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LAW NOTES
November 2016

CERT GRANTED IN GAVIN GRIMM BATHROOM POLICY CASE

Could Potentially Be Vehicle for Landmark U.S. Supreme Court Ruling on Applicability of Federal Sex Discrimination Laws to LGBT Community

EXECUTIVE SUMMARY

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ISSN
8755-9021

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Supreme Court Will Hear Title IX Transgender Discrimination Case and Case Challenging Social Media Restrictions on Sex Offenders

The Supreme Court substantially enlivened its docket for the October 2016 Term on October 28 when it granted petitions for certiorari in *Gloucester County School Board v. G.G.*, No. 16-273, and *Packingham v. North Carolina*, No. 15-1194. In *Gloucester*, a school district in Virginia, obligated not to discriminate because of sex under Title IX of the Education Amendments Act of 1972, seeks review of the 4th Circuit's decision, 822 F.3d 709 (2016), holding that the district court should defer to the U.S. Department of Education's interpretation of a regulation on restrooms in educational facilities, 34 C.F.R. Sec. 106.33, that would require the school to let a transgender boy use the boys' restroom facilities at his high school. In *Packingham*, the petitioner seeks to overturn the North Carolina Supreme Court's decision, 368 N.C. 380, 777 S.E.2d 738 (2015), upholding his conviction for violating North Carolina's rules governing registered sex offenders by posting a message on Facebook celebrating the dismissal of a traffic ticket. Lester Packingham claims that the broad prohibition of his use of social media violates his 1st Amendment rights.

THE *GLOUCESTER* CASE

The *Gloucester* case was closely watched by LGBT lawyers and legal commentators for presenting the Court with a vehicle to respond to the broader question of whether federal laws prohibiting discrimination "because of sex," mostly passed many decades ago, can now be construed to forbid gender identity discrimination (and maybe, also, sexual orientation discrimination), despite the obvious lack of intent by the enacting legislators in the 1960s and 1970s to reach such discrimination. That is, to recur to a question repeatedly raised by the late Justice Antonin Scalia, are we governed by the intentions of our legislators or by reasonable interpretations of the actual texts they adopted in their statutes, or that administrative agencies subsequently adopted in regulations intended to aid in the enforcement of the statutes? Scalia, who was an ardent foe of using "legislative history" as a method of statutory interpretation, decisively argued that courts should focus on the language of the statute, not viewed in isolation, of course, but rather in the context of the overall statute (including any declaration of congressional purpose contained in it), and he won unanimous concurrence by his colleagues in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), holding that a man employed in an all-male workplace could maintain an action for hostile environment sexual harassment under Title VII, even though it was unlikely that the enacting Congress in 1964 was thinking about same-sex harassment when it amended Title VII to add "sex" to the list of forbidden grounds for workplace discrimination. Scalia wrote for the Court that we are governed by the statutory text, and thus Mr. Oncale could maintain his Title VII suit subject to his burden to prove that he was harassed "because of sex" as specified by the statute. The Equal Employment Opportunity Commission (EEOC) has prominently cited and quoted from Justice Scalia's *Oncale* opinion in its federal employment rulings of recent years (*Macy*, *Lusardi*, *Baldwin*) holding that discrimination because of gender identity or sexual orientation is "necessarily" discrimination "because of sex," even though the 1964 Congress would not necessarily have thought so. Although *Gloucester* does not directly involve Title VII, federal courts have generally followed Title VII precedents when they interpret the sex discrimination ban in Title IX, as the 4th Circuit explained in this case.

The Gloucester County School Board voted to establish a policy under which students were required to use the restroom consistent with their "biological sex."

The controversy arose when fellow students and their parents objected to Gavin Grimm, a transgender boy, using the boys' restrooms during the fall term of his sophomore year, in 2014. The principal of the high school had given Grimm permission to use the boys' restrooms, after being presented with the facts about Grimm's transition and his discomfort with continuing to use the girls' restrooms, since he was dressing, grooming, and – most significantly – strongly identifying as male. Responding to the complaints, the Gloucester County School Board voted to establish a policy under which students were required to use the restroom consistent with their "biological sex" – the sex identified on

their birth certificate – or to use a gender-neutral restroom, of which there were a few in the high school. Grimm was dissatisfied with this turn of events and enlisted the American Civil Liberties Union (ACLU) of Virginia to sue the school board in the U.S. District Court for the Eastern District of Virginia, in Newport News. The case was assigned to Senior U.S. District Judge Robert G. Doumar, who was appointed to the district court by President Ronald Reagan in 1981. The plaintiff was identified in the original complaint as "G.G., by his next friend and mother, Deirdre Grimm," but Gavin Grimm decided early on to be open about his role as plaintiff and has spoken publicly about the case. The complaint relied on Title IX as well as the Equal Protection Clause of the 14th Amendment.

Ruling on a motion for a preliminary injunction by the plaintiff and a motion to dismiss by the defendants on September 17, 2015, 132 F. Supp. 3d 736, Judge Doumar found that Grimm could not win a ruling on the merits of his Title IX claim because, in the judge's view, Title IX regulations expressly allowed schools to maintain separate restroom facilities for boys and girls based on "sex," and so it was not unlawful for them to require Grimm to use restrooms consistent with his "sex" which, in the school district's view, was female. He rejected the ACLU's claim that he should defer to the U.S. Department of Education's interpretation of the "bathroom regulation," which was articulated in a letter that the Department's Office of Civil Rights (OCR) sent in January 2015 as a "party in interest" in response to Grimm's request for the Department's assistance in his case. OCR took the position, consistent with recent developments in sex discrimination law, that Grimm should be treated as a boy under the circumstances because it was undisputed that this was his gender identity, and thus, under the regulation, he was entitled to use the boy's restroom, although he could also request, as an accommodation, to have access to gender-neutral facilities. To Judge Doumar, the text of the regulation was clear and unambiguous, so the OCR's attempt to 'interpret' the regulation in favor of Grimm's claim was not entitled to deference from the court. He wrote that deferring to the position articulated in the letter would allow OCR to "create a de facto new regulation." Doumar opined that if OCR wanted to change the regulation, it should go through the procedures set out in the Administrative Procedure Act, a time-consuming process that would result in a new or amended regulation that would then be subject to direct judicial review in the court of appeals. As to the facts, Doumar referred to Grimm in his opinion as a "natal female" and seemingly was unwilling to credit the idea that for purposes of the law Grimm should be treated as a boy. To Doumar, the case presented the simple question of whether the school district had to let a girl use the boys' restroom, and under the "clear" regulation the answer to that question was "No." While denying the preliminary injunction and dismissing the Title IX claim, Judge Doumar reserved judgment on the Equal Protection Claim.

Grimm appealed to the 4th Circuit, which reversed Judge Doumar in a 2-1 opinion on April 19, 2016. Where Doumar saw clarity in the regulation, the 4th Circuit majority saw ambiguity, although a dissenting judge sided with Judge Doumar. Although the regulation clearly said that schools could maintain separate restroom facilities for males and females, it said nothing directly about which restrooms transgender students could use, thus creating the ambiguity. Unlike Judge Doumar, the 4th Circuit majority was unwilling to accept the School Board's argument that a person's sex is definitely established by their birth certificate. The court took note of the developing case law in other circuits and in many district courts accepting the proposition that sex discrimination laws are concerned not just with genetic or "biological" sex, but rather with the range of factors and characteristics that go into gender, including gender identity and expression. Many federal courts (including several on the appellate level) have come to accept the proposition that gender identity and sex are inextricably related, that gender dysphoria and transgender identity are real phenomena that deeply affect the identity of people, and that transgender people are entitled to be treated consistent with their gender identity. The court mentioned, in addition to the OCR letter, a December 2014 OCR publication setting forth the same view, which had been published on the Department of Education's website. Thus, the School District's questioning of deference to an "unpublished letter" was not entirely factual, as the Department had previously published its interpretation on its website, and it was relying on an earlier ruling under Title VII by the EEOC in the *Macy* employment discrimination case, which was issued in April 2012.

Having found that the regulation was ambiguous as to the issue before the court, the 4th Circuit relied on *Auer v. Robbins*, 519 U.S. 452 (1997), a Supreme Court decision holding that an agency's interpretation of its own ambiguous regulation should be given controlling weight by the court unless the interpretation is "plainly erroneous or inconsistent with the regulation or statute." In other words, a reasonable agency interpretation of an ambiguous regulation should be deferred to by the court. The 4th Circuit panel majority went on to find that the requirements of *Auer* were met in this case, and remanded the matter to Judge Doumar to reconsider his ruling. The court's discussion made clear what direction the reconsideration should take and stressed urgency. Judge Doumar reacted with alacrity, issuing the requested preliminary injunction on June 23. The School Board sought a stay, which was denied by both Judge Doumar and the 4th Circuit, which also denied a petition for rehearing *en banc*. With the new school year looming, and desperate to avoid having to let Grimm use the boys' restrooms during his final year of high school, the School Board petitioned the Supreme Court for a stay of the preliminary injunction, which was granted on August 3 by a vote of 5-3. See 136 S. Ct. 2442. Justice Stephen Breyer, taking the unusual step of issuing a brief statement explaining why he had voted for the stay along with the four more conservative members of the Court, said it was an "accommodation." There was speculation at the time about

what that meant. In light of the October 28 vote to grant the School District's petition for certiorari, it probably meant that the four conservatives had indicated they would likely vote to grant a petition for certiorari to review the 4th Circuit's decision, so in Breyer's view it made sense to delay implementing the injunction and to preserve the *status quo*, as the case would eventually be placed on the Court's active docket for the October 2016 Term (which runs through June 2017). Breyer was careful to refrain from expressing any view about the merits in his brief statement. After the School Board filed its petition for certiorari on August 29, the case generated considerable interest, attracting more than a dozen amicus briefs in support or opposition to the petition, including briefs from many states and from members of Congress. There will undoubtedly be heavy media interest when the parties file their merits briefs with the Court, accompanied by numerous amicus briefs on both sides of the case.

The School Board's petition to the Court posed three questions: first, asking whether the *Auer* doctrine, which some of the Justices have signaled a desire to overrule, should be reconsidered; second, asking whether under the *Auer* doctrine "an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought" merits deference; and third, asking whether the Department's interpretation of Title IX and the bathroom regulation should be "given effect"? The Court granted the petition only as to the second and third questions, so there are not four members of the Court ready to reconsider *Auer*, at least in the context of this case.

The remaining questions give the Court different paths to a decision, one of which has minimal substantive doctrinal significance, while others could make this a landmark ruling on the possible application of federal sex discrimination statutes and regulations to discrimination claims by sexual minorities.

The Court might agree with the School Board that no deference is due to an agency position formulated in response to a particular case and expressed in an unpublished agency letter. This could result in a remand to the 4th Circuit for a new determination of whether Judge Doumar's dismissal of the Title IX claim was correct in the absence of any need to defer to the agency's interpretation, a question as to which the 4th Circuit majority has already signaled an answer in its discussion of the merits.

Alternatively, and more efficiently in terms of the development of the law, the Court could take on the substantive issue and decide, at the least, whether reading Title IX to extend to gender identity discrimination claims is a viable interpretation, in light of the Court's seminal ruling in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), that an employer's use of sex stereotypes to the disadvantage of an employee's promotion application was evidence of intentional discrimination because of sex. It was that ruling that eventually led federal courts to conclude that because transgender people generally do not conform to sex stereotypes concerning their "biological" sex as determined at birth, discrimination against them is a form of "sex discrimination" in violation of such federal laws as the Fair Credit Act, the Violence Against Women Act, and Title VII of the Civil Rights Act. The EEOC also relied on *Price Waterhouse* in reaching its conclusion that transgender plaintiffs could assert discrimination claims under Title VII, and the 6th and 11th Circuits have relied on it in finding that claims of gender identity discrimination by public employees should be treated the same as sex discrimination claims under the 14th Amendment's Equal Protection Clause.

The Court could take on the substantive issue and decide, at the least, whether reading Title IX to extend to gender identity discrimination claims is a viable interpretation.

Were the Supreme Court to rule by majority vote that laws banning discrimination "because of sex" also "necessarily" cover discrimination because of gender identity, rather than issuing a narrower ruling focusing solely on Title IX, one could plausibly assert that the inclusion of "gender identity" in the pending Equality Act bill would not be, strictly speaking, necessary in order to establish a federal policy against gender identity discrimination under all federal sex discrimination laws. But it is possible that the Court might write a more narrowly focused decision that would in some way be logically restricted to Title IX claims. At least one district court, in a case involving a transgender student at the University of Pittsburgh, suggested that there were significant enough differences between workplaces and educational institutions to merit a different approach under Title VII and Title IX, especially noting that many of the students affected by Title IX are not adults, while most people affected by Title VII are older, more experienced, and less susceptible to psychological injury in the realm of sexual development. There was the suggestion that sexual privacy concerns in the context of an educational institution are different from such concerns in the context of an adult workplace. The Supreme Court has generally preferred to decide statutory interpretation cases on narrow grounds, so it is possible that a merits decision in this case would not necessarily decide how other sex discrimination laws should be construed.

This case will most likely be argued early in 2017, and it may not be decided until the end of the Court's term in June. Thus, it is possible that Gavin Grimm

could win but never personally benefit as a student at Gloucester County's high school, since he may have completed his studies before the final decision is issued. But, of course, if he goes on to college, a winning decision would personally benefit him in being able to use men's restrooms if he attends a college subject to Title IX – unless, given another complication of our times, he decides to attend a religious school that raises theological objections to letting him use such facilities and seeks to rely on the *Hobby Lobby* decision to avoid complying with Title IX. We suspect, however, that his higher education would likely avoid that complication!

The Supreme Court has not granted as many petitions as usual thus far this fall, leading to speculation that it is trying to avoid granting review in cases where the justices might be predictably split evenly on the outcome and thus would not be able to render a precedential decision. If the Senate Republicans stand firm on their position that President Obama's nominee for the vacant seat, U.S. Court of Appeals Judge Merrick Garland, will not be considered for confirmation, it is possible that the Court will have only eight justices when the *Gloucester* case is argued. A tie vote by the Court would leave the 4th Circuit's decision in place, but it would not be precedential outside of the 4th Circuit. If a newly-elected president nominates a new candidate and the confirmation process takes the average time of several months, a new justice would probably not be seated in time to participate in deciding this case, unless the Court voted to hold it over for re-argument. (In the past, the Court has sometimes held new arguments in cases that were heard when the Court was shorthanded. This happened once when Justice Lewis Powell missed many arguments due to ill health, and his colleagues left it up to him whether to participate in those cases, in some instances by holding new arguments.) This raises the possibility that Grimm's graduation from high school might be found to have mooted the case, resulting in a dismissal on jurisdictional grounds. This wouldn't be an issue, of course, had the lawsuit been filed by DOE and the Justice Department, but where the plaintiff is an individual, his standing remains an issue throughout consideration of the case.

THE *PACKINGHAM* CASE

In the *Packingham* case, the North Carolina Supreme Court, reversing a decision by the state's court of appeals, held that a state law restricting certain online social media use by all registered sex offenders was neither facially unconstitutional nor unconstitutional as applied to the defendant, Lester Gerard Packingham. The North Carolina court, which divided 5-2 on the case, concluded that the statute was a regulation of conduct that incidentally affects freedom of speech, thus subject to heightened, but not strict, scrutiny, and that it survived such review due to the state's important interest in protecting minors from sexual exploitation and to the measures taken by the legislature to narrow the scope of online communications that would be affected.

Packingham was convicted in 2002 of a sexual offense involving a minor. The opinion for the Supreme Court by Justice Robert H. Edmunds, Jr., does not specify the nature of the offense, but a reference in the dissenting opinion suggests it did not involve violence. He did, however, have to register as a sex offender. In 2008, the state legislature amended the sex offender registration law to make it a crime for a registered sex offender to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." The statute included a detailed definition of the characteristics of the kinds of sites that would be prohibited, and explicitly exempted various kinds of websites. In effect, the ban is on sites where a registered sex offender might be able to identify and communicate directly with minors. Sites that require individuals to be at least 18 years old in order to be members would not be affected by the ban, for example, and those that limited their services to things like commercial transactions for selling goods were also exempted. After the law was passed, a written notice was sent to all registered sex offenders in the state advising of these new restrictions to which they must comply. There was evidence in this case that Packingham received the notice.

In 2010, a Durham police officer began an investigation to determine whether any local registered sex offenders were violating the new law. His investigation uncovered the fact that Packingham was maintaining a Facebook page under an assumed name and had posted messages to it, most recently a message celebrating his escape from traffic ticket liability. The investigation did not, apparently, uncover any communications by Packingham to minors using Facebook. Packingham was indicted for violating the statute, and moved to dismiss the charges on 1st Amendment grounds. The trial judge denied the motion, finding the statute constitutional as applied to Packingham while declining to rule on Packingham's facial challenge to the statute, and he was convicted by a jury and sentenced to 6-8 months, suspended for a year while on probation. Packingham appealed. The court of appeals reversed, finding that the statute was unconstitutional on its face and as applied, too broadly sweeping in its effect on the free speech rights of registered sex offenders, and unduly vague.

The North Carolina Supreme Court totally rejected the court of appeals' analysis. For one thing, the court found that the statute regulated conduct (the act of accessing the social media), not directly speech, although it clearly has an incidental effect on the ability of a sex offender to engage in speech activities using social media. But the court decided that under the "heightened scrutiny" approach for evaluating regulations of conduct that incidentally affect speech, this statute survived because of the important state interest in protecting children, and the legislature's care in tailoring the prohibition to focus on the kinds of social media where those so inclined could identify and communicate with minors. The court concluded that this left open a wide variety of social media and other internet forums in which sex

offenders were free to participate, and that the statute (and the notices to sex offenders) were written in such a way that somebody who sought to comply with the statute could determine which social media were off-limits. Nobody disputed that accessing Facebook was prohibited under this law, for example, and the court concluded that Packingham knew that Facebook was off-limits for him, as reflected by his opening an account in an assumed name. (What gave him away was that his photograph on the site matched the photographic depiction on his sex offender registration form.) The court acknowledged that several similar laws in other states had been declared unconstitutionally, but sought to distinguish them as not being as fine-tuned as the North Carolina law in terms of the kinds of websites that were made off-limits.

The dissent was written by Justice Robin E. Hudson, joined by Justice Cheri Beasley. She disputed the majority's conclusion that this was a regulation of conduct, but she determined that didn't make much difference because she concluded that even under the standard of review used by the majority, the statute failed as overly broad and vague. Restricting all sex offenders without regard to the nature of their offenses, for example, undercut the state's justification of protecting minors. Many people are required to register who committed offenses that do not involve minors, and who have no sexual interest in minors. Why, then, is the state restricting their 1st Amendment activities if its articulated justification for the restriction is to protect minors? She also pointed out that there is no requirement that their offense leading to registration status involved using a computer, so why is their computer access being restricted? Further, she contested the majority's conclusion about how narrowly tailored the restriction is. She pointed out that, literally applied, it could bar somebody from using Amazon, because that website makes it possible for users to create profile pages, including contact information facilitating communications between users with common interests. Indeed, she pointed out that some websites allow minors to register with the approval of their parents. One such is the largest circulation daily newspaper in North Carolina, so theoretically Packingham could be barred from accessing the newspaper online. She argued that the law is both facially unconstitutional and unconstitutional as applied to Packingham.

In petitioning the Supreme Court for review, Packingham's counsel wrote: "The statute singles out a subclass of persons, who are subject to criminal punishment based on expressive, associational, and communicative activities at the heart of the First Amendment, without any requirement that their activity caused any harm or was intended to." The certiorari grant extends to the questions of whether the law is facially unconstitutional or just unconstitutional as applied to Packingham. The case has the potential to bring into question numerous state laws that seek to regulate the expressive activities of sex offenders in the name of protecting minors. Nobody argues that the state does not have a significant interest in protecting minors from sexual exploitation, or that the internet has created new opportunities for adults who are sexually interested in minors to locate and communicate with them. At issue is how broadly such laws may sweep. Should the laws pay more attention to the nature of sex offenses leading to registration in deciding whose activities should be restricted, and how narrowly tailored must the restrictions be to avoid subjecting individuals to long-term (even life-long in some cases) restrictions on their ability to use one of the main vehicles for communication in the 21st century without substantial justification for the limitation. The petition was supported by an amicus brief from professors concerned with the law's substantial burden they perceived on communicative freedom imposed by the statute. Interestingly, N.C. Attorney General Roy Cooper did not want to bother responding to the certiorari petition, and filed a waiver of the right to respond on April 6, but then was requested to respond after the amicus brief was filed, and ultimately filed a response on June 30.

The interests of LGBT people are significantly implicated by this dispute. Even after the Supreme Court declared in 2003 that laws against gay sex were not enforceable against individuals engaged in private, adult consensual activities, there is a not inconsiderable number of gay people, especially men, who are still affected by sex registration requirements in many states based on pre-2003 criminal convictions and continuing enforcement of laws involving solicitation, conduct in public, prostitution, and, of course, intergenerational sex. Many offender registration laws sweep broadly encompassing a wide variety of activity that is not specifically protected under the U.S. Supreme Court's *Lawrence v. Texas* ruling, and litigation is ongoing challenging the continued registration requirements imposed in some jurisdictions on people whose offender status is based on pre-*Lawrence* convictions for conduct that may no longer be criminalized. In this connection, it is notable that there are still several states that have not legislatively reformed their sex crimes laws to comply with the *Lawrence* ruling, as a result of which, law enforcement officials continue to make arrests for constitutionally protected conduct. ■

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Federal Court Finds Iowa Church with Bathroom Policy Has Standing to Challenge State and City Public Accommodation Laws on Free Speech Grounds, But Not Likelihood of Success

Worried about the potential ramifications of some compliance guidance, an Iowa church, represented by the notoriously antigay Alliance Defending Freedom (ADF), did have standing to preemptively ask a federal court to stop the Iowa Civil Rights Commission and the City of Des Moines from enforcing portions of state and city public accommodation antidiscrimination laws that the church fears could force it to abide by rules permitting transgender people to use public bathrooms and muzzle ministers who may want to preach against transgender or gay individuals, but lacked the likelihood of success on the merits of its constitutional claims for a preliminary injunction. *Fort Des Moines Church of Christ v. Jackson*, 2016 WL 6089842, 2016 U.S. Dist. LEXIS 143677 (S.D. Iowa Oct. 14, 2016). After the decision denying the motions to dismiss and for a preliminary injunction from U.S. District Court Judge Stephanie M. Rose, the church voluntarily dismissed the lawsuit on October 26, satisfied that Judge Rose had determined it is likely beyond the reach of state and city authorities enforcing the statute and ordinance.

Both the Iowa Civil Rights Act and the Des Moines City Code prohibit places of public accommodation from discriminating based on gender identity, based on 2007 and 2011 legislative amendments, respectively. The statute and ordinance, however, also both have explicit exceptions for bona fide religious institutions acting with bona fide religious purposes, although these exceptions do not apply if an institution both provides gratuitous services and receives government support or subsidy.

Despite these exceptions, the Fort Des Moines Church of Christ and its pastor grew alarmed by the release of a guidance document from the Iowa Civil Rights Commission that indicated the exception would not cover situations where churches host non-religious activities which are open to the public, such as when a church houses a daycare center or serves as a polling place. In light of recent national hysteria over bathroom use by transgender people, the church leadership team adopted a written policy requiring transgender individuals to use the bathroom and shower facilities inconsistent with their gender identity when on the church's premises. The church did not publicize or distribute the policy, though, out of fear it would trigger enforcement action from state and municipal civil rights authorities "through its gratuitous offer of services to the public at large."

In July, the church affirmatively sought declaratory and injunctive relief in federal court under 42 U.S.C. § 1983, alleging both the state and city antidiscrimination law unconstitutionally violate the Free Speech Clause of the First Amendment, the Religion Clauses of the First Amendment, the expressive association and right to peaceably assemble principles of the First Amendment, and the Due Process Clause of the Fourteenth Amendment because of vagueness.

The state and city moved to dismiss, principally arguing that the church did not have standing and, therefore, the federal court did not have jurisdiction. On the injury prong of the standing analysis, the church was the beneficiary of strong precedent opening up federal courts for First Amendment challenges by accepting "self-censorship" as the alleged injury in fact. According to Judge Rose, "[i]n order for the party to face a 'credible threat of prosecution,' the allegedly chilled course of conduct must be proscribed by the challenged statute." While the worry over sermon silencing "is based on a fear that is not objectively reasonable" because of the clear statutory religious exemptions, Judge Rose found "it is sufficient for purposes of standing that whether the statutes and ordinances proscribe [the church's publication and distribution of its bathroom policy] is 'arguable' and open to interpretation."

Specifically, Judge Rose acknowledged that the church "provides services to the public gratuitously, which under certain circumstances could make it a place of public accommodation. . . . It intends to make statements that may lead members of a protected class to feel that their patronage is unwelcome or unacceptable—at the very least, not accepted in Plaintiff's restrooms or showers. . . . Plaintiff's proposed course of conduct is thus arguably proscribed by the statutes and ordinances at issue. Consequently, Plaintiff's fear of prosecution, which led it to self-censor its speech, is objectively reasonable." Getting that last sentence published in the Federal Supplement, in order to arguably validate alarm about LGBT antidiscrimination laws threatening American religious liberty, seems to be what the church and ADF actually wanted out of this entire episode.

Moving on to the preliminary injunction, the first and most significant factor is a likelihood of success on the merits. In the Eighth Circuit, a movant must show they are likely to prevail on the merits in order to enjoin the enforcement of state statutes. Starting with the First Amendment free speech claims, Judge Rose broke the antidiscrimination laws into two parts, the subparts prohibiting discriminatory practices and publications. For discriminatory practices, Judge Rose quoted the unanimous U.S. Supreme Court in the famous 1995 St. Patrick's Day Parade case of *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* for the proposition that "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."

The discriminatory publications subparts, though, demanded a more complicated and lengthy First Amendment analysis for the overbreadth

and vagueness claims; the church argued they are unconstitutional facially and as-applied to it. Judge Rose admits that "each of these terms [in the discriminatory publications subparts] does seem to leave room for a certain amount of subjectivity." But looked at "together within the context of the laws in question—laws aimed at preventing discrimination—the provisions are not so standardless as to lead to seriously discriminatory enforcement. Though not perfect, the terms sufficiently describe messages of limited access to a public accommodation's goods or services based on membership in a protected class." Overall, Judge Rose pinned down the major problem for the church in ultimately succeeding as being that "there is a significant amount of uncertainty surrounding whether the antidiscrimination laws would ever be applied to its conduct. This uncertainty favored Plaintiff's claim under standing analysis but may not support its claims under a more searching constitutional analysis."

Judge Rose more easily disposed of the Religion Clauses claims. "Because the challenged laws are neutral and generally applicable, they do not offend Plaintiff's right to freely exercise its religion." Similarly, she saw "nothing in Establishment Clause jurisprudence that would aid Plaintiff in obtaining injunctive relief," especially because "there is *express* exception written into the antidiscrimination laws at issue preventing their application to religious activities."

A footnote in the opinion seems to explain the church's October 26 voluntary dismissal. Judge Rose gave the church until October 28 to amend its petition to state whether or not it receives government support or subsidy, "a prerequisite to being a public accommodation [under the statute] based on an offer of gratuitous services to the public." It almost certainly does not receive government support or subsidy and, therefore, continuing to litigate this action would be futile. – *Matthew Skinner*

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

Massachusetts SJC Rules Affirmatively on Same-Sex Partner Parentage Claim

The Massachusetts Supreme Judicial Court (SJC) ruled on October 4 that the former same-sex partner of a woman who gave birth to two children through donor insemination during the women's relationship can seek to establish full legal parentage of the children under the state's statute concerning parentage of children born out of wedlock. *Partanen v. Gallagher*, SJC-12018, 2016 Mass. LEXIS 759, 2016 WL 5721061.

Although the state's courts have in the past recognized various rights for co-parents in similar cases using a "de facto parent" concept, this unanimous ruling is the SJC's first to take advantage of a law providing that "words of one gender may be construed to include the other gender and the neuter" to adapt a statute that was originally intended to allow unmarried men to establish their paternity of children born "out of wedlock" to their women companions, and to repurpose the statute as a vehicle to establish parental rights for unmarried same-sex partners. Justice Barbara Lenk, an out lesbian, wrote for the unanimous seven-member court.

Karen Partanen and Julie Gallagher began their "committed relationship" as a couple in Massachusetts in 2001. The next year they moved to Florida, where they bought a house together in 2003. In 2005 they decided to use donor insemination to have children. The plan was for each of the women in turn to be inseminated. Partanen's attempt in 2005 was unsuccessful, but Gallagher's subsequent attempt was successful and she gave birth to their daughter in 2007. Gallagher was inseminated again in 2011, giving birth to a son. These procedures were performed with the full cooperation and involvement of Partanen, who was present at the birth of the children. Partanen did not adopt the children, although in 2010 a Florida appeals court struck down the state's statutory ban on gay people adopting children, but, according to her complaint in this lawsuit, she was fully involved as a parent, including personal contact, financial support, and decision-making.

After their son was born, the family moved back to Massachusetts. Although by then same-sex marriage was legal in Massachusetts, they did not marry. Shortly after the move, they ended their relationship and Partanen moved out. She filed an action to establish "de facto" parentage in February 2014, requesting visitation and shared custody. In September 2015, a Family Court judge ruled that she was a "de facto" parent, ordered visitation, and required her to pay child support to Gallagher. An appeal of that ruling is pending. Meanwhile, however, in October 2014 Partanen filed a separate action "to establish [full legal] parentage," which Gallagher moved to dismiss, arguing that "full parentage" could only be achieved under the paternity statute by a biological parent. Probate and Family Court Judge Jeffrey A. Abber granted Gallagher's motion to dismiss the parentage case.

If one reads the relevant statute without taking into account the state's general statutory directive on gender neutrality in interpretation, one could easily see the basis for Judge Abber's ruling. The provision falls within the chapter of the state's laws titled "Children Born Out of Wedlock," Chapter 209C. The statute extends to "children who are born to parents who are not married to each other." The various sections refer to "paternity" and authorize the courts to determine whether somebody is a child's legal father. The statute recognizes a "presumption of paternity" in various situations. The one most relevant here is that "a man is presumed to be the father of a child" that is born out of wedlock if "he, jointly with the mother, received the child into their home and openly held out the child as their child."

Gallagher argued, and the trial judge agreed, that this statutory scheme was not intended to provide a vehicle for

somebody to establish legal parental rights over a child to whom the party was not biologically related. The SJC disagreed, pointing out that the statute does not state anywhere that the person seeking to establish parental rights has to be biologically related to the child. "While the provisions at issue speak in gendered terms," wrote Justice Lenk, "they may be read in a gender-neutral manner, to apply where a child is 'born to [two people],'" not just a man and a woman, and the child "is received into their joint home, and is held out by both as their own child." Consequently, she wrote, "The plain language of the provision, then, may be construed to apply to children born to same-sex couples, even though at least one member of the couple may well lack biological ties to the children."

Furthermore, such an interpretation was in accord with the overall purpose of the statute, which, as "laid out in its first sentence, is to provide all 'children born to parents who are not married to each other . . . the same rights and protection of the law as all other children."

The court strengthened its interpretation with a telling analogy to the use of reproductive technology by different-sex couples. Clearly, a cohabiting, but unmarried, man and woman who resort to donor insemination to conceive a child because the man is infertile could make use of this statute to establish the man's paternity without any express requirement in the statute that he prove a biological relationship to the child. That is, in fact, one of the normal uses of the statute. If the legislature intended to make sure that all children born to unmarried parents have the same rights, shouldn't children born to unmarried same-sex couples have the same rights as well?

"Here, had [the children] been born to a married couple using artificial reproductive technology, they would have had two parents to provide them with financial and emotional support," wrote Justice Lenk. "We decline to read into the statute a provision that leaves children born to unmarried couples, using the same technology, with only one parent."

Furthermore, she pointed out that the court had in the past recognized an interpretation of another provision that also would "recognize parentage in the absence of a biological relationship," a provision under which parentage may be established through a "written voluntary acknowledgment of parentage executed jointly by the putative father and the mother of the child." The court held years ago that such an acknowledgment does not require that the putative father have any genetic relationship to the child. Under this ruling, same-sex couples can avail themselves of the same provision. This only works, of course, if both parents are willing to sign such a document.

Gallagher argued that because Partanen lacks a biological connection to the children, they were not "born to" her, and thus do not fall within the scope of the statute. She bolstered this argument by referring to a provision authorizing the family court to order genetic testing of the putative father on a "proper showing" by the moving party. That provision was clearly intended to allow single mothers seeking child support from the biological fathers of their children to prove genetic paternity in order to subject the men to their parental support duty. "Where, as here, the parentage claim is not based on a genetic relationship," wrote Justice Lentz, "Gallagher, as a moving party, cannot show such testing would be relevant to the claim at issue, and therefore, no 'proper showing' is possible."

Ultimately, the court concluded that the facts alleged by Partanen in her complaint should have been sufficient to withstand Gallagher's motion to dismiss the claim, and if upon remand the trial court finds the factual allegations to be true, Partanen will enjoy the presumption of parentage authorized by the statute and can seek visitation and custody on the same basis as any other person who is presumed to be a parent. If the Family Court judge finds it to be in the best interest of the children, Partanen would be awarded the same custody and visitation rights that any legal parent could seek after parents have ended their relationship with each other.

Although Massachusetts courts had previously recognized the ability of same-sex partners to seek "de facto" parental status, which accorded some rights, the court emphasized that full legal parentage involves the same rights that a biological or legal adoptive parent would enjoy.

The court did not rule on alternative constitutional claims raised by Partanen, resting its decision entirely on construction of the Massachusetts statutes. The court's opinion does not mention any attempt by Gallagher to argue that treating Partanen as a presumptive parent would violate Gallagher's constitutional due process rights as a "natural parent," so it is unlikely that she would be able to seek U.S. Supreme Court review of this decision.

Mary Bonauto, the Civil Rights Project Director at GLAD (GLBTQ Legal Advocates & Defenders), the Boston-based New England LGBT rights public interest law firm, represents Partanen with co-counsel Elizabeth A. Roberts, Teresa Harkins La Vita, Patience Crozier, and Joyce Kauffman. Bonauto gave the oral argument in the U.S. Supreme Court in 2015 that led to nationwide marriage equality in *Obergefell v. Hodges*, and she also argued to the Massachusetts SJC in 2003, resulting in the nation's first affirmative marriage equality ruling by a state's highest court in the *Goodridge* case. Jennifer M. Lamanna represents Gallagher. The SJC received amicus briefs, all in support of Partanen's appeal, from: C. Thomas Brown for Greater Boston Legal Services; Emily R. Shulman, Brook Hopkins, and Adam M. Cambier for the American Academy of Assisted Reproductive Technology Attorneys; Abigail Taylor, Gail Garinger, Brittany Williams and Andrea C. Kramer for the Massachusetts Attorney General's Office; and Shannon Minter, Marco J. Quina, and Emma S. Winer for a group of law professors specializing in family law issues. The case seems to have flown below the radar of groups that usually file opposition amicus briefs in such cases. ■

Oregon Appeals Court Upholds Child Visitation for Adoptive Parent's Former Partner

On October 5, 2016, Oregon's Court of Appeals upheld a lower court's finding that an adoptive mother, Alice Adelman, failed to act in the best interests of her child "G" when she curtailed visitation between G and her former partner, Laura Jo Husk. *Husk v. Adelman*, 281 Or. App. 378, 2016 LEXIS 1197, 2016 WL 5799727. In an opinion written by Judge Darleen Ortega, the intermediate appellate court also agreed that it was in G's best interests to have extensive visitation with Husk despite Husk's status as a "non-parent." However, the court ruled it was error to order Adelman to provide Husk with copies of G's educational and health records.

Husk sued Adelman in 2013 seeking visitation with G under Oregon's nonparent custody and visitation law, ORS 109.119. Husk alleged Adelman unreasonably limited Husk's parenting time with G. Husk and Adelman had entered into a mediated parenting agreement in 2011, although the agreement itself was unenforceable under Oregon law. Adelman and Husk co-parented G from G's adoption by Adelman in 2006 until 2010, when their romantic relationship ended. Only Adelman was G's legal parent. As long-term partners, Husk and Adelman had wanted to adopt a child together. But, according to the blog of Portland attorney Daniel Reitman, Adelman and Husk's same-sex relationship would have stymied their joint adoption of G, given prevailing attitudes about same-sex relationships in G's country of origin. On that basis, Adelman applied for an international adoption of G as a single woman.

To prevail in her suit under Oregon law, Husk as a non-parent first had to establish that she and G had an ongoing relationship, which no one disputed. Husk then had to present clear and convincing evidence to rebut the statutory presumption that Adelman was acting in G's best interest by limiting G and Husk's time together. If the presumption was rebutted, the trial court was required to order visitation between Husk and G so long as it was in G's best interests for the court to do so.

Adelman argued on appeal that Husk failed to present clear and convincing evidence sufficient to rebut the presumption. The court disagreed, finding instead that Husk introduced ample evidence from which the trial court could have determined Husk rebutted the presumption. Husk presented expert testimony at trial from a psychologist that it would be detrimental to G for visitation with Husk to be curtailed. Further, Husk presented evidence that Adelman's limitation of contact between G and Husk was unreasonable and, according to the trial court, "had primarily been motivated by her own interests, rather than G's." Finally, Husk's evidence tended to show that without a court-ordered visitation plan, Adelman was unlikely to grant Husk consistent, regular visitation with G.

The court also rejected Adelman's argument that the trial court abused its discretion in ordering extensive visitation between G and Husk. Adelman claimed the court-ordered visitation resembled a parenting plan fit for a non-custodial parent but not the likes of Husk, who was not a "parent" at all. Here Adelman relied in part on *Troxel v. Granville*, 530 U.S. 57 (2000). Judge Ortega, disposing of the *Troxel* argument, pointed out that once Husk rebutted the presumption, the trial court's mandate was to focus on "whether the visitation plan is consistent with the child's best interests, not Adelman's custodial rights." Furthermore, Judge Ortega observed that Adelman had, in fact, helped craft the very visitation plan to which she objected on appeal and had failed to point to any evidence showing the visitation ordered was against G's best interests.

The Court of Appeals did find that the trial court abused its discretion by ordering Adelman to provide Husk with copies G's educational and medical records. Here, Adelman relied again on *Troxel* and its "edict that a legal parent should be able to control the day-to-day affairs of a child without interference of the state." Husk had argued entitlement to the records on the basis that Adelman had already consented to provide them to her. The trial court adopted Husk's position while simultaneously noting that it otherwise lacked the authority to order Adelman to provide Husk with the records. The Court of Appeals reversed this portion of the judgment by relying on the trial court's own recognition of its lack of authority.

It was in the wake of *Troxel* that Oregon and many other states revised visitation statutes.

It was in the wake of *Troxel* that Oregon and many other states revised statutes such that courts considering a non-parent's visitation request must apply the same three-part test applied in *Husk*. In *Troxel*, the Supreme Court decided, *inter alia*, that a Washington statute permitting grandparents and other third persons almost unlimited visiting rights if a court deemed such to be in the child's best interest was unconstitutional as applied to that case. New York, however, did not amend the Domestic Relations Law in the wake of *Troxel* and its analogous statute, DRL § 72, was upheld as constitutional (after *Troxel*) by the Appellate Division, Second Department, in *Hertz v. Hertz*, 291 AD 2d 91, 738 NYS 2d, 62 (2d Dept., 2002). – *Matthew Goodwin*

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York, specializing in matrimonial and family law.

U.S. Magistrate Accepts Gay Man's Title VII Claim on Sex Stereotyping Theory

On October 7, Chief U.S. Magistrate Judge John E. Ott of the Northern District of Alabama denied the City of Pleasant Grove's motion to dismiss a Title VII claim by an openly gay man, Lance Smith, who had been discharged from the city's Police Department. *Smith v. City of Pleasant Grove*, 2016 U.S. Dist. LEXIS 139575, 2016 WL 5868510 (N.D. Alabama). Judge Ott referred to the Supreme Court's 1989 decision, *Price Waterhouse v. Hopkins*, 490 U.S. 228, which endorsed the view that employees who suffered adverse consequences because of their failure to comply with the employer's sex-stereotypical views could sue for sex discrimination under Title VII.

In 2012, the Equal Employment Opportunity Commission (EEOC) issued an administrative decision finding that Title VII forbids gender identity discrimination, and the EEOC issued a similar ruling regarding sexual orientation discrimination in 2015. The EEOC rulings relied upon and extended the sex-stereotyping theory. The agency's rulings are not binding on the federal courts, but federal trial judges have begun over the past year to acknowledge them and, in some cases, to follow their reasoning.

Smith's case involves a straightforward sexual orientation discrimination claim against a local Alabama police department. Lance Smith interviewed with Lt. Jennifer Fredrick for an available position in the Pleasant Grove Police Department (PGPD) in 2014. She told him he would be offered a position at a specific salary. At the end of the interview, Smith told Fredrick that he is gay and has a same-sex partner. Smith says that Fredrick's demeanor immediately changed and she advised him to "reconsider" his desire to work in the PGPD. However, after the interview Smith received an email from Fredrick informing him that "his homosexuality would not be an issue," wrote Judge Ott. This was evidently untrue, to judge by subsequent events related by Smith in his Title VII complaint.

After Smith completed the required physical exam, he was directed to meet with the Chief of Police, Robert Knight, who told him he would receive a lower salary than he had been promised by Lt. Fredrick. In his complaint, he claims he was paid $5,000 less than other new recruits. Smith claims that he received only two weeks of field training instead of the three normally provided to new recruits, and then was assigned to a night shift patrol on his own rather than the usual assignment for new officers to patrol with a partner. Smith claims that he was informed by the night shift sergeant that "Lt. Fredrick had instructed the sergeant to write down everything Smith did wrong so Lt. Fredrick could fire him." Smith says another officer warned him to be "careful" because a police corporal was a "homophobe."

After a few months, Lt. Fredrick told Smith he was "not going to work out" and needed to resign, but refused to tell him what he had done wrong. In fact, he claims, she told him he was a good officer and would find another department that would "fit" him better. Fredrick gave him a previously-prepared resignation letter and told him he would be grounded, suspended, and then fired if he did not resign. Smith signed the letter and attempted to find police work elsewhere in the county, relying on Fredrick's statement that she would advise prospective employers and the Jefferson County Personnel Board that he resigned in good standing, but he claims he was unable to find employment because Knight and Fredrick had "falsely reported that he was an unsatisfactory employee."

Smith filed a sex discrimination charge with the EEOC, which issued him a right to sue letter. He filed his suit on March 1, 2016, claiming he was subjected to "discriminatory terms and conditions of employment because of his sexual orientation, and stereotypes associated with his sex and his gender," in violation of Title VII. He also alleged a violation of his rights under the Equal Protection Clause of the 14th Amendment, and asserted a state tort claim that the City, Knight and Fredrick had interfered with his "contractual or business relationship with prospective employers" by giving him a bad employment report. The defendants moved to dismiss on various grounds, including the claim that Title VII does not apply to his case.

"Traditionally, courts in this circuit have held that Title VII does not provide a remedy for discrimination based on sexual orientation," wrote Judge Ott, citing a long list of cases, and adding a list of cases from other circuits with similar holdings. "The Equal Employment Opportunity Commission, however, recently concluded that 'an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII,'" he wrote, and "at least one court in this circuit, noting that the question is an 'open one,' has agreed with the EEOC and has found that 'claims of sexual orientation-based discrimination are cognizable under Title VII.'"

More importantly, wrote Ott, "Smith has also alleged discrimination based on his failure to conform to sex and gender stereotypes." While Ott rejected Smith's argument that discrimination based on his association with his male partner is prohibited sex discrimination, he found that the 11th Circuit, which has appellate authority over federal courts in Alabama, had accepted a broad view of sex discrimination in the *Brumby* case in 2011, involving a transgender state employee asserting an equal protection claim. In that case, the 11th Circuit relied on sex-stereotype theory to conclude that Brumby had a valid equal protection claim, finding that Brumby's claim should be analyzed under the same "heightened scrutiny" standard used for sex discrimination claims.

"In his amended complaint," wrote Ott, "Smith alleges that 'sexual and gender-stereotyping comments' were made to him during his employment with the Pleasant Grove Police Department, including the comment that 'men should be men,' which led him to conclude that other members of the department did not feel that he was 'manly' enough to be a police officer. He also alleges that other officers made jokes about his attire and mannerisms. These factual allegations are 'enough to raise a right to relief

[under Title VII] above the speculative level,'" Ott continued, citing a Supreme Court ruling on the required factual allegations to ground a civil complaint. "They are sufficient to allow the court to draw the reasonable inference that the City of Pleasant Grove could be liable for discriminating against Smith because of his failure to conform to sex and gender stereotypes." Thus, Ott refused to dismiss the Title VII claim, which will next proceed to discovery.

However, Ott dismissed the Equal Protection claim, asserting that Smith had failed to allege facts that would support an inference that he was denied equal protection of the laws because he failed "to adequately allege the existence of a similarly situated comparator, an essential component of an equal protection claim. To prevail on his equal protection claim, Smith must show 'a satisfactory comparator who was in fact similarly situation and yet treated differently.'" Ott found two relevant allegations in Smith's complaint: that he was paid less than "similarly situated employees" and that he was "singled out because of his association with his male partner while similarly situated employees were not." But Ott found that Smith had failed to identify particular specific "similarly situated employees" to illustrate these claims. "He does not identify a single comparator who was allegedly treated more favorably than he was," concluded Ott.

However, Judge Ott refused to dismiss Smith's claim against Chief Knight and Lt. Fredrick in their individual capacities for "interference with a contractual or business relationship," rejecting their argument that any adverse comments they made were privileged due to the city's relationship with the county personnel board. "In their individual capacities," wrote Ott, "Chief Knight and Lt. Fredrick did not have a 'legitimate economic interest in and a legitimate relationship to' any contract of business relationship Smith might secure through the Jefferson County Personnel Board." On the other hand, Ott rejected Smith's claim that the City could be held liable for maintaining an "official custom or policy" of discrimination, finding insufficient factual allegations to support such a claim.

Lance Smith is represented by Cynthia Wilkinson of Birmingham, Alabama. ■

Arizona Appeals Court Adopts Gender-Neutral Construction of Paternity Statute in Same-Sex Couple Dispute

The Court of Appeals of Arizona ruled on October 11 that as a result of the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), holding that same-sex couples have a constitutional right to marry and that their marriages must receive equal treatment under the law to those of different-sex couples, the Arizona courts must construe the state's paternity statute in a gender neutral way so that the same-sex spouse of a woman who gives birth enjoys the presumption of parental status. *McLaughlin v. Jones*, 2016 Ariz. App. LEXIS 256, 2016 WL 5929205 (Oct. 11, 2016). Judge Philip Espinosa wrote for the unanimous three-judge panel.

Kimberly and Suzan were legally married in California in October 2008, shortly before voters approved Proposition 8, which enshrined a different-sex only marriage definition in the state constitution. Shortly thereafter, however, the California Supreme Court ruled that same-sex marriages contracted before the passage of Prop 8 remained valid under California law. "The couple agreed to have a child through artificial insemination," wrote Judge Espinosa, "using an anonymous sperm donor selected from a sperm bank." Suzan's efforts to conceive this way were unsuccessful, but Kimberly became pregnant in 2010. Before their child was born, the women moved to Arizona, a state that did not then recognize their marriage or allow second-parent adoptions.

The women made a joint parenting agreement and executed mirror-image wills, declaring "they were to be equal parents of the child Kimberly was carrying," wrote the court. After their son was born in June 2011, Suzan was the stay-at-home mom while Kimberly resumed her work as a physician. The women's relationship deteriorated, however, and when their son was almost two years old, Kimberly moved out of their home, taking the child with her and cutting off his contact with Suzan.

In April 2013, Suzan filed a petition for dissolution of the marriage and a petition for a court order recognizing her parental status in various ways, most significantly decision-making and parenting time. The matter came before Superior Court Judge Lori Jones in Pima County, who decided to stay the proceedings while marriage equality litigation was pending. In January 2016, six months after the Supreme Court decided *Obergefell*, Kimberly moved to set the case for trial and Judge Jones ordered briefing concerning "the issue whether the case was a dissolution proceeding with or without children in view of the presumption of paternity under an Arizona statute, Section 25-814(A). In an April 7, 2016, ruling, Judge Jones found that it would violate Suzan's 14th Amendment rights not to afford her the same presumption of parenthood that a husband would enjoy. Thus, she ordered, the case should proceed as a "dissolution action with children."

Kimberly then moved for a declaratory judgment about whether she would be permitted to introduce evidence to rebut the presumption. On May 2, Judge Jones ruled that Kimberly would not be permitted to attempt to rebut the presumption that Suzan was a parent of their son. Jones found that there was nothing for Kimberly to rebut, adding that a "family presumption applies to same sex and opposite sex non-biological spouses married to a spouse who conceived a child during the marriage via artificial insemination." She relied on Section 25-501, a support statute which is applicable when a child is born as a result of donor insemination, finding that this "necessarily gives rise to parental rights in the non-biological spouse." Kimberly appealed this ruling.

On appeal, Kimberly argued that as the child's biological mother, "she is, by definition, the only parent and therefore the only person who has parental rights, which are fundamental rights," wrote Judge Espinosa, summarizing Kimberly's argument. She contended that Judge Jones erroneously construed

the paternity statute to encompass same-sex lesbian couples. Suzan, in response, argued that because of *Obergefell*, parentage statutes "must be applied and interpreted in a gender-neutral manner so that same-sex couples' fundamental marital rights are not restricted and they are afforded the same benefits of marriage as heterosexual couples and on the same terms," wrote Espinosa.

The Arizona statute defining "legal parents" includes "biological" or "adoptive" parents, and "does not include a person whose paternity has not been established pursuant to Section 25-812 [acknowledgment of paternity] or Section 25-814 [presumptions of paternity]." The court found that Section 25-814(A)(1) applies to the McLaughlin case, assuming one applies a gender-neutral interpretation of the statutory language. This provides that "a man is presumed to be the father of the child if

The court rejected Kimberly's argument that there was any reason to treat men and women differently after *Obergefell*.

1. He and the mother of the child were married at any time in the ten months immediately preceding the birth."

Judge Espinosa wrote, "Enacted well before the Supreme Court decided *Obergefell*, this statute was written with gender-specific language at a time when the marriage referred to in subsection (A)(1) could only be between a man and a woman." While accepting Kimberly's argument that Judge Jones should not have relied on the child support statute to determine Suzan's status, the court rejected Kimberly's argument that "it would be impossible and absurd to apply Section 25-841(A)(1) in a gender-neutral manner to give rise to presumption parenthood in Suzan. Indeed, *Obergefell* mandates that we do so," he continued, "and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application." Not to do that would deprive same-sex married couples of the same "terms and conditions of marriage" as are enjoyed by different-sex couples, which would be a clear violation of the Supreme Court's mandate of equal treatment in *Obergefell*.

"The word 'paternity' therefore signifies more than biologically established paternity," wrote Espinosa. "It encompasses the notion of parenthood, including parenthood voluntarily established without regard to biology." He pointed out that the long-established purpose of paternity statutes is "to provide financial support for the child of the natural parent." The marital presumption "is intended to assure that two parents will be required to provide support for a child born during the marriage" and serves the additional purpose "or preserving the family unit." For these propositions, the court relied on the Massachusetts Supreme Judicial Court's ruling in *Partanen v. Gallagher* (see above), decided just days earlier. The court rejected Kimberly's argument that there was any reason to treat men and women differently in this regard, after *Obergefell*.

As to Kimberly's request to be able to rebut the presumption of parenthood, the court held that it "need not decide how the rebuttal provision in Section 25-814(C) applies in a same-sex marriage because we determine Kimberly is estopped from rebutting the presumption. Equitable estoppel applies when a party engages in acts inconsistent with a position later adopted and the other party justifiably relies on those acts, resulting in an injury."

In this case, it was uncontested that the women were lawfully married when Kimberly became pregnant as a result of a donor insemination process upon which both women agreed. It is not disputed that their son was born during the marriage. It is not disputed that Suzan was the stay-at-home mom and cared for their son until Kimberly "left the home with him." Furthermore, the women had made a written parenting agreement providing that they were to be equal parents of the child. In that agreement, Kimberly agreed to "waive any constitutional, federal or state law that provide her with a greater right to custody and visitation than that enjoyed by Suzan." They even provided in the agreement that if their relationship broke down, Suzan would continue to enjoy parenting rights, and that if second-parent adoption became available in the jurisdiction where they lived, Suzan would adopt the child. Since their partnership broke up before *Obergefell* was decided, however, Suzan never had an opportunity to adopt their son.

The court concluded that based on these uncontested facts, the doctrine of equitable estoppel applied, barring Kimberly from attempting to rebut the presumption that Suzan is a parent to their son. "Suzan is the only parent other than Kimberly," wrote Judge Espinosa, "and having two parents to love and support [their son] is in his best interest. Under these circumstances, Kimberly is estopped from rebutting the presumption of parenthood pursuant to Section 25-814(C)."

Consequently, Kimberly's appeal was denied, and the case will continue before Judge Jones as a dissolution with a child. It will be up to Judge Jones in the first instance to determine whether it is in the best interest of the child to order Kimberly to allow Suzan to have a continuing relationship, including parenting time and decision-making authority.

Kimberly is represented by Keith Berkshire and Megan Lankford, Phoenix. Suzan is represented by Campbell Law Group, Phoenix, and attorneys from the National Center for Lesbian Rights, San Francisco. Appointed counsel for the child included law students and supervising faculty from various clinical programs, including the Family and Juvenile Law Certificate Program in Tucson, and Child and Family Law Clinic in Tucson, the Community Law Group, Tucson, and the Child and Family Law Clinic at the University of Arizona Rogers College of Law. ■

Texas Appeals Court Upholds Parental Rights for Sperm Donor to Lesbian Mom

The 2nd District Court of Appeals of Texas (Fort Worth) ruled on October 27 that a man who donated sperm to his lesbian friend so that she could have a child could seek parental rights, including visitation, because they did not use a doctor to perform the insemination and so the man was not a "donor" within the meaning of a statute that cuts off parental rights for such a "donor." *In the Interest of P.S., a Child*, 2016 Tex. App. LEXIS 11657. The mother, appearing *pro se*, was appealing an order by Archer County Judge Jack A. McGaughey that established a parent-child relationship between M.S. (the sperm donor) and the child, Pamela. The court described the method of Pamela's conception as "nonmedical artificial insemination."

M.S. and the lesbian mother were friends who had previously lived together but did not have a sexual relationship. Mother asked M.S. if he would provide sperm. M.S. testified that he "wanted children but did not think he would ever marry, so he agreed to Mother's request," wrote Court of Appeals Judge Sue Walker. "Mother provided sterile cups and syringes to Father. Father collected his sperm and gave it to Mother. Mother artificially inseminated herself using Father's sperm and successfully conceived a child." M.S. participated during the pregnancy by attending several of Mother's doctor appointments and the sonogram appointment at which they learned that the child would be a girl. M.S. was also at the hospital when Pamela was born on August 18, 2014, and signed an acknowledgment of paternity and the birth certificate, on which Pamela was given M.S.'s last name. During the first two months of her life, the child saw M.S. "five to seven times," but after mother "lost her phone" in mid-October, 2014, M.S. lost contact with her. Around that time, Mother married her girlfriend. (The court does not explain how this could happen, since same-sex marriage did not become legal in Texas until a few days after *Obergefell* was decided on June 26, 2015, when the 5th Circuit subsequently affirmed a federal district court marriage equality ruling. Perhaps they went out of state? Or perhaps it was a ceremonial but non-legal marriage?) When M.S. tried to visit at Mother's house, "no one would open the door." During September 2014, "Mother rescinded the acknowledgment of paternity that Father had signed" and mailed him a form requesting that he relinquish his parental rights. M.S. discarded the form and asked for assistance from the Office of the Attorney General "because he wanted to be officially named as Pamela's father so that he would have the right to see her."

The Attorney General's Office filed a petition to establish a parent-child relationship between M.S. and Pamela. Mother answered in opposition, and her wife intervene as a co-defendant. Mother's wife intended, with Mother's approval, to adopt Pamela, which would be impossible if M.S. were deemed a legal parent of the child, since Texas law does not contemplate a child having three parents simultaneously. At trial, Mother and M.S. both testified that they had not made a written contract recording their agreement. M.S. testified that they had verbally agreed that he would be involved in Pamela's life "as her father" and that he would care for her "on his days off." Mother testified, to the contrary, that they agreed that M.S. would donate sperm only, and that they would continue to see each other as "friends." Mother's wife testified, asking the court to find that M.S. was a "sperm donor" under Family Code section 160.702 who would not be considered a parent of the child, so that she could adopt Pamela in a second-parent adoption, as Pamela's Mother desired.

Judge McGaughey found that because a doctor had not performed the insemination, the statutory definition of "donor" under the Family Code was not satisfied. Since nobody denied that M.S.'s sperm was used to conceive the child, he was deemed to be the biological father for legal purposes. McGaughey appointed Father and Mother as joint managing conservators, ordered M.S. to pay child support, set a "modified possession and access scheduled for November and December 2015, and ordered a standard visitation schedule beginning January 1, 2016." Mother then appealed.

The court of appeals found that Judge McGaughey did not abuse his discretion by establishing a parent-child relationship between M.S. and Pamela. Texas Family Code Sec. 106.102(6) defines "donor" as "an individual who provides sperm to a licensed physician to be used for assisted reproduction," and Sec. 160.702 provides that a "donor" (as the term is defined in the Family Code) is not a parent of a child conceived by means of assisted reproduction. Thus, the word donor has a *de facto* meaning – M.S. clearly donated his sperm for Mother to use to inseminate herself – and a legal meaning – a man who "provides sperm" to a doctor for the purpose of "assisted reproduction." "Because Father is not a 'donor,' section 160.702 does not prohibit Father from being named as a parent," wrote Judge Walker. "Accordingly, based on the evidence presented, we hold that the trial court did not abuse its discretion by establishing a parent-child relationship between Father and Pamela."

The court also rejected various technical points raised on appeal by Mother, noting that she had failed to brief her arguments on some of them. "Although we liberally construe pro se briefs," wrote Walker, "litigants who represented themselves are held to the same standards as litigants represented by counsel. To hold otherwise would give pro se litigants an unfair advantage over litigants with an attorney." Texas court rules provide that every point raised on appeal must be briefed with citation to relevant authority. Thus, the points that were not addressed in the brief were abandoned. ■

Federal Judge Denies Summary Judgment, Orders Trial, Where Officers Failed to Protect Transgender Inmate

Proceeding by pseudonym, transgender inmate Jane Doe is granted a trial on whether officers were deliberately indifferent to her safety when they assigned her a cellmate with a known history of sexual assault in the jail, in *Doe v. District of Columbia*, 2016 U.S. Dist. LEXIS 143892, 2016 WL 6088262 (D.D.C., October 18, 2016). In an exhaustive application of qualified immunity, U.S. District Judge Randolph D. Moss finds jury questions on the ignoring of obvious warning signs in the placement of a young feminine-appearing transgender inmate (who had developed breasts) in the same cell with her male rapist, contrary to both policy and common sense. Armed with counsel, deposition testimony, video evidence, and expert witnesses, Doe soundly defeated the officers' argument for qualified immunity – because a reasonable jury could find that they were deliberately indifferent to Doe's safety, and the law was clearly established at the time – under *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Doe was assigned "house alone" status in the jail (in the log book and posted on the bulletin board at the officer "bubble"), but the officers did not check the sexual predator history of assailant Leonard Johnson before locking the two together, which resulted in Johnson's raping Doe twice. Doe was Johnson's second victim in eight months. Medical evidence corroborated anal rape.

Protocols (not followed by the officers) required checking predator history and obtaining supervisory approval before cell assignment changes. Protocols also required visual observation of cells every thirty minutes and documentation of same in the security log. Neither occurred, per the log and videotape of the unit. Doe's expert opined that the officers' failures did not satisfy D.C. Jail policies and "established industry standards." Both defendant officers were experienced and had been trained about sexual assault prevention per the Prison Rape Elimination Act, both of which facts worked against them when it came to summary judgment.

Judge Moss applied *Farmer v. Brennan*, 511 U.S. 825 (1994), finding "significant factual parallels" between inmates Dee Farmer and Jane Doe, including both inmates' requesting to be housed with the male population, despite their "expressive gender." He wrote that, under *Farmer*, it does not matter "whether a prisoner faces an excessive risk of attack for reasons personal to [her] or because all prisoners in [her] situation face such a risk." 511 U.S. at 843.

Judge Moss found that "Doe has produced evidence sufficient for a reasonable jury to find that [the officers] put her at substantial risk of rape when they left her unsupervised overnight with Johnson."

Judge Moss found that "Doe has produced evidence sufficient for a reasonable jury to find that [the officers] put her at substantial risk of rape when they left her unsupervised overnight with Johnson," despite her "house alone" status. Doe was "unusually vulnerable" to rape because of her age, size, and transgender presentation. Moreover, Doe showed that transgender women "as a class faced a heightened risk of prison rape" – a risk also increased by Johnson's history and the failure to perform security checks.

The officers' claim that they did not actually appreciate the risk (the "subjective" element of *Farmer*) is overcome by the circumstantial evidence presented, from which a jury could conclude that they did know and disregard the risk, in part because it was "obvious." Judge Moss wrote: "This inquiry, like any state-of-mind determination, is ultimately fact-bound and dependent on both witness credibility and those inferences that a jury can reasonably draw from the relevant circumstances. It is therefore ill-suited for summary judgment in all but the clearest of cases."

Judge Moss warned: "Prison officials may not simply bury their head in the sand and thereby skirt liability," citing *Makdessi v. Fields*, 789 F.3d, 126, 129 (4th Cir. 2015). He found the defendant officers presented "no analysis" supporting their claim that they acted reasonably, particularly given alternatives to their unmonitored placement of Johnson with Doe.

Finally, Judge Moss found the constitutional right at issue to be clearly established by *Farmer* and its progeny. "In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to [the rapes], and no reasonable prison guard could possibly have believed otherwise."

What a difference competent counsel makes! Doe is represented by Jeffrey Louis Light, Caleb Medearis, and Tamara Louise Miller of Washington, DC. – *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.

Italian Supreme Court Rules on Public Policy Regarding Same-Sex Families

On September 30, 2016 the Italian Supreme Court of Cassation (Corte di Cassazione) released a pivotal ruling regarding same-sex couples who decide to access medically assisted procreation (MAP) procedures abroad and subsequently seek recognition of their children's birth certificates in Italy (No. 19599/2016, *X & Y v. Ministero dell'Interno*). Its importance lies in the circumstance that it is the first time for an Italian court to set such a comprehensive and pioneering analysis of the concept of public policy (ordre public, ordine pubblico) in private international law.

The case brought before the Court arose from the request, introduced by a lesbian couple to the City of Turin, to obtain the recognition of their child's birth certificate issued by the Spanish registry office of his place of birth. The couple – an Italian citizen and a Spanish one – married in 2009 in Barcelona, Spain (where same-sex marriage is legal pursuant to Law No. 13/2005 of July 1, 2005, Amending the Civil Code Regarding the Right to Marry), and in 2011 conceived a child whom Spanish law qualified as both women's child, as mentioned in his birth certificate. In this regard, Sec. 7(3) of Law No. 14/2006 of May 26, 2006 on the Techniques of Assisted Human Reproduction provides that the wife of the woman who gave birth to a child may consent to the establishment of the latter's parenthood. In the case at stake, the Spanish mother carried to term as a result of an egg furnished by her wife and the sperm of an anonymous donor.

In contrast with this background, Italian law not only does not recognize same-sex marriage – even if the country has very recently enacted a law on same-sex civil unions, the Law No. 76 of May 20, 2016, reported [2016] LGBT LAW NOTES 226 – but it also limits access to MAP in Italy to couples of the opposite sex (Art. 5 of Law No. 40 of Feb. 19, 2004 on Medically Assisted Procreation) and only recently allowed heterologous MAP (Cons. Ct., judgm. No. 162 of June 10, 2014).

Moreover, the general rule in Italy is that the woman who gave birth to the child is "assumed to be the mother" (mater semper certa: Art. 269(3) of the Civil Code). Since this rule applies in all respects, under Italian law the Spanish woman is the only mother to the child and the latter is prevented from legally acquiring the citizenship of his Italian mother, with whom he is nevertheless biologically linked.

The reasons underlying the two women's request to the City of Turin are therefore obvious: the recognition of the filiation relationship and the registration of the Spanish birth certificate were essential to their family because after separation they intended to share custody of the child and did not want Italian law to impair the Italian mother's rights and obligations towards him.

Finding that the principles expressed in Italian laws were of public policy, at first the City of Turin denied the request, claiming that the certificate, as long as it indicated both women as mothers, violated Italian public policy. The women subsequently filed an appeal.

While the Tribunal of Turin confirmed the City's conclusions and therefore rejected the petitioners' request (*X & Y v. Comune di Torino*, Decree Oct. 21, 2013), the Court of Appeals reversed, ordering to proceed with the registration of the Spanish certificate (*X & Y v. Comune di Torino*, Decree Oct. 29, 2014).

After noticing that Italian private international law provisions establish filiation according to the national law of the child at the time of birth (Sec. 33 of Law No. 218 of May 30, 1995, Reforming the Italian System of Private International Law) and that all foreign judgments and acts regarding family relationships must be automatically recognized in Italy provided that they are rendered by the courts of the State of citizenship of the person concerned (Sec. 65 of same Law), the Court of Appeals found that the child was necessarily both women's child and that, as a consequence of the fact that both Spanish and Italian law follow the jure sanguinis principle, he had acquired both Spanish and the Italian citizenship.

Furthermore, regarding the public policy exception the Court of Appeals excluded that public policy could bar the registration of the birth certificate, as non-recognition would impair the child's best interest, in particular his fundamental right to personal identity, including filiation and citizenship. Notably, here the Court quotes the case-law of the European Court of Human Rights concerning surrogacy, even if the mother who gave birth to the child was not a surrogate in any sense (see the rulings of June 26, 2014, No. 65192/11, *Mennesson v. France*, and No. 65941/11, *Labassee v. France*, Eur. Ct. Hum. Rgts.; in this regard see Esther Erlings, *To Recognize of Not to Recognize–That is the Question*, 17 EUR. J.L. REF. 257, 268 (2015)).

In its ruling the Supreme Court affirmed the judgment of the Court of Appeals and examined in depth the concept of public policy in Italian private international law.

First, the Court noticed that in contrast with the past, today's public policy cannot be severed from the system of protection of fundamental rights embedded in the Italian Constitution and in supranational laws such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Second, the Court warned that not all conflicts of laws can be regarded as relevant and qualified as of public policy, as one should look not at the differences between potentially competing legislation but rather at "the effects" that the foreign legislation that is deemed applicable has – and not simply may have – on the Italian legal order. Public policy enters into play when there is – the Supreme Court says – "a potential aggression to the essential values of the Italian legal order." It is here that public policy definitely plays a role, as the bunch of "fundamental principles that bind the legislator." In

other words, where the Italian legislator has full discretion in whether and how to legislate in a certain field, public policy can neither operate nor bar the application of foreign law.

Now, the Italian Constitution says nothing concerning the establishment of motherhood or parenthood, or the regulation of MAPP. As a consequence, in all these fields the foreign laws which are applicable as a result of Italian private international law do not automatically conflict with public policy and can therefore receive full application in Italy. This interpretation is identical to one recently adopted by the Austrian Constitutional Court in its decisions concerning foreign surrogacy, which focused on the legislator's constitutional obligations to define public policy (Austrian Const. Ct., judgm. B 99/12 and B 100/12, Oct. 11, 2012; B 13/11, Dec. 14, 2011).

Another principle that is embedded in public policy – when a child is involved, as in the present case – is the best interest of the child. It is such interest that according to the Supreme Court commands "the cross-border continuity of the child's personal and parental status," which is why in the case at issue both mothers were granted parenthood and the birth certificate received full recognition in Italy.

The consequences of these statements are very important for the status of same-sex families in the Italian legal setting, opening the door to the recognition of family status acquired in foreign countries: from now on, all same-sex parents and families formed abroad can receive the proper recognition under Italian law. In fact "family" – the Supreme Court concluded – "is more and more conceived as the community of affection, centered on the concrete relationships that are created among its members: the law has the duty to protect these relationships and to balance the conflicting interests existing herein, having always as a reference the best interest of the child." – *Matteo M. Winkler*

Matteo M. Winkler is an Assistant Professor in the Tax & Law Department at HEC Paris.

Massachusetts Appeals Court Upholds Gay Man's Murder Conviction

The Appeals Court of Massachusetts has upheld a jury's second-degree conviction of John Lacoy, in *Commonwealth v. Lacoy*, 2016 Mass App. LEXIS 143, 2016 WL 5818610 (Mass. App. Ct., Oct. 6, 2016). Lacoy, who identifies as gay, was found guilty of murder for stabbing his non-gay friend Casey Taylor in the heart with a knife. On appeal, Lacoy argued that two of the prosecutor's peremptory challenges (including a challenge to a gay prospective juror) were improper, that his defense counsel at trial was ineffective, that his prior bad acts of sexual assault should not have been admitted into evidence, and that the judge erred by declining to instruct the jury on the "sudden combat theory" of involuntary manslaughter.

Lacoy and Taylor met in a homeless shelter and were both alcoholics. The two were often seen drinking alcohol together after Lacoy received his monthly social security check, but, "when the alcohol was gone, Taylor left." Lacoy stated he had sex with Taylor, sometimes consensually, when Taylor had "blacked out." On the day of the murder, the two argued and Lacoy stated he thought Taylor "wanted [him] for [his] money." During an altercation Lacoy stabbed Taylor and dragged him down stairs and underneath an outside latticework enclosure, where Taylor died of the single stab wound to the heart. Lacoy checked into Beth Israel Hospital, professing to be suicidal, as he "need[ed] a place to go and want[ed] to hide." Taylor's body was found nine days later. While in the hospital, Lacoy sent an email stating "I heard they found Taylo[r's] [corpse]. I'm glad. Now he will not [leech] off me anymore." He sent the email six days before Taylor's body was discovered by the police.

Lacoy appealed the jury's verdict. Associate Justice Mary T. Sullivan wrote the Appeals Court's decision upholding the conviction.

Lacoy argued that the prosecutor's peremptory challenge of an African American woman and a gay African American man were "invidious discrimination." Lacoy, a Caucasian man, argued that the prosecutor had already exercised 3 of 4 peremptory challenges directed to African American jurors, and that these additional challenges were racially-motivated. Judge Sullivan found Lacoy failed to prove that the prosecutor's alleged motivation in eliminating the woman (that she was an employee of Beth Israel Hospital) and the gay man (who was discovered to have a much more significant criminal history than he initially reported) were invidious discrimination. She wrote that they did not amount to a "substantial risk of a miscarriage of justice" because both eliminations were for specific reasons unrelated to race or to the male juror's sexuality.

Lacoy further argued he had been denied effective assistance of counsel because of his attorney's "'weird and bigoted dwelling on defendant's homosexuality' in his opening statement and closing argument." During opening argument, defense counsel stated: "The evidence will show and you should prepare yourselves, will be a descent into obscure obsolescence of the abnormal psychological variety. This is a case of homosexual behavior and alcoholism . . . Anyway, for whatever disconcerting and sexual behavior you will hear – and it is lewd, it is sometimes open and lascivious in public. It is disgusting, obscene, you know, beyond reason even of a heterosexual act when in public." In closing, defense counsel stated: "And we've heard, well, every part of the disparaging aspect of it all that we could see. Trying to make Mr. Lacoy a demon. Loathsome, diabolical, malevolent, horrible, horrible, evil. It has nothing to do with the elements of homicide. Not all. They know it. Shoved it into your face anyway. Please, don't fall for that."

Judge Sullivan ruled that here, when the claim was based on "a tactical or strategic decision" made by defense counsel, that Lacoy's burden was to prove that the decision was "manifestly unreasonable when made," and that the result of the trial might have been

different had the error not been made. Here, she found that "faced with the likelihood that the relationship between the two men, the sexual assaults, and the abandonment of the dying Taylor would all come into evidence, defense counsel made a tactical decision to try and deflate those arguments from the beginning, and again at the end, with his admonition not to 'fall for that.'" Judge Sullivan found that even if the "strategic judgment regarding the manner of presentation was manifestly unreasonable when made, the evidence was "simply overwhelming . . . and we do not have a serious doubt as to whether the result of the trial would have been different if the offending statements had not been made."

With respect to admission of evidence of prior bad acts – that Lacoy had committed prior sexual assaults – Judge Sullivan agreed with the trial court that the evidence was "directly relevant to the Commonwealth's theory . . . that defendant was angry at Taylor for 'leeching' off him and for refusing to engage in consensual sex with him, and to rebut the defenses of self-defense and accident," and therefore the evidence was permissibly presented to the jury.

Finally, with respect to Lacoy's argument that the judge should have instructed the jury on self-defense, accident, and manslaughter homicide by reason of "provocation and use of excessive force in self-defense," Judge Sullivan described "sudden combat" as follows: "When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood." Here, Judge Sullivan ruled that Lacoy's testimony that Taylor "attacked him and 'fell' into the knife by 'accident' was inconsistent with a theory of sudden combat," and that therefore failure to give the instructions was not in error. Accordingly, as Judge Sullivan found no error made by the trial court, the second-degree murder judgment was upheld. – *Bryan Johnson-Xenitelis*

Idaho Sex Offender Treatment Blues Revisited: Federal Judges Grant Summary Judgment against Bisexual and Heterosexual Inmates

A year ago, *Law Notes* discussed two *pro se* cases involving Idaho's sex offender treatment program. *See* "Two Federal Decisions Reveal Heterosexism in Idaho's Pre-Parole Prisoner 'Rehabilitation'" (November 2015 at pages 490-91). Bisexual prisoner Oswald Reyna alleged sexual orientation discrimination and retaliation for complaining, and Chief U.S. Magistrate Judge Ronald E. Bush granted partial summary judgment against him, allowing him to proceed to discovery against one supervisor on claims the supervisor retaliated against him by making false "sexually acting out" charges and by extending his parole "pathway." Heterosexual inmate Elias Custodio alleged that the same officials forced him to "engage in homosexual role playing" in violation of his First Amendment rights. Chief U.S. District Judge B. Lynn Winmill allowed Custodio to proceed against one program official (against whom he had exhausted administrative remedies under the Prison Litigation Reform Act and who was personally involved in the claimed civil rights violations); the judge also added the corrections executive as a defendant in his official capacity for possible injunctive relief.

Reyna is now on parole, and Custodio (doing life) was only in the program for five weeks, so their cases against programmatic officials are limited to damages. In separate decisions on the same day, Judges Bush and Winmill granted summary judgment against the inmates on their remaining claims, and Judge Winmill found no basis for injunctive relief.

In *Reyna v. Bearden*, 2016 U.S. Dist. LEXIS 136349 (D. Idaho, September 29, 2016), Judge Bush presents a month-by-month account of Reyna's life in the program. There was evidence of both supervisory retaliation ("exaggerated, misstated, and manufactured information") and arguably legitimate penological actions (Reyna's unsuitability for earlier parole because of "sexual activities," including violating "a cardinal rule by making an inappropriate sexual remark to [another inmate]") – what might be described as a civil rights "mixed motive" case, if it did not involve a prisoner.

Judge Bush cited the classic elements of First Amendment prisoners' claims of retaliation: adverse action; protected conduct; chilling of rights; and lack of legitimate correctional goal – citing *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *Rizzo v. Dawson*, 778 F.2d 527, 532 n.4 (9th Cir. 1985). He found the controlling issue to be Reyna's failure to advance a triple negative (cannot + unless + not) on the last element, writing: "prison administrators cannot be held liable unless their retaliatory action did not advance legitimate goals of the correctional institution," citing *Vance v. Barrett*, 345 F.3d 1083, 1093 (9th Cir. 2003). "Even if Defendant acted in retaliation for something Plaintiff had said—such as Plaintiff's reporting to the Warden that he believed Defendant was harassing him – [the Defendant's] acts advanced a legitimate penological goal": managing the sex offender program.

Reading the cases, one finds that they do not quite support these propositions. In *Rizzo*, the retaliation claim was remanded for further proceedings. 778 F.2d at 532. In *Vance*, Reagan appointee Diarmuid O'Scannlain wrote an opinion *granting summary judgment for the inmate plaintiffs* in a retaliation claim. 345 F.3d at 1093-4. In *Rhodes*, Judge O'Scannlain again reversed a dismissal of a retaliation claim, specifically invoking Heller's original "Catch-22" – the pilot who objects to insanity of future bombing raids is not too insane to fly – and rejecting the notion that an inmate who pursued a retaliation claim was not chilled in exercise of his First Amendment rights. *See* 408 F.3d at 570.

Judge Bush declined to consider the supervisor's admissions revealed during discovery, writing: "because Plaintiff had no knowledge of Defendant's comments made in a private staff meeting until he learned of these facts through discovery many months later, he cannot meet the element that his exercise of a constitutional right was chilled by Defendant's words to other clinicians in the meeting." He cites no authority for the proposition that evidence produced in discovery cannot be used to show retaliation unless the plaintiff already knew about it when he filed the case. *Rhodes* reaffirms that the test is objective ("person of ordinary firmness" – 408 F.3d at 568), not what Reyna personally knew either before or when he filed his complaint.

Judge Bush also ruled against Reyna on Eighth Amendment claims, holding that excessive interrogation of Reyna about sexual activity and "grooming" was not a viable claim. He treat the claim as more than verbal abuse, calling it "harassment coupled with conduct" – *compare Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) – since it involved allegations of "calculated harassment" to exploit Reyna's "mental health history of depression, poor coping skills, and anger management issues." Nevertheless, Judge Bush found no binding authority in the Supreme Court or Ninth Circuit to defeat qualified immunity as to violation of clearly established law on these facts, citing *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015); and *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

Judge Bush wrote extensively in a supposed LGBT discrimination case without mentioning the Equal Protection Clause. He noted, as he did a year ago, when he suggested "early settlement," that Idaho was still "reevaluating" its sex offender program and that it had "discontinued all of its so-called 'shame-based' therapeutic community rehabilitative programs." Obviously, Idaho did not heed the suggestion.

In *Custodio v. Idaho State Bd. of Corr.*, 2016 U.S. Dist. LEXIS 136346, 2016 WL 5661984 (September 29, 2016), Judge Winmill described the sex offender treatment model at length, including its use of abusive "in-your-face" confrontation and "image breakers" in role playing that Custodio claimed "promoted homosexuality to the point of violating his constitutional rights."

Custodio claims he was removed from the program for insisting he was not gay. This may have been actionable, but Judge Winmill finds that Custodio was removed for uttering disrespectful and homophobic slurs ("punk," "queer," and the like), including condemning another inmate (who was raped by a cellmate) for "participating" in homosexual activity. He found that promoting tolerance was a legitimate penological goal under *Turner v. Safley*, 482 U.S. 78, 89 (1987), and that the sex offender treatment program was not a public forum where viewpoint discrimination is prohibited.

Judge Winmill then considered whether Custodio's right to Equal Protection was violated because he "refused to adopt the position that homosexuality is an acceptable alternative lifestyle." He found that, while Custodio was entitled to equal protection as to what he personally considered an "acceptable life style," his claim failed the rational basis test for unprotected classes because he could not point to other inmates in the program who were permitted to describe lifestyles in "crude or derogatory" language without punishment, citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). There is no discussion of heterosexuals receiving heightened scrutiny based on sexual orientation, nor is this writer aware of any prison decision applying reverse discrimination notions to heterosexuals.

As stated, Idaho has abandoned this sex offender treatment program (which Judge Winmill noted had made inmates more likely to reoffend). He therefore denied injunctive relief against the department head.

Neither case addresses the heterosexist assumptions of the LGBT-phobic operation of the Idaho "rehabilitation" system under challenge. Yet, it both suppressed normal LGBT expression and forced straight inmates to engage in a clumsy mockery of gay stereotypes in role playing as a condition of parole. – *William J. Rold*

Nevada U.S. District Court Holds That Title VII Sex Discrimination Includes Gender-Identity Discrimination

As suggested by U.S. District Judge Jennifer A. Dorsey's opinion in *Roberts v. Clark County School District*, 2016 U.S. Dist. LEXIS 138329, 2016 WL 5843046 (D. Nev. Oct. 4, 2016), the defendants have much to learn about transgender individuals, including that being transgender is not primarily related to either sexual orientation or biological sex.

Judge Dorsey granted partial summary judgment to Bradley Roberts, a transgender male police officer, for his Title VII and state law gender-identity discrimination claims against the Clark County School District (CCSD). The CCSD banned Roberts, a transgender school police officer, from using either men's or women's bathrooms, and forced him to use gender-neutral or single occupancy bathrooms. Judge Dorsey did not make any determinations regarding Roberts's retaliation or hostile work environment claims, and ordered the parties to hold a mandatory settlement conference.

Bradley Roberts, formerly known as Brandilyn Netz, was initially hired by the CCSD in 1992 as a campus monitor. After graduating from the Nevada Law Enforcement Academy in 1994, he was hired again by the CCSD as a police officer, and held his position without any incident for seventeen years.

In 2011, Roberts began his transition into a male by dressing, grooming, and identifying himself as such. After other officers complained to Roberts' commanding officers, Sgt. Anthony Jones and Lt. Young, that a woman was using the men's bathroom, the commanders told Roberts to use gender-neutral bathrooms instead. In response, Roberts sent Jones and Young a letter stating that he was changing his name to Bradley and would prefer to be referred to with male pronouns. This led to a second and third meeting after which Captain York and Lt. Young told Roberts that he could informally use a man's name for the time being, but office records would use his female name until he obtained a court order and submitted a name-change packet to human resources. Furthermore, Roberts was banned from both men's and women's bathrooms, and was confined to gender-neutral or single occupancy bathrooms until he had a documented sex change. This was particularly troubling to read in Judge Dorsey's opinion, as it reflects the CCSD's misconception that all transgender individuals opt for sex reassignment surgery as opposed to other less costly or invasive options such as hormone therapy. At no point in the facts did Roberts express a plan to undergo any form of medical treatment.

In December 2011, Robert's name-change petition was granted and he immediately updated his driver's license and submitted his name-change packet to human resources. His records were never updated because in January 2012 he received a new insurance card that listed his gender as female. Roberts then filed his first administrative charge with the Nevada Equal Rights Commission, alleging discrimination as evidenced by the bathroom ban. However, the charge was dropped later that year because the CCSD issued a new bathroom policy no longer singling out Roberts to use gender-neutral bathrooms. Even so, by March 2012, Robert's gender had yet to be corrected in the office's records. Thus, he filed a second administrative charge of sex discrimination, retaliation, and hostile work environment.

Both Roberts and the CCSD moved for summary judgment regarding the Title VII gender-identity discrimination claim; Nevada law already recognizes this type of discrimination. The CCSD argued that Title VII's prohibition against sex discrimination should be limited to biological sex and not gender; e.g., when a woman is treated differently because she is a woman, and not when a woman is treated differently for acting less "feminine." However, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), did away with that distinction between sex and gender discrimination. Judge Dorsey also dismissed the defendant's interpretation in light of overwhelming 9th Circuit precedent regarding Title VII as prohibiting sex stereotyping and gender-identity discrimination within "sex discrimination." *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (9th Cir. 2009). In *Kastl*, the 9th Circuit held that it is unlawful to discriminate against a transgender person because he or she does not behave in accordance with an employer's expectations for men or women.

Here, Judge Dorsey found that summary judgment for Robert's discrimination claim should be granted on either of two grounds: through direct evidence of discriminatory intent, or through the *McDonnell Douglas* burden-shifting framework. The CCSD evinced direct discriminatory intent by banning Roberts from the women's bathroom because he no longer behaved as a woman, and by banning Roberts from the men's bathroom because he was not a biological male.

Under the *McDonnell Douglas* framework, Roberts had to show four requirements: (1) he belonged to a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) the employer treated him differently than a similarly situated employee who does not belong to the same protected class. Judge Dorsey focused primarily on the third and fourth requirements, finding that the CCSD's bathroom ban was an adverse employment action because equal access to bathrooms is a significant and basic condition of employment, and the ban subjected Roberts to one set of conditions different than those set for other male and female workers.

With the four requirements met, the burden shifted onto the CCSD to show it had a legitimate nondiscriminatory reason for the bathroom ban. Because the evidence showed that the ban was imposed due to Roberts's gender and anatomy as opposed to ambiguous private rights of other CCSD employees or students, Judge Dorsey granted Roberts's motion for summary judgment. Once again, the CCSD's allegations evinced a lack of knowledge of transgender individuals and their place within the community. The CCSD's actions against Roberts exemplify the unfounded stereotype of transgender individuals being sexual deviants who must be protected against. Such individuals continue to face the same sort of discrimination that gay and lesbian communities have fought publicly against for decades. – *Timothy Ramos, NYLS '19*

CIVIL LITIGATION

U.S. SUPREME COURT – On October 28, the Supreme Court granted a petition for certiorari in *Esquivel-Quintana v. Lynch*, No. 16-54, decision below: 810 F.3d 1019 (6th Cir. 2016), to determine whether the 6th Circuit should have deferred to the Board of Immigration Appeals' determination that a non-citizen's conviction under a California law making it a crime for an adult to have sex with a person under eighteen when the adult is at least three years older than the minor is the kind of "aggravated felony" that makes the adult deportable. The 6th Circuit concluded that it owed *Chevron* deference (a strong bias to follow the agency's interpretation) to the BIA's conclusion that a conviction under the California statute qualified for this purpose. The federal immigration law specifies that "sexual abuse of a minor" is an "aggravated felony," but leaves it to the BIA to determine in any particular case whether a conviction under a state statutory rape law comes within this meaning. In a partial dissent, Circuit Judge Jeffrey Sutton had disagreed with the majority about *Chevron* deference, arguing that in construing a criminal statute, even in a civil context, the rule of lenity should apply rather than *Chevron* deference. The case is not a vehicle for the Court to consider the constitutionality of statutory rape laws, as it focuses primarily on administrative law issues, as to which the circuits are split. The underlying case involves a male adult who had sex with a female minor. Of course the potential application to same-sex conduct is obvious.

U.S. COURT OF APPEALS, 7TH CIRCUIT – Taking a narrow view of the circumstances under which an employee can pursue a same-sex harassment case under Title VII, the 7th Circuit affirmed summary judgment for the employer in *Lord v. High Voltage Software*, 2016 U.S. App. LEXIS 18035, 2016 WL 5795797 (Oct. 5, 2016). Plaintiff Ryan Lord argued that he should be able to maintain his case even though it didn't neatly fit into one of the categories recognized by the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). But even though some of the harassment he suffered was tinged with sexual comments and the like, the court found one basic flaw: "There is no evidence from which a trier of fact could infer that he was harassed *because of his sex*," wrote Judge Sykes. There was no suggestion that his male harasser was gay, and the harasser's "behavior was not so explicit or patently indicative of sexual arousal that a trier of fact could reasonably draw that conclusion." The court also found that Lord could point to "no facts suggesting that only male employees at High Voltage were the objects of this sort of teasing." Lord relied entirely on the "sexual overtones" of harassment, but, wrote Sykes, "The Supreme Court has said that's not enough," and courts have drawn a distinction between sexual horseplay and sexual harassment. Yet another case showing why it might be useful for Congress to consider a more general workplace sexual harassment statute that is not tied to proof of discrimination because of sex. Should non-discriminatory sexual harassment that makes the workplace intolerable for its victims give rise to actionable claims if the employer fails to remedy severe instances brought to its attention?

U.S. COURT OF APPEALS, 9TH CIRCUIT – The 9th Circuit voted to deny rehearing and rehearing *en banc* in *Welch v. Brown*, 2016 U.S. App. LEXIS 17867 (Oct. 3, 2016), part of the continuing battle by some determined psychotherapists and religious opponents of homosexuality to get California's law against the performance of conversion therapy on minors overturned. A panel of the court rejected their constitutional challenges to the statute in an opinion issued on August 23. Accompanying the announcement denying *en banc* review is a revised version of that opinion. In brief, the opinion rejects claims under the Free Exercise and Establishment Clauses of the 1st Amendment, rejecting an argument that the law "excessively entangled the State with religion," and pointing out that the law regulates conduct "only within the confines of the counselor-client relationship." Some clergy were arguing that the law put them in danger of prosecution of they preached against homosexuality or provided counseling to parishioners to discourage them from engaging in homosexual conduct. Stuff and nonsense! The court also rejected the argument that the law violates the Due Process rights of parents or potential patients for such therapy, pointing to its prior ruling in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.2014), which held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." Since the plaintiffs are represented by "cause" lawyers from the Pacific Justice Institute, expect a cert. petition to be filed.

CALIFORNIA – U.S. District Judge Jon S. Tigar granted a motion by the City of Novato and Police Lieutenant Oliver Collins to dismiss a claim by Sasha D'Amico, a female officer, and Jeffrey Ames, a gay male officer, that they were subjected to unlawful discrimination and harassment in violation of Title VII and the California Fair Employment and Housing Act. *Ames v. City of Novato*, 2016 U.S. Dist. LEXIS 142713, 2016 WL 6024587 (N.D. Cal., Oct. 14, 2016). Judge Tigar denied a motion by the defendants to sever the two officers' cases, but then granted the motion to dismiss. For one thing, both of them had named Lt. Collins, their supervisor, as an individual defendant, and individual supervisors are generally not personally liable under employment discrimination laws, so Tigar dismissed

the claims against Collins. While conceding that a supervisor might be held subject to injunctive relief, Tigar noted that the complaint also named the City of Novato as a defendant, and any injunctive relief against the City would also bind supervisors in its police department, so claims against Collins in his official capacity were duplicative of claims against the City. Focusing on the harassment and discrimination claims by Ames: He alleged that Collins subjected him to "bullying" and "escalating harassment," and that Collins had not subjected similarly situated heterosexual officers to such conduct. He also alleged that Collins retaliated against him after he complained internally by "writing him up," denying him training opportunities, writing "unwarranted emails" about Ames' work, denying him the use of his canine vehicle (Ames was a canine officer before being placed on administrative leave) and "ordering Ames to remove some of the service stripes from his uniform." Tigar wrote, "Plaintiff Ames has not pleaded sufficient facts to support a cognizable harassment claim under FEHA. Ames uses the word 'harass' throughout his complaint, but these conclusory allegations are not sufficient on their own to state a plausible claim for harassment. And almost all of Ames' factual allegations are related to Lieutenant Collins' performance of necessary personnel management duties, such as 'limiting promotion opportunities to plaintiff,' 'subjecting plaintiff to unwarranted disciplinary action,' 'writing up Plaintiff three times and denying him training opportunities,' 'denying plaintiff use of his canine vehicle,' and ordering the plaintiff to remove some of his uniform service stripes in accordance with the service stripe policy. Although these allegations support a discrimination claim under FEHA, they are insufficient as a matter of law to state a claim for harassment under FEHA." The only claim that Tigar found might stand if adequately pled was the "bullying" claim, but "Ames has provided no factual content to support this claim." Thus, the motion to dismiss Ames' harassment claim was granted.

FLORIDA – Soap opera time. Maurice McGriff and Terry Rigby were domestic partners. Rigby had taken out a life insurance policy from Prudential naming McGriff as sole beneficiary. On February 18, 2015, the men got into a fight. According to McGriff, he was defending himself when he caused Rigby to fall. Rigby hit his head and died from the injury. The State's Attorney investigated and decided not to prosecute McGriff, concluding that because there were no witnesses to the incident beyond McGriff, "the State would be unable to 'rebut all reasonable hypothesis of [McGriff's] innocence,'" according to U.S. District Judge Susan C. Bucklew, summarizing an exhibit in evidence in the lawsuit brought by McGriff seeking the insurance proceeds. *Stephenson v. Prudential Insurance Co*., 2016 U.S. Dist. LEXIS 144521 (M.D. Fla., Oct. 19, 2016). McGriff filed a claim after the prosecutor decided not to go forward. Among twists and turns in the case so far are that Rigby's sister, Teresa Harding, filed a competing claim for the proceeds on behalf of Rigby's Estate, citing a Florida statute, Sec. 732.802(3), which bars somebody who "unlawfully and intentionally" kills an insured from being able to collect the death benefits under the policy. Under the statute, if this contingency occurs the insurance proceeds should be distributed as if the beneficiary had predeceased the insured, in this case under Rigby's will. Harding, a potential beneficiary under Rigby's will, argued that the proceeds should go to her brother's estate. However, after her claim was filed, her authority to act on behalf of Rigby's estate was revoked and attorney Robert Pope was named as Curator of the Estate. In light of the competing claims, Prudential did not pay out to either claimant, leaving it to a court to sort out. So McGriff filed the lawsuit against in state court, Prudential removed it to federal court and impleaded all potential claimants, and McGriff died! Millette Stephenson, Personal Representative of McGriff's estate, was substituted as plaintiff. Prudential then filed an interpleader motion, seeking permission to deposit the proceeds with the court and be dismissed from the case. Stephenson filed a motion seeking to have Harding dismissed from the case, and a separate motion seeking Rule 11 sanctions against Harding, claiming that she should be sanctioned for opposing McGriff's claim to the benefits because she "has no competent, admissible evidence to support her claim that McGriff intentionally and unlawfully killed Rigby, such that Florida Statute Sec. 732.802(3) would preclude McGriff from receiving the life insurance proceeds." In effect, she said, Harding's claims are frivolous. Stephenson also argued that Harding had asserted her claim with Prudential "in bad faith and for the improper purpose of dragging this matter out in protracted legal proceedings and to cause McGriff financial distress." Ruling on September 8, Judge Bucklew refused to dismiss Harding as a plaintiff, pointing out that under the life insurance policy's beneficiary rules, she is a potential beneficiary if McGriff is disqualified due to his role in Rigby's death. See 2016 WL 4702429. Ruling on September 13, the judge rejected Stephenson's motion to dismiss Prudential's interpleader action, while granting Prudential's motion to let it pay the money into court and not be involved in the dispute over who gets the money, but she would not drop Prudential entirely from the case due to its claim for attorneys' fees and costs. Stephenson had argued that because McGriff was not prosecuted, there was no need for the interpleader action because his estate is entitled to the money. Judge Bucklew rejected this argument, observing that the prosecutor may have concluded it could not prove

murder beyond a reasonable doubt, but that the standard in this civil litigation would be "weight of the evidence." *See 2016 WL 4766346*. The court's October 19 opinion, cited at the beginning of this note, is solely directed to the Rule 11 motion against Harding, which is denied. "Upon review of the filings in this case," wrote Judge Bucklew, "the Court concludes that Rule 11 sanctions are not warranted. The Court concludes that Harding's argument that Florida Statute Sec. 732.802(3) applies and would preclude McGriff from receiving the life insurance proceeds is not a frivolous contention. Furthermore, the Court concludes that Harding is not pursuing this claim in bad faith or for an improper purpose." The court set a mediation to be held on October 14, and ordered Prudential to participate to resolve the fees and costs issue. If that issue is not settled, Prudential can file a motion seeking an award. Is this all clear? Stephenson is represented by Lisa A. Hoppe of St. Petersburg, Rigby's Estate by Robert Pope, the Curator *pro se*, Harding by Russell Kirk Boring of Anderson & Broderson, St. Pete Beach, and the insurance company by the firm of Sanchez-Medina, Gonzalez & Quesada, LLP, Coral Gables.

ILLINOIS – On October 20 the Illinois Supreme Court denied a petition for rehearing in *Blumenthal v. Brewer*, 2016 Ill. LEXIS 1236, denying rehearing of *Blumenthal v. Brewer*, 2016 IL 118781 (Aug. 18, 2016), issuing a short Order stating that the petition was based in large part on a paragraph in the version of the court's decision that appeared in a draft that was "inadvertently" transmitted by the Reporter of Decisions to the Clerk's Office and released prematurely. The paragraph was subsequently removed and a final version of the opinion published. "Because the paragraph at issue was never part of the court's opinion," said the Order, "it cannot serve as the basis for granting Brewer rehearing," and that portion of her petition was stricken. Focusing solely on the parts of the petition directed to the final published version of the court's opinion, the court denied rehearing, over the dissent of Justice Theis joined by Justice Burke. The dissenters contend that the court should have recognized the distinction between same-sex partners who cohabited prior to Illinois' adoption of civil unions and, subsequently, same-sex marriages, and should have treated them differently from the opposite-sex couples who had sought to assert property claims based on their relationship – claims denied in *Hewitt v. Hewitt*, 7 Ill. 2d 49 (1997), which the court reaffirmed in *Blumenthal*. In light of the U.S. Supreme Court's holding in *Obergefell v. Hodges* that same-sex couples were entitled to marry, and that sexual cohabitation of same-sex couples could not be criminalized in light of *Lawrence v. Texas*, both decisions long post-dating *Hewitt*, the Illinois court should have considered that the policy reasons behind *Hewitt* (to avoid validating fornication and unmarried cohabitation among couples who had a right to marry) would not justify applying *Hewitt* to same-sex couples, who were then prohibited from marrying under state law. In *Hewitt* the Illinois Supreme Court had refused to follow the lead of other states, most notably California in *Marvin v. Marvin*, of allowing contractual claims by non-marital partners upon the breakup of relationships where they had been promised particular rights and treatment by their partners.

ILLINOIS – Not surprisingly, U.S. Magistrate Judge Jeffrey T. Gilbert has recommended that District Judge Jorge Alsonso deny a motion for a preliminary injunction filed by the plaintiffs in *Students and Parents for Privacy v. United States Department of Education*, 2016 WL 6134121 (N.D. Ill., Oct. 18, 2016). The plaintiffs are a group of parents and students who complain that the settlement of a Title IX case by the District 211 (Palatine) school district and the federal government – under which the district will allow transgender students to use restrooms consistent with their gender identity – will endanger the privacy rights of cisgender students using those facilities. They seek to have the settlement enjoined while they litigate the merits of the case. In a lengthy and detailed report, Judge Gilbert found that plaintiffs had failed to establish the elements necessary for preliminary relief. Although he did find that the validity of the "rule" announced by the federal government concerning restroom access by transgender students was subject to judicial review in the context of this actual controversy, the plaintiff had not shown a likelihood of success on the merits of their argument that Title IX's sex discrimination ban unambiguously excludes gender identity discrimination claims. Under current Supreme Court precedents, in the presence of ambiguity the federal court is supposed to defer to a reasonable interpretation of the statute and regulations by the agency. Since numerous federal courts, including some courts of appeals, have found that the term "because of sex" in civil rights statutes include gender identity claims, the agency's interpretation is likely to be deemed reasonable. Furthermore, the 7th Circuit has agreed to *en banc* review of its decision in *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), signaling the possibility that the circuit will issue an en banc ruling lining up with the interpretive authority from several other circuits. Gilbert also rejected the plaintiffs' argument that the "rule" is illegitimate because it was not promulgated in compliance with the Administrative Procedure Act's rules for adopting regulations. He found that this rule is "interpretive" and so did not have to be promulgated under the notice-and-comment process. Further, he rejected the plaintiffs' privacy argument

outright, as not being supported by precedent because it was much too broadly stated. "No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are," wrote Gilbert, " or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort." Here the motion foundered on the specific arrangements approved in the settlement, including making single-stall facilities available for those who did not want to relieve themselves or undress in the presence of other students who they perceived, rights or wrongly, as being of the opposite sex. He also noted that the greatest fear signaled by plaintiffs, that a cisgender boy would claim to be trans in order to get into the girls' locker room, was just not covered by the settlement, which involved only three students (who are defense intervenors in this case). He also rejected plaintiffs' claim that their own rights under Title IX were violated by the creation of a hostile environment toward them in restrooms or locker rooms when transgender people are present. "The mere presence of transgender students in restrooms or locker rooms is not severe, pervasive, or objectively offensive conduct" of a type necessary to create a "hostile environment," he wrote, and the "risk of unwanted exposure" is mitigated by the arrangements permitted under the settlement agreement. Gilbert rejected that anticipated "emotional harm" to the plaintiffs was not sufficient to establish that the settlement needed to be enjoined on grounds of "irreparable harm" to the plaintiffs. He concluded that money damages would be sufficient to make plaintiffs whole if they eventually succeed on the merits of their lawsuit, which is doubtful. (Ironically, as the litigation against Ivy Tech is pending, the school has implemented a new transgender-inclusive policy that prohibits discrimination against transgender and gender-nonconforming students and faculty, even as the school continues to fight against the contention that Title VII's sex discrimination protects students and faculty from sexual orientation discrimination, according to an Oct. 21 report in the *Bloomington Herald-Times*.)

ILLINOIS – It is unusual for an individual employment discrimination case to go to verdict and result in a very large award of damages, but such is the case with *Smith v. Rosebud Farmstand*, 2016 WL 5912886 (N.D. Ill., Oct. 11, 2016), a same-sex and race harassment and discrimination case brought by Robert Smith in 2011. Smith worked as a butcher in the defendant grocery store's meat department from 2003 to 2008. He alleged that employees sexually harassed and discriminated against him on the basis of race throughout his employment, and that the company retaliated against him after he filed a complaint with the EEOC and the Illinois Department of Human Rights. The complaint alleged violation of both Title VII and the state anti-discrimination law, as well as a state law against gender-motivated violence. The jury awarded Smith compensatory and punitive damages totaling $2,407,500, and the judge awarded $69,761.80 in backpay and $19,894.77 in pre-judgment interest. Some of the award ran against individual harassers who were sued under the gender violence statute. Smith had testified at trial "regarding countless incidences in which his coworkers touched, grabbed, and fondled his private parts during work hours," about how this touching was unwelcome and affected him physically and emotionally, and that his protests brought forth no help from supervision. Indeed, wrote District Judge Robert M. Dow, Jr., "The evidence was vast." "Despite Defendants' attempts to impeach the credibility of Plaintiff's testimony and to minimize the alleged severity of this constant touching by categorizing it as 'horseplay or goofing around,' Defendants' argument that no reasonable jury could conclude that Plaintiff was subjected to unwelcome harassment is a non-starter." Dow also pointed out that Smith had shown that the harassment was "based on his sex" both through the nature of the touching, focused on "intimate body parts," and that women in the workplace were not subjected to the same harassment. Given the evidence, it was easy for Smith to satisfy the "severe or pervasive" requirement. There was significant evidence that male supervisors engaged in the physical harassment as well as co-workers, sufficient to ground employer liability. Smith quit his job six months after filing his administrative complaints, and credibly testified that although sexual harassment ceased after he filed the complaints, retaliatory acts of harassment proliferated, including vandalism of his car in the parking lot and other actions that caused him to feel "unwelcome," "disrespected," "nervous," and "scared." Dow concluded that the detailed evidence was sufficient to stand without any corroborating evidence from other witnesses, the jury and court having found Smith to be a credible witness.

ILLINOIS – In *7355 S. Shore Drive Condo Association & Norton v. City of Chicago Commission on Human Relations*, 2016 IL App (1st) 140686-U, 2016 Ill. App. Unpub. LEXIS 2278 (5th Dist. App. Ct. of Illinois, Oct. 28, 2016), the court rejected an argument that the appellants were denied their rights to due process of law when a new administrative judge was substituted for the one that heard the witnesses in a case alleging violation of the city's Fair Housing Ordinance, and issued an opinion for the complainants based on the transcript of the hearing. The case involved a claim of sexual orientation

discrimination by the Condo Association against two lesbian complainants. One complained that the association blocked her purchase of an apartment because she is a black lesbian, and her girlfriend, who already own an apartment in the building, complained that the Association and a board member named as an individual defendant had created a hostile environment based on sexual orientation by anti-gay comments and an eviction proceeding against her. The Commission investigated the charges, found substantial evidence to support them, and set the cases for hearing before hearing officer David Youngman, who conducted hearings for six days in January through March 2007. Then Youngman just sat on the case without issuing a decision for more than three years. The Commission entered an administrative order on July 2, 2010, directing Youngman to issue a recommended ruling by August 2, and communication it was considering discharging Youngman and appointing a new hearing officer for the case. When Youngman failed to issue the ruling, the Commission replaced him with Martin Malin, advising the parties of the situation, and leaving it to Malin whether he consulted with Youngman about credibility issues arising from the hearing transcript. Both parties opposed hold a new hearing and urged that Malin decide the case. The Condo, in particular, was concerned about expending more attorneys' fees on additional hearing dates. Malin issued a recommended decision on February 4, 2011, ruling in favor of the complainants and assessing a large attorneys' fee award against the defendants, while awarding relatively modest damages to the complainants. After the parties filed their objections to the opinion, Malin issued his final opinion, explaining his response to the objections. On appeal the Commission largely affirmed Malin's recommendations, making some adjustments to the damages and fee award. On appeal to the court, the Condo Association raised a due process claim as noted above, which was rejected by the court, which reminded the Condo Association that it had opposed holding a new hearing so that Malin could see the witnesses testify, and the Condo Association more seriously objected to the sizable attorney fee award, which dwarfed the award of actual damages. The court rejected the Condo Association's argument that the damage award was so small as to be de minimis, rejecting their argument that under the circumstances there should be either no award or a sharply reduced one. Despite the minor damages, the court pointed out, "complainants prevailed on a significant legal issue and the litigation served an important public purpose. As stated by the Commission in its final order on attorney fees, the award of attorney fees 'serves the important purpose of condemning and punishing housing discrimination based on sexual orientation, deterring similar discriminatory conduct by condominiums and their officials, and encouraging other discrimination victims to pursue their claims." The court ended by noting that in light of the nature of the case, the amount of fees awarded "does not represent an abuse of discretion" in light of the large number of witnesses and six hearing days expended by counsel. The final fee award is $68,189.05, against a damage award of a few thousand dollars.

INDIANA – The Court of Appeals of Indiana found that a trial judge appropriately ordered a woman to take parenting classes as a condition of her probation after she was convicted of misdemeanor battery arising from a confrontation with the gay male couple living next door over her children's irritating habit of throwing trash and toys into the men's back yard. *Johnson v. State*, 2016 Ind. App. Unpub. LEXIS 1224 (Oct. 21, 2016). Josh VanWolde and Kevin Doty were neighbors of Sheila Johnson on the eastside of Indianapolis. When they complained to Johnson after finding trash and children's toys in their backyard, Johnson said she would "handle it." When more of the same showed up later that day and the men went back to Johnson's house a second time, they were met by hostility, wrote Chief Judge Nancy Vaidik. "Josh took out his phone and tried to record the encounter; however, Johnson shoved Josh off the steps and slapped the phone out of his hands. Johnson told Josh and Kevin that it was their problem and that she was not responsible for the children's actions. Johnson swung her arms at Josh, and called Josh and Kevin 'faggots' and made 'gay jokes.' Johnson also encouraged the children to 'shout and chant' these things to Josh and Kevin. In short, the situation was 'out of control.'" The men called 911, and the police arrived, spoke with the men, and then went to Johnson's house. "Johnson was 'extremely aggressive and uncooperative'" with the female police officer and continued to refer to her neighbors as "faggots" in front of the children. When the officer "expressed concern that Johnson was using this language in front of the children, Johnson told the officer, 'Don't worry about my children, bitch.'" That's it, line crossed. . . . Johnson was arrested and convicted of misdemeanor battery. Marion Superior Court Judge Amy Jones sentenced her to 180 days in jail, 178 suspended to probation with the condition that Johnson complete parenting classes, anger-management classes, and forty hours of community service. Johnson appealed only the requirement of parenting classes as a condition of her probation, claiming it wasn't "reasonably related" to the crime for which she was convicted, "misdemeanor battery" on her neighbor. After a repeated description of how Johnson encouraged her children to verbally harass Josh and Kevin, Judge Vaidik wrote, "Because Johnson encouraged the children to participate

in the taunting of the neighbor that she battered, thereby involving them in her crime, we conclude that requiring Johnson to complete parenting classes as a condition of her probation is reasonably related to her treatment and the protection of public safety." Imposing this condition on her probation was not an abuse of discretion by the trial judge.

LOUISIANA – Governor John Bel Edwards has ordered that the state and its contractors not discriminate because of sexual orientation or gender identity, but separately elected Attorney General Jeff Landry believes that the governor has exceeded his authority by prohibiting discrimination that is not outlawed by statute in the state. He has refused to approve dozens of contracts that state agencies want to enter that include the non-discrimination language required by the governor's order, and a trial judge, Donald Johnson of the 19th Judicial District Court, has ruled that the attorney general has discretion to do so, rejecting a challenge by the governor to Landry's authority. Landry has asked the judge to enjoin the operation of the governor's order as the litigation escalates. *Arkansas Democrat Gazette* (Oct. 21); *New Orleans Times-Picayune*, Oct. 19.

MARYLAND – Maryland's Fair Employment Practices Act forbids discrimination because of sexual orientation and gender identity. In *Parrish v. Tile Shop*, 2016 U.S. Dist. LEXIS 135999 (D. Md., Sept. 29, 2016), U.S. District Judge James K. Bredar acknowledges that because the plaintiff is alleging claims only under state law and the case was removed by the employer to federal court under diversity jurisdiction, he was bound to apply only state law, although Title VII precedents could be useful to analyzing the case. For some reason (cultural cluelessness?), Judge Bredar refers to the plaintiff as a "gay female," but once past that oddity, the opinion is unexceptionable in rejecting all of the employer's arguments in support of its motion to dismiss the discrimination claim. Indeed, the recitation of facts makes clear that the plaintiff would probably also have had a claim under Title VII for sex-stereotyping, since it mentions that she dressed in conformity with the employer's dress code for male employees, which aroused the ire of some customers and, ultimately, her supervisor, who told her not to dress like a man or "cross-dress," to style her hair or to grow her hair out to look more feminine, and that she would be fired if she did not dress differently. There was also an allegation that the employer's regional manager asked the supervisor why the plaintiff dressed the way she did, and suggested that if she was still dressed that way on the manager's next visit, he would "grab her by the elbow and 'throw [her] out the door.'" The plaintiff complained that on a special sales promotion day when sales people on the floor were likely to make big commissions, she was assigned to an undesirable non-customer contact task, presumably because the supervisor thought her mode of dress would offend customers. When she protested this assignment, she claims she was suspended in response, and when the supervisor did not respond to her text message to confirm a meeting at which her suspension was to be discussed, she quit. She claims discrimination, retaliation and constructive discharge. Judge Bredar concluded that if a fact-finder found her allegations to be substantiated, she had a good case on all of her claims, and denied the motion to dismiss. She had included as a separate state law claim that the supervisor's conduct amounted to tortious interference with prospective economic advantage. Judge Bredar accepted the defendants' argument that the supervisor was acting as an agent of the employer and his actions fells within the scope of his employment, so he should not be held individually liable for employment decisions and actions he took which were the responsibility of the employer. Thus the claim against the supervisor was dismissed. Plaintiff Kristen Parrish is represented by Howard J. Schulman and Marie J. Ignozzi of Schulman and Kaufman LLC, Baltimore.

MASSACHUSETTS – Horizon Christian Fellowship and a group of co-plaintiffs filed suit against Massachusetts civil rights officials in the U.S. District Court for the District of Massachusetts on October 11 seeking a declaratory judgment and injunctive relief against enforcement of the state's recently passed gender identity public accommodations law against them. The claim that any such enforcement would violate their rights under the 1st and 14th Amendments of the U.S. Constitution. *Horizon Christian Fellowship v. Williamson*. They want a specific declaration that the law as applied to Churches and Pastors violates the constitution, and seek an award of attorneys' fees and costs. They are represented, of course, by Alliance Defending Freedom, which is busy whipping up law suits to challenge all manner of LGBT rights laws on religious grounds. Attorneys identified on the complaint are Philip D. Moran of Salem, their local counsel; Steven O'Ban, Erik Stanley, an Jeremy Tedesco from ADF's Scottsdale, Arizona, office; and Christiana Holcomb from ADF's Washington, D.C. office. At the same time, Massachusetts officials announced that opponents of the gender identity amendment had submitted enough valid signatures to place a repeal measure on the 2018 general election ballot. By then, of course, the law will be old news, making it difficult for proponents of the repeal to contend credibly that its passage has inflicted serious harm on the public.

CIVIL LITIGATION

MISSISSIPPI – In *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120, 2016 WL 3562647 (S.D. Miss., June 30, 2016), U.S. District Judge Carlton W. Reeves preliminarily enjoined the operation of H.B. 1523, a state law that authorized discrimination against same-sex couples by those with religious objections to marriage equality, among other things. Reeves refused to stay his preliminary injunction while the state's appeal is pending before the 5th Circuit, and the 5th Circuit has allowed the injunction to remain in effect while it decides the appeal. In the meantime, however, a separate suit filed by some individuals and the ACLU of Mississippi, also pending before Judge Reeves, challenging H.B. 1523 on the same basis, confronted a motion by the state to stay litigation of this case while the other case is proceeding. In *Alford v. Moulder*, 2016 U.S. Dist. LEXIS 143292, 2016 WL 6088489 (S.D. Miss., Oct. 17, 2016), Judge Reeves granted the state's motion to stay this case. He pointed out that as long as the other case is pending before the 5th Circuit, his preliminary injunction in that case remains in effect, providing all the relief that the plaintiffs are seeking in this case. Furthermore, he observed, if any clerk refused to issue a marriage license to the plaintiffs or members of the ACLU, they could seek individual relief under 42 U.S.C. 1983 and the *Obergefell* ruling. The plaintiffs argued that "an open-ended stay would be improper because it would not terminate when the Fifth Circuit rules," wrote Reeves. "The applicable law, however, instructs that a stay must be reconsidered when the equities have changed. If the facts and equities of this case change – even if they change between the Fifth Circuit's ruling and the issuance of its mandate – the plaintiffs can file an appropriate motion. There is no need for this case to proceed now."

MISSISSIPPI – More than a decade after the U.S. Supreme Court declared that same-sex couples are entitled to have private consensual sex without the intervention of criminal law, Mississippi continues to require people who were convicted under its sodomy statute to remain registered with the state as sex offenders. Contending that this practice is unconstitutional, Jackson attorney Robert McDuff (McDuff & Byrd) and Ghita Schwarz with the Center for Constitutional Rights have put together a class action suit, filed in the U.S. District Court for the Southern District of Mississippi. All of the plaintiffs proceed under pseudonyms, led by "Arthur Doe," who says that he was told he would have to register as a sex offender because of a 1979 unnatural-intercourse conviction. The plaintiffs seek invalidation of the registration law as applied to convictions for conduct protected under *Lawrence v. Texas*, and expungement of their names from the registry. *Courthouse News Service*, Oct. 11.

NEW JERSEY – Superior Court Judge Lisa Perez Friscia issued a decision dated October 20 refusing to reconsider her August decision which rejected a motion by Paramus Catholic High School and the Archdiocese of Newark to dismiss a discrimination case brought by Kate Drumgoole, a lesbian employee who was fired after she married a same-sex partner. The defendants claim that they have a right under the Free Exercise Clause and religious exemption provisions of the New Jersey Law Against Discrimination to dismiss an employee whose conduct violates precepts of Catholic doctrine. Judge Friscia maintains it will be time enough to consider those arguments in the context of a summary judgment motion after discovery. *NorthJersey.com*, October 21.

NEW YORK – U.S. Magistrate Judge Sarah Netburn has recommended to District Judge George Daniels that substantial compensation be paid to the same-sex partner survivor or a 9/11 victim, in her Report and Recommendation released on October 14, 2016, in *In re: Terrorist Attacks on September 11, 2001*, 2016 U.S. Dist. LEXIS 144325 (S.D.N.Y.). The judge recommended payment of the full spousal amount authorize by Congress of $12,500,000.00 to Keith Bradkowski, whose partner of eleven years, Jeffrey Collman, died in the terrorist attacks on that date. The men had registered as domestic partners the previous year in California. Bradkowski was the primary beneficiary on Collman's life insurance policy and the personal representative of his estate. The events of 9/11 inspired Bradkowski to become an activist for domestic partnership rights, and his leadership role in getting the California DP law amended to add inheritance rights to the limited list in the existing legislation was recognized by then-Governor Gray Davis, who presented Bradkowski with an original print of the bill together with the signing pen. Judge Netburn concluded that based on these factors and the length of the relationship, Bradkowski and Collman clearly had a spousal relationship entitling Bradkowski to the same treatment under the compensation process as surviving legal spouses. This ruling came in the context of the litigation option that some claimants elected rather than have their claims determined by the claims administrator, Ken Feinberg, who had in the course of his process awarded benefits to several same-sex partners of 9/11 victims.

NEW YORK – Thomas Doyle, an 85-year-old gay man whose same-sex partner of more than half a century, William Cornwell, died in 2014, has filed a petition in New York County Surrogate's Court seeking a declaration that he was Cornwell's surviving spouse, even though the men never had a formal marriage ceremony and

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Cornwell's home-made will leaving his entire estate to Doyle cannot be probated because Cornwell got only one witness for his signature. (New York law is unbendable on the requirement of two witnesses for a will to be accepted for probate.) *In the Matter of Petition of Thomas Doyle*, File No. 2014-3465. Doyle's claim is based on some trips the men made to Pennsylvania together before that state legislatively abolished its common law marriage doctrine in 2005. Doyle and Cornwell lived together beginning in 1958 and moved into an apartment on Horatio Street in Greenwich Village in 1961. Years later the building, a brownstone broken into several apartments, came on the market and Cornwell bought it, setting up a corporate shell for the ownership and putting Doyle on the board of the corporation. Cornwell made his will in 2004, adapting a form that was accompanied by an instruction sheet that did not clearly communicate that two witnesses were needed, although the form itself had designated lines for two witness signatures. The men considered marrying after New York passed its marriage equality statute in 2011, and Cornwell even obtained rings for them to exchange, but they were both old and Cornwell was in failing health, and they never got around to a formal wedding. When Cornwell died, Doyle took Cornwell's will to a lawyer who saw the obvious flaw and advised Doyle that Cornwell's nieces and nephews (who live in California) would inherit the building and all of Cornwell's assets as intestate heirs. This was a shock to Doyle, who had counted on continuing to live rent-free in the bottom floor apartment and to count on the rent from the other apartments to supplement his social security check. (He has no pension.) One of Cornwell's nieces, the only one of the relatives who had been close to the men, suggested a deal by which the relatives would assign their rights to Doyle, and he in turn would make a will leaving the property to the niece, and she went so far as to retain a lawyer to draft the necessary documents, which she signed, but this did not fly with the other intestate heirs, and Doyle was informed that the documents were not binding. The Surrogate's Court issued letters of administration to the niece and one of the nephews, and the building is in contract for upwards of $7 million. The sales contract they have negotiated (with a neighbor who wants to purchase the building and is a friend of Doyle) provides that Doyle can continue to live there at a nominal rent ($10 a month) and will get a small portion of the proceeds, $250,000. A new lawyer advised Doyle, based on the history of his relationship with Cornwell, that he might be able to prevail on a theory that the men contracted a common law marriage in Pennsylvania based on several trips they took there, the first to jointly purchase a dog in 1991, and others to vacation with a friend who lived in New Hope. Pennsylvania's pre-2005 law provided that cohabiting couples who held themselves out as married would be deemed to be spouses, and New York courts have routinely extended comity to common law marriages from Pennsylvania, although having a surviving same-sex partner raise the theory would be novel, since Pennsylvania did not recognize same-sex marriages until 2014, when the governor decided not to appeal a marriage equality ruling by a federal district judge. Doyle's petition and an accompanying affirmation-brief by his counsel, Arthur Z. Schwartz and Jamie Wolf, attempt to persuade the court that missed deadlines for filing this claim should be forgiven due to the unusual circumstances of the case and that Doyle should be recognized as the surviving spouse of a man who died without issue, and thus entitled to the full estate under New York's intestacy law. The case achieved considerable press attention, generating articles in *The New York Times, New York Post, The Advocate*. . . . And, not least, this newsletter!

NEW YORK – The 2nd Circuit's decision in *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000), continues to stand in the way of gay plaintiffs seeking to assert Title VII sex discrimination claims in district courts within the circuit, as shown by District Judge George B. Daniels' opinion in *Cargian v. Breitling USA, Inc*., 2016 WL 5867445 (S.D.N.Y., Sept. 29, 2016). Cargian, a gay man, was employed by Breitling, a Swiss manufacturer of high-end watches, in a sales position. At first things went well for him and he was promoted, but in 2010 the company hired a new president who evidently took a dislike to Cargian. Cargian alleges that this new president, Thierry Prissert, "created a 'boy's club' atmosphere, excluding the 'girls,' a group in which he included Cargian, from his inner circle." Cargian claimed he was excluded from social events and various opportunities to advance within the company, and that Prissert imposed unreasonably high sales goals for him. Naturally he fell short, and soon suffered loss of status and salary, which he attributed to Prissert's alleged homophobia. Cargian was terminated in December 2013, with Prissert having made the decision, ostensibly based on Cargian's repeated failure to meet his sales goals. Cargian sued in federal court under Title VII and the Age Discrimination in Employment Act, also pleading supplementary state and city law claims. (He was 52 at discharge, and claims that part of his territory was assigned to a 33 year old man.) Addressing the defendant's motion to dismiss the Title VII claim, Daniels commented: "Courts in this Circuit must distinguish between claims based on discrimination targeting sexual orientation, which are not cognizable under Title VII, and cognizable claims based on discrimination targeting nonconformity with gender stereotypes. . . . Despite significant changes in the broader legal landscape since the Second Circuit's decision in *Simonton*, the prevailing law in this and every

other Circuit to consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation claims. . . In his opposition brief, Plaintiff argues that he 'as a gay man was treated less well than straight men because, based on the fact that [sic] as a gay man he was stereotypically viewed as one of the "girls" by Prissert; and the workplace was permeated with a macho atmosphere that excluded "the girls" from the president's inner circle.'" Not good enough, wrote Daniels: "Plaintiff's argument conflates a sexual orientation discrimination claim with a gender-stereotyping claim. Such claims are not actionable under current Second Circuit law." Daniels also found that the factual allegations would not suffice even if Cargian had been able to show he was a member of a "protected class." "Frequent conversations about sports at an office do not constitute discrimination based upon gender stereotypes," he wrote, concluding that "There is no record evidence on which a rational finder of fact could conclude that Defendant discriminated against Plaintiff in the terms and conditions of Plaintiff's employment on the basis of Plaintiff's gender," and so dismissed the Title VII count. Daniels also found that Cargian failed to make out a *prima facie* case of age discrimination, in light of the fact that most of the sales representatives who were promoted and retained while he was dismissed were over 40. Cargian also alleged claims under the NY state and city human rights laws, which specifically forbid sexual orientation discrimination. However, having disposed of his federal claims, Daniels declined to assert jurisdiction over the state law claims, and dismissed them without prejudice. Cargian is represented by Janice Goodman of New York City. The Second Circuit has some pending appeals challenging the failure to reconsider the issue of sexual orientation claims under Title VII, in light of the EEOC's changed position on the issue in its 2015 *Baldwin* decision, and similar cases are pending before other circuit courts of appeals, so it is possible that affirmative circuit court authority will eventuate in the next year. As of now, however, Daniels is correct in asserting that no circuit court has specifically embraced the argument that sexual orientation discrimination claims, as such, are actionable under Title VII, the closest being the 9th Circuit in some rather elastic same-sex harassment cases.

NEW YORK – Richard Ross, a retired New York State judge sitting as a judicial hearing officer in Family Court, Kings County, ruled in *Matter of L*, A-11966/15, A-29746/15, A-29747/15, A-29857/15, A-704/16, and A-3706/16, that a person who is already a legal parent of a child in New York State but whose parentage as the same-sex spouse of the biological mother "is not expressly recognized in all jurisdictions within the United States and abroad" could be granted a second-parent adoption. He premised the decision on an attempt "to harmonize the non-uniform, unsettled state of family law regarding the definition of legal parentage in the United States and elsewhere," and premised the ruling on "New York's emphatic legal mandate to promote the best interests of children." The opinion covers adoption petition from five parents involving six children, all residents of Brooklyn when the proceedings were filed. All of the petitioners are the legal spouses of the women who gave birth to the children at issue, and donor insemination was used to conceive the children in all six cases, sometimes from known donors, others from anonymous donors. The court found that under New York law, each petitioner was already the legal parent of the child, through the operation of a presumption concerning the parental status of the spouse of a woman who gives birth to a child. He noted that all sperm donors, whether anonymous or know, had waived their parental rights at the time of donation, and in the case of two known sperm donors there was on record a consent to the adoption. In light of *Obergefell*, these adoptions should be unnecessary, but in case these families travel outside New York, either within the United States or in foreign countries that do not recognize same-sex marriages, having an adoption order at hand will be useful in case the occasion arises to verify the parental status of the spouses, in order "to fill the legal gaps related to parent rights." The court noted that many states still lack specific statutes clarifying the parental status of spouses when married women become pregnant through donor insemination, and in some states that have such statutes, informal arrangements and lack of compliance with details rules regarding consent forms and use of physicians may cloud the picture. The court concluded that it would serve the best interests of the children to approve these adoptions, even if technically there is no need under New York law for the same-sex spouses to adopt the child borne by their spouses during the marriages.

NEW YORK – Shaun P. Garvey, representing himself *pro se* in a string of sexual orientation employment discrimination cases, was found by federal magistrate judges to be qualified to proceed *in forma pauperis*, but suffered recommendations that his amended complaints under Title VII be dismissed, because the 2nd Circuit has made clear that claims of sexual orientation discrimination are not actionable under Title VII's ban on sex discrimination. However, in one of the cases the magistrate gave leave to amend since there were also allegations that might potentially support a gender stereotyping claim. Although the judge found that this claim fell short, it was possible that in an amended

complaint Garvey could come up with the necessary factual allegations to avoid dismissal. His attempt to raise a federal age discrimination claim was dismissed because he is not old enough for the federal protected class of 40 or over. The opinions are: *Garvey v. GMR Marketing*, 2016 U.S. Dist. LEXIS 139928 (N.D.N.Y., Oct. 6, 2016); *Garvey v. Connect Wireless*, 2016 U.S. Dist. LEXIS 139939 (N.D.N.Y., Oct. 6, 2016); *Garvey v. Shoppingtown Mall & Moonbeam Capital Investments*, 2016 U.S. Dist. LEXIS 140239 (N.D.N.Y., Oct. 6, 2016); *Garvey v. Childtime Learning Center*, 2016 U.S. Dist. LEXIS 143152 (N.D.N.Y., Oct. 17, 2016); *Garvey v. Childtime Learning Center*, 2016 U.S. Dist. LEIS 145618 (N.D.N.Y., Oct. 29, 2016). Properly advised, Garvey should have filed suit under the New York State Human Rights Law, which expressly outlaws employment discrimination because of sexual orientation and bans age discrimination beginning with age 18, so he would be in the protected class for that claim.

NORTH CAROLINA – In the pending case of *Carcano v. McCrory*, No. 16-1989 (U.S. Court of Appeals, 4th Circuit), Lambda Legal and the ACLU have asked the 4th Circuit to expedite consideration of the appeal and to expand the district court's preliminary injunction to protect all people in North Carolina from gender identity discrimination in access to public restroom facilities while the case is pending. The district court had limited its preliminary relief to the three named plaintiffs in the case, holding in the preliminary injunction proceeding that plaintiffs were likely to prevail on their argument that H.B. 2, the state law mandating that transgender people use restrooms consistent with their birth certificates rather than their gender identity, is likely to be found illegal and unconstitutional under federal sex discrimination laws and the Equal Protection Clause, and that the burden it imposes on the plaintiffs, all associated as employees or students with the University of North Carolina, outweighs any burden imposed on the state by blocking its enforcement against these three individuals. The plaintiffs argue that the law "makes transgender North Carolinians pariahs in their own state," said Lambda Legal Director Jon Davidson upon the filing of the brief. "Courthouses, airports, libraries, public schools, highway rest stops, police departments, state hospitals, and the very halls of government itself are now unsafe for, and unwelcome to, transgender North Carolinians" and that the same weighing of harms would favor a broader class of all transgender residents of the state over the speculative and unsubstantiated claims of harm to the state and its cisgender residents.

OHIO – U.S. District Judge Algenon L. Marbley has denied Highland School District's motion to stay his injunction requiring the district to allow an 11-year-old transgender girl to use the girls' restroom at her elementary school pending a final ruling on the merits of the case. *Board of Education of the Highland Local School District v. U.S. Department of Education*, 2016 U.S. Dist. LEXIS 145560, 2016 WL 5372349 (S.D. Ohio, Oct. 20, 2016). The opinion basically restated Judge Marbley's reasoning underlying the issuance of the preliminary injunction, and concluded that the school district had failed to meet its burden in justifying the grant of a stay. Most significantly, the judge reiterated that the district was unlikely to prevail on the merits of its claim. (Indeed, since the 6th Circuit has ruled in the context of Title VII that discrimination against a transgender employee is covered by Title VII's ban on sex discrimination and federal courts generally follow Title VII precedents in Title IX sex discrimination cases, it is hard to dispute Marbley's conclusion on this score.) And, further, the judge rejected the district's argument that it would suffer irreparable harm if it had to comply with the preliminary injunction before receiving a ruling on the merits. The district said that the elementary school's principal had received "inquiries from over 20 parents of elementary school students, all of whom stressed their concern for students' privacy rights and disapproval of the court's order. Concerns about liability, and the logistical difficulty in 'accommodating requests for more than 20 students to use single-user restrooms,' Highland claims, constitute irreparable harm." Marbley pointed out that the 20 communications came in after the school sent a voicemail to parents informing them of the preliminary injunction, the school's legal position, and invited them to comment. In other words, the school incited the communications, apparently seeking to create a situation of irreparable harm. "Regardless," wrote the judge, "the district's decision to accommodate student requests to use a single-user restroom, and its fears of exposure to lawsuits from parents, do not constitute irreparable harm." On the other hand, the school utterly failed to convince the judge that staying the order would not harm the student, as he pointed out that he had already balanced the equities in his preliminary injunction ruling and noted that the injunction was narrowly focused on permitting the student to use the girls' restroom. (No mention of locker room changing facilities and showers. . . .)

OHIO – The 1st Appellate District Court of Appeals of Ohio upheld a decision by the Hamilton County Court of Common Pleas to deny a motion to quash a subpoena requiring Verizon to disclose identifying information for a person suspected by the plaintiff to have sent defamatory email to the plaintiff's employers. *Fisher v. Doe*, 2016-Ohio-7383, 2016 Ohio App. LEXIS 4245

(Oct. 19, 2016). Eric Fisher, a certified registered nurse anesthetist who worked for various employers in Ohio and Virginia in 2014 and 2015 alleges that an unidentified person sent letters and emails to his employers containing defamatory information, including, *inter alia*, that he had solicited a former patient on a gay website to do drugs with him, and "posting on the internet homosexual pornography in which Fisher was a participant." Fisher suspected a certain man in California of having sent these communications, and had his attorney write to the man, who adamantly denied being the one responsible. Then Fisher filed suit against "an unknown defendant, John Doe, alleging defamation, invasion of privacy, intentional infliction of emotional distress and negligence," and began conducting "third-party discovery" to try to identify his John Doe defendant. A subpoena on Google led to a number of IP addresses used when Doe had logged in and out of his Google account, one of which was traced to Verizon Online, LLC. Fisher served Verizon Online LLC with a subpoena seeking the identity of that account holder; Verizon notified its subscriber, who filed an anonymous motion to quash the subpoena, denying that he was the letter writer and "alleging that he had a First Amendment right to remain anonymous." The trial court, finding that Fisher had alleged a "prima facie case of defamation" also found that "the necessity of identifying the speaker outweighs any First Amendment right of anonymous free speech," and refused to quash the subpoena in part, only granting the motion with respect to information like credit card numbers or other information useful for identity theft. But as far as name and other identifying information was concerned, the motion was denied. The movant appealed, relying on a raft of cases from other states defending the right of people to preserve their anonymity on the internet. "We find these cases to be distinguishable," wrote Judge Russell Mock for the Court of Appeals. "They all involve the cyberspace equivalent of public forums, Internet bulletin boards, review sites, and other places where a large number of people are free to express their opinions. They raise First Amendment concerns much like the proverbial public square in the real world." The court found that "a common theme in these cases is the idea of protecting individuals on the Internet from censorship." However, wrote Mock, "We do not find these cases to be applicable because this case is significantly different. It does not involve a public forum of any kind. An unknown individual sent targeted communications to Fisher's employers. Some were sent by regular U.S. mail. [Presumably without return addresses!] The one at issue in this case happened to be sent by email, but the medium by which it was sent is irrelevant. The case would be the same if that particular communication was also sent by regular mail. The larger issues implicated in the out-of-state cases related to public forums are not implicated here. This is not a corporation or the government trying to stifle an individual's First Amendment rights or prevent open discourse. This is a standard tort case between two individuals. This case is no different than any number of defamation/invasion-of-privacy cases that are frequently filed in Ohio courts. It involves the same First Amendment issues and other defenses inherent in defamation/invasion-of-privacy and other tort cases, on which Ohio has well-settled law. Consequently, we decline to apply the tests set forth in the out-of-state cases cited by the parties." The court held that Doe had failed to "meet the burden to show that he would be subject to an undue burden by providing his name and other identifying information. The trial court's decision denying in part the motion to quash was not so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion."

TEXAS – Responding to filings by the government concerning pending Title IX litigation and seeking clarification of the district court's August 21 nationwide injunction concerning Title IX enforcement in gender identity cases, U.S. District Judge Reed O'Connor issued a new order on October 19 in *State of Texas% v. United States*, Civ. Action No. 7:16-cv-00054-0 (N.D. Tex.), acknowledging the agreement of the parties as to the identity of ongoing litigation in which the government could continue to assert its interpretation of Title IX without violating the order, which prohibits new investigations or litigation. Judge O'Connor found that many of the questions posed by the government about the scope of the order required further briefing by both parties, and set an October 24 deadline for plaintiffs to submit briefs and an October 28 deadline for any reply brief by the defendant. These questions go to such issues as whether the order extends to the complete text of the joint DOE/DOJ guidelines on Title IX compliance in regard to transgender students, or whether parts may be severable, since the guidelines addressed many subjects beyond those specifically mentioned in O'Connor's opinion, whether the injunction runs to Title VII enforcement, particularly in non-school settings, and whether the order applies to enforcement activity by the Occupational Safety and Health Administration or the Department of Labor, both of which have significant policy concerns involving transgender employees' access to restrooms and employee benefits rights. However, O'Connor did provide some more specific clarification about the scope of his nationwide injunction, after rejecting any idea that as a district judge he was restricted to issuing relief limited to the plaintiffs in the case (a collection of states enlisted by Texas to challenge the government's interpretation and application of Title IX). "It is clear from Supreme Court and Fifth Circuit precedent that this Court

has the power to issue a nationwide injunction where appropriate," wrote O'Connor. "Both Title IX and Title VII rely on the consistent, uniform application of national standards in education and workplace policy. A nationwide injunction is necessary because the alleged violation extends nationwide. Defendants are a group of agencies and administrators capable of enforcing their Guidelines nationwide, affecting numerous state and school district facilities across the country. Should the Court only limit the injunction to the plaintiff states who are a party to this cause of action, the Court risks a 'substantial likelihood that a geographically-limited injunction would be ineffective.'" However, he observed, the court's order did not affect other statutes and, as to Titles IX and VII, "Defendants are simply prevented from using the Guidelines to argue that the definition of 'sex' as it relates to intimate facilities includes gender identity. The Court's preliminary injunction neither affects EEOC's fulfillment of its statutory duties, nor Defendants' ability to enforce anti-discrimination statutes nationwide. . . . Defendants are simply 'enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of [its August 21, 2016] Order." O'Connor acknowledged that his injunction did not affect the continuing enforcement actions in a list of cases submitted by the defendants that had been initiated prior to the issuance of his order. The government announced on October 21 that it had filed an appeal from the court's preliminary injunction ruling with the 5th Circuit.

TEXAS – The Texas 5th District Court of Appeals in Dallas ruled on October 11 in *In re Brandon Groves McReynolds*, 2016 Tex. App. LEXIS 11065, 2016 WL 5920779, that the district court in Hunt County had correctly ruled that Texas Code sec. 2005(b)(8) does not authorize Texas courts to issue orders that "judicially change a person's gender identifier." In this case, a Texas resident who was identified as female at birth filed an "Original Petition for Change of Gender Identifier," alleging that he had undergone "surgical reconstruction" as part of transition to a male gender identity. The petition did not specify "what he intended to do with the sex change order of it were granted," but his appellate brief said he would use a judicial sex change order to support an application to amend his birth certificate. In a footnote, the court points out that there is a different statutory provision, Tex. Health & Safety Code sec. 191.028, providing an administrative procedure for changing birth certificates. The opinion does not indicate whether the petitioner was born outside Texas and wished to use a judicial order to get a change made in his natal state. Sec. 2005(b)(8), invoked by the petitioner, deals with issuance of marriage licenses, and provides that the county clerk "shall require proof of the identity and age of each applicant," specifying that one way of establishing proof is "an original or certified copy of a court order relating to the applicant's name change or sex change." The petitioner argued that, logically, this must mean that Texas courts are authorized to issue such orders. The court of appeals disagreed, in an opinion by Judge Bill Whitehill, who premised the disagreement on two points: "the legislature provided no procedures governing a request for a sex change order and the statute has a definite and reasonable meaning as written." Continuing, he wrote, "If the legislature intended to create a new justiciable right of action for a sex change order, it would say so." Furthermore, rejecting the petitioner's suggested interpretation did not render the provision useless, as it could be referring to sex change orders issued by courts in other jurisdictions. Although some Texas trial courts have issued such orders, the court pointed out that trial court decisions are not precedential, and concluded that references to such orders in Texas appellate decisions were dicta, none of which directly supported the petitioner's contention. In other words, the unspoken message of the court was "we see no reason why this court should make life less difficult for transgender people, even if we could do so by a little flexible statutory interpretation." There is no indication on the court's opinion whether petitioner was represented by counsel.

TEXAS – Texas Governor Greg Abbott, Lt. Governor Dan Patrick, and Attorney General Ken Paxton have asked the Texas Supreme Court to reconsider its recent decision refusing to review a lower court ruling affirming that in light of *Obergefell v. Hodges* the city of Houston has to recognize same-sex spouses of city employees for purposes of employee benefits plan spousal coverage. These die-hard opponents of same-sex marriage hope through their amicus brief to persuade the court that Texas is not obligated to comply with the clear message of *Obergefell* that requires same-sex marriage couples to be treated the same as different-sex married couples for all purposes of government policy subject to the due process and equal protection requirements of the 14th Amendment. According to their brief, the *Obergefell* decision did not directly address the question whether state governments are required to provide employee benefits to same-sex couples, and they need clarity since state law prohibits the provision of such benefits. Paxton asserted in a statement on October 28 that "there are a host of issues in that area of the law that remain unresolved," presumably because in Texas the word "equal" carries a different meaning from that followed in the rest of the country! So far, lower courts have been construing "equal" to mean "equal" when states have sought to resist treating same-

sex couples the same as different-sex couples for any reason. Abbott, Patrick, and Paxton probably should read Justice Kennedy's opinion, slowly, and highlight every time the word "equal" appears, and then think about whether the arguments they are making hold any water before proceeding further. The lawsuit was originally filed by two Houston residents, Jonathan Saenz and Jared Woodfill, who have filed a petition for the court to reconsider its 8-1 decision to deny review. They were originally challenging former Mayor Annise Parker's decision to extend spousal coverage prior to *Obergefell* to same-sex spouses married in other jurisdictions. *Houston Chronicle*, October 29; *Austin American-Statesman*, Oct. 20; *Texas Observer*, Oct. 5. Since the Supreme Court's decision in *Obergefell* made clear that states are required to recognize same-sex marriages validly contracted in other states and to treat them as equal to different-sex marriages, it is difficult to know how a state or city can claim the right to restrict spousal benefits to different-sex couples only.

UTAH – The National Center for Lesbian Rights, with pro bono assistance from Ropes & Gray LLP's Washington office, has filed suit on behalf of Utah clients challenging the constitutionality of Utah laws prohibiting any affirmative discussion of homosexuality in the public schools. *Equality Utah v. Utah State Board of Education* (U.S. Dist. Ct., D. Utah, Oct. 21, 2016). The Utah law, similar to laws passed in several other states and commonly referred to as "no promo homo" laws, is alleged to have had harmful effects on LGBT students and straight students who are the children of LGBT parents. The complaint alleges facial and as applied unconstitutionality claims grounded in the 1st and 14th Amendments. NCLR's announcement of the lawsuit asserted that it was the first affirmative litigation to challenge the constitutionality of such state laws. The R&G attorneys working on the case are Douglas H. Hallward-Driemeier and Jeremiah L. Williams. Hallward-Driemeier argued the marriage recognition portion of the *Obergefell* case before the U.S. Supreme Court in 2015.

VIRGINIA – Now that the Virginia Supreme Court has determined that the state's criminal ban on fornication cannot be enforced against consenting adults in *Martin v. Ziherl*, 607 S.E.2d 367 (2005), a supervisor's attempt to get an employee to have sex with him can no longer provide the basis of a civil action of wrongful discharge in violation of public policy, the Virginia Supreme Court ruled on October 27 in *Robinson v. Salvation Army*, 2016 Va. LEXIS 150. Frances Robinson, an at-will employee of the Salvation Army, was discharged after she complained about her store manager's "inappropriate comments when he was alone with [her]," which included things like observations about her cleavage, wanting to sleep over at her house, and salacious comments about her to other employees. She sought to sue under Virginia's common law exception to the employment at will rule for a discharge that violates public policy. She claimed her supervisor was trying to get her to sleep with him, citing the fornication statute (which the legislature has not reformed in response to the case law) as her source of public policy. However, the court pointed out, since *Lawrence v. Texas* followed by the *Martin v. Ziherl* ruling, it was clear that verbal solicitations to participate in what would formerly have been condemned as fornication was no longer a crime, and so there no longer was a public policy against allowing it. As to the "consensual" nature of the sex – a prerequisite to its protection under *Martin* – the court does not develop a detailed analysis, but just treats this case as being about solicitation to engage in lawful consensual fornication. "Because we have ruled that Code Sex. 18.2-344 is unconstitutional as applied to private consensual sexual activity between adults, wrote Judge Craig D. Johnston for the court, demands regarding such activity can no longer provide the basis for a valid allegation of wrongful termination whether the employee accedes to the demands or is terminated for refusing the demands." The decision seems odd to anybody who has read the case law on *quid pro quo* sexual harassment, with its presumptions against finding consent when a supervisor seeks sexual favors from an employee he supervises, and one wonders why this conduct did not lead to a charge under the state's civil rights law or Title VII of the federal law, which both forbid sex discrimination, including hostile environment and quid pro quo sexual harassment. Perhaps part of the problem is that the plaintiff was *pro se*.

WEST VIRGINIA – The EEOC announced that Mon General Hospital has agreed to conciliate a charge of sex discrimination filed by an employee, Kathy McIntire, who claimed she was denied spousal medical benefits solely because she is married to another woman. The hospital said that its spousal medical coverage plan extended only to opposite-sex spouses. EEOC determined that there was merit to McIntire's claim that this violates Title VII's ban on sex discrimination. Under the agreement achieved through conciliation, McIntire receives damages of $8,900 to make up for the cost of obtaining insurance for her spouse, and the employer has changed its policy and informed its employees of the change. The hospital is required by the agreement to report semi-annually to EEOC on employee requests for such coverage and whether they were granted. *State News Service*, Oct. 25. * * * Earlier in the month, a complaint by a nurse at St. Mary's Medical Center in Huntington to the

EEOC when the hospital refused to add her same-sex spouse to the insurance plan has resulted in a decision by the Medical Center to change its policy, effective July 1, 2016, to define "spouse" as any person legally married to an eligible plan participant, thus ending the dispute. *Huntington Herald-Dispatch*, Oct. 6.

WISCONSIN – Last month, we reported on the issuance of a preliminary injunction by U.S. District Judge Pamela Pepper, requiring the Kenosha school district to let a transgender boy use the boys' restrooms at his high school, and the subsequent denial of the district's request for a stay. In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 2016 U.S. Dist. LEXIS 136940 (E.D. Wis., Oct. 3, 2016), Judge Pepper denied a new motion for a stay pending appeal to the 7th Circuit of the judge's grant of the preliminary injunction and denial of the defendants' motion to dismiss the case. On the issue of balance of harms, the District argued that it would suffer irreparable harm if the injunction was not stayed because the injunction "threatens the constitutionally protected privacy interests of the approximately 22,000 students in the school district." This is rather bizarre, unless all 22,000 students (including the girls) are planning to use the boys' restroom at the high school! At any rate, Judge Pepper pointed out that every argument the defendants advanced had already been rejected by the court in the context of its prior rulings. The District premised its renewed argument that it was likely to succeed on the merits on the 7th Circuit's almost quarter-century old ruling, *Ulane v. Eastern Airlines*, 742 F.2d 1081, which rejected a Title VII sex discrimination claim from a transgender woman licensed airline pilot who was discharged when she transitioned without advance notice to her employer. Pepper pointed out that the district had conceded that the 7th Circuit "has not decided the precise issue in question in this case." Pepper commented that in her prior hearing on this matter, she had found against the defendants "on each factor" of the analysis. "The defendants give no explanation for why the court should find in their favor now, when eight days prior to their filing this motion to stay, the court found against them on exactly the same issues they raise here." Ashton Whitaker is represented by Alison Pennington, Ilona Turner and Sasha J. Buchert (lead attorneys) from Transgender Law Center, Oakland, CA, with assistance from Joseph Wardenski of Relman Dane & Colfax (Washington, D.C.) and local counsel Robert Theine Pledl, of Pledl & Cohn SC (Milwaukee).

CRIMINAL LITIGATION NOTES

CALIFORNIA – In *People v. DeSisto*, 2016 WL 5848714 (Cal. 2d Dist. Ct. App., Oct. 6, 2016), the court upheld a trial court's order that the defendant, convicted of sexual penetration by foreign object, submit to HIV testing. The defendant claimed that there was no evidence he had penetrated the victim with his penis or ejaculated in her. The victim was not fully conscious and had significant memory gaps about what happened, having consumed drugs and alcohol at a party before going home with the defendant. She regained consciousness lying in a bathtub, undressed, with defendant standing over her with his penis exposed and erect, photographing her with his cellphone. This was enough for the court. Wrote Judge Raphael, "Our review of the record leads us to conclude that the evidence is sufficient to cause a person of ordinary care and prudence to entertain an honest and strong belief that defendant transferred blood, semen, or some other bodily fluid capable of transmitting HIV to Jane. There was a significant period of time of which Jane had no memory. When she awoke, she was lying on her back completely naked and wet in the defendant's bathtub. Defendant, an acquaintance with whom she was not intimate, was standing over her wearing nothing but a shirt. His penis was exposed and erect. Jane could not remember entering the apartment and did not know how her clothes were removed. Several hours after she fled the defendant's apartment, she reported pain and soreness in her genital area while undergoing a sexual assault examination. A swab taken from her vulvar area contained DNA for which defendant was a possible contributor. The chances of matching the particular male DNA profile taken from Jane were one in 1.2 quintillion. The evidence is sufficient to establish probable cause" justifying the HIV test of the defendant.

ILLINOIS – Reversing a ruling by the circuit court in Cook County, the Illinois Supreme Court held that the internet disclosure provisions of the state's sex offender registry law did not violate the 1st Amendment rights of a man who while still a minor had been adjudicated a sex offender upon conviction of criminal sexual abuse. *People v. Minnis*, 2016 IL 119563, 2016 Ill. LEXIS 1235 (Oct. 20, 2016). The law requires the sex offender to disclose and periodically update "all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all blogs and other Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information." The information is then posted in the state's online sex offender registry, which can be accessed by members of the public. On his first disclosure form in 2010, Minnis had reported his e-mail addresses and his Facebook account, and continued to report this information

for several years. In 2014, however, he failed to list the Facebook account when he updated his registration. (Perhaps he had not posted any messages on Facebook in the prior year and thought this would relieve him of the obligation to list that account which he viewed as dormant.) Police officers took a look at his Facebook profile and noted that he had changed his cover photo a month prior to the registration, and thus was in technical violation of the registration statute for having uploaded content. He was arrested and charged for failing to comply with his disclosure requirement. He moved to dismiss the indictment, arguing that the disclosure provision was overly broad and violated his free speech rights, an argument that impressed the circuit court but not the Supreme Court. That court determined that this was an intermediate scrutiny case, and that the state had substantial policy reasons that would justify the incidental chill of Minnis's speech due to his loss of anonymity as an internet participant. This disclosure requirement, found the court, empowered the public to make the informed decision to avoid interacting with Minnis online. The court held that the broadness of application of the disclosure requirement was justified on the view that *any* communication by a sex offender with the public is related to the statutory purpose of the registration law: to alert the public to the presence of sex offenders so they can protect themselves and their children from interacting with those individuals. As many employers and landlords now use the internet to screen job and apartment applicants, the ruling ensures that Minnis and others like him will have significant problems in finding employment and rental housing. When one adds the residential restrictions commonly placed on sex offenders, it is easy to see why sex offender registration laws may have the counterproductive result of making it difficult for those who are convicted (usually of offenses that carry short to moderate prison sentences; in this case Minnis was sentenced to 12 months' probation, suggesting that the offense of which he was convicted was not severe) to resume a normal life and avoid recidivism.

NEW YORK – Attorney General Eric Schneiderman announced that a Babylon pharmacist, Ira Gross, had been sentenced to 8-24 years in prison for his role in selling over $274 million dollars of "diverted, medically worthless HIV medication." Gross is also subject to a $25 million restitution order. A jury in Suffolk County Court convicted Gross on charges of Grand Larceny in the First Degree, a class B felony, and other related charges.

NEW YORK – Jeffrey Hurant, owner and chief officer of Rentboy.com, pleaded guilty to one count of promoting prostitution and one count of money laundering in the U.S. District Court for the Eastern District of New York (Brooklyn) on October 7. He acknowledged that he accepted money from advertisers to promote their exchange of sexual conduct for a fee in violation of New York prostitution laws. Sentencing and any fines will be imposed in a hearing on February 2 before District Judge Margo Brodie. The government recommended imprisonment within a range of 15 to 21 months, but the judge has discretion to depart from the government's recommendation. The Justice Department was heavily criticized for its raid on Rentboy.com, which shut down the escort site and seized its assets, under a federal law criminalizing the use of instrumentalities of interstate commerce to violate state laws. *Gay City News*, Oct. 7.

MINNESOTA – Travis Clemmensen was convicted of third-degree assault (a felony) and domestic assault (a misdemeanor) for beating up his domestic partner, L.J. *State v. Clemmensen*, 2016 Minn. Unpub. LEXIS 932 (Minn. Ct. App., Oct. 3, 2016). According to the unpublished opinion for the court by Judge Randolph W. Peterson, "Clemmensen repeatedly punched L.J. in the face and chest, strangled him, and tackled him to the ground. The assault caused damage to L.J.'s denture and glasses and injuries to his face, gums, head, and knee. The knee injury resulted in L.J.'s knee popping out of its socket, which caused L.J. to fall to the ground if he attempted to stand for more than a very brief time. For five months after the assault, L.J. used a cane and had a full-immobilization leg brace. At the time of trial, L.J.'s knee was still popping out of its socket, and his mobility was limited in that he could not ascend stairs in the normal manner and, instead, had to put both feet on the same stair before climbing to the next stair." On appeal, Clemmensen argued that the injury to L.J. was not substantial enough to meet the test for third-degree assault, which required "bodily injury" that "causes a temporary but substantial loss or impairment of the function of any bodily member." The court's recitation of L.J.'s injury sufficiently explains why this ground of appeal was rejected. Clemmensen also argued that domestic assault was a lesser-included offense of third-degree assault, and thus the verdict was duplicative. The court rejected this argument, pointing out that the legislature addressed domestic assault in a separate statute, and "domestic assault is not necessarily proved if third-degree assault is proved." However, since both charges arose out of the same incident, and Minnesota law provides that "a defendant will be punished for the most serious offense that arises out of a single behavioral incident," the sentence imposed for the domestic assault count had to be vacated. After the jury had convicted on both counts, the district court "stayed imposition of sentence

for the third-degree-assault conviction, placed Clemmensen on probation for up to five years as a condition of the stay, and imposed a 90-day sentence for the domestic assault conviction." Thus, it appears that the bottom line from the court of appeals opinion is that the 90 day sentence is vacated and the five years of probation is affirmed. Assuming that Clemmensen and L.J. are no longer together as domestic partners – the opinion makes no mention of this – Clemmensen had been stay away from L.J.!

NEW JERSEY – On September 9, the New Jersey Appellate Division reversed the conviction of Dharun Ravi, the dormitory roommate of Tyler Clementi, the gay Rutgers University freshman who committed suicide after learning that Ravi had rigged up a webcam to spy on Clementi's sexual activity with a man in their dorm room and to transmit the images to other students. *State v. Ravi*, 2016 WL 4710195, 2016 N.J. Super. LEXIS 122 (N.J. Super. Ct. App. Div. Sept. 9, 2016). The appeals court found that the conviction on all counts was tainted by the prosecution's reliance on a provision of the state's hate crimes law that had been declared unconstitutional by the New Jersey Supreme Court in another case after Ravi was convicted. The unconstitutional provision allowed for conviction upon proof that the victim felt harassed because of his membership in a class protected under the statute, and the trial was replete with evidence about Clementi's reaction to Ravi's conduct. The appeals court remanded the case, leaving it up to the prosecutors whether they would seek to retry Ravi without presenting the now-inadmissible evidence. On October 27, Ravi appeared in Superior Court and pled guilty to attempted invasion of privacy, one of the 15 counts in the original indictment, and was sentenced to time served and the fines he had already paid after the earlier conviction. (He had been sentenced to a brief jail term and community service, in addition to a fine.) Ravi accepted a plea bargain with the prosecutors to drop all the other charges. The count to which he pleaded is a third-degree felony. Ravi declined to make a statement when invited to do so by the judge. His attorney, Steven D. Altman, said he would file a motion for Ravi's criminal record to be expunged, as he was a minor when the crime was committed. Ravi, born in India, still hopes to apply for U.S. citizenship, but the felony conviction record would stand in the way. Said Mr. Altman, "He just wants to disappear." The prosecutor told the press that Clementi's parents were aware of the plea agreement, and after being told that the prosecutor felt that an appeal of the Appellate Division's ruling was unlikely to succeed they agreed to it. Reported the *New York Times* on October 28, "Moments before Mr. Ravi left the courtroom, joined by his parents, who said the family would not comment, Judge Joseph Paone gave him some parting words. 'Good luck, Mr. Ravi,' he said." Although the Appellate Division had overturned the convictions, it had indicated that in the absence of the tainted evidence, the trial record would have supported convictions on several of the counts of the indictment, and its opinion included severe condemnation for Ravi's behavior.

TENNESSEE – A non-gay man who stabbed to death and set fire to a gay friend who he claims was trying to penetrate him anally after a New Year's Eve party lost his bid to get his conviction vacated on a claim of ineffective assistance and conflicts of interest of defense counsel in *Brown v. State*, 2016 Tenn. Crim. App. LEXIS 780, 2016 WL 6087671 (Ct. Crim. App. Tenn., Knoxville, Oct. 18, 2016). Judge Alan E. Glenn delivered the opinion of the court. Russell Brown, who testified in his own defense in the homicide trial, said that he and the victim had been friends since childhood, and their friendship eventually turned into a "sexual relationship, based on drugs." Brown did not consider himself to be gay, but "he engaged in sexual encounters with the victim because he was addicted to cocaine, which the victim provided for him." Guarding his self-identity as straight, Brown would not allow the victim to penetrate Brown anally, but he allowed the victim to perform fellatio on him and he would anally penetrate the victim. He testified that the victim "was aware" that Brown was opposed to any relationship where he would be penetrated or would actively perform fellatio on another man. On this New Year's Eve, they had purchased alcohol, cocaine and prescription drugs and were partying with the victim's roommates at his apartment. "At about 11:00 p.m., he and the victim checked into a motel, where they continued to drink and use drugs. The petitioner then penetrated the victim anally, and the victim performed fellatio on the petitioner," wrote Judge Glenn, summarizing the trial testimony. "That night, however, he awoke to find the victim penetrating him anally, which enraged him. He got the victim off of him, and the two men began a physical altercation. When he saw that a pocketknife that they had used early in the evening to cut their crack cocaine was open on the nightstand, he picked it up and stabbed the victim nineteen times. He then set fire to the bed, took the victim's car, and fled the scene." Brown turned himself in to the police eighteen hours later. He also testified that at the victim had told him that he had AIDS "after letting the petitioner 'perform on him, and attempting to have anal intercourse' with the petitioner." Brown was convicted by a jury of first degree premeditated murder and aggravate arson, receiving concurrent sentences of life for the murder and twenty years for the arson. He was represented at trial by a senior public defender assisted by a junior counsel in the defender's office. The public defender sought to construct a defense premised on

impaired judgment due to the alcohol and drug use that night and self defense, and the trial included dueling experts by the defense and the state concerning the defendant's capacity that night to make judgments and know what he was doing. Brown claimed that he had not wanted to testify, but his counsel urged him to do it, without adequate preparation, but the defender insisted that Brown had been prepped for trial and that his testimony was necessary as a foundation for the expert's testimony, because there were no blood tests to confirm Brown's contention concerning his ingestion of intoxicants, etc., that evening. It later came out that the junior counsel had represented the victim in a prior criminal proceeding, but he did not recall that at the time of the trial. Ultimately, the court of appeals resolved all of Brown's claims of inadequate representation against him, finding that the evidence was overwhelming and his counsel had done the best they could in a difficult case.

PRISONER LITIGATION NOTES

UNITED STATES COURT OF APPEALS – Seventh Circuit – In "Federal Judge Denies Summary Judgment, Orders Trial, Where Officers Failed to Protect Transgender Inmate" (re *Doe v. District of Columbia*, this issue of Law Notes), a jury will decide the claims of deliberate indifference to an inmate's safety. Here, in *Ramos v. Hamblin*, 2016 U.S. App. LEXIS 19071 (7th Cir., October 24, 2016), on very different facts, Circuit Judge Richard Posner – writing for himself and Circuit Judges Ann Claire Williams and Daniel Anthony Manion – affirmed Western District of Wisconsin Chief Judge William C. Griesbach's summary judgment ruling against an inmate – who alleged that other inmates perceived him to be homosexual – who was raped by a fellow inmate. Doe sued the officers responsible for her placement with a known sexual predator at the jail. Jairo E. Ramos, an inmate who "renounced" gay identity upon a "religious conversion" but complained that he is still perceived as "homosexual" by other inmates, sued only the warden and supervisors after a sexual assault by a cellmate with no history of sexual violence in the prison. Ramos had not previously expressed any concern over his safety (despite an inmate handbook telling him how to report such concerns), and there is no evidence warning that the cellmate posed a danger to Ramos or that Ramos was generally in danger from a presentation that he disavowed. Judge Posner found that Ramos' argument is essentially an attack on the "random assignment of cellmates" used in the medium security prison – not a challenge based on any specific evidence as to his own vulnerability. "We can't even say that administrators of the [prison] were negligent or reckless in erecting this policy. The line officers who assigned Ramos and [cellmate] to the same cell may have been negligent or reckless, but he hasn't sued them — just the administrators." Ramos further maintained that the cellmate's conviction for raping a woman before he was incarcerated should have been sufficient notice that he would assault Ramos, given that Ramos was "perceived" as possibly gay; but there is no evidence that the defendants knew or should have known that the cellmate was about to rape another inmate. Judge Posner rejects the argument that all rapists should be single-celled. "If [Ramos] either is a homosexual or, as he contends, felt vulnerable because he was believed by prison staff and prisoners to be one, it behooved him to complain to prison staff, consistently with the advice in the prison handbook." There is no jury question on deliberate indifference as to these defendants. Ramos was represented in the appeal by the Chicago and New York offices of Jenner & Block, LLP. *William J. Rold*

ARKANSAS – U.S. Magistrate Judge Beth Deere recommends dismissal upon screening of a petition for habeas corpus filed by *pro se* inmate Ronald E. Parker in *Parker v. Kelley*, 2016 WL 6023836 (E. D. Ark., September 27, 2016). Parker, having accumulated "three strikes" under the Prison Litigation Reform Act ["PLRA"] in multiple federal litigation, attempts to recast civil rights claims as a habeas corpus case, challenging, *inter alia*, denial of treatment with hormones for gender identity disorder and classification as a sexual predator. Judge Deere noted that Parker had already lost prior civil right cases on the same claims and found that such relief is not available in habeas corpus, which is limited to challenges to Parker's conviction, sentence, or custody. Although not cited, *Woodford v. Ngo*, 548 U.S. 81 (2006), discusses generally the unavailability of habeas to circumvent strictures of the PLRA. Judge Deere also noted that Parker had previously been denied habeas relief and did not meet the criteria for successive petitions under *Burton v. Stewart*, 549 U.S. 147, 152-53, 157 (2007). Judge Deere recommends denial of a certificate of appealability. *William J. Rold*

CALIFORNIA – An inmate who sued federal prison officials (from the warden on down) for allegedly hiding his HIV status and failing to treat him for years suffers dismissal of his civil rights case in *Carter v. Ives*, 2016 WL 5724056 (C.D. Calif., September 29, 2016). U.S. Magistrate Judge Kenly Kiya Kato grants *pro se* plaintiff Gerald Carter leave to amend. Carter sued on a *Bivens* theory – *see Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) – claiming that the officials responded with deliberate indifference to his health care needs in violation of the Eighth Amendment because they failed to treat him "despite his belief

that he is HIV positive." Carter failed to plead adequately that he was HIV+ or that the defendants knew it and disregarded it. In fact, Carter claimed that officials lied by telling him his HIV test results were negative. Judge Kato found no deliberate indifference claim on these facts, after surveying Ninth Circuit law on the point. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (other citations omitted). This writer knows of no case sustaining a constitutional claims on similar pleadings, but this case cries out for some mention of post-test counseling for this plaintiff. *See Tokar v. Armentrout*, 97 F.3d 1078, 1081 (8th Cir. 1996) (availability of post-test counseling as part of the mix of treatment of HIV+ inmates found to be constitutional); *Laube v. Campbell*, 333 F.Supp.2, 1234, 1258-59 (M.D. Ala. 2004) (court approved settlement of prison class action medical care case that included mandatory post-test counseling for HIV test results); *Hertzel v. Schwartz*, 909 F. Supp. 261, 265 (M.D. Pa. 1995) (court mentions the existence of a Pennsylvania statute mandating post-test counseling for all HIV test results as relevant to the knowledge of risk for Eighth Amendment purposes). Since Carter's case was dismissed without service, there is no way to know whether he received any counseling. *William J. Rold*

LOUISIANA – United States District Judge Sarah S. Vance dismissed a civil rights complaint by a straight inmate who was denied use of shower and toilet facilities while a transgender inmate was using them alone, in *Kennedy v. McCain*, 2016 U.S. Dist. LEXIS 136830, 2016 WL 5678568 (E.D. La., October 3, 2016). Judge Vance found that Terrance Norman Kennedy, *pro se*, like the remainder of the prison population, was permitted to use a different bathroom during this time. Kennedy was not "singled out," nor was he a member of a protected class. There was a rational, penological, purpose for the actions (inmate safety), which was sufficient to sustain them under *Heller v. Doe*, 509 U.S. 312, 320 (1993). Judge Vance applied what might be called the lowest level of rational basis scrutiny: "any reasonably conceivable state of facts," in denying all relief. *William J. Rold*

NEW HAMPSHIRE – U.S. District Judge Steven J. McAuliffe granted summary judgment against transgender inmate Christopher (Crystal) Beaulieu, *pro se*, who sued eight corrections officers for failure to protect her and for excessive force in *Beaulieu v. Aulis*, 2016 U.S. Dist. LEXIS 133324 (D. N.H., September 28, 2016). There were two assaults by other inmates: one occurring when Beaulieu's cell door was left open and another inmate working on the tier entered the cell and assaulted her (the "open cell door" incident); and a second, when an inmate assaulted her with a fire hose after an officer allegedly told him about Beaulieu's criminal history and "boyfriend" (the "fire hose" incident). The excessive force claim involves officers retrieving a security "belly belt" from Beaulieu after she allegedly swung the leather belt and metal cuff buckle at them. For all three incidents, Judge McAuliffe found Beaulieu's accounts generalized and "conclusory," compared to the officers' detailed affidavits. He reviewed the law on deliberate indifference and protection from harm, citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); and *Giroux v. Somerset Cty.*, 178 F.3d 28, 31 (1st Cir. 1999) (other First Circuit law omitted); and he concluded that Beaulieu failed to raise a jury issue even on negligence as to the "open cell door" incident or the "firehose" incident. While there is evidence that officers knew about the history between Beaulieu and the inmate working on the tier (and Beaulieu's reasonable fear), there is no substantial evidence that the officers were remiss in leaving the cell door open. There is no history involving the "fire hose" inmate and no specific showing that confidential information was leaked to the assailant. Relying on *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); and *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986), Judge McAuliffe credits the officers' account (against Beaulieu's generalized explanation that she "slipped"), when they describe her agitated state, their efforts to retrieve the belt, and Beaulieu's resistance. Here, Beaulieu's admission that force ended when the belt was retrieved and the absence of documented serious medical injury in her medical records worked against her. There was a video, but (as happens not infrequently, in this writer's experience) the officers were out of camera range when the core activity occurred. Judge McAuliffe noted that Beaulieu's state law claims against the assaulting inmates would be considered in a separate order. *William J. Rold*

NEW YORK – This decision challenges the belief that the Prison Litigation Reform Act (PLRA) conserves judicial resources. Michael Toliver is a disabled gay inmate, confined to a walker and wheelchair, and a frequent litigator regarding his own protection. Despite prison intake precautions about no double-celling and no regular confinement, he was placed in general population and "double-bunked" at New York's Five Points Correctional Facility, where he was repeated abused. The horrific account of what he endured at the hands of several "cellmates" is described at length in a decision in which United States District Judge Richard J. Arcara adopted U.S. Magistrate Judge Leslie G. Foschio's Recommendation that New York State prison officials be restrained from denying Toliver protective custody. *See* "Gay Inmate Wins Restraining

PRISONER LITIGATION

Order for Protection Against Assault/ Harassment by Other Inmates," *Law Notes* (May 2014 at page 191). Now, in *Toliver v. Colvin*, 2016 U.S. Dist. LEXIS 136182 (W.D. N.Y., September 28, 2016), Judge Foschio screens a second amended complaint, filed by Toliver's appointed counsel, asserting six causes of action on the same facts. Toliver's odyssey is again recounted, with Judge Foschio describing each abusive cellmate and Toliver's 20+ grievances and appeals – only for the court to be to be diverted from the merits by the state's effort to revoke Toliver's *in forma pauperis* status under the "three strikes" rules of the PLRA, 28 U.S.C. § 1915(g). Although the court previously issued injunctive relief for this inmate's protection, Judge Foschio declines to apply the "imminent danger" exception to the "three strikes" rule (same PLRA section), because the imminent harm needed for a restraining order was in the past and the PLRA's exception requires a current imminent danger, citing *Malik v. McGinnis*, 293 F.3d 559, 562-63 (2d Cir. 2002). So, because the injunction apparently worked, Toliver is not in "imminent danger" and cannot avoid the "three strikes" rule. Judge Foschio then discusses six possible "strikes," before finding at least three valid ones, ordering the case stayed unless/until the $350 filing fee is paid. For those who need/wish to follow such things, there is a lengthy discussion of what counts as a strike in the Second Circuit. The State next argues that, even if the case continues, defendants should be granted summary judgment because Toliver did not exhaust administrative remedies under the PLRA, 42 U.S.C. § 1997e(a). Judged Foschio discusses whether Toliver was thwarted from exhaustion by the State's handling of his 20+ grievances and appeals, ultimately denying summary judgment because "the court is faced with genuine issues of disputed material facts regarding whether Plaintiff is excused from exhausting administrative grievances . . . because such procedures were not actually available to Plaintiff." The opinion cites numerous Second Circuit cases, which should be read with caution because Judge Foschio does not apply the Supreme Court's decision on PLRA exhaustion of earlier this year in *Ross v. Blake*, 2016 WL 3128839, 2016 U.S. LEXIS 3614, which supplants them and sets forth three exceptions to exhaustion: (1) when an administrative procedure "operates as a simple dead end – when officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the administrative process is "so opaque that it becomes, practically speaking, incapable of use," that is, "no ordinary prisoner can discern or navigate it"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, Slip Op. at 9-10. On these facts, however, a hearing would likewise be required under *Ross*. If Toliver survives this hearing, perhaps the court can finally turn to the merits. The revocation of *in forma pauperis* status does not render Toliver ineligible for appointed counsel under 28 U.S.C. § 1915(e)(1), so Toliver remains represented by Glenn Pincus of Getzville, NY. *William J. Rold*

OREGON – Transgender prisoner Michale ("Michelle") James Wright has brought a civil rights lawsuit against Oregon correctional officials, including the department's head, its medical director (Steven Shelton, M.D.), and several of its health care supervisors, for failing to meet her serious medical needs and exposing her to harassment in violation of the Eighth Amendment, in *Wright v. Peters*, 16-cv-01998 (D. Ore., filed October 17, 2016). Specifics are taken from the detailed Complaint and a news report in the *Portland Oregonian*, 2016 WLNR 31983811 (October 19, 2016). Wright, now 25, has identified as female since adolescence. She was diagnosed with "gender identity dysphoria" by Oregon officials in 2014, with her earliest possible release date in 2018. She has repeatedly sought hormone therapy while incarcerated, without success. She has attempted suicide and self-castration on multiple occasions. One account documented in her mental health notes says that Wright took blood from one of her wounds and wrote "I am female" on a pane of glass, after which the provider called security, who pepper sprayed her. The Complaint says that Wright has been offered only "dialectical behavior therapy" and "meditation" exercises, neither of which is "recognized as treatment for gender dysphoria." On at least one occasion she was allegedly forced to sign a "treatment" program that omitted any reference to transgender issues, as a condition of receiving mental health services. She has been denied feminizing products or women's garments. The Complaint says she has spent approximately 445 days in segregation during her three years' imprisonment, sometimes ostensibly on "suicide" watch. Staff refuse to use female pronouns when addressing her, and she has been subjected to mockery and ridicule. At one point she was told that "many transgender prisoners have tried to castrate themselves but. . . Defendant Shelton says institutions do not have to provide hormone therapy." The lawsuit challenges Oregon's *de facto* "freeze frame" policy, under which transgender inmates do not receive hormones unless they were started prior to incarceration, regardless of medical need. Federal prison policy has abandoned this practice – *see* FBOP Program Statement 6031.04 (June 3, 2014 at 42): "prisoners in Bureau custody with a possible diagnosis of gender dysphoria 'will receive a current individualized assessment and evaluation' and '[t]reatment options will not be precluded solely due to level of services received, or lack

of services, prior to incarceration,'" available at http://www.bop.gov/policy/progstat/6031_004.pdf – and the U. S. Department of Justice has filed a Statement of Interest opposing such policy in Georgia litigation – *see* "Georgia Allows Individualized Treatment of Transgender Inmates after Department of Justice Files 'Statement of Interest'" *Law Notes* (May 2015) at page 208. The *Oregonian* also refers to prisoner transgender treatment litigation in Florida, Delaware, Missouri and Nebraska. Wright is represented by the law firm of Stoel Rives, LLP, and the ACLU Foundation of Oregon, in Portland. *William J. Rold*

PENNSYLVANIA – A civil rights suit claiming that prison officials (a superintendent, a unit manager, and a sergeant) were deliberately indifferent to gay inmate Devon Frye's safety survives a motion to dismiss in *Frye v. Wilt*, 2016 U.S. Dist. LEXIS 137231 (M. D. Pa., September 30, 2016). U.S. Magistrate Judge Martin C. Carlson, ruling only as to the superintendent and unit manager, issued a Report and Recommendation [R & R] that Frye stated a claim against them for civil rights violations in connection with his assault and rape by his cellmate, Brian White. Frye was placed in the same cell with White by the sergeant at White's request, without asking Frye. Despite Frye's immediate complaint to the sergeant about White's sexual intimidation, the sergeant said no changes could be made for 90 days. According to the Complaint, the superintendent and unit manager were also aware of the situation. White, who was incarcerated for rape and known to be a sexual predator with a history of violent assault in the prison, raped Frye a week later. He was convicted of the rape and sentenced to an additional 4-8 years in prison. Frye was known to be "openly gay and feminine." Frye claimed the following policies were deficient: placing inmates together on one inmate's request without interviewing the proposed cellmate; double-celling known sexual predators with gay and "feminine-appearing" inmates; prohibiting cell transfers for 90 days even with credible complaints of threats and assaults; and not responding in a timely way to complaints of actual threats and sexual assaults. Judge Carlson recommended that the superintendent and unit managers' motion to dismiss be denied. The R & R relied on *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), and Third Circuit case law applying it. Judge Carlson also accepted evidence about knowledge of the dangers of sexual assault generally at the particular prison, which Frye used to challenge the placement of gay and "feminine-appearing" inmates in general population. Judge Carlson characterizes this as taking the *Farmer* argument "one step further," and does not adopt it, finding sufficient allegations without it, including the personal knowledge or involvement of the superintendent and unit manager under *Farmer*, 511 U.S. at 837; and their failure to respond "reasonably" under *Bistrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012); and *Young v. Quinlan*, 960 F.2d 351, 363 (3d Cir. 1992). A review of the motion shows that the State did not even try to have the sergeant dismissed as a defendant under *Farmer*. Frye is represented by Martin Stanshine of Stanshine & Signal, P.C., Philadelphia. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

U.S. CONGRESS – The pending National Defense Authorization Act includes a provision that would exempt defense contractors from having to comply with the Obama Administration's administrative ban on sexual orientation and gender identity discrimination, to the consternation of Democrats in Congress, who have vowed to oppose the measure with that provision, and to the consternation of President Obama, who has threatened a veto. The measure also allows contractors to discriminate on religious grounds. The House approved the measure, which is pending before the Senate and is "must-pass" legislation. A confrontation between the Executive and the Legislative branches looms.

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT – The AID has published a final rule in the Federal Register on October 25, announcing the new version of 48 CFR Part 752, that bans foreign contractors receiving U.S. government funds from discriminating in the provision of services under US-funded programs, including discrimination because of sexual orientation or gender identity.

U.S. DEPARTMENT OF DEFENSE – The DoD has issued a handbook, available on-line, describing the procedure for implementing transgender military service. The handbook sets forth the policies and procedures in the military for transitioning in the service, among other topics.

CHEYENNE, WYOMING – The City Council voted 7-3 on October 24 to pass an anti-discrimination resolution, committing the city to a policy of equal protection for lesbian, gay, bisexual and transgender residents. However, the resolution does not have the same binding authority as an ordinance, creating no private right of action. The vote followed a heated public debate in which religious opponents came on strong, emphasizing hypothetical risk to women using public facilities if transgender women, who the religious advocates consider to be men, are allowed to use them. *Wyoming Tribune-Eagle*, Oct. 25.

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MANCHESTER, NEW HAMPSHIRE – City alderman voted 10-2 in favor of a measure that offers transgender-inclusive health benefits to municipal employees under the city's group health insurance plans. This will include coverage for sex reassignment procedures. The benefits are effective July 1, 2017. *New Hampshire Union Leader*, Oct. 19.

NEW YORK – The New York State Health Department published a notice in the State Register on October 5 of a proposed rule under which transgender youth will be able to receive Medicaid coverage for puberty-blocking hormones, changing existing rules under which Medicaid funding for hormone treatment in connection with transgender identity was limited to adults. "The proposed changes therefore would make Medicaid coverage of transgender care and services available, regardless of an individual's age, when such care and services are medically necessary to treat the individual's gender dysphoria," stated the proposed rule's explanatory section. There is a 45-day comment period before the Department can adopt the proposal as a final rule. The measure would make New York the only state to allow Medicaid to cover such hormone treatments for minors, according to a staff lawyer with the Transgender Law Center, Sasha Buchert. The existing express prohibition on coverage dates back to the Pataki Administration, the last time Republicans were in control of the executive branch of the state government. Governor Andrew Cuomo has instituted several reforms, including regulations of the Department of Financial Services to guarantee insurance coverage for gender dysphoria, and regulations interpreting the state's Human Rights Law to prohibit gender identity discrimination in housing, employment and public accommodations. The Health Department moved in 2015 to end its ban on covering gender transition procedures for adults, and in July 2016 a federal judge ruled that so-called cosmetic procedures in aid of gender transition should also be covered.

LAW & SOCIETY NOTES

ALABAMA – In many parts of the state local officials are still fighting the civil war and reject the binding nature of federal mandates. So it is not surprising that Probate Judges in eight counties were continuing to refuse to issue marriage licenses as of October 18, rather than implement the Supreme Court's decision requiring equal access to marriage for same-sex couples. They rely on the rather weak argument that because the relevant statute says that the Probate Judges "may" issue licenses, they are not required to do so. Even in counties where licenses are available, some judges have declined to officiate at same-sex marriage ceremonies. *al.com/news*, Oct. 19. * * * Perhaps unsurprisingly, Chief Justice Roy Moore, who answers to God but not to the U.S. Supreme Court, is resisting his suspension by the Alabama Judiciary Court. He filed an appeal to the state's Supreme Court, and asked the Supreme Court members to recuse themselves from deciding the case, calling into action a process to appoint retired state judges to hear his appeal. At the same time, he resisted an effort by the acting chief justice to get him out of his chambers, claiming that until his appeals were exhausted he has a right to stay there.

NEW JERSEY – Attorney General Christopher S. Porrino announced on October 5 that as part of implementation of a new law that requires the A.G. to design a course "to promote positive interaction by police with all community residents, including those of all racial, ethnic and religious backgrounds," all police officers in the state will be required to take continuing education courses aimed at reducing deadly confrontations between police and minority group members. Porrino said that this would address interactions with LGBT individuals.

NEW YORK – The Buffalo Public Schools board of education approved by 8-1 vote on October 26 a new gender identity policy, under which transgender students may use restroom and locker room facilities corresponding to their "consistently expressed" gender identity at school. However, a parent or legal guardian has to declare that the student's gender identity is other than the one listed on medical and birth records in order for the students to be able to exercise these access rights. School principals are charged with developing a School Planning Guide for dealing with requests by transgender students to use their preferred name different from their legal name, and to use restrooms, locker rooms or changing facilities consistent with their gender identity. *Buffalo News*, Oct. 27.

INTERNATIONAL NOTES

AUSTRALIA – The situation concerning marriage equality proposals in Australia seems to change from day to day. Prime Minister Malcolm Turnbull, who was elected on a pledge to hold a national plebiscite on the subject of same-sex marriage, has encountered determined opposition in Parliament to authorizing the plebiscite, an expensive procedure that would not even be binding on the Parliament, and that would be expected to set off an ugly national advertising campaign by marriage equality opponents. Marriage equality proponents, both within Turnbull's Liberal coalition and from

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the opposition parties, continue to push for a free vote in Parliament, contending that they would have the votes to pass a measure if the parties would refrain from exerting discipline and allow every member to vote their conscience. Public opinion polls continue to show overwhelming support for same-sex marriage, but nose-counting in the Parliament shows that passage would be a near thing in the house and a likely winner in the Senate. Stay tuned.

AUSTRIA – The Austrian government is considering legislation to "upgrade" the status of same-sex unions, including registration at district clerk offices where marriages are registered, and allowing couples to list their common names as "family names." The law on registered unions provides many of the rights of marriage, enough to satisfy the requirement of the European Convention on Human Rights, according to a decision of the Human Rights Court. The two parties that will be sponsoring this bill hold a legislative majority, so its passage is widely expected to take place later this year. *Canadian Press*, Oct. 4.

CANADA – CBC news reported that a court had ordered that a young person identified male at birth but who had begun to identify as a girl from age 3 must dress as a boy at school. The ruling came in the midst of a custody battle between the child's parents, the father blaming the mother for the child's "gender confusion," and the mother, seeking to regain primary custody, vowing that she would allow the child, now 5, to dress as the child prefers. Another judge later overruled the earlier order concerning the child's dress. *Canadian Government News* (Oct. 25, 2016).

CANADA – The House of Commons voted 248-20 to approve a bill on second reading intended to add gender identity and expression to human rights and hate crimes laws. The measure, Bill C-16, is next headed to the Justice Committee. If finally enacted, the measure would amend the Canadian Human Rights Act and the Criminal Code's provisions on hate speech. *Canadian Press*, Oct. 18.

CZECH REPUBLIC – The government has approved a plan to allow gays and lesbian who are living in registered partnerships to adopt children of their partners (second-parent adoption). The plan must be submitted to Parliament, which approved the proposal to establish an officially recognized partnership status for same-sex couples in 2006. Registered partners enjoy a limited list of rights, not equal to those enjoyed by legally married different-sex couples. *Canadian Press*, Oct. 24.

FRANCE – The country passed legislation ending the requirement that transgender people undergo sterilization as part of gender transition. This follows the lead of Denmark, Malta and Ireland, all of which have changed their laws to allow legal recognition of gender transition without proof of surgical alteration, part of a growing awareness that gender identity is situated in the brain, not the genitals. *The Mercury* (South Africa), Oct. 14.

GIBRALTAR – Add the British Overseas Territory of Gibraltar to the ever-expanding list of British possessions and outposts that have come into line with the Mother Country's adoption of marriage equality. The bill approved by the local government has a conscience exception, under which Deputy Registrars who normally perform marriage ceremonies, can recuse themselves on religious grounds, provided the government makes available a replacement celebrant.

INDIA – The Union Cabinet has approved a proposed bill to protect people living with HIV from discrimination. The bill would establish administrative enforcement procedures and formal mechanisms for investigating complaints and redressing grievances, according to a news bulletin from *Asian News International* (Oct. 5). It would cover discrimination in employment, educational establishments, health care services, residing or renting property, standing for public or private office, and provision of insurance. It would also prohibit HIV testing as a prerequisite for employment or accessing health care or education. It also prohibits hate speech against people living with HIV, and protects the confidentiality of HIV-related information.

INDONESIA – The nation's highest court is reportedly considering a petition by the Family Love Alliance, a conservative Islamist group opposed to same-sex marriage, to broaden an existing law that makes adultery illegal to that it would cover all sexual relations outside of marriage, including, of course, all gay sexual relations. If this is done, it would reportedly be the first time that Indonesia has specifically adopted criminal penalties for private consensual gay sex between adults. *Washington Post*, Oct. 26.

IRELAND – The Court of Appeal ruled that a Christian family operating a bakery had violated the non-discrimination laws by refusing service to a man because of his sexuality. Ashers Baking Company, operated by the McArthur Family for generations, declined an order placed by Gareth Lee at its Belfast Centre Shop in May 2014. Lee sought a festive cake with the motto "Support Gay Marriage" to be used at an event to mark the International Day Against Homophobia. The bakery's staff declined the order on grounds of

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religious disapproval, and that they did not mean to discriminate against Lee, whose custom they generally welcomed, but rather against the message on the cake. Proclaimed Lord Chief Justice Sir Declan Morgan, "What they may not do is provide a service that only reflects their own political or religious message in relation to sexual orientation." The Belfast County Court had ruled against the bakery and ordered it to pay 500 pounds compensation to Lee. North Ireland's top law officer, Attorney General John Larkin QC, argued in support of the McArthur's case, arguing that requiring them to complete the order would be "cruelty." But the Equality Commission supported Lee. The court, siding with Lee, wrote, "The fact that a baker provides a cake for a particular team or portrays witches on a Hallowe'en cake does not indicate any support for either." The court found that this was a case of "direct discrimination. The answer for the supplier of services to cease distinguishing, on prohibited grounds, between those who may or may not receive the service. Thus the supplier may provide the particular service to all or none, but not to a selection of customers based on prohibited grounds." The ruling drew widespread media attention in the U.K., generating substantial controversy. *Belfast Telegraph*, Oct. 25.

MALTA – The Parliament approved a measure making conversion therapy illegal, on a second reading. The measure is the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Bill. Both sides of the house approved it. *MaltaToday*, Oct. 19.

NORTHERN IRELAND – A Labor Tribunal has awarded 16,000 pounds damages to a gay man who charged that a fellow director at the private ambulance firm where he worked for many years persisted in calling him "gay boy" and making grossly offensive jokes about his sexuality, according to an October 30 article in the *Sunday Life* section of the *Belfast Telegraph*. Also, the harasser had made comments that the plaintiff, John Ferguson, might be a risk of transmitting HIV because he was a gay man who used needles in his work. Ferguson asserted his discrimination claim against the employer, Limavady Concierge Practitioners NI Ltd. And CPNI Ambulance Services Ltd. Ferguson was himself a director and shareholder of both firms from 2012 until he left in 2015. The Tribunal found that the harasser's campaign of bullying made Ferguson feel "weak and worthless," affecting his self-esteem.

ROMANIA – Adrian Coman, a gay rights activist who lives in the United States with his same-sex spouse, Claibourn Robert Hamilton, has petitioned the Constitutional Court in Romania to recognize the marriage, which was performed in Belgium in 2010. Religious groups agitating for strengthening the country's policy against same-sex marriage have strongly opposed the petition, and have gotten up their own petition, which has attracted nearly 3 million signatories, seeking a referendum to amend the constitution, which at present has a gender-neutral definition of marriage as a "consensual act between spouses." President Klaus Iohannis has recently spoken out in support of same-sex couples, and warned the country against "religious fanaticism," and was criticized by some political leaders for doing so, according to an October 27 Associate Press Alert.

SCOTLAND – Justice Secretary Michael Matheson announced that the government would propose legislation to issue pardons to person who had been convicted of engaging in same-sex activity that was later made lawful. Consensual sex between men was not decriminalized in Scotland until 1980, and the age of consent for same-sex activity was not equalized with that for different-sex activity until 2001. The government will also purge records to ensure that such convictions do not show up on criminal record checks, according to an October 25 story in the Glasgow *Evening Times*.

SINGAPORE – On October 21, reports Agence France Presse, the government issued a ruling banning foreign companies from providing funding for the annual gay pride rally, as part of a broader set of new rules governing political protests. Beginning in November, only citizens, organization and companies from Singapore will be allowed to sponsor or participate in activities at Speakers' Corner, the traditional designated protest area in the city, according to a statement by the Ministry of Home Affairs. Permits will be required for any "Non-Singapore entities" that wish to engage in such activities there. The new rules appeared responsive to criticism of sponsorship by a gay pride rally last spring by Facebook, Google, and Goldman Sachs. (The "unholy trinity"?)

SWITZERLAND – A group opposed to legislation adopted last June that allowed same-sex couples to access second-parent adoption has fallen short in collecting the necessary signatures to place a repeal referendum on the ballot, according to a press release from Swiss Rainbow Families Association (Oct. 6).

TAIWAN – A crowd estimated at 80,000 people took to the streets in Taipei, the capital, to demonstrate their support for same-sex marriage, reported *The Telegraph* on Oct. 29. Prior to the parade, Justice Minister Chin Tai-san pledged that the new government, elected earlier this year, was in favor of

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marriage equality. At this point polling shows majority popular support on the issue, but attempts to legislate for it have been stalled by a determined, vocal minority.

TONGA – LGBTI people of Tonga have for the first time announced that they plan to approach the government in December to petition for changes to the Criminal Offences Act, which at present criminalizes cross-dressing and sodomy as felonies. Tonga is a Polynesian sovereign state and archipelago comprising 169 islands in the South Pacific, near New Zealand, of which 36 are inhabited. *www.radionz.co.nz*, Oct. 5.

UNITED KINGDOM – A proposal by the government to posthumously pardon gay and bisexual men who were convicted under long-since repealed sodomy laws was shot down in Parliament when an amendment to a crime bill was defeated. Some gay men announced that they would refuse to apply for pardons, considering that they had done nothing wrong, arguing that the government should extend an apology to them while voiding their convictions and purging the records.

PROFESSIONAL NOTES

The **TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND** (TLDEF) held its 2016 Freedom Awards event on Monday, October 24, in New York City. The honorees were U.S. Attorney General Loretta Lynch, HBO, and the law firms of Sullivan & Cromwell LLP and Kirkland & Ellis LLP. Both of the firms have put forth a major effort in pro bono assistance to transgender people through TLDEF's name-change clinic. HBO was honored for its extensive depiction of the lives of transgender people in dramatic programs and documentaries. A.G. Lynch was honored for her determined stand for transgender rights, most notably in the Title IX litigation against North Carolina's H.B. 2 and other cases around the country involving school districts, in both direct litigation and amicus capacity. Although Lynch was not present personally to accept her award, she recorded a substantial video greeting that was played for the large group in attendance. Host for the event was Dominique Jackson a/k/a Tyra A. Ross, star of "Strut" on Oxygen. TLDEF Executive Director Jillian Weiss introduced the organization's staff and paid tribute to her predecessor, founding E.D. Michael Silverman.

TRANSGENDER LAW CENTER has a full-time Staff Attorney position available in their Southern Regional Office in Atlanta. The work involves impact litigation, policy advocacy, and public education, with a focus on the trans and gender-nonconforming communities in the South. The staff attorney will report to the organization's managing attorney, based in their Oakland, California, office. Online applications can be submitted at https://transgenderlawcenter.recruiterbox.com/jobs/fk0641t. More information about the organization can be found on its website: www.transgenderlawcenter.org.

GLBTQ LEGAL ADVOCATES & DEFENDERS (Boston) has announced that Patience Crozier has joined the organization as Senior Staff Attorney effective October 17. Ms. Crozier, known as Polly, is an experienced trial litigator and appellate advocate who was a partner in the law firm Kauffman Crozier LLP, and has served as a cooperating attorney on many of the organization's cases. GLBTQ Legal Advocates & Defenders was formerly known as GLAD, Gay & Lesbian Advocates & Defenders.

DAN JOHNSTON, an Iowa attorney who argued and won the landmark Supreme Court case of *Tinker v. Des Moines School District* shortly after graduating from law school, which vindicated the 1st amendment right of public school students to engage in non-disruptive political protest (against the Vietnam War), died in Des Moines on October 26. Johnston, who was also an Iowa state legislator and prosecutor and a staff attorney for a time at the ACLU, was a gay man who did not become open about being gay until after his elective political career was over, from his belief that an openly gay person could not be elected in Iowa at that time. For many years, he had a relationship with another closeted Iowa state legislator with whom he first connected during law school. In more recent years, Johnston practice law in Iowa and was involved in the campaign to reform the application of criminal law to people living with HIV, resulting in legislation that modified the law as it had been applied by the Iowa Supreme Court. A remembrance of Dan by a reporter from the *Des Moines Register* who had been a longtime friend was published on October 26.

BRAD SEARS, the founding Executive Director of the Williams Institute at the UCLA Law School, is stepping down as executive director, but will continue at UCLA as Associate Dean of Academic Programs and Centers. He will continue to work with the Institute on a variety of projects and will not step down as Executive Director until his successor, yet to be named, is ready to begin work. Under Sears' leadership, the program has grown to national recognition as an authoritative source on data and information about the LGBT community, generating numerous reports that have been cited and relied upon by countless courts, litigants, legislators, and lobbyists.

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LGBT Law Notes Podcast

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EDITOR'S NOTES

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