

L E S B I A N / G A Y
LAW NOTES

June 2014

FROM SEA TO SHINING SEA

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Marriage Equality Moves Forward during May: Oregon & Pennsylvania are 18th & 19th Marriage Equality States after District Court Rulings are Not Appealed

The campaign for marriage equality took a major step forward during May 2014, as federal trial courts in Oregon and Pennsylvania ruled for plaintiffs and state representatives decided not to appeal the rulings, which went into effect immediately. Several new marriage equality lawsuits were filed during May, so by the end of the month there were more than seventy cases pending, with at least one lawsuit in every state with same-sex marriage bans, except for North Dakota. A Minneapolis-based attorney representing plaintiffs in the recently-filed South Dakota lawsuit announced that he was meeting with potential North

motions had been filed and trial court decisions were expected soon.

Finding that the state had no rational basis for refusing to allow same-sex couples to marry or for refusing to recognize marriages of same-sex couples performed elsewhere, U.S. District Judge Michael McShane issued a permanent injunction in *Geiger v. Kitzhaber*, 2014 U.S. Dist. LEXIS 68171, 2014 WL 2054264 (D. Ore) on May 19, barring the operation of the state's marriage amendment and its statutory ban on same-sex marriage, and decreed that his order "be effective immediately." Shortly after the decision was announced, same-sex couples

an organization formed specifically to oppose same-sex marriage, reacted to Governor Kitzhaber's prospective announcement that he would not appeal a ruling by the court, filed an "eleventh-hour" motion to intervene as a defendant shortly before the court's scheduled hearing on the plaintiffs' motions for summary judgment. Judge McShane denied that motion in a ruling from the bench on May 13, asserting that NOM lacked standing to intervene. NOM filed an appeal from his ruling on the motion with the 9th Circuit and sought an "emergency stay" of the district court proceedings, hoping to block the court from issuing its opinion,

Counting only those states in which final decisions have gone into effect, almost 44% of the population lived in jurisdictions where same-sex couples could marry or have their out-of-state marriages recognized.

Dakota plaintiffs and expected to file suit in June. Counting only those states in which final decisions have gone into effect, almost 44% of the population lived in jurisdictions where same-sex couples could marry or have their out-of-state marriages recognized. Appeals by state officials from marriage equality rulings in Utah, Oklahoma and Virginia had been brief and argued in the federal courts of appeals for the 10th and 4th Circuits, the 9th Circuit had announced that arguments would be held on appeals from Idaho and Nevada in September, and arguments were to be scheduled in the 5th, 6th, and 7th Circuits as state officials appealed adverse rulings and marriage equality advocates pressed their Nevada appeal. The Arkansas Supreme Court was also preparing for oral arguments in a state court marriage equality ruling. In several of the pending lawsuits summary judgment

began getting married in Oregon, which thereby became the 18th marriage equality state. Governor John Kitzhaber, the lead defendant, who had refused to defend the marriage ban on the merits in concert with Attorney General Ellen Rosenblum, immediately announced his support for the court's ruling, which the state did not appeal. Oregon United for Marriage, an advocacy group that was planning a ballot initiative to repeal the state's marriage amendment, announced on May 23 that it would not move forward to put the measure on the ballot.

Because all of the defendants in the two lawsuits pending before the district court had previously announced that they would not appeal the court's decision, there at first seemed slight chance for appellate review of McShane's order. The National Organization for Marriage (NOM),

but earlier on May 19 a 9th Circuit panel denied the motion. However, NOM's appeal from the judge's ruling on its motion to intervene remained pending before the 9th Circuit, which gave NOM until August 25 to brief its appeal. Persisting in its quest to block same-sex marriages, NOM filed an Application with the Supreme Court's designated Justice to hear applications from the 9th Circuit, Anthony M. Kennedy, seeking a stay of the judgment pending appeal. NOM argued, by analogy to the NAACP in early civil rights cases, that it had standing to sue in a representative capacity for some of its anonymous members, including, allegedly, an Oregon county clerk, a wedding-services provider, and an unhappy Oregon citizen who had voted for the state's marriage amendment, and that Judge McShane should not have gone forward to rule on the merits of an unopposed motion

for summary judgment. The ACLU of Oregon announced it would file papers opposing NOM's Application. On May 29, Justice Kennedy gave the plaintiffs and the state until noon on June 2 to file a response to NOM's Application. While NOM's efforts played out, same-sex couples continued to get licenses and get married through the end of May.

Judge McShane, an openly-gay appointee of President Barack Obama who began serving on the district court bench last year, included some deeply personal reflections in his opinion. "Generations of Americans, my own included, were raised in a world in which homosexuality was believed to be a moral perversion, a mental disorder, or a mortal sin," he wrote. "I remember that one of the more popular playground games of my childhood

word on this subject," he conceded, "but on this issue of marriage I am struck more by our similarities than our differences. I believe that if we can look for a moment past gender and sexuality, we can see in these plaintiffs nothing more or less than our own families. Families who we would expect our Constitution to protect, if not exalt, in equal measure. With discernment we see not shadows lurking in closets or the stereotypes of what was once believed; rather, we see families committed to the common purpose of love, devotion, and service to the greater community."

"Where will all this lead?" he asked. "I know that many suggest we are going down a slippery slope that will have no moral boundaries. To those who truly harbor such fears, I can only say this: Let us look less to the sky to see what

ruling was not yet "final" because the court had not issued a "mandate" in the case, as one judge of the circuit had called for en banc reconsideration and the process of polling the judges and issuing a decision was not yet concluded. Thus, he said, the decision was not yet a binding precedent.

But that did not matter to the outcome of this case, because he found that the plaintiffs were entitled to win without any need for heightened scrutiny, as "the state's marriage laws cannot withstand even the most relaxed level of scrutiny." Because the state's representatives joined the plaintiffs in arguing that the law was unconstitutional, Judge McShane relied upon amicus briefs and arguments made in other marriage equality cases to consider whether there was any rational justification for Oregon to refuse to allow same-sex couples to marry. Unlike some of the other states in which same-sex marriage bans were struck down over the past several months by federal courts, in Oregon same-sex couples are already provided the opportunity to have almost all of the state law rights of marriage through the status of domestic partnership, which was legislated seven years ago. Furthermore, administrative agencies of the state recently began to recognize same-sex marriages formed out-of-state in line with a formal opinion issued by Attorney General Rosenblum. Thus, it was difficult to hypothesize how any legitimate state interest was being advanced by denying marriage to same-sex couples.

McShane focused on two types of arguments generally advanced by opponents of same-sex marriage. One is that states have a right to maintain long-standing traditions that are deeply rooted in history and the belief systems of many citizens. McShane commented, "Such beliefs likely informed the votes of many who favored Measure 36," the initiative that added the Oregon Marriage Amendment to the state constitution, banning same-sex marriages. "However, as expressed merely a year before Measure 36's passage" in the U.S. Supreme Court's Texas sodomy law decision, *Lawrence v. Texas*, "moral disapproval of a group

"I know that many suggest we are going down a slippery slope that will have no moral boundaries. To those who truly harbor such fears, I can only say this: Let us look less to the sky to see what might fall; rather, let us look to each other . . . and rise."

was called 'smear the queer' and it was played with great zeal and without a moment's thought to today's political correctness. On a darker level, that same worldview led to an environment of cruelty, violence, and self-loathing. It was but 1986 when the United States Supreme Court justified, on the basis of a 'millennia of moral teaching,' the imprisonment of gay men and lesbian women who engaged in consensual sexual acts. Even today I am reminded of the legacy that we have bequeathed today's generation when my son looks dismissively at the sweater I bought him for Christmas and, with a roll of his eyes, says 'dad . . . that is so gay.'" (Judge McShane is raising a son with his same-sex partner.)

"My decision will not be the final

might fall; rather, let us look to each other . . . and rise."

Judge McShane's opinion took a narrowly-focused equal protection approach to the case. He rejected the plaintiffs' argument that the denial of marriage to same-sex couples was actually a form of sex discrimination that would require the court to apply heightened scrutiny, under which the challenged laws would be presumed to be unconstitutional. Instead, he insisted, this case was about sexual orientation discrimination. While acknowledging that a panel of the 9th Circuit ruled in January in *SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, that sexual orientation discrimination claims should invoke heightened scrutiny, he pointed out that the 9th Circuit panel

cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.” The Supreme Court found such a purpose in the Texas sodomy law, which only applied to same-sex conduct, and similarly found such a purpose in the provision of the Defense of Marriage Act that it struck down last June in *U.S. v. Windsor*.

McShane emphasized that this case is about civil marriage, not religious marriage, and said, “Overturning the discriminatory marriage laws will not upset Oregonians’ religious beliefs and freedoms.”

The other type of arguments advance by same-sex marriage opponents concerned “protecting children and encouraging stable families.” As to these, Judge McShane echoed the many decisions issued since the Utah marriage ruling in December, *Kitchen v. Herbert*. “Although protecting children and promoting stable families is certainly a legitimate governmental interest,” he wrote, “the state’s marriage laws do not advance this interest — they harm it.” He pointed out that under the Oregon Family Fairness Act, which established domestic partnerships, the legislature stated that “this state has a strong interest in promoting stable and lasting families, including the families of same-sex couples and their children.” Thus, in the opinion of the state’s own policy makers, there was no particular state interest in depriving same-sex couples and their children of the same legal rights that the state provided for different-sex couples and their children. “With this finding,” wrote McShane, “the legislature acknowledged that our communities depend on, and are strengthened by, strong, stable families of all types whether headed by gay, lesbian, or straight couples.”

He found that withholding the “full rights, benefits and responsibilities of marriage” actually forces the state “to burden, demean, and harm gay and lesbian couples and their families so long as its current marriage laws stand.” This clearly violated the spirit of the Supreme Court’s *Windsor* decision, he

wrote. “Creating second-tier families does not advance the state’s strong interest in promoting and protecting all families.”

He rejected the contention that “any governmental interest in responsible procreation” would be “advanced by denying marriage to gay and lesbian couples” because “there is no logical nexus between the interest and the exclusion. Opposite-gender couples will continue to choose to have children responsibly or not, and those considerations are not impacted in any way by whether same-gender couples are allowed to marry. Nothing in this court’s opinion today will affect the miracle of birth, accidental or otherwise. A couple who has had an unplanned child has, by definition, given little thought to the outcome of their actions. The fact that their lesbian neighbors got married in the month prior to conception seems of little import to the stork that is flying their way.”

He found that “expanding the embrace of civil marriage to gay and lesbian couples will not burden any legitimate state interest. The attractiveness of marriage to opposite-gender couples is not derived from its inaccessibility to same-gender couples. The well-being of Oregon’s children is not enhanced by destabilizing and limiting the rights and resources available to gay and lesbian families,” he continued. Thus, “No legitimate state purpose justifies the preclusion of gay and lesbian couples from civil marriage.”

McShane’s opinion included no discussion of the alternative 14th Amendment argument for marriage equality based on the Due Process Clause, relying solely on equal protection. Judges in some of the prior marriage equality rulings have commented that the Supreme Court’s identification of the “right to marry” as a fundamental right under the Due Process Clause would justify applying heightened or even strict scrutiny in reviewing same-sex marriage prohibitions, but Judge McShane did not go there at all.

McShane thus became the second federal district judge within the 9th Circuit to rule in favor of a marriage

equality claim since last June’s U.S. Supreme Court decision in *Edie Windsor’s* challenge to DOMA, and the first openly-gay judge to do so. (In addition, a U.S. magistrate judge in Utah issued a marriage equality ruling, reported below, shortly before McShane’s ruling.) Now-retired Judge Vaughan Walker, who ruled for marriage equality in the Proposition 8 case in 2010, did not “officially” come out as gay until he retired after the matter was no longer pending before him, so the claim on being the first “openly gay” judge to rule in such a case remains with McShane. Part of NOM’s appeal to the 9th Circuit argues that McShane, as a partnered gay man raising a child, should have recused himself from the case, but it is unlikely that the 9th Circuit would agree, as it already rejected a similar argument made on appeal by the proponents of California Prop 8 in their attempt to get Judge Walker’s decision vacated. Although the 9th Circuit has temporarily stayed the Idaho marriage ruling at the request of that state’s governor, Butch Otter, no such request would come from Oregon officials. Although the 9th Circuit could, at least theoretically, issue a stay on its own motion, such a result seemed unlikely when none of the parties to the case had asked the court to intervene and the state government was happily complying with the court’s order, with scores of couples marrying on the afternoon of May 19.

Plaintiffs were represented by Lake James H. Perriguet, Law Works LLC, and Lea Ann Easton, Dorsay & Easton LLP. Lead attorney for the state, also arguing in support of plaintiff’s claimed right to marry, was Anna M. Joyce of the Oregon Department of Justice.

In other news from Oregon, a decision by the Oregon Supreme Court to uphold without comment the Attorney General’s ballot title draft for an initiative intended to shelter business from discrimination charges if they refused to provide services on religious grounds led the proponents of the initiative to drop their attempt to put it on the ballot. Initiative proponents complained that the approved ballot title used “politically charged” wording — about allowing

businesses to discriminate – that would alienate voters. The title, as approved by the A.G., was: “Religious Belief” exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, “arrangements”.

The day after the Oregon decision, U.S. District Judge John E. Jones III, a Republican appointed to the federal district court in Harrisburg, Pennsylvania by President George W. Bush in 2002, ruled on May 20 in *Whitewood v. Wolf*, 2014 WL 2058105, 2014 U.S. Dist. LEXIS 68937 (M.D. Pa.), that Pennsylvania’s statutes banning same-sex marriages in the state or recognition of same-sex marriages formed outside the state violate the 14th Amendment’s Due Process and Equal Protection Clauses. Judge Jones issued an order declaring both statutes unconstitutional and permanently enjoining the state from enforcing them. Neither his opinion nor his order mentioned any stay, but it seemed likely that Governor Tom Corbett would seek a stay, first from Judge Jones and then, if one was not forthcoming, from the 3rd Circuit Court of Appeals. But Governor Corbett surprised everybody by waiting one day and then announcing he would not appeal the ruling, making Pennsylvania the 19th marriage equality state. Shortly after Judge Jones’s ruling was announced, same-sex couples began getting marriage licenses in some county clerk’s offices. The governor’s office announced its expectation that several other pending marriage equality cases in federal and state courts in Pennsylvania would now be effectively “moot” as a result of the state’s decision to comply with Judge Jones’s order.

[On May 27, the Pennsylvania Supreme Court lifted an order by the Commonwealth Court that had blocked Montgomery County from issuing marriage licenses to same-sex couples as a result of a lawsuit instituted by the state against Register of Wills D. Bruce Hanes, who had begun issuing such licenses last summer based on his own interpretation of *U.S. v. Windsor*. Ironically, because of the Commonwealth Court’s Order, the county clerk who was first to issue licenses prior to Judge Jones’s ruling

was the last to have authority to do so after the ruling went into effect. (*Bucks County Courier Times*, May 29.)]

The American Civil Liberties Union (ACLU) filed *Whitewood* last July on behalf of what Judge Jones described as “eleven courageous lesbian and gay couples, one widow, and two teenage children of one of the aforesaid couples.” Some of the couples are seeking marriage licenses, others are seeking recognition of their out-of-state marriages, the teenagers complain about the deprivations they suffer from their parents not being married, and the widow, who married her late partner out of state, complains about not being recognized as a surviving spouse. One of the state’s defenses to this lawsuit was that the plaintiffs had failed to show any injury for the court to redress, a nonsensical position that Judge Jones dispatched efficiently. He found that the “stigmatizing harms” imposed by the statutes, which were passed in 1996 in response to a marriage equality lawsuit in Hawaii, were “cognizable” as a matter of law, and, additionally, that “plaintiffs suffer a multitude of daily harms, for instance, in the areas of child-rearing, healthcare, taxation, and end-of-life planning.” The state’s other main defense was that this case is precluded by the Supreme Court’s 1972 *Baker v. Nelson* ruling that the issue of same-sex marriage did not raise a “substantial federal question.” All of the recent marriage equality decisions have rejected this argument, pointing to the significant developments in American constitutional law since 1972, not least last year’s Supreme Court ruling striking down the Defense of Marriage Act, to conclude that exclusion of same-sex couples from marriage now presents a very substantial federal question.

Judge Jones found the Pennsylvania statutes unconstitutional on two separate constitutional theories: due process and equal protection.

The due process theory rests on Supreme Court decisions finding that the “right to marry” is a fundamental right, guaranteed to each individual. Judge Jones rejected the state’s argument that because “the United States Supreme Court has never recognized that the

fundamental right to marry includes the right to marry a person of one’s choice,” the state’s marriage laws did not violate the plaintiffs’ due process rights. After briefly summarizing the Supreme Court’s important marriage decisions, Judge Jones wrote, “this Court is not only moved by the logic that the fundamental right to marry is a personal right to be exercised by the individual, but also rejects Defendants’ contention that concepts of history and tradition dictate that same-sex marriage is excluded from the fundamental right to marry. The right Plaintiffs seek to exercise is not a new right,” he continued, “but is rather a right that these individuals have always been guaranteed by the United States Constitution.” He went on to find that this right encompassed both the right to marry and the right to remain married after crossing a state line, so the due process theory served to invalidate both Pennsylvania’s ban on same-sex marriage and its ban on recognizing out-of-state same-sex marriages.

Turning to equal protection, the judge noted that one branch of equal protection jurisprudence would apply strict scrutiny to any law that discriminates regarding a fundamental right, and nobody contends that same-sex marriage bans would survive such strict scrutiny. However, setting that issue aside, he proceeded to analyze whether discrimination because of sexual orientation requires heightened scrutiny. The 3rd Circuit Court of Appeals has never ruled on the question, and neither has the Supreme Court, at least directly. Judge Jones noted that several of the other courts that have issued marriage equality rulings, in addition to the 9th Circuit in a recent jury selection case, have held that heightened scrutiny is appropriate for sexual orientation claims, and that a review of the Supreme Court’s gay rights decisions suggests that the Court has been using a more demanding standard of judicial review than the traditional deferential rational basis test. After reviewing the factors that courts generally consider in deciding whether a particular form of discrimination is subject to heightened scrutiny review, Jones concluded that this was the

appropriate level of review.

Consequently, presuming the ban to be unconstitutional, Jones considered whether there was an “important governmental objective” to support the ban. Since the state had been arguing in support of using the deferential rational basis test, its arguments fell quite short. Jones identified “promotion of procreation, child-rearing and the well-being of children” and “tradition” as the only interests the state was proposing. “Significantly,” he wrote, “Defendants claim only that the objectives are ‘legitimate,’ advancing no argument that the interests are ‘important’ state interests as required to withstand heightened scrutiny. Also, Defendants do not explain the relationship between the classification and the governmental objectives served; much less do they provide an exceedingly persuasive justification. In essence, Defendants argue within the framework of deferential review and go no further. Indeed, it is unsurprising that Defendants muster no argument engaging the strictures of heightened scrutiny, as we, too, are unable to fathom an ingenuous defense saving the Marriage Laws from being invalidated under this more-searching standard.”

Like the other trial judges ruling in marriage equality cases over the past several months, Judge Jones rose to an eloquent conclusion. “The issue we resolve today is a divisive one,” he wrote. “Some of our citizens are made deeply uncomfortable by the notion of same-sex marriage. However, that same-sex marriage causes discomfort in some does not make its prohibition constitutional. Nor can past tradition trump the bedrock constitutional guarantees of due process and equal protection. Were that not so, ours would still be a racially segregated nation according to the now rightfully discarded doctrine of ‘separate but equal.’” After citing the Supreme Court’s key ruling against racial segregation, *Brown v. Board of Education* (1954), he continued, “In the sixty years since *Brown* was decided, ‘separate’ has thankfully faded into history, and only ‘equal’ remains. Similarly, in future generations the label same-sex marriage will be abandoned,

to be replaced simply by marriage. We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.”

Pennsylvania’s marriage statutes require a three-day process to apply for and receive a marriage license. Thus, unless individual couples can secure some sort of waiver of this waiting period, it is possible that speedy action by the state to obtain a stay could avoid what happened in Utah, Arkansas, and Michigan, where same-sex marriages took place before the state was able to secure a stay pending appeal. In those states, one could apply for a license, obtain it immediately, and then quickly have a marriage ceremony, but Pennsylvania’s laws do not routinely provide such speed. Judge

the state signified in advance that it would not appeal a marriage equality ruling, same-sex marriages could quickly begin taking place. Each new decision now cites the lengthening list of prior decisions, the sheer weight of which is building to a daunting body of precedent, even though viewed individually trial court rulings may have little precedential weight. We still await the first federal appellate ruling that the 14th Amendment of the U.S. Constitution guarantees to gay people the same individual right to marry the partner of their choice. The U.S. Courts of Appeals for the 10th Circuit (in Denver) and the 4th Circuit (in Richmond) have heard arguments on cases arising from Utah, Oklahoma and Virginia, and other circuits will

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Jones’ decision to issue his opinion on a Tuesday, rather than right before a weekend, made it more likely that the state might secure a stay before marriages could take place.

Taking together both the rulings on the right to marry and those rulings that just dealt with marriage recognition, Judge Jones’s decision was the fourteenth consecutive ruling by a state or federal court since last June’s U.S. Supreme Court DOMA decision to rule in favor of LGB plaintiffs seeking marriage rights or recognition. Since then no court has rejected such a claim, although many of the trial court decisions are “on hold” due to stays pending appeal. In New Mexico and New Jersey, the states’ highest courts last year agreed with their trial courts, and in Oregon, yesterday, where

hear arguments soon from other states. While there may be more federal trial court decisions in the months ahead, with scores of cases pending in all but three of the remaining states that ban same-sex marriage, the next truly significant development will be the first court of appeals ruling, which could come at any time.

Counsel for the plaintiffs include Dylan J. Steinberg, John S. Stapleton, Mark A. Aronchick, Helen E. Casa, and Rebecca S. Melley of Hanglely Aronchick Segal Pudlin & Schiller; Mary Catherine Roper and Molly M. Tack-Hooper of the ACLU of Pennsylvania, James D. Esseks and Leslie Cooper of the ACLU Foundation, Witold J. Walczak of the Pittsburgh Office of the ACLU of Pennsylvania, and Seth F. Kreimer of Philadelphia. ■

Federal Court Says Utah Must Recognize Same-Sex Marriages That Were Celebrated Before the Supreme Court Stay

U.S. District Judge Dale A. Kimball ruled on May 19 in *Evans v. State of Utah*, 2014 WL 2048343 (D. Utah), that the state must recognize same-sex marriages that were performed there from December 20, 2013, to January 6, 2014. Another federal district judge, Robert Shelby, ruled on December 20 in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), that Utah's ban on same-sex marriage was unconstitutional. Judge Shelby, and subsequently the 10th Circuit Court of Appeals, refused to stay that decision pending appeal, and more than 1300 marriage licenses were issued to same-sex couples before the U.S. Supreme Court responded affirmatively to the state's request for

hesitated, awaiting instructions from the state government. Finally, upon the attorney general's advice that clerks who refused to issue licenses could be held in contempt by the federal district court, many clerks fell into line and issued more than 1300 licenses, as state officials announced that such marriages were valid. However, when the Supreme Court issued its stay and the governor declared that those marriages were now "on hold" because the state could not recognize them under the "revived" laws, the ACLU filed suit on behalf of several recently-married couples, seeking an injunction requiring the court to recognize all of the marriages.

The result of Herbert's action was to interfere with the ongoing efforts

court, but the state removed the suit to federal district court and opposed the plaintiffs' motion to certify to the Utah Supreme Court the question whether couples legally married under Utah law have vested rights in their marriage that could not be taken away by the state without a compelling interest. The plaintiffs then moved for a preliminary injunction, arguing that their vested rights were being abridged by the state for no valid reason. The state, in response, argued that the Supreme Court's stay had a retroactive effect, restoring the marriage ban going back to December 20, 2013, thus rendering the marriages invalid. And after having opposed the plaintiff's motion to certify the vested rights question to the Utah Supreme Court, the state reversed course and urged Judge Kimball to certify virtually the same question, but Judge Kimball refused to do so, finding that Utah judicial precedents are clear on the question of vested marriage rights.

Judge Kimball found that the state's arguments were contradicted by well-established principles of Utah law as well as the Due Process Clause of the 14th Amendment. Kimball placed heavily reliance on the California Supreme Court's ruling in the somewhat analogous situation created when California voters adopted Proposition 8 in November 2008, after thousands of same-sex couples had married in the five months after that court's marriage equality decision went into effect in June 2008. In that case, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court said that those who had married at a time when same-sex marriage was legal had vested rights in their marital status and everything that went with that status, which could not be taken away by a subsequent constitutional amendment. Kimball found that Utah cases dating back to the 19th century had also taken the position that once a

Judge Kimball found that the state is barred by the Due Process Clause of the 14th Amendment from putting legally valid marriages "on hold."

a stay pending appeal. (See *Herbert v. Kitchen*, 134 S. Ct. 893 (U.S. 2014)). After the Supreme Court issued its stay, Governor Gary Herbert declared that the same-sex marriages that had been performed were "on hold" as the stay had "revived" the state's marriage ban. In his May 19 ruling, Judge Kimball found that the state is barred by the Due Process Clause of the 14th Amendment from putting legally valid marriages "on hold," but temporarily stayed his own ruling for 21 days to give the state an opportunity to appeal to the 10th Circuit.

There was some confusion on the part of the state government after Judge Shelby issued his injunction against the state's marriage ban. Some clerks began issuing licenses quickly, while others

by recently-married same-sex couples to assert their rights, including several adoption proceedings that were thrown into limbo as Utah trial judges were uncertain how to proceed. Indeed, the state soon faced the threat of a contempt proceeding from one trial judge who issued an adoption order that state officials were refusing to honor by issuing an appropriate birth certificate, and there were questions pending at the Utah Supreme Court about the status of these marriages. That court temporarily stayed various adoption proceedings while it decided whether the state must recognize the marriages, and it was an interesting question how Judge Kimball's decision would affect that determination by the state court.

The ACLU filed its lawsuit in state

couple was legally married, they had vested marriage rights protected against retroactive rejection by the state.

Utah's attorneys argued that the California situation with Proposition 8 was distinguishable. The Utah licenses were issued in compliance with an injunction by a single federal trial judge that the state had promptly appealed. Thus, they said, it was not in that sense a final order in the case, unlike the California Supreme Court's ruling on marriage equality, which could only be overturned by a state constitutional amendment. (That amendment was subsequently ruled unconstitutional by a federal district court in the *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal., Aug. 4, 2010), *app. dismissed sub nom Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), which went into effect last June after the U.S. Supreme Court ruled that the proponents of Proposition 8 did not have standing to appeal the court's ruling, which had not been appealed by state officials.) Judge Kimball was not persuaded by this distinction, and he also pointed out the strong bias against retroactive application of new legal rulings. The Supreme Court did not issue any explanation about the impact on existing marriages of the stay it issued on January 6, and Judge Kimball pointed out that such an action would not be deemed to have any sort of retroactive effect unless the Supreme Court had voiced such an intention.

He also found that there were strong Utah judicial precedents concerning vested rights in marriage, holding that such rights vest when the marriage was performed. According to Judge Kimball, from the time Judge Shelby issued his injunction until the time the Supreme Court stayed the injunction pending appeal, it was legal for same-sex couples to marry in Utah, and as soon as any such marriage was performed, the couple had vested rights in the marriage that could not be abridged by the state. He pointed out that this was consistent with the Supreme Court's DOMA ruling, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

"The *Windsor* Court held that divesting 'married same-sex couples of the duties and responsibilities that are an essential part of married life' violates due process," he wrote.

Judge Kimball went through the wording of the Utah constitutional and statutory same-sex marriage bans, and found that all of those provisions were stated in the present tense and made no mention of retroactive application. Thus, if one construed the Supreme Court stay to have "revived" those provisions while the case was on appeal, there was no basis to apply them retroactively.

"The State argues that application of Utah's previously existing marriage bans after the Supreme Court's Stay Order is not retroactive application of the bans because the laws were enacted long before the Plaintiffs entered into their marriages," he wrote. "However, this argument completely ignores the change in the law that occurred. The marriage bans became legal nullities when the *Kitchen* decision was issued and were not reinstated until the Stay Order. In addition, the State's argument fails to recognize that Utah law defines a retroactive application of a law as an application that 'takes away or impairs vested rights acquired under existing laws in respect to transactions or considerations already past.' Under this definition, the State's application of the marriage bans to place Plaintiffs' marriages 'on hold,' necessarily 'takes away or impairs vested rights acquired under existing law.'" Judge Kimball concluded that even if Judge Shelby's decision is eventually reversed and the injunction dissolved, the marriages that were performed would remain valid under the vested rights theory and the strong policy against retroactive application of law.

After analyzing the factors applied in the 10th Circuit to determine whether a preliminary injunction should be issued, Judge Kimball found that all the factors had been satisfied. "Plaintiffs have demonstrated a clear and unequivocal likelihood of success on the merits of their deprivation of federal

due process claim," he wrote, and he found that they had also established the necessary irreparable harm if their marriages were not recognized. On the other hand, he found, "The State has no legitimate interest in depriving Plaintiffs of their constitutional rights," and he also found "no harm to the State based on an inability to apply the marriage bans retroactively." As to the public interest, "the court agrees with Plaintiffs that the public is well served by having certainty about the status of Plaintiffs' marriages."

The state's lawyers had asked the court to stay its preliminary injunction so that the state could appeal it to the 10th Circuit. Judge Kimball concluded that "the State has not met its burden of establishing the factors required for a stay pending appeal," but he decided to exercise discretion to grant to the state a "limited 21-day stay during which it may pursue an emergency Motion to Stay with the Tenth Circuit." His explanation: "The court recognizes the irreparable harms facing Plaintiffs every day. However, the court finds some benefit in allowing the Tenth Circuit to review whether to stay the injunction prior to implementation of the injunction. Therefore, notwithstanding the many factors weighing against a stay, the court, in its discretion, grants the State a temporary 21-day stay." However, unless the 10th Circuit responds favorably to the state's request, Judge Kimball's order will go into effect requiring recognition of the marriages.

The plaintiffs were represented at the court's hearing on the preliminary injunction motion by attorneys Erik Strindberg, Joshua A. Block and John Mejia, Legal Director of Utah's ACLU chapter.

Judge Kimball was appointed to the federal district court by President Bill Clinton in 1997 and took senior status and a reduced caseload in November 2009 upon reaching age 70. He teaches at Brigham Young University Law School, and is an active member of the Mormon Church, in which he has held various leadership positions. ■

Federal Magistrate Judge Declares Idaho's Ban on Same-Sex Marriage Unconstitutional

U.S. Magistrate Judge Candy Wagahoff Dale ruled in *Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417, 2014 WL 1909999 (D. Idaho), that Idaho's ban on same-sex marriage violates the 14th Amendment Due Process and Equal Protection Clauses. Judge Dale released her decision late on May 13, issuing an injunction against enforcement of the ban to become effective at 9 a.m. on May 16, unless stayed by judicial action. Anticipating this result, Governor C. L. (Butch) Otter had already filed a Contingent Motion to Stay Pending Appeal on Monday, May 12, with the expectation that Judge Dale would grant a stay pending Otter's appeal to the 9th Circuit. However, on Wednesday, May 14, Judge Dale denied

with pretrial discovery matters and settlement conferences and issue recommendations to federal district judges on motions, but in this case Judge Dale was authorized to issue a final decision on the merits.

Judge Dale's decision closely resembled the long string of federal trial court decisions dating back to *Kitchen v. Herbert*, decided in December in Utah, but it had one important distinguishing factor. This was the first decision by a federal trial court within the jurisdiction of the 9th Circuit Court of Appeals to rule on a marriage equality claim in light of the circuit court's January 21 decision in *SmithKline Beecham v. Abbot Laboratories*, 740 F.3d 471. In that

The defendants in the Idaho case — Governor Otter, Ada County Recorder Christopher Rich, who had denied marriage licenses to some of the plaintiffs, and the State itself as represented by Attorney General Wasden — argued that *SmithKline* was distinguishable from this case and should not apply. They argued that the *SmithKline* ruling limits application of heightened scrutiny to “instances of proven animus or irrational stereotyping,” but Judge Dale rejected this contention. “*SmithKline* addresses purposeful discrimination and the perpetuation of impermissible stereotypes,” she wrote, “but it does so in the context of *Batson* [jury selection] analysis — not in the discussion about *Windsor*. With respect to *Windsor*, the court's holding is undeniably broad: ‘*Windsor*'s heightened scrutiny applies to classifications based on sexual orientation.’ Had the Ninth Circuit intended to limit its holding to cases involving animus or irrational stereotyping, it easily could have done so. Instead it found *Windsor* to be ‘dispositive of the question of the appropriate level of scrutiny in this case,’ a case that fits into the broader category of ‘classifications based on sexual orientation.’ Just as the Ninth Circuit was ‘bound by *Windsor*'s controlling, higher authority’ when deciding *SmithKline*, this Court is bound to apply *Windsor*'s heightened scrutiny to Idaho's Marriage Laws.”

Ironically, Judge Dale didn't even have to engage with this argument to reach her result, as she had already concluded earlier in her opinion that the Idaho marriage law would be subjected either to strict scrutiny — the stiffest level of judicial review — or heightened scrutiny, because the law abridges a fundamental right: the right to marry. She firmly rejected the defendants' argument that she was still bound to dismiss the case based on the U.S. Supreme Court's 1972 rejection

The Idaho parties had agreed to expedite their case by referring it for decision to Magistrate Judge Dale.

the motion for a stay. The Governor and Attorney General Lawrence Wasden then sought an emergency stay from the 9th Circuit. A three-judge panel of the 9th Circuit granted a “temporary” stay while it considered the parties' arguments concerning a stay pending appeal. As a result, the Magistrate's order did not go into effect at 9 am on May 16. The following week, the 9th Circuit panel issued a stay pending a ruling on the merits, and ordered expedited review, with a hearing to be held during the week of September 8, 2014. The panel stated that no extensions of time would be granted on a tight briefing schedule.

The Idaho parties had agreed to expedite their case by referring it for decision to Magistrate Judge Dale. Normally magistrate judges deal

case, a three-judge panel decided that the Supreme Court's *U.S. v. Windsor* decision, striking down Section 3 of the Defense of Marriage Act, had effectively invalidated prior 9th Circuit rulings on the question whether sexual orientation discrimination claims are subject to “heightened scrutiny.” When heightened scrutiny applies, the challenged law is presumed to be unconstitutional and the government bears the burden of proving that the law significantly advances an important government policy. Most legal commentators agree that a ban on same-sex marriage cannot survive heightened scrutiny review. The *SmithKline* panel found that, in light of how the Supreme Court dealt with the challenge to DOMA in *Windsor*, such claims should be subject to “heightened scrutiny.”

of a same-sex marriage challenge from Minnesota, *Baker v. Nelson*, 409 U.S. 810, on the ground that same-sex marriage did not present a “substantial federal question,” pointing out that all the federal courts ruling in marriage equality cases since *Windsor* have rejected that argument as no longer tenable. Then she demolished the defendants’ argument that the plaintiffs are seeking “recognition of a new fundamental right, the right to same-sex marriage.” “This ‘new right’ argument attempts to narrowly parse a right that the Supreme Court has framed in remarkably broad terms,” wrote Judge Dale. “*Loving* was no more about the ‘right to interracial marriage’ than *Turner* was about the ‘prisoner’s right to marry’ or *Zablocki* was about the ‘dead-beat dad’s right to marry,’” she continued, invoking the Supreme Court’s leading marriage cases. “Even in cases with such vastly different facts, the Supreme Court has consistently upheld the right to marry, as opposed to a sub-right tied to the facts of the case.”

As such, of course, the Supreme Court has frequently referred to the “right to marry” as a right of fundamental importance, and spoke of it in similar terms in *Windsor* last June. Furthermore, Judge Dale noted, “and most critically, the Supreme Court’s marriage cases demonstrate that the right to marry is an individual right, belonging to all. If every individual enjoys a constitutional right to marry, what is the substance of that right for gay and lesbian individuals who cannot marry their partners of choice? Traditional man-woman marriage is no answer, as this would suggest that gays and lesbians can switch off their sexual orientation and choose to be content with the universe of opposite-sex partners approved by the State. Defendants offer no other answer.”

Having settled on heightened scrutiny, Dale carefully reviewed each of the “justifications” proposed by the defendants for maintaining the ban, and found them all wanting. The notion that the ban advanced the state’s interest in the welfare of children struck her as “so

attenuated that it is not rational, let alone exceedingly persuasive.” Rejecting the defendants’ attempt to rely on outlier “scientific” publications arguing that children need to have parents of both sexes in order to thrive, she wrote, “The best that can be said for Defendants’ position is that some social scientists quibble with the prevailing consensus that the children of same-sex parents, on average, fare no better or worse than the children of opposite-sex parents. But the Court need not — even if it could at the summary judgment stage — resolve this sociological debate. The parties’ debate over the scientific literature distracts from the essential inquiry into the logical link between child welfare and Idaho’s wholesale prohibition of same-sex marriage.” Indeed, she pointed out, denying same-sex couples the right to marry disregards “the welfare of children with same-sex parents,” she observed. “Although the State and Recorder Rich dismiss same-sex households as ‘statistically insignificant,’ no Defendant suggests that the State’s child welfare interest does not extend to the children in these households.”

Judge Dale was similarly dismissive of the ridiculous “channeling procreation” argument or “federalism” arguments, and was particularly critical of the argument that the ban was necessary to “accommodate religious freedom,” characterizing this argument as “myopic.” “No doubt many faiths around the world and in Idaho have longstanding traditions of man-woman marriage rooted in scripture,” she acknowledged, “But not all religions share the view that opposite-sex marriage is a theological imperative. In fact, some of the Plaintiffs actively worship in faiths that recognize and support their unions. To the extent that Governor Otter argues that Idaho has a legitimate interest in validating a particular religious view of marriage, that argument blithely disregards the religious liberty of congregations active in Idaho.” She went on to quote the Utah marriage decision on this point: “By recognizing the right to marry

a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.”

Of course, no marriage equality decision would be complete without a quote from one of Supreme Court Justice Antonin Scalia’s dissenting opinions, in which he argued that the Supreme Court’s gay rights rulings were opening up the possibility of constitutional claims to the right to marry. Judge Dale quoted Scalia in the context of refuting the defendants’ argument that there is no evidence of animus against gay people in the Idaho ban. “Suggesting that the laws’ discriminatory effects are merely incidental, Defendants characterize them as efforts to preserve Idaho’s traditional civil marriage institution. ‘But “preserving the traditional institution” is just a kinder way of describing the State’s moral disapproval of same-sex couples,’” she quoted Justice Scalia’s dissent in *Lawrence v. Texas*, the 2003 case invalidating sodomy laws.

Concluding, Judge Dale wrote that the plaintiffs “are entitled to extraordinary remedies because of their extraordinary injuries. Idaho’s Marriage Laws withhold from them a profound and personal choice, one that most can take for granted. By doing so, Idaho’s Marriage Laws deny same-sex couples the economic, practical, emotional, and spiritual benefits of marriage, relegating each couple to a stigmatized, second-class status. Plaintiff suffer these injuries not because they are unqualified to marry, start a family, or grow old together, but because of who they are and whom they love.”

Grounding her decision firmly in the 14th Amendment, Judge Dale wrote, “While the Supreme Court has not expressly decided the issues of this case, it has over the decades marked the path that leads to today’s decision,” and concluded: “Slow as the march toward equality may seem, it is never in vain.”

Governor Otter’s “contingent” motion pointed to the Supreme Court’s

January 6 stay of the Utah marriage decision, arguing that the “Supreme Court made clear that it will decide the constitutionality of man-woman marriage and until that time no lower court decision holding against man-woman marriage should operate to allow same-sex couples to marry or have their marriages recognized contrary to the law of their particular states.” If a stay is not granted, he argued, “there is likely to be a repetition in Idaho of the chaos, confusion, conflict, uncertainty, and spawn of further litigation and administrative actions seen in Utah and, to a lesser extent, in Michigan.” Otter and Wasden pressed these arguments anew in their petition addressed to the 9th Circuit after Judge Dale refused to stay her order.

Already pending at the 9th Circuit was an appeal by gay rights advocates of a pre-*Windsor* adverse ruling in the Nevada marriage equality case, *Sevcik v. Sandoval*. That had been scheduled for argument in April, but the argument was postponed after a member of the circuit court asked to poll the entire Circuit on whether to reconsider the “heightened scrutiny” ruling in *SmithKline Beecham v. Abbott Laboratories*, which would obviously affect that case and subsequent marriage equality appeals.

Meanwhile, marriage equality suits were pending in trial courts within the 9th Circuit in Arizona, Oregon (decided after Idaho, see above), Alaska and Montana.

Four same-sex couples are plaintiffs in the case: Susan Latta and Traci Ehlers, Lori Watsen and Sharene Watsen, Shelia Robertson and Andrea Altmayer, and Amber Beierle and Rachael Robertson. Some of them seek to marry, while others, already married out-of-state, seek recognition of their marriages. They are represented by Boise attorneys Deborah A. Ferguson and Craig Durham and the National Center for Lesbian Rights, which had represented plaintiffs in the California marriage litigation that concluded with a historic marriage equality ruling by the California Supreme Court in 2008. ■

Arkansas Judge Strikes Down State Ban on Same-Sex Marriage in a Case of “Epic Constitutional Dimensions”

Pulaski County Circuit Judge Christopher Charles Piazza ruled on May 9 that Arkansas’s same-sex marriage ban violates the 14th Amendment of the federal constitution as well as Article 2, Section 3 of the Arkansas Constitution’s Declaration of Rights. Judge Piazza, who made no mention of a stay in his ruling, waited until after county clerk offices had closed on Friday afternoon to release his decision in the case of *Wright v. State of Arkansas*, Case No: 60CV-13-2662 (Ark. Cir. Ct., Pulaski Co.). Although the Pulaski County Clerk’s office announced that they were prepared to begin issuing marriage licenses to same-sex couples at the start of business on Monday morning, some couples in the state set their sights on a handful of county offices that were scheduled to be open on Saturday morning. In the event, at least one county clerk’s office issued some licenses on Saturday, after initial hesitation. The attorney general’s office quickly filed Motions for Immediate Stay with Judge Piazza and the Arkansas Supreme Court, indicating that the office would be filing an immediate appeal. Judge Piazza did not issue a stay, and on Monday morning clerks in several counties began issuing licenses to same-sex couples, as the Supreme Court asked the plaintiffs to file a response to the state’s motion by noon on Tuesday, May 13.

The Arkansas Supreme Court ruled, per curiam on May 14, *Smith v. Wright*, 2014 Ark. 222 (not officially published), that as Judge Piazza’s ruling did not expressly invalidate a provision of state law barring clerks from issuing licenses to same-sex couples, there was no need for a stay, and, furthermore, as Piazza had not yet issued a final order in the case, the state’s attempt to appeal was premature. Piazza then ruled the next day that the provision adverted to by the Supreme Court, Ark. Code Ann. Sec. 9-11-208(b), was also unconstitutional.

Subsequently a stay was issued by the Supreme Court on May 16, without any written explanation. In the meantime, however, several hundred couples had managed to obtain licenses and marry.

Trial judges seem to be striving to out-do each other in eloquence as they write their marriage equality rulings, and Judge Piazza was no exception. He ended his opinion by referring to the U.S. Supreme Court’s famous ruling on interracial marriage, *Loving v. Virginia*, “It has been over forty years since Mildred Loving was given the right to marry the person of her choice. The hatred and fears have long since vanished and she and her husband lived full lives together; so it will be for the same-sex couples. It is time to let that beacon of freedom shine brighter on all our brothers and sisters. We will be stronger for it.”

Although two state court systems — New Jersey and New Mexico — have produced marriage equality decisions since the Supreme Court struck down Section 3 of the Defense of Marriage Act last year in *U.S. v. Windsor*, Judge Piazza’s decision was the first to do so on both federal and state grounds in a state that has an anti-gay marriage amendment. The amendment was enacted as part of Karl Rove’s 2004 campaign strategy to re-elect George W. Bush by drawing conservative voters to the polls with anti-gay marriage initiatives in key states. That strategy had high salience because the Massachusetts Supreme Judicial Court’s order to allow same-sex couples to marry — the first such in the nation — went into effect on May 17, 2004, amidst a frenzy of media attention prompted by San Francisco Mayor Gavin Newsom’s attempt to let same-sex couples marry in that city, followed by copy-cat actions by some local authorities in Oregon, New Mexico and New York. The Arkansas amendment, constitutionalizing a statute that had been enacted almost a decade

earlier in response to same-sex marriage litigation in Hawaii, won support from three-fourths of Arkansas's voters.

The overwhelming popular approval for the amendment was a centerpiece of the state's defense of its ban before Judge Piazza. He characterized the amendment vote as "an unconstitutional attempt to narrow the definition of equality. The exclusion of a minority for no rational reason is a dangerous precedent," he continued. "Furthermore, the fact that Amendment 83 was popular with voters does not protect it from constitutional scrutiny as to federal rights. The Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual's fundamental rights 'may not be submitted to vote; they depend on the outcome of no elections,'" quoting from the U.S. Supreme Court's historic 1943 flag salute decision, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, which held that Congress could not legislate to compel religious objectors to salute the flag.

Judge Piazza found that the U.S. Supreme Court has repeatedly characterized the right to marry as a fundamental right, and that considering the factors that the Supreme Court has used to determine the level of scrutiny to apply to discriminatory laws, it was clear that laws that discriminate against same-sex couples invoke at least heightened scrutiny. However, in common with many of the trial judges who have ruled in marriage equality cases over the past year, Judge Piazza found that it was not necessary to apply heightened scrutiny to find the Arkansas marriage ban unconstitutional. "Regardless of the level of review required," he wrote, "Arkansas's marriage laws discriminate against same-sex couples in violation of the Equal Protection Clause because they do not advance any conceivable legitimate state interest necessary to support even a rational basis review.

Piazza's decision relied heavily on several key Supreme Court rulings. He quoted extensively from the Court's decision last year in *U.S. v. Windsor*,

referred to several of the more recent marriage equality decisions, duplicated the Virginia district court's quotation by Mildred Loving about the significance of her 1967 case, and pointed out that adverse rulings cited by the state all predated the *Windsor* decision.

"The issues presented in the case at bar are of epic constitutional dimensions," he wrote, continuing that "the charge is to reconcile the ancient view of marriage as between one man and one woman, held by most citizens of this and many other states, against a small, politically unpopular group of same-sex couples who seek to be afforded that same right to marry. Attempting to find a legal label for what transpired in *Windsor* is difficult but as United States District Judge Terence C. Kern wrote in *Bishop v. United States* [the Oklahoma

the criticism that judges should not be super legislators. However, the issue at hand is the fundamental right to marry being denied to an unpopular minority. Our judiciary has failed such groups in the past."

However, Judge Piazza was careful to note that the Arkansas Supreme Court has several times in more recent history ruled in favor of gay rights, bolstering Piazza's conclusion that the Arkansas equal protection clause would also justify his conclusion in this case. In 2002, that court declared the state's sodomy law unconstitutional. In 2011, that court struck down a state policy prohibiting unmarried opposite-sex and same-sex couples from adopting children, finding that there was no rational basis for it. "The exclusion of same-sex couples from marriage for no

"The court is not unmindful of the criticism that judges should not be super legislators. However, the issue at hand is the fundamental right to marry being denied to an unpopular minority."

marriage equality decision], 'this court knows a rhetorical shift when it sees one.' Judge Kern applied deferential rational review and found no "rational link between exclusion of this class from civil marriage and promotion of a legitimate governmental objective.""

Judges deciding marriage equality cases have frequently felt the need to provide a brief civics lecture in support of their rulings. Along these lines, Judge Piazza wrote, "The strength of our nation is in our freedom which includes, among others, freedom of expression, freedom of religion, the right to marry, the right to bear arms, the right to be free of unreasonable searches and seizures, the right of privacy, the right of due process and equal protection, and the right to vote regardless of race or sex. The court is not unmindful of

rational basis violates the fundamental right to privacy and equal protection describe in" these prior Arkansas Supreme Court rulings, he wrote, asserting: "The difference between opposite-sex and same-sex families is within the privacy of their homes."

The plaintiffs in this case include twelve same-sex couples seeking to marry in Arkansas and eight same-sex couples seeking to have their out-of-state marriages recognized, so the ruling covers both the right to marry and the right to recognition, although Judge Piazza's opinion focused almost exclusively on the right to marry and provided no separate analysis on the recognition issue. His focus was broadly on the state's discrimination against same-sex couples, which logically includes both of these issues. ■

HHS Appeals Board Finds Policy Against Medicare Coverage of Sex-Reassignment Surgery No Longer Valid

Ruling on a complaint filed by a Medicare beneficiary who was denied coverage for sex-reassignment surgery, the Department of Health and Human Services Departmental Appeals Board—Appellate Division, issued a ruling on May 30 holding that the existing “National Coverage Determination” (NCD) dating from 1981 is no longer valid, and its provisions “are no long a valid basis for denying claims for Medicare coverage of transsexual surgery, and local coverage determinations (LCDs) used to adjudicate such claims may not rely on the provisions of the NCD.” *NCD 140.3, Transsexual Surgery*; Docket No. A-13-87, Decision No. 2576, May 30, 2014).

one of the factual assertions in the NCD is effectively countered by new information. Summarizing the expert medical testimony submitted in support of this appeal, the Board made the following factual findings: “The NCD is invalid because a preponderance of the evidence in the record as a whole supports the conclusion that the NCD’s stated bases for its blanket denial of coverage for transsexual surgery are not reasonable. The fact that the new evidence is unchallenged and the NCD record undefended is significant. The new evidence indicates acceptance of criteria for diagnosing transsexualism. The new evidence indicates that transsexual surgery is safe. The new

implement the decision in 30 days, and the claim by the appellant in this case must be adjudicated without reference to the NCD.

The American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, the National Center for Lesbian Rights, and civil rights attorney Mary Lou Boelcke filed an administrative challenge last year on behalf of Denee Mallon, a transgender woman whose doctors have recommended surgery to alleviate her severe gender dysphoria. Mallon joined the U.S. Army when she was 17-years-old and worked as a forensics investigator for a city police department after she was honorably discharged from the Army. She was later diagnosed with gender identity disorder (now known as gender dysphoria), a serious medical condition that is characterized by intense and persistent discomfort with one’s birth sex. Amicus briefs were submitted on behalf of Human Rights Campaign, the World Professional Association for Transgender Health, the FORGE Transgender Aging Network, the National Center for Transgender Equality, the Sylvia Rivera Law Project (which focuses on transgender legal issues), and the Transgender Law Center.

The decision is consistent with other recent developments, including the growing body of federal case law recognizing 8th Amendment treatment rights for transgender inmates and a Tax Court ruling holding that expenses of gender reassignment surgery can be deductible medical expenses under the Internal Revenue Code (abandoning the prior rulings that such procedures are elective cosmetic surgery that were not deductible). It is also consistent with the Obama Administration’s policy statement banning gender identity discrimination in the federal workforce, and recent court decisions finding gender identity discrimination to violate Title VII of the Civil Rights Act of 1964. ■

In its May 30 decision, the Appeals Board found that every one of the factual assertions in the NCD is effectively countered by new information.

The challenged NCD, titled “140.3, Transsexual Surgery,” stated: “Transsexual surgery for sex reassignment of transsexuals is controversial. Because of the lack of well-controlled, long-term studies of the safety and effectiveness of the surgical procedures and attendant therapies for transsexualism, the treatment is considered experimental. Moreover, there is a high rate of serious complications for these surgical procedures. For these reasons, transsexual surgery is not covered.” The Obama Administration did not offer a defense of the NCD in response to this appeal, leaving the matter to be decided based on the submissions of medical experts.

In its May 30 decision, the Appeals Board found that every

evidence indicates that transsexual surgery is an effective treatment option in appropriate cases. The new evidence indicates that the NCD’s rationale for considering the surgery experimental is not valid.”

In explaining the effect of this decision, the Board wrote that the decision addresses only surgery, not the other treatments used for gender dysphoria. Claims for coverage can still be denied if there are other grounds for them that are not covered by the now-invalidated NCD. The Board notes that the Centers for Medicare & Medicaid Services (CMS), which administers the Medicare program, is not required by this decision to issue a new NCD on the subject, but is barred from continuing to rely on the old one in making coverage decisions. CMS is supposed to

Fifth Circuit Denies Gay Jamaican's Convention against Torture Case

The U.S. Court of Appeals for the Fifth Circuit has denied a gay Jamaican man's Petition for Review of the Board of Immigration Appeals' denial of his motion to reopen his Convention Against Torture claim, in *J.T. v. Sealed Respondent*, 2014 U.S. App. LEXIS 9177 (May 6, 2014).

Petitioner, a native and citizen of Jamaica, immigrated to the United States in 1987. In 2011 he was placed in removal proceedings charging him as a person convicted of an offense classified under the Immigration and Nationality Act as an "aggravated felony." The Immigration Judge ruled the conviction was an aggravated felony and, further, a "particularly serious crime," barring Petitioner from most types of relief from removal. Petitioner sought relief under the Convention against Torture (CAT), claiming it was more likely than not he would be tortured if returned to Jamaica and that such torture would be acquiesced to by the government of Jamaica.

The Immigration Judge denied the claim and ordered him removed to Jamaica. On appeal before the Board of Immigration Appeals (BIA), the Petitioner argued both that the Immigration Judge had erred in finding his crime to be "particularly serious" and in denying his CAT claim; however, the Board affirmed the Immigration Judge's decision. Petitioner filed a motion to reconsider and reopen providing additional evidence including an expert declaration by a "Jamaican attorney and human rights activist" and an August 2012 human rights report on Jamaica. The Board determined that Petitioner had not shown evidence that would change the result in his case and denied his motions to reconsider and/or reopen. Petitioner filed a timely Petition for Review with the 5th Circuit and a request for a stay of removal.

On March 21, 2013, a motion panel

of the court denied Petitioner's request for a stay of removal. On May 6, 2014, a panel of the court issued a per curiam decision. The panel initially denied the Government's motion to dismiss the Petition for Review and ruled the court had jurisdiction to address Petitioner's claims despite a jurisdiction-stripping statute prohibiting federal court review for persons ordered removed as an alien convicted of an aggravated felony, holding that they nonetheless retained jurisdiction over constitutional and legal issues. The panel framed Petitioner's three legal and therefore reviewable issues on appeal: 1) whether the Board failed to articulate the correct legal standard of "torture," 2) whether the Board's decision was "arbitrary and capricious" and thus in violation of Section 706(2)(A) of the Administrative Procedures Act; and 3) whether Petitioner's offense was a "particularly serious" crime.

Petitioner argued the Board erred in articulating a standard of "torture" which failed to consider "whether the Jamaican government acquiesces in the torture of gay men by private actors," and argued that the Board misapplied the legal standard for torture to exclude certain acts of violence. With respect to acquiescence, the panel held that the Board had "correctly acknowledged that government acquiescence would constitute torture for CAT purposes" and ruled that "the record does not support [Petitioner's] characterization of the proceedings below." The panel discussed country conditions reports in the record which discussed incidents of violence against homosexuals but that did not report any specific incidents of torture, and agreed with the Board that the evidence "did not establish torture as opposed to acts of violence and misconduct that fall short of torture."

With respect to Petitioner's Administrative Procedure Act claim, the panel acknowledged that the U.S. Supreme Court had authorized review

of Board decisions under the "arbitrary and capricious" standard pursuant to Section 706(2)(A) of the Act, but held that such review was of Board policy and not individual cases, and that accordingly Petitioner "cites to no other authority (and cannot)" for the proposition that the panel could review Petitioner's individual immigration case pursuant to the Act.

Last, the panel addressed Petitioner's argument that his crime was not "particularly serious" because, while the Immigration laws mandate that any conviction found to be an aggravated felony for which an individual is sentenced to an aggregate term of imprisonment of at least 5 years is a "particularly serious" crime, Petitioner was sentenced to an indeterminate term of 2 1/3-7 years imprisonment and that "indeterminate sentences imposed in New York cannot be understood solely in terms of the maximum sentenced term." The Panel held that Petitioner's arguments "cannot overcome the weight of authorities holding that sentences for an indeterminate term are considered to be sentences for the maximum period specified or allowed." Accordingly, the court dismissed the Petition for Review of the denial of Petitioner's motion to reopen and reconsider and his order of removal remains final.

A check of Immigration and Customs Enforcement's detainee locator based on Petitioner's Alien Number and country of origin indicates that he is not in custody, meaning it is very likely Petitioner has already been removed to Jamaica. – *Bryan C. Johnson*

[Editor's Note: Considering the frequent press reports of severe societal bias and physical assaults on gay men in Jamaica, this decision shows shocking insensitivity to human rights.]

Federal Court Holds ERISA Does Not Require Non-Governmental Employers to Provide Benefits to Same-Sex Spouses

In *Roe v. Empire Blue Cross Blue Shield*, 2014 U.S. Dist. Lexis 61345 (S.D.N.Y., May 1, 2014), a New York federal judge ruled that an employee who is lesbian-identified could not sue her hospital employer, St. Joseph's Medical Center (St. Joseph's), nor its administrator, Empire Blue Cross and Blue Shield (Blue Cross) under the federal Employee Retirement Income Security Act (ERISA) for refusing to enroll her wife in the employee health insurance plan. U.S. District Court Judge Nelson Roman granted Blue Cross' motion to dismiss.

The same-sex couple in this case was legally married in New York State, but still denied spousal medical benefits by St. Joseph's Medical Center, a Catholic entity, when the plaintiff Jane Roe attempted to have her plaintiff spouse, Jane Doe, added to her medical coverage plan. The hospital denied the request based on its policy that specifically excludes same-sex benefits. (The names of the plaintiffs have been assigned as Jane Doe and Jane Roe to preserve anonymity.)

Roe has been working at St. Vincent's Medical Center, which is a division of St. Joseph's Medical Center, since 2007. When New York enacted marriage equality, Roe married her partner Doe. During her employer's next "open season" for changes to her medical coverage she sought to add Doe to her health benefits. St. Joseph's informed Roe that the health insurance contract with Blue Cross excludes coverage for same-sex partners. Roe went through the employer's internal grievance procedures and was again informed that same-sex partners are excluded from the health plan.

Roe filed her complaint in federal court alleging that Blue Cross violated two sections of the Employee Retirement Income Security Act (ERISA). ERISA is a federal statute

that regulates employee benefit plans of non-governmental employers. Roe's argument is focused on the Supreme Court's decision last June in *U.S. v. Windsor*, which declared section 3 of the Defense of Marriage Act unconstitutional. Roe believes this now makes it illegal for her to have been denied benefits for her same-sex spouse because ERISA must follow New York State law recognizing same-sex marriages.

Blue Cross and St. Joseph's argued that New York law is preempted by ERISA. ERISA's preemption clause states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. However, the judge in this case was not focused on whether or not ERISA is preemptive in this case. Judge Roman thought that issue was "irrelevant." The real question posed by Roe is whether Blue Cross and St. Joseph's, which offer private plans, violate a provision of ERISA by excluding same-sex couples from health benefits.

Judge Roman's decision was that the same-sex exclusion does not violate ERISA. ERISA Section 510 titled "Interference with protected rights," is sometimes referred to as the anti-discrimination section. It states that it is unlawful to "discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." It has been held that Section 510 "only proscribes interference with the employment relationship." *Cioinigel v. Deutsche Bank Ams. Holding Corp.*, 2013 U.S. Dist. Lexis 4689 (S.D.N.Y. 2013). Roe would have to establish that St.

Joseph's took an adverse employment action against her, not just denying her the right to add her spouse to her health coverage. This is an application of the Second Circuit's interpretation and not all circuits have this narrow view of Section 510.

ERISA gives employers like St. Joseph's and plan sponsors like Blue Cross the ability to "adopt, modify, or terminate welfare plans," such as health insurance plans, and does not regulate the "substantive content of welfare-benefit plans." Consequently, ERISA does not prohibit a private, non-governmental benefit plan, such as that provided by St. Joseph's, a Catholic hospital, to deny Roe's spouse health benefits. Since ERISA preempts state laws, the Does could not assert a supplementary state law claim asserting a violation of New York's Human Rights Law and Marriage Equality Law, both of which prohibit employers from discriminating against married same-sex couples.

The final argument made by Roe is that St. Joseph's and Blue Cross violated their fiduciary duties under ERISA. Roe argued that enforcing an "illegal" provision in an employer plan violates fiduciary duties. Judge Roman dismissed this argument and found that Section 510 was not violated by the same-sex exclusion and therefore no fiduciary duties could be violated.

This case is bigger than just Roe and Doe. It is significant for all same-sex couples getting married and hopeful to receive health benefits from their partner's plan. Those employed by private employers will have to be cognizant of whether such benefits will apply to them. In this case, same-sex marriage does not equal same-sex benefits. — Tara Scavo

Tara Scavo is an attorney in Washington D.C.

New York Court Finds Marriage Presumption of Parenthood Applies to Child of Married Lesbian Couple

On May 7, 2014, Acting Monroe County Supreme Court Justice Richard A. Dollinger found the New York common law presumption that a child born during a marriage is the legitimate child of both parents also applies to a married lesbian couple, and can override the lack of an acknowledgement on a consent form authorizing artificial insemination. *Wendy G-M. v. Erin G-M.*, 2014 WL 1884486 (Sup. Ct., Monroe Cty., May 7, 2014). The case arose in the context of a bitter lesbian divorce.

Wendy and Erin married in Connecticut before the Marriage Equality Act became effective in New York. They decided to have a child in October 2011, after the Act went into effect, and both signed a consent form authorizing artificial insemination. The document included a clause that reads “any child or children born as a result of a pregnancy following artificial insemination shall be accepted as the legal issue of our marriage.” They failed, however, to obtain an acknowledgement to the signatures. Such an acknowledgement is required by Section 73 of the New York Domestic Relations Law in order for the consent to create what the New York courts have interpreted as “an irrebuttable presumption of paternity.”

Both women underwent artificial insemination for two years until Wendy became pregnant. During the pregnancy, Wendy and Erin attended medical appointments, pre-birth classes, and baby showers together. Wendy even posted the following message on Facebook: “Our daughter will lawfully have two mommies when she arrives . . . When you go through fertility and have a partner, they have to sign off and agree to the fertility treatments so that there is NO question that you’ve both agreed to have a child.” (She would come to regret this post in short order.)

Both women were present at the birth. They jointly chose a name for the child, including a hyphenated surname combining the surnames of Wendy and Erin. That name went on a birth certificate also listing both women as parents. It was not long, however, before the relationship between the spouses broke down. Erin moved out within a week of the baby’s birth. Wendy thereafter refused to let her see the child, and a divorce action was filed by her in December 2013, less than three months after the birth of the child.

Justice Dollinger previews his analysis early in the opinion, saying that “there are two paths to be followed, each with intriguing twists and turns.”

common law marital presumption has corollaries in both Section 24 of the Domestic Relations Law and Section 417 of the Family Court Act, but “[t]he statutes only have applicability in opposite sex marriages as evidenced by the fact that the usual technique to confirm parentage is a genetic test of the putative father which establishes an irrefutable genetic link between the child and the father.” He then laments the legislative failure to define “parent” in any New York statute, leaving New York courts to decide “this important facet of modern life.” The New York Court of Appeals, in particular, has not done so broadly, but he adds that *Debra H.* left unsaid “whether the marriage presumption—one of the most powerful

“The presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law.”

The first path involves the outdated statutes that make up the Domestic Relations Law and the Family Court Act, and “[t]he second runs through the common law, with a lengthy stop over at the Court of Appeals opinion *Debra H. v. Janice R.*, 14 N.Y.2d 576, . . . (2010), which confronts the issue of children of same sex relationships albeit in a different, pre-Marriage Equality Act context.” He notes, however, that “one bright light illuminates both: New York’s public policy strongly favors the legitimacy of children, and that ‘the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law.’”

Moving on, he begins his substantive analysis by noting the

in the legal lexicon—should be added to the list of circumstances in which ‘parentage’ arises, even though the only putative ‘parents,’ recognized by New York’s past jurisprudence under the statutes and the common law, were members of opposite sexes.”

Addressing New York’s artificial insemination statute, he concludes that the intent behind the 1974 enactment was clear: “the statute was designed not to benefit the adults in the marriage, but to benefit the child, born into a marriage, by transforming what the common law considered an illegitimate child into a legitimate child.” This legislative intent becomes important when analyzing the effect of the failure to secure acknowledgement of the signatures on an artificial insemination



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consent form, despite New York courts requiring strict compliance with the statute. After surveying past cases, Justice Dollinger notices that those cases were characterized by “the non-birth parent argu[ing] for a strict reading of the statutory requirement as a form of financial protection.” In this case, meanwhile, “the birth-mother seeks to use a strict reading of New York’s consent requirements as a sword to cut off her spouse’s rights as a parent to access to the child.” Keeping that in mind, he concludes that “[t]here is no language in the statute, or its history, suggesting that the birth mother can use a spouse’s non-compliance with the statute for the purpose sought here: to strip the spouse of the rights of access to the newborn through artificial insemination during the marriage.”

Justice Dollinger, instead, believes the more relevant statute here is the Marriage Equality Act, and specifically the language in it that “no ‘common law’ provisions relating to marriage ‘shall differ’ because the married couple have the same sex.” The lack of a “parent” definition in the Marriage Equality Act, however, leads him to reexamine *Debra H.* While the Court of Appeals rejected adopting the common law doctrine of equitable estoppel as a potential legal option for non-biological parents seeking custody of children, the court also accepted, through the principles of comity, that a child born via artificial insemination to a lesbian couple in a Vermont civil union had a parent in each party to the civil union. Justice Dollinger, then, sees the open question as “whether to recognize a spouse, in a marriage, as a presumed parent of a child born by AID during the marriage.”

As to that question, he finds the case clearly distinguishable enough from *Debra H.* so as to avoid extending its equitable estoppel holding to these facts. The couple in *Debra H.* were in a civil union before marriage was recognized in New York. Moreover, the non-biological spouse in this case was not seeking parental rights under a post-birth estoppel, but rather “only

to enforce a pre-birth form of estoppel, conditioned upon the undisputed fact that the couple was married in a marriage both recognized in New York, and a marriage that is now legally permitted in New York.”

With those facts on the table, Justice Dollinger confidently predicts that “the Court of Appeals would not mandate that compliance with DRL § 73 is the only means for a married, non-biological spouse to acquire parental status for a child born by artificial insemination of their spouse” because “[a] contrary finding would make a child’s parentage for their entire life depend on a notary public being present when the parties signed the consent.” The “clinching argument” for Justice Dollinger flows from the final conclusion in *Debra H.*, where the Court of Appeals recognized a Vermont civil union, and the effect that civil union had on parentage of the child, under comity principles. Spring forward, past the enactment of the Marriage Equality Act in New York, and Wendy and Erin’s marriage “is [now] consistent with New York law.” Therefore, “the spouse is presumed . . . to be a ‘parent’ of the child.”

Before concluding, Justice Dollinger dismisses the hypothetical put forth by Wendy concerning unknowing spouses to women undergoing artificial insemination and insists that Erin is not asking for equitable estoppel in this case. He also notes that New York has rejected an “approach that predicated a child’s legitimacy on biological connection alone,” but rather “focuses legitimacy of children on public policy grounds, and the firmly rooted belief that a child, born in a marriage, has two parents.”

These conclusions behind him, Justice Dollinger ordered an immediate conference to discuss access to the child, as well as temporary monthly maintenance and legal fees that Wendy must pay Erin. — *Matthew Skinner*

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

Indiana Federal Court Grants Preliminary Injunction for One Plaintiff Couple in Marriage Recognition Case

U.S. District Judge Richard L. Young (S.D. Indiana) issued a preliminary injunction on May 8 in *Baskin v. Bogan*, 2014 WL 1814064, 2014 U.S. Dist. LEXIS 63421, requiring Indiana officials to recognize the same-sex marriage of Nikole Quasney and Amy Sandler. Unlike the temporary restraining order that Judge Young had previously issued in this case that was to expire on May 8, the preliminary injunction will remain in effect until the court decides the complete case on the merits, unless it is stayed or reversed on appeal. The Indiana Attorney General's office responded to the court's order by announcing that it would appeal to the 7th Circuit.

Quasney and Sandler have been partners for more than thirteen years and are raising two very young children together. They entered into an Illinois civil union in 2011 and a legal marriage in Massachusetts in 2013. Quasney has been battling ovarian cancer since her May 2009 diagnosis, with a projected five year survival rate. Although she has been in remission off and on as a result of chemotherapy, her cancer is no longer treatable since the most recent recurrence in April.

Quasney and Sandler joined with several other same-sex couples in suing the state of Indiana, whose laws prohibit same-sex marriages. Some of the plaintiff couples are seeking the right to marry in Indiana, while Quasney and Sandler are seeking recognition of their marriage by the state. Although a motion for preliminary injunction was filed on behalf of all the plaintiffs, at this point the only motion before the court for immediate decision was that of Quasney and Sandler, who want their marriage to be recognized before Quasney's likely death in the near future.

Judge Young found that the criteria for such preliminary relief were satisfied in this case. In states within the 7th federal circuit, the analysis begins with a determination whether the plaintiff has shown some likelihood of success on the merits, would suffer irreparable

harm without the injunction, and that traditional legal remedies (damages, for example) would be inadequate to repair the harm. If these requirements are met, the court has to balance the interests of the plaintiff and the state to determine whether the plaintiff's need for the relief outweighs the state's interest in preserving the status quo until the court can decide the case on the merits in a dispositive ruling.

Noting the long string of favorable federal district court decisions around the country since last June's Supreme Court ruling striking down Section 3 of the Defense of Marriage Act in *U.S. v. Windsor*, Judge Young found it likely that plaintiffs will prevail on the merits of their claim that Indiana's ban on recognizing

application of its marriage laws lacked merit in this situation.

As to the issue of irreparable harm, Judge Young found that Quasney had been traveling across state lines regularly to get treatment in a hospital where her marriage is recognized in a neighboring state, presenting a concrete harm. He also found that the dignitary harm Quasney and Sandler suffer from the non-recognition of their marriage would suffice, for constitutional purposes, to be counted as an irreparable injury.

In balancing the harms to the plaintiffs and the state, Young wrote, "The State does not have a valid interest in upholding and applying a law that violates these constitutional guarantees [of equal protection and due process]."

Although Quasney has been in remission off and on as a result of chemotherapy, her cancer is no longer treatable since the most recent recurrence in April.

same-sex marriages contracted in other states is unconstitutional. He also found that the Supreme Court's decision to stay the Utah marriage decision and the subsequent action by federal district courts to stay their marriage equality rulings while the cases are on appeal did not necessarily mean that he could not issue a preliminary injunction to take effect immediately. This ruling would provide relief to just one couple, he pointed out, in a state population of 6.5 million, so did not present the same issues as a broad order requiring the state to issue marriage licenses to any same-sex couples who applied or to recognize large numbers of same-sex marriages contracted elsewhere. The judge concluded that the state's argument that issuing this injunction would cause confusion about the continued

Although the court recognizes the State's concern that injunctions of this sort will cause confusion with the administration of Indiana's marriage laws and to the public in general, that concern does not apply here. The court is faced with one injunction affecting one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws."

The court ordered that if Quasney passes away in Indiana while this injunction is in effect, Dr. William C. VanNess II, the state's Commissioner of the Indiana State Department of Health, "and all those acting in concert," shall "issue a death certificate that records her marital status as 'married' and lists Plaintiff Amy Sandler as the 'surviving spouse.'" ■

Gay Inmate's Suit to Compel Same-Sex Conjugal Visits and Allow Sexual Conduct Between Inmates Dismissed

Pro se plaintiff Martin Demetrio Morales, an “openly” gay inmate, lost his lawsuit to establish a same-sex conjugal visit program in Vermont prisons and to allow sexual relations between inmates, when United States District Judge William K. Sessions III adopted the Report & Recommendation [R & R] of United States Magistrate Judge John M. Conroy that the lawsuit be dismissed. *Morales v. Pallito*, 2014 WL 1758163 (D. Vt., April 30, 2014). Morales sued Andrew Pallito, Commissioner of the Vermont Department of Correction [DOC] under 42 U.S.C. § 1983, claiming both discrimination and violation of his fundamental rights.

Judge Conroy had little difficulty disposing of Morales' claims about same-sex conjugal visits, because Vermont DOC does not allow any conjugal visits and there is no constitutional right to have them. *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.), cert. denied, 513 U.S. 836 (1994). Gays therefore do not have an Equal Protection claim of discrimination. [Note: Only a handful of states allow conjugal visits for anyone. California extended its conjugal visit program to domestic partners in 2007 (*abcnews.com*) and New York did so in 2011 (*Daily News*, August 23, 2011). Same-sex conjugal visits are apparently allowed in prisons in Belgium, Brazil, Canada, Israel, and Mexico and in some political subdivisions of Argentina, Australia, and Columbia.]

Vermont DOC, which has no prisons with mixed-sex populations, prohibits all consensual sexual conduct between inmates. It not only prohibits kissing, fondling, and the like between inmates, but also “proposals” or even “comments” or “requests” of “a derogatory or offensive sexual nature by one inmate directed toward another inmate.” In fact, DOC officials issued a misbehavior report when Morales sent “romantic correspondence” to his inmate “boyfriend,” and they put him in segregation for allegedly

“sharing an embrace” with a bisexual prisoner. Although Morales referred to the policy’s “chilling effects on homosexual prisoners exercising constitutional rights,” the R & R did not adjudicate the case as presenting First Amendment issues, nor did it analyze possible challenges based on vagueness or overbreadth.

Instead, Judge Conroy’s R & R focused mostly on Substantive Due Process (Liberty) and Equal Protection interests in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), and the “legitimate” penological interests that must be balanced in Corrections, as required by *Turner v. Safley*, 482 U.S. 78, 95–96 (1987). The R & R forecast its conclusion with the observation: “If inmates have no constitutional right to conjugal visitation with individuals from outside the prison walls, then it is difficult to see how they might enjoy a constitutional right to similar visitation with other inmates.” While prison officials “violate the Constitution when depriving an inmate of his ‘basic human needs’ such as food, clothing, medical care, and safe and sanitary living conditions” – quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) – “sexual intimacy is not listed among the ‘basic human needs’ that prison officials must provide to inmates.”

Although the R & R said that “[o]ther courts have reached similar conclusions,” it cited just one: a district court decision in *George v. Lane*, 1987 WL 10573, at *2 (N.D. Ill. Apr. 30, 1987), saying that “there was no constitutional merit to a challenge to rules that prohibit voluntary sex in a public place such as a prison.” The R & R also noted that “no court has held that prisoners have a constitutional right to have consensual sex with each other,” citing Robinson, “Masculinity as Prison: Sexual Identity, Race, and Incarceration,” 99 Cal. L. Rev. 1309, 1316 n. 30 (2011). It also cited the Prison Rape Elimination Act [PREA], codified at 42 U.S.C. §§

15601–15609, and one of its regulations, which provides: “An agency may, in its discretion, prohibit all sexual activity between inmates and may discipline inmates for such activity.” 28 C.F.R. § 115.78(g).

The R & R then turned to the “potential impact” of *Lawrence* on *Hernandez*. The R & R found a “spatial” dimension to the liberty interests addressed in *Lawrence*, relying on language that its holding did “not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.” 539 U.S. at 578. The R & R emphasized the DOC’s “dominant presence” in a prison facility: “That fact alone immediately suggests that *Lawrence* is distinguishable. Consensual sexual intimacy between inmates in a correctional facility was not recognized as a constitutionally protected right in *Lawrence*. The Second Circuit’s decision in *Hernandez* therefore continues to control.”

Applying the balancing scrutiny in *Turner v. Safley*, 482 U.S. 78 (1987) (which sustained a prison regulation restricting correspondence between inmates but overruled a ban on inmate marriages), the R & R found that preventing prison violence was a legitimate prison objective and that the prohibition was “neutral,” because it suppressed all sexual expression without regard to type. It relied on *Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995), which upheld a prison prohibition of possession of nude photographs of prisoners’ spouses or girlfriends on the grounds that such photographs “may provoke violence,” writing: “Even assuming that there are certain sexual interactions in correctional facilities that pose no threat to prison safety and security, there are also sexual interactions that do affect safety and security.... Banning all sexual interactions may not be the most nuanced solution, but

it certainly qualifies as having a valid, rational connection to preventing prison violence and promoting safety.” The R & R found no alternatives that would allow the alleged “right” while also upholding the security interests.

Finally, the R & R addresses whether the policy prohibiting sexual activity between inmates discriminates against gay prisoners. Morales claimed that, under the policy and the enforcement of PREA in the Vermont DOC, “homosexuals are the focus of virtually every PREA investigation” and that he had been investigated 23 times during his incarceration. Therefore, Morales alleged that the ban violates Equal Protection as “based on anti-LGBTQ prejudice.” Judge Conroy did not accept the argument. He found that gays were investigated or targeted more frequently because “presumably heterosexual inmates in the DOC’s same-sex prisons have little interest in sexual activity other inmates,” not because of intentional animus from the DOC – but he did allow room for the notion of “situational” sexuality in prison, citing Smith, “Rethinking Prison Sex: Self-Expression and Safety,” 15 Columbia J. Gender & L. 185, 209-210 (2006). Even if the enforcement were intentionally discriminatory, however, Morales would still have to show that it was not reasonably related to legitimate penological objectives, which would fail under the Turner balancing already discussed.

It appears that Equal Protection analysis for the LGBT community has not yet progressed sufficiently for prisoners to win this kind of case, despite *Lawrence* and *United States v. Windsor*, 570 U.S. 12 (2013). Judge Conroy’s struggle with it, however, is gratifying – and a good harbinger.

– 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.

New York Appellate Division Rules on Erotic Asphyxiation Case

A unanimous four-judge panel of the New York Appellate Division, 2nd Department, ruled that a jury erred in convicting Larry Davis of second degree murder in the death of his sexual partner, Richard McCoy, from asphyxiation. *People v. Davis*, 2014 N.Y. Slip Op. 03277 (May 7, 2014). Finding that a jury could reasonably have acquitted Davis of the murder charge, the court reduced the conviction to manslaughter in the second degree and sent the case back to the trial judge, Justice Dineen Riviezzo of Kings County Supreme Court.

According to the court’s opinion, McCoy was found dead in his apartment on August 19, 2010, with a “piece of clothing around his neck.” Davis told the police that “he tied a piece of clothing

of the evidence. Davis argued that the only evidence going to motive that was presented to the jury was his statement to the police that he did not intend to kill McCoy.

“Weight of evidence review requires a court first to determine whether an acquittal would not have been unreasonable,” wrote the court. “If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt.”

Concluding that the jury’s verdict was against the weight of the evidence in this case, the court found that “an acquittal

The court found that the prosecution had not proved beyond a reasonable doubt that it was Davis’s “conscious objective” to kill McCoy.

around the victim’s neck and that he tightened it while they were engaging in sexual conduct to enhance sexual pleasure.” Davis told the police that “he pulled harder on the piece of clothing because he was ‘pissed off’ due to his own inability to reach orgasm and that he failed to realize that the ligature was ‘dangerous’ to the victim, and that he ‘didn’t mean it.’”

The medical examiner testified at trial that McCoy died by strangulation, that it would have taken fifteen seconds for McCoy to lose consciousness if sufficient pressure was applied to his neck by the piece of clothing, and that death would have occurred after three more minutes of pressure.

The jury returned a verdict of second degree murder. In order to reach that verdict, the jury had to find beyond a reasonable doubt that Davis intended to kill McCoy. On appeal, Davis argued that the verdict was against the weight

would not have been unreasonable.” Although the evidence showed beyond reasonable doubt that “the defendant tied a ligature around the victim’s neck, that he tightened it, and that his actions caused the victim’s death,” the court found that the prosecution had not proved beyond a reasonable doubt that it was Davis’s “conscious objective” to kill McCoy.

“The evidence supports a finding that the defendant, while engaging in sexual conduct with the victim, acted recklessly by continuing to hold the ligature around the victim’s neck with sufficient force and for a sufficient length of time to completely obstruct blood flow to the victim’s brain during his effort to achieve sexual gratification, but not as a part of a calculated effort to kill the victim.” Thus, according to the court, the appropriate verdict was manslaughter, a lesser offense that would carry a lesser sentence. It will be up to the trial court to determine an appropriate new sentence for Davis. ■

Gay Teacher Survives Motion to Dismiss Sexual Orientation Discrimination Claim

On May 9, 2014, U.S. District Judge Dominic J. Squatrito of the District of Connecticut granted in part and denied in part a motion for summary judgment by the defendants, Norwalk Board of Education, Lynne C. Moore (Principal of West Rocks Middle School,) and Salvatore Corda (Superintendent of Norwalk Public Schools), in *DeMoss v. Norwalk Board of Education*, 2014 WL 1875105, 2014 U.S. Dist. LEXIS 64574. This motion for summary judgment was in response to an eighteen-count amended complaint from the plaintiff Mark DeMoss, a teacher employed by the Norwalk Board of Education from 2000 to 2003, who claimed racial and sexual orientation discrimination

orientation, DeMoss sent a sealed letter to the student's parents to alert them to the situation.

According to another teacher at West Rocks, Moore's treatment of DeMoss changed from "collegial to hostile" in the time after the "faggot" incident. In addition, Moore reacted negatively to DeMoss's response to the "pink" episode. Although the parents of this student denied having made legal threats in respect to DeMoss's letter, DeMoss claimed that Moore told him that they were planning on suing.

On another level, DeMoss argued that Moore promoted racially discriminatory behavior in the acceptance process of the Connecticut

grades instead of her racial guidelines, she reacted angrily and continued to treat him unfairly.

Finally, on August 22, 2003, Corda informed DeMoss that he would be suspended with pay based on Moore's negative evaluation of him. The following reasons were given regarding DeMoss's termination: issues with teaching performance, problems with "the timely preparation of report cards," interference and disturbance of school operation, and leaving assigned work location without authorization.

Regarding DeMoss's complaints about racial discrimination in violation of the Equal Protection Clause, Judge Squatrito granted the defendants' motion of summary judgment as DeMoss failed to provide evidence of being treated differently "from others similarly situated." In such situations, the defendant does not need to prove a negative of that which the plaintiff claims. On the topic of Moore's policy for CPEP, DeMoss declared that his Title VII and CFEP race discrimination claims arose from the fact that "Moore retaliated against him because he refused to implement her racially discriminatory policy." In this specific scenario, to establish a case of retaliation under Title VII, DeMoss's rejection of Moore's instructions must fall under the category of "protected activity." According to *Rodriguez v. International Leadership Charter School*, complaints of DeMoss's type were not considered "protected activity" under Title VII and, as such, Judge Squatrito granted summary judgment to the defendants on these counts.

On the larger issue of sexual orientation discrimination, Judge Squatrito ruled that the "defendants' non-discriminatory reasons were pretext for discrimination" and thus he denied their motion for summary judgment. In accordance with the framework of *McDonnell Douglas*,

According to his complaint, during his time as teacher at West Rocks Middle School DeMoss had several conflicts with students on account of his sexual orientation.

in violation of the Equal Protection Clause, Title VII of the Civil Rights Act, and the Connecticut Fair Employment Practices Act (CFEPA).

According to his complaint, during his time as teacher at West Rocks Middle School DeMoss had several conflicts with students on account of his sexual orientation. In early May 2002, one of his students called him a "faggot," in response to which he sent the student to Moore for disciplinary action. In yet another incident in September 2002, a student interrupted class and asked DeMoss, "What is your favorite color?" After DeMoss replied, "blue," the student laughed and remarked, "Oh, I thought it was pink." Believing this outburst from the student to be a reference to his sexual

Pre-Engineering Program (CPEP). During the 2001-2002 and 2002-2003 school years, DeMoss acted as faculty supervisor for this program, which was supposed to grant acceptance based on a student's merit. While the CPEP Deputy Director Maureen Coelho asserted that CPEP admission "was to be primarily merit based and teacher recommendation based and not primarily race based," DeMoss claimed that Moore informed him that the program was aimed at African-Americans and subsequently ordered him to accept specific African-American students to the exclusion of other students. When Moore discovered that DeMoss had continued to accept students according to test scores, teacher recommendations, and

the plaintiff must prove that the defendants' explanation is pretextual. The court found that the evidence provided by DeMoss was sufficient to show pretext as it demonstrated "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons." To this point, the evidence presented suggests that DeMoss prepared report cards in a timely fashion, despite the defendants' claims. In addition, the concerns about DeMoss's teaching performance remain inconsistent with Moore's positive evaluations of him prior to the "faggot incident." Lastly, the extremely restrictive nature of DeMoss's assigned workspace and the employment of a substitute teacher, who had not covered the class in his absence, further accentuated the contradictions. The court also refused to dismiss DeMoss's claim that he was retaliated against for having filed complaints of sexual orientation discrimination.

While DeMoss's claims concerning discrimination based on sexual orientation were matters of state law, since Title VII does not cover such claims, the court exercised supplementary jurisdiction over these issues to maintain "judicial economy, convenience, fairness, and comity." Ultimately, Judge Squatrito justified the federal court's jurisdiction in this situation by noting that the Connecticut courts would follow the same procedure to issues of proof in civil rights cases.

In short, all claims against the defendants Lynne Moore and Salvatore Corda were dismissed, and the case will proceed to trial on two matters: sexual orientation discrimination and retaliation for complaining of sexual orientation discrimination.

DeMoss is represented by Elisabeth Ann Seieroe Maurer of Ridgefield, Connecticut. – *Daniel Ryu*

Daniel Ryu studies at Harvard College ('16).

Another Australian State Legislates Against "Gay Panic" Defense

As part of a package of reforms to the law of provocation, the Australian State of New South Wales has legislated to abolish the partial defence where the accused was responding only to a non-violent sexual advance. The reform is seen as a major step to undermining the phenomenon of homosexual panic defense – in Australia often referred to as homosexual advance defence (HAD).

Where an accused is charged with murder and it appears that the act causing death was in response to "extreme provocation", the accused can be acquitted of murder and convicted of manslaughter. During the 1990s and 2000s, the phenomenon

particularly in cases either where the female partner was with another man or was threatening to end her relationship with the accused. The committee received evidence about the phenomenon of HAD. The evidence was not challenged, even by right-wing organisations. Indeed, in a supreme irony, the committee was chaired by the Reverend Fred Nile, the State's most notorious and longstanding homophobic politician. When the committee reported, amongst the changes it recommended, unanimously, was the removal of the opportunity for accused to escape conviction for murder by claiming they were responding only to a non-violent sexual advance from the victim.

The reform is seen as a major step to undermining the phenomenon of homosexual panic defense – in Australia often referred to as homosexual advance defence (HAD).

of HAD received extensive publicity in Australia and was the subject of government review and judicial and police education. In NSW this led to a reduction in the number of cases where offenders succeeded in HAD claims – through a combination of more sophisticated investigation of such cases and greater judicial sensitivity to the risk that such claims were grounded in false and homophobic stereotypes.

A parliamentary committee was set up in 2013 to examine the defence of provocation generally, largely in response to concerns that men were escaping conviction for murder by using sexist stereotypes about the behaviour of women,

In 2004, the Australian Capital Territory legislated in a similar way to remove the opportunity to base a claim of provocation on HAD. In 2005, the State of Victoria abolished the provocation altogether.

HAD is not dead in the ACT and NSW. It can be a basis for a claim of provocation where the accused alleges he was not responding only to a non-violent sexual advance. And HAD has also been successfully used in recent times to reduce penalty in at least one case of claimed excessive self-defence. –*David Buchanan*

David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.

MARRIAGE EQUALITY

4TH CIRCUIT COURT OF APPEALS -

A 3-judge panel of the 4th Circuit held oral arguments on May 13 in *Bostic v. Schaefer*, an appeal by two county clerks of a district court decision that held Virginia's ban on same-sex marriage unconstitutional. See *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. Feb. 14, 2014). The 4th Circuit had granted intervenor status on the appeal to the plaintiffs in another pending marriage case, *Harris v. Rainey*, so both pending federal court challenges to the Virginia ban were heard in this consolidated appeal. However, since the state had lined up with the plaintiffs agreeing that the ban is unconstitutional, the only parties appealing were two county clerks, George E. Schaefer III and Michele McQuigg. They were represented in the arguments by David B. Oakley, a private attorney retained by Mr. Schaefer, and Austin Nimocks, an attorney from the anti-gay litigation firm "Alliance Defending Freedom," representing Ms. McQuigg. Former U.S. Solicitor General Ted Olson represented the plaintiffs from the Eastern District of Virginia, Timothy Bostic and Tony London, seeking the right to marry, and Carol Schall and Mary Townley, seeking recognition of their out-of-state marriage. James Esseks, Director of the LGBT Rights Project of the ACLU, represented a class of all same-sex couples in Virginia as certified by the Western District of Virginia, but their class representatives are also two same-sex couples, Joanne Harris and Jessica Duff, and Christy Berghoff and Victoria Kidd, also one married seeking recognition and the other seeking to marry. Virginia's Solicitor General, Stuart A. Raphael, appeared on behalf of the state to urge the court to affirm the ruling by District Judge Arenda L. Wright Allen that the Virginia ban violates the 14th Amendment. The three-judge panel consisted of Paul V. Niemeyer, appointed by President George H.W. Bush, Roger L. Gregory, who received a recess appointed from President Bill

Clinton and then was renominated by George W. Bush as part of a deal to break a confirmation deadlock, and Henry F. Floyd, who was appointed by President Barack Obama. During oral argument, it appeared that Judge Niemeyer was hostile to constitutional claims for same-sex marriage, Judge Gregory seemed favorable, and Judge Floyd, who spoke the least, appeared to be leaning towards the plaintiffs' claims.

ALABAMA – A same-sex couple who married in California in 2008 and who are raising a child together have sued state officials in the U.S. District Court for the Southern District of Alabama seeking official state recognition of their marriage. *Searcy v. Bentley*, Case No. 14-208 (May 7, 2014). Plaintiffs Cari D. Searcy and Kimberly McKeand are represented by attorneys Christine C. Hernandez and David G. Kennedy, both of whom practice in Mobile, Alabama. Their named defendants include the governor, the attorney general, the Mobile County probate judge, the State Registrar of Vital Statistics, and the Commissioner of Human Resources. The suit alleges that the state's refusal to recognize the plaintiffs' marriage violates the Full Faith and Credit Clause of Article 4 of the Constitution, and that the state's statute and constitutional amendment banning same-sex marriage are facial violations of the Due Process and Equal Protection Clauses of the 14th Amendment. *Mobile Press-Register*, May 9.

ALASKA – Attorneys for four married same-sex couples and one unmarried couple in Alaska filed suit in the U.S. District Court in Anchorage on May 12, challenging the constitutionality of Alaska's marriage amendment and statutory bans on same-sex marriage. *Hamby v. Parnell*. The complaint asserts violations of the Due Process and Equal Protection clauses of the 14th

Amendment. Named defendants include Governor Sean C. Parnell, Attorney General Michael Geraghty, Health and Social Services Commissioner William J. Streuer, and State Registrar and Licensing Officer Phillip Mitchell. Counsel for plaintiffs, all members of the Alaska bar, including Heather Gardner of Seattle, Washington, Caitlin Shortell of Anchorage, and Allison Mendel of Anchorage.

FLORIDA – On May 21, Owen Trepanier and Richard Puente filed suit on May 21 against Monroe County Clerk of Court Amy Heavilin for the right to marry. Trepanier and Puente have been together for 14 years and are raising two adopted children, ages 7 and 18 months. Trepanier is the only legal parent of the children, as the state does not officially allow joint adoptions by unmarried couples, and bans same-sex marriages. They applied for a marriage license on July 17, which was denied by Heavilin's office. Their attorney, Wayne LaRue Smith, asserted 1th Amendment claims in their behalf. Their lawsuit is the second marriage equality case filed in Monroe Circuit Court, as Aaron Huntsman and William Lee Jones, who have been together for eleven years, filed suit against Heavilin during April. *Key West Citizen*, May 21. * * * Paul Rubio and Gildas Dousset, who married in Massachusetts in 2013, are suing Florida Atlantic University for denying Dousset's application for in-state tuition. *Rubio v. Florida Atlantic University*. Florida's constitutional and statutory law forbidding recognition of same-sex marriages, is cited by FAU for denying the application. If the marriage was recognized, Dousset would automatically be qualified for the tuition break as the newly-married spouse of a Florida resident. Represented by George Castrataro, the couple filed suit on May 14 in Florida's 4th District Court of Appeal in West Palm Beach. Because Dousset pursued internal government appeals of the denial of his

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application, his case goes directly to an appellate court, placing in issue the constitutionality of the refusal by the university and the state to recognize his marriage. Several other cases are pending in Florida courts challenging the current laws, including a divorce action from Tampa, in which Circuit Judge Laurel M. Lee held in *Shaw v. Shaw* that she lacked jurisdiction to grant a divorce to a lesbian couple who had married in Massachusetts, that will shortly be appealed to the 2nd District Court of Appeal, and some federal lawsuits demanding recognition of marriages formed in Canada and other states. *Ft. Lauderdale Sun Sentinel*, May 20; *Tampa Tribune*, May 13. It was reported that Miami-Dade Circuit Judge Sarah Zabel set a July 2 hearing date for a suit by several couples against Miami-Dade Clerk of Courts Harey Ruvin for refusing to issue marriage licenses to same-sex couples. *Daily Business Review*, May 21. In a recent interview with the *Washington Post*, ACLU LGBT Project Director James Esseks said he expected a summary judgment ruling soon in one of the pending federal cases.

MONTANA – The ACLU and local attorneys filed suit on May 21 in the U.S. District Court for Montana on behalf of four same-sex couples, challenging the Montana marriage amendment and various state statutes that reserve marriage for different-sex couples only. *Rolando v. Fox*. The named defendants include Attorney General Tim Fox, Director Michael Kadas of the state's Department of Revenue, and Cascade County Court Clerk Faye McWilliams, whose office denied a marriage license to Angela and Ronya Rolando. The other couples have all gotten married in other states and are seeking recognition of their marriages in their home state of Montana. The complaint states claims under the due process and equal protection clauses of the 14th Amendment. Counsel for plaintiffs

include James H. Goetz and Benjamin J. Alke (Goetz, Baldwin & Geddes PC, Bozeman); Ruth N. Borenstein, Stuart C. Plunkett and Emily F. Regier (Morrison & Foerster LLP, San Francisco); Ariel F. Ruiz (Morrison & Foerster LLP, New York); Jim Taylor, Legal Director of the ACLU of Montana Foundation; and Elizabeth O. Gill, counsel with the LGBT & AIDS Project of the ACLU Foundation, San Francisco.

NEBRASKA – The Nebraska Supreme Court heard oral arguments on May 28 in *Nichols v. Nichols*, an appeal from Lancaster County District Judge Stephanie Stacy's ruling that a same-sex couple married in Iowa could not get a divorce in Nebraska because of the state's laws banning recognition of same-sex marriages. The divorce petition was filed by Bonnie Nichols of Raymond, Nebraska, who married her wife Margie in Council Bluffs, Iowa, in November 2009. Margie did not appeal the dismissal of the divorce action. A press report about the oral argument suggested that the justices' questions focused heavily on ways the court could decide the case with addressing Bonnie's constitutional argument, including possible procedural grounds for dismissal. Bonnie's attorney, Megan Miolajczyk, argued that Nebraska is required to give "full faith and credit" to a marriage performed in Iowa, which sounds to us like a losing argument. A stronger ground would be 14th Amendment Equal Protection, which has been successfully invoked in marriage recognition cases thus far this year in federal courts in Ohio, Kentucky, Tennessee and Indiana. Indeed, in light of the Supreme Court's ruling in *U.S. v. Windsor*, which was, in essence, a marriage recognition case, it is difficult to see how a state court could plausibly escape the conclusion that there is no rational basis for a state to distinguish between same-sex and different-sex marriages contracted by its citizens in

other states when deciding whether its trial courts have jurisdiction to entertain divorce petitions filed by its residents. The ACLU of Nebraska and Legal Aid of Nebraska filed amicus briefs in support of Bonnie's appeal. *Omaha World-Herald*, May 28.

NEVADA – On May 23, the 9th Circuit announced that argument will be held in *Sevcik v. Sandoval*, Lambda Legal's appeal of an adverse marriage ruling from the U.S. District Court in Nevada, sometime during September. It seems likely that the court would have the same panel hear the Idaho and Nevada cases, just as the 10th Circuit had the same panel hear the Utah and Oklahoma cases, but not necessarily on the same date. The Nevada case was already briefed in anticipation of an earlier-scheduled April 9 hearing, but then was postponed indefinitely as the circuit took up a suggestion by one judge that they rehear en banc the appeal in *SmithKline Beecham v. Abbott Laboratories*, an antitrust case concerning HIV drugs that incidentally presented the question whether sexual orientation discrimination provokes heightened scrutiny, there in the context of a *Batson* objection to a peremptory challenge of a gay juror. The announcement that *Sevcik* will be argued in September suggests that the court will shortly announced what it has decided about the en banc suggestion.

NORTH CAROLINA – With litigation pending against the state's constitutional and statutory ban on same-sex marriage, the University of North Carolina has announced that it will be charging in-state tuition rates for same-sex spouses of military personnel attending UNC schools, provided they were married in a state that recognizes same-sex marriages. A spokesperson indicated that the tuition break is offered to comply with federal rules that require colleges

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to offer in-state tuition to spouses of military personnel. *Greensboro News & Record*, May 30.

SOUTH DAKOTA – Six same-sex couples filed suit in U.S. District Court for South Dakota on May 22, challenging the state's ban on performance or recognition of same-sex marriages. *Rosenbrahn v. Daugaard*, No. 14-CV-4081. Four of the couples are seeking marriage licenses, while the other two, who married out-of-state, are seeking recognition of their marriages. The defendants include Governor Dennis Daugaard, Attorney General Marty Jackley, Secretary of Health Doneen Hollingsworth, Secretary of Public Safety Trevor Jones, Pennington County Register of Deeds Donna Mayer, and Brown County Register of Deeds Carol Sherman. The complaint advances the following theories to challenge the state's marriage amendment and marriage statutes: deprivation of equal protection on the basis of sexual orientation and sex with respect to fundamental rights and liberty interests, deprivation of due process, and deprivation of the fundamental right to travel (in connection with the recognition claim). Counsel for plaintiffs are Joshua A. Newville of Madia Law LLC, Minneapolis, and local counsel Debra Vogt of Burd & Vogt Law Office, Sioux Falls. Mr. Newville has also been contacted by potential plaintiffs in North Dakota for assistance in filing a marriage equality suit. He has promised to bring a case there within six to eight weeks, which would leave no state in this country still maintaining a ban on same-sex marriage without a live court challenge to its ban.

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2ND CIRCUIT – The 2nd Circuit affirmed a decision by District Judge

Michael A. Telesca (W.D.N.Y.) holding that the plaintiff had failed to establish that he suffered unlawful retaliation because of treatment he received in the workplace after he complained about homophobic harassment. *Rodas v. Town of Farmington*, 2014 U.S. App. LEXIS 9291 (May 20, 2014). The court found that the plaintiff's allegations did not show sufficient "materially adverse" consequences after he filed his civil rights complaint to justify a retaliation claim. The opinion is a bit confusing, and the case was not helped by the plaintiff's decision to proceed pro se and not to contest the district court's dismissal of his supplementary state law sexual orientation discrimination claim, as a result of which the issue before the 2nd Circuit seems to have been solely one of whether Title VII's sex discrimination ban would provide him with protection from the conduct he was protesting. The court recites an extensive bill of particulars, only a few of which relate to sexual orientation, and it is not clear from the opinion whether the plaintiff is gay or a non-gay man who was perceived to be gay, or just a non-gay man who was subjected to nasty conduct by co-workers that had a homophobic tinge to it.

9TH CIRCUIT – A 9th Circuit panel has rejected claim by the organization that drafted and campaigned for passage of California Proposition 8 in 2008 that the continued listing on publicly-accessible websites of the names of donors to their campaign violates their 1st Amendment rights. (Proposition 8 amended the California Constitution to provide that only the union of one man and one woman would be valid or recognized as a marriage in California. It was declared unconstitutional by the federal district court in 2010, and an appeal of that ruling by the plaintiffs in this case was dismissed by the Supreme Court on standing grounds in 2013.) Affirming a ruling by Chief District Judge Morrison

C. England, Jr. (E.D. Cal.), the panel ruled 2-1 in *ProtectMarriage.com-Yes on 8 v. Bowen*, 2014 WL 2085305 (May 20, 2014), the panel affirmed in part Judge England's grant of summary judgment, while dismissing in part the appeal as non-justiciable. Among other things, the court found that the names have been listed on the state's website for so long that a privacy claim is essentially moot. The majority adhered to past circuit rulings upholding the state's donor disclosure rules.

9TH CIRCUIT – A gay man from the Marshall Islands who had been living in the U.S. since 1980 has been denied relief by the Board of Immigration Appeals and the 9th Circuit in *Konou v. Holder*, 2014 U.S. App. LEXIS 8757, 2014 WL 1855660 (May 9, 2014). According to the opinion for the court by Circuit Judge Ronald Gilman, the petition "fled the Marshall Islands in 1980 as a teenager after being sexually assaulted and beaten as a homeless, homosexual child. The authorities there allegedly did nothing to intervene. He came to California under a student visa and remained without documentation. In 1999, Konou was convicted in a California state court of assault with a deadly weapon other than a firearm and of battery with serious bodily injury following a fight with his then-boyfriend. The Immigration Judge found that this crime was particularly serious, rendering Konou ineligible for withholding of removal. But the IJ further found that Konou was more likely than not to be tortured for his homosexuality if forced to return to the Marshall Islands." Based on this finding, the IJ granted Konou relief against deportation under the Convention Against Torture (CAT). The BIA reversed, finding that "the Marshall Islands has no enforced prohibition on homosexuality," and that the finding of particularly serious crime required immediate deportation. Konou

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voluntarily departed but filed an appeal, which was rejected by the 9th Circuit. The court found that the BIA had relied on a 2007 State Department report that stated that “there were no accounts of societal violence based on sexual orientation” and that “homosexuals were accepted in society” in the Marshall Islands, which provided substantial evidence in the record for the BIA’s decision. The court found reasonable the BIA’s assertion that “the factors that precipitated Konou’s mistreatment as a child would be less relevant to a ‘self-sufficient homosexual adult.’” While the court found this analysis to be “somewhat cursory,” it was “sufficient to explain why Konou’s own testimony of past torture did not establish a likelihood of future torture.” Konou, who had been convicted on evidence that he kicked his boyfriend twice after he was already on the ground and suffered a sentence enhancement, argued that the IJ should not have taken the sentencing enhancement into account in deciding whether he had committed a particularly serious crime. The court rejected this argument as well.

9TH CIRCUIT – Homophobic name-calling is not persecution for purposes of asylum and refugee law, held the 9th Circuit in *Inda-Ulloa v. Holder*, 2014 WL 2211717 (May 29, 2014) (not officially published). The petitioner, denied asylum and withholding of removal, waited too long to file his asylum petition, and “substantial evidence supports the agency’s finding that his past experiences in Mexico, including being called derogatory names related to sexual orientation, did not rise to the level of persecution,” wrote the court. As LGBT civil rights has advanced in Mexico, it is difficult to persuade U.S. immigration authorities that a gay person would have a well-founded fear of future persecution because of his sexual orientation if required to return to there.

9TH CIRCUIT – California prohibits sexual orientation discrimination, and that goes for straight people as well as gay people, argued Ron Reynolds, a former member of the San Francisco Police Department’s sex crimes unit who claims he encountered discrimination at work because he is straight. U.S. District Judge Richard Seeborg granted summary judgment to the city on this claim, finding that Reynolds failed to allege facts that would support a prima facie case. Affirming Seeborg, the appeals court wrote that “the only comment directed at Reynolds that could arguably be based on sexual orientation or gender apparently came from Dolly Casazza who, in response to a decision by the California Supreme Court to enjoin San Francisco from continuing to issue marriage licenses to same-sex couples, stated: ‘Your people did this and the people in Southern California.’ This statement,” the court continued, “does not clearly indicate animus on the basis of gender or sexual orientation and at most amounts to a stray remark. Although the evidence clearly demonstrates that Dolly Casazza did not like Reynolds, it does not show a pervasive pattern that Reynolds was harassed on account of his gender or sexual orientation.” *Reynolds v. City and County of San Francisco*, 2014 WL 2211677 (May 29, 2014) (not officially published). Reynolds is not totally out of court, as he is pursuing a claim under another provision of the Labor Code that was not dismissed by the trial court.

DEPARTMENT OF HEALTH AND HUMAN SERVICES – The AIDS Institute and the National Health Law Program filed a complaint with the HHS Office of Civil Rights on May 29 against four insurance companies that are participating in the federal marketplace under the Affordable Care Act, alleging that they are discriminating against people living with HIV by subjecting

them to restrictions on medication coverage and unconscionably high deductibles and co-pays for HIV-related medications. A staff attorney for the National Health Law Program, Wayne Turner, released a statement accusing the insurers of “going out of their way to discourage people with HIV and IADS from enrolling in their plans – a blatantly illegal practice.” The accused insurers are CoventryOne, Cigna, Humana, and Preferred Medical. *New York Times*, May 29.

ALABAMA – The Court of Civil Appeals of Alabama affirmed a trial court’s refusal to modify a child custody award in *Davis v. Blackstock*, 2014 Ala. Civ. App. LEXIS 83 (May 9, 2014). One of the father’s arguments for a change of custody concerned the mother leaving her 8-year-old girl with the child’s aunt, a lesbian, and her female partner. The father objected, on Biblical grounds, to his daughter being exposed to a relative’s homosexual relationship. The court found that in the absence of any evidence that there was any harm to the child, this was not a legitimate ground to change a custody designation from the mother to the father.

CALIFORNIA – The 2nd District Court of Appeal ruled in *Jason P. v. Danielle S.*, 2014 WL 1912547 (May 14, 2014), that a man who donated sperm to a woman to whom he was not married through a physician for assisted reproduction may assert a claim for parental rights under Section 7611 of the California Family Code, even though on its face it might appear that he is precluded from doing so under Section 7613(b). The case drew significant attention because the plaintiff, the actor Jason Patric, sought to publicize his battle to assert parental rights towards the boy conceived with his sperm. Patric and his girlfriend Michelle Schreiber lived together for various periods of time and attempted

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to have a child together without success until they resorted to in vitro fertilization using Patric's sperm. They signed a consent form in which he was identified as an intended parent, but the court placed no weight on this. Patric played a parental role toward the child after its birth, but when his relationship with Michelle ended she cut off contact and he sued to assert parental rights. The trial court ruled against him based on Section 7613(b), which provides that a man who donates semen through a physician or a licensed clinic "for use in assisted reproduction of a woman other than the donor's spouse" will not be treated as the natural father of the resulting child. The trial court relied on dicta from the 2nd District Court of Appeal, suggesting that a sperm donor could never assert parental rights in such circumstances. In this case, the court disclaims the prior dicta, pointing out that in the earlier case it was not considering a claim under Section 7611, the presumed parentage statute, which does not rely on a genetic tie in cases where a "presumed parent receives the child into his or her home and openly holds out the child as his or her natural child." "Thus," wrote the court, "a sperm donor who has established a familial relationship with the child, and has demonstrated a commitment to the child and the child's welfare, can be found to be a presumed parent even though he could not establish paternity based upon his biological connection to the child." Section 7611 has been crucial to parental rights determinations in cases involving same-sex partners. The court emphasized that the birth mother could avoid the application of Section 7611 by assuring that a sperm donor is not given the opportunity to play a parental role. Thus, Patric is barred by Section 7613(b) from asserting rights as a natural father (despite his genetic tie to the boy) but may assert rights under Section 7611 as a "presumed parent" based on his conduct after the birth of the child.

CALIFORNIA – In *Guay v. Colvin*, 2014 U.S. Dist. LEXIS 72826 (C.D. Calif., May 28, 2014), U.S. District Judge Douglas F. McCormick upheld a decision to deny disability benefits to an HIV-positive applicant, finding that the Administrative Law Judge for the Social Security Administration had provided an appropriate explanation for not crediting the opinions of the applicant's treating physician or another examining physician that the applicant was too disabled to work. A vocational expert credited by the ALJ testified that although the applicant could not perform his past relevant work, there were jobs available in the national economy that he could perform. The court also found that the ALJ had "properly identified clear and convincing reasons for discrediting Plaintiff's credibility" in his testimony about the limitations imposed by his medical condition.

CALIFORNIA – U.S. District Judge Otis D. Wright II granted a motion by plaintiff Francisco Perez to remand certain state law claims to the state courts after his entire case had been removed by federal court by his former employer based on one federal cause of action in his complaint. *Perez v. Exceptional Children's Foundation*, 2014 U.S. Dist. LEXIS 70015 (C.D. Calif., May 21, 2014). Perez worked as a live-in apartment manager and handy man. He alleged that his supervisor, Dorothy Burbank, discriminated against him because of his Hispanic national origin and also made comments about him being homosexual, telling him that his sexuality was sinful. He complained that Burbank entered Perez's apartment without his permission, searched through his personal belongings, and made fun of his Catholic religious articles. His tense relationship with her generated psychological issues and he was placed on disability leave and never returned. He waited too long to file discrimination claims under Title VII

or the California Fair Employment and Housing Act, but not too long to bring a federal claim under the Civil Rights Act of 1866 (42 USC 1981) for race/national origin discrimination, which he bundled with assorted state law tort claims in the complaint he filed in Los Angeles County Superior Court, including wrongful discharge in violation of public policy, invasion of privacy, and intentional and negligent infliction of emotional distress. His inclusion of the CRA claim gave the employer the hook to remove the case to federal court. Perez then moved to remand the state law claims, arguing that they involved some novel questions of California law that would be better decided by the state courts. He pointed out that all but one of his causes of action arose under state law. The employer objected to having to defend the case in two forums. Judge Wright ultimately agreed with Perez that some of his tort claims were sufficiently novel that it would be prudent to let the California courts take the first crack at them. However, in addition to retaining the CRA claim, he also retained the emotional distress claims, finding them to be largely derivative of the federal civil rights claim and thus suitable for litigation in the same case.

COLORADO – The Colorado Civil Rights Commission announced on May 30 that it had affirmed Administrative Law Judge Robert N. Spencer's ruling that Masterpiece Cakeshop violated the state's ban on discrimination because of sexual orientation in public accommodations when it refused to make wedding cake for Charlie Craig and David Mullins because the owner, Jack Phillips, had religious objections to their marriage. Although Colorado does not yet have marriage equality, the men were getting married out of state and wanted the cake for their subsequent celebratory party. Judge Spencer ruled on December 6, and Phillips appealed to the full Commission, which decided

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the case based on written submissions. Craig and Mullins are represented by the ACLU and cooperating attorneys. *Craig and Mullins v. Masterpiece Cakeshop, Inc.*, Case No. CR 2013-0008.

CONNECTICUT – U.S. District Judge Vanessa L. Bryant granted a motion by defendants to dismiss a federal/state civil rights suit brought by a self-described bisexual man who was barred from using library facilities at Gateway Community College. *Mpala v. Gateway Community College*, 2014 U.S. Dist. LEXIS 68275 (D. Conn., May 19, 2014). Mpala, representing himself, alleged that he had a friendly relationship with Clara Ogbaa, the chief librarian at the college, and was invited to dine at her house. Mpala was not a student of the College, but frequently used the college library. He showed up for dinner in a sleeveless shirt, dressed similarly to the way he dressed when using the library. She allegedly said to him that he could not dress like that if he wanted to use the library, and when he told her that he preferred to dress “unisexually” as a bisexual man, she taunted him, saying “are you a girl” repeatedly, and told him that sexual deviancy was punishable by death in Nigeria. Mpala alleged that Ogbaa subsequently banned him from using the library, and involved College security forces to remove him. He claimed violations of his federal equal protection and First Amendment rights. Judge Bryant found that he failed to meet the factual pleading requirements necessary to support his claims. In light of his pro se status, she dismissed the case with leave to plead supplying the necessary facts as described in her opinion, if indeed it was possible for him to plead with specificity.

FLORIDA – Reversing a judgment of the Seminole County Circuit Court, the 5th District Court of Appeal held that a woman was estopped from invoking the

jurisdiction of the circuit court to void the adoption of her child by her former same-sex partner. *Matter of Adoption of D.P.P.; G.P. v. C.P.*, 2014 WL 2109130 (May 21, 2014). C.P. and G.P. were partners from 2005 to 2012, and decided to have a child to raise together in 2007. C.P. became pregnant through donor insemination, G.P. was present when the child was born, and they raised the child together for the first four years of its life. C.P. and G.P. jointly petitioned to allow G.P. to adopt the child without affecting C.P.’s parental rights, and the adoption was approved by the trial court. However, a year after the women split up, C.P. petitioned to have the adoption voided, arguing that the trial court had lacked jurisdiction to approve it. The trial court agreed, and order the adoption voided. G.P. succeeded on appeal, arguing that the trial court did have jurisdiction over the parties and the adoption proceeding, and that C.P. was estopped from arguing to the contrary. “Here, the circuit court had personal jurisdiction over the parties (invoked by the petition filed by both women), and subject-matter jurisdiction to act on petitions for adoption,” wrote the court of appeal, “and thus, the court erred in concluding that the final judgment of adoption was void.” Furthermore, wrote the court, “in seeking to set aside the final judgment, C.P. would have us ignore her role in procuring the adoption. G.P. and C.P. jointly sought to make G.P. a co-equal legal parent of D.P.P., and both joined in the adoption petition. D.P.P. regards both C.P. and G.P. as parents, and all three lived as a family for years. C.P. is estopped to argue otherwise.”

GEORGIA – The city of Sandy Springs is under attack for its ordinance forbidding distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs.” Return to the Sex Toys Wars!! The ordinance was passed in 2009,

presumably because the city council was disturbed that the place was being flooded with vibrators, dildos and other implements of sexual pleasure likely to corrupt the morals of its citizens. Presumably, one “rational basis” for this measure could be to encourage sexual intercourse in order to prop up the place’s lagging population growth? After all, sex-toys, when used as instructed, may cause non-reproductive orgasms, which are condemned by some religious authorities, and which, of course, make no contribution towards the propagation of the species through their wasted effort. *The Daily Beast* (May 30), reporting on the lawsuits, identified two brave plaintiffs: Melissa Davenport, a woman with multiple sclerosis who says that sex toys she ordered through the mail have saved her marriage and complains that she shouldn’t have to pay for shipping and postage in order to get them, and Marshall Henry, a bisexual man who not only confesses to using these implements of the Devil for personal sexual pleasure but also to using them as an artist in his work. He complains that his artwork incorporating sex toys can’t be sold in town because of the ordinance, in violation of his First Amendment rights. Garry Weber, Davenport’s lawyer, claims a violation of Equal Protection, but Davenport’s description of her plight suggests Due Process arguments as well. Either way, their lawsuits may end up calling for the 11th Circuit to change its position from 2007, when it upheld a state-wide sex toys ban in Alabama. (The following year, the 5th Circuit struck down an almost identically worded statute in Texas, but thus far the Supreme Court has ducked this vital issue. Concluded the news report: “Here’s hoping we can watch Scalia and Ginsburg battle it out over feather ticklers and vibrators.”

LOUISIANA – The Louisiana Supreme Court rejected a constitutional challenge to the City of Baton Rouge/Parish of East

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Baton Rouge single family residential zoning ordinance in *City of Baton Rouge v. Myers*, 2014 La. LEXIS 1152 (May 7, 2014). Landlord Stephen Myers claimed that the ordinance's definition of family was too vague and would unconstitutionally exclude various non-traditional families, including same-sex partners, from residing in rental housing within the single-family zoning area. He managed to persuade District Judge Janice G. Clark, but not the Supreme Court, which reversed with one dissenting vote. Writing for the court, Justice Hughes found that there was no ambiguity in the family definition, and that in fact it provided significant flexibility in allowing unmarried adult couples to live together in single-family housing, and even larger groupings of unmarried adults provided the landlord was in residence and that the landlord was not trying to run a commercial establishment such as a bed & breakfast or hotel on the premises within a single-family zoned residential district. In dissent, Justice Knoll wrote that the constitutional right of privacy would protect the right of the landlord to rent to people without regard to their familial relationships. Justice Knoll found that the intersection of the right of privacy and the right to "acquire, own, control, use, enjoy, protect and dispose of private property" under the Louisiana Constitution should lead the court to apply strict scrutiny to an attempt by a municipality to interfere with a landlord's decision to rent to unrelated people. The city's legitimate concern to preserve the residential character of the area related to the number of people and whether they were residential tenants, not to their legal relationship, the judge asserted. Knoll argued that the Louisiana Constitution provides "an affirmative right to privacy which is more robust than the right to privacy implied in the federal constitution," and thus that the court should not have followed the U.S. Supreme Court's zoning decisions in deciding this case.

MAINE – The Maine Commission on Governmental Ethics and Election Practices voted unanimously to impose civil penalties in the amount of \$50,250 on the National Organization for Marriage and directed NOM to file disclosure of donor reports with the Commission, having found that NOM was out of compliance with Maine election rules. The commission approved a staff report that found that NOM intentionally violated Maine law by failing to register or report its activities despite its central role in managing and funding an anti-same-sex marriage referendum campaign in 2009. NOM's electoral victory was only temporary, as Maine's voters approved a measure in 2012 authorizing same-sex marriages. *HRC Press Release*, May 28.

MARYLAND – Willful blindness by a federal district judge or just inadequate pleading by counsel for plaintiff? These questions suggest themselves upon reading U.S. District Judge Marvin J. Garbis's opinion dismissing the discrimination complaint in *Greene v. Harris Corporation*, 2014 U.S. Dist. LEXIS 69727, 2014 WL 2114889 (D. Md., May 20, 2014) (not officially reported). Greene, a lesbian, worked for fourteen years as a cleaner for Harris Corporation in its office in Columbia, Maryland. She was evidently good at her work, or they wouldn't have repeatedly renewed her contract. The court's opinion is not ideally clear on this, but it appears that she was an independent contractor. In October 2008, Harl Dan Pierce was employed as Director of Engineering in that office. He apparently took an immediate dislike to Greene, told other workers that "Greene dressed like a man, 'which really bothered him,'" and described her as "frumpy, dumpy and dresses like a man in flannel and jeans." When one worker told Pierce that Greene was a lesbian, he appeared "visibly upset and then disgusted." Pierce then allegedly

created a financial pretext to terminate Greene's contract, drafting a letter stating that he was terminating her contract for budgetary reasons, and left it around for Greene to discover while cleaning his office. In a subsequent meeting, Pierce told Greene that he didn't mean for her to see the letter, and she responded "you have treated me like dog shit, therefore, I have no respect for you, Mr. Pierce." Other employees who were present said that Greene "acted in a calm and professional manner." Harris then contracted with Eures Services to provide cleaning services. Their services proved to be unsatisfactory, generating lots of complaints, but they figured out to hire Greene and assign her to the Harris job, without consulting Harris. The day Greene showed up, Pierce had her escorted from the premises and told the cleaning company that she had been barred from the premises. Greene filed a discrimination charge with the Howard County Office of Human Rights, which found probable cause and, based on this finding, Greene filed suit in the Howard County Circuit Court, which Harris removed to federal court on diversity grounds. Greene alleged both employment discrimination and tortious interference with her employment contract with Eures. Denying that it had an employment relationship with Greene, Harris moved to dismiss. In ruling for Harris, Judge Garbis asserted that Greene had not alleged sufficient facts to show that she was an employee of Harris, either in her original or first amended complaint. Employment discrimination laws don't apply to subcontractors. He also found insufficient factual allegations to sustain her alternative claim of tortious interference with contract. Although he doesn't spell it out in the opinion, Judge Garbis presumably concluded that Pierce did not engage in any tortious conduct by refusing to accept Greene as a cleaner on the premises. The opinion is quite frustrating to read. The judge's factual narrative seems to clearly suggest

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that Greene lost her job, both times, because she is a lesbian and that Pierce was disgusted by her mannish manner of dress and her sexual orientation. This took place in a state and county where sexual orientation discrimination are purportedly illegal. But the court concludes that she has no cause of action because her pleadings are insufficiently factual. Ms. Greene was not proceeding pro se. Perhaps this problem can be corrected on appeal, or perhaps it just illustrates a gap in protection against employment discrimination in an economy where a significant number of workers are not, formally, employees of the companies where they work.

MINNESOTA – The Court of Appeals rejected a gay man’s appeal of the denial of unemployment benefits upon his resignation as an international program coordinator at the University of Minnesota due to differences with his supervisor. *Fridgen v. University of Minnesota*, 2014 Minn. App. Unpub. LEXIS 415, 2014 WL 1758303 (May 5, 2014) (unpublished disposition). As a result of a reorganization of the office in which he worked in March 2013, Fridgen was assigned to a new supervisor, who changed his work hours, required him to get advance approval of expenses, assigned him to coordinate a new summer research program, refused his request for permission to work at home, and cancelled a work-related overseas trip that Fridgen had previously scheduled for himself. On May 13, Fridgen asked for permission to take vacation time that afternoon so he could watch the Minnesota legislature vote on legalizing same-sex marriage, explaining that he had been involved in the state’s marriage equality movement for “a very long time” and “it meant a lot to him to witness the vote.” His request was denied; his supervisor told him that his “personal choices . . . needed to stay off campus and that he needed to work that afternoon,” when

he was expected to attend a meeting. Fridgen believed that the scheduling conflict was “intentional,” and left the meeting in process, saying he felt ill, went to his office and watched the vote on television. The supervisor took no action against him for leaving the meeting, but he filed a complaint with the chancellor, alleging his supervisor’s actions were homophobic and that the changes to his work assignments were inappropriate. He asked to be assigned to a different supervisor, but his request was denied, and the university’s internal procedure concluded his complaint was unsubstantiated. He quit and applied for unemployment benefits, asserting that these incidents would have led a rational person to quit their job. He was denied benefits, the Unemployment Law Judge finding no evidence that the supervisor was homophobic or that the change in working conditions were adverse or out of the norm of what employers do when reorganizing their functions. “The record contains no support for Fridgen’s claim that his supervisor’s alleged homophobia justified his quitting his employment,” wrote Judge Smith for the court. “Fridgen neither identifies adverse employment actions that resulted from his leaving the meeting to watch the legislature’s same-sex marriage vote, nor cites to any other evidence linking his supervisor’s alleged homophobia to any adverse employment action.” Thus, the court held Fridgen did not have a good reason to quit and was not qualified for unemployment benefits.

MISSOURI – The *Columbia Tribune* (May 4) reported that Boone County Circuit Judge Leslie Schneider granted a divorce during April for Dena and Samantha Latimer, a same-sex couple who were married in Massachusetts in 2009 and resided in Columbia. Schneider applied traditional “comity” principles to recognize the marriage “for the limited purpose of granting equitable relief.” Schneider pointed out that

Missouri courts had previously rendered judgments on marriages that were not officially recognized, and wrote that “the court maintains authority to enter judgment with respect to a marriage that is not legally recognized.” This was claimed to be the first same-sex divorce to be granted by a Missouri court, although there was a prior case, also involving a same-sex couples married in Massachusetts, where an annulment was sought. Missouri has constitutional and statutory bans on recognizing same-sex marriages, which are under attack in other litigation.

NEW YORK – A law professor who wrote about a discrimination case in progress, summarizing and commenting on the allegations in the complaint, could not be sued for defamation and false light invasion of privacy by the employee whose alleged discriminatory conduct was described in the professor’s article and a subsequent lecture about the subject matter of the article, according to a May 7 decision by U.S. District Judge Paul A. Engelmayer in *Catalanello v. Kramer*, 2014 U.S. Dist. LEXIS 63044, 2014 LW 1807108 (S.D.N.Y.). A former employee of Credit Agricole CIB, Ryan Pacaifico, sued the company in New York Supreme Court alleging hostile environment discrimination in violation of New York State and local law. The essence of Pacaifico’s allegations were that when his boss, Robert Catalanello, discovered that he was a vegetarian, Catalanello then perceived Pacaifico to be gay and subjected him to harassment sufficient to cause Pacaifico to leave the company. While the case was pending, Prof. Zachary Kramer of Arizona State University Law School published an article that “challenges how existing employment discrimination law characterizes sex discrimination – specifically the law’s treatment of gender stereotyping,” wrote Judge Engelmayer. Kramer referred to and discussed the Pacaifico lawsuit,

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reporting the allegations and mentioning Catalanello by name. Kramer also gave a lecture at Western New England Law School based on the article, mentioning the allegation that the boss scheduled business meetings in a steakhouse and when an employee objected that this was unfair to Pacifico, said “Who the fuck cares? It’s his fault for being a vegetarian homo.” Pacifico voluntarily terminated his lawsuit against Catalanello after the article was published. Catalanello sued Kramer for defamation and false light invasion of privacy, claiming that the article’s statements about the allegations against him, which he denied, had subjected him to ridicule and harmed his reputation. Judge Engelmayer found that Kramer’s article describing Pacifico’s allegations was entitled to the “fair-report privilege” which “protects from liability the publication of defamatory statements appearing in a report of an official action or proceeding.” As Kramer was merely “reporting” what Pacifico had alleged in his lawsuit, the factual assertions were protected by privilege, and Kramer’s comments about the legal issues raised by the allegations were non-actionable as statements of opinion. Engelmayer employed similar reasoning to dismiss the false light invasion of privacy claim. We were struck by the novelty of the underlying case, as this is the first time we ever heard tell that a man was suspected of being gay *because* he was a vegetarian. Bearing in mind Judge Engelmayer’s caution that these were just allegations, one wonders whether, if indeed Catalanello made the statements attributed to him, he had been reading a recent biography of Mahatma Gandhi by Joseph Lelyveld that both emphasized Gandhi’s life-long vegetarianism and intimated that he had an intense emotional (but not necessarily physical) relationship with a German bodybuilder. (The book was banned in India due to widespread public outrage at the implication that Gandhi might have been emotionally attracted to another man.

Perhaps Indian culture is not ready to accept the western concept of bromance between straight men.)

TEXAS – A panel of the 4th District Court of Appeals in San Antonio issued a writ of mandamus to Bexar District Judge Barbara Nellermeo, who is presiding in the divorce proceeding captioned *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421 (Bexar County, 438th Judicial District), requiring her to vacate her April 22 ruling purporting to declare unconstitutional Texas’s laws forbidding recognition of same-sex marriages and requiring her to allow attorneys for the state to intervene on behalf of the respondent, who argues that the court does not have jurisdiction of the plaintiff’s suit for divorce and custody. The opinion of the court of appeals, *In re State*, 2014 Tex. App. LEXIS 5653 (May 28, 2014), relates that the parties in the divorce action were married in Washington, D.C., in 2010 and then returned to live in Texas, where K.L.L. gave birth in 2013 to a child conceived through donor insemination. The women separated five months later. Their out-of-state marriage was “registered as a foreign judgment” without objection in October 2013, and in February 2014 A.L.F.L. filed suit in Bexar County seeking a divorce or, in the alternative, a ruling on parental rights. After Judge Nellermeo rejected an attempt by the state to intervene, the state petitioned for a writ of mandamus from the court of appeals, pointing out that although A.L.F.L.’s complaint placed in question the constitutionality of Texas laws, the trial judge had failed to notify the Attorney General’s office of the pending case until after she had ruled on the constitutionality question, in violation of a statutory obligation to give such notice. The court of appeals rejected the relevance of the U.S. District Court’s ruling in *De Leon v. Perry*, 2014 WL 714741 (W.D. Tex., Feb. 26, 2014), holding Texas’s same-

sex marriage ban unconstitutional, observing that the question before the court of appeals was whether the trial judge violated the statutory duty to notify the Attorney General of a pending challenge to a state law and allowing intervention by the state to defend the law. *De Leon* has been appealed by the state to the 5th Circuit Court of Appeals, which has yet to schedule arguments on the appeal. The Texas Supreme Court heard arguments last year in two cases concerning jurisdiction of Texas courts over divorce actions involving same-sex couples married out-of-state, but has yet to issue a ruling.

WASHINGTON – King County Superior Court Judge Catherine Shaffer has denied a motion by defendants to dismiss an employment discrimination case brought by a former Catholic school administrator who was dismissed after marrying his same-sex partner. Reading her ruling from the bench on May 23, Judge Shaffer said that based on the allegations in the complaint, taken to be true for purposes of deciding a motion to dismiss, it did not appear that allowing Mark Zmuda’s complaint to proceed would violate the 1st Amendment rights of the defendants: Eastside Catholic School and the Archdiocese of Seattle. *Zmuda v. Eastside Catholic School*. The defendants claim that “Zmuda’s responsibilities were inextricably tied to the magisterium of the Church,” and that when they are allowed to put in their defense they would expect to win a motion for summary judgment on 1st Amendment grounds. Zmuda alleges that his employment did not implicate the defendant’s religious free-exercise rights, and asserted that the school has an express non-discrimination policy that includes sexual orientation, that his employer’s knew throughout his employment that he was a gay man with a partner, and that they relieved him of his position after he and his partner took advantage of the newly-enacted

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Washington state laws to get married. Indeed, Zmuda recounts that he was told by his principal that he could continue in his position if he would immediately divorce his partner, and that the school would be happy to pay the costs of a commitment ceremony in place of a wedding. Despite the denials of the Archdiocese, which claimed that the school was autonomous and made its own decision to fire Zmuda, he alleges that school officials stated publicly that they were required to dismiss him by the Archdiocese and that “their hands were tied.” Meanwhile, as litigation proceeds, Zmuda will take up his new job as associate principal of Mercer Island High School (a public school) on July 1, having been selected from a slate of 60 candidates as the most qualified.) 2014 WLNR 14152546 (May 26).

CRIMINAL LITIGATION NOTES

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

– The court of criminal appeals upheld a court-martial conviction of a gay corporal who, according to the evidence presented at his trial, had a tendency to get drunk and then put the moves on men of the same or lesser rank when they were also inebriated and not capable of giving consent. *U.S. v. Dunton*, 2014 CCA LXXI 333 (May 29, 2014). The defendant argued on appeal that the trial was tainted by evidence about his sexual orientation, but the court didn’t buy the argument, finding that Dunton’s own counsel had raised the issue of his sexual orientation during the trial. The court found that under the circumstances of the case, it was appropriate to defer to the trial judge’s rulings on evidence, finding no clear abuse of discretion. “This was a case involving multiple allegations of unwanted sexual contact by a male accused upon other males,” wrote Senior Judge Ward for the appeals court. “The issue of the appellant’s

sexual orientation was placed in front of the members before trial through the supplemental questionnaires. The government’s case relied on numerous witnesses’ descriptions of the appellant passed out and naked in the rack with other Marines. Even the defense made numerous references to the appellant’s sexual orientation during opening statement and closing argument. Consequently, the innuendo arising from LCpl [J]’s testimony likely caught no one by surprise. Finally, the members found appellant not guilty of the charged offense involving sexual contact with LCpl [B] and guilty of the lesser offense involving assault consummated by battery. This cuts against appellant’s argument on appeal that the panel improperly responded to the insinuation of LCpl [J]’s testimony.” (J) testified about steering clear of Dunton when Dunton was drunk because of his reputation of coming on to other men in such circumstances.) “Consequently, to the extent that we find error in the military judge’s ruling, we are convinced that the appellant suffered no material prejudice.” Dunton was sentenced by the jury to 12 months’ confinement, forfeit \$994 pay per month for 12 months, reduction in grade, and bad-conduct discharge. The convening authority approved the sentence except for the bad-conduct discharge.

U.S. ARMY COURT OF CRIMINAL APPEALS

– In *U.S. v. Hurts*, 2014 CCA LXXI 284 (May 2, 2014), the court dealt with an appeal from a court martial conviction of a female member on charges that she withheld the information that she was HIV+ when engaging in sexual intercourse with men. “All but one of appellant’s victims engaged in sexual activity – including sexual intercourse – with appellant either when she had a detectable viral load, without using a condom, or both. One victim, Private First Class (PFC) PM, testified that he had sexual intercourse with appellant

between five and ten times during the summer of 2011, a time period when appellant’s viral load was undetectable. Private First Class PM testified that he used a latex condom every time they engaged in sexual intercourse and that he never noticed any defects or other issues with the condom.” Private Hurts was convicted on six counts of willfully disobeying a superior commissioned officer and six specifications of assault with a means likely to produce death or grievous bodily harm. She was sentenced to bad conduct discharge and extended confinement. The appeals court adjusted her prison time downward slightly based on its review of the expert testimony presented in the record, showing that for some portion of the charged sexual activity Hurts’ viral load was undetectable and that in some cases condoms were used, as a result of which the likelihood of transmission was “remote.” “Put another way,” wrote the court, “the evidence does not establish beyond a reasonable doubt that the probability of infection was more than a remote possibility. Accordingly, we only affirm an assault consummated by battery” for those instances, although the result was still a substantial prison sentence. One judge registered a partial dissent, contending that the court should have reduced the prison term more.

CALIFORNIA – The 6th District Court of Appeal ruled in *People v. Scott*, 2014 Cal App. Unpub. LEXIS 3669 (May 22, 2014) that the trial court had appropriately imposed an AIDS testing requirement on a man who was convicted of performing oral sex on female minors. The defendant asserted that the girls were lying, but the jury believed them, and the court of appeal found that testimony on the record, if apparently believed by the jury, supported the imposition of the test. “Given B. Doe’s testimony, the jury’s verdicts, and the Legislature’s recognition that oral copulation can

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result in a transfer of fluid capable of transmitting HIV, we conclude that there was sufficient evidence to support an implied finding of probable cause here” under Sec. 1202.1, subd. (e)(6), so the trial court did not err in ordering Scott to submit to HIV testing. However, the trial court did err by imposing a \$70 AIDS education fine, as conceded by the Attorney General, because the section of the penal code under which Scott was convicted, Sec. 288(a), was not the one under which such a fine is specified, Sec. 288a(m).

CALIFORNIA – The *San Francisco Chronicle* (May 20) reported that Superior Court Judge Susanne Fenstermacher sentenced Humberto Salvador to a cumulative prison sentence of 411 years to life after he was found guilty of targeting a woman for rape and kidnapping because she is a lesbian. The assault took place on December 13, 2008, involving Salvador and two fellow gang members, who previously pled guilty and received significant sentences. Another defendant testified against Salvador, pled guilty to lesser offenses, and also received prison time.

PRISONER LITIGATION NOTES

U.S. COURT OF APPEALS, 11TH CIRCUIT -- The Eleventh Circuit affirmed the Southern District of Georgia’s dismissal of a case brought by an HIV+ inmate who claimed a prison nurse, physician and warden violated his civil rights because he did not receive his medication three times over a five-week period. The per curiam opinion in *Gorrell v. Haynes*, 2014 U.S. App. LEXIS 9783(11th Cir., May 28, 2014), found that each defendant was entitled to qualified immunity because the law did not clearly establish a prisoner’s right to medication within such a short time. The three lapses were four, four, and seven

days -- for a total of fifteen days – and the defendants were unaware of when some of the lapses started (and at least once the plaintiff requested cessation of the medication). The court relied only on the Second Circuit case of *Smith v. Carpenter*, 316 F.3d 178, 181-82 (2d Cir. 2003), which it said “describe[d] a jury verdict finding that depriving the plaintiff of HIV medication on two separate occasions for several days at a time did not amount to an Eighth Amendment violation.” Reliance on *Smith* is misplaced because it was neither a qualified immunity case nor a dismissal without trial. Rather, in *Smith*, the case went to a jury, which found in a special verdict that the plaintiff did not present a serious medical need, and the Second Circuit affirmed the denial of a new trial. While it found HIV treatment in general to present a serious medical need, it wrote: “this case is conceptually different from the ordinary denial of medical care case, because *Smith*’s claim is based on short-term interruptions in the otherwise adequate treatment which he was receiving for his underlying medical condition.” *Id.* at 185. The per curiam *Gorrell* court conflated qualified immunity (whether the law is clearly established) with the merits (whether, under the law, brief interruption of medication states a claim). The *Smith* trial heard medical evidence; *Gorrell* will not have a trial. It is unclear from the opinion whether *Gorrell* was represented, but the opinion said the court heard oral argument, which was unlikely to have occurred in a pro se prisoner’s case. *William J. Rold*

GEORGIA -- Hugh Lawson, Senior U.S. District Judge, adopted the Recommendation of U.S. Magistrate Judge Thomas Q. Langstaff that pro se plaintiff Christopher Lynch’s 42 U.S.C. § 1983 civil rights case be dismissed in part and allowed to proceed in part in *Lynch v. Lewis*, 2014 WL 1813725 (M.D. Ga., May 7, 2014). Lynch is a

“self-described transsexual inmate” (the court’s words) suing two prison doctors for refusing to initiate treatment for her Gender Identity Disorder pursuant to a Georgia Department of Corrections policy that allows such treatment to be maintained if the patient were receiving it prior to incarceration but not to initiate it after imprisonment. Lynch claimed the failure causes her to suffer physical ailments (nausea, dizziness, headaches, vomiting) and mental illness (anxiety, depression, psychological breakdown and a “serious preoccupation with genital mutilation and self-castration”). Judge Langstaff “Granted in Part” Lynch’s “Motion for Feminine Form of Address and Use of Female Pronouns” as a “courtesy” that is “not to be taken as a factual or legal finding.” On initial screening under the Prison Litigation Reform Act, the Recommendation treats the merits summarily. Judge Langstaff found that Lynch did not state an Equal Protection claim because she did not allege discrimination because of a “constitutionally protected interest, such as race, gender or religion” or plead facts sufficient for a “class of one” equal protection case. (The Recommendation did not address an equal protection “rational basis” for distinguishing between transgender people who commence treatment before incarceration and those who do not.) The Recommendation also found that Georgia state law (prohibiting inhumane or oppressive treatment of inmates) and the United States Universal Declaration of Human Rights do not provide private causes of action. Judge Langstaff allowed Lynch to proceed with claims that her treatment denial violated her rights under the Eighth Amendment to be free of deliberate indifference to her serious medical needs. He relied on *Kothmann v. Rosario*, 2014 WL 889638 (11th Cir. March 7, 2014) (recognizing Eighth Amendment claim based on prison official’s refusal to provide treatment for diagnosed GID); and *Fields v. Smith*, 653 F.3d 550 (7th Cir.2011)

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(holding that enforcement of statute preventing DOC medical personnel from providing hormone therapy to inmates with GID constituted deliberate indifference to inmates' serious medical needs). *William J. Rold*

OHIO – The *Portland Press Herald* (May 3) reported that U.S. District Judge Algenon Marbley (S.D. Ohio) ordered the state to resume providing hormone therapy to a transgender prison inmate. According to the news report, Whitney Lee had been receiving continuous hormone therapy since 1999 until the Ohio Department of Correction “abruptly” halted treatment in 2012. Lee claimed that she suffered “medical setback and depression” when treatments stopped. DOC took the position that its psychiatrist had determined that Lee did not suffer from gender identity disorder. Under the order Lee, 36, who had been living as a woman since age 18, will receive treatments until her expected discharge from prison in seven months. The ruling does not affect her continuing damage claim for \$75,000. Her request filed with the court said that after the treatments stopped, Lee lost breast tissue, her voice deepened, her skin became coarser and she began growing facial hair, and had to be placed on suicide watch. She had been receiving treatments at home, in federal prison, and at the Hamilton County jail prior to her placement at Mansfield Correctional Institute.

LEGISLATIVE NOTES

FEDERAL – The Social Security and Marriage Equality Act has been introduced in both houses of Congress. Lead sponsors in the Senate are Patty Murray (D-Wash.) and Mark Udall (D-Colo.). In the House, lead sponsors are Ron Kind (D-WI), Ileana Ros-Lehtinen (R-FL), Allyson Y. Schwartz

(D-PA), and Elizabeth H. Esty (D-CT). The measure would amend the Social Security Act to provide that the “place of celebration” rule govern all determinations whether couples are married for purposes of Social Security benefits eligibility. At present, the “place of domicile” rule specified in the statute means that legally-married same-sex couples may be denied benefits if they reside in a state that does not recognize their marriage. At present, a majority of states do not recognize same-sex marriages, although that would change if all the affirmative trial level decisions on marriage equality now on appeal are affirmed.

CALIFORNIA – The California Assembly has approved the Modern Family Act, AB 2344, authored by Assemblymember Tom Ammiano (D-San Francisco), by an overwhelming vote of 60-2 on May 19. The measure is intended to make it easier for LGBT couples who want to start a family, providing legal protection throughout the process, and would also benefit single parents and heterosexual couples who want to use donor insemination technology to have children. It streamlines the adoption process for same-sex couples, waiving typically required fees and protecting family privacy by disallowing various invasive procedures that have traditionally been required in such adoption proceedings, such as home studies and investigations of partners who are proposed as adoptive parents. The intent of the bill is to modernize California’s statutory family law to reflect the diversity of ways in which families are now formed. The measure is considered very likely to pass the Senate and be approved by Governor Jerry Brown. *Huffington Post*, May 23. * * * The Assembly voted 42-16 on May 28 to approve AB 2501, which would prevent defendants from using a “gay panic” defense to escape liability for murder. The bill says that

a defendant’s “discovery of his victim’s true gender or sexual orientation is not grounds for a ‘heat of passion’” defense, according to a description of the bill in the *Salinas Californian* on May 29. The measure now goes to the Senate.

IDAHO – Voters in Pocatello narrowly defeated a proposal to repeal a non-discrimination ordinance on May 20, with 4,943 voting to keep the ordinance while 4,863 voted to rescind it. The law bans discrimination in housing, employment and public accommodations because of sexual orientation or gender identity. Opponents had argued that the law would trample the rights of business owners by forcing them to provide goods and services to people of whom they don’t approve on moral or religious grounds. *Idaho State Journal*, May 22.

IOWA – The legislature approved Senate File 2297, which rewrites the state’s draconian HIV criminal liability law in several respects. It expands the law on criminal liability for transmission to include other contagious and infectious conditions, requires proof of actual transmission, and adjusts the level of culpability depending on whether the infected person passed on the infection intentionally or with reckless disregard or without informing the other person of their infected status. The measure was seen as a reform, although it is still open to criticism for criminalizing a public health issue and possibly deterring people from getting tested. The measure passed both Houses at the end of April and was sent to Governor Terry Branstad. *The Register*, May 1.

KANSAS – The Topeka City Council voted 5-3 on May 20 to establish a municipal domestic partnership registry, open to both same-sex and different-sex couples, and to make a good faith effort to contract to provide

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health coverage for registered domestic partners of city employees. The Council also voted 5-3 to add gender identity to prohibited grounds for discrimination in city employment and hiring practices. *Topeka Capital Journal*, May 21.

KENTUCKY – The Danville City Commission voted 3-2 in favor of a proposed ordinance banning sexual orientation or gender identity discrimination in employment, housing or public accommodations. The vote came after the Commission bowed to pressure from Sunrise Children’s Services, a Baptist-affiliated agency, which threatened to sue if it was not exempted, as it does not accept job applications from gay people. Sunset derives most of its income from government funds and presumably is not allowed to discriminate in providing services, but the Commission agreed to amend the measure, which had originally provided an exemption only for organizations that derive a minority of their funds from government sources. Under the revised version, all religiously-affiliated non-profit organizations, regardless of their funding sources, are exempt. The matter goes to a second reading next month. *Associated Press*, May 28.

MARYLAND – Governor Martin O’Malley signed the Fairness for All Marylanders Act into law on May 15. The new statute adds gender identity and expression to the state’s anti-discrimination laws. Maryland has long banned sexual orientation discrimination, and became a marriage equality state in 2012 when the public voted to ratify the marriage equality statute passed by the state’s General Assembly.

MICHIGAN – The Saginaw City Council voted 9-0 to kill a proposed anti-discrimination ordinance that would

have included sexual orientation and gender identity as prohibited grounds for discrimination in employment and public accommodations. Prior to this vote, on May 20, the Council had voted 7-2 on April 21 to “postpone indefinitely” further consideration of the ordinance. *Saginaw News*, May 22. * *
* Surprisingly, the state’s conservative Republican governor, Rick Snyder, attending the Detroit Regional Chamber Policy Conference, announced that he wants the legislature to debate a proposal to amend Michigan’s civil rights law to add bans on sexual orientation and gender identity discrimination. “I don’t believe in discrimination,” said the Snyder, “and I think it would be great if they, the Legislature, looked at it later in the year.” First legislative priority, indicated the governor, is dealing with the Detroit bankruptcy and road funding, but action on civil rights should take place before the end of the year. Initial reports about Snyder’s remarks suggested that he had endorsed the proposed amendment; later reports modified that to say that he supported having the legislature take it up but had not specifically endorsed the pending proposal. *MichiganRadio.org*, May 29; *Detroit News*, May 30.

MISSISSIPPI – In the face of continued recalcitrance at the state level, yet another municipality has passed a resolution recognizing the dignity and worth of all city residents, including LGBT people, as the Bay St. Louis City Council voted 7-0 on May 6 in favor of such a measure. This was the sixth such measure passed this year. These measures were inspired by the state’s enactment of a law purporting to advance religious freedom by relieving government and business of any liability for refusing to provide goods or services based on religious views. Such measures are widely construed as attempts to relief anti-gay folks from any obligation to comply with laws against discriminating based on sexual orientation. Ironically, many

of these measures are being proposed and enacted in jurisdictions that do not include sexual orientation or gender identity in their civil rights laws, so such discrimination could already take place with impunity. As such, these religious freedom measures are really symbolic expressions of state disapproval of sexual minorities. *Sun Herald*, May 6.

NEW HAMPSHIRE – The House voted 234-95 to refer a proposed constitutional amendment to prohibit discrimination because of sexual orientation to interim study. The measure, Proposed Constitutional Amendment Concurrent Resolution 17, had previously received a unanimous 23-0 vote in the Senate, but opposition emerged during a public hearing before the House Judiciary Committee, which voted 16-4 to send the bill to interim study, essentially killing it for this session of the legislature. LGBT community leaders in the state are divided over the proposal, many stating reservation about putting a constitutional amendment on gay rights on the ballot. Proponents tout the measure as necessary to preserve the community’s gains – a non-discrimination law and a law authorizing same-sex marriage, for example – against the possibility of future changes in the make-up of the legislature. At one time New Hampshire was known as one of the most conservative anti-gay states, even banning adoption by gay people, and there were fears that the pendulum could swing back in that direction in the future. *New Hampshire Union Leader*, May 1.

SOUTH CAROLINA – State legislators apparently believe that college students in the state need to be protected from exposure to gay-affirmative literature. The House voted to cut \$70,000 from appropriations for two public colleges that had included such material in their optional freshman reading lists;

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the Senate voted to restore the cuts but to direct that the money be spent on courses about the U.S. Constitution and other founding documents. Presumably, these courses are supposed to avoid mentioning the first amendment or the equal protection clause! Republican State Senator Larry Grooms, who proposed the amendment directing how the money should be spent, characterized as “pornographic” the widely acclaimed graphic memoir, “Fun Home: A Family Tragicomic,” by Alison Bechdel, and “Out Loud: The Best of Rainbow Radio,” by poet and professor Ed Madden. Criticizing Grooms, Senator Brad Hotto, a Democrat, said, “You can wish away homosexuality all you want. It’s been around for eons. It’s time for us to move into the century we live in.” *Advocate.com*, May 14.

TEXAS – Houston, the nation’s fourth-largest city, moved on May 28 to adopt an ordinance enacting protection against discrimination because of sexual orientation or gender identity. The City Council voted 11-6 in favor of a measure proposed by Annise Parker, the city’s openly-lesbian mayor, who was recently re-elected by a substantial majority and announced enactment of such a measure as a major goal of her administration. Indeed, Houston was the largest American city not to have such a measure in effect. (Cities 1, 2 and 3 – New York, Los Angeles, and Chicago – all adopted “gay rights” bills many years ago, and almost all of the nation’s major cities had such legislation in place, leaving Houston as a prominent outlier before this vote.) Opponents of the measure vowed to pursue a repeal referendum for this November, and some said they would try to prompt recall efforts to remove Council members who voted in favor. Much of the opposition, voiced during an impassioned nine-hour public meeting, seemed religiously-based. The measure is not a narrowly-focused “gay rights” law, but rather

gives the city a broad civil rights law addressing discrimination because of sex, sexual orientation, gender identity, race, color, ethnicity, national origin, age, religion, disability, pregnancy, genetic information, family, marital or military status. It covers public and private employment, housing, public accommodations, and city contracting. There is an exemption for religious institutions, which was itself the subject of substantial controversy as it went further than would be constitutionally required under the Free Exercise Clause as of now. Enforcement will be largely through moral suasion and shaming, since violators are subject to a fine up to \$5,000, little more than a wrist slap. The barriers to putting a repeal referendum on the ballot are slim, and Houston voters have rejected protections or partner benefits for gay people twice before, in 1985 and 2001. The grounds for recall petitions are highly circumscribed, making it unlikely that any could qualify for the ballot. *Houston Chronicle*, May 29.

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HOMOPHOBIC HISTORY – A project initiated by the Mattachine Society of Washington has uncovered a trove of federal government documents relating to the government’s anti-gay employment policies. Charles Francis, a member of the Society who worked with the pro bono assistance of attorneys from McDermott, Will & Emery to obtain documents through FOIA requests, intends to make the entire archive public at some point. These documents are of more than merely historical interest. Although executive orders and constitutional rulings now make clear that federal employees are protected from sexual orientation discrimination, this documentation of aggressive anti-gay policies from earlier times help to bolster arguments in judicial

forums concerning the appropriateness of heightened scrutiny for sexual orientation discrimination claims, since a history of past discrimination is an important factor determining the appropriate level of judicial scrutiny. *New York Times*, May 20.

DEPARTMENT OF DEFENSE – Defense Secretary Chuck Hagel responded to a question at a press conference by stating that he was open to reconsidering the Defense Department’s ban on service by transgender persons. Spin-doctors at the DoD promptly announced that Hagel’s response did not mean that the Department was actually considering a change, but follow-up questioning at a White House press briefing brought what sounded like support for ending the ban from Press Secretary Jay Carney. Unlike the prior statutory ban on service by gay people, the transgender ban is entirely regulatory, based on the view that transgender individuals have psychological and medical needs that would impede their ability to function as uniformed personnel. However, recent reports that thousands of transgender people have served (albeit under the radar) with success suggest that these beliefs are questionable. While Hagel did not say that a change is contemplated, he did state that the issue “continually should be reviewed.” Since the ban is not statutory, it could be changed by the Pentagon without legislation. *Metroweekly.com*, May 16. * * * In line with existing policy, the Army is considering transferring Private Chelsea Manning, who was convicted at a court martial on charges of leaking national security secrets to Wikileaks, to a civilian prison where she can receive treatment for her gender dysphoria. A state judge recently approved Manning’s name-change application.

U.S. DEPARTMENT OF VETERANS AFFAIRS – Tracy Dice Johnson, the

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wife of a female soldier killed on duty in Afghanistan, will receive full military death benefits, according to a recent report in the *Army Times*. She is believed to be the first widow of a same-sex married couple affected by a casualty since the Defense Department ended the “don’t ask, don’t tell” policy in response to legislation enacted late in 2010. Tracy Dice Johnson’s wife, Donna Johnson, was killed by a suicide bomber on October 1, 2012. Dice Johnson’s application for benefits was long stalled because of Section 3 of the Defense of Marriage Act, which block the Defense Department from recognizing the marriage, but which was declared unconstitutional by the Supreme Court in June 2013 in *U.S. v. Windsor*. After the Supreme Court decision, her application for benefits retroactive to her spouse’s death kicked around in the federal bureaucracy until May, when a decision was finally made that it would be appropriate to extend benefits back to a date prior to the invalidation of that statute. *msnbc.com*, *Huffington Post*, May 19.

NEW YORK CITY POLICE DEPARTMENT

– In a triumphant victory for common sense and public health, the New York City Police Department announced on May 12 that it will limit the practice of seizing condoms for use as evidence in prostitution-related cases. While condoms will continue to be used as evidence in sex-trafficking cases, the NYPD has bowed to evidence from public health authorities that its practice in making street arrests for prostitution has deterred street prostitutes from protecting themselves and their customers by using condoms to prevent HIV transmission. *New York Times*, May 12.

EXXONMOBIL – Consistency is so very important when you are making

corporate policy, and ever since the merger of Exxon and Mobil resulted in the rescission of Mobil’s policy protecting gay employees from discrimination, shareholder proposals for the combined corporation to adopt a non-discrimination policy including sexual orientation (and more recently also gender identity) have gone down to ignominious defeat. On May 28, true to form, shareholders again voted overwhelmingly (for the 17th time) to reject a proposed non-discrimination policy, with only 19.5 percent of shares cast in support of the proposal. While ExxonMobil claims that it does not discriminate, it won’t put that claim into writing, unlike other major energy companies such as Chevron, BP, Shell and Spectra, which are all highly rated by Human Rights Campaign for their corporate policies. By contrast, HRC rates ExxonMobil at -25 on its Corporate Equality Index. LGBT energy consumers – take note! *HRCBlog*, May 29.

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AFRICA – The African Union’s Commission on Human and Peoples’ Rights, meeting in Angola from April 28 to May 12, approved a resolution condemning violence against LGBTI people. This is the first time an African multinational human rights body has taken such a step, and was seen as a direct rebuke to Nigeria and Uganda, member states that recently stiffened their criminal sanctions against gay sex. The resolution will next be presented to the full African Union, which includes almost all of the countries on the continent. Due to the controversy surrounding gay sex in Africa, it is uncertain what will happen when the matter is taken up. A lesbian activist from Botswana said, “We have no precedent. I don’t know what the AU will do.”

AUSTRALIA – Justice Ann Lyons of the Supreme Court in Brisbane, Queensland, released an opinion on May 29 holding that a lesbian couple who conceived a child through donor insemination using sperm from a gay man who was recruited through a gay community website were entitled to both be listed as legal parents of the child, to the exclusion of the sperm donor. The women had been in a 20-year relationship, and contacted the man through the website. He was listed as the father on the birth certificate, supplied sperm for a second child, and visited the mother after the births. A dispute arose about what role he was to play in the children’s lives, the man claiming that he had always spoken about wanting to play a parental role and to involve his extended family in a relationship with the children, but the women insisted that the man had told them he wanted only a casual relationship, saying to them, in effect, “I’m happy to put my DNA into the world but I do not really want to be a parent.” This litigation concerned the application by the biological mother to have her partner listed as a legal parent over the sperm donor, while separate litigation proceeds over the man’s quest for court-ordered visitation rights. Wrote Justice Lyons, “A Register of Births, Deaths and Marriages is . . . a register of statistical and evidential information, mainly for the purposes of succession law. It is not a register of genetic material.” Ordering that the same-sex partner’s name be substitute for that of the sperm donor, she wrote, “The register will now accurately reflect the correct parents for the children and the true nature of the relationship between (the two women).”

AUSTRIA – The government must be dragged kicking and screaming through the courts in order to vindicate gay rights, it seems. Although all other Austrian states allow same-sex couples to serve as foster parents, Lower Austria does not, the Constitutional

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Court refuses to get involved, and the Administrative Supreme Court confirmed the state government's decision to deny an application by a long-time lesbian couple to be foster parents. The application by Miriam Bock and Barbara Huber has been pending since September 2010. RKL, the Austrian gay rights organization, vowed to take their case to the European Court of Justice in Strasbourg.

BOTSWANA – The Botswana Network on Ethics, Law and HIV/AIDS announced that it will mount a court challenge to the government's decision to ban blood donations by LGBT individuals. The director of the Network characterized the policy as “institutionalized discrimination” and said the Network was attempting to discuss with matter with the blood donation center. The lawsuit will be filed if talks break down. *Agence de Presse Africaine*, May 28.

COSTA RICA – The nation's social security system will extend medical benefits to same-sex couples, according to a May 23 report by *Reuters*. The board of directors of the system voted unanimously to extend the benefits on May 22, even though a bill on civil unions for same-sex couples has languished in the National Assembly for several years. The system now has three months to implement a framework to recognize same-sex couples for health insurance and hospital visitation rights.

ESTONIA – The government on May 22 approved a cohabitation bill that regulates finance, inheritance, care and visitation rights for cohabiting couples regardless of sex. A report about the bill by the Estonian Public Broadcasting service said that it took into account the position of Chancellor of Justice Indred Teder, who said that current laws

offered inadequate legal protection for cohabiting couples, and that same-sex couples were entitled to the protection of the same basic rights as different-sex couples. She opined that lack of legal regulation violated the equality guarantees of the Estonian constitution. *Xinhua News Agency*, May 22.

FRANCE – A court ruled that a woman who went with her same-sex partner to Belgium to become pregnant through IVF treatment had “defrauded” French law (which prohibits IVF for unmarried women) and denied a petition by her partner, now her same-sex spouse, to adopt the child, age 4. Although France legislated last year to allow same-sex marriage and adoption, surrogacy is illegal in France and IVF is provided only for heterosexual couples. Although a bill was proposed to allow IVF for gay couples, it was dropped from consideration by President Francois Hollande in response to strong opposition from “pro-family” campaigners, as part of the concessions made to get the same-sex marriage bill approved. The court decided that as the child was conceived through an illegal procedure, the court could not be a party to legalizing his status with his birth mother's spouse. *Guardian*, May 3.

GAMBIA – President Yahya Jammeh, who has threatened gays and lesbians with “stiff punishment” if they are caught engaging in gay sex in his country, has also warned that Gambians seeking asylum in Europe should not use the government's position on gay sex to tarnish his image, according to a report on May 8 by *Agence de Presse Africaine*. “Some people go to the west and claim they are gays and that their lives are at risk in The Gambia, in order for them to be granted a stay in Europe. If I catch them I will kill them,” he said, thereby clearly supporting their claim that they should be granted asylum because they

would likely be subjected to persecution or returned to The Gambia. Self-fulfilling prophecy?

GEORGIA – President Giorgi Margvelashvili signed into law a new measure titled “On elimination of all forms of discrimination,” which was published in the Legislative Herald and went into force on May 7. The law, approved on May 2, prohibits discrimination “against any persons on any grounds, including age, health, disability, sexual orientation, gender identity, profession and others. The law prohibits discrimination both in the public and private sectors,” reported *Trend Business News* (May 7). With this action, the Eastern European republic of Georgia puts itself ahead of the U.S. state of Georgia as a protector of LGBT rights.

GERMANY – On May 22 the German parliament approved legislation allowing gay people in registered civil unions to legally adopt their partner's adopted child. The measure was described by Justice Secretary Christian Lange as a “direct implementation” of a recent ruling by the constitutional court, but opposition parties criticized the measure for not going further to allow joint-adoptions by same-sex civil partners. *Legal Monitor Worldwide*, 2014 WLNR 13961959 (May 23).

INDIA – While a five-judge panel of the Supreme Court of India was deciding whether to reconsider a two-judge panel's ruling reviving Article 377, the criminal sodomy statute, in response to a curative petition that had been filed by the federal government and several private parties, a national election intervened to cast doubt on the position of the government going forward. The outgoing government, which lost many seats in the election, had argued strongly

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that the Supreme Court should reverse the panel and approve the ruling by the Delhi High Court striking down the law. However, due to divided views within the government, it had not taken any steps in Parliament to revise the law. The incoming government, of much more conservative bent on social issues, seemed unlikely to echo the views of its predecessor, although some advocates were hopeful that the BJP Manifesto, which called for refining and scrapping outdated laws, might lead the government to support the curative petition. After all, Article 377 is a relic from British colonial times, phrased in archaic language, and out of step with the law in western democracies to which India now compares itself in matters of human rights. Prime Minister-elect Modi, who was described as being “extremely active on social media,” had remained silent on this issue, even as some conservatives were cheering the two-judge panel’s action as it was being condemned by government spokespersons. So there was some hope on this front. *Legal Monitor Worldwide*, 2014 WLNR 14131008 (May 26).

ISRAEL – The Health Ministry has amended regulations governing procedures for gender reassignment surgery, lowering the minimum age from 21 to 18 and reducing the time that a person must spend living as a member of their desired gender from 2 years to 1. The authority to approve the surgery will be transferred from the sex-reassignment committees at hospitals to a special committee made up of a psychologist, a psychiatrist, a urologist, an endocrinologist, a gynecologist and a representation of the transgender community. These changes were fervently sought by the transgender community, which complained about the waiting periods and the disdainful treatment that individuals frequently encountered from the hospital-based committees. *Washington Blade*, May 15.

LUXEMBOURG – The Parliament’s Legal Affairs Committee voted to approve a bill that will open up marriage and adoption to same-sex couples, and will also reform other aspects of the country’s family law. The measure was first introduced in 2012, undergoing two years of debate and refining in legislative committees. The bill is expected to be presented to Parliament for a vote before the summer begins. All three parties in the government coalition as well as the opposition party CSV supported the measure, the only opposition coming from the conservative party ADR. When the measure is passed, Luxembourg will become the ninth European Union member state to embrace marriage equality, following the lead of the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France and the U.K. *wort.lu*, May 28.

MEXICO – An anonymous same-sex couple who were turned down for a marriage license have filed a complaint with the Inter-American Commission on Human Rights. Hunter T. Carter, a New York lawyer who represents the couple, says that one of the men, who is living with HIV, needs to marry in order to access medical benefits through his employed partner. “Every day they cannot be legally married, his health and their family are threatened more,” said Carter. Numerous same-sex couples in Mexico have won the right to marry by pursuing individual cases through the courts to the Supreme Court of Mexico, but under the nation’s legal system these cases do not set nationwide precedents binding outside the states where they originate until a certain threshold of rulings has been achieved. In January, the Supreme Court ruled in a different case that same-sex spouses are entitled to the same benefits as different-sex spouses under the country’s social security system. *Washington Blade*, May 12.

SOUTH AFRICA – South African President Jacob Zuma, recently re-elected, has appointed Lynne Brown, a lesbian, to be the Public Enterprises Minister in his cabinet. It was reported that Ms. Brown will be the first openly-gay cabinet minister on the continent of Africa. She was born in Cape Town of mixed-race ancestry and served as premier of West Cape until the ANC lost control of that province in 2009 to the Democratic Alliance. Prior to government service she worked as a teacher, and earned a certificate in “gender planning methodology” from University College London. It is interesting to note that the ANC, which has had a strong gay rights stance, supported writing gay rights into the post-apartheid constitution and appointed openly-gay judges. The party has been in power since 1994 but only now in its twentieth year has elevated an openly-gay party member to a cabinet post, by appointment of the most socially-conservative president in its history. Even then, the press pointed out that Brown has not been a gay rights campaigner. *guardian.co.uk*, May 27. * * * The South Africa National Blood Service has lifted a blanket ban that prevented sexually active gay men from donating blood. An amendment to the criteria for eligible donors provides that sexually active people of any sexual orientation who have been in a monogamous relationship for six months or more are allowed to donate blood. The questionnaire for donors has been revised to remove mention of male-to-male sex. Instead, the questionnaire will address sexual risk in a non-discriminatory manner, providing that any sexual act or contact with a new partner (or partners) during the preceding six months will be deemed a risk to the safety of the blood supply, irrespective of the personal sexual orientation or preference of the donor. This takes account of the possibility that the screening tests used to detect infected blood may not reliably detect a recent infection, but are highly

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accurate within a few months when the body generates anti-bodies to fight the infection, which provide the basis for detecting the infection. *Cape Argus*, May 22.

UGANDA – Determined to continue its wrong-headed policies on anything related to homosexuality, Uganda’s parliament voted unanimously on May 13 to adopt the HIV Prevention and Management Bill, making it a crime to transmit HIV, mandating HIV testing for all pregnant women, and allow doctors to disclose a patient’s HIV status without their consent. The measure imposes a ten-year jail sentence and a fine of up to 5 million Ugandan shillings (about \$2,000) for transmission of HIV in a “willful and intentional” manner. The bill would also make unprotected sex by an HIV-positive person a criminal offense. The measure was passed in the face of rising rates of HIV infection in the country. At the time of this news report, President Yoweri Museveni had not yet signed the measure into law. *hivplusmag.com*, May 16. * * * A report issued by Human Rights Watch and Amnesty International says that in the five months since the nation’s new anti-homosexuality bill was signed into law, there has been an upsurge of violence against people perceived to be gay, including at least one murder, seventeen arrests, and numerous evictions from residential housing. People are citing the law as license to hunt out and punish gay people. One informant told the organizations that his landlady called him and said, “Now we have proof that you are gay... So I’m giving you one week to get out of the house.” *AllAfrica.com*, May 28.

UNITED KINGDOM – The Home Office has halted the scheduled deportation of Aida Asaba, a lesbian from Uganda who fled to the U.K. after suffering abuse by her family and community and receiving death threats.

She claimed to have been forced into an arranged marriage. U.K. officials have been charged by gay rights activists with gross insensitivity in dealing with asylum claims by refugees from parts of Africa where draconian anti-gay laws and fiercely homophobic social sentiment make life extremely dangerous for gay people. Extensive publicity to this case led Home Secretary Theresa May to announce a general review of the handling of LGBT asylum cases. *PinkNews*, May 23.

UNITED KINGDOM – Family Judge Peter Jackson of the U.K. High Court in London ruled in *L. v. C.* that a woman who helped to inseminate her partner with sperm from an anonymous donor has a family relationship with the resulting child, whom she breastfed after the child was born. After the couple split up, the birth mother returned with the child to her native Ireland. Because the child is resident in Ireland, the court found that it did not have jurisdiction to decide on residency and access rights for L., and remanded the case to the Irish courts. Judge Jackson ruled that L.’s relationship to the child is entitled to “respect” from the courts under Article 8 of the European Convention on Human Rights. The judge commented that the case was an example of “the painful legal confusion that can arise when children are born as a result of unregulated artificial conception.” *Irish Daily Mail*, May 13.

PROFESSIONAL NOTES

On May 20 **MARY YU** took the oath of office as a justice of the Washington (State) Supreme Court, becoming the first openly gay justice in the court’s history. She was formerly a King County Superior Court judge for fourteen years, and is co-chairwoman of the Washington State Minority & Justice Commission. She is also the

first Asian-American justice, and the first female Hispanic justice of the court. (Her mother is from Mexico and her father is from China.) She was appointed by Governor Jay Inslee to fill a vacancy cause by the resignation of Justice James Johnson, and will have to run for election in November to serve the rest of Johnson’s term, which was to expire in January 2017. She officiated at the first same-sex marriage in King County on December 9, 2012. *Associated Press*, May 20.

LAMBDA LEGAL announced the election of several new members to its board of directors: **JOHN STAFSTROM**, **RACHEL GOLDBERG**, **KENNETH WEISSENBERG**, and **MICHELLE WAITES**. Board member **KAREN DIXON** was appointed co-chair. Stafstrom is Chair of the Public Finance Department with Pullman & Comley LLC; Goldberg is General Counsel of the Stamford (CT) Urban Redevelopment Commission; Weissenberg is a tax partner and co-chair of the real estate group at EisnerAmper LLP, and Waites is senior patent counsel at Xerox. Dixon, who has been a member of Lambda’s board since 2009, is a commercial litigator.

President Obama has nominated his sixth openly gay diplomat to an ambassadorial post: **TED OSIUS**, to be Ambassador to Vietnam. Osius is married to Clayton Bond, an officer with the State Department’s Bureau of African Affairs. Osius, a career diplomat, is an Associate Professor at the National War College, and has served in diplomatic postings in Indonesia and India. From 1998 to 2001, he served as senior advisor for international affairs for then-Vice President Al Gore. So far, all of Obama’s openly-gay ambassadorial appointments have gone to men: Daniel Baer, John Berry, James Costos, Rufus Gifford and Wally Brewster. Time for some diversity?

Lesbian/Gay Law Notes Podcast

Check out the **Lesbian/Gay Law Notes** Podcast each month to hear our Editor-In-Chief New York Law School Professor Art Leonard and Matthew Skinner, the Executive Director of LeGaL, weigh-in on contemporary LGBTQ legal issues and news.

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We note the passing of Philadelphia attorney **DAVID ROSENBLUM**, a co-founder of the LGBT Bar's career fair, a past co-chair of the Lavender Law Conference, and a former board of directors member of the National LGBT Bar Association. He was Legal Director of the Mazzoni Center in Philadelphia, an organization providing health care and legal services for the LGBT community, and taught on sexual orientation and gender identity law as an adjunct professor at Temple University's Beasley School of Law.

The National LGBT Bar honors **THERESE LEE**, Global Ethics and Compliance Counsel at Google, at an Out & Proud Corporate Counsel Award Reception in San Francisco on June 5.

We note the passing of **U.S. SENIOR DISTRICT JUDGE HAROLD BAER, JR.** (S.D.N.Y.), a staunch ally for the LGBT community who wrote the unpublished trial court decision recognizing a cohabiting same-sex couple as family members, which ultimately led to the New York Court of Appeals' landmark decision in *Braschi v. Stahl Associates*, one of the earliest precedential rulings recognizing a legal status for LGBT families. He also wrote a controversial opinion (later reversed by the 2nd Circuit) striking down restrictions on the size of demonstrations in front of New York City Hall in a case brought by Housing Works, an organization that provides services and representation to people living with HIV/AIDS. Baer, previously a New York state trial judge, was appointed to the federal bench by President Bill Clinton in 1994 and took senior status in 2004 at age 70 but continued to preside over cases. He was a founder of the Network of Bar Leaders in New York City, which shortly after its formation welcome representation from the LGBT bar, and he was among the first federal judges to open his chambers for the LGBT Bar Association of Greater New York's Hank Henry Judicial Internship program.

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SPECIALLY NOTED

Two new books have been published focusing on major LGBT rights lawsuits. In *Forcing the Spring: Inside the Fight for Marriage Equality* (Penguin Press), newspaper journalist Jo Becker provides an “insider” account of the California Proposition 8 litigation, mainly from the perspective of Chad Griffin and the plaintiffs and prosecution legal team. The book stirred controversy by implying through its title and opening paragraph that this lawsuit was the central and seminal event of the campaign for marriage equality, and many critics spotted errors of omission in its treatment of prior and contemporaneous developments, but the account of the litigation itself is gripping and revelatory. In *Judging the Boy Scouts of America: Gay Rights, Freedom of Association, and the Dale Case* (Univ. of Kansas Press), Willamette University political science professor Richard J. Ellis dissects the struggle against the Boy Scouts’ anti-gay membership and leadership policies. Ellis writes from the perspective of an academic observer, producing an account of more depth, balance and perspective but less human interest color than Becker’s. The books complement each other in their approaches to major Supreme Court cases, and are both worth reading for students of LGBT law. * * * Another recently-published book of interest is *The Glass Closet*, by John Browne, Baron Browne of Madingley. Lord Browne, who resigned as CEO of British Petroleum in 2007 after a scandal concerning his relationship with his former same-sex partner, rebounded by starting a successful private-equity company, Riverstone Holdings, and has become a prominent advocate for LGBT rights in the U.K. and Europe. The book tells about his experiences as a closeted corporate executive and speaks more generally about the need for LGBT people to be “out” in the corporate world.

EDITOR’S NOTES

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

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