

L G B T
LAW NOTES

December 2023



**7th Circuit Jeopardizing the Safety of
LGBTQ+ People in Prison?**

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Notes Podcast are Publications of
the LGBT Bar Association
Foundation of Greater New York
www.lgbtbarny.org

ISSN 8755-9021

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Whither *Bivens* and LGBT Incarcerated Plaintiffs? 7th Circuit Trashes *Farmer v. Brennan* as a Precedent

By Arthur S. Leonard

In a 2-1 panel ruling, the U.S. Court of Appeals for the 7th Circuit held that *Farmer v. Brennan*, 511 U.S. 825 (1994) – which authorized transgender Dee Farmer to sue prison officials for deliberate indifference to her safety resulting in physical injuries through the device of an implied right of action – is no longer “good law” in light of the Supreme Court’s decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017), which essentially confined the seminal precedent of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to three factual contexts, its own and two subsequent Supreme Court rulings. Thus, in *Sargeant v. Barfield*, 2023 WL 8224194, 2023 U.S. App. LEXIS 31354 (Nov. 28, 2023), the 7th Circuit panel majority disallowed a *Bivens*-type claim by an incarcerated plaintiff who claimed that a corrections officer (CO) deliberately assigned him cellmates who would predictably inflict physical injuries on him in retaliation for his having filed a grievance against the CO, thus exhibiting deliberate indifference to his safety in violation of the 8th Amendment. Ironically, the panel majority concedes that plaintiff Sargeant’s 8th Amendment claim is substantively strong, but it concludes he is precluded from suing the CO for damages.

Just one day after the *Sargeant* decision, a federal district judge in New Jersey, Chief District Judge Renee Marie Bumb, also dismissed a damage claim by an incarcerated plaintiff in *King v. Ponce*, 2023 WL 8253060 (D.N.J., Nov. 29, 2023).

Although the *Sargeant* opinion does not explicitly state that plaintiff Roy Sargeant is gay or bi, Circuit Judge Doris Pryor’s summary of Sargeant’s factual allegations supports that hypothesis. Sargeant filed a grievance against CO Nicole Cruze, who commented on his “sexual preferences” and “refused to give him some books that he had ordered.” He grieved against her. Aracelie

Barfield, a CO who was Sargeant’s “case manager,” showed Sargeant the prison’s response to the grievance, which was signed by Cruze. Sargeant protested that under the prison’s rules Cruze should not have been shown the grievance that was lodged against her. “Apparently unhappy with Sargeant’s remarks, Barfield ‘angrily’ told others about the grievance. This led Sargeant to file a separate grievance against Barfield.” Sargeant claims that Barfield retaliated against him by “repeatedly” putting Sargeant in cells with “prisoners that she knew were violent.” Indeed, Sargeant was marked as a “cooperator” with the government, but he was placed with incarcerated individual who were non-cooperators, and “predictably, this led to ‘some fights’ between Sargeant and his cellmates, before he was transferred to another prison.”

This lawsuit, originally *pro se*, concerns Sargeant’s claim that Barfield’s actions caused him physical harm and were undertaken with “deliberate indifference” to his safety in violation of the 8th Amendment. Since he was transferred to another prison, he has no claim for prospective injunctive relief against Barfield, but he can sue Barfield for damages *if* he has a right to bring a “*Bivens* action.”

The Constitution guarantees many individual rights without specifying how they can be enforced or by whom. As the dissent in this case points out, there is a long history predating *Bivens* of federal courts allowing individuals harmed by the unconstitutional actions of federal employees to sue the employees for damages, but *Bivens* is generally noted as the “modern” precedent supporting an implied right of action to bring such suits in the absence of a statute specifically authorizing them.

In *Bivens*, a group of FBI agents was sued by a plaintiff who claimed they had violated his 4th Amendment rights through unlawful searches and seizures of himself and his property.

The Court held he had an implied right of action to sue the agents for damages. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended *Bivens* to a congressional staffer’s 5th Amendment equal protection discrimination claim against her congressman, and in *Carlson v. Green*, 446 U.S. 14 (1980), the court allowed a *Bivens* action by an incarcerated individual claiming an 8th Amendment violation due to inadequate medical care by prison officials for his asthma condition. However, as the Court turned more conservative in this century, several justices evinced unhappiness with implied rights of action in constitutional tort claims, and in *Ziglar*, the Court described *Bivens*, *Davis*, and *Carlson* as “mistakes of an ‘ancient regime,’” according to Judge Pryor, and cautioned against “implying new causes of action because creating remedies is a job for the legislature, not the judiciary.”

“As a result,” wrote Pryor, “since those original three *Bivens* cases, the Supreme Court has consistently declined to imply new damages remedies,” and more recent cases have specified that only cases that fall solidly within the factual context of *Bivens* and the other two subsequent cases will fall within the sphere of a *Bivens* implied right of action. In this case, Sargeant is an incarcerated individual claiming deliberate indifference to his safety by a CO, resulting in physical injuries. Relying on *Farmer v. Brennan*, a post-*Bivens* case that only mentioned *Bivens* in passing, he asserts a *Bivens* claim, arguing that his case falls within the context of *Carlson v. Green*, one of the three cases mentioned in *Ziglar*. A majority of the 7th Circuit panel disagrees, finding that denial of medical care is relevantly distinguishable from making a cell assignment that puts an incarcerated individual in foreseeable danger, thus constituting a “new” context. But more significantly, Judge Pryor’s decision effectively “overrules”

Farmer v. Brennan by contending that the Supreme Court has itself effectively overruled *Farmer* by not mentioning it in *Carlson*. (In a post-*Ziglar* case, *Egbert v. Boule*, 596 U.S. 482 (2022), the Court slightly modified *Ziglar* to make it even more difficult for a plaintiff to invoke *Bivens*.)

Dissenter David Hamilton chides the majority for doing something that the Supreme Court has said lower federal courts should not do: finding a Supreme Court decision to have been implicitly overruled by a subsequent case that doesn't mention it or explicitly overrule it. It is up to the Supreme Court to decide which earlier rulings to abandon, he points out, not the circuit courts of appeals. Judge Pryor responds by arguing that *Farmer* was not really viable as a *Bivens* precedent. Although the court mentioned that Dee Farmer had "filed a *Bivens* complaint," the only other mention of *Bivens* was in the context of allocation of proof burdens, where the Court explained that "*Bivens* actions against federal prison officials . . . are civil in character," in the course of adopting a different view in *Farmer* more characteristic of the "criminal law's standard of subjective recklessness." However, wrote Pryor, "The Court never held – just assumed – that a *Bivens* remedy was available to the plaintiff" in *Farmer*.

In reaching this conclusion, the majority sided with the 4th Circuit and declined to follow the 3rd Circuit in cases where courts faced the same question of the status of *Farmer v. Brennan* as a precedent. This contributes to an existing circuit split on a question of some significance for plaintiffs seeking to vindicate their constitutional rights by holding government officials accountable in damages.

Although Sargeant originally filed *pro se*, he eventually received appointed counsel from Arnold & Porter Kaye Scholer LLP to represent him on appeal. Perhaps they will find this case worthy of further pursuit, either a petition for *en banc* review or a cert petition to the Supreme Court. However, dangling this case before the Supreme Court may provide the current conservative super-majority with an

opportunity to overrule *Bivens* entirely and end the ability of persons injured by unconstitutional government action to seek damages in the courts from the government actors, a particularly harmful result for incarcerated LGBT individuals seeking to vindicate their rights against occasionally callous prison staff. Of course, Congress could cure this problem by providing legislative authorization for such suits, since the Constitution gives Congress the power to determine the jurisdiction of the federal courts, but the lower courts have found, for example, that the Prison Rape Elimination Act does not authorize a private cause of action. The plethora of lawsuits by transgender plaintiffs seeking gender-affirming care in prison all rely on *Bivens* by way of *Carlson*. Congress has never taken this step in the half century since *Bivens* was decided and, in the present sharply divided Congress, such a statutory "expansion" of federal court jurisdiction seems unlikely.

Judge Pryor was appointed by President Joseph R. Biden, Jr. The other judge in the majority, Circuit Judge Michael Scudder, was appointed by President Donald J. Trump. The dissenter, Senior Circuit Judge David Hamilton, was appointed by President Barack Obama. ■

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Federal District Court Rejects Challenge to Florida Ban on Transgender Girls from Competitive Girls' Sports

By Arthur S. Leonard

U.S. District Judge Roy K. Altman, an appointee of President Donald Trump, has dismissed a lawsuit challenging Florida's "Fairness in Women's Sports Act," which bans transgender girls and women from competing in interscholastic, intercollegiate, intramural or club athletics teams or sports sponsored by public schools that have been designated by the school as for women only. *D.N. v. DeSantis*, 2023 U.S. Dist. LEXIS 198678, 2023 U.S. Dist. 7323078 (S.D. Fla., Nov. 6, 2023).

The Fairness Act requires that all sports be designated as either for men, for women, or mixed. The Act does not prohibit "transgender women" from competing in sports designated for men, because under the Act transgender women are deemed to be "biological men" in accordance with their original birth certificates.

Judge Altman's November 6 decision relies heavily on a recent Atlanta-based 11th Circuit Court of Appeals ruling, *Adams v. School Board of St. Johns County*, 57 F. 4th 791 (11th Cir. 2022) (*en banc*), that allows a Florida school district to prohibit a transgender boy from using the boys' restrooms at his high school. The 11th Circuit concluded that neither Title IX nor the Equal Protection Clause forbids schools from maintaining separate restrooms based on "biological sex."

Although the facts of the two cases are distinguishable since restroom access and sports participation present different issues, both cases depend on how the court interprets Title IX of the Education Amendments of 1972

and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Title IX forbids schools that receive federal funds from excluding or discriminating against students because of their sex. The Equal Protection Clause, which requires states to provide “equal protection of the laws,” has been interpreted by the Supreme Court to require that government policies that discriminate because of sex be struck down if the state cannot show that it has a strong justification for the policy.

Whether Title IX applies to school policies that discriminate against students because they are transgender is a point of hot contention in the federal courts. Access to restrooms is one flashpoint while participation in women’s sports is another. The district courts and courts of appeals disagree about how these issues are to be decided. While there is near unanimity that policies discriminating because of sex raise serious equal protection issues, the courts are divided about whether policies excluding or disadvantaging transgender people violate Title IX and the 14th Amendment’s Equal Protection Clause. In his ruling, Altman sided with those courts that reject the application of Title IX to gender identity discrimination and that are skeptical about using equal protection in a transgender context.

A transgender individual who has identified as a girl from “a very young age” has taken on the state of Florida, whose governor and legislature have made transgender people a political target. D.N., whose parents support her right to compete in her high school’s athletic program as a girl, is represented in the lawsuit by Human Rights Campaign and the law firm of Arnold & Porter Kay Scholer.

Analyzing the Title IX claim, the judge found that “promoting women’s equality in athletics is an important government interest,” pointing to the stated purpose of the challenged statute. When Title IX was enacted, Congress expressed concern that educational institutions devoted considerable resources to athletic

competition for boys and provided few if any opportunities for girls who wanted to do sports. One of the main arguments for passing Title IX was that schools should have to devote equal resources to athletic programs for girls. Based on this, Altman found that “the government has an important interest in protecting and promoting athletic opportunities for girls.”

Florida claims to be doing this by enacting its “Fairness” statute, but D.N. argued that the “real purpose” of the new Florida law is to “categorically exclude transgender girls from school sports.” Altman rejects this argument, crediting the state’s contention that transgender girls (who are regarded by the Florida legislature as “biological boys”) are not disqualified from competing in boys’ sport (and, interestingly, neither are transgender boys) and may also compete in sports that are designated as open to all interested students (of which there seem to be few).

Despite the surrounding political context in which Republican-dominated state legislatures have rushed to pass transgender sports bans despite expert testimony that the bans are not necessary to “protect” women’s sports from unfair competition, Altman credits the state’s argument that categorical exclusion of transgender women is necessary for “fair” competition because, as Governor DeSantis stated in connection with this legislation, “the inherent biological differences between men and women [is] a general principle that realistically reflects the average physical differences between the sexes.”

The judge finds support for this in various comments in a concurring opinion in *Adams v. School Board*, the boys’ restroom ruling by the 11th Circuit in which Circuit Judge Barbara Lagoa, another Trump appointee, wrote that “commingling of the biological sexes in the female athletic arena would significantly undermine the benefits afforded to female student athletes under Title IX’s allowance for sex-separated teams.” Countering these assertions, some judges in other states have pointed to the very small number of transgender girls interested in competitive athletics

and the expert testimony about how the process of transition (puberty blockers and cross-sex hormones) suppresses any advantage that a person identified as male at birth might have in athletic competition as a result of going through male puberty.

Altman asserts that sex discrimination may be illegal if it is based on “fixed notions concerning the roles and abilities of males and females” or relies on “archaic or stereotypic notions,” but he insists that is not true of Florida statute, because its “gender-based classifications are rooted in real differences between the sexes – not stereotypes. In requiring schools to designate sports-team memberships on the basis of biological sex, the statute adopts the uncontroversial proposition that most men and women do have different (and innate) physical differences. Ignoring those real differences would disserve the purpose of the Equal Protection Clause, which is to safeguard the principle that ‘all persons similarly situated should be treated alike.’”

Altman has apparently concluded that transgender girls whose transition has included puberty blockers and cross-sex hormones to prevent the effects of male puberty are not “similarly situated” to cisgender girls who are going through female puberty. This is, of course, contrary to D.N.’s factual allegations, which are supposed to be accepted for the purpose of deciding a motion to dismiss a complaint. Whether it is unfair to cisgender girls to let D.N. participate on the girls’ volleyball team – her main interest – is a disputed fact, which should not be decided on a motion to dismiss in the absence of discovery and a full hearing record.

But Judge Altman claims that, taking D.N.’s factual allegations as true, “we find that SB 1028’s sex-based classifications are substantially related to the State’s important interest in promoting women’s athletics.”

He also finds that regulations issued under Title IX, early in its history, support the conclusion as a matter of law that schools can decide qualifications based on “biological

sex,” essentially without regard to when the student in question has taken the medical transition route sufficiently early in her life to avoid accruing the physical advantages normally flowing from male puberty.

He also rejects D.N.’s contention that the Florida law unconstitutionally invades her privacy by requiring her to disclose intimate medical facts, finding this concern to be too speculative to support her constitutional claims.

However, the court did indicate that it would accept submission of an amended complaint if filed by November 21 on the issue of animus (for the Equal Protection Claim) and a Title IX argument that Title IX prohibits the state from treating D.N. as a biological male differently (and worse) than biological females. The court’s rejection of D.N.’s argument that the Florida law was enacted due to animus against transgender people was, in this writer view, one of the most blinkered parts of the opinion. Perhaps an amended complaint can survive a motion to dismiss, but the judge’s predisposition seems to forecast otherwise.

Judge Altman’s decision to dismiss the case can be appealed to the 11th Circuit Court of Appeals. The 11th Circuit has twelve active judges, of whom seven were appointed by Republican presidents – the chief judge appointed by President George W. Bush and six other judges appointed by President Donald Trump – and five by Democratic presidents – three by President Barack Obama and one each by Presidents Bill Clinton and Joe Biden. The resulting conservative tilt helps to explain the *Adams* decision upon which Judge Altman relied in this case.

Amicus briefs were filed by Christian Family Coalition, the State of Alabama, The Trevor Project, and Alliance Defending Freedom (on behalf of one Selna Soule, identified as “Intervenor,” so one assumes a cisgender woman supporting the state’s argument that allowing transgender women to compete would be unfair to people like her). ■

U.S. District Court Rules Against Illinois Corrections Department in Ongoing Class Action Transgender Incarcerated Individual Litigation

By Jason Miranda

On November 16, 2023, Chief U.S. District Judge Nancy J. Rosenstengel delivered two opinions in what seems to be a never-ending class action saga consisting of all transgender incarcerated individuals in custody of the Illinois Department of Corrections (IDOC) who have previously requested evaluation or treatment for gender dysphoria. Since 2019, the court in *Monroe v. Bowman* has issued several injunctive orders, entered enforcement orders, and even required ongoing status reporting. Clearly, none have been fruitful as the court finds itself reviewing motions brought by the plaintiffs to both transfer prisons and find the state defendants in contempt of court orders, and a motion brought by the defendants to vacate the injunction. See 2023 U.S. Dist. LEXIS 205793; 2023 U.S. Dist. LEXIS 205800 (S.D. Ill. Nov. 16, 2023).

Readers of *Law Notes* may already be familiar with the details surrounding this ongoing case. In 2019, the court entered the first order for preliminary injunction against the IDOC, ordering an immediate stop to the policy and practice of depriving gender dysphoric incarcerated individuals of medically necessary social transition and requiring IDOC to develop a policy to allow for transition. A second order for preliminary injunction was entered in August of 2021, emphasizing that the 2019 order continued in effect and delineating timelines for hormone therapy and facility transfers. It also directed the IDOC to provide access to private showers and to allow incarcerated individuals to choose the gender of the correction officer who would search their person. In December of 2021, a special monitor was appointed to oversee compliance. In February 2022, after a full bench trial

on the merits, a permanent injunction was issued.

In response to that February 2022 ruling, the defendants file their motion to vacate, arguing that a permanent injunction never ensued but, rather, the injunction was labeled as preliminary. Because of this error, the defendants argue that pursuant to the Prison Litigation Reform Act (PLRA), injunctive relief issued by the court expires 90 days after issuance, and that recent enforcement orders exceed the limitations set by the PLRA. While the court does concede to its error, it rebuts with a lengthy discussion of context and previous case law, ultimately finding the “preliminary injunction” issued in February 2022 was a permanent injunction, resulting in the PLRA not applying.

Judge Rosenstengel dives deep into the February 2022 order, recalling the ruling on the merits finding the defendants in violation of the Eighth Amendment for deliberate indifference to the plaintiffs’ serious medical need for gender dysphoria treatment. Due to evidence introduced at trial and other inconsistencies regarding prospective and preliminary injunctive relief, the court finds enough to signal that the intention of the order was to provide permanent relief. The permanent injunction, along with subsequent operative injunction, was sufficient to satisfy the PLRA’s narrowness-need-intrusiveness test that would allow the injunction to remain in effect beyond the 90 days.

Notably, the court makes mention of the WPATH Standards of Care as the benchmark for appropriate care and, although the defendants attempt to argue that the court has intruded on the IDOC’s discretion to develop solutions, policies, and procedures,

the IDOC has also failed to introduce other alternatives to the WPATH Standards. Therefore, the court has only imposed the constitutional bare minimum, offering only what is necessary to prevent further violation of the Eighth Amendment. Additionally, Judge Rosenstengel mentions that the defendants had failed to bring the error to the court's attention earlier, signaling waiver by the defendants to grounds for such a claim. Since the February 2022 ruling almost two years ago, the IDOC has continued to work with co-monitors and the court to enforce the injunction and other measures. Never once had it mentioned the PLRA 90-day limitation nor the injunction mislabeling.

As a last-ditch attempt to get the PLRA to apply, the defendants attempt to mark the court's subsequent enforcement orders for violation of the PLRA narrowness-need-intrusiveness requirements, arguing they instead prescribed additional prospective relief. A quick shut-down ensues, where Judge Rosenstengel finds that no new obligations were imposed but, rather, because of failure to comply and make the changes, they were reiterated, and timelines/deadlines were placed to prevent further noncompliance. The court finds that it is within its equitable powers to clarify and impose deadlines where the defendants have shown a failure to comply.

In the motion for finding of contempt, the plaintiffs argue the defendants have failed to perform their reasonable due diligence in complying with court orders to provide "constitutional care" to the serious detriment of class members. Most appalling is that, in relying on class member accounts and reports from co-monitors, fewer than 15% of all class members receiving hormone therapy tested within the appropriate therapeutic range. The defendants cite staffing shortages and time constraints as their reason for noncompliance, creating rather baseless conclusions for such failures including incarcerated individual complaints and position changes amongst staff. The court does not buy into these excuses, finding the defendants to be creating bottlenecks themselves such as relying

on only one medical provider with an overly saturated surgical schedule.

Judge Rosenstengel takes offense at the defendants' criticisms of the court's orders, including their belief that speed is not an issue in constitutional offenses or that deadlines were never imposed in the initial injunction and are therefore not applicable. Although the court finds the defendants in contempt of the court's orders, Judge Rosenstengel finds a scintilla of sympathy for the February 2022 error and imposes no sanctions, allowing for more time to make changes and abide by the court orders.

In the second opinion is the plaintiff's motion for transfer, where several class members have petitioned the court to be transferred out of the Pinckneyville Correctional Center. The opinion recalls the testimony provided by several class members, recounting the alleged horrors experienced while in the facility. The issues range from physical attacks to verbal abuse to lack of attorney access. Throughout the six provided testimonies, a few common accounts stand out. For example, the class members consistently recount how officers would announce private shower times for the class members as "tranny showers" or "gay showers." Additionally, male officers would consistently subject the incarcerated individuals to strip searches, disregarding the wristbands that specify the incarcerated individual is to be searched by female guards only. Other issues include skimpy shower curtains that prevent private showers, physical abuse by guards, and prevented access to grievance forms.

All in all, the testimony provided by these six transgender class members is only further corroborated by the court-appointed co-monitor, who confirms limited access to grievance forms, poor privacy measures with showers, and extremely slow training for officers. The defendants provide testimony as well, condemning many of the statements made but, in the process, incriminating themselves by demonstrating poor attention to the issues at hand and blatant disregard for the safety of the incarcerated individuals, all in violation of the Eighth Amendment prohibition on deliberate indifference.

Notably, Judge Rosenstengel claims she is "shocked to learn that a transgender woman class member [...] was forced to undergo a search by a male officer immediately before her appearance to testify at the recent hearing." Overall, from the many changes the court has required to be implemented, the defendants have either failed to implement them or have only recently begun considering them. In case it was not made clear earlier, the initial injunction was granted over two years ago.

Ultimately, with 22 class members petitioning for transfer, the court requires these motions to be reviewed as requests and allows until December 22 for a decision to be issued on each request. All requests shall be evaluated appropriately, and evidence must be provided to show the appropriate criteria were applied. Written decisions for each class member must also be provided to the court-appointed co-monitors and to parties' counsel. Most importantly is that for each request denied, the request must be reviewed again 60 days from the denial.

Chief Judge Nancy J. Rosenstengel was appointed by President Barack Obama in 2014. The plaintiffs are represented by the ACLU Foundation of Illinois and the national ACLU LGBT Rights Project. ■

Jason Miranda is a law student at New York Law School (class of 2024).





Oregon U.S. District Court Refuses to Block Human Services Agency from Requiring Adoptive Parents to Support a Child’s Sexual Orientation or Gender Identity

By Corey L. Gibbs

Jessica Bates heard the call to adopt a child and applied to become certified to adopt. But the Oregon Department of Human Services required applicants to respect, accept, and support children’s identities. Applicants had to use a child’s preferred pronouns and create a supportive environment for a child, and Bates believed this rule conflicted with her religious beliefs. Following a denial letter, Bates filed a complaint and a motion for preliminary injunction. On November 14, 2023, Judge Adrienne Nelson of the U.S. District Court for the District of Oregon denied Bates’s motion. *Bates v. Pakseresht*, 2023 WL 7546002; 2023 U.S. Dist. LEXIS 203533.

Jessica Bates is a widow and the mother of five school-aged children. She identifies as a Christian and regularly attends church. Following a radio broadcast that discussed a man who adopted a child, Bates felt the call to adopt a child as well. In particular, she wanted to adopt a sibling pair, who were younger than all her children. In March 2022, Bates took the initial step towards adoption: applying to become certified to adopt.

The Oregon Department of Human Services (ODHS) requires applicants to apply for a “Home Study.” The Home Study would include interviews and an inspection of applicants’ homes. The applicants bore the burden of proving that they “possess the required qualifications to be approved as a certified resource family or as a potential adoptive resource.” Thus, applicants show that they can care for the various needs of a child and “respect, accept and support the . . . sexual orientation, gender identity, [and] gender expression” of a child.

As part of the process for applying for Home Study, Bates attended a training session where she learned that she should use a child’s preferred pronouns. Although Bates claimed that she was open to receiving a child regardless of sexual orientation, gender identity, and gender expression, she stated that she could not, among other things, use a child’s preferred pronouns because that would conflict with her religious beliefs. When Bates notified an ODHS employee of this conflict, ODHS issued Bates an official denial letter. Bates was ineligible to adopt a child because she failed to demonstrate compliance with the rules (*i.e.*, respecting, accepting, and supporting a child).

At the time of the denial, Bates was not an adoptive mother. She was merely an applicant. The state of Oregon was the *de facto* parent of the children at issue.

Bates filed a complaint in April 2023 that challenged the rule with which she failed to comply. Days later, she filed a motion for preliminary injunction. Idaho, Alabama, Mississippi, Arkansas, Missouri, Georgia, Montana, Iowa, Nebraska, Kansas, South Carolina, Kentucky, and Texas filed a joint amicus brief.

To obtain the preliminary injunction, Bates had to show: (i) she would likely succeed on the merits, (ii) she would likely suffer irreparable harm without the preliminary injunction, (iii) the balance of equities tipped in her favor, and (iv) the preliminary injunction was in the public’s interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In the Ninth Circuit, Bates bore the initial burden of making a “colorable claim” that her First Amendment rights had been infringed. *Cal. Chamber of*

Com. v. Council for Educ. & Rsch. On Toxics, 29 F.4th 468, 478 (9th Cir. 2022). Because Bates failed to show that she would likely succeed on the merits, the court did not consider any other factor.

Bates brought three claims under the First Amendment: (i) Free Exercise of Religion, (ii) Freedom of Speech, and (iii) Freedom of Association. The court analyzed each in turn.

First, the court considered Bates' claim that the rule substantially burdened her sincere religious exercise. To demonstrate a free exercise violation, Bates had two options. First, she may show that the rule was neither neutral nor generally applicable. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). Second, Bates may show that the rule infringed on the traditional scope of her right. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022). The court had to determine whether the rule: (i) was neutral with respect to religion, (ii) was generally applicable, (iii) burdened Bates's religious exercise, or (iv) treads on the historical protection of religious speech.

To demonstrate that the rule was not neutral, Bates had to show that the government "[proceeded] in a manner intolerant of religious beliefs or [restricted] practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). If the government sought to infringe on a practice because of its religious motivation, then the rule would not be neutral with respect to religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The rule at issue was facially neutral because it made no reference to a religious practice. Thus, the court had to consider the historical background of the rule. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). But the court found no evidence that ODHS was hostile towards Bates's religious beliefs. The court emphasized that nonreligious hostility towards LGBTQ+ individuals existed. And the rule sought to prevent children from enduring any hostilities towards their identities. The welfare of the children motivated ODHS to create the rule.

To demonstrate that the rule was not generally applicable, Bates had to show that the rule "[invited] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. Bates argued that the government offered exemptions in a variety of ways, such as issuing waivers to biological parents and accommodating sex-based preferences. But the waivers existed in situations where Oregon was not the *de facto* parent of the child. And allowing a sex-based preference did not amount to an exemption from the requirement. Thus, Bates failed to persuade the court that any exemptions existed.

Bates argued that the rule forced her to choose between adoption services and her religious beliefs. However, she erroneously relied on *Fulton*. There, the Supreme Court found that a "freeze" on referrals to an agency violated the Free Exercise Clause because it was not generally applicable. Here, the court determined that the rule was generally applicable.

Alternatively, Bates argued that the rule treaded on the historical protection of religious speech. The court reminded us that Bates was "seeking a certification that grants her only the opportunity to house and care for a child under the state's umbrella of protection." Thus, her challenge was one to impose her own beliefs on children to whom she had no parental rights.

The court applied rational basis review upon finding that the rule: (i) was neutral, (ii) was generally applicable, (iii) did not burden Bates's religious exercise, and (iv) did not tread on the historical protection of religious speech. Thus, the court would uphold the rule if it was rationally related to a legitimate government purpose. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). Judge Nelson wrote, "The [rule] is rationally related to the government's legitimate interest in protecting LGBTQ+ children in ODHS care from harm." Thus, Bates's Freedom of Religion claims would not likely succeed on the merits.

Then, the court turned to Bates's Freedom of Speech claims. Bates had

two claims: (i) the rule was facially invalid due to overbreadth and (ii) the rule, as applied to her, infringed on her freedom of speech.

To demonstrate that the rule was overbroad, Bates had to show that a significant number of the rule's applications were unconstitutional when "judged in relation to the [rule's] plainly legitimate sweep." *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). Bates argued that the rule required her to communicate by words (e.g., preferred pronouns) and signs (e.g., pride flags) that accept ODHS's political ideas. But the government countered by noting the rule regulated Bates's conduct. Bates was required to create a supportive and affirming environment. Any impact on her speech would be incidental to the government's regulation of conduct. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). The court determined that the rule was not overbroad.

To show that the rule was unconstitutional as applied to her, Bates had to show that the particular application of the rule to her was unconstitutional. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1054 (9th Cir. 2023). Bates argued that the rule compelled her to speak and restricted her speech. Here, Bates had to use a child's preferred pronouns even when using them would violate her religious beliefs. The court determined that the rule compelled positive speech and restricted negative speech. And the compulsion and restriction were content-based and viewpoint-based. Thus, strict scrutiny had to apply.

When applying strict scrutiny, a court must determine (i) whether the government had a compelling interest that required the specific action and (ii) whether the government narrowly tailored the rule to target the evil it seeks to remedy. The government asserted that it had a compelling interest in protecting LGBTQ+ children. And the government offered substantial evidence that LGBTQ+ children need protection. The court was satisfied that the government had a compelling interest to protect LGBTQ+ children.

To demonstrate that the government had narrowly tailored the rule, the court focused on two aspects. The court sought to determine whether the rule was overinclusive and underinclusive. If a less restrictive alternative existed, then the rule may have been overinclusive. *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228 (9th Cir. 2019). If the government regulated one aspect of the problem but declined to regulate another, then the rule may have been underinclusive. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015). Bates failed to show the existence of a less restrictive alternative. And she failed to show where the government declined to fully protect LGBTQ+ children. Thus, the rule survived strict scrutiny and Bates's Freedom of Speech claims would not likely succeed on the merits.

Finally, the court turned to Bates's claim under Freedom of Association. Bates had to show that the government: (i) penalized or withheld benefits from members of a disfavored group, (ii) attempted to require disclosure of a member's membership, or (iii) attempted to interfere with a group's internal affairs and organization. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-623 (1984). Bates argued that the rule restricted her from attending church, sharing the Gospel with her children, and allowing her children to attend a youth group. And she argued that the rule compelled her to seek out LGBTQ+ events and take her children to Pride parades. In response, District Judge Nelson wrote, "The larger problem with plaintiff's reading, however, is that her interpretation of how the [rule] infringes on her freedom of association implies that she has a right to infringe on the freedom of association of a child in ODHS care." Once again, we were reminded that Bates did not have parental rights to the children. Bates's Freedom of Association claim would not likely succeed on the merits. Thus, the court denied Bates's motion for preliminary injunction.

Alliance Defending Freedom represents Jessica Bates. The non-profit legal organization was "committed to protecting religious freedom, free speech, the sanctity of life, marriage and family, and parental rights." This

case highlighted how aggressive the organization was towards accomplishing its mission. Bates presented several hypotheticals and alternatives to challenge the rule. Many of these seemed rather weak. And others were simply interesting. The organization has revealed itself as one that will take the kitchen-sink approach. Judge Nelson respectfully addressed each hypothetical and alternative.

Not only did Judge Nelson provide a well written opinion that analyzed every issue, but she continued to humanize Bates. She wrote, "To be clear, the Court does not doubt the sincerity of [Bates's] willingness to love a child placed in her home; rather, it recognizes that the totality of [Bates's] statements indicate a lack of understanding about the unique support and care that LGBTQ+ children require." Rather than painting Bates as a transphobic crusader, Judge Nelson shows that Bates, a mother and widow, is simply not ready to adopt at this time. But there is hope that one day she will be prepared to care for an LGBTQ+ child. Life is a journey. Where we are today is not indicative of where we will be tomorrow.

Jessica Bates was represented by Jonathan A. Scruggs, Rebekah Schultheiss, Christiana M. Kiefer, and Johannes Widmalm-Delphonse. Director Fariborz Pakseresht, Deputy Director Liesl Wendt, Aprille Flint-Gerner, Rebecca Garrison, and Cecilia Garcia were represented by Deanna J. Chang, Alexander Charles Jones, and Thomas H. Castelli. District Judge Adrienne Nelson was appointed by President Biden. ■

Corey L. Gibbs is a member of the New York Bar.



New Jersey U.S. District Court Judge Denies Preliminary Injunction Against School District's Alleged Censorship of Mother's Facebook Posts

By Brian M. Brantley

Plaintiff Angela Reading filed a motion for a preliminary injunction on May 4, 2023, against nine individuals, including local officials and military personnel affiliated with North Hanover Township and Joint Base McGuire-Dix-Lakehurst. Reading alleges that these individuals censored, retaliated against, and intimidated her in response to her views expressed in a November 2022 Facebook post, violating her free speech rights. She seeks a preliminary injunction to prevent them from interfering with her social media posts containing what she claims is protected free speech. On November 17, 2023, U.S. District Judge Karen M. Williams (D.N.J.) denied Plaintiff's motion in *Reading v. N. Hanover Township*, 2023 U.S. Dist. LEXIS 206595, 2023 WL 7986408.

Plaintiff's case revolves around alleged violations of her First Amendment rights after Defendants purportedly caused the removal of her Facebook post criticizing posters at her daughters' elementary school. In addition to being the mother of students at the school, Reading had been a member of the board of education. The posters, part of a "Week of Respect" initiative, displayed gender identity and sexual orientation terms. Visiting the school for "Math Night," Plaintiff noticed these posters, allegedly created by students, and expressed concerns about their appropriateness for young children. One poster contained terms like "transgender,"

“agender,” “polysexual,” among others, accompanied by supportive slogans.

Questioning the authenticity of these student-created posters, Plaintiff posted her objections on Facebook, which sparked a wider online discussion. Defendants, fearing the traffic generated by Plaintiff’s post posed a safety risk to the school, reportedly used their positions to take down the post and allegedly engaged in actions to intimidate and silence Plaintiff. This included emails, statements implying threats, the removal of the post, and security measures at a school board meeting. Plaintiff argues these actions infringe upon her free speech rights.

The court denied the preliminary injunction because Plaintiff failed to prove imminent harm. Plaintiff claims she is afraid to express herself due to Defendants’ actions, but Defendants argue she’s continued to post about her experiences and similar topics on different platforms, questioning the urgency of her fear. Plaintiff argues her First Amendment rights were violated, causing irreparable harm, but the court disagrees, stating that the Plaintiff’s fear of censorship lacks evidence. The Defendants’ lack of engagement with her posts since December 2022 also weakens her claim. Plaintiff’s continued expression on other forums contradicts the urgency of her fear, prompting the court to deny the injunction, although the case’s merit will be further explored in later stages.

Plaintiff is represented by Christopher A. Ferrara of Thomas More Society, Fairfield, New Jersey. Judge Karen M. Williams was appointed by President Joe Biden. ■

Brian M. Brantley is a member of the New York Bar.



Appellate Court of Illinois Upholds Order of Protection for Transgender Petitioner Against Her Transphobic Mother

By Jared Trujillo

Appellee A.A. obtained a civil order of protection pursuant to Illinois Domestic Violence Act of 1986 against their mother, Appellant Nita A., after seven years of their mother sending them abusive, obsessive, and sometimes threatening messages, emails, and phone calls over A.A.’s objection. These messages frequently attacked A.A. for being transgender. Justice Rena Van Tine, writing for the Appellate Court of Illinois’ First Division, affirmed the trial court order which denied Nita A.’s claim to vacate or reconsider the order of protection. *A.A. v. Nita*, 2023 IL App (1ST) 230011, 2023 Ill. App. LEXIS 424 (Nov. 22, 2023).

Notably, though the order expired several months after this case was argued, but the Appellate Court agreed to hear this case under the public interest exception to the mootness doctrine. *Whitten v. Whitten*, 226 Ill. Dec. 670, 686 N.E.2d 19 (1997). The court noted that “protecting transgender individuals from abuse by family members is a matter of public interest, and unfortunately, it is likely that transgender individuals will face abuse from family members in the future. There appear to be no reported appellate decisions that address how the [Illinois Domestic Violence Act of 1986] applies to transgender victims of domestic abuse, so it is necessary to provide guidance as to how courts should apply the Act in the future.” *A.A. v. Nita A.*, at ¶ 25.

In 2013, A.A. moved from New Jersey to California to attend California Institute of Technology (Caltech). Nita A. shortly moved to California to purportedly care for A.A., even though A.A. noted the move was “unnecessary.” While there, Nita A. read A.A.’s emails and text messages, and accused A.A. of “doing LGBT behaviors” if A.A. did not immediately respond to any of the

numerous messages Nita A. sent. From March 2014 through March 2015, Nita A. sent A.A. Gchat harassing messages, including messages to “stop” being “LGBTQ,” assertions that Nita A. would “beat the crap out of [A.A.] for leaving [their] mama in hell,” and assertions that A.A. was “mutating” their body. In 2016 A.A. moved to a dormitory and asked Nita A. not to contact them. Yet Nita A. left A.A. daily messages, and she allegedly contacted campus staff, A.A.’s friends, and relatives to find A.A.. That same year A.A. started receiving hormone therapy for transition, and Nita A. sent an unsolicited message about the danger of testosterone. While A.A. did voluntarily meet with Nita A. to retrieve A.A.’s belongings, A.A. maintained their request that Nita A. not contact them.

In 2017, Nita A. went to A.A.’s graduation ceremony, despite not being invited. In 2018, after A.A. changed their legal name to match their gender identity, Nita A. sent them messages that people would “discover” this legal change and “kill” A.A.. In 2019, while A.A. was a graduate student, Nita A. offered to pay for A.A.’s rent, healthcare, and tuition, which A.A. accepted. During the pandemic in 2020, A.A. briefly moved in with Nita A., but requested that their mother refrain from discussing A.A.’s healthcare and academics. However, Nita A. continued to discuss these topics and A.A. moved away. A.A. asked their mother not to contact them, but she continued messaging A.A. throughout 2020. In July 2021, A.A. incidentally encountered Nita A. in a public area in Berkeley, California. Nita A. asked A.A. to call their grandmother, but Nita A. later refused to connect A.A. to their grandmother via Skype. From September through November 2021, Nita A. continued to leave A.A. voicemails

and emails. Despite A.A. withholding their address and life information, Nita A. sent them a message that A.A. deemed chilling, where Nita A. claimed that she knew A.A. was pursuing a PhD at Northwestern University and a message implying that she knew A.A.'s address. A.A. claimed that their mother was not providing for them financially at this time, while Nita A. disputes that claim.

These messages caused A.A. stress, depression, and anxiety. They had a negative impact on A.A.'s ability to focus on school, and they even withdrew from some social activities due to the fear of seeing Nita A. Notably, A.A. repeatedly asked their mother to stop contacting them, though Nita A. ignored or disregarded this request.

A.A. was issued a six-month civil order of protection, whereby the court ordered Nita A. to stay away from A.A., and not threaten or abuse A.A. The order was valid until February 9, 2023. The court held that A.A.'s occasional consent to contact and their acceptance of financial assistance did not obviate the abusive and damaging nature of Nita A.'s calls, messages, emails, and Gchat messages. However, the court issued a six-month order of protection, rather than a standard two-year order of protection, because the worst abuse in evidence was from 2014, and the court hoped that the two could have a loving and healthy relationship in the future.

Nita A. subsequently filed a motion to vacate or reconsider the order of protection. She argued that the general five-year statute of limitations for civil claims prohibited A.A.'s allegations of abuse that occurred in 2014 and 2015, which were the most jarring instances of abuse; that A.A.'s occasional voluntary contact with Nita A. and accepting financial support from her obviated their claims of abuse; that the order of protection was a "severe penalty: that did not achieve "substantial justice;" and, that A.A. did not establish by a preponderance of the evidence that Nita A. had abused them. The trial court rejected all of Nita A.'s arguments and decided A.A. had satisfied their burden of proof to obtain the order of protection.

The court held that the general civil five-year statute of limitations did not apply to A.A.'s petition for an order of protection. Further, the court held that A.A. did not forego or invite communication with Nita A. by accepting financial assistance. The court also rejected Nita A.'s argument that the order of protection was a severe penalty, as the court reasoned Nita A. had not been criminally charged and the order was unlikely to cause negative consequences for Nita A.

On appeal, Nita A. argued that the trial court lacked personal jurisdiction because the alleged abuse occurred primarily outside of Illinois. Pursuant to the state's long-arm statute, a court "may exercise jurisdiction in any action arising within or without [Illinois] against any person who [i]s a natural person present within [Illinois] when served. 735 ILCS 5/2-209(b)(1) (West 2020). However, the court noted that she was served in open court in Illinois, which provided the court personal jurisdiction. Further, the court rejected Nita A.'s claim that the Illinois Domestic Violence Act barred claims that occurred outside of Illinois. The court stated that Nita A. did not provide any authority to support this contention. The court further noted that accepting Nita A.'s contention would undermine the purpose of the law by disabling survivors of abuse that occurred in another state from obtaining an order of protection upon moving to Illinois, even if the abuser followed that survivor. The court reasoned that this would delegitimize Illinois as a haven for survivors, which is contrary to one of the law's purposes of not "allowing abusers to escape effective prosecution." 750 ILCS 60/207, § 102(3)-(4).

The Appellate Court also rejected Nita A.'s argument that the statute of limitations barred A.A.'s petition because it was based on events that happened more than five years before A.A. filed. The court noted that the Illinois Domestic Violence Act of 1986 does not contain a statute of limitations for an order of protection. Moreover, the court held that Nita A.'s claim was not timely, and that she forfeited this claim because she raised this issue for the

first time in her post-hearing motion to vacate the order, and a party forfeits an argument that it only raises for the first time in a motion to reconsider. *Zander v. Carlson*, 2020 IL 125691, ¶ 34.

The Appellate Court also rejected Nita A.'s claim that the trial court improperly admitted evidence of text messages from 2014 and 2015 because she did not properly authenticate them, and because 2014 and 2015 were too remote in time to warrant admission. The court noted that A.A. testified that they took screenshots of the messages and that the screenshots were accurate depictions of the messages. Further, the court held that A.A. had laid the proper foundation for this evidence because A.A. recognized Nita A.'s contact information as the sender, and they were able to use context to recognize that the messages were sent by Nita A. The court held that a reasonable trier of fact could conclude that the messages were what A.A. claimed they were. The court also noted that Nita A. never denied that she authored the messages. Additionally, the court noted that past evidence of abuse is germane to a trial court's determination as to whether abuse occurred, regardless of whether the prior abuse occurred within the past five years, or even further back in time. *Richardson v. Booker*, 2002 IL App (1ST) 211055 at 59. The court held that Nita's messages from 2014 and 2015 were germane to determining whether abuse occurred, and the messages were properly considered by the trial court.

Finally, the court rejected Nita A.'s argument that the trial court's decision to grant the order of protection was against the manifest weight of evidence. A finding is against the manifest weight of evidence when the opposite conclusion is clearly evident or where the trial court's findings are unreasonable, arbitrary, and not based on any of the evidence. *Stapp v. Jansen*, 2013 IL App (4th)120513, ¶ 16. The court reasoned that Nita A. sent A.A. several harassing messages for seven years, that Nita A.'s repeated unwanted contact despite requests to stop constituted stalking, and that Nita A.'s messages to A.A. suggesting that she knew where A.A. lived in Evanston,

and that she had visited Evanston was concerning. As such, the court held that the trial court's decision was not against the manifest weight of evidence.

Justice Rena Van Tine authored the judgement and opinion of the court. Justices Bertina Lampkin and Debra B. Walker concurred in the judgement and opinion.

A.A. was represented by Aziza Khatoun, Benjamin J. Bennett, and Miriam Hallbauer of the Legal Aid Society of Chicago. Her mother, Nita A., was represented by Lawrence A. Stein of Lawrence A. Stein LLC. ■

Jared M. Trujillo is an Associate Professor at CUNY Law School.



New York Appellate Division Applies Marriage Equality Law Retroactively in Lesbian Divorce Case

By Arthur S. Leonard

The New York Appellate Division, 2nd Department, ruled on November 15 in *Mackoff v. Bluemke-Mackoff*, 2023 N.Y. Slip Op 05721, 2023 N.Y. App. Div. LEXIS 5809, 2023 WL 7561813, that New York's Marriage Equality Law (MEL), which made it legal for same-sex couples to marry in New York as of July 24, 2011, should be applied retroactively to a lesbian couple's July 21, 2005, religious marriage ceremony in deciding whether assets acquired between those two dates should be considered marital property for purposes of equitable distribution in a divorce proceeding. Writing for a unanimous four-judge panel, Justice William G. Ford wrote that the issue presented was apparently one of first impression for a New York appellate court and reversed the trial court refusal to allow the respondent to amend her answer to the complaint using the earlier date for the marriage.

Robin Mackoff and Linda Bluemke had a traditional Jewish wedding ceremony in 2005, which was performed and "solemnized" by a rabbi in the presence of about 100 guests. Wrote Ford, "The ceremony was performed under a chuppah and the parties signed a Ketubah." A chuppah is the traditional canopy held over the couple during the ceremony, and a Ketubah is a formal contract of marriage written in Hebrew which each of them signs. They did not have a marriage license, because New York did not issue marriage licenses to same-sex couples at that time. Robin and Linda lived together as a married couple after that ceremony. The marriage then had no legal significance.

In June 2011, New York enacted the MEA, which amended the state's marriage law to allow same-sex couples to get marriage licenses and enter legally recognized marriages. The MEA provided that there should be no distinction between same-sex and difference-sex marriages for any purpose

of New York law. In June 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. 644, that same-sex couples have a federal constitutional right to marry. Since then, courts in many states have struggled with the questions of whether and how to apply that ruling retroactively, since it was based on the 14th Amendment, which was adopted in 1868 after the Civil War.

The question of retroactive application is easiest when a state recognized common law marriage, a doctrine under which a couple who live together and hold themselves out to the public as spouses would have that legal status despite the lack of a marriage license or a formal marriage ceremony. New York used to have common law marriages, but a statute passed in the 1930s put an end to that practice, although New York courts will still recognize a common law marriage that was formed *prior* to that statute or that is recognized in the state where the couple resided when they had fulfilled that state's requirements for proving a common law marriage. Only a handful of states still recognize common law marriage today, the doctrine has been abolished either by statute or judicial decision in the other states.

The Mackoff-Bluemke marriage occurred long *after* common law marriage was abolished by statute in New York, so the question arising in this case is whether the religious marriage ceremony that they had in 2005 would be irrelevant or would be deemed "valid" for purposes of the state's Equitable Distribution Law.

When Robin filed for divorce on January 23, 2019, she claimed in her petition that they were married on July 28, 2011. When Linda filed an answer to the petition several months later, she did not "refute" the July 28, 2011, marriage date, and she was then awarded certain relief pending a final ruling on the divorce, including temporary spousal

maintenance. Justice Ford’s opinion doesn’t reveal the situation regarding assets that Robin or Linda acquired, either jointly or separately, between their religious marriage ceremony and their civil marriage ceremony, but presumably the assets are substantial enough to have prompted Linda to subsequently move the court for permission to amend her answer to substitute the earlier date for the marriage. Robin opposed the motion.

Suffolk County Supreme Court Justice John J. Leo denied Linda’s motion on two grounds. First, Justice Leo concluded that the amendment was “patently devoid of merit” because the MEA did not go into effect until 2011 and was not by its terms retroactive. Second, he found that it would be prejudicial to Robin to allow the amendment, in light of the time that had elapsed and the temporary relief that had already been awarded to Linda after she had filed her original answer. Linda appealed this ruling.

The Appellate Division decided that Justice Leo was wrong on both issues. Although the MEA did not specifically say that it was retroactive, it did say that for all purposes same-sex and different-sex marriages should be treated the same, and there is precedent under New York Law for deeming a marriage that was performed without a license but otherwise in conformity with New York Law as “valid.” Justice Ford cited three prior New York cases, *Bernstein v. Benchemoun*, 216 App. Div. 3d at 894; *Yusupov v. Barin*, 197 App. Div. 3d at 539; and *Matter of Faraj*, 62 App. Div. 3d at 1083. In none of these did the court find the unlicensed marriage to be valid, but in each case, there were problems with proving that all the requirements for “solemnization” of the marriage had been met. The courts stated that if those requirements had been met, the marriages would have been deemed “valid.”

Justice Ford pointed out that although the MEA said nothing about retroactive application, it was a “remedial” statute intended to remedy a problem in the law – in this case, the denial of a fundamental right to marry to same-sex couples as proclaimed by the legislature’s findings in the statute – and

the New York State Tax Department had already interpreted the statute as being retroactive for parties who prove they *would* have married had it been possible, usually by showing some sort of civil union ceremony or agreement between them. In addition, New York courts have recognized same-sex marriages that were legally contracted in other jurisdictions (the handful of other states that had marriage equality before New York, or Canada, for example) before July 2011 as valid. Taking these factors together, the court decided that Linda’s argument for retroactive recognition of the 2005 marriage was not “patently devoid of merit.” The court also found that it would not be prejudicial to Robin to allow the amendment of Linda’s answer. “Neither the length of time between the defendant’s original answer and her motion for leave to amend, nor the fact that the amendment may affect the plaintiff’s maintenance and equitable distribution obligations, are sufficient to establish prejudice to the plaintiff,” declared the court, sending the case back to Justice Leo while granting Linda’s motion to amend her answer.

It is still up to Justice Leo to determine, based on evidence presented by Robin and Linda, whether the 2005 marriage is valid for this purpose. The facts alleged by Linda suggest none of the problems that led earlier courts to reject unlicensed marriages two of which were unlicensed Jewish marriages performed by rabbis. There was also a case of a marriage performed without a license by an Imam, but the ceremony took place in New Jersey, not New York, and New Jersey law renders invalid all unlicensed marriages, so the New York law on this subject could not be applied, and the New York court would not recognize the marriage in determining distribution of assets from the estate of one of the “spouses” who died without a will.

Danielle Sican and Stanford Bankston of Michael B. Schulman & Associates, P.C., Melville, New York, represent Linda. Gilbert L. Balanoff of Garden City, New York represents Robin.

The other judges on the unanimous 2nd Department panel were Betsy Barros, Paul Wooten, and Barry E. Warhit. ■

Eighth Circuit Finds Bisexual Guatemalan Failed to Establish Persecution

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the Eighth Circuit has found that a bisexual Guatemalan man was not entitled to asylum because he failed to establish that the groping and homophobic slurs he endured during childhood and young adulthood rose to the level of persecution and that he had not established a pattern or practice of persecution of bisexual men in Guatemala, in *Juarez-Vicente v. Garland*, 2023 WL 7317335 (8th Cir., November 7, 2023).

Petitioner stated that from elementary school through adulthood, his classmates and coworkers touched his “private parts” and subjected him to homophobic slurs because he was bisexual. He left both the University and a workplace on account of abuse and harassment, but never reported any incidents to his school or to the police. Petitioner came to the United States seeking asylum, withholding of removal, and protection under the Convention Against Torture. An Immigration Judge denied his applications for relief and the Board of Immigration Appeals dismissed his appeal, finding Petitioner “did not experience harm severe enough to be persecution” and that he did not show the Guatemalan government would be unwilling or unable to protect him from future harm. He brought a timely petition for review of the decision before the 8th Circuit.

Speaking for a panel of the court, Trump-nominated Circuit Judge Jonathan Allen Kobes, the first federal judicial nominee ever confirmed by a tie-breaking vote, noted that the review of the Board’s dismissal was under the substantial evidence standard. Petitioner argued that “repeated sexual harassment by classmates and coworkers over more than ten years cumulatively is past

persecution.” Judge Kobes noted that persecution is an “extreme concept” that involves severe suffering and harm, such as “the infliction or threat of death, torture, or injury to one’s person or freedom, on account of a protected characteristic.”

Petitioner compared his case to that of a Cameroonian widow where the case was remanded for failure to consider all of the non-physical harm to that petitioner. Judge Kobes found here that the Board did consider all the non-physical harm to Petitioner and found it to not rise to the level of persecution, a conclusion with which “a reasonable factfinder could agree.” Petitioner also encouraged the court to adopt a rule that repeated non-consensual sexual touching, or any other form of harassment, is *per se* persecution; however, Judge Kobes rejected this rule, finding that “consistent with the fact-specific teaching of *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L.Ed.2d 38 (1992), we have not recognized *per se* persecution.”

Further, Judge Kobe noted that while the Board “did not use any phrases like ‘pattern or practice’ or ‘well-founded fear,’” “we can piece together its reasoning” stating that when an administrative decision embodies “less than ideal clarity,” the court may uphold the decision “if the agency’s path may be reasonably discerned.” Petitioner cited issues faced by transgendered persons and sex workers in Guatemala, but Judge Kobes noted that Petitioner was neither transgender nor a sex worker. Judge Kobes ruled that even if Petitioner established an objectively reasonable fear of severe harm, it was not “persecution” because it was not inflicted by a government or individuals the government was unable or unwilling to control, noting that “mere difficulty in controlling private actors is not enough.”

Finding the Board held Petitioner was harmed by private actors, country conditions evidence shows that private actors perpetrate much of the harm against LGBT Guatemalans, and that the Guatemalan government has made efforts to address discrimination against LGBT Guatemalans, Judge Kobe agreed

that Petitioner had not shown that the Guatemalan government is unwilling or unable to protect him. Judge Kobe concluded by stating “on this record, we cannot say that ‘any reasonable adjudicator would be compelled to adjudicate to the contrary,’” and accordingly denied the petition for review. ■

Bryan Johnson- Xenitelis is an attorney and an adjunct professor at NYLS.



U.S. District Court Awards Summary Judgement to Lesbian Plaintiff in Discrimination Claim Against Christian Non-Profit

By Arthur S. Leonard

Senior U.S. District Judge James L. Robart granted summary judgment to Aubry McMahon, a married lesbian, on her Title VII and Washington Law Against Discrimination (WLAD) claims against World Vision, Inc., a self-described “Christian nonprofit organization,” for rescinding a job offer to be a “customer service representative” after discovering that McMahon was married to a woman and expecting to bear a child. McMahon claimed discrimination because of sex, sexual orientation and marital status. (Marital status is covered under the WLAD, not Title VII.) The court rejected all of the defendant’s affirmative defenses: the church autonomy doctrine, the religious organization exemption, the ministerial exception, the Free Exercise of Religion, Expressive Association, and bona fide occupational qualification. *McMahon v. World Vision, Inc.*, 2023 WL 8237111, 2023 U.S. Dist. LEXIS 211417 (W.D. Wash., Nov. 28, 2023).

The plaintiff describes herself as “an openly gay woman” who became engaged to her girlfriend in November 2019 and married her in September 2020, after having become pregnant through donor insemination. The couple’s child was born in March 2021. In November or December of 2020, she saw a job posting for a position of “customer service representative” (CSR) with World Vision, Inc., on the website Indeed.com. This was advertised as a “remote” position during “call center hours” with hourly compensation depending on location and cost of

living “as well as a comprehensive benefits package.” The job required the CSR to “acquire and maintain donor relationships through basic inbound and outbound calls” and to serve as a “liaison between donors and the general public as well as provide basic levels of customer service for special programs.” The posting job description also said the CSR would “help carry out our Christian organization’s mission, vision and strategies” and “personify the ministry of World Vision by witnessing to Christ and ministering to others through life, deed, word, and sign.” The job posting’s list of duties places first “Keep Christ central in our individual and corporate lives. Attend and participate in the leadership of devotions, weekly Chapel services, and regular prayer.” However, the evidence presented in this case was that the CSRs were not actually required to lead or attend Chape services or to engage in regular prayer. All the other requirements listed were administrative and operational in nature, with almost no mention of religious obligations. In essence, the CSR was a remote call center operator hired to raising money for the organization.

World Vision, founded in 1950, is a self-described “Christian ministry” dedicated to “sharing the gospel of Jesus Christ, primarily through humanitarian outreach to children and families around the world who are poor and underserved.” It “operates in many ways like a Christian church and implements its programs through and as supported by local churches in the United States and around the world” and its articles of incorporation state that “the primary, exclusive and only purposes for which this corporation is organized are religious ones.” The articles list a statement of faith that includes, as part of employee Standards of Conduct, that “sexual conduct outside the Biblical covenant of marriage between a man and a woman” is prohibited.

The plaintiff responded to the job posting, was interviewed telephonically, including inquiries about her personal faith and willingness to comply with World Vision’s Standards of Conduct. She received a verbal offer of employment as to be a CSR on January

4, 2021, which was followed up by a formal letter offering employment, dependent upon completion of a nine-to-eleven-week training and evaluation program. Successful trainees would transition into the CSR role at the conclusion of the program but, wrote Judge Robart, World Vision does not consider this process to be a “religious commissioning.”

On the day World Vision sent the written confirmation of the job offer, McMahan sent an email to the person who had extended the verbal offer, stating: “Hey there, I just have a quick question! My wife and I are expecting our first baby in March and I wanted to see if I would qualify for any time off since I’ll be a new employee? I will be the one having the baby so I just wanted to check to see if any time would be allowed off. If not, no worries, thanks so much!” Receipt of this email led to a few days of internal discussion at World Vision and a conclusion that the email “indicated potential non-compliance with World Vision’s Standards of Conduct and related policies surrounding World Vision’s deeply held religious conviction that sexual conduct should not be outside of marriage and that marriage is a Biblical covenant between a man and a woman.” They sent her an email a few days later rescinding the job offer. When she called for an explanation, she was told the offer was being rescinded “because the standards of conduct are to not have any sexual conduct outside of marriage, and marriage is defined as being between a man and a woman. So that’s the behavior that all employees have to comply with.”

McMahan sued under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination (WLAD), alleging discrimination because of her sexual orientation. After discovery, both parties filed motions for summary judgment. World Vision claimed absolute immunity from suit, arguing that as a Christian organization it was entitled under the “church autonomy doctrine” to be free from judicial interference with its religiously-based employment decisions. As a fallback, it argued that

holding it liable to McMahan would violate the religious organization exemptions in Title VII and the WLAD, the First Amendment “ministerial exception” recognized by the Supreme Court, constitutional rights of free exercise and freedom of association, and the bona fide occupation qualification defense under Title VII.

In a ruling in June 2023, Judge Robart concluded that the church autonomy doctrine applied, this was an internal dispute about religious doctrine, and World Vision was entitled to summary judgment. See 2023 U.S. Dist. LEXIS 102872, 21023 WL 3972060 (W.D. Wash., June 12, 2023). However, upon receiving plaintiff’s motion for reconsideration, Judge Robart vacated the summary judgment ruling, concluding that the “church autonomy doctrine” did not apply to a defendant that is not a church, see 2023 U.S. Dist. LEXIS 127071, 2023 WL 4704711 (W.D. Wash., July 24, 2023), and denied World Vision’s subsequent motion to reconsider this ruling, see 2023 U.S. Dist. LEXIS 146116, 2023 WL 5258365 (W.D. Wash., Aug. 8, 2023). Then the judge turned to considering the other affirmative defenses proffered by World Vision. Ultimately, he concluded that none of these affirmative defenses were applicable and granted summary judgment on liability to McMahan on November 28, denied World Vision’s summary judgment motion, and indicated that he would set the case for trial to determine the appropriate relief that should be granted. Of course, one expectation is that once judgment on the merits was granted to McMahan, the parties would negotiate a settlement amount. Alternatively, World Vision could attempt an interlocutory appeal of the summary judgment rulings to the 9th Circuit.

Turning first to the religious organization exemption, the court held that this exemption only extends to claims of discrimination *because of religion*. Essentially, in Title VII Congress provides that although employment discrimination because of religion is prohibited, religious organizations may “prefer” to employ members of their own religion. This exemption does not

extend to discrimination because of other grounds prohibited under Title VII: race, sex and national origin. McMahon is claiming discrimination because of sex and sexual orientation, not because of religion, so the exemption does not apply to this case.

As to the ministerial exception, despite World Vision's attempts to dress up the CSR position as part of its "ministry" activities, the court pointed out that there is no basis for concluding that McMahon had applied for a job to be a minister. Although the job specifications spoke about attending and leading religious services and the like, discovery had disclosed that CSRs are not actually required to do any of this. The job is performed "remotely" and what they are required to do is to make and receive phone calls for the purpose of raising money to fund the organization's activities. They can pray along with the people they call or hear from, but they are not required to do so. The ministerial exception under the 1st Amendment does not apply.

As to the "bona fide occupation qualification" defense under Title VII and the WLAD, the court pointed out that this is very narrowly construed, focusing on essential job functions. Here, he wrote, "the relevant BFOQ is not being in a same-sex marriage," and World Vision would have the burden of showing that "not being in a same-sex marriage is 'reasonably necessary' to the 'normal operation' of its 'particular business,' and that [this requirement] concern[s] job-related skills and aptitudes," and that a person who is in a same-sex marriage would not be able to perform essential job functions. Finding that World Vision could not meet this burden, he wrote: "Nothing in the record indicates that being in a same-sex marriage affects one's ability to place and field donor calls, converse with donors, pray with donors, update donor information, upsell World Vision programs, or participate in devotions and chapel."

As to free exercise, the court found that both Title VII and WLAD are "neutral and generally applicable laws that survive constitutional scrutiny." While a few courts have disagreed with these

contentions, noting various exemptions built into the laws, Judge Robart found that "a law generally applies if it does not selectively 'impose burdens only on conduct motivated by religious belief,'" and that was not the case with either of these statutes. "World Vision claims Title VII and WLAD fail general applicability because they contain 'individualized' and 'discretionary' exemptions, but that is incorrect," he wrote, because "the cited exemptions are categorical. Their application does not depend on individualized discretion; they contain no mechanism to import such discretion, and they therefore do not invite 'the government to decide which reasons for not complying with the [law] are worthy of solicitude. As neither Title VII nor WLAD seeks to selectively burden religious motivated conduct, both are generally applicable." Consequently, they are not subject to strict scrutiny in a free exercise context, and they survive the rationality test due to the government's interest in preventing discrimination based on sex (as that concept is now recognized by the Supreme Court) in the area of employment.

As to expressive association, World Vision relied on the Supreme Court's ruling in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which upheld the BSA's decision to terminate James Dale's service as an assistant troop leader because he is an out gay man, reversing the New Jersey Supreme Court's holding that this violated the state's public accommodations law. Crucially, found Judge Robart, *Dale* was a public accommodations case, James Dale was a volunteer (not an employee), and so the case is not a precedent for Title VII or the WLAD employment provisions. "The legal issues here and in *Dale* are distinct," he wrote, "and *Dale* does not support application of the expressive association doctrine to Ms. McMahon's claims." He noted that the Supreme Court has in the past "rejected such a defense in the context of employment discrimination," citing to *Hishon v. King & Spalding*, 467 U.S. 69 (1984), where a law firm's expressive association defense failed in the context of a sex discrimination claim

by a woman who was turned down for partnership in the law firm.

World Vision also claimed it was entitled to prevail based on the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023). Judge Robart concluded that *303 Creative* was a free speech case and "has no application to this case." That was a "compelled speech" case, he wrote. "This employment discrimination action, however, does not involve compelled speech . . . World Vision has not shown that continuing to employ Ms. McMahon would amount to expressive conduct that communicates its views so as to constitute 'speech' within the meaning of the First Amendment."

McMahon is represented by Casimir Wolnowski of Nisar Law Group, PC, New York, and Michael C. Submit (local counsel), of Frank Freed Submit Thomas, Seattle. Judge Robart was appointed by President George W. Bush. ■



District Court Green Lights ACA Discrimination Suit Arising from Denial Of Insurance Coverage For Transgender Affirming Care

By Willy C. Martinez

Pursuant to the Affordable Care Act (ACA), an individual shall not “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance” on the basis of race, color, national origin, sex, disability, or age. The ACA further incorporates the enforcement mechanisms available under civil rights legislation, including Title IX of the Education Amendments of 1972 (which prohibits sex discrimination) and Section 504 of the Rehabilitation Act (which prohibits disability discrimination). After Independence Blue Cross (IBX) denied insurance coverage for Jane Doe’s facial feminization surgeries (FFS), she filed and asserted claims under the ACA for underlying sex and disability discrimination, the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), and Pennsylvania’s insurance bad faith statute. In *Doe v. Indep. Blue Cross*, 2023 WL 8050471, 2023 U.S. Dist. LEXIS 209063 (E.D. Pa. Nov. 21, 2023), U.S. District Judge Timothy J. Savage granted in part and denied in part IBX’s motion to dismiss, concluding that Plaintiff “ha[d] stated a plausible claim of discrimination based on sex in violation of the ACA.”

Plaintiff had experienced numerous instances of mistreatment, harassment, physical and sexual abuse on account of her transgender identity. As a result, she sought to undergo FFS and other related treatments, which medical experts have determined “help transgender individuals attain physical attributes that are more congruent with their gender identity, alleviating gender dysphoria.” After IBX denied her initial claim, Plaintiff submitted a statement explaining how “her current body has prevented her from engaging and functioning in society,” including

loss of employment, and verbal, physical harassment on account of her transgender identity. Following her submission, IBX informed Plaintiff that the coverage determination was based on a “personal impression of whether or not you look female.” Accordingly, IBX denied coverage as Plaintiff failed to show the procedure was medically necessary and instead “demonstrated a mental rather than a physical or functional impairment.”

At the outset, Judge Savage explained that to succeed on her ACA discrimination claim, Plaintiff must allege facts sufficient to support her claim that IBX discriminated against her on the basis of sex, in violation of Title IX, and on the basis of a disability, contrary to Section 504. With respect to her Title IX claim, the court held Plaintiff “had alleged facts showing that IBX applied its cosmetic procedure exclusion in a discriminatory manner.” Judge Savage opined, “[t]he alleged facts show that IBX’s denial of coverage for FFS procedures was based, at least in part, on considerations of gender stereotypes and gender conformity or nonconformity.” Accordingly, the court ruled that Plaintiff had “stated a plausible claim that IBX’s denial of coverage constitutes intentional discrimination based on sex in violation of Title IX and consequently the ACA.”

As to the remainder of Plaintiff’s claims, the court granted IBX’s motion to dismiss on each count. First, the court determined Plaintiff failed to allege sufficient facts showing that IBX’s denial of coverage was based on her gender dysphoria as a disability. Likewise, Judge Savage held Plaintiff’s telephone conversations with IBX’s insurance representatives cannot serve as a basis to support her ADA claim. Third, as the Plaintiff only sought reimbursement of medical expenses, she likewise failed to assert a viable claim

under ERISA. Lastly, Judge Savage ruled that Plaintiff’s Pennsylvania state law claim was preempted by ERISA.

Plaintiff was represented by Justin F. Robinette of Philadelphia, PA. IBX was represented by Heather Reardon Olson and Joe H. Tucker, Jr. of the Tucker Law Group, LLC.

Judge Timothy J. Savage was appointed by President George W. Bush. ■

Willy C. Martinez, Esq. is an Associate at Gibbons PC in Newark, NJ.



REFUGEE / CIVIL LITIGATION *notes*

REFUGEE LITIGATION NOTES

By Arthur S. Leonard

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

U.S. COURT OF APPEALS, 9TH CIRCUIT

– A 9th Circuit panel denied a petition to reopen a proceeding brought by a lesbian, HIV-positive citizen of Zimbabwe in *Makawa v. Garland*, 2023 WL 8014655, 2023 U.S. App. LEXIS 30835 (Nov. 20, 2023). The petition was granted voluntary departure by an immigration judge in 1999 and the Board of Immigration Appeals dismissed her appeal of that order as abandoned, but gave her 60 days to leave the U.S. Back she is with a petition to reopen that case, alleging changed country conditions justify order the agency to reconsider its decision on her request for asylum or withholding of removal. Without stating any view on the merits of petitioner's claims for asylum or withholding, the court focused exclusively on whether she had satisfied the criteria for getting her case reopened. The court found she had not submitted changed circumstances evidence particular to Zimbabwe, but instead had attached to her petition newspaper articles which focused generally on the impact of the COVID pandemic around the world without singling out Zimbabwe. Furthermore, none of her evidence showed a change for the worse in conditions for gay people in Zimbabwe (possibly because they were already as bad as they could be when she filed her original petition?). Only a material change that would justify a different decision on the merits by the Board would be sufficient for a reopening order, but in this case the court found that case had not been made. Makawa is represented by Zulu Ali, Riverside, CA. Members of the panel that issued this Memorandum opinion are Senior Circuit Judge Margaret

McKeown (appointed by George W. Bush), Circuit Judge Ronald M. Gould (appointed by Bill Clinton) and Judge of the U.S. Court of International Trade M. Miller Baker (appointed by Donald Trump) sitting by designation.

CIVIL LITIGATION NOTES

By Arthur S. Leonard

UNITED STATES SUPREME COURT

– On November 16, the Supreme Court announced in *Griffin v. HM Florida-ORL, LLC*, that it would not grant Florida's request to narrow the preliminary injunction that the district court had issued in *HM Florida-ORL, LLC v. Governor of Florida*, 2023 U.S. Dist. LEXIS 111612, 2023 WL 4157542 (M.D. Fla., June 23, 2023), barring any enforcement of the state's recently-enacted anti-drag law while the case was pending. The state took the position that it was not opposed to a preliminary injunction barring enforcement of the law against Hamburger Mary's, an establishment that presents drag shows, but opposed extending that statewide to bar all other enforcement of the statute. The state argued that it does not regard the drag shows that take place at Hamburger Mary's, as described in the record before the district court, as violating the statute. The trial court denied a motion to narrow the injunction, *see* 2023 U.S. Dist. LEXIS 1314671 (M.D. Fla. July 19, 2023), and a three-judge 11th Circuit panel affirmed that denial on October 11 by a vote of 2-1, *see* 2023 U.S. App. LEXIS 28905, 2023 WL 6785071. (The panel vote was two Obama appointees v. one Trump appointee.) The only question presented to the Supreme Court was whether to stay the preliminary injunction as it applied beyond Hamburger Mary's. The application for stay was denied with three justices dissenting: Thomas, Alito and Gorsuch. Justice Kavanaugh, joined by Justice Barrett, concurring in

denial of the stay, found that the state had not shown that the Supreme Court was likely to grant cert on the question presented in the stay petition – i.e., the scope of the preliminary injunction. Thus, denial of the stay says nothing about how the Court would decide the underlying question of whether the Florida law violates the First Amendment. In addition to seeking a stay of the preliminary injunction, the state is also asking the 11th Circuit to review the district court's decision of the 1st Amendment issue as it was articulated in the opinion granting the injunction. That appeal is still pending. Eventually, one imagines, one or more cases raising the issue of bans on drag shows may rise to the level of the Supreme Court, but the question is complicated by variations in the language of the various state laws that have been passed on this subject, some of which are more or less likely to pass constitutional muster depending on whether they incorporate the Supreme Court's *Miller* test for obscenity, since a drag show that is not obscene is likely to enjoy First Amendment protection – unless the Supreme Court is ready to abandon a significant amount of precedent.

UNITED STATES SUPREME COURT

– As of the beginning of December, the Court had yet to act on the cert petition filed last spring in *Tingley v. Ferguson*, No. 22-942, in which the 9th Circuit rejected a 1st Amendment challenge to Washington State's ban on performance of conversion therapy on minors. The cert file had been distributed to the Court for consideration at its conferences nine times since the beginning of the October 2023 Term with no decision. In late-breaking news, however, the Court announced denial of cert on December 11, with three justices indicating they would have granted cert, just one vote short. Justices Thomas and Alito wrote dissents, while Justice Kavanaugh just indicated he would have granted cert.

CIVIL LITIGATION *notes*

More on the dissents in the January issue of *Law Notes*. * * * In *Metropolitan School District of Martinsville v. A.C.*, No. 23-392, the Court is asked to rule on whether Title IX and/or the Equal Protection Clause requires public schools to allow transgender students to use single-sex facilities consistent with their gender identity. The petition seeking a reversal of the 7th Circuit's ruling against the school district was filed in October. Respondents have been granted two extensions of time to file their Responses to the petition, the most recent extending to December 20. Unless the Court grants the petition by mid-January, it is unlikely the case would be argued until the October 2024 Term of the Court. * * * In *L.W. v. Skrmetti*, No. 23-466, *Jane Doe 1 v. Commonwealth of Kentucky*, No. 23-492, and *United States v. Skrmetti*, No. 23-477, petitions all filed in November, the Court is asked to consider whether Tennessee and Kentucky laws banning gender-affirming care for transgender minors should remain in effect during challenges to their constitutionality. The 6th Circuit overturned preliminary relief issued by the district judges. The respondents asked for extensions of time to file their Responses to the petitions, which were granted, to early January. Attorney General Jonathan Skrmetti of Tennessee requested an additional extension to early February, likely to be granted. Due to timing issues, these cases would likely be consolidated for argument if the Petitions are granted, and arguments would likely be scheduled for the October 2024 Term of the Court.

UNITED STATES COURT OF APPEALS, 4TH CIRCUIT – When the Supreme Court announced its decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), holding that a website designer had a 1st Amendment right to refuse to design websites for same-sex marriages even though she had never

been asked to design such a website, some commentators protested that the Court should have dismissed the appeal on standing grounds. Their argument could have been bolstered by U.S. District Judge Claude M. Hilton's decision dismissing the complaint in *Updegrave v. Herring*, 2021 U.S. Dist. LEIS 62307, 2021 WL 1206805 (E.D. Va., March 30, 2021), in which Alliance Defending Freedom (ADF) brought a pre-enforcement challenge to application of the Virginia Values Act (which prohibits, *inter alia*, discrimination because of sexual orientation or gender identity in public accommodations) on behalf of a commercial photographer who wanted to be able to decline services for same-sex weddings and to publish this policy on his website. Judge Hilton found that there had been no prosecutions under the recently-enacted statute, so the plaintiff lacked standing to challenge its application to him despite his claim of suffering chilled speech because of a provision banning a public accommodation from publishing a policy of refusing to provide services. ADF filed an appeal on Robert Updegrave's behalf in the 4th Circuit and this had been scheduled for argument when the Supreme Court granted certiorari in *303 Creative* in February 2022. The 4th Circuit then put the appeal on hold pending a ruling by the Supreme Court in *303 Creative* and cancelled the oral argument. After the Supreme Court's ruling, ADF and the Virginia Attorney General's Office negotiated a settlement under which the appeal would be withdrawn and dismissed, and the state would bind itself not to prosecute Updegrave if a complaint was filed because of his refusal to photograph a same-sex wedding or because he posted a statement of his views (religiously-motivated) on his website. The settlement agreement and motion to dismiss the appeal was filed with the 4th Circuit early in November 2023 and was approved on November 11, without an opinion.

UNITED STATES COURT OF APPEALS, 5TH CIRCUIT – In *Boudreaux v. Louisiana State Bar Association*, 86 F.4th 620 (5th Cir., Nov. 13, 2023), Attorney Randy Boudreaux continues his First Amendment battle against mandatory bar association membership and dues in Louisiana, focused on his argument that he has a 1st Amendment right not to be compelled to fund the Bar Association as long as the Association is engaging in expressive activities with which he disagrees. He scored a victory in the 5th Circuit in this decision, which held that some of the State Bar's expressive activities (noting particularly an article in the State Bar's journal touting Gay Pride Month with a history of the gay rights movement) are not "germane" to the reasons for which mandatory membership is required – regulating legal practice or improving the quality of legal services. Finding a few examples of such "non-germane" expressive activity by the Louisiana State Bar, the court affirms a ruling that mandatory membership as a condition of practicing law in Louisiana is unconstitutional, and remands for a remedy determination, while specifying that Mr. Boudreaux is not required to maintain State Bar membership in order to practice. In reaction to prior litigation over this issue in the 5th Circuit, the Louisiana State Bar has curtailed its legislative activities, but evidently had not pruned the content of its published Journal sufficiently in the view of the 5th Circuit. Circuit Judge Jerry E. Smith, an appointee of President Ronald Reagan, wrote the opinion for a unanimous panel that included Senior Circuit Judge Carolyn Dineen King (Carter) and Circuit Judge Jennifer Walker Elrod (G.W. Bush).

CALIFORNIA – Allen D. McCloskey and Antonio Moreno Munguia, a married couple one or both of whom we infer are Native Americans, sue the Humboldt County Sheriff's Department

CIVIL LITIGATION *notes*

and individual defendants on a wide-ranging *pro se* complaint that, in the opinion of U.S. Magistrate Judge Robert M. Illman, is so confusing that the judge had to infer claimed causes of action, and then found that the lack of factual pleading made it quite difficult to determine whether to allow the case to proceed without substantial amendments. *Pro se* litigants are generally accorded a right to submit an amended complaint curing problems identified by the screening judge, and that is mainly the case here in *McCloskey v. Humboldt County Sheriff's Department*, 2023 WL 7597215, 2023 U.S. Dist. LEXIS 203911 (N.D. Calif., Nov. 14, 2023). The judge complains that the complaint utterly fails to meet the Rule 8 requirement that the complaint put forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The problems, recurring ones with *pro se* complaints, are the failure to plead facts in support of the plaintiff's claims, the failure to plead dates from which one could determine whether claims are time barred, and the failure to resist the urge to argue the case without having set forth the elements of a legal claim. The judge criticizes the complaint for editorializing rather than asserting relevant facts. It is not enough for a plaintiff to allege that the defendant has engaged in a blatant violation of some federal statute or of the plaintiff's constitutional rights. They have to plead facts sufficient to satisfy the elements of a legal claim or claims, and of course to file their claims within the time set by statutory limitation periods. In this case, Judge Illman was able to decode and summarize the complaint to the extent that a sympathetic reader might conclude that the plaintiffs may have valid legal claims, but they have proven thus far incapable of articulating them in clear factual assertions. Ironically, plaintiffs started off this case begging the court to appoint a lawyer to represent them, but in a prior decision

on April 20, the court saw no need to appoint counsel! The November 14 decision says nothing about remedying *that* problem, instead sending the case back to plaintiffs with permission to submit an amended complaint on a short timeframe (30 days), which sounds to us like setting them up for failure. It seems clear from Judge Illman's description of the complaint that these plaintiffs are not likely capable of coming up with a complaint that would survive screening without the assistance of counsel. Help!

CONNECTICUT – Lydia Schofield sued her former employer, Rafley, Inc., for employment discrimination and breach of contract. The Appellate Court of Connecticut affirmed a decision by the Superior Court in Hartford awarding judgment to the employer. *Schofield v. Rafley, Inc.*, 2023 Conn. App. LEXIS 264, 2023 WL 8007660 (Nov. 21, 2023). The arguments on appeal are complicated by the fact that Schofield filed two different lawsuits with overlapping subject matter, resulting in collateral estoppel arguments as well as statute of limitations arguments, and plaintiff's repeated assertion of a breach of contract claim despite the employer's documentation that plaintiff signed a written contract specifying that she was employed at-will and thus could be discharged at any time without notice or cause. The at-will language could also be found in the employee handbook, for which she had signed an acknowledgement of receipt. The discrimination claim was based on gender identity or expression, but the plaintiff conceded that this claim should drop from the case due to her failure to provide sufficient evidence to sustain it. Due to this concession by the plaintiff, the court's opinion does not discuss any facts relevant to the discrimination claim. The plaintiff is represented by Mathew Olkin. Judge Nina F. Elgo wrote the opinion for the unanimous Appellate Court panel.

INDIANA – U.S. District Judge Philip P. Simon dismissed without prejudice a *pro se* complaint filed by Jennifer Van Dalsen claiming that four named city officials in Lafayette violated her civil rights by failing to undertake an impartial investigation of the death of her transgender child. *Van Dalsen v. Roswarski*, 2023 WL 7686227 2023 U.S. Dist. LEXIS 204475 (N.D. Ind., Nov. 15, 2023). She sued the officials in their official capacity, but failed to allege facts showing that any of the four were directly involved in deciding whether to carry out such an investigation. Furthermore, Judge Simon noted the lack of a viable theory of constitutional liability in the complaint, although he hypothesized a theory that might be sufficient to state a claim against property identified defendants. Since it was not impossible that Van Dalsen could state a claim with an amended complaint, the dismissal was without prejudice, and the plaintiff was given until December 18 to file an amended complaint.

MAINE – In *Donovan v. Nappi Distributors*, 2023 WL 7702137, 2023 U.S. Dist. LEXIS 204257 (D. Maine, Nov. 15, 2023), Helen Donovan, a lesbian who was not "out" in her workplace until midway through the factual saga, asserted claims against her former employer under the Family and Medical Leave Act (and its Maine counterpart), federal Equal Pay Act, Maine Human Rights Act, Title VII of the federal Civil Rights Act, and the Americans with Disabilities Act. The employer contested all claims and moved for summary judgment. In this lengthy decision (about 40 pages of small text in the Westlaw print – a large portion was devoted to the detail factual allegations in the pleadings and about 100 pages of footnote, many textual), Senior District Judge John A. Woodcock, Jr., granted summary judgment to the employer on Donovan's sex sexual orientation discrimination claims but denied

CIVIL LITIGATION *notes*

summary judgment on the other claims. On the sexual orientation discrimination claims, Donovan was able to allege a prima facie case, but the court granted judgment to the employer, based on its reading of the facts. The disability discrimination claims had nothing to do with her sexual orientation. The major problem Donovan ran into was the court's determination that the plaintiff's prima facie case as to discrimination under Title VII and the Maine law had been rebutted by defendant showing evidence that its articulated reasons for firing her were supported by enough evidence so as not to be deemed pretextual as a matter of law. We are including this necessarily short report because most of the opinion deals with other claims having nothing to do with sexual orientation and lengthy, detailed factual recitation dominates the opinion, which seems on its face a rather routine application of correctly stated legal doctrine. Donovan is represented by Danielle Quinlan & Laura White of White & White & Quinlan, of Kennebunk, Maine. Senior Judge Woodcock was appointed by President George W. Bush.

MARYLAND – Plaintiff Lashonda S., who is HIV-positive, petitioned the court to review Social Security's final decision to deny her claim for Social Security disability benefits. *Lashonda S. v. Kijakaze*, 2023 U.S. Dist. LEXIS 199446, 2023 WL 7324506 (D. Md., Nov. 7, 2023). Observing that the plaintiff's HIV infection is stable and controlled, the Social Security administrative law judge (ALJ) failed to consider the combined effects of all of Plaintiff's impairments, including her HIV infection. U.S. Magistrate Judge Charles D. Austin found in a letter ruling that this argument was "dispositive," since SSA regulations require an ALJ to "consider the severity of each of a claimant's impairments, both individually and in combination." 20 C.F.R. Sec. 416.920(a)(4)(ii). Under 4th Circuit precedent, *Walker v. Bowen*,

889 F. 2d 47, 50 (1989), the ALJ may not "fragmentize" their assessment of a claimant's impairments, because a "disability may result from a number of impairments which, taken separately, might not be disabling, but whose total effect, taken together, is to render a claimant unable to engage in substantial gainful activity," which is the ultimate test to be qualified for SS disability benefits. The case had to be remanded for reconsideration. The plaintiff is represented by Stephen F. Shea of Shea Disability Litigation, Silver Spring, MD.

MASSACHUSETTS – Octavius Rowe, a former Boston Fire Department employee, was terminated because of his social media postings. He claimed a violation of his 1st Amendment rights, but his claim was rejected administratively, on appeal to state court, and now by the Appeals Court of Massachusetts in *Rowe v. Civil Service Commission*, 2023 Mass. App. Unpub. LEXIS 544, 103 Mass. App. Ct. 1112, 2023 WL 7289667 (Nov. 6, 2023). The evidence before the Civil Service Commission from Rowe's social media posting showed that he "attacked others based on their religion, sexual orientation, and race. The posts, many of which Rowe admitted to having authored, employed abusive, threatening, and offensive language. It was reasonable for the commission to find that all of Rowe's statements and posts constituted conduct unbecoming a firefighter, and prejudicial to good order, whether made on or off duty." The court expressed support for the Commission seeing to uphold the reputation of the Boston Fire Department by terminating Rowe.

NEW YORK – In *Lashawn K. v. Administration for Children's Services*, 2023 N.Y. App. Div. 5726, 2023 WL 7391728 (N.Y. App. Div., 1st Dept., Nov. 9, 2023), the court held that a Family Court judge erred by dismissing a third-party custody dispute without allowing

the petitioner (who was seeking custody and visitation rights) to present evidence of "extraordinary circumstances" that would give her standing to contest custody. In this case, "Family Court determined after a hearing that petitioner failed to establish the existence of an enforceable pre-conception agreement to conceive and co-parent the subject child with the child's biological mother" . . . who "unexpectedly died only months after the child was born and before she and petitioner were to be married." The Appellate Division panel listed things that could be the basis of a finding of "extraordinary circumstances" and pointed out under the case law that proof of a pre-conception agreement involved with surrogacy could be one of them. Petitioner is represented by NY Legal Assistance Group (Jacquelin Hacker, of counsel), and there was an amicus brief by the LGBTQ Advocacy Clinic at Brooklyn Law School. Karen Freedman of Lawyers for Children Inc., New York, was joined on the brief by Ira Greenberg of Locke Lord LLP.

OHIO – Joshua Batchelor, a gay man, was hired to Executive Director and Head of School of a charter school called "The Brilliance School." Marshall Emerson, the managing partner of the company that manages the school, hired Batchelor, and his immediate supervisor was Kenan Bishop, a managing director of the parent company. Emerson knew Batchelor was gay when he hired him. Bishop denies ever knowing that Batchelor was gay prior to this lawsuit. Batchelor was hired in May 2020 and quit the job in September 2020. He alleges a constructive discharge because of his sexual orientation, based on his contention that he was treated differently from the heterosexual employees as to weekend work assignments, work deadlines, and sick leave when he was ill with COVID 19. He says he complained to Emerson, but Emerson took no action. After quitting, Batchelor filed a charge

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with the EEOC. The agency made no determination on the merits of his claim but issued a right-to-sue letter signifying exhaustion of administrative remedies. He then filed a complaint of discrimination and retaliation under Title VII. In *Batchelor v. The Brilliance School*, 2023 U.S. Dist. LEXIS 206031, 2023 WL 8004713 (N.D. Ohio, Nov. 17, 2023), U.S. District Judge Pamela A. Barker, an appointee of President Donald J. Trump, granted the school's motion for summary judgment. She found that the differences of treatment Batchelor alleged were not so "hellish" as to constitute a justification for quitting. The standard for a "constructive discharge" claim requires conditions such that no reasonable person would stay in the job. Even a wisecrack by his supervisor that God made Adam and Eve, not Adam and Steve, was not enough to tip the scales here. As to Batchelor's retaliation claim, he alleged that he had complained to Emerson about his treatment, but nothing happened, and things got worse. Emerson denied receiving such a complaint. Judge Barker asserted that having determined that Batchelor's treatment was not bad enough to compel him to quit, it was not adverse enough to sustain a retaliation claim, either. Batchelor is represented by Daniel S. Dubow, Spitz Law, Beachwood, OH.

OREGON – Liana Reyna, an out and proud Latina while employed by the Portland Police Bureau (PPB), sued the City of Portland twice, once while employed and once after she retired. The earlier suit resulted in a jury verdict for defendants, but the response by various PPB personnel to the lawsuit provided a basis for Reyna's subsequent retaliation claims. She had been married to a woman with whom she was raising a child, but that relationship ended in 2012, before the events giving rise to this second lawsuit, although there were allegations in the lawsuit of harassment of Reyna by her ex. Among the various

causes of action that she asserted in her second lawsuit, several were dismissed by US District Judge Karin J. Immergut on statute of limitations grounds. Of particular interest for *Law Notes* readers are her claims of sexual orientation discrimination under Title VII and Oregon's civil rights law. The court found the Title VII claims to be barred by the statute of limitations, but not the Oregon state law discrimination claims, which gives plaintiffs a longer time window to assert their claims than is afforded by federal law. *Reyna v. City of Portland*, 2023 WL 8114155, 2023 U.S. Dist. LEXIS 209181 (D. Ore., Nov. 22, 2023). Reyna is represented by Randy J. Harvey, Patrick Gerard Conroy and Jameson Edward Giddeon, Employment Law Professionals, Sherwood, OR. Judge Immergut was appointed by President Donald J. Trump.

OREGON – Daniel W. Bean appealed from a state trial court's stalking protective order, which prohibited him from contacting his neighbor, T.J.T. The Court of Appeals of Oregon found that T.J.T.'s evidence was "legally insufficient to support an SPO," reversing the Marion County Circuit Court. The trial judge's basis for the order was one incident during which Bean called his neighbor, who is a transgender woman, a "faggot and a freak," gestured at her with "finger guns as though he would short her," while laughing. The court characterized these as homophobic/transphobic slurs, and found that single incident would count for purposes of seeking a stalking protective order, but since this was the lone example offered to the court, it couldn't meet the statutory requirement of multiple incidents, to constitute stalking. When T.J.T. asked in response to Bean's laughing why he was doing this, the response was that it was because he thought she was a freak. On another occasion, Bean asked T.J.T. "what the hell" she was doing on a shared easement between their properties and asked her

whether she wanted to "go back to jail." On a third occasion, Bean approved T.J.T.'s garage when she was playing with her band and told them to stop playing "or he would break everything." The court found that only the first incident qualified to support a stalking order since they did not constitute direct threats, but the statute authorizing such orders required at least two incidents, and the court found the incident on which T.J.T. was relying in seeing the SPO did not meet the threshold by itself. *T.J.T. v. Bean*, 329 Or. App. 242, 2023 Ore. App. LEXIS 114 (Ct. App. Or., Nov. 22, 2023). T.J.T. represented herself.

OREGON – A divorced man with two daughters wanted to have a son and sought to procreate one using donor eggs and a gestational surrogate. After two attempts failed, he turned to a woman with whom he had a dating relationship and she agreed to donate eggs with the understanding that if a male embryo resulted, the man could claim it as sole legal parent and have it implanted in a gestational surrogate, but if a female embryo resulted, it would be the property of the woman. They agreed that the donor would not be a legal parent with any rights to custody but would play a role in the child's life. They memorialized their understanding in a written agreement, which was in addition to a separate form agreement used by the fertility service under which the donor waived parental rights to the children resulting from her donation. A male embryo resulted from the fertilization of the egg with the man's sperm, and a gestational surrogate bore the resulting boy. Meanwhile, during the pregnancy the relationship between the man and the egg donor soured, and their agreement that the woman would play some role in the child's life (with the thought that they might marry and raise the boy together) dimmed. The man had not told his daughters about any of this, and he decided to leave the infant with the gestational surrogate briefly while he

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broke the news about their new brother's birth. The egg donor, misinterpreting the situation, sent the man offensively worded emails accusing him of abandoning the child to the surrogate (which was not her understanding of their agreement) and thus apparently ending her possibility of playing a maternal role. In response, he cut off all communication with her, and proceeded to obtain a court declaration that he was the sole legal child. The egg donor's attempt to intervene in this proceeding was rejected by the trial court. The egg donor then brought a new lawsuit seeking a filiation ruling based on her genetic tie to the child, as well as court-ordered parenting time. The trial court concluded she was the boy's legal maternal parent based on her undisputed genetic connection to the boy; the man appealed and won a reversal from a divided court of appeals panel. The case went to the Oregon Supreme Court, which issued a 4-3 ruling on November 28 in *Matter of the Parentage of S.D.S.*, 371 Or. 573. Two members of the court whose terms were ending did not participate, and two Senior Judges participated as Justices *pro tempore*, one of whom, former Chief Justice Thomas Balmer, wrote the majority opinion, summarizing the conclusion as follows: "Schnitzer wanted to have a son through ART, and Sause gave Schnitzer her eggs to support that process. . . . In these circumstances, Sause's genetic link to S does not make her his legal parent. At the same time, both she and Schnitzer hoped that she would play some role in S's life and agreements between them provide a basis for Sause to seek to prove those contractual rights. We therefore reverse the judgment of the trial court and remand for further proceedings in that court to declare the legal parentage of S and to determine the extent of Sause's contractual, nonparental rights, if any, with respect to S." A dissenting opinion by Justice Stephen Bushong equated Schnitzer and Sause as both having a "legally significant parental interest" due to their "genetic link" to the boy,

which interest the dissent contended was "protected under Oregon parentage law and by the Due Process Clause of the United States Constitution," concluding that the trial court was correct to hold that "Sause's interest was not overcome by any contrary provision of law, the parties' agreements, or other evidence in this case." This dissent was joined by the chief justice and a former chief justice sitting *pro tempore* as noted above. Whatever the trial judge decides on remand is liable to be appealed by the disappointed party, unless Schnitzer and Sause can reach an agreement that the trial court would incorporate into a final decree. The lengthy majority and dissenting opinions (with a separate dissent by former Chief Justice Linder) would be worth reading and pondering by anybody concerned with surrogacy arrangements, which are frequently used by gay men seeking to be biological parents.

RHODE ISLAND – Kimberly Ripoli was Associate Director of the Office of Veterans Affairs in the Rhode Island Department of Human Services for four years, overseeing a variety of the Office's programs, and "by all accounts, Ms. Ripoli Performed well in this role," wrote Chief U.S. District Judge John J. McConnell, Jr., in *Ripoli v. State of Rhode Island*, 2023 WL 7920473, 2023 U.S. Dist. LEXIS 205305 (D. R.I., Nov. 16, 2023). She was laid off on July 26, 2016, several months after the governor appointed a new Director of Veterans Affairs. The new director, a man, reorganized the office and proposed eliminating Ms. Ripoli's position and appointed a male colleague of Ms. Ripoli to take a new position that was absorbing several of Ms. Ripoli's functions in the reorganization. Ripoli, reflecting on the way she as treated up to the time of the layoff, felt that she was a victim of discrimination and sued under Title VII. She claimed that the reorganization was pretextual and "that new positions

were created or maintained to shuffle around underperforming men in the organization." She also claimed that the new director mistreated her based on her gender, disability, and sexual orientation, pointing to the all-male replacements for members of the executive team of the Office. But Judge McConnell was not convinced. After a detailed review of arguments and evidence, he wrote: "After an exemplary career assisting veterans at the OVA, Ms. Ripoli is understandably upset at being let go when the Governor appointed a new director, and rightly questions if her termination resulted from discriminatory conduct. But after a full analysis of the record, the Court concludes that no reasonably jury could find by a preponderance of the evidence that her termination was motivated, in whole or in part, by any of her protected class designations." The court granted defendant's motion for summary judgment. Ms. Ripoli is represented by Chip Muller, Barrington, R.I. Judge McConnell was appointed by President Barack Obama.

VIRGINIA – Senior U.S. District Judge Rebecca Beach Smith denied the employer's motion to dismiss Janyia Sunkins' claims of hostile environment, constructive discharge and retaliation in violation of Title VII of the Civil Rights Act of 1964 in *Sunkins v. Hampton Roads Connector Partners*, 2023 U.S. Dist. LEXIS 202262, 2023 WL 7411761 (E.D. Va., Nov. 9, 2023). A male co-worker, Luther Wayne, propositioned Sunkins repeatedly, even after she informed him that she was a lesbian and uninterested in his solicitations. After each such solicitation she complained to her supervisor, who said he would "take care of it" but did nothing, even after she said she would take the issue to the company's Human Resources Department. After that, the supervisor propositioned her as well, knowing that such a proposition would be unwelcome. When she complained again to HR, she

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was told that Wayne would be required to stay away from her, and he disappeared from the workplace for seven weeks, but eventually he came back again, to her consternation, and she finally quit. In a detailed analysis of the employer's motion to dismiss, Judge Smith carefully analyzed every element of each claim and found that on balance Sunkins had met the pleading requirements for each of them sufficiently to survive a motion to dismiss. Sunkins is represented by Mark Joseph Passero, of Passero Employment Law PLLC, Midlothian, CA. Judge Smith was appointed by President George H.W. Bush.

VIRGINIA – Troy Antonio Smith worked for Dupont Specialty Products from January through June 2022, when he was discharged. He sues *pro se* under Title VII, the Americans with Disabilities Act (failure to accommodate a disability) and asserts a defamation claim. *Smith v. Dupont Specialty Products USA, LLC*, 2023 WL 7703470, 2023 U.S. Dist. LEXIS 205110 (E.D. Va., Nov. 15, 2023). He claims that coworkers harassed him due to his gender identity, his supervisors delayed his training progress, and they failed to protect Smith from the harassment. His complaint named his supervisors as defendants along with the company. Senior U.S. District Judge John A. Gibney, Jr. granted a motion to dismiss the supervisors as defendants on the Title VII and ADA claims, finding that only the company itself can be a defendant under those statutes. The defamation claim was dismissed because it was based on what the company wrote to the EEOC in response to its investigation, and such communications are covered by absolute judicial privilege. The ADA claim is dismissed with prejudice because the court found Smith failed to exhaust administrative remedies, by omitting the necessary allegations from his EEOC complaint. This leaves the Title VII claim against the company to

be litigated. Judge Gibney was appointed by President Barack Obama.

WASHINGTON – We previously reported in *Law Notes* about Senior U.S. District Judge Barbara Jacobs Rothstein's prior decision dismissing the complaint in *Olympus Spa v. Armstrong*, 2023 U.S. Dist. 97542 (W.D. Wash., June 5, 2023), rejecting 1st Amendment claims by a Korean-style women's spa which was being investigated by the Washington State Human Rights Commission providing, in effect, that nobody possessing a penis could avail themselves of the Spa's services. Judge Rothstein dismissed the complaint without prejudice, and the Spa's lawyers at Pacific Justice Institute, a conservative litigation group, came back with a new complaint adding 14th Amendment procedural and substantive due process claims and strongly arguing that the case pending before the Commission against the Spa was moot because the individual who filed a public accommodations discrimination claim against the Spa, a pre-operative transgender woman, had undergone gender-affirming surgery and, no longer possessing a penis, was no longer barred under the Spa's policy. The court pointed out that the investigation was focused on the Spa's policy itself, and as it was announced on its website. (No, it said nothing about penises on the website, that's just our interpretation of a policy limiting service to "biological women" and transgender women who had "gone through post-operative sex confirmation surgery.") At any rate, in a new decision, *Olympus Spa v. Armstrong*, 2023 WL 7496382, 2023 U.S. Dist. LEXIS 203056 (W.D. Wash., Nov. 13, 2023), the court found that WHRC's continuing investigation and eventual push to a settlement agreement that preserved the Spa's right to challenge the agency's position in court, was focused entirely on the policy and not on whether the complainant before the Commission had actually been denied admittance,

other than having just phoned ahead to find out whether she would be permitted to contract for the Spa's services. Judge Rothstein saw no need to revisit the 1st Amendment issues and made rather short work of the due process issues, pointing out procedural and substantive regularity and refuting the argument that the WHRC had evinced hostility to the religious freedom concerns of the Spa. Senior Judge Rothstein was appointed by President Jimmy Carter.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – Miguel Carrillo was convicted on multiple child sex crime counts. In addition to imposing a thirty-year prison sentence, San Bernardino County Superior Court Judge Shahla S. Sabet (retired) ordered that Carrillo submit to HIV testing, without finding on the record probable cause that Carrillo's acts could have transmitted HIV to his child victims. On appeal, the court upheld the conviction, but remanded for resentencing. The court found, as the parties agreed, that the trial judge erred in ordering HIV testing in the absence of the statutorily required factual finding. The court struck the testing order, but since the case was being remanded for other reasons, the court gave the prosecution leave to request a hearing on the issue whether probable cause exists to order HIV testing in this case. *People v. Carrillo*, 2023 WL 7980416, 2023 Cal. App. Unpub. LEXIS 6843 (Cal. 4th Dist. Ct. App., Nov. 17, 2023).

INDIANA – Indiana has a statute making it a crime for anybody who knows they are infected with HIV to fail to disclose it to others before engaging in sex with them. Kevin Webster had tested HIV-positive in 2011 and was informed of the test result and told about his disclosure obligations. Several years

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later, he was attending a “homecoming celebration” being held by a deaf family that include S.M., a girl who was fifteen years old at the time. Webster was then in his mid-30s. He took a fancy to S.M., following her around, eventually engaging in sex, both vaginal and oral, with her. S.M. later learned that Webster was HIV positive, reported it, and in the subsequent prosecution, Webster was convicted by the jury for failing to warn persons at risk that he had a dangerous communicable disease. He was also convicted on the charges of sexual misconduct with a minor and child solicitation. The court sentenced him to an aggregate sentence of fourteen years with seven years suspended to probation. On appeal, he claimed that the jury instruction was insufficient to inform the jury of the necessary elements for the state to prove to procure a conviction on the failure to warn charge. He claimed that no evidence was presented that he was HIV-positive at the time of his sexual dalliance with S.M. The court found that the state’s evidence from Health Department records about his positive HIV+ test in 2011 was sufficient to satisfy the prosecution’s burden on that element of the crime. The Court of Appeals of Indiana disagreed with Webster and affirmed his conviction, finding no fundamental error in the trial court’s instruction of the jury. *Webster v. State of Indiana*, 2023 WL 8252975 (Nov. 29, 2023). Webster is represented by Valerie K. Boots and Joshua Vincent of the Marion County Public Defender Agency. Judge Elaine Brown wrote the opinion for the unanimous panel.

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By Arthur S. Leonard

CALIFORNIA – Some of the magistrate judges of the U.S. District Court for the Eastern District of California have long been notorious – at least within the

confines of *LawNotes* – for their handling (or mishandling) of *pro se* complaints from incarcerated persons seeking to assert constitutional claims arising from their treatment in prison. One exemplar of this reputation is *Erbacher v. Robles*, 2023 WL 7343245, 2023 U.S. Dist. LEXIS 200316 (E.D. Calif., Nov. 7, 2023), a Report and Recommendation by U.S. Magistrate Judge Barbara A. McAuliffe, involving a claim by a transgender woman incarcerated in the California state prison system that she was psychologically abused and harassed by a male Correctional Officer seeking to humiliate her in the course of checking her back into the prison after a medical appointment. Erbacher was part of a group of six people returning from medical appointments as a group. When they approached the security station, the five others were waved through without having to submit to strip searches, but Erbacher was singled out by Correctional Officer Robles for a strip search. Erbacher protested that she had her transgender card and had been approved for limiting strip searches, such that they could only be conducted by a female CO. This had been formally approved, and would have shown up on the computer, but she hadn’t yet received a new card reflecting this, and Robles refused to honor her request, to look her up on the computer terminal to verify her claim of preference, or to call a superior officer or summon a female CO to conduct the search. He insisted on the strip search in front of him and two other male CO’s. When one of the other CO’s at the station was going to let Erbacher through without a complete strip, Robles insisted and the other CO stood back. The entire procedure left Erbacher – who had a history of early childhood sexual abuse and a depressive condition that led her in the past to attempt suicide several times – shaking and in tears. Erbacher filed grievances, noting a violation of prison rules, etc., but got nowhere with her appeals through the system, eventually filing this *pro*

se case alleging 4th and 8th Amendment violations. Her first complaint fell short, and she was allowed to file an amended complaint. Judge McAuliffe nit-picked the second complaint, asserting that it failed to state either 4th or 8th Amendment claims, and recommending that it be dismissed with prejudice. A bullying CO, in McAuliffe’s estimation, has not violated constitutional rights as long as he didn’t touch the incarcerated individual. In order to back this up, McAuliffe cited to some really old cases. If the district judge, Jennifer L. Thurston, a Biden appointee, approves this recommendation, perhaps somebody can step up and provide representation to take the case to the 9th Circuit.

ILLINOIS – *Comage v. Wills*, 2023 WL 7183673, 2023 U.S. Dist. LEXIS 196461 (S.D. Ill., Nov. 1, 2023) – Ronald Comage, a transgender individual, is incarcerated at Menard Correction Center (MCC). Comage requested that the court use neutral, non-binary pronouns in referring to them, a request honored by U.S. District Judge Nancy J. Rosenstengel in this opinion. For reasons of safety, Comage is designated as entitled to protective custody due to danger of assault by other incarcerated persons in MCC. Comage was found to be in possession of home-made weapons (presumably for self-defense) in violation of MCC rules and was moved to disciplinary segregation “with disciplinary segregation inmates from general population,” according to their complaint. They argue that this constitutes deliberate indifference to their safety, and persuaded Judge Rosenstengel to allow them to proceed on 8th Amendment claims against specified corrections officers on a “failure to protect” claim. Comage, *pro se*, also sought a preliminary injunction to place them back into protective custody pending a merits ruling in this case. There is a factual

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dispute about whether Comage's current placement poses the risks they have described, however. An affidavit from one of the defendant officers asserts that Comage's placement in disciplinary segregation does not change their status as a "protective custody" incarcerated individual. They are escorted by an officer whenever out of their cell, and are provided with a separate recreation area so as not to be mixed with general population. Comage claims these assertions are untrue due to how Comage is being treated. Judge Rosenstengel decided that the preliminary injunction should be denied, concluding that Comage failed to plead a "direct threat to their safety. Although they are a member of an identifiable group of inmates who are often at risk of attack, they have not demonstrated that they have faced any specific threats to their safety while isolated in disciplinary segregation," she wrote. "Nor have they shown that the protections provided by Defendants, single-celling Comage and giving them access to an isolated yard, amounts to deliberate indifference to their safety." Instead, Comage disputed the truth of the affidavit, and said it was not consistent with replies Comage received to their grievances. Perhaps there is a failure of communication here, where some defendants argue that Comage remains entitled to protective custody measures while in disciplinary segregation and others don't agree with that proposition. Judge Rosenstengel, whose sympathy for transgender persons in prison is well-documented by numerous opinions issues in a massive statewide class action relating to conditions of confinement and medical care, she is not persuaded in this case, concluding: "Although it appears there is a dispute among staff as to whether Comage retains the title of 'protective custody,' there is no dispute that the conditions are the same and Comage received additional protections such as single-celling and access to an isolated yard." Thus, the deliberate indifference

standard is not met. Judge Rosenstengel was appointed by President Barack Obama.

MISSOURI – *McSean v. Hacker*, 2023 WL 7298835, 2023 U.S. Dist. LEXIS 198752 (E.D. Mo., Nov. 6, 2023) – Kelly McSean is a pretrial detainee incarcerated at St. Francois County Jail in Farmington, but this case relates to her treatment while housed at Southeast Missouri Mental Health Center. She names 23 individuals as defendants, sued in both their official and individual capacities, but the complaint does not otherwise identify them, leaving U.S. District Judge Henry Edward Autrey to infer that they are all employees of SMMHC. The factual allegations in her 27-page handwritten complaint only devote one page to her "Statement of Claim" which asserts, in a general way, that she arrived there dressed consistent with her female gender identity but was told (she does not allege who told her this) that the policy of the program was that civil detainees must wear the clothing of their biological sex. She claims great emotional distress from having to dress that way, and claims violations of her First, Fifth and Fourteenth Amendment rights, without explaining what each defendant did to violate her rights or expounding any sort of explanation about how her claimed constitutional rights specifically were violated. Judge Autrey found that this generalized claim must be dismissed, but without prejudice for a pro se litigant, and he then provided extensive commentary on the various things an incarcerated would need to know in order to frame a complaint that could serve to start litigation. The court denied a motion to proceed in forma pauperis (plaintiff had not submitted a prison account statement, which is a prerequisite) and a motion for appointment of counsel. The court observed that the appointment of counsel could wait upon the filing of a complaint that survives screening, which

sounds backwards to us. The failure to an incarcerated person to frame a complaint that survives screening suggests that they need legal help to represent themselves competently. But evidently that is not how the system works. Judge Autrey was appointed by President George W. Bush.

NORTH CAROLINA – *Advocate.com* (Nov. 22) reported that Wake County Superior Court Judge A. Graham Shirley ordered state prison officials to transfer Ashlee Inscocoe, who was born intersex to a women's prison because the state now recognizes her as a woman in official records as a result of her transition. "This is straight statutory interpretation," said Shirley, presumably not intending a pun. "This is not a political statement, it's not a policy statement." It's just that individuals who are recognized by the state as women are supposed to be incarcerated in a women's institution. Emancipate NC, a civil rights group, hailed the ruling as "the first such court order in state history."

TENNESSEE – *Johnson v. Taylor*, 2023 U.S. Dist. LEXIS 196895, 2023 WL 7252126 (M.D. Tenn., Nov. 2, 2023) – Donnell Johnson is in the custody of the Davidson County Sheriff's Office. During the booking process he claims that "Corporal Taylor addressed him with abusive and derogatory language of a sexual nature after learning that he was 'of the LGBTQ community,' and then proceeded to use excessive force against him." Johnson threatened to file a complaint against Taylor under PREA (the Prison Rape Elimination Act), but Taylor responded by threatening retaliation. Taylor then proceeded to escort Johnson to segregation, during which process Johnson claims that Taylor "slammed [him] to the ground with no reason." Johnson then "began kicking to interfere with the process" and was returned to the holding cell

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and “was later charge criminally with aggravate assault with bodily fluids against Cpl. Taylor.” Johnson filed grievances about these incidents that were not sustained. He filed this separate lawsuit seeking damages and other relief against Taylor and against Davidson County. U.S. District Judge William L. Campbell, Jr., found that Johnson had stated “nonfrivolous claims” against Taylor, but the case must be stayed pending the outcome of the criminal charges against Johnson. On the other hand, the court dismissed the action against Davidson County, finding that the factual allegations fell far short of supporting a “municipal liability claim.” This would require showing that Johnson’s mistreatment was due to official policy or established practice of the Department, and the court found the complaint insufficient to support such a claim. Judge Campbell was appointed by President Donald J. Trump.

VIRGINIA – *Sabbats v. Warden White*, 2023 WL 7549363, 2023 U.S. Dist. LEXIS 203767 (W.D. Va., Nov. 14, 2023) – Rachel Hallows Sabbats, suing *pro se*, alleges that she is a transgender woman who is wrongfully identified as male and housed in a male prison where she has been sexually harassed and was sexually assaulted. She sues the warden of her current prison as the lead defendant. There are other defendants, but Senior U.S. District Judge James P. Jones does not refer to these individual defendants more generally. This opinion concerns motions for interlocutory relief that Sabbats filed shortly after filing her *pro se* complaint in June 2023. The first motion seeks transfer to a women’s prison or a prison that houses transgender incarcerated individuals. In the second motion, filed in July, she “states concern over unidentified, future harm she may face as a transgender female at Red Onion” (the name of the prison). According to Judge Jones, this concern seems based mainly on her

allegation that on June 25, 2023, officers “forced” her to stand outside of her cell during a search, clad only in underwear. Judge Jones made short work of the motion, finding that the decision on housing Sabbats in a men’s prison (albeit in protective custody there) was made by a committee that explored a variety of factors and made a conscious decision that Sabbats was appropriately assigned to protective custody in the men’s prison, pointing particularly to her past conviction for physically assaulting a woman. Evidence offered in opposition to Sabbats’ motions asserted that she was standing out of her cell in her underwear because when ordered to exit the cell for a search, she came out of the cell in her underwear, and the correction officers could not “force” her to put on additional clothing. Judge Jones described her vague allegations, insufficient to sustain a grant of interlocutory injunctive relief. “At the most,” he wrote, “Sabbats asserts vaguely a possibility that male inmates will sexually assault or harass her at a men’s prison because she has experienced such events in the past at Red Onion and at other male prisons.” The judge asserts in turn: “A possibility of harm, however, is not sufficient. Evidence of past harm is not dispositive on the question of whether irreparable future harm is probable. Moreover, Sabbats states that she has not always reported such incidents to prison officials, who cannot take action to prevent conduct of which they had not been notified.” As to the public interest components of evaluating motions for preliminary relief, “The public interest and maintaining a balance of equities are best served when courts do not interfere with prison administrative decisions, based on the professional expertise of prison administrators.” Sounds to us like a senior judge who has seen altogether too many *pro se* incarcerated individual complaints and doesn’t take the fears of trans women being housed in all-male institutions seriously. He adds that it is “well established” that “an inmate is not

entitled to interlocutory relief to obtain a desired transfer to another correctional facility.” In support of this quote, he cites a Supreme Court case holding that incarcerated persons don’t have a right to dictate where they will be housed. But they do have a right to be housed where they are reasonably safe from attack by other incarcerated individuals or prison staff, which is all the plaintiff seeks here. This decision is peculiarly lacking in empathy. Senior Judge Jones was appointed by President Bill Clinton.

WEST VIRGINIA – *Paige v. Young*, 2023 U.S. Dist. LEXIS 201691, 2023 WL 7414628 (S.D. W. Va., Nov. 9, 2023) – Under the Prison Litigation Reform Act of 1995, an incarcerated person whose prison litigation record shows at least three prior lawsuits that have been dismissed for failure to state a claim is generally barred from obtaining permission to proceed *in forma pauperis* in a new lawsuit. This is the case for Brianna Nicole Paige, a transgender person whose new lawsuit challenges West Virginia’s name-change statute as it restricts the ability of incarcerated people to get legal name changes matching their gender identity. An exception to this bar is recognized where the plaintiff plausibly alleges that they are in “imminent danger of serious physical injury” if they cannot sue. (The main benefit of proceeding *in forma pauperis* is the waiver of filing fees.) In this case, Paige argues that because of the inability to get a name change that is a prerequisite to getting appropriate identification material, she is at heightened risk for violence since her current I.D. does not accurately depict who she is, thus “outing” her as trans with resultant possibility of physical assault. To District Judge Joseph R. Goodwin, this is too generalized to qualify Paige for the exception, so the judge accepted the magistrate’s recommendation against granting *in forma pauperis* status. “Plaintiff

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provides no proof to corroborate these claims,” wrote the judge, “such as examples of past threats or harm inflicted due to Plaintiff’s mismatched identification documentation. She has not specifically pleaded that she, herself, is in any immediate danger of harm. Without facts to substantiate Plaintiff’s claims, there are mere conclusory allegations insufficient to invoke the three-strikes rule’s exception for imminent danger of serious physical injury.” Judge Goodwin was appointed by President Bill Clinton.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

EEOC – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – *BloombergLaw* reported on November 2 that a coalition of state attorneys general led by Texas’s Ken Paxton have filed a Comments objecting to the EEOC’s proposed enforcement guidance on protecting transgender workers under Title VII. The attorneys general, all of whose state laws do not expressly forbid discrimination because of gender identity, contend that the agency’s reliance on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), for extending to transgender individuals the full panoply of protection against workplace discrimination under Title VII is not warranted by that decision. The EEOC proposal addresses such topics as assaults and hostile environment, misgendering, and bathroom use. The attorneys general Comment insists that *Bostock* was a narrow ruling concerning discharging an employee because of her transgender status and that the Supreme Court’s opinion had disclaimed any ruling on the other specific forms of discrimination mentioned in the guidance. The Comment accuses EEOC of treating *Bostock* as a “silver bullet for imposing breathtakingly broad

transgender-based liability in contexts the Supreme Court never considered.”

CALIFORNIA – *Advocate.com* reported on November 2 that a trio of ballot measures intended to restrict the rights of transgender youth have been cleared for a signature campaign to be placed on the general election ballot in November 2024. Each of the three initiatives must garner 546,651 signatures from registered voters to be placed on the ballot, representing 5% of the votes cast in the last gubernatorial election in 2022. The deadline for submitting signatures is April 29, 2024. The first measure requires schools to report any change in a student’s expressed gender, without exception for the student’s safety. The second measure would eliminate students’ rights to participate in school activities consistent with their gender identity, mainly aimed at sports participation. The third would prohibit gender-affirming health care for minors. If enacted by the voters, each of these would reverse current California laws or regulations and would be immediately challenged in court. Placing these measures on the ballot would, among other things, probably enhance Republican turnout in contested congressional elections, as part of the GOP’s battle to maintain and increase its House majority.

NEW YORK – N.Y. Governor Kathy Hochul signed S. 5399/A. 5627, a measure requiring the State Department of Health to conduct a public information campaign about “medically unnecessary treatments” performed on intersex individuals.” Intersex individuals are born with genitalia that don’t fit standard textbook descriptions for “male” and “female.” In the age of plastic surgery, it became commonplace for doctors to encourage the parents of such newborns to submit their infants to surgical alteration to approximate

“normal” genitalia. In some cases, this has amounted to premature gender transition when the child is too young to consent, based on the consent of parents or government officials (when the newborn is a ward of the state). The premature operations have in some cases resulted in gender confusion and trauma during puberty when an individual experiences body changes that seem inconsistent with their post-surgical genital structure. The goal of the new legislation is to label these procedures unnecessary and possibly harmful. A report on the bill signing by Gay City News (Nov. 9, 2023), reports that “Medical professionals widely agree intersex surgeries are medically unnecessary.”

WISCONSIN – Governor Tony Evers, a Democrat, vetoed a bill passed by the Republican-controlled legislature that would have banned gender-affirming care for minors. Evers is a staunch supporter of LGBTQ rights. In a statement explaining his veto, he said “I promised I would veto any bill that makes Wisconsin a less safe, less inclusive, and less a welcoming place for LGBTQ folks and kids — and I keep my promises.”

LAW & SOCIETY NOTES

By Arthur S. Leonard

CALIFORNIA – Here we go again with California ballot measures targeting transgender youth. *Advocate.com* (Nov. 2, 2023) reported that California’s Secretary of State had reviewed three proposed ballot measures and authorized their proponents to begin collecting petition signatures to put them on the 2024 ballot. Each initiative will need to receive at least 546,651 signatures of registered voters, which is 5% of the total votes cast for governor in the November 2022 general election. A group calling

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itself Protect Kids California will be gather the signatures, working against an April 29, 2024, deadline. One of the propositions would authorize school districts to inform parents that about their transgender or gender non-binary students. This reacts to a recent ruling by a state court judge to enforce enforcement of a school board's adoption of such a notification policy. The second measure would eliminate the right of transgender students to participate in school activities and use school facilities consistent with their gender identity. The third would outlaw gender-affirming care for minors. All of these measures are framed as "protecting" minors from being encouraged and then force to embrace their gender identity.

MISSISSIPPI – In a historic breakthrough, Fabian Nelson, a Black gay man, was elected to the state legislature on November 7, becoming the first out gay Black person to be elected to that body. He will represent the 66th District in the state's House of Representatives. After winning the Democratic primary for this seat, he faced no formal opposition in the general election, just some write-in candidates.

VIRGINIA – Danica Roem was elected Virginia's first out transgender state senator on November 7, and is reportedly only the second out trans state senator in the United States, according to a pretty release from the *GLBT Victory Fund*.

INTERNATIONAL NOTES

By Arthur S. Leonard

NEPAL – On November 29 LGBTQNation.com reported that Nepal had registered its first same-sex

marriage. The nation's Supreme court ordered the government earlier this year to recognize the German same-sex spouse of a Nepali national, who had married in Germany where same-sex marriage was legal and sought a non-tourist visa for the German spouse, which was denied by Nepali authorities as a same-sex marriage bill had not yet been approved by the legislature. "In July, the court issued an interim order to allow same-sex couples and other LGBTQ+ couples to legally register their marriages while the government prepares legislation to amend the civil code and formally legalize same-sex marriage," reported *LGBTQNation*. Officials nonetheless refused to recognize the marriage of a transgender woman and a gay man who had participated in a Hindu marriage ceremony in 1997 and were seeking to register their marriage. (Under Nepali law, transgender people are not entitled to recognition of their gender identity, so this was considered a same-sex couple.) Despite the interim order from the court, government officials continued to refuse to register the marriage, "citing a lack of clear instructions." The couple filed two lawsuits, both of which failed, but "a change to the regulations at the Home Ministry" during the last week of November "allowed officials to move forward with the recognition process."

RUSSIA – At the request of the government, the Supreme Court declared the "international public LGBT movement" to be an extremist element and ban all of its activities within the country. On one level, seems laughable, because there is no organization called "International Public LGBT Movement," but those reporting from Russia know what it means: that the government is now armed with legal tool to crack down further on LGBT political and cultural activities. Less than 48 hours

after the ruling, "police and security forces raided at least four LGBTQ+ establishments in Moscow," reported *Advocate.com* on December 2. There was speculation that these actions are meant to rally President Vladimir Putin's conservative base in anticipation of his impending candidacy for re-election in March 2024.

UNITED KINGDOM – The Angling Society, which governs fishing competitions, has banned transgender women from competing in women's competition, based on the content that transgender women in general have a strength and reach advantage over cisgender women. Competitive fishing has many non-gendered events, so trans people will still be able to participate in those, and of course there is no ban on trans people participating in competitions for persons of their gender as identified at birth.

EDITOR'S NOTES

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 LGBT Bar NY 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, Arthur S. Leonard, via e-mail to info@lgbtbarny.org

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