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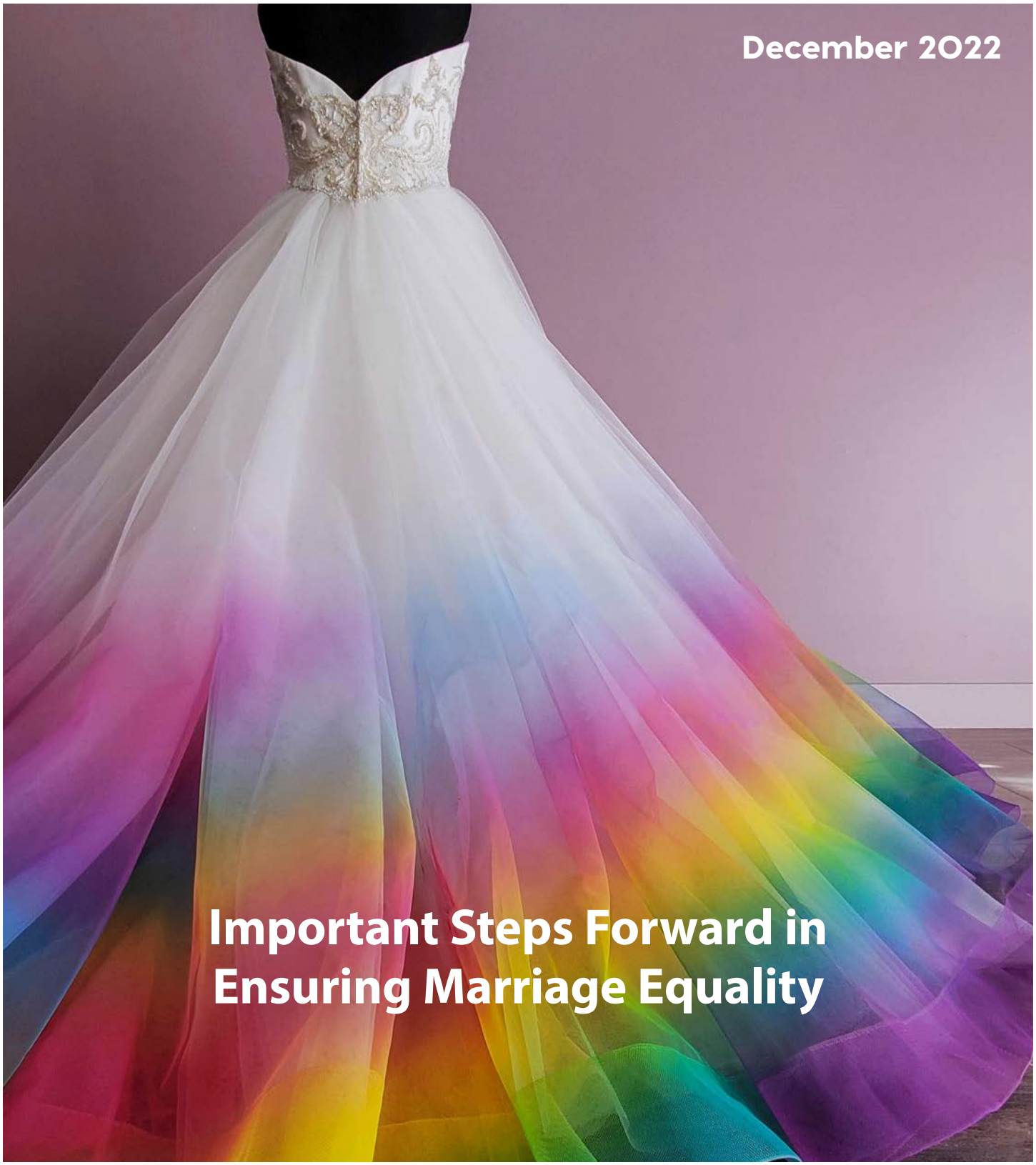
LAW NOTES

December 2022



Important Steps Forward in Ensuring Marriage Equality

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LAW NOTES

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LGBT Law Notes Podcast
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ISSN 8755-9021

Cover Photo Credit: taylorannart.com

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EXECUTIVE SUMMARY

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Florida Appellate Court Rules Against Visitation for Same-Sex Partner of Birth Mother

By Arthur S. Leonard

This one sounds a lot like a case from the 1980s or 1990s, but Florida appellate courts have generally been unreceptive to gay family law claims, lagging behind developments in other states. In *Stabler v. Spicer*, 2022 WL 16628940 (Fla. 1st Dist. Ct. App., Nov. 2, 2022), the court reversed an order by Circuit Judge Ross M. Goodman (Santa Rosa County) which ordered the birth mother of two children, Misty Leigh Stabler, to allow her former partner, Amy Nicole Spicer, visitation with the two children born during their time as partners (one of whom is the genetic child of Spicer's brother, who donated sperm for the child to be conceived) as per a mediation agreement into which the women entered but which Stabler subsequently challenged as unenforceable under Florida law. The Court of Appeal insisted that under Florida law, a person who is not a legal parent has no visitation rights.

Stabler and Spicer had agreed to have a child together using sperm donated by Spicer's brother, resulting in the birth of their first child in 2010. Although their relationship was "rocky" over the next few years, they decided to have another child, this time using sperm from a "mutual friend." Their second child was born in 2015. "Relationship difficulties" persisted, leading to litigation regarding custody and visitation. They entered into a mediation agreement, but only regarding the child conceived with sperm from Spicer's brother. The mediator ordered visitation for Spicer as to both children.

Stabler challenged enforcement of the mediation agreement based on the state constitution's privacy clause. She also objected that the mediator (from the sounds of it, more like an arbitrator) had extended the agreement to both children. Responding to Stabler's suit, Spicer essentially argued waiver, contending that by her "action and deeds," Stabler had "waived her constitutional rights."

Explains the Court of Appeal by a *per curiam* opinion: "We begin by noting that the trial court's thoughtful and comprehensive nine-page order showed compassion for the children, imploring Stabler and Spicer to 'put the children's interests above their own.' That said, the dispositive question in this case –- as the trial court recognized – is a legal one: does Spicer – as a nonparent – have a legally enforceable right to have visitation rights with either of the children under Florida law? The answer is no."

The court relied on *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. 1st DCA 2006), *Springer v. Springer*, 277 So. 3d 727 (Fla. 2nd DCA 2019), *Russell v. Pasik*, 178 So. 3d 55 (Fla. 2nd DCA 2015), and *De Los Milagros Castellat v. Pereira*, 225 So. 3d 368 (Fla. 3d DCA 2017), in which a concurring judge noted that the Supreme Court had "expressly approved *Wakeman*'s holding that the lesbian partner who was the birth mother had parental rights protected by the constitution that prevailed over the claims of a partner who was neither the biological nor legal mother, even though the couple clearly intended to raise the children together").

The trial court had essentially used an estoppel argument, but the court of appeal insisted that this "is inconsistent with applicable caselaw, such as *Wakeman*. Spicer lacks a legally enforceable visitation right notwithstanding the mediation agreement." Continued the court, "Though it is admirable when nonparents promise to assist with the financial and emotional upbringing of a child, which is an enormous task, the law does not thereby allow visitation rights when the underlying relationship between the nonparent and the biological mother unravels."

Why not? Courts or legislatures in many other states have moved to recognize that the best interest of the child in the case of an adult split-up may support providing legal visitation for the "non-parent," recognizing that the role of a parent is not necessarily encompassed solely by the legal relationships – or non-relationship – of the parents. The Florida Supreme Court as currently constituted consists entirely of Republican appointees, including a majority by Governor Ron DeSantis, so it is unlikely this decision would be reversed on appeal. A legislative solution is needed to this issue.

Stabler is represented by Ross A. Keene, Pensacola. Spicer is represented by Carrington Madison Mead, Jacksonville. Her brother, George Wreath Spicer, is also named as an appellee, but was not joined with his sister as "cross-appellant." ■

Arthur Leonard is the Robert F. Wagner Professor of Labor & Employment Law Emeritus at New York Law School.

9th Circuit Rules That Beauty Pageant May Exclude Transgender Women

By Arthur S. Leonard

A 9th Circuit U.S. Court of Appeals panel has ruled in *Green v. Miss United States of America, LLC*, 2022 U.S. App. LEXIS 30400, 2022 WL 16628387 (Nov. 2, 2022), that the defendant, operator of a female beauty pageant, had a First Amendment right to refuse to allow a transgender woman to participate in its Oregon pageant for 2019. The defendant operates state pageants in various age classifications as well as an annual national pageant, whose winner receives a variety of benefits. The published qualifications require that each contestant be a "natural born female."

Anita Green began identifying as transgender at 17 and went through a complete physical transition, including feminizing hormones and surgical alteration. After her transition, she began competing in "female beauty pageants," according to the opinion by Circuit Judge Lawrence VanDyke. These included a Miss Montana pageant, in which she participated until she "aged out" of the qualifications for that pageant. She moved to Oregon and continued competing, including in "Miss Earth" pageants held in Oregon and Nevada.

Late in 2018, she exchanged messages on Facebook with Tanice Smith, Miss United States of America's national director, inquiring about participation in the Oregon pageant for the next year. Smith sent her the rules, and she responded, "you know I'm transgender, right?" and "your rules seem to discriminate against transgender women." Smith responded that she had not known Green was transgender, and that Miss United States of America is a "natural pageant." They did not anticipate changing the eligibility requirements. Smith offered to help Green find "a pageant you would qualify for," but Green instead contacted filed suit in federal court under diversity jurisdiction, charging a violation of the Oregon Public Accommodations Act (OPAA).

Her case came before U.S. District Judge Michael W. Mosman. Assuming that the Oregon Miss America Pageant is subject to the OPAA as a public accommodation, Judge Mosman ruled that the defendant had a right to exclude transgender people based on the First Amendment's protection for freedom of expressive association.

Green appealed. Although Judge VanDyke agreed with Judge Mosman's conclusion that Miss USA had a First Amendment right to exclude Green, he needed to switch his focus to the First Amendment's protection for freedom of speech in order to get the vote of Senior Circuit Judge Carlos Bea for a majority opinion. This two-member majority concluded that the U.S. Supreme Court's ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) controlled the outcome in this case.

"As with theater, cinema, or the Super Bowl halftime show, beauty pageants combine speech with live performances such as music and dancing to express a message," wrote VanDyke. "And while the content of that message varies from pageant to pageant, it is commonly understood that beauty pageants are generally designed to express the 'ideal version of American womanhood.' In doing so, pageants 'provide communities with the opportunity to articulate the norms of appropriate femininity both for themselves and for spectators alike,'" quoting from an anthropology textbook.

Accepting this proposition, the panel majority found that the Miss United States of America eligibility requirements were a method of articulating to the public the organization's message as to the "ideal version of American womanhood." "Put differently," wrote VanDyke, "the Pageant's message cannot be divorced from the Pageant's selection and evaluation of contestants. This interdependent dynamic between medium and message is well-established and well-protected in our caselaw."

Just as the Supreme Court ruled that the sponsors of the Boston St. Patrick's Day Parade could not be required by the state to include an LGBTQ group with its self-identifying banner in their parade, thus introducing messaging that the sponsors did not want to include in their expressive activity, the Miss United States of America organization could not be required to include a message that they did not want to transmit: that a transgender woman fits their view of the "ideal version of American womanhood."

This holding by the majority is supplemented by a separate concurring opinion by Judge VanDyke, explaining his agreement with Judge Mosman's conclusion that this can also be decided as a First Amendment expressive association case, in which the Miss Oregon Pageant would be seen as a group activity undertaken to express a particular message, and the pageant was entitled to exclude somebody whose inclusion would alter its message.

Senior Circuit Judge Susan Graber dissented, arguing that the district court erred by failing first to consider whether the Miss United States of America pageant is a "public accommodation" for purposes of the Oregon anti-discrimination statute. She pointed out that under "diversity jurisdiction," a federal court is supposed to apply state laws consistent with their interpretation by the state courts. If the defendant is not a public accommodation, then the law does not apply to it, and the court has no need to consider the constitutional arguments on which it relied to get the court to reject Anita Green's claim. She argued that in a diversity case, the court was required to follow the approach of Oregon courts on this issue, and cited cases where those courts disposed of cases on statutory grounds to avoid ruling on constitutional defenses.

Countering her argument, Judge VanDyke cited some cases in which Oregon courts had not taken that

approach. In addition, he observed that in *Hurley*, the Supreme Court stated that the application of the public accommodations law to the St. Patrick's Day Parade was an "unusual" interpretation of that law, but because the Massachusetts Supreme Judicial Court had voted 4-3 to apply the law and to rule against the parade organizers, the Supreme Court was stuck with that interpretation, as the highest court of a state is the authoritative interpreter of the state's laws. However, he came up with several examples of other cases where the Supreme Court had affirmed constitutional rulings even though a lower court had not first analyzed the plaintiff's statutory claims to determine whether there was any need to resort to constitutional analysis.

Judge Graber also challenged the majority's First Amendment free speech conclusion. "We must assume that Defendant is a business that offers services to the public, as defined by the OPAA, because otherwise the OPAA would not apply to it," she wrote. "A law that compels such a business to provide its services to a customer despite that business owner's prejudices neither improperly compels speech nor violates the owner's freedom of association," she continued, rejecting both First Amendment defenses. She pointed out that the defendant is, "first and foremost, a for-profit corporation acting in a marketplace." She detailed the revenue-generating aspects of the business. "In sum," she wrote, "the record before us suggests that Defendant's for-profit business model has more in common with a multi-level marketing business than with the parade in Hurley, and demonstrates that Defendant is a commercial association," not an "expressive association." (In Hurley, the Supreme Court had identified the St. Patrick's Day Parade as a 'quintessential expressive association." And as a business offering its services to "the public," it "must provide its services to customers with protected statuses even if it would prefer not to do so. That is all that the OPAA requires. It does not compel speech and it does not violate the Defendant's right to associate freely. . . Defendant cannot alter the nature of the business transaction by claiming that it has a discriminatory belief that it hopes to further through its business."

Providing examples of her analysis, Judge Graber wrote: "A white supremacist who operates a bowling alley cannot transform his business into an expressive entity by naming the building 'White Bowling,' claiming that he intends to use the bowling alley to express his racist beliefs, and then turning away Black bowlers who hope to compete in a bowling league. Nor can a militant feminist owner of a hotel chain, 'A Room of One's Own,' refuse to allow men to stay at her hotels and claim that her organization should receive heightened First Amendment protections because she hopes to further her beliefs with her business."

Her conclusion: "The State has a compelling interest in preventing discrimination on the part of commercial entities that offer their services to the public. Any burden faced by such public accommodation's being required to offer services without discriminating is minimal, and the non-discrimination policy neither compels speech nor violates the freedom of association." This is entirely different from Hurley, she insisted.

Judge VanDyke was appointed by President Donald Trump and Senior Judge Bea was appointed by President George W. Bush. Senior Judge Graber was appointed by President Bill Clinton. Miss United States of America is represented by Alliance Defending Freedom, a conservative religious litigation group that argues for First Amendment rights to discriminate against LGBTQ people in a variety of cases. Anita Green is represented by Portland, Oregon, attorney Shenoa Payne. ■

The Fight Is Not Over: Texas Appellate Court Disciplines Judge for Refusing to Perform Same-Sex Marriages

By Corey L. Gibbs

Dianne Hensley is a justice of the peace in Waco, Texas. In 2017, a local newspaper reported that Hensley refused to marry same-sex couples. The State Commission on Judicial Conduct sought clarity regarding her conduct, which she claimed was protected by a state statute. In late 2019, the Commission issued a public warning. Hensley could have filed an appeal but chose to file suit against the Commission and its members. The trial court dismissed her claims. On November 3, 2022, the Court of Appeals of Texas in Austin affirmed the lower court's dismissal. *Hensley v. State Commission on Judicial Conduct*, 2022 WL 16640801, 2022 Tex. App. LEXIS 8137.

On June 24, 2017, No Courthouse Weddings in Waco for Same-sex Couples, 2 Years After Supreme Court Ruling appeared in the Waco Tribune. The article referred to Judge Hensley's refusal to marry same-sex couples despite the Supreme Court's 2015 ruling in *Obergefell v. Hodges*. She proudly proclaimed that she would only marry heterosexual couples.

The State Commission on Judicial Conduct sent Hensley a letter that sought clarification regarding her remarks. The letter asked her to confirm that she had made the statements and whether, in her opinion, her conduct violated three canons of the Texas Code of Judicial Conduct. Hensley responded by claiming that her statements were protected under the Texas Religious Freedom Restoration Act.

The Commission gave Hensley two option: appear for a hearing or accept a tentative public warning. She chose

the hearing, where she continued to argue that her statements were protected by both the statute and the Texas Constitution. The Commission decided to issue a public warning, which laid out findings of fact. One finding stated:

Beginning on about August 1, 2016, Judge Hensley and her court staff began giving all same-sex couples wishing to be married by Judge Hensley a document which stated 'I'm sorry, but Judge Hensley has a sincerely held religious belief as a Christian, and will not be able to perform any same sex weddings.' The document contained a list of local persons who would officiate a same-sex wedding.

The Commission used the warning as a means to cast doubt on Hensley's capacity to act impartially. Although Hensley had 30 days to appeal the Commission's decision, she chose to file suit instead.

Hensley asserted that her rights under the Texas Religious Freedom Restoration Act were violated by the Commission, because it substantially burdened her free exercise of religion. Additionally, she sought relief under the Texas Uniform Declaratory Judgments Act and based on the principle of ultra vires. The Commission and the officials filed a plea to the jurisdiction. The trial court sided with the Commission and the officials, because Hensley failed to exercise her exclusive statutory remedy and comply with jurisdictional statutory notice requirements.

First, Justice Baker discussed the Court's standard of review. He wrote, "Because whether a court has subject-matter jurisdiction is a question of law, we review de novo a trial court's ruling on a plea to the jurisdiction." In his discussion regarding how the court will review the matter, he noted that the Commission was a constitutionally created agency that is entitled to sovereign immunity. This meant that Hensley would have had to establish a waiver of immunity.

Next, focus shifted to Hensley's claims under the Texas Religious Freedom Restoration Act. She claimed that the investigation and issuance of the warning violated her rights. Moreover, she disagreed with the Commission's determination that she violated a specific canon.

Justice Baker noted that the Commission determined during its hearing that her rights were not violated and that she had violated the canons. He wrote, "Rather than pursue an appeal of the Commission's determination—an avenue established by the Legislature to obtain review of Commission decisions and set forth in Texas Government Code section 33.034—Hensley filed a proceeding." Justice Baker affirmed the lower court's decision to dismiss her claims under the Act. He went a step further and identified her claims as an impermissible collateral attack, because they were attempts to avoid a judgment. She also failed to demonstrate that the Texas Religious Freedom Restoration Act waives the Commission's immunity.

Then, Justice Baker scrutinized Hensley's claims under the Texas Uniform Declaratory Judgment Act. He noted that the trial court dismissed these claims on several grounds, but he focused on whether the claims were barred by sovereign immunity. While the Texas Uniform Declaratory Judgment Act did not act as a general waiver to sovereign immunity, a waiver could be established in certain cases. Hensley argued that the statute allowed her to challenge the validity of agency regulations. However, the case she relied on differed from her situation. The case presented a challenge to a statute. Hensley sought to challenge a regulation. Thus, nothing supported her argument. Justice Baker affirmed the trial court's dismissal of her claims under that statute, too.

Finally, Justice Baker wrapped up his analysis with a discussion on ultra vires claims. If an official acted ultra vires, then the official acted without authority. In such a situation, sovereign immunity would not bar a claim alleging ultra vires. Justice Baker concluded, "The Officials—whether right or wrong—were not acting without legal authority in making their determinations regarding Hensley's conduct." Hensley failed to show where the officials had acted without authority. Justice Baker affirmed each dismissal.

In a concurring opinion, Justice Goodwin agrees with the result but writes that the analysis was unnecessary. She argued that the court was providing an advisory opinion, when it should have promptly dismissed Hensley's claims because of her failure to comply with the provisions of the notice. Additionally, she expressed her disagreement with parts of the analysis. Justice Goodwin wrote, "I do not agree with the Court's analysis or its ultimate determinations about those claims or the evidence surrounding those claims, particularly the Court making an implicit finding by the Commission that its investigation and disciplinary action did not substantially violate Hensley's free exercise of religion and that this implied finding foreclosed any future claims." While Justice Baker relied on the Commission's findings, Justice Goodwin argued that the court should not have been so reliant.

Although the facts from this case come from 2017, this opinion arrived months after *Dobbs v. Jackson Women's Health Organization*. In his concurring opinion, Thomas wrote, "In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." While it may have been easy to dismiss Hensley as a dimwitted judge who failed miserably, she was likely one of many seeking to challenge *Obergefell*.

The Respect for Marriage Act, which was passed by the Senate, has been viewed as the codification of same-sex marriage. However, the bill only requires that states respect marriages performed in other states. It did not, and some argue could not, force states to legalize same-sex marriages.

It remains imperative that we continue to fight for the legalization of same-sex marriages in each state. Dobbs highlights that precedent means little to the current Supreme Court. Fifty years of precedent can topple. Do not expect seven years of precedent to stand its ground when fifty years could not. This is especially true when people, like Hensley, continue to throw stones at it, waiting for it to come crashing down.

John J. McKetta III, David R. Schleicher, and Douglas S. Lang represented the Commission and the officials. The First Liberty Institute and Jonathan Mitchell represented Hensley. Justice Thomas J. Baker wrote the opinion. Justice Melissa Goodwin wrote the concurring opinion. Although last updated in October before the ruling, the First Liberty Institute claimed to still be fighting for Hensley. ■

Corey L. Gibbs is a member of the New York Bar.

U.S. District Judge in Tennessee Rules Against Transgender Girl Seeking to Use Restroom Consistent with Her Gender Identity

By Matthew Goodwin

On November 2, U.S. District Judge William L. Campbell, Jr., a Trump appointee in the U.S. District Court for the Middle District of Tennessee, ruled against an eight-year-old transgender girl in her lawsuit seeking access to use the multi-occupancy girls' restroom in her Nashville elementary school. *D.H. v. Williamson Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 199490, 2022 WL 16639994.

Through her parents as "next friends," the girl, identified in the opinion only by her initials D.H., sued to enjoin the Williamson County Board of Education and Public Schools, as well as the Tennessee Department of Education (Defendants), from enforcing the "Tennessee Accommodations for All Children Act." The Act has sometimes been referred to in the press and elsewhere as the School Facilities Law.

The 2021 Act is just one of many such anti-transgender laws passed in recent years in jurisdictions throughout the United States. The Act ". . . provides students, their parents or legal guardians, teachers, and employees a private right of action to sue [Tennessee] public school systems for 'psychological, emotional, and physical harm,' including monetary damages and 'reasonable attorney fees and costs,' if they 'encounter[] a member of the opposite sex [defined as sex at birth] in a multi-occupancy restroom or changing facility located in a public school building . . . [and] the public school intentionally allowed a member of the opposite sex [defined as sex at birth] to enter the multi-occupancy restroom or changing facility while other persons were present."

The practical effect is to bar Tennessee schools from allowing transgender students like D.H. from accessing and using restroom facilities consistent with their gender identity.

D.H. alleges that the Act law violates Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex" in education programs that receive federal funding. D.H. further alleges that the Act violates her rights under the Equal Protection and Due Process Clauses of the U.S. Constitution.

The case was before Judge Campbell on a motion for a preliminary injunction brought by D.H.

D.H., presently a third grader, began her social transition at age 6, during which time she began using she/her pronouns; this coincided with 2020 and the COVID pandemic. After beginning her social transition, D.H. was frequently misgendered by teachers and bullied and harassed by students both at school and the bus stop.

When D.H. returned to in-person classes for the second half of second grade, she was not allowed to use the multi-occupancy girls' restroom but, instead was only provided access to the school's four single-occupancy restrooms. According to D.H., one of these single-use bathrooms was far from her classroom and the others were dirty, often unavailable, or located in school areas closed-off to students requiring that she "out" herself to staff in order to use the bathroom.

The result was that D.H. began either limiting the amount she ate or drank at school or would not use the restroom at all. Once, D.H.'s mom had to pick her up from school so that D.H. could use the bathroom elsewhere during the day. D.H. felt singled out and began ". . . having screaming fits, throwing objects, engaging in negative self-talk, and hitting herself. She also became apathetic and lethargic at times, and experienced migraines, and recurring nightmares."

The U.S. District Court for the Middle District of Tennessee is part of the Sixth Circuit, where there is no controlling appellate precedent to follow on this issue, unlike in the neighboring Fourth and Seventh Circuits. D.H. argued, however, that the Sixth Circuit's decision in *Dodds v. United States Dept. of Educ.*, 845 F.3d 217 (2016) bound Judge Williams to find that D.H. was likely to prevail on the merits.

In *Dodds* an eleven-year-old transgender girl, who sought to use a restroom consistent with her gender identity, was granted a preliminary injunction by the district court hearing her Title IX and Equal Protection claims. The Sixth Circuit denied the school district's subsequent appeal of the injunction. Wrote Judge Williams, "[t]he *Dodds* Court's finding that the school district did not make its required showing of a likelihood of success on appeal, does not equate to a holding that the failure to allow individuals to use the restroom corresponding with their gender identity is a violation of equal protection or Title IX."

Judge Williams also took pains to insulate D.H.'s case from the implications of the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731.

As readers may recall, *Bostock* held "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." At the same time, Justice Gorsuch writing for the majority in *Bostock*, ". . . expressly declined to address 'bathrooms, locker rooms, or anything of the kind.'"

The U.S. Department of Justice and the U.S. Department of Education have each released guidance that would apply *Bostock*'s reasoning to Title IX cases, but the Education Department was enjoined from implementing this guidance by a different Tennessee district court judge in August of 2022.

Judge Williams' analysis of Plaintiff's likelihood of success on her Equal Protection claim, reads, initially, as though he disagrees with Defendants and will find for D.H—which of course is not where he lands.

Plaintiff and the Tennessee Department of Education defendants agreed, albeit for different reasons, that intermediate is the appropriate level of scrutiny for the court to apply in the Equal Protection context. The Williamson County Board of Education and Public School defendants contend that rational basis review is appropriate. Here, the Court found "Plaintiff has the better argument."

The Defendants went on to argue that the substantially important government objective furthered by the Act, and which justifies the differential treatment of D.H., was the safety of children who might be using the restroom at the same time as a transgender student.

Wrote Judge Williams, ". . . Defendant's suggestion that transgender students seek access to restrooms corresponding to their gender identity for any reason other than that which everyone else seeks to use the restroom is entirely speculative and is indicative of precisely the kind of prejudice of which Plaintiff accuses them. Defendants do not cite to any evidence that allowing transgender individuals – in this case an eight-year-old – to use the restroom corresponding with their gender identity poses any threat to the safety of others in the restroom."

The court, nevertheless, went on to state D.H. was unlikely to prevail on the merits of her Equal Protection claim on the basis that ". . . separate bathrooms for the biological sexes have been accepted as a valid differentiation that serves the interest of individual privacy . . . Even if the actual risk of exposure of private areas of the body is minimal during typical restroom use, the interest in privacy extends beyond avoiding unwanted genital exposure, to a privacy interest in 'perform[ing] bodily functions away from those of the opposite sex."

Arguably, after apparently chiding Defendants for prejudicial attitudes toward transgender children, the court itself seems to fall back onto the same prejudiced notions.

Turning to the Title IX claim, D.H. alleged that excluding her from using a multi-occupancy restroom for girls was exclusion from an education program for Title IX purposes and was discrimination "on the basis of sex."

Judge Williams wrote, "[t]he Court does not disagree that discriminating against a person for being transgender constitutes discrimination on the basis of sex."

Again, however, the court finds D.H. unlikely to prevail on the merits of her Title IX claim by adopting reasoning at odds with *Bostock* and the enjoined guidance from the Department of Education.

"Acceptance of Plaintiff's argument requires either that Title IX allows for the provision of separate bathrooms, but does not mandate who may use them, or that 'sex' encompasses 'gender identity.' The Court is not persuaded by either of these readings of the statute . . . Absent indication that 'sex,' as it is used in the statute, means something more expansive than 'biological sex,' the Court presumes 'sex' has its ordinary meaning. The conclusion that 'sex' refers to biological sex does not mean that discrimination for being transgender is not discrimination based on sex. In this context, it merely means that provision of separate restrooms for the different biological sexes is not a violation of the statute."

The court also disagreed that D.H. would suffer irreparable harm absent the injunction she sought, although Judge Williams allowed that there would be "some harm" if D.H. was not immediately able to use the girls' restroom. Here, the court seemed to point to a letter from D.H.'s mother sent to the school at the end of her second-grade year stating D.H. had improved, her nightmares had subsided, and she was using the bathroom more frequently as evidence that any harm was not irreparable. Of course, at the end of her second-grade year, D.H. was not using the multi-use girl's restroom so the leap the court seems to make is that her improvement while being denied access to the girl's bathroom must mean any harm she is suffering is not irreparable. None of the parties offered expert testimony or affidavits on this question.

Finally, the Court found the balance of the equities and public interest to be "neutral." Most persuasive to the Court

in reaching this conclusion appears to have been the fact the Court deemed D.H. unlikely to succeed on the merits of her claim, which, Judge Williams wrote, "minimizes the public interest in granting the injunction."

D.H. was represented by Adam S. Lurie, Sean Mooney, Linklaters LLP, New York, NY; Ami Rakesh Patel, Jason Starr, Human Rights Campaign Fund, Washington, DC; Tricia Herzfeld, Branstetter, Stranch & Jennings, PLLC, Nashville, TN. ■

Matthew Goodwin is a partner at Brady Klein Weissman LLP in New York City, specializing in matrimonial and family law.

Federal Court Declares Biden Administration Application of *Bostock* to the Affordable Care Act Unlawful

By Ashton Hessee

On November 11, U.S. District Judge Matthew J. Kacsmaryk (N.D. Tex., Amarillo Division), issued his latest ruling *Neese v. Becerra*, 2022 WL 16902425, 2022 U.S. Dist. LEXIS 205608 brought by several medical practitioners who ethically oppose gender-affirming healthcare to varying extents against Xavier Becerra in his official capacity as Secretary of the U.S. Department of Health and Human Services (HHS). Recent opinions by Judge Kacsmaryk in this action include denying a motion to dismiss in April and granting a motion to certify a class action suit in October – which was covered in the previous issue of Law Notes. *Neese v. Becerra*, 2022 US Dist LEXIS 188379 (ND Tex. Oct. 14, 2022).

This time around, Judge Kacsmaryk considers motions for summary judgment brought by both the plaintiff medical practitioners (who are represented by former Trump administration attorneys) and the defendant Secretary of HHS. He grants both motions in part by awarding the Plaintiffs relief under the Administrative Procedure Act (APA) and the Declaratory Judgment Act (DJA). However, he denies the Plaintiffs' request for injunctive relief and issues a declaratory judgment which clarifies that for the purposes of this action Becerra's May 10, 2021, Notification is unlawful, and §1557 of the Affordable Care Act (ACA) and Title IX do not implicitly prohibit discrimination based on sexual orientation or gender identity (SOGI).

The controversy at the center of this suit is whether health care providers who receive federal funding subject to §1557 of the ACA are prohibited from discriminating against patients on the basis of their sexual orientation and gender identity, in addition to "sex". 42 U.S.C. §18116(a). This dispute takes place in the shadow of the Supreme Court's decision of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which the definition of "sex" was interpreted to encompass SOGI for the purposes of Title VII. Defendant Becerra in his Notification shared with healthcare providers subject to the ACA that the government will apply this logic for the purposes of preventing SOGI discrimination by healthcare providers. The Plaintiffs in filing this suit assert that the imminent enforcement of the Notification if and when they refuse to provide gender-affirming care to Transgender patients causes them an injury, an assertion that Judge Kacsmaryk confirmed for standing purposes. Now, the court weighs in on whether the reasoning in *Bostock* that prevents SOGI discrimination can be applied in respect to the ACA and Title IX, as the Biden Administration contends.

First, Judge Kacsmaryk considers both parties' motions for summary judgment. For summary judgment to be appropriate, the moving party must be entitled to judgment as a matter of law and there must be no outstanding issues of material fact in the dispute. Judge Kacsmaryk highlights three elements that are at issue in the parties' respective motions: (1) whether the Plaintiffs have proper standing, (2) whether the Defendant's Notification is in accordance with the law, and (3) whether §1557 prohibits SOGI discrimination.

Citing his previous findings that the eventual enforcement of the Notification yields an injury to the Plaintiffs that is actual and imminent, concrete and particularized, traceable to the Defendant, and redressable by the courts; Judge Kacsmaryk now reaffirms that the medical practitioners possess the required standing.

Next, the court turns to whether the Notification is itself in accordance with the law. While the Defense argues that a similar analysis to *Bostock* should be

used in this case as is common in several jurisdictions, Judge Kacsmaryk deduces that *Bostock* should not be applicable to this action at all.

He begins his reasoning by extracting the language and reasoning from the Supreme Court's *Bostock* ruling regarding the scope of Title VII and contrasting it from the parameters of Title IX as required by the ACA's §1557. Citing the majority opinion, Judge Kacsmaryk highlights that *Bostock* ruling was exclusively intended to address SOGI discrimination claims in matters of employment discrimination law. He explains that the scope of the Court's opinion prohibits *Bostock* from being applied to matters outside of Title VII disputes – such as this action.

Further, Judge Kacsmaryk finds the case law provided by the Defense to be unpersuasive and inapplicable. Most notably, he takes issue with the application of *Franklin v. Gwinnett County Pub. Schs*., 503 U.S. 60 (1992) by distinguishing that (1) the Court did not need to use a "but-for" analysis to determine sex discrimination as the Defense wishes to do now, and (2) interpreting Title IX's "on the basis of" standard interchangeably with Title VII's "because of" standard would be to distort Congress's choice of language. Although other circuits including the Fourth and Ninth apply post-*Bostock* Title VII analysis to contemporary Title IX actions, Judge Kacsmaryk assures that the Fifth Circuit is under no obligation to follow suit. While it does recognize SOGI claims under Title VII in accordance with *Bostock*, it is under no precedential duty to do so in the Title IX context.

Additionally, he elaborates that "if 'on the basis of sex' included 'sexual orientation' and 'gender identity' . . . Title IX and its regulations would be nonsensical." Insisting that Title IX was intentionally designed in accordance with a sex binary, Judge Kacsmaryk explains that following the Defendant's interpretation would imperil the opportunities of "biological" women. He furthers that Title IX applies generally to "each sex as a whole" with no language alluding to sexual orientation or gender identity, and those experiencing SOGI discrimination can turn to Congress' hate crime statutes instead.

Finally, Judge Kacsmaryk turns to the relief sought by the Plaintiffs: "(1) hold unlawful and set aside Secretary Becerra's Notification; (2) enjoin Secretary Becerra from using or enforcing the interpretation of Section 1557 that appears in the Notification; and (3) issue declaratory relief." The court will consider the claims under the Administrative Procedure Act (APA) and the Declaratory Judgment Act (DJA) because the issue is "fit for judicial resolution" and would require an "immediate and significant change in the Plaintiffs' conduct." The APA permits a court to determine the lawfulness and set aside an agency action if there is "no other adequate remedy in law." 5 U.S.C. §704. Simultaneously, the DJA allows the court to clarify the disputed rights and legal relationships owed to the parties, and whether any additional relief is warranted. 28 U.S.C. §2201(a). The Plaintiffs invoke the DJA as a defensive action to establish nonliability prior to anticipated enforcement proceedings, which the Defendant has indicated would eventually follow a violation of the Notification.

Because the Plaintiffs did not brief factors relevant to injunctive relief, the court will refrain from assessing this claim of relief, and instead focus on the request for declaratory judgment. Judge Kacsmaryk finds that the Plaintiffs' case satisfies the necessary elements to warrant a decision which include: "(1) the declaratory action is justiciable; (2) the court has the authority to grant declaratory relief; and (3) to exercise its discretion to decide or dismiss the action." *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383 (5th Cir. 2003). Further, Judge Kacsmaryk holds that because there are no pending state proceedings, the Plaintiffs filed out of concern of enforcement in a convenient forum, and the court does not have to interpret any congruent state judicial decrees, it is appropriate for the district court to exercise its authority to grant declaratory relief.

Based on this reasoning, Judge Kacsmaryk grants relief to the Plaintiffs under both the APA and DJA. He denies in part their request for injunctive relief, subsequently granting in part the Defendant's motion.

Presently, this decision in favor of the medical practitioners legally refusing to provide gender-affirming care to Transgender patients without risking federal funding applies to this specific action, it will not be binding as Circuit precedent until a decision is rendered from an appellate level court, if and when the government decides to appeal. This ruling is delivered amid national contention surrounding access to gender-affirming healthcare and against the backdrop of perpetual litigation efforts faced by the Biden Administration.

The Plaintiffs are represented by Jonathan F. Mitchell, Christopher L. Jensen, Gene Patrick Hamilton, and Marvin W. Jones. The Defendant is represented by Jeremy S. B. Newman, Brian Walters Stoltz, and Jordan Landrum Von Bokern. Judge Kacsmaryk was appointed by former President Donald J. Trump. ■

Ashton Hessee is a law student at New York Law School (class of 2024).

California U.S. District Court Orders Bond Hearing for Detained Bisexual Man from Fiji

By Bryan Johnson-Xenitelis

A U.S. Magistrate Judge for the Northern District of California, Donna M. Ryu, has ruled that a bisexual man from Fiji facing removal proceedings is entitled to a bond hearing after facing mandatory detention since August 2021, in *Salesh P. v. Kaiser*, 2022 WL 17082375, 2022 U.S. Dist. LEXIS 210104 (N.D. California, Nov. 18, 2022).

Petitioner came to the United States as a lawful permanent resident at the age of six and identifies as a queer, bisexual Indo-Fijian man. In 1995, he was convicted of second-degree murder in California state court and sentenced to 15 years to life. The California Board of Parole Hearings ordered Petitioner's release from prison in April 2021 and his release date was set for August 19, 2021. Days before his release, DHS charged Petitioner as removable from the United States as a person convicted of an aggravated felony and initiated removal proceedings against him, placing him in ICE custody subject to mandatory detention. (Because of his serious felony conviction, his only hope for remaining in the United States is to achieve protection under the Convention Against Torture, which has initially been denied by an Immigration Judge on May 13, 2022, but his appeal to the Board of Immigration Appeals resulted in a remand to the IJ on October 28, 2022, "to reconsider [Petitioner's] aggregate risk of future torture." Thus, for now removal to Fiji is not imminent for the Petitioner.) After nine months of detention and four denied requests for release, Petitioner filed a petition for habeas corpus on May 23, asking the district court in San Francisco to order his release from custody or to direct Respondents to provide him with an individualized custody hearing.

Deciding the case, Magistrate Judge Ryu first discussed jurisdiction over the petition. An issue arose because Petitioner was physically detained in the Eastern District of California while Respondent Polly Kaiser, Acting Field Office Director, was located in San Francisco and is responsible for the management and direction of all enforcement and removal operations and law enforcement operations within the boundaries of the "San Francisco Area of Responsibility" which encompasses offices in seven cities in California, as well as Hawaii, Guam, and the Northern Mariano Islands. Judge Ryu found the evidence showed that since Director Kaiser "has the legal authority to provide the relief Petitioner seeks, she is a proper respondent. Given her presence in this district, the Northern District is the proper forum for the petition."

On the merits of case, Judge Ryu noted that the parties do not dispute that Petitioner is detained pursuant to the government's mandatory detention authority or that he has now been in custody for over fourteen months without having been afforded a bond hearing. She further noted that "there remains 'a dearth of guidance regarding the point at which an individual's continued mandatory detention under Section 1226(c) becomes unconstitutional.'"

Judge Ryu set forth the 3-part balancing test regarding procedural due process from *Matthews v. Eldridge*, 424 U.S. 319 (1976): 1) the private interest affected; 2) the government's interest; and 3) the value added by alternative procedural safeguards to what has already been provided in the particular situation before the court.

Here, Petitioner's interest, Judge Ryu stated, "is straightforward," noting that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Judge Ryu stated that "Petitioner has been detained for over fourteen months without a bond hearing, and there is no reasonably certain end to his detention. This period of detention leans heavily toward finding a strong private interest at stake."

Second, Judge Ryu noted, "Respondents do not explain how providing Petitioner with a bond hearing after fourteen months of detention would undermine its interest in enforcing immigration laws and effecting removal. Respondents do not argue that there are any costs associated with providing a bond hearing." Judge Ryu concludes: "Therefore, this factor is neutral at best."

Finally, Judge Ryu found that "in this case, Petitioner has not received any bond hearing during his fourteen-month detention. Accordingly, the value of additional procedural safeguards- i.e., a bond hearing- is high, because 'Respondents have provided virtually no procedural safeguards at all.'"

Judge Ryu held: "Having considered and weighed the Mathews factors, the court concludes that Petitioner's continued detention without a bond hearing violates his due process rights under the Fifth Amendment. Due process requires Respondents to provide Petitioner with a bond hearing." Judge Ryu ruled that "as the court does not have an adequate basis to evaluate whether Petitioner is a flight risk or a danger to the community, he is not entitled to immediate release from ICE Custody. That portion of his petition is denied."

Accordingly, the petition for a writ of habeas corpus was granted in part and denied in part and by December 5, 2022, Petitioner must be provided with a bond hearing before an Immigration Judge where DHS must establish by clear and convincing evidence that Petitioner is a flight risk or a danger to the community to continue his detention.

The Petitioner is represented by Maddie Boyd and Genna Ellis Beier of the San Francisco Public Defender's Office. ■

Bryan Johnson- Xenitelis is an attorney and an adjunct professor at New York Law School.

Tenth Circuit Leaves Prisoners Who Want to Marry Each Other in Procedural Morass

By William J. Rold

It was bound to happen after *Turner v. Safley,* 482 U.S. 78, 97 (1987), recognized that prisoners had a fundamental right to marry: two prisoners would want to marry each other. Here, the plaintiff is transgender, but the sexual orientation or gender identity of her fiancé is unclear. It does not matter so long as marriage equality is intact under *Obergefell v. Hodges,* 576 U.S. 644 (2015). The problem: they are incarcerated in different Oklahoma prisons. (The history of their courtship is not explained.)

When both halves of the couple are prisoners, *Turner* offers little help – not even for couples who are already married. History records that Julius and Ethel Rosenberg, although both on death row at Sing Sing, were allowed contact only through a wire mesh prior to their execution. Nizer, *The Implosion Conspiracy,* (New York: Doubleday 1973), 368, 395-6.

Here, the 10th Circuit's slog through exhaustion of administrative remedies under the Prison Litigation Reform Act guarantees that it will never come close to reaching the merits in *Johnson v. Pettigrew,* 2022 WL 17333074 (10th Cir., Nov. 30, 2022). Chief Judge Jerome A. Holmes (appointed by President George W. Bush) writes for a unanimous panel that includes Judges Harris Hartz (also appointed by Bush) and Veronica S. Rossman (appointed by President Joe Biden).

Pro se plaintiff Lamone M. Johnson (a/k/a Marylin Monai Porter) filed numerous grievances prior to her federal lawsuit. She filed a grievance about problems obtaining forms for a license and ceremony for her marriage to her fiancé. Staff responded that Johnson had already been sent the forms, to which Johnson replied that she did not receive them, reiterating her request. This time, she was put on "grievance restriction" for making the same request twice. Under Oklahoma rules, an inmate can be found to have "abused the grievance process" if a grievance is repeated "about an issue previously addressed by staff." Apparently one incident suffices.

Once an inmate is on grievance restriction, no further grievances are permitted unless accompanied by an affidavit (notarized on each page) listing all prior grievances in the last twelve months, their grievance number, disposition, appeal, if any, and final decision. Oklahoma DOC, OP-090124, § X-B (Jan. 18, 2022). Johnson tried to submit this, but one page was not notarized, and one grievance had incomplete information. Johnson offered to cure the notary problem and explained that she could not provide the missing information because the prison had characterized that grievance as "sensitive" and refused to disclose the details. She was denied a grievance log to assist her.

This grievance history affidavit must be attached to any grievances or appeals, but it is not electronically made part of the appeal; the inmate must physically submit it each time. This writer's review of the Oklahoma grievance rules does not make this clear. [Perhaps she also failed to cackle like a chicken or accurately state the number of jelly beans in a jar.]

Johnson filed two other grievances: asking for a list of LGBTQ-friendly chaplains; and requesting permission to correspond with her fiancé. She had similar problems with the notarized list of prior grievances. Oklahoma also deemed her appeals to be untimely, although Johnson said she put them in the prison mailbox within the deadline. Oklahoma DOC does not follow the "mailbox rule" that provides that a paper is timely submitted when put into the prison mail system. Oklahoma DOC, OP-090124, § II-D (Jan. 18, 2022). This is the rule in federal court. *See Houston v. Lack,* 487 U.S. 266, 270 (1988) (appeals). Finally, officials said she could not correspond with her fiancé because he had not been on her visiting list for six months – an impossible pre-condition for prisoners in different institutions.

The 10th Circuit affirmed a summary judgment dismissal without prejudice on exhaustion grounds in a brief Order and Judgment. It rejected Johnson's argument that the above combination of procedural requirements made exhaustion "unavailable." The court does not cite or apply the key Supreme Court case of *Ross v. Blake,* 136 S.Ct. 1850, 1862 (2016), which speaks at length about unavailability, through denial, impossibly complex requirements, or intimidation. While the court puts the burden on unavailability on Johnson, citing the pre-*Ross* case of *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011), some circuits have ruled that *Ross* places the "ultimate" burden on defendants to establish their affirmative defense. *See, e.g., Fondley v. Lizarragan,* 18 F.4th 344, 352 (9th Cir. 2021) (plaintiff has burden of raising factual issue on "unavailability," but defendants have ultimate burden of proof). Oddly, in *Tuckel,* the 10th Circuit itself reversed and remanded summary judgment against the prisoner plaintiff because of disputed facts and "sparse" record.

The absence of a "mailbox" rule for grievances has been questioned in Oklahoma. *See Rachel v. Troutt,* 2015 WL 3408757, *6-7 (W.D.Okla., Apr. 13, 2015) (holding defendants' reliance on policy stating "[t]here is no mailbox rule" for grievances was "misplaced" where the policy also stated grievances must be submitted within 15 days), *report and recommendation adopted*, 2015 WL 3408783 (W.D.Okla., May 27, 2015), *rev'd and remanded on other grounds,* 820 F.3d 390 (10th Cir. 2016). In the 7th Circuit, the mailbox rule applies to PLRA exhaustion. *Dole v. Chandler,* 438 F.3d 804, 811 (7th Cir. 2006) (holding prisoner had filed a timely grievance appeal by placing it in the prison mail system even though it was never received by the next level); *accord, Rutledge v. U.S.*, 230 F.3d 1041, 1052 (7th Cir. 2000); *Burt v. Harrington,* 2017 WL 468211, at *7 (S.D. Ill., Feb. 3,

2017) (citing *Conley v. Anglin*, 513 Fed. App'x 598, 601 (7th Cir. 2013).

Equitable tolling may be available in PLRA exhaustion cases. *Cf. Burger v. Scott*, 317 F.3d 1133, 1143 (10th Cir. 2003) (equitable tolling applied to federal habeas where Oklahoma refused mailbox rule in required exhaustion of state habeas). There are a dozen or more 10th Circuit cases addressing equitable tolling in its various permutations. This question is given short shrift by the court, and its development is beyond the scope of this article. Interested readers can start with the following: *Johnson v. Garrison*, 805 Fed. App'x 589, 594 (10th Cir. 2020) (addressing federal tolling and holding that Oklahoma's lack of tolling is contrary to § 1983's goals); and *Roberts v. Barreras*, 484 F.3d 1236, 1240-43 (surveying tolling rules in states of Tenth Circuit). Even which tolling rule applies is a conflicts of law question.

The Oklahoma Supreme Court issued an Order that tolled limitations in all civil cases because of COVID during part of the period of exhaustion relevant here. OCCA COVID-19 SCAD No. 2020-36 (Apr. 29, 2020). The 7th Circuit judicially noticed the impact of COVID-19 in prison grievance system operations in *Rutledge*. *See, generally,* Schlanger & Ginsberg, "Pandemic Rules: COVID and PLRA Exhaustion Requirements," 72 Case West. L. Rev. 533 (2022); Amond, "PLRA Exhaustion in the COVID Pandemic: A Simple Dead End," 67 Loyola L. Rev. 299 (2021).

The 10th Circuit refuses to consider some of these arguments because they were not made in objections to the Magistrate's R & R before the District Court, citing *Soliz v. Chater*, 82 F.3d 373, 375-76 (10th Cir. 1996). This court has shown its hostility to LGBTQ plaintiffs repeatedly over the years. Its dismissiveness and pretzelled logic is on full display again here. ■

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.

City of New York Pays $1.4 Million to Settle Civil Rights Claim Arising from Double Rape of Transgender Inmate on Rikers Island

By William J. Rold

The City of New York paid $1.4 million in civil rights damages to settle a lawsuit brought by transgender Rikers Island inmate Alyssa Rodriguez after she was raped twice in male dormitory housing at the Anna M. Cross Center on Rikers Island in April of 2018. After the first rape, she was treated at Bellevue Hospital in Manhattan and then returned to the same dormitory by NYC Department of Corrections officials, where she was raped again four days later. The final settlement of the case, *Rodriguez v. City of New York*, was reported by *Law.com* on November 8, 2022.

The plaintiff died in 2020, of unrelated health complications. Her recovery goes to her Estate, and the case bears the following caption: *Bronx Public Administrator v. City of New York*, 18-cv-07538 (S.D.N.Y. (DLC). [More about the Public Administrator, below.]

According to court papers, Rodriguez presented as a woman, but she was housed in an open sleeping area with male detainees, who raped her – twice. While "some corrections employees expressed surprise that she would be placed in that particular facility," others subjected her to "relentless harassment." Her lawyers objected to her return to the same unit after her stay in Bellevue. Rodriguez said: "I was raped two times and I will never forget the loneliness, pain, destruction. This has changed my life." Her lawsuit alleged that her treatment was part of a "pattern by the city of failing to protect transgender people in its custody."

Senior U.S. District Judge Denise L. Cote (appointed by President Bill Clinton) presided over the federal case. The litigation consisted mostly of adjournments, since the Bronx District Attorney opened a criminal investigation, and COVID-19 delayed witness interviews. Rodriguez filed a Notice of Claim, and her testimony was preserved in a Section 50-h hearing prior to her death. [See N.Y. Gen. Mun. L., § 50-h, discovery in claims against municipalities. Although its only bridge connection is to Queens, Rikers Island is part of Bronx County – hence the S.D.N.Y. venue and the state proceedings in The Bronx.]

Judge Cote referred the case to mediation in 2022. Because Rodriguez died intestate and without known heirs, the Public Administrator for Bronx County was substituted as the plaintiff when settlement was reached. Law.com quoted a spokesman for the New York City Law Department: "This settlement was in the best interests of the city." That may be an understatement.

The Surrogate's Court for Bronx County appointed the Public Administrator as fiduciary for Rodriguez' Estate in August of 2022. File No. 2022-1824. Papers listed a "husband" as sole distribute, but his whereabouts were unknown. The Surrogate's Order of August 9, 2022, confined the fiduciary's authority to settlement of the "cause of action" pending in the Southern District of New York, which was the only listed asset of the Estate. The Surrogate dispensed with service on the "husband," but she ruled that "jurisdiction shall be obtained over him in any future accounting . . . or proceeding." The City received a general release in exchange for the $1.4 million payment –the Net Amount of which will be held in escrow by Rodriguez' attorneys. Judge Cote approved the settlement, subject to the Bronx County Surrogate's jurisdiction over distribution of the Net Amount.

The City of New York may have an interest in the Net Amount, after

payment of attorneys' fees and costs (which Judge Cote approved). If the husband cannot be located and no other heirs are found, the money held in escrow will escheat. The Surrogate's Court Procedure Act has protections for beneficiaries who are unknown or whose whereabouts are unknown – §§ 2222-2225 – but escheat can eventually occur. At final accounting, a public administrator in the five counties of the City of New York pays the balance remaining to the NYC Commissioner of Finance. S.C.P.A. § 1123(g). Compare S.C.P.A. § 1213(e) (public administrators in counties outside the City of New York pay the balance to the State Comptroller). To date, there have been no further proceedings in Surrogate's Court. Further comments about the residual interests in this settlement's Net Amount are beyond the scope of this article.

Rodriguez was represented by Cuti Hecker Wang, LLP (New York City), who had a contingent fee arrangement. They were awarded costs of $2,455.01, and 1/3 of the balance of the $1.4 million (or $465,848.33, from which the attorneys for the Public Administrator were also paid). For now, the Net Amount of nearly one million dollars presumably remains in Rodriguez' attorneys' escrow account. ■

Lesbian Couple Prevails in New York Wedding Garment Public Accommodations Case

By James A. Naumann

On Sept. 26, 2022, Administrative Law Judge Thomas S. Protano (New York State Division of Human Rights, Bronx) found for Complainant Tiffany Lane-Allen in her suit against Respondent D Auxilly NYC, LLC, for an unlawful discriminatory practice relating to public accommodations in violation of New York Executive Law, Article 15 (Human Rights Law). *Lane-Allen v. D Auxilly NYC, LLC,* No. 10205884 (NYSDHR, Sept. 26, 2022). The complaint involved Tiffany Allen and Angel Lane, a lesbian couple from St. Louis, Missouri (now residing in Texas), who wanted to purchase a wedding garment from a New York-based designer but were denied the sale because of the designer Dominique Galbraith's religious belief that a marriage should only be between a man and a woman.

Tiffany Allen and Angel Lane became engaged on January 27, 2018. After searching for over a year for just the right wedding outfit, Angel eventually found a white jumpsuit online, offered for sale by New York-based designer Dominique Galbraith through her company, D Auxilly NYC, LLC. On June 13, 2019, Tiffany wrote to Galbraith through her company's website, explaining that her fiancée had fallen in love with the garment and would like to purchase it. On June 19, 2019, Galbraith responded first by explaining the payment procedure but then denying Tiffany the sale, stating, "I wouldn't be able to make a piece for a same-sex wedding. It goes against my faith in Christ." Galbraith further confirmed via an Instagram post that she would not provide a garment for a same-sex wedding. Tiffany and Angel suffered emotional distress, although the couple proceeded with their marriage on October 23, 2019, with Angel wearing a white jumpsuit similar to the one denied them by Galbraith.

New York Executive Law, Article 15, §296(2)(a) states, "It shall be an unlawful discriminatory practice for any person . . . of any public accommodation . . . because of . . . sexual orientation . . . to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . on account of . . . sexual orientation[.]" Finding robust protection in New York, Tiffany filed a complaint with the New York State Division of Human Rights on September 17, 2019. The Division conducted an investigation and found both that it had jurisdiction over the complaint and that probable cause existed to believe that the Respondent had engaged in unlawful discriminatory practices. A decision on Respondent's motion to dismiss for lack of jurisdiction was reserved until after a public hearing, which took place on July 13, 2022.

As a preliminary procedural matter, Respondent argued that the New York State Division of Human Rights lacked subject matter jurisdiction over the case because the impact of the discrimination did not occur within the state of New York. Respondents cited employment discrimination cases from New York holding that adverse employment decisions on employees who worked outside of New York were sufficient to dismiss those cases for jurisdictional purposes within the State of New York. ALJ Protano rejected the argument, finding that employment discrimination is distinguishable from public accommodation discrimination. Here, all aspects of the business decision landed within the State of New York – from where the decision was made to where the work would have been completed and where payment would have landed. Therefore, the impact flowed into New York and implicated the State's Human Rights

Law, which the legislature designed "[to] be construed liberally." N.Y. Ex. L. §300.

As a substantive matter, Respondent argued that requiring her to provide a garment for a same-sex wedding would violate both her right to free speech and her right to free exercise of religion under the First Amendment, citing *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 707-708 (2014). However, ALJ Protano rejected the argument, quoting Masterpiece Cakeshop: "[I]t is a general rule that such objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop v. Colorado C.R. Commission*, 138 S.Ct. 1719, 1727 (2018).

Respondent claimed that New York State's Human Rights Law is actually not a "neutral, generally applicable law." Respondent pointed to Rule 20 (reopening of a proceeding) and 5.5 (dismissal for administrative convenience) of the Division's Rules of Practice, claiming that they provided the Commission discretion to grant exemptions, which would then fail a strict scrutiny standard. The day after both submitted their post-hearing briefs, Respondent submitted a letter to ALJ Protano, drawing attention to Justice Alito's Sept. 14, 2022, dissent in the *Yeshiva University v. YU Pride Alliance* application for stay. *Yeshiva University v. YU Pride Alliance*, No. 22A184 (order denying stay pending appeal of a permanent injunction). There, a four-justice minority of the Supreme Court would have granted the stay because a restriction on religious exercise that is not "neutral and of general applicability" cannot withstand strict scrutiny and would therefore violate the First Amendment. Respondent argued that the Division should consider Alito's dissent in its finding that the New York State and New York City Human Rights Laws are not generally applicable because they treat a vast category of secular groups more favorably than certain religious groups.

ALJ Protano found that Respondent misinterpreted the Division's rules. Specifically, administrative dismissals are procedural and therefore subject to judicial review. Furthermore, Commissioners have the authority to reopen an investigation, which is neither a final determination nor an exemption. ALJ Protano dismissed Respondent's free exercise claim because "[t]he Division is not requiring Respondent to either participate in, or give affirmation to, a same sex wedding and Galbraith is free to practice her faith as she sees fit."

As to the free speech claim, Respondent pointed to the thorny and nuanced result of *Masterpiece Cakeshop*, arguing that a cake-maker using his artistic skills to "to make an expressive statement . . . in his own voice and his own creation" would be able to refuse to bake a cake for a same-sex wedding under Colorado law. *Masterpiece Cakeshop*, 136 S.Ct. at 1728. ALJ Protano highlighted Masterpiece Cakeshop's distinction between making an expressive statement as part of a same-sex wedding – thereby endorsing same-sex marriage through speech – and denying a same-sex couple an already designed garment for their wedding. In the latter situation, ALJ Protano pointed out that Galbraith had already designed the jumpsuit and simply refused to sell the couple a duplicate that was put into the marketplace for purchase, thereby triggering the State's neutrally applied and generally applicable public accommodations law.

Under the proposed order, Tiffany and Angel were awarded $5,000 in compensation for emotional distress. In addition, the Respondent was required to pay $20,000 in civil fines and penalties.

D Auxilly NYC, LLP, was represented by Barry Black and Sarah Child of Nelson Madden Black, LLP, a New-York based law firm whose focus is on religious clients and causes.

Tiffany and Angel Lane-Allen were represented by Ian Shapiro, Kathleen Hartnett, Kaitland Kennelly, Valeria Pelet del Toro, and Katelyn Kang of Cooley, LLP, along with Brett Figlewski of the LGBT Bar NY. ■

James A. Naumann is a law student at Elisabeth Haub School of Law at Pace University (class of 2023).

California Appeal Court Affirms Criminal Conviction Despite Prosecution's Mis-Gendering of Defendant

By Arthur S. Leonard

Jasmine Mareza Zarazua was driving an SUV with no rear license plate, and led a police officer in Rio Vista on quite a chase when he tried to conduct a traffic stop, in the course of which Zarazua committed numerous traffic violations, culminating with crashing the SUV into a stand of roadside bushes and unsuccessfully attempting to escape on foot. Zarazua was driving with a suspended license on top of everything else, and was charged with numerous offenses. But at trial – a surprise! Counsel for Zarazua, who had been identified female at birth and was living as a woman during the incidents involved here, advised prospective jurors that Zarazua now identified as male. Although the prosecutor might refer to the defendant as Ms. Zarazua and "she," the current pronoun now was he as Zarazua now identified as male. The prospective jurors were questioned on transgender bias and the judge was eventually clued in as well. The case is *People v. Zarazua*, 2022 WL 17090435, 2022 Cal. App. LEXIS 956 (Nov. 21, 2022).

The prosecutor slipped up numerous times during the trial as to pronouns and names, despite admonishing by the judge and intermittent objections from the defense. At one point, defense counsel moved for a mistrial and/or corrective instructions from the court, but Solano County Superior Court Judge Jeffrey C. Kauffman denied the mistrial motion, finding that misgendering had been "unintentional" and did not constitute prosecutorial misconduct or inflame "the jury to the extent that a mistrial required." Judge Kauffman

denied the request for a "curative admonition" but without prejudice, suggesting that defense counsel could renew the request when the parties discussed jury instructions, but defense counsel failed to do so. The court gave the jury a standard California anti-bias charge – CALCRIM No. 200 – which directed jurors not to let sympathy, prejudice or bias – including bias based on Zarazua's gender identity – to affect their decision.

The jury convicted in fewer than two and a half fours of deliberation, on all charges: reckless evading a peace officer, resisting a police officer, hit and run driving resulting in property damage, and driving with a suspended license. Judge Kauffman placed Zarazua on probation and ordered that he serve jail time.

Appealing through appointed counsel David Kaiser, Zarazua claimed the mistrial motion should have been granted, and a new trial ordered with proper instructions, but the 1st District Court of Appeal panel affirmed the conviction and sentence, in an opinion by Justice Victor A. Rodriguez.

The introductory paragraphs of Justice Rodriguez's opinion neatly summarize the appeal: "At trial for recklessly evading a police officer and other offenses, the prosecutor repeatedly misgendered Jasmine Marez Zarazua – who identifies as male – in the presence of the jury. Defense counsel moved for a mistrial and for a curative admonition on the grounds of prosecutorial misconduct. But the trial court denied the motion and decline to admonish the jury. On appeal, Zarazua contends the failure to use masculine pronouns constituted prosecutorial misconduct which, in the absence of a curative admonition, was prejudicial. Parties are to be treated with respect, courtesy, and dignity – including the use of preferred pronouns. Failure to do so offense the administration of justice. Nevertheless, given the record here, we conclude any misconduct was not prejudicial and therefore affirm."

The court explained that the jury had already been vetted on the issue of Zarazua's gender identity, and the jurors who were selected all affirmed that they could remain impartial. "When the prosecutor misgendered Zarazua during opening and closing arguments, the prosecutor apologized and acknowledged the mistake," wrote Rodriguez. "And the trial court reminded the prosecutor to use correct pronouns and subsequently instructed the jurors not to let bias of any kind – including gender identity bias – affect their decision. We presume the jury followed the court's instructions. Additionally, the evidence of guilt was overwhelming and largely uncontested."

The court concluded that "the prosecutor's failure to use masculine pronouns was "harmless under any standard of prejudice" and that "Zarazua does not persuasively argue otherwise." Zarazua urged a presumption of prejudice because of the lack of a curative admonition, but the court found this argument to have been waived because defense counsel failed to renew the request for such an instruction when it was time to instruct the jury after closing arguments. Zarazua also failed to persuade the court of appeal that the trial judge mistakenly focused on whether the misgendering was "intentional" rather than whether it was "prejudicial," but the court of appeal disagreed, pointing to the trial judge's statement that it did not "inflame" the jury.

While the court said "we emphasize that we do not condone the prosecutor's repeated misgendering of Zarazua" and that trial courts "have an obligation to ensure litigants and attorneys are treated with respect, courtesy, and dignity – including the use of preferred pronouns" and should take "affirmative steps to address the issue" if it arises, the court reiterated its view that "the prosecutor's failure to use masculine pronouns was not prejudicial. We acknowledge there may be instances when misgendering is so overt, malicious, and calculating that it infects the trial with such unfairness as to make the conviction a denial of due process," but the court concluded that this was not such a case.

The three-judge panel was unanimous. ■

Student Wins Temporary Restraining Order Against University Ordering His Removal From Campus Housing and Dining

By Jason Miranda

John Doe, an anonymous plaintiff-student from the University of Chicago, was granted a 14-day temporary restraining order in his pursuit of a Title IX and Fair Housing Act claim against the University. He sought the TRO after the University required him to move out of his on-campus housing and prohibited him from entering any other residence halls and dining commons for the remainder of the academic year. The motion was granted in a memorandum opinion by Judge Edmond Chang of the United States District Court for the Northern District of Illinois on November 7, 2022. *Doe v. University of Chicago*, 2022 U.S. Dist. LEXIS 202214, 2022 WL 16744310.

While the facts in this opinion are scarce, the court gives sufficient details to make out what appears to be a misunderstood dispute between Doe and another student. Doe, a senior-year undergraduate student at the University of Chicago, was placed under investigation by the University when he was accused of physically attacking another student, referred to as "Student 1." When Student 1 complained to on-campus housing authorities of the altercation, Doe replied, stating the allegations were leveled only after Doe and another student threatened Student 1 with Title IX complaints in response to Student 1's allegedly homophobic comments and behavior. When the University completed its investigation into Doe, its outcome letter and subsequent appeal denial failed to mention anything regarding Student 1's discriminatory behavior against Doe.

Instead, it only mentioned Doe reporting prior "issues," dismissing these issues as distinct from the supposed physical violence.

The University seems to double down in its appeal denial letter, giving even less reasoning behind its motives and claiming the potential Title IX claims Doe threatened to file as completely separate and irrelevant from the altercation issue. In a telephonic hearing days before the opinion was issued, the University attempted to argue the two issues should be considered separately but then contradicted itself by acknowledging that what happens before an alleged attack is relevant to determining whether the attack even occurred. Additionally, the University concedes it failed to interview Student 3, a witness Doe called on to corroborate his version of that night's events.

Doe alleges six counts, including hostile educational environment, gender discrimination, and retaliation, all under Title IX's prohibition against sex discrimination (which theoretically includes sexual orientation discrimination under the reasoning of *Bostock v. Clayton County*). The hostile educational environment claim is sufficient to grant the TRO so Judge Chang confines his analysis to it. In a TRO, the plaintiff must show a likelihood of success on the merits, inadequate remedy at law, and irreparable harm. The court then balances the nature and degree of the harm to each party and the public interest.

On the likelihood of success portion of the analysis, Judge Chang is quick to state the evidence favors John Doe – simply because he was the only one to present any evidence on account of the quick turnaround timeframe of a TRO motion. For Title IX claims, the court puts forth a three-factor test where the educational institution must receive federal funding, the plaintiff must have been excluded from participation or denied the benefits of an educational program, and the educational institution in question discriminated against the plaintiff on the basis of sex and sexual orientation. Quickly proving the first two as satisfied, the analysis turns to the third factor.

Recounting the previously described facts of the case, Judge Chang decides that had the University been more transparent in its decision-making process or simply demonstrated in its decision that it properly weighed the totality of evidence between Doe and Student 1, the outcome may have been different. But instead, the University shows an incomplete investigation and a lack of transparency, both counting in favor of Doe's claim of discrimination. While this stage of litigation remains very abstract, Judge Chang rules there is a likelihood of success.

On the inadequate remedy at law factor, the court states that even if Doe has the financial means of finding housing on short notice, he will still face imminent harm that could not be remedied with monetary damages. For irreparable harm, Judge Chang takes Doe's argument that he would suffer on account of being in the midst of completing several assignments due in the coming weeks that would allow him to graduate in the Spring as well as graduate school applications, some of which are due prior to the end of year. Whether Doe has the financial means to find a home or whether he would be rendered homeless albeit temporarily is enough to constitute irreparable harm, says the court.

Having satisfied the required elements for a TRO motion, the court moves to the balancing of harms where the goal is to "minimize the costs of being mistaken." While the harms to Doe are plenty, the court is also clear that Student 1's interests are also protected by the University and present a "serious and intense interest." The University had already placed the two students under a "no-contact directive" that prohibits contact between the two on campus grounds. No violations have been reported since and the directive has remained a reasonable compromise between the two conflicted students. As for the public interest, the court dismisses it claiming it weighs in neither party's favor.

Ultimately, the court bars the University from enforcing its directives ordering John Doe from moving out of his residence hall and banning him from entering all residence halls and dining commons. The TRO was issued the day the directives were set to be enforced, preventing Doe from facing a consequential housing expulsion during his last year of studies at the University. The claims will now move towards discovery and potentially a quickly approaching trial on account of the TRO lasting only two weeks. Although the TRO has expired since the opinion was issued, it appears no extension has been given nor has litigation proceeded. Whether the parties came to an agreement remains unknown.

Judge Edmond E. Chang was appointed by President Obama. John Doe is represented by Steven H. Fine from the Law Office of Steven H. Fine in Chicago, Ill. ■

Jason Miranda is a law student at New York Law School (class of 2024).

Southern District of Georgia Uniquely Hostile to *Pro Se and In Forma Pauperis* Plaintiffs

By William J. Rold

Pro se HIV-positive prisoner Anthony Webb sued a variety of defendants for denying him HIV medication, which he said had been withheld from April 2022 until November 2022. He filed his case on October 25, 2022, stating he had been in "isolation" and had not had access to legal services. Webb said that his lack of treatment caused him to lose 25 pounds and to become so weak that he could not get out of bed "most days." He said his CD4 count dropped and that his viral load spiked. [It is unclear how he obtained these lab tests.]

U.S. Magistrate Judge Christopher L. Ray denied Webb's motion to proceed in forma pauperis because much of the indigency form was left blank; and, because of the "apparent exigency" of his complaints, he also screened the complaint and found it deficient in *Webb v. Wellpath*, 2022 WL 16626730 (S.D. Ga., Nov. 1, 2022). He directed that Webb file a new IFP form under oath and an amended complaint within thirty days.

On November 17, 2022, Webb filed a new indigency affidavit and an amended complaint, from which Judge Ray found him to be able to pay the filing fee from his prison assets. Without letting him so do, however, Judge Ray dismissed the case the next day for failure to exhaust administrative remedies evident on the face of the amended complaint. Judge Ray directed the Clerk to close the case and enter Judgment. He signed the Judgment, without referring the case to an Article III judge or giving Webb an opportunity to object to a Report and Recommendation [R & R] – in fact, the docket shows no Article III judge was ever assigned.

There is a lot wrong here, in this case and systemically in the Southern District of Georgia. We will first address the handling of the IFP, then the failure to exhaust, and finally the entering of Judgment by a Magistrate Judge.

Judge Ray's first opinion said he is "wary" of indigency claims where "information appears to have been omitted" and "how easily one may consume a public resource with no financial skin in the game." He warns Webb that "the Court tolerates no lies," referring him to Southern District of Georgia cases involving sanctions, writing "liars may be prosecuted" and found guilty – specifically citing criminal cases in the Southern District of Georgia and the punishment of "convicted criminals [who] choose to burden this Court with falsehoods."

In demanding that Webb provide more information about his poverty, Judge Ray *cited Marceaux v. Democratic Party*, 79 Fed. App'x 185, 186 (6th Cir. 2003), with this parenthetical: "(no abuse of discretion when court determined plaintiff could afford to pay the filing fee without undue hardship because he has no room and board expenses, owns a car, and spends the $250.00 earned each month selling plasma on completely discretionary items)." This seemed odd. *Marceaux* has never been cited by the Sixth Circuit – or by any District Court in the Sixth Circuit – or by any other Court of Appeals. So, this writer did a national search.

Marceaux was apparently found by a law clerk (who else?) in the Northern District of Iowa in 2013, who used it as a comparative example of what not to do in a case in which the court granted IFP. *Marceaux* appears with a "*cf.*" legal signal in *Lafontaine v. Tobin*, 2013 WL 4048571 at *1 (N.D. Iowa, Aug. 9, 2013). This was picked up in the Southern District of Georgia in 2014 and relied upon. The "*cf.*" became "*see also*," and *Lafountaine* morphed into authority for denying IFP.

The national search revealed that *Marceaux* has never been cited in *any* federal civil decisions (apart from its brief appearance in Iowa), except for cases in the Southern District of Georgia, mostly by U.S. Magistrate Judges Ray and G.R. Smith (who has retired). In the last nine years *Marceaux* has been cited in fifty-eight cases – with the same parenthetical and string cites – Webb being the most recent.

So, what is the *Marceaux* case? Basil Marceaux was a perennial political candidate in Tennessee who ran unsuccessfully for state and federal office, including the U.S. House of Representatives, the U.S. Senate, and the Tennessee Governor (three times – finishing fifth in one primary with over 3,500 votes). *My.Fox.Memphis* (Aug. 6, 2010). At the time, he was something of a media sensation – having advocated banning law enforcement from charging any crimes except traffic offenses, granting immunity from criminal law for everyone voting for him, and requiring high school reading of the Congressional Record. *Knoxville News Sentinel* (July 10, 2010). His campaign ads were satirized on *The Colbert Report* and *MSNBC*, and he appeared on *Jimmy Kimmel Live!* He denied being intoxicated when he filmed his ads, according to the *Chattanooga Times Free Press* (July 29, 2010), which also reported on August 4, 2010, that he had a "lengthy" record in Hamilton County Criminal Court, having been found "not guilty by reason of insanity" in 7 of 19 cases.

As to denial of his IFP application, Marceaux sued for an injunction against the "Pledge of Allegiance." Although a well-travelled candidate, he declared as income only his wife's disability and money from selling his plasma. The "completely discretionary" items he bought were gasoline and food. It appears that judges in the Southern District of Georgia have for almost ten years relied on *Marceaux, Lafountain*, and the accompanying string citations, apparently without reading the primary material.

Marceaux is an outlier that has no other support. The Sixth Circuit did not believe his affidavit of poverty, and it wrote its decision prior to promulgation of F.R.A.P. 32.1 in 2007, making unpublished decisions public. On its facts, it is wrong. Plasma, unlike whole blood products, *cannot be donated monthly*. 21 C.F.R. § 630.15(a)(1)(i) (allowing plasma every 2-4 months, depending on components taken and health and weight of patient). Prisoners, to whom these judges continually apply the case, cannot donate blood products at all. 21 C.F.R. § 630.10(e)(1)(iv). *Lee v. McDonald's Corp*., 231 F.3d 456, 458 (8th Cir.2000). *Lee v. McDonald's Corp*., 231 F.3d 456, 458 (8th Cir. 2000), on which Judge Ray relies, held that it was an abuse of discretion to count a wife's assets in determining her husband's IFP application and reversed the denial of IFP.

More generally, the accompanying string citations of Supreme Court cases are also wrong. The issue in *Denton v. Hernandez*, 504 U.S. 25, 31 (1992), was not whether IFP is discretionary but rather whether it should be decided separately from consideration of whether the complaint is frivolous. Justice O'Connor's opinion for the Supreme Court said that IFP was enacted to "guarantee that no citizen shall be denied" access to the court. Id., citing *Adkins v. E.I. DuPont de Nemours & Co*., 335 U.S. 331, 342 (1948). *Rowland v. California Men's Colony*, 506 U.S. 194, 198 (1993), is cited for the proposition that IFP is a "privilege" or "favor granted by the government." The case does not use these words; it speaks of "benefits" and "entitlement." [*Rowland* was about whether an association could qualify for IFP status as a "person," and the Court quoted from a House Report in a footnote, saying that Congress intended by substituting "person" for "citizen" to include aliens (but not associations) with the same privileges otherwise accorded to citizens. Judge Ray's use is out of context, which he repeated in his opinion dismissing the case on November 18, 2022.] The Supreme Court also used words of "entitlement" in speaking of those who qualify for IFP in *Roberts v. United States District Court*, 339 U.S. 844, 844-45 (1950).

These Supreme Court string cites with erroneous parentheticals – plus the misuse of *Marceaux* and the flipping of the holding in *Lafountain* – appear nearly *verbatim* like an *Aushägeschild* in over fifty cases involving *pro se* applications to proceed IFP in the Southern District of Georgia. They are accompanied by threats and unconcealed hostility to *pro se* IFP plaintiffs (mostly prisoners) who seek vindication of civil rights. This is a persistent abuse of judicial process to a targeted group found nowhere else in the country.

Judge Ray gave Webb a chance to amend his complaint to show liability under *Monell* for the denial of HIV medication by vendor health care defendants – see *Monell v. Dep't of Soc. Servs*, 436 U.S. 658, 691 (1978); and *Denham v. Corizon Health, Inc*., 675 Fed. App'x 935, 940 (11th Cir. 2017) – and personal involvement of the individual defendants in the medication denials. Judge Ray did not comment on exhaustion of administrative remedies under the Prison Litigation Reform Act [PLRA]. But he uses the PLRA to dismiss the case *sua sponte* without addressing the merits.

When Webb filed his initial Complaint, he said he grieved the denial of HIV medication, and the response was "nothing." Corrections refused even to give him a receipt for the grievance. In the amended complaint, Webb again referred to filing his grievance and wrote that the prison took "no action" and that he is "still waiting." Judge Ray found this second formulation ("no action"; "still waiting") to be "apparent" failure to exhaust on the face of the complaint in his November 18, 2022, decision. Judge Ray compared Webb's writing "nothing" in his first complaint, which he found to be "less definitive." *Horsepucky*. Both statements say that, despite the passage of months, defendants have not acted on Webb's grievance. Neither formulation establishes failure to exhaust on the "face" of the complaint.

The Eleventh Circuit has twice reversed the Southern District of Georgia for this kind of unsupported dismissal on PLRA exhaustion grounds. In *Whatley v. Warden*, 802 F.3d 1205, 1212 (11th Cir. 2015), the11th Circuit ordered the District Court to make specific findings about exhaustion under the PLRA, particularly where "the prison's failure to respond to [plaintiff's] grievance prevented him from [exhausting]." This is a well-established two-part process (looking at the face of the complaint; and making findings on contested issues) established by *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). The Southern District of Georgia was reversed again in *Whatley v. Warden*, 898 F.3d 1072, 1086-87 (11th Cir. 2018), when it failed on remand to make findings about Corrections officials' alleged waiver of procedural requirements in its own PLRA exhaustion rules. Judge Ray misapplied both steps of the Turner process on PLRA exhaustion, as well as the teachings of both decisions in *Whatley*.

Worse, Judge Ray himself ordered a dismissal and signed a final judgment, which he had no authority to do under 28 U.S.C. § 636. Without the consent of the parties, a magistrate judge cannot enter a final disposition but is limited to issuing an R & R with time for objections. 28 U. S.C. § 636(b) and (c); see also F.R.C.P. 72 (same). S.D. Ga. Local Rule 72.3(a)(2) requires reports to a district judge when a magistrate judge considers "prisoner petitions challenging conditions of confinement." That was not done here, although a magistrate judge's R & R is de rigueur even on issues under 28 U.S.C. § 1915. *Attwood v. Singletary*, 105 F.3d 610, 611-12 (11th Cir. 1999); see also, *Lister v. Dept. of Treasury*, 408 F.3d 1309, 1312-13 (10th Cir. 2005) (collecting courts of appeals cases).

To be fair, a review of the last two years shows that Judge Ray usually issues an R & R in cases like this. Further review of summary magistrate judge dismissals in the Southern District of Georgia is beyond the scope of this article, except to note that Judge Ray

did the same thing to the jailed plaintiff in *Brisham v. Chatham County*, 22-cv-44 (S.D. Ga., Apr. 19, 2022). This problem also existed for some time in the Eastern District of California, but it seems to have been curtailed. *Law Notes* reported same to the Office of the Circuit Executive for the Ninth Circuit in 2019.

What started as a simple claim about denial of HIV medication to a prisoner has exposed a dark underbelly in the Southern District of Georgia. The Corrections system failed to treat Webb and then refused to answer his complaint. The federal court said he might be hiding wealth in his prison account and threatened him. Then it dismissed his case because he said he is "still waiting" for an answer to his grievance instead of saying "nothing" happened with his grievance. He was not given a chance to appeal or informed about his right to make objections to a Magistrate Judge's rulings. Judge Ray made sure, however, that Webb understood that he still had to pay the filing fee in installments for his now dismissed case. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

Arthur S. Leonard is the Robert F. Wagner Professor of Labor & Employment Law Emeritus at New York Law School.

U.S. COURT OF APPEALS, 2ND CIRCUIT – Every once in a long while, a person who is turned down for asylum, withholding of removal, or protection under the Convention Against Torture (CAT) in the administrative process actually gets somewhere asking a court of appeals to tell the Board of Immigration Appeals (BIA) to reconsider. This is such a case. *Nagahama v. Garland*, 2022 WL 173330084, 2022 U.S. App. LEXIS 33013 (2nd Cir., Nov. 30, 2022). The petitioner, a woman from Peru, came out as gay and started living as an out gay person after arriving in the United States. She did not meet the one-year deadline to file for asylum after arrival. Her asylum petition was denied as untimely. The Immigration Judge (IJ) did not make findings of fact regarding the reasonableness of her delay in light of the attendant circumstances, just dismissing the asylum petition as untimely without further explanation. She argued for withholding of removal or CAT protection, citing adverse conditions in Peru for out gay people. The IJ found that her evidence failed to show that she was likely to be subjected to persecution or torture in Peru due to her sexual orientation. The BIA, confronted with the argument that the IJ failed to make fact findings as to reasonableness of delay, made its own first instance determination that her beginning to live as openly gay did not make her delay in filing for asylum reasonable, without giving any explanation as to why, and rejected as irrelevant to this issue other evidence she presented (the substance of which is not mentioned in the court's opinion). While upholding the denial of withholding or CAT protection, the court found that BIA erred in not remanding the case to the IJ for fact-finding on the reasonableness of delay issue, and pointed out that the BIA, "compounding" the issue of inappropriately making factual determinations, "gave no reasoning for its conclusion that the relevant circumstances made her delay unreasonable." The court quoted from *Poradisova v. Gonzales*, 420 F. 3d 70 (2nd Cir. 2005): "We require a certain minimum level of analysis from the IJ and BIA if judicial review is to be meaningful." The petitioner is represented by Genet Getachew, Brooklyn, N.Y. The panel consisted of Senior Circuit Judge Richard C. Wesley (a Bush appointee), Joseph F. Bianco (a Trump appointee whose opinion in the *Zarda* case was reversed by the 2nd Circuit and ultimately the Supreme Court in *Bostock*), and Alison J. Nathan (a Biden appointee and a lesbian – representation matters!).

U.S. COURT OF APPEALS, 8TH CIRCUIT – The 8th Circuit denied *en banc* review of a panel decision that upheld a preliminary injunction against enforcement of an Arkansas law prohibiting health care providers from providing or referring any minor for "gender transition procedures." The interesting thing to observe here is that the 8th Circuit consists almost entirely of appointees of Republican presidents, including four appointees of President Donald J. Trump. One point of interest is that the District Judge who issued the preliminary injunction after finding plaintiffs were likely to prove the law was unconstitutional was James M. Moody, Jr., an appointee of President Barack Obama. *See Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021). The three-judge circuit panel decision was written by Circuit Judge Jane Kelly, the only appointee of a Democratic president (Barack Obama) now sitting on the 8th Circuit. The other members of the panel were James Loken, an appointee of George W. Bush, and

CIVIL LITIGATION *notes*

Katherine Menendez, a District Judge from Minnesota sitting by designation who was appointed by President Joe Biden. *See Brandt v. Rutledge*, 47 F. 4th 661 (2022). On the petition for *en banc* review, out of the eleven active judges, five judges joined a dissent from the denial of review penned by Trump appointee David Stras. All four Trump appointees voted to grant *en banc* review, joined by former Chief Circuit Judge Raymond Gruender, an appointed of George H. W. Bush. Thus, all the 8th Circuit judges who were appointed by George W. Bush joined with Judge Kelly in voting to deny *en banc* review. A brief Order by Circuit Judge Steven Colloton, joined by Chief Circuit Judge Lavenski Smith and Circuit Judge Duane Benton, all George W. Bush appointees, made the points that the state never requested a stay of the preliminary injunction, the case is "in the midst of a trial in the district court" that was scheduled to conclude on December 1, 2022, and that the interlocutory appeal of the p.i. Order could be rendered moot once the district court ruled on the case, either becoming a permanent injunction or granting judgment to the defendants. "An appeal from the final judgment will present this court with a comprehensive record developed after more than ten months of discovery and a full trial, as opposed to the preliminary record that is before the court in the present appeal," wrote Judge Colloton. Judge Stras, in dissent, characterized this as a case of "exceptional importance" that "draws a major piece of Arkansas legislation into doubt and recognizes what amounts to a new suspect class." While acknowledging that the impending district court judgment on the merits could render the appeal of the p.i. moot, he argued: "Even so, I think it is worth the risk. The panel opinion will frame the debate in the future, if not effectively decide any later appeal. And even if this case never comes back, we may be dealing with its far-reaching consequences for years to come." The interesting point to observe here is the division between the Trump appointees and the G.W. Bush appointees. Even though the 8th Circuit is with one exception an "all-Republican" circuit, it is not necessarily monolithic!

CALIFORNIA – U.S. District Judge Maame Ewusi-Mensah Frimpong has granted a preliminary injunction in *AIDS Healthcare Foundation v. California Department of Health Care Services*, 2022 WL 17252189 (C.D. Cal., Nov. 28, 2022), a dispute over whether the state agency will continue to contract with AHF to provide health care services to people living with HIV/AIDS who are qualified to participate in the state's Medicaid program, which is referred to as MediCal. AHF has long complained that the capitation rate paid by the state for coverage under AHF's Positive Health Care Special Needs Plan (PHC) is insufficient to cover the costs of running the program. Negotiations over renewal of the program contract had failed to produce an agreement by November 2021, and AHF sent a letter to its PHC enrollees on November 12 advising them that it was possible that the program under which their health care was covered "May sunset on December 31, 2021." The lengthy letter talked in detail about the financial difficulties of providing care under the program at the rates to which the state would agree, and attempted to enlist the enrollees to lobby the state government and agency to increase the funding. This letter, sent without prior notice or approval by the state agency, contributed to a sharp deterioration in relations, although an agreement was reached to extend the existing contract for a year. However, in the summer of 2022, the state agency announced it would not renew the contract further, and would assist in transitioning MediCal beneficiaries living with HIV/AIDS to other programs. In responding to an inquiry from a state senator about the non-renewal decision, the agency claimed that AHF had breached its contract by sending the November 12 letter, the agency asserting that all communications to beneficiaries had to be cleared in advance with the agency. AHF sues, claiming a violation of its federal and state constitutional rights, specifically invoking freedom of speech and freedom to petition the government, and sought a preliminary injunction to keep the program going while this case is litigated. Judge Frimpong, rejecting governmental immunity claims by the state agency, found that AHF had standing and its allegations were sufficient to ground preliminary injunctive relief, including a finding that AHF was likely to prevail on its 1st Amendment claims. The legal issues are complicated and the opinion commensurately lengthy. Andrew Kim is listed as counsel of record on the complaint. Judge Frimpong was appointed by President Barack Obama.

CALIFORNIA – In *California Tribal Families Coalition v. Becerra*, 2022 U.S. Dist. LEXIS 201407, 2022 WL 16716155 (N.D. Cal., Nov. 4, 2022), Senior U.S. District Judge Maxine M. Chesney dealt with cross-motions for summary judgment in litigation concerning the Trump Administration's regulatory initiative to reduce regulations, many of which were adopted during the final years of the Obama Administration. As part of this effort, Health and Human Services (HHS) issued new rules on required information reporting under federally funded or assisted foster care programs. In this lawsuit, organizations interested in Indian affairs and LGBT rights combined to attack significant reductions in the information-gather and reporting requirements. As would particularly concern *Law Notes* readers, the Obama Administration had promulgated regulations in 2016 under a 1993 statute. The 2016 regulations required reporting of the sexual

orientation, gender identity or gender expression of children in the foster care system age 14 or older, such information about their foster or adoptive parents and legal guardians, and data indicating whether "there is a family conflict related to the child's sexual orientation, gender identity, or gender expression as a child and family circumstance at removal as reported when a child is removed from home." In its 2020 Rule, HHS retained the data element pertaining to whether a "circumstance at removal" was the child's sexual orientation, gender identity or gender expression, but eliminated the data elements pertaining to the sexual orientation of the child, the foster parents, and the adoptive parents or legal guardians. Plaintiffs claimed that the removal of these elements was "contrary to law" in light of the statutory charge to HHS to collect data to provide "comprehensive national information with respect to the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents." The court disagreed with this argument, finding that the data collection program had been in place for decades before the Obama Administration added sexual orientation and gender identity to the program. The court also rejected the argument that the decision to remove these data items was "arbitrary or capricious" in violation of the Administrative Procedure Act, pointing to the fact finding recited by HHS in its explanation of the 2020 Rule, part of which was that self-reporting of sexual orientation by teenagers was unlikely to be statistically reliable. The court noted a citation to an OMB working paper stating that "teenagers may be in the midst of developing their sexual orientation, experienced sexual attraction, and beginning to engage in sexual behavior and therefore unsure of how to respond to SOGI questions," that they might use different terms than adults would use, and that due to "the use of the terms 'lesbian' and 'gay' as slurs," teenagers may be "reluctant to identify themselves with those terms," resulting in a significant undercount. Thus, HHS concluded that it was "not feasible for HHS to test the validity or accuracy of adding questions related to sexual orientation," which the court found was not arbitrary or capricious. Ultimately, HHS concluded that the importance of collecting such data was outweighed by "the need to collect accurate data per the statute." Thus, on the issue of the sexual orientation data, the court granted summary judgment against the plaintiffs and for the government. The opinion as reported reflects counsel for plaintiffs including numerous public interest firms, including Lambda Legal. Senior Judge Chesney was appointed by President Bill Clinton.

CONNECTICUT – Filing deadlines, exhaustion of administrative remedies, and statutes of limitations trip up many an employment discrimination plaintiff. To wit, in *Baerga v. City of Hartford*, 2022 U.S. Dist. LEXIS 205143, 2022 WL 16856097 (D. Conn., Nov. 10, 2022), U.S. District Judge Sarala V. Nagala granted the city's motion to dismiss claims asserted by a "gay Hispanic woman" who was an employee of the Harford Police Department who claimed to suffer discrimination and retaliation in violation of Title VII, the Connecticut Fair Employment Practices Act, and Connecticut General Statutes Sex. 31-51q. In an earlier ruling, a different judge allowed her hostile work environment and retaliation claims based on sex and sexual orientation to proceed to trial, but granted judgment for defendants on claims based on race, color, and national origin. After the s.j. motion was decided, plaintiff moved for leave to amend her complaint to add allegations that she had been subjected to improper discipline and suffered retaliation because of her internal and external complaints of misconduct. She had received a right-to-sue letter from the EEOC in connection with her new allegations. Defendant objected that she had "unduly delayed" in seeking leave to amend and allowing the amendment would be prejudicial and the court denied her motion. Because she wanted to pursue these new claims, she filed a new action in Connecticut Superior Court, which was assigned to Judge Nagala, asserting the claims that she was not allowed to pursue in her earlier case. Defendants moved to dismiss claiming Baerga had failed to exhaust administrative remedies concerning the Connecticut FEPA claims, and that the Title VII claims should be dismissed because her complaint filing missed the 90-day deadline after receiving a notice of right to sue from the EEOC. Judge Nagala agreed with both objections. Baerga also sought to file a surreply brief, but the judge denied that motion as well. Baerga is represented by Cynthia R. Jennings, Windsor CT, and Josephine S. Miller, Danbury CT. Judge Nagala was appointed by President Joe Biden.

DISTRICT OF COLUMBIA – Jabari Bruton-Barrett, an out gay African-American man who is employed by Gilead Science, Inc., expressed interest in being promoted to a newly-created position as Director of Corporation Contributions that had not yet been posted for job applications. He was surprised to learn in January 2019 that the "selecting official" at the company (Patrick McGovern, a white heterosexual man) had chosen a heterosexual Asian man for the position, which had still not been posted. He sent an email to the Human Resources Department complaining about what he suspected was race discrimination. HR conducted an internal investigation. On March 28, 2019, Bruton-Barrett claims he first "learned from his supervisor that McGovern state that he believed plaintiff was 'too gay' and an 'embarrassment,' and that he wanted a 'non-black, non-gay' person for the role in question." Sounds like a

slam dunk case, right? Bruton-Barrett filed a charge with the D.C. Office of Human Rights on February 20, 2020, and received a notice from DCOHR on August 4, advising that the parties must attend mandatory mediation on September 24. In the meantime, Gilead filed a motion to dismiss the charge as untimely. Plaintiff filed his complaint on July 12, 2021, asserting claims of sexual orientation and race discrimination under the D.C. Human Rights Act and Title VII, and race discrimination under 42 U.S.C. sec. 1981. Defendant moved to dismiss the D.C. claim on timeliness grounds, and the Title VII claim for failure to exhaust administrative remedies. In *Bruton-Barrett v. Gilead Sciences, Inc.*, 2022 U.S. Dist. LEXIS 206280, 2022 WL 16921507 (D.D.C., Nov. 14, 2022), U.S. District Judge Reggie B. Walton granted the motion to dismiss the Title VII claim. The record did not reflect a cross-filing of the D.C. claim with the EEOC, and there was no EEOC right-to-sue letter. As to the D.C. claim, Judge Walton decided that more briefing from the parties was required to determine whether the court even has jurisdiction over that claim, because the D.C. law provides for an election of remedies. Bruton-Barrett's filing with the DCOHR was an election to proceed administratively, rather than through litigation; the only exceptions would be if DCOHR dismissed the charge for "administrative convenience" or Bruton-Barrett withdrew the charge before it was decided by the Office. The court pointed out that the record at this point is silent as to both exceptions. Thus, the motion to dismiss the D.C. charged was denied without prejudice, and the court ordered plaintiff to file a supplemental brief addressing the jurisdictional issue. The court noted that plaintiff's response to the motion to dismiss failed to mention the Title VII claim, effectively leaving that motion unopposed. The dismissal motions do not involve the Sec 1981 race discrimination claim, which clearly remains within the case. Plaintiff is represented by Donna William Rucker, of Tully Rinckey PLLC, Washington. Judge Walton was appointed to the district court by President George W. Bush, after service as a judge in the District of Columbia court system.

DISTRICT OF COLUMBIA – File this one under "crazy pro se litigation" notes! In *Pickup v. Biden*, 2022 WL 17338099 (D.D.C., Nov. 30, 2022), a psychotherapist, four pastors, a lobbyist, and a lawyer sued President Biden and three members of Congress, asking the court to declare unconstitutional two pieces of pending legislation – The Women's Health Protection Act, S. 4132, which would guarantee to health care providers "a statutory right to provide abortion services", and The Equality Act, which would amend various federal civil rights laws to expressly forbid discrimination because of sexual orientation or gender identity, H.R. 5 – and to enjoin passage of these bills. U.S. District Judge Trevor N. McFadden, an appointee of President Donald J. Trump, could have cracked wise about how stupid this litigation is, but does plaintiffs the courtesy of explaining why the court lacks jurisdiction to do anything but grant the government's motion to dismiss their complaint. He explained the jurisdictional limits of federal courts, the Speech or Debate Clause of the constitution which precludes enjoining members of Congress from proposing and advocating for legislation, the separation of powers principle that would bar a court from interjecting itself into congressional deliberations on proposed legislation, and the obvious conclusion that the seven plaintiffs lack Article III standing to bring this lawsuit. He also noted that as far as the complaint specifically took aim at provision of the Equality Act that would add sexual orientation and gender identity to the list of prohibited grounds of discrimination under Title VII, the plaintiffs were too late because the Supreme Court already did that through interpretation in the *Bostock* decision. Judge McFadden noted that the complaint originally named Speaker Nancy Pelosi, Majority Leader Charles Schumer and Majority Whip Richard Durbin as defendants, but plaintiffs voluntarily withdrew their claims as to these individuals, finding they were not necessary parties. Instead, they limited their congressional defendants to lead sponsors of the bills in question. The court dismiss the complaint with prejudice, because "the Court cannot possibly grant the relief Plaintiffs request, short-circuiting the legislative process, reversing Supreme Court decisions, and enjoining the President's exercise of routine duties." Students of LGBT law will recognize the first named defendant, David Pickup, a conversion therapy practitioner who was the lead plaintiff in an unsuccessful constitutional challenge to California's statute banning performance of such "therapy" on minors.

FLORIDA – Characterizing Florida's attempt to regulate the speech of state university professors as "positively dystopian," Chief U.S. District Judge Mark E. Walker (N.D. Fla.) granted plaintiffs a preliminary injunction against enforcement of the "Stop W.O.K.E. Act" on November 17 in *Pernell v. Florida Board of Governors of the State University System*, 2022 WL 16985720, 2022 U.S. Dist. LEXIS 208374. The Act specifies eight "concepts" that may not be taught in the public colleges and universities of the state unless they are mentioned in an "objective" manner without any "endorsement" of the concepts by the professors. The judge's introduction to his opinion says it all concisely: "'It was a bright cold day in April, and the clocks were striking thirteen,' and the powers in charge of Florida's public university system have declared the State has unfettered authority to muzzle its professors in the name of 'freedom.' To

confront certain viewpoints that offend the powers that be, the State of Florida passed the so-called 'Stop W.O.K.E. Act' in 2022 – redubbed (in line with the State's doublespeak) the 'Individual Freedom Act.' The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves. This is positively dystopian. It should go without saying that 'if liberty means anything at all it means the right to tell people what they do not want to hear.'" This is the kind of language plaintiffs were seeking in the cases challenging the "Don't Say Gay" law, in cases that have preliminarily foundered on standing issues. But Judge Walker has no trouble finding standing for many of the plaintiffs (college and university professors as some students) who filed this lawsuit, and he accuses the lawyers for the state of "cherry-picking" out-of-context quotes from Supreme Court cases in constructing their argument that anything a professor says in the classroom is "government speech" and thus not protected by the 1st Amendment. Walker's opinion is a lengthy treatise on the 1st Amendment rights of public college and university faculty members. The bottom line is a preliminary injunction against enforcement of specified sections of the Act by particular named defendants who the court found were the relevant administrators for the purpose of preserving the status quo while the case proceeds on the merits. Plaintiffs are represented by a large team of lawyers, many of whom are affiliated with the ACLU. Judge Walker was appointed by President Barack Obama.

GEORGIA – Finally, a resolution to the case of *Bostock v. Clayton County, Georgia*! Gerald Bostock claimed that his discharge from a position with the county as a court child welfare services coordinator was because of his sexual orientation and sued under Title VII. The district court in Georgia and the 11th Circuit both ruled that sexual orientation claims were not cognizable under Title VII and dismissed his case. The Supreme Court combined his case with cases from two other circuits and ruled in June 2020 that sexual orientation and gender identity claims are actionable as a form of sex discrimination forbidden by Title VII. *See* 140 S. Ct. 1731. The case was remanded to the district court, reversing the dismissal and left to pursue the normal course of litigation. The parties negotiated a settlement, and the *Associated Press* reported on November 7 that the Clayton County Board of Commissioners had approved an $825,000 settlement, as reported to A.P. by Bostock's lawyer, Ed Buckley, on November 4.

ILLINOIS – November produced two more rulings in Lambda Legal's lawsuit against Blue Cross Blue Shield of Illinois, challenging the defendant's exclusion of coverage for gender-affirming care, pending before Senior U.S. District Judge Robert J. Bryan in the U.S. District Court for the Western District of Washington. The plaintiffs allege that the coverage exclusion violates Section 1557 of the Affordable Care Act, which by reference to Title IX of the Education Amendments Act prohibits discrimination "on the basis of sex." *C.P. v. Blue Cross Blue Shield of Illinois* (W.D. Wash.). The central issue, for insurance purposes, is whether gender-affirming care is "medically necessary care" that must be covered without discrimination pursuant to the ACA. BCBS contends that existing regulations (issued during the Trump Administration) do not require such coverage. On May 4, 2021, Judge Bryan denied the defendant's motion to dismiss, accepting Lambda's argument that under the reasoning of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), Title IX – and thus by extension Section 1557 – should be construed to extend to discrimination because of gender identity under the rubric of sex discrimination. The court observed that the issue was one of interpreting the statute, not regulations. The court also rejected the defendant's attempt to invoke a Religious Freedom Restoration Act defense, adhering to the majority view that RFRA applies to enforcement actions by the government, not litigation between private parties, which this is. See 536 F. Supp. 3d 791. On June 28, 2022, the court granted Lambda's motions to compel certain evidence that the defendants had resisted disclosing. See 2022 U.S. Dist. LEXIS 114142, 2022 WL 2317374. On November 9, 2022, the court granted Lambda's motion to certify the case as a class action, covering all individuals who "(1) have been, are, or will be participants or beneficiaries in an ERISA self-funded 'group health plan' administered by Blue Cross Blue Shield of Illinois during the Class Period and that contains a categorical exclusion of some or all Gender-Affirming Health Care services; and (2) were, are, or will be denied pre-authorization or coverage of treatment with excluded Gender Affirming Health Care services." Appointed class counsel are Eleanor Hamburger and Daniel Gross of Sirianni Youtz Spoonemore Hamburger (local counsel) and Jennifer Pizer and Omar Gonzalez-Pagan of Lambda Legal. See 2022 U.S. Dist. LEXIS 204480, 2022 WL 16835839. On November 22, 2022, the court ruled on challenges by both sides to expert witnesses proposed by the other side, generally rejecting the challenges without prejudice, while emphasizing that this is a bench trial, under which the rules are a bit looser than in jury trials where the judge is policing the evidence to avoid misleading the jury. Thus, either party can renew their objections as the case unfolds. As to

the defendant's main medical expert on the question of "medically necessary care," Dr. Robert Laidlaw, Lambda emphasized his scant experience in treating transgender individuals and lack of research credentials. Judge Bryan found the challenge a "close question" but rejected the challenge. See 2022 U.S Dist. LEXIS 210769, 2022 WL 17092846. Meanwhile, BCBS filed an appeal to the 9th Circuit on November 23, seeking to overturn the class certification. BCBS argues that there are several hundred different plans that it administers that vary in wording, and that decisions to deny coverage may vary, but Lambda prevailed with Judge Bryan on the argument that the more general issue of exclusion for gender-affirming care is common to all the plans, regardless of such variations. Judge Bryan was appointed by President Ronald W. Reagan in 1986 and took senior status in 2000.

ILLINOIS – Russia Brown is a transgender man who was employed for Chicago Transit Authority (CTA) as a bus driver. Another driver complained about his use of the men's restroom. A CTA representative told him that he could use that restroom, but his general manager told him to use the clerk's restroom instead because it would be "safer" for him and "no one should question use of the bathroom because 'everyone has been notified' of the issue." In other words, now everybody knew he was transgender, and the harassment followed. He asked the union for help, but got none. He filed an EEOC charge of discrimination and reported the harassment to Local 241. Then he worked with the ACLU to get the CTA to cover gender-affirming health care, which CTA eventually agreed to do but the union president "made disparaging remarks" about Brown's entitlement to the coverage and publicly criticized his efforts to get CTA to extend it. Brown began "gender transition treatments" after CTA agreed to provide coverage, but has not undergone surgery. After he complained about harassment, he was transferred from the north side to the south side, where, the Local 241 president told him, "his 'bitching' would not work." After Local 241 learned that Brown filed a complaint with the Illinois Labor Relations Board in 2021, the union excluded him from the Facebook page where it updated members on union activity. He requested FMLA leave in June 2020, and was initially told he was eligible, but ultimately it decided he had "falsified" his FMLA application and suspended him in October, then terminated him in January 2021. He claims its reliance on FMLA falsification to fire him was a pretext because CTA did not want to cover the costs of transition surgery. He sued under the union and the employer under Title VII and also brought a constitutional equal protection claim against CTA, seeking punitive damages. Defendants moved to dismiss. District Judge Gary Feinerman rejected the dismissal motions, with the exception of the claim for punitive damages against CTA, since municipal corporations are immune from punitive damage claims. The case is *Brown v. Chicago Transit Authority*, 2022 U.S. Dist. LEXIS 204939, 2022 WL 16856400 (N.D. Ill., Nov. 10, 2022). Brown is represented by Christina W. Abraham of Chicago. Judge Feinerman was appointed by President Barack Obama.

LOUISIANA – U.S. District Jude Greg Gerard Guidry issued two decisions on November 4 in *G.K. v. D.M.*, 2022 U.S. Dist. LEXIS 201091 and 2022 U.S. Dist. LEXIS 201080 (E.D. La.), in which two presumably gay men, neither of whom resides in Louisiana, are litigating about the claim that during an interaction (not otherwise described in detail) in New Orleans on September 1, 2019, D.M. knowingly transmitted HIV to G.K., presumably by sexual contact. (We are drawing lots of inferences from the court's opinion, which is skimpy on facts, due to the nature of the issues decided on these pretrial motions.) In the case with the higher citation number in Lexis, Judge Guidry deals with D.M.'s motion seeking review of a decision by the Magistrate Judge granting G.K.'s motion to compel discovery of D.M.'s medical records, which are in the possession of his health care providers in New York, where D.M. resides. D.M. claimed that the order violates his 5th Amendment protection against self-incrimination and medical privileges under state law. In response to being sued, D.M. had filed a declaratory judgment action in New York state court seeking to block disclosure of his medical records under N.Y. Public Health Law Sec. 2785. G.K. removed that to the federal district court on diversity grounds. The magistrate judge found that the plaintiff had a compelling need for the records in order to make his case, and issued protective guidelines to preserve D.M.'s confidentiality. In the case with the lower citation number in Lexis, Judge Guidry denied a motion by D.M., a resident of New York, to have the case transferred to the U.S. District Court for the Southern District of New York, where D.M. claims that it would be more convenient for D.M. to defend. D.M. argued that G.K. could have brought the suit under diversity jurisdiction in the New York U.S. District Court, and contended that by removing D.M.'s state action to federal court, G.K. had basically conceded to the jurisdiction of that court, an argument rejected by Judge Guidry. Unhappily for D.M., the federal court dismissed his case before the motion to transfer was decided, so the idea of merging the two cases is gone. In any event, Judge Guidry agreed with G.K. that D.M.'s transfer motion should be denied, considered it to be obvious that it was "filed with dilatory intent and in an effort to manufacture a seemingly viable bid to have this case transferred."

CIVIL LITIGATION *notes*

Although neither man is a Louisiana resident, the conduct complained of in this case occurred in Louisiana and thus is governed by Louisiana state law. Furthermore, the judge seconded G.K.'s contention that D.M. was just trying to circumvent the magistrate's discovery ruling. "Defendant's argument that his medical records are located in New York is unpersuasive in today's world where such records are likely digital, but at a minimum, could easily be copied and provided to the litigants," wrote the judge, who carefully applied a 5th Circuit eight factor test to determine how to rule on the motion. One has a feeling from reading these decisions that we may never learn the outcome, since it might end up getting settled as a result of these rulings. Any guesses about why D.M. is struggling to prevent his medical records from being disclosed? One suspects that if D.M. is HIV-positive, he will not want to let a jury decide about his potential liability to G.K. G.K. is represented by Michael Ryan Dodson, Danielle C. Teutonico, and Monica Leigh Bergeron, of Fishman Haygood LLP (New Orleans). D.M. is represented by Sara A. Johnson, local counsel in New Orleans, and Brian M. Delaurentis, New York. The Louisiana Attorney General's Office filed an amicus brief. Judge Guidry was appointed by President Donald R. Trump.

MICHIGAN – Kevin Hamm, a bisexual man, began working for Pullman SST, Inc., in July 2020 as a laborer. He claims that the work crew to which he was assigned, including the supervisor of the work crew, subjected him to numerous "homosexual slurs" beginning in November 2020, "almost a daily occurrence." His amended complaint lists fourteen incidents of name-calling and other forms of mistreatment. He complained to the Construction Manager in February 2021, but he alleges the company failed to investigate or take remedial action. On April 29, 2021, he told his supervisor that he felt ill. He alleges that the supervisor responded by calling him a "fucking faggot" and tell him to "get the fuck out of here then and go fuck yourself." He complained to H.R. and an investigation was launched. Meanwhile, he submitted a request for medical leave to deal with the anxiety caused by his working conditions. A few days later, the company said they found no corroborating evidence of harassment. He was to return to work from leave on May 10, but asked to be reassigned to a different work crew and supervisor. He was told that this request was reasonable, but he claims they refused to provide him with a "realistic job position" and when nothing was settled by May 17, the company told him that it considered him to have voluntarily quit. He filed a charge with the EEOC under Title VII, received a right to sue notice, and filed suit on June 7, 2022, in state court, asserting violations of Michigan's Elliot-Larsen Civil Rights Act and of Title VII of the federal Civil Rights Act of 1964. The company removed the case to federal court and moved to dismiss for failure to state a claim. Hamm filed an amended complaint with more details while that motion was pending, and the Court denied the motion to dismiss the original claim without prejudice, shifting its attention to the amended complaint, as to which the company filed a new motion to dismiss. In *Hamm v. Pullman SST, Inc.*, 2022 U.S. Dist. LEXIS 205395, 2022 WL 16856092 (E.D. Mich., Nov. 10, 2022), Senior U.S. District Judge George Caram Steeh denied the motion to dismiss. The court found that Hamm's amended complaint had sufficient factual detail to meet the test for alleging a hostile work environment on the basis of sexual orientation, and that his allegations were sufficient to hold the company liable, first because he had twice brought his complaints about co-workers to H.R. without a positive result and second because a supervisor (whose actions could be attributed to the company) was among those accused of harassment. The court also found that Hamm had alleged sufficient facts to go forward on a retaliation claim, based on the failure of the company to provide a "realistic alternative" for him to return to work, after he had filed a complaint about his supervisor a shortly before the difficulty about his return to work. Judge Steeh decided that contested material facts had to be determined in order to rule on the retaliation claim, so he refused to dismiss that as well as the hostile environment claim. Hamm is represented by Scott P. Batey, Bingham Farms, MI. Senior Judge Steeh was appointed by President Bill Clinton.

MISSOURI – The August issue of *Law Notes* reported that U.S. District Judge Roseann Ketchmark rejected a motion to dismiss ERISA claims against an employee benefit plan that had refused to cover facial feminization surgery for a transgender employee of the company that provides the benefit plan. *Duncan v. Jack Henry & Associates*, 2022 U.S. Dist. LEXIS 132980, 2022 WL 2975072 (W.D. Mo., July 27, 2022). Bloomberg Daily Labor Report reported on November 21 that the parties notified the court that they have reached a settlement in the case, the terms of which were not announced. The court's thorough analysis of the ERISA claims in its opinion on the motion to dismiss evidently persuaded the defendants that further litigation was futile. However, the court dismissed counts under federal disability discrimination law, finding that exclusionary language in the Americans with Disabilities Act precludes a claim that gender dysphoria is a disability under that statute.

NEW YORK – A transgender *pro se* plaintiff was subjected to evidentiary limitations by U.S. Magistrate Judge Barbara Moses as a result of the plaintiff's lack of cooperation during the

discovery process. *Azzarmi v. 55 Fulton Market*, 2022 U.S. Dist. LEXIS 211756, 2022 WL 17156709 (S.D.N.Y., Nov. 22, 2022). Azzarmi is claiming to have been defamed as a "thief" and a "shoplifter" by the manager of defendant's store, as well as to being misgendered by the manager using male pronouns to refer to her. An eyewitness (not clearly identified by the court as either an employee of defendant or as a customer, but probably the latter, because her deposition testimony was presented to corroborate plaintiff's case) testified at her deposition that "Manager Angel began loudly screaming in a hostile tone, pointing at Assir 'he is a thief, I had him arrested several times for stealing, he is always stealing, loading up the shopping carts and loading up his garbage bags and running out of the store.'" The defendants claim the plaintiff fabricated the entire incident in order to have a claim against it. While submitting to a deposition via Zoom, she declined to answer numerous questions that U.S. Magistrate Judge Barbara Moses deemed to be relevant to the case, and during the deposition of the eyewitness, she refused to turn on her Zoom camera. Plaintiff cited the 5th Amendment in refusing to answer questions. Commented Judge Moses, "Plaintiff has indeed engaged in frequent discovery and other pretrial misconduct, including numerous violations of this Court's orders, thereby imposing unnecessary and unwarranted burdens on defendants and the Court. Moreover, plaintiff has made detailed voluntary statements about her transgender and disability status in this action, thus barring her from invoking her Fifth Amendment rights 'when questioned about the details.'" But Judge Moses observed that scrutiny of the full transcript showed that "the plaintiff later relented and provided much of the requested information, including a full description of her appearance and conduct on October 20, 2019." Jurisdiction in federal court is premised on diversity; the store is in Manhattan and plaintiff claims to be a citizen of another state, but initially declined during her deposition to confirm her residential address. While refusing to grant the motion to dismiss, however, Judge Moses imposed limitations due to plaintiff's misbehavior: "At trial, defendants may seek an appropriate instruction informing the jury that it may (though it is not required to) infer from such a refusal that the answer would have been adverse to the witness's interest," and, furthermore, "plaintiff will be precluded, henceforth, from offering favorable testimony (written or oral) as to any of the questions she refused to answer at deposition." As discovery is concluded, Judge Moses wrote, "the parties' summary judgment motions, if any, are due 30 days from the date of this Order," and pointedly added: "Motion papers must conform to Judge Moses's Individual Practices."

NORTH CAROLINA – Third time's the charm . . . . Marcus Smith, a pro se Black gay employment discrimination plaintiff, struggled through the screening process in *Smith v. Lowes Companies Inc.*, 2022 WL 16579812 (W.D. N. C., Nov. 1, 2022). His first complaint, alleging violations of Title VII and the Americans with Disabilities Act, was clearly deficient, and he filed an amended complaint. Chief U.S. District Judge Robert J. Conrad, Jr., found this deficient as well, but an appeal to the 4th Circuit resulted in a remand "for the Court to specifically address the Plaintiff's claim for failure to promote." (See 2022 WL 2901717.) Meanwhile, Smith filed a second amended complaint (his third complaint in this case), and this time, having learned the lessons from the judge's prior screening decisions, he scored a bull's eye. The court found that he had adequately alleged a disability (ulcerative colitis) and that he alleged that the employer had failed to provide reasonable accommodations in the form of adequate bathroom breaks, and thus stated a plausible ADA claim. On Title VII, he was claiming unlawful harassment, failure to promote, and retaliation. As to each of these claims, Judge Conrad found that Smith had finally alleged sufficient facts to ground such claims, as the detail of his factual narratives could give rise to the necessary inferences of discrimination to get past a screening. One begins reading this opinion thinking that the case for the plaintiff is hopeless, but by the time Judge Conrad gets around to summarizing the second amended complaint, it is clear that Smith has gotten past the hurdle and the marshal will be tasked with serving this complaint on the employer. Which does not mean he may not yet be confounded by a motion to dismiss after the papers are served. The only respect in which Smith suffered defeat was that he added individual defendants to his complaint, but individuals (managers, supervisors, co-workers) cannot be sued directly under Title VII or the ADA; the only defendant under these statutes is the employing entity. Chief Judge Conrad was appointed by President George W. Bush.

PENNSYLVANIA – Dr. Kathy Rumer, a Doctor of Osteopathic Medicine has her own practice, Rumer Cosmetic, in Ardmore, Pennsylvania. Most of her income derives from performing gender reassignment surgery. A "John Doe" patient seeking such surgery was turned down by Dr. Rumer, who "made the ethically proper determination that John Doe was not psychologically prepared for surgery." But John Doe did not agree, and evidently decided to get back at Dr. Rumer by creating an on-line blog in which Doe defamed the doctor, leading to this lawsuit, *Delaware Valley Aesthetics, PLLC d/b/a Rumer Cosmetic Surgery v. John Doe 1*, 2022 WL 17094740, 2022 U.S. Dist. LEXIS 210247 (E.D. Pa., Nov. 21,

2022). Dr. Rumer discovered the blog when patients and potential patients mentioned it to her, and googling turned it right up. Blog posts asserted that Rumer engaged in false advertising, had instructed a patient to engage in self-surgery ("Cut it off with scissors"), and "botched" surgeries. Links to the blog were posted on social media websites, disclosing Dr. Rumer's home address and posting images of her property. She subsequently received an email from somebody claiming to run "the Rumer's Anonymous blog" stating "Do you know how many submissions I get from people that you hurt? It's all going to come to light soon enough." She and her practice received many similar emails. She alleged that all these statements were false, and U.S. District Judge Chad F. Kenney found that once Dr. Rumer initiated this action, the blog was deactivated. She presented the court with an example of a prospective patient who cancelled a scheduled surgery citing "negative information that they had read online." She ended up engaging a specialist firm to run a Google ad campaign countering the damage caused by the blog (and its afterlife, since items from the blog, as noted above, were reposted on social media taking on a life of their own). She filed suit against "Doe" defendants but eventually was able to figure out the identity of "John Doe 1" and to effect service of process. Doe has never rebutted the allegations of the complaint or offered any formal opposition to Dr. Rumer's motion for default judgment on her claims of libel per se, commercial disparagement, intentional interference with business relationships, and invasion of privacy: disclosure of private facts, all torts recognized under Pennsylvania common law. As a result, the court deems the allegations of the complaint as true for purposes of deciding the default judgment. The complaint alleges that the blog "contained false and damaging attacks on Dr. Rumer's 'surgical practice, reputation, medical skills, professionalism, and personal character.'" The court granted default judgment in January 2022, and then held a hearing in October 2021 on damages, ultimately concluding that Dr. Rumer was entitled to compensatory damages of $169,214.44 (proven costs of the efforts she had undertaken to combat the reputational damage) and $5,000 in punitive damages, but the court was unwilling to assuming speculatively that Rumer would incur $95,000 a year for several years in her continuing efforts to counter harm to her reputation, so denied her claim for further damages. Since Dr. Rumer knows who John Doe is, she may actually be able to figure out a way to collect some of this. Presumably these tort claims are in federal court based on diversity allegations, since no federal statute was cited in the complaint. In a prior decision at 2021 U.S. Dist. LEXIS 122257, the court granted a motion by Doe to proceed anonymously as a transgender woman. In a prior decision at 2021 U.S. Dist. LEXIS 238330, the court granted a motion by Dr. Rumer to serve the defendant by email, having failed to ascertain any other contact information. Dr. Rumer is represented by Brian T. Newman of Rubin Glickman Steinberg & Gifford PC, Lansdale PA, and Joseph R. Heffern and Lance Rogers of Ardmore, PA. Judge Kenney was appointed by President Donald J. Trump.

TENNESSEE – On November 18, U.S. District Judge Travis R. McDonough issued decisions in two cases that ultimately came down to the question whether plaintiffs had standing to challenge Biden Administration policies interpreting various federal statutory bans on sex discrimination to extend to gender identity or sexual orientation discrimination claims. Judge McDonough concluded that the plaintiffs lacked standing and granted the government's motions to dismiss in *American College of Pediatricians v. Becerra*, 2022 WL 17084365, 2022 U.S. Dist. LEXIS 209569 (E.D. Tenn., Nov. 18, 2022), and *Holston United Methodist Home for Children, Inc. v. Becerra*, 2022 WL 17084226, 2022 U.S. Dist. LEXIS 209566 (E.D. Tenn, Nov. 18, 2022). Both cases are part of an effort by religious health care and social service providers that receive federal funding to immunize from federal enforcement their policies of refusing services to same-sex couples of LGBT people. In both cases, Judge McDonough provided a historical perspective on the swinging pendulum between the Obama Administration, which had adopted regulations and issued policy statements extended federal anti-discrimination protections on the basis of sex to encompass gender identity and/or sexual orientation discrimination. When the Trump Administration came into office, it initiated abrupt about-faces regarding enforcement of such anti-discrimination requirements. In *American College*, the issue was whether health care providers that receive federal funding must providing gender-affirming care to transgender individuals, and in *Holston*, the issue was regulations pertaining to discrimination by foster care agencies. In both cases, the Trump Administration made clear that it would not enforce gender identity and sexual orientation discrimination bans, and ultimately issued new rules purporting to replace those issued by the Obama Administration. In typical fashion, the Trump Administration failed to go through all the requirements of the Administrative Procedure Act (APA). After the Biden Administration took office, President Biden issued a Day One Executive Order pointing federal agencies to the *Bostock* decision (2020) and directing them to consider changes to the Trump Administration rulings to take account of that decision's reasoning that it was impossible to discriminate on the basis of sexual orientation or gender identity without taking account of the sex of the

individual. (The Trump Administration reacted to *Bostock* by arguing that it applied as a precedent only to employee discharge decisions under Title VII.) This development of 2021 came amidst pending lawsuits challenging both the Obama Administration rules (mainly issued during Obama's second term, some close to the end of that term) and the Trump Administration rules. The HHS rule supplanting the Obama Administration approach was, ironically, published in final form in the Federal Register just days after the *Bostock* decision, and was soon tied up in litigation. Judge McDonough lays out the complicated litigation history of the various challenges both to HHS health care regulations and to a regulation of federal contractors, including foster care agencies. The court's conclusion that plaintiffs in these cases lack standing is premised on the finding that they failed to allege facts that would support their contention that they face a credible threat of prosecution. Federal district judges in Texas appointed by George W. Bush and Donald J. Trump have concluded, applying 5th Circuit precedents, that publication of current interpretive approaches by the Biden Administration was enough to trigger standing for the plaintiffs, but McDonough explained that 6th Circuit precedent – as distinguished from 5th Circuit precedent – prescribes a much more demanding analysis, called the "McKay Factors" after *McKay v. Federspiel*, 823 F.3d 862 (6th Cir., 2016), under which the plaintiffs failed to establish standing because of the lack of a credible threat of prosecution against any of them being imminent. They alleged, without citing any proof or documentation, that they were under investigation for their alleged discriminatory practices, but that was not enough for the Court. Judge McDonough was appointed by President Barack Obama. Plaintiffs in both cases are represented by counsel associated with Alliance Defending Freedom. No surprise there!

WASHINGTON – In *Brown & Smith v. Alaska Airlines & Association of Flight Attendants*, 2022 WL 17176844, 2022 U.S. Dist. LEXIS 212702 (W.D. Wash., Nov. 23, 2022), Senior U.S. District Judge Barbara Jacobs Rothstein granted the AFA's motion to dismiss religious discrimination claims against the union by two flight attendants who were terminated from their employment after posting on an Alaska Airlines company-wide intranet their religiously-based statements of opposition to the Equality Act, a bill pending in Congress that would add "sexual orientation" and "gender identity" to a host of federal anti-discrimination laws. In a footnote, Judge Rothstein reproduces the posting by plaintiff Marli Brown, who asked whether Alaska Airlines supports "endangering the Church, encouraging suppression of religious freedom, obliterating women [sic] rights and parental rights." Her posting continued with the standard tropes recited by religious conservatives in opposition to laws protecting LGBTQ people from discrimination. Both Brown and Lacey Smith contended that the union discriminated against them by failing to provide vigorous representation in the grievance process and then refusing to take their terminations to arbitration after the company denied their internal appeal (during which the union provided representation). The case is in federal court because the women invoked the National Labor Relations Act ("duty of fair representation") and Title VII of the Civil Rights Act of 1964, suing both the airline and the union, and also asserted supplementary claims under the anti-discrimination laws of Oregon and Washington. The union moved to dismiss the claims against it under these state laws, arguing that they were preempted by the National Labor Relations Act. Judge Rothstein agreed with the union, finding that the plaintiff's claims arose out of the union's conduct of its role as the legally certified collective bargaining agents, so the state laws are preempted to the extent that the NLRA gives plaintiffs a cause of action for discriminatory representation by the union. Senior Judge Rothstein was appointed by President Jimmy Carter.

WASHINGTON – In a sharply divided 5-4 decision, the Supreme Court of Washington vote to reject the Washington State Bar Association Character and Fitness Board's recommendation that Zachary Stevens be denied admission to the bar, despite the facts that he had been denied admission to the Arizona State Bar and that he is a registered sex offender. *Matter of Bar Application of Stevens*, 2022 WL 16641830, 2022 Wash. LEXIS 15547 (Nov 3, 2022). The opinion for the court by Justice Mary Yu and the dissent by Chief Justice Barbara Madsen both provide lengthy discussions of the applicant's history. Yu's opinion heavily turns on the majority's conclusion that Stevens made many mistakes in his youth, partly for reasons not entirely within his control, and that the teenager who committed acts that led him to be adjudged a sex offender (masturbating on-line with underage males while struggling with sexual orientation issues, and ultimately "caught" by an undercover police officer who was posing as a minor) and to incur a criminal record was not the same person who presented himself for bar admission after having cleaned up his act, graduated college and law school, gained legal employment, married and become a father. Stevens graduated from law school in Arizona and obtained legal employment there while awaiting bar admission. His law firm was aware of his criminal record but considered him employable. When he was turned down by the Arizona bar, he and his wife decided to move to Washington, where she had relatives, if his application for admission was approved. The majority was willing to look behind the paper record and focus on the question of Stevens' present

fitness. They saw him as a person who had worked hard to rehabilitate himself and had shown that he could meet the state's standard for bar admission. Wrote Justice Yu: "Like all of us, Stevens is more than the sum of the worst moments of his life. As an adult, he has abstained from engaging in any unlawful conduct since 2013. In that time, he has graduated from college and law school, he has been steadily employed, and he has developed a supportive network of friends and family." The dissenters noted the reciprocity with other state bars weighing strongly against admitting somebody turned down by another state on character and fitness grounds, and pointed out that Stevens' period of probation on his sex offenses had yet to run, observing: "This court has routinely required completion of legal obligations as evidence of fitness. Finally, Stevens' own therapist expressed some concern about his ability to handle stress. Stevens has not presented any recent evidence showing his current mental fitness to practice, despite the doctor's concerns." The dissenters argued that the burden on Stevens to show "by clear and convincing evidence that he is currently of good moral character and fit to practice law" had not been met. Despite the court's vote to admit him, Stevens told a reporter that he might not even end up practicing law, as he has found employment that does not require bar admission. The case received a lot of attention from the bar, attracting sixteen amicus briefs – an unusual number for a state supreme court decision.

WASHINGTON – Senior U.S. District Judge Robert J. Bryan issued two rulings during November in Lambda Legal's challenge to the exclusion of "treatment, drugs, therapy, counseling services and supplies for, or leading to, gender reassignment surgery" under employer self-funded health insurance plans that are administered by Blue Cross Blue Shield of Illinois (BCBS). Under self-funded plans, the employer contracts with the insurance company to administer the plan, with the employer rather than the insurance company bearing the cost of the benefits paid out. The employer determines what risks are to be covered when it adopts the plan (ERISA plans must be in writing and describe the benefits to be covered), but it appears likely that employers sign a standard form supplied by BCBS that has virtually identical language excluding coverage for gender transition care. BCBS provides these plan administration services for hundreds of employers nationwide. Lambda Legal and its local counsel represent C.P., a 16-year-old transgender boy, and his mother, Patricia Pritchard. C.P.'s insurance coverage comes through the plan provided by his mother's employer. Their first application for coverage of hormone treatment was granted, but then they were informed that this was a mistake and that future prescriptions would not be covered, BCBS relying on the exclusion in the plan. The issue in the first motion decided in November, *C.P. v. Blue Cross Blue Shield of Illinois*, 2022 WL 16835839, 2022 U.S. Dist. LEXIS 210769 (W.D. Wash., Nov. 9, 2022), was whether to certify a class action, the defendant having conceded that it had denied a large number of claims under the similar insurance plans it administered for employers, but contending on various grounds that the case is not suitable for class action treatment. Under ERISA, the administrator's duty is to interpret and apply the terms of the plan, but technically it is the employer who decides coverage issues, and BCBS had previously sought to dismiss the case on the ground that it was merely the administrator, duty bound to enforce the contracts according to their terms. This motion to dismiss was denied. BCBS objected to class certification, which would certainly multiply its financial exposure by cumulating large numbers of claims. It argued lack of exact identity between all the plans it administered and the need in awarding relief to consider numerous individual circumstances, but Judge Bryan concluded that the requirements for class certification had been met. He did, however, require some modifications in the wording proposed plaintiffs to describe the class, and found that a four-year statute of limitations would be applied counting back from the filing of the complaint to limit individual damage claims. In the second ruling, 2022 WL 17092846, 2022 U.S. Dist. LEXIS 210769 (W.D. Wash., Nov. 21, 2022), the parties clashed over proposed expert witnesses and the admissibility of their testimony. Expert testimony would be relevant on the issue of the size of the proposed class, on whether the services described in the exclusionary language was "medically necessary," and on the economic impact of a ruling for the plaintiff class. The court found that the experts proposed by both sides were qualified on the issues as to which they would testify, rejecting each party's motion to exclude the other party's proposed experts, denying without prejudice all motions, with the exception that certain material in one expert's report would be excluded as untimely. Local counsel is the firm of Sirianni Youtz Spoonemore Hamburger, Seattle. Lambda Legal attorneys on the case are Jenny Pizer and Omar Gonzalez-Pagan. Judge Bryan was appointed by President Ronald Reagan.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – Yet two more California trial court orders that convicted defendants submit to HIV testing as part of their sentences are reversed in *People v. David*, 2022 WL 17091242 (Cal. Ct. App., 2nd Dist., Nov. 21, 2022) and *People v. Lopez*, 2022 WL 17335985 (Cal. Ct. App., 4th Dist., Nov. 30, 2022). The relevant statutory language is so clear that it is astonishing

that some judges fail to comply with it and prosecutors apparently are failing to take the necessary action to make a record on which a probable cause finding can be based. To order HIV testing of a convicted defendant, the court has to find "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." See Cal. Penal Code Sec. 1202.1. The probable cause finding must be "articulated" on the record. * * * Billy David was convicted of one count of assault with the intent to commit rape and/or sexual penetration during the commission of first-degree burglary, two counts of sexual penetration by a foreign object accomplished by force, violence, duress or fear; two counts of assault by means of force likely to produce great bodily injury and one count of first-degree burglary. Definitely a bad actor. Los Angeles County Superior Court Judge Lauren Weis Birnstein imposed an overall term of life imprisonment plus 19 years (no comment in the opinion about why the state should have to continue imprisoning a corpse for 19 years! – just kidding, they must have a refrigeration unit at the prison . . .) and the defendant was ordered to submit to HIV/AIDS testing. Judge Birnstein did not make the probable cause finding specified by Sec. 1202.1 on the record, and Justice Thomas L. Willhite, Jr., writing for the court of appeal panel, found nothing in the record on which to base such a finding. "The Attorney General contends that the possibility defendant was bleeding during his assault of C.W. is sufficient to establish probable cause to believe he transferred bodily fluid capable of transmitting HIV to C.W." No, responded the court, which labelled this argument as "speculation." "The only evidence tending to prove defendant was bleeding was located outside C.W.'s residence and out of C.W.'s presence. There being insufficient evidence to support the HIV/AIDS testing order," wrote the judge, "the proper remedy is to 'remand the matter for further proceedings at the election of the prosecution." In other words, unless the prosecutor has evidence (not mere speculation) to prove transfer of bodily fluids from the defendant to the victim, just drop it!! Alex Green argued for the defendant in the Court of Appeal by appointment of the court. The court found several errors in the sentencing decision, and noted the intervening enactment of a sentencing reform bill that would apply retroactively to this case to reduce the final sentence, so remanded for resentencing. * * * The situation in Lopez is similar and draws similar language. Anthony Lopez pled guilty to five counts of committing lewd or lascivious acts on a child under 14 and was sentenced to 16 years and ordered to submit to HIV testing. The trial judge, F. Paul Dickerson III, ignored the statutory requirement to make a factual finding of likely exposure. "If the implicit probable cause finding is not supported by sufficient record evidence," wrote Justice Frank J. Menetrez for the Court of Appeal, "we cannot sustain the testing order. As both parties point out, the record here is devoid of any evidence or factual admissions or finding that would support the required probable cause finding." The court struck the testing order and remanded "to allow the prosecution the opportunity to present evidence supporting a testing order" if there is such evidence. Heather L. Beugen represented Lopez under appointment by the Court of Appeal. * * * As to *Lopez*, wouldn't it just be simpler and more efficient in the context of a plea agreement for a judge who is contemplating making such an order, or a prosecutor who is seeking it, to be sure that the defendant pleading guilty admits on the record to conduct that would expose the victims to possible HIV transmission? Shouldn't a prosecutor who wants a testing order be asking the judge to make a probable cause finding, after the prosecutor has taken care to get the necessary factual material in the record? Is there need for remedial education for California prosecutors and judges on this subject? Does that question answer itself?

ILLINOIS – A unanimous three-judge panel of the Appellate Court of Illinois, 2nd District, reversed the criminal conviction of Robert Stowe on charges of criminal sexual abuse and aggravated criminal sexual abuse, finding that the trial judge erred by admitting into evidence (without any limiting instruction) two photos of naked men with erections that were found in a single GIF file among hundreds of pictures on Stowe's cellphone. These were the only photos of naked men on Stowe's phone. Stowe, a heterosexually married graduate student who was working as a direct service provider at Willow Glen Academy, an institution for mentally and physically disabled individuals, was alleged to have been masturbating a 14-year-old mentally defective boy in a bathroom in the facility. The prosecution was based largely on eyewitness testimony of a supervisor who claimed to have seen Stowe and the boy for a few seconds when she opened the bathroom door to ask Stowe for a key that she needed; the supervisor was so shocked that she immediately called Stowe out of the room but refused to tell him why she was doing so. The boy in question needed close one-on-one supervision at all times due to his mental condition and was known to frequently masturbate himself. His condition required that he be observed by direct service staff at all times, including while he was masturbating. When confronted with the charges, Stowe claim he was not masturbating the boy and the supervisor was mistaken as to what she saw. Police obtained Stowe's cellphone from his wife and a forensic investigation turned up the photos in question, but there were no photos of the boy, which a police witness testified that they found surprising in light of the charges. At

the outset of the trial, the prosecution made a motion *in limine* to get the court's approval to introduce the photos, arguing successfully that the photos would tend to confirm that Stowe had a sexual interest in males and to bolster the supervisor's testimony as to what she saw. The trial court granted the motion, and the jury convicted Stowe, who was sentenced to 3-1/2 years. On appeal, Stowe challenged the admission of the photographs on grounds of relevance and prejudice. Reversing the conviction in an opinion by Presiding Justice Liam C. Brennan, the court agreed with Stowe's argument that the photos were not relevant to proving he had any sexual interest in adolescent males, and that they were definitely prejudicial in light of the arguments the prosecutor made in his rebuttal closing and the failure of the trial judge to explain to the jury the limited use that they could make of that particular evidence. "The instant photos were, at best, probative of sexual attraction to a class of adults," wrote Judge Brennan, "and the State offered no evidence to support the further inference that sexual attraction to that class of adults is probative of sexual attraction to children of any kind . . . Given the state of the evidence in this case, the photographs bore no relevance to the charged offenses . . . Our review of cases from other jurisdictions supports our conclusion that the admission of the photos was an abuse of discretion under the facts of this case . . . The admission of the photos into evidence had the primary effect of casting a negative light on defendant for reasons unrelated to the trial and invited the jury to decide the case based on an improper propensity inference." Further, the court found that this was not "harmless error." "The evidence in this case is not overwhelming," wrote Brennan, "and boils down to a credibility contest between Phillis [the supervisor] and defendant. Phillis was the sole eyewitness, and, according to her own testimony, she had only a few seconds to observe defendant with J.B. There was no testimony that J.B. was behaving abnormally after the incident. Indeed, Heller, the Willow Glen nurse, noted in his statement the absence of guarding behavior or signs of mental distress . . . Having determined that the evidence was not overwhelming, we cannot say that there is no reasonable probability that the jury would have acquitted defendant without the error." However, the court said, even without the photos in question, "the evidence submitted is sufficient to sustain a conviction, and, thus, defendant may be retried." The case is *People v. Stowe*, 2022 Il. App (2nd) 210296 (Nov. 29, 2022). Stowe is represented on appeal by attorneys from the State Appellate Defender's Office: James E. Chadd, Thomas A. Lilien, and Vicki P. Kouros.

MICHIGAN – The Supreme Court of Michigan denied an application for leave to appeal the conviction of Joseph Ryan-Everett Gobrick on child sexual abuse charges, whose direct appeal to the intermediate Court of Appeals resulted in affirmance of the trial verdict and a 10-20 year sentence. *People v. Gobrick*, 2021 WL 6062732, 2021 Mich. App. LEXIS 7185 (Mich. Ct. App., Dec. 21, 2021), appeal denied, 2022 WL 16857114, 2022 Mich. LEXIS 2001 (Mich. Supreme Ct., Nov. 10, 2022). Gobrick is a transgender woman. During the trial Gobrick presented as a man, but on appeal identified as a woman, and counsel requested the court to use "they/them" pronouns in referring to Gobrick, which the court of appeals did, including an explanation of its terminology in a footnote, over the protest of Judge Mark Boonstra, who filed a concurring opinion, stating that the court should not detract from the clarity of its opinions to "conform to a particular litigant's predilections" and stating "I decline to join in the insanity that has apparently now reached the courts." The Supreme Court denied Gobrick's appeal of the conviction and sentence, stating that it was denied "because we are not persuaded that the questions presented should be reviewed by this Court." But Justice Elizabeth Welch, joined by Chief Justice McCormack, were moved to a concurring opinion "to address the Court of Appeals' use of gender-neutral pronouns in the majority opinion after defendant requested to be identified by using the pronoun 'they.'" She wrote to refute Judge Boonstra's contention that this was "insanity" by explaining that the English language evolves over time. "While there might be instances where adoption of a novel change in the English lexicon could cause confusion, this was not such a situation. The Court of Appeals majority provided a detailed explanation in a footnote as to how and why it was using a gender-neutral pronoun in its opinion. The Court of Appeals' simple use of a footnote and gender-neutral pronoun demonstrates that words matter and that a small change to an opinion, even if unrelated to the merits, can go a long way toward ensuring our courts are viewed as open and fair to all who appear before them." Gobrick is represented by Steven D. Helton.

NEVADA – The Court of Appeals of Nevada held that the trial court did not err by rejecting a Batson challenge to the prosecution's use of a peremptory challenge to exclude a person from the jury whom the defendant perceived to be gay. *Richards v. State of Nevada*, 2022 WL 16703260 (Nov. 3, 2022). Richards was convicted by the jury on two counts of sexual assault of a vulnerable person. Appealing the verdict, he argued that the trial court rejected four of his five Batson challenges to the prosecution's use of peremptory challenges. He pointed out that the peremptory challenges were all used to exclude "minorities" from the jury. The other challenges involved Hispanic or Black potential jurors. Richards objected to the State's strike of "juror Skilling," which Richards

contended was improper because "it appeared that Skilling was a member of the 'LGBTQ' community." Richards asked for additional question regarding Skilling's sexual orientation, which the trial court denied, noting that the juror had "not identified herself as a member of the LGBTQ community on the record and that questioning of the juror concerning her sexual orientation would not have been appropriate." The trial judge also asserted that "the subject matter of this case did not present an issue of consequence to the LGBTQ community." The court rejected any notion that striking a potential juror who might be gay automatically raised an inference of discrimination requiring a non-discriminatory justification by the prosecution.

PENNSYLVANIA – The Superior Court of Pennsylvania (an intermediate appellate court) rejected an appeal by Clifford Kamau Ibirithi of jury conviction on charges of aggravated harassment by a prisoner and assault by a prisoner, and granted a motion by his trial counsel to withdraw from representation on the appeal because counsel considered there was no non-frivolous basis for appealing. *Commonwealth of Pennsylvania v. Ibirithi*, 2022 WL 16848982, 2022 Pa. Super. Unpub. LEXIS 266 (Nov. 10, 2022). Ibirithi, who is HIV-positive, while incarcerated in York County Prison, performed anal sex on his cellmate, who is also HIV-positive. The cellmate claims that Ibirithi raped him on that occasion, choking him and concurrently inserting his penis. The cellmate testified that he passed out from the strangulation, waking up with his pants down and feeling a "wet substance" on his backside. Evidence was presented that the "wet substance" was, to a high degree of certainty, seminal fluid ejaculated by Ibirithi, against him four charges were asserted by the prosecutor – sexual assault, strangulation, aggravated harassment by a prisoner, and assault by a prisoner. Ibirith claimed that he and his cellmate had consensual sex on several occasions, including this one. The jury acquitted on the first two charges and convicted on the last two, 18 Pa.C.S.A. Sections 2703.1 and 2703(a)(2). These charges involving causing another to come into contact with a prisoner's seminal fluid in 2703.1, with the aggravating factor of the prisoner knowing that he is HIV positive in 2703(a)(2). The defendant was sentenced by the trial judge in Court of Common Pleas, York County, to 2-1/2 to 5 years. Ibirithi appealed claiming evidence was insufficient to support the verdict, and his counsel filed what is called an "Anders brief" (*see Anders v. California*, 386 U.S. 783 (1967)) supporting counsel's motion to withdraw from the representation. Ibirithi was served with counsel's Anders brief and told that he could respond to it and could substitute counsel, but he did neither. A memorandum opinion by Senior Superior Court Judge James Gardner Colins spoke for the unanimous 3-judge panel in affirming the sentence and approving of counsel's withdrawal. The court agreed with counsel that there were no non-frivolous grounds for appeal, and that the evidence provided sufficient basis for the jury to conclude that Ibirithi, who did not deny knowing that he was HIV-positive, had deliberately exposed his cellmate to his seminal fluid.

PRISONER LITIGATION NOTES

By 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.

CALIFORNIA – Rarely has a federal judge managed to get so many things wrong in fewer than a thousand words. It is difficult to believe that anyone in U.S. Magistrate Judge Jeremy D. Peterson's chambers tried to read the *pro se* complaint in *Wheaton v. McCrombe*r, 2022 WL 16926203 (E.D. Calif., Nov. 14, 2022). It is a fifty-page slog, but the gist is discernable with a skim. Judge Peterson rightly dismissed it under F.R.C.P. 8 and 20, with leave to amend, but he made it unlikely that Wheaton will do any better the next time. Wheaton, a transgender inmate, combined a conditions-of-confinement claim with a lost property claim, which probably is misjoinder under F.R.C.P. 20. Taking the property claim first, it has been settled law for forty years that a prisoner who has an administrative complaint mechanism for lost property has no constitutional claim. *Parratt v. Taylor*, 451 U.S. 527, 543 (1981). Judge Peterson should have just told Wheaton that. The conditions claim relates to corrections officials' assigning an "R" suffix to Wheaton's inmate number, indicating "sex offender." Wheaton says he has no sex crime convictions and that the "R" has denied him privileges and subjected him to danger in population, for being both perceived as a sex offender and as transgender. He attributes the "R" suffix to his transgender presentation and his prior disciplinary tickets for masturbation. There is no evidence in the brief opinion that Judge Peterson made any effort to decipher what the "R" suffix meant – although it is apparent even on skimming. Judge Peterson refers to Wheaton using "they/them/their" pronouns because plaintiff did not state "what pronouns they desire." Wrong again. Wheaton used male pronouns in several places – including his insistence that "pleasuring himself . . . does not warrant him being labelled a sex offender." Judge Peterson does not mention Equal Protection, although use of the "R" suffix, as applied, may fail a rational basis test; and the transgender discrimination is subject to heightened scrutiny in the Ninth Circuit. *Karnosky v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019).

PRISONER LITIGATION *notes*

CALIFORNIA – U.S. Magistrate Judge Deborah Barnes denies further discovery and recommends summary judgment to sole defendant, a correctional physician, in a claim for deliberate indifference, discrimination, and retaliation against a gay prisoner in *Barth v. Montejo,* 2022 WL 17324922 (E.D. Calif., Nov. 29, 2022). She finds that *pro se* plaintiff, Shawn Damon Barth, has not identified specifically what he needs to oppose summary judgment, nor explained why he could not have sought it before the discovery deadline. Barth says he had a back brace from a prior history of a three-story fall when he arrived at the California DOC Medical Facility and was put under the care of defendant Montejo. Barth says that Montejo was homophobic and called him a "faggot." Montejo also took away Barth's permit for the walker, saying that he did not need it and that it was interfering with his development of core strength. Montejo referred Barth to a physical therapist, and he later ordered an MRI. Barth alleges that Montejo also gave only a cursory examination of his shoulder pain. When Barth was later transferred out of Montejo's care, a different prison doctor restored his walker permit. Barth submitted a group affidavit signed by fourteen inmates who testified that Montejo had arbitrarily revoked their walker permits. Judge Barnes finds no triable factual issues. Although she notes the need to be deferential in inferences on summary judgment in *pro se* cases, in this writer's view she does not in fact apply such deference. She emphasizes that Montejo exercised sound medical judgment about the walker, which is not a violation of the Eighth Amendment, rejecting Barth's argument that the "judgment" was retaliatory and homophobic. She finds that the walker permit revocation pre-dated Barth's complaint under the Prison Rape Elimination Act, so Montejo could not have been retaliating. Barth says the homophobic slurs occurred before the walker was taken, that he made verbal complaints about the remarks, and that Montejo found out. PREA allows verbal complaints under 28 C.F.R. § 115.51(c), and Judge Barnes should not have started the retaliation timeline for summary judgment purposes with Barth's written complaint. This was a jury question. She then uses the petition for other inmates against Barth, saying that Montejo was not discriminating against gays because the list included gays, straights, blacks, whites, Asians, etc. – thereby excluding class-based discrimination. In short, for purposes of sound medical judgment, Montejo made individualized decisions. For purposes of class-based animus, he took away walkers indiscriminately. Other inferences were possible; it was up to a jury. A *pro se* prisoner has what seems to be a snowball's chance in hell of winning a case in the Eastern District of California.

CALIFORNIA – Previous reporting by this writer of Magistrate Judge Barbara A. McAuliffe in *Law Notes* has often been critical. In *Gonzalez v. Calif. DOC.,* 2022 WL 16926146 (E.D. Calif., Nov. 14, 2022), the persistence of the transgender plaintiff, accompanied by the reporting orders of Judge McAuliffe, may have ultimately resulted in a favorable outcome. *Pro se* plaintiff Giovanni (Sharon) Gonzalez was diagnosed in custody as transgender with gender dysphoria in 2015. Gonzalez managed to obtain her diagnosis, as well as hormone therapy and transfer to a women's facility, prior to initiating this lawsuit in 2019, wherein she sought a court order for gender affirming surgery and relief for transgender discrimination. Judge McAuliffe screened the case in April of 2020, and she allowed Gonzalez to proceed on Eighth Amendment and Equal Protection discrimination claims. It took over eight months (until late December 2020) for the Report and Recommendation to be adopted by Senior U.S. District Judge Anthony W. Ishii. In March of 2021, Gonzalez filed a motion for a court order granting her access (four hours/week) to work on her litigation in the law library at the women's prison. Nothing was done on this motion (which Judge McAuliffe construed as a request for a preliminary injunction) until the above-cited decision in November of 2022. Judge McAuliffe denied the order, faulting Gonzalez for failure to name any defendant with authority over the law library. Because Judge McAuliffe had previously denied counsel, this writer looked at the docket to see what happened in the interim. Quite a lot. In September of 2021, the State of California moved to stay the proceedings because it had approved gender affirming surgery. Gonzalez said she wanted the surgery itself, not just an "approval" for it. Judge McAuliffe granted the stay, with the provision that the defendants file status reports every 90 days until surgery occurs. It took a year, but Gonzalez had surgery in September of 2022. Defendants then sought to dismiss as moot, relying on their 2021 motion. Judge McAuliffe instructed them to file new papers and said that Gonzalez could seek an extension to reply if she needed one. This writer cannot say with any confidence that Gonzalez' case would have moved any faster in the E.D. California with counsel and motion practice.

DISTRICT OF COLUMBIA – Trey Oshae Stevenson is a transgender man, who was arrested in Washington, D.C., for having an "open container of alcohol" in his vehicle. Stevenson's claims arise from an intrusive search at the precinct prior to being transferred to central booking. He originally had other defendants and claims (including an Equal Protection claim under the Fifth Amendment), but they are no longer before the court. The opinion in *Stevenson v. District of Columbia,* 2022 WL 16713034 (D.D.C., Nov. 4,

2022), concerns Stevenson's right to be free of an unreasonable search under the Fourth Amendment against Doe defendants and the District of Columbia. Senior U.S. District Judge Reggie B. Walton (appointed by President George W. Bush) dismisses claims against the Doe Defendants and grants summary judgment to the District of Columbia. This is a detailed decision of more than 8,500 words, but one thing is strikingly missing. Stevenson is a transgender inmate who alleges he was groped in his vagina repeatedly during a search, but Judge Walton does not mention the Prison Rape Elimination Act [PREA] at all, even though its regulations cover both the search claims against the Does and the inadequate training claims lodged against the District of Columbia. While this is not uncommon in cases, it is astonishing here, because Judge Walton was the Chair of the PREA Commission whose report called for the Attorney General to promulgate the regulations covering these activities. Without PREA, this whole opinion reads like an advisory one. First, Judge Walton dismisses the Doe defendants. Stevenson did not amend her complaint to name them, and this alone would have been sufficient grounds for dismissal. Judge Walton continues, however, and rules that there was a jury question on the "reasonableness" of the search. Basically, a "thorough search of the groin" is reasonable, but "fondling of the genitalia" is not. *Dickey v. United States*, 174 F. Supp. 3d 366, 372 (D.D.C. 2016). Here, the groping consisted of about four hand inspections of about five seconds each – or twenty seconds – but it was accompanied by the comment: "we're trying to figure out who you are." Searches to determine gender identity are illegal, so this presented a jury question if there is no qualified immunity. The discussion here is very long and worth the read if counsel have this issue. [PREA would define these allegations as "sexual abuse," regardless of whether the search was same-gender or cross-gender. 28 C.F.R. § 115.6.] Judge Walton finds that the law was not so clear in 2017 [although PREA was, since 2012], and *Dickey* was just a District Court case. So, although he denies summary judgment to the Does, he grants them qualified immunity, writing: "The Court has identified no Supreme Court or Circuit precedent establishing that sexual assault committed by a police officer violates the Fourth Amendment." This seems wrong. There is a Gaza Strip of behavior that is simply wrong, and people know it, without a decision on point. *See Hope v. Peltzer,* 536 U.S. 730, 745-46 ((2002) (tying prisoner shirtless in Alabama sun without water or toilet); *see also, Taylor v. Riojas,* 141 S.Ct. 52, 54 (2020) (reversing Fifth Circuit's grant of qualified immunity to prison officials who threw inmate naked into cell "filled with feces"). Police officers do not need a case to tell them that sexual assault is wrong. Judge Walton's analysis seems to fall apart on qualified immunity, which undermines any good that can be drawn from the painstaking analysis of Fourth Amendment search law. He took almost a year to decide the summary judgment motion, yet he struggles to characterize the search. PREA would certainly have helped. The District of Columbia had a policy against "groping" or searching to determine an inmate's gender, so its exposure comes down to a failure to train under *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989). Here, D.C. provided some training on interaction with transgender inmates, and Judge Walton finds Stevenson's allegation insufficient to support a jury finding of deliberate indifference required by *Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988). This is also a very lengthy discussion of summary judgment on failure to train liability. These claims are always difficult when the action causing the constitutional tort can be attributed to a rogue officer. Again, PREA has specific regulations on training officers, which are never mentioned. 28 C.F.R. § 115.31(a). Stevenson was represented by Clark Law Group, PLLC (Washington).

COLORADO – This case, involving an HIV positive jail inmate denied HIV medication (who also needs hip replacement surgery) will have been pending for three years in April of 2023 – and it is still at the motion to dismiss stage. In *Pike v. Lewis,* 2022 WL 17091992 (D. Colo., Nov. 21, 2022), U. S. Magistrate Judge Maritza Dominguez Braswell recommended that most of the case be dismissed without prejudice, leaving two claims to proceed in her nearly 16,000-word opinion. The *pro se* plaintiff, Anthony G. Pike, was denied counsel repeatedly. Defendants discussed in the opinion are the county sheriff, the county (Mesa – in western Colorado, including Grand Junction), the jail's contractual health care vendor, the health services administrator, and the medical director. In this writer's view, much of this prolix opinion serves no purpose. The events began in May 2018, and they continued for an undetermined number of months. By the time Pike filed his complaint in April 2020, however, he was in state prison and no longer at the jail. There go injunctive claims against the jail (and most of the official capacity stuff); and dismissal without prejudice with leave to refile now would be time-barred for damages, since Colorado has a two-year statute of limitations for § 1983 claims. *Blaker v. Dickason,* 997 F.2d 749, 750-51 (10th Cir. 1993). The opinion is useful for those who have a problem with tardiness under a F.R.C.P. 16 Pre-Trial Order and who need a lengthy discussion of amendment of the Complaint under F.R.C.P. 15 – but the analysis is omitted here. As to the hip, Judge Braswell found that the doctor was not liable under the Eighth Amendment, since he changed his mind about referring Pike to an orthopedist, because the hip was not an "emergency." This is wrong as a matter of law. Pike

has "bone-on-bone" rubbing, and he was confined to a wheelchair and in constant pain. A condition need not be a life-threatening emergency to raise an Eighth Amendment issue. *Al-Turki v. Robinson,* 762 F.3d 1188, 1191 (10th Cir. 2014). The amended complaint was sufficient to state a claim. In this writer's opinion, the doctor did not want an orthopedist's order for surgery in the file. While Judge Braswell says Pike can refile against the doctor for malpractice if he can comply with the certificate of merit requirements for medical malpractice under state law (which is a practical fantasy) – but, even then, Pike would have a limitations bar. A certificate of merit is apparently not required for the health services administrator, whom Judge Braswell calls a nurse practitioner. In the PACER papers, defense counsel call her a licensed practical nurse. There is a huge difference, a nurse practitioner can diagnose and treat and prescribe; a practical nurse cannot. [Note: This writer could not find an entry at any level of licensing in Colorado's professional registry.] In any event, citing the health services administrator's duties regarding medications, Judge Braswell allows the claims to go forward against her for denials/delays in HIV meds – and against her employer, the contractual vendor, under *respondeat superior.* According to Pike, he got an order for hip surgery after he left the jail, but it could not be performed because his CD-4 count was too low – a deterioration he blames on the jail. Judge Braswell says that the health services administrator is not responsible for the inability to operate. This also seems wrong, and Judge Braswell cites no authority. Colorado has the "thin skull doctrine" under which the tortfeasor "must accept his or her victim as the victim is found." *Schafer v. Hoffman,* 831 P.2d 892, 900 (Colo. 1992). If Pike cannot have necessary surgery because his condition is too frail as a result of this defendant's negligence, that is part of the tort, at least for pleadings purposes. *See Trask v. Franco,* 446 F.3d 1036, 1046-47 (10th Cir. 2006) (error for district judge to grant summary judgment to probation officers, whose illegal search may have led to separate unlawful arrest of third party who was at the premises; proximate cause is usually a jury question). What is the matter with these judges? How can they take 16,000 words to explain themselves while maintaining counsel is not needed for a *pro se* plaintiff?

ILLINOIS – *Pro se* transgender inmate Michael A. Chest is given a third chance to plead a cognizable § 1983 claim by U.S. District Judge Stephen P. McGlynn in *Chest v. Merriman*, 2022 WL 17337799 (S.D. Ill., Nov. 30, 2022). At the outset, it should be noted that Judge McGlynn took eight months to screen the initial complaint and another six months to screen the First Amended Complaint. Judge McGlynn identifies three claims from the First Amended Complaint: (1) sexual harassment; (2) protection from sexual assault; and (3) excessive force. His disposition, however, is full of mistakes, on top of which he gives Chest a little over a month to file a Second Amended Complaint under threat of dismissal with prejudice. Taking the last claim first, Chest has to file a separate case on excessive force, because it involved different defendants at different times. Judge McGlynn dismisses it without prejudice to filing a separate action, citing *George v. Smith*, 507 F.3d 605 (7th Cir. 2007). This is probably a correct application of the Seventh Circuit's strict reading of F.R.C.P. 20 and 21 as they interact with the Prison Litigation Reform Act in *George*, but Judge McGlynn errs when he writes about Chest's detailed grievance response about the use of force that he attached to the Complaint, saying it did not "satisfy . . . pleading requirements" or put defendants on notice. To the contrary, its detail would put anyone on notice, and documents "attached to the Complaint" become part of the pleadings "for all purposes." *Geinosky v. City of Chicago,* 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Tierney v. Cahl,* 304 F.3d 734, 738 (7th Cir. 2002); F.R.C.P. 10(c). As to sexual harassment, Judge McGlynn asks Chest to provide more detail, saying that "simple verbal harassment" is not enough, citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). WestLaw gives this one a red flag. *DeWalt* was limited to the point of overruling in *Beal v. Foster*, 803 F.3d 356, 357 (7th Cir. 2015), which explained circumstances when verbal is enough. Judge McGlynn also refers Chest to *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009), on the sexual harassment claim. *Brooks* involved a parole board member who was acquitted of fraud and then brought a conspiracy case against the officials who charged him. The plaintiff was not a prisoner, and the case did not involve the Eighth Amendment or sexual harassment. It does not belong here, and it can only confuse a *pro se* litigant. Judge McGlynn gives at least one point of good advice on this claim: "If Plaintiff meant to allege that [Defendant] made some physical contact with her in addition to the verbal harassment, her amended complaint should clearly and legibly state such relevant facts." On the second count (protection from harm), Judge McGlynn only partially states the rule in *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994), by referring to the duty to respond to "a specific threat." *Farmer* goes further, however. Defendants also have a duty to abate "known risks," even if they cannot identity a specific assailant, if plaintiff is within a zone of serious risk. 511 U.S. at 843, 848. Farmer, also transgender, had not objected to general population, yet she stated a claim because of how dangerous her block was at Terre Haute Federal Penitentiary. 511 U.S. at 830. Either theory suffices to state a claim. Judge McGlynn was appointed by President Trump.

LEGISLATIVE & ADMINISTRATIVE *notes*

PENNSYLVANIA – Chief U.S. Magistrate Judge Richard A. Lanzillo severs the claims of two *pro se* transgender inmates (Leonard Young and Jl'Haad Harrison) who filed as joint plaintiffs in the same lawsuit alleging failure to treat gender dysphoria and abuse and discrimination for transgender status. Both have a long mental health history and claim failure to treat and abuse at the Albion SCI, albeit the latter occurred at different times and from different employees. Judge Lanzillo allows Young to proceed, but he finds Harrison's claims to be too different to join under F.R.C.P. 20. Instead, Harrison's claims are severed under F.R.C.P. 21 and dismissed without prejudice and with leave to amend another complaint that she previously filed in the W.D. Pa. that raises overlapping issues. The case is reported at *Young v. Pa. DOC*, 2022 WL 16638255 (W.D. Pa., Nov. 2, 2022). In this writer's experience, *pro se* prisoners are rarely permitted to join similar claims, with the rare exceptions of two or more prisoners jointly beaten in the same incident or two inmates trying to claim rights as a couple. This writer is not aware of an appellate decision finding what Judge Lanzillo did here to be an abuse of discretion.

VIRGINIA – *Pro se* transgender inmate Bria L. Young claims she was harassed because of her gender identity and punished with beatings and misbehavior tickets after she complained, which included calling the Prison Rape Elimination Act "Hotline." One of the misbehavior tickets was for "misuse of telephone" for calling the Hotline. She sued some twenty defendants; but some were named only as supervisors, and some had no specific allegations against them. These defendants moved to dismiss. The other six answered the Complaint. Young filed an opposition to dismissal, which was poorly drafted. She alleged, however, that a Special Agent named Todd Watson investigated her complaints for the Department of Correction (File No. 210655) and that there was videotape of some of the use of force. Senior U.S. District Judge James P. Jones granted the motion to dismiss as to fourteen defendants, in *Young v. Perkins,* 2022 WL 17248989 (W.D. Va., Nov. 29, 2022). There was no leave to amend, and he ordered the case "terminated" as to them. Judge Jones directed the other six to file a motion for summary judgment within thirty days, or he would set the matter for jury trial. This writer does not understand this disposition. One chance to amend a *pro se* complaint is regular order. This case is not trial ready. There has been no conference, no F.R.C.P. 16 Order, and no discovery. Surely Judge Jones should have directed defendants to respond to the existence of an investigative file and videos. Retaliation against PREA complainants is specifically forbidden by 28 C.F.R. § 115.67, which applies to supervisors. Judge Jones was appointed by President Clinton, and he previously served on the FISA Court.

WASHINGTON – Readers may remember U.S. District Judge Marsha J. Pechman (Clinton) as the trial judge handling the consolidated litigation challenging the Trump Administration's ban on transgender military service. *See Karnoski v. Trump,* 328 F.Supp.2d 1156 (W.D. Wash. 2018), *vacated,* 926 F.3d 1180 (9th Cir. 2019) (approving heightened scrutiny of trans claims but remanding to evaluate President Trump's "change" in policy). Here, in *Sutton v. State of Washington,* 2022 U.S. Dist. LEXIS 201417 (W.D. Wash., Nov. 4, 2022), now Senior Judge Pechman rejects total dismissal of a transgender prisoner's claims, as recommended by U.S. Magistrate Judge S. Kate Vaughan. The plaintiff, Jason (Jennifer) Lee Sutton, objected to the part of the R & R that recommended dismissal of her damages claim for delays in providing hormones and her state law claims for negligence. Judge Pechman allows both to proceed. According to the opinion, it "took well over two years for [Sutton] to receive her first dose of [hormones]." The opinion traces Sutton's efforts and various obstacles she faced in the Washington DOC. The judge also summarizes standard of care under the World Professional Association for Transgender Health and the expert testimony of plaintiff's expert, Randi Ettner. She finds a triable issue on damages for the two-plus-year delay in hormones, as to the one psychologist most involved in Sutton's care. The comparative culpability of two psychologists is worth reading for counsel having defendants with varying degrees of involvement in treatment. Judge Pechman also finds that qualified immunity is not available as a question of law on these facts. On the state law negligence claim, Judge Pechman finds that the case sounds in medical malpractice, not regular negligence. As such, Sutton had to show standard of care. This was done through Ettner's affidavit, so there is a jury question here as well, and it is sufficiently connected to try the state law claim in one case. Sutton can seek emotional and psychological damages on her pendent state law claims. There is a good discussion of supplementary jurisdiction. Sutton is represented by Civil Rights Justice Center, PLLC (Seattle).

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. CONGRESS – By the end of November, the "Respect for Marriage Act" approved by the House of Representatives earlier in the year had been approved by the Senate, in an amended version which insulated various religious institutions from

having to perform or recognize same-sex marriages consistent with their religious doctrines and which also provided that only a marriage involving two persons would be recognized under federal law. The religious exemption language was negotiated by a bipartisan group of Senators and written in a way to attract the votes of just enough Republican senators to be able to win a cloture vote to get the measure to the floor. In the event, the same twelve Republican Senators who joined the Democrats to prevent a filibuster also voted for the bill on the merits. Three floor amendments were proposed by Republican Senators, each of which would have broadened the religious exemptions, but they were all defeated on the Senate floor. The amended bill was sent back to the House. While this issue of *Law Notes* was in preparation early in December, the House voted to approve the amended bill, and it was expected that a signing ceremony would be held at the White House in mid-December. * * * As we noted when *Law Notes* reported the House passage of the original version of the bill, it repeals the Defense of Marriage Act and provides that the federal government will recognize marriages that were lawful where they were performed, regardless of whether the couple is living in a state that would not recognize such marriages. Furthermore, it makes clear that states are expected to extend full faith and credit to lawful marriages contracted in other states. The bill was prompted, in part, by serious concerns that the activist conservative majority on the Supreme Court might overrule *Obergefell v. Hodges* using the kind of "originalist" approach that the Court applied in *Dobbs* to overrule *Roe v. Wade*, thus freeing the states to decide whether to enforce existing state constitutional or legislative bans on same-sex marriage, which had been rendered unenforceable under *Obergefell*. Although Congress does not have power to order states to allow same-sex marriages, in the event of an *Obergefell* overruling, strategists may figure out ways to use the federal spending power to incentivize states to continue to license, perform, and recognize same-sex marriages.

FLORIDA – The Florida Board of Medicine, whose members were appointed by Gov. Ron DeSantis, who is working overtime to own the label of leading transphobic public official, voted 6-3 on November 4 to adopt a standard of care forbidding doctors from prescribing puberty blockers and hormones, or to perform gender transition surgery, until patients are at least 18 years old, with exceptions for children who are already receiving treatment. The Florida Board of Osteopathic Medicine also voted on November 4 to restrict treatments for new patients, with exceptions for children enrolled in clinical studies. These actions were taken despite that failure of the State Legislature, which is controlled by Republicans, to take up a bill that would impose the same restrictions by statute. Those who violate the standard of care may be subject to professional discipline and loss of licensure. *NY Times*, Nov. 4.

NEVADA – On November 8, Nevada announced that voters have approved the addition of an Equal Rights Amendment to their state constitution, which amends the document to ensure equal rights to all persons "regardless of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or nation origin." The amendment does not specify an enforcement mechanism, which leaves it to the state courts to determine in any particular case whether the constitutional equality right has been violated. *Associated Press*, Nov. 10.

NEW JERSEY – On November 16, Governor Phil Murphy signed an executive order to enhance privacy protection for name-change records, following along on recent court decisions in New Jersey dropping the publication requirement for name change petitions. This is a matter of intense concern for transgender people, for whom the "open records" regime for name changes has posed a constant threat of outing and harassment. *Courier Post (NorthJersey.com)*, Nov. 18.

LAW & SOCIETY NOTES

By Arthur S. Leonard

LAW STUDENT ORGANIZATIONS – Samford University's president, Beck A. Taylor, has informed student petitioners that an application from a student OUTLaw group for recognition at Samford's Cumberland Law School has been denied. Samford, a university established as Howard College for Men in 1841 by the Alabama Baptist State Convention, acquired Cumberland Law School (itself established in 1847), in 1961. The school's website speaks of a "Christian campus community." OUTlaw, with about fifty members, has been operating as an unofficial group since last year. In a letter dated October 20 to a student founder of the group, Taylor wrote: "This letter communicates my decision to not recognize OUTLaw as an official student organization at Samford. Civil discourse on matters of human sexuality and other subjects at the forefront of public debate will always exist at Samford, and the university is not retreating from those discussions. Nevertheless, extending official university recognition to a student organization that advocates for beliefs and behaviors contrary to the religious values of Samford would be inconsistent with my responsibilities as president. I want to ensure that you and all your fellow students enjoy an exception law school experience." Samford University is located in Birmingham, Alabama, which has a local ordinance prohibiting

discrimination because of sexual orientation or gender identity, but it is uncertain whether it would apply to Samford University's internal student policies. At the state level, Alabama law does not prohibit discrimination because of sexual orientation or gender identity. The question whether federal Title IX's sex discrimination ban by educational institutions may apply to this issue does not have a definitive answer yet. *ALM.com*, Nov. 1.

MIDTERM ELECTIONS – The number of out candidates running in federal, state and local elections in November was so large (well over 300) that we are not going to report in any great detail, other than to note that there are several states that will have lesbian, gay or bisexual representation in Congress for the first time, and there is a flood of newly-elected "out" individuals in state legislatures, city councils, and other local government bodies, in unprecedented numbers. One first particularly worth noting, as reported by the Victory Fund: "New Hampshire state Representative-elect James Roesener, the first trans man ever elected to a state legislature in U.S. history, recently spoke with *POLITICO* about why he chose to run for office this year, what running as an out trans man was like in the current political climate and his policy goals for the new year."

INTERNATIONAL NOTES

By Arthur S. Leonard

HONG KONG – A three-judge panel of the Court of Appeal has certified an appeal by Jimmy Sham Tsz-kit to the Court of Final Appeal on his bid for legal recognition and marital benefits based on a same-sex marriage performed in New York. Although the Court of Appeal rejected his argument that his New York marriage should receive the same recognition that a foreign different-sex marriage would receive, it agreed to certify the appeal to the highest court, stating in writing that the case raised questions that were of great public importance and should be determined by Hong Kong's highest court. "Having considered their submissions, we are inclined to think that the applicant has met the threshold they are reasonably arguable, even though we do not consider the arguments to be particularly strong," said the court. At this point, the local government recognizes foreign same-sex marriage for limited purposes such as taxation, inheritance rights, and civil service benefits, all of which were won through legal action over the past few years. The argument to the Court of Final Appeal invokes the Basic Law (Hong-Kong's "constitution"), citing provisions on equality and privacy. *South China Morning Post*, Nov. 10.

INDIA – On November 25 the Supreme Court directed the national government (in India referred to as "The Centre") and the Attorney General to respond within four weeks to petitions that have been filed with the Court seeking a ruling that same-sex couples are entitled to be legally married. Similar petitions that are pending before the High Court in Delhi and Kerala will be incorporated into consideration of the petitions pending, and the two-judge bench, consisting of Chief Justice D. Y. Chandrachud and Justice Hima Kohli, announced that the hearing will be held in four weeks after the notices to the Center and the Attorney General were sent. The petitioners, Supriya Chakraborty and Abhay Dang, who have lived as a same-sex couple without benefit legal recognition for a decade, argued that such a ruling would be a sequel to earlier rulings by the Court advancing LGBTQ rights. They are specifically seeking a declaration under the Special Marriage Act of 1954, which provides a form of civil marriage for couples whose religious institutions do not provide them the option of marriage. A decision by the two-judge bench, which is the norm for hearing petitions, could be appealed by the government to a larger bench. In 2018, a five-judge bench of the Supreme Court, reversing a two-judge bench ruling, held that criminalization of private consensual conduct between adults of the same sex under Section 377 of the Indian Penal Code was unconstitutional. *LiveLaw.In*, Nov. 25; *The Hindu*, Nov. 25.

ITALY – Reuters reported on November 17 that an Italian court ruled in favor of a lesbian couple both of whom wanted to be listed as "mother" on their child's national identity card. Current rules for the cards require that parents be identified as "father" and "mother" but the judge reasoned that because one of the women had adopted the child born to her partner, they were both legal mothers, so identifying one as "father" made no sense. Prior to 2019, the card identified them as "parents" without reference to gender, but the Interior Minister of a conservative government changed the rules that year. The court's ruling was issued in September but first publicized by Famiglie Arcobaleno (Rainbow Families) on November 16. At the time the ruling was issued, the government then in power, led by Mario Draghi, did not appeal it, so it is a final ruling. But it only applies to the specific case, according to the Reuter report, not all same-sex couples. So same-sex couples who do not want to be mislabeled on their children's identity cards will need to go to court, unless the government responds to the logic of the ruling by returning to the prior practice. What will Prime Minister Giorgia Meloni, a "traditional values campaigner," do?

MEXICO – We need to correct our summary of the marriage situation in Mexico, as advised by Rex Wockner,

PROFESSIONAL *notes*

the journalist who has been carefully monitoring the situation there: "Mexico's supreme court is not the "Supreme Court of the Nation" but the Supreme Court of Justice of the Nation, widely referred to as the SCJN. Also, marriage is not legal nationwide by 'administrative procedures.' It passed the state legislature in 26 states and the federal capital, Mexico City, and is legal by court ruling in 3 more states and legal via administrative procedures in the final 2 states." The bottom line is that a same-sex couple can get married anywhere in Mexico now.

POLAND – *NotesfromPoland.com* reported on November 3 that a same-sex couple who lost an appeal from a denial of recognition of their marriage (contracted in Portugal) had nonetheless drawn from the Supreme Administrative Court (NSA) a statement that Article 18 of the Polish Constitution, which states that "marriage as a union of a man and a woman, family, motherhood and parenthood are under the protection and care of the Republic of Poland," is not a prohibition on same-sex marriages. In other words, at least as Jakub Kwiecinski and Dawid Mycek, the couple who are described in the article as "popular vloggers who had been fighting for five years for the Polish state to recognize their marriage," Article 18 does not stand as an impediment to the government recognizing same-sex marriages, or put otherwise, a constitutional amendment would not be required to make it possible for the national government to recognize such marriages. Their claim has been disputed by a legal organization, Ordo Iuris, which points out that the NSA ruled against the couple, and that the provision in question, taken together with other material in the Constitution, can be used to argue that only different-sex marriages can have the protection of the state. Dispute unresolved, although it is clear that there is not public support in Poland for same-sex marriage at present.

RUSSIA – The Duma (Parliament) gave final approval to a new measure that extends the existing ban on "homosexual propaganda" direct to children to everybody. In effect, if given final approval by the Council of State and President Vladimir Putin, this measure will be Russia's "Don't Say Gay" Statute, with criminal penalties attached. This would make it a criminal offense, incurring draconian fines, for publicly advocating for LGTBQ rights in Russia, holding demonstrations, and publishing LGBTQ news and advocacy.

SINGAPORE – *Reuters* reported on November 29 that Singapore's parliament had given overwhelming approval to legalizing private adult consensual sex between persons of the same sex, but at the same time had overwhelming approved amending the constitution to make it impossible for proponents of same-sex marriage to be able to pursue their goal through the courts. Proponents of the constitutional amendment successfully argued that the decision whether to allow same-sex marriage should be made by the political branches of the government, not the court.

PROFESSIONAL NOTES

By Arthur S. Leonard

Last month, the **AMERICAN BAR ASSOCIATION'S COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY** has announced that it will honor **U.S. DISTRICT JUDGE PAMELA K. CHEN (E.D.N.Y.)** with its **STONEWALL AWARD**. Judge Chen is the first out LGBTQ Asian-American person to serve as a federal judge, having been nominated by President Barack Obama in 2012 and confirmed and seated in 2013. Judge Chen is a graduate of Georgetown University Law Center, and was Chief of the Civil Rights Section of the U.S. Attorney's Office for the Eastern District of New York prior to her nomination to the bench. She is board chair of the Sonia & Celina Sotomayor Judicial Internship Program, and has also m1entored student through LeGaL's Hank Henry Fellowship program. * * * The **ABA COMMISSION** has also announced a **STONEWALL AWARD** for **JENNIFER PIZER**, recently named as Chief Legal Officer at Lambda Legal. Pizer previously served as legal director of the Williams Institute at UCLA Law School, legal director of the National Abortion Rights Action League, and clerked for U.S. District Judge Ann Aldrich (N.D. Ohio). She is a graduate of New York University School of Law. * * * A third recipient of the **STONEWALL AWARD** also announced by the **ABA COMMISSION** is **ELLIE KRUG**, a transgender activist, author and lawyer. A graduate of Boston College Law School, Kruger transitioned at age 52 and has the unusual distinction of having tried jury cases as both a man pre-transition and a woman post-transition. She was the founding director of Call for Justice LLC, connecting low-income people with Minnesota legal resources. In 2016 she founded Human Inspiration Works LLC, a consulting and training company devoted to transgender issues. She is a published memoirist and radio and podcast personality. OutFront Minnesota honored her with its 2019 Legacy Award for her leadership role on transgender issues. * * * All three awards will be conferred at the ABA Midyear Meeting in New Orleans on February 4, 2023.

PUBLICATIONS NOTED

1. Agarwal, Akshat, Marriage Equality in India: Thinking Beyond Judicial Challenges to Secular Marriage Law, 6 Indian L. Rev. No. 2, 170-188.
2. Burke, Sara Emiliy, and Roseanna Sommers, Reducing Prejudice Through Law: Evidence from Experimental Psychology, 89 U. Chi. L. Rev. 1369 (October 2022).
3. Dwyer, James G., Smith's Last Stand? Free Exercise and Foster Care Exceptionalism, 24 U. Pa. J. Const. L. 856 (June 2022).
4. Gottlieb, Chris, Remembering Who Foster Care is For: Public Accommodation and Other Misconceptions and Missed Opportunities in *Fulton v. City of Philadelphia*, 44 Cardozo L. Rev. 1 (October 2022).
5. Redburn, Kate, The Visibility Trap, 89 U. Chi. L. Rev. No. 6 (2022) (focus on transgender rights, and the problems of trans visibility in a social context where there are gaps in protection for transgender people).

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers. All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LGBT Bar NY Foundation, Inc. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor via e-mail to info@lgbtbarny.org.