L G B T LAW NOTES

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Which Bathroom Can I Use??

L G B T
LAW NOTES

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EXECUTIVE SUMMARY

9th Circuit Panel Affirms District Court's Refusal to Stay Preliminary Injunction Preventing Implementation of Idaho's Ban on Gender-Affirming Care for Minors

By Ashton Hessee

On January 16th, 2024, Senior U.S. District Judge Barry Lynn Winmill denied the Idaho Attorney General Raúl Labrador's emergency motion for a stay pending appeal in a case that is presently enjoining the state from enforcing HB 71, colloquially known as the Idaho Vulnerable Children Protection Act, a state law that criminalizes all forms of gender affirming healthcare for minor patients under 18 years old. This motion from the lead defendant follows the December 26th ruling in which this court deemed the plaintiffs' Equal Protection and Due Process arguments against the bill likely to succeed, and subsequently granted their motion for a preliminary injunction and barring enforcement of the Idaho law for the duration of litigation. In analyzing this latest motion, the court found defendant AG's arguments and lack of new evidence to be unpersuasive, thus denying the stay and preserving the enjoinment of Idaho's gender affirming care ban in favor of minor plaintiffs Pam Poe and Jane Doe by and through their respective parents and friends Penny Poe, Peter Poe, Joan Doe, and John Doe, pending a ruling on the merits of the case. *Poe v. Labrador*, No. 1:23-cv-00269-BLW, 2024 U.S. Dist. LEXIS 8648 (D. Idaho Jan. 16, 2024).

In order to prevail on the motion for a stay and resume the enforcement of HB 71, the AG would have had to prove to the satisfaction of the court that (1) he is likely to succeed on the merits of his arguments; (2) he would experience irreparable injury if the requested stay were denied; (3) other interested parties would not suffer substantial injuries if the stay were granted; and (4) public interest aligns with the granting of the stay. The court considered each factor and began its analysis by first looking at the second and third factors, both of which address prospective injury.

To support his assertion that denial of the stay would result in irreparable injury, the AG argued that the present preliminary injunction (1) robs him of his immunity under the 11th Amendment and (2) usurps the authority of the Idaho legislature by allowing the federal government to enjoin the state ban. In furtherance of his first argument, the AG argues that the legislature did not "explicitly provide him with enforcement powers" when it implemented HB 71. However, as the court pointed out, that argument selectively ignored the existing enforcement powers of the AG codified by Idaho statute. Further, the court defends the Ninth Circuit precedent of *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) which forecloses his claim of immunity under the *Ex Parte Young* theory. The AG attempted to circumvent this precedent by relying on an Idaho trial court level decision that granted an AG's motion to dismiss a suit challenging the state's abortion ban. However, this case did not involve any 11th Amendment claims, was not binding authority, and was ultimately unpersuasive to this court.

The AG next argued that the enjoinment of HB 71 unconstitutionally "thwart[s] the will of the Idaho legislature". The court was equally unimpressed with this argument, as it deemed the law to be unconstitutional in its December 26th ruling, and there is no right being violated in the event that the federal government prevents a state from implementing an unconstitutional law. Considering both arguments in their totality, the court found that the AG failed to demonstrate an irreparable injury as a result of the present injunction.

Next, the court briefly considered the AG's argument that the plaintiffs failed to prove an injury in the absence of the injunction and would thus not incur an injury if the stay were to be granted. Notably, the AG did not bring forth any new evidence to support these claims. Accordingly, the court affirmed its previous finding that the plaintiffs demonstrated adequate injury which necessitated the injunction in the first place. In the absence of any new evidence or change in circumstances, the court moved onto the next factor for consideration – whether the AG is likely to succeed on the merits.

In furtherance of his success on the merits, the defendant AG argued that this court erred in finding that the plaintiffs were likely to succeed in their Equal Protection and Due Process claims against the Idaho law because the court (1) acknowledged "conflicting evidence" about gender affirming care, (2) gave undue weight to plaintiffs' expert witness who allegedly had a "financial stake" in the decision, and (3) granted the plaintiff parents a new fundamental right as a result.

In support of his first argument, the AG asserted that this court contradicted the U.S. Supreme Court's "reluctance to constitutionalize areas in which 'the States are currently engaged in serious, thoughtful, examinations'" by considering conflicting evidence regarding the risks and benefits of gender affirming healthcare. The court found these arguments unconvincing and explained that it considered the conflicting evidence solely in the context of determining whether the Idaho law met the level of heightened scrutiny required in order to discriminate based on one's gender identity. The court engaged in this consideration as demanded by the "extraordinarily fact-bound test" and ultimately determined that the statute failed to meet strict scrutiny, hence the preliminary injunction.

Regarding the AG's accusation that the expert witnesses for the plaintiffs had a financial stake in the continuation of gender affirming care and were therefore given undue credibility, the court was similarly unimpressed. The court reasoned that the AG was basing this argument off a footnote in the December 26th decision that mentioned particular weight given to a specific expert witness for the plaintiffs. However, this credibility was not a result of any financial interests, but rather the fact that this witness actively treats patients experiencing gender dysphoria and could speak to the relevant psychological impacts. This was given particular consideration because not one single expert witness for the defense could do so.

The court then broke down the glaring lack of financial stake held by the plaintiffs' experts by including the facts that (1) any conceivable benefits for the witnesses were "far too attenuated to be considered a financial stake in this litigation"; (2) the expert doctors were not Idaho providers and therefore have no local business interests; and lastly that (3) the expert mentioned in the footnote at issue is a psychologist whose practice would not be impacted by HB 71's ban whatsoever.

Further, the court refuted the AG's argument that the injunction acknowledged a new right for parents to pursue gender affirming care for their children. The court reasoned that there is no new right being granted to parents by this litigation, rather that the U.S. Supreme Court long ago determined that parents have a fundamental interest in the upbringing of their children, which has consistently included decisions about medical care. Contrary to the defense's reasoning, the will of the Idaho legislature does not trump binding SCOTUS precedent.

Lastly, the court turned to the final factor to be considered in a motion for a stay – the public interest. The court simply referred to the December 26th opinion in which it determined that the public interest favored the granting of a preliminary injunction. Finding that nothing in the stay motion alters the circumstances or presents new evidence, the court refused to reverse their initial determination, bringing an end to their analysis. Finding no evidence presented by the defendant AG to be persuasive, the court denied his stay motion and upheld the preliminary injunction granted to the plaintiffs on December 26th.

This half-baked attempt by the Idaho AG to circumvent the district court's injunction of the state's gender affirming care ban despite a lack of binding precedent, yielded a brief opinion from the district court and hopefully bodes well for the course of this litigation. This opinion arrives amidst several amicus curiae briefs filed by over a dozen national medical organizations including the American Academy of Pediatrics, the American College of Osteopathic Medicine, and the Society for Adolescent Health and Medicine.

[Editor's Note: The state of Idaho, which had promptly filed an appeal of the issuance of the preliminary injunction in the 9th Circuit, filed a motion with the assigned three-judge Circuit panel requesting a stay. This was denied unanimously on January 30, with no explanation other than a citation to a Supreme Court decision, *Nken v. Holder*, 556 U.S. 418, 424 (2009), setting out the traditional four-part test of evaluating a request for stay of a court's order while an appeal was pending. The three-judge panel consisted of Circuit Judges Kim Wardlaw (Clinton appointee) and Jacqueline Nguyen (Obama appointee) and Senior Circuit Judge Richard Paez (Clinton appointee) – all Democratic appointees. This did not reflect the change in political complexion of the 9th Circuit effected by Trump's ten appointments. The current composition of active judges in the 9th Circuit includes three Clinton appointees, three G. W. Bush appointees, five Obama appointees, ten Trump appointees, and 8 Biden appointees, leaving a circuit almost evenly split between Democratic and Republican appointees. There are more than twenty Senior Circuit Judges as well, the majority of whom were appointed by Democratic Presidents.]

The plaintiffs are represented by Alexia D. Korberg, Brad S. Carp, Dana Kennedy, Jackson Corey Yates, Ariella C. Barel, Eric Alan Stone, Kyle N. Bersani, Casey Parsons, David Amiable DeRoin, Richard Alan Eppinik, Dina M. Flores-Brewer, Jordan E. Orosz, Leslie Jill Cooper, Li Nowlin-Sohl, Philip S. May. The defendants are represented by Brian W. Barnes, David H. Thompson, John D. Ramer, James Edward Monroe Craig, Joshua N. Turner, Rafael John Droz, Dayton Patrick Reed, and Heather M. McCarthy. Judge Barry Lynn Winmill was appointed by former President Bill Clinton. ■

Ashton Hessee is a law student at New York Law School (class of 2024).

5th Circuit Panel Affirms Preliminary Injunction Against Texas Public School Library Book-Rating System

By Jason Miranda

In *1984*, George Orwell writes, "Nothing exists except an endless present in which the Party is always right." This rings especially true today, when states have taken the crusade against LGBTQ+ rights to another level, this time enacting laws that will make it even easier to challenge and eventually ban the presence of books containing anything related to LGBTQ+ existence from public school classrooms and libraries. But there is a glimmer of hope. On January 17, 2024, a 5th Circuit Court of Appeals panel affirmed the granting of a preliminary injunction against such a Texas law, finding its provisions instituting a vendor rating system for public school library books was likely to be a violation of the First Amendment. *Book People, Inc. v. Wong*, 2024 U.S. App. LEXIS 1091, 2024 WL 175946 (5th Cir. Jan. 17, 2024).

Texas appealed after the district court issued a preliminary injunction in September 2023 (see 2023 U.S. Dist. LEXIS 165010, 2023 WL 6060045), finding that a portion of the law violated the bookstore-plaintiffs' rights under the Free Speech Clause of the First Amendment. Before the 5th Circuit is a determination of whether proper jurisdiction exists and then, whether there is sufficient likelihood of success to the First Amendment claims to affirm the preliminary injunction, where the conservative court finds such success under the compelled speech doctrine. Most surprisingly, the opinion comes from Trump-appointed Judge Don Willett.

This appeal comes from a challenge to a newly passed Texas law called the "Restricting Explicit and Adult-Designated Educational Resources Act," or READER for short. Under READER, schoolbook vendors who want to do business with Texas public schools will be required to issue sexual-content ratings for every piece of library material they have ever sold or will ever sell to a public school in Texas. Additionally, the law imposes library-collection standards on school districts which prohibit them from possessing, purchasing, or acquiring harmful material (as defined by the state's obscenity statute), material rated as sexually explicit by the vendor, or material that is "pervasively vulgar or educationally unsuitable as referenced in *Pico v. Board of Education*," the 1982 Supreme Court case where the plurality opinion found book bans to be presumptively unconstitutional. The instant case only challenges the vendor-rating system.

The vendor-rating system is complex and frankly, disturbing. Vendors, under this system, would be required to give all library materials a rating of "sexually explicit," "sexually relevant," or "no rating." Both sexually explicit and sexually relevant involve material that "describes, depicts, or portrays sexual conduct," as defined by the state's Penal Code statute on obscenity. The only difference is that sexually explicit content is that which is described, depicted, or portrayed in "a way that is patently offensive," also defined by the Penal Code's obscenity provision, a near mirror of the test in *Miller v. California*, the landmark Supreme Court case on obscenity and the First Amendment.

Vendors are then required to submit their ratings to the Texas Education Agency (TEA) by April 1, 2024, where once submitted, material rated sexually explicit may no longer be sold to school districts and must be removed from bookshelves. Material rated sexually relevant must be segregated and may only be accessed with prior written parental consent. When rating materials, vendors are to perform a "contextual analysis" considering the "explicitness or graphic nature of [. . .] the sexual conduct," "whether the material consists predominantly of or contains multiple repetitions of depictions of sexual or excretory organs or activities," and "whether a reasonable person would find that the material intentionally panders to, titillates, or shocks the reader." One can already imagine how subjective and flawed this analysis could be.

The system allows for contextual determinations and recognizes the fact-specific nature of the methodology, but here is where the joke comes in. Once a vendor submits their ratings, TEA may elect to conduct a review of the ratings and, if they determine that a different rating should apply to a particular item, TEA can then provide written notice to the vendor with what they believe should be the appropriate rating. Upon receiving this notice, the vendor has two options. They can either re-rate according to the rating provided by TEA or the vendor can choose to not comply, being labeled as noncompliant. The price of the latter option? School districts are prohibited from purchasing from noncompliant vendors. Vendors can only be removed from the noncompliant list if TEA is satisfied the vendor has corrected the rating according to TEA's corrected rating.

Among the plaintiffs are two Texas bookstores, three national trade associations, and a legal-defense organization. They argue that READER's rating system is a violation of their 1st Amendment rights, particularly that the statute unconstitutionally compels private speech, is unconstitutionally vague and overbroad, is a prior restraint, and is an unconstitutional delegation of government authority.

Judge Willett begins his analysis on the issues of standing and sovereign-immunity. This portion of the opinion is rather simple, following the pattern of most analyses for standing in federal courts. Of note is how the plaintiffs establish injury in fact, both by constitutional injuries and economic injuries. Blue Willow Bookshop, one

of the bookstore defendants, alleges that, as a result of the rating system, all purchases from Katy Independent School District have ceased, resulting in a $200,000 loss of business. Additionally, they estimate that the cost of compliance with the law will equal between $200 to $1,000 per book and estimates that the cost to rate books already sold will be between $4 million and $500 million. Mind you, Blue Willow also reports their annual sales at just over $1 million.

The next few pages go over more details involving standing, immunity, and ripeness, where the court finds the plaintiffs have sufficient standing to challenge the vendor rating system provision of READER and finds the claim is sufficiently ripe for review. As for immunity, Judge Willett removes all defendants except for Commissioner Morath of TEA, since only he has enforcement power with regard to READER. Having established jurisdiction, the court then turns to the merits of the motion for preliminary injunction, limiting its analysis to the compelled speech theory on account that it suffices to establish likelihood of success on the 1st Amendment claim.

Before that, the court outright disproves the State's argument that READER involves government speech, thus does not affect the plaintiffs' rights. While the ratings are posted on a State website, the ratings are ultimately those of the vendors, with each list posted under the corresponding vendor's name. The State, grasping at straws, argues the tasks are ministerial and not at all a representation of the vendors' opinions, a statement that in and of itself is laughable. Either way, Judge Willett does not buy into it, stating the rating system is highly discretionary and is neither precise nor certain to be labeled as such. Finally, the State tries to argue that TEA's ability to correct and issue new ratings creates a presumption of government speech but that is simply incorrect given the corrections must be issued by the vendor at the State's insistence. Therefore, the government speech doctrine does not apply.

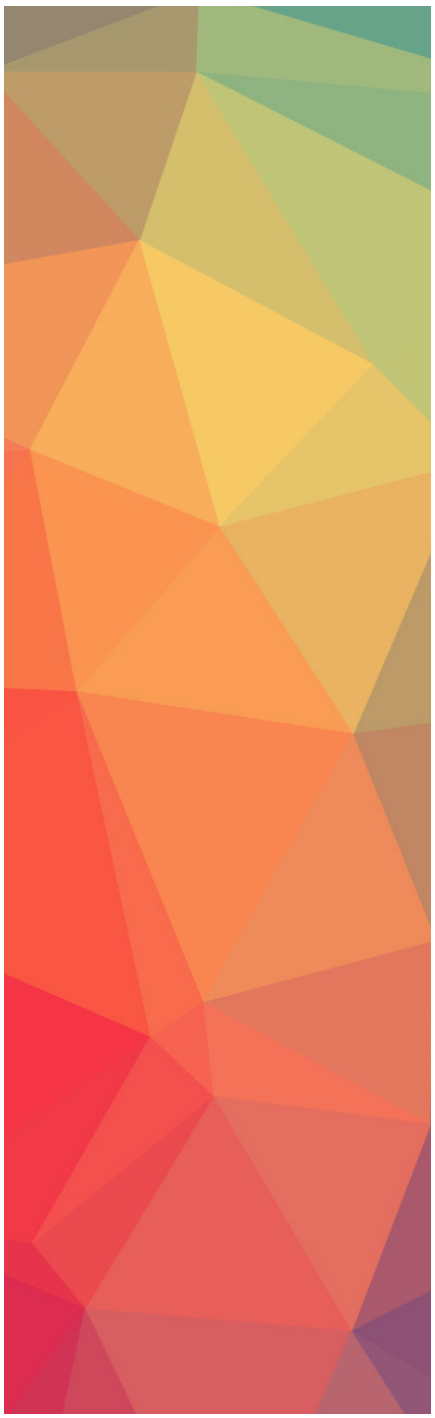
Onto the compelled speech claim, the plaintiffs argue that READER forces them to review material and issue ratings as a condition for selling books to public schools and that if TEA disagrees with any of those ratings, the law requires the vendor to adopt TEA's "corrected" rating. Classic textbook compelled speech, huh? Under this scheme, a vendor either speaks as TEA demands or suffers the consequences (citing *303 Creative*). The State tries to save itself again, arguing two exceptions: the government operations exception and the commercial speech exception.

The former is inapplicable because the ratings go beyond a mere disclosure of factual information as the exception is usually limited, such as IRS forms and sex offender registries. The latter exception is even funnier than the State's attempt to argue the ministerial exception. Using *Zauderer*, a Supreme Court case applying the *Central Hudson* test for commercial speech, the State argues that it may require the dissemination of "purely factual and uncontroversial information." The State then argues that *Zauderer* applies because the ratings are "purely factual and uncontroversial" like a nutrition label, which simply tells the buyer "what they are receiving rather than pass judgment." Yes, you read that right – subjectively rating books on bogus factors is the same as a nutrition label. Thank you, Texas.

Either way, the court disagrees, actively going out of its way to disclaim this argument, even stating that balancing a myriad of factors that depend on community standards is anything but "purely factual" and READER has already proven to be controversial. Concluding that neither of the exceptions apply, Judge Willett finds the plaintiffs are likely to succeed on their compelled speech claims and turns to the remaining preliminary injunction factors, finding that any loss of First Amendment freedoms is enough to constitute irreparable injury and that the public interest is always in favor of correcting First Amendment violations. Therefore, the preliminary injunction is affirmed.

The plaintiffs are represented Laura Lee Prather, Michael Lambert, William Reid Pillifant, and Catherine Lewis Robb, of Haynes & Boone, L.L.P., in Austin, Texas. Judge Don Willett was appointed by President Donald J. Trump in 2017. Judge Jacques Wiener was appointed by President George H.W. Bush in 1990. Judge Dana Douglas was appointed by President Joe Biden in 2022. ■

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



5th Circuit Remands Gay Honduran Unaccompanied Minor for Further Proceedings

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the Fifth Circuit has ordered remand in the case of a gay Honduran unaccompanied minor seeking asylum, in *Velasquez-Castillo v. Garland*, 91 F.4th 358 (5th Cir., January 17, 2024).

A young Honduran man born October 2002 and at all relevant times a minor, entered the United States with his mother at the Mexico-Texas border on July 16, 2019. They were both placed into removal proceedings and were ordered removed after failing to establish eligibility for asylum and withholding of removal or the convention against torture.

Petitioner again went to the border, this time alone, while still 17 years old and sought asylum while simultaneously filing a motion to reopen his prior removal case, arguing that his impending removal would violate the Trafficking Victims Protection Reauthorization Act (TVPRA) because he was an unaccompanied minor, and that newly available evidence of his sexual orientation was relevant to his eligibility for asylum, withholding, and CAT relief. However, three days later the Department of Homeland Security executed the Immigration Judge's order from the initial proceedings and removed Petitioner to Honduras. After filing several motions and subsequently bringing two petitions for review of the Board of Immigration Appeals' denials of those motions, the two petitions for review were consolidated in a single petition for review before the 5th Circuit.

Circuit Judge James E. Graves, Jr., wrote for the panel. He first found that the case presented a live case or controversy. He held that Petitioner had asserted an actual injury that could be sufficiently redressed by relief ,as Petitioner met the requirements of the TVPRA when he filed his subsequent asylum claim, and application of the TVPRA would "invalidate the existing removal order and provide an alternative pathway for [Petitioner] to pursue his asylum claim." Therefore, Judge Graves rejected the government's argument that the removal order mooted the case.

Petitioner argued the case should be remanded for further consideration regarding reopening under the TVPRA and that the Board should have considered the evidence of his sexual-orientation-based threats.

With respect to the TVPRA claim, Judge Graves stated the TVPRA provides that any unaccompanied noncitizen child "sought to be removed by the Department of Homeland Security . . . shall be placed in removal proceedings under section 240 of the Immigration and Nationality Act" and that the court had "referred to TVPRA proceedings as 'mandatory.'" Holding that while the court "generally defers to an agency's decision, this presumption does not apply when the agency's decision is not based on its interpretation of a statute." He ruled that since the Board's opinion did "not address the possible application of the TVPRA, we send the case back to the [Board] for an initial determination."

With respect to the motion to reopen, Judge Graves noted that the court reviews motions generally under a "highly deferential abuse-of-discretion standard," but reviews constitutional challenges *de novo*. Here, Judge Graves found "it is unclear whether the [Board] sufficiently considered the evidence regarding [Petitioner's] sexual orientation and his experiences with threats of violence in Honduras." He stated that Petitioner filed a motion requesting an "urgent ruling" and attached "additional evidence about sexual-orientation-based threats and country violence." Since the Immigration Judge and the Board "failed to address whether this new evidence was previously unavailable and material to the eligibility to relief," the court ordered remand. Judge Graves concluded that "upon remand, the [Board] will address whether the TVPRA applies in this case. In doing so, it should consider whether the evidence submitted by [Petitioner] – in his motion to reopen, his motion for reconsideration, and his motion for an urgent ruling – meets the requirements of 8 C.F.R. Section 1003.2."

The petitioner was represented by Elizabeth Sanchez Kennedy, Galveston-Houston Immigrant Representation Project. Circuit Judge Graves was appointed by President Barack Obama. The other members of the panel were Senior Circuit Judge Jacques L. Wiener, Jr. appointed by President George H. W. Bush, and Dana M. Douglas, appointed by President Joseph R. Biden, Jr. ■

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

Florida U.S. District Court Refuses to Dismiss 1st Amendment Challenge to Escambia County School Board Library Book Removal Policy

By Arthur S. Leonard

U.S. District Judge T. Kent Wetherell, II, denied a motion to dismiss First Amendment viewpoint discrimination claims brought by authors and students (and their parents) against the Escambia County School Board, which has allegedly been removing books from school library collections based on the Board's disagreement with the viewpoint of the books in implementing a Florida statute that is part of the DeSantis administration's goal of cleansing school libraries of materials that the governor and his legislative allies find objectionable. *Pen American Center v. Escambia County School Board*, 2024 WL 133213, 2024 U.S. Dist. LEXIS 7314 (N.D. Fla., Jan. 12, 2024).

In their complaint, plaintiffs brought three counts against the School Board: (1) On behalf of Pen and its members and Penguin Random House, a leading publisher, a viewpoint discrimination claim; (2) On behalf of parents and their children, a right to receive information claim; and (3) On behalf of all plaintiffs, an equal protection claim.

The Defendant argued that the complaint should be dismissed as an "impermissible shotgun pleading," argued that none of the plaintiffs had standing to sue in federal court, that the claims are unripe or moot, and that the amended complaint pending before the court fails to state any plausible claims for relief. "For the most part," wrote Judge Wetherell, "the Court finds these arguments unpersuasive."

Turning first to the "shutgun pleading" issue, the judge observed that the complaint "is considerably longer than it needed to be" (80 pages and 240 numbered paragraphs), but it is not a shotgun pleading because it "provides Defendant fair notice of the claims against it and the grounds upon which those claims rest." The court pointed out that the motion to dismiss (36) pages and the oral argument "show that Defendant has a clear understanding of the claims being asserted against it and the ground upon which those claims rest." Thus, the reason for rejecting shotgun pleadings does not pertain to this case.

As to standing, the court found that the plaintiff parents had standing (at least on behalf of their minor children) because the complaint alleges that "the children intended to check out specific removed and restricted books during the upcoming (now ongoing) school year" but can't because the materials have been removed under the school board's policy. Similarly, the authors have standing because removal of their books deprives them of their target audience and "a previously available forum for the speech embodied in those books." PEN's standing is associational, on behalf of its author members. And nobody could question the standing of a publisher whose books had been removed. The judge cautioned that his decision of the standing question does not necessarily mean that plaintiffs will be able to prevail on their claims, but that isn't necessary at this stage, as long as they meet the standing requirements. The court noted the 11th Circuit having "repeatedly cautioned against conflating the merits and standing."

The court also rejected Defendant's argument that the case is not "ripe" because the statute the Escambia District purports to enforce establishes a special magistrate process that should be exhausted before resorting to the court. The court noted that this process was not available to those challenging the policy as such; it was created as a vehicle for parents protesting the refusal of a school board to remove a book to which the parents had raised objections. At oral argument, said the court, Defendants had effectively conceded the point that the magistrate process was irrelevant to this case.

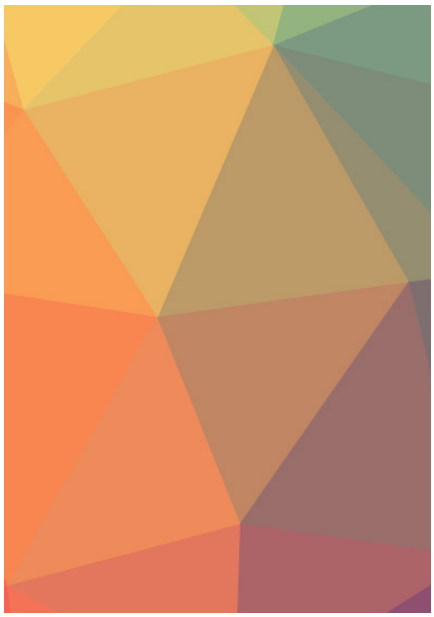
On to the main event . . . . The court found that the first two counts stated plausible First Amendment claims. It rejected the Defendants' argument that book acquisition and retention decisions consist of "government speech" unconstrained by First Amendment concerns. The Supreme Court, in the leading case of *Board of Education v. Pico*, 457 U.S. 853 (1982), had rejected this characterization, which was argued in that case by the dissenters in a dispute over whether book removal/restriction decisions are subject to First Amendment review. "The applicable legal standard for evaluating alleged First Amendment violations in the school library context is not entirely clear," wrote the judge, "but the common theme in all of the potentially relevant standards (e.g., *Pico* plurality, *Hazelwood*, nonpublic forum) is that school officials cannot remove books solely because they disagree with the views expressed in the books but that they can make content-based removal decisions based on legitimate pedagogical concerns including thing like pornographic or sexual content, vulgar or offensive language, gross factual inaccuracies, and educational unsuitably for certain grade levels." According to the complaint in this case, the removal decisions in the Escambia district were based on "ideological objection to their content or disagreement with their messages or themes, rather than for pedagogical reasons." If plaintiffs can prove this, they will have stated a strong First Amendment claim.

On the other hand, the court found no "plausible equal protection claim." The court saw the challenged policy as facially neutral and based on "legitimate pedagogical concerns – e.g., ensuring that students do not have access to books containing pornography, that are harmful to minors, that contain sexual conduct that has no literary

value, and/or that are not grade-level appropriate." The court saw the third claim as more of a disparate impact claim, with plaintiffs arguing that "the book removal/restriction decisions have had a greater impact on non-white and/or LGBTQ authors and non-white and/or LGBTQ students." The court's objection is that this "amalgamates non-whites and LGBTQ individuals even though they are discrete protected classes; it attributes alleged animus of the individual objecting to the books to the Defendant; and it requires far too many inferences to conclude that the removal or restriction of a book about a particular subject constitutes intentional discrimination against an individual in a particular protected class." There is also a problem that as far as the removal of LGBTQ-related material is concerned, there might be standing problems because the plaintiffs were not alleging that their children were LGBTQ, and had no intention to "out" their children in this lawsuit. Thus, the court dismissed the equal protection claim, but allows the case to continue on the free speech claims.

The law firm of Ballard Spahr LLP is representing most of the plaintiffs. Judge Wetherell was appointed by President Donald J. Trump. ■

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



Oklahoma District Court Dismisses Challenge to Oklahoma's "Bathroom Bill" Excluding Transgender Students from Using Preferred Bathrooms in School

By Katherine Avazis

On January 12, 2024, U.S. District Court Judge Jodi W. Dishman dismissed a challenge to Oklahoma's "bathroom bill," which excludes transgender students from using school bathrooms consistent with their gender identity. Judge Dishman, who was appointed by President Donald J. Trump, holds the opinions that "physical differences between men and women are enduring" and that "sex, like race and national origin, is an immutable characteristic." Absent binding Supreme Court or Tenth Circuit precedent on the issue, the court concluded that Plaintiffs had failed to state a claim on which relief can be granted. *Bridge v. Oklahoma State Department of Education*, 2024 WL 150598, 2024 U.S. Dist. LEXIS 6714 (W.D. Okla.).

Andrew Bridge, Mark Miles, and Sarah Stiles (plaintiffs) are transgender students at public high schools in Oklahoma. These students were adversely affected by the Oklahoma law, which forces them to use the bathroom that coincides with their "biological sex," instead of the gender that they identify with. Plaintiffs filed suit on September 6, 2022, challenging the constitutionality of S.B. 615 under the Equal Protection Clause of the Fourteenth Amendment, and Title IX of the Education Amendments Act of 1972.

When considering Plaintiffs' argument that S.B. 615 prevents them from being treated like other Oklahoma public school students, in turn violating their constitutional and statutory rights, the court determines whether the law survives intermediate scrutiny and identifies the State's reasons for enacting a sex-based classification. The court then must ask whether "the reasons qualify as important governmental objectives, and if so, whether the gender-based means employed substantially serve those objectives." The court concluded that the Oklahoma law does serve an important governmental interest in ensuring students are safe and have privacy from the "opposite sex" in restrooms, and that this law is substantially related to that interest. The court concluded that S.B. 615 does not violate the Equal Protection Clause.

In discussing the issue of whether separating the use of male and female restrooms and changing areas in public schools based on a student's biological sex violates Title IX of the Education Amendments Act of 1972, the court relies heavily on a dissenting opinion in a 4th Circuit decision from Virginia, *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). In this opinion, dissenting Circuit Judge Paul Niemeyer discusses the "dictionary" definition of 'sex', which refers to "the physiological distinctions between males and females – particularly with respect to their reproductive functions." The court contends that since S.B. 615 separates students and the restrooms they are allowed to use based on biological sex, then the Plaintiffs can only prevail if "sex" under Title IX means the sex with which an individual identifies rather than this "biological sex" definition. The court understands the term "sex" as used in Title IX at the time it was enacted to mean the biological, anatomical, and reproductive differences between male and female. Under Title IX, schools are allowed to "maintain separate living facilities" and "separate toilet, locker room, and shower facilities" for the "different sexes." Therefore, the court concludes that since the term "different sexes" should be construed as meaning biological sex, that the Oklahoma law is aligned with Title IX. Since the "biological sex" of the Plaintiff students

does not align with the sex that they identify with, the court concludes that they do not have a valid claim under Title IX.

Lastly, the court granted the State Defendants' motion to dismiss on the grounds that there are no factual disputes regarding the "biological sex" of the Plaintiff students. The court believes that Plaintiffs' "biological sex" is the only dispositive factor, therefore Plaintiffs' claims are, in its view, legally insufficient, and they have failed to state a claim for which relief may be granted. Circuit courts are split on this issue. The Plaintiffs will likely appeal this ruling to the 10th Circuit.

The Plaintiffs are represented by Megan E Lambert and Devraat Awasthi, ACLU of Oklahoma Foundation, Oklahoma City, OK; Isaac D Chaput, Covington & Burling LLP, San Francisco, CA; Jon Warren Davidson, American Civil Liberties Union Foundation, New York, NY; Paul David Castillo, Lambda Legal, Dallas, TX; and Robert Gianchetti, Covington & Burling, New York City. ■

Katherine Avazis is a law student at New York Law School (class of 2025).

Federal Court Refuses to Dismiss Challenge to Colorado Program Conditioning State Funding for Preschool Programs on Non-Discrimination Requirements

By Corey L. Gibbs

Colorado created a source of funding from which preschool providers could benefit, but they were required to agree to certain nondiscrimination requirements. However, the department overseeing the program granted several individualized "preferences" to preschool providers. The Archdiocese of Denver and certain Archdiocesan preschools requested to reserve seats for students whose families embrace Catholic teachings both in word and deed. The department denied their request, because it conflicted with the statutory nondiscrimination requirements. In response, the Archdiocese, the preschools, and two parents (collectively, the Plaintiffs) brought suit against two government officials charged with administering the program (Defendants). On January 3, 2024, Senior District Judge John L. Kane denied the Defendants' motion to dismiss in part, the Plaintiffs' motion for summary judgment, and the Plaintiffs' motion to exclude expert witness testimony. *St. Mary Catholic Parish in Littleton v. Roy*, 2024 WL 195885, 2024 U.S. Dist. LEXIS 11355 (D. Colo.).

In 2020, Colorado created a source of funding for universal preschool and the Colorado Department of Early Childhood (Department). The Department required that "each preschool provider give eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." Colo. Rev. Stat. § 26.5-4-205(2)(b). Importantly, school participation in the program was voluntary.

In order to participate in the universal preschool program, a school had to sign an agreement. The Plaintiffs claim that the agreement incorporated the statutory nondiscrimination requirement, which explicitly stated that preschool providers cannot "discriminate against any person on the basis of gender, race, ethnicity, religion, national origin, age, sexual orientation, gender identity, citizenship status, education, disability, socio-economic status, or any other identity." The Plaintiffs took issue with three provisions: (i) Colorado's statutory nondiscrimination requirement; (ii) the agreement's incorporation of the statutory requirement; and (iii) the agreement's nondiscrimination requirement.

Despite the nondiscrimination requirements, families and preschool providers were able to assert *preferences*. Families were able to rank their preferred preschool providers, and preschool providers could select from nine options that departed from the default matching process. For example, churches could grant preference to their members. This option would allow churches to reserve all or some of their seats for members and decline giving a seat to nonmembers.

Not only did the Department grant preschool providers the ability to choose from nine preference options, the Department also granted several individualized requests. These individualized requests included: serving teen mothers, only accepting vaccinated children, and prioritizing subdivision residents. But not all individualized requests were granted.

The Archdiocesan preschools made an individualized request to reserve their seats for families who embrace Catholic

teachings both in word and deed. This request conflicted with the three provisions because the Archdiocese claimed that a Catholic school could not "treat a same-sex couple as a family equivalent to the natural family without compromising its mission and Catholic identity and causing confusion about the nature of marriage for all students enrolled." The Archdiocese instructed the Archdiocesan preschools to use pronouns, enforce a dress code, and make bathrooms available based on an individual's "biological sex." Important to note, however, the schools were separate legal entities from the Archdiocese, although they heeded its guidance. While the Department granted several individualized requests, the Department denied the Archdiocese and the Archdiocesan preschools' request for an exception for an exception to the non-discrimination requirements.

The Plaintiffs brought several claims in response to the denial. The Archdiocese and the Archdiocesan preschools brought seven claims: five under the Free Exercise Clause, one based on compelled speech, and one under the Establishment Clause. The parents only asserted a claim under the Free Exercise Clause.

A bench trial began on January 2, 2024. Immediately before the court were three motions. First, the Defendants moved to dismiss the Plaintiffs' amended complaint. Second, the Plaintiffs moved for summary judgment or, in the alternative, a preliminary injunction against application of the nondiscrimination requirement. Third, the Plaintiffs moved to exclude the testimony of the Defendants' expert witnesses.

Judge Kane first analyzed the Defendants' motion to dismiss. The Defendants claimed that the Plaintiffs lacked standing and that their claims were not ripe. In order to prove that the Plaintiffs had standing, they must have shown (i) an injury, (ii) a causal connection between the Defendants' actions and that injury, and (iii) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Although a plaintiff generally could not make claims to relief based on the rights and interests of others, an organization could make a claim on behalf of its members (*i.e.*, associational standing). *Warth v. Seldin*, 422 U.S. 490 (1975). For a plaintiff to show associational standing, it must have shown that (i) its members would have standing, (ii) the interests it strives to protect were relevant to its purpose, and (iii) "the nature of the claim and of the relief sought [did] not make the individual participation of each injured party indispensable to the proper resolution of the cause." *Id*. at 511; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). And if a threatened injury was imminent enough to establish standing, then Article III ripeness would be satisfied. However, prudential ripeness would require a court to "balance the fitness of the issue for judicial review with the hardship to the parties from withholding review." *United States v. Bennett*, 823 F.3d 1316, 1326 (10th Cir. 2016); *see Hill v. Warsaw*, 947 F.3d 1305, 1310 (10th Cir. 2020) (providing "[I]njury to a party's interest for the purpose of constitutional standing does not automatically confer prudential standing").

The district court had to analyze each group of Plaintiffs to make a determination. Before the district court were the Archdiocesan preschools, the parents, and the Archdiocese. The Defendants claimed that the Archdiocesan preschools failed to demonstrate two components of standing: injury in fact and causation. The schools claimed that they were unable to participate in the program and benefit from it. That was enough to show an injury in fact. And the Defendants' denial of their request showed causation. While Article III ripeness was necessarily satisfied, the district court held that the claims had prudential ripeness as well. The district court found that the schools would suffer hardships if their claims were withheld. The analysis and the result for the parents was the same.

For the Archdiocese, the district court had to consider whether the Archdiocese had associational standing. And it determined that the Archdiocese did not have such standing because the individual participation of the Archdiocesan preschools was indispensable to the issue at hand. Furthermore, the Archdiocese would not be able to produce documents during discovery because it did not have legal control over the Archdiocesan preschools' documents. After all, the schools were separate legal entities.

Second, Judge Kane analyzed the Plaintiffs' motion for summary judgement. According to the Federal Rules of Civil Procedure, summary judgment would only be appropriate if there were "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Here, the Defendants submitted a table disputing facts that the Plaintiffs claimed to be "undisputed material facts." For instance, the parties dispute the difference between a preference and an exception to the nondiscrimination provisions. The district court determined that genuine disputes existed and the motion for summary judgment should be denied.

Third, the judge analyzed the Plaintiffs' motion to exclude the Defendants' expert witness testimony. The Defendants sought to include testimony from two clinical psychologists, who would unpack Colorado's interest in preventing trauma associated with schools intruding into sensitive space. But the Plaintiffs claimed that the testimony was not relevant because (i) *post hoc* reasons for a government action would be inadmissible and (ii) the testimony failed to address the questions at hand. The district court concluded that the testimony was relevant because it addressed Colorado's focus on healthy environments for children and their families. Furthermore, the district court determined Plaintiffs' second argument presupposed that the provisions were not generally applicable and neutral. In addition to challenging the testimony of the two psychologists, the Plaintiffs sought to prevent the Defendants' employee-witnesses from qualifying as experts. However, the Plaintiffs failed to identify specific opinions that would be problematic. Thus, the district court denied the Plaintiffs' motion to exclude the Defendants' expert witness testimony.

Although the district court did not make a determination on the merits, Judge Kane clearly articulated his thoughts on the matter. He identified the question to be determined at trial. Were preferences, like those to serve only individuals with specific disabilities, equivalent to failing to meet the nondiscrimination requirements? If so, then the Department could be viewed as having provided exceptions to some. But Judge Kane stated that he doubted the preferences were equivalent to exceptions.

Plaintiffs are represented by attorneys from the Becket Fund for Religious Liberty, a Catholic litigation group. President Jimmy Carter appointed Judge Kane in 1977, and he assumed senior status in 1988. ■

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

Trans Plaintiff's Suit for Coverage of Facial Feminization Surgery Settled After District Court Denies Insurer's Motion for Summary Judgement

By Arthur S. Leonard

The transgender plaintiff, who was permitted in an earlier opinion to proceed anonymously as Jane Doe, sought coverage for facial feminization surgery, which had been denied by her insurer, Independence Blue Cross (IBX), which deemed it to be "cosmetic." The issue in *Doe v. Independence Blue Cross*, 2024 WL 233216, 2024 U.S. Dist. LEXIS 10536 (E.D. Pa., Jan. 22, 2024), was whether the defendant was entitled to summary judgment on plaintiff's claim that its refusal to cover the procedure in her case violated the Affordable Care Act's antidiscrimination provision, which is derived as to sex discrimination claims from Title IX of the Education Amendments of 1972. Senior U.S. District Judge Timothy J. Savage denied the motion for summary judgment on January 22, and the parties then held a previously-scheduled settlement conference shortly thereafter. According to the court's docket, a few days later Judge Savage signed their stipulation to dismiss the action with prejudice, which suggests to us that they reached a settlement, which likely involved defendant covering the procedure for the plaintiff. The court's docket that we consulted did not provide any explanation regarding the terms of a settlement.

Doe sought the facial feminization procedure as part of her gender transition, contending that it was medically necessary in order for her to present as a woman. At her first level appeal of the insurer's denial of coverage, the insurer hired a consultant, who reported that "photographs were not enclosed to demonstrate a facial appearance outside the broad range of normal for the female gender." After plaintiff requested a second-level appeal, plaintiff emailed an IBX Appeals Specialist, seeking clarification as to "the broad range of female standards that has been reference by ibx." The specialist responded with "attached documentation regarding the broad range of female standards as referenced in the first level appeal," which contained a second report from the same consultant, explaining that "objective findings of facial features outside of the normal adult female variation must be demonstrated by photographs and/or facial measurements."

IBX claimed that it was bound by the determinations made by independent reviewers at the final (third) stage of appeal. An independent consultant at that stage concurred with the first consultant that Doe's photographs, submitted as part of this stage, did not demonstrate facial features "outside of the norm of an average adult female variation." Judge Savage observed that "a reasonable jury could find that IBX relief on gender stereotyping language in denying Doe coverage for FFS. Therefore, summary judgment is inappropriate with respect to Doe's claim that IBX intentionally discriminated against her on the basis of sex."

At the second level of appeal within IBX, an independent reviewer determined that the requested procedure was "medically necessary" and thus should be covered. Under the terms of IBX's gender dysphoria treatment policy, a procedure would be covered for "medical necessity demonstrating a functional impairment can be identified." In the absence of a "functional impairment," the procedure would be deemed "cosmetic," and the insurance policy does not cover "cosmetic" procedures.

In order to grant summary judgment, however, the court had to determine that there was no dispute of material facts so that judgment could be rendered as a matter of law. Judge Savage found,

however, "There is an issue of fact as to whether IBX's interpretation was "reasonably consistent" with the text of the cosmetic procedure exclusion. The exclusion provides that medical necessity must be demonstrated by a 'functional impairment.' The final denial of coverage concluded that Doe did not meet this criterion because there were no 'actual physical impairments present, only psychological impairments.'" However, the court concluded, "IBX's gender dysphoria policy does not limit 'functional impairment' to physiological defects. IBX's own definition of gender dysphoria refers to 'clinically significant distress or impairment in social, occupational, or other important areas of functioning.' A reasonable fact finder could find that IBX applied a physical defect requirement an ignored Doe's impaired social and occupational functioning in a way that is not 'reasonably consistent' with the plan's text." Thus, the court could not declare as a matter of law that IBX was entitled to judgment.

Faced with this analysis of the legal issues, it is not surprising that IBX negotiated a settlement, thus avoiding a final ruling on the merits that looked likely to go against it.

Doe is represented by Justin F. Robinette, Philadelphia, PA. Judge Savage was appointed by President George W. Bush. ■

Federal District Court Refuses to Dismiss Incarcerated Transgender Plaintiffs' Constitutional Suit Over Their Conditions of Confinement and Other Claims

By Arthur S. Leonard

Two transgender incarcerated individuals claim that they have been subjected to sexual assault and harassment by a California Corrections staff psychologist, Joseph Claybough, and that seventeen other CDCR employees should be held liable for failing to protect them from Claybough and from other sexual attacks and harassment arising from their placement in dormitory-style housing leaving them vulnerable to such attacks. They also assert retaliation claims for various actions taken against them after they filed grievances, and "deliberate indifference" claims challenging dormitory housing in circumstances leaving them vulnerable to attack in the prisons. In *Unique v. Claybaugh*, 2024 WL 189018 (N.D. Cal., Jan. 17, 2024), U.S. District Judge P. Casey Pitts denied defendants' motions to dismiss the complaint. Most significantly, the court held that because of the existence of regulations under the federal Prison Rape Elimination Act (PRDA) intended to protect vulnerable incarcerated individuals, and various studies that document the risks faced by transgender people in prison, the defendants cannot credibly argue that they were unaware of the risks, and high level management people could expose the state to liability for failing to implement appropriate policies

The complaints by plaintiffs Ms. Unique and Ms. White, transgender women being housed in male prisons, divide into four distinct claims. First, they assert 8th Amendment claims against Dr. Claybough in his individual capacity for sexual assault and harassment. Second, they allege that four named correctional officers failed to protect them from Claybaugh's sexual assaults, by repeatedly leaving them alone with Claybaugh "who was known to have an unusual interest in them, with no video surveillance or security staff supervision, despite the known issue of staff sexual misconduct at Salinas Valley State Prison (SVSP), as well as of incarcerated transgender individuals' susceptibility to sexual assault." Third, they assert 1st Amendment retaliation claims against various CDCR staff member, alleging that after they filed grievances about Claybough, these defendants "thereafter retaliated by ransacking their prison cells, filing fabricated rules violation reports against them, and separating them from one another." Finally, focusing on other CDCR facilities to which they were transferred, they allege failure to protect them from dangerous housing conditions by placing them in dormitory housing – "which involved sharing rooms with a large number of people" – as a result of which they claim to have suffered additional sexual and physical assaults.

Judge Pitts found that their allegations were sufficiently specific to state constitutional claims against all the named defendants, and rejected claims that since the plaintiffs had been transferred around the system to various facilities, the case should be dismissed for improper venue regarding any incidents that took place outside the Northern District of California. The court held that Claybough could not raise this defense, since he is not a resident of California either now or when the suit was filed. The court noted that the doctrine of "pendent venue" would apply to this case, which allows courts to adjudicate claims where "principles of judicial economy, convenience, avoidance of piecemeal litigation and fairness to the litigants" so require, even though some of the incidents occurred outside the venue. Since all the pending

claims are "closely related," the court refused to dismiss on venue grounds.

Defendants tried to raise the defense that they "did not known that Unique and White were exposed to an objectively serious risk of harm, and that Plaintiffs thus fail to state a claim of deliberate indifference" under *Farmer v. Brennan*, the leading Supreme Court precedent on point. The court accepted plaintiffs' argument that defendants "were aware of sufficient circumstantial evidence to have actual knowledge of the risk of harm," and cited specific allegations of facts tending to show such awareness. The court also cited studies by the American Medical Association and the California Department of Correction supporting plaintiffs' claim that the SVSP Defendants had sufficient knowledge to allege that they were deliberately indifferent to the risks faced by the plaintiffs. The court also noted the failure of the prison system to comply with requirements under the Prison Rape Elimination Act. Although plaintiffs can't sue directly under PREA, the statue and its regulations can be summoned to combat the argument that prison officials are unaware of the risks faced by transgender women who are incarcerated in male prisons. In support of this conclusion, the court cited *Cortez v. Skol*, 776 F.3d 1046 (9th Cir. 2015), where the court held that "an officer leading three inmates through a prison was deliberately indifferent to the risk that the inmates would be violent with one another, citing evidence that the officer knew about (1) the hostility between the inmates, (2) the inmate victim's protective custody status, and (3) a prison policy requiring leg restraints when moving detention unit inmates." The court found the allegations in this case to be "similar," in terms of imputing knowledge about the risks posed by leaving plaintiffs along and unmonitored with Dr. Claybough.

As to the housing allegations, violation of PREA regulations was summoned as a basis of overcoming the professed ignorance of defendants about the risks the transgender individuals faced. For example, "Despite reporting the assaults at both CIM and CMF, White alleges that she was kept in dormitory housing and told by staff that they did not believe her. Specifically, White states that 'CIM Housing defendants repeatedly housed White in dorm settings,' which result in 'two separate assaults by two separate cisgender male inmates,'" and that despite this knowledge, the CMF defendants "housed White in a tent with approximately 50 cisgender male inmates,' after which she suffered 'multiple sexual and physical assault by the same cisgender male inmate at CMF." Even though her prison file recorded these assault, she continued to be place in a dorm when she was transferred to another facility.

Official capacity claims were stated against RJD Warden Hill and CDCR Secretary Macomber for failing to implement PREA regulations to protect incarcerated transgender people from known risks. "Plaintiffs have pleaded a systematic violation of the federal PREA regulations that require prisons to safely house vulnerable inmates," wrote Judge Pitts. "These allegations sufficiently identify a policy or practice for which state officials can be sued in their official capacity." The advantage of this is that plaintiffs can request injunctive relief against officials who are in a position to implement policy changes. "Because Unique and White adequately plead an imminent threat of harm resulting from an identified CDCR policy or practice," wrote Judge Pitts, "the Court denies Defendants' motion to dismiss the official capacity claims" against these named officials.

This is only a decision by one district judge, but if the state decides to appeal – particularly that aspect of the ruling concerning official capacity suit against CDCR Secretary Macomber which is in essence a suit against the state for failing to implement policies intended to avoid constitutional injuries to incarcerated individuals – this case may provide an opportunity to establish at the circuit level and maybe even higher that substantial reform is required to create safe conditions for transgender people who are incarcerated in state prison systems.

The plaintiffs are represented by Nadia E. Haghighatian and Kat Li, of Kirkland & Ellis LLP, Austin, TX, Fan

Chen, Jeffrey Michael Jacobsen, Julien Crockett, Laura Ashley Harris, Laura Ashley Harris, of Kirkland and Ellis, LLP, San Francisco, CA, and Hannah Suh, San Francisco, CA, for Plaintiffs. The result in this case thus far shows the importance of legal representation for transgender incarcerated individuals, whose attempts to litigate these issues *pro se* frequently fail due to their inability to formulate complaints that will survive motions to dismiss. So often we read statements by district judges or magistrates repeating that PREA does not create a private right of action, without taking the next step of acknowledging PREA as setting a standard to judge whether prison officials are being deliberately indifferent to the well-established risks of serious harm incurred by failing to implement PREA guidelines. Judge Pitts was appointed by President Joseph R. Biden. ■

Court of Appeals of Ohio Applies *Obergefell* Retroactively in Same-Sex Parentage Dispute

By Brian M. Brantley

In re: L.E.S., E.S., N.S., 2024-Ohio-165, 2024 Ohio App. LEXIS 179, 2024 WL 208178 (Jan. 19, 2024), involves a dispute over the recognition of parental rights between a same-sex couple, P.S. and C.E., who had children through non-spousal donor insemination (assisted reproductive technology [ART] using sperm donated by a non-spouse). This case hinges on the constitutional rights established in *Obergefell v. Hodges* (2015), where the U.S. Supreme Court held that same-sex couples have the right to marry on the same terms and conditions as opposite-sex couples. The Court of Appeals of Ohio determined that states cannot constitutionally exclude same-sex couples from marriage and, consequently, cannot deprive them of the associated benefits. Judge Marilyn Zayas wrote for the unanimous three-judge panel.

Under Ohio law R.C. 3111.95(A), a married woman's husband is recognized as the natural parent of a child conceived through non-spousal donor insemination during the marriage. The court concluded that this legal recognition should equally extend to a consenting same-sex spouse of a married woman. The more challenging question presented in the case is whether the same-sex partner of a woman, who was not married but intended to be at the time of conception, can be recognized as the legal parent of the child(ren) conceived through donor insemination.

In this case, the juvenile court denied legal parent status to C.E., who consensually conceived children with her same-sex partner, P.S., through non-spousal donor insemination. P.S. bore the child. The court ruled that there was no legal pathway for C.E.'s recognition as a parent, despite her claim that they would have been married at the time of conception if not for Ohio's same-sex marriage ban. The trial court instead granted shared custody based on factors from under *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, and *In re Mullens*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302. The appeals court disagreed, stating that the juvenile court should have first assessed the potential marriage but for the ban before denying parentage. Consequently, the court reversed the parentage determination, remanding the case for further proceedings. It notes that addressing P.S.'s custody and visitation issues prematurely is unnecessary until the juvenile court's decision on remand.

P.S. and C.E. filed a nonparent petition for custody in 2012 concerning their child, L.E.S., born via donor insemination. A custody agreement was established, with P.S. relinquishing sole custody. In 2018, P.S. sought to modify the agreement, claiming C.E. was not acting in the child's best interest. In response, C.E. filed a parentage and custody complaint, asserting jurisdiction under relevant Ohio laws and post-*Obergefell* developments. The complaint detailed the parties' relationship, a civil commitment ceremony, and their involvement in conceiving three children through assisted reproductive technology. P.S. moved to dismiss, arguing no Ohio law supported parental rights for C.E. The magistrate denied the motion. After hearings and objections, the juvenile court, in 2022, upheld the denial of C.E.'s legal parent status, citing Ohio law. Both parties appealed the decision.

The Court of Appeals of Ohio relies on *Obergefell*, 576 U.S. at 651-652, 135 S. Ct. 2584, 192 L.Ed.2d 609, emphasizing constitutional promises of liberty, protected by the Due Process Clause of the Fourteenth Amendment. It highlights that fundamental rights identification and protection are part of the judicial duty, not bound by history. The right to marry is deemed a fundamental constitutional right applicable to

same-sex couples, encompassing essential attributes grounded in history, tradition, and constitutional liberties. The protection of this right is linked to safeguarding children and families, providing both state law and profound benefits. The court's reliance on *Obergefell* underscores that states, while varying benefits for married couples, historically made marriage the basis for numerous governmental rights, benefits, and responsibilities. Exclusion from marriage denies same-sex couples these benefits, leading to more than just material burdens—an instability that opposite-sex couples would find intolerable.

Under the Due Process and Equal Protection Clauses, same-sex couples must have the right to marry under the same terms as opposite-sex couples. The court cites *Obergefell* and *Pavan*, highlighting the Supreme Court's invalidation of state laws denying same-sex couples the same benefits linked to marriage. The principle of full retroactive effect of federal law is emphasized, quoting *Harper v. Virginia Dept. of Taxation*. The argument challenges the juvenile court's finding that *Obergefell* did not create a pathway for C.E. to be recognized as a legal parent since the parties were never married. It contends that the court failed to consider the retroactive application of *Obergefell*, urging an assessment of whether the parties would have married without Ohio's same-sex marriage ban. The central question posed is whether the court should have considered the hypothetical marriage scenario before determining C.E.'s legal parentage under Ohio law.

Under Ohio law, if a married woman undergoes non-spousal donor insemination and her husband consents, he is conclusively considered the natural father of the child. "Under *Obergefell*, this marital benefit cannot constitutionally be deprived from a consenting same-sex spouse of a married woman as Ohio has linked the establishment of a parent-and-child relationship to the marriage in such a situation and therefore provides married couples with a form of legal recognition not available to unmarried couples." *In re: L.E.S., E.S., N.S.*, 2024-Ohio-165, 2024 Ohio App. LEXIS 179, *P22.

The argument emphasizes that denying legal recognition to same-sex spouses violates constitutional principles of due process and equal protection. The court's failure to consider the retroactive effect of *Obergefell*, especially for couples unable to marry due to Ohio's past ban on same-sex marriage, is criticized. The court suggests that recognizing marriages that would have existed absent the unconstitutional ban is a remedy to protect the constitutional rights of same-sex couples and safeguard the welfare of their children.

The court argues that the juvenile court's reliance on *Mullens* is misplaced since *Mullens* dealt with a different issue – the relinquishment of sole custody by a parent to a nonparent through an agreement. The court emphasizes that the question of who may be considered a parent under Ohio's parentage statutes was not directly addressed in *Mullens*.

In contrast, *In re Bonfield*, the Ohio Supreme Court looked to R.C. 3111.01 for the definition of a "parent" and acknowledged three ways to establish a parent-and-child relationship: by natural parenthood, by adoption, or "by other legal means in the Revised Code that confer or impose rights, privileges, and duties upon certain individuals." The parties in *Bonfield* argued that R.C. 3111.95(A) provided "other legal means" for recognizing parental rights, advocating for a four-part test. Although the court rejected the proposed test, it did not dispute the general claim that R.C. 3111.95(A) created other legal means for conferring parental rights.

The court contends that R.C. 3111.95(A) provides "other legal means" for conferring parental rights in Ohio, and the subsequent U.S. Supreme Court decision in *Obergefell* supports extending such recognition to same-sex spouses. It concludes that neither *Mullens* nor *Bonfield* contradicts the court's holding in the present case, where the critical question is whether the parties would have been married at the time of the children's birth but for Ohio's unconstitutional ban on same-sex marriage. The court cites a similar case from Oregon to support

the argument that the choice to marry, not just the intent to parent, is crucial in determining the applicability of such statutes to same-sex couples. The court maintains that its holding addresses a narrow set of circumstances and aims to right a wrong resulting from the unconstitutional ban.

The court emphasizes the limited scope of its opinion, clarifying that it does not extend to broader questions about marriage or children in Ohio. It specifically addresses cases where individuals lack the chance to prove they would have been married at the time of their child's conception due to Ohio's unconstitutional ban on same-sex marriage. The court aims to remedy the inability to establish parental rights, particularly under R.C. 3111.95(A), based on a marriage, akin to the rights of different-sex spouses.

In citing *Candelaria v. Kelly*, the court contends that the "would-have-married" standard exceeds legislative authority in states like Ohio, which do not recognize common-law marriage even for different-sex couples. The court disagrees, highlighting that the parties were deprived of the personal choice to legally marry due to the state's unconstitutional ban on same-sex marriage. It criticizes *Candelaria's* retroactive application of *Obergefell* to the date of solemnization, asserting that it fails to consider the unconstitutional deprivation of the parties' choice to marry.

The court cautions against deciding in favor of marriage based solely on the parties holding themselves out as married, clarifying that common-law marriage considerations are irrelevant. It stresses the need for a careful inquiry by the trial court, considering various factors when assessing credibility and determining whether the parties would have married but for the unconstitutional ban.

The court acknowledges the intimate nature of marriage decisions and urges caution in imposing the effects of marriage on parties who would not have mutually assented to it. If it is credibly established that the parties would have been married at the time of the child's conception absent the ban, the court asserts that marriage should be recognized for the purpose of determining parental rights, particularly under R.C. 3111.95(A). The opinion's specific aim is to address a narrow set of cases, providing recognition to marriages that would have existed if not for the unconstitutional ban and safeguarding the parent-and-child relationship. The court sustains C.E.'s cross-assignment of error, asserting that the trial court should have considered whether the parties would have been married at the time of the child's conception before determining that *Obergefell* did not create a pathway for C.E. to become a parent under Ohio law.

In conclusion, the court reversed the trial court's decision on parentage, remanding the case for further proceedings consistent with its opinion and the law. It declined to address P.S.'s assignments of error pertaining to custody and visitation, as the resolution of parentage might render them moot.

The Appellant was represented by Durst Kerridge Khatskin LLP, Alexander J. Durst, Paul R. Kerridge, Link Nestheide Family Law and Diana M. Link. The Appellee was represented by Hilton Parker LLC, Jonathan L. Hilton, Geoffrey C. Parker, Essig & Evans LLP and Danielle L. Levy. The court received several amicus briefs, including those from the ACLU of Ohio Foundation, the National Association of Social Workers, and the Nathaniel R. Jones Center for Race, Gender, and Social Justice. ■

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

Illinois Appellate Court Reverses Sexual Abuse Conviction of Bisexual Stepmother of Teenage Girl

By Arthur S. Leonard

In *People v. Petersen*, 2024 IL App (4th) 230280-U, 2024 WL 278354, 2024 Ill. App. Unpub. LEXIS 156 (Jan. 25, 2024), the 4th District Appellate Court of Illinois reversed the jury conviction of Amanda Ruth Petersen on charges of sexually abusing her stepdaughter, N.N., finding reversible error in the trial court's admitting over objection by the defense a recording of a statement by the defendant to a police officer investigating the circumstances that she was bisexual. Writing for the unanimous panel, Presiding Justice John W. Turner found that the Amanda Petersen's sexual orientation was irrelevant to the charge and "based on the closeness of the case, the error was not harmless."

According to Justice Turner's opinion, N.N.'s father, Justin, and her stepmother, Amanda, the defendant, were with N.N. at a Quality Inn in Bloomington on December 4, 2020, where they were meeting to celebrate before N.N. left to move out of state to be with her mother. N.N., then 14, did not live full-time with her father, staying at times with her older sister. She had a variety of psychological issues and was on various medications, some of which might affect her perceptions. When she was agitated, Justin and Amanda would give her massages to calm her down. N.N. placed a call from her cellphone to 911 after running out of the hotel. She "sounded out of breath" on the recording of the call. "She said defendant and Justin tried to rape her in a room at the Quality Inn and she was running away from the hotel." During the call, Amanda, who had caught up to N.N., took the phone, identified

herself, told the operator that N.N. "as making a big deal out of nothing, nothing happened, and N.N. was just acting out." That she had been giving the girl a massage, and then N.N. ran out because she wanted to go see a boy she was dating and Justin and Amanda wouldn't let her go. A police officer was dispatched in response to the all and found another officer on the scene when he arrived. N.N.'s story was recorded on a video of her conversation with that officer, and there was subsequently a video of Amanda's conversation with the other officer, during which she was questioned about her sexual orientation and said she was bisexual. Alternative stories were given (and related at trial) about what had happened, and it was up to the jury to decide whether it was just an innocent massage or sexual abuse when Amanda touched N.N.'s breast.

Defense counsel objected to having the jury hear the bit of the interview in which Amanda said she was bisexual, claiming it would bias the jury and was irrelevant. According to the transcript, he said: "It think it is inappropriate to equate sexual orientation with sexual decency. They are saying that because she is bisexual, it is likely that she is attracted to minors who are young adolescent, or even pre-pubescent. I don't see that. I think that is crossing a different line. There has been on propensity motion, nothing like that." The prosecution argued that "the reference was relevant, but did not specifically name a purpose for the reference, such as to show intent, motive, or lack of mistake," instead stating "She is charged and accused of committing sexual crimes on a female with a male present. Whether or not she is a bisexual is relevant as to whether or not should would commit these crimes. McLean County Circuit Judge John Casey Costigan overruled the objection, stating, "The Court agrees with the State, including this potentially could have happened based upon the answer that was given." Judge Costigan did not discuss whether the evidence was overly prejudicial.

Defendant had been charged with aggravated criminal sexual abuse and criminal sexual assault. The jury convicted on sexual abuse but acquitted on sexual assault. The trial court at sentencing stated that defendant's position as N.N.'s stepmother put her in a position of trust for N.N.'s welfare, and was an aggravating factor, sentencing her to 14 years in prison.

After a lengthy recital of precedents on the issue, Justice Turner concluded, "without evidence connecting the defendant's sexual orientation to a sexual interest in children, her sexual orientation was irrelevant. The burden was on the State to establish the relevancy of the evidence, but the State provided nothing indicating defendant's bisexuality extended to anyone other than adults. Further, the State never articulated any relevant use of the evidence other than the assumption a bisexual person would be more likely to commit a sex crime on a child of the same sex . . . Even in its brief on appeal, the State does not articulate a specific relevant use of the evidence other than to state 'an offender'es bisexuality is relevant where the victim was the subject of a homosexual act.'" The court found it was erroneous to introduce the evidence, and that the judge's charge to the jury was too general to counter it.

The court held that the State had a burden to show that an erroneous introduction of evidence was "harmless error," which it failed to do. "First, although the evidence consisted of a single question and answer in defendant's police interview, its topic was potentially inflammatory, and a camera angle change and redaction in the video drew attention to it. In general, we do not conclude it is something the jury would easily overlook or disregard." And, the court found this to be a "close case" given the conflicting testimony of what happened, with the credibility of the witnesses in question. The court also rejected the State's argument that the court's limiting instruction was "curative' in this case, as it was a general admonition against bias bae on sexual orientation, but did not tell the jury they should disregard the defendant's sexual orientation. "Overall, in such a close case, the State has not convinced us there is no reasonable probability the jury would have acquitted the defendant without the error." However, as the defendant was not arguing that double jeopardy precludes retrial, and the evidence was sufficient to sustain a conviction depending how the juror resolved contested factual issues, the court said that Amanda Petersen can be retried.

Having reversed the verdict, the court did not address other arguments raised on appeal by the defendant. ■

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 – 3RD CIRCUIT – In *W.R.R. v. Attorney General*, 2024 WL 243321, 2024 U.S. App. 1494 (Jan. 23, 2024), the court ruled against petitioner, self-described as non-binary, and upheld a removal order to the Dominican Republic (D.R.). Circuit Judge Stephanos Bibas wrote for the unanimous panel. Petitioner arrived as a "toddler" and received Deferred Action for Childhood Arrivals status, but Petitioner stole a car and fled from police, receiving an eight-year prison sentence and rendering themself removable. Responding to a deportation proceeding, they sought asylum, withholding of removal and protection under the Convention against Torture (CAT), claiming fear of gang violence and persecution as a *bisexual* man, but was denied relief by the Immigration Judge (IJ), who found that they had been convicted of a "particularly serious crime" and so was ineligible for asylum or withholding, and had failed to submit evidence specifically justifying CAT protection. The Board of Immigration Appeals (BIA) rejected Petitioner's motion to remand the case for further consideration, in which they raised for the first time the claim to be non-binary. W.R.R. submitted "hundreds of pages of supposedly previously unavailable evidence" in support of their motion. The BIA concurred with the IJ that the car theft conviction was serious enough to prelude ordinary asylum or withholding relief, but remanded for further consideration of the CAT claim. IJ Mirlande Tadal doubled down on her prior ruling against CAT relief, finding no specific evidence that W.R.R. personally would be tortured if returned to the Dominican Republic. The BIA dismissed W.R.R.'s appeal from these rulings, and the 3rd Circuit denied a petition for review. But W.R.R. moved again to reopen the BIA proceedings, submitting voluminous materials claimed to be "new evidence," but was turned down by the BIA again, and in this January 23 ruling is yet again denied relief by the 3rd Circuit. Judge Bibas wrote that the supplemental evidence presented was "not new," as most of it predated the relevant hearing or was based on sources predating that hearing. Furthermore, the court found that this evidence was not material, since it discussed just general D.R. conditions, "not how Petitioner specifically would fare there. It did nothing to cure the fatal evidentiary gap; the lack of anything tying the generalities to Petitioner personally." The court also said W.R.R. did not have a right to a supplemental hearing. W.R.R. claimed that having "come out as non-binary" after the BIA's earlier hearing justified requiring the BIA to take another look at their case. W.R.R. also wanted to raise a claim that their mental health was at stake, not just potential physical injury – an issue as to which the Attorney General had ruled in 2022 that IJs *may* consider mental health issues in deciding whether someone convicted of a particularly serious crime poses a danger to society – and argued that a hearing was required on this issue, but the court demurred, finding that the A.G.'s ruling was "permissive, not mandatory." So W.R.R. struck out again. W.R.R. is represented by Lauren Major, American Friends Service Committee, Newark. Judge Bibas was appointed by President Donald J. Trump. Other judges on the panel were Circuit Judge Kent A. Jordan, appointed by President George W. Bush, and Senior Circuit Judge Thomas L. Ambro, appointed by President Bill Clinton.

CIVIL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS – 4TH CIRCUIT – Alyssa Reid had a faculty appointment at James Madison University (JMU) in Virginia. She was accused of violating JMU's Title IX policy by engaging in a sexual/emotional relationship with a female graduate student. That relationship ended acrimoniously, and the graduate student, claiming that Reid had "manipulated" her, filed a Title IX complaint with the university. JMU's Title IX investigation culminated with a determination that Reid had violated the policy. While the investigation was pending, Reid was suspended, and was denied a promotion for which she had applied. She appealed the decision of the Title IX office to the university provost, who upheld the decision and accepted the recommendation that a reprimand be recorded in Reid's file. Meanwhile, Reid had resigned her faculty position and looked for work elsewhere. When she found that the reprimand in her file got in the way of finding new employment, she filed this lawsuit against JMU and several of its officials, alleging due process claims under Section 1983 (finding fault with the Title IX process as conducted then at JMU, which from the description in the 4th Circuit opinion by Circuit Judge A. Marvin Quattlebaum likely failed to meet minimum due process standards for a public institution), and a sex discrimination claim under Title IX, as well as state constitutional claims. Defendants moved to dismiss based on the statute of limitations, which for this purpose is two years. Reid filed her complaint more than two years after the Title IX investigation terminated in a finding that she had violated JMU's Title IX policies, but less than two years after the University provost denied her appeal and the reprimand was placed

in her file. U.S. District Judge Elizabeth Kay Dillon granted the motion to dismiss, concluding that Reid's claim accrued when the Title IX proceeding ended, as she knew about the alleged due process violations at that time. Disagreeing, the 4th Circuit panel held in *Reid v. James Madison University*, 2024 WL 87628, 2024 U.S. App. LEXIS 575 (Jan. 9, 2024), that her claim accrued when the provost rejected her appeal and accepted the Title IX office's recommended sanction of recording a reprimand in Reid's file. Gregory Dolin of the University of Baltimore School of Law represented Reid in the 4th Circuit. Judge Quattlebaum was appointed by President Donald J. Trump. The other judges on the unanimous panel were Circuit Judges Paul Niemeyer (appointed by President George H.W. Bush) and Stephanie Thacker (appointed by President Donald J. Trump).

U.S. COURT OF APPEALS – 10TH CIRCUIT – Dr. Tinsley Saramosing describes herself as "a female who is transgender and has medically and socially transitioned. A native of Oklahoma where she currently resides, she has "had both legal name and gender marker changes made to her driver's license, passport, birth certificate and social security card." She filed a complaint in the Western District of Oklahoma mounting an attack on a recently enacted Oklahoma statute that requires permanent medical transition before transgender individuals can obtain amended birth certificates, which are then notated with the changes to names or gender on the amended birth certificate, so whoever views the document can deduce that the person is transgender. The complaint names as defendants five state officials in their official capacity only. Dr. Saramosing seeks injunctive relief to end all of the practice she describes and seeks damages, relying on 42 U.S.C. Sec. 1983 for jurisdiction. In *Saramosing v. Corbett,* 2024 WL 277682, 2024 U.S. App. LEXIS 1716 (Jan. 25, 2024), a 10th Circuit panel affirmed a district court ruling dismissing the action on grounds of standing. In terms of seeking prospective injunctive relief, she can't rely on what happened to herself in the past to establish standing, so her first claim for relief fails because, the court points out, she cannot rely entirely on the prospective claims of *other* transgender people to establish her own standing to sue. The dispute has to be between her and the government. She has already undergone medical transition and actually received her amended birth certificate. She has to allege a current or prospective injury. Here she sought to rely on the notations, claiming she should be entitled to a birth certificate that does not show her former name and gender, and seeks an injunction accordingly. As to her claim for injunctive to get a clean birth certificate not showing amendments, the court found that allegations of present and future harm are insufficient because they rest solely on alleged hypothetical situations without showing that they are imminent or even likely to occur. The court rejected the argument that the district court was biased against her, arguing that defendants "repeatedly misgendered and deadnamed Plaintiff, and they also used anti-transgender slurs" without any rebuke from the district court judge. The court found that scrutiny of the record turned up no evidence along the lines argued by Saramosing. The court also rejected her contention that an adverse ruling by the trial judge was sufficient, standing alone, to establish judicial bias. Writing for the unanimous panel, Circuit Judge Paul J. Kelly commented, "Dr. Saramosing's district court and appellate filings are replete with passionate arguments. It is well-established, however, that 'standing is not measured by the intensity of a party's commitment, favor or aggression in pursuit of its alleged right and remedy. Nor is the perceived importance of the asserted right a substitute for constitutional standing. The Complaint fails to show a concrete, imminent, non-speculative injury to Dr. Saramosing that is redressable by the court." Further, the court denied Dr. Saramosing's motion to supplement the record to show what happened after she filed suit, holding that such evidence should have been introduced in testimony, not in a response to a motion to dismiss. Dr. Saramosing's facts would be determined based on the time when she filed suit. While conceding that her filings were "replete with passionate arguments," the court asserted that petitions of this sort don't decide lawsuits. "The Complaint failed to show a concrete, imminent, non-speculative injury to Dr. Saramosing that is redressable by the court. It therefore fails to establish Dr. Saramosing's standing. As to damages, the court noted that all defendants were sued in their official capacity, to they could not be sued for monetary damages and since injunctive relief is likely not available, any injury attributed to their enforcement of the statute would be non-compensable. Saramosing appears to be *pro se*. The panel consisted of Senior Circuit Judges Paul Kelly (appointed by President George H. W. Bush) and Carlos Lucero (appointed by President Bill Clinton, and Circuit Judge Robert Bacharach (appointed by President Barack Obama).

U.S. COURT OF APPEALS, 11TH CIRCUIT – In an unusual move, the 11th Circuit issued an order on January 11 that a preliminary injunction by the district court barring enforcement of certain provisions of an Alabama statute barring gender-affirming care for minors should be stayed while the Circuit Court is considering whether to grant *en banc* review after a three-judge panel had issued an opinion holding that the district court had used the wrong standard to decide whether plaintiffs were likely to prevail on the

merits of their constitutional challenge, and ordered the preliminary injunction vacated. The district court had applied heightened scrutiny, based on its 14th Amendment analysis; the three-judge panel, divided, found that this was a rational basis case, vacated the preliminary injunction, and sent the case back to the district court. This decision by the 11th Circuit in *Eknes-Tucker v. Governor of Alabama,* 80 F.4th 1205, was issued in August 2023. The plaintiffs challenging the statute quickly filed a motion for rehearing *en banc*. On September 15 a judge of the court ordered that the mandate to vacate the preliminary injunction not be issued while the petition for *en banc* review was pending. This brought forth from the state a motion to stay the preliminary injunction as the court considers whether to grant *en banc* review, which is what the court granted on January 11. Thus, the law banning gender-affirming care for minors will be allowed to go into effect.

ARIZONA – In *Doe v. Horne*, 2024 U.S. Dist. LEXIS 2540, 2024 WL 69645 (D. Ariz., Jan. 5, 2024), the plaintiffs, two transgender girls and their parents, seek declaratory and injunctive relief against enforcement of Arizona's recently enacted law, A.R.S. Sec. 15-120.02, that prohibits transgender girls and women from participating in interscholastic or intramural sports. The plaintiff girls are middle school students. The state defendants filed a demand for a jury trial, which provoked a motion to strike that demand from the plaintiffs. On January 5, U.S. District Judge Jennifer G. Zipps denied defendants' jury trial demand and granted the cross-motion to strike. Judge Zipps found that none of the federal statutes sued upon specifically authorized jury trial, and the 7th Amendment has also been construed not to apply when the only remedy plaintiffs are seeking is an equitable remedy – in this case an injunction against enforcement of an allegedly unconstitutional law. Juries are not empowered to exercise equitable judgment. Although the court doesn't discuss the political strategy behind the jury demand, it is clear when one considers that public opinion polls generally show a majority of the public disapproves of transgender women competing in women's sports. The idea of bringing a case of this sort before a jury is a non-starter. The judge also denied defendants' alternative request for an advisory jury. Plaintiffs are represented by attorneys with the National Center for Lesbian Rights, with pro bono counsel from Debevoise & Plimpton, LLP, and local counsel in Arizona: Colin Matthew Proksel, of Osborn Maledon PA, Phoenix. Judge Zipps was appointed by President Barack Obama.

CALIFORNIA – *LGBTQNation.com* reported on January 25 that Sacramento Superior Court Judge Christopher Krueger issued a temporary injunction against California Attorney General Rob Bonta in a suit brought by the Peace Officers Research Association of California (PORAC), the California Association of Highway Patrolmen and other organizations challenging a new rule announced by the Attorney General requiring police officers to report their gender identities when they provide documentation about the people they stop to comply with the Racial and Identity Profiling Act (RIPA). RIPA was passed to gather data about *who is being stopped* by police officers and for what purpose. Bonta added the requirement that police officers report their own gender identities in an order issued on January 1. Since these records will be accessible to other officers and members of the public, allege the plaintiffs, this constitutes a forced "outing" of transgender officers, which seems inconsistent with the position Bonta has taken regarding adoption by California school districts of rules requiring the schools to notify parents if their children are seeking accommodations for their gender identity, such as calling them by their desired names and pronouns and otherwise recognizing their gender identities. Bonta has filed suit against school districts, arguing that this violates the privacy rights of the students. Do police officers who may be transgender have the same privacy rights?

FLORIDA – Plaintiff Joseph Stelljes is a gay man who was not "out" in his workplace at Target. After several years of good work reviews and incentive payments, he began to need more frequent bathroom use, leading to adverse comments by his supervisor, and he ultimately took medical leave during which he was diagnosed with "Chron's Disease." Upon return to work he suffered increased harassment leading to his complaining to the employee helpline, after which he experienced "renewed harassment." He believes his supervisor discovered Stelljes' orientation when he saw a notification on Stelljes's phone from Grindr, and afterward noted that the supervisor began "issuing statements that were discriminatory based on sexual orientation" in an employee group chat. Stelljes reported this to Human Resources, after which he was placed on a "performance improvement plan with no good explanation" until he was terminated. He sued for discrimination because of age (47), disability, sexual orientation, and retaliation. Last year, U.S. District Judge Raag Singhal granted the employer's motion to dismiss the first amended complaint in its entirety for various pleading deficiencies, see *Stelljes v. Target Corporation*, 2023 U.S. Dist. LEXIS 154313 (S.D. Fla., Aug. 31, 2023), but without prejudice and with leave to file a second amended complaint, which Stelljes did by the court's deadline. In

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Stelljes v. Target Corporation, 2024 U.S. Dist. LEXIS 1118 (S.D. Fla., Jan. 3, 2024), the court granted the employer's motion to dismiss the sexual orientation and retaliation claims, and the parties went into mediation on the remaining claims, quickly reaching a settlement that was approved by the court, which finally dismissed the case. Of significance here was the court's insistence that Stelljes could not press a sexual orientation discrimination claim without alleging that he was treated worse than a similarly situated non-gay comparator, despite the allegations of homophobic comments by his supervisor, and that the retaliation claim could not be pursued without evidence linking the termination to protected activity. Stelljes is represented by Jason Saul Remer, of Remer Georges-Pierre & Hoogerwoerd PLLC, Coral Gables, FL, and Michael Thomas Wojnar, also of Coral Gables. Judge Singhal was appointed by President Donald J. Trump.

FLORIDA – When Governor Ron DeSantis suspended State Attorney Andrew Warren (Fla. 13th Judicial Circuit) in August 2022, one of the grounds he cited was that Warren had signed a statement by Fair and Just Prosecution (a reform organization) expressing concern about "bills targeting the transgender community," especially about minors' access to gender-affirming care. DeSantis also cited a statement by the same organization that Warren signed on abortion policy, and some policies Warren had formally adopted for his office of not prosecuting certain low-level offenses, and other political factors, claiming that an investigation showed Warren was derelict in his duties by not enforcing the law. Warren filed a 1st Amendment suit in federal court, but the district court concluded that most of the factors cited by DeSantis were not protected 1st Amendment activities and provided sufficient grounds for the suspension. In *Warren v. DeSantis*, 2024 WL 132518 (11th Cir., Jan. 11, 2024), the court of appeals reversed and remanded, finding that Warren's act of signing on to position statements by FJP were, contrary to the district court's finding, protected 1st Amendment activities. Further, the court found, DeSantis was apparently misrepresenting signing on to those political statements as equivalent to adopting a formal policy for his office of non-prosecution of Florida laws. On remand, the district court will have to re-examine its reasoning, so Warren's case is revived for now. At the time that Warren signed the FJP statements, Florida had not yet adopted statutory bans on gender-affirming care for minors or the abortion ban taking advantage of the license afforded by the *Dobbs* decision. Since the suspension, however, Florida has enacted prohibitions on gender-affirming care for minors and abortions after six weeks of pregnancy. Circuit Judge Jill Pryor (appointed by President Barack Obama) wrote for the court, with a concurring opinion by Circuit Judge Kevin Newsom (appointed by President Donald J. Trump). Sitting by designation, Senior District Judge Anne C. Conway (appointed by President George H.W. Bush was the third member of the panel.

INDIANA – In *K.C. v. The Individual Members of the Medical Licensing Board of Indiana*, 2024 WL 247284, 2024 U.S. Dist. LEXIS 11518 (S.D. Ind., Jan. 23, 2024), U.S. District Judge James Parker Hanlon issued an order granting plaintiffs' motion to certify three plaintiff classes and several subclasses in a lawsuit challenging Indiana Senate Enrolled Act 480, which would "prohibit physicians and other practitioners from knowingly providing gender transition procedures to a minor, and from aiding or abetting another physician or practitioner in the provision of gender transition procedures to a minor," as summarized by Judge Hanlon. The ACLU filed suit representing four minor children, their parents, and a doctor and her family medical practice, alleging a violation of the U.S. Constitution and various federal laws. The judge granted a preliminary injunction on June 16, 2023, to prevent part of the law from going into effect, which the state has appealed to the 7th Circuit, where oral argument was scheduled for February 16. (The district judge blocked enforcement of the ban on puberty blockers and cross-sex hormones, but not blocking the ban on surgical transition for minors, which the parties all agreed is generally not practiced in Indiana.) Meanwhile, in this order the court agreed to certify three classes for purposes of the plaintiffs' goal of achieving class-wide relief. Class 1 is the Minor Patient class, Class 2 is the Parent class, and Class 3 is the Provider class. Within these classes separate subclasses are broken out to specifically challenge the restriction of Medicaid coverage. The case has attracted significant amicus curiae interest, judging by the lengthy list of briefs filed with the 7th Circuit. Judge Hanlon was appointed by President Donald J. Trump.

INDIANA – Rodger Fain, then an employee of Twin Lakes Regional Sewer District, allegedly had a bit of a temper and occasionally resorted to profanity on the job. The District Manager admonished Fain about swearing and finally got him dismissed by approval of the Board. Fain, a gay man who never came out publicly but was known to be gay by some friends and family, brought a sexual orientation discrimination claim under Title VII, raising a significant question whether an employer could be held liable for sexual orientation discrimination against an employee whose sexual orientation was not actually known to the employer, but the court ended up not having to confront this question, because the employer, which had only 14 employees on its payroll, moved to dismiss on

grounds of jurisdiction. Title VII applies only to employers with at least fifteen employees. Fain argued in opposition that the members of the company's board of directors should be counted as employees, since they were each paid $50 for attending monthly board meetings. Treating Fain's argument more seriously than it deserved, since 7th Circuit precedent already held that members of corporate boards of directors are employers, not employees, for Title VII purposes, Chief U.S. District Judge Philip P. Simon carefully went through the factors that courts have considered in determining employee status in Title VII cases and came to the conclusion (Sound the trumpet fanfare!) that these board members were not employees, so the case must be dismissed. Since Indiana does not outlaw sexual orientation discrimination by state law, Fain is out of luck unless he could file a timely complaint and persuade the Indiana courts to adopt the reasoning of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), to find that the state's statutory sex discrimination ban should be construed to apply to sexual orientation claims. Although the opinion notes that Fain was sometimes teased by other employees because he was single and some presumed him to be gay, there is nothing in the court's fact recital that suggests his actual or perceived sexual orientation rather than his linguistic offenses was the cause of his termination. *Fain v. Twin Lakes Regional Sewer District,* 2024 WL 229504, 2024 U.S. Dist. LEXIS 10703 (N.D. Ind., Jan. 22, 2024). Fain is represented by Annavieve C. Conklin and Kathleen A. DeLaney, of DeLaney & DeLaney LLC, Indianapolis, IN. Judge Simon was appointed by President George W. Bush.

INDIANA – Chief U.S. District Judge Tanya Walton Pratt issued a mixed ruling, but largely favoring the employer, in *Stringham v. Carmel Clay Schools*, 2024 U.S. Dist. LEXIS 1684, 2024 WL 51185 (S.D. Ind., Jan. 4, 2024), in which a married lesbian guidance counselor contested her discharge for cause and asserted retaliation claims against her employer. Plaintiff claimed discrimination because of her sex, race, and national origin (Mexican American lesbian married to a woman), and retaliation against her when she complained about discrimination in the district's internal grievance process. Ruling on summary judgment motions, Judge Pratt found for the defendants on the discrimination claims but found that factual disputes concerning some of the retaliation claims precluded a grant of summary judgement as to those. The way Judge Pratt phrased her conclusion seemed to signal her expectation that the parties would reach a settlement on the retaliation claims, now that the constitutional and statutory discrimination claims were out of the picture. The opinion is heavy with extensive factual recitation that leads this reader to conclude that the defendants' substantial victory had much to do with the limited grounds of judicial review, as the court concluded that the school board's decision to terminate plaintiff for cause was due to be treated as a decision of an administrative agency that would be upheld unless there was found to be an abuse of discretion in light of the record before the body when it made its decision. The chronology in the opinion leads to an inference that the plaintiff was apparently a successful employee until a new supervisor came into play and began picking apart her job performance and imposing improvement plans that plaintiff failed to meet. Her problem was that evidence that her sexual orientation or marital situation (or race or national origin) was a reason for the supervisor's disapproval of her work seemed to be lacking, apart from largely hearsay evidence that was discounted by the court. The plaintiff is represented by counsel who came up with a panoply of legal theories on her behalf, but none prevailed except for some of the retaliation claims. Plaintiffs counsel are Jamie A. Maddox and Sandra L. Blevins of Betz & Associates, Indianapolis. Judge Pratt was appointed by President Barack Obama.

KENTUCKY – Wilfred Wollor was discharged from his job as an aircraft inspector by Collins Aerospace Headquarters after five years of employment. He was an at-will employee, who described himself in his pro se complaint as "an African and a Naturalized U.S. Citizen." The discharge arose from an incident in which a co-worker, a Black woman, remarked to him that one of their white co-workers was gay, and she believed people were born that way, which brought forth a homophobic diatribe from Wollor. The co-worker reported Wollor's comments, he was placed on paid leave and an investigation undertaken. A company representative asked him whether he told his co-worker that "they burn gay people alive in Africa." He responded, "no, I didn't say it like that, the way you said it," and then stated, in his own words quoted in his *pro se* complaint: "I said I don't think that people are born gay, I believe people are sexually molested into being gay, I said if only people could report when they are inappropriately touched, once they don't report that incident instantly when it happened, they have given the molester the freedom to keep sexually molesting them and that is how I think people become gay. I said in Africa when a rapist or a gay person is cought [sic] sexually molesting or having sex with a child, the angry crowd of people will bring that person out into the street and they will burn that person alive before the police even arrive, they say they do that as a deterrence to others." He claims the company representative then said to him "you people are the want [sic] that makes gay workers uncomfortable on the job." Wollor was subsequently

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terminated. He filed *pro se* in state court, claiming he was a victim of wrongful termination and race discrimination, not mentioning any source of law. The company removed the case to federal court under diversity jurisdiction and filed a motion to dismiss. In *Wollor v. Collins Aerospace Headquarters*, 2024 U.S. Dist. LEXIS 269, 2024 WL 25097 (W.D. Ky., Jan. 2, 2024), U.S. District Judge Claria Horn Boom noted the employer's argument that the complaint could be dismissed for failing to comply with FRCP 8 and 10, as it is a "five-page, single-paragraph narrative of the events leading up to his termination, some of what are relevant to his termination and others of which are entirely unrelated. At the outset of his narrative, Plaintiffs states that he is 'seeking for a jury trial against former employer Collins Aerospace for discrimination and wrongful termination." Since he doesn't mention any statutes, the court infers that he means to bring a common law wrongful termination claim and a discrimination claim under Kentucky's civil rights statute. The court declined to dismiss solely because the complaint does not have the required numbered paragraphs and statement of legal authorities, instead analyzing his claims. The court concludes that he failed to state a claim under Kentucky law, with no indication that his race had anything to do with the discharge, and the company representative's reference to "you people" under the context could be a reference to people who make homophobic remarks in the workplace. Wollor's attempt to suggest a comparator white employee to bolster his discrimination clam failed, and he failed to invoke a public policy that would be violated by his discharge, the court granted the company's motion to dismiss the complaint. Judge Boom was appointed by President Donald J. Trump.

LOUISIANA – The *pro se* Plaintiff, Montreal Linn, filed a rather incoherent complaint alleging violations of various federal statutes as well as claims in negligence, contract and tort, alleging discrimination against him by the Louisiana Workforce Commission. *Linn v. Louisiana Workforce Commission,* 2024 WL 115931, 2024 U.S. Dist. LEXIS 5688 (W.D. La., Jan. 10, 2024). As with so many *pro se* complaints, the pleadings failed to state a cause of action and failed to make clear in what particulars the Workforce Commission violated Linn's rights. The complaint does not allege that he is or was an employee of the defendant, so his Title VII sexual orientation claim was gone. Senior District Judge Elizabeth Erny Foote found that the Workforce Commission is a state entity, and that Louisiana has not waived its sovereign immunity against federal suits asserted under the Age Discrimination in Employment Act or the Americans with Disabilities Act, both invoked by Linn. (In Title VII, Congress implicitly waived state immunity by making the Act expressly applicable to state government employers who can be sued for its violation.) Rejecting defendant's argument to dismiss for improper venue, the court found that the complaint fell short in terms of stating a claim, not least because all the statutes invoked, regardless of sovereign immunity, require allegations of employment status. Since no federal claim was left standing, the court could refuse to consider state law claims. All claims were dismissed without prejudice, the norm for screening pro se complaints, except for the title VII claims, which was dismissed with prejudice. Judge Foote was appointed by President Barack Obama.

MISSOURI – In *Sproaps v. Brown*, 2024 WL 277943, 2024 U.S. Dist. LEXIS 13047 (E.D. Mo., Jan. 25, 2024), the gay *pro se* plaintiff alleges discrimination by his former building manager in violation of the federal Fair Housing Act (FHA) and Missouri statutory and common law. It seems that plaintiff had a falling out with his boyfriend (called, by the building manager "your Lover Boy") that resulted in the boyfriend engaging in some vandalism on the plaintiff's apartment, rendering it uninhabitable in the opinion of the plaintiff until repairs could be made (although plaintiff used the word inhabitable to mean uninhabitable in his complaint). When plaintiff contacted the building manager, plaintiff was told that because his "lover boy" cause the vandalism, plaintiff would have to bear the expense of fixing things, and that he stilled owed the manager money that was past due, as a result of which eviction had been threatened. Ultimately Sproaps paid the money demanded for the repairs, ownership of the building changed, and he no longer lives there. He is suing Brown, the former manager, claiming discrimination against him because of his sexual orientation and having a same-sex boyfriend. Senior U.S. District Judge Rodney W. Sippel refers to the "lover boy" comment as a "stray discriminatory remark" and writes, "there is no evidence linking defendant Brown's discriminatory remark to any discriminatory conduct . . . . The discriminatory remark was related to a dispute between the parties as to who caused, and was therefore financially responsible, for damage to Plaintiff's apartment," wrote Judge Sippel," who continued: "the evidence suggests that repairs were not done on Plaintiff's apartment because he owed money to Brown. Plaintiff alleges that Brown wanted him out so that he could rent to someone without a same-sex partner, but at one point, Brown agreed to drop eviction proceedings against Plaintiff in exchanged for money owed." While acknowledging that "Plaintiff may have reasonably found Brown's remark offensive," Sippel wrote, "isolated or stray remarks are not normally treated as evidence of discrimination, especially when they are not tied to management

policy or any discriminatory impact." Factual allegations here were deemed insufficient to state a claim under the FHA, and that dispensed with the only federal claim in the case, leaving the court free to decline jurisdiction over the state law claims. Judge Sippel was appointed by President Bill Clinton.

NEW YORK – The Equal Employment Opportunity Commission (EEOC) brought suit against T.C. Wheelers Bar & Pizzeria on behalf of a transgender complainant in March 2023, the first time EEOC had sued on a gender identity claim since the Obama Administration. (The Trump Administration took the position that gender identity claims were not actionable under Title VII.) On January 22, Bloomberg Law reported that EEOC and Wheelers had settled, with Wheelers agreeing to pay $25,000 as backpay and compensatory damages for a transgender man who claimed he was subjected to crude and derogatory references due to his transgender status. Wheelers also agreed as part of the settlement to adopt appropriate strong workplace policies aimed at preventing sex discrimination and harassment, including bias against transgender employees. Wheelers also undertook to train its employees about anti-discrimination obligations and to have an "independent human resources monitor" to investigate employee complaints and provide annual reports to the EEOC. The case is *EEOC v. T.C. Wheelers, Inc.*, W.D.N.Y., No. 1:23-cv-00286. The consent decree settling the case was signed on January 19.

UTAH – *Bugg v. Benson*, 2024 WL 170742, 2024 U.S. Dist. LEXIS 8281 (D. Utah, Jan. 16, 2024), is yet another lawsuit by a professor who claims he is being unconstitutionally restricted by being required to use the pronouns that students desire in addressing them. He is a tenured professor at Southern Utah University, which has a policy that professors are supposed to address students using the pronouns the students desire. In this case, the professor got in trouble over a non-binary student who wanted him to use neutral pronouns (e.g., them, they) because the student identified as neither male nor female. Professor Richard Bugg alleges that his continuing refusal to comply has incurred four sanctions from the University's Title IX office, leading him to file this lawsuit seeking a declaratory judgment that he is constitutionally entitled to do what he is doing. In this opinion, Senior U.S. District Judge David Nuffer affirmed a decision from last October by U.S. Magistrate Judge Paul Kohler denying Bugg's motion to file a fourth amended complaint. Bugg's counsel is identified in this opinion as Jerome H. Mooney and G. Randall Garrou, of Weston Garrou & Mooney, Los Angeles, CA. The court's docket indicates that Messrs. Garrou and Money have been representing Bugg throughout the litigation. The explanation they provided to explain the delay in seeking to add new legal theories after having already amended their complaint three times was that "the significant constitutional issues in this case are in a rapidly evolving area of constitutional law where the rights of LGBTQ+ students and the Title IX obligations of public universities come up against the First Amendment rights of professors." But they didn't cite any caselaw to the magistrate to illustrate this point that would show such "evolution" occurring between the filing of the third amended complaint and the motion to amend a fourth time, and they offered no other factual justification for the delay. Wrote Judge Nuffer, "The Tenth Circuit has cautioned courts against 'allowing plaintiffs to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, or to present theories seriatim in an effort to avoid dismissal.'" Judge Nuffer concluded that allowing the fourth amendment would make this complaint a "moving target" to the prejudice of defendants. The motion to amend is denied. The court set a deadline of February 17 for filing of dispositive pretrial motions. Judge Nuffer was appointed by President Barack Obama.

CRIMINAL LITIGATION NOTE

By Arthur S. Leonard

INDIANA – The Court of Appeals of Indiana affirmed the Madison Circuit Court's conviction of Jhanika R. Nance on a charge of rape as a level 3 felony in *Nance v. State of Indiana*, 2024 WL 340542, 2024 Ind. App. Unpub. LEXIS 99 (Jan. 30, 2024). The victim, a woman named B.R., was arrested for a probation violation and was placed in a cell at Madison County Jail with Nance as her cellmate. According to B.R.'s testimony, Nance told her that she was bisexual, was bored, and "wanted a snack." B.R. did not know what Nance meant, so she clarified "that she wanted to lick pussy." In her testimony to the court, B.R. detailed the sexual assaults committed upon her by Nance, who was much larger than B.R. and allegedly forced B.R. to submit to oral sex performed on her by Nance about half a dozen times. B.R. claims that she always indicated she did not want to do this, but she held off complaining to anybody at first out of fear of Nance. She eventually told another inmate, and word got to the jail staff. A registered nurse examined B.R. and found bruising on her legs and tenderness consistent with B.R.'s story. Nance was prosecuted and convicted of rape as a level 3 felony. Her only defense was consent, but B.R. proved more credible, and the Court of Appeals affirmed her conviction. The court's opinion does not mention what sentence it imposed. Nance was represented by Marietto V. Massillamany, of Massillamany Jeter & Carson LLP, Fishers, Indiana.

INCARCERATED PERSONS LITIGATION NOTES

By Arthur S. Leonard

ARIZONA – *Fly v. Peters*, 2024 WL 280350, 2024 U.S. Dist. LEXIS 13233 (D. Ariz., Jan. 25, 2024) – Consider the procedural maze confronting a transgender individual suing *pro se* in the federal prison system while being bounced around from one location to another. The litigation history in this case, set out in an opinion by U.S. District Judge Scott H. Rash, involves decisions by federal courts of appeals in three different circuits. Petitioner Fly, who identifies as a transgender woman and is referred to by the court using she/her pronouns, pled guilty in North Dakota to transportation with intent to engage in criminal sexual activity. The plea agreement waived her right to appeal over various issues. She appealed the requirement that she register as a sex offender to the 8th Circuit, which dismissed the appeal on the ground that her appellate claims fell within the scope of the appeal waiver in the plea agreement. Then she filed a motion protesting her conditions of confinement under 28 USC Sec. 2255, but the trial court found her claims concerning the trial process outside the scope of a Sec. 2255 motion, and the 8th Circuit rejected her attempt to appeal. Then she filed a 28 U.S.C. Section 2214 petition for a writ of habeas corpus in the Central District of Illinois (where she was incarcerated at the time), raising claims regarding her conditions of confinement, conviction, and sentence. The court dismissed the petition. Conditions of confinement could not be litigated as part of a habeas proceeding, and attacks on her conviction and sentence could not be brought under Sec. 2241. The conditions of confinement claims were a panoply of mistreatment that one frequently sees in *pro se* suits by incarcerated transgender people. The 7th Circuit affirmed the district court and denied a petition for panel rehearing. Then while incarcerated in the U.S. penitentiary in Tucson, Arizona, Fly tried again, filing a habeas petition in the Arizona district court, and ran into a barrage of procedural discussion by Judge Rash explaining why Fly's complaints about the trial process were not properly before the judge in this motion. As to conditions of confinement, the court pointed out that these can't be raised in a habeas petition, and the case is misfiled as such. But Fly also has a civil rights action on confinement conditions pending in the same court, so the claims concerning confinement in the habeas petition are dismissed, being essentially duplicative. And, indeed, in a footnote the court observes that after she filed this Petition, she was transferred several times and is currently confined in Florida. The third circuit decision? Judge Rash had denied a petition to proceed in forma pauperis, which was upheld by the 9th Circuit. Is Fly the victim of a royal runaround from the Federal Bureau of Prisons? After she files in a district court, she is transferred to a different jurisdiction. Again and again. But there are likely lots of facts one does not get from reading this opinion. Maybe as a transgender person standing up for her rights, she manages to alienate prison authorities wherever she goes, incentivizing them to keep transferring her around the system. Judge Rash was appointed by President Donald J. Trump in 2019. Judging from the date he joined the Federalist Society (2018), he was possibly one of many conservative lawyers hopeful for a federal judicial appointment who suddenly found it useful to obtain such membership before putting in his papers for consideration.

CALIFORNIA – *Claudio v. PIA Industries, Inc.*, 2024 WL 348521, 2024 U.S. Dist. LEXIS 16409 (S.D. Cal., Jan. 30, 2024) – Robert Claudio, suing *pro se*, claims to have suffered discrimination on the basis of gender identity, incarcerated in the California prison system, although it is unclear from the decision by Senior U.S. District Judge John A. Houston dismissing Claudio's case whether Claudio is really asserting a sexual orientation claim or a gender identity claim, since Claudio does not explicitly allege his own transgender status. In any event, the suit is dismissed for failure to state a claim because of jurisdictional issues and incompetent pleading. For one thing, the 11th Amendment bars a suit against the California Department of Corrections and Rehabilitation (CDCR) and the Prison Industry Authority (PIA Industries), as they are state entities that enjoy immunity from suit for damages in federal court. Furthermore, various prison management personnel can't be sued in their official capacities for damages and are not liable on *respondeat superior* grounds for actions committed by their subordinates. That leaves some individually named subordinates, who are alleged to have conspired to set up Claudio with phony theft charges to get him removed from the job he was performing in PIA's shoe-making operation. Claudio asserts various homophobic comments to allege that he was discriminated against because of his gender identity. The court finds, however, that he failed to state a claim because his complaint does not describe what each of the named defendants did to violate Claudio's rights, instead making general statements about being set up unfairly. After explaining the particularity with which Claudio must describe who said or did what in order to hold the individual defendants liable, Judge Houston dismissed without prejudice and gave Claudio 45 days to file an amended complaint. In an uncontroversial part of the opinion, the judge explained his decision to allow Claudio to proceed *in forma pauperis*. Judge Houston was appointed by President George W. Bush.

INCARCERATED PERSONS LITIG. *notes*

CONNECTICUT – *Jones v. Beckert*, 2024 WL 308480, 2024 U.S. Dist. LEXIS 14073 (D. Conn., Jan. 26, 2024) – *Pro se* plaintiff DeShante Scott Jones brought a 42 USC 1983 action against the warden and five corrections officers at Garner Correctional Institution, he called the Prison Rape Elimination Act hotline to complain that Officer Beckert had harassed him and called him "pretty boy homo" and "faggot." He claims that Beckert told another incarcerated person that Jones wanted to "lick him in a sexual manner," and that she told other incarcerated individuals that Jones had been masturbating. In addition to the PREA call he sent letters and grievances to Warden Maldonado but asserts that she "did nothing" in response. He claims that Beckert told him that she would have someone go into his cell and "destroy" his legal work, and that subsequently happened, in an incident where he showed enough resistance to what he thought was an unjustified cell inspection to get him sent to an isolation cell. He complained of various other insulting forms of treatment by correctional officers, that he had been denied access to the courts (by the destruction of his "legal papers" which were removed and not returned), that he suffered retaliation because of his PREA complaint against Beckert, that he was subjected to sexual abuse/excessive force by one of the officers in a cell removal, and that generally he was subjected to cruel and unusual punishment, unsafe conditions of confinement, and deprivation of property. On screening his complaint, U.S. District Judge Vernon D. Oliver found that some of his claims survived screening and could be pursued: retaliation claims had been stated against Beckert and three other corrections officers, and a race discrimination claim violating equal protection was allowed to proceed, as well as a state law slander claim and some state statutory claims. However, nasty name-calling based on sexual orientation by corrections officers is not considered actionable as harassment under Section 1983. Judge Oliver was appointed by President Joe Biden.

FLORIDA – In *George v. Mathieu*, 2024 WL 149542, 2024 U.S. Dist. LEXIS 6463 (M.D. Fla., Jan. 12, 2024), the *pro se* plaintiff, incarcerated in a federal penitentiary, is living with HIV and takes anti-viral medication to keep his immune system operative. On December 4, 2020, he arrived at U.S. Penitentiary Coleman with a seven-day supply of medication. He claims that the medical staff was supposed to "put a refill" but failed to do so, despite his repeated requests. By the time he got medication, he had gone five days without it. He claims that his CD-4 count (a measure of immune function) was significantly below his norm when his blood was tested in January 2021. He sued two nurses on the prison medical staff who he claims knew about his serious medical condition but failed to order the refills in a timely fashion. He asserts a claim of deliberate indifference to his serious medical condition in violation of the 8th Amendment, seeking to hold the two nurses liable in a *Bivens* action. He seeks $1 million in compensatory damages and $1 million in punitive damages. (He's dreaming there . . .) The defendants moved to dismiss. U.S. District Judge Sheri Polster Chappell granted the motion in part and denied it in part. Ordinary negligence, even medical malpractice, have been held not to rise to the level of a constitutional violation, and the Supreme Court has limited *Bivens* claims to three factual contexts. One of those contexts, observes Judge Chappell, concerns claims of deliberate indifference to the serious medical condition of an incarcerated individual, rejecting defendants' argument that this case cannot be brought at all. However, the judge decided that George's factual allegations were insufficiently detailed to state a claim of deliberate indifference, and dismissed without prejudice, inviting George to file an amended complaint within ten days that "must state what each defendant knew about George's condition, when he or she knew it, and how he or she responded," as these facts will be crucial to determining whether the case qualifies for a *Bivens* action. The court attached a copy of the necessary form for filing an amended complaint to the opinion. Judge Chappell was appointed by President Barack Obama.

MICHIGAN – *Martin v. Unknown Halstead*, 2024 U.S. Dist. LEXIS 13236, 2024 WL 278212 (W.D. Mich., Jan. 25, 2024) – According to the allegations before the Magistrate Judge, pro so plaintiff Ricky Martin asked Corrections Office Halstead to turn off a fan that was blowing into Martin's cell, and Halstead at first denied his request, but later in the day, when Martin repeated his request, Halstead responded by asking Martin, "if I cut it off what are you gonna do for me?" Martin asserts that Halstead is "openly gay" and was soliciting sex. Martin felt "sexually violated" by this question, and responded, "I'm not gonna play faggot games and comments queer." Martin requested a PREA grievance form and submitted a grievance about Halstead's conduct that day. The following day, Halstead charged Martin with sexual misconduct, alleging that while Halstead was passing out food trays, Martin "stuck his erect penis out of the food slot asking if I wanted to touch it." Martin, who denied the incident, was subsequently found not guilty of this charge. He grieved against Halstead, charging him with violating Martin's First Amendment rights by retaliation against him for filing the PREA grievance. Halstead moved for summary judgment. Magistrate Judge Phillip J. Green issued a Report and Recommendation on September 26 (see 2023 U.S. Dist. LEXIS 234039), finding that Martin's PREA grievance was not frivolous, and that Martin's allegations

were sufficient to state a retaliation claim. However, he recommended dismissing any official capacity claims against Halstead, while at the same time rejecting Halstead claim for qualified immunity. Halstead filed objections to the R & R, specifically arguing, as he had to the Magistrate, that his comment to Martin was not a sexual solicitation and that he was not "openly gay." Senior District Judge Janet T. Neff said the case boiled down to how Halstead's comment could be construed in the prison setting. "Defendant may be correct that the Magistrate Judge erred in accepting Plaintiff's assertion that Defendant is 'openly' gay. The Court does not condign Plaintiff's apparent reasons for believing that Defendant was gay. Nonetheless, Defendant's sexual orientation is not dispositive. In this Court's view, the statement 'what are you going to do for me' in a prison setting – specifically, the segregation unit while the officer is making rounds – could certainly be interpreted by the fact finder as sexual in nature. A reasonable jury could do the same. The question must be decided by a jury." Martin had asked for injunctive relief, which the magistrate had denied on the ground that "obey the law" injunctions are "not proper." But the magistrate judge found Martin was not entitled to monetary damages, and that claim should be dismissed as well. The district judge saw no legal error in the magistrate's conclusion and adopted the R & R. in full. Thus, Martin's claim to a First Amendment violation is vindicated, but he gets neither monetary nor injunctive relief. This leaves us puzzled. How about a declaratory judgment and an award of nominal damages, since courts generally hold that an individual whose constitutional rights are violated has suffered an injury? Judge Neff was appointed by President George W. Bush.

MICHIGAN – In *Smith v. Washington*, 2024 WL 233730 (E.D. Mich., Jan. 22, 2024), the *pro se* plaintiff, incarcerated at Macomb Correctional Facility in New Haven, Mich., claimed that he had endured several years of harassment and retaliation for filing verbal and written complaints, that his property has been damaged or destroyed several times, that the defendants have refused to investigate his complaints or wrongfully denied his grievances. He also claims that two of the named defendants have announced over the prison intercom that he was a "snitch" and several times called him a "homosexual," placing him in danger. He seeks monetary damages and injunctive relief. After granting Smith's request to proceed i*n forma pauperis*, the court dismissed claims against various named defendants who were not specifically alleged to have personal involvement, or as to whom claims were not actionable since precedents dictate that there is no constitutional liability for failing to investigate a grievance or denying a grievance wrongfully. Even wrongful destruction or taking of an incarcerated person's property is not considered a constitutional violation if state law provides a means of redress. However, Senior U.S. District Judge Bernard A. Friedman was not willing to dismiss the claims against two prison employees who made the intercom announcements. "Plaintiff's claim that Defendants Steece and Herbert called him a 'snitch' (and possibly a homosexual) over the prison intercom, if true, states a claim for relief," he wrote," as the act of labeling Plaintiff a 'snitch' amounts to deliberated indifference to Plaintiff's personal safety." Judge Friedman was appointed by President Ronald W. Reagan.

MISSOURI – Kelly McSean, a *pro se* plaintiff who identifies herself as a transgender woman, is a pretrial detainee at the St. Francois County Detention Center in Farmington, MO. Her dispute is with Nurse Harris of the detention center who, despite having access to McSean's medical records and knowing that McSean is transgender, sent her a letter using male pronouns. McSean alleges that this "misgendering" was "nothing less than discrimination meant to belittle, harass, and humiliate on the basis of sex, which is sexual harassment." She alleges violations of her rights to due process and equal protection (invoking the 5th and 14th Amendments). In addition, after she filed a grievance against Nurse Harris, Harris, accompanied by her son who also works at the Detention Center, informed McSean that she would no longer assist McSean with her "Medicaid application," and returned the uncompleted form to her. Screening the *pro se* complaint in *McSean v. Harris*, 2024 WL 195749, 2024 U.S. Dist. LEXIS 9243 (E.D. Mo., Jan. 18, 2024), U.S. District Judge Ronnie L. White inferred from these allegations that McSean meant to assert a 1st Amendment retaliation claim in addition to her due process and equal protection claims. After granting McSean's motion for leave to proceed in forma pauperis, the judge explained that the 14th Amendment claim would be dismissed, as a single incident of misgendering would not amount to a constitutional violation. However, the judge decided that McSean had adequately pleaded a 1st Amendment retaliation claim, and so authorized the clerk to serve the complaint as to that claim on Nurse Harris, who is sued in her individual capacity. McSean sought appointment of counsel, to which the judge's response was, effectively, not yet. "In this case," wrote Judge White, "there is no indication Plaintiff is not capable of representing herself, and nothing in the instant motion or in the record before the Court indicates that the factual or legal issues are sufficiently complex to justify the appointment of counsel." However, the denial was made without prejudice, and the suggestion that if "circumstances . . . change," McSean could reapply for

counsel. Judge White was appointed by President Barack Obama.

OHIO – *United States v. Nash*, 2024 U.S. App. LEXIS 730 (6th Circuit, Jan. 10, 2024) – The *pro se* transgender plaintiff was sentenced to 175 months incarceration followed by supervised release and a restitution requirement, having been convicted of being the leader of an identity theft ring found guilty of wire fraud, mail fraud, and aggravated identity theft. Plaintiff and confederates conspired to obtain identity information from poor people to file fraudulent unemployment insurance claims in six states. Since being incarcerated, she claims to have been subjected to 135 instances of sexual assault by fellow incarcerated individuals and at least one correctional officer and seeks compassionate release as the prison system seems incapable of protecting her. She asserts that this record of assault over the 97 months of her incarceration so far means that sexual assault has become a routine part of her punishment. She points to recently adopted guidelines making sexual assaults a ground for consideration in deciding motions for compassionate release. The district court denied her petition, finding that when all relevant statutory factors were weighed, the court should keep her in prison, and the 6th Circuit panel decided that this was not an abuse of discretion by the trial court. The 6th Circuit *per curiam* does not go into details about how the district court weighed the statutory factors, but it strikes this writer that protecting the public and the petitioner's leadership role in the identity-theft scam weighed heavily.

TENNESSEE – *Rush v. Burton*, 2024 WL 54599, 2024 U.S. Dist. LEXIS 1980 (E.D. Tenn., Jan. 4, 2024) – Cody Rush, a gay man incarcerated in Lincoln County Jail, sued *pro se* two corrections officers he alleges subjected him to name-calling and harsh comments that he found emotionally upsetting. He asserts that verbal abuse and harassment violated his constitutional rights, seeking $40,000 in damages for "mental distress." One of the defendants used "foul language and slurs" in addressing him, and the other called him a "fag" and a "crybaby," accused him of whining about "everything," and told him that "she hates retards." Although U.S. District Judge Clifton L. Corker granted Rush's motion to proceed *in forma pauperis*, upon screening the complaint the judge decided it failed to state a constitutional claim, and even if it did, under the Prison Litigation Reform Act damages would only be available for physical or economic injury, not emotional injury. "Plaintiff cannot sustain a Sec. 1983 action based on his allegations that Defendants threatened or taunted him with derogatory speech, because such conduct is not 'punishment' in the constitutional sense," wrote Judge Corker. "Neither does Defendants' conduct give rise to an equal protection violation," he continued. "In order to state a viable equal protection claim, 'a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" The judge pointed out that sexual orientation is not a "suspect class" in the 6th Circuit. Here, observed the judge, Rush had not alleged that he was "treated differently than similarly situated individuals with a different sexual orientation. And he has not presented any facts suggesting Defendants took action to deny him anything to which he was entitled, or which other inmates received." The judge declared that being subjected to verbal abuse is "insufficient to state an equal protection claim." Judge Corker was appointed by President Donald J. Trump.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

GENDER-AFFIRMING CARE – According to the Kaiser Family Foundation, as of the end of January, 23 states have laws on the books adversely affecting the ability of transgender minors to obtain gender-affirming care, usually by threatening license health care providers with license revocation, fines, or imprisonment so as to make the procedures unavailable in the jurisdiction. As of that date, sixteen of those state laws are being actively challenged in courts – almost always federal district courts – and a few have either been permanently enjoined in a ruling on the merits or in more cases preliminarily enjoined while litigation advances. Kaiser estimates that 38% of transgender minors live in jurisdictions that make it impossible for them to obtain gender-affirming care in their state of domicile. All the states that have legislated in this way have state governments controlled by Republicans, who have made "defending vulnerable children" their meme on the subject. Three petitions are pending in the U.S. Supreme Court for review of a 6th Circuit decision rejecting due process and equal protection challenges to such laws in Kentucky and Tennessee. As of the end of January, it was anticipated that the Court will take up these petitions in conference during February. If certiorari is granted, the case(s) would be argued next term, with a decision expected in 2025. In the interim, it is likely that many – perhaps all – of the pending challenges within other circuits may be put on hold until the Supreme Court rules. It is also possible that the Supreme Court will reach this issue on its shadow docket in responding to petitions to stay lower court preliminary and permanent injunctions while the 6th Circuit case

is pending before the Court. The 9th Circuit having refused to stay the preliminary injunction in Idaho while a direct appeal of that injunction is being considered, Idaho might petition the Supreme Court for such interim relief in order to make its new law enforceable. If the Court grants review, it is possible that the issue will be argued, with attendant media attention during the final weeks of the presidential and congressional election campaigns.

U.S. DEPARTMENT OF HEATH AND HUMAN SERVICES – HHS issued a final rule on January 9 that displaced a Trump Administration rule authorizing doctors and other medical professionals to refuse to treat patients for religious reasons. The main targets of the Trump rule were pregnant persons and LGBTQ people. Although the Trump rule had been blocked through legal proceedings, the substitution of the new rule makes it unnecessary for courts to rule on the merits in pending cases.

FLORIDA – The latest front in the DeSantis Administration's war on transgender people is in the Department of Motor Vehicles. On January 26, Deputy Executive Director Robert Kynoch released a letter sent to all "County Tax Collectors" indicating that the DMV was unilaterally changing its rules and would henceforth deny applications for a new driver license for transgender people who want to replace the old license, former picture, and former gender designation. Henceforth, applicants for driver licenses will have to document their biological sex, and that will dictate how they are identified. Thus, the DMV was rescinding a prior practice of granting new licenses for transgender people. Furthermore, the letter stated that "misrepresenting one's gender, understood as sex, on a driver license constitutes fraud . . . and subjects an offender to criminal and civil penalties, including cancellation, suspension, or revocation of his or her driver license." The letter devoted a full paragraph to relating the DeSantis Administration's anti-trans catechism, insisting that sex means biological sex (i.e., "determined by innate and immutable biological and genetic characteristics"). The paragraph seeks to justify this move by asserting that a driver license is a form of identification and allowing licenses according to gender identity would undermine the state's ability to enforce its laws, such as the new law on use of public restrooms, which criminalizes the use by transgender people of the "wrong" restroom (that is, wrong in the eyes of the governor and his acolytes). The government of Florida appears to desire that all transgender people leave the state, as they work on new legislation to forbid gender-affirming care for transgender people of all ages, not just minors.

NEW YORK – on January 30, Governor Kathy Hochul signed into law a bill that redefines the crime of rape in New York so as to change its heteronormative definition to a broader definition that encompasses oral and anal sex as well as vaginal intercourse. Gov. Hochul commented: "We are reassuring survivors that when they walk into a police station or approach the witness stand that the full weight of the law is behind them now going forward. Rape will be treated like the horrific crime it is. The voices have been heard, and we affirm that justice will be served." The effort to pass the law emerged from a notorious case in which jurors acquitted the perpetrator of a sexual assault because they could not conclude based on the evidence that vaginal penetration had been achieved by the assailant. Co-sponsor Brad Holyman-Sigal, an out gay Manhattan state senator, issued a statement: "In New York State we cannot allow outdated, heteronormative notions of sex to limit our ability to acknowledge the fact and to hold those who commit acts of sexual violence accountable." Under the new law, LGBTQ victims of sexual assault that involves oral or anal sex will find protection under the revised rape law.

NEW YORK – In *Doe v. Hunter*, 2024 WL 113556, 2024 U.S. Dist. LEXIS 5255 (S.D.N.Y., Jan. 10, 2024), Chief U.S. District Judge Laura Taylor Swain denied the *pro se* gay Plaintiff's motion to proceed under a pseudonym in his suit against former fellow Columbia University students and staff arising out of an incident in a Columbia residence hall. According to Plaintiff, he is an African American gay man who as a sophomore was living in Columbia's Intercultural Resources House. On September 7, 2012, he was attending a party in the dorm room of two of the defendants, at which he was encouraged to become severely intoxicated, in which state one of the defendants took videos that were subsequently distributed on-line. One of the defendants, "seeing that Plaintiff was severely intoxicated . . . escorted Plaintiff into the men's bathroom . . . where other student-Defendants were present directly outside the men's bathroom." Plaintiff claimed he asked to be allowed to leave, but that this defendant "refused to let Plaintiff go," and then "put Plaintiff on his knees in the corner of the men's bathroom, took off his pants and forced Plaintiff to perform oral sex on him against his will and without his consent. Plaintiff resisted [the student's] attempts to force him into the bathroom corner while [he] prevented him from escaping." This student than "took photos and/or video of his rape of Plaintiff" using a smartphone. "Plaintiff lost consciousness during his rape and his next memory is waking up to see [the student] in the hallway outside Plaintiff's dorm room . . . where Plaintiff immediately

questioned [him] as to what occurred the night before." Subsequently these photos and/or video were shown to other students, and apparently spread widely. "In the following weeks and months after the assault, a number of random students on Columbia's campus would take out their cell phones and take photos of Plaintiff as he walked through campus." Plaintiff alleged severe psychological injury as a result of this incident and ensuing events that required professional services and a medical leave of absence. He notified a Columbia Title IX investigator "but no action was taken against [the student] for recording a lewd and non-consensual encounter in the men's bathroom with Plaintiff" and instead this student and "his con-conspirators [sic]" reported to Columbia that Plaintiff himself had engaged in "some unspecified misconduct" and collaborated on falsehoods about Plaintiff that led to him being removed from that dormitory to a location on the other side of campus." Plaintiff has reported this to the US Department of Education's Office of Civil Rights. He alleges that Columbia fired its Title IX investigator in 2014. In this case, he sues the students involved and two "guardians" invoking 42 USC 1985(3) (conspiracy to violate civil rights) and state tort claims. The court denied the motion to proceed under a pseudonym after a detailed discussion about the factors considered in dealing with such motions, and further found that the pleadings would not support a federal civil rights claim. Turning to a possible diversity jurisdiction basis to allow the state law claims to proceed, the court noted that several of the individual defendants were, like Plaintiff, residents of New York, so a diversity claim could not be maintained against the defendant group as named due to the "complete diversity" rule. Furthermore, Plaintiff had failed to allege facts sufficient to meet the $75,000 minimum for damages in a diversity claim. While dismissing the case with leave to replead within 30 days, Judge Swain indicated that plaintiff could bring a diversity case suing only those defendants who are not residents of New York (which could include the chief malefactor, who is a resident of California) and provide the necessary factual allegations to document an injury exceeding $75,000. The judge advised that Plaintiff renew his motion to proceed anonymously when filing, providing a factual basis to meet the tests for a John Doe case that she described in this opinion, and submitting two complaints identical in substance, one under his name and the other under John Doe. After deciding the motion, she would accept the appropriate complaint for filing. The latest entry we found on the court's docket recorded receipt of a letter from the Plaintiff seeking a 60-day extension of the time to file a new complaint. There was no indication that Plaintiff had retained counsel, which would be advisable if he plans to pursue this further. Judge Swain was appointed by President Bill Clinton.

OHIO – The Ohio legislature voted to override Governor Mike DeWine's veto of HB 68, a measure banning gender-affirming health care for minors and preventing transgender girls or women from competing on female sports teams. Ohio became one of more than twenty states that have legislated such bans, despite overwhelming testimony against the measure during legislative hearings. In his veto message, the governor had stated: "Ultimately, I believe this is about protecting human life. Many parents have told me that their child would not have survived – would be dead today – if they had not received the treatment, they received from one of Ohio's children's hospitals." The governor was supportive of those seeking access to puberty blockers and hormone therapy, but was opposed to surgical transition by minors, and after his veto had issued an executive order prohibiting the performance of such surgery in Ohio's public hospitals. That became irrelevant after the law was passed over his veto, however. Next step: a lawsuit challenging the measure's constitutionality, which may be filed by the Ohio chapter of the ACLU. To date, every state law banning gender-affirming care for minors has been passed in states where the legislature and the governorship are controlled by Republicans. Governor DeWine was the rare Republican governor to veto such a measure.

UTAH – Governor Spencer Cox signed H.B. 257 into law. As summarized in a report by LGBTQNation.com, the bill "creates criminal penalties for many transgender people who use the bathroom associated with their gender." The bill distinguishes between transgender people who have had "bottom surgery" and thus no longer have the genitalia with which they were born, who can use public restrooms and locker room facilities consistent with their gender identity, and those who have not had such surgery. Evidently, Utah legislators and the governor are panicked at the thought of people with penises using women's restrooms – that's what all of this is about, right? There are fines and penalties involved with violations of the law, including substantial fines for businesses that don't enforce the rules. The measure also proposes "workarounds" for schools, all of which may put transgender students in the position of "outing" themselves as trans every time they use a restroom. Trans students who violate the rules may be subjected to criminal penalties.

WEST VIRGINIA – *Pink News* reported on January 15 that a trio of bills has been introduced in the West Virginia Senate (Bills 194, 195 and 197) seeking

INTERNATIONAL/PROFESSIONAL *notes*

to classify transgender people as "obscene," bar them from public places and within 2500 feet of a school (labeling such situations as "indecent exposure") and deny gender affirming care for anybody under age 21. In addition, they would threaten health care providers with loss of licensure and civil fines if they provided care prohibited by the bill and prohibit the use of state funds for any gender-affirming care, specifically authorizing whistleblower protection for individuals reporting violations of the spending prohibition. The bill also states that therapists and social workers should attempt to "cure" trans identities, labeling them as "sexual deviation." West Virginia has already prohibited providing gender-affirming care for minors under age 18.

INTERNATIONAL NOTES

By Arthur S. Leonard

CANADA – According to a report by the CBC (Canadian Broadcasting Corporation), Premier Danielle Smith of the province of Alberta released an announcement on January 31 of a series of policy proposals that may be adopted by legislation, regulation or executive order in the coming months concerning transgender youth. According to the report, minors under age 16 should not have access to any gender-affirming medical care, and surgical alteration should be prohibited under age 17. However, with permission from their parents, 16- and 17-year-olds would be allowed to start cross-sex hormones. Other policies announced included restrictions on name changes at school, restrictions against transgender girls competing on girls' sports teams, parents would have a veto over exposure of their children in school to information about sexual orientation and gender identity. The Education Ministry would be charged with reviewing and approving any materials to be presented in schools on these subjects.

ESTONIA – Family Act amendments, which opened up marriage for same-sex couples, went into effect on January 1, making Estonia the first former Soviet-ruled country to legalize same-sex marriage, according to a report in *The Guardian* of that date. The act was approved on a vote of 55-34 in the parliament last June. The installation of a progressive coalition government after the election of Kaja Kallas as prime minister last February was "credited with bolstering efforts to achieve marriage equality," according to the news report. Same-sex couples were authorized to register their marriage applications on-line on New Year's Day, and "the first applications will be processed and certified by February 2, with applications typically taking one to six months to process. Estonia began to recognize civil partnerships and cohabiting partners for various legal issues as early as 2013, and public support for recognizing same-sex marriages grew rapidly in recent years. In a 2023 poll by the Estonian Human Rights Center, 53% supported same-sex marriage.

FRANCE – President Emmanuel Macron has appointed Gabriel Attal, an out gay man, to be the new Prime Minister of France. In addition to be the first out gay person to occupy that petition, Attal, age 34, is the youngest. He was previously the Education Minister, and before that had several positions in Macron's government. A recent poll showed that he had the highest popularity rating of any French politician, but politicians apparently do not enjoy much public esteem in France, since he won that honor with a 40% approval rate. *NY Times,* Jan. 9.

RUSSIA – By the end of January, there were reports of prosecutions under recently adopted Russian laws cracking down on LGBTQ rights advocacy in the country. The trigger for prosecution in some cases has been displaying the rainbow flag on social media, in person, or on ornamental jewelry. All LGBTQ advocacy is now deemed by the state to be radical and illegal. In the few cases reported to date the penalties have been fines or relatively short jail terms.

PROFESSIONAL NOTES

By Arthur S. Leonard

The **NATIONAL LGBTQ+ BAR**, in collaboration with its **BLACK LGBTQ+ LEGAL PROFESSIONALS CAUCUS** and the **NATIONAL BAR ASSOCIATION**, have announced the **TYRON GARNER MEMORIAL SCHOLARSHIP**, to provide financial assistance to Black LGBTQ+ law students. Funds raised by April 1, 2024, will support one or more Black LGBTQ+ law students enrolled in an ABA-accredited law school, with a $2,500 one-time scholarship. For information, check the website of the National LGBTQ+ Bar. Tyron Garner was co-petitioner in *Lawrence v. Texas*, and historic Supreme Court decision striking down state laws against consensual sodomy between adults.

The **NATIONAL LGBTQ+ BAR** has announced new recipients of its *Out & Proud Counsel Award*, to be conferred on March 12 at a reception at 6 pm at the Ivy Hotel Chicago: **Amy Crawford**, First Assistant Corporation Counsel, City of Chicago Department of Law; **Jordan M. Heinz**, Senior Intellectual Property Counsel, Abbot; **Marion C. Moore**, Chief Assistant Corporation Counsel – Federal Civil Rights Litigation, City of Chicago Department of Law. Visit lgbtqbar.org to register for the event.

On January 17 the **NATIONAL CENTER FOR TRANSGENDER EQUALITY** and the **TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND** announced an intention to merge the two organizations, under the name of **ADVOCATES FOR TRANS EQUALITY**. Once the merger is accomplished, Andy Mara, executive director of TLDEF, and Rodrigo Heng-Lehtinen, executive director of NCTE, will serve as CEO and Executive Director, respectively. ATE will comprise both a 501(c)(3) organization focusing on litigation and public education, and a 501(c)(4) organization that will engage in political advocacy for trans equality at the local, state and federal level. The new organization will maintain offices in Washington, D.C., and New York City.

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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1. Crozier, Clay W., "Purposefulness" Throughout the Doctrines: The Importance of Masterpiece Cakeshop and Its Contribution to Constitutional Analysis, 36 Regent U. L. Rev. 59 (2023-2024).
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3. Nendze, Jonathan, First Comes Love, Then Comes Marriage, Then Comes a Bab: The Exclusion of Gay Men from New Jersey's Fertility Treatment Mandate, 27 Quinnipiac Health L.J. 95 (2024).
4. Oh, Reginald, The Anti-Constitutionality of the Deeply Rooted Test in *Dobbs v. Jackson*, 72 Clev. St. L. Rev. 83 (2023) (persuasively argues that Justice Alito's approach to determining "fundamental rights" in *Dobbs* is itself anti-constitutional in relying on the dubious proposition that state laws against abortion in effect in 1868 can be the basis for determining that the framers and ratifiers of the 14th Amendment would consider its adoption it to affirm the constitutionality of all existing state law restrictions on individual rights).
5. Rodriguez, Leah N., An Academic Freedom Exception to Garcetti: A Pronoun-ced Standard to Protect the Free Speech and Academic Freedom Rights of Public University Professors Facing Transgender Pronoun Mandates, 36 Regent U. L. Rev. 86 (2023-24) (Note the source! Argues that profs should have a first amendment right to misgender trans students).
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