a motion to dismiss, and the Court will allow the parties to flesh out the contents of Ms. Adkins' complaints to her manager and to human resources during discovery." Adkins is represented by Danielle M. Campbell and Guy D. Loranger, Law Office of Guy D. Loranger, Old Orchard Beach, ME.

MARYLAND – In *Finkle v. Howard County*, 2015 U.S. Dist. LEXIS 76144, 2015 WL 3744336 (D. Md., June 12, 2015), U.S. Magistrate Judge Stephanie A. Gallagher granted summary judgment to Howard County on a Title VII sex discrimination brought by a transgender woman who was not selected to be a member of the initial class of a new Volunteer Mounted Patrol (VMP) being formed for the county police department. Finkle, well qualified as an equestrian, is a retired police officer, and had been very involved with a police lieutenant who was in charge of setting up this new program. In the course of the process of screening applicants, the selecting body adopted a preference against hiring retired police officers, based on their view that the role of the VMP would not be confrontational but rather ceremonial and informational, and they were concerned that retired police officers would be likely to want to intervene to make arrests and engage in other police-type actions. There were about 75 applicants, and Finkle survived all stages of the selection process until

it came down to the interviews of the finalists for the twelve-member unit. At that point, she was limited for three reasons that were articulated: her status as a retired police officer, her conduct during the interview (which suggested to the selection panel that she would be inclined to be confrontational and interventionist and thus not "fit in" to their concept for the unit), and the response time she indicated she would need to report for assignments, which was assertedly much longer than they considered desirable. When she was informed that she was not selected but would be placed on a waiting list for the future, she expressed dissatisfaction, and when she learned who had been selected she came to believe that some of the reasons stated for not selecting her were bogus. She filed a discrimination charge with the state civil rights agency and ultimately received a right-to-sue letter from the EEOC, claiming sex discrimination because of her gender identity. The court accepted the proposition, more frequently being accepted now by federal trial courts, that gender identity discrimination can be actionable under Title VII, but concluded that she had failed to allege a plausible discrimination claim, either through direct or circumstantial evidence. Only one of the selection committee members was aware that was transgender, and there was no evidence that her gender identity ever came up in the discussions of the selection panel, or was relied upon in deciding not to select her. The court found no basis in the circumstances for inferring discriminatory intent, and found that the stated reasons for selecting others in preference to her were not pretexts for discrimination. She tried to make an argument that disqualifying retired police officers was a form of occupational discrimination that would be actionable under the state's discrimination law, but the court found that she had not filed a complaint to that effect with the state agency, failing to exhaust administrative remedies.

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MASSACHUSETTS – U.S. District Judge Talwani denied a motion to reconsider a prior dismissal of a defamation claim brought pro se by Donal Coleman against the Commonwealth of Massachusetts, the Andover Police Chief, and Starbucks. *Coleman v. Commonwealth*, 2015 WL 4094336 (D. Mass., July 7, 2015). According to the brief summary given by the court, Coleman, who asserted in this motion but not in his original complaint that he is gay, alleged that an individual (not a defendant in this case) had called him a derogatory term in Starbucks, that a different individual (not a defendant in this case) “banged” on the window of a Brueger’s Bagels and called him a derogatory term, and that three Andover police officers, none of whom are named as defendants in this case, had failed to investigate these incidents when Coleman sought their help. In the original ruling, the court found that there was no federal question or diversity jurisdiction and dismissed, finding no reason to assert jurisdiction over purely state law questions. On the motion for reconsideration, Coleman asserted a federal equal protection claim. The court pointed out that Starbucks was not a state actor, that the Commonwealth enjoyed immunity, and that there was no allegation that the police chief had “directly violated his rights” or “had condoned or acquiesced to a pattern of civil rights violations” that might support supervisory liability. Although Coleman’s motion for reconsideration did allege “new” facts not alleged in the original complaint, there was no showing as to why they couldn’t have been alleged then.

MASSACHUSETTS – U.S. District Judge Indira Talwani denied a summary judgment motion filed by two police officers who are being sued on constitutional and statutory privacy claims by Joseph Amato, a gay man who they arrested on Christmas Eve

2012. *Amato v. Barone*, 2015 U.S. Dist. LEXIS 70376 (D. Mass., June 1, 2015). Christian Peters went to a neighbor’s house to call the police about a “domestic disturbance” with his partner, Joseph Amato. When Police Officers Michael Barone and Thomas Steele showed up at the apartment, Peters was still at the neighbors’ house. Amato was at the time clad only in a sweatshirt and a blanket wrapped around his body. The police officers placed Amato under arrest and handcuffed him as he stood in the doorway of an office in the apartment. As he was being cuffed, the blanket fell to the floor, leaving him naked from the waist down, genitals exposed. He asked the police officers to allow him to put on a pair of pants sitting nearby on the floor. Sergeant Steele responded, “Shut the fuck up” and “Merry Fucking Christmas.” Officer Barone picked up the pants, but wouldn’t allow Amato to put them on. Instead, they paraded him in that state out of his apartment from his residence to the police car, and they did not allow him to put on pants until after they reached the police station where he was booked. Amato did not resist arrest and cooperated with the police officers at all times. He was exposed to public view on a cold Massachusetts night while being marched from the house to the police car. Amato did not contest the constitutionality of his arrest, but only the manner in which it was carried out. Judge Talwani found that the officers were not entitled to summary judgment on Amato’s claim that the arrest was carried out in an unreasonable manner, noting that no safety concern would justify refusing to let Amato put on his pants once the police officers had a chance to check the pockets for contraband or weapons. “Even a brief period of nudity may be unreasonable if not supported by countervailing security interests,” wrote the judge, “and this unreasonableness is compounded where a nude arrestee is exposed to both public view and to the extreme weather typical of Massachusetts in late December.”

The court rejected a qualified immunity argument, finding that there was clear Supreme Court precedent dealing with a right to be free from unjustified nudity during a seizure of the person. She also rejected the summary judgment motion directed to Amato’s claims under the Massachusetts Civil Rights Act and the Massachusetts Privacy Act. “A jury could find that Amato’s forced exposure was not reasonably justified by any countervailing interest,” she concluded.

MICHIGAN – U.S. District Judge Patrick J. Duggan issued an order enforcing an arbitration award finding that Spirit Airlines had violated its collective bargaining obligations in a dispute concerning domestic partner health benefits. *Spirit Airlines, Inc. v. Association of Flight Attendants*, 2015 WL 3771330 (E.D. Mich., June 17, 2015). Under the parties’ collective bargaining agreement, the arbitration board consisted of a management designee, a union designee, and a neutral party. The AFA designated a senior flight attendant to be its member of the panel. Before the matter was concluded, the flight attendant retired from active duty, and an issue was raised whether she could continue on the arbitration panel, inasmuch as the collective agreement specified that the management and union members of the panel be employees of the airline. The neutral member took it upon herself to rule that the retired flight attendant could continue to participate on the panel, as she was employed when the panel was constituted to hear the case. Ultimately, the flight attendant member voted together with the neutral member to grant the union’s grievance. The court rejected the union’s argument that every intermediate procedural issue to be decided during a case must be by a majority vote of the panel, finding that the collective agreement’s majority vote rule applied only to the final decision on the merits by the panel. The issue before the panel had been whether the

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company's policy of treating married flight attendants and their spouses more favorably than partnered flight attendants by providing more healthcare options to the married attendants violated the contract's prohibition on marital status discrimination, a question the panel answered in the affirmative. "Spirit does not argue that the Board acted outside its authority in resolving this dispute," wrote Judge Duggan, "nor does Spirit allege fraud, dishonesty, or a conflict of interest. Therefore, if the award is to be vacated, Spirit must show that the majority was not arguably construing or applying the contract in resolving legal or factual disputes in the case. Spirit has not satisfied its burden." Duggan asserted, in conclusion, "Spirit's conclusory argument that the award does not draw its essence from the CBA is unpersuasive." He granted the union's motion for summary judgement and ordered enforcement of the arbitration award.

MINNESOTA – The Justice Department has filed suit on behalf of the EEOC against Deluxe Financial Services, a Minnesota-based company, alleging that Deluxe had violated Title VII's ban on sex discrimination by its actions in response to a longtime employee who had recently begun to present as a woman. The complaint alleges that the company would not allow the employee who now is known as Britney Austin to use the women's restroom, and had taken to no action in response to harassing comments by co-workers, who had engaged in name-calling and referring to Austin as "he". The case is part of an initiative by the EEOC to establish that Title VII's ban on sex discrimination extends to protect transgender employees who are transitioning on the job. *National Law Review*, June 17.

MISSOURI – The *Joplin Globe* (July 15) reported that the insurance company

and attorneys representing the Carl Junction School District had settled a federal wrongful death lawsuit filed by Mika and Jessica Nugent, parents of 14-year-old Luke who had committed suicide in response to extended bullying at school. The lawsuit, *Nugent v. Cook*, asserted claims of violation of Title IX, denial of due process, and tort claims of wrongful death and negligence. Luke Nugent had come out as bisexual while attending junior high school, and immediately became the subject of ridicule, harassment, torment and bullying, according to the complaint. Luke suffered homophobic slurs, physical threats, and theft and destruction of his personal property. The named defendants included in the superintendent of schools, the junior high school principal, the bus driver, and several other school employees. Under the settlement agreement filed with the U.S. District Court for the Western District of Missouri, the case would be dismissed and the insurance company would pay \$300,000 to the plaintiffs. The school district's attorney stated that the decision to settle was made by the insurance company, not the school district, as the insurance policy gave the company the right to settle claims. The school responded to the incident by putting in place new training programs and an online reporting system for bullying complaints.

NEW JERSEY – It seemed a bit anticlimactic after all the pretrial rulings, but following a dramatic three-week trial that received substantial press coverage, a New Jersey Superior Court jury in Hudson County unanimously ruled in *Ferguson v. JONAH* that the defendant, an organization whose name is an acronym for Jews Offering New Alternatives for Healing that advertised services for "curing" homosexuality, had violated New Jersey consumer fraud laws. The jury held the organization, its founder and an affiliated counselor

liable for advertising misrepresentations and unconscionable commercial practices on June 25. The trial lasted three weeks. The jury awarded damages totaling \$24,500, which will be allocated in various amounts among the five plaintiffs based on the evidence concerning the harms they suffered and subsequent costs they incurred from being exposed to the so-called therapy. A detailed report about the trial and jury verdict was published in the *New Jersey Law Journal* and republished in the *New York Law Journal* and the *National Law Journal*.

NEW YORK – In what may have been the first New York court opinion to cite *Obergefell v. Hodges*, a Manhattan trial judge ruled on July 2 that a purported marriage between an Orthodox Jewish woman and a man was invalid. *Devorah H. v. Steven S.*, 2015 N.Y. Slip Op. 25228 (Sup. Ct., N.Y. Co.). Devorah and Steven (an attorney) never obtained a marriage license. They were living together with their young children from prior marriages in a tiny apartment, and sought help from their rabbi in finding more suitable housing when a complaint by Devorah's ex-husband to the Administration for Children's Services triggered an investigation of the children's living conditions. The rabbi found them a larger apartment and suggested they should marry before moving there. He then officiated at an abbreviated religious marriage ceremony for them on the spot in his office, partially completing a standard form certificate (which he didn't sign) and urging them to go to City Hall and get a license. They didn't follow up, however. Ten years later Devorah filed for divorce and Steven moved to dismiss, contending they were never validly married. She relied on NY Domestic Relations Law Sec. 25, which provides that a "properly solemnized" marriage is valid despite the lack of a marriage license. This is an ancient

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statute, most likely passed in order to validate religious marriages in the large immigrant community in New York when it was adopted in the early years of the 20th century. After recounting the extensive testimony of the parties and the rabbi on the question whether this marriage was “properly solemnized,” the court concluded that the marriage was invalid, noting particularly the rabbi’s testimony that he had repeatedly urged the parties to “go to City Hall” to get a license, and that they had to know that they would need a new solemnization after a license was issued. Steven testified that after they left the rabbi’s office he had torn up the copy of the certificate that the rabbi gave them. Supreme Court Justice Matthew F. Cooper’s conclusion, invoking *Obergefell*, is interesting: “In the over 100 years since the enactment of DRL Sec. 25, the way citizens marry in New York has changed immeasurably. While at one time the wedding ceremony was the central element of the process, that is no longer the case; church weddings are more and more the exception rather than the rule, and the new wage of marriage ceremonies would be almost unrecognizable to earlier generations. What is key to the process is the marriage license itself. This is not only true for New York, but for the entire nation. After all, when the United States Supreme Court issued its historic decision in *Obergefell v. Hodges* (576 U.S. – [2015]) making the right to same-sex marriage the law of the land, it did so by decreeing that ‘States are required by the Constitution to issue licenses to same-sex couples’ (emphasis added). DRL Sec. 25, in its present form, serves no useful function in today’s world. Conceivably, if the statute was amended to allow couples who justifiably believed they were legally married with a valid marriage license to protect the marriage from the claim that the license was improperly executed or otherwise defective, that would certainly serve the public interest.

But as it exists now, the statute allows for the wholesale disregard of New York’s licensing requirements – requirements that, as we have seen, play a vital role in insuring that marriages are legally valid. Until DLR Sec. 25 is repealed or reformed, courts will be forced to grapple with situations like this, where the parties fully understood that they did not legally marry but one side seeks to abuse the statute to attain the financial remedies only available to litigants who are married to one another. In light of the foregoing, it must be concluded that plaintiff cannot show that she and defendant are married, and therefore has failed to prove an essential element of her *prima facie* case for divorce.” The court evidently did not consider the couples’ ten years of cohabitation after the quick marriage ceremony to be a basis for finding Devorah eligible to seek a formal divorce and disposition of assets. Devorah H. is represented by Eurydice A. Kelley, Steven S. by Jeffrey S. Kofsky.

OHIO – In *Currie v. Cleveland Metropolitan School District*, 2015 U.S. Dist. LEXIS 87311, 2015 WL 4080159 (N.D. Ohio, July 6, 2015), what might have been a plausible employment discrimination was dismissed due to pleading deficiencies by the pro se plaintiff, Brian Currie, who had been an English teacher in the Cleveland public school system. Currie alleged that he was subjected to sexual harassment by Regional Superintendent Luther Johnson. He wrote in an EEOC complaint, “Expletives and threats concerning sexual orientation were used against me in my classroom at John Marshall Ninth-Grade Academy.” Currie alleges that due to psychological and emotional trauma he suffered as a result of the harassment, he did not return to work for the remainder of the school year. He filed an internal complaint with school authorities, which was investigated and rejected,

and a grievance with his union that went nowhere. He says the district’s investigator asked Currie about his sexual orientation. He claims that when he returned to school for the fall semester, he was not reinstated to his position as an English teacher, for which the school was using a long-term substitute, and he was quickly discharged for “absence abuse.” He sought to bring claims under Title VII (which he misidentified in his complaint) and the Americans with Disabilities Act, although he did not explicitly identify in his complaint what disability he had, apparently thinking that his reference to the psychological and emotional trauma he suffered due to the alleged harassment would be sufficient. In any event, U.S. District Judge Patricia A. Gaughan granted the motion to dismiss, finding that claims could not be asserted under the federal civil rights laws against the individual named defendants, since only the employer, as such could be sued, and that the complaint failed to state a claim under either Title VII or the ADA against the school district. In particular, applying 6th Circuit precedent and concluding that Currie was really trying to assert a sexual orientation discrimination claim, she accepted the school district’s argument that this claim was not actionable under Title VII. She found that Currie’s allegation “only involve discrimination based on sexual orientation,” rejecting his argument that because he alleged in his complaint that he was discriminated because of sex (male), he had met the requirement for coverage under the statute. Judge Gaughan did not expressly analyze the question whether a retaliatory discharge for filing his complaints with the district and the union should be found actionable based on his belief that the harassment he was protesting was unlawful, merely asserting that because the controversy involved sexual orientation, the retaliation claim also was not actionable. No mention is made of Cleveland’s ordinance forbidding

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sexual orientation discrimination, presumably because Currie, proceeding pro se, had not thought to include it in his complaint. One suspects that an experienced employment lawyer could have found a way to frame a complaint that could survive a motion to dismiss, although one would need more facts than are revealed in this opinion to be sure.

OKLAHOMA – U.S. District Judge Robin J. Cauthron has refused to dismiss a Title VII claim filed by the Justice Department on behalf of a transgender woman against Southeastern Oklahoma State University, alleging that she suffered discriminatory treatment and a denial of tenure after she announced her intent to transition. *United States v. Southeastern Oklahoma State University*, 2015 U.S. Dist. LEXIS 89547 (W.D. Okla., July 10, 2015). Dr. Rachel Tudor intervened as a plaintiff, represented by Brittany Novotny of Oklahoma City and Ezra I. Young and Jillian T. Weiss of the Law Office of Jillian T. Weiss PC of New York. The court rejected defendant's claim that Dr. Tudor's complaint to the EEOC was insufficient to meet the requirement to exhaust administrative remedies before filing suit, finding that the EEOC's own procedural regulations basically allow notice filing, and that the 10th Circuit had adopted a policy of "utmost liberality" in construing EEOC charges for this purpose. Judge Cauthron concluded that the letter Dr. Tudor sent to the EEOC was sufficiently detailed to meet the exhaustion requirement, putting the defendant on notice that she was asserting a hostile work environment and discrimination claim. The court rejected defendant's argument that Dr. Tudor's claim fell short on the theory that she is not a member of a "protected group." She noted 10th Circuit precedent stating that "like all other employees, [Title VII] protection extends to transsexual employees only if

they are discriminated against because they are male or because they are female." "Here," wrote the judge, "it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender." Thus, the first element of a Title VII discrimination claim had been adequately pled. As to her factual allegations, the court said that defendant's reading of her Complaint was unduly narrow. "When taken as a whole, it is clear that the factual allegations set forth by Dr. Tudor demonstrate that she was subjected to unwelcome harassment based on the protected characteristic and that the harassment by Defendants' employees was sufficiently severe or pervasive to alter a term, condition, or privilege of her employment and thereby create an abusive work environment." Among her allegations is discrimination regarding insurance coverage for transition expenses, which is not explicitly mentioned in the court's opinion but was included in the factual allegations presented to the court. She also alleged discrimination concerning restroom access, and recounted being told by a Human Resources Administrator that a management official of the university had responded to news of Dr. Tudor's gender transition by urging her discharge, stating that transsexuality offended his religious beliefs. The court also rejected the defendant's argument that the suit was barred under the doctrine of laches, finding that Dr. Tudor had begun the administrative process to redress her complaint promptly and any delay in filing suit was attributable to the EEOC's administrative process, which should not be held against her claim. This lawsuit is one of several filed by the Justice Department on behalf of transgender complainants seeking to vindicate sex discrimination claims under Title VII and establish precedents

holding that discrimination against transgender individuals because of their gender identity or expression violates the sex discrimination ban in Title VII.

OKLAHOMA – Did the Payne County Detention Center violate the Americans with Disabilities Act (ADA) when a pre-trial detainee who was identified as HIV-positive was housed in a segregation pod, thus restricting his movements and his ability to enjoy the benefits, programs or activities that were afforded to general-housing detainees? The John Doe plaintiff in *Doe v. Board of County Commissioners of Payne County, Oklahoma*, 2015 WL 3500019 (10th Circuit, June 4, 2015), was unsuccessful at trial in establishing ADA liability. On appeal, he claimed that the trial court inappropriately refused to let his expert witness on prison best practices testify, and improperly charged the jury that they could not find for the plaintiff unless they found that he had proved that his HIV status was the sole reason for his being placed in segregation. At the time Doe was placed in segregation, the responsible officer noted on a form that it was "due to his HIV statutes [sic]." She later explained that she did not elaborate because she believed that there was not "enough room in our field of putting all the reasons in the cell movement log," but she would have explained that she knew Doe personally and "due to the nature of his charges" she worried about him getting into a fight and exposing other inmates to "bodily fluids or blood." In reject Doe's arguments on appeal, the court first concluded that the trial court "did not abuse its discretion in excluding Mr. Sparkman's testimony. Despite Doe's arguments to the contrary, not a single one of Mr. Sparkman's sixteen opinions pertained to the question of whether Doe was placed in a segregated housing unit solely because of his HIV status; instead, Mr. Sparkman opined on the inadequacies of the Detention Center's

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policies on classifying prisoners with HIV and its failure to follow so-called ‘best practices.’” On the more hotly contested point, the court held that in the absence of Supreme Court precedent to the contrary, it was bound to follow 10th Circuit precedent, which construes the operative language of the ADA Title II to require discrimination plaintiffs to show that they suffered discrimination “solely” because of their disability. The standard of liability under civil rights laws is a moving target. Under Title VII, the standard for a discrimination claim is “motivating factor,” but the standard for a retaliation claim is “but for” the plaintiff’s protected activity. Referring to the Supreme Court’s recent decision in *University of Texas v. Nassar*, 133 S. Ct. 2517 (2013), the court said, “If *Nassar* suggests anything regarding the instruction issue presented, it suggests that a mixed-motive standard does not apply to any claims other than Title VII discrimination claims.” A footnote describes the complex case law accumulating around the question of appropriate standards in discrimination cases. In any event, in this case the panel was unwilling to depart from prior circuit precedent.

OREGON – Oregon Labor Commissioner Brad Avakian approved an administrative law judge’s decision holding that Aaron and Melissa Klein, the owners of a bakery called Sweet Cakes, had violated the state’s public accommodations law by declining an order for a wedding cake by a lesbian couple, Rachel and Laurel Bowman-Cryer. The Kleins, who suspended their business after this controversy blew up, had festooned the business’s website with Biblical quotations and a statement that the bakery was interested in providing cakes for traditional man-woman marriage ceremonies only. Part of the order approved by Avakian awarded damages of \$135,000 to the Bowman-Cryers, and ordered the

Kleins to remove from their website and any other statement on behalf of the business that they would not provide their services to same-sex couples. The Kleins protested that this violated their First Amendment rights, as well as contesting the underlying discrimination determination, and vowed that they would appeal this ruling to the courts. The large damage award responded to evidence that after the Kleins put a copy of the complaint (including the complainants’ contact information) on their website, the Bowman-Cryers were subject to harassment and threats causing severe emotional distress. Thus, in contradiction to reports in right-wing blogs that Oregon had “fined” the Kleins \$135,000, this was an award of damages for emotional distress stemming from the Kleins’ actions. In a statement released through their attorney, Paul Thompson, the Bowman-Cryers stated, “This has been a terrible ordeal for our entire family. We never imagined finding ourselves caught up in a fight for social justice. We endured daily, hateful attacks on social media, received death threats and feared for our family’s safety, yet our goal remained steadfast. We were determined to ensure that this kind of blatant discrimination never happened to another couple, another family, another Oregonian. Everyone deserves to be treated as an equal member of society.” The Kleins responded by stating: “Americans should tolerate diverse opinions, not use the government to punish fellow citizens with different views. This case has become a poster for an overpowered elected official using his position to root out thought and speech with which he personally disagrees.” *Huffington Post*, July 2; updated July 3. The *Washington Times* reported on July 15 that a crowd-sourcing campaign on the internet had raised pledges of \$352,500 to support the Kleins, so they will easily be able to pay this fine if it is upheld on appeal and actually profit handsomely by this experience.

PUERTO RICO – U.S. District Judge Daniel R. Dominguez rejected a claim that when Puerto Rico amended its anti-discrimination law to add “sexual orientation” and “gender identity” as prohibited grounds for discrimination, it had created a cause of action for an employee who alleged that she was terminated because her romantic male partner was a lawyer who had filed several age discrimination cases against the employer on behalf of his clients. *Villeneuve v. Avon Products, Inc.*, 2015 WL 4006215 (D. P. R., June 19, 2015). Ms. Villeneuve began working for Avon as Caribbean Zone Manager in January 1998, and subsequently had a variety of other assignments until she was terminated from employment on July 11, 2014. She alleged that “the reasons behind her employment termination were unlawfully based on age and sexual-orientation discrimination” in violation of local law. Her case is in federal court on diversity grounds, as she does not allege any federal law claims. “Her sexual-orientation discrimination claim is specifically about her affective relationship with a lawyer who has filed several age-discrimination actions against Avon,” explained Judge Dominguez. “The aforementioned lawyer had allegedly filed a federal-discrimination complaint against Avon on March 24, 2014, which, according to Plaintiff, led to Avon terminating Villeneuve’s employment,” as a result of which she alleged emotional and mental damages. This decision is ruling on Avon’s partial motion to dismiss the sexual orientation discrimination claim, Avon asserting that Plaintiff’s sexual orientation has nothing to do with the case. Wrote the judge, “Plaintiff alleges. . . that it is immaterial to consider whether she is heterosexual or homosexual to be protected under Law 22. The Court disagrees. The Court notes that in the complaint, Plaintiff alleges that her termination was due to her ‘longstanding affective relationship’ with a lawyer who has filed

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several federal cases against Defendant. The described conduct by itself does not constitute a protected class under the definition of ‘sexual orientation’ that Law 1000 provides, even when considering the expansive definition of the term in the Law 22 amendment. The purpose of the Law 22 amendment was to extend the protection that Law 100 provided to a new set of classes as outline by Law 22’s statement of motives. The definition focuses on the person’s ability to have emotional, sexual or affectional attachments toward someone else of the same or a different gender. Hence, Law 100 prohibits an employer from firing someone because of their sexual orientation. However, an employee being terminated because the employer disapproves of the professional legal conduct of the romantic partner is totally different and is not considered as a discriminating event within the law. In the latter case, the professional conduct of the partner of the employee plays no role in classes protected under the law as to the affected employee. Thus, no Law 100 interest would come into play. Plaintiff would argue that this definition was intended to be interpreted in such a broad way as to include relationships as a protected class under this definition. The Court disagrees with Plaintiff’s reasoning.” The court noted that the dismissal was solely as to the sexual orientation claim, and that “Plaintiff’s age discrimination claims persist,” so Avon was ordered to answer the complaint as thus reduced in scope.

TEXAS – The *Houston Chronicle* (July 11) reported that Dave Wilson, a “longtime anti-gay activist,” had filed a lawsuit against the City of Houston, seeking to compel officials to count the signature on a petition he had submitted seeking to amend the city charter to prohibit men “who perceive or express themselves as women” from using women’s restrooms. The city’s legal team had refused to accept the petition,

arguing that it was duplicative of another petition challenging the city’s equal rights ordinance that is already being considered in another court proceeding. There is a statute of limitations for filing repeal petitions, and Wilson’s new petition was submitted long after the deadline. He argues, of course, that his petition would not lead to repeal, merely to carving out an exception from the ban on gender identity discrimination in places of public accommodation. Wilson claims to have collected 22,000 valid signatures as against the requirement of at least 20,000. Wilson insists that the public should have the right to vote about whether transgender women should be allowed to use female-designated public restrooms.

TEXAS – In a decision that the court designated as not to be published and that the *per curiam* majority should be ashamed of having made in any event, as the dissent explains, a 5th Circuit Court of Appeals panel voted 2-1 to affirm summary judgment against Daniel Valderaz, a male nurse who was suing Lubbock County Hospital District for retaliation against him for raising a sexual harassment claim against his co-workers in the Pediatric Intensive Care Unit (PICU) at University Medical Center. *Valderaz v. Lubbock County Hospital District*, 2015 WL 3877788 (June 24, 2015). As dissenting Circuit Judge James L. Dennis explained in dissent, the majority misconstrued and misinterpreted the evidence in a way that deprived the plaintiff of the jury trial to which he was entitled. Valderaz encountered a problem well-documented in the professional literature: the overwhelmingly female nursing staff in the PICU was intolerant of male nurses, and subjected Valderaz, a married heterosexual, to hostile treatment with a distinct homophobic tinge to it. His allegations are that “his coworkers made frequent jokes about him having a homosexual relationship

with Fausto Montes,” the only other male nurse in the PICU. (There were seven female nurses.) Valderaz claims that the stream of such comments were also joined at times by doctors and residents. When he asked them to knock it off, things got worse. In addition, he claims that female coworkers regularly made remarks about “his inability to be a good pediatric nurse because he is a man. In particular, they said that ‘he could not provide as good of care to patients of the hospital as the female nurses’ because he ‘didn’t have the nurturing capabilities of a woman.’” Furthermore, coworkers filed reports alleging that he was giving inadequate treatment, leading the director of the PICU to order him to undergo additional training. On April 11, 2011, Valderaz and his wife met with the director of the PICU and the hospital’s HR director to discuss the ongoing problem, as Valderaz complained that the hostility and uncooperativeness of his coworkers was preventing him from providing effective care. He alleges that he was told they would make an exception to the normal rules and allow him to transfer to a different department, to which he agreed, believing he had been promised a transfer. However, what they actually did was to remove him from full-time status, putting him on “on call” status (stripping him of employee benefits), and ultimately he was terminated when a transfer didn’t work out. By the time he was offered an interview for an operating room position, he had already accepted employment elsewhere. The 5th Circuit majority affirmed the district court’s conclusion that Valderaz’s complaint should be dismissed, in a decision that lacks all empathy for the predicament he found himself in and misrepresents his deposition testimony as contradicting the affidavit filed in opposition to the dismissal motion. The majority also mischaracterizes the deposition testimony (as Judge Dennis shows by quoting it at length), twisting it to make it sound as if Valderaz agreed to quit

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his job and understood that he wasn't being promised a transfer. All in all, the opinion and dissent are dismaying to read, as a documentation of a man being hounded out of his professional position due to the sexist and homophobic attitudes and comments of co-workers perpetuating stereotypes about male nurses, and the injustice apparently compounded by a circuit court majority inexplicably mischaracterizing the record before it on appeal. The majority hiding behind the anonymity of a per curiam opinion consisted of Circuit Judge E. Grady Jolly, an elderly Reagan appointee, and District Judge Carlton Reeves (of Mississippi, sitting by designation), who was appointed to the district court by Barack Obama and is the author of the decision declaring Mississippi's ban on same-sex marriage unconstitutional. Dissenting Judge Dennis is a former Louisiana Supreme Court justice appointed to the 5th Circuit by Bill Clinton.

TEXAS – In *Pinedo v. Alliance Inspection Management LLC*, 2015 WL 3747426, 2015 U.S. Dist. LEXIS 76689 (W.D. Texas, June 14, 2015), U.S. District Judge Kathleen Cardone granted the employer's summary judgment motion on a Title VII retaliation claim, but refused to grant summary judgment to either party on a claim that the male plaintiff had been the victim of same-sex sexual harassment at the hands of a co-worker for which the company might be held liable, finding that there were factual disputes requiring trial resolution. Plaintiff Shane Pinedo alleges that a co-worker subjected him to frequent sexually-charged comments, some of a homophobic nature, sufficient to create a hostile work environment, and that other co-workers and his supervisor were aware of this misconduct and did nothing to stop it. Pinedo was discharged shortly after telling the Human Resources Department that he was the victim of discrimination,

although he did not share specifics with them at that time. The company sought to justify the discharge by reference to various incidents and problems for which Pinedo had not been "written up" at the time, but several "write-ups" were quickly generated shortly before the discharge decision was communicated to Pinedo. The court found, despite the timing of the discharge and the write-ups, that Pinedo had not communicated sufficiently specific facts about his discrimination claim to management in order to charge the company with the requisite knowledge to ground a Title VII retaliation claim. However, Judge Cardone rejected the company's arguments against the viability of Pinedo's same-sex harassment claim under Title VII. The co-worker's taunts and sexually-charged comments could be construed by a jury to exhibit signs of sexual interest in Pinedo, sufficient to invoke the first prong of the Supreme Court's same-sex harassment methodology promulgated in the leading case of *Oncale v. Sundowner Offshore Services*, thus meeting the requirement that the harassment was "because of sex" as required to find a violation of Title VII. The court also found that Pinedo's allegations were sufficient to create a jury issue on the questions of severity and pervasiveness, as well as the question whether the employer was negligent in not taking action in light of the open nature of the harassment. The company argued, unsuccessfully, that Pinedo's failure to file a formal complaint with management about the co-worker's conduct should let the company off the hook.

VIRGINIA – The National Center for Lesbian Rights announced that the U.S. Department of Justice had filed an amicus brief in support of NCLR's client in *Student v. Arcadia Unified School District*, arguing that under Title IX transgender students are entitled to use the restroom matching their gender

identity. NCLR hailed the Department for going one step beyond prior guidance documents to lend its voice to ongoing litigation on this issue.

WISCONSIN – Here is some ridiculous *pro se* litigation, brought by Robert C. Braun against Milwaukee County Executive Chris Abele, Milwaukee County Sheriff David A. Clarke, Jr., Milwaukee County Sheriff's Deputy Byron Terry, and some other police officers, in connection with the extraordinary events of June 7, 2014, when Abeles personally paid to open up City Hall so that same-sex couples could get married between the time U.S. District Judge Barbara Crabb held unconstitutional Wisconsin's ban on same-sex marriage in *Wolf v. Walker*, 986 F.Supp.2d 982 (W.D. Wis. 2014), and the time shortly thereafter when the 7th Circuit granted a stay of her ruling pending appeal. (The ruling ultimately went into effect after the 7th Circuit had affirmed Crabb's decision and the Supreme Court ruled on Oct. 6, 2015, that the decision would not be reviewed, leading to the stay being lifted.) Over 70 same-sex couples were married that Saturday morning in Milwaukee's City Hall. Plaintiff Braun was part of a small group of protesters who showed up a City Hall to demonstrate against the court's decision and the conduct of same-sex marriages at City Hall. In this lawsuit, Braun asserted constitutional and federal Religious Freedom Restoration Act and state criminal law claims against Abeles for opening up City Hall for this purpose and Clarke and the police officers for the action on the day of containing the demonstration and refusing to allow the demonstrators to enter City Hall or obstruct pedestrian traffic in front of the building. Braun also complained that the police showed favoritism to some demonstrators who showed up to support the decision and cheer on the couples who were getting married. U.S. District Judge

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J. P. Stadmueller granted a motion by various of the defendants to dismiss the complaints against them. The court found that, of course, federal RFRA has no application to claims against state actors, and a state statute criminalizing misconduct in office by public officials did not give rise to a private right of action. The court also found that Braun had failed to state a federal constitutional claim against Abeles, Clarke and the police officers. The judge's impatience with the case is palpable, best reflected by his parting shot in a footnote. Braun had argued that the defendants are "not entitled to qualified immunity because this case was moved from state court to federal court" and "there is no mention of it in the constitution." Wrote the judge, "Because the Court need not reach the issue of qualified immunity, the Court will shelve explaining – at length, or otherwise – the fallacy of this argument."

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AIR FORCE COURT OF CRIMINAL APPEALS – In *U.S. v. Burckhardt*, 2015 WL 4039268 (U.S.A.F. Ct. Crim. App., June 12, 2015) (not officially published), the court confronted the aftermath of *U.S. v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2015), in which it had accepted scientific evidence that an HIV-infected person using current state-of-the-art medication presents a negligible risk of transmission through sexual contact. In this case, Sr. Airman Burckhardt, a gay man who was HIV-positive, had unprotected sex with several nine different men, eight of whom he did not inform about his serostatus. During the subsequent investigation, he lied to investigators about having informed several of his sexual partners about his serostatus. He was court-martialed prior to the *Gutierrez* decision and ultimately pled guilty to an array of charges, including aggravated assault, with an

understanding that he would appeal the sentence imposed by the military judge by making the scientific argument. After *Gutierrez*, the aggravated assault charge would have to fall out of the case, since Burckhardt's conduct was not likely to transmit the virus. Finding that Burckhardt's guilty plea to the aggravate assault charge was, in retrospect, improvident because of the significant difference in maximum sentences to which he would be exposed, the court reassessed his sentence, affirming only so much of the original sentence "as provides for a bad-conduct discharge and confinement for 36 months." The court had found that the remaining charges were serious, in that evidence at the court-martial established that Burckhardt's sexual partners would not have consented to unprotected sex with him as he revealed his serostatus, so his conduct still constituted a battery. Much of the opinion was devoted to rejecting his speedy trial claim and determining whether, in the procedural posture of the case, it was open to the court to consider the appeal on the merits in light of his guilty plea.

U.S. ARMY COURT OF CRIMINAL APPEALS – *U.S. v. Pinkela*, 2015 WL 3789499 (June 11, 2015) (not reported in M.J.), is yet another case where a military officer convicted at court martial for engaging in unprotected sex contests the charge that he had engaged in conduct "likely" to cause death or grievous bodily harm. As in the case discussed above, Lt. Col. Pinkela's prior conviction was vacated for reconsideration in light of *U.S. v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2015), but this time the defendant did not fare well, since the charges included unprotected anal sex. And that's not all. The court wrote in confirming the conviction: "The evidentiary posture of this case is quite different than that in *Gutierrez*. An expert testified in this case that 'infectivity has to do with

things like viral load, whether they have open sores, the type of sex in which they're engaged.' Appellant had a 'pretty significant' viral load and did not use a condom. First Lieutenant CH also testified that his anus was bleeding as a result of appellant sexually assaulting him with a 'shower shot' enema into his anus in preparation for intercourse. Appellant and 1LT CH also engaged in anal intercourse, distinct from the sexual behavior in *Gutierrez*. Given these facts, we distinguish appellant's conduct from the conduct in *Gutierrez*. We have made our 'own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.' And are convinced it does meet that standard." In a footnote, the court acknowledges that "the victim in this case, First Lieutenant CH, tested positive for the HIV virus. We do not consider that fact in rendering this decision. Although we might infer 1LT CH's HIV status from chat logs admitted into evidence, we do not make that inference here." The court also noted that although there was evidence that the chance of transmission in a single sex act was 1.4% on average, it asserted that "aggravating factors" in this case undoubtedly posed a higher transmission risk.

ALABAMA – The Court of Criminal Appeals of Alabama rejected an appeal by Joshua Wesson of his conviction on sodomy charges. *Wesson v. State*, 2015 WL 4066690 (July 2, 2015). Wesson was indicted for "engaging in deviate sexual intercourse with a woman by forcible compulsion" and for sexual misconduct (a lesser included charge) under state laws that purport to outlaw all acts of oral or anal sex, providing that consent is not a defense. Of course, under *Lawrence v. Texas* this statute could not be used to prosecute private consensual adult sex, but that is not what Wesson was charged with. He filed a motion to dismiss based on *Lawrence* but,

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according to the opinion for the court by Judge Windom, “He did not, however, present any evidence indicating that his conduct was protected under the Supreme Court’s holding in *Lawrence*.” The circuit court denied his motion and he entered into a plea agreement under which he reserved the right to appeal the court’s denial of his motion to dismiss the sexual misconduct charge. The appeals court found that he had not preserved the right to argue that the statute was facially unconstitutional, so he was limited to an as-applied challenge. As to that, he offered no evidence that the conduct was consensual. “The record in this case fails to show that Wesson’s conduct falls within the conduct protected under *Lawrence*,” wrote Windom. “Specifically, there is no evidence in the record indicating that Wesson engaged in *consensual* deviate sexual intercourse,” so he “failed to meet his burden of establishing” that the law was unconstitutional “as applied to him.” Thus, the Alabama court takes a different view from the 4th Circuit, which held Virginia’s similar unreformed sodomy law was facially unconstitutional a few years ago on the ground that it clearly criminalized constitutionally protected conduct by not including a consent defense, and thus could not be used to prosecute anybody. Here, the Alabama court was seemingly hanging its hat on the conclusion that Wesson hadn’t preserve the right to appeal on grounds of facial unconstitutionality. * * * However, on the same date, the Court of Criminal Appeals issued a ruling in *Williams v. State*, 2015 Ala. Crim. App. LEXIS 46, 2015 WL 4066693, holding that a man convicted of sexual misconduct for have anal sex with a male hotel clerk was entitled to the reversal of his conviction on grounds that the sexual misconduct statute could not be applied to consensual sex. The hotel clerk had complained that the sex, which took place in a bathroom off the hotel lobby at the instigation of Williams, was not consensual. Williams

was charged with both sodomy and sexual misconduct; the jury’s acquittal on the sodomy charge meant that it found the conduct consensual. Therefore, said the appeal court, since the conduct was found to be consensual, *Lawrence* barred Williams’ prosecution for it under the sexual misconduct law. (The court noted that this was an “as applied” challenge, so it had no occasion to consider the argument that the statute was unconstitutional on its face.) The court rejected the state’s request to be able to retry Williams, finding that inasmuch as jury had acquitted him on the sodomy charge, thus necessarily finding his conduct consensual since he didn’t deny having the sex with the clerk, to retry him would constitute double jeopardy in violation of the Constitution. The significant difference between the two cases, of course, was that Wesson failed to provide evidence that the woman had consented to his conduct.

ARIZONA – In *State v. Gibson*, 2015 WL 3991080 (Ariz. Ct. App., June 30, 2015), the male appellant was convicted by a jury of sexual misconduct and sexual abuse of two minors who were his grandchildren. Part of his defense at trial was that he was straight and did not have any sexual interest in males. However, gay pornography was found in his home pursuant to a lawful search warrant. He protested against its admission at trial. Wrote the court: “During defense counsel’s cross-examination of Defendant’s daughter regarding Defendant’s relationships with various women over the years, the trial court questioned defense counsel about the relevancy of these questions. The court asked counsel if the questions were intended “to show that [defendant was] interested in women.” Defense counsel replied, “that’s true, and that’s part of our defense.” Based on this response, the trial court determined that Defendant had “opened the door”

to the evidence, and that the state would be permitted to show Defendant had gay pornography.” The court of appeals agreed with this ruling: “During cross examination, when asked directly if he was “indicating to the Jury that [he] did not molest [his] grandchildren, at least in part because [he did not] have any interests in males,” Defendant replied, “[t]hat is correct, to 150 percent, yes, sir.” This evidence clearly opened the door to the admission of the DVD to rebut Defendant’s claims that he did not commit the offenses because, among other things, he had no interest in males. . . Furthermore, the prosecutor made no improper use of the evidence. In his closing arguments, the prosecutor argued only that Defendant’s claim that he did not commit the offenses because he had no interest in men were belied by the “explicitly pornographic homosexual DVDs” found in his possession. We also disagree with Defendant’s contention that the “particular title” of the DVD “was likely extremely offensive” to some jurors such that it would have invited them to speculate that defendant committed the offenses. The prosecutor did nothing to suggest that the mere possession of homosexual pornography made it likely that Defendant had committed these offenses, and Defendant’s argument is speculative and unsupported by the record. The trial court did not abuse its discretion in finding the evidence of the DVD admissible.”

CALIFORNIA – California trial courts persist in ordering HIV testing for defendants convicted of sexual abuse of children, regardless whether the evidence shows acts that could transmit HIV. In *People v. Daniels*, 2015 WL 3901980 (Cal. 3d Dist. Ct. App., June 25, 2015) (not officially published), the court of appeals reversed the trial court’s HIV testing order. Wrote Justice Murray: “Here, the trial court made no express findings of probable cause but merely

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noted the probation report did not recommend such a test and asked for the parties' positions. The prosecutor, after conferring with the only victim present at the sentencing hearing, asked for the test. Thereafter, the trial court asked if the matter was submitted. Defense counsel replied, 'I would just note that the nature of the conduct would not have subjected anyone to that risk and submit it.' The trial court ordered the test. As defense counsel noted, nothing in the record suggests any possibility of transmission of defendant's bodily fluids to the victims. Further, the court made no express finding of probable cause and we see nothing supporting an implied finding. Accordingly, on this record the testing order is invalid." The defendant had asked that all mention of HIV testing be stricken from the trial record, and that anybody to whom test results had been disseminated be required to destroy them. The court agreed to the former, but noted that it had no jurisdiction to issue orders to anyone not a party to the case.

CONNECTICUT – The Appellate Court of Connecticut ruled June 16 in *In re Angel R.*, 2015 WL 3561257, that a transgender girl who had pled guilty to a charge of assaulting a law officer and had been remanded to the custody of the Department of Children and Families (DCF) as a delinquent, was deprived of her due process rights when DCF subsequently sought and obtained a court order to transfer her to the Department of Correction, where she was confined in a female prison among convicts and adults awaiting trial on criminal charges. Such transfer would almost necessarily include periods in solitary confinement, in light of the safety issues for a transgender teen in an adult prison. Although the court rejected the argument that the statute under which the transfer was effected was unconstitutionally vague, or that the minor's guilty plea to the delinquency

charge was invalid because she was not advised at the time of the possibility that DCF could move to transfer her to a penal institution as opposed to a juvenile institution, it agreed with the appellant that the trial court's application of a preponderance of the evidence standard in determining whether to transfer the minor from the juvenile system to the corrections system was inadequate to meet constitutional due process standards. The court particularly focused on the different mandates of the two institutions, and the fact that a penal institution was ill-equipped to serve the child protective functions of a juvenile institution. The court concluded that a "clear and convincing evidence" standard should apply to the court's determination of the necessity for such transfer in light of the best interests of the child. The fact recitation in the opinion for the panel by Judge Thomas A. Bishop shows that there was some initial confusion due to Angel's transgender status, as DCF initially petitioned to have her sent to a men's prison, but the trial judge at the juvenile division of the Fairfield County Superior Court redirected her to a women's prison. In the event, Angel had done time at the women's prison and been returned to the custody of DCF by the time the appeal came to be decided, confronting the court with a mootness argument by DCF. However, the court determined that given the ages of juveniles involved in transfer petitions and the typical periods of such transfers, this was the kind of issue that was recurring and capable of evading review, implicating an important question of law, so proceeded to the merits. The court articulated the following standard: "We conclude, accordingly, that in order to protect the constitutionality of the transfer statute, the burden should be on DCF to adduce evidence regarding whether a transfer to DOC is warranted by 'clear and convincing evidence,' that the juvenile subject to transfer to DOC is a danger

to himself or herself or others or cannot be safely held under the supervision of DCF. Some evidence must also be adduced by the proponent that transfer is in the juvenile's best interest." The court rejected the appellant's argument that the normal "beyond a reasonable doubt" standard should be applied because the transfer would be to a penal institution, observing that the U.S. and Connecticut Supreme Courts had both allowed for less demanding proof standards in cases involving restrictions on the liberty of juveniles, who are always in "custody" either of their parents, an institution or the state, until they reach age 18 and are emancipated.

MISSOURI – Michael L. Johnson, convicted in May on five felony counts for recklessly infecting one sex partner with HIV and risking infection of four others, was sentenced on July 13 by St. Charles County Circuit Judge Jon Cunningham to 30 years in prison. Cunningham stated that Johnson had committed "very severe" crimes. "The main thing is the profound effect your actions have had on the victims and their families," he said, according to a report posted by the *St. Louis Post-Dispatch*. Johnson made a brief statement. He did not apologize for his actions, but said, "I never want anyone to have to go through the pain" of having HIV. His attorney had argued for a lighter sense, contending that contract HIV "is not a death sentence anymore" because of current treatments. The prosecutor countered, "This defendant was totally irresponsible and placed countless people at risk," and added the controversial assertion that drugs currently used to treat HIV infection might lose their effectiveness and that HIV could spread to places and people where access to medication was poor. Johnson, who had been a varsity wrestler for Lindenwood University, was expelled as a result of the criminal charges being filed against him.

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NEW JERSEY – *State v. Durmer*, 2015 N.J. Super. Unpub. LEXIS 1575 (N.J. App. Div., July 1, 2015), may stand as a particular instance of injustice. On December 16, 1997, Joel Durmer was convicted on multiple counts on claims that he had orally and anally sexually molested his young nephew numerous times, and he was sentenced to concurrent terms of twenty years with ten years of parole ineligibility on first degree sexual assault convictions and a consecutive ten-year term with five years of parole ineligibility for a child endangerment conviction. He consistently denied having committed the charged acts and filed numerous appeals, ultimately being turned down by the U.S. Supreme Court on direct appeal of his conviction and appeal of a denial or a writ of habeas corpus. It wasn't until 2007, he claims, that he finally received discovery from the Office of the Public Defender "that he had been trying to get since 1999," that he learned that there was a document withheld from evidence, purporting to be a letter written by the victim to the victim's brother Mike, revealing that the victim had been sexually molested by their father (Joel's brother) and had been engaging in consensual sexual activity with Mike. The letter lent itself to the interpretation that the victim had framed "Uncle Joel" as revenge for statements Joel had made about the boys' mother, and "Now I have to get Dad back for all he did to us." The letter continues: "But Mike we have to stop. The last couple of times it really hurt when you went inside like it did when Dad did it for the first time. Maybe I really am homosexual but we have to stop for now okay? Maybe later when I get older we can do it more. Do you like girls to [sic] or just me? Send me a letter back okay? And yes I love you just nobody else. Love, [C.B.]" Durmer sought in this newest motion to reopen his conviction and trial on grounds of newly-discovered evidence, but the trial court rejected his motion, finding "that

he failed to show excusable neglect for failing to timely file his second petition" for post-conviction relief. The Appellate Division also rejected his attempt to reopen the case, this time premised in part on Durmer's failure to "authenticate" the document, which did not bear a complete signature by his nephew, just a first name. If, in fact, Durmer was being framed by a vengeful teenager (now, of course, an adult), this would stand as a severe injustice. (Durmer pointed out in the motion the additional assertion that the prosecutor had failed to go after the boy's father for sexually assaulting his sons.) If, as Durmer alleges, the Public Defender possessed this document at the time of trial but failed to introduce it as evidence or use it to impeach the victim's testimony, that would be ineffective defense of his case. But the court was unwilling to allow him to reopen his case based on this newly-discovered letter in the absence of evidence of authentication. Public Defender Joseph Krakora represented Durmer on this appeal, and Durmer filed a supplemental brief *pro se*, presumably to make arguments that the Public Defender wouldn't make. Of course, there is always the possibility that the Public Defender believed that the letter was not authentic. . . So one is not sure what to think about this, but if Durmer's allegations are correct, the wrong person is sitting in prison.

NEW YORK – An Appellate Division panel affirmed a ruling by New York County Surrogate Nora Anderson that Ronald D. Myers' home-made will should be construed to leave his stock portfolio, apart from some IBM stock, to his mother rather than to his same-sex life partner. *Ephraim v. O'Connor*, 2015 WL 4002277 (N.Y. App. Div., 1st Dep't, July 2, 2015). In the will, Myers wrote that he left "all monies" to his mother, and "all stocks of I.B.M." and "all personal property"

to his life partner, whom he referred to as his "close friend." He designated his mother and his life partner to be co-executors. At the time he made his will, Myers' sole stock ownership was I.B.M. shares, but at his death his portfolio included other significant stock holdings. The dispute was whether the rest of the stock portfolio would go to his mother or his life partner. The surviving partner argued that stock is personal property and should go to him. The mother argued that by designating I.B.M. stock to the partner, Myers did not intend his other stock to go to the partner. Surrogate Anderson opted for the mother, who is now deceased as is Myers' former life partner, so the dispute is now between successors in interest on both sides. LeGaL member Tom Shanahan, representing the fiduciary for the deceased life partner, argued that the stock should come within the term "personal property" rather than monies and go to his client, and that the surrogate had improperly favored the mother over the life partner in resolving this interpretive dispute. The Appellate Division was not sympathetic, writing: "The court properly interpreted the will as intending to bequeath to decedent's mother the stock in companies other than IBM, in view of the limiting language of the bequest to his life partner and the broad language of the bequest to his mother. If decedent viewed stock as 'personal property,' he would not have expressly noted the bequest of the IBM stock, since it would have been included in the more general bequest to his life partner." Finding that the court's reliance on this linguistic distinction was "proper," the court found that because the will itself referred to the partner as his close friend, the court's "reference to decedent's life partner as a 'friend' does not show that the court relied on a presumption in favor of relatives or that it marginalized or disregarded decedent's long-term relationship with his life partner."

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OHIO – U.S. Magistrate Judge Michael R. Merz recommended denial of a petition for writ of habeas corpus filed by Andre Davis, who had been convicted on several counts of felonious assault, having engaged in sexual contact with numerous women without disclosing that he was HIV-positive, and is serving an aggregate sentence of 32 years. *Davis v. Warden, London Correctional Institution*, 2015 WL 3466857 (S.D. Ohio, June 1, 2015). Several of Davis's arguments were disposed of on the ground that they did not present federal constitutional issues, but were solely concerned with issues of state law, and thus could not serve as the basis for a habeas corpus petition. However, Judge Merz acknowledged that a conviction based in insufficient evidence would present a Due Process issue. Davis argued that there was insufficient evidence that he knew he was infected with HIV at the time of the charged sexual encounters. The evidence introduced included a laboratory report showing a positive HIV-antibody test result, testimony that Davis had texted somebody that he was HIV-positive, and evidence that Davis had signed a document required for counseling at an AIDS organization indicating that he was requesting "medical case management services supportive services offered by STOP AIDS." Judge Merz rejected the contention that this was insufficient evidence of Davis's state of knowledge to support a conviction, and specifically rejected Davis's sophistical argument that testing positive for HIV-antibodies was not sufficient to prove that somebody was infected with HIV.

TEXAS – Finding that San Antonio police officers did not have probable cause to detain a gay African-American man on the street at night and subject him to a search (which yielded a Ziploc bag of cocaine), the Texas 4th District Court of Appeals found that District

Judge Ray Olivarri erred in denying a motion to suppress the evidence, and reversed the penalty imposed upon the defendant's subsequent plea of no contest to the charge of possession of a controlled substance as part of a plea bargain. *Johnson v. State*, 2015 Tex. App. LEXIS 6973 (July 8, 2015). Shamar Johnson testified that on the night in question he had been visiting one club, then drove over to another club and parked his car. Because the parking lot was full, he parked on the street and was walking towards the second club when he was suddenly accosted by two police officers, asked lots of questions, and required to put his hands up on the police car while submitting to a search. The police officer who testified said that Johnson was loitering or walking with no apparent purpose in an area near gay clubs that was a known site for gay prostitutes soliciting customers. The trial court bought the officer's testimony hook, line and sinker and denied Johnson's motion to suppress. Justice Karen Angelini wrote for the court of appeals that the state, in defending the trial court's action, was "overstating" the police officer's testimony. "Thus, Officer Connelly testified that Johnson was standing around in a dimly lit area with an apparent purpose (Officer Connelly later clarified that he meant pacing without an apparent purpose) and many prostitutes in the area also 'loitered' trying to pick up dates. We disagree with the State that this testimony is sufficient to support the officers having reasonable suspicion to detain Johnson. Being present in a 'dimly' lit area, even one known for prostitution, at about 9:00 p.m. and walking without an apparent purpose does not support an officer having reasonable suspicion to suspect that person of engaging in prostitution." The court then found that Johnson's consent to being searched was not an act of free will under the circumstances. The court concluded that "Johnson's consent to search his person did not dissipate the

taint of the officer's violation under the Fourth Amendment because his consent was not an independent act of his free will." Thus, the conviction had to be reversed because the unlawful search "undoubtedly contributed in some measure to the State's leverage in the plea bargaining process and may well have contributed to [Johnson]'s decision to relinquish his constitutional rights of trial and confrontation in exchange for a favorable punishment recommendation." The trial court had sentenced him to "deferred adjudication community supervision" for two years and a \$1,500 fine, of which \$500 was "probated." The sentence was set aside and the case remanded for "further proceedings consistent with this opinion."

TEXAS – In *Dunn v. State of Texas*, 2015 WL 3814304 (June 18, 2015), the Court of Appeals of Texas in Dallas affirmed the jury conviction and forty year prison sentence imposed on Larry Dunn, Jr., for murdering Cicely Bolden, a woman with whom he had been having an affair, after he learned that she was HIV-positive. Dunn, married and a father, met Bolden through a chat line, "which led to a sexual relationship that lasted a few weeks." During a phone conversation, Bolden mentioned a TV show she was watching "in which a girl told a guy she was having a relationship with that she was HIV positive and that how it happened was funny." Dunn remarked that it was not funny, and testified that this conversation threw up a red flag for him. A few days later, he asked Bolden in a phone conversation if she had HIV. At first she denied it, then admitted it was so. Dunn immediately assumed that Bolden had probably infected him and he had probably infected his wife. (The court's opinion does not mention whether Dunn or his wife was actually infected.) He felt suicidal and distraught, but about a week later, after Bolden contacted him again to find out why he

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had stopped contacting her, he went to her apartment, he says to confront her about why she would expose him to HIV. He claimed that he did not go intending to kill her. She apparently concluded from his text messages that he was coming over to have sex, and when he arrived she performed oral sex on him. In the ensuing conversation, he became outraged at her lack of concern or any remorse, and her statement that “you are not the first and you won’t be the last,” which he construed to mean that she was “basically targeting men to give HIV to.” He became agitated, went into the kitchen, picked up a knife he saw on the counter, returned and stabbed her twice in the neck, leaving her to bleed out, knowing that her children would come home from school later and find her in that condition. Dunn subsequently made a variety of contradictory statements to police and to the press, some of which might support his claim that this was a “heat of passion” killing, others that might lend themselves to a conclusion that he went to her house to seek revenge. The court of appeal rejected his argument that the jury’s conclusion that he did not act in the heat of passion due to adequate provocation was against the weight of the evidence. This issue would be the difference between a first-degree felony and a second-degree felony, which would significantly affect the length of the prison sentence. “The issue of whether appellant acted under the immediate influence of sudden passion hinged on the jury’s evaluation of the appellant’s credibility, and we defer to their resolution of the issue,” wrote Justice Brown. “After reviewing the evidence, we cannot conclude the jury’s finding that appellant did not act under the immediate influence of sudden passion arising from an adequate cause is so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule appellant’s first issue.” Dunn also objected to the introduction of his text messages that the police retrieved

from Bolden’s cellphone. The court acknowledged that individuals enjoy a right of privacy regarding the contents of their own cellphones, but found no support for the proposition that an individual has a right of privacy in text messages residing on the recipient’s cellphone. Certainly, a communication between a married man and a person with whom he is having an affair is not privileged.

VIRGINIA – Finding that defendant Albert Fowler’s conditional guilty plea to a charge of soliciting sex from a minor was not “knowingly and voluntarily entered,” the Court of Appeals of Virginia reversed and remanded for a new trial in *Fowler v. Commonwealth*, 2015 Va. App. LEXIS 217, 2015 WL 4207442 (July 14, 2015). Fowler, then 49 years old, handed the “victim”, a then-17-year-old boy, a note while the victim was working in a grocery store. The note complimented the boy – “I think you are one fine looking guy. Very hot” – and offered to take him out for dinner or a drink and to give him sexual pleasure in Fowler’s home. After receiving the note, the boy alerted his manager, who called the sheriff’s office. A month later, Fowler gave the victim a substantially similar note. The victim passed this note to his mom, who contacted the sheriff’s office. A police investigator called the number on the note, pretending to be the victim, figured out the identity of Fowler using the internet, and Fowler was arrested and charged with violating Va. Code Ann. Section 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children). It seems that it is a felony in Virginia for man of Fowler’s age to contact a teenager with a solicitation for sex. Fowler pled not guilty and the state sought a jury trial. On the date of the trial, Fowler’s attorney agreed to stipulate to the evidence the prosecution intended to proffer, relying for his defense on motions to strike the evidence which, if denied by the

court, would lead Fowler to withdraw his plea and enter a conditional guilty plea, provided he could appeal the evidentiary ruling. The trial judge asked Fowler if he understood that by pleading guilty, “you may be waiving your right to appeal this Court’s decision except for the objections that have been noted on the record in regard to the conditional plea?” With Fowler’s statement that he understood, the judge sentenced him to “ten active years in prison.” (Seems pretty steep for two politely worded notes communicating a proposition that was never consummated.) When Fowler sought to appeal, the appeals court found that “Although an accused has the constitutional right to enter a guilty plea, an accused does not have a constitutional right to enter a conditional guilty plea.” Although there is a statutory authorization for conditional pleas in some circumstances, it doesn’t extend to the pretrial evidentiary ruling that Fowler wanted to appeal. “Here, the legislature explicitly limited the scope of appeals from conditional pleas to pretrial motions,” wrote Judge Richard Y. Atlee, Jr., for the court. “To permit an appeal of the denial of a motion to strike would impermissibly expand the scope of the statute beyond what the legislature intended.” However, the court saw some fundamental unfairness here, because Fowler had agreed to withdraw his “not guilty” plea on his understanding that he would be able to appeal the evidentiary ruling. Thus, concluded the court, “appellant clearly did not enter his plea intelligently and knowingly. His counsel unequivocally stated that appellant was entering a conditional plea for the express purpose of retaining his right to appeal the denial of his motions to strike. The Commonwealth did not object. The judge did not clarify that this was not allowed under Code Sec. 19.2-254. Everyone present appeared to share the same mistaken understanding of Code Sec. 19.2-254.” Thus, the court reversed the conviction, vacated the plea, and remanded “for proceedings

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consistent with this memorandum opinion.” Fowler gets a second shot at defending against the charges. His attorney on this appeal was Gregory T. Casker.

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U.S. SUPREME COURT – Not infrequently, LGBT prisoners’ civil rights cases involve allegations of excessive use of force by corrections officers. A 5-4 Supreme Court made it slightly easier for such claims to prevail in *Kingsley v. Hendrickson*, 2015 WL 2473447, (June 22, 2015) – at least for pre-trial detainees. Corrections officials extracted plaintiff Michael Kingsley from his Wisconsin jail cell for a rules violation and placed him in handcuffs. When the incident was over and Kingsley resisted removal of the cuffs, it is undisputed that officers applied a Taser to the cuffed inmate for five seconds. Kingsley also alleges that they slammed his head into a cement bunk. Kingsley appealed a jury verdict for the defense, challenging instructions that required him to prove subjective intent to use excessive force. The Supreme Court reversed a divided Seventh Circuit affirmance, holding that objective standards should apply to the “excessive” component of the state of mind of the officers. Justice Breyer (for himself and Justices Kennedy, Ginsburg, Sotomayor and Kagan) wrote that, while the intent to do the action (using the Taser) was a subjective one, the intent to do so excessively was objective. Prior cases holding that excessive force was absent if “applied in a good faith effort to maintain or restore discipline” or present if done “maliciously and sadistically to cause harm” – see e.g., *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) – did not require a wholly subjective test: what officers “believed” to be excessive at the time. Rather, the phrases were examples of “non-

exclusive” considerations in reaching an objective conclusion. There had been a circuit split on this point. The decision is limited to due process claims of pre-trial detainees under the Fourteenth Amendment, and its application to convicted prisoners’ Eighth Amendment claims is specifically reserved. Justice Scalia dissented (for himself, Chief Justice Roberts and Justice Thomas) and wrote that subjective standards should apply to both components: decisions to use force and excessive use of force, asserting that the majority had adopted a “heuristic” (a mental shortcut) in a “tender-hearted desire” to “tortify” the Fourteenth Amendment. Justice Alito also dissented, writing that certiorari was improvidently granted and that the claims should have been litigated under the Fourth Amendment. *William J. Rold*

U. S. COURT OF APPEALS – SIXTH CIRCUIT – A gay former prisoner described as “having effeminate mannerisms” lost an 8½-year battle to vindicate his rights when Senior Circuit Judge Ralph B. Guy (for himself and Circuit Judges Karen Nelson Moore and David W. McKeague), affirmed the summary judgment entered against him by Judge Nancy G. Edmunds of the Eastern District of Michigan in *Lee v. Willey*, 2015 WL 3771051, 2015 U.S. App. LEXIS 10266 (6th Cir., June 18, 2015). Plaintiff Larry Lee sued in 2010 for events occurring in 2007 when he was in prison custody, arising from sexual orientation harassment and the failure of a part-time psychologist (now deceased) and others to protect him from a subsequent sexual assault. Lee filed over a dozen grievances about his conditions of confinement, but he only mentioned the psychologist in one of them, misspelling his name. Judge Edmunds conducted a full-day bench trial on exhaustion under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) [PLRA], ultimately deciding that Lee failed to exhaust

administrative remedies. The Circuit – after deciding in what it called an issue of “first impression” that PLRA exhaustion determinations did not require a jury – affirmed the finding of no exhaustion, because: (1) Lee continued to appeal his grievances to higher authority without mentioning the psychologist again; and (2) Judge Edmunds’ finding that there was no record of any grievance mentioning a rape was not clearly erroneous. This case went through two summary judgment proceedings before the PLRA “trial,” one of which involved whether the psychologist, a part-time private contractor with the state, was entitled to qualified immunity. When he was denied qualified immunity, he obtained a stay and appealed to the Circuit, which affirmed in an unpublished opinion that noted that the Supreme Court had already ruled that privatized prison employees could not invoke qualified immunity in *Richardson v. McKnight*, 521 U.S. 399, 401 (1997), and that it had specifically applied *Richardson* to psychiatrists in *McCullum v. Tepe*, 693 F.3d 696, 697 (6th Cir. 2012). Senior Circuit Judge Guy does not explain why the PLRA issues were left to be determined in a bench trial on a third summary judgment motion after a weak interlocutory appeal. If the PLRA is to serve its intended purpose of reducing federal court burdens by promptly winnowing out prison litigants who file lawsuits before properly exhausting, that goal failed here – although, at the end, plaintiff Lee was surely exhausted. *William J. Rold*

CALIFORNIA – A straight California inmate failed to achieve any relief after he was disciplined and labeled a sex offender following receipt of a “love letter” from a gay inmate, with whom he was friends but not sexually involved in *Dunaway v. Cal. Dep’t of Corr. & Rehab.*, 2015 U.S. Dist. LEXIS 85098 (E.D. Calif., June 30, 2015). After inmate

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Burson's letter was found in a search: Dunaway was given a misbehavior report for having a prohibited sexual relationship, which was noted in his central file; classified as a sex offender; denied all contact with Burson; and had a "bed card" naming Burson as a "no contact" inmate placed outside his cell. After administrative appeals succeeded only in lifting the "no contact" with Burson prohibition, Dunaway sued the California Department of Corrections and Rehabilitation (CDCR) and "John Doe" defendants, alleging a violation of his rights under the Due Process Clause of the Fourteenth Amendment. United States Magistrate Judge Barbara A. McAuliffe granted a motion to dismiss, finding that CDCR had Eleventh Amendment immunity and that granting leave to amend to name responsible individual defendants would be futile. Judge McAuliffe judicially noticed Dunaway's criminal convictions for multiple counts of sexual conduct with minors, which Dunaway did not contest and which were sufficient for the sex offender labeling regardless of whether Dunaway had an "opportunity to fairly and fully contest the allegations" drawn from the "love letter" or other inmates with "special clearance" had access to the central file information. The classification decision also did not impose an "atypical and significant hardship" sufficient to invoke due process protections under *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), or *Sandin v. Conner*, 515 U.S. 472, 481-84 (1995). Holding that prisoners have no due process right to be free of "false" charges, so long as they receive a hearing, Judge McAuliffe relies on two circuit decisions from the 1980's: *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986); and *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989). *Freeman* was limited by *Franco v. Kelly*, 854 F.2d 564, 589-90 (2d Cir. 1988), when the "false" charges were levied for retaliatory reasons under the First Amendment. *Sprouse* cited *Franco*

for the same proposition, and reserved a dismissal. The Ninth Circuit recognized a limited First Amendment right of inmate association in *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985), but Judge McAuliffe found that "freedom of association is among the rights least compatible with incarceration," quoting *Overton v. Bazzyetta*, 539 U.S. 126, 131 (2003). Her "cf." citation omits the qualifying language on the same page: "We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations [limiting "non-contact" visitors to an approved list] bear a rational relation to legitimate penological interests." Id. at 131-132. Development of this theory for gay association in prison awaits a better test case. Judge McAuliffe found that Dunaway's claims of "constant fear for his life and safety" after being classified as "having a relationship with a homosexual inmate" sounded under the Eighth Amendment's protection from risks to safety – see *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) – not the Due Process Clause; and here there were no allegations exceeding "ridicule and threats." Judge McAuliffe found that issues involving the "bed card," which continued to display Dunaway's name even after the restrictions were lifted, were effectively "moot" because Dunaway failed adequately to challenge CDCR's contention that the issue was moot when he was allowed to resume "contact" with Burson notwithstanding the card. Dunaway was represented by Benjamin Albert Williams, Sacramento. *William J. Rold*

ILLINOIS – Litigation continues in the Southern District of Illinois by transgender inmate Dameon Cole,

a/k/a Divine Desire Cole; her multiple cases and corresponding opinions were summarized in the March 2015 issue of *Law Notes* at pages 120-121. Most recently, United States District Judge J. Phil Gilbert adopted the unopposed Report & Recommendation ["R & R"] of United States Magistrate Philip M. Frazier that allowed Cole to amend her protection from harm pleadings in *Cole v. Johnson*, 2015 WL 4037522 (S.D. Ill., July 1, 2015). The "thrust" of the amended pleadings is deliberate indifference to Cole's safety at the Lawrence Correctional Facility, in violation of the Eighth Amendment over some 14 months in 2013-2014. The R & R allowed Cole to proceed against a corrections officer, now identified as Corey Knop, for opening Cole's cell to an HIV+ inmate for the purpose of facilitating sexual relations on multiple occasions, as summarized in *Law Notes* (December 2014) at page 500. The R & R found a "colorable Eighth Amendment failure to protect claim against Knop because Knop was deliberately indifferent to a substantial risk of serious harm." The R & R also allowed a claim against a correctional lieutenant, Chad Ray, because he forced Cole to cell with another inmate when Ray knew they "share[d] a mutual animosity." According to the pleadings, Ray announced at the time that "I guess you two will learn to fuck or fight" and that he would "be back in twenty minutes to see who's still alive." There is no allegation of any altercation, and the Prison Litigation Reform Act generally bars an action by an inmate for mental distress "without a prior showing of physical injury" – 42 U.S.C. § 1997e(e). The R & R nevertheless allowed the pleading against Ray because Cole "was exposed to a risk of harm that occurred as a result of 'an official's malicious or sadistic intent,'" citing *Babcock v. White*, 102 F.3d 267, 270 (7th Cir. 1996); see also *Calhoun v. DeTella*, 319 F.3d 936, 942 (7th Cir. 2003) (allowing a prisoner nominal or punitive damages

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in such situations). The R & R denied amendment to plead against another officer for ignoring Cole's grievances about the same cellmate situation because the allegations did not suggest "malicious or sadistic intent." Cole also sought amendment to address excessive force when another officer cuffed her so tight as to cut off blood circulation and shoved her head against the wall in the shower. The R & R found the allegations sufficient to state a claim under *Hudson v. McMillian*, 503 U.S. 1, 4 (1992), but it declined to join the claim because of its "weak connection" with the protection from harm claims. This without-prejudice dismissal is likely to produce another separate federal claim. Finally, the R & R denied Cole's Equal Protection protest of denial of "audio visual privileges" as too "sparse" to state a claim when privileges can be denied for a "multitude of reasons."

William J. Rold

NEVADA – United States District Judge Robert C. Jones dismissed *pro se* prisoner Rickey Lee Hill's civil rights case on initial screening under 28 U.S.C. § 1915A(a), in *Hill v. Rowley*, 2015 U.S. Dist. LEXIS 82050, 2015 WL 3887188 (D. Nev., June 24, 2015). Hill sued under 42 U.S.C. § 1983, claiming abuse and discrimination on the basis of sexual orientation, race, religion and nature of conviction, in violation of the Eighth and Fourteenth Amendments. Hill alleged that an officer "gripped his buttocks" while cuffing him before seeing a nurse and ordered him to strip and "show his vagina," while referring to his conviction of a sexual act with a boy – within the hearing of other inmates and another officer. Although this conduct involved the same officer on the same tier on the same date, Judge Jones "perceived" the counts separately. He found the "gripping" too inconsequential to violate the Eighth Amendment, citing *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); and

Berryhill v. Schriro, 137 F.3d 1073, 1076 (8th Cir. 1998) (a "brief unwanted touch on [the] buttocks," while inappropriate, does not constitute "objectively serious injury"). Judge Jones then dismissed the Equal Protection claim, because the "gripping" was the only evidence of disparate treatment, and Hill did "not allege whether he was the only black sex offender on the tier." While recognizing that the constitution protects inmate safety under *Farmer v. Brennan*, 511 found that the verbal taunts and public statements at most constituted a "failure to prevent exposure to risk of harm," which is not actionable unless Hill had actually been assaulted in a complaint where he sought only damages. Judge Jones then added Hills' religion (Jewish) to the mix, noting that his race, sexual orientation, and religion all required "heightened" Equal Protection scrutiny – but he dismissed the claim, finding that Hill did "not allege knowledge of the lack of equally bad treatment of [others similarly situated], only that he never witnessed it," and judicially noticing unspecified lawsuits by a white sex offender from the same prison who claimed violations of his rights. Hill's third allegation involved a separate date and officer who stripped him prior to a disciplinary hearing and forced him to walk the tier in his boxers and no shirt so that "you can show your tits," whereupon other inmates whistled and threatened to "kill his gay ass." Hill also claimed that this officer ordered him to bend over and cough repeatedly while he showered but did not subject other inmates to this treatment, alleging that he was "targeted" because "I'm black, and I'm labeled a gay-sex-offender who practices Judism [sic]." Judge Jones found that Hill's allegations were "conclusory" and failed to allege that this officer "knew of and disregarded an excessive risk"; that the incident is plausibly likely to increase any risk of harm to [Hill] beyond the risk of harm from other inmates having already

known that he was homosexual and a sex offender"; or that any harm actually ensued. Judge Jones found that Hill failed to include "allegations... as to dissimilar treatment of non-black, non-Jewish, and/or heterosexual sex offenders." Judge Jones did not mention possible transgender claims based on reference to "vagina" and "tits," but he denied Hill all leave to amend any of this claims or to respond to the deficiencies in the complaint – a significant departure from settled case law that a *pro se* litigant should be allowed at least one chance to amend. *See, generally, Denton v. Hernandez*, 504 U.S. 25 (1992) (*passim*). Judge Jones (an appointee of George W. Bush), wrote the decision in *Sevcik v. Sandoval*, upholding Nevada's prohibition of marriage equality that was reversed by the Ninth Circuit *sub nom.*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), which ordered Judge Jones to enter an injunction promptly. The next day, Judge Jones recused himself in *Sevcik*, 2:12-cv-00578-RCJ (Doc. N. 117, October 8, 2014); and the injunction against Nevada's same-sex marriage prohibition was entered the following day by United States District Judge James C. Mahan. The Circuit denied rehearing in *Latta* at 779 F.3d 902 (9th Cir. 2015). In a rare published comment on a colleague, Judge Jones has been criticized in another circuit opinion as showing "arrogance," engaging in "dilatatory tactics," and assuming power "not acceptable in our judicial system." *Townley v. Miller*, 693 F.3d 1041, 1043-45 (9th Cir. 2012) (Reinhardt, J., concurring). This Hill case, if appealed, presents further work for the Circuit.

William J. Rold

OHIO – United States District Judge Christopher A. Boyko dismissed *pro se* prisoner Sherwood L. Starr's lawsuit against a sheriff and a warden alleging disparate treatment of LGBT inmates in *Starr v. Bova*, 2015 WL 4138761, 2015 U.S. Dist. LEXIS 88683 (N.D. Ohio,

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July 8, 2015). Starr contended that LGBT inmates were housed only in twelve designated beds in two dorms and were not permitted individual cells unless moved to administrative segregation. As dorm inmates, they were forced to use showers and toilet facilities one at a time. Judge Boyko found insufficient allegations of discrimination to sustain the complaint under 28 U.S.C. § 1915(e), and he certified that any appeal would “not be taken in good faith.” Judge Boyko wrote that “sexual orientation and transgender have not been identified as suspect classifications in the Sixth Circuit,” but he recognized that they constitute an “identifiable group” for equal protection purposes, citing *Davis v. Prison Health Services*, 679 F.3d 433, 441 (6th Cir.2012). He applied traditional rational basis scrutiny, finding that Starr failed either to “negat[e] every conceivable basis which might support the government action, or [to] demonstrate[e] that the challenged government action was motivated by animus or ill-will,” quoting *Davis* at 438. Starr failed to allege sufficient information to ascertain who else was housed in other beds in the dormitory, which Judge Boyko found “by inference” included non-LGBT inmates; Starr failed to describe the classification more generally, including distinctions between pre-trial detainees and convicted misdemeanants; and he did not address “non-discriminatory reasons” for dormitory housing. Starr’s claims about dormitory restroom distinctions failed to show that LGBT inmates were discriminated against, as opposed to rules applying to all dormitory inmates without “a discriminatory purpose.” Judge Boyko found that Starr’s allegations included “legal conclusions” without support. Starr’s injunctive request was denied as moot because he was released from the jail after 35 days. [Note: This writer remembers vividly the clamor both to establish and to reject separate housing for LGBT inmates on Rikers Island in

New York City. Safety and civil rights issues are far more complex than either Judge Boyko or plaintiff Starr allowed here.] *William J. Rold*

OHIO – Proceeding in state court, as opposed to federal court, may sometimes advantage plaintiffs, who can avoid strictures of the Prisoner Litigation Reform Act (like exhaustion) or the civil rights hurdles (such as personal involvement) under 42 U.S.C. § 1983. Here, an Ohio prisoner sought damages in the Ohio Court of Claims because an officer called him (apparently falsely) a “dick sucker” in the presence of other inmates – but his case for defamation was dismissed under Ohio tort law in *Peters v. Department of Rehabilitation and Correction*, 2015 WL 3964204 (Ohio App., June 30, 2015). Writing for a unanimous three-judge panel of the Ohio Court of Appeals, Judge Jennifer L. Brunner affirmed dismissal of plaintiff John E. Peters’ *pro se* complaint alleging defamation *per se* and harassment. Under Ohio defamation law, *per se* defamation cannot lie absent words importing an indictable offense, a contagious disease, or an injury to trade or business. Words tending to “subject a person to public hatred, ridicule, or contempt” must be written (libel) not spoken (slander) to constitute a *per se* tort – Judge Brunner assuming, without saying so, that falsely stating a plaintiff engaged in fellatio was defamatory if put in writing. Absent such writing, Peters had to show special damages, as with ordinary defamation, which he failed to do, because he did not allege financial loss or adverse conduct by someone “other than the defamer or the one defamed.” In the prison context, this amounts to a failure to show that either inmates or other officers did something to Peters’ detriment after the remark. Judge Brunner distinguished *Stokes v. Meimaris*, 111 Ohio App.3d 176, 185 (8th Dist.1996), where the plaintiff alleged and proved special damages against an

ex-husband who had told police that she was a lesbian, resulting in initiation of an investigation by the local Salvation Army of which plaintiff was a board member. Judge Brunner also affirmed: (1) dismissal of pleadings alleging inappropriate supervision of the officer, harassment and intimidation, because they did not amount to an allegation of negligence – the elements of which apparently were absent in any event and could not be imposed on the civil common law by the existence of general regulations governing officer conduct; and (2) denial of leave to amend as futile, applying an abuse of discretion standard of review. Peters was represented on the appeal by Richard F. Swope, Swope & Swope, Reynoldsburg. *William J. Rold*

PENNSYLVANIA – In *Armstrong v. Wetzel*, 2015 WL 2455418 (W.D. Pa., May 22, 2015), United States Magistrate Judge Lisa Pupo Lenihan granted summary judgment against *pro se* prisoner Kareem Armstrong in a “protection from harm” case, holding that no reasonable jury could find in his favor because he had “no evidence” that his assault was not staged. Armstrong occupied a single cell for many years, until Pennsylvania officials determined that he no longer qualified for such protection. In 2011, after undressing and masturbating in front of cellmates, he sought a single cell as an “inmate with known or documented homosexual behavior.” He filed grievances stating his “strong desire for sex,” while maintaining the institution was “on notice” (and therefore responsible) if he was assaulted. Under a decision subheading (“Plaintiff ‘Comes Out’ as a Homosexual”), Judge Lenihan wrote that Armstrong declared that he “wanted to engage in an openly alternative lifestyle” and “to be housed with someone of the ‘same sexual orientation.’” Stating that institutional rules prohibit sexual activity, officials offered him “administrative custody”

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but he declined, saying that he was not concerned about his safety and that his “only goal is to have oral and/or anal intercourse with another man.” Defendants then deemed him a “danger” and placed him in administrative custody, where he and inmate James Copeland agreed to share a cell. Weeks later, Armstrong alleges that Copeland attacked him twice over three days and that defendants were liable for not separating the men after the first attack. An investigation found “no indication” that the first assault occurred and concluded that Armstrong’s behavior was “manipulative” and that he was “appropriately housed.” Judge Lenihan found “no evidence” to support Armstrong’s allegations, noting that the complaint about the first assault was date-stamped “literally hours” before the second assault. While the Eighth Amendment protects inmates from deliberate indifference to their safety, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), a jury must be able to find that defendants were aware of facts from which an “inference could be drawn that a substantial risk of serious harm exists.” *Id.* at 834-7. Judge Lenihan could have granted summary judgment under *Farmer* on this basis alone, due to the weakness of evidence of defendants’ knowledge of risk prior to the assaults and Armstrong’s disavowal of safety concerns, but the decision does not stop there. In granting summary judgment, Judge Lenihan relied on a letter Kareem Armstrong wrote to one Michael Armstrong that stated, in part: he had “gone naked” twice to get his cell back; “I love pussy”; “gay shit aint never gonna be my style”; and “me and my celly pulled a stunt.” Despite Armstrong’s account of the assaults, Judge Lenihan found that he presented “no evidence” because his testimony was impeachable and he failed to prove a negative (that the assault was “not staged”). This ruling contradicts a long line of authority that prior inconsistent statements cannot be used to prevent a

jury question. See, e.g., *Kassim v. City of Schenectady*, 415 F.3d 246, 251 (2d Cir. 2005): “When a party has made a prior statement inconsistent with one the party seeks to advance at trial, a question of credibility arises, which is for the jury, not the judge, to assess,” citing F.R. Evid. 607, 613. Judge Lenihan went further, affirmatively finding that the record “overwhelmingly” shows that the attack was “staged,” writing: “The evidence is clear, inmate Armstrong has attempted to use any means at his disposal to secure single cell status when he obviously does not warrant such placement.” She found that the record “utterly discredits Plaintiff’s version of events,” quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007): “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott* involved a videotape of erratic driving that destroyed the Fourth Amendment plaintiff’s assertion that he was driving safely and should not have been stopped. Here, there is no videotape, and this writer could find no other case applying *Scott*’s “blatantly contradicted” exception to summary judgment rules to a prior inconsistent statement. Judge Lenihan’s extension of *Scott* to this case and her loaded adverbs (“overwhelmingly”; “utterly”; “obviously”) ignore the milieu in which this *pro se* plaintiff continues to live. In prisons, the “don’t-ask-don’t-tell” architecture of homophobia remains largely intact: a prisoner is not necessarily “manipulative” because he “comes out” assertively inside while denying his sexuality in street slang to outsiders who may be his family – nor does his characterizing an assault as a “stunt” make it impossible for a jury to believe he was a victim of abuse. Judge Lenihan’s decision shows reckless disregard for Armstrong’s future safety. Her finding that he is “obviously” not in

need of protection will be Exhibit One in any future protection from harm case. *William J. Rold*

SOUTH CAROLINA – HIV-positive prisoner Charles Edward Thomas sued the South Carolina Department of Corrections and a former prison medical director under 42 U.S.C. § 1983, the Americans with Disabilities Act, the Rehabilitation Act, and state law, alleging that officials segregated him for ten years because of his HIV status (forcing disclosure of his condition), denied him prison employment, and deprived him of free medical care. United States District Judge David C. Norton adopted the Report and Recommendation [“R & R”] of United States Magistrate Judge Paige J. Gossett that the *pro se* lawsuit be dismissed on the pleadings under the Prison Litigation Reform Act, for failure to exhaust administrative remedies, per 42 U.S.C. § 1997e(a), in *Thomas v. South Carolina Department of Corrections*, 2015 WL 3789418 (D.S.C., June 17, 2015). While the State was immune from suit under the Eleventh Amendment, the physician was not. Nevertheless, Thomas admitted he did not exhaust, claiming he was in imminent danger of retaliation if he filed a grievance. The R & R found no “imminent danger” exception to PLRA exhaustion and dismissed without prejudice, citing *Reynolds v. Stouffer*, 2014 WL 576299 at *4 (D. Md. Feb. 11, 2014) (holding that the PLRA does not contain an “imminent danger” exception to exhaustion and collecting cases). Moreover, the R & R found Thomas’ claimed fear of retaliation to be “purely speculative as he provide[d] no factual allegations to indicate that he has ever experienced retaliatory conduct for filing a grievance.” The court declined to exercise pendent jurisdiction over state claims. *William J. Rold*

VIRGINIA – Alicia Jade Brown, a transgender federal prisoner, brought

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a pro se *Bivens* action [*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)] against FBOP officials at the Federal Correctional Institution in Petersburg, Virginia, where many transgender inmates are clustered – and against the Federal Bureau of Prisons Director – alleging deliberate indifference to her serious medical needs under *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976), and denial of Equal Protection based on her gender and perceived sexual orientation. United States District Judge John A. Gibney, Jr., granted summary judgment to defendants on all claims in *Brown v. Wilson*, 2015 U.S. Dist. LEXIS 81456, 2015 WL 3885984 (E.D. Va., June 23, 2015). Brown raised medical claims about: (1) her hormone dosage level; (2) referral to an endocrinologist; (3) purchasing of “women’s” commissary items; and (4) denial of electrolysis hair removal. As presented by Judge Gibney, the material facts seem to be largely undisputed. FBOP physicians “initiated” hormone therapy after Brown’s incarceration. She received Estradiol Valerate in increasing dosages (from 20 mg every four weeks to 20 mg every two weeks. Later, Spironolactone, 25 mg daily, was added – later increased to 37.5 mg, then to 50 mg, then to 100 mg. Brown also has seizure disorder (from a prior head trauma) and hypertension, and she takes medication for cardiac and electrolyte problems. Defendants said they denied Brown’s further requested hormone increases based on their “professional medical judgment,” considering her various medical conditions, drug interactions, and lab reports – some of which showed supratherapeutic (too high) levels of medication. A referral to an “outside” endocrinologist about hormone levels was denied by utilization review, and a second request was pending at the time of the decision. Judge Gibney found on these facts that the defendants were not deliberately indifferent, citing the Fourth Circuit’s decade-long

consideration of the care of a Virginia transgender prisoner in *De’lonta v. Angelone*, 330 F.3d 630, 635-36 (4th Cir. 2003) (no treatment) and *De’lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (inadequate treatment). By contrast, Brown received individualized decisions, and the case amounted to a disagreement about appropriate treatment, which is not actionable under the Eighth Amendment. He rejected Brown’s attempt to constitutionalize the World Professional Association for Transgender Health Standards of Care, and found that Brown was not “competent” to testify as her own expert. Similarly, regarding the endocrinologist (which is being reconsidered): “Absent exceptional circumstances, which are not present here, the medical decision of whether to refer an inmate to a specialist, generally fails to provide a basis for demonstrating deliberate indifference.” Judge Gibney accepted defendants’ security arguments that permitting “men” to wear “female” make-up increases risks of misidentification and escape, noting that defendants permitted Brown to wear a bra for enlarged breasts. He also accepted defendants’ insistence that Brown try nonformulary “Nair” for hair removal, which decision could be “revisited” if not successful. Applying rational basis scrutiny to Brown’s Equal Protection claim (and the twin Fourth Circuit *De’lonta* cases), Judge Gibney found no violation under *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985), finding that no heightened scrutiny was available and that Brown was not unreasonably singled-out from others similarly situated. This case illustrates two additional points: The FBOP has come a long way since its initial handling of transgender prisoners on a “freeze in place” policy; and it is impossible for a transgender patient to prevail to survive summary judgment on medical care without an expert witness, if the treating physicians document facially sound medical judgment. *William J. Rold*

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FEDERAL – The House of Representatives approved an amendment to a pending appropriations bill for the Department of Housing and Urban Development that would require funding recipients to comply with Executive Order 11246, which – as amended last year by President Obama – forbids discrimination by federal contractors because of sexual orientation or gender identity. The June 9 vote has symbolic importance, as Republicans control the House and so Republican votes were needed to approve the amendment, thus showing the possibility that if a general federal ban on sexual orientation and gender identity discrimination were allowed to come to a vote in the House, it might pass. However, the Republican leadership of the House is unlikely to allow such a vote, due to opposition from a majority of its caucus. And the House vote was largely symbolic, since it was attached to a measure which is under a veto threat because the Administration is opposed to several substantive parts of the bill, including a cut in funding for Amtrak at a time when additional spending is needed to improve the safety of the national railway passenger service in the wake of recent accidents. *Washington Blade*, June 10.

FEDERAL – The Senate voted 52-45 to add an amendment to the Every Child Achieves Act which would have added protection for students from discrimination because of sexual orientation or gender identity, but the amendment failed because the Republican leadership specified this as an issue to which the filibuster rule applied, requiring 60 votes for passage. Every Democrat and seven Republicans voted for the amendment. The overwhelming majority of Senate Republicans would not support a

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measure to ban discrimination against LGBT students because. . . Well, because most Republicans believe, as a matter of politics, that discrimination against LGBT people is just fine and dandy. Perhaps it didn't help that this vote came on July 14, just a few weeks after many Republicans were publicly discomfited by the Supreme Court's decision in *Obergefell v. Hodges* and were perhaps looking for an opportunity to go on record with their core constituency as being anti-gay. In addition, congressional Republicans are very responsive to arguments that requiring schools not to discriminate against transgender students would run into the "bathroom issue."

DEFENSE DEPARTMENT – Addressing the audience at the Defense Department's Gay Pride Month event on June 9, Secretary of Defense Ashton Carter announced that DoD was adding "sexual orientation" to the forbidden grounds of discrimination in the Department's equal opportunity policy. This brings policy full-circle, from the absolute exclusion of gays from military service during World War II, through various equivocating policies that usually led to discharges, to the repeal of "don't ask, don't tell" early in the Obama Administration, to the newly-explicit ban on sexual orientation discrimination. At the same time, efforts were mounting to persuade DoD to end the categorical ban on service by transgender people. This ban is part of medical regulations promulgated by the DoD based on the argument that gender dysphoria is a medical condition that disqualifies individuals from uniformed service. On June 8, the American Medical Association approved a resolution stating that there is "no medically valid reason to exclude transgender individuals from service in the U.S. military." Earlier in the year, some transgender military members began to "come out" and give press

interviews, putting a face on the issue for the public and elected officials. Among the effective spokespersons was Shane Ortega, a transgender man who has served on active duty in the Middle East and whose photoshoot for *The Advocate* caused lots of double-takes, since he presents the kind of body one would see on a professional football player. (Those running on the beach photos would by themselves be sufficient to startle people to shed any stereotypes they were carrying around about transgender men!) Early on July 13, the Associated Press reported that the Defense Department was about to announce a six-month transition period during which they were going to evaluate all the issues presented by transgender service, figure out how to deal with them, and eventually end the current regulatory ban. Although the ban on enlistment by transgender people would remain in place during this transitional period, discharging people because of their gender identity would be effectively placed on hold by referring all cases to the high DoD official who had been placed in charge of the study process. Later on the 13th, the Department posted a statement on its website by Secretary Ashton Carter confirming the plan, resulting in article about the policy in most major media by July 14.

JUSTICE DEPARTMENT – On Feb. 3, the Equal Employment Opportunity Commission's Office of Field Programs sent a memorandum to all the EEOC's district directors, informing them about how to deal with complaints of sexual orientation discrimination filed under Title VII of the Civil Rights Act of 1964, which bans employment discrimination because of sex. Significantly, the EEOC now takes the position that sexual orientation discrimination claims should be processed and investigated as sex discrimination claims in line with a growing body of internal agency

rulings and a handful of federal district court decisions, and the agency has reported some success in getting employers to settle such claims. The EEOC had previously ruled formally that gender identity discrimination claims should be processed as sex discrimination claims, a proposition that is winning wider support among the lower federal courts, and the agency has recently filed some lawsuits in federal court on behalf of transgender plaintiffs. The Supreme Court has yet to rule on either type of claim under Title VII. On June 4, the ACLU wrote to Attorney General Loretta Lynch, asking that the Justice Department "formally announce that it will take the position in litigation that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to claims of discrimination based on an individual's sexual orientation because it constitutes sex stereotyping and because it is sex discrimination *per se*." The letter referenced a Justice Department memorandum from December 2014 where the Department took a similar position on gender identity discrimination claims. The letter cites as examples of federal court acceptance of such sexual orientation claims the recent cases of *Deneffe v. SkyWest, Inc.*, 2015 WL 2265373 (D. Colo., May 11, 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash., Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012); and *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002). None of these courts went so far as to treat sexual orientation discrimination claims as *per se* violations of Title VII, but their reasoning has begun to stretch the concept of "sex stereotyping" beyond the rather restrictive view that had prevailed in earlier rulings. If this Title VII coverage were to be endorsed by the Justice Department and more widely accepted by the courts, the

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necessity for enactment of a bill such as the Employment Non-Discrimination Act might be rendered superfluous. On the other hand, having an express prohibition of discrimination would undoubtedly be more effective in getting a broad range of employers to comply with the non-discrimination requirement and better serve the educational function of a statute to influence public opinion.

LABOR DEPARTMENT – The Occupational Safety and Health Administration (OSHA) issue a Guide to Restroom Access for Transgendered Workers, posted on the agency’s website early in June. *A Guide to Restroom Access for Transgender Workers*, OSHA Publication 3795 (<https://www.osha.gov/Publications/OSHA3795.pdf>). “It is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity,” wrote OSHA. “Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety.” This is the policy now officially followed by the executive branch of the federal government in its own workplaces, as a result of prior policy statements signed by the President, although compliance has not been complete, as indicated by recent litigation at the EEOC and the Justice Department involving a transgender civilian employee of the Defense Department who had to sue to vindicate restroom access rights. OSHA’s “Guidance” is described as a “best practices” guideline, and is not legally binding as such on private sector employers, but it aligns OSHA with the EEOC and the DOJ in its approach to the workplace rights of transgender employees. *Washington Post*, June 11.

HOUSING & URBAN DEVELOPMENT

– The Department of Housing and Urban Development issued Notice H 2015-06 to all of its program directors, addressing program eligibility in multifamily assisted and insured housing programs under HUD’s equal access rule. The July 13 notice stated that eligibility decisions should be made “without regard to actual or perceived sexual orientation, gender identity, or marital status” in HUD-assisted or insured housing. This would extend to all public housing projects that receive federal financial assistance. The notice spells out in detail enforcement options for dealing with allegations of discrimination, and is available on the agency’s website.

U.S. OFFICE OF PERSONNEL MANAGEMENT (OPM)

– OPM issued Letter No. 2015-12 on June 23 to insurers participating in the Federal Employees Health Benefits Program, stating that effective January 1, 2016, “no carrier” participating in the program “may have a general exclusion of services, drugs or supplies related to gender transition or ‘sex transformations.’” This letter clarifies OPM’s earlier guidance recognizing the evolving professional consensus that treatment may be medically necessary to address a diagnosis of gender dysphoria,” wrote John O’Brien, Director, Healthcare and Insurance.

SECURITIES AND EXCHANGE COMMISSION (SEC)

– The SEC issued a “Commission Guidance Regarding the Definition of the Terms ‘Spouse’ and ‘Marriage’” Following the Supreme Court’s Decision in *United States v. Windsor* on June 19, 2015. The document, technically referred to as a “Release,” notifies all those concerned with enforcement of the laws regulating corporate securities that when the terms ‘spouse’ and ‘marriage’ are used

anywhere in federal securities statutes or implementing regulations, releases, SEC orders or guidance documents, they should be construed to include same-sex spouses and same-sex marriages, regardless of the individual’s domicile. At the time this document was issued, such a statement was necessary to insure that this meaning would prevail even if the couples involved lived in a state that did not recognize their marriage. Just a week later, it became superfluous in light of *Obergefell v. Hodges*, since the Supreme Court’s decision required every state to recognize same-sex marriages, regardless whether they were performed within the state or outside the state, on the same basis that a state would recognize different-sex marriages.

HOMELAND SECURITY

– The U.S. Immigration and Custom Enforcement (ICE) Office of Enforcement and Removal Operations issued guidance to personnel on care of transgender individuals in custodial settings on June 29. This refers mainly to people apprehended as undocumented and held in detention pending decisions on whether they will be allowed to stay in the U.S. or will be deported to countries of origin. There were numerous complaints that transgender individuals were receiving terrible treatment in detention. LGBT groups criticized the new guidance at not going far enough and not containing appropriate methods of enforcing the guidelines, and there were strong contentions that too many transgender individuals are being unnecessarily detained.

INTERIOR DEPARTMENT

– U.S. Secretary of the Interior Sally Jewell announced on June 19 that the Henry Gerber House in Chicago was being designated a National Historic Landmark. Gerber was the founder of the nation’s earliest gay rights organization, the Society for Human Rights, formed in

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Chicago in 1924. *Interior Department Documents*, June 19.

BOARD OF IMMIGRATION APPEALS

– Lambda Legal announced that the Board of Immigration Appeals had granted asylum to a Mexican man because of persecution it found he was likely to experience in Mexico because he is HIV-positive and thus would be perceived to be gay. Roberto Santin was represented by Heartland Alliance's National Immigrant Justice Center with amicus support from Lambda Legal and the HIV Law Project. Hena Mansori, an attorney with the NIJC Detention Project, was his attorney for the case. As a result of the ruling, Santin was released from detention on June 22. *Lambda Legal News Release*, June 25.

ARIZONA – The Maricopa County Attorney's Office, which had been providing free legal assistance for non-contested adoption cases, has terminated that activity, contracting it out to private attorneys, due to County Attorney Bill Montgomery's opposition to same-sex couples adopting. Montgomery stated at a news briefing on July 9, "The Supreme Court case addressed marriage, it didn't address adoption, so I didn't read it to affect that at all," referring to Arizona statutes limiting joint adoptions to married couples. The ACLU had threatened to sue the office for failing to provide same-sex couples with the same services as different-sex couples in connection with adoptions, but Montgomery decided to avoid that problem by farming out the task to private counsel. *trivalleycentral.com*, July 11.

ARKANSAS – Second attempt: The Fayetteville City Council voted 6-2 on June 17 to approve a new LGBT non-discrimination ordinance, which would

cover employment, housing and public accommodations. A previous ordinance had been repealed in a referendum. The new ordinance will not go into effect unless approved by voters in a special referendum on September 8. The new ordinance has a broad religious exemption built in, and provides for mediation of complaints. *Arkansas Times*, June 17.

CONNECTICUT – Governor Dannel Malloy signed into law on June 29 a bill that changes birth certificate procedures making it possible for transgender people who were born in Connecticut to have their birth certificates revised without presenting proof of surgical gender reassignment procedures. Health care professionals would have to certify that a person has received appropriate treatment for the purpose of gender transition, which could be surgical, hormonal, or other treatment.

FLORIDA – Bowing to the reality created by litigation and executive acquiescence a few years ago, Florida has repealed its statutory ban on "homosexuals" adopting children. *Associated Press* reported on June 12 that Governor Rick Scott signed a bill removing the offending language as part of a law intended to promote adoption. An attempt by Republicans in the state's House to exempt private adoption agencies from having to provide services to same-sex couples was unsuccessful.

IDAHO – Bellevue's City Council unanimously passed an ordinance that will prohibit discrimination because of sexual orientation or gender identity in housing, employment and public accommodations on June 15. Various amendments were included to address concerns about room rentals in private homes or application to certain organizations or agencies. The council

voted to waive the usual second and third readings so that the ordinance could go into effect in July. *mtexpress.com*, June 17. * * * Latah County Commissioners approved a change in the county's personnel policy to include sexual orientation and gender identity as prohibited grounds of discrimination. *Lewiston Morning Tribune*, June 30.

ILLINOIS – Chicago Alderman James Cappleman has proposed requiring gender neutral washrooms in places of public accommodation. Cappleman said he was trying to initiate a discussion that might lead to a proposed ordinance. *Chicago Sun-Times*, June 26.

KENTUCKY – Midway, Kentucky (population approximately 1,700) is the eighth Kentucky municipality to enact an ordinance outlawing discrimination because of sexual orientation or gender identity, joining the growing list that includes Lexington, Louisville, Frankfort, Danville, Covington, Morehead, and Vicco (perhaps the smallest municipality in the country with such an ordinance). The measure was proposed by Mayor Grayson Vandegrift and approved on June 1 by a 4-2 vote. It applies to employment, housing and public accommodations. Proposed "religious freedom restoration act" style language was removed from the measure before it was approved. *Kentucky.com*, June 9; *FairnessCoalition.org*, June 1 press release.

MASSACHUSETTS – Mayor Martin Walsh of Boston signed an executive order on June 11 establishing gender-neutral restrooms on the fifth floor of Boston City Hall outside the Mayor's Office and the City Council Chamber, making Boston among the first city halls in New England to institute gender-neutral restrooms in order to

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accommodate the needs of transgender individuals. *U.S. Official News*, June 11.

MICHIGAN – Governor Rick Snyder signed into law bills allowing adoption agencies to refuse to provide services to which they have religious objections. The governor's action on June 11 short-circuited an attempt by LGBT rights advocates to organize opposition to a package of three bills that were suddenly called up for a vote the previous day despite not being listed on the published legislative agenda. Thus House Bills 4188, 4189 and 4190 became Public Acts 53, 54, and 55 of 2015. P.A. 53 declares that "a private child placing agency does not engage in state action when the agency performs private-adoption or direct-placement services" or makes a referral for such services. "To the fullest extent permitted by state and federal law, the state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide any services that conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency." The measure requires an agency that is declining to provide services on this basis to "refer the applicant to another child placing agency that is willing and able to provide the declined services." Interestingly, the statute does not appear to require that the agency be operated under the auspices of a religious body in order to be able to claim this immunity from liability. The measure appears to require that any agency seeking to assert the right to deny services must have a written policy statement to that effect posted on its website. The other two bills amended various statutory provisions to ensure that agencies declining such services would not be

subject to any adverse consequences. The statutes were clearly drafted to incorporate the argument that refusal by non-governmental child-placing agencies to provide services would not be deemed state action, regardless whether they receive any state funding for their activities, and thus would be immune from constitutional challenge, but such a declaration would not stop a federal court from evaluating the degree of state involvement. The ACLU of Michigan responded to this enactment by suggesting that constitutional lawsuits might be filed against agencies declining services to same-sex couples seeking to adopt. However, plaintiffs might have a standing problem in mounting a facial equal protection challenge to the statute, inasmuch as it requires referrals to agencies that will provide the services, and also declares that it is not intended to deny any qualified applicants the ability to adopt children. * * * Governor Snyder also signed into law on June 30 a measure that will prohibit local governments in Michigan from enacting ordinances requiring employers to provide workers with any benefits not mandated by federal or state law. One casualty of the bill could be domestic partnership benefits, but after *Obergefell v. Hodges*, employees could marry same-sex partners and demand the same marital benefits as are provided to straight employees.

NEVADA – On June 25, Nevada Insurance Commissioner Scott Kipper issued a bulletin advising that "prohibitions of medically necessary health care services to covered persons on the basis of discrimination because of the covered persons' gender identity or expression" would be considered a violation of the state's regulations governing insurance companies. The companies would be forbidden from denying transgender individuals coverage for medically necessary health services

that are provided for other customers. The ACLU of Nevada announced this development in a June 29 press release.

NEW JERSEY – On June 25, the New Jersey Senate gave final approval to a bill that would make it easier for transgender individuals to change their sex and name and receive an amended birth certificate. However, Governor Chris Christie had vetoed an earlier measure to reform the birth certificate process in 2014, and it was uncertain whether a new veto would result, in light of the governor's subsequent announcement that he will seek the Republican presidential nomination. The measure passed the Senate with enough votes to override a veto, but an override in the lower chamber seemed questionable in light of the closeness of the vote. * * * The East Brunswick Board of Education adopted a new policy to protect the rights of transgender students. A student's assertion of gender identity will be accepted when there is a "uniform assertion" of gender identity, or if there is any other evidence that the gender-related identity is "sincere and a part of the student's core identity." This will carry through to access of facilities and student dress and grooming. *East Brunswick Sentinel*, July 9.

NEW YORK – The North Hempstead town board voted unanimously on June 2 to add gender identity to the prohibited grounds for discrimination under the code governing municipal employment. The amendment adds "gender" to the list of prohibited grounds, defining it as "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different form that traditionally associated with the legal sex assigned to that person at birth." *Newsday*, June 3.

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NEW YORK – The New York City Landmarks Commission voted June 23 to recognize the site of the Stonewall Inn on Christopher Street in Greenwich Village as an official New York City landmark. This is the first time that the Commission has designated a site solely on the basis of its historic significance for the LGBT community. The Stonewall was the site of resistance to a police raid of a gay bar that helped to spark a new activist phase in the movement for LGBT rights, and that is commemorated each year by events leading to the last weekend in June, culminating in a Pride March in New York City and similar events in many other locations around the world.

TENNESSEE – The Chattanooga City Council voted unanimously on July 14 to approve an ordinance forbidding discrimination against municipal employees because of sexual orientation or gender identity, after an amendment had been approved to “protect employees’ rights to their religious beliefs,” reported the *Chattanooga Times* on July 15. Some criticized the passage of the measure as unnecessary or premature, because the city is in the process of putting together a new employee handbook that is to be presented to the Council for approval in several weeks, and these provisions could have been incorporated into that and not put up as a stand-alone measure. It was uncertain whether the anti-discrimination provisions in the proposed handbook would precisely incorporate the text of what was approved on July 14. The newspaper article did not include the precise text of the religious amendment.

TEXAS – Taylor County Commissioner voted 3-2 on July 14 to allow same-sex spouses of county employees to enroll for insurance benefits. The “no” voters voiced the sentiment that it is not the “responsibility” of Taylor County

taxpayers to provide insurance benefits for same-sex couples. One would ask why not, since they (including gay residents) are being taxed to provide benefits to different-sex couples? According to Kelly Stephens, the Director of Human Resources and Risk Management for the county, because the county’s benefits plan is self-funded, the county did not have to offer benefits to same-sex couples. One of the “yes” voters, however, County Judge Downing Bolts, said that not offering the benefits “created a conflict if we’re covering spouses of not-same-sex couples,” which would impose a “dual standard” that is “discriminatory.” Also, Stephens commented, providing the coverage actually would not cost the county anything, since employees pay 100% of the cost of dependent coverage. So all the bluster by the “no” voters about the “taxpayers” was just that – bluster. *Abilene Rep-News*, July 15.

VIRGINIA – The Fairfax County School Board voted on June 25 to add sexual orientation and gender identity sections to the family life curriculum of the county public schools, having voted in May to add gender identity to the non-discrimination policy. *Arlington Catholic Herald*, June 30.

WASHINGTON – Seattle Mayor Ed Murray has introduced legislation that would require City-controlled and privately operated places of public accommodation to designate existing or future single-occupancy restrooms as all-gender facilities, in order to accommodate the needs of transgender individuals. The Seattle LGBT Commission proposed the measure to the Mayor. *US Official News*, June 27.

WEST VIRGINIA – After a burst of adverse publicity after transgender women were denied the right to update their driver’s licenses to reflect their

gender identity, the West Virginia Division of Motor Vehicles announced on July 1 that they will no longer dictate how transgender residents can dress for their license photos. The policy changed after the DMV received threats of lawsuits over the issue from the NY-based Transgender Legal Defense and Education Fund. *latimes.com*, July 7.

KEWEENAW BAY INDIAN COMMUNITY – Tribal leaders voted 5-4 to amend their marriage ordinance to allow same-sex marriages on June 10. Members of the tribe had narrowly approved same-sex marriage in a non-binding referendum in December. However, recognition of such marriages in the state of Michigan, where most of the tribe resides, remained in doubt pending a ruling by the Supreme Court in *Obergefell v. Hodges*, since the 6th Circuit had reversed a federal court decision from Michigan finding the state’s ban on recognizing same-sex marriages unconstitutional. *miningjournal.com*, June 10.

LAW & SOCIETY NOTES

AIDS EPIDEMIC – On July 14 the United Nations issued a progress report on its Millennium Development Goal to halt and reverse the spread of HIV. According to UNAIDS, the agency charged with implementing the program, it is possible that the epidemic can be ended by 2030. “Ending the AIDS epidemic as a public health threat by 2030 is ambitious, but realistic, as the history of the past 15 years has shown,” said Secretary-General Ban Ki-moon in a report released on that date. The report said that 15 million people are receiving antiretroviral treatment for HIV, up from fewer than 700,000 in 2000, ahead of the projected date for this goal when the program was initiated, and that the cost of HIV-related medications in many

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countries has sharply declined. Indeed, Michel Sidibe, Executive Director of UNAIDS, stated that the key to change in combating the epidemic was to break up the pharmaceutical industry's "tight grip" on government policies and drug prices, which has made combating HIV much more expensive than it needs to be. The report, as summarized in a COMTEX News Network report on-line, asserted: "Legislation allowing developing countries to override patent rights was critical, allowing them to manufacture copies of the drugs and cut prices." The report stated that AIDS-related deaths have dropped more than 40% since 2004, now running at about 1.2 million a year, and new HIV infections had fallen by 35 percent since 2001 to 2 million a year in 2014. Investment in combating HIV/AIDS had climbed to almost \$22 billion in 2015, from less than \$5 billion in 2001. New infection among children has fallen by 58% between 2000 and 2014, by ensuring that women living with HIV receive medication to prevent transmission in utero. It was reported that in June Cuba became the first country to eliminate mother-to-child transmission of HIV. * * * Publication of the UN report brought immediate criticisms that it was overstating progress, was unduly optimistic, and failed to acknowledge the lack of adequate funding and will on the part of many governments.

VAMPIRES? – *UPI Newstrack* reported on July 9 that "self-identified vampires fear 'coming out of the coffin' to social workers and clinicians because they don't want to be judged as evil or mentally ill." Sound familiar? The article derives from a press release on research conducted on "self-identified vampires" published in the journal *Critical Social Work*. The concerns of these vampires intersect with their sexuality in some cases. The article reported that researchers had interviewed eleven self-identified vampires. "Nearly all of the participants reported being female, with one being female-assigned

intersex, one post-operative male-to-female transgender, one gender-queer, and one male. . . Researchers reported five participants identified as bisexual or bicurious, three as heterosexual, two as pansexual or omnisexual, and one as asexual. . . Drawing a difference between 'lifestyle' vampires who wear black clothes and fake fangs, 'real' vampires consume blood from consenting individuals by using a razor to make small incisions in their chest and lick or suck out the blood. They claim to have different energy needs than other people, requiring them to 'feed' on blood." According to one of the academics who co-authored the study, "The purpose of the study was to better inform clinicians about a subset of people who may need treatment and fall into a category of alternative identities that often are judged negatively, including by social workers. These include bondage and discipline, dominance and submission, and sadomasochism practices, all of which researchers wrote in the study are not associated with psychopathology. 'The real vampire community seems to be a conscientious and ethical one,' [Professor DJ Williams of Idaho State University] told *Empire State Tribune*, explaining that they need non-judgmental professionals to be able to honestly seek help. 'Most vampires believe they were born that way – they don't choose this.' So much for the literary conceit that people become vampires as a result of being bit by other vampires. . .

MORMON CHURCH ON MARRIAGE EQUALITY – *Deseret Morning News* reported that the Council of the First Presidency and Quorum of the Twelve Apostles of the Mormon Church issued a letter to be read in Church meetings beginning on July 5, in response to the Supreme Court's *Obergefell* decision. The letter states, "Marriage between a man and a woman was instituted by God and is central to His plan for His children and for the well-being of society. Strong

families, guided by a loving mother and father, serve as the fundamental institution for nurturing children, instilling faith, and transmitting to future generations the moral strengths and values that are important to civilization and vital to eternal salvation." However, the letter urges respect for people who disagree with this view, stating: "The gospel of Jesus Christ teaches us to love and treat all people with kindness and civility – even when we disagree. We affirm that those who avail themselves of laws or court rulings authorizing same-sex marriage should not be treated disrespectfully," and the letter concludes by asking for "all to pray that people everywhere will have their hearts softened to the truths God established in the beginning, and that wisdom will be granted to those who are called upon to decide issues critical to society's future." Several months ago Church representatives were part of a negotiation to add sexual orientation and gender identity to Utah's anti-discrimination laws on employment and housing, with a broad religious exemption, but skirting the problems of individuals and businesses who wanted to refrain from entanglement with same-sex marriages by not adding these categories to the public accommodations provisions. Thus, the Church and its spokespeople, who carry heavy influence in Utah and some surrounding states with large Mormon populations, has moderated its language and is treading a fine line, quite distinguishable from its heavy-handed intervention in 2008 to help win enactment of Proposition 8 in California. The Church seems to be in a gradual process of figuring out ways to accommodate the reality of LGBT people within the Church and in the areas where the Church plays a major role in its influence on public policy.

EPISCOPALIANS – The Episcopal General Convention held in Salt Lake City voted on July 1 to allow religious

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weddings for same-sex couples in Episcopal Churches. The House of Bishops approved the resolution by a vote of 129-26 with 5 abstentions. The measure takes effect on November 29, 2015. The other mainline protestant churches that allow such weddings in the U.S. are the United Church of Christ and the Presbyterian Church (USA). The Evangelical Lutheran Church leaves it up to individual congregations to decide whether to allow such weddings. The United Methodist Church bars such ceremonies, although many of its clergy have performed the ceremonies as an act of protest. *Associated Press*, July 2.

KENTUCKY STATE BAR – Lawyers seeking to start an LGBT Section of the Kentucky State Bar had to follow a circuitous route. In the past, the Kentucky Supreme Court approved new sections of the state bar, which is a unified bar in Kentucky where all lawyers admitted to practice must be members. However, the members of the court evidently wanted to avoid voting on this proposal, so they delegated to the Board of Governors of the Kentucky Bar the authority to create new sections. The Board approved the proposal, and the new section met for the first time on June 18 to elect officers and get organized.

NEW YORK – Governor Andrew Cuomo sent a letter on June 28 to the New York Education Department demanding immediate action to protect transgender students from discrimination in public schools in New York State. Cuomo was responding to a report by the New York Civil Liberties Union documenting the continued existence of discrimination despite passage of the Dignity for All Students Act, which was supposed to require schools to take affirmative steps to deal with this recurring issue. The report documents delays with implementation of DASA. Wrote Cuomo: “I demand that you conduct a

review of your full DASA compliance for all protected groups covered by the law. I would like the results of this exercise within three weeks.” It is undoubtedly no coincidence that June 28 was Gay Pride Day in New York, and the governor participated in the annual Gay Pride March in Manhattan. * * * New York City Comptroller Scott Stringer has proposed local legislation that would alter City building codes to allow building owners to designate gender-neutral restroom facilities. Existing codes for places of public accommodation require that all facilities be labeled as gender-specific, although some waivers have been granted. Stringer also proposes that all publicly-accessible single-occupancy restrooms become gender-neutral. *US State News*, June 26.

EXXONMOBIL – At long last, one of the nation’s largest employers is falling into line on LGBT rights. When Exxon merged with Mobil, the combined corporation rescinded Mobil’s progressive LGBT policies, and Exxon was one of the few major corporations that resisted adding sexual orientation or gender identity to its non-discrimination policies. But it is a major federal contractor, and as a result of last summer’s Executive Order by President Obama, it has to adopt an express non-discrimination policy as its contracts come up for renewal. So Exxon has formally amended its policies in anticipation of the next round of contracts. *New York Times*, July 1.

BAYLOR UNIVERSITY – The University has dropped language from its sexual conduct policy explicitly outlawing sexual relationships between same-sex partners. In fact, the policy dropped the entire list of prohibited sexual acts, substituting a statement that “Baylor will be guided by the biblical understanding that human sexuality is a gift from God and that physical intimacy is to be expressed in the context of marital

fidelity.” Of course, Baylor also states that “Marriage is the uniting of one man and one woman in covenant commitment for a lifetime” and emphasizes the centrality of procreation for marriage. The University was coy about whether this signaled a new tolerance for gays on campus. The Student Senate passed a resolution two years ago calling on the University to substitute the phrase “deviate sexual intercourse” for “homosexual acts,” which would not have worked any real practical change in terms of liberalizing the religiously-affiliated school’s policy.

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EUROPEAN PARLIAMENT – By a substantial majority vote, the European Parliament approved a report on gender equality in Europe calling for legal family rights for same-sex couples. Taking note of the evolving definition of family in Europe, the Parliament recommended that the rules in the area of family law “(including implications for workplace leaves and other family rights) take into account phenomena such as single parents and same-sex parenting.” *ANSA English Media Service*, June 9.

AUSTRALIA – The Australian Human Rights Commission issued a report, authored by Commissioner Tim Wilson, reporting on a national survey that found legal discrimination, harassment and violence against LGBTI Australians, reported *Guardian (U.K.)* on June 9. The report urges the government to amend the Marriage Act to allow same-sex couples to marry, arguing that this step is crucial to protection of the human rights of LGBTI people. “Marriage is an important institution that reflects a cultural understanding of relationship,” says the report. “By not extending marriage to same-sex couples, the social exclusion of same-sex couples is perpetuated.” The

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report also recommends that transgender children be able to obtain hormone therapy without having to get a court order. At present, the Family Court must authorize such medication. *World Today*, June 10.

BELGIAN FLANDERS – The *Philippines News Agency* reported July 10 that Flanders, the Dutch-speaking region of Belgium, had announced plans to install gender-neutral toilet facilities in all public buildings so as to provide equal access for transgender individuals. A special logo will be displayed on the restroom doors.

CANADA – The Ontario Superior Court ruled that Ontario's Law Society did not violate the law when it refused to award accreditation to Trinity Western University's proposed new law school. The Law Society took the position that TWU's requirement that students not have any sexual relations outside of heterosexual marriages was unlawfully discriminatory against LGBT applicants and students. Same-sex marriage is legal in Canada, but TWU would expect married gay students to remain celibate from enrollment through graduation. A three-judge panel of Justices Frank Marrocco, Ian Nordheimer and Edward Thesaid that the school's rules effectively mean that it is closed to LGBT students, as they would have to "essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship." Anti-discrimination laws in Canada forbid sexual orientation discrimination, so the school's requirements would be deemed unlawful. Denial of accreditation would make it impractical for the university to start its new law school. It is also litigating over denial of accreditation in British Columbia and Nova Scotia. The university indicated its intention to appeal the ruling. *Globe & Mail*, July 3.

* * * The Ontario legislature approved a bill offered by the New Democratic Party to ban conversion therapy for minors. The measure is titled "Affirming Sexual Orientation and Gender Identity Act." *Globe and Mail*, June 4.

CHILE – A comprehensive civil union law came into force on July 9.

CZECH REPUBLIC – The Supreme Court has partly recognized a California court parenthood ruling for a gay couple. Czech-American Jiri Ambroz is one of the fathers of a child. As a result of the ruling recognizing his parental status, the child may be accorded Czech citizenship, according to a June 22 report by the *Czech News Agency*.

COLOMBIA – Colombia has dropped the requirement that transgender people undergo gender reassignment surgery before the government will recognize their transition. A decree from the Ministry of Justice and the Ministry of the Interior, which went into effect on June 5, "eliminates the need for psychiatric or physical examinations to prove an individual's gender identity," according to a report by *americasquarterly.org* (June 9). "Under the new rules," it continues, "individuals need only submit a copy of their civil registry form, a copy of the identification card and a sworn declaration expressing their wish to change their gender identity in the civil registry." The notary public to whom the form is submitted has five days to complete the procedure. The individual must wait at least ten years if they want to make another such change, and the law limits gender changes to twice per person.

COSTA RICA – It was reported on June 2 that a gay couple in Costa Rica, Gerald Castro and Cristian Zamora, were

granted recognition of their common-law marriage by the Family Court in the city of Goicoechea. This was hailed in the local press as the first legal recognition of a same-sex relationship in Central America, but it was uncertain whether the Castro-Zamora marriage would be recognized by all units of the government. The Family Court achieved this result by interpretation of an amendment to the Youth Code in 2013 that its sponsor claimed would legalize same-sex marriages. The amendment states that common-law marriages should be granted regardless of gender and "without discrimination against their human dignity." After the measure was approved, several gay couples filed for such recognition of their relationships, but the Castro-Zamora marriage was the first to be recognized. One catch: the Youth Code only applies to Costa Ricans between the age of 12 and 35. *ticotimes.net*, June 2. Costa Rican President Luis Guillermo has announced his intention to push for a bill to legalize same-sex unions, which would extend beyond individuals covered by the Youth Code provision. *EFE Ingles*, June 3; *Reuters News*, June 3.

CYPRUS – A vote on a proposed civil union law which was supposed to take place early in July was postponed until September.

FINLAND – The Supreme Court imposed a fine of 18,000 euros (approximately \$20,320) on Kai Telanne, the chief executive of Alma Media, for dismissing newly-hired editor-in-chief Johanna Korhonen when he found out that she had a politically-active same-sex partner. The decision affirmed a ruling by the Helsinki Court of Appeals, but increased the fine imposed from 7,000 euros to 18,000 euros, finding discrimination based on sexual orientation and lawful political activity of the partner. *Agence France Presse English Wire*, June 10.

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FRANCE – France’s openly-gay ambassador to the U.S., Gerard Araud, was celebrated in the *New York Times* Sunday Review on June 7 by columnist Maureen Dowd, who is particularly noted for his cheeky Twitter effusions. The article claims that “Araud was such a star in his job at the U.N. that the Foreign Ministry asked him to start tweeting.”

GERMANY – The Bundesrat, the upper house of the parliament, voted on June 12 to approve a resolution calling for the legalization of same-sex marriage. The resolution, titled “Marriage for All” (borrowing the title of the French same-sex marriage statute), is not legally binding. Germany has had a civil union status for same-sex couples since 2001, but it does not provide all the rights of marriage, most notably not authorizing same-sex couples to adopt children. The Bundestag, the lower house, is controlled by a coalition that includes conservative factions that are strongly opposed to same-sex marriage, as is Chancellor Angela Merkel, making it unlikely that such legislation will be approved there unless the next national election, in 2017, results in a substantial change of membership. The upper house action was described as being inspired by the recent vote to amend the constitution of the Republic of Ireland to allow for same-sex marriages. Draft legislation permitting same-sex marriage was referred to a committee in the Bundesrat. If it were approved, it would be referred to the Bundestag, which would be obliged to consider it. *Agence France Presse English Wire*, June 12. The *Irish Times* (July 11) reported that German President Joachim Gauck, inspired by the Irish referendum, called for Germany to enact civil marriage for same-sex couples, ahead of a state visit to Ireland. “It should be made clearer that enabling homosexual people who wish to live in a legally binding partnership gives them the chance to live a life of equal value in love and partnership,” he stated.

GREECE – The government published on June 10 the text of a proposal to amend the country’s Civil Partnership Law so as to allow same-sex couples to register civil partnerships and be entitled to the same rights that had previously been accorded to different-sex civil union partners. The proposal responds to a decision by the European Court of Human Rights, finding that Greece’s adoption of a civil union law that was not open to same-sex partners violated its obligations under the European Convention on Human Rights. Although the Court has not yet reached a conclusion that same-sex couples are entitled to marry in country that are party to the Convention, as there is not yet a consensus to that effect among the signatories, it has found that legal recognition of same-sex partners has spread in Europe to the extent that denial of such recognition with attendant rights is a violation of the Convention. Although same-sex partners will be accorded many of the rights of spouses, they will not be entitled to adopt children jointly. However, if a civil union couple has a child, both partners will be deemed parents of the child. The ruling Syriza party had pledge to introduce such legislation during its successful election campaign in January. The justice ministry stated: “With the enactment of a new civil union pact, Greece will cease to be one of the last European countries where same-sex couples do not receive some kind of official recognition for their relationship.” *Agence France Presse English Wire*, June 10.

IRELAND – The government in the Republic of Ireland has announced that it intends to drop the requirement of medical certification for transgender people to have their gender identity recognized on official documents. Transgender people will be able to self-declare their gender identity in order to get official documents and services, including modifying birth certificates. The only limitation noted was that

applicants must be over the age of 18. This depends, of course, on enactment of the Gender Recognition Bill now pending in the parliament. According to the announcement of the agreement reached in the cabinet, “A person who transitions gender will have their preferred gender fully recognized by the State for all purposes – including the right to marry or enter a civil partnership in the preferred gender and the right to a new birth certificate.” *thejournal.com*, June 3.

ISRAEL – The National Labor Court ruled on June 2 that the Employment (Equal Opportunities) Law forbids gender identity discrimination by employers, by inference from provisions banning discrimination due to gender and sexual orientation. The ruling came in the case of *Meshel v. Center for Educational Technology*. A transgender woman, Marina Meshel, had been fired; according to the employer she was fired for talking about her gender identity issues with female students at the Center, while she claimed that she was fired because the employer learned that she was transgender. The Tel Aviv Labor Court had determined that the discharge was for conduct, not status, and rejected her claim, but the National Labor Court approved an award of damages in the case to compensate Meshel for being wrongfully discharged. *Times of Israel*, June 11; *Jerusalem Post*, June 11. * * * A proposal to establish civil unions or civil marriage in Israel to accommodate couples (including same-sex couples) who cannot be married by the recognized religious authorities – all of whom reject same-sex marriage – went down to defeat in the Knesset on July 8 by a vote of 39-50. The current governing coalition includes socially conservative religious parties, so passage by the Knesset was not really expected, even though public opinion polls show, for example, that about 70% of Israelis support the right of same-sex couples to

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marry. Israel was founded after World War II as a Jewish state, and *Times of Israel* (July 12) explained in reporting on the vote that Israel continued the system that was in place under the prior British Mandate, which governed the land after the Ottoman Empire was deposed in World War I. Under that system, marriage is a religious status that is recognized by the state, but only religious bodies could perform marriages within the state. However, by virtue of international treaty obligations and customary international law, Israel recognizes civil marriages performed elsewhere, so those Israelis who do not desire a religious marriage or can't qualify to have one go outside the country to marry, and their marriages receive government recognition. In 2006 the High Court of Justice held that this principle applies to same-sex marriages, requiring the state to recognize same-sex marriages of Israelis that had been performed in Canada. Israel also has a fairly robust common law marriage doctrine, under which cohabitants have a portion of the rights that go with marriage. Thus, same-sex marriage exists in Israel in various forms, even though same-sex couples cannot formally marry within the country, and thus cannot really be said to enjoy full marriage equality. However, Israel is the only location in the Middle East where same-sex couples enjoy at least some degree of legal status for their relationship.

ITALY—The lower house of the parliament approved a motion authorizing the government to seek legislation to allow same-sex civil unions. The motion by the Democratic Party passed on its first reading, committing the government “to promote the adoption of a law on civil unions, particularly with regard to the condition of the people of same sex,” and commits the government to “ensure equal treatment throughout the nation.” Prime Minister Matteo Renzi has stated that “civil unions cannot

be delayed any longer,” presumably reflecting the emerging consensus that failure to provide a legal status to same-sex couples would violate the emerging human rights standard in Europe. *Pink News*, June 10. * * * The Court of Appeal of Naples issued a ruling requiring local authorities to register a same-sex marriage contracted in France by a French-born lesbian couple who had origins in Italy and were living in Italy while maintaining dual citizenship. According to a translation we received, the opinion stated: “There is no doubt that the failure [by Italy] to register the marriage of two French women, lawfully entered into in France. . . only because they reside in Italy (which has not yet prepared forms to guarantee same-sex civil unions), would represent a violation of the exercise of the rights associated to their status as spouses. Italy cannot refuse to recognize such status only because it has not (yet) introduced forms of protection of such civil unions for its citizens.” The court’s ruling appears to be keyed to the special circumstances of the couple, and would not necessarily carry over to any Italian same-sex couple who went to another EU country where same-sex marriage is allowed, got married, returned to live in Italy and demanded that their marriage be registered. According to a press release from the couple’s lawyer, Alexander Schuster, this may be the first ruling of its kind. He writes: “No other judgment from a EU country not providing for any form of legal recognition of same-sex unions is known. The judgment is not yet final and likely to be reviewed by the Italian Supreme Court of Cassation.”

JAPAN – The *Japan Times* (July 8) reported that hundreds of LGBT people filed a request on July 7 with the Japan Federation of Bar Associations for support in legalizing same-sex marriage. The Bar Association will investigate their contention that failure to allow same-sex marriages is a violation of

human rights, and may issue a report urging the central government to review its policy on this issue. Although such a report would be nonbinding, one of the lawyers involved contended that it could have a “far-reaching” effect on the nation’s legislative and judicial process, due to the prestige of the Association.

MALAYSIA – A Sharia court in Malaysia convicted nine transgender women under a law that prohibits “a male person posing as a woman,” imposing fines and jail terms, according to a June 22 news report from *RTT News*. The arrests arose from a club raid on June 16, and the defendants all pled guilty. A lawyer filed an appeal. * * * *Legal Monitor Worldwide* (June 22) reported that a transgender woman failed in an attempt to get her legal status changed to female when the High Court dismissed her application, saying it was bound by prior UK cases and a 2013 court of appeal decision.

MEXICO – The Supreme Court of Mexico ruled on June 3 that same-sex couples have a right to marry under Mexico’s constitution and that its ruling is “jurisprudence,” which means that it creates a binding precedent on lower courts. This is to incentivize state legislators to alter existing statutes accordingly. Under the nation’s jurisprudence, a single Supreme Court ruling on a constitutional question is apparently not enough to declare the battle over, since rulings apply in particular provinces from which appeals are brought. The June 3 ruling involved a case from Colima state. Because this is the fifth case in which the Supreme Court has struck down a ban on same-sex marriage, it creates a constitutional principle, but that is not self-enforcing, as continuing litigation around the country shows. Lower courts would be bound to follow it, but it is not clear that state and local legislators would be

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obliged to revise their marriage statutes.

*** On June 11, it was reported that the government in Chihuahua had bowed to demands for same-sex marriage after it appeared likely that a court would award damages to a large group of same-sex couple who had sued after being denied the right to marry there. *** On July 10, twenty same-sex couples participated in a mass wedding on an Acapulco beach with Guerrero state's governor and wife as witnesses. Governor Rogelio Ortega promoted the event despite opposition from some other local politicians and Catholic Church leaders. Following the Supreme Court's June 3 ruling, Governor Ortega instructed civil registries in the state to approve same-sex marriage licenses, overriding opposition from Acapulco's mayor. Similar confrontations and dramas were playing out around the country during June and July. It seemed likely that the U.S. Supreme Court decision of June 26 would provide additional ammunition for local marriage equality advocates seeking to bring their states into line with the trend in North America, where Canada has had nationwide same-sex marriage recognition since 2005. It was expected that over the next few months the legislatures in various of Mexico's more than thirty states would take up proposals to amend their statutes to take account of the Supreme Court ruling, as it was likely that the state governments would face potential damage claims if individual couples had to continue going to court to get judges to order that they be issued marriage licenses.

MOZAMBIQUE – Legislation went into effect on June 29 decriminalizing private consensual gay sex, departing from the widespread outlawing of homosexual conduct by African nations. According to *International Business Times News* (June 2), this would still leave 35 African nations that deem homosexual conduct a crime, including two (Sudan and Mauritania) that impose the death

penalty. The action in Mozambique was part of a general process of updating the penal code to meet international human rights standards.

PAKISTAN – Two men who claim that their “gay wedding” was just a joke discovered that law enforcement authorities in Pakistan lack a sense of humor. The men were arrested, as was the man who “officiated” at their ceremony. They were forced to undergo medical examinations, and the police concluded based on the results that the men had sex with each other in violation of the country's criminal law, Section 277 of the Penal Code, which covers “unnatural offenses.” They may receive life prison sentences. *Washington Post*, June 18.

PITCAIRN ISLAND – The British Overseas Territory of Pitcairn Island, population 48, passed a law that came into effect on May 15 allowing same-sex marriages. It was seen as largely symbolic, since nobody was aware of any gay couples on the island seeking to marry, but it was seen as bringing the island into conformity with British law and emerging international human rights trends. Hope was expressed that it might promote tourism for the financially strapped island. *Associated Press*, June 22.

SOUTH KOREA – Inspired by the U.S. Supreme Court's *Obergefell* decision, a gay couple in South Korea filed suit seeking the freedom to marry. Kim Jho Gwang-Soo and Kim Seung-Hwan filed an action in the district court in Western Seoul on July 6. They had an outdoor wedding ceremony in Seoul in September 2013, but the local authority refused to register their marriage at that time. *Daily Tribune (Bahrain)*, July 7. *** A court in Seoul ruled on June 16 that the police violated the law when they banned a gay

pride march that was scheduled to be held on June 28 as part of Korean Queer Cultural Festival. The police had denied the permit on grounds of conflicts with other permits that had previously been sought by Christian conservative activists, who were specifically seeking to provoke the conflict in order to prevent the pride march. Wrote the court, “Unless there is a clear risk of danger to the public, preventing the demonstration is not allowed and should be the absolute last resort.”

TAIWAN – Republic of China – The city of Taipei on June 17 opened a registry for same-sex couples. Although the registration will have very limited effect, it might be used by the couples in dealing with hospitals, courts and the police, and is viewed as a symbolic first step towards legal recognition. *GayStarNews*, June 18.

PROFESSIONAL NOTES

Lambda Legal has announced that **KEVIN CATHCART**, Executive Director of the organization since 1992, will retire in April 2016 at the end of his current contract. Prior to joining Lambda, Cathcart was Executive Director of Gay & Lesbian Advocates & Defenders in Boston from 1984 to 1992. He is the longest-serving executive director of any LGBT movement organization. At Lambda he presided over the quintupling of the staff and expansion to several regional offices, and led the organization in many noteworthy legal campaigns, including the successful effort to strike down sodomy laws nationwide in *Lawrence v. Texas*, a case in which Lambda represented the defendants appealing the case through the Texas courts to the U.S. Supreme Court. Lambda also participated as counsel or amicus in several other Supreme Court cases during Cathcart's leadership of the

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organization, including *Romer v. Evans*, *Boy Scouts v. Dale*, *U.S. v. Windsor*, and *Obergefell v. Hodges*. Other particularly notable Lambda achievements during these years included winning marriage equality lawsuits in Iowa and New Jersey and establishing important precedents in the 9th Circuit (challenging the discharge of a lesbian military officer), 11th Circuit (establishing equal protection rights of transgender public employees), and the 7th Circuit (vindicating the claim of a gay high school student subjected to merciless harassment) and many others. Lambda's board will undertake a nationwide search for Cathcart's successor beginning in the fall of 2015.

President Barack Obama has appointed **SHANNON PRICE MINTER**, Legal Director of the National Center for Lesbian Rights, to the President's Commission on White House Fellowships, the body that selects candidates to serve as White House Fellows, recent college graduates who spend a year as full-time paid assistants to senior White House staff members. Media reports focused on the fact that Minter is a transgender man. *Huffington Post*, June 8.

The Pennsylvania Senate voted unanimously to confirm **DR. RACHEL LEVINE**, a transgender woman, to be the state's Physician General and serve as a cabinet-level appointment and chief medical advisor to the state's Department of Health. The unanimous confirmation was considered remarkable because the Senate is controlled by Republicans, who have refused to take up proposed legislation that would ban discrimination because of sexual orientation and gender identity. Governor Tom Wolf identified Dr. Levine as an expert in pediatrics and psychiatry. *AP State News*, June 9. She has also been very active in LGBT politics, serving on the board of Equality Pennsylvania, the

state's LGBT rights lobbying group. Dr. Levine is a professor of pediatrics and psychiatry at Pennsylvania State College of Medicine's Hershey Medical Center. *Advocate.com*.

ROBERTA KAPLAN, a partner at Paul Weiss who represented Edith Windsor in the epochal U.S. Supreme Court case of *U.S. v. Windsor*, ending the refusal by the federal government to recognize same-sex marriages, was awarded an honorary doctorate by the Jewish Theological Seminary of America (JTS). JTS is the flagship rabbinical school of the Conservative Movement of American Judaism. The awarding of this degree shows the important distance that JTS and Conservative Judaism have progressed on LGBT issues. In 1990, JTS refused to allow NYC's LGBT synagogue to list its rabbi search with the seminaries placement office, and at that time had not yet progressed to the position of allowing openly gay people to enroll in its rabbinical training program. Today there are openly gay and lesbian Conservative rabbis, and the Conservative movement files pro-gay amicus briefs in Supreme Court cases.

The Tennessean published a lengthy tribute on July 9 to **ABBY RUBENFELD**, a Tennessee lawyer who was the first legal director of Lambda Legal Defense & Education Fund in the 1980s and, more recently, the lead attorney in a Tennessee marriage equality case that became part of *Obergefell v. Hodges* before the Supreme Court.

The Transgender Legal Defense Fund has honored the law firm **DAVIS POLK & WARDWELL LLP** at its annual Freedom Awards benefit in New York on June 1. Davis Polk has provided pro bono services assisting 175 transgender people with their name-change petitions through TLDEF's Name Change Project.



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PUBLICATIONS NOTED

1. Appleton, Susan Frelich, Surrogacy and *Windsor's* Penumbra, 90 Wash. L. Rev. Online 43 (2015).
2. Arkles, Gabriel, Regulating Prison Sexual Violence, 7 Northeastern U. L. J. 71 (2015).
3. Assil, Sanam, Can You Work It? Or Flip It and Reverse It?: Protecting LGBT Youth From Sexual Orientation Change Efforts, 21 Cardozo J.L. & Gender 551 (Winter 2015).
4. Balent, Alvan, Jr., Get It Right, Florida: Why the Florida Supreme Court Should Rule that Equal Protection Claims of Sexual Orientation Discrimination Receive Intermediate Scrutiny, 44 Stetson L. Rev. 759 (Spring 2015).
5. Box, Lauren, It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation, 48 Ind. L. Rev. 995 (2015) (making the economic case for LGBT rights).
6. Chang, Helen, California Putative Spouses: The Innocent, the Guilty, and the Law, 44 Sw. L. Rev. 327 (2014).
7. Coleman, Franciska A., Democracy and the Other: The Inverse Relationship Between Majority Rule and a Heterogeneous Citizenry, 117 W. Va. L. Rev. 1153 (Spring 2015).
8. Courtney, Paul Vincent, Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach, 163 U. Pa. L. Rev. 1497 (2015).
9. Dailey, Anne C., The Psychodynamics of Sexual Choice, 57 Ariz. L. Rev. 343 (2015) (suggests that under the precedent of *Lawrence v. Texas*, criminal liability for consensual adult S&M sex should generally not be imposed).
10. Den Otter, Ronald C., Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015).
11. Dillender, Marcus, Health Insurance and Labor Force Participation: What Legal Recognition Does for Same-Sex Couples, 33 Contemp. Econ. Pol'y 381 (2015).
12. Ertman, Matha M., Love's Promise: How Formal and Informal Contracts Shape All Kinds of Families (Boston: Beacon Press, 2015) (part of series: Queer Action/Queer Ideas) (see below under Specially Noted).
13. Faderman, Lillian The Gay Revolution (N.Y.: Simon & Schuster [ISBN: 978-1-4516-9411-6], 2015) (history of the struggle for gay rights in the United States, through the 2013 US Supreme Court decision of *U.S. v. Windsor*).
14. Fellmeth, Aaron X., Leading From (A Bit) Behind: The United States and International Human Rights Law, 40 N.C. J. Int'l L. & Com. Reg. 977 (Summer 2015) (US falls short by not protecting gays from discrimination).
15. Fore, Wyatt, *DeBoer v. Snyder*: A Case Study in Litigation and Social Reform, 22 Mich. J. Gender & L. 169 (2015) (one of the consolidated cases making up *Obergefell v. Hodges*).
16. Forward (The Editors), Paper Symposium: Polygamous Unions? Charting the Contours of Marriage Law's Frontier, 64 Emory L.J. 1669 (2015) (individual articles noted by authors).
17. Goldnick, Layla, Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy For Its Victims, 21 Cardozo J.L. & Gender 583 (Winter 2015).
18. Gordon, Andrew J., End Around: HIV Discrimination in the Post-Amendments Act Workplace, 36 Berkeley J. Emp. & Lab. L. 215 (2015) (how the lack of federal statutory protection against sexual orientation discrimination undermines the policy goal of protecting people living with HIV under the ADA Amendments Act of 2008).
19. Greene, Abner S., Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?, 9 Harv. L. & Pol'y Rev. 161 (Winter 2015) (critiques aspects of *Hobby Lobby* decision; recognizes the problem in the same-sex marriage context with small businesses that have religious objections to providing goods and services, but punts....).
20. Griffin, Leslie C., Hobby Lobby: The Crafty Case That Threatens Women's Rights and Religious Freedom, 42 Hastings Const. L.Q. 641 (Summer 2015) (shows inconsistency between Hobby Lobby and same-sex marriage cases that reject the imposition of religious beliefs on non-believers).
21. Guiora, Amos N., No Excuses: Protection the Vulnerable after *Brown v. Buhman*, 35 N. Ill. U. L. Rev. 317 (Spring 2015) (Offering documentation of harmful effects of polygamous cohabitation in response to district court's invalidation of Utah criminal cohabitation statute for lack of evidence of harmful effects; note that briefing is completed on the state's appeal which will be argued in the 10th Circuit soon).
22. Haley, Daniel, Bound by Law: A Roadmap for the Practical Legalization of BDSM, 21 Cardozo J.L. & Gender 631 (Winter 2015) (We would never have expected to find an article of this type in Yeshiva University's Law Review. . . How times have changed!).
23. Hamilton, Marci A., The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy, 9 Harv. L. & Pol'y Rev. 129 (Winter 2015).
24. Hawkins, Stacy, Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality, 66 Mercer L. Rev. 577 (Spring 2015).
25. Henry, Chris, Wider Vision: Hate Speech Law, Public Opinion and Homosexual Rights in Germany and the United States, 30 Conn. J. Int'l L. 123 (Spring 2015).
26. Hermann, Donald H.J., Defending the Public Good and Traditional Society: Non-Scriptural Religious Objections to Same-Sex Marriage, 49 Val. U. L. Rev. 1 (Fall 2014).
27. Higdon, Amy E., and Emily J. Barry, Recent Developments in Indiana Family Law, 48 Ind. L. Rev. 1297 (2015) (includes brief discussion of same-sex marriage developments in 2014 and custody/visitation issues pre-dating marriage equality in Indiana).
28. Inks, Nathan, The Issue of Standing in *United States v. Windsor*: A Constitutional Error That Impacted the Integrity of the Judicial Process, 60 Wayne L. Rev. 891 (Spring 2015) (argues S. Ct. should have found that federal government did not have standing to appeal in *U.S. v. Windsor*).
29. Jackson, Vicki C., Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094 (June 2015) (argues that courts should use balancing tests more frequently in deciding constitutional claims).
30. Johnson, Michael, Institutionalized Indifference: Rape with a View, 23 J. Prisoners on Prisons No. 1 (2014).
31. Joslin, Courtney G., Marital Status Discrimination, 95 B.U.L. Rev. 805 (May 2015) (argument for expanding federal

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- laws to prohibit discrimination because of marital status).
32. Knauer, Nancy J., LGBT Elders in a Post-*Windsor* World: The Promise and Limits of Marriage Equality, 24 Tex. J. Women, Gender, & L. 1 (Fall 2014).
 33. Kovalchek, Brielle N., Do Actions Speak Louder Than Words?: An Analysis of Conversion Therapy as Protected Speech versus Unprotected Conduct, 16 Rutgers J. L. & Religion 428 (Spring 2015) (While stating agreement with conclusion that bans on practice of conversion therapy by licensed health-care providers on minors are not unconstitutional, prefers 3rd Circuit's protected speech approach over 9th Circuit's unprotected conduct approach).
 34. Lobo, James, Behind the Venire: Rationale, Rewards and Ramifications of Heightened Scrutiny and the Ninth Circuit's Extension of Equal Protection to Gays and Lesbians During Jury Selection in *SmithKline v. Abbott*, 56 B.C. L. Rev. E-Supplement 106 (2015) (contends that abolition of peremptory strikes would be more beneficial to gay potential jurors than the 9th Circuit's application of Batson).
 35. Marvel, Stu, The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage, 64 Emory L.J. 2047 (2015).
 36. McClain, Linda C., The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways", 95 B.U. L. Rev. 891 (May 2015) (the role of arguments about morality in the enactment of civil rights laws).
 37. McDaniel-Miccio, Kris, Tzadek, Tzadek Tirdof – Justice, Justice You Shall Pursue: *Romer*, *Lawrence*, & *Windsor*: A Critique of Justice Scalia's Dissenting Opinions, 21 Cardozo J.L. & Gender 317 (Winter 2015) (Calling out Justice Scalia for infusing religious belief and ideology into his dissenting opinions in LGB rights cases).
 38. McMillian, Jacob R., After "I Do", 62-JUN Fed. Law. 42 (June 2015) (discusses legal priorities for the LGBT rights movement after a Supreme Court decision in *Obergefell v. Hodges*).
 39. Moser, Megan, Intestacy Concerns for Same-Sex Couples: How Variations in State Law and Policy Affect Testamentary Wishes, 38 Seattle U. L. Rev. 1523 (Summer 2015)
 40. Murray, Melissa, Griswold's Criminal Law, 47 Conn. L. Rev. 1045 (May 2015) (How the Griswold case's right to privacy holding worked a major reform in criminal law culminating in *Lawrence v. Texas*).
 41. Nejaime, Douglas, and Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516 (May 2015) (the dangers of recognizing religious liberty claims that have third-party effects).
 42. Palmer, Shane, No Legs to Stand On: Article III Injury and Official Proponents of State Voter Initiatives, 62 UCLA L. Rev. 1056 (May 2015) (argues that *Hollingsworth v. Perry* should be overruled and that state initiative proponents should be allowed to appeal adverse decisions when state officials refuse to defend the constitutionality of initiative measures).
 43. Pizer, Jennifer C., Navigating the Minefield: *Hobby Lobby* and Religious Accommodation in the Age of Civil Rights, 9 Harv. L. & Pol'y Rev. 1 (Winter 2015).
 44. Pomerance, Benjamin, What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court, 1 Belmont L. Rev. 221 (2014) (After the Senate refused to confirm President Reagan's appointment of Robert Bork to the Supreme Court, the position as eventually filled by Anthony Kennedy; author explores how key cases might have been decided had Bork been confirmed; conclusion that the gay rights case would have come out the same way, although Bork would not have voted as Kennedy did in *Romer* and *Lawrence* [article does not consider *Windsor*]).
 45. Porter, Jonathan A., L'Amour for Four: Polygyny, Polyamory, and the State's Compelling Economic Interest in Normative Monogamy, 64 Emory L.J. 2093 (2015).
 46. Rienzi, Mark L., Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty, 68 Stan. L. Rev. Online 18 (May 23, 2015) (argues that a marriage equality decision premised on due process would be preferable to one premised on equal protection in order to accommodate anti-gay-marriage views in a post-*Obergefell* world).
 47. Rocha, James, The Homophobic Sexual Harassment Claim and Sexuality Discrimination 28 Ratio Juris 204 (2015).
 48. Sachs, Stephen E., Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817 (Summer 2015).
 49. Singer, Joseph William, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B.U. L. Rev. 929 (2015).
 50. Strassberg, Maura I., Scrutinizing Polygamy: Utah's *Brown v. Buhman* and British Columbia's Reference Re: Section 293, 64 Emory L.J. 1815 (2015).
 51. Strauss, Gregg, Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage, 90 Ind. L.J. 1261 (Summer 2015) (responding to suggestions that states abandon legal marriage as a response to the movement for marriage equality).
 52. Tebbe, Nelson, Religion and Marriage Equality Statutes, 9 Harv. L. & Pol'y Rev. 25 (Winter 2015) (alert to the dangers of religious exemptions in marriage equality laws).
 53. Thompson, Erik S., Compromising Equality: An Analysis of the Religious Exemption in the Employment Non-Discrimination Act and Its Impact on LGBT Workers, 35 B.C. J.L. & Soc. Just. 285 (Spring 2015).
 54. Turley, Jonathan, The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions, 64 Emory L.J. 1905 (2015).
 55. Vanderhorst, Blaise, Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex, 9 Harv. L. & Pol'y Rev. 241 (Winter 2015).
 56. Williams, Parker, Scrutiny of the Venire, Scrutiny from the Bench: *SmithKline Beecham Corp. v. Abbott Laboratories* and the Application of Heightened Scrutiny to Sexual Orientation Classifications, 64 Cath. U. L. Rev. 803 (Spring 2015).
 57. Witte, John, Jr., Why Two in the Flesh? The Western Case for Monogamy Over Polygamy, 64 Emory L.J. 1675 (2015) (lengthy exploration of arguments pro and con on legalizing polygamy, demonstrating why allowing same-sex marriage does not require allowing polygamy).

EDITOR'S NOTES

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

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All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please submit all correspondence to info@le-gal.org.

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SPECIALY NOTED

In *Love's Promises* (Beacon Press, 2015), Prof. Martha M. Ertman has provided an eminently readable and useful book about the role of contracts in the new family diversity landscape. Although the book predates the Supreme Court's decision in *Obergefell v. Hodges*, it remains timely for all those dealing with LGBT family law as it explores the formal and informal agreements characteristic of "non-traditional" families, discusses how such agreements can be used to the advantage of the parties, and suggests strategies for legal planning for such families. At the time the book was completed, same-sex couples could already marry in many states and the book takes this into account in its discussion of the application of contract principles to family formation. The legal discussion is humanized with many examples from the author's life experience as a lesbian mother maintaining a continuing contractual relationship with the good gay male friend who agreed to be her sperm donor and to assume some parenting responsibilities as well as her same-sex partner/spouse, whose relationship with her post-dates the birth of her child. Their family relationship is embodied in their own written contract. * * * In *Equal Before the Law: How Iowa Led Americans to Marriage Equality (Iowa and the Midwest Experience)*, *Des Moines Register* reporters Tom Witosky and Marc Hansen present a detailed account of how marriage equality came to Iowa through the first unanimous state supreme court decision for same-sex marriage. This is a paperback original published by the University of Iowa Press on June 1, 2015.

The Williams Institute at UCLA Law School has announced the Dukeminier Awards Journal for 2014, with the following articles reprinted from their original publications as the Best Sexual Orientation and Gender Identity Law Review Articles of 2014: Jessica Clarke, *Inferring Desire* (Duke L.J.); Brian Coucek, *Perceived Homosexuals: Looking Gay Enough for Title VII* (Am. U. L. Rev.); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates* (Ind. L.J.); Andrew Karp, "A Sincerely Held Belief": What LGBT Refugee and Asylum Law Can Learn from Free Exercise Claims and Post-DOMA Immigration Benefits for Same-Sex Couples (Jeffrey S. Haber Price for Student Scholarship).