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**LAW NOTES**

January 2020

**SCOTUS Denies Trans Inmate's Petition**

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LGBT Bar Association Foundation  
of New York (www.lgbtbarny.org)

ISSN 8755-9021

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# Supreme Court Denies Trans Inmate's Petition in Transition Denial Case

By Arthur S. Leonard

The U.S. Supreme Court announced December 9 that it had denied a petition for certiorari in *Gibson a/k/a Lynn v. Collier*, No. 18-1586, in which the 5<sup>th</sup> Circuit ruled on March 29, 2019, that Texas was not obligated to provide sex reassignment surgery to a transgender prisoner. The Court of Appeals panel, voting 2-1, issued an opinion by Circuit Judge James Ho, an appointee of President Donald J. Trump, with Circuit Judge Rhesa Hawkins Barksdale, an appointee of President George W. Bush, dissenting.

The 5<sup>th</sup> Circuit's holding focused on three main points.

First, the court held that transgender inmate Vanessa Lynn "offered no evidence" that there was "universal acceptance" in the medical community that sex reassignment surgery as a treatment for gender dysphoria was either necessary or efficacious. In the absence of "universal acceptance" by the medical profession, the court opined, the issued boiled down to a difference of opinion between medical experts such that it was not proved that denying the treatment was either cruel or unusual.

Second, the court rejected the inmate's contention that the 8<sup>th</sup> Amendment requires prison authorities to make an individualized assessment of each inmate's medical claims, rather than establishing a policy that certain kinds of treatment that do not enjoy universal acceptance in the medical community may not be provided regardless of the individual case.

Third, the court opined that it could not credibly be argued that denial of sex reassignment surgery to inmates was in any sense "unusual," since to date almost every attempt by inmates to obtain this treatment for gender dysphoria has been rejected by prison systems and the courts.

Judge Barksdale's dissent focused on the fundamental unfairness of the

entire proceeding. The district court granted summary judgment in a *pro se* case without giving the inmate an opportunity to present evidence. Furthermore, although the defendant prison officials had defended on qualified immunity grounds, there being no binding precedent in the 5<sup>th</sup> Circuit recognizing a constitutional right to access treatment for gender transition, the district judge had gone on to rule on the merits, rejecting the constitutional claim, with no notice to the inmate that the court would be addressing the question. Her position was that the case should be remanded for proper proceedings before any constitutional issues were decided.

The 5<sup>th</sup> Circuit's merits ruling relied heavily on the 1<sup>st</sup> Circuit's *en banc* ruling in *Kosilek v. Spencer*, 774 F.3d 63 (2014), in which the court premised its holding on "expert testimony" that Judge Ho cited to support the conclusion that sex reassignment surgery lacks universal acceptance in the medical community. Indeed, because of the procedural irregularities in this case, the record is bereft of expert testimony, with is required for a ruling on medical necessity and efficacy, so Judge Ho relied on the 1<sup>st</sup> Circuit's recounting of the expert testimony in *Kosilek*, which confirms the procedural irregularity of this ruling. A requirement of "universal acceptance" sets a virtually impregnable barrier against access to such treatment through litigation, since in an area as contentious as this, there will always be disagreements.

By contrast, the 9<sup>th</sup> Circuit, in the pending litigation in *Edmo v. Corizon, Inc.*, 935 F.3d 757 (Aug. 23, 2019), found that denial of the surgery violated the constitutional rights of the transgender inmate in that case due to the severity of her gender dysphoria, approving an individualized approach while disclaiming any categorical ruling that such surgery is always necessary for a

transgender inmate, and upholding the district court's decision to accept the testimony of the plaintiff's experts that sex reassignment surgery is medically necessary for the particular individual, while discounting the testimony by the state's "experts," who were not considered particularly well qualified to testify on this subject by the trial judge. A petition for *en banc* review was pending in the 9<sup>th</sup> Circuit. If it is denied, or the panel decision is affirmed *en banc*, the Idaho Department of Corrections is likely to petition for cert, and the likelihood of the Supreme Court granting review would seem to be quite high.

Although inmate Vanessa Lynn represented herself in the district court, her appeal to the 5<sup>th</sup> Circuit was handled pro bono by Stephen Louis Braga of the Appellate Litigation Clinic at the University of Virginia Law School, Charlottesville. Braga also filed the cert petition on Lynn's behalf.

Interestingly, the Texas Attorney General filed a waiver of right to respond to the cert petition, and the case file was distributed for the Supreme Court's conference of October 1. Evidently, the court was interested enough in the case at that point to request a response to the petition, which was communicated to the Texas A.G.'s office that day, with a short deadline of October 7. The A.G.'s office immediately petitioned for an extension of time, and ended up filing its response on October 28. The Response noted the 9<sup>th</sup> Circuit's *Edmo* decision, which it characterized as "the first circuit court in the nation to order taxpayers to fund SRS for prisoners," and argued, "But that outlier opinion does not make this issue certworthy," and noted that a petition for *en banc* review was pending in the 9<sup>th</sup> Circuit (and was still pending by the time the Supreme Court denied cert in this case on December 9). The Texas A.G. also argued that "any disagreement between



the courts of appeals is shallow and lopsided,” contending that “the Ninth Circuit’s poor reasoning is not likely to be adopted elsewhere, and if this Court is concerned about inconsistent circuit authority, the solution is to summarily reverse the Ninth Circuit.” Chutzpah, indeed! Both District Judge Winmill and the 9<sup>th</sup> Circuit panel issued lengthy, detailed decisions which put to shame the brief, dismissive opinion by Judge Ho in a case where the merits were not even properly before the court. ■

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## Montana High Court Tacks Pre-Marriage Equality Portion of Same-Sex Relationship to Subsequent Marriage Through Common Law Doctrine

*By Matthew Goodwin*

On December 10, the Supreme Court of Montana upheld the retroactive application of *Obergefell v. Hodges*, 135 S. Ct. 2584, to find that a same-sex couple had been in a common law marriage under state law since 1996, before the time same-sex marriage was legal in Montana or anywhere in the United States (or the world, for that matter). *Adami v. Nelson*, 2019 MT 286, 2019 Mont LEXIS 1148, 2019 WL 6769739.

In Montana, common law marriage is “an equitable doctrine used to ensure people are treated fairly once a relationship ends . . .” and “‘designed, in part, to prevent unjust economic harm to couples who have held themselves out as [spouses].’”

In Montana, common law marriage, as opposed to ceremonial or deliberative marriage, exists where “ . . . the parties (1) were competent to enter into a marriage; (2) assumed a marital relationship by mutual consent; and (3) confirmed their marriage by cohabitation and public repute.” In many states the third element is also described as the parties having held themselves out as a married couple.

The pertinent facts as recited by the court were as follow: The lesbian couple at issue in the case met and began their long-term relationship in 1996. By the year 2000 they had their first child using a sperm donor, and two more children followed within the next five years. The parties chose sperm donors who had physical traits similar to one of the parents and all of the children were given the surname “Nelson-Adami,” a hyphenated version of the parties’ last names.

The parties also divided roles and responsibilities as a married couple might, with Adami assuming responsibility as primary caregiver for

the children and Nelson, a physician, assuming the role of “breadwinner.” The parties attended church together with their children and held themselves out as being in a “committed relationship.”

The court focused on the fact the couple comingled their finances, assets, and earnings during their relationship and were financially as well as emotionally interdependent. The family moved frequently in support of Nelson’s career, first from Virginia where Nelson did her residency, to Texas, where Nelson worked at a local hospital and then opened an outpatient private practice. Thereafter, the family decided Adami would no longer work and would exclusively care for the children. In 2006 the parties moved to Grand Junction, Colorado, in 2009 to Wyoming, and finally in 2012 to Missoula, Montana—all the relocations undertaken for Nelson’s work.

The court took for granted that the first element of the three-part test outlined above was satisfied given the age of the parties when they began their relationship.

As to the second element, the Supreme Court found no reason to disturb the trial court’s findings or conclusion that the parties “mutually respected and supported each other similar to a married couple” and that “their conduct [was] sufficient to establish that mutual consent to marry existed.” Wrote Justice Mike McGrath for the court: “Nelson and Adami did not engage in marital-like conduct unwittingly or accidentally; rather, the facts indicate their financial and familial actions, which were decided upon mutually, were taken purposefully and deliberately in a manner similar to a married couple. While Nelson disputed much of the evidence in the record, the District Court judge, Leslie Halligan,

repeatedly found her testimony and statements made in her affidavits not credible. “The District Court did not err in finding that Adami met her burden that mutual consent to marry existed.”

As to the third element, the court upheld the trial court’s finding that “Adami met her burden . . . [i]n establishing public reput[e],” because the couple held themselves out to their community as spouses. The court held “[t]he record provides ample evidence that those closest to Nelson and Adami viewed them as married, practically married, or a family.”

The remainder of the court’s opinion dealt with the objections raised by Nelson to the trial court’s rulings as to procedural, child support, and counsel fee matters.

Only nine jurisdictions in the United States recognize common law marriage: Colorado, District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, Texas, and Utah. Other jurisdictions recognize common law marriage under certain conditions—New Hampshire (for inheritance purposes only), Ohio (if created before October 10, 1991), Pennsylvania (if created before January 1, 2005), Georgia (if created before January 1, 1997), and Idaho (if created before January 1, 1996).

The Montana Supreme Court did not address in exactly which state the couple “contracted” to enter into a common law marriage or whether the couple sufficiently met the elements for a common law marriage in a particular state, an analysis usually undertaken by New York courts analyzing common-law marriage claims, regardless of the sexual orientation of the couple.

For example, in 2010, the Appellate Division, Second Department, held that a putative wife failed to establish a common law marriage where “the parties’ visits to Pennsylvania and the District of Columbia . . . ” were “brief and sporadic” and noted “the absence of specific allegations in the plaintiff’s submissions evidencing a mutual agreement of the parties, expressed in an exchange of words in the present tense, to enter into a marital relationship while in those jurisdictions . . . ” and “the substantial documentary evidence

establishing that the parties continued to consider themselves unmarried after those visits.” *Baron v. Suissa*, 74 A.D.3d 1108, 1109, 906 N.Y.S.2d 50, 51 (2010).

Some jurisdictions, whether through legislation or decisional law, will allow same-sex spouses in divorce to “tack-on” a period of the pre-marital relationship to the marriage to address the issue faced by the Montana Supreme Court. To date, however, New York has not adopted a “tacking” approach, with the courts instead holding that, by definition, the legislature has given them only the power to equitably distribute assets which arose during the marriage, not before.

Adami was represented by Susan G. Ridgeway and Jill Gerdrum of Axilon Law Group, PLLC in Missoula, Montana. Nelson was represented by Marybeth M. Sampsel of Measure Law, P.C., Kalispell, Montana. ■

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## Louisiana Appeals Court Awards Shared Custody of Children to Transgender De Facto Father and Estranged Biological Mother

*By Filip Cukovic*

On December 6, 2019, the 5<sup>th</sup> Circuit Court of Appeals of Louisiana reversed the trial court’s decision that had denied child custody to a transgender co-parent, finding that custody should be shared between the petitioner and the children’s biological mother. *Ferrand v. Ferrand*, 2019 La. App. LEXIS 2230, 2019 WL 6649379.

Last May, Jefferson Parish District Judge Stephen D. Enright, Jr., awarded sole custody of the two minor children to Stephanie Wilson, their biological mother, even though she had previously neglected her children, who spent considerable time exclusively with their transgender *de facto* father, Vincent Ferrand. (The court does not label Ferrand as such, and he was never legally married to Wilson, who will be referred to throughout this story as Wilson, her current married surname, to avoid confusion. When she and Ferrand met, she was married to another man, Frannon Dykes, III, and using what was presumably her maiden name, Farrell.) After considering the “best interest of the child” factors applied to a dispute between a biological/legal parent and a third party, the Court of Appeal reversed the lower court’s ruling, ordered that the children must be reunited with Ferrand, and ruled that Wilson and Ferrand should share custody.

In August 2000, Ms. Wilson (then known as Stephanie Harrell) met Vincent Ferrand and began a relationship with him. At that time, she was married to Frannon Dykes, and she had two children with him. Within five months of meeting Ferrand, Wilson left

Alexandria, Louisiana – where she was living with her husband and children – and moved to New Orleans with her two children to live with Mr. Ferrand.

The relationship between Wilson and Ferrand continued to progress, and in April 2003 they participated in an unofficial wedding ceremony, in which they exchanged vows and wedding rings. In spite of this ceremony, however, they were never legally married, although they held themselves out to the community as a married couple. Wilson changed her last name from Harrell to Ferrand. Soon the couple decided to start a family, and Ferrand agreed and paid for *in vitro* fertilization for Wilson, now “Ms. Ferrand,” to become pregnant.

On July 5, 2007, Wilson gave birth to twins: a daughter and a son. At the hospital, Wilson and Ferrand held themselves out to the medical personnel, just as they had done to the community at large over the prior four years, as husband and wife. Accordingly, Wilson was named on the children’s birth certificates as their mother and Ferrand was named on their birth certificates as their father, and they both signed the birth certificates. Over the next four years, they lived together as a married couple and raised the children together. The two minor children have since birth always known Vincent Ferrand as their father and called him “Daddy.” However, Mr. Ferrand was not a biological father to his children, as the couple obtained another man’s semen for purposes of *in vitro* fertilization.

Problems started to arise between Wilson and Ferrand in November 2011. After an argument, Mr. Ferrand allegedly threatened Ms. Wilson with her life if she attempted to separate him from the children. In response, Wilson obtained a court protective order against Ferrand, but the petition in the case was eventually dismissed. At the same time, Wilson stated that she sent an email to her aunt, complaining about Mr. Ferrand’s behavior, in which she also added that she just recently learned that Mr. Ferrand was in fact a female living as a man, which explains why, in ten years, she had never seen him naked.

Despite all the drama and accusations, Wilson continued to live

with Mr. Ferrand and their children for some time. However, in January 2012, she moved out of the family home, leaving the children residing with Mr. Ferrand. Although Ms. Wilson and Mr. Ferrand initially agreed to joint custody, Ms. Wilson’s visitations soon become sporadic and she would rarely take the children over night.

In April 2012, she met Robert Wilson. By the end of 2014, they were married with a child. At the same time, the relationship between her and Ferrand had grown more tense, as she would neglect to see her children or to make any financial contributions for their support. More importantly, Ms. Wilson did not see her children from Thanksgiving of 2013 until the end of February of 2014.

Later that winter, Wilson filed her second petition for protection from abuse against Mr. Ferrand, as she alleged that Ferrand threatened that if she came around his house, he would “pop a cap on her head.” Finally, after Ms. Wilson picked up her children for visitation, she had Mr. Ferrand’s name removed from the children’s birth certificates as their father and had their last names changed. After multiple court hearings that ensued, Mr. Ferrand was able to maintain some visitation with the minor children, as the court denied Wilson’s request for protective orders against him.

However, in August of 2015, Wilson filed another petition for protection against Ferrand, claiming that he had physically abused her at the children’s first day of school. The incident was caught on camera, and the court issued temporary restraining orders against both Ferrand and Wilson. After the incident, the children remained with Ms. Wilson, and Mr. Ferrand soon petitioned for legal custody of the children.

After trial, District Judge Enright, analyzing this matter as a non-parent’s petition for custody against a parent on September 9, 2015, found that Ferrand had failed to meet his burden to prove that the granting of sole custody to the children’s mother would result in substantial harm to the children, as the judge deemed to be required by La. C.C. art. 133, and therefore the court

denied his custody petition. The judge also found that Ferrand had perpetrated domestic abuse against Wilson and issued a protective order for life against Ferrand as it related to Wilson. Further, despite the fact that no allegations of any type of threats or abuse, physical or otherwise, were ever made against Ferrand regarding the minor children, the trial court issued a protective order against Ferrand as it related to the minor children until their eighteenth birthdays.

In February 2018, the Court of Appeal remanded the trial court’s decision, and ordered the court to appoint Dr. Van Beyer to conduct a custody evaluation regarding the minor children. Following Dr. Van Beyer’s evaluation, which concluded that the children would suffer substantial harm if they were separated completely from Ferrand, the domestic commissioner issued a judgment awarding joint custody. Ms. Wilson appealed this judgement. At a re-trial, the trial court overturned Dr. Van Beyer’s recommendation and awarded sole custody rights to Ms. Wilson. It is from this judgment that Ferrand appealed to the Louisiana 5<sup>th</sup> Circuit Court of Appeal.

The Court of Appeal reversed the trial court’s decision that had awarded exclusive custody rights to Wilson. In an opinion by Judge Robert A. Chaisson, the court ordered that Ferrand and Wilson have shared custody of the children, and ordered immediate reconciliation therapy between the children and Ferrand.

In reaching its conclusion, the court began by recognizing that because Ferrand is not these children’s biological father, and because at the time of their births he could not qualify as their legal father under Louisiana law, the court was constrained to analyze this matter as a parent versus non-parent custody dispute. Hence, this dispute was analyzed under the standard provided by the Louisiana Civil Code, which states that if an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment.

Furthermore, the court recognized that in a conflict between a parent and a non-parent, the parent enjoys the paramount right to custody of a child and may be deprived of such right only for compelling reasons. The test to determine whether to deprive a legal parent of custody is a dual-pronged test: first, the trial court must determine that an award of custody to the parent would cause substantial harm to the child; if so, then the court looks to the “best interest of the child” factors to determine whether an award of custody to the non-parent is required to serve the best interest of the child.

Applying the principles stated above, the court first held that awarding custody solely to Wilson would result in substantial harm to the children. This is mostly because Ferrand fulfilled the role of the primary parent for the children in question during the first six years of their lives. Although the record supports that both Wilson and Ferrand were involved in raising the children during the first few years of their lives, it was clearly Ferrand who took the initiative regarding the children’s education once they started school. Furthermore, Wilson chose to leave the children with Ferrand when she moved out in January 2012, when the children were four and a half years old, and she made no attempt to gain custody of them for the next two years. This means that the children developed a relationship and reliance on Ferrand and that they clearly saw him as their primary care giver. Wilson’s action removing Ferrand from their birth certificates was inconsequential to the children’s understanding of who their father was.

Although Wilson alleged that Ferrand was abusive to her, there are no allegations that Ferrand was every abusive with the children. On the other hand, there are some indications that Wilson’s husband, Robert, has some alcohol abuse issues that could potentially put children who would live solely with Wilson at risk. Furthermore, although Wilson’s expert witness claimed that the children were recently experiencing behavior issues due to the revelation that their father was

identified as female at birth, and that he had been abusive toward their mother, Ferrand’s expert witness persuaded the court that the primary reason for these behavioral issues was the constant stream of litigation between the parents; the separation of the children from their primary caregiver; as well as Wilson’s insensitive request to her children that they should refer to her new husband with whom they had no relationship, as their dad.

Hence, when all these factors were analyzed in their totality, Judge Chaisson concluded that it is in the children’s best interest to spend time both with their biological mother, Ms. Williams, and with Mr. Ferrand, whom the children have always seen as their dad, and who was in fact their primary, and in some instances, their only caregiver. Thus, the court reversed the judgement of the trial court, awarding shared custody to Ferrand and Williams.

Wilson is represented by Becki Truscott Kondkar, Shama Farooq. Ferrand was represented by Harold Weiser and William Beaumont in the trial court, but the Court of Appeal’s opinion states that defendant’s counsel is C. Vincent Ferrand, “In Proper Person.” ■

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## Virginia Court Denies Annulment to Woman Who Claims Her Marriage to Transgender Spouse was Induced by Fraud

*By Arthur S. Leonard*

This is one of those “truth is stranger than fiction” stories. In *Sun v. Riley*, 2019 Va. Cir. LEXIS 1180 (Virginia - Fairfax County Cir. Ct., Dec. 30, 2019), Circuit Judge David A. Oblon denied a petition by Renee Sun to annul her marriage to Joseph Michael Riley, either on the ground that it was not consummated or that Riley had defrauded her by not disclosing an intention to transition to female gender. The judge pointed out that Sun could alternatively seek a divorce.

Sun and Riley married on November 19, 2017. On March 29, 2019, Riley “underwent a surgical procedure consistent with a male to female gender reassignment,” wrote Judge Oblon. “Sun testified she learned of this, not from Riley, but from medical records she found in their bedroom. To the contrary, Riley testified he discussed it with Sun before the procedure. Sun testified he only told her he was obtaining a vasectomy, and not a bilateral orchiectomy.”

(Translation: A vasectomy is a procedure to block the route by which sperm generated by the testicles can be ejaculated through the penis, and is one method of birth control. A bilateral orchiectomy is a procedure by which the testicles are removed and may be a prelude to further procedures of penectomy and construction of a vagina.)

Obviously, there is a story behind this, much contested by the parties to this case. “Prior to the marriage,” relates Judge Oblon, “Riley was ‘unsure of [his] gender,’ according to his testimony.



“He engaged in hormone testing and took female hormones on May 16, 2018, roughly six months before marriage.” He testified that he had told Sun about this “in passing,” by saying that “he was a girl and like to ‘dress up,’” and he claimed that Sun was “supportive.” In her testimony, she recalled Riley “joking” about being a girl and liking to dress up, and she admitted he mentioned having taken hormones but explained that it was to treat “in-grown hair” and assured her that it would not turn him female, because “a doctor oversaw the treatment and the dosage was low.” Sun testified that she did not know Riley was transitioning to become female, they had no discussions about gender reassignment, and she thought their mutual intention was to have children. Riley claimed in his testimony that they discussed the fact that he did not want to have children.

“They never engaged in coitus once married,” wrote Oblon. Riley claimed he had approached Sun twice to engage in sex, but she “rebuffed him” and he “did not wish to force her,” so he desisted, and their marriage did not include sex. “He denied being impotent before marriage, and on either of his two post-marriage attempts at coitus.” Sun claimed not to recall these incidents, but testified that she never approached Riley about having sex. “She did not testify that she ever asked him for coitus or even asked why they remained celibate.” This situation continued from November 19, 2017 until after Riley’s surgical procedure on March 29, 2019, after which Sun’s discovery of the medical records and subsequent questioning of Riley led her to file her petition for annulment.

“When a marriage is annulled,” wrote the judge, “the law treats the marriage as a nullity. It never happened because it was either void ab initio (such as in the case of bigamy) or it is voidable (such as in the case of marriage to one lacking capacity to consent). “The biggest effect is that annulments are divorced from the benefits of Virginia’s equitable distribution and spousal support laws,” as a result of which “parties seeking annulment must be held to their high evidentiary burdens” – in this case,

the petitioner must meet a “clear and convincing evidence standard.” By contrast, Virginia, like all other states, now has a no-fault divorce regime, and divorce is the alternative to annulment for terminating a marriage. But Sun did not file for divorce, seeking instead to have the marriage declared to have never been validly formed.

She advanced two grounds. First, she pointed out, they never had sex, so the marriage had not been “consummated.” Judge Oblon rejected this ground, pointing out that the statute governing annulment – Va. Code. Sec. 20-89.1 – lists grounds for annulment, but lack of sexual consummation is not among them. “Noticeably absent is ‘coitus,’ ‘sexual intercourse,’ or any synonymous term,” he wrote, pointing out as well that “coitus is nowhere included in the solemnization procedures” of the marriage law, and the word “consummated” as used in the law does not refer to sexual intercourse.

However, a marriage that was induced by fraud could be a ground for annulment under Va. Code Ann. Sec. 20-89.1(A). The party charging fraud must prove by clear and convincing evidence “(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.” The court noted a prior Virginia case in which an annulment had been granted on fraud grounds, explaining: “The court did not hold that consummation was itself a condition precedent to a valid marriage. Rather, it held that the fraud was misleading a person to marry with the intent to deny marital relations, not the lack of marital relations by itself.”

Weighing the credibility of testimony by Sun and by Riley, the court concluded that Riley was more believable than Sun on key points. “In the present case,” he wrote, “Riley testified he entered the marriage with the intent to consummate it. He claimed he tried twice with the ability to perform, was twice rebuffed, and that he never tried again. The Court believed his testimony.”

Sun claimed not to recall these advances, but did not deny that Riley

tried to get her to have sex. “Tellingly,” wrote Oblon, “she admitted she never approached him for marital relations despite her stated goal of having children. She did not even testify that she ever initiated a conversation about why they would not have sex. This is very different from the language she used in her Petition. There, she wrote, ‘the parties have not engaged in any sexual relations or sexual contact due to his vehemently refusing to do so.’ The Court finds as fact her *ore tenus* testimony to be more credible than her Petition and concludes that Riley did not ‘vehemently’ refuse sexual relations; rather, he tried and was rebuffed, and it was Sun who did not want these relations.” Thus, Sun did not show by clear and convincing evidence that Riley defrauded her.

The court rejected Sun’s alternative argument that Riley’s failure to disclose before they got married any intention on his part to transition was itself fraud *per se*. She claimed she believed she was marry a man who wanted to be a man and have children with her, not a person in the process of becoming a woman, and pointed to various events, including her claim that Riley concealed from the steps undertaken towards transition by misrepresenting the procedure he was getting as a vasectomy. In response, “Riley implicitly argued that it is not as simple as Sun argues. He testified he never wanted to be transgender, he wanted to have marital relations with Sun, and his feelings changed over time despite his wishes.”

Neither party presented expert witnesses, leaving the Court to try to figure out what was going on in this case. In the absence of expert testimony, the court resorted to “burdens of proof and weight of evidence under the lens of its own understanding and of common sense. So viewed, Sun has not proved by clear and convincing evidence that Riley defrauded her into marrying him.” While Oblon conceded that Sun’s feeling of being defrauded was understandable, “she did not prove it.” And Oblon embraced the view that “people are not static; they change over time – some in ways more dramatic than others.”



“Must a person ‘unsure of his gender’ before marriage, who now believes he was ‘not supposed to be male,’ have told this to a future spouse to avoid defrauding the spouse?” he asked. “the Court can conceive of circumstances where failure to so inform – or to affirmatively hide these feelings – could amount to fraud in the inducement. However, on the present record, the Court finds Sun failed to prove by clear and convincing evidence that, at the time of her marriage, Riley defrauded her by knowing he did not wish to engage in and perpetuate a marriage between a man and a woman with her. The Court believed Riley that he entered the marriage believing he would be in a lifelong relationship with Sun. It believed him that he tried to have marital relations with her. It believed him that he was unsure of his own sexuality, but that he wanted to be married to Sun as a male.”

In effect, the court seems to have believed that Riley, not having accepted that he was transgender and not wanting to be transgendered, intended to marry Sun and live in a man-and-woman marriage. It didn’t work out that way, but she did not prove that he intended to defraud her by marrying, and the statute places the burden of proof on the party seeking the annulment. Furthermore, the court seems to fault Sun, stating: “Counterfactually, the evidence showed that Sun knew – pre-marriage – that he joked about being a girl and dressing up. She knew he had taken female hormones. She rebuffed his sexual advances and did not make advances of her own or question him as to their celibate status. If one were to apply an *ex post* analysis to this case, one could make a case that Sun should have known Riley was on a trajectory toward becoming a female someday.” So much for the fraud argument . . .

Thus, the Petition for annulment was denied. The opinion as reported by LEXIS indicated that some text was “redacted by the court.” The opinion lists Danielle A. Quinn of Dycio & Biggs, PC, Fairfax, as counsel for Sun. Riley represented himself. ■

## Sixth Circuit Upholds Torture Claim Denial of Iraqi Woman With Same-Sex Sexual Abuse Conviction

By Bryan Xenitelis

The U.S. Court of Appeals for the Sixth Circuit has upheld an order of removal and denial of Convention Against Torture (CAT) relief by the Board of Immigration Appeals (BIA) against an Iraqi former refugee, who claimed that she would be arrested and tortured upon her return to Iraq on account of several factors, including that she had been forced into prostitution and raped both in Iraq and in the United States, that she was an unwed woman, her conversion to Christianity, and because of her criminal conviction of Criminal Sexual Conduct where the victim was a minor girl, in *Saleh v. Barr*, 2019 U.S. App. LEXIS 36731, 2019 WL 6770008 (6<sup>th</sup> Cir., December 12, 2019).

The Petitioner described a traumatic past in Iraq, where she was forced into prostitution and abused. She was eventually granted refugee status and lawfully relocated to the United States, where she was also raped and forced into prostitution. During her nine years in the United States, she converted to Christianity and gave birth to a child (who is, of course, a U.S. citizen). While she was living with a social worker, the social worker’s granddaughter accused the Petitioner of sexual assault, and the Petitioner eventually was convicted of a Michigan Criminal Sexual Conduct offense to which she pleaded *nolo contendere*, an outcome which Petitioner claimed to have agreed to because she believed the crime, a misdemeanor, would have no immigration consequences.

The Petitioner was charged by the government with being removable from the United States on account of having a “Sexual Abuse of a Minor” “Aggravated Felony” conviction, which limited her relief solely to seeking protection under the CAT. Petitioner claimed that she was more likely than not that on return to Iraq she would be detained and tortured for many reasons:

her prior forced prostitution constituted a felony in Iraq; she was unwed; she had converted to Christianity; and that her U.S. criminal record would reveal that she had engaged in same-sex sexual conduct. Both the Immigration Judge and the BIA upheld the removability charge and found that the Petitioner failed to meet her burden necessary to receive CAT Relief.

Responding to her petition for review, the 6<sup>th</sup> Circuit panel summarized the very complex factual and procedural history of the case, and ultimately upheld the BIA’s removal order. Writing for the panel, Circuit Judge Eric L. Clay noted that only questions of law could be addressed on judicial review. He first addressed the Petitioner’s arguments regarding whether her sexual conduct plea constituted an “aggravated felony” that would render her removable. Because Petitioner had made several arguments about why the crime did not constitute an “aggravated felony” for the first time in her Petition for review, Clay found that the panel could not consider the merits of those arguments because she had failed argue them in the administrative forum. One of Petitioner’s rejected arguments arose out of a newly-decided Supreme Court precedent that was announced *after* the BIA had denied her appeal of the Immigration Judge’s decision, but Clay ruled that Petitioner’s only way to have properly preserved and exhausted that argument would have been if she had filed a motion with the BIA to reopen her appeal at that level. Finding none of the issues she sought to raise on this appeal reviewable, the court refused to address them on the merits.

Regarding Petitioner’s torture claim, she argued that the Board erred in its handling of the burden of proof. Under the laws and case history relating to the CAT, Petitioner could meet her burden by proving it was more likely than not

that she would be tortured, on one or both of two theories: 1) that in reviewing multiple reasons for torture, she could prove in the aggregate among them a 50 percent or higher likelihood of torture; and/or 2) a chain of events would occur leading to torture, and that the Petitioner could prove a 50 percent or higher likelihood of each link in the chain occurring. The Petitioner argued that the Board erred because they considered only the “chain of events” analysis and found that she failed to meet it. Judge Clay ruled that either theory could be applied to the case, and therefore found no mistake by the Board to consider the “chain of events” theory.

The Petitioner also argued that the Board held her to an “impossible evidentiary standard.” After a lengthy discussion of case law and the discussions by the IJ and BIA finding no “concrete evidence that establishes a direct threat of torture against Iraqi women deportees” who are similar in relevant respects to the Petitioner, Judge Clay ruled that the BIA applied the correct evidentiary standard and upheld its decision denying CAT relief.

The Petitioner was represented on appeal by Ruby Aaron Robinson, Michigan Poverty Law Program, Ypsilanti, MI; and Catherine J. Villanueva, Michigan Immigrant Rights Center, Grand Rapids, MI. From references with the court’s opinion, it seems that Petitioner had advice of counsel prior to her decision to plead no contest on the sexual abuse charge, but her counsel at that stage is not identified in the opinion. ■

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



## Pro Se Inmate with PTSD Wins Reversal of Dismissal of Shower Privacy Case Under Eighth and Fourteenth Amendments

*By William J. Rold*

*Pro se* prisoner Larry Allen Thompson (from the opinion, presumably heterosexual) has post-traumatic stress syndrome from childhood abuse, and he asserts that he cannot shower communally with other men. After he was transferred to a prison that had only communal showers with no privacy dividers, he sued to challenge denial of private shower facilities. U.S. District Judge Lewis T. Babcock dismissed the case on the pleadings as “frivolous,” writing, in part, that there was no constitutional right to a private shower. The Tenth Circuit, in an unofficially published opinion by Circuit Judge Allison H. Eid (a Trump appointee) – for herself and Circuit Judges Mary Beck Briscoe (Clinton) and Nancy L. Moritz (Obama) – reversed in pertinent part under both the Eighth and Fourteenth Amendments. *Thompson v. Lengerich*, 2019 U.S. App. LEXIS 38237 (10<sup>th</sup> Cir., Dec. 23, 2019).

Thompson remained *pro se* throughout the appeal. No appellee appeared. Remarkable as the showering remand is, Thompson also won a remand on a claim of overcrowding at Colorado’s Buena Vista facility – one of the state’s oldest – but discussion of this part of the decision is beyond the scope of this article. Although it appears that Thompson is not gay, bisexual or transgender, the court’s treatment of the constitutional issues affects claims commonly litigated by LGBT prisoners.

Colorado began to allow Thompson to shower privately before he filed this lawsuit. The court found this voluntary cessation to have Article III (jurisdictional) consequences for injunctive relief, which it could raise *sua sponte*, citing, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) and some 10<sup>th</sup> Circuit

opinions. Thompson therefore did not have standing to request an injunction. This does not affect his claim for monetary relief, since Thompson could seek nominal or punitive damages, even if compensatory damages did not occur or are barred by the Prison Litigation Reform Act. The discussion that follows is limited to claims for damages.

The court rejects Thompson’s attempt to present his issues under the Fourth Amendment. Showering is neither a “search” nor a “seizure” under applicable precedent. The court therefore turns to the Eighth and Fourteenth Amendments. (There is no discussion of accommodation under the Americans with Disabilities Act.)

Thompson argues that his PTSD was particularly aggravated by forcing him to shower with sex offenders, who were included in the population using the communal showers. The state responded, generally, that it was not required to provide “private” shower facilities except for transgender and intersex inmates under the Prison Rape Elimination Act, 34 U.S.C. §§ 30301-30309, and its implementing regulations, 28 C.F.R. Pt. 115 (federal), and A.R. 100-40 (Colorado). The court noted that these regulations do not address private showers “for other inmates such as Thompson who have special needs.” Thompson was denied private showers for approximately 25 days before the state agreed to them.

On the Eighth Amendment claim, the Court wrote: “the defendants essentially presented Thompson with a Hobson’s choice between hygiene/sanitation, on the one hand, and personal safety and/or care for his diagnosed PTSS/D, on the other. Either way, Thompson would be deprived of humane conditions of confinement. These allegations are not legally frivolous.” The named defendants were sufficiently involved

in the denial of private showers – and were knowledgeable about them – to permit the damages claim under the Eighth Amendment to go forward. *Tafuya v. Salazar*, 516 F.3d 912, 916 (10<sup>th</sup> Cir. 2008).

There are two branches to the court’s analysis of the Fourteenth Amendment: privacy; and equal protection. On privacy, the court recognizes an inmate interest in bodily privacy, citing *Cumbey v. Meachum*, 684 F.2d 712, 714 (10<sup>th</sup> Cir. 1982) (privacy interest in male inmate’s request to limit female officer’s observation of nudity). The court found that it was not frivolous for Thompson to argue that *Cumbey* should extend to “the proposition that an inmate with PTSS/D from childhood abuse has an interest in bodily privacy that would preclude being required to shower communally with other inmates, including sex offenders.”

On Equal Protection, the court found that the District Court has mis-framed the class by positing the comparison as between transgender and intersex inmates on the one hand and inmates with special needs on the other. Rather, the apt analysis is the extent to which Thompson was *like* transgender/intersex inmates but nevertheless treated differently, citing *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (treating “like cases alike”). “Thompson adequately alleged that he is similarly situated to transgender and intersex inmates with regard to the relevant respect—prisoners who, for legitimate reasons of personal safety (either mental or physical), have a need for private showers. We also conclude that it is not legally frivolous for Thompson to contend that there is no legitimate penological interest in privileging some inmates with special needs for private showers while rejecting the requests of other inmates with special needs.”

This decision is important. It supports Eighth Amendment jurisprudence on abuse-based need for mental health accommodation. It recognizes a residual privacy that survives incarceration. It also adopts a functional approach under Equal Protection that is more sophisticated than standard class-based

categories. Transgender inmates who are not dysphoric under the DSM, for example, could cite this case to support female presentation or feminizing items outside of rigid “treatment” protocols. If officially published, this case would set precedent. Perhaps that is why it is not going to be officially published. *See Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10<sup>th</sup> Cir. 2012) (cautioning district courts about relying on unofficially published cases in deciding what is “clearly established” for qualified immunity purposes). Advocates are reminded that it can still be cited under F.R.A.P. 32.1. ■

*William 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 Appellate Court Affirms That Name Changes Cannot Be Denied on the Basis of Gender Transitioning

*By Timothy Ramos*

What’s in a name? For the transgender community, a name change is one step towards being recognized as the people they truly are. This step is seemingly insurmountable in a number of states. In addition to large court fees and bureaucratic red tape, the name-change process has, at times, been burdened by judges who wrongly usurp the role as gatekeeper. On December 3, 2019, a three-judge panel of the Court of Appeals of Arizona, Division 1, reversed and remanded Yuma County Superior Court Judge Lawrence Kenworthy’s decision to summarily deny—with prejudice—Valeria Cortez’s application to change his name for lack of good cause. *Matter of Cortez*, 453 P. 3d 813 (Ariz. Ct. App., Dec. 3, 2019). Writing for the appellate court, Judge David D. Weinzwieg held that Judge Kenworthy abused his discretion and that the relevant state statute does not have a good-cause requirement.

Cortez sought to change his name from “Valeria Stephany Cortez” to “Sebastian Tomas Valentine.” By the time he filed his name-change application in early 2019, he had already been using his new name for some time. In his application, on a form supplied by Yuma County, Cortez made all the required oaths and wrote that he was requesting the name change because he is transitioning and wanted his documents to match his identity. Six days later, Judge Kenworthy denied Cortez’s application with prejudice for failure to show good cause. The judge neither held a hearing nor provided an explanation for his ruling.



On appeal, the court reviewed the Judge Kenworthy's denial of a name change for abuse of discretion and reviewed his interpretation and application of the relevant statute *de novo*. A.R.S. § 12-601 sets forth the requirements and procedures for requesting a name change. The statute also provides a list of criteria for judges to consider in determining whether to grant a name change, including whether the applicant: (i) has a felony conviction or faces felony charges; (ii) is knowingly changing his name to commit or further the commission of various criminal offenses; (iii) seeks a name change solely for his or her best interest; and (iv) has acknowledged that the proposed name change will not release him or her from any obligation incurred or harm any rights of property or actions in the original name.

The court simply looked to the language of A.R.S. § 12-601 to determine that Judge Kenworthy erroneously misinterpreted the statute to have a good-cause requirement. Quoting *State v. Hansen*, 215 Ariz. 287, 289 (2007), the court reiterated that "when the language is clear and unequivocal, it is determinative of the statute's construction." Thus, the court held that A.R.S. § 12-601 does not permit the superior court to deny a person's name-change request only because the person wants the new name to reflect a gender transition. Furthermore, because Cortez had also sworn under penalty of perjury that he sought his name change solely in his best interest and not for any unlawful purposes, the court held that Judge Kenworthy abused his discretion.

Cortez was represented by Molly Patricia Brizgys from the ACLU Foundation of Arizona, Phoenix, and Abigail Jensen from the Southern Arizona Gender Alliance, Inc., Tuscon. ■

*Timothy Ramos earned a J.D. from NYLS in 2019.*



## New York Appellate Division Affirms Ruling Reuniting Child With Second Parent After a Significant Lapse of Time

*By Arthur S. Leonard*

The New York Appellate Division, 3<sup>rd</sup> Department, has affirmed a ruling by Broome County Family Court Judge Mark H. Young that the Petitioner, a former same-sex partner who has not had contact with the child born during her relationship with the biological mother (the Respondent) for almost a decade (as of the time of the Appellate Division's ruling), should be reunited with the child, deferring to Judge Young's conclusion that this would be in the best interest of the child. *Heather NN. v. Vinnettee OO.*, 2019 N.Y. App. Div. LEXIS 9381, 2019 WL 7173471 (Dec. 26, 2019). The court *rejected* the Respondent's argument that because the child allegedly has no memory of the Petitioner, having last seen her at the age of three and now being a teenager, and has no knowledge about the history of her conception, it would not be in the best interest of the child to order visitation.

The parties met in 2004 at a counseling facility in Brooklyn where Respondent was a counselor and Petitioner was a convicted drug dealer who was required to undergo substance abuse counseling as a result of her 2002 conviction. The parties began a relationship, and after Petitioner completed the counseling, Respondent moved to Binghamton, in Broome County, where Petitioner owned a home, to live with her. Petitioner continued to sell drugs during this period, and served 14 months in prison in 2006 and 2007, but the relationship survived this, with Respondent continuing to live in Petitioner's house and handling her business affairs (she owned and managed several properties) during her incarceration. During this time, Respondent wrote letters to Petitioner (admitted in evidence by the trial court) in which Respondent "stated her desire to marry Petitioner and have children with her."

This desire was fulfilled after Petitioner was released from prison. They selected a sperm donor "who would reflect Petitioner's ethnic background," and Petitioner participated fully in the process, including injecting the sperm on one of the attempts to induce pregnancy. Petitioner paid for the insemination procedure with her credit card, attended a baby shower with friends and family members, was present for the birth, cutting the umbilical cord. The child was given two last names, combining the mothers' surnames, and was named, in part, after petitioner's mother. Petitioner shared costs of raising the child, including day-care costs, and the parties were listed as the child's two mothers in medical and immunization records. All of this happened several years before it became possible for same-sex partners to marry in New York.

The parties separated in 2009, about a year after the child's birth. The child remained with her biological mother, the Respondent, who allowed some parenting time for Petitioner over the next two years, but then terminated all visitation. Respondent occasionally sent pictures of the child to the Petitioner and permitted some telephone contact, but told Petitioner not to use her real name or tell the child who she was, and Petitioner has not had parenting time with the child since 2010. Petitioner brought suit seeking visitation and joint custody in 2011, but the Family Court, applying the prevailing New York precedent, dismissed the action for lack of standing, and, at Respondent's instance, issued an order of protection blocking any contact between Petitioner and the child.

After the New York Court of Appeals issued its historic decision in *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 39 N.Y.S. 3d 89, 61 N.E.3d 488 (2016), reversing prior precedent and

finding that under certain circumstances a same-sex partner who had participated in the conception of a child would have standing to seek visitation and custody, Petitioner decided to try again. This time, the Family Court found that she came within the definition of a parent under the “conception” analysis, i.e., upon proof that she and Respondent had been a couple who jointly decided to have a child together and had gone through the process together resulting in the birth of the child whom they were raising together as parents in the period following the birth. Thus, she had standing to see custody and visitation.

The vexing question was how to handle the lack of any relationship between Petitioner and the child. As the court described the situation, the child had no active memory of Petitioner and was not aware of Petitioner’s role in her conception and early years. Family Court Judge Young’s solution to this problem was to order a gradual process, beginning in counseling, extending to periodic supervised visitation, culminating in limited periodic unsupervised visitation, with the idea that at some point the process would progress to where the court could be asked to modify to a more usual visitation schedule. At the same time, the Family Court declined to issue a new order of protection that Respondent had requested.

Writing for the unanimous four-judge panel, Justice Elizabeth A. Garry rejected virtually all of the Respondent’s arguments challenging the Family Court’s actions.

As to standing, Justice Garry wrote, “Contrary to respondent’s argument, Family Court did not err in applying the conception test to determine petitioner’s standing rather than a ‘functional’ test that would have examined the relationship between petition and the child after the child’s birth. The evidence fully establishes that the parties planned jointly for the child’s conception, participated jointly in the process of conceiving the child, planned jointly for her birth, and planned to raise her together.” This proof met the “clear and convincing evidence” standard adopted by the Court of Appeals in *Brooke S.B.*

As to Respondent’s challenging the Family Court’s parenting time award, the court noted the rule that a child’s best interests “generally lie with a healthy, meaningful relationship with both parents.” The court rejected Respondent’s argument that Petitioner is a parent “only by operation of law” and thus not entitled to the same parenting rights as a biological parent. Respondent had not cited any cases specifically supporting such a theory, and the court asserted that neither the relevant statutes nor case law would support it. Respondent offered a long list of reasons why she contended visitation would not be in the best interest of the child, with Petitioner’s history of criminal drug sales leading the list, but the court found that the record supported Petitioner’s argument that she had long since ceased that activity and was actively managing her rental property to support herself. The court deferred to Judge Young’s credibility determinations, upholding his conclusion that Respondent failed to show that Petitioner was “currently involved in criminal or otherwise harmful conduct.”

The court also noted Judge Young’s decision to deny Respondent’s new request for a protective order, finding that the only lapse in Petitioner’s conduct during the lengthy period since dismissal of her earlier visitation case had been one objectionable text message sent on the child’s eighth birthday. The court noted Judge Young’s conclusion that the acrimony between the parties weighed against any grant of joint custody, but found that “the text message, alone, did not rise to the level of a family offense.” “We concur,” wrote Garry, “with the court’s implied finding that the parties’ acrimonious history did not constitute substantial evidence that parenting time would be harmful to the child.”

The court described the fashioning of a visitation order in light of the lapse of contact between Petitioner and the child as “the most delicate issue that confronted the Family Court.” Of course, this lapse was created by Respondent’s action in cutting off contact. “Notably,” wrote Justice Garry, “the child’s lack

of knowledge resulted solely from respondent’s unilateral decision to cut off her contact with petitioner; in the context of custody determinations, this Court has repeatedly held that a parent’s unwillingness to foster a positive relationship with a child’s other parent is inconsistent with the child’s best interests. Although parenting time may sometimes be denied because of a parent’s prolonged lack of effort to maintain a relationship with a child, this case does not present such a circumstance.” Petitioner tried to get a visitation order at a time when New York law denied her standing to do so, and renewed her effort as soon as New York law changed to make it possible. Thus, the presumption that visitation is in the child’s best interest was not rebutted.

The court held that the Family Court’s solution, to reintroduce Petitioner and the child through a gradual process beginning with counseling, was within that court’s broad discretion. However, the court made two small modifications in the Family Court’s order. “First, we agree with the attorney for the child that, in view of the parties’ acrimonious history, they may require assistance in selecting a therapeutic counselor.” The court modified the order to provide the services of the court to help find a counselor if the parties could not agree. The other modification was to provide that the first three sessions for the child with the counselor would take place without the presence of the Petitioner, “to assist the child in developing familiarity with the therapeutic counselor and the counseling process.” After the first three sessions, Petitioner would join to begin an eight-week period of parenting time *during* therapeutic counseling, which would then be followed, as set out by the Family Court, with a period of supervised visitation, and then unsupervised visitation.

The court lists Tully Rinckey PLLC (Tauseef S. Ahmed of counsel) as representing Vinnette OO., characterized as “Appellant-Respondent,” i.e., the birth mother. Heather NN., the Petitioner (characterized as “Respondent-Appellant”) appeared *pro se*. Larisa Obolensky served as attorney for the child. ■

# Federal Judge Preliminarily Enjoins “Unqualified” Transgender “Committee” in Illinois Prison System; Orders State Officials to Read Hearing Transcript

By William J. Rold

There is only a “putative” class of Illinois transgender prisoners, but Chief U.S. District Judge Nancy J. Rosenstengel preliminarily enjoins Illinois correctional officials [Illinois Department of Corrections - IDOC] from using an “unqualified” “Transgender Committee” to ration and deny transgender treatment and services to inmates in *Monroe v. Baldwin*, 2019 WL 6918474, 2019 U.S. Dist. LEXIS 217925 (S.D. Ill., Dec. 19, 2019). The three defendants are the IDOC Director, IDOC’s Chief of Health Services, and its Mental Health Supervisor. Only injunctive relief is sought in the lawsuit.

There are six plaintiffs, whose individual circumstances the judge recites in detail. Each was delayed or denied diagnosis, hormones, monitoring of hormones, feminizing transition, mental health services, or evaluation for surgery. Each was subjected to harassment, slurs, and denials of basic humanity, as described in the complaint.

More generally, Judge Rosenstengel found that IDOC’s “Transgender Committee” [hereafter Committee] was composed of five members – all of whom were unqualified to determine basic medical and mental health treatment for transgender people – and two of whom had no health training at all. This is typical of such Committees throughout the country, in this writer’s experience.

Judge Rosenstengel’s lengthy opinion includes a discussion of transgender people, gender dysphoria and its treatment, qualifications for treatment, transitioning, the co-therapeutic role of psychotherapy, hormones, and surgery. She found that hormone therapy is “often a necessary component of treating gender dysphoria” and that a transgender woman must be “afforded the same canteen items that female prisoners can access” and be permitted “makeup or clothing that affirms her gender.”

Following a two-day hearing, Judge Rosenstengel adopted guidelines of the Endocrine Society and WPATH (World Professional Association of Transgender Health). She heard from two experts for plaintiffs. Vin Tangpricha, M.D., Ph.D., has treated over 360 transgender patients. He opined on the named plaintiffs and on the IDOC system in general. He pointed out that the plaintiffs (and others) were denied basic endocrinological care, and that the Committee was “unqualified” to make such decisions or to supervise hormone therapy – not even the Committee members with medical credentials. The Committee failed to monitor 90% of the inmates on hormones; and, of the 10% who were monitored, 90% had lab results outside acceptable therapeutic values.

Plaintiffs also called clinical and forensic psychologist, Dr. Randi Ettner, whose experience includes over 3,000 transgender patients. She likewise opined that she “does not believe any of the members of the [Committee] are competent to treat gender dysphoria.” Her testimony cited “fail[ure] to facilitate social transition,” conflation of “sexual identity with gender identity,” and “inadequate and inappropriate care by delaying” various therapies.

IDOC called the chair of the Committee, Dr. William Puga, a psychiatrist. He said that he has never treated a transgender patient, either individually or under the supervision of a WPATH-certified physician. He has never presided over social transition. He has never prescribed hormones or monitored them, saying, “I don’t know how medicine works, frankly.” He defers to “Dr. Reister” as having the most experience on the Committee. Dr. Reister is an IDOC regional psychologist who has attended a WPATH conference, but he said he defers to Dr. Puga on hormones. [One cannot make this up;

Dr. Puga “estimated” that IDOC has seventy inmates on hormones – and it seems that no one is overseeing this.]

Judge Rosenstengel had little trouble finding both arms of the Eighth Amendment standard for correctional health to be violated – serious medical issues and deliberate indifference to them – citing *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019). She accepted the expert testimony of both Drs. Tangpricha and Ettner. Defendants offered no qualified experts.

Defendants tried to mount a facial challenge to plaintiffs’ experts, arguing that they were unqualified to opine under *Daubert v. Merrell Pharmaceuticals*, 509 U.S. 570, 595 (1993). Judge Rosenstengel rejected this, given their credentials and experience, and it merely showed the paucity of Dr. Puga’s credentials. She also rejected objections that the experts were too “identified” with plaintiffs’ litigation and that the standards they cited from the Endocrine Society and WPATH were aspirational and were not appropriate to set constitutional floors for treatment. She found plaintiffs’ expert testimony to be credible, and that the experts’ use of standards was unimpeached, as IDOC offered no standards and Dr. Puga’s testimony actually accepted WPATH as appropriate source of standards. The judge also noted that these standards were adopted by the 9<sup>th</sup> Circuit recently in *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (2019).

Judge Rosenstengel found that IDOC “denies and delays the diagnosis and treatment of gender dysphoria without a medical basis or penological purpose,” citing *Mitchell v. Kallas*, 895 F.3d 492, 498 (7th Cir. 2018). She found the Committee (and its chair, Dr. Puga) to be “unqualified to make medical decisions for transgender inmates.” Further, she found that social transition is “an important component of medical



treatment” and that IDOC “prevents Plaintiffs’ social transitions” by denying them appropriate commissary items, garments, and hygiene items.

The judge ruled that “there is no doubt that Plaintiffs face irreparable harms that cannot be compensated by monetary damages,” citing *Whitaker v. Kenosha United School Dist.*, 858 F.3d 1034, 1045-6 (7th Cir. 2017). “In contrast,” she wrote, “Defendants have not identified any harm they will suffer if an injunction were granted.” There is the “highest public interest” in preventing ongoing violations of constitutional rights. *United States v. Raines*, 362 U.S. 17, 27 (1960). Under the Prison Litigation Reform Act, the preliminary injunction is the “minimum necessary” to correct the situation, citing *Brown v. Plata*, 563 U.S. 493, 530 (2011).

Judge Rosenstengel ordered IDOC immediately to cease the policies and practices of: (1) allowing the Committee to make the medical decisions regarding gender dysphoria, ordering IDOC to develop a policy to ensure that decisions about treatment for gender dysphoria are made by medical professionals who are qualified to treat gender dysphoria; (2) denying and delaying hormone therapy for reasons that are not recognized as contraindications to treatment, and to ensure that timely hormone therapy is provided when necessary, as well as to perform routine monitoring of hormone levels; and (3) depriving gender dysphoric prisoners of medically necessary social transition, including by mechanically assigning housing based on genitalia and/or physical size or appearance.

She further ordered IDOC to: (1) develop policies and procedures which allow transgender inmates access to clinicians who meet the competency requirements stated in the WPATH Standards of Care to treat gender dysphoria; (2) allow inmates to obtain evaluations for gender dysphoria upon request or clinical indications of the condition; (3) develop a policy to allow transgender inmates medically necessary social transition, including individualized placement determinations, avoidance of cross-gender strip searches, and access to

gender-affirming clothing and grooming items; and (4) advise the Court what steps, if any, IDOC has taken to train all correctional staff on transgender issues, including the harms caused by misgendering and harassment—by both IDOC staff and other inmates.

Judge Rosenstengel also noted that no IDOC representative attended any portion of the two-day preliminary injunction hearing. “Because the Court is concerned that IDOC is not taking Plaintiffs’ allegations in this lawsuit seriously, the court orders that each named Defendant shall read the transcript of the evidentiary hearing held on July 31-August 1, 2019, and certify to the court, on or before January 6, 2020, that he has done so,” she wrote in her Order. Their holiday reading amounted to over 400 pages. This writer has never seen such an order, which probably correctly assumes that the officials would not familiarize themselves with the details of her findings and directives unless ordered to do so.

The court ordered another conference on the IDOC’s progress to be held by January 22, 2020, at which time the judge will determine whether a “court-appointed medical expert to oversee implementation of the preliminary injunction” is needed. The plaintiffs are represented by the Roger Baldwin Foundation, ACLU of Illinois, Kirkland & Ellis, LLP (all of Chicago); and Kennedy Hunt PC (St. Louis). ■



## In West Virginia, the Third Time Is Not A Charm For Pro Se Lesbian Attorney, As Judge Grants Defendants’ Motion to Dismiss With Prejudice

By Wendy Bicovny

Ruling on motions in Lisa Marie Kerr’s third attempt to sue Marshall University and some of its employees for her adverse experiences as a graduate student, U.S. District Judge Robert C. Chambers granted the named Marshall University defendants’ (2019 Defendants) motion to dismiss with prejudice, denied without prejudice the 2019 Defendants’ motion for sanctions, and denied as moot lesbian *pro se* petitioner Kerr’s motion for leave to file surreplies in opposition to defendants’ motion for sanctions. *Kerr v. Bailey*, 2019 U.S. Dist. LEXIS 208484, 2019 WL 8355 (S.D. W. Va., Dec. 4, 2019). Although Kerr is technically *pro se* in bringing her own case, she is a lawyer who left practice to enroll in a Masters in Teaching program at Marshall University.

Judge Chambers began his analysis by summarily explaining that fewer than four months after her unsuccessful attempts to continue with her first two cases, Kerr filed her current and third action arising from her litigation against Marshall University, concerning its refusal to issue her a teaching credential in the state of West Virginia. Kerr alleges that the University will not, as a matter of policy, award a teaching credential to somebody they know to be gay. Kerr appealed the adverse decisions in her prior cases to the Fourth Circuit. On August 28, 2018, the Fourth Circuit affirmed. On February 19, 2019, the United States Supreme Court denied Plaintiff’s petition for writ of certiorari. Once again, Kerr named most of the Original Defendants, and now added

Marshall University's President as well as the attorneys who represented the Original Defendants in the first two actions (2019 Defendants). As in the 2014 and 2016 actions, Kerr makes claims for defamation, denial of due process, and the denial of equal rights (unlawful discrimination). In her newest filing, she adds claims for fraud, abuse of process, and conspiracy to deny equal rights. Kerr seeks \$36,000,000 in relief.

Noting Kerr's *pro se* status, Judge Chambers accepted the factual allegations in her complaint as true for purposes of ruling on the dismissal motion, but quickly honed in on when the issue of *res judicata* is raised as a ground to dismiss, as here. Judge Chambers explained that a court might take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact. For *res judicata* to apply, three elements must be satisfied: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.

Applying these factors to the present case, the court finds all three criteria clearly are met for those claims Kerr previously made and now realleged against the Original Defendants in the 2019 Complaint. The first action was dismissed on the merits with prejudice, resulting in the second action being barred by *res judicata*. Kerr insists that the current action is different from the previous two actions because the 2019 Defendants conspired to commit a fraud, and she just learned of the fraud in mid-2018. Specifically, Plaintiff alleges that Bailey, aided by Eagle, forged the Clinical Experience Evaluation Form that was relied upon in deciding the first two actions. Thereafter, she claims, all the 2019 Defendants (including those not named in the previous two actions) colluded with one another to make the court believe the evaluation was legitimate, even though the 2019 Defendants either knew or should have known the document was forged. As a result, she argues that her 2019 action is not barred because the 2014 and 2016

actions were obtained by fraud. But Judge Chambers finds Kerr's allegation of fraud is insufficient to save her current action.

Although Kerr repeatedly makes conclusory statements in her 2019 Complaint and her briefs that the evaluation was forged, she fails to offer even a scintilla of evidence to support her claim. Kerr suggests that she realized her evaluation was forged in mid-2018 when, according to her, the Original Defendants refused to authenticate the document upon her demand. Kerr then speculates that the reason why the Original Defendants refused to authenticate the document is because it was forged. Kerr adds that because the factual allegations in her Complaint must be presumed true, any dispute about her knowledge and reliance cannot be addressed at the 12(b)(6) motion to dismiss stage. Therefore, she argues, the court cannot dismiss her 2019 Complaint. However, Kerr's argument belies the very basic principles the court must apply in evaluating a Rule 12(b)(6) motion to dismiss.

While Kerr goes on incessantly in her 2019 Complaint and subsequent briefs about the evaluation being forged and the many ways she believes she was wronged by the 2019 Defendants, her long-winded assertions are found by the court to lack substance and the factual support required to avoid dismissal. As stated above, Kerr must offer at least some evidence to support her claim of fraud other than her personal belief that the evaluation must be a forgery. Kerr's conjecture about the authenticity of the evaluation is just that: conjecture. It is well established that Kerr cannot use her 2019 Complaint as a fishing expedition in the hopes of supporting her speculation that there was fraud. Chambers found that Kerr's mere speculative, conclusory, and threadbare allegations that the evaluation was forged fail to permit the court to infer a plausible claim of misconduct.

Additionally, even if the court had found Kerr established a sufficient factual basis of fraud – which it does not – the Court agrees with the 2019 Defendants that Kerr's claim is barred

by the statute of limitations. Despite Kerr's contention that she did not realize the forgery until mid-2018, the judge found that record evidence statements definitively establish that Kerr believed the evaluation was forged and there was a fraud on the court long before mid-2018, as she now claims. Specifically, Kerr stated in a brief she filed with the Fourth Circuit that she had an "a-ha" moment on March 22, 2016, that the evaluation must have been forged/alterd by one or more of the (Original) Marshall Defendants. Kerr told the Fourth Circuit that, knowing the evaluation was fraudulent, she filed a fresh action on July 2016 to allow defense counsel to walk away from what they must have known was a fraudulent document. As defense counsel continued with their representation, she argued the Fourth Circuit should sanction them for using a forged/alterd document and relying upon the district court's decision they had obtained through fraud on the court. Thus, even if the court did have evidence of fraud (which she did not set forth in her 2019 Complaint), the 2019 Complaint was untimely filed. Moreover, the fact that Kerr named three new Defendants in her 2019 Complaint and asserted additional claims of abuse of process and conspiracy made no difference to this court's decision. Kerr concedes that all her claims are woven together by her claim of forgery. As her claim of forgery fails for the reasons stated above, the rest of her claims against all 2019 Defendants likewise fail.

Lastly, turning to the motion for sanctions by the 2019 Defendants, the court found Kerr's attempt to use an unsupported allegation of fraud to bootstrap yet another action based on the same core set of facts treads dangerously close to bad faith and to justifying an award of sanctions. Although the court assumed that Kerr believes in the merits of her case, she cannot continue to litigate claims that have already been dismissed with prejudice. The judgments against her have finality and, regardless whether Kerr agrees with those judgments, she cannot keep filing new actions against

the 2019 Defendants for the same alleged transgressions. In the court's opinion, Kerr's decision to bring this third action has resulted in five years of repetitious litigation. Although the court, in its discretion, declined to award sanctions, the court denied the 2019 Defendants' motion for sanctions *without prejudice*. If Kerr files a fourth frivolous or vexatious action against the 2019 Defendants, the court very likely would impose significant sanctions against her. ■

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## Arizona District Court Treats State Health Provider's Exclusion of Gender Reassignment Surgery as a Violation of Title VII and Leaves Open Plaintiff's Equal Protection Claim

*By David Escoto*

On December 23, 2019, the U.S. District Court for the District of Arizona denied State Defendant's objections to a magistrate judge's ruling on a motion to dismiss regarding Dr. Russel B. Toomey's Title VII and Equal Protection claims. Dr. Toomey's health provider refused a preauthorization for a total hysterectomy because of the health plan's exclusion of gender reassignment surgery. Judge Rosemary Márquez also granted Dr. Toomey's objections to the magistrate judge's decision regarding the viability of his Title VII claim. *Toomey v. Arizona*, 2019 U.S. Dist. LEXIS 219781, 2019 WL 7172144. Considering we are in the Supreme Court term that will address whether Title VII prohibits discrimination against transgender people, it is significant that Judge Márquez rules that in the Ninth Circuit gender identity discrimination is an actionable Title VII claim and that Plaintiff's Equal Protection claim has alleged a sufficient factual and legal basis to survive a motion to Dismiss.

Dr. Toomey is a transgender man who is employed as an Associate Professor at the University of Arizona. Toomey has been living as a man since 2003 and has received medically necessary hormone therapy and chest reconstruction surgery for diagnosed gender dysphoria. Toomey's health insurance plan is self-funded and provided by the State of Arizona. The plan covers most medically necessary care related to gender dysphoria, including mental health counseling and hormone therapy, but gender reassignment surgery is excluded from this coverage. Per the recommendation of Toomey's doctor, he sought preauthorization for a total hysterectomy from his provider, Blue Cross Blue Shield of Arizona

(BCBSAZ). BCBSAZ refused to approve the procedure due to the plan's exclusion of gender reassignment surgery.

Toomey then filed an Equal Employment Opportunity Commission charge against the Arizona Board of Regents, alleging sex discrimination under Title VII. Toomey received his Notice of Right to Sue and filed the present lawsuit. Toomey sought declaratory relief for violations of Title VII and the Equal Protection Clause, along with injunctive relief, which required Defendants to remove the exclusion of coverage for gender reassignment surgery and evaluate whether surgical care for gender dysphoria is "medically necessary" under the plan. The State Defendants filed a Motion to Dismiss on March 18, 2019, arguing that the action should be dismissed because Toomey failed to exhaust the plan's internal appeals process before commencing the suit. They also argue that there is no actionable Title VII sex discrimination or Equal Protection claim, that sovereign immunity bars Toomey's claims against them, and that Toomey failed to exhaust his Title VII remedies by failing to file an EEOC charge against the State of Arizona or the Arizona Department of Administration.

On June 24, 2019, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation (R&R) recommending that the Motion to Dismiss be partially granted and partially denied. Judge Bowman's R&R rejects the State Defendant's argument concerning Toomey's failure to exhaust the plan's internal appeals process because the exhaustion provision in the plan was ambiguous as it relates to Title VII and Equal Protection challenges. The R&R also recommends denying



the Motion to Dismiss with respect to the Equal Protection claim, because the Judge Bowman found that Toomey has alleged facts that if true could justify a heightened level of scrutiny under the Equal Protection Clause. Regarding sovereign immunity, the R&R finds that the case falls within the *Ex Parte Young* exception, which permits actions seeking prospective injunctive relief against a state officer who has allegedly violated federal law. However, the R&R recommends dismissing Toomey's Title VII claim as non-viable and does not reach the issue of administrative exhaustion with respect to Title VII.

All parties filed objections to the R&R. Several State Defendants, including the Arizona Board of Regents and other individuals named in the lawsuit, objected to the R&R to the extent that the dismissal of the Title VII claim does not apply to all parties. State Defendants also object to the findings regarding the Equal Protection claim, exhaustion of the plan's internal appeals process, and sovereign immunity. Toomey objects to the findings regarding the viability of his Title VII claim. Judge Márquez reviewed Judge Bowman's findings *de novo* and had the authority to accept, reject, or modify the R&R in whole or in part.

Regarding administrative exhaustion, the Public Health Services Act requires a health insurance plan to provide internal processes for "full and fair review to adverse benefit decisions." The plan in question contains an exhaustion provision stating that "no action in law or in equity can be brought to recover on this Plan until the appeals procedure has been exhausted as described in this Plan." In objection to the R&R, the State Defendants argued that the provision was unambiguous and required Toomey to exhaust the internal appeals process. Judge Márquez agreed with the R&R and Toomey in finding the exhaustion provision inapplicable because Toomey was not seeking to recover "on the plan." Instead, he was seeking prospective declaratory and injunctive relief on the ground that the plan's express exclusion of surgical procedures for sex reassignment violate Title VII and the Equal Protection clause.

Two of the named Defendants who are state officers further contend that sovereign immunity bars Toomey's suit against them. However, the Motion to Dismiss mischaracterizes the type of relief requested by Toomey. Defendants argue that the relief requested is a retroactive payment of benefits. Judge Márquez disagrees with this argument, and adopts the R&R fully with respect to sovereign immunity because the requested relief is entirely prospective, requiring Toomey's surgery to be evaluated for medical necessity.

Judge Márquez points out in her opinion that the Circuit Courts are divided on whether discrimination based on a person's transgender identity constitutes sex discrimination for the purposes of Title VII. Some circuits have found that transgender individuals are a protected class in and of themselves. Others have held that they are protected not by their status as transgender, but by applying the analysis used in cases against cisgendered individuals. However, the Ninth Circuit has found that discrimination based on transgender identity violates Title VII.

The court disagreed with the R&R, finding that Toomey has pled sufficient factual and legal basis to survive a Motion to Dismiss his Title VII claim because, but for the individual's sex, the employer's treatment of the individual would be different. The reasoning behind this, Judge Márquez points out, is that the sex characteristic is inseparable from transgender identity. Had Toomey been born male, rather than female, he would not suffer from gender dysphoria and not be seeking gender reassignment. Had Toomey needed a hysterectomy for any medically necessary purpose other than for gender reassignment, the plan would have covered the procedure. The narrow exclusion in the plan, the opinion notes, is directly connected to the incongruence between the Toomey's natal sex and his gender identity.

Defendants argued that there has to be a line drawn in order to contain health care costs and that the exclusion targets a "service" and not transgender individuals. However, this argument failed because the exclusion negatively impacts only those who do not conform

to the gender identity that is typically associated with the sex they were assigned at birth. Further, transgender individuals are singled out and receive different treatment under the plan's exclusion because they are the only individuals that would ever seek gender reassignment. Judge Márquez finds the alleged facts sufficient to survive Defendant's Motion to Dismiss and rejects the R&R findings.

Judge Márquez agreed with the R&R findings that the alleged facts, if true, would warrant a heightened level of scrutiny for an Equal Protection claim and that the State Defendants had not shown that the plan's exclusion would survive heightened scrutiny. There is a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination. On the other hand, when the government action neither involves a fundamental right nor proceeds along "suspect line," the act is afforded a presumption of validity and subject only to rational-basis review. Under rational-basis scrutiny, there must be "a rational relationship between the disparity of treatment and some legitimate government purpose."

State Defendants argued that rational basis is the applicable standard of review, and even if heightened scrutiny were to apply, the exclusion would survive because of the governmental interest in containing and reducing health care costs. However, Judge Márquez agrees with Toomey, finding that in the Ninth Circuit, transgender status is a suspect or quasi-suspect classification subject to heightened scrutiny. Further, the interest in reducing health care costs asserted by the State Defendants does not justify the disparaging treatment of transition-related surgery from the costs associated with other medically necessary treatments.

Judge Márquez agrees with the R&R in applying heightened scrutiny, but points out that even if the court were to apply rational basis, it is unclear that Toomey's claim would fail. Most importantly, Judge Márquez states that "limiting health care costs is a legitimate state interest, but that interest cannot be furthered by arbitrary classifications or by harming a politically unpopular

or vulnerable group.” In other words, Judge Márquez finds that Toomey has alleged enough facts that plausibly show his health provider’s exclusion of gender reassignment surgery is not rationally related to a legitimate government interest, leaving open his Equal Protection claim.

Russell B. Toomey is represented by Heather Ann Macre, James Burr Shields, II and Natalie Brooke Virden of Aiken Schenk Hawkins & Ricciardi PC in Phoenix, AZ, Joshua A. Block and Leslie Cooper as Pro Hac Vices from ACLU – New York, NY and Molly Patricia Brizgys from the ACLU – Phoenix, AZ. The State of Arizona and Paul Shannon, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration, are represented by Catherine Christine Burns and Kathryn H. King of Burns Barton LLP, Phoenix, AZ. ■

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



## New York Family Court Approves Two Adoption Petitions by Transgender Fathers of Children Born to Their Wives through Donor Insemination

*By Joseph Meese*

In two consolidated adoption proceedings, *In the Matter of A and LU*, 2019 N.Y. Misc. LEXIS 6601, 2019 NYLJ LEXIS 4510 (Dec. 20, 2019), Judicial Hearing Officer Richard Ross of the Kings County Family Court approved the adoption of two children by their fathers, both of whom transitioned from female to male, and who were already the legal parents of the children because they were born during the fathers’ marriage to their respective mothers. Both fathers were named on their respective children’s birth certificates, constituting a prima facie case of legal parenthood in New York, which may be rebutted. However, in the present case, no rebuttal was made. Furthermore, the children’s respective mothers consented to the adoptions. The parents sought to adopt the children to ensure their parental status and protect the best interest of the children in case of traveling, a family move, or in the event of the death of the mother. The fathers’ status as legal parents would be uncertain because some jurisdictions do not recognize the fathers’ male gender identity.

First, the court agreed with the petitioners’ argument that their case was supported by *Matter of L*, 2016 NY Slip Op 31868, 2016 N.Y. Misc. LEXIS 3674 (N.Y.C. Fam. Ct., October 6, 2016), involving six petitioners in same-sex marriages, in which the court, seeking to harmonize the non-uniform law of legal parentage across the United States as well as promote the best interests of the children, approved the adoption of the subject children when the petitioner was already the legal parent in New York, but whose legal parentage might not be not recognized in all jurisdictions.

Second, the court agreed with the petitioners’ arguments that legal

protections may not be available to them in jurisdictions not recognizing their male gender identity without an adoption decree. In a substantial majority of the 192 United Nations member countries, as well as many states within the U.S., New York State’s legal protections may not be available if the parent happens physically to be within one of those jurisdictions in which the parent’s gender identity is not recognized.

Third, recent New York legislation signed in June 2019 prohibits the denial of adoption based solely on the fact that the petitioner’s parentage is already recognized under New York law. (See Domestic Relations Law § 110, as amended by 2019 NY Senate-Assembly Bill S.3999, A.460.) Governor Andrew Cuomo’s press release upon signing the bill stated that the legislative intent was to protect parents whose names were not on a birth certificate, same-sex couples, and parents who had a child through surrogacy from being denied an adoption when the petitioning parent is already recognized as the child’s parent. The court held that while the parents in the present case do not specifically match the family structures described in Governor Cuomo’s press release, their family situation was consistent with the legislative intent because the facts underlying the proceeding show the potential that the families will not be treated with the fairness and equality envisioned by the legislation.

This court approved the lawful adoption of a child already recognized under New York law, broadening the scope of families to include those with a parent who has transitioned genders. New York adoptions must be given full faith and credit by every state, as provided under the Article IV, Section 1 of the U.S. Constitution. Therefore,

the court's approval of the adoptions must be recognized in jurisdictions not recognizing the proper gender identity of a parent legally recognized under New York law. Such a decision represents an important victory to recognize and secure the parental rights of LGBT parents and to protect and promote the best interests of their children.

The court's opinion does not list counsel for the parties. ■

*Joseph Meese is a law student at New York Law School (class of 2022) and Spring Intern at the LGBT Bar Association of Greater New York (LeGaL).*



## HIV-Positive NYC Health Care Worker Loses Discrimination Suit Against Health & Hospitals Corporation

*By Wendy Bicovny*

On December 17, 2019, U.S. District Judge Paul A. Engelmayer granted New York City Health and Hospitals Corporation's (H+H) motion to dismiss for failure to state a claim against Joshua Garcia, a gay Hispanic man suffering from HIV infection and several mental health conditions. *Garcia v. New York City Health & Hosps. Corp.*, 2019 U.S. Dist. LEXIS 219048, 2019 WL 6878729 (S.D. N.Y.).

Garcia worked as a hospital care investigator (HCI) at H&H's Woodhull Medical Center since 2010. HE claims H+H discriminated against him by failing to promote him, fostering a hostile work environment, and retaliating against him on the basis of his race, sexual orientation, and disability in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the New York City Human Rights Law (NYCHRL). In September 2017, Garcia's supervisor, Pascal, promoted one of Garcia's co-workers to a management position. According to Garcia, this position had not been posted in accordance with H+H's policies. Garcia believed that Pascal had promoted this coworker instead of him as a result of discrimination on the basis of Garcia's race, sexual orientation, and/or disability. Garcia filed a union complaint. Pascal informed Garcia that she was aware that he had filed a union complaint against her, and that he would be relocated. Garcia told Pascal that the relocation would exacerbate his mental health conditions, for which Garcia provided Pascal medical documentation.

This marked the beginning of a series of communications between Garcia and H+H, in which H+H informed Garcia that he would be relocated to various workspaces in the hospital. Garcia objected to relocation

on account of his disabilities. However, H+H relocated or attempted to relocate Garcia's workstation to a myriad of locations. Garcia alleges that, despite his medical documentation, H+H repeatedly refused to engage in good faith discussions to reasonably accommodate his condition, and that Pascal's repeated attempts to move him from his workspace were acts of retaliation for his Union complaint about the coworker's promotion.

Other incidents ensued. These include: October 11, 2017, where Garcia overheard Pascal speaking in Haitian Creole and referring to him as a faggot in Haitian, a dialect with which Garcia is familiar; July 5, 2018, where Garcia alleges that another coworker, Raquel Kenley, placed her hand on Garcia's rear end and commented that she had never seen a man with a butt so big; September, 2018, when Kenley told Garcia she had decided to nickname him "Skittles," which Garcia understood to be a reference to his sexual orientation; December 2018, when Kenley began throwing Skittles wrappers in the garbage can by Garcia's desk; and January 2, 2019, when Kenley left a bag of green Skittles with a red bow on his desk.

On January 4, 2018, Garcia filed a complaint of discrimination with the New York State Division of Human Rights (SDHR). This complaint was forwarded to the EEOC. On Nov. 5, 2018, the EEOC adopted the SDHR's findings, closed its investigation, and issued a right to sue letter to Garcia. On February 1, 2019, Garcia filed suit.

Judge Engelmayer first dismissed Garcia's claim that H+H discriminated against him in violation of Title VII on the basis of both his sexual orientation and race for failure to exhaust administrative remedies. Garcia's claim challenged the coworker



promotion, alleged a hostile work environment in which Garcia was called derogatory names, and had co-workers leave Skittles candy wrappers near his workstation. Explaining that a Title VII plaintiff must file a charge of discrimination action in federal court within 90 days of receiving a right-to-sue letter from the EEOC, Judge Engelmeyer noted at the outset that Garcia never filed a second EEOC complaint alleging the incidents that occurred after January 2018. Nor is the later conduct reasonably related to the conduct Garcia had previously alleged.

Judge Engelmeyer specifically explained, “[F]or example, where Garcia pled that beginning in September 2018, a coworker began calling him Skittles, which Garcia interpreted to refer to his sexual orientation, and later left Skittles wrappers near his workstation. . . . is completely unrelated to any of the conduct that Garcia alleged in his January 2018 SDHR complaint. Thus, the post-January 2018 conduct cannot be considered in assessing Title VII claims for failure to exhaust administrative remedies.”

Judge Engelmeyer next dismissed Garcia’s hostile work environment claims, classifying the incidents alleged in the complaint as merely “episodic.” Specifically (and for LGBT concerns), Judge Engelmeyer said, “The incident where Garcia overheard his supervisor, Pascal, conversing with another employee and referring to him as a faggot, based on the totality of the circumstances, does not link the workplace hostility he encountered to his race or sexual orientation under Title VII.”

Judge Engelmeyer next denied Garcia’s ADA discrimination claim. Garcia alleged that his mental health conditions and HIV qualify him as a person with a disability under the ADA, that H+H had notice of his disability that would allow him to complete his assigned duties as an HCI, and that H+H refused to make such an accommodation. Judge Engelmeyer first noted that because Garcia pled that he is substantially limited only in the major life activity of working, the court

must refer to job-related requirements that an individual is limited in meeting. Specifically, Garcia claimed his medical condition requires that he be in an open area with low patient volume and away from contagious patients as a result of his HIV positive status. Judge Engelmeyer said Garcia has not pled facts that establish that he is limited from working in his chosen field of healthcare, or even his chosen role of HCI. Rather, Garcia’s plea that he is unable to perform the duties of an HCI in particular workspace environments within the hospital, or even at several locations, within the hospital where he has long worked, does not, without more, mean that he has a substantial limitation to the major life activity of working, Judge Engelmeyer explained.

Because Garcia failed to plead facts supporting that he is substantially limited in the major life activity of working, he has failed to adequately plead that he is a person with a disability under the ADA parameters, Judge Engelmeyer concluded. This seems contrary to the attempt by Congress in the 2008 amendments to broaden the definition of disability and to signal that those with living with HIV would normally be considered persons with a disability under the ADA.

Lastly, Judge Engelmeyer addressed Garcia’s NYCHRL claims that were not dismissed when he filed his SDHR complaint on January 4, 2018. Foremost, there is Garcia’s claim that he was called Skittles by a coworker and that same coworker left Skittles wrappers around his workstation. Judge Engelmeyer explained that given the court’s dismissal of all of Garcia’s federal claims, the court has not invested the judicial resources necessary to resolve these non-federal claims or even to determine whether Garcia has pled sufficient facts to make out a *prima facie* case. Nor do convenience, fairness, or comity require the court to exercise supplemental jurisdiction. Dismissing the municipal-law claims now, at the motion to dismiss stage, would not cause substantial delay, wrote the judge, because the parties have not yet engaged in discovery. ■



# CIVIL LITIGATION *notes*

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## CIVIL LITIGATION NOTES

By Arthur S. Leonard and  
Wendy Bicovny

*Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School; Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City,*

**U.S. SUPREME COURT** – The Supreme Court announced on December 13 that it will revisit the case of *United States Agency for International Development v. Alliance for Open Society International, Inc.*, No. 19-177, granting the government’s petition to decide the appropriate scope of the Court’s prior ruling in this case, which is reported at 570 U.S. 205 (2013). At issue are statutory conditions placed on recipients of federal funds to fight the spread of HIV. The high moralists in Congress (that was joke, folks) don’t want any federal funding to go to organizations that fail to condemn prostitution. Because prostitution has been determined to be a major vector of HIV transmission in Africa and South Asia, non-governmental organizations working to combat the spread of HIV and make treatments available in those countries must of necessity work with prostitutes, and don’t want to be put in the position of taking overt condemnatory positions on the issue as complicating their task. In its 2013 ruling, the Court held that the 1<sup>st</sup> Amendment stands in the way of Congress requiring U.S.-based non-governmental organizations to take a particular position on an issue of public concern in order to qualify as funding recipients. This was forbidden compelled speech. This new petition calls on the Court to decide whether the First Amendment “further bars enforcement of that directive with respect to legally distinct foreign entities operating overseas that are affiliated with respondents.” That is, the U.S.-based NGO’s work with foreign organizations in the affected countries,

and the moralistic U.S. government funding agencies want those foreign organizations to take anti-prostitution positions as well. The government argues that such organizations enjoy no First Amendment protection, so it doesn’t violate the free speech clause to say that they must comply with the Congressional directive if they are to receive any of the funding. The district court in the Southern District of New York and the 2<sup>nd</sup> Circuit disagreed with the government on this, instituting permanent injunctive relief, which the Supreme Court has agreed to address. Justice Kagan recused herself from considering this case, as some of the litigation took place while she was Solicitor General and played a role in the case on behalf of the Obama Administration. The Supreme Court’s argument calendar is already set through March 4, so this case will probably be argued in the spring with a ruling anticipated by the end of June 2020.  
*Arthur S. Leonard*

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**U.S. COURT OF APPEALS, 11TH CIRCUIT** – A three-judge panel of the U.S. Court of Appeals for the 11th Circuit remanded the Florida district court’s dismissal for failure to state a claim of a violation of the First Amendment, in a suit by Eric Watkins, concerning his treatment for loudly singing an anti-gay song in a public park. *Watkins v. Bigwood*, 2019 U.S. App. LEXIS 36610, 2019 WL 6724401 (11th Cir., December 11, 2019). On the morning of December 15, 2014, Watkins was in the parking lot of a public park in Florida loudly singing an anti-gay song. Watkins said he was sitting more than 60 feet away from a walkway used by several people to walk and to exercise. Two joggers were offended by Watkins’ singing. One jogger, Jackson, cursed at Watkins and asked whether Watkins was talking to him. Watkins claimed he ignored Jackson and continued singing. Jackson then attempted physically to attack Watkins, but he was restrained by

his jogging partner, Beckford. Watkins continued singing as the joggers walked away, still cursing at Watkins. Later, Sergeant Bigwood approached and told Watkins that the joggers complained that Watkins had been making anti-gay slurs while waving a knife in his hands. Watkins told Sergeant Bigwood that he had been singing an anti-gay song that had upset the two joggers. And, when Watkins ignored the joggers and continued singing, he said, Jackson tried to aggressively approach Watkins and was stopped by Beckford. Watkins also told Sergeant Bigwood that he lived out of his car and kept two knives in his car for preparing meals, but stated he had not taken his knives out of his car. The panel detailed why Watkins had alleged sufficient facts to state a claim for violation of his rights under the First Amendment. Under the circumstances alleged by Watkins, his singing clearly constituted protected speech, the panel first noted. The most basic principle underlying the First Amendment’s right to free speech is that the government has no power to restrict expression because of its message, ideas, subject matter, or content. The Supreme Court has recognized few exceptions to this broad protection, only for well-defined and narrowly limited classes of speech, including obscenity (i.e., sexual content), incitement of violence, and fighting words. Here, the panel said, the lyrics of the anti-gay song involved in this case, as distasteful and offensive as they likely are to many people, fall within no exception of First Amendment protection. Although the song included references to violence, nothing in the facts established that Watkins was seeking to or was likely to incite imminent violence toward homosexuals. Nor did the song, objectively viewed in the context of Watkins’s version of the facts, fit the narrow constitutional exception for fighting words. His merely singing in an out-of-doors, public place, a recognized song that has been available to the public to hear otherwise

# CIVIL LITIGATION *notes*

in a variety of ways, more than 60 feet away from the pertinent walkway for passersby, and without addressing any particular person, would be protected speech. *Wendy Bicovery*

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**INDIANA** – On Dec. 20, 2019, U.S. District Judge Tim A. Baker denied Roman Catholic Archdiocese of Indianapolis, Inc.’s. (Archdiocese) motion to bifurcate discovery due to the applicability of the ministerial exception. *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 2019 U.S. Dist. LEXIS 218951, 2019 WL 7019362 (S.D. Ind.) The Archdiocese terminated Lynn Starkey (Starkey), a lesbian woman, from her position as Co-Director of Guidance at Roncalli High School after learning Starkey was in a same-sex union. Resisting efforts by Starkey to discover facts she contended were vital to proving her claims, the Archdiocese asserted that the court must first address the applicability of the ministerial exception to Starkey’s discrimination claims. An, unless the court deems this exception inapplicable, that the remainder of this case should be bifurcated. The ministerial exception under First Amendment doctrine bars litigation of certain employment disputes between a religious organization and its ministers. This doctrine protects religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission—including within religious schools. Judge Baker zeroed in on Starkey’s submission exhibit, an email chain to support the contention that in May 2016, the Archdiocese’s Human Resources department confirmed to Roncalli’s Principal, that the Archdiocese’s lawyers had confirmed that school counselors and social workers are not covered by the ministerial exemption. The Archdiocese took issue with Starkey’s reliance on the email chain, contending that Starkey cites this out of context and that a careful reading of the emails reflects

that the Archdiocese viewed Starkey as a minister. Perhaps so, Judge Baker noted, but the email string explicitly states that, according to the Archdiocese legal counsel, school counselors do not meet the definition for the ministerial exemption. Thus, Starkey’s arguments against bifurcation carry some weight. Ultimately, however, Judge Baker was struck by significant and material disputes in the facts underlying Starkey’s duties with the Archdiocese. Judge Baker then set forth both parties’ respective descriptions of Starkey’s nearly forty years of job duties: years in various capacities, including as a religion teacher, music teacher, drama teacher, choral director, guidance counselor, and Co-Director of the Guidance Department. Whether Starkey’s role can be considered ministerial is subject to a fact-intensive analysis, and such questions are usually left for a jury, Judge Baker concluded. As a consequence, the applicability of the ministerial exception to Starkey’s different duties, was very much up in the air at this juncture. *Wendy Bicovery*

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**LOUISIANA** – An HIV-positive man suffered summary judgment and dismissal of his Americans with Disabilities Act (ADA) lawsuit in *Louviere v. Carewell Hospitality, LLC*, 2019 WL 6464978 (E.D. La, Dec. 2, 2019). U.S. District Judge Mary Ann Vial Lemmon’s decision turned heavily on the employee-numerosity requirement of fifteen employees, a substantive element of Louviere’s claimed discrimination under the ADA. Louviere was employed by Carewell Hospitality, LLC (Carewell), beginning on or about November 1, 2000. Carewell is the owner of property, which includes a motel formerly known as Red Carpet Inn, and an RV Park known as Mardi Gras RV Park. In 2007, Louviere notified his employer (and the former owner of Carewell, Chintu Patel (Mike), that he was HIV positive. Louviere claimed that Mike discriminated against him by not allowing him to miss

work for doctors’ appointments. Mike terminated him on February 17, 2016, believing Louviere had abandoned his job. On July 27, 2016, Louviere filed with the EEOC claiming discrimination by Carewell due to his HIV status. On October 11, 2016, Louviere filed a Charge of Discrimination with EEOC alleging Carewell’s conduct violated the ADA. Carewell responded to the EEOC claim, asserting that it was not covered under the ADA because the company employed only six individuals at all relevant times. On October 23, 2017, EEOC mailed a Notice of Right to Sue letter to Louviere at the address on his discrimination charge informing him that his case was closed because they were unable to determine whether a violation of law occurred, and that Louviere had 90 days to file suit. On November 7, 2017, EEOC’s letter was returned undeliverable. (Apparently, Louviere moved and disconnected his phone without notifying the EEOC). On July 2, 2018, Louviere filed this lawsuit alleging that Carewell violated both the ADA and the Louisiana Employment Discrimination Law (LEDL). Carewell moved for summary judgment, arguing that the matter should be dismissed because it had fewer than 15 employees, and thus was not a covered employer under the ADA. It also contended that the ADA claim was time-barred because it was filed 92 days after Louviere’s presumed receipt of the EEOC letter. Further, Carewell contended that the LEDL claim is prescribed because it was not brought within one year, or at the latest 18 months, of Louviere’s alleged termination. Louviere responded that material fact issues exist as to whether Carewell is actually an integrated enterprise comprised of several superficially distinct entities, namely Carewell Hospitality, LLC, Hospitality International, and Mardi Gras Motor Home Park, Inc. (d/b/a Mardi Grass RV Park), which may have the requisite number of total employees. He argued that he should be given time to conduct



# CIVIL LITIGATION *notes*

additional discovery on the issue of the number of employees of Carewell. He asserted that his suit was filed within 90 days of his receipt of the Notice of Rights letter. Despite his LEDL claims being brought beyond the prescriptive period, he argued that his claim should go forward anyway to avoid inconsistent results due to different state and federal prescriptive periods. Judge Lemmon first explained that the ADA prohibits discriminatory conduct by a covered entity, an “employer,” defined as a person engaged in an industry affecting commerce that has 15 or more employees. Accordingly, employers with fewer than fifteen employees are specifically excluded from ADA coverage. However, Judge Lemmon noted that separate business entities can be treated as a single employer for purposes of anti-discrimination suits when there is (1) an interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. Courts applying this four-part standard in Title VII and related cases focus most on the second factor: centralized control of labor relations. Judge Lemmon showed that Carewell supplied the affidavit of Pinku Patel (Mike’s Widow), attesting that Carewell Hospitality, Inc., never had more than eight employees during the relevant time period, and never more than five employees who worked more than 20 weeks a year. Payroll records from 2005 through 2016 support this claim. Additionally, Carewell submitted affidavits and responses to interrogatories reflecting that it purchased the property upon which its business is situated in 2005. At that time, the motel was operated under the trade name Red Carpet Inn, under a franchise agreement with Hospitality International. The RV Park has always been operated under the trade name Mardi Gras RV Park. Since Carewell’s purchase, both the motel and RV Park have always been maintained and operated by Carewell and no other entity.

This evidence submitted in support of Carewell’s motion for summary judgment further established Carewell is a stand-alone entity, not an integrated enterprise, with fewer than 15 employees during the relevant time period. Accordingly, Judge Lemmon concluded, Carewell has pointed to the failure of Louviere to establish a substantive element of his ADA Discrimination claim (i.e., the employee-numerosity requirement). Judge Lemmon further noted that Louviere has come forward with only conclusory allegations that Carewell, Hospitality International, and Mardi Gras Motor Home Park, Inc. are three distinct entities that operated in conjunction to manage the Carewell property. The record evidence reflected that Carewell absorbed Mardi Gras Motor Home Park when it purchased the property, and Carewell does not deny that it has always managed the property. The evidence also demonstrates that Hospitality International was a franchisor from whom Carewell purchased the right to use the trade name Red Carpet Inn, but that Carewell, not Hospitality International, managed the motel. Judge Lemmon summarized and concluded that the answer to the question, of “What entity made the final decisions regarding employment matters related to Louviere’s claimed discrimination?” was only Carewell, an entity with at most 8 employees, and thus not covered under the ADA. Judge Lemmon said also that, as for Louviere’s request for additional discovery, subsequent to the filing of the motion, Carewell responded, and nothing alters the previously adduced facts. Lastly, Judge Lemmon concluded that Louviere did not dispute that the instant suit was filed beyond the deadline for filing a claim pursuant to the LEDL, and is dismissed as prescribed. *Wendy Bicovny*.

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**NEW YORK** – A panel of the N.Y. Appellate Division, 1<sup>st</sup> Dept., unanimously ruled that the trial court

did not err in a non-traditional family visitation and custody proceeding when it ordered the “more monied” party to pay the other party’s counsel and expert fees under N.Y. Dom. Rel. L. Sec. 237, even before that party had been finally adjudicated a parent. The court reasoned that inequitable results would flow from permitting the party with “far greater resources” to seek custody without allowing the child’s primary parent to seek counsel fees to help with the cost of defending the action. The court found an appropriate exercise of discretion by the trial court because “the court, as *parens patriae*, had authority to direct the petitioner to pay the costs associated with the attorney for the child.” *Matter of Kelly G. v. Circe H.*, 2019 N.Y. App. Div. LEXIS 9019, 2019 N.Y. Slip Op 08961, 2019 WL 6869009 (December 17, 2019). Appellant is represented by Eric Wrubel of Warshaw Burstein LLP. Respondent is represented by Bonnie E. Rabin of Cohen Rabin Stine Schumann LLP.

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**TENNESSEE** – *Fox17-Nashville* reported on December 24 that eleven Christian ministers and the Tennessee Independent Baptists for Religious Liberty have filed a “Petition for a Declaratory Order” with the Tennessee Department of Health, contending that the Department’s compliance with *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), reflected in changes in marriage license and certificate forms, violates the Tennessee Constitution, which continues to declare that marriage is only between one man and one woman. The petitioners claim that the changed forms violate their religious liberty, in effect making them complicit in the recognition of same-sex marriage every time they perform a marriage ceremony authorized by and recorded by those forms, even though the petitioners only perform marriages for different-sex couples. They are asking the Department to declare its current Certificate of Marriage form

# CRIMINAL LITIGATION *notes*

to be void and unenforceable, and ask for the Certificate of Marriage form in use prior to *Obergefell* to be reinstated. The Health Department declined to comment on the Petition when contacted for a reaction by Fox News. Perhaps the petitioners are hoping to instigate litigation eventuating in an appeal to the U.S. Supreme Court so they can seek a reversal of *Obergefell*. *Arthur Leonard*

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**UTAH** – U.S. District Judge Howard C. Nielson, Jr., denied a recusal motion by defendant Stoney Westmoreland, a bisexual man charged with trying to have sex with a 13-year-old boy. *United States v. Westmoreland*, 2019 U.S. Dist. LEXIS 210847, 2019 WL 6648920 (D.C. Utah, Dec. 6, 2019). Westmoreland presented overwhelming evidence that Judge Nielsen was biased against gay people and thus incapable of being fair, primarily due to then-attorney Nielson having taken a leading role in the effort to prohibit same-sex marriage in California's Proposition 8—a state constitutional amendment stating that only marriage between a man and a woman is valid or recognized in California. During Nielson's cross-examination of two expert witnesses at a trial regarding the validity of Proposition 8, he said that homosexuality is a choice, and homosexuals can become heterosexual through conversion therapy. Nielsen had also argued that the federal judge in that case should be disqualified from hearing the case because he was gay. In his recusal motion, Westmoreland argued that his trial will require discussion of the homosexual male lifestyle, particularly, "the hookup culture," which is distinctly non-traditional. He anticipated calling gay men as witnesses who will testify about his transition from a heterosexual marriage to being an out homosexual man. Judge Nielson explicitly refuted Westmoreland's anti-homosexuality bias contentions, stated that any assumption that the statements

he made in the course of representing clients reflected his personal views was unreasonable. Judge Nielson stated: "Any suggestion that positions taken as a private attorney on behalf of clients prior to appointment to the bench—whether the clients or their positions are popular or unpopular—somehow indicate that a judge cannot fairly preside over an unrelated case implicating arguably similar issues is surely an unreasonable assumption. Indeed, even if I in fact held the personal views that Westmoreland imputes to me based on positions that he believes I advanced on behalf of my clients—and I do not—a reasonable person would not assume that as a judge I would follow those views rather than the law that I have sworn to uphold." Judge Nielson stressed that statements made by members of Congress who opposed his judicial nomination further failed to provide grounds for his recusal. Judge Nielson explained, "statements made by politicians who opposed my nomination [do not] accurately reflect my personal views, nor do these statements indicate how I might rule as a judge in any particular case. The statements relied on here by Westmoreland, reflect the same unreasonable assumptions—that the views of my former clients and the positions that I took on their behalf reflect my own personal views and that those positions will determine or otherwise improperly influence my conduct and rulings as a judge." Howard C. Nielsen is one of the majority of the current administration's circuit court Federalist Society member judicial appointees (as noted in his Wikipedia bio). *Wendy Bicornvny*

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## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard and  
Wendy Bicornvny*

**IOWA** – There were press reports that Adolfo Martinez, of Ames, Iowa, was sentenced to about 16 years in prison

after he set fire to a church's LGBTQ rainbow glad in June. He was found guilty of third-degree arson in violation of individual rights, hate crime third degree harassment, and reckless use of fire. The length of the sentence, which received some astounded comment, was partly due to Martinez's status as a habitual offender. He had been arrested after stealing a pride banner that was hanging at Ames United Church of Christ and burning it early on June 11 in front of Dangerous Curves Gentleman's Club, an establishment serving a predominantly gay crowd. *Des Moines Register*, Dec. 19.

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**WASHINGTON** – In two LGBT-related cases, U.S. District Judge John C. Coughenour, revoked a detention order, denied a motion to dismiss an indictment or, in the alternative, for a bill of particulars for Defendant Marie Christine Fanyo-Patchou, who was charged with outing John Doe (Doe), a gay man from Cameroon who lives in Seattle, with the intent to cause Doe reasonable fear of serious bodily injury. *U.S. v. Marie Christine Fanyo-Patchou*, 2019 WL 6790311, 2019 U.S. Dist. LEXIS 214410 (W.D. Wash., Dec. 12, 2019), and *U.S. v. Marie Christine Fanyo-Patchou, Rodrigue Fodjo Kamdem, and Christen Fredy Djoko* (Codefendants), 2019 WL 7049929, 2019 U.S. Dist. LEXIS 220010 (W.D. Wash., Dec. 23, 2019). The more significant decision is to revoke Patchou's detention in the first case. From September 2018 until November 2018, the Codefendants allegedly conducted a campaign of harassment against Doe. As part of their campaign, Patchou purportedly disseminated information about Doe's sexual orientation—including nude images of Doe and his husband—to the Cameroonian community in Seattle. On November 14, 2018, FBI agents interviewed Patchou regarding her involvement in a hate crime and subsequent internet stalking and asked

# PRISONER LITIGATION *notes*

her about her relationship with Doe. Patchou ended the interview quickly after the FBI pressed her about her claim that she did not learn that Doe was gay until she arrived in the United States. On August 1, 2019, a federal grand jury indicted the Codefendants on charges of cyberstalking and conspiracy to commit cyberstalking. The Government claimed Patchou might threaten or intimidate John Doe, because as part of the conspiracy she purportedly disseminated materials that she knew would result in a serious threat to John Doe and his family's physical safety. Judge Coughenour first noted that the acts alleged in the indictment all occurred in 2018. Since then, Patchou has not tried to threaten, intimidate, or even contact Doe, and therefore there were conditions that would reasonably assure the safety of both John Doe and the community. Judge Coughenour explained that, like Codefendant Djoko, Patchou is charged with outing Doe's sexual identity with the intent to cause Doe reasonable fear of serious bodily injury. These charges are serious and show a disregard for Doe's humanity and safety. But, unlike Codefendant Djoko, Patchou is not accused of committing physical acts of violence toward Doe. Consequently, the accusations against Patchou do not relate as strongly to the danger that she poses to the community. Evidence proffered by Patchou does not seriously undercut the evidence that she engaged in a cyberstalking campaign. However, at this stage of the case, the court must consider the weight of the evidence only in terms of the likelihood that the person will pose a danger to any person or the community. Patchou does not pose a serious danger to anyone, the judge concluded. Although she purportedly committed intimidating acts of cyberstalking, the Government does not allege that she engaged in physical acts of violence. Also, there is no indication that Patchou has so much as contacted Doe since 2018, Judge Coughenour further noted in his decision

to set free Patchou from detention. In the second case, Judge Coughenour's denial of all motions is more encouraging for the LGBT community. Here, the Codefendants argued that the indictment was inadequate because it did not identify the specific communications that gave rise to the conspiracy or the communications sent with the requisite intent to put John Doe in danger or at risk of physical harm. Judge Coughenour noted that the Government provided a list of 15 overt acts committed in furtherance of a conspiracy to harass and intimidate John Doe by distributing and disseminating personal and intimate materials relating to John Doe's sexual orientation to other members of the Cameroonian communities in the United States and Cameroon. In addition, the Government contended that a bill of particulars is unnecessary given the information it has provided in discovery. Judge Coughenour agreed, pointing out that the indictment and information produced by the Government gave the Codefendants enough evidence to prepare an adequate defense and laid out the theory of the Government's case: that the Codefendants engaged in a multifaceted campaign to out John Doe's sexual identity to the Cameroonian community with the intent to put John Doe in danger or at risk of physical harm. Judge Coughenour next said that while the indictment does not identify specific communications that crossed the line from distasteful to criminal behavior, the Government has produced the information that it intends to use to prove that Codefendants did, in fact, cross that line. The Codefendants are more than capable of reviewing that information to determine which communications will be most and least relevant at trial. By asking the Government to do their work for them, the Codefendants request the details of how the charges against them will be proved; the Government is not required to do so, Judge Coughenour concluded. *Wendy Bicornvy*

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## 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** – This case is one of twelve “related” actions filed in the District of Arizona by transgender plaintiff Melinda Gabriella Valenzuela, *pro se*. Here, U.S. District Judge Michael T. Liburdi denies her a preliminary injunction for protection from assault for multiple reasons in *Valenzuela v. Schmidt*, 2019 U.S. Dist. LEXIS 208924 (D. Ariz., Dec. 3, 2019). Valenzuela does not meet the hefty standards for preliminary injunctive relief, because she fails to articulate specifically her risk of danger while in protection, where she is currently housed. Although Valenzuela has a claim for relief under *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994), it will have to await further factual development. Judge Liburdi substitutes the new Arizona correctional director as a party defendant in his official capacity for purposes of injunctive relief, under F.R.C.P. 25(d); but his predecessor remains a defendant for damages. The case is complicated by the existence of the other litigation – all of which appears to be before Judge Douglas L. Rayes. Valenzuela has apparently reached a settlement with Arizona officials about her claims that would include dropping this lawsuit. There is a dispute before Judge Rayes as to whether Arizona accurately reduced the Agreement to written terms, as represented in court last summer. Judge Rayes has granted a limited F.R.C.P. 60(b) motion (relief from judgment), directing defendants to show cause why Valenzuela's requested post-Agreement changes should not be ordered, since they were negotiated before him and then omitted. In an order



# PRISONER LITIGATION *notes*

also entered in the case before Judge Liburdi on December 19, 2019, Judge Rayes stays all motions to dismiss until this is resolved. There is no discussion of why one action of twelve is before a different judge or how Judge Rayes has authority over proceedings before a peer-level judge. (Perhaps they talked.) In any event, it is noteworthy that Judge Rayes observed that his post-settlement authority over the Agreement is limited because the parties did not explicitly reserve enforcement jurisdiction.

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**CALIFORNIA** – *Pro se* inmate Daniel Lee Thornberry asked correction officials to rescind his designation for a “special needs yard” (apparently a form of protection) so that he could remain at a prison near Sacramento. This was done, although the warden asked him to “stop filing” grievances. Thereafter, a conflict ensued with his cellmate. Thornberry also filed more grievances and lawsuits. Thornberry was transferred to the California Correctional Institute [CCI] and re-assigned to “special needs yard” status. Thornberry protested the transfer as retaliatory and as posing an undue risk of harm to him, since he is gay and CCI is unusually dangerous for gay prisoners. U.S. Magistrate Judge Edmund F. Brennan dismissed the case on screening in *Thornberry v. Baughman*, 2019 U.S. Dist. LEXIS 218447 (E.D. Calif., Dec. 19, 2019). Judge Brennan found that there were insufficient allegations of retaliation, since the warden had not requested the transfer and the pleading did not establish a *prima facie* case of retaliation under *Rhodes v. Robinson*, 408 F.3d 559, 567-568 (9th Cir. 2005). Thornberry’s problems with his cellmate could account for the transfer. On the issue of danger to his safety as a gay man, Thornberry alleged that other inmates attacked him some months after his transfer. But, wrote Judge Brennan, Thornberry could not base

a case on those who transferred him based only on generalities and CCI’s reputation. “Plaintiff’s broad concerns about anti-gay inmates and unspecified enemies throughout the State’s entire special needs yard system is not enough to demonstrate that his transfer to CCI posed an ‘identifiable serious risk’ of harm,” quoting *Davis v. Scott*, 94 F.3d 444, 446-47 (9th Cir. 1996). Judge Brennan grants Thornberry leave to amend, however, in case he can make specific factual allegations necessary to meet pleading standards.

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**NEW YORK** – U.S. District Judge Nelson S. Román dismissed the *pro se* complaint of Rahmel Anthony Walker against Downstate Correctional Facility correction officers C. Fierro and S. Ortiz in *Walker v. Fierro*, 2019 WL 6841798, 2019 U.S. Dist. LEXIS 218268 (S.D.N.Y., Dec. 13, 2019). This was Walker’s third pleading about events that occurred in the summer of 2017. U.S. District Judge Colleen McMahon screened the initial Complaint and wrote a twenty-page opinion about it. She found that Walker complained about defendant officers using homophobic and transphobic slurs against Walker that included denouncing Walker in front of her cell block. (It is unclear what pronouns are preferred here, so this writer defaults to feminine.) The Complaint also alleged that Walker was assaulted and denied medical care. Judge McMahon determined that the slurs, by themselves, were not actionable and that Walker needed to clarify the role of the named defendants in the assault and the denial of medical care for a serious need. Walker filed an amended complaint that Judge McMahon rejected because (unlike the initial pleading, which was printed by hand) it was cursive and difficult to read. She gave leave to amend a second time. Walker filed another complaint (hand-printed), by which time the case was reassigned to Judge Román. There is no

opinion screening the second amended complaint, but Judge Román ordered service by the U.S. Marshal in March of 2018. There is no further substantive review of the case by the court until the current dismissal of December 2019. Judge Román dismissed basically for the grounds outlined in Judge McMahon’s decision in 2017 (without mentioning it), since alleged slurs are not actionable, and Walker did not sufficiently tie the assault to the named defendants by name or time. Walker also failed to describe the injuries from the assault, or to claim that medical care was denied for serious needs. Walker’s failure to describe her injuries over the course of three separate pleadings is likely fatal to her deliberate indifference claim. The tie between the slurs and the assault seems a closer question, given allegations that the named defendants tried to bate Walker’s cellblock to retaliate against her by blaming her for their denial of recreational time to the entire cellblock. The cursive pleading (which this writer could read) said the named defendants told the cellblock that “this faggot ass” “he she” is “going to get his” and “no one will be coming.” Judge Román treated the last pleading as the “controlling” one. (Hostility to cursive pleadings seems to be on the rise among federal district judges dealing with prisoners litigation. U.S. District Judge Nancy Rosenstengel struck an inmate’s *pro se* pleading because of “cursive scribbles” in *Adams v. Menard Corr. Center*, 15-cv-0604 (S.D. Ill., 1/8/16); see also *De-Armor v. Cabalan*, 19-cv-0128 (D. Haw., 4/2/19) (encouraging *pro se* plaintiff to print); *Wright v. Sauk County*, 16-cv-0119 (W.D. Wisc., 5/27/16) (criticizing cursive filing); *Fiore v. Drew*, 14-cv-4007 (N.D. Iowa, 6/12/15) (same).) That said, this writer attempted to ascertain why this case “sputtered out” after a very serious initial treatment by Judge McMahon and two timely amended pleadings by Walker before the case was reassigned. First, it took six months before the U.S.

# PRISONER LITIGATION *notes*

Marshal filed proof of service. During the interim, the New York Attorney General asked for more time to plead/move. (The same Assistant Attorney General who asked for more time had appeared on marshal's papers accepting service weeks earlier, but apparently the dots were not connected.) At the end of "more time," the AG sent a letter to Judge Román indicating an intention to file a motion to dismiss, which (per Judge Román's individual rules) stays time to answer/move until the court responds. Judge Román did not respond for 4 months and then gave the defendants 3 months to file a motion, taking the case to April 1, 2019. Walker did not respond to the motion to dismiss. The motion was *sub judice* for 6-½ months before the instant decision. Thus, procedural delays account for the 22 months that elapsed between the second amended complaint and its dismissal. Walker is currently at Green Haven Correctional Facility (not Fishkill Correctional Facility, as indicated by Judge Román). Nevertheless, it was her responsibility to inform the court of her move and to respond to a dispositive motion, if she was aware of it.

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**PENNSYLVANIA** – *Pro se* inmate Vito A. Pelino (sexual orientation and gender identity unknown) brought a Fourth Amendment/privacy lawsuit regarding videotaping of his strip searches after visits and his use of the restroom during visits as being a violation of his constitutional rights. Pennsylvania defendants moved to dismiss, but U.S. Magistrate Judge Maureen P. Kelly recommended that the motion be denied, writing that "Plaintiff's allegations that nude images of Plaintiff are recorded and stored for an unknown amount of time, are viewed by various prison officials, including officials of the opposite sex, and that this policy was imposed for retaliatory purposes, raise questions of fact at this early stage." U.S. District

Judge David Stewart Cercone accepted the recommendation, and the case is now in discovery. In *Pelino v. Gilmore*, 2019 WL 6696206 (W.D. Pa., Dec. 6, 2019), Magistrate Judge Kelly issues several discovery rulings. First, she compels a response to Pelino's demand for electronic images recorded on four specific dates. She denies the remaining motions to compel, key points of which follow. Pelino's demand for discovery of defendants' prior misconduct or allegations of misconduct is overbroad and not relevant to the issue of the reasonableness of the video-recordings, she wrote. Pelino's demand for disclosure of defendants' sexual orientation is likewise denied for these reasons (and because it is an unwarranted invasion of defendants' privacy). Demand for detailed information about the capabilities of the ceiling camera used to record is denied for security reasons. (Counsel could probably get this, subject to a protective order about redisclosure, even to the plaintiff – but Pelino is *pro se*.) Judge Kelly denied Pelino access to his "entire" prison record, as "overbroad." She accepts defendants' representation that they did not adopt the policy on videotaping for reasons attributable to Pelino. (This seems inconsistent with allowing a claim of retaliation to go forward. Perhaps Pelino would have had more success identifying specific incidents, as he did with the videotapes themselves.) Judge Kelly also denies discovery of specific incidents underlying adopting of the videotaping policy, because defendants have come forward with reasons for the policy, finding that specific documentation would violate other inmates' privacy and raise security concerns. Defendants' main security affiant filed papers with three sentences redacted; Pelino demanded an unredacted copy. Upon *in camera* review, Judge Kelly determined that the three sentences would be a security risk if release to an inmate. Judge Kelly also denies Pelino access to "all" policies

and procedures on monitoring and recording of strip searches. Judge Kelly sustains defendants' objection, noting that this information is not publicly available and that disclosure "could undermine institutional security if produced to inmates," citing *Mercaldo v. Wetzel*, 2016 WL 5851958 (M.D. Pa. Oct. 6, 2016). She further finds that "these materials do not appear likely to contain information relevant to Plaintiff's claims." (This seems inconsistent with the broad scope of "relevance" under F.R. Evid. 401.) Judge Kelly also denies discovery of other inmate grievances about strip search videotaping, because of their privacy and security concerns. (Counsel could probably get this, but Pelino's *pro se* status make it problematic.) It is unclear to this writer what is happening here. If the court is permitting a facial or as-applied challenge to strip search videotaping, it is not permitting discovery that would make such a challenge meaningful if handled by counsel – yet it is not appointing counsel for an inmate denied discovery because he is an inmate.

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**WASHINGTON** – Transgender plaintiff Brooke Lyn Sonia, *pro se*, is a prisoner at Washington State Penitentiary. In a complaint that U.S. Magistrate Judge David W. Cristel found confusing and overly lengthy (ECF noted over 240 pages), Judge Cristel ordered Sonia to file an amended complaint within thirty days in *Sonia v. Rainer*, 2019 U.S. Dist. LEXIS 210124, 2019 WL 6617974 (W.D. Wash., Dec. 5, 2019). Sonia sought medical care under various federal and state causes of action. Sonia has now filed an Amended Complaint (40 pages per ECF) that has not yet been screened. This is an example of a district court's declining to dismiss the pleadings but instead allowing the *pro se* transgender inmate plaintiff to try again, without accumulating a strike under the Prison Litigation Reform Act.

# LEGISLATIVE & ADMINISTRATIVE *notes*

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## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**FEDERAL** – The National Defense Authorization bill passed Congress without a House-approved amendment that would have overturned the Trump Administration's transgender service ban. However, certain House approved measures did survive the conference committee process to be part of the final bill. One codifies a process by which service members who had been expelled under the repealed "Don't Ask, Don't Tell" policy can update their DD-214 paperwork to "honorable" if they had been issued "other than honorable" or "dishonorable" discharges tied to their sexual orientation. There is also a measure providing some encouragement to the Defense Department to grant waivers to transgender people seeking to enlist or remain in the military, and requiring the Department to report to Congress on the administration of the waiver policy. According to the *Washington Blade* (Dec. 10), attempts to find out how many waivers have been granted or denied have been fruitless, the Pentagon claiming they have no record of any waiver being granted.

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**FEDERAL** – A coalition of LGBT rights and other civil rights groups issued a statement opposing the so-called "Fairness for All" Bill that has been introduced in Congress by some Republican legislators. According to the statement, "The 'Fairness for all' Act is anything but fair, and it certainly does not serve all of us. It is an affront to existing civil rights protections that protect people on the basis of race, sex, and religion and creates new, substandard protections for LGBTQ people with massive loopholes and carve-outs, and upends critical federal programs that serve children in need."

The statement claims that the bill, if enacted, would "erode protections that already exist for people based on race, sex and religion, rolling back protections that have been on the books for decades. It would expand the number of places and situations in which lawful discrimination could occur." While introducing for the first time explicit non-discrimination protection for LGBTQ people, it is riddled with loopholes and exceptions that would deny protection to many of those who most need it. The statement points out that the Equality Act passed the House with bipartisan support, only to be ignored by the Senate, where hearings were not even held during the last session of Congress. Lambda Legal issued the joint statement on behalf of all the signing groups on December 7.

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**U.S. DEPARTMENT OF THE INTERIOR** – *Huffington Post* (Dec. 27) reported that the Interior Department had "removed 'sexual orientation' from a statement in the agency's ethics guide regarding workplace discrimination." The 2009 version of the ethics guidelines, issued at the beginning of the Obama Administration, had included "sexual orientation." The *Huffington Post* report also noted that on his first day on the job, then-Deputy Interior Secretary David Bernhardt sent agency staff a letter stating the non-discrimination policy that omitted "sexual orientation" from the list of prohibited grounds of discrimination. The group Friends of the Earth had obtained a copy of the draft of Bernhardt's letter in response to a Freedom of Information Act request, which showed the words "sexual orientation" crossed out in red. Bernhardt took over as head of the agency in April 2019 after his scandal-ridden predecessor was forced out. The agency had added "sexual orientation" to its anti-discrimination policy during the Clinton Administration, it was not removed during the George W. Bush

administration, and it was reiterated at the beginning of the Obama Administration. News reports have noted that during the Trump Administration various agencies have revised their non-discrimination policies to remove "sexual orientation" and, in some cases as well, "gender identity" from agency anti-discrimination policies, aligning them with the Justice Department's position, adopted by former Attorney General Jeff Sessions, that the statutory bans on sex discrimination applicable to federal employees do not extend to discrimination claims based on sexual orientation or gender identity, a position that the Justice Department argued in its amicus briefs to the Supreme Court in pending Title VII cases on the subject.

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**SEVERAL STATES** – In South Carolina, Georgia and Kentucky, new legislative sessions will encounter bills intended to prohibit doctors from providing gender transitional care to persons under age 18. Legislators claim that until people are legally adults, they should not be allowed to obtain any medical intervention to interfere with naturally occurring puberty and the development of physical characteristics of their sex as identified at birth. Such laws seem to be in conflict with the general underlying theme of the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which recognized an individual right of personal autonomy in the sphere of sexual identity lodged in the protection of liberty by the Due Process Clause of the 14<sup>th</sup> Amendment (although, concededly, *Lawrence* involve sodomy, not gender reassignment). However, the Supreme Court cautioned in *Lawrence* that its decision did not involve the sexual activities of minors, and it is unclear the degree to which the Supreme Court would acknowledge due process autonomy rights for minors as broad as those accorded adults. Some conservatives may hope that



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getting this kind of question before the current Supreme Court could result in whittling away or even overruling *Lawrence* itself, an undying goal of some movement conservatives. A handful of the most conservative states have refused to repeal their sodomy laws, in the hope that someday the Supreme Court will overrule or abrogate *Lawrence*, giving them a green light to resume enforcing those laws. (Recently, as one reader informed us, Utah repealed its invalidated sodomy law, more than 15 years after it became unenforceable under *Bowers*.) Supreme Court constitutional rulings can be overturned, as the Supreme Court overturned *Bowers v. Hardwick* in *Lawrence*. As Supreme Court justices are fond of writing when they issue a ruling in conflict with their past decisions, the Court is not compelled to apply *stare decisis* to its own decisions (it is not an “inexorable command,” as they say), although they will cite it to justify rejecting a new challenge to laws that have been upheld in the past.

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**KENTUCKY** – On December 3 that City Council of Highland Heights, Kentucky, voted 6-0 to adopt a Fairness Ordinance that prohibits discrimination in employment, housing and public accommodations on grounds including sexual orientation and gender identity. This was the sixth time during 2019 that a Kentucky municipality passed such an ordinance, bringing the total of such ordinances to 16. The Kentucky legislature has failed to enact proposed legislation for statewide protection for LGBTQ people. *Fairness Campaign Press Release*, Dec. 3.

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**MICHIGAN** – Frustrated with the failure of the state legislature to advance a measure adding sexual orientation and gender identity to the state’s Elliott Larsen Civil Rights Act, Fair and Equal Michigan, a committee

of activists formed for this purpose, submitted proposed petition language to the Board of State Canvassers, seeking to initiate legislation to amend the law. Public opinion polls show that despite the opposition from Republicans in the state legislature, an overwhelming majority of the state’s voters tell political pollsters that they support such legislation, including a clear majority of Republican voters. Both states that border on Michigan – Indiana and Ohio – also lack such legislation, but in common with those states, Michigan has several major municipalities that have adopted such non-discrimination laws. The first municipality in the U.S. to legislate against discrimination because of sexual orientation was East Lansing, Michigan, in 1972, making it ironic indeed that Michigan has yet to join the growing number of states banning discrimination. Passage of the pending federal Equality Act bill would not cure the problem, since the federal legislation, in line with existing federal Civil Rights Law, would not apply to small workplaces, where a substantial portion of the nation’s civilian labor force works.

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**MINNESOTA** – Duluth enacted an ordinance prohibiting the performance of conversion therapy on minors.

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**NEW HAMPSHIRE** – Last summer, the state enacted S.B. 263, which permits anti-discrimination lawsuits against school districts if students encounter discrimination because of their race, disability, religion, sexual orientation, or gender identity, in addition to some other grounds. Following up, the Nashua School District acted early in December to approve a new policy for transgender students, requiring each school in the district to ensure that transgender and gender nonconforming students have a safe school environment, that any incident of

discrimination, harassment or violence is given immediate attention, and that complaints as to such discrimination or harassment receive the same treatment as those for other forbidden grounds of discrimination, such as race or sex. Without expressly taking a position on these issues, the policy encourages students and their parents to discuss with building administrators “any issues that may arise in relation to a student’s transgender and nonconforming status, including but not limited to: privacy, official records, names and pronouns, restrooms, locker rooms, other gender-segregated facilities or activities, dress code and safety and support for transgender and transitioning students. *Union Leader*, Dec. 8.

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

### AMERICAN MEDICAL ASSOCIATION

– The American Medical Association announced that it will take its opposition to the performance of conversion therapy a step further by urging that states and the federal government pass legislation outlawing its use. The AMA’s House of Delegates committed to working with civil rights groups to draft model legislation for states to pass, and will advocate for some form of national ban as well. In addition, the AMA will encourage medical schools and educational accreditation bodies to support efforts to address LGBTQ issues in health care. *MetroWeekly*, Nov. 19.

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**GEORGIA** – Run-off elections held on December 3 resulted in two historic first for LGBTQ elected officials. Joseph Geierman defeated incumbent Mayor Donna Pittman to become the out gay mayor of Doraville, Georgia. Geierman had served on the city council since 2017. He will serve together with two

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out gay councilmembers, Stephe Koontz and Any Yeoman. In Savannah, Kurtis Purtee won a run-off race to defeat a 20-year veteran city councilmember and become the Savannah City Council's first out gay member.

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## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**MEXICO** – Rex Wockner reported on December 24: “The civil registry in the Baja California state capital, Mexicali, has followed the civil registry in the state’s largest city, Tijuana, in deciding to let same-sex couples marry normally while waiting for the state congress to pass marriage equality.”

**UNITED KINGDOM** – Parliamentary elections, which produced a large majority for the Conservatives, also brought in the largest number of out LGBT members in the country’s history: 46.

**ZAMBIA** – The U.S. State Department withdrew U.S. Ambassador Daniel Foote after it became clear that his outspoken comments about government corruption and the unconscionable prosecution of a gay couple for consensual sex had made him persona non grata to the Zambian government. The State Department did not disavow Foote’s comments. President Edgar Lungu demanded Foote’s removal from the country after news reports about his statement calling the prosecution of the gay couple “outrageous.”

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## PROFESSIONAL NOTES

*By Arthur S. Leonard*

The U.S. Senate confirmed President Trump’s nomination of out gay

conservative Republican **PATRICK BUMATAY** to be a judge of the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, the nation’s largest intermediate appellate federal court. Bumatay is the first out gay member of that court. Bumatay’s career has focused on law enforcement in the U.S. Attorney’s office in San Diego and at main Justice in Washington. He is a graduate of Yale University and Harvard Law School. Bumatay had originally applied for consideration for an open district court seat in San Diego, but was asked by the Justice Department whether he wanted to be considered for the Court of Appeals post. He was nominated a few years ago by Trump, but being an out gay man, albeit a very conservative Republican, caused the initial nomination to die without Senate action. Trump re-nominated him earlier in 2019.

## 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](mailto:info@le-gal.org).



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