EXECUTIVE ACTION

President Obama Amends Executive Orders to Protect LGBT Employees of Federal Government and Federal Contractors
**EXECUTIVE SUMMARY**

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President Barack Obama signed Executive Order 13672 on July 21, 2014, amending Executive Order 11478, which forbids employment discrimination in the executive branch of the federal government, to add “gender identity” to prohibited grounds of discrimination, and Executive Order 11246, which forbids discrimination by federal contractors, to add “sexual orientation” and “gender identity” as prohibited grounds of discrimination by government contractors. The contractor non-discrimination requirements will be included in new federal contracts made after the Labor Department has published final regulations implementing the amendments, probably beginning early in 2015. Only new contracts entered after that date will be affected by the amendment. Some press reports of the signing estimated that about 20% of private sector employees work for employers that contract with the federal government, many of them in states that do not forbid sexual orientation and/or gender identity discrimination.

Richard M. Nixon on August 8, 1969, at which time it covered the non-discrimination categories then covered by federal statutory law: race or color, religion, national origin, sex and age. After Congress passed the Rehabilitation Act of 1973, the EO was amended to cover “handicap.” President Bill Clinton amended it late in his second term to add “sexual orientation.” As federal courts and the Equal Employment Opportunity Commission (EEOC) have increasingly come to interpret the ban on sex discrimination to include gender identity, it might seem that there was no need to amend the EO to include that term, but proponents of adding it pointed out that the case law was controversial, 11246 charged the Labor Department, through its Office of Federal Contract Compliance Programs (OFCCP), to oversee a program under which “government contracting agencies” would include in every contract (with some exceptions) a provision under which the contractor agreed not to discriminate in employment because of race, color, religion, sex or national origin, the categories of forbidden discrimination under Title VII, and agreed to abide by rules, regulations and relevant orders promulgated by the Labor Department to enforce this requirement. Contractors are required generally to include similar provisions in any subcontracts they make as part of their performance of their federal contracts. The penalty for noncompliance with these requirements could be cancellation, termination or suspension of the contract, and ineligibility for future contracts. Complaints about noncompliance are handled administratively; the president does not have the power to enact laws that can be enforced by individual plaintiffs in the federal courts. Generally EO 11246 charges the Labor Department to investigate complaints, to try to facilitate settlements, and to refer cases that involve violations of federal statutes to the appropriate enforcement agencies, such as the Equal Employment Opportunity Commission (EEOC). Of course, the EEOC would only have jurisdiction to initiate enforcement action over complaints involving forms of discrimination prohibited by the

EO 11478 was issued by President

Some press reports of the signing estimated that about 20% of private sector employees work for employers that contract with the federal government, many of them in states that do not forbid sexual orientation and/or gender identity discrimination.
laws, holding that religious organizations have a 1st Amendment free exercise right to decide whom to employ in ministerial positions free of government interference. As it is constitutionally-based, presumably the “ministerial exemption” applies to EO 11246.

President Obama’s amendments did not change this 2002 religious exemption. That is to say, religious corporations, associations, educational institutions or societies that contract with the federal government to provide services or goods will have to agree not to discriminate in their employment practices on the ground of sexual orientation or gender identity (always keeping in mind the ministerial exemption), which may present some organizations with particular challenges in light of the religious doctrines to which they adhere. This raises immediate questions about whether religious organizations might plausibly argue that they cannot recognize a gay person as a member in good standing of their faith, regardless of that person’s professed beliefs. Who gets to decide, for example, whether an individual professing to be Catholic but also being openly gay can be denied employment by a Catholic social welfare agency under contract to the government to provide services to the public, because the agency does not believe that an openly gay person can be deemed to be a practicing Catholic in good standing?

The First Amendment’s Free Exercise Clause generally protects religious organizations from interference by the government in their religious activities. The Supreme Court has held that organizations of any type do not have a constitutional right to refuse to comply with laws of general application that do not single out religious practices for prohibition, apart from the ministerial exemption under which neither Congress nor the states can dictate personnel policies of religious employers concerning ministerial position. There is some controversy about who can be deemed a ministerial employee, with litigation tending to focus on teachers and administrators in religious schools who teach secular subjects but who are deemed by the schools to be “ministers” nonetheless and required to sign employment contracts that commit them to avoiding conduct that violates the tenets of the religion.

After the Supreme Court issued its key ruling about the requirement to comply with laws of general application, Employment Division v. Smith, 494 U.S. 872 (1990), Congress passed the Religious Freedom Restoration Act (RFRA), providing that persons with religious objections to complying with laws of general application could claim a religious exemption unless the government could show that the government had a compelling interest supporting the general law and that the law provided the least restrictive alternative to achieving that interest. In effect, Congress wanted to restore prior Supreme Court case law to the extent possible through a statute by imposing upon itself and the federal regulatory apparatus a limitation on its ability to compel people to comply with legal requirements that would violate their religious beliefs. The Supreme Court then held that Congress did not have authority to override a constitutional decision by the Court, and thus could not apply RFRA to the states, see City of Boerne v. Flores, 521 U.S. 507 (1997), but could establish limits on its own power and the power of the federal government through legislation, thus cutting back the effect of RFRA to limiting federal statutes, regulations and executive branch actions. Many states then passed similar laws placing the same restrictions on their own legislative and regulatory functions.

In June the Supreme Court ruled in Burwell v. Hobby Lobby Stores, 2014 WL 2921709 (June 30, 2014), that the federal Dictionary Act’s definition of “person” to include corporations applies to RFRA, in a case where two closely-held family-owned business corporations claimed an exemption from complying with regulations under the Affordable Care Act requiring them to cover certain contraceptive methods in health insurance for their employees. The Court went on to hold that, assuming the government had a compelling reason for including these contraceptive methods in its coverage requirements, requiring these employers to arrange
and pay for the coverage was not the least restrictive method of achieving the coverage goal, as the government could provide the coverage directly itself, or could provide some other mechanism that would make the coverage available without imposing on the objecting corporation. Another example of a less restrictive alternative cited by the Court was a regulation that the administration had adopted for religiously-identified non-profit corporations, who could signify their objections to the specific items of coverage on a form provided by the government that they would submit to their health insurer, which would then be required to provide the coverage and seek reimbursement from the government. (That regulation is under attack by some religious non-profit corporations, that claim that executing an attack by some religious non-profit corporations, who could signify their objections to the specific items of coverage on a form provided by the government that they would submit to their health insurer, which would then be required to provide the coverage and seek reimbursement from the government. (That regulation is under attack by some religious non-profit corporations, that claim that executing the form and sending it to their insurer substantially burdens their free exercise rights as well.)

The Court’s Hobby Lobby ruling raised immediate fears about whether corporations owned or operated by individuals with religious objections to homosexuality and/or same sex marriage might claim exemptions from employing or serving gay people or same-sex couples. In her dissenting opinion, Justice Ruth Bader Ginsburg cited two cases on this point, in which state courts had rejected religious exemption claims from state public accommodations laws by a Minnesota health club, which did not want to have gay members, and a New Mexico wedding photographer, who had rejected a job preparing a wedding album for a lesbian couple. The New Mexico case also involved that state’s version of RFRA, which the New Mexico Supreme Court held was not violated by application of the public accommodations law to a small business. Similarly, there is litigation pending in Colorado involving a baker who rejected an order to provide a cake for the wedding celebration of a gay male couple. The state’s civil rights agency ruled against the baker, who is appealing the decision to the state courts. These small local businesses are generally not the kinds of businesses that would likely contract with the federal government, but the nature of the problem is clear. The federal government contracts with a broad range of private sector institutions and businesses, some of which are religiously affiliated or which are owned by groups or individuals with strong religious views about homosexuality.

Under EO 11246 as amended by President Obama, for example, could a closely-held family-owned company that produces certain technology that the federal government wants to buy, or that provides consulting services that the federal government wants to obtain, insist that for religious reasons it cannot employ gay people, or more particularly cannot continue to employee gay people who marry same-sex partners? There are many reports now of Catholic schools that have employed gay people as teachers and administrators for many years suddenly terminating their employment after learning that these people are marrying or have married a same-sex partner. Could a federal contractor refuse to include the same-sex spouse of an employee in its employee benefits plan on the same-basis that it includes different-sex spouses, because of religious objections to same-sex marriage? The amended executive order would seem to prohibit such discrimination. But if the protesting contractor sought protection from the non-discrimination requirement under RFRA, how would it fare?

These questions are difficult to answer prospectively. In his opinion for the Court in Hobby Lobby, Justice Samuel Alito said that the court was ruling on the case before it, focusing on whether a closely-held family-owned business with religious objections to some forms of contraception was entitled to an exemption from ACA coverage requirements, at least to the same extent that non-profit religiously-affiliated organizations had already been accorded by the Obama Administration in its regulations. The Court, according to Alito, was not purporting to establish a wide-ranging exception to all legal obligations for all business corporations. Alito commented that an employer could not rely on its religious beliefs to seek exemption from the race discrimination requirements of Title VII. But we don’t know whether that comment implicitly relied on the status of race as a suspect classification under the Equal Protection Clause, or the fact that Title VII recognizes a bona fide occupational qualification defense in cases involving religion, national origin or sex discrimination but not in cases involving race or color. Did Alito mean to suggest more broadly that the RFRA exemption would not extend to any discrimination claims?

Justice Ginsburg was concerned about this in her dissent when she cited the two gay-specific examples from prior case law. She might well have also noted the Supreme Court’s decision in Boy Scouts of America v. Dale, 430 U.S. 640 (2000), where the Court’s 5-4 majority found that the Boy Scouts’ 1st Amendment freedom of expression and association rights took priority over whatever interest the state of New Jersey had in forbidding public accommodations such as the Boy Scouts from discriminating based on sexual orientation. What would the Supreme Court majority think about the relative weight of an executive order banning sexual orientation or gender identity discrimination as opposed to statutory protection for free exercise of religion in RFRA? Statutes would logically outweigh executive orders when there is a conflict between the two. Can a presidential executive order that is not effectuating a policy adopted by Congress (as the original 11246 was effectuating the policy of Title VII, albeit going beyond it by applying the non-discrimination requirement to businesses exempt from coverage under Title VII due to their size or the nature of their business) signify a compelling government interest, or does Congress have the sole authority to establish compelling governmental interests, since the President’s Executive Orders as a matter of law and custom are aimed at the internal policies of the Executive Branch?

When religious opponents of the LGBT executive order suggest that it is going to lead to litigation, they are not
making empty threats. It is likely that some contractor who loses or fails to obtain a contract because they will not comply on religious grounds with the non-discrimination requirement will go to court seeking injunctive relief, and the question will be squarely presented whether RFRA applies to the situation and whether a compelling state interest can be based on an executive order that is not effectuating a policy decision by Congress?

Other questions arise about the pending version of the Employment Non-Discrimination Act, approved last year by the Senate, which provides a rather broad religious exemption beyond the narrow exemption now found in Title VII, the ministerial exemption, or the Bush amendments to EO 11246. In the wake of Hobby Lobby, one has to ask whether a narrower exemption, similar to that in Title VII, would survive challenge under RFRA? Questions for which there are at present no firm answers…

Finally, it remains to be seen whether the Labor Department will encounter recalcitrance from the few major federal contractors that don’t already have internal policies banning sexual orientation and gender identity discrimination. One long-time Fortune 500 holdout is ExxonMobil. Prior to the merger of Exxon and Mobil, Mobil was among the progressive members of the energy industry, with a non-discrimination policy and a domestic partner benefits program. Upon the merger, Exxon assume control over corporate policies and imposed its long-standing refusal to amend its discrimination policy or adopt a partner benefit program. However, in response to signing of the executive order, a spokesperson for the corporation said to signing of the executive order, a discrimination policy or adopt a partner benefits program.

### 4th Circuit Strikes Virginia Ban on Same-Sex Marriages; Certiorari Petitions Filed with Supreme Court

A three-judge panel of the U.S. Court of Appeals for the 4th Circuit voted 2-1 to declare Virginia’s ban on same-sex marriage unconstitutional. *Bostic v. Schaefer*, 2014 U.S. App. LEXIS 14298, 2014 WL 3702493 (July 28, 2014). The opinion for the court did not go into immediate effect. One of the defendants, Prince William County Clerk Michele B. McQuigg, gave notice on August 1 that she would be filing a petition for certiorari with the Supreme Court.

On August 8, Attorney General Mark R. Herring and Solicitor General Stuart A. Raphael filed a petition for certiorari in *Rainey v. Bostic*, No. 14-153. Herring announced that he was filing the petition to ensure that the 4th Circuit case is considered when the Supreme Court reconvenes in September to consider the summer cert petitions, and he was uncertain when McQuigg’s petition would be filed. (She had 90 days from the date of the decision, which could put her filing into late October). But that uncertainty about a timely filing by defendant was vitiates on August 22, when the other clerk defendant, Norfolk Court Clerk George E. Schaefer, III, filed his own cert. petition.

On August 27, counsel for the *Bostic* plaintiffs filed its response to the cert petitions, arguing that the case had been correctly decided but that the petition should be granted because it presents a question of national importance that requires speedy resolution by the Supreme Court.

A response was also filed by counsel for the *Harris* class-action plaintiffs, similarly urging the court to take the case. Finally, counsel for McQuigg filed a cert petition on August 29.

The circuit court’s decision, if it went into effect, would dictate the result of pending marriage equality litigation in North and South Carolina and West Virginia, where pending cases have been “on hold” while the district judges waited to see what the 4th Circuit would do. Those district judges could decide to wait to see whether there is further review before issuing their rulings, however. One state in the 4th Circuit, Maryland, already has marriage equality as a result of state legislation ratified by the voters in 2012. One immediate consequence of the decision was an announcement by North Carolina’s Attorney General, Roy Cooper, that having read the opinion he would drop his defense of his state’s same-sex marriage ban, as he felt there were no new arguments to make, but his counterpart in South Carolina, Alan Wilson, immediately announced that he would continue to defend that state’s marriage ban. On August 13, the 4th Circuit panel voted 2-1 to deny a motion to stay its mandate pending ultimate appellate review, which would mean that the mandate would issue at 8 a.m. on August 21.

McQuigg promptly filed an application for a stay with Chief Justice John Roberts on August 14, seeking a quick replay of the stay that the Supreme Court issued after the Utah marriage equality ruling, *Herbert v. Kitchen*, 134 S. Ct. 893 (January 6, 2014). Her request was strengthened by Virginia Solicitor General Raphael’s stated agreement with the need for a stay in his response to McQuigg’s original post-trial motion to the 4th Circuit. Roberts asked for responses from other parties. On August 18, ACLU and Lambda Legal, representing the *Harris v. Rainey* class, parted company from Herring and opposed the stay motion, but urged that if the Court decided to stay the mandate, it move quickly to grant certiorari so there would not be undue delay in determining the right to marriage and recognition for class members. Herring supported the stay request. On August 20, the Supreme Court issued it Order in Pending Case, granting the motion for stay “pending the timely filing and disposition of a petition for writ of certiorari.” The Court stated that if such petition were denied, the stay “shall terminate immediately.” If the writ is
The Bostic case was filed. The ACLU which filed its lawsuit shortly after marriage. and were seeking recognition of their had married in California in 2008 Carol Schall and Mary Townley, who by adding another couple as plaintiffs, the new legal team expanded the lawsuit Boies. AFER’s offer was accepted, and representation by Ted Olson and David California Proposition 8, to provide (AFER), which had litigated against American Foundation for Equal Rights ensuing publicity brought an offer by the Tony London filed their lawsuit and the go forward on their own with their own Eastern District of Virginia, decided to constitutional amendment. While the ACLU was preparing its case, to be filed in the U.S. District Court for the Western District of Virginia, a same-sex couple in Norfolk, which is in the Eastern District of Virginia, decided to go forward on their own with their own private attorney. Timothy Bostic and Tony London filed their lawsuit and the ensuing publicity brought an offer by the American Foundation for Equal Rights (AFER), which had litigated against California Proposition 8, to provide representation by Ted Olson and David Boies. AFER’s offer was accepted, and the new legal team expanded the lawsuit by adding another couple as plaintiffs, Carol Schall and Mary Townley, who had married in California in 2008 and were seeking recognition of their marriage.

Olson and Boies pushed their case ahead more quickly than the ACLU, which filed its lawsuit shortly after the Bostic case was filed. The ACLU focused on getting the trial judge in the Western District, Michael Urbanski, to certify their case as a class action, seeking to ensure that a win would be binding throughout the state. Olson and Boies focused on pushing forward quickly to a summary judgment that would get their case up to the court of appeals, and District Judge Arenda L. Wright Allen accommodated them with a grant of summary judgment on February 13, which she stayed pending appeal. When the appeal was filed, the ACLU moved to intervene on behalf of their plaintiff class, as Judge Urbanski had put their case on hold pending a ruling by the 4th Circuit, and it was agreed that the ACLU would participate in the briefing and argument.

Things were also complicated on the defense side of the case. Bostic and London had originally sued the governor and attorney general, as well as the local clerk in Norfolk who would not take their marriage application. After the Schall-Townley plaintiffs were added, the amended complaint added Virginia State Registrar Janet Rainey, whose office plays a role in recognizing out-of-state marriages, as a defendant. The 2013 election in November turned out writing the opinion for the court, was up representing the clerks in appealing Judge Wright Allen’s ruling.

At the oral argument before the three-judge panel in Richmond on May 13, Oakley and Nimocks argued for the clerks, Virginia Solicitor General Stuart Raphael argued on behalf of Rainey (now representing the Virginia executive branch’s position that the ban was unconstitutional), Olson argued for the AFER plaintiffs, and James Esseks, Director of the ACLU’s LGBT Rights Project, argued for the class action plaintiffs.

The three-judge panel selected for the argument was suitably diverse. The senior member of the panel, Paul V. Judge Floyd’s opinion followed closely on the path set by the 10th Circuit Court of Appeals when it struck down the Utah marriage ban.

as the local clerk in Norfolk who would not take their marriage application.

After the Schall-Townley plaintiffs were added, the amended complaint added Virginia State Registrar Janet Rainey, whose office plays a role in recognizing out-of-state marriages, as a defendant. The 2013 election in November turned out to be a萨破 about the clerks, Norfolk Clerk George E. Schaefer, III, and Michele McAuliffe and Attorney General Mark Herring, are marriage equality supporters who were not inclined to defend the ban. Herring filed notices with the courts that the state would not provide a defense, which left that role to the clerks: Norfolk Clerk George E. Schaefer, III, and Michele McAuliffe, the Prince William County Clerk whose motion to intervene had been granted shortly before Herring, who was representing Rainey, notified the court that he would not offer to serve on the 4th Circuit. Finally, the Gregory was appointed by Bill Clinton in 1993. Gregory was appointed by Bill Clinton in 1993. Roger L. Neimeyer, was appointed to the court by George H.W. Bush in 1990. Roger L. Gregory was appointed by Bill Clinton toward the end of his second term, was blocked in the Senate, and then was reappointed by George W. Bush as part of a deal to break a deadlock over Bush’s first group of appellate appointees. Gregory is the first African-American to serve on the 4th Circuit. Finally, the junior member of the panel, who ended up writing the opinion for the court, was Henry F. Floyd, appointed by Barack Obama in 2011.

Judge Floyd’s opinion followed closely on the path set by the 10th Circuit Court of Appeals when it struck down the Utah marriage ban in Kitchen v. Herbert, 2014 U.S. App. LEXIS 11935, 2014 WL 2868044 (June 25, 2014). Both courts, faced with prior circuit precedent holding that sexual orientation discrimination claims were
subject to deferential rational basis review, avoided that route entirely, instead basing their decisions on the conclusion that the plaintiffs were being denied a fundamental right, which required the court to subject the state marriage ban to strict scrutiny. Under the strict scrutiny test, a challenged law can only survive if it is narrowly tailored to achieve a compelling state interest. Most laws subjected to strict scrutiny are held unconstitutional.

Before getting to the main issue, however, Floyd contended briefly with the defendants’ contention that the plaintiffs lacked standing to bring the case, a make-weight argument of virtually no substance in these lawsuits, and that the Supreme Court had foreclosed this challenge by its 1972 ruling in *Baker v. Nelson*, a Minnesota case, that same-sex marriage did not present a “substantial federal question.”

**Floyd went through the various Supreme Court right-to-marry cases, finding a common thread supporting the plaintiffs’ contention.**

Floyd pointed out that “every federal court to consider this issue since the Supreme Court decided *U.S. v. Windsor* has reached the same conclusion,” that the old case is no longer relevant. He then cited the 10th Circuit’s ruling and ten U.S. District Court rulings. He also quoted Justice Ruth Bader Ginsburg’s comment when this issue was raised during the oral argument in the Proposition 8 case: “*Baker v. Nelson* was 1971. The Supreme Court hadn’t even decided that gender-based classifications get any kind of heightened scrutiny. . . Same-sex intimate conduct was considered criminal in many states in 1971, so I don’t think we can extract much in *Baker v. Nelson*.”

Turning to the main issue, Floyd asserted that the plaintiffs in this case were not seeking a new constitutional right – a right of same-sex marriage – but rather an individual right to get married to the partner of their choice. As such, the majority of the court saw this case as falling into the same category as *Loving v. Virginia*, the Supreme Court ruling from 1967 that struck down Virginia’s ban on interracial marriages. Floyd went through the various Supreme Court right-to-marry cases, finding a common thread supporting the plaintiffs’ contention. “Over the decades,” he wrote, “the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms.”

After briefly describing the most important marriage precedents, he wrote, “These cases do not define the rights in question as ‘the right to interracial marriage,’ ‘the right of people owing child support to marry,’ and ‘the right of prison inmates to marry.’ Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. The Supreme Court’s unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of ‘freedom of choice’ that ‘resides with the individual.’ If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.”

Dissenting, Judge Niemeyer vehemently disagreed. “In reaching this conclusion,” he argued, “the majority has failed to conduct the necessary constitutional analysis. Rather, it has simply declared syllogistically that because ‘marriage’ is a fundamental right protected by the Due Process Clause and ‘same-sex marriage’ is a form of marriage, Virginia’s laws declining to recognize same-sex marriage infringe the fundamental right to marry and are therefore unconstitutional. . . This analysis is fundamentally flawed because it fails to take into account that the ‘marriage’ that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly-proposed relationship of a ‘same-sex marriage.’ And this failure is even more pronounced by the majority’s acknowledgement that same-sex marriage is a new notion that has not been recognized ‘for most of our country’s history.’ Moreover, the majority fails to explain how this new notion became incorporated into the traditional definition of marriage except by linguistic manipulation.”

Niemeyer also suggested that the majority’s approach would lead to the argument that polygamous and incestuous marriages came within the fundamental right to marry.

The difference between the majority and the dissent over whether a fundamental right was involved was determinative of their outcomes. Judge Floyd examined the five rationales advanced by the county clerks for maintaining a ban on same-sex marriage and found that none of them met the test of strict scrutiny. Judge Niemeyer asserted confidently that several of these rationales would suffice to uphold the ban under the rational basis approach. While disclaiming any view about whether same-sex couples should be allowed to marry as a matter of public policy, Niemeyer asserted that this was a decision for the state to make, and its voters had made the decision by adopting their marriage amendment.

Judge Floyd’s discussion of the various state rationales followed now-familiar paths after two dozen prior marriage equality rulings by federal courts. There was the usual quotation from Justice Scalia’s dissent in *Lawrence v. Texas*, the usual invocation of an amicus brief from various learned professional association’s pointing out the consensus of reputable authority on the parenting abilities of same-sex couples, and the usual observation that denying marriage to same-sex couples disadvantaged their children without
in any way increasing the likelihood that different-sex couples would forgo procreating outside of marriage.

“We recognize that same-sex marriage makes some people deeply uncomfortable,” wrote Judge Floyd. “However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual’s life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.”

With his dissent, Judge Niemeyer became only the second federal judge to rule against a marriage equality claim since the ruling last December in *Kitchen v. Herbert* by U.S. District Judge Robert Shelby that the Utah marriage ban was unconstitutional. The first, of course, was the dissenting 10th Circuit judge, Paul Joseph Kelly, also appointed by the first President Bush a quarter century ago. Every other federal judge to rule in a marriage equality case, regardless of the party of the president who appointed her or him, has ruled for marriage equality.

The cert petition filed by Herring and Raphael urged the Supreme Court to take the case on several grounds, emphasizing the importance of the question playing out in litigation in every state that does not have marriage equality, the split of appellate authority, with a pre-*Windsor* 8th Circuit ruling having rejected a constitutional challenge to the Nebraska marriage amendment and state supreme courts having divided over the issue, and arguing that the dissenting opinions in the 4th and 10th Circuits had misapplied the Court’s fundamental rights doctrine to argue that plaintiffs were seeking a “new right” as opposed to seeking to access a well-established fundamental right.

In his cert petition, Norfolk County Clerk Schaefer argued that the Court should grant his petition rather than Herring’s because Herring’s substantive position in the case had prevailed at the 4th Circuit and that a party defending the constitutionality of Virginia’s ban was the proper party to obtain review in the Supreme Court. He pointed out that if the Court granted his petition, Herring could participate as representative of State Registrar Janet Rainey, who remains a nominal defendant in the case even though she changed sides on the merits prior to the District Court’s ruling. As to substance, Schaefer contended that in terms of the question before the Supreme Court, the issue is one of federalism — whether the people of Virginia acting through their legislature and constitutional amendment process or the federal courts should decide who can marry in Virginia — and that the 4th Circuit misconstrued *U.S. v. Windsor* as to this. He also argued that the 4th Circuit’s analysis of the due process issue was precluded by *Washington v. Glucksberg* because the court failed to define the right at issue at the correct level of specificity, misapplying the Supreme Court's marriage precedents, which all arose in cases involving different-sex marriages.

Schaefer retained independent counsel to represent him on the petition: David B. Oakley and Jeffrey F. Brooke of Poole Mahoney PC in Chesapeake, VA, and S. Kyle Duncan, listed as counsel of record, of Duncan PLLC, Washington, D.C.

McQuigg’s petition pressed the Court with the urgency of a nationwide resolution of the marriage issue, documenting the cases in which lower courts had refused to stay marriage equality rulings, resulting in numerous same-sex couples marrying before stays could be entered, contracting marriages whose bona fides might be questioned. “Delaying review of the question presented for any significant period risks harm to the rule of law and the dignified resolution of the important constitutional question presented here,” asserted McQuigg’s counsel, lawyers from Alliance Defending Freedom, led by Byron J. Babione as counsel of record.
Utah Petitions for Supreme Court Review of Marriage Equality Ruling

Utah Governor Gary Herbert and Attorney General Sean Reyes filed their petition for certiorari with the United States Supreme Court on August 5, seeking review of the 10th Circuit Court of Appeals’ ruling in Kitchen v. Herbert. At the Supreme Court, the case would be called Herbert v. Kitchen, No. 14-124. The 10th Circuit had ruled on June 25 that Utah’s ban on same-sex marriage violated the 14th Amendment by depriving same-sex couples of the fundamental right to marry without sufficient justification, but stayed its ruling pending appeal, to be consistent with the Supreme Court’s issuance of a stay pending appeal of the district court’s original decision in the case.

Utah’s counsel of record, Gene C. Schaerr and John J. Bursch, have put together a certiorari petition that is well-calculated to persuade the Court that they should take the case. They have position this as a federalism case. Their main “pitch” to the Court is that the task of defining marriage is left under our constitutional scheme to the states, and that federal courts should not dictate how that term is to be defined. This is reflected in their wording of the question presented to the Court: “Whether the Fourteenth Amendment to the United States Constitution prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman.”

They built on Justice Samuel Alito’s dissenting opinion in U.S. v. Windsor, in which he posited that there are essentially two conceptions of marriage in the United States today, an adult-centric version and a child-centric version, and that the question which of these concepts to embrace should be left to the political processes of the states under a constitutional scheme which has traditionally left the details of domestic relations law to the states. They come back numerous times to Justice Anthony Kennedy’s statements in his opinion for the Court in Windsor that the definition of marriage has traditionally been left to the states, and that for almost all of our history that definition has limited marriage to the union of a man and a woman, and they emphasize the Court’s holding in Windsor that the constitutional flaw in Section 3 of the Defense of Marriage Act was that Congress had failed to defer to state decisions to allow or recognize same-sex marriages.

In other words, this Petition does not demonstrate gay people or employ homophobic language. It is carefully written to avoid comments that might be deemed hostile, and emphasizes that both the trial judge in this case, Robert Shelby, and the 10th Circuit panel, had specifically found no evidence that Utah’s ban on same-sex marriage was enacted out of animus against gay people. Rather, they argue, Utah’s ban, most recently enacted as a constitutional amendment a decade ago, was a decision by the people of the state to embrace a child-centric concept of marriage, under which the procreative potential of different-sex marriage was its defining feature and linking children with their biological parents the main purpose.

The purpose of a petition for certiorari is to persuade the Court that there is an important federal question that requires national resolution. This is an easy argument to make in light of the current litigation situation. They list all the states in which marriage equality litigation is pending — a very impressive list of 32 states — and also emphasize that hundreds of same-sex couples were married in several of these states when trial courts did not stay their rulings and some time elapsed until appellate courts could restore the “status quo” by staying the decisions pending appeal. As a result, there is collateral litigation about the validity of those marriages that would be resolved by a ruling on the merits by the Court.

They point out that the Court has already decided recently that marriage equality is a decision requiring its attention, when it granted certiorari in December 2012 in Hollingsworth v. Perry, the Proposition 8 case from the 9th Circuit. Although the Court ultimately decided that the petitioners’ standing in that case precluded a decision on the merits, it had granted certiorari on the same question presented in this case, so it had already decided recently that a federal court decision striking down a state ban on same-sex marriage presented a pressing federal question. They also note that the Utah litigation has already generated two stays from the Supreme Court: first, staying Judge Shelby’s decision in January 2014, and then more recently staying Judge Kimball’s decision in Evans v. Herbert concerning the validity of the marriages performed during the interval between Judge Shelby’s decision and the Supreme Court’s stay of that decision. In issuing a stay, the Court makes an initial determination that the case is likely to be worthy of Supreme Court review, with a possibility that it would be reversed. Thus, they argue, the Court has already decided, preliminarily, that this is a case that likely merits review.

Finally, they argue that there is a split of authority that needs resolution by the Court. They note Baker v. Nelson, the Supreme Court’s determination in 1972 that the Minnesota Supreme Court’s rejection of a 14th Amendment claim for marriage equality did not present a substantial federal question, even in light of the Court’s recent ruling against anti-miscegenation laws in Loving v. Virginia. They contend that Baker v. Nelson was still binding and that the 10th Circuit erred in failing to follow that precedent. They argue that the method used by the 10th Circuit to reach its decision that a fundamental right is involved in this case violates the methodology approved by the Court in Washington v. Glucksberg in 1997, and that it violates the Court’s statement last year in U.S. v. Windsor that the federal government must defer to the states in...
defining marriage. Finally, they note a split from the 8th Circuit’s pre-Windsor ruling in Citizens for Equal Protection v. Bruning, which had rejected an equal protection challenge to a same-sex marriage ban in a somewhat different context.

They argue that this case, the first in the door from the current wave of marriage equality litigation, is also the “ideal vehicle” for the Court to use in deciding the marriage equality question. First, the Court is already familiar with this litigation from considering and granting two stay petitions. Second, the petitioners are vigorous proponents of the child-centric marriage concept. Third, the findings of the courts below that Utah did not act out of animus left the Court free to focus on the “pure legal question” rather than being distracted by the animus findings in some of the other pending marriage equality cases. Fourth, they argue that the courts below were “unusually clear in embracing the adult-centric concept as the basis of their holdings that the fundamental right to marriage includes the right to marry someone of the same sex,” thus highlighting the clash of philosophy that is at stake. Fifth, they note that unlike some of the other marriage equality cases now pending, this one presents both the issues of the right to marry and of recognition of out-of-state marriages, so it would provide a vehicle to address both issues in one case. Sixth, there are no standing issues to prevent the Court from reaching the merits. Seventh, “there is no need to let the issue percolate even more” in light of the litigation history and the U.S. Attorney General’s announcement that he will support the plaintiffs when the Court next takes up the marriage equality issue. Finally, they emphasized that counsel on both sides of the case “are experienced and capable.”

“The harm in waiting is significant,” Respondents argue, “regardless of which side prevails. Either thousands of couples are being denied their constitutional right to marry, or millions of voters are being disenfranchised of their fundamental right to retain the definition of marriage that has existed since before the People ratified the Constitution. This Court should grant the petition and answer, once and for all, the important question presented.”

They close with a strong summary of their argument on the merits: “Promoting marriage as an institution designed to honor every child’s fundamental right to know and be raised by a mother and father does not ban any other type of relationship. But rewriting the Constitution to impose the Tenth Circuit’s marriage definition on every single State has consequences. It communicates that the marriage institution is more about adults than children. It teaches that mothers and fathers are interchangeable and therefore expendable. And it instills an incentive that citizens seeking social change should use the courts, rather than the democratic process, to achieve it. For all these reasons, the Court should grant Utah’s petition and reverse the Tenth Circuit.”

Throughout the petition Schaerr and Bursch make arguments and use vocabulary that could be sharply contested by marriage equality proponents. Their goal in this document, however, is primarily to persuade the Court to take their case, and that should not be difficult in light of the prior certiorari grant in the Proposition 8 case. The Plaintiffs’ response to the Petition will not differ from the Petitioners on that primary goal, since they want a Supreme Court merits ruling that will finally lift the stay and allow same-sex marriages in Utah, but they will sharply counter many of the assertions concerning the merits.

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is not a decade of experience with same-sex marriage in Massachusetts that can serve to challenge their speculations about the impact that allowing same-sex marriage would have on heterosexuals in terms of "signaling" that heterosexual marriage is not important or desirable to provide a setting for raising children. (There is similarly a decade of experience from Canada and the Netherlands, if that be deemed relevant, as it should be.) In Massachusetts, the rate of marriage among heterosexual couples has not been affected by marriage equality; nor has been the rate of divorce. If this is really all about the children, as the Petitioners argue, then — as virtually all the courts that have considered the matter over the past year have concluded — the interests of the children being
raised by same-sex couples must be taken into account, as Justice Kennedy suggested during the oral argument in *Hollingsworth v. Perry* and forcefully asserted in the *Windsor* opinion. They similarly misrepresent the Supreme Court’s marriage precedents by the sin of omission. They suggest that the Supreme Court’s view of marriage as a constitutional right has been the child-centric view, when in fact the Court has specifically found a constitutional right to marry to be present in the case of prisoners who are not entitled to conjugal visits — a case in which the Court provided a list of adult-centric reasons for finding that right to trump the state’s contrary arguments.

After the cert petition was filed, counsel for the plaintiffs announced that one of the nation’s leading Supreme Court advocates, Neal Katyal from the law firm Hogan Lovell, will represent the plaintiffs in the Supreme Court. Katyal is a former Acting Solicitor General and has a long track record of successful Supreme Court arguments. He is so in demand that he already has five arguments scheduled from the Court’s 2014-15 Term. Katyal’s firm is supporting his pro bono effort, and he announced early in August that they were busy drafting a response to the Petition that would also urge the Court to take the case, in order to affirm the 10th Circuit’s ruling. Local counsel Peggy Tomsic argued the case successfully in the 10th Circuit and at trial, with assistance from the National Center for Lesbian Rights. Later in August, NCLR announced that Gary Buseck and Mary Bonauto from Gay & Lesbian Advocates & Defenders were also joining the team as co-counsel. The Plaintiffs’ response to the cert petition was filed with the Supreme Court on August 28. It emphasized the need for a national precedent, in order to protect the rights of same-sex couples who travel for work or leisure or who need to relocate from state to state, and joined the Petitioners in suggesting that the case would make an ideal vehicle for the Supreme Court to resolve the issue for the nation.

### 10th Circuit Strikes Oklahoma Same-Sex Marriage Ban; Cert Petitions Filed

The same panel of three judges that ruled during June that Utah’s same-sex marriage ban is unconstitutional reiterated that ruling on July 18 in *Bishop v. Smith*, 2014 WL 3537847, 2014 U.S. App. LEXIS 13733, holding that Oklahoma’s ban was unconstitutional for the same reason: It denies same-sex couples a fundamental right without sufficient justification. Once again, 10th Circuit Judge Carlos F. Lucero wrote for the majority of the court, devoting most of his opinion to procedural and jurisdictional issues and, in fact, ceding one portion of the opinion to Judge Jerome A. Holmes, who also authored a separate concurring opinion to address an issue that technically wasn’t before the court: whether the Oklahoma Marriage Amendment was the product of unconstitutional animus, which Holmes concluded it was not. As in the Utah case, Judge Paul J. Kelly, Jr., dissented, but the focus of his dissent this time was Article III standing of the plaintiffs, not the merits of their constitutional claim, although he left no doubt that he stood by his Utah dissent. And, also as in the Utah case, the court stayed the effect of its ruling “pending the disposition of any subsequently-filed petition for writ of certiorari” to the Supreme Court. Alliance Defending Freedom, representing the appellant, promptly filed a petition for certiorari, sub nom *Smith v. Bishop*, 14-136. Responding to the petition, counsel for plaintiffs also urged the Supreme Court to take the case, even suggesting that the Court consider granting multiple cert petitions in order to assure that all relevant issues could be covered in one proceeding.

The Oklahoma marriage case has the distinction of having taken longer to get to this point — a ruling on the merits by the U.S. Court of Appeals — than any other marriage equality case. It was filed nearly ten years ago, in November 2004, by two same-sex couples, Mary Bishop and Sharon Baldwin, who were seeking the right to marry, and Susan Barton and Gay Phillips, who were civilly united in Vermont in 2001 and subsequently married in Canada in 2005. Barton and Phillips were originally concerned with the failure of the federal government to recognize their legal relationship. That original lawsuit was filed against the Governor and Attorney General of Oklahoma and the federal government, and specifically challenged the Oklahoma Marriage Amendment, known as State Question 711 (SQ711) and the federal Defense of Marriage Act.

The case actually got to the 10th Circuit when the state officials appealed District Judge Terence C. Kern’s refusal to dismiss the complaint against them. In an unpublished opinion, the 10th Circuit ruled that neither the Governor nor the Attorney General were appropriate officials to sue, because neither played a direct role in administering Oklahoma’s marriage laws. The 10th Circuit said in that opinion that in Oklahoma the marriage laws were administered by the court system, through the court clerks in each county, so a lawsuit challenging the laws must be filed against a clerk.

The case was sent back to the district court, where plaintiffs filed an amended complaint against the Tulsa County Clerk, Sally Howe Smith, who refused to issue Bishop and Baldwin a marriage license. By then Barton and Phillips had gotten married in Canada (in 2005) and in California (in 2008), so now they were specifically seeking recognition of their out-of-state marriages by both Oklahoma and the federal government.

The case sat before Judge Kern for years with nothing much happening, other than the Tulsa court clerk, Sally Smith, filing an affidavit swearing that her job had nothing to do with recognizing out-of-state marriages. In 2011, when U.S. Attorney General Eric Holder announced that the Justice Department would no longer defend Section 3 of DOMA, the House Bipartisan Legal Advisory Committee (BLAG) entered the case to defend DOMA. After the Supreme Court decided *U.S. v. Windsor* last June, holding Section 3 of DOMA...
unconstitutional and setting off the avalanche of new marriage equality lawsuits around the country, Judge Kern reactivated the dormant lawsuit, which had been “on hold” while the DOMA litigation was playing itself out.

Placing great weight on Smith’s affidavit, Judge Kern ruled that Barton and Phillips, who were suing for recognition of their out-of-state marriage, had failed to sue an appropriate defendant and thus lacked standing to attack the state’s law on marriage recognition. Under Article III standing principles in federal court, the plaintiffs have to sue a party whom the court can order to do something to redress the plaintiff’s injury. Barton and Phillips had never produced any evidence to contradict Smith’s affidavit, so it stood as uncontradicted. Thus, Kern refused to rule on the marriage recognition issue.

As to Bishop and Baldwin’s claimed right to marry, Kern ruled in their favor, rejecting Smith’s argument that they also lacked standing because their lawsuit challenged only the constitutional amendment and not Oklahoma’s marriage statute, which also provides that only different-sex couples can marry. Kern brushed that problem aside, and held that the ban on same-sex marriage violated the 14th Amendment.

Smith appealed, represented by lawyers from Alliance Defending Freedom, an anti-gay litigation group based in Scottsdale, Arizona, as well as the Tulsa County District Attorney’s Office. Barton and Phillips also appealed, represented by Don Holladay, the Oklahoma City lawyer who had initially conceived the lawsuit and represented the couples throughout the litigation with other lawyers from his firm, Holladay & Chilton PLLC. Among other things, Barton and Phillips argued that they had appropriately sued the clerk, because that’s what the 10th Circuit had told them to do in the prior opinion.

Judge Lucero started his opinion by referring to the court’s ruling in *Kitchen v. Herbert*, 2014 WL 2868044, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014), the Utah marriage case, and reiterated the court’s holding from that case: same-sex couples are seeking to be included in the fundamental right to marry, and the state’s justifications for refusing to let them marry “that turn on the procreative potential of opposite-sex couples do not satisfy the narrow tailoring test applicable to laws that impinge upon fundamental liberties.” Smith had attempted to raise some new arguments, but Lucero rejected them.

More significantly, Smith argued that the right to marry claim should be dismissed on standing grounds because the complaint had attacked only the marriage amendment, not the marriage statute. Judge Lucero found that under Oklahoma law the marriage amendment actually replaced the statute, so a ruling holding the amendment unconstitutional would completely resolve the issue. Lucero quoted a prior Oklahoma case on point: “A time-honored rule teaches that a revising statute (or, as in this case, a constitutional amendment) takes the place of all the former laws existing upon the subject with which it deals.” Thus, there was no need to specify the marriage statute in the plaintiffs’ complaint in order to obtain complete relief through an injunction against enforcement of the marriage amendment.

Lucero also rejected Smith’s challenge to Judge Kern’s conclusion that *Baker v. Nelson*, 409 U.S. 810 (1072), the Supreme Court’s dismissal of a marriage equality case from Minnesota as not presenting a “substantial federal question” was not binding on the court. “Her argument that doctrinal developments do not allow a lower court to reject the continued applicability of a summary disposition is undermined by the explicit language broadly in that it denies a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized regardless of their child-rearing ambitions. As with opposite-sex couples, members of same-sex couples have a constitutional right to choose against procreation. But Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry. Such a regime falls well short of establishing ‘the most exact connection between justification and classification,’ which is required where a fundamental right is at stake.

Judge Holmes wrote the next part of the opinion, dealing with Barton/
Phillips’ appeal of Kern’s ruling that they lacked standing to challenge the marriage-recognition portion of the Oklahoma marriage amendment because they had sued the wrong defendant. In its earlier decision in this case, the 10th Circuit had identified the court system – and specifically the county court clerks – as the appropriate defendant because the courts administer the state’s marriage laws through the clerks. Ordinarily, this ruling would be treated as part of the “law of the case” and not subject to challenge later on. But Holmes pointed out that there is an exception to the law of the case when new evidence is presented to the court that requires reconsidering the issue. In this case, the new evidence was Smith’s affidavit, filed in response to the amended complaint, in which she swore that her duties did not involve recognizing out-of-state marriages. This information was not part of the record for the prior 10th Circuit ruling because Smith was not then a defendant, having only been sued in the amended complaint filed after the case was returned to Judge Kern’s court. This “new” information was dispositive of the standing issue, wrote Judge Holmes, because it was clear that the court could not redress the plaintiffs’ marriage claim by issuing an order to Smith.

So, who could be sued on the marriage recognition question? Holmes pointed out that in other marriage equality cases the plaintiffs had sued state officials who had a direct role in marriage recognition. For example, in several cases the plaintiffs sued state tax officials after they had refused to accept joint tax filings from same-sex couples who had married out of state. In Tennessee, a couple sued the commissioner of the department of finance and administration after the department turned down their application to participate in a family health insurance plan provided by one of their employers, a state university. In another case, the defendant was the state registrar of vital records for refusing to issue an appropriate birth certificate for a jointly-adopted child, and in another, the director of the state health department for refusing to recognize the marriage on a death certificate.

The court rejected other arguments made by Barton and Phillips to try to resuscitate their challenge to the marriage recognition part of the Oklahoma marriage amendment. “No matter how compelling the equitable arguments for reaching the merits of the non-recognition claim,” wrote the court, “its fate must be determined by the law, and the law demands dismissal. The frustration that may be engendered by the court’s disposition today should be tempered, however. Although it would not be appropriate to definitively opine on the matter, it is fair to surmise that the court’s decision in Kitchen [the Utah case] casts serious doubt on the continuing vitality” of the recognition ban.

Judge Holmes wrote an interesting and lengthy concurring opinion as well, explaining why the 10th circuit judges agreed with Judge Kern in not relying on “animus” as a basis to strike down SQ711. Holmes traced in detail the development of the animus doctrine by the Supreme Court as an alternative way of dealing with challenged federal statutes, observing that when the court concludes that a statute disadvantaging particular groups was tainted by animus, it was unconstitutional because animus against a group never suffices as a legitimate ground for legislation.

The prime example of this doctrine is *Romer v. Evans*, the Supreme Court’s 1996 decision striking down Colorado Amendment 2, which prohibited the state from protecting gay people from discrimination. The Supreme Court concluded that Amendment 2 was motivated by animus because it was extraordinarily sweeping and that it was unprecedented for the state to single out a class of people and deny them all redress from any form of discrimination they might encounter. By comparison, said Judge Holmes, SQ711 was narrowly focused on marriage and was hardly unprecedented, inasmuch as it merely enacted in state constitutional law the definition of marriage that had prevailed in Oklahoma throughout its history. Gay people had no fewer rights after it was passed than they had before it was passed. By contrast, Colorado Amendment 2 effectively rendered unenforceable the gay rights law in several Colorado municipalities and appeared on its face to take away from gay people the protection of the state constitution’s equal protection requirement.

Holmes also pointed to the example of California Proposition 8, which took away from same-sex couples in California a state constitutional right to marry that had been identified previously by the California Supreme Court. In the Prop 8 litigation, the 9th Circuit held that Prop 8 was unconstitutional on the theory of *Romer v. Evans*, an animus case in that it withdrew a previously identified right. Holmes’ narrow understanding of the animus doctrine, however, seemed to ignore how Justice Kennedy had used it in *Windsor* by focusing not on direct evidence of hatred, but more on the purpose and effect of the statute. If the purpose and effect was to enact a policy of discrimination against a discrete group without any objective policy goal that was advanced by the discrimination, then animus in this sense was the remaining reason. It is unclear how the Oklahoma statute evades this label.

Holmes joined with Lucero to make up a majority of the court. Judge Paul J. Kelly, Jr., dissented in part, arguing that the majority had misapplied Oklahoma precedents in finding that a challenge to the marriage amendment would suffice and there was no problem with plaintiffs having omitted a challenge to the marriage statute from their complaint. He agreed, however, with the court’s ruling that Judge Kern lacked jurisdiction over the marriage recognition claim. Because he found that the district court did not have jurisdiction over any of the claims due to the plaintiffs’ lack of standing, he did not address the merits, but he had already made clear in his Utah dissent that he believes that state bans on same-sex marriage do not violate the 14th Amendment. So far, he is the only federal judge since the *Windsor* ruling to take that position.

Alliance Defending Freedom, which represented Clerk Smith, filed their certiorari petition on August 6.
Indiana Federal Judge “Calls Out” Governor in Marriage Recognition Ruling

Chief U.S. District Judge Richard L. Young was clearly perturbed by the actions of Indiana Governor Mike Pence in response to Young’s June 25 ruling requiring the state to allow same-sex couples to marry, Baskin v. Bogan, 2014 WL 2884868. There were several marriage equality cases pending in Indiana, all assigned to Judge Young, and Governor Pence had moved to be dismissed as an individual defendant in those cases, claiming that he was not appropriately sued because he does not have “any authority to enforce or other role respecting” the Indiana laws against same-sex marriage. When Judge Young ruled in prior cases, Baskin v. Bogan and Love v. Pence, he had granted Pence’s motion and dropped him as an individual defendant. But after the Baskin ruling, Pence, through his legal counsel, took action, sending memoranda with instructions to other elected officials in the state on compliance with the court’s order and communicated again after the 7th Circuit issued its stay. To Young, this looked like the opposite of what Pence had been saying, and it came back to bite the governor on August 19, when Young issued his ruling in another pending marriage equality case, Bowling v. Pence, 2014 WL 4104814. The Attorney General’s office promptly noted its appeal from this decision.

In this case, a lesbian couple who married in Iowa was suing Indiana to recognize their marriage, as one of the women is a state employee and wants to sign up her spouse and their children for the health plan. Another plaintiff is an Indiana woman who married her partner of seven years in another state in 2013, but now wants to get out of the marriage. She was stymied by the refusal of the Marion Superior Court to entertain her divorce action because Indiana doesn’t recognize the marriage. She plans to appeal that ruling to the Indiana Court of Appeals, but in the meanwhile joins as a plaintiff in this marriage recognition case.

After Judge Young’s prior rulings in Baskin and Love, his ruling on the merits in this case is really nothing new. What is new is what he has to say about Governor Pence, whose motion to be dismissed as a defendant in this case had yet to be decided. After the Baskin ruling, the Governor’s office sent directions to state officials about compliance with the Order. After the 7th Circuit intervened to stay Judge Young’s Order after many same-sex couples had rushed to marry or apply for benefits based on their existing marriages, Governor Pence sent a memo to relevant Indiana officials telling them to comply with the 7th Circuit’s stay order, and had his counsel send a memo that instructed all executive branch agencies “to stop any processes they had commenced in complying with the District Court order of June 25.” The memo stated, “Indiana Code Sec. 31-11-1-1 is in full force and effect and executive branch agencies are to execute their functions as though the U.S. District Court Order of June 25, 2014 had not been issued.”

“The memoranda issued by the Governor clearly contradict his prior representations to the court,” wrote Young. “The Governor can provide the parties with the requested relief as was evident by his initial memorandum on June 25, 2014,” which had reacted to Judge Young’s ruling in Baskin v. Bogan, “and he can enforce the statute to prevent recognition as evidenced by his correspondence on June 27 and July 7. Thus, the court finds that this case is distinguishable from the cases cited by Defendants because it is not based on the governor’s general duty to enforce the laws. It is based on his specific ability to command the executive branch regarding the law. Therefore, the court finds that the Governor can and does enforce Section 31-11-1-1(b) and can redress the harm caused to Plaintiffs in not having their marriage recognized.”

Looking back at the representation Pence had made to the court in seeking to be dismissed from the case, Judge Young characterized it as a “bold misrepresentation.”

Young refused to dismiss Governor Pence as a defendant, and denied similar motions by Attorney General Gregory Zoeller and the state’s Revenue Commissioner, Michael Alley. On the substance of the case, he reiterated his conclusions from the prior rulings that Baker v. Nelson (1972), the Supreme Court’s one sentence opinion dismissing an early marriage equality case as not presenting a “substantial federal question,” is no longer binding due to subsequent developments, and that Indiana’s refusal to recognize same-sex marriages contracted in other states violates the Equal Protection Clause of the 14th Amendment. The plaintiffs had argued a host of other constitutional theories to attack the recognition ban, but Young said there was no need to rule on any of those,
since he had struck down the ban on equal protection grounds.

However, because the 7th Circuit had stayed his prior marriage equality rulings as well as the Wisconsin district court’s ruling in anticipation of the appeals filed by both states, Young granted the defendants’ motion to stay his declaratory judgment and permanent injunction pending the appellate process on the cases.

“The phenomenon that the court previously observed has continued to grow,” he wrote. “Since issuing its prior orders, two circuit courts have found bans similar to Indiana’s to be unconstitutional. This court reaffirms that conclusion today. Additionally, the court, after witnessing the Governor do what he claimed he could not do, reverses course and finds him to be a proper party to such lawsuits. The court wishes to reiterate that it finds the Governor’s prior representations contradicting such authority to be, at a minimum, troubling.”

In his stayed Order, Young directs state officials not to enforce the marriage recognition ban or the ban on allowing same-sex couples to marry, specifying that state officials are “to afford same-sex marriages the same rights, responsibilities, and benefits as opposite-sex marriages,” and that state law enforcement officials are not to enforce provisions that might be used to deter or punish same-sex couples seeking to marry. He specifically directs the tax authorities to allow same-sex married couples the same rights and status under the tax laws as different-sex married couples, and the state personnel department to allow for the same benefits rights and entitlements.

“This Order is stayed until the Seventh Circuit rules on the merits of this case or one of the related cases of Baskin v. Bogan, Lee v. Pence, and Fujii v. Pence,” he concluded. “Should the Seventh Circuit stay its decision in the related cases, this order shall remain stayed.” The 7th Circuit heard oral argument in the other Indiana cases, as well as the pending Wisconsin case, on August 26, as reported below.

### Florida Federal Court Rules for Marriage Equality


Judge Hinkle’s ruling on the merits was relatively brief in light of the growing list of prior federal marriage equality rulings that has accumulated since Kitchen v. Herbert, the Utah decision from last December 20 by District Judge Robert Shelby. In his introductory section, after briefly summarizing the background of the case, Judge Hinkle wrote, “Indeed, except for details about these specific parties, this opinion could end at this point, merely by citing with approval the circuit decisions striking down state bans on same-sex marriage,” citing the 10th Circuit’s Utah and Oklahoma cases and the 4th Circuit’s Virginia case. But since Hinkle was the first district court to rule on a marriage equality claim within the 11th Circuit (which includes Alabama and Georgia as well as Florida), he clearly felt obliged to provide an explanation for his ruling.

He explained the obligation of federal courts to strike down unconstitutional state laws “when necessary to the decision in a case or controversy properly before the court, so the suggestion that this is just a federalism case — that the state’s laws are beyond review in federal court – is a nonstarter.” He also noted that because 20 out of the 22 plaintiffs in the cases before him were seeking recognition of marriages performed in other states, “the defendants’ invocation of Florida’s prerogative as a state to set the rules that govern marriage loses some of its force.” He also found that the “general framework” that applies to the plaintiffs’ rights to due process and equal protection “is well settled.”

Relying on the Virginia interracial marriage decision from 1967, Loving v. Virginia, and subsequent rulings by the Supreme Court, he agreed with the 10th and 4th Circuits that this case involves a fundamental rights claim, requiring strict scrutiny of the state’s purported justifications for denying marriage rights to same-sex couples. Judge Hinkle provided a very clearly written argument as to why this is a fundamental rights case.

In discussing the application of strict scrutiny, he wrote, “A state may override a fundamental right through measures that are narrowly tailored to serve a compelling state interest. A variety of justifications for banning same-sex marriages have been proffered by these defendants and in many other cases that have plowed this ground since Windsor. The proffered justifications have all been uniformly found insufficient. Indeed, the states’ asserted interest would fail even intermediate scrutiny, and many courts have said they would fail rational-basis review as well. On these issues the circuit decisions in Bostic, Bishop, and Kitchen are particularly persuasive. All

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that has been said there is not repeated here.”

However, Judge Hinkle was moved to address the state’s procreation argument. “The defendants say the critical feature of marriage is the capacity to procreate. Same-sex couples, like opposite-sex couples and single individuals, can adopt, but same-sex couples cannot procreate. Neither can many opposite-sex couples. And many opposite-sex couples do not wish to procreate. Florida has never conditioned marriage on the desire or capacity to procreate. Thus individuals who are medically unable to procreate can marry in Florida. If married elsewhere, their marriages are recognized in Florida. The same is true of individuals who are beyond child-bearing age. And individuals who have the capacity to procreate when married but who voluntarily or involuntarily become medically unable to do so, are allowed to remain married. In short, the notion that procreation is an essential element of a Florida marriage blinks reality.”

“Indeed,” Hinkle continued, “defending the ban on same-sex marriage on the ground that capacity to procreate is the essence of marriage is the kind of position that, in another context, might support a finding of pretext. It is the kind of argument that, in another context, might be ‘accompanied by a suspicion of mendacity.’ The undeniable truth is that the Florida ban on same-sex marriages stems entirely, or almost entirely, from moral disapproval of the practice. Properly analyzed, the ban must stand or fall on the proposition that the state can enforce that moral disapproval without violating the Fourteenth Amendment.”

And who is Judge Hinkle’s source for this assertion? Our old unintended ally in the marriage equality struggle, Supreme Court Justice Antonin Scalia. Judge Hinkle quotes his statements to this effect from Scalia’s dissent in Lawrence v. Texas, the 2003 sodomy law decision.

“In short,” wrote Hinkle, “we do not write on a clean slate. Effectively stripped of the moral-disapproval argument by binding Supreme Court precedent, the defendants must fall back on make-weight arguments that do not withstand analysis. Florida’s same-sex marriage provisions violate the Due Process and Equal Protection Clauses.” The judge went on quickly to dispose of the state’s remaining argument that his ruling was precluded by the Supreme Court’s 1972 dismissal of a marriage equality appeal from Minnesota in Baker v. Nelson.

“Every court that has considered the issue has concluded that the intervening doctrinal developments — as set out in Lawrence, Romer, and Windsor — have sapped Baker’s precedential force,” he wrote.

He also rejected the argument that he was bound by Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804 (2004), an 11th Circuit ruling issued shortly after Lawrence, in which that court resisted a constitutional challenge to Florida’s statutory ban on gay people adopting children, pointing out that it was a rational basis case and that the state courts had subsequently invalidated the statute under the state constitution. According to Judge Hinkle, Lofton makes it the “law of the circuit” that sexual orientation equal protection claims do not get heightened scrutiny, but since he was treating this case as a fundamental rights claim, that was not relevant to his decision.

Judge Hinkle concluded that plaintiffs were entitled to a preliminary injunction barring Florida from enforcing its ban. However, he found that there is a “substantial public interest in implementing this decision just once – in not having, as some states have had, a decision that is on-again, off-again.” Thus, although he might be inclined to deny a stay pending appeal, the examples from the past year counseled against that route. “There is a substantial public interest in stable marriage laws,” he wrote. “A stay thus should be entered for long enough to provide reasonable assurance that the opportunity for same-sex marriages in Florida, once opened, will not again close. The stay will remain in effect until stays have been lifted in Bostic, Bishop, and Kitchen [the 10th and 4th Circuit cases that have been stayed pending Supreme Court appeals], and for an additional 90 days to allow the defendants to seek a longer stay from this court or a stay from the 11th Circuit or the Supreme Court.”

The judge did make one exception, however, for a plaintiff who was seeking to have a properly completed death certificate for her deceased spouse. “There is little if any public interest on the other side of the scale,” wrote Hinkle. “There is no good reason to further deny Ms. Goldberg the simple human dignity of being listed on her spouse’s death certificate. Indeed, the state’s refusal to let that happen is a poignant illustration of the controversy that brings us here.”

In the course of his ruling, Hinkle dismissed as defendants the governor and attorney general, finding that other state officials who were responsible for administering the relevant laws directly were the most suitable defendants. He directed that Florida’s Surgeon General “must issue a corrected death certificate for Carol Goldwasser showing that at the time of her death she was married to Arlene Goldberg,” and set a deadline of the later of September 22, 2014 or 14 days after all information is provided that would normally be necessary to complete a death certificate.

Florida Attorney General Pam Bondi reacted to the decision by reaffirming her commitment to defend the Florida marriage ban. Appeals from four state court rulings are already pending in the Florida court of appeal, and Bondi has argued that these cases should be put “on hold” as other appellate cases are going forward to the Supreme Court. Presumably she will notice an appeal of Judge Hinkle’s decision with the 11th Circuit, but she might ask the Circuit to delay scheduling consideration of the case until the Supreme Court acts on the petitions from Utah, Virginia, and one expected to be filed from Oklahoma. However, the plaintiffs would be expected to strongly oppose any such request, arguing that any delay in vindicating their constitutional rights would impose irreparable injuries on the plaintiffs.

Judge Hinkle was nominated to the federal bench by President Bill Clinton in 1996. The two cases the judge was deciding were brought by private attorneys and the ACLU of Florida. ■

Judge Luis M. Garcia ruled that Monroe County Clerk Amy Heavilin must issue a marriage license on July 22 to Aaron R. Huntsman and William Lee Jones, who have been a couple for eleven years, but Attorney General Pam Bondi’s prompt filing of a notice of appeal to the 3rd District Court of Appeal stayed his ruling, and Garcia rejected a motion by the plaintiffs to lift the stay. Judge Sarah Zabel, anticipating a prompt appeal, stayed her own ruling that the state was required to allow and recognize same-sex marriages in Pareto v. Ruvin. Judge Dale Cohen ruled in Brassner v. Lade that the petitioner was entitled to have her Vermont civil union from 2002 recognized so that the court could dissolve it, freeing her to marry her new same-sex partner. Judge Cohen stayed the effect of his declaratory judgment of the unconstitutionality of Florida’s marriage amendment, pending the outcome of the state’s appeal of the previous two decisions, which had been consolidated for argument before the 3rd Circuit Court of Appeal, and as to which those plaintiffs had asked to skip the court of appeals and bring the appeal directly before the Florida Supreme Court. Judge Diana Lewis had ruled in the Estate of Bangor case that the Florida marriage recognition ban was unconstitutional as applied to an application by an out-of-state resident for appointment as Representative for his deceased husband’s estate to deal with Florida property the decedent had owned, and it was not clear that the state was seeking to appeal that ruling. (On August 21, a marriage equality ruling was issued in two consolidated federal cases by District Judge Robert Hinkle (see article below)).

After appealing the first two rulings to the Miami-based 3rd District Court of Appeal, Attorney General Bondi, opposing plaintiffs’ suggestion that the case be certified directly to the Florida Supreme Court, suggested that all the Florida courts should put the issue of same-sex marriage “on hold” and save themselves and the state some money, as cases from other states were likely to be taken up by the U.S. Supreme Court this term, resulting in a definitive ruling by next spring. “What do we have happening now?” she asked. “We have someone getting married in one state and they can’t get divorced in another. So the U.S. Supreme Court, they have to decide this case,” she said, according to an Aug. 20 on-line report. Legal Monitor Worldwide, 2014 WLNR 22848591. The Court of Appeals did not look favorably on Bondi’s suggestion, issuing a terse statement on August 28 rejecting her suggestion that the case be put on hold. At the same time, the Court of Appeal granted a motion by the plaintiffs to consolidate the two pending cases for purposes of the appeals. These recently decided Florida cases brought in state courts were all remised on the federal constitution, because Florida’s constitution has a marriage amendment banning performance or recognition of same-sex marriages.

The plaintiffs and the defendants in Huntsman agreed that there were no factual issues that required a trial, authorizing the court to issue a ruling on the plaintiff’s motion for summary judgment. The court had allowed two organizations to file legal memoranda defending Florida’s constitutional and statutory same-sex marriage ban, and they had argued that a trial was needed, but Judge Garcia ruled that only the defendants had standing to make that argument.

The state’s first argument in Huntsman was that the plaintiffs’ constitutional claim was blocked by the Supreme Court’s 1972 ruling in Baker v. Nelson, a Minnesota marriage equality case, in which the Court dismissed the appeal, stating that it did not present a “substantial federal question.” Garcia wrote that after Romer v. Evans, Lawrence v. Texas and United States v. Windsor, he concluded that Baker “is no longer binding and the issue of same-sex marriage has now become a Federal question.” He cited the 10th Circuit’s recent ruling in Kitchen v. Herbert, the Utah marriage case, as well as trial court rulings from Pennsylvania, Oregon, Oklahoma, Michigan and Virginia in support of this conclusion.

Moving to the plaintiffs’ Due Process argument, he found that Supreme Court rulings treat the right to marry as an individual right, and, refuting the state’s argument that plaintiffs were
Judge Garcia concluded that the fundamental right to marry “encompasses the right to marry a person of one’s own sex,” and thus the Florida marriage amendment and statute are unconstitutional.

He also rejected the argument that there is “no evidence of animus towards homosexuals by the proponents of the Florida Marriage Protection Amendment,” finding that “there is ample evidence not only historically but within the very memorandum of law filed by the Amici Curiae.” Here the opponents of same-sex marriage hurt their own case by their outrageous assertions. “The Amici Curiae’s memorandum paints a picture of homosexuals as HIV infected, alcoholic and drug abusers, who are promiscuous and psychologically damaged and incapable of long-term relationships or of raising children,” and thus it was rational, they argued, for Florida’s voters to “minimize the deleterious effect of these conditions on public health, safety and welfare by affirming that marriage in Florida remains the union of one man and one woman.” Garcia concluded that “animus has been established.”

He also concluded that the Equal Protection claim should be decided using a “heightened rational basis test,” and that the marriage ban could not survive such a test. Indeed, he wrote, “Only the Amici Curiae has attempted to put forward a rational basis for the unequal treatment of a segment of our society,” and he found their arguments unavailing. Their first basis was to argue that the law “memorialized millennia of history and tradition,” but, as Justice Scalia had pointed out in his dissent in Lawrence v. Texas, “Preserving the traditional institution of marriage is just a kinder way of describing the State’s moral disapproval of same-sex couples.” The other argument was the ban somehow “encourages procreation” among heterosexuals, but Garcia found that there was nothing in the marriage ban “that encourages heterosexual couples to procreate.” The third argument was that the law “encourages a better environment for the rearing of children,” but, Garcia pointed out, quoting from an Ohio marriage recognition ruling from last year, “The only effect the marriage recognition bans have on children’s well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married.”

As the only plaintiffs in this case are two men who wish to be married, Garcia found that they did not have standing to challenge the Florida statute that bans recognizing out-of-state same-sex marriages, so he limited his ruling to the right to marry. “The court is aware that the majority of voters oppose same-sex marriage,” concluded Judge Garcia, “but it is our country’s proud history to protect the rights of the individual, the rights of the unpopular and the rights of the powerless, even at the cost of offending the majority. . . All laws passed whether by the legislature or by popular support must pass the scrutiny of the United States Constitution. To do otherwise diminishes the Constitution to just a historical piece of paper.”

The Miami-Dade case was filed by attorneys from the law firm of Carlton Fields Jorden Burt, Elizabeth F. Schwartz and Mary B. Meeks and the Nation Center for Lesbian Rights earlier this year on behalf of six same-sex couples who went to the county clerk’s office and were denied marriage licenses in January. Joining with the plaintiff couples was co-plaintiff Equality Florida Institute, representing its members who are also seeking the right to marry. As none of the named plaintiffs had already been married elsewhere, the lawsuit did not specifically target Florida’s ban on recognition of out-of-state same-sex marriages, and Judge Zabel did not address that ban.

The case was originally filed only against Miami-Dade County Clerk of the Courts Harvey Ruvin, but the state intervened to defend the statute, and the clerk actually took no position as
to its constitutionality. Some local officials supported the plaintiffs, with the City of Miami Beach joining with the City of Orlando in filing an amicus brief and participating in oral argument. In addition to the state, several amicus organizations defended the statute, having a particular interest because they had worked to pass Florida’s constitutional ban on same-sex marriage in 2008.

Although accounts of judges’ decisions in marriage equality cases are coming to take on a repetitious character, each judge brings his or her own style to the task, and Judge Zabel took the occasion to write a thorough decision that falls solidly within the mainstream of the three dozen rulings that have been issued in support of marriage equality since the Supreme Court decision striking down Section 3 of the Defense of Marriage Act, U.S. v. Windsor, in June 2013. Zabel offered several pointed and quotable comments, although much of her decision consisted of pertinent quotations from those prior decisions.

Confronting the state’s argument that the court lacked jurisdiction because the anti-marriage amendment was “enacted via a citizen-led ballot initiative” and the court “must respect the voters’ policy preferences,” Zabel responded, “The United States Constitution would be meaningless if its principles were not shielded from the will of the majority… Accordingly, the ‘will of the voters’ does not immunize Article 1, Section 27 of Florida’s Constitution from judicial review into whether it comports with the commands of the U.S. Constitution. Recently that historical blinders have begun to fall so that we have been able to recognize that the right belongs to them as well. Simply put, fundamental rights belong to everyone. All individuals have a fundamental right to marry. The inquiry is not whether there is a right to same-sex marriage, but whether same-sex couples can be excluded from the right to marry.”

Having decided that a fundamental right is at stake, Judge Zabel determined that only a compelling state interest could justify abridging that right, and none had been advanced by the state of Florida. This is not very surprising, since the state’s argument was that no fundamental right was at stake and this was an ordinary rational basis case. Lacking arguments from the state, Zabel looked to the arguments by the amicus organizations, which raised the same tired arguments that have been rejected in every other marriage equality case this year. She found them no more compelling than any other court had done.

In light of past Florida litigation over gay parenting in the context of adopt, she had a precedential state decision to quote, Florida Department of Children & Families (Adoption of XXG), 45 So. 3d 79 (Fla. 3d DCA 2010), in which the Florida 3rd District Court of Appeal summarized the expert testimony about gay parenting. That court concluded, after discussing the various reports and studies produced in evidence, “These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children,” and “this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise.”

Furthermore, noted Zabel, gay people can have children without getting married and are doing so in large numbers, so “the issue of same-sex marriage is inapposite to the purported goal of preventing same-sex couples from being parents. Rather, the marriage bans merely prevent same-sex couples from having their already existent families and partnerships recognized in the same manner as opposite-sex couples.” She pointed out that denying marriage to same-sex couples with children “actually harm the amici’s stated objective of promoting the best interest of children.” She was similar dismissive of the idea that the procreative capacity of heterosexual couples provided any reason for treating same-sex couples differently, since Florida was perfectly willing to let such couples marry even if they could not or did not desire to procreate.

One issue raised by amici in this
Brassner, a 14-year Florida resident, has a new same-sex partner whom she wants to marry, for which dissolving the civil union was a prerequisite.
and Simpson was appointed Executor as per the instructions in the will. Appointing Simpson to be Personal Representative of the estate in Florida would have been a routine matter, were it not for the Florida marriage ban, which specifically forbids recognizing out-of-state same-sex marriages for any purpose. Thus, Judge Lewis concluded that she would have to rule on the constitutionality of the marriage ban before she could appoint Simpson. She notified the attorney general’s office, but the state did nothing to participate in the case.

Simpson was challenging the Florida ban’s application to his situation, but was not mounting a facial challenge to the ban, so Judge Lewis dealt with it in that context. Lewis found that the ban was unconstitutional “as applied.” She noted that federal courts in thirteen states had ruled that bans on recognizing out-of-state same-sex marriages were unconstitutional after *Windsor*. She also noted that the same-sex marriage ban in Pennsylvania “was overturned, thus fully recognizing Mr. Simpson’s status as Mr. Bangor’s surviving spouse under Pennsylvania law.” Lewis noted that the state had not offered any interest in denying Bangor’s choice for his Personal Representative to serve in Florida. “This Court routinely appoints non-resident surviving spouses as Personal Representatives without inquiry into the nature of the marriage,” she wrote. “While the Courts cited above have considered and rejected many policy reasons proffered to support the ban on same-sex marriage, those reasons have no application to this Estate. Indeed, Florida’s Marriage Laws unconstitutionally impair Mr. Bangor’s right to choose his Personal Representative, and Mr. Simpson’s right so to act, not because of who they are married to, but only because of who they were married to, prior to Mr. Bangor’s death. There is no justification in denying Mr. Simpson the privilege of acting as the fiduciary, based solely on the gender and sexual orientation of his now-deceased spouse. The Marriage Laws unnecessarily discriminate against this ‘spouse,’ who is recognized by other States as a ‘spouse’, to act as a fiduciary. Clearly, it was Mr. Bangor’s intent that Mr. Simpson serve as his Personal Representative and inherit all of his property.”

Thus, Judge Lewis concluded that there was no rational basis to apply Florida’s ban to “the facts of this case.” She wrote that her holding was “strictly limited to the facts before” the court. Without any mention of a stay, she signed the Ancillary Letters of Administration and the Order Admitting Will of Nonresident to Probate and Appointing Personal Representative. Since the state is not a party to this case, there seems to be no basis for an appeal and, unlike Judge Cohen in Broward County, Judge Lewis did not stay her Order pending appeals in other cases.

The 2nd District Court of Appeal’s August 27 ruling in *Shaw v. Shaw* certifying the question of divorce jurisdiction to the Florida Supreme Court might not even turn out to be a marriage equality ruling, as such. The dissenters from the majority’s decision to certify the case pointed out that the circuit court’s conclusion that the Marriage Amendment precluded it from entertaining a divorce action might be found incorrect by interpretation of the Marriage Amendment, although that seemed an unlikely move. In any event, this is purely a marriage recognition case, and it is unpredictable how broadly or narrowly the Florida Supreme Court might rule if it takes jurisdiction of the case. (It was unclear to this writer from reading that court’s practice rules whether it is obligated to take up a case certified by the court of appeal or retains discretion to deny review.) The majority of the 2nd District court considered it an urgent matter of statewide import, and saw no need why it should have to go through an intermediate round of arguments and decisions, thus delaying the ability of married same-sex couples to get divorced. This is undoubtedly a particular important issue for Florida because it is a major retirement destination for people from the northeast, and as of now all the states in New England and the middle-Atlantic region have marriage equality, so there will likely be plenty of married same-sex couples who move to Florida and will need to have the state recognize their marriages for many different reasons, not least being the current limitations under the federal Social Security Law, which uses the place of domicile rule to determine whether somebody is a spousal beneficiary. It is possible to address the marriage recognition issue without determining whether couples have a right to marry – as the U.S. Supreme Court demonstrated in *Windsor* - so this appeal might result in a limited ruling. However, if it were to be treated in tandem with the appeals pending in the 3rd District, all bases would have to be covered.

These cases were among several pending in state and federal courts in Florida. At the 4th District Court of Appeal is *Dousset v. Florida Atlantic University*, Case No.: 4D14-480, in which the National Center for Lesbian Rights represents a man appealing a decision by the University not to recognize an out-of-state same-sex marriage for purposes of in-state tuition eligibility for a person married to a Florida resident. The first two right-to-marry decisions, as noted above, are pending before the 3rd District Court of Appeals. The federal district court in Tallahassee ruled on consolidated federal marriage equality challenges on August 21 (see below). Given the speed with which things are moving on the marriage equality front, the state cases might become irrelevant if they do not move more quickly than Florida state court appeals tend to move. Since there are already four petitions for certiorari on marriage equality cases filed with the U.S. Supreme Court which will be ready for consideration in conference by early in the October 2014 term.
Federal & State Trial Judges in Colorado Issue Rulings Advancing Same-Sex Marriage

Two trial judges in Colorado advanced the cause of same-sex marriage on July 23, as U.S. District Judge Raymond P. Moore in Denver issued an Order in Burns v. Hickenlooper, No. 14-cv-01817-RM-KLM, finding, in accord with recent 10th Circuit precedents, that Colorado’s ban on same-sex marriage violates the 14th Amendment, and Boulder County District Judge Andrew Hartman issued an Order in State of Colorado v. Hall, No. 2014CV30833, denying the state’s motion to order Boulder County Clerk Hillary Hall to stop issuing marriage licenses to same-sex couples. The Colorado Court of Appeals affirmed Judge Hartman’s Order on July 24, commenting only that the appellant had not satisfied the factors for injunctive relief required by state law. But the Colorado Supreme Court issued an order on July 29 requiring Hall to stop issuing licenses pending a ruling on the merits of the state’s appeal, while signaling expedited treatment of the state’s appeal, requiring that the record on appeal be filed with the Supreme Court on or before October 20. On August 21, the 10th Circuit granted Attorney General John Suthers’ motion to stay District Judge Moore’s ruling pending appeal to the 10th Circuit.

The outcome of Judge Moore’s ruling on the merits of the plaintiffs’ motion for a preliminary injunction was foreordained, of course, by the 10th Circuit’s recent decisions holding similar marriage bans unconstitutional in Utah and Oklahoma. The only suspense surrounding his decision concerned whether he would grant the state’s request for a stay until final resolution of the Utah case. Moore’s preliminary injunction, if it went into effect, would order the state not to enforce its marriage-ban, either respecting the right to marry or the right to recognition of out-of-state marriages.

Boulder County Clerk Hall had begun issuing marriage licenses to same-sex couples shortly after the 10th Circuit ruled last month that the Utah marriage ban was unconstitutional. Since Colorado is in the 10th Circuit, she reasoned, the court’s ruling was binding there as well. Although the 10th Circuit had stayed its order to give the state of Utah time to seek rehearing en banc at the 10th Circuit or to petition the Supreme Court for review, Hall, after consulting Boulder County legal officials, concluded that she could go ahead and ignore Colorado’s unconstitutional ban. Judge Hartman had denied a request by Colorado Attorney General John W. Suthers for a preliminary injunction against Hall on July 10, the day after another Colorado trial judge, Scott Crabtree, issued a ruling in Brinkman v. Hickenlooper finding the Colorado ban unconstitutional in a case against the Adams County clerk. Crabtree’s decision led clerks in Denver and Pueblo counties to join Hall in issuing marriage licenses, even though Crabtree stayed his ruling with respect to the Adams County clerk. The Colorado Supreme Court subsequently granted Suthers’ request to order the clerks in Adams and Denver Counties not to issue licenses, and a subsequent letter by Suthers threatening suit persuaded the Pueblo clerk to cease issuing them with an expression of reluctance. That left Hall the only clerk still issuing licenses.

These and other developments persuaded Judge Hartman that, on balance, the state was not entitled to an order stopping Hall. He noted Crabtree’s July 9 ruling, the 10th Circuit’s July 18 ruling that Oklahoma’s marriage ban was unconstitutional, the July 17 ruling from Monroe County, Florida, by a circuit court judge finding Florida’s ban unconstitutional, and the recent actions by Supreme Court Justice Samuel Alito, no supporter of same-sex marriage to judge by his dissent in U.S. v. Windsor, rejecting an attempt by a Pennsylvania clerk to stop marriage equality in that state while she tried to intervene to appeal a federal court decision there, noting as well that Alito had cited the Supreme Court’s prior action rejecting a stay of the Oregon marriage decision. Had he known of Judge Moore’s decision, which was issued several hours later, he would undoubtedly have cited that as further evidence that the state’s case lacked merit. He rejected Suthers’ argument that the Colorado Supreme Court’s order to the Adams and Denver county clerks was binding on his court in this case, observing that the Supreme Court had phrased its Order “in light of the stay entered by the Trial Court” in the Adams County case, and pointed...
out that he had previously denied the state’s demand for a preliminary injunction against Hall, so there was no injunction in this case to stay.

Hartman returned to the four-factor test used by Colorado courts to evaluate requests for injunctive relief, and found, as he had in his prior ruling, that each factor favored allowing Hall to continue issuing licenses: The state is unlikely to win on the merits of its defense of the marriage ban, especially in light of the recent 10th Circuit rulings; the state “has offered no additional support since this Court’s ruling two weeks ago that the same sex marriage licenses issued in Boulder County (or Denver and Pueblo Counties for that matter) had caused any harm to the State whatsoever, let alone irreparable harm”; an injunction against Hall would inflict the deprivation of constitutional rights on same-sex couples seeking to marry; and the public interest would not be advanced by denying the enjoyment of fundamental constitutional rights. As to Suthers’ argument that “chaos” would ensue in the absence of an injunction, Hartman commented, “The State has simply offered no evidence of any confusion or disorder resulting from same sex couples obtaining marriage licenses in Boulder County.”

Suthers announced that he would appeal, of course, despite Governor John Hickenlooper’s plea that he desist. Hickenlooper is a named defendant in the pending Colorado marriage cases, although he has made clear that he supports same-sex marriage and is not interested in pursuing appeals. However, as the state’s chief legal officer, Suthers is autonomous in deciding whether to appeal these rulings, and has indicating his eagerness to defend the existing ban. Having obtained stays of the marriage equality rulings, he will be in a position to do so. Perhaps if he listens to the audio recordings of the arguments in the 10th Circuit Utah and Oklahoma cases, he will have second thoughts about this. But, speaking pragmatically, declining to appeal and allowing these decisions to go into effect would create a large class of Colorado same-sex married couples whose marriages might be cast in doubt if the U.S. Supreme Court ultimately reverses one of the 10th Circuit decisions, or so one might speculate.

The federal case was in a curious posture, as Suthers and the Denver county clerk had joined with Hickenlooper in asking Judge Moore to issue a preliminary injunction against enforcement of the marriage ban. Suthers’ request was for strategic reasons: he wanted to get to the 10th Circuit to seek a stay, and the prerequisite for that was getting Moore to issue his injunction. But, of course, Suthers had to request a stay from Moore before he could seek one from the 10th Circuit, so he did so in the course of litigating over the preliminary injunction motion. Judge Moore devoted most of his opinion to explain why he would not stay the action pending final resolution as Suthers had requested.

Suthers had actually requested Moore to stay the entire proceeding, not just his preliminary injunction order. Suthers was relying on the U.S. Supreme Court’s stay of the Utah marriage decision as his trump card, arguing that this was a signal to all lower courts that they must stay their marriage equality rulings until the Supreme Court was ready to resolve the matter at the national level. And, of course, almost all lower courts have accepted this signal and stayed their decisions, apart from a few outliers that left it to appellate courts to grant stays. But Moore was not ready to stay his preliminary injunction based on an unexplained Supreme Court order in another case, despite the July 18 Supreme Court stay issued in Herbert v. Evans, in which the trial court had ordered Utah to recognize same-sex marriages performed prior to the January 6 stay in Kitchen v. Herbert.

“There is at least one aspect of this case which differs from other same-sex marriage cases being litigated elsewhere in the federal system which has not been emphasized by the parties,” he wrote. “Here, the applicable appellate court [the 10th Circuit] has already spoken — more than once. Thus, it is conceivable that any perceived ‘directive’ from the Supreme Court to let appellate courts consider this issue does not apply here. The Court has given strong consider to this difference. The proverbial wild card in the analysis is the recent stay entered by the Supreme Court in Herbert v. Evans.” However, he continued, “making extraction of the meaning of the stay in Evans more difficult, Evans is a ‘companion’ case to Kitchen, both addressing the application of Utah’s same-sex marriage laws.”

“Based on the most recent stay,” he wrote, “it appears to the Court that it may well be that a message is being sent by the Supreme Court. But this Court is not some modern day haruspex skilled in the art of divination. This Court cannot — and, more importantly, it will not — tell the people of Colorado that access to this or any other fundamental right will be delayed because it ‘thinks’ or ‘perceives’ the subtle — or not so subtle — content of a message not directed to this case. The rule of law demands more.”

What the rule of law demands, according to Moore, is the court’s faithful application of the four-factor test set out in the Federal Rules of Civil Procedure and the precedents of the 10th Circuit. And, he concluded, in harmony with Judge Hartman, that the state was not entitled to a stay order under that test. “The Court recognizes that the Tenth Circuit or the Supreme Court may choose to issue a stay in this matter. And this Court will not foreclose Defendants from having a fair opportunity to seek such a stay. Accordingly, as it pertains to the preliminary injunction, this Court will temporarily stay the preliminary injunction order until 8:00 a.m. on August 25, 2014, to permit Defendants time to seek a stay of the injunction from a higher court.”

At the same time, Moore granted Suthers’ request that the remainder of this case at the trial level be put “on
The String is Broken: Tennessee State Trial Judge Rules against Marriage Recognition

After a string of about three dozen affirmative marriage equality rulings by federal and state judges, including 2-1 rulings by two federal circuit courts of appeals, a Tennessee judge, Roane County Circuit Court Judge Russell E. Simmons, Jr., departed from the growing consensus and ruled on August 5 in Borman v. Pyles-Borman, No. 2014CV36, that the court is bound to reject a federal constitutional claim for marriage recognition because of Baker v. Nelson, 409 U.S. 810 (172), and the public policy exception to the federal constitutional requirement of Full Faith and Credit. Judge Simmons is the first judge since the Supreme Court’s U.S. v. Windsor ruling last year to construe Baker as a continuing bar to recognizing a same-sex marriage.

Judge Simmons is the first judge since the Supreme Court’s U.S. v. Windsor ruling last year to construe Baker as a continuing bar to recognizing a same-sex marriage.
1972 have rendered *Baker* inapplicable, but found it unconvincing. “The *Windsor* case is concerned with the definition of marriage, only as it applies to federal laws,” he wrote, “and does not give an opinion concerning whether one State must accept as valid a same-sex marriage allowed in another State. The premise that ‘doctrinal developments indicate otherwise’ gives a court discretion to formulate new law by predicting what future appellate decisions will say other than what they have already said. The decision of this Trial Court will only be binding on this case and on this court. It would be more productive for an appellate court whose opinions would have more precedential authority to delve into this analysis. For purposes of passing this issue to the appellate courts without discussion, this court will find that the doctrinal development of the question whether Tennessee must accept another State’s same-sex marriage to be valid has not developed sufficiently to overrule precedent cases.”

As to Borman’s equal protection argument, Judge Simmons rejected the idea that Tennessee’s marriage recognition law discriminated because Borman is in a same-sex marriage. “The Anti-Recognition clause clearly does not single out only same-sex marriages to be declared void and unenforceable,” he asserted, “but would also declare void and unenforceable marriages within a prohibited degree of relationship and multiple marriages.” In other words, Tennessee’s ban extends to recognition of first-cousin and polygamous marriages as well, and therefore is not solely focused on same-sex marriages. Therefore it cannot be the target of an equal protection claim, since such a claim would invoke a disparate impact theory, which is not available for such a claim. Tennessee adopts the general policy of not recognizing marriages that could not be performed in Tennessee for any reason, which has the incidental effect of not recognizing same-sex marriages.

While Simmons conceded that the right to marry is a fundamental right, he observed that Tennessee has reserved that fundamental right to different-sex couples. “The Court also finds that this should be the prerogative of each State. That neither the Federal Government nor another state should be allowed to dictate to Tennessee what has traditionally been a state’s responsibility, which is to provide a framework of laws to govern the safety and wellbeing of its citizens. One reason for this is that there is a divergence of opinion on this issue, and if Tennessee laws have a rational basis and a reasonable relationship to a legitimate state interest, then Tennessee’s laws should not be found invalid because another opinion is available.”

Simmons proceeded to adopt wholesale and lift from “the State’s brief on the issue of whether or not a law defining marriage as one (1) man and one (1) woman has a rational basis” a full page-and-a-half from that brief, whose source is not identified. (Since the state is not a party to this case, which is a divorce action between two men, one wonders whether the state intervened or filed an amicus brief, or whether Simmons just lifted this from Tennessee’s brief to the 6th Circuit in the pending marriage recognition appeal in a different case?) The excerpted argument, which has been justly ridiculed in the press, is Tennessee’s version of the procreation justification, which was forcefully advocated by its counsel before the 6th Circuit the day after Simmons issued this decision.

Simmons also rejected Borman’s attempt to invoke the Full Faith and Credit Clause of the federal Constitution. He noted that both the Supreme Court and the Tennessee courts have said that this Clause “does not require a State to apply another State’s law in violation of its own legitimate public policy.” “The laws of Iowa concerning same sex marriage is so diametrically opposed to Tennessee’s laws, and Tennessee’s own legitimate public policy concerning same-sex marriage, that Tennessee is not required by the U.S. Constitution to give full faith and credit to a valid marriage of a same-sex couple in Iowa,” he wrote, ungrammatically but without any mistake of meaning.

Thus, Mr. Borman and Mr. Pyles-Borman are wedlocked in Tennessee. Since *Windsor*, this has become an even more burdensome status than it was before. These men now must continue to file joint federal tax returns and be treated to the responsibilities of marriage under federal law, even if they no longer live together or desire to remain married, and of course each of them is barred from forming a legal relationship with a new partner, since no marriage equality state allows somebody to marry a new partner unless any prior marriage, domestic partnership or civil union has been ended. (Of course, if they desired to do so, either of them could marry a different-sex partner in Tennessee, as Tennessee does not recognize their existing marriage.) As a purely practical matter, the court’s refusal to recognize this marriage for the limited purpose of granting a divorce would seem to have virtually no legitimate policy justification. It certainly has nothing to do with the state’s interest in channeling the procreative activity of heterosexuals into marriage for the benefit of the resulting children, which is Tennessee’s main official policy argument for resisting marriage equality. And if Tennessee is opposed to same-sex marriages, one wonders why it would object to a court terminating such a marriage!

This is a limited decision applicable only to these parties and having no precedential force in any other court. On the other hand, Judge Simmons may be providing a preview of what to expect from the 6th Circuit, as some of his assertions sound strikingly like those implied in questions raised by Circuit Judge Jeffrey Sutton at the 6th Circuit oral argument. This decision, dated August 5, was released to the parties the day before the 6th Circuit argument, and surfaced a week later when a SCOTUSblog reader, hearing about the case, was able to get a copy of the opinion for reporter Lyle Denniston, who posted it on that blog.
Alaska Supreme Court Affirms Same-Sex Partner Death Benefits Ruling

On July 25, 2014, the Alaska Supreme Court ruled that the surviving same-sex partner of a hotel employee who was shot and killed while at work may qualify to receive death benefits under Alaska’s Workers’ Compensation Law. Harris v. Millennium Hotel, 2014 Alas. LEXIS 149, 2014 WL 3695019. This decision was in line with the Alaska Supreme Court’s prior decisions finding on the side of equal protection in same-sex cases even though Alaska has an anti-gay marriage amendment.

Kerry Fadely and Deborah Harris were same-sex partners for over 10 years. Fadely was a manager at the Millennium Hotel. In October 2011, while on duty, she was shot and killed. After Fadely’s death Harris filed a workers’ compensation claim for death benefits and said she was Fadely’s “dependent/spouse.” Millennium opposed the benefits because they had not received any documentation that Harris was Fadely’s legal spouse. Instead, Millennium described Harris as an “unmarried cohabitant” of Fadely and relied on a 2005 Alaska Supreme Court decision, Ranney v. Whitewater Engineering, 122 P.3d 214 (Alaska 2005). Ranney held that unmarried cohabitants of employees were not entitled to death benefits under the Workers' Compensation Law.

In Harris’s response she challenged the constitutionality of Alaska’s statute that in effect limits survivor benefits. Because Alaska does not permit same-sex marriage Harris was prevented from marrying her partner and therefore she further could not obtain the worker’s compensation death benefits.

Harris conceded that the Worker’s Compensation Board did not have jurisdiction to hear the constitutional challenge. Harris wanted the Board to issue its decision so she could appeal. It was clear from the filings submitted by Harris that she and Fadely lived together in a committed and financially interdependent relationship for almost ten years and had even exchanged rings in 2005. Harris and Fadely were domestic partners and Harris was receiving Fadely’s employer benefits.

The Board issued its decision and held that Harris was not entitled to benefits under the law. After the decision was upheld on appeal by the Alaska Workers’ Compensation Appeals Commission, Harris appealed directly to the Alaska Supreme Court where they could decide her constitutional claim.

Although Alaska had what was called a Marriage Amendment on the books, Harris had some prior Alaska Supreme Court decisions in her favor with regards to equal protection.

Although Alaska had what was called a Marriage Amendment on the books, Harris had some prior Alaska Supreme Court decisions in her favor with regards to equal protection.

Alaska Supreme Court ruled that the state could not provide a surviving same-sex partner with a benefit that was authorized by law only for married couples. Unfortunately for Millennium, the Court had in two prior cases (ACLU and Schmidt) said that interpreting the Marriage Amendment as a complete bar for same-sex couples could violate the equal protection clause of the United States Constitution. The court pointed out that in ACLU and Schmidt it had observed that interpreting the Marriage Amendment like Millennium proposes could violate the Federal equal protection clause.

In reviewing Harris’s equal protection claim, the Court noted that it had ruled in prior cases that...
they cannot obtain the benefits. If the Alaska Workers’ Compensation Act denied death benefits to all unmarried individuals but all individuals had the right to marry it would be a different situation.

The Alaska Supreme Court held that equal protection means same-sex partners in committed relationships are similarly situated to widows or widowers, and that the death-benefits provisions of the Alaska Workers’ Compensation Act, together with the Marriage Amendment, treat these similarly situated groups differently.

Harris had argued that heightened scrutiny should be used for her case, but the Court had previously found that the state did not have a rational basis for the discrimination.

Lastly, the state had argued that the amount of claims would increase significantly without the “marriage” requirement. The court did not find this argument persuasive and said there would be a small number of claims that could be anticipated because there were only 30 death benefit claims in the entire state not to mention that the 2010 Census had less than one percent of Alaska households registering as same-sex households so the increase would at most be a couple of claims.

The Court sent the case back to the Board for a factual hearing since it made the initial decision without one. The Board then can decide whether Harris and Fadely had the kind of relationship that should be granted the payment of survivor benefits once the marriage requirement was no longer an impediment.

This case was decided in Harris’s favor because she did not have the option to marry Findlay. If same-sex marriage becomes legal in Alaska, same-sex couples will have to marry to obtain the same benefits and the victory for marriage equality will benefit those who marry. Harris would not be able to make the same arguments she made here if same-sex marriage was legal. – Tara Scavo

Tara Scavo is an attorney in Washington D.C.

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**Nassau County (N.Y.) Family Court Rejects Lesbian Co-Parent Custody Petition**

Nassau County (NY) Family Court Judge Edmund M. Dane rejected a lesbian co-parent’s joint custody petition on June 30, finding that despite the 2011 passage of New York’s Marriage Equality Law, the state’s child custody laws fail to acknowledge parental claims of a co-parent who was not married to the child’s birth mother when the child was born. *Jann P. v. Jamie P.*, NYLJ 1202664272007 (published July 23, 2014).

According to Judge Dane’s opinion, the child, named John, was born to Jamie P. in 2011. Jamie P. and Jann P. were married on January 20, 2012. The petition has been filed, however.

Jann P. filed suit in Family Court on December 9, 2013, seeking joint custody of John. The petition identifies Jann P. as John’s father, and identifies Jamie P. as John’s mother. The petition alleges that joint custody would be in the best interest of John, citing the “mental well being of the child.” Jamie filed a motion to dismiss the petition, arguing that Jann is not John’s legal parent and, in the absence of extraordinary circumstances that would support terminating Jamie P.’s custody, Jann would not have standing under New York law to seek custody of John. The attorney appointed to represent John’s interest also opposed the custody petition.

Opposing Jamie’s motion, Jann argued that the court should use equitable estoppel to block Jamie’s argument, pointing to the separation agreement under which both women were identified as parents and the reality that Jann acted as a parent to John while the women were living together and married. Equitable estoppel is a legal doctrine that courts sometimes use to block a party from making a legal argument that would be inconsistent with their past actions. In this case, Jann argued that Jamie had conceded Jann’s parental status by signing the separation agreement and should not be allowed to take a contrary position in court.

The state’s child custody laws fail to acknowledge parental claims of a co-parent who was not married to the child’s birth mother when the child was born.
“This case presents a timely and important issue,” wrote Judge Dane, “the likes of which the courts and legislature of this State will likely be addressing for some time to come, namely, are there circumstances under which a spouse in a same-gender marriage has standing to seek custody of a child who is not biologically related to the petitioning spouse, but was considered by both spouses to be a child of the marriage?” Dane observed that passage of the Marriage Equality Act in 2011 “took a significant step in redefining long-standing concepts of what constitutes a family under the laws of this State,” but that “it is apparent that this process of evolution is incomplete.”

Specifically, Dane referred to a New York Court of Appeals decision from 2010, Debra H. v. Janice R., 14 N.Y.3d 576, in which the court rejected the use of equitable estoppel by a same-sex co-parent of a child’s birth mother seeking to establish parental rights. In that case, the women had been in a Vermont civil union when the child was born, and the court concluded that it could find standing based on the Vermont Civil Union Act, which established the presumption that a child born to a married woman was the legal child of the women’s spouse. Also in that case, the Court of Appeals reaffirmed its terrible old decision of Alison D. v. Virginia M., 77 N.Y.2d 651 (1991), which has continued to haunt LGBT family law in New York State with its refusal to readjust the interpretation of antiquated family law statutes in light of modern family realities. Relying on these cases, both of which pre-date the Marriage Equality Law, Dane found that Jann’s equitable estoppel argument had to be rejected, and he observed that a traditional legal presumption concerning a child born to a married woman being the legal child of her spouse was a presumption of fact concerning biological parenthood that could not logically be entertained in the case of a same-sex couple. Such a presumption would not apply in this case anyway, since John was born before the women were married.

Alternatively, Jann pointed to New York cases allowing a man who married a woman who already had children to seek to establish parental rights based on the relationship he developed with the children, but Judge Dane observed that New York law does not provide a procedure for establishing maternity, just paternity, and that the principal case cited by Jann, Jean Maby H. v. Joseph H., 246 App. Div. 2d 282 (2nd Dep’t 1998), was of questionable authority after the Court of Appeals ruling in Debra H..

The problem as Judge Dane identified it was that New York’s existing legal framework provides for paternity actions but not maternity actions. “Accordingly,” he wrote, “it stands to reason that if the petitioner were a man who held himself out as John’s father for a period of time sufficient to establish a paternal bond with John, he would have standing to file a petition seeking a declaration of paternity under article 5 of the Family Court Act and then, if successful in the paternity proceeding, would have standing to seek custody or visitation with the child. Unlike a man in the same position, the petitioner cannot employ a paternity proceeding as a means of establishing standing to seek custody of John because she cannot allege that she is John’s father and the law does not provide for a proceeding to declare paternity.”

Dane also dismissed as irrelevant a New York statute concerning donor insemination within marriage, under which the husband can be deemed the legitimate parent of a child conceived through donor insemination of his wife with his consent. Dane pointed out that there was no information in the court record about whether John was conceived through donor insemination, and furthermore “he was conceived and born prior to the marriage.”

Dane suggested that the legislature should address this issue, perhaps by amending the Family Court Act to provide same-sex co-parents with the same legal remedies that a man in the same situation would have. “The inequity of the imbalance of remedies available to the petitioner is highlighted in this case,” wrote Dane, “by the parties’ separation agreement, which clearly indicates that the parties viewed the petitioner as John’s parent, contemplated the possibility of the parties sharing custody of John, and gave the petitioner specific visitation rights. Until such time as the legislature addresses the issue, however, the court agrees with the attorney for the child’s position that the petitioner may not use equitable estoppel as a ground to establishing standing to seek custody.”

Judge Dane pointed out that separation agreements “are not enforceable in Family Court,” but that “they may be enforceable in a matrimonial action,” so it’s possible that Jann would get somewhere in her quest for custody by filing a divorce petition. He mentioned that Jann argued that denying her standing in this case violated her constitutional right to equal protection, but then never addressed that argument anywhere in his opinion. Certainly the one-sided statutory framework suggests that stereotypes about women and men concerning parental roles were at play when the legislature set up the statutory scheme, which should heightened scrutiny in the context of an equal protection challenge, but Dane evidently considered Jann’s lack of standing to preclude any constitutional argument.

In its article reporting on the case on July 24, the New York Law Journal quoted Jann’s attorney, William Scheeckutz, Jr., as saying that the women were a couple when John was born, that no divorce proceedings are pending, and that since the court ruled, John had been removed from Jamie and put into foster care because of a neglect petition. Scheeckutz said that he had filed a notice of appeal from Judge Dane’s ruling, and that Jann was also considering attempting to intervene in the neglect proceeding.

Jamie is represented by the Legal Aid Society of Nassau County, and attorney Dennis Monahan was appointed by the court to represent John.
New Jersey Federal Judge Rejects Parents’ Challenge to “Gay Conversion Therapy” Ban

U.S. District Judge Freda L. Wolfson, who ruled last November 8 that New Jersey’s legislative ban on licensed therapists using “sexual orientation change efforts” (SOCE) on minors did not violate the 1st Amendment rights of the therapists, has issued a further ruling on July 30, 2014, holding in a parallel case that the statute did not violate the 1st and 14th Amendment rights of a minor seeking to gain such therapy or the minor’s parents. Judge Wolfson’s decision in Doe v. Christie, 2014 WL 3765310, 2014 U.S. Dist. LEXIS 104363 (D.N.J.), granted the state’s motion to dismiss the lawsuit, denied the plaintiffs’ motion for a preliminary injunction, and, as in the prior case, granted a motion by Garden State Equality, New Jersey’s statewide LGBT rights political group, to intervene as a plaintiff. Judge Wolfson’s decision from last year in the therapists’ case, King v. Christie, 981 F. Supp. 2d 296 (D.N.J. 2013), is pending on appeal before the U.S. Court of Appeals for the 3rd Circuit. Plaintiffs in both cases are represented by Demetrios K. Stratis of Fairlawn, New Jersey.

The plaintiffs in this case, identified in the opinion as John Doe (the minor) and Jack and Jane Doe (the minor’s parents), filed their lawsuit before Judge Wolfson had ruled on the therapists’ case, but are represented by the same attorneys. After she had ruled in the other case and received pre-trial motions, Judge Wolfson contacted the attorneys and asked how they wanted to proceed in light of the overlap between the cases. The plaintiffs’ attorney indicated they would rely on the arguments they had already submitted, asking the court to “revisit” its 1st Amendment ruling in the context of a lawsuit by a potential SOCE client and his parents.

At the time, the therapists who had challenged California’s statutory ban on SOCE for minors were petitioning the Supreme Court to review the 9th Circuit’s decision, Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), which had rejected the constitutional challenge in that case. Judge Wolfson decided that since she had relied on the 9th Circuit ruling as precedent, and as the 3rd Circuit had not yet ruled on the appeal of her earlier decision, she would put the matter “on hold” to see what would happen before proceeding further. On June 30, 2014, the Supreme Court denied to petitions for certiorari in the 9th Circuit case (which had consolidated appeals from two trial court rulings), and Judge Wolfson decided to activate this case and rule on the pending motions by the plaintiffs, the defendant, and Garden State Equality.

A large part of the court’s decision repeated the 1st Amendment analysis from the prior ruling, except this time the court was facing the 1st Amendment issues from a different perspective. In the earlier case, the therapists were arguing that as SOCE was a speech-based therapy, the 1st Amendment’s protection for freedom of speech, protected their right to provide the therapy unless the state had a compelling reason to ban it. Judge Wolfson had rejected that argument, concluding that SOCE was a form of medical treatment that incidentally involved speech, and as such could be regulated or prohibited by the state if the state found that SOCE lack efficacy or was harmful to the patient. In this case, by contrast, plaintiffs were arguing the other side of the 1st Amendment right, the right of an individual to receive information, claiming that the state law improperly prevented them from getting access to information relevant to John Doe’s desire to change his sexual orientation and his parents’ desire to make the treatment available to him. Judge Wolfson concluded that the changed perspective did not change the outcome. SOCE was still medical treatment that the state could regulate or ban.

“Surely it is undisputed,” wrote the judge, “that a state has the power to regulate not only medical and mental health treatments deemed harmful, but also those that are based not on medical or scientific principles but, instead, on pseudo-science. Thus, regardless of whether the legislature’s findings show that SOCE is harmful or merely ineffective, I find that the enactment of A3371 prohibiting SOCE on minors is a rational and legitimate exercise of New Jersey’s power to reasonably regulate licensed medical and mental health professionals.”

Judge Wolfson similarly rejected the parents’ free exercise of religion claim, also based on the 1st Amendment. The Does claimed that the law “imposes a substantial burden” on their religious beliefs “that changing same-sex attraction or behavior is possible.” They claimed that the law “prohibits Plaintiff John Doe from obtaining spiritual advice and assistance on the subject matter of same-sex attractions.”

Judge Wolfson pointed out that this misconstrued the statute. Spiritual counseling about same-sex attraction is not affected by the law, which applies only to licensed medical or mental health professionals seeking to provide SOCE as “therapy.” Judge Wolfson found that the statute is facially neutral with respect to religion, and is one of general applicability. Since it doesn’t target religion in general or any specific religious belief, it is evaluated under the rational basis test and, as she had found in her free speech analysis, easily survived that challenge.

The one major difference between this case and the prior case was the parents’ due process claim. The Supreme Court has repeatedly recognized that parents have a liberty interest in deciding how to raise their children without significant state
York, to enact bans on such therapy. ■

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care providers.
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consequences,” and would effectively
otherwise,” she wrote, “would create
imaginable and unintentional
was well-established. “To find
ban ineffective or harmful treatments
state has reasonably deemed harmful.’”
Wolfson found that the state’s right to
or mental health treatment that the
proposition that Jack and Jane Doe’s
or other authority in support of the
rights with the state’s traditional role as
fundamental parental rights encompass
right to choose for their son any
medical treatment they desire,” wrote
‘the
fundamental rights of parents do not
include the right to choose a specific
type of provider for a specific medical
or mental health treatment that the
state has reasonably deemed harmful.’”

“Plaintiffs provide no case law
or other authority in support of the
proposition that Jack and Jane Doe’s
fundamental parental rights encompass
the right to choose for their son any
medical treatment they desire,” wrote
Wolfson. “Indeed, to the contrary,
the Ninth Circuit — in one of the
few decisions that speaks directly to
this issue — has concluded that ‘the
fundamental rights of parents do not
include the right to choose a specific
type of provider for a specific medical
or mental health treatment that the
state has reasonably deemed harmful.’”

Although she dismissed the
complaint and denied the plaintiff’s
request for preliminary injunctive
relief, it was important that Judge
Wolfson also granted Garden State
Equality’s motion to intervene, since
that preserved the organization’s right
to participate as a party on the appeal
that plaintiffs will undoubtedly take
to the 3rd Circuit, perhaps seeking to
join this case to the appeal that their
attorney has already filed form Judge
Wolfson’s prior decision.

The multiple rulings that have now
upheld state statutory bans on SOCE
for minors, as well as a pending lawsuit
in New Jersey state court in which
former clients are seeking damages
from SOCE practitioners for breach
of contract and infliction of emotional
distress, have provided momentum for
efforts in more states, including New
York, to enact bans on such therapy.

New Jersey Appellate Division Revives Parental Rights Claim by Former Domestic Partner of Birth Mother

I
n a complicated three-way parental
rights case, the New Jersey Appellate
Division ruled on August 6 that the
Mercer County Superior Court should
not have dismissed without a plenary
hearing a custody/visitation action by
a child’s former lesbian step-parent.
LEXIS 112, 2014 WL 3843057. Key to
the court’s ruling was that the consent
of only one legal parent is necessary to
the determination whether a third party
has formed a relationship with a child
sufficient to meet the requirements of
the “exceptional circumstances”
document as a psychological parent.

The facts are complicated. K.A.F.
and F.D. became a couple in 1998
and began living together in 1999. In
2000 they bought a house together and
decided to have a child. K.A.F. became
pregnant through donor insemination
and their child, called “Arthur,” was born
in December 2002. Although the
relationship between K.A.F. and F.D.
became strained, leading them to live
separately, they continued to co-parent
Arthur, whom F.D. formally adopted in
a second-parent adoption in 2005. In
November 2005, a new birth certificate
was issued showing K.A.F. and F.D.
as legal parents of Arthur. However,
as no reconciliation had taken place
between K.A.F. and F.D., K.A.F.
subsequently became involved with
D.M., a friend of both women, and they
moved in together in the fall of 2004.
With K.A.F.’s apparent consent, D.M.
began to assume a parental role toward
registered as New Jersey domestic
partners. There is some difference of
opinion between K.A.F. and D.M. about
the extent to which D.M. participated in
Arthur’s care when he resided in their
home. F.D. concedes no knowledge as
to that, but contends that at all times she
had “adamantly and wholeheartedly
opposed [D.M.’s] attempt to parent”
Arthur. The relationship of K.A.F.
and D.M. eventually grew strained,
and D.M. moved out in March 2010,
after having, according to her, played a
parental role with Arthur for six years.
She continued to have regular visitation
with him until June 2011, but relations
with K.A.F. had so deteriorated that
by November 2011, K.A.F. stopped
D.M.’s contact with Arthur, and in
January 2012 she wrote D.M. that she
would no longer be allowed visitation
with Arthur. The domestic partnership
between K.A.F. and D.M. was legally
dissolved in October 2011.

In February 2012, D.M. filed this
lawsuit, seeking “joint custody” of
Arthur and a “reasonable visitation
schedule.” Remember that the legal parents of Arthur are K.A.F. and F.D., Arthur’s adoptive co-parent. K.A.F. and F.D. opposed D.M.’s lawsuit, arguing that F.D. had never given consent for D.M. to assume a parental relationship with Arthur. F.D. had remained an involved parent with regular visitation throughout this period. K.A.F. and F.D. argued that the “exceptional circumstance” of a “psychological parent” status requires the consent of both legal parents, and F.D. never consented to D.M.’s role, so her lawsuit must be dismissed. The Family Part judge agreed, and dismissed the case, refusing to hold a plenary hearing on disputed facts.

Reversing, the Appellate Division found that the trial court had misconstrued the state’s precedents. Although K.A.F. and F.D., as the legal parents, have a fundamental right to parental autonomy that would normally exclude an assertion of parental rights by a third party, New Jersey courts hold that the “presumption in favor of the parent will be overcome by a showing of gross misconduct, unfitfulness, neglect, or ‘exceptional circumstances.’” One such “exceptional circumstance” that has been identified by the courts is where a third party has “stepped in to assume the role of the legal parent” and has become a “psychological parent” of the child. This requires the consent of the child’s legal parent. The trial court had ruled that if the child had two fit and involved legal parents, consent by both of them would be required for a third party to achieve this status. In this case there was no allegation that either of the legal parents was unfit or uninvolved in the child’s life.

“From the perspective of simple logic,” wrote Judge John C. Kennedy for the court, “it would be difficult to ignore the ‘psychological harm’ a child might suffer because he is deprived of the care of a psychological parent simply because only one of his ‘legal parents’ consented to the relationship.” The court’s perspective is focused on the child’s best interest, and the doctrine of psychological parent exists to protect the child’s best interest. “The clear policy” of the court’s prior rulings on psychological parents,” continued Kennedy, “is that ‘exceptional circumstances’ may require recognition of custodial or visitation rights of a third party with respect to a child where the third party has performed parental duties at the home of the child, with the consent of a legal parent, however expressed, for such a length of time that a parent-child bond has developed, and terminating that bond may cause serious psychological harm to the child. It is fatuous to suggest that this fundamental policy may be subverted, and that a court may not even examine the issue at a plenary hearing, where one of the child’s legal parents colorably claims lack of consent, in circumstances where the other legal parent has consented. If we were to accept the arguments of K.A.F. and F.D., a court would be powerless to avert harm to a child through the severance of the child’s parental bond with a third party. That result is not supported by the Court’s carefully crafted policy governing such cases.” The court dismissed the Family Part judge’s concern that allowing this proceeding to continue might result in the child having more than two legal parents.

Kennedy asserted that “the transcendent importance of preventing harm to a child weighs more heavily in the balance than the fundamental custody rights of a non-forsaking parent. It also supports the proposition that where at least one ‘legal parent’ of a child has, by his or her actions, effectively consented to the creation of a psychological parent relationship between that child and a third-party, the third party has standing to pursue the claim.” The court did note that F.D.’s alleged lack of consent may be a factor considered by the Family Part judge as part of the overall weighing of factors in determining the best interest of Arthur in this situation.

Thus, it followed that the trial judge erred in dismissing the case without holding a hearing to resolve the factual disputes between K.A.F., D.M. and F.D. The court found that it was “clear that D.M. averred sufficient facts that, if credited at a plenary hearing, would establish her standing to pursue her complaint.” D.M. alleged that “she and K.A.F. lived in a familial setting with Arthur for over six years, from the time he was eighteen months old, and that she performed many normal parental duties during that time with the full consent and encouragement of K.A.F.” She also claimed that F.D. had “assented to” her assumption of parental duties for Arthur, and ‘knew that she was parenting Arthur’ and ‘participating in all “major decisions” pertaining to his welfare.” That these averments were disputed by K.A.F. and F.D. meant that there was a dispute of material facts that could not be resolved without a hearing. Since F.D.’s consent to the formation of a parental bond with D.M. was not necessary, in the view of the court, if K.A.F. had consented, F.D.’s disavowal of such consent did not deprive D.M. of standing to bring the case. Furthermore, the court found that consent can be “inferred” from action, and need not be expressed verbally.

“Moreover,” wrote Kennedy, “the focus of the court’s inquiry must always be the intent and actions of a legal parent during the formation of the disputed relationship and not the later expressions of a legal parent about his or her desire to sever the relationship. ‘The reason is that the ending of the relationship between the legal parent and the third party does not end the bond that the legal parent fostered and that actually developed between the child and the psychological parent.’” The court thus remanded for a plenary hearing, charging the trial court to determine whether D.M. had become a psychological parent of Arthur, and whether it was in the best interest of Arthur to award D.M. a sharing of custody, visitation, “or other relief.”

Abbey True Harris argued the appeal for D.M., Robin T. Wernik argued for respondents K.A.F. and F.D., and the National Center for Lesbian Rights filed an amicus brief authored by Lawrence S. Lustberg of Gibbons P.C. ■
Federal Court Upholds Denial of Inmate’s Domestic Partnership

A s the battleground has shifted from domestic partnerships to marriage equality, the old wars are still being fought by prisoners. In Saintal v. Cox, 2014 U.S. Dist. LEXIS 93765 (D. Nev., July 10, 2014), United States District Judge James C. Mahan upheld a Nevada prison regulation that forbids inmates from forming domestic partnerships, holding that the rule was a reasonable application of the Nevada domestic partnership statute that required the couple to share a “common residence” at least “part-time.” Although forbidding inmates from entering into domestic partnerships, the regulation states: “Persons who have domestic partnerships prior to incarceration will be managed in the same manner as persons who were married prior to incarceration.”

The State of Nevada granted plaintiff Priscella Sintal’s application for domestic partnership with Kimberly Boykins upon her certification that the couple shared a common residence at least part-time, even though Saintal had been incarcerated over three years. On learning of the approval, prison officials claimed it was based on a fraudulent statement, cited Saintal for misconduct, and denied the couple visitation. This lawsuit ensued.

Although marriage equality cases typically raise both equal protection and fundamental rights arguments, Judge Mahan addressed only equal protection – and not in the typical way. He found that there was no discrimination based on sexual orientation because all prisoners – straight and gay -- were denied domestic partnerships. He found that Saintal failed to show that officials acted with animus against a protected class, relying on a pair of Ninth Circuit decisions -- Thorton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005); and Lee v. City of Los Angeles, 250 F.3d 668, 686-7 (9th Cir. 2001) – where equal protection suits were dismissed because the alleged discrimination was at most incidental to the state action. In Thorton, the plaintiff was denied an automobile wrecking license for failure to meet land use requirements, not because he was Native American; in Lee, the plaintiff’s arrest was due to his misidentification as an at-large fugitive, not because he was mentally ill. Here, the judge found that plaintiff’s sexual orientation was likewise incidental because Nevada denies domestic partnerships – which are available in Nevada to both different-sex and same-sex couples - to all prisoners.

Judge Mahan treated domestic partnerships as solely a creature of statute, but he did not discuss possible limiting constructions of the phrases “common residence” or “part-time,” or look at how Nevada treats prisoners’ “residence” for other purposes. [Editor’s note: Some jurisdictions consider prisoners to retain their residence of domicile despite incarceration.] Judge Mahan also did not analyze whether there is a rational basis to: (1) apply the “common residence” element of domestic partnerships to all prisoners, even assuming that it served some general interest in avoiding sham partnerships; or (2) allow pre- but not post-incarceration partnerships.

Perhaps most strikingly, Judge Mahan did not even mention the United States Supreme Court decision in Turner v. Safley, 482 U.S. 78, 95-99 (1987), which held that prisoners retain a fundamental right to marry despite incarceration, as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Instead, he granted summary judgment without any fundamental rights analysis. Even if sexual orientation discrimination is incidental for equal protection purposes, the failure to render any analysis on fundamental rights is inexplicable: the couple would have a fundamental right to marry, but the state may deny them access to a domestic union because of a residency requirement.

Judge Mahan also upheld denial of visitation to the couple, as acceptable punishment for violation of the prison regulation prohibiting domestic partnerships and the “fraudulent” certification. He found no evidence that visitation was denied because of sexual orientation -- although someone in corrections clearly was troubled about this couple, and his failure to review Nevada visiting rules for “friends” or unrelated people suggests cursory analysis of the denial of all contact between Saintal and Boykins.

The Supreme Court allows corrections officials wide discretion in visitation, see Overton v. Bazzetta, 539 U.S. 127, 131 (2003), but the First Amendment right to association is not altogether terminated by incarceration. Indeed, it was recognized and upheld by the Lee court just one page prior to the equal protection point cited by Judge Mahan. 250 F.3d at 685. See also, Whitmore v. State of Arizona, 298 F.2d 1134, 1136 (9th Cir. 2002) (reversing dismissal of challenge to prison bar on same-sex kissing/embracing during prison visits).

The decision recites boilerplate about according pro se plaintiffs latitude in pleading, but it is at best myopic in its treatment of Saintal’s relationship; ignorant of the Turner elephant sitting in the middle of the case; and hostile to the equal protection claims implicit in denial of visitation. – William J. Rold

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

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Arizona & California Courts Recognize Marriages between Transgender Men and Women

Two recent court decisions show how far we have come in getting the judicial system to understand and respect gender transition. In Miller v. Angel, No. GD053180 (Cal. Superior Ct., Los Angeles County, August 6, 2014), and Beatie v. Beatie, 2014 Ariz. App. LEXIS 156, 2014 WL 3953199 (Arizona Court of Appeals, August 13, 2014), the courts found that they do have jurisdiction to dissolve out-of-state marriages between a transgender man and a woman, which would first require recognizing the validity of the marriages. This is no small thing, because there have been quite a few American court decisions holding, to the contrary, that such marriages are actually same-sex marriages that are null and void. In both cases, the courts making these new decisions were applying the law of states that did not allow or recognize same-sex marriages when these marriages were contracted.

Jake Miller, better known as “Buck Angel,” was born female. In 1996 he had “sexual reassignment surgery” and subsequently applied to the California courts for a judgment changing his name and official gender. That judgment also authorize him to apply for a new birth certificate, which he asked his attorney to handle. However, his attorney at the time did not follow through with this. In 1999, Miller married Karen Winslow, but the marriage was short-lived, ending in divorce in 2002. Miller, who was then living in Louisiana, listed himself on a website for those seeking to date transsexual men, through which he met Elayne Angel. On October 22, 2003, they signed a document titled “Matrimonial Regime” in which Miller was referred to as the husband and Angel the wife. This seems to have been some sort of prenuptial agreement.

On November 17, 2003, Miller and Angel obtained a marriage license and went through a civil marriage ceremony. The notary did not request to see their birth certificates, but asked for proof of age, which they provided through their driver’s licenses. They both later testified that they were unaware that Louisiana law required marriage license applicants to provide their birth certificates. Several years later, in 2006, Miller applied for and received a new California birth certificate identifying him as male.

While living together in Louisiana as husband and wife, Miller and Angel filed joint state and federal tax returns. They then moved to Mexico, where they lived for several years until they had a “falling out” in September 2013, when Angel asked Miller to move out of their home. Miller went to California to stay with his sister and filed a Petition in Los Angeles County Superior Court for a legal separation. When the petition was served on Angel, she responded without objecting to jurisdiction. Miller amended his action to seek a marital dissolution, and Angel responded again without raising any jurisdictional issue. But when Miller sought support payments, Angel changed her tune and filed a petition in Louisiana seeking an annulment of the marriage. She claimed that the marriage was actually a prohibited same-sex marriage that should be annulled, and pointed out that at the time the marriage ceremony was performed, Miller did not have a birth certificate designating him as male. She also raised an objection to the jurisdiction of the California Superior Court.

L.A. Superior Court Judge Dianna Gould-Saltman held a hearing on July 29 on “the validity of the marriage.” The court received expert testimony from a Louisiana law professor and a Louisiana lawyer who specializes in family law. Both of them testified that the marriage was null and void under Louisiana law because the law requires presentation of birth certificates and, at the time, both intended spouses’ birth certificates identified them as female. Thus, the marriage was prohibited under Louisiana law, in their opinion. The parties both testified that at the time they were not aware that birth certificates were required, and that the notary did not ask to see birth certificates, just some proof of age, and had accepted their driver’s licenses for that. At the time, they both believed that they had been validly married.

California and Louisiana law both provide that a person who undergoes gender transition can obtain a new birth certificate on presentation of evidence of their surgical alteration to the desired gender. There was no question that the California court order that Miller obtained, changing his name and recognizing his male gender, was a judicial order or judgment, that would ordinarily be entitled to be accorded full-faith-and-credit by a Louisiana court. “The Court believes that any analysis of the issue of the validity of the parties’ marriage must begin with the concept of ‘full faith and credit,’” wrote Judge Gould-Saltman, underlining the word “full.” “In this case, the State of California had entered a judgment determining Petitioner to be male in 1998. By the testimony of Professor Carroll and Mr. Transchina, although not requested to do so, he believed the State of Louisiana might give partial faith and credit to this judgment but not full faith and credit. The testimony indicated that the California judgment might be considered for purposes of identification, obtaining a Louisiana driver’s license, draft eligibility or which prison to send somebody, but might not be given credit for purposes of marriage. The Court heard no testimony that a Louisiana resident who had a gender reassignment and sought a new birth certificate pursuant to Louisiana law would not thereafter be able to marry a person of the opposite sex. A review of that statute, on its face, contains no such prohibition.”

Although both experts had testified that the marriage was a nullity because
Miller did not have a birth certificate designating him as male, Judge Dianna Gould-Saltman was not willing to adopt that conclusion. “There is no evidence that Petitioner could not have obtained a birth certificate identifying him as male prior to the date of marriage in that he had the judgment allowing him to do so, had submitted the papers to his attorney for that to be done and that, but for the failure of the attorney to file the papers, it would have been done.” The judge posed a pointed hypothetical question: “Had Petitioner sought to marry a man in Louisiana, with a California judgment finding that Petitioner was also a man, would Louisiana issued such a license? It seems unlikely in that all agree that Louisiana had, in 2003, a public policy against same-sex marriage as it does today.”

Because the California judgment from 1998 had established that Miller was male, and not a woman, “the failure of the clerk of court to request a birth certificate at the time of the issuance of the marriage license is a technical defect not affecting the validity of the marriage,” the court concluded. If the clerk had asked for a birth certificate showing Miller as male, Miller could have promptly obtained one from California by submitting the court judgment on his name and gender. The court found that Angel had failed to meet her burden of proving that the marriage was invalid.

Judge Gould-Saltman also briefly discussed California’s “putative spouse” doctrine, under which somebody who reasonably believes themselves to be married will be treated as married for various legal purposes. In this case, the parties had applied for and obtained a license, after giving the clerk the documentation requested, had signed their pre-marital agreement, and participated in a wedding ceremony. Under the circumstances, they would qualify under California law as putative spouses, even if the marriage was found to have a legal defect.

Thus, the court denied Angel’s motion to quash Miller’s dissolution petition, and the case can go forward.

The Arizona case, Beatie v. Beatie, is a bit more complicated. Born as Tracy Lehuanini Lagondino in Hawaii in 1974, Thomas considered himself male from an early age despite his female anatomy. Numerous discussions with his doctor led to a testosterone hormone therapy regime and discussions about surgical alteration. Between 1997 and 1999, Thomas underwent testing for a definitive diagnosis and upon determination that his true gender was male, engaged in “extensive hormonal and psychological treatment to conform to his gender identity,” wrote Judge Kenton D. Jones for the Court of Appeals. Thomas’s doctor referred him to Dr. Michael Brownstein, who did gender transition surgery. Thomas underwent surgery to irreversibly correct his anatomy and to irreversibly correct his anatomy and appearance. This should qualify him to be legally considered male within the guidelines of the particular jurisdiction in which this individual seeks to legally change his gender status.” Based on this documentation, Thomas obtained a new Hawaii driver’s license, altering his name from Tracy to Thomas, and undertook the necessary steps for a legal name change and issuance of a new birth certificate that identified him as male with the name Thomas Beatie.

Although both experts had testified that the marriage was a nullity because Miller did not have a birth certificate designating him as male, Judge Dianna Gould-Saltman was not willing to adopt that conclusion.

A month after Thomas had completed these procedures, he and Nancy were married in Hawaii. At the time, Hawaii’s marriage law prohibited same-sex marriages. (Late in 2013 Hawaii enacted marriage equality, essentially mooting a federal lawsuit challenging its ban on same-sex marriage, but that is not relevant to this case.) At the time they applied for the marriage license, Thomas presented identification satisfactory to the Hawaii State Registrar.

Nancy was unable to bear children. Because Thomas had not submitted to internal or bottom surgery, he was still capable of doing so. They agreed that he would conceive and bear children for the couple using donor insemination. The pregnancy of the very masculine-
Thomas had produced three children while married to Nancy, he was concerned that their marriage would not be recognized in Arizona. After receiving briefs and hearing oral argument, Judge Gerlach decided that he could not recognize this marriage. He felt that the Arizona legislature had repeatedly recognized pregnancy as a uniquely female attribute. Regardless of what Hawaii had done in the way of recognizing Thomas as male, Judge Gerlach felt that he could not do so. He was concerned that Thomas had not disclosed to Hawaii authorities that he was still capable of becoming pregnant when he applied for the name change and new birth certificate. Thus, in Gerlach’s view, this was a same-sex marriage, as “the marriage was between a female (Nancy) and a person born a female (Thomas), who at the time of the wedding was capable of giving birth and later did so.” Although both parties desired that the marriage be dissolved, Gerlach concluded that there was no marriage to dissolve, and dismissed the case for lack of jurisdiction.

Judge Jones, writing for the unanimous three-judge panel, sharply disagreed with the trial court. He found that Thomas had met the requirements of the “clear and unambiguous language” of the Hawaii statute on gender change. The affidavit from Dr. Brownstein was not required to have the degree of specificity that Judge Gerlach was looking for. As long as Brownstein had verified that Thomas underwent “a sex change operation” and should be qualified to be “legally considered male,” the Hawaii requirements had been met. “Therefore,” wrote Jones, “the possibility of Thomas giving birth to children did not preclude him from legally amending his birth certificate under the plain language of the Hawaii statute. Further, there is no apparent basis in law or fact for the proposition that in the event Thomas gave birth after having modified his gender designation, it would have abrogated his ‘maleness,’ as reflected in the amended birth certificate.”

Ironically, the court found that Arizona’s requirements for amending birth certificates for gender change was even less demanding than Hawaii’s. As the California court had done a week earlier, the Arizona court turned to the full faith and credit clause of the U.S. Constitution, finding that Arizona had essentially enacted the requirements of full faith and credit in its statute providing that “marriages valid by the law of the place where contracted are valid in this state, except marriages that are void and prohibited by Sec. 25-101.” The only relevant prohibition in Sec. 25-101 would be for same-sex marriages. But the court of appeals had determined that Thomas is legally male, based on the requirements of both the Hawaii and Arizona statutes governing birth certificate gender amendments, so that was not a problem.

require specific surgical procedures be undertaken or obligate the applicant to forego procreation.”

As the California court had done a week earlier, the Arizona court turned to the full faith and credit clause of the U.S. Constitution, finding that Arizona had essentially enacted the requirements of full faith and credit in its statute providing that “marriages valid by the law of the place where contracted are valid in this state, except marriages that are void and prohibited by Sec. 25-101.” The only relevant prohibition in Sec. 25-101 would be for same-sex marriages. But the court of appeals had determined that Thomas is legally male, based on the requirements of both the Hawaii and Arizona statutes governing birth certificate gender amendments, so that was not a problem.

“In interpreting and applying the nearly identical laws of Arizona and Hawaii regarding the issuance of amended birth certificates predicated upon transgendering,” wrote Jones, “we are obligated to allow those who obtain such certificates the rights attributable to the assertions of their amended certificate — the same rights that would inure to one who had been issued that certificate at birth.” This would, of course, include the right to marry a person of the other sex in a jurisdiction that only allowed different-sex marriages. Thus, the court concluded, the family court had jurisdiction to decide this case.

The court also noted that “the right to have children is a liberty interest afforded special constitutional protection,” so it might be unconstitutional to require somebody to undergo sterilization as apart of gender reassignment procedures in order to recognize their preferred gender for purposes of legal status. But a ruling on this point was not necessary to the decision and the court refrained from rendering such a conclusion.

In Miller v. Angel, Jake Miller was represented by Alana Chazan of Baumber & Chazan Law Group, and Elayne Angel was represented by Michael Whitemarsh of Land Whitmarsh LLP, both California law firms. In Beatie v. Beatie, Thomas was represented by David M. Cantor of Cantor Law Group and Nancy by David B. Higgins of Law Office of David B. Higgins, both of Phoenix. The Transgender Law Center and National Center for Lesbian Rights participated as amici.
Kentucky Appeals Court Rejects Challenge to Anti-Lesbian Hate Crime Conviction

In Burke v. Commonwealth, 2014 Ky. App. Lexis 123 (2014), plaintiff Devlin Burke, a persistent felony offender, appealed a jury verdict finding him guilty of fourth and second degree assault, claiming that the trial court erroneously admitted prejudicial and irrelevant evidence, inaccurately instructed the jury, and wrongfully restricted his right to present a defense, coupled with an attack on the constitutionality of Kentucky’s hate crime statute, KRS 532.031, which was invoked by the prosecutor due to Burke’s anti-gay slurs voiced during his attack -- a matter of first impression for this court.

Burke unsuccessfully challenged the constitutionality of the hate crime statute, claiming that he should have received pretrial notice of the Commonwealth’s intention to pursue the finding of a hate crime for his anti-gay slurs by a preponderance of the evidence standard; jurors should have been told how a hate crime impacts parole eligibility; and rather than a judge finding Burke’s actions to be a hate crime by a preponderance of the evidence, jurors should have been required to make that finding beyond a reasonable doubt.

A group of men and women crossed a gas station parking lot after a housewarming party, and at the same time, a group of unrelated people, including Burke, got into a car and backed up quickly nearly hitting those walking, causing one of the pedestrians to hit the trunk of the car to alert the driver of their presence. Suddenly, Burke and the others exited the car and began hurling anti-gay slurs at the group; Burke calling them “fucking dykes.” One of those in Burke’s group began chasing one of the women around the corner, grabbed her hair, kicked and punched her, and threw her into a brick wall. Soon after, one of the women saw Burke standing over two women yelling “fucking dykes” and “clit lickers.” Later back at the gas station, Burke swung at three others in the group with a knife, causing severe cuts and injuries that required stitches.

Burke was indicted on three counts of second-degree assault and one count of fourth-degree assault. Defense counsel filed three motions in limine, one seeking to prohibit mention of the discriminatory phrases, one that sought to exclude any reference to the pill bottle, hammer, and knife found in their car, and one to exclude testimony about, and photos, of Burke’s tattoos, which included the words “Hitler”, skinhead, and a swastika. The commonwealth asserted that the tattoos were relevant to establish motive as the quintet used white supremacist words of hate and discrimination, and that they were relevant for identification purposes. The trial court held that the Commonwealth can talk about the tattoos, but only those identifiers Burke had openly shown to the public, and as the trial commenced, it was determined that the jury would be shown a photo revealing his tattoos “quickly,” yet it would not be sent to the jury room. Ultimately, the jury found Burke guilty on all charges.

The Commonwealth filed a written motion after the verdict, asking the trial court to find that Burke’s primary motive was due to the women appearing to be lesbians. Burke then challenged the constitutionality of Kentucky’s hate crime statute, KRS 532.021, alleging violation of his Fifth, Sixth, and Fourteenth Amendment rights, and Section 11 of the Kentucky Constitution. KRS 532.021 requires a court to make specific written findings if it considers that the actions of a defendant are motivated by hate, entitling defendant to know the facts the court relied upon in its sentencing. The statute does not add time to the defendant’s sentence, nor change the parole regulatory scheme.

Under Kentucky’s hate crime statute, a jury plays no role in determining whether a crime is a hate crime; that decision is left to the judge alone. Burke argues that this decision must be made by a jury to “pass constitutional muster.” The Court of Appeals found that, due to a finding of a hate crime in Kentucky only having a minimal effect, essentially creating just one more factor a sentencing judge may use to deny probation and another factor the parole board may use to deny or defer parole, it need not be made by a jury. Also, because the statute does not increase the maximum penalty for any crime, the constitution does not require it to be made by a jury. Further, because Burke’s sentence was not lengthened by the finding of a hate crime, the court also found that the Commonwealth is not required to reveal its intention to seek a hate crime finding in the indictment. Burke argued that he might have proceeded differently had he known before trial that the Commonwealth was going to seek the finding of a hate crime, however the court held that Burke should have already known this possibility. Also, Burke read the Kentucky hate crime statute to require proof of the victim of a hate crime’s sexual orientation, however the court held that this put the focus on the victim, rather than Burke. The court stated that there is no requirement that the actor’s motivation be accurate, only that it prompted him to act, so whether they were lesbians is inconsequential. Whether accurate or not, Burke’s belief that they were, as expressed by his own words, suggested his act was based on their perceived sexual orientation.

The court ultimately held that the trial court’s findings were sufficient, and that KRS 532.031 was constitutional and no error occurred in its application.

– Anthony Sears

Anthony Sears studies at New York Law School (’16).
In Malu v. U. S. Attorney General, 2014 U.S. App. LEXIS 15923, 2014 WL 4073115 (11th Cir. 2014), the U.S. Court of Appeals for the 11th Circuit held that a lesbian who clearly suffered heinous acts in the Congo had to have contested her status as an aggravated felon in an expedited removal proceeding as prerequisite to raising the issue before the court of appeals, despite the gruesome allegations before the court.

According to her Petition, Malu was born in Kinshasa, Democratic Republic of Congo, and lived there for more than two decades before she fled to the United States. When she was 11 years old, her parents sold her to her uncle, a high-ranking officer in the Congolese military. According to Malu, her uncle raped and impregnated her, put her head in the toilet, urinated on her, burned her with cigarettes, stabbed her, and pierced her with a screwdriver. By age 12, she had aborted three pregnancies, and when she became pregnant a fourth time her doctor instructed her to keep the baby because she would die if she had another abortion. However, she miscarried the fourth child during a visit to parents’ home when a group of rebel soldiers invaded their home, killed two of her brothers and two of her sisters, beat her father, and raped Malu and her mother. When her uncle left her with her parents so that Malu could undergo the customary female genital mutilation, she escaped Congo in 2000. After enduring a long trip, some of it in the trunk of a car, she eventually arrived in the United States, where she first married a man but then separated.

Malu now identifies as a lesbian and dresses like a man, has a same-sex partner with whom she lives, and is coparent to her partner’s twin daughters. While in Georgia, Malu committed two state-law crimes: the state charged her with cruelty to children after she argued with her partner in their presence, and she was charged on another occasion with simple battery. The Department of Homeland Security classified her conviction for simple battery as an aggravated felony, and initiated expedited removal proceedings.

DHS served Malu with a notice of intent to issue a final administrative removal order, and Malu responded by requesting withholding of removal because she feared persecution in Congo. At that time, Malu however failed to contest that she should not have been subjected to the expedited removal proceeding because her prior convictions for “simple battery” did not qualify as an aggravated felony, which was the only ground for her removal before the Department. Malu cited Johnson v. United States, 559 U.S. 133 (2010) (holding that a felony offense of battery thus does not constitute a “violent felony”), trying to contend that this decision was not an available remedy at the time of her notice of intent, however, the notice was issued in 2011, and Johnson was decided in 2010.

The court held that the statute that governs this petition required Malu to exhaust all administrative remedies available to her, which she failed to do because she did not contest the only ground for her expedited removal. Malu further argued that the notice of intent did not clearly explain that she was permitted to contest the classification of her conviction as an aggravated felony, however, the court stated that in an expedited proceeding, an alien must exhaust all administrative remedies by rebutting all charges, including conclusions of both law and fact, before the Department.

Raising more arguments, Malu then advocated that her membership in two social groups will subject her to persecution if she is returned to the Congo: the fact that she was a Congolese wife, and her sexual orientation, now identifying as a lesbian. The Board found that being a Congolese wife, who is treated as property because of one’s domestic relationships, is not a particular social group and is not readily identifiable in Congolese society.

Malu contended that the Board selectively viewed undisputed evidence about the treatment of homosexuals in Congo, and failed to give her reasoned consideration. The IJ found that Malu would not suffer future persecution in the Congo on account of her sexual orientation because homosexual activity is not prohibited by law in Congo, and stated it is “very rare” for homosexual relationships to be prosecuted under the public decency provision of the penal code (although homosexual relationships could be criminalized under the public decency provision) and no evidence established that state police perpetrated or condoned violence against lesbians. The appeals court affirmed these findings and stated that, as a matter of law, evidence of harassment by state security forces alone cannot amount to persecution. The IJ also considered evidence about private citizens’ harassment and violence towards homosexuals, yet found that the evidence did not amount to state-sponsored persecution.

The Board of Immigration Appeals dismissed her appeal. It agreed with the immigration judge that Malu failed to corroborate her allegations of past persecution and could not establish future persecution. The Board also found that even if Congolese wives did constitute a particular social group, that Malu failed to prove that her uncle was still alive or that he would know she reentered the Congo. In the end, the Board did not adopt the IJ’s rejection of Malu’s purported nationality and did not adopt the immigration judge’s conclusion that the Department rebutted a presumption that Malu would suffer future persecution. However, the Board explained that these determinations by the immigration judge, even if in error, were not necessary to the disposition of Malu’s case because ultimately, Malu failed to exhaust all administrative remedies available to her. – Anthony Sears
On July 31, 2014, the Supreme Court of Wisconsin unanimously found that the domestic partnership status created by the Wisconsin state legislature in 2009 for same-sex couples was constitutionally permissible, despite a 2006 state constitutional amendment banning any “legal status identical or substantially similar to that of marriage.” Appling v. Walker, 2014 WL 3744232. The decision, however, came only weeks before an August 26 oral argument at the United States Court of Appeals for the Seventh Circuit that, if the questions from the panel, and Republican appointee Judge Richard Posner in particular, are any indication, the 2006 constitutional amendment itself is now on very thin constitutional ice.

By a vote of 59 to 41 percent, Wisconsin voters approved an amendment in 2006 that added two sentences to the state constitution, codified at Article XIII, Section 13. “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” After the state legislature passed, and former Democratic Governor Jim Doyle signed into law, a domestic partnership status for same-sex couples in 2009, the usual suspects in Wisconsin filed a lawsuit in state court claiming the domestic partnership status violated the 2006 constitutional amendment. Throughout the litigation, they have claimed that the amendment permits only a scheme recognizing “cohabiting domestic relationships that bear no resemblance at all to marriage, with same-sex couples only as incidental beneficiaries.” They lost at both the trial and intermediate appellate court levels.

Early in his opinion for the court, Justice N. Patrick Crooks announced that the challengers “face a very difficult task,” one that “has doomed many challenges,” needing to “have proved beyond a reasonable doubt” the unconstitutionality of the statute, “which is accorded a presumption of constitutionality.” The “daunting standard” the challengers were up against “dooms this one as well.”

“[I]n order to give effect to the intent of the framers and of the voters who adopted it,” Justice Crooks explains that, when analyzing constitutional amendments, the court’s precedent calls for considering “what is reflected in the plain language of the statute, the constitutional debates and practices of the time as exemplified during the ratification campaign that surrounded the voters’ passage of the Amendment, as well as, to the extent probative, the first legislation passed following the Amendment’s passage.” As he notes, when the statute in question, like the one in this case, is the first one signed into law after an amendment’s passage, it is less useful for the analysis.

On the first prong, considering the inclusion of the modifier “substantially,” Justice Crooks concluded that “[t]he plain language of the Amendment indicates that the framers and the voters intended to prohibit a status that gives a domestic partner a sum total of legal rights, duties, liabilities, and other legal relations that is more than just similar to the sum total of a married person’s legal rights, duties, liabilities, and other legal relations.”

Moving to the second prong, he then went through a litany of statements made by the legislative and major conservative interest group proponents of the amendment prior to passage indicating it would not prevent the state legislature or localities from granting certain benefits to same-sex couples should they choose to do so. As those advocating passage repeatedly declared, the real target of the second sentence, instead, was Vermont-style civil unions offering all the rights and responsibilities of marriage except the name. “This representative sampling of messages, publicized by some of the most prominent and prolific advocates of the Amendment, makes clear that in response to concerns about what exactly the Amendment would prohibit, such advocates answered directly that the Amendment would not preclude a legislative decision to create a legal mechanism giving unmarried couples in intimate relationships specific sets of rights and benefits.”

As to the last prong, although the first legislation following the passage of the 2006 amendment was the very statute
require the approval or consent of the second partner, and it can be dissolved automatically if either partner marries.”

He listed a series of rights domestic partners were granted, and mentions a big one the legislature left out: domestic partners “are not permitted to obtain joint fishing licenses.” They also have no federal recognition, unlike married same-sex couples after Windsor.

[During the 7th Circuit argument in the Wisconsin marriage equality case, the joint fishing license issue was raised as an example of how Wisconsin domestic partnerships differ from marriages – a point probably inspired by Justice Crooks’ opinion. -- Editor]

Putting all this together, the conclusion was clear for Justice Crooks and his colleagues. “The proper interpretation of a constitutional amendment is what framers and the voters who approved it thought it meant. The voters were told by proponents, including the framers of the Amendment, that same-sex couples could be granted rights notwithstanding the Amendment. The message given to the voters did not present the qualifications in regard to extending benefits that the Plaintiffs now claim.”

Chief Justice Shirley S. Abrahamson wrote a separate concurrence to call attention to the fact that the 2006 constitutional amendment had recently been declared unconstitutional by Senior U.S. District Court Judge Barbara B. Crabb of the Western District of Wisconsin (a decision almost certain to be affirmed by the Seventh Circuit panel hearing the appeal). Justice Patience Drake Roggensack also concurred separately “to further discuss the presumption of constitutionality and the importance of the burden of proof that we must employ when a legislative enactment is challenged on constitutional grounds.”

Christopher R. Clark argued the case on behalf of Lambda Legal, with Brian Butler and Barbara Neider of Stafford Rosenbaum LLP in Madison on the brief. — Matthew Skinner

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

New York Federal Court Rules on Sexual Orientation Discrimination in the Workplace

In Sletten v. Liquidhub, Inc., 2014 U.S. Dist. LEXIS 94697 (S.D.N.Y., July 11, 2014), U.S. District Judge Naomi Reice Buchwald upheld in part and dismissed in part Plaintiff Chad Sletten’s claims of sexual orientation discrimination in the workplace against Liquidhub, Inc. and James McDermott. Essentially, Sletten argued that he was subjected to a hostile work environment and unfavorable conditions (including, eventually, termination) due to his sexual orientation. According to Sletten, such discrimination violates the New York State Human Rights Law, N.Y. Exec. Law sec. 290 et seq. (NYCHRL), and the New York City Human Rights Law, N.Y. City Admin Code 8-101 et seq. (NYCHRL). The case was in federal court under diversity jurisdiction.

On February 13, 2012, Sletten began his job at the New York offices of Liquidhub, a corporation organized under Delaware law with a primary place of business in Pennsylvania. During this time, James McDermott served as a Director/Manager working in the Pennsylvania offices and frequently communicated with the New York branch—corresponding on a daily basis and visiting once per week. Not long after starting at Liquidhub, Sletten heard from coworkers that McDermott had made the following comments: “[Plaintiff] comments, both direct and indirect, Sletten alleges that he experienced adverse employment actions. Starting in April 2012, Brassington stopped returning plaintiff’s calls and emails and subsequently became “fixated” on cutting plaintiff’s pay. Furthermore, the priority level of plaintiff’s account was demoted, diminishing plaintiff’s overall commission. Finally, on September 17, 2012, Sletten was terminated from his employment and was told that “he was not being fired for cause.”

Plaintiff alleges that the negative treatment from his Liquidhub supervisors continued outside of the workplace. On September 15, 2012, McDermott and his friend Michael Sneider arrived unannounced at Sletten’s farmhouse with guns and...
asked to explore his property for hunting. According to Sletten, the visit was an attempt to “coerce and intimidate Plaintiff to quit his job.” On two other occasions following this initial one, Sletten noticed armed men on his property, with one of them alleged to be Sneider. While plaintiff argues that McDermott and his friend’s trip to the farmhouse was clearly meant to coerce his resignation, the purpose of their trip was anything but obvious to the court, and thus plaintiff’s interference claim was dismissed.

Regarding plaintiff’s argument that he faced unlawful retaliation in violation of the NYSHRL as well as the NYCHR, the court found that he failed to meet the requirements to prove such a case. Because plaintiff did not explicitly associate his pay cut with his sexual orientation when he initially filed a complaint, the court cannot see this action as a protected activity, a necessary piece of proving retaliation in such circumstances.

Plaintiff looked again to the NYSHRL and the NYCHR for his hostile work environment claim against Liquidhub. To prove this point under the NYSHRL, plaintiff must demonstrate that “a workplace is so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered.” Desardouin v. City of Rochester, 708 F.3d 102, 105 (2d Cir. 2013). As noted before, the majority of the discriminatory and more offensive comments were indirectly communicated and learned of secondhand. Despite the fact that these statements were heard secondhand, the court still found them important to consider as they can negatively impact a workplace. At the same time, however, the court did not consider secondhand comments as persuasive as direct ones in a hostile work environment claim since they are less credible, less confrontational, and less wounding. As such, indirect statements are not enough on their own to drive forth a hostile workplace claim; they require additional support from direct offensive statements. In Sletten’s specific case, the court believed that the examples of direct comments were fundamentally inoffensive and thus dismissed plaintiff’s NYSHRL hostile work environment claim. Despite this conclusion, it was still necessary to analyze independently the NYCHR claim, as the city statute is more plaintiff-friendly than the NYSHRL. Under the NYCHR, plaintiff needs to just prove that he was “treated less well than other employees” on account of his protected status. In this case, the offensive comments about Sletten’s sexual orientation created an environment in which he received “differential treatment.” As such, the court upheld plaintiff’s hostile work environment claim under the NYCHR.

In addition, plaintiff claimed that he experienced discrimination as described under the NYSHRL and the NYCHR. As before, the claims must be studied separately as the NYCHR is construed “more liberally.” A NYCHR claim for discrimination based on sexual orientation needs to meet four requirements: plaintiff is a member of a protected class; plaintiff performs his job satisfactorily; plaintiff suffers adverse employment action (usually in terms of material status); and said employment actions happens under circumstances which give rise to an inference of discrimination. On the topic of adverse employment actions, Sletten cited two instances of reductions in pay and his final termination without cause, all of which the court confirms as such. In terms of the first three prongs of a NYSHRL discrimination claim, the court believed that Sletten had met them sufficiently. Therefore, the only thing to be considered was whether these adverse employment actions were motivated by plaintiff’s sexual orientation. In his account, plaintiff pointed out that Brassington, the CEO and thereby the person in charge of plaintiff’s pay, spoke negatively about plaintiff’s sexual orientation behind his back and soon became “fixated” on reducing his pay. The court saw this “fixation” by Brassington as enough to establish correlation between the employment actions and sexual orientation discrimination, thus upholding plaintiff’s claim under the NYSHRL. For similar reasons, the court also accepted plaintiff’s discrimination claim under the NYCHR.

The last matter to consider in this case is plaintiff’s allegations against defendant McDermott. With respect to the adverse employment actions, McDermott cannot be held responsible for them because he never had the authority to control plaintiff’s pay and thereby could not implement them. However, the court accepted plaintiff’s claim of hostile work environment under the NYCHR against McDermott. First, because McDermott constantly interacted with the New York offices as a liaison figure between New York and Pennsylvania, he can be considered as a person who “transacts business in New York”—the first requirement for this NYCHR charge. Second, the court viewed McDermott’s business dealings with the New York offices as the source of plaintiff’s sexual orientation becoming a negative topic of conversation in the workplace. In short, personal jurisdiction over McDermott exists in respect to the NYCHR hostile work environment claim.

To sum up, plaintiff’s retaliation claims under state and city law, NYCHR interference claim, and NYSHRL hostile work environment claim were dismissed. The court found that plaintiff had adequately demonstrated the NYCHR hostile work environment claim against Liquidhub and McDermott and his sexual orientation discrimination claims under both the NYSHRL and NYCHR against Liquidhub. – Daniel Ryu

Daniel Ryu studies at Harvard College (‘16).
Connecticut Supreme Court Rules on Pre-Marriage Equality Loss of Consortium Claim

The Connecticut Supreme Court ruled unanimously in Mueller v. Tepler, 312 Conn. 631, 2014 Conn. LEXIS 251 (July 16, 2014), that a woman whose same-sex partner was misdiagnosed with the wrong kind of cancer when it was too late for effective medical treatment can assert a claim for damages for loss of consortium if she can show that the women would have married had they not been prevented from doing so by state law. Although the court’s ruling involves the only such claim that has been presented in Connecticut, it may have significance as a persuasive precedent in other states where recent extension of the right to marry to same sex couples might make such claims plausible. Because findings,” according to the opinion by Connecticut Chief Justice Chase T. Rogers. “As a result of this negligence, Mueller was mistakenly diagnosed with ovarian cancer. Mueller remained under the care of Wertheim until March 5, 2004. Although the diagnostic error was discovered in April, 2005, Mueller’s cancer had progressed to a stage where some of the tumors no longer could be removed surgically.” Mueller and Stacey entered into a civil union during 2005 when Connecticut’s new civil union law went into effect, after the negligent medical treatment she had received.

Mueller filed a medical malpractice action against Wertheim and Dr. Isidore Tepler in January 2006, and Stacey on the loss of consortium claim on August 20, 2008. Just weeks later, the Connecticut Supreme Court ruled in Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008), that denial of marriage to same-sex couples violated a fundamental right to marry under the Connecticut constitution. Stacey appealed the denial of her claim.

In responding to the appeal, the defendants were confronted with the changing legal landscape in Connecticut created by Kerrigan. Recognizing that Stacey could now raise a claim that denying her the right to seek damages for loss of consortium might be unconstitutional, the defendants raised for the first time the objection that Stacey’s complaint did not allege that the women would have been married had that option been available at the time the alleged negligence occurred in 2001-1004, and thus her complaint was factually insufficient to raise a loss of consortium claim. The Appellate Court agreed with the defendants, and affirmed the trial court’s judgment against Stacey on the loss of consortium claim.

The Connecticut Supreme Court faced two questions on appeal. First was whether the court of appeals should have sent the case back to the trial court to give Stacey a chance to support the claim that Stacey had suffered the same kind of intangible injuries that a spouse would suffer in like situation. The defendants filed a motion to strike the loss of consortium claim, arguing that Connecticut law recognizes such claims only for persons who are legally married. Indeed, the Connecticut Supreme Court had previously rejected such a claim brought by somebody who was engaged but not yet married, imposing a “bright line test” for reasons of public policy. The trial court granted the motion to strike from the bench on February 11, 2008, and granted a motion for judgment against

It may have significance as a persuasive precedent in other states where recent extension of the right to marry to same sex couples might make such claims plausible.

the trial judge in this case granted the defendants’ motion to strike the loss of consortium claim as legally deficient, the court sent the case back to the trial court to allow the surviving partner to file an amended complaint making the necessary factual allegations concerning the women’s relationship.

Margaret Mueller and Charlotte Stacey became domestic partners in 1985, living together continuously until Mueller’s death from cancer in January 2009. In August 2001, Mueller was referred to Dr. Iris Wertheim after testing by her gynecologist showed that she had cancer. Wertheim performed surgery to remove cancerous tumors, which were then diagnosed by a pathologist as cancer of the appendix. “Wertheim either failed to review the pathology report or misinterpreted its a subsequent amended complaint asserted a claim for damages for loss of consortium by Charlotte Stacey. The complaint recited their long history as domestic partners to support the claim that Stacey had suffered the same kind of intangible injuries that a spouse would suffer in like situation. The defendants filed a motion to strike the loss of consortium claim, arguing that Connecticut law recognizes such claims only for persons who are legally married. Indeed, the Connecticut Supreme Court had previously rejected such a claim brought by somebody who was engaged but not yet married, imposing a “bright line test” for reasons of public policy. The trial court granted the motion to strike from the bench on February 11, 2008, and granted a motion for judgment against
The court found that allowing a same-sex couple to assert a loss of consortium claim would not undermine the public policies that the court had identified.
Oregon Federal Court Refuses to Dismiss Title VII Retaliation Claim by Lesbian Employee

U.S. District Judge Michael McShane ruled on August 21 that a lesbian former employee could sue a hospital under Title VII of the federal Civil Rights Act for 1964 for retaliatory discharge, even though the complaints she claims to have made before her discharge concerned sexual orientation discrimination. Bennefield v. Mid-Valley Healthcare, 2014 U.S. Dist. LEXIS 116554, 2014 WL 4187529 (D. Or.). Title VII outlaws discrimination because of sex, but federal courts have generally held that this does not include sexual orientation discrimination. While finding that the plaintiff had not stated valid Title VII claims of discrimination and retaliation for her refusal to cooperate. Bennefield claims to have made numerous informal complaints to supervisors, but it was after she made a formal complaint to the Human Resources Department that she was notified of her discharge. One comment by this hostile employee referring to religion was the basis for Bennefield’s claim of religious discrimination, which Judge McShane did not find persuasive.

Bowing to the fact that federal courts generally do not interpret Title VII’s sex discrimination ban to extend to sexual orientation discrimination, Bennefield agreed to dismissal of her Title VII sexual orientation discrimination claim. Ultimately, the court’s continued would suggest that complaints about discriminatory conduct that is not itself forbidden by Title VII could not provide the foundation for a Title VII retaliation claim. But Judge McShane noted that courts – and particularly the 9th Circuit, whose rulings are precedent for the district court in Oregon – had been willing to extend the protection of this provision to employees who believed in good faith that they were complaining about conduct that violates Title VII. The question would be whether the plaintiff held a “reasonable belief” to that effect.

“Defendants… appear to conclude that mistakes of law cannot support a Title VII retaliation claim,” he wrote. “I think that argument goes too far. An employee may bring a retaliation claim even if the employee makes a mistake of law in thinking that the employer engaged in prohibited conduct,” citing Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994). “Whether the error is one of fact or law is irrelevant, so long as the mistake is made in good faith,” he continued, citing Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987). “Title VII is construed broadly, and ‘this directive applies to the reasonableness of a plaintiff’s belief that a violation occurred, as well as to other matters.’

Although the reasonableness prong is an objective standard, courts must take into account ‘the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.’”

Judge McShane does not mention, but could well have done, that public opinion polls show that a majority of the public incorrectly believes that anti-gay employment discrimination is illegal under Title VII, even though most federal courts construe Title VII otherwise and most states have not banned sexual orientation discrimination in employment. This suggests that many employees – especially those whose job does not require them to keep up with legal issues – assume that anti-gay discrimination is unlawful,
and that they may expect protection against retaliation if they complain to a supervisor about such discrimination. The situation is complicated in a state like Oregon, where the state forbids sexual orientation discrimination and employees may presume that they are protected so long as their complaint concerns conduct that is unlawful, regardless whether the anti-discrimination law in question is state law or federal law. Thus, Bennefield was complaining about unlawful discrimination, but it was not discrimination made expressly unlawful by Title VII.

“That discrimination based on one’s sexual orientation turned out to not be prohibited under Title VII does not make Bennefield’s belief objectively unreasonable,” wrote McShane. In making this conclusion, I take into account the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims,” again quoting from a 9th Circuit opinion. McShane also rejected the defendant’s argument that Bennefield could not demonstrate that her discharge was due to a complaint that she filed after her supervisor had already decided to discharge, because Bennefield had alleged numerous informal complaints predating that decision. He also noted that Bennefield’s pleadings contradict the employer’s contentions about her deficiencies as an employee, creating a material fact issue that it would be improper to resolve on summary judgment. “Viewed in the light most favorable to Bennefield, he concluded on this point, ‘she has met her burden of demonstrating defendants’ proffered reasons for firing her were pretextual.’”

Bennefield is represented by Carl Lee Post, Cynthia J. Gaddis and Daniel J. Snyder of the Law Offices of Daniel Snyder in Portland, Oregon. Judge McShane is the first openly-gay person to serve as a U.S. District Judge in the District of Oregon, and recently rendered the ruling holding Oregon’s ban on same-sex marriage unconstitutional. Because the state decided not to appeal his ruling, Oregon recently became a marriage equality jurisdiction.

New York Court Refuses to Dismiss Gay Discrimination Claim against New York Sports Club


Waters, who had been a member at that location for four years, was working out in the evening. After his workout, he returned to the locker room to use the shower, steam room, and sauna. When he entered the sauna after using the steam room, two other men were present. After about five minutes, another man not previously known to Waters, identified in the complaint as “John Smith,” “entered the sauna and screamed homophobic slurs at the three men, particularly focusing on plaintiff,” wrote Edmead, summarizing the complaint allegations. “Smith shouted epithets at the three men, including ‘What the f--- is going on in here you disgusting faggots?’ and ‘You can’t do things like that in here! I have people who train here!’” Waters claims that he and the other men were not engaging in any activity in the sauna, gay or otherwise, just using the sauna for “its intended purpose,” Waters claims that Smith “had his fist cocked back as if ready to attack the men at any moment,” and Waters felt threatened. “As this occurred, John Q, a TSI janitor who was wearing a red NYSC shirt (typically worn by NYSC employees), stood outside the sauna door looking in through the glass. From outside the glass, John Q yelled at plaintiff and the two men, calling them ‘disgusting homosexuals’ and shouted, ‘You can’t be practicing that disgusting homosexual behavior outside of your house. If you want to practice that disgusting homosexual behavior, go home.’” Waters and the two other men tried to leave the sauna, but at first Smith blocked the door, then exited but leaned on the door to keep them from leaving until they managed to push against the door and “were eventually able to generate enough force to escape after numerous attempts.” Waters tried to go to his locker to get dressed and leave the gym, but “Smith blocked his path and refused to let him through, yelling ‘You are not going anywhere!’ Waters eventually was able to get past Smith, avoiding a physical confrontation, but alleges that Smith and John Q “continued to direct obscenities toward him, calling him a ‘faggot’ and a ‘disgusting homosexual.’ Smith and John Q berated plaintiff while he was naked and changing, which caused a commotion in the locker room, and great embarrassment to plaintiff.”

Water alleges that another TSI employee, identified as John Roe, arrived in the locker room, observed what was going on, but stood idly by and did nothing to diffuse the situation. Once Waters got dressed, he attempted to run out of the locker room and upstairs to the exit, but the individual defendants ran after him, yelling “You are not leaving,” and “You are going to be arrested,” attracting the attention of other gym members, some whom Waters recognized. As he tried to go upstairs, some of the individual defendants “shoved past him and blocked the doors on the main level, preventing him from leaving and repeating that he was going to be arrested. Waters protested, stating this was “false imprisonment,” but Smith and John Q continued to block...
Raised fists and attempts to grab a backpack and a cellphone were sufficient, accompanied by the alleged statements, to make out a claim for assault and battery.

was engaging in sexual conduct with the other men in the sauna in violation of NYSC’s posted rules, and that they were merely enforcing the rules without regard to his sexual orientation. But that is not a basis to grant a motion to dismiss, because Waters alleged in his complaint that he was not engaging in any sexual activity in the sauna when the incident began, and he alleges that he was targeted because of his sexual orientation.

The judge found that the complaint adequately alleged facts to support the tort and discrimination claims. She rejected TSI’s claim that Smith was not an employee for whose acts it could be held liable. From the factual allegations, and especially what he is alleged to have said initially in the sauna, it sounds like he was a trainer who might be deemed an independent contractor by TSI, but clearly the other two individual defendants, who were wearing the NYSC-logo shirts typically worn by employees, were apparently employees, at least in terms of the factual allegations relevant to determining a motion to dismiss by TSI.

Raised fists and attempts to grab a backpack and a cellphone were sufficient, accompanied by the alleged statements, to make out a claim for assault and battery. Although intentional infliction of emotional distress is a difficult tort to plead in New York, Justice Edmead found that “homophobic slurs have been held to constitute the requisite ‘extreme and outrageous conduct,’ and, “Moreover, plaintiff alleges that a portion of this beratement occurred in front of other NYSC patrons, while he was naked in the locker room. And, that as a direct consequence of the incident, he sustained physical and emotional pain and suffering, as well as great mental distress, shock, fright and humiliation.” Defendants argued that “it is questionable under a reasonable person standard whether others would have reacted to the alleged incidents as presented in the complaint in a similar manner,” but Edmead found this “disingenuous and speculative,” and found that the cause of action had been stated.

Justice Edmead also rejected TSI’s argument that its posted policy against sexual activity anywhere in the club was sufficient by itself to require dismissal of the discrimination claim. The complaint alleges that TSI enforced unlawful discriminatory policies targeted against gay men, including calling the police when “purported homosexual activity” occurred in the gym or locker room, “physically restraining gym patrons accused of homosexual activity,” and “preventing gym patrons accused of homosexual activity from leaving the gym until they forfeited their NYSC identification cards.” “TSI fails to make any sort of demonstration that is employees’ (including Smith’s) alleged behavior – and thus enforcement of its purported written policy—would be applied in the same way if plaintiff were heterosexual,” she wrote. She also pointed out that TSI had failed to show that it could not be held vicariously liable for its employees’ conduct, or that their actions went beyond the scope of their duties or its written policy. TSI’s allegation that Waters was not targeted due to his sexual orientation was beside the point on a motion to dismiss, the issue being whether the alleged facts, if proved, would support a discrimination claim.

“Allegedly, plaintiff was chased from the sauna to the locker room, and then forced to escape the gym based on TSI’s employees’ homosexual animus, homosexually-based remarks, and pursuit of him while he was enjoying the privileges and use of the TSI gym,” she wrote. These allegations were sufficient to support his discrimination claims. “Moreover,” she concluded, “TSI’s argument that the complaint lacks allegations that a person in a supervisory capacity was aware of the incident does not address anything raised in the opposition [to the motion], and is, in any event, insufficient, at this juncture, to defeat the NYSHRL and NYCHRL claims as alleged.”

Justice Edmead scheduled a preliminary conference for September 30, and directed that all defendants submit their answers to the Complaint by August 20. Waters is represented by the law firm Morelli Alters Ratner LLP. TSI is represented by Wilson, Elser, Moskowitz, Edelman and Dicker LLP.
The New York State Division of Human Rights ruled on August 8 in New York State Division of Human Rights v. Liberty Ridge Farm, LLC, 10157952, NYLJ 120266939841, at *1 (NYSDHR, Decided July 2, 2014), that a rural wedding venue violated the state’s Human Rights Law by its policy against same-sex weddings. Commissioner Helen Diane Foster formally adopted a recommended decision by Administrative Law Judge Migdalia Pares, awarding the complainants $1,500 each in compensatory damages and fining Liberty Ridge Farm $10,000 for its violation of the law.

The complainants, Melissa McCarthy and Jennifer McCarthy, decided to get married in October 2011, after New York’s Marriage Equality Law had gone into effect. Because Jennifer had proposed to Melissa while they were apple picking at an orchard in the Albany area, they decided to continue this “rustic” theme for their wedding by finding a “wedding barn” in the area. Their online search yielded Liberty Ridge Farm as their first choice. The website offered the Farm as a wedding venue for hire with pricing packages, catering services, and photographs of wedding ceremonies. They tried to contact Liberty Ridge by email and then left a phone message. In September 2012, Cynthia Gifford, a co-owner of the facility, returned their phone call and left a voice message, prompting Melissa to call Gifford.

The telephone conversation took place in September 2013, with Jennifer listening in on the conversation. Melissa and Gifford discussed renting the Gifford Barn at Liberty Ridge Farm (LRF) to hold a wedding between June and August 2013, and Gifford invited Melissa to visit to check out the facilities. When Melissa then referred to her fiancé as “she,” the tone of the conversation changed. Gifford stated that there was “a little bit of a problem” because “we do not hold same sex marriages here at the barn.” When Melissa challenged the legality of that policy, Gifford responded that “we are a private business.” When Melissa asked why they had the policy, Gifford said, “It’s a decision that my husband and I have made that that’s not what we wanted to have on the farm.” In response to the subsequent discrimination claim that Melissa and Jennifer filed, the Giffords contended that they have a “specific religious belief regarding marriage” and a “policy” against having such marriages at their barn.

ALJ Pares had first to determine whether Liberty Ridge qualified for an exemption from the state Human Rights Law’s prohibition of sexual orientation discrimination in public accommodations, by virtue of its facilities, so they were purely business transactions. Pares concluded that LRF is a public accommodation, and rejected the Giffords’ argument that because they live on the third floor of the wedding barn it is their private home rather than a public accommodation. The evidence showed that the first floor is a public events space, not a private living space, and the second floor apartment was normally rented out to the wedding party as a bridal suite. Despite the small scale of the operation and family owners, operating as a limited liability corporation (LLC), it clearly qualified as a public accommodation under the Human Rights Act.

They argued that they had not actually discriminated against Melissa and Jennifer because of their sexual orientation, but Pares concluded that the refusal to make the facility available for their wedding constituted discrimination in violation of the law.

Furthermore, the Giffords did not deny that they had adopted a policy against holding same-sex weddings in their facility, based on their personal religious beliefs. They argued that they had not actually discriminated against Melissa and Jennifer because of their sexual orientation, but Pares concluded that the refusal to make the facility available for their wedding constituted discrimination in violation of the law. “It is unlawful discrimination to deny a benefit to a member of a protected class based on being a member of that protected class,” she wrote. “Here, the policy to not allow same-sex marriage ceremonies of LRF is a denial of access to a place of public accommodation.”

Judge Pares also rejected the Giffords’ argument that they could not be held personally liable, since they were
Federal Judge Dismisses Transsexual Inmate’s Claim of Sexual Assault by Deputy

A transgender inmate who claimed that a sheriff’s deputy sexually assaulted her while she was housed as a male pre-trial detainee sued Deputy Duane Clark, the sheriff and the county for civil rights violations under 42 U.S.C. § 1983; but United States District Judge William S. Duffey, Jr., granted the county and the sheriff judgment on the pleadings in Nimmons v. Gwinnett County, 2014 U.S. Dist. LEXIS 118364, 2014 WL 4230914 (N.D. Ga., August 25, 2014). The opinion provides almost no detail about plaintiff Jerome Nimmons or about the assault, and it does not mention Farmer v. Brennan, 511 U.S. 825 (1994), the leading Supreme Court case on protection from harm for transgender inmates. The opinion also fails to mention the Prison Rape Elimination Act (PREA), passed in 2003 and codified at 42 U.S.C. §15601, et seq., with final implementing regulations at 28 C.F.R., Part 115 (2012). PREA emphasizes protective measures (including for transgender people in particular) and the necessity to screen, train, and supervise staff to reduce the incidence of sexual assault.

Judge Duffey found that Nimmons’ pleadings failed to establish that defendants knew and disregarded that Nimmons was at greater risk or that assault was predictable, that they failed to train or supervise, or that any policies could reduce the risk. Therefore, he ruled, there was no “deliberate indifference” to Nimmons’ safety. While the risk of assault at issue in Farmer was inmate-on-inmate, the Supreme Court struggled for several pages to articulate the “state of mind” necessary to establish deliberate indifference concerning the safety of a transgender inmate who, in fact, had insisted on housing in general population, eventually remanding because the district court may have “mistakenly thought that advance notification was a necessary element of an Eighth Amendment failure-to-protect claim.” Farmer, 511 U.S. at 849. PREA begins with a Congressional declaration that prison rape is endemic and is premised on the notion that policies (including personnel) can make a difference. All correctional institutions are charged by PREA with formulating such policies.

According to Judge Duffey, Nimmons also failed to establish any “policy” of the county that contributed to her assault. In addition, Judge Duffey dismissed claims against the county, because Georgia sheriffs (and their deputies and the jails they operate) are arms of the state, not the counties, under Georgia law.

As to the sheriff, Judge Duffey focused on his lack of specific knowledge of risk to Nimmons – a pleadings defense rejected in Farmer’s remand. Judge Duffey found that the sheriff was entitled to qualified immunity because the absence of deliberate indifference meant that no constitutional violation occurred. Judge Duffey relied on Goodman v. Kimbrough, 718 F.3d 1325, 1331-32 (11th Cir. 2013), which does discuss Farmer, in dismissing claims against the sheriff. In Goodman, the plaintiff inmate, suffering from dementia, was severely beaten by his cellmate after officers disabled his emergency call buzzer. The sheriff, who disciplined the officers, was found in summary judgment not to be charged with knowledge of the risk. It is not authority for dismissal of Nimmon’s claims without discovery. Judge Duffey nevertheless dismissed because the “conclusory allegations” in the Complaint fail to “suggest that Clark was hired and retained as a deputy at the Detention Center though Sheriff Conway actually knew that Clark posed a serious risk of harm to transgender persons.” Although there is no discussion of the fate of claims against Deputy Clark, he was served, and the opinion does not dismiss claims against him.

Nimmons was represented by Jeffrey Ross Sliz, of Sliz, Drake, Estes & Greenwald, of Lawrenceville, Georgia; and Thomas McKee West, of Atlanta. – William J. Rold

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SUPREME COURT – When will the Supreme Court decide whether to grant review in a marriage equality case? As of now, there are petitions for certiorari on file from the cases in Utah, Oklahoma, and Virginia, and responses to the petitions have been filed by all of the Respondents (plaintiffs below), so all of the cases that had been decided by courts of appeals by Labor Day will definitely be ready for consideration in time for the Court’s first conference of the October 2014 Term on September 29. However, it seems likely that the Court might wait in light of pending cases that have been argued in the 6th and 7th Circuits. In 2012, the Court rapidly received a succession of petitions in DOMA cases from around the country beginning in the summer, but did not announced which one it was granting until early in December, after the government filed a petition for review in the Windsor case and the 2nd Circuit had issued its ruling with lightning speed after oral argument. (A bit oddly, the Court’s cert grant in Windsor took place before the losers in that case, the House Bipartisan Legal Advisory Group, had filed its own cert petition.) That December grant was still in plenty of time for the case to be argued and decided by the end of the term in June 2013. One speculates that things might move along more quickly this term, as several Petitions are ready with their responses on file before the Court’s first conference, so we may not have to wait until December to know whether the Court will hear a marriage equality case this term and, if so, which one. On yet another hand (what, have we three?), the Court may pick up on the peculiarity that in these cases the respondents want the Court to grant review. Usually a winner in the court of appeals would rather avoid review, but there is a sense that none of the marriage equality rulings will go into effect until the Supreme Court decides the merits, so everyone wants the Court to take a case and decide it on the merits, but the Court itself may not be so eager, especially as arguments are yet to be scheduled in the 5th Circuit (Texas appeal) and the 11th Circuit (anticipated Florida appeal). This is not to rule out totally the optimistic scenario that the Supreme Court will abstain and just “hold” cert petitions as marriage equality triumph in every circuits, and then the Court will dismiss all the petitions for lack of a circuit split to resolve, allowing the lower court orders to go into effect; this has struck us as farfetched, however, and it wouldn’t necessarily produce a national rule due to the missing-in-action 8th Circuit, where a pre-Windsor decision rejected a challenge to the Nebraska Marriage Amendment and associated statutory ban. Various cases in that circuit are at earlier stages as of now, and two states in the circuit, Minnesota and Iowa, already have marriage equality.

FEDERAL AGENCIES – Highlighting the cleanup work yet to be accomplished at the federal level after U.S. v. Windsor invalidated the federal statutory ban on recognizing same-sex marriages, the Washington Post reported on Aug. 25 on the continuing struggle to get the Department of Veteran Affairs, the Social Security Administration, and the Railroad Retirement Board to extend recognition to married couples living in states that do not recognize their marriages. Although Justice Kennedy’s opinion in Windsor is not ideally clear on the point, there are good arguments that the decision would support federal agencies abandoning the statutory requirement to use the “place of domicile” rule in determining which marriages get federal benefits, and Lambda Legal has filed suit on behalf of a gay veterans group seeking a constitutional ruling to that effect. However, advocates for LGBT rights continue to lobby the Obama Administration to take administrative action to rectify the constitutional flaws in existing law, since there seems no movement in Congress on bills that have been introduced in both houses to establish the “place of celebration” rule for all federal purposes.

FEDERAL CIRCUIT COURT OF APPEALS – Lambda Legal and cooperating attorneys from Morrison & Foerster LLP have filed suit in the U.S. Court of Appeals for the Federal Circuit challenging the decision by the Department of Veterans Affairs to use the place of domicile rule to determine whether to recognize the legal marriages of same-sex couples for purposes of Veterans benefits. American Military Partner Association v. McDonald (filed August 18, 2014). After the U.S. Supreme Court held Section 3 of the Defense of Marriage Act unconstitutional on June 26, 2013 in U.S. v. Windsor, President Obama directed federal agencies to review their policies to comply with that decision, which held that it violated the 5th Amendment for the federal government to refuse to recognize same-sex marriages validly contracted under state law. Pursuant to this review, the Veterans Affairs Department began to recognize same-sex marriages of service-members and some veterans for various benefits and entitlements. However, relying on a specific provision of their enabling statute, 38 U.S.C. sec. 103(c), the VA has declined to recognize marriages of veterans who are living in states that do not recognize their marriages. This police was formalized in Memoranda issued in June and summarized in the Federal Register on Jun 20, 2014, 79 Fed. Reg. 35414-15. Even though at least one federal court had ruled last year that sec. 103(c) was unconstitutional, Cooper-Harris v. U.S., 965 F. Supp. 2d 1139 (C.D. Cal. 2013), and its inconsistency with the Windsor decision is manifest, the VA has stood firm, insisting it cannot change the rule without congressional approval. Lambda’s lawsuit argues on behalf

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of an association of 28,000 military families that sec. 103(c) suffers the same constitutional flaws as Section 3 of DOMA and should be overturned. Denying recognition to same-sex veteran families because they do not reside in marriage equality states treats their marriages as “second class” and inferior to opposite-sex marriages, the same flaws that the Supreme Court discerned in DOMA. Since the memoranda and Federal Register publications establish policies for the agency, they are subject to judicial review under the Administrative Procedure Act. Susan L. Sommer of Lambda is lead counsel on the case, with cooperating attorneys M. Andrew Woodmansee and Jessica A. Roberts of M&F’s San Diego office and Jessica E. Palmer of M&F’s Washington, D.C., office.

6TH CIRCUIT U.S. COURT OF APPEALS – A 6th Circuit panel consisting of Deborah Cook, Martha Daughtrey and Jeffrey Sutton heard oral arguments on August 6 in appeals of cases from Ohio, Michigan, Kentucky and Tennessee in which district courts issued affirmative marriage equality rulings, some just on recognition of out-of-state same-sex marriages while others went to the right of same-sex couples to marry in the state. The appellants were represented by Michigan Solicitor General Aaron Lindstrom, Ohio Solicitor General Eric Murphy, Leigh Gross Latherow, a Kentucky attorney, and Tennessee Acting Solicitor General Joe Whalem. Plaintiffs-respondents were represented by Carole Stanyar of Michigan, Alphonse Gerhardstein of Ohio, Laura Landenwich of Kentucky, and William Harbison of Tennessee. Judge Sutton took the most active role in questioning during the arguments, and seemed very concerned about the court getting out in front of the public and the Supreme Court on the issue of same-sex marriage. Sutton is a judicial conservative, strongly committed to states’ rights and judicial deference to the political process in making public policy decisions, and seemed to be looking for a way not to decide the merits of the case but rather treat it as a federalism issue, so he seemed receptive to the arguments that Windsor reserves to the states the authority to determine who can marry and that Baker v. Nelson, until directly overruled, remains binding on lower federal courts. Existing 6th Circuit precedent denying heightened scrutiny to sexual orientation claims also seemed to weigh heavily on the panel. Both Sutton and Cooke were appointed early in his administration by George W. Bush, and are generally seen as very conservative judges. Judge Daughtrey, appointed by Clinton, was the only apparent vote on the panel in favor of the Plaintiffs-Respondents, although some commentators noted that Sutton is sometimes unpredictable, having voted to uphold the challenged Affordable Care Act. On balance, however, it seemed possible that the 6th Circuit might be the first after Windsor to reject marriage equality claims. If so, that would present the Supreme Court with a post-Windsor circuit split that would make a cert grant on a marriage equality case more likely.

7TH CIRCUIT U.S. COURT OF APPEALS – A 7th Circuit panel consisting of Richard Posner, Ann Claire Williams and David Hamilton heard oral argument on August 26 in four marriage equality cases: Baskin v. Bogan, the lead Indiana case consolidated with two other cases, and Wolf v. Walker from Wisconsin. These were state appeals of marriage equality rulings issued by federal district courts during 2014. Indiana Solicitor General Thomas M. Fisher and Wisconsin Assistant Attorney General Timothy Samuelson represented the appellants. Arguments for the Indiana plaintiffs were presented by Lambda Legal’s Camilla Taylor and Kenneth J. Falk from the ACLU of Indiana. James Esseks of the ACLU’s national LGBT Rights Project argued on behalf of the Wisconsin plaintiffs. An audio recording of the argument is available on the court’s website. It makes extraordinarily entertaining listening, because the judges, and especially Judge Posner, really roughed up the state attorneys, pushing them hard to come up with a rational justification for their marriage bans, and scoffing at those justifications suggested by the lawyers. Responding to the insistence that the state could rely on “tradition” or “experience” to justify the bans, Posner referred to a “tradition of hatred” against gay people and “savage discrimination” in the past, and pointed out that long-established tradition did not justify the ban on interracial marriage in Loving v. Virginia. The judges seemed a bit dubious about the plaintiffs’ argument that a generalized fundamental right to marry should decide these cases, seeming to prefer equal protection arguments premised on the harm imposed on same-sex couples and their children without any corresponding benefit to the state. It seemed likely that the 7th Circuit panel will produce an affirmative marriage equality ruling, probably premised on the lack of a rational basis for imposing unequal treatment on same-sex families and the appearance that these bans were adopted not to achieve any legitimate state policy but rather to ensure that same-sex couples would be excluded from marrying due to tradition and disapproval of homosexuality. Judge Posner particularly cited an amicus brief filed by the Family Equality Council, documenting what Posner characterized as “harrowing information” about the “misfortunes” suffered by children whose families were denied recognition by the state, and signaled incredulity that Indiana solicitor general could have read that brief without being affected by it. Counsel for the plaintiffs-respondents were pressed by the court to define the scope of the argued fundamental right to
marr y, and the judges appear to dismiss the content that “heightened scrutiny” was necessary to decide this case for the plaintiffs. It seemed possible that the 7th Circuit might even produce the first unanimous federal appellate ruling for marriage equality. Because Posner is a fast writer, it even seemed possible that the panel might produce a decision before the Supreme Court begins considering cert petitions for the new term.

9TH CIRCUIT U.S. COURT OF APPEALS – The 9th Circuit denied Idaho Governor Butch Otter’s petition to skip a three-judge panel and hear the state’s appeal of the marriage equality ruling in Latta v. Otter en banc on August 19. Oral argument in the pending appeals from 9th Circuit marriage equality cases from Nevada, Hawaii and Idaho was scheduled to be held on September 8. * * * On August 27, a 9th Circuit panel rejected an attempt by the National Organization for Marriage (NOM) to intervene and appeal the Oregon marriage equality ruling from May 19 by District Judge Michael McShane, Geiger v. Kitzhaber, 2014 WL 2054264. Reacting to announcements and news reports suggesting that state officials would comply with an order by Judge McShane striking down the state’s ban on same-sex marriage, NOM filed a motion to intervene as a defendant shortly before Judge McShane’s announced date for deciding the plaintiffs’ pending summary judgment motion. McShane denied the intervention motion, and NOM reacted by trying to get the 9th Circuit to stay the court’s ruling pending appeal. That attempt was unsuccessful, and the August 27 ruling goes further to find that NOM did not have Article III standing to appeal the marriage equality ruling. NOM was claiming organizational standing to represent, from among its alleged members, some who provide wedding services, some who voted for the state’s Marriage Amendment, and at least one Oregon county clerk who doesn’t want to have to issue marriage licenses to same-sex couples. The court found that none of these provided a basis for Article III standing, noting particularly that an Oregon voter who is opposed to the district court’s ruling would not have a sufficient individual interest, and that “NOM’s member who is an elected Oregon county clerk is not appearing in an official capacity and that the clerk’s personal objections are not sufficient to establish Article III standing. The 9th Circuit panel granted a motion to dismiss the case that had been filed by the Oregon State Defendants on June 13, and also granted a motion to dismiss as moot NOM’s appeal of the denial of its motion to intervene. While it is possible for NOM to file a cert petition with the Supreme Court, the likelihood of such a petition being granted seems slim indeed.

MINNESOTA – Cole Frey and Adam Block, who sought to hold their wedding ceremony at a lodge in Little Falls, have settled their discrimination claim against the owners of the lodge, who had declined the business on the ground that they did not condone same-sex marriage. Frey and Block filed a discrimination claim with the Minnesota Department of Human Rights. Frey said that a representative of Rice Creek Hunting and Recreation had phoned him to cancel the event, stating “Because they don’t condone same-sex marriage they weren’t ready for that yet.” The DHR found probable cause to believe the state’s human rights law was violated. Commissioner Kevin Lindsey said, “This is the first public accommodation case for the department related to same-sex marriage, and it serves as a reminder that businesses may not deny services based on a person’s sexual orientation just as they can’t deny services on the basis of race or gender.” Under the terms of the settlement, Rice Creek agreed to pay for the cost of the Frey-Block wedding, which was held elsewhere, to the tune of $8,500.00. An attorney for the lodge owners said that they had realized they made a mistake in refusing to provide services for the couple, and wanted to remedy it. “We wish them the best,” said the attorney, Paul Rogosheske. The Republic, August 22.

MISSOURI – The ACLU’s marriage equality lawsuit, Barrier v. Vasterling, which was filed this spring in Jackson County Circuit Court, has been removed by Attorney General Chris Koster to the federal district court. Koster observed that the case raises 14th Amendment claims, and moving the case to federal court would “expedite” the appeals process. The state was not a defendant in the original filing of the lawsuit, but Koster moved to intervene in order to defend the state’s ban on same-sex marriage. Kansas City Business Journal, Aug. 8.

MONTANA – After a preliminary trial conference in Rolando v. Fox, CV-14-40-GF-BMM (U.S. Dist. Ct., D. Mont.), U.S. District Judge Brian Morris adopted a detailed scheduling order under which discovery is to be completed and summary judgment motions filed by March 27, 2015, all response and reply briefs filed by April 24, 2015, and a final status conference held by telephone on June 29, 2015. To anybody who believes that by June 29, 2015, the U.S. Supreme Court will have rendered a marriage equality decision, this sounds like a schedule intended by Judge Morris to avoid having to make any decision in this case other than to grant or deny the summary judgment motions consistent with whatever the Supreme Court does. That is, it requires the parties to do all the work of discovery and briefing, while leaving
Marriage Equality

The judge free from doing hardly any work at all. Nice job if you can get it….

North Carolina – After the 4th Circuit ruled in Bostic v. Schaefer, 2014 WL 3702493 (July 28, 2014), that Virginia’s ban on same-sex marriage violates the 14th Amendment, Chief U.S. District Judge William L. Osteen, Jr., before whom two marriage equality cases were pending, asked the parties to submit supplemental briefs responding to that decision. Noting that the 4th Circuit’s ruling was stayed by the Supreme Court on August 20 and that the stay would remain in effect until either the Supreme Court denied the cert petitions filed in that case or the Supreme Court issued a ruling on the merits, Judge Osteen, who had previously stayed the litigation pending the 4th Circuit’s ruling, decided to stay any action on these cases so long as the 4th Circuit’s ruling was stayed. He directed the parties to notify him within twenty days if the cert petition was denied or the Supreme Court sent down a judgment in the Virginia case to the 4th Circuit, at which time he would presumably take action consistent with either of those developments. If the Supreme Court denies cert, the stay of the 4th Circuit’s ruling would be lifted, and its holding would be binding on Judge Osteen, who would presumably grant appropriate relief to the plaintiffs in the pending cases of Fisher-Borne v. Smith, No. 1:12CS89, and Gerber v. Cooper, No. 1:14CV299. It is possible that the Supreme Court will grant a petition in a different marriage equality case, e.g., from Utah or Oklahoma, in which case it is likely the Supreme Court would just “hold” cert petitions in other marriage equality cases pending a final ruling on the merits in the case it agrees to consider, as it did in the DOMA challenges in 2012-13. If that occurs, the Court would most likely announce rulings on held cert petitions soon after issuing its ruling on the merits of the case it takes for review.

Texas – For those wondering why the 5th Circuit has not yet scheduled oral argument in the Texas marriage equality case, De Leon v. Perry, 975 F.Supp.2d 632 (W.D. Tex. 2014), the answer is simple. Texas Attorney General Gregg Abbott waited until the latest moment to file his appeal to the 5th Circuit, not acting until July 28. In the appeal, Texas Solicitor General Jonathan Mitchell urged the court to reverse the district court ruling, and not to put the case on hold pending Supreme Court review of cases from other circuits. He argued that the decision whether to allow same-sex marriages is a policy decision best left to the legislature and the voters, that the district court misapplied the rational basis test by putting the burden on the state to justify the challenged laws. “Indeed,” he wrote, “it is enough if one could rationally speculate that opposite-sex relationships might be more likely than same-sex relationships to produce children.” The Texas A.G. took this action on the day that the 4th Circuit announced its Virginia marriage equality decision (see above). However, if the Supreme Court grants cert in the Virginia, Utah or Oklahoma cases, it seems likely that the 5th Circuit would want to delay taking up the Texas case rather than dedicate time and resources to work on a case that would be mooted by a Supreme Court ruling on the merits. If the Supreme Court significantly delays ruling on the pending cert petitions, a 5th Circuit argument would probably be scheduled. National Law Journal, July 29.

Utah – The Utah Attorney General’s Office has asked the 10th Circuit for a one-month extension of time to appeal the district court decision in Evans v. Utah, the ACLU’s case challenging the refusal by Utah to recognize as valid the marriages of same-sex couples performed during the period between District Judge Robert Shelby’s marriage equality ruling on December 20, 2013, and the Supreme Court’s stay order on January 6, 2014. More than a thousand couples married during that period. Governor Herbert announced that those marriages were apparently legal but that the state could not recognize them while the stay was in effect, because the stay left the state’s marriage amendment and statutory recognition bans in place while Kitchen v. Herbert was being appealed. U.S. District Judge Dale A. Kimball ruled on May 19 in Evans v. Utah, 2014 WL 2048343 (D. Utah), that the state’s refusal to recognize the marriages violated the 14th Amendment rights of the married couples. Neither Judge Kimball nor the 10th Circuit was willing to stay that ruling pending appeal, but Governor Herbert petitioned the Supreme Court for a stay, which was granted on July 18 without explanation in Herbert v. Evans, 2014 WL 3557112. Now with a stay in place, the state apparently wants to delay its appeal to the 10th Circuit, hoping the Supreme Court will grant certiorari in Herbert v. Kitchen, which it would then argue would justify putting off the appeal in this recognition case until the Kitchen case is decided by the Supreme Court. The ostensible reason for the extension of time, according to the A.G.’s office, is that this is a very complex case and the office is overwhelmed. Those sound like very good reasons for delaying
a determination whether the state is violating the constitutional rights of its citizens – not!!! Perhaps the problem is that the state’s attorneys are scratching their heads trying to come up with some new argument that hasn’t already been rejected by the 10th Circuit in its two marriage equality rulings this summer.

**CIVIL LITIGATION NOTES**

**3RD CIRCUIT U.S. COURT OF APPEALS** – The court denied a gay HIV-positive Mexican man’s petition to review an adverse ruling by the Board of Immigration Appeals (BIA) ordering his removal from the United States in Gutierrez v. Attorney General, 2014 U.S. App. LEXIS 15418, 2014 WL 3907014 (Aug. 12, 2014). The petitioner, a Mexican citizen, entered the U.S. on a tourist visa in 1988 when he was 16 and overstayed. In December 2001 he was convicted of simple assault in New Jersey and the Homeland Security Department went after him; he was removed to Mexico in 2004. However, he immediately returned illegally. In 2007 he was convicted of illegal reentry, and in June 2009 he was convicted of forgery. He testified that he has been arrested more than 17 times. Nonetheless, an asylum officer concluded that he had a reasonable fear of persecution if returned to Mexico, where he had been sexually abused by an uncle and sexually harassed by a police officer trying to force him to perform oral sex on the officer and assaulting him when he resisted. He testified before an Immigration Judge that he had received threats from a criminal gang (which had killed his father over a monetary issue) and that he was concerned he would not be able to receive appropriate treatment for his HIV infection in Mexico. Despite this testimony, the IJ denied withholding of removal or protection under the Convention against Torture. The BIA concluded on appeal that even if his testimony was credible, he had failed to show a reasonable fear of persecution due to his sexual orientation, finding that the evidence did not show that any of the incidents to which he testified were due to his sexual orientation, as such, and that he had failed to prove that he would not be able to get HIV treatment in Mexico. Most significantly, the BIA approved the IJ’s finding that there was not a pattern or practice of persecuting gay people in Mexico now. Based on State Department reports and news articles, the evidence showed that there is protection against sexual orientation discrimination and that “gay marriage is legal in Mexico.” (This is a bit of an overstatement; it is legal in some parts of the country and litigation continues to create a national precedent; only in Mexico City is it legal as a result of legislation.) But things have turned around for gay people in Mexico over the past few decades. At one time gay Mexicans were granted asylum in the U.S., but the various gains that the LGBT community has made there make it less likely today.

**5TH CIRCUIT U.S. COURT OF APPEALS** – The court denied a Peruvian lesbian’s appeal from the Board of Immigration Appeals’ denial of her application for asylum in the United States in Cordero-Gonzales v. Holder, 2014 WL 3611608, 2014 U.S. App. LEXIS 14030 (July 23, 2014). Unfortunately, the court’s per curiam opinion does not give a coherent narrative of the record, instead referring to various facts out of context. What seems clear is that the petitioner failed to establish past persecution by the government, or a pattern of anti-lesbian persecution by the government, and that her own statements and actions in the past undermined the credibility of her claim to have an objective fear of persecution if she were required to return to Peru. The opinion refers to allegations that she was subjected to physical and sexual abuse by her former partner and feared a recurrence if she returned to Peru, but the court noted the BIA’s conclusion that she could settle elsewhere in Peru to avoid such a result. “An applicant does not have a well-founded fear of persecution if she could avoid persecution by relocating to another part of her country and ‘under all the circumstances it would be reasonable to expect the applicant to do so,’” wrote the court, quoting from a prior 5th Circuit precedent. “Because Cordero failed to show past persecution and failed to demonstrate that a national government is the persecutor, she has the burden of showing that the persecution is not geographically limited in such a way that relocation within the applicant’s country of origin would be unreasonable.” Although the court found that the record might support a finding that Cordero “has a well-founded fear of future persecution because she cannot safely relocate,” wrote the court, “the evidence does not compel...
such a finding, particularly in light of the inconsistencies in the record and her own lack of credible.” Thus, under the highly deferential standard for review of BIA decisions by the courts of appeals, her appeal had failed.

7TH CIRCUIT U.S. COURT OF APPEALS – Immigration officials, Immigration Judges and the Board of Immigration Appeals are not required to accept as true the uncorroborated testimony of those seeking refugee status that they are gay; at least, that is the clear message of the 7th Circuit’s unsigned opinion in Tian v. Holder, 2014 U.S. App. LEXIS 14370, 2014 WL 3703986 (7th Cir., July 28, 2014). According to her testimony, Tian grew up as a closeted lesbian in China, was forced into a marriage with a man by her father, and fled China to escape her husband, coming to the U.S. in 2005. She testified that she lived openly as a lesbian in the U.S. and had a serious relationship with another woman that had ended by the time of the IJ hearing. She says that when her husband contacted her she informed him that she was gay, and subsequently she received an angry letter from her father, calling her “crazy” and “sick.” She did not introduce this letter in evidence, but claims that it embodied her evidence showing that her life would be threatened in China. “She had testified that she would not be able to seek protection from the policy, because of their hostility to homosexuality and the likelihood that the police would just help her father to find her. Tian is represented by Scott Yu of Chicago.

9TH CIRCUIT U.S. COURT OF APPEALS – An Armenian lesbian lost her refugee appeal in Petrosyan v. Holder, 2014 U.S. App. LEXIS 13570 (July 16, 2014), as the court affirmed per curiam the Board of Immigration Appeals’ affirmation of an adverse ruling by the Immigration Judge. The petitioner argued that substantial evidence didn’t support the IJ’s adverse credibility determination, but the court disagreed with her contention that the inconsistencies were minor. “Petrosyan initially testified that before she moved to Moscow she left in her apartment in Yerevan a court summons criminally charging her for attempting to encourage her minor neighbors to adopt her gay lifestyle. But on cross-examination, she stated that she ‘didn’t leave it there, [but] destroyed it because [she] was afraid’ that it would be found. When confronted with the inconsistency, she said she destroyed it, but then backtracked and state ‘but as far as what I did with the document, I could not recall.’ This inconsistency was also ‘accompanied by other indication of dishonesty’ that support the adverse credibility determination,” continued the court. “Her explanation that she destroyed medical records relating to her rape to keep others from learning about it is inconsistent with her filing of a public, written complaint about the incident. Moreover, both the Board and the IJ also correctly noted that Petrosyan failed to provide accessible corroborating evidence, such as medical records, police and court reports, and immigration documents submitted in Russia.” The court found that the evidence in the record did not compel a conclusion that Petrosyan was credible, so under the deferential standard of review for BIA decisions, her appeal had to be rejected.

9TH CIRCUIT U.S. COURT OF APPEALS – A gay man from El Salvador lost his refugee appeal in Sanchez v. Holder, 2014 U.S. App. LEXIS 13337 (July 14, 2014). The main reason the case was lost was that the BIA found that Sanchez was more than peripherally involved with the “particularly serious crime” of selling marijuana, so the court lacked jurisdiction to review the final order of removal in his case. The court also found that Sanchez had failed to preserve his claim under the Convention against Torture because he hadn’t raised it in his opening brief to the court. “Even if Arias-Sanchez had preserved this claim,” wrote the court, “he has failed to demonstrate it is more likely than not that he will be tortured by or with the acquiescence of a government official if he returns to El Salvador. Although, as the BIA found, ‘there is evidence of societal and government discrimination and occasional violence against homosexuals in El Salvador by public officials,’ such evidence does not rise to the level of torture within the meaning of CAT.”

CALIFORNIA – The 2nd District Court of Appeal affirmed the Santa Barbara County Superior Court’s dismissal of a motion to strike a lawsuit brought by John Travolta’s former private airplane pilot, Douglas Gotterba, seeking to determine whether he is bound by a confidentiality agreement that would prevent him from writing his planned book about his alleged “intimate relationship” with the controversial film star. Gotterba v. Travolta, 228 Cal. App. 4th 35 (July 22, 2014). Gotterba was employed by Travolta’s production company, Atlo, from 1981 to 1987. He quit his job early in 1987, pursuant to a termination agreement between the parties. Gotterba claims that the enforceable agreement of the parties is a three-page document dated March 17, 1987, which does not contain a confidentiality provision. Atlo
claims that an April 3, 1987, four-page document signed by Gotterba, Atlo, and Travolta governing their relationship, and it contains a confidentiality agreement. When Gotterba’s claims about his relationship with Travolta became news (most particularly in a report published by the National Enquirer), an attorney for Travolta and Atlo wrote to Gotterba and the Enquirer citing the confidentiality agreement and warning about possible litigation and liability for its breach. Gotterba then filed this declaratory judgment action, seeking a definitive ruling from the court about which of the alleged agreements was the contract between the parties. Atlo, arguing that Gotterba’s lawsuit was brought to try to stifle Travolta’s speech, filed the so-called SLAPP motion under a California statute, Code Civ. Proc. Sec. 425.16, concerning what is called a “strategic lawsuit against public participation.” Under this provision, if a defendant can show that a lawsuit has been brought not to vindicate a legal right of the plaintiff but rather to stifle the freedom of speech on a matter of public concern by the defendant, the court can dismiss the lawsuit. In this case, as the trial court ruled and the court of appeals affirmed, the lawsuit clearly was brought by Gotterba to establish his legal rights by ascertaining definitively whether his conduct is subject to a confidentiality agreement covering his alleged relationship with Travolta. While the lawsuit may have been triggered by the lawyers’ letters on behalf of Travolta and Atlo threatening litigation, it was not brought specifically to prevent the writing of trial demand letters. Unfortunately for celebrity gossip fans, the court’s opinion does not relate any juicy details about the alleged Gotterba-Travolta intimate relationship.

California – Judge Gloria Connor Trask of California’s Riverside Superior Court has ruled that California Baptist University’s academic programs are not subject to the state’s Unruh Civil Rights Act, which prohibits discrimination by businesses, and thus a claim by a transgender woman that her enrollment was cancelled when the school discovered her transgender identity was not actionable. Carbading v. California Baptist University, Case No. RIC1302245 (July 11, 2014). However, the court found that some of the ancillary activities of the University are public accommodations with no religious requirements for access, and as to those the University’s initial “exclusion” of the plaintiff from accessing any of its facilities did violate the law, meriting a token damage award of $4,000.00.

California – A gay anesthesiologist suffered summary judgment of several counts from this 13-count complaint arising from his discharge by Santa Clara Valley Medical Center, but U.S. District Judge William H. Orrick found that Dr. Luke Romero had stated a prima facie case of unlawful retaliation under Title VII and the First Amendment, allowing those claims to survive. Romero v. County of Santa Clara, 2014 U.S. Dist. LEXIS 94643, 2014 WL 3378628 (N.D. Calif., July 10, 2014). Romero first worked at SCVMC as a resident and was hired on staff in 2002, and was openly gay throughout his employment with SCVMC. He did not get along with Dr. King, the Director of Pediatric Anesthesia, who Romero alleges was homophobic, stemming from King’s early remark to him that he needed to look for employment in San Francisco to “be with his own kind.” Romero got into some controversies with King about patient care, and expressed concerns about King’s performance to other hospital executives. Prior to his expressions of concern, he had never been subjected to a peer review procedure due to a poor outcome of a patient, but after his complaints there was a string of peer reviews initiated by King and others. At the heart of Romero’s lawsuit is his allegation that various hospital officials used the peer review process to build a case against him. After repeated reviews and inquiries, and allegations (denied by Romero) that he had violated federal and hospital confidentiality rules, Romero took leave, complaining that he was suffering from job stress, and his own doctor recommended against his performing work or participating in some of the review process and investigations into his conduct initiated by others. By December 2012, the Anesthesiology Department Chair decided they could grant no more leave and directed Romero to report for work on December 3. When Romero did not report for work, he was terminated. His 13-count federal suit alleged federal and state discrimination and retaliation claims. Responding to pretrial motions, District Judge Orrick found that Romero had failed to allege facts sufficient to support his discrimination claims, but that the record facts to this point support his claims that peer review proceedings may have been retaliatory in response to his filing various complaints, and that the subject matter of his complaints may have rendered them subject to 1st Amendment protection. On the sexual orientation discrimination claim, there was no direct evidence apart from the early statement attributed to Dr. King (who had retired from the hospital well before the time period leading to Romero’s discharge), and there was no other evidence that Romero’s sexual orientation was a reason for his discharge or the alleged retaliatory actions. Under Judge Orrick’s view of the record, the retaliation had to do with the complaints Romero was filing, not due to his sexual orientation.

California – The Washington Post (Aug. 14) reported that Matthew Moore, a gay man, is suing Dr. Elaine Jones and the Torrance Health Association for intentional infliction of emotional...
distress and libel arising out of statements about his sexual orientation in his medical records. Moore saw Jones for the first time in April 2013 for a routine check-up, during which he was diagnosed with vitamin B-12 deficiency, high blood pressure and high cholesterol. Also entered on his medical record as a “chronic condition” was “homosexual behavior.” When Moore returned to the doctor’s office and was given a print-out of his record, he was shocked to see “homosexual behavior” noted as a “chronic condition.” “My jaw was on the floor,” said Moore. “At first, I kind of laughed, I thought, ‘Here’s another way that gay people are lessened and made to feel less-than,’ and then as I thought about it and as I dealt with it, it angered me.” According to Moore, when he questioned Dr. Jones she told him that there was still debate in the medical profession about whether homosexuality is a disease. He complained to Jones’s employer and received a written apology and disclaimer from Torrance Health Association, which stated that their physician network “does not view homosexuality as a disease or a chronic condition, and we do not endorse or approve of the use of Code 302.0 as a diagnosis for homosexuality.”

It seems that in the computer software for maintaining medical records, an obsolete reference to homosexuality as a disease or a chronic condition, and we do not endorse or approve of the use of Code 302.0 as a diagnosis for homosexuality.”

COLORADO – The Civil Rights Division of the Colorado Department of Regulatory Agencies has concluded that The Wrangler, a popular gay bar in Denver, had violated the state’s human rights law by discriminating against transgender and cross-dressing individuals, finding that beyond the individual complaint being investigated the bar had a history of discriminating against women and effeminate men. The agency specifically found that the bar violated the public accommodations law on August 31, 2013, by denying entry to Vito Marzano, who showed up at the bar, according to a summary in the Denver Post (Aug. 4) wearing a dress, a wig, makeup and high heels after having attended a drag show. The bouncer refused to let him in, claiming that his identity could not be verified through his ID. The bar defended based on its obligation to enforce the age limits on drinking, which required it to have a strict door policy requiring proof of age. The owner of the bar contested some of the agency’s findings, including that of discrimination against women. The bar also cited its dress code policy. The Director of the Civil Rights Division, Steve Chavez, conceded in his written decision that the policies “appear legitimate and nondiscriminatory” on their face, but, he concluded, “the evidence indicates that the [bar] uses its policies to select patrons whose appearance is masculine, whether or not they are male or female, for entry into its club.” The decision mandates mediation between Marzano and the bar.

COLORADO – On July 16, Jack Phillips petitioned the Colorado Court of Appeals to review a ruling by the Colorado Civil Rights Commission that he had violated the state’s public accommodations law when his business, Masterpiece Cake Shop, refused to prepare a wedding cake for a same-sex couple. The couple was planning to get married out of state, since Colorado does not yet have marriage equality, but they wanted to have a celebration of their wedding closer to home. Phillips said he would not prepare a wedding cake from them because of his religious objections to same-sex marriage, and he has argued that the 1st Amendment shields him from having to provide this service. An administrative law judge for the Commission ruled against him, and was upheld in May by the Commission. Associated Press, July 17.

CONNECTICUT – Claiming that she was perceived as being a lesbian and that this was why she was terminated, a Title VII plaintiff lost her case when the court could find no factual allegations tying her sexual orientation to any particular adverse action. McKibben v. ODD Fellows Health, Inc., 2014 U.S. Dist. LEXIS 101611 (D. Conn., July 25, 2014). Plaintiff Katherine M. McKibben, who worked in a nursing home in Groton, informed management that she had seen a co-worker slapping a patient and pouring cold water over his head. After she submitted her complaint, which the company evidently showed to the other employee, that employee charged McKibben with sexual harassment – of which there is not a whiff in any workplace records. Rather than follow its usual confrontation policy, the company did not investigate or allow McKibben to confront her accuser before it fired her. Throwing out her Title VII claim, U.S. District Judge Janet C. Hall noted 2nd Circuit precedent that sexual orientation discrimination claims are not covered under Title VII, but, even if they were, “McKibben does not begin to state a claim of this kind here. She merely makes bald assertions that individuals at her place of employment spread rumors about her sexuality and then states in conclusory fashion that she was fired because of her perceived sexual orientation.” No go in the 5th Circuit, evidently. The court found many of her claims time-barred, in
any event, and having disposed of all federal law claims in this diversity case, informed McKibben that her state law claims would be dismissed as well.

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**FLORIDA** – The Florida Supreme Court denied review in *Matter of Adoption of D.P.P.; G.P. v. C.P.*, 2014 WL 2109130 (Fla. 5th Dist. Ct. App., May 21, 2014), review denied, Aug. 11, 2014. The court of appeal reversed a judgment of the Seminole County Circuit Court voiding an adoption by a lesbian co-parent of a child she had been raising with her former partner. The court of appeal said that the birth mother was estopped from invoking the jurisdiction of the Superior Court to void the adoption, which had taken place with the mutual consent of the parties when they were living together and jointly raising the child. The court did not see a split-up by the parents as grounds for voiding an adoption that had been actively sought by the birth mother when the couple was together.

**FLORIDA** – U.S. District Judge James S. Moody, Jr., granted defendant Cracker Barrel’s motion for summary judgment in an employment discrimination case brought by John Bostick, a gay man who alleged that he had been subjected to a hostile environment because of his sexual orientation and was discriminatorily discharged. *Bostick v. CBOCS, Inc.*, 2014 WL 3809169, 2014 U.S. Dist. LEXIS 105478 (M.D. Fla., Tampa Div., Aug. 1, 2014). Bostick, who alleges that his supervisors at Cracker Barrel knew he was gay, began with the company in September 2008 as an Associate Manager in Training at the store in Anderson, South Carolina, where he completed most of his training and received satisfactory ratings. He was transferred at his request in February 2011 to a store in Bradenton, Florida, coming out to his new managers during the transfer process. He cited various comments by supervisors as being homophobic, and complained about them to management. At the same time, he received write-ups for alleged deficiencies in his performance. His discharge came shortly after he contacted the company’s Employee Relations Department to complain about harassment and discrimination by his supervisors. He sued under Title VII and the Florida Civil Rights Act, neither of which expressly forbids sexual orientation discrimination. Judge Moody, agreeing with Cracker Barrel, found that Bostick’s discrimination claims were based on his sexual orientation and, as such, were not actionable under Title VII. “Notably,” wrote Moody, “because the law is clear that harassment based on sexual orientation is not prohibited by Title VII, Bostick’s retaliation claim would also fail as a matter of law because Bostick could not have held an objectively reasonable belief that the conduct he complained of was unlawful.” Moody also found that the “sporadic comments” upon which Bostick relied for his hostile environment claim “are woefully insufficient to establish a hostile environment.” In opposing summary judgment, Bostick’s counsel, Antonios Poulos, tried to repurpose the case as a sex discrimination case, arguing that Bostick would not have been subjected to the alleged adverse treatment were he not male. Judge Moody wasn’t buying this, asserting that Bostick had first raised the idea of sex discrimination in opposition to the summary judgment motion, and that “the record is clear that the conduct a proper step-three inquiry, since he fundamentally misunderstood the applicable regulations. And even rejected the theory that “all gay men fail to comply with male stereotypes simply because they are gay,” since that would effectively amend Title VII to ban sexual orientation discrimination. Finally, Moody concluded that even if Bostick’s claims were actionable, he had failed to show that the reason cited for his discharge was pretextual, inasmuch as he had conceded the accuracy of criticisms of his work. “Bostick does not point to anything specific that was incorrect or false, other than Bostick’s belief that the Reports and his termination were premised on his sexual orientation. Bostick’s own evaluations and opinions about his ultimate termination are insufficient to establish pretext,” wrote Moody.

**GEORGIA** – Correcting a “fundamental legal error” committed by a Social Security Administrative Law Judge, U.S. Magistrate Judge George R. Smith issued a Report and Recommendation in *Drummond v. Colvin*, 2014 WL 4199162 (S.D. Ga., Aug. 25, 2014), reversing the denial of disability benefits to a man suffering from HIV infection and hypertension. According to Judge Smith, the ALJ mistakenly ruled: “Claimant’s impairment does not meet Listing 14.08(D)(2) because he does not even have actual AIDS, per labs on CD4 count (Exhibits 1F and 4F). The nurse practitioner’s comment stating that the claimant has AIDS does not make it so when objective labor reports show otherwise.” “The ALJ committed a fundamental legal error by grafting onto the HIV listings a requirement that the claimant suffer from ‘actual AIDS,’” wrote Judge Smith. “By adding that requirement, the ALJ was unable to determine properly whether claimant met or medically equaled a listed impairment.” This meant that the ALJ “failed to conduct a proper step-three inquiry, since he fundamentally misunderstood the applicable regulations. And even
though it appears from the record that Drummond is unlikely to meet any of the other HIV-related listings, this Court is not authorized to engage in a post hoc analysis creating reasons out of whole cloth to support the ALJ’s conclusion, especially where the ALJ so plainly misconstrued the applicable regulations.” Thus, the case had to be remanded to the Commissioner for further consideration.

HAWAII – Now pending before the Hawaii Intermediate Court of Appeals is an appeal from a trial court ruling that Aloha Bed & Breakfast unlawfully discriminated against Diane Cervelli and Taeko Bufford, a lesbian couple, by refusing to provide them with accommodations because of their sexual orientation and relationship. Reacting to the Supreme Court’s Hobby Lobby case, counsel for the appellant submitted a letter to the court on August 4, explaining the inapplicability of the Hobby Lobby ruling to a state court proceeding. Hobby Lobby concerned a construction of a federal statute, not the constitution, and applies only to restrict the application of federal laws in certain cases. Setting that aside, however, the letter argues that the Supreme Court purported to rule narrowly in Hobby Lobby about an employer’s religious objections to funding certain medical treatments, and specifically stated that its decision would not provide a “shield” for discrimination, even if “cloaked as religious practice.” Although the Supreme Court specifically referenced race discrimination in this comment, the letter argued that this was merely an example, noting that there is no less restrictive alternative for the state to achieve its goal of banning discrimination by places of public accommodation. The letter also distinguished arguments made by the other side, and pointed out that allowing religious exemptions in the context of this case would undermine the policy behind the discrimination law. The case is Cervelli v. Aloha Bed & Breakfast, Case ID CAAP-13-0000806.

ILLINOIS – Finding that there was no dispute of material fact that the plaintiff was discharged from her position as a loss prevention detective because she was violating the company’s customer apprehension guidelines, U.S. District Judge Marvin E. Aspen dismissed a claim that the employer had discriminated because of the plaintiff’s sexual orientation in violation of the Illinois Human Rights Act. Hall v. T.J. Maxx of Illinois, 2014 U.S. Dist. LEXIS 107659, 2014 WL 3860306 (N.D. Ill., Aug. 6, 2014). The court found that a few stray references to the plaintiff’s sexual orientation by one employee were not sufficient to build a discrimination case against the employer, in light of the uncontested evidence that there were sufficient grounds for discharge. The plaintiff failed to show that there were any similarly-situated employees who were treated differently from her. The court found that her proffered comparators were not comparable.

ILLINOIS – Energy giant Exxon Mobil, headquartered in Illinois, is one of the largest corporations to resist adopting an explicit policy against anti-gay workplace discrimination. The company has insisted that it does not discriminate based on sexual orientation, but has refused to add the words to its policy and has vigorously fought back against shareholder initiatives on the subject. The non-profit group Freedom to Work decided to mount a campaign to demonstrate that Exxon Mobil does discriminate. It sent paired resumes in response to Exxon Mobil job postings in Illinois; the resumes in each pair had somewhat comparable qualifications and background experience, but one resume in each pair contained information from which hiring decision-makers could conclude that the applicant was gay and was more qualified than the heterosexual applicant. Freedom to Work documented that Exxon gave “substantial preference” to heterosexual job applicants over gay applicants with better qualifications when it came to responding to applications and scheduling interviews. Based on these findings, Freedom to Work filed a complaint with the Illinois Human Rights Department, alleging a violation of the state’s ban on sexual orientation discrimination in employment. The Human Rights Department recommended dismissing the charge, finding a lack of standing because Exxon had not actually refused to hire anybody because of their sexual orientation but merely failed to contact applicants or schedule interviews. But the Human Rights Commission determined that Freedom to Work’s findings were sufficient to justify a Department investigation of Exxon Mobil’s hiring practices and rejected the recommendation to dismiss the case, in Response to Request for Review dated July 3, 2014 and reported August 7 by VerticalNews, 2014 WLNR 20968082. Of course, the stakes on this were raised recently by President Obama’s federal contractor executive order, described in our lead story this month. Exxon Mobil is a major federal contractor and as its contracts come up for renewal, it will be required to sign new contracts that include a requirement not to discriminate because of sexual orientation. Proof that such discrimination is taking place could be a significant detriment to Exxon Mobil’s business.

ILLINOIS – A psychologist contracted by the Illinois Department of Human
Services to evaluate the degree of risk presented by a committed sex offender does not enjoy absolute immunity from a federal lawsuit by the offender charging that the evaluator deliberately falsified his report because of the offender’s sexual orientation, ruled U.S. District Judge Edmond E. Chang in Brown v. Smith, 2014 U.S. Dist. LEXIS 96268, 2014 WL 3511487 (N.D. Ill., July 16, 2014). David Brown had been convicted of a sexually violent offense and was sentenced to three years in prison and a consecutive term of 2.5 years of probation. Just prior to his mandated supervised release date, the State filed a petition to have him adjudged as a “sexually violent person” (SVP), which would block his release. An Illinois state court found probable cause to believe he was an SVP in January 2000, which should have triggered a trial on the merits within 120 days, but for reasons not explained by the court, Brown didn’t receive a trial until March 2007, after which the court declared him an SVP and had him committed. The state law requires that a written report be generated on a committed SVP’s condition at least once every twelve months, to determine whether it is safe to release him. In this lawsuit Brown alleges that the psychologist contracted by the state, defendant Edward Smith, responded to Brown’s challenge of inaccuracies in his evaluation by stating, “I’m not changing nothing. I will do whatever is necessary to make sure you never get out. You homosexuals are a plague, you’re a disease, you cause more harm to society than anything else.” Judge Chang agreed with Brown that Smith was not entitled to absolute immunity, even though he was contracted to perform a governmental function, because he was not acting as a judicial officer or an appointee of the court.

MINNESOTA – Chris Kluwe, former punter for the Minnesota Vikings NFL football team, was threatening to bring a discrimination suit against the Vikings, claiming they let him go because of his outspoken advocacy for gay rights and marriage equality. The team claims he was let go because his performance was slipping, but Kluwe argued that his stats for the most recent season were near his normal numbers. Kluwe also alleged that Special Teams Coach Mike Priefer had made inflammatory anti-gay remarks, most notably: “We should round up all the gays, send them to an island, and then nuke it until it glows.” The Vikings commissioned an “independent investigation” into Kluwe’s charges, but then refused to release the full report by the investigators, instead making public an “executive summary” in which Priefer admitted making the statement but said it was “a joke between three men.” Kluwe’s litigation threat included an attempt to get the full report released. However, Kluwe and the team reached a settlement agreement under which the Vikings will make a substantial financial donation to gay charities, enhance sensitivity training and enforcement a zero tolerance policy for discrimination in its club code of conduct. The Vikings also agreed to sponsor a national symposium bringing together LGBT leaders and professional athletes in the spring next year. Priefer will be suspended for three games for his remarks, but the team could reduce the suspension if he completes a sensitivity training program. Kluwe receives no money under the settlement. Argus Leader (Sioux Falls, S.D.), Aug. 20.

NEW JERSEY – The family of DeFarra Gaymon, who was shot and killed by an undercover police officer in Newark’s Branch Brook Park in 2010, has reached a settlement in their civil rights lawsuit against the Essex County Sheriff’s Department. Gay City News (July 29) reported that the federal case was settled for $1.5 million, with counsel for the plaintiffs to receive approximately one third of the settlement, the remaining amount to be divided among Gaymon’s widow and children. Gaymon, who was unarmed, had driven from Atlanta to attend a high school reunion, and was shot in the park by Deputy Sheriff Edward Esposito, who was engaged in a sex sting operation targeting gay men. Esposito claimed that Gaymon exposed himself and became aggressive when Esposito attempted to arrest him. Garden State Equality, New Jersey’s state LGBT lobbying group, obtained police records showing a pattern of violence during sex-sting arrests by Esposito, and the family claimed that
this was a murder case. It was reported that the county spent nearly $700,000 defending the case, on top of the costs of settlement, retaining law firms to represent the county, Esposito and other officials in the federal action. The county blamed its liability insurer for the county, Esposito and other officials in the federal action. The county blamed its liability insurer for

NEW YORK – New York County Surrogate Judge Rita M. Mella has resolved a dispute about construction of the last will and testament of Francesco Scavullo, a “renowned fashion photographer” who died age 82 on January 6, 2004, leaving an estate valued at approximately $3.7 million.

Scavullo was survived by his domestic partner, Sean Byrnes, and the dispute concerns whether Byrnes is entitled to half of the tangible personal property left by Scavullo, or rather is entitled to the net income generated by such tangible personal property (photographs, negatives, and transparencies) held in trust, the principal to be distributed to Scavullo’s siblings upon Byrnes’ death. Mella found the will to be contradictory, but applied canons of interpretation to resolve the contradiction in favor of the trust approach. In particular, she noted that when two provisions are in conflict, the later provision must be given effect, and that the earlier provision prevail made the later provision a nullity.

NEW YORK – It’s not over until it’s really, really over. On March 27, 2014, the New York Court of Appeals affirmed a decision by the Appellate Division, 1st Department, holding that H. Kenneth Ranftle died a New York domiciliary, thus his marriage to J. Craig Leiby was recognized and the Probate Court was not required to notify his surviving blood heirs in order to finalize his estate.

In the Matter of H. Kenneth Ranftle, Decedent; Ranftle v. Leiby, 22 N.Y. 3d 1146, 984 N.Y.S.2d 287. The court thus affirmed rejection of the argument by Ronald Ranftle, a surviving brother, that he and another brother must be notified and allowed to participate in the probate proceedings because of Kenneth’s connections to and residence in Florida, where the marriage was not recognized. Unwilling to give up, Ronald Ranftle filed a petition for certiorari with the U.S. Supreme Court on June 25, arguing that the state court rulings denied him equal protection of the laws. Ranftle v. Leiby, No. 14-128. This one sounds like a real long-shot for a grant of certiorari, but who knows? Spin the dice?

NEW YORK – Quarreling former same-sex partners had lawsuits pending in New York Supreme Court, Erie County, and U.S. District Court. The Plaintiff, Thomas B. Akers, filed the state law claim “seeking to unwind the parties’ legal affairs,” wrote U.S. District Judge Richard J. Arcara in Akers v. Barrett, 2014 WL 3778591, 2014 U.S. Dist. LEXIS 104389 (W.D.N.Y., July 30, 2014). After the state law case had been pending for about a year-and-a-half, in the discovery phase, plaintiff filed a federal Title VII action, alleging discrimination due to his sexual orientation and his “intimate relationship with [his] direct supervisor, the President of the defendant corporations.” His ex-partner, John Michael Barrett, defendant in the state law action, sought to remove the state law case to federal court to join it to the discrimination case, arguing that the two cases arose out of the same “nucleus of operative facts.” Judge Arcara granted plaintiff’s motion to remand the case back to state court, agreeing with plaintiff that the state law case was no removable because it presented no federal question. Arcara pointed out an elementary lesson in civil procedure and federal practice; to be removable based on the subject matter, a state court proceeding must raise federal questions, not just supplementary state law claims arising from the same facts.

Arcara noted that the state law case might have been alternatively removable under diversity jurisdiction, since the former partners reside in different states now, but such removal must be effected within thirty days of the filing of the complaint in state court, a deadline long since past.

Having found that there was no basis for removal, Arcara also ordered defendant to compensate plaintiff for the costs, expenses and attorneys fees he incurred in opposing the removal.

NEW YORK – Bradley Beeeny is suing InSightec, Inc., a Delaware corporation headquartered in Texas that is a global manufacturer of advanced technological equipment, alleging sexual orientation discrimination in violation of the New York City Human Rights Law as well as claiming unpaid wages due under the Fair Labor Standard Act. Beeeny v. InSightec, Inc., 2014 WL 3610941 (S.D.N.Y., July 7, 2014). In February 2013 Beeeny was hired by Insightec to work in its Dallas office, requiring him to move to Dallas, but he was permitted to work remotely from New York while
he searched for housing in Dallas. After he accepted the employment offer, Beeney went to Texas for on-site orientation. He claims that while he was there, one of the InSightec employees learned that he was gay, and her attitude to him immediately changed. He alleged various problems arose during the time he was working remotely from New York, and that while he was on a client visit in Virginia, and InSightec employee who was there told him he did not think that Beeney “fit into the company’s ‘culture,’” that he knew he should be more ‘politically correct’ but did not care, and that ‘if he were him, he would be looking for another job.”’ After the laptop sent to Beeney stopped working, he contacted the first employee and asked if he could come to the Dallas office to work, but was told not to, and shortly thereafter that employee told Beeney she was recommending his discharge, which followed shortly thereafter. Beeney sued the company and the two individual employees. In a ruling on July 7, U.S. District Judge George B. Daniels dismissed the claims against the individual employees on their motions, finding that they were never present or doing business in New York and were not amenable to the court’s jurisdiction. The case against the company continues. The case is in federal court under federal question jurisdiction (the Fair Labor Standards Act claim) with the NYC Human Rights Law claim under supplementary jurisdiction. Presumably some question might be raised whether the company is subject to the NYC Human Rights Law when hiring for its Dallas office, but since it was employing Beeney remotely in New York at the time the discharge took place, that shouldn’t be an issue.

NEW YORK – A person who published an account of riding on a Greenwich Village bus tour during which he claimed that employees of the tour company tourists on the bus to scream the line “not that there’s anything wrong with that” did not defame the proprietor of the tour company, ruled N.Y. Supreme Court Justice Barbara Jaffe in Kramer v. Skyhorse Publishing, Inc., 2014 WL 3583822, 2014 N.Y. Misc. LEXIS 3194 (Sup. Ct., N.Y. Co., July 14, 2014). Kenny Kramer, the plaintiff, known as the inspiration for the character Cosmo Kramer on the old Seinfeld television show, is principal agent of Kramer Reality Tours, hauling tourists on buses to New York City locations portrayed on that program. The defendant published a memoir by co-defendant Fred Stoller, a former Seinfeld staff writer and occasional guest star, who wrote in the memoir that he had been “pained” when going along on a tour bus and hearing the tour guide “make everyone scream out, ‘not that there’s anything wrong with that!’” when the bus went through Greenwich Village, quoting from an episode of the show when Seinfeld and another character were “outed” as gay by a student journalist, but stoutly denied they were gay, saying “not that there’s anything wrong with that.” “To determine whether Stoller’s statement in the book is reasonably susceptible of being interpreted as a depiction of plaintiffs taunting members of the gay community,” wrote Justice Jaffe, “plaintiff’s employee’s conduct must be reasonably susceptible of being anti-gay, or homophobic. And, as the defamatory content of the statement depends in large part on the Seinfeld episode and catch phrase, ‘Not that there’s anything wrong with that!’” Justice Jaffe found that the phrase from within a large tour bus wending its way down tiny streets in Greenwich Village may reasonably reflect homophobia, nowhere does Stoller depict any pointing and he never uses the term ‘taunting.”’ Concluded Justice Jaffe on this point, “In any event, that some readers may nonetheless infer from Stoller’s statements that plaintiffs are homophobic does not render the inference reasonable under the circumstances, and in opposing this motion, plaintiffs do not explain how, given its context, Stoller’s statement constitutes an accusation that they were taunting gay people.”

PENNSYLVANIA – A former employee of Pennsylvania Steel Company, Inc., survived a motion to dismiss his Title VII and Pennsylvania Human Rights Act sex discrimination and retaliation claims in Barrett v. Pennsylvania Steel Company, Inc., 2014 U.S. Dist. LEXIS 98465, 2014 WL 3572888 (E.D. Pa., July 21, 2014). District Judge Thomas M. O’Neill, Jr., found that the plaintiff had alleged facts sufficient to sustain a hostile environment sexual harassment complaint. He alleged that he was harassed for failing to engage in the crude conduct typically expected of
men in a steel manufacturing plant, that the language used against him supported the claim that he was being harassed because he was perceived as not sufficiently masculine in demeanor and conduct, and that the harassing conduct was frequent and continuous. His complaints to management brought no relief from the harassment. A manager told him to lock his office door if he didn’t want to be disturbed, but this led to a disruptive incident on top of a string of others, and he was eventually fired for being the “common denominator” (i.e., the victim) in several disruptive workplace incidents. Judge O’Neill found the basis for both a sexual harassment claim and a retaliation claim arising from these factual allegations, refusing to dismiss either count of Barrett’s complaint. If Barrett’s factual allegations are accurate, this sounds like a case of woefully incompetent and ignorant management on the part of the company, whose leaders could use a remedial course in modern American employment discrimination law. Although neither Pennsylvania nor the federal government prohibits sexual orientation discrimination by statute, developments in sex discrimination law over the past two decades have made this kind of case clearly actionable, potentially subjecting the company to significant financial exposure should it get to a jury.

**SOUTH CAROLINA** – A woman who was discharged from her position as a counselor after a patient complained about her conduct lost her subsequent hostile environment and retaliation case under Title VII in *Askins v. Point*, 2014 U.S. Dist. LEXIS 112737, 2014 WL 4063036 (D. S. Car., Aug. 14, 2014). Among other things, the plaintiff claimed that some female co-workers had shown her pornography and touched her inappropriately. The court noted that in a same-sex hostile environment harassment case, a plaintiff was given three options under the Supreme Court’s *Oncale* decision to state a cause of action: they could show that the harasser was gay and made “explicit or implicit proposals of sexual activity,” that the harasser was motivated by general hostility to members of the same sex in the workplace, or that the harasser treated men and women differently. District Judge R. Bryan Harwell affirmed a magistrate judge’s finding that Askins had fallen short on all three. “Plaintiff has not provided any credible evidence that either Defendant Roundtree or Defendant Quenault was homosexual,” he wrote. “Plaintiff asserts that they were having a lesbian relationship, but provides insufficient proof of this aside from her own subjective beliefs. In any event, Plaintiff has not set forth allegations that these Defendants made any explicit or implicit proposals of sexual activity. Moreover, as to the second scenario, the Court finds that Plaintiff has not set forth any allegations or provided any evidence demonstrating Defendant Roundtree or Quenault maintained a ‘general hostility’ to women being present in the workplace.” She also never alleged differential treatment because of sex in the mixed-sex workplace. Thus, the court concluded that she hadn’t shown that any harassment she claimed to have suffered was “because of her sex” in violation of Title VII. The court also found her allegations fell short of the required showing that harassment was “severe and pervasive.” In her deposition, she claimed that she has “had lesbians hit on me at every job I’ve been to,” that she gets hit on by lesbians “just about all the time, more than two or three times a week,” and that men also hit on her “all the time.” Sounds like equal-opportunity hitting upon…. The court recalled Justice Scalia’s comment in *Oncale* that Title VII does not enact a general civility code for the workplace.

**UTAH** – Last December U.S. District Judge Clark Waddoups ruled in *Brown v. Buhrman*, 947 F. Supp. 2d 1170 (D. Utah 2013), that Utah’s criminal law against polygamy was unconstitutional to the extent that it purported to outlaw unmarried cohabitation apart from plural marriage. Relying on a host of sexual privacy cases, including *Lawrence v. Texas*, the court found that the Due Process Clause would protect the liberty of a man to cohabit with his wife and additional women, as in the case at hand, and that to save its constitutionality the statute should
be narrowly construed to apply to situations where somebody attempts to marry more than one spouse at a time. In a memorandum and judgment issued on August 27, 2014, with the new case name of Brown v. Herbert, Judge Waddoups found that the defendants had waived any claim of qualified immunity or prosecutorial immunity in the case by failing to raise those defenses in a timely manner. However, the plaintiffs had withdrawn their demand for damages to compensate them for injuries or expenses incurred during the criminal investigation of their living arrangements that had provoked the filing of this action against state officials, seeking only equitable relief. Thus, the court issued a declaratory judgment and injunction concerning enforcement of the statute and awarded to the plaintiffs, as prevailing parties, attorney’s fees, costs, and expenses incurred in the action. The next step for plaintiffs would be filing an application for the specific amount they would be claiming.

CRIMINAL LITIGATION NOTES

U.S. COURT OF APPEALS, 8TH CIRCUIT – A prison term that reflects an anti-gay extortion scheme that extended over more than a year was affirmed, but a restitution order that reflected the same period of time was reversed, in United States v. Howard, 2014 WL 3511798, 2014 U.S. App. LEXIS 13640 (July 17, 2014). Defendant Justin Lee Howard contacted the victim, D.D., a closeted gay professional, through LifeOut.com, a gay social networking site, in June 2011. After some correspondence, Howard began asking D.D. for money, which D.D. began sending. Most of Howard’s repeated requests referenced D.D.’s job, which led D.D. to fear that if he didn’t send money Howard would “out” him to his employer. When D.D. had given Howard all his money, Howard mentioned that he had nude photographs of D.D. At this, D.D. decided to go to law enforcement. By then he had sent $53,625.25 to Howard. Howard made additional threats on July 16, 2012, and D.D. then sent him $100 that had been provided by law enforcement. On July 17 D.D. told Howard there was no more money coming, and Howard demanded that D.D. take out a loan against his car. When D.D. refused, Howard expressly threatened to take action against him, specifically saying he would contact D.D.’s secretary. The secretary then received a photo of D.D. with the words “Sky Jock.” Howard also threatened to contact D.D.’s family, employer and co-workers, and sent faxes to D.D. while D.D. was at a work retreat. Howard continued making threats through July 27, 2012, but D.D. sent no more money. Howard was indicted for extortion. The indictment specifically referenced conduct from July 16 through July 27, 2012. Howard pled guilty, and was sentenced to 21 months in prison, a year of supervised release, and restitution to D.D. of $53,625.25. Howard appealed the sentence, claiming that the court should not have taken account of his conduct prior to the dates specified in the indictment in its application of the sentencing guidelines, but the court of appeals rejected this argument, finding that the federal extortion statute authorized the sentencing court to take account of conduct preparatory to commission of the extortiionate acts charged in the indictment in calculating the sentence. As to the restitution claim, however, the court agreed with Howard that he could only be required to return to D.D. money extracted by the extortiionate act charged in the indictment, thus reducing the restitution award to $100, the amount given during the charged time period. Sounds like a Catch-22 situation to us. Why didn’t the prosecutor seek an indictment for the full period of time during which Howard’s extortiitation demands took place?

U.S. AIR FORCE COURT OF CRIMINAL APPEALS – An openly gay service member who was convicted at a court martial of wrongful sexual contact and sentenced to 30 days confinement, reduction in grade, and a bad conduct discharge, was not entitled to have excluded from the jury an officer who stated that she believed homosexual conduct could be perceived as immoral and who belonged to a church that condemned homosexual conduct on moral grounds, or to have excluded evidence that he had engaged in similarly uninhibited conduct in the past. United States v. Sutton, 2014 CCA LEXIS 610 (U.S. Air Force Ct. Crim. App., Aug. 21, 2014). The appeals court was satisfied with the challenged juror’s statement that she could impartially decide the case based on the facts and the law, and that the evidence of past misconduct was relevant and not sufficiently prejudicial. The court martial trial took place one year after the Defense Department ended the don’t ask, don’t tell policy. The defendant was an openly gay student at the Defense Language Institute who, to judge by the court’s narrative of the evidence, had trouble keeping his hands to himself around people he found sexually attractive. The incidents described involved groping or touching clothed individuals who were upset enough to complain, and it seems that the defendant’s real offenses were more on the order of bad judgment than serious sexual offenses. Perhaps this case can be put down to difficulties and misunderstandings incident to the changes in policy leading to service by openly gay personnel.

CALIFORNIA – A jury verdict convicting a woman of charges of sexually abusing a girl for whom she was babysitting had to be reversed because the prosecutor harped on the defendant’s sexual orientation during closing argument, ruled the California 4th District Court of Appeal in People v. Garcia, 2014 WL 388
CRIMINAL LITIGATION

4247729, 2014 Cal. App. LEXIS 785 (Aug. 28, 2014). A mother contacted law enforcement after she returned him to discover the babysitter on top of her daughter while the other kids were watching TV; the daughter told police she had been repeatedly abused by the sitter. This incident occurred in 1995, but for various reasons Garcia was not formally charged until 2011, and the trial occurred in 2012. At trial, the defense asked the judge to rule out any evidence of the defendant’s lesbian sexual orientation as prejudicial and irrelevant. The judge agreed, and sustained several objections along the way, but rejected a motion for mistrial during the evidentiary stage after the prosecutor overstepped a bit in questioning. However, having avoided getting the case dismissed, the prosecutor apparently threw caution to the winds and went over-the-top on her closing argument, suggesting to the jury that a lesbian babysitter was more likely to abuse a girl. The jury convicted, and the judge sentenced the defendant to 16 years. Writing for the court of appeal panel, Judge William Bedsworth did not fault the trial judge’s denial of the mistrial motion, but concluded that the prosecutor’s closing argument had fatally tainted the trial. He found that “by linking appellant’s sexual orientation to the issue of motive, the prosecutor essentially told the jury the reason appellant chose to victimize A.G. is because she is gay. We have grown beyond that notion. “The modern understanding of pedophilia is that it exists wholly independently from homosexuality,” he continued, quoting from a 2004 Ohio case. And, from the same source, “The existence or absence of one neither establishes nor disproves the other.” “Trying to draw a connection between a child molester’s sexual orientation and a preference for children of one gender or the other is problematic to the point of counterproductivity,” continued Bedsworth. “That being the case, we do not believe the evidence of appellant’s sexual orientation was relevant to her prosecution.” And, concluding, “On this record, we do not believe the evidence and argument concerning appellant’s sexual orientation can be said to be harmless beyond a reasonable doubt. The judgment against her must therefore be reversed. Due process and the interests of fairness dictate that appellant be judged by what she did, not who she is. Nothing less will do.” Garcia was represented on appeal by appointed counsel, Robert L.S. Angres.

MARIANA ISLANDS – The Supreme Court of the Commonwealth of the Northern Mariana Islands rejected a criminal defendant’s argument that her prosecution for prostitution activities was precluded by the U.S. Supreme Court’s ruling in Lawrence v. Texas. Commonwealth v. Taman, 2014 N. Mar. I. LEXIS 13, 2014 WL 4050021 (Aug. 14, 2014). Her constitutional argument was grounded in due process (Lawrence) and equal protection, alleging discriminatory application of the law against women. Justice Manglona wrote, “First, we are not persuaded that Lawrence created a liberty interest making prostitution laws unconstitutional. Lawrence overturned a statute criminalizing homosexual sodomy; recognized a due process liberty interest in private consensual sex; and concluded that moral disapproval is not an adequate basis for criminalizing conduct. However, Lawrence offers no basis to invalidate laws on prostitution. While some courts have interpreted Lawrence as extending beyond sodomy, Lawrence has not been interpreted as creating a liberty interest that invalidates prostitution laws,” citing a string of decisions to that effect. “Because there are non-morality based justifications for criminalizing prostitution, Taman’s argument that Lawrence’s prohibition on morality-based laws precludes criminalization of prostitution is unpersuasive.” On this point, the court noted a 5th Circuit ruling, Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (2008), which cited “promoting public safety and preventing injury and coercion.” Turning to the equal protection argument, the court stated that Taman had provided no evidence that prosecutions “almost exclusively focus on women, specifically Chinese women,” saying that she asks the court to take judicial notice of that without proof. “This we cannot do,” wrote Justice Manglona. “We can only take judicial notice of facts that are free of reasonable dispute because the facts are ‘generally known’ or ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’ Applying this rule, the information about race and gender of prostitution prosecutions is not subject to judicial notice... Without such evidence, we cannot conclude Sec. 1343 is applied discriminatorily.” Most the opinion is devoted to reviewing the factual evidence supporting the prosecution of Ms. Taman, who claims that she did not violate the law.

MICHIGAN – And still they come… Several times each year we see a court decision rejecting a claim, usually in the context of a habeas corpus proceeding, that a man was unconstitutionally convicted of incest for having consensual, private sex with his adult niece or step-daughter. The convicted defendant argues that the incest statute was unconstitutional as applied to him under Lawrence v. Texas, since it was private consensual sex between adults. The courts always respond that Lawrence is limited to homosexual sex and did not create a generalized fundamental right for adults to engage in consensual sex. And so it goes.... For the latest rendition, see Perry v. Berguis, 2014 WL 3500386, 2014 U.S. Dist. LEXIS 95110 (W.D. Mich., July 14, 2014). Mr. Perry’s niece was 22 years old at the time of the incident for which he was prosecuted. Odd as it is, sometimes these habeas...
petitioners are even represented by counsel, champions of lost causes. The idea that any court is going to find incest laws unconstitutional, either facially or as applied, seems laughable. But, we suppose, stranger things have happened, and hope springs eternal in the breast of the man who loves his niece or step-daughter a bit too much.


Weinstein noted that the maximum term under the sentencing guidelines for this offense is ten years with a maximum fine of $250,000, but he sentenced the man to time served and three years of supervised release, with a special assessment of $100. He explained that he imposed no fine because Evbade has no assets. “Evbade committed visa fraud,” wrote Weinstein. “This is a serious but aberrant offense. Defendant has no prior criminal history. Evbade is a 37-year-old citizen of Nigeria with a high school education. He identifies as gay. His crime was motivated by an attempt to escape harassment in his home country as a result of his sexual orientation. He is afraid to return to his village for fear of violence; his partner returned to the village and was killed because of his perceived sexual orientation. Evbade also had a strained relationship with his parents, who disapprove of the fact that he has not married a woman. He has created distance between himself and his family in order to keep his sexual orientation a secret. A Guidelines sentence of time served plus three years supervised release reflects the seriousness of the offense and will promote respect for the law and provide just punishment.” Weinstein also commented that the defendant had “expressed genuine remorse” and that it is “unlikely that he will engage in further criminal activity.”

OHIO — Although he expressed some doubts about Ohio’s 1996 HIV exposure law during a hearing, Cuyahoga County Judge Stuart Friedman issued an opinion on August 25 holding that defendant Rev. James McGonegal, who is HIV-positive, can be tried on a felony charge under the statute for soliciting a male park ranger for sex. State v. McGonegal.

Under the statute, an HIV-positive person who solicits another for sex without disclosing his HIV-status can be convicted of a felony. Without the complicating factor of HIV infection, the charge would only be a misdemeanor. Rev. McGonegal’s attorney had moved to dismiss the felony charges, arguing that the statute is constitutionally defective, based on outdated medical information. According to press reports, Ohio is one of 34 states that still make it a felony for HIV-positive people to solicit sex without disclosing their status. As is common with these statutes passed at that earlier stage of the HIV epidemic, the law fails to take account of current information on how the likelihood of HIV transmission, especially if an individual is adherent to antiretroviral therapy that may reduce the virus to undetectable status and almost totally prevent transmission. According to press reports, Friedman’s unpublished decision concedes that the 1996 law was motivated by panic and hysteria by legislators, but he concluded that the necessary factual grounds for a constitutional challenge were not present in the case. Associated Press, Cleveland.com, Aug. 25.

TENNESSEE — The Court of Criminal Appeals affirmed a jury conviction on second degree murder and robbery charges and the judge’s imposition of a 37 year sentence on a gay man who murdered another gay man with whom he had “hooked up” on-line in State v. Gibson, 2014 Tenn. Crim. App. LEXIS 808 (Aug. 19, 2014). The victim, Joshua Martin, and the defendant, Stevie Gibson, met up on-line and arranged for Martin to come to Gibson’s apartment. After the men had sex, Gibson stabbed Martin to death and removed his wallet, credit card and car keys from his pants, undressed the corpse and tried to do some cleaning up, but was distraught, phoned family members, and ultimately his brother called the police. Gibson claimed that it was self-defense. He said that after the men had sex, Martin grabbed a kitchen knife and demanded his wallet, the men scuffled, Gibson disarmed Martin, and started stabbing him. Martin tried to escape but Gibson barred his exit from the apartment, administering the final blows in his back. It came out at trial that Gibson used cocaine (and may have been under the influence when the crime occurred) and had some prior convictions. Gibson was charged with first degree murder and the jury was instructed on second degree as a lesser-included offense. The jury went for second degree, which dismayed the trial judge, who announced his view that Gibson should get a life sentence but, unfortunately, the most he could sentence for second-degree murder was 25 years. The judge also sentenced Gibson to 12 years on the robbery conviction, and ruled that the sentences should be served consecutively. The court of appeals rejected Gibson’s argument that the trial record did not support the convictions, but found fault with the trial judge’s announced methodology of imposing sentence. Nonetheless, it found that the actual sentence imposed was not an abuse of discretion in light of the jury verdicts, the trial record, and Gibson’s prior convictions.
staff disclosed his health records to another inmate received no relief from United States District Judge Dean D. Pregerson, in Doe v. Beard, 2014 U.S. Dist. LEXIS 95643 (C.D. Calif., July 14, 2014). The disclosures about the patient (John Doe, proceeding anonymously) revealed “highly personal information,” including his HIV+ status, and his affliction with hepatitis C and lupus. Doe reported the disclosure and the errant employee promptly, but he did not know the name of the recipient inmate; and the records were not retrieved for nearly three weeks. Doe sued medical records and correctional officers and the California corrections secretary in their individual and official capacities under the United States and California Constitutions. Judge Pregerson dismissed official capacity damages claims with prejudice, relying on the Eleventh Amendment. He dismissed individual capacity claims without prejudice under qualified immunity and that the disclosure was a result of deliberate indifference to their well-being is among the most sensitive information a person may possess….

As noted in the Fifth Circuit in the United States v. Pinson, 429 U.S. 97, 103 (1976), because the disclosure did not in fact place Doe in actual danger or serious risk; and he declined to exercise jurisdiction over the state law claims. Doe was represented by Christopher Joseph Kelly and Keith Harris Lynch of Lynch and Kelly, Ltd., Los Angeles. William J. Rold

CALIFORNIA – United States District Judge Fernando M. Olguin approved the recommendation of United States Magistrate Victor B. Kenton that an inmate’s lawsuit requesting an order directing a jail to confine him “with other homosexuals” be dismissed in Dunphy v. Los Angeles County Sheriff Department, 2014 WL 4060052 (C.D. Calif., August 14, 2014). Pro se plaintiff Thomas Dunphy was booked “as a homosexual inmate” but assigned to general population approximately two weeks later. Ten months later, Dunphy commenced a federal civil rights action asserting a right to be protected from assault by other inmates based on the Due Process Clause of the Fourteenth Amendment, because he “believes there is a substantial risk of harm because he is gay and is housed in the general population.” The Magistrate Judge afforded Dunphy two opportunities to amend his complaint, warning him the second time that he risked dismissal of his case. No other details are provided, and the case was dismissed after Dunphy failed to amend. Inmates have a right to freedom from deliberate indifference to their safety under Farmer v. Brennan, 511 U.S. 825 (1994) (which the Court does not cite), but the pleadings must show more than a bald assertion of what the plaintiff “believes.” The absence of details, the lapse of time before seeking an injunction, and the failure to amend after warning resulted in this dismissal. William J. Rold

D.C. CIRCUIT COURT OF APPEALS – A federal prisoner in Alabama failed in his efforts to maintain an action in the District of Columbia and to avoid filing fees in Pinson v. Samuels, 2014 U.S. App. LEXIS 15000 (D.C. Cir., August 5, 2014). Jeremy Pinson, who has filed more than 100 civil actions during the course of his incarceration, challenged his assignment to the Special Management Unit at the Federal Correctional Institution, Talledega, alleging that its reputation put him at “substantial risk of harm” if confined there, because of his “homosexuality” and his need for separation from “other gang members.” The District Court denied his application for in forma pauperis status, because Pinson had accumulated more than three dismissals of prior lawsuits as frivolous, malicious, or failing to state a claim under the Prison Litigation Reform Act [PLRA], 28 U.S.C. § 1915(a)(1). It also directed transfer of the case to the Northern District of Alabama, if a partial filing fee were paid. Pinson’s “appeal,” in which other prisoners tried to join, was treated by the Circuit as a petition for writ of mandamus, and the court appointed an amicus to argue for the inmates. Although the appeal of the 2009 case did not reach the Circuit for years, the court, through Judge Sri Srinivasan, declined all relief. It recognized that an exception to the PLRA’s “three strikes” rule existed for prisoners who could show “imminent risk,” but it found that mere “reputation” of a receiving facility as “a dangerous place for inmates possessing certain characteristics – here, as a rival gang-member and homosexual,” was insufficient and that Pinson had made no particularized showing beyond defendants’ knowledge...
of his sexual orientation. The court declined to consider intervening events, such as Pinson’s transfer to Colorado or an inmate murder at Talladega, because the “imminent risk” determination, as a screening device, had to be evaluated on the facts at the time of filing the complaint. For those who follow such things, the opinion has extensive discussion of whether a partial filing fee for inmates with “three strikes” under the PLRA should be capped per inmate or per case, on which there is a circuit split (the D.C. Circuit joining the 5th, 7th, 8th and 10th Circuits, which set limits “per simultaneously; as opposed to the 2nd and 4th Circuits, which set limits “per prisoner”). Pinson has the choice of dropping his case or paying a partial filing fee and proceeding in Alabama. 

William J. Rold

MARYLAND – United States District Judge William D. Quarles, Jr., granted summary judgment against a Maryland prisoner who claimed that he was extorted to engage in “homosexual prostitution” by prison officials, who then punished him for refusing, in Ryidu-X v. Stouffer, 2014 U.S. Dist. LEXIS 119095 (D. Md., August 26, 2014). The pro se plaintiff, Malcom Ryidu-X, who is a frequent litigator in the District of Maryland and in the Fourth Circuit, sued various uniform officials (including John Does) and a medical staff person, all of whom claimed that Ryidu-X’s allegation were a “complete fabrication.” Judge Quarles converted their motion to dismiss to one for summary judgment; and he found that Ryidu-X did not adequately oppose the motion, presenting “no factual support” for his claims. (Judge Quarles had earlier upheld Ryidu-X’s punishment as justified by charges that contraband was found in his shoes.) Judge Quarles found that Ryidu-X had failed to raise the “prostitution” claims in previous proceedings, had refused to cooperate with internal investigations of his allegations (including refusing interviews), had not complied with exhaustion requirements of the Prison Litigation Reform Act (PLRA), and (as to some defendants) had missed the three-year statute of limitations. Although it did not help Ryidu-X’s case, the opinion has a lengthy discussion of exceptions to PLRA exhaustion based on corrections officials’ conduct.

MASSACHUSETTS – Judge Denise J. Casper ruled that the Prisoner Litigation Reform Act (PLRA) does not apply to a lawsuit brought about prison conditions if it is filed after the plaintiff’s release from custody in Morissette v. Superintendent of MCI, 2014 U.S. Dist. LEXIS 109024 (D. Mass., August 7, 2014). Thus, a partial filing fee was not required by 28 U.S.C. § 1915 of plaintiff Albert Morissette, who claimed that corrections officials first discriminated against him in job assignment because of his sexual orientation and then retaliated against him – including setting him up for sexual assault by assigning him to a cell outside visual monitoring – after he grieved the discrimination. The exacting screening review of all prisoner lawsuits under the PLRA is likewise inapplicable, but the pleadings remain subject to scrutiny under in forma pauperis rules; and Judge Casper dismissed the claims brought only against the warden and corrections secretary for failing to plead their personal involvement. She also held (as has every court addressing the issue) that no private cause of action exists under the Prison Rape Elimination Act, 42 U.S.C. § 15601, et seq. As a practice point, those prisoners who can delay filing a civil rights case until after they are released and can still satisfy the statute of limitations can avoid the requirements of the PLRA. If the gravamen of their claim is retaliation, there may also be tactical reasons for waiting. William J. Rold

LEGISLATIVE & ADMINISTRATIVE NOTES

CONGRESS – U.S. Senator Mike Enzi (R-Wyoming) and U.S. Rep. Mike Kelly (R-Pennsylvania) have introduced the “Child Welfare Provider Inclusion Act of 2014,” intended to shelter from any adverse consequences child welfare agencies that discriminate out of religious or moral convictions. Relying on the spending power of Congress, the bill would impose financial penalties through loss of federal funding on state or local governments that enforce public accommodations non-discrimination laws against these entities. The bill responds to a situation in several parts of the country where Catholic adoption agencies that refused to discriminate against gay or same-sex couple prospective adoptive parents faced legal penalties or disqualification for government funding and have responded by closing down. The findings and purposes section of the bill points out that many social service functions in this country are performed by religiously-affiliated agencies which “display particular excellence when providing child welfare services,” and the purpose of the bill is to ensure that “religious organizations can continue to provide child welfare services” that will “benefit the children and families that receive those federal funded services.” According to MetroWeekly (July 1), Kelly found 29 Republican co-sponsors in the House, but the number of Senate sponsors was not known at the time of publication. The article quoted a spokesperson from Human Rights Campaign criticizing the bill as likely to allow “rampant discrimination” against same-sex couples, and that such agencies might discriminate not only based on sexual orientation or gender identity but also because of marital status, religion and sex. By authorizing such discrimination out of

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“moral conviction” as well as religious belief, the bill would create a huge exemption to anti-discrimination law extending beyond religious agencies to any child welfare provider. Although this sort of measure is unlikely to pass as a freestanding bill, the great danger is that it could be attached to another measure as an amendment and pass as part of a broader bill that the president feels compelled to sign, unless an effective lobbying campaign prevails, as one did so brilliantly in Arizona earlier this year in persuading the governor to veto a measure that would have allowed businesses a broad religious-based exemption from complying with anti-discrimination laws.

U.S. DEPARTMENT OF EDUCATION
– In the wake of the Supreme Court’s Hobby Lobby decision and President Obama’s Executive Order requiring federal contractors to refrain from discrimination because of sexual orientation or gender identity, there were reports that the U.S. Department of Education had granted waivers from Title IX sex discrimination rules governing educational institutions that received federal money to Christian colleges seeking the right to discriminate based on gender identity due to their religious beliefs. The reports identified Spring Arbor University in Michigan, Simpson University in California, and George Fox University in Oregon. The Education Department asserts that it is required by statute to grant exemptions based on colleges’ religious beliefs. The exemptions allow religiously-identified schools to refuse to employ transgender staff or to deny admission or services to transgender students upon certification of their religious objections to transsexualism. The exemption policy is written in the statute. The Gay, Lesbian & Straight Education Network called on Congress to “narrow the broad (religious) exemption found within Title IX.” Deseret News, July 26.

U.S. DEPARTMENT OF LABOR – On August 19, the U.S. Department of Labor, which administers Executive Order 11246 governing discrimination by federal contractors, issued a “guidance” adopting the Equal Employment Opportunity Commission’s understanding of sex discrimination to include gender identity discrimination in the enforcement of the Executive Order. A bit late to the dance, however, since the EEOC ruled on this two years ago and President Obama recently amended the Executive Order to expressly cover sexual orientation and gender identity. . .

ARIZONA – Voting on a ballot question concerning an amendment to the city charter that had been adopted by the Tempe City Council to protect people from discrimination because of sexual orientation, gender identity or military status, 69% of voters favored the measure. The charter provision covers housing, public accommodations, and city employment (i.e., public employees), but apparently does not extend to private sector employment. The amendment approved by the voters was specifically focused on adding these three categories to the already lengthy list of prohibited grounds of discrimination for public employment. BNABloomberg Daily Labor Report, 167 DLR A-13 (August 28, 2014).

CALIFORNIA – If approved by Governor Jerry Brown, A.B. 2501 will become the first state statute to prohibit criminal defendants from using the so-called “gay panic” defense. The Assembly approved the measure 50-10 on August 27, following earlier approval by the Senate. The American Bar Association recently passed a resolution calling on governments to move on this issue. The usual context is a defendant on trial for homicide attempting to introduce evidence about the sexual orientation or gender identity of the victim in support of a theory that the defendant “snapped” and lost control upon receiving some sort of sexual advance or discovering the identity of the victim during a sexual act. In the absence of a statutory prohibition, the admission of such evidence may lead the jury to convict on a lesser offence of manslaughter with a significantly lighter penalty, although in the past juries would sometimes acquit on such a theory in the face of no reasonable doubt that the defendant actually killed the victim. There is no support in the psychological literature for the validity of such a defense, but courts enamored of junk science have been known to admit “expert” testimony in support of such a defense. In other cases, it may come into evidence as a result of people assuming that merit of the theory as a result of bias or ignorance. Equality California, a statewide lobbying group, celebrated legislative approval of the
measure as the 100th piece of LGBT rights legislation to be passed by the California legislature.

CALIFORNIA – The legislature completed work on approval of a measure that would provide for birth certificates to more accurately identify parents in “non-traditional” families. Parents could identify themselves as father, mother or parent, introducing more nuance into the documentation of children’s parentage. The measure was introduced by Assemblyman Jimmy Gomez (D-Los Angeles). It received its final affirmative vote on Aug. 20 and was sent to Governor Jerry Brown for approval. Reuters, Aug. 20.

FLORIDA – The Atlantic Beach City Commission voted 4-0 with one member absent on Aug. 11 to enact an ordinance prohibiting discrimination in employment, housing, financial services and public accommodations because of sexual orientation or gender identity. However, the absent member, who opposes the measure but was prevented from attending by car trouble, had prevailed on a Commission colleague to vote yes even though he was in opposition, so that he would be in a position to move to reconsider the measure at the Commission’s Aug. 25 meeting. Thus, if the absent member had been present on Aug. 11, the vote would have been 3-2 for the ordinance unless the opponents managed to persuade at least one supporter to change their vote to defeat it. The proposal was discussed, debated or revised at 14 prior commission meetings or workshops. The missing member, Jimmy Hill, had sent a note to the mayor asking that the vote be postponed so that he could be present, but the commission rejected that request. The vote followed several hours of hearings during which nearly 100 people testified pro or con. One opponent has begun collecting signatures to seek a repeal referendum, which will require valid signatures from 735 registered voters. A local minister condemned the vote, asserting that it would “bring God’s judgment on Atlantic Beach” because the measure gives “special rights” to LGBT people. But another resident cited the Bible’s command to “love my neighbor as myself” as justification for banning discrimination. Florida Times Union, Aug. 12. On August 26, the Times Union reported that the Commission would take a vote at its September 8 meeting on a motion to reconsider the ordinance at the request of one of the commissioners, who said he had voted for the measure for the purpose of being able to move for reconsideration when the absent commissioner could be present.

FLORIDA – The Orlando City Council voted unanimously on August 11 to add gender identity to the city’s anti-discrimination ordinance, which already covers sexual orientation, race, disability, sex, national origin, religion, age and marital status. The law extends to employment, housing, and public accommodations. Although there was considerable controversy 12 years ago when the Council banned sexual orientation discrimination, the current action was reportedly free of controversy. At the public hearing, all the speakers favored the measure. Orlando Sentinel, Aug. 12.

FLORIDA – The Palm Beach City Commission voted 5-0 on Aug. 18 to require city contracts to carry an obligation for the contractor to provide equal family benefits to all employees, including those in same-sex relationships, according to the Palm Beach Post (Aug. 20). The requirement covers any business with five or more employees that do at least $50,000 in business with the city, but exempts those companies that do not provide insurance coverage to spouses or dependents of employees, government entities, contracts for sale or lease of property, emergency contracts, and provisions that would violate grant requirements of federal or state law. The exemptions are so numerous that one has to ask whether this measure is mainly symbolic? According to the report in the Post, other Florida jurisdictions with similar ordinances include Broward County, Hallandale Beach, Oakland Park and Wilton Manors, and the cities of Key West and Miami Beach.

KENTUCKY – The Owensboro City Commission had planned to take up a proposed Fairness Ordinance that would have banned discrimination because of sexual orientation or gender identity, but the Commission responded to controversy about the measure by tabling the discussion for a year. Mayor Ron Payne said that things would have to “cool down” before the Commission could take up the measure again. All five members of the Commission had expressed support for the measure at the August 5 Commission meeting, according to a report in the August 20 Owensboro Messenger-Inquirer, but Payne said that “pressure quickly mounted” against the proposal. Payne said that the Commission had to “do more homework and educating of the community.”

ILLINOIS – The Illinois Department of Insurance issued a bulletin to private insurers in the state advising that under Illinois law as well as the federal Affordable Care Act the insurers may not discriminate because of gender identity in the coverage scope of their policies. The Illinois action followed similar actions in recent months by insurance regulators in Oregon, California, Colorado, Vermont, Massachusetts, Washington State and the District of Colorado, Vermont, Massachusetts, Washington State and the District of
Columbia, according to a news release from Lambda Legal on July 29.

**LOUISIANA** – No LGBT rights in Baton Rouge, after the Metro Council voted 8-4 on August 13 to reject a proposed fairness ordinance that would have banned discrimination against veterans, seniors, and members of the LGBT community in Louisiana’s capital city in employment, housing and public accommodations. [wafb.com](http://wafb.com), Aug. 14.

**MONTANA** – In the opinion of Billings Mayor Tom Hanel, the city is not ready yet for a nondiscrimination ordinance, so he cast the deciding vote to defeat the pending Non-Discrimination Ordinance by a vote of 6-5. The measure would have amended the city code to prohibit discrimination because of sexual orientation, gender identity or gender expression. It appeared that the measure might have passed were it limited only to employment and housing, but one member said he voted against because he was opposed to applying the gender identity or expression provisions to restrooms and locker rooms and thus would have omitted coverage for public accommodations. [Billings Gazette](http://billingsgazette.com), August 12.

**NEVADA** – Responding to an appeal by Lambda Legal, the Nevada Division of Child and Family Services has revised its regulations so that HIV-positive people are no longer categorically excluded from being licensed to be foster parents. Lambda Legal had submitted a petition on behalf of a gay male couple who had been disqualified because one of the men is HIV-positive. As revised, the policy will provide that “each foster parent must be in sufficiently good physical and mental health, and be physically and emotionally capable, to provide the necessary care to children. Participating in negotiations with Nevada authorities to achieve these revisions were Lambda Legal attorneys Scott A. Schoettes and M. Currey Cook, and attorneys from Sidley Austin LLP and the James M. Davis Law Office. [Lambda Legal News Release](http://lamdalegal.org), July 31.

**OREGON** – The state’s Health Evidence Review Commission voted on August 14 to amend the list of covered conditions under the Oregon Health Plan, which is the state’s Medicaid program, to add hormone therapy and surgical healthcare for transgender residents. The Commission had undertaken a four-month review process, concluding that such care is “medically necessary” and should be covered on the same basis as other medically necessary treatments for medical conditions. The Commission estimated that about 175 Medicaid patients per year were likely to access the treatments. Oregon’s insurance commission has required private insurance companies to cover treatment for gender dysphoria since 2012, and last year had added some basic treatments for transgender children. Other U.S. jurisdictions that cover treatment for gender dysphoria under their Medicaid programs include California, Vermont, and Washington, D.C. [advocate.com](http://advocate.com), Aug. 15. The case for doing so has been strengthened in recent years by administrative and judicial decisions rejecting the idea that such treatments are “cosmetic,” although the question whether prison inmates are entitled to gender reassignment surgery is pending now before an en banc panel of the U.S. Court of Appeals for the 1st Circuit, after a district judge and a three-judge panel had ruled in favor of the inmate.

**TEXAS** – Officials of the city of Houston announced on August 3 that opponents of the recently-enacted ordinance prohibiting discrimination because of sexual orientation or gender identity had failed to submit sufficient valid signatures to trigger a referendum on the law. However, those behind the referendum effort went to court to challenge the signature validation process, and Mayor Annise Parker announced that implementation of the ordinance would continue to be suspended until any such court challenge is resolved. As of now, it appears that will not take place until January. However, the measure will not be on the November 2014 ballot. The measure was approved by the Houston City Council on May 28 by a vote of 11-6. Approximately 15,200 signatures were held in the 6th Circuit in pending marriage equality cases, including marriage recognition litigation from Tennessee. During the oral argument, Circuit Judge Jeffrey Sutton suggested that if the LGBT rights movement was looking to “win hearts and minds” it would be more effectively done through the political process than through litigation. The voters of Chattanooga seemed eager to prove him wrong, as the LGBT rights movement in that city had used the political process to persuade the city council to pass the ordinance, only to be rebuffed overwhelmingly by the voters. [Slate.com](http://slate.com), Aug. 8.

**TENNESSEE** – On August 7, voters in Chattanooga voted 13,685-8,184 in favor of an initiative to repeal a city ordinance that would have protected city workers from discrimination because of sexual orientation or gender identity and extended benefits to same-sex partners of city employees. Ironically, the vote took place the day after oral arguments were held in the 6th Circuit in pending marriage equality cases, including marriage recognition litigation from Tennessee. During the oral argument, Circuit Judge Jeffrey Sutton suggested that if the LGBT rights movement was looking to “win hearts and minds” it would be more effectively done through the political process than through litigation. The voters of Chattanooga seemed eager to prove him wrong, as the LGBT rights movement in that city had used the political process to persuade the city council to pass the ordinance, only to be rebuffed overwhelmingly by the voters. [Slate.com](http://slate.com), Aug. 8.
and public accommodations because of sex, sexual orientation, gender identity, race, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, genetic information, or pregnancy. BuzzFeed, com, Aug 4; news92fm.com, Aug 15. Houston is probably the largest city by population in the United States that does not presently have in effect an ordinance banning discrimination because of sexual orientation, and most large cities with such ordinances also ban gender identity discrimination.

HOUSE OF REPRESENTATIVES – Representatives John F. Tierney (D-MA), Chris Gibson (R-NY) and Richard Hanna (R-NY) have introduced the International Human Rights Defense Act, which would direct the State Department to make international LGBT human rights one of its foreign policy priorities. The bill would establish a position with the State Department charged with coordinating efforts in this area. A similar measure had previously been filed in the Senate by Sen. Edward Markey (D-MA). Other House co-sponsors include Representatives David Cicilline (D-RI), Elizabeth Esty (D-CT), Alan Lowenthal (D-CA), Jim McGovern (D-MA), and Jan Schakowsky (D-IL). Congressional Documents, 2014 WLNR 19409792 (July 16).

LAW & SOCIETY NOTES

NUMBERS – How many LGBT people are there in the United States? The Williams Institute at UCLA has suggested that between 3.5 and 4% of the adult population are gay. For many years LGBT lobbying groups have urged the U.S. Centers for Disease Control and Prevention to include in its National Health Interview Survey questions about sexual orientation towards providing a more accurate counting. In a case of “be careful what you wish for;” the NHIS finally acceded to these requests, and the CDC reported on July 15 that the most recent survey showed that less than 3% of the population self-identified as gay men, lesbians or bisexuals. (The survey did not ask gender identity questions.) Indeed, the Survey found that only 1.6% of adults self-identified as gay or lesbian, with another 0.7% self-identifying as bisexual. 96.6% identified themselves as heterosexual, and 1.1% either declined to answer, responding either “I don’t know the answer” or that they were “something else” other than the categories offered as responses to the question. As information came out about the methodology used for the survey, commentators suggested that the final figures were an undercount. The survey relied upon live face-to-face interviews, which in the past have notoriously undercounted the gay population, and the result was likely affected by the phenomenon of people being unwilling to “come out” to the government, even when assured that their responses would be coded and not connected to them individually in any records. The sample size for this survey was 33,557. Washington Post, July 15. The report is published and available on the CDC’s website: Brian W. Ward, James M. Dahlhamer, Adena M. Galinsky & Sarah S. Joestl, “Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013,” National Health Statistics Reports, No. 77, July 15, 2014. * * *

On August 18, the American Lawyer published on its website a “Diversity Scorecard” based on returns from a survey they did of large law firms, asking what proportion of their lawyers self-identified as lesbian, gay, bisexual or transgender. They reported the responses of 22 firms, whose percentage of self-identified LGBT lawyers ranged from 8.9% at Patterson Belknap down to 3.6% at Rapes & Gray. Many prominent firms were absent from the list, and there was no breakdown to identify transgender lawyers separately from the broad category of LGBT, thus masking what is generally acknowledged to be a major diversity gap in the legal profession.

AMERICAN BAR ASSOCIATION – The House of Delegates of the American Bar Association meeting on August 12 adopted a Resolution condemning all discrimination against LGBT people, urging governments to repeal anti-gay laws, urging bar associations and lawyers in countries with anti-gay laws to work on repealing them and defending victims of anti-LGBT discrimination or conduct, and urging the U.S. government to work towards eradicating anti-LGBT discrimination and ensuring equal protection for LGBT people. A nice gesture. How will they follow up? The Resolution, available on the organization’s website, is No. 114B.

CHELSEA MANNING – Chelsea Manning is a transgender woman who is confined to U.S. Disciplinary Barracks at Fort Leavenworth after being convicted on charges of unauthorized disclosure of classified information. Although Manning originally enlisted in the Army as a male, she announced her preferred gender identity during the court martial proceeding, and upon sentencing asserted her desire to fully assume the female gender and transition while serving her sentence. She has since obtained a legal name change, and is seeking appropriate medical treatment to confirm her gender identity, but the Army is stalling. The ACLU LGBT Rights Project is representing her in the quest to obtain treatment, and wrote Defense Secretary Chuck Hagel, Secretary of the Army John McHugh and relevant military officials on August 11, 2014, asserting Manning’s treatment rights under the 8th Amendment. Manning’s Army

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physicians have confirmed her gender dysphoria diagnosis and the necessity for appropriate medical treatment, but her attempts to initiate treatment have been ignored or rebuffed. She has been informed that her chain of commands does not have authority to grant her treatment request, and her attempts to get some response from the Director of Treatment Programs has been futile. Although there were press reports that the Defense Department was considering transferring Manning to the U.S. Bureau of Prisons to received treatment, nothing has happened along those lines. Citing the developing case law on the 8th Amendment rights of inmates to received medically appropriate treatment for the serious medical condition of Gender Dysphoria, the ACLU letter demands “prompt action to initiate treatment for Ms. Manning consistent with the recommendations of her doctors,” and informs the Army that if an appropriate written commitment to provide such treatment is not received by September 4, the ACLU will consider initiating litigation.

DUKE UNIVERSITY – Duke University in Durham, North Carolina, has modified an optional essay prompt on its application form to give LGBTQ applicants who want to self-identify an opportunity to do so. The supplementary portion of the application form will allow for a 250 word essay responsive to the following: “Duke University seeks a talented, engaged student body that embodies the wide range of human experience; we believe that the diversity of our students makes our community stronger. If you’d like to share a perspective you bring or experiences you’ve had to help us understand you better – perhaps related to a community you belong to, your sexual orientation or gender identity, or your family or cultural background – we encourage you to do so. Real people are reading your application, and we want to do our best to understand the real people applying to Duke.” An undergraduate LGBTQ support group had agitated to add sexual orientation and gender identity categories to the check-list on the main form, but was rebuffed. However, the published non-discrimination statement on the form does include sexual orientation and gender identity. U-Wire, Aug. 29.

UNITED STEELWORKERS – The United Steelworkers held their constitutional convention in Las Vegas during August, and voted overwhelmingly to amend their organization’s constitution to forbid gender identity-based harassment. According to an Aug. 13 report in BloombergBNA Daily Labor Report, the measure was approved with “little opposition” during debate on the floor of the convention. With this amendment, the union binds itself not to “harass a member at a union or workplace-related location or activity on the basis of race, creed, color, sex, sexual orientation, gender identity, age, disability, nationality or other legally protected status.” The USW newsletter reported that International President Leo Gerard told the delegates: “We are all human being in this union, and as long as I am president . . . we will not tolerate any form of discrimination against any human being for any reason.”

TREVOR BURGESS – The Wall Street Journal and the New York Times deemed it newsworthy that Trevor Burgess, CEO of C1 Financial, parent company of a regional bank with 29 branches in Florida, became the first openly-gay CEO of a publicly-traded bank when he rang the bell at the New York Stock Exchange to mark the initial public offering (IPO) of his company’s stock on August 14. Burgess is married to Gary Hess, who is a C1 shareholder, and they are parents of a young girl. (Unfortunately, Florida, the state in which they live, doesn’t recognize their marriage yet, but as the federal government does Burgess had to disclose Hess’s shareholder status in filings with the Securities and Exchange Commission.) Burgess has been “out” since college, and was one of the first openly-gay managing directors at Morgan Stanley before moving to C1 to become the CEO there. Huffington Post, Aug. 15.

EUROPEAN COURT OF JUSTICE – Paulo Mengozzi, one of the Advocate Generals for the European Court of Justice, has rendered a formal opinion that the widespread policy of refusing blood donated by men who have sex with men is discriminatory. Mengozzi rendered his opinion in the case of Geoffrey Leger, a French citizen who sought to give blood but was refused for being gay. Mengozzi took note that an EU directive provides that those who engage in high risk behavior for contracting HIV should be banned from giving blood, but he pointed out that homosexual conduct is not, by itself, inherently risky, and that every blood donor should be considered individually based on their own behavior, asserting, “Sexual orientation is not in itself a risk.” French President Francois Hollande takes the same position. The question now is whether the Court will adopt Mengozzi’s opinion, which is merely advisory. GayStarNews.com, July 17. * * * Another Advocate General, Eleanor Sharpston, responded to a request by the Dutch court to consider what evidence concerning sexual orientation the authorities may require in passing on asylum claims presented by self-identified gay men. Dutch authorities claim to have doubts about the applicants’ sexual orientation in three cases. Sharpston said that
“verification methods such as medical and pseudo-medical examinations, intrusive questioning and requiring evidence of sexual activities” breach fundamental rights. “Homosexuality is not considered to be a medical condition,” she wrote, and “there is no objective way of definitively proving a person’s averred sexual orientation. Nothing can be required of applicants that would undermine their human dignity or personal integrity.” Thus, she wrote, assessments of asylum claims based on an applicant’s claimed sexual orientation should “focus on whether the applicant is credible,” and “whether his account is plausible and coherent.”

dpa Deutsche-Presse-Agentur, July 17.

EUROPEAN COURT OF HUMAN RIGHTS – Although marriage equality continues to advance step by step in Europe, the European Court of Human Rights is not yet ready to declare that a nation signatory to the European Convention on Human Rights is required to allow same-sex couples to marry or to recognize same-sex marriages. This status report comes via an unusual decision concerning Finland, Hamalainen v. Finland, Application No. 37359/09 (July 16, 2014), in which a transgender woman from Finland wants to have her gender identity recognized by the government but without affecting the continuing marriage with her wife, with whom she had entered into a different-sex marriage long before her transition. Under Finnish law, the government will not officially recognize the transition unless the wife consents to the conversion of their relationship into a registered partnership; otherwise, the applicant would have to divorce her wife in order to achieve appropriate gender recognition. She argued that this violated her Convention rights to privacy, equality, and marriage. Although a few judges dissented, arguing that the applicant’s marriage continues to be protected by the Convention, the overwhelming majority of the panel decided: “The Convention does not require access to marriage for same-sex couples.” This is consistent with other recent rulings. The Court noted that Finland’s legal structure extends to transsexuals the same treatment as homosexuals, who are offered registered partnerships to fulfill the state’s obligation under the Convention to provide legal recognition to same-sex families. Until the Court decides that a tipping point has been reached reflecting a “consensus” among signatory countries, it will not move further than that.

AUSTRALIA – Will marriage equality come to Australia next year? It appears likely that Prime Minister Tony Abbott may allow a vote in Parliament in the spring, with the major parties most likely allowing their members a “conscience vote” (no party discipline) on a member bill being drafted by Senator David Leyonhjelm. The present prognostications are that such a bill would be narrowly defeated based on current readings of the legislators, but that the upwards trend in public support for marriage equality reflected in opinion polls might conduce to approval by the time the measure comes to a vote on the floor. Australia is now looking more and more like a laggard on this issue, with marriage equality having been adopted in the leading English-speaking democracies of the United Kingdom, Canada and New Zealand, with the strong litigation push towards a marriage equality decision by the U.S. Supreme Court, most likely in its 2014-15 Term.

AUSTRALIA – A former corrections officer decided to have a bit of fun by circulating an email to about 1200 people, purporting to have been sent by a former colleague, stating “Hello people, just a note to say that I am a homosexual and I am looking for like-minded people to share time with.” Adelaide Remand Centre Office Cosimo Tassone, the victim of this prank, sued Stephen Kirkman, alleging defamation for falsely calling him a homosexual, promiscuous and unprofessional. District Court Judge Susanne Cole awarded Tassone a substantial damage award (press accounts vary, perhaps in the neighborhood of $100,000), but not for calling Tassone a homosexual. “I do not consider, in the context of this case, that that aspect of the meaning of the email is, by itself, defamatory in the general community of contemporary South Australia, or among the recipients of the email.” However, the judge ruled, imputing promiscuity and “loose moral character” is defamatory, and she found that Tassone had suffered “severe personal hurt and distress,” entitling him to substantial compensation for his former colleague’s prank. Tassone v. Kirkham, [2014] SADC 134 (Aug. 7, 2014). Advertiser, 2014 WL 22049065 (Aug. 13).

BOTSWANA – Gay rights activists in Botswana announced their intention to consider suing the government to end the national policy of barring members of the LGBT community from donating blood. The Botswana Network on Ethics, Law and HIV/AIDS contends that the policy is unnecessary and fuels anti-gay stigma. A Ministry of Health spokesperson denied that there is such a policy, pointing out that there is a dire shortage of blood. Agence de Presse Africaine, July 16. * * * The Botswana High Court ruled that the government must provide anti-retroviral treatment to HIV-positive foreign nationals who are incarcerated in Botswana, because denial of treatment would violate the inmates’ rights under Botswana’s constitution. The court said that the government’s denial of treatment to such inmates was a threat to the health of other prisoners, who might acquire HIV-infection and opportunistic

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diseases from untreated fellow inmates. The court rejected the government's argument that it lacked sufficient funds to provide treatment for non-citizens, holding that the government failed to provide evidence to back this assertion. The applicants were represented by Advocate Gilbert Marcus SC, Advocate Isabel Goodman and Tschiamo Rantao. AllAfrica.com, Aug. 22.

CHINA – A government spokesperson in Hong Kong announced that effective July 17 transgender people who have gone through a full sex-change procedure can marry in their chosen sex, even though final work has not been done on a bill to formalize this policy change. The change responds to a Court of Final Appeal ruling that a person who had undergone such male-to-female surgical transition could marry her girlfriend. The Marriage (Amendment) Bill intended to effectuate this change was submitted to the Legislative Council in March but did not receive a vote before the Council ended its session on July 15. The court’s order in May gave the government one year to adjust its policies in conformity with the ruling. South China Morning Post, July 17.

CHINA – A court in Shenyang has received a lawsuit brought by three men who were denied service by Spring Airlines after they informed the staff that two of them were HIV-positive. They were told that their tickets had been cancelled. They were traveling with an HIV-negative companion, and all three were denied boarding. They have sued the airline for discrimination and demanded an apology. This is reportedly the first such discrimination case brought to court in China against an airline. Chinese law allows air carriers to deny transport to “infectious patients, people with mental illness or passengers whose health condition may endanger others or themselves.” The president of the airline told a Chinese media outlet that the company did not have a policy of denying service to HIV-positive people, and blamed the incident on “staff anxiety” and on the passengers making themselves “overly noticeable.” Agence France Presse, Aug. 15.

COLOMBIA – The Constitutional Court ruled on August 28 that a lesbian could adopt her long-time partner’s daughter, as the child was the biological offspring of the mother. The agency administering the adoption process had rejected Veronica Botero’s petition to adopt Ana Leiderman’s daughter, who was born as a result of donor insemination and who is being raised jointly by the women as co-parents. “The court considered that the discriminatory criterion the administrative authority had used to deny the adoption procedure was unacceptable in this case, which involves a consensual adoption in which the biological father or mother consents to an adoption by his or her permanent partner,” said Magistrate Luis Ernesto Vargas. By the reasoning of the court, it is not of consequence that the case involves a same-sex couple; the same ruling would apply in a case involving unmarried different-sex partners. Whether the court would extend this ruling in a subsequent case to a joint or second-parent adoption without that biological tie was uncertain. Al Jazeera, Aug. 29. An amicus brief was filed with the court on behalf of the New York City Bar Association, authored by Hunter T. Carter and G. David Carter of Arent Fox LLP.

CROATIA – The Parliament voted on July 15 to approve a civil partnership law that would recognize same-sex unions and grant them the same rights as traditional marriages, with the exception of the right to adopt children. The law was drafted along the lines of Germany’s civil partnership law. The vote was 89-16. Official ceremonies will be held in Town Council offices. Although the law will not allow joint adoptions, it will allow for the same-sex partner of a parent to become a legal guardian of the child if the child does not have a second, legally-recognized parent. If the child does have a second, legally-recognized parent, the partner of the gay parent will be treated as having the rights of a step-parent. ANSA English Media Service, July 15.

CUBA – With one-party rule, votes in the 612-member National Assembly are usually unanimous, but a celebrity dissenter, Mariela Castro, daughter of President Raul Castro and niece of Fidel Castro, cast a “no” vote last December on a workers’ rights bill because it did not provide protection against discrimination due to gender identity or HIV status, which she had advocated. Her vote did not draw much attention at the time, but after the bill went into effect this summer, Cuban gay activists publicized Castro’s vote, which was described as unprecedented. Mariela Castro is the leading, most outspoken advocate for LGBT rights in Cuba. The bill that passed lists sexual orientation among prohibited grounds of discrimination, however. Castro’s
family ties make it possible for her to get away with being dissenter, but they also have given her a platform to bring forward issues that might not otherwise be heard. Postmedia News (Canada), Aug. 20.

**ECUADOR** – President Rafael Correa reported after meeting with LGBTI community leaders on August 18 that members of the community have a constitutional right to register their unions, overruling the policy of the Ecuadoran Civil Registry. However, Correa stated that he did not support same-sex marriage or adoption of children by gay couples. The Ecuadoran Constitution grants equal rights to “cohabitation partnerships” as if they are civil or Catholic marriages, but the Constitution also expressly provides that marriage is “the union between man and woman.” telesur.net, Aug. 24.

**INDIA** – Responding to press inquiries, the national government stated on July 22 that it has no plans to amend or repeal Section 377 of the Indian Penal Code, the sodomy provision that was revived by a ruling of the Supreme Court in December after having been declared unconstitutional by the Delhi High Court two years earlier. Minister of State for Home Kiren Rijiju stated, “The matter is subjudice before the Supreme Court. A decision regarding Section 377 of IPC can be taken only after pronouncement of judgment by the Supreme Court.” Of course, this response is nonsense, since the government is not required by the Supreme Court’s prior ruling to maintain Section 377 in place. The December 11 ruling merely stated that the law as it stands does not violate the Indian Constitution. The law now on the books makes homosexual activity a criminal offense subject to a range of potential penalties, including life imprisonment in some cases. The Supreme Court has received a curative petition supported by the prior government asking it to reconsider the decision. The Court heard arguments on the petition but has not announced whether it will return to this issue. Siasat Daily, July 22. * * * livemint.com (Aug. 11) reported that the cabinet is considering proposing amendments to the Juvenile Justice Act that will prevent same-sex couples from adopting children. An existing draft bill does not mention this subject, but the cabinet has voted in support of such a restriction and was expected to incorporate it into the bill before consideration by the Parliament.

**ISRAEL** – Interior Minister Gidon Sa’ar, a member of the Likud Party, has issued a letter to the Ministry of Immigration and Absorption codifying an interpretation of the country’s Law of Return, which extends citizenship to any Jew seeking to settle in Israel. The Law of Return has been expansively construed in recent years to extend the right of Israeli citizenship to non-Jewish spouses and children of Jews, and Sa’ar has now construed this to apply as well to same-sex spouses. Although same-sex couples cannot marry in Israel, which does not have civil marriage, those who are married in other countries can register their marriages in Israel, be identified as married on the national identity card, and be treated as married for many purposes. Sa’ar’s decision is justified as furthering the purpose of the Law of Return, which is to encourage Jews to move to Israel. Extending the right to emigrate and receive citizenship to non-Jewish same-sex spouses would remove a potential barrier to their decision to emigrate to Israel. Israel National News, 2014 WLNR 22146281 (Aug. 12).

**ISRAEL** – TheDailyBeast.com published a fascinating article on Aug. 13 titled “Israel’s Gay Palestinian Underground,” about the situation of gay Palestinians seeking refuge in Israel because of the harsh intolerance and danger they encounter in their home communities in the West Bank and Gaza. Palestinians discovered to be gay are routinely suspected of collaborating with Israeli intelligence. Ironically, if they are able to escape into Israel and are apprehended by Israeli security forces, they will not be allowed to stay unless they agree to become informants. The article relates the story of one gay Palestinian who was finally able, with the assistance of LGBT community organizations in Israel, to migrate to Norway, where he obtained asylum and is now a citizen. As a citizen of a European Union country, he can travel just about anywhere, except his home country, where he fears he would be immediately targeted. But he said he really misses Tel Aviv, which is, after all, the gay capital of the Middle East.

**ITALY** – In the city of Bologna, Mayor Virginio Merola announced on July 22 that same-sex marriages performed outside of Italy for couples who are residents of Bologna can be recorded in the city’s civil register, extending symbolic recognition. This change will go into effect on September 15. Because marriage is defined under national law in Italy, the most the municipality can do is to extend symbolic recognition. Naples began recording foreign same-sex marriages of its residents early in July, but took a slightly more liberal approach under which only one member of the couple needs to be a resident of Naples in order to register the marriage. Italian Prime Minister Matteo Renzi has reacted to recent court developments by stating that his government will eventually take up the question of civil partnerships for same-sex couples. Italy is one of the few Western European democracies that has yet to establish some form of legal recognition for same-sex couples.
ITALY – A court in Rome has approved a second-parent adoption by the lesbian partner of the adoptive child’s mother, reported ANSA English Media Service on August 29. The press report indicated that this was the first such “step-parent adoption” in Italy. The child was conceived by donor insemination, is five years old, and is being jointly raised by the mother and her partner. Italy provides no legal status for same-sex couples, but by this adoption they will both be legal parents of the child, creating some form of recognition as a family unit. A senator with the center-left Democratic Party, Sergio Lo Giudice, commented that the decision was “another humiliation for a parliament deaf and blind to the fundamental rights of individuals, a wonderful day of civilization for our country,” according to the ANSA report.

JAMAICA – Activist Javed Jaghai has withdrawn a legal challenge he had filed against Jamaica’s criminal sodomy statute, a colonial artifact first enacted in 1864. His lawsuit alleged that the law violated a 2011 human rights charter adopted in Jamaica. However, in an affidavit filed with his motion to dismiss the lawsuit he stated that he has been “threatened enough times to know that I am vulnerable,” and he also asserted that his “loved ones are under threat. . . Though the cause and the case are noble,” he wrote in his affidavit, “I am no longer willing to gamble with my life or the lives of my parents and siblings.” The challenged statute, modeled on 19th century British law, outlawed anal sex and authorizes a maximum sentence of ten years and hard labor. It is rarely enforced, but stands as a signifier of outlaw status for gay people amidst a deeply homophobic society. Associated Press, Aug. 30.

KENYA – Foreign gay people who engage in homosexual activity in Kenya may be stoned to death under a proposed law now pending before the National Assembly. Any Kenyan national found guilty of homosexual acts could be jailed for life. The measure’s chief sponsor, Edward Onwonga Nyakeriga, said his motivation is to “protect children and youth who are vulnerable to sexual abuse and deviation.” He alleged that there are “increasing attempts by homosexuals to raise children in homosexual relationship through adoption, foster care or otherwise,” which he apparently viewed with alarm. The measure was referred to committee early in August. The bill also provides for stoning to death in the case of “aggravated homosexuality,” which includes acts involving minors and where the offender is HIV-positive. The Star/All Africa Global Media, Aug. 12. * * * On the other hand, some Kenya gay activists encouraged by the recent ruling by the Uganda Supreme Court voicing that country’s Anti-Homosexuality Law have announced they will file a petition with the courts to have Kenya’s law penalizing gay sex reformed so it does not apply to private adult consensual sex. Perhaps they are overlooking the fact that the Uganda Supreme Court did not rule on the merits of the substantive challenge to the law, premising its decision solely on a procedural flaw with its enactment. buzzfeed.com, Aug. 14.

LEBANON – A bathhouse raid by police in Beirut on August 9 resulted in the arrest of 27 men, who may be charged with “public indecency,” although the prosecutor told protesting advocacy groups that he was “not interested” in charging them under the more stringent and controversial Article 534, which prohibits sexual relations that “contradict the laws of nature.” According to a report on Aug. 13 by Agence France Presse, “Lebanon is considered the most liberal country in the Arab world on the question of gay rights, with Beirut-based Halem the only NGO to advocate for lesbian, gay, bisexual and transgender rights in the Arab world. But the country’s laws remain conservative, as does much of society on the question of homosexual relations, and police have regularly rounded up gay men at nightclubs and other gay-friendly venues.” Halem protested the arrests, and told the press that the raid was sparked by the arrest of an individual who then told police that the bathhouse was a gathering place for men seeking sex with other men. Halem has been campaigning for legislative reform, but without success. Halem asserted that no sex was taking place in public areas of the facility when the police entered, and that detainees were being interrogated about their homosexuality. “We denounce this incident as a case of homophobic practice that aims to police the sexual rights and liberties of the individuals involved.”

MACEDONIA – The Assembly voted to amend the constitution to define marriage as exclusively a different-sex union. The government spokesperson stated, “The constitutional protection and the clear defining of marriage will allow further protection of children and affirmation of their upbringing in a family atmosphere in which the main pillars are the parents, the father and mother.” According to a report in Pink News, July 16, the country’s president has stated that discrimination against lesbian and gay people is “a myth,” stating, “Our system discriminates against no-one. Homosexuals stigmatize themselves and think they are in an underprivileged position. In general, I support the pluralism of life styles of the subculture groups – that is one of the cornerstones of today’s society.”

MALTA – Taking the next step. After having outlawed sexual orientation discrimination and made civil unions available for same-sex couples, Malta took the step of forbidding gender

**NAMIBIA** – The Windhoek High Court rejected an attempt by the government to deport a gay man from Uganda. Judge Shafimana Ueitele granted an “interdict” to stop Namibia’s Commissioner for Refugees from deporting Kris Kelly, who claims he was in a same-sex relationship in Uganda when he and his partner decided to leave the country in November. Although the Anti-Homosexuality Law enacted in February was recently declared unconstitutional due to lack of a proper quorum in the parliament, the government is proposing to reintroduce the bill. Kelly had gone to a local police station as soon as he arrived across the border, seeking to claim refugee status, but was instead detained as an illegal immigrant, and in February the Immigration Tribunal ordered his deportation. He escaped from custody but was recaptured and sentenced to brief imprisonment for his escape. He argues that he would be liable to persecution if returned to Uganda. He brought the action seeking an order against his deportation because he feared it was imminent when he was relocated to a police station near the international airport. The government lawyer appearing in opposition to Kelly’s action claimed that Namibian authorities had not received a proper application for refugee status from Kelly, but agreed that the court could issue an interdict against deportation while the refugee case gets sorted out. The Namibian, Aug. 8.

**NETHERLANDS** – Taking note of the repressive campaign against gay people in Russia, the Dutch government announced that it would make it easier for gay people in Russia to apply for political asylum in the Netherlands. Junior Justice Minister Fred Teeven told a parliamentary briefing that the usual requirement that asylum applicants prove that they had sought and failed to secure the protection of local law enforcement authorities would be waived for gay applicants from Russia. It seems clear from the events of recent years that gay people need to steer clear of local law enforcement to avoid harassment or worse, and asking for help from Russian police was futile. Teeven commented in a briefing document, “There is throughout the Russian Federation, among government officials (including the police) and the Russian people, a high degree of intolerance and prejudice against homosexuality and members of the LGBT community.” Irish Times, Aug. 8.

**PERU** – Peru’s Council of Ministers approved a bill amending the criminal code to punish street harassment. Street harassment is defined, according to a press report from Malaysia (!), as “any action or comment between strangers in public places that is disrespectful, unwelcome, threatening and/or harassing and is motivated by gender, sexual orientation or gender expression.” This kind of “violence” is a widespread problem in Peru, according to the news report, especially in the capital city of Lima. The bill needs to be approved by Congress as an amendment to sections 176 and 176a of the Criminal Code. Prime Minister Ana Maria Jara expressed “confidence” that Congress would approve the initiative soon, in response to the “public outcry” against the problem. Malaysian Government News, Aug. 9.

**SAUDI ARABIA** – Various international news sources reported that a 24-year-old Saudi man entrapped by police through social media was convicted of the crime of “promoting the vice and practice of homosexuality” and sentenced to 450 lashes, to be meted out to him over the course of his three years of imprisonment. Under Saudi law, according to a report by the British daily The Independent (July 26), any married man convicted of engaging in sodomy, or any non-Muslim engaging in sodomy with a Muslim, can be stoned to death. For sodomy offenses not involving these “aggravating” factors, punishments can include flogging, chemical castration, imprisonment, and execution. While much international attention has focused recently on “draconian” anti-gay laws being enacted in various African nations, there has been little comment or attention on the brutal anti-gay laws in effect in many of the Muslim nations of the Middle East.

**SINGAPORE** – Reacting to adverse public comment when the National Library Board announced that it was going to destroy all library copies of several children’s books dealing with the LGBT issues, Minister of
Communications and Information Yaacob Ibrahim announced that he supported the decision to remove the books from the children's sections of libraries, but that they should not be destroyed. Rather, they should be placed in the adult sections. The announcement came too late to save one book, “Who's In My Family?: All About Our Families,” which had already been destroyed, but it will save “And Tango Makes Three” and “The White Swan Express: A Story About Adoption.” Associated Press, July 18. * * * The nation’s highest court heard arguments on July 14 and 15 about the constitutionality of the law against gay sex, Penal Code Section 377A, a relic from Singapore’s past as a British colony. The Court of Appeal heard two appeals of constitutional challenges, one brought by Gary Lim and Kenneth Chee, a gay couple, the other by Tan Eng Hong. They argue that the law infringes their equality rights in violation of Article 12 of the Constitution, as well as their rights to life and personal liberty protected by Article 9. Counsel for Lim and Chee, Deborah Barker, argued that if the court finds that Section 377A should not be totally invalidated, it should interpret the statute not to apply to private adult consensual activity. She said that her clients, who have been together for 16 years, are not asking the court to pronounce on the acceptability of homosexual conduct. Rather, she said, “the appellants call on this court to find that the majority cannot, through the guise of public morality, target an unpopular minority group by restricting their intimate conduct in private.” The government’s position, articulated by Aedid Abdullah from the Attorney General’s chambers, was that any change in the law should be left to the Parliament, and rejected the contention that the law as worded is vague or discriminatory. Straits Times, July 15.

SPAIN – The Andalusian Regional Government has adopted a transgender-inclusive anti-discrimination law on July 18, according to an online report by the International Lesbian & Gay Association (ILGA), European branch. In addition to addressing various forms of discrimination, the law simplifies gender-recognition procedures by, among other things, eliminating the requirement of medical/psychological diagnosis or opinion, leaving it to the individual to declare their gender identity, according to the ILGA Report.

SWEDEN – BBC International (July 24) reports that the Swedish government has reacted to the recent anti-gay bill in Uganda by redirecting its development aid away from the Ugandan government to non-governmental charities in the country.

THAILAND – Thai News Service reported on August 4 that about 50 children born through Thai surrogates for Israeli couples, some of them same-sex male couples, have been stuck in Thailand because the Foreign Ministry has refused to issue the necessary travel documents from their intended parents to take them from the country. The Ministry is studying whether this would be considered forbidden “human trafficking” if the surrogate is not a blood relative of the child. The Council of State is currently considering legislation to deal with the status of children born through assisted reproductive technology (ART), under which the procedures will have to be performed by a certified doctor, not be advertised commercially, and contain a guarantee of a good future for the child. It sounds like Thailand may be seeking to limit surrogacy to non-commercial situations where a family prevails on a female relative to be a surrogate for family members who cannot have children with such assistance. Thailand had become a nation of choice for Israeli couples seeking surrogates when India put an end to surrogacy for foreigners. Israel does not allow the procedure. Thai Council President Dr. Somsak Lohlekha said that the law would ban ART for “homosexuals and single women” and would ban egg-donation advertisements.

UGANDA – On August 1 the Constitutional Court declared that the recently-enacted Anti-Homosexuality Law was “null and void” because it was passed without an appropriate quorum of the Parliament having been established prior to the vote on December 20, 2013. The measure was signed into law by President Museveni in February 2014, after significant lobbying campaigns pro and con. A petition was filed in court in March by a non-governmental organization and a coalition of prominent individuals, challenging the law both substantively and procedurally. In June, the registrar of the court notified the petitioners that the matter would be conferenced in August and a hearing would be held in September, but without much advance warning the court accelerated the hearing date to July 30, and the court ruled from the bench just two days later – a surprising burst of speed from a court that normally takes a year or more to dispose of a case. The government, pleading lack of preparation, had urged the court to put off the hearing, but the court unanimously declined to adjourn the case, finding that the attorney general had filed a response to the petition. Supporters of the law speculated that the court rushed through its decision to take pressure off President Museveni, who had drawn outraged criticism from western governments and trading partners, particularly noting the African leaders’ summit meeting coming up a few days later in Washington, D.C., sponsored by the U.S. State Department. Undeterred by the court’s ruling, a member of the Parliament, Latif Ssebagalla,
announced that he was organizing an effort to revive the bill. Since the court had not address the substantive merits of the case, ruling on the quorum issue alone, the bill could be resubmitted for a vote, this time making sure to secure a recorded quorum. The Observer, AllAfrica.com, August 4. Subsequently, the Attorney General announced that he was appealing the ruling to the nation’s Supreme Court. However, there was a news report that President Museveni wants the law to be revised before it is voted on again, removing the tough penalties for consensual adult sex. A spokesperson said, “The president said he wants the law back in the house but now says if two consenting adults go into their room and decide to be stupid, let them.” Al Jazeera, Aug. 13. * * * Gay rights advocates in Uganda happily celebrated the court victory with a gay pride parade and rally on the shore of Lake Victoria in Entebbe on August 9. * * * The USAID Mission Director in Uganda, Leslie Reed, has denied rumors that the U.S. will be cutting off funding for HIV/AIDS work in Uganda. Rather, the funding will be redirected away from organizations that supported the recently enacted anti-gay law, most specifically the Inter-Religious Council of Uganda. BBC International Reports, July 24.

UGANDA – Determined to embrace ineffective but symbolically anti-gay policies in the ongoing struggle against HIV, President Yoweri Museveni signed into law a bill that criminalizes HIV transmission, authorizing fines and sentences up to ten years for “intentional transmission of HIV” and five years for “attempted transmission of HIV.” The law authorizes compulsory HIV testing of pregnant women and authorizes courts to order the release of information about a person’s HIV status without consent where the court deems it appropriate to do so. buzzfeed.com, Aug. 19.

UNITED KINGDOM – John Bercow, Speaker of the House of Commons, called for British Commonwealth nations that still have sodomy laws on their books to repeal them. Bercow was speaking as the Commonwealth Games were set to begin in Glasgow, Scotland. Speaking just prior to the opinion ceremony, Bercow stated, “Shamefully, it is estimated that 4 out of 5 countries in the Commonwealth criminalize homosexuality. Surely, it is time for the Commonwealth to do more to support lesbian, gay, transsexual and bisexual people, to ensure that they are not discriminated against, no matter where they live.” Guardian, July 23.

UNITED KINGDOM – The Same-Sex Marriage Act went into effect in England and Wales on March 29. During April, May and June, more than 1400 same-sex marriages were recorded. Female couples accounted for 56% of the marriages. There were 95 same-sex weddings in the first two days that the law was in effect, with a total of 351 in April, 465 in May and 498 in June. Scotland passed its own same-sex marriage law in February, and the first weddings are expected to take place in October. Guardian.co.uk, Aug. 22.

UNITED KINGDOM – The Court of Appeal rejected a transgender woman’s claim that she was entitled to receive the female state pension at age 60 when she reached that age in 2008. A Press Association report on July 31 about MB v. Department for Work and Pensions related that MB transitioned from male to female but “decided as a Christian to stay married ‘in the sight of God’ to his wife of 38 years and the mother of their two children,” and that this decision blocked his pension entitlement because she turned 60 before England’s marriage equality laws went into effect. To qualify for a woman’s pension, MB would have had to obtain a “gender recognition certificate” under the 2004 Gender Recognition Act, which would have required annulment of her marriage. Lord Justice Kay, writing for the court in upholding the decision by the Department for Work and Pensions, said, “The appellant does not wish to have her marriage annulled. She and her wife have lived as a married couple for 38 years and to not wish to change. Also, as a Christian she says that she and her wife feel married in the sight of God. Accordingly, she has not applied for a gender recognition certificate, and so far as the law is concerned she remains a man.” She applied for a state pension upon reaching age 60 in May 2008 but was refused because men become eligible for a pension at age 65 in the U.K. Under the Marriage (Same Sex Couples) Act which recently came into force, transsexuals are no longer required to annual existing marriages in order to get a gender recognition certificate, although the consent of their spouse to remain married despite the gender transition is required. Lord Kay noted that Parliament’s failure to engage earlier with the gender reassignment issue caused this discrepancy, and going forward in the new era of marriage equality in Britain transgender women will not face this problem. The court rejected any argument that this result contravened the principle of equal treatment or was discriminatory.

UNITED KINGDOM – A member of Parliament from the Conservative Party, Michael Fabricant, published an opinion article in The Guardian calling for a change in the blood collection policy. Fabricant criticized the continuing disqualification of gay men, arguing that it was unscientific and actually dangerous at a time of blood shortages. Unlike the U.S., which disqualifies any man who has had sex with another man since 1977,
the U.K. recently revised its policy to allow men who have sex with men to donate blood if they have not had any sexual contact in the prior 12 month period. Fabricant pointed out that this would disqualify a man who was careful about having only safer sex while allowing a heterosexual man who engages in lots of unprotected sex to donate blood. “This is wrong,” he insisted, arguing that other groups at higher risk for HIV than gay men who observe safer sex guidelines are allowed to donate blood. “HIV is not unique to gay men,” he wrote. “It is prevalent in straight people too. If a gay man practices safe sex, and can prove he does not have HIV, why should he not be able to donate?” Of course, it is technically not possible to “prove” one does not have HIV, since any given blood test for HIV antibodies may not be 100% accurate, but the odds of somebody being infected if they test negative and have not had any fluid-exposure sex in recent weeks are vanishingly low. The U.S. advisory board on blood donation policy has taken up this issue many times in recent years, but has been unable to muster a majority for revising the U.S. donation rules in this regard.

UNITED KINGDOM—Queen Elizabeth II signed an official pardon for the late Alan Turing, who was convicted under sodomy laws after World War II and sentenced to chemical castration, leading to his suicide. Turing’s secret service during World War II on the successful project to break the codes used by the German military played a crucial role in the Allied Victory, and his theoretical work provided the underpinnings of modern computing, and his theoretical work provided the underpinnings of modern computing. “HIV is not unique to gay men,” he wrote. “It is prevalent in straight people too. If a gay man practices safe sex, and can prove he does not have HIV, why should he not be able to donate?” Of course, it is technically not possible to “prove” one does not have HIV, since any given blood test for HIV antibodies may not be 100% accurate, but the odds of somebody being infected if they test negative and have not had any fluid-exposure sex in recent weeks are vanishingly low. The U.S. advisory board on blood donation policy has taken up this issue many times in recent years, but has been unable to muster a majority for revising the U.S. donation rules in this regard.

Michael Greenberg Writing Competition for law students is JILLIAN LENSON of Boston College Law School, and the winner of this year’s International Association of LGBT Judges’ Writing Competition is COLIN SALTRY of Temple University Law School. The Association’s board also paid tribute to D’ARCY KEMNITZ upon completing ten years as executive director of the Association, during which membership and the range of services provided to members has grown enormously. This tribute included fervent best wishes for the next ten years of D’Arcy’s leadership.

THE NATIONAL LGBT BAR ASSOCIATION will be holding an Out & Proud Corporate Counsel Award Reception in Philadelphia on September 18, honoring ROMULO DIAZ, JR., Vice President and General Counsel of Peco Energy. Information about this event, being held at Hotel Palomar, can be found on the organization’s website: lgbtbar.org.

The ASSOCIATION OF AMERICAN LAW SCHOOLS will hold a Workshop on Next Generation Issues on Sex, Gender and the Law in Orlando, Florida, on June 24-26, 2015. Persons interested in proposing presentations and delivering papers at this event have a September 15, 2014, deadline to make their submissions. Information is available on the AALS website (aals.org) and questions can be directed to 15wksp@aals.org.

THE SOUTHEASTERN ASSOC. OF LAW SCHOOLS has announced that Stetson University Professor ELLEN S. PODGOR, the chair of the Association of American Law Schools Section on Sexual Orientation and Gender Identity Issues is the new president of the association, whose members includes 72 law schools and 31 affiliate member schools.
2. Aloni, Erez, Deprivative Recognition, 61 UCLA L. Rev. 1276 (June 2014) (good and bad consequences of state recognition or non-recognition of unmarried partners).
12. Cantalupo, Nancy Chi, Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State, 73 Md. L. Rev. 887 (2014).
15. Cooper, Jacquelyn, Modern Day Segregation: States Fighting to Legally Allow Businesses to Refuse Service to Same-Sex Couples Under the Shield of the First Amendment, 15 Rutgers L. & Religion 413 (Spring 2014).
19. Duffey, Patrick J. and Alexander M. Popovich, Implications of State ‘Conversion’ Laws for Same-Sex Couples, 41 Estate Planning 22 (July, 2014)(this refers to laws that that provide, for example, that a same-sex couple married in one state will be recognized in another state as having a civil union).
“Wedding Venue” cont. from pg. 373

Thus, any 1st Amendment claim by the Giffords would be futile under *Employment Division v. Smith*, since the N.Y. Human Rights Act is a religiously-neutral law of general application. Religious organizations in New York are deemed “distinctly private” for purposes of the public accommodations law, and are thus statutorily exempt from complying, but businesses in New York do not enjoy a statutory exemption based on their owners’ religious beliefs. Unless the New York courts were to construe the state constitution’s guarantee of individual religious liberty more broadly than the U.S. Supreme Court has construed the federal 1st Amendment, there seems slight chance that this decision would be reversed by the state courts based on the Giffords’ religious objections, and there appears to be no basis for U.S. Supreme Court review, unless that Court is interested in overruling *Employment Division v. Smith*, an opinion that was written by Justice Antonin Scalia. Having decided to enter the commercial sphere by advertising and providing a wedding venue for hire with catering in their barn, they have to play by the rules governing the commercial sphere, including the Human Rights Law.

**EDITOR’S NOTES**

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

All points of view expressed in *Lesbian/Gay Law Notes* are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

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