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2-1 Sixth Circuit “TED Talk” Creates Circuit Split that May Finally Get Supreme Court’s Attention
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A three-judge panel of the U.S. Court of Appeals for the 6th Circuit voted 2-1 to reverse marriage equality decisions from Michigan, Ohio, Kentucky and Tennessee on November 6, creating a split of circuit authority that appeared calculated to provoke Supreme Court review, just one month after the High Court had turned down petitions from five states in three circuits, effectively allowing marriage equality decisions to take effect in those states. The opinion for the majority in DeBoer v. Snyder, 2014 U.S. App. LEXIS 21191, 2014 Westlaw 5748990, written by Circuit Judge Jeffrey Sutton, framed the issue as “who should decide” whether same-sex couples have a right to marry, judges or the voters (either directly through referenda or indirectly through their elected legislators), while acknowledging the likelihood that same-sex couples would eventually win the right to marry nation-wide. Sutton concluded that this was a policy decision best made through “democracy” rather than adjudication, thus parting company from his colleagues in the 4th, 7th, 9th and 10th Circuits. Dissenting Circuit Judge Martha Craig Daughtrey sharply disagreed.

Plaintiffs in the cases consolidated for review quickly conferred and agreed to eschew any attempt to win reversal of this opinion through motions for en banc review. Such an attempt would likely be futile in the 6th Circuit, where ten out of the fifteen active judges were appointed by Presidents Reagan, Bush I and Bush II. Instead, they all filed petitions for certiorari within a few weeks: Henry v. Hodges; Obergefell v. Hodges, No. 14-556 (filed Nov. 14, 2014) (Ohio); Tango v. Haslam, No. 14-562 (filed Nov. 14, 2014) (Tennessee); DeBoer v. Snyder, No. 14-571 (filed Nov. 17, 2014) (Michigan); Love v. Beshear, No. 14-574 (filed Nov. 17, 2014) (Kentucky). The states had thirty days in which to file responses. If everybody moved with celerity, it seemed possible that the filings would be completed in time for the Court to consider the petitions during January, and many observers suggested that a grant of certiorari in January could result in a spring argument and a decision by the end of the Supreme Court’s term in June. It was reported that Michigan filed its response on November 24, defending the 6th Circuit’s decision but agreeing that the Supreme Court should grant review, but as of Nov. 30 a state statute. Because of the sheer volume of such cases, the Court frequently summarily affirmed the lower court without holding oral arguments or receiving full merits briefing from the parties, stating that the case did not present a “substantial federal question.” Under the circumstances, such rulings are considered binding precedents on lower courts as to their judgments, but lacking a written opinion from the Court, the grounds of the decisions are open to speculation.

“It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions ‘until such time as the Court informs us that we are not,’” wrote Sutton, referring to a later Supreme Court ruling explaining the precedential status of such summary dispositions, Hicks v. Miranda, 422 U.S. 332 (1975). This was a selective quotation from Hicks, however, as each of the other circuit courts has found a basis in other statements in Hicks and later Supreme Court opinions suggesting that if later Supreme Court rulings make it clear that an earlier summary affirmance has been superseded by doctrinal developments, the old summary affirmance is no longer binding.

Sutton’s position also appeared blatantly inconsistent with the Supreme Court’s action on October 6, when it denied petitions for certiorari by Indiana, Wisconsin, Utah, Oklahoma, and court clerks in Virginia, seeking review of decisions in which three other circuits had expressly held that they were
not bound by *Baker* to reject a marriage equality claim. True enough, as Sutton insisted, a denial of certiorari is not a ruling on the merits. However, if a majority of the Supreme Court believed that *Baker v. Nelson* still precludes lower federal courts from ruling affirmatively in marriage equality cases, then the simplest way to communicate that belief would have been to summarily reverse these new circuit court rulings, citing *Baker v. Nelson* as binding authority. The Court did not do so; this “speaks volumes,” to use a phrase employed by U.S. District Judge Ortrie Smith in his Missouri marriage equality decision issued the day after the 6th Circuit ruling (see below). Clearly, at least a majority of the Supreme Court now views same-sex marriage claims as presenting a substantial federal question, rendering *Baker* irrelevant. (Later-breaking news that Justices Thomas and Scalia thought that the Court should have granted certiorari in those cases does not change this calculus.)

Judge Sutton explained why he concluded that the 2013 DOMA ruling, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), did not overrule *Baker v. Nelson*. Justice Anthony Kennedy’s opinion for the Court did not mention *Baker*, Sutton observed, and Kennedy expressly disclaimed ruling on whether same-sex couples are entitled to marry. Although Justice Kennedy wrote that the basis for the Court’s ruling was the 5th Amendment’s Due Process and Equal Protection requirements, expressly disclaiming reliance on federalism to reach this result, Chief Justice John Roberts’ dissenting opinion characterized the case as being about “federalism” — the division of authority between state and federal governments — and Sutton reiterated that contention, arguing that the *Windsor* ruling leaves *Baker v. Nelson* untouched because it says nothing directly about whether same-sex couples are entitled under the 14th Amendment to marry. Justice Antonin Scalia, for whom Sutton clerked, would sharply dispute this, of course. In his *Windsor* dissent, Scalia rejected the idea that the majority opinion was based on federalism, and insisted that its 5th Amendment analysis would provide a template for lower federal courts to write marriage equality decisions in subsequent 14th Amendment cases.

Sutton’s conclusion that a ruling for the plaintiffs was foreclosed by *Baker* and *Windsor* meant that there was no reason for Sutton to address the merits otherwise. He could have ended his opinion right there, without addressing the due process and equal protection arguments made by the plaintiffs in these cases, but he plunged ahead, rejecting the analyses of all the prior circuit court decisions as well as dozens of district court opinions (including the six opinions being reviewed in this case), scattering absurd dicta in all directions.

“A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States,” he insisted, and went on to adopt the theory presented by the states that marriage as an institution was created to channel the procreative activities of heterosexual couples into a stable institution for raising their children. Thus, while claiming to be faithful to *Windsor*, he was ignoring that opinion’s implicit rejection of the arguments that forms of discrimination that are “traditional” are thereby saved from constitutional challenge, or that courts could willfully ignore the impact of marriage exclusion on the children being raised by same-sex couples. While he conceded that views of marriage have evolved, and that there could be strong policy arguments for extending the right to marry to same-sex couples today, he said that this “does not show that the States, circa 2014, suddenly must look at this policy issue in just one way on pain of violating the Constitution.” This is, of course, in line with his general philosophy concerning the respective role of legislatures and courts in making public policy decisions, and it channels the arguments made by Justice Samuel Alito in his dissenting opinion in *Windsor*, which similarly argued that differences of philosophy about marriage policy should be resolved by the political branches of government.

Understanding Sutton’s opinion requires understanding his judicial philosophy. Sutton was appointed to the 6th Circuit by George W. Bush. He was among Bush’s earliest appointments, and his very conservative reputation, earned from his law review articles and his service as Ohio State Solicitor, caused a substantial delay in his confirmation. The Democrats briefly controlled the Senate at the beginning of Bush’s first term, and they refused to vote on the Sutton nomination. After Republicans gained a majority in the Senate, Bush re-nominated Sutton and he was finally confirmed two years after his initial nomination. After graduation from law school at Ohio State, Sutton had clerked at the Supreme Court for both Scalia and Justice Lewis Powell. His general views on judging seem to be closely in sync with many of Scalia’s articulated positions, most notably “originalism” as a determinative interpretive tool for old constitutional provisions.

Sutton lines up with those who say that constitutional provisions should be held to mean only what their framers intended them to mean, based upon what they would have been taken to mean by the public at the time they were ratified. Viewed from this perspective, the 14th Amendment, adopted in 1868, was intended to assure that the recently freed black slaves would be accorded the same legal status by the states as all other citizens. Also viewed from this perspective, the function of the 14th Amendment’s due process clause was to guarantee procedural fairness to racial minorities in the administration of state laws. Adherents to this view of constitutional interpretation generally dispute the theory of “substantive due process” under which courts invalidate laws as impairing fundamental rights without sufficient justification. They also long argued that the equal protection clause was intended solely to ban race discrimination, given the context of its adoption, and fought as “unoriginalist” the extension of equal protection theories to sex discrimination. Even Justice Scalia seems to have backed away from the most extreme view of the limits of equal protection, now describing himself as an “imperfect” originalist, but he has referred from time to time to the “discredited” theory of “substantive due process.” Sutton devoted a section...
of his opinion to an originalist argument that the drafters of the 14th Amendment could not have intended it to require the states to “redefine marriage” to include same-sex couples.

At the same time, Sutton also proclaimed, as does Scalia, that courts must be very deferential to the legislatures and the voters in matters of public policy, that they must accord a strong presumption of constitutionality to policies made through the democratic process, and that they should only strike down state constitutional provisions and statutes in extreme cases where they directly contradict express constitutional provisions. Such judges are fond of pointing out that the constitution does not mention marriage, and they consider the argument that there is a constitutionally protected fundamental right to marry as illegitimate.

Together with this, as Sutton pointed out, prior decisions by the 6th Circuit had rejected the contention that sexual orientation is a “suspect classification” or that laws discriminating against gay people are subject to heightened or strict scrutiny, so this 6th Circuit panel was bound in his view to uphold the state marriage bans if any rational basis for them could be hypothesized. Providing a revisionist (and startlingly over-simplified) history of the institution of marriage, he rejected the argument that it was irrational for a state to cling to a “traditional” definition of marriage that, in his view, had subsisted for thousands of years. Amplifying a point he had raised during oral argument, he contended that accepting the plaintiffs’ argument that the Supreme Court’s right-to-marry precedents were not limited to different-sex marriages would open up a plausible argument in favor of plural marriage, with no limiting principle to determine how many spouses a person could have.

Given his background of judicial philosophy and 6th Circuit precedents, together with his rejection of the argument that U.S. v. Windsor had any direct application to this case, Sutton’s conclusion that the marriage bans are constitutional was not very surprising. Indeed, anybody listening to the oral argument exactly three months earlier would have to conclude that Sutton was deeply skeptical about the argument that the bans were unconstitutional. This result from the 6th Circuit was widely anticipated, even by Supreme Court Justice Ruth Bader Ginsburg, whose public remarks before the start of the Supreme Court’s term sent a clear signal that the Court felt no rush to take a same-sex marriage case, but that this could be changed by the decision that was forthcoming from the 6th Circuit. Obliquely confirming that point, Justice Stephen Breyer responded to a question about the cert denials in light of the 6th Circuit ruling by observing that circumstances can change.

Dissenting 6th Circuit Judge Martha Craig Daughtrey, a senior judge who was appointed by President Bill Clinton early in his first term, chided Sutton at the outset of her opinion. “The author of the majority opinion has drafted what would make an engaging TED Talk approach,” I dissent.”

Daughtrey’s dissent incorporated parts of the other circuit court decisions, with particular emphasis on Judge Richard Posner’s opinion for the 7th Circuit and Judge Marsha Berzon’s concurring opinion in the 9th Circuit, rejecting the continuing precedential salience of Baker v. Nelson (which she described as a “prime candidate” for being treated as a “dead letter”), and finding the states’ justifications for their marriage bans unavailing even under the least demanding rational basis review. Thus, prior 6th Circuit cases commanding that rational basis review apply in sexual orientation cases presented no barrier to her conclusion, because she found that the state arguments failed to meet the rational basis test. Judge Daughtrey also corrected Judge Sutton’s mistaken characterization of “traditional marriage,” pointing out that for much of history (and in many parts of the world today) polygamous, incestuous and child marriages have been accepted and deemed very traditional, and that as a legal construct the modern institution of marriage bears little resemblance to the “traditional” marriage invoked by Sutton.

The 6th Circuit’s panel decision was merely a way-station on the route to a final constitutional determination in a higher tribunal, and Sutton’s opinion reflected his understanding that his view is out of step with the trend of federal decisions and may well fall to Supreme Court review. Daughtrey suggested a possible ulterior motive on the part of the majority. Alluding to the rulings by four other circuit courts, she wrote, “These four cases from our sister circuits provide a rich mine of responses

“The author of the majority opinion has drafted what would make an engaging TED Talk or, possibly, an introductory lecture in Political Philosophy.”

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to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages. Indeed, it would seem unnecessary for this court to do more than cite those cases in affirming the district courts’ decisions in the six cases now before us. Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of certiorari by the Supreme Court and put an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens.”

As noted above, lawyers for the plaintiffs had filed petitions for certiorari in the Supreme Court by November 14. Counsel of record signing the petitions were Alphonse Gerhardstein for the Ohio petitioners, Douglas Hallward-Driemeier for the Tennessee petitioners, Carole M. Stanyar for the Michigan petitioners, and Daniel J. Canon for the Kentucky petitioners. Lambda Legal and the ACLU Foundation are co-counsel in the Ohio cases. The National Center for Lesbian Rights is co-counsel in the Tennessee case. Gay & Lesbian Advocates & Defenders is co-counsel in the Michigan case.

By reversing the district court in Michigan, the 6th Circuit immediately threw into doubt the validity of same-sex marriages contracted in that state in the short time between the district court’s ruling and the 6th Circuit’s grant of a stay pending appeal. The ACLU of Michigan has a lawsuit on the merits in the Michigan case. The ACLU of Michigan has a lawsuit on the cert petition in DeBoer v. Snyder, but a decision could come at any time.

**Missouri Trial Judge Issues Marriage Equality Ruling**

On November 5, 2014, St. Louis Circuit Court Judge Rex Burlison overturned Missouri’s constitutional ban on same-sex marriage by ruling that Missouri’s measure recognizing marriage only between a man and woman violates due process and equal protection clauses of the United States Constitution. The decision in St. Louis mirrors recently issued decisions in other states, and same-sex couples were immediately issued marriage licenses in some counties of Missouri. *State of Missouri v. Florida*, 2014 WL 5654040.

Before the court were cross-motions for summary judgment, and the question before the court was whether it is unconstitutional to prevent same-sex couples from marrying. On September 29, 2014, oral arguments were made before the court in St. Louis. This case originated in June 2014, when acting St. Louis Recorder of Deeds Sharon Carpenter issued marriage licenses to four St. Louis couples, in defiance of Missouri’s constitutional marriage ban. The State of Missouri argued that the four couples should not have been issued the marriage licenses. Defendant Jennifer Florida in good faith agreed to stop issuing marriage licenses to same-sex couples until a decision was issued in the case. Based on Ms. Florida’s agreement, the court denied the temporary restraining order.

In determining whether Missouri law violates a constitutional right, the court examined the Fourteenth Amendment to the United States Constitution and the part most relevant for this case is “equal protection under the law.” The Missouri Constitution states that a marriage must be between a man and a woman and the RSMO prohibits the occupant of Ms. Florida’s position from issuing marriage licenses to same-sex couples. Therein lies the State’s objection to Ms. Florida issuing marriage licenses to same-sex couples.

Because of the constitutional question, the court has to determine which level of scrutiny should be applied in this case. At first glance, since the right to marry is a fundamental right strict scrutiny could be applied. Under strict scrutiny, the State of Missouri must show that the law at issue is necessary to accomplish a compelling state interest. In this case, the only compelling state interest articulated by the State of
Missouri is uniformity and stability of a standardized definition of marriage. The State relies on Chief Justice Robert’s dissenting opinion in United States v. Windsor, 133 S. Ct. 2675, 2696 (2013), to try and make their case. Note that the State of Missouri is relying on a dissenting opinion to argue their case. The State of Missouri also argues that without the definition of marriage as between a man and woman, Ms. Florida will not be able to consistently and predictably issue marriage licenses. However, the State of Missouri offers no other evidence in support of their theory beyond mere speculation of harm. Mere speculation does not constitute a compelling state interest. Edison Co. v. Public Serv. Commission, 447 U.S. 530, 543 (1980).

The court decided that debating which level of scrutiny is applied is irrelevant because the court concluded that Section 451.022 of the RSMO and Article I, Section 33 of the Missouri Constitution are not rationally related to a legitimate government interest and therefore, they would fail even a rational basis review.

The State of Missouri attempts to rely on two additional cases as precedent. Baker v. Nelson, 409 U.S. 859, 810 (1975) and Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir.2006). Judge Burlison did not agree that these cases were proper as precedent and supportive to the State of Missouri. Later cases rendered Baker to have no precedential value to the State of Missouri and Citizens was not about the right to marry. Instead Citizens, a challenge to the constitutionality of Nebraska’s marriage amendment, was about the “equal opportunity to convince the people’s elected representatives that same-sex relationships deserve legal protection.” Citizens at 865. The Missouri courts are not bound by Eighth Circuit decisions and both cases cited above were abandoned. The State of Missouri made a losing argument.

The court next turned to the Due Process Clause, which is intended to protect the liberty interests of all and one of those liberty interest is the right to marry. Hampton v. Hampton, 17 S.W.3d 599, 605 (Mo. App. W.D. 2000). The court found that the freedom to marry is a fundamental personal right and is deeply rooted in the nation’s history and tradition. The State of Missouri had their own argument that the right to same-sex marriage is not deeply rooted in the nation’s history. The court explained that fundamental rights are not person-specific. It is the right to marry, not the right to marry a specific person. Freedom to marry describes a fundamental right and should not be infringed upon.

Again, the only argument the State of Missouri could provide in its defense is that the State had a compelling state interest in providing uniformity and stability by providing a standardized definition of marriage. The court held that the State’s purported legitimate interest is not a compelling state interest sufficient to justify infringement of the fundamental right to marry. Based on the court’s finding, it denied the State of Missouri’s petition to permanently enjoin the Recorder of Deeds and Vital Records Registrar of the City of St. Louis from issuing marriage licenses to same-sex couples. Ms. Florida is free to issue marriage licenses to same-sex couples.

The Attorney General of Missouri, Chris Koster, stated that the constitutional challenge to Missouri’s historically recognized right to define marriage must be presented to and resolved by the state’s highest court. Koster also added that his office would not seek a stay of the court’s order while the Missouri Supreme Court weighs in on the case. In the interim, same-sex couples will proceed to Jennifer Florida’s office to obtain marriage licenses. Marriage equality developments have been evolving very quickly. As of the date of this decision, the count of marriage equality states was close to 35. – Tara Scavo

Tara Scavo is an attorney in Washington D.C.
Kansas Officials Grasping at Straws to Delay Inevitable Progression to Marriage Equality

On November 4, 2014, U.S. District Court Judge Daniel D. Crabtree issued a preliminary injunction barring the named defendants in Marie v. Moser, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 (D. Kansas), from enforcing Kansas’ same-sex marriage ban. Judge Crabtree, appointed by President Barack Obama and only confirmed by the U.S. Senate several months ago, also temporarily stayed the injunction until November 11 to give state authorities time to appeal. The U.S. Court of Appeals for the Tenth Circuit denied state officials’ request for a stay pending appeal on November 7. After Circuit Justice Sonia Sotomayor entered a temporary stay pending consideration of their request, the full U.S. Supreme Court followed suit in denying a stay on November 12, despite Justices Antonin Scalia and Clarence Thomas disagreeing with their colleagues.

Antigay forces in Kansas pushed through Amendment 1 in 2005, a constitutional amendment now codified at Article 15, § 16 of the Kansas Constitution, that excludes same-sex couples from marriage, and further prohibits them from attaining any form of legal family status. Similar Kansas statutes, passed in 1996 and codified at K.S.A. §§ 23-2501 and 23-2508, prevent same-sex couples from marrying or having their out-of-state marriages recognized.

Fast forward to October 6 of this year, when the U.S. Supreme Court denied all of the then-pending marriage equality case certiorari petitions, making Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) and Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014) the binding law of the Tenth Circuit. Kitchen and Bishop affirmed federal district court rulings striking down same-sex marriage bans in Utah and Oklahoma. This made Kansas, a state covered by the precedent of the Tenth Circuit, ripe for the picking. Not surprisingly, then, the American Civil Liberties Union and the ACLU of Kansas recruited two lesbian couples as plaintiffs and swiftly filed a new marriage equality case in the U.S. District Court for Kansas on October 10, challenging all of the aforementioned Kansas provisions. They named Robert Moser, the Secretary of the Kansas Department of Health and Environment, and the state district court clerks for Douglas and Sedgwick Counties as their defendants.

The majority of Judge Crabtree’s memorandum addresses the “litany of defenses asserted by defendants.” Their attorneys appear to have consulted the syllabus for their federal courts class in law school and decided to throw literally every jurisdictional and justiciability defense at the court to see if anything would stick, from standing and sovereign immunity to the domestic relations exception to federal court diversity jurisdiction and all of the various abstention doctrines. Perhaps the most interesting objection came from an amicus brief filed by Phillip and Sandra Unruh, who claimed that Crabtree could only decide the constitutionality of Kansas’ marriage laws as applied to lesbian couples, because the case had no gay male plaintiffs. Crabtree, however, systematically dismissed all of the defenses one-by-one and got to the merits of whether he should enter a preliminary injunction.

For the likelihood of success factor, Crabtree focused on the Kitchen and Bishop precedents and easily found they would similarly control the Kansas legal landscape. “Kitchen and Bishop establish a fundamental right to same-sex marriage, and state laws prohibiting same-sex marriage infringe upon that right impermissibly. . . . Kansas’ same-sex marriage ban does not differ in any meaningful respect from the Utah and Oklahoma laws the Tenth Circuit found unconstitutional,” he wrote.

He also pointed out that defendants’ counsel’s attempt at oral argument to distinguish Kansas marriage law from Utah and Oklahoma by noting the statutory recognition of common law marriage did not change the analysis. If he were to take that argument seriously, opposite-sex couples “could marry by either statutory or common law marriage while same-sex couples [would be confined] to the common law alternative,” which would still leave the plaintiffs without the equal protection of the marriage laws. A 2001 state appellate court ruling also did not control because “federal courts are not bound by state court interpretations of federal constitutional issues” and “a federal district court must follow the precedent of its Circuit.”

Crabtree then moved to the other three preliminary injunction factors—irreparable injury, balance of harm, and public interest—and noted that they all point to the plaintiffs based on the proposition that precedent establishing constitutional rights trumps other concerns in cases like this one.

Having determined that a preliminary injunction was appropriate, Crabtree then considered whether a stay pending appeal was appropriate. He concluded it is a “relatively close call,” but “the Circuit may come to a different conclusion about one of the[ ] threshold determinations” and, therefore, “a short-term stay is the safer and wiser course.” As noted previously, he gave defendants until November 11, and that eventually became November 12 by the time the Supreme Court resolved the stay request in the case.
As the injunction in *Marie* was set to take effect, fiercely antigay Republican Kansas Attorney General Derek Schmidt (joined rhetorically in a series of bombastic public statements by Republican Governor Sam Brownback, just reelected to a second term) shamelessly contended that Crabtree’s preliminary injunction only applied to the two counties involved in the lawsuit, rather than statewide, despite a statewide official being one of the named defendants. As state district court judges have responsibility for licensing marriages in Kansas, some of them have also refused to authorize the issuing of marriage licenses to same-sex couples based on their own interpretation of the legal situation.

Several days later, on November 18, the Kansas Supreme Court, acting in *Schmidt v. Moriarty*, No. 112,590, lifted the temporary stay they had earlier placed on same-sex marriages in Johnson County. The court ruled that it was within the jurisdiction of Judge Kevin P. Moriarty, as chief judge of that district, to authorize the issuance of marriage licenses to same-sex couples based on his determination of the law.

The Kansas Supreme Court, however, ambiguously left the issue of whether to license same-sex marriages to each judicial district, suspending consideration of the legal status of the same-sex marriages licensed by other judicial districts until the litigation of *Marie v. Moser* in federal court is completed. More court battles, then, appear bound to be necessary for full compliance and recognition of the new normal by all state and county officials and agencies in Kansas. As of November 24, clerks in 25 counties were issuing licenses, but state agencies were not recognizing the resulting marriages. On November 26, the ACLU of Kansas filed an amended complaint, adding three state-wide officials as named defendants and asking the court to expand its original order to extend to the additional state officials, whose offices have been refusing to recognize legally-contracted same-sex marriages. – *Matthew Skinner*

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

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Federal District Courts in Missouri and West Virginia Issue Marriage Equality Rulings

On November 7, one day after the 6th Circuit Court of Appeals rejected marriage equality claims from Ohio, Michigan, Tennessee and Kentucky (see above), federal district courts in Missouri and West Virginia issued new marriage equality rulings. Chief U.S. District Judge Robert C. Chambers of the Southern District of West Virginia granted summary judgment to the plaintiffs in *McGee v. Cole*, 2014 U.S. Dist. LEXIS 158680, 2014 WL 5802665, a case brought by Lambda Legal and The Tinney Law Firm. Senior U.S. District Judge Ottie D. Smith of the Western District of Missouri granted summary judgment to the plaintiffs in *Lawson v. Kelly*, 2014 U.S. Dist. LEXIS 157802, 2014 WL 5810215, a case brought by the ACLU of Missouri Foundation. Missouri will appeal. West Virginia was already granting marriage licenses to same-sex couples, in compliance with the 4th Circuit’s ruling that the Supreme Court declined to review on October 6. Thus, the West Virginia ruling could be seen as a formality, part of the “mopping up” process in the 4th Circuit. But the Missouri decision staked out important new ground in the 8th Circuit.

Judge Chambers was appointed to the court by President Bill Clinton in 1997. Judge Smith was appointed by President Clinton in 1995, and has been serving as a senior judge since 2011.

The most notable aspect of Judge Chambers’ ruling in West Virginia was the pointed rebuttal to 6th Circuit Judge Jeffrey Sutton’s opinion issued the previous day. Sutton had argued that the decision whether same-sex couples can marry should be left up to the political process in each state, and not dictated by federal judges, a “wait and see” approach. Countered Chambers, after noting that the 6th Circuit had “reached the opposite result” from the other circuit courts: “The majority there noted two rationales in support of the marriage bans. First, the court found the marriage bans in Kentucky, Michigan, Ohio, and Tennessee to be rooted in the States’ interest in regulating procreation by providing incentives for parents to remain together. But the opinion then conceded that this view of marriage can no longer be sustained, that marriage now serves ‘another value — to solemnize relationships characterized by love, affection, and commitment.’ Denying marital status and its benefits to a couple that cannot procreate does nothing to further the original interest of regulating procreation and irrationally excludes the couple from the latter purpose of marriage. Second, the majority [in the 6th Circuit] implores opponents of the marriage bans to proceed slowly, through the legislative process, and justifies the bans by asserting the States’ right to take a ‘wait and see’ approach. This approach, however, fails to recognize the role of courts in the democratic process. It is the duty of the judiciary to examine government action through the lens of the Constitution’s protection of individual freedom. Courts cannot avoid or deny this duty just because it arises during the contentious public debate that often accompanies the evolution of policy making throughout the states. Judges may not simultaneously find a right violated yet defer to an uncertain future remedy voluntarily undertaken by the violators.’ Take that, Judge Sutton!”

Judge Smith’s decision is particularly significant because the 8th Circuit issued a decision in 2006, *Citizens for Equal Protection v. Bruning*, 455 F.2d 859, rejecting a challenge to Nebraska’s constitutional amendment banning same-sex marriage. Ordinarily, one might easily assume that a trial judge within the 8th Circuit would be precluded from ruling in favor of the plaintiffs in a marriage equality case because of controlling circuit precedent. A contrary argument could assert that *Bruning* is no longer a binding precedent in light of *U.S. v. Windsor*, but Judge Smith did not take that route. Instead, he examined the issues at stake and decided in the *Bruning* case, and concluded that it did
not control the issue before him. In Bruning, some Nebraska citizens challenged the enactment of the state’s marriage amendment using an argument that had been accepted by the Colorado Supreme Court more than a decade earlier in Evans v. Romer when it ruled against the constitutionality of that state’s Amendment 2, which prohibited the state from protecting gay people from discrimination. (The Supreme Court affirmed the Colorado ruling on different grounds, in Romer v. Evans.) The plaintiffs in Bruning argued that the amendment unconstitutionally deprived them of equal access to the political process by locking a different-sex definition of marriage into the state constitution, thus requiring them to achieve repeal of the amendment before they could approach the legislature to obtain same-sex marriage through the ordinary legislative process. The 8th Circuit rejected their claim, and pointed subsequent Supreme Court cases on the right to marry and on gay rights. “As the Second Circuit observed in Windsor, ‘when Baker was decided in 1971, “intermediate scrutiny” was not yet in the Court’s vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect.’ Given that the Second Circuit concluded Baker was not binding, and that the Second Circuit was later affirmed in Windsor, ‘the Supreme Court’s willingness to decide Windsor without mentioning Baker speaks volumes regarding whether Baker remains good law,’” he concluded, quoting from the 4th Circuit’s opinion in the Virginia marriage case, Bostic v. Schaefer.

Turning to the merits, he found that the Missouri marriage ban violates the fundamental right to marry. The court was helped in this case because Missouri’s attorney general, Chris Koster, who is not an ardent defender of the ban, had decided to abandon the ridiculous arguments that have been rejected by dozens of federal trial and appellate judges over the past year, and had fallen back on the lame argument that the ban is “rationally related” to the state’s interest “in promoting consistency, uniformity and predictability.” Judge Smith characterized this as a “circular argument” under which any regulation adopted by the state would be deemed rational, no matter how outlandish. As he pointed out, “a rule restricting marriage to those with one-syllable names promotes consistency, uniformity and predictability. A rule restricting marriage to people within a specified age difference promotes consistency, uniformity and predictability. Neither of these rules would be constitutional — the state’s ability to interfere with the personal decision as to who can and cannot get married is not so far-reaching. Merely prescribing a ‘followable’ rule does not demonstrate the rule’s constitutionality.”

Thus, Smith concluded, there was “no real reason for the State’s decision to dictate that people of the same gender cannot be married.” Since he had found that the ban violates a fundamental right, the lack of any real justification was fatal for the ban. He also found that the ban creates a “classification based on gender,” and any such classification requires heightened scrutiny, a test that the state could not meet. In a tiny victory for the state, Smith acknowledged that sexual orientation discrimination claims only merit rational basis review in the 8th Circuit, and that in Bruning the 8th Circuit court “had clearly expressed its belief that laws prohibiting same-sex marriage would pass rational basis review.” On that basis, said Smith, he would grant summary judgment to the state on the plaintiff’s sexual orientation discrimination claim. No matter, however, since plaintiffs won on the other two claims.

However, due to a particular oddity of the case, Judge Smith felt constrained to offer only limited relief, in the form of an order that the Jackson County Recorder, Robert T. Kelly, as the only named defendant, would be the only state official directed to issue marriage licenses. This seemed peculiar, since the case was originally filed in state court solely against Kelly, and then the state intervened as a co-defendant and removed the case to federal court. Presumably the state’s strategic removal move was to bring this case, which raised only federal questions, into a court whose judge would be bound by circuit precedent to rule against the plaintiffs. That strategy failed when Smith found that Bruning did not settle the question. One would think that with the state as an intervenor-defendant, Smith could make his order binding on all state officials. He did point out that he was also providing declaratory relief, which would presumably have some binding effect, especially if his decision is affirmed by the 8th Circuit, to which the state had indicated it would be appealing.

However, Attorney General Koster released a statement indicating that he

The district court in the November 7 ruling was writing on a partially clean slate, having also concluded that it was not bound by the Supreme Court’s 1972 summary disposition in Baker v. Nelson.
would not be seeking a stay of Judge Smith’s decision, which was consistent with Koster’s reaction to recent state court rulings both mandating recognition of out-of-state same-sex marriages and requiring that certain county clerks issue marriage licenses. But, in his decision, Judge Smith said that his ordered was stayed pending a final judgment in the case. The Jackson County Recorder’s Office began issuing licenses to same-sex couples promptly, but licenses were not generally available elsewhere in the state.

On November 25, Judge Smith issued any order denying a motion that had been filed by the plaintiffs seeking to lift his stay. “The Court does not agree that the Supreme Court’s recent denials of stays indicate the stay should be lifted,” he wrote. “Most of the cases Plaintiffs cite arose in circuit that had already struck down a statute and those decisions were final. Therefore, a district court in a different state within the circuit applied that circuit’s final ruling, and at the same time declined to issue a stay. The higher courts (the courts of appeal and the Supreme Court) declined to issue a stay of the order applying that circuit’s final and binding decision. That is not the procedural posture present here. This case involves the initial determination of a statute’s validity. Without citing all the cases from a similar procedural posture, the Court notes that in most such previous situations the district courts entered a stay and, if they did not, a higher court did it for them, and the stays persisted until the cases were final.” Judge Smith expressed concern about the possibility that people would get married and then have their marriages placed in doubt as a result of subsequent developments in the appeal of the case. He pointed out that his stay would expire if there was no appeal to the 8th Circuit filed by December 8, and that plaintiffs could, of course, file a motion with the 8th Circuit asking for the stay to be lifted. “The Court does not want to cast a cloud on the validity of marriages performed under its Judgment’s auspices,” wrote Smith. “For that reason, the Court deems it prudent to leave the stay in place until Judgment is final.”

South Carolina Courts Follow 4th Circuit Precedent, Ruling for Marriage Equality

Condon v. Haley, 2014 WL 5897175 (D. S. Car., Nov. 12, 2014), grew out of events that occurred in October 2014. After the Supreme Court refused to review the 4th Circuit’s ruling in Bostic v. Schaefer, holding that Virginia’s ban on same-sex marriage violates the 14th Amendment, the local Probate Judge in Charleston County, South Carolina, Irvin Condon, finding that this ruling is binding in South Carolina (which is within the 4th Circuit), issued a marriage license to Colleen Therese Condon and Ann Nichols Bleckley. There is a mandatory 24-hour waiting period in South Carolina between issuance of a license and performance of a marriage ceremony. During that brief period, South Carolina’s Attorney General, Alan Wilson, ran to the state Supreme Court and sought an order blocking Probate Judge Condon from performing the ceremony. The state Supreme Court said that no same-sex marriages could be performed until the lawsuit pending before Judge Childs in federal court was finally resolved. That suit was finally resolved on November 18 in Bradacs v. Haley, 2014 U.S. Dist. LEXIS 162184, 2014 WL 6473727 (D.S.C.), for details of which see below in this article.

Thwarted in their marriage plans by the state Supreme Court’s order, Condon and Bleckley filed suit in the federal district court against Governor Haley, Attorney General Wilson, and Probate Judge Condon, seeking an order allowing them to marry. The case was filed in their behalf by the Atlanta office of Lambda Legal working with cooperating attorneys from South Carolina: Malissa Burnette, Nekki Shutt, and Victoria Eslinger. The matter was assigned to District Judge Richard Mark Gergel. Shortly after filing the complaint, Lambda Legal moved the court for summary judgment and immediate injunctive relief. Governor Haley filed a motion to dismiss as to her, and Attorney General Wilson moved to dismiss the case as failing to state a valid legal claim, arguing that the court was bound to dismiss the case because of the U.S. Supreme Court’s 1972

Judge Gergel ruled on November 12 that the plaintiffs are entitled to the declaratory and injunctive relief that they are seeking.

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Thwarted in their marriage plans by the state Supreme Court’s order, Condon and Bleckley filed suit in the federal district court against Governor Haley, Attorney General Wilson, and Probate Judge Condon, seeking an order allowing them to marry. The case ruling in Baker v. Nelson that same-sex marriage did not present a “substantial federal question,” an argument that had been rejected by the 4th Circuit in the Virginia case. Wilson also argued that the federal court should abstain deciding this case until Judge Childs ruled on the summary judgment motion in the Bradacs case, as the South Carolina Supreme Court had ordered that no same-sex marriages take place until the pending federal challenge was finally decided.

Rejecting all of the defense’s jurisdictional and substantive arguments, Judge Gergel ruled on November 12 that the plaintiffs are entitled to the declaratory and injunctive relief that they are seeking. He found that the pending cases in the South Carolina Supreme Court and before District Judge Childs ( Bradacs v. Haley) posed no impediment to his ruling on the merits of this case.
He agreed with Judge Childs that Governor Haley should be dismissed as a defendant. But he pointed out that the issues pending before Judge Childs and before him were different, as she had ruled just days before that the Bradacs plaintiffs had standing only to seek a ruling on recognition of their out-of-state marriage. See Bradacs v. Haley, 2014 WL 5840153 (D. S. C., Nov. 10, 2014) (denying Attorney General Wilson’s motion for judgment on the pleadings, finding plaintiffs have alleged a viable constitutional claim, but granting motion as to Governor Haley on 11th Amendment grounds, discussed in more detail below).

Judge Gergel rejected Attorney General Wilson’s argument that he could ignore the 4th Circuit’s ruling in Bostic or reject it if he disagreed with it. “This Court has carefully reviewed the language of South Carolina’s United States Supreme Court (in fact very few are), and lower federal courts are not free to disregard clear holdings of the circuit courts of appeals simply because a party believes them poorly reasoned or inappropriately attentive to alternative legal arguments. Coherent and consistent adjudication requires respect for the principle of stare decisis and the basic rule that the decision of a federal circuit court of appeals left undisturbed by United States Supreme Court review is controlling on the lower courts within the circuit. This principle, along with the foundational rule that the United States Constitution is the supreme law of the land and state laws that run contrary to constitutionally protected rights of individuals cannot be allowed to stand, are among the body of doctrines that make up what we commonly refer to as the rule of law.”

Judge Gergel point out that since constitutional and statutory ban on same sex marriage and now finds that there is no meaningful distinction between the existing South Carolina provisions and those of Virginia declared unconstitutional in Bostic,” he wrote.

“While a party is certainly free to argue against precedent, even very recent precedent,” he continued, “the Fourth Circuit has exhaustively addressed the issues raised by Defendants and firmly and unambiguously recognized a fundamental right of same sex couples to marry.”

He agreed with Judge Childs that October 6, all of the other states in the 4th Circuit had fallen in line with the Bostic ruling (apart from Maryland, which had legislated and then voted in favor of same-sex marriage earlier), leaving South Carolina the last holdout. This ruling, along with the foundational rule that the United States Constitution is the supreme law of the land and state laws that run contrary to constitutionally protected rights of individuals cannot be allowed to stand, are among the body of doctrines that make up what we commonly refer to as the rule of law.”

Judge Gergel was appointed to the bench by President Barack Obama and took his seat in August 2010. He had previously been a personal injury litigator in private practice after graduating from Duke Law School, and his appointment had been endorsed by South Carolina’s U.S. Senator Lindsey Graham, a Republican.

Judge Childs issued her ruling in Bradacs v. Haley on November 18. She rejected challenges to the standing of the plaintiffs, Katherine Bradacs and Tracie Goodwin, whose out-of-state marriage was being denied recognition by the state, rejected the state’s argument that Attorney General Wilson was immune from suit under the 11th Amendment, or that the “domestic relations” exception to federal court jurisdiction should apply in this case. She did accept the state’s argument that it wasn’t compelled under the Full Faith and Credit Clause of the Constitution to recognize out-of-state same-sex marriages, relying among other things on Section 2 of the federal Defense of Marriage Act, which had not been struck down as part of the Windsor decision last year. However, she rejected the state’s argument that Baker v. Nelson was controlling or that Windsor was a federalism case that would compel a ruling for the state in this action. She found that the court was “bound” to follow the 4th Circuit’s precedent,
Federal Court Refuses to Dismiss South Dakota Marriage Equality Case

U.S. District Judge Karen E. Schreier denied a motion by South Dakota Governor Dennis Daugaard to dismiss the pending marriage equality case of Rosenbrahn v. Daugaard, 2014 U.S. Dist. LEXIS 160340, 2014 WL 6386903 (D.S.D. Nov. 14, 2014). Although this was not a ruling on the merits of the case, Judge Schreier’s ruling suggests that she will become the second district judge within the jurisdiction of the 8th Circuit Court of Appeals to rule for marriage equality. Following the lead of District Judge Ottride Smith in his recent Missouri ruling, Judge Schreier found that the 8th Circuit’s decision rejecting a constitutional challenge to Nebraska’s marriage amendment, Citizens v. Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006), did not stand in the way of entertaining a 14th Amendment challenge to South Dakota’s ban on same-sex marriage.

Before getting to Bruning, however, Judge Schreier had to deal with the state’s argument that the case should be dismissed because of the U.S. Supreme Court’s ruling in 1972 in Baker v. Nelson, 409 U.S. 810, that same-sex marriage did not present a substantial federal question. Thus, the Sixth Circuit’s reasoning is not as persuasive as the reasoning of the Second, Fourth, Seventh, Ninth and Tenth Circuits on this issue.”

Judge Schreier also discounted the state’s argument that the 8th Circuit had “adopted” the Baker decision by mentioning it in Bruning. Although it was mentioned in that opinion, there was not “any discussion of the continued validity of Baker or the doctrinal development exception,” she wrote. “Despite defendants’ contention, Bruning does not compel this court to follow Baker.”

Turning to the 8th Circuit’s Bruning decision, she observed that the plaintiffs in that case had framed it as “an equal protection case based on a fundamental right of access to the political process,” arguing that by adopting the marriage amendment Nebraska had discriminatorily shut out gay couples from resort to the ordinary political process of seeking marriage equality from the legislature. The 8th Circuit expressly stated that the plaintiffs were not seeking a ruling that same-sex couples had a right under the 14th Amendment to marry in Nebraska. It did, however, rule that sexual orientation discrimination does not involve a “suspect classification” and thus the amendment would be evaluated using rationality review.

Acknowledging that she was thus bound not to use heightened scrutiny in ruling on the challenge to South Dakota’s marriage ban on a sexual orientation discrimination theory, the judge found that this did not mandating dismissing the case. For one thing, she found, the Bruning court had not ruled on whether there is a fundamental right to marry from which same-sex couples are excluded. “Bruning is not dispositive of the central issue before this court,” she wrote, so “Bruning does not preclude plaintiffs from relief as a matter of law.” Furthermore, she found that since Bruning had not pronounced on this fundamental due process question, “Plaintiffs are not consigned to rational basis review and have a plausible claim for relief with respect to their due process argument.” That would suffice to reject

Bostic v. Schaefer, 760 F.3d 352 (2014), as to which the Supreme Court denied review on October 6, 2014. Turning to the merits, she accepted the plaintiffs’ argument that South Carolina’s non-recognition of their marriage violated the fundamental right to marry under the 14th Amendment, but as a matter of Due Process and Equal Protection, and permanently enjoined the state from refusing to recognize lawfully contracted same-sex marriages. Leader attorneys for the plaintiffs are Carrie A. Warner, John Shannon Nichols and Laura W. Morgan.

Judge Childs issued a second ruling in the case on November 18, Bradacs v. Haley, 2014 U.S. Dist. LEXIS 162076, rejecting a pro se motion filed by Don Boyd requesting that the court allow him to intervene in defense of the state’s same-sex marriage ban. As described by Judge Childs, “In this case, Boyd, an alleged musician and psalmist, and self-proclaimed ‘watchman for the souls of that people errantly identifying and calling themselves lesbian and gay,’ seeks dismissal of this action claiming that any ratification by the courts of lesbian and gay marriage rights would cause irreparable injury to and/or violate his real and established rights conferred and guaranteed by the First Amendment,” arguing that by adopting the marriage amendment Nebraska had discriminatorily shut out gay couples from resort to the ordinary political process of seeking marriage equality from the legislature. The 8th Circuit expressly stated that the plaintiffs were not seeking a ruling that same-sex couples had a right under the 14th Amendment to marry in Nebraska. It did, however, rule that sexual orientation discrimination does not involve a “suspect classification” and thus the amendment would be evaluated using rationality review.

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the motion to dismiss.

However, Judge Schreier went further, exploring the plaintiffs’ equal protection claim. She found that plaintiffs had stated “a plausible equal protection claim based on the alleged deprivation of a fundamental right where plaintiffs allege the classification is not precisely tailored to serve a compelling governmental interest.” Furthermore, citing 9th Circuit Judge Marsha Berzon’s concurring opinion in the Idaho/Nevada marriage ruling, Latta v. Otter, she found that the plaintiffs also had a plausible “gender discrimination” case. “At this stage — a motion to dismiss — the court finds that the complaint sufficiently states a claim for relief because it plausibly shows a classification related to gender,” she wrote. “Even though several courts have rejected the argument that same-sex marriage bans discriminate based on gender because the plaintiffs did not present sufficient evidence of invidious gender discrimination to prevail on their claim, the complaint should still survive” a motion to dismiss. She also pointed out that in light of the developing marriage equality case law, it would be improper to dismiss the plaintiffs’ sexual orientation discrimination claim either, as many courts have found that the states had presented no rational basis for their bans.

She did, however, find that the plaintiffs’ “right to travel” claim, asserted against the state’s refusal to recognize out-of-state same-sex marriages, should be dismissed, because she found it did not fit within the sphere of the constitutional right to travel mapped out in past decisions. “Although plaintiffs in this case may lose certain benefits when they move to South Dakota,” she wrote, “the fact that they are treated the same as existing residents proves that South Dakota’s marriage laws do not operate as a penalty on the right to travel. Therefore, plaintiffs have failed to state a claim that is plausible on its face with respect to their right to travel claim.”

The judge ordered the state to respond to plaintiffs’ pending motion for summary judgment by Nov. 24, and plaintiffs would then have up to 14 days to file a reply, after which the court will rule on the pending motion for summary judgment.

Minnesota Attorney Josh Newville represents the plaintiffs, six same-sex couples who either seek to marry in South Dakota or to have their out-of-state marriages recognized.

### Time for Marriage Equality in Montana

The time has come for Montana to follow all the other states within the Ninth Circuit and recognize that laws that ban same-sex marriage violate the constitutional right of same-sex couples to equal protection of the laws,” wrote U.S. District Judge Brian Morris on November 19, 2014, granting summary judgment to the plaintiffs in Rolando v. Fox, 2014 WL 6476196, 2014 U.S. Dist. LEXIS 164112 (D. Mont.). Judge Morris’s ruling made Montana the ninth and last state in the circuit to face a ruling ordering the state to allow same-sex couples to marry. He concluded his opinion bluntly, stating: “This injunction shall take effect immediately.” There was no mention of a stay, and named defendant Attorney General Timothy Fox knew that asking for one from the 9th Circuit would be an exercise in futility, so he didn’t.

Instead, having anticipated the court’s ruling, he was already to take the next step and immediately filed a notice of appeal with the 9th Circuit, which set February 27 as the due-date for Fox’s opening brief and March 30 as the due date for the plaintiffs’ responding brief, thus guaranteeing that the appeal would not be argued before April 2015 at the earliest. Meanwhile, same-sex couples began receiving marriage licenses and marrying.

Montana’s marriage amendment was part of the wave of such amendments enacted in 2004 in response to the advent of same-sex marriage in Massachusetts and the subsequent launching of marriage equality lawsuits in other jurisdictions, including California and New York. Montana already had a statutory ban on same-sex marriage. This case placed both bans in issue, with the lead plaintiff couple seeking a marriage license and several other plaintiff couples seeking recognition for their marriages contracted in other states.

After rejecting the state’s argument that Baker v. Nelson should control the outcome, pointing out that this argument had been rejected by the 9th Circuit in Latta v. Otter, Judge Morris proceeded directly to his equal protection analysis. He followed Latta’s direction to apply heightened scrutiny, and found that the Latta’s analysis plainly disposed of the arguments raised in defense of the Montana ban. “Defendants have failed to meet their burden under heightened scrutiny to justify the discrimination engendered by the Montana laws that ban same-sex marriage,” he concluded.

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The judge spent several paragraphs pointing out the diversity and ordinariness of the plaintiffs and their family lives, emphasizing particularly the children being raised by some of the plaintiff couples. “These families, like all of us, want their children to adventure into the world without fear of violence; to achieve all that their talent and perseverance allows without fear of discrimination; and to love themselves so that they can love others,” he wrote. “No family wants to deprive its precious children of the chance to marry the loves of their lives. Montana no longer can deprive Plaintiffs and other same-sex couples...
of the chance to marry their loves.” While conceding that “not every will celebrate this outcome,” Morris asserted that the federal constitution “exists to protect disfavored minorities from the will of the majority. Equal protection of the laws will not be achieved through “indiscriminate imposition of inequalities,”” quoting from the Supreme Court’s 1996 ruling, Romer v. Evans. “Our constitutional tradition does not permit laws to single out a certain class of citizens for ‘disfavored legal status,’” again quoting from Romer. “Today Montana becomes the thirty-fourth state to permit same-sex marriage,” he exclaimed. The numbering might or might not be accurate as of that date, depending how one would classify Kansas and South Carolina. Marriage licenses were available by the end of the week in all three states, so there were 35.


Judge Morris was appointed by President Obama, after having served as an elected justice of the Montana Supreme Court, the first member of that bench to have clerked at the U.S. Supreme Court (for Chief Justice William Rehnquist). Morris graduated from Stanford Law School, where as an undergraduate he was a varsity football player who won glory at the Gator Bowl. After law school he clerked for 9th Circuit Judge John T. Noonan, Jr., a conservative appointee of President Reagan. Morris was serving as state solicitor when he was elected to the Montana Supreme Court. The enthusiastic tone of his marriage equality decision would undoubtedly surprise the extremely conservative judges for whom he had clerked.

### The Dominoes Continue to Fall as Federal Courts Strike Arkansas and Mississippi Marriage Bans

On November 25, 2014, U.S. district court judges in Arkansas and Mississippi issued rulings declaring unconstitutional the constitutional and statutory bans on same-sex marriage in those states. Jernigan v. Crane, 2014 U.S. Dist. LEXIS 165898, 2014 WL 6685391 (E.D. Ark.); Campaign for Southern Equality v. Bryant, Case No. 3:14-CV-818-CWR-LRA (S.D. Miss.). In Arkansas, District Judge Kristine G. Baker stayed her ruling pending an appeal to the 8th Circuit Court of Appeals by the state, but the situation was complicated by another marriage equality case pending before the state’s Supreme Court, which may render this ruling superfluous depending on timing. In addition, Attorney General Dustin McDaniel, a Democrat who personally supports same-sex marriage but who had claimed to be defending the ban as his duty, indicated that he would confer over the Thanksgiving holiday with the incoming Republican Attorney General, Leslie Rutledge, an opponent of same-sex marriage, before deciding whether to appeal. In Mississippi, District Judge Carlton W. Reeves granted the state a two-week stay during which it may seek a further stay pending appeal from the 5th Circuit Court of Appeals, where marriage equality cases from Texas and Louisiana are scheduled for argument on January 9. On November 26 the state filed its notice of appeal in the 5th Circuit. Attorney General Jim Hood said that his office has a “statutory duty” to defend the existing law, and he would ask the 5th Circuit for a stay to last until the case if finally resolved on appeal.

Both of the judges who ruled on November 25 were appointed by President Barack Obama and seated during his first term of office, Judge Reeves in 2010 and Judge Baker in 2012. Although dozens of federal district judges have issued rulings in similar cases over the past year, neither of these judges skimped on their opinions, exploring both procedural and substantive issues in depth, as their opinions will likely be appealed to circuit courts that have yet to weigh in on the questions presented. Both judges were undeterred by the recent ruling by the U.S. Court of Appeals for the 6th Circuit, rejecting challenges to the marriage bans in Ohio, Michigan, Tennessee and Kentucky. Both judges were not persuaded by 6th Circuit Judge Jeffrey Sutton’s reliance on the Supreme Court’s 1972 summary affirmance of negative ruling by the Minnesota Supreme Court as a currently binding precedent, finding that it had been superseded by more recent developments in the Supreme Court, and emphasizing that the overwhelming majority of federal courts considering this issue over the past year have found Baker to be no impediment to striking down the bans.

Both judges were writing their opinions against the obstacles of circuit court rulings that precluded certain doctrinal moves. In the 8th Circuit, a 2006 decision rejecting a challenge to Nebraska’s constitutional amendment included language indicating that the court believed the amendment would survive rational basis review, which that court deemed the appropriate standard for evaluating claims of sexual orientation discrimination. Undeterred, Judge Baker followed the lead of 9th Circuit Judge Marsha Berzon, whose concurring opinion in the Nevada/Idaho marriage ruling of October 7, Latta v. Otter, argued that bans on same-sex marriage are a form of sex discrimination, and thus merit heightened scrutiny. In the 5th Circuit, prior precedents also reject heightened scrutiny for sexual orientation discrimination claims. This did not deter Judge Reeves, who found that the Mississippi marriage ban fails even the usually deferential rational basis test.

Both judges also ruled against the same-sex marriage bans under an alternative Due Process theory, finding that Supreme Court precedents recognize a fundamental constitutional right to marry as an individual right of every citizen, subjecting to strict scrutiny
any attempt by the state to interfere with the choice of marital partner. A law that does not survive rational basis review or heightened scrutiny cannot, by definition, survive strict scrutiny, the most demanding level of judicial review.

Both judges were also careful to address various procedural and jurisdictional arguments raised by the state defendants, systematically and respectfully analyzing and then rejecting them. Judge Baker confronted a particularly complicated argument, as the Arkansas Supreme Court held oral arguments less than a week earlier in the state’s appeal of a trial judge’s marriage equality ruling from earlier in 2014, and there is some argument that federal courts should abstain from deciding issues that are pending in the state courts. Judge Baker demonstrated that there were distinctions between the cases that counseled against federal court abstention, not least that the plaintiffs in the federal case were not participating in the state case. Both judges emphasized the duty of federal courts to deal with federal constitutional claims when they are appropriately presented by plaintiffs have meet the standing requirements.

The plaintiffs in the Arkansas case had presented Judge Baker with a panoply of constitutional arguments, and she carefully picked among them, rejecting — as have some other judges in recent decisions — the argument that the state’s failure to recognize marriages contracted out of state violates the constitutional right to travel between the states, as well as rejecting the plaintiff’s sexual orientation discrimination claim. However, she found that while the plaintiffs had met all the tests required to obtain an injunction against the state, the Supreme Court’s issuance of a stay in January in the Utah case set the path for her response to the state’s request in this case to keep the ruling from going into effect while the state appeals. However, she wrote, “If no timely notice of appeal is filed, this injunction shall take immediate effect upon the expiration of the time for filing a notice of appeal.”

Judge Reeves’ decision was substantially longer than Judge Baker’s, because he decided, despite 5th Circuit precedent, to take on the question whether sexual orientation discrimination claims should be subjected to heightened or strict scrutiny. One suspects this was a reaction to extraordinary briefing on the question provided by the plaintiffs and their amici. As a result, Reeves’ opinion includes within it a virtual monograph on the history of anti-gay discrimination in Mississippi, leading him to explicitly counter the suggestion by some judges that gay marriage litigants don’t need the assistance of the federal courts since they can obtain the right to marry through the ordinary political process. While that might be possible someday in Michigan, for example, wrote Reeves, it seemed unlikely in Mississippi.

“A common argument against homosexual equality is that the gay and lesbian community is so popular that it needs no judicial protection from the will of the majority,” wrote Reeves. “In this vein, the U.S. District Court for Nevada, which upheld that state’s same-sex marriage ban until the Ninth Circuit reversed, found that ‘the public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals.’ He noted that the President now supports same-sex marriage. But pointing to statements of popular support, those of individual politicians, or even the national ‘climate’ is not the standard. The standard is whether homosexuals in Mississippi have ‘the strength to politically protect themselves from wrongful discrimination.’ Much of that discrimination, of course, happens at the state and local levels, far from celebrities and national politicians. On this question, it can only be concluded the Mississippi’s gay and lesbian community does not have the requisite political strength to protect itself from wrongful discrimination.” He noted particularly that the Mississippi anti-gay marriage amendment passed by the largest margin of any of the numerous such measures that appeared on state ballots in 2004, as well as the recent enactment of a measure that “was perceived to condone sexual orientation discrimination” by allowing businesses to deny their services based on the owners’ religious objections.

Thus, argued Reeves, if he were free from binding 5th Circuit precedent, he would apply heightened scrutiny to the plaintiffs’ sexual orientation claim, and he suggested that the 5th Circuit should reconsider its precedent. He would not take the alternative approach of treating this as a sex discrimination case in order to apply heightened scrutiny because, as he pointed out, it was unnecessary to do so. He was invalidating the ban using strict scrutiny under the Due Process Clause, and he also found that none of the state’s articulated justifications for the ban even met the less demanding rational basis test for an Equal Protection analysis.

Both Reeves and Baker, countering contentions by the state that U.S. v. Windsor was a federalism ruling that support the state’s right to ban same-sex marriages, invoked Justice Scalia’s dissents in Windsor and Lawrence v. Texas, in which one of the most conservative justices on the Supreme Court asserted that the reasoning of the Court in those cases would create an argument in support of a constitutional right for same-sex couples to marry.

“Today’s decision may cause uneasiness and concern about the change it will bring,” he concluded. “But ‘things change, people change, times change, and Mississippi changes, too,” he wrote, quoting the former segregationist governor, Ross R. Barnett, Jr., who he commented “knew firsthand” the truth of these words. “Mississippi continues to change in ways its people could not anticipate even 10 years ago,” when the marriage amendment was passed. “Allowing same-sex couples to marry, however, presents no harm to anyone. At the very least, it has the potential to support families and provide stability for children. This court joints the vast majority of federal courts to conclude that same-sex couples and the children they raise are equal before the law. The State of Mississippi cannot deny them the marriage rights and responsibilities it holds out to opposite-sex couples and their children. Mississippi’s statute and constitutional amendment violate the Fourteenth Amendment to the United States Constitution.”

Lead counsel for plaintiffs in the Mississippi case is Roberta Kaplan of New York’s Paul Weiss Rifkind Wharton & Garrison, who represented Edith Windsor in her successful challenge to Section 3 of the federal Defense of Marriage Act. Jack Wagoner, a Little Rock attorney, is lead counsel in the Arkansas case.
New York High Court Affirms Setting Aside Hate Crime Conviction as Inconsistent

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he New York Court of Appeals, the state’s highest court, ruled unanimously on November 24 in People v. DeLee, 2014 N.Y. LEXIS 3323, 2014 NY Slip Op 08212, that the Appellate Division had correctly reversed the hate crime manslaughter conviction of Dwight R. DeLee, who was charged in the murder of a New York transgender woman named Lateisha Green, because the jury’s verdict was inconsistent. (The decision below is People v. DeLee, 969 N.Y.S.2d 350 (N.Y. App. Div., 4th Dep’t. 2013). However, the court modified the Appellate Division’s decision by granting the prosecution an opportunity to resubmit the charge of manslaughter in the first degree as a hate crime to another grand jury, which may lead to a new prosecution.

The decision for the court by Judge Susan P. Read reveals nothing about the nature of the charged offense, and makes no reference to the fact that the victim was a transgender woman or that the defendant was charged with murdering her because of her gender identity. Instead, the coldly analytical opinion focuses solely on the inconsistency in the jury’s verdict and the trial judge’s failure to correct the situation by explaining the inconsistency to the jury and asking them to resume deliberations to produce a consistent verdict. A casual reader of the court’s opinion in isolation would have no idea what the case was actually about.

Under New York law, a jury can convict on a hate crime charge if they find all the elements of an underlying crime plus the element of bias on grounds prohibited by the state’s hate crime law. DeLee was indicted for second-degree murder as a hate crime, second-degree murder, and third-degree criminal weapon possession. The jury convicted him of first-degree manslaughter as a hate crime and a weapon possession offense, but acquitted him on the charge of first-degree manslaughter. After the verdict was rendered, DeLee’s attorney argued that the verdict was inconsistent, since the acquittal on the manslaughter charge could be taken to mean that the jury found that the prosecution failed to prove all the elements of the crime of manslaughter. If so, of course, logically DeLee could not be found guilty of manslaughter as a hate crime.

The defense lawyer moved to set the verdict aside as “repugnant,” a technical term meaning that it was fatally flawed due to inconsistency. The trial judge denied the motion, and sentenced Lee to 25 years in prison. But Lee successfully appealed, persuading the Appellate Division that the verdict was repugnant. There was a heated dissenting opinion by Justice Erin Peradotto, who focused on the lack of clarity in the trial judge’s charge to the jury and the obvious misunderstanding by the jury that if they found all the elements of manslaughter as a hate crime satisfied, they should not acquit on the simple manslaughter count. By its conviction, she argued, the jury was clearly indicating their conclusion that all the manslaughter elements had been met.

Judge Read wrote that this case “presents a straightforward application” of the relevant Court of Appeals precedents, “which clearly contemplate that when jury verdicts are absolutely inconsistent, the verdict is repugnant. The rationale for the repugnancy doctrine is that the defendant cannot be convicted when the jury actually finds, via a legally inconsistent split verdict, that the defendant did not commit an essential element of the crime.” Since the jury in this case acquitted DeLee of manslaughter, it arguably found that the prosecution failed to prove at least one element of that crime.

Read continued, “Repugnancy does not depend on the evidence presented at trial or the record of the jury’s deliberative process, and the instructions to the jury will be examined only to determine whether the jury, as instructed, must have reached an inherently self-contradictory verdict. In making these determinations, it is inappropriate for the reviewing court to attempt to divine the jury’s collective mental process. Jurors are allowed to compromise, make mistakes, be confused or even extend mercy when rendering their verdicts.”

The prosecution had presented an affidavit from the jury foreperson, attesting to the jury’s intention to convict DeLee, but the court dismissed that as “the opinion of just one juror, and, in any event, [it] cannot be considered under our longstanding precedent.”

However, the court concluded that the Appellate Division’s decision to order absolute acquittal of DeLee went too far, because “a repugnant verdict does not always signify that a defendant has been convicted of a crime on which the jury actually found that he did not commit an essential element.” It is possible that a jury has decided to acquit on a lesser-included charge, as here, in order to exercise mercy. “But if this mercy function is the cause of a repugnant verdict,” wrote Read, “the remedy of dismissal of the repugnant conviction is arguably unwarranted. Indeed, it provides a defendant with an even greater windfall than he has already received.” The court concluded that “permitting a retrial on the repugnant charge upon which the jury convicted, but not on the charge of which the jury actually acquitted defendant, strikes a reasonable balance. This is particularly so given that a reviewing court can never know the reason for the repugnancy. Accordingly, the People may resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury.”

If the new grand jury indicts DeLee on the manslaughter as a hate crime charge, he can be retried on that charge without violating the ban on “double jeopardy” since he was not acquitted on that
Federal Court Denies Another Injunction in California Conversion Therapy Challenge

In *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the 9th Circuit rejected the argument that California’s law prohibiting licensed mental health practitioners from engaging in sexual orientation change efforts (SOCE) with minors violates 1st Amendment free speech and association guarantees. Undaunted, several plaintiffs from the consolidated cases considered by the 9th Circuit pressed one of the district court judges to grant them a preliminary injunction against enforcement of the law on grounds that it violates the 1st Amendment’s religion clauses. On November 5, U.S. District Judge William B. Shubb issued an opinion denying the motion, finding that plaintiffs were unlikely to prevail on the merits of their claim. *Welch v. Brown*, 2014 U.S. Dist. LEXIS 156728, 2014 WL 5781208 (E.D. Cal.).

Judge Shubb, whose earlier injunction based on 1st Amendment speech and association theories had been reversed by the 9th Circuit, rejected all of plaintiffs’ arguments on the merits this time around. He found that S.B. 1172 is a neutral enactment of conduct.

In a concurring opinion, Judge Sheila Abdus-Salaam explained at length how a trial judge in a hate crime case should charge the jury to avoid the problem of inconsistent verdicts. She concluded that “courts would provide particularly clear and legally correct guidance on this subject by telling the jury to treat a non-hate crime as a lesser included offense of an equivalent hate crime allegedly committed via the same criminal acts” and thus that “it is impossible to commit the hate crime without also committing the ordinary crime” on which it is based. “To that end,” she wrote, “the court should instruct the jury that if it convicts the defendant of the greater offense, it will not consider the lesser included offense. In that situation, the jury should be told to deliberate on any unrelated charges based on different criminal conduct,” such as the weapons possession charge in this case. “Of course, if the jury instead acquits the defendant of the hate crime, it should next deliberate on the equivalent ordinary offense, and in the event of an acquittal on that ordinary charge, it may consider any lesser hate crime or lesser included ordinary crime which has been charged based on the same conduct.”

In this case, DeLee was charged with second-degree murder as a hate crime, for which ordinary second-degree murder, manslaughter as a hate crime, and ordinary manslaughter are lesser included offenses. It is easy to see how a jury could become confused and produce a repugnant verdict, even if it concluded that the defendant was guilty of a hate crime. The party most likely at fault for this result is the trial judge, whose failure to instruct the jury immediately upon the rendition of the inconsistent verdict and to resubmit the case to them has generated all the subsequent litigation on appeal. Now the local prosecutor will get a second chance to seek justice for Lateisha Green by retrying Dwight DeLee.

James P. Maxwell represented the prosecution on appeal and Philip Rothschild represented DeLee. Lambda Legal, the District Attorneys Association of NY and the NY State Association of Criminal Defense Lawyers submitted amicus briefs.

Judge Shubb, whose earlier injunction based on 1st Amendment speech and association theories had been reversed by the 9th Circuit, rejected all of plaintiffs’ arguments on the merits this time around. He found that S.B. 1172 is a neutral enactment of conduct.
fact that although the law expressly excludes religious counselors from its prohibition, the exclusion may not extend to religious counselors who are licensed therapists. The defendants, Governor Jerry Brown and various state officials, argued that S.B. 1172 would not restrict Welch from providing SOCE in his capacity as a Counseling Pastor “so long as he does not ‘hold himself out’ as a licensed marriage and family therapist when providing therapeutic treatment as a Counseling Pastor.” But Judge Shubb found that the statutory exemption “does not resolve the application of S.B.1172 to Welch,” and concluded that “it is likely Welch will be able to show that S.B. 1172 will subject him to the possibility of discipline if, as a licensed marriage and family therapist, he utilizes SOCE while working as a Counseling Pastor for his church.” Thus, Welch had standing to raise the religious freedom claims in his challenge to the statute.

But the religious freedom and establishment clause arguments did not get Walsh very far, since it was clear that California had a rational basis for enacting S.B. 1172, based on a legislative record showing that the therapy can be harmful to minors. “Plaintiffs have not proffered any argument as to why S.B. 1172 could not survive rational basis review,” wrote the judge, “and, more importantly, the Ninth Circuit held on appeal that ‘S.B. 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.’” The court rejected plaintiffs’ alternative violation of privacy argument asserted on behalf of parents who want to provide SOCE therapy for their children, as well as children desiring the therapy, as it had in its prior order, finding that parents and minors could sue to vindicate their privacy rights and didn’t need the representation of therapists for that purpose. The court also rejected the plaintiffs’ argument that S.B. 1172 somehow interfered with psychotherapist-patient privilege or clergy-penitent privilege. Having found that there was slight likelihood of success on the merits, the court held it was not necessary to consider the other factors usually review in deciding whether to order preliminary relief.

Oklahoma Supreme Court Holds Lesbian Co-Parent Has Standing to Seek Enforcement of Joint Parenting Agreements

In Eldredge v. Taylor, 2014 Okla. 92, 2014 WL 5839981 (Nov. 12, 2014), upon separation and dissolution of defendant Karen Taylor and plaintiff Julie Eldredge’s long-time civil union, the Supreme Court of Oklahoma unanimously found that the District Court erred in granting Taylor’s motion to dismiss Eldredge’s claims seeking determination of her parental rights after Taylor attempted to remove her from their children’s lives by removing them from the state and change the children’s last name.

Eldredge and Taylor committed their last names, and planned to move from Oklahoma. Plaintiff petitioned the District Court in Canadian County, Oklahoma, for a determination of her parental rights. The district court granted Defendant’s motion to dismiss. Plaintiff appealed, and the Oklahoma Supreme Court retained the appeal.

Eldredge petitioned the court to determine her to be the legal parent of the children, for joint custody, to return of the children’s names to Eldredge, for the court to issue a temporary order granting her custody, and to deny the children egress from the country. Taylor attempted to remove Eldredge from their children’s lives by removing them from the state and change the children’s last name.

Taylor attempted to remove Eldredge from their children’s lives by removing them from the state and change the children’s last name.

to and lived together in a family relationship from May 19, 2001, until April 2011. In 2005, the parties entered into a civil union in New Zealand. Taylor is the sole biological mother who chose to conceive two children, with the intent that her partner, Eldredge, would share the rights and duties of parentage with her. To guarantee that both parties would be considered natural, legal, and acknowledged parents, the parties entered into co-parenting agreements following the birth of each child, creating these agreements by putting their intent into writing. Eldredge nurtured a relationship with the children for years, she had them in her will, enrolled them in school, lived with them, and they bore her last name. The parties eventually separated, and Taylor severed the parent-child relationship for “no apparent reason,” removing the children from Plaintiff’s care, changed their last names, and planned to move from Oklahoma.

To determine standing, Justice Taylor wrote for the court, “The key element is whether the party whose standing is challenged has sufficient interest or stake in the outcome.” Eldredge contended that she had standing to enforce the co-parenting agreements she and Taylor had signed. “Given Eldredge’s admission that she is seeking a best-interest-of-the-child hearing,” wrote Justice Taylor, “this Court need only find that Eldredge has standing under one of her theories...” The court explained that a party has standing to seek enforcement of a contract that was void against public policy, citing Huber v. Culp, 1915 OK 366 (holding that a clause in a contract between husband and wife which prohibits either spouse from defending a divorce action in...
The court found, “It is axiomatic that if the allegations are taken as true, Eldredge suffered an injury in fact -- the deprivation of the Agreements’ benefits and a relationship with the children with whom she had developed a parental relationship,” determining that Eldredge has a sufficient interest in the outcome to properly litigate the issues.

As the party seeking to void the co-parenting agreement, Karen Taylor bears the burden of proving that the agreement violated public policy. (Horn v. Gibson, 1909 OK 174, ¶ 0, 103 P. 563, 563 (syllabus by the court)). Karen Taylor contended that the co-parenting agreement was unenforceable because it is contrary to express provisions of law and public policy, specifically arguing that Oklahoma public policy is “for a child to have one mother, one father, or both, but not to have any other combination of parents;” boldly citing the prohibition on same-sex marriage, and the Oklahoma Adoption Code provision listing persons eligible to adopt a child.

The court stated, “Taylor’s reliance on the Oklahoma Constitution’s ban on same-sex marriage is misplaced. The United States Court of Appeals for the Tenth Circuit recently struck down Oklahoma’s same-sex marriage ban as unconstitutional Article 2, Section 35’s ban on same-sex marriage,” citing Bishop v. Smith, 760 F.3d 1070 (10th Cir.), cert. denied, 83 U.S.L.W. 3102 (U.S. Oct. 6, 2014). The court explained that when the United States Supreme Court denied the petition for a writ of certiorari, the Tenth Circuit opinion became final and enforceable.

Next, Taylor tried to rely on the Oklahoma Adoption Code to bar Eldredge standing, however the court found this to be misplaced because the Adoption Code does not place any restriction on the gender of the person adopting a child. Taylor failed to point to any place in the Adoption Code which bans adoption by a person of the same gender as a sole biological parent, and the court found no such public policy in the Adoption Code.

Federal District Court Strikes Michigan Statute Banning Same-Sex Partner Benefits for Public Employees


Michigan amended its State Constitution in 2004, declaring that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” At the time, the city of Kalamazoo had allowed same-sex partners of city employees to receive health care and other benefits as the partner of a municipal worker. Litigation eventually led to a ruling that such benefits could not be offered if the eligibility criteria were similar to marriage. Several municipalities introduced the status of “Other Qualified Adult” (“OQA”) into their plans as a work-around to this restriction. OQAs are defined as persons of either sex who are not eligible to inherit from the employee, not related by blood to the employee in a degree of closeness that would prohibit marriage in Michigan, and not otherwise eligible for benefits from the public employer.

Several Michigan legislators publicly stated the law was “disgusting,” “an absolute abomination,” and one that “makes a mockery of the moral fabric that has made America what it is today,” and led the legislature to pass Public Act 297, banning benefits extended by most state employers (university employees and state employees under civil service were not included in the law) unless the beneficiary was married to the public employee, a relative, or a legal dependent. Eleven plaintiffs, all employees of a Michigan city, county, or school district or the domestic partner of such an employee, brought suit against Michigan Governor Richard Snyder in the United States District Court for the Eastern District of Michigan, Southern Division, arguing Public Act 297 violates the U.S. Constitution’s Equal Protection Clause.

On June 28, 2014, District Court Judge David M. Lawson issued a preliminary injunction ordering that Act 297 not be enforced during the pendency of the lawsuit. Subsequent to that date, a different judge of the same District Court ruled there was no rational basis upholding Michigan’s marriage amendment, but the decision was reversed on appeal by the Court of Appeals for the Sixth Circuit (see above); therefore, currently, same-sex marriage remains prohibited in Michigan. Both parties in the instant case filed for summary judgment, and on November 12, 2014, Judge Lawson issued his decision.

Judge Lawson wrote, “The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.” After a long discussion of the standard of review in which he discussed whether United States v. Windsor, 133 S. Ct. 2675 (2013), required heightened scrutiny review as opposed to rational basis review, Judge Lawson held that the Supreme Court’s rule of law held that “when a law discriminates against a non-

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suspect group because of that group’s characteristic, the State’s motives are called into question and the standard of review is ‘less deferential than the traditional rational basis standard.’”

He concluded: “That standard – rational basis with bite, as it has been called – is appropriate here, if Act 297 found its way into law because of animus toward same-sex partners.”

In discussing animus, Judge Lawson stated that “animus focuses on legislative motivation,” and provided a list of factors that can be used to detect whether state action was motivated by a discriminatory purpose: 1) the impact of the official action on the group challenging the classification; 2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes; 3) the sequence of events that preceded the state action; 4) procedural or substantive departures from the government’s normal procedural process; and 5) the legislative or administrative history. He stated “the detrimental impact of Act 297 falls most heavily on gay and lesbian partners and families with OQA benefits,” citing the estimated costs the various plaintiffs would incur if denied OQA benefits and further concluded that “one need not look very far to learn that gays and lesbians are a disfavored group” in light of hate crime, housing discrimination, and employment discrimination statistics, and the fact that Michigan never repealed its sodomy or gross indecency statutes “despite the Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003), nearly twelve years ago.”

Governor Snyder cited three purposes of Act 297: that it “demonstrates a preference for marriage and ensures the benefits of marriage are not distributed to people that are not married,” that “it eliminates policies that disfavor familial relationships,” and “it promotes the State’s fiscal goals of reducing costs to government and promoting financially sound local government units.”

With respect to the preference for marriage argument, Judge Lawson stated: “The defendant, in essence, justifies discriminating against a group by noting that the law promotes the interests of the group’s counterpart,” and went on further to say “that is no justification at all. Discrimination against one group cannot be justified merely because the legislature prefers another group.”

Judge Lawson found that the reasoning behind the justification that Act 297 eliminated policies disfavoring familial relationships to be “largely theoretical, and, when viewed in the context of the local government’s actual OQA plans, flawed.” He held that “Public Act 297 effectively singles out one type of family formation – same-sex domestic partners – and bars employers from providing benefits to them.” He concluded that “Although public ‘employees and their families are not constitutionally entitled to health benefits, … when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.’”

Finally, Judge Lawson found that the legislative history showed little analysis of financial impacts and stated that “the defendant’s rationalization based on saving money is nothing more than a Potemkin village; there is no substance backing up its reasoning.”

Stating that “another badge of animus can be found when a legislature ‘stray[s] from [its] historical territory to enact a law that ‘eliminate[s] privileges that a group would otherwise receive,’” Judge Lawson ruled that “Public Act 297 is a substantial departure from Michigan’s strong tradition of home rule” in light of Governor Snyder’s admission that “he was unaware of any law other than Public Act 297 that ‘placed any limits on the categories of Insured to whom local governmental units could provide health insurance benefits.’”

Judge Lawson concluded: “As one court succinctly stated, ‘once animus is detected, the inquiry is over: the law is unconstitutional’” and ruled that “Public Act 297 was enacted to deprive the same-sex partners of employees of health and other fringe benefits offered by local units of government… [and] therefore violates the Equal Protection Clause and is unconstitutional.” Judge Lawson granted plaintiff’s motion for summary judgment and denied defendant’s, declared Act 297 unconstitutional, and issued a permanent injunction ordering “that the defendant and all those in active concert and participation with him who receive actual notice of [the order] are restrained and enjoyed from enforcing Public Act 297.”

– Bryan C. Johnson
Federal Judge Allows Transgender Inmate to Pursue Protection from Harm Claims

United States District Judge J. Phil Gilbert allowed a transgender inmate to proceed on claims of lack of protection from sexual assault in Cole v. Johnson, 2014 U.S. Dist. LEXIS 156992 (S. D. Ill., November 6, 2014). Pro se plaintiff Dameon Cole, a/k/a Devine Desire Cole, filed a “lengthy narrative” (“shotgun”) pleading against thirteen named defendants (and other “unknowns”) that Judge Gilbert distilled into specific “Counts” against three of the named defendants, while dismissing most others without prejudice.

The factually-detailed case illustrates a relatively generous consideration of Cole’s claims in initial screening under 28 U.S.C. § 1915A, compared with many other recent transgender cases. It also shows the relative desperation of a transgender prisoner, who engaged in some self-destructive/aggressive behavior, while trying to survive in a rural southeastern Illinois prison.

Cole brought suit under 42 U.S.C. § 1983 for what Judge Gilbert characterized as an allegation of “systemic failure to house Plaintiff with cellmates who do not pose a risk to her safety.”

She received another discipline and segregation for “intimidation/threats.” Cole’s subsequent requests for protective custody were ignored and “indulged in prison sex” with her next five cellmates.

Meanwhile, Cole continued to send grievances to two Wardens (Marc Hodge and Steven B. Duncan) and to an Assistant Warden (Beth Treadway). Cole lived in “steady and constant fear of retaliation from staff for grievances written.”

Judge Gilbert found that Cole stated “colorable” claims against Assistant Warden Treadway because she spoke to Treadway individually about her safety concerns, and “it cannot be conclusively determined that Assistant Warden Treadway was not deliberately indifferent when she was told about the dangers Plaintiff was facing and did nothing.” Judge Gilbert deemed this claim “Count 1.” Cole also stated a claim (“Count 2”) against Warden Hodge for “doing nothing” about her “emergency” grievance concerning her “vulnerable status.” Finally, Cole stated a claim against Warden Duncan (“Count 3”) for ignoring another “emergency” grievance about which Cole spoke to him directly, only to have him “laugh” at her and say “enjoy yourself.”

Judge Gilbert detailed the allegations against the other ten defendants, finding them indefinite or otherwise legally insufficient. This opinion is unusual in sustaining claims against executive defendants, based on grievances and personal notice, while dismissing without prejudice charges against their subordinates. Judge Gilbert also denied preliminary injunctive relief to Cole, because her pleading asked for a “laundry list” of remedies, without rationale or proof of immediate irreparable injury. “Not all of the behaviors are even mentioned in the complaint, so the Court is left to wonder if all of these behaviors have occurred in the past or what basis there is for finding them sufficiently probable to occur in the future.” Judge Gilbert expressed concern about the allegations of fear of sexual assault or other physical harm and of retaliation, but he found them to be “too vague” and denied relief without prejudice.

Judge Gilbert allowed Cole to supplement her complaint with exhibits for purposes of the screening. He also directed corrections officials to provide the Clerk of Court with addresses of the remaining defendants to facilitate service of process, but he instructed the Clerk not release the addresses.

– William J. Rold

William J. Rold is a civil rights attorney in NYC and a former judge. He previously represented the ABA on the National Commission for Correctional Health Care.
Transgender Plaintiff Merits Trial of Discrimination and Disability Claims


Essentially, the court found that there exist issues of material fact on a number of the claims and as such required a jury to decide in favor of either party.

On September 6, 2013, Plaintiff James (Jamie) Hughes filed six claims against her employer, William Beaumont Hospital (WBH), alleging violations of the Americans with Disabilities Act (ADA), the Michigan Persons with Disabilities Civil Rights Act (PDCRA), Title VII of the Civil Rights Act of 1964, and the Michigan Elliot-Larsen Civil Rights Act (ELCRA).

As a transgender individual, Hughes was biologically male but identified as female, accordingly undergoing hormone replacement therapy and dressing as a woman. In her job at the hospital, Hughes worked as an Inventory Control Clerk, a position that she held for 30 years since 1982. In 2010, she experienced leukemia-like symptoms and was eventually diagnosed with immune thrombocytopenic purpura (ITP), an auto-immune disease that affected the blood system. Because of the necessary treatment and hospitalization to address this medical condition, Hughes took a medical leave of absence from WBH under the Family and Medical Leave Act, which allowed up to 12 weeks of job protection during leave within a 12 month period and granted an additional 60-day layoff period if an employee’s leave exceeded 12 weeks. When Hughes presented to WBH a medical document that cleared her to start working again, she had already requested to extend her leave four times and had been on leave for six months. As such, her previous position had been filled, and she was given the 60-day layoff status, which provided her with the benefit of applying to other WBH jobs as an internal candidate.

During this 60-day period, Hughes applied to another clerking position and interviewed for it; according to WBH, she did not receive this job because of low interview scores and on January 21, 2011, WBH terminated Hughes as an employee. On August 4, 2011, she filed a discrimination charge with the Equal Employment Opportunity Commission, which believed that WBH had violated Title VII based on gender and the ADA.

At the heart of plaintiff’s motion for partial summary judgment lies the issue of whether the ADA required WBH to reinstate Hughes to her former position or place her into a comparable position. While plaintiff argued that WBH discriminated against her due to her disability as a sufferer of ITP, ADA and the PDCRA employ a similar statutory framework, the court applied the same logic in concluding that there existed a genuine issue of material fact regarding accommodation and retaliation claims under the PDCRA.

On the subject of gender discrimination under Title VII and the state civil rights law, the court again noted a situation in which the material facts needed further discernment from a jury. Plaintiff argued that she had been overlooked for the position that she interviewed for because of her transgender identity, manifesting as non-conformance to gender stereotypes. In making this case, she noted how the interviewers marked her down on the interview for her appearance — specifically, her “messy ponytail” and velvet jacket — because they felt that people were uncomfortable with a man acting as a woman. In addition, she pointed out that the person who was eventually hired for this position had to undergo a month-long training process as proof of the interviewers’ prejudice in choosing a less qualified candidate. To this claim, WBH explained that Hughes was not hired because of low scores on the interview and that the comments about her physical appearance were a critique of general presentation rather than gender identity.

Because the material facts on the various claims remain issues to be decided by a jury, the court denied for these reasons the motions for summary judgment by both Plaintiff and Defendants.

Daniel Ryu studies at Harvard (’16).

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New York Court Refuses to Apply Parental Presumption for Married Same-Sex Couple

The traditional rule in family law is that the husband of a woman who gives birth to a child is presumed to be the child’s legal father. The original purpose of this doctrine was to protect the legal status of a child, who would be considered “illegitimate” if its biological parents were not married to each other. Some states have treated that presumption as incontestable, while others, including New York, say that the presumption can be defeated by evidence showing that a different man is the child’s biological father. A New York court, faced with a paternity proceeding brought by a man who had an affair with a woman who was married to another woman, recently decided that the man had a right to attempt to prove that he is the biological father and seek a paternity order, rejecting the idea that the traditional presumption should play any role in this case.

The facts of Q.M. v. B.C. and J.S., 2014 WL 5835812 (N.Y. Supreme Ct., Monroe Co., October 21, 2014), reported in the New York Law Journal on November 13, are unusual. Ms. C. and Ms. S. became acquainted when Ms. S was just 16. They began living together the following year, and were married in Dover, New Hampshire, on November 22, 2010. Their marriage has not been smooth, however, including several separations, and a divorce proceeding is under way. During one of their separations, during parts of 2011 and 2012, Ms. C began a relationship with Mr. M. Wrote Justice Joan Kohout, “Ms. C. admitted that she became pregnant with J.C. as a result of sexual relations with Mr. M. and that she was not sexually involved with any other man at the time she became pregnant.” That is, Ms. C. admits that Mr. M. is the biological father of her child, who was not conceived through donor insemination. Indeed, after the child was born, Ms. C allowed Mr. M. two visits, even though their intimate relationship had ended when she got back together with her wife. However, shortly after these visits, Mr. M. filed this paternity action, and Ms. C. cut off his access to the child. Mr. M. sought, among other things, genetic testing to confirm that J.C. is his daughter.

Ms. C was pregnant when she got back together with Ms. S., who was at the hospital when the child was born, “selected the child’s name and signed her birth certificate. Both Ms. C. and Ms. S. testified that Ms. S. has a close relationship with J.C.,” wrote the judge, “and that since their separation, Ms. C. has permitted Ms. S. to have contact with the child.” The women have been separated since April 2014, and their divorce action was filed in July. Nonetheless, Ms. S. desires to be treated as a mother of J.C., and her estranged spouse, B.C., supports her position on this.

“Ms. C. takes the position that Mr. M. should be excluded from J.C.’s life,” wrote the judge. “Although she has never denied that he is J.C.’s biological father, she argues that her wife is the lawful and proper parent of J.C. She testified that she wants her ‘wife to have rights to my daughter as she has been.’ Ms. C. acknowledges that Ms. S. never adopted J.C. and that the couple separated in April 2014.”

Ms. C. and Ms. S. want to take advantage of the parental presumption, arguing that there was no need for Ms. S. to adopt J.C. in order to be considered her parent, because the women were married when J.C. was born. They relied on New York’s Marriage Equality Law, which provides that same-sex and different-sex marriages are to be treated the same for all purposes of law. Alternatively, they relied on the legal doctrine of “equitable estoppel,” arguing that under these circumstances Q.M. should be barred from asserting parental rights. Justice Kohout rejected both arguments.

“With the advent of same-sex marriage, the role of the non-biological spouse, especially in a marriage of two women, requires a re-examination of the traditional analysis of the presumption of legitimacy,” wrote the judge. “Most of the cases to date concerning same-sex couples involve children born of artificial insemination where female spouses have planned together to raise the child. Recently, in the well-crafted decision of Wendy G-M v. Erin G-M the supreme court held that in the context of a divorce of a same-sex couple, the non-biological wife was the legal parent of a child born of artificial insemination during the marriage.” The judge pointed out that such cases usually involve an anonymous sperm donor and “there is no legal father,” so “the statute may easily be applied in a gender neutral manner.”

But in this case, she found, such application of the statutory presumption did not make sense because, as a matter of biology, “there is no dispute that Ms. S. is not, and could not possibly be, the second parent of this child.” Responding to Ms. C.’s argument that the Marriage Equality Act requires the parental presumption rule to be applied in a gender neutral manner, the judge said that “the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives.” Referring to the state in question, she wrote that it could be “easily applied to same-sex female married couples, but not to same-sex male couples, neither of whom are able to bear a child. In the same vein, neither spouse in a same-sex female couple can father a child. Thus, while the language” of the Marriage Equality Law “requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology.”

The judge also noted that New York’s highest court, the Court of Appeals, has “repeatedly declined to expand the traditional definition of a parent beyond biological or birth parents and adoptive parents,” and has “rejected arguments that non-adoptive or non-biological third parties, such as Ms. S., should be granted parental status based on a claim of a close relationship with the child.” In Justice Kohout’s view, Ms. S. has, at best, the status of a step-parent. While that might mean, under appropriate circumstances, she would be awarded visitation rights with J.C., she could not seek custody in preference to the child’s biological parents, Q.M. and B.C. The fact that she was married to B.C. when the child was born “does not change her status.”

Justice Kohout found that the alternative legal theory of equitable estoppel provided no help to the mothers in this case. Mr. M. has never denied being the biological father of
J.C., sought out contact shortly after the child’s birth, and filed a paternity action promptly, seeking to establish his legal ties. Equitable estoppel might be used, for example, to reject a paternity claim from a man who had agreed to donate sperm under the condition that he would not assert parental rights, but could not be used on these facts to prevent Mr. M. from asserting a paternity claim.

Justice Kohout wrote, “Since Ms. S. never adopted J.C. and is not a biological parent, she does not fit within New York’s definition of parent. Thus, Ms. S. is not entitled to court ordered custody or visitation with J.C., and any contact she has with J.C. is entirely by voluntary arrangement with Ms. C. Of course, there is nothing to prevent Ms. C. from continuing to permit Ms. S. to have a relationship with J.C., as suggested by the attorney for the child [appointed by the court], especially if she believes it to be consistent with her daughter’s best interest.”

The problem, however, is that Mr. M. will have the status of a legal parent who can seek court-ordered custody and visitation, as against Ms. S., who will have no such rights. If Ms. C were to die or become incapacitated from taking care of J.C., Mr. M. would hold all the cards in a dispute with Ms. S. over custody and visitation. The failure of New York law to allow for the possibility that a child can have more than two legal parents at the same time leaves a gap in the rights of de facto parents such as Ms. S. Progressive legislation in California now recognizes the possibility of more than two parents in unusual cases. New York might consider the desirability of legislative reform in light of the legal and social changes accompanying the Marriage Equality Act. The facts of this case suggest that it would be desirable for Ms. S. to have more secure legal standing than “step-parent” in her relationship with J.C.

B.C. is represented by Yolanda Rios of the Legal Aid Society of Rochester, New York. J.S. is represented by Marc A. Duclos, Assistant Conflict Defender, assigned because the Legal Aid Society could not represent both mothers simultaneously due to their differing legal interests. The court appointed Beth A. Ratchford as attorney to represented the child’s interests. James A. Napier represents Q.M.

California Inmate Stated Constitutional Privacy Claims When HIV Status Revealed

A California inmate stated constitutional claims against state prison officials after they misplaced and then failed to retrieve a medical file that revealed his HIV+ status to other inmates, causing him to be taunted and threatened, in Doe v. Beard, 2014 U.S. Dist. LEXIS 161667 (C.D. Calif., November 18, 2014). Plaintiff John Doe, proceeding anonymously, “immediately” informed various prison officials that his medical records were in other inmates’ hands, but the records were not returned for some 19 days. A supervisor admitted several months later that the incident “should never have happened.”

United States District Judge Dean D. Pregerson found Doe’s first complaint insufficient under 42 U.S.C. § 1983 because it alleged merely “negligence.” His amended pleading, however, established a claim of “deliberate indifference” to his safety in the failure to retrieve his records, regardless of how they were misplaced initially. The opinion is an exhaustive analysis of constitutional privacy in medical information in the prison context, relying on both Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners’ rights to medical care), and Farmer v. Brennan, 511 U.S. 825 (1994) (prisoners’ right to safety). “In the unique context of the disclosure of a prisoner’s HIV status..., the constitutional violation may subject the prisoner to direct acts of violence, which would obviously qualify as ‘serious harm’...” [K]nowledge of a prisoner’s HIV-positive status can be dangerous for the prisoner, because his fellow prisoners may harbor irrational fears about transmission, however unlikely, and because prisoners cannot simply avoid each other as civilians can.” The prisoner need not allege that disclosure was intentional, because “prison officials’ deliberate indifference to the risk of such violence is a sufficient mental state to establish a claim under § 1983 for violation of medical privacy in these circumstances.”

Prison officials “acted with deliberate indifference to a substantial risk of serious harm when they failed to retrieve (or even attempt to retrieve) the itinerant medical file even after Plaintiff explained that it had fallen into the hands of other prisoners and that he was receiving threats based on his HIV status.” Judge Pregerson found this failure sufficient to state claims against the defendants, except against the supervisor, since Doe did not allege she was timely informed about the threats. The other defendants were told of the risk (one for only two days), and their subjective state of mind (deliberate indifference or not) is a jury question.

Judge Pregerson found that the remaining defendants were not entitled to qualified immunity because Doe’s constitutional rights were “clearly established” under Pearson v. Callahan, 555 U.S. 223, 231 (2009). A reasonable prison official would have “been on notice” that he or she could not violate Doe’s rights without “a legitimate penological objective”– see Turner v. Safley, 482 U.S. 78, 95 (1987) – and numerous cases (citing string from multiple circuits) establish medical privacy in prison – and defendants failed to show that “their refusal to try to retrieve the record (or otherwise mitigate the potentially dangerous effects of the disclosure) was related to such an objective.”

Judge Pregerson also analyzed Doe’s claims under the California constitution, disagreeing with some non-controlling intermediate state appellate authority as to the scope of the California Constitution’s privacy amendment. In summary, he found that the defendants were not immune from liability under state law and that negligence in this context was sufficient to state of claim under the state constitution. California practitioners should take note of this lengthy analysis and history, comprising nearly half of Judge Pregerson’s opinion, which found greater protection under state law than is afforded by federal constitutional provisions and precedent.

The court also declined to strike a claim for punitive damages, relying on Smith v. Wade, 461 U.S. 30, 33 (1983). Defendants’ alleged recklessness, as a form a deliberate indifference, was sufficient for a jury question, because “the Court cannot say at this point that there is no set of circumstances under which Plaintiff’s claim to punitive damages could succeed.”

Doe was represented by Christopher Joseph Kelly, Lynch & Kelly, Ltd., Los Angeles. –William J. Rold

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SUPREME COURT – As noted above, Lambda Legal has filed a Petition for Writ of Certiorari before Judgment in Robicheaux v. George, No. 14-596, seeking to by-pass the 5th Circuit Court of Appeals (where oral argument has been scheduled for January 9) in seeking appellate review of the Louisiana U.S. District Court’s ruling rejecting a challenge to the state’s ban on same-sex marriage. Kenneth D. Upton of Lambda’s Dallas office is counsel of record on the petition. The Supreme Court rarely grants such petitions, but the filing is consistent with Lambda’s DOMA strategy, when it also filed such a petition in the Golinsky case at the same time that petitions were filed seeking review of rulings from the 1st and 2nd Circuit Court of Appeals. At the very least, it seemed possible that the 5th Circuit might decide either to put off oral argument in this case (and the Texas case, De Leon, scheduled to be argued on the same day) or to delay rendering a decision, on the chance that the Supreme Court would make such proceedings redundant by hearing and deciding a marriage equality case this term.

ARIZONA – Attorney General Thomas Horne has filed a notice of appeal in the U.S. Court of Appeals for the 9th Circuit seeking review in Connolly v. Roche, No. 14-17274, in which District Court Judge John W. Sedwick ruled on October 17 that same-sex couples are entitled to marry in Arizona. See Connolly v. Jeans, 2014 WL 5320642 (D. Ariz.). Of course, the three-judge panel that hears this appeal will be bound by Latta v. Otter, the 9th Circuit’s October 7 ruling holding that state bans on same-sex marriage violate the Equal Protection Clause under the heightened scrutiny standard applied to sexual orientation discrimination claims in the 9th Circuit, so Horn’s appeal is not realistically seeking a reversal on the merits. However, he told the press that he was appealing in an attempt to avoid having the state pay the plaintiffs’ legal fees. The briefing schedule set by the court guarantees that the appeal will not be argued until April 2015 or later.

FLORIDA – U.S. District Judge Robert L. Hinkle ruled on November 5 that the stay on his marriage equality ruling, Brenner v. Scott, 999 F.Supp.2d 1278 (N.D. Fla. 2014), would remain in effect until January 5, 2015, to give the state time to appeal to the 11th Circuit. The ACLU had asked that the stay be lifted after the Supreme Court denied review in marriage equality cases from the 4th, 7th and 10th Circuits, but Hinkle said that leaving it in effect until January 5 would give the 11th Circuit sufficient time to decide whether to extend it pending final resolution of the case. Miami Herald, Nov. 5.

ARKANSAS – On November 20 the Arkansas Supreme Court heard the state’s appeal from Pulaski County Circuit Judge Chris Piazza’s May 2014 ruling in Wright v. State, No. 60CV-13-2662, which held unconstitutional the state’s constitutional and statutory bans on same-sex marriage. Arkansas is within the federal 8th Circuit, one of the few remaining circuits without a ruling by the court of appeals on whether same-sex couples have a 14th Amendment right to marry, although dicta in a 2006 decision challenging the Nebraska Marriage Amendment intimate a lack of sympathy for such a claim. However, the 2006 case has been distinguished this month by federal district judges in 8th Circuit states of Arkansas, Missouri and South Dakota, whose marriage equality rulings (see articles above) will bring the issue up to the 8th Circuit.

ALASKA – The 9th Circuit Court of Appeals announced on November 18 that it had denied the state’s request to have its appeal in Hamby v. Parnell, No. 14-35856, go directly to an en banc panel of eleven judges. The district court found the state’s marriage ban unconstitutional; see 2014 U.S. Dist. LEXIS 145876, 2014 WL 5089399 (D. Alaska, Oct. 12, 2014). The state had argued that its appeal should not go to a three-judge panel because such a panel would be bound to apply circuit precedent, Latta v. Otter, which held the marriage bans in Nevada and Idaho unconstitutional. As Alaska has no new arguments to make in defense of its ban, and only an en banc panel could produce a different result, going to a three-judge panel seems like a waste of time and money. However, the state will probably persist, even though the Supreme Court rejected their request of a stay pending appeal, in order to be able to file a petition for certiorari. The briefing schedule for the three-judge panel argument indicates that the appeal will not be argued until April 2015 or later. Meanwhile, same-sex couples are marrying in Alaska.

KANSAS – A few days after issuing his decision finding that the Kansas ban on same-sex marriage was unconstitutional, U.S. District Judge Daniel Crabtree issued a memorandum and order in Marie v. Moser, 2014 U.S. Dist. LEXIS 158236, 2014 WL 5800151, denying a motion to intervene by Westboro Baptist Church, which had feared that the state would inadequately defend the marriage ban by failing to make religiously-based arguments. Evidently counsel for Westboro didn’t study the First Amendment in law school, and thus was unaware that religiously-based arguments cannot serve as justifications for statutes in the United States. Westboro expressed concern that the church would be required to perform same-sex marriages if the ban was struck down, but Judge Crabtree deemed this interest “too speculative
to support intervention as a matter of right.” He pointed out that the Attorney General was vigorously defending the marriage ban.

MISSOURI – On October 3 the Missouri Jackson County Circuit Court ruled in Barrier v. Vasterling, 2014 WL 4966467, that the state must recognize same-sex marriages contracted in other states, and the government defendants declined to appeal, saying that the state would comply with this requirement. On Nov. 24, the ACLU of Missouri Foundation filed suit in Mooneyham v. Ozark Fire Protection District, No. 6:14-cv-3496 (U.S. Dist. Ct., W.D. Mo.), alleging that the defendant, a public agency, had refused to recognize the marriage of the plaintiff, a woman who was married to a woman in California in 2013. After the Barrier decision, the plaintiff applied for various spousal benefits offered by the defendant agency to spouses of its employees, but the agency repeatedly refused to extend the benefits. The complaint alleges sexual orientation and sex discrimination in violation of the 14th Amendment of the federal constitution, noting that were plaintiff’s spouse a man, the agency would extend the benefits without question.

NEBRASKA – The ACLU filed suit in U.S. District Court in Nebraska on November 17 seeking declaratory and injunctive relief against the state’s constitutional and statutory same-sex marriage bans, in Waters v. Heineman. Although other lawsuits had been pending in state courts, getting a federal district court case on file was deemed prudent in light of the unfolding litigation trend within the states of the 8th Circuit, where at least two federal district judges had ruled that the circuit’s 2006 ruling, Citizens v. Equal Protection v. Bruning, 455 F.3d 859, did not stand in the way of a district court in the circuit ruling in favor of a marriage equality claim. Plaintiffs are same-sex couples either seeking to marry in Nebraska or to have their out-of-state marriages recognized. Named defendants include Governor Dave Heineman, Attorney General Jon Bruning, and the state’s Tax Commissioner, Kim Conroy, whose department refuses to accept joint tax filings from married same-sex couples residing in Nebraska. Lead counsel for the plaintiffs are Susan Koenig and Angela Dunne, Omaha law partners. Also representing the plaintiffs are Amy A. Miller of the ACLU of Nebraska Foundation and Leslie Cooper and Joshua Block from the ACLU Foundation’s national LGBT Rights Project staff in New York.

NORTH CAROLINA – Kenny Barner and Scott Chappell, who have been together for nine years, obtained a marriage license and asked their pastor, Kelly P. Carpenter, to preside at their wedding. But Carpenter’s church, the United Methodist Church, does not permit same-sex marriages, and Rev. Carpenter declined their request. They have filed a complaint with Bishop Larry Goodpaster, head of the Western North Carolina Conference of the United Methodist Church, and they are hoping that by filing this complaint and encouraging other Methodists to file similar complaints, they can stimulate the Church to reconsider its position. They claim that Rev. Carpenter’s refusal to perform their marriage violates the church discipline to “be in ministry with all people” and is a form of gender discrimination. They disclaim any interest in getting their pastor in trouble over this, stating that their dispute is with the Church, not the pastor. Said Chappell, “Change seldom happens unless an agitation happens first.” Greensboro News & Record, Nov. 13.

TEXAS – In De Leon v. Perry, 975 F.Supp.2d 632 (W.D. Tex. 2014), U.S. District Judge Orlando L. Garcia ruled last February 26 that Texas’s constitutional and statutory bans on same-sex marriage violate the 14th Amendment, but stayed his ruling pending appeal. The state took its own sweet time filing its appeal in the 5th Circuit, not doing so until the last permissible moment in July, and the case is scheduled to be argued on January 9, almost eleven months after it was decided, with the stay still in effect. Judge Garcia was guided by the Supreme Court’s decision announced on January 6, 2014, to stay the Utah marriage equality ruling pending appeal. But, of course, same-sex couples are now marrying in Utah, as the 10th Circuit affirmed the district court and the Supreme Court denied the state’s petition for certiorari on October 6, automatically lifting the stay. But the Texas decision is still stayed, even though the number of states in which same-sex marriages are taking place number thirty-five and the Supreme Court has denied every stay application in a marriage equality case since its October 6 certiorari denials in appeals from the 4th, 7th and 10th Circuits. These stay denials have involved states in the 4th, 9th and 10th Circuits. The attorneys from Akin Gump Strauss Hauer & Feld LLP who represent the Texas plaintiffs filed a motion with Judge Garcia on November 24, 2014, requesting that the Texas stay be lifted. They argue that the court’s basis for issuing the stay no longer exists, and that “more recent decisions lifting and denying stays establish that there is no need to prevent gay men and lesbians from marrying pending the outcome of appeals from decisions striking down unconstitutional state laws.” The motion runs through the litany of irreparable injuries being imposed on same-sex couples in Texas who are being denied the right to marry in the state or any recognition of out-of-state same-sex marriages, and calls for the court to end this injustice. Anticipating
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the state’s opposition, the motion is labeled “Plaintiffs’ Opposed Motion to Lift Stay of Injunction.” * * * Somaly Phrasavath has filed suit challenging the refusal of Texas to recognize her as a surviving widow of Stella Powell, with whom she lived for ten years as committed life partners. They were planning to start a family together but Powell died from cancer last year. Phrasavath is seeking to have her marriage recognized under the common law marriage doctrine available in Texas for marriages that have not been formalized. Her attorney, Equality Texas board member Brian Thompson, is asking the Travis County Probate Court to apply the common law marriage rules without regard to the state’s same-sex marriage ban, which has been declared unconstitutional by the federal district court, as reported above. A declaration of her status is necessary in an ongoing dispute concerning inheritance rights between Phrasavath and her partner’s surviving intestate heirs. Her lawsuit is the tenth case to be filed in Texas challenging some aspect of the state’s same-sex marriage ban. Lone Star Q, Nov. 13.

MARRIAGE / CIVIL LITIGATION NOTES

2ND CIRCUIT COURT OF APPEALS – Upholding administrative determinations that the petitioner lacked credibility due to inconsistencies and omissions in the applications for asylum, withholding of removal and protection under the Convention Against Torture, the 2nd Circuit rejected petitions for review for an Uzbeki transgender woman in Talipov v. Holder, 2014 WL 6462653, 2014 U.S. App. LEXIS 22047 (Nov. 19, 2014) (not published in F.3d). As is frequently the case in summary dispositions of refugee appeals, the court’s opinion does not present a full account of the factual record. It identifies the petitioner as “a native of the former Soviet Union and citizen of Uzbekistan.” The Board of Immigration appeals affirmed the Immigration Judge’s decision to deny relief on September 27, 2012. The court recited various reasons why the IJ and BIA concluded that the petitioner lacked credibility. Talipov sought to reopen the case to present evidence concerning her “male-to-female transgender identity,” wrote the court. “The BIA concluded that evidence of Talipov’s transgender identity and sexual orientation could have been presented at his merits hearing because Talipov was aware of his gender identity since childhood. Talipov relies on evidence that he only recently began hormone therapy, started using makeup, started wearing women’s clothes, and began living openly as a male-to-female transgender person. These events may have been recent, but for all the record shows, the recent hormonal therapy may have had no obvious outward effect, and he could at any time have assumed a woman’s habit and presentation. In short, Talipov’s gender identity evidence was not new or previously unavailable because it shows only the recent expression by him of his unchanged psychological self-perception.” Who elected these judges to the American Psychological Association??? Are we the only ones who find this characterization troublesome – along with the court’s determinedly referring to Talipov as “he” throughout the opinion, even though it subsequently granted Talipov’s motion to amend the case caption to “reflect his legally changed name: Victoria Jacobs”? The court noted that Talipov secured a name change order in the NYC Civil Court. The least the court could have done would be to respect Talipov’s gender identity by using feminine pronouns in referring to her in its opinion. Talipov is represented by Stacy Caplow, of counsel with the Brooklyn Law School Legal Services Corp.

7TH CIRCUIT COURT OF APPEALS – The 7th Circuit affirmed a decision by District Judge Amy J. St. Eve to deny a motion by an intestate male decedent’s sister to require a DNA test of a man claiming the proceeds of the intestate’s life insurance policy as his reputed son. If the man is not the intestate’s son, the sister would be entitled to the insurance proceeds. Minnesota Life Insurance Company v. Jones, 2014 U.S. App. LEXIS 21117, 2014 WL 5649876 (Nov. 5, 2014). The deceased, Lenord Jones, never married, and his sister alleged that Jones was gay and had never had any biological children. However, Jones had executed an acknowledgement
of parentage of a boy named Quincy, together with Quincy’s mother, and Quincy had filed a claim for the remaining proceeds after Lenord’s funeral expenses were paid. Lenord’s sister offered an affidavit from a man who claimed to have known Lenord was gay and to have seen him engaging in “homosexual acts.” Writing for the 7th Circuit panel, Judge Richard Posner said, “A DNA test for paternity is quick, noninvasive, painless – and conclusive. Given the conflicting evidence of Lenord’s parentage of Quincy, ordering Quincy to submit to a DNA test would seem a no-brainer. Not so fast. The Illinois Parentage Act creates a presumption that a man is the natural father of a child if, so far as bears on this case, he and the child’s biological mother have signed an acknowledgement of paternity or, equivalently, or parentage,” which had been done in the case of Quincy. The Illinois law makes such an acknowledgement applicable “to any civil action,” including this interpleader action filed by the insurance company to determine who was entitled to the proceeds. The Illinois law even says that the presumption is irrebuttable, although Illinois courts have created exceptions. “Since Angela, the sister, couldn’t have contested a beneficiary designation in the insurance policy itself,” wrote Posner, “she shouldn’t be able to contest the parentage order. It makes sense in other words to deem the presumption irrebuttable when the putative parent has full control over who inherits and relies on the presumption to direct assets to a particular person, in this case Quincy.” Although Lenord never formally adopted Quincy, Posner wrote, “What is beyond doubt is that he had evinced no intent to leave money to his sister.” Furthermore, the parties had never mentioned a recent Illinois Supreme Court case that narrowly limited those who could contest a parentage order to “the child, the mother, or a man presumed to be the father by reason of marriage,” and so Angela was out of luck. Preclusion of a DNA test “may seem an odd rule, given the simplicity and conclusive of a DNA test of paternity,” wrote Posner. “But it reflects an understandable distaste for creating monetary incentives for family quarrels likely to generate painful accusations – here of homosexuality, for the parties agree that if Lenord was homosexual he didn’t want it known.” Furthermore, Posner commented, “Notice the distasteful implication that had Quincy died after Lenord, Angela could have required Quincy’s corpse to be dug up in order for a DNA test to be conducted on it to determine whether Quincy had been Lenord’s biological son.” He also noted that Angela’s evidence, even if believed, was not conclusive, as “homosexual men can of course father children; and so far as appears our Lenord may have been bisexual – or indeed 100 percent heterosexual.” Posner considered it a “suspicious omission” that Angela “made no effort, so far as we can tell, to obtain evidence from Quincy’s mother.” Thus, the district judge’s refusal “to disinherit Quincy” was not an abuse of discretion.

11TH CIRCUIT COURT OF APPEALS – An 11th Circuit panel unanimously affirmed the district court’s ruling denying enforcement of a subpoena issued by the Equal Employment Opportunity Commission seeking information in connection with its investigation of a discrimination charge filed by an HIV+ man who was dismissed as a cruise ship waiter by Royal Caribbean Cruises, Ltd. EEOC v. Royal Caribbean Cruises, Ltd., 2014 U.S. App. LEXIS 21228 (Nov. 6, 2014). The complainant, Jose Morabito, is a citizen of Argentina who was employed on an RCCL cruise ship. RCCL refused to renew his contract when he was diagnosed with HIV infection and Kaposi Sarcoma, an opportunistic infection associated with AIDS. Morabito filed a charge of disability discrimination with the EEOC. RCCL responded by denying that the EEOC had jurisdiction, as the cruise ship in question was registered in the Bahamas and Morabito was not a U.S. citizen. Furthermore, RCCL claimed that the Bahamas Maritime Authority (BMA) medical standards required it to disqualify Morabito from serving on the ship. The EEOC responded by requesting a list of all employees discharged by RCCL since 2010 in response to BMA standards. RCCL provided information only about its U.S. citizen employees, resisting full compliance with the request, and EEOC issued a subpoena, seeking judicial enforcement. A magistrate judge denied enforcement, finding the information requested not relevant to the individual charge being investigated, and was back up in this by the district court. The 8th Circuit agreed, pointing out that this evidence, which would have been more relevant to a pattern or practice case, was not, strictly speaking, pertinent to Morabito’s discrimination charge, especially as RCCL was conceding that Morabito was discharged because of his medical condition. The 8th Circuit panel took no position in its per curiam decision on the issue whether the EEOC’s jurisdiction over this charge is proper, and pointed out that a Commissioner could formally institute a pattern or practice investigation, in which case the requested information would be pertinent.

(EEOC) EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – The EEOC is undertaking affirmative litigation to establish that the ban on employment discrimination because of sex in Title VII of the Civil Rights Act of 1964 includes protections for LGBT people. Speaking at the ABA’s Section of Labor and Employment Law annual meeting, Commissioner Chai Feldblum described the history
of this issue at the agency and noted that two cases were filed by the EEOC in September alleging Title VII sex discrimination claims on behalf of transgender plaintiffs. There is already a small body of court precedents in cases brought by individual plaintiffs, but this is the first time that the agency has affirmatively target such claims for government prosecution. BloombergBNA Daily Labor Report, 217 DLR C-1 (Nov. 10, 2014).

**OFFICE OF SPECIAL COUNSEL** – The OSC, which investigates charges of discrimination within the federal civil service, issued a report finding that the Department of the Army had discriminated against a transgender employee in violation of President Obama’s executive order banning such discrimination as well as 5 U.S.C. Sec. 2302(b). The employee’s supervisor insisted on continuing to use her male birth name and male pronouns for her, even months after she transitioned and asked to be referred to under her new name and identity. She was barred from using the women’s restroom and asked not to discuss her gender transition with coworkers. The OSC stated that “coworker (or even supervisor) anxiety alone cannot justify discriminatory working conditions.” OSC suggested training on LGBT issues as a corrective action, as well as ordering that discriminatory conduct cease.

**CALIFORNIA** – In January the 9th Circuit vacated a jury verdict and remanded in SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014), an antitrust case concerning HIV medications, finding that the jury process was tainted when the defendant used a peremptory challenge to keep a gay man off the jury. The case is back before District Judge Claudia Wilken (N.D. Cal.), who issued a ruling on November 24 denying a motion by Abbott for judgment as a matter of law, SmithKline Beecham Corp. v. Abbott Laboratories, 2014 U.S. Dist. LEXIS 164367, 2014 WL 6664226 (N.D. Cal.). The court had denied a similar motion prior to the first jury trial. Judge Wilken noted that in reaching it decision to vacate and remand, the 9th Circuit “also held that this Court did not err in denying Abbott’s Rule 50(b) motion for judgment as a matter of law on GSK’s contract claim and that it ‘need not consider whether the district court erred in submitting the UDTPA and antitrust claims to the jury.’” This new motion was devoted to the claims as to which the 9th Circuit had not opined. Abbott argued that new developments justified revisiting the issue, but Judge Wilken ultimately disagreed, ruling that the case should go to a new trial.

**MISSISSIPPI** – The Court of Appeals of Mississippi affirmed a decision by the Monroe County Chancery Court in the divorce case of Jackson v. Jackson, 2014 Miss. App. LEXIS 638 (Nov. 4, 2014), granting a divorce to Rosie Jackson on grounds of habitual cruel and inhuman treatment. The Chancellor had found that Mr. Jackson’s homosexual activities, together with one incident of sexual assault of a minor boy, combined to constitute cruel and inhuman treatment of his wife, making the marriage repugnant to her when she learned about these activities, thus justifying the divorce decree, which also included a division of assets and the award of lump-sum alimony to Rosie. The court made the point that homosexual activities of a husband, as such, would not constitute cruel and inhuman treatment of the wife under Mississippi precedents unless combined with some other unlawful act. In this case the pedophilic incident qualified as such.

**NEW JERSEY** – U.S. District Judge Susan D. Wigenton denied summary judgment to a police detective being sued by a Hispanic lesbian for false arrest, malicious prosecution and violation of her civil rights, in Ayala v. Randolph Township, 2014 WL 5503107, 2014 U.S. Dist. LEXIS 154213 (D. N.J., Oct. 30, 2014) (not officially published). Ayala was employed as the shipping and receiving manager at a K-Mart in Randolph, N.J., when Detective William Harzula was assigned to investigate claims of theft of bales of cardboard from the rear of the store. He interviewed Ayala in the course of his investigation. He subsequently learned that two men had been arrested in a neighboring township for thefts of cardboard in that jurisdiction had also admitted to stealing cardboard from the Randolph K-Mart, with the assistance of an employee. He interviewed them and both of them indicated that they had dealings with a Hispanic woman whom they identified as a “dyke” or “lesbian,” as to whose physical description they were both vague. On the basis of these statements, Harzula submitted an affidavit to get an arrest warrant, failing to conduct an identity line-up or ascertain whether Ayala was the only tough-looking Hispanic woman employed at the K-Mart. He arrested Ayala and theft charges were brought against her, which she denied. Ultimately, all charges were withdrawn by the prosecutor, and Ayala sued Harzula and Randolph Township, in essence claiming that she was a victim of “profiling” because of her sexual orientation and national origin. Judge Wigenton found that issues of material fact precluded a grant of summary judgment to Harzula, although she granted judgment to the Township. Harzula’s liability will turn on whether he had probable cause to make the arrests and whether there was probable cause for the prosecution. The court decided that there were too many disputed facts relative to these issues to rule as a matter of law, and specifically rejected Harzula’s claim of qualified immunity. “As a threshold matter,”
she wrote, “Det. Harzula is alleged to have violated a clearly established constitutional right. Plaintiff alleges that Det. Harzula’s ‘conduct in arresting the plaintiff violates the Fourth Amendment of the Constitutional as an unreasonable seizure or arrest without probable cause.” Ayala claimed that Harzula concealed facts when he submitted his affidavit to the magistrate to get the arrest warrant. “In essence, Plaintiff contends that Det. Harzula unilaterally concluded probable cause existed and secured an arrest warrant by simply informing the judge of inculpatory evidence. If proven, these allegations would obviate Det. Harzula’s entitlement to qualified immunity,” wrote the judge.

**Ohio** – Asserting that “sexual orientation is not a protection classification” under Title VII, U.S. District Judge Benita Y. Pearson dismissed a pro se complaint by Malloy Robinson, who contended that her co-workers had engaged in a campaign of harassment against her in violation of federal law. *Robinson v. AT&T*, 2014 WL 6389553 (N.D. Ohio, Nov. 14, 2014). Judge Pearson found that the complaint failed to specify the grounds upon which Robinson sought relief, presenting instead a “diary” of events, culminating in a claim of hostile work environment, defamation, retaliation and “sexual orientation.” Quoting from the Supreme Court’s statement in *Oncale v. Sundowner Offshore Services* (1998) that Title VII is not “a general civility code for the American workplace,” Judge Pearson wrote, “It does not provide a cause of action for all acts of unprofessional or harassing behavior in an employment setting. The critical issue in any Title VII inquiry is whether members of a protected class are exposed to disadvantageous terms or conditions of employment, which members who are not of that class are not exposed.” While Robinson may have been experiencing hostile environment harassment by co-workers, it was unclear whether this was because of any forbidden ground for discrimination under Title VII. “It is possible Plaintiff may be asserting she was harassed on the basis of her perceived sexual orientation,” Pearson explained. “She denies being gay, but claims her co-workers taunted her and intimidated she was a lesbian.” But because Title VII does not list sexual orientation as a forbidden ground, wrote Pearson, “Harassment or discrimination based upon a person’s sexual orientation cannot form the basis of a cognizable claim under Title VII.” Instead, she continued, “Plaintiff appears to be claiming she was subjected to general harassment. While Plaintiff may feel this harassment created a hostile work environment, these actions are only a violation of federal law if the harassment is based on criteria prohibited by Title VII or another federal statute. The actions Plaintiff details in her complaint, accepted as true and construed in her favor, do not support a federal cause of action.” Furthermore, her retaliation claim was dismissed because she could not meet the pleading requirement of showing that her complaints about the harassment constituted a “protected activity” under Title VII, and her defamation claim under state law was declined once her federal claims dropped from the case.

**Ohio** – An African-American lesbian faculty member who was denied tenure at a Cincinnati community college suffered summary judgment of her Title VII discrimination claim in *Revely v. Cincinnati State Technical & Community College*, 2014 U.S. Dist. LEXIS 155999, 2014 WL 5607605 (S.D. Ohio, Nov. 4, 2014). Judge Sandra S. Beckwith found that a major problem with Revely’s race and sex discrimination claim was that she was replaced by an African-American woman, and that the alleged excessive length of time that Cincinnati State took to hire her replacement was not evidence that the hiring was made mainly to conceal its animus towards Revely on account of her race or sex. The defendant took the position that Revely was denied tenure and renewal of her contract because of various deficiencies in her performance, which it documented in support of its summary judgment motion. Revely also tried to assert a gender-nonconformity sex discrimination claim, contending that the school “non-renewed her because she is a lesbian and did not conform to a stereotypical female gender role.” The problem with this, wrote Judge Beckwith, was that “other than her self-described ‘non-gender-normative’ style of dress, she has not identified any evidence that indicates that Cincinnati State was motivated not to renew her contract because of her failure to conform to its perception of a stereotypical female gender role. Plaintiff, for instance, has not pointed to any evidence that anyone at Cincinnati State ever commented unfavorably about her style of dress or believed that her appearance and demeanor were too masculine or insufficiently feminine.” In the absence of such allegations, this reduced to a simple sexual orientation discrimination claim, and sexual orientation is “a personal characteristic that Title VII does not protected against employment discrimination,” wrote Beckwith. “The fact that other administrative and faculty members were aware of her sexual orientation cannot be transformed into a basis for finding that Cincinnati State decided not to renew her teaching contract because she failed to conform to a female gender stereotype.” In other words, the court was unwilling to entertain the argument, accepted by some other federal courts, that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices” and thus that discrimination because of sexual orientation is, as such, sex discrimination.
OREGON – An on-line university’s promise not to discriminate on the basis of sexual orientation, contained in a student handbook that also contained an express disclaimer of contractual intent, was not violated when the university dismissed a student from its mental health counseling degree program after he identified himself in a small-group session as having a “pedophilic sexual orientation.” Gibson v. Walden University, 2014 U.S. Dist. LEXIS 160566, 2014 WL 6085783 (D. Ore., Nov. 13, 2014). In its dismissal letter to the plaintiff, the University stated, “Walden University has determined that your continued preparation as a counselor is not consistent with the objectives of the counseling profession and not in your best interests or that of the university or the counseling client community.” District Judge Owen M. Panner found that the plaintiff’s breach of contract claim was not viable due to the clear disclaimer, but that even if the disclaimer were not effective, the plaintiff had “not sufficiently alleged that Defendant’s conduct constituted a violation of the Handbook’s non-discrimination clauses,” as the provisions in question state that they are “consistent with applicable federal, state, and local laws guaranteeing nondiscrimination for all protected classifications,” “pedophilic sexual orientation” was not “a protected classification under either federal or state law,” and plaintiff had cited no authority to the contrary. The court also rejected Gibson’s claim that the school breached his contractual rights by taking longer than the time set out in the handbook to respond to his appeal of his dismissal. The court noted that the handbook stated that “normally no more than 45 calendar days should elapse between the filing of an appeal and the disposition by the chief academic officer,” which was not on its face a contractual guarantee that a disposition would be announced within 45 days.

TENNESSEE – An outraged heterosexual married woman who was upset that the Social Security Administration was recognizing same-sex marriages struck out in her attempt to get a federal court to order SSA to stop this practice. U.S. Magistrate Judge Juliet Griffin issued a Report and Recommendation to District Judge Kevin H. Sharp on November 4, recommending that Martin v. Colvin, 2014 WL 5607028 (M.D. Tenn.), be dismissed. Martin was also protesting the Social Security Act’s failure to attribute a portion of a working husband’s earnings to the contribution of his stay-at-home wife, whose homemaking and childrearing activities contributed to her husband’s ability to work fulltime and support the family. This system thus fails to recognize the wife’s contribution, depriving her of the credits necessary to earn benefits on her own. Wrote Magistrate Judge Griffin, “The plaintiff further contends that she has been discriminated against because the SSA does not treat members of same-sex marriages in a similar manner to members of heterosexual marriages and has retroactively processed widows’ and widowers’ claims arising from same-sex marriages. She complains that the United States government’s administration of tax laws and benefits with respect to same-sex couples adversely impacts her receipt of ‘benefits of taxation’ and her right to ‘live in health and safety’ and is forcing ‘Republican Party officials’ in states that do not recognize same-sex marriages to validate same-sex marriage licenses from other states.” Judge Griffin pointed out that federal courts do not issue advisory opinions, and Susan Martin, who premised her standing “as an aggrieved married female taxpayer and grandmother,” had not actually applied for and been denied any benefits that could make the subject of an Article III lawsuit against the SSA. The federal government has only lifted its sovereign immunity to the extent of permitting individuals to sue over the denial of benefits to them. Judge Griffin rejected Martin’s argument that she was not suing under the Social Security Act, finding that “the inextricable intertwining between the plaintiff’s claims and the Social Security Act is evidenced by the relief she does request, which includes a request for injunctive relief requiring the Defendants to change the manner in which Sections 414(a)(2), 413(a)(2)(A)(i) and (ii), and 403(f)(5)(A) of the Social Security Act are interpreted and administered and to adopt different record keeping practices at the SSA and revise the manner in which benefits under the Social Security Act are calculated,” which presumably would increase the benefits to which she would be entitled. The judge found that Martin’s pro se attempts to frame her claim in a way that would avoid these problems were futile, and that her complaint had not “set forth a legal basis that would entitle her to any form of mandamus relief.”

TENNESSEE – In a procedurally complex ruling issued on November 4, a three-judge panel of the Court of Appeals of Tennessee affirmed a decision by Davidson County Chancery Court Judge Carol L. McCoy to dismiss a lawsuit challenging the constitutionality of certain actions by the Tennessee legislature adopted in response to the Nashville City Council’s adoption of a ban on sexual orientation and gender identity discrimination by city contractors. Howe v. Haslam, 2014 Tenn. App. LEXIS 716, 2014 WL 5698877. The legislature adopted a statutory definition of “sex” for purposes of the state’s civil rights laws to mean and refer solely to the “designation of an individual person as male or female as indicated on the individual’s birth certificate.” This, alleged plaintiffs, rescinded protection against discrimination for transgender people, but the court of appeals expressed uncertainty that the prior law had afforded such protection or that the

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amendment would preclude gender non-conformity discrimination claims. The legislature also adopted the so-called Equal Access to Intrastate Commerce Act, which prohibited local governments from prohibiting discrimination on grounds not forbidden under state law. This responded to Nashville’s adoption of an ordinance forbidding sexual orientation and gender identity discrimination by city contractors. The court of appeals affirmed the chancery court’s decision that none of the plaintiffs had standing to challenge these measures, rejecting the claim that they ran afoul of federal equal protection precedents concerning state enactments making it more difficult for particular groups to seek protection from the government. In particular, the opinion for the court by Judge David R. Farmer distinguished Romer v. Evans, the Supreme Court’s 1996 Colorado Amendment 2 ruling, by pointing out that the Colorado case involved a state constitutional amendment specifically directed against gay people, whereas the Tennessee enactment was merely a statute that could be amended or repealed through the ordinary legislative process and did not focus solely on one group. The court also relied on defendants’ assertions that the measure would not prevent the city from adopting additional forbidden grounds of discrimination for municipal employees, including employees of local schools. In a concurring opinion, Judge W. Neal McBrayer would have remanded for trial the question whether the contested law applies to local education agencies. A team of attorneys led by Abby R. Rubenfeld of Nashville, with assistance from pro bono counsel from the National Center for Lesbian Rights, represents the plaintiffs, who may seek further review from the Tennessee Supreme Court.

TENNESSEE – A lesbian employee of Metro Nashville Parks & Recreation formerly employed as a Parks Police officer suffered dismissal of her discrimination complaint on November 25, but will be allowed to file an amended complaint as to some of her claims, in DeSoto v. Board of Parks and Recreation, 2014 U.S. Dist. LEXIS 165714, 2014 WL 6680681 (M.D. Tenn.). District Judge Aleta A. Trauger was highly critical of the complaint, which in her description seems to have overlooked various jurisdictional hurdles and failed to tie charges of discrimination to specific actions of named defendants. Particularly worrying, however, is Judge Trauger’s discussion of DeSoto’s equal protection claim, to the extent it raised issues of discrimination because of age and sexual orientation. After noting that “age and sexual orientation are not suspect classes,” she asserted: “The claims of a plaintiff asserting discrimination based on age or sexual orientation must typically be analyzed as a ‘class of one’ under rational basis review. Unfortunately for DeSoto, public employees cannot proceed as a ‘class of one,’ because ‘the class-of-one-theory of equal protection does not apply in the public employment context.’ Therefore, DeSoto’s age and sexual orientation discrimination claims premised on the Equal Protection Clause must be dismissed with prejudice because she cannot proceed with those claims as a ‘class of one’ under any set of alleged facts.” We rather doubt the accuracy of this assertion, since there are plenty of decisions from other district courts allowing gay public employees to assert equal protection claims in protest of alleged sexual orientation discrimination by their employers. There are no “suspect classes” under the Equal Protection Clause; rather, there are suspect classifications, such as race or sex. Indeed, the Supreme Court’s decisions in Romer v. Evans and U.S. v. Windsor, despite not explicitly finding sexual orientation to be a suspect classification, did not treat either of those cases, both of which involved equal protection arguments brought by gay plaintiffs, as proceeding under the “class of one” rubric, and at least one circuit, the 9th, has concluded that Windsor used some form of heightened scrutiny in evaluating the discriminatory Defense of Marriage Act. The Equal Protection Clause is not limited in its scope to “suspect classes” – an inappropriate label in any event since the Equal Protection Clause guarantees equal protection of the laws to everybody, not just women and people of color. The 6th Circuit case that Judge Trauger cites for the proposition that sexual orientation claims under the Equal Protection Clause must be treated as “class of one” cases, PHN Movers, LLOC v. Medina Twp., 498 F. App’x 540, 548 (6th Cir. 2012), is only vaguely on point and does not deal with sexual orientation, and although of course Judge Trauger is bound by 6th Circuit precedent, this case refers to “protected or suspect” classes, not just “suspect classes,” and it is clear after Romer and Windsor that gay people are entitled to some degree of protection against government discrimination under the Equal Protection Clause. Her discussion is particularly surprising since she is the author of the district court ruling in Tanco v. Haslam, holding earlier this year that Tennessee’s failure to recognize same-sex marriages probably violates the Equal Protection Clause, a ruling that relied upon U.S. v. Windsor and acknowledged the 9th Circuit’s decision on heightened scrutiny for sexual orientation discrimination claims. Perhaps this new decision is reacting to the 6th Circuit’s reversal of Tanco on November 6. But the 6th Circuit did not suggest in DeBoer v. Snyder that sexual orientation discrimination claims are to be treated as “class of one” claims under the Equal Protection Clause.

Price Waterhouse provides a vehicle for case,” he wrote, “because, although gender stereotypes.” “This is a difficult in terms related to her conformance with terms specifically related to Eure’s status as a transgender person,” he wrote, “not in terms related to her conformance with gender stereotypes.” “This is a difficult case,” he wrote, “because, although Price Waterhouse provides a vehicle for transgender persons to seek recovery under Title VII, neither the Supreme Court nor the Fifth Circuit have held that discrimination based on transgender status per se is gender stereotyping actionable under Title VII. Without any briefing from the parties on the issue, this Court declines to hold otherwise.” Brandon’s claim was weakened by the court’s decision to strike much of the relevant evidence submitted in opposition to the employer’s motion for summary judgment as “hearsay,” and the court found she had not credibly alleged that she suffered discrimination due to race, premised mainly on offensive comments about Mexican employees by Campanian. The court found inadequate support for Brandon’s contention she was constructively discharged due to Campanian’s hostility and threats to cut her salary in punishment for hiring Eure.

CRIMINAL LITIGATION NOTES

U.S. ARMY COURT OF CRIMINAL APPEALS – The Court of Criminal Appeals affirmed the conviction of Lt. Col. Kenneth A. R. Pinkela on charges of willful disobedience of a superior commissioned officer, abusive sexual contact, aggravated assault, conduct unbecoming an officer and reckless endangerment, and the sentence of dismissal and confinement for one year. U.S. v. Pinkela, 2014 CCA LEXIS 852 (Nov. 14, 2014). According to the per curiam decision, Pinkela was diagnosed HIV-positive in 2006 and became involved in a mentoring relationship late in 2008 with 1st Lieutenant CH, who visited Pinkela in his home in December 2008. Before the visit, CH told Pinkela he would not have sex with him if Pinkela was HIV-positive. Pinkela lied about his HIV status and initiated unprotected anal sex with CH, who was subsequently diagnosed as HIV-positive. According to the court’s findings, CH had asked Pinkela to use a condom but Pinkela said that “he didn’t do that and offered to provide test results showing he was not HIV-positive.” CH “trusted appellant’s word and consented to unprotected anal intercourse,” during which Pinkela told CH to use poppers, which he did. CH testified that the sex was “very painful.” Pinkela subsequently claimed in a “chat log” that was introduced in evidence that he had not ejaculated during sex with CH. The court martial received expert testimony that the incidence of HIV transmission through unprotected sexual intercourse was about 1.4%, that “HIV is hard to get in sexual transmission settings.” Nonetheless, the court convicted Pinkela. The Court of Appeals found the evidence sufficient to support the conviction. “In this case, the evidence established that appellant engaged in unprotected anal intercourse with ILT CH while appellant was HIV-positive. Expert testimony adduced that appellant’s viral load was ‘pretty significant’ and that there was a 1.4 percent per act sexual transmission rate of HIV. The probability of infection under these facts is ‘more than merely a fanciful, speculative, or remote possibility.’ Accordingly, we are convinced that the evidence is factually sufficient to support appellant’s conviction for aggravated assault.”

PRISONER LITIGATION NOTES

se, who “endured sexual harassment, sexual assaults, and violent attacks” for months, during which time Diamond was “enslaved” by gang members and “claimed” by an inmate who held him captive in a cell and “sexually abused” him multiple times. Warden Marty Allen allegedly “took no action” and “actually contributed” to the incidents by “rude and offensive” statements to Diamond’s complaints to Allen and to Sexual Assault Response Team leader Dave McCraken. The Recommendation notes: “Apparently, at some point, Plaintiff did seek, and was denied, protective custody” prior to the “enslaving” and “claiming” events. The Complaint alleges that Diamond suffered post-traumatic stress disorder (PTSD) and became suicidal, “resorting to self-mutilation” because of the conditions of his confinement. Although Judge Langstaff found it likely that treating a prisoner differently because of his “gender non-conformity” violated the Equal Protection Clause – citing Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011) – he dismissed this count without prejudice because the Complaint did not allege “any direct evidence of disparate treatment on the basis of Plaintiff’s transgenderism or the existence of any similarly situated, non-transgender inmate who was treated differently after complaining of sexual harassment or assault at the prison.” The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., specifically excludes coverage of transgender individuals as disabled – see 42 U.S.C. § 12211(b)(1). Relying on this provision and Diamond’s failure to establish any other disability-causing discrimination, Judge Langstaff dismissed this claim. Finally, Judge Langstaff joined a nearly universal chorus of decisions holding that the Prison Rape Elimination Act of 2003 creates no private cause of action and likewise dismissed this count. The opinion ends with numerous orders for further proceedings against the remaining defendants. William J. Rold

**NEW YORK** – In Dawud H. v. State of New York, 2014 N.Y. App. Div. LEXIS 8124 (4th Dep’t., Nov. 21, 2014), the court affirmed an order denying summary judgment to the plaintiff, who was seeking a civil penalty and compensatory damages for the alleged unauthorized disclosure of his “confidential HIV-related information” by Correctional employees at Mid-State Correctional Facility. “The Court of Claims properly denied claimant’s motion for summary judgment inasmuch as claimant failed to establish as a matter of law that the information disclosed satisfies the definition of ‘confidential HIV-related information’” under the statute. However, the court declined the state’s request to grant summary judgment dismissing the case or holding that the state was entitled to judgment as a matter of law, so the plaintiff will get an opportunity to attempt to prove that the information in question is covered by the statute. The claimant is represented by Prisoner Legal Services of New York. The court’s brief per curiam opinion is uninformative as to the nature of the information at issue.

**LEGISLATIVE & ADMINISTRATIVE**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES** – An advisory panel of experts convened by HHS has been holding hearings on proposals to modify the rules governing blood donation by gay men. Under existing rules, any man who has had gay sex since 1977 is disqualified from donating blood, regardless whether he tests negative for HIV. There are proposals to modify the rule to disqualifying only men who have had sex with another man within a year prior to the proposed blood donation. Further hearings are expected early in December. In the past, the advisory committee has voted to stay with the current rules, despite evidence that they exclude many people who could donate safely. Washington Times, Nov. 13.

**ARKANSAS** – Voters will decide in a December 9 special election whether to keep a civil rights ordinance adopted recently by the Fayetteville City Council.

**MARYLAND** – The Department of Health and Mental Hygiene announced that it was moving to modify regulations to provide transition-related health care to low-income transgender residents under the state’s Medicaid program. They were seeking federal approval to put the new benefits into place by April 1, 2015. During the summer of 2014, the state took action to make such benefits available to state employees, including gender reassignment surgery, hormone therapy, and other transition-related care. Baltimore Sun, Nov. 22.

**MICHIGAN** – Newly re-elected Governor Rick Snyder, a conservative Republican, announced that his agenda includes speaking with legislative leaders about expanding the state’s civil rights act to ban discrimination because of sexual orientation or gender identity, according to a November 6 report in the Lansing State Journal. The newspaper stated, “This is no longer an issue defined by conservatives and liberals; a coalition of Michigan businesses has called on lawmakers to act because it’s important to attracting the best talent here. And it’s the right thing to do.” In the event, however, a bill introduced by Republican legislators failed to include gender identity, and stimulated at the same time the introduction of a proposed “Religious Freedom Restoration Act” that would prohibit the government from burdening free exercise of religion without a compelling justification.
State RFRA bills have become a flashpoint since the Supreme Court’s ruling in the Hobby Lobby case, finding a federal statutory RFRA exemption from compliance with the contraceptive coverage regulations under the Affordable Care Act for corporate employers with religious objections, and they are also seen as a mechanism to insulate discriminatory businesses and employers from liability for anti-gay discrimination. House Speaker Jase Bolger defended against criticism for omitting gender identity, arguing that under current jurisprudence transgender people would be protected under the existing sex discrimination ban. Democratic legislators criticized the Republican bill as a retrogressive move.

MISSOURI – The Springfield City Council’s Oct. 13 decision to add sexual orientation and gender identity to the city’s nondiscrimination ordinance has led to a successful petition campaign, putting the Council in the position where it would have to either repeal the measure or put it up to a public vote. On November 24, the Council voted to table a repeal proposal and another that would have placed it on the ballot. If the Council does not take up the issue again within 30 days, it will automatically go on the April 2015 municipal election ballot. Enforcement of the non-discrimination measure will be suspended if it is placed on the ballot. AP Alerts, Nov. 25.

SOUTH CAROLINA – Two months after openly-lesbian Crystal Moore was sworn in as the second time as town police chief over the protest of Mayor Earl Bullard, the Latta town council voted 6-0 to pass an ordinance forbidding discrimination in municipal employment because of sexual orientation or gender identity. Latta joins Charleston, Columbia, Myrtle Beach, North Charleston and Richland County as South Carolina jurisdictions forbidding such discrimination against public employees, but Latta is the smallest by far. wbtv.com, Nov. 20.

TEXAS – On November 4 voters in Dallas approved a significant expansion to their City Charter’s protection of municipal employees against discrimination. Until that date, the only prohibited grounds of discrimination were race, sex and political or religious opinions or affiliation. The amendment adds sexual orientation, gender identity and expression, color, age, marital status, genetic characteristics, national origin, disability, and military or veteran status to the list. State law in Texas provides no protection against discrimination because of sexual orientation or gender identity and expression. * * * Rep. Rafae Anchia filed a measure in the Texas House to allow same-sex marriages. Rep. Garnet Coleman filed a resolution seeking repeal of the state’s constitutional amendment banning such marriages. Sen. Jose Rodriguez filed a bill to repeal the state’s Homosexual Conduct Law, which was declared unconstitutional by the U.S. Supreme Court in 2003 but which the legislature has resisted removing from the statute books. On the other hand, Sen. Donna Campbell has introduced a resolution that would protect the right of Texans to “act or refuse to act in a manner motivated by a sincerely held religious belief.” This might defund the government, since we suspect many citizens would quickly develop religious objections to paying taxes and fees of various kinds. . . StarTelegram, Nov. 16.

LAW & SOCIETY NOTES

NOVEMBER ELECTIONS – The November elections produced mixed news for openly LGBT candidates. All of the openly LGBT members of the House of Representatives who ran for re-election were successful, but several openly gay candidates seeking to expand the size of the House’s LGBT caucus, including two Republicans, were unsuccessful. One openly-gay Representative, Michael Michaud, who came out during his campaign for the governorship of Maine, was unsuccessful in his quest. Maura Healey was successful, however, winning election as Attorney General of Massachusetts as an openly-lesbian Democratic candidate, even as the head of the ticket, incumbent Attorney General Martha Coakley, went down to defeat. Healey is the first openly-gay lawyer to be elected Attorney General of a state. Had he been elected, Michaud would have been the first openly-gay person to be elected Governor of a state. The re-elected LGBT incumbents included Sean Patrick Maloney (N.Y.), Jared Polis (Colorado), Kyrsten Sinema (Arizona), Mark Takano (California), Marc Pocan (Wisconsin, and David Cicilline (Rhode Island). Among the unsuccessful openly-gay House candidates were Sean Eldridge (N.Y.), Carl DeMaio (California), and Richard Tisei (Massachusetts). The Advocate. com, Nov. 5.

INTERNATIONAL NOTES

AUSTRALIA – On November 26, Liberal Democrat David Leyonhjelm introduced a private senator’s bill in the Parliament to allow same-sex marriages. The bill would allow any Australian to marry regardless of “sex, sexual orientation and gender identity,” according to a report online by the Australian Associated Press. It would also provide that non-government religious and civil celebrants would be free to refuse to perform such
Australias. Leyonhjelm said that Prime Minister Tony Abbott, an opponent of same-sex marriage, advised him not to introduce the bill, as Abbott wishes to avoid a contentious vote on the subject, while some members of the Parliament have been agitating for a “conscience vote” under which there would be no attempt to impose party discipline.

**AUSTRALIA** – In *Re: Dylan*, [2014] FamCA 969 (Nov. 5, 2014), Justice Kent of the High Court of Australia authorized the performance of medical procedures to induce male puberty in Dylan, a male-identified fifteen year old who is genetically female but has external male genitals while retaining internal female genitals. The court’s decision, which goes into great detail about the medical facts, indicates that if male puberty is not induced, female puberty may occur spontaneously with various psychological and medical complications. Dylan’s parents are separated. His father began telling him about his unusual physical situation when he was 11. The induced male puberty treatment will result, among other things, in his voice breaking and lowering, his male genitals enlarging and the development of such secondary sex characteristics as body hair growth. In the absence of this treatment, he might begin to menstruate and require special surgery because of the lack of a vagina. This is awfully complicated. The court concluded that it would be in Dylan’s best interest to induce male puberty, in light of his firmly centered male gender identity, even though the treatment has its own potential adverse side effects. The court received considerable expert testimony, and the decision is in line with Dylan’s wishes, although the court concluded that at his stage of psychological and intellectual development he does not yet fully understand all the issues. The court redacted the publicly available text of the decision to conceal the identity of all parties and their legal counsel.

**BOTSWANA** – The High Court of Botswana, a trial court, ruled on November 14 that the Minister of Labour and Home Affairs erred in refusing to register a gay rights organization, LEGABIBO, as a legitimate and legal organization authorized to operate in the country. *Rammoge v. The Attorney General of Botswana*, MAHGB-000175-13. Judge Terrence Rannowane rejected the government’s argument that the criminal ban on sodomy precluded registering an organization of gay rights supporters who sought to advocate for decriminalization and the end of discrimination against gay people. The Director of the Department of Civil and National Registration had rejected LEGABIBO’s application on the state grounds that “Botswana’s constitution does not recognize homosexuals” and that the application would violate Section 7(2)(a) of the Societies Act, which prohibits the Director from registering an organization when “it appears to him that any of the objects of the Society is, or is likely to be used for any unlawful purpose, or for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare and good order in Botswana.” The court concluded that the refusal to register the organization was “therefore clearly wrong because it was based on the presumption that the objectives were to engage in homosexual relationships when as a matter of fact, the objectives were inter alia, to lobby for legislative reforms to make same sex sexual relationships legal is therefore not a crime, neither does it give any appearance of being ‘likely to be used for any unlawful purpose, nor prejudicial to, or incompatible with peace, welfare and good order in Botswana.’” The court found that the constitution’s protection for freedom of expression and association were violated by denying this registration, as was its guarantee of equal protection of the law. The government promptly signaled that it would appeal this ruling, rather than comply. But LEGABIBO optimistically indicated that it would re-apply to register. Attorneys U. Dow and L.N. Nchunga represent the applicants.

**CANADA** – The governing council of the British Columba Law Society voted on October 31 to reverse an
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earlier decision and deny recognition of graduates of Trinity Western University’s law school. The school is controversial for maintaining anti-gay policies, the only law school in Canada to take such a position. The various provincial law societies are divided about how to handle Trinity. Law societies in Ontario and Nova Scotia voted against accrediting Trinity students. Alberta and Saskatchewan bar groups will recognize the graduates, but Saskatchewan has put a hold on its decision for further consideration. The Law Society of Canada has approved Trinity’s program.  Globe and Mail, Oct. 31.

EGYPT — Law enforcement has convicted eight men said to be depicted in a video of a same-sex wedding celebration, on charges of “inciting debauchery.” The verdict is part of a government crack-down against gay people, who are seen as subversive in a state that rests on Muslim principles. The crackdown also targets liberal and pro-democracy activists generally. Human Rights Watch charges that Egyptian authorities have repeatedly arrested and tortured men suspected of consensual gay sex, in order to get confessions and the names of more suspects.  HuffingtonPost, Nov. 1.

FINLAND — On November 28, the Parliament voted 105-92 to approve a citizens’ petition to open up marriage to same-sex couples, in an equal status for all legal purposes. Same-sex couples have had access to registered partnership with many of the rights of marriage since 2002. This vote sends the proposal to a legislative committee for the framing of appropriate legislation, which will then be referred back to the Parliament for adoption in the form of amendments to the nation’s marriage law. It was expected that these would go into effect in March 2017. Among those who voice approval of the vote were Prime Minister Alexander Stubb and Archbishop Kari Makinen, head of the Evangelical Lutheran Church in Finland. Finland will be the last of the Nordic countries to have adopted same-sex marriage legislation. Reuters; International Services in English; Agence France-Presse, Nov. 28.

GAMBIA — President Yahya Jammeh signed into law a bill that authorizes life imprisonment for some homosexual acts, according to a November 21 Associated Press report. The legislature approved the measure in August, and there was considerable international pressure on Jammeh not to sign it. The new law has language identical to a Uganda statute that was declared unconstitutional earlier this year due to a defect in the legislative process. The measure criminalizes “aggravated homosexuality,” targeting “serial offenders” and people living with HIV or AIDS. It also targets those who engage in homosexual acts with persons under 18, or those who are disabled or who have been drugged, or where the offender is the parent or guardian of the victim. Amnesty International reported that the police had been inspired by the passage of the law to begin a crackdown on suspected homosexuals, subjecting detainees to torture and get them to confess their “crimes” and provide the names of other homosexuals.

ITALY — Controversy continues in the battle between national authorities and mayors over whether same-sex marriages performed elsewhere can be “registered” by Italian municipalities. On November 4, Rome Mayor Ignazio Marino filed an appeal with the Lazio Regional Administrative Court against an order by the city prefect to void the registration of 16 same-sex marriages by Rome citizens. The nation’s Interior Minister, Angelino Alfano, had ordered the Rome Prefect Giuseppe Pecoraro, to take the contested action, relying on the national ban on same-sex marriage enacted in 1995. ANSA English Media Service, Nov. 4.

KOREA — The Seoul Metropolitan Government was planning to hold a public hearing on gay rights proposals, but organized opposition in the form of 200 anti-gay activists storming the City Hall in protest against the hearing caused it to be postponed. The issue before the government was whether to include a clause protecting sexual minorities in the city charter. The Christian Council of Korea was a leading organizer of the protest. They reportedly bombarded the city’s on-line message board with protesting messages after the Mayor, Park Wonsoon, spoke out in favor of gay rights in an interview with a U.S. newspaper. Korea Times, Nov. 20.

LATVIA — Foreign Minister Edgars Rinkevics came out as gay using Twitter, stating “I proudly announce I am gay. . . . Good luck to all of you.” He had earlier tweeted, in Latvian, “Our country must create a legal framework for all types of partnerships, I will fight for it, I know that there will immediately be mega-hysteria by #Proudtobe gay.” Rinkevics was the first senior government official to “come out” anywhere in the Baltic states. Various leading government officials made statements of support for him, and in the short term there appeared to be no major adverse consequences. Agence France-Presse, Nov. 7.

MALAYSIA — A three-judge appeals court panel has ruled that a state law banning men from cross-dressing as woman is unconstitutional, as it
deprives the appellants of the right to live with dignity,” according to a Nov. 7 report by Agence France-Presse. Judge Hishamudin Yunus wrote that the ban “has the effect of denying the appellants and other sufferers of GID (gender identity disorder) to move freely in public places. This is degrading, oppressive and inhuman.” The decision overturns a 2012 lower court ruling, which had dismissed the challenge by the three appellants to their arrests. They are all Muslims who were born male but identify as women. Islamic law prescribes imprisonment for this offense.

MEXICO – Mexico City legislators approved a measure on Nov. 13 allowing transgender people to legally change their gender without a court order. The measure was approved 42-0 with 6 abstentions, and had been proposed by Mayor Miguel Angel Mancera. Washington Blade, Nov. 14.

NAMIBIA – The Supreme Court of Namibia has found in favor of three HIV-positive women who claim to have been forcibly sterilized by health care workers without their consent. Al Jazeera (Nov. 3) reports that cases of forced sterilization have also been documented in South Africa and Kenya. The health care workers rationalize it as a way to prevent women from transmitting their HIV infection to their children, but it is an extreme measure and there are medical ways to sharply reduce the risk of such transmission if an HIV-positive woman gives birth to a child. Having decided on liability, the Supreme Court will conduct a second proceeding to determine appropriate damages to be paid to the women.

RUSSIA – BBC International Reports reported on November 26 that three Russian journalists and an LGBT rights activist were seeking asylum in Germany and the United States, claiming persecution on account of their sexual orientation. Those named in the article include TV news correspondent Artur Akhmetgaliyev and graphic designer Aleksandr Izmailov, who left St. Petersburg for Germany after receiving homophobic threats. Oleg Potapenko, head of the Amururg news website in Khabarovsk, was reportedly planning to seek asylum in the U.S. Russian LGBT rights activist Kyrill Lagutin was also seeking asylum in Germany. The article was sourced from the Moscow Times English language edition of November 25.

SLOVAKIA – Even though Slovakia amended its constitution last year to define marriage as the union of a man and a woman, opponents of same-sex marriage petitioned the government to hold a referendum on the subject. On Nov. 27, President Andrej Kiska announced that a public referendum on February 7 will consider whether marriage should be limited to different-sex unions, and also whether same-sex couples should be allowed to adopt children. Such referenda, held from time to time in Slovakia, have no legal effect unless more than half of the registered voters participate, a level that is rarely reached. ABCnews.com, Nov. 27.

SOUTHAFRICA – In an action that was described as potentially transformative, Judge Tshifhiwa Maumela has imposed a thirty-year prison sentence on Lekgoa Moteleleleng, who pled guilty to the homophobic rape and murder of Duduzile Zozo in September 2013. At the sentencing hearing, the judge said to the defendant: “No one has been given the right to correct alcoholics. No one has been given the right to correct those who take too much salt or sugar. No one has been given the right to correct others when it comes to the right to love their own gender. . . You can’t interfere with how someone chooses to live.” The judge justified the lengthy sentence as “a warning to those who threatened the vulnerable.” The judge’s parting words to the defendant: “Lead your life and let gays and lesbians be.” South Africa Star, Nov. 26.

SYRIA – There were press reports late in November that the Islamic State (ISIL) had executed two young men for alleged homosexuality by stoning. ISIL endorses a fundamentalism form of Islam that prescribed death by stoning for homosexuals. In one case it was claimed that there were videos showing a man engaging in indecent acts with other men. United Nations sources also indicated that ISIS had executed several women by stoning on accusations of adultery. Asian News International, Nov. 26.

Lena Klimova, the founder of Children-4040, an online support network for LGBT teens in Russia, for having the temerity to launch an “It Gets Better” campaign that suggests that gays can be good people. This violates legislation prohibiting “propaganda” for homosexuality, because it will “cause children to believe that being gay means being a person who is brave, strong, confident, tenacious, and someone with a sense of dignity and self-respect.” Such beliefs are contrary to the policy of the state, which sees gay people as weak, depraved, undignified, and unworthy of respect, and encourages children who may have gay thoughts to seek medical assistant. Global Voices blog, Nov. 18.

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UGANDA – Agence France-Presse (Nov. 8) reports that Uganda’s ruling party has drawn up new anti-gay legislation which is intended to be introduced and enacted before the end of the year. A prior law had been passed but then struck down by the constitutional court on account of the lack of a proper quorum when it was approved in the legislature. The measure is intended to outlaw the “promotion” of homosexuality by banning gay organizations, demonstrations, or any lobbying for reform of the anti-gay criminal laws. Any publish pro-gray statement could be punished, thus muzzling newspaper reporting about gay issues. The measure would clearly make consensual gay activity criminal.

UNITED KINGDOM – Sometimes what begin as “good ideas” turn really sour, as reported by the Daily Telegraph (Nov. 4) in recounting a custody visitation dispute between a gay male couple and a lesbian couple. The men donated sperm and the women had two girls. The couples have fallen out, there is great acrimony, and Mr. Justice Cobb found that the girls’ childhoods have been “irredeemably marred” by the most “bruising and distressing” case he had ever been involved with. The judge ruled that the girls should live with their mothers, even though there were serious problems in the home, because moving them would be “devastating” to them. Relations with the fathers are so poisoned that contact visits will be allowed only with the younger daughter, as the older one does not want to see the fathers.

PROFESSIONAL NOTES

New York City Mayor Bill De Blasio appointed Carmelyn P. Malalis, a partner at Outten & Gouliden LLP and chair of that firm’s LGBT Workplace Rights and Disability and Family Responsibilities practice groups, to be CHAIR OF THE NEW YORK CITY HUMAN RIGHTS COMMISSION. Malalis is a former chair of the New York City Bar Association’s LGBT Rights Committee. Among the mayor’s other appointees to the Commission, announced on November 21, are LGBT rights activists Rabbi Sharon Kleinbaum of Beit Simchat Torah, NYC’s LGBTQ synagogue, and Ana Oliveira, former Executive Director of Gay Men’s Health Crisis and a past member of several NYC commissions dealing with HIV and LGBTQ issues.

The White House has designated Aditi Hardikar as Associate Director of Public Engagement in the Office of Public Engagement, with responsibility as liaison to the LGBT community as well as the Asian American and Pacific Islanders communities. Hardiker was most recently director of the LGBT Leadership Council at the Democratic National Committee, and was involved with the Obama-Biden presidential re-election campaign in 2012 as Deputy Director of LGBT Voter Outreach and LGBT Finance.

The U.S. Senate has confirmed President Obama’s appointment of an openly-gay career diplomat, Ted Osius, to be the U.S. Ambassador to Vietnam. A career member of the Foreign Service, Osius has recently served as an associate professor at the National War College and a senior fellow at the Center for Strategic and International Studies. Prior to that, he served in various diplomatic posts in Indonesia, Thailand, Vatican City, the Philippines, and India, and has served as deputy director of the Office of Korean Affairs in the State Department’s Bureau of East Asian & Pacific Affairs. At the State Department he has been a leader of the Departments LGBT employee affinity group, GLIFAA, and is the seventh openly-gay Ambassador appointed by President Obama, and the second openly-gay Ambassador to be appointed from the ranks of the career Foreign Service, the first being Michael Guest, who was appointed Ambassador to Romania by President George W. Bush. Washington Blade, Nov. 18.

MASEN DAVIS, Executive Director of the TRANSGENDER LAW CENTER, announced he would step down from that position early in 2015, and the board is launching a national search for his replacement. Davis served as ED for seven years, presiding over staff grown from four to 14, and budget growth from $325,000 to $1.5 million as TLC emerged as a national player in litigation and lobbying efforts for transgender equality.

GAY & LESBIAN ADVOCATES & DEFENDERS. New England’s LGBT rights public interest law firm, has announced that Janson Wu would become its executive director effective December 1, 2014. Wu has been a staff attorney at GLAD for eight years and played a prominent role in several landmark cases, including GLAD’s successful challenge of Section 3 of DOMA in the 1st Circuit and a lesbian co-parent recognition case in the New Hampshire Supreme Court. He also played a leading role on behalf of GLAD in helping to secure marriage equality in New Hampshire and Rhode Island, and has most recently served as Deputy Director of the organization. Wu is a graduate of Harvard College and Harvard Law School, and practiced with Quinn Emanuel and Tri-City Community Action Program before joining GLAD.
The Oklahoma Supreme Court stated that the state has a strong public policy that custody and care of children should be based on their best interests, finding that Taylor failed to direct the court to any public policy which would cause the co-parenting agreement to be unenforceable. In fact, the court pointed out that Oklahoma has a public policy of allowing parents to relinquish all or some of their parental rights without terminating those rights after the Oklahoma Legislature recognized a public policy in favor of a parent sharing some or all child-rearing responsibilities with another person regardless of gender.

The court held, “Taylor is presumed to have acted in the best interests of the children when she acted in a manner consistent with that intent – she executed Agreements in which she allegedly consented to sharing her parental authority over the children, she encouraged a parental relationship between Eldredge and the children, she held Eldredge out to the world as the children’s parent, and she accepted Eldredge’s financial and emotional support as a parent even after they separated. These special factors justify state interference into Taylor’s decision to withdraw all of Eldredge’s contact with the children.” The public policy of the State mandates that the district court consider the best interests of the children before they lose one of the only two parents they have ever known, said the court, ultimately finding that the district court erred in granting the motion to dismiss.

Eldredge is represented by Melody Huckby Rowlett of Oklahoma City. Taylor is represented by Candee R. Wilson, Cathy C. Barnum, and Kelley Bodell Barnum & Clinton of Norman, Oklahoma. – Anthony Sears

Anthony Sears studies at New York Law School (’16).
PUBLICATIONS NOTED


17. Pulman, Charles D., Same-Measure Marriages: The Quagmire Continues After Windsor, 37-FALL Fam. Advoc. 8 (Fall 2014).


SPECIALY NOTED

Dr. Jillian Weiss, Professor of Law and Society at Ramapo College of New Jersey, has written an excellent “Issue Brief” titled “The Transgender Tipping Point: An Overview for the Advocate,” which is being distributed by the American Constitution Society on its website. This summarizes the current state of the law on transgender rights in the United States and should prove very useful to practitioners, especially those confronting transgender law issues for the first time. The URL is https://www.acslaw.org/publications/issue-briefs/the-transgender-tipping-point-an-overview-for-the-advocate?mgs1=8be9igG3hH

EDITOR’S NOTES

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