SUPPLEMENT TO LGBTQ ESTATE PLANNING AND ADMINSTRATION IN 2019: APPLYING OBERGEFELL IN NORTH CAROLINA

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On June 15, 2020, the Supreme Court held that employment discrimination based upon sexual orientation or gender identity was unlawful discrimination "based upon sex" under Title VII of the Civil Rights Act (42 U.S.C. 2000d et seq.). *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). As discussed in the foregoing manuscript (Manuscript), the Obama Administration similarly interpreted the prohibitions against discrimination based upon sex to include discrimination based upon sexual orientation or gender identity under both Title IX of the Education Amendment of 1972 ((20 U.S.C. 1681 et seq.)[1] and under Section 1557 of the Affordable Care Act (42 U.S.C. 18116)[2]. However, prior to *Bostock v. Clayton County*, the Trump Administration reversed both of those interpretations.[3] Since *Bostock v. Clayton County* only dealt with employment discrimination under Title VII, future case law, legislation and regulatory action will be required to resolve the conflicting interpretations of LGBTQ rights outside of Title VII of the Civil Rights Act.[4]

Additionally, the litigation over the Trump Administration's reversal of the Open Service Directive and ban of transgender servicemembers in the military continues in the district court. The most recent decision being a ruling on discovery related to both the policy adopted by Secretary Carter and the policy adopted by Secretary Mattis.[5]

4815-6477-2804, v. 1

[1] Manuscript, pp 34-38.
[2] Manuscript, pp 26, 40-43.
[3] 2017 Dear Colleague Letter Dept of Justice, Civil Rights Division; Dept of Education, Office of Civil Rights. https://www.justice.gov/crt/page/file/942021/download. Final Rule 45 C.F.R. §92; Manuscript, pp 25-26, 40-43.
[4] See, Kohut, *Trouble, Good Trouble, Necessary Trouble and LGBTQ Equality: Pushing Forward as President Trump Steps Backwards.* Trial Briefs, Advocates for Justice (April 2018) (attached).
[5] Karnoski v. Trump, 2020 U.S. Dist. LEXIS 125023 (discovery order, July 15, 2020).

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Trouble, Good Trouble, Necessary Trouble and LGBTQ Equality: Pushing Forward as President Trump Steps Backwards[1]

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> *And I think we're going to have generations for years to come that will be prepared to get in trouble, good trouble, necessary trouble. And lead us to higher heights. It's a struggle that doesn't last one day, one week, one month, one year. It is the struggle of a lifetime, or maybe many lifetimes.*
>
> —Congressman John Lewis commenting on the inspiration of Dr. Martin Luther King, Jr.[2]

While speaking about the struggle for racial justice, Mr. Lewis' words also ring true in the contexts of social justice and LGBTQ equality, particularly as we live in this time of backlash.

Unsurprisingly, President Trump's campaign rhetoric that he was a champion of LGBTQ equality has proven empty. Within thirty-one days of Mr. Trump's inauguration, anti-LGBTQ policy reversals were in full swing. Fortunately, plaintiffs have been willing to get into "trouble, good trouble, necessary trouble" when denied their rights as LGBTQ citizens and the courts have generally leaned forward as Mr. Trump steps backwards.

Transgender Equality, Bathrooms, Locker Rooms, and Schools

Mr. Trump Steps Backwards

On February 22, 2017, under Attorney General Sessions and Secretary DeVos, the Departments of Justice (DOJ) and Education (DOE) issued a Dear College Letter (2017 Joint Guidance)[3] withdrawing the May 13, 2016, Joint Statements of Policy and Guidance (2016 Joint Statement of Policy) regarding enforcement of Title IX and transgender students.[4] The withdrawn 2016 Joint Statement of Policy, citing Price Waterhouse v. Hopkins[5] and its progeny, advised:

> The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[6]

In sharp contrast to the 2016 Joint Statement of Policy, the 2017 Joint Guidance questioned the Fourth Circuit's decision upholding the DOJ and DOE's 2016 interpretation that

"sex" includes gender identity relative to toilet, locker room and shower facilities and, instead, referenced a ruling of the United States Northern District of Texas, Wichita Division, holding that "sex" means "biological sex" assigned at birth. Despite North Carolina's debacles with HB2 and HB142, Mr. Trump's DOJ and DOE doubled down on the tenuous argument that "biological sex"—not gender identity—is the polestar for determining the rights of transgender persons as some had claimed it to be for marriage.[7] On March 6, 2017, shortly after the 2017 Joint Guidance, the Supreme Court vacated the Fourth Circuit's judgement and remanded the case for consideration in light of the 2017 Joint Guidance.[8]

Additionally, on March 2, 2017, the Department of Justice withdrew its 2016 appeal of a nationwide injunction against the Departments of Education, Justice, and Labor and the Equal Employment Opportunity Commission (EEOC) from interpreting and enforcing Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972 in a manner requiring that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.[9] The same day, the plaintiffs voluntarily dismissed the action, without prejudice, referencing the 2017 Joint Guidance.[10]

The Courts Lean Forward

Despite these policy reversals by the Trump Administration, the trend in the courts has been to respect and uphold the rights of transgender students. There is reason to believe this trend will continue, paving the way for bold advocacy.

Federal courts have enjoined public school districts from enforcing policies which prohibit school children from using restrooms and locker rooms aligned with their gender identity.[11] Federal courts have also denied injunctive relief to cisgender students claiming their privacy rights are violated by trans-inclusive policies.[12] On May 31, 2017, the Seventh Circuit upheld a preliminary injunction prohibiting the Kenosha Unified School District from denying the right of a transgender student to use bathrooms aligned with his gender identity, noting:

> Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy, and those who truly have privacy concerns are able to utilize a stall. . . . Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent chil-

dren who do not look alike anatomically. The School District has not drawn this line.[13]

The Open Service Directive

Mr. Trump Steps Backwards

On August 25, 2017, Mr. Trump issued a Memorandum to the Secretaries of Defense and Homeland Security (2017 Memorandum Regarding Transgender Servicemembers) extending the ban against transgender individuals serving in the military "until such time as the Secretary of Defense provides a recommendation to the contrary that I [Mr. Trump] find convincing. . . ." Prior to the Memorandum, the ban, as extended by Secretary of Defense Mattis, was set to expire on January 1, 2018, under the Open Service Directive. All of Mr. Trump's reasons for extending the ban—lifting the ban would hinder military effectiveness, disrupt unit cohesion, and tax military resources—were debunked in the Rand Corporation's 2016 Study, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*.[14] The Rand Corporation's Study estimated a mid-range of 2,450 transgender servicemembers in active duty and 1,510 in the reserves. [15] The report took note of the lack of thorough epidemiological studies and a range of estimates in prior studies from 1,323 to 6,630 transgender servicemembers in active duty and 830 to 4,160 transgender servicemembers in the reserves.[16]

The Courts Lean Forward

Responding to Mr. Trump, servicemembers obtained preliminary injunctions in four federal courts against extending the ban of transgender servicemembers.[17] On December 29, 2017, after two federal courts of appeal upheld the injunctions, the DOJ announced the withdraw of its appeal to the Ninth Circuit.[18] Transgender individuals became eligible to enlist in the U.S. Military effective January 1, 2018. Despite the expiration of the ban, DOJ will continue its challenge against the Open Service Directive in the district courts. A DOJ official, upon the condition of anonymity, stated to the press:

> The Department of Defense has announced that it will be releasing an independent study of these issues in the coming weeks. So rather than litigate this interim appeal before that occurs, the administration has decided to wait for DOD's study and will continue to defend the president's lawful authority in District Court in the meantime."[19]

On March 23, 2018, within twenty-four (24) hours after a court ordered deadline compelling initial disclosures under Rule 26(a)(1) in one of the cases, *Karnoski v. Trump*, the Defendants, Mr. Trump and the Secretary of Defense Mattis, filed a Motion for Protective Order and Motion to Dissolve the Preliminary Injunction.[20] The motion to dissolve the preliminary injunction attached a Memorandum, dated March 23, 2018 (2018 Memorandum regarding Transgender Servicemembers) in which Mr. Trump revoked his 2017 Memorandum Regarding Transgender Servicemembers and announced the military would be adopting the recommendations of Secretary Mattis that "transgender persons with a history or diagnosis of gender dysphoria—individuals who the policies state may require substantial medical treatment, including medications and surgery—[be] disqualified from military service except under certain limited circumstances."

The motion to dissolve the preliminary injunction explained that Secretary Mattis recommends a new policy based upon the Department of Defense's 44-page report dated February 22, 2018, entitled Department of Defense Report and Recommendations on Military Service by Transgender Persons (2018 DOD Report).[21] The 2018 DOD Report questioned the findings in the Rand Corporation's 2016 Study.

Interestingly, the 2018 DOD Report recommends that Service members who were diagnosed with gender dysphoria by a military provider after the effective date of the Open Service Directive, but before the adoption of a new policy, "may continue to receive all medically necessary care, to change their gender marker . . . , and to serve in their preferred gender, even after the new policy commences . . .", but states that such an exemption "should be deemed severable from the rest of the policy" if the exemption is used by a court as a basis for invalidating the entire policy."[22] Though the Open Service Directive may be short lived, there is little doubt that any new policy banning transgender persons from service in the military will be challenged in the courts.

Discrimination Under Title VII and Title IX

Mr. Trump Steps Backwards

On May 25, 2017, the Second Circuit Court of Appeals granted a rehearing *en banc* in *Zarda v. Altitude Express, Inc.*[23] The issue in *Zarda* was whether discrimination based upon sexual orientation was unlawful sex discrimination under Title VII. Previously, the panel of the court was constrained by prior precedent and had upheld the district court's dismissal of Donald Zarda's sex discrimination claim against Altitude Express, Inc.[24] On June 23, 2017, the EEOC filed an amicus

brief[25] arguing that discrimination based upon sexual orientation was unlawful sex discrimination under Title VII.[26] Surprisingly, the DOJ filed an amicus brief in July 2017[27] arguing that Title VII's prohibition against sex discrimination does not include discrimination based upon sexual orientation.[28] During oral argument, the court questioned the conflicting positions taken by the EEOC and the DOJ.[29]

The Second and Seventh Circuits Lean Forward

On February 26, 2018, the Second Circuit held "that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex'."[30] While an in-depth analysis of the court's opinion is beyond the scope of this article, the majority rejected the arguments of the defendant and the DOJ, joining the Seventh Circuit Court of Appeals in holding that Title VII's prohibition against sex discrimination includes discrimination based upon sexual orientation.

On April 4, 2017, in *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit Court of Appeals, sitting *en banc*, held that discrimination based upon sexual orientation is unlawful sex discrimination under Title VII.[31] The court recognized "the paradoxical legal landscape [its former precedent created] in which a person can be married on Saturday and then fired on Monday for just that act."[32] The court discussed the consistency of its decision with the approach[33] taken in *Price Waterhouse v. Hopkins* (sexual stereotyping)[34] and *Onclale v. Sundowner Offshore Services, Inc.* (same-sex sexual harassment),[35] and noted the parallel between Virginia's unconstitutional prohibition of marital relationships between persons of different races and discrimination based upon martial relationships with a member of the same sex.[36] The court observed the "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex. . . ."[37]

Religious Freedom, Public Accommodation Laws and LGBTQ Equality

Mr. Trump Steps Backwards

Jack Phillips refused to bake a wedding cake for newlyweds, Charlie Craig and David Mullins, contending that such would be contrary to his religious beliefs, as well as his right to Free Speech.[38] Both the Colorado Civil Rights Commission and Colorado Court of Appeals held the actions of Mr. Phillips and his bakery constituted unlawful discrimination under Colorado's public accommodation law.[39] *Mullins v. Masterpiece Cakeshop, Ltd.* is now before the Supreme Court.[40]

In September 2017, the Trump Administration filed an amicus brief in the Supreme Court supporting the right of Jack Phillips and Masterpiece Cakeshop, Ltd., to refuse to bake a wedding cake for Charlie Craig and David Mullins upon the grounds that Colorado's public accommodation law violated his right to Free Speech under the First Amendment.[41]

On October 6, 2017, Attorney General Sessions issued a memorandum on "Federal Law Protections for Religious Liberty,"[42] providing guidance on religious liberty protections under federal law per Mr. Trump's Executive Order, dated May 4, 2017.[43] The first four principles read:

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.
2. The free exercise of religion includes the right to *act* or *abstain from action* in accordance with one's religious beliefs.
3. The freedom of religion extends to persons *and* organizations.[44]
4. Americans do not give up their freedom of religion by participating in the marketplace, partaking of the public square, or interacting with government.

Oregon Leans Forward, Will the Supreme Court?

On December 5, 2017, the Supreme Court heard arguments in *Masterpiece Cakeshop, Ltd.* A decision will be announced this year.

On December 28, 2017, in *Klein v. Oregon Bureau of Labor and Industries*, the Oregon Court of Appeals upheld an award of $135,000 in damages to the plaintiffs and rejected a baker's Free Speech argument under the First Amendment.[45]

The Supreme Court's decision this year in *Masterpiece Cakeshop, Ltd.* will be pivotal in the fight for LGBTQ equality. Regardless of the Court's decision, it is clear that during the Trump Administration LGBTQ citizens and their allies and advocates will be pressed into "trouble, good trouble, necessary trouble." ◆

1. The author acknowledges with appreciation the assistance of Sarah Morin-Gage, an associate with Kohut & Adams, P.A.

2. John Lewis, *Why Trouble is Necessary to Make Change*, Time, January 15, 2018, at 32.

3. https://www.justice.gov/crt/page/file/942021/download.

4. https://www.justice.gov/opa/file/850986/download.

5. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

6. https://www.justice.gov/opa/file/850986/download.

7. Shannon Price Minter, "*Déjà Vu All Over Again*": *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C.L. Rev. 1161, 1191-92 (2017) (discussing similarities between the "biological" arguments asserted by opponents to marriage equality and now transgender equality).

8. *Gloucester County School Board v. G.G*, 137 S. Ct. 1239, 1239 (2017). Based upon the withdraw of the 2016 Statement of Policy and Guidance, the Supreme Court vacated the Fourth Circuit Court of Appeals' decision in *Gloucester County School Board v. G.G.* (the Galvin Grimm case) and remanded the case "in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."

9. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) *appeal dismissed by Texas v United States*, 679 F App'x 320 (CA 5, 2017).

10. *Texas v. United States*, Case 7:16-cv-00054-0, Document 128, Filed 03/03/17.

11. *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016); *Evancho v. Pine Richland School District*, 237 F. Supp. 3d 267 (W.D. Penn. 2017).

12. *Doe v. Boyertown Area School District*, 2017 U.S. Dist. LEXIS 137317, 2017 WL 2675418 (E.D. Penn. 2017).

13. *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

14. Rand Corporation, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* (2016). https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf

15. Id. at 14-15. A 2014 study from the Williams Institute at UCLA estimated the prevalence of transgender servicemembers to be double that in the U.S. population at large – 8,800 transgender servicemembers in active duty and 6,700 transgender servicemembers in the reserves. http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf

16. *Id*.

17. *Doe 1 v. Trump*, 2017 U. S. App. LEXIS 26477, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017); *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx) (C.D. Cal. Dec. Dec. 22, 2017); *Stone v. Trump*, 2017 U. S. Dist. LEXIS 212556 (D. Md. Dec. 28,2017) (denying motion to stay preliminary injunction); and *Karnoski v. Trump*, 2017 U.S. Dist. LEXIS 213420 (W.D. Wash. Dec. 29, 2017) (denying motion to stay preliminary injunction).

18. http://www.foxnews.com/politics/2017/12/29/doj-not-appealing-transgender-military-ruling-but-not-abandoning-case.html
https://slate.com/news-and-politics/2017/12/trump-administration-wont-appeal-trans-troops-ban-to-the-supreme-court.html

19. *Id*.

20. *Karnoski v. Trump*, 2:17-cv-01279-MJP (W. D. Wa. 2017) (Order Granting Motion to Compel, March 14, 2018; Motion for Protective Order, March 23, 2018; and Motion to Dissolve The Preliminary Injunction, March 23, 2018).

21. U.S. Department of Defense, *Department of Defense Report and Recommendations on Military Service by Transgender Persons* (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF

22. *Supra*, at note 17, pp. 5-6.

23. *Zarda v. Altitude Express, Inc*., 2017 U.S. App. LEXIS 13127.

24. *Zarda v. Altitude Express, Inc*, 855 F.3d 76 (CA 2, 2017), *citing*, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (holding that Title VII does not prohibit discrimination based upon sexual orientation).

25. https://www.eeoc.gov/eeoc/litigation/briefs/zarda.html

26. https://www.c-span.org/video/?433984-1/zarda-v-altitude-express-oral-argument at 12:18

27. Brief for the United States as Amicus Curiae, p. 6, *Zarda v. Altitude Express, Inc*, 855 F.3d 76 (CA 2, 2017). https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf

28. https://www.c-span.org/video/?433984-1/zarda-v-altitude-express-oral-argument; at 1:01:49.

29. https://www.c-span.org/video/?433984-1/zarda-v-altitude-express-oral-argument at 28:06; *compare* https://www.eeoc.gov/eeoc/litigation/briefs/zarda.html and https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf.

30. *Zarda v. Altitude Express*, 2018 U.S. App. LEXIS 4608 (2nd Cir. 2018).

31. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017).

32. *Id*. at 342.

33. *Hively*, 853 F.3d at 342-45 (citing *Price Waterhouse*, 490 U.S. 228, 235 (1989); *Oncale*, 523 U. S. 75, 79-80 (1998)). In *Oncale*, the male plaintiff was sexually harassed by his male co-workers on an oil platform and the Court held that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Onclale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79-80 (1998).

34. 490 U.S. 228 (1989).

35. 523 U.S. 75 (1998).

36. *Hively*, 853 F.3d at 342 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

37. *Hively*, 853 F.3d at 350-51.

38. *Mullins v. Masterpiece Cakeshop, Inc*, 370 P3d 272 (2015), *cert. denied*, *Masterpiece Cakeshop, Inc. v. Colo. Civ. Rights Comm'n*, 2016 Colo. LEXIS 429, 2016 WL 1645027 (Colo. 2016), *cert. granted*, *Masterpeice Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 2017 U.S. LEXIS 4226 (U.S. June 26, 2017).

39. *Id*. at 279.

40. *Supra*, at note 33.

41. Brief for the United States as Amicus Curiae, p. 9-11, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, on writ of certiorari to the Court of Appeals of Colorado, https://assets.documentcloud.org/documents/3988525/16-111-United-States.pdf.

42. https://www.justice.gov/opa/press-release/file/1001891/download.

43. https://www.federalregister.gov/executive-order/13798 (emphasis in original).

44. The explanatory comment of principle 3 notes that organizations include "even businesses."

45. 289 Or. App. 507, 510, 2017 WL 6613356, 2017 Or. App. LEXIS 1598 (Or. App. Dec. 28, 2017).