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LAW NOTES

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Accurate Passports for Intersex Individuals

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EXECUTIVE SUMMARY

10th Circuit Orders State Department to Reconsider Denial of Accurate Passport to Intersex Plaintiff

By Eric Lesh

The U.S. Court of Appeals for the Tenth Circuit has rejected several reasons given by the U.S. State Department for denying an accurate passport to Dana Zzyym, a non-binary and intersex U.S. Navy veteran, who does not identify either as male or female. *ZZYYM v. Pompeo*, 958 F.3d 1014 (May 12, 2020). In a ruling authored by Judge Robert Bacharach for a three-judge panel, the court partially overturned a district court ruling in Zzyym's favor by U.S. District Judge R. Brooke Jackson.

Plaintiff Dana Zzymm, who uses the gender-neutral pronouns "they," "them" and "their," and who was born with ambiguous sex characteristics, declined the State Department's offer to issue them a passport with F or M in the gender mark space, insisting that a gender-neutral X be used. At least ten countries issue passports with gender markers other than "F" (female) or "M" (male), including Australia, Canada, Germany, India, and New Zealand. To support the identification as intersex, Zzyym supplied a letter requesting an "X" sex designation, a letter from a physician stating that Zzyym is intersex, an amended birth certificate identifying the sex as "Unknown" and a Colorado driver's license identifying the sex as female. (In November 2018, Dana obtained a driver's license with a nonbinary "X" gender marker, after their home state of Colorado changed its policy in response to Dana's federal lawsuit.)

The State Department resisted issuing a gender-neutral passport. Instead the Department offered Zzyym three options: they could obtain a passport identifying the sex as female; they could obtain a passport identifying the sex as male if a physician attested that Zzyym had transitioned to become a male; or they could withdraw the application. As described in the March 2019 edition of Law Notes, the State Department "asserted that it would be expensive and time-consuming to adjust their passport system software to accommodate Zzyym (and, presumably, other non-binary individuals who may request X passports in the future), and urges the court to stay its order pending appeal so that the Department will not have to undertake this onerous process and expense unless it is ordered to do so in a final and definitive appellate ruling."

The U.S. District Court for the District of Colorado issued two rulings in favor of Zzyym on November 22, 2016, and September 19, 2018. The March edition of Law Notes describes the non-overturned district court ruling, where Judge Jackson had concluded that the "Department's insistence upon passport applicants identifying as either male or female violated the Administrative Procedure Act, since no statutory provision requires this and the Department has never gone through the necessary procedure to adopt a formal regulation on point. Indeed, in light of the statutory language on passports, it is possible that even a properly-adopted regulation would be struck down on grounds of statutory interpretation and due process rights, since under the Supreme Court's rulings on personal autonomy (such as *Lawrence v. Texas*), a person who identifies as non-binary probably has a constitutional right to government recognition of that status." *See ZZYYM v. Pompeo*, 341 F.Supp.3d 1248 (D. Colo. 2018), for the district court's ruling on the merits.

The 10th Circuit panel held that the State Department's reliance on its binary sex policy was arbitrary and capricious, and in so doing the court rejected three of the five reasons the Department gave for denying an accurate passport.

First, the court held that the Department's first reason (that the binary sex policy ensured the accuracy and reliability of U.S. passports) lacked support in the record. The Department argued that they determine eligibility for passports based on "an applicant's identity through identification documents issued by other U.S. jurisdictions." The Department argued that listing a sex other than male or female would "hamper verification of an applicant's identity," given the prevalence of binary sex policies in the 50 states. The court agreed with Zzyym, holding that "consistency between inaccurate identification documents does not render them more accurate or reliable." The court reasoned that "given the State Department's willingness to allow Zzyym to identify as either male or female, the binary sex policy sunders the accuracy and reliability of information on Zzyym's passport application."

The court accepted the State Department's second reason: that the binary sex policy helpfully matches how other federal agencies record someone's sex, arguing that "sex is one of the primary data points used by these agencies in recordkeeping," and that "all such agencies recognize only two sexes." Zzyym pointed out that the "State Department was apparently willing to tolerate mismatches for transgender individuals." But the court found that the Department had "reasonably tried to limit unnecessary mismatches and thus satisfied arbitrary and capricious review." The court also accepted the Department's argument that "using a third sex designation could burden other state and federal agencies when they use the State Department's data."

But the court rejected the Department's argument on the final two points. The State Department concluded that the medical community lacks a consensus on how to determine whether someone is intersex, rendering an "X" designation "unreliable as a component of identity." The court reasoned that "even if the medical community disagreed on whether

some individuals are intersex, the State Department would need to explain why the lack of a consensus would justify denying Zzyym's application." Finally, the Department argued that a third sex designation would be infeasible because of the "required time and expense." The court noted that the expense was not obvious, citing nine states that insist that "adding non-binary gender designation in accord with national and international standards has required negligible administrative effort—the kind that accompanies routine changes to government documents."

In its ruling, the court did note that forcing nonbinary intersex individuals like Dana to pick a male or female gender marker in the passport application "injects inaccuracy into the data." The court noted, "A chef might label a jar of salt a jar of sugar, but the label does not make the salt any sweeter. Nor does requiring intersex people to mark "male" or "female" on an application make the passport any more accurate." (emphasis supplied).

Zzyym is represented by a small army of litigators, including attorneys from several offices of Lambda Legal and a host of cooperating attorneys from Faegre Baker Daniels LLP. ■

Eric Lesh is the Executive Director of the LGBT Bar Association of New York (LeGaL).

U.S. Supreme Court Denies Stay of Idaho Prisoner's Transgender Confirmation Surgery Case

By William J. Rold

In the continuing saga of Idaho transgender prisoner Adree Edmo, the Supreme Court has declined to stay proceedings pending disposition of a petition for a writ of *certiorari* in *Idaho DOC v. Edmo,* No. 19-1280. [Note: The Order in Application No. 19A1038 was entered May 21, 2020). The leaves intact the partial stay of the District Court pending *certiorari* reported last month in *Law Notes* (May 2020 at page 15).

The Idaho DOC sought review of the Ninth Circuit decision in *Edmo v. Corizon,* 935 F.3d 757 (9th Cir. 2019), which affirmed the District Court's injunction directing confirmation surgery. The Ninth Circuit declined to extend its stay after affirming, and the District Court's Order permits pre-surgical preparation to proceed. U.S. District Judge B. Lynn Winmill's Order also required Idaho DOC to preserve Edmo's medical records and make them available to her, pending finality of the litigation.

Arguing that it will be irreparably injured by any surgical preparation, the Idaho DOC sought a full stay pending a ruling on *certiorari*. The application was presented to Justice Elena Kagan as circuit justice, who ordered a response, after which she referred the matter to the full Court.

Notably, Corizon, Inc. – Idaho's medical services contractor for the prison system, which had been dismissed from the case by the Ninth Circuit, but which moved unsuccessfully for rehearing nevertheless – is not a party to the petition for *certiorari* or the application for a stay. Their chief physician, defendant Dr. Scott Eliason (who remains a defendant), is a petitioner.

The Court denied the stay, but Justices Clarence Thomas and Samuel Alito indicated they would have granted it. Since it takes five justices to grant a stay (but only four to grant *certiorari*), it is possible to glean a little more from this stay denial.

Had there been four votes to grant *certiorari*, it is possible (probable?) that Justice Breyer would have voted for a stay. This is known colloquially as a "courtesy fifth" – meaning a justice votes to stay an action when the Court is going to review the case – and might reverse the action in favor of the party seeking the stay. Think capital punishment: *Medellin v. Texas,* 554 U.S. 759, 765 (2008) (Justice Breyer dissenting from denial of stay of execution where four justices vote to hear *habeas* petition but there is no fifth vote to stop imposition of the death penalty).

In the LGBT arena, Justice Breyer provided a "courtesy fifth" in *Gloucester County v. G.G., ex rel. Grimm,* 136 S. Ct. 2442 (Order of Aug. 3, 2016), involving a transgender student's access to gender-appropriate high school facilities. He concurred in a stay of the Fourth Circuit's ruling for the student "as a courtesy" because "four Justices have voted to grant the application" for *certiorari*.

Predicting what the Court will do on the merits at this point is still a fair bit of witchcraft. There is some reason, however, to believe that four Justices may not vote to grant review in Edmo's case. ■

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

Ninth Circuit Allows State Law Claims to Proceed Against Corrections Officer for Sexual Assault

By William J. Rold

Transgender inmate Katlynn Marie brought a civil rights lawsuit in Arizona Superior Court, raising claims under 42 U.S.C. § 1983 and Arizona state law against correctional defendants for sexual assault. Defendants removed to federal court. In *Marie v. Szapiro,* 2020 WL 2510752, 2020 U.S. App. LEXIS 15600 (9th Cir., May 15, 2020), the Court of Appeals affirmed U.S. District Judge Diane J. Humetewa's decision declining to dismiss the state law claims.

Marie's claims were supported by DNA results against the principal defendant, corrections officer David Szapiro. She alleged that Szapiro "sexually abused [her] by non-consensually fondling her, forcing her to shower in front of him, and forcing her to perform oral sex on him." She said that Szapiro's conduct was driven by "personal motives unconnected to the [State's] business." At issue was the applicability of Arizona Statute § 31-201.01(F), providing that prisoners' state tort claims could only be brought against the State of Arizona for actions of correctional employees within the "scope of their legal duty."

The Memorandum (not for publication) was issued by a panel consisting of Circuit Judges Michelle Friedland (Obama) and Mark J. Bennett (Trump) and Senior U.S. District Judge Jed S. Rakoff (Clinton, S.D.N.Y., by designation). District Judge Humetewa found that the allegations against Szapiro were outside the "scope" of his legal duty. Asserting this was a denial of "immunity," Szapiro filed an interlocutory appeal, whereupon the panel affirmed Judge Humetewa. So far, so good.

The Court of Appeals relied on *Arizona v. Schallock*, 941 P.2d 1275, 1283 (Ariz. 1997), for scope of duty. While this case has language about "scope of duty" versus "personal motivations" of the state employee, the Arizona Supreme Court's outcome in this suit involving a district attorney who sexually harassed and assaulted subordinates was actually contrary to its purported application here. In S*hallock,* the State of Arizona sought a declaratory judgment that it did not have to indemnify the attorney for his actions because they were outside the scope of his duty. The Arizona Supreme Court ruled that the actions were not necessarily "outside the scope" for insurance purposes and that it was error for the lower court to grant summary judgment on the point. *Id*. at 1287.

Szapiro also alleged on appeal that Marie improperly plead that he acted as a state official for purposes of § 1983 and "outside" his duty for state tort purposes – and that her allegation for tort purposes should constitute an admission that Szapiro was not a state actor for § 1983 purposes. The Court of Appeals found no problem with pleading "in the alternative" – *see* F.R.C.P. 8(d)(3) – and therefore there was no "admission" for § 1983 purposes.

The problem is that Marie was not really pleading "in the alternative." The two concepts – color of state law under § 1983; and acting within the scope of one's duties for state government tort law – are distinct. It has been settled law for decades – since the resuscitation of § 1983 in the 1960's – that a state employee who abuses her job and causes constitutional injury acts under color of state law for § 1983 purposes but cannot defend on the basis that the actions were beyond her duties. *Monroe v. Pape,* 365 U.S. 167, 172 (1961), citing cases going back to *Ex parte Virginia,* 100 U.S. 339, 346 (1880), and holding that the statute reaches errant officers "whether they act in accordance with their authority or… abuse it." Suing an abusive correction officer under both federal and state law is not pleading in the alternative. Rather, it is a recognition that the officer's abuse of office is only made possible by her holding the office in the first place.

The "scope of duty" defense is not qualified immunity because the law is unsettled or no constitutional violation occurred. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Harlow v. Fitzgerald,* 457 U.S. 800, 817-8 (1982. Rather, the "scope of duty" is a defense under state tort law or a limitation on damages against state officials under state law. The Arizona statute at issue applies to tort claims, and it does not specifically confer immunity. The Ninth Circuit treats it like the California statute that formed the basis for an interlocutory appeal in *Liberal v. Estrada*, 632 F.3d 1064, 1073-76 (9th Cir. 2011), without deciding whether the Arizona statute provides for immunity from suit.

This case was originally scheduled for oral argument in May, but it was taken off the calendar. Perhaps it was the audacity of the appeal that influenced the less-than-precise handling of the legal issues. Szapiro was caught with his DNA showing, and an officer's having sex with an inmate (even "consensual") is a felony under Arizona Criminal Code § 13-1419. ■

Two Federal District Courts Rule on Social Security Survivor Benefits for Same-Sex Spouses Whose Marriages Occurred Fewer Than Nine Months Before the Death of Their Spouse

By Arthur S. Leonard

The Social Security Act provides for a lump-sum death benefit to be paid to the surviving spouse of a Social Security Beneficiary, and as well for a widow/widower's benefit to be paid to the surviving spouse for the rest of his or her life if the surviving spouse is at least 60 years old when their partner died. If the surviving spouse is already a benefits recipient but their deceased partner was receiving a higher benefit, the surviving spouse is entitled to receive the higher benefit. At least three lawsuits in which same-sex surviving partners are seeking spousal benefits were in the news during May, two from Arizona and one from the state of Washington.

In *Ely v. Saul*, 2020 U.S. Dist. LEXIS 92121, 2020 WL 2744138 (D. Ariz., May 27, 2020), U.S. Magistrate Judge Bruce G. Macdonald, whom the parties agreed could rule rather than just make a recommendation to the district court, certified a class of surviving spouses whose benefits claims were denied because they hadn't been married for at least nine months when the recipient died, and then ruled on the merits that the denial of benefits was unconstitutional if the exclusion of same-sex couples from marriage in their state due to the nine-months rule was the reason for disqualification.

In *Driggs v. Commissioner of Social Security Administration*, 2020 U.S. Dist. Lexis 94001, 2020 WL 2791858 (D. Ariz., May 29, 2020), a *pro se* plaintiff won a reversal by U.S. District Judge Diane Humetewa of an adverse administrative ruling based on his not being legally married to the recipient for nine months when the recipient passed away, and a remand to the agency to determine whether the men would have been married earlier if not for the ban on same-sex marriage in Arizona. Just days earlier, Judge Humetewa had rejected a request by the government to transfer this case over to the jurisdiction of Magistrate Judge Macdonald, observing that Mr. Driggs had not consented to having his case determined by a magistrate judge. *See Driggs v. Commissioner of Social Security Administration*, 2020 U.S. Dist. LEXIS 92118, 2020 WL 2745413 (D. Ariz., May 27, 2020).

In the third case, *Thornton v. Commissioner of Social Security*, 2020 U.S. Dist. LEXIS 87066 (W.D. Wash., May 18, 2020), reported in detail in *Civil Litigation Notes*, below, the district judge delayed making a final ruling on class certification or on the merits pending further factual development about the size of the proposed class. This case would, if the class is certified, potentially affect the largest range of beneficiaries, but in recognition of the then-pending motion for class certification in *Ely*, the court ruled that the proposed *Ely* class would be carved out of any class certified in the *Thornton* case.

Michael Ely, the named plaintiff, and James Taylor met in Sunset Beach, California, in 1971, and quickly became a couple. At the time, the idea that same-sex couples might be allowed to marry anywhere in the world was merely a fantasy, although Ely testified that as early as 1973 they had discussed the possibility of marriage. The men lived together for decades, moving from California to Arizona in the early 1990s to "escape" the AIDS epidemic. In December 2007, after they had been living together for thirty-six years, they decided to have a formal commitment ceremony, in the

presence of friends with a celebrant and an exchange of rings. Then in the spring of 2008, the California Supreme Court ruled that state's ban on same-sex marriage unconstitutional, and there was a five-month period during which same-sex marriages could take place until the voters passed Proposition 8 in November. Although they could have gotten married that summer in California, they decided not to do so because Arizona would not recognize the marriage and they didn't want to undertake the expense, having limited resources.

It wasn't until October 2014 that same-sex marriage became available in Arizona, with a district court ruling that that the state declined to appeal as part of the national wave of marriage litigation that occurred in the two years between the Supreme Court decisions in *U.S. v. Windsor* and *Obergefell v. Hodges*. By then Taylor was battling with cancer with a poor prognosis. He had stopped working and went on Social Security in January 2014. They married in November, and Taylor passed away six months later.

Taylor had been employed as a structure mechanic working on jet airplanes with Bombardier. "Mr. Taylor was the breadwinner and Mr. Ely was the homemaker," wrote Judge Macdonald. "As with many traditional households, Mr. Taylor worked outside of the home, and Mr. Ely was responsible for maintaining their home—including doing the cooking, cleaning, laundry, banking, and paying bills. Mr. Taylor would take care of any necessary repairs. Together they adopted a dog and had a joint bank account." After Taylor died, Ely applied for survivor's benefits.

The opinion provides factual recitations about two members of the potential class, James Obergefell and Anthony Gonzales. Obergefell's story is familiar from his case seeking to compel Ohio to recognize his marriage to John Arthur for purposes of a death certificate. The two men had been together for many years but could not marry in Ohio before Arthur died in August 2013. However, after *U.S. v. Windsor* was decided in June 2013, it seemed likely that Ohio would have to recognize a same-sex marriage contracted out of state, and Obergefell was able to arrange for a medical jet to fly with his ailing partner to Maryland, where they were married in July 2013 on the tarmac at the Baltimore airport. Since Arthur passed away soon after, Obergefell cannot satisfy the 9-month rule. Similarly, Gonzales and his long-time partner were unable to marry until a ruling by the New Mexico Supreme Court made marriage available in their home state in 2013, but his husband, Mark Johnson, passed away less than 9 months after the ceremony. The facts concerning these couples, similar in many respects to the Ely-Taylor relationship, strongly support the argument that these couples would have been married many years previously had not their states banned same-sex marriage.

In *Obergefell*, the Supreme Court ruled in June 2015 that states that ban same-sex marriages or refuse to recognize same-sex marriages contracted in other states were violating the fundamental constitutional right to marry, in violation of the Due Process and Equal Protection clauses of the 14th Amendment. Ely's argument is that applying the 9-month rule to disqualify him from survivor's benefits thus violates his Equal Protection rights. The 9-month rule as it now stands has been shortened by Congress several times over the years. The intent of the requirement is to avoid a situation where somebody marries a dying person specifically in order to be able to get survivor's benefits, and not really for the purpose of having a marriage. The rule has several statutory exceptions, including a situation of a couple that wants to marry but was precluded from doing so because one was incarcerated in a state that did not allow marriages of prisoners.

Judge Macdonald concluded that Ely and those in the situation described for the putative class – people such as Obergefell and Gonzales – should be entitled to the same sort of exclusion. If the only thing standing in the way of their having married more than nine months before their husbands' deaths was an unconstitutional state ban on same-sex marriages, then it would deny their equal protection rights to disqualify them for the survivor's benefit.

Because the statutory language of the requirement and its express exceptions is clear, one can't really fault the agency for rejecting the claims. It is necessary for a court to resolve the constitutional issue, since an administrative agency does not have authority to declare a statute unconstitutional.

Judge Macdonald granted the motion for class certification, with the class described as follows: "All persons nationwide who (i) presented claims for and were denied, or will present claims for and be denied, social security spousal survivor's benefits based on not being married to a same-sex spouse for at least nine months at the time of the spouse's death and (ii) were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months. This class is intended to exclude any putative class members in *Thornton v. Social Security Administration*, No. CV-18-01409-JLR-JRC (W.D. Wash.)."

In opposing class certification, the government had argued that there was no adequate showing that the "numerosity" requirement under Rule 23 had been met. That is, the plaintiff's burden here is to show that the number of potential class members is large enough to justify going forward on a class basis. The judge found persuasive statistical evidence provided by the William Institute at UCLA Law School, estimating that several hundred surviving spouses would be affected by the application of the 9-month rule.

The class for which certification is being sought in Thornton includes people whose exclusion is not based on the 9-month rule. As noted above, the proposed class in Thornton excludes members of the proposed class in Ely. Mr. Ely was designated as class representative, and his counsel from Lambda Legal and Arizona counsel associated with them will represent the class.

In terms of the substantive ruling, Judge Macdonald wrote: "Defendant is ENJOINED from denying class members benefits without consideration of whether survivors of same-sex couples who were prohibited by unconstitutional laws barring same-sex marriage from being married for at least nine months would otherwise qualify for survivor's benefits," and as to Ely personally, the Commissioner's decision to deny benefits was reversed and remanded for calculation and award of benefits, the court having concluded that his situation clearly comes within the terms of the substantive ruling." Judge Macdonald granted plaintiff's request that the injunction be national in scope, as indicated by the class description.

Joshua Driggs sued *pro se* and resisted the government's attempt to get his case folded into the *Ely* case. As noted above, just days before ruling on the merits, Judge Humetewa denied the government's motion to transfer the case.

Joshua and Glen were together as a couple since 1972, when they met in Michigan where they lived for more than a decade. They moved around to various places, ending up in Arizona. They travelled to California to get married in March 2014, then returning to their residence in Arizona, where Glen died in June. When they married, Arizona did not recognize same-sex marriages but, as noted above in discussing the facts of *Ely*, later in 2014 the state decided not to appeal a federal district court decision ruling in favor of same-sex marriage, but not before Glen had died. Joshua applied for the lump sum death benefit, which he eventually was awarded, but he was denied the survivor benefits when he applied for them, on the ground that the men were married for fewer than nine months, even though, as noted, they had been partners since 1972.

"Defendant acknowledges that Plaintiff had a valid marriage to Glen Driggs at the time of his death, even though Glen Driggs was domiciled in Arizona at the time of his death, and even though Arizona did not recognize their California marriage as valid at that time," wrote the judge. This was why Driggs was awarded the lump sum death benefit. The remaining issue, as in *Ely v. Saul*, was whether denying him the widower's entitled to continuing benefits for the rest of his life was unconstitutional.

Driggs, representing himself, argued that denying him the benefit violates both due process and equal protection under the 5th Amendment. Judge Humetewa ruled in his favor on the equal protection claim, but she denied the due process claim. Addressing equal protection, she observed that the nine-month rule, as stated in the statute, is a neutral rule of general application, although it clearly has a disparate impact on same-sex couples because they were denied the right to marry until recently. Sometimes a disparate impact can ground an equal protection claim, but not always. It depends on finding evidence of discriminatory intent.

Summarizing the government's argument, the judge wrote: "Defendant apparently argues that the use of the durational requirement has no disparate impact in Plaintiff's case. Instead, Defendant argues that the durational requirement can result in seemingly unfair applications for same-sex couples and opposite-sex couples, and Defendant offers hypothetical examples of potential unfairness that could result from the use of the bright-line durational requirement. Since the durational requirement can result in seeming unfairness to both same-sex and opposite couples, Defendant argues that there is no disparate impact. Simply put, Defendant argues that all marriages that are shorter than nine months do not meet the durational requirement, and this is true regardless of whether the couple is opposite-sex or same-sex and regardless of the reason the marriage did not last at least nine months."

The judge rejected this argument. Significantly, the ruled of marriage recognition under the Social Security Act depends on the state in which a beneficiary is domiciled when they die, and at the time of his death, Glen's marriage to Joshua was not recognized by the state of Arizona, which, per *Obergefell*, violates the 14th Amendment. "Undeniably, Defendant's hypotheticals provide conceivable examples of unfair barriers to meeting the durational requirement for same-sex couples and opposite-sex couples alike. However, these examples are not apt comparisons to this particular case. The durational requirement incorporates Arizona's marriage laws, up to October 17, 2014, that placed a unique and targeted burden on same-sex couples. Arizona's same-sex marriage prohibition placed no burden on opposite-sex couples seeking to marry, and therefore, it did not keep opposite-sex couples from meeting the durational requirement. Accordingly, the durational requirement does not apply equally to Plaintiff and similarly situated opposite-sex spouses because it incorporates state laws that created unequal barriers to marriage for certain individuals. Therefore, the durational requirement, as applied here, discriminatorily impacts Plaintiff."

But disparate impact alone is not necessarily enough for the plaintiff to win. Usually, in equal protection cases, an intent to discriminate must be shown. Here, the judge found persuasive the 9th Circuit's ruling in *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), in which the court discerned discriminatory intent in legislation adopting "neutral" language with the intention of excluding same-sex couples that included Arizona public employees from qualifying for employee benefits. She observed that "The Ninth Circuit agreed with the district court that none of the offered justifications for the statute survived scrutiny because the rule necessarily depended upon 'distinguishing between homosexual and heterosexual employees, similarly situated.' Since the offered justifications for the statute—promoting marriage, costs-saving, and reducing administrative burdens—relied on discriminating against same-sex couples, the Ninth Circuit concluded that the statute was based on "'a bare… desire to harm a politically unpopular group,'" quoting from Justice Sandra Day O'Connor's concurring opinion in *Lawrence v. Texas* (2003).

"Following the logic of *Diaz*, this Court finds that Defendant had a discriminatory purpose in using the durational requirement to deny Plaintiff's Application for Widower Insurance Benefits," wrote Judge Humetewa. "Defendant expressly incorporates state marriage laws into the evaluation of eligibility for Widower Insurance Benefits. 42 U.S.C § 416(h)(1)(A)(i). Some of these laws, including Arizona's, had unconstitutionally denied same-sex couples access to marriage for discriminatory purposes in violation of equal protection. The Court is unpersuaded by Defendant's arguments that Plaintiff was not deprived of benefits because of "Arizona's marriage laws, nor because of [his] sexual orientation or gender," but only because of unfortunate timing. The durational requirement is not an amorphous requirement. It is a duration of marriage requirement, and Defendant considers the validity of a given marriage by applying state law. Plaintiff was denied the opportunity to marry not just in Arizona, but in many states, because of marriage laws that prohibited him from marrying Glen Driggs due to his sexual orientation and gender. Defendant relied on these laws to deny Plaintiff's Application for Widower Insurance Benefits. Thus, the discriminatory purpose of Arizona's same-sex marriage ban is imputed to Defendant's decision to rely on that ban in Plaintiff's case."

She continued: "The Court is unconvinced by Defendant's suggestion that Plaintiff was not discriminated against because he could have married in California or another state sooner, or because Glen Driggs hypothetically could have lived longer." As to the former contention, same-sex marriage became available in California in June 2013 after the Supreme Court ruled in *Hollingsworth v. Perry* that the proponents of Proposition 8 did not have standing to appeal a district court opinion holding Proposition 8 unconstitutional. "While Defendant states that these different circumstances would have resulted in Plaintiff receiving benefits and obviated the need for this case, it may not have been clear to Plaintiff that going out of state for marriage sooner would have resulted in eligibility for Widower Insurance Benefits. Arizona did not recognize same-sex marriages any earlier than October 17, 2014. Moreover, the SSA regulations by their terms still limit recognition of valid marriages for Widower Insurance Benefits to those *recognized by the state of domicile*. 42 U.S.C § 416(h)(1)(A)(i). [emphasis supplied] Finally, the timing of Glen Driggs's death is irrelevant to whether Defendant purposefully discriminated against Plaintiff under the actual facts of this case. Moreover, it is no argument to claim that Plaintiff would not have been discriminated against had his spouse lived longer. Ultimately, Defendant's hypothetical circumstances highlight that Plaintiff encountered barriers to pursuing a crucial requirement––marriage––for Widower Insurance Benefits that opposite-sex spouses did not."

But this is only a partial victory for Joshua Driggs, because the court concluded that it was not appropriate to order that he be paid the benefits. Because of the administrative rulings on his claims, there has never been a factual determination of whether he would have satisfied the 9-month rule by marrying earlier had Arizona recognized California marriages earlier or had Arizona allowed same-sex marriages earlier. Thus, the case is remanded for the same kind of fact-finding that will be necessary for potential class members in *Ely v. Saul*. "Evidence points in both directions on this issue and it is Plaintiff's burden on remand to establish that he would have met the requirements for Widower Insurance Benefits but for Defendant's reliance on unconstitutional marriage laws," wrote the judge.

Ely's counsel, in addition to Lambda Legal, include the Office of Brian Clymer, Esq., and Menard Disability Law. ■

Arthur S. Leonard is the Robert F. Wagner Prof. of Labor and Employment Law at New York Law School.

Tennessee Appeals Court Rejects Lesbian Partner's Standing to Seek Parental Rights

By Matthew Goodwin

A familiar fact-pattern has played out in a Tennessee courtroom with sparring former same-sex partners seeking parental rights to a six-year old son whom they had raised together while their relationship was intact. The rulings of the trial and appellate courts in *Pippin v. Pippin*, 2020 Tenn. App. Lexis 220, 2020 WL 2499633 (Tenn. App., May 14, 2020), underscore the uncertainty and risk faced by individuals in same-sex relationships who parent a child to whom they have no biological or adoptive ties. Judge Richard Dinkins wrote the opinion for the Court of Appeals, joined by Judge W. Neal McBrayer. Judge Andy D. Bennett dissented.

The case involves two unmarried women, Christina and Sandra, who had been in an intimate relationship for nine-and-a-half years prior to separating in late 2016. In 2011, four years into their relationship, Christina and Sandra decided to have a child through donor insemination with Christina as the birth mother.

Sandra's petition recited the facts of their relationship and co-parenting prior to their separation, all of which were taken as true by the lower and appellate courts as they were deciding and reviewing Christina's motion to dismiss, alleging that Sandra lacked standing to seek parental rights.

At the time of their son's conception and birth, same-sex marriage was not legal in Tennessee. Christina legally changed her last name to match Sandra's, and they executed a sworn Domestic Partner Affidavit to "verify they were a family, together supporting each other and both children…"

Sandra was known to the child as "Momma Sandy." The child also knew Sandra's family as his own extended family. Sandra was the primary

financial support for the family, while Christina stayed at home with the children. (Sandra also had a son prior to her relationship with Christina, whom they were jointly raising when together.) Nevertheless, the two women shared many parenting responsibilities, such as making meals, getting the child to and from school or daycare, taking the child to various activities, etc. Both women were listed as parents on all registration forms and directories pertaining to their son, and both regularly attended parent/teacher conferences.

Although the parties split up in late 2016, Sandra did not file her petition for parentage until sometime in early January 2018. Presumably the parties co-parented in some fashion during the interval between breaking up and commencement of litigation, although the case does not directly address this point.

A few months into the litigation, Christina filed her motion to dismiss, which Wilson County General Sessions Court Judge John Thomas Gwin granted. "The trial court dismissed the petition," wrote Judge Dinkins, "stating that it was 'being asked to create a new category of parent in Tennessee' — 'a de facto parent.' The court further opined that there 'is no such thing in Tennessee… except on the street and in real life; there are all sorts of de facto parents, but the law gives them no rights."

During the pendency of the proceedings, the trial court and appellate court continued visitation even though Sandra's parental rights had not been established. That ends with the appellate court's decision, unless Sandra can get visitation extended while attempting to appeal to the Tennessee Supreme Court.

Sandra's appeal argued for a reversal of the trial court's denial of her parentage on essentially two different legal theories.

First, Sandra argued that a Tennessee statute and the Constitution secured her parental rights because both compelled reading Tennessee's parentage presumption statutes in a gender-neutral fashion. Tennessee has a statute on its books that "[w]ords importing the masculine gender include the feminine and neuter, except when contrary intention is manifest…" Sandra contended that this requires reading Tennessee's parentage presumption statute in a gender-neutral way, which would have made her the presumed parent of their son. Both Sandra and the dissent pointed out such a reading was required by the Supreme Court's holding in *Pavan v. Smith*, 582 U.S. ___ 2017. *Pavan* held that an Arkansas state rule that requires a child's birth certificate to list the non-biological father if he is married to the biological mother but that does not allow both same-sex spouses to be listed as parents is unconstitutional discrimination that violates *Obergefell v. Hodges*.

In this respect, Sandra wanted to rely on either the Tennessee statute codifying the common law marital presumption or the Tennessee statute which appears to have been passed initially to estop men from denying parentage vis-à-vis children who they took into their homes and held out to be their child.

The two-judge majority of the three-judge panel disagreed with Sandra and their dissenting colleague, Judge Bennett. At the outset, the majority dismissed Sandra's attempted reliance on the marital presumption because, even if read in a gender-neutral fashion, the couple were not married at the time of the child's birth.

More to the point, Judge Dinkins reasoned that the court only needed to read the Tennessee parentage statutes in a general-neutral way if it they were ambiguous, which they decided that they were not, because they could infer legislative intent from the natural and ordinary meaning of their plain language.

Furthermore, Judge Dinkins' opinion stated that "[n]o rights or relationships are created by the parentage statutes, only a procedure by which the father is able to establish parentage; as such recourse to [a gender-neutral reading] for other purposes is not warranted." Judge Bennett's dissent points out, to no avail, that construing placement of a parent's name on a birth certificate as simply a ministerial act with no import was considered and rejected by the *Pavan* court, which held instead that birth certificates are essential documents that imbue those named on them with far-reaching rights and responsibilities.

Second, Sandra argued that the women's conduct prior to and after the birth of their son established her to be his de facto parent. The two-judge majority again disagreed, reasoning that precedent rooted in 1999 and 2013 Tennessee cases precluded such an outcome.

The first case relied on by the majority in this regard is *In re Thompson*, 11 S.W.3d 913 (Tenn. App. 1999). That decision held: "[w]hile it *may* be true that in our society the term 'parent' has become used *at times* to describe more loosely a person who shares mutual love and affection with a child and who supplies care and support to the child, we find it inappropriate to legislate judicially such a broad definition of the term 'parent' as relating to legal rights relating to child custody and/or visitation. Just as a grandparent who provides care and support to a child does not become recognized as being a parent (absent adoption) under Tennessee law, other persons are not recognized as being a parent under Tennessee law based *only* upon prior care and support of a child. These persons include any unmarried persons who maintain a close intimate relationship with a child's natural parent, whether they are of the same or opposite sex of that natural parent."

The other case, *In re Hayden C.G-J*, 2013 WL 6040348 (Tenn. App.), permission to appeal denied, 2014, dealt with essentially identical facts to the *Pippin* case and concluded that no parental rights vested in the claimant there who was not biologically related to the child.

The appellate court then went one step further than the trial court and stripped Sandra of her visitation with the child.

The dissent minced no words and declared the majority opinion "stuck in the past." "In my opinion," wrote Judge Bennett, "*Obergefell v. Hodges*…altered the way we must interpret many statutes relating to marriage and parentage….It has met with resistance, just like *Brown v. Board of Education of Topeka*, and other United States Supreme Court

cases that required society to alter its thinking about its institutions."

Judge Bennett argued that the majority's decision was tantamount to ignoring *Obergefell* and its implications. His dissent focused only on the urged gender-neutral reading of Tennessee's parentage statutes. He would have found Sandra had standing under these statutes read in a gender-neutral way and so presumably does not reach the question of *de facto* parentage.

As to the marital presumption statute, Bennett seemed to want to rely on the fact that gay marriage was illegal at the time the parties had the child to perhaps give Sandra the benefit of the marital presumption—i.e. he seems to be stating that but for the prohibition on gay marriage in effect at the time the women had their son, they would have been married and a gender neutral reading of the marital presumption statute could bring Sandra in as a parent.

Regardless of the strength of this position, Bennett argues that the majority has erroneously construed both the marital presumption statute the statute appearing to codify a common law rule estopping individuals because they chose a construction which ran afoul of the Constitution as made clear by *Pavan*. He cites the rule of statutory construction in a 1993 Tennessee case as "[w]hen faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid conflict with the Constitution, and another which renders the statute unconstitutional, we must choose the former."

The case seems certain to be appealed to Tennessee's highest court.

Sandra is represented by Abby R. Rubenfeld, a leading LGBT rights attorney in Nashville who was the first full-time staff attorney and first legal director at Lambda Legal back in the 1980s. Christina is represented by Jacqueline B. Dixon, also of Nashville. Tiffany D. Hagar, of Lebanon, Tennessee, represented the interest of the child as Guardian ad Litem. ■

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

3rd Circuit Refuses to Reopen Transgender Guatemalan Petitioner's Case for Withholding of Removal

By Wendy Bicovny

In *Arrivillaga v. Attorney General of the United States*, 2020 US App. Lexis 14273, 2020 WL 2125772 (3rd Cir., May 5, 2020), a 3rd Circuit panel rejected a transgender individual's appeal from the Board of Immigration Appeals' (BIA) refusal to reopen her withholding of removal case based on changed country conditions. The case is procedurally complex, but ultimately rests on the BIA concluding that the Petitioner, a native and citizen of Guatemala, failed to show that transgender individuals in Guatemala face worse circumstances than other LGBTI individuals or that relevant circumstances have worsened since her initial deportation hearing in May 1995. Circuit Judge L. Felipe Restrepo wrote the opinion for the court.

Approximately fifteen years after the Immigration Judge's (IJ), denial of the Petitioner's withholding of removal due to her failure to appear at the initial May 1995 hearing, she filed a motion to reopen, arguing that she was completely unaware of the hearing because she never received proper notice. The IJ denied her motion. An appeal to the BIA followed and was denied.

She then petitioned the 3rd Circuit for review, which remanded the case back to the BIA. The BIA then directed the IJ to make factual findings and enter a new decision. The IJ declined to reopen, finding that Arrivillaga received ample notice and abandoned her application for relief both because she failed to present it at the May, 1995, hearing that she did not attend, and because there was no evidence of changed country condition changes regarding the treatment of homosexuals in Guatemala since1995 that would qualify for an exception to her late filing of her motion to reopen.

In 2014, the Petitioner filed a second motion to reopen, which the IJ again denied. In June 2016 the BIA dismissed her second appeal. In June 2018, she filed a third motion to reopen with BIA based on changed country conditions. However, this time she emphasized that she is transgender, lives full-time as a female, and has begun hormone therapy to cause permanent changes to her body. She further argued that recent changes in the treatment of transgender individuals in Guatemala necessitated reopening her case.

On February 8, 2019, the BIA denied the motion, finding that her evidence of country conditions did not warrant reopening. She appealed the BIA's denial of her motion to reopen to the 3rd Circuit, which reviewed the denial of a motion to reopen for abuse of discretion.

The court initially noted that the record supports the BIA's refusal to reopen the Petitioner's case due to her failure to demonstrate material, previously unavailable country conditions in Guatemala that would excuse the untimeliness of her motion to reopen. The court first explained that there is no time limit, when the underlying purpose of the motion to reopen is to seek asylum and when the motion is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if the evidence is material, was not available, and would not have been discovered or presented at the previous proceeding. In determining whether a petitioner has presented material, previously unavailable evidence of changed country conditions, the court compares the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below.

The Petitioner argues that conditions in Guatemala for transgender people have changed since her initial May1995 deportation hearing. She explains that the1995 U.S. Department of State Human Rights Report for Guatemala does not mention transgender

individuals, whereas the 2016 Report uses the word "transgender" six times. Her take-aways from the 2016 Report are that the Guatemalan government attempted to implement standards for treatment of LGBT prisoners, took up its first case of trafficking involving transgender individuals, and enacted the Strategy for Comprehensive and Differentiated Health Care for Trans Persons in Guatemala 2016.

She argues that, years ago, transgender people were more generally classified as LGBT, and now, there is a societal and governmental recognition of the unique needs of transgender individuals and the assistance and protection they may need. The Petitioner further argues that this categorical recognition is material in that it evidences membership in a particular social group (as required for asylum) and that she could not have presented it during previous proceedings because the 2016 Report was not published until March 3, 2017.

Furthermore, BIA failed to address changed country conditions as they relate to social distinction—and when the BIA noted that the relevant changes were improvements, it failed to appreciate the 2016 Report's language stating that there was general societal discrimination against LGBTI persons. The court pointed out that in denying her motion, the BIA noted, and she concedes, that her transition from male to female constitutes changed *personal* circumstances, not changed circumstances arising in the country of nationality.

The court also noted that the BIA addressed her evidence of country conditions head-on and explained that to the extent that the evidence shows a change in country conditions – through Guatemala's implementation of a strategic plan to address the unique health concerns and rights of *transgender* individuals – that change would appear to be an *improvement* in the treatment of members of the LGBTI community, and *towards transgender persons in particular*. The BIA further stated that Arrivillaga did not identify any part of the country condition evidence that specifically addresses conditions in Guatemala as materially different than at the time of her initial hearing.

Lastly, regarding her argument that changed country conditions demonstrate social distinction, a point she says the BIA did not address, the court found that the BIA appreciated the distinction the Petitioner is making and concluded that she has not shown that transgender individuals face worse circumstances than other LGBTI individuals or that relevant circumstances have worsened since her May 1995 hearing. Thus, the court concluded that the BIA's denial of Petitioner's motion to reopen is deeply rooted in evidence and does not constitute an abuse distinction.

The Petitioner is represented by Kimberly A. Tomczak, Esq., Gian-Grasso Tomczak & Hufe, Philadelphia, PA. ■

Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City.

Indiana Appeals Court Rejects Citizenship Test for Transgender Name Change

By Filip Cukovic

After consolidating two cases in which the trial court denied applications of two transgender persons to change their birth name, the Court of Appeals of Indiana reversed on May 18, holding that the state statute does not require petitioners to prove their citizenship before proceeding with a petition for change of name. The majority opinion was written by Judge Sheryl Lynch, with Judge Terry A. Crone dissenting. *In re Name Change of Jane Doe*, 2020 Ind. App. LEXIS 215*, 2020 WL 2518080.

Jane Doe and R.A.C. (Petitioners) are transgender men who were born in Mexico and brought to the United States by their families around the age of five. Although both Petitioners are residents of Marion Country in Indiana, they are not United States citizens. However, both have previously received a DACA status. Specifically, Doe became a lawful permanent resident in 2016, while R.A.C. has a pending petition for a United States visa.

R.A.C. and Doe individually filed with the Marion Circuit Court verified petitions for change of name on December 7, 2018 and March 1, 2019, respectively. In March of 2019, the trial court heard Doe's petition and concluded that Doe's testimony was sincere and truthful. In July, the court arrived to the same conclusion regarding R.A.C's petition. However, the trial court indicated at the conclusion of the hearings that the Petitioners would be entitled to a legal name change only if they were United States citizens. Since neither of them could provide proof of citizenship, the sole issue left for the trial court was to determine whether under I.C. § 34-28-2-2.5(a)(5), petitioners for a change

of legal name are indeed required to provide such proof. In August 2019, the trial court issued orders denying the petitions based on each petitioner's inability to provide proof of United States citizenship. *In re Name Change of Jane Doe*, 49C01-1903-MI-8545, 49C01-1812-MI-48558.

Following the trial court's denial of their petitions, the Petitioners filed a timely appeal, and on November 22, 2019, the appeals were consolidated. Petitioners then filed a joint appellate brief in which they argued that they are statutorily entitled to a name change regardless of their citizenship status and that the trial court's interpretation of I.C. § 34-28-2-2.5(a)(5) would render the statute unconstitutional on Equal Protection grounds. However, since Court of Appeals successfully resolved the issue on the grounds that the trial court made a statutory interpretation mistake, the court did not reach any conclusion on whether I.C. § 34-28-2-2.5(a)(5) violates the Equal Protection Clause of the 14th Amendment.

I.C. § 34-28-2-2.5(a) provides, in relevant part, that: "If a person petitioning for a change of name under this chapter is at least seventeen (17) years of age, the person's petition must include at least the following information: (1) The person's date of birth. (2) The person's current address. (3) The person's valid Indiana driver's license or identification card and (5) Proof that the person is a United States citizen.

Although Court of Appeals recognized that at first blush, the statute appears to require proof of United States citizenship, Judge Lynch highlighted that such interpretation would be at odds with the common law, under which a natural person has long been permitted to change his or her name, as long as the name change does not interfere with the rights of others and is not done for a fraudulent purpose.

In 1852, such right to change a name was codified, as the Indiana legislature statutorily authorized courts to effect a change of name. However, the Indiana Supreme Court has described the statute as "quite simple", and it held that statutory procedure did not abrogate – but rather supplemented – the common law. *Petition of Hauptly*, 312 N.E.2d 857, 859-60 (Ind. 1974). Furthermore, in that same case, the Supreme Court stated that any member of society who wished to make a name change may take advantage of the Indiana statute, and that the only duty of the trial court is to determine that there was no fraudulent intent involved. The *Hauptly* court stated that if trial court finds no such intent, it would be an abuse of judicial discretion to deny any application for a change of name under I.C. § 34-28-2-2.5(a)(5).

Over forty years later, the Indiana Supreme Court reiterated that "*Hauptly* means that Indiana courts must grant a name change where no evidence of fraud exists" and indicated that "under the common law only a statutorily authorized court order gives legal sanction to a name change." *Leone*, 933 N.E.2d at 1253, 1254. The Leone Court also noted that the paperwork required for a name change should be "light."

Relying on *Hauptly* and *Leone*, the Court of Appeals noticed that the simplicity of obtaining a name change is also reflected in the statute itself, since I.C. § 34-28-2-1, broadly provides that: "Except as provided in section 1.5 of this chapter, the circuit courts, superior courts, and probate courts in Indiana may change the names of natural persons on application by petition." The only exceptions listed in the succeeding sections are if the person "is confined to a department of correction facility" or "is a lifetime sex or violent offender." I.C. § 34-28-2-1.5(b).

Since Doe and R.A.C. do not fall into either of these specific categories, the Court of Appeals agreed with Petitioners that had the legislature intended to prohibit a third class of natural persons from being able to petition for a name change – namely, those who are not United States citizens – such category would have been expressly listed in section 1.5 with other exceptions. Thus, contrary to the plain language of sections 1 and 1.5 of the name change statutes, the trial court's interpretation of section 2.5 created an entirely new category of individuals not entitled to petition for a name change.

This exclusion of non-U.S. citizens, per the trial court's interpretation, is hidden in subsection (a)(5) of I.C. § 34-28-2-2.5, a provision that sets out the list of information that must be included in the petition. As listed above, a piece of information that is required by this section is proof of United States citizenship, among other things. However, the trial court failed to consider the holding of the *Resnover* case, where Court of Appeals held that the list of required documents as set out by the (a)(5) section is not mandatory, but directory. *Resnover*, 979 N.E.2d at 675-76. In *Resnover,* the petitioner Herron did not have a valid Indiana driver's license or identification card, as 'required' by subsection (2)(3) of the statute. In spite of petitioner's inability to provide such document, the court granted his petition. Seizing on the "if applicable" language of I.C. § 34-28-2-2, Herron asserted that this language should be implicitly read in conjunction with I.C. § 34-28-2-2.5, which is a subpart of I.C. § 34-28-2-2. As such, he maintained that a petitioner, who was at least seventeen years of age, should only have to include his driver's license number or identification card number with his petition for name change, if it is applicable. The Court of Appeals bought into his theory.

Thus, it is not surprising that in Doe's and R.A.C's case, the Court of Appeals recognized again that the interrelationship between Indiana Code section 34-28-2-2 and its subsection 2.5, indicates that when filing a petition for name change, the petitioner must "if applicable, include the information required by section 2.5 of this chapter." In other words, the court here interpreted the "if applicable" language to indicate that if the required documentation enumerated in subsection 2.5 cannot be submitted to the court, the petitioner is relieved from the necessity to produce the documents. Construing the statute otherwise would negate the "if applicable" language in I.C. § 34-28-2-2. This means that, for example, a homeless person is not precluded from seeking a name change simply because

they cannot provide a current address as required by subsection (a)(2). Similarly, here, Petitioners were unable to provide proof that they are United States citizens. Thus, since the trial court was able to validate the truthfulness and sincerity behind applicants' petition for change of name, the trial court abused its discretion when it failed to absolve Petitioners from responsibility of providing proof of their US citizenship.

Petitioners were represented by Kathleen Cullum, Indianapolis, Indiana; Megan Stuart, Bloomington, Indiana; Barbara J. Baird, Indianapolis, Indiana; Lynly S. Egyes, Brooklyn, New York; Shawn Meerkamper, Oakland, California; Andres R. Holguin-Flores, Thomas A. Saenz, Los Angeles, California. ■

Filip Cukovic is a law student at New York Law School (class of 2021).

ICE Detainee Wins Injunction/Habeas Relief for COVID-19 Risk

By William J. Rold

Eight individual ICE detainee plaintiffs – one with HIV and anemia – sought preliminary injunctive and *habeas corpus* relief due to risk of COVID-19 at two Arizona detention facilities (La Palma Correctional Center and Eloy Detention Center) operated by CoreCivic under contract with ICE. They sued defendants ranging from the Warden to Chad Wolf, the Acting Secretary of the Department of Homeland Security [DHS]. By the time of a preliminary injunction proceeding, DHS had released seven of them, mooting their claims and leaving no one at Eloy.

U.S. District Judge Steven P. Logan proceeded with a comprehensive decision regarding detainee Noel Mejia Hernandez, who has severe scoliosis that compromises his lung function. In *Urdaneta v. Keeton,* 2020 WL 2319980 (D. Ariz., May 11, 2020), he grants broad injunctive relief, enforced by a writ of *habeas corpus* in three days if there is not compliance.

The opinion opens with an extensive discussion of what is known about COVID-19, its mitigation, and its impact on institutions. This is fully footnoted and is well worth mining for experts. Judge Logan presents DHS and ICE "policies" and compares them with conditions that actually existed at the two detention facilities. Advocates should note that Judge Logan accepted memorialized telephone conversation accounts (over DHS's objection) – since in-person legal visits are suspended during the pandemic – under F.R. Evid. 807. This rarely invoked residual exception to hearsay allows statements with "sufficient guarantees of trustworthiness… considering the totality of circumstances."

Judge Logan found that ICE was not following its own "Guidelines," that "cohorting" (quarantining positive COVID-19 cases or their close contacts together as a group) was the norm, not a last resort; that infected inmates were not treated, and that mitigation was not occurring. Here – unlike at the California Otay Mesa facility in *Rodriguez Alcantara v. Archambreault*, also discussed in this issue of *Law Notes* – positive COVID-19 inmates are "cohorted." In *Rodriguez Alcantara*, "cohorting" isolated detainees who tested negative. It appears ICE policy is "facility specific."

At these institutions, Judge Logan listed the ICE "protocols" in quotation marks, following by the conditions described by the detainees that increased their risk of exposure and inhibited their ability to protect themselves. Staff are not required to wear (and are not provided with) masks or other PPE; detainees cannot social distance in living or common areas; detainees have limited shampoo and soap and no hand sanitizer or disinfectant; and detainees with symptoms are not isolated in practice.

Pursuant to the nationwide preliminary injunction in *Fraihat v. ICE*, 2020 WL 1932570 (C.D. Cal. April 20, 2020), ICE completed its review of all its detainees and conducted an "individualized determination of their custody." ICE determined that Hernandez was a member of the *Fraihat* class, but "concluded that [Petitioner] Hernandez's custody conditions will not change." While only Hernandez' case is not moot, Judge Logan uses "Petitioners" (plural) as he addresses the legal contentions.

DHS first argues that *habeas corpus* is improper for a conditions of confinement case. In *Ziglar v. Abbasi*, 582 U.S. ___, 137 S. Ct. 1843, 1862 (2017), the Supreme Court left this issue "open" for cases posing "large-scale policy decisions concerning the conditions of confinement"; *see also*, *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (Guantanamo case). Judge Logan holds: "Because Petitioners claim that

their continued detention under the present conditions is unconstitutional and that their immediate release is the only effective remedy…, in the absence of clear or binding authority to the contrary, these claims are cognizable under 28 U.S.C. § 2241."

Even if they were not, the conditions can be remedied under the Fifth Amendment's protection against "punishment" and protection against violations of liberty without due process. The court has "broad" powers to enter injunctive relief under *Ziglar,* 137 S.Ct. at 1865; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019).

DHS next argued that the threat of exposure to COVID-19 for ICE detainees was "speculative." "This argument lacks merit," wrote the judge. Petitioners need only show that "the threatened injury is certainly impending" or that there is a "substantial risk that the harm will occur." *List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("a remedy for unsafe conditions need not await a tragic event"). Hernandez remains at risk, and ICE has refused to alter his custody.

The Fifth Amendment extends to all persons, "including aliens." *Zadvydas v. Davis*, 533 U.S. 678, 690, 693 (2001). Government action in violation of the Fifth Amendment amounts to "punishment" if it is also "objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2473 (2015).

Advocates, take note: While the Eighth Amendment prohibition against cruel and unusual punishment has a subjective component – *Farmer v. Brennan,* 511 U.S. 825, 833-4 (1994) – the *Kingsley* court applied an objective test for excessive force purposes to arrestees (who are not convicted and have no Eighth Amendment rights). The Ninth Circuit has applied the *Kingsley* objective test to obviate the need to show subjective intent to punish in detainee cases. *Castro v. County of Los Angeles,* 833 F.3d 1060, 1070 (9th Cir. 2016).

Here, this fine point really seems to make a difference. If detainees need not show subjective intent, the protests of DHS that, in effect, it is "doing its best and has good policies" is of far less import. Advocates can focus more directly on the objective science, as applied. For example, Judge Logan found that "cohorting" is "not a reasonable substitute for social distancing." He noted inherent irrationality: staff and other inmates are not provided PPE, but visitors (who are limited to non-contact) must wear masks. Hernandez could not maintain social distancing and could not adequately disinfect himself or his surroundings, despite ICE "policy" and intent.

The preliminary injunction, enforced by a writ of *habeas corpus* if there is not compliance, bears quoting at some length: (1) Hernandez is to be placed in a "well-ventilated single-occupancy cell without a roommate" – and not in administrative segregation, protective custody, or any form of solitary confinement; (2) Hernandez is to be provided with "reasonably unlimited and free" PPE, including masks, gloves, soap, shampoo, and alcohol-based hand sanitizer; (3) staff and other detainees must wear masks when interacting or sharing common space with Hernandez; (4) Hernandez' meals, medicine, laundry and other basic necessities must be delivered to his cell; (5) Hernandez must be permitted regular showers in isolation; (6) Hernandez must be permitted regular access to common rooms, outdoor recreation, and telephones in areas where he can maintain six feet of social distancing; and (7) Hernandez shall have daily scheduled medical examinations – to include temperature and screening for CDC-COVID-19 symptoms.

It is annoying to report that the compliance and reporting documents (Docket Nos. 57, 58 and 59) are under seal. The public status of this case, as of this writing, is unknown.

The plaintiffs are represented by the ACLU (Phoenix, New York, and Washington); Perkins Coie, LLP (Phoenix); and the Immigrants Rights Project (Tucson). ■

TRO Prompts Release of Majority of Sub-Class of ICE Detainees Vulnerable to COVID-19 at California Detention Facility; Preliminary Injunction Denied

By William J. Rold

U.S. District Judge Dana M. Sabraw issued a bench ruling on April 30, 2020, certifying a sub-class of ICE detainees at Otay Mesa Detention Center (California) and granting a temporary restraining order to screen each member of the sub-class for release and to release those eligible. In *Rodriguez Alcantara v. Archambeault*, 2020 WL 2315777 (S.D. Calif., May 6, 2020), he explained his reasoning. By May 26, 2020, when defendants finished reporting, they had released 92 of 134 class members. Judge Sabraw found that those remaining did not show a likelihood of prevailing on the merits, and he denied a preliminary injunction, without prejudice. Docket No. 77.

Any reporting of epidemiological information in COVID-19 litigation is likely to be obsolete before it is published, but it appears that Otay Mesa had the highest COVID-19 positive population of any ICE facility in the nation at the time of hearing. Now, it is at 38% of capacity. One class member has died, but the defendants convinced Judge Sabraw that the unreleased class members posed a risk to society (mostly by submitting *ex parte* filings that are sealed) and that ICE had taken significant measures to protect them, including suspension of new admissions, protective equipment, and more finely-tuned cohorting available with a reduced population.

When the TRO was heard, ICE was saying there were only eight highly vulnerable detainees at Otay Mesa. After

argument, and Otay Mesa's compliance with the nationwide screening ordered for ICE facilities by F*raihat v. ICE*, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020), the warden increased the number of positives to 69.

The lead plaintiff in this case, Adrian Rodriguez Alcantara, is a 31-year-old HIV-positive detainee from Cuba, who has passed his "credible fear" hearing and is awaiting a merits hearing on his petition for asylum. He has since been released, but at the time of the TRO he sought to represent "all civil immigration detainees incarcerated at the Otay Mesa Detention Center who are age 45 years or older or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19."

In certifying a F.R.C.P. 23(b)(2) sub-class at Otay Mesa, despite the nationwide class certified in Fraihat, Judge Sabraw considered whether certification was precluded by possible overlap with Fraihat. He noted: "It does not appear that Judge Bernal intended, by the general nationwide relief he ordered, to interfere with the ability of facility-specific litigation to proceed," citing *Zepeda Rivas v. Jennings, 2020 WL 2059848, at *4 (N.D. Cal. Apr. 29, 2020).* He certified the class, but set the minimum age at 60 years, to conform to ICE's own "guidelines."

Judge Sabraw found at the time of granting the TRO that a majority of district courts in the Ninth Circuit had found that highly vulnerable ICE detainees were likely to prevail on an argument that the conditions of their confinement would expose them to COVID-19, in violation of their right to due process under the Fifth Amendment. He found "no dispute" that "alternatives are available" to continued confinement of medically vulnerable detainees who do not pose community danger, while still ensuring appearance at deportation hearings. Continued confinement without individual decisions was "excessive in relation to its purpose."

Policies at Otay Mesa were insufficient to reduce the "high risk" for the vulnerable detainees at the time of the TRO. Although the warden submitted corrected numbers after the hearing, he could not inform Judge Sabraw where the positive inmates were being housed. Social distancing was also not feasible. The TRO allowed ICE to set "appropriate conditions for release" so that the balance of equities weights in favor of the TRO.

Judge Sabraw then considered a motion by ICE and the warden to modify or vacate the TRO. He adjusted some language, but the bulk of the TRO remained, and the releases began. This case shows what can be accomplished when a federal judge (here, an appointee of George W. Bush) applies the law to "nudge" recalcitrant institutional defendants.

The class is represented by the ACLU Foundation of San Diego and Imperial Counties. ■

Federal Judge Orders Individualized Care Management Plan for Transgender Inmate's Health Care and Safety

By William J. Rold

In a pair of decisions that consume over 22,000 words, Chief U.S. District Judge Nancy J. Rosenstengel sustains claims of transgender inmate Tay Tay against a motion to dismiss, denies a change of venue, and enters a preliminary injunction for Tay Tay's care and safety. A complete report of the court's handling of this matter – in *Tay Tay v. Dennison*, 2020 U.S. Dist. LEXIS 76921, 2020 WL 2100761 and 2020 U.S. Dist. LEXIS 76911, 2020 WL 2104962 (S.D. Ill., May 1, 2020) – is beyond the scope of *Law Notes*, but advocates facing these issues can mine the decisions for the law and for experts.

Judge Rosenstengel first addresses defendants' motion to dismiss, sustaining six of Tay Tay's eight claims. The Equal Protection claims are two-fold: that Tay Tay is treated unlike cisgender women by confining her to men's prisons, while she is similarly situated to them, citing *Norsworthy v. Beard*, 87 F. Supp. 3d 1103, 1120 (N.D. Cal. 2015); and that defendants "intentionally discriminated against her by subjecting her to constant verbal sexual harassment, insults, threats, and intimidation that male prisoners do not endure due to her transgender status." Tay Tay also states a claim against the Commissioner of the IDOC for failing to provide for her safety in multiple prisons, citing *Gonzalez v. Feinerman*, 664 F. 3d 311, 315 (7th Cir. 2011). These three claims are the basis of the preliminary injunction in the second decision.

Tay Tay also states a two-fold claim under the Americans with Disabilities Act: disparate treatment and failure to accommodate under *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021-22 (7th Cir. 1997). Both claims may

proceed, since Tay Tay alleges denial of equal treatment because of disability and failure to transfer her to a women's prison. Judge Rosenstengel reserves for now the definitional question of whether transgender plaintiffs qualify as persons with a disability under 42 U.S.C. § 12211(b)(1), noting conflicting decisions.

Tay Tay's allegations of violation of her due process rights and of retaliation (which occurred at a prior prison) are mooted by her transfer. Judge Rosenstengel finds that injunctive claims against the Commissioner in his official capacity can proceed under *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989); and *Ex Parte Young*, 209 U.S. 123 (1908). This includes (indirectly) violations of the Prison Rape Elimination Act [PREA], as explained below. Finally, Judge Rosenstengel allows a state claim for intentional infliction of emotional distress to proceed, because state sovereign immunity does not apply in cases of abuse of authority.

Defendants also sought a change of venue to the Central District of Illinois, where more of the prisons where Tay Tay has been incarcerated are found. Judge Rosenstengel denied the motion because no one Illinois district was a superior forum and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"

Judge Rosenstengel held a two-day hearing on Tay Tay's motion for a preliminary injunction: (1) directing her transfer to the women's prison at Logan; and (2) ensuring her protection from sexual abuse and harassment. Tay Tay has been housed only in men's prisons, "despite being a transgender woman"; and she has been "sexually assaulted, harassed, and threatened by other prisoners and IDOC staff at every prison where she has been housed." Her mental health has "severely deteriorated," resulting in suicide attempts.

Tay Tay is not currently taking hormones, but she wants to receive them. Tay Tay says that hormones "decrease her strength" and she feels "it is unsafe to transition in a men's facility." Judge Rosenstengel finds that this is not a refusal of treatment.

The opinion addresses at length Tay Tay's odyssey at various men's prisons: Menard, Pontiac, Western, Centralia, Shawnee, Dixon, and Danville (where she is now). She called three other inmates as witnesses to corroborate her testimony. She also offered the deposition testimony of the warden at Logan concerning the women's facility's ability to accommodate her.

Tay Tay also called two experts: George Brown, a psychiatrist, who has worked with transgender inmates at various federal and state facilities over the last 25 years; and Dan Pacholke, a corrections expert on security, safety, and administration. Brown said that there is "no medical justification or psychiatric justification for Plaintiff's continued placement in a men's prison and the continuation of such placement renders her at risk for serious harm and potential lifelong consequences." He said that "she cannot receive medically necessary care while housed at a male facility because doing so places her at an increased risk for sexual violence." He also dispelled the anti-transgender chestnut that her gender identity is not genuine because she fathered a child earlier in her life, saying this was "not at all uncommon."

Judge Rosenstengel cited numerous PREA "investigations" that failed to result in discipline or other affirmative steps for Tay Tay's protection. Pacholke testified that "nothing appears to have been done to follow-up" – and complaints were closed as "unsubstantiated." Given the multiple incidents, Tay Tay should have been sent "to a place that would be able to accommodate and provide for her safety in a more comprehensive manner." Hence, violations of PREA, not actionable in themselves, are evidence of unconstitutional deliberate indifference.

There were also Facebook posts from officers that were admitted into evidence. These were virulently homophobic and transphobic. Pacholke said that there was no investigation to determine "how high up does it go [in IDOC]." Both experts said that IDOC never seriously considered transferring Tay Tay to a women's facility. Pacholke testified that, even though Tay Tay has functioning male genitalia, she could be housed safety (for herself and other women) at a women's prison.

The defendants called mental health and operational witnesses from their own staff. A summary of their testimony covers several pages of the opinion. They also produced reports from their Transgender Care Review and Policy Committees. They emphasized that transgender women who have been transferred to Logan have had "stressors" and that Tay Tay's situation is even more complicated. IDOC "hopes to develop more progressive policies for transgender offenders," but Judge Rosenstengel was "unaware what, if any, steps towards these goals have been completed."

Having determined that Tay Tay stated claims under the Equal Protection Clause and the Eighth Amendment, Judge Rosenstengel now rules that she is likely to prevail on the merits of these claims with sufficient certainty to justify a preliminary injunction. She is like to show that defendants have: (1) violated the Equal Protection Clause by housing her in a men's facility; (2) violated the Equal Protection Clause by constantly sexually harassing her; and (3) violated the Eighth Amendment by failing to protect her from sexual abuse and harassment.

Even putting aside whether "heightened scrutiny" applied to transgender cases, Tay Tay has shown a sex-based classification under *United States v. Virginia*, 518 U.S. 515, 533 (1996), since IDOC "houses inmates, by default, in the prison of their gender assigned at birth." Defendants have not substantially justified this classification. The court finds that IDOC "never considered whether Plaintiff should be housed in the Women's Division." Tay Tay has likewise shown discrimination by harassment under *Trautvetter v. Quick*, 916 F. 2d 1140, 1149 (7th Cir. 1990); and *Owens v. Ragland*, 313 F. Supp. 2d 939, 944-47 (W.D. Wis. 2004), continuing even after the evidentiary hearing in this case.

Under the duty to protect inmates from harm under *Farmer v. Brennan*,

511 U.S. 825, 833 (1994), Tay Tay has shown that "Defendants have knowledge that Plaintiff faces a substantial risk of serious harm from both other prisoners and staff." In addition to testimony and Congressional findings in PREA, Judge Rosenstengel cites *Doe v. D.C.*, 215 F. Supp. 3d 62, 77 (D.D.C. 2016) (transgender woman face substantial risk); and *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016) (same; data from the Bureau of Justice Statistics). The court discounts a single letter from Tay Tay saying that she felt "safe" at one point and finds that she does not have to wait for another rape at Danville before she can seek preliminary relief.

The court finds sufficient proof of both irreparable injury and no adequate remedy at law. "Plaintiff has already attempted suicide multiple times and has frequently been on crisis watch." The balance of harms tips in Plaintiff's favor. "The Court will only direct Defendants do their job: protect Plaintiff from abusive staff and prisoners and house her appropriately based on an individualized determination of her needs" (emphasis by the court).

Judge Rosenstengel declines to order Tay Tay's immediate transfer to Logan, but she directs IDOC to fashion within three weeks an individualized plan for Tay Tay that "takes into consideration Plaintiff's need for safety, her past history of victimization, her medical and psychiatric history, all PREA standards, and the expert witness opinions set forth in this Order." The plan must "ensure the inmate's health and safety" without "involuntarily" segregating her. See PREA regulations, 28 C.F.R. §§ 115.42-115.43.

The Prison Litigation Reform Act requires that injunctive relief be narrowly tailored to cure the constitutional violation – 42 U.S.C. § 1997e; *Brown v. Plata*, 563 U.S. 493, 530 (2011) – and the preliminary order here does that, citing *Westerfer v. Neal*, 682 F. 3d 679, 681 (7th Cir. 2012). Defendants have failed to show that "voluntary cessation" negatives the need for preliminary relief. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Tay Tay is represented by Uptown People's Law Center, Chicago. ■

Maryland Federal Judge Issues TRO to Reduce Risk of COVID-19 at County Jail

By William J. Rold

Keith Seth, for himself and a class of other Prince George's County (Maryland) DOC inmates, sued the Jail's Director, in her official capacity, as the sole defendant in *Seth v. McDonough*, 2020 U.S. Dist. LEXIS 89694, 2020 WL 2571168 (D. Md., May 21, 2020). Plaintiffs sought injunctive relief against the risk of COVID-19; and, for a sub-class of "high risk" vulnerable detainees, immediate release through a TRO or a writ of *habeas corpus*. U.S. District Judge Paula Xinis granted a TRO to protect high risk detainees and all other detainees in the Jail.

The Jail, in suburban D.C., holds adult men and women and juveniles. It has seventeen housing units of 48 double-occupancy cells, with common areas. It has a medical unit with twelve negative pressure single cells and a "holding" area for up to ten inmates. The Jail sub-contracts with Corizon, Inc., for medical care.

The parties largely agreed as to what the CDC says Jails should do; their dispute mostly "concerns whether the Facility has followed these basic recommendations." Judge Xinis received twenty-seven inmate declarations, as well as affidavits from physicians (who reviewed charts) and public defenders who visited the Jail. She also appointed a F.R. Evid. 706 expert to report to the court, Dr. Carlos Franco-Paredes, Program Director of the Division of Infectious Diseases at the University of Colorado Denver School of Medicine. He toured the Jail over two days, with "unrestricted access," and he interviewed detainees, officers, and staff.

The Jail was "ill-equipped" and "uninformed." Most "disturbing" to Judge Xinis, "each detainee either described himself as having COVID-19 symptoms, being directly exposed to detainees with COVID-19 symptoms, or both."

The Jail had taken steps. It wrote protocols, to "prepare" the staff for training. It eliminated all programming and work details, and it "went to full lockdown," with detainees cycling out of their cells in groups of ten for one hour/day. It initiated temperature checks.

The "cycling" detainees, however, share the same common areas. The temperature checks were not consistently reported, and they showed readings as low as 90 degrees, but never over 99 degrees – which Judge Xinis (in understatement) found both both "curious and alarming." Other "red flags" included no inventory of testing kits. Inmates reported being told: "If you can walk to sick call, you don't have COVID."

Staff did not appreciate the relationship between breathing and other chronic problems and COVID-19 – or how quickly medical conditions could escalate to acute illness, respiratory failure, or risk of death. Adequate PPE was not available for staff or detainees. Detainees "uniformly described" no access to soap, sanitizer, or disinfectant. Compliance with CDC guidelines on hand washing and social distancing was not possible.

Most shocking to this writer, the medical "isolation" cells had "mucus, feces, blood, old food, urine, spit, everything you can name on the walls." The ten-person medical "holding" area had accumulated dust and trash, no cleaning supplies, and bug problems.

Vulnerable inmates, such as HIV patients, were not followed per CDC guidelines, and the Jail had "no plan of any kind for the high-risk detainees." They were left in the general housing mix.

By the time Dr. Franco-Perades concluded his inspection, the Jail had more soap, disinfectant, cleaning supplies, and PPE. Nevertheless, the Jail had a spike in positive cases in April. Judge Xinis found the need for a TRO to protect the detainees.

She found it likely that the class would succeed on the merits of a constitutional

claim of deliberate indifference to their serious medical needs, justifying preliminary injunctive relief. In general, the standard has two elements: serious risk, and reckless response to it, taking what is known to the defendant at the time. Reasonableness of the actions taken must be judged in light of the risk known to the defendant at the time. *Jackson v. Lightsey*, 775 F.3d 170, 179 (4th Cir. 2014); *Brown v. Harris*, 240 F.3d 383, 390 (4th Cir. 2000).

Pre-trial detainees cannot be "punished," since they have not been convicted. Judge Xinis recognizes the circuit debate about whether the second element of deliberate indifference for detainees should be "objective" (as opposed to subjective) since *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2471-72 (2015). She "defers" ruling (except to say she would apply objective standards if pressed), because subjective recklessness is met here.

The Jail's Director filed numerous declarations and clearly subjectively "knew" about the dangers of COVID and her Jail's response. Moreover, the risks were "obvious" within the meaning of *Farmer v. Brennan*, 511 U.S. 825, 844 (1994); *see also, Porter v. Clarke*, 923 F.3d 348, 361 (4th Cir. 2019 (obvious danger); *Makdessi v. Fields*, 789 F.3d 126, 141 (4th Cir. 2015) (risks "expressly noted by prison officials").

The evidence shows a "clear triple-threat": "(1) undertesting, and (2) inadequate treatment and isolation of COVID-19 symptomatic detainees, and (3) no plan for those at high risk of COVID-19 complications" (conjunctive emphasis by the Court). "The Court thus concludes that, on this record, Defendant at a minimum recklessly disregarded the health and safety of the detainees exposed to COVID-19, particularly those at high-risk of complications if infected," wrote the judge.

Judge Xinis rules that the Prison Litigation Reform Act [PLRA] applies to this suit about "conditions" at the Jail. Thus, the relief must be "narrowly tailored" and go "no further than necessary to correct the [constitutional] violation." 18 U.S.C. § 3626(a)(1)(A); *see also Brown v. Plata*, 563 U.S. 493, 511 (2011) (disapproving judicial micro-management). The TRO does not order a release of detainees. A release order under the PLRA must issue from a three-judge court. 18 U.S.C. §§ 3626(a)(3) and 3626(g)(4). In cases involving ICE, a single district judge can order release, since the PLRA does not apply to immigration detainees, who are not considered "prisoners."

This also avoids a knotty problem of whether a release can be ordered under § 1983 – or if it is limited to habeas petitions. It allows Judge Xinis to skirt the issue of her jurisdiction for conditions relief under habeas and 28 U.S.C. § 2241. (See other cases about § 2241 and COVID, this issue of Law Notes.) In this regard, Judge Xinis notes in passing that this case is not about "duration of confinement," however artfully plead, and her jurisdiction to enter a TRO per 42 U.S.C. § 1983 is not in dispute, citing *Lee v. Winston*, 717 F.2d 888, 892 (4th Cir. 1983).

Even though the sub-class seeks "immediate" relief, their submissions on injunctive relief suggest that something short of release may suffice to remedy the constitutional violation. The judge indicated that this should be tried first.

The TRO addresses "high risk detainees" as a sub-class (those age 65 or over and/or who have any of a list of conditions, including "HIV status" or "immunocompromised status"). The sub-class includes HIV patients whose virus is under control. The Jail, within five days, is directed to (1) identify the high risk sub-class and to submit a plan for their monitoring, treatment and single-cell housing; (2) devise a protocol for training staff on COVID-19 and ensuring monitoring of high risk detainees; and (3) develop a plan for testing all detainees. Within fourteen days, the Jail was directed to provide proof of availability of PPE, disinfectant, masks and social distancing for all detainees. The Jail was further directed to report to the court in two-week intervals the status of all testing and results and follow-up for all detainees testing positive.

The class is represented by Cadene Russell Brooks and Edward Henderson Williams, II, WilmerHale; and Katherine Chamblee Ryan, Olevia Boykin, Ryan Downer, and Elizabeth Ann Rossi, Civil Rights Corps, Washington, DC. ■

Federal Court Dismisses Gay Plaintiff's *Pro Se* Complaint Against Former Employer

By Corey L. Gibbs

Amir Hamza brought a *pro se* action against Eileen Yandik, Stephen Yandik, Green Acres Farm, and his former husband, William Yandik, in the U.S. District Court for the Northern District of New York. The Complaint was screened by Magistrate Judge Daniel J. Steward, who recommended dismissal. On May 1, 2020, District Judge Lawrence E. Kahn found four potential claims suggested by Hamza's factual allegations. But Hamza, like many *pro se* litigants, did not know how to plead facts sufficient to state legal claims or to specify the legal theories under which he might be entitled to relief, so Judge Kahn dismissed the Complaint without prejudice, leaving Hamza a chance to revive his case by filing an amended complaint, if he did so within the court's 30-day deadline. *Hamza v. Yandik*, 2020 U.S. Dist. LEXIS 76933; 2020 WL 2092487 (N.D.N.Y. 2020).

Amir Hamza began working at Green Acres Farm, which has been owned and operated by the Yandik family since 1915, in 2013. Around the same time, Hamza began a romantic relationship with his supervisor, William Yandik. By 2015, the supervisor, and employee had married and had a child. Following Green Acres Farm's termination of Hamza's employment, the couple eventually divorced.

Hamza claimed that his responsibilities at the farm ranged from clearing fields to managing the store, but he asserted that he was not compensated for the work that he did. He believed that he would be compensated by becoming a "partial owner" of Green Acres Farm, because the Yandiks promised him that he would. After all, he married into the family that owned the business. Amir Hamza, however, would never become a

partial owner of Green Acres Farm.

Hamza asserted that his former husband and Eileen Yandik coerced him into hiding his sexual orientation from customers. This coercion ended in 2016, when William Yandik publicly revealed his own sexual orientation as part of his congressional campaign. While William and Eileen Yandik coerced Hamza back into the closet, Hamza claims that Stephen Yandik made discriminatory comments regarding Hamza's religion, race, and sexual orientation.

The Yandiks owned a business and had political influence, but they also owned and managed Green Acres Airport. The family's ties to the local area ran deep, and Amir Hamza claimed that Eileen Yandik instructed public employees to follow and monitor his car. He further asserted that the police had photographed him and his son. Hamza also stated that Eileen and William Yandik harmed his reputation by making slanderous statements about him to public officials.

Magistrate Judge Stewart reviewed Hamza's complaint. He recommended that all of Hamza's claims be dismissed, but with leave to amend. Hamza responded by filing an Amended Complaint instead of filing objections, and the Magistrate Judge again recommended that the claims be dismissed, with leave to amend. After the second recommendation for dismissal, Hamza submitted Objections. Then, United States District Judge Lawrence E. Kahn reviewed the Complaint, the Amended Cmplaint, and the Objections.

Judge Kahn began his analysis by determining that the district court lacked jurisdiction based on diversity because Amir Hamza and the defendants are all residents of New York. Then he analyzed whether the District Court had federal question jurisdiction. While finding that federal questions could be raised, he found that Hamza had failed to adequately plead any federal claims upon which relief could be granted.

Judge Kahn also noted that the court would not exercise supplemental jurisdiction over any state law claims in the absence of an adequately pleaded federal claim. He dismissed Hamza's amended complaint without prejudice, and provided leave to further amend the complaint within thirty days. Then, Judge Kahn proceeded to describe four potential federal claims that Hamza might assert in a second amended complaint, which would give the court federal question jurisdiction.

Hamza's amended complaint might assert claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). A plaintiff must have pleaded a violation of the statute; suffered an injury to business or property; and the injury must have been caused by the defendant's violation of the statute. Judge Kahn wrote, "The Court [found] no clear error in the Magistrate Judge's finding that plaintiff fails to state a RICO claim predicated on Defendants' violation of § 1343." However, he dismissed the claim without prejudice and acknowledged that there may be a claim predicated on defendants' violation of 18 U.S.C. § 1589, which prohibits forced labor, if Hamza were to allege the necessary facts.

Judge Kahn turned to a potential claim under 42 U.S.C. § 1983. For this particular type of claim, the complaint must allege that the defendant deprived the plaintiff of a federal right and the defendant acted under color of state law. Judge Kahn wrote, "Plaintiff's failure to allege a violation of a specific federal right [was] fatal to any potential § 1983 claim." However, Hamza later brought up a potential violation of his Fourth Amendment right against unreasonable search and seizure, and Judge Kahn alluded to a violation of procedural due process under the Fourteenth Amendment.

Next, the judge focused on Hamza's claims of employment discrimination on the basis of race, religion, and sexual orientation under Title VII of the Civil Rights Act of 1964. Hamza alleged discrimination by the defendants against other employees, but the District Court refused to allow him to assert discrimination claims on behalf of the other employees. Judge Kahn noted that Hamza's factual allegations might support a claim that he suffered from discrimination based on his sexual orientation. However, Hamza did not exhaust the administrative remedies that are required to bring such a claim.

The final claim Judge Kahn analyzed was Hamza's possible Fair Labor Standards Act (FLSA) claim. In order to assert a claim under FLSA, the plaintiff must allege that there was an employee-employer relationship; the work involved interstate commerce; and the plaintiff was not compensated as required by the statute. Hamza alleged that an employee-employer relationship existed between himself and the defendants. However, he did not allege that the work involved interstate commerce, nor did he give an approximation of the hours that he worked without being paid.

Although Hamza's case is not necessarily over yet, it may be more time sensitive than he realizes, because the Supreme Court will likely decide during June either to affirm or reverse the 2nd Circuit's *Zarda v. Altitude Express* decision, recognizing sexual orientation discrimination claims under Title VII. However, even if he were to lose the opportunity to sue under Title VII, he might be able to proceed with his case in federal court (including state law claims not discussed here) if he can adequately plead a claim under one or more of the other three potential theories of relief discussed by Judge Kahn. ■

Corey L. Gibbs is a law student at New York Law School (class of 2021).

Lesbian Couple's Challenge to South Carolina Foster Care Policy Survives Motion to Dismiss

By Arthur S. Leonard

Lambda Legal's lawsuit on behalf of Eden Rogers and Brandy Welch, a married lesbian couple seeking to be foster parents who were denied services by Miracle Hill Ministries, a state-licensed child placement agency (CPA) that is the largest such agency in South Carolina, has survived its first hurdle, beating back a motion to dismiss the lawsuit by state and federal government defendants. *Rogers v. U.S. Department of Health and Human Services*, 6:19-cv-01567-TMC (D.S.C., May 8, 2020). The opinion is apparently not available on Westlaw or Lexis as of the time of writing, but can be obtained from the Lambda Legal website.

U.S. District Judge Timothy M. Cain, an Obama appointee, ruled that the plaintiffs have standing to challenge the federal government's granting of a "waiver" to South Carolina to allow foster care agencies to discriminate on the basis of religion, and to challenge the state's policy, applying that waiver, allowing licensed agencies to discriminate based on religion and sexual orientation. The judge ruled that the plaintiffs have a potentially valid claim under the First Amendment's Establishment Clause and the 14th Amendment's Equal Protection Clause.

According to the complaint, Rogers and Welch were married in South Carolina in 2015 after a lawsuit struck down the state's ban on same-sex marriage. They already have two children but wanted to be foster parents for another child and applied to Miracle Hill Ministries, which turned them down, stating that based on its Evangelical Christian beliefs, the agency could not provide services to same-sex couples.

Prior to 2018, South Carolina's published policies for licensing child placement agencies provided that such agencies could not discriminate based on religion or sexual orientation. Miracle Hill's policy, made obvious on its website, is to provide services only to Evangelical Christians. When their annual license came up for renewal, the state's Department of Social Services concluded that Miracle Hill's published policy violated the DSS's anti-discrimination requirements, and asked Miracle Hill for clarification. When Miracle Hill confirmed that their application process sought information about the applicants' religious affiliations and beliefs in order to screen out those who would not be provided service under Miracle Hill's policy, DSS determined that Miracle Hill's policy violated both federal and state laws, and issued them only a temporary six-month license, notifying Miracle Hill that it had 30 days to address DSS's concerns and issue a written plan of compliance with the non-discrimination requirements. There is no indication that Miracle Hill ever submitted such a plan as of the date of the court's decision.

Apparently, aware that the Trump Administration was open to granting "waivers" from compliance with federal statutory non-discrimination requirements by child placement agencies that receive federal funding, Governor Henry McMaster went into action to preserve Miracle Hill's license by applying to the U.S. Department of Health & Human Services for such a waiver, which HHS promptly provided. Having secured the waiver, Governor McMaster issued an executive order directing DSS to allow child placement agencies to discriminate based on their religious beliefs. As a result, Miracle Hill never had to provide the kind of plan that DSS sought and was able to get its annual license renewed.

In this lawsuit, Rogers and Welch argue that allowing a state-licensed and funded child placement agency to discriminate based on religious belief (and, derivatively from that, sexual orientation) violates the 1st Amendment's Establishment Clause, using taxpayer money and government policy to advance religion and exclude members of the public from receiving a benefit, and also denies them Equal Protection of the Laws. They are seeking an order from the court requiring the state and federal governments to refrain from authorizing such discrimination against same-sex couples by child placement agencies.

The defendants are the U.S. Department of Health and Human Services, HHS Secretary Alex Azar (in his official capacity), and the specific division within HHS that administers this program, together with its director; Governor Henry McMaster, in his official capacity, and Michael Leach, the Director of South Carolina's Department of Social Services, in his official capacity.

In their motion to dismiss the case, the government defendants argue that they can't be sued because they didn't turn down Rogers and Welch, the agency did. Judge Cain characterized this as an attempt to "pass the buck" to Miracle Hill and easily rejected it, pointing out that the granting of waivers in this case made it possible for Miracle Hill to continue as a licensed agency and funding recipient while maintaining its discriminatory policy.

The judge also rejected the argument that Rogers and Welch had not sustained any personal injury as a result of the actions of HHS or DSS. The state delegates its function of running the foster care system to private agencies such as Miracle Hill, but that does not insulate the state from responsibility for determining that the function is being performed consistent with the state's constitutional and statutory obligations.

Furthermore, the federal program under which South Carolina gets financial assistance to administer foster care has a statutory religious non-discrimination requirement, leaving a big question whether HHS can override that statutory requirement by granting a "waiver" from compliance. The Trump Administration's waiver policy, part of

a broader policy initiative announced by President Trump in an executive order early in his term directing federal agencies to adopt policies giving maximum play to "religious freedom," has attracted several legal challenges as it has been put into effect by various agencies of the federal government.

The stigma of being turned down from a government-regulated and funded program because of one's religion or sexual orientation was enough of an injury, according to Judge Cain, to give these plaintiffs individual standing to challenge the policies under which they suffered discrimination, and to seek injunctive relief against the federal and state officials who have authorized the waivers.

Turning from jurisdictional issues to the merits of the complaint, the judge found that the plaintiffs' factual allegations, which are treated as true for purposes of deciding a motion to dismiss, had set forth sufficient facts to bring both the Establishment Clause and the Equal Protection requirement (of the 5th Amendment regarding the federal government and the 14th Amendment regarding the state government) into play.

Under long-standing Supreme Court precedents, an action undertaken by the government for the purpose or with the primary effect of advancing religion can be challenged under the Establishment Clause. The government is supposed to be neutral in matters of religion. The plaintiffs argue that in this case the federal government and the state government have collaborated affirmatively to allow a private agency that is performing a public function funded by the government for the purpose of facilitating the ability of the private agency to prefer those with its religious beliefs and exclude those with different or no religious beliefs. Under Miracle Hill's published policy, it will only provide services to Protestant Christians whose religious views are in accord with those of the agency. This is a facial exclusion of atheists, Catholics, Jews, Muslims, Christians whose views differ from those held by Evangelicals, and certainly the church to which the plaintiffs belong – Unitarians. Thus, the plaintiffs have stated a plausible claim for relief under the Establishment Clause.

Turning to the Equal Protection claim, Judge Cain decided, surprisingly, that the plaintiffs' claim should be limited to their sexual orientation issue. As to the religious discrimination claim, he decided that the federal and state waivers, on their face, were not amenable to an Equal Protection challenge. The defendants argued that the waivers are "facially neutral with respect to religion and designed to limit South Carolina's interference with religious exercise" and are, therefore, "subject to rational basis review. In particular," the judge explained, "State Defendants argue that their actions treat all religions equally by allowing any religiously-affiliated CPA to apply its own religious criteria to select prospective foster parents. The court agrees with State Defendants."

This is an odd conclusion. While the waiver policy on its face "treats all religions equally," its application by the state in this case is to license an agency that does not treat "all religions equally" in running its program, but rather discriminates against all religions that it finds incompatible with Evangelical Christianity. Furthermore, the waiver itself treats non-religion unequally with religion. This seems to violate the concept of equal protection when applied to the issue of religion. But Judge Cain did not see it that way and granted the motion to dismiss the claim of an equal protection violation on the basis of religion.

Be that as it may, Judge Cain was willing to let the Equal Protection claim proceed on the theory of sexual orientation discrimination. While asserting that neither the Supreme Court nor the 4th Circuit Court of Appeals, whose precedents are binding on the district court in South Carolina, has yet found that sexual orientation discrimination claims should receive heightened or strict scrutiny, which would treat such discrimination as presumptively unconstitutional, placing a burden on the defendants to provide a significant non-discriminatory justification for the challenged waiver policy, nonetheless those courts have recognized that the government needs to have a legitimate policy reason for allowing an agency to carry out governmental functions such as approving prospective foster parents and placing children with them, in a manner that discriminates against people because of their sexual orientation.

The court found that the plaintiffs had adequately pleaded that they were turned down as a same-sex couple because of their sexual orientation. Here the defendants fell down in their pleading, failing to assert in their motion to dismiss any substantive argument about why same-sex couples should be excluded from being foster parents, resting their motion to dismiss instead on the absurd contention that the plaintiffs had failed to allege facts supporting their claim to being victims of sexual orientation discrimination. The court was not willing to accept such sophistry. Consequently, Judge Cain decided that the sexual orientation discrimination claim survives the motion to dismiss. Discovery is the next step. ■

California District Court Allows *Pro Se* Plaintiff to Amend His Complaint Alleging Discrimination Based on Sexual Orientation, Disability, and Retaliation

By David Escoto

After being fired by Bayer U.S. LLC, Leroy Pruitt, a gay man living with HIV, filed charges of discrimination because of disability against his former employer. Pruitt subsequently filed a *pro se* complaint in state court, alleging discrimination because of disability, sexual orientation, and retaliation, which the employer removed to the U.S. District Court for the Northern District of California. On May 18, 2020, District Judge Richard Seeborg granted the employer's motion to dismiss the sexual orientation and retaliation counts, but with leave to file an amended complaint within twenty-one days to cure the pleading deficiencies in the original complaint. *Pruitt v. Bayer U.S. LLC*, 2020 WL 2527028 (N.D. Cal.).

Bayer hired Pruitt in December 2012 as a General Worker at Bayer's Berkeley, California, location. At the commencement of his employment, Pruitt was required to submit to a blood draw. Pruitt informed the nurse administering the blood draw that he lives with HIV. Pruitt worked for Bayer for the next four years in varying positions. However, he alleges that he spent the latter three years of his employment being "discriminated and harassed every workday for being homosexual and living with HIV and AIDS." Pruitt further alleges that he was retaliated against for reporting the alleged incidents of discrimination and harassment to Bayer's Human Resources Department.

Pruitt claims that other employees would heckle him in the cafeteria, refuse to sit with him, and take photographs of him without his consent. On one specific instance, an employee told Pruitt that "no one wants you here" and punched him in the stomach. On a separate occasion, during an interview for a promotion, Pruitt was asked if he was married, had a girlfriend, or had children. When Pruitt answered, they responded that Bayer only wants "those with families working here, not people like you." Pruitt also contends that his locker was broken into, and both his cell phone and car keys were taken. Pruitt believes that Bayer installed GPS tracking software on his phone and installed a GPS device on his car.

While working in the shipping department, he reported that some items were missing from a shipment listed on the invoice, but his supervisors assumed that he had taken them. At times while in the shipping department, Pruitt would ask for help to unload shipments, but all of his coworkers would refuse to help him. Pruitt claims that he reported all of these incidents to management.

Pruitt alleges the harassment continued, and in August 2016, Pruitt reported to management that co-workers attacked him at Bayer's fermentation lab. He further alleged that he was harassed in areas of the parking lot away from the security camera's line of sight. In response to these allegations, Bayer's management told Pruitt they could not substantiate these claims. At a meeting between the employee union leadership and Bayer, Bayer asked that Pruitt see a therapist regarding his reports. Pruitt alleges that the therapist recorded his sessions and relayed the information back to Bayer.

In February 2017, Pruitt was placed on administrative leave. Bayer informed Pruitt that he needed to be evaluated by a mental health expert and cleared to return to work. Pruitt did so, but learned that Bayer told the evaluator about his allegations of discrimination for being HIV positive and that Bayer "felt [Pruitt] did not meet their image of a typical homosexual man." Pruitt reported what he had learned, but the evaluator's report stated that he was not fit to return to work. In response to the evaluator's determination, Pruitt made an appointment with his physician, who determined Pruitt was fit to return to work. Pruitt relayed his personal physician's assessment on May 29, 2017. In June 2017, Bayer terminated Pruitt's employment.

On April 6, 2018, Pruitt concurrently filed a concurrent charge with the Equal Employment Opportunity Commission and California's Department of Fair Employment and Housing (DFEH), alleging that Bayer had discriminated against Pruitt on the basis of disability between February 1, 2017, and April 28, 2017. Despite only checking the box for disability discrimination, the narrative in the charge also discussed instances of discrimination on the basis of sexual orientation as well as allegations of retaliation.

Pruitt then filed a *pro se* complaint with the Alameda County Superior Court. After two demurrers to two amended complaints, Bayer filed a Notice of Removal to federal court. Pruitt filed an amended complaint with the federal court, alleging three causes of actions: (1) discrimination and harassment, (2) harassment, (3) retaliation and stalking. Pruitt's complaint did not specify what statute the first two causes of action arise under, but the court notes the third cause of action seems to be made under Cal. Labor Code §1102.5. Pruitt is requesting almost $2 billion, access to Bayer's cafeteria with a daily allowance of twenty-dollars, and removal of the GPS device in his car. Bayer filed motions to dismiss the latter two causes of action and a motion to strike portions of the complaint.

In order to survive a motion to dismiss, a complaint must contain a short and plain statement of the claim showing the pleader is entitled to relief. Dismissal of a complaint may be based on either lack of a cognizable legal theory or on the absence of sufficient facts alleged to support a cognizable legal theory.

As noted by the court, Pruitt's complaint does not reference what state law the claim is made under. In response to Bayer's motion to dismiss, Pruitt references two state laws that do not relate to Pruitt's claims. The court here assumes that he is intending to reference a different state law, which requires exhaustion of administrative remedies with DFEH before filing a civil action. When determining if a plaintiff's administrative remedies have been exhausted, a court will construe liberally in favor of the plaintiff what was submitted to the DFEH and will construe that in light of what might be uncovered by a reasonable investigation.

The court finds that Pruitt did exhaust his administrative remedies. Despite only checking the disability box on the charge form, a liberally construed reading of the narrative section of the form would lead an investigation to uncover facts regarding discrimination on the basis of sexual orientation and retaliation.

Regardless, the court finds that the second cause of action must be dismissed because it is duplicative or based on discrimination for which he failed to file an administrative claim. If the second cause of action is premised on disability or sexual orientation discrimination, it is repeating the first cause of action. The court does note that the second cause of action makes one reference to racial discrimination. Still, this claim was never brought to DFEH's attention, nor could the facts in the charge form reasonably lead to the discovery of racial discrimination through an investigation.

Regarding the third cause of action, the court assumes that it arises under California law that prohibits retaliation against an employee for reporting what an employee reasonably believes to be a violation of local, state, or federal laws or regulations. Bayer argues that Pruitt failed to identify which law was violated when he was reporting the violation. In Pruitt's response, he does list several statutory provisions which he believes Bayer violated. However, Pruitt's response is not the complaint, which is what is considered at the motion to dismiss stage. Further, the response does not tie Pruitt's reporting to any specific conduct by Bayer. The court also points out that to the extent that the third cause of action is based on "stalking," Pruitt does not point to any statutory provision where he is entitled to collect damages.

On leave to amend, the court allows Pruitt to correct these defects. The court tells Pruitt he must specify under which law the second cause of action arises and point to the statutory provisions where damages are available to him for the third cause of action.

Bayer also filed a motion to strike three parts of Pruitt's complaint. First, Bayer argues that a reference to a defendant from the state case be stricken. The court notes that they are only referenced once on the first page of the complaint and are not a party in the federal case. It is likely a typographical error that will not lead to "litigation of a spurious issue." Second, Bayer argues to have an alleged failure to follow procedures laid out in the Collective Bargaining Agreement (CBA) stricken. However, the court notes that Pruitt's causes of action do not appear to be based on a violation of the CBA, which would be subject to binding arbitration and outside of the court's jurisdiction. The court also stresses that Pruitt may be prejudiced if the references were to be stricken to the extent that a CBA violation is relevant to his other causes of action. Lastly, Bayer argues that references to "defamation of character" and "wrongful termination in violation of public policy" should be stricken because they are separate causes of action and may "confuse the presentation of issues." The court does not agree with this argument and states that "it is evident from the pleadings that no cause of action for either" has been raised.

The court granted both motions to dismiss with leave to amend within twenty-one days but denied the motion to strike.

This case sheds some light on some of the issues surrounding *pro se* litigation. Growing income inequality has made legal services less accessible, increasing the number of litigants appearing before courts without representation. There is a double-edged sword at work here. Procedures have been implemented by courts to allow for easier access to the courts. However, at the same time, litigation may draw out the monetary and emotional cost of litigation, especially where the lack of legal expertise comes into play, similar to Pruitt's defective complaint. Instead of making changes to how *pro se* litigants can access the courts, it may be worth taking a moment to think about what is bringing *pro se* litigants to court in the first place and addressing those issues. ■

David Escoto is a law student at New York Law School (class of 2021).

6th Circuit Rules Lesbian Couple Can Intervene in Religious Agency's Challenge to Michigan's Agreement to Require Agency to Serve Same-Sex Couples

By Arthur S. Leonard

In *Buck v. Gordon*, 959 F.3d 219 (6th Cir., May 11, 2020), a 6th Circuit panel ruled that Chief U.S. District Judge Robert J. Jonker (W.D. Mich.) abused his discretion by refusing to allow a same-sex couple to intervene in a lawsuit by St. Vincent's, a faith-based child placement agency, against the state of Michigan, in which St. Vincent's claims that the state violated the agency's rights under the 1st and 14th Amendments and the Religious Freedom Restoration Act by "directing" the agency to provide services to same-sex couples, as required by a settlement agreement of prior litigation against the state by the couple. Circuit Judge Richard Allen Griffin wrote for the court.

As summarized by Judge Griffin, "The State of Michigan finds itself in a tug-of-war between faith-based child placement agencies and same-sex couples who wish to foster or adopt children. In an earlier round of litigation, appellants Kristy and Dana Dumont claimed the State violated their First and Fourteenth Amendment rights by allowing faith-based child placement agencies to refuse them service based on their sexual orientation. Michigan settled that suit by agreeing to enforce a policy prohibiting discrimination on the basis of sexual orientation against faith-based child placement agencies." (*See Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018), in which a refusal to dismiss the Dumont's lawsuit led to the settlement, under which the state undertook to require all licensed agencies that received state funding not to discriminate against same-sex couples.)

"That settlement spawned this litigation," wrote Griffin. "Plaintiff St. Vincent Catholic Charities claims the State violated its First and Fourteenth Amendment rights by directing it to perform its duties in a manner that violates its sincerely held religious beliefs." The Dumonts, represented by the ACLU, sought to intervene as defendants, but the trial judge said no, finding that the interests of the state and the proposed intervenors were "aligned" and that the intervenors could effectively make their arguments as *amicus curiae*. He dismissed their motion but said they could renew it at a later stage in the litigation. But, as the 6th Circuit points out in this decision, there is not complete alignment, since the state decided not to appeal a preliminary injunction that was issued by the trial court at the instance of St. Vincent's while the case is pending, but the Dumonts, were they a party, could have appealed from the district's court's grant of preliminary relief.

While rejecting the Dumonts' contention that they are entitled to intervene as of right, the 6th Circuit panel found that it was an abuse of discretion for Judge Jonker to have denied them permissive intervention.

"Consider the benefits of resolving the legal question presented by the Dumonts in the same action as St. Vincent's claim," wrote Griffin. "The core dispute between the Dumonts and St. Vincent has spawned at least three actions in federal district court, two appeals to our court, and one motion for certification of a question to the Michigan Supreme Court. No case has yet reached a final judgment on the merits. Absent intervention, these numbers are likely to increase. Strong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible therefore supports permissive intervention."

The court also said that any issues of "undue delay or prejudice to the existing parties" was outweighed by "the benefits of having both sides of this constitutional dispute litigated in a single action, either now or, more importantly, at the time the Dumonts moved to intervene." Griffin pointed out that allowing intervention would not generate more discovery, since there had already been substantial discovery in the Dumont's case, and as to "delay," St. Vincent's itself had persuaded Judge Jonker to stay all action in this case pending the Supreme Court's anticipated decision next term in *Fulton v. City of Philadelphia*, which presents exactly the same central question posed in this case: whether religiously affiliated child placement agencies enjoy a constitutional right to discriminate against same-sex couples – a claimed right that the Trump Administration is fighting to preserve in its amicus brief filed in the *Fulton* case as well as a new regulation that is itself under attack for violating the Establishment Clause.

St. Vincent's argued that the Dumont's interests were adequately served by being allowed to participate as an *amicus*, but Griffen pointed out "two other unique aspects of this case" supporting the decision to reverse the district court's order regarding permissive intervention.

"First, the district court's decision to deny the motion to intervene without prejudice and to allow its renewal is difficult to square with Federal Rule of Civil Procedure 24(b). Timeliness of the motion is one of the primary factors. It makes little sense then to invite the Dumonts to renew their motion for intervention at some unspecified point in the future, when their motion will be less timely, and the case will have progressed to a point where undue delay or prejudice to the existing parties is more probable.

"Second, the district court strayed too far from the legal standard set out in Federal Rule of Civil Procedure 24(b) by treating the dispositive issue as whether the Dumonts' and the State defendants' interests were 'aligned.' To be sure, 'we have recognized that identity of interest is one of several 'relevant criteria'

under Rule 24(b).' (quoting *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007).) But as explained above, their interests are not completely aligned. Moreover, by analyzing the identity of interests, and not the risk of undue delay or prejudice to the existing parties, which plainly favored the Dumonts, the district court applied the wrong standard."

"District courts are afforded wide latitude to determine whether a party with a common question of law or fact may join a particular suit," concluded Griffin. "But sometimes, a court steps outside its 'zone of discretion,' and thus abuses its discretion. This is just such a case. The Dumonts filed a timely motion to intervene which raised a common question of law that was not outweighed by any countervailing factors, warranting permissive intervention. We therefore hold only that based on the unique facts and circumstances of this case, the district court abused its discretion by providing a cursory explanation of its denial of permissive intervention, failing to address the relevant legal factors or the unique circumstances of the case, and denying the motion without prejudice to be revisited in the future. Upon remand, the district court retains broad discretion in setting the precise scope of intervention going forward."

Ann-Elizabeth Ostrager, of Sullivan & Cromwell, LLP (New York) argued in the 6th Circuit for the Dumonts; on the brief were Ann-Elizabeth Ostrager, Garrard R. Beeney, Leila R. Siddiky, Jason W. Schnier, and James G. Mandilk, of Sullivan & Cromwell, Leslie Cooper, of the ACLU Foundation (New York) and Jay Kaplan and Daniel S. Korobkin, ACLU Fund of Michigan. ■

Denied Damages for Mistreatment by Jersey City Police Despite Jury Ruling in His Favor, Transgender Plaintiff Pushes for Preventative Actions and Attorney's Fees

*By Ezra Cukor**

New Jersey's intermediate appellate court issued a *per curiam* opinion affirming a grant of attorney's fees and keeping open the possibility of equitable relief in a transgender man's sevenyear struggle to address mistreatment by the Jersey City Police Department. *Holmes v. Jersey City Police Department,* 2020 WL 2298700 (N.J. App. Div., 2020).

In 2013, the Jersey City Police Department (JCPD) arrested the Plaintiff for shoplifting. He gave the police his legal name and matching driver's license. JCPD fingerprinted him and placed him in a male holding cell but then returned, yelling his culturally female former name and demanding to know "who the hell" that was. Plaintiff responded that was his twin sister, at which point JCPD removed him from the male holding cell, "subjected him to intense questioning and profane and degrading remarks about his gender, anatomy, and other characteristics" after which they placed [him] in a female cell by himself where the humiliating remarks continued until his release."

In 2017, the Appellate Division determined a reasonable transgender person could find JCPD's conduct created a hostile environment, reversed the trial court's grant of summary judgment for JCPD, and remanded the case for trial. A jury determined the JCPD had discriminated against Plaintiff in a place of public accommodation in violation of the New Jersey Law Against Discrimination (NJLAD), but awarded no compensatory damages. Plaintiff moved for additur or in the alternative a new trial on damages, equitable relief in the form of "transgender awareness training" for all JCPD employees, as well as attorney's fees.

Following the Appellate Division's 2017 reversal of summary judgment, the JCPD had issued a policy covering transgender people, which it argued afforded most of the relief Plaintiff sought. The trial court had reviewed the policy *in camera*. It noted the policy did not address training on discrimination against transgender people and told the parties it would take additional briefing on the proper training, but never did. The trial court granted Plaintiff's requests for attorney's fees and training but denied his request for additur or in the alternative a new trial. JCPD appealed. Because Plaintiff appealed neither the jury verdict nor the portions of the post-trial motion that bear on damages, he stands to gain no compensatory damages from the outcome of the case.

The appellate division first reviewed Plaintiff's motion for equitable relief. The opinion flows from the premise that in addition to affording individuals remedies for discrete instances of discrimination, the NJLAD serves a public purpose. In accordance with the LAD's mission to eradicate discrimination, a court has wide discretion to fashion equitable relief and "may, and frequently does, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Following these principles and because the Plaintiff's complaint included a generic prayer for equitable relief, the appellate division concluded that the trial court was within its authority to order equitable relief, but did not decide whether equitable relief was appropriate in this case. Instead it remanded the case to give the parties the opportunity to brief whether training was necessary to prevent future instances of harassment and what the scope of training should be.

The opinion is not clear as to whether JCPD's 2017 transgender policy was a first effort, but one hopes it was

not. NJLAD has expressly prohibited discrimination against transgender people since 2007. Even absent those protections, the JCPD sergeant would still be simply incorrect to assert that Plaintiff was concealing something by initially providing his present name rather than his former name. The degrading manner in which JCPD officers treated Plaintiff upon learning he was transgender is a reminder that anti-discrimination laws are too often not sufficient to prevent unlawful conduct. Instead, to achieve the goal of eradicating discrimination covered entities, especially government, must take aggressive actions to prevent and correct discrimination in their operations.

The court also remanded on the question of attorney's fees. It rejected JCPD's argument that Plaintiff was not a prevailing party. To prevail for purposes of attorney's fees under the LAD, a plaintiff must obtain actual relief on the merits that "materially alters the legal relationship by modifying the defendant's behavior in a way that directly benefits the plaintiff." This is a familiar standard, but not identical to 42 U.S.C. § 1988, the federal fee-shifting statute applicable to civil rights suits. The LAD requires 1) the plaintiff's suit to be "a necessary and important factor" in obtaining the relief and 2) the relief must have a basis in law. This standard requires only that a plaintiff be nominally successful. It also allows fees under the catalyst theory, in contrast with federal law. *Compare State v. Hudson Cty. Register,* 422 N.J. Super. 387, 394 (App. Div. 2011) *with Buckhannon Board v. WV Dep't of Health & Human Resources,* 532 U.S. 598 (2001).

The Appellate d\Division concluded Plaintiff was entitled to relief on two independent grounds. First, he won a jury verdict. Even though the jury awarded no damages, the jury concluded that JCPD violated his rights under the LAD, which "vindicates his accusations" and renders him at least nominally successful. Second, the court concluded JCPD's adoption of a new policy covering treatment of transgender people was "clearly a result of plaintiff's lawsuit" and so he was a catalyst to the JCPD's changes in policy. The court held that attorney's fees were appropriate for work through the time of trial, but not on the motion for equitable relief, which it was remanding. Therefore, it also remanded the issue of attorney's fees, which included fees for the post-trial motions, for further consideration. ■

*The views contained in this article are my own and do not necessarily reflect the positions of my employer.

Ezra Cukor is a staff attorney at the Center for Reproductive Rights.

Discovery Disputes Continue to Generate Rulings in *Karnoski v. Trump*

By Arthur S. Leonard

On May 20 and May 29, Senior U.S. District Judge Marsha J. Pechman issued three more in a seemingly endless series of rulings on discovery issues in *Karnoski v. Trump*, one of the five pending challenges to the Trump Administration's policy restricting military service by transgender people.

The first, 2020 U.S. Dist. LEXIS 89027, 2020 WL 2405442 (W.D. Wash., May 20), concerned a proposed stipulation to resolve a dispute about the Justice Department's failure to answer the plaintiff's request for information about all currently serving members diagnosed with gender dysphoria who are thus subject to the policy now in effect.

Under the so-called Mattis policy, individuals who have transitioned are allowed to serve in the gender with which they identify, and those who had not initiated transition before the policy went into effect can serve only in the gender recorded on their formal military records when they joined the service. On April 15, the court granted plaintiff's request as follows: "Produce to the Court for in camera review a list of the name, rank, and service unit of each transgender service member rendered non-deployable on account of gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability for each service branch since June 30, 2016"; and (2) "provide Plaintiffs with a version of the list, subject to the Parties' protective order, and substituting a unique anonymized identifier in place of each member's name." DOJ kept asking for extensions of time, explaining that "complying with the Court's order would require a review by medical professionals of more than 1,000 service members' medical records and would take approximately nine weeks.

Defendants further explained that the current COVID-19 pandemic resulted in the review taking longer than it would otherwise."

The parties met several times and agreed to the following: "By June 1, 2020, Defendants shall produce to Plaintiffs (1) all "profiles" of Army or Air Force service members related to a condition that reasonably might be associated with gender dysphoria or transition treatment since June 30, 2016; and (2) all "Limited Duty" or "LIMDU" records of Navy service members related to a condition that reasonably might be associated with gender dysphoria or transition treatment since June 30, 2016. Defendants shall be permitted to redact personally identifiable information from these records. However, where multiple "profiles" or "Limited Duty" records relate to the same service member, Defendants will so indicate. However, Defendants having advised that the profiles may not directly indicate whether a condition is related to gender dysphoria or transition related medical care, Plaintiffs and Plaintiff-Intervenor reserve their right to seek additional documents or information once the above documents have been produced and Plaintiffs and Plaintiff-Intervenor have had opportunity to review. Subject to the above reservation of rights, the parties agree that this satisfies Defendants' obligations to respond to Plaintiffs' RFP No. 44 and, with the exception of Coast Guard records, Washington's RFP No. 16, and that Defendants need not provide additional information or documents to satisfy the Court's orders (Dkt. 485, 486, and 507) with respect to those requests at this time."

On May 29, Judge Pechman issued two more rulings on discovery issues. *Karnoski v. Trump*, 2020 WL 2813167 & 2020 WL 2800609.

One of the orders concerns disputes over the extent of questioning that will be allowed when plaintiffs depose officials designated by the Defense Department to testify on the Department's behalf, pursuant to FRCP 30(b)(6), which deals with depositions by organizations. Defendants contended that a significant amount of topic coverage listed by the plaintiffs for these depositions should be cut down by the court, especially in light of a pending mandamus motion that defendants have filed with the 9th Circuit requesting that court to order the district court to further restrict the scope of discovery. Judge Pechman largely rejects the defendants' arguments.

Among other things, the judge points out that the defendants may raise objections to particular questions at the depositions, in which case the witnesses may be directed not to answer, pending the 9th Circuit's ruling on the mandamus motion, but the judge warns that if necessary the witnesses can be recalled to answer questions that are not excluded by the 9th Circuit's ruling, with defendants obligated to cover the plaintiff's costs for the rescheduled depositions.

The other opinion deals with the court's ruling on privilege claims asserted by the defendants regarding documents demanded by plaintiffs. The court, with the assistance of a special master, reviewed *in camera* over 1700 pages of documents as to which defendants raised privilege claims, most of which the court found to be unavailing. The degree to which defendants' conduct is irritating the judge is shown by this comment: "Each of the documents submitted for in camera review, covering PrivWithholding page numbers 1415 through 3180, have now been reviewed. For a sizeable number of these documents, Defendants' privilege assertions were not justified. This blanket assertion of privilege without close analysis or articulated rationale must stop."

Judge Pechman's position has been that plaintiffs are entitled to broad discovery in order to be able to make their case that the government does not have sufficient justification for the current version of the transgender service ban under a "heightened scrutiny" standard, and that most claims of privilege have to fall by the wayside when the central issue in the case is whether the government's adoption of the policy was not objectively justified. As noted in the past, the government continues to assert that internal deliberations that led to the so-called Mattis policy, which was formulated during the fall of 2017 under a mandate from the president to recommend how to implement his total ban on transgender service (which he tweeted in July, 2017 – apparently falsely claiming that he had adopted it after consulting with "my generals") – should be almost entirely shielded from discovery. They are fighting tooth and nail to be able to avoid having to expose the likely fraudulence of the formal report that was submitted to President Trump in February 2018. If discovery stretches out long enough and Trump is defeated for re-election, it is possible that the policy itself would be rescinded in January 2021 after his successor takes office. To the extent the cases seek injunctive relief, they might be mooted at that point. We hesitate to speculate about what happens if Trump is re-elected. ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

U.S. SUPREME COURT – Aimee Stephens, co-respondent in the *Harris Funeral Homes* case, having passed away, the Court granted a motion on May 26 to substitute Donna Stephens, as Trustee of the Aimee A. and Donna Stephens Trust, as co-respondent. The case was argued on October 8, 2019. Aimee Stephens attended the argument, in a wheelchair due to her poor health at that time. The case presents the question whether gender identity discrimination claims may be asserted as sex discrimination claims under Title VII of the Civil Rights Act of 1964. *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107.

U.S. COURT OF APPEALS, 5TH CIRCUIT – The petitioner, a native of Nigeria in 1995, married and had children there, then divorce. He now identifies as a gay man. In December 2009, he was extradited to the United States to face various criminal charges involving defrauding U.S. citizens. The Department of Homeland Security paroled him into the U.S. for the specific purpose of his standing trial. Upon his conviction, he was sentenced to 108 months in prison. While still serving his sentence, he was identified by DHS as being subject to removal, was transferred to DHS custody, and had an interview with an asylum officer, who found his fear of being returned to Nigeria, identified as a gay man, to be credible. As a result of that determination, he was given a hearing before an Immigration Judge, who disagreed with the asylum officer's credibility determination, finding that the petitioner was not entitled to stay in the U.S. as a refugee. The Board of Immigration Appeals agreed with the IJ. Before the IJ and the BIA, the petitioner raised the issue that he had been living in Canada, not Nigeria, and that under the Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Canada-U.S., art. 4, Dec. 5, 2002, T.I.A.S. No. 04-1229, https://2009-2017.state.gov/s/l/38616.htm, he should be removed to Canada, not Nigeria. The IJ and BIA both rejected this argument, pointing out that he had not voluntarily sought to enter the U.S. as an asylum seeker, so they did not consider that the Agreement would cover his situation. The 5th Circuit also rejected his claim, finding jurisdictional and issue preclusion issues getting in the way of a ruling on the merits. It specifically rejected his argument that the IJ and the BIA did not have jurisdiction to interpret the Agreement. Here is a case of legal formalism interfering with common humanity. Sending somebody who has been identified as gay to Nigeria is a set-up for persecution or worse. *Anekwu v. Barr*, 2020 U.S. App. LEXIS 16764 (5th Cir., May 26, 2020).

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Lona v. Barr*, 2020 U.S. App. LEXIS 15595 (May 15, 2020), a 9th Circuit panel rejected a Mexican-born lesbian's attempt to get her deportation reversed. The petitioner was brought to the U.S. infant shortly after her birth and achieved legal resident status in 2009, but she got into trouble with the law in California and was targeted by ICE for deportation. At that point she applied for asylum, withholding of removal, and protection under the Convention against Torture, but without success. Her convictions were deemed "aggravated felonies" making her deportable, and by the time her case was being adjudicated, there was a consensus in federal courts that conditions for gay people in Mexico were not such as to justify treating the individuals as protected refugees in the absence of evidence that they had been subjected personally to persecution. She was removed to Mexico in 2013. Later she learned of some more recent 9th Circuit decisions that could support an argument that her criminal convictions were not serious enough to justify her removal, and she attempted to get the case reopened so that she could come back to the U.S. She was unsuccessful in the administrative process, partly because she waited too long to apply and had previously waived her right to appeal the earlier removal proceeding. The Board of Immigration Appeals exercised its discretion to deny her petition to reopen her case. The 9th Circuit panel found that such an exercise of discretion by the BIA is generally not subject to judicial review, barring exceptional circumstances presenting issues of constitutional or statutory interpretation. The court did not engage in any substantive discussion of her claim that she would be subjected to persecution in Mexico on account of her sexual orientation. There is no hint in the opinion that Lona is contending that she has encountered discrimination on that account since being removed to Mexico. Lona was represented in the 9th Circuit by Ana F. Barhoum, Olmos & Barhoum LLP, San Jose, California; Jennie I. Medina, Mira Law Group A.P.C., San Leandro, California; and Mei F. Chen, Canton, Georgia.

U.S. COURT OF APPEALS, 9TH CIRCUIT – In *Gomez-Ortega v. Barr*, 2020 WL 2316108 (9th Cir., May 7, 2020), the 9th Circuit rejected an appeal by a transgender woman from Guatemala from the Board of Immigration Appeal's affirmance of an Immigration Judge's rejection of her petition for withholding of removal or protection under the Convention against Torture.

CIVIL LITIGATION *notes*

The court does not go into details regarding the petitioner's factual claims, but explains that many significant inconsistencies between what she stated in her pre-hearing interview and her testimony before the IJ were sufficient to uphold the IJ's adverse credibility determination. The court emphasized that she was examined in her own language in the pre-hearing interview and was able to consult with a lawyer prior to her testimony. Furthermore, the court's Memorandum opinion noted that the BIA discussed the various discrepancies noted by the IJ, rejecting the petitioner's argument that the BIA decision was effectively a rubber-stamp which gave no consideration to the arguments she raised on appeal. The petitioner is represented by Nicholas Maugeri, II, Esquire, Telleria, Telleria & Levy, LLP, Los Angeles, CA.

ARIZONA – U.S. Magistrate Judge Leslie A. Bowman issued a Report and Recommendation on May 12 that the district court should grant Russell B. Toomey's motion to certify a class action for his lawsuit challenging the exclusion of "gender reassignment surgery" from coverage under Arizona's health insurance plan for state employees. *Toomey v. State of Arizona*, 2020 WL 2465707, 2020 U.S. Dist. LEXIS 84030 (D. Ariz., May 12, 2020). Toomey, a transgender man, is an associate professor at the University of Arizona, which provides health insurance coverage to its employees through the state plan. Toomey claims that the categorical exclusion of gender reassignment surgery from coverage under the plan, which caused his request for coverage of a total hysterectomy as medically necessary treatment for his transition, violates his rights under Title VII of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the 14th Amendment. With this motion, he seeks to be lead plaintiff for a class of all employees of the Board of Regents (University) and of the state government who might in future seek coverage for such procedures. Defendants claimed that the proposed class was not numerous enough to justify class action certification, but Magistrate Judge Bowman was persuaded by the statistical analysis presented by plaintiffs' counsel, based on a 2016 study by the Williams Institute of UCLA Law School, which calculated that approximately 221 employees of the Board of Regents and 854 employees of the state government overall, could be class members. The defendants took potshots at the methodology of the Williams Institute report, but to no avail, as the judge found particularly refreshing the Report's identification of a margin of error in its calculations. Even if they erred on the high side, the judge considered that the proposed class easily exceeded the numerosity requirement, inasmuch as courts have said that as few as 40 potential class members was enough to certify a class. The court also pointed to judicial economy, since the relief Toomey is seeking would be common to the class, and it made little sense to require individual transgender employees to have to file suit and argue collateral estoppel based on a judgment in favor of Toomey, rather than to just seek enforcement of a decree of class relief. Toomey's small army of advocates includes Heather Ann Macre, James Burr Shields, II, Natalie Brooke Virden, of Aiken Schenk Hawkins & Ricciardi PC, Phoenix (at the time the motion was filed; a google search reveals that the firm closed at the end of March); Kathleen E. Brody, Christine Keeyeh Wee, Martin Lieberman, ACLU of Arizona, Tucson; Molly Patricia Brizgys, of Mitchell Stein Carey Chapman PC, Phoenix; Joshua A. Block, Pro Hac Vice, Leslie Cooper, Pro Hac Vice, of the ACLU LGBT Rights Project, New York; and Matthew Stephen Freimuth, Pro Hac Vice, Wesley R. Powell, Pro Hac Vice, of Wilkie Farr & Gallagher LLP, New York, NY.

COLORADO – The Colorado Supreme Court has granted certiorari in *LaFleur v. Pyfer*, Case No. 18CA2252, reframing the question presented to the Court as follows: "Whether a common law same-sex marriage entered in Colorado may be recognized as predating Colorado's recognition of formal same-sex marriages."

DISTRICT OF COLUMBIA – An HIV-positive D.C. Metro train operator suing his employer under the Family & Medical Leave Act, Section 504 of the Rehabilitation Act, and 42 U.S.C. sec. 1983, suffered dismissal or summary judgment as to all his claims in *Austin v. Washington Metropolitan Area Transit Authority*, 2020 WL 2962609, 2020 U.S. Dist. LEXIS 96542 (D.D.C., May 28, 2020). U.S. District Judge Dabney L. Friedrich found that Metro's refusal to let Arnold Austin resume working after a hospitalization without getting to see his medical records was not a violation of FMLA or Section 504, as the request was job-related, inasmuch as his doctor said that he should not return to work until, among other things, his HIV-related condition, for which he had been declining treatment, be brought under control. Austin accused Metro of refusing to offer him a reasonable accommodation for his disabling medical condition, but, found the court, he had never requested any particular accommodation and the agency had allowed him to apply to find an alternative position that he would be able to perform without safety risks posed by operating a train in his condition. The court found that sovereign immunity barred a Section 1983 action against Metro, and the complaint was unclear whether individual named defendants were sued in their official or individual capacities; either way, the court, concluded, the complaint failed to state a valid claim. Austin, whose case was consolidated with a similar case by another Metro

employee with different medical issues, is represented by John M. Gilman, of McAllister, Detar, Showalter & Walker, Cambridge, MD.

FLORIDA – The 1st District Court of Appeal ruled on May 1 that amendments to the Jacksonville Human Rights Ordinance adopted in 2017 by the city council to add a prohibition of discrimination because of sexual orientation or gender identity were not validly enacted and thus are void in *Parsons v. City of Jacksonville*, 2020 Fla. App. LEXIS 5964, 2020 WL 2091544 (Fla. 1st Dist. Ct. App., May 1, 2020). The trial court had dismissed this lawsuit, finding that the plaintiffs did not have standing to bring it, failing to show an individual injury. The Court of Appeals disagreed, finding that any citizen of the city would have standing based on a Florida statute providing that all proposed legislation had to be set out in full before the council voted on it. The Court of Appeals also concluded that the plaintiffs' allegation that the ordinance would violate their rights to freedom of speech and religion also gave them individual standing. The problem here is that the measure presented to the council listed 28 provisions of the municipal code and stated that sexual orientation and gender identity would be added to them. The proponents of the measure stated that if it passed the city attorney would make the necessary adjustments through the municipal code. The council was not presented with a complete text of the Human Rights Ordinance with these terms incorporated into the text. When these plaintiffs filed their challenge, the city council was presented with a revised version of the entire municipal code which they enacted, providing the basis for an argument that the problem raised by the plaintiffs had been dealt with. The Court of Appeals agreed with the plaintiffs that the problem was not dealt with, citing a prior Florida Supreme Court ruling that had rejected the argument in an earlier case that reenactment of a municipal code would cure this kind of procedural irregularity in the adoption of particular provisions. The city could attempt to appeal this ruling to the Florida Supreme Court or present a new proposal to the city council curing the procedural flaw. Passage of the ordinance was hard-fought over a period of years, raising the question whether a new measure that crossed all the T's and dotted all the I's could be passed now.

ILLINOIS – In *Burch v. Saleh*, 2020 WL 2308222, 2020 U.S. Dist. LEXIS 81330 (S.D. Ill., May 8, 2020), U.S. District Judge Nancy Jo Rosenstengel, screening a *pro se* complaint against several Carbondale, Illinois, police officers by Eddie Burch, ruled that Burch may proceed with his claim that defendants violated his rights by using excessive force in arresting him for allegedly illegally parking his car in a handicap space and improperly recording his HIV-positive status in public documents incident to the arrest. Burch maintains that he was entitled to park in the space because he is legally blind (and has a driver who was with him on the occasion in question). They were attempting to leave the parking spot in front of a convenience store and got into an argument with a woman whose car was blocking theirs. The woman called the police, and when officers arrived, they got into a confrontation with Burch, using injurious force to arrest him (including pepper spraying him in the face after he was handcuffed). They took him to a hospital where an officer overheard a doctor mentioned that Burch was HIV-positive, a fact irrelevant to the arrest that nonetheless the police officer recorded in the incident report of the arrest. Burch subsequently found out about his HIV status being recorded when he complained about the arrest and obtained copies of the police report through a Freedom of Information request. ""The Supreme Court has recognized a constitutional right to information privacy under the Fourteenth Amendment," wrote Judge Rosenstengel, then citing cases holding that this right of privacy "includes the protection of medical information concerning an individual's HIV-status from unjustified disclosures by governmental actors," citing *Tabbert v. Kollmann*, 2020 WL 886184, at *1 (E.D. Wis. Feb. 24, 2020), and *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001) ("It is beyond question that information about one's HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information."). She found that Burch's factual allegations were sufficient to state a 14th Amendment privacy claim. As to the excessive force claim, "Burch alleges Officer Saleh grabbed his arm, slammed him against the car, knocked his glasses off, slammed his foot in the door of the police car, repeatedly punched him in the face while he was handcuffed in the back of the police car, and pepper sprayed Burch's eyes, all for parking in a handicapped parking spot. Accepting Burch's allegations as true, the Court finds that Burch may proceed on his claim for excessive force in violation of the Fourth Amendment against Defendant Saleh." However, the court dismissed 1st Amendment claims focused on the pathetic attempts by the Carbondale Police Department to prevent being sued by giving Burch a repeated run-around when he came to the Department to make his complaints, pointing out that ultimately Burch was able to get his claim filed through the City Manager's office. The court also found Burch was eligible to proceed in forma pauperis in light of his limited financial resources. Certain named defendants who were not directly involved with the arrest or the privacy violation were dismissed from the case.

CIVIL LITIGATION *notes*

INDIANA – Sometimes a lawsuit founders on the failure of the plaintiff to sue an appropriate party. In *Badanish v. Lake County Government*, 2020 U.S. Dist. LEXIS 89084, 2020 WL 2572516 (N.D. Ind., May 20, 2020), Jamie Badanish, who alleges that she was discharged because of her sexual orientation in violation of Title VII, faced a confusing situation in figuring out whom to sue. The first time she was discharged, she filed a claim that resulted in a settlement agreement, which was concluded by the County government. She was rehired into a different position, and ended up working as an assistant director at the Lake County Juvenile Detention Center. When she was subsequently fired, she sued the Detention Center after getting her right to sue letter from the EEOC. In the meantime, the Indiana Department of Workforce Development ruled on her internal grievance, finding she was not discharged for good cause. It seems clear, at least from her factual allegations, that the reason given for her discharge was likely pretextual, but that is not preclusive on her discrimination claim. The Detention Center moved to dismiss, arguing that she wasn't its employee, and that she should be suing the Superior Court and the Chief Judge, who appoints people to the staff of the Detention Center. She moved to add them as defendant parties, and ultimately also added the County Government when the Superior Court and Chief Judge argued that they were not her employers, either. Just for good measure, defendants claimed that since Badanish was technically an appointee, she was exempt from Title VII coverage under a provision exempting government appointees in policy-making positions. Ruling on the defendants' motion to dismiss, Chief District Judge Theresa L. Springmann found that the allegations of the complaint were sufficient to show that any one or all of the named defendants might turn out to be employers of Badanish. Clearly, she was an employee of *somebody*, and it could be left to discovery and a subsequent motion for summary judgment to sort things out. Her allegation in her complaint that she was an employee was enough to get her past the hurdle of a motion to dismiss, since her allegations were deemed to be true for purposes of deciding the motion. In addition, the court considered that the argument that she was exempt could also await a motion for summary judgment, since the complaint on its face did not say enough about her duties for the court to conclude, as a matter of law, that she was in a policy-making position. In addition to a discrimination claim, Badanish is claiming her second discharge was retaliatory for her earlier lawsuit, and that she had been defamed in the course of discharging her. All these things wait to be decided, but delay could be fatal, since the applicability of Title VII depends on what the Supreme Court does this Term in the *Zarda* case. Badanish's Title VII claim is actionable in Indiana because of the 7th Circuit's *Hively* decision (which was not appealed), but a reversal in *Zarda* would implicitly overrule the 7th Circuit precedent. Badanish is represented by Kirk B Johnson of Lake Forest, IL; and local counsel John C Duffey, of Stuart & Branigin LLP, Lafayette, IN.

INDIANA – Jacob Mills claims that his arrest and prosecution for possession of drugs and related offenses was engineered by a prosecutor, two Indiana state troopers and another man as retribution based on their relationship with his ex-husband. Once it came out that witnesses testified falsely for this purpose, the prosecutors on the case (from a different county who were not part of the conspiracy) offered to drop all charges in exchange for Mills' agreement to do some community service. Then Mills filed suit in federal court against the prosecutor, Dustin Houchin, the arresting police officers, Riley Nungester and Brian Beauchamp, and the other man, Mason Mossey, asserting constitutional and tort claims. In *Mills v. Nungester*, 2020 WL 2526022, 2020 U.S. Dist. LEXIS 86680 (S.D. Ind., May 18, 2020), U.S. District Judge Tanya Walton Pratt granted in part and denied in part various defendants' motions to dismiss. Mossey, a civilian who perjured himself in support of the prosecution, did not move to dismiss. Houchin, the prosecutor, was found to be totally immune from suit under the doctrine of prosecutorial immunity, even though he was not the prosecutor in this case. His role in the conspiracy was to offer immunity to Mossey in an unconnected case in exchange for Mossey's perjured testimony against Mills. Mills argued, that this conduct by Houchin was outside the scope of his immunity as a prosecutor, but Judge Pratt didn't buy the argument. Finally, the two troopers were found to be immune from suit in their official capacities, but subject to suit in their individual capacities on Mills' "class of one" equal protection claim, but not on his ordinary equal protection claim, because the court determined that Mills did not allege that they entered into the false arrest and prosecution scheme because Mills is gay. (After all, they are buddies with his ex-husband…) This case definitely falls within soap opera country. Mills is represented by Andrea Lynn Ciobanu of Indianapolis, IN.

INDIANA – A medical assistant at Parkview Health System, Inc., accessed a female patient's file briefly for a minute to enter some information and noticed that the patient was HIV-positive and had reported having about fifty sexual partners. She asked another employee if they knew the patient, and the other employee said she only knew that the patient worked as a "dispatcher." Out of curiosity on her break, the medical assistant looked up the patient on *Facebook* and noticed that the patient

had "liked" a picture of the assistant's then-husband. She immediately texted him, wanting to know if he knew this woman and mentioning the HIV-related information and that the woman worked as a "dispatcher." Her husband's sister was using his phone and saw the text. She contacted Parkview and said that one of their employees was revealing patient information. Parkview investigated and subsequently fired the medical assistant for violating the patient confidentiality agreement she had signed as a condition of employment. The patient learned about what happened and filed suit against Parkview on three legal theories, including respondeat superior liability for the medical assistant's violation of the patient's right of privacy in medical information. The trial judge granted summary judgment to Parkview on this count, finding that Parkview could not be held vicariously liable because the assistant's conduct fell outside the scope of her employment. In this opinion, the court of appeal reversed, holding that the trial court had taken too narrow a view of scope of employment for this purpose, and that there was a question of material fact that could not be resolved on summary judgment. The case is *SoderVick v. Parkview Health System*, 2020 Ind. App. LEXIS 211, 2020 WL 2503923 (Ind. App., May 15, 2020).

MICHIGAN – Fair and Equal, an organization that had been collecting petition signatures to place an initiative on the ballot in November that would amend the state's civil rights law to define "sex" to include "gender, sexual orientation and gender identity." Legislative proposals to extend the law's coverage to protect LGBTQ people has stalled in the legislature. Although the Attorney General's Office has opined that the existing ban on sex discrimination should be interpreted to include sexual orientation and gender identity discrimination, the courts have not yet embraced that interpretation. Fair and Equal was well on its way to get the required signatures, which would have given the legislature the choice of enacting an appropriate measure or placing the initiative on the ballot, but when the governor issued her shut-down order in response the COVID-19 pandemic, signature gathering stalled, as social distancing and shelter-at-home campaigns starkly reduced the ability to obtain signatures, and attempts to gather them on-line were expensive and not particularly successful. Fair and Equal asked the state to consider reducing the number of necessary signatures by the deadline of May 27, but the state did not take action on the request. In the meantime, a potential state office-seekers whose own petition campaign was similarly stalled filed suit and won a ruling from a federal district judge that in light of the pandemic the signature requirements were unconstitutional. Thus encourage, Fair and Equal also filed suit a day before the signature deadline in the state Court of Claims. *Fair and Equal v. Benson*.

NEVADA – Transgender plaintiff Gina Garcia Navarrete sue her former employer under Title VII and Nevada's anti-discrimination act, complaining of a hostile environment and discriminatory treatment by her supervisor. In *Navarette v. Poly-West, Inc.*, 2020 WL 2748303, 2020 U.S. Dist. LEXIS 91935 (D. Nev., May 27, 2020), U.S. District Judge Gloria M. Navarro granted the employer's motion to compel arbitration, based on the defendant's showing that plaintiff had signed arbitration agreements with the company twice, both of which on their face applied to any disputes that might arise involving allegations of employment discrimination, and specifically referencing Title VII. Navarrete argued that the employer had not provided evidence to validate her signature on the proffered documents, but the court rejected this argument, pointing out that Navarrete had not denied the genuineness of her signature, and that the employer had provided several documents with Navarrete's signature matching the signatures on the proffered arbitration agreements.

NEW JERSEY – Spencer Golden and Jenney Sorensen were living together as a couple and formed a corporation to buy a condominium in Fort Lauderdale in June 2014. After they moved in together, Sorensen claims that Golden "became abusive and controlling, physically and sexually assaulting Sorensen multiple times," according to the opinion by U.S. District Judge Susan Davis Wigenton partially granting and partially denying Golden's motion to dismiss, in *Avraham & Sorensen v. Golden & McClatchy*, 2020 WL 2214535, 2020 U.S. Dist. LEXIS 80851 (D.N.J., May 7, 2020) (not officially published). Sorensen developed a "social relationship" with Carly Avraham (an MRI/CT Technologist) in May 2015. Sorensen and Avraham claim that while Avraham was visiting Sorensen in the condo on July 8, 2015, Golden "physically attacked" both, stemming from an earlier argument between Golden and Sorensen, and Sorensen asked Golden to move out of the condo, after which she began a romantic relationship with Avraham (and Golden subsequently listed the condo for sale with Sorensen's permission). As described by Sorensen (and, in an amended complaint, Avraham as co-plaintiff) this led to an extended vendetta against the two women by Golden (and subsequently Sarah McClatchy, who allegedly conspired with Golden get Avraham fired from her New Jersey hospital job and was named as a co-defendant), which included defamation and cyberstalking, after Sorensen and Avraham had moved to New Jersey. Among other things, the complaint alleges that Golden "outed" Avraham as a lesbian to her relatives. A quick read through Judge Wigenton's

statement of the facts suggests this would make a good cable-TV soap opera. Golden and McClatchy's motions to dismiss raise a host of jurisdictional and procedural issues, generating a lengthy opinion by Judge Wigenton methodically analyzing choice of law, jurisdictional and procedural issues and dismissing some of the claims against Golden as time-barred or not within the court's jurisdiction, while others (including the claims against McClatchy) survive. The opinion could be a rich source of material for a final examination essay question in a federal civil litigation class, but are beyond the subject matter scope *Law Notes*. The plaintiffs are represented by David D. Lin, Lewis & Lin LLC, Brooklyn, NY.

NEW MEXICO – In *Valencia v. Board of Regents, University of New Mexico*, 2020 U.S. Dist. LEXIS 85393, 2020 WL 2489775 (D. N.M., May 14, 2020), Senior U.S. District Judge Robert C. Brack granted summary judgment to defendants, who were being sued by a professor who was dismissed after an investigation of student complaints showed, among other things, his discriminatory conduct towards gay students. Complaints against Prof. Christopher Valencia caused the University to launch an investigation, which produced a written report. "The first section of the Report found that Valencia engaged in differential treatment, whereby he showed favorable treatment to students who "presented themselves in a 'feminine way'" and favored students "as a means to develop relationships with them that could lead to sexual activity," wrote Judge Brack. "The next section found that Valencia was "dismissive" of and spent little time with LGBTQ students, as they did not fit his "type." The OEO Report continues with additional examples of Valencia engaging in inappropriate relationships and even acting in a "sexually aggressive" manner toward some students. The Court does not need to offer an opinion on this investigation—only that the termination decision was based on these nondiscriminatory findings. The OEO Report cites various instances of inappropriate behavior that the university claims violate their policies, giving UNM nondiscriminatory grounds to terminate Valencia's employment." The court found that no basis for Valencia's claim that he was not afforded adequate due process in the procedures leading to his termination, or that his national origin or his sex, as such, had anything to do with his discharge. Finding no viable federal claim to ground jurisdiction, the court also declined to rule on various state law claims asserted by Valencia.

NEW YORK – U.S. District Judge Denise Cote granted a motion for summary judgment in favor of NYPD Officer Eric Rodriguez and the City of New York in *Raydo v. City of New York*, 2020 U.S. Dist. LEXIS 89616 (S.D.N.Y., May 20, 2020), in which a transgender plaintiff and a gender nonbinary plaintiff claimed that their civil rights were violated when they were arrested by NYPD officers as alleged participants in a fight outside a lower Manhattan piano bar on November 25, 2015. They also asserted a *Monell* claim against the City "for failing to train, supervise, and discipline NYPD officers in connection with their treatment of transgender detainees. Finally, it includes a New York common law negligent hiring claim against the City," wrote Judge Cote, summarizing the Complaint. The plaintiffs, Daniel Lang and Melanie Raydo, who claimed that they did not instigate the fight and did not give any grounds for being arrested, sought to hold liable Officer Rodriguez, identified on the arrest record as the "arresting officer," and also the City for failing adequately to train NYPD officers about how to deal with transgender individuals. Under automatic discovery rules, the City provided them with copies of relevant arrest records as well as the identity of the two police officers who actually arrested them. It seems that Officer Rodriguez, who was not on the scene when the plaintiffs were arrested, filled out the arrest forms in the station house based on what the arresting officers told him had happened. He was listed as "arresting officer" as part of standard NYPD practice to list the officer who had completed the arrest form. Since it was clear he wasn't there, the court easily granted the motion for summary judgment as to him, finding that it was reasonable for him to rely on what the arresting officers told him, and questioning why the plaintiffs did not amend their complaint to name the two arresting officers as defendants. The City took depositions of both plaintiffs, but the plaintiffs never sought to conduct any additional discovery prior to defendants' filing their motions for summary judgment. On the issue of the City's alleged lack of training, Judge Cote pointed out that the plaintiffs' conclusory allegations provided no factual basis for stating a *Monell* claim (i.e., a claim that the City had an unconstitutional policy of failing to train police officers as alleged by the plaintiffs). They had provided a list of cases to back up their point, but Judge Cote noted that they had failed to explain how the listed cases supported their argument. She had read those that came with publication citations and found none of them on point. Although problems between transgender people and NYPD officers have been reported often enough in the past (including in this newsletter) to suggest that the City has fallen short in this regard, a Complaint needs specific factual allegations to support such a claim in court under federal pleading standards. Having disposed of the federal claims, the court declined to exercise jurisdiction over the state tort claims, but without prejudice to

the plaintiffs refiling them in state court. The plaintiffs are represented by Moira Meltzer-Cohen and Geoffrey St. Andrew Stewart, both of New York City.

NEW YORK – In *Dennis v. City of New York*, 2020 N.Y. Misc. LEXIS 1767; 2020 NY Slip Op 31140(U) (N.Y.Sup. Ct., N.Y. Co., May 1, 2020), an infant fell in Morningside Park Playground and suffered a puncture wound from a hypodermic needle. She was brought to the hospital, where her parents, who brought the hypodermic needle with them, requested that the needle be tested for HIV and other infectious agents and that she be provided with medication to prevent infection. The hospital (Mt. Sinai – St. Luke's) allegedly refused to test the needle claiming that there was no established "protocol" for doing so, and the parents have sued, charging negligence and infliction of emotional distress. There is no indication in the court's opinion that the child has subsequently been diagnosed with an infection that could have been caused by the puncture wound. The defendant moved to dismiss, noting that the complaint was not accompanied by a certificate of merit as required by CPLR §3012-a (a)(1), which provides that in any malpractice action the complaint be accompanied by a certificate by the attorney stating under oath that they have consulted with a health care professional in the relevant field of practice and have a reasonable basis for asserting a malpractice claim. The plaintiff argued that the certificate was not required because they were not suing for malpractice, just ordinary negligence. Justice Laurence L. Love begged to differ, pointing out that the complaint specifically alleges that defendant "failed to follow accepted standards of medical and surgical practice existing at the time and place of treatment, by failing to provide Minor Plaintiff with HIV preventive medication; failing to test the needle to determine any potential exposure to diseases such as HIV and others." Sounds like a malpractice claim.

NEW YORK – In *Torres v. City of New York*, 2020 WL 2520665, 2020 U.S. Dist. LEXIS 86863 (S.D.N.Y., May 18, 2020), lesbian police officer Lisette Torres asserted claims of sexual orientation discrimination and retaliation against the New York City Police Department. She sought to make it a class action, alleging systemic discrimination in the Department. Eventually a settlement was reached before trial, after a protracted period of discovery and on-again, off-again pretrial negotiations. Under the terms of the settlement agreement, Torres was authorized to apply for an award of attorneys fees and costs on behalf of her counsel, Yetta G. Kurland and Erica Tracy Kagan, of Kurland's law firm, and Kathleen Belle Cullum, now of Indiana Legal Services, who worked on the case as an associate in Kurland's firm. Fees were requested in the amount of $759,760.50 and costs in the amount of $18,014.02. U.S. Magistrate Judge Katharine H. Parker awarded fees in the amount of $289,859 and costs in the amount of $17,193.32. The opinion goes into detail about the backgrounds and qualifications of the attorneys and the work they did on the case. Judge Parker found that the hourly rate quoted in the fee request was not supported by the usual factual analysis and used a significantly lower number to calculate the fee.

OKLAHOMA – It's as American as apple pie. If you don't agree with something, file a lawsuit to get it declared unconstitutional. Well, Oklahoman Joe Julian Acree has obviously been stewing for almost five years about the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which ruled that same-sex couples have a constitutional right to marry. So why not do something about? He marched himself down to the federal courthouse in Muskogee, Oklahoma, and filed a declaratory judgment action, demanding that the court declare *Obergefell v. Hodges* to be "wrongly reasoned and decided." No need to have a lawyer represent him. (But we imagine him running from one lawyer to another, suffering insulting rejections at every turn, so maybe he tried to obtain representation but was frustrated.) In *Acree v. U.S. Supreme Court*, 2020 WL 2430942, 2020 U.S. Dist. LEXIS 83791 (E.D. Okla., May 12, 2020), Chief U.S. District Judge Ronald A. White paid Acree the courtesy of providing a legal analysis of his Complaint, explaining why the court had no jurisdiction to rule on the merits of his claim. For one thing, he lacks standing, as he failed to allege that he had been personally harmed by the *Obergefell* decision, so there was no "case or controversy" as that term is construed by the Supreme Court for purposes of Article III of the Constitution. For another thing, Judge White explained, "Courts have routinely dismissed for lack of subject matter jurisdiction claims requesting the lower courts to review decisions of, or compel action by, the Supreme Court and its Justices." Judge White's use of the word "routinely" here provokes some mirth; can it be that federal district judges are frequently presented with *pro se* complaints from disgruntled citizens seeking to get Supreme Court decisions overturned by district courts? Finally, the judge observed, members of the Supreme Court enjoy judicial immunity from personal liability for their decisions, so if that's what Acree was angling for, he was out of luck. Acree's complaint was dismissed with prejudice, the court concluding that "amendment would be futile." Judge White was appointed by President George W. Bush.

PENNSYLVANIA – In *Dobson v. The Milton Hershey School*, 2020 WL

2199001, 2020 U.S. Dist. LEXIS 79935 (M.D. Pa., May 6, 2020), a young man who was dismissed from the Milton Hershey School, a non-profit private academy for indigent youth, unsuccessfully asserted various tort and contract claims alleging he had been subjected to "gay conversion therapy" by his "house parents" prior to his dismissal from the school and is entitled to compensation for emotional distress resulting therefrom. The preceding sentence drastically oversimplifies a complicated trail of litigation over several years, but ultimately many other legal claims fell out of the case, which boiled down to the alleged conversion therapy issue addressed by U.S. District Judge John E. Jones, III, in this opinion granting summary judgment to the school. Plaintiff Adam Dobson was enrolled in the school at age 9. He claims that over the ensuing years he was a model student, but as a teenager he grappled with the realization that he was gay, was caught by his house parents looking at gay pornography on line, and was subjected by them to "gay conversion therapy" in an attempt to make him straight. He describes being required by them to view and read various materials intended to persuade him that he was not gay and that he could overcome his homosexual feelings through prayer and so forth. Dobson pursued this claim without providing any expert testimony, submitting only some materials published by the Williams Center at UCLA Law School in support of his claim that he had been subject to gay conversion therapy and that emotional distress would naturally flow from the experience. The school denied that Dobson had been subjected to conversion therapy, and Judge Jones, crediting the school's testimony, asserted that Dobson's factual allegations did not resemble what the Williams Center literature described as conversion therapy. Furthermore, the court found that the absence of expert testimony to support Dobson's claim that he had been psychologically harmed by the experience was fatal to his claim. In a part of the lawsuit that had fallen away by the time of this motion, Dobson had claimed a violation of the Americans with Disabilities Act as well as a breach of contract by the school. The court's description of the facts in this opinion is heavily redacted, but earlier opinions in the case fill in some of the factual blanks. See 356 F.Supp.3d 428 (M.D. Pa., 2018), an opinion by Chief Judge Christopher Conner, who ruled on earlier motions in this case before he retired and the case was reassigned to Judge Jones. Judge Conner had denied a motion to dismiss the various tort and contract claims relating to the conversion therapy issue. Dobson is represented by Matthew B. Weisberg, Morton, PA.

TENNESSEE – In *Reid v. Herrera Harvesting LLC*, 2020 WL 2473491 (E.D. Tenn., May 13, 2020), Nigel M. Reid, II, *pro se*, filed a charge with the EEOC and subsequently this federal lawsuit, claiming to have been the victim of employment discrimination because of his race and disability, and the victim of a hostile environment because of his sex. The complaint evidently did not identify the statutory basis for his claim, but the court construed it to arise under Title VII and the ADA. Attached to the complaint was a copy of a letter that the employer's lawyer sent to the EEOC refuting some of the claims articulated in Reid's EEOC charge. The employer asserted that Reid was a seasonal worker who was laid off at the same time as the rest of the workers at the end of the harvest season. Evidently, from Judge Harry S. Mattice, Jr.'s opinion, neither the charge nor the complaint makes specific factual allegations sufficient to ground a race or disability discrimination case, but Mr. Reid describes in ungrammatical but graphic detail how he was propositioned for sex and subjected to unwanted touching by his male boss and others. The employer's lawyer withdrew from the case and the employer never substituted new counsel. In fact, it appears that the employer ceased responding to anything having to do with the litigation, even after being notified that it stood to be defaulted in the case. When the employer failed to respond by a date set by the court, Judge Mattice ordered that the employer be held in default and referred the case to a magistrate judge for a report and recommendation about how to proceed. The magistrate recommended dismissing the case in its entirety, commenting regarding the sex discrimination charge that as the employer said Reid was a seasonal worker who was laid off at the end of the season, he had not suffered an adverse employment action upon which to ground a Title VII claim. Reid had a motion for default judgment on file. Taking in consideration the magistrate's report and recommendation, Judge Mattice decided to dismiss the race and disability charges for failing to plead facts upon which such charges could be based, but he disagreed with the magistrate judge about the sex discrimination claim. He pointed out that the letter submitted by the employer's former lawyer was not evidence and should not be deemed to be true for the purpose of deciding the motion to dismiss or to grant a default judgment. As the employer never specifically refuted Reid's allegation concerning the way he was treated, Judge Mattice credited Reid's allegations and found that they stated a claim for hostile environment sexual harassment, as to which he will grant a default judgment, leaving to be determined Reid's damages. Reid claims $20 million, which is clearly absurd in light of the Title VII damages cap. Mattice orders Reid to provide evidence documenting whatever monetary claim he seeks to prove, and if he doesn't submit some admissible evidence on point to that, he will get nominal damages of $1.

CRIMINAL LITIGATION *notes*

WASHINGTON – U.S. District Judge James L. Robart decided to extend discovery on the issue of numerosity of the proposed class in Lambda Legal's challenge to the Social Security Administration's blanket denial of spousal survival benefits under the Social Security Law to same-sex partners who were prevented from marrying due to unconstitutional state bans on same-sex marriage. *Thornton v. Commissioner of Social Security*, 2020 U.S. Dist. LEXIS 87066 (W.D. Wash., May 18, 2020). Rule 23 of the Federal Rules of Civil Procedure require the plaintiff in a proposed class action to show that the number of potential class members is numerous enough to support the argument that joinder of individual co-plaintiffs is not practical and that judicial economy will be served by litigating on the basis of a description of the class, due to the commonality of the legal issues to be decided and relief sought. In this case, Lambda Legal provided evidence that its Help Desk had received at least 22 calls on this subject, and estimated based on that call volume that the total number of such affected surviving partners nationally was undoubtedly a multiple of this number, easily surmounting the rule of thumb under case law of at least 40 potential class members. Magistrate Judge J. Richard Creatura, persuaded by Lambda's showing on this point, recommended certification of a class described as: "All persons nationwide who presented claims for social security survivor's benefits based on the work history of their same-sex partner and who were barred from satisfying the marriage requirements for such benefits because of applicable laws that prohibited same-sex marriage. This class is intended to exclude any putative class members in *Ely v. Saul*, No. 4:18-cv-00557-BPV (D. Ariz.)." Both Lambda Legal and the government filed objections to the report, the government's focusing on numerosity, Lambda's on the limitation of the class to those who had actually applied for benefits and been turned down. Lambda pointed out that the party in possession of the best relevant evidence on numerosity of the class limited to those who had applied and been turned won was surely the Social Security Commission, whose records should yield such information. Judge Robart decided that better evidence on this issue was needed, that Lambda should be authorized to conduct discovery on the issue, and that the Social Security Commission should cooperate in reviewing its records and providing the information in its possession. And, that it should be done quickly, giving Lambda 60 days with a filing deadline of July 24 for additional evidence and July 31 for the government to respond. He also directed that if there were any disputes about discovery, the parties should phone his clerk rather than file a motion to compel or oppose discovery. Counsel for named plaintiff Helen Josephine Thornton are Linda Rae Larson, Nossaman LLP (Seattle), Tara Borelli, Lambda Legal, Atlanta; Karen Loewy, Lambda Legal, New York; Peter C Renn, Lambda Legal, Los Angeles; and Robert D Thornton, Nossaman LLP (OC), Irvine, California. * * * Note: In the separate case of *Ely v. Saul*, whose plaintiffs were excluded from this class, a U.S. Magistrate Judge in Arizona granted class status for a more limited class and ruled on the merits in favor of Lambda Legal's claim, and a U.S. District Judge in Arizona ruled May 29 in *Driggs v. Commissioner*, a *pro se* case, that the surviving partner plaintiff may be entitled to benefits depending upon facts to be determined on remand to the agency. An article about these decisions from Arizona can be found above.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – The Court of Criminal Appeals affirmed Damon Hedgecock's conviction on charges of maiming and obstruction of justice in connection with his physical assault of a man who was trying to form a relationship with him. *United States v. Hedgecock*, 2020 WL 2791765, 2020 CCA LEXIS 179 (U.S. Navy-Marine Corps Court of Criminal Appeals, May 28, 2020). The story is rather pathetic. Hedgecock, married to a woman and a father, was stationed in Hawaii. He formed an online attachment to a man, J.A.W., who lived in the continental U.S., and they agreed to meet to establish a relationship. Hedgecock concealed the fact that he was married at first, but J.A.W. eventually found out and urged him to leave his wife. "Appellant sought to appease J.A.W. by weaving an elaborate lie about his deteriorating relationship with his wife, who at this point was unaware of her husband's homosexual love affair," wrote Chief Judge James Crisfield, summarizing the evidence. "Appellant's lies to J.A.W. included forged police reports and divorce documents, all designed to convince J.A.W. that Appellant and he would soon be able to start an exclusive life together." On this basis, J.A.W. flew to Hawaii, expecting to be staying with Hedgecock but, inconveniently enough, Hedgecock, whose wife knew nothing about his gay interests, was still married and his wife and kids were in residence. He met J.A.W. at the airport and drove him around for a while, finally bringing him to his home, carrying his luggage into the garage, and started making out with J.A.W. in the garage. J.A.W. insisted on going into the house and Hedgecock, panicking, grabbed a hammer and started battering J.A.W. on the head. J.A.W. suffered extensive injuries to his head and hands (from trying to fend off the blows). Hedgecock brought J.A.W. to a hospital, manufacturing a cover story that J.A.W. was assaulted by a homeless man, but when J.A.W. subsequently found out that Hedgecock was not divorcing his wife, he went to

the police, leading to criminal charges against Hedgecock. He was sentenced to 10 years in the brig and a bad conduct discharge. Hedgecock's main defense, evidently found implausible by the military jury, was that he was suffering from some sort of mental disorder that caused him to act out, and he got into a dispute with the court about expert witnesses. The appeals court rejected his argument that the trial judge erred in rulings about the experts, but accepted his argument that the trial court erred in blocking any testimony about Hedgecock having offered to pay J.A.W.'s medical expenses. Yet the court found this was harmless error and affirmed the conviction and sentence. It was noted that Hedgecock was originally charged with attempted murder. Hedgecock's military defense lawyer is Lieutenant Gregory Hargis, JAGC, USN.

CALIFORNIA – Several decades ago, "Ryan Idol" was prominently featured in gay pornography. The actor in question, Marc Anthony Donias, also used the "stage-name" of Ryan Idol when appearing in some gay-themed off-Broadway productions in New York. Donias, who claimed to be bisexual, was in a relationship for some time with a woman named Felicia Huppert and was also in a relationship with a man named Leo Uy, with whom he entered into a Vermont civil union and a California domestic partnership. For some time Donias, Huppert and Uy were all living together in California, but there was a falling out between Donias and Huppert, followed by an incident the led to Donias' conviction by a California jury on charges of battery and corporal injury of Huppert. The conviction was based on Huppert's testimony that Donias attacked her with a toilet seat cover while she was in the bathtub. Donias claimed he was acting in self-defense, but the jury believed Huppert's testimony that Donias had attacked her in a drunken rage. Donias received a substantial sentence, which he is presently serving in the state prison in Vacaville. After his direct appeal of his conviction failed, he began seeking to win release using petitions for habeas corpus. His petitions were unsuccessful in the California courts, so now he is pursuing a federal habeas petition. On May 29, U.S. Magistrate Judge Dennis M. Cota issued a ruling in *Donias v. Fisher*, 2020 WL 2792982, 2020 U.S. Dist. LEXIS 94582 (E.D. Cal.), rejecting the latest habeas petition and denying a certificate of appealability. In addition to claiming that he suffered from ineffective representation by trial and appellate counsel, Donias' main argument is "actual innocence," based on a videotape of Huppert made years after the trial in which she purportedly confesses that aspects of her trial testimony were untrue. Noting that the video is of uncertain provenance, contains statements not made under oath, and does not clearly establish Donias' innocence, the judge points out that it is not unusual for victims of domestic violence to later recant their testimony. There is nothing of LGBT law in this decision, as such, but we report it because there is a detailed recounting of the history and testimony of Donias' trial, which may be of interest to readers familiar with "Ryan Idol" and curious about whatever became of him.

CALIFORNIA – In *People v. Murrietta*, 2020 Cal. App. Unpub. LEXIS 3016, 2020 WL 2505538 (Cal. Ct. App., 6th Dist., May 15, 2020), the Court of Appeal dealt with an argument that the Santa Clara County Superior Court should not have ordered defendant David Murrietta to submit to an HIV test after he entered a no contest plea to three counts of lewd acts on a child under age 14. (Part of the appeal deals with the trial court's refusal to allow Murrietta to withdraw his plea, which the appeals court upheld.) The trial judge purported to find that the statutory prerequisite to ordering an HIV test had been met. The statute requires a probable cause finding that the defendant's conduct, as reflected in the record, could lead a jury to strongly and honestly believe that bodily fluid exchange occurred. At trial, defense counsel objected to the imposition of testing, telling the judge that he had had not heard any testimony that would support such a conclusion, but the judge overruled the objection. Acting Presiding Judge Eugene Premo include in his opinion a lengthy excerpt from the questioning of the teenage girl who is the victim in this case, and concluded that it provided the necessary evidence to support the trial judge's conclusion, even though the witness denied that any penetration of her anus by the defendant's penis had occurred. He wrote: "At a minimum, there was evidence that Murrietta removed child's pants, pulled her legs up, and tried to insert his penis in her anus, touching her in the 'center' and making skin-to-skin contact which felt 'nasty.' The fact that there was no penetration does not preclude a reasonable person from holding a strong and honest belief that semen or other bodily fluid capable of transmitting HIV was transferred as a result of the direct contact between the defendant's penis and the victim's anus when he 'tried to put it in ....'" The court's conclusion seems contrary to what is known about HIV transmission, reflecting uninformed conventional wisdom rather than scientific evidence. Any qualified medical expert about HIV would likely have testified to the contrary, since the quanta of virus necessary to cause an infection is high unlikely to have been transmitted under the circumstances described. But the appellate panel was satisfied that the trial judge did not err in ordering HIV testing. There is no indication in the court's opinion whether Murrietta was represented by counsel on this appeal, or of the identity of his trial counsel.

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FLORIDA – Ian Gokay was tried for possession of illegal drugs and drug paraphernalia and driving with a suspended license. He was convicted and sentenced to 270 days in the county jail and 48 months of probation. Because evidence showed that he had smoked meth with a man he met through a gay dating app, the prosecutor asked that he be required to submit to a test for sexually-transmitted diseases as a condition of probation, and the trial judge agreed with that suggestion. In *Gokay v. State*, 2020 Fla. App. LEXIS 6860 (Fla. 2nd Dist. Ct. App., May 20, 2020), the court of appeal agreed with Gokay's argument that imposing this condition was improper. Writing for court of appeal panel, Judge Nelly Khouzam pointed out that under Florida precedents a probation condition has to be reasonably related to rehabilitation for the crime the defendant committed. "A condition is not reasonably related to rehabilitation if it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality,'" she wrote, quoting from Florida cases. "Here, the STD test mandated by the trial judge . . . fails all three tests of relatedness. First, Gokay was convicted of driving with a suspended license and possession of drugs and paraphernalia, which are not sexual crimes that would be impacted by an STD test. Secondly, it is not a crime *per se* for someone with STDs to engage in sexual activity. Thirdly, it is not reasonable to believe based on this record that an STD test will have any effect on Gokay's future criminality." In this case, the trial court found "that it had discretion to impose the test merely because Gokay had been smoking methamphetamine with someone he met on an LGBTQ dating website." Not so, held the court of appeal. "Here, 'the absence of any evidentiary connection between [Gokay's] prior criminality and [Gokay's sexual activity] would seem to warrant some particularized evidence to show that, now, for whatever reason, his [sexual activity] could fuel future criminal behavior on his part. There was no such evidence to be found in this record.'" Gokay is represented on appeal by Howard L. Dimmig, II, Public Defender, and Carly J. Robbins-Gilbert, Assistant Public Defender, Bartow.

TEXAS – This is one of many decisions supporting the contention that having sexual conversations with teenagers on Grindr is just not a good idea. *Karch v. State*, 2020 Tex. App. LEXIS 3815 (Texas Ct. App., 12th Dist., May 6, 2020). The court of appeals upheld the jury conviction for soliciting deviate sexual intercourse with a minor, and a twenty-year sentence, for Todd Allen Karch, who at the time of the offense represented himself to C.H., the teenage boy, as being 34 years old. C.H., then age 15, disturbed and curious about his sexual feelings and afraid of what would happen if he told his parents about them, downloaded the Grindr app to his phone, giving a false birth date that would satisfy Grindr's requirement that those using the app be at least 18 years old. He included a photo on his Grindr profile. Soon after this, Karch contacted C.H. on Grindr, using the name "Stormtrooper," and initiated conversation leading eventually to the sexual solicitation, but when C.H. learned that Karch was known to him, had been his school bus driver, and was the divorced step-father of some of his classmates, he got spooked and eventually cut off contact and removed Grindr from his phone. C.H. testified that he had revealed his true age to Karch before the solicitation, which explicitly discussed oral and anal sex, was made. The court's decision does not relate how this turned into a criminal prosecution. It appears that the evidence at trial included testimony by C.H. and Karch, as well as statements Karch and C.H. gave to police, and a police witness who testified that Karch's conversational approach with C.H. was classic "grooming" of a minor to submit to sex. The opinion for the court of appeals by Judge James Worthen explained that the standard of review for a jury verdict was whether a rational juror could have found Karch guilty beyond a reasonable doubt based on the evidence in the record, jurors being free to judge credibility and decide what they believed or disbelieved regarding testimony, and that the record in this case was sufficient to survive such review. The court also explained that the conviction was for solicitation, so it did not matter that the two never met, and it was not necessary for the state to prove that Karch intended to meet C.H. and have sex with him. It was enough that he made the solicitation. Karch's counsel on appeal was James W. Volberding.

PRISONER LITIGATION NOTES

By William J. Rold

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

ARIZONA – *Pro se* transgender prisoner Melinda Gabriella Valenzuela has multiple civil rights cases pending in the District of Arizona. In *Valenzuela v. Centurion Health,* 2020 U.S. Dist. LEXIS 76030 (D. Ariz., Apr. 30, 2020), U.S. District Judge Michael T. Liburdi allows her to proceed on one count: delay of ordered surgery for her eye, which was injured in an inmate-on-inmate altercation. Valenzuela says she has been waiting since September of 2018 and that a nurse practitioner wrote that her outside referral was "urgent" last November. She claims constant pain and lost of vision in her left eye. Judge Liburdi orders two defendants (a health administrator and a registered nurse) to respond to the allegations of delay. Judge Liburdi dismisses

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claims against the nurse practitioner, because Valenzuela does not allege the practitioner took part in the delay. He also dismisses claims against the corporate vendor, Centurion, for lack of pattern and practice allegations, citing *Tsao v. Desert Palace, Inc*., 698 F.3d 1128, 1138-39 (9th Cir. 2012). *Tsao* involved a casino's rough handling of a "card counter." Its applicability to private entities performing a state function and the pattern and practice limitations of *Monell v. Dep't of Social Services,* 436 U.S. 658 (1978), to private entities working in prisons is an open question in the Ninth Circuit, which the court left "for another day" in *Edmo v. Corizon,* 935 F.3d 757, 799 (9th Cir. 2019), citing *Oyenik v. Corizon Health Inc*., 696 F. App'x 792, 794 n.1 (9th Cir. 2017) (specifically reserving question of applicability of *Tsao* to corrections). The nurse practitioner and Centurion aside, Judge Librudi does not explain why a physician, a nurse practitioner, and one nurse are dismissed, while a health administrator and another nurse must answer the complaint. The only explanation from the opinion itself is Valenzuela's bare allegation that the latter were "responsible" for the delays – but she says that about all of the defendants.

ARIZONA – *Pro se* transgender inmate Alfred A. Caraffa begins her civil rights case by trying to disqualify U.S. District Judge Michael T. Liburdi because he ruled against her in a number of her other dozen or so cases filed in the District of Arizona. She fails in *Caraffa v. United States,* 2020 WL 2319930 (D. Ariz., May 11, 2020). There is a lengthy annotated discussion of recusal under 28 U.S.C. §§ 144 and 455, for those who genuinely have this issue [caution: such a motion is not for the fainthearted]. Caraffa loses under the authority of *Snegirev v. Sedwick*, 407 F. Supp. 2d 1093, 1095 (D. Alaska 2006), because Judge Liburdi found the allegations were made solely to try to engineer recusal. He also declines to order that this case be combined with any of her other ones. Caraffa raised more than ten causes of action (including discrimination and protection from harm), but her principal defendants were: the United States, the State of Arizona, and the Maricopa County "Sherriff's Office" – none of which could be sued. There is no *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claim against the United States; Arizona has sovereign immunity; and the "Sherriff's Office" is not a suable entity. Caraffa did name two individuals: Deputy C. Garcia and Deputy No. 1300. The claim against Garcia appears to relate to denial of a legal tablet, and this writer could not find the claim against Deputy 1300 in the rambling handwritten complaint. Judge Liburdi rules that the case fails to state any claim, but he grants Caraffa leave to amend.

COLORADO – Jennifer Gary Leaford Codner (a transgender woman) and thirteen other ICE detainees at the GEO Group's Aurora Detention Center petitioned for a writ of *habeas corpus* because of their COVID-19 risks. Chief U.S. District Judge Philip A. Brimmer dismisses the case in *Codner v. Choate,* 2020 U.S. Dist. LEXIS 92768, 2020 WL 2769938 (D. Colo., May 27, 2020). Judge Brimmer begins by noting that nine of the fourteen have been released, and their claims are moot. As to the remainder, who have a variety of conditions that he finds make them more vulnerable to COVID-19 (or not), he describes each petitioner in detail. He also discusses Aurora's efforts to mitigate COVID-19. This may be useful for advocates to parse, but it is not relevant to the legal decision. After all that, Judge Brimmer finds that he cannot grant *habeas* relief under 28 U.S.C. § 2241, because this is really a case about conditions of confinement – even if it is styled as a *habeas*. In fact, it is at the "core" of *habeas* because petitioners seek immediate release. *Preiser v. Rodriguez,* 411 U.S. 475, 500 (1973). As such, the case could not be brought under *habeas* but had to filed as a civil rights action. *Palma-Salazar v. Davis,* 677 F.3d 1031, 1036 (10th Cir. 2012); *Standifer v. Ledezma,* 653 F.3d 1276, 1280 (10th Cir. 2011). As petitioners are federal detainees, they needed to file under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). They did not do so. Hence, Judge Brimmer also denies the request to treat the filing as one for injunctive relief. Petitioners were represented by Arnold & Porter, LLP (Denver); National Immigrants' Project of the National Lawyers' Guild (Washington); and Rocky Mountain Immigrant Advocacy Network (Westminster, CO).

CONNECTICUT – Last month, *LawNotes* published an article-length report on *Morgan v. Semple,* 2020 WL 1974381 (D. Conn., Apr. 24, 2020), reported May 2020 at page 14. The report, titled: "Gay Inmate's Dispute over Television Volume Leads to First, Eighth, and Fourteenth Amendment Claims," covered a comprehensive decision about how a dispute escalated to homophobic abuse of a mentally disabled inmate. Now, on motion by Morgan, U.S. District Judge Victor A. Bolden, modifies the April decision to allow Morgan to proceed against supervisors, finding the earlier opinion (which otherwise remains intact and is fully reprinted) erroneously ruled that the supervisory claims should be dismissed. Judge Victor, on reconsideration, finds that the record on how Morgan's grievances were handled is inadequate to absolve the supervisors of liability as a matter of law. *Morgan v. Semple,* 2020 WL 2198117, 2020 U.S. Dist. LEXIS 79619 (D. Conn., May 6, 2020). Morgan is represented by Updike, Kelly & Spellway, P.C. (Hartford).

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CONNECTICUT – U.S. District Judge Victor A. Bolden allows *pro se* inmate Shabash Lawrence to proceed on a claim of deliberate indifference to his safety in *Lawrence v. Agramonte,* 2020 U.S. Dist. LEXIS 81400, 2020 WL 2307642 (D. Conn., May 8, 2020). A corrections officer (Agramonte) called Lawrence a "rat, snitch, rapist, homosexual, and child molester" in front of other inmates and urged them to harm Lawrence – although he does not plead that an actual attack occurred. Rather, he said that Agramonte was persistent in his verbal abuse and instigation of potential attacks and that the other defendants (a captain, a counselor, and the warden) were repeatedly apprised of Lawrence's potential danger and did nothing. While usually such a case must include an allegation of an actual attack, Judge Bolden permits Lawrence to proceed on these facts. "Although Mr. Lawrence has not alleged that he suffered a physical injury as a result of Correction Officer Agramonte's conduct, he has alleged that he suffered threats from other inmates…. Moreover, [he] has alleged that Correction Officer Agramonte encouraged other inmates to harm him when he returned to general population.… Construing the Complaint most favorably, the Court finds that Mr. Lawrence has alleged facts suggesting that he faced an excessive risk of harm as a result of Correction Officer Agramonte's alleged conduct, citing *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). Finding only an actionable claim under the Eighth Amendment, Judge Bolden dismisses (without prejudice) claims on these facts under the First Amendment and the Equal Protection Clause. He directs the Clerk to send a copy of the Complaint to the Connecticut DOC.

ILLINOIS – *Pro se* inmate, David Mackel, who self-identifies as gay/bisexual, is civilly committed under Illinois' Sexually Violent Persons Act. He brought a civil rights case, claiming that he was denied permission to share a cell with another inmate (Hydron) as LGBT discrimination and in retaliation for suing for the same relief in the past. Senior U.S. District Judge Michael M. Mihm allows Mackel to proceed on his retaliation claim against two defendants, dismissing the balance of his lawsuit, in *Mackel v. Hou*, 2020 U.S. Dist. LEXIS 87662, 2020 WL 2544400 (C.D. Ill., May 19, 2020). Judge Mihm finds no constitutional right to cellmate choice under *Riccardo v. Rausch*, 375 F.3d 521, 525-26 (7th Cir. 2004); see also, *Smego v. Weitl*, 2016 U.S. Dist. LEXIS 197886, 2016 WL 10934368, at *7 (C.D. Ill. Dec. 6, 2016), *aff'd sub nom. Smego v. Jumper*, 707 Fed. App'x 411 (7th Cir. 2017) (same rule for detainees). As to retaliation, most of the defendants have shown a legitimate non-retaliatory reason for the denial of cellmate: "inappropriate conduct" and undue influence of Mackel on Hydron, contrary to clinical goals. Two defendants, however, according to Mackel, admit that they were motivated by retaliation against Mackel for prior lawsuits. Because "otherwise permissible conduct can become impermissible when done for retaliatory reasons" –*Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000) – and out of an "abundance of caution" – Judge Mihm allows these claims to proceed for now. But his finding them "questionable" does not augur well for summary judgment.

ILLINOIS – Transgender male inmate Ana Gabriela Garcia Diaz is an ICE detainee at the Pulaski County Detention Center in Southern Illinois (near the Kentucky border), seeking release due to COVID-19. He has no criminal convictions (and ICE did not argue he is a danger to the public), but he has a history of illegal entries into the United States and is confined pending deportation. United States District Judge Staci M. Yandle denied all relief in *Diaz v. Acuff,* 2020 WL 2769994 (S.D. Ill., May 28, 2020). In April, Judge Yandle denied a preliminary injunction on medical care because the plaintiff failed to show that he was a member of a vulnerable group and he had no major symptoms of infection. In the May decision, Judge Yandle revisited the medical case for release, and she also denied a writ of *habeas corpus*. Diaz was housed in the women's wing at Pulaski. This misgendering worked against his release claims, because there were only five inmates in the women's unit, and none had COVID. They did not mix with cisgender male inmates, and they could observe social distancing. No staff were currently positive. Diaz's only significant medical complaints were allergy-related. Judge Yandle found that ICE presented a convincing case that Diaz was a flight risk, although the submissions are sealed. His immigration case is before the Board of Immigration Appeals, with a June briefing deadline. Judge Yandle found that she had constitutional jurisdiction to issue a writ, citing *Nielsen v. Preap,* 139 S.Ct. 954, 972 (2019); *Jennings v. Rodriguez,* 138 S.Ct. 830, 851-2 (2018); and *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973). But Diaz had not made his case. The dismissal is without prejudice if the Board of Immigration Appeals does not review the case within a "reasonable" time, citing *Zadvdas v. Davis,* 533 U.S. 678, 687, 690 (2001). Six months raises "reasonableness" questions. *Id*. at 682. Diaz is represented by Sidley Austin, LLP (Chicago).

MINNESOTA – Gay inmate Kenneth S. Daywitt, civilly committed to a sex offender program, sues after an attack by a cellmate with known homophobic bias in *Daywitt v. Harpstead,* 2020 U.S. Dist. LEXIS 88849, 2020 WL 2557946 (D. Minn., May 20, 2020). U. S. District Judge Paul A. Magnuson grants in part and denies in part a motion to

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dismiss. Daywitt alleged that some sixteen individual capacity defendants witnessed his cellmate's homophobic slurs and shouts prior to the attack. Daywitt does not specify what each defendant heard and did or failed to do to protect him. Judge Magnuson finds it "implausible" that each defendant witnessed each incident and grants Daywitt leave to amend, specifying "how each individual defendant was involved in the alleged deprivation of his constitutional rights." Daywitt also sued the Commissioner and Executive Director of the Minnesota Sex Offender Program for failing to: (1) protect openly gay or transgender patients from attacks such as the one he experienced; and (2) train staff "to recognize and respond to threats against LGBTQ individuals." These defendants first argued that they could not be sued because of a lack of an underlying constitutional violation by subordinates. Judge Magnuson rejected this defense because Daywitt did not fail to plead a constitutional violation; he failed to show personal involvement and was granted leave to amend. These defendants also alleged absence of a custom or pattern, which Judge Magnuson found better left for the summary judgment stage. The allegations (deemed true at this stage) – that staff were not trained and that they placed the same assailant with a transgender inmate after the assault – sufficiently allege staff's inability "to recognize and respond to threats against LGBTQ individuals." Daywitt also alleged negligence under Minnesota law, which requires a showing of "willful or malicious wrong" where state employees are involved, under *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). This makes it "especially important that a pleading specify what each Defendant did or did not do that meets this high standard." Daywitt's state-law claim is also dismissed without prejudice. Daywitt is represented by the Law Office of Zorislav R. Leyderman, Minneapolis.

MISSOURI – *Pro se* prisoner Dennis Lee Vargas was fired for stealing linens from his laundry job. He claims that defendant prison officials violated his constitutional rights by circulating a memo calling him a thief and that they defamed him by called him a "homosexual." He sought $5 million dollars in damages. In *Vargas v. Minor,* 2020 WL 2323003 (E.D. Mo., May 11, 2020), U.S. District Judge Jean C. Hamilton granted a motion to proceed *in forma pauperis* and then dismissed without service and certified an appeal would not be in good faith. Judge Hamilton found that Vargas' constitutional rights were not denied by removing him from his job because he had no "property" or "liberty" interest in it. *Phillips v. Norris*, 320 F.3d 844, 846 (8th Cir. 2003); *Singleton v. Cecil*, 155 F.3d 983, 987 (8th Cir. 1998). Moreover, calling him a thief or a "homosexual" was at most defamation, which is not actionable under 42 U.S.C. S 1983, because "a defamed person has not been deprived of any right, privilege or immunity secured to him by the Federal Constitution or laws of the United States." *Ellingburg v. Lucas*, 518 F.2d 1196, 1197 (8th Cir. 1975); *see also, Wong v. Minnesota Dep't of Human Servs*., 820 F.3d 922, 934 (8th Cir. 2016) (same; "name calling"); *Martin v. Sargent*, 780 F.2d 1334, 1339 (8th Cir. 1985) (same). Vargas made no allegation that the words placed him in danger, potentially giving rise to an Eighth Amendment violation under *Patterson v. Kelley*, 902 F.3d 845, 851 (8th Cir. 2018).

NEW JERSEY – Anthony Ortiz is an ICE detainee living with HIV, held at the Bergen County (New Jersey) Jail. U.S. District Judge Madeline Cox Arleo granted him a preliminary injunction for his immediate release (on conditions) in *Ortiz v. Decker,* 2020 U.S. Dist. LEXIS 89183, 2020 WL 2571897 (D.N.J., May 20, 2020). While Ortiz styled his action as a petition for a writ of *habeas corpus* under 28 U.S.C. § 2241, Judge Arleo treats it as a motion for a preliminary injunction. Ortiz has not contracted COVID-19, but his papers allege that he is at serious risk of exposure, critical illness, and even death. While conceding that it has authorized release of some medically vulnerable inmates, ICE has declined to release or grant bail to Ortiz because of prior convictions for drug offenses and an outstanding bench warrant. His immigration case has been adjourned to an unspecified date because of COVID-19. Ortiz has symptomatic HIV. He had pneumonia two years ago, and his lungs never recovered, leaving him with persistent pain. More currently, he has had diarrhea and rectal bleeding. He has broken teeth, causing pain and risk of further infection. He is weakened from insomnia. Judge Arleo finds that, although the jail has taken some steps (suspending new ICE admissions and visiting and curtailing out-of-cell time), it has not achieved social distancing or met cleaning and disinfecting standards. Only symptomatic inmates are quarantined; those with known exposure are "cohorted"; those whose status is unknown mix with general population. Defendants say their "protocols" are sufficient. Judge Arleo finds that the general protocols are inadequate to protect highly vulnerable detainees like Ortiz. Evidence from inmates also contradicts stated policies. Ortiz says masks are given only to those with "symptoms." Ortiz has only paper towels for hygiene and no soap or disinfectant to clean himself or his cell. Staff (even food handlers) do not wear PPE, and social distancing is "not possible." Judge Arleo finds that Ortiz' continued confinement is likely to violate his rights under the Fifth Amendment, citing a string of Third Circuit District Court decisions. Judge Arleo grants a preliminary injunction releasing Ortiz to home confinement with electronic bracelet. He may leave home for court appearances and for "essentials" and

to perform work allowed under the Governor's quarantine orders and permitted by ICE or the court. Ortiz is represented by the Law Office of Jason Scott Camilo, New Brunswick, NJ.

NEW YORK – Proceeding *pro se*, transgender inmate Dennis T. Nelson alleged that she was raped in her hospital room at the Behavioral Health Unit at Great Meadow Correctional Facility by Correction Officer Disorbo. U. S. Magistrate Judge Christian F. Hummel recommends that summary judgment be granted to Disorbo in *Nelson v. Jenkins*, 2020 U.S. Dist. LEXIS 88607, 2020 WL 2561026 (N.D.N.Y., May 20, 2020). Judge Hummel first addresses whether Nelson has exhausted her administrative remedies, as required by the Prison Litigation Reform Act [PLRA]. New York has dual complaint procedures available to inmates where a sexual act or harassment is concerned: (1) three-step formal grievance under 7 N.Y.C.R.R. § 701.5; or (2) report of sexual acts or harassment under 7 N.Y.C.R.R. § 701.3(i). Reports under the latter can be made by the victim to agency staff – including Central Office and Inspector General – or to the agency by third parties on the victim's behalf. The report can be made at any time, and the PLRA is "deemed exhausted" upon filing the report. *Sheffer v. Fleury*, 2019 U.S. Dist. LEXIS 158842, 2019 WL 4463672, at *4 (N.D.N.Y. Sept. 18, 2019). Here, defendants argued that Nelson did not make a PREA complaint or report to the agency. Although Nelson's allegation that she reported the rape to several security staff is contested, she also alleged that she reported the rape to several medical staff, including a nurse and a physician. There are no statements from the nurse or physician in the summary judgment record, which also does not contain any medical records. Thus, defendants did not meet their burden to show failure to exhaust. *See Abreu v. Miller*, 2018 U.S. Dist. LEXIS 139930, 2018 WL 5660409, at *5 (N.D.N.Y. Aug. 16, 2018) (sick call slips "could serve as documentation confirming that plaintiff reported the sexual assault"); *Allen v. Graham*, 2017 U.S. Dist. LEXIS 159177, 2017 WL 9511168, at *7 (N.D.N.Y. Sept. 26, 2017) (same; treatment notes raise "question of fact with regard to exhaustion"). Thus, summary judgment is denied on PLRA exhaustion. Disorbo also denied even being at the facility on the date the rape occurred. Here, there is considerable documentation by defendants and no corroboration of Disorbo's identification by Nelson. Judge Hummel reviews the record, despite Nelson's failure properly to oppose summary judgment on personal involvement in accordance with Local Rule 7.1 (counter statements of material facts), because Nelson is *pro se*. Nevertheless, he finds that Disorbo is entitled to summary judgment under *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005), because "plaintiff's uncorroborated version of events was so improbable that no reasonable person would undertake the suspension of disbelief necessary to give credit to the allegations" in the complaint. Jeffries applies where: (1) the plaintiff relies "almost exclusively" on her own testimony; and (2) the testimony is internally inconsistent or contradictory and is also contradicted by the defendants' submissions. See also, *Blake v. Race*, 487 F. Supp. 2d 187, 202 (E.D.N.Y. 2007) ("no reasonable juror could find for the plaintiff"). Judge Hummel quotes at length from Nelson's deposition testimony about when the rape occurred, how long the assault lasted, whether (and how long) she knew Disorbo before the rape, and when (if ever) she encountered him afterwards. (For example, Nelson testified she did not see Disorbo after the incident, but she filed grievances against him for an event that occurred after the rape.) The testimony, as recounted, is replete with contradictions; and Nelson failed to counter payroll records, time sheets, etc., showing Disorbo was not at the prison on the night of the rape. Judge Hummel recommends that summary judgment be granted against Nelson on the issue of personal involvement.

NEW YORK – *Pro se* federal transgender prisoner July Justine Shelby tested positive for COVID-19 and was placed in isolation. Her symptoms substantially improved. In *Shelby v. Petrucci,* 2020 U.S. Dist. LEXIS 87976 (S.D.N.Y., May 18, 2020), U.S.Magistrate Judge Sarah Netburn recommended that Shelby's petition for release through *habeas corpus* be denied. Medical records showed that Shelby contracted the virus and "recovered" and was not, therefore, being held in custody on her 180-month sentence in violation of the Constitution insofar as the risks of and treatment for COVID-19 are concerned. In reaching this conclusion, Judge Netburn finds that Shelby properly proceeded under 28 U.S.C. § 2241(c)(3) (habeas) and that she need not have exhausted administrative remedies before commencing her case. The rare application of habeas to prisoners with COVID-19 claims is addressed in a full article in this issue of *Law Notes*. Respectfully, the cases on which Judge Netburn relies do not support the application of § 2241 or the exhaustion ruling here. In *Adams v. United States*, 372 F.3d 132, 135 (2d Cir. 2004), the court denied resort to § 2241, where the prisoner should have challenged the jurisdiction of the trial court under § 2255. *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001), was a petition to restore good time, not a conditions of confinement case. And *Washington v. Barr*, 925 F.3d 109, 119 (2d Cir. 2019), was a civil action to remove medical marijuana from classification as a Schedule I drug, not a habeas decision – and exhaustion was ordered, while the court kept jurisdiction. Judge Netburn considers and recommends denial of other avenues for Shelby's release. The

continuing thread is that her medical proof on COVID-19 is inadequate. Judge Netburn recommends that the court allow Shelby's claims about inadequate transgender treatment to continue.

NEW YORK – Adrienne Roberts, convicted of sex trafficking and sentenced earlier this year to 48 months, seeks a court order for her compassionate release because of COVID-19 and her diagnosis of HIV. U. S. District Judge Jesse M. Furman denies relief in *United States v. Roberts,* 2020 U.S. Dist. LEXIS 90372 (S.D.N.Y., May 22, 2020). Having exhausted administrative remedies, Roberts moved for release under 18 U.S.C. § 3582(c)(1)(A). Judge Furman wrote: "The Court may not order that Ms. Roberts be temporarily released…; only the Bureau of Prisons can do that, and it has denied Ms. Roberts that form of relief…. Instead, the Court's sole choice is between leaving Ms. Roberts's sentence as is and reducing it to a sentence of time served…. [T]he Court concludes that reducing Ms. Roberts's sentence that drastically would disserve the factors that justified her forty-eight-month sentence only months ago…." He notes that CDC Guidelines speak of patients with HIV as at greater risk when their disease is "not well-controlled." Roberts argued that a "detectable" HIV viral presence was enough; Judge Furman found otherwise. Compassionate release – here, essentially converting her 48-month sentence to time served – "is simply too blunt an instrument for the task at hand."

NEVADA – *Pro se* gay inmate Anthony Festa filed a grievance under the Prison Rape Elimination Act [PREA] after a correctional sergeant (Gordon) referred to him as a "faggot" and called the attention of other inmates to the rainbow flag in his cell and a picture on the wall of his naked boyfriend. Gordon allegedly retaliated for the grievance with more verbal abuse, and the situation deteriorated. Eventually, Festa, while in transport, was refused use of the restroom by an officer friend of Gordon (Lavell), after which Festa soiled himself. Festa has since been released from prison, relocating to Utah. U.S. District Judge Andrew P. Gordon (same last name as defendant Gordon) found Festa's injunctive claims to be mooted by his release in *Festa v. Sandoval,* 2020 U.S. Dist. LEXIS 77719 (D. Nev., May 4, 2020). Any claim that he could in the future return to prison for violation of parole and be returned to the same custody arrangement with these defendants is "speculative." *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012); *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985). In moving to dismiss damages claims, Lavell argued that forcing Festa to defecate in a bag in front of other prisoners was "only a minor and temporary deprivation." Festa claims that Lavell's action was retaliatory. Most of the opinion parses this issue. It seems it turns on how long toilet access is denied, how "accidents" are handled, and whether inmates are exposed to each other's "waste." There is a Ninth Circuit class action with lengthy discussion where a riot investigation forced inmates to remain in their soiled clothes for four days, contaminating one another. *Johnson v. Lewis,* 217 F.3d 726, 731-3 (9th Cir. 2000) [string cite, including scatological circuit survey, omitted.] It appears here that, at most, Festa was denied a toilet for up to ninety minutes, which no case had found unconstitutional by itself – so Lavell is entitled to qualified immunity. Judge Gordon also addresses a "class of one" Equal Protection claim, finding it not actionable, because there was a rational basis: someone had to go last. "Lavell could have reasonably believed that requiring Festa to wait to use the restroom was lawful given that he was supervising multiple inmates who were requesting to use the restroom." Accepting Festa's "class of one" theory would allow suit by whomever was the last one permitted to use the john. So, Lavell is also entitled to qualified immunity on this point, even though retaliation is supposed to apply an objective test: would the actions taken deter a reasonable person from exercising First Amendment rights? Judge Gordon allows Festa to try to amend against Lavell on the retaliation claim, if the time in soiled clothes passes the constitutional threshold and can overcome qualified immunity.

OHIO – Criminal defendant Brandon L. Caudle sought compassionate release from the balance of his sentence for mail fraud due to COVID-19 in *United States v. Caudle*, 2020 U.S. Dist. LEXIS 85602 (N.D. Ohio, May 15, 2020). U.S. District Judge Sara Lioi denied his motion without prejudice. The conviction and 41-month sentence stemmed from fraudulent schemes he operated as a prisoner on another offense. He was convicted of falsely clearing other prisoners (and himself) of accumulated debts, obtaining restaurant gift cards while posing as relatives who got poor service, and defrauding the United States Postal Service. He has an anticipated release date of June 2020. Caudle has HIV and respiratory issues, and he awaits testing for Chronic Obstructive Pulmonary Disease. 18 U.S.C. § 3582 allows a court to re-sentence a convicted offender under limited circumstances to "reduce [an inmate's] term of imprisonment [and…] impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." Since 2018 (upon enactment of the First Step Act), a federal prisoner can make such a petition: (1) after exhausting administrative appeals on compassionate release within the Federal Bureau of Prisons; or (2) after thirty days have elapsed after the

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receipt of such a request by the warden. There is a split on "whether a district court may waive the exhaustion and 30-day requirement due to the exigent circumstances presented by COVID-19." *Compare United States v. Zukerman*, 2020 U.S. Dist. LEXIS 59588, 2020 WL 1659880, at *3 (S.D.N.Y. Apr. 3, 2020) (waiving exhaustion requirement in light of COVID-19); *United States v. Colvin*, 2020 U.S. Dist. LEXIS 57962, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) (same); with *United States v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020) (finding exhaustion requirement in § 3582 mandatory); *United States v. Alam*, 2020 U.S. Dist. LEXIS 61588, 2020 WL 1703881, at *2 (E.D. Mich. Apr. 8, 2020) (same; collecting cases); *see also, United States v. Johnson*, 2020 U.S. Dist. LEXIS 59206, 2020 WL 1663360, at *2 (D. Md. Apr. 3, 2020) (exhaustion requirements are jurisdictional). Judge Loio adopts the holdings in *Raia* and *Johnson* and denies re-sentencing. She then urges the Federal Bureau of Prisons to consider an early release before the impending June release date. Good luck. Seems like "high profile" offenders like Paul Manafort and Michael Cohen have fared better on such applications.

OREGON – Transgender inmates in Oregon should use caution if they give personal items to another inmate as a parting gift when they are released: the recipient could be disciplined for contraband and barter. This happened to transgender inmate Shane Ryan Womack in *Womack v. Kelly,* 2020 WL 2768687, 2020 U.S. Dist. LEXIS 93373 (D. Ore., May 28, 2020) – and U.S. Magistrate Judge Jolie A. Russo dismissed her lawsuit challenging the discipline. Womack had an otherwise spotless prison record until she shattered security by possessing a "pink comb," a "white make-up brush," a "v-neck t-shirt," a brassiere, and a pair of blue and green panties "with a cat and the word Thursday." She was given seven days segregation and ten days loss of privileges, upon a finding that such "gifts" are "most likely provided to the individual as items of barter or trade." Womack's arguments – that a departing trans inmate collected the items while working in the laundry and that she could obtain similar items at the male prison under new commissary rules allowing feminizing purchases – were rejected. Judge Russo (who had the case for all purposes under 28 U.S.C. § 636(c)) ruled that the punishment did not invoke a significant liberty interest under *Sandin v. Connor,* 515 U.S. 472, 484 (1995). [How about terminally silly? Oops, not a recognized constitutional argument for prisoners.] Womack tried to bring her case within *Burnsworth v. Gunderson,* 179 F.3d 771, 774 (9th Cir. 1999), which allowed a federal court to overturn a prison discipline supported by "no evidence whatsoever." Here, however, Judge Russo found the complaint itself established "some evidence," which is all that is required. Womack has leave to amend.

PENNSYLVANIA – *Pro se* prisoner Henry Baynard brought a civil rights action alleging that correctional officials surveilled his thoughts, broadcasted his thoughts to other inmates and individuals outside the institution, and failed to investigate and stop sexual harassment resulting from the publication of his thoughts" as part of an attempt to "homosexualize" him. He said that "effeminate" officers were assigned to "taunt" him and that video cameras in his cell and "micro" cameras in his food monitored his every move. He said other inmates and officers pretended to be members of his family and broadcast messages to him over the prison PA system. He admits to being under psychiatric observation for five months and to treatment with psychotropics, including Haldal – but the voices and spying continued unabated. U.S. District Judge Petrese B. Tucker dismissed his suit with prejudice in *Baynard v. Wetzel,* 2020 U.S. Dist. LEXIS 89371, 2020 WL 2571162 (E.D. Pa., May 21, 2020). She found Baynard's allegations to be "frivolous" and "delusional" and so cure by amendment would be futile. *See Caterbone v. Nat'l Sec. Agency*, 698 F. App'x 678, 679 (3d Cir. 2017) (allegations of government "mind control"); *Golden v. Coleman*, 429 F. App'x 73, 74 (3d Cir. 2011) (allegations of micro eye cameras in food and broadcasting of images on prison television). Before dismissing, Judge Tucker granted a motion to file *in forma pauperis* and assessed the $350 filing fee to be paid in installments, serving this order on the warden. Although there is reason to question Baynard's competence, there was no consideration of appointment of a representative under F.R.C.P. 17(c)(2). The Third Circuit has held that "fanciful" pleadings can be dismissed without such consideration at screening under the Prison Litigation Reform Act. *Powell v. Symons,* 680 F.3d 301, 307 (3d Cir. 2012). But then something happened that this writer cannot explain. The docket entries by the Clerk for the Court's opinion on screening and its order of dismissal both say in capital letters: "ENTERED AND COPIES NOT MAILED TO PRO SE PLAINTIFF." [This contrasts with earlier court orders where the docket says that they were mailed.] Judge Tucker is an experienced and former chief judge, and her rulings lend no clue as to why their entry was withheld from Baynard.

PENNSYLVANIA – Tamika Somerville, a transgender male federal prisoner, sought compassionate release due to his risk of contracting COVID-19, after serving over half of a mandatory fifteen-year sentence in *United States v. Somerville,* 2020 WL 2781585, 2020 U.S. Dist. LEXIS 93935 (W.D. Pa., May 29, 2020). U.S. District Judge J. Nicholas Ranjan granted release in a remarkable

opinion that is scholarly while avoiding legalistic flourishes. It is a good read on compassionate release under the First Step Act, 18 U.S.C. § 3582(c)(1); and this report can only summarize it. Somerville has severe hypertension, obesity, hyperlipidemia, bronchitis, and asthma, for which he carries an Albuterol inhaler. His gender identity has almost nothing to do with this decision, but its framework is useful for advocates whose clients have myriad COVID risk factors, such as symptomatic HIV. Somerville is incarcerated at FCI Danbury (Connecticut), but venue for resentencing is the Pennsylvania district where he was sentenced. Judge Ranjan converted the balance of Somerville's sentence to home confinement, to be followed by community supervision. He found that the Danbury prison could not assure Somerville's medical safety. A combination of factors provides an "extraordinary and compelling reason" to reduce Somerville's sentence under § 3582. Judge Ranjan exhaustively discusses the First Step Act, "exhaustion" that an inmate must exercise to invoke it, and the factors a district judge must weigh in applying compassionate release to a resentencing motion. Congress passed the First Step Act in part because the Federal Bureau of Prisons [BOP], which has sole discretion to grant compassionate release under the old law, so rarely used it. Now, an inmate can seek judicial review after either: exhaustion through BOP; or submission to a warden without action for thirty days (whichever is shorter). Here, in an abundance of caution, Judge Ranjan gave BOP an additional thirty days after oral argument to state a position, but they did not file papers with the court. While the court considers the Sentencing Commission's "Guidelines," the Commission has not updated its policies since passage of the First Step Act – and they are "outdated." Moreover, Judge Ranjan finds that the mandatory sentencing in effect when Somerville was sentenced did not permit weighing of the "extraordinary and compelling" considerations permitted now under the First Step Act. *See United States v. Brown*, 411 F.Supp.3d 446, 451 (S.D. Iowa 2019) (court has "the same discretion as the BOP Director… when it considers a compassionate release motion properly before it"). Somerville's conditions place him at high risk if he contracts COVID-19, and Danbury is a COVID-19 "hotspot." Somerville is housed with 130 prisoners in the "women's" unit. They share three bathrooms and sleep in a single dormitory with bunk beds. Social distancing is not possible. At least one inmate has been hospitalized after vomiting and gasping in a common area, and almost half of these inmates have tested positive for COVID (not including Somerville – so far). [Note: There is already a parallel *habeas* class action pending regarding COVID-19 at Danbury. *Martinez-Brooks v. Easter,* 2020 WL 2405350 (D. Conn., May 12, 2020).] To date, not a single inmate at risk at Danbury has been granted compassionate release. Judge Ranjan reviews Somerville's resentencing under the factors governing release, "even if the original sentencing judge could not," noting that the sentencing judge lamented that Somerville had ""the most pathetic childhood and early adulthood that I have ever seen." In fact, Somerville's mother was in prison when he was born. Somerville's offense, while subject to a then-mandatory minimum term of 15 years imprisonment, was not violent. Mitigating factors would have justified what is now considered a reasonable "downward departure" from Guidelines. Judge Ranjan reviews all the factors for sentencing under 18 U.S.C. § 3553. Also, Somerville has now served 8 years, with a good record; and he is in low security confinement. The judge concludes: "Mr. Somerville was born in prison. He shouldn't die there." Somerville is represented by the Federal Public Defender in Pittsburgh. Judge Ranjan was appointed to the District Court by President Trump in 2019.

WISCONSIN – This is one of at least five cases *pro se* transgender inmate Brandon D. Bradley has filed in the Eastern District of Wisconsin. Another case, alleging excessive force/assault was reported by *Law Notes* earlier this year, *Bradley v. Breahm,* 2020 U.S. Dist. LEXIS 23239 (E.D. Wisc., Febr. 1, 2020). In that case, U.S. District Judge William C. Griesbach permitted Bradley to proceed. (March 2020 at page 36.) Now, in *Bradley v. Kallas,* 2020 WL 2748104 (E.D. Wisc., May 27, 2020), Judge Griesbach again permits Bradley to proceed, this time on medical claims. Bradley claims that medical staff defendants (including Wisconsin's medical director Kallas) refuse to identify her as a woman or permit her to receive hormones or feminizing accommodations. Judge Griesbach dismisses claims related to excessive force as improperly joined under *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). The medical allegations state claims under *Mitchell v. Kallas*, 895 F.3d 492 (7th Cir. 2018) (same Kallas); and *Fields v. Smith*, 653 F.3d 550, 554–55 (7th Cir. 2011). Bradley fails to "identify a particular right guaranteed by the First Amendment" to present as a woman. Finally, Judge Griesbach denies Equal Protection claims, illogically framing the class as Bradley compared to "cisgender male inmates," citing *Brown v. Budz,* 398 F.3d 904. 916 (7th Cir. 2005). While *Brown* states the elements of equal protection claims, on the next page – 398 F.3d at 917 – the Seventh Circuit found an inmate in a sex offender program had stated an equal protection claim based on alleged racial disparity in investigating assaults. Here, the comparator class to Bradley is cisgender women, not men. The discrimination is subject to "heightened" Equal Protection scrutiny. *See Whitaker by Whitaker v. Kenosha Unified School District,* 858 F.3d 1034, 1051 (7th Cir. 2017) (bathroom policy "is inherently based upon a sex-classification and heightened scrutiny applies").

LEGISLATIVE / LAW & SOCIETY / INT'L *notes*

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES – In a final rule published in the Federal Register on May 12, to take effect on July 13, the Trump Administration has cut back substantially on the state reporting requirements on the demographics of children and adults involved in the foster care systems that receive federal funding, eliminating, among other things, a requirement to report on the sexual orientation of children in the system. According to a report in *Metro Weekly* on May 13, it is estimated that as many as 30% of children in foster care in the U.S. are LGBTQ, and eliminating the collection of this data will make it more difficult to monitor the quality of treatment they are getting in their foster homes. The Obama Administration had adopted a rule, which this one replaces, that required the collection of publication of such data. The move is in line with the overall policy of the Trump Administration to remove LGBTQ-related information from federal databases and websites and render LGBTQ people in the U.S. as invisible as the administration can make us.

IDAHO – Idaho Falls amended its anti-discrimination ordinance to broaden the ban on discrimination because of sexual orientation or gender identity. The measure added "public accommodations" to a provision that already extended to housing and employment. This was reported May 15 in the local media outlet *Post-Register.*

OHIO – *The Advocate* reported on May 5 that the Village Council of Gambier, Ohio, meeting via Zoom, approved a local version of the Ohio Fairness Act, the bill pending in the state legislature to add sexual orientation and gender identity as forbidden grounds for discrimination. Although the legislature remains unresponsive, this article reports that Gambier (population approximately 2500) is the 29th local government unit in the state to enact such legislation, cumulatively extending protection to about a quarter of the state's population.

OKLAHOMA – Governor Kevin Stitt signed into law a measure requiring that funeral homes be notified if they are asked to provide services when the deceased was HIV-positive. The measure was criticized as redundant, since existing regulation of the industry, both in terms of federal workplace safety law and professional ethical standards, require all those in the industry to take precautions against possible transmission of infectious agents when handling a corpse. Thus, the underlying purpose of this is to facilitate the ability of funeral homes to discriminate. *Public Radio Tulsa*, May 7.

PUERTO RICO – The legislature approved a new civil code to replace the outdated one from the 1930s, removing explicitly anti-LGBT provisions and redefining marriage as the union of two people in place of the old gendered definition. However, a provision on birth certificates has raised concerns for transgender people, who will not be able to get a clean birth certificate showing the gender with which they identify. Instead, the original certificate issued at birth will show an amendment. This means that transgender people will be "outed" any time they have to use their birth certificate. LGBT rights advocates urged the governor to veto the new civil code and send it back to the legislature to fix this. *Reuters*, May 15.

LAW & SOCIETY NOTES

By Arthur S. Leonard

UNITED STATES NAVY – CNN reported on May 15 that the U.S. Navy has granted a "waiver" to a transgender service member, allowing her to serve in her "preferred gender." Under the policy now in effect, transgender service members who did not transition before the Supreme Court stayed preliminary injunctions and allowed the "Mattis policy" to go into effect were required to serve in their birth gender, affecting the uniforms they wore, the facilities to which they had access, and their official gender on Navy records, but that waivers could be given. "The acting Secretary of the Navy has approved a specific request for exemption related to military service by transgender persons and persons with gender dysphoria," Navy spokeswoman Lt. Brittany Stephens told CNN. Presumably, the waiver was issued in an attempt by the government to get a new lawsuit challenging the transgender ban dismissed. The service member is the plaintiff in *Jane Doe v. Esper*, filed recently by National Center for Lesbian Rights and GLAD (Boston) in U.S. District Court in Massachusetts.

MARYLAND – The Montgomery County School Board approved a proposal to develop an elective course on LGBTQ issues for high school students, the *Washington Blade* reported on May 12.

INTERNATIONAL NOTES

By Arthur S. Leonard

ALBANIA – The professional association of psychologists in Albania has announced a "ban" on the performance of conversion therapy, the *Associated Press* reported on May 16. The article stated

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that this made Albania the six country in Europe to ban the controversial practice, after Spain, Switzerland, Malta, Britain and Germany. The wire service report did not specify whether the ban only covered practicing this voodoo on minors, or constituted a complete ban. The announcement came the day after LGBT rights proponents held a virtual Pride Celebration on-line. Albania outlaws anti-LGBTQ discrimination, but does not yet have marriage equality.

BRAZIL – After pondering the case for four years, the Supreme Court ruled that the rules adopted in the 1980s banning men who have sex with men from donating blood offend the equality requirements of the constitution and are not justified by the facts. Henceforth, donors will be evaluated based on individual risk, not sexual orientation.

CHINA – A newly enacted Civil Code includes a provision that may be interpreted to protect the housing rights of surviving same-sex partners when the tenant or owner of an apartment dies, according to a *Reuters* report on May 28. Due to the vagueness of the provision, however, it remains to be seen whether local legal authorities will interpret it that way in disputes between the legal family members of LGBT decedents and their surviving partners.

COSTA RICA – Marriage equality went into effect on May 25, after a last-ditch attempt by legislative opponents failed to block it.

GERMANY – Outrightinternational.com reported that the German Parliament approved a bill on May 7 that will outlaw conversion therapy for minors in Germany. Germany thus joins Malta, Ecuador, Brazil and Republic of China (Taiwan) as the only countries to adopt such a ban. The measure applies both to advertising and performance of the so-called "therapy."

HUNGARY – Hungary's LGBT rights organization, Hatter Society, has reported that the nation's blood-banking authority has lifted, as of January 1, 2020, the former policy banning blood donations by gay men. Under the new rules, potential donors will be individually evaluated based on their sexual activities, and only those whose sexual activities are deemed at high risk for HIV transmission will be disqualified from donating blood. The report was circulated on-line on May 6. * * * CNN reported on May 19 that Hungary has legislated against recognizing legal change of gender, a retrogressive move that puts the country out of step with the European Union is likely to spark litigation, first in Hungary's Constitutional Court and ultimately in European courts.

MALAYSIA – The nation's highest court has given permission for an appeal challenging the application in Malaysian courts of an Islamic law against gay sex, according to a *Thompson-Reuters Foundation* report on May 27. The petitioner is one of several men who were arrested and prosecuted for attempting sex "against the order of nature." He is being allowed to proceed anonymously to protect his confidentiality.

NORTH MACEDONIA – Last year, a majority of members of Parliament who were present and voting approved a non-discrimination law for the country that included sexual orientation. But during May, the Constitutional Court ruled that the law was not validly enacted, because the majority of those present did not represent a majority of the entire Parliament. Back to the drawing board. *BalkanInsight*, May 18.

POLAND – A public prosecutor has brought charges of religious discrimination against an IKEA store manager who discharged an employee for incendiary anti-gay statements. The employee, a devout Catholic, was outraged that the company was celebrating gay rights, and quoted Biblical passages widely interpreted as imposing capital punishment for homosexual acts in his opposition. *Associated Press,* May 28.

TURKMENISTAN – *Advocate.com* reported on May 28 that nearly a dozen men were arrested for being gay and several were sentenced to two years in prison. The report indicated that among countries in that part of the world, only Turkmenistan and Uzbekistan maintain criminal penalties for gay sex between consenting adults.

UGANDA – *Gay Star News* reported on May 18 that Ugandan authorities released 19 LGBT people who had been held in jail for over 40 days charged with "'doing a neglect act likely to spread infection of disease' under emergency COVID-19 laws." They were among 23 people arrested by police in a raid on a house that was serving as a shelter for LGBT young people who had left abusive households. LGBT rights campaigners accused the government of having targeted these individuals because of their sexuality, but law enforcement officials insisted it was about enforcing public health requirements.

UNITED KINGDOM – The Court of Appeal of the United Kingdom affirmed a trial judge's ruling that the government was not required to issue a gender-neutral passport to a nonbinary person. The decision was announced on May 10 and published on May 27. While conceding the appellant's argument that the government's refusal affected

their right to respect for private life under Article 8 of the European Charter of Human Rights, the court took the position that the lack of a European consensus on the specific issue resulted in a wide margin of appreciation within which the government's obligation was to act reasonably in its consideration of the issue. In this case, the government took the position that it was not just a narrow question of whether to issue a gender-neutral passport, but rather whether the government should in general and for all purposes eliminate the identification of persons as either male or female and only one or the other for all purposes. As such, the court held it was within the margin of appreciation for the government to decline the specific request for an X-identifier while the broader policy question was undecided. *Regina (Elan-Cane) v. Secretary of State for the Home Department*, [2020] EWCA Civ. 363 (Judgment March 10, 2020). The appellant could seek review by the Supreme Court of the United Kingdom.

ZAMBIA – Towleroad (May 26) reported that Zambia's President, Edgar Chagwa Lungu, pardoned a gay male couple who were serving a 15-year prison sentence for having a sexual relationship. Zambia's law makes sex "against the order of nature" a serious felony. A trial judge passed sentence in November 2019. The men were among 3000 inmates pardoned to commemorate Africa Freedom Day.

PROFESSIONAL NOTES

By Arthur S. Leonard

The **NATIONAL LGBT BAR ASSOCIATION** has announced several new board members. **RACHEL GOLDBERG**, a Connecticut real estate lawyer, is a James W. Cooper Life Fellow of the Connecticut Bar Foundation and has served on the Connecticut Law Tribune's Editorial Board and works on transgender law reform issues. **MIKE JACKSON** is Assistant General Counsel/Senior Director for Microsoft's Global Workplace Investigations Team, and lives in Seattle where Microsoft is headquartered. **NONA LEE** is Executive Vice President and Chief Legal Office with the Arizona Diamondbacks professional baseball team and was previously Vice President and Associate General Counsel for the Phoenix Suns professional basketball team. She is also Immediate Past President of the Sports Lawyers Association. * * * The Association has also announced that its annual **FRANK KAMENY AWARD** this year will be presented to **GLMA: HEALTH PROFESSIONALS ADVANCING LGBTQ EQUALITY**, a forty-year old organization dedicated to pushing the medical profession and health care industry to provide equal services to the LGBT community. GLMA will be honored during the virtual Awards Program on August 12, 2020, at the 2020 Lavender Law® Conference and Career Fair, which will be held entirely on-line this year. For registration information about the Conference, go to the website as registration is now live. * * *The Association also announced that the annual **DAN BRADLEY AWARD** will be bestowed upon **DAVID LAT**, founding editor of the blog *AbovetheLaw.com*, who is now working as a legal recruiter in New York. Lat's blog made him a major observer of the legal profession, including, of course, issues of concern to LGBT people in the profession. His personal struggle to survive COVID-19 received front-page coverage in the *New York* and *National Law Journals*. David Lat will be honored during the virtual Awards Program on August 12, 2020 at the 2020 Lavender Law® Conference and Career Fair.

The **ACLU OF NEBRASKA** seeks to add an LGBTQIA+ Legal and Policy Counsel to its full-time staff. For full details, see their website: aclunebraska.org/careers. To apply, email a cover letter and resume to jobs@aclunebraska.org with the subject line: LGBTQIA+ Legal & Policy Counsel. In your cover letter, please indicate that you heard about the position through *LGBT Law Notes*. Applications accepted beginning May 15 and continuing until the position is filled, at which time the job announcement will be removed from the website.

The **U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE** has scheduled a vote for June 3 on pending Trump Administration nominations to the **NATIONAL LABOR RELATIONS BOARD** and the **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**, which could lead to both agencies being fully staffed at the Board/Commission level for the first time during the Trump Administration. The Senate has been so narrowly focused on confirming judicial nominees that the administrative agencies have been relatively neglected under Trump. The White House had signaled an intention to re-nominate incumbent EEOC member **CHAI FELDBLUM**, an out lesbian who was first appointed by President Obama, but enough Republican senators balked so that Feldblum decided to go into private practice when her term ended and is now with Morgan Lewis LLP. The Committee will vote on the nomination of **JOCELYN SAMUELS**, also an out lesbian, who is the executive director of the **WILLIAMS INSTITUTE AT UCLA LAW SCHOOL**. She was formerly head of the Office of Civil Rights at the Department of Health and Human Services during the Obama Administration. Under Title VII of the Civil Rights Act, no more than three EEOC Commissioners may be members of the same political party. The Commission currently has a bare quorum of three members. The EEOC

was the victorious plaintiff on appeal in the 6th Circuit in the *Harris Funeral Home* case, holding that gender identity discrimination is actionable under Title VII. The Trump Administration changed signals once the case got to the Supreme Court, with the Solicitor General's Office siding with the employer-petitioner as *amicus curiae*. The ACLU, representing the charging party, Aimee Stephens, was left to argue alone in support of the EEOC's court of appeals victory at the October 8 argument. A decision is expected in June.

PUBLICATIONS NOTED

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2. Bagenstos, Samuel R., Book Review, This is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State (Review of R. Shep Melnick, The Transformation of Title IX: Regulating Gender Equality in Education), 118 Mich. L. Rev. 1053 (April 2020) (critical review of Melnick's book, which argues that the Education Department's Office of Civil Rights has illegitimately extended Title IX to, for example, protect transgender students from discrimination).
3. Balkin, Jack M., Book Review, Translating the Constitution (review of Lawrence Lessig, Fidelity and Constraint: How the Supreme Court Has Read the American Constitution), 118 Mich. L. Rev. 977 (April 2020).
4. Barclay, Stephanie H., First Amendment "Harms", 95 Ind. L.J. 331 (Spring 2020) (analyzing the concept of "harm" when a religious institution asserts a Free Exercise right to discriminate in public accommodations or employee benefits).
5. Barros, Benjamin, Rick Hodges, Jim Obergefell, Robert S. Salem, Elizabeth Seedorf, Lindsey K. Self (Participants), Law Review Lecture on Finding Friendship in a Contentious Place: A Conversation with Obergefell and Hodges from the Landmark U.S. Supreme Court Case on Same-Sex Marriage, 51 U. Tol. L. Rev. 443 (Spring 2020) (Beth Seedorf, managing editor of the Toledo Law Review, had an inspiration: to bring together plaintiff Jim Obergefell and defendant Rick Hodges from *Obergefell v. Hodges* to discuss the Supreme Court's marriage equality ruling from the perspective of the named parties).
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10. Busby, Nicole, and Morag McDermont, Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal 49 Indus. L.J. 159 [U.K.] (June 2020).
11. Cahill, Courtney Megan, The New Maternity, 133 Harv. L. Rev. 2221 (May 2020) (considers transgender

issues in the context of maternity).

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15. Ferleger, David, The Constitutional Right to Community Services: Olmstead and Equal Protection, 40 J. Legal Med. 101 (May 2020) (argues that even though they did not speak in terms of heightened or strict scrutiny for sexual orientation claims, several major Supreme Court decisions have effectively created a new form of equal protection, which author calls "mature equal protection").
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31. Matsumura, Kaiponanea T., Transcending Time and Place: Judge A. Wallace Tashima and the Libertation of LGBT Identity, 66 UCLA L. Rev. 1910 (December 2019) (Focus on a landmark 9th Circuit opinion by Judge Tashima finding that a gay man who cross-dresses is a member of a particular social group for purposes of refugee law).
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45. Swanson, Louie, Implications of the Ban on Open Service by Transgender Individuals in the United States Military, 41 Mitchell Hamline L.J. Pub. Pol'y & Prac. 135 (Spring 2020).
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EDITOR'S NOTES

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