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LAW NOTES

December 2015

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*Oklahoma Supreme Court Extends Progressive
Family Law Doctrine to Recognize Lesbian Co-Parent*

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The LeGaL Foundation
of the LGBT Bar Association
of Greater New York
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ISSN

8755-9021

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Oklahoma Supreme Court Uses “In Loco Parentis” Doctrine to Find Co-Parent Standing for Lesbian Mom

The Oklahoma Supreme Court unanimously ruled that a woman who spent almost ten years raising a child with her former same-sex partner can use the equitable doctrine of “in loco parentis” to achieve standing to sue for custody or visitation of the child. *Ramey v. Sutton*, 2015 OK 79, 2015 WL 7253501 (November 17, 2015). The court’s opinion, written by Justice Joseph M. Watt, drew on the U.S. Supreme Court’s June 26, 2015, marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584, and its 10th Circuit analogue, *Bishop v. Smith*, 760 F.3d 1070, cert. denied, 135 S. Ct. 271 (2014).

participated in the delivery of their newborn,” wrote Justice Watt. “Sutton prepared a baby book for their child identifying both Sutton and Ramey as parents. Sutton gave a card to Ramey congratulating her on becoming a ‘mother’ to their son and that she would be a wonderful mom.” Ramey supported the family during Sutton’s pregnancy and the child’s early months. Sutton returned to work in the winter of 2005. Due to Sutton’s work and sleep schedule, Ramey ended up being the primary caregiver to their son, who always referred to Ramey as “mom” but, according to the opinion, “did not being to refer to Sutton as

maintain parental ties through a legal proceeding seeking custody and visitation rights. Sutton argued that since they had no written parenting agreement and Ramey had no legal relationship to the child, she lacked standing to seek a court order. The district court agreed with Sutton, dismissing the case for lack of a written parenting agreement, and Ramey appealed.

The court framed the questions presented on the appeal as follows: “(1) Whether the district court erred finding that a non-biological parent lacked standing because the same sex couple had not married and had

The ruling is really a transitional one, effectively applying the constitutional rulings of *Bishop* and *Obergefell* retroactively to benefit couples who had children at a time when they were being denied the constitutional right to marry.

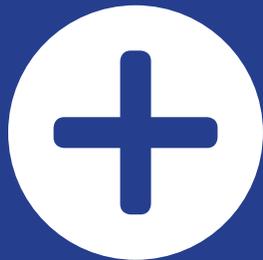
Kimberly Sutton proposed marriage to Charlene Ramey in 2004, according to Justice Watt’s opinion. The women exchanged rings and considered themselves to be life partners, even though at that time same-sex couples could marry nowhere in the United States except Massachusetts and Oklahoma did not recognize such marriages. They decided to have a child together and to raise the child jointly, with Sutton conceiving the child through donor insemination. A male friend of the couple agreed to donate sperm, with the understanding that he would have no parental responsibilities or rights. The baby boy was born on March 22, 2005.

“Ramey attended all ultrasound appointments, shared in related pregnancy costs, and was present and

‘mom’ until the age of five or six. Even today,” continued Watt, “their child will sometimes refer to Sutton, the biological mom, as Kimberly and not as ‘mom.’” Ramey was an active parent, serving as a home room mother at their son’s school, volunteering for school activities, and “built family traditions incorporating their child’s love of the outdoors.” The women held themselves out as a family to friends and relatives, took vacations as a family, and Ramey claimed their son as a “dependent” on her tax return. Even after the women ended their relationship, they continued living together as roommates for many months while continuing to raise the child together.

However, after Ramey moved out, Sutton opposed her attempt to

no written parenting agreement; (2) Whether a biological mother has the right as a parent to legally erase an almost ten year parental relationship that she voluntarily created and fostered with her same sex partner.” The court answered the first question “yes” and the second question “no.” The court characterized this case as “a matter of first impression before this court,” noting that in 2014, in the case of *Eldredge v. Taylor*, 339 P.3d 888, it had upheld the right of a non-biological mother to enforce the terms of a written co-parenting agreement with her former same-sex partner. The district court’s dismissal of Ramey’s case was thus based on a narrow reading of *Eldredge* to require such a written agreement in order to confer standing on a same-sex co-parent.



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Justifying a broader reading of *Eldredge*, the court relied on *Obergefell* and *Bishop*. “Today we broaden *Eldredge*, acknowledging the rights of a non-biological parent in a same sex relationship who has acted in loco parentis where the couple, prior to *Bishop* or *Obergefell*, (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner’s parental role following the birth of the child.”

Thus, the ruling is really a transitional one, effectively applying the constitutional rulings of *Bishop* and *Obergefell* retroactively to benefit couples who had children at a time when they were being denied the constitutional right to marry or to have out-of-state same-sex marriages recognized in Oklahoma. The ruling presumably would not apply to same-sex couples who do not take advantage of the right to marry and have their marriage recognized in Oklahoma, which became effective shortly after the Supreme Court denied review in *Bishop* on October 6, 2014, before having children together. Presumably, same-sex couples who do not marry before having a child may still benefit from the *Eldredge* decision by executing a written co-parenting agreement. For those who had children prior to October 6, 2014, or perhaps prior to the *Obergefell* ruling on June 26, 2015 (the court is not explicit about this), Oklahoma courts will be required to set aside the lack of marital status or of a written parenting agreement, and will instead apply the 3-part test set out in this new ruling.

A finding of co-parent standing will not be automatic, of course, as the application of “in loco parentis” requires the court to find that the parties had planned to have a child together and then held themselves out as a family while raising the child together for some period of time before ending their relationship. The doctrine rests on a finding that the biological parent had intended her partner to be

a co-parent to the child and voluntarily nurtured that parent-child relationship.

The court pointed out that this new case only applies to the issue of standing. Once a trial court determines that a same-sex co-parent has standing to seek custody or visitation, it will then turn to the issue of what is in the best interest of the child, just as it would in a custody and visitation dispute involving divorcing different-sex couples. To drive home this point, three judges joined a separate opinion, concurring in the result, stating: “In child custody cases the Court must determine standing first based on an agreement of the parties. Then and only then is best interest considered to determine custody and visitation.” This refers to the second part of Justice Watt’s 3-part test: intentional family planning to have a child and to co-parent.

The court’s decision is not without precedent in other jurisdictions, where courts have used various equitable doctrines including in “loco parentis” and “equitable estoppel” to establish standing for a same-sex co-parent to seek continued contact with the child he or she was helping to raise. But some states, including New York, have refused to embrace this equitable route. The New York courts still adhere to the now-anachronistic 1991 New York Court of Appeals ruling, *Alison D. v. Virginia M.*, which treated co-parents as “legal strangers” to the child who have no right to seek custody or visitation, although a few lower courts confronted with the realities of family diversity have sought ways to get around that precedent. Although a new case that could finally overturn *Alison D.* has recently been accepted for review by the New York Court of Appeals, for now we have the anomalous situation that the Oklahoma Supreme Court is more progressive on gay family law!

Brady R. Henderson of the ACLU of Oklahoma Foundation and Oklahoma City attorney Rhonda G. Telford Naidu represented Ramey on this appeal. Sutton was represented by Oklahoma City attorney Kacey L. Huckabee. ■

Federal Court Applies Heightened Scrutiny in Transgender Discrimination Claim against NYPD

U.S. District Judge Jed S. Rakoff (S.D.N.Y.) has found that gender identity discrimination claims warrant heightened scrutiny in partially dismissing summary judgment motions against a transgender man who claimed he was mistreated on account of his gender identity by the NYPD upon his arrest following an “Occupy Wall Street” protest. *Adkins v. City of New York*, 2015 WL 7076956, 2015 U.S. Dist. LEXIS 154204 (Nov. 15, 2015).

Adkins was one of many protesters arrested for disorderly conduct in connection with an October 1, 2011, “Occupy Wall Street” protest on the Brooklyn Bridge. After initially detaining him along with other male inmates where neither Adkins nor the other inmates complained of any safety issues, upon learning that he was transgender, the officers ridiculed him, removed him from the cell, and handcuffed him to a rail near the restroom for seven hours while the other male inmates (but not Adkins) were provided with sandwiches.

Adkins sued New York City, former Mayor Michael Bloomberg and several other officials under 42 USC Section 1983, claiming deprivation of federal civil rights, excessive force used against him, denial of equal rights, unreasonable conditions and confinement, failure to intervene to prevent harm, municipal liability, and supervisory liability. He also brought state law claims of false arrest, malicious prosecution and malicious abuse of process, but he later voluntarily dismissed them. Finally, he brought a First Amendment claim which was framed in “contradictory and uncertain terms,” which was later dismissed.

Defendants filed a motion to dismiss the case for failure to state a claim. Judge Rakoff issued a decision partially granting and partially dismissing the motion to dismiss. The judge first stated that to survive a motion to dismiss, a complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”

Judge Rakoff found that Adkins’ excessive force claim failed because while he was handcuffed to a rail for seven hours, he alleged only that he suffered soreness in his arm and shoulder for one week and that injury which was no longer continuing was outweighed by governmental interest in maintaining order and security.

Similarly, with respect to Adkins’ confinement claim, Rakoff found that he failed to establish deprivation “sufficiently serious that he was denied minimal civilized measure of necessities” or that the defendants acted with a “sufficiently culpable state of mind” or “deliberate indifference to inmate health or safety.”

Judge Rakoff held that with respect to Adkins’ Equal Protection claims, he had the burden of proving that he was “treated differently than others similarly situated as a result of intentional or purposeful discrimination,” and “show the disparity in treatment cannot survive the appropriate level of scrutiny.” He held that Adkins’ allegation that the policy initially placed him with male prisoners and later removed him and handcuffed him to a rail without food satisfied the first requirement of alleging differential treatment. Rakoff held that since Adkins alleged this treatment was “pursuant to the NYPD’s custom of subjecting transgendered detainees to special conditions,” his allegations rendered his claims of intentional discrimination “plausible.”

In determining what level of scrutiny applies, Judge Rakoff noted that Defendants argued that “rational basis review,” the lowest level of scrutiny, should be applied, while Adkins argued “intermediate scrutiny” should be applied.

Judge Rakoff held that the 2nd Circuit’s analysis in *Windsor v. United States*, 699 F.3d 169 (2012), which was not explicitly reviewed by the Supreme Court when it affirmed the 2nd Circuit’s decision, set forth a four-factor test in determining whether anti-gay discrimination merited intermediate (or heightened) scrutiny, which when applied to transgender people also

required intermediate scrutiny: that gay people suffered a history of persecution and discrimination; that sexual orientation has no relation to ability to contribute to society; that gay people are a discernible group; and that gay people remain politically weakened.

When applied to transgender people, Judge Rakoff held, they have suffered a history of persecution based upon data indicating that transgender people report “high rates of discrimination in education, employment, housing, and access to healthcare.”

With respect to contribution to society, he held that “the Court is not aware of any data or argument suggesting that a transgender person simply by virtue of transgender status, is any less productive than any other member of society.”

Judge Rakoff found transgender people to be a discernible class because of the various documented troubles they face generally in life, and the “backlash [they face] in everyday life when they are discovered,” such as the treatment Adkins received when police officers “gawked and giggled at him and asked him what he had ‘down there.’”

Finally, Judge Rakoff found that transgender people were a politically powerless group, as that term is used in constitutional analysis. He found that “particularly in comparison to gay people at the time of *Windsor*,” transgender people lack the political strength to protect themselves without the assistance of the courts, noting that transgender persons may not serve openly in the military, and that while there were some openly gay people serving in Congress and as federal judges, the court knew of no openly transgender person in Congress or the federal judiciary.

Finding transgender people to constitute a quasi-suspect class warranting intermediate scrutiny, Judge Rakoff stated that plaintiffs had the burden of proving that removing Adkins from his cell and the treatment he received must be “substantially related to an important governmental interest.”

Defendants had argued that Adkins had no right to be detained with

cellmates of the same gender, to which Judge Rakoff found that in justifying the discriminatory conduct, “whatever form” it took, Defendants must prove it was substantially related to an important governmental interest. They also argued safety concerns, as to which Judge Rakoff found Adkins had alleged “no safety concerns” when he was detained with other male detainees.

Defendants raised the affirmative defense of qualified immunity, claiming their actions were “objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.” Judge Rakoff found that since the arrest happened before *Windsor*, at a time when the Second Circuit had not yet ruled on what protections are accorded to LGBT people under the Fifth and Fourteenth Amendments, individual police officials could not have known their actions could be subject to more than rational basis review, and that it was objectively reasonable for Defendants to conclude that it would not be arbitrary or irrational to hold Adkins separately. Therefore, Judge Rakoff dismissed all claims against individual defendants.

However, the judge held that the defense of qualified immunity was not available to the City of New York, finding that case law allowed suit to be brought against local governing bodies and that qualified immunity was not an available defense, but that to succeed a plaintiff must “adequately allege a policy or pattern of misconduct.” Plaintiff had alleged such, asserting that both eyewitness accounts and internal police documents show that transgender detainees were handcuffed to railings as a matter of regular policy. While the City argued that Adkin had failed to show the existence of “concentrated, fully packed, precisely delineated scenarios,” Judge Rakoff held that plaintiff’s allegations, assumed to be true and without respect to their supporting evidence being admissible, “nudged his claims across the line from conceivable to plausible.”

Accordingly, Judge Rakoff granted summary judgment to individual defendants, but not to New York City, and ordered counsel to contact the court to schedule further proceedings with regard to the remaining claim. – *Bryan C. Johnson*

Michigan Appeals Court Applies Equitable Parent Doctrine in Co-Parent Visitation Case

The Court of Appeals of Michigan has recognized that under the U.S. Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Michigan courts must recognize a same-sex marriage that was performed in Canada in 2007 and thus accord standing to one of the spouses to sue for a divorce, a parentage order, and orders regarding custody, parenting time, and child support, provided the trial court determines that she has met the requirements to be considered an equitable parent. *Stankevich v. Milliron*, 2015 WL 7304483 (Nov. 19, 2015).

motion, finding that Stankevich lacked standing, a conclusion affirmed by the court of appeals on October 17, 2013. Stankevich’s attempt to use the doctrine of “equitable parent,” that the Michigan courts had previously adopted in cases involving de facto fathers who were not the biological fathers of the children they were raising with their wives, was dismissed by the lower courts on the ground that extending any parental recognition to Stankevich would violate the state’s ban on same-sex marriage.

Stankevich appealed to the Michigan Supreme Court. In light of the pending

In effect, the court found that Stankevich is in much the same position as the husband of a woman who gives birth during the marriage to a child who is not the biological offspring of her husband, but who plays a full parental role in raising and caring for the child.

Jennifer Stankevich and Leanne Milliron were married in Canada in July 2007. Stankevich alleges that Milliron was already pregnant through donor insemination and subsequently gave birth to the couple’s child. Stankevich alleges that she was intended to be the co-parent of the child based on an agreement of the parties, and that she participated in raising and caring for the child. The women separated in March 2009, initially agreed to a visitation schedule for Stankevich, but ultimately could not agree. Stankevich then filed suit, alleging her full participation in the care and raising of the child, seeking a legal divorce, a ruling on her parentage, and orders on custody, visitation and child support. The trial court granted Milliron’s summary judgment

marriage equality litigation in Michigan (*DeBoer v. Snyder*), that court put the case on hold until an ultimate resolution of the marriage question. After the Supreme Court issued *Obergefell*, the Michigan Supreme Court remanded the case to the court of appeals for reconsideration.

“Because of the United States Supreme Court’s opinion in *Obergefell*,” wrote the court *per curiam*, “plaintiff has standing under the equitable parent doctrine since Michigan now is required to recognize the parties’ same-sex marriage, and plaintiff’s complaint alleges facts that, if proven, are sufficient to establish equitable parenthood.” In effect, the court found that Stankevich is in much the same position, from a legal standpoint, as the husband of a woman

who gives birth during the marriage to a child who is not the biological offspring of her husband, but who plays a full parental role in raising and caring for the child. The court of appeals had recognized the equitable parenthood doctrine on these sorts of facts in *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987).

“In our previous opinion,” wrote the court, “we concluded that the equitable parent doctrine should not be expanded to include same-sex couples, such as the parties in this case, because Michigan statutory and constitutional provisions precluded recognition of the parties’ same-sex marriage, and *Van [v. Zahorik]*, 460 Mich. 320, 597 N.W.2d 15 (1999)] limited the application of the equitable parent doctrine to the confines of marriage. However, now with *Obergefell*, Michigan is required to recognize the parties’ same-sex marriage.”

“Should it be determined by the trial court that the parties’ proffered marriage was valid pursuant to Canadian, or applicable provincial, domestic relations law and other legal and contractual requirements, plaintiff alleges facts that afford her standing to seek the status of an equitable parent” since the child was born during the course of the Canadian marriage. Indeed, Stankevich alleged that the parties had an agreement “to conceive and raise the child with the attendant parental rights and responsibilities,” that she assisted with the insemination process, was present at the child’s birth, and fully participated in parenting the child until Milliron cut off her contact, sometime after the parties split up. On remand, the trial court will first have to address whether Stankevich has standing for the relief she is seeking, in light of Michigan’s newfound recognition of the marriage (which would, of course, be retroactive recognition), and whether the relief she is seeking should be made available in light of such recognition. If Stankevich establishes standing, her request for custody, visitation and child support would depend on the normal rules of Michigan domestic relations law in a case contested between legal parents. ■

Lesbian Co-Parent Seeks Expedited Supreme Court Review of Alabama Refusal to Recognize Adoption

Attorneys for V.L., the adoptive mother of children born to her former same-sex partner, have asked the U.S. Supreme Court (SCOTUS) to review an erroneous decision by the Alabama Supreme Court to refuse to recognize the adoption that was approved by the Georgia Superior Court, and have also asked SCOTUS to restore her visitation rights while the appeal is pending by suspending the Alabama Supreme Court’s order in the case. The petitions in *V.L. v. E.L.*, No. 15-648, 2015 WL 7272155, were filed on November 16.

V.L., who is represented by the National Center for Lesbian Rights and cooperating attorneys from Jenner & Block LLP (Washington, D.C.), with local counsel Traci Owen Vella and Heather Fann in Birmingham, Alabama, lived with E.L. in a seventeen-year relationship. In May 2000 V.L. changed her last name to E.L.’s last name, and the women decided to have and raise children together. E.L. subsequently gave birth to one child in 2002 and twins in 2004 through donor insemination. The women played equal parental roles in raising the kids. In order to provide more security to their legal relationship, they rented a residence in Atlanta and obtained a legal adoption from the Georgia (Fulton County) Superior Court so that V.L. would be the legal parent of the children. The Georgia judge construed that state’s adoption law to allow second-parent adoptions without terminating the birth mother’s parental rights, as several other Georgia trial courts have also done. So far, there is no Georgia appellate ruling against such adoptions, and the Georgia Supreme Court has not addressed the issue directly.

After the adoption, the women returned to Alabama and resumed living there as a family until the women separated and E.L. eventually cut off V.L.’s contact with the children. V.L. registered the adoption with an Alabama court and filed an action seeking custody or visitation. The Alabama trial and appellate courts concluded that V.L. must be recognized as an adoptive

parent entitled to seek a determination of custody or visitation, with E.L. appealing every step of the way, until she won a reversal from the Alabama Supreme Court on September 18.

The lower Alabama courts correctly applied the Full Faith and Credit Clause (FFCC) of the U.S. Constitution, which requires that the courts of one state accord “full faith and credit” to the judgments issued by courts in other states. More than a century of well-established court precedents provide that courts may not refuse to accord full faith and credit to a sister state court’s ruling because of a disagreement over the merits of that ruling. The limited exception to full faith and credit would be cases where the court that issued the judgment did not have jurisdiction to do so, either because the court was not authorized to decide such cases or because the parties were not properly within the jurisdiction of the court. In this case, the Georgia Superior Court had specifically concluded that it had jurisdiction over the parties and the subject matter of the case. Indeed, Georgia statutes provide that the Superior Court has jurisdiction over all adoption proceedings.

A majority of the Alabama Supreme Court, however, departing from established constitutional precedents, decided based on its own reading of Georgia’s adoption statute that the Georgia law could not properly be construed to allow second-parent adoptions. Even though the Georgia appellate courts have never specifically disapproved such adoptions, and courts of several other states have approved them in the context of similarly-worded adoption statutes, the Alabama court decided that the Georgia Superior Court’s departure from the Alabama Supreme Court’s interpretation of the Georgia adoption statute is a “jurisdictional” fault that justifies refusing to recognize the adoption.

This startling result drew a sharp dissent from a member of the court, who wrote that it “creates a dangerous precedent that calls into question the finality of adoptions in Alabama: Any

irregularity in a probate court's decision in an adoption would now arguably create a defect in that court's subject matter jurisdiction."

Petitioning SCOTUS, V.L. argued that the Alabama Supreme Court's departure from established constitutional precedent, in general contradiction with more than a century of precedent and in direct contradiction of the Denver-based U.S. 10th Circuit Court of Appeals' 2007 ruling, *Finstuen v. Crutcher*, 496 F.3d 1139, requires a resolution of whether state courts are permitted to inquire into the merits of rulings by sister state courts in deciding whether to accord full faith and credit to those judgments, particularly in adoption cases where the result would be to interfere with family relationships that had been established and then legally ratified in completed adoption proceedings. In *Finstuen*, the 10th Circuit invalidated an Oklahoma statute that barred recognition of same-sex couple adoptions, holding that the statute violated the obligation of Oklahoma courts under the full faith and credit clause to recognize such adoption judgments.

Under the rulings of the Alabama trial and intermediate appellate courts V.L. had been enjoying visitation rights with the children on a temporary basis while E.L. pursued her appeal. Shortly after its ruling, the Alabama Supreme Court suspended that visitation. In addition to her petition for review, V.L. filed a petition with SCOTUS requesting a stay of the Alabama Supreme Court order and restoring her visitation rights while this appeal is pending. This is in accord with her argument that she is the legal adoptive parent of those children and thus is entitled to continued contact of some sort unless E.L. can show that she is unfit or poses a danger to the children. Because of the appeals of the recognition rulings in this case, there has not yet been a determination by the Alabama trial court whether it is in the best interest of these children for their adoptive mother to have custody or visitation. By its erroneous decision that V.L. is not a parent with standing to contest these issues, the Alabama Supreme Court has decreed that there be no inquiry into the best interest of the children — an inquiry that should be at the heart of custody and visitation decisions when parents split up. ■

9th Circuit Rejects Gay HIV-Positive Mexican Man's Asylum Claim

Things have progressed so far on the gay rights front in Mexico that it has become quite difficult for a gay Mexican to achieve protection under refugee law in U.S. courts. In *Bringas-Rodriguez v. Lynch*, 2015 U.S. App. LEXIS 20051, 2015 WL 7292592 (9th Cir., Nov. 19, 2015), the petitioner, a gay man from Mexico, alleged that he was sexually abused as a child by family members and a neighbor in Mexico, which led him to flee to the U.S. in 2004. He challenged the Board of Immigration Appeals' decision denying his applications for asylum, withholding of removal and protection under the Convention against Torture (CAT). He also challenged denial of his motion to remand the case to the Immigration Judge "in light of his recent HIV diagnosis."

The court affirmed the BIA's finding that the appellant had failed to show that the Mexican government was unwilling or unable to control those who perpetrated such acts. The Immigration Judge had found that Bringas never reported the abuse to any adult or law enforcement officials, and there was no evidence that Mexican authorities were unwilling to offer protection against such abuse, especially against children. Also, referring to the State Department's more recent country report on Mexico, the IJ noted that despite random incidents, "the country as a whole — and especially Mexico City — has made significant advances with respect to gay people." Thus, if removed to Mexico, Bringas could settle in Mexico City if he wanted to avoid future abuse by family members in his home community in Veracruz. The BIA found that Bringas failed to establish past persecution because of his sexual orientation or a well-founded fear of future persecution on that basis.

The BIA stated, citing a 2011 9th Circuit opinion, *Castro-Martinez v. Holder*, 674 F.3d 1073, that there is no "widespread brutality against homosexuals or criminalization of homosexual conduct in Mexico," and that the country had taken numerous steps for gay rights in recent years, including substantial progress on

marriage equality and prosecuting human rights violations against gays. Furthermore, the BIA had rejected Bringas' request to remand in light of his HIV diagnosis by stating that Bringas failed to provide "any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changes the outcome of this case." In a lengthy discussion, Circuit Judge Jay Bybee endorsed the BIA's position.

Circuit Judge William Fletcher dissented, citing "growing doubts" about the 2011 9th Circuit opinion in which he had joined. He found that Bringas had shown sufficient evidence of past persecution because he was gay, and pointed out that Bringas was aware of stories about anti-gay abuse by Mexican police, causing him to refrain from reporting his problems to authorities. He noted earlier cases in which the 9th Circuit had granted asylum claims by gay Mexicans, and pointed out that since Bringas left Mexico in 2004, the court should be looking at the conditions in the country when he left, not present conditions, in determining whether he had a reasonable fear of persecution. He noted that country reports show continued anti-gay discrimination by Mexican authorities, and found that the some of the statements in the IJ's decision were outright incorrect. He also noted reports of increased violence against LGBT people in Mexico, and recent cases holding that there was a continuing failure by the Mexican government to prosecute perpetrators of "homophobic hate crimes throughout Mexico." He criticized the court and the BIA for requiring an unduly high degree of specificity from asylum claimants in their factual allegations, especially in cases where the applicants had fled Mexico at a young age and were unlikely to have access to the necessary information to meet that standard.

The appellant was represented by law students from University of California at Irvine School of Law (Appellate Litigation Clinic), as well as pro bono attorney Mary-Christine Sungaila of Snell & Wilmer LLP, Costa Mesa. ■

Two Mississippi Supreme Court Justices Dissent from Routine Order Acknowledging Same-Sex Couple May Now Divorce

Over the pontifications of two justices who believe the United States Supreme Court overstepped its bounds earlier this year when it held the Fourteenth Amendment requires all states to license and recognize same-sex marriages, the Mississippi Supreme Court allowed a same-sex couple's divorce to proceed via an order on November 5 in *Czekala-Chatham v. State of Mississippi ex rel. Hood*, No. 2014-CA-00008-SCT (Nov. 5, 2015). Seven of the nine justices agreed that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), mandated this outcome, although two disagreed with the procedural course of simply issuing an order without any analysis. The gist of the two dissenting opinions, however, was that *Obergefell* is so far removed from any constitutional mooring that the lower courts can ignore it.

Lauren Beth Czekala-Chatham and Dana Ann Melancon traveled to San Francisco to get married in 2008 in the brief window period before Proposition 8 passed, but the relationship soured after returning to Mississippi, leading them to separate in 2010. Czekala-Chatham filed for divorce in 2013 in the Chancery Court of DeSoto County. Melancon opposed the divorce action, arguing that because Mississippi could not recognize their marriage pursuant to a 1997 statute and a 2004 constitutional amendment, the court could not grant a divorce. Czekala-Chatham then moved to turn the case into a challenge to Mississippi's refusal to recognize the marriage, and the state, represented by Democratic Attorney General Jim Hood, intervened to defend its same-sex marriage ban. The women then entered an agreement on settlement of property rights, the motion to dismiss was withdrawn, and both women requested the court to proceed to grant the divorce on grounds of irreconcilable differences.

On December 6, 2013, DeSoto County Chancery Judge Mitchell Lundy rejected their arguments and dismissed the action for lack of subject-matter jurisdiction. Czekala-Chatham appealed to the Mississippi Supreme Court, which heard argument in January 2015 and later requested supplemental briefing, but sat on the case for the next few months while *Obergefell* was pending. After the United States Supreme Court handed down *Obergefell* on June 26, both the State of Mississippi and Czekala-Chatham's lawyer filed motions for entry of judgment in the case in July.

Five of the Mississippi Supreme Court justices signed the simple order

why *Obergefell* could be ignored, relying chiefly on the *Obergefell* dissents delivered by Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, and both of them supported the other one in turn.

Justice Dickinson proposed that *Obergefell* is the kind of decision "that is in no way a constitutional interpretation, but rather is a legislative act by a judicial body that is—as Chief Justice Roberts put it—a decision that 'has no basis in the Constitution or [United States Supreme Court] precedent.'" He offered as the worst possible example of such a situation as if the United States Supreme Court

Justices Jess Dickinson and Josiah Coleman penned separate dissents setting forth their views on why *Obergefell* could be ignored, relying chiefly on the *Obergefell* dissents.

in support of Czekala-Chatham and Melancon getting a divorce. Chief Justice William Waller and Justices Michael Randolph, Ann Lamar, Randy Pierce, and David Chandler ordered a short entry of judgment in Czekala-Chatham's favor, reversing the previous trial court ruling that said the women could not get a divorce.

Four justices objected to the order, however. Justice Leslie King, joined by Justice James Kitchens, made clear her view that the occasion called for a full published opinion, regardless of how straightforward the analysis and outcome would now be post-*Obergefell*. As several Louisiana Supreme Court justices similarly suggested in July, Justices Jess Dickinson and Josiah Coleman, meanwhile, penned separate dissents setting forth their views on

"concluded that gun violence impedes the flow of interstate commerce, leading it to interpret the Commerce Clause as granting the Congress the power to confiscate all privately owned guns." As the principal support for his view, he individually named thirty-one conservative law professors and legal scholars that signed the "Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*," an open letter posted online in October. In his view, the majority of the Mississippi Supreme Court should not have succumbed to "judicial tyranny" and, instead, should have taken this opportunity to "analyze the troubling points raised by the *Obergefell* dissenters."

In the other dissenting statement, Justice Coleman stuck a similar

tone, finding *Obergefell* to have created a situation where we “must ask ourselves what, if anything, it means.” In that vein, he harkened back to *Cooper v. Aaron*, 358 U.S. 1 (1958), the unanimous United States Supreme Court decision making clear that its constitutional rulings are binding on the states. To get around it, he posited that *Obergefell* may not really be the law of the land because “as all four dissenters seem to agree, the *Obergefell* decision had nothing to do with interpreting the Constitution.” Offering other examples of possible outrageous rulings, he suggests as similarly startling “[a] decision . . . holding . . . that substantive due process requires each household to own a giraffe” or “an opinion and mandate that hold the Constitution requires all members of fill-in-the-blank ethnic group to be removed to work camps.” Before keeping that latter possibility on a future list of ridiculous hypotheticals, he might want to read *Korematsu v. United States*, 323 U.S. 214 (1944).

Justice Pierce, joined by Justice Chandler, wrote a separate statement in support of the court’s order, insinuating that Justices Dickinson and Coleman were violating their oaths of office by calling for defiance of the United States Supreme Court.

This case was not the only development in Mississippi this past month involving turning the page on its anti-gay laws. Roberta Kaplan, formerly the lead counsel in both *United States v. Windsor* and the Mississippi federal court marriage challenge (*Campaign for Southern Equality v. Bryant*), was back in Mississippi federal court for a hearing in the case of *Campaign for Southern Equality v. Mississippi Department of Human Services*. She filed this latest case in August to overturn Mississippi’s statutory ban on gay couples adopting children. – *Matthew Skinner*

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

Federal Judge Finds No Jury Issue on Prisoner’s Ten Month Suspension of HIV Therapy or 2½ Year Delay Starting Hepatitis-C Treatment

United States District Judge Victor A. Bolden entered summary judgment against represented prisoner plaintiff David S.L. Parks, whose HIV medication was interrupted for ten months and who waited 2½ years to start treatment for Hepatitis-C, in *Parks v. Blanchette*, 2015 WL 6755208 (D. Conn., November 4, 2015).

Parks sued Connecticut correctional physician executive Edward A. Blanchette, who was also his treating physician during much of this period and serves through the University of Connecticut on the monitoring panel for the federal court class judgment regarding Connecticut HIV+ prisoners under *Doe v. Meacham*, Civil. No. H88-562 (D. Conn. 1990). Parks also sued two wardens, primarily for claims arising from numerous transfers allegedly in retaliation for his complaints and in violation of his rights to nondiscrimination and accommodation under the Americans with Disabilities and Rehabilitation Acts, on which Judge Bolden also granted summary judgment against him – discussion of which is beyond the scope of this article. In an 86-page slip opinion that reads like a decision after a bench trial, Judge Bolden found that Parks presented no jury issue on any claim.

Parks alleged that Blanchette’s suspension of his HIV anti-retroviral treatment caused his CD4 count to drop from 779 to 567 and his viral load to spike from 100 to 93,500(!), as he experienced thrush, diarrhea, anxiety, and night sweats. He also claimed that he waited for over two years for approval of treatment of his Hepatitis-C (and another four months for initiation of treatment once approved), causing liver damage, pain, and anxiety. Defendant Blanchette averred that the HIV medication was discontinued for patient non-compliance without significant

harmful effect and that Parks was not a candidate for Hepatitis-C treatment earlier than its initiation because of mental health co-morbidity.

Judge Bolden applied the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). He found the delays/denials of treatment for HIV and Hepatitis-C were both sufficiently serious to present a jury question on the objective component of the claim (serious risk), but he found insufficient evidence to warrant a trial under the subjective prong (deliberate indifference to the risk), under *Salahuddin v. Goord*, 467 F.3d 263, 279-81 (2d Cir. 2006).

On the suspension of HIV treatment, Judge Bolden applied *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003), which distinguished between denials of care and interruptions in care and approved a jury instruction that allowed a defense verdict if the interruption had no significant medical consequences. *Smith*’s interruptions were for a total of twelve days (five + seven), not ten months; and no one in *Smith* questioned that the case should have gone to the jury. Blanchette argued that suspension of HIV medication was a difference in medical judgment that was, at worst, merely nonactionable negligence. Looking at the expert submissions, Judge Bolden found that Parks had “failed to produce a genuine issue of material fact that Dr. Blanchette knew of and disregarded an excessive risk to his health” because there was evidence that Blanchette had “investigated Mr. Parks’s complaints about some of his physical symptoms.” Judge Bolden found that the evidence that another doctor reinstated the medication did not present a jury issue on whether standards of practice were deliberately ignored by Dr. Blanchette, since it does “not indicate” that the second

doctor “disagreed with Dr. Blanchette’s reasoning or course of treatment.” Finally, Judge Bolden rejected Parks’ expert’s opinion that, if medication were to be denied because of patient non-compliance, Blanchette should have first discussed the issue with Parks. He found this opinion “conclusory” because no case decision established that such failure was deliberate indifference “as a matter of law.” This is backwards, since Parks was the non-moving party, and he did not have to show entitlement to relief as a matter of law.

As to Hepatitis-C, Blanchette was a voting member of the utilization review committee that found Parks was not a candidate for Interferon because of his neuropsychiatric condition. Judge Bolden found that Parks failed to establish a jury question on subjective deliberate indifference to risk, under *Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005), which actually reversed a summary judgment for defendant corrections officials on the issue of denial of Interferon for Hepatitis-C. Parks had argued that Blanchette’s mental health reasons were a “post hoc rationalization” created after Parks contacted human rights organizations about the denial. Judge Bolden found “no evidence” of same, noting that Blanchette had prior chart notes about mental health concerns – despite the rule that using prior consistent statements to rebut charges of fabrication almost always presents a jury question on credibility.

Judge Bolden also found “no evidence” that Blanchette unduly influenced the utilization review decision despite evidence of his anger towards Parks (and charges of arranging his retaliatory transfer), ruling that “temporal proximity alone” did not present a jury question. In any event, even if Dr. Blanchette denied Hepatitis-C treatment for retaliatory reasons, Parks would have been denied anyway for mental health reasons, defeating the claim under *Mount Healthy School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), since there were also valid reasons for the action. (Mount Healthy was a case tried to judgment, and the presence of

a “mixed motive” is also usually a jury question.)

Judge Bolden found “ample evidence” that Parks “suffered from some kind of mental health condition,” and his expert failed to buttress “with external sources” his opinion that withholding Hepatitis-C treatment for conditions other than depression or suicidal ideation substantially deviated from accepted practice. Judge Bolden found that Blanchette was “evaluating Mr. Parks carefully” and wrote: “Because Dr. Blanchette exercised his medical judgment in deciding to delay the administration of Interferon and that judgment was not entirely arbitrary,” summary judgment was appropriate.

Judge Bolden distinguished *Johnson’s* reversal of summary

of *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

This decision is noteworthy for its painstaking review of factual submissions at summary judgment, as well as its seeming conversion of 8th Amendment factual and expert disputes into questions of law in a case involving protracted delays and denials in known treatment for a complex patient. It is reminiscent of the challenge to denial of sex reassignment surgery to the transgender plaintiff in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. December 16, 2014), reported in *Law Notes* (January 2015, at pages 3-4). (At least Kosilek got a trial.) In this writer’s view, although the stars may not have been in alignment for Parks to win before a jury, Judge Bolden’s exhaustive attempt

This decision is noteworthy for its painstaking review of factual submissions at summary judgment, as well as its seeming conversion of 8th Amendment factual and expert disputes into questions of law in a case involving protracted delays and denials in known treatment for a complex patient.

judgment by noting that here there was no unanimity of recommendation among treating providers about providing the Hepatitis-C treatment (despite Connecticut’s taking such decisions from treating providers and referring them to committee) and no rigid application of protocols to deny treatment. He also wrote, in apparent disregard of feuding expert declarations, that there was “no conflict” as to whether denial of Interferon was medically justifiable. Judge Bolden found that Blanchette was not “personally involved” in the delay of Hepatitis-C treatment after Parks was approved for Interferon, since he was no longer a treating provider and Parks did not show that he knew there was a delay in implementation under the standards

to align the stars himself usurped the jury’s role and misapplied summary judgment standards.

The opinion notes the court’s appreciation for the advocacy of Parks’ appointed counsel throughout the litigation. He was represented by the Law Office of Andrew O’Toole, LLC, Hartford, which self-identifies as a “boutique” law firm specializing in business litigation, with a *pro bono* commitment. – *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.

7th Circuit Rules Chicago Sheriff Violated First Amendment Rights of Backpage.com by Pressuring Credit Card Companies

Cook County, Illinois, Sheriff Thomas J. Dart violated the First Amendment rights of Backpage.com when he sent a letter to the executives of MasterCard and Visa pressuring them to refrain from processing credit card transactions between Backpage and its advertisers, ruled the 7th Circuit on November 30 in a sweeping free speech opinion by Circuit Judge Richard Posner. *Backpage.com, LLC v. Dart*, 2015 U.S. App. LEXIS 20728, 2015 WL 7717221.

Wrote Posner, “The Sheriff of Cook County, Tom Dart, has embarked on a campaign intended to crush Backpage’s

adult categories, whether or not the jobs are sexual – not every employee of a brothel is a sex worker.”

District Judge John J. Tharp, Jr., had denied Backpage’s motion for a preliminary injunction against Sheriff Dart, reasoning that he was just exercising his own free speech rights by writing to Visa and MasterCard to express his disgust with the sexually-oriented advertising and alluding to the credit card companies’ potential liability under a federal money-laundering statute.

To Posner and the other members of the panel (Circuit Judges Ripple and

with Craigslist, but was rebuffed by the district court in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009). “Craigslist, perhaps anticipating Dart’s campaign against Backpage, shut down its adult section the following year,” Posner observed, “though adult ads can be found elsewhere on its website. The suit against Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers. The analogy is to killing a person by cutting off his oxygen supply rather than by shooting him. Still, if all the sheriff were doing to crush Backpage was done in his capacity as a private citizen rather than as a government official (and a powerful government official at that), he would be within his rights. But he is using the power of his office to threaten legal sanctions against the credit-card companies for facilitating future speech, and by doing so he is violating the First Amendment unless there is *no* constitutionally protected speech in the ads on Backpage’s website – and no one is claiming that.”

“The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands,” Posner asserted. He picked apart Dart’s letter in detail, concluding that it was not a mere expression of Dart’s opinion, but rather was “designed to compel the credit card companies to act by inserting Dart into the discussion; he’ll be chatting them up.” The credit card companies certainly felt threatened; shortly after receiving the letter, both of them cut off Backpage and informed Dart of their actions, which he hailed at a press conference, with a press release claiming credit for their actions. Backpage was forced to make its ads free, forfeiting a major source of revenue, which led to this lawsuit.

Posner pointed out that a letter like

“While he has a First Amendment right to express his views about Backpage, a public official who tries to shut down an avenue of expression of ideas and opinions through ‘actual or threatened imposition of government power or sanction’ is violating the First Amendment.”

adult section – crush Backpage period, it seems – by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage, since the ads might be for illegal sex-related products or services, such as prostitution. Visa and MasterCard bowed to pressure from Sheriff Dart and others by refusing to process transactions in which their credit cards are used to purchase *any* ads on Backpage, even those that advertise indisputably legal services.”

Dart’s ire is specifically aimed at the “adult” section of Backpage.com, which is “subdivided into escorts, body rubs, strippers and strip clubs, dom[ination] and fetish, ts (transsexual escorts), male escorts, phone [sex], and adult jobs (jobs related to services offered in other

Sykes), Dart was doing more than just expressing a personal opinion. “While he has a First Amendment right to express his views about Backpage,” wrote Posner, “a public official who tries to shut down an avenue of expression of ideas and opinions through ‘actual or threatened imposition of government power or sanction’ is violating the First Amendment,” citing *American Family Association, Inc. v. San Francisco*, 277 F.3d 1114 (9th Circ. 2002).

The 7th Circuit panel saw through Dart’s carefully-worded letter to perceive the implicit threat of a boycott and possible prosecution. Posner pointed out that if Backpage was engaging in any unlawful activity, Dart could prosecute the organization directly. Dart had attempted to do that

Dart's emanating from a private citizen "would be more likely to be discarded or filed away than to be acted on," noting that the companies had received numerous such letters from private citizens in the past objecting to their facilitating operation of websites such as Backpage and Craigslist.

The court concluded that the credit card companies "were victims of government coercion aimed at shutting up or shutting down Backpage's adult section (more likely aimed at bankrupting Backpage—lest the ads that the sheriff doesn't like simply migrate to other sections of the website), when it is unclear that Backpage is engaged in illegal activity, and if it is not then the credit card companies cannot be accomplices and should not be threatened by the sheriff and his staff."

Posner rejected Dart's argument that most of the sexually-related advertising on Backpage is illegal. "Fetishism? Phone sex? Performances by striptease artists? (Vulgar is not violent.) One ad in the category 'dom & fetish' is for the services of a 'professional dominatrix'—a woman who is paid to whip or otherwise humiliate a customer in order to arouse him sexually. It's not obvious that such conduct endangers women or children or violates any laws, including laws against prostitution," wrote Posner. What is delightful about that paragraph, actually, is Posner's citations to several on-line reference sources spelling out the activities of professional dominatrices. Indeed, the entire opinion is a delight to read, as Posner's indignation with the sheriff's abuse of power shines through the writing. The opinion is available free on the 7th Circuit's website.

Backpage.com is represented by James C. Grant of Davis Wright Tremaine (Seattle) and Robert Corn-Revere and Ronald G. London of the same firm's D.C. office. The court received amicus briefs from Ilya Shapiro on behalf of the Cato Institute, Reason Foundation, Dkt Liberty Project, and Wayne Giampietro on behalf of the Center for Democracy & Technology, the Electronic Frontier Foundation, and the Association of Alternative Newmedia. ■

Federal Court Refuses to Dismiss Challenge to Michigan's Restrictive Policy on Driver License Gender Changes

U.S. District Judge Nancy G. Edmunds held in *Love v. Johnson*, 2015 U.S. Dist. LEXIS 154338, 2015 WL 7180471 (E.D. Mich., November 16, 2015), that a group of transgender individuals' civil rights lawsuit against the Michigan Secretary of State, seeking a declaration that the Michigan state department's policy for changing the sex on a state-issued ID card is unconstitutional, survived Defendant's motion to dismiss.

that a person "has had appropriate clinical treatment for gender transition" in order to issue a new passport showing the individual's appropriate gender.

State laws differ as to how an individual can amend their gender on a birth certificate. Under Michigan law, Plaintiffs would be required to undergo sex-reassignment surgery to procure an amended birth certificate. Further, two of the named Plaintiffs were unable to obtain an accurate Michigan driver's

The driving force behind the Plaintiffs' complaint is that having to carry state I.D. that mislabels their gender subjects them to harassment, embarrassment, and psychological injury by labeling them by the wrong sex.

In 2011, Michigan Secretary of State Ruth Johnson, the named Defendant, implemented a new policy for "changing sex" on a state ID, holding that an applicant was required to provide a certified birth certificate showing the sex of the applicant to make a change to a state ID, no longer accepting a U.S. passport as proof of a sex change. As a result, transgender individuals in Michigan were forced to procure an amended birth certificate in order to obtain a new state ID, thereby "placing onerous and in some cases, insurmountable obstacles to prevent transgender persons from correcting the gender on driver's licenses and state IDs" because it is a much more accessible policy to alter one's federal passport. The U.S. Department of State only requires a doctor's certification

license because the state in which they were born did not allow them to amend the gender on their birth certificates. Plaintiffs therefore claimed that these obstacles created various subclasses solely based on an individual's state of birth.

Further, Plaintiffs claimed that the policy required them to reveal "their transgender status, their transition, and/or medical condition to all who see their licenses, including complete strangers" and the forced disclosure of their status places them at great risk of bodily injury. The driving force behind the Plaintiffs' complaint is that having to carry state I.D. that mislabels their gender subjects them to harassment, embarrassment, and psychological injury by labeling them by the wrong sex. Based on these disclosures,

Plaintiffs sought a declaration that the Policy was unconstitutional on the basis that it impermissibly interfered with their right to free speech, substantive due process, and equal protection of the law. Also, Plaintiffs alleged that the Policy implicated their right to travel and their autonomy in medical decision-making.

Plaintiffs claimed that the policy violated their right to privacy under the Due Process Clause of the Fourteenth Amendment because it forced them to reveal their transgender status to complete strangers. The court recognized that two types interests have been identified as protected by the right to privacy, rooted in substantive due process: the interest in independence in making certain kinds

of physical injury, and endangering their personal security and bodily integrity.

The Defendant's contrary argument relied on the contrast between cases in the Sixth Circuit to the current one where precedent was set, according to Defendant, on a "very real threat" to bodily harm in such a case where it was a violent gang against an undercover officer who testified against them. (*Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998)). The court was not persuaded by this argument, because *Kallstrom* unambiguously identified the right to personal security and bodily integrity "from a perceived likely threat." The court found that the Plaintiffs offered a plethora of evidence which, accepted

of several well-documented studies, maintain that there is a great deal of animosity towards the transgender community" and the court found no reason to doubt that where disclosure of this highly intimate information may fall into the hands of persons harboring such negative feelings, the Policy creates a very real threat to Plaintiffs' personal security and bodily integrity.

The Defendant "vaguely" offered two purported state interests — albeit not in the context of a fundamental right, since Defendant was arguing that no fundamental right was at stake in this case — in support of the Policy: (1) maintaining accurate state identification documents to promote effective law enforcement and, (2) ensuring that the information on the license is consistent with other state records describing the individual. The court stated that the Policy bore little, if any, connection to the Defendant's stated interests, and even if it did, as Plaintiffs pointed out, "because of the policy, the sex listed on their licenses fails to match their appearance and sex associated with their names" so in essence, the policy undermines the Defendant's interests in accurately identifying Plaintiffs to "promote law enforcement."

The court concluded by stating, "Finally, the Court need not spill a considerable amount of ink on the narrow tailoring requirement," recognizing that at least 25 states do not require what Michigan does to change gender on one's license. Consequently, the Court stated, it "...seriously doubts that these states have any less interest in ensuring an accurate record keeping system." Thus, the Defendant's motion to dismiss was denied and the case may be ripe for a quick summary judgment motion by the Plaintiffs, who are represented by the ACLU Fund of Michigan, the ACLU Foundation of Illinois, and cooperating attorneys from the Chicago office of Proskauer Rose, LLP. — *Anthony Sears*

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

The court found that the Plaintiffs offered a plethora of evidence which suggested that the policy posed a real threat to their personal security and bodily integrity.

of important decisions and the interest in avoiding disclosure of personal matters. See *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008), in which the Sixth Circuit describes the later as the right to "informational privacy." A plaintiff alleging a violation of her right to informational privacy must demonstrate that the interest at stake related to a "fundamental liberty interest."

The Sixth Circuit recognized an informational-privacy interest in only two instances: where the release of personal information would lead to bodily harm or where the information released was of a sexual, personal, or humiliating nature. According to the Plaintiffs, because the Policy requires them to carry an ID with a sex that conflicts with their lived sex, the Defendant forces them to reveal their transgender status to complete strangers, placing them at serious risk

as true for purposes of deciding the motion to dismiss, suggested that the policy posed a real threat to their personal security and bodily integrity. The court stated, "In addition to general statistics regarding the high incidence of hate crimes among transgender individuals . . . when their transgender status is revealed, Plaintiffs point to first-hand experience of harassing conduct that transgender persons often live through when forced to produce an ID document that fails to match their lived gender." The court found that those allegations cut at the very essence of personhood protected under the substantive component of the Due Process Clause.

The Sixth Circuit has also found in the past that transgender individuals are among those who possess a constitutional right to maintain medical confidentiality. "Plaintiffs, relying on their own experiences and the findings

CIVIL LITIGATION

U.S. BOARD OF VETERANS APPEALS

– The Board of Veterans Appeals has ruled that the same-sex spouse of a Veteran, married after completing his military service, meets the criteria for compensation for a dependent spouse. [*Title Redacted by Agency*], Bd. Vet. App. 1539940, 2015 WL 6941094 (Decision Date: 9/17/15; Archive Date: 10/2/15). Both the veteran and his spouse are residents of California. The veteran served from 1981 to 2002. The men were married in California in 2008, during the period between the California Supreme Court’s marriage equality decision and the vote to adopt Proposition 8. The veteran then applied for eligibility for additional compensation for a dependent spouse. The Regional Office in Reno, Nevada, denied the application, and the veteran appealed. Under the relevant statute, wrote the Board, a spouse is defined as “a person of the opposite sex whose marriage is recognized for VA purposes,” and a recognized marriage is one that is valid under the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued. “The Board notes that on June 26, 2013, the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA), which limited the definition of marriage for purposes of federal benefits to spouses of the opposite sex, was unconstitutional. . . . These invalid provisions are substantively identical to the provisions defining spouse for VA purposes.” As the claims file reflected that the men were California residents at the time of the marriage and have remained so throughout all the relevant time period, and California has recognized the marriage throughout that period, the Board granted the appeal, granting the claim for additional compensation for a dependent spouse. This is consistent with the position taken by the Department of Veterans

Affairs after the Supreme Court decided *Windsor* and *Obergefell*. The opinion gives no reason why the Board took so long after the *Windsor* decision to render this ruling on the appeal, or why the title of the ruling was redacted by the agency.

6TH CIRCUIT COURT OF APPEALS

– On November 5, a 6th Circuit panel consisting of Judges Keith, Rogers and Donald issued a brief order in *Miller v. Davis*, Nos. 15-5880/5961/5978, the pending appeals by Rowan County, Kentucky, Clerk Kim Davis from various orders and rulings issued by District Judge David Bunning. After the Supreme Court ruled in favor of marriage equality in *Obergefell v. Hodges*, a case that directly decided that Kentucky’s ban on same-sex marriage was unconstitutional, Davis instituted a policy in her office of issuing no marriage licenses. As she explained, her religious beliefs justified her refusal to issue licenses to same-sex couples, and she was taking her office out of the marriage license business so as not to be accused of discriminating by issuing licenses to different sex couples while refusing them to same-sex couples. Two couples sued, and Judge Bunning issued a preliminary injunction on August 12, requiring Davis to issue licenses to the plaintiff couples; Davis sought a stay pending appeal which the 6th Circuit denied on August 28. Meanwhile, plaintiffs secured from Bunning a modification of his preliminary injunction to apply to license applications from all qualified couples, on September 3. Davis’s defiance of both orders landed her in jail for five days for contempt, while one of her deputy clerks began issuing licenses. Davis has appealed everything to the 6th Circuit, and she sought a stay of the modified preliminary injunction. In this order, the court denied Davis’s request. Davis had argued that it was improper for

Judge Bunning to have modified his original preliminary injunction – which had ordered that marriage licenses be issued to the two plaintiff couples in the case – to expand it to all qualified marriage license applicants, at a time when Davis’s appeal was pending before the 6th Circuit. Rejecting this argument, the panel cited Fed. R. Civ. Pro. 62(c), which provides that while an appeal from a ruling on injunctive relief is pending “the court may suspend, modify, restore, or grant an injunction.” So there, Liberty Counsel. Evidently Davis’s attorneys have difficult construing plain language from the Federal Rules of Civil Procedure.

9TH CIRCUIT COURT OF APPEALS

– In *Smbatyan v. Lynch*, 2015 U.S. App. LEXIS 19778, 2015 WL 7074811 (Nov. 13, 2015), the court rejected a petition by a man from Armenia whose motion to reopen his case had been denied by the Board of Immigration Appeals. The plaintiff at his removal hearing submitted “substantial evidence of violent anti-gay sentiment in Armenia,” wrote the court. “Given this, the B.I.A. did not abuse its discretion in finding that a single article that stated that hostilities towards gay men had ‘increased’ did not show that conditions in Armenia had changed since the removal hearing.” However, it seems that Smbatyan’s problem had primarily been one of credibility. Even if he had shown that it was quite dangerous for gay people to be in Armenia, the court said that such evidence was not “material when Smbatyan was denied relief based on an adverse credibility determination that would be unaffected by changed conditions in Armenia.” Smbatyan was criticized by the court for waiting six years before moving to reopen the hearing or to raise ineffective assistance of counsel claims in support of his motion. The brief opinion does not even hint about what the credibility problems were.

CIVIL LITIGATION

ARKANSAS – The *Arkansas Democrat Gazette* (Little Rock) reported on November 7 that Washington County Circuit Judge Doug Martin denied a request by opponents of the Fayetteville Uniform Civil Rights Protection Ordinance to issue an injunction staying application of the law pending the outcome of their lawsuit challenging its validity. The opponents argue that a state statute preempts the city from legislating to protect LGBT people from discrimination, because there is no such protection under state law. Martin ruled that the Protect Fayetteville Ballot Question Committee had failed to show that the ordinance would cause irreparable harm if it was enforced or that they had a reasonable probability of prevailing on the merits in their lawsuit. The *Democrat Gazette* reported on November 24 that Arkansas Attorney General Leslie Rutledge filed a motion on November 23 to intervene on behalf of the state in the lawsuit challenging the ordinance, since the defenders of the measure had challenged the constitutionality of the Arkansas Intrastate Commerce Improvement Act, the euphemistically named statute that purports to bar localities from banning forms of discrimination that are allowed under state law.

ARKANSAS – On November 23, Pulaski County Circuit Judge Tim Fox ruled from the bench that the Department of Health was required to amend the birth certificates of three children born to same-sex families to properly show both of their parents. The parents said that a delay in getting appropriate birth certificates would directly harm them by making it difficult to obtain insurance to cover the infants. On November 24, the Department asked Fox to stay his order, claiming it could not go into effect until it was put into writing. Fox had ordered that the certificates be issued without waiting for his written opinion, to follow, because of potential

harm to the interests of the children. The Health Department had insisted that a non-birthing same-sex spouse get a court order to be listed on a birth certificate, but the plaintiffs argued that this was discriminatory since heterosexual couples are not put through such a requirement. They argued that the parental presumption concerning the spouse of a woman who gives birth should apply. By the end of the month there was no report of a stay having been issued. *Associated Press*, Nov. 23 & 24.

CALIFORNIA – The California 3rd District Court of Appeal affirmed a judgment by the Sacramento Superior Court that an AIDS service provider was not liable to an HIV-positive man for failing to prevent him from developing HIV infection. *Alonzo v. Center for AIDS Research and Services – Sacramento (CARES)*, 2015 WL 7012514, 2015 Cal. App. Unpub. LEXIS 8196 (Nov. 12, 2015). Justice Duarte was critical of the plaintiff, observing that “the bulk of this appeal rests on theories that were not pleaded in the complaint or on facts as to which objections were sustained by evidentiary rulings that are not properly challenged on appeal.” The facts of the case are difficult to sort out from the opinion, but it appears that Alonzo claims that the clinic’s failure to provide him with PREP treatment was responsible for his developing HIV. Alonzo’s factual allegations are difficult to reconcile as he testified differently at different times as to the chronology of events, but it came down to whether Alonzo was within the 72-hour effective post-exposure treatment period when he showed up at the clinic early on a Monday morning, his testimony varying as to the last time he had sex. Ultimately the court concluded that Alonzo failed to show that he was within the treatment window when he showed up at the clinic, and had failed to present expert testimony to rebut the testimony of the clinic’s expert as to

the appropriate standard of care. The court also rejected Alonzo’s allegation that the clinic breached a duty to him to warn him that his sexual partner was HIV positive, noting particularly expert testimony for the clinic that “it would breach the duty of care to disclose that Alonzo had been exposed to HIV.” Alonzo raised a discrimination claim on appeal, which the court rejected as not having been asserted in his complaint. The opinion does not state that Alonzo was representing himself *pro se*, but does not list counsel for either party.

CONNECTICUT – In *Doe v. Sotil Tree Service*, 2015 WL 6684889 (Ct. Super. Ct., Oct. 15, 2015), the court rejected the plaintiff’s claim that the employer violated his privacy rights under Gen. Stat. Sec. 19a-590 by revealing that plaintiff has AIDS to co-workers. The court found that the plaintiff had spoken about his medical problems with family members and co-workers, that the employer credibly denied the allegation that he was told about plaintiff’s illness “in confidence,” and that the employer had actually been very supportive of the plaintiff, driving him to the hospital and installing a small refrigerator in the plaintiff’s rented room on the company’s premises so that he would not have to use the communal refrigerator for his medications.

FLORIDA – U.S. District Judge James S. Moody Jr. granted summary judgment to the employer in an Americans with Disabilities Act (ADA) case brought *pro se* by a gay HIV-positive man who had resigned a position as Vice President-Premier Relationship Manager at the Miami Beach Branch of HSBC Bank. *Rodriguez v. HSBC Bank USA, N.A.*, 2015 U.S. Dist. LEXIS 157883, 2015 WL 7429273 (M.D. Fla., Nov. 23, 2015). Plaintiff’s complaint, first filed in state court and removed to federal court by the defendant, failed to specify what

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statutes were violated, but defendant did not file a motion to dismiss, instead going through discovery and filing a motion for summary judgment. As the complaint alleged generally that the plaintiff suffered discrimination because of his HIV-status, Judge Moody construed the complaint as asserting claims under the ADA and parallel provisions of Florida's anti-discrimination statute of disparate treatment, hostile work environment, and constructive discharge. In a possibly controversial move, Judge Moody concluded that despite his HIV-status Rodriguez failed the first step of a disability discrimination claim, finding that Rodriguez was not a "individual with a disability" within the meaning of the two statutes. While acknowledging regulatory guidance by the Equal Employment Opportunity Commission suggesting that a person with HIV would presumptively qualify as a person with a disability, Moody observed that Rodriguez's factual allegations fell short of establishing that he was ever substantially limited in a major life activity as a result of his HIV-status. Indeed, Rodriguez testified in his deposition that he was not limited as a result of his HIV-status and that he was not taking any HIV-specific medications; his medical record showed that his HIV infection was "well controlled" and he never missed work because of it. Rodriguez insisted more than once that he did not have a disability, apparently unaware that his doomed his claim from the outset. (The court's analysis overlooks the regulatory guidance indicating that HIV's effect in compromising a person's immune system could be deemed the limitation of a major life activity necessary to qualify an infected individual as disabled despite the lack of external symptoms.) The court never overtly considered the alternative possibility that Rodriguez was regarded as having a disability, probably because there were no factual allegations apart from

Rodriguez's conclusory statements that would support such a claim. Moody proceeded to analyze the motion as if Rodriguez had satisfied this first requirement, however, and found that HSBC was entitled to summary judgment anyway since there was no indication that Rodriguez's HIV status had anything to do with the adversity he encountered on the job. Personnel records show that he was promoted and given more responsibility but eventually attained a level at which much more productivity was expected from him, and he fell short in meeting the goals set for him by management, despite being provided guidance to improve. His immediate supervisor was an openly gay man like Rodriguez and there was no basis for claiming anti-gay animus (which would violate a city ordinance but no state or federal law). Rodriguez had been put on probation and resigned when the probation ended without his achieving specified goals, and it appeared he might be terminated due to performance deficiencies. The hostile environment claim was rejected by Judge Moody, who found just a few scattered remarks in the record over six years of employment, falling far short of pervasive harassment. With the rejection of this claim, the constructive discharge claim fell as well.

FLORIDA – In *C.S. v. Department of Children and Families*, 2015 WL 7007794 (Fla. 4th Dist. Ct. App., Nov. 12, 2015), a father was appealing a final judgment that terminated his parental rights on the grounds of "egregious conduct." The conduct in question was "alleged medical neglect of the child who was born HIV positive but progressed to full-blown AIDS as a result of the failure of the parents to properly care for the child." The court decided that because of the "life-and-death consequences to the child of the failure to provide proper care," the father's conduct could be correctly

characterized as "egregious" within the meaning of the statute, justifying the termination of parental rights.

GEORGIA – Judge Madeline Garcia of the Atlanta Immigration Court has granted withholding of removal and protection under the Convention against Torture (CAT) to a Honduran transgender woman who was represented on a pro bono basis by Sutherland Asbill & Brennan LLP, according to a press release from the firm. The October 22 ruling was premised on a finding that she would be more likely than not to suffer persecution, and perhaps serious physical harm, if removed to her home country. An initial trial in 2013 denying relief was appealed to the Board of Immigration Appeals and the 11th Circuit; then the case was retried before Judge Garcia. Sutherland attorneys representing the woman included Samuel J. Casey, James R. McGibbon, Mary Beth Martinez, firm alumnus Michael Freedman, and recent summer associates Kamryn Deegan and Roshni Chokshi. The Sutherland lawyers also received assistance from Keren Zwick and the National Immigrant Justice Center.

ILLINOIS – Lambda Legal announced settlement of a discrimination complaint brought by Steven White and Matthew McCrea against Sun Taxi. The driver of the taxi, who forced them to exist his cab after the men kissed each other in the back seat, has apologized to them as part of the settlement, and the owner of the cab has agreed to make a donation to a local LGBT-focused charity, the Illinois Safe Schools Alliance. The men were represented by Lambda staff attorney Kyle Palazzolo and counsel Christopher Clark.

KANSAS – In *Fugett v. Secretary of Transportation Services*, 2015 U.S.

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Dist. LEXIS 157753 (D. Kans., Nov. 23, 2015), U.S. District Judge Julie A. Robinson denied plaintiff's motion for summary judgment and partially granted the defendant's motion for summary judgment in a Title VII and Kansas Act Against Discrimination case brought by a self-identified heterosexual female employee claiming sexual harassment by a lesbian supervisor. Ultimately, the only claim that survived the cross-motions was a retaliation claim. The court found that the plaintiff had not established severe and pervasive harassment because of her sex. Notably, there was evidence that the alleged harasser was an "equal opportunity" harasser who also mistreated male subordinates.

KENTUCKY – A lesbian elementary school teacher who was terminated one day prior to reaching tenure after she went public about marrying her same-sex partner suffered dismissal of her discrimination claims against individual defendants in *Vinova v. Henry County Board of Education*, 2015 U.S. Dist. LEXIS 159492, 2015 WL 7681246 (E.D. Ky., Nov. 24, 2015). Amanda Vinova filed suit against the Board of Education, three individual named defendants, and New Castle Elementary School, at which she had been employed, asserting claims under 42 USC Sec. 2000d (Title VI), KRS Sec. 344.040 (the state's anti-discrimination law), Title VII, and Title IX. The problem she encountered was that these statutes do not authorize claims against individual persons, only against "employers" as statutorily defined or federal funding recipients. The only federal funding recipient in sight in this case is the school district, which was also her employer. The court found no indication that the elementary school, as such, was an entity capable of being sued under these statutes, as it was just a building owned and operated by the school district. In dismissing

claims against all individual defendants and the elementary school, U.S. District Judge Gregory F. Van Tatenhove indicated that the claims against the board of education "remain in place." Vinova is represented by Dawn Elliott and Shannon R. Fauver of Fauver Law Office, Louisville.

MICHIGAN – U.S. District Judge Sean F. Cox issued a ruling on November 25 clarifying the basis for his prior decision not to dismiss the Equal Employment Opportunity Commission's Title VII lawsuit against a funeral home that had discharged a transgender woman. *EEOC v. R.G. & G.R. Harris Funeral Homes*, 2015 U.S. Dist. LEXIS 159153, 2015 WL 7567503 (E.D. Mich.). The context is a challenge by the defendant to a September ruling by the U.S. Magistrate Judge on an EEOC a discovery request by the defendant. In rejecting the challenge, Judge Cox noted the defendant's assertion that claims based on the theories that gender identity discrimination or gender transition discrimination violate Title VII as such "remain in a kind of legal limbo" in this case, and sought to dispel that idea. "The Court clarifies here that this Court has *already rejected* the EEOC's theory that the Funeral Home's decision to fire [Aimee] Stephens violated Title VII because it was based on Stephens' status as a transgender person or the fact that Stephens was transitioning from male to female." Cox had rejected those claims in ruling on a motion to dismiss, finding that the basis for Title VII liability here was the alternative claim that Stephens was discharged because she "did not conform to the Funeral Home's sex or gender-based preferences, expectations, or stereotypes," a theory that has been accepted in prior 6th Circuit decisions that are binding precedents for this court. Cox insisted that his prior ruling had "clearly rejected" the other theories. This is one of several cases

that the EEOC has initiated or entered as amicus to advance its view, first articulated in a 2012 agency ruling, that gender identity discrimination is sex-related discrimination covered by Title VII, seeking to break out of the narrower sex-stereotyping theory that has been accepted by some federal courts. It seems clear that if the agency is to get federal approval of that theory in this case, it will have to occur at the appellate level. Also pending in the case is a sex discrimination claim based on the allegation that defendant provided a clothing allowance/work clothes for male employees but not for female employees.

NEW YORK – When a gay couple's domestic partnership dissolves, how should a court decide their contested custody dispute over their dog? This puzzle confronted N.Y. County Supreme Court Justice Arthur F. Engoron in *Gellenbeck v. Whitton*, 2015 N.Y. Misc. LEXIS 637 (March 2, 2015), in which he initially found that the standard for decision would be "what is best for all concerned" and that each party would have the burden of proving why Stevie, the dog, will have "a better chance of living, prospering, loving and being loved" in the care of one partner as opposed to the other. The ruling was based on a prior case in which a New York County judge ordered a hearing finding that technical "ownership" of the dog is only one factor in such a dispute. But since Engoron ruled in March, there has been a new decision by yet another New York County judge, rejecting the idea that animals have "rights" or "best interests" to be considered and decreeing that such disputes must be settled under property law principles. Engoron, responded to a renewed application from Douglas Gellenbeck, the partner who is claiming that Stevie was a birthday present from his former domestic partner and belongs solely to

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him, urging the court to abandon the “best interests” standard and focus on who owns the dog as property. Engoron ruled favorably on this on October 26, finding, in a somewhat poetic decision that whatever rights an animal might have endowed by a “Supreme Being” could not be enforced in New York County’s “Supreme Court.” He also echoed the judge in the more recent case, who questioned whether people could really determine the preferences of animals in this context. The other contested issue in the case was the disposition of the studio co-op apartment the couple had bought in July 2008. The court concurred with Stevie’s owner that the apartment should be sold and the proceeds equitably distributed between the men in light of their respective financial contributions to its purchase and maintenance. This part of the decision is amply set out in the March 2 opinion. The plaintiff did not file an affidavit dissolving their legal domestic partnership with the City until after the defendant filed an answer to his complaint, but the defendant had moved out months earlier. The defendant argued that the apartment could be physically divided between the men, but Engoron accepted the plaintiff’s contention that a studio apartment with one door and one bathroom was not really divisible and, besides, who would pay for this, even if the co-op board would allow it? Gellenbeck is represented by David Wolf. Defendant Michael Whitton is represented by Daniel S. LoPresti.

NEW YORK – U.S. District Judge Michael A. Telesca ruled in *Wells v. Colvin*, 2015 WL 6829711 (W.D.N.Y., Nov. 6, 2015), that an Administrative Law Judge for the Social Security Administration ruling adversely to an HIV-positive man’s disability benefits claim had erred in at least two respects requiring a remand. First, the ALJ “erred by formulating a [residual

functional capacity] finding when the record was devoid of any evidence, from any medical source, as to plaintiff’s functional limitations.” Second, the ALJ failed adequately to consider the opinion of the nurse practitioner who was Wells’ principal health care provider concerning his symptoms. “The ALJ’s failure to address NP Abbatesse’s opinion was not harmless error,” wrote the judge, “because assignment of significant weight to this opinion would have resulted in a presumptive finding of disability under the listings.” * * * Similarly, in *Kneepel v. Colvin*, 2015 WL 7431398 (W.D.N.Y., Nov. 23, 2015), U.S. District Judge John T. Curtin remanded a denial of disability benefits in a case involving an HIV-positive plaintiff, concluding: “The Court finds that the ALJ’s RFC assessment in this case was based on a misapplication of regulations and case law governing consideration of the findings and opinions of treating and consultative medical sources, with the result that the Commissioner’s denial of plaintiff’s claim for SSDI benefits is not supported by substantial evidence.”

NEW YORK – New York City’s Human Rights Ordinance provides broader protection against discrimination than the New York State Human Rights Law, so District Judge William H. Pauley, III, refused to dismiss a sexual orientation discrimination claim under the city law after finding that the factual allegations were insufficient to state a claim under the state law in *Malanga v. NYU Langone Medical Center*, 2015 WL 7019819, 2015 U.S. Dist. LEXIS 153304 (S.D.N.Y., Nov. 12, 2015). Michele Malanga, who is a lesbian, was hired in June 2011 by Silvia Formenti, a supervisor at NYU Langone, to be Director of Research for the Department of Radiation Oncology. In 2013, she claims to have discovered that NYU employees were “unlawfully billing tests performed on blood

specimens to the federal government, overcharging federal grants for patient clinic visits, and paying for the salary of a post-doctorate employee out of an unrelated federal grant.” She initiated an investigation and informed Formenti and others about her efforts, but was told to “stay out of it.” She went into whistleblower mode, however, after making further disturbing discoveries, reporting a patient death to the Defense Department resulting in the suspension of a study. Malanga claims that after this happened Formenti made comments to her about her sexuality, calling her “butch” and making “loud grunting noises” at her. She also alleges inappropriate touching by another NYU employee who had asked questions about her sexuality in 2011. NYU terminated her, assertedly for various kinds of misbehavior, in October 2013. She sued under the False Claims Act, New York’s whistleblower law, and the state and city human rights laws alleging sexual orientation discrimination. The court refused to grant NYU’s motion to dismiss the whistleblower claims, but dismissed the state human rights claim. “The Amended Complaint fails to plead an NYSHRL claim because Plaintiff does not allege that the discrimination was severe or pervasive enough to create an objectively hostile or abusive work environment,” wrote Judge Pauley. “And at oral argument, Malanga’s counsel offered to withdraw the NYSHRL claim to simplify the case. However,” he continued, “the NYCHRL is broader than the NYSHRL. It must ‘be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights law, including those laws with provisions comparably-worded to provisions of this title have been so construed.’” He quoted from an earlier Southern District of New York case, *Vaigasi v. Solow Mgmt Corp.*, 2014 WL 1259616 (2014): “To state a hostile work environment

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claim under the NYCHRL, Plaintiff need not allege that Defendants' conduct was severe or pervasive, and need only show differential treatment – that she is treated less well – because of a discriminatory intent.” Under this standard, Pauley wrote, Malanga “alleged a hostile work environment” under the city law. However, her claim that her supervisor was “aiding and abetting” NYU in discrimination against her was dismissed, the judge agreeing with NYU that “Formenti, as the primary discriminatory actor, cannot be liable for ‘aiding and abetting’ her own illegal actions.” Malanga is represented by Todd Jamie Krakower of Park Ridge, N.J.

NEW YORK – The Appellate Division, 3rd Department, heard arguments on November 24 in *Gifford v. Erwin*, in which the New York State Division of Human Rights found that the owners of Liberty Ridge Farm in Rensselaer County violated the public accommodations provision of the Human Rights Act by refusing to rent their space for a same-sex wedding for Melisa Erwin and Jennifer McCarthy. The agency decision in *NY State Div. of Hum. Rts. v. Liberty Ridge Farm LLC*, No. 10157952, NYLJ 1202666939841, was issued on July 2, 2014, and published in the *New York Law Journal* on August 19, 2014. The agency found that the defendants operated a place of public accommodation that was made available to the public for weddings, and that they when Melisa McCarthy spoke with Cynthia Gifford about holding her wedding there, she was invited to visit the farm, but as soon as Gifford learned that the wedding would be for a same-sex couple, she said there was “a little bit of a problem” because “we do not hold same sex marriages here at the barn,” claiming that policy was legal “because we are a private business.” The Gifford have asserted a “specific religious belief regarding marriage”

that is the basis of their refusal to hold same-sex marriages on their premises. The agency concluded that Erwin and McCarthy’s interest in holding their wedding there was rejected because of their sexual orientation, in violation of state law. In addition to awarding the complaining parties \$1,500 each as damages for mental anguish, the agency imposed a penalty of \$10,000 to “effectuate the purposes of the Human Rights Law.” According to the *New York Law Journal*’s account of the oral argument, posted on November 24, the Giffords are claiming a constitutional free exercise right to refuse to allow same-sex marriages on their farm. They claim that their close involvement in the planning and execution of weddings that take place on their farm means that the state would be requiring them to participate in activities that violate their religious convictions. Their attorney, J. Caleb Dalton (appearing on behalf of Alliance Defending Freedom, which represents the Giffords along with local counsel James Trainor) argued, “You cannot force an entity to facilitate a message with which they disagree,” and cited *Boy Scouts of America v. Dale*, the 2000 Supreme Court decision recognizing the right of the Boy Scouts to avoid complying with New Jersey’s ban on sexual orientation discrimination based on the Scouts’ 1st Amendment rights. New York Civil Liberties Union attorney Mariko Hirose, representing the complainants, argued that “in order to have a functioning society, businesses that enter a public marketplace are required to follow a neutral law” about which customers they serve. Representing the Division of Human Rights, LeGaL member Michael Swirsky said, “We are not asking the Giffords or Liberty Ridge to change their position on marriage to a person of the same sex. We are not asking them to endorse a message they disagree with. We are asking them to follow the law and rent their space on an equal basis on which they rent to other

parties.” In response to a question from Presiding Justice Karen Peters, Swirsky responded that if the Giffords did not want to host same-sex marriages, they could withdraw from making their premises available for any marriages. “They could choose not to provide any marriage ceremonies at all,” he argued, “But if they do, they have to provide them on an equal basis.” The Giffords’ local counsel, James Trainor, told the *Law Journal* that the Giffords have gay employees and had in the past rented their facilities for birthday parties and other events involving gay participants. They disclaim anti-gay animus, contending only that they should not be required to be complicit in same-sex marriages that violate their religious beliefs. New York does not have a Religious Freedom Restoration Act, so their argument would rest solely on constitutional claims. At least on the federal level, it would be difficult to reconcile such claims with *Employment Division v. Smith*, a Supreme Court ruling holding that individuals and businesses can’t claim a constitutional religious exemption from complying with state laws of general application.

NEW YORK – An openly-heterosexual man complaining of hostile environment sexual harassment by a gay co-worker suffered dismissal of all but a retaliation claim in *Erasmus v. Deutsche Bank Ams. Holding Corp.*, 2015 U.S. Dist. LEXIS 160351 (S.D.N.Y., Nov. 30, 2015). Brett Erasmus complained about the co-worker’s “sexual gestures and advances” toward Erasmus, claiming the behavior “continued and escalated over time.” The alleged conduct included “leering at me in a sexual manner” and commenting to Erasmus about how much sex the co-worker was having. Erasmus claims to have rejected these advances, as a result of which the co-worker “made my work experience unbearable and hostile.” Erasmus claimed that the co-worker “defamed

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my good name and professional reputation” and “tortuously [sic] interfered with prospective business relationships and dealing.” He also complained that his supervisor gave him negative performance reviews “for not being a team player” and that his “salary and bonuses began to diminish.” Erasmus claimed that when he complained about the co-worker to his supervisor, the supervisor began “imposing unattainable goals” on Erasmus, “withholding” his participation in departmental activities and “ignoring his request for updates on assignments.” Erasmus was fired after telling his boss that he was involved in an “external/internal investigation” involving the bank and the supervisor. District Judge Paul Engelmayer, granting Deutsche Bank’s motion to dismiss almost all of Erasmus’s claims, found that his allegations fell short of the standard set in the 2nd Circuit for alleging hostile environment sexual harassment under Title VII, and also fell short under the New York state and city human rights laws, even taking into account the more permissive pleading standards under the city law. However, the timing of Erasmus’s discharge in relation to the complaints he raised and his raising of grievances and participation in an EEOC investigation of his Title VII claims led the judge to conclude that Erasmus had successfully pled a retaliation claim. Thus, his claims against the bank (and against his supervisor under the state and local laws) “may go forward, as narrowed by this decision.”

OHIO – In *Stacey v. Colvin*, 2015 WL 7068779 (S.D. Ohio, Nov. 13, 2015), Senior U.S. District Judge Sandra S. Beckwith declined to accept a Magistrate Judge’s recommendation to sustain the denial of disability benefits to James Stacey, who is HIV-positive. Contrary to the Magistrate, Judge Beckwith found that Stacey had raised

significant questions as to whether the ALJ correctly determined that he did not meet the criteria for a disability benefits award in connection with his HIV infection, mental depression, and effects of medication. The court rejected Stacey’s argument that it should award benefits to him outright, noting the 6th Circuit’s ruled that benefits can be awarded by the court only where there are “no unresolved factual issues, ‘the proof of disability is strong, and opposing evidence is lacking in substance, so that remand would merely involve the presentation of cumulative evidence, or where the proof of disability is overwhelming.’” In this case, the court found that facts are unresolved and that Stacey’s proof is not overwhelming. The court was particularly critical of the ALJ and Magistrate’s treatment of evidence provided by Stacey’s physicians and psychiatrist.

PENNSYLVANIA – Amanda R. Thomas and Deborah M. Stewart, who were co-workers at Keystone Real Estate Group in State College, Pennsylvania, became involved in “a private, romantic relationship” with each other beginning in December 2011. They allege that they were subject to repeated verbal attacks and gender discrimination when Keystone learned about their relationship, including at the hands of the CEO, the HR Manager, and the Maintenance Coordinator. Both of them were ultimately terminated in October 2012. They filed charges with the State College Human Relations Commission under a local ordinance forbidding sexual orientation discrimination, and subsequently filed charges with the EEOC alleging gender discrimination and sexual harassment, culminating in their complaint in federal court. The company moved to dismiss their count under the State College Human Rights Ordinance, arguing that they had failed to exhaust administrative remedies

with the city Commission. It seems that when they decided to proceed under Title VII, their attorney communicated with the State College Commission, stating that they wanted to discontinue their action and pursue a remedy at the EEOC, resulting in dismissal of their local charge before an investigation could be completed. U.S. District Judge Matthew W. Brann granted the employer’s motion to dismiss the sexual orientation discrimination claim under the local ordinance for failure to exhaust administrative remedies. *Thomas v. Keystone Real Estate Group LP*, 2015 U.S. Dist. LEXIS 152980, 2015 WL 7016530 (M.D. Pa., Nov. 12, 2015); *Stewart v. Keystone Real Estate Group LP*, 2015 U.S. Dist. LEXIS 152987, 2015 WL 7016534 (M.D. Pa., Nov. 12, 2015).

PENNSYLVANIA – In a ruling that may prove useful to gay couples using surrogacy contracts to have children, the Pennsylvania Superior Court ruled in *In re: Baby S; Appeal of: S.S.*, 2015 PA Super 244, 2015 Pa. Super. LEXIS 767, 2015 WL 7432454 (Nov. 23, 2015), that gestational surrogacy contracts are enforceable in Pennsylvania. The case involves a heterosexual couple who were residents of New York (where surrogacy contracts are illegal) who hired a gestational surrogate through the services of a New Jersey company to carry a child conceived with the husband’s sperm and an egg from an anonymous donor who is a resident of Pennsylvania. (Surrogacy contracts are unenforceable in New Jersey but not illegal.) The couple lived in New Jersey, the surrogate in Pennsylvania, where they were not illegal but there was no controlling statutory or common law holding them enforceable. After the surrogate became pregnant, the couple had marital difficulties and the wife changed her mind about wanting to be the mother of the child, balking at executing necessary documents

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proffered by their attorney. When the surrogate gave birth, the only name listed as a parent on the birth certificate was that of the surrogate. She surrendered the child to the husband, who moved with the child to California. Subsequently the surrogate filed this lawsuit seeking to establish that the wife was the child's legal parent and that under the surrogacy agreement the husband and wife were responsible for her medical expenses and the child's support. The wife argued that surrogacy agreements are not enforceable as contracts under Pennsylvania law, noting that a bill on surrogacy had failed to advance in the legislature in 2005, showing the "distinct reluctance" of the legislature to recognize surrogacy agreements. She also argued that although the Department of Health had a policy on "assisted conception birth certificates," it lacked the force of law. The wife argued that Pennsylvania law provides only two ways for a woman to become a mother – by giving birth or by adoption, not as an "intended mother" under a surrogacy agreement. The trial judge ruled in favor of the surrogate, finding the contract enforceable, and the Superior Court agreed. Judge Gantman reviewed some trial court opinions and concluded that the agreement was enforceable. "Despite Appellant's emphasis on the fact that no statute recognizes the validity of surrogacy agreements," wrote the judge, "the absence of a legislative mandate one way or the other 'undermines any suggestion that the agreement at issue violates a dominant public policy or obvious ethical or moral standards demonstrating a virtual unanimity of opinion sufficient to warrant the invalidation of an otherwise binding agreement.'" The court rejected the wife's argument that she could become the legal mother of the child "only through a formal adoption, which would require termination of [the surrogate's] parental rights. Acting solely as the gestational carrier, [the surrogate] was

not the biological mother of Baby S. Therefore, [she] had no parental rights to Baby S. and none to relinquish under the Adoption Act. [She] was named on the birth certificate as a ministerial act precisely because Appellant had reneged on the surrogacy contract." The court concluded that in the absence of an established public policy "to void the gestational carrier contract at issue, the contract remains binding and enforceable against Appellant."

PENNSYLVANIA – The U.S. Department of Justice has filed a "statement of interest" in the pending case of *Blatt v. Cabela's Retail, Inc.*, Civil Action No. 5:14-cv-4822-JFL, opining that the express exclusion of coverage under the Americans with Disabilities Act for people with gender dysphoria should be ignored by the court in order to avoid constitutional 14th Amendment issues. The exclusionary amendment, championed at the time the ADA was passed by Senator Jesse Helms of North Carolina, provides that "transsexualism" shall not be considered a disability. DOJ urged the court (U.S. District Court for the Eastern District of Pennsylvania) that "under a reasonable interpretation of the statute, Plaintiff's gender dysphoria falls outside of the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may 'result from a physical impairment.' This interpretation of the GID Exclusion would allow the Court to avoid the constitutional question, and thus is compelled by the doctrine of constitutional avoidance." DOJ noted that the Exclusion language concerns "gender identity disorders not resulting from physical impairments," thus giving the court an "out" from applying the exclusion as a matter of statutory interpretation.

UTAH – In a strange on-again, off-again case that received international

media attention, 7th District Court Juvenile Court Judge Scott Johansen ordered that an infant foster child be removed from the home of a lesbian married couple, Beckie Peirce and April Hoagland, claiming that he had seen research showing that children do better in heterosexual homes. Utah law limits fostering children to married couples. Peirce and Hoagland married after the state's ban on same-sex marriage was struck down by the courts and then applied to be foster parents, were approved, and received the placement, which was to be confirmed by the court. Johansen's order sparked such an outcry that he reversed himself a few days later, then recused himself from the case. His original order gave the Department of Children and Family Services seven days to remove the child and place it with a heterosexual married couple. Even the governor, a conservative Republican, commented at a press conference that Judge Johansen should "follow the law" and not his personal beliefs. It seemed clear, in light of *Obergefell*, that disqualifying a married same-sex couple would raise constitutional issues. *Salt Lake Tribune*, various articles beginning November 12.

WISCONSIN – The Court of Appeals of Wisconsin, District 2, ruled on November 4 in *In the Interest of P.L.L.-R: S.R. & C.L. v. Circuit Court for Winnebago County*, 2015 Wis. Ap. LEXIS 789, 2015 WL 6701332, that a lesbian couple who married six days after one of them gave birth to their child conceived through donor insemination, were not entitled to a declaratory judgment that both were parents of the child applying the state's parental presumption concerning the spouse of a married woman who gave birth. The women argued that denying the judgment they sought would raise constitutional questions under *Obergefell v. Hodges*, but the court

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faulted them on having failed to file their action in the appropriate form to obtain such relief. They had filed a “Joint Petition for Determination of Parentage,” seeking to apply the “intended parentage doctrine” used in Wisconsin to deal with parental claims where a married woman is inseminated with the permission of her husband, who is intended to be the legal father. The trial court had determined that it could not grant the petition because they were not seeking an adoption, and a declaratory judgment of this type required notifying the Attorney General to appear as representative of the state. Affirming the circuit court, Justice Gundrum wrote, “It was clear to the circuit court from S.R. and C.L.’s petition, other filings, and the hearing before the court that while S.R. and C.L. filed their petition as an adoption action, they were not interested in C.L. adopting P.L.L.-R. Indeed, this is undisputed. Filing this matter as an adoption action, S.R. and C.L. sought to advance their claims without having to pay the filing fee, as S.R. and C.L.’s counsel admitted to the circuit court, that otherwise would have been required if they had filed the matter as a declaratory judgment or paternity action. The State further points out and complains that S.R. and C.L.’s decision to file this as an adoption action also permitted them to advance their claims before the circuit court unilaterally, that is, without another party, such as the State, having an opportunity to advance an alternative position.” The petitioners argued that under the new federal rulings, “a narrow, gendered reading of the statutes in this case would raise constitutional questions” and that the circuit court’s refusal to grant relief violated “the controlling precedent of *Wolf v. Walker*” (the Wisconsin marriage equality case). “However,” wrote Justice Gundrum, “as the same federal district court in *Wolf* noted in an order a week after *Obergefell* was decided, *Obergefell* did not answer questions

regarding Wisconsin’s presumption of paternity statute. Nor did *Obergefell* answer questions regarding Wisconsin’s artificial insemination statute.” The court of appeals concluded that where “declaratory relief is sought on the basis that a statute is unconstitutional as written, ‘the attorney general shall be served with a copy of the proceeding and be entitled to be heard,’ as expressly required by a Wisconsin statute. Since the attorney general was not served or otherwise brought into the case, the trial court “was without competency to hear the matter and appropriately dismissed it.”

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U.S. AIR FORCE COURT OF CRIMINAL APPEALS – In *U.S. v. Gutierrez*, 74 M.J. 61 (Ct. App. Armed Forces 2015), the court came to grips with up-to-date science on HIV transmission and ruled that an HIV-positive military member cannot be prosecuted for aggravated assault for engaging in unprotected sexual intercourse without disclosing his HIV status to his sexual partner. This reversed two decades of precedent in the military criminal courts. However, the court found that such individuals could still be prosecuted for several lesser offenses. In the actual case, the court remanded to the Air Force Court of Criminal Appeals to either reassess the sentence imposed on Tech. Sgt. David J.A. Gutierrez or to hold a new sentencing hearing. That court issued its decision on remand on November 23, *U.S. v. Gutierrez*, 2015 CCA LEXIS 525. The court found that a new hearing was not necessary, as it was possible to review the sentence based on the convictions that had been withheld without the need for any new evidence. In the event, the court concluded that most of the original sentence was still valid, requiring only a two-year

downwards adjustment in prison time from 8 to 6 years. Gutierrez, who was into “swingers” parties with his wife and multiple other participants, was not found to have actually infected any sexual partners during his transgressive activities. Apart from the aggravate assault conviction set aside in this case as a result of the ruling by the Armed Forces court, he was convicted on charges of assault consummated by a battery, failure to obey a lawful order, indecent acts, and adultery.

U.S. ARMY COURT OF CRIMINAL APPEALS – The court found that the appellant, Staff Sergeant Travis R. McGruder, was given an improper explanation by the court martial judge of the charges to which he was pleading guilty, thus rendering his guilty plea “improvident.” *U.S. v. McGruder*, 2015 WL 6660794 (Oct. 30, 2015) (not reported in M.J.). McGruder was diagnosed HIV-positive and given the usual cautions about using condoms, warning his sexual partners, and not engaging in Mixed Martial Arts (MMA) because of potential blood exposure to his opponents. He was charged with violating these warnings and placing others at risk, subjecting him to specifications of aggravated assault with a means likely to produce death or grievous bodily harm, reckless endangerment, and other charges. He pled guilty to the aggravated assault charge after the charge was explained to him by the military judge, using language that has since been declared inappropriate in the context of HIV based on the current science concerning transmission. Noting its decision in *U.S. v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), wrote the court, “the C.A.A.F. expressly rejected, at least for purposes of HIV cases, that ‘the risk of harm need only be more than merely a fanciful, speculative, or remote possibility.’ The court found this standard inconsistent with the statutory language of Article 128,

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UCMJ. Instead, the ‘ultimate standard remains whether – in plain English – the charged conduct was “likely” to bring about grievous bodily harm.’ Therefore, as the very language found problematic in *Gutierrez* is the language used in this case, we find a substantial basis in law and fact to question appellant’s guilty plea to three of the charged aggravated assaults and reckless endangerment.” However, the court found that it could still affirm convictions to the lesser-included offense of assault consummated by battery “as appellant’s ‘sexual partners did not provide meaningful informed consent’” since he did not disclose his HIV status to them prior to having sex. Despite setting aside the more serious convictions, the court of appeals found that the sentence ultimately imposed on McGruder should not be reduced, because it was far below the normal sentence range for the offenses on which his pleas were upheld.

CALIFORNIA – Amazingly, after dozens of appellate rulings over the past decade or more reversing HIV testing orders imposed by California trial judges on people convicted of sex crimes, one would think the trial judges had gotten the message, but the cases keep on coming. In *People v. Franklin*, 2015 WL 7428930 (5th Dist. Ct. App., Nov. 23, 2015), the 5th District Court of Appeal vacated an HIV testing order that had been imposed on Bradley Franklin, who was convicted of “committing a lewd and lascivious act upon a child under 14, arranging a meeting with a minor for lewd purposes, and two counts of indecent exposure.” In addition, “an enhancement allegation was also found true that appellant had substantial sexual conduct with the victim.” Franklin’s conduct with his teenage half-sister was pretty disgusting, as described by the court, but none of it as described involved conduct that could transmit HIV to the girl if Franklin

was infected. It was mainly exposing his penis to her and fingering her under her shorts. Nonetheless, Superior Court Judge Joseph A. Kalashian ordered HIV testing, without making any explicit finding that there was probable cause to believe that Franklin could have transmitted HIV by these acts (which would be scientifically ridiculous). Agreeing with Franklin’s argument that there was insufficient evidence to support a finding of probable cause to order HIV testing, the court said, “If the trial court does not articulate its reasoning for ordering HIV testing, we will presume an implied finding of probable cause,” even though the statute appears to require an express finding. “However, we may sustain the trial court’s order only if the record contains sufficient evidentiary support,” which was lacking in this case. “There is no indication that blood, semen, or bodily fluids were transmitted between appellant” and the girl. The court reversed the testing order and remanded to the trial court “to determine whether probable cause supports the court’s order mandating HIV testing.”

NORTH CAROLINA – The North Carolina Supreme Court has rejected a 1st Amendment challenge to a provision of state law that forbids convicted sex offenders from accessing most commercial social networking websites, such as facebook.com. *State v. Packerham*, 2015 WL 6777114 (Nov. 6, 2015). Lester Packerham, a convicted sex offender, established a facebook.com page using the name J.R. Gerrard. A Durham Police Department officer investigating whether any convicted sex offenders were on facebook.com recognized Packerham from his profile photo, triggering a search of Packerham’s residence that turned up a copy of a notice of “Changes to North Carolina Sex Offender Registration Laws” that

specified the kind of social networking sites prohibited to sex offenders that he had signed, so he could not credibly raise a procedural due process argument that he was unaware of the prohibition. The prohibition specifically extends to any commercial social networking website to which minors may subscribe. Facebook.com fits within this description. Packerham was indicted for violating the statute. The trial court denied his motion challenging the facial constitutionality of the provision, finding that it was constitutional as applied to him. He was then sentenced to jail time and probation. The court of appeals reversed, finding that intermediate scrutiny applied to this speech-targeted statute, and that the statute was too vague to withstand review by failing to “target the ‘evil’ it is intended to rectify” because of the sweeping prohibition extending to all social networking websites. The Supreme Court vote was 4-2 to reverse, with one member not participating. Writing for the court, Justice Robert Edmunds held that the statute was a regulation of conduct, not speech, and that the legislature had a rational basis for enacting it in order to protect children from being approached by sex offenders through social networking websites. He pointed out that a sex offender was not barred from using the internet as a whole, and that there were plenty of websites apart from commercial social networking websites where he could express his views and interact with others. Justice Robin Hudson, dissenting, agreed with the court of appeals that the statute regulates speech and fails to meet the test of heightened or strict scrutiny. Justice Cheri Beasley joined Hudson’s opinion in dissent. Packerham is represented by an appointed Appellate Defender, Glenn Gerding. Perhaps the ACLU or a similar free-speech organization will step up and assist Packerham in seeking United States Supreme Court review.

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TEXAS – A man convicted of burglary of a habitation with intent to commit felony sexual assault suffered rejection of his claim on appeal that his constitutional rights were violated when the prosecution failed to disclose that the object of his attempted assault was a transgender woman. *Jordan v. State*, 2015 Tex. App. LEXIS 11491, 2015 WL 6768497 (Tex. Ct. App., 1st Dist., Houston, Nov. 5, 2015). Of course, had James Jordan succeeded in completing his assault, he might have discovered the “true” situation himself. As it was, he was holding the victim down on the bed when a policeman’s knock on the door cut things short. Jordan claimed that the prosecution’s failure to disclose the victim’s gender identity violated his *Brady* disclosure rights. He argued that revelation at trial of the victim’s gender identity would undermine the prosecution’s “damsel in distress” arguments, and that “had Jordan known the information, he ‘might have argued impossibility, mistake, or heat of passion.’ More generally, he argues that the State’s decision to ‘conceal’ the information demonstrates its materiality and that the nondisclosure is analogous to undisclosed government informants.” Rejecting these contentions in a memorandum opinion, the court pointed out that the crime of which he was convicted was burglary “with intent to commit felony sexual assault.” The victim’s gender identity was irrelevant in this context. “By his words and actions, Jordan expressed an intention to sexually assault Valdez,” wrote the court. “Valdez testified that Jordan choked her with a rag, forced her into her bedroom, and while on top of her, told her that ‘this was going to be my night with a black man, and that he was going [to] do it forcefully whether I wanted to or not.’ He then told her that, if she moved, he would ‘cut’ or ‘kill’ her.” Continued the court, “Any error Jordan may have made regarding Valdez’s gender might have influenced his future actions during

the course of the sexual assault, but it could not have retroactively altered his intent upon entering the home.” And, wrote the court, “We reject the implication that subsequent awareness of a complainant’s transgender status is material to whether a burglar intended a sexual assault before such information was known.”

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UNITED STATES COURT OF APPEALS, THIRD CIRCUIT – The Third Circuit affirmed a defense judgment following a jury verdict in favor of two officers charged with failing to protect inmate Shaun Austin from assault, notwithstanding appeals of evidentiary rulings in *Austin v. County of Northampton*, 2015 WL 7280986 (3d Cir., November 18, 2015). The case seemed to turn on whether Austin was assaulted for being a “snitch” or for having a conviction of sex offenses against a minor. United States Circuit Judge Michael A. Chagares, for himself and Circuit Judges Patty Schwartz and Marjorie O. Rendell, upheld rulings by United States District Judge Thomas N. O’Neill, Jr., of the Eastern District of Pennsylvania, that: excluded evidence that the inmate who assaulted Austin had assaulted other “snitches”; and allowed evidence of Austin’s criminal sex offense history and HIV status. Austin was already in protective custody when he was assaulted with a razor. On the day before the assault, he told the defendant officers he was afraid of his assailant because the assailant had learned that Austin had identified him as involved in a fight three months earlier. The Circuit ruled that Judge O’Neill did not abuse his discretion in excluding evidence of the assailant’s prior assault of a “snitch,” because there was no showing that the defendant officers knew of the prior assault, making it irrelevant to their state of mind in the

protection of Austin. Even though circumstantial evidence can create an inference of subjective knowledge, the argument that the officers could or should have learned of the prior event in a shift briefing was insufficient and “fanciful.” As to Austin’s criminal history, although Judge O’Neill admitted a hearsay statement by the assailant that he attacked Austin because of his sex crime, the record showed that any hearsay error was “harmless” because Austin’s history was “high profile” and he talked about it himself and used it and his HIV+ status as a means to act “with impunity” on the protective custody tier. The admittedly “highly prejudicial” nature of the evidence did not “substantially outweigh” its “probative value” regarding the attack on Austin – “a risk the officers could not have anticipated.” There is no discussion in the opinion of why Northampton County was no longer a defendant, even though the reader can see the possibility of “pattern and practice” allegations against the municipal corporation for failing to protect a highly visible inmate already assigned to protective custody. Under Third Circuit rules, the court tagged the case as “not binding precedent.” Austin was represented on the appeal by attorneys Stephen D. Brown, Jennings F. Durand, and William T. McEnroe, of Dechert, LLP, Philadelphia. *William J. Rold*

CALIFORNIA – *Pro se* prisoner-plaintiff Frank Lee Dearwester’s lawsuit against the California corrections department, his prison, Quest Diagnostics, and several individual defendants for mental anguish suffered when he was given false positive HIV test results was dismissed with leave to amend by United States Magistrate Judge Dennis L. Beck in *Dearwester v. CDCR*, 2015 WL 6537351 (E.D. Calif., October 28, 2015). Dearwester alleged that officials’ “mishandling” of records may have caused the false

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positive diagnosis. Judge Beck found that no claims could be stated against California or its agencies under 42 U.S.C. § 1983 because of sovereign immunity, citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54-5 (1996). Quest and the individuals could be sued, but Dearwester failed to allege: (1) how the tort was more than negligence, when deliberate indifference is required for Eighth Amendment claims under *Estelle v. Gamble*, 429 U.S. 907, 105 (1976); or (2) how the named defendants were personally responsible for the misdiagnosis, required by *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). Dearwester alleged acute anxiety over the false positive for about six weeks, during which time he experienced heart palpitations, insomnia and panic attacks – with residual distress even after he received reassurance of negative HIV results from one of the named defendants, behavior inconsistent with 8th Amendment liability. There is little case law discussing post-test counseling for HIV results for prisoners (and almost nothing for false positives), but three cases seem worth reviewing by counsel with clients in this situation. In *Tokar v. Armentrout*, 97 F.3d 1078, 1081 (8th Cir. 1996), the court referred to the availability of post-test counseling as part of the mix of treatment of HIV+ inmates found to be constitutionally required. In *Laube v. Campbell*, 333 F.Supp.2, 1234, 1258-59 (M.D. Ala. 2004), the court approved a settlement of a prison class action medical care case that included mandatory post-test counseling for HIV test results. Here, Judge Beck ruled that Dearwester failed to plead that defendants “knew of a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it.” In *Hertzel v. Schwartz*, 909 F. Supp. 261, 265 (M.D. Pa. 1995), the court cited the existence of a Pennsylvania statute mandating post-test counseling for all HIV test results as relevant to the knowledge of risk for 8th Amendment

purposes. Since Dearwester’s case was dismissed on screening under 28 U.S.C. 1915A, the defendants have not answered the complaint, but it would be expected they would invoke the Prison Litigation Reform Act’s preclusion of awards of damages for mental distress when not accompanied by physical injury in 42 U.S.C. § 1997e(e). Counsel can anticipate such a defense by stressing the physical manifestations of injury that accompany anxiety in similar cases. *William J. Rold*

DISTRICT OF COLUMBIA – U.S. District Judge Colleen Kollar-Kotelly has rejected an attempt by a former federal government employee to win compensation from the government for its refusal to add his same-sex spouse to his insurance plan from 2004 until 2013. *Horvath v. Dodaro*, 2015 WL 7566665 (D.D.C., Nov. 24, 2015). Edward Horvath married Richard Neidich in Massachusetts on June 23, 2004, shortly after the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), went into effect, making Massachusetts the first and only state in which same-sex marriages could take place. At the time, Horvath was employed by the Government Accountability Office (GAO) and sought to add Neidich to the employee health benefits plan, but was turned down pursuant to Section 3 of the Defense of Marriage Act, which prohibited federal recognition of his marriage. (Horvath retired from the GAO in 2014.) Horvath pursued administrative remedies after the turndown, but did not take the case all the way through the administrative process, dropping his internal appeals in 2006 and never taking them to court, persuaded that success was unlikely in that forum. After *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), federal policy changed and Horvath was able to add Neidich to the plan, but only prospectively. At

the same time, he sought compensation for the prior refusal to add Neidich, reasoning that if it was unconstitutional for the federal government to refuse to recognize the marriage, it should have added Neidich to the plan back in 2004. When his request was denied, he filed a complaint with the GAO’s Office of Opportunity, but that office rejected the complaint, explaining that the rule change implemented after *Windsor* “did not approve benefits prior to the June 26th date.” Judge Kollar-Kotelly found that Horvath’s claim for compensation for the pre-*Windsor* period is time-barred, agreeing with defendants that the subsequent decisions in *Windsor* and *Obergefell* “do not revive Plaintiff’s time-barred claim under the Federal Employee Health Benefits Act. . . . Moreover, even if equitable tolling were available, Plaintiff’s failure to bring suit within the six-year statute of limitations because of his assessment that the odds of success in court were minimal would not be ‘extraordinary circumstances’ sufficient to justify equitable tolling,” she wrote. She also found that any attempt to assert the damage claim on a constitutional theory would similarly be time-barred and would confront sovereign immunity problems. Horvath’s attempt to assert a Title VII claim was found barred as well, the court finding that Horvath had not exhausted administrative remedies as required by that statute. The judge explained that she did not reach the merits of the underlying claims due to the time-bar and exhaustion issues with respect to each of Horvath’s causes of action. Readers may recall that soon after *Windsor* was decided, LGBT organizations advised the public to get claims and charges on file immediately in order to preserve claims, but cautioned about the likelihood of procedural difficulties with respect to claims going back more than six years due to the statute of limitations. The advice is vindicated in this case, although Horvath might seek review

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of the court's conclusion that there are no "exceptional circumstances" here justifying equitable tolling. After all, *Windsor* and *Obergefell* were epochal decisions that totally changed the legal universe for same-sex couples in the United States, and even the most optimistic LGBT advocates were not predicting such a relatively speedy federal victory for same-sex marriage recognition back in the early years of the 21st century when Horvath and Neidich were married in the only jurisdiction in the U.S. that then allowed same-sex marriages. Might the D.C. Circuit view an equitable tolling argument with more favor? And why would the Obama Administration fight it in light of their position before the Supreme Court that DOMA was unconstitutional and indefensible?

MARYLAND – In *Judd v. Gilmore*, 2015 WL 7012719 (D. Md., November 11, 2015), Senior United States District Judge J. Frederick Motz wrote that Wexford Medical Sources, Inc., who provided contractual medical care at a state prison, was not a proper defendant in an inmate patient's civil rights case, writing: "Defendant Wexford argues that it should be dismissed from the case because as a corporate entity it cannot be held liable under 42 U.S.C. § 1983. The court agrees." [Note: Rarely does a District Judge so succinctly get it wrong. Every appellate decision of which this writer is aware has applied standards of "policy or practice" liability under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 (1978) (regarding civil rights violations by municipalities) to analysis of constitutional torts by private corporations. This includes the Fourth Circuit: in *Austin v. Paramount Parks, Inc.*, 195 F.2d 715, 728 (4th Cir. 1999), the court specifically applied *Monell* standards to private corporate behavior alleged to violate constitutional rights, noting similar rules in the Second,

Seventh and Eighth Circuits. While the rules for the "color of law" basis for state action have developed separately from those involving private corporations as "persons" under § 1983, they point in the same direction for private providers of prison health care: private corporations are "persons" who may be liable if they have a "policy or practice" that fosters unconstitutional care. Judge Motz cited two Fourth Circuit cases from the 1970's and *West v. Atkins*, 815 F.2d 993, 996 (4th Cir.1987), *rev'd on other grounds*, 487 U.S. 42 (1988). *West* actually reversed the Fourth Circuit for not finding state action by a private contractual prison health care provider. The Supreme Court has declined to extend *West's* theory to actions against federal contractors under *Bivens v. Six Unknown...*, 403 U.S. 388 (1979), in *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 69-71 (2002).] Here, *pro se* prisoner Antwoin T. Judd sued Wexford and two of its employees for alleged deliberate indifference over seven months to his serious medical needs, including treatment with hormones for "gender identity disorder." Judge Motz found defendants' submissions (mostly medical records) show that Judd was evaluated and treated frequently for his complaints and that there was no record of any request for treatment for "GID." Judge Motz denied summary judgment to the two employees, however, because the "crux of Judd's claim" is lack of treatment for GID, and there is an "inference" that the medical records submitted are "incomplete." He also notes that defendants are now aware of the claim of lack of treatment for GID, and he orders Wexford's counsel to submit "supplemental information" about such care, even though the corporate defendant is dismissed. *William J. Rold*

NEVADA – Eleven months after an anonymous HIV+ prisoner's *pro se*

filing, U.S. Magistrate Judge George Foley, Jr., allows him to proceed past screening under 28 U.S.C. § 1915A on claims involving discriminatory housing, violation of privacy, and placement in danger in *Doe v. Cox*, 2015 WL 6962857 (D. Nev., November 10, 2015). Inmate John Doe sued Nevada corrections director James Cox (and other "et. al" defendants not identified in the opinion) claiming that perpetuation of a "House Alike/House Alone" system for HIV+ inmates resulted in the disclosure of his HIV status and violated his rights. According to the pleadings, the "House Alike/House Alone" system is mandated by Nevada statute and regulation (N.R.S. § 209.385(4) [incorrectly cited as § 208.385(4)] and NDOC policy AR 610.03), "which require that HIV positive prisoners be segregated from other offenders" and caused Doe's removal from general population and placement in an "HIV wing" of the prison, thereby revealing his HIV status and subjecting him to threats. Judge Foley allowed the official capacity claims for injunctive relief to proceed, citing *Hafer v. Melo*, 502 U.S. 21, 27 (1991), and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). He found that Doe stated a claim for denial of Equal Protection for being a member of one group that "is singled out and treated differently" and that intentional discrimination was adequately alleged by reference to defendants' notice of investigations of "House Alike/House Alone" by the United States Department of Justice and the American Civil Liberties Union. Judge Foley found the pleadings insufficient to state a Fourteenth Amendment Due Process claim for conditions of confinement that are an "atypical and significant hardship" under *Sandin v. Connor*, 515 U.S. 472, 478 (1995). Judge Foley did find that Doe adequately pleaded an Eighth Amendment violation under *Farmer v. Brennan*, 511 U.S. 825, 833 (1994),

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for the unreasonable risk to his safety described in the complaint, which included receipt of actual threats but not assaults. Judge Foley also noted that Doe's complaint properly alleged discrimination under the Americans with Disabilities Act, for denying him participation in various programming because of his HIV status. He also accepted state law claims regarding violation of Doe's privacy and failure to provide state-mandating counseling, citing N.R.S. §§ 209.385 and 441A.220. This case has the potential to be of law reform significance, particularly if Doe finds counsel and/or the U.S. Justice Department files a statement of interest. The civil rights of HIV+ inmates has been litigated for at least 25 years – see *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991) (segregation of HIV+ inmates in Alabama prisons). While the complaint has been pending, however, lead defendant Cox, who has discretion on how to implement N.R.S. § 209.385, approved a revision to AR 610.03 (effective June 15, 2015) that on its face does not require removal of HIV+ inmates from general population or the creation of "HIV wings." Under the revision, the "House Alike/House Alone" program appears to apply only to prohibit double-celling HIV+ inmates with "non-HIV" inmates. There are no restrictions on inmates in dormitories, and there are provisions allowing programming on a "case-by-case" basis, linked to medical indicators. It remains to be seen how this is implemented at the institutional level and how it affects Doe's case, but it does illustrate the downside of unduly delaying defense response to inmate pleadings that await screening. Judge Foley allowed Doe to proceed by pseudonym at least for now, writing that to require Doe "to openly admit his HIV status through court filing could bring further harm" and noting that he will "entertain objections to this ruling" after defendants are served. *William J. Rold*

SOUTH CAROLINA – United States District Judge Richard M. Gergel granted summary judgment against *pro se* prisoner plaintiff Vernon Wilcox in *Wilcox v. South Carolina Department of Corrections*, 2015 WL 7428569 (D.S.C., November 23, 2015), ruling that corrections officials' forcible treatment of Wilcox for gonorrhea did not violate his constitutional rights. Judge Gergel rejected a recommendation from a Magistrate Judge that the case merely be dismissed for failure to exhaust administrative remedies under the Prison Litigation Reform Act. Because of his HIV status, Wilcox was segregated in a dorm that experienced an "outbreak" of sexually transmitted diseases, including gonorrhea. When targeted treatment did not quell transmission, officials elected to treat everyone who declined "quarantine" (whether they had gonorrhea or not). Although Wilcox denied sexual behavior, and he was not named as a sexual contact by any partner, he received forced injection and oral antibiotics. While recognizing that inmates have a substantive due process right under the Fourteenth Amendment to refuse unwanted treatment, citing *Washington v. Harper*, 494 U.S. 210, 221-22 (1990), and *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), Judge Gergel found that the "imminent threat of infection to these already immune-compromised inmates" justified involuntary treatment, citing the balancing test of *Turner v. Safley*, 482 U.S. 78, 89 (1987). Judge Gergel also found that the defendants lacked a "sufficiently culpable state of mind" to state an Eighth Amendment medical care claim under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), citing *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (which, ironically, established transgender inmates' right to individualized treatment in the Fourth Circuit). The decision also referred to Wilcox's refusal of medical quarantine for the incubation period

and the absence of permanent injury. *William J. Rold*

SOUTH DAKOTA – An inmate who had a sexual encounter with a prison guard is allowed to proceed to discovery in a civil rights case against the guard in *Caskey v. South Dakota State Penitentiary*, 2015 WL 7345763 (D.S.D., September 29, 2015). Cody Ray Caskey met Captain Dennis Lauseng anonymously on "Manhunt.com," when he used a friend's computer while on work release. Caskey recognized Lauseng after he sent a picture, and he tried to terminate further exchanges; but Lauseng came to the friend's house (out of uniform) and engaged Caskey in oral sex with Lauseng. Caskey testified that he "consented" out of fear of Lauseng and possible consequences to his work release after Lauseng "swore [him] to secrecy." Caskey's initial lawsuit claimed denial of medical care, but it did not mention the Lauseng incident. Later, United States District Judge Karen E. Schrier allowed Caskey to amend his complaint, naming Lauseng. United States Magistrate Judge Veronica L. Duffy stayed discovery (except for medical records) and directed South Dakota officials to provide *in camera* disclosure of Lauseng's home address for service, since he had "resigned" from government employment. Her instant Report and Recommendation [R & R] found for defendants on Caskey's claims about deliberate indifference to his health care (for reasons unremarkable for purposes of this article). The R & R also denied Equal Protection claims based on Caskey's sexual orientation and HIV status, because: (1) there were legally valid correctional reasons to distinguish services for gay inmates, citing *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir.1994)(allowing different programming for male and female inmates in Nebraska based on

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differing “needs”); and (2) Caskey failed to show deficiency in HIV care, except for an “awkward and insensitive” comment by a physician that “HIV is bad and you should stop spreading it” – not itself actionable under the Eighth Amendment. As to the sexual encounter between Caskey and Lauseng, the R & R identified material issues precluding summary judgment. The R & R found that “a prisoner’s right to be free from sexual assault by his guards” was long established, citing *Kahle v. Leonard*, 477 F.3d 544, 553 (8th Cir.2007) (collecting cases). Lauseng argued, however, that he was engaging in “personal pursuits” at the time and did not act “under color of state law.” As a back-up, he argued that the encounter was consensual. The R & R pursues the “color of law” and “consent” arguments at length, noting: (1) color of law can be satisfied when a defendant invokes the “real or apparent power of his office” to perpetuate a constitutional tort or its concealment; and (2) “consent” is not a defense to a sexual encounter between inmates and guards, which is a felony in most states (including South Dakota), regardless of consent. The R & R reviewed earlier rulings of the Eighth and other circuits – including *Wood v. Beauclair*, 692 F.3d 1041, 1047–48 (9th Cir.2012), which collected cases and adopted a shifting burden of proof on consent as opposed to a “per se” rule – but noted the “dubious,” “problematic,” and “inherently difficult” factors underlying consent in correctional settings. The R & R also cited with annotation the wealth of scholarly writing about sexual assault of female prisoners, applying the abuse of power and dichotomy of control arguments in such articles to same-sex relations between prisoners and guards. Judge Duffy found that, viewed in the light most favorable to Caskey, the evidence so far showed a genuine issue of fact about consent, a legal question as to its relevance (which may be determined by additional factual development), and

an unresolved question about whether Lauseng “abused the power bestowed upon him by the state to transform his actions from purely personal to under color of state law.” The R & R also recommended appointment of counsel for Caskey. *William J. Rold*

VIRGINIA – Senior United States District Judge Jackson L. Kiser granted summary judgment against pro se gay prisoner Darrell Eugene Farley in *Farley v. Stoots*, 2015 U.S. Dist. LEXIS 148342 (W.D. Va., November 2, 2015). Farley alleged multiple rapes and assaults at two prisons; denial of protection, of medical care, and of post-rape counseling for PTSD; and “insinuat[ing] that he was gay and deserved to be sexually assaulted.” Judge Kiser had earlier denied Farley a preliminary injunction on protection against risk of sexual assault because Farley was moved to a single cell and had access to a rape hotline, in *Farley v. Stoots*, 2015 U.S. Dist. LEXIS 146979 (W.D. Va., Oct. 29, 2015). In the instant case, Judge Kiser divided the lawsuit into eighteen separate claims, and dismissed fifteen of them for failure to exhaust administrative remedies under the Prison Litigation Reform Act because, despite Farley’s writing dozens of “emergency” grievances and letters, he failed to start formal grievances and appeals therefrom under Virginia correctional procedures. The court found that although the Prison Rape Eliminate Act [“PREA”], required officials to accept reports of rape “in any form” – see 28 C.F.R. § 115.52 – it did not excuse a failure to file and appeal regular grievances about rape. He also found no private right of action under PREA or in Virginia’s failure to follow federal (or state) implementing regulations under PREA. On the exhausted issues, Judge Kiser found that Farley failed adequately to allege that the defendant officers denied him protection or medical treatment for

injuries. As to health care providers, Judge Kiser found that Farley had repeated visits for mental health evaluation and treatment, including sixteen mental health visits and two psychiatric assessments, at times denying “having any mental health issues.” He found that all defendants were entitled to summary judgment on the question of qualified immunity. He does not address sexual orientation as an Equal Protection issue, and it is presented as an incidental averment on one of the claims dismissed for failure to exhaust. *William J. Rold*

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WHITE HOUSE – After some initial hesitancy to take time to study the legislation and its ramifications, the White House announced on November 10 that President Obama has endorsed the Equality Act, introduced in Congress over the summer to amend federal civil rights statutes across the board to include “sexual orientation” and “gender identity.” The president’s endorsement is largely symbolic, since Republicans will control both houses of Congress for the duration of his administration and no Republican members of Congress agreed to co-sponsor the legislation. *Washington Post*, Nov. 10.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) – HUD has published proposed regulations to require recipients of federal housing money to provide transgender persons and other person who do not identify with their sex assigned at birth with access to programs, benefits, services and accommodations in accordance with their gender identity. The proposed rule would clarify the differences in between “gender identity” and

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“perceived gender identity” in existing regulations. The proposed regulations are published at 80 FR 72642, with public comments due by January 16.

U.S. DEPARTMENT OF LABOR – The DOL announced on November 9 that it will propose rules to expand and update regulations concerning the National Apprenticeship Act of 1937. Among other things, the proposed regulations would add new categories to non-discrimination requirements for federally supported apprenticeship programs, including age, genetic information, sexual orientation, and disability. *National Law Review*, November 9.

U.S. HOUSE OF REPRESENTATIVES – U.S. Representative Mike Quigley (IL-05) announced Nov. 17 the formation of the Transgender Equality Task Force, made up of members of the House concerned with gender identity issues. Following the announcement, Task Force members held a forum on transgender violence with leaders of various LGBT organizations. *State News Service*, Nov. 17.

U.S. HOUSE OF REPRESENTATIVES – Rep. Patrick Murphy (D-FL-18) introduced H.R. 3793, the Ruthie and Connie LGBT Elder Americans Act of 2015, intended to amend the Older Americans Act of 1965 to provide equal treatment of LGBT older individuals. The measure, introduced on October 21, had 16 co-sponsors, and was referred to the Committee on Education and the Workforce. It is named in honor of Ruth Berman and Connie Kurtz, longtime LGBT rights advocates, originally from Brooklyn, who reside in retirement in Rep. Murphy’s state of Florida. They are the subject of a film documentary about their long-time partnership – now marriage.

ALASKA – Anchorage Assembly Ordinance 96, which added “sexual orientation” and “gender identity” to the prohibited grounds of discrimination under the city’s laws in September, may be tested in a repeal referendum. Opponents of the measure filed a petition application on November 30, which must be approved by the municipal attorney before the proponents can begin collecting signatures. They will need 5,754 valid signatures of registered voters to get their measure to the ballot, and would have until January 11 to submit the required signatures. Ringleaders of the repeal campaign include conservative talk radio host Bernadette Wilson, who has reached out to evangelical Christian churches and Alaska Family Action seeking support for the repeal effort. *adn.com*, Nov. 30.

FLORIDA – The Department of Children and Family has published proposed amendments to regulatory language to ensure non-discrimination because of sexual orientation and gender identity in residential child caring agencies. The proposed regulations are published at 2015 FL REG TEXT 391317, and can be found on Westlaw at 2015 WLNR 348-1916.

FLORIDA – The Mascotte City Council voted unanimously to approve a human rights ordinance that includes “sexual orientation” and “gender identity.” *Daily Commercial* (Leesburg, Florida), Nov. 5.

INDIANA – Republican state legislators introduced Senate Bill No. 100, which would extend some protection against discrimination because of sexual orientation or gender identity, but the measure was riddled with exceptions, exclusions for small businesses, defenses for religious objectors, to the extent that LGBT rights organizations in the

state as well as national LGBT groups immediately denounced it as unworthy of passage. Indeed, the measure also incurred opposition from business leaders in the state, whose concerted efforts had led to modifications in the state’s Religious Freedom Restoration Act earlier in the year to assure that the RFRA could not be raised as a defense to various discrimination claims asserted under local ordinances. SB 100, by overriding such local ordinances, would totally undermine the curative amendment to RFRA.

INDIANA – The Anderson City Council has passed through two of three required readings an ordinance that would forbid discrimination, inter alia, based on sexual orientation or gender identity. Final passage was scheduled to take place at the Council’s December 10 meeting. *Herald Bulletin*, Nov. 13.

MASSACHUSETTS – Governor Charlie Baker announced on November 3 that Massachusetts will certify veteran, disability and LGBT-owned businesses for the first time under the state’s program for business suppliers and contractors. This makes Massachusetts the first state to take account of LGBT-owned businesses as part of its contracting policies. *University Wire*, Nov. 6.

MISSOURI – The Marionville School District adopted a policy on November 25 providing that transgender students can either use a gender-neutral restroom or a restroom designated for their “biological” sex. Students in physical education classes that require locker room or shower use are expected to use facilities designated for their biological gender, or can take an alternative PE class where they don’t work up enough of a sweat to require showering! The policy allows students

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to change their names once a year, use whatever pronoun they prefer to refer to themselves, and dress consistent with their gender identity as long as they are consistent with the school's dress code. A weird mix of progressivity and cowardice.... *Springfield News-Leader*, Nov. 25.

PENNSYLVANIA – Philadelphia Mayor Michael Nutter signed legislation that requires privately-owned establishments open to the public to replace gender specific signage designating male or female single-occupancy bathrooms with gender-neutral signage. The main impact is likely to be on restaurants. *State News Service*, Nov. 19.

RHODE ISLAND – Rhode Island announced a policy change under which Medicaid benefits will include transgender care, including mental health treatment, hormone therapy, and sex reassignment surgery. The coverage will include more than a dozen sexual reassignment surgeries, including breast augmentation, mastectomy, hysterectomy, and penectomy. Surgical procedures will require prior authorization documenting a diagnosis of persistent gender dysphoria. The changes do not extend to participants under age 18, do not cover cosmetic procedures, reversals of reassignment surgery, or preservation of sperm or embryos for transgender people who wish to preserve the ability to procreate through assisted reproductive technology after the sterilization resulting from full sex reassignment procedures. The new rules are contained in Health Insurance Bulletin 2015-3, effective November 23, 2015. *Providence Journal*, Nov. 10.

TEXAS – The Dallas City Council unanimously approved a measure on November 10 making the city's

human rights ordinance explicitly cover "gender identity" as a prohibited ground for discrimination. The vote came shortly after Houston voters repealed such protection in their city. The ordinance had already included gender identity within its definition of "sexual orientation," but proponents thought it important, especially in light of the Houston vote, to make the protection explicitly on par with the other categories of protection. *Houston Chronicle*, Nov. 11.

WEST VIRGINIA – The Kanawha County School Board has approved policy changes to protect prospective and current LGBT employees from discrimination. The policy also adds "ancestry" to the prohibited grounds of discrimination under the district's employment policies. *Charleston Gazette-Mail*, Nov. 20.

LAW & SOCIETY NOTES

Openly-gay **PATRICK WOJAHN** has won election as Mayor of College Park, Maryland. Wojahn was a plaintiff in Maryland's marriage equality lawsuit, which lost at the state Court of Appeals in 2012. In 2007, he was elected to the College Park City Council, and served for the next eight years.

DANA NESSEL, a lesbian attorney who represented plaintiffs in the **MICHIGAN** marriage equality case, announced plans to seek a ballot proposal to amend the state's constitution to prohibit discrimination because of gender, gender identity, sex and sexual orientation. Paperwork was filed with the secretary of state's office on October 29. Although Governor Rick Snyder has signaled openness to legislation on the subject, the state legislature has refused to move on

proposals introduced by minority Democratic legislators. *Port Huron Times Herald*, Oct. 31.

The *Associated Press* reported on November 7 that a major part of the population not covered by the Supreme Court's *Obergefell* ruling were **NATIVE AMERICAN TRIBES**, who have political autonomy on their reservations. A few dozen tribes have adopted marriage equality policies, but there are 567 federally-recognized tribes. Same-sex Native American couples can, of course, obtain civil marriages off the reservations, but their marriages will not invariably be recognized on the reservations. Cleo Pablo, who wed a same-sex partner in Arizona, is suing the Ak-Chin Indian Community, which has refused to recognize her marriage and has a law prohibiting unmarried couples from cohabiting on tribal lands. Pablo alleges a violation of the federal Indian Civil Rights Act, claiming that the tribe has incorporated federal constitutional rights into tribal laws and thus must follow the *Obergefell* ruling.

As reported at length in the November issue of *Law Notes*, **HOUSTON, TEXAS**, voters repealed the city's civil rights ordinance at the end of a referendum campaign that focused almost exclusively on the claim by opponents that the measure's coverage of gender identity discrimination in public accommodations would endanger women and children by giving men access to women's public restrooms. The argument was idiotic (numerous jurisdictions have banned such discrimination for years and none of them have reported such incidents), but effective scare propaganda mobilized fearful voters, leaving Houston as one of the largest municipal jurisdictions in the country that does not ban discrimination because of sexual orientation or gender identity.

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Openly-lesbian **JACKIE BISKUPSKI**, a former Utah state legislator, defeated Salt Lake City incumbent mayor Ralph Becker, winning more than 50% of the vote to become the first openly-lesbian or gay executive in the state of Utah. **DEREK KITCHEN**, lead plaintiff in the Utah marriage equality case, won election to the Salt Lake City Council. *Advocate.com*, Nov. 4.

THE UNION FOR REFORM JUDAISM voted on November 5 to endorse a resolution protecting the rights of transgender people to be free of discrimination and enjoy equal access in Reform congregations. Congregations totaling 1.5 million members are affiliated with the Union, which represents the largest Jewish congregational movement in the United States. The resolution calls for congregations to educate staff on transgender issues, to provide sermons on transgender rights and to provide gender-neutral restrooms in their facilities. *Reuters News*, Nov. 5.

THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS reported that the number of murders of transgender persons reported to law enforcement agencies hit an all-time record during 2015, of 22 murders, twice the number for 2014, with the year not yet done. Ironically, this development comes at a time of increasing transgender visibility and acceptance, reflected in the enactment of laws banning gender identity discrimination and the Obama Administration's pursuit of gender identity protection in federal employment and contracting. Some observers speculated that this increased visibility, together with intense political debates about transgender access to public restrooms, had sparked the increased level of violence. *Thomson Reuters Foundation*, Nov. 6.

An internal document of the **MORMON CHURCH**, leaked to the press, stirred massive controversy, leading to thousands formally resigning their membership. Under the document, married same-sex couples are deemed to be apostates of the faith whose children would be ineligible for baptism until they reached age 18, and even then only if they renounced their parents' "lifestyles." The document was particularly shocking in light of public perceptions that the Church was becoming less gay-phobic, as indicated by its recent role in negotiating the so-called "Utah Compromise" under which the legislature enacted a ban on sexual orientation discrimination in employment and housing, albeit riddled with exemptions for church-affiliated businesses and lacking protecting against public accommodations discrimination. Under the document, same-sex couples who married were held to have renounced the faith and would be subject to ex-communication, which could cut them off from their families of birth. *Reuters US Top News*, Nov. 7.

An initiative that would require actors in adult films to wear condoms in all sex scenes was qualified for the November 2016 ballot, according to state officials in an announcement on November 4. The measure was proposed by Michael Weinstein, president of the Los Angeles-based **AIDS HEALTHCARE FOUNDATION**. Los Angeles County legislated such a ban, resulting in most pornography production moving outside the city. Polls show overwhelming statewide support for the measure, which would have the effect of sending porn producers out-of-state, undoubtedly damaging the California economy (at least a little, since southern California has been a major center of pornography production). *Los Angeles Times*, November 4.

THE VETERANS ADMINISTRATION has opened a clinic for transgender patients as part of the VA medical system. The program opened on November 12 located at the Louis Stokes Cleveland VA Medical Center, according to a November 16 report in the *Cleveland Plain Dealer*. This is the first such VA program in the nation, and will initially provide services for up to 20 transgender veterans at a time. **DR. MEGAN MCNAMARA** is the medical director of the program.

Actor **CHARLIE SHEEN** came out as HIV-positive on November 17 in television interviews, revealing that he had paid hush money of more than \$10 million to past sexual partners to keep them from revealing his secret. He told Today Show host Matt Lauer (NBC), "I released myself from this prison today," asserting that by going public he could stop paying the hush money, and he vowed to become an AIDS activist.

HUMAN RIGHTS CAMPAIGN'S annual list ranking employers on their LGBT-friendly employment policies has become a really big deal – and a source of controversy. Employers that receive high rankings touted their image to the gay community, but some critics from the community have complained that not all highly-rated companies deserve their rankings. On November 18, *The American Lawyer* ran a feature article on the rankings of law firms, noting the increase of those who attained perfect scores on HRC's checklist of policies. "Of the 156 law firms surveyed by HRC in 2015," reported the magazine, "95 received a perfect score, according to the most recent report, which was released Wednesday. That up from 87 firm that earned perfect scores last year." Many firms issued press releases touting their scores, but not, of course, such low-ranking firms as Howard & Howard,

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LeClair Ryan, Holland & Hart, Loeb & Loeb, and Willkie Farr & Gallagher, which suffered a large drop from 2014 because HRC added various policies to the list and WFG had not kept up....

TWITTER, the social networking company, has reacted to a gay employee being turned away from a blood drive, has decided not to hold any blood drives in its offices worldwide in any jurisdiction where regulations prohibit gay and bisexual men from donating blood, a first for such a large company. Twitter has 2300 employees in its San Francisco headquarters and more than twice as many globally, according to a *Thomas Reuters Foundation* report online on November 24.

The **OFFICE OF HUMAN RIGHTS OF THE DISTRICT OF COLUMBIA** published a report titled “Qualified and Transgender: A Report on results of resume testing for employment discrimination based on gender identity,” which shows a high level of discrimination because of gender identity when employers received virtually identical-qualification resumes with and without hints concerning the transgender identity of applicants. *BloombergBNA Daily Labor Report*, Nov. 4, 2015. Copies of the report are available on the agency’s website.

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AUSTRALIA – The Senate voted on Nov. 11 against holding a plebiscite on marriage equality, instead urging the Prime Minister to allow a free vote on the issue before the end of 2015. The motion was introduced by Greens Senator Robert Simms. The idea of holding a plebiscite had previously been rejected by the governments

of New South Wales and Western Australia, and public opinion polls show majority support for marriage equality. *Gaynewsnetwork.com.au*, Nov. 11.

BERMUDA – *The Royal Gazette* (November 27) reports that the Supreme Court of Bermuda has ruled that those in same-sex partnerships with Bermuda citizens should have the same rights of residency and employment as spouses of Bermudans. The ruling came in a lawsuit brought by the Bermuda Bred Company against the Minister of Home Affairs and the Attorney General. Chief Justice Ian Kawaley characterized the discrimination against same-sex spouses under existing law as “self evident and quite obvious,” and said that “No or no coherent counterargument was advanced on behalf of the respondents.”

BOLIVIA – The government on November 25 sent to the legislative assembly a proposal for a new Gender Identity Law, which would allow transgender people to change the names and gender indications on their official identification documents and birth certificates. News reports did not go into details about the criteria that would be used by civil registry officers in deciding whether to allow the changes. Justice Minister Virginia Velasco told a press conference that the law would not include the marriage of persons of “the same sex,” reported the Philippines News Agency in a November 26 online report, stating that was an issue that “belonged to another debate.” This is, of course, incorrect. Any debate about such a bill should address the legal consequences of allow changes of name and gender identification.

CANADA – In a published letter to his newly-appointed Justice Minister,

Prime Minister Justin Trudeau included in his legislative agenda the addition of “gender identity” to the country’s anti-discrimination and hate crimes laws. Since Trudeau’s party swept to large working majorities in the new Parliament, passage of such measures appears highly likely. * * * The provincial government for British Columbia announced late in November that had adopted a new policy for housing transgender inmates, placing them in accordance with their gender identity rather than their sex recorded at birth. Ontario had previously adopted such a policy, according to a November 25 report in the *Globe and Mail*. The policy change was sparked by complaints from Bianca Sawyer, a transgender woman who contacted Prisoners’ Legal Services to protest about the indignities she confronted while being incarcerated in a series of men’s prisons. Sawyer has been moved to a women’s prison under the new policy. Federal prisons continue to follow the policy of placing inmates in accord with their biological sex, but Correctional Service Canada’s website says that inmates in federal prisons with gender dysphoria will be referred to a psychiatrist and may be considered for hormone therapy or surgery. Post-operative transgender inmates will be placed in institutions consistent with their gender identities. Under British Columbia’s new policy, reports the newspaper, “transgender inmates will have individual and private access to the shower and toilet; be referred to by their preferred names and gender pronouns; and be permitted personal effects to express their gender.” * * * Yukon Territory is considering changes to its driver license policy for transgender individuals in response to a ruling by the Yukon Human Rights Commission critical of the existing policy, which requires proof of complete sex reassignment surgery before new licenses will be issued. Shaun LaDue, a transgender man, filed

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a complaint with the Human Rights Commission when Yukon authorities issued a female license upon LaDue's relocation from British Columbia, where he had a male license. The Motor Vehicles Act is expected to be updated to reflect the new policy before April 30, 2016. *Canadian Press*, November 5.

CHINA – A student using the pseudonym Qiu Bai has sued China's Ministry of Education, challenging the inaccurate information in state-sanctioned textbooks about homosexuality. She was joined by Xin Ying, executive director of the Beijing LGBT Center, and other student LGBT activists in demonstrating outside a Beijing courthouse on November 24 when the suit was filed. *Washington Post*, Nov. 24.

COLUMBIA – The Constitutional Court ruled by a 6-2 vote on November 4 that adoption agencies may not discriminate against gay, lesbian and transgender couples during adoption proceedings. The government had argued in support of the plaintiffs in the case challenging discriminatory actions by adoption agencies, many affiliated with the Roman Catholic Church. A church spokesperson denounced the decision and urged that a plebiscite be held on the subject, since, after all, the public should be allowed to vote on whether adoption agencies can discriminate based on sexual orientation or gender identity. Same-sex couples in Columbia may form civil unions pursuant to court order, but a proposal for marriage equality is still pending in the legislature. *Associated Press*, November 4.

COSTA RICA – Civil Registry Director Luis Bolanos has filed suit against Laura Florez-Estrada and

Jazmin Elizondo, who were married on July 25 by Notary Marco Castillo. Castillo is also a defendant in the case. It seems that Elizondo has been listed for her entire life in the Civil Registry as a man due to a clerical error. Conveniently, she identifies as a lesbian and wanted to wed Florez-Estrada. Given her male registry, the notary was willing to perform the ceremony, but Bolanos is outraged, stating that this may be a violation of the Penal Code, which prohibits same-sex marriages. Although a judge had previously legally recognized a same-sex civil union between two men, thus far the government has not recognized same-sex marriages. Bolanos argues that under the Penal Code this is an "unlawful marriage" and the participants can be sentenced up to six years in prison. Furthermore, Bolanos said, the Civil Registry will promptly correct the erroneous listing of Elizondo. Bolanos will request that a judge formally annul the marriage. *TicoTimes.net*, Nov. 9.

CYPRUS – The Cypriot Parliament vote 39-12 with three abstentions to approve a civil union law under which same-sex couples will be given most of the same rights as married couples, but not the right to adopt children jointly. The vote was taken on November 26. *ILGA Europe*, Nov. 26.

EAST AFRICA – The East African Court of Justice has ruled that the Secretariat of the Joint United Nations Programme on HIV/AIDS may participate as an *amicus curiae* in the pending case of *Human Rights Awareness & Promotion Forum v. Attorney General of Uganda*, a pending challenge to certain provisions of Uganda's Anti-Homosexuality Act 2014, seeking a declaratory order that the challenged provisions violate principles of human rights

and the rule of law in the Treaty for the Establishment of the East African Community, of which Uganda is a member. The UN group is expected to advise the court on technical questions concerning measures to eradicate HIV that may be adversely affected if the Uganda act ever goes into effect. It was passed by the nation's legislature and approved by the executive, but a Ugandan court declared the legislature process defective on technical grounds and the measure is once again pending. The government of Uganda had opposed allowing the UN group to participate as an *amicus*, stating that they were not a "neutral" party that could advise the court impartially, but the court rejected this argument, finding that it could evaluate *amicus* testimony appropriately.

ESTONIA – The coalition government in Estonia is internally divided about implementing legislation that would be required to effectuate the Cohabitation Act, which is supposed to go into force in 2016. The Act would allow cohabiting couples, regardless of gender, to register their relationship before a notary and qualify for benefits similar to marriage, but implementing legislation is necessary. The Social Democrats and the Reform Party, who had supported the measure, are now governing in coalition with the IRL, which had opposed it. The Act was narrowly approved by the parliament before the present coalition was formed, and there are doubts that a majority can be obtained to ratify them. *news.err.ee*, Nov. 6.

FRANCE – The French Health Minister, Marisol Touraine, announced on November 4 that France will modify its rules on blood donation to end the lifetime ban on donations by sexually active gay men. Instead, following a newer trend, it will allow gay men to

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give whole blood if they have abstained from sex for at least twelve months, and plasma if they have abstained for four months or are in a monogamous relationship. This ridiculous and unscientific condition was immediately criticized by civil rights groups as little better than the prior policy. Touraine said that experts will analyze whether the change in policy has increased risks of HIV transmission through the blood supply, and if it has not, the measures may be “relaxed” further. *yahoo.com*, Nov. 4.

GREECE – Justice Minister Nikos Paraskevopoulos has released a propose civil partnership bill, which would create a legal status for same-sex couples under the same legislation that previously created a legally recognized status for unmarried cohabiting different-sex couples. The European Court of Human Rights ruled that Greece had discriminated in violation of its European Convention obligations by excluding same-sex couples from the previously-enacted law. The measure would provide many of the rights of marriage, but not rights of adoption. A separate article of the bill lists sexual orientation among other forbidden grounds for discriminatory exclusion from soup kitchens or blood donations. *Athens-Macedonian News Agency*, Nov. 9.

INDIA – The Madras High Court ruled Nov. 6 that Tamil Nadu Uniformed Services Recruitment Board must appoint K. Prithika Yashini to a job as sub-inspector of police, as she met the qualifications and the only basis for denying her the appointment had been that she is a transgender woman. The Board was directed to include transgender persons as a “third category” when the next recruitment process for an opening is undertaken. *Free Press Journal (India)*, Nov. 6.

IRELAND (REPUBLIC OF IRELAND)

– The marriage equality law went into effect on Monday, November 16. Because of a 24 hour waiting period between license application and ceremony, the first same-sex marriages were conducted on November 17. The first ceremony to be conducted united gay lawyer Cormac Gollogly and banker Richard Dowling in County Tipperary. They had previously had a lavish civil partnership ceremony on Sept. 18 followed by a honeymoon in the Maldives, but held a low-key event followed by a family dinner on November 18. The men have been together for twelve years. The men held the civil partnership ceremony in order to take advantage of a provision of the law waiving the usual three-month notice period for couples who were already civil partners. *Boston Globe*, Nov. 18.

ISRAEL – The High Court of Justice (the nation’s supreme court) affirmed a district court decision rejecting a request by family members of May Peleg, a transgender woman, to bury her as a man instead of following the directive in her will that she be cremated. The woman’s ultra-Orthodox family refused to recognize her as a woman and sought to carry out the traditional ban on cremation followed by the Orthodox Jewish community. Peleg drew up her will the day before she took her own life, giving instructions that she be cremated and her ashes divided, most to be scattered at sea and the rest to be placed under a tree to be planted in her memory. Peleg had served as chair of the Jerusalem Open House. She anticipated problems with her family (with whom she had no recent contact) and specifically stated to her attorney that she did not want to be buried. The family’s court filing identified her as their “son” and sought to have the will voided, claiming Peleg was not competent to make the will.

The court’s opinion stated that the wishes of the deceased take priority; in a separate opinion, Judge Anat Baron stated: “We do not come to judge the wishes and the way of May Peleg, but only to honor them. May her memory be blessed.” *Buzzfeed.com*, Nov. 25; *Haaretz*, Nov. 24.

JAPAN – Shibuya Ward in Tokyo on November 5 became the first jurisdiction in Japan to issue certificates recognizing same-sex unions. Hiroko Masuhara and Koyuki Higashi were the first couple to register their partnership. Another ward, Setagaya, also began accepting such registrations on November 5. The registrations are largely symbolic, but the local governments expressed hopes that businesses and landlords would respect the rights of registered partners. Prime Minister Shinzo Abe reacted to the developments by observing that Japan’s constitution describes marriage as “based only on the mutual consent of both sexes.” *The Guardian (UK)*, November 5.

MEXICO – The Supreme Court struck down the state of Jalisco’s ban on same-sex marriage as a violation of Article 1 of Mexico’s constitution. The capital of Jalisco is Guadalajara, Mexico’s second-largest city. The Supreme Court had previously ruled that local courts must grant “amparos” (injunctions) ordering local officials to allow same-sex marriages, but the process of getting marriage equality nationwide has been gradual, as at least five such decisions must be issued in one state before the ruling becomes “jurisprudential” and requires the state’s legislature to repeal its ban on same-sex marriages. The Supreme Court also ruled several years ago that same-sex marriages valid where they were performed (at first only in Mexico City) must be recognized throughout

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the country. Internet journalist Rex Wockner has been keeping abreast of developments and observes that at least four states now have jurisprudential rulings and efforts continue to obtain the necessary rulings in additional jurisdictions. He reported on Nov. 30 that a collective amparo was issued for 44 people by a trial court in Baja California.

PORTUGAL – The Parliament has voted to allow same-sex couples to adopt children, approximately five years after legalizing same-sex marriages. However, President Anibal Cavaco Silva is a social conservative, and it was uncertain whether the president would sign the measure into law. Support for the bill came from the Socialist Party, the Left Bloc, the Communist Party, the Greens, and the Party of Animals and Nature, reported Rex Wockner from Portuguese sources on Nov. 20.

SLOVENIA – Pursuant to a ruling by the Constitutional Court, the legislature has set a referendum for Dec. 20 on whether to allow same-sex marriages in the country. A group opposed to marriage equality, calling itself “Children Are at Stake,” gathered 40,000 signatures in support of holding a referendum. The November 4 vote authorizing the referendum was 69-11. *Associated Press*, Nov. 4.

SOUTH AFRICA – The Constitutional Court refused to hear a discrimination claim brought by Ecclesia De Lange against the Methodist Church, which dismissed her as a minister after she told her congregation in 2009 that she planned to marry her same-sex partner. The church had not objected to De Lange being a lesbian or even living with a partner, but was unwilling to tolerate a marriage ceremony, even

though same-sex marriage has been legal in South Africa now for many years. The court cited technical reasons for denying the appeal, particularly because De Lange did not initially proceed in the Equality Court.

TAIWAN (REPUBLIC OF CHINA) – *Taipei Times* reported on Nov. 29 that public opinion in support of marriage equality has grown so much that it seems just a matter of time before politicians catch up to the public. It noted that the 13th Taiwan LGBT Pride Parade was the second largest LGBT event in Asia and the Middle East, smaller only than the Tel Aviv Pride Parade in Israel. The Ministry of Justice conducted an online vote about marriage equality on the day of the Parade, with more than 310,000 people responding, 59% in support of marriage equality.

THAILAND – The Thai Red Cross AIDS Research Centre has opened the first clinic in Asia to target services to the transgender community, according to a Nov. 30 report by *Indo Asian News Service*. The clinic, called Tangerine Community Health Centre, is located on the first floor of the Thai Red Cross AIDS Research Centre in Bangkok, and has received funding from the US Agency for International Development. The *Bangkok Post* reported that it has become a model for quality health services and research on transgender health.

UKRAINE – President Petro Poroshenko signed in law a bill prohibiting employment discrimination on grounds of sexual orientation and gender identity. This is intended to fulfill Ukraine’s obligation for participation in the European Union Visa Liberalization Action Plan. *Ukrainian News*, Nov. 23. The measure had barely passed the 423 member parliament, receiving 219

votes, having fallen several votes short in a prior vote. *kyivpost.com*, Nov. 12.

VIETNAM – The National Assembly approved a measure to come into effect January 1, 2017, that will allow transgender individuals to change their official identity in government records. Although Vietnam does not allow performance of sex reassignment procedures, many transgender individuals have gone to neighboring Thailand for this purpose. The new law is expected to make it easier for transgender people to enact day to day business that requires showing identification documents. *dpa international*, Nov. 23.

PROFESSIONAL NOTES

MICHAEL MICHAUD, a former member of the U.S. House of Representatives from Maine (Dem.), who disclosed that he is gay during his unsuccessful campaign for governor of Maine, was confirmed by the Senate on November 19 to be Assistant Secretary of Labor for Veterans’ Employment and Training Services. He was appointed by President Obama in July, and had represented Maine in the House from 2003 until January 2015. In the House, he was the ranking member of the Committee on Veterans Affairs in 2012. *BloombergBNA Daily Labor Report*, 222 DLR A-5, Nov. 18, 2015.

Openly-gay **CHRIS MAGNUS** has been named police chief of Tucson, Arizona, after a successor stint as chief in Richmond, California. When he married Terrance Cheung, chief of staff to Richmond Mayor Tom Butt, last year, Magnus was said to be the first openly gay male police chief in the United States to marry his same-sex partner. *towleroad.com*, Nov. 19.

PUBLICATIONS NOTED

1. Belavusau, Uladzislau, A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on Asociatia Accept (C-81/12), 21 Columbia J. Euro. L. 353 (Spring 2015).
2. Blincoe, Emily, Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification, 46 Victoria Univ. of Wellington L. Rev. 57 (July 2015).
3. Boucai, Michael, Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J.L. & Human. 1 (Winter 2015) (Fascinating perspectives on the early history of same-sex marriage efforts).
4. Bruno, Nicholas, *Agency for International Development v. Alliance for Open Society International*: An Alternative Approach to Aid in Analyzing Free Speech Concerns Raised by Government Funding Requirements, 93 Texas L. Rev. 1569 (May 2015).
5. Cahill, Courtney Megan, The Oedipus Hex: Regulating Family After Marriage Equality, 49 U.C. Davis L. Rev. 183 (Nov. 2015) (How will marriage equality affect the law on assisted reproductive technology and the family?).
6. Calabresi, Steven G., and Sofia M. Vickery, On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees, 93 Texas L. Rev. 1299 (May 2015).
7. Carpenter, Leonore, and David S. Cohen, A Union Unlike Any Other: *Obergefell* and the Doctrine of Marital Superiority, 104 Geo. L.J. Online 124 (2015) (Observes with some alarm the romanticizing of marriage and exaltation of it as superior to other forms of family in *Obergefell*).
8. Carron, Anna, Marriage-Based Immigration for Same-Sex Couples After DOMA: Lingering Problems of Proof and Prejudice, 109 Nw. U. L. Rev. 1021 (Summer 2015).
9. Clark, J. Stephen, But-For Sex: Equal Protection and the Individual Right to Marry a Specific Person Without Regard to Sex, 60 S.D. L. Rev. 389 (2015).
10. Clarke, Jessica A., Against Immutability, 125 Yale L.J. 2 (Oct. 2015) (suggests that new concepts of "immutability" that have been developed in, among other contexts, LGBT rights litigation may unduly constrain the development of anti-discrimination law).
11. Coleman, Charles E., Design and Deviance: Patent As Symbol, Rhetoric as Metric Part 1, 55 Jurimetrics J. 419 (Summer 2015).
12. Corcoran, Eric B., #Love Wins* *But Only if You Marry One of Us, 2015 Utah L. Rev. OnLaw 77 (2015) (limitations of marital rights in the immigration context).
13. Culhane, John G., After Marriage Equality, What's Next for Relationship Recognition?, 60 S.D. L. Rev. 375 (2015).
14. DiPippa, John M., Bias in Disguise: The Constitutional Problems of Arkansas's Intrastate Commerce Improvement Act, 37 U. Ark. Little Rock L. Rev. 469 (Spring 2015) (critiques euphemistically titled law intended to prevent localities from protecting LGBT people from discrimination in Arkansas).
15. Dupre, Meghan A., There Goes the Community: Federal Preemption of Marriage as the Demise of the State Community Property Regime, 90 Tul. L. Rev. 185 (Nov. 2015).
16. Ellis, Julian, and David M. Hyams, RFRA: Circuits Split on "Compelling Government Interest," 34-NOV Am. Bankr. Inst. J. 36 (Nov. 2015).
17. Garrett, Tim, Workplace Impact from Same-Sex Marriage Ruling, Nat'l L.J., Nov. 9, 2015 (Labor and Employment: A Special Report).
18. George, Marie-Amelie, The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States, 24 J. Hist. Sexuality 225 (2015).
19. Goldberg, Suzanne B., *Obergefell* at the Intersection of Civil Rights and Social Movements, 6 Cal. L. Rev. Circuit 157 (Nov. 2015).
20. Gondera, Ryan, Same-Sex Marriage Licenses in Pennsylvania After DOMA Was Declared Unconstitutional: An Examination of *Commonwealth, Department of Health v. Hanes*, 24 Widener L.J. 459 (2015) (Annual Survey of Pennsylvania Administrative Law; Administrative Law Progress in 2014: Survey of Selected Court Decisions; Administrative Agency Statutory Interpretation).
21. Goodsoe, Cynthia, Marriage Equality and the "New" Maternalism, 6 Cal. L. Rev. Circuit 145 (Nov. 2015).
22. Haigh, Tyler, Legislating Love: Ancillary Issues Arising From South Dakota's Refusal to Recognize Same-Sex Marriage, 60 S.D. L. Rev. 474 (2015).
23. Hunter, Nan D., Interpreting Liberty and Equality Through the Lens of Marriage, 6 Cal. L. Rev. Circuit 107 (Nov. 2015).
24. Jones, Maj. Christopher D., Redefining "Religious Beliefs" Under Title VII: The Conscience as the Gateway to Protection, 72 Air Force L. Rev. 1 (2015).
25. Joshi, Yuvraj, The Respectable Dignity of *Obergefell v. Hodges*, 6 Cal. L. Rev. Circuit 117 (Nov. 2015).
26. Kampschror, Kevin, Can You Remove "The Gay Person" From the Jury?, 23-JUL Nev. Law. 18 (July 2015).
27. Katz, Ellen D., What the Marriage Equality Cases Tell Us About Voter ID, 15 U. Chi. Legal F. 211 (2015).
28. Larsen, Allison Orr, Do Laws Have a Constitutional Shelf Life?, 94 Tex. L. Rev. 59 (Nov. 2015) (suggesting that laws that were constitutional when they were passed may be rendered unconstitutional by subsequent developments).
29. Lee, Jack Tsen-Ta, Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct, 16 Asia-Pacific J. Hum. Rts. & L. 150 (2015).
30. Leong, Nancy, Negative Identity, 88 S. Cal. L. Rev. 1357 (Sept. 2015) (shouldn't asexual, atheists, et al., people have some protection?).
31. Mayeri, Serena, Marriage (In)equality and the Historical Legacies of Feminism, 6 Cal. L. Rev. Circuit 126 (Nov. 2015).
32. Mezey, Susan Gluck, The Federal Courts and Marriage Equality: "Who Decides?", 60 S.D. L. Rev. 424 (2015).
33. Nicolas, Peter, *Obergefell's* Squandered Potential, 6 Cal. L. Rev. Circuit 137 (Nov. 2015).
34. Oliveri, Rigel C., Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions, 67 Fla. L. Rev. 1401 (July 2015).
35. Rawls, John D., Practical Effects of the Gay Marriage Opinion: How Will It Impact Wyoming Lawyers?, 38-OCT Wyo. Law. 52 (Oct. 2015).
36. Rosenow, Scott E., Heightened Equal-Protection Scrutiny Applies to the Disparate Impact Doctrine, 20 Tex. J. on C.L. & C.R. 163 (Fall-Spring 2014-15).

37. Schultz, Vicki, Taking Sex Discrimination Seriously, 91 Denv. U. L. Rev. 995 (2015).
38. Sobel, Stacey L., Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People, 89 St. John's L. Rev. 143 (Spring 2015).
39. Spitko, E. Gary, A Reform Agenda Premised Upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth, 48 Conn. L. Rev. 71 (Nov. 2015).
40. Stephanopoulos, Nicholas O., Political Powerlessness, 90 N.Y.U. L. Rev. 1527 (Nov. 2015) (attempt to establish an intellectual framework for evaluating the "political powerless" factor in equal protection suspect classification analysis; briefly discusses sexual orientation and suggests that gays are relatively politically powerless).
41. Strasser, Mark, Definitions, Religion, and Free Exercise Guarantees, 51 Tulsa L. Rev. 1 (Summer 2015).
42. Strasser, Mark, *United States v. Windsor* and Interstate Marriage Recognition, 60 S.D. L. Rev. 409 (2015).
43. Strasser, Mark, *Windsor* and its Progeny, 13 Ave Maria L. Rev. 181-206 (2015).
44. Strauss, David A., Foreword: Does the Constitution Mean What It Says?, 129 Harv. L. Rev. 1 (Nov. 2015) (Common law constitutionalism and the virtual irrelevance of the actual text of the Constitution; includes analysis of the *Obergefell* decision).
45. Tribe, Laurence H., Equal Dignity: Speaking Its Name, 129 Harv. L. Rev. F. 16 (Nov. 2015) (response to critique of *Obergefell v. Hodges* by Prof. Kenji Yoshino).
46. Tryfonidou, Alina, EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition, 21 Columbia L. Euro. L. 195 (Spring 2015).
47. Tweedy, Ann E., Tribes, Same-Sex Marriage, and *Obergefell v. Hodges*, 62-Nov Federal Lawyer 6 (2015).
48. Waldman, Ari Ezra, Privacy as Trust: Sharing Personal Information in a Networked World, 69 U. Miami L. Rev. 559 (Spring 2015).
49. Yoshino, Kenji, A New Birth of Freedom?: *Obergefell v. Hodges*, 129 Harv. L. Rev. 147 (Nov. 2015) (How *Obergefell* creates a new substantive due process regime with its invocation of "equal dignity").
50. Ziegler, Mary, The (Non)-Right to Sex, 69 U. Miami L. Rev. 631 (Spring 2015).

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