LESBIAN/GAY
LAW NOTES
February 2014

HEIGHTENED SCRUTINY

9th Circuit Ruling Could Have Wide Ramifications for Pending Marriage Equality Litigation

EXECUTIVE SUMMARY

L E S B I A N / G A Y

LAW NOTES

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
Inquire for rates.

***Lesbian/Gay Law Notes* Archive**
http://www.nyls.edu/jac

Lesbian/Gay Law Notes Podcast
Listen to/download the
Lesbian/Gay Law Notes Podcast
on iTunes ("search LGBT Legal"),
or at http://legal.podbean.com.

ISSN
8755-9021

Lesbian/Gay Law Notes welcomes authors interested in becoming a contributor to the publication to contact info@le-gal.org.

9th Circuit Holds Sexual Orientation Requires Heightened Scrutiny in Gay Juror Case

A unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit ruled in *Smithkline Beecham Corp. v. Abbott Laboratories*, 2014 U.S. App. LEXIS 1128, 2014 WL 211807 (January 21, 2014), that a new trial has to be held because Abbott, the defendant in a civil suit involving claims about the pricing of HIV medications, used one of its peremptory challenges to exclude a gay man from the jury. The court found that excluding people from a jury because they are gay without some legitimate justification violates the Equal Protection Clause of the 14th Amendment, under an extension of the Supreme Court's ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986). As a necessary part of its ruling, the 9th Circuit panel concluded that sexual orientation discrimination claims are subject to "heightened scrutiny," a doctrine that makes such claims more likely to succeed and that may have a significant impact on pending marriage equality cases in Nevada, Arizona, Idaho and Oregon, all states within the geographic scope of the 9th Circuit. On January 27, the court granted a petition by Abbott to extend the time for it to file a motion seeking *en banc* review, until early in March. Abbott's counsel argued, in effect, that they were caught by surprise by the court's ruling, and needed time to study the opinion and decide whether to seek *en banc* review or accept the remand and prepare to retry the case. Although SKB filed an opposition to the petition, the court granted it without explanation.

In *Batson*, the Supreme Court held that excluding a potential juror by peremptory challenge because of his race violated the 14th Amendment. The court explained that such discrimination in jury selection would "touch the entire community" because it would "undermine public confidence in the fairness of our system of justice," and that proof of such discrimination was grounds for reversing a trial verdict and ordering a new trial. In a subsequent case, *J.E.B. v. Alabama*, 511 U.S. 141 (1994), the Supreme Court extend *Batson* to discrimination in jury selection based on sex, but indicated that "parties may exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." Race is subject to "strict scrutiny," and sex is subject to "heightened scrutiny," sometimes referred to as "intermediate scrutiny." In order to decide whether the jury strike in this case came within the *Batson* rule, the 9th Circuit had to decide whether sexual orientation discrimination is subject to "rational basis review" or "strict scrutiny."

Sexual orientation claims are now subject to heightened scrutiny, a doctrine that may have an impact on pending marriage equality cases.

In past decisions, the 9th Circuit has rejected "heightened scrutiny" for sexual orientation discrimination claims, and normally a 9th Circuit panel would be bound to follow those precedents. But, in an opinion by Judge Stephen Reinhardt, the panel concluded that the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), has rendered the past 9th Circuit decisions obsolete on this point. Even though the opinion for the Supreme Court by Justice Anthony M. Kennedy did not state explicitly what standard of review the Court was using in striking down Section 3 of DOMA, Judge Reinhardt asserted that the *Windsor* court apparently was applying some form of heightened scrutiny in that case. Reinhardt observed that in a prior due process decision, the 9th Circuit had applied a similar analysis to deduce that the Supreme Court's ruling in *Lawrence v. Texas* had used some form of heightened scrutiny when it struck down the Texas Homosexual Conduct Law.

Reinhardt reached this result by a probing reading of Kennedy's opinion, showing that what the Supreme Court *actually did* bore the hallmarks of a heightened scrutiny case. Under rational basis review, a statute would be presumed to be constitutional and would be upheld, despite its discriminatory effects, if the Court could hypothesize any rational justification for it. In a rational basis review of Section 3 of DOMA, the Court would examine the various justifications that were argued by the drafters and defenders of the statute, but would go beyond that to consider whether any hypothetical justification for the discrimination might exist. But the Supreme Court did not presume Section 3 to be constitutional, and paid no attention to the post-hoc justifications argued by former Solicitor General Paul Clement on behalf of the House of Representatives Bipartisan Legal Advisory Group. (Post-hoc justifications are irrelevant in a heightened scrutiny case.) Instead, the Supreme Court focused on the legislative history of DOMA, which showed that it was enacted specifically to discriminate against gay people on grounds of moral disapproval. Justice Kennedy focused on Congress's "avowed purpose" for enacting DOMA. "The principal purpose," he wrote, "is to impose inequality, not for other reasons like governmental efficiency." "The result of this more fundamental inquiry," wrote Judge Reinhardt,

"was the Supreme Court's conclusion that DOMA's 'demonstrated purpose raised a most serious question under the Constitution's Fifth Amendment.' *Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress's actual purposes. *Windsor*'s 'careful consideration' of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review."

Reinhardt also noted that the *Windsor* court put the burden on Congress to "justify disparate treatment of the group," and under rational basis review, the burden is placed on the challenger to prove that there is no rational justification, not on the government to justify its discrimination. Reinhardt pointed out that in rational basis cases, the court is "ordinarily unconcerned with the inequality that results from the challenged state action," but that in *Windsor*, the Court expressed great concern about the inequality imposed on married same-sex couples by DOMA.

"*Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians," wrote Reinhardt. "Section 3 of DOMA violates the equal protection component of the due process clause, *Windsor* tells us, because 'it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.' *Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance." From this, Reinhardt concluded, "*Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose." This, of course, is the hallmark of heightened scrutiny in equal protection cases. "*Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny."

In this case, Abbott had an interest in avoiding seating jurors who might be biased against it because it was being charged with improperly inflating the price of HIV medications whose patents it controlled. During the *voir dire* questioning of potential jurors, it became clear that one man was gay due to his references to his same-sex partner. Although the attorney for Abbott questioned him briefly, he elicited no answers that indicated any particular bias against his client. However, he asked to strike the juror anyway, without articulating any particular reason. When the attorney for SKB objected, raising the *Batson* principle, the trial judge questioned whether *Batson* applied to the case or the circumstances, but asked the Abbott attorney whether he had any particular reason for seeking to exclude the juror. The attorney did not specify a reason, declining to challenge the juror for "cause," and the judge allowed Abbott to use a peremptory (unexplained) challenge to eliminate the gay man from the jury. The 9th Circuit held that this was error. If, as the 9th Circuit found, sexual orientation discrimination merits heightened scrutiny, the *Batson* rule applies and because it was clear that the juror was a gay man and this was why Abbott sought to exclude him from the jury, some valid cause to believe the juror was biased was necessary to sustain the challenge to his service.

After reviewing the history of anti-gay discrimination by government, Reinhardt wrote, "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with our fitness to serve." Furthermore, he continued, "*Windsor*'s reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation." The reference to *Windsor* in connection with a "fundamental institution" is telling – although Reinhardt is dealing with one fundamental American institution, the jury, *Windsor* was dealing with another – marriage. This portion of Reinhardt's opinion tantalizingly signals an equation of the two and a suggestion that gay people cannot be frozen out of participation in either "fundamental institution." Reinhardt continued that allowing the use of peremptory challenges to remove gay people from juries would risk "perpetuating the very stereotypes that the law forbids. . . . As illustrated by this case, permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation." He concluded, "The history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation." Reinhardt made clear that the court's ruling does not require that jurors "come out" during *voir dire*, but if it is obvious from the circumstances and the responses to questions that a juror is gay, a peremptory challenge to the juror may be questioned applying the *Batson* analysis. In this case, the juror had voluntarily mentioned his same-sex partner in response to routine *voir dire* questioning, and the court found Abbott's protestation that its counsel did not know the juror was gay to lack credibility.

The California courts extended the *Batson* rule to gay jury challenges long ago for purposes of trials in the state courts, see *People v. Garcia*, 92 Cal. Rptr. 2d 339 (Cal. Ct. App. 2000), but this ruling by the 9th Circuit is the first to extend *Batson* to such challenges in federal courts. (One press report suggested that this ruling opened up a circuit split with the 8th Circuit, increasing the chances that a cert petition from *Abbott* might find favor at the Supreme Court.) But the ruling is potentially much more immediately consequential–first, because it would apply more broadly to all sexual orientation discrimination claims in the 9th Circuit, not just juror challenges, and second, because of another case pending

now before the 9th Circuit and shortly to be argued, *Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev. 2012), a challenge to Nevada's ban on same-sex marriage. In *Sevcik*, the district court, ruling before *Windsor*, rejected a challenge to the Nevada marriage ban, holding that the court was bound under the 1972 Supreme Court affirmance in *Baker v. Nelson* to hold that the *Sevcik* plaintiffs had not presented a "substantial federal constitutional question" and that the state's ban survived rational basis review in any event. *Windsor* was decided after Sevcik's appeal to the 9th Circuit was filed. Now the 9th Circuit has ruled that *Windsor* requires heightened scrutiny of sexual orientation claims. That surely forecasts a reversal in *Sevcik*, although it is not clear whether the 9th Circuit would remand the case to the trial court for reconsideration under the heightened scrutiny standard or whether the court of appeals would rule as a matter of law under the heightened standard that the Nevada ban is unconstitutional. Either way, the 9th Circuit's ruling should have immediate consequences for recently filed marriage equality lawsuits in the 9th Circuit states of Arizona (*Connolly v. Brewer*), Idaho (*Latta v. Otter*) and Oregon (*Geiger v. Kitzhaber*), as those district courts will be bound to apply heightened scrutiny in deciding those cases unless Abbott succeeds in overturning the panel decision through *en banc* review or a successful Supreme Court appeal. Before now, it had appeared likely that the Supreme Court would next confront the question of the level of judicial review of sexual orientation discrimination claims in a marriage equality case, but depending how this one goes, the Court might actually confront the question first a case focusing on the extension of *Batson* to peremptory challenges of gay jurors!

The litigants on this appeal were represented by the usual roster of major national law firms. Lambda Legal filed an amicus brief, arguing in support of the application of *Batson* in cases of peremptory strikes against gay jurors. The Lambda brief was co-authored by Shelbi B. Day, Tara L. Borelli and Lambda's Legal Director, Jon Davidson, working out of the organization's Western Regional Office in Los Angeles. ■

Utah Marriage Ruling Stayed by U.S. Supreme Court Pending 10th Circuit Decision; ACLU Challenges Governor's Non-Recognition Order; 10th Circuit Announces April Argument Date; Kaplan Seeks to Intervene in Appeal

The U.S. Supreme Court issued an order on Monday, January 6, in *Herbert v. Kitchen*, 2014 WL 30367 (No. 13A687), staying the injunction that U.S. District Judge Robert Shelby issued against the state of Utah on December 20 in *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah, Dec. 20, 2013), pending the state's appeal to the 10th Circuit of Shelby's ruling that Utah's ban on same-sex marriage violated the 14th Amendment. Both Shelby, on December 23, 2013 WL 6834634, and a motions panel of the 10th Circuit, on December 24, had refused the state's application to stay the ruling pending appeal. The 10th Circuit panel also directed that the appeal be expedited, and subsequently the circuit adopted a briefing schedule calculated to have the case ready for oral argument by the end of February, and announced that the argument in this case will be held on April 10. Final issuance of an opinion might be slightly affected by the state of Oklahoma's appeal to the 10th Circuit of a trial court ruling declaring part of the Oklahoma Marriage Amendment unconstitutional, issued on January 14 but stayed by the trial judge pending appeal (see below), as to which the 10th Circuit has also granted expedited review, with oral argument to be held before the same panel hearing the Utah appeal, but on April 17. The case is now denominated *Kitchen v. Herbert and Swensen*, No. 13-4178. (Swensen is Salt Lake County Clerk Sherrie Swensen, whose office denied marriage licenses to the plaintiffs, three same-sex couples.)

On January 31, Roberta Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York filed a motion with the 10th Circuit on behalf of three Utah same-sex couples, seeking to intervene in the appeal and participate in oral argument. Kaplan was lead counsel to Edith Windsor in *U.S. v. Windsor*, arguing on her behalf in the successful litigation to have Section 3 of the federal Defense of Marriage Act declared unconstitutional. Kaplan's clients sought intervention to bring to the court of appeals an issue not considered in Judge Shelby's opinion: the denial under Utah's constitution and statutes of any form of legal recognition for same-sex couples. Shelby's ruling addressed only denial of the right to marry, but Utah's constitutional provision also bars the legislature from establishing civil unions, domestic partnerships, or any form of legal recognition for same-sex couples. As such, Kaplan argues,

Shelby's ruling addressed only denial of the right to marry, but Utah's constitutional provision also bars the legislature from establishing any form of legal recognition for same-sex couples.

the state has violated 14th Amendment rights as identified both in *Windsor* and in *Romer v. Evans*, the 1996 Supreme Court decision invalidating a Colorado constitutional amendment that broadly banned the state from protecting gay people from discrimination. The parties have agreed that Kaplan could file an *amicus* brief on behalf of her clients, but were opposed to granting them intervenor status as respondents. In her motion, Kaplan noted 10th Circuit precedent disfavoring the raising of new issues in amicus briefs, but broadly supporting intervention on appeal by interested parties in unusual circumstances. Kaplan also asked the court to consider granting her time to argue as amicus if it was not granting intervenor status.

The U.S. Supreme Court did not explain the reasoning behind its January 6 stay order, and did not expand on the order's possible impact on same-sex marriages that had been celebrated in Utah beginning on December 20. Neither did the Supreme Court reveal whether its ruling was unanimous, although no dissenting votes were disclosed. The Court's action gave rise to speculation that it hoped to delay the need to resolve the underlying question of whether same-sex couples have a constitutional right to marry as a matter of 14th Amendment due process or equal protection, but the pace of litigation on the issue suggests that the Court will have to confront the question before long.

Issuance of the stay put a stop to new same-sex marriages in Utah, but immediately led to questions about the status of the same-sex marriages – estimated at more than 1300 – that had already taken place. After the stay order was issued, Utah Attorney General Sean Reyes, pointing out that there was no clear precedent, disclaimed any firm view as to the status of those marriages. Governor Gary Herbert took a stronger position, announced in a written statement that was directed to Utah state agencies on January 8, signed by the governor's chief of staff, Derek B. Miller. "With the district court injunction now stayed," wrote Miller, "the original laws governing marriage in Utah return to effect pending final resolution by the courts. It is important to understand that those laws include not only a prohibition on performing same-sex marriages but also recognizing same-sex marriages" (*Emphasis in original*). Thus, the governor's office directed state agencies that as long as the stay was in effect, they could not recognize the marriages that had already taken place. However, the directive said it was not taking a position about the validity of the marriages, and that actions taken prior to January 6 – such as name changes on driver's licenses – would be honored. This was the only example given in the statement, not clearly addressing the more substantial question of whether state employees who had signed up their same-sex spouses for spousal employee benefits would actually receive those benefits during the stay period, although there was some speculation that those who had completed the enrollment process prior to issue of the stay would be provided with the benefits. Despite the absolutist tone of the letter, the governor's office subsequently instructed clerks that they could complete processing of marriage certificates for ceremonies that had taken place prior to the stay and deliver those certificates to the involved couples.

On January 15, the state's Tax Department issued a notice advising that same-sex couples who had married by the end of calendar year 2013 and who planned to file their federal income taxes as married "may also file a joint 2013 Utah individual income Tax return as provided in Utah Code Sec. 59-10-503." Perhaps in explanation of this apparent departure from the governor's directive, the Department observed that the Supreme Court "had not yet issued its stay of the District Court's injunction" as of December 31, 2013. Thus, technically, these couples had marriages recognized under Utah law on the crucial date for determining tax status: the last day of the calendar year. The notice was carefully hedged to state that it was limited to the 2013 tax year, and that if taxpayers were required to file amended returns because of future court rulings, "they will not be subject to penalties for any tax deficiencies resulting solely from following this guidance." That is, if the 10th Circuit reverses Judge Shelby and that decision is final, presumably these marriages would be considered invalid and those who realized tax savings by filing jointly could be liable to the state for underpayment of taxes, so those filing jointly will be taking a calculated risk.

Responding to criticism of the state government for announcing a commitment to spend substantial sums on an appeal of the marriage ruling, State Representative Merrill Nelson (R-Granville) proposed a bill that would allow state taxpayers to donate part of their refund to a fund to support the appeal. This would be listed next to nine other charitable causes for which the tax return provides a check-off for voluntary donations from tax refunds. Nelson said that his proposal was intended to "placate supporters of same-sex marriage who complain that the state is wasting money" appealing the decision, according to an *Associated Press* report.

The ACLU of Utah began collecting information from married same-sex couples who might be plaintiffs in an action challenging the state's refusal to recognize their marriages in particular instances, and announced on January 21 that it had filed suit on behalf of some of the married same-sex couples seeking full recognition for their marriages from the state in the Utah District Court in Salt Lake County. *Evans v. State of Utah*. Plaintiffs, all married in Utah between December 20, 2013, and January 6, 2014, argued that their marriages gave them "vested rights" in the validity and recognition of their marriages, protected by the Due Process Clauses of the Utah and federal constitutions. They asserted that these vested rights would continue regardless of the ultimate outcome in the state's appeal of the marriage ruling. They sought declaratory and injunctive relief requiring the state to honor their marriages. While the Supreme Court stayed the district court's injunction, it did not – and could not – stay the 14th Amendment, so the state will be put to the task of justifying unequal treatment for legally married same-sex couples. ■

Federal Court Rules Oklahoma Constitution's Same-Sex Marriage Ban Violates Equal Protection; Appeal of Stayed Ruling to be argued in 10th Circuit on April 17

Yet another federal district judge declared a state constitutional amendment that bans same-sex marriages an unconstitutional infringement of rights under the 14th Amendment of the U.S. Constitution. On January 14, Senior U.S. District Judge Terence C. Kern, who had been dealing with the case of *Bishop v. United States* since 2004, held that one part of a constitutional amendment adopted by an overwhelming vote of Oklahoma citizens that year fails to meet the deferential "rationality review" test under the Equal Protection Clause. *Bishop v. United States*, 2014 U.S. Dist. LEXIS 4374, 2014 WL 116013 (N.D. Okla., Jan. 14, 2014). Kern stayed his ruling sua sponte, an obvious move in light of the Supreme Court's order on January 6 granting a stay in the Utah marriage equality case. The state quickly noticed its appeal to the 10th Circuit, which responded affirmatively to the request for a fast track appeal, setting an expedited briefly schedule and an argument date of April 17, one week after arguments before the same three-judge panel in an appeal of the Utah marriage equality case. Two of the four plaintiff couples cross-appealed from Judge Kern's conclusion that he did not have jurisdiction to rule on their claim that Oklahoma's refusal to recognize their out-of-state marriages also violates the 14th Amendment. Judge Kern had opined that the only state defendant in the case, the Tulsa County Clerk, had no responsibility for the issue of marriage recognition and thus was not a proper defendant on that claim, thus depriving him of jurisdiction to rule on it.

The strange name for this case, *Bishop v. United States*, relates to the unusual way it got started. After the Oklahoma Marriage Amendment was passed in 2004, two lesbian couples — Mary Bishop and Sharon Baldwin, and Susan Barton and Gay Phillips — filed a Complaint against both the federal and state governments, seeking a declaration that Sections 2 and 3 of the federal Defense of Marriage Act (DOMA) and Parts A and B of the Oklahoma Marriage Amendment, were unconstitutional. Section 2 of DOMA purports to allow states to refuse to give "full faith and credit" to same-sex marriages contracted in other states, while Section 3, invalidated by the Supreme Court last year in *U.S. v. Windsor*, provided that the federal government would recognize only different-sex marriages. Part A of the Oklahoma amendment bans same-sex marriage and any similar form of recognition for unmarried couples in that state, and Part B refuses recognition to same-sex marriages contracted in other states.

Judge Kern held that Oklahoma's constitutional amendment fails to meet the deferential "rationality review" test.

The case took a few procedural twists and turns, including a trip up to the 10th Circuit Court of Appeals, leading to some changes in the identity of defendants. Originally top state executive branch officials were sued, but ultimately, the summary judgment motion upon which Judge Kern ruled involves a suit between the two couples and Sally Howe Smith, the Tulsa County Clerk, who denied the Bishop couple a marriage license. The Barton couple, being dissatisfied with the pace of events in Oklahoma, had married in Canada and in California (in 2008). A major part of Judge Kern's opinion considers the Barton couple's challenge to DOMA, holding that they lack standing to challenge Section 2, because that provision did not compel Oklahoma to refuse to recognize their marriage and, in any event, the sole defendant has nothing to do with recognizing out of state marriages and is not amenable to suit on that issue, and that their challenge to Section 3 is moot because the U.S. Supreme Court declared it unconstitutional. Thus, the Barton couple is effectively out of the case, unless they successfully appeal this ruling on standing concerning DOMA Section 2, or seek to add other defendants on a claim challenging Part B – the marriage recognition provision – of the Oklahoma Marriage Amendment, which was not challenged by the Bishop couple.

The Bishop couple, not being married, were challenging Part A of the Oklahoma marriage amendment, under which Ms. Smith rejected their request for a marriage license. For reasons not explained in Judge Kern's opinion, they did not challenge the Oklahoma statutes that also ban same-sex marriage, just the constitutional amendment, so that is all Judge Kern ruled on, although he noted that much the same constitutional analysis would apply to the question whether the statutes are also unconstitutional.

Judge Kern's opinion on the Oklahoma amendment goes through three stages.

In the first part, he rejected the argument that the U.S. Supreme Court's 1972 *Baker v. Nelson* decision is binding

on the court and required dismissing the case. In *Baker*, the Supreme Court dismissed a challenge to the Minnesota ban on same-sex marriage, which had been upheld by the Minnesota Supreme Court. The Supreme Court dismissed that appeal as not raising a "substantial federal question" and didn't bother to hear oral arguments or issue a written opinion explaining its conclusion. Such "summary affirmances" by the Supreme Court are technically binding on lower courts, unless subsequent developments in the law render them obsolete. In this case, Judge Kern, agreeing with Judge Robert Shelby of the U.S. District Court in Utah and several other district judges ruling in DOMA Section 3 challenges prior to the *Windsor* decision, held that subsequent developments had rendered *Baker* of little precedential value. Most significantly, of course, the Supreme Court's rulings in *Romer v. Evans*, *Lawrence v. Texas*, and *U.S. v. Windsor* have changed the landscape for constitutional analysis of gay rights claims. "It seems clear that what was once deemed an 'unsubstantial' question in 1972 would now be deemed 'substantial' based on intervening developments in Supreme Court law," wrote Judge Kern.

In the second part of the analysis, the court had to decide what impact the *Windsor* decision would have. Judge Kern found that *Windsor* did not decisively tip the balance toward either party. "This Court interprets *Windsor* as an equal protection case holding that DOMA drew an unconstitutional line between lawfully married opposite-sex couples and lawfully married same-sex couples," he wrote. He found that the *Windsor* court "did not apply the familiar equal protection framework," but instead "based its conclusion on the law's blatant improper purpose and animus." He continued, "Both parties argue that *Windsor* supports their position, and both are right." That is, *Windsor* supports the state's argument that as a matter of history and practice, the regulation of marriage is a state function, not a federal function, and that Congress directing that the federal government ignore same-sex marriages authorized under state law upset the traditional balance of authority between the states and the federal government on domestic relations law. But *Windsor* supports the Bishop couple's position because "much of the majority's reasoning regarding the 'purpose and effect' of DOMA can be readily applied to the purpose and effect of similar or identical state-law marriage definitions." As had Judge Shelby in Utah, Judge Kern noted Justice Scalia's dissenting opinion in *Windsor*, which helpfully demonstrated how the majority's reasoning in that case would support a same-sex marriage claim.

Kern drew two lessons from *Windsor*. Because it is the usual thing for states to define marriage, state marriage definitions "must be approached differently, and with more caution, than the Supreme Court approached DOMA," a federal statute. But, when courts are reviewing marriage regulations, they "must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples."

Finally, in the third part of the analysis, Kern turned to the 14th Amendment claim in this case. He embraced a much narrower doctrinal analysis than did Judge Shelby in *Kitchen v. Herbert*. Kern decided that this was a case of sexual orientation discrimination, not sex discrimination, and thus was not subject to heightened scrutiny because 10th Circuit precedent in sexual orientation discrimination cases had rejected the argument that sexual orientation is a suspect classification. He also did not accept the alternative argument that this was a "fundamental right to marry" case under the due process clause, cherry-picking language from Justice Anthony Kennedy's *Windsor* opinion that observed that same-sex marriage was a relatively new concept that would not have been imagined by the framers of the 14th Amendment back in the 19th century. Having concluded that this was an ordinary rational review case, Judge Kern would not employ any presumption against the constitutionality of the Oklahoma amendment. After reviewing the history of the amendment's adoption, Judge Kern concluded that it was adopted specifically to exclude same-sex couples from marriage because of moral disapproval of homosexuality by the legislators who proposed it (and presumably the voters who approved it), making it an instance of intentional discrimination with an impermissible motivation. The remaining question was whether there was any other legitimate justification for it, once the court had ruled out "promoting morality," which has not been a legitimate justification for anti-gay policies at least since the Supreme Court's 1996 decision striking down Colorado Amendment 2, *Romer v. Evans*.

Not surprisingly, the court confronted the same arguments that have been raised in other states about promoting responsible procreation and providing an ideal setting for child rearing, but Judge Kern found no merit to these arguments in the context of excluding same-sex couples from marriage. He found that "there is no rational link between excluding same-sex couples from marriage and the goals of encouraging 'responsible procreation' among the 'naturally procreative' and/or steering the 'naturally procreative' toward marriage. Civil marriage in Oklahoma does not have any procreative prerequisites," he pointed out. As to the argument that allowing same-sex marriages would somehow undermine the stability of different-sex marriages in Oklahoma, he evidently found the assertion laughable, pointing out that despite its strongly worded constitutional and statutory same-sex marriage ban, Oklahoma has one of the highest divorce rates in the country (unlike, he might have added, Massachusetts, which has one of the lowest divorce rates and has been allowing same-sex marriages for almost a decade).

While acknowledging that the state has an interest in incentivizing different-sex couples to get married before having children, he said that this "asserted justification" for excluding

same-sex couples from marriage "makes no sense because a same-sex couple's inability to 'naturally procreate' is not a biological distinction of critical importance, in relation to the articulated goal of avoiding children being born out of wedlock. The reality is that same-sex couples, while not able to 'naturally procreate,' can and do have children by other means." Citing 2010 census data showing that "there were 1,280 same-sex 'households' in Oklahoma who reported as having 'their own children under 18 years of age residing in their household,'" he pointed out that the articulated goal of reducing the number of children born outside of a marital relationship is hindered rather than promoted by a gay marriage ban.

As to the states interest in providing an "ideal environment" for raising children, Judge Kern said that the state "has not articulated, and the Court cannot discern, a single way that excluding same-sex couples from marriage will 'promote' this 'ideal' child-rearing environment. Exclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner (thereby providing the 'ideal' child-rearing environment). It is more likely that any potential or existing child will be raised by the same-sex couple without any state-provided marital benefits and without being able to 'understand the integrity and closeness of their own family and its concord with other families in their community,'" quoting *U.S. v. Windsor.*

Having rejected all the arguments in support of the ban, Judge Kern turned back to the Supreme Court precedents. Although the Supreme Court has not yet ruled on the precise question, he found its rulings on related issues compelling. "Supreme Court law now prohibits states from passing laws that are born of animosity toward homosexuals, extends constitutional protection to the moral and sexual choices of homosexuals, and prohibits the federal government from treating opposite-sex and same-sex marriages differently," he wrote. "There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one."

"Applying deferential rationality review," he continued, "the Court searched for a rational link between exclusion of this class from civil marriage and promotion of a legitimate governmental objective. Finding none, the Court's rationality review reveals Part A [of the Oklahoma Marriage Amendment] as an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit." He found that the exclusion was "without a legally sufficient justification."

Thus, he declared Part A unconstitutional. He did not rule on the constitutionality of Part B, which denies recognition to same-sex out of state marriages, because the Bishop couple was not challenging it and, given the identity of the sole defendant in the case and the court's ruling earlier in its opinion on jurisdiction and standing, the court would not have jurisdiction of that issue in the present posture of the case. Because the Oklahoma marriage statutes banning same-sex marriages were not specifically challenged by the Bishop couple in their complaint, Judge Kern did not rule on them in this opinion, but he observed that the legal analysis of a challenge to those statutes would be essentially the same. However, observing that the Supreme Court recently stayed the Utah marriage ruling pending appeal, he adopted a similar stay, anticipating what would happen if he denied a stay and the state appealed for one.

Thus, same-sex marriage may not actually happen in Oklahoma for some time as this case makes its way through the appellate process, but Judge Kern has provided another nail in the coffin of state bans on same-sex marriages, in an opinion that is relatively modest compared to the more far-ranging opinions written by Judge Shelby and now-retired Judge Vaughn Walker in the California Proposition 8 case. This more modestly reasoned opinion may well be more sustainable on appeal for that very reason, as the Supreme Court tends to prefer moving in smaller rather than large doctrinal steps when addressing politically controversial issues, and, with Justice Kennedy the likely author of any ruling for marriage equality that the Court is likely to issue, it is unlikely based on his opinions in *Romer, Lawrence* and *Windsor* that he would embrace a broader approach using traditional equal protection terminology about suspect classes or fundamental rights.

Judge Kern has provided another nail in the coffin of state bans on same-sex marriages in an opinion that is relatively modest.

Public officials in Oklahoma reacted to the ruling with predictable scorn and horror. Revealing startling ignorance about the direction in which the Supreme Court has been developing its equal protection jurisprudence, Attorney General Scott Pruitt told Station KRMG that "courts have previously ruled that the 14th amendment wasn't written for gays and lesbians, but rather to protect people from discrimination on characteristics of race or gender, not behavior." Perhaps he can be excused for his ignorance, as a 1993 law school graduate, in not having studied *Romer v. Evans* (1996) and subsequent cases in law school, but this seems a startling failure by the state's principal lawyer to keep abreast of the law after his

admission to the bar! Despite the best efforts of so-called "originalists" like Justice Scalia to persuade the Court that the Equal Protection Clause should be limited to race discrimination cases, it is well established over the past half century of Supreme Court decision-making that this provision, which does not mention race and does not on its face narrow or restrict the concept of equal protection, was written to establish a general equality principal that the Supreme Court has actually applied on behalf of gays and lesbians, beginning in 1996 in *Romer*. Somebody in the Oklahoma Attorney General's office should print out the relevant cases and present them to Mr. Pruitt for his review. The state's appeal was accepted by the 10th Circuit for "fast track" treatment in tandem with the pending Utah appeal in *Kitchen v. Herbert*, and the Circuit indicated that the same three-judge panel will consider both cases, although they will hold separate arguments and presumably will not slow down the Utah case in order to accommodate the slighter later briefing schedule for the Oklahoma case. On appeal, the case will likely be denominated *Smith v. Bishop*, as Tulsa County Clerk Sally Howe Smith is the formal appellant.

Plaintiffs in *Bishop* are represented by a large team of Oklahoma lawyers, including Don G. Holladay, James E. Warner, Laura Lea Eakens, Timothy P. Studebaker, and Phillips Craig Bailey. According to the court's opinion, Tulsa County Clerk Sally Smith was represented primarily by out-of-state attorneys affiliated with Alliance Defense Fund (which, since the case evolved to its present configuration, has changed its name to the more euphemistic Alliance Defending Freedom), generally identified as a right-wing Christian litigation organization. At an earlier stage of the litigation when DOMA was an issue, the Bipartisan Legal Advisory Group of the House of Representatives was involved as an intervenor. Press reports indicated that the Tulsa County Attorney's office also participated in the defense. Going forward, one expects the Attorney General's office will play an active role in the appeal. ■

Virginia Attorney General Abandons Defense of Same-Sex Marriage Ban, Urging Federal Court to Strike it Down

Inaugurated as Attorney General of Virginia early in January, Democrat Mark Herring, who had run on a platform supporting same-sex marriage, was immediately faced with a strategic decision. His office represents the state's Registrar of Vital Records, Janet M. Rainey, who is the lead defendant in two federal lawsuits challenging the state's constitutional and statutory ban on same-sex marriage: *Bostic v. Rainey* (E.D. Va.) and *Harris v. McDonnell* (W.D. Va.). *Bostic*, brought by private plaintiffs who are now represented by David Boies and Ted Olson (the prominent appellate lawyers who handled the California Prop 8 challenge), had a hearing scheduled on pending summary judgment motions for January 30. The other lawsuit, *Harris v. Rainey*, Civ. Action No.: 5:13cv077 (W.D. Va.), brought by ACLU and Lambda, was not as far along in terms of a hearing being scheduled, although on January 31 District Judge Michael Urbanski granted a motion by the plaintiffs to certify two classes of plaintiffs in the case: all same-sex couples in Virginia who have not married in another jurisdiction, and all same-sex couples in Virginia who have married in another jurisdiction. The class certification will broaden the range of arguments that plaintiffs can make in support of their challenge to the Virginia marriage ban. Judge Urbanski was careful to exclude from the certified classes the plaintiffs in the *Bostic* case.

In light of the looming hearing, Attorney General Herring had to make a quick decision: whether to continue arguing the case along the lines of his predecessor, conservative Republican Ken Cuccinelli, the unsuccessful gubernatorial candidate who was pledged to defend "traditional marriage," or to follow the lead of attorneys general in other states (California, Pennsylvania) who had refused to defend same-sex marriage bans? Herring announced on January 23 that he was following the course set by former California Attorney General Jerry Brown, who had refused to defend Prop 8, and subsequently by U.S. Attorney General Eric Holder, who had decided not to defend Section 3 of DOMA. In a "Notice of Change in Legal Position" filed with the Eastern District Court by Virginia Solicitor General Stuart A. Raphael, Herring's senior litigator, the Attorney General's office took the position that although state law required them to continue enforcing the marriage ban until it is definitively ruled unconstitutional, the office would no longer defend it. The Notice was accompanied by a memorandum arguing that the ban is unconstitutional and urging the court to strike it down. A similar notice and memorandum was expected to be filed in the *Harris* case.

U.S. District Judge Arenda L. Wright Allen responded promptly to Herring's Notice, filing an Order the same day stating that "all pending motions for summary judgment are taken under advisement." Allen continued, "In light of the compelling Notice from the Office of the Attorney General of Virginia indicating that the Attorney General has concluded that Virginia's laws denying the right to marry to same-sex couples violates the Fourteenth Amendment of the United States Constitution, counsel for the parties and the Intervenor are ordered to file Status Reports" that would address three points: whether oral argument previously scheduled for January 30 was warranted, "or whether the Court should instead rule promptly on the briefs without a hearing," what would need to be covered if there were to be oral argument "with the understanding that duplicative or cumulative arguments are strongly discouraged", and whether any parties "have grounds to present argument that the laws denying the right to marry of same-sex couples should be construed as constitutional." The court gave counsel for the two county clerks in the case until January 27 to file any written response they had to the Attorney General's Notice, and

asked all parties to submit their status reports by January 24. It appeared that Judge Allen was eager to rule quickly on the summary judgment motions and send this case on its inevitable way to the 4th Circuit Court of Appeals, on the assumption that the clerks would appeal an adverse ruling and the plaintiffs and Attorney General would appeal a ruling in their favor. However, on Monday, January 27, responding to filings by the parties, Judge Allen confirmed that oral argument would be held on Thursday morning, January 30, allocating time to the various parties (including counsel for the state arguing in support of petitioners and counsel for the two clerks arguing to support the ban). Due to inclement weather, Judge Allen subsequently postponed the hearing to February 4.

The Virginia marriage cases are distinguished from the Prop 8 case in an important way, because Rainey is not the only defendant. The Norfolk County Clerk is also a defendant in *Bostic*, and has separate counsel. Earlier in the lawsuit, the Prince William County Clerk, anticipating that the newly-elected A.G. might take this move, had also won the right to intervene, and also has separate counsel. Similarly, Thomas E. Roberts, Staunton Circuit Court Clerk, is among the defendants in *Harris* pending in the Western District. In a press release announcing his move, Herring pointed out that unlike in the Prop 8 case, where the Supreme Court held that the trial court's decision striking down Prop 8 could not be appealed because none of the defendants with standing to appeal had sought to do so, in this case the defending clerks would clearly have standing to appeal in case the district courts declare the ban unconstitutional, and shortly after the announced change of position by the state, the clerks indicated that they would appeal any adverse ruling. In addition, Republican legislators promptly introduced a bill in the Virginia House, H.B. 706, which would give standing to the legislature or either chamber to defend a law in court if the attorney general was refusing to defend it. Such a bill, if enacted, might satisfy Article III standing concerns for purposes of federal litigation, but with the other chamber having attained a slight Democratic majority as a result of a recent special election to fill a vacant seat, and the possibility of a veto by the Democratic governor, the bill's chances were not highly rated. The House gave preliminary approval to the bill on January 31, and it was expected to receive final approval in that chamber on February 3.

The memorandum submitted on behalf of the State of Virginia (for, in reality, Herring represents the State and seems to have the full support of Governor Terry McAuliffe) argues that the ban on same-sex marriage violates the 14th Amendment in three different ways. It violates the Due Process Clause by denying a fundamental right, the right to marry, to same-sex couples without any justification sufficient to survive the strict scrutiny that courts apply to deprivations of fundamental rights. Further, the memorandum argues, the ban discriminates on the basis both of sexual orientation and sex. The memorandum makes full use of the recent decisions by Utah District Judge Robert Shelby and Oklahoma District Judge Terence Kern, and prominently cites Supreme Court Justice Antonin Scalia's assertions, in his dissenting opinions in *Lawrence v. Texas* and *U.S. v. Windsor*, that those opinions provide the basis for finding that same-sex couples have a constitutional right to marry. It is noteworthy that since *Windsor* was announced, all judicial rulings in pending same-sex marriage cases have favored the plaintiffs, including state constitutional rulings in New Mexico and New Jersey and federal constitutional rulings in Utah and Oklahoma. A cumulative unanimity of view seems to be emerging on the bench.

Herring's action caused consternation among Virginia Republicans. A group of legislators sent a joint request to Governor McAuliffe, asking him to appoint a special counsel to defend the state's marriage ban, but McAuliffe demurred, noting that the clerks had counsel dedicated to defending the statute. (One clerk is represented from lawyers at former Gov. McDonnell's law firm, another by lawyers affiliated with Alliance Defending Freedom [formerly known as the Alliance Defense Fund, an anti-gay litigation group that has participated in many cases arguing against marriage equality].)

Herring's action and Judge Allen's response quickly thrust Virginia into the forefront of the current battles over same-sex marriage. As marriage equality cases from Nevada (9th Circuit), Utah and Oklahoma (10th Circuit) headed to the appellate level, it seemed likely that the next major trial court decision might come from Virginia after the January 30 hearing. Solicitor General Raphael urged the court to decide the case quickly. "Defendant Rainey has no authority to invalidate or ignore Virginia's ban on same-sex marriage, even though it conflicts with the Fourteenth Amendment," he wrote. "In light of Rainey's obligation to continue enforcing that ban, we urge the Court to adjudicate the merits of this case as rapidly as its fair-minded consideration will permit." Clearly Judge Allen took that request to heart in the Order issued later the same day. Also pending as of the end of January were hearings in one of the Texas marriage equality cases, in which U.S. District Judge Orlando Garcia in San Antonio denied a motion by Texas Attorney General Greg Abbott to consolidate that case with two others pending before U.S. District Judge Sam Sparks in Austin. Garcia had already set a hearing on a motion for preliminary injunction for February 12. ■

Herring's action and Judge Allen's response quickly thrust Virginia into the forefront of the current battles over same-sex marriage.

Maine High Court Says Transgender Girl Can Use Public School Restroom of her Choice

Maine's Supreme Judicial Court ruled on January 30 that a transgender girl attending Maine public schools is entitled to use the girl's restroom. Voting 6-1, the court reversed a contrary ruling by the Penobscott County Superior Court. The dissenting judge agreed that the right of transgender students to use the restroom of their choice should be protected, but argued that the legislature needed to amend the state's public restroom statute to reach that result. Justice Warren M. Silver wrote the opinion for the court in *Doe v. Regional School Unit 26*, 2014 ME 11, 2014 WL 325906, 2014 Me. LEXIS 14 (Jan. 30, 2014).

The court allowed the plaintiffs to use pseudonyms to protect confidentiality, so the plaintiffs were identified as John and Jane Doe, parents of Susan Doe. Susan, born male, began to identify as female as early as age two. She began attending school at the Asa Adams School in Orono, and generally wore gender-neutral clothing until third grade, when, as the court describes it, "her identity as a girl became manifest" and, for the first time, the school's principal became aware that Doe was transgender. Students in the early grades used single stall restrooms, and Susan was allowed to use the single-stall girl's room without incident. In third grade, teachers and other students referred to Susan as she and used her preferred name, and by fourth grade, she was dressing and appearing exclusively as a girl.

During Susan's fourth-grade year, the school implemented a formal plan to "address Susan's gender identity issues and her upcoming transition to fifth grade, where students used communal bathrooms separated by sex." By this time, Susan had received a formal diagnosis of gender dysphoria. "School officials recognized that it was important to Susan's psychological health that she live socially as a female," wrote Justice Silver. And school officials did not interpret the state's restroom facilities law as prohibiting somebody in Susan's position from using the girls' bathroom. A team was convened, including Susan's mother, her teachers, a guidance counselor and the school district's director of special services to deal with how the school would treat Susan. They agreed she would be treated as a girl and could use the communal girls' restroom. They agreed that requiring her to use the boys' room was not acceptable. Indeed, the principal testified in this lawsuit that it would not have been safe for her to do so. There was a unisex staff restroom on the school premises, which the team saw as available in case Susan's use of the girl's restroom became "an issue."

In the fifth grade, it became "an issue," because the grandfather of a male student, who was the student's guardian, instructed him that if Susan was free to use the girls' restroom, than so was he. This student followed Susan into the girls' restroom on two occasions, and "the controversy generated significant media coverage." Schools tend to react to controversy by wimping out, which is what the school did in this case, directing Susan that she had to use the single-stall, unisex staff restroom. Susan was the only student directed to use that room.

The special team met again to discuss Susan's transition to middle school, and school officials insisted that Susan would not be permitted to use the girl's restroom in middle school. Her parents objected to this, and at the end of her sixth grade year, they moved to another part of the state to transfer her to another school.

But even before the move, they filed a complaint with the Maine Human Rights Commission against the school district, represented by Gay & Lesbian Advocates & Defenders, the Boston-based New England LGBT rights law firm. Maine's Human Rights Law specifically bans discrimination in public accommodations because of sexual orientation, and the term sexual orientation as used in the statute is defined to include gender identity. For the first time, the school district argued in response that the state statute requiring schools to provide separate restrooms for male and female students supported its position, and the Superior Court granted summary judgment to the school district on that basis.

Rejecting that interpretation, Justice Silver wrote that the "sanitary facilities" provision was intended "to establish cleanliness and maintenance requirements for school bathrooms, as well as requirements for the physical layout of toilet facilities. It does not purport to establish guidelines for the use of school bathrooms. Nor does it address how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities." On the other hand, the human rights act was intended to "prohibit discrimination against transgender students in schools." Justice Silver rejected the school district's argument that the sanitary facilities provision "preemptively created an exception" to the human rights law requirements. Instead, he insisted that "a consistent reading of the two statutes avoids conflicting, illogical results and comports with the legislative intent by giving effect to both provisions."

In this case, said the court, school administrators had accepted at an early stage that Susan was a girl and would be treated as a girl, and the school had itself determined that she could use the girls' room. The later decision to limit her to the staff room was not due to any change in her status, but "on others' complaints about the school's well-considered decision," and this was discriminatory. The court said that the school's discrimination could not be "excused" by "compliance" with the sanitary facilities law.

The court pointed out that it was

not holding that "any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are presented in this case." Thus, the court rejected the dissent's argument that its interpretation of the statutes would require schools "to permit students casual access to any bathroom of their choice."

Dissenting Justice Andrew M. Mead insisted that he supported the right of a transgender student to be free from discrimination at school because of gender identity, but he could not agree with the majority's interpretation of the sanitary facilities statute. "The statutory directive to segregate bathrooms in schools by sex, and providing for separate entrances and exits for those bathrooms, clearly anticipates that the use of a bathroom would be restricted to the sex for which it has been designated," he insisted, disagreeing with the court's statement that the schools had the prerogative to create their own policies concerning how the bathrooms were to be used. He found the "plain language" of the two statutes to be in conflict, and said that the court should have abstained from resolving the conflict, deferring the issue to the legislature.

In a concurring opinion, Chief Justice Leigh I. Saufley agreed with the court's result, but strongly supported Justice Mead's call for the legislature to address the issue. "Put simply," wrote Saufley, "it could now be argued that it would be illegal discrimination for a restaurant, for example, to prohibit a man from using the women's communal bathroom, and vice versa. I agree with the dissent that it is highly unlikely that the Legislature actually intended that result. Accordingly, on this matter of public policy, it would benefit the public for the Legislature to act quickly to address the concern raised by the dissent in this matter."

Jennifer Levi, a law professor who works with GLAD on gender identity cases, argued the appeal on behalf of the Does. ■

West Virginia Marriage Equality Lawsuit Mainly Survives Motion to Dismiss

U.S. District Judge Robert C. Chambers ruled on January 29 in *McGee v. Cole*, 2014 U.S. Dist. LEXIS 10864 (S.D. W.Va. 2014), that three same-sex couples may pursue their lawsuit claiming that West Virginia's ban on same-sex marriage violates the federal constitution. However, expressing concern that the suit against two county clerks might not result in effective statewide relief, the court gave the plaintiffs until February 12 either to seek joinder of additional state officials if necessary to achieve that goal or to submit an argument as to why the existing defendants are sufficient for that purpose. Judge Chambers rejected the argument that the Supreme Court's 1972 ruling in *Baker v. Nelson*, the old Minnesota same-sex marriage case, would preclude this lawsuit, but accepted an argument by attorneys for the state, which had intervened as a defendant, that the plaintiffs lack standing to challenge a West Virginia statute denying recognition to out-of-state same-sex marriages. On this point, however, Judge Chambers gave the plaintiffs the opportunity to amend their complaint to add more plaintiffs if necessary to create standing on that issue.

The court gave the plaintiffs until February 12 either to seek joinder of additional state officials or to explain why the existing defendants are sufficient.

The plaintiffs, represented by Lambda Legal, are three same-sex couples and a child being raised by one of the couples. They claim that West Virginia's laws banning the performance or recognition of same-sex marriages violate their 14th Amendment rights. They filed suit in the U.S. District Court for the Southern District of West Virginia in Huntington against two county clerks who had denied marriage licenses. They did not name any state officials as defendants, but the state, invoking its rights under a federal jurisdictional statute, moved to intervene to defend the constitutionality of the statute.

After pre-trial motions had been filed, Lambda submitted to the court a "notice of supplemental authority" on January 3, attaching copies of the recent marriage equality decisions from Utah and Ohio, together with arguments based on those cases. The first issue Judge Chambers dealt with in his opinion was whether to "strike" these materials as improperly filed. He pointed out that he was going to read those cases in any case, so there was no need to strike the notice, but he would not read the arguments because the rules precluded submitting these materials without getting advance permission from the court.

Moving to a more important issue that has not been previously discussed to any great extent in same-sex marriage litigation, Judge Chambers considered the defendants' contention that he should abstain from deciding this case under the "domestic relations exception" to federal jurisdiction. The Supreme Court has developed this exception in a series of cases dating back to the 19th century, taking the view that federal courts should generally not get involved with deciding divorce, custody and alimony issues, which entirely involve state law, and the defendants noted that the Supreme Court

had advised abstention when a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Chambers rejected this argument, writing that he "believes that this reading of the domestic relations exception is too expansive." He observed that the prior case relied upon by defendants indicated that "abstention would be appropriate when disposition of the federal case depends on a state court's decision about how state domestic relations law should be interpreted and applied. The instant case, however, does not present such a situation." To Chambers, there was no serious interpretive problem presented by the challenged statutes: they clearly state that same-sex couples can't be married in West Virginia, and the state will not recognized their marriages if contracted out-of-state.

He also rejected the idea that issuing a federal court decision would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," another ground for abstention. The defendants argued that pending bills in the legislature to establish civil unions or to present the voters with a constitutional amendment to ban same-sex marriage show that state efforts to deal with this question are under way. "Defendants point to no cases," wrote Chambers, "suggesting that legislative efforts to define domestic relations justify federal court abstention," and he also pointed out that no marriage equality cases are pending in the state courts.

However, he did find merit to an argument by one of the clerks that "if the marriage ban is struck down, only clerks in Kanawha and Cabell Counties will be impacted, resulting in confusion and the lack of a uniform policy regarding same-sex marriages across West Virginia." He pointed out that in the Utah case, the plaintiffs had sued the governor, the attorney general, and the Salt Lake County Clerk. Even though the state had intervened as a party, he was not certain that this was "sufficient to support jurisdiction and create certainty as to this case's effect on all clerks across West Virginia's two federal districts." Although he did not find this sufficient to justify dismissing the case at this point, he decided to reserve judgment on the question, giving the plaintiffs time to either seek to join more defendants or present a more substantial argument on the point. This was a broad suggestion that Lambda either seek to certify a class action naming all the West Virginia County Clerks, or identify and join as defendants particular state officials with supervisory or administrative authority over the marriage laws, just to pin down this point.

Having disposed of the motion to dismiss, Chambers indicated that he would soon proceed to decide Lambda's pending motion for summary judgment.

Turning to more substantial issues, Judge Chambers found persuasive the recent decisions by Judge Shelby in Utah and Judge Kern in Oklahoma finding that *Baker v. Nelson* has been superseded by doctrinal developments, most pointedly *U.S. v. Windsor*. He rejected with little discussion the contention that plaintiffs had failed to state a legal claim because "there is no controlling case law that invalidates West Virginia's marriage ban." As a practical matter, that will always be true of a case of "first impression" in a jurisdiction. He also was not ready to dismiss on the argument that the law was presumptively constitutional, which implies that he is open to the argument that "heightened scrutiny" might apply to this case.

However, plaintiffs stumbled on the issue of standing to challenge the West Virginia law that bans recognition of out-of-state marriages. None of the plaintiffs have already married in another jurisdiction, and, apart from papers filed during motion practice, did not allege in their complaint that they would seek to marry outside West Virginia if they could not do so in the state but could have their out-of-state marriages recognized. Despite various arguments attempting to construct a personal interest for the plaintiffs in having a determination on the marriage recognition issue, and Judge Chambers' acknowledgment that it would be more efficient to decide the fate of both marriage provisions in one proceeding, he concluded that the present plaintiffs do not have "standing" to maintain the challenge under federal jurisdictional rules. Thus, he granted the state's motion to dismiss the challenge to the recognition statute.

However, Judge Chambers did give the plaintiffs until February 12 to file an amended complaint, implying that if they can find suitable plaintiffs (West Virginia same-sex couples who have married out of state and have been denied some right or benefit because of the marriage recognition statute) they might be able to revive this part of their claim.

Having disposed of the motion to dismiss, Chambers indicated that he would soon proceed to decide Lambda's pending motion for summary judgment on those claims remaining. Since he had directed Lambda to file something in response to the concern about statewide effect of an order, he gave the state more time to file its briefs in response to Lambda's summary judgment motion. (That deadline had been held in abeyance while the court was considering the motion to dismiss.)

Of course, Judge Chambers gave no indication about his thoughts on the ultimate merits of the case, but it appears that this case may be moving quickly to a summary judgment ruling, perhaps vying with *Bostic v. Rainey*, the pending case in the Eastern District of Virginia, to see which will be first to hit the 4th Circuit Court of Appeals. The summary judgment hearing in *Bostic* scheduled for January 30 was postponed due to inclement weather, and rescheduled for February 4. ■

Don't Do This Home Alone in Kansas: Court Holds Sperm Donor Liable for Child Support

A man who responded to a Craigslist ad placed by a lesbian couple in Kansas seeking a sperm donor to help them have a child is considered the legal father of the child, ruled a Kansas judge in *State of Kansas, ex rel., Sec'y, Dept. for Children and Families v. W.M.*, Case No. 12 D 2686 (Kan. Dist. Ct., Shawnee Co., January 22, 2014), because he provided his sperm directly to the couple in a sample cup rather than submitting it to them through a doctor and the insemination was performed without medical assistance. The court found unenforceable a "contract" that the man and the couple had signed under which they agreed he would not have any parental status with the resulting child. The ruling by Shawnee County District Judge Mary E. Mattivi responded to a lawsuit filed against the sperm donor by the Kansas Department for Children and Families (DCF), seeking the donor's financial support for the child, whose birth mother had filed several applications for welfare benefits from the state.

According to Judge Mattivi's written opinion, which unsuccessfully sought to preserve anonymity for the donor and the couple by using initials rather than names, A.B. and J.L.S., women living in a committed relationship, placed their advertisement on Craigslist in March 2009, and W.M. responded and met them in person on March 23, 2009. They presented him with a form contract that appeared to have been downloaded from the internet, which he took home to review. He did not consult a lawyer, and the women seem not to have consulted a lawyer either. On March 30, 2009, W.M., A.B. and J.L.S. signed the contract. On three consecutive nights in April, W.M. provided semen to the women in a specimen cup, and A.B. used the semen to inseminate J.L.S., who became pregnant and gave birth to M.L.B.S. in December 2009. The women and child lived together until at least early in December 2010, when the women separated.

Early in her pregnancy, J.L.S. applied for benefits from DCF without disclosing her relationship with A.B. or her pregnancy. In February 2011, after the women had split up, J.L.S. filed a new benefits application for food, cash and medical assistance for the child. The application form asked for the identity of the father, and she wrote "donor" in that space. She did not identify her former partner, A.B., as a co-parent, or indicate any financial support from A.B. for the child. DCF then requested a copy of the Sperm Donor Contract, but evidently J.L.S. had not retained the agreement, W.M. having taken the original. J.L.S. submitted another application in July 2012, this time writing "anonymous sperm donor" in the space for father, and again not mentioning A.B. or any other source of support.

In September 2012, DCF suspended support because of J.L.S.'s failure to supply the Sperm Donor Contract. It appears that J.L.S. then downloaded another copy of the form and filled it out, including signatures for herself, A.B. and W.M., and submitted it to DCF, which appropriately concluded that the sperm donor was known and decided to seek support for the child from him. In the ensuing litigation, DCF sought and obtained blood testing confirming that W.M. is the biological father of M.L.B.S. A.B. sought to intervene in the litigation to assert her parental rights as an "intended parent," arguing that establishing W.M. as the parent would interfere with her parental rights and violate the Sperm Donor Contract.

The court decided to simplify matters by focusing first on the question of W.M.'s status — donor or parent? — and leaving questions about A.B.'s status until later. The January 22 opinion concludes that W.M. is a legal parent, and that Kansas's version of the Uniform Parentage Act, which protects donors from legal liability, does not immunize W.M. because the parties failed to involve a physician in the insemination process.

The statute says, "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." Since 1973, when this language was formulated by the Commissioners on Uniform State Laws and submitted to the states for adoption, the Commissioners have gone through several rounds of revisions and updating, taking account of the increasing phenomenon of donor insemination being used by unmarried women and same-sex couples, but "for reasons known only to the legislature," wrote Judge Mattivi, "Kansas is one of the states that remains in line with the UPA of 1973," have failed to adopt the more recent versions of the uniform law. "It is from here that this Court must apply the law."

Judge Mattivi concluded that the statutory language is clear and unambiguous in providing that only insemination accomplished with the involvement of a physician will shield the sperm donor from having the status of a parent. Thus, the do-in-yourself-at-home insemination in this case did not qualify for such protective treatment. W.M. is the father.

Then the question arises whether the Sperm Donor Contract signed by W.M., A.B. and J.B.L. would extinguish his parental status, and the court ruled that it would not. "A parent may not terminate parental rights by contract," she wrote, "even when the parties have consented. Termination of parental rights is controlled by statute, and in Kansas it may be accomplished only in one of the three following ways: (1) through relinquishment and adoption; (2) through adjudication as a child in need of care; or (3) through a finding of parental unfitness by the court." After quoting the operative paragraph of

the Sperm Donor Contract, the judge wrote, "The Kansas legislature does not authorize this manner of termination of parental rights. It is well established under Kansas law that a child is entitled to support from its parents, and that obligation may not be abandoned." Since none of the three methods of terminating parental rights had been followed in this case, "W.M.'s status as birth father precludes termination."

Having concluded that W.M. is the birth father, the court granted DCF's motion for summary judgment on that point, finding him "the presumptive father of M.L.B.S.," rejected W.M.'s cross-motion for summary judgment, and instructed DCF's attorney to arrange with W.M.'s attorney to secure a date and time for a status conference with the judge's administrative assistant. Unless W.M. is able to secure a stay pending an appeal, he will have to negotiate payment terms. The court's opinion does not address A.B.'s contention that she is a co-parent of the child, as that issue was put off by the court for now. There is no indication in the court's opinion that DFC was interested in pursuing A.B. for child support payments.

Press accounts identified W.M. as William Marotta. Marotta sat for interviews with media and announced that he wanted to appeal the ruling, as he felt he had no connection with this child, having agreed to donate his sperm under an agreement with the mothers that relieved him of all parental rights and responsibilities. Press accounts identified the birth mother as Jennifer Schreiner and her former partner as Angela Bauer, and indicated that as of now the amount of money at stake is about $6,000 that has already been paid out for support of the child, with future support payments possible. One press report said that DCF had been demanding support payments of $200 a month from Marotta. There is no indication in press reports whether DCF intends to take any action against Schreiner for attempting to conceal Marotta's identity by submitting the applications without identifying him as the father. ■

1st Circuit Affirms Order for Sex Reassignment Surgery for Life Inmate

A three-judge panel of the Boston-based U.S. Court of Appeals for the 1st Circuit voted 2-1 to affirm the district court's decision that the Massachusetts Department of Corrections (DOC) violated the 8th Amendment when it refused to provide sex-reassignment surgery for Michelle Kosilek, who is serving a life-sentence without the possibility of parole for the murder of her wife. The ruling may not conclude the action, since the state's staunch opposition to providing the surgery will likely lead it to seek further review from the Supreme Court, especially in light of the dissenting opinion in the court of appeals. *Kosilek v. Spencer*, 2013 U.S. App. LEXIS 951, 2014 WL 185512 (1st Cir., Jan. 17, 2014). The court's opinion made no mention of staying the trial court's injunction pending an appeal to the Supreme Court. U.S. District Judge Mark Wolf had directed the Department of Corrections (DOC) to identify a suitable doctor and make arrangements to be prepared to provide the surgery if his order was upheld by the court of appeals, but Kosilek's counsel have criticized the state for dragging its feet in making these contingent arrangements.

The court's opinion made no mention of staying the trial court's injunction pending an appeal to the Supreme Court.

On January 31, the Department of Correction announced that it would petition the 1st Circuit for *en banc* review. "While we acknowledge the legitimacy of a gender identity disorder diagnosis," said the department, "DOC's appeal is based on the lower court's significant expansion of the standard for what constitutes adequate care under the Eighth Amendment and on substantial safety and security concerns regarding Ms. Kosilek's post-surgery needs." [*Boston Globe*, Feb. 1]

Kosilek, now 64 years old, has been incarcerated at MCI-Norfolk since 1994. According to the opinion for the court by Circuit Judge O. Rogeriee Thompson, Kosilek, who "was born and still is anatomically male," experienced a turbulent childhood and "suffered regular abuse as a child, in part because of her expressed desire to live as a girl." Kosilek married Cheryl McCaul, a volunteer counselor at a drug rehabilitation facility where Kosilek was receiving treatment. "McCaul thought she could cure Kosilek's gender identity disorder," wrote Judge Thompson, but that did not turn out well, as Kosilek murdered McCaul and fled the area in 1990. She was apprehended in New York and brought back to the Bristol County Jail to await trial. While there, she took female hormones in the form of birth control pills she "illicitly obtained from a guard." She attempted suicide twice while awaiting trial, and also attempted to castrate herself.

After she was convicted and sent to MCI-Norfolk, she sought treatment for her gender dysphoria. Although DOC's medical staff agreed that she genuinely suffered from gender identity disorder, the Commissioner of Corrections took the position that no inmate should receive hormone treatment if they were not already on such a regimen prior to their conviction. Kosilek sued, as a result of which she ended up obtaining hormone treatment and eventually other accommodations to her desire to live

as a woman while in prison, includng electrolysis to remove unwanted body hair, cosmetics and some feminine garments. Although she was housed in general population in an all-male prison, there were no untoward incidents and she had an excellent disciplinary record. However, DOC absolutely refused her request for surgery to make her gender transition complete, or to consider moving her to a women's prison, resulting in this second lawsuit.

The case consumed several years in the district court, with at least three rounds of testimony from various medical experts, some presented by Kosilek, some by DOC, and a "neutral" expert appointed by the Judge Wolf. On September 4, 2012, Judge Wolf issued his decision, finding that DOC's continued denial of sex reassignment surgery to Kosilek violated her rights under the 8th Amendment of the U.S. Constitution. Wolf ordered DOC to provide the surgery for Kosilek, but stayed his ruling pending appeal. At the time, no federal court had ever ordered a state prison system to provide sex reassignment surgery to an inmate. Since then, the 7th Circuit has ruled that a state law banning the prison system from providing such treatment is unconstitutional, and the 4th Circuit has ruled that prisoner authorities must evaluate an inmate for potential sex reassignment surgery and provide the procedure if medical experts agree that it is necessary for the inmate's health.

The 8th Amendment bans "cruel and unusual punishment." The Supreme Court has interpreted this to mean that if an inmate has a serious medical need, prison authorities are required to provide minimally adequate treatment to prevent serious harm to the inmate. Many courts have ruled on situations where transgender inmates sought treatment in prison, and a consensus has emerged that such inmates are entitled to hormone therapy at the state's expense if qualified medical personnel diagnose gender dysphoria and agree that hormone therapy is necessary to meet the inmate's medical needs. However, there is not yet a consensus that the 8th Amendment requires prison systems to provide sex reassignment surgery.

In this case, Judge Wolf concluded that the expert testimony supported Kosilek's claim, and a majority of the court of appeals agreed. One point of contention between the majority and the dissenter, Circuit Judge Juan R. Torruella, concerned the appropriate standard for reviewing the district court's decision. Generally, the court of appeals will give great deference to fact finding by a trial judge, and the majority felt that most of the key findings in this case were factual findings that should be upheld unless they were clearly erroneous. Judge Torruella argued that many of these findings concerned mixed questions of fact and law as to which less deferential review was warranted.

But Judge Torruella's more serious objection was to the majority's conception of what the 8th Amendment requires. He noted that the trial record indicated that Kosilek is receiving substantial treatment, both psychological and medical, for her gender dysphoria, and argued that it could not be said that DOC is being "deliberately indifferent" to Kosilek's medical needs, in light of the security and logistical challenges posed by sex reassignment surgery, which would necessarily have to take place outside of facilities under DOC's control, and by the need to properly house Kosilek after the surgery.

All the judges agree that DOC's objection to providing the surgery is not based on expense, which, according to newspaper reports, can range from $7,000 to $50,000, depending on the extent of necessary cosmetic work. DOC offered various non-expense related reasons for denying Kosilek's demands, but Wolf found none of them convincing. He found that DOC had unduly inflated the security concerns, and he concluded that DOC's objections were raised in bad faith, influenced inappropriately by the political controversy that Kosilek's case had inspired after Boston media ran feature stories about the case early on. Groups of state legislators sent letters to the Corrections Commissioner strongly objecting to spending state funds on sex reassignment surgery for a convicted murderer who would be spending the rest of her life in prison. Although the Commissioner testified that the department's opposition to surgery for Kosilek was not due to political pressure, Wolf did not believe it.

The majority also endorsed Judge Wolf's finding that some of the expert testimony was based on inadequate information, as some of the experts who testified about the security issues were not informed about Kosilek's age and exemplary disciplinary record in prison. Wolf had totally discounted the testimony of one of the state's experts, concluding that he was specifically sought out by the state because he was known to be opposed to sex reassignment surgery. Judge Torruella, the dissenter, was critical of this, noting that another of the experts had testified that the state's expert's testimony was within the bounds of professional opinion on the subject. Professional views range across a wide spectrum as to the appropriate treatment for gender dysphoria, both outside and inside prisons, but Judge Wolf, and the majority of the court, took as reasonably established the Harry Benjamin Standards of Career that have been accepted by many courts as the baseline for evaluating the adequacy of treatment in a prison setting. These standards provide for sex reassignment surgery if hormone therapy proves insufficient to deal with the individual's strong gender dysphoria. One expert had testified that Kosilek suffered from the strongest case of gender dysphoria the expert had ever seen.

Although she initiated litigation on her own, Kosilek now is represented by a substantial legal team, led by Frances S. Cohen, with Jeff Goldman, Christina Chan, Joseph L. Shulman and David Brody. Her case has received support through amicus briefs from civil liberties, prisoners' rights, and LGBT organizations (in a brief authored by Jennifer Levi and Bennett H. Klein of GLAD on behalf of their organization and Equality Maine, Human Rights Campaign, Mass Equality, Massachusetts Transgender Political Coalition, National Center for Transgender Equality, NGLTF, and Transgender New Hampshire). ■

Gay Pennsylvania State Trooper's Sexual Orientation Discrimination Claim against Supervisors Survives Motion to Dismiss

On January 6, 2014, U.S. District Court Judge Robert D. Mariani granted in part and denied in part a motion to dismiss a gay Pennsylvania State Trooper's Section 1983 lawsuit against his troop superiors, leaving intact an equal protection claim of discrimination because of sexual orientation. *Etheredge v. Henry*, 2014 U.S. Dist. LEXIS 1036 (M.D. Pa.).

Plaintiff James Etheredge had been an openly gay Pennsylvania State Trooper assigned to Troop T – Pocono until a devastating on-the-job car accident on September 17, 2006. Although Etheredge also alleged that a discrimination and harassment complaint filed in the spring of 2006 was ignored, the real gravamen of his complaint was the treatment by his superiors once his accident forced him to stop working. He alleged a sustained harassment campaign by several of his superior officers that was intended to force him back to work, despite his doctors' insistence otherwise. The campaign allegedly included leaving dozens of threatening phone messages for Etheredge, personally confronting Etheredge at his home, engineering baseless code enforcement violations on Etheredge's commercial property, stopping Etheredge's pay, and attempting to cut off Etheredge's public benefits.

Meanwhile, Etheredge noted that a straight trooper from the same troop, confronting a similar injury sustained several months earlier that also forced him off the job, faced no such harassment to return. They both had personal doctors saying they could not return to work, while state doctors said they could. Despite the similarity of their injuries and doctors' recommendations, Etheredge claimed the superiors at the troop did not cut off the straight trooper's pay, force him to take sick leave, or terminate his public benefits.

Etheredge first filed a federal lawsuit in December 2011. Looking at Etheredge's initial complaint, Judge Mariani adopted a magistrate judge's recommendation to dismiss a First Amendment retaliation claim with prejudice, an equal protection claim without prejudice, two of the defendants without prejudice, and all facts arising before spring 2006 with prejudice. After the court granted Etheredge leave to amend his complaint, he filed an amended complaint reasserting his equal protection claim. His superiors again moved to dismiss.

As Judge Mariani recounted, Section 1983 cases require that a plaintiff be deprived of a federal right by a person acting under color of state law. To meet these elements, Etheredge claimed that his troop superiors denied him the equal protection guaranteed by the Fourteenth Amendment of the U.S. Constitution, based on both his gender and sexual orientation.

First, Judge Mariani dismissed the gender discrimination claim, citing a lack of female colleague comparison. "There is no allegation that a similarly situated female trooper was treated differently than Plaintiff," he wrote. "Therefore, the Court concludes that Plaintiff offers no allegations in support of a gender-based Equal Protection claim and will grant Defendant's motion to dismiss this claim."

Judge Mariani did, however, deny dismissal of the sexual orientation basis for Etheredge's equal protection claim. Etheredge's superiors argued that homosexuals are not a suspect class and, therefore, rational basis applies. Judge Mariani accepted this argument, but concluded that "Defendants have not yet articulated to the Court what their purported 'reasonably conceivable state of facts that could provide a rational basis' for their treatment of Plaintiff were." With that in mind, "it would be premature for the Court to dismiss this particular claim."

Moving on, Judge Mariani next dealt with the superiors' argument that dismissal was warranted because Etheredge did not allege they also supervised the straight trooper, and liability in civil rights actions cannot be predicated on *respondeat superior*. Judge Mariani disagreed. "Although Plaintiff has not alleged specifically that Defendants Henry, Brahl, and Holly-Storms were the supervisors of both Plaintiff and Trooper Boettger at the Troop T barracks, the Court infers that Plaintiff is making this argument based on a reading of the Amended Complaint" and deposition testimony.

Finally, Judge Mariani handled a statute of limitations defense. State personal injury tort law governs the length of the statute of limitations for Section 1983 claims, and a two-year Pennsylvania statute applied to this case. Etheredge's superiors argued that his claims should be limited to facts arising since March of 2008 instead of spring of 2006. Etheredge tried to rely on the "continuing violations" doctrine, an equitable exception to filing on time "when a defendant's conduct is part of a continuing practice." Judge Mariani agreed with Etheredge's superiors that "allowing Plaitiff here to allege facts dating back to the spring of 2006 would be unfair to Defendants when Plaintiff clearly could have brought suit as early as 2006 and any continuing wrongs could have been averted." Based on that conclusion, Judge Mariani found that "allegations pertaining to Plaintiff's sole remaining claim of Equal Protection violations stemming from his sexual orientation will be limited to facts arising from March 2008 when he was first ordered to return to work." – *Matthew Skinner*

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

N.Y. Surrogate Court Denies Second-Parent Adoption for Married Lesbian Mom

Claiming that a married lesbian had no need to adopt the child born to her same-sex spouse, Kings County (Brooklyn) Surrogate Court Judge Margarita Lopez Torres refused to entertain her adoption petition in *Matter of Seb C-M*, NYLJ 1202640083455 (Jan. 6, 2014).

Surrogate Torres reasoned that under New York's Marriage Equality Law same-sex marriages enjoy the same presumptions of parental status that are accorded to different-sex marriages. Thus, a child born to a married woman is presumed to be the legal child of that woman's spouse, and the names of both spouses are placed on the birth certificate as a matter of course. That being the law in New York, Judge Torres said that an adoption decree to document the petitioner's parental status was "neither necessary nor available."

Judge Torres's decision flies in the face of advice that LGBT lawyers routinely give to women in this situation. Although the couple here, A.C. and M.M., were married in Connecticut in 2011, and their marriage has been legally recognized in New York even before the passage of the Marriage Equality Law under court decisions dating back to 2008, and the birth certificate of their son records both their names as parents, they are living in a country with a patchwork of marriage recognition, in which more than thirty states ban recognition of same-sex marriages, whether by constitutional amendment, statute or both. Several lawsuits are now on file challenging refusals to recognize same-sex marriages, but a definitive ruling on the issue may be years away. In the meantime, it is well established in the law that a judicial adoption decree will be given full faith and credit by the courts of other states, even if those states would not themselves allow same-sex second-parent adoptions, so an uncontested adoption proceeding is generally advised for such couples who want to minimize the risk of complications when traveling or relocating across state lines. If their parental status is challenged, they can produce a court order establishing and recognizing that status, which is likely to be respected.

Judge Torres identified the purpose of an adoption proceeding being "to create a new legal relationship where one did not previously exist," quoting from a prior decision by New York County Surrogate Kristin Booth Glen, *In re Sebastian*, 25 Misc.3d 567, in which, ironically, she granted a second-parent adoption petition in 2009. In that case, Surrogate Glen wrote, "Adoption is not utilized for, nor is it available to reaffirm, an already existing parent/child relationship." But, as Surrogate Torres pointed out in a footnote, Surrogate Glen was dealing with a different case, in which the petitioning second-parent had no pre-existing legal parental relationship with the child that would be recognized under New York law, so adoption was an appropriate remedy in that case to solidify the legal status of the family headed by a same-sex couple who had married in the Netherlands.

Judge Torres's decision flies in the face of advice that LGBT lawyers routinely give to women in this situation.

Judge Torres said that prior to the New York precedents recognizing out-of-state same-sex marriages and the passage of the Marriage Equality Law, she would have "without any hesitation whatsoever" approved this adoption petition. But, she said, "Today no such action is warranted or permitted by this court to affirm an existing, recognized and protected parent-child relationship between the petitioner and her son. Indeed," she continued, "were this court to entertain the instant petition, such action would imply that, notwithstanding the existing and lawful marital relationship between the petitioner and her spouse, true marriage equality remains yet to be attained, and that, although legally recognized in this state, a same-sex marriage remains somehow insufficient to establish a parent-child relationship between one particular parent and any child born within that marriage, thereby raising equal protection concerns."

Surrogate Torres was according the marriage of A.C. and C.M. true equality, as it is entitled to receive under New York law. But as a practical matter, such true equality exists, as it were, in a bubble consisting of the states in which same-sex marriages are recognized, and we live in a mobile society in which movement in and out of that bubble is predictable. Judge Torres notes a recent Ohio federal court decision, *Obergefell v. Wymyslo*, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio 2013), now under appeal to the 6th Circuit Court of Appeals, ordering Ohio to recognize an out-of-state same-sex marriage on equal protection grounds, as exemplary of the "tectonic shifts occurring in the geography of our culture's definition of 'family,' particularly with respect to the increasing recognition of the right to marriage equality and adoption by same-sex families, as well as the ethical complexities arising from assisted reproductive technology."

Perhaps Judge Torres is operating

under a misapprehension about how other states are likely to react to a same-sex couple traveling through their borders with a child. While stating that she is "wholly sympathetic to the concerns of families of same-sex couples who may wish or need to relocate" to non-recognition jurisdictions, she predicts that a state that would *not* recognize their marriage would be "equally likely to deny full faith and credit to decrees of adoption issued to same-sex couples by a New York Surrogate's Court." Actually, that does not seem to be the case, as courts in non-marriage recognition states have thus far recognized their constitutional obligations to honor adoption decrees, which is precisely why LGBT lawyers recommend this second-parent adoption route to their married clients.

While Judge Torres's ruling may be seen as further confirmation of the equal marriage rights hard-won by New Yorkers, it cuts off a procedure that may prove vitally important to LGBT families as they travel about the country — at least until the final triumph of marriage equality ultimately negates the non-recognition problem. Her ruling could be appealed to the N.Y. Appellate Division, 2d Department. The *New York Law Journal* (Jan. 28) reported that prior to issuing her ruling, Surrogate Torres had commented to counsel for the petitioner, Staten Island attorney Michael DiMauro, that she had granted second-parent adoptions where the petitioner was not named on the child's birth certificate, but this was the first time she was asked to approve an adoption where the petitioner's name was already recorded on the birth certificate as a parent of the child. DiMauro observed to the *Law Journal* that the ruling was "a great advancement for the gay and lesbian community" in affirming that adoption was not necessary for the same-sex spouse of a birth-mother to be recognized as the child's parent, but it left his clients "uneasy" about their situation should they travel or relocate. He described the ruling as "a bittersweet victory" since it did deny his client's petition. ■

Third Circuit Remands Gay Jamaican's Convention against Torture Claim for Further Consideration

The U.S. Court of Appeals for the Third Circuit has remanded a gay Jamaican man's request for deferral of removal under the Convention Against Torture (CAT) for further consideration in *Codner v. Attorney General*, 2014 U.S. App. LEXIS 537 (January 10, 2014).

Petitioner, a native and citizen of Jamaica, came to the United States as a tourist in 1997 and overstayed his visa. He was placed in removal proceedings which were later administratively closed. He was later convicted of a drug offense and sentenced to 3-5 years imprisonment. The removal proceedings were reopened and removability charges based on the conviction were brought against him and sustained.

Before an Immigration Judge, Petitioner applied for asylum, withholding of removal, and protection under the CAT, arguing that he was gay, that he left Jamaica to escape homophobia, that he had been the victim of a serious anti-gay assault leaving him with gunshot scars on his leg and foot, and that his nephew had been murdered in 2008 for "defending [Petitioner's] honor." He further testified that while he had been married to women and had sexual relations with women, he only disclosed his homosexuality to other gay men. He submitted numerous letters (all from Jamaica) from relatives, friends, and government and law enforcement officials, all attesting that Petitioner was known in the community to be gay, confirming the murder of Petitioner's nephew, and stating that Petitioner would likely be killed if returned to Jamaica.

The Department of Homeland Security (DHS) argued that Petitioner's testimony was not believable, especially since he had been married to women, had dated women, had fathered children with women, and only disclosed the truth about his sexual orientation "when he ran out of other options to remain in the United States." The Immigration Judge first ruled that Petitioner's drug conviction was "particularly serious," thereby barring him from asylum, withholding of removal, and withholding of removal under CAT, leaving him only eligible to seek deferral of removal under CAT. The Immigration Judge agreed with DHS that Petitioner should have corroborated his case with letters from someone in the United States, that the timing Petitioner's disclosure of his sexual orientation was "highly suspicious," and denied Petitioner's request for relief.

On appeal to the Board of Immigration Appeals, Petitioner raised only his deferral of removal under CAT claim, but included additional country reports regarding the adverse treatment of homosexuals in Jamaica. The Board ruled that Petitioner had not presented sufficient credible evidence both that he was gay and that it was more likely than not that he would be tortured if returned to Jamaica. Petitioner, acting pro se, filed a motion to reconsider in which he resubmitted all of the same prior evidence, and, when the Board denied it, filed a Petition for Review with the Third Circuit.

In a per curiam decision, a panel of three Circuit Judges discussed whether Petitioner was raising reviewable legal questions or factual questions over which they had no jurisdiction. The panel concluded that they had jurisdiction to review Petitioner's legal question of whether the Immigration Judge "overlooked and improperly failed to consider material and probative evidence." The panel stated that Petitioner's letters, if credible, could corroborate Petitioner's position, but that the record on appeal did not disclose why the Immigration Judge found them to be "suspect," and ruled that "[i]f authentic and truthful, the letters from [Petitioner's] family and friends are at least as probative, if not more so, of his sexual orientation as any affidavit he might have obtained from a sexual partner in the United States." Accordingly the panel remanded the case for further proceedings. *–Bryan C. Johnson*

Wrong Jury Instructions Prejudiced Defendant in Gay Employment Discrimination Suit

The California 4th District Court of Appeal reversed a $238,000 jury verdict awarded to a terminated gay hospital worker, finding that the jury was given incorrect instructions. The jury was instructed that they could find that the employer retaliated against Romeo Mendoza in violation of California law if an unlawful motive was a motivating reason. However, the correct jury instruction was supposed to be a finding of retaliation if the jury found an unlawful motive to be a substantial motivating reason for Mendoza's termination. *Mendoza v. Western Medical Center Santa Ana*, 2014 WL 123417, 2014 Cal. App. LEXIS 30 (Cal. 4th Dist. Ct. App., Jan. 14, 2014).

Romeo Mendoza was a nurse at Western Medical Center Santa Ana for more than 20 years. He had an excellent reputation and was not fired for any errors in his work. In late 2010, Mendoza reported that his new supervisor, Del Erdmann, was sexually harassing him. The hospital's human resources department conducted an investigation. Both Mendoza and Erdmann are gay men. Mendoza claims that on multiple occasions Erdmann harassed him with inappropriate comments, physical contact and lewd displays of his genitals. During the investigation and at trial, this turned into a case of "he said – he said."

Mendoza claimed Erdmann harassed him and Erdmann claimed Mendoza consented to his behavior. The two men were the only individuals with personal knowledge of what occurred. At the conclusion of the investigation, the hospital fired both men, concluding that both participated in the inappropriate behavior.

Mendoza sued the hospital for wrongful termination in violation of public policy and for retaliation, claiming that the hospital fired him because he complained about his supervisor Erdmann's sexually harassing conduct. At trial, an expert testified that the hospital's investigation was indeed shoddy. After answering a special verdict form, the jury found for Mendoza in the amount of $238,328. The hospital filed an appeal.

The hospital on appeal claims that the jury instruction was given in error and the Court of Appeal should reverse the decision. At trial, the jury was instructed that it could find for Mendoza on the retaliation claim if his reporting of the harassment by Erdmann was *the motivating reason* for his termination by the hospital. This instruction was slightly different from the 2012 version of the CACI No. 2430. CACI is the California Civil Jury Instructions. More interesting was the special verdict form given to the jury, which stated something different from the initial jury instructions. The special verdict form used "the reason" instead of the motivating reason. In this case we have the jury instruction, the CACI and the special verdict form all with different wording used. During deliberations, the jury submitted a follow up question regarding causation on the special verdict form, which stated "the reason". The jury was clearly confused on the issue of whether retaliation needed to be the motivating reason or just a reason for Mendoza's termination. Over the hospital's objection, the court replied to the jury's question and instructed that the form should say a motivating reason, not the reason. The jury proceeded to mark out the word "the" and insert the word "a". The hospital objected to this instruction response because they believed the initial instruction and form were in fact correct. The court responded by saying if the CACI is right, we are right. The CACI that the judge used, it turns out, was no longer accurate.

The special verdict form used "the reason" instead of the motivating reason. In this case we have the jury instruction, the CACI and the special verdict form all with different wording used.

California had revised the CACI instructions in 2013 with a new instruction requiring that Mendoza's reporting of harassment had to be "a substantial" motivating factor in his termination. The change in jury instructions was inspired by *Harris v. City of Santa Monica*, 56 Cal.4th 203 (2013) and *Alamo v. Practice Management Information Corp.*, 219 Cal.App.4th 466 (2013). *Harris* makes clear that the initial instruction in this case and the Court's amended instruction were both incorrect. The correct jury instruction should have been whether Mendoza's report of sexual harassment was a substantial motivating factor in his termination.

The Court of Appeals too thought it was clear that the jury instructions at trial were incorrect.

On appeal, the issue of the poor investigation came up again. Mendoza argued that the poor investigation demonstrated that the hospital did not really have an interest in the truth. Erdmann argued that the expert witness even testified that a more thorough investigation would not necessarily lead to additional facts. The Court of Appeal, viewing the evidence in the light most favorable to the defense, found there is a probability that the instructional error prejudicially affected the verdict. The Court of Appeal ordered a new trial on both the jury instruction and the matter of the investigation.

The Court of Appeals did footnote the importance of investigations in these kinds of "he said – he said" cases. "At oral argument, defense counsel asked (perhaps rhetorically) just what employers were expected to do when faced with a scenario in which two employees provide conflicting accounts of inappropriate conduct. Our answer is simple: employers should conduct a thorough investigation and make a good faith decision based on the results of the investigation. Here, the jury found this did not occur. Hopefully, this opinion will disabuse employers of the notion that liability (or a jury trial) can be avoided by simply firing every employee involved in the dispute."

In California this case is significant because it highlights the change with regard to the burden of proof in retaliation cases. It is not enough to show that a retaliatory motive was involved; employees will have to show that retaliation was a "substantial" motivation. Mendoza's fight for his job will continue at the new trial, unless the case is settled. – *Tara Scavo*

Tara Scavo is an attorney in Washington, D.C.

New York Federal Court Rejects Prisoner Claim, But Leaves Room for Amended Complaint

U. S. District Judge John G. Koeltl dismissed a gay inmate's claim of harassment based on sexual orientation in *Bowden v. Duffy*, 2014 U.S. Dist. LEXIS 11692 (S.D.N.Y., January 30, 2014). Plaintiff John L. Bowden's pro se complaint alleged a pattern of discriminatory harassment by correction officers and captains at Rikers Island, including the failure to protect him against harm from other inmates.

The claimed harassment, occurring over a period of seven months, consisted primarily of verbal taunts by corrections officers about his sexual orientation that encouraged other inmates' "verbally abusing him, spitting on him, throwing urine on him, physically assaulting him, and demanding that he perform sexual acts upon them." Bowden said he quit his job in the commissary because of the abuse.

According to Judge Koeltl, the complaint "also describes multiple abusive incidents that occurred between the plaintiff and other inmates at the prison, which, the plaintiff alleges, were reported to COs in the prison, who took no action to protect him or prevent the abuse." The incidents included two occasions in which Bowden was forced to perform oral sex. Bowden also alleges that officers intentionally caused him distress by repeatedly threatening to change his housing assignment to move him close to where his assaulters were living. He claims his grievances were ignored, as was his request for protective custody.

Judge Koeltl identified several potential claims, but he dismissed each one. Officers' verbal taunts and threats, "however inappropriate," were insufficient to state a violation of the Eighth Amendment's proscription against "cruel and unusual punishment" since they were "unaccompanied by any injury." Bowden's loss of his prison job was not actionable, since inmates have no protected liberty interest in any particular employment. (In sweeping language, unlikely to be applied to racial or ethnic animus, Judge Koeltl wrote: "even if the plaintiff was led to quit his job due to discrimination, he has not stated a claim upon which relief can be granted.") Judge Koeltl also broadly dismissed Bowden's claim that defendants violated his First Amendment rights in the handling of his grievances (presumably a form of the "Right to Petition" the government), writing: "the failure to respond to a prisoner's grievance does not constitute a First Amendment violation."

Although Judge Koeltl also dismissed Bowden's claim that defendants failed to protect him from harm from other inmates – see *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) -- he did so without prejudice, allowing him to replead "freely" to supplement his "conclusory" allegations and providing him a virtual road map for meeting Farmer's requirements. In order to sustain a claim based on deliberate indifference to serious risk of harm, Bowden's amended pleading should detail the complaints made to each defendant, stating "when the plaintiff made these reports, whether he continued to be harassed after making them, and what, if any, harm occurred after his reports." The amended complaint should "list specifically what injury he suffered, when and how it occurred, and who was responsible for it," clarifying "who, if anyone, had notice of the risk of this injury as well as when and how notice was given."

Judge Koeltl also wrote that Bowden needs to: (1) show the "personal involvement" of each defendant he is suing; and (2) allege physical injury or the commission of a sexual act" in order to recover any monetary damages for emotional distress under the limitations for such awards in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). – *William J. Rold*

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

Austrian Constitutional Court Rejects Insemination Ban for Lesbian Couples

Rechtskomitee LAMBDA (RKL), Austria's civil rights organization for LGBT people, announced the fifth victory of its registered partnership litigation offensive. As the first supreme court in the world to do so, the Austrian Constitutional Court (the world´s oldest constitutional court) held that Austria's statutory ban on donor insemination for lesbian couples violates human rights protected under Austrian and European law. The court found no valid reasons for the ban on donor insemination for lesbian couples. The judges saw the traditional family not affected by realizing a lesbian couple´s wish for a child. And the Constitutional Court took its ground-breaking judgment, released on January 17, on the highly symbolic date of 10 December 2013, the International Day of Human Rights.

Christina Bauer, an Austrian citizen, and Daniela Bauer, a German citizen, entered into a registered partnership in Germany in 2008 and then moved to the city of Wels in Upper Austria. Christina wanted to conceive a child through medically assisted procreation (insemination) and Daniela agreed. Both are very much looking forward to live a happy family-life with Christina's child.

But with introduction of registered partnership by 1st January 2010, Austria's federal legislator explicitly banned medically assisted procreation for lesbian couples. The specified punishment is up to EUR 36.000, or up to 2 weeks in jail. This ban prohibits medically assisted insemination for lesbian women on the basis that they are living with a woman instead of a man. Thus they are legally barred from any procreation, as it cannot reasonably be expected that a lesbian woman will engage in sexual intercourse with a man, contrary to her sexual orientation and (for couples) contrary to their promise of faithfulness, in order to conceive a child.

In 2010, Daniela and Christina Bauer asked the District Court of Wels to register Daniela's consent to the insemination, this being under Austrian law one of the preconditions for lawful medically assisted insemination. The District Court refused in March 2010 and the Regional Court of Wels, on appeal, confirmed the District Court's decision in June 2010. The appeals court saw neither a violation of the European Convention of Human Rights nor a violation of freedom of movement within the European Union (there is no such ban in Germany). The women could go to Germany and get inseminated there, the appeals court said.

The Supreme Court disagreed. Two times it has applied to the Constitutional Court to strike down the ban as unconstitutional (OGH 22.03.2011, 3 Ob 147/10d; OGH 19.12.2012, 3 Ob 224/12f). In addition a lesbian registered couple from Vienna directly addressed the Constitutional Court with the same objective (G 44/2013).

As the first supreme court in the world to do so, the Austrian Constitutional Court held that Austria's statutory ban on donor insemination for lesbian couples violates human rights.

In its judgment delivered on January 17, the Constitutional Court stressed that same-sex couples (with children) are families (VfGH 10.12.2013, G 16/2013, G 44/2013, par. 36). Protection of the traditional family cannot justify the exclusion of same-sex couples from donor insemination, as same-sex partnerships are not substituting marriage or opposite-sex cohabitation, but instead are complementing them (par. 54). Also, same-sex couples enjoy the fundamental right (under Art. 8 of the European Convention on Human Rights) to medically assisted procreation, the 14 judges said (par. 50). Restricting legal methods of medically assisted procreation to bridging fertility-problems in heterosexual partnerships and marriages is disproportionate and discriminatory (par. 47). In its opinion sought by the Constitutional Court, the federal government´s Bioethics-Commission had supported the repeal of the ban with a vast majority of three-fourths of its members.

The judgment of the Austrian Constitutional Court is the first one worldwide in which a country's highest court has turned down the exclusion of lesbian couples from donor insemination as a violation of human rights.

The ruling also leads to liberalization of other restrictions on insemination. Couples won't be required anymore to establish that they have engaged all possible and reasonable kinds of treatment in order to produce pregnancy by sexual intercourse (§ 2 par. 2), and in-vitro-fertilization using donor sperm (instead of the partner´s sperm) will be legalized (§ 3 par. 1 & 2). For the reintroduction of these regulations the conservative party now needs its coalition partner. If they find no consensus (also) the liberalization for heterosexual couples will enter into force on 1 January 2015.

"The Constitutional Court's judgment is great, historic and ground-breaking," says Dr. Helmut Graupner, president of RKL and counsel for the four women. "Today is a great day for human rights and the rule of law." [Adapted with permission from a news release by RKL.] ■

Dispute in Ohio Between Former Lesbian Couple Falls Within Domestic Relations Exception to Federal Jurisdiction

Even though Ohio's State DOMA prohibits recognition of the marital status of a same-sex couple, the domestic relations exception to federal subject matter jurisdiction was nonetheless successfully used by a former same-sex partner who moved to dismiss a case brought in Ohio by her spouse in *Chevalier v. Barnhart*, 2014 WL 198494 (S.D.Ohio,2014).

Caroline Chevalier and Kimberly Barnhart married on July 7, 2007 in Leamington, Ontario, and separated on November 1, 2010. Chevalier then brought the instant action in U.S. District Court in Cincinnati, seeking to recover based on claims sounding in breach of contract, default on loans, unjust enrichment, fraud, constructive lien/trust and foreclosure of real property. Chevalier is a Canadian citizen and Barnhart is a citizen of Ohio. Barnhart thereafter filed for divorce in Canada.

In her divorce petition, Barnhart seeks support for herself and an equalization of net family properties, or, in the alternative, a declaration that the parties' net family property has been equalized. Barnhart alleges in her petition that "upon her marriage to [Chevalier], she left employment at Ohio State University and resided with [Chevalier] in Windsor, Ontario where she assisted [Chevalier], without compensation, in managing and improving [Chevalier's] rental property." Barnhart stated that Chevalier gave her money to maintain her property in Ohio and for her personal needs. Barnhart also claimed that she was forced to settle a civil rights action against the Logan, Ohio, police department because Chevalier refused to testify as a witness on her behalf. The civil rights action allegedly arose from an altercation between the parties and police officers when Barnhart "stepped between" Chevalier and the officers.

Barnhart moved to dismiss the federal case for lack of subject matter jurisdiction, arguing that the case falls within the domestic relations exception to federal jurisdiction. Judge Graham granted the motion, even though Ohio prohibits the recognition of same sex marriages (see Ohio Const. art. XV, § 11; Ohio Rev. Code § 3101.01 [c]). He found that the nature of the dispute before the district court was the "functional equivalent of divorce proceedings" because Chevalier "asked this court to determine her marital property rights and obligations with respect to the monies referred to in the complaint." Judge Graham held that merely framing the complaint in terms of breach of contract and tort claims did not mandate a different result.

Judge Graham couched the federal action as Chevalier's attempt to "play one court system off another against the other."

Judge Graham couched the federal action as Chevalier's attempt to "'play one court system off against the other (internal citations omitted)' ", noting that "[a]ny Ohio or Canadian law which might impact the property rights of either party by reason of their marriage in Canada would not be applicable under Ohio law." Judge Graham further noted that the Canadian court has a special proficiency in matters concerning the division of marital property and since this case involves "'delicate issues of domestic relations'" this case should be "left to the Canadian court." – *Eric J. Wursthorn*

Eric J. Wursthorn is an Associate Court Attorney in the NYS Unified Court System.

MARRIAGE EQUALITY

ARIZONA – Four Arizona same-sex couples filed suit in U.S. District Court on January 6, seeking a declaration that Arizona's constitutional and statutory ban on same-sex marriages is unconstitutional. *Connolly v. Brewer*, No. 2:14-cv-00024. Two of the couples were married in California and seek recognition of their marriages; the other two seek to marry in Arizona but were denied licenses by Maricopa County Superior Court Clerk Michael Jeanes. (Maricopa County includes the city of Phoenix.) The named defendants are Governor Jan Brewer, Attorney General Tom Horne, and Mr. Jeanes. It is possible due to 11th Amendment issues that Mr. Jeanes will be the only real defendant, but of course the state government, which vehemently opposes same-sex marriage, will provide the defense. Plaintiffs were handed a distinct advantage when the 9th Circuit ruled a few weeks later that sexual orientation discrimination claims are subject to heightened scrutiny, which will put the burden on the state to show that denying same-sex couples the right to marry or have their marriages recognized substantially advances an important policy interest of the state.

COLORADO – On a party-line vote of 3-2, a Colorado senate committee approved a measure that would allow same-sex couples who marry in other states to file joint returns as married in Colorado, even though the state does not allow same-sex marriages. The only witness to testify against the measure in committee hearings was a representative of Alliance Defending Freedom, who claimed that the measure was a subterfuge to evade the anti-gay marriage amendment passed by voters. Republican opponents said the measure was "another attack on the institution of marriage." *9news.com*, Jan. 14.

FLORIDA – On January 21, National Center for Lesbian Rights and attorneys from the law firm Carlton Fields Jorden Burt filed suit in a state court in Miami seeking a ruling that same-sex couples are entitled to marry in Florida. Although the case is in state court, the plaintiffs rest their claim on the 14th Amendment of the U.S. Constitution, arguing based on the Supreme Court's analysis in *U.S. v. Windsor* (2013) that same sex couples are entitled to "equal dignity" with different-sex couples who are allowed to marry. The plaintiffs are six same-sex couples and the Equality Florida Institute. The lawsuit is titled *Pareto v. Rubin* (Fla. Cir. Ct., 11th Judicial District, Miami-Dade County).

HAWAII – Hawaii First Circuit Judge Karl Sakamoto ruled on January 26 in *McDermott v. Abercrombie* that the Hawaii Marriage Equality Act, passed last year, does not violate either the Hawaii or federal constitutions. Rep. Bob McDermott, a Republican from Oahu who is a diehard opponent of marriage equality, filed suit even before the bill was approved by the legislature, seeking injunctive relief, which was twice previously denied by Judge Sakamoto, in rulings refusing to block the governor from signing the bill and refusing to block the state from issuing marriage licenses to same-sex couples. Judge Sakamoto's January 26 ruling granted summary judgment to the state, in response to a motion filed at the direction of Attorney General David M. Louie. The law went into effect on December 2, 2013. McDermott says he will appeal the ruling. *bigislandnow.com*, Jan. 30.

LOUISIANA – On January 13, U.S. District Judge Martin C. Feldman issued a new opinion in *Robicheaux v. Caldwell*, 2014 U.S. Dist. LEXIS 3870 (E.D. La.), reiterating his earlier jurisdictional ruling and rejecting an attempt by plaintiffs to revive this case attacking Louisiana's ban on same-sex marriages. The plaintiffs sued Attorney General James D. Caldwell, seeking a declaration that the ban was unconstitutional. Judge Feldman found that the court lacked jurisdiction, due to 11th Amendment sovereign immunity. Basically, citizens of a state may not sue their own state in federal court, but they may sue a state official who has "some connection" to the enforcement of the law that they are challenging, seeking injunctive relief. Judge Feldman found that the attorney general's connection to the enforcement of the same-sex marriage ban was not substantial enough to subject him to federal court jurisdiction as a defendant on this claim, and Feldman is sticking by this decision. He rejected the plaintiffs' suggestion that they be allowed to file an amended complaint naming a different official as defendant, quoting a 5th Circuit decision to the effect that "we have consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling." If Louisiana plaintiffs want to mount a federal legal challenge, they need to identify an appropriate defendant and start over. Or, to avoid the complications of federal jurisdiction, they might file suit in state court. Either way, they can't win until the U.S. Supreme Court rules in their favor, and it shouldn't matter unduly whether they get there through a petition from a state appellate court ruling or a federal appellate ruling. The plaintiffs are represented by New Orleans attorney Scott Spivey.

MICHIGAN – On January 3, U.S. District Judge Bernard A. Friedman granted a motion by the plaintiffs to bifurcate the trial in *DeBoer v. Snyder*, Civ. Action No. 12-cv-10285 (E.D. Mich.), in which plaintiffs challenge Michigan's refusal to allow

second-parent adoptions or same-sex marriages. Under Michigan law, only married couples or single people can adopt a child, thus ruling out second-parent adoptions by same-sex partners of parents. The lawsuit originally concerned only the adoption ban, but was expanded at the judge's suggestion to encompass the question whether the Michigan Marriage Amendment and the state's statutory ban on same-sex marriage are constitutional, since allowing same-sex couples to marry could, at least theoretically, eliminate the problem with the adoption statute (although some LGBT rights advocates argue that same-sex couples should not have to marry in order to jointly adopt children or adopt each other's children). Judge Friedman has scheduled a trial in March, which under the bifurcation order will focus on the standard of judicial review, the question being whether heightened scrutiny applies in consideration of the constitutionality of the marriage ban. Since Judge Friedman ruled on the motion, the 9th Circuit (not binding in Michigan) ruled in favor of heightened scrutiny in a jury selection case, and, of course, the 2nd Circuit (also not binding) ruled for heightened scrutiny in *Windsor v. United States*. These rulings, and the current trend of marriage equality litigation, suggest the likelihood that Judge Friedman will conclude that heightened scrutiny applies. Governor Snyder and Attorney General Schuette, the state defendants, opposed bifurcation, arguing that it would result in extensive and duplicative pre-trial motions and discovery, but Judge Friedman found that "these efforts would be completely unnecessary to the resolution of the heightened scrutiny issue particularly in light of the limited scope of such an inquiry." * * * Lawyers from the ACLU and Gay & Lesbian Advocates & Defenders (GLAD) have joined the legal team representing plaintiffs in *DeBoer* as the case advances to the scheduled February 25 hearing.

MISSOURI – Four Missouri homophobes have joined forces to sue Governor Jay Nixon over his executive order directing the state's tax officials to allow same-sex couples married in other jurisdictions to file joint marital tax returns in Missouri. Justin Mosher, Don Hinkle, Kerry Messer, and Joe Ortwerth are the plaintiffs challenging Executive Order 13-14, which they contend violates the state's constitutional amendment banning recognition of same-sex marriages. Nixon argued in support of his order that it was applying the state's tax code, which mandates that taxpayers file using the same status that they use for their federal returns. The suit was filed in Cole County Circuit Court in Jefferson City, seeking a declaration that the executive order is unconstitutional. *Missouri Times*, Jan. 8.

NEVADA – Here's a case of bad timing. The brief on behalf of the state of Nevada, defending its trial court victory in *Sevcik v. Sandoval*, was due at the 9th Circuit on January 21, the same day that the 9th Circuit issued its decision in *Smithkline Beecham Corp. v. Abbott Laboratories*, holding that sexual orientation discrimination claims are subject to strict scrutiny (see above). Attorney General Catherine Cortez Masto announced on January 24 that she would "reconsider" the brief that had been filed, since the arguments she made are "likely no longer tenable" in light of the *Smithkline* ruling. Masto was defending the trial court's ruling the *Baker v. Nelson* controls and that under a rational basis review, Nevada could sustain its same-sex marriage ban "to serve the legitimate purpose of preserving traditional marriage." That argument clearly won't work in a heightened scrutiny case. "The Ninth Circuit's new decision appears to impact the equal protection and due process arguments made on behalf of the state," said Masto, who indicated she would be conferring with the governor's office and conducting an internal review to consider how to proceed. Surely, a request to the Circuit for additional time to file a new brief would seem reasonable. * * * Eleven state attorneys general (Alabama, Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, Oklahoma, South Carolina, and Utah) filed a joint amicus brief in *Sevcik*, arguing that reversing the trial court would result in a "tragic deconstruction" of marriage, taking away the "natural limits" to the institution. If that happens, they argue, "it follows that any group of adults would have an equal claim to marriage." They also argued that the marriage law is neutral as to sexual orientation, since all same-sex couples are forbidden to marry, regardless of their sexual orientation, that gay people are free to marry partners of the opposite sex, that there was no evidence that the Nevada legislature intended to discriminate against gay people by creating civil unions for them instead of letting them marry, and that the 9th Circuit's recent "heightened scrutiny" ruling in *SmithKline Beecham* (see above) is irrelevant for this reason. *Salt Lake Tribune*, January 31.

OREGON – The *Associated Press* reported on January 22 that U.S. District Judge Michael McShane had ordered consolidation of two pending marriage equality lawsuits and set oral arguments on summary judgment motions for April 23. The article speculated that a ruling might come before voters are asked to repeal the state's ban on same-sex marriage. An organization behind a ballot measure to accomplish that aim announced that it has already collected 127,000 petition signatures and is continuing to collect signatures against a July 3 deadline to make this November's ballot. The number of valid signatures required is 116,284. In the last vote in Oregon on this issue, the spread was 57-32 in support of an amendment

to the state constitution defining marriage as the union between one man and one woman. If the proposed ballot measure is passed, Oregon would be the first state to repeal a constitutional same-sex marriage ban by popular vote. In 2012, Maine voters were the first to affirmatively enact same-sex marriage.

PENNSYLVANIA – Commonwealth Court President Judge Dan Pellegrini announced from the bench on January 16 that Governor Tom Corbett and Attorney General Kathleen Kane would be dropped as defendants in pending marriage equality litigation, leaving the state's Department of Health, which administers the marriage law, as the defendant. Kane had previously announced that she considers the state's ban on same-sex marriage to be unconstitutional, and the plaintiffs agreed to dismiss her as a defendant, but they had hoped to keep Governor Corbett in the case, since he was providing the defense through the Office of General Counsel in default of the Attorney General defending the law. Said Pellegrini, "Generally, nobody cares who's in the caption as long as the commonwealth is in the caption." *LegalIntelligencer.com*, Jan. 16.

SOUTH CAROLINA – State Rep. Todd Rutherford (D-Richland) filed H. 4461, a measure that would allow same-sex couples legally married in other states to file joint South Carolina state tax returns. The state's Department of Revenue had announced that it was adopting a rule that would require such couples to file individual returns, even though the federal government will require them to file as married. Rutherford also filed a bill, H.4460, to place before voters a measure to repeal the state's constitutional amendment that bans same-sex marriages. Neither of his measures are given any chance of passage. *Columbia State*, Jan. 16.

TEXAS - This one is complicated. Shortly after she was re-elected in November, openly-lesbian Houston Mayor Annise Parker announced that in light of the developing case law flowing from *U.S. v. Windsor*, it would be unconstitutional for the city to fail to provide spousal benefits for city employees who had married their same-sex partners in other jurisdictions, and City Attorney David M. Feldman was prepared to defend this position in court. She directed city officials to allow employees with same-sex spouses to enroll for benefits. Two local Republican leaders, Jack Pidgeon and Larry Hicks, represented by the county's GOP chairman, Jared Woodfill, filed a lawsuit in the Family Court and obtained an *ex parte* order purporting to block the mayor's directive to provide the benefits, premised on Texas's ban on same-sex marriages and purported limitations on the mayor's authority under the city charter. The city removed the case to federal court, where it was assigned to District Judge Lee Rosenthal (S.D. Tex.), and some city employees who had immediately enrolled their spouses in response to the mayor's action intervened, represented by Lambda Legal, seeking an order to override the Family Court order. On January 2, Judge Rosenthal ruled, on a temporary basis, that the employees who had enrolled their spouses could keep their benefits for now. Meanwhile, Lambda Legal had filed suit on behalf of some city employees who had enrolled for benefits and whose benefits would be blocked by the Family Court's order, in the case *Freeman v. Parker*, also in the Southern District of Texas. Judge Rosenthal is considering a motion to consolidate the cases. Texas Attorney General Greg Abbott, a Republican who is running for governor, filed a brief with the court arguing for federal abstention, insisting that a Texas state court should decide whether Mayor Parker's directive violates Texas law. This case resembles, on a speeded up timetable, the litigation Lambda is pursuing in the 9th Circuit on behalf of Arizona state employees who were extended spousal benefits by executive directive which were then revoked by statute. In that case, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), cert. denied sub nom., *Brewer v. Diaz*, 133 S.Ct. 2884 (2013), preliminary relief is keeping the benefits in effect until a final ruling on the merits, but so far the courts seem inclined to rule for the employees – an inclination fueled by the subsequent *Windsor* ruling, which might be broadly construed as requiring that governmental bodies not discriminate between same-sex and different-sex couples without some good justification (although, of course, the *Windsor* court was more narrowly confronted with the question whether the federal government could discriminate between legally-married same-sex couples and legally-married different sex couples). Actually, *Windsor* is more directly on point to the Houston situation, since Mayor Parker sought only to extend benefits to couples who have legally married in other jurisdictions, not to all city employees in committed relationships with same-sex couples. The Houston case is *Pidgeon v. Parker*, Case No. 4:13-cv-03768.

VIRGINIA – Parting shot from a sore loser? Defeated gubernatorial candidate Ken Cuccinelli spent some time during his last days in office framing some opinion letters as a final zing against same-sex marriage, one of his nightmare obsessions. In a letter responding to a question posed by state Senator John A. Cosgrove, dated January 10 (Attorney General Opinion No. 13-102), Cuccinelli opined that a U.S. Department of Labor Technical Release, No. 2013-04, advising that public sector health plans provided under the Public Health Service Act should recognized lawfully married same-sex couples, regardless where they were living, "should not be considered as legally binding to the extent that it conflicts with section 2 of DOMA and Article I, Sec. 15-A of the

Constitution of Virginia." Section 2 of DOMA, a provision not addressed by the Supreme Court in *U.S. v. Windsor*, provides that states are not obliged to extend full faith and credit to same-sex marriages contracted in other states; the Virginia constitutional provision bans same-sex marriage or any other legal status for same-sex couples. Cuccinelli hedged his opinion by making it "subject to the outcome of litigation that may, or may not, change the status of current law." In another letter dated January 10, Opinion No. 13-114, Cuccinelli opined that the governor does not have authority to require or direct the state's Finance Department or Department of Taxation to allow same-sex couples who are married in other jurisdictions to file joint married tax returns in Virginia. This responds to an inquiry from House member Robert G. Marshall. The question is a legitimate one, since at least one pro-marriage-equality Democratic Governor in an anti-gay-marriage state, Jay Nixon in Missouri, has directed his state's tax officials to allow same-sex partners to file jointly as married, on the theory that this is required under the state's tax code, which directs that state taxpayers use the same filing status as they do for their federal returns. Cuccinelli opines that any such order from the governor would violate separation of powers, as an exercise of legislative power.

CIVIL LITIGATION NOTES

9TH CIRCUIT – The 9th Circuit has rejected a petition for panel rehearing or rehearing *en banc* in *Pickup v. Brown*, No. 12-17681, but has replaced its prior decision, which was published at 728 F.3d 1042 (Aug. 29, 2013), with an amended decision, which was issued on January 29. 2014 WL 306860, 2014 U.S. App. LEXIS 1877. This was a consolidation of two lawsuits, *Pickup v. Brown* and *Welch v. Brown*, that had challenged the constitutionality of California's S.B. 1172, a ban on state-licensed mental health providers engaging in "sexual orientation change efforts" (SOCE) with patients under age 18. The measure was enacted in 2012. Two district judges had issued conflicting decisions on the constitutionality challenge, and the circuit panel affirmed the judge who found that the measure is constitutional. The 9th Circuit held that the measure, "as a regulation of professional conduct, does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate the parents' fundamental rights." The court circulated the petition for *en banc* review among all the active non-recused judges of the circuit, but it did not receive majority support and thus was denied, over the dissent of Circuit Judges O'Scannlain, Bea and Ikuta. Judge O'Scannlain released a substantial dissenting opinion, challenging the court's conclusion that First Amendment problems with the ban could be avoided by characterizing it as a regulation of "conduct" or "medical practice" rather than a regulation of speech. He asserted that the panel decision "contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California's prohibition – in the guise of a professional regulation – of politically unpopular expression." O'Scannlain pointed to *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which challenged a federal statute forbidding "material support" to terrorist organizations. The challengers argued that the law was unconstitutional as applied to purely verbal communication. Wrote O'Scannlain, "the Court rejected the government's argument that the statute only punished 'conduct'; for, in this situation, the 'conduct triggering coverage under the statute consists of communicating a message.'" O'Scannlain drew from this the conclusion that "the government's ipse dixit cannot transform 'speech' into 'conduct' that it may more freely regulate," and he rebutted the panel's arguments seeking to distinguish that case. He also asserted that "federal courts have never recognized a freestanding exception to the First Amendment for state professional regulations" using a conduct/speech distinction. The amended panel decision by Judge Susan Graber, released on January 29, reiterates the earlier opinion's distinction between "therapeutic speech" and "expressive speech," insisting that "it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment." The panel distinguished the *Humanitarian Law Project* case as an attempt by Congress to regulate "political speech by ordinary citizens." The heat of the dissent underlines that this is a "culture wars" case, and the plaintiffs, ardent proponents of so-called "conversion therapy," are likely to file a petition for certiorari with the Supreme Court.

9TH CIRCUIT – Rejecting a claim for refugee status under the Convention against Torture (CAT), a 9th Circuit panel ruled that a gay man from El Salvador had failed to establish he was likely to be tortured for being gay if sent back to that country. *Soriano v. Holder*, 2014 U.S. App. LEXIS 1454 (Jan. 24, 2014) (not designated for publication). The court rejected the plaintiff's argument that the BIA erred in considering his prior state criminal conviction as "particularly serious," which made him ineligible for withholding of removal. As to CAT protection, wrote the court, "The BIA's rejection of [his] CAT claim was supported by substantial evidence in the record, including the country report, which recounted the Salvadoran government's efforts to protect homosexuals from discrimination. The BIA did not err in rejecting his [CAT]

claim on the grounds that there was insufficient evidence of government acquiescence in torture and that [he] had not demonstrated that he personally was more likely than not to be tortured. The record does not compel a contrary conclusion, because [he] did not establish either 'the likelihood that any one member of [the LGBT community] will be tortured – as opposed to being persecuted or discriminated against – or that the police refuse to investigate or prosecute crimes against homosexuals."

6TH CIRCUIT - The U.S. Court of Appeals for the 6th Circuit denied a petition by a woman from Malawi and her son seeking review of the Board of Immigration Appeals order dismissing their appeal from denial of their motion to reopen removal proceedings. *Kamkondo v. Holder*, 2014 U.S. App. LEXIS 1824, 2014 FED App. 0088N (Jan. 28, 2014) (not for publication). The plaintiff and her son are HIV-positive, and allege that "HIV-positive individuals in Malawi receive ineffective treatment and are subject to severe societal discrimination." The problem is that they didn't raise this issue promptly enough. They argued that they didn't realize until rather late in the game that they could seek withholding of deportation on this basis, and that the necessary State Department country report to support their claim was not published until 2008. Unfortunately for them, the BIA noted that earlier country reports had identified problems for HIV-positive people in Malawi, and the court found that it would have been possible for plaintiff to raise this issue in a timely fashion. Thus, the court found BIA did not abuse its discretion in denying a motion to reopen the case when the plaintiffs, who had agreed to voluntary departure, overstayed again.

5TH CIRCUIT – Being sexually abused by your uncle "may be 'unfair, unjust, or even unlawful,' but it does not amount to the sort of 'extreme conduct' that constitutes persecution," wrote a 5th Circuit panel as it upheld the Board of Immigration Appeals' determination that a gay man from Mexico is not entitled to withholding of removal or relief under the Convention Against Torture. *De Los Santos v. Holder*, 2014 U.S. App. LEXIS 354 (Jan. 8, 2014). Neither was the court impressed by the plaintiff's allegation that "one policeman did not act appropriately when De Los Santos reported that abuse on one occasion." The problem was, "there is no indication that Mexican officials sanctioned this conduct," and the plaintiff actually testified that he had "not experienced trouble with Mexican authorities and had no reason to believe that he would experience such trouble if he returned to Mexico." There was also no evidence that the government tortures gay people. Indeed, although the court doesn't mention this, gay rights has been advancing in Mexico over the past few years, consistent with the trend of developments in Latin America, so it has become difficult to credibly assert a CAT claim regarding that country.

ARKANSAS – A transgender divorce case was properly filed in Arkansas ruled the state's Court of Appeals, denying a motion to dismiss for lack of jurisdiction filed by the transgender spouse, who resides in Arizona. *Adams v. Adams*, 2014 Ark. App. LEXIS 68 (January 22, 2014). Husband and wife met and married in Arkansas and had two children. They moved to Arizona for husband's career purposes, but husband was diagnosed with gender dysphoria and transitioned. Wife and children moved back to Arkansas. Divorce cases were filed in both jurisdictions, with Husband moving to dismiss the Arkansas action, arguing wife and children were not residents. Supporting the argument, Husband observed that wife and children had gone to Minnesota for a counseling program that ran for about four months. Husband argued that this broke their Arkansas period of residence and thus they would not qualify for jurisdiction under the statute that requires six months of continuous residence in order to invoke the jurisdiction of the court in a divorce and custody proceeding. The court concluded that the Minnesota period did not break the period of residence, as it was not a relocation of domicile and they clearly intended to return after the counseling program. On another contested point, the court rejected Husband's argument that a requirement that he not dress in female garb when using Skype for visitation by telephone with the children was gender identity discrimination. The court could find no basis for a gender identity discrimination claim under Arkansas law, as the statutes there do not use the term (and, indeed, don't even ban sexual orientation discrimination). The court noted that Husband had cited no legal authority to support his claim, and "our courts have often said that failure to develop an argument precludes review of the issue on the merits."

CALIFORNIA – U.S. District Judge Edward M. Chen granted the employer's motion for summary judgment on a sexual orientation discrimination claim by a lesbian employee arising from her failure to be promoted to a supervisory position. *Maridon v. Comcast Cable Communications Management, LLC*, 2014 U.S. Dist. LEXIS 4027 (N.D. Cal., Jan. 13, 2014). "Plaintiff has failed to introduce any evidence from which a jury could find that the decisionmakers behind these promotional decisions were aware of Plaintiff's sexual orientation," wrote Chen. However, finding that "a jury could conclude that the Plaintiff was subjected to severe or pervasive harassment on the basis of her gender or sexual orientation," Chen refused to grant summary judgment on the hostile environment harassment claim. Geri

Maridon alleged that she had been subjected environment "where offensive and demeaning statements regarding women and homosexuals are common place," according to Chen, who did not recount the specific allegations. The court also denied Comcast's motion as to an intentional infliction of emotional distress claim, finding that this was "co-extensive with her harassment claims."

CALIFORNIA – A Superior Court jury in Los Angeles County has awarded nearly $400,000 to Edward Martinez on January 24 in his sexual orientation employment discrimination suit against Jared Piety, owner of Spring Family Medical Group. Piety did not know that Martinez was gay when he hired him as a medical assistant, but asked during Martinez's orientation. Such an inquiry is itself considered a violation of the state's ban on sexual orientation discrimination. Once Piety became aware that Martinez was gay, Martinez alleges that he was constantly subjected to anti-gay slurs and was mocked in front of patients, and finally after six months of harassment and discrimination, was discharged. Martinez's attorney is Harrison Todd. *Long Beach Press-Telegram*, Jan. 25.

CALIFORNIA – The 2nd District Court of Appeal affirmed an award of $150,000 in damages (and $680,520 in attorney fees) upon a jury verdict in a hostile environment harassment case where two supervisors had subject a straight employee to homophobic harassment. *Taylor v. Nabors Drilling USA, LP*, 2014 Cal. App. LEXIS 20 (Jan. 13, 2014). The opinion describes in detail how the two male supervisors subjected the plaintiff to constant references as "fagot," "homo," and "gay porn star." (The porn star reference evidently derived from the plaintiff's activities in community theater and some film work, not of a sexual nature.) The supervisors also indulged in embarrassing comments about masturbation, and one of them urinated on the plaintiff from an upper level. The supervisors knew that the plaintiff was not gay. Finally, the plaintiff became fed up and filed a grievance, which led to a company investigation and the discharge of one of the supervisors. However, a few months later the plaintiff was discharged. His suit under the California Fair Employment and Housing Act alleged hostile environment because of his sex and/or perceived sexual orientation as well as wrongful discharged and retaliation. The jury rejected the discharge and retaliation claims, evidently finding the employer had valid reasons for discharging the plaintiff not relating the problems with his supervisors, but ruled for plaintiff on the hostile environment claims, awarding $10,000 for economic damages and $150,000 for non-economic damages. The court of appeals found that record evidence did not support the economic damage award, but upheld the non-economic damage award, and rejected the company's argument that because the plaintiff was not gay, this same-sex harassment case was not actionable. Citing a 2006 case, *Singleton v. U.S. Gypsum Co.*, 140 Cal. App. 4th 1547, presenting similar facts, the court said, "As in *Singleton*, here sex was used as a weapon to create a hostile work environment for respondent. Mason and Mendez 'employed attacks on [respondent's] identity as a heterosexual male as a tool of harassment.' Pursuant to *Singleton*, therefore, substantial evidence supports the verdict." The *Singleton* court noted that a woman would not have been subjected to this sort of harassing conduct, so the plaintiff was being singled out because of his sex. The court also found that a typographical error in the jury charge form, as a result of which the jury did not explicitly respond to a question involving one of the elements of the harassment claim, was a harmless error that did not affect the outcome or justify retrying the case. The court also upheld the trial courts exercise of discretion in awarding attorney fees substantially in excess of the actual damages awarded.

FLORIDA – U.S. District Judge James S. Moody dismissed claims of intentional infliction of emotional distress and violation of the Family and Medical Leave Act by an HIV-positive man who is suing his employer for disability discrimination. *Chiles v. Symon Says Enterprises, Inc.*, 2014 U.S. Dist. LEXIS 6764 (M.D. Fla., Jan. 17, 2014). Chiles claims that "his supervisors commented that they did not want other employees exposed to an incurable disease, that they dramatically reduced his hours once they learned of his condition, and that he was ultimately fired after one medical absence on the basis of his HIV status." He filed claims under the ADA, the Florida Civil Rights Act, and the Family & Medical Leave Act, and asserted a tort claim of intentional infliction of emotional distress. The dismissal motion concerned only the tort and FMLA claims. As to the tort claim, Judge Moody commented, "Florida courts have consistently dismissed cases alleging discriminatory and offensive behavior and language against individuals, particularly in the workplace. In cases where Florida courts have permitted a plaintiff to move forward with an IIED claim, they often involve threats of death, rape, or severe bodily harm to the plaintiff or family members. Therefore, the Court concludes that Plaintiff fails to state a cause of action for IIED." As to the FMLA claim, the court found no allegation that Plaintiff was eligible for or had requested FMLA leave. Discharging an employee because he is HIV-positive and missed a day of work would not state a claim under the FMLA unless the employee was eligible for leave, had requested it, and had been wrongly denied. While dismissing these claims, Judge Moody said that Chiles

could file an amended complaint within 14 days of the Order to state a claim if he could allege the necessary facts that were missing from his original complaint.

KANSAS – In the context of ruling on discovery disputes in a personal injury case, U.S. District Judge Karen M. Humphreys raised, apparently *sua sponte*, the issue of HIV-related information, and ruled that the court would deny any request for records or *ex parte* communications regarding "the disclosure of HIV-related information or AIDS testing" because "the parties fail to provide reasons why such information should be disclosed" and so the court was unable to determine whether state statutory exceptions to the general prohibition on disclosure of HIV-related information would apply to this case. *Giegerich v. Nat'l Beef Packing Co.*, 2014 U.S. Dist. LEXIS 2280 (D. Kans., Jan. 9, 2014).

MASSACHUSETTS – As same-sex marriage has become available in more jurisdictions, there have been several reports of teachers or administrators at Catholic schools being dismissed after school authorities learned that they were planning to marry a same-sex partner. Generally, religious schools enjoy immunity from employment discrimination liability in such circumstances, either under express religious exemptions in anti-discrimination laws or under the "ministerial exemption" that was recently recognized by the Supreme Court as required for First Amendment purposes. But should such exemptions apply for positions that have nothing to do with instruction or school policy-making? In Massachusetts, Matthew Barrett seemed to have landed a terrific job as food services director at Fontbonne Academy, a Catholic-affiliated girls' school in Milton, successfully passing through three rounds of interviews and accepting a verbal job offer, but when he filled out personnel forms and listed his husband as his emergency contact, the head of school rescinded the job offer that Barrett had already accepted. Barrett, represented by Gay & Lesbian Advocates & Defenders, has filed a discrimination charge with the Massachusetts Commission Against Discrimination, which the *Boston Globe* reported (Jan. 30) may be the first complaint of its kind to be filed in the U.S. Barrett had not been asked to sign a contract stating that he would abide by Catholic doctrine in conducting his personal life; such contracts have barred legal recourse in other cases involving teachers and administrators. He does concede that he was told by school officials when he was hired that "employees recognize church doctrine." GLAD asserts on Barrett's behalf that his job had nothing to do with the school's religious mission, and as such would be covered by the state's policy against sexual orientation discrimination. Barrett is employed as a cook in the Milton public schools.

MICHIGAN – An HIV-positive employee who was discharged by Walgreens Specialty Pharmacy may pursue most of his claims under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA), according to a January 22 decision on Walgreen's motion for summary judgment in *Ash v. Walgreens Specialty Pharmacy LLC*, 2014 U.S. Dist. LEXIS 7459 (E.D. Mich.). Judge George Caram Smith found that Gerald Ash, who was dismissed the day he came back from FMLA leave, alleged a prima facie case that his supervisors treated him differently after his first application for FMLA leave. All parties acknowledge that Ash's HIV infection makes him a person with a disability under the ADA, and that proof that the supervisor who made the discharge decision knew he was HIV-positive is not necessary at this stage when she had signed off on his written request for FMLA leave, which indicated that he had a serious chronic medical condition. (Ash had confided with a human resources official, but not with his supervisor about his HIV status.) The court found that there was a jury question on pretext in light of the timing of the discharge decision, but rejected Ash's claim that Walgreens failed to accommodate his medical situation, as he had not proposed any particular accommodation to the company. Also, his supervisor's request that he reschedule a medical appointment for which he had requested a one-day FMLA leave was not, in the court's view, sufficient to ground a claim that the company had "interfered" with his exercise of FMLA rights. Ultimately, Ash can proceed on his claim that he was discharged in violation of FMLA and ADA, despite dismissal of some of his claims.

MICHIGAN – U.S. District Judge Lawrence P. Zatkoff granted the defendant's motion for summary judgment against a dismissed employee's claim that his dismissal as a probationary employee by due to adverse ratings of his work by a gay supervisor violated Title VII and state anti-discrimination law, or that he was the subject of unlawful retaliation for contesting the validity of those negative ratings. *Laduke v. Shinseki*, 2014 U.S. Dist. LEXIS 11907 (E.D. Mich., Jan. 31, 2014). The court found that plaintiff, who had been hired by the Veterans Affairs Medical Center as a probationary employee, had failed to show that there were comparator women with similar records who were treated differently, vitiating his sex discrimination claim. Neither Title VII nor Michigan's anti-discrimination law bar sexual orientation discrimination, so the plaintiff was limited to charging sex discrimination. Further, the court found that plaintiff had failed to allege specific

protected activity in which he engaged that would ground a retaliation claim. He was a probationary employee whose work record was found by the employer to merit discharge, and an email to a supervisor contesting the adverse work rankings was not seen by the court as the basis for a retaliation claim when his complaint was rejected.

NEW YORK – U.S. District Judge Paul A. Engelmayer rejected a motion to dismiss sexual orientation discrimination and Family and Medical Leave Act (FMLA) claims against Edward J. Minskoff Equities, property manager and co-owner of 590 Madison Avenue, on a complaint by Otis Daniel, described by Judge Engelmayer as "a gay man of African descent from St. Vincent and the Grenadines," who worked as a Fire Safety/Emergency Action Plan Director at 590 Madison as an employee of T & M Protection Resources, a contractor. *Daniel v. T&M Protection Resources, Inc. & Edward J. Minskoff Equities*, 2014 U.S. Dist. LEXIS 5799 (S.D.N.Y., Jan. 16, 2014). Daniel alleged that John Melidones, the building's security director, and Joseph Greisch, Minskoff's building manager, wrongly denied him medical or family leave, and that Melidones subjected him to homophobic and "emasculating" comments and unwanted touching, as well as mimicking his accent and making racially charged comments. Daniel claimed that the reasons stated for his discharge were pretextual, and that it was actually in retaliation for complaints he had filed about Melidones' conduct. The lawsuit, filed after securing right to sue letters from the EEOC and the NY State Division of Human Rights, named both T & M and Minskoff as defendants. This dismissal motion by Minskoff argued that it was not Daniel's employer and thus not amenable to suit under these employment discrimination provisions. However, the court found that the "joint employer doctrine" applied, that Minskoff's management employees, Melidones and Greisch, were alleged to have adversely affected Daniel's employment status, and that although Minskoff was not expressly named in the original charges filed with the administrative agencies, the charges did name its management employees as the persons who had discriminated against Daniel, leading the court to conclude that "there was a sufficient identity of interest between T&M and Minskoff such that Daniel's failure to name Minskoff as a respondent in the administrative proceeding should not bar him from naming Minskoff as a defendant in his Title VII claim before this court." Given the role of Minskoff's building employees, its agents, alleged in the complaint, the court rejected Minskoff's argument that the complaint failed to allege that Minskoff engaged in any wrongdoing. However, the court agreed that Daniels appended common law negligence claim should be dismissed, as statutory employment discrimination claims cannot be "transmuted" into tort claims.

NEW YORK – A straight man's claim that he was denied employment as a waiter because he would not put out for a gay proprietor was shot down by U.S. District Judge Michael A. Telesca in *Goodman v. Mullberry Knoll, Inc.*, 2014 U.S. Dist. LEXIS 5295 (W.D.N.Y., Jan. 15, 2014). Samuel Goodman claimed that he was hired to be a waiter at openly gay Michael Colvin's planned new restaurant, Beef and Brew, and was assigned to work at Colvin's existing restaurant, Sun Garden Grille, as training. He alleges, in effect, that Colvin solicited him to have sex for money and, after being turned down, Colvin lost interest in him and did not employ him at the new restaurant. Colvin's version of the story is quite different. The entire tale is amusingly set out in Judge Telesca's opinion, and it sounds as if there might have been misunderstandings and miscommunications, and perhaps Goodman taking seriously statements that were made in jest. In any event, Telesca found no basis for Title VII sex discrimination and retaliation charges, and also rejected a claim of sexual orientation discrimination under the New York Human Rights Law. As to the Title VII claim, wrote Telesca, "Even if Plaintiff could demonstrate that he is a member of a protected class under Title VII, he fails to produce evidence from which a reasonable jury might infer that adverse employment actions were linked to a refusal of sexual advances. The only evidence of a possible sexual advance is Plaintiff's own testimony that there was a text message from Defendant Colvin that he would pay for sexual activities with Plaintiff. However, even Plaintiff's own testimony is equivocal about the offer. He admits that the context of the discussion of money for sex was a continuation of a group conversation with other employees regarding sex trafficking in South Africa. There is no evidence of any offer and refusal of sexual activities relative to work activity that could form the basis for a quid pro quo claim." The court also found scant evidence to support a hostile environment claim. "The text messages allegedly received by the plaintiff, when viewed together or individually, lack the pervasiveness, ridicule or intimidation necessary to create a hostile work environment for purposes of Title VII," wrote the judge. "Moreover, Plaintiff acknowledged that the alleged harassment did not prevent him from doing his job. In addition, Plaintiff admits that he did not specifically object to or complain of the conduct and in fact he wanted to continue his employment with the Defendants." As to retaliation, Telesca found credible the defendants' argument that Goodman did not work at the new restaurant because he just stopped reporting for work after his vacation break, even though he was scheduled.

CIVIL LITIGATION

NORTH CAROLINA – Warren and Frances Joyner were married for 26 years, but at some point Warren "came out" and engaged in "homosexual relationships" and moved into a separate bedroom in the home he shared with Frances. Warren had become disabled and unemployed and provided no financial support to Frances during the last six years of their marriage, although there was evidence that he was the primary caretaker for Frances during her illness culminating in her death, intestate, on January 17, 2011, without children and with Warren as her only potential heir. Warren then died intestate on February 6, 2011, survived only by his mother. Under the circumstances, it seems, Warren's mother should inherit everything! But Frances had surviving siblings, and they challenged this conclusion, arguing that Warren had effectively "abandoned" Frances when he ceased conjugal relations, moved to a different bedroom, engaged openly in "homosexual relationships," and provided no financial support, so he had forfeited intestate succession rights and Frances' assets at her death should be distributed to her siblings. Judge Phyllis M. Gorham of Lenior County Superior Court granted summary judgment to defendants. On appeal, plaintiffs argued there was a genuine issue of material fact as to whether Warren had constructively abandoned Frances before her death, thus forfeiting his right to intestate succession. The court of appeals, in an opinion by Judge Robert C. Hunter, held that the applicable statute would only cause forfeiture of Warren's intestate succession rights if he "was not living with the other spouse at the time of the spouse's death." Although they were not sharing a bedroom, they were occupying the same house. "Because it is undisputed that Warren was not 'absent from the marital home' at the time of Frances's death, but was merely sleeping in a separate bedroom, plaintiffs failed to meet this required element" of the statute, wrote Hunter. Hunter criticized counsel for relying on an earlier version of the statute that had been superseded, and for failing to cite to the court a North Carolina Supreme Court decision on point construing the "not living with the other spouse" language. *Estate of Frances Joyner v. Jessie Bell Joyner*, 2014 WL 44013, 2014 N.C. App. LEXIS 20 (N.C. Ct. App., Jan. 7, 2014).

OHIO – A woman suing General Electric for race, age and sexual orientation discrimination suffered dismissal without prejudice of her lawsuit on the ground that she was bound to arbitrate her discrimination claim. *Tweedy v. GE Capital Retail Finance*, 2014 U.S. Dist. LEXIS 1744 (S.D. Ohio, Jan. 7, 2014). U.S. Magistrate Judge Karen L. Litkovitz found that the agreement Beverly Ann Tweedy signed when she was hired by GE unequivocally required arbitration of all claims against the company. She rejected the argument that GE's participation in the EEOC investigation of Tweedy's administrative charge was implicitly waiving the arbitration agreement, or that GE waived its right to compel arbitration because it never mentioned arbitration in the discharge letter and never sought to initiate an arbitration proceeding with Tweedy. The court rejected the argument that the arbitration agreement was unconscionable, or that Tweedy signed it under duress. Tweedy's duress argument was essentially that she was hired in 2008, during the Great Recession, at a time when jobs were so scarce that she felt compelled to sign everything placed in front of her by GE for fear of not getting the job. The court pointed out that the date on Tweedy's signature is 2007, before the Recession. While the case was dismissed, it was without prejudice to Tweedy's right to seek judicial review after exhausting the arbitration procedure. Of course, such review would be sharply limited under Supreme Court precedents.

PENNSYLVANIA – Chief U.S. District Judge Petrese B. Tucker denied a motion to dismiss a Title VII sex discrimination brought by an openly lesbian correctional officer against the City of Philadelphia in *Roadcloud v. City of Philadelphia*, 2014 U.S. Dist. LEXIS 769 (E.D. Pa., Jan. 6, 2014). Plaintiff Angelina Roadcloud began working for the Philadelphia Prison System in 2001, rising to the rank of correctional sergeant, but she began experiencing difficulties when her supervisor, Tabatha Baldwin Adams, allegedly began harassing her about her appearance and sexuality. Roadcloud's complaint details several incidents occurring over the period of a year, her complaints about the harassment, and the failure of the employer to do anything about it. If anything, she claims, harassment got worse after she complained. Roadcloud alleges violations of Title VII, the Pennsylvania Human Relations Act, and the Philadelphia Fair Practices Ordinance. Of those three statutes, only the Philadelphia ordinances specifically forbid sexual orientation discrimination. Judge Tucker found that Roadcloud's allegations were sufficient to state a Title VII sex discrimination claim, under the established 3rd Circuit case law concerning gender stereotyping. "The Third Circuit states in *Bibby* that a plaintiff may show that he or she was harassed by a member of the same sex by showing that the harasser was motivated by sexual desire, expressed a general hostility to the presence of one sex in the workplace, or acted to punish noncompliance with gender stereotypes," wrote Tucker. "Plaintiff has sufficiently alleged defendants discriminated against her on the basis of her failure to conform to expected gender stereotypes. An employer that acts based upon the belief that women should not be aggressive, acts on the basis of gender. Hostile or paternalistic statements or acts

based upon perceptions or expected qualities of womanhood are inherently based on sex or gender." In this case, Roadcloud alleged that Adams' harassment "focused on plaintiff appearance, specifically the signs of sexual conduct Adams believed plaintiff exhibited. Adams made similar comments throughout 2011 and 2012 to plaintiff's supervisors and coworkers. Conversely, Adams did not make similar comments about women that conformed to Adams' expectations of a female." Tucker also found that Roadcloud allege harassment that was sufficiently severe or pervasive to meet Title VII requirements, and found that negative performance evaluations and an involuntary transfer to a less desirable assignment were "adverse employment actions" sufficient to trigger potential Title VII liability. The court also found that Roadcloud's complaints about harassment met the requirement to exhaust administrative remedies.

PUERTO RICO – U.S. District Judge Francisco A. Besosa denied defendants' motion for summary judgment in a same-sex harassment and retaliation case, *Polo-Calderon v. De Salud*, 2014 U.S. Dist. LEXIS 5312 (D. P.R., Jan. 13, 2014). The plaintiff, a 17-year-old man who was working in a business for relatives, began to receive text messages coming from an older man seeking his sexual favors. The identity of the sender was disguised, but after this had continued for some time with messages going back and forth and the plaintiff being resistant to meeting to consummate a sexual relationship, the man determined that the sender of the messages was an official of the company and he filed a grievance. He was discharged the next day. The court found that this sequence of events was sufficient to state a claim for same-sex harassment in violation of Title VII as well as a Title VII retaliation claim.

PRISON LITIGATION NOTES

OKLAHOMA – United States District Judge Joe Heaton adopted Magistrate Judge Charles B. Goodwin's Report & Recommendation [R & R] recommending denial of a pro se prisoner's application to proceed *in forma pauperis* and dismissing his case unless he pays the full $400 filing fee. Plaintiff Quinn Aaron Klein had previously accumulated "three strikes" under the Prison Litigation Reform Act -- see 28 U.S.C. § 1915(g) – when three prior cases were dismissed as unfounded, frivolous, etc.; and he did not show "imminent danger of serious physical injury" in the current case. *Klein v. Salinas*, 2014 WL 238703 (W.D. Okla., January 22, 2014). (The court noted that Klein had also accumulated six "strikes" in Oklahoma state court.) Although he styled his current case as a petition for habeas corpus, the court treated it as a civil rights case under 42 U.S.C. § 1983, because Klein claimed that prison officials had "endangered" him by telling other inmates that he was a "snitch" and that he had HIV. The R & R found that Klein had "not provided adequate factual detail to support his conclusory assertion that his safety is in jeopardy." The Magistrate also judicially noticed Klein's statement in a previous federal court proceeding "contradicting his assertion of being in danger." Although the court provided for dismissal without prejudice, Klein will have to meet the "imminent danger" standard if he hopes to return to court. *William J. Rold*

CRIMINAL LITIGATION NOTES

GEORGIA – A jury in Clayton County convicted Craig Lamar Davis on two counts of "reckless HIV," a felony under state law. Davis was charged with knowingly exposing a woman to the virus, and was taken into custody pending sentencing, scheduled for February 21. He is facing similar charges in Fulton County involving a second woman, who testified in the Clayton case, according to a report in the *Atlanta Journal and Constitution*, Jan. 22. Two women testified in the Clayton case that Davis did not tell them he was HIV-positive before having sex with them. The woman in the Clayton case is not HIV-positive, but the one from Fulton County is positive and claims to have been infected by Davis, asserting that she was celibate for fifteen years before having sex with Davis in 2012.

OREGON – At the end of January a federal jury was considering hate crime charges against George Mason, Jr., and had convicted his wife of obstruction of justice in an attack on David Beltier that arose out Mason's insult of Beltier's dog. On March 1, 2013, Beltier and his boyfriend where walking their poodle, which they had dyed pink for some reason, when Mason and his wife drove by and yelled, "You fucking fags. You are un-American because your poodle is pink." This brought a rejoinder from Beltier. Mason made a u-turn with his van circling back towards Beltier, while Beltier pulled out his cellphone and dialed 9-1-1 as Mason ran towards him and started punching him while his wife, sitting in the car, yelled homophobic insults. D.B. told Mason that he "hit like a girl," so Mason ran back to his car, retrieved a metal tool, and came back and started beating Beltier with it while yelling anti-gay slurs. Several witnesses in cars started honking their horns and Mason ran back to his car and fled, with witnesses following and noting his license plate number, which they gave to the police when they arrived on the scene. Mason was eventually apprehended, but his wife, who was a passenger in the car, told various lies to the police to try to divert

them from arresting him. In pretrial motion practice, District Judge Michael Simon rejected Mason's constitutional challenge to the federal hate crimes statute, and also held that the police had provided adequate Miranda warnings so that testimony about what Mason and his wife said to them could be admitted in evidence. *United States v. Mason*, 2014 U.S. Dist. LEXIS 866 (D. Ore., Jan. 6, 2014). The wrench that Mason used to beat Beltier had moved in interstate commerce, providing the necessary commerce clause nexus to bring the matter within the scope of the federal hate crimes statute. At trial, Mason's attorney contended that Mason was not homophobic, contended that prior to his marriage Mason had been in a gay relationship for some time, and that he had also lived with gay foster parents for a year when he was a teenager. The attorney contended that Mason suffered from "poor impulse control" and that something Beltier said to him must have set him off.

WASHINGTON - In *State v. Markwell*, 2014 Wash. App. LEXIS 244 (Wash. Ct. App., Div. 3, Jan. 30, 2014), the court upheld three rape convictions of a Washington state inmate who was found by the trial court to have forced another inmate to submit to performing oral sex and receiving anal sex in return for "protection" from other prisoners. Defendant Markwell was described as a physically imposing man, who upon learning that a new inmate convicted of sex crimes was in the jail, approached the inmate in question, who was shorter and slighter of build, and told him that as a sex crimes convict he would be a target for attacks by other inmates but would be protected by Markwell if he satisfied Markwell's physical needs. The court of appeals rejected Markwell's objection to the introduction of expert testimony at the trial explaining to jurors the "lingo" used by prisoners and the typical sort of "protection" set-up that exposes inmates to this type of sexual exploitation, and found that the jurors heard sufficient testimony to support their rejection of Markwell's "consent" defense.

LEGISLATIVE & ADMINISTRATIVE NOTES

FEDERAL – U.S. Senator Brian Schatz (D-Hawaii) has introduced a bill called the "Restore Honor to Service Members Act," which would allow gay veterans who were discharged for being gay prior to the abolition of the don't ask, don't tell policy to get their discharges upgraded to "honorable." Military members separated from the service under prior policies might receive discharges stating "other than honorable," "general discharge," or "dishonorable discharge," depending on the circumstances. Such classifications would disqualify them from various veterans benefits, including tuition assistance and health care, and might even affect voting rights or potential civilian or government employment. The legislation would streamline existing procedures for changing service records, and drew 17 Senate co-sponsors upon introduction, all Democrats. Representatives Mark Pocan (D-Wis.) and Charles Rangel (D-N.Y.) led in rounding up sponsors for the House version of the bill, which was introduced in July 2013. The White House has not yet stated a position on the legislation. *Washington Blade*, Jan. 30.

FEDERAL – In a private, off-the-record meeting with the House of Representatives LGBT Equality Caucus, House Speaker John Boehner indicated that the Employment Non-Discrimination Act (ENDA) will not come up for a vote in the House during the current session. The measure was passed with bipartisan support in the Senate last year, and there were hopes that this bipartisan vote might encourage House Republicans to let the measure come up for a vote, with the further hope that enough Republicans would join with Democrats to push the measure over the top, inasmuch as national public opinion polls show overwhelming majorities in support of such a measure, even among Republicans. However, the great fear of House Republicans in safe districts is a primary challenge from the right, and Speaker Boehner is apparently unwilling to risk the possibility of losing some incumbent House members (and possibly seats if extremist challengers win nominations and then go on to lose the general elections) by bringing ENDA to a vote. Some hope was still expressed that action might be taken after the fall election during the lame duck session of the House.

FEDERAL – In response to complaints about some incidents with American Airlines personnel in Colombia, the U.S. Transportation Security Administration is modifying its policies to allow same-sex couples to be screened for security together, the same way TSA handles other family groups. A TSA spokesperson told the *Washington Blade* (Jan. 23) that the agency is "working to make clear any confusion in language included in the Aircraft Operator Standard Security Program (ASOP) document," stating that "TSA policy is for every attempt to be made to accommodate all families traveling together."

ARIZONA – The Senate Committee on Government and Environment voted 4-2 on January 16 to approve SB 1062, which would amend the state's Religious Freedom Restoration Act to expand the definition of "person" to include associations, partnerships, corporations, churches, estates, trusts, foundations or any other legal entities. The bill would effectively allow a free exercise of religion defense –

that the "person's" religious liberty was violated, if there is any attempt to compel them to do anything they disagreed with on religious grounds. The bill's sponsor said this measure was responsive to the New Mexico wedding photographer case. Such a response is, of course, unnecessary, since Arizona does not ban discrimination because of sexual orientation by places of public accommodation and businesses, so there would be no statutory basis for the kind of discrimination claim that was adjudicated in that case. *CCH Workday*, Feb. 1. However, the measure could provide help for those seeking to avoid complying with the law generally on the ground that it offends their religious sensibilities. As such, it probably violates the Establishment Clause of the 1st Amendment.

COLORADO – The Colorado Senate voted 18-16 on January 22, a strict party-line vote, to approve a measure that would require same-sex couples in Colorado civil unions to use the same tax filing status for their Colorado income tax returns as they do for their federal returns. Since the federal government does *not* recognize civil unions, this would mean that Colorado civil union partners who file their federal returns as "single" would also file their state returns as single, contrary to the previously-enacted Civil Union Law, which would have had them filing jointly in the equivalent of a married status. Conversely, same-sex couples subject to Colorado income tax who were married in other states and thus would be obliged to file their *federal* returns as married would also be required to file their Colorado returns as "married." The intent of the statute is to simplify matters for same-sex couples by conforming the status in which they file both state and federal forms. Such are the convolutions when state and federal law are out-of-sync on the issue of marriage. Republicans objected that this law "chips away" at the state's ban on same-sex marriage. But the pending marriage equality lawsuit in Colorado state court, *Brinkman v. Long*, may eventually remedy the problem, if the state does not do so first by repealing its ban on same-sex marriage. The measure was expected to have easy sailing in the House, where Democrats hold a wider majority than in the Senate, according to an *Associated Press* report about the vote.

FLORIDA – The Punta Gorda City Council unanimously voted on January 8 to move forward with the establishment of a registry for unmarried couples to "make health care decisions for each other as surrogates, to have visitation at health care facilities within the city, make funeral and burial decisions for their partners, be notified in the event of an emergency, allow partners to be appointed as guardians by the courts, and allow for participation in the education of a dependent," reported the *Charlotte Sun* (Jan. 9). The measure having been approved in principle, it will now be solidified in a draft ordinance to receive a final vote of approval.

IDAHO – Despite public opinion polls showing that Idaho voters support extending anti-discrimination protection on the basis of sexual orientation and gender identity, House and Senate Republicans informed Rep. Grant Burgoyne (D-Boise), chief proponent of such a measure, that they would block any hearing on his bill. Democrats, who hold fewer than 20% of the seats in the legislature, have been advocating to add sexual orientation and gender identity to the state's Human Rights Act for eight years, with little sign of progress. *Idaho State Journal*, Jan. 25.

INDIANA – The Indiana House may have effectively delayed for several years a referendum on same-sex marriage by voting on January 27 to strip some language from a proposed constitutional amendment. The original version, approved by both houses of the legislature in 2011, would have banned same-sex marriages, civil unions, domestic partnerships, or any form of legal recognition for same-sex couples. In order for it to get on the ballot, the identically worded amendment needed to be approved by a subsequent session of the legislature after an election. Anticipating that Republican leaders would make passing the original amendment again a high priority, gay rights groups in the state undertook a massive public campaign to enlist businesses, local governments, educational institutions and professional associations against the amendment. Republicans proved unshakeable in wanting to have the public vote on same-sex marriage, but some of them were less adamant in insisting that the measure be as wide-ranging as the version approved in 2011. By a vote of 52-43 on January 27, the House of Representatives approved an amendment to remove the broader language. The yes votes came from 23 Republicans and 29 Democrats – the Democrats voting yes for the amendment not to endorse the anti-marriage provision but rather to make it possible, with a bi-partisan majority, to approve a new version of the amendment, which thus would not go on the ballot this year but instead would have to passed again two years from now in order to go on the ballot. The full house then voted on January 28 to approve the narrow version. Although there was still some concern that the Senate might pass the original amendment and then get the House to approve it in another vote, that possibility was deemed remote, given the number of Republicans who had jumped ship in the face of persuasive evidence that there was public disquiet with the more extensive ban. Putting off the vote might delay it forever, of course, if the U.S. Supreme Court

LEGISLATIVE

issues a favorable marriage equality ruling before the measure can come to the ballot. Otherwise, the earliest it might appear on the ballot, after another legislative election, would be in 2016. *Indianapolis Star*, Jan. 28.

KANSAS – Anticipating the possibility that the 10th Circuit will rule in favor of marriage equality in pending appeals from Utah and Oklahoma, Republican legislators in Kansas, also in the 10th Circuit, have introduced a bill that would protect from liability anybody who refused to recognize or deal with same-sex couples. House Bill No. 2453, proposed by Rep. Charles Macheers, would provide that "no individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender: (1) Provide any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnerships, or civil union or similar arrangement; (b) solemnize any marriage, domestic partnership, civil union or similar arrangement; or (c) treat any marriage, domestic partnership, civil union or similar arrangement as valid." The measure would shield from legal liability anybody who asserted their rights under this bill, and would forbid the government from taking any action against them. The measure purports to insulate "privately-held" businesses based on their sincerely-held religious beliefs, without explaining how a business entity can have a belief. (To be fair, the circuit courts of appeals are divided over whether closely-held corporations can claim the shield of the Free Exercise Clause, and the Supreme Court has agreed to resolve the circuit split, so these Kansas legislators are just declaring themselves on an arguable point of law.) Perhaps in Kansas businesses are sentient beings, sort of like golems. Governor Sam Brownback, an ardent foe of gay rights in all circumstances, has endorsed the need for such legislation, and has helpfully observed that the *Windsor* decision did not invalidate Section 2 of DOMA, so Kansas does not face any federal constitutional compulsion to recognize same-sex marriages contracted in other jurisdictions. But the Attorney General's office said there was a strong change that the bill would be challenged in court. * * * Thomas Witt, Executive Director of Equality Kansas, was so irked by the House bill that he asked some friendly legislators to introduce H.B. 2554 and House Concurrent Resolution 5026, seeking to repeal the ban on same sex marriage and legislate for marriage equality. These measures were filed on January 31. *Hutchinson News*, Feb. 1.

MISSISSIPPI – The Starkville Board of Alderman passed a resolution on January 22 "recognizing the inherent worth of all its city's residents, including those who are lesbian, gay, bisexual and transgender," according to a report published online by wtok.com. This was the first such resolution to be passed by any municipality in Mississippi. Perhaps there is some hope for gay rights in the deep Red south.

MONTANA – The Judiciary Committee of the Butte-Silver Bow commission voted on January 30 to approve a proposal anti-discrimination ordinance that would include sexual orientation and gender identity. The one dissenting vote came from a member who wanted to add a provision similar to one adopted in Helena that would impose some restrictions concerning facilities in which people normally appear undressed, such as restrooms and showers; the member said that otherwise he would support the proposal. The bill as approved was patterned on one enacted in Missoula in 2010. The vote advances it to consideration by the full commission. *Montana Standard*, Jan. 30.

NEW JERSEY – The New Jersey legislature's attempt to reform the law under which transgender people born in the state can update the gender markers on their birth certificates was stymied by Governor Chris Christie, who vetoed the bill on January 13. This leaves in place the existing requirement of surgical sex reassignment as a prerequisite for such changes on the birth certificates. The legislature had been willing to authorize such changes based on medical testimony of gender identity indicating that the individual was receiving appropriate medical treatment. Many transgender individuals prefer not to undergo surgery or find the procedures too expensive.

VIRGINIA - On January 11, 2014, newly-inaugurated Virginia Governor Terry McAuliffe issued his Executive Order No. 1 - Equal Opportunity, expressly displacing former Governor Bob McDonnell's EO No. 6 of 2010, establishing as the policy of the Commonwealth of Virginia a prohibition of discrimination because of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, or otherwise qualified persons with disabilities, as well as prohibiting discrimination against military veterans. McDonnell's Order had dropped sexual orientation -- which prior governors had included -- and did not mention gender identity. Thus, McAuliffe restores protection against government discrimination for gay Virginians and adds, for the first time, protection against discrimination on the basis of gender identity. The order also orders the Secretary of Administration

LEGISLATIVE / LAW & SOCIETY

to update the state's procurement policies to "ensure compliance with the non-discrimination mandate contained herein," which means state contractors may find themselves losing their contracts if they discriminate on these grounds. The full text of the Executive Order is available on the governor's official website: governor.virginia.gov/policy/executive-orders/executive-order-number-1/. *Bloomberg BNA Daily Labor Report*, Jan. 14, 2014.

VIRGINIA – The Virginia Senate's Rehabilitation and Social Services Committee voted 6-6 on January 24 on a proposal to authorize second-parent adoptions for same-sex couples. A tie vote would not advance the legislation. Perhaps this measure will come up again, since as a result of special elections the Democrats now narrowly control the Senate and some committee appointments have yet to be made. A Republican member of the House, Delegate Joseph Yost from Giles County, has introduced a counterpart bill pending before the House Civil Law Subcommittee. *Washington Blade*, Jan. 25. * * * A Republican-controlled House committee rejected, on party-line votes, proposals to amend the state's anti-discrimination laws to ban sexual orientation discrimination in housing and employment. *Virginia Pilot and Ledger-Star*, Jan. 24. * * * The House Health, Welfare and Institutions Subcommittee rejected a proposal for a ban on licensed mental-health providers engaging in sexual orientation change efforts with patients under 18 on January 30. *Pilotonline.com*, Jan. 31.

LAW & SOCIETY NOTES

NEW YORK – The United Methodist Church will hold a trial on March 10 on a complaint by a group of Methodist ministers against Rev. Thomas Ogletree, 80, who officiated a same-sex marriage for his son in 2012 after New York State legislated marriage equality. The ministers filed their complaint after reading an announcement about the ceremony in *The New York Times*. This follows on the nationally publicized prosecution of Rev. Frank Schaefer, from Pennsylvania, who officiated a same-sex wedding for his son in Massachusetts. According to an *Associated Press* report (January 17), two other cases are pending in the Methodist Church, involving Rev. Stephen Heiss of the Upper New York Annual Conference, who officiated a religious marriage ceremony for his daughter in 2002, and Rev. Sara Thompson Tweedy, who is now openly-lesbian and living with a same-sex partner, which allegedly violates church law.

CALIFORNIA SOCE BAN REFERENDUM – As of the end of January, it appeared unlikely that a ballot initiative to repeal California's law banning licensed health care professionals from engaging in sexual orientation change effort (SOCE) therapy would qualify for the ballot. An initial sampling of petition signatures had come close enough to the required number to require scrutiny of all the submitted signatures to see whether enough were valid to qualify the measure. That process will end during February, but by the end of January enough signatures had been disqualified in the reporting counties that it appeared highly unlikely, albeit not impossible, that the measure would meet the required threshold. As reported above, at the end of January the 9th Circuit Court of Appeals denied *en banc* review to a panel decision from last year rejecting a constitutional challenge to the law.

CHRISTIANS AND MARRIAGE EQUALITY – The on-line journal *Christianity Today* published an article on January 19 titled "Evangelicals' Favorite Same-Sex Marriage Law," suggesting that some evangelical Christians, now resigned to the momentum gathering behind same-sex marriage, are focusing their efforts on attempting to shape the emerging institution in a way least oppressive to their continued practice of their faith by focusing on securing legislation to protect religious opponents from prosecution under public accommodations laws. Some of those interviewed by the newsletter pointed out that every state that has legislated for same-sex marriage has included religious exemptions in the legislation. By contrast, where same-sex marriage is achieved through court decisions, there is no express protection for religious objectors. Thus, they reason, expecting that they will lose the court battles, they should be focusing on getting legislatures to pass marriage equality laws with broad religious exemptions, which could moot existing marriage equality lawsuits. (By this logic, Christian evangelicals should have gotten behind efforts to enact a marriage equality law in New Jersey.) However, some of the strongest opponents of same-sex marriage are not ready to concede the judicial forum, and vow to fight on. Alliance Defending Freedom, the main litigation group opposing same-sex marriage, continues to push into as many marriage equality lawsuits as they can to continue making the same arguments that used to win cases but now usually lose them.

NORTH CAROLINA BLUE CROSS BLUE SHIELD – Same-sex couples who applied for health insurance coverage with North Carolina's Blue Cross Blue Shield through the federal marketplace received cancellation notices informing them that the insurer, the largest in the state, did not cover same-sex couples. The resulting media

exposure and protests caused the insurer to reconsider, and it announced that for policies sold starting January 27 and taking effect starting March 1, family coverage would be available to married same-sex couples and domestic partners. Since a constitutional amendment in North Carolina bans same-sex marriage, the couples would have to have been married out of state, and it was not clear from news reports how BCBS would be determining whether unmarried couples qualified as domestic partners. This was reportedly the first time that BCBS has offered domestic partner or same-sex family health coverage in North Carolina. The policies will be available both through the federal marketplace and through direct purchases, and small groups will have the option to offer the coverage as well. Couple who had to enroll using separate policies will be able to convert them to family plans retroactive to their original starting date. The availability of family coverage through BCBS might incentivize some large employers in the state who use BCBS to provide health insurance for their employees to add such coverage to their employee benefits plans. *Asheville Citizen Times*, Jan. 30.

INTERNATIONAL NOTES

AUSTRALIA – The *Herald Sun* (Feb. 1) reported that a Family Court judge has ordered that a transgender man may spend father's day with his former lesbian partner's child. The parties had lived in a de facto lesbian same-sex relationship until the co-parent transitioned, after which his former partner referred to him as her daughter's "ex-step-parent," but rejected the idea that he was the child's father. The parties are litigating over the degree of involvement that the man will have in the child's life. The judge concluded in his January ruling that both parties had positive relationships with the child, but that "her primary attachment figure is her mother and this must not be jeopardized." The only point on which the parties agreed was that the girl could spend time with the man on Father's Day. The parties agreed to allow the child to decide what she would call the man.

BULGARIA – The Parliament rejected a measure proposed by Ataka, a nationalist party, that would have amended the criminal code to punish anybody who openly states that they are gay. The proposal provided for prison terms of 1-5 years and a fine for anybody who "by organizing or participating in events, rallies and parades, or through the media and the internet publicly manifest their own or of other person's homosexual orientation," according to a report by Sofia news agency *novinite.com* on Jan. 30. The parliamentary committee on human rights and citizen's complaints had already rejected the measure in November, but it was suddenly put on the agenda and discussed in a parliamentary plenary session on January 30. Supporters of the proposal quoted from the Bible as their authority.

CHILE – A committee of Chile's legislature voted 28-6 on January 6 to advance a proposal to enact a civil union law which provides a legal status to same-sex couples. The measure will now be considered by the full Senate. *Washington Blade*, Jan. 7.

CHINA – The conviction of a man who used the internet to organize gay sex parties by the Xuhui District People's Court in Shanghai has sparked debate about "whether group sex should be viewed as a moral or criminal matter," according to a Jan. 17 report in *China Daily*. The article said that the defendant, a married man in his 30s with a doctorate from a prestigious Chinese university, began publishing information about gay sex parties on Internet message groups on QQ in September, and held the party in a hotel room on September 7. He had video chats with individual applicants and selected seven men to invite to the party. They watched gay sex movies and then had their own little orgy. Police raided the hotel room and found the party in full swing, the participants all naked. Most of the men who were arrested are married and have good jobs, according to the news report. Gay sex is not illegal in China, but public sex is. So the debate rages about whether this was public or private. One legal expert quoted in the article opined: "Sex involving more than two people is not in keeping with virtuous social conventions or with China's marriage law. It's reasonable to fight such behavior." In a prior case, a college professor in Nanjing who organized such sex parties was sentenced to 3-1/2 years in jail for "group licentiousness," the first such conviction in two decades.

INDIA – As widely expected, a two-judge panel from the Supreme Court of India announced on January 28 that it saw no reason to reconsider the decision issued December 11 in *Koushal v. Naz Foundation*, which reversed a ruling by the Delhi High Court and held that Section 377 of the Indian Penal Code, the sodomy provision derived from British colonial law of more than a century ago, did not violate the Indian Constitution and could only be changed legislatively. The next step is for the government (which had sought reconsideration) and the Naz Foundation to file a "curative plea" that would be heard by a panel of five senior justices. Failing a reversal at that level, gay activists would need to seek legislation, a daunting process in light of pending elections and the opposition

INTERNATIONAL

of conservative parties. *Guardian.co.uk*, Jan. 29; *Times of India*, Jan. 30. There were press reports that some gay activists were attempting to run for office, as the Indian parliament lacks the presence of openly-gay outspoken members. * * * Just days after the India Supreme Court's December 11 ruling, U.S. immigration officials granted an asylum petition from a gay couple from India. According to a report in *Hindustan Times* (Jan. 4), news reports about the Supreme Court ruling "bolstered the couple's case before an immigration judge that they feared persecution and imprisonment if they were sent home." Jagdish Kumar and Sukhwinder Sukhwinder are living with a relative in Wisconsin, and as result of the asylum grant will be free to live and work in the U.S. When they arrived in the U.S. in 2013, they went directly to an immigration official at the Texas border and sought asylum, and were promptly confined in an immigration detention facility in Texas. Immigration Equality assisted them to seeking asylum. Their lawyer Clement Lee said, "What made their case really compelling was that a week and a half before their asylum argument here, a court in India re-criminalized same-sex conduct."

ISRAEL – When India clamped down on the process, Thailand became the destination of choice for gay male couples from Israel seeking to have children through surrogacy. (Such surrogacy is not legal for same-sex couples within Israel, although it is promoted and paid for by the government for different sex couples experiencing fertility problems.) But they encountered a roadblock: the Israeli government was refusing to issue passports for the babies to be brought into Israel by their intended parents, based on the Israeli government's interpretation of Thai law, under which a biological mother has full parental rights, even if they were functioning as a surrogate. Under a deal being negotiated between the governments involved, it is hoped that the logjam can be broken and dozens of stymied Israeli gay couples will be able to bring their children home. The deal would involve Israel accepting a document executed by the surrogates agreeing to let the child leave Thailand permanently. Foreign Ministry spokesman Yigal Palmor told *Haaretz* (Jan 23) that this would meet Israel's requirements, if approved by the Thai government as well. * * * *Jerusalem Post Online* reported January 22 that the Knesset, Israel's parliament, had voted down a bill that would apply family law to same-sex couples following a "heated debate" that day. The vote was 42-17.

LUXEMBOURG – Luxembourg's Justice Minister, Felix Braz, announced on January 8 that the government expects to bring a marriage quality measure up for a vote in the Parliament this summer, to go into effect if passed before the end of the year. If the law is approved, it will make Luxembourg the eleventh European country to legally recognize same-sex marriage. *wort.lu*, Jan. 12.

MALAWI – UNAIDS, the Malawi Law Society and some local civil rights groups are seeking a ruling from Malawi's High Court on March 17 that the county's laws against gay sex are unconstitutional, and are challenging the convictions of three men who were jailed in 2011. The southern African country imposes imprisonment for up to 14 years for sodomy. International donors have complained about the continuing criminalization, and, according to a news report, this has strained relations between international organizations and the Malawi government. *Legal Monitor Worldwide*, Jan. 21.

MEXICO – The Supreme Court ruled on January 26 that the Instituto Mexicano de Seguro Social, the ministry that oversees pensions and health benefits, must accord to same-sex couples who are married or registered in civil unions the same benefits as different-sex couples receive. The specific case involved a claim for surviving spouse benefits under the nation's social security law. *Reuters* (Jan. 30) reported: "The case was initially brought by a couple who were refused the right to enroll in full spousal benefits, but one of them died before the case was decided." The court usually issues written opinions only after it has announced a ruling in a case, so there is no opinion to cite yet. Mexico City legislated in favor of marriage equality years ago, and the Supreme Court ruled that same-sex marriages contracted in Mexico City must be recognized everywhere in Mexico. Subsequently, the court has ruled more than once that same-sex couples are entitled to get marriage licenses, but the rulings have not yet cumulated to the point of establishing a firm national precedent. As of now, Mexico City and three other states also have civil unions open to same-sex couples.

NEW ZEALAND – In a show of solidarity, the Parliament unanimously passed a resolution offered by Green Party MP Jan Logie in support of gay rights in Russia, responded to the controversial Russian legislation barring "propaganda" for alternative lifestyles. *New Zealand Press*, Jan. 31. New Zealand bans sexual orientation discrimination and legislated for same-sex marriage, and has become a significant marriage destination for same-sex couples from Australia.

NIGERIA – On January 7, Nigeria's President Goodluck (what a curious name under the circumstances) signed

INTERNATIONAL

into law the Same Sex Marriage Prohibition Bill, which not only prohibits same-sex marriages and imposes criminal penalties against anybody involved with them, but also ramps up criminal penalties for being openly gay or associating with gay people or advocating for gay rights. Within days, police in Bauchi, a northern province where Islamic Shariaa law is enforced, had begun rounding up suspected gays for prosecution. One of the first men prosecuted was sentenced to twenty lashes of the cane. An attempt to hold a public trial of several men was stymied when an angry mob showed up and threw stones at the defendants. The court suspended the proceedings, and subsequently announced that future trials would be held secretly to avoid mob violence. When applications were made for bail for the prisoners, they were told that they would be safer in jail due to the public hysteria against gay people that has been whipped up in the furor aroused by the new law. The situation in Nigeria for gay people is now dire, and it is anticipated that many gay people may flee the country seeking asylum elsewhere. *Boston Globe*, Jan. 23.

NORTHERN CYPRUS – A vote by the parliament to repeal the nation's criminal law against gay sex will, when it takes effect, eliminate the last such law in Europe. No states in Europe, Australasia or North America would criminalize homosexual conduct, such bans remaining in effect only in parts of Africa and Asia and some island nations. Turkish Cypriot MPs voted on January 27 to repeal a colonial-era law under which gay sex merited up to five years in prison. The president was expected to approve the measure. The vote came as a case was presented to the European Court of Human Rights challenging the law. The ECHR has struck down such laws in past cases. *Guardian.uk*., Jan. 28.

RUSSIA – Prosecutors are going after Lena Klimova, the founder and leader of a Russian LGBT teens support group called "Children 404," for violation of the "gay propaganda" law. Klimova is accused of creating an internet support group on social networks that violates the ban on promoting "non-traditional sexual relationships" to minors. A court session on the charges was to take place early in February. *QueerRussia.com*. * * * A Russian court fined Alexander Suturin, editor of a weekly newspaper published near the Chinese border, for publishing an interview with a gay school teacher during which the teacher said "homosexuality is normal." Publishing such a statement was found to violate the law banning "gay propaganda" to minors. The school teacher claims he was fired for being gay, and stated in the interview, "My very existence is effective proof that homosexuality is normal." The prosecutor stated: "This statement goes against logic. By offering it to underage readers, the author is misleading them about the normality of homosexuality." Suturin was ordered to pay a fine of 50,000 rubles (about $1400.00). *Guardian.co.uk*, Feb. 1. * * * Fifty-two current and past Olympic athletic competitors joined in a petition calling on Russia to repeal the recently-enacted anti-gay laws, and also criticizing the International Olympic Committee and multinational commercial sponsors of the winter Olympics scheduled to be held in Sochi in February for failing to confront Russia adequately over its anti-gay policies. *Guardian.co.uk*, Jan. 31. The Sochi 2014 chief executive, Dmitry Chernyshenko, said that athletes who wished to speak out against the legislation while in Sochi could do so, but only in a special "protest zone" that has been established about eleven miles away from the Olympic Village where the competitors will be housed. IOC President Thomas Bach said that athletes would be free to call for equality in press conferences, but were prohibited from making political statements during competition or medal award ceremonies under Olympic regulations.

SCOTLAND – A Catholic adoption agency, St. Margaret's Children and Family Care Society in Glasgow, was charged with discriminating against gay couples who sought to adopt children. The Office of the Scottish Charity Regulator found a violation of the Equality Act 2010, in response to a complaint filed by the National Secular Society. However, the Scottish Charity Appeals Panel reversed that ruling. An NSS spokesperson found this perplexing, since numerous appeals elsewhere in the U.K. by Catholic agencies had been unsuccessful, leaving St. Margaret's now as the only Catholic adoption agency in the U.K. which discriminates against same-sex couples in placements. A further appeal to the courts may follow. *Scottish Daily Mail*, Feb. 1.

UGANDA – A Ugandan court ruled on January 22 that Bernard Randall, a British subject resident there, would be expelled for "corrupting Uganda's youth" based on his relationship with a Ugandan man and the finding of a gay sex video on his laptop computer. The court's ruling came one week after Uganda's president, Yoweri Museveni, had refused to approve a parliamentary measure that would have mandated life imprisonment for gay sex, saying that there was no quorum when the measure was passed and that it was rushed through without adequate study and consultation. Under the existing law, Randall's partner, Albert Cheptoyek, faces a possible seven-year prison term because of his sexual relationship with Randall. Randall said that his laptop was stolen during a break-in at his home, and the thieves, finding the gay sex video on the laptop, passed it to a

INTERNATIONAL

Christian evangelist who gave it to a tabloid newspaper, which published screen grabs from the video, leading to the arrest of Randall and Cheptoyek. The court ordered dropping of a charge of trafficking obscene material against Randall, and that he be deported within 12 hours of the court's ruling. Randall decided to accept the order and leave rather than file an appeal. *Guardian.co.uk*, Jan. 23; *New York Times*, Jan. 17.

UNITED KINGDOM – Although the government has announced that marriage licenses will be available for same-sex couples beginning March 24 for marriages commencing March 29, they will not issue marriage licenses to same-sex couples who are already in civil partnerships, the status that was provided for same-sex couples under prior law. According to a January 25 article in *Guardian.co.uk*, government officials are taking the position that couples in civil partnership would have to formally dissolve those partnerships first, a process akin to a divorce action, because only legally unrelated couples can get marriage licenses. The government says it is working on procedures to allow civil union partners to convert their status to marriage, but those won't be ready until later in the year. Michael and Paul Atwal-Brice, who were planning to marry in March but then were informed they would need to divorce from their partnership first, are threatening to sue the government for a declaration that they have a right to get married without going through a formal dissolution procedure for their partnership. * * * The government has announced a consultation on a proposal to expand the civil partnership law to allow different-sex couples to register as civil partners. This step would seem to be mandated if they are not planning to propose repeal of the civil partnership law, in light of last year's ruling by the European Court of Human Rights that Greece had violated the European Convention on Human Rights equality requirements by establishing a civil union status from which same-sex couples were excluded. However, the Court has refused to take a case from the U.K. filed by different-sex couples seeking the right to enter into civil partnerships. Although the Court did not explain its reasoning in finding the proposed case inadmissible, perhaps it was assuming that the government was going to amend the civil partnership law accordingly. * * * The Registrar-General's office announced that where one member of a couple is seriously ill and not expected to recover, or is about to be sent away on military service, the usual 15-day notice period would not be required, and such marriages will be available beginning March 13.

UNITED KINGDOM – When Transport for London (TfL), the organization that runs public transportation in the capital, decided to refuse to run bus advertisements from Core Issues Trust, an organization that advocates "conversion" to "cure homosexuality," was it acting out of the political needs of Mayor Boris Johnson and violating Core Issues' free speech rights under the European Convention on Human Rights, or was it taking a justified action to avoid embroiling the public transit system in a controversial public debate? The issue arose after Stonewall, the national gay rights organization, placed an advertisement on London buses stating: "SOME PEOPLE ARE GAY. GET OVER IT! Stonewall. www.stonewall.uk.org." This prompted Core Issues Trust to submit an ad worded as follows: "NOT GAY! EX-GAY, POST-GAY AND PROUD, GET OVER IT. www.anglican-mainstream.net www.core-issues.org." Core Issues sued after TfL refused to take their ad. A trial judge ruled against them, but the Court of Appeal issued a decision on January 27 in *Core Issues Trust v. Transport for London*, [2014] EWCA Civ 34, finding that the lawfulness of declining the ad would turn on a factual determination yet to be made: whether Mr. Johnson, who was also as mayor chairman of TfL, had killed the ad for political reasons, as he was running for re-election as a left-wing Laborite and craved the gay vote, as it is alleged, and perhaps feared that the gay community would see the ads running on the buses as an instance of the city government selling out the gay community. In the initial trial, an executive for TfL insisted that he, not the mayor, had made the decision, but the mayor had not himself been called to testify. The Court of Appeal decided more fact-finding was needed and sent the case back to the trial court.

VENEZUELA – Marriage equality efforts are advancing along two fronts in Venezuela. On January 30, three hundred citizens rallied outside the National Assembly building in Caracas as representatives of 47 Venezuelan organizations submitted petitions with 20,000 signatures asking the legislature to consider a civil marriage equality bill in their next session. Meanwhile, some same-sex couples who married in Argentina are seeking judicial recognition of their marriages in Venezuela. Although a civil court turned down a petition by a married lesbian couple on December 16, they are appealing that ruling, and a gay male couple is initiating a similar proceeding. *Blabbeando.blogspot.com*, Jan. 31.

ZIMBABWE – High Court Justice Priscilla Chigumba ruled on January 14 that the police must return to Gay and Lesbians of Zimbabwe material that was confiscated during a police raid on the organization's offices in 2012 shortly after the group had published a report detailing police violations against its members. The police accused the group of operating

without registration and possessing material that promotes homosexuality. Forty-four members of the group were arrested, released the next day, but then subjected to harassment, outing at work, and loss of jobs and homes. An unsuccessful petition to the police in Harare for return of their property generated this lawsuit. The court ruled that the organization was not covered by the registration requirement, and the decision was likely to be helpful to the group's Chairperson Martha Tholanah, who is fighting charges of running an illegal organization. *SWRadioAfrica.com*, January 14.

PROFESSIONAL NOTES

The LeGaL Foundation, the publisher of this newsletter, has announced that the honorees at the annual dinner of the LGBT Bar Association of Greater New York, being held at Capitale on March 20, will be **MARY BONAUTO** of Gay & Lesbian Advocates & Defenders, **BRIAN ELLNER** of the public relations firm Edelman, and **CREDIT SUISSE**, an international financial organization. Bonauto has spearheaded landmark litigation on behalf of GLAD, including the first successful same-sex marriage case, *Goodridge v. Department of Public Health* (Massachusetts), whose tenth anniversary was observed in 2013, and the successful 1st Circuit challenge to Section 3 of DOMA, *Gill v. Office of Personnel Management*. Ellner was senior strategist for HRC in helping to get New York to pass the Marriage Equality Law in 2011, and has been an active leader for LGBT rights in a variety of positions. Credit Suisse's LGBT Open Network was one of the first LGBT employee resource groups on Wall Street, and created the Credit Suisse LGBT Equality Index, tracking the equity performance of publicly-traded companies that are recognized as supporting and promoting LGBT equality.

Readers of law blog AbovetheLaw.com voted to name **ROBERTA KAPLAN**, plaintiff's advocate in *U.S. v. Windsor*, their Lawyer of the Year for 2013. Runners-up: David Boies and Ted Olson, counsel for plaintiffs in *Perry v. Schwarzenegger*, which went to the Supreme Court as *Hollingsworth v. Perry*.

President Obama announced on January 16 the nomination of **STACI MICHELLE YANDLE** to the U.S. District Court for the Southern District of Illinois. If confirmed, Yandle will be the second openly lesbian African-American federal district judge, the first being Deborah Batts, appointed to the Southern District of New York by President Bill Clinton. Judge Batts, who took the bench in 1994, went to senior status in 2012, taking a reduced case load. A solo practitioner in Southern Illinois, Yandle is a graduate of Vanderbilt University Law School. * * * The worm turned…. U.S. Senator Marco Rubio of Florida enthusiastically endorsed the nomination of **WILLIAM THOMAS**, a gay African American state court judge, to be a U.S. District Judge, so President Obama nominated him. But then Rubio changed his mind, contending that he disagreed with the way Thomas had handled some criminal cases on the Florida bench, and refused to give his consent to go forward with the nomination. By custom, senators have this veto power over district court appointments in their home states. Critics charged that the opposition was political and ill-timed, since Thomas was nominated to fill a long-standing vacancy and understaffing of the federal trial courts in Florida is causing unconscionable delays in case-handling. But Rubio stood firm, and President Obama did not renominate Thomas when Congress returned from the holiday recess in January.

The *New York Law Journal* (Jan. 22) noted the passing of **DENIS "DEK" KELLMAN**, a prominent entertainment lawyer who was former president and chairman of the Black Entertainment and Sports Lawyers Association (BESLA). Kellman is survived by his husband, Cal Miller. Kellman, a Yale College alumnus, held J.D. and M.B.A. degrees from Harvard, and had prominent legal positions with Columbia Pictures, RCA, and BMG, most recently working in-house for Blackstone Audiobooks until ill health forced his retirement.

KEES WAALDIJK, professor of Comparative Sexual Orientation Law at the University of Leiden's Law School (The Netherlands), is the 2014 McDonald/Wright Visiting Chair of Law at the Williams Institute, UCLA Law School. He will make a special presentation under the auspices of the Institute on April 23 at 12:15, titled "More progress, more stagnation, more setbacks: a global picture of the recognition of same-sex orientation."

The National Center for Lesbian Rights announced that **DAVID CODELL** has joined NCLR as its new Constitutional Litigation Director. Codell has previously been Visiting Legal Director at the Williams Institute at UCLA Law School, and has worked as co-counsel with NCLR on many cases. Codell, a Harvard Law School alumnus, clerked for Judge David Tatel of the D.C. Circuit and Supreme Court Justice Ruth Bader Ginsburg, practiced constitutional law in association with Prof. Laurence Tribe of Harvard, and became a partner in the Los Angeles office of Irell & Manella, LLP. He also had a solo practice. His work for NCLR will be based in West Hollywood.

PUBLICATIONS NOTED

1. Araiza, William D., Flunking the Class of One/Failing Equal Protection, 55 Wm. & Mary L. Rev. 435 (Nov. 2013).
2. Armstrong, Carlie, Slow Progress: New Federal Rules Only Begin to Address Housing Discrimination Based on Sexual Orientation and Gender Identity, 9 Mod. Am. 2 (Summer 2013).
3. Badul, Chantal J., and Ann Strode, LM and Others v Government of the Republic of Namibia: The first sub-Saharan African case dealing with coerced sterilisations of HIV-positive women – Quo vadis?, 13 African Hum. Rts. L. J. 214 (2013).
4. Bagenstos, Samuel R., Employment Law and Social Equality, 112 Mich. L. Rev. 225 (Nov. 2013).
5. Balmer, Thomas A., and Katherine Thomas, In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation, 76 Albany L. Rev. 2027 (2012/13).
6. Bernstein, Anita, What's Wrong With Stereotyping?, 55 Ariz. L. Rev. 655 (2013).
7. Birkhold, Alexander S., Poking Holes in L.A.'s New Condom Requirement: Pornography, Barebacking, and Speech, 90 Wash. Univ. L. Rev. 1819 (2013).
8. Brunson, Samuel D., Taxing Polygamy, 91 Wash. U. L. Rev. 113 (2013).
9. Cauthen, James N.G., Referenda, Initiatives, and State Constitutional No-Aid Clauses, 76 Albany L. Rev. 2141 (2012/13).
10. Cheruvu, Padmini, Three-Parent IVF and Its Effect on Parental Rights, 6 Hastings Sci. & Tech. L.J. 73 (Winter 2014).
11. Comment, Russia's "Gay Propaganda" Law, 6 J. Eurasian L. 373 (2013).
12. Conkle, Daniel O., Evolving Values, Animus, and Same-Sex Marriage, 89 Ind. L.J. 27 (2014).
13. Craig, Elaine, Capacity to Consent to Sexual Risk, 17 New Crim. L. Rev. 103 (2014).
14. Cribbs, Megan, Expanding the Responsibility to Protect: Saving Populations From HIV/AIDS, 85 Temple L. Rev. 879 (Summer 2013).
15. Crooks, Daniel J., III, Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time, 8 Charleston L. Rev. 223 (Winter 2013-14).
16. Dinan, John, State Constitutional Amendments and Individual Rights in the Twenty-First Century, 76 Albany L. Rev. 2105 (2012/13).
17. Dolan, Peter, An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State, 88 Wash. L. Rev. 1119 (Oct. 2013).
18. Durden, Major Jayson L., Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law, 2013-NOV Army Law. 4 (Nov. 2013) (anticipating reform of Article 125 of the UCMJ, this article discusses circumstances under which sexual relations that include conduct previously outlawed may remain prosecutable under different sections of the Code).
19. Eskridge, William N., Jr., The Ninth Circuit's *Perry* Decision and the Constitutional Politics of Marriage Equality, 64 Stan. L. Rev. Online 93 (Feb. 22, 2012) (written pre-*Hollingsworth*, posted online post-*Hollingsworth*).
20. Fishman, Hannah R., HIV Confidentiality and Stigma: A Way Forward, 16 U. Pa. J. of Const'l L. 199 (Oct. 2013).
21. Feinberg, Jessica R., Avoiding Marriage Tunnel Vision, 88 Tul. L. Rev. 257 (Dec. 2013) (argues that an exclusive focus on marriage equality improperly ignores the variety of other family arrangements that people make in their lives).
22. Ferrara, Christopher A., Customizable "Sexual Orientation Privacy" for Minor Schoolchildren: A Law School Invention in Search of a Constitutional Mandate, 43 J.L. & Educ. 65 (Winter 2014).
23. Galie, Peter J., and Christopher Bopst, "It Ain't Necessarily So": The Governor's "Message of Necessity" and the Legislative Process in New York, 76 Albany L. Rev. 2219 (2012/13).
24. Glezer, Anna, Dale E. McNiel and Renee L. Binder, Transgendered and Incarcerated, 41 J. Am. Acad. Psych. & L. 551 (2013).
25. Hackford-Peer, Ruth, *Adar v. Smith*: Penalizing Innocent Children for the 'Sins' of the Parents, 8 Mod. Am. 35 (Fall 2012).
26. Hernandez, Blanca L., The Prurient Investment: How First Amendment Speech Jurisprudence Obstructs the Movement for LGBT Equality, 22 S. Cal. Rev. L. & Social J. 377 (Spring 2013).
27. Hunter, Nan C., Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in *Perry v. Brown*, 64 Stan. L. Rev. Online 111 (March 19, 2012) (written pre-Hollingsworth, posted on-line post-Hollingsworth; 9th Circuit decision discussed here was vacated by the Supreme Court on jurisdictional grounds).
28. Johnsen, Dawn, Windsor, Shelby County, and the Demise of Originalism: A Personal Account, 89 Ind. L.J. 3 (2014).
29. Kramer, Zachary A., The New Sex Discrimination, 63 Duke L.J. No. 4 (2014).
30. LaFleur, Frances P., and Cristin M. Obsitnik, U.S. Supreme Court Rules Defense of Marriage Act Unconstitutional – What Does this Mean for Plan Sponsors?, 39 Emp. Rel. L. J. No. 3, 9 (Winter 2013).
31. Lamparello, Adam, Why Justice Kennedy's Opinion in *Windsor* Shortchanged Same-Sex Couples, 46 Conn. L. Rev. Online 27 (Jan. 2014).
32. Lange, James, The Demise of Federal DOMA: New Financial Planning Strategies for Pennsylvania Same-Sex Couples, 36-FEB Pa. Law. 28 (Jan/Feb 2014).
33. LaPiana, William P., The Geography of Marriage, Tax Management Estates, Gifts and Trusts Journal, Jan. 9, 2014.
34. McClain, Linda C., From *Romer v. Evans* to *United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act, 20 Duke J. Gender L. & Pol'y 351 (Spring 2013).
35. Miller, Kenneth P., Defining Rights in the States: Judicial Activism and Popular Response, 76 Albany L. Rev. 2061 (2012/13).
36. Newcomer, Meghan, Can Condoms be Compelling? Examining the State Interest in Confiscating Condoms from Suspected Sex Workers, 82 Fordham L. Rev. 1053 (Nov. 2013).
37. Nicolas, Peter, Gay Rights, Equal Protection, and the Classification-Framing Quandary, 21 Geo. Mason L. Rev. 329 (Winter 2014).
38. Leading Cases, First Amendment Freedom of Speech Unconstitutional Conditions: *Agency for International Development v. Alliance for Open Society International*, Inc., 127 Harv. L. Rev. 218 (Nov. 2013).
39. Pollvogt, Susannah W., Forgetting *Romer*, 65 Stan. L. Rev. Online 86 (Jan. 10, 2013) (written pre-*Hollingsworth*, posted electronically January 2014).
40. Proia, Andrew A., Freeing the Prop 8 Tape: *Perry v. Brown*, the Presumption of Access to Civil Proceedings, and the Preservation of Judicial Integrity, 24 U. Fla. J. L. & Pub. Pol'y No. 1 (2013).
41. Recent Cases, First Amendment-Commercial Speech-Second Circuit Holds that Prohibiting Truthful Off-Label Promotion of FDA-Approved Drugs by Pharmaceutical Representatives Violates First Amendment-*United States v. Caronia*, 703 F.3d 149 (2nd Cir. 2012), 127 Harv. L. Rev. 795 (Dec. 2013).
42. Reed, Alex, A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act, 50 Amer. Bus. L.J. No. 4 (2013).
43. Rehman, Javaid, and Eleni Polymenopoulou, Is Green a Part of the Rainbow? Sharia, Homosexuality, and LGBT Rights in the Muslim World, 37 Fordham Int'l L.J. 1 (Nov. 2013).
44. Rodriguez, Madelyn, See No Evil, Hear No Evil, Speak No Evil: Stemming the Tide of No Promo Homo Laws in American Schools, 8 Mod. Am. 29 (Spring 2013).
45. Romero, Victor C., Reading (into) Windsor: Presidential Leadership, Marriage Equality, and Immigration Policy, 23 S. Cal. Rev. L. & Soc. Jus. 1 (2013).
46. Ross, Allison, The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members, 23 S. Cal. Interdisc. L.J. 185 (Winter 2014).
47. Sachs, Justice Albie, The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriage, 102 Ky. L.J. 147 (2013-14) (Ray Distinguished Lecture).
48. Samons, Christina, Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government, 22 S. Cal. Rev. L. & Social J. 417 (Spring 2013).
49. Sanders, Steve, Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of Conventional Wisdom, 89 Ind. L.J. 95 (2014).

50. Sant' Ambrogio, Michael, The Extra-Legislative Veto, 102 Geo. L.J. 351 (Jan. 2014) (executive decisions not to defend the constitutionality of statutes).
51. Sbardelatti, Elizabeth, Skin Flicks Without the Skin: Why Government Mandated condom Use in Adult Films is a Violation of the First Amendment, 9 NW J. L. & Soc. Pol'y 138 (Summer 2013).
52. Schoonmaker, Samuel V., IV, and Wendy Dunne DiChristina, Repercussion of the *Windsor* Decision Beyond DOMA: Family, Tax, Estate, and Employment Issues, 47 Fam. L.Q. 409 (Fall 2013).
53. Scott, Ryan W., Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases, 89 Ind. L.J. 67 (2014).
54. Smith, Catherine E., Equal Protection for Children of Same-Sex Parents, 90 Wash. Univ. L. Rev. 1589 (2013).
55. Stephens, Sarah M., What Happens Next? Will Protections Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama's Second Term?, 19 Wash & Lee J. Civ. Rts. & Social J. 365 (Spring 2013).
56. Streit, Michael J., The Written Word: Reflections on Composing a Major Civil Rights Decision, 2013-NOV B. B.J. 2 (Nov. 18, 2013) (Writer was a justice of Iowa Supreme Court that decided *Varnum* same-sex marriage case).
57. Titshaw, Scott, Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-*Windsor* World, 66 Vand. L. Rev. En Banc 167 (Oct. 17, 2013).
58. Turner, Ronald, On Substantive Due Process and Discretionary Traditionalism, 66 SMU L. Rev. 841 (Fall 2013) (*Bowers v. Hardwick* and *Lawrence v. Texas* as prime examples of how the Supreme Court manipulates "tradition" in outcome-determinative ways in its substantive due process cases).
59. Vandervort, Lucinda, HIV, Fraud, Non-Disclosure, Consent and a Stark choice: Mabior or sexual autonomy?, 60 Crim L. Q. (UK) 301 (2013).
60. Villazor, Rose Cuison, The Undocumented Closet, 92 N.C. L. Rev. 1 (Dec. 2013) (uses the metaphor of "the closet" from LGBT experience to analyze the situation of undocumented aliens in the United States).
61. Wardle, Lynn D., and Travis Robertson, Adoption: Upside Down and Sideways? Some Causes and Remedies for Declining Domestic and International Adoptions, 26 Regent U. L. Rev. 209 (2013-14) (anti-gay legal scholars explain why allowing same-sex couples to adopt in the U.S. imperils international adoptions).
62. Widiss, Deborah A., Leveling Up After DOMA, 89 Ind. L.J. 43 (2014).
63. Yeatman, Lucy, Lesbian co-parents: Still not real mothers, 43 Fam. L. (UK) 1581 (Dec. 2013).
64. Youn, Monica, Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure, 81 Geo. Wash. L. Rev. 2108 (Nov. 2013).
65. Yurko, Richard, All in the Family, 2013-NOV Boston B.J. 11 (Nov. 18, 2013).
66. Zirkel, Perry A., Counterpoint Introduction: The Secret of Being Gay and Still Being Happy?, 43 J.L. & Educ. 61 (Winter 2014) (introduction to article by Ferrara, above).

SPECIALLY NOTED

Whittier Law School in collaboration with the Williams Institute at UCLA Law School is offering a summer study abroad program July 1-31, 2014, in Barcelona, Spain, hosted by the University of Barcelona. As in past years, this program offers an opportunity for students from the U.S. and other countries to study LGBT legal and policy issues in depth with a comparative law focus, earning up to 6 academic credits as approved by the ABA accreditation authorities. For more information, go to www.law.whittier.edu/spain or contact the program's director, Prof. Calvin Peeler, cpeeler@law.whittier.edu.

The Indiana Law Journal invited five scholars to contribute papers to a symposium titled "Essays on the Implications of Windsor and Perry," which was published in 89 Ind. L.J. No. 1 (2014). The individual articles are noted in this issue's bibliography.

EDITOR'S NOTES

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

All points of view expressed in *Lesbian/Gay 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 *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please submit all correspondence to info@le-gal.org.