L G B T
LAW NOTES
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4TH CIRCUIT RULING CALLS H.B. 2 INTO QUESTION

Public Educational Institutions Enforcing Bathroom Provisions Would Violate Federal Law

EXECUTIVE SUMMARY

L G B T LAW NOTES

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4th Circuit Revives Transgender Teen's Title IX Restroom Access Claim against Virginia School Board

A three-judge panel of the U.S. Court of Appeals for the 4th Circuit voted 2-1 on April 19 that U.S. District Judge Robert G. Doumar erred by not deferring to the U.S. Department of Education's interpretation of its regulations to require schools to let transgender students use restrooms consistent with their gender identity. Judge Doumar had dismissed a claim by G.G., a teenage transgender boy attending high school in Gloucester County, Virginia, that the school violated his statutory rights under Title IX of the Education Amendments Act by adopting a rule that he could use only restrooms designated for girls or unisex single-user restrooms. The court referred to the plaintiff by his initials throughout the opinion to guard his privacy, but the ACLU's press releases about the case identify him as Gavin Grimm. *G.G. v. Gloucester County School Board*, 2016 U.S. App. LEXIS 7026, 2016 WL 1567467 (April 19, 2016).

The high school had accommodated G.G. when, at the beginning of his sophomore year in August 2014, he informed school officials that he was transitioning, had gotten a legal name change, and would be expressing his male gender identity, by letting him use the boys' restroom. After several weeks without serious incident, some parents alerted to the situation by their children objected. They pushed the school board to adopt its resolution after two public meetings in which indignant parents threatened the board members with political retribution if they did not adopt the restrictive policy. G.G., now 16, has not undergone reassignment surgery, which is not available to minors under the prevailing medical standards for treating gender dysphoria, but has transitioned in all other respects and identifies fully as male.

The 4th Circuit is the first federal appeals court to rule that the Education Department's interpretation of Title IX, as expressed in an opinion letter by the Department's Office of Civil Rights on January 7, 2015, in response to this controversy, should be followed by the federal courts. Since North Carolina is also within the 4th Circuit, this ruling, as it now stands, suggests that the "bathroom" provisions of the notorious H.B. 2, at least as they apply to public educational institutions, violate federal law, as the ACLU and Lambda Legal have argued in a lawsuit challenging that statute pending in the U.S. District Court in North Carolina.

Since North Carolina is also within the 4th Circuit, this ruling, as it now stands, suggests that the "bathroom" provisions of the notorious H.B. 2 violate federal law.

Writing for the majority of the panel, Circuit Judge Henry F. Floyd observed that the court's role in a case involving an administrative agency's interpretation of a statute is most deferential when the statute and the official regulations that have been adopted by the agency are ambiguous regarding the particular issue in dispute. Title IX says that educational institutions that receive federal funds may not discriminate because of sex. The regulations, adopted decades ago, provide that educational institutions may designate separate facilities for use by males and females, so long as the facilities are equal in quality, but never directly address how to deal with transgender individuals whose "biological sex" differs from their gender identity. In this respect, concluded a majority of the court, the regulations are "ambiguous." As such, the court should defer to the Department's interpretation of the regulations when they are a reasonable interpretation of the statute. Indeed, wrote Floyd, the Department's interpretation is entitled to deference "unless the [school] board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute."

District Judge Doumar had concluded that the regulations were not ambiguous, and refused to defer to the Department interpretation. Judge Floyd devoted a section of his opinion to explaining why the regulations are ambiguous. "We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading – determining maleness or femaleness with reference exclusively to genitalia – and the Department's interpretation – determining maleness or femaleness with reference to gender identity." When language can support alternative readings, there is ambiguity. "The Department's interpretation resolves the ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity."

Protesting against this conclusion, dissenting Circuit Judge Paul Niemeyer (who was, incidentally, also a dissenter in the 4th Circuit's Virginia marriage equality decision in 2014), found that

it would produce unacceptable results by violating the "physiological privacy interest" of students who did not want to share restroom facilities with students whose biological sex differed from theirs. Judge Niemeyer essentially articulated, in more elevated terms, the arguments that North Carolina Governor Pat McCrory has been making in defense of the "bathroom" provisions in H.B. 2: that the privacy concerns of students who object to sharing facilities with transgender students should take priority over the interests of the transgender students.

But Judge Niemeyer doesn't put it quite so crudely. Indeed, he suggests that the opinion letter from the Department authorized just what the school board did, by opining that schools could accommodate the needs of transgender students by providing unisex single-occupancy facilities for them to use. Judge Floyd points out, however, that the Department's advice was to provide such facilities for students who did not want to use multiple-use facilities. In this case, G.G. wants to use the male-designated multiple-use facility as being congruent with his gender identity. As to the privacy concerns, the court noted that the school board has made physical modifications in the boys' restrooms by adding partitions between urinals and taping over visual gaps in the toilet stalls so as to enhance the privacy of all users.

Judge Floyd emphasized that because G.G. was only contesting the school board's policy on restrooms, the court did not have to deal with the question whether other single-sex facilities, such as locker rooms and shower rooms, would have to be open to transgender students as well. Judge Niemeyer observed that discrimination "because of sex" had to mean the same thing throughout the statute and regulations, so he argued that the majority opinion opened up the door to allowing transgender students to claim a right of access to all such sex-designated facilities.

In a somewhat unintentionally humorous footnote, Judge Floyd noted the school board's argument, reiterated in Judge Niemeyer's dissent, that allowing biological males into the girls' restrooms and biological females into the boys' restrooms could produce "danger caused by 'sexual responses prompted by students' exposure to the private body parts of students of the other biological sex.'" Floyd observed, perhaps tongue in cheek, "The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the 'sexual responses prompted' by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms." Yes! Here is a federal judge with real empathy for hormone-infused teenagers of every sexual orientation and gender identity!

In addition to appealing Judge Doumar's dismissal of his Title IX claim, G.G. was also appealing Judge Doumar's refusal to issue a preliminary injunction that would require the school board to let him use the boys' restroom facilities while the case proceeded. Judge Doumar had refrained from ruling on G.G.'s constitutional equal protection claim, so his case was still alive before the district court, even though his Title IX claim was dismissed. Judge Doumar had focused his refusal of injunctive relief on his determination that G.G. failed to show that he would suffer irreparable harm if he was excluded from the boys' restrooms while the case was pending.

The majority of the panel concluded that Doumar had wrongly refused to give appropriate consideration to the evidence presented by G.G. and his medical expert on this point, applying too strict a standard for considering evidence in the context of a motion for a preliminary injunction. The majority concluded that the appropriate step was to reverse the dismissal of the Title IX claim and send the case back to the district court for reconsideration of the motion for preliminary injunction, applying the correct evidentiary standard. This means that G.G. will be back to square one before the district court, but with the wind of the court of appeals decision behind his back on key issues in the case.

G.G. had asked the court of appeals to reassign the case to another district judge. Judge Doumar made various comments in court that suggested bias, or at least a refusal to believe in the validity of the concept of gender identity, with references to G.G. as a girl who wanted to be a boy. However, Judge Floyd pointed out, none of that objectionable language appeared in the written opinion that Judge Doumar released to explain his ruling, and the court was not going to conclude at this point that Doumar would not give appropriate consideration to the evidence when called upon by the court of appeals to reconsider his ruling, so the court denied G.G.'s request and the case will return to Judge Doumar.

The third member of the panel, Senior Circuit Judge Andre M. Davis, agreed with Judge Floyd that the Title IX claim should be revived, but would have gone further, contending that G.G. had satisfied the requirements for a preliminary injunction. However, since the grant of such an injunction is a matter within the discretion of the trial judge, he ultimately agreed to "defer to the district court in this instance. It is to be hoped," he continued, "that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year."

Judge `Niemeyer's dissent, reminiscent of his dissent in the Virginia marriage equality case, harps on the "unprecedented" nature of the ruling, asserting that the court's "holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect." He also accused the majority of misconstruing the language of Title IX and its regulations, and concluded that "it reaches an unworkable and illogical result."

G.G. is represented by the ACLU of Virginia and the ACLU's national LGBT Project. Joshua Block argued the appeal on his behalf on January 27. ■

Ninth Circuit Revives Loincloth-Wearing Gay Man's Constitutional Discrimination Suit

On April 5, 2016, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit concluded that the district court erred in granting summary judgment to the City of San Diego and several police officers against a gay man arrested at San Diego Pride in 2011. *Walters v. Nieslit*, 2016 U.S. App. LEXIS 6239, 2016 WL 1320762 (9th Cir.). The short, unsigned opinion was joined by Senior Judge Harry Pregerson and Judges Richard A. Paez and Jacqueline Nguyen.

Will X. Walters was arrested for violating San Diego's public nudity ordinance. San Diego Municipal Code § 56.53 forbids persons over the age of 10 from being "nude and exposed to public view." For males, "nude" is defined as "devoid of an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region of any person."

On the day of his arrest, he was wearing a "gladiator-type black leather loincloth" with a g-string underneath. After gaining admission to the Pride event, he entered the beer garden where he had an initial confrontation with a police lieutenant who told him to cover up. After Walters told him "I'm not interested in your opinion," the lieutenant met up with other officers and told them about Walters' outfit. One of those officers then saw Walters when the wind was blowing, lifting up the back of his loincloth and exposing his buttocks. Another officer directed Walters to talk to him, but Walters refused to comply. He was then arrested and physically escorted out of the beer garden.

Walters believed that the entire episode was not about enforcing a public nudity ordinance, but rather a conspiracy to discriminate against a gay man participating in a pride event. With that in mind, Walters filed a § 1983 civil rights action with seven claims against the City of San Diego and the police officers involved: (1) injunctive relief for a discriminatory policy, (2) individual Fourteenth Amendment equal protection violation, (3) Fourth Amendment search and seizure violation, (4) false arrest, (5) battery, (6) negligence, and (7) California Civil Code § 52.1 Civil Rights Violation (the Bane Act). He also made similar claims against San Diego Pride; all defendants moved for summary judgment.

District Court Judge Cathy Ann Bencivengo found in March 2014 "[t]here is nothing in the record that reasonably suggests sexual orientation had anything to do with the decision to insist upon compliance with the literal text of § 56.53 at the 2011 Pride Event." *Walters v. San Diego*, 2014 U.S. Dist. LEXIS 32176 (S.D. Cal. Mar. 11, 2014). She further noted there was "no evidence that the San Diego Pride Defendants entered into a conspiracy with the [police] or willfully sought to implement an unlawful policy of discriminatory and selective enforcement of San Diego's public nudity laws." Bencivengo in turn granted summary judgment to all defendants on all claims and Walters appealed to the Ninth Circuit.

They added that an officer called Walters a "drama queen" for further evidence of a discriminatory purpose.

Although he had to wait two years for vindication (and five since the arrest), it finally came. The Ninth Circuit panel was, at least, much more sympathetic to Walters' theory of the case, repeatedly resting on the standard civil procedure adage that all evidence must be viewed in the light most favorable to a plaintiff at the summary judgment stage.

The panel saw "material triable issues of fact as to whether the San Diego Police Department . . . adopted a discriminatory policy of selectively enforcing the City's nudity ordinance at San Diego Gay Pride," including evidence of a planning meeting with police and volunteers before the Pride Event where a more restrictive policy was announced and the lack of any increased enforcement of the ordinance at other San Diego events.

In addition, the judges also found disputes on the equal protection claim for discriminatory effect and purpose, first citing evidence that 12 to 15 other attendees were warned to cover up but not arrested. Moreover, according to them, "Walters is entitled at the summary judgment stage to an inference that targeting Pride Event attendees is tantamount to targeting gay individuals and individuals who support gay rights." They added that an officer called Walters a "drama queen" for further evidence of a discriminatory purpose. Therefore, the panel reversed the granting of summary judgment against the City and Lieutenant Nieslit and remanded the case to the district court for further proceedings.

After reversing on the policy claim, the court also reversed on Walters' individual equal protection claim, as well as his negligence and Bane Act claims. At oral argument, Walters' counsel conceded that the individual defendants were entitled to qualified immunity on the Fourth Amendment claims, and agreed to dismiss his false arrest and battery claims, so the panel affirmed the district court's qualified immunity determination and the grant of summary judgment on the false arrest claim. Walters waived any challenge on his battery claim by failing to raise it in his opening brief.

Walters is represented by Christopher Morris of the Morris Law Firm in San Diego. – *Matthew Skinner*

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

Mississippi Enacts Sweeping Anti-LGBT Law

On April 5, Mississippi Governor Phil Bryant signed HB 1523 into law. Critics characterized the measure as a "sweeping" law that targets LGBT people, single mothers, and anyone who has a sexual relationship outside a heterosexual marriage, by effectively allowing people with religious objections to discriminate against them. Discrimination is allowed by people and businesses who, based on their religious convictions, believe that marriage is only appropriate for different-sex couples, that sexual relationships should only take place within heterosexual marriages, and that the terms "male" and "female" refer only to an individual's immutable sex as "determined by genetics and anatomy at the time of birth."

According to a summary of the law prepared by Lambda Legal, among those who may discriminate based on such beliefs without any state or local law impediment or consequence are individuals, private businesses, medical and social service agencies, licensed health professionals, schools, foster and adoptive parents, and some government actors. These beliefs can be cited to refuse counseling services, foster care, and child adoption services. Foster parents may impose anti-LGBT religious beliefs on the youths in their care. Transgender students and employees can be barred from using sex-designated facilities that are consistent with their gender identity, and health care providers can deny services to transgender people. Psychological services, counseling, or fertility treatments can be denied to LGBT or non-marital heterosexual couples based on the provider's religious beliefs, and public employees can refuse to issue marriage licenses or solemnize marriage if they "sincerely" believe that such marriages are unacceptable. For-profit businesses that provide wedding-related goods or services can deny them if they have religious objections to the weddings due to their same-sex nature, and religious organizations have carte blanche to discriminate. State or local governments are barred from imposing fines, denying grants or contracts or favorable tax status, denying professional licensing, refusing to hire, or taking other actions against those who discriminate because of religious anti-LGBT beliefs. In short, Mississippi has exalted anti-LGBT religious beliefs to a privileged position, according "special rights" to those who hold such beliefs.

Less controversially, perhaps, the law shields clergy from discrimination charges or a loss of tax-deductible status for their institutions if they refuse to officiate at same-sex marriage ceremonies for religious reasons. Such "pastor protection" measures are, of course, totally unnecessary, as nobody would seriously contend that the government can require clergy to perform wedding ceremonies against their religious beliefs or that a court would seriously entertain any sort of civil or criminal claim against clergy for such a refusal. Since the measure allows government employees with religious objections to refuse to issue marriage licenses, the legislature implicitly conceded that it must abide by the Supreme Court's *Obergefell* ruling by providing that objecting employees have a duty to make sure that somehow their offices provide the necessary services, whether it involves issuing licenses, officiating at civil marriage ceremonies, or recording marriages that have been performed.

One exception to the general authorization to discriminate involves health care institutions. Religiously-affiliated health care institutions are subject to federal rules because they all receive federal money, so they are not authorized to deny health care services or to refuse to honor same-sex spousal rights when it comes to patient access and decision-making as a matter of federal law, no matter what the state law says. Similarly, employers and institutions subject to federal sex discrimination law (such as Title VII and Title IX) cannot set up this state law as a defense to a federal discrimination claim. However, at present it is not fully established with definitive federal appellate precedents that these laws outlaw sexual orientation and gender identity discrimination, although the relevant administrative agencies and the Justice Department have taken that position.

Since neither Mississippi law nor local ordinances specifically outlawed discrimination against LGBT people, Governor Bryant insisted that the law was not taking away rights that people had, which may be technically correct, but the law has the effect of signaling to people and businesses that anti-LGBT discrimination is acceptable and carries no state or local law penalty, thus giving license to discriminate and, in effect, encouraging such discrimination.

The law was scheduled to go into effect on July 1, 2016. As had been the case with North Carolina's H.B. 2, the measure immediately stimulated widespread condemnation, and government leaders in other jurisdictions began announcing bans on official travel to Mississippi. Among those were: New York Governor Andrew Cuomo, Connecticut Governor Dannel P. Malloy, Minnesota Governor Mark Dayton, Washington Governor Jay Inslee, Santa Fe (New Mexico) Mayor Javier Gonzales, Providence (Rhode Island) Mayor Jorge O. Elorza, Los Angeles (California) Mayor Eric Garcetti (in concert with the City Council), Dane County (Wisconsin) Executive Joe Parisi. The City Council in Cincinnati (Ohio) voted to ban all unnecessary travel to Mississippi. After Portland (Oregon) Mayor Charles Hales announced that he would refuse to travel to Mississippi for the scheduled commissioning of the U.S.S. Portland, the Navy agreed to sale the ship up to Portland for the commissioning ceremony. *katu.com*, April 11.

In Jackson, Mississippi, the City Council reacted to the enactment of the new law with a unanimously passed resolution stating that Jackson acknowledges the U.S. Constitution, which prohibits governments from establishing religion and protects all people equally under the law. The measure was entitled "Resolution to Commitment to Diversity and Hospitality." *Clarion Ledger*, April 5. The Biloxi City Council unanimously passed a resolution calling for repeal of the measure. *wlox.com*, April 19. ■

New Judge Rules for Plaintiffs in Puerto Rico Marriage Equality Case

On April 7, U.S. District Judge Gustavo A. Gelpi issued an order declaring the Commonwealth of Puerto Rico's statutory ban on same-sex marriage unconstitutional in *Conde-Vidal v. Padilla*, Civil No. 14-1253 (GAG) (D. P. R., April 7, 2016). This was a bit of an anti-climax, since the state government had been complying with the Supreme Court's marriage equality ruling since last summer while awaiting some action in the lawsuit pending in federal court, but the pathway to the April 7 Order was not easy.

Lambda Legal represented a group of Puerto Rico residents who filed suit challenging the constitutionality of the statutory ban, Article 68 of the Puerto Rico Civil Code, title 31, section 221, after the Supreme Court had declared DOMA unconstitutional. At a time when federal trial judges around the country seemed to be competing with each other to see how fast they could strike down state bans on same-sex marriage, District Judge Juan M. Perez-Gimenez was determined to be an outlier. On October 21, 2014, he granted the Commonwealth's motion to dismiss the case in *Conde-Vidal v. Garcia-Padilla*, 54 F.Supp.3d 157 (D.P.R. 2014), relying on the Supreme Court's decades-old *Baker v. Nelson* ruling and the lack of any marriage equality ruling by the federal courts in the First Circuit. (The First Circuit comprises most of the New England states, where marriage equality was achieved through state court litigation, referenda and state legislative action, without any assistance from the federal courts.)

This dismissal seemed particularly odd because it came just a few weeks after the Supreme Court refused to review the pro-marriage equality rulings by federal appeals courts in the 4th, 7th and 10th Circuits, and those circuit courts had all ruled that *Baker v. Nelson* was no longer a controlling precedent.

Lambda filed an appeal to the 1st Circuit, which then put the appeal on hold when the Supreme Court announced early in 2015 that it would review an anti-marriage equality decision that had been issued by the 6th Circuit Court of Appeals in Cincinnati.

Shortly after the Supreme Court ruled in *Obergefell v. Hodges* on June 26, 2015, that state bans on same-sex marriage violate the 14th Amendment, Puerto Rico Governor Alejandro Garcia-Padilla, the lead defendant in Lambda's case, issued an order that the state government comply with the Supreme Court's ruling, and the Commonwealth agreed to file a joint motion with Lambda in the 1st Circuit, informing that court that all parties to the case agreed that the Puerto Rico ban was unconstitutional. The 1st Circuit agreed as well, vacated Judge Perez-Gimenez's decision on July 8, 2015, and sent the case back to him "for further consideration in light of *Obergefell*." At that time, the 1st Circuit stated, "We agree with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith."

But Judge Perez-Gimenez did not take action "forthwith." Instead, he pondered for eight months, and then issued a peculiar decision on March 8, 2016, 2016 U.S. Dist. LEXIS 29651, 2016 WL 901899 (D.P.R. 2016), stating that the Supreme Court's decision did not necessarily apply to Puerto Rico because of its commonwealth status. This was nonsense, because a U.S. Supreme Court decision in 1976, *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, had ruled that the residents of Puerto Rico are entitled to the rights protected under the 14th Amendment, which was the provision underlying the marriage equality ruling.

Once again, Lambda Legal petitioned the 1st Circuit, which responded on April 7: "The district court's ruling errs in so many respects," said the court, "that it is hard to know where to begin." After pointing out the 1976 Supreme Court ruling, the court observed that its own mandate from July 8 was clear, and the federal district court was obligated to follow it.

Once again, Lambda Legal petitioned the 1st Circuit, which responded on April 7: "The district court's ruling errs in so many respects," said the court, "that it is hard to know where to begin."

The appeals court ordered that the clerk of the district court randomly assign the case to a different judge "to enter judgment in favor of the Petitioners promptly, and to conduct any further proceedings necessary in this action."

Acting with alacrity, the clerk reassigned the case immediately to Judge Gelpi, who quickly issued his Order the same afternoon. As part of the Order, Judge Gelpi scheduled a conference of the lawyers in the case in his chambers to meet on April 11, by which time he hoped they would have drafted a joint stipulation for him to endorse as the final judgment in the case. Once that is done, presumably, the plaintiffs can file a motion for attorney fees and costs as the prevailing parties. ■

Federal Judge Dismisses "Failure to Protect" Claim of Transgender Inmate Raped in Unsupervised Area

Transgender inmate LeslieAnn Manning had a prison job assisting blind and deaf inmates in a classroom area shared with a sex offender's group when she was raped by another inmate known to be sexually violent at New York's Sullivan Correctional Facility. Represented by two law school clinics (Cardozo and Cornell), Manning filed a 24-page amended complaint, detailing her history and the events leading up to the rape and suing the entire Sullivan table of organization, from the warden through the correction officer assigned to her work area and her civilian supervisor. United States District Judge Kenneth M. Karas dismissed her claim of deliberate indifference to her safety under the Eighth Amendment in *Manning v. Griffin*, 2016 WL 1274588 (S.D.N.Y., March 31, 2016), finding the specificity of her pleadings inadequate.

Manning had been incarcerated for over two decades before she was transferred to Sullivan, a 600-bed maximum-security institution. In addition to presenting as a female in a male institution, Manning is frail and physically compromised from multiple medical conditions. During her incarceration, she has "fought to have her gender identity recognized" – changing her legal name and twice suing to obtain hormone treatment and female garments. Her file showed notice of her vulnerability, including letters on her behalf from the Sylvia Rivera Law Project, complaining about transphobic officer harassment (including squeezing her breasts) before and at Sullivan. Manning was raped by an inmate who had access to the unsupervised classroom area ("Sublevel E") and who had been transferred to Sullivan after sexually assaulting an inmate at nearby Woodbourne Correctional Facility.

Judge Karas analyzes defendants' liability under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), which requires knowledge of risk and deliberate indifference to the risk. He breaks Manning's arguments into four categories of proof: (1) transgender inmate vulnerability generally; (2) risks to Manning specifically; (3) history of the assailant; and (4) lack of supervision in Sublevel E. The opinion concludes that Manning pleaded sufficient detail to show (or allow inference of) knowledge of a risk to her safety by all of the defendants. Judge Karas concludes, however, that Manning failed adequately to plead deliberate indifference to that risk, primarily because she failed to establish that the defendants knew she worked in Sublevel E – except for her civilian supervisor, as to whom Judge Karas writes that Manning failed to allege "what it is [the supervisor] could have or should have done, as a civilian instructor." Yet, the Second Circuit has written about civilians in administrative and supervisory roles in corrections on numerous occasions. *See Reynolds v. Barrett*, 685 F.3d 193, 197-8 (2d Cir. 2010); *Davis v. New York*, 316 F.3d 93, 96 (2d Cir. 2002); *Horne v. Coughlin*, 155 F.3d 26, 27 (2d Cir. 1998).

Judge Karas observes that Manning's allegation that defendants allowed "isolated sublevels of the prison to remain unmonitored for most of the day and particularly *at times when they knew [Plaintiff] worked in that area*" (emphasis by the Court) is "vague and conclusory." He also observes that allowing Manning and her assailant to live in the same housing area is irrelevant because the assault occurred in the classroom area. Yet, ¶ 47 of the Amended Complaint reads: "Defendants acted with deliberate indifference to the safety of Ms. Manning by allowing a sexual predator not only to reside in the same block as a transgender female but also to occupy an unmonitored area where she was assigned to work."

Judge Karas also finds that the defendants' lack of security in Sublevel E was not actionable because there was no history of assaults in the classrooms. He also notes (twice, because it "bears repeating") that Manning reports no previous assaults by other inmates at Sullivan or elsewhere and that she did not request protective custody. No such history is required by *Farmer* (which was a summary judgment case – not a dismissal on the pleadings – and which remanded for consideration of more discovery under F.R.C.P. 56(f)). Dismissal on the pleadings here deprives Manning's counsel of a type of discovery critical to cases of this nature: a tour of the assault scene with an expert. In any event, *Farmer*'s progeny do not establish a "one-rape" zone of immunity to defendants whose conduct caused the conditions that allowed the first rape to occur.

Judge Karas sarcastically disposes of Manning's argument that the Sylvia Rivera letters showed disregard of the risk by writing: "There is a critical difference in the types of remedial measures one would expect to be taken in response to the risk of harm from correctional officers as opposed to inmates. Indeed, Plaintiff's chief criticism of Defendants' actions is that they allowed for too *few* correctional officers to supervise Sublevel E" (emphasis by the Court) – recalling the old prison saw: "lousy food and such small portions." This statement ignores the prison reality that inmates may see the unpunished conduct of officers against transgender inmates as green-lighting their own harassment or assault.

A point-by-point review of this obtusely reasoned decision is beyond the scope of this note. Suffice it to say that Judge Karas also finds insufficient pleading of the supervisory claims for similar reasons. He grants Manning's attorneys 30 days to file a Second Amended Complaint to address the Court's concerns without discovery. – *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.

Lesbian Psychologist Loses Employment Discrimination Case against University of Denver

Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado has granted summary judgment against and dismissed without prejudice all state claims made by an openly lesbian psychologist claiming sex, sexual orientation, and gender stereotyping employment discrimination claims against Colorado Seminary (doing business as The University of Denver (DU)) and her two supervisors, in *Hiatt v. Colorado Seminary*, 2016 U.S. Dist. LEXIS 45979 (April 6, 2016).

Hiatt had been hired by DU as a Staff Psychologist and Training Director for its Health and Counseling Center. She was also permitted to run her own private practice so long as it did not interfere with her DU duties. Problems for her began when she began dating a female post-doctoral student. Two American Psychological Association Code of Ethics provisions may have been violated: one forbade having sexual relationships with supervisees, and the other prohibited a psychologist from being in a professional role with one person while simultaneously being in a relationship with someone closely associated with the person with whom the psychologist has a professional role. With respect to the first, Hiatt was dating a former supervisee, but it was disputed whether the relationship began during the supervisor-supervisee relationship or afterwards. The second stemmed from the fact that the former supervisee-now-girlfriend was a good friend of Hiatt's former supervisee who learned of the relationship and was upset.

DU staff found that Hiatt's conduct "was in an ethical grey area" but also showed a "serious lack of judgment given [Hiatt's] position as a role model for the trainees." Subsequently, many of Hiatt's interns opted to no longer be supervised by her. Much dispute as to the facts followed; Hiatt eventually accepted a different position, but raised sexual orientation discrimination issues, which at the time were not investigated. Later, Hiatt was given poor performance reviews and eventually took a leave of absence. There were questions whether she was meeting performances deadlines despite accommodations, and she claimed she was being treated differently than other clinical staff. Hiatt eventually resigned and complained of "retaliation." She brought the instant suit arguing employment based sex-discrimination and retaliation under Title VII (relating to employment) and Title IX (relating to federal government-funded education institutions) as well as several state law claims. Defendants filed motions for summary judgment and to strike affidavit statements.

Judge Jackson ruled on the motions on April 5. With respect to Hiatt's sex discrimination claims, Judge Jackson noted that Hiatt argued she was discriminated against because of her sexual orientation, her sex, or because she failed to fit gender stereotypes. Judge Jackson noted the 10th Circuit Court of Appeals had not yet ruled on whether sexual orientation was a basis for Title VII discrimination and further that precedent was not clear as to whether an employee's failure to conform to gender stereotypes would always constitute a Title VII claim based on sex. Jackson found that even assuming the gender stereotype claim was available, Jackson had failed to demonstrate the two employees she proffered as similarly situated to her (comparators) actually were similarly situated based upon the fact that they all had the same supervisor, finding them to have "materially different work histories and roles," and moreover that Hiatt had formerly supervised both of them. Therefore, Judge Jackson ruled that Hiatt had failed to meet her burden of proof to show discriminatory treatment.

With respect to Hiatt's retaliation claims, Jackson found that Hiatt did not provide direct proof of retaliation, and that even if she could satisfy her burden of proof circumstantially, Defendants met their burden of proving a legitimate non-discriminatory reason for the alleged retaliatory actions, which were that Hiatt's conduct had "raised serious questions about her judgment and boundaries" and because many of her supervisees did not want her to continue in a supervisory role. Jackson ruled Hiatt was unable to overcome the proffered reasons by demonstrating pretext, when Hiatt had argued that Defendants had never actually established she dated during the supervisor-supervisee relationship. Judge Jackson noted that there was "no evidence to suggest that Defendants would have taken a different course had they had firm evidence that [the romantic relationship] began during the supervisory relationship or that Hiatt's conduct was unethical." Therefore, Judge Jackson ruled that Hiatt had failed to meet her burden of proving pretext.

Judge Jackson ruled that Hiatt had failed to meet her burden of proof to show discriminatory treatment.

Having found Hiatt to have not met her burden on the above claims, Judge Jackson granted summary judgment to Defendant on those claims. All remaining claims were state court claims. Without any remaining federal questions to ground jurisdiction, Jackson declined to exercise supplemental jurisdiction and dismissed the state claims without prejudice. She further ruled that Defendants' motion to strike was now moot and accordingly denied it. – *Bryan Johnson-Xenitelis*

Iowa Supreme Court Bars Wrongful Imprisonment Suit by HIV-Positive Man Whose Conviction Was Previously Vacated

In an unfortunate turnabout, the Iowa Supreme Court unanimously ruled on April 15 that Nick Rhoades, whose guilty-plea conviction on one count of "criminal transmission of HIV" was reversed by that court in 2014, could not bring an action for damages against the state under its Wrongful Conviction Statute because the statute does not allow claims by those who pled guilty. *Rhoades v. State of Iowa*, 2016 WL 1533519, 2016 Iowa Sup. LEXIS 47. The court declined to follow rulings in some other states interpreting similar statutes that had allowed such lawsuits when a guilty plea is vacated on appeal.

Rhoades met A.P. through a social networking website. After exchanging messages, A.P. invited Rhoades to his home and they had unprotected oral sex and anal sex with a condom. A.P. believed Rhoades to be HIV-negative based on his online profile, and they did not discuss the issue before having sex. When A.P. subsequently learned that Rhoades was HIV-positive, he contacted law enforcement and Rhoades was charged with "criminal transmission of HIV" under Iowa Code sec. 709(C).1, an inaccurately titled statute that was subsequently repealed in part due to the publicity surrounding this case, and replaced with a statute that better reflects current science on HIV transmission. Rhoades pled guilty to the charge and was sentenced to 25 years in prison, lifetime parole, and a requirement to register as a sex offender. No evidence was presented that A.P. was infected with HIV, and the statute at that time did not require evidence of actual transmission, merely exposure that could cause transmission.

Rhoades filed a motion to reconsider the sentence, stressing the lack of transmission, and the district court suspended the prison sentence and placed him on five years' probation. Then Rhoades filed an application for post-conviction relief. He claimed his trial counsel provided ineffective assistance by letting him plead guilty when there was, in his view, no factual basis for the charge. Rhoades argued that as his viral load was virtually undetectable at the time he had sex with A.P., the chance that he would transmit the virus, even through unprotected anal sex, was slight, and certainly not sufficient to meet the standard of guilt under the statute, which required "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." This was described in the statute as "intimate contact." At the time of his guilty plea, the trial judge asked Rhoades if he had engaged in "intimate contact" with A.P., without any explanation by the judge or Rhoades' trial counsel of the meaning of that term. Indeed, without an explanation, Rhoades could have believed he had violated the statute without having engaged in any penetrative sex. Although the trial and intermediate appellate courts rejected his motion, the Iowa Supreme Court reversed because, as Justice Appel writes in the current decision, "We concluded that the district court had used technical terms from the statute but that such conclusory terms were insufficient to establish that the defendant acknowledged facts consistent with the completion of the crime. We further noted the minutes of testimony and the presentence investigation report did not provide a factual basis for the element of intimate contact."

The Supreme Court had also concluded that "in light of advances in medicine" the record contained "insufficient evidence to show that Rhoades exchanged bodily fluids with A.P. or intentionally exposed A.P. to the disease." By vacating the guilty plea, the court was not concluding that Rhoades was innocent, but rather that a new trial was needed to determine his guilt, either through a properly informed guilty plea or a trial. "Because it was possible the State may have been able to establish the necessary factual basis," wrote Justice Brent R. Appel, "we directed the district court to give the State an opportunity to do so. If the State was unable to do so, we stated that the plea must be withdrawn and the State could proceed accordingly. On remand, the State dismissed the charges against Rhoades."

In the current lawsuit, Rhoades asserted a claim under Iowa Code chapter 663A for "wrongful imprisonment." That provision provides relief if two tests are met: "the individual did not plead guilty to the public offense charged, or to any lesser included offense, but was convicted by the court or by a jury of an offense classified as an aggravated misdemeanor or felony," and the claimant proves "by a clear and convincing preponderance of the evidence that the claimant is actually innocent." Thus, the legislature was not authorizing a damage claim by somebody who had been officially charged and convicted but then got off on some technicality or procedural flaw. The Supreme Court pointed out that if it were to hold that Rhoades' guilty plea was not disqualifying in this case, he would still have to prove his innocence under the repealed statute before he could receive relief. The focus of this appeal, however, was on interpretation of the guilty plea language.

Rhoades argued, with support from some cases in other jurisdictions, that a guilty plea that is vacated or nullified as the result of an appellate ruling should not stand in the way of a "wrongful imprisonment" claim, but, after a lengthy consideration of the issue, including review of the various state wrongful imprisonment statutes, the court decided to reject his claim. First, it pointed out, the statutory language was clear and did not include any statement, as was found in other state's laws, softening the guilty plea bar in certain circumstances. Justice Appel pointed out that in a separate provision the legislature had provided that somebody who is vindicated and proved innocent through DNA evidence may seek relief despite having pled guilty, and "the difference in linguistic approach between Iowa's DNA statute and the wrongful imprisonment statute offers at least some support for the view that if the legislature intended to provide relief to those who plead guilty, it knows how to do it." There was also the contention that the state "should not pay for convictions for which the accused is in part responsible." The court also noted that the overwhelming majority of criminal charges are resolved through plea bargaining, resulting in a guilty plea in exchange for an agreed sentence, and "the legislature could rationally believe

that allowing one who pleads guilty to later seek compensation from the state unduly unravels the benefit of the bargain." The court observed that as a result of the guilty plea, there is no trial record in the case, so no basis relatively contemporary with the charged acts for a court to determine whether the claimant can prove actual innocence. The court also noted the fiscal consequences of allowing such claims by defendants who pled guilty.

While acknowledging at some length the flaws in its arguments attempting to justify disqualifying Rhoades, the court ultimately retreated into a narrow view of its role in matters of statutory interpretation. "Although there are substantial arguments that a guilty plea should not disqualify a claimant from seeking compensation for wrongful imprisonment in all instances," wrote Justice Appel, "we conclude … that the legislature made a different judgment in 1997" when it enacted the statute. "Our job is to do the best we can in interpreting the meaning of legislation. We do not expand the scope of legislation based upon policy preferences. In balancing all the considerations, we think the best interpretation of Iowa Code section 663A.1(1)(b) is that it categorically excludes all persons who plead guilty from Iowa's wrongful imprisonment statute. This interpretation leads to a narrow but not impractical or absurd result. As we have stated before, if we have missed the mark, the legislature may respond to correct it." The court upheld the lower courts' dismissal of Rhoades' claim.

Justice Thomas Waterman, specially concurring, opined that most of Justice Appel's decision was unnecessary because the clear language of the statute excludes those who plead guilty from relief. Justice Bruce Zager also concurred, having dissented in the earlier case in which the court had vacated Rhoades's guilty plea, and continuing to take the view that "the record, when viewed as a whole and allowing all reasonable inference, provided an ample factual basis for his guilty plea."

Rhoades is represented in this appeal by attorney Dan Johnston of Des Moines. Since the case revolves entirely around an interpretation of an Iowa statute, there appears no basis to seek further review from the U.S. Supreme Court. ■

N.Y. Appellate Division Approves Comity for California Parentage Rights of Lesbian Co-Parent

The New York Appellate Division, Second Department, issued a unanimous ruling on April 6 affirming a decision by Suffolk County Family Court Judge Deborah Poulos recognizing the parental status of a lesbian co-parent, now resident in Arizona, who is seeking visitation with two children who were conceived through donor insemination while she was legally partnered with their birth mother, first as a California domestic partner and then as a California spouse. The birth mother and children live in Suffolk County. *Matter of Kelly S. v. Farah M.*, 2016 N.Y. App. Div. LEXIS 2533, 2016 WL 1355552, 2016 N.Y. Slip Op 02656.

Kelly and Farah decided to have another child, and Andrew again donated sperm. This time Farah became pregnant, giving birth in March 2007 to Z.S. Kelly was listed as a parent on the birth certificate and the child's legal surname is Steagall.

After the California Supreme Court ruled for marriage equality in 2008, Kelly and Farah decided to get married, which they did that August. A few months later the voters approved Proposition 8, ending new same-sex marriages in California until it was

Kelly filed a visitation petition in the Suffolk County Family Court, seeking visitation with Z.S. and E.S.

The lead sentence above is complicated, but not more so than the decision by Justice Sheri S. Roman, which methodically works its way through several complex issues to arrive at a total affirmance of Judge Poulos's decision from March 2015, which not only upheld the co-parent's standing to seek visitation but also rejected the birth mother's attempt to institute a paternity action against the sperm donor for both children. Justice Roman's opinion refers to the parties as Kelly S. and Farah M., but subsequent press reports about the ruling identifies them as Kelly Steagall and Farah Martin.

According to the decision, Kelly and Farah began their relationship around March 2000 and became registered domestic partners in California in January 2004. Shortly afterwards they asked a close friend, Andrew S., to donate sperm so they could have a child together. Kelly became pregnant and bore their first child, whom Farah legally adopted. That child is not a subject of this lawsuit.

declared unconstitutional several years later. In the meantime, however, the California Supreme Court ruled in 2009 that same-sex marriages performed prior to the passage of Prop 8 remained valid. Kelly and Farah decided to have a third child and Andrew again donated sperm so that Farah could become pregnant. Their third child, E.S., was born in April 2009. Kelly was again listed on the birth certificate as a parent, and E.S. received Kelly's surname.

In 2012, the family relocated to New York State, but Kelly and Farah soon split up and Kelly moved to Arizona in the summer of 2013. The children remained in New York with Farah. As diplomatic relations between the women were poor, Kelly filed a visitation petition in the Suffolk County Family Court, seeking visitation with Z.S. and E.S. She alleged that the women were legally married in California and Kelly

was a legal parent of the two children, whom she had helped to raise until the parties split up.

Farah moved to dismiss the case, arguing that Kelly lacked standing under New York law to seek visitation, invoking the old New York precedent of *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), under which same-sex co-parents were deemed to be "legal strangers" to their children. She also sought to drag Andrew into the case as the children's biological father by filing a paternity petition. Although Andrew had never sought to establish his paternity, he was a close friend of the women and had formed a loving relationship with the children and they with him. Farah evidently hoped that if the court declared Andrew their legal father, that would cut off Kelly's claim, because New York does not recognize that a child can have more than two legal parents at the same time.

Farah argued in opposition to Kelly's standing that Z.S. was born before the women were married, and that Kelly should not be deemed their parent because the insemination did not follow the prescribed route under either California or New York donor insemination statutes, which specify the involvement of a doctor in performing the insemination and a written consent from the birth mother's spouse in order to raise a presumption of parental status for the spouse. Both of these children were conceived through insemination at home without the aid of a physician.

LGBT family law has advanced so significantly in both California and New York since the turn of the century that Farah's arguments clearly lacked merit. Same-sex marriage is legal in both states, and New York's Marriage Equality Law, enacted in 2011, makes clear that same-sex and different-sex marriages are to be treated the same, a point driven home as a matter of constitutional rights by the U.S. Supreme Court's 2015 *Obergefell* decision.

New York courts have several times used the doctrine of "comity" to rule that somebody who is a parent of a child under the law of another state will be recognized as their parent in New York, despite the precedent of the *Alison D.* case. Under California law, when a registered domestic partner gives birth to a child her partner is presumed to be a legal parent of the child and, of course, when a married woman gives birth to a child in California, her legal spouse is presumptively the child's parent. The family court found that both of these presumptions applied in this case, and the Appellate Division agreed.

The court rejected Farah's argument that failure to comply with the statutory donor insemination procedures of the two states would bar Kelly from parental status, pointing out that court decisions in both California and New York establish that the donor insemination statutes are not the exclusive way to create parental rights. These laws provide that partners of birth mothers who comply with the statutory requirements will obtain parental status, but don't explicitly provide that failure to comply will forfeit any claim to parental status. The general rule for recognition of parental status in New York for a child born in a sister state is comity, unless there is a strong public policy reason for New York to refuse to recognize the status. California law clearly provides that a child born to a woman who has a registered domestic partner is also the child of the partner, and similarly, of course, that a child born to a married woman is the child of her spouse, and New York courts have extended comity in such situations in the past. In this case, since Kelly was listed on both birth certificates and the children were given her surname, it is clear that the parties intended that she be a parent of both children when they were born.

The Appellate Division also upheld Judge Poulos's decision to dismiss Farah's paternity petition. Poulos determined that Farah filed the petition "in an attempt to terminate Kelly S.'s parental rights." But this would be inconsistent with the ultimate factual findings in the case. Wrote Justice Roman, "The record reflects that the parties made an informed, mutual decision to conceive the subject children via artificial insemination and to raise them together, first while in a registered domestic partnership in California, and, later, while legally married in that state. Additionally, the children were given Kelly S.'s surname, Kelly S. was named as a parent on each birth certificate, and the parties raised the children from the time of their births, in March 2007 and April 2009, respectively, until the parties separated in or around the summer of 2013. Under the circumstances presented, the court properly determined that Farah M. may not rebut the presumption of parentage in favor of Kelly S. arising under California law by filing paternity petitions against the sperm donor and correctly determined that Kelly S. has standing to seek visitation with the subject children at a best interests hearing."

Kelly Steagall is represented by New York attorney and LeGaL member Christopher J. Chimeri. Farah Martin is represented by Sari M. Friedman of Garden City. Regina M. Stanton was appointed by the court to represent the interest of the children. Friedman told Newsday that she doubted her client would appeal, but she criticized the decision as "not good law." Steagall told Newsday, "As unfortunate as the situation is, I'm happy that some good came out of my rough situation and could help families in the future."

The New York Court of Appeals will hear oral argument on June 2, 2016, in *Matter of Brooke S.B. v. Elizabeth A. C.C.*, an appeal challenging the continued validity of *Alison D. v. Virginia M.* The Court of Appeals gave leave to appeal a ruling by the Buffalo-based Appellate Division, 4th Department, *Matter of Barone v. Chapman-Cleland*, 129 A.D. 3d 1578, 10 N.Y.S.3d 380 (June 19, 2015), which had matter-of-factly applied *Alison D.* as precedent to hold that a lesbian co-parent lacked standing to seek custody and visitation with her son. The Court of Appeals reaffirmed the holding of *Alison D.* as recently as 2010, in *Debra H. v. Janice R.*, 14 N.Y.3d 576, but since then Democratic Governor Andrew Cuomo has appointed six new judges of the seven-member court, leaving only one appointee by former Republican Governor George Pataki on the bench, an almost complete turnover of membership since *Alison D.* was last affirmed, so it is highly possible that the court granted leave to appeal with a view to overruling the obsolete precedent. ■

CIVIL LITIGATION

U.S. COURT OF APPEALS, 2ND CIRCUIT – The 2nd Circuit denied a petition for review of a decision by the Board of Immigration appeals in *Jara v. Lynch*, 2016 U.S. App. LEXIS 7494 (April 26, 2016). The petitioner, claiming to be a lesbian Peruvian, failed to provide any evidence of past persecution because of sexual orientation before she left Peru, which meant there could be no presumption in her favor and her best shot would be to gain protection under the Convention against Torture. The record compiled by the judge included a U.S. State Department country report on Peru stating that "homosexuals were 'sometimes harassed and abused by governmental authorities, including the police, and were subject to discrimination." However, affirming the ALJ and BIA decisions, the court said that while the report "also described efforts being made to alleviate the problem," Jara had failed to show that her face fell outside the norm and required extra testimony through a hearing process. The court upheld the decision by the BIA to rely on various articles that gave inconsistent accounts of the level of discrimination and incidents involving homosexuals in Peru. Ultimately the court agreed with the BIA that its opinion merited the usual administrative deference, finding that "the weight of the evidence 'lies largely' within the agency's discretion."

U.S. COURT OF APPEALS, 6TH CIRCUIT – The *Associated Press* reported on April 20 that the U.S. Court of Appeals for the 6th Circuit has dismissed an appeal by Rowan County, Kentucky, Clerk Kim Davis, of the district court's order requiring her office to issue marriage licenses to same-sex couples. The court found that subsequent developments had effectively mooted the case. After Governor Steve Beshear and State Librarian Wayne Onkst left office, the new administration changed the rules removing Davis's objection that she did not want her name to appear on same-sex couples' marriage licenses since she had religious objections to same-sex marriage. The district court had rejected her argument that requiring her to do her job imposed an undue burden on her constitutional right to free exercise of religion. After she served some prison time for refusing to comply with District Judge David Bunning's order, she was released with the understanding she would not prevent other employees in her office from issuing the licenses, but she arranged that her name not appear on them, thus casting doubt on their legal validity as Kentucky law specified that the county clerk certify the eligibility of the license applicants on the form. Governor Matt Bevin, a Republican, issued an Executive Order removing the names of county clerks from the license forms, and the legislature subsequently amended the marriage statute to establish a license form intended to diffuse this controversy. Thus, Davis's request for injunctive relief is moot, because she is not experiencing irreparable harm.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Quinonez v. Lynch*, 2016 U.S. App. LEXIS 6854, 2016 WL 1534369 (9th Cir., April 15, 2016), the court upheld the decision by the Board of Immigration Appeals to rejected a motion to reopen and rescind an in absentia deportation order issued against the petitioner. Among the grounds she had advanced was that "her new same-sex relationship, along with increased violence against lesbians in Guatemala, constituted "changed country conditions" that warranted reopening to file a new asylum petition. In rejected that argument, the court upheld the BIA's conclusion that "Quinenez's same-sex relationship was a changed personal condition, and not a changed country condition. The BIA also concluded that Quinonez's evidence regarding the mistreatment of lesbians in Guatemala did not show that conditions in Guatemala had *worsened* since 1996 [when she had previously failed to show up for a deportation hearing], as would be necessary to show changed country conditions." Consequently, the court found that the BIA did not abuse its discretion in refusing to let the petitioner reopen her case and file a new asylum petition.

U.S. COURT OF APPEALS, 9TH CIRCUIT – Evidently things have gotten so great for HIV-positive gay people in China that an attempt to avoid deportation to that country can be rejected, pretty much out of hand, according to the opinion in *Chuan Wu Pang v. Lynch*, 2016 WL 1399366 (9th Cir., April 11, 2016), which was decided within 5 days after the papers were submitted to the court. In an unsigned memorandum, the court upheld the BIA's finding that the petitioner failed to establish a clear probability of persecution if removed to China. "Petitioner testified that he had not suffered any harm when he lived in China before arriving in the United States," wrote the court. "Reports and articles in the record state that 'private, consensual same sex activities between adults' are not unlawful in China; that the government decriminalized homosexuality six years before the United States repealed sodomy laws in all states; and that most people in China 'acknowledge that the government has made great improvements over the years and . . . will eventually adopt a positive stance toward homosexuality.' Similarly, the record shows that Chinese employment regulations make it unlawful to discriminate against persons carrying infectious diseases; that it is common practice for individuals with HIV/AIDS to receive medical attention from specialty

hospitals; and that localities have improved the way the deal with HIV/AIDS prevention, care, and treatment in recent years. Although some instances of discrimination against homosexuals and individuals with HIV/AIDS occur, the record does not compel a reversal of the BIA's finding." The court also found substantial evidence to support the BIA's conclusion that petitioner failed to show he would be subjected to torture in China because of being HIV-positive and/or gay. Nothing like rose-colored glasses and treating relative terms as substantive proof . . . In light of the court's recent sensitivity to the plight of transgender people in Mexico, it's surprising to see such a cavalier attitude toward the plight of HIV-positive gay men in China.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A gay man from Mexico suffered a total loss on points in attempting to appeal the Board of Immigration Appeals' denial of relief under the Convention Against Torture in *Martinez-Gonzalez v. Lynch*, 2016 U.S. App. LEXIS 6364, 2016 WL 1380907 (April 7, 2016). The petitioner has three felony convictions since coming to the U.S. and is unquestionably deportable on the application of the Department of Homeland Security, unless he can adequately plead facts to support the contention that deportation would lead to his death or serious physical injury at the hands of government forces or those the government is unable or unwilling to control. It's actually difficult to figure out why the court bothered to release this opinion, which never addresses the merits of Mr. Martinez-Gonzalez's claim. Instead, the court devotes most of the brief "Memorandum" to reciting the technical faults of the petitioner's brief, as a justification for refusing to reach the merits. From the court's description, it sounds like a "homemade" brief put together by an inmate who had no acquaintance with the Supreme Court's pleading rules. While conceding that the court could overlook briefing deficiencies if it was convinced that the petitioner's claim had merit, in this case it was not convinced, finding that factual allegations of the complaint would not show that the BIA's decision to deport him was unsupported by substantial evidence. Left unspoken was that despite the scourge of gang warfare and the like in Mexico, it is hard to claim credibly in the current climate in that country that gay people, in general, are singled out for official persecution. However, petitioners in similar cases have shown when pressed that there is targeted discrimination against LGBTQ people just about any day of the week. Opinions like this one may send a message to the bar, but will not necessarily win a break from the relevant state agencies. Martinez-Gonzalez is represented by Bethany Danks of the Law Offices of Erika Roman, Woodland Hills, California.

U.S. COURT OF APPEALS, 9TH CIRCUIT – Have things gotten so rosy for gay people in China that refugee claims should no longer be serious considered? That is the take-away from a memorandum decision in *Pang v. Lynch*, 2016 U.S. App. LEXIS 6566 (9th Cir., April 11, 2016). In this case, the petitioner testified that he suffered no harm before leaving China to study in the U.S. The 9th Circuit panel found that the record evidence would sustain the BIA's defense of its decision and rejection of Pang's argument that his due process rights were violated. After reciting evidence proffered by the government suggesting it was just fine for LGBT people in China today, the court said that racial, ethnic and sensitive civilian operations could be put at risk if gays are allowed to immigrate and naturalize their claim to be entitled to stay. The court found no basis for holding that the petitioner was likely to be raped if returned China. To quote the court: "Reports and articles in the record state that 'private, and consensual same sex activities between adults" are not unlawful in China; that the government decriminalized homosexuality in China before the Supreme Court's 2003 ruling in the United States, and that opinion polls show a rising belief in China that "the government has made great improvements over the years and… will eventually adopt a positive stance toward homosexuality." Pang is represented by Bessie Wong of Pasadena, California.

U.S. COURT OF APPEALS, 10TH CIRCUIT – The federal district court in Utah sent shock-waves through the state government in 2014 by ruling that the state's bigamy law could not be used to prosecute polygamists who did not claim that they were legally married to more than one of their wives in *Brown v. Herbert*, 43 F.Supp.3d 1229 (D. Utah 2014). On April 11, the 10th Circuit ruled on the state's appeal, finding in *Brown v. Buhman*, 2016 U.S. App. LEXIS 6571, that the district court did not have jurisdiction to issue its ruling because the county attorney where the plaintiffs lived had announced a policy that the office would initiate bigamy prosecutions only upon allegations that a victim was induced to marry through fraud or where there was also some type of fraud, abuse, or violence. As such, said the court of appeals, there was no credible threat of prosecution of people in the position of the plaintiffs so there was no live controversy and Article III standing did not exist. The court found that because the county attorney had issued a sworn statement to this effect, the risk that the office would revoke or ignore the policy was insufficient to sustain a live controversy. The case was remanded to the district court with instructions to vacate its judgment and dismiss the action.

CIVIL LITIGATION

CALIFORNIA – U.S. District Judge Phyllis J. Hamilton has denied a motion by anonymous plaintiffs to preliminarily enjoin the implementation of the new International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, a law that was signed by President Obama on February 8. The complaint in *Doe v. Kerry*, 2016 U.S. Dist. LEXIS 49912 (N.D. Cal., April 13, 2016), was filed on Feb. 9, and the motion for preliminary relief was filed on March 4. The lawsuit challenges two aspects of the new law: the requirement that notification be given to foreign countries of all those U.S. federal and state registered sex offenders who were convicted of offenses involving children when such individuals propose to travel outside the U.S., and the requirement that some unique identifier be placed on the passports of such registered sex offenders so that they can be identified overseas by any government officials with whom they come into contact, since the notification process might fail to identify them if they travel beyond their reported destinations while overseas. The anonymous plaintiffs, registered sex offenders represented by Janice M. Bellucci of Marina Del Ray, California, assert in their complaint that these requirements violate the 1st and 5th Amendments. They claim that the passport identifier provision consists of compelled speech and that the broad scope of the law's application, regardless of the nature of the child-related offense of which the individual as convicted, violates the federal Due Process Clause. They claim unreasonable impedance of the right to travel. They point out that Congress's concern is with child trafficking and prostitution, but that many registered sex offenders had not engaged in such offenses, so the measure was overbroad. And they argue that the measure's implementation should be blocked until the federal courts have definitively determined whether it is constitutional. Judge Hamilton found that although the right to travel within the U.S. is well established for lawful U.S. residents and citizens, there is no federal constitutional right to travel outside the United States. As to the passport identifier provision, she found that the request for injunctive relief is not ripe. Under the statute, the State Department and other affected agencies have to work out implementation procedures, report back to Congress, and then consider whatever response Congress might have. It was not clear whether they would also have to publish the proposed procedures for public comment before implementing them. But an affidavit filed in March in response to the motion by a State Department representative indicated that work on implementation had barely begun, the report to Congress was not due until May (90 days after the law was signed), and they did not anticipate implementation in the form of placing identifiers on passports until sometime in the fourth quarter of 2016. Consequently, the court found no pressing need to stop the process from going forward while considering the plaintiffs' constitutional claims. (Interestingly, the State Department's affidavit suggested the possibility that the identifier on passports might take the form of a computer code that could only be read by a scanner, so it would not necessarily be detectable in many circumstances in which a passport is used for identification.)

COLORADO – The Colorado Supreme Court announced on April 25 that it would not review the court of appeals ruling in *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 2015 WL 4760453, 2015 Colo. App. LEXIS 1217 (Colorado Ct. App. Aug. 13, 2015), review denied, April 25, 2016. The court of appeals had affirmed a decision by the Colorado Civil Rights Commission that a refusal by a bakery to prepare a cake for a same-sex couple's wedding celebration violated the ban on sexual orientation in public accommodations under Colorado law. The case attained national notoriety as it was seized upon by "religious freedom" advocates as an example of how Christians who disapprove of same-sex marriage are being forced into complicity with that despised institution if they own or work at a place of public accommodations, and helped to fuel the movement towards state adoption of new laws protecting religious objectors from penalty for denying goods and services to LGBT couples. The court's denial of review was consistent with the U.S. Supreme Court's refusal to review a New Mexico Supreme Court decision that a wedding photographer did not have a first amendment right to refuse to provide photography services for a same-sex commitment ceremony. Interestingly, these cases came up before either state had allowed same-sex marriage to be performed, so the issues they raised predated the advent of the nationwide right to marry for same-sex couples.

COLORADO – A lesbian former employee of Jeppesen Sanderson, a subsidiary of Boeing Corporation, suffered summary judgment of her Title VII and Colorado anti-discrimination act complaint in connection with her termination during a reduction in force in her department in *Spaziani v. Jeppesen Sanderson*, 2016 U.S. Dist. LEXIS 46491, 2016 WL 1365567 (D. Colo., April 6, 2016). In asserting her Title VII discrimination claim, plaintiff Kimberly Spaziani eschewed reliance on any claim that she was laid off because she is a woman or because she failed to conform to female gender stereotypes, relying solely on a claim of sexual orientation discrimination. However, this did not become an

issue in the case, as U.S. Magistrate Judge Kathleen M. Tafoya assumed that Spaziani's complaint sufficed to state a prima facie Title VII claim as a member of a "protected class." The problem for Spaziani was that Judge Tafoya found that the employer had adequately stated a non-discriminatory reason for her lay-off, and that she had failed to allege facts sufficient to create the necessary material factual dispute as to "pretext" that would suffice to block an award of summary judgment against her. Spaziani alleged that the new male supervisor who made the reduction-in-force decision to lay her off when her position was eliminated had blanched when he first learned that she was a lesbian and had mentioned her sexual orientation once or twice and excluded her from certain meetings and information, but Judge Tafoya accepted the company's allegations that the RIF criteria had been objectively applied to rank Spaziani as expendable in light of her experience and training when it was necessary to reduce the number of workers in her department, and that the supervisor had also not met with other non-gay employees or informed them about the information specified by Spaziani. The co-workers upon whose affidavits Spaziani sought to rely disclaimed specific knowledge about her qualifications or work record. Spaziani had participated in an EEO investigation concerning her supervisor's predecessor, and alleged that the layoff was retaliatory because of that protected activity, but the judge found no evidence of a causal link, especially in light of the 21 months that had passed between the time of Spaziani's protected activity and her lay-off and the lack of evidence that the supervisor who made the lay-off decision in her case had any but superficial knowledge of what had happened before coming to the company to occupy that position. Spaziani is represented by Robert Mark Liechty of Greenwood Village, Colorado.

COLORADO – In *Deneffe v. Skywest, Inc*., 2015 U.S. Dist. LEXIS 62019, 2015 WL 2265373 (D. Colo., May 11, 2015), U.S. District Judge Michael E. Hegarty refused to dismiss a gay pilot's claim of sex discrimination under Title VII using a gender stereotyping theory, finding that such a claim could be actionable in the 10th Circuit. However, on April 26, 2016, Judge Hegarty granted summary judgment on the Title VII claim to the employer, finding that Charles Deneffe had failed to show that he was discriminated against because he is gay or because of failure to conform to gender stereotypes. *Deneffe v. SkyWest, Inc*., 2016 U.S. Dist. LEXIS 55496, 2016 WL 1843061. Indeed, the court found that Deneffe never "came out" on the job, that the supervisors who made decisions adverse to him were not aware of his sexual orientation, and that he did not allege that he was gender-nonconforming in any substantial way. He could not contest his termination under Title VII and the Age Discrimination in Employment Act because he failed to satisfy administrative exhaustion of claims in a timely way, but he had preserved his claim that SkyWest discriminated against him by "submitting false and derogatory information to potential employers describing the reason that SkyWest terminated" his employment. As Judge Hegarty recounts the summary judgment record, it appears that numerous pilots with whom Deneffe flew during his training period noted various deficiencies in his performance, and ultimately the company's contention that he was let go because he failed to develop the necessary skills within a reasonable period of time was adequately documented. Although Deneffe recounted homophobic remarks by some fellow pilots, the court found that he failed to allege that any pilot who filed an adverse comment about Deneffe's performance had made such remarks, much less the supervisor who decided to let him go. Deneffe had also alleged that he had travelled on SkyWest using employee partner privileges to take his same-sex partner, but he never identified the partner to SkyWest employees as other than a "friend," and he could not document that anyone from SkyWest saw them holding hands or otherwise giving signs of being more than just friends. Analyzing Deneffe's Title VII claim, the court wrote, "Both parties acknowledge that the Tenth Circuit has not recognized a Title VII claim for discrimination based on sexual orientation, and that Deneffe's Title VII claim is premised on Deneffe's failure to conform to gender stereotypes. While the Tenth Circuit has not decided whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'based on sex,' the court has assumed that a transsexual who alleged, as a biological male, she did not act or appear as a male is expected to act or appear established a *prima facie* case of gender stereotyping under Rule 56 analysis. *Etsitty v. Utah Transit Auth*., 502 F.3d 1215, 1224 (10th Cir. 2007). SkyWest argues there is no evidence that any SkyWest decision makers had any belief or perception that Deneffe failed to conform to traditional male gender stereotypes. The Court agrees that a reasonable juror could not conclude on the evidence presented that SkyWest submitted a negative, 'false' PRIA employment reference 'under circumstances giving rise to an inference of unlawful discrimination' under Title VII." The court found insufficient Deneffe's argument that his reserved demeanor and failure to enter into the kind of sexual banter common among male pilots would support a claim of failure to conform to stereotypical gender norms, and rejected his contention that SkyWest had "fostered an environment of discriminatory animus for gender

stereotyping" based on the comments attributed to some pilots who were not decision makers with respect to Deneffe's employment.

DISTRICT OF COLUMBIA – The present-day incarnation of the Mattachine Society, a gay rights research and education organization that dates back to the 1950s, has filed suit against the National Archives in U.S. District Court in the District of Columbia under the Freedom of Information Act, seeking disclosure of "hundreds of pages of documents related to a 1953 Order signed by President Dwight Eisenhower that empowered federal agencies to investigate and fire employees thought to be gay," according to an *Associated Press* news report on April 27. Charles Francis, president of the Society, told the AP, "We want to know, and history needs to know, how this thing was administered and how it was enforced, and what was the dynamic inside the Justice Department and the FBI driving it." The Society filed its FOIA request in 2013, seeking all documents related in any way to the Order and to the Sex Deviate Program established by FBI Director J. Edgar Hoover (himself reputedly a "closet case"), which predated the Order by several years. E.O. 10450, which was not rescinded until the Clinton Administration, led to the discharge of between 7,000 and 10,000 federal employees during the 1950s alone, according to a 2014 report issued by the Merit Systems Protection Board, the current-day successor to the old U.S. Civil Service Commission. President Clinton issued an Executive Order during his second term establishing a sexual orientation non-discrimination policy for the Executive Branch, after almost all the Executive Branch agencies had adopted their own non-discrimination policies earlier in his administration, with the most prominent exception being the military uniformed personnel. (Subsequently the federal judiciary has adopted its own sexual orientation non-discrimination policy, and many members of Congress have established such policies in their own offices, but federal employment discrimination laws do not expressly cover sexual orientation as a prohibited ground of discrimination, although the EEOC has ruled in federal employee cases that Title VII's ban on sex discrimination covers gender identity (2010) and sexual orientation (2015), a position not yet established definitely in the courts.) The lawsuit asserts that although more than 800 documents have been turned over in response to the FOIA request, this is less than half the documents that were requested, including among those omitted the papers of the late Chief Justice Warren Burger, who was involved in enforcement of the Executive Order while a lawyer with the Justice Department in the 1950s. Amazingly, given the time period involved, the FBI has "invoked exemptions to the public records law," according to the AP report, "including a provision that protects against the disclosure of classified information for national security reasons." Since there has never been a documented case of a U.S. federal government employee compromising national security because of his or her sexual orientation, this is puzzling.

FLORIDA – *Global Banking News* (April 14) reported that Florida insurance regulators investigating charges that Humana Insurance, a major health insurer in the state, had discriminated against people living with HIV by placing HIV-related medications in the tier that charges the highest co-pay to consumers, had reached a settlement in February, under which Humana will pay a fine of $500,000 for lack of cooperation with the regulators' investigation. The investigation was sparked by a complaint filed with the State Insurance Department by The AIDS Institute and the National Health Law Program.

FLORIDA – One of the cases in which the EEOC has supported private litigation to establish that sexual orientation discrimination is actionable under Title VII has been settled while pending on appeal before the 11th Circuit. In *Burrows v. College of Central Florida*, 2015 WL 4250427 (M.D. Fla., July 13, 2015), *reconsideration denied*, 2015 WL 5257135 (September 9, 2015), the district court held that under 11th Circuit precedents it was bound to dismiss the Title VII sexual orientation claim despite the EEOC's argument that such claims should be actionable as sex discrimination claims. The case was settled for $82,500, according to a report in *BloombergBNA Daily Labor Report* on April 7. The parties filed a joint motion to dismiss the appeal on April 5. The EEOC also has an amicus brief on file in another appeal pending before the 11th Circuit on the same question, according to the DLR report. Burrows is represented by Ronnie Guillen of Chartwell Law Offices in Miami.

FLORIDA – Circuit Court Judge G. Keith Cary has approved a legal name change for a transgender man, Billy Gene Huff, after receiving a letter from Huff's doctor to prove he was undergoing appropriate treatment for gender transition. Huff had filed a petition in the Lee County Circuit Court to change his name from Kimberly Danielle Huff, and was surprised to receive a letter from Judge Cary in response to his petition, seeking a "doctor's note." The formal requirements for a name change in Florida law including "passing a

background check and indicating the name change is not for an ulterior or illegal purpose," according to a report about the case in the *Fort Myers News-Press* (April 9), but there is no formal requirement in state law to document gender transition in order to get a name change, so Huff complained about this in an interview with the newspaper. Judge Cary did not respond to the paper's request for an interview. There is a requirement for medical documentation in order to change the gender designation on a driver's license, and Huff plans to apply for a new driver's license soon, in connection with his new job as an instructor at South Florida University in Tampa.

FLORIDA – Insurance agent greed may provide the underlying explanation for U.S. District Judge Marcia G. Cooke's denial of an insurance company's motion for summary judgment in a dispute over life insurance proceeds upon the death of an HIV-positive insured. *Gilbert v. Liberty Bankers Life Insurance Company*, 2016 WL 1573166 (S.D. Fla., April 19, 2016). Clara Gilbert was diagnosed HIV-positive sometime between May 1987 and December 1988, when she bore a son, John Geter III, on Dec. 12, 1988. After his birth the doctors informed her that he had been "born with AIDS." Yet young John grew to adulthood, passing away on November 12, 2012, almost age 24, from "metastatic CNS Lymphoma" and "AIDS," according to his death certificate. On September 17, 2011, three insurance salesmen showed up on Gilbert's doorstep to sell her life insurance policies for her son and daughter. The application's question 28 asked whether the applicant had tested positive for HIV infection or had been diagnosed with AIDS or other sickness or condition derived from HIV infection. Gilbert answered this "yes", but one of the agents, Jim Sanphasiri, changed that response to "no" and initialed it, presumably because he knew Liberty would reject the application if the answer was yes and he wanted to sell Gilbert the policy and collect his commission. Sanphasiri's story was that Gilbert told Sanphasiri that John was born with HIV but had tested negative for the past several years. Gilbert's story was that she answered "yes" but one of the other agents told Sanphasiri to change that answer to "no" and initial the change, and that she did not know why Mr. Christopher, the other agent, told Sanphasiri to change the answer. A few days later, Liberty contacted Gilbert stating that the policy on John had not been issued and would require the execution of an Amendment to Application" confirming that the answer to question 28 was "no." Sanphasiri and the third agent, Eddie Palacios, claim that they delivered the amendment form to John and Gilbert who both signed it, but the two of them disclaimed having signed it. (A forgery by the agents seeking to preserve their commission??) At any rate, Liberty's file contains a "signed" copy of the amendment. After John passed away, Liberty refused to pay on the policy, claiming that had it "known of this medical history prior to the application date, we would have declined to issue this contract." Notably, John passed away less than two years after the policy was purchased, and a Florida law authorizes insurers to cancel policies based on an applicant's misrepresentation of material facts. Gilbert sued for the benefits and Liberty moved for summary judgment. In denying the motion, Judge Cooke tentatively resolved against Liberty the question whether the acts of its agents could be imputed to it in this case, and found that "a genuine issue of material fact exists as to whether Mr. Sanphasiri, Mr. Christopher, and Mr. Palacios acted in a dual capacity as a broker for Ms. Gilbert and her son and an agent for Liberty. Here, Ms. Gilbert has presented enough evidence indicating the Liberty may have cloaked Mr. Sanphasiri, Mr. Christopher, and Mr. Palacios with enough indicia of agency to lead her to believe that they were Liberty's agents by providing them with blank insurance application forms and using them as Liberty's primary means of communicating with Ms. Gilbert. For example, when Liberty determined that an amendment to the original application was necessary [presumably because #28 showed signs of crossing out and "no" being substituted for "yes"], they sent Mr. Sanphasiri and Mr. Palacios back to Ms. Gilbert's home to have her execute the Amendment instead of mailing it to her or having another agent deliver her the Amendment." Judge Cooke found that "it would not be unreasonable for her to believe that they were Liberty's agents and that they had the authority to oversee and change any answers she provided on her application for insurance." Under the circumstances, since Gilbert originally answered the question "yes" and it was changed to "no" at the direction of Christopher, the statute allowing cancellation for material misrepresentations by the applicant might not apply in this case.

FLORIDA – Lambda Legal has filed a proposed class certification motion in its lawsuit seeking to require Florida to issue amended death certificates retroactively recognizing the legal marriages of same-sex couples married in other jurisdictions where the deaths occurred prior to the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Court held that it was unconstitutional for states to refuse to recognize same-sex marriages that were validly contracted in other states. The proposed class plaintiffs, Hal F. B. Birchfield and Paul G. Mocko, are surviving spouses

of men whom they married in other states (New York, California), who passed away at a time when Florida would not recognize their marriages and thus were identified as unmarried on their death certificates. The state has refused requests by Birchfield and Mocko that amended death certificates be issue identifying the deceased as married and naming their surviving spouses. In its motion Lambda argues that the case should be certified as a class action because "if the issues are litigated in more than one lawsuit, various courts might reach different conclusions with respect to the constitutional claims alleged and relief sought, yielding inconsistent outcomes, and there is no dispute that Plaintiffs seek only equitable relief" to remedy "the same constitutional wrong committed against the entire class." Lambda puts itself forth as appropriate counsel for the class. Since Florida is a popular retirement destination and didn't begin to recognize out-of-state same-sex marriages until federal court litigation compelled it to do so early in 2015, it stands to reason that there will be many people in the position of the plaintiffs. Lawyers who are working on the motion include Lambda attorneys Tara L. Borelli (Atlanta Regional Office) and Karen L. Loewy (New York Headquarters Office) and local counsel David P. Draigh and Stephanie S. Silk of White & Case's Miami office. The case is pending in the federal district court in Tallahassee, the state capital: *Birchfield v. Armstrong*, Case No. 4:15-cv-00615 (N.D. Fla.).

GUAM – U. S. District Judge Ramona V. Manglona ruled that the Guam Federation of Teachers lacks Article III standing to bring an action challenging the constitutionality of the new Guam Rules Governing the Standards of Professional Conduct for Guam Educators, P.L. 32-236 (2015). *Guam Federation of Teachers v. Cruz*, 2016 U.S. Dist. LEXIS 47896, 2016 WL 1383477 (D. Guam, April 7, 2016). Under the new rules, teachers "may lose their teaching certificates – be 'decertified' – for a broad range of 'immoral conduct,'" wrote the judge. The organizational plaintiff alleges that, among other things, teachers might be "decertified" for engaging in same-sex marriages or other same-sex activity, in violation of their constitutional due process rights. The plaintiff also suggested that the new rules could chill constitutionally protected speech by teachers, for example by deterring school librarians from selecting books for their libraries that were controversial. In finding lack of jurisdiction, Judge Manglona described the concerns articulated by the plaintiff as speculative and hypothetical, and noted that the Guam Commission for Educator Certification has not yet taken action against any teacher under the new Rules or even threatened to take such action. Furthermore, she noted, it was speculative to suggest that the Commission might try to decertify a teacher for engaging in conduct protected by the Constitution. She granted the Commission's motion to dismiss without prejudice and with leave to amend, suggesting that if the plaintiffs could come up with more concrete grounds to challenge the Rules, they could file an amended complaint.

INDIANA – As far as the Indiana Supreme Court is concerned, a claim by an employee that he was harassed because of his sexual orientation does not state a claim under Title VII, although the Court does not engage in any analysis of the issue whether sexual orientation discrimination is sex discrimination, merely asserting that no sex discrimination claim was stated in the context of finding that the trial court appropriately granted summary judgment to the defendant on plaintiff's retaliation claim. *Gaff v. Indiana-Purdue University of Fort Wayne*, 20165 Ind. LEXIS 287, 2016 WL 1619358 (Indiana Supreme Ct., April 22, 2016). Plaintiff Adam Gaff sued the defendant university in Allen Superior Court on claims of discrimination and retaliation in violation of the federal and state constitutions and included a federal Title VII retaliation claim. As to the retaliation claim, wrote Justice Dickson for the Supreme Court, "the undisputed facts in the parties' 'Agreed Statement of Material Facts' do not establish any basis for the plaintiff's retaliation claim under Title VII of the Civil Rights Act of 1964. The only potential 'protected activity' is that the plaintiff complained to his supervisor that his co-worker called him derogatory names related to his weight and sexual orientation. These complaints are not indicative of discrimination that occurred because of sex, race, national origin, or some other protected class under the statute. In light of the parties' Agreed Statement of Material Facts, the defendant has satisfied its burden on summary judgment to affirmatively negate the plaintiff's claim. And the plaintiff has not come forward with contrary evidence showing a genuine issue of material fact for the trier of fact." The EEOC, which has construed Title VII to extend to sexual orientation discrimination claims as a form of sex discrimination, would undoubtedly disagree with the Indiana Supreme Court that Gaff's complaint did not involve a "protected class under the statute." Gaff is represented by Robert O. Vegeler of Fort Wayne.

INDIANA – The U.S. Department of Justice announced that Pain Management Care in South Bend, Indiana, has settled an HIV discrimination claim for $30,000. An HIV-positive man was referred to Pain Management Care

after his previous clinic closed, but was allegedly denied services by staff doctor Joseph Glazier "because he was HIV-positive." It took him more than six months to find a new pain clinic for treatment. He complained to the Justice Department, which filed a lawsuit in the U.S. District Court in Fort Wayne alleging a violation of federal law. The defendant has entered into a consent decree with the Justice Department under which the man will receive $20,000, the Justice Department will receive payment of a fine for $10,000, and the clinic will develop a non-discrimination policy compliant with the Americans with Disabilities Act, which has been interpreted to prohibit health care providers from discriminating against people living with HIV. The consent decree must be approved by the federal court to become a final binding settlement. *South Bend Tribune*, April 9.

NEVADA – U.S. Magistrate Judge Peggy A. Leen denied a motion by the Clark County School District, which is defending a lawsuit by a transgender security officer, to seal an exhibit, a CCSD Police Department Bureau of Professional Standards Investigative Report that was generated in response to an EEOC complaint by the plaintiff, because it identifies by name three officers with whom the plaintiff had conversations about "private aspects of his gender transition, including his surgeries." *Roberts v. Clark County School District*, 2016 WL 1611587 (D. Nev., April 21, 2016). Wrote Leen, "The Motion asserts that making the Report public would improperly cast the three officers in a false light and inevitably cause them unnecessary embarrassment because the Report found that Roberts's allegations of misconduct were unsubstantiated and the officers are not parties to this litigation." The Report concluded that Roberts's allegations against two of the officers were "not sustained" and against the third officer was "unfounded." CCSD argued that "when an allegation of impropriety by an officer is unsubstantiated, the need for public disclosure is limited – especially when the officer is a non-litigant." But Judge Leen was unwilling to treat this as analogous to a publication of private personnel information, pointing out that the Report, while naming the officers, contained no other identifying information about them. Roberts, opposing the motion, argued that the Report shows that the CCSD investigation of his complaint was "tardy and inadequate, and the manner in which it was undertaken" allowed additional retaliatory harassment against him, thus it "chronicles the very activities which give rise to this suit, which alleges, among other things, that CCSD's handling of Roberts' EEOC charge created resentment and hostility towards him by co-workers." Roberts objected to the assumption of the Motion that the public should not have a right to access internal affairs records unless the investigating agency finds wrongdoing. Judge Leen agreed with Roberts, noting that the standard for sealing an exhibit of this sort is "compelling interest," and that CCSD did not meet the standard. "The mere fact that public availability of the Report may lead to embarrassment is insufficient to justify sealing," she wrote, asserting that this was not comparable to "an officer's personnel file containing sensitive personal information" of the type that had been sealed in a case relied upon by the defendant. She found that defendant had not shown "that specific prejudice or harm will result from public disclosure of the Report." Because Judge Leen's opinion was narrowly focused on the motion to seal the Report, it does not include any detailed narrative about the nature of Robert's case apart from the brief references quoted above.

NEW YORK – The N.Y. Appellate Division, 3rd Department, decision in *Estate of Peter T. Brown*, 2016 N.Y. App. Div. LEXIS 2575 (April 7, 2016), provides one example of why the right to marry is important for same-sex couples, especially when one dies without a will. Peter T. Brown passed away on April 22, 2013, without leaving a valid will, survived by his domestic partner, Zan Heath, and his daughter, Janet Brown-Castro. Since the informal domestic partnership was (and still is) not recognized under New York law, the intestate decedent's daughter was his sole distributee and entitled to be appointed administrator, but she and Heath jointly sought letters of administration from the Broome County Surrogate David Guy, who issued the letters appointing them in June 2013. However, the relationship between the co-administrators broke down over various disputes, including two "purported wills" under which Heath sought to assert various claims against the estate. Brown-Castro commenced this proceeding in March 2014, seeking to remove Heath as co-administrator, and Heath counterclaimed for Brown-Castro's removal or, alternatively, for a decree of probate of one of the two purported wills. Brown-Castro challenged Heath's response to her action as untimely and without merit. Surrogate Guy dismissed Heath's counterclaims, converted Brown-Castro's letter response to the counterclaim into a motion for summary judgment, and granted it, revoking Heath's letters of administration and designating Brown-Castro the sole administrator. Heath appealed this ruling, which the Appellate Division affirmed in a brief opinion by Justice Christine Clark. The court pointed out that Surrogate's Court can revoke letters of administration if there is demonstrated "friction, hostility or antagonism between the fiduciary and beneficiaries . . . , but only when such enmity threatens to interfere with the administration of

the estate." In this case, the court found that "the parties' submissions separately established a complete breakdown of their relationship and evidenced their inability to cooperate as co-administrators of the estate to such an extent that petitioner's interests as a distributee and the proper administration of the estate were threatened." Since only Brown-Castro has a statutory right to serve as administrator, and because Heath was only allowed to serve as co-administrator with her consent, the Surrogate made the correct move, according to the Appellate Division. "Respondent's conclusory allegations of misconduct and unfitness on the part of petitioner were insufficient to establish that she was ineligible or unqualified to serve as administrator of the estate or raise a genuine issue of material fact as to that matter," wrote the Justice Clark. The court also found a statute of frauds problem with the writings that Heath submitted to "substantiate" his claim that he had a binding contract with Brown-Castro concerning estate matters, finding that the documents did not bear Brown-Castro's signature and "did little more than suggest an on-going negotiation between respondent and petitioner regarding distribution of the estate." Brian R. Gallagher represented Heath on the appeal.

NORTH CAROLINA – In *Smith v. Colvin*, 2016 WL 1664905 (E.D. N.C., April 22, 2016), U.S. District Judge Terrence W. Boyle ruled that a Social Security Administrative Law Judge's ruling denying disability benefits to an HIV-positive applicant was deficient, because the ALJ failed adequately to explain her reasoning and there was "ambivalence" in the medical record. While the ALJ noted various HIV-related symptoms experienced by the plaintiff, she "did not address Listing 14.08H, which addresses these factors: HIV with involuntary weight loss accompanied by either gastrointestinal issues or chronic fatigue and fever. Instead of analyzing plaintiff's condition under this listing, the ALJ simply stated that she had considered Listing 14.08 without elaborating or discussing specific listings within 14.08, including 14.08H. This was in error." Remand rather than reversal was required, since the gaps in the ALJ's decision precluded the court from "meaningful review." "Here," wrote Judge Boyle, "the ALJ did not mention the pertinent listing at all, which precludes meaningful review. Therefore, on remand, the ALJ is to consider plaintiff's condition in light of Listing 14.08H, addressing each of its requirements and determining if plaintiff's circumstances meet the listing requirements."

PENNSYLVANIA – A lesbian who was denied reappointment to her faculty position at Slippery Rock University of Pennsylvania suffered summary judgment of her claims against the university and various administrators in *Kazar v. Slippery Rock University*, 2016 WL 1247233 (W.D. Pa., Mar. 30, 2016). U.S. District Judge Alan N. Block found that the summary judgment record failed to show that Sheila Kazar's sexual orientation had anything to do with her non-renewal or her treatment by the individual named defendants, who are university administrators. Kazar did not include any Title VII claim, but asserted violations of Title IX (sex and sexual orientation discrimination) and the First and Fourteenth Amendments and a raft of state law contract and tort claims. When she was hired for a faculty position requiring a PhD she had not yet completed that degree at West Virginia University, where she had been a graduate student, and she did not complete it until after she was notified of her non-renewal by the defendant university almost two years later. Although there were various adverse comments about her performance, the non-renewal seems to have boiled down largely to her failure to complete the PhD on the schedule that she had represented to administrators when she was rehired and reappointed after her first year. (Tellingly, after she was non-renewed and the university advertised an opening for her position, the successful applicant held a PhD degree.) Although she was in a relationship with another female faculty member and had signed up and been active with "Safe Zone," a program to provide support for LGBT students, there was scant evidence that the administrators who made the decision not to renew her were personally aware that she was a lesbian. (Her placement of the Safe Zone pink triangle on her office door and her participation in the program's activities would not necessarily signal her sexual orientation, because non-gay faculty members who were supportive of LGBT students were members of Safe Zone and engaged in those activities.) The dismissal of her Title IX sex discrimination claim was without prejudice to a potential Title VII claim if she were to file an administrative complaint within the statute of limitations and exhaust her administrative remedies, the court having concluded that persons who have potential employment discrimination claims under Title VII are precluded from proceeding directly to court under Title IX, as Congress intended to require administrative exhaustion of employment discrimination claims. Thus, Judge Black did not rule on the merits of the Title IX claim, confining his merits ruling to the 1st and 14th Amendment claims. As to those, he found that Kazar had failed to show that the difficulties she experienced with the administration had anything to do with her speech activities or her sexual orientation.

CIVIL LITIGATION

RHODE ISLAND – A federal civil jury in Providence found that the City of Providence and other defendants unlawfully discriminated against a lesbian firefighter, Lt. Lori Franchina, in violation of Title VII. The jury awarded Franchina, now retired from the Providence Fire Department, $706,000 in compensatory damages and $100,000 in punitive damages. Presumably an application for attorney's fees will follow. According to an April 18 report in the *Providence Journal*, Franchina "had accused her male colleagues of harassing, disrespecting and discriminating against her based on her gender and sexual orientation." However, reported the *BloombergBNA Daily Labor Report* on April 19, the trial judge dismissed the sexual orientation discrimination count and the case proceeded as a sex discrimination and retaliation case, conceived as a "sex-plus" case on the theory that due to her sexual orientation Lt. Franchina was "unavailable for intimate relationship with men" which was one of the reasons for harassment. The trial began on April 6 and resulted in a verdict on April 18. Franchina alleged that she developed "severe post-traumatic stress disorder" due to "constant mistreatment" and that her superiors failed to take action in response to her complaints. She has been on "injured-in-on-duty" status since 2013. Her lawyer is John T. Martin with the KJC Law Firm. He told the DLR that he believes the 1st Circuit would likely endorse the EEOC's view that sexual orientation claims are covered under Title VII, in case the City of Providence seeks to appeal. *Franchina v. City of Providence*, No. 1:12-cv-00517 (D.R.I.).

SOUTH CAROLINA – The Transgender Law Center reported on April 29 that its demand letter on behalf of a transgender high school student who was denied access to appropriate restroom facilities in the Horry County School District had resulted in a reversal of policy by the District. The student, a transgender boy, had been suspended for using the boy's restroom when instructed not to do so. The School Superintendent has now stated that the student, upon return to school, and all transgender students, "will be allowed to use facilities consistent with their gender identity." The District also agreed to remove the suspension from his record, to inform faculty and staff of their obligation to use appropriate pronouns in referring to transgender students, and will update classroom attendance rosters to reflect the names that transgender students select. This is the first such policy turnaround by a school district in the 4th Circuit since the court's April 19 ruling in *G.G. v. Gloucester County School District*, a Virginia case applying Title IX to require a public school to provide appropriate restroom access for a transgender student. (See this month's lead story.)

TEXAS – Justices Brown and Devine were outraged by the conduct of counsel and the trial judge in securing a marriage license for a same-sex couple through a temporary restraining order proceeding without notifying the state's Attorney General that the Texas ban on same-sex marriage was being challenged as unconstitutional, but they reluctantly joined the Texas Supreme Court's order to dismiss a petition for writ of mandamus that had been filed by the state, in an opinion blasting that behavior. *In re State of Texas, Relator*, 2016 Tex. LEXIS 316 (April 15, 2016). Attorney General Ken Paxton had filed the motion for a writ of mandate to get the marriage quashed, but the Court dismissed the motion for obvious reasons, even though the women were married several months before the U.S. Supreme Court ruled that bans on same-sex marriage are unconstitutional. Acknowledging that in light of the U.S. Supreme Court's decision in *Obergefell v. Hodges*, they could not "dispute" the denial of the writ, Justice Brown, joined by Devine, saw fit to issue a concurring opinion that harshly condemned "a deliberate and premediated misuse of the Texas justice system." Brown pointed out that a statute requires notification of the Attorney General when the constitutionality of a Texas law is drawn into question in litigation, and that important issues of first impression should not be decided on a motion for a temporary restraining order. Upon issuance of the TRO, the plaintiffs' lawyer quickly arranged for the couple's immediate marriage and then crowed to the press that once the women were married the state couldn't do anything about it. The lesbian couple who married as a result of this proceeding was Sarah Goodfriend and Suzanne Bryant.

TEXAS – When elected County Commissioners are interviewing an applicant for an interim constable appointment to fill a vacancy pending an election, may they question potential applicants about their politics and views on subjects such as abortion and gay rights in order to avoid appointing anybody who does not meet the Commissioners' political preferences? Evidently so, according to the latest chapter in the ongoing saga of *Lloyd v. Birkman*, 2016 WL 1306650, 2016 U.S. Dist. LEXIS 44313 (W.D. Texas, April 1, 2016), in which Senior U.S. District Judge David Alan Ezra found that the defendant Commissioners enjoyed qualified immunity in a suit by a disappointed candidate, Robert Lloyd. We reported in October 2015 on Judge Ezra's previous decision, 2015 U.S. Dist. LEXIS 117410, 2015 WL 5202687, 2015 Fair Empl. Prac. Cas. (BNA) 285 (W.D. Tex., Sept. 2, 2015), finding that there were material issues

to be resolved before he could rule on the defendants' motion for summary judgment. This time around, however, the judge decided to undertake an independent analysis of the qualified immunity issues upon concluding that the parties had presented insufficient material to the court. Finding that there was no authoritative precedent that would clearly preclude people in the position of the Commissioners from imposing their own political and policy test on somebody seeking a discretionary appointment to what is usually an elective office, he concluded that they enjoyed immunity from suit and, derivatively, so did Williamson County. In particular, during his interview with the committee of Commissioners to whom the selection process had been delegated on Mar. 18, 2013, Lloyd was asked for his views on same-sex marriage. His response was that he had been married to his wife for 19 years and based on his faith, he believed that marriage was between a man and a woman, but that the laws were shifting and the Supreme Court could change that at any time. A Commissioner responded that if he was appointed to the position, he would need to come up with a "better answer." He was questioned about his church attendance, his regularity as a Republican voter, and his views on abortion, as to which his statement of a pro-life position tempered by an exception in circumstances of rape, incest or the health of the mother raised eyebrows among the Commissioners. Thus, it was clear that the Commissioners were at the least imposing a religious test for appointment to a public official position, a clear violation of express language in the U.S. Constitution, but this did not stop Judge Ezra from finding no clear precedent that this violated the Establishment Clause or the main body of the Constitution. The opinion is fairly outrageous, in the view of this writer, but at the same time it may fairly reflect the jurisprudence on qualified immunity that the Supreme Court has developed to shield public officials from liability for their discretionary actions.

TEXAS – U.S. District Judge Sidney A. Fitzwater denied a preliminary injunction sought by Three Expo Events, LLC, which asked the court to order the City of Dallas to allow the plaintiff to hold its "Exxxotica" adult entertainment show in the City's Convention Center on May 20-22, 2016. *Three Expo Events, LLC v. City of Dallas*, 2016 U.S. Dist. LEXIS 53168 (N.D. Tex., April 21, 2016). Three Expo Events held such an event at the Convention Center in August 2015 and claims that the event went off without incident and wholly within the guidelines agreed upon with local law enforcement. Buoyed by the successful event, which focused on all forms of adult entertainment, the plaintiff approached the Convention Center to negotiate a contract to hold another such show in 2016, and after preliminary negotiations the dates May 20-22 were confirmed and the Center advised Three Expos "that it was still working on getting a contract together. But in early February, Dallas Mayor Mike Rawlings told the City Council that he did not want to see another Exxxotica event held at the Convention Center, and got them to pass a resolution on February 10 directing the Convention Center not to enter into a contract with the plaintiff. The plaintiff sued on February 24, arguing that the City's refusal to let a 2016 Exxxotica event take place at the Convention Center was a violation of its 1st and 14th Amendment rights. The plaintiff, arguing that it already had an agreement for those dates, sought a preliminary injunction directing the City to let the Convention Center sign the agreement. In opposition to the motion, the City presented evidence, mostly drawn from reports by undercover police officers who had undertaken surveillance at the August 2015 show to determine whether the plaintiffs had complied with the requirements laid down in advance of that show. The evidence purported to show possible violations of the city's Sexually Oriented Businesses ordinance, including customers touching unclothed performers and at least one possible underage patron on the premises. Plaintiffs argued that the Convention Center was a public forum, that the City's refusal to allow the show was a content-based regulation of speech without any compelling justification, and that was based solely on the beliefs and opinions of Mayor Rawlings and the Council members. Judge Fitzwater ruled, for purposes of deciding the motion, that the Center was only a "limited public forum," such that the City could refuse to allow the show to take place there if its actions were reasonable and not based on the content of speech. In this case, he found that the City's evidence concerning various alleged violations of the Sexually Oriented Business ordinance made the City's refusal to go forward with the contract reasonable under the circumstances, or at least sufficiently so to forestall the award of preliminary injunctive relief. The judge pointed out the possibility that in the context of a full trial it was possible the plaintiffs could prevail on their argument that the Center was a public forum, thus requiring a compelling justification from the City, or that the court might be persuaded that the conduct of the August 2015 event did not provide the necessary support for the City's decision even on the reasonableness standard. (After all, it is possible that the actions by the Mayor and the City Council had more to do with politics than with legitimate public order concerns. – Editor) But on a motion for preliminary relief, the court was inclined to err on the side of

upholding the City's position, meaning that a new Exxxotica show at the Dallas Convention Center will not take place in May.

WISCONSIN – U.S. District Judge Barbara B. Crabb has granted a motion to certify a plaintiff class in *Torres v. Rhoades*, 2016 WL 1312167, 2016 U.S. Dist. LEXIS 45210 (W.D. Wis., April 4, 2016), a case challenging the refusal of Wisconsin officials to extend equal treatment to lesbian couples who have children through on member of the couple being a birth mother when it comes to issuing birth certificates listing both women as parents. The proposed class representatives are Chelsea Torres and Jessamy Torres, a married same-sex couple who had a child through donor insemination. Judge Crabb had previously rejected their motion to certify a class of "all same-sex couples who legally married in Wisconsin or in another jurisdiction, at least one member of whom gave birth to a child or children in Wisconsin on or after June 6, 2014 [the date on which Judge Crabb in an unrelated case held unconstitutional the state's ban on performing or recognizing same-sex marriages], and who request birth certificates for such children listing both spouses as parents, regardless of whether they have already received birth certificates listing only one spouse as a parent ('Plaintiff Parents'); and all children born to such couples on or after June 6, 2014 ('Plaintiff Children')." Judge Crabb had found compelling the state's argument that in fact there were three subclasses to be considered: same-sex couples who conceived through donor insemination and complied with the state's law regulating that process, which involve performance of the insemination by a physician and written consent by the non-birth parent; couples who conceived without complying with the statute; and same-sex couples who conceived by the birth mother engaging in sexual intercourse with a male. The equal protection issues were asserted to be different for each of these subclasses because of the way the state treats different-sex couples, who are the comparators for purposes of equal protection. The state argued that the Torres couple could only represent one of those classes, presumably the first, as they used a doctor for the insemination process. At the same time, the state conceded that as a matter of Equal Protection it was obligated to provide equal birth certificate treatment in the cases of couples who complied with the donor insemination statute, and thus argued that there was no dispute the plaintiff couple was entitled to the birth certificate they were requesting, which the state offered to issue to them. Judge Crabb suggested, while denying the initial class certification motion, that plaintiffs narrow the definition of their requested class or obtain additional class representatives in the various sub-categories. Instead, the plaintiffs came back suggesting that the class consist of those who conceived children in a manner inconsistent with the donor insemination statute, and pointed out that Jessamy Torres had not provided written consent for the insemination of Chelsea prior to the insemination taking place, so the couple was not covered by the state's concession regarding those who complied with that statute. There was further argument about whether the Torres couple was adequate as class representatives concerning lesbian couples who conceived their children through sexual intercourse with a male donor, and Judge Crabb decided to exclude that sub-class from the case and certify the women only as representing same-sex couples who used donor insemination without full compliance with the relevant statute. She noted that this litigation will not include those who conceive through in vitro fertilization, since that is not covered by the "artificial insemination" statute, and rejected the state's arguments that the couple are disqualified because Jessamy could still provide retroactive written consent and had turned down the state's offer to issue them the requested birth certificate as a way of getting the case dismissed. Wrote Crabb, "Defendant has not identified any reason to believe that the plaintiffs' rejection of her offer makes them inadequate representatives. If anything, it shows their resolve to obtain relief for the class as a whole." Crabb agreed with plaintiffs that the class she was certifying, now more narrowly defined, did not require that actual notice be given to the class, since "the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members," quoting from *Lemon v. Int'l Union of Operating Engineers*, 216 F.3d 577 (7th Cir. 2000). The question whether the constitutionality of Sec. 891.41, a provision on the presumption of parentage, need be resolved in this litigation was reserved to later. Judge Crabb appointed as class counsel attorneys Camilla Taylor, Christopher Clark and Kyle Palazzolo of Lambda Legal and Tamara Beth Packard of Cullen Weston Pines & Bach LLP.

CRIMINAL LITIGATION NOTES

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS – The Court of Criminal Appeals upheld the conviction of Staff Sergeant Jeffery L. Lewis for performed oral sex on a sleeping lieutenant, upholding a sentence consisting of a bad conduct discharge, two months confinement, and a reduction in grade. *United States v. Lewis*, 2016 CCA LEXIS 256 (April 20, 2016). The only witness

at Sgt. Lewis's court martial was the ungrateful lieutenant, who testified that he had been out drinking and had fallen in with Lewis at an all-night restaurant, at which the suggestion had been made to go to Lewis's apartment with some friends. After arriving at the apartment, Lewis decided to "go out to see if some friends wanted to join the party" and the lieutenant volunteered to go with him. Lewis drove them to a friend's apartment complex and the lieutenant waited in the car while Lewis went outside. Lewis returned alone, stating his friends had changed their minds about coming, so he got back in and started driving back to the apartment. During the trip, "the conservation turned to sex before leading to the sexual contact alleged in the charge. During the conversation Lewis mentioned that he was bisexual and offer to "perform oral sex on the victim or masturbate him." But the lieutenant "demurred, expressing appreciation, but telling Appellant he was heterosexual and not interested." Lewis persisted, however, the lieutenant refused "more insistently," and Lewis desisted. The lieutenant noticed they were taking an "indirect route" back to Lewis's apartment and questioned Lewis, who said "he liked to take the long way." As Lewis continued driving, the lieutenant dozed off. He "awoke to find the car stopped by the side of the road, his belt and pants undone, and Appellant reaching beneath the victim's underwear and fondling his penis. The victim panicked, shoving Appellant's hand away and briefly trying without success to get out of the car. Appellant drove back to his apartment complex where the victim, who by that time was very distressed, met up with his friend and went home. The victim did not report the incident until months later." At the court martial, Lewis attempted to make his case through cross-examination of the prosecution witnesses and the testimony of a forensic psychologist, who offered theories about why the lieutenant might have fabricated the story, but the court martial was not impressed, convicting Sgt. Lewis of "abusive sexual contact" with the aforementioned penalty. The appeals court rejected Lewis's contention that the evidence was legally and factually insufficient to sustain his conviction. Although the only direct evidence of what happened came from the victim, the court found that the military judge "could reasonably have believed the victim's account," and rejected Lewis's theories about why the lieutenant might have lied. "After making allowances for not having observed the witnesses directly," wrote Senior Judge Teller for the court, "we ourselves are also convinced of Appellant's guilty beyond a reasonable doubt."

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – The court agreed with the defendant-appellant that because his straight male friend was awake when he brushed his penis against his friend's lips during a sleep-over at his apartment, his conviction on a charge of abusive sexual contact under the circumstances was inappropriate, and should be downgraded to *attempted* abusive sexual contact. But it didn't really make a difference in the end, as there were also two other incidents for which he was convicted of abusive sexual contact with the same friend over the course of an odd relationship that stretched over a few years, and the appeals court upheld the court martial sentence of one year confinement and a dishonorable discharge in *United States v. Welch*, 2016 CCA LEXIS 253 (April 21, 2016).

CALIFORNIA – In a domestic violence case involving a lesbian couple, the defendant appealed her jury conviction, unsuccessfully arguing that the trial judge should not have instructed the jury that in evaluating the testimony of the victim of the crimes (her wife), it could consider the effect of defense counsel's failure to disclose to the prosecutor that defendant would be calling the victim to testify. *People v. Bailey*, 2016 Cal. App. Unpub. LEXIS 2925 (1st District Ct. App., April 22, 2016). Laura F. showed up in the emergency department at St. Francis Memorial Hospital in San Francisco on July 28, 2014, with various injuries, telling the nurse that "she had pain in her face and head as a result of an assault and that her domestic partner had struck her in the head and face with fists and a kitchen spoon." The nurse was charged with domestic violence reporting responsibilities and notified the San Francisco Police Department. Laura told a similar story to a physician assistant at the hospital. But when she was subsequently interviewed by police officers, she began to change her story, ultimately settling an account in which her partner had struck her in self-defense after a heated argument in which she had put her partner in a position where her claustrophobia cause her to strike out. Laura testified in defense of her partner, to whom by then she was married. She apportioned some of the blame on herself for what happened, testified that she and Bailey had since married and that she wanted to stay married to her. The state put on an expert witness who told the jury that "it was common for someone to report having been assaulted by an intimate partner and later to give a different account of events in order to prevent the partner from facing jail or probation. This expert gave his opinion that a victim's first statement, given while under the effects of the attack, was generally the most accurate. The defendant's counsel had not spoken with Laura until late on the day before she testified, and as a result was unable to give the prosecutor the thirty-day notice as to defense witnesses required

by the evidentiary rules. As a result of this, the judge instructed the jury as noted above that it could take account this failure of notification, as a result of which the prosecutor was unable to prepare in advance to counter Laura's testimony. The jury found Bailey guilty of inflicting corporal injury resulting in a traumatic condition on an intimate partner, not guilty of assault with force likely to cause great bodily injury, but guilty of the lesser offense of simple assault. The trial court suspended imposition of sentence and put Bailey on three years' probation. In the disputed instruction, the judge told the jury: "Both the People and the defense must disclose their evidence to the other side before trial within the time limit set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence to counter or oppose any evidence in order to receive a fair trial. [Defense counsel] filed to disclose to [the prosecutor] that the defense would be calling [Laura] as a witness within the required time limit. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. However, the fact that [defense counsel] failed to disclose evidence within the legal time period is not evidence that Ms. Bailey committed a crime." The court of appeal rejected Bailey's argument that this instruction was sufficiently prejudicial to her to justify setting aside the verdict, rejecting the argument that the jury likely misapplied the instruction. The court pointed out that even the prosecutor emphasized to the jury that the fact that the prosecution didn't receive advance notice that Laura would testify "is not in evidence at all, that the defendant is guilty. What is it is [sic] for you to consider is that it affects my ability to prepare for her." Wrote the court: "This record does not establish a likelihood that the jury misapplied the instruction." And, it concluded, "The instruction given here not only attributed the violation to defense counsel, rather than defendant, but also explicitly told the jury the violation was not evidence defendant committed a crime."

CALIFORNIA – Long Beach Superior Court Judge Halim Dhanidina dismissed charges of indecent exposure and lewd conduct that had been brought against Rory Moroney, who was caught up in an undercover police sting operation targeted at gay men who were using public restrooms at Long Beach's Recreation Park. According to a report in the April 29 *Long Beach Press Telegram*, Dhanidina issued a written ruling that made "sweeping statements about the Long Beach Police Department's treatment of gay men in the community, saying in a ruling over a lewd conduct case that the department intentionally targets gay men, and that the prosecutor's office portrays them as 'sexual deviants and pedophiles.'" If Moroney had been convicted of the charge of indecent exposure, based on allegations that he was masturbating in the restroom in view of an undercover police officer, he would have suffered a lifetime obligation to register as a sex offender in California and, if he moved to another state, to report to law enforcement and register there under statutes that the states have adopted in compliance with federal requirements. Dhanidina granted a motion to dismiss based on discriminatory enforcement and prosecution, arguing that the Police Department vice unit in Long Beach uses only male undercover decoys in its sting operations targeted only on gay men. Apparently the Department does not use female undercovers to entrap straight men in compromising circumstances. The Police Chief issued a statement denying discriminatory enforcement, and said the Department is "100% committed to civil rights and equality for all people, including the LGBTQ community." There are past California appellate precedents supporting Dhanidina's action, in cases involving other police departments that were found to have discriminatorily focused their vice operations on entrapping gay men in public restrooms, parks, and beaches.

IOWA – Jimmy Dean Stevens was convicted by a jury in 2004 on charges of third-degree sexual abuse and transmission of HIV after having sex with a 15-year-old boy he met through an online chat room. The boy did not contract HIV as a result of their sexual encounter. At the time, the relevant Iowa statute did not require transmission actually to take place so long as the defendant had "exposed" the victim to HIV in a way that could transmit the virus through "intimate contact." Stevens was sentenced to up to 35 years in prison, 10 years of which was attributed to the transmission charge. He appealed the transmission charge with post-conviction relief petitions, the latest of which was dismissed due to a missed filing deadline. The Iowa Court of Appeals has reinstated his appeal in a 2-1 decision issued on April 27, *Stevens v. State*, 2016 Iowa App. LEXIS 405, pointing to the Iowa Supreme Court's ruling last year in the *Rhoades* case as a significant development that would justify allowing Stevens to continue with his challenge to his conviction. Indeed, the facts of Stevens' case are strikingly similar to those in the case of Nick Rhoades, in which the Iowa Supreme Court reversed the conviction and remanded for retrial under a proof standard that persuaded prosecutors to dismiss the complaint against Rhoades, who had initially been sentenced to 25 years after entering a guilty plea to engaging in "intimate contact" with a teenage boy. *Waterloo Courier*, April 27. The *Rhoades* ruling also inspired the Iowa legislature to revise the statute

in question. In the April 27 decision, the appeals court said that on remand the trial court should determine whether the *Rhoades* decision applies retroactively to Stevens' case. *Rhoades* turned in part on the Supreme Court's conclusion that it was inappropriate, in light of current medical facts, to judicially notice the likelihood that HIV could be transmitted sexually without specific evidence concerning the viral load of the defendant and the sexual acts that took place. Kevin E. Hobbs of West Des Moines represents Stevens.

NEBRASKA – The Nebraska Supreme Court affirmed a hate crime conviction of Gregory S. Duncan for slugging a man in the face outside a gay bar in *State of Nebraska v. Duncan*, 2016 Neb. LEXIS 58, 2016 WL 1544862 (April 15, 2016). Ryan Langenegger, a non-gay man, was at the bar with his two gay friends, Joshua Foo and Jacob Gellinger, who were dressed in drag to participate in a drag show at the bar. Langenegger was dressed in a men's suit. Three men who were sitting in the bar were staring at Langenegger and his friends and the word "fag" was heard repeated a few times. When Langenegger and friends left the bar, they were confronted by the three men, one of whom was Duncan. Langenegger asked the men to leave them alone because they were just going home, but an argument escalated with one of the other men, during which Duncan slugged Langenegger in the face, causing serious injuries. Duncan was subsequently prosecuted under the state's hate crime law, which authorizes a sentencing enhancement if a victim is selected "because of the person's sexual orientation or because of the person's association with a person of a certain sexual orientation." Duncan defended by arguing that he didn't know Langenegger's sexual orientation or the sexual orientation of his friends, and that "sexual orientation" is a vague term as to which the judge should have specifically instructed the jury. He was convicted and sentence to 12-18 months, with credit for 53 days already served at the time of trial. The Supreme Court rejected his argument that there was any need to define "sexual orientation" for the jury, or that he should have won a directed verdict based on the evidence. Justice Cassel wrote that Duncan could only receive a directed verdict on the hate crimes charge if there was a "complete failure of evidence to establish an essential element of the crime or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained." In this case, the court was construing the language of the hate crimes enhancement statute for the first time, pointing out that this case turned on "motive" rather than "intent" in light of the statute's wording. It found that the jury could infer motive from the testimony about the situation offered by various witnesses, including that Duncan heard the two men he was with "call out derogatory names for homosexuals." "A rational jury could find that Duncan did in fact hear those words and that he therefore believed that Langenegger was with people who were homosexual," and the state "presented evidence to show that Langenegger's association with homosexual people was the reason for the assault. The State's witnesses testified that there was no other apparent motivation," so the trial court did not abuse discretion in rejecting Duncan's motion for a directed verdict. As to the issue of defining "sexual orientation," the court noted that the term was used frequently during the jury selection process, in a way that would make clear to the potential jurors what its meaning was in the context of this statute, so there was no need to specially define it in the jury instructions.

NEBRASKA – The *Omaha World-Herald* reported on April 28 that Cameron Mayfield, 24, was found guilty of arson on charges that he took a gay pride flag from the porch of a married lesbian couple living near him and set it on fire. Mayfield yanked down the flag, ran home, doused it in gasoline, set it on fire, and then walked back 300 yards to the couple's house and stood in the middle of the street, waving the flaming flag. The couple testified that they were frantically checking their house to see whether some was trying to break in. The incident was prosecuted as a hate crime. Mayfield's attorney, James Martin Davis, argued that his act was a "drunken prank," not a hate crime, and Mayfield, testifying in his own defense, claim he did not realize the flag symbolized gay pride, thinking it was just a "spring ornament," and he was not aware the residents of that house were gay. The prosecutor, John Alagaban, argued, "His actions were too purposeful to not be targeting this couple and that item." Douglas County District Judge Duane Dougherty set sentencing for August. The range of possible sentences could extend from probation to up to two years in jail.

NEBRASKA – The state has announced it will appeal a decision by Senior U.S. District Court Judge Richard G. Kopf, holding that a minor who was adjudicated a delinquent in Minnesota for misconduct he engaged in there at age 11 and required to comply with that state's "predatory offender registration statute" but now living with relatives in Nebraska was not required to register under the Nebraska Sex Offender Registration Act, despite a provision requiring anybody who enters the state to register as a sex offender if he is required to register as such under the laws of a different jurisdiction. *A.W. v. Peterson*, 2016 U.S. Dist. LEXIS 20682 (D. Neb., March 21, 2016). A.W.'s sex offense was committed during the

summer of 2013 when he was living in Minnesota, and he was adjudicated delinquent in Anoka County District Court on July 18, 2014, placed on probation for two years, and ordered to register. By the time of the adjudication, he was living with his grandparents in Nebraska, and an Application for Services and Waiver was filed pursuant to the Interstate Compact for Juveniles to transfer probation supervision to Nebraska. The Nebraska probation office then notified A.W. that he must register under Nebraska's Sex Offender Registration Act. Although the Minnesota registry is not open to public inspection, the Nebraska registry is, and A.W.'s grandparents filed suit on his behalf, challenging the registration requirement, pointing out that the offense for which he was adjudicated delinquent in Minnesota would not have required him to register under the state's SORA had it been committed at that age in Nebraska! Judge Kopf agreed with the plaintiffs, commenting, "It is simply not possible to draw from the Nebraska statutes a desire to impose a stigmatizing burden on juveniles adjudicated out of state while not doing so to juveniles adjudicated in Nebraska." The *Lincoln Journal Star* (April 8) quoted a spokesperson for the Attorney General's Office as saying that the office appealed "because the outcome of the case has important ramifications on how Nebraska's Sex Offender Registry Act should be properly interpreted."

OKLAHOMA – The Oklahoma Court of Criminal Appeals ruled in an unpublished opinion on March 24, 2016, that forcible sodomy cannot occur when a victim is so intoxicated as to be completely unconscious at the time of the sexual act of oral copulation. Justice Hudson wrote for the court in *State of Oklahoma v. R.Z.M.*, No. JS 2015-1076, "The Legislature's inclusion of an intoxication circumstance for the crime of Rape, 22 O.S. sec. 1111(A)(4), is not found in the five very specific requirements for commission of the crime of Forcible Sodomy, 22 O.S. sec. 888(B). As set forth in *Leftwich v. State*, 2015 OK CR 5, para. 15, 350 P.3d 149, 155, we will not, in order to justify prosecution of a person for an offense, enlarge a statute beyond the fair meaning of its language." Tulsa County Assistant District Attorney Benjamin Fu told a local newspaper that the court's ruling left him "completely gobsmacked," which is apparently a term of legal art in Oklahoma, calling the decision "insane," "dangerous" and "offensive." Perhaps he imagines this will lead to a new practice in Oklahoma of getting people so drunk that they pass out and then sodomizing them with impunity. The court did not describe the facts of the case. According to the press report, the court was ruling in "the case of a 17-year-old boy accused of having oral sex with a 16-year-old girl after they drank and smoked marijuana at a local park. The girl had to be carried to the defendant's car and was unconscious when the defendant took her to her grandmother's house. The girl's blood alcohol level was found to be .341 after she was taken to the hospital. The defendant's DNA was found on the girl in a sexual assault exam. The defendant told police the oral sex was consensual, while the girl told police she didn't remember anything that happened after being in the park." The story was picked up by the *ABA Journal* website on April 28.

TENNESSEE – Denying a *pro se* motion to vacate, correct or set aside a sentence, U.S. District Judge Ronnie Greer ruled in *Hoyle v. United States*, 2016 U.S. Dist. LEXIS 51317 (E.D. Tenn., April 18, 2016), that *Obergefell v. Hodges* had nothing to do with a federal prosecution of a man who enticed a teenage boy to have sex with him through messages transmitted on Facebook.com. "To the extent that Hoyle's position is comprehensible or can be intuited from the bits and pieces of case citations and case excerpts scattered throughout the motion," wrote the judge, "it appears that he is claiming that his conviction for inducing a minor to engage in illegal sexual activity by use of a facility or means of interstate commerce constitutes discrimination against him based on his sexual orientation, in violation of his right to equal protection of the law, as enunciated in *Obergefell*. In *Obergefell*, the Supreme Court held that same-sex couples have a fundamental right to marry, which is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that a state must recognize lawful same-sex marriages performed in other states. Though this holding might case a wide shadow in certain cases, Petitioner has provided no authority to indicate that it has or will have any applicability to federal criminal law. The jurisprudence in one area of the law does not ipso facto apply in every other legal category. Furthermore, while *Obergefell* was decided June 26, 2015, the Court's research has not revealed a single case decided since that time which holds that *Obergefell*'s ruling applies in a collateral challenge to a federal criminal conviction." Furthermore, wrote Judge Greer, "the claim is groundless. . . . The sexual conduct which is proscribed by the statute is pegged to the status of the victim as a minor; not to the sexual orientation of a defendant or even of a victim. Sexual orientation is not relevant to a Section 2422(b) offense and any contention that Petition was charged, convicted, or punished due to his sexual preference is legally frivolous because it has no arguable legal

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VIRGINIA – U.S. District Judge John A. Gibney, Jr., taking the view that the

jurisdictional requirements under the federal Matthew Shepard-James Byrd, Jr. Hate Crimes Prevention Act (HCPA) should be taken seriously, granted the defendant's motion to dismiss a federal hate crimes indictment in *United States v. Hill*, 2016 U.S. Dist. LEXIS 54455, 2016 WL 1650767 (E.D. Va., April 22, 2016), where no nexus to interstate commerce was shown. According to the facts recounted by Judge Gibney, defendant James William Hill, III, and the victim were employed at an Amazon Fulfillment Center in Chester, Virginia. While they were working on May 22, 2015, Hill, with no provocation, hit the victim several times in the face with his fists, "making no statement during the assaults," but Hill later said that he hit the victim because the victim is gay. Hill was charged with misdemeanor assault and battery in state court, but the prosecutor asked the U.S. Attorney to "assume prosecution of this case as a hate crime" because Virginia's hate crime law does not extend to sexual orientation hate crimes. The U.S. Attorney certified that Hill's prosecution under the federal hate crimes law "is in the public interest and is necessary to secure substantial justice," so the state prosecutor dropped the misdemeanor case in favor of the federal prosecution, and Hill was indicted by a federal grand jury. Hill moved to dismiss on jurisdictional grounds, pointing out that there was no nexus with interstate commerce in the case. The federal statute requires that "(i) the conduct occurs during the course of, or as the result of, the travel of the defendant or the victim (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce; (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct; (iii) in connection with the conduct the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or (iv) the conduct (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate commerce." The statute also requires a certification along the lines of what the U.S. Attorney produced in this case. Judge Gibney found that the certification requirement had been met, but not the commerce requirement. "Punching someone who is filling up boxes in a warehouse is not the kind of substantial effect on the economy required by the Constitution," wrote Judge Gibney, pointing to the Supreme Court's decision limiting the application of the Violence Against Women Act on jurisdictional grounds that led to Congress's express commerce requirements being included in the hate crimes law. As to the specific requirements in the statute, he wrote: "The assault had nothing to do with travel. The defendant did not use a weapon or an instrumentality or a channel of interstate commerce. If Hill's prosecution is constitutionally permissible, it must be caught on the hook's final barb – the catch-all that the offense interferes with commercial or economic activity or otherwise affects interstate commerce." The government argued in this case that this requirement was met, as Hill and the victim were packaging goods for shipment in interstate commerce when the assault took place. "If the Court accepted the government's argument," wrote Gibney, "the reach of the HCPA would barely have an end, as the statute would cover any conduct that occurs at any commercial establishment." This struck Gibney as presenting the same constitutional problem that the Supreme Court identified with the Violence against Women Act (VAWA). Thus, he concluded, it would not be constitutional to prosecute Hill under the statute.

WASHINGTON – The Washington Court of Appeals rejected an attempt by a state prison inmate to use *Lawrence v. Texas*, 539 U.S. 558, the U.S. Supreme Court's 2003 decision striking down the Texas Homosexual Conduct Act, to void his conviction for participating in a gang rape of another inmate. *State v. Music*, 2015 Wash. App. LEXIS 862 (April 28, 2016). John Music was doing hard time for the 1969 murder and robbery of a teenage boy when in 1974 he and several other inmates engaged in a gang rape of another prisoner during a movie in the prison theater. The victim "was forced to fellate one prisoner at the same time another was anally penetrating him; this process continued with each of the six or more prisoners engaged in the assault." Sounds like a scene from a hard core gay prison porn flick. . . Music was convicted of one count of sodomy in April 1975 and sentenced to ten years, consecutively with his existing sentence (which was for life with possibility of parole). Music was granted parole on the murder conviction in March 2010, having served about 40 years of his life sentence and then being close to 60 years old, and began serving the ten-year sodomy sentence. He filed a motion in February 2015, arguing that his conviction for "consensual sodomy" should be vacated on the ground that Washington's criminal sodomy law as it then was on the books was facially unconstitutional under *Lawrence v. Texas*. Walla Walla County Superior Court Judge John W. Lohrmann granted his motion, ruling that the former statute was facially unconstitutional and that Music should have been prosecuted for rape, not sodomy. Of course, the statute of limitations had long run for such a prosecution. The trial court then denied the state's motion for reconsideration, which was accompanied by an affidavit from a retired judge who had been Music's defense attorney in the rape case, stating that the victim had

testified that he was gang raped and it was not consensual. The state appealed. In his opinion for the appeals court, Judge Kevin M. Korsmo provided a brief history of the rape and sodomy laws in Washington. It seems that at the time of the prison gang rape, the state was in the midst of a criminal law reform process by which the sodomy law was to be repealed and the rape law expanded to go beyond heterosexual rape and encompass all non-consensual oral, anal and vaginal sex. At the time of this prison incident, the archaic rape law could not be used to prosecute same-sex conduct, and the sodomy law had not yet ceased to be in effect, so Music could not have been prosecuted under the rape law, only the sodomy law. The court of appeals rejected the idea that the sodomy law was unconstitutional as applied to Music's conduct, noting that the Supreme Court in *Lawrence* had limited the effect of its ruling to consensual adult participants. "Accordingly," wrote Judge Korsmo, "we conclude that *Lawrence* recognized a personal liberty interest in consensual adult sexual behavior. It does not forbid sodomy prosecutions for non-consensual, public, or adult-child relationships. The reading of *Lawrence* urged by Mr. Music effectively treats that case as extending constitutional protections to specific sexual actions rather than according human dignity to private adult sexual relationships. *Lawrence* does not support a facial challenge to Washington's former sodomy statute. That statute was the sole means of addressing certain forms of sexual abuse that the former rape statutes did not reach. The former statute also addressed criminal conduct that *Lawrence* expressly exempted from its holding; it was not addressed solely to consensual adult behavior. Since the former sodomy statute applied to criminal conduct beyond that invalidated in *Lawrence*, it is not facially invalid." Although Music had argued to the trial court that he had been convicted of consensual sodomy, he had introduced no evidence to prove that assertion. "In contrast," wrote Korsmo, "the State through newspaper clippings and the affidavit of an attorney who recalled the victim's testimony indicated that Mr. Music engaged in non-consensual sexual contact that likely would be addressed under our modern rape statutes." Thus, the court reversed the order vacating his conviction. For some reason a majority of the panel decided the opinion should not be published in the Washington Appellate Reports, but it was filed for public record and so appeared on Lexis. Perhaps they didn't want to sully the official court reports with a graphic description of a prison gang rape!!

PRISONER LITIGATION NOTES

CALIFORNIA – In a second case in less than a year, a federal judge has dismissed on screening the claims of a prisoner alleging LGBT discrimination in cellmate assignment at California's Corcoran Substance Abuse and Treatment Facility. Last fall, United States Magistrate Judge Michael J. Seng rejected an Equal Protection challenge to an inmate's request to lock with a transgender cellmate when others were permitted "to be housed with whomever they choose" in *Williams v. Reynoso*, 2015 WL 3795033 (E.D. Calif., June 17, 2015), reported in *Law Notes* (October 2015 at pages 463-4). Now, in *Olive v. Reynoso*, 2016 U.S. Dist. LEXIS 53077 (E.D. Calif., April 20, 2016), United States Magistrate Judge Sandra M. Snyder holds that Damien D. Olive, a "transgendered homosexual" inmate, litigating *pro se*, is barred from challenging cellmate choice rules on multiple procedural grounds, including standing, mootness, and failure to state a claim. Standing is an unusual screening device in prisoner cases, and Judge Snyder cites no prisoner cases on this point, relying instead on organization standing decisions involving welfare rights, environmental, or farm worker groups — and on two 30+-year-old Ninth Circuit cases involving standing in First Amendment facial challenges to restrictions on drug paraphernalia marketing (no standing for head shop owners who did not advertise) and to suppression of school textbooks (no standing for teachers but standing for students and parents). It would have been helpful if someone had studied these decisions and their application before misfiring them. Mootness alone would have sufficed for dismissal, since Olive had been transferred to state prison by the time of the screening eleven months after filing. Finally, Judge Snyder finds that Olive did not state a claim for violation of constitutional rights under 42 U.S.C. § 1983, even though "heterosexual inmates are allowed to be housed with whomever they choose upon their request, while Plaintiff, a homosexual, cannot." Having thus framed an Equal Protection issue, Judge Snyder (unlike Judge Seng) does not discuss it, noting that Olive's disciplinary record of infractions was sufficient to deny leave to choose a cellmate. Judge Snyder also found lack of personal involvement by a number of the named defendants. The existence of these two decisions filed against the same administration only months apart suggests that there may be anti-LGBT-animus at this substance abuse facility. *William J. Rold*

CALIFORNIA – *Pro se* transgender prisoner Jose Silva alleged that a psychiatrist (Dr. Nathu) at Mule State Prison massaged his own penis during an individual session with Silva and offered Silva medications if she would "perform" for him. United States Magistrate Judge Kendall J. Newman dismissed the complaint on screening

under 28 U.S.C. § 1915A(a) for failure to state a claim, in *Silva v. Nathu*, 2016 U.S. Dist. LEXIS 53754 (E.D. Calif., April 21, 2016). While Judge Newman found that inmates have a constitutional right under the Eighth Amendment to be free of sexual abuse – citing *Wood v. Beauclair*, 692 F.3d 1041, 1045-46 (9th Cir. 2012); and *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) – the conduct here was non-actionable "verbal harassment" because there was no allegation "that Dr. Nathu touched plaintiff and also no allegation that the defendant acted in an effort to cause plaintiff psychological damage." Judge Newman found it significant that Silva continued to see Dr. Nathu (without determining whether Silva had a choice); and that Silva's grievance stated that Nathu "acted *only* though gestures, statements and bribery, also mental manipulation" [emphasis added]. Judge Newman allowed Silva to replead, noting that she might have additional facts to state a claim, if "verbal harassment" was "calculated to cause psychological damage" or extended beyond "mere verbal sexual harassment," citing *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987), amended by 135 F.3d 1318 (9th Cir. 1998); and *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004). On repleading, Silva must "allege facts that would raise Dr. Nathu's conduct beyond the isolated incident of verbal harassment identified in the complaint." This writer wonders if the harassment standard has been relaxed for a transgender victim and whether the analysis would differ had the psychiatrist been a male provider with a female patient in a women's prison. *William J. Rold*

MISSOURI – United States District Judge Carol E. Jackson granted a motion to dismiss against *pro se* transgender inmate Rodney A. Kaprielian, confined in Missouri's sex offender treatment facility, in *Kaprielian v. Stringer*, 2016 U.S. Dist. LEXIS 52729 (E.D. Mo., April 20, 2016). Kaprielian sued a dozen supervisory defendants under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. [ADA] and under 42 U.S.C. § 1983, claiming they violated her rights by not having transgender-specific treatment and conditions of confinement and by imposing "male gendered" standards on male-to-female transgender inmates. Judge Jackson dismissed the ADA claim because Kaprielian did not name any agency, and 42 U.S.C. § 12132 excludes individuals from its definition of "public entity." Judge Jackson also found that Kaprielian did not allege impairment of a "major life" activity and that "transsexualism" was precluded from ADA coverage, citing 42 U.S.C. §§ 12102(2)(A) and 12211(b)(1). On the civil rights claims, Judge Jackson found the allegations too "vague and conclusory" to state a claim under F.R.C.P. 12 (b)(6). A review of the complaint on PACER shows it to be conclusory, but it shows a degree of sophistication often absent in *pro se* pleadings. For example, she writes: "The defendants… have discriminated against plaintiff by subjecting plaintiff to a standard for release from confinement and/or release to a less restrictive environment that is different and more difficult to meet than the standard applied to male gendered persons" – and she includes a constitutional challenge to the Missouri Sexually Violent Predator Act, "as applied" to transgender offenders – but the complaint lacks specific examples of disparate treatment. Judge Jackson found no linkage between the conduct of individual supervisors and the general allegations. Although Kaprielian requested damages and injunctive relief, Judge Jackson dismissed the Equal Protection claims on qualified immunity (finding no clearly established law and therefore no need to find a constitutional violation or determine whether transgendered people have protection as a class), even though qualified immunity is not a defense to injunctive relief. Finally, Judge Jackson denied appointment of counsel, finding that Kaprielian had "not presented any non-frivolous allegations to the Court" and that the factual and legal issues were not "complex." In this writer's view, counsel would be very helpful in re-framing this complaint to state a claim. *William J. Rold*

PENNSYLVANIA – United States District Judge Joel H. Slomsky granted partial summary judgment against prisoner James A. Jefferson, a/k/a James Johnson, and allowed other counts to proceed, in claims arising from disclosure of Jefferson's HIV status during an outside medical trip in *Jefferson v. Husain*, 2016 WL 1255731 (E.D. Pa., March 31, 2016). Jefferson sued escorting correction officers, the treating doctor (Husain) and the hospital (Einstein Medical Center – "Einstein") in state court on twelve counts of liability; and the defendants removed to federal court on the basis of a federal question. In summary, Jefferson alleged that Husain revealed his HIV status to the officers, who told others, who harassed Jefferson at the prison. The opinion is needlessly prolix. As to the officers, Judge Slomsky finds (as Jefferson admits) that no grievance was filed about the disclosures prior to court action, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). This was dispositive, but Judge Slomsky nevertheless proceeds to discuss at length: whether Jefferson sued the correct officers (a question that a grievance might actually have helped resolve); whether the officers (if correctly named) had violated a constitutional right; and whether (assuming Jefferson had exhausted remedies, sued the correct officers,

and had his rights violated) the officers were entitled to qualified immunity – ultimately finding against Jefferson on all questions. In unfortunate dicta, the judge writes that, although the Third Circuit "has held that inmates retain a Fourteenth Amendment substantive due process right to privacy in their medical information, subject to legitimate penological interests," citing *Doe v. Delia*, 257 F.3d 309, 323 (3d Cir. 1987), the contours of what interests are "legitimate" remain "unresolved" under the balancing factors in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). "Plaintiff points to no decision that holds that a correctional officer who discloses that a prisoner is HIV-positive to another correctional officer, who is in contact with the prisoner on a daily basis, violates a clearly established right," citing *Smith v. Hayman*, 489 F. App'x 544, 549 (3d Cir. 2012) (*Delie* "did not establish any such rule with obvious clarity"). As to Husain and Einstein, Judge Slomsky found no basis to grant them summary judgment on direct or vicarious liability on claims they violated Pennsylvania common law on physician-patient privilege or the Pennsylvania Confidentiality of HIV-Related Information Act, 35 P.S. § 7601, *et seq*. (which has a private cause of action for damages). He did find Einstein was entitled to summary judgment for civil rights claims under 42 U.S.C. § 1983 because there is no vicarious liability under the statute and the complaint had no allegations supporting corporate liability under a *Monell* theory (*Monell v. New York City Dep't of Soc. Servs*., 436 U.S. 658, 691 (1978)). Judge Slomsky denied summary judgment to Dr. Husain individually under § 1983, finding disputed issues as to whether Husain was a state actor, whether Jefferson's rights under *Delie* were counterbalanced by the *Turner* factors, and whether Husain should have qualified immunity. Judge Slomsky reviews "color of state law" factors to be used in answering the first question, without citing the dispositive case of *West v. Atkins*, 487 U.S. 42, 54-5 (1988) (private physician treating state prisoners "acted under color of state law for purposes of § 1983"). He reviews the *Delie* and *Turner* factors concerning privacy again, ultimately determining: "It is a question for the jury whether Dr. Husain should have used a more discreet method, such as whispering the information, writing it down to show Plaintiff, or taking some other action instead of verbally disclosing the information in the presence of the officers." Finally, on qualified immunity, Judge Slomsky discusses at length whether the defense should be available to "private" actors (despite *West*) and the state of clarity of Third Circuit law, only to punt at the end, holding that there was "not enough" information to rule on this point at summary judgment, that Husain had not affirmatively pleaded the defense, and that he could raise it at trial, "if applicable." Jefferson is represented by Rania Major-Trunfio of Philadelphia. *William J. Rold*

SOUTH CAROLINA – United States District Judge David C. Norton rejected the recommendation of United States Magistrate Judge Kaymani D. West that prison defendants be granted summary judgment on all claims and ordered a trial on claims of inmate Dmitry Pronin that defendants were deliberately indifferent to his safety leading to a rape by another inmate in *Pronin v. Vining*, 2016 U.S. Dist. LEXIS 43418 (D.S.C., March 31, 2016). The decision is notable for its acceptance of inmate declarations and documents as creating a triable case based on conflicting versions of past events. Pronin alleged that his cellmate harassed him in escalating steps, culminating in a rape at knifepoint and that he sought intervention by prison officials repeatedly verbally and in writing in the weeks leading up to the rape. Pronin attached copies of the written requests to his sworn complaint and filed sworn declarations in opposition to summary judgment. Judge Norton found that Pronin's version of events, which contrasted with officers' statements, created material factual issues in dispute preventing summary judgment, citing *Raynor v. Pugh*, 2016 WL 1056091, at *5 (4th Cir. Mar. 17, 2016); *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); and *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979). Judge Norton also relied on the amendment to F.R.C.P. 56(c)(2) that allows summary judgment opposition based on evidence "in a form that would be admissible" at trial. On the law, Judge Norton found "no question" that Pronin presented a triable claim of failure to protect under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), as to whether defendants knew of and disregarded a risk that the cellmate would sexually assault him. Given the "clearly established constitutional right" under *Farmer*, a qualified immunity defense was not available. Pronin was represented on objections to the Magistrate Judge's recommendation by Howard Walton Anderson, III, of Pendleton, SC. *William J. Rold*

TENNESSEE – Senior United States District Judge James D. Todd allowed *pro se* inmate Hywon Reed's protection from harm case to proceed past screening under 28 U.S.C. §§ 1915A(b) and 1915(e)(2)(B) against five of eight defendants in *Reed v. Schofield*, 2016 U.S. Dist. LEXIS 46434, 2016 WL 1369589 (W.D. Tenn., April 6, 2016). When Reed, a gay man "with feminine characteristics," was imprisoned as a probation violator, the District Attorney wrote the state corrections commissioner that Reed would be in danger "were he to be housed in the general population." Nevertheless,

that is where he was placed, to be threatened, assaulted, and sexually harassed "on a daily basis." Although he was occasionally put in segregation (sometimes as discipline for "fighting"; sometimes for "protection" after injuries), he was returned to general population repeatedly – once housed with a known assailant whose "gang" bribed a defendant officer to place them together. During the odyssey, Reed was told he had to "deal with his problems 'like other gays'"; and "he was the cause of his own injuries" and "needed to suffer for acting like a girl in the penitentiary." Some staffers (who were not sued) tried to help by writing "incompatible notices" regarding Reed and some other inmates, but these were largely ignored or not posted; and Reed's repeated requests to administration for protection were ignored. When he identified a particular inmate as threatening to kill him, he was asked if they were "lovers." He suffered lacerations and broken bones in addition to sexual assaults. The opinion has a long recitation of factual history and an even longer overview of the law – but almost no application of the law to the specific facts of the case. Senior Judge Todd dismissed claims against the warden and a deputy commissioner for lack of specific allegations; and he likewise dismissed claims against the commissioner, despite the (in this writer's experience, extraordinary) letter about Reed's safety from the District Attorney. The remaining defendants (in addition to the officer who allegedly took the bribe to set up Reed) included the prison's classification coordinator and the deputies for security and administration, against whom Reed stated "plausible" claims under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Judge Todd directed the Clerk to arrange for service of process. He declined, however, to allow Reed to proceed under the Equal Protection Clause, finding that, although he "continues to face violence due to his feminine propensities," he is not a member of a "protected class." Despite the recited facts and Reed's claim that "inmates known as 'Girls' have faced a history of discrimination," Judge Todd wrote: "Plaintiff's allegations on this point are wholly conclusory. Plaintiff merely states that he is being treated differently because he is homosexual. Plaintiff provides no specific factual allegations to support his contention." [*Really!?*] Judge Todd also rejects "class of one" Equal Protection theory. His citations are so off the mark that they do not bear repeating in this note, except for one. Judge Todd cites *Davis v. Prison Health Services*, 679 F.3df 433, 441 (6th Cir. 2012), for his "class of one" analysis without apparently realizing that on the previous pages the Sixth Circuit reversed a district court for refusing to recognize a civil rights claim based on sexual orientation discrimination when "anti-gay-animus" motivated corrections officials to deny an inmate a prison job. *Id*. at 438-41. Suspect class and "class of one" theory are not necessary to state an Equal Protection claim in the Sixth Circuit based on sexual orientation. *William J. Rold*

WISCONSIN – In a rare victory on reconsideration, *pro se* gay inmate Joel Scott Flakes persuaded United States Magistrate Judge Stephen L. Crocker to allow him to proceed against a prison warden who had previously been dismissed as a defendant in *Flakes v. Wall*, 2016 U.S. Dist. LEXIS 53317, 2016 WL 1611389 (W.D. Wisc., April 21, 2016). Six weeks ago, Judge Crocker had trimmed Flakes' complaint but allowed him to proceed against three prison employees, including a sergeant, on claims that they "violated his rights under the Eighth and Fourteenth Amendments by revealing his sexual orientation to other inmates, by disregarding serious risks of harm against him and by discriminating against him because he is homosexual." Judge Crocker dismissed claims against the inmate grievance defendants, the state corrections commissioner, and the warden. On reconsideration, Judge Crocker adhered to his decisions about the commissioner (who lacked personal involvement) and about the grievance defendants (whose failures do not state an Eighth Amendment claim but could be introduced on an issue of exhaustion of administrative remedies under the Prison Litigation Reform Act, should it be raised later); but he granted reconsideration regarding the warden. Although Flakes' allegations against the warden are vague as to actual risk (particularly since the warden asked him to provide more information in response to his grievance), they present a "closer question" than that posed regarding the other dismissed defendants. The allegation that the warden "consciously turned a blind eye toward an obvious risk" to an inmate's safety when the inmate notified the warden directly that he had been placed in a cell "with inmates with whom there was bound to be a confrontation" and that "violence was inevitable" stated a failure to protect claim against the warden under *Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010). On summary judgment or trial, however, Flakes will have to come forward with evidence that the warden knew of a substantial risk of serious harm and disregarded that risk. Interestingly, Flakes won reconsideration of the earlier dismissal despite the appearance in the interim of the Wisconsin Department of Justice for the defendants, who filed an answer with a general denial of the allegations in the Complaint (including identity of parties) and with boilerplate defenses. The docket shows no response to Flakes' request for reconsideration. *William J. Rold*

LEGISLATIVE

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U.S. DEPARTMENT OF DEFENSE – House Republicans added a provision to the annual defense policy bill that would allow religious government contractors with objections to evade President Obama's Executive Order banning sexual orientation or gender identity discrimination by the contractors. The measure was introduced by Rep. Steve Russell, an Oklahoma Republican, and provides broad religious exemptions from compliance with federal civil rights laws. Although it is an amendment to the Defense bill, it is broadly worded in a way that could extend the exemption to any "religious corporation, religious association, religious educational institution or religious society" that has contracts with the federal government from complying with federal anti-discrimination policy. The measure was approved in committee on April 28. *WashingtonPost.com*, April 29.

UNITED STATES DEPARTMENT OF LABOR – SOCIAL SECURITY ADMINISTRATION – The Social Security Administration has belatedly issued a new policy under the Supplemental Security Income (SSI) program, excusing any demand for "back payments" from people as a result of retroactive recognition of same-sex marriages pursuant to the Supreme Court's decision in *U.S. v. Windsor*. A lawsuit filed by GLBTQ Legal Advocates & Defenders (formerly GLAD) in Boston, Justice in Aging, and cooperating attorneys from Foley Hoag LLP, on behalf of two plaintiffs who had received such demands and a proposed nationwide plaintiff class, undoubtedly contributed to convincing the SSA that it should drop the demands. Prior to *Windsor*, the agency was making payments to same-sex married individuals as if they were single, pursuant to the unconstitutional Defense of Marriage Act. After determining that they should have recognized those marriages, the agency was recalculating benefits eligibility, which requires that spousal income be taken into account in determining the amount of benefits to be paid, and notified recipients that they owed money to the agency for "overpayments." Of course, these are low-income people who would have spent whatever money they received and had no resources to make payments to the agency. Now common sense has prevailed. (One would have expected a more agile response to the situation from the Obama Administration, but bureaucracies will be bureaucracies.)

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT – The Office of Personnel Management published a final rule in the Federal Register on April 8, 2016, changing the definition of "spouse" under the Family and Medical Leave Act as it relates to federal employees in response to the Supreme Court's 2013 decision in *United States v. Windsor* striking down Section 3 of the Defense of Marriage Act and the 2015 marriage equality decision, *Obergefell v. Hodges*. The new definition permits federal employees with same-sex spouses to use FMLA leave in the same manner as federal employees with opposite-sex spouses, and ensures that they can take family leave in response to the medical needs of their children. OPM had responded to the *Windsor* decision on October 21, 2013, with a memorandum to federal agencies advising that the definition of spouse in OPM's FMLA regulations was no longer valid, but the process under the APA for making permanent changes in regulations required formulating a proposed new definition, publishing it in the Federal Register for public comment, evaluating the comments, and then publishing a final regulation. OPM published the notice of proposed rule-making on June 23, 2014, and received 27 comments, with 24 supporting the change and three opposing it, citing "religious and traditional beliefs as reasons for adhering to a definition of marriage that applies only to opposite-sex couples." OPM pointed out that the positions advanced by the dissenting commenters were unconstitutional under *Windsor* and, subsequently, *Obergefell*. The new regulation modifies the definition of spouse to clarify that it "includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages, or (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State." Since every state now recognizes same-sex marriages as a result of *Obergefell*, the new definition clearly embraces all same-sex marriages contracted in the United States as well as those formed overseas in countries that allow same-sex marriages. The new final rule also modifies the definition of Parent, to provide: "Parent means a biological, adoptive, step, or foster father or mother, or any individual who stands or stood in loco parentis to an employee meeting the definition of son or daughter below. This term does not include parents 'in law.'"

UNITED STATES CENSUS BUREAU – Rep. Raul Grijalva and Sen. Tammy Baldwin enlisted 70 representatives and 9 senators to sign on to a bipartisan letter to U.S. Census Bureau Director John Thompson urging that questions regarding sexual orientation and gender identity be included in the American Community Survey, an ongoing federal survey that is sent to 3.5 million households every year to gather statistical information about

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the U.S. population for the use of the government in making policy decisions. *Congressional Documents*, April 27. The letter states, in part: "The current lack of population-based data on the LGBT community inhibits the creation of sound public policy as well as the delivery of effective programs and services to all Americans. Expanding and improving data collection and analysis about LGBT people is essential to better understanding the issues affecting our communities and to improve the health and well-being of all our families." The full text of the letter is available at: https://grijalva.house.gov/uploads/20160427CensusThompsonACS.pdf.

ALABAMA – Alarmed that a local Target store would be implementing the national retail chain's announced policy of allowing transgender staff members and customers to use restrooms consistent with their gender identity, thus threatening the chastity and virtue of Southern womanhood, the Oxford, Alabama, City Council enacted what was called the toughest anti-transgender "bathroom bill" in the country. The ordinance outlaws the use of a public bathroom different from the gender indicated on a person's birth certificate, providing for either a $500 fine or imprisonment for 6 months for violators. Police Chief Bill Partridge announced that the law, which also affects changing rooms, would be enforced the same as any other misdemeanor provision. "If somebody sees something that makes them uncomfortable," he said, "they would call the police. If the person is still there when the officer arrives, the officer has to witness the crime. Then we take down the person's information, and the person who reported it has to sign out a warrant." Assuming the usual rules of criminal law apply, of course, it would be up to the state to prove beyond a reasonable doubt that the suspect was in the "wrong" bathroom. *aol.comnews*, April 26. There was no indication that the local Target store in the Oxford Exchange shopping center planned to deviate from the company's national policy in response to this measure. Interestingly, it imposes no penalty on the operator of the restroom.

ARIZONA – Although the seven-member city council in Mesa, Arizona, seems to have the votes to pass a bill banning sexual orientation and gender identity discrimination in the city, and Mayor John Giles says that enactment is a priority, by agreement all consideration will be put off until after the elections in light of the controversial nature of the proposal. Action on the measure was on hold for many months while the Council waited to see whether the state legislature would take action on a similar proposal, which it did not. *Arizona Republic*, April 25.

ARKANSAS – The Texarkana Board of Directors unanimously passed an ordinance in January prohibiting sexual orientation and gender identity discrimination in employment, housing and public accommodations. This stirred up the city's homophobes, who circulated petitions and gained enough signatures to require the Board either to repeal the measure or put it up for a referendum vote. On April 4, the Board voted to appropriate the money to pay for a special election on June 28. The opponents are calling the measure a "bathroom law" and basing their campaign on the contention that it will endanger health and safety of the public by allow men to use restrooms designated for women and girls, a spurious charge since this danger has not occurred in the 17 states and hundreds of municipalities that have banned gender identity discrimination. The text of the ordinance doesn't mention restrooms at all, but the measure covers public accommodations, which means that transgender people could claim discrimination if they were prevented from using restrooms open to the public. *Arkansas Democrat Gazette*, April 6.

COLORADO – The Republican majority in a state Senate committee voted down a proposal to ban conversion therapy. Senator Owen Hill, a Republican Senator from Colorado Springs, argued that such a ban could unconstitutionally limit free speech rights, a position that has now been rejected by the U.S. Courts of Appeals for the 3rd and 9th Circuits in rulings that have been denied review by the Supreme Court, but what do they know? *Associate Press*, April 11.

FLORIDA – Governor Rick Scott signed into law on April 6 a bill repealing the state's 148-year-old ban on unmarried cohabitation. Although the crime was rarely prosecuted, the law deemed it a second-degree misdemeanor punishable by up to 60 days in jail or a $500 fine, as well as an order that the cohabitation end. Because of how it was worded, it did not apply to same-sex couples, resulting in a curious anomaly, although, of course, until the Supreme Court decided *Lawrence v. Texas*, it was illegal for cohabiting same-sex couples to have sex in the privacy of their home. A co-sponsor of the bill, Rep. Richard Stark, emphasized that it made criminals of many senior widows and widowers who decided to cohabit without marrying their new partners. "I represent communities of seniors, where a lot of them are technically not married," he said. "They are living together, but it makes more sense financially or for whatever reason like Social Security to not be married. I don't think that they want

to be considered to be violating the law." Of course, the law was also out of step with the widely-accepted social practice of young people who now tend to live together, sometimes for many years, before marrying. (Frequently it is the decision to have children that moves them to marry.) The measure received unanimous support from Senate Democrats but five Republicans voted no because…. well, just because. Governor Scott signed the measure without issuing any statement. *Orlando Sentinel*, April 7. * * * The Marion County School Board, apparently frightened at the prospect that men might invade the girls' restrooms in the district schools, adopted a ban on transgender students using restrooms other than those consistent with their sex as identified at birth, despite being warned by the ACLU of Florida that this policy violates Title IX of the Education Amendment Act, this putting at risk federal money received through the U.S. Department of Education. The ACLU of Florida has offered to provide legal representation to any transgender students in the district who seek to challenge the policy. *Ocala Star-Banner*, April 27. In light of the history of stupid school board decisions on a variety of LGBT issues in Florida, this action is not totally surprising.

HAWAII – The legislature has approved a bill that would prohibit insurance companies from discriminating against transgender patients. As passed by the House on April 26, it would prohibit "denying, canceling or limiting coverage based on a person's gender identity," reported the *Associated Press* on April 27. The bill had already passed the Senate and was sent to Governor David Ige for his approval. In response to a criticism from a Republican legislator, bill sponsor Chris Lee said that the bill does not mandate coverage of sex reassignment surgery; it merely bans discrimination because of gender identity in services already covered. Studies have shown that transgender individuals routinely encounter discrimination from health care providers when attempting to get services that are routinely provided to non-transgender individuals, and this is what the measure is intended to address.

ILLINOIS – The City of Highland Park announced that it would designate some single-stall restrooms in city buildings as gender-neutral in order to accommodate transgender individuals. Mayor Nancy Rotering said that she had discussed the idea with city council members and received unanimous support for it. This would affect nine of the city's 27 public restrooms. *Waukegan News Sun*, March 31.

KANSAS – Governor Sam Brownback (Republican), a proud and unrepentant opponent of LGBTQ rights, has signed into law S.B. 175, which prohibits universities in the state from enforcing any policy denying a religious student group benefits available to other student organizations because the group excludes individuals based on their religious beliefs. The measure is intended to allow such student groups to exclude LGBT students from participating in their activities without suffering any adverse consequences in terms of official recognition or access to university facilities and services. The measure was proposed in reaction to a U.S. Supreme Court decision that upheld the ability of a California state university law school to deny recognition to a Christian student group that excluded from membership anybody who would not affirm their opposition to homosexuality. The measure clearly accords with the governor's theocratic leanings. *Topeka Capital Journal*, April 4. * * * The *Wichita Eagle* has reported that the Brownback Administration is going ahead with a policy change that would make it virtually impossible for transgender people to change the gender indication on their birth certificates. The current policy allows for a change with medical documentation of surgical transition. The proposed policy would instead require the applicant to sign an affidavit stating that their gender was recorded incorrectly on their original certificate, and provide medical records to back that up. So on the odd chance that somebody was born intersexual and the doctor guessed wrong when identifying their gender for their birth certificate, they could have a correction made. This would effectively block transgender people from getting new birth certificates after transitioning. The Administration is doing this because Governor Brownback is afraid of being attacked by an angry transgender man the next time he has to use the restroom in the state capitol. (We wish…. We just made that up, but why not? No reputable policy reason has been offered for this change, which is apparently being proposed out of hatred, spite and ignorance. But that's nothing new for the Brownback Administration, which has thrown the state into a financial crisis in order that the Governor and his sleepwalking followers in the legislature could enact steep tax cuts to benefit his wealthy friends and donors.)

KENTUCKY – On April 1 the legislature gave final approval to a bill creating a new marriage license form that can be used for both same-sex and different-sex couples, and that dispenses with the prior legislative requirement that the county clerk's name appear on the form as certifying the qualifications of the couple to marry under state law, which had been the sticking point behind the Rowan County Clerk Kim Davis rebellion. (Gov. Bevin had

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previously ordered removal of county clerk names from license forms in an Executive Order, although his authority to do this was questionable since the requirement was in a statute.) In the new form, the applicant would have the option of checking bride, groom or spouse beside their name. *San Mateo Daily Journal*, April 2.

LOUISIANA – Governor John Bel Edwards, a Democrat, has issued Executive Order No. JBE 2016-11, rescinding an anti-gay Order issued by his predecessor, the outspoken anti-gay Republican, Bobby Jindal, and establishing an anti-discrimination policy for his administration that includes sexual orientation and gender identity. The measure applies to government employment and the practices of government contractors, as well as the provision of government services and benefits. The measure was signed on April 13 and went into immediate effect. Louisiana state law does not presently prohibit sexual orientation or gender identity discrimination because the Republican majorities in the state legislature in recent terms believed that individuals and businesses that don't want to associate with LGBT people should have a right to exercise their preferences. The legislature is currently considering a measure to add sexual orientation and gender identity to the state law, but its prospects are uncertain due to the political balance of the body.

MAINE – Militant anti-gay activist Michael Heath has begun a petition drive to support an initiative to repeal the ban on sexual orientation discrimination in the state's Human Rights Act. The Secretary of State's Office announced that his petition forms had been finalized and were waiting for him to pick them up. Heath has 18 months to collect signatures from approximately 61,000 registered voters if he wants his initiative on the November 2017 ballot. The anti-discrimination measure has been on the books for ten years and survived a 2005 referendum that was spearheaded by Heath, described in the press as an "Augusta preacher and tech consultant." He said he was moved to action by the Supreme Court's June 2015 marriage equality decision. *Portland Press*, April 7.

NEW JERSEY – The Pascack Valley Regional High School District adopted a new anti-discrimination policy on April 11 by a 6-1 vote. Under the policy, no person shall be discriminated because of his or her gender identity, expression, gender or sexual orientation. "The board of education will accept a student's assertion of his or her gender identity when there is consistent and uniform assertion of the gender identity." The district will use the student's preferred name and pronouns and allows students access to restrooms and locker rooms consistent with their gender identity. Some of the district's transgender students testified at the school board meeting at the express invitation of Board President Jeffrey Steinfeld, whose conduct puts to shame North Carolina Governor Pat McCrory and Texas U.S. Senator Ted Cruz. *Pascack Valley Community Life*, April 14. * * * The Rutherford Board of Education adopted a similar policy on April 25. According to *New Jersey Record* (April 27), a move to adopt such policies has been spreading among the towns of Bergen County. The School Board president, Kevin McLean, told an objecting parent that the policy was necessary to comply with state law banning gender identity discrimination and recent court rulings, undoubtedly referring to the 4th Circuit's recent Title IX ruling. McLean also pointed out that the policy approved by the board came verbatim from a model policy proposed by the New Jersey School Boards Association, and had been adopted by several other school districts around the state.

NEW MEXICO – The Santa Fe Public School system put into effect new regulations in March to protect transgender students from discrimination. Albuquerque district administrators were reported working on a similar policy. The Santa Fe policy allows transgender students to use restroom and locker room facilities consistent with their gender identity, and allows transgender student to designate their preferred name on a form that will upload it into the district computer system to be part of their official record. The similar proposal in Albuquerque has stirred heated debate at school board meetings. *Albuquerque Journal*, April 14.

NEW YORK – The State Department of Health has adopted a rule adding psychiatric nurse practitioners to the list of health care professionals who can recommend sex reassignment surgery under the state's Medicaid program. This will have the effect of making the procedures more readily available to transgender individuals without the private insurance coverage or financial resources to pay for the procedures. In addition, the new rule effectively lowers the age at which such surgery can be performed to 18. Under current laws, a sex reassignment procedure that would sterilize the patient could not be performed before age 21. *Journal News* (Westchester County), April 28.

NORTH CAROLINA – Reacting to the adverse publicity and comment stirred by enactment of H.B. 2, Buncombe County Commissioners voted 4-3 on April 5 to reaffirm the county's own

policy forbidding sexual orientation and gender identity discrimination in its own employment practices. This was a party line vote, Democrats eschewing discrimination and Republicans embracing it. The resolution reads, in part: "That Buncombe County Government is and remains supportive of a respective workplace policy intended, in part, to provide clear expectations about workplace practices in order to maintain and promote a culture of diversity and inclusion." * * * Political leaders and governmental bodies in other jurisdictions continued to react to the passage of H.B. 2. Among those that acted during April to prohibit official travel to North Carolina by government employees were: The Los Angeles (California) City Council and Mayor Eric Garcetti, the Cincinnati (Ohio) City Council, Madison (Wisconsin) Mayor Paul Scoglin, Providence (Rhode Island) Mayor Jorge O. Elorza, Atlanta (Georgia) Mayor Kasim Reed, and Santa Fe (New Mexico) Mayor Javier Gonzales. When it was pointed out that Mayor Gonzales' planned trip to Qatar, a country with severely repressive anti-gay policies, appeared inconsistent with this action, he cancelled the trip. Many other political leaders took similar actions soon after the measure was passed in March, and they are listed in the April issue of *Law Notes*. * * * Reeling from the continued criticism engendered by H.B. 2, Governor Pat McCrory issued Executive Order No. 93 ("To Protect Privacy and Equality") on April 12. The Order establishes equal employment opportunity for state employees, prohibiting "unlawful discrimination, harassment or retaliation on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, political affiliation, genetic information, or disability," and making clear that private employers in the state "may establish their own non-discrimination employment policies." Since state law in North Carolina does not prohibit sexual orientation or gender identity discrimination, it was unclear how such "unlawful discrimination" was defined under this Order. Addressing the "restroom accommodation" issue, the Order reaffirms the requirement in H.B. 2 that access to public facility restrooms be limited to those whose gender as identified on their birth certificates is consistent with the sex-designation of the facility, but pointed out that private businesses were free to adopt different policies. He directs the state's Department of Administration to interpret H.B. 2 as not restricting restroom access "when a private entity leases State real property" and the property is "in the lessee's exclusive possession." The Order includes "feel good" rhetoric about the state's Human Relations Commission, which is charged with attempting to resolve discrimination claims under H.B. 2, and suggests that the legislature to take action to "restore a State cause of action for wrongful discharge based on unlawful employment discrimination." With an oblique bow to federal preemption under Titles VII and IX, the Order states that "nothing in this section shall be interpreted as an abrogation of any requirements otherwise imposed by applicable federal or state laws or regulations." This may be an acknowledgement that after the 4th Circuit's Title IX ruling reported in our lead story above, the state's defense of a lawsuit challenging H.B. 2 under the statute has become precarious.

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

SOUTH DAKOTA – Voters in Sioux Falls approved six revisions to the City Charter on April 12, including codifying a city policy that had been effectuated through a mayoral executive order banning discrimination against LGBT people in city hiring. This amendment received the support of 76% of the voters and was generally considered to be non-controversial. *Argus Leader*, April 13.

TENNESSEE – A legislative proposal to require students in public schools to use only restrooms corresponding to their sex at birth died in committee after the office of Attorney General

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Herbert H. Slatery III issued Opinion No. 16-15, concluding that passage of the bill would endanger federal funding for the state's schools under Title IX as interpreted by the U.S. Department of Education. But the legislature did pass HB 1840/SB 1556, allowing counselors and therapists to withhold services from a client "whose goals, outcomes or behaviors conflict with the counselor's 'sincerely held principles'" which was signed into law by Governor Bill Haslam on April 27. The bill had originally specified "sincerely held religious beliefs" and was characterized as a measure intended to protect the religious freedom of counselors and therapists, who might be unduly burdened by having to provide assistance to LGBT people whom they abhorred, but the governor, evidently sensitive to the potential Establishment Clause issues raised by providing this special right to discriminate only to those with religious objections and evidently feeling that even atheistic homophobes in the profession should be accommodated, insisted that the legislature expand the measure into a general conscience bill, albeit including provisions charging counselors and therapists to make sure that these abhorrent potential clients are referred to somebody who is prepared to provide service to them, and charging them not to turn away somebody who was in the throes of an immediate crisis. The measure was amended during final consideration to provide that the state board licensing counselors could not take action against counselors who denied services as authorized by this law, despite the provisions of the American Counseling Association (ACA) Code of Ethics. The ACA immediately announced that it was weighing moving its 2017 Conference and Expo to a different city, as Nashville would no longer be a suitable location with this law in effect, and blasted the measure as "Hate Bill 1840." Washington State Secretary of State Kym Wyman (a Republican) quickly announced that neither she nor her staff would attend this summer's National Association of Secretaries meeting in Nashville, stating that Governor Haslam's action signing the bill contributed to her decision. When he was criticized for signing the measure, Haslam insisted that counselors should be able to turn away people just as doctors and attorneys legally can do, stating, "We let lawyers turn down clients." Haslam is evidently not aware of the rules of professional responsibility prohibiting discrimination by lawyers. *Chattanooga Times*, April 29. One is astonished that anti-gay counselors and therapists seem to have such a strong lobbying presence in the Tennessee state house. This new law seems to be unique in the United States.

LAW & SOCIETY NOTES

CALIFORNIA – Los Angeles Mayor Eric Garcetti has joined with members of the transgender community, statewide LGBT organizations, local officials, civil rights groups, businesses, faith-based leaders and community members to launch a new organization, Transform California, a statewide movement started by Equality California and the Transgender Law Center to educate and advocate for equal rights for transgender people. The organization will host regional rallies throughout the state intended to promote respect, understanding and safety for the transgender community and to oppose discrimination. Coalition members signed a pledge to work towards these goals, the text of which can be found on a new website: TransformCalifornia.org.

NORTH CAROLINA – Showing their disdain for the state's recent enactment of the anti-LGBT H.B. 2, the executive committee of the Guildford County Democratic Party designated Chris Sgro, executive director of the LGBT rights political group Equality North Carolina, to fill a vacancy in the state General Assembly resulting from the death last month of Representative Ralph Johnson. Sgro, a Greensboro resident, will become the only openly gay member of the Assembly. Johnson suffered a stroke during his hard-fought re-election campaign, and passed away on the day when he was narrowly re-elected on March 15. Sgro will serve out the balance of his term, and a local board of education member, Amos Quick, will take over the seat when the next two-year term begins in January. *Winston-Salem Journal*, April 10.

(EEOC) EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – The EEOC, charged with enforcing federal employment discrimination laws, announced that charges filed with the agency alleging discrimination against LGBT people had increased 28% during the agency's fiscal year running from Oct. 1, 2014 through September 30, 2015, undoubtedly reflecting reaction to the EEOC's historic decision in the *Baldwin* case last July 15 holding that sexual orientation discrimination claims may be filed under Title VII as a form of sex discrimination. Monetary awards for the cases that EEOC took up increased 51% to $3.3 million. The agency received 1,412 charges on behalf of LGBT complainants during the fiscal year, out of a total of about 90,000 charges lodged with the agency. *BloombergBNA Daily Labor Report*, April 13.

U.S. DEPARTMENT OF EDUCATION – The Department of Education published thousands of pages of documents on its website relating to applications by religious schools to be exempt from the requirement under

Title IX to refrain from discriminating against LGBT people and women. The statute has always allowed for religious-affiliated educational institutions to seek exemptions from compliance on religious grounds, but the push for such exemptions exploded in response to the requirement to provide access to birth control under the Affordable Care Act and the Supreme Court's decisions concerning same-sex marriage in *Windsor* and *Obergefell*. Also contributing to this surge is the sudden visibility of transgender issues, especially related to access to restrooms, locker rooms, and other sex-designated facilities. As news reports about such exemptions increased, LGBT rights groups and members of Congress urged the Obama Administration to make public information about the educational institutions that had applied and been granted the dispensations. The published documents involved applications from 232 religious-affiliated schools, and indicated that no religiously-affiliated school that sought the exemption had been turned down. Granting the exemption is apparently mandatory under the statute, as Congress was concerned when it enacted Title IX about the impact it might have if applied to religious schools. *BuzzFeed.com*, April 29.

HISTORIC GAY BAR – The National Park Service has added Julius, a venerable gay bar in the New York's West Village, to the National Register of Historic Places, in recognition of the 50th anniversary of the famous "sip-in" that was staged by gay activists who were challenging state liquor authority regulations against bars serving alcoholic beverages to gay people. According to news reports at the time, the bar had evaded the regulations by not asking customers about their sexual orientation, so the activists proclaimed that they were gay, leading the bartender (documented in a famous news photo) to place his hand over a drink and tell the men that they could not be served. *Washington Blade*, April 21.

FORMER SENATOR COMES OUT – Retired U.S. Senator Harris Wofford (D-Pennsylvania) published an op-ed article in the *New York Times* on April 23, announcing that he would be marrying his same-sex partner on April 30, 2016. Wofford was 70 when his wife of 48 years died, and he had no expectation that there would be a future romance in his life. But five years later he met a man on the beach at Fort Lauderdale, Florida, a relationship developed, they began to live together, and finally decided to marry. Wofford is 90 and his husband, Matthew Charlton, is 40. Wofford, who attended Howard University Law School and Yale Law School, was a lawyer and law professor before becoming involved in politics, so we welcome him belatedly to the ranks of (retired) LGBT lawyers. He represented Pennsylvania in the Senate from 1991 to 1995.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION – The NCAA has voted that it will not hold its iconic "Final Fours" national basketball championship games in any city that has not outlawed sexual orientation and gender identity discrimination. The vote came in response to the enactment of H.B. 2 in North Carolina, which preempts the Charlotte anti-discrimination ordinance, replacing it with a state law that does not ban such discrimination. As such, the NCAA warned that if H.B. 2 is not repealed, Charlotte will lose its status as host of the tournament for 2017. Despite this progressive stand, the NCAA has taken no action concerning its religiously-affiliated members that have applied for and obtained exemption from complying with Title IX of the Education Amendments Act, which has been construed by the Education Department to ban discrimination against LGBT students and employees.

INTERNATIONAL NOTES

BANGLADESH – Islamic extremists have been attacking and murdering people in the capital of Dakha. On April 25, it was reported that "unidentified attackers" later claimed to be member of Al Qaeda had broken into the apartment of a leading gay rights activist and publisher of the country's only gay magazine, Xulhaz Mannan, and hacked him to death with machetes. The U.S. Ambassador, Marcia Bernicat, condemned the killing, confirming that Manna was a Bangladeshi national who had been working for the U.S. Embassy. The assailants also murdered a friend who was in the apartment with Mannan. The killings followed the murder of a "liberal" professor in Rajshahi two days earlier, and was followed within days by other fatal assaults as the country seems to be besieged by religious activists bent on eliminating those who do not fall in with their brand if Islam. *Agence France Presse*, April 25.

CANADA – The City of Hamilton, Ontario, has settled a human rights complaint alleging that a transgender woman was denied access to the women's restroom at the MacNab Bus Terminal by a city employee, being directed instead to the "family washroom" that is provided for couples with young children. The Human Rights Legal Support Centre reported that the City had agreed to codify non-discrimination principles in writing to prevent the recurrence of such discrimination in access to public facilities. The City agreed to train its workers and to post signage confirming its commitment to providing safe and accessible washroom/change room

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facilities for all. *Canadian Newswire English*, April 25. * * * The British Columbia Supreme Court has appointed a litigation guardian to represent the interests of an eleven-year-old child diagnosed with gender dysphoria, whose parents are disputing whether the child, J.K., who is transitioning from female to male, should be administered a puberty-blocking drug to prevent her from developing female secondary sex characteristics as she enters puberty. Justice Ronald Skolrood ruled in the J.K. should be represented by a litigation guardian who can advise the court on formulating its views in the court battle over J.K.'s treatment. The child's father filed the lawsuit to try to stop the treatment, which is supported by the child's mother, who had sought appointment of the law guardian. *Postmedia News*, April 28.

CHINA – The Changsha Furong District Court, Hunan Province, rejected a claimed right to marry in a suit brought by a gay male couple, Sun Wenlin and Hu Mingliang, on April 13. The men announced their plan to appeal the ruling. The district court had agreed to hear the case earlier this year, but the scheduled hearing in January was postponed. The hearing was held on April 13 with the decision announced a few hours later. *New York Times*, April 13.

COLOMBIA – On April 28, Colombia became the fourth country in South America to allow same-sex marriage, as a result of a 6-3 ruling by the Constitutional Court. The court had previously approved same-sex marriage in concept, and lower courts had recognized legal unions of same-sex couples without the name of marriage, but the legislature failed to take action, and the court had warned them that such failure could lead to a constitutional decision. The ruling came several weeks after the Court, by the same 6-3 vote, rejected a petition by a conservative group to rule that same-sex couples are not entitled to marry on April 7. The other countries in South America that now have same-sex marriage are Argentina, Brazil and Uruguay. Presiding Justice Maria Victoria Calle announced, "The judges affirmed by a majority that marriage between people of the same sex does not violate constitutional order. The current definition of the institution of marriage in civil law applies to them in the same way as it does for couples of the opposite sex." Under this ruling, "all people are free to choose independently to start a family in keeping with their sexual orientation, receiving equal treatment under the constitution and law." Couples that had previously received legal sanction for their relationships will henceforth be considered married, and a member of the Court responded to press inquiries by stating that the effect of the ruling was immediate, and local officials could modify the necessary forms without waiting for new official forms to be printed. *Digital Journal*, April 29; *New York Times*, April 29.

FAROE ISLANDS – The legislature in the Faroe Islands, an autonomous Danish dependency, voted 19-14 to adopt Denmark's same-sex marriage and adoption laws, although the local church will not be authorized to perform same-sex weddings. The bill will be referred to the Danish Parliament, with a request to amend Denmark's 2012 marriage equality law, under which Greenland and the Faroe Islands were not included. The necessary votes in the Danish Parliament and subsequent royal assent are considered a formality rather than an obstacle at this point. *theperchybird.blog*, April 29.

FRANCE – Having given up on his intention to appoint openly-gay Laurent Stefanini as ambassador to the Vatican due to the Catholic Church's refusal to accept him, French President Francois Hollande has appointed Stefanini as France's representative to UNESCO, the Paris-based United Nations social and cultural agency. Prior to his appointment, Stefanini served as Chief of Protocol for the Hollande government. *Reuters*, April 6. * * * A labor tribunal in Paris has stirred outrage by ruling that the proprietor of a hair salon who dismissed a gay employee through a text message calling him a "dirty faggot" had not violated the law, advancing the strange rationale that "The term 'faggot' used by a manager cannot be considered as a homophobic insult because hair salons regularly employ gay people, notably in female hairdressers, and that poses no problem." The plaintiff announced he would appeal the ruling. *Daily Mail* (UK), April 9.

ISLE OF MAN – The Isle of Man, a self-governing British dependency, has legislated for marriage equality. On April 26 the Legislative Council, upper house of the legislature, voted 6-3 to approve the Marriage and Civil Partnership (Amendment) Bill 2016, which was previously approved by the House of Keys (the lower house of the legislature) in March by a vote of 17-3. The bill opens up marriage to same-sex couples (and those who previously were in civil partnerships will be able to convert them to same-sex marriages if they like) while making civil partnerships available to different-sex couples who want to obtain legal status for their relationships but don't care to marry. The remaining formalities will be formal signing by the executive and submission to the Queen for Royal Assent. The goal is to have weddings started by the summer. The Isle of Man is located in the Irish Sea between Britain and Ireland and at its last census had a population of almost 85,000.

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ITALY – The Court of Appeal in Naples ordered full recognition of two second-parent adoption orders by the Court of Lille (France) in favor of a French-Italian family residing in the Province of Avellino, according to a posting to facebook.com by NELFA, the European platform of LGBTIQ Families Associations. Local mayors had refused to update birth certificates to show both parents of the children, but are now under court order to do so.

KENYA – Hope springs eternal. Gay rights advocate Eric Gitari, who heads the National Gay and Lesbian Human Rights Commission in Kenya, has filed a lawsuit in the High Court challenging the continued criminalization of gay sex in that country. At present, gay sex can be punishable by up to 14 years in prison. "Carnal knowledge against the order of nature" is the crime with a 14 year sentence, while "gross indecency with another male" can draw 5 years in the clink. Gitari's complaint alleges that the offending passages in the Penal Code violate constitutional rights to equality, dignity and privacy. *Reuters*, April 15.

KUWAIT – The *Arab Times* (April 18) reported that Kuwait authorities arrested 41 men for engaging in "homosexual prostitution services" in a raid on a massage parlor in Kuwait City. Law enforcement authorities sent an undercover officer to the facility to negotiate a sexual assignation, then sent in the raiding party, which claimed that the 41 workers were not complying with labor laws and regulations. The claim was that the massage parlor was actually a front for blackmail.

MEXICO – The campaign for same-sex marriage advanced as the Supreme Court of Justice, having approved two "amparos" for same-sex couples seeking to marry in the state of Sinaloa, had informed the Sinaloa Congress that the state's ban on same-sex marriage is unconstitutional. Three other states are almost this far along in progressing toward a situation where local authorities will be required to allow same-sex marriage: Oaxaca, Aguascalientes, and Baja California. In Mexico marriage is legislated at the state level, and until the Supreme Court has adjudicated at least five cases from the same state, its ruling for that state is not deemed "jurisprudential" and fully binding for others than the parties involved, apparently. As marriage equality advocates have initiated actions in many different states simultaneously, new developments are occurring on a regular basis, with the expectation that it will not be too long before the entire country is under court orders to allow same-sex marriages. At present, in most states same-sex couples seeking to marry must apply to a court for an amparo (an order to allow the marriage) in order to compel local administrative officials to allow the wedding to take place. The Supreme Court has decreed, with binding effect, that any lawfully performed same-sex marriage must be recognized by local governments through the country.

NIGERIA – The Ministry of Foreign Affairs has denied a story that it is investigating the Ambassador of Switzerland, Eric Mayooraz, on suspicion of having brought his same-sex spouse from Switzerland. Newspapers were reporting that the Swiss Embassy was attempting to register Mayooraz's part "as a member of the Association of Spouses of Heads of Mission in Nigeria." The government disclaimed any direct knowledge of this. *allAfrica.com*, April 14.

SCOTLAND – The leader of Scotland's Labour Party, Kezia Dugdale, became the fifth key political figure and fourth official party leader in Scotland to come out as gay or bisexual, reported *The Observer* (April 4). Ruth Davidson, leader of the Scottish Conservative Party, Patrick Harvie, leader of the Scottish Green Party; and David Coburn, the leader of UKIP Scotland (which sought to cut ties with the United Kingdom), are all openly gay or bisexual, along with Scotland's only Conservative member of the U.K. Parliament, David Mundell, who serves as Secretary of State for Scotland in the current U.K. government. Reported the newspaper, "Scotland is believed to be the only country in the world where most of its political leaders are openly lesbian, gay or bisexual. Dugdale said, "I have a female partner. I don't talk about it very much because I don't feel I need to." * * * Despite this plethora of LGBT leaders, Scotland prior to the upcoming parliamentary elections has only the third most gay legislative body. Netherlands is first, with 7.3% of members of Parliament being openly LGBT, followed by the United Kingdom, with 5.5%. However, with the recent "coming out" of Kezia Dugdale, if all the openly LGBT members are re-elected in May, Scotland will surpass the U.K. with 6.2% of the members of its legislature being openly LGBT. *The National* (Scotland), April 7.

THAILAND – Ending a protracted litigation, a same-sex couple from the United States has won court approval to leave Thailand with the baby for whose birth they contracted with a Thai surrogate mother. A law came into effect in July to end the practice of Thai women contracting with foreign couples to bear children for them through donor insemination. American Gordon Lake and Spaniard Manuel Santos contracted with Patidta Kusolsand to bear their child. She gave birth to a healthy girl before the new law went into effect, and refused to surrender custody of the child, claiming that she was not aware the couple was gay and was concerned

for the welfare of the child. The Central Juvenile and Family Court in Bangkok ruled April 26 that the fathers were entitled to custody of the child. The men has a three-year-old son who was born through surrogacy in India before that country outlawed the practice of Indian women bearing children for foreigners. *Huffington Post*, April 26.

TURKMENISTAN – Turkmenistan has enacted a law requiring marriage license applicants to be tested for HIV. Anyone found to be infected could be denied a license. A report by a government newspaper said that the measure was passed "in order to create conditions for forming healthy families and avert the birth of HIV-infected children." The law also requires HIV testing of persons suspected of using narcotics, foreigners seeking work visas, and blood donors. *Associated Press*, April 6.

PROFESSIONAL NOTES

LGBT BAR OPPORTUNITY – THE NATIONAL LGBT BAR ASSOCIATION is currently hiring for two new positions in its national office in Washington, D.C. They are seeking a Director of External Affairs and a Development Associate. Full specifications for each position can be found on the organization's website, lgbtbar.org.

LAMBDA LEGAL – Lambda Legal announced that **RACHEL B. TIVEN** will become its new CEO, following the imminent retirement of Executive Director Kevin Cathcart, who has helmed the organization through tremendous growth and historical legal victories over the past 24 years. The announcement was timed to coincide with Lambda's annual Liberty Awards Dinner in New York on May 2. Tiven is best known in the community for her very effective leadership of Immigration Equality for eight years, and is a graduate of Columbia Law School. She spent the last two years leading Immigrant Justice Corps, the nation's first fellowship devoted to representing immigrants. Lambda is the nation's largest LGBTQ public interest law firm, having been founded in New York early in the 1970s and grown to a national presence with offices in every major region of the country and a large active docket.

TRANSGENDER LEGAL DEFENSE & EDUCATION FUND – TLDEF is searching for an Executive Director to be based in its New York City office. The public interest legal organization brings test-case litigation, operates a Name Change Project, provides direct legal services to transgender people in need, engages in public education, and advocates for legislative and administrative changes in support of legal and social equality for transgender people. For full information, consult their website: tldef.org.

LEIDEN UNIVERSITY SUMMER SCHOOL – Leiden University (The Netherlands) has announced a summer school program on August 1-5, 2016, to be held at The Hague, focused on the emergence of sexual orientation and gender identity issues in human rights law, international criminal law, and refugee law. The faculty will includes speakers from international organizations, non-governmental organizations, and academics from sever different countries. The program will be coordinated by Kees Waaldijk, a prominent scholar and academic and professor of comparative sexual orientation law at the University's law school. For information, see http://grotiuscentresummerschools.com/event/sexual-orientation. The deadline for applications is June 1, 2016, so don't delay if you are interested.

PUBLICATIONS NOTED

1. Acocella, Francesca Rebecca, Love Is Love: Why Intentional Parenting Should Be the Standard for Two-Mother Families Created Through Egg-Sharing, 14 Cardozo Pub. L. Pol'y & Ethics J. 479 (Spring 2016).
2. Arango, Katherine M., Trial and Heirs: Antemortem Probate for the Changing American Family, 81 Brook. L. Rev. 779 (Winter 2016) (suggesting change procedures to compensate for the failure of traditional intestacy law to provide for changing family patterns).
3. Bernhardt, Autumn L., The Profound and Intimate Power of the *Obergefell* Decision: Equality Dignity as a Suspect Class, 25 Tul. J. L. & Sexuality 1 (2016) (insightful development of *Obergefell* as an important precedent for equal protection of sexual minorities).
4. Bos, Henny M., and Justin R. Knox, Loes van Rijn-van Gelderen, and Nanette K. Gartrell, Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health, 37 J. Developmental & Behavioral Pediatrics 179 (April 2016) (and see commentary below by Nathaniel Frank).
5. Bourda, Matthew W., Turning the Water to Blood: How *Burwell v. Hobby Lobby* Drove the Religious Freedom Restoration Act Out of Touch With Society, 41 T. Marshall L. Rev. Online 160 (Fall 2015 – Spring 2016).
6. Burnett, Craig M., and Mathew D. McCubbins, Marriage on the Ballot: An Analysis of Same-Sex Marriage Referendums in North Carolina, Minnesota, and Washington During the 2012 Elections, 19 Chap. L. Rev. 1 (Winter 2016).
7. Calabresi, Steven G., Sarah E. Agudo, and Katherine L. Dore, The U.S. and the State Constitutions: An Unnoticed Dialogue, 9 N.Y.U. J. L. & Liberty 685 (2015) (Article appears to have been drafted prior to *Obergefell* decision; infuses meaning into the 14th Amendment's Privileges & Immunities Clause by reference to rights explicitly protected by state constitutions at the time of the founding, leading, among other things, to an argument that same-sex marriage is a fundamental right protected against state abridgement by the Privileges & Immunities Clause – no need for substantive due process).
8. Calabresi, Steven G., and Hannah M. Begley, Justice Oliver Wendell Holmes and Chief Justice John Roberts's Dissent in *Obergefell v. Hodges*, 8 Elon L. Rev. 1 (2016) (Calabresi & Begley campaign to undermine the pedestal on which rests Justice Holmes's famous dissent in *Lochner v. New York*).
9. Colker, Ruth, The Freedom to Choose to Marry, 30 Colum. J. Gender & L. 383 (2016) (advances and retreats of the *Obergefell* decision).
10. Dodson, Scott, The Gravitational Force of Federal Law, 164 U. Pa. L. Rev. 703 (Feb. 2016) (argues that federal law is followed too slavishly by state courts, using *Bowers v. Hardwick* as an example, but we think not completely accurately, since several state supreme courts refused to follow *Bowers* over the ensuing 15 years, insisting that their state constitution provided broader protection for sexual privacy than the federal constitution. However, his theory would suggest that the newly broadened understanding of sex discrimination under Title VII might influence state court interpretations of their sex discrimination laws).
11. Elrod, Linda D., and Robert G. Spector, A Review of the Year in Family Law 2014-2015: Family Law Continues to Evolve as Marriage Equality is Attained, 49 Fam. L.Q. 545 (Winter 2016).
12. Fischel, Joseph J., and Hilary R. O'Connell, Disabling Consent, or Reconstructing Sexual Autonomy, 30 Colum. J. Gender & L. 428 (2016).
13. Frank, Nathaniel, Moving Beyond Anti-LGBT Politics: Commentary on "Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health," 37 J. Developmental & Behavioral Pediatrics 245 (April 2016).
14. Goetting, Nathan, More Than Just the Last Gay Marriage Case, 72 Nat'l Law. Guild Rev. 55 (Spring 2015) (pre-*Obergefell* article predicting that the Supreme Court's decision would be about more than just same-sex marriage; in the event, early commentators expressed disappointment on this score, but more recent writers have suggested that the *Obergefell* decision is seeded with the ingredients to enhance equal protection for LGBT people).
15. Greenwood, Daniel J. H., Person, State, or Not: The Place of Business Corporations in Our Constitutional Order, 87 U. Colo. L. Rev. 351 (Spring 2016) (The Supreme Court has gone overboard in according constitutional rights to business corporations).
16. Griffin, Leslie C., A Word of Warning from a Woman: Arbitrary, Categorical, and Hidden Religious Exemptions Threaten LGBT Rights, 7 Ala. C.R. & C.L. L. Rev. 97 (2015).
17. Heyman, Steven J., A Struggle for Recognition: The Controversy Over Religious Liberty, Civil Rights, and Same-Sex Marriage, 14 First Amendment L. Rev. 1 (2015) (argues for a compromise position under which religious objectors to same-sex marriage do not enjoy a general First Amendment right to deny goods, services and recognition to legal same-sex marriages, but that those who provide services that would involve them directly in the performance of same-sex marriages should be entitled to assert a religious exemption from participation).
18. Jones, Trina, Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law, 6 Ala. C.R. & C.L. L. Rev. 45 (2014) (despite the cover date for this law review, article post-dates and references *Obergefell v. Hodges* (2015) and the EEOC's 2015 ruling that sexual orientation discrimination claims are cognizable under Title VII, and summarizes the state of the law regarding protection against discrimination because of sexual orientation).
19. Kitrossera, Heidi, Interpretive Modesty, 104 Geo. L.J. 459 (March 2016) ("New Originalism" and the *Obergefell* decision).
20. Koppelman, Andrew, A Zombie in the Supreme Court: The Elane Photography Cert Denial, 7 Ala. C.R. & C.L. L. Rev. 77 (2015) (Elane was not an appropriate vehicle for the Supreme Court to tackle the gay rights/religious freedom struggle).
21. Landau, Joseph, Bureaucratic Administration: Experimentation and Immigration Law, 65 Duke L.J. 1173 (March 2016) (LGBT immigration issues as an example of an area where administrators have tried to respond creatively to non-traditional situations).
22. Lane-Steele, Laura, Masking Discrimination: How the "Second Wave" of RFRAs Can Weaken Protections for LGB Individuals, 72 Nat'l Law. Guild Rev. 109 (Summer 2015).
23. Lupu, Ira C., Moving Targets: *Obergefell*, *Hobby Lobby*, and the Future of LGBT Rights, 7 Ala. C.R. & C.L. L. Rev. 1 (2015).
24. Matsumura, Kaiponanea, A Right Not to Marry, 84 Fordham L. Rev. 1509 (March 2016) (Compulsory marriage under *Obergefell*? An unintended consequence?)
25. NeJaime, Douglas, Marriage Equality and the New Parenthood, 129 Harv. L. Rev. 1185 (March 2016) (How evolving domestic relations law, including expanding rights for non-married heterosexual parents, helped to shape the arguments for marriage equality).

26. Note, Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling and Important-Interest Inquiries, 129 Harv. L. Rev. 1406 (March 2016) (So what's up with Due Process and Equal Protection Analysis these days? Are the verbal formulations that scholars and courts use really meaningful anymore?).
27. Rochow, Neville, An Incurable Malaise: *Commonwealth v. Australian Capital Territory* and *Baskin v. Bogan* as Symptoms of Early-Onset Dystopia, 2015 B.Y.U. L. Rev. 609 (2015) (why same-sex marriage is the end of the world as we know it, for the worse, of course – consider the source).
28. Rogers, Jordan, Being Transgender Behind Bars in the Era of Chelsea Manning: How Transgender Prisoners' Rights Are Changing, 6 Ala. C.R. & C.L. L. Rev. 189 (2015).
29. Samar, Vincent J., Toward a New Separation of Church and State: Implications for Analogies to the Supreme Court Decision in *Hobby Lobby* by the Decision in *Obergefell v. Hodges*, 36 B.C. J.L. & Soc. Just. 1 (2016).
30. Seidman, Louis Michael, Substitute Arguments in Constitutional Law, 31 J.L. & Pol. 237 (Winter 2016).
31. Seinfeld, Gil, The Good, the Bad, and the Ugly: Reflections of a Counterclerk, 114 Mich. L. Rev. First Impressions 111 (March 2016) (Memorial recollections of clerking for Justice Scalia by one of his "counterclerks" – a political liberal recruited by Scalia to presenting opposing views in chambers, who clerked during the term of *Lawrence v. Texas*. Fascinating view of the judge and the man.)
32. Sepper, Elizabeth, Gays in the Moralized Marketplace, 7 Ala. C.R. & C.L. L. Rev. 129 (2015) (How the *Hobby Lobby* decision threatens to take us back to the days when racist Christians tried to claim religious exemptions from complying with public accommodation laws barring race discrimination, this time in the context of refusing services to gay people).
33. Serkin, Christopher, and Nelson Tebbe, Is the Constitution Special?, 101 Cornell L. Rev. 701 (March 2016) (Is there any justification for using different interpretive principles for construing the Constitution than one uses for construing statutes and regulations?)
34. Silverman, Bradley G., Federal Questions and the Domestic-Relations Exception, 125 Yale L.J. 1364 (March 2016).
35. Stone, Amy L., Rethinking the Tryanny of the Majority: The Extra-Legal Consequences of Anti-Gay Ballot Measures, 19 Chap. L. Rev. 219 (Winter 2016).
36. Strasser, Mark, Free Exercise and Substantial Burdens Under Federal Law, 94 Neb. L. Rev. 633 (2016).

EDITOR'S NOTES

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

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