

L G B T  
LAW NOTES

March 2017

# WITHDRAWN

*Trump Administration Rescinds Guidance At Center of  
Transgender Rights Case Only Weeks Before  
U.S. Supreme Court Argument*

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### Editor-In-Chief

*Prof. Arthur S. Leonard*  
New York Law School  
185 West Broadway  
New York, NY 10013  
(212) 431-2156  
asleonard@aol.com  
arthur.leonard@nyls.edu

### Contributors

*Matthew Goodwin, Esq.*  
*Bryan Johnson-Xenitelis, Esq.*  
*Michael Leone Lynch, Esq.*  
*Timothy Ramos, NYLS '19*  
*William J. Rold, Esq.*  
*Matthew Skinner, Esq.*  
*Matteo M. Winkler, Esq.*

### Production Manager

*Leah Harper*

### Circulation Rate Inquiries

LeGaL Foundation  
@ The Centre for Social Innovation  
601 West 26th Street, Suite 325-20  
New York, NY 10001  
(212) 353-9118 / info@le-gal.org  
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# Trump Administration Withdraws Title IX Guidance in Contradictory “Dear Colleague” Letter

The Trump Administration, keeping a promise made by Donald Trump (although, like on many issues, he made contradictory statements) during his campaign to leave the issue of restroom and locker room access by transgender students up to state and local officials, issued a letter to all the nation’s school districts on February 22, withdrawing a letter that the Obama Administration Education Department submitted in the Gavin Grimm transgender rights case on January 7, 2015, and a “Dear Colleague” letter sent jointly by the Education and Justice Departments to the nation’s school districts on May 13, 2016. The

views expressed within them.” It also states that the departments “believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy,” embodying Trump’s articulated campaign position on this issue. At the same time, however, the February 22 letter stated: “All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment,” and insisted that the withdrawal of the earlier guidance documents “does not leave students without protections from discrimination, bullying, or harassment” and that the Education Department’s

the Grimm litigation were not the first position statements from the Education Department on the scope of coverage under Title IX to mention protection of LGBT students. A prior guidance, issued on April 29, 2014, signed by Assistant Secretary Catherine E. Lhamon and titled “Questions and Answers on Title IX and Sexual Violence,” states, in response to the question “Does Title IX protect all students from sexual violence?”: “Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence from elementary to professional school students; male and

**The Obama Administration letters had communicated an interpretation of Title IX of the Education Amendments of 1972 that required educational institutions to allow transgender students and staff to use sex-segregated facilities consistent with their gender identity.**

Obama Administration letters had communicated an interpretation of Title IX of the Education Amendments of 1972, a statute banning sex discrimination by educational institutions that receive federal money, as well as a DOE regulation issued under Title IX, 34 C.F.R. Section 106.33, governing sex-segregated facilities in educational institutions, to require those institutions to allow transgender students and staff to use facilities consistent with their gender identity. The regulation says that educational facilities may have sex-segregated facilities, so long as they are “equal.”

The February 22 letter states that the Departments “have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Department thus will not rely on the

Office of Civil Rights “will continue its duty under law to hear all claims of discrimination and will explore every opportunity to protect all students and to encourage civility in our classrooms.” It asserts that the two departments “are committed to the application of Title IX and other federal laws to ensure such protection.” Secretary DeVos emphasized this point in a statement she released, asserting that the Education Department’s mission includes assuring that all students are protected against discrimination. However, Press Secretary Sean Spicer said on February 22 that the administration was analyzing its overall position on Title IX, which could result in parting ways from the Obama Administration’s view that Title IX prohibits gender identity discrimination in schools.

The withdrawn guidance and the 2015 letter sent in connection with

female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.” The guidance also addressed the issue of same-sex violence, pointing out that LGBT students report high rates of violence and suggested ways for institutions to respond to the problem. The guidance also cites back to a June 14, 2011 guidance that addressed the rights of student-initiated groups, such as Gay/Straight Alliances, under the Equal Access Act.

Thus, an internal contradiction appears in the February 22 letter, which at least implies or assumes that sexual orientation and gender identity discrimination do violate Title IX, but that the question of whether transgender students should be allowed access to sex-segregated facilities consistent with

their gender identity needs further study, and perhaps needs to be addressed in a new regulation accompanied by detailed analysis that is put through the Administrative Procedure Act process of publication of proposed rules, public comment and hearing, and final publication in the Federal Register, with Congress having a period of several months during which it can intervene to block a new regulation.

The Solicitor General's office, which represents the government in Supreme Court cases, also informed the Supreme Court on February 22 that the Obama Administration guidance documents of 2015 and 2016 had been withdrawn, that the views expressed in them would no longer be relied upon by those executive branch agencies, and that, instead, the administration would "consider further and more completely the legal issues involved." This development came just

developments, inasmuch as the only ruling on the full merits rendered thus far in this case was by the district court when it granted the defendants' motion to dismiss the Title IX claim for failure to state a question. The 4th Circuit's ruling was based on a deference analysis, not on a *de novo* consideration of the statutory interpretation issue. The appeal to the Supreme Court in this case was from the district court and the 4th Circuit's refusal to stay a preliminary injunction issued by the district court on remand from the 4th Circuit, not from a ruling on the merits in favor of Grimm. The Clerk of the Court requested that counsel for the parties submit letters to the Court by March 1 responding to this development and suggesting how the Court should proceed with the case. Both parties encouraged the Court to rule on the merits (the school district, however, suggested the Court should ask

Rights Sandra Battle (Education Department) and Acting Assistant Attorney General for Civil Rights T.E. Wheeler, II (Justice Department), shows the signs of compromise reflecting the reported battle between Education Secretary Betsy DeVos and Attorney General Jefferson Beauregard Sessions. Several media sources reported that DeVos did not want to withdraw the earlier guidance, but that Sessions was determined to do so. In light of his record on LGBT issues as a Senator and former Attorney General of Alabama, Sessions is reportedly bent on reversing the numerous Obama Administration regulations and policy statements extending protection to LGBT people under existing laws. It was probably a big disappointment to him that the President decided not to rescind Obama's Executive Order imposing on federal contractors an obligation not to discriminate because of sexual orientation or gender identity, and we may not have heard the last of the Administration on that issue. DeVos, by contrast, is reportedly pro-LGBT, despite the political views of her family, who are major donors to anti-LGBT organizations. According to press accounts, for example, in Michigan, when she was a state Republican Party chair, she intervened on behalf of a gay party staffer whose position was endangered when he married his partner.

Several newspapers and websites have reported that DeVos and Sessions brought their dispute to the President, who resolved it in favor of Sessions, leaving it to them to work out the details. Trump was undoubtedly responding to the charge by many Republicans that the Obama Administration had "overreached" in its executive orders and less formal policy statements, going beyond the bounds of existing legislation to make "new law" in areas where Congress had refused to act and overriding state and local officials on a sensitive issue. In this case, Republicans in both houses had bottled up the Equality Act during the last session, a bill that would have added sexual orientation and gender identity as explicitly forbidden grounds for

## The ACLU probably believes now might be the best shot, or even the only chance for one for the foreseeable future, for a transgender rights win from the U.S. Supreme Court.

six weeks before the Supreme Court argument scheduled for March 28 in *Gloucester County School Board v. G.G.* (the Gavin Grimm case), and just before the due date for the Solicitor General to file an amicus brief presenting the government's position on the issues before the Court. The Court might react to this development in a variety of ways. Since the government is not a party in the case, the Court might just go ahead with the argument on the questions on which it granted certiorari. Or it might consider that this development renders moot one or both of the questions on which it granted review, which could lead to a reshaping of the case to focus solely on the appropriate interpretation of Title IX and the facilities regulation. It might even decide that the entire case should be sent back to the 4th Circuit for reconsideration in light of these

for briefing from the Solicitor General and delay the argument, potentially to allow time for Neil Gorsuch to be confirmed—and be another likely vote in its favor). This is a change in position for the ACLU; the ACLU opposed the Court granting certiorari in the case at all back in September. The ACLU probably believes now might be the best shot, or even the only chance for one for the foreseeable future, for a transgender rights win from the Court, since the Court is likely to become only more conservative over the next few years. President Trump might get to fill another vacancy on the Court, in addition to the nomination of Judge Gorsuch to replace the late Associate Justice Antonin Scalia.

The February 22 Dear Colleague letter, sent over the signatures of Acting Assistant Secretary for Civil

discrimination in a variety of federal statutes, including Title IX. The bill has yet to be reintroduced in the new session of Congress that began in January.

While withdrawing the Obama guidance documents, the February 22 letter does not state a firm position on how Title IX should be interpreted, either generally, in terms of gender identity discrimination, or specifically, in terms of access to sex-segregated facilities, such as restrooms and locker rooms, and did not expressly withdraw earlier letters or guidance documents from the Education Department dealing with LGBT issues. The letter criticizes the withdrawn documents as failing to “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX,” and points out that they did not “undergo any formal public process,” a reference to the Administrative Procedure Act steps that are necessary to issue formal regulations that have the force of law. It also noted the difference of views among lower federal courts on the bathroom issue, counterpointing the 4th Circuit’s ruling in the *Grimm* case with the Texas district court’s conclusion that the Dear Colleague letter exceeded the Department’s authority, which resulting in a preliminary nationwide injunction against its enforcement by the government.

While the withdrawn guidance documents did not have the force of law, they communicated to schools that the Education Department believed that Title IX bars gender identity discrimination and requires access to facilities consistent with a person’s gender identity, which meant that the Education Department or the Justice Department might initiate litigation or seek suspension of federal funding against districts which failed to comply. In the end, it would be up to courts to decide whether to follow this interpretation. Furthermore, federal courts have found an “implied right of action” by individuals to bring suit to enforce their rights under Title IX, and that is not changed by withdrawal of the guidance documents, although some federal district courts may be confused on this point.

The 4th Circuit’s decision of May 2016, up for review by the Supreme Court with oral argument scheduled for March 28, came in a lawsuit initiated by an individual high school student, Gavin Grimm, a transgender boy who was barred from using the boys’ restrooms at his high school by a resolution of the Gloucester County, Virginia, School Board after it received complaints from members of the community. District Judge Robert Doumar had dismissed Grimm’s Title IX complaint, even though the Obama Administration sent its January 7, 2015, letter, informing the court that the Education Department believed that Title IX required the school district to let Grimm use the boys’ restrooms. *See* 132 F. Supp. 3d 736 (E.D. Va. 2015). The 4th Circuit ruled that Judge Doumar should have deferred to the Education Department’s interpretation, as the regulation governing sex-segregated facilities was ambiguous on the question and the Department’s interpretation, which relied on federal appeals court and administrative agency decisions under other sex discrimination statutes finding that gender identity discrimination was a form of sex discrimination, was “reasonable.” *See* 822 F.3d 709 (4th Cir. 2016). The school district petitioned the Supreme Court to review this ruling.

The Supreme Court agreed to consider two questions: (1) Whether deference to an informal letter from the Education Department was appropriate, and (2) whether the Department’s interpretation of Title IX and the regulation was correct. *See* 137 S. Ct. 369 (Oct. 28, 2016). With the letter having been withdrawn, the question of deferring to it may be considered a moot point, but some commentators on administrative law had been hoping the Court would use this case as a vehicle to abandon its past ruling that courts should give broad deference to agency interpretations of ambiguous regulations, and the Court could decide that this issue has not really been rendered moot since it is a recurring one. As phrased, the certiorari question relating to this issue also emphasizes that at the time Judge Doumar dismissed the complaint, the only document from the Education Department was a letter,

not a formal guidance or regulation, and questions whether such an informal communication merits deference, a point that the Court might want to address. Indeed, the February 22 letter implicitly raises the new question of whether the federal courts should defer to the February 22 letter in place of the withdrawn guidance.

The Supreme Court’s agreement to consider whether the Education Department’s interpretation was correct might also be considered moot, since the Education Department has abandoned that interpretation, but certainly the underlying question of how Title IX and the regulation should be interpreted is very much alive, as several courts around the country are considering the question in cases filed by individual transgender students, states, advocacy organizations and the Obama Administration Justice Department (in its challenge to North Carolina’s H.B. 2, which is based on Title IX, Title VII of the Civil Rights Act, and the Equal Protection Clause of the Constitution).

Two groups of states filed suit in federal courts challenging the Dear Colleague letter of May 13, 2016. In one of those lawsuits, with Texas as the lead plaintiff, Judge Reed O’Connor of the Northern District of Texas ruled that the plaintiffs were likely to succeed in their challenge, and issued a nationwide preliminary injunction last August forbidding the government from enforcing this interpretation of Title IX in any new investigation or case. The DOE/DOJ February 22 letter points out that this nationwide injunction is still in effect, so the departments were not able to investigate new charges or initiate new lawsuits in any event. What it doesn’t mention is that the Justice Department had filed an appeal to the 5th Circuit, challenging the nationwide scope of the injunction, but the Trump Administration recently withdrew that appeal, getting the 5th Circuit to cancel a scheduled oral argument on the motion. Of course, these lawsuits specifically challenging the 2016 guidance document are now probably moot, with those documents having been withdrawn by the Trump Administration, since the plaintiffs in those cases sought

only prospective relief which is now unnecessary. Presumably a motion to dismiss as moot would be granted by Judge O'Connor, thus dissolving the preliminary injunction. O'Connor's order never had any effect on the ability of non-governmental plaintiffs, such as Gavin Grimm, to file or maintain lawsuits under Title IX.

In North Carolina, the Obama Administration, former governor Pat McCrory, Republican state legislative leaders, a group representing parents and students opposed to transgender restroom access, and transgender people represented by public interest lawyers had all filed lawsuits challenging or defending H.B. 2. The Trump Administration's February 22 actions may signal that at least the federal government is likely either to abandon or cut down on the scope of its lawsuit challenging H.B. 2. Since North Carolina is in the 4th Circuit, all of these cases were likely to be affected by any reconsideration by the 4th Circuit in light of these new developments. Around the country, several pending lawsuits have been put "on hold" by federal district judges as well, while awaiting Supreme Court action on the Gavin Grimm case. If the Supreme Court were to reject the argument that "sex discrimination" in a statute can be broadly construed to encompass gender identity, these cases, arising under either Title IX or Title VII, may be dismissed.

Since the confirmation hearing for Judge Gorsuch was scheduled to begin on March 20 and Democratic opposition may stretch out the confirmation process, it seems likely that there will be only eight members on the Supreme Court to consider the Grimm case. In that event, it seems predictable that the result would be either a tie affirming the 4th Circuit without opinion and avoiding a national precedent, or a 5-3 vote with an opinion most likely by Justice Anthony Kennedy, joining with the more liberal justices to adopt the more expansive reading of Title IX. However, as this will be the first time the Supreme Court has tackled directly a gender identity issue under sex discrimination laws, predicting how any member of the Court may vote is speculative. ■

## Washington Supreme Court Unanimously Rules against Florist Who Refused Flowers for Same-Sex Wedding Ceremony

Continuing an unbroken string of appellate rulings finding that small businesses cannot refuse to supply goods or services for same-sex marriages in jurisdictions that ban sexual orientation discrimination, the nine members of the Supreme Court of the State of Washington unanimously ruled on February 16 that Barronelle Stutzman, proprietor of Arlene's Flowers, Inc., and her business, violated the Washington Law Against Discrimination (WLAD) and the state's Consumer Protection Act, and had no constitutional right to do so based on her

statute. Washington State does not have such a statute, so Ms. Stutzman's case came down to two questions: whether her refusal of services violated the public accommodations and consumer protection statutes, and whether she was privileged to withhold her services by the 1st Amendment of the U.S. Constitution or an equivalent provision of the Washington Constitution.

Robert Ingersoll and Curt Freed had been living together, in what the opinion by Justice Sheryl Gordon McCloud calls "a committed, romantic relationship," for several years. Over those years, they

### This ruling follows a string of losses by businesses that have tried to rely on religious objections to refuse providing wedding-related services.

religious beliefs. *State of Washington v. Arlene's Flowers*, 2017 Wash. LEXIS 216, 2017 WL 629181.

This ruling follows a string of losses by businesses that sought to rely on religious objections to refuse wedding-related services to same-sex couples, involving a photographer in New Mexico (*Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013)), a baker in Colorado (*Mullins v. Masterpiece Cakeshop*, 370 P.3d 272 (Col. App. 2015) (now awaiting decision from U.S. Supreme Court on a certiorari petition), and a farm that provided a venue for weddings in upstate New York (*Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016)). So far, no final court decision has ruled in favor of a for-profit business claiming a right to discriminate against same-sex couples in connection with their weddings, either under the federal and/or state constitutions or under a state's religious freedom

had been regular customers of Arlene's Flowers, spending by their estimate as much as \$1,000 total at the store. After the Washington legislature passed a bill allowing same-sex marriages in 2012, Freed proposed to Ingersoll and they planned to marry on their ninth anniversary in September 2013, with a large reception at a major event venue, "complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers." Naturally, Ingersoll went to Arlene's Flowers to make arrangements, anticipating no problems because the owner, Ms. Stutzman, knew him and Curt, knew they were gay, and had dealt with them many times. They considered Arlene's Flowers to be "their florist."

So it was a big surprise when Stutzman told Ingersoll that she could not do the flowers for their wedding because of "her relationship to Jesus Christ." Indeed, the conversation did

not even get as far as discussing what kind of flowers or floral arrangements the men wanted, or whether Stutzman was being asked to deliver and set up floral arrangements at an event venue, or just to prepare them to be picked up at her store.

The story quickly got media play after Ingersoll posted about it on his Facebook page, inspiring the state's Attorney General Bob Ferguson to initiate litigation against Stutzman and her business, and Ingersoll and Freed filed their own complaint. The cases were combined in Benton County Superior Court, where the trial judge granted summary judgment against Stutzman.

The analysis by the court will be familiar to anybody who has been following this issue, as it has unfolded in parallel with the advance of marriage equality. Courts have generally rejected the argument made by Stutzman that refusing to do business with same-sex couples in connection with their marriages is not sexual orientation discrimination because the refusal has to do with "conduct" (a wedding) rather than "status" (sexual orientation). The Washington court decisively rejected this argument, advanced by lawyers from Alliance Defending Freedom, the organization that has been involved in the other cases mentioned above and which is petitioning the Supreme Court to review the Colorado baker case. So the major focus of the case is not on whether she violated the statutes, that being easily decided, but rather on whether she was privileged to do so because of constitutional protection for her freedom of religion, speech, or association.

Most civil rights laws include provisions exempting religious institutions and their clergy from complying to the extent that their doctrines would be violated, but the exemptions usually do not extend to private, for-profit businesses. The Supreme Court of the United States ruled in the *Hobby Lobby* case, consistent with prior decisions going back to the 1990s, that the 1st Amendment does not require the government to exempt businesses from complying with statutes of general application, such as civil rights laws or, in that case, the Affordable Care Act.

However, under the federal Religious Freedom Restoration Act (RFRA), a statute enacted in response to the Supreme Court's religious freedom ruling, the Supreme Court found that a for-profit business may be entitled to claim an exemption from complying with a federal statute or regulation because of the religious views of the owners of the business. The test in such a case would be whether the challenged statute imposes a substantial burden on the free exercise rights of the business, and then whether the government has both a compelling interest for the statute and has adopted the least intrusive means of achieving that interest.

Washington State does not have a RFRA, so Stutzman was limited to making constitutional claims. The court rejected her argument that her floral arrangements were the kind of artistic creations entitled to free speech protection, or that requiring her to design and supply floral arrangements for a wedding ceremony of which she disapproved would burden her freedom of association. The court conceded that requiring her to devise floral decorations for such an event would burden her free exercise of religion, but found that the state's compelling interest in protecting all its residents from discrimination in places of public accommodation clearly outweighed the incidental burden on religion.

"As applied in this case," wrote Justice Gordon McCloud, "the WLAD does not compel speech or association. And assuming that it substantially burdens Stutzman's religious free exercise, the WLAD does not violate her right to religious exercise under either the First Amendment or article I, section 11 [of the Washington constitution], because it is a neutral, generally applicable law that serves our state government's compelling interest in eradicating discrimination in public accommodations."

When the court refers to a "neutral law," it means a law that does not expressly target religion and was not enacted for the specific purpose of imposing a burden on religion. A law that, in general, forbids all public accommodations from discrimination because of sexual orientation or gender identity, is such a "neutral law." Of course, one notes, religiously-inspired

advocates such as Alliance Defending Freedom would argue that it is not neutral, and that legislators adopt those laws knowing that they will burden religious believers, because testimony to that effect is usually presented in legislative hearings and the argument is made during legislative debate. But the courts generally will not attribute a discriminatory intent to the legislature as a whole on the basis of such testimony and arguments.

Stutzman had argued that her refusal to "do" the flowers for the wedding was not a serious problem for the two men because she supplied Ingersoll with the names of other florists who would readily do it, and, in fact, after this case got publicity, several florists contacted Ingersoll and Freed and volunteered to provide flowers for their wedding. In any event, the men were so affected by what had happened to them that they dropped their plans for a big wedding ceremony and instead had a small private event with minimal fuss. The court said that being able to get flowers was not really the issue in this case. Rather, it was about the violation of civil rights stemming from a denial of services because the customers were a gay couple. Indeed, in her deposition, Stutzman conceded that she would happily supply flowers for a Muslim wedding or a wedding for atheists, making clear that her objections here focused on the fact that it was for a "gay wedding." It was not relevant that she claimed she was not homophobic and happily sold flowers to Ingersoll and Freed when it was not for a wedding. That was not the point of the case.

The timing of this decision is particularly interesting, because the Supreme Court was scheduled to discuss whether to grant review of the Colorado baker case on February 17, having listed it at two of the Court's prior conferences and having sent for and received the full record from the state courts just recently. No decision on certiorari has been announced yet.

The ACLU of Washington has been involved in representing Ingersoll and Freed in this case. A spokesperson for Alliance Defending Freedom, representing Stutzman, announced that they would petition the Supreme Court to review this case, as well as the Colorado baker case. ■

# Arkansas Supreme Court Finds Fayetteville Anti-Discrimination Measure Violates State Law

Fayetteville has been a hotbed of LGBT rights advocacy, but on February 23, the Arkansas Supreme Court, reversing a ruling by Washington County Circuit Court Judge Doug Martin, found that the city and its voters had violated state law by adding “sexual orientation” and “gender identity” to their antidiscrimination ordinance. *Protect Fayetteville & State of Arkansas v. City of Fayetteville*, 2017 Ark. 49, 2017 WL 715056, 2017 Ark. LEXIS 51 (not reported in S.W.3d). Justice Josephine Linker Hart wrote the opinion for the unanimous court.

Responding to earlier attempts to enact LGBT rights protections in Fayetteville, the Arkansas legislature

their own employment policies. Thus, a city can adopt an ordinance banning discrimination in its own workforce on grounds “not contained in state law.”

Arkansas, in common with the entire southeastern United States, does not forbid sexual orientation or gender identity discrimination in its state antidiscrimination statute. The clear intent of the legislators was to preempt local governments from adding those two characteristics to their local antidiscrimination ordinances. Or at least that’s what the court held in this decision.

Local LGBT rights advocates and city officials took a different view, however, seizing upon the literal meaning of “not

The city council approved a new ordinance, Ordinance 5781, to add those categories to the local law, subject to an affirmative referendum vote. Opponents of the measure (plaintiffs in this case) tried to get the local court to stall the referendum while they contested the legality of the proposed ordinance, but the local court refused and the public voted to approve the measure. Ultimately, Judge Martin agreed with the argument that “sexual orientation” and “gender identity” could be added to the local ordinance, as they were categories that were mentioned in state law.

The Supreme Court’s reversal was premised on legislative intent. “In this case,” wrote Justice Hart, “the General Assembly expressly stated the intent.” The operative language could not be construed in isolation from the prefatory provision explaining why the legislature had adopted Act 137. They wanted nondiscrimination laws to be uniform through the state, and did not want localities to outlaw discrimination based on classifications that were not included in the state’s own antidiscrimination law. “The express purpose of Act 137 is to subject entities to ‘uniform nondiscrimination laws and obligations,’” wrote Justice Hart. She also noted that the Fayetteville ordinance, in a provision explaining the city council’s purpose, stated that “its purpose is to ‘extend’ discrimination to include ‘sexual orientation and gender identity.’” Explained Justice Hart, “In essence, Ordinance 5781 is a municipal decision to expand the provisions of the Arkansas Civil Rights Act to include persons of a particular sexual orientation and gender identity.” She’s incorrect, of course, as to this statement, since by its plain meaning the ordinance would protect anybody from discrimination because of their sexual orientation or gender identity, including “straight” and “cisgender” people.

“This violates the plain wording of Act 137 by extending discrimination laws in the City of Fayetteville to include two classifications not previously

## Local LGBT rights advocates seized upon the literal meaning of “not contained in state law” and pointed out that several Arkansas statutes mention sexual orientation or gender identity.

passed Act 137 in 2015. Titled the Intrastate Commerce Improvement Act, Ark. Code Ann. Sec. 14-1-401 to 403, the measure was intended, according to its purpose section, “to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, regardless of the counties, municipalities, or other political subdivisions in which the businesses, organizations, and employers are located or engage in business or commercial activities.” To that end, the measure bars local governments from adopting or enforcing “an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.” The Act recognizes one exception: local governments are left free to legislate on

contained in state law” and finding that Arkansas laws existed mentioning sexual orientation or gender identity. For example, an anti-bullying law protects public school students and employees from bullying because of sexual orientation or gender identity, among a list of 13 characteristics. There is also a provision in the state’s domestic violence law requiring domestic violence shelters to adopt nondiscrimination policies that include “sexual preference.” And the state’s vital statistics act provides a mechanism for an individual to get a new birth certificate after sex reassignment surgery. Taken together, the advocates argued that because “sexual orientation” and “gender identity” are classifications that exist in Arkansas law, their inclusion in the city’s anti-discrimination ordinance would not be prohibited by Act 137.

included under state law,” wrote Hart. “This necessarily creates a nonuniform nondiscrimination law and obligation in the City of Fayetteville that does not exist under state law. It is clear from the statutory language and the Ordinance’s language that there is a direct inconsistency between state and municipal law and that the Ordinance is an obstacle to the objectives and purposes set forth in the General Assembly’s Act and therefore it cannot stand.” She noted that the statutes relied upon by the city and Judge Martin to argue that these categories were covered in state law were not antidiscrimination statutes, and thus could not be relied upon as a basis for adding them to the local antidiscrimination ordinance.

As a co-plaintiff in the case, the State had intervened to protect the constitutionality of Act 137, which had been questioned by the city, but that issue had not been addressed by the circuit court, and the Supreme Court held it thus had not been preserved for appeal. The case was reversed and remanded. On remand, the city could pursue the question of the constitutionality of Act 137. It is strikingly similar, despite its euphemistic wording, to Colorado Amendment 2, which was declared unconstitutional under the 14th Amendment by the Supreme Court in *Romer v. Evans* (1996). Amendment 2 prohibited the state or any political subdivision from prohibiting discrimination because of sexual orientation. The Supreme Court, focusing on the legislative history of the measure, condemned it as intended to make gay people unequal to everybody else in the state out of moral disapproval. The state had advanced a desire for uniformity of state laws as one of many justifications for Amendment 2, but Justice Anthony Kennedy, writing for the Court, did not specifically reject any of the state’s justifications, merely stating that none of them were sufficient to justify the law, which did not even clear rational basis scrutiny.

City Attorney Kit Williams told the local press that the challenged ordinance would remain in effect pending a ruling on remand by Judge Martin on the city’s challenge to the constitutionality of Act 137. ■

## Federal Court Awards Preliminary Restroom Access Relief to Transgender Students on Their Constitutional Claim

Switching the focus from Title IX of the Education Amendments of 1972 to the Equal Protection Clause of the federal Constitution, U.S. District Judge Mark R. Hornak of the Western District of Pennsylvania awarded a preliminary injunction on February 27 to three transgender high school students represented by Lambda Legal who are challenging a school board resolution that bars them from using sex-segregated restrooms that are consistent with their gender identities. *Evancho v. Pine-Richland School District*, 2017 U.S. Dist. LEXIS 26767.

On the other hand, Hornak concluded that the plaintiffs did have such a path under the Equal Protection Clause and decided to blaze a new trail on this issue. Prior courts have focused their attention almost exclusively on Title IX, in line with the general preference of federal courts to rule based on statutes, rather than resorting to constitutional rulings.

Hornak prefaced his constitutional analysis with a detailed set of factual findings and a sharp focus on the particular facts of this case, including that the three transgender students involved all began their transitions a few

**Judge Hornak concluded that the plaintiffs did have a path to relief under the Equal Protection Clause and decided to blaze a new trail on this issue.**

Acknowledging the Trump Administration’s February 22 action withdrawing two letters sent by the U.S. Education Department during the Obama Administration on the subject of transgender restroom access under Title IX as well as the pending U.S. Supreme Court consideration of *Gloucester County School Board v. G.G.* (certiorari granted October 28, 2016), a Title IX claim by Gavin Grimm, a transgender boy from Virginia, against his school district, in which that Court granted the school district’s request to stay a preliminary injunction issued by the district court (*see* 136 S. Ct. 2442 (Aug. 3, 2016)), Judge Hornak wrote that he “cannot conclude that the path to relief sought by the Plaintiffs under Title IX is at the moment sufficiently clear that they have a reasonable likelihood of success on that claim.” A “reasonable likelihood” finding is a prerequisite to issuing preliminary relief.

years ago and had been using restrooms consistent with their gender identities without any opposition from school administrators or any disturbance as early as the 2013-14 school year. In each case, they and their parents had met with school administrators, who had agreed to recognize and honor their gender identities in all respects. Each of them has been living consistent with their gender identity for several years, although because of their ages only one of them has obtained a new birth certificate. Administrators, teachers, and fellow students have consistently used their preferred names and pronouns and treated them accordingly. It wasn’t until a student mentioned the restroom use to her parents, who then contacted the school board, together with other parents, and turned it into an “issue,” that administrators even became aware that the transgender students were using the restrooms,

since nobody had complained about it or made it an issue before then. Ultimately, the school board responded to noisy parental opposition at a series of public meetings, first rejecting a resolution allowing the transgender students to use the restrooms consistent with their gender identity by a tie vote, then adopting a contrary resolution by a slim margin.

The judge also pointed out that the boys' and girls' restrooms at the Pine-Richland high school were designed with individual privacy in mind, with dividers between the urinals in the boys' rooms and privacy-protecting stalls with internal locks for the toilets in both rooms. Locker room access is not an issue at this point in the case, since all three plaintiffs have completed their physical education requirements and are not using the locker rooms. The school also has established numerous single-user restrooms that are accessible to students. The judge easily concluded, based on uncontested evidence that the restrictive Resolution was not necessary to protecting anybody's privacy, thus rejecting one of the main justifications advanced by the school board.

Neither the Supreme Court nor the Third Circuit Court of Appeals, which has jurisdiction over federal trial courts in Pennsylvania, has ruled on what standard of judicial review applies to government policies that discriminate because of gender identity. The school board argued that this means the court should use the least demanding standard, rationality review, to evaluate its policy. Judge Hornak rejected that argument, saying, "First, that means that applying an Equal Protection standard other than rational basis in such a setting is not contrary to settled law, and second, when an issue is fairly and squarely presented to a District Court, that Court must address it. Dodging the question is not an option." He also observed that an earlier decision by another trial judge in his district involving a transgender student, *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 557 (W.D. Pa. 2015), was not binding on him, and he found that case distinguishable on the facts and the law, not least because of the extended period in this case during

which the plaintiffs had full recognition of their gender identity by the school administration and staff and, likewise, used restrooms without incident.

Reviewing the various criteria that the Supreme Court has discussed in cases about the appropriate level of equal protection review, Hornak concluded that the "intermediate standard" used in sex discrimination cases should apply in this case. "The record before the Court reflects that transgender people as a class have historically been subject to discrimination or differentiation; that they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; that as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and that as a class, they are a minority with relatively little political power." Focusing on this particular case, he wrote, "As to these Plaintiffs, their transgender characteristics are inherent in who they are as people, which is not factually contested by the District. As to these Plaintiffs, and more generally as to transgender individuals as a class, that characteristic bears no relationship to their ability to contribute to our society. More precisely, the record reveals that the Plaintiffs are in all respects productive, engaged, contributing members of the student body at the High School. Thus, all of the indicia for the application of the heightened intermediate scrutiny standard are present there."

That means that the defendants have the burden to justify their discriminatory policy, and the judge concluded they were likely to fall short in that. "Specifically, what is missing from the record here are facts that demonstrate the 'exceedingly persuasive justification' for the enforcement of Resolution 2 as to restroom use by these Plaintiffs that is substantially related to an important governmental interest," wrote Hornak. The Resolution was not shown to be "necessary to quell any actual or incipient threat, disturbance or other disruption of school activity by the Plaintiffs," he found, and there was no evidence that it was necessary to "address any such threat or disturbance

by anyone else in the High School restrooms." Furthermore, it did not address any privacy concern "that is not already well addressed by the physical layout of the bathrooms," he found, continuing, "it would appear to the Court that anyone using the toilets or urinals at the High School is afforded actual physical privacy from others viewing their external sex organs and excretory functions. Conversely, others in the restrooms are shielded from such views." And the school's existing code of conduct as well as state laws already exist to deal with any "unlawful malicious 'peeping Tom' activity by anyone pretending to be transgender," he wrote, dismissing a concern raised by the defendants as a hypothetical justification for the policy.

The school board argued that some parents had threatened to withdraw their students from school if the Board did not keep transgender students out of the restrooms, but the court was not willing to countenance this as a justification for the policy. "If adopting and implementing a school policy or practice based on those individual determinations or preferences of parents – no matter how sincerely held – runs counter to the legal obligations of the District," he wrote, "then the District's and the Board's legal obligations must prevail. Those obligations to the law take precedence over responding to constituent desires," because the 14th Amendment's Equal Protection Clause "is neither applied nor construed by popular vote."

Furthermore, rejecting the Board's argument that enjoining the Resolution while the case proceeds was an improper change of the "status quo," the court found that for several years the plaintiffs freely using the restrooms consistent with their gender identity was the "status quo," even if school officials claimed they were unaware of it. This was a "persistently-applied custom or practice" which had the same weight as a written policy and, of course, until the Resolution was adopted, the District had no written policy on this issue. The court rejected the defendants' argument that the availability of single-user restrooms "sprinkled around the

High School” provided a sufficient “safety valve” for the plaintiffs, making an injunction unnecessary. “Given that settled precedent provides that impermissible distinctions by official edict cause tangible Constitutional harm,” he wrote, “the law does not impose on the Plaintiffs the obligation to use single-user facilities in order to ‘solve the problem.’” He found that this was “no answer under the Equal Protection Clause that those impermissibly singled out for different treatment can, and therefore must, themselves ‘solve the problem’ by further separating themselves from their peers.”

He easily concluded that the differential treatment inflicted irreparable harm on the plaintiffs, and that ordering the District to allow them to use gender-appropriate restrooms would “cause relatively little ‘harm’ in the preliminary injunction sense – if any harm at all – to the District and the High School community.” It was crucial to this conclusion, of course, that the plaintiffs had been using the restrooms without incident for years until some parents made an issue out of it. He also found that issuing the injunction would serve the public interest by vindicating the constitutional rights of the plaintiffs.

In case a second-guessing court of appeals should disagree with his determination that heightened scrutiny applied to this case, Judge Hornak also stated that the Resolution probably would not even survive rationality review, since he found that it was not necessary to achieve any of the goals suggested by the defendants.

Judge Hornak’s decision not to grant the injunction based on Title IX seems prudent in light of the unsettled situation he describes. The Fourth Circuit Court of Appeals ruling in the Gavin Grimm case depended on deference to the Obama Administration’s interpretation of the Education Department’s bathroom regulation. With that interpretation being “withdrawn” by the Trump Administration in a letter that did not substitute any new interpretation in its place, there is nothing to defer to and the construction of the statute and regulation is now pending before

the Supreme Court, which voted 5-3 last summer to stay the district court’s preliminary injunction in the Grimm case. Hornak noted that the criteria for the Supreme Court issuing a stay in a case like that include the Court’s judgment that the case presents a serious possibility of being reversed by the Court on the merits. What he omits to mention is that the stay was issued only because Justice Stephen Breyer, who would in other circumstances have likely voted against granting the stay, released an explanation that he was voting for the stay as a “courtesy” to the four more conservative justices, undoubtedly because they had the four votes to grant a petition to review the Fourth Circuit’s ruling. Under the Supreme Court’s procedures, five votes are needed to take an action, such as issuing a stay or reversing a lower court ruling, but only four votes are needed to

Title IX because they receive federal funds, it does not really matter whether Title IX requires them to afford gender-consistent restroom access to transgender students (or staff, for that matter), because as government-operated institutions, they are bound to respect the Equal Protection rights of their students and employees. However, for non-governmental educational institutions that receive federal funds, either through work-study programs, loan assistance, or research grants in the case of the major private universities, their federal obligations towards transgender students depend on Title IX and whatever state or local laws might apply to them as places of public accommodation, which vary from state to state. Only a minority of states and localities, though, explicitly protect transgender people from discrimination.

**He found that this was “no answer under the Equal Protection Clause that those impermissibly singled out for different treatment can, and therefore must, themselves ‘solve the problem’ by further separating themselves from their peers.”**

grant a petition to review a lower court decision. It was clear in that case that the Gloucester County School Board would be filing a petition for review and that there were four justices ready to grant it. Judge Hornak interpreted that, as Justice Breyer clearly did, as a signal that the interpretation of Title IX in this context is up for grabs. If Neil Gorsuch is confirmed by the Senate in time to participate in deciding that case, the outcome will probably turn on Justice Anthony Kennedy, who voted for the stay. (Justices Ginsburg, Sotomayor, and Kagan announced that they would have denied the stay.)

Judge Hornak’s ruling confirms that for the overwhelming majority of educational institutions subject to

In light of the lack of Third Circuit appellate precedent on the constitutional issue, it would not be surprising if the defendants seek a stay of this injunction from the court of appeals, and there is no predicting how that court would rule, although the likelihood that the Supreme Court will issue a ruling of some sort in the Grimm case by the end of June might lead them to err on the side of caution to give the school district temporary relief.

Lambda Legal’s attorneys representing the plaintiffs are Omar Gonzalez-Pagan, Christopher Clark, and Kara Ingelhart, who are joined by local counsel in Pennsylvania, Tracie Palmer and David C. Williams of Kline & Specter, P.C. ■

# Federal Court Denies Preliminary Relief to Gay Victim of Revenge Listings on Grindr

A federal judge in Manhattan has denied a gay man's request to extend a temporary restraining order that had been issued against Grindr, a web-based gay dating app, by a state trial court on the plaintiff's behalf before the defendant removed the case to federal court. *Herrick v. Grindr, LLC*, 2017 WL 744605 (S.D.N.Y., Feb. 24, 2017). Matthew Herrick claims that a "former love interest, known as JC, has impersonated him on Grindr by creating profiles bearing Plaintiff's image and personal information, including his home and work address," wrote District Judge Valerie Caproni in her ruling on the application to renew the state court's TRO, which has since expired. "Some of the fake profiles describe Plaintiff as being interested in fetishistic sex, bondage, role playing, and rape fantasies and encourage potential suitors to go to his home or workplace for sex." Herrick alleges that "dozens of men" had responded, "some of whom have physically assaulted or threatened Plaintiff and his friends and co-workers." In a footnote, the judge says that Herrick "has at times described the total number of persons as 'approximately 400.'"

Herrick claims that he has sent more than fifty complaints to Grindr, which acknowledges receiving them but has taken no action. In his state court complaint, as described by Judge Caproni in her opinion, he asserted claims against Grindr for negligence, intentional and negligent infliction of emotional distress, and failure to warn (in connection with Grindr's alleged failure to monitor its users, prevent abuse of the Grindr application, or respond adequately to his complaints). He also brought claims for false advertising and deceptive business practices under state law, and a common law claim for negligent misrepresentation based on "Grindr's alleged misrepresentations regarding the safety of the Grindr user community generally and Grindr's alleged knowledge of JC's history of harassment."

The Manhattan state supreme court responded quickly to Herrick's January 27, 2017, complaint, issuing a TRO the same day "compelling Grindr to 'immediately disable all impersonating profiles created under Plaintiff's name or with identifying information relating to Plaintiff, Plaintiff's photograph, address, phone number, email account or place of work.'" Grindr then removed the action to federal court, claiming diversity of citizenship as the basis for jurisdiction. Judge Caproni notes that there may be grounds for contesting the federal court's jurisdiction. On February 21, Herrick filed his application to the federal court to extend the temporary restraining order, just one day before it was to expire, which Judge Caproni denied after hold a hearing on February 22.

In order to get a temporary restraining order, the plaintiff has to show, in addition to irreparable harm if it is not granted, that there is either a likelihood of success on the merits of his claim or sufficiently serious question going to the merits to make them a fair grounds for litigation and a balance of hardships tipping decidedly in his favor. When the plaintiff seeks to compel the defendant to do something, not just to refrain from doing something, he has to show that "extreme or very serious damage" will flow from denial of relief. In this case, Herrick is seeking to compel Grindr to take affirmative action to identify and remove any false postings by JC in this continuing course of harassment.

Judge Caproni assumed that the balance of equities favored Herrick's request in light of his serious factual allegations of harm. The problem, however, is that a federal statute apparently shelters Grindr from all, or almost all, of Herrick's common law claims, and maybe even his claims about false advertising and deceptive business practice. The Communications Decency Act (CDA), Section 230, protects against liability an "interactive computer service" (ICS) for content created and posted by a third party

"information content provider." In other words, as interpreted by various federal courts, including the New York-based 2nd Circuit Court of Appeals, Grindr generally can't be held liable for harm caused by content posted by its users unless it plays an active editorial role in the substance of that content.

"Plaintiff argues that Grindr is not merely a publisher of third-party content but is also a creator of content by virtue of the sorting and matching functions and geo-location services that it integrated into the Grindr application," wrote Caproni. "While dating applications with Grindr's functionality appear to represent relatively new technological territory for the CDA, past cases suggest strongly that Plaintiff's attempt to artfully plead his case in order to separate the Defendant from the protections of the CDA is a losing proposition. The fact that an ICS contributed to the production or presentation of content is not enough to defeat CDA immunity," she continued. "Rather, an ICS only loses its immunity if it assists in the 'development of what [makes] the content unlawful.'" "Neutral assistance" won't lose the immunity.

Judge Caproni found that all the features of the app Herrick specifies as assisting the development of a listing are the kind of "neutral assistance" that does not lose an ICS its immunity under federal law, which would preempt his state law claims. "The fact that these offerings have been weaponized by a particular Grindr user does not make Grindr the creator of the allegedly tortious content," she asserted. "Moreover, to the extent Grindr has 'contributed' to the harassment by providing functionality such as geo-location assistance, that is not what makes the false profiles tortious."

The judge rejected an analogy to the famous *Roommates.com* case, in which the federal courts in California found that an app had lost its immunity because of the way it elicited information about personal characteristics of potential roommates, putting it in the position of assisting those posting roommate

listings in violation of local housing discrimination laws. “By comparison,” she wrote, “there is nothing inherently illegal about the Grindr features described in the complaint. Critically, Grindr has not contributed anything to the objectionable profiles; the profiles are objectionable solely because of the false information supplied by Plaintiff’s tormenter.” She also found that Herrick’s claims were similar to claims that had been rejected by one of her Southern District colleagues in a lawsuit against Craigslist, *Gibson v. Craigslist, Inc.*, 2009 WL 1704355 (S.D.N.Y., June 15, 2009).

Although Herrick’s claims might seem to be viable under state consumer protection laws concerning misrepresentations in advertising, the judge found that his “injuries are so attenuated from the misstatements that it is highly unlikely Plaintiff will be able to prove causation.” Herrick claims he signed up for Grindr because “he believed Grindr’s advertisements representing Grindr to be a ‘safe space.’” Approximately four years later, Plaintiff met JC on Grindr and began an intimate relationship with him. More than a year after that, in October 2016, Plaintiff ended his relationship with JC. Thereafter, JC began using Grindr to harass Plaintiff. Put slightly differently,” wrote Caproni, “the only connection between Plaintiff’s present day injury and Grindr’s alleged misrepresentations approximately five years ago is the fact that Plaintiff would not have otherwise joined Grindr in 2011 and would not have otherwise met JC. This is an exceedingly remote connection. The fact that ‘but for’ Grindr’s advertising, Plaintiff would not have joined Grindr some five years before the harassment relevant to this case – assuming that to be true – is insufficient, standing alone, to establish causation.”

Caproni emphasized that this decision only addressed whether Herrick is entitled to the “extraordinary remedy” of a temporary restraining order” which is based solely on the allegations in his complaint. Caproni indicated that she would set a briefing schedule for Herrick’s potential motion to send the case back to state court, and “Defendant’s anticipated motion to dismiss” based on the CDA, at a conference scheduled for March 10. ■

## Italian Court of Appeals Enforces Two Children’s Foreign Birth Certificates in Favor of Two Gay Fathers

On December 28, 2016, the Court of Appeals of Milan, Italy, ordered the city authorities to register two birth certificates issued by Ventura County, California, regarding two 15-month-old twins and indicating a couple of Italian men as their respective fathers. *X (on behalf of A) & Y (on behalf of B) v. Comune di Milano [In Re California Surrogacy Twins]*, (No. 3990/2016, Milan App. Ct.).

In a successful attempt to bypass Section 12(6) of the Italian law on medically-assisted procreation, No. 40 of February 19, 2004, which prohibits surrogate motherhood in any form,

observed that “barely a twin pregnancy could give rise to two different legal fathers.” Both petitioners, however, appealed the decision on behalf of each twin but again lost at first instance when, on October 26, 2016, the Tribunal of Milan rejected their claims on the same public policy grounds. The Court of Appeals joined their request in one proceeding and, in contrast with the previous instances, granted both petitions.

The Court remarked, in the first place, that under Italian private international law rules (Articles 33 et seq. of Law No. 218 of May 31, 1995),

### In a successful attempt to bypass Italian law, two Italian men resorted to surrogate motherhood in California.

two Italian men resorted to surrogate motherhood in California under the procedure in force in that state. To this end, both men entered into separate agreements with a gestational carrier, who brought the pregnancy to term in 2015. Because the children were born from the same mother in the same moment, they were marked as twins in their birth certificates. As a result, Ventura County Superior Court issued a judgment declaring the existence of parental rights, with each birth certificate indicating the respective biological father.

Back in Italy, the couple petitioned the city to recognize and enforce the birth certificates. On March 23, 2016, the Civil Status Office of the city of Milan denied such a request on the basis that the certificates contrasted with the public policy expressed by the above-mentioned statute. Moreover, the Office

filiation is governed by the national law of the child. Because both twins are U.S. citizens, their respective fathers are those indicated in their birth certificate pursuant to the laws of California, where surrogate motherhood is legal and specifically regulated. Each twin will therefore bear the family name of the biological father.

Moreover, the Court observed that the term “twin” does not necessarily mean that the children share the same genetic heritage. Indeed, in this specific case the twins developed from two different eggs, each fertilized with its own semen, and therefore represent a rare case of dizygotic (“fraternal”) children. As their birth certificates simply reflect their different genetic heritage, they cannot be said to contrast with public policy.

Finally, the Court cited the Supreme Court judgment No. 19599/2016

to stigmatize the situation of legal uncertainty in which the children would find themselves should the birth certificates not be recognized in Italy. This result would be contrary not only to their best interest, which according to both international and domestic law must lead any decision concerning them, but also to the fact that the burden of being born as a result of a technique that is prohibited in Italy cannot be borne by an innocent person such as a child, “who has a fundamental right to preserve the status [and the family link] established abroad.” Sup. Ct. Cass., Sept. 30, 2016, *X & Y v. Ministero dell’Interno* (No. 19599/2016). See M. Winkler, *Italian Supreme Court Rules on Public Policy Regarding Same-Sex Families*, [2016] LGBT LAW NOTES 470 (2016). Using the judicial precedents of the European Court of Human Rights (*Menesson v. France*, App. No. 65192/11, [2014] ECHR 664, June 24, 2014; *Paradiso & Campanelli v. Italy*, App. No. 25358/12, [2015] ECHR 76, Jan. 27, 2015, *rev’d* [2017] ECHR 96, Grand Ch., Jan. 25, 2017), the Italian Supreme Court had acknowledged that “the parental link represents an essential aspect of any person[, whereas] the right to preserve one’s name constitutes a complementary aspect of the right to identity and movement of people[, so that] the lack of recognition would prejudice such a right to personal identity of which nationality is a constitutive element.”

The Court of Appeals concluded that because the birth certificates at issue are not contrary to public policy they must be recognized in Italy, as they are in the best interest of the children concerned. However, despite the unicity of the proceedings, the ruling concerned two different children, two birth certificates, and two fathers. Not a word is spent by the Court on the circumstance that the two men are in a relationship. Hence, even if the two men now live together with their kids, their family is both genetically and legally disconnected. – Matteo M. Winkler

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

## Federal Court Upholds IRS’ Denial of Gay Man’s Medical Expense Deduction for In Vitro Fertilization Expenses

Senior U.S. District Judge Richard A. Lazzara held in *Morrissey v. United States*, 2016 WL 8198717 (M.D. Fla., Dec. 22, 2016), that a gay man’s costs associated with *in vitro* fertilization (IVF) were not deductible medical expenses under the Internal Revenue Code, and that the denial of such deduction did not violate the man’s due process and equal protection rights guaranteed by the Fifth Amendment to the U.S. Constitution. Joseph F. Morrissey, the plaintiff in the case, sought the tax deduction after he and his committed partner of many years incurred substantial medical expenses while conceiving twins through

Return, claiming a refund of \$9,539 for medical expenses associated with the IVF procedures under Section 213 of the Internal Revenue Code (Amended Return). Section 213(a) allows taxpayers a deduction for “expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent.”

On July 20, 2014, the IRS issued a letter to Morrissey disallowing the claimed deduction and denying him the refund. Morrissey alleged in his complaint that the IRS Revenue Agent reviewing his request described Morrissey’s sexual orientation as a

### Morrissey argued that denying the deduction to gays is unconstitutional discrimination.

IVF. Morrissey, who happens to be a constitutional law professor at Stetson University College of Law, argued in his complaint that “to deny Plaintiff the tax deduction given to heterosexual couples who incur medical expenses to conceive a child” unconstitutionally discriminates against gay couples. Morrissey plans to appeal this ruling to the 11th Circuit.

Morrissey and his partner began the journey towards parenthood back in 2011. They experienced many setbacks along the way. After nearly four years, three surrogates, three egg donors, and a miscarriage, Morrissey and his partner’s twin boys were finally born in the summer of 2014. In the end, Morrissey has expended over one hundred thousand dollars in this effort.

On October 15, 2012, Morrissey filed his Form 1040 U.S. Individual Income Tax Return for the year of 2011 (Original Return). In the Original Return, Morrissey did not claim any deductions for medical expenses, but on December 17, 2012, he filed a Form 1040X Amended U.S. Individual Tax

“choice” and suggested that his medical expenses were not necessary because he was capable of having children through heterosexual intercourse. Accordingly, Morrissey filed a complaint seeking the refund under Section 213(a), as well as injunctive relief and a declaration that the IRS’ application of the statute was unconstitutional.

Morrissey argued that the language of Section 213 plainly authorized the type of deduction for medical expenses he sought. The Internal Revenue Code defines “medical care,” as used in Section 213(a), as including amounts paid “for the purpose of affecting any structure or function of the body.” According to Morrissey’s complaint, this definition should include fertility procedures, as they affect the reproductive “function” of the body. In response, the government argued that the plain language of Section 213 patently disallows the claimed deduction. Specifically, the expenses Morrissey paid were for IVF procedures performed on third-party egg donors and surrogates, not on him or his family

members. Therefore, the government argued, those expenses are not covered by Section 213(a), which requires that they be for medical care of the “taxpayer [himself], his spouse, or a dependent.” Judge Lazzara agreed and held that “IVF procedures involving individuals other than the taxpayer, his/her spouse, or dependents are not deductible under [Section] 213, regardless of the taxpayer’s sexual orientation.”

Morrissey additionally argued that the IRS’ denial of his claimed deduction violated his fundamental due process and equal protection rights under the Fifth Amendment. In his complaint, Morrissey alleged that the IRS has allowed deductions for medical expenses associated with IVF for heterosexual couples, and that by denying his deduction, “the federal government has created a classification that singles out one class of citizens – homosexuals – for disfavored treatment.” Effectively, Morrissey argued that this application of Section 213 requires him to engage in heterosexual relations as a precondition to receive equal treatment. Citing the land-mark marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Morrissey urged the court to take into consideration that the Supreme Court itself has recently recognized that being gay is not a choice, but rather an “immutable” sexual orientation.

Judge Lazzara entirely rejected Morrissey’s constitutional deprivation claim, beginning his analysis by stating, “Plaintiff’s sexual orientation . . . has nothing to do with the disallowance of Plaintiff’s requested tax refund.” He concluded that Section 213 does not permit deductions for IVF procedures performed on *third-party* egg donors and surrogates, regardless of the taxpayer’s sex, sexual orientation, or gender. While this may be true, Judge Lazzara does not acknowledge in his opinion that Section 213 as written and currently applied does single out one group who can effectively never claim a deduction for medical expenses they incur while trying to conceive children through IVF procedures: gay men. – *Michael Leone Lynch*

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*Michael Leone Lynch is a law clerk for Justice Paul Feinman of the Appellate Division of the Supreme Court of the State of New York, First Department.*

## Federal Judge Denies Gay Plaintiff’s Partial Summary Judgment Motion on Sexual Orientation Discrimination Claims

Look beyond the four corners of a writing! Sound familiar? In the case of *Carlson v. Lewis Cty. Hosp. Dist. No.1*, 2017 WL 497604 (W.D. Wash. Feb. 7, 2017), it may be necessary to read beyond U.S. District Judge Robert J. Bryan’s opinion in order to better understand what should be a major factor in the ensuing litigation. As the case stands now, Judge Bryan has denied partial summary judgment for the gay plaintiff’s claims under the Washington Law against Discrimination (WLAD) and the 14th Amendment of the U.S. Constitution. Eric Carlson filed his sexual orientation discrimination suit against the Lewis County Hospital District, five members of Morton General Hospital’s board of directors, and the hospital’s human resources director, after he was terminated by the hospital’s Chief Executive Officer (CEO).

Carlson was hired by the Hospital District as Morton General Hospital’s Chief Financial Officer (CFO) on November 21, 2014. Hospital CEO Seth Whitmer made this decision, and subsequently awarded Carlson a retention bonus in December. Carlson claimed that the hospital’s finances were a mess when he took over, and the bonus was recognition of the progress he was making in improving the situation. By the time of the board of directors executive session on December 17th, five of the six individual defendants (board members) had received word from various sources — including a disgruntled former customer of Carlson — of an opinion by a Western District of Washington bankruptcy judge; in dicta, the opinion suggested that Carlson may have been involved in a fraud to finance his own business venture in 2008, which several of the directors viewed with alarm.

Given the fuss around the bankruptcy judge’s opinion, this author finds that the writing warrants some discussion not found in the case at hand. Upon reading the first couple of pages, one

could easily learn that the bankruptcy petition was filed by Carson Taylor, who coincidentally had ended a sexual relationship with Carlson in 2008! Thus, one reading the opinion would learn, if they did not already know, that Carlson was gay. The procedural history section of the opinion discussed at length how the parties in that proceeding ultimately agreed to exclude their sexual orientation and relationship from the trial. Obviously, however, that agreement did not stop the brow-raising details about an alleged scheme to divert an elderly woman’s savings, over which Taylor had power of attorney, into Carlson’s risky business venture from making their way into the bankruptcy judge’s opinion.

Flash forward to the December 17, 2014, hospital board executive session, during which the directors instructed Whitmer to look into Carlson’s past behavior. Within the next two weeks, Whitmer set the termination of Carlson’s employment into motion, beginning with a December 31 “hearing” between the two. They met again at a second “hearing” on January 5, 2015, in which Whitmer told Carlson he could no longer serve as CFO due to the fraud allegation in the old bankruptcy opinion. Later, Carlson received a termination letter from Whitmer that was notably silent on that matter.

Clearly, one plot-twist is not enough! The board of directors then terminated Whitmer on March 11, 2015. After filing his own wrongful termination suit against the Hospital, Whitmer provided Carlson an affidavit stating that Carlson was fired because the board of directors learned of his homosexuality and demanded his removal. The board also allegedly compelled Whitmer to find an alternative reason to fire Carlson in order to avoid a discrimination suit, and hired a private investigator to find out more information. Furthermore, Whitmer stated that he consulted Morton Hospital’s attorney, who advised him to use the prior bankruptcy case

as a pretext for the termination, and to first place Carlson on administrative leave before terminating him, to make it appear as if an investigation was being conducted. But, swore Whitmer, there was no actual investigation beyond reading the bankruptcy court opinion. In response to this affidavit, the individual defendant board members have denied that they discussed Carlson's sexual orientation, and reaffirmed that they sought his dismissal because of the fraud allegation.

Judge Bryan first addressed whether Carlson was entitled to summary judgment on his WLAD claim. An employer who discharges any person from employment because of sexual orientation is in violation of WLAD, RCW 49.60.180 (2). A plaintiff claiming such violation must either establish a prima facie case by offering direct evidence of an employer's

the defendant's reasons were a pretext for discrimination.

Here, Judge Bryan concluded that there were legitimate issues of fact as to whether Carlson was discriminated against because of his sexual orientation. Viewed in a light most favorable to the defendants, who were opposing Carlson's summary judgment motion, their affidavits indicated that the board was concerned with the fraud allegation and a former employer's complaints against Carlson. Thus, Judge Bryan held that a trier of fact should determine the credibility of the witnesses, notably Whitmer, whose affidavit is the main evidence for Carlson's case, but who, as a discrimination plaintiff against the board, is not a disinterested witness. Credibility issues loom!

Next, Judge Bryan addressed Carlson's motion for partial summary judgment on his 14th Amendment Equal

motion for partial summary judgment because there remain issues of fact as to whether Carlson was terminated due to his sexual orientation or the fraud allegation. Because of this, Judge Bryan did not proceed to address the other requirements to allege a sufficient claim under § 1983. Carlson had also alleged a Due Process violation, premised on the lack of a real investigation by Whitmer before discharging him.

Based on the summary of facts provided in Judge Bryan's opinion, it is understandable that a reader would be more willing to regard Whitmer's affidavit as retaliation against the board for his own termination. However, the bankruptcy judge's earlier opinion places the case at hand in a new light that may provide Whitmer's version of events with more credibility. On the other hand, the board members swore that their concern was derived from the fraud allegations in the old bankruptcy opinion, as well as some complaints about Carlson's employment by community members and his former employer. Only time will tell how this will all turn out.

For now, Judge Bryan ordered that discovery be completed by March 17, and for trial briefs to be submitted by May 12. (The defendants had asked the court to delay ruling on the summary judgment motions to give them time to depose Whitmer. The time they were given in this order is brief, but perhaps a deposition could be completed by then.) Maybe if this case goes to trial Carlson will have to discuss his history with Taylor as the court explores the question whether the hospital had a legitimate, non-discriminatory reason to discharge Carlson! If the court ultimately finds dual motivations for the discharge and the court follows the course for dealing with such cases under Title VII, Carlson might win a partial victory with a limited remedy. If Washington state courts don't follow the federal lead on dual motive cases, there could be an issue as to what the primary motivation of the employer was in terminating Carlson. The court doesn't discuss these possibilities in its opinion, focusing on the sharply contested material facts as a reason to deny summary judgment. – *Timothy Ramos (NYLS '19) and Arthur Leonard (Professor of Law at NYLS and Editor of LGBT Law Notes)*

## Judge Bryan concluded that there were legitimate issues of fact as to whether Carlson was discriminated against because of his sexual orientation.

discriminatory intent, or by satisfying the *McDonnell Douglas* burden-shifting test, established by the U.S. Supreme Court for applying Title VII of the Civil Rights Act of 1964 in cases lacking such direct evidence, which is generally followed by state courts in applying their own state civil rights laws. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The test requires the plaintiff to first establish that he: (1) belongs to a protected class; (2) was qualified for the position; (3) was subjected to an adverse employment action; and (4) was replaced by or treated less favorably than a person outside the protected class. This raises a presumption of discriminatory intent, shifting a burden of production to the defendant employer to show a legitimate nondiscriminatory reason for the termination. If this is proffered, then the plaintiff has the opportunity to prove by a preponderance of the evidence that

Protection claim against the Hospital District pursuant to 42 U.S.C. § 1983. Under the 9th Circuit's decisions, the plaintiff must allege that: (1) he was deprived of a constitutional right; (2) the Hospital District had a policy, practice, or custom of discriminating because of sexual orientation; (3) the policy, practice, or custom amounted to a deliberate indifference to the plaintiff's constitutional rights; and (4) the policy, practice or custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001). In regard to a violation of his equal protection rights, the plaintiff must show that the defendants acted with an intent or purpose to discriminate against him based upon his membership in a protected class. *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003). Once again, Judge Bryan dismissed the

# Transgender Man's Treatment Discrimination Claim under ACA Section 1557 Stayed but State Law Claim to Proceed

On January 30, 2017, the U.S. District Court for the District of Minnesota refused to stay a state law discrimination claim brought by Jakob Tiarnan Rumble, a transgender man, against defendant health care providers, but granted a stay of Rumble's federal discrimination claim because of the nationwide preliminary injunction issued by the U.S. District Court for the Northern District of Texas in *Franciscan Alliance Inc. v. Burwell*, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016), and the U.S. Supreme Court's grant of certiorari in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. Apr. 19, 2016), stay granted, 136 S. Ct. 2442, petition for certiorari granted, 137 S. Ct. 369 (Oct. 28, 2016). *Rumble v. Fairview Health Services*, 2017 U.S. Dist. LEXIS 13316; 2017 WL 401940 (D. Minn.) is pending before District Judge Susan Richard Nelson, who was appointed by President Obama in 2010.

Rumble sued defendants Fairview Health Services (Fairview) and Emergency Physicians, P.A. (Emergency Physicians) in June of 2014, alleging that defendants violated both Section 1557 of the Affordable Care Act (Section 1557) and the Minnesota Human Rights Act (MHRA). In pertinent part, Section 1557 bars discrimination "on the basis of sex" in health care treatment and the U.S. Department of Health and Human Services (HHS) in May of 2016 issued a final rule implementing Section 1557 providing that "discrimination on the basis of sex," includes "discrimination on the basis of . . . gender identity." The MHRA prohibits discrimination based on sexual orientation and Minnesota law defines sexual orientation as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness," so it has been construed in the past to extend to gender identity discrimination claims.

In June of 2013, Rumble sought emergency room medical treatment from defendants for inflammation of his reproductive organs, pain urinating, and a high fever. According to Rumble,

at intake he was required to wear a wristband labeling him as female despite his identifying as male, and he was made to wait 4.5 hours before being seen by a doctor despite extreme pain. Rumble further alleges, *inter alia*, that one of the doctors who examined him violently continued jabbing at his painfully swollen genitals despite Rumble crying out for the doctor to stop. Rumble alleges he suffered this mistreatment because he is transgender and the defendants would have treated a non-transgender person differently.

Shortly after Fairview and Emergency Physicians had moved for summary judgment in December of 2016, an injunction was issued in *Franciscan Alliance*, barring the government

using the restroom that matches his gender identity. Judge Nelson ordered supplemental briefings on whether a stay of litigation on the federal claims and/or the state claims was warranted in light of these two cases.

Rumble's counsel argued that the *Franciscan Alliance* injunction did not control non-parties or other district courts. Judge Nelson disagreed, and adopted the position of the *Franciscan Alliance* court that "while injunctive relief is generally limited to the party or parties in a particular case, 'when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed.'"

## Judge Nelson allowed Rumble's state law discrimination claim under the Minnesota Human Rights Act to proceed.

from enforcing the final rule, which was scheduled to go into effect on January 1, 2017. Defense counsel filed a letter with the court arguing that the injunction required either dismissal of Rumble's Section 1577 claim or a stay of the litigation. The *Franciscan Alliance* court's preliminary injunction barred the government from enforcing the HHS rule pending a decision on the merits, and found that the faith-based health care providers and eight states who had brought suit challenging the rule were likely to prevail on their claim that Section 1577 did not extend to gender identity discrimination claims. This preliminary injunction followed the October 2016 decision by the U.S. Supreme Court to grant certiorari in *Gloucester County*, in which Gavin Grimm, a 17-year-old transgender boy in rural Virginia sued his school board for sex discrimination under Title IX after he was prevented from

In any event, Judge Nelson reasoned that "... absent the *Franciscan Alliance* injunction, the Supreme Court's review of *Gloucester County* — involving essentially the same underlying issue of whether Title IX's prohibition against sex-based discrimination includes gender identity discrimination . . . warrants a stay of these proceedings as to Plaintiff's Section 1557 claim." In other words, Rumble's claims "would be directly affected by [the Supreme Court's] interpretation of Title IX addressed to the meaning of 'on the basis of sex,' since that definition is expressly incorporated into the text of section 1557."

However, Judge Nelson allowed Rumble's state law discrimination claim under the MHRA to proceed, rejecting the defendants' argument that doing so would potentially mean two different trials causing an unnecessary expenditure of judicial time and

resources. Judge Nelson observed that “[t]he ACA does not supersede state laws that provide additional protections against discrimination . . . and although the Court has determined that Plaintiff’s federal question claim is stayed, this Court possesses supplemental jurisdiction over the MHRA claim.” As to defendants’ concerns over duplicative trials, Judge Nelson wrote, “[T]he Court finds that the possibility of a subsequent trial on Rumble’s Section 1557 claim would only expend nominally more resources. Both the Section 1557 claim and the MHRA claim are based on the same facts and evidence. The evidence in a later trial could be streamlined and presented in such a way as to alleviate much of the inconvenience . . . . The Court finds that Defendants’ concerns about economy are outweighed by competing considerations for the just determination of cases and the hardship or inequity of delay that [Rumble] would be forced to bear.”

At the time of this writing, the Trump administration has withdrawn the Obama administration’s request to have the *Franciscan Alliance* injunction narrowed so it would apply only in the states that are co-plaintiffs with Texas in the challenge to the Section 1557 regulation. The Trump administration asked the 5th Circuit Court of Appeals to cancel the scheduled hearing on that motion, and indicated that the parties would confer about how to proceed. Since the parties (the states and the justice department) are now possibly on the same side concerning interpretation of Section 1557, it is possible that the Trump Administration will drop any opposition to the preliminary injunction. To the extent the injunction continues to stand, it will likely impede the Section 1557 claims of Rumble and other plaintiffs in similar cases for the foreseeable future. However, Judge Nelson’s ruling shows a possible path forward for such transgender plaintiff’s in their respective cases where they have brought federal and state law claims against health care providers. – *Matthew Goodwin*

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

## NCLR Seeks Supreme Court Review of Arkansas Birth Certificate Decision

The National Center for Lesbian Rights (NCLR) filed a petition for certiorari with the U.S. Supreme Court on February 13, seeking review of the Arkansas Supreme Court’s decision that the state was not required under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to extend the presumption of parentage to the same-sex spouse of a birth mother for purposes of recording parentage on a birth certificate. *Smith v. Pavan*, 2016 WL 7156529 (Ark. December 8, 2016), *petition for certiorari filed sub nom. Pavan v. Smith*, No. 16-992.

The Arkansas Supreme Court’s decision, by a sharply divided court with three strong dissenting opinions, was the first ruling on this question to depart from a post-*Obergefell* consensus

the certiorari filings, seeing no need for full briefing and hearing on the merits. That ruling was announced several weeks after the death of Justice Scalia by the eight-member Court, and brought no dissent from any justices, three of whom had dissented in *Obergefell*. They implicitly agreed that with *Obergefell* as a precedent, there was no justification for recognizing any exception to the general rule that adoption decrees are to be recognized when the court granting the adoption clearly had jurisdiction over the parties and the subject matter of the adoption petition. They rejected the Alabama Supreme Court’s reliance on its own interpretation of the Georgia adoption statute as withholding “jurisdiction” from the family court to grant such an adoption.

### The due process and equal protection issues raised by the Arkansas court’s decision are stark.

of courts in other jurisdictions that equal marriage rights for same-sex couples necessarily include the equal right to have a spouse recorded as a parent on a birth certificate, despite the lack of a “biological” tie to the child, especially in light of the common practice of automatically recognizing a birth mother’s husband for that purpose, regardless whether he is “biologically related” to the child.

The due process and equal protection issues raised by the Arkansas court’s decision are stark, raising the possibility that the Supreme Court might consider this an appropriate case for a summary reversal, similar to its decision last term to summarily reverse the Alabama Supreme Court’s refusal to accord full faith and credit to a same-sex second parent adoption approved by a Georgia family court in *V.L. v. E.L.*, 136 S. Ct. 1017 (March 7, 2016). In *V.L.* the Court moved quickly to reverse the state supreme court ruling based on

NCLR petitioned on behalf of two married same-sex couples – Marisa and Terrah Pavan and Leigh and Jana Jacobs. Each couple had married out of state and then, living in Arkansas, had a child conceived through donor insemination. In both cases, the mothers completed the necessary paper work to get a birth certificate when their children were born. In both cases, the state health department issued a certificate naming only the birth mother and leaving the space for “father” blank on the birth certificate rather than naming the other mother. The state insisted that under its statute the automatic listing was limited to a husband of the birth mother.

The women filed suit against the director of the state health department, Dr. Nathaniel Smith, seeking to compel issuance of appropriate birth certificates, together with another couple who were not married when they had their child but who subsequently married after the *Obergefell* decision and sought an

amended birth certificate. That other couple is no longer in the case, having gone through an adoption proceeding and obtained a new birth certificate naming both mothers. The Arkansas state trial court construed *Obergefell* and its own marriage equality decision, *Wright v. Smith*, to require according equal recognition to same-sex marriages for this purpose, and ordered the state to issue amended birth certificates accordingly. The trial court refused to stay its decision pending appeal, so the certificates were issued.

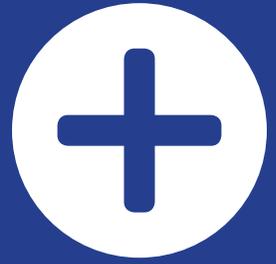
The Arkansas Supreme Court reversed, even though the state conceded at oral argument that in light of its statute requiring that a husband be listed on a birth certificate regardless whether he was biologically related to the child the state's position was inconsistent with its own practice. Indeed, the state conceded at oral argument that it had no rational basis for treating same-sex and different-sex spouses differently for this purpose. However, the state insisted that it was refusing to list same-sex spouses consistent with its gender-specific statute because the birth certificate was necessary to establish the identity of biological parents for public health reasons. This was a patently absurd argument in light of the various circumstances under Arkansas law where non-biological fathers are listed on birth certificates.

The dissenting judges pointed in various ways to the *Obergefell* decision, which actually listed birth certificates as one of the issues related to marital rights that helped explain why the right to marry was a fundamental right. Furthermore, as the certiorari petition points out in detail, the very question raised by this case was specifically part of the *Obergefell* case, as the underlying state cases that were consolidated into the appeal argued at the 6th Circuit and the Supreme Court included plaintiffs who were married lesbian couples seeking to have appropriate birth certificates for their children. In those cases, the certificates had been denied by states that refused to recognize the validity of the mothers' out-of-state marriages. Thus, the Supreme Court's reference to birth certificates was part of the issue before the Court, not merely illustrative of the reasons why the Court deemed the right to marry fundamental,

and in holding that states were required to recognize same-sex marriages validly performed in other states, the Court was incidentally addressing the refusal of states in the cases before the Court to recognize petitioners' marriages for purposes of recording the names of parents on birth certificates!

Thus, the Arkansas Supreme Court majority was clearly wrong in asserting that the *Obergefell* decision did not address this issue and pertained only to the question whether same-sex couples had a right to marry. Given biological facts, lesbian couples having children through donor insemination are exactly similarly situated with different-sex couples having children through donor insemination, as in both cases the spouse of the birth mother is not the biological parent of the child. By the logic of *Obergefell*, denial of such recognition and marital rights offends both due process and equal protection guarantees of the 14th Amendment. And, as the petition points out, such denial relegates same-sex marriages to a "second tier" treatment, which was condemned by the Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), when it ruled that the federal government was required to extend equal recognition to same-sex marriages validly contracted under state laws. In both cases, the Supreme Court rejected the argument that the inability of same-sex lesbian couples to conceive children without a sperm donor provided a rational basis to deny recognition to their marriages or treat them differently from the marriages of heterosexual couples.

NCLR attorneys on the Petition including Legal Director Shannon Minter and staff attorneys Christopher Stoll and Amy Whelan. Arkansas attorney Cheryl Maples is listed as local counsel. Cooperating Attorneys from Ropes & Gray LLP (Washington and Boston offices) on the Petition include Molly Gachignard, Christopher Thomas Brown, Justin Florence, Joshua Goldstein and Daniel Swartz, with prominent R&G partner Douglas Hallward-Driemeier as Counsel of Record for the case. Hallward-Driemeier successfully argued the marriage recognition issue before the U.S. Supreme Court in *Obergefell v. Hodges*. GLAD attorney Mary Bonauto from Boston argued the right to marry issue in *Obergefell*. ■



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# CIVIL LITIGATION

## U.S. COURT OF APPEALS, 3RD CIRCUIT

– The 3rd Circuit affirmed a decision by District Judge Alan N. Bloch rejecting the plaintiff’s claim that the non-renewal of her tenure track appointment at Slippery Rock University of Pennsylvania (a state school) violated her 1st and 14th Amendment rights as well as Title IX of the Education Amendments of 1972. *Kazar v. Slippery Rock University*, 2017 WL 587984, 2017 U.S. App. LEXIS 2581 (3rd Cir., Feb. 14, 2017). Sheila A. Kazar applied for an open position in the Geography Department, even though she did not yet have the required Ph.D. She assured school officials that she had completed most of the requirements for earning the Ph.D. from West Virginia University and would be defending her dissertation during the summer before she would begin teaching, and was appointed. The process of defending the dissertation and then making revisions to it as required by her dissertation committee ended up stretching out longer than her employer was willing to tolerate, and she was informed that her tenure-track appointment would not be renewed during the spring of 2011, even though her dissertation supervisor had emailed the school expressing confidence that the process would finish soon. In the meantime, Kazar had participated in a number of LGBT programs on campus, including Safe Zone, a support program for LGBT students under which she received training and placed a pink triangle sticker on her office door. After Kazar was non-renewed, the Department posted an opening for an instructor position that required a master’s degree and she was encouraged to apply, but she did not. A man with a Ph.D. was hired for that position. Kazar’s Section 1983 suit alleged that her non-renewal was retaliatory for her LGBT-related campus activities, asserted a denial of equal protection, and claimed sex discrimination in violation of Title IX. (She did not file any administrative charge or pursue

relief under Title VII or state anti-discrimination law.) The district court granted summary judgment to the university on the constitutional claims, finding that Kazar’s non-renewal was due to her failure to obtain a Ph.D. as required for a tenure-track position, and that the defendants did not treat her different from similarly situated persons. The court found none of her proffered comparators to be similarly situated. The court dismissed the Title IX claim, asserting that an employment discrimination claim had to be asserted under Title VII, not Title IX (in reliance on a 5th Circuit decision to that effect, *Lakoski v. James* 66 F.3d 751 (5th Cir. 1995)). The opinion for the 3rd Circuit panel by Judge Patty Shwartz agreed with the district court that Kazar had failed to provide evidence to support her claim that her non-renewal had anything to do with her LGBT-related activities, and had failed to suggest any similarly-situated faculty members who had been treated differently from her. The court agreed with Kazar that her posting of the pink triangle on her office was protected expressive activity under the 1st Amendment, but found no basis to conclude that her non-renewal was retaliation for that activity. The panel took no position on whether an employee of an educational institution can bypass the administrative exhaustion requirements under Title VII by filing a sex discrimination claim under Title IX, and also said nothing about the hotly-debated question whether Title IX covers sexual orientation discrimination claims. After observing that the proof standards for sex discrimination claims are the same under Title VII and Title IX, the court analyzed the claim in terms of the Title VII *McDonnell Douglas* proof framework, and found that the university had articulated a non-discriminatory reason for the non-renewal – failure to get the Ph.D. – and that Kazar had not met her burden of showing this was pretextual. Judge Shwartz wrote that “the record supports

only one conclusion: SRU decided not to renew Kazar’s tenure-track contract because she failed to timely receive her Ph.D.” In addition to her decision for the panel, Judge Shwartz wrote a separate concurring opinion rejecting the district court’s (and the 5th Circuit’s) view that an employee of an educational institution with a sex discrimination claim must go through Title VII and exhaust administrative remedies. Noting that Title IX post-dated Title VII, she concluded that Congress intended to provide an alternate route for employment discrimination claims against educational institutions that receive federal funding, as many courts have recognized a private right of action under Title IX, which does not by its own terms require any exhaustion of administrative remedies. Kazar is represented by James B. Lieber, Thomas M. Huber, and Jacob M. Simon of Lieber Hammer Huber & Bennington, Pittsburgh.

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## U.S. COURT OF APPEALS, 5TH CIRCUIT

– Dr. Rachel Jona Tudor is the complaining party and an intervening plaintiff in a lawsuit brought by the Justice Department against Southeastern Oklahoma State University, claiming that the university violated Title VII as alleged by Dr. Tudor, who is a transgender professor. The district court denied the university’s motion to dismiss for failure to state a sex discrimination claim under Title VI, finding that Tudor’s complaint was covered by Title VII because the defendants’ alleged actions “were based upon their dislike of her gender.” *United States v. Southeastern Oklahoma State University*, 2015 WL 4606079 (W.D. Okla., July 10, 2015). However, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction a little over a year later, banning the Justice Department from enforcing its guidance to schools (jointly issued with the Education Department), which had stated that

# CIVIL LITIGATION

schools could not discriminate because of gender identity under Title IX. (Sex discrimination bans under Title VII and Title IX are construed by most courts to be coextensive.) In a clarifying order, District Judge Reed O'Connor of the Texas federal court specifically noted this *Southeastern* case and disclaimed any intention for his Title IX preliminary injunction to interfere with the Justice Department's continuing prosecution of this Title VII lawsuit. Thereafter, District Judge Robin Cauthron, presiding in Tudor's case, stayed the litigation, on the ground that pending litigation may affect the validity of the discrimination claim. Tudor then moved to intervene as a co-plaintiff in *Texas v. United States*, the case pending before Judge O'Connor. All parties to that case opposed allowing Tudor to intervene; after all, hers is a Title VII case, although, if the university gets federal funding, it is also theoretically covered by Title IX. Tudor argues that whatever is finally decided about the fate of gender identity discrimination under Title IX may affect her claim under Title VII, given the practice of federal courts concerning interpretations of these sex discrimination provisions. Although Judge O'Connor had yet to rule on her intervention motion, she filed a notice of appeal seeking to join in the review of the preliminary injunction in the 5th Circuit, where the Justice Department had filed an appeal, seeking to narrow the scope of the preliminary injunction. On February 9, the 5th Circuit denied Tudor's motion to intervene in a *per curiam* opinion, citing 5th Circuit precedent stating, "It is well settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit." *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996). The court would not find Tudor to qualify for an exception to the general rule, although it appeared that if Judge O'Connor were to grant her intervenor status as a co-defendant in the district court, she might

again seek to participate in the 5th Circuit appeal. *State of Texas v. United States*, 2017 U.S. App. LEXIS 2373, 2017 WL 543266 (5th Cir., Feb. 9, 2017). When the Justice Department filed a notice the next day seeking to cancel a scheduled hearing in the 5th Circuit on its appeal, it appeared that with Jeff Sessions newly sworn-in as Attorney General, the Justice Department was reconsidering its position in this case and might end up not defending the Title IX guidance that was issued in its name. In which case, who would be left to defend the guidance in court other than . . . Tudor??? Bad timing here?

## U.S. COURT OF APPEALS, 6TH CIRCUIT

– The 6th Circuit adheres to the view that Title IX does not protect students from discrimination because of sexual orientation, but could extend to cases where a student suffers discrimination because of failure to conform to gender stereotypes. In *Tumminello v. Father Ryan High School*, 2017 WL 395106, 2017 U.S. App. LEXIS 1816, 2017 FED App. 0084N (Jan. 30, 2017), the court affirmed a district court decision dismissing a lawsuit by the mother of a high school student who killed himself during his freshman year as a result of bullying by other students, who called him "gay" and "fag" and suggested that he should take his life. Patricia Tumminello claimed that her son had been the victim of sex discrimination in violation of Title IX. However, based on her factual allegations, the district court concluded that the bullying was due to other students' perception of his sexual orientation, and not to his failure to conform to male sexual stereotypes, so there was no Title IX cause of action. Furthermore, the court found that the boy had suffered in silence, failing to complain to school officials, who were not shown to have been aware of the problem and thus could not be held liable under Title IX.

## U.S. COURT OF APPEALS, 11TH CIRCUIT

– In an *en banc* ruling issued on February 17 in *Wollschlaeger v. Governor, State of Florida*, 2017 WL 632740 (11th Cir., Feb. 16, 2017), the 11th Circuit questioned whether the 9th Circuit had "correctly decided" the case of *Pickup v. Brown*, 740 F.3d 1208, 1225–29 (9th Cir. 2013). In *Pickup*, the 9th Circuit held that a state law prohibiting licensed health care workers from performing "sexual orientation change efforts" on minors did not violate the 1st Amendment rights of physicians who sought to provide such "therapy" mainly through talking with their patients. The 9th Circuit characterized the performance of SOCE as conduct subject to state regulation, not speech of the type protected by the 1st Amendment. The 11th Circuit in *Wollschlaeger* was dealing with a 1st Amendment challenge to a Florida law prohibiting doctors from inquiring into or discussing gun ownership and gun safety with their patients. Reversing a panel decision, the court found the law unconstitutional on this point. The state had cited *Pickup*, arguing it as persuasive authority for the proposition that a state could regulate as conduct the content of what doctors say to their patients about health issues. The 11th Circuit rejected the argument: "Importantly, however, the law in *Pickup* . . . did not restrict what the practitioner could say or recommend to a patient or client. See *id.* at 1223 (explaining that the California law did not prevent mental health providers 'from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic' or from 'recommending SOCE to patients, whether children or adults'). The *Pickup* panel, therefore, concluded that the law 'regulate[d] conduct' even though it covered the verbal aspects of SOCE therapy. See *id.* at 1229. There are serious doubts about whether *Pickup* was correctly decided. As noted earlier, characterizing speech as conduct is a dubious constitutional

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enterprise. See also *id.* at 1215–21 (O’Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the Pickup panel for, among other things, not providing a ‘principled doctrinal basis’ for distinguishing ‘between utterances that are truly ‘speech,’ on the one hand, and those that are, on the other hand, somehow ‘treatment’ or ‘conduct’”). In any event, Pickup is distinguishable on its facts and does not speak to the issues before us. To the extent that Pickup provides any relevant insight, it recognizes that ‘doctor-patient communications about medical treatment receive substantial First Amendment protection,’ *id.* at 1227, and is therefore consistent with our approach.”

## U.S. COURT OF APPEALS, 11TH CIRCUIT

– Here is a case of the court of appeals coddling a state whose resistance to marriage equality was virtually unparalleled in the nation, and continued in many respects after *Obergefell* at the instigation of the state’s rogue chief justice, who was eventually suspended from his position for encouraging the state judiciary to resist the Supreme Court ruling. In *Aaron-Brush v. Attorney General of the State of Alabama*, 2017 WL 393168 (January 30, 2017), the 11th Circuit ruled *per curiam* that a lesbian couple who married in Massachusetts and lived in Alabama, who had sued the state for recognition of their marriage prior to the Supreme Court’s decision in *Obergefell*, were not “prevailing parties” entitled to attorneys’ fees when, after the Supreme Court ruled for marriage equality, the state’s representatives agreed in a status conference before the judge that *Obergefell* was “the law of the land” and that the state would comply with the plaintiffs’ demand to recognize their marriage, get them new driver’s licenses reflecting their married names and status, and allow them to file state tax returns as a married couple. The

district judge refused to issue them a declaratory judgment, finding that their case had been rendered moot, and subsequently denied their motion for attorneys’ fees, which they appealed. The 11th Circuit panel found that the test for “prevailing parties” had been set by the Supreme Court in *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), requiring a “court-ordered change in the legal relationship between the plaintiff and the defendant” as a result of a ruling on the merits, a consent decree, or a settlement agreement formally incorporated in a final order of dismissal or where the district court retained jurisdiction to supervise enforcement. The 11th Circuit panel found that the resolution of this case was too informal to meet that standard. The trial judge had secured the agreement of the government to meet the demands of the plaintiffs, evidenced by a subsequent letter from the government reporting its actions. None of the formal requirements of *Buckhannon* were met, in the view of the court, which found no fault in the district court’s determination that the government’s compliance with *Obergefell* effectively mooted this lawsuit. The plaintiffs were represented by ACLU attorneys and cooperating attorneys in Alabama.

**ALABAMA** – U.S. District Judge Callie V. Granade, whose rulings in several cases were an important part of the battle for marriage equality in Alabama, has ruled that the state must pay \$315,000 in attorney fees and costs to the civil rights lawyers who represented the plaintiffs in *Strawser v. Strange*. The fees would be split among the Southern Poverty Law Center, the ACLU of Alabama, the National Center for Lesbian Rights, Americans United for Separation of Church and State, and attorney Heather Fann of Birmingham, local counsel for the plaintiffs. Judge Granade awarded counsel for plaintiffs

in the other important marriage equality case, *Searcy v. Strange*, \$126,000 in fees. *Alabama Media Group News*, Feb. 2.

**CALIFORNIA** – Because the federal statute governing confidentiality of medical records (HIPAA) does not afford a private right of action, U.S. District Judge Larry Alan Burns ruled on January 27 that the court lacked jurisdiction over a claim by the plaintiff against the San Diego County District Attorney’s office and two investigators from the office that they had improperly disclosed his HIV status to two women in May of 2016, and that at an upcoming court date he was concerned that information about his HIV status would be put on the public record. Blow sought an injunction against any such disclosure, and moved to be allowed to proceed in forma pauperis and to have counsel appointed. *Blow v. San Diego County District Attorney’s Office*, 2017 U.S. Dist. LEXIS 12620 (S.D. Cal., Jan. 27, 2017). Judge Burns granted the motion to waive filing fees but refused to appoint counsel, noting that plaintiff Blow had failed to complete the form explaining his attempts to find counsel, and apparently had “not talked to any legal aid organizations or tried to find an attorney who would be willing to represent him free of charge or on a contingency basis.” The judge pointed out that HIPAA applies to covered entities, like hospitals and clinics, and their business associates, not to state law enforcement officials. “HIPAA provides for no private right of action,” he wrote. “In addition, Blow has not alleged that any of the three Defendants are either covered entities or business associates of a covered entity, and it does not seem likely he could do so. And even if HIPAA applied, it includes an exception for court proceedings. Finally, there are very limited circumstances under which the Court has authority to enjoin state court proceedings.” Blow had also asserted state law defamation claims, but

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lacking a ground for federal jurisdiction, Judge Burns was unwilling to assert jurisdiction over those claims. He did dismiss without prejudice, giving Blow a month to file an amended complaint.

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**CALIFORNIA** – A unanimous panel of the California 2nd District Court of Appeal rejected a constitutional challenge to the state’s surrogacy statute in *C.M. v. M.C.*, 7 Cal.App.5th 1188, 213 Cal.Rptr.3d 351 (Jan. 26, 2017). C.M. and M.C. are parties to a 75-page surrogacy agreement. C.M., the intended father, obtained eggs from an anonymous donor and paid for an attorney to represent M.C. in the contracting process. The agreement was drafted to comply with the requirements of Family Code Section 7692, under which courts have for years routinely granted the intended parent’s Petition to Declare the Existence of a Parent-Child Relationship Between the Children to be Born and Petitioner, and Non-existence of a Parent-Child Relationship Between the Children and Respondent/Surrogate.” It seems that in this case the surrogate, inseminated with C.M.’s sperm, ended up carrying triplets, and she alleges that C.M. urged her to have one aborted because he, a single man, did not feel capable of raising three children. This seems to have set off her pro-life alarm, and she decided that he should not have custody of these children. She refused to cooperate by executing the necessary documents in response to his Petition, even though in the agreement she had undertaken to cooperate in establishing his parental status. She now sought to have custody of at least one of the children, and to be heard on the best interest of the other children in terms of a suitable placement. She also challenged the constitutionality of California’s entire surrogacy scheme, alleging violations of due process and equal protection with respect to the children and her. The trial court, rejecting all her objections, granted the

Petition and declared C.M. the legal father of the children. On appeal, the unanimous court affirmed, finding that the California Supreme Court has rejected constitutional challenges to the surrogacy statute, and that enforcement of the surrogacy agreement does not violate public policy.

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**ILLINOIS** – U.S. District Judge Ronald A. Guzman granted Illinois Attorney General Lisa Madigan’s motion to dismiss a lawsuit brought by a group of religious ministers, joined together under the named “Pastors Protecting Youth,” who were challenging Illinois’s recently-enacted conversion therapy ban. *Pastors Protecting Youth v. Madigan*, 2017 U.S. Dist. LEXIS 21860, 2017 WL 635146 (N.D. Ill., Feb. 15, 2017). Being too dignified and solicitous of the rights of people to initiate litigation to characterize the complaint for the nonsense that it is, Judge Guzman issued a detailed refutation of the plaintiffs’ arguments that the statute violates their 1st Amendment rights by threatening to impose liability on them for providing anti-gay religious counseling to minors, focusing mainly on showing that the statute clearly does not apply to clergy who are providing religious counseling at no fee. He pointed out that there are three operative sections of the law. One prohibits licensed mental health providers from offering conversion therapy to minors, another subjects mental health providers who provide such therapy to possible discipline by the licensing entity or review board having jurisdiction over their profession, and the third, focused on “Advertising and Sales; misrepresentation,” concerns people offering conversion therapy for a fee (participating in trade or commerce) who publicize their services by making certain assertions that are now deemed false by the mental health professions concerning the nature of sexual orientation and the possibility of changing it through therapy. In addition

to a thorough review of language and case law, Judge Guzman quoted from legislative history making clear that proponents of the legislation said it applied only to licensed professionals, and did not address religious or non-licensed professionals, so far as the practice goes. The false advertising provision applies to any person, not just professionals, but only in connection with advertising conversion therapy for a fee. Thus, the court concluded, the plaintiffs lack standing to challenge the statute because it doesn’t apply to them and thus does not affect their constitutional rights.

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**MARYLAND** – U.S. District Judge Roger W. Titus ruled in *Stennis v. Bowie State University*, 2017 WL 633312 (D. Md., Feb. 16, 2017), that a former faculty member who resigned after being awarded tenure and took a position at another state university in Maryland failed to withstand a motion to dismiss her claims under Title VII, Title IX, and the Maryland Fair Employment Practices Act. Kesslyn Brade Stennis was an Assistant Professor in Bowie State’s College of Social Work. She told the department chair that some students felt they were being unfairly treated by certain faculty members, and he asked her to speak to members of the Social Work Club to determine their complaints. She learned that they felt the department chair himself was discriminating against students because of their gender and sexual orientation. She typed up a report and submitted it to the chair, who did not react well. She claims he became hostile to her thereafter, and undertake a campaign to deny her tenure. Although the faculty review committee voted not to recommend her for tenure, a decision supported by the department chair, she was eventually awarded tenure anyway, but she claimed that the “hostile and abusive environment” created by the department chair continued, leading

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her to resign six weeks later, then obtaining employment at Coppin State University. She filed an Intake Questionnaire with the EEOC several months before learning of the tenure award (but after the review committee vote). She did not file her formal charge of retaliation with the EEOC until after she quit her tenured position. Almost two years later, she filed her lawsuit, alleging violations of Title VII's anti-retaliation clause, Title IX, and the state anti-discrimination law. Being awarded tenure didn't help her case, of course, and the court found that under state law her claim was untimely as to several of her factual allegations, as she allowed too much time to pass after filing her EEOC charge to file her lawsuit. (Local precedents rejected the idea that her time to file suit under state law was tolled while the EEOC investigation was pending.) The retaliation claim under Title VII fell apart because she didn't file a charge with the EEOC until after winning tenure, and because her report on behalf of the students didn't involve Title VII protected activity, since Title VII relates only to a defendant's employment policies, not its policies towards students. The court found scant evidence, based on her generalized allegations, that she had suffered adverse personnel actions sufficient to ground an employment discrimination claim.

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**NEVADA** – In a ruling showing the limits of protection afforded workers by federal discrimination law, U.S. District Judge Robert C. Jones granted a motion by the Veterans Affairs Department for summary judgment on disability discrimination, retaliation, and constructive discharge claims asserted by Sholanda McGill, a lesbian respiratory therapist who had been employed with the Veterans Affairs Department at its hospital in Clark County, Nevada. *McGill v. McDonald*, 2017 WL 706100, 2017 U.S. Dist. LEXIS 24711(D. Nev., Feb. 22, 2017).

McGill claims that she was subjected to physical verbal harassment by two male coworkers because of her sexual orientation, causing her to suffer from depression, nausea, headaches, stress, fatigue and nightmares. The agency investigated her claims and temporarily transferred her to an outpatient facility away from the alleged harassers. This was an outpatient facility at which the work was ranked at a lower grade with lower pay, and she was not trained to work in that environment. Soon after, she was informed that she would be required to report to a new VA facility where the outpatient therapists were being relocated. She claims that she was also informed that her alleged harassers would be working at this new location. She let her supervisors and local HR office know about her fear of confronting them again, but she says they failed to address her concerns. The thought of having to work in that environment caused her such “physical and mental affliction” that she could not bring herself to report there, and she filed another complaint, proposing an “accommodation” under which the VA could create a unit in one of its primary care clinics where she could continue her outpatient duties apart from the other therapists, but no agreement was reached on this and she resigned her position, filing suit. Her original ten-count complaint was ultimately whittled down to a three-count amended complaint asserting disability discrimination (ADA), retaliation, and constructive discharge. Judge Jones found none of these claims viable. He accepted the VA's argument that the accommodation she proposed was not possible, so she did not meet the definition under the ADA of a qualified person with a disability because she apparently could not perform the essential functions of her job at the necessary location. “Plaintiff's position as a certified respiratory therapist depends on being part of the pulmonary clinic,” testified the VA's Section Chief.

“Thus,” wrote Jones, “it was not possible for Defendant to allow Plaintiff to work as a respiratory therapist outside the new facility because all the respiratory therapists and the necessary equipment and resources would be at the new facility.” Judge Jones noted that ADA does not require an employer to create a new position in order to accommodate an employee with a disability. Rejecting her retaliation claim, Jones wrote, “Plaintiff has presented no evidence to show that Defendant treated her differently than other employees in regard to the move. Requiring an employee to move like all other employees in a clinic would not reasonably deter an employee from filing a complaint of discrimination.” To be actionable, alleged retaliation must be such as would deter a reasonable employee from pursuing her statutory rights. Finally, as to constructive discharge, the court found that 9th Circuit precedent requires a showing of discrimination to ground the claim. “Here, no evidence shows that Defendant discriminated against Plaintiff or that Defendant was willing and able to begin discriminating against her.” Although she had been informed that if she reported to the new clinic she would be working at the same facility as her alleged harassers, “which could have created intolerable working conditions . . . the standards for a claim of constructive discharge require the existence of discrimination, not just difficult working conditions.” Having found no discrimination under ADA because of her disability or in retaliation for her EEO charge, it followed that her constructive discharge claim would fail as well. “Although Plaintiff presents evidence of harassment by her coworkers, she presents no evidence that the allegedly intolerable conditions created by the harassment were the ‘result of discrimination’ by Defendant, her employer,” wrote the judge. “Plaintiff certainly faced a difficult choice of either accepting a clerical position with a two-step demotion, or working at the

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new facility where her former harassers might also be working, but these working conditions were not “so intolerable and discriminatory as to justify a reasonable employee’s decision to resign,” wrote Jones, quoting from a prior 9th Circuit case. McGill is represented by Erica D Loyd and Patrick W Kang, Kang & Associates, Las Vegas, NV.

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**NEW YORK**—In *Lorber v. Lew*, 2017 U.S. Dist. LEXIS 21189, 2017 WL 633446 (S.D.N.Y., Feb. 15, 2017), U.S. District Judge Kimba W. Wood dismissed most of the counts in a discrimination case brought by a gay male Internal Revenue Service employee against the Treasury Department (naming former-Secretary Jacob Lew as lead defendant in his official capacity) and several supervisory employees in their individual capacities on a *Bivens*-type damage claim for violation of constitutional rights. Daniel Lorber alleged, as summarized by the court, that “over the course of several years, supervisors passed over him for promotions, gave him lower performance evaluations to prevent him from being promoted, intentionally excluded him from consideration for promotions, excluded him from meetings, ridiculed him or embarrassed him, gave him more menial tasks and less substantive work, and removed his subordinates.” Plaintiff contended that these actions were taken because he is a gay man, pointing out instances in which heterosexual females and males who did not have requisite qualifications were promoted into positions for which he was qualified, and that the Director of the part of the agency in which he was employed overwhelmingly favored women, almost regardless of qualifications, in making managerial-level appointments. He was also told by one agency executive that they would never promote an openly gay man into a managerial position. He grounded his discrimination claims on Title VII’s ban on sex discrimination and, for the

*Bivens* claim, the equal protection component of the 5th Amendment. He alleged hostile environment, sex discrimination, and retaliation claims. Judge Wood concluded that his factual allegations were not sufficient to meet the high pleading bar for hostile environment claims, that his allegations would not meet the 2nd Circuit’s precedent for gay plaintiffs being able to advance a sex-stereotyping theory to gain protection under Title VII, and that the retaliation allegations also fell short of pleading requirements. However, she noted, “the Second Circuit has recently held oral argument in two cases that present the issue of whether Title VII protects against sexual orientation discrimination. See *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. argued Jan. 5, 2017); *Christiansen v. Omnicom Group, Inc., et al.*, No. 16-748 (2d Cir. argued Jan. 20, 2017). Accordingly, adjudication of Plaintiff’s fifth count is STAYED pending the outcome of these cases.” If the 2nd Circuit will change its current position and accept the argument that sexual orientation discrimination is necessarily sex discrimination and thus forbidden under Title VII, as the Equal Employment Opportunity now maintains, Lorber’s allegations might be sufficient to survive a motion to dismiss a straight-forward sex discrimination claim grounded on his sexual orientation. Lorber is represented by Morris E. Fischer of New York and Daniel E. Kenney of Chevy Chase, Maryland.

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**NEW YORK** – *Pro se* plaintiffs, a same-sex male couple one of whom is an attorney, were defeated by the intricacies of employee benefits law in their suit seeking coverage under a New York State employee benefits plan in *Uddoh v. United Healthcare*, 2017 U.S. Dist. LEXIS 19415, 2017 WL 563973 (E.D.N.Y. February 10, 2017), but U.S. District Judge Brian M. Cogan gave them leave to refile

their dismissed complaint against appropriately identified defendants, while encouraging them to make some of their claims “more plausible.” Humphrey Uddoh, an attorney for the New York City Transit Authority, and his partner, Plamen Koev, are covered by insurance provided by NYCTA through the New York State Health Insurance Program (NYSHIP). Uddoh had selected the “Empire Plan” from among the choices offered. It is administered by United Healthcare by contract with the state. Koev was identified as male at the time Uddoh signed him up for partner coverage. Plaintiffs decided to start a family in early 2014 through IVF using a surrogate, and Uddoh applied for preapproval of coverage of certain IVF procedures. He received a letter from United confirming that various procedures would be covered, but it appears that United was operating under the mistaken belief that Koev was female (even though he was identified as male on the application forms). When a United employee, defendant Ginger Whispell, called one of Koev’s medical providers to inquire about Koev’s gender and learned that Koev was male, Whispell told the provider to cancel the procedure in question. When Uddoh learned of this, he contacted Whispell’s supervisor, defendant Jennifer Jablonski, who accused Uddoh of insurance fraud and “threatened to seek recoupment of the surgical costs that had already been paid for Uddoh’s two surgical procedures” that had been undertaken to harvest sperm for the IVF process. The complaint charges that Jablonski and Whispell made similar fraud allegations to plaintiffs’ health care provider. United sent a letter to Koev disclaiming coverage for his portion of “infertility services” in connection with the IVF and surrogacy process. The letter noted that the Empire Plan did not cover surrogacy and limited fertility treatment to situations of infertility diagnosed by a physician. Uddoh subsequently showed United State Koev’s gender

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had never been misrepresented by the men, and United subsequently modified its rejection letter, agreeing to cover surgical procedures for harvesting sperm from both men, but refused to cover various steps of the IVF process involving “Procurement of oocytes” or “services rendered to a surrogate,” asserting that these procedures were expressly excluded from the Empire Plan’s coverage. The men proceeded with their IVF procedures in reliance on the original coverage letter, they claim, to the tune of about \$150,000 in expenses, some of which were incurred because the delays incident to coverage caused them to lose the services of their volunteer surrogate, leading them to contract with a surrogate who would be compensate. (A New York state law prohibits compensated surrogacy, creating an additional wrinkle in the case.) The complaint, which treats United and Empire as a single entity, alleges a violation of equal protection, breach of contract, slander, and “detrimental reliance,” which Judge Cogan characterized as a promissory estoppel claim. The named defendants on the complaint are “The Empire Plan (NYSHIP),” United Healthcare, and Whispell and Jablonski. United was mentioned only in the caption of the complaint, all factual allegations being asserted against Empire or NYSHIP. The problem, according to Judge Cogan, is that these public entities are not appropriate defendants in the case. The Empire Plan, as such, is not an entity that can be sued. Employee benefits plans are not entities that can be sued outside of the context of ERISA, and state employee benefits plans are not covered by ERISA. Re-pleading will be necessary to focus the complaint on United, the plan administrator charged with making coverage decisions. The court gave the plaintiffs fourteen days to file an amended complaint that properly describes the role of United and its employees Jablonski and Whispell, who are misidentified in the original

complaint as employees of NYSHIP. The court found the slander claim to be time-barred and, in any event, abandoned as a result of a request by the plaintiffs to substitute a misrepresentation claim. The court found no basis for an equal protection claim, concluding that United Healthcare is a private sector entity that is administering the plan under contract with the state and is not, thereby, rendered a state actor. Going *pro se* against United’s law firm and the N.Y. State Law Department did not work out well for the plaintiffs.

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**PENNSYLVANIA** – U.S. District Judge William W. Caldwell ruled on February 1 that a deportable gay man from Jamaica who is being held in detention by the federal government while the Board of Immigration Appeals decides how to rule on the government’s appeal of an Immigration Judge’s ruling that he is entitled to deferral of removal under the Convention Against Torture (CAT) is entitled to an individual bond hearing to determine whether it is necessary to continue detaining him pending decision of the government’s appeal. *Kennedy v. Rowley*, 2017 U.S. Dist. LEXIS 13500, 2017 WL 440277 (M.D. Pa.). Kennedy entered the U.S. as an immigrant in 1984. Immigration Control and Enforcement initiated removal proceedings against him in 1997 for convictions of weapons and cocaine offenses in Maryland and New York, and he was ordered removed back to Jamaica by an Immigration Judge on April 10, 1997. The BIA subsequently approved the IJ’s ruling and Kennedy was taken into federal custody from a federal prison on October 30, 2015. On February 29, 2016, the BIA granted his unopposed motion to reopen proceedings and remanded to the Immigration Court to consider his application for protection under the CAT, in light of recent federal court rulings finding that gay men are in danger of torture or violence because of severe anti-gay animus in Jamaica. On

July 20, 2016, an IJ found that Kennedy “is likely to be targeted for violence upon his return as a homosexual” and granted him deferral of removal. The government has appealed, and as of February 1 the BIA had yet to rule on the appeal. Meanwhile, Kennedy had been in federal immigration detention for 15 months, and sought to be released on bond. Caldwell wrote, “We conclude that Kennedy is entitled to an individualized bond hearing before an IJ to determine ‘whether his detention is still necessary to fulfill the [INA]’s purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community.” While presumptions arising from the nature of his adjudicated offenses might justify a shorter period of detention without an individualized determination of these issues, the burden on Kennedy’s liberty imposed by prolonged detention “outweighed any justification for using presumptions to detain him without bond to further the goals of the statute,” wrote Caldwell, quoting from *Chavez-Alvarez*, 783 F.3d 469 (3rd Cir. 2015). Kennedy represents himself *pro se* in this proceeding.

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**PUERTO RICO** – U.S. District Judge William G. Young has denied a motion for summary judgment by a municipal employer that is being sued by an HIV-positive former worker on a discrimination claim under the Americans with Disabilities Act. *Rodriguez-Alvarez v. Municipality of Juana Diaz*, 2017 U.S. Dist. LEXIS 23342 (D. P.R., Feb. 17, 2017). The plaintiff began working for the municipality in 2001 and quit in 2015. She was diagnosed HIV-positive in 2013. After she notified her employer of her diagnosis, the city closed the bathroom and kitchenette within the department, which forced the plaintiff (and, of course, other employees) to take a 5-10 minute walk to another location in order to access a restroom. Plaintiff testified

# CIVIL LITIGATION

that this resulted in her having to urinate in the hallway on occasion. Her shift was changed from the 5 a.m. shift to the 6 p.m. shift, essentially leaving her to sit at her desk with nothing to do since the department's interaction with the public basically stopped after "regular" work hours. She also claims that she no longer was invited to attend social gatherings after the news of her diagnosis became public. The focus of Judge Young's decision – surprisingly, in light of the 2008 Amendments to the ADA that were intended, among other things, to short-circuit extended litigation about whether people with conditions such as HIV-infection were to be considered to have a disability – focuses extensively on the question whether an HIV-positive person who has not developed full-blown AIDS could be considered a person with a disability under the statute. Thus, the municipality contended that the plaintiff failed to qualify for protection because of lack of evidence that her HIV-positive condition "substantially limited" a major life activity. She contended, in line with EEOC regulations issued pursuant to the amendments, that the impact of HIV infection on a person's immune system was sufficient to meet this standard, at least at the summary judgment stage, and there was no need to show that she was symptomatic, although her medical records did show some side-effects of her treatment. The judge concluded that the 2008 amendments were intended to lower the bar for showing "substantially limited," but not to remove it, with an individual evaluation of the plaintiff still required to see whether her own major life activities had been "substantially limited." "In light of the post-ADAAA case law that continues to apply an individualized inquiry," wrote the judge, "this Court eschews a *per se* rule, but adopts a low standard for surviving summary judgment. The record reflects that [plaintiff] was diagnosed with HIV on August 19, 2013, and has been receiving treatment at the Immunology Clinic of Ponce since September 16,

2013. [Plaintiff] indicated that her condition resulted in her suffering from vomiting, urinary incontinence, and drowsiness. She further testified that she had to be very careful in dealing with bacteria because she 'could end up in a hospital,' and that she took six months of sick leave after her diagnosis. Finally, the plaintiff's medical records – a series of 'progress notes' that track [her] HIV treatment – show that she received regular treatment for HIV from September 16, 2013, through October 24, 2016. Based on the available evidence, a rational factfinder could reasonably conclude that [her] HIV-positive status substantially limits her immune system function." But the judge opined that her case "survives summary judgment . . . by the thinnest of margins" and that her "failure to introduce testimony by a medical expert on the effects of her HIV diagnosis on her symptoms, though not fatal at this stage, will severely impede her chances of success at trial." The court acknowledges that EEOC regulations suggest that people living with HIV should be easily deemed to have a disability, but insists that at trial she is going to have to prove it through expert testimony. This seems to undermine the intent of Congress in enacting the 2008 amendments, which were intended to address the problem that too much ADA litigation was focused on the definitional question. The court had little trouble concluding that the employer's response to learning of the plaintiff's diagnosis provided a basis on which a factfinder could conclude that she was subjected to a hostile environment. The plaintiff is represented by Jose Rafael Santiago-Pereles of Ponce, P.R.

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**SOUTH CAROLINA** – Accepting without detailed analysis the plaintiffs' contention that the state's refusal to list a lesbian's spouse as the parent of her children on a birth certificate violates their constitutional rights under *Obergefell v. Hodges*, U.S. District Judge

Mary Geiger Lewis approved a consent decree by which the state agreed after the parties' briefing on the plaintiff's motion for summary judgment that it would change its practice and henceforth deem the female spouse of a married woman to be the parent of the resulting offspring. Having approved the consent decree, Judge Lewis found that the plaintiff's demand for injunctive relief was moot. Judge Lewis granted summary judgment to the plaintiffs on the merits of their constitutional claims, and granted their motion for declaratory relief. *Carson v. Heigel*, 2017 WL 624803, 2017 U.S. Dist. LEXIS 21104 (D. S.C., Feb. 15, 2017). Plaintiffs are represented by Lambda Legal staff attorneys and Colleen Therese Condon, Condon Law Firm, Charleston, SC, Jerry Leo Finney, Finney Law Firm, Columbia, SC, and Jennifer B. Dempsey, Luke A. Lantta, and William Vance Custer, Bryan Cave.

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**TEXAS** – The Equal Employment Opportunity Commission (EEOC) and Lambda Legal (representing the complainant-intervenor) have reached a settlement in *EEOC v. Granite Mesa Health Center LTD.*, No. 1:16-cv-01113-LY (W.D. Texas, consent decree signed Feb. 8, 2017, by U.S. District Judge Lee Yeakel). Lambda's client, Michael Janssen, a certified nurse assistant, was discharged by Granite Mesa after disclosing that he was living with HIV. Under the settlement, Granite's current owners (who acquired the company after the events underlying this case) agreed to pay Janssen \$70,000 and to conduct on-site training concerning the company's obligations under the Americans with Disabilities Act, including specific training concerning HIV and disability-based discrimination. Janssen was fired just days after telling the Director of Nursing that he had tested HIV positive and then getting into a disagreement with an administrator who demanded to know his viral load and CD4 white

# CIVIL / CRIMINAL LITIGATION

blood count, citing a “company policy” that had not been disclosed to Janssen. Janssen contacted Lambda, which filed a complaint on his behalf with the EEOC. The agency decided to sue Granite. Janssen intervened as a co-plaintiff represented by Lambda. Lambda attorneys Paul D. Castillo and Scott Schoettes handled the organization’s participation in the case. *Lambda Legal Press Release*, Feb. 9. \* \* \* In another HIV-related case brought by the EEOC in Texas, *Business Management Daily* (Feb. 8) reported that Diallo’s, a Houston night club, agreed to pay \$139,366.00 to resolve charges that it violated the Americans with Disabilities Act by requiring an employee to provide medical documentation that she was not HIV-positive, and discharged her when she refused. The damages broke down into \$89,366 in back-pay and \$50,000 for pain and suffering. Under the agreement settling the case after the district judge granted a “default judgment” to the EEOC, Diallo’s will establishing policies and procedures to prevent future ADA violations.

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**WASHINGTON** – In *Kaiser v. CSL Plasma, Inc.*, 2017 U.S. Dist. LEXIS 26342, 2017 WL 735926 (W.D. Wash., Feb. 24, 2017), District Judge Ricardo S. Martinez rejected a motion by a plasma center to confirm and enforcement a purported settlement agreement of a discrimination claim brought by a transgender woman who was turned away when she attempted to “donate” plasma, for which the center normally compensates the donor. Jasmine Kaiser claims she was told that CSL Plasma had placed a “lifetime” deferment on any donation by her, and “that CSL would be notifying other, similar centers of the lifetime deferment, which essentially precluded her from ever ‘donating’ her plasma at one of these centers” for compensation, according to the court’s opinion. Kaiser alleged violations of the state’s consumer protection and anti-

discrimination laws, the latter of which forbids gender identity discrimination by places of public accommodation. Although the parties had agreed upon a settlement amount, Kaiser refused to execute a written settlement agreement, as she objected to the defendant’s proposed confidentiality provision. Although the court had been notified by the parties that they had reached a settlement and had actually entered a standard Order and closed the matter, Kaiser exercised her right under the Order to move to reopen the case on the ground that the settlement was not “perfected,” and the court had reopened the case. Judge Martinez found that the parties had “generally agreed that any settlement would be reduced to a written document that would cover various subjects, including a confidentiality provision,” but the details of such provision had not been agreed upon. Kaiser had sought as part of the settlement the adoption of a new policy on plasma donation by transgender individuals and asked for a copy of the new policy. Subsequent discussions “led to a dispute about confidentiality and what was expected of Plaintiff and any discussion of her claims as part of the settlement,” wrote the judge. “On this record, the Court finds that neither Plaintiff’s actions nor her words manifested any intent to accept the confidentiality agreement proposed by Defendant. Further, Defendant clearly has not accepted the proposed exception to the confidentiality agreement from Plaintiff.” Since no enforceable agreement has been reached, the court denied the defendant’s motion to enforce the alleged settlement agreement.

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## CRIMINAL LITIGATION NOTES

**U.S. COURT OF APPEALS, 5TH CIRCUIT** – In a case of first impression for the 5th Circuit, a panel unanimously rejected a challenge by a defendant

who pled guilty to a federal hate crime charge to the category and amount of damages awarded to the victim as restitution. *United States v. Serrata*, 2017 U.S. App. LEXIS 2454, 2017 WL 568324 (Feb. 10, 2017). The *per curiam* opinion for the panel says that Ramiro Serrata, Jr., “did not object to the [Pre-Sentencing Report], which detailed the violence and brutality of the assault, including the use of racial and homosexual epithets by Serrata and other attackers against K.G. while they beat him with various items, whipped him, sodomized him with a broom handle, poured bleach on his face, and threatened to kill him. At sentencing, K.G. provided a statement reflecting the severe psychological trauma he had suffered, which included increased drug use, depression, nightmares, insomnia, discomfort in groups, revenge fantasies, loss of concentration, and flashbacks.” The government also reported that K.G., who is now incarcerated on drug charges, “was receiving mental health treatment while in jail” and was deemed by medical personnel to be suffering from post-traumatic stress disorder attributable to the hate crimes committed against him. Serrata pled guilty and got a prison sentence of 15 years plus three years’ probation, about half of what he might have received had he been convicted of the charges at trial, according to the sentencing judge. The sentencing judge in the Southern District of Texas, obviously outraged at the offense to judge by statements quoted in the government’s brief, supplement the sentence with a restitution award, first to reimburse K.G. for a college loan to cover a semester he had to miss due to his injuries, and second to cover expenses of mental health treatment. The specific issue appealed was the award of \$5,000 for future psychiatric treatments. The 5th Circuit panel wrote: “This court has not addressed whether the restitution statutes authorize payment of future medical expenses that are attributable to a defendant’s actions. However,

# CRIMINAL / PRISONER LITIGATION

as the Government points out, other courts have held that calculable future losses may be included in an order of restitution. . . . In light of this persuasive authority, we conclude that the district court did not plainly err in ordering Serrata to pay restitution to K.G. for future psychiatric or psychological treatment.” The court also found the amount awarded to be reasonable, and did not fault the district court for failing to prescribe a specific payment schedule. When questioned at sentencing when the money was due to be paid, the trial judge, evidently exasperated, said it was “due now, it’s due now.” The 5th Circuit explained that this did not necessarily mean that Serrata had to come up with the full amount immediately, but merely to begin making good faith payments towards the full amount immediately. Serrata also objected for the first time on appeal to the restitution award of K.G.’s college loan money in addition to the medical costs amount, but the court rejected his strained argument.

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## PRISONER LITIGATION NOTES

**ALABAMA** – U.S. Magistrate Judge Wallace Capel, Jr., recommended that summary judgment be granted against HIV-positive *pro se* inmate Ronald Lee Hatcher in *Hatcher v. Thomas*, 2017 WL 712634 (M.D. Ala., February 1, 2017). Hatcher sued for discrimination under both Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* [ADA], and § 504 of the Rehabilitation Act, 29 U.S.C. § 794 [RA]; and for denial of Equal Protection. He alleged that he was segregated in housing, denied a job in food services, and forced to wear an armband designating his HIV status. He also relied on the class action decision in *Henderson v. Thomas*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012), finding violations of both the ADA and RA in Alabama’s treatment of HIV-positive

inmates, including the use of armbands. *Henderson* required individualized assessment of HIV-positive prisoners in housing and programs and protected privacy of diagnosis. *Henderson*, 913 F. Supp. 2d at 1294-98, 1306, 1312, 1316-18. Hatcher, who had been transferred, sought damages but not injunctive relief. *Henderson* was brought for declaratory and injunctive relief on behalf of a F.R.C.P. 23(b)(2) class, of which Hatcher is a member. The class action did not provide for damages and its approval excluded them but allowed unrelated individual damages cases. Defendants’ affidavits denied any discrimination in housing or jobs, said Hatcher was denied food services work due to an individual medical decision unrelated to HIV, and listed programs in which he had participated. It admitted use of armbands, but it denied they were HIV-identifying. The R & R found: (1) that both the ADA and RA apply to state prisons, citing *Penn. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998); (2) defendants can be sued in their official but not individual capacity if actions “actually violate” the Constitution, citing *United States v. Georgia*, 546 U.S. 151, 159 (2006), and *Badillo v. Thorpe*, 158 F. Appx 208, 211 (11th Cir. 2005); (3) that HIV is a disability under the ADA and RA, citing *Henderson*, 913 F. Supp. 2d at 1287; and (4) that, despite all this, Hatcher cannot recover damages under the Prison Litigation Reform Act because he does not allege physical injury, citing 42 U.S.C. § 1997e(e). The R & R found that dismissal under the PLRA on this basis should be without prejudice under *Harris v. Garner*, 216 F.3d 970, 980 (11th Cir. 2000) (*en banc*). Judge Capel then turns to declaratory relief under the Equal Protection Clause, including the imposition of armbands, finding that Hatcher’s claims were “subsumed” in the *Henderson* decision and that his remedy was to seek enforcement of the consent decree. Although Judge Capel quotes from *Henderson*’s findings that the use of

armbands “does not serve a legitimate purpose” and was “infected” by “an intentional bias against HIV-positive people” (earlier opinion, 900 F. Supp. 2d at 1313, 1318), he did not refer this claim to Middle District of Alabama Judge Myron H. Thompson, who is still sitting. He again recommended denial of damages for Equal Protection violations under 42 U.S.C. § 1997e(e). *William J. Rold*

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**GEORGIA** – U.S. Magistrate Judge George R. Smith recommends that *pro se* inmate Joseph Martin McRoberts’ lawsuit for spending a year in administrative segregation be dismissed with prejudice in *McRoberts v. Pvt. Odell*, 2017 U.S. Dist. LEXIS 25551, 2017 WL 725734 (S.D. Ga., February 23, 2017). McRoberts was confined after he threatened to “infect another inmate with HIV.” McRoberts’ complaint alleges that he is not HIV-positive and that he made the threat to try to get placed in protective custody because of threats against him. Neither the complaint nor the Report and Recommendation [R & R] discuss McRoberts’ sexual orientation or the conditions of administrative segregation under which he was confined. McRoberts’ complaint, reviewed under PACER, says that he tried to convince jail officials that he was not HIV-positive, that the jail violated regulations calling for periodic review of administrative segregation placement, and that “internal affairs finally remedied the situation” after almost a year. The R & R said that McRoberts failed to allege that the conditions imposed an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,” citing *Sandin v. Conner*, 515 U.S. 472, 483-4 (1995) – the standard for review of “non-punitive” administrative segregation. The R & R also relied on Eleventh Circuit law applying *Sandin: Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004); and *Williams v. Fountain*, 77 F.3d

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372, 374 n. 3 (11th Cir. 1996). In each case, however, the Court of Appeals looked at the specific conditions alleged (*Magluta* was remanded three times; and *Williams* found one year of administrative segregation could violate *Sandin*). [Note: *Sandin* involved only 30 days.] In *Al-Amin v. Donald*, 165 F. App'x 733, 737-38 (11th Cir. 2006) (not cited in the R & R), the court upheld three years in administrative segregation because the conditions were similar to those in general population. *Magluta* also recognized that violation of regulations for periodic review of placement in administrative segregation was relevant to finding a liberty interest. 375 F.3d at 1284. Under the instant *pro se* circumstances and circuit precedent, dismissing the case with prejudice on first pleading seems unnecessarily harsh. McRoberts could have been given a chance to explain the administrative segregation conditions under which he was confined. The facts do not seem incapable of stating a claim. Instead, Judge Smith said McRoberts could submit an amended complaint within the 14 days allowed for objecting to the R & R and let the District Judge consider it. Judge Smith ended the R & R by assessing a “strike” under the Prisoner Litigation Reform Act and writing: “Meanwhile it is time for plaintiff to pay his \$350 filing fee,” requiring setting aside 20% of all future deposits to his inmate account (whenever it exceeds \$10.00) until the fee is paid in full. *William J. Rold*

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**ILLINOIS** – Changing the law is a slow prospect, particularly for prisoners. Three years ago, U. S. District Judge Michael J. Reagan allowed *pro se* gay inmate Vance White to proceed on Equal Protection claims when he adopted a Magistrate Judge’s Report that found White was subject to discrimination and slurs (including being called “faggot” and “Ms. White”), in *White v. Hodge*, 2014 U.S. Dist. LEXIS 18132 (S.D. Ill.,

February 13, 2014), reported in *Law Notes* (March 2014 at page 122). Now that White has been released from state custody, his injunctive claims are moot; and Judge Reagan grants defendants summary judgment in *White v. Hodge*, 2017 WL 446930 (S.D. Ill., February 2, 2017). Judge Reagan found that the record was not clear whether White was claiming damages for discrimination in denial of prison jobs because he is gay or because he was classified as “vulnerable”; but White loses either way, both substantively and on qualified immunity. First, on sexual orientation discrimination, Judge Reagan applied rational basis scrutiny and found that exclusion of gays from certain jobs for their own protection meets such scrutiny in prison. Judge Reagan found that gays are not members of a “suspect class” and that prison jobs are not a fundamental right entitling White to heightened scrutiny in the Seventh Circuit. Ironically, although Judge Reagan cites pre-*Windsor* cases, he relies on *Hughes v. Farris*, 809 F.3d 330, 334 (7th Cir. 2015) (which protected gay prisoners’ equal protection rights); and *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014) (marriage equality case in which Judge Posner said sexual orientation discrimination fell along “suspect lines,” requiring a “compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims”). The inability to persuade Judge Reagan to apply a higher level of scrutiny is fatal to the argument that “vulnerability” was a subterfuge for sexual orientation discrimination or that the classification (as claimed and as applied) was both over- and under-inclusive for equal protection purposes. The record supports both arguments. While White conceded that all gay inmates are not classified as “vulnerable,” he avers that all openly gay inmates are so classified, vulnerable or not. Moreover, he says that “vulnerable” inmates are assigned work in other institutions in Illinois, but

not at Lawrence Correctional Facility. Without higher scrutiny, an otherwise facially reasonable classification usually survives review, and Judge Reagan found that “there is a rational basis for the policy preventing inmates classified as vulnerable from holding jobs at Lawrence Correctional Center,” citing *Flynn v. Thatcher*, 819 F.3d 990, 991 (7th Cir. 2016). Alternatively, since White has been released from Illinois state custody and has only damages claims remaining, qualified immunity is a defense. Since qualified immunity raises both: (1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation – Judge Reagan elects to proceed first on whether the law was clearly established at the time White was denied jobs as a “vulnerable” inmate, as permitted *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). For the same reasons he cited on equal protection, he found no clearly established law. Even if heightened scrutiny would change the result, it was not clearly established in the Seventh Circuit in 2014, when the discrimination occurred. *William J. Rold*

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**MINNESOTA** – The Eighth Circuit continues to be an inhospitable forum for transgender inmates, despite some recent inroads and efforts toward change. Compare *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); and *cf. Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015) (granting qualified immunity,) with a recent minor success in Nebraska and major efforts in Missouri and Iowa. See *Brown v. HHS*, 2016 U.S. Dist. LEXIS 155500 (D. Nebr., November 9, 2016) (civilly committed transgender inmate allowed to proceed), reported in *Law Notes* (December 2016 at pages 533-4); Iowa’s voluntary change in transgender

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policy; and Lambda's lawsuit (*Hicklin v. Lombardi*, 16-cv-01357 (E.D. Mo., 2016)), the latter two reported in *Law Notes* (September 2016 at pages 395, 396). In Minnesota, however, a civilly committed transgender inmate loses on all counts in *Lovejoy v. Minnesota Department of Human Services*, 2017 WL 462015 (D. Minn. January 3, 2017). Plaintiff David Josef Lovely, a/k/a Kendra Michelle Lovejoy, sued officials claiming she received "multiple" misbehavior reports relating to her sexual identification, most of which relate to her signing documents with her preferred rather than birth name and other "numerous degrading and defaming actions" against her, to the point that she "avoids coming out of her room, except at mealtime," saying defendants "acted in a manner that was offensive and discriminatory toward Plaintiff." Lovejoy was allowed to proceed past screening, but U.S. Magistrate Judge Leo I. Brisbois' Report and Recommendation ["R & R"] recommends dismissal of all federal claims. The R & R is a primer on 11th Amendment immunities, which will not be repeated in this blurb. Recognizing that the defendants could be sued in their individual capacities, citing *Ex Parte Young*, 209 U.S. 123 (1908) and *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995), Judge Brisbois nevertheless found lack of specific showing of personal involvement in what the R & R characterizes as "vague and conclusory allegations." Although Lovejoy sought declaratory relief that the institution's insistence on her using her birth name and male pronouns violated her rights, the R & R rejects declaratory relief because Lovejoy also sought injunctive relief, citing another District of Minnesota case – 2012 WL 1004985, \*5 (D. Minn. Jan. 25, 2012), *adopted sub nom Smith v. Fabian*, 2012 WL 1004982, \*1 (D. Minn. Mar. 26, 2012) – and *Black's Law Dictionary*. Neither supports the proposition. In *Smith*, the

prisoner sought a declaratory judgment that prison regulations on sexually explicit material violated his First Amendment rights. The R & R in that case recommended denial of declaratory relief because the regulations had been changed and the plaintiff could not seek "a retrospective opinion that he was wrongly harmed by the defendant" – the passage quoted by Judge Brisbois. If one reads further (to the next page), the R & R states: "For declaratory relief, a plaintiff must assert a claim that, if granted, would affect the behavior of the defendant[s] toward the plaintiff. *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (*per curiam*)." Judge Brisbois misuses *Smith*, which addressed declaratory judgment in the context of mootness. Lovejoy presents a live controversy because the policy continues, and she has a valid facial claim for declaratory relief, if there is a violation. Citing *Black's Law Dictionary's* definitions of declaratory and injunctive relief adds nothing. Lovejoy was merely doing what hundreds of thousands of civil rights plaintiffs do all the time: seek declaratory and injunctive relief in the same complaint. The R & R also seems remiss in holding lack of personal involvement by the executive defendants, who either made or enforced the policy barring transgender inmates' use of preferred name, even if allegations are conclusory against some defendants. Perhaps recognizing this, Judge Brisbois continues, addressing the constitutional claims, "even if" the complaint were adequate pled as to personal involvement. The R & R finds no constitutional violation, because transgender inmates have no Due Process, Equal Protection, or First Amendment right to use their preferred name. The R & R uses logic we thought put to bed by marriage equality litigation, but Judge Brisbois writes: "Plaintiff needed to plead that Defendants treated her differently than similarly situated persons . . . . Instead, Plaintiff's argument is the opposite—

that Defendants treated her the same as other MSOP patients, despite her transgender identification. Defendants required her, for example, to sign her legal name . . . , just as other individuals at the MSOP must." Defining the Equal Protection claim to beg the question of discrimination (like the old nugget "we don't discriminate against women, just against pregnant people") is alive and well for transgender inmates in Minnesota. The R & R leaves Lovejoy with two options: change her name legally; or pursue her lawsuit in state court under the Minnesota state constitution and human rights law. *William J. Rold*

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## LEGISLATIVE & ADMINISTRATIVE

**U.S. COPYRIGHT OFFICE** – On February 14 the Copyright Office issued a final rule allowing individuals to remove personal information from the on-line copyright records, and copyright holders who have a legal name change will be able to get their new name substituted for their old name upon submissions of proper documentation, instead of the current practice of requiring that both names appear in the record. These measures were requested by the National Center for Transgender Equality, which maintained that the Office's practice of keeping the name under which copyright was issued permanent in the online records violated the privacy rights of transgender copyright holders. NCTE had written, "for transgender individuals, disclosure of a birth name equals disclosure of transgender status," and having a transgender individual's birth name and changed name appear in the record could threaten that person's "well-being and personal and professional life." In issuing the final rule, the Office said that NCTE's argument was "compelling." *Mondaq*, Feb. 14.

# LEGISLATIVE

**ALABAMA** – Republican Senator Phil Williams, from Etowah County, has introduced a bill called The Alabama Privacy Act, under which any entity that operates multiple-user restrooms that are open to the public and allows transgender people to use restrooms consistent with their gender identity will be required to staff such restrooms with an attendant “stationed at the door of each restroom to monitor the appropriate use of the restroom and answer any questions or concerns by users.” The purpose of the bill is to expand employment opportunities for the many frustrated Alabamans who wish to engage in restroom voyeurism for pay. (Just kidding, folks! The purpose is to counter the epidemic of sexual attacks in restrooms throughout Alabama as a result of non-discriminatory businesses that are allowing predatory transgender people to stalk their restrooms looking for vulnerable prey . . . Oops, alternative facts!!! We’re not really sure why Sen. Williams has introduced this measure, other than to stoke fears and pander to bigots.) *Cullman Times*, Feb. 14.

**ARKANSAS** – Some Republican state legislators who are clearly panicked at the prospect of sharing public restroom facilities with transgender people are working on a bill that would require people to use facilities consistent with the sex indicated on their birth certificates. Presumably this will require Arkansas residents to carry their birth certificates with them at all times in case they are challenged. One presumes that somebody questioned in a restroom who does not have documentary proof of gender at hand will have to submit to a partial strip search, assuming that polygraph machines and examiners are not readily at hand. We hope that these sponsoring legislators are the first to be challenged, hopefully by humorless state troopers who will stake out restrooms to detect urinary miscreants. Governor Asa Hutchinson, a rare Republican

who seems not to be afflicted with such restroom panic, indicated that the contemplated legislation is unnecessary and “potentially harmful,” referring to the experience of North Carolina, where boycotts inspired by H.B. 2 have inflicted economic injury on the state. *AP Alerts*, Feb. 14.

**CONNECTICUT** – Reacting to the Trump Administration’s withdrawal of a Guidance on transgender student rights that was issued last year by the Education and Justice Departments, Governor Dannel Malloy signed an executive order on February 23 intended to protect the rights of transgender students in the state to access restrooms and locker rooms consistent with their gender identity. The order specifies that such facilities in public schools and institutions of higher education are “places of public accommodation” within the meaning of the state’s anti-discrimination law, which forbids discrimination because of gender identity or expression. The executive order directs the state’s Department of Education to provide guidance to the state’s Board of Education on policies that local school districts can adopt to provide appropriate facilities access for students. *Darien Daily Voice*, Feb. 24.

**FLORIDA** – After numerous failed attempts over many years, the City Council in Jacksonville voted on February 14 to approve legislation banning sexual orientation and gender identity discrimination in the city. Mayor Lenny Curry announced that he had “allowed” the measure to become law without his signature, according to the *Jacksonville News*, Feb. 14. The vote was 12-6, with one absent. Several proposed amendments, including one requiring a public referendum on the measure, were voted down. Discrimination complaints will be subject to investigation by the city’s Human Rights Commission.

Violations will be punishable by a fine up to \$500 per occurrence. Businesses with fewer than 15 employees are exempt, as are religious organizations. The mayor’s position was that the measure was “unnecessary” but he did not see any need to veto it if the Council decided to pass it.

**GEORGIA** – Diehard opponents of same-sex marriage have reintroduced a proposal for a state law incorporating by reference the federal Religious Freedom Restoration Act, with the specific intent of protecting businesses from liability if they want to refuse services in connection with same-sex weddings. Governor Nathan Deal announced that he was unequivocally opposed to the enactment of such a measure, stating on February 23: “I didn’t want there to be any confusion about where I stand on the RFRA bill: I have no desire or appetite to entertain that legislation.” *Atlanta Journal and Constitution*, Feb. 24. \* \* \* Hope springs eternal. A pending bill to give Georgia its first state-wide civil rights law has picked up proposed amendments to add sexual orientation and gender identity as prohibited grounds of discrimination, in addition to race, color, religion, national origin or sex. Since Republicans, who favor leaving such matters as discrimination to the free market, are opposed to the bill, its chances of passage are slim at best, but including sexual orientation and gender identity is an important symbolic step at a time when the Republicans are pushing a religious freedom bill. *Atlanta Journal and Constitution*, Feb. 14.

**INDIANA** – St. Joseph County Council voted 6-2 on Feb. 14 to approve a human rights ordinance against discrimination because of sexual orientation, gender identity, race, religion, sex, age, disability and other characteristics. The Republican members provided the two

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negative votes, and another Republican council member was absent. The measure is subject to approval by the County Board of Commissioners, which has a 2-1 Republican majority, and whose veto power can only be overridden by a 2/3 vote of the council. A citizen who spoke against the measure out of “moral concerns” said, “We’re seeing sexual molestation and problems in transgender bathrooms across the country, and pedophiles are using this type of legislation to get in the restroom.” *South Bend Tribune*, Feb. 15. This gentleman, Mr. Patrick Mangan of Citizens for Community Values in South Bend, is clearly an exponent of “alternative facts,” the newest fashion in public discourse introduced by the Trump Administration at the federal level.

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**MONTANA** – After the House Judiciary Committee voted 8-11 to defeat H.B. 417, a bill that would add sexual orientation and gender identity to the state’s anti-discrimination law, bill sponsor Rep. Kevin McCarthy (D-Billings) moved on the floor of the House to give the bill a hearing despite the committee action, which would have required at least 60 votes. The measure fell far short, receiving only 43 votes. A Republican member, Greg Hertz, stated that this issue should be worked out at a local level. McCarthy said that local leaders had told him that they thought it should be resolved at the state level. *Catch-22. Great Falls Tribune*, Feb. 22.

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**NEW HAMPSHIRE** – The school board in Keene, New Hampshire, unanimously approved a policy to allow transgender students to use restrooms and locker rooms consistent with their gender identity, on a case-by-case basis, and to participate in interscholastic sports as well. This was based on a policy recommendation from the New Hampshire School Boards Association. The vote on Feb. 14 followed months

of local discussion over the proposal. *Keene Sentinel*, Feb. 15.

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**NEW MEXICO** – The State Senate voted 32-6 on February 16 to approve a bill sponsored by Jacob Candelaria, the chamber’s first openly gay man, to make it illegal for health care providers to perform conversion therapy on minors. *Albuquerque Journal*, Feb. 17.

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**NORTH CAROLINA** – It is back to the drawing board for LGBT rights advocates in North Carolina after a special session of the legislature failed to repeal HB2, commonly known as the “bathroom bill,” which not only restricts restroom access for transgender people but preempts local governments from protection LGBT people from discrimination. On February 9, a group of Democratic state legislators and LGBT rights advocates held a press conference to announce that H.B. 82 has been filed to ban sexual orientation and gender identity discrimination in housing, lending, employment, insurance, education and public accommodations. A separate bill repeals HB 2, adds sexual orientation and gender identity to the state’s civil rights law, and increases penalties for people who commit sex-related crimes in restrooms and locker rooms. This last point was intended to blunt the arguments, advanced last year by Republican state legislators with overactive imaginations, that allowing transgender people to use restrooms consistent with their gender identity would endanger other users of those facilities, in light of the epidemic of such attacks in jurisdictions that have allowed such access – oops, not! *Asheville Citizen-Times*, Feb. 10.

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**OHIO** – The Toledo City Council voted unanimously on February 7 to make it a fourth-degree misdemeanor for medical professionals to perform “conversion

therapy.” The measure imposes a maximum fine of \$250 per day for each day during which the therapy is given to the individual. Unlike such measures approved in several other jurisdictions, the Toledo ban is the first that is not limited to protecting minors, but extends to performing such therapy on any person. This responds to evidence that such therapy can be harmful regardless whether the individual is an adult or a minor. At the same time, the Council voted to add gender identity to its non-discrimination ordinance, which protects all persons, regardless of age. The conversion therapy measure applies only to medical professionals, and is not intended to restrict pastors and other religious professionals who are not licensed medical professionals from providing religious counseling. *Toledo Blade*, Feb. 8.

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**OKLAHOMA** – The Senate Committee on General Government voted 6-4 to approve S.B. 694, which would prevent local governments in the state from including in their employment and public accommodations anti-discrimination ordinances any categories not covered by state law. Of course, Oklahoma’s state anti-discrimination law does not forbid sexual orientation or gender identity discrimination. Sponsor Joshua Brecheen says the measure is intended to protect small business owners who want to be able to discriminate based on their religious beliefs without facing a potential lawsuit. Why religious bigots should be accommodated in this way is not clear. The measure seems to be inspired by the city of Tulsa’s decision to ban such discrimination in 2015. That action has not yet resulted in any lawsuits, perhaps because people in Tulsa have decided not to discriminate. *publicradiotulsa.org*, Feb. 21.

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**SOUTH DAKOTA** – The Senate Health and Human Services Committee

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approved S.B. 149 by a 5-2 vote on February 15, intended to protect religious or faith-based foster care and adoption agencies from any liability or loss of state licensure for refusing to place children with same-sex couples or single parents. The sponsor, Sen. Alan Solano, a Republican, of course, said he introduced the bill to make sure that groups with “sincerely held” anti-gay religious beliefs would be able to place children with the kind of traditional families of which they approved. The executive director of Catholic Social Services in the state, James Kinyon, a supporter of the bill, said that the bill was needed “so the state respects the autonomy of faith organizations.” Under current law, organizations that receive state funds must comply with “state and federal standards that bar them from imposing restrictions based on religion, sexual orientation, marital status, or gender identity,” reported the *Argus Leader*, Feb. 16. A critic of the bill, Libby Skarin of the ACLU of South Dakota, argued that when it was necessary to make foster placements, “the state has a duty to place them in homes based on the children’s needs, not the religious or moral beliefs of the agency it hires to find them families.”

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**TENNESSEE** – State lawmakers who seem not to have been paying attention in high school civics, Republicans Mae Beavers and Mark Pody, introduced a bill against same-sex marriage contending that Tennessee did not have to comply with *Obergefell v. Hodges* if it does not want to do so. At a press conference they called to announce the introduction of their bill, an angry crowd quickly drowned out the speakers, ending the event. *fox17.com*, Feb. 16.

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**UTAH** – House Bill 369, a criminal measure which would require individuals to disclose their HIV/AIDS status before engaging in any sexual

activity, was approved by a House committee on February 24, by a vote of 9-2. Two Democrats opposed the bill, arguing that “criminalizing HIV” was not an appropriate public health policy. Bill sponsor Justin Fawson argued that the bill does not criminalize HIV, “it only criminalizes the act. So if someone’s HIV positive and they disclose, there’s no problem. There’s always a potential of transmitting HIV. We can’t reduce that to zero. They have to inform a partner that they are HIV positive.” Opponents had argued that the bill would drive people away from testing, treatment, or even disclosure, for fear of criminal prosecution once there is a record that they know they are HIV-positive. *fox13now.com*, Feb. 24. \* \* \* The Senate Education Committee voted unanimously to approve a bill that would delete from state law a provision that bans the “advocacy of homosexuality” in public schools. The bill, sponsored by Senate Republicans, would replace that language with “advocacy of premarital or extramarital sexual activity,” which, a news report indicated, is already outlawed in Utah schools. The sponsor, Senator Stuart Adams, said that the change would allow all children, including LGBT students, to be treated equally. *Canadian Press*, Feb. 22.

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## LAW & SOCIETY NOTES

**AMERICAN BAR ASSOCIATION** – At its midwinter meeting, the American Bar Association’s House of Delegates approved a Resolution 112D, urging the Food and Drug Administration (FDA) to “update its current policy requiring deferral of blood donations from men who have sex with men for one year after the donor’s most recent sexual encounter with a man to a deferral policy based on an assessment of the risk posed by an individual based on potential recent exposures rather than on the individual’s sexual orientation,”

and also urging “the FDA to develop and implement validated tools for assessing individual risk, to ensure the safety of the blood supply in light of the most up-to-date testing technology that can reliably indicate the presence of HIV and other blood-borne pathogens within a short period of time after an individual has been exposed.” The U.S. and several other major western countries have recently adopted the one-year deferral rule after having maintained lifetime bans since HIV was identified in the mid-1980s as a transmissible blood-borne retrovirus associated with AIDS. The one-year rule has been criticized as unduly restrictive since it effectively disqualifies all sexually-active gay and bisexual men from donating blood, regardless of the degree of their risk. The argument in support of the resolution is that men who are taking PREP and have undetectable viral loads present close to no risk of transmitting HIV through donated blood, yet would be disqualified from donating blood under current rules if not abstinent from any sexual activity for at least a year. At the same time, there is a continuing shortage of blood donations, which argues against disqualifying people as donors unnecessarily.

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**LGBT CENSUS** – A new Gallup poll survey (2015-16) showed Vermont as the state with the highest percentage of its adult population self-identifying as LGBT – 5.3%. This placed Vermont second only to the District of Columbia, which in 2015-16 had an estimate of 8.6% – a number that might change with the Republican takeover of the executive branch in January 2017. Vermont was followed by Massachusetts, California, and Oregon, tied with 4.9%. By contrast, LGBT people barely registered in South Dakota (2.0%) and North Dakota (2.8%). In terms of regional representation, LGBT people made up almost 5% of the adult population in Pacific Coast states (including Hawaii and Alaska),

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an increase of 0.7 percent over data from a 2012-13 survey. Every region of the country showed an increase in self-identified LGBT population, but the smallest percentages and increases were in the West Central, Southwest and Southeast regions. New England had the second highest numbers, following by the Mid-Atlantic states. The survey correlated willingness to self-identify with age, noting a correlation between younger average age in a region with higher levels of identification as LGBT. The results, as summarized and explained by Gary J. Gates, a longtime specialist in LGBT data affiliated with the Williams Institute at UCLA, were published on the Gallup organization's website on February 6. ([gallup.com/poll/203513/vermont-leads-states-lgbt-identification](http://gallup.com/poll/203513/vermont-leads-states-lgbt-identification)).

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**TRANSGENDER WRESTLER** – High school wrestling phenom Mack Beggs, who identifies as male despite his birth certificate, triumphed on February 25 in the Texas women's high school wrestling state championship. It seems that University Interscholastic League (UIL), the outfit that sets the rules for high school competition in the state, requires students to compete in the division consistent with their birth certificate, not the division consistent with their gender identity (or build and musculature, evidently). Beggs, named Mackenzie at birth but now preferring Mack as more consistent with his gender identity, began wrestling as a girl and fell in love with the sport. After concluding he was a transgender boy and beginning conversion therapy, Mack sought to compete in the boys' division, but was turned down by officials. His first few years of high school competition in the girls' division were not extraordinary, but now after two years of testosterone therapy, he's built and strong and unbeatable in that division. He won the girls' division crown after an undefeated junior season. Jim Baudhuin, a Tarrant

County attorney who is the father of a female wrestler who competed against Beggs last year, filed a lawsuit seeking to bar Beggs from girl's competition, but it didn't get far enough to prevent Beggs from competing this year. Several girls forfeited their matches rather than compete against him – perhaps as much from the “ick” factor of wrestling with a boy as from concern that they might be injured due to his superior strength. His school indicated that his testosterone level is within the limits necessary for him to compete in the girls' division. The UIL standard prohibits use of hormones to enhance performance, but allows such use for medically necessary treatment. The current medical consensus (reinforced by the Tax Court and 8th Amendment rulings on prison health care) is that hormone treatment is necessary for gender dysphoria. Perhaps Beggs' case will cause some rethinking of the reflexive “you are what your birth certificate says” position taken by social conservatives. He just wants to compete, in whatever division that will let him. The *Houston Chronicle* has been following the story in great detail during February, and as the championship rounds drew near, national media picked it up – most prominently the *Washington Post*.

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## INTERNATIONAL NOTES

**CANADA** – The Supreme Court of Canada will hear appeals involving Trinity Western University Law School's efforts to win appropriate recognition from the law societies so that its graduates can be admitted to the bar. Law societies that exercise this accrediting function across Canada are divided about whether Trinity's strict Christian conduct code, which is clearly discriminatory to LGBT people, should disqualify its graduates from practice. The school won approval in British Columbia, where a court overturned the law society's refusal to accredit its

graduates, but lost its case in Ontario. The Nova Scotia Barristers' Society has twice lost in court against Trinity. *Postmedia News*, Feb. 23.

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**FINLAND** – Amendments to the Marriage Act that will allow same-sex couples to marry become effective in March. Existing registered partnerships of same-sex couples will remain valid, but can be converted to marriages by filing a joint notification at the local register office, for which there is no statutory deadline. Only partnerships registered in Finland can be converted to same-sex marriages in Finland, and no new registered partnerships will be recorded when the Marriage Act amendments go into effect. Under the Adoption Act, only married spouses may adopt. This right of joint adoption will automatically be available to legally married same-sex couples. The amendments will also remove the requirement that a person be unmarried in order to be able to effect a legal change of gender. *European Union News*, Feb. 10. Later in February the Parliament voted 120-48 to confirm the validity of the law, rejecting a proposal to jettison it.

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**GERMANY** – The German press reported that an HIV-positive man has been ordered to pay damages equivalent to approximately \$75,000 to a woman whom he infected with HIV. They met in 2012. The woman demanded that he take an HIV test before they have sex together, as his previous partner died from HIV complications. He then had a general health checkup that did not include an HIV test and told the woman that he was healthy. A few months after their first sexual activity, she tested positive for HIV. She had initially asked for much larger damages, but the amount awarded was lowered by the higher regional court in Munich on February 8. That court also ruled that the man must

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pay the woman's legal fees and other costs. *dpa International*, Feb. 8.

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**JAPAN** – *The Mainichi* (Feb. 12), self-described as Japan's national daily, reported that the National Personnel Authority has "issued changes starting this year on how regulations for preventing sexual harassment are to be implemented at government ministries and agencies, explicitly stating that discriminatory speech and behavior regarding LGBT people constitute sexual harassment." The new rules apply to some 280,000 national public servants, according to the report, and punishment is authorized for those who violate the rules.

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**MALAYSIA** – The government has endorsed gay conversion therapy. Federal authorities claimed that sexual orientation can be "changed" with extensive training, in a video produced by the Family, Social and Development Department. Sodomy remains a crime in the former British colony. *Independent Online*, Feb. 14.

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**MEXICO** – On January 31 the legislature of the state of Durango voted 15-4 to reject a bill to legalize same-sex marriages. The action flies in the face of numerous decisions by the Supreme Court of Mexico granting petitions by LGBT people seeking the right to marry. However, under the Mexican legal system, such individual decisions do not constitute binding jurisprudence for a particular state until five such petitions have been granted in separate actions for couples from that state. In the meantime, the Court has ruled that local courts must grant such petitions when they are applied for by same-sex couples, so the legislature's vote will not prevent couples in Durango from getting married if they are willing to undertake the expense and burden of applying

for a court order, called an "amparo." On February 22, the Supreme Court issued another such ruling, authorizing marriages for 57 people in the city of Nuevo Laredo in the border state of Tamaulipas. The Court also ruled many years ago that legally contracted marriages in any particular jurisdiction in Mexico must be recognized by the government. During February Chihuahua became the first state in which five rulings by the Supreme Court established jurisprudence, which now mandates that the state Congress pass a bill authorizing same-sex marriages and individuals no longer need to go to court to get orders. It is uncertain what route marriage equality advocates will take if the state Congress refuses to comply. We are indebted to journalist Rex Wockner for keeping us up to date on Mexican marriage equality developments. \* \* \* *The Times of Israel* (Feb. 17) reported that three single men who had gone to Mexico to have children with surrogate mothers were unable to return to Israel with their newborn children because the Mexican Interior Ministry had refused to issue birth certificates as a result of a scandal involving allegations of bribery in the local government. Gay men in Israel have to go overseas if they wish to have children through surrogacy because Israel allows the process only for heterosexually married couples who are having difficulty conceiving.

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**NEW ZEALAND** – Following the precedent being set by Great Britain, New Zealand plans to introduce a process for individuals who have criminal records because of the enforcement of since-repealed laws against consensual gay sex to apply to have the convictions quashed and their criminal records eliminated. New Zealand reformed its sex crimes laws in 1986 to remove criminal penalties for consensual sex between males age 16 or older. Justice Minister Amy Adams said that legislation to implement this will

be forthcoming, and it is estimated that about 1,000 people would be eligible to apply. "Although we can never fully undo the impact on the lives of those affect," said Ms. Adams, "this new scheme will provide a pathway for their convictions to be expunged. It means people will be treated as if they had never been convicted, and removes the ongoing stigma and prejudice that can arise from convictions for homosexual offences." The government's action responds to a parliamentary petition filed last year, which also sought an official apology from the government for the past prosecutions. *BBC.com*, Feb. 9.

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**NORWAY** – The first same-sex Church of Norway marriage took place on the stroke of midnight the morning of February 1, pursuant to the Norwegian Evangelical Lutheran Church's new liturgy allowing church weddings for same-sex couples. Kjell Frolich Benjaminsen and Erik Skjelnaes were the happy couple.

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**SLOVENIA** – A law allowing legal partnerships for same-sex couples went into effect in Slovenia on February 24, with the first ceremonies set to take place on Saturday, the 25th. While the law allows the formation of legally recognized partnerships, it does not allow joint adoption of children or use the terminology of marriage.

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**TANZANIA** – The government on February 16 banned provision of HIV/AIDS in some 40 facilities that authorities have accused of clandestinely promoting homosexuality, according to a February 17 report in *The Citizen*, 2017 WLN 5147480. The Health Minister said that health workers in the banned "drop-in-centers" would be transferred to public health facilities under public control. The government

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claimed that the drop-in-centers were providing lubricants such as K-Y jelly to their patrons, which “lured many youth to engage in homosexuality.”

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**TRINIDAD & TOBAGO** – Gay rights activist Jason Jones has filed a lawsuit challenging Sections 13 and 16 of the Sexual Offences Act, which effectively outlaw gay sex in Trinidad and Tobago. The action alleges that the laws violate constitutional privacy rights inasmuch as they affect private adult consensual sexual activity between men. The suit claims that amendments to the criminal code in 1986 and 2000 meant that these provisions were not impervious to attack under the saving clause in the constitution that prohibits constitutional challenges to laws in effect when the constitution was adopted. *Jamaica Observer*, Feb. 24.

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**UNITED KINGDOM** – The Court of Appeal has rejected a challenge by a different-sex couple to the government’s refusal to allow them to form a civil partnership instead of a marriage. The civil partnership law was created to provide a vehicle for legal recognition of same-sex couples, but with the passage of marriage equality it has been effectively superseded, although still on the books. Rebecca Steinfeld and Charles Keidan, of London, claimed that they should be allowed the same opportunity to form a civil partnership as same-sex couples. Some of the judges opined that the denial was a potential breach of their human rights, but that the government needs more time to determine whether formally to sunset the civil partnership law. The couple indicated that they would appeal to the U.K. Supreme Court. *bbc.com*, February 21.

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**UNITED KINGDOM** – An Employment Tribunal and an Employment Appeals

Tribunal have held that the Bishop of Southwell and Nottingham was privileged under Schedule 9 of the Equality Act to refuse to grant an Extra Parochial Ministry License to Reverend Canon Pemberton, a gay man who had entered into a same-sex marriage and sought the license in order to take a position as a salaried chaplain at Sherwood Forest Hospitals Trust. The “religious occupational exception” under Schedule 9 applies when the employment is for the purposes of an organized religion and there is a requirement that employees comply with the doctrines of that religion. Since the Church of England had opposed the 2013 statute extending the right to marry to same-sex couples in Britain, the Bishop had warned Pemberton that there could be adverse consequences for him if he entered into a same-sex marriage. Although the Sherwood Forest Hospitals Trust is not a religious institution, the chaplaincy is considered a religious occupation, which is why the license from the Church is a qualification for the position, according to the tribunals. But the matter is not without doubt, and the Appeal Tribunal observed that the case was suitable for leave to be given to the Court of Appeal. In a commentary on the case published by the law firm Dentons in the JD Supra blog (2017 WLNR 4107458, Feb. 8), the commentator concludes: “This decision demonstrates the interplay for employees of religious organizations between their rights under equality legislation and the doctrines of religion. The facts of this case are particularly difficult as the ultimate employer would have been a non-religious institution, namely, the hospital trust. It is important to note that the religious occupational exception will not be applicable to most employers.”

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**UNITED KINGDOM** – The British press reported on February 15 that the legislative body of the Church of

England had rejected a report issued in January by the House of Bishops which had reaffirmed the Church’s teaching that marriage is only between a man and a woman, which seems an odd affirmation for the nation’s established church to make after the Parliament approved a marriage equality measure. Approving the report would have reaffirmed refusal of church blessings for same-sex marriages, which has infuriated some gay Britons. The House of Clergy voted against the report, which would not be adopted unless it received majority support. A few days before the vote, 14 retired bishops published an open letter criticizing the report, stating: “Our perception is that while the pain of LGBT people is spoken about in your report, we do not hear its authentic voice.” *nbcnews.com*, Feb. 15.

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## PROFESSIONAL NOTES

**THE LGBT BAR ASSOCIATION OF GREATER NEW YORK** held its Induction Ceremony for 2017 Officers on February 13, 2017. **GENNARO SAVASTANO** was sworn in as President by Appellate Division Justice **PAUL G. FEINMAN**, himself a former president of the Association. Other officers sworn in by **JUSTICE GEORGE J. SILVER** included First Vice President **JANICE GRUBIN**, Secretary and Second Vice President **M. FRANK FRANCIS**, Treasurer **K. SCOTT KOHANOWSKI**, and LeGaL Foundation officers **PATRICK MACMURRAY**, **EDWARD AUGUSTINE**, and again **K. SCOTT KOHANOWSKI**. President Savastano is an associate attorney at Weitz & Luxenberg, which generously hosted the event in their offices.

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In a surprise move, President Trump resisted a call by the anti-gay Family Research Council to purge all LGBT

career diplomats from the State Department, and openly gay **RANDY BERRY**, the Special Envoy for Human Rights of LGBTI Persons, was asked to continue working under the new Secretary of State, Rex Tillerson. Berry is a career diplomat would be protected by statutory job tenure, but that was no guarantee that the position to which he was appointed by Secretary John Kerry would necessarily continue. Shortly before Trump was sworn in as president on January 20, Berry had been appointed Deputy Assistant Secretary to the Bureau of Democracy, Human Rights, and Labor, one of a raft of last-minute Obama Administration appointments to vacant positions that do not require Senate confirmation. A State Department spokesman said that Berry would continue to occupy both positions. *Foreignpolicy.com*, Feb. 13.

**SHARON MCGOWAN**, who served as Principal Deputy Chief of the Appellate Section of the Civil Rights Division in the U.S. Justice Department during the Obama Administration, has joined Lambda Legal in the new position of Director of Strategy. Prior to her work at DOJ, McGowan was Acting General Counsel and Deputy General Counsel for Policy at the U.S. Office of Personnel Management, where she worked on getting federal personnel policy in line with the Supreme Court's decision in *U.S. v. Windsor*, striking down Section 3 of the Defense of Marriage Act and requiring the federal government to recognize same-sex marriages formed under state law. Before her government positions, McGowan was a staff attorney at the ACLU LGBT & AIDS Project, following private sector employment at Jenner & Block, where she had worked on the litigation team assisting Lambda Legal in the *Lawrence v. Texas* sodomy case. A graduate of Harvard Law School, McGowan clerked for Judge Norman H. Stahl of the 1st Circuit Court of Appeals and Helen G. Berrigan of the U.S. District Court, E.D. Louisiana. She also served for several years as a contributing writer to *Law Notes*.

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17. Smith, Robert J., and Zoe Robinson, Constitutional Liberty and the Progression of Punishment, 102 *Cornell L. Rev.* 413 (Jan. 2017).

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20. Velte, Kyle C., All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes, 49 Conn. L. Rev. 1 (Nov. 2016).
21. Walls, Megan M., *Obergefell v. Hodges*: Right Idea, Wrong Analysis, 52 Gonz. L. Rev. 133 (2016/2017) (argues *Obergefell* should have been decided as a suspect-classification case).

#### EDITOR'S NOTES

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

All points of view expressed in *LGBT Law Notes* are those of the author, and are not official positions of LeGaL – The LGBT Bar Association of Greater New York or the LeGaL Foundation.

All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please submit all correspondence to [info@legal.org](mailto:info@legal.org).

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