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MOORE HARM THAN GOOD

Marriage Equality Arrives, But Meets Stiff Resistance, in Alabama

EXECUTIVE SUMMARY

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The Alabama Marriage Equality Circus – And Foreshadowing the Final Result

On Friday afternoon, January 23, 2015, U.S. District Judge Callie V. S. Granade ruled in *Searcy v. Strange*, 2015 U.S. Dist. LEXIS 7776, 2015 WL 328728 (S.D. Ala.), that Alabama's refusal to recognize a same-sex marriage contracted out of state violated the 14th Amendment. Judge Granade ordered the only named defendant, Alabama Attorney General Luther Strange, to cease enforcing the recognition ban. Her opinion made no mention of a stay pending appeal, but was issued too late in the day for same-sex couples to show up at the county probate courts seeking licenses. Alabama Attorney General Strange promptly filed a motion for a stay, arguing that as the U.S. Supreme Court had just weeks earlier granted a petition for certiorari to review the 6th Circuit's decision in *DeBoer v. Snyder*, it would be appropriate for the court to stay its ruling until the Supreme Court resolved the issue "on a nation-wide basis." In Alabama, the elected probate judges in each county are responsible for issuing marriage licenses and registering marriages; their Association issued a statement on January 24, contradicting media reports and asserting that the court's order, directed solely at the attorney general, did not require the probate judges to issue marriage licenses to same-sex couples. Thus, the Alabama Marriage Equality Circus was duly launched, to play out over the remainder of February in a series of astonishing developments, including a statement by a Supreme Court Justice dissenting from a stay denial suggesting that the Supreme Court was likely to rule in favor of marriage equality in June.

On Sunday, January 25, counsel for the plaintiffs in *Searcy*, Christine C. Hernandez and David G. Kennedy, filed their objection to Strange's motion, arguing that the motion should be denied because the U.S. Supreme Court had refused to stay any district court marriage equality rulings pending appeal since October 6, 2014, when it had denied petitions from several states to review marriage equality rulings in the 4th, 7th and 10th Circuits. This included subsequently denying stay petitions from other states in those circuits, as well as a stay petition from Florida – the first stay petition to be denied from a state that was in a circuit that had yet to rule on the issue of marriage equality. Also on January 25, the Alabama Probate Judges Association sought leave to appear as *amicus curiae* in support of Strange's motion for a stay. In an unusual move, Judge Granade issued a Sunday ruling, *Searcy v. Strange*, 2015 WL 328825 (S.D. Ala., Jan. 25, 2015), holding that because Strange had failed to show that he was likely to succeed on the merits, he had not met the requirements for a stay pending appeal. She then ordered, however, that her injunction and judgment in the case be stayed for 14 days to give the Attorney General a chance to seek a stay from the 11th Circuit, this temporary stay to be lifted on February 9 if no stay was obtained from a higher court.

The next day, January 26, Judge Granade upped the ante by ruling in another case, *Strawser v. Strange*, 2015 U.S. Dist. LEXIS 8439 (S.D. Ala.), that the reasoning of her decision in *Searcy* applied as well to the question whether a same-sex couple was entitled to marry in Alabama. This ruling came on a *pro se* complaint filed by a couple of gay men who expressed particular urgency about marrying because of the medical condition of one of them. Granada concluded that the plaintiffs had met the requirements for a preliminary injunction and ordered the Attorney General not to enforce Alabama laws that prohibit same sex marriages. She specified that this ruling binds "defendant and all his officers, agents, servants and employees, and other in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage." Apparently, she hoped by this ruling to counter the Probate Judges Association's contention that her rulings were not binding on them. She also stayed execution of her order until February 9 to give the state an opportunity to seek a stay pending appeal from the 11th Circuit.

In Alabama, the elected probate judges in each county are responsible for issuing marriage licenses and registering marriages.

At this point, a new player entered the arena, Alabama Chief Justice Roy Moore, who issued an "open letter" to Governor Robert Bentley contending that Judge Granade's ruling "has raised serious, legitimate concerns about the propriety of federal court jurisdiction over the Alabama Sanctity of Marriage Amendment, Art. I, section 37.03,

Ala. Const. of 1901." According to Chief Justice Moore, nothing in the federal constitution authorized a federal district judge to strike down the Alabama same-sex marriage ban. Quoting from Christian scripture as his ultimate source of authority, Moore insisted that the legislature and people of Alabama could embody this higher authority in their laws, and no federal court could question it. "Our State Constitution and our morality are under attack by a federal court decision that has no basis in the Constitution of the United States," he thundered. "Nothing in the United States Constitution grants the federal government the authority to desecrate the institution of marriage." He argued that such "an infringement upon the definition of marriage" violated the 10th Amendment's reservation of rights to the states, stated that he was "encouraged" by the Probate Judges Association's advice to probate judges to refuse to issue marriage licenses to same-sex couples, and expressed "dismay" that some judges had been quoted in the press as being willing to issue such licenses. "I ask you to continue to uphold and support the Alabama Constitution with respect to marriage, both for the welfare of this state and for our posterity," he concluded his letter to the governor. "Be advised that I stand with you to stop judicial tyranny and any unlawful opinions issued without constitutional authority." But Governor Bentley, with little hesitation, seemed unwilling to be enlisted into a nullification controversy, and attempted throughout the ensuing controversy to steer clear of it. Although he joined in the Attorney General's petition to stay the ruling, he also subsequently announced that the state government would obey any lawful order of the federal courts.

Meanwhile, on January 28 Judge Granade responded to the request contained in plaintiffs' opposition to Attorney General Strange's motion for a stay for a clarification of the scope of her order. After noting the controversy around the Probate Judges Association's statement, she wrote: "Because the court has entered a stay of the Judgment in this case, neither the named Defendant, nor the Probate Courts in Alabama are currently required to follow or uphold the Judgment. However, if the stay is lifted, the Judgment in this case makes it clear that Ala. Const. Art. I., sec. 36.03 and Ala. Code sec. 30-1-19 are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment." She then quoted at length from U.S. District Judge Robert Hinkle's ruling in *Brenner v. Scott*, 2015 WL 44260 (N.D. Fla., Jan. 1, 2015), from a passage that had persuaded county clerks throughout Florida to comply with that court's marriage equality order, even though only one of the clerks was a named defendant. Hinkle had asserted that there "should be no debate on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allowing certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees."

The Court's stay denial and Justice Thomas's dissent set off a fair amount of jubilation among marriage equality proponents.

Also on January 28, the Southern Poverty Law Center filed a citizen's complaint against Chief Justice Moore with the Judicial Inquiry Commission of Alabama, citing his letter to the governor and subsequent public statements in which he encourage probate judges to defy the federal court's order, asserting that Moore's actions "violate Alabama's Canons of Judicial Ethics in numerous and significant regards," which the complaint set out at length. This was beginning to look like a replay of a prior controversy involving Moore, in which his defiance of a federal court order to remove a 10 Commandments monument that he had constructed at the Supreme Court building led to him being removed from office, only to be subsequently re-elected to the court after an unsuccessful run for the governorship based on the notoriety he had attained through the prior controversy.

Of course, Attorney General Strange had moved the 11th Circuit to stay the district court orders pending appeal in both *Searcy* and *Strawser*. On February 3, a panel consisting of Circuit Judges Tjoflat, Hull, and Marcus issued an order consolidating the two cases for appeal, accepting amicus curiae filings from the Probate Judges Association and Governor Bentley in support of the motion for a stay, but denying the motion without explanation. The *Searcy* plaintiffs then moved Judge Granade to accelerate the lifting of her stay, while Strange advised the court that he was seeking a stay from the U.S. Supreme Court. Judge Granade denied the plaintiffs' motion. "If the Supreme Court denies a stay or does not rule before February 9, 2015," she wrote, "this court's stay will remain in place until that date to allow the Probate Courts of this state to be completely prepared for compliance with the rulings in this

case and the *Strawser* case." Thus, she had not so obliquely made stronger the message from her January 28 ruling that Probate Judges should comply and issue licenses *when the stay was lifted*. However, anticipating the lifting of the stay on February 9, Chief Justice Moore issued an "Order" on Sunday evening, February 8, purporting to direct the state's probate judges not to issue marriage licenses to same-sex couples. The question of his authority to issue such an order immediately arose. The next day, the 11th Circuit announced that the pending marriage equality appeals by Florida and Alabama would be put on hold until the U.S. Supreme Court rules in June on the appeals from the 6th Circuit's decision in *DeBoer v. Snyder.*

The U.S. Supreme Court stretched out the drama by not ruling on the stay petition until the morning of February 9, when it issued a one-sentence opinion in *Strange v. Searcy*, 2015 WL 505563: "The application for stay presented to Justice Thomas and by him referred to the Court is denied." While this had been widely anticipated, some had speculated that the recent certiorari grant on the question whether states were required to allow or recognize same-sex marriages might cause the Court to change course in responding to stay requests from additional states. Justice Clarence Thomas, with whom Justice Scalia joined, reiterated his views, released earlier in connection with the denial of the Florida stay request, that it was inappropriate for the Court to allow these marriage equality rulings to go into effect. "When courts declare state laws unconstitutional and enjoin state officials from enforcing them, our ordinary practice is to suspend those injunctions from taking effect pending appellate review," he wrote, citing the Court's action in January 2014 in *Herbert v. Kitchen*, 134 S. Ct. 893, staying the Utah marriage equality ruling. He also cited the stay that the Court had granted in *Bostic*, the Virginia case. He noted that he had disagreed with the decisions to deny stays in cases arising in the 9th Circuit after the court of appeals in that circuit had ruled for marriage equality on October 7, while acknowledging that "there was at least an argument that the October decision [to deny certiorari in the marriage equality cases from the 4th, 7th and 10th Circuits] justified an inference that the Court would be less likely to grant a writ of certiorari to consider subsequent petitions. That argument is no longer credible," he asserted. "The Court has now granted a writ of certiorari to review these important issues and will do so by the end of the Term. The Attorney General of Alabama is thus in an even better position than the applicant to whom we granted a stay in *Herbert v. Kitchen*," since it was now clear that the Alabama motion raised questions on which the Court has agreed to make a ruling. Thomas scolded the majority for letting the Alabama district court ruling go into effect. "This acquiescence may well be seen as a signal of the Court's intended resolution of that question," he wrote. "This is not the proper way to discharge our Article III responsibilities. And, it is indecorous for this Court to pretend that it is." He characterized the decision to deny the stay as "yet another example of this Court's increasingly cavalier attitude toward the States," evidenced by repeated denials of stays sought by states seeking to appeal adverse constitutional rulings. "I would have shown the people of Alabama the respect they deserve and preserved the status quo while the Court resolves this important constitutional question."

The Court's stay denial and Justice Thomas's dissent set off a fair amount of jubilation among marriage equality proponents. A majority of the Supreme Court was unwilling to delay the district court's ruling from going into effect; this seemed like a clear signal that there was a majority on the Court that was poised to overrule the 6th Circuit's wrong-headed *DeBoer* ruling. Thomas's dissent, by describing the underlying substantive issue as an "important constitutional question," clearly refuted the 6th Circuit's odd contention that it was bound by *Baker v. Nelson*, the Supreme Court's 1973 disposition of a marriage equality appeal from Minnesota with the cryptic statement that the case did not present a "substantial federal question." Even as firm an opponent of marriage equality as Thomas was willing to acknowledge on the record that what was not a "substantial federal question" in 1973 had now become an "important constitutional question." The failure of Chief Justice John Roberts or Justice Samuel Alito to join Thomas's dissent also raised the possibility that one or both of them might join in a vote to overrule the 6th Circuit's rejection of marriage equality.

Meanwhile, back to the Alabama Marriage Equality Circus. . . As soon as the Supreme Court announced its denial of a stay, Judge Granade's temporary stay was lifted. However, Probate Judges in Alabama varied widely in their responses to the new situation, in light of the Order they had received from Chief Justice Moore directing them not to issue licenses. A few were quick to issue marriage licenses to same-sex couples, apparently accepting the argument that the federal Supremacy Clause compelled them to do so. Some others, expressing consternation at finding themselves caught between conflicting directions from Chief Justice Moore, the titular head of the state court system, and Judge Granade, whose decision had been declared invalid by Moore, decided to keep their office windows shut and not issue marriage licenses to anybody, while some continued to deny marriage licenses to same-sex couples while issuing them to different-sex couples.

When Don Davis, the Probate Court Judge in Mobile, decided not to open the marriage license division of the Mobile County Probate Court that morning, the *Searcy* plaintiffs filed a motion for contempt and immediate relief with Judge Granade.

Judge Granade denied that motion, pointing out that Judge Davis was not a named defendant in their case. However, other plaintiffs were busy as well. Strawser and Humphrey filed an emergency motion for leave to file an amended complaint adding additional plaintiffs and defendants and seeking a preliminary injunction or temporary restraining order against Davis, because they had sought a marriage license without success at the Mobile County Probate Court. This was filed by their new counsel from the National Center for Lesbian Rights, the ACLU Foundation of Alabama, and local counsel Heather Fann in Birmingham. In addition, the counsel from the *Searcy* case filed a new complaint representing a group of same-sex couples who had unsuccessfully sought marriage licenses in Mobile.

The Alabama Probate Judges Association had backed away from its earlier position in light of Judge Granade's "clarification" of the scope of her ruling.

This complaint named Probate Judge Davis as the lead defendant, but also named several other local and state officials, including Strange and also Governor Bentley and Chief Justice Moore. This new case was styled *Hedgepeth v. Davis*, Civil Action No. 15-0067-C. On February 10, Judge Granade issued an order in *Hedgepeth*, denying the motion for the TRO, and pointing out that plaintiffs had not filed proof of serve on the numerous named defendants, as to whom defense counsel had not yet appeared. Since she had already set a preliminary injunction hearing for February 12 in *Searcy*, however, she indicated she would allow counsel for this set of plaintiffs to participate in that hearing.

By this point, the Alabama Probate Judges Association had backed away from its earlier position in light of Judge Granade's "clarification" of the scope of her ruling. On February 10, Lambda Legal sent a letter to all the probate judges in the state via Judge Alan King, president of the Association, setting out the detailed legal argument as to why all the probate judges were bound to comply with the federal district court's order. In the meantime, however, Judge Davis had filed a petition in the Supreme Court of Alabama, effectively seeking an advisory opinion as to whether he could or must issue marriage licenses to same-sex couples. That court, with Chief Justice Moore not participating, dismissed the petition on February 11, explaining that under state law the only advisory opinions it could issue were in response to requests for advice from the governor or the legislature. *Ex parte Don Davis, Judge of Mobile County Probate Court*, 2015 WL 567479. Several of the justices wrote their own concurring opinions, agreeing that it was inappropriate for the court to respond to Davis.

Justice Michael Bolin quoted a recent opinion of the court, to the following effect: "What has been an orderly process, I suspect, will soon resemble a three-ring circus," *Tyson v. Macon County Greyhound Park, Inc.*, 43 So.3d 587, 595 (Ala. 2010). "Admittedly this quotation is taken out of context," he wrote, but "from the perspective of a probate judge in Alabama, however, the events that have unfolded subsequent to the issuance of the memorandum opinion and order by United States District Judge Callie S. Granade, in the United States District Court for the Southern District of Alabama, Southern Division, in Civil Action No. 14-0208-CG-N, surely brings to mind this quotation. I do not intend to trivialize the important constitutional questions presented by this controversy, but the unfortunate path this litigation has taken so far has resulted in mass confusion that I suspect has led the public to wonder what has happened to the orderly rule of law." He failed to mention that the source of much of the confusion was Chief Justice Moore. He expressed regret that the probate judges had not been represented in the proceedings, noting that Davis was originally named as a defendant in the *Searcy* case but had been "dismissed from the proceedings" back in July 2014, and was not added again as a party until February 10, when the plaintiffs filed their First Amended Complaint in response to Judge Granade's refusal to hold Davis in contempt. He then quoted Justice Thomas's dissent from the denial of the stay in full, and pointed out that the ultimate issue will be decided by the U.S. Supreme Court. Justice Bolin went on about the controversy concerning the effect of federal district court decisions on state judges. "The ensuing legal 'circus' has left the probate judges, who had no voice or opportunity to be heard in this matter, in an untenable position – caught between a federal district judge's order, the statewide precedential value of which is uncertain, and an order form the Chief Justice of the Alabama Supreme Court. If the term 'circus' is hyperbole, the current predicament at least qualifies as a 'darned if I do, darned if I don't' dilemma for the probate judges, and this is no way to wisely, fairly, and deliberately administer justice," he asserted. He went on to question whether Moore had authority to direct the probate judges in this way, disclaiming any attempt to answer the questions about the relative authority of federal and state decisions, but said he was writing to "illustrate the

probable angst and consternation that each of the 68 probate judges of this State has undergone since the federal court's order and Chief Justice Moore's order were issued, and it did not have to be this way."

Justice Glenn Murdock suggested that implicit in Davis's petition had been the question whether probate judges are required to issue marriage licenses at all, but agreed that the question was not properly before the court. (Some commentators seized on this as a suggestion by Murdock that the state could respond to the controversy by just stopping issuing any marriage licenses, but it is not clear from the context of his opinion that he was doing anything more than noting the question implicitly raised by Davis.) Justice Greg Shaw set out at greater length why the state supreme court could not issue an advisory opinion requested by a probate judge.

On February 11, the Alabama Policy Institute and the Alabama Citizens Action Program, two organizations strongly opposed to same-sex marriage, filed an "Emergency Petition for Writ of Mandamus" in the Alabama Supreme Court, naming all Alabama probate judges as defendants, seeking "on behalf of the state of Alabama" that the Court order the probate judges not to issue marriage licenses to same-sex couples. Attorney General Strange had no apparent connection with this action, which had not been authorized by any elected official or the legislature.

On February 12, after hearing from the parties, Judge Granade issue a new Order in *Strawser v. Strange*, 2015 WL 589917, 2015 U.S. Dist. LEXIS 17200 (S.D. Ala.). By now, Judge Davis had been added as a defendant, so the Order specifically ran against him. First, Judge Granade reiterated her earlier rulings on the merits concerning the unconstitutionality of the Alabama marriage ban. Then she specifically enjoined Judge Davis "from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage. . . This injunction binds Judge Davis and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage."

On Friday, February 13, six members of the Alabama Supreme Court (Chief Justice Moore not participating) agreed to consider the petition from the two organizations, setting a schedule for the different sides to file answers and briefs, without indicating when or whether it would hold a hearing. Probate judges who had been issuing marriage licenses to same-sex couples were directed to respond to the Petition by February 18.

On February 15, Jefferson County Probate Judge Alan King filed a motion seeking leave to intervene in the *Strawser* case, pointing out that he had been named as a defendant in the action pending in the Alabama Supreme Court. He stated that his office had begun issuing licenses to same-sex couples on February 9, when the district court's stay was lifted. He revealed that the Alabama Supreme Court had ordered him (and the other probate judges) to file an answer to that "Emergency Petition," and asserted that the petitioners in that case "acting in concert with and on behalf of the State of Alabama, are improperly attempting to seek a further stay of this Court's prior Orders from the Alabama Supreme Court," which would violate Judge Granade's injunction. In effect, King was seeking by intervention to shelter himself from the problem of being subjected to contradictory orders from the federal and state courts. Montgomery County Probate Judge Steven L. Reed, who also had been issuing marriage licenses to same-sex couples, also sought to appear in the *Strawser* case.

On February 20, Judge Granade issued a new ruling, *Strawser v. Strange*, 2015 WL 736091, 2015 U.S. Dist. LEXIS 20456 (S.D. Ala.), denying Probate Judge King's motion to intervene, which had been opposed by Attorney General Strange. She accepted the argument that King did not have any controversy with the plaintiffs, all of whom resided in Mobile County and had received the relief they sought through Judge Granade's prior injunction against Probate Judge Davis.

Meanwhile, little by little, probate judges around the state fell into line and began to issue marriage licenses to same sex couples. By the end of February, with the Alabama Supreme Court not having ruled on the "Emergency Motion" and also having received a motion from the marriage equality plaintiffs seeking to compel the Attorney General to prevail on those petitioners to withdraw their motion, at least 50 of the 68 county probate courts were open for business to same-sex couples. A handful still had their doors closed, and a handful were still issuing licenses only to different-sex couples, facing the possibility of litigation against them.

On February 24, it was reported that Judge Davis, despite complying with the order to issue licenses, had decided to stall on the issue that had led to the original *Searcy* case – the Probate Court's refusal to approve Cari Searcy's petition to adopt the child born to her wife Kim McKeand's. Davis indicated he would not finalize the adoption until after the Supreme Court of the United States rules on same-sex marriage. This was despite the federal district court's direct order to him requiring him to recognize the couple's out-of-state same-sex marriage. Instead, Davis issued an "interlocutory decree" granting temporary parental rights to Searcy, including the authority to consent to necessary medical treatment. This led Searcy and McKeand to file a new complaint in federal district court, seeking a direct order that Davis proceed on the adoption case expeditiously. And so the Alabama Marriage Equality Circus was still in full swing as the month drew to a close. ■

New York Court of Appeals Approves Reduction of Charges in HIV Transmission Case

The New York Court of Appeals, the state's highest court, ruled 4-1 on February 19 that a Syracuse (Onondaga County) trial judge had appropriately granted a defendant's motion to reduce charges against him from felony to misdemeanor reckless endangerment where the defendant had apparently transmitted HIV to another man by engaging in unprotected anal sex without disclosing his HIV status, reassuring his sex partner that it was "okay." *People v. Williams*, 2015 WL 685818, 2015 N.Y. LEXIS 256 . The defendant also faces a misdemeanor assault charge. The court's decision is premised on its conclusion that evidence presented to the grand jury would not support the conclusion that the defendant acted with "depraved indifference to human life."

According to the court's statement of the facts, the victim and Terrance Williams became friends in July 2010, and their relationship became sexual later in the summer "when they engaged in anal sexual conduct." The first few times they used condoms, but eventually they had unprotected sex. "The first time this happened," wrote the court, "the victim reached for a condom only to have defendant take the condom away from him," assuring him that it was "safe for them to have unprotected sex." The men had previously conversed several times about HIV and "the need to be careful to avoid infection." In October 2010, Williams told his partner that Williams might be HIV-positive, because a prior sexual partner with whom he had unprotected sex had been diagnosed. Williams urged his partner to get tested, and shortly after this conversation their relationship ended. In February 2011, the victim experienced symptoms, got tested, and turned out to be infected. He started on antiretroviral therapy soon thereafter.

In April 2011, the victim received a message through social media from Williams, in which Williams confessed that he had been diagnosed as HIV positive before he and the victim had started having sex, and Williams expressed remorse about having lied to him. "I want to start by saying that I sincerely apologize for giving you HIV," he wrote. "I made my biggest mistake that night I said I didn't want to use a condom knowing my status but still being so deep in love with you that I wanted us to be one person. I was selfish and I was more so concerned with my own false happiness than your health." The victim contacted the police, and this prosecution ensued.

The Onondaga County District Attorney's office presented the case to a grand jury, which voted to indict Williams on charges of reckless endangerment in the first degree (Penal Law section 120.25) and third-degree assault (Penal Law section 120.00[2]). Reckless endangerment in the first degree is a Class D felony, subjecting a defendant to a potential prison term of up to seven years. Conviction requires a finding that the defendant "under circumstances evincing a depraved indifference to human life … recklessly engages in conduct which creates a grave risk of death to another person." The third-degree assault charge applies to situations where a defendant intentionally, recklessly or negligently causes a physical injury to another. In cases of negligence, the defendant must have use a deadly weapon or a dangerous instrument. This is a misdemeanor with a maximum prison sentence of a year.

Williams filed a pretrial motion challenging the appropriateness of the first degree reckless endangerment charge, arguing that his conduct did not show depraved indifference to human life and that in light of current medical treatments he did not subject the victim to a "grave risk of death" by transmitting HIV to him. Onondaga Supreme Court Justice John J. Brunetti granted the motion and reduced the charge to second degree reckless endangerment (Penal Law section 120.20), which applies when a defendant "recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." This is a Class A misdemeanor, carrying the same potential prison sentence as the assault charge.

The prosecutor appealed Brunetti's ruling, but the Appellate Division, 4th Department, affirmed Brunetti by a unanimous 5-0 panel vote. The panel wrote that the evidence presented to the grand jury would not support a finding of depraved indifference to human life. The court focused on Williams' explanation why he did not disclose his HIV status (he was "afraid [the victim] would not want to be with" him, and he "loved [the victim] so very much"), and on his action of urging the victim to be tested and then sending his apology. "The fact that defendant encouraged the victim to be tested for HIV indicates that defendant was trying, however weakly and ineffectively, to prevent any grave risk that might result from his conduct. We thus conclude that, while the evidence certainly shows that defendant cared much too little about [the victim]'s safety, it cannot support a finding that he did not care at all," which would be necessary to support a finding of "depraved indifference to human life." The Appellate Division panel also found that medical evidence presented to the grand jury countered the conclusion that transmitting HIV today puts somebody in grave risk of death. A doctor had testified that the prognosis for somebody who starts antiretroviral therapy soon after being infected is "outstanding." The prosecutor applied to the Court of Appeals for review of this decision.

The Court of Appeals abstained from deciding whether HIV infection today creates a grave risk of death, instead focusing on the depraved indifference issue. "Here," wrote the court, "there is no evidence that defendant exposed the victim to the risk of HIV infection out of any malevolent desire for the victim

to contract the virus, or that he was utterly indifferent to the victim's fate. Without a doubt, defendant's conduct was reckless, selfish and reprehensible. Under our case law, though, this is not enough to make out a *prima facie* case of depraved indifference." Since it concluded that the evidence would not support a finding of "depraved indifference," the Court of Appeals saw no need to rule on whether the medical evidence would show a "grave risk of death."

Judge Eugene Pigott, Jr., dissented, contending that the evidence presented to the grand jury was sufficient to support the felony charge. "The People's evidence established that defendant knew at the time he engaged in sexual conduct with the victim that he had been infected with HIV. The victim was unaware of defendant's condition. Prior to engaging in unprotected intercourse, defendant and the victim had spoken about the need for people to be careful when engaging in unprotected sex, but defendant intentionally failed to tell the victim that defendant had been diagnosed with HIV in December 2009, eight months before he and the victim had met. The grand jury testimony established that when the victim reach for a condom, defendant took it away from the victim, and after the victim had asked defendant four times whether it was safe to engaged in unprotected sex with the defendant, defendant responded that it was 'okay.' These facts, viewed in the light most favorable to the People, established at the very least that defendant acted with 'wanton cruelty, brutality or callousness' and 'utter indifference' to the victim's fate." Judge Pigott contended that Williams' subsequent remorse was irrelevant; his state of mind at the time the acts were committed were the relevant consideration. He argued that it was inappropriate for the court to substitute its judgment for the grand jury on this point. Further, he noted that the grand jury received conflicting evidence on the "grave risk of death issue," which in his view was "legally sufficient" to establish that element of the charged offense.

The Court of Appeals' action means that the prosecution will continue with the reduced charge of second degree reckless endangerment and the original third-degree assault charge. Unless Williams is contesting the prosecution's factual case, it is likely that this case will end with some sort of plea bargain. Reduction of the reckless endangerment charge to a misdemeanor probably increases the likelihood of a plea to a short prison sentence. The district attorney's appeal through two levels suggests that the office feels strongly enough about this case that it is unlikely they would offer a plea that doesn't involve prison time.

The court's ruling raises interesting public policy issues. Surely it is reprehensible for somebody who knows they are infected and capable of transmitting HIV to fail to disclose their status to a sex partner while assuring them that it is "safe" for them to have unprotected anal sex. The question is whether such conduct should be treated as merely a misdemeanor, and whether actual transmission of HIV under those circumstances should also be treated as a mere misdemeanor under the assault statute? Some have argued that criminal law is too blunt an instrument altogether to address issues of sexual ethics in the context of consensual gay sex where undisclosed HIV is involved, while others would undoubtedly be glad to "throw the book" at somebody who affirmatively lies about their HIV status to get a partner for whom they supposedly feel love to submit to a serious risk of permanent infection with HIV and all the complications that might ensue. (Nothing is said in the opinion about using PREP to prevent transmission, so presumably Williams had no basis for arguing that he was not infectious.) This is not one of those outrageous cases where somebody is prosecuted and sentenced to decades in prison for "exposing" another to the virus under circumstances where the chance of transmission is slight, where transmission did not actually take place, and where the defendant did not affirmatively misrepresent his medical condition. Perhaps further fine-tuning of the statutes is needed. ■

Sixth Circuit Affirms Majority of Civil Suit Damages Jury Awarded Against Former Michigan Assistant Attorney General

The bad news continues to pile up for former Michigan assistant attorney general Andrew Shirvell in 2015. Last month, the Court of Appeals of Michigan dealt him his first defeat of the year by overturning his reinstated unemployment benefits and affirming his termination. *Shirvell v. Department of Attorney General*, 2015 Mich. App. LEXIS 8, 2015 WL 114608 (Mich. Ct. App. Jan. 8. 2015). Now, a three-judge panel of the United States Court of Appeals for the Sixth Circuit has separately affirmed $3.5 million dollars, of the original $4.5 million dollars, in damages that a federal jury awarded to Chris Armstrong in 2012 after a trial on his civil claims of defamation, false light invasion of privacy, intentional infliction of emotional distress, and stalking. *Armstrong v. Shirvell*, 2015 WL 410545, 2015 U.S. App. LEXIS 1782 (6th Cir. Feb. 2, 2015). Judge Julia Smith Gibbons wrote the opinion joined by Judge Karen Nelson Moore and Senior Judge Alan Eugene Norris.

Readers of last month's issue will be familiar with the troubling facts that led to this civil suit, although Judge Gibbons' opinion focuses on some different parts of the story, more relevant to the claims in this case.

In early 2010, Shirvell became aware that the new student body president, Armstrong, at his alma mater, the University of Michigan, was openly gay. Shirvell reacted to this development by launching an obsessive online campaign to destroy Armstrong's reputation, first on Facebook and then via a blog entitled the "Chris Armstrong Watch."

In his subsequent smear campaign, he both greatly exaggerated Armstrong's political power as a college student body president and drastically twisted Armstrong's agenda for the limited role, calling Armstrong a "radical homosexual activist," comparing him to a Nazi and even going so far as to place a picture of Armstrong's face alongside a swastika, and warning that pro-life, pro-family Christians like himself would be "violently persecuted" by Armstrong. He also pushed stories about Armstrong's supposed habitual facilitation of underage binge drinking and gay orgies. When his outrageous accusations caught the public's attention, he appeared on local and then national television to defend his views. Finally, Shirvell's conduct expanded beyond online harassment as he repeatedly tracked Armstrong down in Ann Arbor at his home, at school events, and even off-campus to confront and "protest" him. Shirvell eventually took the blog down at the end of September 2010 and lost his job (the circumstances surrounding which were the focus of last month's story) in the Michigan Attorney General's Office in November of that year.

Following this whole ordeal, Armstrong filed a civil lawsuit against Shirvell in April 2011 alleging defamation, intentional infliction of emotional distress, abuse of process, false light, intrusion, and stalking. Shirvell removed the case to federal court and got several claims dismissed on summary judgment before a jury trial commenced in August 2012. The jury found Shirvell liable on all remaining counts, awarding Armstrong $750,000 in compensatory damages and $500,000 in exemplary damages for defamation, $1,000,000 in compensatory damages for casting Armstrong in a false light, $1,750,000 in compensatory damages for intentional infliction of emotional distress, and $100,000 in compensatory and $400,000 in exemplary damages for stalking, amounting to a grand total of $4.5 million plus interest.

The complicated series of elements necessary to make out each of the claims and Armstrong's use of similar facts to satisfy the criteria for his separate counts provided Shirvell with "a litany of challenges" on appeal. Ironically, due to some quirks of American civil procedure and jurisdiction, the state court decision last month focused largely on federal First Amendment law and the federal court decision this month focuses largely on state tort law.

Shirvell's main objection to the defamation claim centered on his argument that "his statements . . . were not subject to interpretation as actual facts and thus not capable of defamatory meaning." Gibbons easily rejects Shirvell's view, finding that the "vast majority of Shirvell's statements were capable of defamatory meaning because they can reasonably be interpreted as conveying actual facts." The context of his statements, made on a blog claiming to be a "watch site," strengthen the case that "a reasonable person could interpret them as conveying actual facts," and his declarations on television "made it abundantly clear that he wanted others to interpret the statements on the blog as actual facts." There was also no prejudicial error even if a small number of the statements submitted to the jury were not defamatory. Notably, they did not have the effect of lessening the harm to Armstrong's reputation because his "reputation would have already been decimated in the eyes of any person reading the 'Chris Armstrong Watch' with the tendency to be influenced by that blog."

Still looking at the defamation claim, Shirvell also challenged the district court's finding that Armstrong was a private figure. With the interplay of the First Amendment, such a finding meant Armstrong only needed to show Shirvell spoke negligently, rather than with actual malice. Shirvell believes Armstrong should have been deemed a limited-purpose public figure, but Gibbons notes that "[t]here is no evidence that anyone besides Shirvell saw Armstrong's character for truthfulness as a live issue or a subject of debate" and "the record is completely devoid of any evidence that Armstrong's conduct affected anyone beyond the immediate participants, or that anyone besides

those participants and Shirvell had any interest in the conduct." Armstrong's sexual orientation alone did not ipso facto create a "public controversy over Armstrong's sex life."

Ironically, though, whether Armstrong proved actual malice remains relevant to whether he is entitled to actual damages as opposed to only provable economic damages, and Gibbons declares that "the record . . . contains plentiful evidence from which the jury could have found by clear and convincing evidence that Shirvell acted with actual malice." Gibbons repeatedly asserts that a reasonable jury could conclude Shirvell knew his stories were fabrications and his contradictory testimony about what he personally believed was not credible.

Throughout the rest of the opinion, Gibbons continues to display sympathy to the plight of an innocent college student who was relentlessly pursued for months by a stranger who turned his strong aversion to a homosexual orientation into an a public crusade. She thoroughly analyzes almost every legal conclusion reached by the district court on all of the rest of the claims and the different kinds of damages awarded. Out of the myriad objections Shirvell raised, the only one she finds to have merit is the imposition of an illegal double recovery for defamation and false light under Michigan law. She writes that "[t]he jury was assessing the same harm caused by the same statements and awarded a lump-sum figure for both." As a result, she subtracts the $1 million Armstrong was awarded for false light and orders the district court to enter judgment in Armstrong's favor for $3.5 million, rather than $4.5 million.

While a great victory, unfortunately, the win might not prove to mean much in a tangible sense for Armstrong, as it appears very doubtful that Shirvell has anywhere near $3.5 million in assets to cover the judgment. The opinion also recounts how the devastating personal ramifications of Shirvell's past vitriol continue to reverberate even years later in Armstrong's life. – *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGaL.

New Jersey Court Rules Conversion Therapy Group Cannot Claim Homosexuality is a Disorder

The New Jersey Superior Court, Hudson County, Law Division, granting partial summary judgment to plaintiffs who are past victims of conversion therapy suing a faith-based conversion therapy provider, has ruled that in advertising or selling conversion therapy services it is a misrepresentation in violation of the Consumer Fraud Act of New Jersey to describe homosexuality as a mental illness, disease, or disorder and that it is further a misrepresentation to include specific "success" statistics when client outcomes are not tracked and no records of client outcomes are maintained, in *Ferguson v. JONAH*, Docket No. L-5473-12 (N.J. Super. Ct., Hudson Co., Feb. 10, 2015). The court had previously ruled to bar JONAH's proffered expert witnesses whose testimony would be based on the proposition that homosexuality is an illness. *Ferguson v. JONAH*, 2015 N.J. Super. Unpub. LEXIS 236 (N.J. Super. Ct., Hudson Co., Feb. 5, 2015).

"It is not a proper inquiry for a court to determine the correctness of the APA's decision to generally accept that homosexuality is not a disorder, and no proper basis has been advanced on which a court may reassess the scientific accuracy of the psychiatric categorization of homosexuality."

Plaintiffs, six persons who received conversion therapy services by therapy provider Jews Offering New Alternatives for Healing ("JONAH"), brought suit under the New Jersey Consumer Fraud Act ("CFA") alleging that JONAH misrepresented that homosexuality is a mental illness or disorder and that JONAH's therapy program is effective in changing the sexual orientation of clients, and sought a refund of their money paid to JONAH as well as the costs for their reparative therapy that was necessary as a result of JONAH's services.

Plaintiffs alleged that the conversion therapy involved both group and individual activities which included such unusual practices as stripping naked, role-playing a past abuser, beating the effigy of a plaintiff's mother with a tennis racket while screaming as if killing her, being blindfolded and subjected to anti-gay slurs, participating in group same-sex cuddling sessions, and being told that homosexuality is loathsome and that homosexuals are more susceptible to loneliness, suicidal thoughts, and contracting HIV/AIDS, and that such therapy required its own reparative therapy after completion of JONAH's treatments.

On February 5, 2015, the Judge Peter F. Bariso issued an opinion addressing Plaintiffs' motion to exclude the expert testimony of 5 doctors and a rabbi whom JONAH proffered as witnesses. Each potential witness's opinion began with the contention that homosexuality is a mental disorder, and Plaintiffs argued that their testimony should be excluded because, they claimed, "it is a scientific fact that homosexuality is not a disorder," and that any expert

opinion that is derived from that false initial premise is unreliable and should be excluded. Plaintiffs argued that since the American Psychiatric Association ("APA") removed homosexuality from the list of disorders in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), it was a scientific fact that homosexuality was not a disorder. Judge Bariso held that JONAH's "suggestion that the court should ignore the DSM misapprehends basic New Jersey law," rejected their argument that "the APA's decision to remove homosexuality as a disorder from the DSM was a politically motivated decision made to de-stigmatize homosexuality, and was not based on science," and stated that "it is not a proper inquiry for a court to determine the correctness of the APA's decision to generally accept that homosexuality is not a disorder, and no proper basis has been advanced on which a court may reassess the scientific accuracy of the psychiatric categorization of homosexuality." Accordingly Judge Bariso ruled that "any expert opinion based on the initial premise that homosexuality is a mental disorder or abnormal is unreliable and likewise barred," and excluded all expert witnesses with the sole exception of the portion of one expert's testimony which related to his comments as to the "remarkability" of the absence of any discussion of JONAH in one individual plaintiff's post-JONAH treatment records.

On February 10, 2015, Judge Bariso issued an order granting Plaintiffs' motion for partial summary judgment, denied Defendant's cross-motion for summary judgment, and issued a Statement of Reasons justifying the orders and incorporating the facts as stated in the February 5, 2015 opinion. He summarized Plaintiffs' arguments that the following qualify as misrepresentations under the CFA: 1) describing homosexuality as a mental illness, disease, disorder, or equivalent thereof; 2) using the word "change" as including a mere change of label or merely suspending same-sex activity while continuing to experience homosexual desire, when discussing change of sexual orientation or change from gay to straight, without so specifying; and 3) including specific "success" statistics when there is no factual basis for calculating such statistics. JONAH had argued that the alleged misrepresentations are contradicted by undisputed evidence that homosexuality is unhealthy, "loathsome," and a mental disorder, or in the alternative that the alleged misrepresentations are opinions or puffery, or finally that the action is improper as a matter of law because it seeks to resolve societal issues that are subject to scientific dispute.

Judge Bariso took judicial notice, (as discussed in his February 5, 2015 opinion) of the general consensus in the mental health field that homosexuality is not a mental disorder, and concluded that "any representations made to the contrary would qualify as a misrepresentation under the CFA." Judge Bariso held that the issue of whether JONAH did or did not misrepresent that it is "loathsome" to be homosexual when they never actually used the word loathsome but "repeatedly disparaged gay people, asserting they were damaged, disordered, physically ill, promiscuous, incapable of happiness… and that the overall effect was to communicate that homosexuality is loathsome," was a disputed fact that should be left to the jury's determination.

In determining whether JONAH's statement that their conversion therapy services could "change" their client's sexual orientation was a misrepresentation, Judge Bariso held that "Defendants have the right to have a jury determine whether their use of the word change was misleading" and ruled that the "issue is not ripe for summary judgment." Judge Bariso stated that while certain issues with respect to JONAH's success rates were "clear factual issues," since Plaintiffs were seeking only a ruling that it is a misrepresentation in violation of the CFA to advertise success rates when there is no factual basis for calculating statistics, "it is a misrepresentation in violation of the CFA to use specific success statistics in advertising and selling of services when client outcomes are not tracked and records are not maintained."

Judge Bariso rejected JONAH's argument that because plaintiffs signed "no guarantee" disclaimers and therefore the "no guarantee" clause prohibited them from bringing claims, arguing that "it is well settled under New Jersey law that a written instrument does not immunize CFA claims," but did not grant summary judgment to Plaintiffs on the issue because the "no guarantee" defense is related to the issue of whether the term "change" means a full change in sexual orientation or a change in identity.

Judge Bariso rejected JONAH's puffery defense, stating "JONAH would be hard-pressed to argue that statements such as its 'program is effective in changing homosexuality' or 'its program and SOCE in general are scientifically proven to be effective' are 'pure' puffery."

Judge Bariso rejected JONAH's argument that the action improperly sought to resolve societal issues subject to scientific dispute, stating that "the court has concluded that the general consensus in the mental health field is that homosexuality is not a disorder" and that therefore there is no "great question" in scientific dispute on that issue.

Finally Judge Bariso refused to strike JONAH's affirmative defense with respect to First Amendment protections, stating that "a jury could find, based on evidence presented at trial, that JONAH represented homosexuality not as a mental disorder, but as 'disordered' and prohibited by its religion," holding that "First Amendment protections would be applicable in this latter situation" concerning representations about religious doctrine.

Accordingly, Judge Bariso issued orders granting partial summary judgment to Plaintiffs on certain issues, striking some, but not all, of JONAH's affirmative defenses, and denying JONAH's cross-motion for summary judgment as to all Plaintiffs. – *Bryan Johnson*

Military Appeals Court Changes Analysis of "Aggravated Assault" HIV Exposure Cases

Reversing the conviction of HIV-positive Air Force Technical Sergeant David Gutierrez on charges of aggravated assault for engaging in unprotected oral and vaginal sex with women during "swingers" parties, the U.S. Court of Appeals for the Armed Forces ruled on February 23 in *United States v. Gutierrez*, 2015 CAAF LEXIS 157, that statistics about the likelihood of transmission of HIV under such circumstances would not support a conviction under Article 128(b) of the Uniform Code of Military Justice, which applies when a person "commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm."

Gutierrez was convicted of "aggravated assault" and other charges at a court martial presided over by Military Judge William C. Muldoon, Jr., who applied a 1993 decision, *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), which held that "the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm if it invades the victim's body. The probability of infection need only be more than merely a fanciful, speculative, or remote possibility." Thus, Muldoon rejected Gutierrez's contention that the statistics presented in the court martial would not support a conclusion that his conduct was "likely" to cause death or grievous injury to the women with whom he was having sex.

The court of appeals, bowing to criticism of its prior reasoning as having become outmoded as a result of medical advances and better knowledge about how HIV is transmitted, agreed that if HIV transmission is highly unlikely as a statistical matter, then it cannot be said that the defendant had acted in way that was "likely to produce death or grievous bodily harm."

Clearly, any sexual activity using barrier contraception (condoms) could not constitute an aggravated assault on this reasoning, in light of the very high rate of effectiveness of condoms in preventing transmission. The expert testimony presented in this case, wrote Judge Baker, "makes clear that condom use protects against the transmission of bodily fluids in ninety-seven to ninety-eight percent of cases, and that any transmission risk only obtains in the transmission of bodily fluids." The government's own expert witness had testified that the risk of HIV transmission in a case of "protected vaginal sex was only 'remotely possible.'" As such, it could hardly be called "likely."

As to unprotected vaginal sex, the same expert put the risk of transmission at 20 out of 10,000, or about 1-in-500, which was described as the "high-end" statistic. Based on this number, the court concluded that "HIV transmission is not the likely consequence of unprotected vaginal sex. This is so because, in law, as in plain English, an event is not 'likely' to occur when there is a 1-in-500 chance of occurrence. As a result, Appellant's conviction for aggravated assault by engaging in unprotected vaginal sex is legally insufficient" to support the conviction.

As to unprotected oral sex, the expert testimony said that the chance of transmission through that mechanism was "almost zero." Under the court's new reasoning, that testimony would not support a conviction for aggravated assault.

The court also rejected the government's argument that Gutierrez could be convicted of "attempted aggravated assault," since that would require proof of "specific intent to commit the offense of afflicting "grievous bodily harm" on the victim. The court hypothesized that an HIV-positive person who filled a syringe with his own blood and injected it into another person could be convicted of this offense.

The court of appeals agreed that if HIV transmission is highly unlikely as a statistical matter, then it cannot be said that the defendant had acted in way that was "likely to produce death or grievous bodily harm."

However, the court held that David Gutierrez was guilty of the lesser-included offense of simple assault, which requires that the accused "did bodily harm" which includes "any offensive touching of another, however slight." Since the women involved testified that they would not have consented to unprotected sex with Gutierrez had they known he was HIV-positive, they did not give "informed consent" based on awareness of the risks involved. "Here, Appellant's conduct included an offensive touching to which his sexual partners did not provide meaningful informed consent," wrote Judge Baker. Thus, Gutierrez

"is therefore guilty of assault consummated by battery, and we affirm that offense as a lesser included offense of aggravated assault."

The court stated that it was expressly overruling *U.S. v. Joseph* and reversing the aggravate assault conviction, but affirming the conviction on other charges (including adultery, in that these swingers parties in which Gutierrez and his wife participated included other married couples and everybody was mixing it up with each other's spouses). The case was sent back to the lower court to either reassess the sentence originally imposed or to hold a new sentencing hearing. Recognizing that this case has dragged on for a very long time, the court also charged the Air Force Court of Criminal Appeals with considering whether Gutierrez's due process rights were violated "by the facially unreasonable appellate delay that occurred in this case."

This ruling raises important issues outside the military context, since civilian courts have also imposed severe penalties in some cases upon HIV-positive defendants comparable to Gutierrez, using much the same reasoning. It is noteworthy, however, that in the past few years courts have started to become much more sensitive to the developing knowledge about transmission risks, especially when HIV-positive people are compliant with anti-retroviral therapy rendering their viral load undetectable or are using condoms to block transmission. This military case involved a "swingers" club that, so far as the court's decision went, didn't involve same-sex contact or anal sex. It will be interesting to see whether the military courts will be consistent in their reasoning if they are presented with cases involving gay service members who credibly testify that they are compliant with treatment regimens that have sharply reduced their infectiousness to the vanishing point. ■

Probate Ruling Sets Off Flurry of Marriage Equality Activity in Texas

Travis County, Texas, Probate Judge Guy Herman, ruling in a pending contest over intestate inheritance rights of the decedent's surviving same-sex partner, who was claiming the status of a common law spouse, held that the Texas constitutional and statutory bans on same-sex marriages "are unconstitutional insofar as they restrict marriage in the State of Texas to a union of a man and a woman and prohibit the creation or recognition of marriage to same-sex couples, because such restrictions and prohibitions violate the Due Process Clause of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Estate of Stella Marie Powell, Deceased*, No. C-1-PB-14-001695 (Probate Court, Travis County, Texas, Feb. 17, 2015). Since the state was not a party to the proceeding, it technically could not seek a stay of this ruling, raising questions whether the Travis County authorities were obligated to issue marriage licenses, but the county clerk, Dana DeBeauvoir, was hesitant. After all, a Probate Court ruling does not create an appellate precedent.

But Suzanne Bryant and Sarah Goodfriend, especially eager to marry because of Goodfriend's struggle with cancer and the uncertainty facing them and their children, applied to Travis County District Judge David Wahlberg for an order directing DeBeauvoir to issue a license, and Wahlberg responded affirmatively. His Order stated: "The Court finds that unless the Court immediately issues a Temporary Restraining Order, the unconstitutional denial of a marriage license to Plaintiffs will cause immediate and irreparable damage to Plaintiffs, based solely on their status as a same-sex couple. That irreparable injury includes the ongoing violation of their rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, through the denial of their vital, personal right to marry." The court found that Goodfriend's health condition "strongly militates in favor of issuing immediate relief." He specified that his Order would remain in effect for 14 calendar days, and a request for a temporary injunction would be set for hearing on March 5, 2015. DeBeauvoir complied with the Order, and Bryant and Goodfriend quickly became the first same-sex couple in Texas to marry pursuant to a license issued by a county clerk, on February 19.

Fearing that this might set off a run on the clerk's office by same-sex couples, Texas Attorney General Ken Paxton promptly asked the Texas Supreme Court to stay the two Travis County rulings on an emergency basis, which that court did later the same day, but not before Bryant and Goodfriend had married. Paxton further requested that the Supreme Court reverse the decisions, although there was some doubt about his standing to do so, at least in the probate case, where the ruling was merely rejecting a motion by legal heirs to dismiss the surviving partner's claim, not a final ruling on the merits. Paxton insisted that the Bryant-Goodfriend marriage is invalid, but that position is inconsistent with federal district court rulings in several states concerning the validity of same-sex marriages contracted pursuant to trial court orders before those orders had been stayed pending appeal.

This was all playing out against the backdrop of the consequential litigation taking place in federal court, where a U.S. District Court judge ruled a year earlier in *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. Feb. 26, 2014), that the Texas same-sex marriage bans violate the 14th Amendment. However, District Judge Orlando Luis Garcia had stayed his ruling *sua sponte* pending the state's appeal to the 5th Circuit, in obeisance to the U.S. Supreme Court's action in staying the Utah marriage equality ruling in January 2014. The 5th Circuit heard oral argument in *DeLeon* and cases from Mississippi

and Louisiana on January 9, 2015, but it is not clear whether that panel will issue a ruling before the U.S. Supreme Court rules in the appeals from the 6th Circuit's decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), which will be argued in April and probably decided by the last week of June.

Eager to get things moving, however, and noting that the Supreme Court has denied a stay from an Alabama marriage equality ruling despite having previously granted the petition to review *DeBoer*, counsel for the *DeLeon* plaintiffs had filed a motion with the 5th Circuit on February 12, asking that court to lift Judge Garcia's stay. The motion asserted: "The Supreme Court's actions indicate that the stay of the District Court's decision is no longer necessary. The District Court expressly found that the denial of the fundamental right to marry causes irreparable harm. Despite this, Plaintiffs continue to suffer irreparable harm – only now the potential consequences are graver. As discussed further below, Plaintiffs De Leon and Dimetman are expecting a child any day, and the State's refusal to recognize their marriage risks grave harm both to the Plaintiffs and the child." Their attorney pointed out that same-sex couples are marrying in Alabama and Florida, pursuant to district court rulings that the Supreme Court had refused to stay, and there was no good reason that such couples should not be able to marry in Texas as well. Although Judge Garcia had denied an earlier motion to lift the stay, that was before the Supreme Court had allowed the Florida and Alabama rulings to go into effect. Observers of the 5th Circuit oral argument had emerged afterwards convinced that the panel was likely to rule 2-1 in favor of the plaintiffs, so perhaps the panel might vote to accelerate things in Texas.

Judge Wahlberg's willingness to assist Bryant and Goodfriend in getting married brought its own strange reward, as Republican state Representative Tony Tinderhold filed a complaint against Wahlberg with the Texas Commission on Judicial Conduct, seeking an "investigation" of Wahlberg's "violation" of state law. ■

Connecticut Trial Court Applies Parental Presumption to Determine Parental Status of Birth-Mother's Same-Sex Spouse

In *Barse v. Pasternak*, 2015 WL 600973 (Conn. Super. Ct., Jan. 16, 2015), Judge Lisa K. Morgan of the Superior Court of Connecticut in New Britain concluded that a lesbian in a civil union that was subsequently converted by operation of law into a same-sex marriage was the legal parent of a child born to her spouse, although she was not genetically related to the minor, did not adopt the minor, and the parties did not comply with Connecticut's artificial insemination statutes. The determination came in the context of an action seeking dissolution of the marriage and an ensuing custody dispute.

Barse has no biological relationship to the child, never adopted the child, and the couple never entered into a "gestational agreement."

Lauren Barse and Krista Pasternak entered into a Connecticut civil union in 2005. A few years later, Pasternack conceived a child through artificial insemination using her egg and an anonymous donor's sperm. The child was born in 2008. The civil union was converted into a marriage in 2010 by operation of law when Connecticut adopted a marriage equality statute in response to the Connecticut Supreme Court's ruling that it is unconstitutional to exclude same-sex couples from marriage. Barse has no biological relationship to the child, never adopted the child, and the couple never entered into a "gestational agreement" defined under General Statutes § 7–36(16). Barse filed the dissolution action in 2012 and filed an ex-parte emergency motion seeking sole custody of the child, which was granted without prejudice to later litigation; the emergency order also granted visitation rights to Pasternack. Although there has been subsequent litigation in which Pasternack sought a joint custody order, the original order has remained in effect. Pasternack moved in 2013 to vacate the emergency order, arguing that she is the sole legal parent of the child and should have custody. In 2014, she further moved to dismiss Barse's custody claims entirely, asserting that the court lacked jurisdiction and statutory authority to determine such claims. The Connecticut Supreme Court refused to intervene when the trial court refused to rule on the motion to dismiss. Ultimately Pasternack sought to get the trial judge who had been deciding these motions disqualified; the judge granted the motion and the case was transferred to Judge Morgan.

Plaintiff initially argued that that she has been legally recognized under Connecticut law as the minor child's parent simply because her name is on his birth certificate, but the court stated that being named as a parent on a child's birth certificate does not create a legal relationship between a parent and child. Next, the court had to decide whether compliance with the requirements of the artificial insemination with donor sperm or egg ("A.I.D.") statute is mandatory in order for a married couple to establish statutory legal parentage to a child conceived via artificial insemination.

As instructive authority, the court

examined the legislative history and text of the statue in *WW v. WW*, 51 A.D.3d 211, 856 N.Y.S.2d 268 (N.Y. App. Div., 3rd Dep't, April 11, 2008). That court held that although the husband's consent was not obtained in writing as required by New York's artificial insemination statute, "equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed a legal parent of the resulting child." The court analogized how if an unmarried man who has a child without the premeditated intent of birth is legally obligated to support the child, then the equivalent resulting child caused by deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law.

Further, in *G-M v. G-M*, 45 Misc.3d 574, 985 N.Y.S.2d 845 (N.Y. Sup. Ct., May 7, 2014), two women married and had a child together via artificial insemination, but failed to get the consent form acknowledged and therefore did not comply with the requirements of New York's artificial insemination statute. The court found that New York's statute is the only means for a married, non-biological spouse to acquire parental status for a child born by artificial insemination of their spouse, and a contrary finding would make a child's parentage for their entire life depend on a notary public being present when the parties signed the consent; this would essentially deny the non-biological spouse one of the primary benefits of marriage.

In this case, Judge Morgan examined the text and legislative history of Connecticut's A.I.D statute and stated that compliance with the statute is not the exclusive means by which the legitimacy of the child at issue may be established, because that would deny the child the benefits of legitimacy status and provide non-biological spouses a feasible avenue to disclaim the child and decline support. "Well-reasoned case law from our sister state of New York," with strong public policy, supports the conclusion that the parties' failure to comply with the A.I.D. statute does not, in and of itself, defeat the plaintiff's claim that she is the minor child's legal parent, and that the plaintiff's lack of genetic relationship to the minor child is not fatal to her claim of parentage.

The defendant argued that the common-law presumption of legitimacy, the marriage presumption, does not apply to children born to same-sex married couples. The court rejected this argument because the minor child at issue in this case was born after the parties entered into a civil union. The court found that children born to two parties bound by a civil union are deemed issue of the parties' marriage when their civil union was converted to a marriage by operation of law. Therefore, the minor child is presumed to be legitimate and the plaintiff is presumed to be the legal parent of the minor child.

The court was guided by the principles in *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (Conn. October 28, 2008) (holding that same-sex couples have the right to marry, recognizing that excluding same-sex couples from marriage will prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure) and *Mueller v. Tepler*, 312 Conn. 631, 95 A.3d 1011 (Conn. July 16, 2014) (holding that same-sex couples who were unconstitutionally unable to marry can maintain a loss of consortium claim, recognizing that the attitudes and needs of society with respect to same sex relationships and marriage have changed significantly in recent decades). The court found that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages. "Specifically," wrote the judge, "society has come to accept the view that committed same sex couples who wish to marry are entitled to the same social and legal recognition as committed opposite sex couples who wish to marry."

Having found that the marital presumption applies to the parties in this case, the court next addressed whether there are any circumstances under which the defendant may be precluded from rebutting the presumption that the plaintiff is the minor child's legal parent, because the defendant can easily meet her burden to show that the plaintiff has no genetic relationship to the minor child. The court found that the plaintiff in this case may rely upon equitable principles in an effort to preclude the defendant from rebutting the marital presumption and asserting that the plaintiff is not the minor child's legal parent, requiring an evidentiary hearing.

However, the court rejected the equitable parent doctrine as a basis for finding that the plaintiff is the legal parent of the minor child. That doctrine "grants parental status, for purposes of custody in a marital dissolution case, to an adult who is neither a biological nor adoptive parent where (1) the adult and child mutually acknowledge a parent-child relationship, or the adult has cooperated in the development of such a relationship over a period of time, (2) the adult desires to have parental rights, and (3) the adult is willing to take on the responsibility of raising the child." *Doe v. Doe*, 244 Conn. 403, 710 A.2d 1297 (Conn. April 7, 1998).

The court ultimately held that compliance with the A.I.D. statute was not the exclusive means by which the legitimacy of the minor child may be established, because neither the language nor the legislative history of the statute suggest that it was intended to be the exclusive means to establish parentage of a child born through A.I.D. procedures. Under the circumstances of this case, the plaintiff is presumed to be the minor child's legal parent and the child is presumed to be legitimate. Whether the plaintiff conceived or adopted the child, complied with the artificial insemination statutes, or entered into a valid gestational agreement was not deemed relevant to this determination, given the strong presumption of legitimacy for children born to women who are married.

– Anthony Sears

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

Mississippi Supreme Court Calls for More Briefing in Already-Argued Same-Sex Divorce Case

The Mississippi Supreme Court heard oral argument on January 21 in *Czekala-Chatham v. State ex rel. Jim Hood, Attorney General of the State of Mississippi*, in which a same-sex couple legally married in California but residents of Mississippi are embroiled in divorce proceedings.

Lauran Czekala-Chatham and Dana Ann Melancon separated in 2010, and Czekala-Chatham filed for divorce in 2013. Melancon opposed the divorce action, arguing that because Mississippi did not recognize their marriage, the court could not grant a divorce. Czekala-Chatham then moved to turn the case into a challenge to Mississippi's refusal to recognize the marriage, and the state, represented by Attorney General Jim Hood, intervened to defend its marriage ban. The women then entered an agreement on settlement of property rights, the motion to dismiss was withdrawn, and both women requested the court to proceed to grant the divorce on grounds of irreconcilable differences.

On December 6, 2013, the chancery court rejected their arguments and dismissed the action for lack of subject matter jurisdiction, and the woman who filed the divorce petition appealed, arguing that Mississippi's marriage recognition ban violates the 14th Amendment and the constitutional right to travel. The state argued that the Supreme Court's ruling in *U.S. v. Windsor* "placed the authority to regulate marriage solidly with the states."

On February 24, the court voted 6-3, 2015 Miss. LEXIS 114, to ask the parties for additional briefing on the following question: "In light of Mississippi's public policy of not allowing or recognizing a marriage between two persons of the same gender, what rational basis supports the interpretation or application of a law or constitutional provision so as to prohibit Mississippi courts from granting a divorce to a Mississippi resident who was lawfully married in another state to a person of the same gender?" The court ordered the parties to submit their briefs in thirty days. It commented, "Both parties agreed that this matter should be stayed until an opinion issues from the United States Supreme Court."

Three justices dissented from the order for additional briefing. Justice Chandler argued there was no way, based on a plain reading of state laws, for a Mississippi court to grant a divorce to a same-sex couple, so further briefing was unnecessary and caused undue delay in resolving the case. Justice King, joined by Justice Kitchens, dissented on substantive grounds. "I can determine no rational basis to believe that this Court will receive any substantial benefit from the required supplemental briefing," wrote King, and charged that the court's reason for doing this is "pushing the responsibility for deciding a sensitive and highly emotional issue to the United States Supreme Court" by delaying things.

Three justices dissented from the order for additional briefing.

Justice King went on to write at length about why the Mississippi same-sex marriage ban is unconstitutional. He wrote that "on the most basic level, Mississippi's bans on same-sex marriage and its recognition violate the Equal Protection Clause under rational basis review. Not only are many of the interests advanced by the State illegitimate interests, even to the extent the State does espouse legitimate interests, banning same-sex marriage has absolutely no rational relation to any of those interests. It does not further them in any way, and the classification claiming to further those interests is based on animus. On that basis alone, this Court should reverse the trial court and remand the case, allowing Czekala-Chatham to proceed in her divorce action." Thus, at least two justices have now gone on record through this dissent in find the bans unconstitutional.

King also contradicted the court's statement that the parties had agreed that the matter should be stayed pending the U.S. Supreme Court's expected marriage equality ruling. He pointed out that the state had urged such a delay, but counsel for plaintiffs merely said that they would bow to the court's determination as to that.

Lauran Czekala-Chatham's attorney, Carey Varnado, told the *Memphis Commercial Appeal* (Feb. 27) that he would file the requested brief. Among the arguments that will be presented is that the state should allow divorces if it believes same-sex couples should not be allowed to marry.

Two same-sex divorce cases presenting the same issues were argued before the Texas Supreme Court in 2013 and have not yet been decided. Presumably that court has also decided to avoid having to decide, pushing the politically hot matter off on the U.S. Supreme Court. Mississippi Supreme Court Justice King's dissent is rightly scornful of such a strategy, contending that it is "contrary to the constitutional oath of office" that a state requires of its judiciary to "faithfully and impartially discharge" its duties "*agreeably to the Constitution of the United States*" as well as the state constitution. Since he saw the Mississippi bans as "clearly unconstitutional," he saw no reason for further delay in deciding the case. ■

Ohio Same-Sex Divorce – Were They Really Married?

Jennifer McKettrick appealed the decision of the Warren County, Ohio, Court of Common Pleas dismissing her complaint for divorce from her wife, Cheryl McKettrick. On February 2, 2015, the Court of Appeals of Ohio affirmed the decision to dismiss the case. *McKettrick v. McKettrick*, 2015-Ohio-366, 2015 Ohio App. LEXIS 342, 2015 WL 420185, finding that there was no valid marriage before the court to dissolve.

Same-sex partners Jennifer and Cheryl lived together in Ohio between mid-1998 and early 2012. Sometime between late 2005 and early 2006, Cheryl purchased a vacation home in Massachusetts. In 2006, Jennifer and Cheryl decided to marry in Massachusetts, and obtained a marriage license there. The couple vacationed in Massachusetts often, but continued to reside in Ohio as their legal domicile, evidenced by their voter registrations, driver's licenses, and places of employment. They stopped living together in 2012, and in November 2013, Jennifer filed the complaint for divorce which led to this appeal. Cheryl moved to dismiss the complaint for lack of jurisdiction, based on their living in Ohio, where same-sex marriages are not recognized, and her argument that the Massachusetts marriage was itself void. Jennifer maintained that the Massachusetts marriage was legal, and Ohio's refusal to recognize it was unconstitutional. Both Jennifer and Cheryl submitted supporting evidence and arguments for their respective claims.

The trial court granted Cheryl's motion to dismiss in May 2014, holding that based on a Massachusetts statute in effect in 2006, no valid marriage could be performed in Massachusetts for parties who were living and intending to continue to live in another state that would not recognize that marriage. Such a marriage would be void, even if celebrated pursuant to issuance of a license. Mass. Gen. Laws. Ann. 207, Sec. 11. The trial court therefore ruled that the marriage was void, because Jennifer and Cheryl continued to reside principally in Ohio and intended on continuing to live in Ohio; Massachusetts was solely their vacation destination.

Jennifer argued on appeal that the trial court should not have granted the motion to dismiss because the Massachusetts law cited above was not applicable and Ohio laws banning same-sex marriage were unconstitutional. Jennifer argued that unconstitutional laws could not serve as an impediment to the validity of their 2006 marriage.

The court articulated the standard for a motion to dismiss for lack of subject matter jurisdiction: if there is no cause of action in the forum in which the complaint is filed, the action must be dismissed. Here, Jennifer filed her divorce complaint in Ohio. Under Ohio law, a complaint for divorce may be filed by either party to a valid marriage. In this case, Ohio is the state of residence but not the state of the marriage. The missing fact for Jennifer's argument is whether the marriage is actually valid under Ohio law. Jennifer needed to show proof of the marriage in order to be granted a divorce. The court found that she could not show proof of a valid marriage that would be recognized under Ohio law.

As mentioned above, Jennifer contended that the trial court misapplied the Massachusetts law. The Court of Appeals stated that even if the marriage was valid under Massachusetts law, Jennifer's complaint would not state an action for divorce in Ohio because Ohio does not recognize same-sex marriages from other states. At the time the marriage was contracted, Massachusetts did not authorize same-sex marriages of residents of other states who planned to continue to reside in the other states, if the other states would not recognize their marriage. (The Massachusetts restriction was repealed several years later.) Thus, Jennifer could not sue for divorce either in Massachusetts or Ohio, since her marriage was not recognized in either jurisdiction.

Jennifer focused her argument on one federal decision from Ohio, *Obergefell v. Wymyslo*, 962 F. Supp.2d 968 (S.D. Ohio 2013), which held that Ohio must recognize a same-sex marriage of its residents lawfully contracted in another state. She argued that the reasoning in *Obergefell* "applied to the facts of this case, should compel the same conclusion – Ohio's [same sex marriage provisions] unjustifiably violate due process and equal protection guarantees." The Court of Appeals found this argument problematic.

Ohio appellate courts are not precedentially bound by lower federal court opinions, pointed out Judge Hendrickson in the opinion for the court. Therefore, even if *Obergefell* was persuasive, the court was not bound by its decision. Most importantly, *Obergefell* was not similar to this case in that *Obergefell* involved a marriage in a state that allowed out-of-state residents to contract same-sex marriages in the state, regardless whether their home states would recognize them, so the marriage was unquestionably valid as a matter of the law of the state where it was contracted.

In addition, of course, the court noted that the 6th Circuit reversed *Obergefell* in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). However, the Supreme Court has granted petitions for review from all the plaintiffs whose cases from states within the 6th Circuit were consolidated in *DeBoer*, and will hear arguments in the case during April 2015, which a decision expected in June. In the meantime, the court said that because there was no decision by a court of *supreme jurisdiction* striking down Ohio's ban on recognizing same-sex marriages, the court would not "retroactively nullify the Ohio same sex marriage provisions."

Ultimately, Jennifer's appeal was denied because the court found that the Massachusetts marriage was void. The more widespread same-sex marriage becomes, the more widespread petitions for same-sex divorce will become, providing one more reason why a resolution of the same-sex marriage issue on a nationwide basis by the Supreme Court is urgently needed. – *Tara Scavo*

Tara Scavo is an attorney in Washington D.C.

Inmate Misdiagnosed as HIV+ and Punished for Refusing Treatment States Claims for Malpractice and Violation of Civil Rights

Peter Davis is a Pennsylvania inmate who was misdiagnosed as HIV+ and given HIV medication over a number of years after his chart was "comingled" with HIV+ patients' records. The error (of which Davis was unaware for a period of time) followed him through several transfers and repeated negative tests (some of which were administered over his objections). Davis says that his wrong "diagnosis" and treatment caused harassment from other inmates and officers and "severe" side effects, including interference by the HIV drugs with medication he took for other conditions. Davis also claims that he was placed in disciplinary segregation based on his refusals to continue to take the unnecessary HIV medication.

Davis sued some thirty defendants, including the Commonwealth of Pennsylvania, the City and County of Philadelphia, Corizon Health, Inc. (contractual health care provider), and employees of these entities, on federal and state legal theories. All of the parties had lawyers. In an exegesis that reads like an answer key to a law school torts essay question, United States District Judge Lawrence F. Stengel dismissed some of Davis' claims and allowed others to proceed or be repleaded in *Davis v. Corizon Health*, 2015 U.S. Dist. LEXIS 15083, 2015 WL 518263 (E.D. Pa., February 9, 2015). Reporting on all rulings is beyond this article.

Judge Stengel found that Davis "stated a claim for malpractice by alleging that the defendants misdiagnosed him as HIV positive and placed him on an inappropriate course of treatment which caused him harm." He rejected a statute of limitations defense, applying a discovery rule that may have tolled the statute when Davis learned of the inappropriate medication. He also rejected a defense based on the absence of a "certificate of merit" required under state malpractice law, finding that, although the "certificate" was a substantive (not procedural) requirement that applied in federal court, it sufficed if Davis tendered a certificate that expert testimony was "unnecessary" for the claim. In a ruling that may return to bite Davis, Judge Stengel then ruled that he was "bound by the certification" and could not present expert testimony at trial on "the questions of standard of care and causation."

Judge Stengel dismissed with prejudice state law claims of negligent supervision against Pennsylvania and Philadelphia on state immunity grounds. He likewise dismissed a battery claim arising from the involuntary taking of blood for an HIV test, unwilling to extend medical informed consent rules to cover a non-surgical needle stick. Applying a theory of "corporate negligence," Judge Stengel found that Corizon, "which provides the exclusive and comprehensive medical services to prison inmates," may be held liable for its corporate actions (such as staff selection, policies, quality control and supervision), citing *Fox v. Horn*, 2000 WL 49374, at *8 (E.D. Pa. Jan. 21, 2000) (predicting that the Pennsylvania Supreme Court would extend the doctrine of corporate negligence to state prison healthcare providers). He then dismissed this claim, without prejudice to replead by omitting reliance on vicarious liability.

Judge Stengel dismissed Davis' claim for violation of the Eighth Amendment, since his case sounded in malpractice, not in deliberate indifference under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Nevertheless, because "defendants took an adverse action when they placed [Davis] in disciplinary custody" following his refusal of HIV medication, "it would appear that Mr. Davis has a viable retaliation claim" under *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000); *see also Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir.1989). While this claim is not an Eighth Amendment violation, Judge Stengel granted leave to amend to assert it under the Due Process Clause, since Davis may have a liberty interest in refusing medication, noting that protection from retaliation is not limited to situations arising under the First Amendment.

Judge Stengel dismissed with prejudice state law claims of negligent supervision against Pennsylvania and Philadelphia on state immunity grounds.

Judge Stengel addresses both intentional and negligent infliction of emotional distress, dismissing the former with prejudice (as insufficiently "outrageous") but granting leave to replead the latter, since a negligent breach of the doctor-patient relationship as to some defendants may have caused Davis emotional distress. *See Toney v. Chester County Hospital*, 36 A.3d 83, 95 (Pa. 2011). "Mr. Davis alleges that his doctors breached the relationship when they released his HIV misdiagnosis to correctional officers and other inmates…. I can only imagine the visceral and devastating effect of being branded HIV positive within a prison population. Mr. Davis has pleaded

enough facts to pursue [a negligent infliction of emotional distress] claim."

Judge Stengel dismissed claims against the Commonwealth of Pennsylvania under the Eleventh Amendment, but he found it too "premature" to dismiss Davis' claims for punitive damages against the remaining defendants.

Davis is represented by Geoffrey V. Seay, Philadelphia. Corizon and its employees were represented by Marshall Dennehey, et al., Philadelphia, and by O'Connor Kimball, et al., Philadelphia (who also represented the City and County of Philadelphia and its employees). The Commonwealth of Pennsylvania and its employees were represented by the Pennsylvania Attorney General. At various times, Judge Stengel rebukes various counsel in caustic terms for lack of "familiarity" with law or pleading rules. With all due respect to Judge Stengel, the problem with this case is that it was too "lawyered-up."

This is a case that realistically could only happen in prison, because in the non-correctional world, where defense lawyers are not on unfettered auto-pilot, it would have settled. First, the doctor-patient relationship is imposed in corrections: patients do not choose their doctors (and vice versa). Non-incarcerated patients are relatively free to seek providers who do not insist for years on a misdiagnosis and the wrong treatment. Second, no matter how much they may be tempted, doctors in the "free" world are not at liberty to punish their non-compliant patients with solitary confinement for their refusals of care. And, finally, it is extremely unlikely that a non-prisoner medical malpractice case – involving a misplaced file, the wrong diagnosis, mistaken lab results, inappropriate medication, and patient harm – would ever reach a judge's desk. – *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.

Washington Court of Appeals Dismisses Parts of Trial Court Ruling in Sexual Orientation Discrimination Case

Ruling on February 3, 2015, the Court of Appeals of Washington overturned parts of the a trial court decision in a suit by Leon Peoples against Puget Sound's Best Chicken!, Inc. and his manager, Bennie Martin, for sexual orientation discrimination in violation of state law. *Peoples v. Puget Sound's Best Chicken!, Inc*., 2015 Wash. App. LEXIS 185. Basing its decision on the "federal enclave doctrine," the trial court had granted summary judgment in favor of Popeye's, operated by Puget Sound's Best Chicken! Inc. on a federal military base, and had dismissed Peoples's lawsuit for lacking subject matter jurisdiction. Judge Thomas R. Bjorgen's opinion for the court rejected the trial court's decision that the court lacked subject matter jurisdiction, and also showed how Peoples's lawsuit had valid state law claims other than sexual orientation discrimination, thus surviving despite the federal enclave doctrine.

Peoples alleged that during his employment Martin had taunted him about his sexual orientation and that the company did not take any action to address this situation. Peoples filed suit against Popeye's in Pierce County Superior Court under claims of violations of the Washington Law against Discrimination (WLAD) and tort claims of outrage and negligent hiring or retention. Popeye's argued that the court should grant summary judgment in its favor because these events took place on a federal enclave and, as such, Peoples's state law charges are not applicable.

In the case of a federal enclave, the State cedes its legislative jurisdiction over to the enclave and so legislation enacted by the State after cession of this land has no effect without "clear and unambiguous" authorization from the United States Congress. At the same time, state laws in place before the creation of this enclave still remain in effect.

Considering the special legislative circumstances of the federal enclave, the court found that Peoples's claims under WLAD do not hold because the legislature did not enact WLAD until 1949, 30 years after the creation of the JBLM enclave in 1919. For similar reasons, the court upheld summary judgment in favor of Popeye's for outrage claims as these claims had not been recognized under Washington's tort law as of 1919.

However, on the final issue concerning negligent hiring or retention, the court reversed the order of summary judgment by the trial court, as it saw *Matsuda v. Hammond*, 77 Wash. 120 (1913), as an example of negligent hiring or retention claims existing before 1919. Popeye's pointed to a later court case, *La Lone v. Smith*, 234 P.2d 893 (1951), as the first instance of such claims and argued that *Matsuda* is irrelevant because it did not impose liability on these theories, but the court of appeals disagreed and affirmed the legitimacy of Peoples's claim in this case. Since Peoples had alleged a *valid* state law claim regarding negligent hiring or retention, Judge Bjorgen reversed the trial court's dismissal based on lack of subject matter jurisdiction.

In short, the court affirmed the grant of summary judgment in favor of Popeye's in respect to the WLAD and outrage claims, but it reversed the order of summary judgment in respect to negligent hiring or retention and subject matter jurisdiction issues. – *Daniel Ryu*

Daniel Ryu studies at Harvard ('16).

[Editor's Note: The decision shows that businesses operating on federal installations in states that ban sexual orientation discrimination are insulated from having to comply with the state laws due to the lack of a federal employment discrimination ban. However, if Popeye's is a federal contractor of sufficient size, perhaps President Obama's Executive Order can be used to require the company to include a sexual orientation non-discrimination pledge the next time its contract is renewed?]

Teacher Can Pursue Constitutional Claims Challenging Her Dismissal Over Anti-Gay Facebook Postings

A New Jersey federal judge has ruled that a Union County public school teacher who lost her job after posting anti-gay comments to her Facebook page may continue her lawsuit against the school board and various officials on claims of constitutional violations. Although District Judge Kevin McNulty dismissed several of Jenye Viki Knox's claims, the central constitutional claims survived the defendants' motion to dismiss in *Knox v. Union Township Board of Education*, 2015 U.S. Dist. LEXIS 21536, 2015 WL 769930 (D.N.J., Feb. 23, 2015).

Knox was employed as a special education teacher at Union Township High School, and was awarded tenure in 2003. Knox is African-American, a fact that is relevant due to the race discrimination charges in her complaint. While employed at the high school, she served as academic advisor for The Seekers Club, a Christian Bible study group, and she was also the advisor for the school's Gospel Choir. Knox is an ordained minister as well, a fact known by the school authorities named as defendants in her complaint.

Knox took offense to a billboard in the school and posted comments on her Facebook page in September 2011. According to Judge McNulty's summary of her allegations, she "posted a public message on Facebook stating that a school billboard that promoted alternative lifestyles did not accord with her religious beliefs." She posted these comments from her home computer. "Facebook users commented on Knox's post, and Knox responded. Her responses included an explanation of her religious objections to the billboard; statements about the Bible and homosexuality; characterizations of homosexuality as a sin and disobedience to God; and descriptions of salvation through Jesus Christ. Knox's comments prompted racist posts from other users, who are not identified," wrote the judge.

The ongoing conversation prompted by Knox's postings soon came to the attention of school authorities, who reacted swiftly early in October. "Without prior notice," wrote McNulty, "Know was removed from her classroom. The removal took place during school hours, in front of her students and other teachers." she was taken to a small room and interrogated about the Facebook posts by the school board's attorney, the Assistant Superintendent, and the Vice President of the teachers union. "She alleges that she 'was then pressured by these individuals to say that her religious beliefs were wrong, and felt extremely intimidated by them.' She alleges that the individuals spoke critically about her religious beliefs and her expression of them. Those individuals did not discuss or express 'dismay' about any of the racist third-party comments to her Facebook posts," which she alleges was "tacit approval of the racism that she was subject to."

She "posted a public message on Facebook stating that a school billboard that promoted alternative lifestyles did not accord with her religious beliefs."

Although she was allowed to return to her classroom, she was removed again a few days later, in the presence of students, and questioned against, this time by the Superintendent, the Principal of the school, and the union president. In this meeting she was told that she was suspended with pay," which Knox alleges is what the "racists" had advocated in their postings on Facebook. She characterized the suspension as "part of the ongoing pattern of intimidation the Board leveled against [her] as a result of her religious beliefs and/or race," and that the Board was attempting to "undermine" her "reputation" and "humiliate" her. After she was told that she was suspended, she was escorted back to her classroom to gather her personal belongs and escorted from the building, against in the presence of students and other teachers, which she said caused her "further humiliation and embarrassment." The Board held a public meeting about the situation on October 18.

On December 23, the Board's attorney notified Knox that her suspension would henceforth be without pay and that the Board was filing charges to remove her tenure. Knox claims that her health deteriorated after these experiences, and she resigned her position on June 30. She later characterized this as a "constructive discharge" and made it part of her lawsuit. Four months after she resigned, she agreed to a negotiated settlement of the tenure proceedings, under which she agreed to resign her tenured position and to refund the school the money she was paid during the paid suspension period. The parties agreed to forego a formal hearing and the Board and an Administrative Law Judge approved the settlement, which was finally approved by the state Commissioner of Education, which involved dismissal of the Tenure Charge. Knox never filed a grievance under the union contract, and never filed a discrimination charge with state or federal agencies.

On October 2, 2013, she filed her lawsuit against the School Board and several individual defendants who were involved with her suspension and discharge, stating ten distinct claims,

four of which Judge McNulty dismissed in response to the School Board's motion. At the heart of the School Board's motion was the claim that the court should defer to the settlement that had been negotiated, but McNulty pointed out that the School Board could have negotiated for a waiver of claims by Knox as part of the settlement, but had not done so.

Although certain claims were precluded because of the settlement, the court found that her claims of denial of due process of law, violations of her rights to freedom of speech and free exercise of religion, violation of equal protection of the laws and violation of the New Jersey Free Exercise and Enjoyment of Religion Clauses all survived the motion to dismiss, as did her claim of a violation of the 1st Amendment establishment clause. The race discrimination claims she brought were dismissed without prejudice to the filing of a properly supported motion to amend the complaint. Judge McNulty had found that the factual allegations in the complaint were insufficient to support a race discrimination claim, but was willing to give Knox an opportunity to plead the necessary facts if possible. McNulty granted the motion to dismiss a claim of "constructive discharge," finding that there is no independent cause of action by that name in New Jersey (although constructive discharge is a theory that can be used by an employee who claims to have been forced to quit because of her race, religion, political views, and so forth). He also dismissed her claim of intentional infliction of emotional distress, but against without prejudice to the right to amend her complaint with more specific factual allegations.

The School District's attorney, Jonathan Cohen, expressed pleasure at the dismissal of four of the 10 counts of the complaint. Knox's attorney, Demetrios Stratis, pointed out that the claims that survived the motion were "the thrust of our case" and argued that when Knox spoke as an individual, from home on her Facebook page, "she certainly is entitled to do that. Just because she became a teacher, it doesn't mean she gives that up." ■

Italian Supreme Court Rules against a Constitutional Right to Same-Sex Marriage

On February 9, 2015, the first Section of the Italian Supreme Court of Cassation decided *A.A. & D.P. v. Ministero dell'Interno, Sindaco del Comune di Roma et al*., No. 2400/2015. The question presented to the Court was whether the Italian Constitution, as interpreted in light of supranational instruments such as the European Convention on Human Rights and Fundamental Freedoms of Nov. 4, 1950 (ECHR) and the Charter of Fundamental Rights of the European Union of Dec. 7, 2000, compels the State to recognize for same-sex couples the right to marry. The ruling puts an end to a strategic litigation campaign called «Affermazione Civile».

Started in 2008 with the action of lawyers and scholars working in the field of LGBT rights, Affermazione Civile brought to the attention of Italian tribunals and courts the need of gays and lesbians to obtain recognition of their individual rights. The campaign proved successful in stimulating the courts and both national and local governments to take actions in matters such as immigration regulation, refugee status recognition, and registration of foreign same-sex marriages.

In particular, the campaign sought to obtain rights that had been so far neglected by the Italian Parliament. When the lawyers of Affermazione Civile started to look for gay and lesbian couples available to present their requests to get married to the municipal offices, the first draft legislation aimed at regulating both same-sex and different-sex couples had aborted in the Parliament due to many criticisms and strong opposition by influential religious lobbies. After the fall of the center-left coalition in 2008, all attempts to regulate non-married couples were completely abandoned. Hence, the legal campaign.

In 2009, the first lawsuit of Affermazione Civile was admitted by the Tribunal of Venice, which presented a question to the Constitutional Court. Other courts in Florence, Ferrara, and Trento soon followed. All these courts asked the Constitutional Court whether the prohibition of same-sex marriage contained in the Civil Code's various provisions on civil marriage was constitutional. The basis of the question laid in Articles 2, 3, and 29 of the Constitution: Art. 2 recognizes human rights, while Art. 3 prohibits discrimination based on individual characteristics. Finally, Art. 29 — the most problematic of the three — recognizes «the rights of the family as a natural society founded on marriage», without explicitly addressing the spouses' gender. The Constitutional Court ruled on April 15, 2010 and dismissed the constitutional challenge as partially inadmissible and partially ungrounded. The Court stated that it is for the Parliament and not for courts to determine the rights of same-sex couples under Art. 2. The Court made no reference to the principle of nondiscrimination; as to Art. 29, The Court's reasoning, later subjected to heavy criticism by commentators, was to rest on the definition of marriage only as the union between a man and a woman. Despite all this, the Court stated that, regardless of any legislation on the matter, same-sex couples were entitled to «homogeneous» treatment compared to married couples.

The ruling of the Constitutional Court combined with the almost simultaneous judgment of the European Court of Human Rights in the case *Schalk & Kopf v. Austria* (June 26, 2010, No. 30141/04). In *Schalk*, the European Court established that, even if Art. 12 of the European Convention on Human Rights «does not impose an obligation on [signatory States] to grant a same sex couple […] access to marriage» (id., § 63) and «Art. 14 taken in conjunction with Art. 8 […] cannot be interpreted as imposing such an obligation either» (§ 101), same-sex couples are nevertheless entitled to the «right to respect of family life» (§ 94).

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MARRIAGE EQUALITY

UNITED STATES SUPREME COURT – Briefs were filed by the petitioners on February 27 in the pending marriage equality appeals, seeking reversal of the 6th Circuit's decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). Briefs from the states defending their bans on allowing or recognizing same-sex marriages are due to be filed by March 27, with oral argument to be held during the last week of April. Assuming the Court follows its usual practice with such announcements, the argument calendar for April will be posted to the Court's website early in March, pinpointing the date for the oral argument. Unlike some lower courts, the Supreme Court does not normally provide live audio transmission of its oral arguments, but for cases that draw substantial interest it usually posts links to audio recordings by the afternoon of argument days. All of the petitioner briefs argue that bans on same-sex marriage fail to meet even the relatively undemanding rational basis test under the 14th Amendment, since no legitimate state interests justify excluding same-sex couples from marrying or denying recognition to marriages of same-sex couples across state lines. The briefs also argue that state policies discriminating because of sexual orientation should receive heightened scrutiny, as should state policies categorically excluding a class of people from marrying under the Court's fundamental rights precedents. Respondent's briefs are due before the end of March.

UNITED STATES SUPREME COURT – The National Organization for Marriage has petitioned the Supreme Court to review the 9th Circuit's holding that it lacks standing to intervene and appeal the Oregon marriage equality decision. *National Organization for Marriage v. Geiger*, No. 14-1048 (Petition for Certiorari filed Feb. 23, 2015). The 9th Circuit rejected NOM's suggestion for rehearing *en banc* of a panel decision rejecting its intervention motion. The government of Oregon had ceded during the litigation before the trial court that the state's marriage amendment was likely unconstitutional, didn't defend it on the merits, and immediately complied with the district court's order requiring the state to allow same-sex couples to marry. The marriage amendment had been passed by the voters without the support of leading state officials. NOM, purporting to represent, voters who supported the amendment, a wedding services provider who doesn't want to have to provide services to same-sex couples, and a county clerk who supported the amendment and was unhappy about being subject to the court's order, did not attempt to intervene until rather late in the proceeding, but before the district court issued its ruling on summary judgment. The district court found the motion untimely, and also rejected NOM's suggestion of protectable interests for the categories of members NOM sought to represent in defending the amendment, and the 9th Circuit endorsed that view. The district court relied on the Supreme Court's decision in *Hollingsworth v. Perry*, holding that the Proposition 8 sponsors in California lacked Article III standing to defend their handiwork in court. NOM argues in its petition that *Hollingsworth* is distinguishable, and that those of its members identified as personally interested parties endow it with Article III standing in this case. In light of the fact that the Supreme Court will most likely be deciding the underlying 14th Amendment question in its forthcoming consideration of the 6th Circuit *DeBoer v. Snyder* decision, it seems doubtful that the Supreme Court would be interested in taking up this ancillary issue.

U.S. DEPARTMENT OF LABOR – The Wage and Hour Division of the U.S. Department of Labor published a final rule in the Federal Register on February 25, 80 FR 9989-01, changing the basis for determining eligibility for benefits under the Family and Medical Leave Act to require employers to recognize all lawfully-contracted same-sex marriages. Prior to the effective date of this rule (March 27, 2015), employees are entitled to unpaid family leave to care for a spouse if their marriage is recognized by their state of domicile. Under the new rule, such eligibility will not depend on the marriage recognition policy of the domicile state. All same-sex marriages that are contracted in a jurisdiction that allows such marriages will be recognized for these purposes, regardless where the employee resides or works. This includes common law marriage, for employees who have entered into same-sex common law marriages in jurisdictions that allow common law marriages (which are marriages informally contracted without licenses or legal ceremonies). Although most states have abolished common law marriages, requiring all marriages to be formally contracted through a state-issue license and prescribed ceremony with subsequent registration of marriage certificates, a small number of states, including some that now allow same-sex marriages, have continued the old common law marriage tradition. In a press release issued on February 23, the Department explained that the old place of domicile rule was established by regulation, not be statute, so no congressional action was required to adopt the new rule. In compliance with the Administrative Procedure Act, the Department published the proposed rule last year and gave the requisite time period for public comment. The proposed rule document contains a detailed discussion and response to the comments submitted, which included a large body of identical comments stimulated by a campaign by Human Rights Campaign.

MARRIAGE EQUALITY

5TH CIRCUIT COURT OF APPEALS – There was no word by the end of February about a decision in the combined appeals of marriage equality cases from Texas, Louisiana and Mississippi, although plaintiffs in Texas and Mississippi were urging that stays of the affirmative district court decisions be lifted in light of the Supreme Court's refusal to stay marriage equality rulings in Alabama and Florida (in the 11th Circuit). Unfortunately for plaintiffs in those cases, they won their trial court victories too early to benefit from the Supreme Court's post-October 6 consistent practice of denying stays in marriage equality cases, and the district courts had granted stays based on the Supreme Court's consistent practice of staying such rulings prior to October 6. A panel of the court heard oral argument in the three cases on January 9, and observers at the time concluded that at least two of the three panel members seemed disposed to rule for plaintiffs.

8TH CIRCUIT COURT OF APPEALS – The court's clerk issued an order granting joint motions to expedite marriage equality appeals in several pending cases, requiring appellants' briefs to be filed by February 27, Appellees' briefs by March 19, reply briefs by April 2, and oral argument to take place on April 2, 2015, with oral argument to be held during the week of May 11-15 in the pending cases of *Lawson v. State of Missouri*, *Jernigan v. McDaniel* and *Rosenbrahn v. Daugaard*. One panel will hear arguments in the three cases.

11TH CIRCUIT COURT OF APPEALS – On February 4 the 11th Circuit issued notices to the parties in *Brenner v. Armstrong*, the Florida marriage equality case, and *Searcy v. Attorney General*, the Alabama marriage equality case, informing them that the appeals in those cases "are held in abeyance pending the United States Supreme Court's issuance of an opinion in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)," as to which certiorari was granted on January 16. The court directed the parties to notify it within 21 days of the date the Supreme Court issues its decision "what issues, if any, remain pending in these appeals." Panels of the 11th Court had previously refused to stay the district court orders in both cases, and the Supreme Court allowed them to go into effect, so holding the appeals in abeyance did not prejudice same-sex couples in the two states who were eager to marry.

ALASKA – Marriage equality came to Alaska in 2014 when the 9th Circuit and the Supreme Court refused to stay a federal district court marriage equality ruling, but that decision did not extend to Indian tribes, which are sovereign with respect to marriage. The largest tribe in Alaska announced late in February that it would allow same-sex marriages as part of a new effort to assert its sovereignty by issuing marriage certificates. The president of the Central Council of Tlingit and Haida Indian Tribes of Alaska, Richard Peterson, pointed out that a tribal marriage certificate has the same validity as a certificate issued by the state government, because Indian tribes are recognized by the United States as sovereigns. He said all the inquiries he had received in the immediate wake of the announcement were from different-sex Indian couples seeking a tribal marriage. *Alaska Dispatch*, Feb. 25.

ARKANSAS – Arkansas attorney Cheryl Maples filed a civil complaint in Pulaski County Circuit Court on February 13 against Attorney General Leslie Rutledge, Governor Asa Hutchinson, and the director of the state's Department of Finance and Administration, on behalf of two couples who obtained marriage licenses during the period when they were available in response to Judge Chris Piazza's marriage equality ruling, which was subsequently stayed pending appeal and is still to be argued in the Arkansas Supreme Court. These couples married but are being denied recognition of their marriages by the state, which Maples alleges constitutions an unlawful deprivation of their constitutional rights. Among other things, they were told to file their state taxes as single and one plaintiff who is a public employee has been denied benefits for her spouse. Although the ban has been overturned in separate litigation by U.S. District Judge Kristine Baker, that case is pending on appeal before the 8th Circuit, which scheduled arguments for May. *AP State News*, Feb. 14. On February 17, Maples, representing the plaintiffs in the pending state marriage equality case, asked the Arkansas Supreme Court to lift its stay of Judge Piazza's order. Although the Court heard oral arguments on the appeal in November, it has not yet issued a ruling, and changes in membership of the court at the end of the year raised an issue of which judges should participate in deciding the case, as to which further oral argument has been scheduled for March. It looks like the Arkansas Supreme Court would like to defer deciding this case until after either the 8th Circuit or the U.S. Supreme Court has ruled on the pending federal constitutional issues. *Arkansas Times*, Feb. 18. On February 27, Attorney General Leslie Rutledge filed a response on behalf of the state to the plaintiff's request to lift the stay on the district court's decision, arguing that because the U.S. Supreme Court will be deciding the underlying issue by the end of June, the court should keep the stay in effect. "If the stay is lifted," wrote Rutledge, "marriages could be recognized that are ultimately determined to be inconsistent with Arkansas law, resulting in confusion in the law and in the legal status

of marriages. Arkansas law on this issue can only be settled definitively by a ruling from this Court or the U.S. Supreme Court that is certainly binding on all state and local officials in Arkansas," reported the *Arkansas Times* (Feb. 28). * * * U.S. District Judge Baker, responding to a request by the plaintiffs to lift her stay in light of the Supreme Court's denial of a stay in Alabama, asked the state to respond to the plaintiffs' motion by March 5 on an expedited schedule. This led the *Arkansas Times* to speculate on Feb. 25 that Judge Baker might be inclined to lift the stay, which would render the by-play in the state Supreme Court irrelevant.

IDAHO – Idaho being stupid…. The Supreme Court denied Idaho's petition to stay the 9th Circuit's ruling in *Latta v. Otter* on October 10, 2014, and hearing the news several same-sex couples promptly presented themselves at the Latah County Clerk's office, received licenses, and were married. In due course they submitted their marriage certificates for filing, and the county sent them in to the Idaho Bureau of Vital Records and Health Statistics. Assuming that everything was done and settled, the couples in question went on with their lives, for example by filing their income tax returns for tax year 2014 as married. But the *Lewiston Morning Tribune* reported on February 12 that the state bureau had declined to register the marriages, taking the position that the stay of the 9th Circuit's decision was not formally raised until October 15, and these licenses had been issued on October 10 while a temporary stay was in effect. The bureau didn't inform the county about its refusal to register the marriages until January 27, 2015. The local officials had carefully reviewed the situation on October 10 and had concluded that the Supreme Court's denial of the stay ended the matter, but it seems that the 9th Circuit did not formally lift the stay until October 15. Now a handful of married couples are finding the validity of their marriages questioned. County officials have offered to issue them new licenses and perform ceremonies at no charge, but that won't help with their tax status, for example, unless the marriages can be back-dated into calendar year 2014. Jeff Dodge and his husband, Mark McLaughlin, expressed concern about whether they would have to refile their 2014 taxes as single, which could result in their owing money to the government, as they had already filed as married. "Those questions are still unanswered and that's a bit unsettling" he told the newspaper.

INDIANA – Indiana has been under court order to allow same-sex couples to marry and to recognize such marriages since October 6, 2014, when the U.S. Supreme Court denied the state's petition to review the 7th Circuit's marriage equality decision. But Indiana authorities are refusing to apply the usual parental status presumption when a child is born to a woman who is married to another woman, insisting that the same-sex co-parent may not be listed on the birth certificate until there has been a formal adoption by the co-parent with the permission of the birth mother. Ashlee and Ruby Henderson, whose son was born after they married, has filed suit challenging the state's refusal to put both names on the birth certificate as a matter of course. *Henderson v. Adams*, Cause No: 1:15-CV-220 (S.D. Indiana, filed Feb. 13, 2015). Their complaint alleges that the relevant Indiana statutory provisions "bastardize L.W.C.H. [their son] by refusing to recognize the L.W.C.H. was born in wedlock to two lawfully married same-sex spouses; deny to L.W.C.H. the benefit and stability of presuming two parents obliged and responsive for L.W.C.H. upon his birth; and deny a presumption of parenthood and all the rights and responsibilities which are attendant to such a presumption to Ashlee Henderson because she is a woman married to L.W.C.H.'s biological mother." The complaint asserts both facial and as-applied challenges to the statutory definitions of "child born in wedlock" and "child born out of wedlock." Counsel for plaintiffs include Karen Celestino Horseman, William R. Groth and Richard A. Mann (all of Indianapolis) and Raymond L. Faust (of Carmel).

MICHIGAN – Governor Rick Snyder announced that the state would not file an appeal of the U.S. District Court ruling in *Caspar v. Snyder*, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741(E.D. Mich., January 15, 2015), which held that more than 300 same-sex couples who married before the 6th Circuit stayed the District Court's ruling in *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), had valid marriages that the state must recognize. Although the state was successful in getting the 6th Circuit to reverse the *DeBoer* ruling (see *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)), the Supreme Court has granted review and it is widely anticipated that that 6th Circuit will be reversed when the Court announces its decision in June, since the Court refused to stay district court marriage equality rulings from Florida and Alabama in recent months, even though the 11th Circuit had not yet heard the states' appeal of those rulings. Perhaps the governor and his legal advisors have concluded that they are likely to lose in the Supreme Court, so they might as well concede to the *Caspar* ruling and extend recognition to those marriages. In default of an appeal, the district court's ruling was to go into effect on February 5.

MISSOURI – A St. Louis Circuit Court judge acted too quickly when he dismissed a petition filed by a member of a same-sex couple married out-

of-state seeking a divorce, ruling the Missouri Supreme Court on February 10 in *In re the Marriage of: M.S. v. D.S.*, No. SC94101. M.S. filed the divorce petition, which Judge John N. Borbonus III promptly dismissed, holding that the court lacked jurisdiction over such a case because the state's ban on same-sex marriage deprived the court of authority to dissolve such a marriage. Judge Borbonus dismissed the action *sua sponte*, before the petition had been served on the other spouse, and not in response to any motion by D.S. to dismiss the petition. This was an error, wrote Judge Richard B. Teitelman for the Supreme Court, as Missouri procedural rules "do not authorize a judgment on the merits prior to service and an opportunity to answer the petition." Thus, this "*sua sponte* dismissal for lack of subject matter jurisdiction did not resolve any of the underlying issues raised in the petition, including the court's constitutional or statutory authority to dissolve a same-sex marriage." Judge Teitelman pointed out that the Missouri Constitution gives to circuit courts "original jurisdiction over all cases and matters, civil and criminal." Thus, under the plain language of the state constitution, the circuit court had jurisdiction to entertain this petition. "Assuming for the sake of argument only that the circuit court lacked constitutional or statutory authority to grant the requested relief," wrote Teitelman, "the court would still have subject matter jurisdiction to dispose of the petition by denying the requested relief." Thus, the case was remanded to the circuit court, to give D.S. an opportunity file an answer and join issue on the question whether the marriage should be dissolved. Teitelman was careful to note that the Supreme Court was expressing "no opinion as to the merits of any aspect of this case, including the constitutional or statutory authority of the circuit court to dissolve a same-sex marriage." What went unmentioned in the opinion was that federal trial courts have ruled against the constitutionality of the same-sex marriage ban, and the issue is pending on appeal in the 8th Circuit, which has scheduled oral argument in pending appeals from three states during the week of May 11-15.

MONTANA – The state had moved promptly to appeal U.S. District Judge Brian Morris's marriage equality ruling, *Rolando v. Fox*, 23 F.Supp.3d 1227 (D. Mont., Nov. 19, 2014), to the 9th Circuit, but on February 6 a spokesperson for Attorney General Tim Fox announced that the state would ask the 9th Circuit to put the appeal on hold pending a ruling by the U.S. Supreme Court in the 6th Circuit *DeBoer* case, which will be argued in April and probably decided by the end of June. An appeal to a three-judge panel of the 9th Circuit is a futile exercise, in any event, since a three-judge panel would be bound by the circuit's ruling in *Latta v. Otter*, 771 F.3d 456 (9th Cir., Oct. 7, 2014), *stay denied*, 135 S. Ct. 345 (Oct. 10, 2014), *motion for rehearing en banc denied*, 2015 WL 128117 (9th Cir., Jan. 9, 2015), *petition for cert. filed*, No. 14-765, 788, and it seems unlikely that the Supreme Court will grant the cert petitions filed by Idaho Governor Butch Otter and the Idaho attorney general while consideration of *DeBoer* is pending. Montana ACLU Legal Director Jim Taylor, speaking for the plaintiffs, said that they had no objection to delaying the proceedings before the 9th Circuit until after the Supreme Court announces its decision. *AP State News*, Feb. 6. The ruling is in effect, since 9th Circuit precedent now rejects stays of marriage equality rulings. * * * In Yellowstone County, the County Commission notified County Clerk Kristie Boelter that she must exempt clerks with religious objections from having to issue marriage licenses to same-sex couples. The Commission warned Boelter that if she requires clerks to issues such licenses over their objections and they sue her, the County will not pay for her defense. *Church & State*, Feb. 2015.

OKLAHOMA – Oklahoma is in the 10th Circuit and is bound by that circuit's ruling in *Bishop v. Smith*, 760 F.3d 1070 (10th Cir., July 18, 2014), which was denied review by the U.S. Supreme Court on October 6, 2014. Thus, same-sex couples in Oklahoma have the same right as different-sex couples to obtain marriage licenses and have their marriages recognized by the state. But some Republican state legislators are so unhappy about this that they have proposed draconian legislation to avoid having the state take any affirmative part in the implementation of this ruling. One bill, HB 1125, abolishes the state's role in issuing marriage licenses, replacing it with a status that would relegate many couples to the option of common law marriage while allowing religious authorities to perform weddings according to the rules of their denominations. The other, HB 1599, would prohibit any employee paid by the state to have any role in implementing the marriage equality rulings, including issuing marriage licenses, and would prohibit the spending of any state funds enforcing the federal court marriage equality decision. It provides that any judge who violates the act would be removed from office, and purports to be grounded in states' rights pursuant to the 11th Amendment. Inasmuch as the Supreme Court of the United States has repeatedly identified the right to marry as a fundamental right that cannot be abridged by the states without a compelling justification, it seems likely that both of these bills would be held unconstitutional by the federal courts upon an appropriate challenge. Nonetheless, the Oklahoma House Judiciary Committee voted to release both bills to the floor on February 17. Bizarre!

MARRIAGE / CIVIL LITIGATION

SOUTH DAKOTA – Counsel for plaintiffs filed an Emergency Motion with U.S. District Judge Karen E. Schreier on February 10, asking that the stay of her decision in *Rosenbrahn v. Daugaard*, 2015 WL 144567 (D. S.D., Jan. 12, 2015), be lifted in light of the Supreme Court's refusal to stay all district court marriage equality rulings that states had sought to have stayed since October 6, 2014, including most notably the Florida and Alabama cases, in which the Supreme Court denied stays even though the 11th Circuit has not ruled on the states' appeals in those cases. "Since October 2014, the Supreme Court has repeatedly and consistently denied motions to stay lower court decisions that struck down state bans on marriage equality as unconstitutional," wrote attorney Joshua Newville for the plaintiffs. "The Supreme Court's order in *Strange* [the Alabama case] indicates that the grant of review in *DeBoer, et al*, has not changed the Court's conclusion that such stays are not necessary. To the extent that this Court's entry of stay was premised on the fact that the Eighth Circuit Court of Appeals and/or the U.S. Supreme Court had not yet ruled on the constitutionality of state marriage equality bans, the Supreme Court's post-certiorari refusal to grant a stay in the Alabama case demonstrates that the continued stay of the judgment in this matter is no longer appropriate." After a detailed discussion of the factors that courts analyze in deciding comparable stay requests, he concluded: "The Plaintiffs and same-sex couples across South Dakota have waited years – in many cases, decades – to be treated equally in accordance with the Constitution. They should have to one more day. Accordingly, Plaintiffs respectfully request action on this Motion by this Court within one week." However, the court did not respond within one week, and had not lifted the stay by the end of February.

CIVIL LITIGATION NOTES

ALABAMA – The Moss Point School District has agreed to settle a suit brought against it by Destin Holmes, a student who alleged that she was subjected to pervasive anti-gay bullying and harassment by students, faculty and administrators. Holmes is represented by the Southern Poverty Law Center, which announced the settlement agreement under which the district undertakes significant policy changes, including reforming procedures to deal with bullying complaint. There is also a financial settlement subject to a non-disclosure agreement.

CALIFORNIA – Upholding a decision by the Commissioner of Social Security that a man living with HIV was not sufficiently disabled to qualify for supplemental security income, U.S. Magistrate Judge Alicia G. Rosenberg rejected a claim that the agency had improperly failed to respect the opinion of the man's treating physician. Rosenberg accepted the agency's argument that an administrative judge had properly given little weight to the treating physician's determination when it was not supported by the written patient records and was contrary to testimony of other doctors, including one who had examined the plaintiff. *Knott v. Colvin*, 2015 U.S. Dist. LEXIS 20088 (C.D. Calif., Feb. 19, 2015). Unlike some cases where plaintiffs have won judicial reversals of such administrative rulings by showing that the administrative judge had failed to articulate valid reasons for rejecting a treating physician's testimony, the court found that in this case the ALJ "articulated specific and legitimate reasons supported by substantial evidence in the record, for discounting" the doctor's testimony.

CALIFORNIA – Anna Eakens complained of sexual orientation discrimination by Corinthian College, at which she is a student. But when she enrolled she had signed an agreement that required disputes with the college to be submitted to arbitration. The college responded to her lawsuit by moving to compel arbitration. *Eakins v. Corinthian Colleges, Inc*., 2015 WL 758286, 2015 Cal. App. Unpub. LEXIS 1270 (Cal. App., 4th Dist., Feb. 23, 2015). The trial court decided that the arbitration agreement was unconscionable and thus not enforceable under California contract law, and the college appealed. The Court of Appeal rejected the college's argument that the trial court should have deferred to an arbitrator to rule on whether the agreement was unconscionable, holding that the trial court "could properly decide whether the arbitration provisions were unconscionable, because they did not clearly and unmistakably provide that issues of enforceability were reserved for the arbitrator." However, the court went on to hold that the trial court erred by finding the provisions unconscionable, and remanded with directions to compel arbitration. The lengthy opinion by the court provides no details about the nature of Eakens' discrimination claim.

CALIFORNIA – In a same-sex harassment case, the trial court erred by giving a special jury instruction offered by the defendant employer that required the jury to find that it was necessary to establish hostile environment same-sex harassment to find that the harasser was motivated by sexual desire, general hostility toward his own gender in the workplace, or a desire to punish the harassed employee for failing to conform to a gender stereotype. The 2nd District Court of Appeal ruled in *Chavez v. Southern California Edison Co*., 2015 Cal. App. Unpub. LEXIS 760

(Feb. 3, 2015), that "same gender sexual harassment does not require a specific motivation to be actionable." Judge Ashmann-Gerst wrote, "Following the lead of federal cases applying Title VII, our Supreme Court has held that when a plaintiff employee sues on a hostile work environment sex harassment claim under the FEHA, the claim has merit if he or she 'was subjected to sexual advances, conduct or comments that were (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive work environment. To prove that harassment is because of sex, a FEHA plaintiff must show that gender was a substantial factor in the harassment, and that he or she would not have been treated in the same manner if he or she were the opposite gender. . . The plaintiff need not prove that the same gender harasser was motivated by sexual desire, only that the plaintiff was subjected to harassment because of sex. . . In Title VII cases, which California courts frequently seek guidance from, it has been stated that 'so long as the environment was hostile to the plaintiff because of his sex, why the harassment was perpetrated (sexual interest?, misogyny? Personal vendetta? Misguided humor? Boredom?) is beside the point," citing the leading homophobic same-sex harassment case of *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Circ. En banc, 2003). The court found that this erroneous instruction was prejudicial with respect to several aspects of the jury's verdict in favor of the employer, and remanded for a new trial as to those claims.

KENTUCKY – Finding that the transgender plaintiff had failed to allege facts that would support a hostile work environment finding, the Court of Appeals of Kentucky upheld the trial court's grant of summary judgment to an employer without determining whether Kentucky's statutory ban on sex discrimination would apply to a gender identity discrimination claim. *Ransom v. B.F. South, Inc.*, 2015 Ky. App. Unpub. LEXIS 91 (Feb. 6, 2015). Plaintiff Jacques Ransom, a transgender woman who has undergone gender reassignment surgery, was employed at a franchise Wendy's restaurant in Louisville. One of her co-workers made various offense comments to other co-workers concerning Ransom's gender transition in the summer of 2011. Ransom complained to management, which moved relatively quickly to transfer the offending employee to a different shift and then to a different restaurant. Ransom conceded that the store manager had addressed the situation and cautioned co-workers not to discuss the issue of Ransom's gender transition, and that it had been "clear sailing" since then, but she filed a discrimination claim, nonetheless, alleging that the employer should be liable for the hostile environment initially created by the co-worker's remarks. She also asserted a retaliation claim, but the court found that the demotion from a supervisory to a line position had occurred before her complaint and was only temporary in any event. Ransom quit the job at Wendy's, but not until after she had filed her discrimination claim under the Kentucky Civil Rights Act. In upholding the summary judgment in favor of the employer, the court found that the allegations failed to establish a hostile environment and added, in a footnote, "Accordingly, we need not address whether transsexuals are a protected group. We note that the federal courts have disagreed as to whether Title VII encompasses discrimination claims made by transsexuals," citing only three sources: a 1986 law journal article, a 2007 10th Circuit adverse ruling, and a 2008 U.S. District Court ruling finding coverage for gender identity claims. It seems odd that the court would not reference the growing body of more recent case law, together with rulings by the EEOC and the Department of Justice, showing that the growing weight of authority supports treating gender identity discrimination claims as being encompassed within the scope of bans on sex discrimination.

MARYLAND – A transgender former Revenue Agent for the Internal Revenue Service (IRS) whose discrimination claim survived a motion to dismiss has now suffered a grant of summary judgment against her in *Hart v. Lew*, 2015 U.S. Dist. LEXIS 15274, 2015 WL 521158 (D. Md., Feb. 6, 2015). U.S. District Judge Ellen Lipton Hollander found that there were no material fact issues for trial on plaintiff Sydney Hart's discrimination claim. "The evidence shows that Hart repeatedly, expressly asked to be fired, and she finally got her 'wish' when she vowed never to return to the workplace," the judge commented about the *pro se* litigant's claims. Hart worked for the IRS from 2006 until 2011, a period that encompassed her transition. The court's opinion presents a long, detailed factual recitation based on the papers submitted by Hart. The papers cover so many incidents that it is hard to characterize the case succinctly, but it appears that Hart was not particularly diplomatic in phrasing her criticisms of co-workers and management, filing several grievances and expressing dissatisfaction with her working conditions. In one complaint that she sent to IRS officials, for example, she stated that "perverted and out-of-touch management … breeds ignorance and intolerance" and "causes personnel disputes." Judge Hollander noted "that plaintiff has not provided the Court with any testimony or statements, such as depositions and affidavits. But, she has provided numerous emails, as well as the investigative file resulting from the Treasury's internal investigation of the EEO complaint that Hart filed in May 2011, after her termination became effective." A cursory review of the allegations suggests that experienced

counsel in employment discrimination law might have been able to shape a plausible case for Hart, but a *pro se* effort was not likely to succeed. Hart had withdrawn or agreed to settle many of the complaints she had raised over the years. Judge Hollander decided that she did not need to address Hart's lengthy argument in her Opposition to the summary judgment motion, contending that Title VII applies to gender identity discrimination claims. The government is now on-board with this contention, and did not dispute the potential applicability of Title VII. But Judge Hollander found that, even taking Hart's extensive documentation of events as true, she had failed to meet the standard of defeating summary judgment. "Considering the facts in the light most favorable to Hart," she wrote, "as I must, at best I can say that Hart truly believed that many of her colleagues and supervisors harbored a discriminatory animus toward her because of her transgender status or because she did not conform to traditional sex stereotypes. However, no reasonable juror could conclude that the IRS fired Hart *because of* discriminatory animus, rather than because Hart point-blank refused to report to work, even when efforts were made to allay her fears." The judge found that the supervisors had "repeatedly issued lesser discipline than they might" based on Hart's conduct, which "are not the actions of people just looking for a pretextual reason to fire someone," and that Hart's repeated statements that she wanted to be fired (presumably so that she could file a wrongful discharge case) were "not the words of someone looking to keep her job." Some of the disputes were about criticisms of the way Hart dressed for work, and Judge Hollander opined that "a reasonable juror would not see most of the incidents … as discriminatory."

MASSACHUSETTS – U.S. District Judge Mark G. Mastroianni denied an employer's motion to dismiss a state law sexual orientation discrimination claim on preemption grounds in *Rivera v. United States Tsubaki*, 2015 U.S. Dist. LEXIS 13824, 2015 WL 477196 (D. Mass., Feb. 5, 2015). Leslie Rivera was employed by an Illinois-based company in their Massachusetts operation, as part of a collective bargaining unit represented by the Steelworkers Union. She had a run-in with the company when they withdrew insurance coverage from her same-sex spouse and, even after it was reinstated, charged her more for the coverage than was charged for different-sex spouses. This matter was resolved, blamed in part on a clerical error in the Illinois home office, but it may have adversely affected her standing with the employer. In the case at hand, she alleged discrimination regarding promotions and working conditions because of her sex and sexual orientation, in violation of the Massachusetts anti-discrimination law. She filed suit in state court; the company removed the case to federal court and moved to dismiss, claiming that the dispute was subject to arbitration under the Steelworkers collective bargaining agreement and thus not justiciable due to preemption under Sec. 301 of the Labor-Management Relations Act. In denying the motion, Judge Mastroianni found that the collective bargaining agreement's grievance and arbitration procedure did not clearly waive the right of employees to sue on statutory claims, since it did not on its face extend to state statutory claims, and that the decision of the merits of the claim did not require an interpretation of the collective bargaining agreement, since the procedures for determining employee qualifications for promotions, although referred to in the collective bargaining agreement, were not spelled out there but separately negotiated by the union and the company. The judge concluded that Rivera was not seeking to vindicate collective bargaining rights, only state statutory rights, so there was no preemption of her claim. Since federal courts are generally disposed to find preemption and remit employee claims to the collective grievance procedure, it would not be surprising if this employer were to appeal to the 1st Circuit, as they are unlikely to look with equanimity on defending this case before a gay-friendly Massachusetts jury.

MASSACHUSETTS – U.S. District Judge Rya W. Zobel denied cross-motions for summary judgment in *Doe v. Unum Life Insurance Company of America*, 35 F.Supp.3d 182 (D. Mass., Aug. 8, 2014), a case which recently appeared for the first time in case law databases despite its August 2014 date. The John Doe plaintiff was suing the insurance company under ERISA for benefits under a long-term disability insurance plan provided through his employer. Doe was a high-level executive of an international accounting firm. He was diagnosed HIV+ in 2004, and went on long-term disability benefits after an unsuccessful suicide attempt. At first the LTD benefits were pegged to disability due to mental illness; such benefits lasted 24 months under the plan. Then Doe applied for benefits for physical illness, which were authorized while the insurer reserved its right to investigate the claim. Doe's doctors provided reports documenting the severe diarrhea and incontinence from which he suffered, attributable in part to the treatment for his HIV infection. The doctors consulted by the insurer concluded that Doe was able to work, and Unum preferred their conclusions, cutting off benefits and leading to the lawsuit. Judge Zobel found numerous errors, most significantly that Unum's doctors had ignored the clinical findings of Doe's doctors, and thus the final decision to deny benefits was "arbitrary and capricious." Most significantly, Unum's doctors stated their conclusions virtually without reference to the particular characteristics of Doe's job. Under the LTD policy, the immediate

question was whether he was capable of performing work that would return at least 60% of his last salary, a considerable sum characteristic of a high-tension job supervising a large number of people, and requiring frequent travel. The flip comment by one of Unum's doctors was that Doe could work if they located him near a bathroom and scheduled travel to accommodate his needs. "In short," concluded the judge, "the record shows that Unum ignored or minimized facts favorable to Doe while emphasizing facts unfavorable to his case. Its decision to terminate Doe's benefits was not the product of reasonable decisionmaking and substantial evidence. It was arbitrary and capricious." However, this did not mandate summary judgment in favor of Doe, she concluded. "Unum concluded that Doe could work his old job as a partner at a global accounting firm. I have now held that its conclusion is wrong. But it remains to be seen whether plaintiff can work any other gainful occupation. Thus, the problem is not – at least not yet – that Does was denied benefits to which he was entitled. The problem is that Unum did not complete the inquiry for which the Plan language calls. In this circumstance, it is appropriate to remand the case to the plan administrator to determine whether Doe can work 'any gainful occupation' which will pay him $51,343.60 monthly, or $616,123.22 annually, indexed for inflation." Since it would be hard to imagine an employer that would pay that kind of money to somebody to hold down a sedentary, low-stress job with frequent bathroom breaks, one suspects that any conclusion to the contrary by Unum will be heavily contested in court.

NEW JERSEY – Ruling in *Sacchi v. Luciani*, 2015 WL 685853 (D.N.J., Feb. 18, 2015), U.S. District Judge Freda Wolfson granted a motion to dismiss a claim of beneficiary status by the same-sex spouse of a former employee of Meridian Health Systems, who claimed that he had been unlawfully denied the opportunity to apply for COBRA insurance extension benefits after his husband (who is also his attorney) was discharged. Judge Wolfson found that John Sacchi had never been designated by his husband, Stephen Simoni, as a beneficiary under the employee benefits plan, and thus was not entitled to apply for COBRA benefits. "Importantly," she wrote, "during his employment, Simoni only elected coverage and participation in the Plan for himself; not for his spouse." Under these circumstances, she found, the statutory requirement that an employer notify beneficiaries (including spousal beneficiaries) of their right to elect continuation coverage after a qualifying event did not apply to Sacchi.

NEW YORK – In *Daniel v. T&M Prot. Res. LLC*, 2015 U.S. Dist. LEXIS 20051, 2015 WL 728175 (S.D.N.Y. Feb. 19, 2015), U.S. District Judge Paul A. Engelmayer granted the employer's motion for summary judgment on discrimination and retaliation claims brought by a gay black employee under Title VII of the Civil Rights Act of 1964, the New York State Human Rights Act, and the New York City Human Rights Act. Judge Engelmayer found that by filing charges with the City Human Rights Commission, which resulted in a finding by the Commission of no probable cause, the plaintiff had made an election of remedies and could not assert his local law claims in his federal Title VII suit. As to the Title VII claims, the court found that the evidence proffered by the plaintiff did not rise to the level of severe or pervasive misconduct by the supervisor in question, and that the company had credibly asserted a non-discriminatory reason for discharging the plaintiff, clear and uncontested violation of employer work rules. Judge Engelmayer commented that while a discharge might be seen as "unfair," that did not make it illegal if the plaintiff's factual allegations did not meet the standard set under the case law for finding liability. Most of the plaintiff's evidence related to racially-tinged comments and name-calling by the supervisor, but there was evidence that the supervisor was profane and verbally abusive to everybody, not just the plaintiff. Indeed, when the supervisor made comments implying that the plaintiff (who was not "out" in the workplace) was gay and saw the plaintiff was upset, the supervisor reassured him that he had a gay son, who was subsequently employed at the same workplace.

NEW YORK – One would think that once the Supreme Court found that it violated the 1st Amendment for the government to require non-governmental organizations (NGO) to adopt explicit anti-prostitution polices in order to qualify for federal AIDS prevention funds for overseas activities, that would be the end of the matter. But it seems that the government has been slow to comply with the requirements of the preliminary injunction that had been issued by U.S. District Judge Victor Marrero (S.D.N.Y.) as the case was wending its way to the Supreme Court, and even after the decision in *Alliance for Open Society International v. U.S. Agency for International Development*, 133 S. Ct. 2321 (2013), the government has continued to include the anti-prostitution policy requirement in new funding application forms and communications with funding recipients, thus deterring applicants who are opposed to adopting such a policy, as an impediment to their AIDS prevention work, and confusing funding recipients about their ongoing obligations. In a ruling issued January 30, 2015, 2015 U.S. Dist. LEXIS 12361, 2015 WL 706668, which appears to be a transcription from an Order delivered from the bench, Judge Marrero made his preliminary injunction permanent, ordered the

government to not issue any official communications that include this policy requirement without making it clear that the plaintiffs and their domestic and foreign affiliates are exempt from the requirement, to refrain from applying the requirement to the plaintiffs and their domestic and foreign affiliates, and ordering the government to "show cause why this Court should not bar it from enforcing the Policy Requirement against any organization and why allowing the Government to continue to apply the Policy Requirement would not violate the Supreme Court's decision in this matter." Rather incredibly, the government has been arguing that the Supreme Court's constitutional ruling only applied to the plaintiffs in the case, and not to all NGOs seeking or receiving funding under the government's AIDS prevention initiative, even though there was no indication in the Supreme Court's ruling that its First Amendment analysis was dependent on the particular identity of the plaintiffs.

NEW YORK – U.S. District Judge J. Paul Oetken granted a motion to dismiss Lisa Guttilla's *pro se* lawsuit against the City of New York, the NYC Department of Education and various city and private school administrators on claims arising from her resignation of her tenured teacher position in the wake of charges of sexual contact with a student. *Guttilla v. City of New York*, 2015 WL 437405 (S.D.N.Y., Feb. 3, 2015). Gutilla was employed as a phys ed teacher at James Madison High School in Brooklyn and part-time girls' varsity volleyball coach at Poly Prep Country Day School, a private school also in Brooklyn. Allegations that she had improper sexual contact with a member of the volleyball team led to criminal charges against her, as a result of which the Education Department instituted proceedings leading to a probable cause hearing before labor arbitrator Martin Scheinman, who upheld her suspension as the collective agreement equated criminal charges with probable cause for suspension. Ultimately the criminal charges were dropped, but the Education Department undertook its own investigation, leading to another probable cause hearing before Scheinman, who again upheld suspension based on the investigation evidence as sufficient to constitute probable cause. Guttilla was represented by counsel in these proceedings. The next step would be a full-blown hearing on the merits before another arbitrator, but before this could happen, Guttilla signed a stipulation of settlement under which she resigned her tenured position and waived her right to assert claims against the Department and its employees. However, she instituted suit in federal court, claiming her constitutional rights were violated and that defendants had also violated various federal criminal statutes. Judge Oetken found that the procedures followed in her case comported with the requirements of due process, that her appropriate route to relief if she wanted to contest the settlement was an Article 78 proceeding in state court, and that there was no private right of action for her to enforce federal criminal statutes. He also found that the City could not be sued on these claims, that she had failed to allege a policy of discrimination by the Education Department, and that her constitutional allegations lacked the necessary factual allegations, being stated in conclusory terms. It was a total washout for Guttilla, ironically before an openly-gay federal district judge. She alleged that they got rid of her because she is a lesbian. Perhaps she actually has a case, but proceeding *pro se* in constitutional litigation in apparent ignorance of the demanding pleading requirements for such litigation is not well-advised.

NEW YORK – The Appellate Division, 3rd Department, rejected a gay plaintiff's sexual orientation discrimination claim against his employer in *Miranda v. SA Hudson Valley, Inc*.., 124 A.D.3d 1158, 125 Fair Empl. Prac. Cas. (BNA) 1784, 2015 N.Y. Slip Op. 00670 (Jan. 29, 2015). The stated reason for Howard Miranda's discharge from his paramedic position was a violation of company rules concerning safeguarding of controlled substances in the ambulette he was assigned to drive. He claimed that this was a pretext for sexual orientation discrimination, but the Appellate Division panel was not convinced, pointing out that the employer had known he was gay for many months prior to the discharge. In the interim there had been complaints (including a male co-worker complaining about inappropriate touching) and minor infractions on his part that could have been seized upon by an employer intent on discharging a gay employee, but the employer hadn't discharged him. "The fact that defendant refrained from terminating plaintiff's employment based upon these earlier – and comparatively minor – disciplinary infractions militates against a finding that discrimination was the real reason behind plaintiff's termination from his employment in January 2010," wrote Justice John Egan for the appellate panel. "Even assuming, as plaintiff now contends, that he was falsely accused of entering inaccurate information on the controlled substances log and inventory sheets and, further, that defendant mistakenly held him accountable for ensuring that both doors to the controlled substances locker were secured, plaintiff's Executive Law claim survives only if he can demonstrate that the stated basis for his termination was designed to mask discrimination." As to this, the court held, his proof fell short.

OHIO – U.S. Magistrate Judge Mark R. Abel granted the employer's motion for summary judgment in *Turner v. Judge Gregory L. Frost Ocedon Restaurant Group*, 2015 U.S. Dist.

LEXIS 22692, 2015 WL 795827 (S.D. Ohio, Feb. 25, 2015), in which a "straight" employee claimed he had been subjected to homophobic harassment by a co-worker to which the employer had been inadequately responsive when he complained. The plaintiff asserted his claims under a hostile environment sex discrimination theory. Judge Abel disposed of the case based on his conclusion that the alleged conduct did not meet the "severe or pervasive" standard required for a hostile environment claim. "The alleged conduct here was not frequent," he wrote. "It was relatively mild, albeit inappropriate. The conduct was neither physically threatening nor humiliating. And it cannot be said to have interfered with Plaintiff's work performance; although Plaintiff argues that it made him not want to work with [the harasser], Plaintiff's work history indicates attendance issues when he was not scheduled to work with [the harasser]. Thus, although [the harasser]'s alleged conduct would certainly be creepy behavior, under the totality of the circumstances it does not rise to the level of sufficiently severe or pervasive conduct to present an objectively hostile work environment." As to plaintiff's claim that his subsequent discharge was retaliatory, the court found that the company had a legitimate reason for the discharge: plaintiff's recurring attendance problems. Normally we would not even bother to report this case, but we couldn't resist a chance to quote the "creepy behavior" remark.

OHIO – U.S. Magistrate Judge Karen L. Litkovitz issued a report and recommendation in *Milot v. T.J. Maxx*, 2015 U.S. Dist. LEXIS 21436 (S.D. Ohio, Feb. 23, 2015), recommending dismissal of a Title VII claim by Aurora N. Milot, who claims to have been constructively discharged after being interrogated by management about "rumors" that she was a lesbian that had been circulating among the staff at the office. She had filed a sex discrimination charge with the EEOC and received a right to sue letter, but the company successfully argued that under 6th Circuit precedent a claim of sex discrimination by a gay plaintiff should not be entertained unless it falls into one of the recognized exceptions, such as discrimination for failure to accord to gender stereotypes. "Plaintiff's complaint fails to state a plausible claim for sex discrimination," wrote the judge. "Plaintiff alleges she was discriminated against based on rumors concerning her sexual orientation. In accordance with Sixth Circuit law, plaintiff's claim for discrimination based on her sexual orientation is not actionable under Title VII." Judge Litkovitz found that Milot's allegations would not support a gender stereotyping claim or a sexual harassment claim, despite Milot's attempt in responding to the defendant's dismissal motion to reframe her claim in terms of sex discrimination by arguing that the employer would not have treated a male employee in the same way. Milot represented herself *pro se*.

OHIO – A transgender woman who had obtained a new birth certificate identifying herself as female could bring a claim of sex discrimination as a woman against her employer, ruled U.S. District Judge James S. Gwin in *Cummings v. Greater Cleveland Regional Transit Authority*, 2015 WL 410867 (N.D. Ohio, Jan. 29, 2015). Cummings was born in Alabama and obtained an amended birth certificate from that state after her gender reassignment surgery was completed. Judge Gwin found that at the motion to dismiss stage, it was "premature for the Court to decide what evidentiary value to afford Cummings' out of state birth certificate. At this juncture, all well-pleaded factual allegations in the complaint are accepted as true. Cumming states that she 'identifies and considers herself a female' and is female from 'a biological standpoint.' Cummings has a valid birth certificate which indicates she is female. These statements are sufficient for Cummings to allege gender discrimination as a female." Thus, she could assert a violation of the Ohio Equal Pay Act, and could allege she suffered gender discrimination for failing to conform to male gender stereotypes that her employer sought to impose. However, the court found that Ohio does not recognize a cause of action for failure to promote in violation of public policy, so dismissed Cummings' tort claim to that effect.

OREGON – Clackamas County Circuit Judge Michael Wetzel ruled that a gay man fired from a job at an adult bookstore suffered unlawful discrimination and awarded him more than $76,000 in damages, according to *AP State News* (Feb. 11) summarizing a report in the *Oregonian*. Wilford Beardon was hired by Fantasyland II in April 2010 and discharged three months later. The bookstore manager claimed that other employees complained about Bearden's behavior, but the court found for Beardon on his claim that the store allowed a hostile environment, treated him badly because of his sexual orientation, and fired him when he complained about harassment. According to the newspaper report, Judge Wetzel found that Bearden was subjected to actions that "were reasonably and subjectively offensive" to him as a gay man.

OREGON – The Oregon Bureau of Labor and Industries announced on February 2 that Sweet Cakes, a bakery in Gresham, violated state law when it refused to bake a wedding cake for a same-sex couple in January 2013. A hearing on March 10 will determine how big a fine the bakery will have to

pay to the couple. The bakery closed its doors in December 2013, but its proprietor continues to operate a home-based bakery. *USAToday*, Feb. 4.

TEXAS – A Houston jury ruled on February 13 that opponents of Houston's equal rights ordinance submitted a repeal referendum petition that contained forgery and other flaws. District Judge Robert Schaffer would subsequently begin the process of reviewing those petitions not so tainted to determine whether they contain sufficient valid signatures to force the city council either to repeal the ordinance or put it on the ballot. *Houston Chronicle*, Feb. 14.

WASHINGTON STATE – Benton County Superior Court Judge Alexander C. Ekstrom ruled on February 18 in *State v. Washington v. Arlene's Flowers, Inc*., No. 13-2-00871-5, that a florist's categorical refusal to "do the flowers" for a same-sex wedding violated the state's Law Against Discrimination and Consumer Protection Act. A violation of the form by a public accommodation is automatically a violation of the later statute. Judge Ekstrom rejected the defendant's argument that she and her business were privileged under the 1st Amendment to deny services that contradicted their religious beliefs. Defendant Barronelle Stutzman argued that this was all a misunderstanding, anyway, as it later developed that all that Robert Ingersoll and Curt Freed wanted to buy from her were loose flowers that they planned to arrange themselves, and had she known that she would have made no objection. Reviewing the factual allegations, however, Ekstrom concluded that Stutzman had refused to sell to the men as soon as she was told that they were seeking flowers for a same-sex marriage ceremony. Ekstrom pointed to the famous New Mexico wedding photographer case as a persuasive precedent. Stutzman subsequently rejected a settlement offer from the Attorney General's office, stating that she would not pay any fine and would appeal the ruling.

CRIMINAL LITIGATION NOTES

ARIZONA – Judge Crane McClennen of the Maricopa County Superior Court vacated the judgment of guilt in *State v. Jones*, LC2014-000424-001 DT (Jan. 22, 2015), in which a transgender woman, Monica Renee Jones, was convicted in a bench trial on the charge of manifesting an intent to commit or solicit an act of prostitution. According to Jones, she was just walking down the street with some transgender friends when she was arrested, and was not engaged in soliciting prostitution. She sought a jury trial, which was denied by the Municipal Court judge, who also rejected the defense's motion *in limine* seeking to exclude evidence of her prior offenses, which had included some prostitution solicitation arrests. The judge said that the defense could object and he would rule at the time when testimony was sought. Jones testified in her own defense and was questioned by the prosecutor about her past arrest record, without any objection by Jones' attorney. She also testified that she was not out soliciting at the time she was arrested. In explaining his verdict, the trial judge clearly indicated that that he was indulging the judgment that Jones had a motivation to testify falsely when she denied that she was soliciting prostitution at the time she was arrested. In vacating the conviction, Judge McClennen noted, "trial courts routinely instruct jurors not to consider the possible punishment in determining the defendant's guilt or innocence," and quoted a lengthy passage from a 2nd Circuit decision, *U.S. v. Gaines*, 457 F.3d 238 (2006), explaining the fallacy of basing credibility determinations on assumptions about the motivations of defendants testifying at trial. He wrote, "Because both a defendant who is truly innocent and thus should be not be punished has a motive to testify truthfully that he or she did not commit the crime, and a defendant who is truly guilty and wants to avoid punishment has a motive to testify falsely that he or she did not commit the crime, the fact that the defendant testifies that he or she did not commit the crime is not a valid indicator whether the defendant is testifying truthfully or falsely. For the trial court to have concluded Defendant was not credible and thus guilty because she was facing conviction and sentence deprived Defendant of a fair trial." However, the court rejected Jones' argument that the court should have ruled that the statute under which she was convicted was unconstitutional, pointing out that its constitutionality has been upheld by Arizona appellate courts, whose rulings are binding on the trial courts. The ACLU assisted Jones with her appeal, filing an amicus brief in support of her claims.

CALIFORNIA – Affirming the conviction of Joseph Chapa on eight counts of sex offenses against two male minors, the California 3rd District Court of Appeal found that the defendant was not denied his constitutional rights when the prosecution presented expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS) and about a practice of pedophiles "grooming" adolescents to make them acquiescent to sexual activity. *People v. Chapa*, 2015 Cal. App. Unpub. LEXIS 1108, 2015 WL 729345 (Feb. 19, 2015). The defendant also claimed that the trial court should have excluded evidence of sex toys and gay porn DVDs found in his home, and that the prosecutor engaged in misconduct by arguing to the jury that a male defendant abusing male teenagers was "not inconsistent" with what gay men do. The prosecution largely boiled down to whether the jury would find

credible the testimony of two teenage boys about their sexual experiences with the defendant when they were several years younger. The defendant claimed that the testimony allowed by the trial judge was precedential and intended to tar a gay male defendant based on generalizations rather than proof of the actual commission of a crime, but the court was unpersuaded. The opinion summarizes the expert's testimony in some detail, and also reproduces several paragraphs of the prosecutor's closing argument to the jury, which should make it useful as a reference source for those studying the subject or practicing in the field.

LOUISIANA – The U.S. Supreme Court ruled in 2003 in *Lawrence v. Texas* that the state cannot make private adult consensual sodomy a crime, but that cut little ice with the Louisiana legislature, which has refused to reform its sodomy law, leaving it to police officers to figure out what is enforceable and what is not. East Baton Rouge Parish sheriff's deputies have continued to arrest men and charge them under the unconstitutional law, and local judges continue to throw out the prosecutions when apprised of the controlling Supreme Court precedent. On February 13, Baton Rouge Police Chief Carl Dabadie sent a department-wide memo to remind officers that they could not arrest people for violation of this unconstitutional statute. While the police department will continue to prosecute people for having sex in the park under a trespassing statute, it promises not to include "crime against nature" counts in such prosecutions. Critics of the department argue that enforcement is selective, targeting gay men, and recent history shows that police officers continue to carry out sting operations against gay men cruising for sex. As recently as last April the Louisiana House rejected a proposal to amend the sex crimes laws to comply with the limits announced in *Lawrence*. A spokesperson for the state gay rights group expressed some surprise that the Baton Rouge Police are still charging people with "crime against nature," referring to prior statements by the Department that they were no longer enforcing that law. He indicated that they haven't heard complaints of such enforcement activities about other police departments in the state. *TheAdvocate.com*, Feb. 16.

NEW YORK – The New York Court of Appeals ruled by unanimous vote on February 17 that a local government may not enact residential restrictions on registered sex offenders, as the state has occupied the field with its sex offender registration laws. *People v. Diack*, 2015 WL 641723. In 2006, Nassau County enacted a local law prohibiting registered sex offenders from living within 1,000 feet of a school. The defendant in this case was convicted of "possessing an obscene sexual performance by a child" in 2001, served 22 months in prison, and upon release was classified as a level one sex offender under the state's Sex Offender Registration Act. He was discharged from parole in 2004. He reported a change of address in July 2008 to the State Division of Criminal Justice Services. When the Nassau County Police received this information, they determined that he had moved into an apartment that was too close to a school under the local law, and charged him with a violation. He moved to dismiss, claiming that state law preempted the local law, and his motion was granted by the District Court. Appellate Term reversed, finding that it "could not discern any express or implied intention by the Legislature through the enactment of the Sex Offender Registration Act (and other state laws) to occupy the entire field so as to prohibit the enactment of local laws imposing residency restrictions for sex offenders who are no longer on probation, parole supervision, subject to conditional discharge or seeking public assistance." The Court of Appeals found that such preemption was implied. Rejecting Nassau County's argument that the patchwork of state laws related to the subject suggested that the Legislature was leaving it to local governments to decide how to handle registered sex offenders, the court said that "it is clear from the State's continuing regulation with respect to identification and monitoring of registered sex offenders that its 'purpose and design' is to preempt the subject of sex offender residency restriction legislation and to 'occupy the entire field' so as to prohibit local governments from doing so." Judge Eugene Pigott wrote for the court.

NEW YORK – Prosecutorial misconduct convinced the Appellate Division, 4th Department, to find that a man convicted of sexual abuse of a boy had not received a fair trial, requiring a reversal and remand for a new trial in *People v. Scheidelman*, 2015 N.Y. App. Div. LEXIS 1122 (4th Dep't, Feb. 6, 2015). Mark Scheidelman was convicted in Oneida County Court on July 17, 2013, of sexual abuse in the first degree. The alleged victim was the nephew of a man with whom Scheidelman had previously had a sexual relationship. Although the Appellate Division panel rejected Scheidelman's argument that the verdict was contrary to the weight of the evidence because the prosecution's witnesses were not credible, it accepted his argument that the trial judge let the prosecution get away with too much objectionable conduct at the trial. "Initially, we agree with defendant that the prejudice created when the prosecutor questioned defendant about his homosexuality and his former homosexual relationship with the victim's uncle, apparently at a time when the uncle was a young man, far outweighed the minimal probative value that such evidence may have had,

especially in light of the charges here, wherein defendant was accused of having sexual contact with a boy. By asking those questions, the prosecutor improperly 'cross-examine[d] the defendant about a [sexual] practice, not rising to the level of a crime, which had no logical bearing on the question of credibility,'" wrote the court, citing to *People v. Moore*, 548 N.Y.S. 2d 344. The court was also critical of the prosecutor's questions about criminal records of other people residing in the defendant's home and his assistance to them in dealing with criminal charges, and of the prosecutor's introduction of evidence that someone living in the house allegedly cautioned the child to stay out of the defendant's room "because you don't know what [he] can do." This would prejudice defendant by suggesting that he "was an erratic and potentially dangerous person." The court also erred in letting the prosecutor present "expert testimony" on the so-called Child Sex Abuse Accommodation Syndrome by a police investigator who was not qualified as an expert on the subject, and by allowing the prosecutor to make prejudicial characterizations of the evidence in her closing arguments. The court noted that these various challenges to what happened at the trial had not been properly preserved for review, but they would take them up as a matter of justice. Justice Fahey (who has since been elevated to the Court of Appeals) dissented, arguing that the court should not have addressed these issues, having found that the verdict was not contrary to the weight of the evidence. His dissent identifies the defendant as "the longtime supervisor of the Town of Trenton" and recites in more graphic detail than the majority opinion the evidence, based largely on the testimony of the boy, about what happened during a "sleepover" at the defendant's house. "I agree with the majority," wrote Fahey, "that the jury was entitled to resolve what was essentially a contest of credibility between the prosecution's witnesses and defendant against defendant." He disagreed with the majority that the cumulative effect of the alleged errors would justify upsetting the verdict.

VIRGINIA – The Virginia Supreme Court *really* doesn't like the U.S. Court of Appeals for the 4th Circuit's 2013 ruling in *MacDonald v. Moose*, 710 F.3d 154, which held that the Virginia sodomy law was facially unconstitutional in light of the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003). This dislike is manifested anew in *Toghill v. Commonwealth*, 2015 Va. LEXIS 18, 2015 WL 798710 (Feb. 26, 2015), in which a man convicted of soliciting oral sex with a minor over the internet was challenging his conviction in reliance on *MacDonald* and the contention that his prosecution under the Virginia sodomy law (since repealed in 2014, by the way) was unconstitutional. After much wrangling about whether the Appellant had standing to raise the issue on appeal, since he had not objected to the constitutionality of the sodomy law at his trial, the court asserted that it was not bound by a federal court of appeals ruling as to the constitutionality of a Virginia law, and it disagreed with the finding of facial unconstitutionality. The court insisted that *Lawrence v. Texas* was an as-applied challenge to the Texas sodomy law, and that the U.S. Supreme Court had clearly intimated that the state could punish oral sex between an adult and a minor. The point is now irrelevant, of course, since the sodomy law was repealed and other Virginia criminal statutes can be used to prosecute intergenerational sex (as the 4th Circuit pointed out in *MacDonald*), but the court couldn't resist the opportunity to take a swipe at the 4th Circuit, a once ultra-conservative court that has been repurposed through President Obama's appointments into a liberal bastion that struck down Virginia's ban on same-sex marriage last year.

PRISONER LITIGATION NOTES

10TH CIRCUIT COURT OF APPEALS

-The Unites States Court of Appeals unanimously affirmed the denial of a preliminary injunction seeking hormone treatment and accommodation for a transgender inmate in Oklahoma in *Druley v. Patton*, 2015 WL 430770, 2015 U.S. App. LEXIS 1720 (10th Cir., February 3, 2015). In a decision that is "not binding precedent" under F.R.A.P. 32.1, Circuit Judges Neil M. Gorsuch and Jerome A. Holmes and Senior Circuit Judge Terrence L. O'Brien found that plaintiff Jeanne Marie Druley (a prisoner for 27 years, who presents as female and has had two of three sex reassignment surgeries and a birth certificate changed to read female) did not show a likelihood that she would prevail on the merits to justify preliminary relief. Druley sued under 42 U.S.C. § 1983, claiming that prison officials gave her inadequately low hormone medication in violation of the Eighth Amendment, housed her in an all-male facility and denied her female clothing in violation of the Equal Protection Clause. The court found that Druley's reliance on Standards of Care recommended by the World Professional Association for Transgender Health (WPATH), without "any medical evidence specific to her," was inadequate. The court cited the First Circuit decision in *Kosilek v. Spencer*, 2014 WL 7139560, at *2, n.3, *20 (1st Cir. Dec. 16, 2014), id. at *2 n.3) (reported in Law Notes, January 2015, pages 3-4) (stating WPATH standards are "flexible directions" and denying after trial an injunction for last stage gender reassignment surgery); and its own nearly thirty-year-old decision in *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (finding estrogen treatment for transgender patients was "medically controversial"). There is no mention of more appellate recent decisions rejecting categorical denials

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of transgender treatment for inmates. *See De'Lonta v. Johnson*, 708 F.3d 520, 525-26 (4th Cir. 2013) (rejecting refusal to evaluate for gender reassignment surgery); and *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S.Ct. 1810 (2012) (striking categorical ban on hormone treatment). As to the Equal Protection Claim, the court reiterated that "a transsexual plaintiff" is not a member of a suspect class, citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (involving non-prisoner employment rights of transgender employees); and *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995) (affirming the dismissal of equal protection claim in denial of estrogen to "transsexual prisoner"). The court concludes summarily that Druley failed to allege any facts "suggesting that [Oklahoma's] decisions concerning her clothing or housing do not bear a rational relation to a legitimate state purpose." There is no discussion of more recent Equal Protection decisions involving LGBT plaintiffs. *William J. Rold*

ARKANSAS – An Arkansas prisoner who tried to remove one testicle and succeeded in severing the other one lost to summary judgment in a case about deliberate indifference to serious health needs in *Reid v. Kelley*, 2015 WL 640673 (E.D. Ark. Feb. 13, 2015). United States District Judge J. Leon Holmes adopted the findings and recommendations of United States Magistrate Judge Jerome T. Kearney that no reasonable defendant could conclude that he or she violated the rights of pro se plaintiff Andrew Reid and therefore all defendants are entitled to qualified immunity as a matter of law. As framed, the case involves only a disagreement about diagnosis and treatment, and Reid received mental health treatment, even though defendants did not treat Reid for "Gender Identity Disorder (GID)" as requested. The record indicated multiple psychiatric visits, numerous physical and mental (non-transgender-related) diagnoses, a meeting with the "Gender Identity Committee" (which found Reid did not meet transgender "criteria"), and a treatment plan, including non-hormonal medication, individual therapy and review. Reid was discharged from in-patient care after he was found to be sleeping and eating and off medication, even though "for safety reasons" Reid was housed "under camera in an isolation cell." Records showed no attempts at "self-mutilation" since 2013, and "most of the entries from the latter part of 2014 indicate that Plaintiff reported no mental health concerns or issues." Judge Kearney found that Reid's disagreement with treatment did not constitute a triable constitutional issue. This case is another illustration of the inability of a pro se plaintiff to sustain a claim against contrary physician affidavits at summary judgment without the assistance of expert testimony. *William R. Rold*

FLORIDA – Appellate decisions matter. The April 2014 issue of *Law Notes* (at pages 134-5) discussed the plight of civilly committed transgender inmate Ronald C. Hood, a/k/a Erika Denise Hood, whose challenge to denial of diagnosis and treatment was found not to state a claim in *Hood v. Dep't of Children & Families*, 2014 U.S. Dist. LEXIS 24367 (M. D. Fla., February 26, 2014). The same issue (at pages 135-6) reported an Eleventh Circuit case, *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. March 7, 2014), which denied qualified immunity to prison defendants who refused transgender medical care. Now, the same trial judge who rebuffed Hood in 2014 is granting a trial on the total denial of any program for transgender inmates in *Hood v. Dep't of Children & Families*, 2015 U.S. Dist. LEXIS 19282 (M. D. Fla., February 18, 2015). U.S. District Judge John E. Steele's opinion remains hostile to Hood, using male pronouns and recounting Hood's lurid criminal and sexually violent predator history; but it assumes for purposes of the decision that Hood presents with a "serious medical need" – "GID" (using DSM-IV definitions, but recognizing the evolution of terminology) – and that the failure to have "any" policy addressing such patients cannot stand after *Kothmann*. Thus, the named defendants, who conceded that they had no policy for diagnosis or treatment, were not entitled to summary judgment "on Plaintiff's claim for declaratory and injunctive relief seeking the formulation of a DCF policy for the treatment of GID." Judge Steele continued: "However, even if it is determined that Plaintiff suffers from GID, he is not entitled to treatment of his choice…. Therefore, Defendants are entitled to summary judgment on Plaintiff's request that the Court order Defendants to provide him with hormone therapy" [thirty-year-old citations omitted]. Judge Steele also reaffirmed his earlier holdings that Hood did not state federal claims about denials of female clothing and "accessories" or lack of treatment that allegedly prolonged the civil commitment. The defendants achieved partial summary judgment with unsworn statements and submission of policies about clothing and personal care items. Presumably, represented by the Florida Attorney General, they will have some sort of transgender "treatment" protocol before trial. Hood remains *pro se* and without expert assistance. This status and the granting of partial summary judgment will make it nearly impossible to show at trial that any protocol violates civil rights as applied. *William J. Rold*

ILLINOIS – Transgender inmate Dameon Cole, a/k/a Divine Desire Cole, continues to litigate in the Southern District of Illinois. Law Notes reported a prior opinion: *Cole*

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v. Johnson, 2014 U.S. Dist. LEXIS 156992 (S. D. Ill., November 6, 2014) (*Law Notes*, December 2014, at 500), which allowed her to proceed past initial screening in a protection from harm case. This note reports three additional decisions of United States District Judge J. Phil Gilbert: a denial of a preliminary injunction in the protection from harm case; permission to proceed against a physician for failure to monitor her hormone levels; and screening approval to challenge the failure to provide any mental health treatment. In the protection from harm case, Judge Gilbert adopted the Report & Recommendation [R & R] of United States Magistrate Judge Philip M. Frazier in *Cole v. Johnson*, 2015 WL 435047 (S.D. Ill., February 2, 2015). Cole, who occupies a single cell in segregation, sought removal of a "predator" designation and return to population at a different prison with a cellmate who poses no danger. The R & R found that she is sufficiently safe in her current situation (where she has not been assaulted by other inmates or by staff) to deny preliminary injunctive relief. Although Cole attached ten affidavits from other inmates attesting to harassment, the opinion found that none of them actually bolstered Cole's case. The R & R recommended no preliminary relief on Cole's claims about her showers, laundry, and cell "searches" – and stated "verbal abuse," "[s]tanding alone" does not rise to a constitutional issue under *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir.2000). The R & R did recommend an order that the prison show cause why Cole's mail from the "Transformative Law Project" (under "publication review") was being withheld, because the mail was from a "transgender rights organization and content based restrictions on prisoner mail can sometimes run afoul of the First Amendment," citing *Kaufman v. McCaughtry*, 419 F.3d 678, 685 (7th Cir.2005); and *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir.1999). In the second case, *Cole v. Coe*, 2015 U.S. Dist. LEXIS 10397 (S.D. Ill., January 29, 2015), Cole sued because Dr. Coe failed to take blood levels or other lab work prior to or during Cole's hormone prescriptions, despite possible risks of the medication. "At this early stage," Judge Gilbert found that the complaint alleging deliberate difference to serious medical needs under the Eighth Amendment by the absence of "all monitoring" could not be dismissed under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), even though Cole did not allege that she actually experienced side effects or other adverse medical outcome. Judge Gilbert dismissed other medical claims without prejudice, including Cole's objections to oral medication (instead of a patch), since this kind of disagreement with choice of care is not actionable under the Eighth Amendment. Judge Gilbert also dismissed Cole's attempt to plead a separate action based on her going on a hunger strike in protest of her medical care. Judge Gilbert denied a request for a preliminary injunction (without prejudice) because Cole was to be seen by Dr. Coe in February, but he sua sponte directed the court clerk to add the prison's warden as a party defendant in his official capacity for injunctive relief, should the same be needed in the future. In the third case, *Cole v. Tredway*, 2015 U.S. Dist. LEXIS 19241, 2015 WL 726751 (S. D. Ill., February 18, 2015), Judge Gilbert allowed Cole to proceed after initial screening under 28 U.S.C. § 1915A in a claim against an assistant warden for allegedly "ignoring" her requests for mental health treatment for "personality disorder, anxiety, depression, mood swings, and episodes of lost time." Judge Gilbert found that a non-medical assistant warden could be liable for a "absolute lack of care" in denial of mental health services, even if deference to professionals' judgment is usually granted to lay defendants, so long as the defendant knew of the need and its disregard occurred within the defendant's sphere of responsibility – citing a string of Seventh Circuit cases. Judge Gilbert referred the last two cases to a magistrate judge for further proceedings. *William J. Rold*

MICHIGAN – A transgender Michigan prisoner's lawsuit was dismissed on statute of limitations grounds by United States District Judge Marianne O. Battani, adopting the Report and Recommendation [R & R] of United States Magistrate Judge Patricia T. Morris in *Black v. Michigan Department of Corrections*, 2015 WL 668142 (E.D. Mich., Feb. 17, 2015). The R & R found that pro se plaintiff Ivan Black, whose hormone therapy was stopped upon her incarceration over five years ago, was barred from pursuing a 42 U.S.C. § 1983 case that claimed Michigan failed to apply its own transgender regulations for prisoners and "slowed down [her] process [of becoming a woman]." While Black failed to proceed correctly under various rules (such as properly identifying the defendants and objecting to the R & R under local rules), any liberal reading of the pro se papers would show that she was challenging the ongoing failure to provide her with transgender services. As such, a statute of limitations dismissal is plainly wrong. Nearly seventy years ago, the United States Supreme Court recognized: "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Much more recently, Chief Justice Roberts, writing for a unanimous court in a Prison Litigation Reform Act case, faulted the Sixth Circuit for dismissing all claims (some of which arose from the same Saginaw prison involved here) when only part of the case was barred by the statute of limitations: "We have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by the statute of limitations, and it is hard to imagine what purpose such a

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rule would serve." *Jones v. Bock*, 127 S.Ct. 910, 924 (2007). Laches might bar injunctive relief for a plaintiff who sat on her rights, but this is a balancing rule in equity, not an absolute affirmative defense, as applied here. The R & R addresses timeliness in the context of qualified immunity (saying there is no constitutional claim because it is time barred), even though qualified immunity also applies only to damages claims. The R & R's holding (that a prisoner cannot obtain an injunction for ongoing denial of treatment, if the time for bringing a damages claims has elapsed) has no basis in law. *William J. Rold*

NORTH DAKOTA – United States District Judge Daniel L. Hovland adopted the Report and Recommendation [R & R] of United States Magistrate Judge Charles S. Miller, Jr., regarding correspondence censorship of inmate Nicholas Dodge Bruesch in *Bruesch v. Schmalenberger*, 2015 WL 419799 (D. N.D. Feb. 2, 2015). The R & R is an exhaustive analysis of prisoners' First Amendment right to send and receive mail, articulated in *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989), and subject to security limitation in a number of subsequent cases, using balancing criteria concerning the "penological interests of the state," derived from *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Litigating pro se, Breusch brought ten challenges to denials of correspondence with individuals and organizations and of receipt of catalogues and pamphlets, claiming violations of his First Amendment rights and of Due Process, for the procedures used in the denials, in violation of the safeguards of *Procunier v. Martinez*, 416 U.S. 396, 417 (1974). The R & R upheld the ban on prisoners' solicitation of "pen-pals," including indirect placement of ads "by or on behalf of" Bruesch by third parties and family. Finding the burden of proof on the inmate to show the censorship response was "exaggerated," the R & R found that Bruesch failed his burden and rejected each challenge. Bruesch challenge one censorship (to and from "FRD Press," a self-identified LGBT group) as biased. The R & R found that the standards for denial (solicitation ban on "pen-pals") was applied neutrally and the same as for the other censorship and that there was "no evidence" Bruesch was "discriminated against for sexual orientation." The R & R allowed the defendants to argue for censorship based on standards not articulated at the time of the refusals, so long as the newly articulated standards fell within the range of what is permissibly censor-able under the Turner balancing test. North Dakota regulations ban solicitation for pen-pals, not pen-pals per se, which are permitted if the inmate and correspondent find each other by some other means. The defendants, who included the warden and several mail clerks, were granted summary judgment, and the case was dismissed with prejudice. *William J. Rold*

PENNSYLVANIA – United States District Judge Matthew W. Brann dismissed *pro se* plaintiff Johnny Foster's complaint, but granted leave to replead, when Foster sued after a prison nurse reveals his HIV+ status to other inmates and staff in *Foster v. Nurse Colleen Lawrence*, 2015 U.S. Dist. LEXIS 19626, 2015 WL 778486 (M. D. Pa., February 19, 2015). As a result of the revelation, Foster claimed that "rumors about [him]… spread throughout the prison which have greatly raised the chances of Foster being harassed by prisoners and correctional staff and caused him sleep deprivation." Foster sued the nurse, as well as the Medical Director, the contractual health provider (PrimeCare Medical Inc.), and the prison warden under 42 U.S.C. 1983, claiming that the other defendants failed to take action after the nurse's remarks and failed to train and/or supervise her. Foster also raised pendent state law tort claims, and he sought injunctive and declaratory relief and compensatory and punitive damages. Judge Brann reviewed several theories of liability, all of which he found insufficiently supported in the existing complaint. He noted that inmates have a limited right to privacy "in regards to… personal medical information," citing *Doe v. Delie*, 257 F. 3d 309, 316 (3d Cir. 2001), but he ruled that Foster had not specified enough about the nature of the disclosure to establish a claim, since "inadvertent" disclosure (sounding like inactionable negligence) may be insufficient to state a viable federal claim or may entitle the speaker to qualified immunity. Under the Eighth Amendment, Foster failed to allege that the defendants placed him at risk through deliberate indifference to his safety under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). He also failed to establish the personal involvement of the warden, medical director, or contractual provider, whose activity as alleged seemed limited to denying Foster's grievance, which is not itself unconstitutional under *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 137-138 (1977). The failure to train claim was inadequate because Foster failed to claim that the nurse's "alleged need for more training was so apparent that the failure to provide additional training constituted deliberate indifference," citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 215 (3d Cir. 2001). The opinion includes a good recitation of Eighth Amendment health care law in the Third Circuit under *Estelle v. Gamble*, 429 U.S. 97 (1976). Following a discussion of the exercise of discretion over pendent state law claims, Judge Brann deferred a decision about exercising it, pending a new review of the adequacy of his federal causes of action in Foster's amended pleading. *William J. Rold*

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CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES – CMS published new rules in regulations at 80 Fed. Reg. 7975-01 (Feb. 13, 2015), amending 42 CFR Parts 406, 407, and 408, to make clear that in administering the health insurance programs governed by Titles II of the Social Security Act, same-sex marriages will be recognized under the "place of domicile" rule as required by the statute. However, in those Medicare programs covered by Title XVIII of the Social Security Act, where the statute does not specify the recognition rule to be used, the "place of celebration" rule will be used. Of course, these distinctions may disappear if the Supreme Court rules in June that same-sex couples have a right to marry and to recognition of their marriages under the 14th Amendment, as then every place of domicile in the United States will be required to recognize legally married same-sex couples.

ARKANSAS – The legislature gave final approval on February 13 to a nefarious bill, SB 202, intended to block counties or municipalities from adopting legislation that would protect LGBT people from discrimination, by providing that no political subdivision can adopt a law that bans discrimination that is not banned by state law. This would lock in the handful of prohibited grounds for discrimination under Arkansas law, which do not include sexual orientation or gender identity, and would cut off the means by which LGBT rights campaigners in many other states have been able to achieve some modicum of protection despite the resistance of state legislatures. For example, in Pennsylvania, where the legislature has continued to resist enactment of such a measure, dozens of municipalities, from small towns to the state's largest cities, have enacted ordinances prohibiting sexual orientation and gender identity discrimination, such that large portions of the population are living under such laws. A similar phenomenon exists in Florida, Ohio, and Texas. The Arkansas measure, which Governor Asa Hutchinson had announced that he would allow it go into effect without his signature, was enacted in response to passage of an LGBT antidiscrimination bill by the city council in Fayetteville. Even though the measure was subsequently repealed by voters, Republican state legislators proclaimed the importance of maintaining uniform laws governing businesses throughout the state. *Buzzfeed*, Feb. 13. Some commentators suggested that this is a strategy that will be embraced by LGBT rights opponents nationwide, as only a minority of states has adopted laws banning sexual orientation and gender identity discrimination. Despite aggressive last-minute lobby, Governor Hutchinson did not raise a finger and the measure went into effect. * * * Despite the legislature's action, some municipalities continued their efforts to pass new anti-discrimination laws. On February 9, the city council in Eureka Springs approved an antidiscrimination ordinance that includes sexual orientation and gender identity. A Similar measure was approved 6-2 on February 24 by the Conway city council. * * * A state Senate committee voted on February 25 against approving H.B. 1228, which would have allowed individuals with religious objections to avoiding providing goods and services. The measure had previously been approved by the state's House of Representatives. Since the state does not ban sexual orientation discrimination in places of public accommodation, and only a few municipalities do (with their laws purportedly rendered a nullity by SB 202), this measure, patently intended to allow religious bigots to discriminate against gay people, would have been mainly symbolic in any event. But it follows the template for similar measures introduced in several dozen other states that do not ban sexual orientation but, in some cases, have many municipalities that do ban such discrimination. One hopes that if these measures are challenged in the courts, they will meet the same fate as Colorado Amendment 2, which was struck down as a facial violation of the Equal Protection Clause by the U.S. Supreme Court in *Romer v. Evans* (1996).

FLORIDA – The City Commissioners of Boynton Beach unanimously approved on first reading a proposed ordinance to prohibit discrimination because of race, sex, nationality, disability, religion, sexual orientation and gender identity, among other factors. The vote was taken on February 17, and a second reading vote was scheduled for March 3. *New Times*, Feb. 18.

GEORGIA – Former Georgia Attorney General Michael Bowers, the petitioner in *Bowers v. Hardwick*, who successfully defended Georgia's felony sodomy law in 1986, has signed on to advocate against adoption of a proposed Georgia Religious Freedom Restoration Act, under which individuals with religious objections would be allowed an exemption from compliance with state laws. Bowers stated, "If enacted, the proposed [law] will permit everyone to become a law unto themselves in terms of deciding what laws they will or will not obey, based on whatever religious tenets they may profess or create at any given time," and would provide an "excuse to practice invidious discrimination." He pointed out that the proposed law could allow the Ku Klux Klan to circumvent the state's Anti-Mask Act, which specifically excluded a religious exemption provision when it was enacted. *BuzzFeed.com*, Feb. 22.

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IOWA – A Human Resources Subcommittee of the Iowa Senate voted to approve a measure that would prohibit licensed mental health providers from attempting to change the sexual orientation of a person under age 18. Offenders would be subject to professional disciplinary action under the bill. The bill would next be considered by the full Human Resources Committee. It is modeled after measures that have been enacted in California, New Jersey and the District of Columbia. *AP Alerts*, Feb. 18.

KANSAS – Governor Sam Brownback (Republican), a staunch opponent of LGBT rights, issued an executive order on February 10 eliminating protection against discrimination in state government for LGBT employees, thus rescinding protection that had been adopted by his predecessor, Governor Kathleen Sebelius (Democrat). EO 15-01 rescinds EO 7-24, leaving intact the other prohibited grounds of discrimination, which echo state and federal statutes. Brownback's statement accompanying his action insisted that employment discrimination policy should be made by the legislature, not the governor. "This Executive Order ensures that state employees enjoy the same civil rights as all Kansans without creating additional 'protected classes' as the previous order did." *Bloomberg Daily Labor Report*, 29 DLR A-8 (Feb. 12, 2015). Thus, the LGBT state employees in Kansas must fall back on whatever general protections might be available to state employees without regard to their sexual orientation or gender identity, supplemented, of course, by potential constitutional claims if they encounter discrimination. In the absence of federal appellate precedent in the 10th Circuit or from the Supreme Court mandating heightened scrutiny in sexual orientation discrimination cases, however, such protection is not particularly robust.

KENTUCKY – The state senate approved a bill that would forbid transgender people to use student restrooms, locker rooms or shower rooms designated for persons not of their genital/chromosomal sex. S.B. 76 is a response to a decision by the principal of Atherton High School in Jefferson County to allow a transgender student to use the facilities consistent with her gender identity, which stirred outrage in a majority of the state senators, responding to the usual ignorant propaganda about how such policies will subject innocent people to potential sexual assaults. The bill's proponents refer to it as the Bathroom Bully Bill, claiming that transgender students are trying to "bully" non-transgender students by using their restrooms. The vote, following lengthy debate, as 27-9. Opponents argue that the bill is a clear violation of Title IX, the federal law banning sex discrimination in schools that receive federal financial assistance.

MONTANA – The City of Bozeman, which enacted an ordinance banning sexual orientation and gender identity discrimination last summer, is now defending it in court against a suit brought by five residents (Peter Arnone, Dave Baldwin, Ross Hartman, Dawnette Osen, and Sharon Swanson) in state District Court. The plaintiffs argue that the city commission did not have power to adopt prohibited grounds of discrimination beyond those addressed in the state's Human Rights Act. Although a measure was recently introduced in the legislature to add sexual orientation and gender identity to that statute, it has not gotten beyond the Senate Judiciary Committee yet. The city argued in a brief filed on February 13 that there was no conflict between the city and state measures, and that the city's enactment came with its home rule power to "secure and promote the general health and public welfare." The city rejected the plaintiffs' argument that the state legislature intended to occupy the entire field of discrimination law with its enactment of the Montana Human Rights Act. The matter is pending before Gallatin County District Judge John Brown. *Bozeman Daily Chronicle*, Feb. 17.

NEBRASKA – Ideology can cut two ways when it comes to marriage equality. Nebraska's state government is firmly opposed to same-sex marriage, as are the state's Republican legislators. But when it comes to gun rights, they feel "the more the merrier," evidently. So the State Senate voted 38-0 for an amendment to a pending bill that would allow military spouses to avoid residency requirements in applying for conceal-carry firearms permits, even though that amendment would extend to all spouses recognized by the Defense Department, which necessarily includes same-sex spouses in accord with Pentagon policy adopted after the *U.S. v. Windsor* decision struck down Section 3 of the Defense of Marriage Act in 2013. Sen. Paul Schumacher, a Republican sponsor of the amendment, said: "Is not the Second Amendment sex blind? Color blind? What great evil would come from saying a partner of somebody in the military is entitled to exercise their Second Amendment rights to carry a concealed weapon in this state?" He is, of course, an opponent of same-sex marriage rights. One senator who abstained from the vote on the amendment, John Murante, expressed concern that the legislature had just "recognized gay marriage. We are now using the federal government's standard for who receives the marriage benefits." The application form for the conceal carry permit does not ask for any specification of the gender of a spouse, so it will not provide data that could be useful in distinguishing between marriages recognized by

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Nebraska and those recognized by the federal government. *politico.com*, February 4.

NORTH CAROLINA – On February 25, the state Senate approved by a vote of 32-16 a measure that would allow magistrates and workers in register of deeds offices to refuse on grounds of religious belief to provide services to same-sex couples seeking marriage licenses, marriage ceremonies, and registration of their marriages. Under the bill, anybody who voiced religious objections as a basis for denying such services would be disqualified from all of their marriage duties for at least six months, and the elected register of deeds and chief state District Court judge for each county (who would not be accorded this privilege to discriminate under the bill) would be required to fill in so that same-sex couples could still be able to marry, as per federal court orders issued during 2014. This patently unconstitutional measure now goes to the state's House of Representatives. The Senate vote was mainly along party lines: all but two Republicans voted for it, and all but two Democrats voted against it. *Fayetteville Observer*, Feb. 26.

NORTH DAKOTA – The Senate Judiciary Committee voted 4-2 against a proposal to ban sexual orientation and gender identity discrimination early in February, but on February 17 the measure went to the floor of the Senate and, surprisingly, passed on a vote of 25-22. Senator David Hogue, a Minot Republican who chairs the Judiciary Committee, asserted during the floor debate that no evidence had been presented to the committee that sexual orientation or gender identity discrimination occurs in North Dakota. "We really did not see a problem," he said, "at least the problem was never defined to us in terms of either explicit discrimination or even implicit discrimination. We didn't have witnesses come forward to say that they were discriminated against on the basis of their sexual orientation, either by the government or by the private sector." The measure would apply to employment, housing and public accommodations, and will now be sent to the House for its consideration. Similar bills were introduced but failed to achieve passage in 2009 and 2013. *Capital Journal*, February 18.

OKLAHOMA – Rep. Jason Dunnington, an Oklahoma City Democrat, introduced H.B. 1345, which would add sexual orientation and gender identity to Oklahoma's anti-discrimination laws, but legislative leaders announced on February 19 that the measure would not get a committee hearing in the current session of the legislature. *Bartlesville Examiner-Enterprise*, Feb. 19. Instead, they are considering a pair of oddball bills intended to combat the recent court rulings requiring Oklahoma to allow same-sex couples to marry. For details, see the Marriage Equality section of this issue of *Law Notes*. * * * A House committee voted on February 24 to approve a measure that would protect the practice of conversion therapy, by which practitioners attempt to reorient gay-identified patients away from homosexuality. Licensed health care providers have been forbidden to practice conversion therapy on minors by laws enacted in California and New Jersey that have withstood judicial review. The House Children, Youth and Family Services Committee voted 5-3 to send the bill to the floor of the House. It is hard to understand why such legislation is needed in Oklahoma, since it is clear that the legislature would not pass a bill condemning conversion therapy. Perhaps they feared that some "misguided" city council under the sway of politically powerful gay activists might seek to imitate California or New Jersey with municipal legislation.

TEXAS – Opponents of Plano's recently enacted ordinance banning sexual orientation and gender identity discrimination submitted petitions intended to force the city council either to rescind the measure or place it on the ballot for public vote, but city officials announced that the petitions were invalid. Plano City Manage Bruce Glasscock said that the petitions "contained false information and failed to comply with city and state requirements," which he characterized as "an integrity and ethics issue." According to Glasscock, over half of the petitions contained false statements about the ordinance. For example, petitions stated: "Also under this policy, biological males who declare their 'gender identity' as female MAY BE ALLOWED to enter women's restrooms." However, during the city council debate over the measure, as this issue emerged as a major point of controversy, it was amended to specifically exclude public restrooms, showers, locker rooms and dressing rooms, by including a statement that it is not unlawful to "deny the opposite sex access to facilities inside a public accommodation segregated on the basis of sex for privacy." The petitions also failed to request information specifically required by the Texas Election Code, including the signer's county of residence and voter registration number. The petitions also failed to include a copy of the ordinance, as required by the Plano City Charter. *Dallas Morning News*, Feb. 21. Although it seems likely that if correct petitions were circulated they would probably attract sufficient signatures, the rules governing this process put a strict time limit on petitions to repeal recently-enacted ordinances, and that time limit was passed in January.

TEXAS – The Dallas City Council voted to extend retirement benefits

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to same-sex spouses of municipal employees on February 18. The council was approving a vote by the Dallas Employees' Retirement Fund. The *Dallas Morning News* (Feb. 19) reported that the council had previously ordered that the city take steps to eliminate discrimination in benefits for married same-sex couples, but that two pensions boards – the retirement fund and the Police and Fire Pension Board – had refused to act, relying on arguments that such a measure would require a public vote or a direct order from the city council. City Attorney Warren Ernst issued an opinion on February 14 that equalizing the benefits was required by federal tax rulings and orders. Mayor Mike Rawlings commented that he hoped the Police and Fire Pension Board would take similar action, now that the Retirement Fund has moved on the issue.

VIRGINIA – The Virginia Senate voted on February 3 to add sexual orientation and gender identity as prohibited grounds for discrimination in state government employment. The vote on SB 785 was actually tied at 19-19, but Lt. Gov. Ralph Northam, case a tie-breaking vote. Since Republicans have a slight majority in the Senate, the measure required the votes of two Republicans (John Watkins, Powhattan, and Jill Vogel, Fauquier County) to pass. *Roanoke Times-Dispatch*, Feb. 3. The measure then went to the House of Delegates, solidly controlled by the Republicans, where it was tabled by a House subcommittee and blocked from a floor vote.

WEST VIRGINIA – A measure that would prevent any political subdivision from adoption legislation protecting gay people from discrimination found favor in a House committee, but the state's Republican Senate Majority leader announced that the measure would not be given a vote in the Senate. H.B. 2881, titled the "West Virginia Intrastate Commerce Improvement Act," was touted by its sponsors as an economic measure seeking to ensure that businesses would not be deterred from operating in West Virginia by the possibility of being subjected to different anti-discrimination laws in different parts of the state. This would nullify bans on sexual orientation and gender identity discrimination in six municipalities. Floor consideration in the House was postponed indefinitely after an emotional hearing on February 27 in the House chamber in which 40 witnesses spoke against the bill. *Huntington Herald-Dispatch*, Feb. 28. * * * Thurmond, West Virginia, was claimed to have become the smallest town in America to pass a local ordinance banning discrimination because of sexual orientation or gender identity, when the town's five residents voted unanimously to approve the measure on February 9 as part of a new Human Rights Act. Why such a measure would be necessary in a municipality where all of the voters oppose such discrimination poses an interesting question. Actually, the measure was passed as part of a strategy by the state's gay rights proponents to secure as many municipal anti-discrimination laws as possible in light of the failure to secure passage of a state-wide bill. Although polling shows overwhelming public support for adoption of such a measure, the legislature has stood firm against it. Local laws banning such discrimination have been adopted in Charleston, Huntington, Morgantown, Athens and Harpers Ferry. *Fayette Tribune*, Feb. 19.

WYOMING – The state senate voted on February 10 to approve Senate File 115, which would add sexual orientation and gender identity to the state's anti-discrimination laws. The vote was 24-6, after senators rejected a proposed amendment that would have exempted small businesses from complying with the employment provisions. The amendment, offered by Senator Curt Meier, a LaGrange Republican, would have exempted businesses with fewer than 15 employees from the sexual orientation and gender identity provisions, but not from the existing categories of race, color, sex and so forth. The bill then went over to the House of Representatives, where it was approved in the Labor, Health and Social Services committee on February 20 by a vote of 6-2. One opponent of the measure, Rep. Harlan Edmonds, a Cheyenne Republican, was ejected from the meeting after he proposed an amendment to change the effective date of the bill from July 1, 2015, to "when hell freezes over." Committee Chair Elaine Harvey told Edmonds to leave the meeting, which followed committee discussion during which Edmonds had asked why the bill failed to protect pedophiles. Some religious opponents of the measure said that the exemption for religious organizations didn't go far enough, arguing that their members should be able to refuse to associate with gay and transgender people in their businesses as well. *Wyoming Tribune-Eagle*, Feb. 11; *Star-Tribune*, Feb. 20. However, on February 24 the House voted 33-26 to reject the bill, after it was first amended to exempt a variety of situations from coverage. Opponents of the bill argued that it was unnecessary, since Wyoming is a paradise for gay people who never suffer discrimination there, and furthermore that its passage would infringe on the religious freedom of those whose faith requires them to discriminate against gay people. *trib.com*, Feb. 25. No explanation was tendered as to how the state has people of faith who are required by their beliefs to discriminate but at the same time gay and trans people don't suffer discrimination in Wyoming.

LAW & SOCIETY / INTERNATIONAL

LAW & SOCIETY NOTES

CHELSEA MANNING – A change of heart by the Army! In a February 5 memo, Colonel Erica Nelson, commandant of the Fort Leavenworth Disciplinary Barracks where Chelsea Manning is serving a 35-year prison term (with eligibility for parole in about seven years), stated that Manning can begin receiving hormone treatment while incarcerated. Manning, originally enlisted in the Army as Bradley Manning, was convicted for leaking classified documents to Wiki-leak. She announced during the prosecution that her gender identity was female, and sought appropriate treatment during incarceration, which the Army had been resisting. "After carefully considering the recommendation that (hormone treatment) is medically appropriate and necessary, and weighing all associated safety and security risks presented, I approve adding (hormone therapy) to Inmate Manning's treatment plan," wrote Col. Nelson. Manning had sued the government for access to the treatment, citing numerous court decisions around the country that have found a denial of 8th Amendment rights when prison systems categorically reject all requests for hormone therapy by transgender inmates. Despite the approval of hormone therapy, Manning's request to be allowed to adopt "female hair grooming" has been denied based on "risk assessment." *USAToday*, Feb. 13. * * * This decision comes amidst increased talk about the Defense Department reconsidering the existing ban on uniformed service by transgender people. The policy is not embodied in statutory form, so it could be changed by the Defense Department by modifying its regulations without need for congressional approval. Outgoing Defense Secretary Chuck Hagel had said that he believed the policy should be reviewed, and Secretary of the Air Force Deborah Lee has stated that she believes the ban will likely be reassessed and should be lifted. The decision to provide the treatment to Manning introduces a certain inconsistency in Pentagon policy. Until the expiration of her prison term, she is considered a member of the Army. If a serving soldier seeks hormone therapy for purposes of gender transition, he or she would be subject to discharge under current policy, but if an incarcerated soldier seeks such therapy, 8th Amendment principles apply and the question of entitled to medically necessary treatment kicks in. Can the center hold?

INTERNATIONAL NOTES

CANADA – The province of Alberta has adopted regulations that will simplify the process for transgender resident to change their birth certificates. The new rules abandon existing requirements for two affidavits signed by physicians attesting that the individual has completed gender reassignment surgery. Under the new rules, the applicant must submit a signed affidavit stating the gender they identify as, with a supporting letter from an accredited physician or psychologist. There is no surgical requirement, as that was declared unconstitutional last year in a court decision. Since then the government has followed an ad hoc case-by-case procedure to deal with applications to amend birth certificates, and 89 have been amended so far. *Calgary Herald*, Feb. 21. A similar policy change was announced in Manitoba in January, according to a February 3 report on *Advocate.com*.

CHILE – The Department of Immigration of the Ministry of the Interior announced that the government will officially recognize same-sex marriages and civil unions between same-sex couples entered into abroad.

COLOMBIA – The Constitutional Court has ruled that same-sex couples can adopt a child, but only if one of the partners is the child's biological parent. "Adoption will only be allowed when it deals with the biological child of the same-sex partner," wrote the court in a decision approved by a 5-4 vote on February 18. The ruling was announced by Judge Jose Roberto Herrera, who broke the tie among the judges. *Agence France Presse English Wire*, Feb. 19; *EFE Ingles*, Feb. 19.

FINLAND – President Sauli Niinisto signed legislation on February 20 to make same-sex marriage legal in Finland, with an effective date of March 1, 2017. The Finnish Ministry of Justice will now begin the process of systematically amending national legislation, including a variety of social and health entitlement programs, to ensure a smooth transition. Finland is the last Nordic country to make the transition from registered partnerships to marriage equality.

GREECE – Responding to a 2013 ruling by the European Court of Human Rights awarding damages to Greek plaintiffs who sued the state for failing to make its new civil partnership law open to same-sex couples, the Justice Minister Nikolaos Paraskevopoulos told Parliament on February 9 that the new left-wing government would propose a measure to extend civil partnerships to same-sex couples, although he didn't say when the measure would be proposed. This announcement came two weeks after elections led to a change of government in Greece. The prior government had stalled on any response to the court decision. *AP Worldstream*, Feb. 9.

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IRELAND – The Republic of Ireland has set May 22 as the date for a national referendum on marriage equality. The ballot question will ask voters to approve the following legal provision: "Marriage may be contracted in accordance with law by two persons without distinction as to their sex." The wording was approved by the Cabinet in February. The leader of the government, Enda Kenny, stated that public support for the referendum is important to show that the Republic of Ireland is "very tolerant and inclusive." Said Mr. Kenny, "I hope it will go through; this is about tolerance, respect, understanding and sensitivity." He also said that most of the members of Parliament "are very much in favor of this." Public opinion polling shows that there is overwhelming support for the measure, but proponents are planning to wage an intense public campaign, hoping to ensure a substantial victory.

ISRAEL – Writing in *Haaretz* (Feb. 11), Israeli law professor Aeyal Gross reported that Attorney General Yehuda Weinstein had submitted an opinion to the court in a pending case concerning parental status for the same-sex partner of a birth mother, backing away from the government's previous position that a same-sex partner must go through a full adoption process to become the second legal parent of a child. Now the government's position is that a court order establishing parental status can be given without a full adoption process provided three conditions are satisfied: the women must have been domestic partners for at least 18 months, there must be no record of violence or sexual offenses that would raise concerns about the child's welfare, and the application to the court must be made no more than 90 days after the birth of the child. Weinstein's opinion references a bill pending in the Knesset that was approved in committee but stopped due to objections from a religious party, that had called for recognition of the parental status of a non-biological partner based on a less extensive welfare report than would be required for an adoption proceeding. * * * Transgender citizens of Israel will no longer have to provide proof of surgical transition to change the gender marker on their national identification documents. The Interior Ministry announced the new policy on January 18 in response to a petition filed by two transgender women, Nora Greenberg and Ronit Liran. They argued that they felt no need to undergo gender-affirming surgery in order to live as women, and that the current policy "rests on an unfounded and outdated misconception" that "genitalia equate to gender identity." *Advocate.com*, February 3.

ITALY – The new government of Premier Mateo Renzi (Democratic Party) has announced that it will establish a working group to draft a civil union law for Italy. Party leaders met with LGBT groups in Rome and made the announcement on February 20. Mayors in several cities have been defying an order from the Interior Minister, Angelino Alfano (New Centre Right Party), who had directed city prefects to cancel any city registries of same-sex marriages contracted abroad. Because of freedom of movement within the European Union, same-sex couples from Italy can easily go to a neighboring country to marry, and many municipalities have proven eager to recognize such marriages, to the consternation of more conservative elements in the government. Rome's Mayor, Ignazio Marino, has been among those who have created special registries for same-sex couples, and he said last year that the city's legal department was considering taking the issue to the European Court of Human Rights. *ANSA English Media Service*, Feb. 20. Prompt action by the new national government may forestall the necessity for such litigation. As of now the European Court does not interpret the Charter on Human Rights to require countries to allow same-sex marriages, but it has construed the Charter to require countries to create a legal status for same-sex couples that would be broadly equivalent to marriage.

JAPAN – The ward (political subdivision) in Tokyo, Shibuya Ward, is proposing to issue "certificate" that recognize same-sex couples as having relationships "equivalent to marriage," according to a report in *Japan Times* on Feb. 13. A statutory proposal was expected to be presented to the municipal assembly in March and would take effect on April 1 if approved. Although the resulting certificates would have no formal legal power, it is expected that they might be honored by hospitals, landlords and other businesses in their dealings with same-sex couples. Under the proposal, both partners would have to be at least 20 years old, and they would be required to complete a contract declaring that they would take responsibility as guardians for each other.

KYRGYZSTAN – A legislative committee has approved a draft law banning "gay propaganda," modeled on the Russian law that has been the source of such much adverse international comment. The European Parliament quickly condemned it and urged the Kyrgyz parliament not to pass it. *BBC International Reports*, Feb. 17.

MALAYSIA – The campaign by Prime Minister Najib Razak's government to sideline opposition leader Anwar Ibrahim through sodomy prosecutions has continued, with a February 10, 2015 ruling by the Federal Court of Malaysia

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upholding a lower court's conviction of Ibrahim, sentencing him to five years in prison for violating the sodomy law. The ruling was criticized as a "travesty of justice" by a spokesperson for Human Rights Watch. The decision removed Anwar from his seat in parliament, where he is a prominent opposition leader, and bars him from running for office for five years after he has served his sentence, which effectively ends his political career. Anwar had been arrested in 2008 based on a complaint by a political aid that the men had consensual sex, which violates the penal code. The original trial was characterized by procedural and evidentiary irregularities suggesting a political verdict, and the High Court acquitted Anwar in 2012 on an evidentiary ruling. The government appealed, and the Court of Appeal overturned the acquittal in 2014. This is Anwar's fourth conviction under Section 377 (yes, derived from the same Victorian-era colonial sodomy law that exists in the penal codes of many former British colonies, including India), but researchers claim that Section 377 has been invoked only seven times since 1938. The continued prosecution of Anwar is seen by many as a political vendetta against him by the government. He has denied the charge of having sex with the accuser. *Human Rights Watch*, Feb. 10.

MEXICO – A slow process of same-sex marriage spreading to more states within Mexico continues and the paces accelerates, as same-sex couples seek an "amparo" (a court order authorizing to vindicate civil rights) which is almost always given in light of existing appellate court precedents, compelling local officials to allow them to marry. Unlike in the U.S., where a single decision by the U.S. Supreme Court can decide the issue for the entire country, the Mexican legal system uses different procedures requiring multiple appellate rulings originating from any given state in order to create a binding precedent. Although the Supreme Court of Mexico has ruled that same-sex marriages contracted in the capital, Mexico City (whose city council adopted a marriage equality law), must be recognized throughout the country, and has ordered local state officials to allow same-sex couples to marry in particular cases, there is not yet a definitive precedential ruling with nationwide effect requiring all local officials to authorize same-sex marriages, although it is clear under Supreme Court precedents that validly contracted marriages will be recognized by government authorities throughout the country. At present, there are two states in addition to Mexico City where applicants do not need to go first to court to get an order to allow them to marry. Mexico has 31 states, and by one count same-sex marriages have taken place in at least 22. Our source on this is continuing reporting on developments by internet journalists Rex Wockner and Lester Feder. Feder published a detailed description of the situation on *Huffington Post* late in February.

SLOVAKIA – A nationwide referendum that would have banned same-sex marriages, barred same-sex partners from adopting children, and allowed parents to prevent their children from being exposed to sex education in schools, won the support of a majority of those voting on February 7, but the turnout was so low that the vote was declared ineffective. A turnout of 50% of eligible voters is necessary for a referendum measure to be enacted in Slovakia, but the turnout reached only 21.4%. Even though each of the three questions was supported by 90% or more of those voting, this result was hailed by gay rights activists who insisted that the people voted by staying away from the polls. Putting their best face on the result, proponents of the questions said that the voters who participated and voted overwhelming for the proposal provided "a good base" for future activities. *Boston Globe*, February 9.

SWITZERLAND – The Legal Affairs Committee of the National Council has endorsed a parliamentary proposal, called "Marriage for All," to open up marriage to same-sex couples and to open up the nation's registered partnership system to different-sex couples. Registered partnership had been established to provide a legal mechanism for recognition of same-sex couples.

THAILAND – The government has decided to ban commercial surrogacy arrangements. The legislature voted 160-2 on February 19 to prevent foreigners (including same-sex couples) from seeking surrogacy services in the country. Only heterosexually married Thai couples will be allowed to seek surrogacy, and then only if they can prove that they are infertile and cannot reproduce without such assistance. If only one spouse is a Thai citizen, the couple must be married at least three years to qualify for such services. A member of the legislature told the Associated Press that this policy was to prevent Thailand from becoming "the womb of the world." The legislation responded to incidents last year that attracted much adverse comment. In one case, an Australian couple abandoned a twin with Down's syndrome born to their Thai surrogate. In another, it was found that a Japanese man had fathered at least 16 babies using Thai surrogates. Thailand had become a place of choice for surrogacy arrangements for people from countries where the practice was forbidden, highly restricted, or very expensive. *Deutsche Welle Asia*, February 20.

PROFESSIONAL

PROFESSIONAL NOTES

LAMBDA LEGAL, the nation's oldest and largest LGBT rights public interest law firm, has announced the election of three new members to its board, **DR. BETH MEYERSON** (Bloomington, Indiana), **RODERICK HAWKINS** (Chicago, Illinois), and **DAVID DE FIGUEIREDO** (San Francisco, California). The organization also announced that **STEPHEN WINTERS** (Chicago), former General Counsel for BP America, will be serving as co-chair of Lambda's national board. Winters retired from BP in 2008, having served as General Counsel there beginning in 2004. He is a 1975 graduate of the University of Kansas Law School. He joined Lambda's Board in 2012. Dr. Meyerson is Assistant Professor of Public Health Policy & Administration at Indiana University. Mr. Hawkins is Vice President of External Affairs at the Chicago Urban League. Mr. de Figueiredo is a Senior Vice President at Wells Fargo Bank.

The **U.S. DEPARTMENT OF STATE** announced on February 23 that Secretary of State John Kerry has appointed Randy Berry, the openly-gay U.S. Consul General in Amsterdam, to be the State Department's special diplomatic envoy to promote gay rights abroad, responding to pending legislation proposed by Sen. Edward Markey (D-Mass.) and Rep. Alan Lowenthal (D-Calif.). Berry is a career diplomat with previous overseas postings in New Zealand, Nepal, Egypt and Uganda. In his new role he will coordinate the State Department's activities promoting LGBT rights abroad and responding to particular situations calling for U.S. comment and action.

The **NATIONAL LGBT BAR ASSOCIATION** has elected **JEREMY PROTAS**, an intellectual property lawyer and partner at Marshall, Gerstein & Borum LLP, to be the president of its Board of Directors for a term beginning February 12, 2015. Protas has been a board member of the LGBT Bar since 2010, and his firm has been a financial supporter of the Association since 2007. In 2009, Protas established an LGBT Patent Law Scholarship to raise awareness of patent law among LGBT law students in hopes of increasing the presence of LGBT lawyers in the patent law community.

The nation's first sexual minority governor? On February 18, **KATE BROWN**, the openly bisexual Secretary of State of Oregon, was sworn in as governor upon the resignation of John Kitzhaber, who was sidelined by a scandal concerning allegations that his fiancée traded on her relationship with the governor to benefit her consulting business and failed to report the fees she had been paid to tax authorities. Brown was first in succession to the governor under the state constitution. In her inaugural statement, she promised to make immediate reforms to "restore the public's trust in government." Brown is a graduate of Lewis & Clark Law School in Portland and served for 17 years in the legislature before being elected Secretary of State. She is married to Dan Little and has two step-children.

Openly-gay **ERIC FANNING**, a former Under Secretary of the Air Force, has been designated Chief of Staff of the Defense Department upon the swearing-in of the new Defense Secretary, Ashton Carter. He has also served as Deputy Under Secretary of the Navy, and was Acting Secretary of the Air Force while a nominee for that position was pending before the Senate. Clearly, he is a man who knows the administrative side of the Defense Department inside and out! Fanning has spoken publicly in the past about supporting proposals to end the Pentagon's policy against service by transgender people, and has endorsed proposals to add sexual orientation to the Military Equal Opportunity Program. At present, the lack of inclusion in that program means that service members who encounter sexual orientation discrimination do not have any recourse outside their chain of command. Although Congress provisionally repealed the Don't Ask, Don't Tell policy, leaving it up to the Defense Department how to handle service by LGBT individuals, neither Congress nor the Pentagon has adopted a policy expressly banning sexual orientation discrimination. Perhaps Fanning will be able to advocate effectively to improve the situation from his administrative position.

The **LGBT BAR ASSOCIATION OF GREATER NEW YORK** has announced that **BRETT M. FIGLEWSKI** joined LeGaL as its first Legal Director on February 2, 2015. Figlewski is a graduate of Vanderbilt University Law School, and previously worked as a senior staff attorney at Sanctuary for Families, a New York City service provider and advocate for survivors of domestic violence, sex trafficking, and related forms of gender violence. He has frequently volunteered at LeGaL's drop-in clinics, and created a weekly legal clinic for LGBTQ youth participating in the outreach program of St. Luke-in-the-Fields in Greenwich Village. Figlewski will manage LeGaL's walk-in clinics, lawyer referral system, and coordinate CLE programs. The appointment was announced by LeGaL Executive Director Matt Skinner and President Meredith R. Miller in a January 27 announcement to the membership.

PUBLICATIONS NOTED

1. Berg, Thomas C., Religious Accommodation and the Welfare State, 38 Harv. J. L. & Gender 103 (Winter 2015) (points out parallels between religious liberty and gay rights claims).
2. Bergman, Zachary R., Testing Solutions for Adult Film Performers, 24 Cornell J. L. & Pub. Pol'y 183 (Fall 2014).
3. Boyce, Bret, Sexuality and Gender Identity under the Constitution of India, 18 J. Gender, Race & Justice No. 1 (2015).
4. Cahill, Courtney Megan, and Geoffrey Christopher Rapp, Does the Public Care How the Supreme Court Reasons? Empirical Evidence from a National Experiment and Normative Concerns in the Case of Same-Sex Marriage, 93 N.C. L. Rev. 303 (Jan. 2015) (Presenting empirical evidence disputing the argument that public reaction to Supreme Court decisions may vary based on the legal theory employed by the Court to decide the case; suggests that the public reaction to an affirmative same-sex marriage ruling would not significantly differ depending on whether the Court employed a liberty rationale or an equality rationale).
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6. Deutsch, Hope Marie, Marrying Polygamy Into Title VII, 16 Rutgers J. L. & Religion 145 (Fall 2014).
7. Dorocak, John R., Why is Obamacare Constitutional While DOMA Was Not? How Libertarian is the Constitution?, 14 Conn. Pub. Int. L.J. 1 (Fall-Winter 2014).
8. Feinberg, Jessica R., The Survival of Nonmarital Relationhip Statuses in the Same-Sex Marriage Era: A Proposal, 87 Temp. L. Rev. 47 (Fall 2014).
9. Grossman, Joanna L., Family Law's Loose Canon, 93 Tex. L. Rev. 681 (Feb. 2015) (review of Hasday, Family Law Reimagined [Harv. Univ. Press]).
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13. Karwacki, Nicholas A., Who's the Bully Now? The Third Circuit Gives Negligent School Districts a Constitutional "Hall Pass" in *Morrow v. Balaski*, Leaving Bullied Students Out in the Cold, 59 Villanova L. Rev. 821 (2014).
14. Knauer, Nancy J., LGBT Elders in a Post-*Windsor* World: The Promise and Limits of Marriage Equality, 24 Tex. J. of Women & L., No. 1 (2014).
15. Knauer, Nancy J., LGBT Youth: Reconciling Family, Pride, and Community, 23 Temple Pol. & Civ. Rts. L. Rev. No. 2 (2014).
16. Knowles, Helen J., Taking Justice Kennedy Seriously: Why *Windsor* Was Decided "Quite Apart From Principles of Federalism," 20 Roger Williams U. L. Rev. 24 (Winter 2015)(It was about "equal liberty," not about federalism!).
17. Lamparello, Adam, and Charles E. MacLean, The Separate but Unequal Constitution, 64 DePaul L. Rev. 113 (Fall 2014) (critique of Supreme Court's approach to deciding constitutional cases as inadequately textually based; approves result in *U.S. v. Windsor*, but sharply criticizes the opinion's "liberty" rhetoric, arguing that the decision should have been based solely on equality principles).
18. LeBruna, Ashley, Are We There Yet? – VAWA 2013: Same-Sex Legal Acceptance, 39 Seton Hall Legis. J. 101 (2015).
19. Lee, Christina, Toward a Transformative Equality: A Comparison of South Africa's and the United States' Constitutional Equality Doctrines, 16 Scholar: St. Mary's L. Rev. & Soc. Just. 749(2014).
20. Lupu, Ira C., Hobby Lobby and the Dubious Enterprise of Religious Exemptions, 38 Harv. J. L. & Gender 35 (Winter 2015) (Discusses possible impact of *Hobby Lobby* in LGBT discrimination cases under President Obama's Executive Order banning such discrimination by federal contractors).
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25. Melone, Matthew A., Corporations and Religious Freedom: Hobby Lobby Stores – A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System, 48 Ind. L. Rev. 461 (2015).
26. Melone, Matthew A., and George A. Nation, "Standing" on Formality: *Hollingsworth v. Perry* and the Efficacy of Direct Democracy in the United States, 29 BYU J. Pub. L. 25 (2014) (argues that Supreme Court erred in holding that sponsors of initiative amendment to state constitution lacked standing to appeal federal district court's decision holding amendment unconstitutional).
27. Nice, Julie A., The Responsibility of Victory: Confronting the Systemic Subordination of LGBT Youth and Considering a Positive Role for the State, 23 Temple Pol. & Civ. Rts. L. Rev. No. 2 (2015).
28. Oleske, James M., The Born-Again Champion of Conscience (Book Review), 128 Harv. L. Rev. Forum 75 (2015) (exposes the inconsistence position on religious exemptions by their principal academic champion, Robert P. George).
29. Popoff, Emalee G., Testamentary Conditions in Restrain of the Marriage of Homosexual Donees, 7 Drexel L. Rev. 163 (Fall 2014).
30. Recent Executive Order, Civil Rights – Employment Discrimination – Executive Order Prohibits Federal Government and Contractor Employment Discrimination on the Basis of Sexual Orientation or Gender Identity. – Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014), 128 Harv. L. Rev. 1304 (Feb. 2015) (student commentary on President Obama's anti-discrimination executiv e orders of July 2014).
31. Roane, Richard, and Richard A. Wilson, Marriage Equality Update, 27 J. Am. Acad. Matrim. Law. 123 (2014-15) (useful brief history of the marriage equality movement in the courts, partially left behind by events).
32. Schumer, Travis, Abusing Our LGBT Youth: The Criminalization of Sexual Orientation Change Efforts, 24 S. Cal. Rev. L. & Soc. Just. 53 (Fall 2014).
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35. Traylor, Elizabeth, Protecting the Rights of Children of Same-Sex Parents in Indiana by Adopting a Version of the Uniform Parentage Act, 48 Ind. L. Rev. 695 (2015).
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37. Zalesne, Deborah, The Contractual Family: The Role of the Market in Shaping Family Formations and Rights, 36 Cardozo L. Rev. 1027 (Feb. 2005).
38. Zoeller, Gregory F., Duty to Defend and the Rule of Law, 90 Ind. L.J. 513 (Spring 2015) (criticizes contention by Attorney General Eric Holder that state attorneys general could appropriately refuse to defend state law bans on same-sex marriage).

"Italian Marriage" cont. from pg. 106

Italian tribunals used these two rulings to establish a legal framework ensuring the protection of gay and lesbian couples, in particular same-sex families, absent proper legislation.

The Supreme Court of Cassation itself soon stepped in. In 2012 it ruled that, as same-sex couples are entitled to respect of their family life, their marriage contracted abroad cannot be deemed contrary to public policy (Cass. civ., March 15, 2012, No. 4184, in LGLN 108 (2012)). Based on this decision, some inferior courts acknowledged the aliens' right to remain in Italy if liaised with their same-sex partners. Furthermore, lower courts protected gay parents and families, for example acknowledging the possibility for a young child to be adopted by her mother's female partner after the two women had married in Spain (Rome Juv. Ct., July 30, 2014), or ordering the registration of a birth certificate of a child born in Spain mentioning both his mothers (Turin App. Ct., Oct. 29, 2014). In all these decisions the preeminent interest of the child played a substantial role, but the recognition of same-sex couples as «family life» contributed to such a positive outcome. We can therefore conclude that the strategic litigation inaugurated by Affermazione Civile had a stimulating effect on the debate on the legal status of same-sex couples in Italy, triggering significant judicial innovation.

Ultimately, in the February 9 ruling, the Supreme Court reaffirmed the principles already delineated in the past. Therefore, even if gays and lesbians are not entitled to marry in Italy because marriage is subject to Parliament's discretion, they may receive, the Supreme Court concluded, «a degree of protection that is equivalent to marriage in all situations where a lack of regulation causes a violation of the fundamental rights that arise out of their relationships». The Parliament is now considering a bill on civil unions proposed by the new government.

– *Matteo M. Winkler*

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EDITOR'S NOTES

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

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