

# NEW YORK ENACTS MARRIAGE EQUALITY LAW

More than doubling the portion of the United States population living in jurisdictions where same-sex couples are entitled to marry, New York's legislature approved a pending Marriage Equality bill late on Friday, June 24, and Governor Andrew Cuomo signed it into law just prior to midnight. The new law would go into effect 30 days after enactment, July 24. Anticipating many eager couples seeking to apply for licenses, officials in several municipalities, including New York City, Binghamton, Niagara Falls, Rochester, Brookhaven and Northampton (on Long Island), and Albany, announced that clerk's offices would especially open on Sunday to issue marriage licenses. Under New York law, license recipients must wait at least 24 hours to solemnize their wedding, but judges are authorized to waive that waiting period for adult applicants, and a call by court administrators for judges willing to volunteer to hear waiver applications, including on Sunday, July 24, brought numerous volunteers, including most of the state's openly LGB judges.

The Marriage Equality Act amends the statutory definition of a marriage in Section 10-A of the New York Domestic Relations Law to provide: "A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex," and mandates that same-sex and different-sex marriages be treated the same by the state government and its political subdivisions. According to a study of U.S. Census data by the Williams Institute at UCLA Law School, the percentage of the population living in jurisdictions authorizing same-sex marriage will go from about 5.1% to over 11.4% when the statute goes into effect.

Apart from the brief period when same-sex marriage was available in California from mid-June to early November 2008, New York will be the largest U.S. jurisdiction authorizing same-sex marriages, and is the largest to have reached this step through legislation rather than a court order.

Passage of the measure, a version of which had been approved by the Democratic-controlled State Assembly in three prior sessions but rejected by the State Senate in 2009, was widely attributed to the decisive leadership provided by Governor Cuomo, who made its passage one of his leading legislative priorities for 2011. As soon as the state budget (the number one priority) was approved, the Governor turned to this issue and summoned leaders of gay political groups to a strategy meeting at which agreement was achieved to present a united, coordinated campaign, with the Governor playing a personal role in lobbying legislators of both parties. The Governor also met with some influential Republican business leaders, who agreed to help underwrite the campaign and to assist in persuading a handful of Republican State Senators to vote for the bill, in the face of threats by the influential Conservative Party to actively oppose re-election of any Republican Senators who supported the bill, according to a post-enactment report by *The New York Times*.

Supported by an aggressive campaign of letters, phone calls, emails, Facebook page postings, and personal lobbying in district offices and in Albany, the Governor was able to persuade four Democratic senators who had voted against the bill in 2009 to change their positions, and ultimately won over four Republicans to create the necessary margin for victory in the Senate, a

chamber controlled by the Republicans by a margin of 32-30.

The measure passed the Assembly by a vote of 80-63 on June 15 in the form introduced by the Governor, and then passed the Senate 33-29 more than a week later in the waning moments of the legislative session, having been placed last on the agenda by the Republican leaders. The Senate vote came after the Assembly had agreed to a separate package of amendments rewriting the "religious exceptions" that had been part of the Governor's bill. The main suspense in the final days was about whether the measure would win the final one or two Republican votes necessary to make a majority (as the last two Republican Senators in question had refused to announce their positions publicly until the actual voting began), and whether the Republican Caucus would agree to allow the measure to come to the floor. The Republican Caucus was overwhelmingly opposed to the bill, and held numerous lengthy closed-door meetings about whether to allow it to come to the floor, as a handful of "undecided" Senators negotiated with the Governor over revisions to the "religious exception" language in the Governor's bill. On Friday afternoon, agreement was reached between the Governor and the Republican negotiators and a package of amendments was framed to be submitted to the Assembly and sent to the Senate floor. It was a politically interesting move for the Republican Caucus to agree to a floor vote, knowing that a measure that many of them strongly opposed was likely to pass.

Much of the media attention and public comment surrounding the "religious exceptions" focused on what should have been a non-issue: whether religious officials and

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## LESBIAN/GAY LAW NOTES

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entities were sufficiently protected from liability in case they refused to perform religious marriage ceremonies for same-sex couples and refused to make their facilities and services available for ceremonies solemnizing same-sex marriages. The bill as originally introduced by the Governor seemed to adequately provide for these exemptions in straightforward language, and mirrored or even went beyond the minimum that would probably be required by the Free Exercise of Religion requirements of the federal and state constitutions. However, various Republican Senators held out for more, seeking to ensure that local as well as state government would be bound by the exceptions, and, in some cases, apparently seeking to more broadly exempt religious and religiously-affiliated institutions from having to provide recognition of same-sex marriages in contexts beyond marriage ceremonies. The exemption language in the final bill was convoluted and not ideally clear, but ultimately appeared to track the existing exemption which has long existed in the state's Human Rights Law. Perhaps this is in the nature of legislative compromise, as it left the Republicans stating that they had achieved a broader religious exemption than originally contemplated in the Governor's bill, while the Governor and marriage equality proponents were left proclaiming that the final language did not "cross the line" to an inappropriately broad exemption.

Here is the language, so readers can judge for themselves:

"Section 10-B. Religious Exception.

"1. Notwithstanding any state, local or municipal law, rule, regulation, ordinance, or other provision of law to the contrary, a religious entity as defined under the Education Law or Section Two of the Religious Corporations Law, or a corporation incorporated under the Benevolent Orders Law or described in the Benevolent Orders Law but formed under any other law of this State, or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such re-

fusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits, or discriminate against such religious corporation, benevolent order, a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation.

"2. Notwithstanding any state, local or municipal law or rule, regulation, ordinance, or other provision of law to the contrary, nothing in this article shall limit or diminish the right, pursuant to subdivision eleven of Section Two Hundred Ninety-Six of the Executive Law, of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

"3. Nothing in this section shall be deemed or construed to limit the protections and exemptions otherwise provided to religious organizations under Section Three of Article One of the Constitution of the State of New York."

The religious exception section also contains a paragraph immunizing any "clergyman or minister" from any sort of adverse legal consequence for refusing to perform a marriage, and a "poison pill" provision, stating: "This Act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this Act shall be adjudged by any Court of competent jurisdiction to be invalid, the remainder of this Act shall be invalidated. Nothing herein shall be construed to affect the parties' right to appeal the matter." Thus, any litigation that successfully attacks any provision in the Marriage Equality Act will invalidate the entire Act. This provision seems to have been added primarily as a device to forestall challenges to the religious exception as violating the Establishment Clause of the 1st Amendment through its

extreme deference to religious organizations.

While the religious exception provisions make crystal clear that no religious or benevolent association may be required to take part in any way in a marriage of which it disapproves, the extent to which other non-profit organizations with religious ties or affiliations may be privileged to discriminate against same-sex spouses is not ideally clear, especially in light of the phrase "from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained," as applied to organizations that are "operated, supervised or controlled by or in connection with a religious organization." This language is taken from N.Y. Executive Law Section 296(11), the religious exception language in the New York State Human Rights Law, and there is not a robust body of case law construing this provision. (A quick check of the annotated statute showed only a handful of cases that have dealt with the subdivision 11 exemption. The one most pertinent to concerns expressed here is *Scheiber v. St. John's University*, 84 N.Y.2d 120 (1984), in which the N.Y. Court of Appeals confirmed that St. John's University would be considered a "religious institution" within the meaning of the Human Rights Law, but that the exemption only applied to discrimination on religious grounds; that is, St. John's would not be privileged to discriminate in employment based on race or sex by virtue of the exemption. One wonders whether the Court of Appeals would similarly rule that St. John's could not discriminate against a same-sex married couple due to their sexual orientation, in light of the "religious exception" in the Marriage Equality Act and the presumed religious basis for any such discrimination.) One of the things that caused some consternation among critics of the "religious exception" language is that it appears to give religiously-affiliated social service agencies that benefit from substantial government funding permission to discriminate in the provision of services. Unfortunately, the Human Rights Law exception does not seem to have been construed by the courts yet in the context of a religiously-affiliated social service agency. The idea that taxpayer money — including money paid by gay taxpayers — will be channeled to organizations whose right to

discriminate against gay people is expressly preserved does not sit well.

For example, would the “religious exception” have the effect of overruling the decision by the New York Court of Appeals in *Levin v. Yeshiva University*, 96 N.Y.2d 484 (2001), which found that the orthodox Jewish university’s medical school (Einstein Medical College) had unlawfully discriminated against a lesbian student on the basis of sexual orientation by refusing to allow her to have her same-sex partner live with her in University housing that was provided for married students? The University’s housing policy restricted occupancy of dormitory rooms to students and members of their legal families, and they did not allow students to take in roommates who were not also students. The Court of Appeals premised the University’s liability for discrimination on the NY City Human Rights Ordinance’s ban on sexual orientation discrimination, and the University conceded that the city law applied to it. Now, with the express “religious exception” language enacted, would a religiously-affiliated school such as Yeshiva University be privileged to refuse to recognize a student or a patient’s spousal relationship to a married same-sex partner on religious grounds? (One of the few cases construing the Human Rights Law’s religious exception found that St. John’s University was entitled to the religious exception.)

Would a religiously-affiliated residential facility (such as a retirement home, group home for persons with mental disabilities, or a nursing home, for example) be similarly privileged to refuse to recognize same-sex marital relationships of patients if their ownership or operational structure fell within the definition of the exception? These are all institutions that might conceivably qualify for the exception, depending how the language is interpreted, and which benefit from governmental funding, mainly through Medicaid and Medicare, and there is a lack of legislative history to shed light, since there are no committee reports, no hearings were held specifically on the final version of the exception language, which was negotiated in secret, and the text was not made public until it was presented to the Assembly and Senate on Friday June 24 for a vote, although it had been the subject of extensive negotiation for several days prior to the vote. New York had previously passed a statute guaranteeing hospital

access and decision-making rights for patient designees in addition to legal family members, that presumably would not be supplanted by the Marriage Equality Act religious exemption, but this might become a point of contention.

The Governor’s bill as originally introduced was accompanied by an explanatory memorandum that mentioned the existing Human Rights Law exceptions, but did not directly answer these questions. Due to changes in regulations implemented by the Obama Administration, hospitals that receive Medicaid or Medicare funds will not be able to discriminate with respect to patient access for same-sex partners, regardless of any state law religious exceptions — at least, if they want to remain eligible to participate in those programs, which are major source of income for hospitals. See 42 C.F.R. Sec. 482.13. But these regulations leave to state law the issue of decision-making rights, which may be just as important as access.

This question does *not* arise with respect to some employee benefits issues, most particularly health insurance and pension rights, because of federal preemption under the Employee Retirement Income Security Act [ERISA] of any state law affecting *employee benefit plans*, as defined in that federal statute. However, employee benefits that are not part of a *plan* covered by ERISA, such as unpaid family leave, family use of employer facilities, family discounts and memberships, and the like, that would be subject to state regulation; the religious exception provision most likely insulates objecting religious and religiously-affiliated employers from having to extend such fringe benefits to same-sex spouses of employees.

However, given the broad exception language already contained in the Human Rights Law, apart from more clearly spelling out the applicability of the religious exceptions to local and municipal governments, it may be that the amendments to the religious exception language negotiated in the days leading to enactment did not necessarily broaden the exception beyond what the Governor had originally proposed, and that claims by the Republican negotiators to have secured more than that have more to do with politics than legal substance. On the other hand, it was not ideally clear how these exceptions might

apply out in the real world away from the hothouse of the legislative chamber.

Prior to the enactment of the Marriage Equality Law, many New York courts and government agencies had recognized same-sex marriages contracted in Canada or in other states, but the State’s Department of Taxation and Revenue had refused to do so. The courts and other state agencies had premised marriage recognition, in part, on the lack of any New York version of the federal Defense of Marriage Act, so that there was no explicit state legislative barrier interposed against recognition, at least in the contexts in which the issue arose in litigation (about government employee benefits, divorce, estate administration). The Tax Department, on the other hand, relied on Section 607(b) of the New York Tax Law, which provides: “Marital or other status. An individual’s marital or other status under [state *income tax* provisions] shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates.” (In addition, Section 651(b) requires that if married couples file their federal tax returns separately, they must also file their state tax returns separately; however, this section refers to separate filings by “husbands and wives” so arguably should have no application to same-sex couples.) Prior to passage of the new law, the Tax Department took the position that it could not deviate from a legislative mandate that individuals be considered under New York law to have the same filing status as they have under federal law for purposes of the state income tax. Under federal law, due to Section 3 of the Defense of Marriage Act, same-sex couples are treated as unmarried despite the legal status of their relationship under state law. Legislation is pending in Congress to address this problem, but is given little chance of advancing in the current session.

The Marriage Equality Act provides: “No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-



neutral manner in all such sources of law.” In a section of the Marriage Equality Act labeled “legislative intent,” the law states: “It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.”

This language suggests an implicit amendment of Section 607(b) of the state’s Tax Law, eliminating differential treatment under New York tax law for same-sex spouses as compared to different-sex spouses. Under general principles of statutory interpretation, when two statutes come into conflict, the newer law is said to predominate over the older law, even if the newer law does not explicitly repeal or amend the older law. However, there is also a canon of statutory interpretation providing that when statutes conflict, the more specific would take priority over the more general. The Marriage Equality Act adopts a general policy of formal equality, while Section 607(b) provides a very specific rule requiring uniformity of filing status between federal and state income taxes. Implicit repeals of specific rules by general statutes are usually, but not invariably, disfavored. The statement in the “intent” section that the legislature intends equal treatment, regardless whether particular provisions of state law requiring something different have not been changed, suggests that the drafters of the Marriage Equality Act, to the extent they were concerned about this issue, intended that same-sex married couples be treated under the Tax law in the same manner as different-sex married couples, and would say that same-sex married couples are to be deemed married for purposes of New York’s personal income tax law. Presumably, they would say the same for purposes of the state gift and estate tax provisions, which are not expressly subject to 607(b) but also track federal tax law.

The Tax Department indicated that it would be publishing an advisory before too long, which should be useful for lawyers counseling clients on the legal impact of marrying. The marital deduction under the Estate Tax is potentially a big issue for married same-sex couples who own real property or other significant assets, and the practice under the New York Tax Law has been to use federal criteria for determining eligibility for a marital deduction. But the legal effect of enactment of the Marriage Equality Act for purposes of the state’s tax laws might not be finally determined — in the absence of legislative clarification — until tax issues end up in the courts. The ACLU’s pending DOMA challenge in the U.S. District Court in Manhattan, Edie Windsor’s suit for an estate tax refund, illustrates the marital deduction issue, and might lead to a resolution of that problem, especially if it results in an appellate precedent invalidating the application of DOMA in this context.

Within days after the measure was enacted, other issues began to spring up, and predictably so, in light of the experience in other states that authorized same-sex marriage prior to New York. The *Wall Street Journal* queried Human Resources departments at corporations that have domestic partnership plans, to ask whether their gay employees would have to marry their partners to continue receiving benefits, and predictably enough some said “yes” and created a new story for the media to chew over, beginning with the *Journal’s* report posted to its website on June 28. Some media inquiries uncovered some conservative employees in county clerk offices who were appalled that they might have to deal with same-sex couples coming in to apply for marriage licenses, and even to perform wedding ceremonies for them. (The statute insulates clergy from having to do this, but does not provide “conscience” protection for government employees.) Might there be some mini-rebellions in county clerk offices, or will people “suck it up” and do their jobs without a fuss? This issue seemed likely to heat up as the effective date of the statute approached. (Indeed, it was reported on July 13 that a town clerk in Barker was resigning her position rather than have to compromise her religious objections by issuing licenses to same-sex couples. *Ithaca Journal*.) Anticipating employer questions, some law firms quickly prepared and dis-

tributed advisories about the impact of the new law on compensation and employee benefits. See “Same-Sex couples May Now Marry in New York — Impact on Employee Benefits and Other Employment Rights,” 2011 WLNR 13268116 (Proskauer Rose LLP Employee Benefits, Executive Compensation & ERISA Litigation Center, July 5, 2011).

New York City Mayor Michael Bloomberg, who personally lobbied various state legislators in support of the bill, announced that he would be officiating at one of the first same-sex marriages, on July 24 at Gracie Mansion, for his chief policy advisor, John Feinblatt, and his Commissioner of Consumer Affairs, Jonathan Mintz, who have been a couple for fourteen years. The mayor is authorized under state law to solemnize weddings, but has previously done so only twice: for his daughter Emma in 2005 and for former Mayor Rudolph W. Giuliani in 2003. (Ironically, Giuliani, who as a former mayor is also authorized to perform weddings, was reported to have backed away from a promise he made years ago to perform a wedding for a gay couple with whom he lived for several months after his own marriage broke down. On this issue Giuliani has drifted rightward as he has gotten more involved in national Republican politics.) Competing for the claim to the first same-sex marriage performed in New York, Albany Mayor Jerry Jennings said he wanted to perform a ceremony just past midnight on July 24 if he could find a couple willing to be wed at that hour and a willing clerk and judge. . . . But it’s possible that the first same-sex marriage will be performed in a very traditional setting for honeymoons, as Niagara Falls Mayor Paul A. Dyster is set to officiate at the wedding of Kitty Lambert and Cheryle Rudd as they stand by the waterfall shortly after the stroke of midnight on the fateful date.

At the end of the day, the political enactment of Marriage Equality in New York State is a landmark achievement in the movement for equal rights for sexual minorities, whose significance overshadows details about religious exceptions, employee benefits and tax status. These issues have been worked out on a state-by-state basis in other jurisdictions as same-sex marriages, civil unions, and domestic partnerships have spread on both coasts and in the heartland, but they have not taken away from the overriding significance of legal

recognition for the relationships of LGBT people who have for so long been treated by government and society as “legal strangers” of their intimate partners. A.S.L.

## LESBIAN/GAY LEGAL NEWS AND NOTES

### Rhode Island Enacts Civil Union Law Despite Protests From the Left and the Right

On July 2, Rhode Island Governor Lincoln Chafee signed into law H 6103, amending the state’s domestic relations law to add a new Chapter 3.1 to Title 15 of the General Laws titled “Civil Unions.” Under the law, same-sex couples will be able to enter into civil unions that will have all the state law rights enjoyed by different-sex married couples, and the family court will have authority to use the provisions of the divorce law for dissolving civil unions. Acknowledging criticisms by both gay rights advocates, who wanted to hold out for marriage and were fiercely critical about a provision exempting religiously-affiliated organizations from any obligation to treat civil unions as “valid,” and same-sex marriage opponents, who bemoaned the extension of legal recognition to same-sex couples, the governor stated his sympathy with the criticisms by marriage equality advocates, but said he signed the measure because it “brings tangible rights and benefits to thousands of Rhode Islanders.” Of course, it only brings state law benefits, and then only to those who decide to register as civil union partners.

LGBT Rhode Islanders were cheered upon the election of Chafee as governor, for the Independent candidate had been a reliable pro-gay vote in the U.S. Senate, where he represented Rhode Island as a moderate Republican for many years. Chafee was elected on a platform that endorsed same-sex marriage, unlike his predecessor in the office. With Democratic majorities in both houses of the legislature, and an openly gay House Speaker, Gordon Fox, who expected to sponsor a marriage equality bill, it appeared that Rhode Island would join its bordering neighbors of Massachusetts and Connecticut. But it turned out that the leader of the other chamber, Senate President M. Teresa Paiva Weed, did not support same-sex marriages, and Fox had

difficulty finding enough votes to pass a marriage equality measure, so instead he decided to support civil unions, which were acceptable to Weed. Both houses approved the civil union measure and sent it on to the governor.

The civil union measure that was originally introduced ultimately picked up an exemption provision that struck many as unduly broad. It provides as follows:

“15-3.1-5. Conscience and religious organizations protected. — (a) Notwithstanding any other provision of law to the contrary, no religious or denominational organization, no organization operated for charitable or educational purpose which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required:

“(1) To provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization, certification, or celebration of any civil union; or

“(2) To solemnize or certify any civil union; or

“(3) To treat as valid any civil union;

“If such providing, solemnizing, certifying, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

“(b) No organization or individual as described in subsection (a) above who fails or refuses to provide, solemnize, certify, or treat as valid, as described in subsection (a) (1), (a)(2) or (a)(3) above, persons in a civil union, shall be subject to a fine, penalty, or other cause of action for such failure or refusal.”

This appears similar in scope to the exemption measure included in the New York Marriage Equality Law, although the section authorizing religious and religiously-affiliation organizations to treat civil unions as “invalid” seemed brazen by comparison to the circumlocutions of the New York provision. Despite urging by the anti-marriage crowd and a coalition of the gay advocacy groups to veto the measure, Governor Chafee quickly signed it, adding Rhode Island to the expanding list of jurisdictions that have adopted not-quite-equal marriage substitutes (under the names “civil union” or “domestic partner”) for same-sex couples. Civil unions are now available in Delaware, Hawaii, Illinois, and New Jer-

sey, while California, Oregon, Nevada, and Washington provide domestic partnerships of similar scope, while Maine, Colorado, and Wisconsin have domestic partnerships of narrower scope. A.S.L.

### 9th Circuit Panel Activates Injunction Against DADT, Stating: “The circumstances and balance of hardships have changed”; Justice Department Begg For Reconsideration

It did not take the U.S. 9th Circuit Court of Appeals, pondering a motion by Log Cabin Republicans to lift a stay of District Judge Virginia A. Phillips’ injunction against enforcement of the “Don’t Ask, Don’t Tell” military policy, very long to react to the Justice Department’s filing of a brief with the U.S. District Court in the *Golinski* spousal benefits case (see below), arguing that DOMA Section 3 is unconstitutional. In that brief, the Justice Department affirmatively argued that government policies that discriminate based on sexual orientation are subject to heightened scrutiny, and Section 3 can’t survive such scrutiny because it does not serve any important government interest. This was enough for the 9th Circuit panel, which issued an order on July 6 lifting the stay, saying that “the circumstances and balance of hardships have changed.” A few days later, the Pentagon announced it would comply with the injunction — terminating enforcement of DADT and instructing recruiters to accept applications from openly gay people. And on July 11, the 9th Circuit panel issued another order, asking whether the case should be dismissed as moot. This apparently woke up the Justice Department, which on July 14 filed an “Emergency Motion under Circuit Rule 27-3 for Reconsideration of Order Lifting Stay of Worldwide Injunction.” DOJ also filed a letter in response to the July 11 Order, contending that the court was misinterpreting its position and that the case as properly understood would not be moot until DADT was ended by certification of the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff.

Many commentators had reacted to DOJ’s *Golinski* brief as a real “game changer” in terms of gay rights constitutional litigation, for the government had gone from refusing to defend anti-gay discrimination,

in a February 23 announcement by Attorney General Eric Holder, to actively opposing it in the July 1 brief. This may be seen, in retrospect, as perhaps the most decisive action in support of gay rights yet taken by the Obama Administration, greater in its potential impact than the various administrative actions that have been taken to address individual inequities in federal policies or even than signing into law the Hate Crimes Act and the DADT Repeal Act, Obama's signal legislative accomplishment on behalf of gay rights. The DOJ brief now signals, according to this view, the government's position that not only is Section 3 of DOMA (the anti-gay definition of marriage under federal law) unconstitutional, but potentially all unequal treatment of gay people is unconstitutional.

This seems consistent with DOJ moves on the bi-national couples immigration front, as a recent directive from the Justice Department about the exercise of discretion in deciding whether to deport otherwise law-abiding undocumented foreign nationals who are spouses of legal U.S. residents and citizens has begun to pay off with some cancellations of deportation orders. See, e.g., M. O'Brien, *Gay couple gets two-year deportation reprieve*, *Contra Costa Times* (CA), July 31, 2011. It suggests that a brief similar to the July 1 brief in the *Golinski* case will also be filed in the U.S. 1st Circuit Court of Appeals in the *Gill* case, the pending appeal of a ruling last summer by District Judge Joseph Tauro holding Section 3 unconstitutional.

In September 2010, District Judge Virginia Phillips ruled in *Log Cabin Republicans v. United States of America*, 716 F.Supp.2d 884 (C.D.Cal. 2010), that the DADT policy violated the 5th Amendment equal protection rights of gays who sought to serve in the military, and issued a worldwide injunction against its enforcement. She refused to stay her injunction pending appeal, but a motions panel of the 9th Circuit responded to the Justice Department's emergency appeal and issued a stay pending an appeal and ruling on the merits. Then the Obama Administration used the threat of an injunction against the policy as part of the lobbying effort to pass the Don't Ask, Don't Tell Repeal Act, which was signed into law on December 22.

Under the DADT Repeal Act, the anti-gay military policy will end 60 days after a

written certification to Congress by President Obama, the Chair of the Joint Chiefs of Staff, and the Secretary of Defense that all steps have been taken to prepare for implementation of the new policy and that such implementation would not impair the effective operation of the armed forces. Policy changes and training have been ongoing, and President Obama indicated at the White House Gay Pride reception during June that certification would occur "in a matter of weeks, not months."

Meanwhile, having passed the repeal measure, the Justice Department asked the 9th Circuit to put the Log Cabin Republicans case on hold, keeping the stay in effect until the policy was lifted pursuant to the repeal measure, in order to avoid disruption and allow for an orderly policy transition. Log Cabin Republicans countered with a motion to lift the stay, arguing that the government was no longer contending that Section 654 was constitutional, and that every day DADT continued in effect was inflicting a constitutional injury on gays in the service. The court refused to put the case on hold, setting a briefing schedule and planning for oral argument to be held, eventually scheduled for the week of August 29. The Justice Department filed a brief with the court, arguing not that DADT as enacted was constitutional, but rather that the Repeal Act, which provides that DADT continues in effect until certification, presented a constitutionally acceptable method of abandoning the old policy without disrupting the military unduly. The sudden order on July 6 granting Log Cabin Republicans' motion to lift the stay was a surprise, but a logical development given the Justice Department's position (or lack of position) on constitutionality of the underlying policy.

The court's order, issued by a three judge panel consisting of Chief Judge Alex Kozinski and Judges Kim McLane Wardlaw and Richard A. Paez, was brief and direct. After pointing out that the government apparently is no longer arguing that the DADT policy is constitutional, and that DOJ is now arguing in the *Golinski* case that "classifications based on sexual orientation should be subjected to heightened scrutiny," and pointedly quoting DOJ's concession in the *Golinski* brief that "there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private

entities," the court observed that "the process of repealing" DADT "is well underway, and the preponderance of the armed forces are expected to have been trained by mid-summer." Thus, the grounds for staying the injunction had diminished, in the panel's opinion.

"The circumstances and balance of hardships have changed," wrote the court, and the government "can no longer satisfy the demanding standard for issuance of a stay." Once a federal court has determined that a government policy is violating the constitutional rights of individuals, the government bears a burden of showing that it is necessary to keep that policy in effect while an appeal is going on. In this case, the government had argued the potential for major disruption of the military in the middle of two ongoing conflicts (in Iraq and Afghanistan) as justifying a status quo injunction while the district court's ruling was being appealed. In light of all that has happened since last fall, that argument appears much less credible.

The injunction was put back into effect, barring enforcement of DADT. As a practical matter, the Defense Department had already stopped discharging gay and lesbian personnel unless (in a handful of cases that have come to light in recent weeks) the gay personnel were actively seeking discharge, so it did not seem like a big deal for the Defense Department, edging closer to certification, to announce that it would comply with the injunction.

The 9th Circuit panel issued a further order on July 11, asking the government whether it intended to defend DADT on the merits at the forthcoming oral argument. The court pointedly asserted that the only brief on the merits filed by the government had not made any argument directly on this point. The court noted that if DOJ was not going to defend DADT, it had an obligation to notify Congress, so that the legislature could, if it desired, intervene in the case. Failing that, however, the court wanted to know, from both parties, whether the case should be dismissed as moot, either immediately (in light of the Pentagon's decision not to appeal the July 6 order) or as soon as the certification is sent up by the Administration to Congress. The court gave the parties ten days to respond.

The Justice Department did not wait the full ten days to respond, filing its response and its Emergency Motion on July



14. (The Emergency Motion, in addition to asking that the stay be revived, urged the court to decide on July 15 to issue temporary injunctive relief while it considered DOJ's argument.) The essence of DOJ's argument in its July 14 filings was that the court seemed to have misunderstood the government's position in the case. DOJ argued that when Congress passed the repeal it, it had effectively rendered moot the question whether Section 654, as originally enacted, was constitutional. Since Section 654, as originally enacted, was repealed, the question whether it was constitutional was no longer a live question, in the government's view. According to DOJ's argument, the Repeal Act turned Section 654 from a permanent part of statutory military policy into a temporary measure intended to preserve the status quo while the necessary steps were taken for an orderly transition to a military policy that was neutral on sexual orientation. Thus, according to DOJ, the live question before the 9th Circuit in this suit by Log Cabin Republicans for prospective injunctive relief was, as argued in its prior brief on the merits, whether Congress, having decided to repeal DADT, could exercise its discretion to maintain the status quo until the specified certification had been received from the designated officials. To bolster that point, DOJ accompanied the motion and the letter with an affidavit from Major General Steven A. Hummer, Chief of Staff of the Repeal Implementation Team, who reported on the status of implementation and asserted that the most effective way to accomplish a smooth transition was to let the military "own" the transition by having it occur through certification by the Secretary and Chairman, and not by the sudden application of a court-ordered injunction. As our deadline for this issue of Law Notes is July 15, we will not know the outcome as we go to press. It is possible that the 9th Circuit panel will temporarily revive the stay in order to consider the government's argument. Major General Hummer's affidavit also confirms President Obama's statement during his June Gay Pride Reception that certification would come in a matter of weeks. According to Hummer, it was expected to come in late July or early August. A.S.L.

### or Require Return of Trial Recordings

In a pair of opinions released on June 15, Chief U.S. District Judge James Ware of the Northern District of California denied a motion by the Proponents of Proposition 8 to vacate last summer's ruling by now-retired Chief Judge Vaughan Walker (which held Prop 8 to be unconstitutional), and also denied a motion by the Proponents to require all parties to surrender copies of the video/audio recording of the trial that are in their possession. *Perry v. Schwarzenegger*, 2011 WL 2321440 (N.D. Cal., June 14, 2011)(recusal); *Perry v. Schwarzenegger*, NO. C 09-02292 JW (N.D. Cal., June 14, 2011) (Order Denying Motion for Order Compelling Return of Trial Recordings). (Any further trial level responsibilities with respect to the case were assumed by Chief Judge Ware upon the retirement of Chief Judge Walker earlier this year.) Within weeks of the ruling, counsel for proponents filed an appeal with the 9th Circuit of Judge Ware's ruling rejecting the motion to vacate.

The Proponents argued that because Judge Walker is a gay man with a long-term partner, he "stood in the shoes" of plaintiffs who were challenging Prop 8 and thus had a conflict of interest requiring his recusal from the case. They filed their motion this spring when, shortly after he retired, Judge Walker told some reporters that he was gay and had been living with a same-sex partner for ten years. Although Judge Walker's sexuality and possible partnered status had been widely rumored and was considered an "open secret" in the San Francisco legal community, to the extent of being mentioned in the press when the trial was pending, Proponents never raised any question about it until after they lost the case and the judge "came out." They argued, among other things, that his failure to disclose these personal facts prior to the trial further bolstered their argument that he was biased in favor of the plaintiffs.

They repeatedly rejected any argument that their motion contended that gay judges should automatically be disqualified from sitting in any case raising gay rights issues, instead emphasizing, given Walker's long-term relationship, that he had a personal interest in the case because his future ability to marry his partner would be directly affected by how he ruled in the case.

Judge Ware noted that this appears to be the first case in which a party has argued that a judge should have disclosed his sexual orientation and partnership status to the parties or recused himself because of his sexual orientation and/or partnership status. Thus, there is no direct precedent, and Judge Ware was writing on a clean slate in rejecting all of the Proponent's arguments. However, there is considerable precedent concerning attempts by litigants to disqualify minority or female judges from hearing civil rights cases raising issues of race or sex discrimination, and to disqualify judges of particular religious persuasions from hearing cases about issues on which their religions have taken a strong position, and that body of precedent strongly supports Ware's conclusion that these personal status considerations, by themselves, are not sufficient to require recusal.

There is a statute, 28 U.S.C. section 455, which governs the circumstances under which federal judges are supposed to withdraw from hearing a case. Section 455(a) says a judge should "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," while 455(b)(4), the other potentially relevant provision, calls for withdrawal of a judge who knows that he "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." Proponents argued that because of Walker's status as a gay man with a long-term partner, his impartiality might reasonably be questioned and he has an interest that could be substantially affected by the outcome of the proceeding, both grounds premised on the idea that under Prop 8 Walker and his partner can not marry in California, but if he declared Prop 8 unconstitutional and was sustained on appeal, he and his partner could marry in California.

In addressing Proponents' arguments as to the idea that Walker has an interest that could be substantially affected by his ruling in the case because he is similarly situated with the plaintiffs, two same-sex couples who sought to marry but were denied that right because of Prop 8, Judge Ware wrote that "the fact that a federal judge shares a fundamental characteristic with a litigant, or shares membership in a large association such as a religion, has been categorically rejected by federal courts as a sole basis

for requiring a judge to recuse her or himself.” Ware noted a prior ruling that “where federal judges have possessed speculative [non-pecuniary] interests as members of large groups, these interests [are] too attenuated to warrant disqualification [under Section 455(b)(4)].” In this case, Judge Walker and his partner are members of a large group: all same-sex partners in California who are not married to each other. Everybody in this large group is possibly affected by a ruling in the Prop 8 case, but only those who actually desire to marry are directly affected. Judge Ware noted that in these “member of large group” cases, courts have held that “in light of the attenuated nature of non-pecuniary interests held by a judge as a general member of the public or a large community, ‘courts also have concluded that no personal bias or reasonable doubt about the judges’ impartiality exists in these circumstances.’”

Indeed, the application of this rule is of pressing importance in a country where there are increasing numbers of members of racial minorities and women on the bench, and where there is significant litigation going on involving claims of discrimination, unfair treatment, exclusion, or preferences turning on the race or sex of litigants. As a result, courts have resisted the idea that because somebody is a part of some large social group (women, African-Americans, Latinos, etc.), one should be disqualified from judging in any case where the rights of those groups to fair treatment is at issue.

Ware adopted the following legal conclusion: “In a case that could affect the general public based on the circumstances or characteristics of various members of that public, the fact that a federal judge happens to share the same circumstances or characteristic and will only be affected in a similar manner because the judge is a member of the public, is not a basis for disqualifying the judge.” That, found Ware, describes the situation with Judge Walker. Any other rule, he wrote, “would lead to a Section 455(b)(4) standard that required recusal of minority judges in most, if not all, civil rights cases. Congress could not have intended such an unworkable recusal statute.”

Responding to Proponents’ argument that Walker should be disqualified “because his same-sex relationship gave him a markedly greater interest in a case challenging restrictions on same-sex marriage than the interest held by the general public,” Ware

found it inconsistent with “general principles of constitutional adjudication to presume that a member of a minority group reaps a greater benefit from application of the substantive protections of our Constitution than would a member of the majority.” Under this view, every member of society has an interest in seeing constitutional values protected. “Thus,” he wrote, “we all have an equal stake in a case that challenges the constitutionality of a restriction on a fundamental right.” He also rejected as “unworkable” a recusal standard that would be “based on assumptions about the amorphous personal feelings of judges in regards to such intimate and shifting matters as future desire to undergo an abortion, to send a child to a particular university, or to engage in family planning.”

Judge Ware drew an analogy to a 9th Circuit ruling rejecting a recusal challenge to Catholic judges sitting on a case where an abortion clinic sued protesters who were interfering with the ability of patients to enter the clinic free of harassment, where the court found unworkable a test that would premise disqualification on how “fervently” a particular Catholic judge followed the Church’s teachings on abortion. He pointed out that the standard sought by Proponents would “place an inordinate burden on minority judges.” He pointed as one of several examples to a case upholding the refusal of an African-American judge to recuse himself in a school desegregation lawsuit, even though the judge had school-age children whose ability to attend the school of their choice might be affected by the judge’s decision.

As to whether Judge Walker’s impartiality could reasonably be questioned, Judge Ware said that the starting point of the analysis is the presumption that a judge is impartial, placing a heavy burden on the party seeking recusal to demonstrate otherwise. He also noted that the word “reasonably” in this context had been construed to adopt an objective test. The question isn’t whether some portion of the public might actually question a judge’s impartiality — such questioning and second-guessing happens all the time — but rather whether an objective person with full knowledge of the circumstances and understanding the presumption that judges are professional neutrals who strive to make decisions based on the law and the facts without interjecting their personal views would say that this

was a set of circumstances where it is clear that the judge can’t be impartial.

Ware said that Proponent’s argument on this point should be rejected because “it depends upon the assumption that a judge who is in a relationship has an interest in getting married which is so powerful that it would render that judge incapable of performing his duties.” Ware asserted that such an assumption is “unreasonable” under the 9th Circuit’s precedents, as a “well-informed, thoughtful observer would recognize that the mere fact that a judge is in a relationship with another person — whether of the same or the opposite sex — does not ipso facto imply that the judge must be so interested in marrying that person that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain.” He also rejected the argument that Walker’s silence throughout the trial about his relationship with his partner could be construed to undermine the presumption of impartiality, finding that silence is, by its nature, ambiguous, “and thus is open to multiple interpretations,” including the presumption of impartiality.

Indeed, Ware wrote, had Walker felt compelled to disclose this kind of personal information, he could be setting a “pernicious precedent” that would be “detrimental to the integrity of the judiciary,” as it would require judges to undergo extensive personal disclosure in every case, no matter how irrelevant or time-consuming, on the chance that a party might have some basis for requesting recusal. Ware also rejected any sort of contention that “all people in same-sex relationships think alike” so that it could automatically be assumed that Walker shared with the plaintiffs the same interest in marrying a same-sex partner. He argued that it was just as reasonable to presume that Walker, like any other judge, could rise above personal interests to act in a professional manner.

In the second opinion, Ware did not provide much substantive discussion, appearing to rest on his remarks at the prior day’s hearing, merely asserting: “Upon review, the court does not find good cause to require the parties to return their copies of the video recordings of the trial to the Court. As discussed previously, the Court made copies of the video available to the parties, pursuant to the Protective Order [which limits the parties’ use and prohibits



public disclosure of the recordings], for use during the trial.” Proponents had not alleged that any of the parties had violated the Protective Order, their motion having been provoked by Judge Walker’s use of some brief video clips to illustrate lectures he was giving about trial procedure. Since appellate proceedings are on-going and use of the recordings could be helpful to the parties in that process, Ware could not see a reason to demand their return.

Actually, Proponents seemed most concerned about Walker’s use of the recordings, now that he is lecturing and teaching part-time. Walker had actually surrendered his copy of the recordings (which Ware had presented to him upon his retirement from the bench), and in a footnote Ware indicated that if Walker wanted them back, he could have them. Ware left unresolved the larger question, posed in a counter-motion filed by the Plaintiffs, about whether the Protective Order should be lifted so that the parties would no longer be restricted in how they might use the recordings. Instead, Ware called for further briefing on that issue and set a hearing for August 29 to consider it.

Although most legal ethics experts who opined to the press predicted this outcome on the recusal issue, the actual opinion, which will be published in the Federal Supplement reporter, is important, because it is the first to thoroughly canvass the authorities and address in detail the question whether gay judges have to “come out” to parties about their sexuality and relationships, and whether there is any reason to presume that gay judges should be disqualified from sitting in cases involving gay rights issues. In this opinion, Judge Ware strikes an important blow for the right of gays to be equal participants in the judicial process, with no more presumed disqualifications than could theoretically be imposed on racial or ethnic minorities or women.

Although Ware does not come right out and say it, the bottom line is that there is no more reason to assume that “majority” (i.e., white male) judges are unbiased in gay rights cases than there is to assume that gay judges are biased in such cases. Indeed, any reasonably objective observer of gay-related law over the past half century in the American courts would have to conclude that a substantial portion of the judiciary has held deep anti-gay biases for a significant period of time, and that those biases have infected

quite a few decisions. It is only in more recent years that gay litigants can be increasingly (although not yet, unfortunately, completely) confident that they are going to get an unbiased hearing of their claims. One need only read the dissenting opinions by Supreme Court Justice Antonin Scalia in *Romer v. Evans* and *Lawrence v. Texas* to understand why gay people might reasonably entertain serious doubts about receiving impartial justice from some ‘straight’ judges. *A.S.L.*

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### **Wyoming Supreme Court Recognizes Same-Sex Canadian Marriage for Divorce Proceedings**

The Supreme Court of Wyoming has held that a same-sex couple lawfully married in Canada were entitled to seek divorce in a Wyoming district court, in *Christiansen v. Christiansen*, 2011 WY 90, 2011 WL 2176486 (Wyoming Supreme Court, June 6, 2011).

Paula and Victoria Christiansen were validly married in Canada in 2008. In February, 2010, Paula filed for divorce in Niobrara County District Court in Wyoming. District Judge Keith G. Kautz dismissed the action for lack of subject-matter jurisdiction, reasoning that “the jurisdictional grant to dissolve marriages is premised on the definition of marriage,” which in Wyoming is defined by statute as “a civil contract between a male and a female person.”

On appeal, the Wyoming Supreme Court stated that “the pivotal issue is whether the fact that this is a same-sex marriage strips the district court of the subject-matter jurisdiction it would otherwise enjoy to entertain a divorce proceeding.”

Writing for the unanimous Supreme Court, Justice Golden cited Wyo. Stat. Ann. § 20-1-111, which provides that “all marriage contracts which are valid by the laws of the country in which contracted are valid in this state.” The court reasoned that the statutory definition of marriage “can coexist in harmony” with § 20-1-111 because “the two sections treat different situations.” The court further reasoned that the common-law exception to foreign marriage recognition, that the state will not recognize marriages “contrary to the policy” of the state’s laws, must be “necessarily narrow, lest it swallow the rule.” The court provided the example of common-law marriages, which entered into in Wyoming are invalid,

yet are recognized in Wyoming “for purposes of receipt of benefits” if valid in the state where contracted.

The court held that “recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages... we find nothing in Wyoming statutes or policy that closes the doors of the district courts to them.” The court reversed and remanded the case for further proceedings consistent with its decision. Attorneys Tracy L. Zubrod of Cheyenne and Mary Elizabeth Galvan of Laramie represented Paul Christiansen on the appeal. No brief was filed on behalf of Victoria. *Bryan Johnson*

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### **Ohio Supreme Court Rules Against Lesbian Co-Parent in Custody Dispute**

The Ohio Supreme Court has affirmed lower court rulings that a lesbian co-parent could not seek “shared custody” of the child she was raising with her former partner, finding that there was evidence in the record from which the juvenile court could conclude that the women had not expressly agreed to shared custody. Two of the seven justices dissented on the ground that the majority opinion did not make any new law, so review should not have been granted. But one member of the court, Justice Paul E. Pfeiffer, filed an impassioned dissent, arguing that in addition to the co-parent and the child, “common decency is another victim in this case,” and that “this court has failed to craft a rule that addresses reality.” *In re Mullen*, Slip Opinion No. 2011-Ohio-3361 (July 12, 2011).

The case begins with a fairly typical scenario, as Michele Hobbs and Kelly Mullen met in May 2000, fell in love, moved in together, and in 2003 initiated the steps of having a child. Hobbs asked a friend, Scott Liming, to donate sperm so that Mullen could become pregnant. Mullen and Liming executed a “Donor-Recipient Agreement on Insemination” under which Liming would be listed on the legal birth certificate but would relinquish parental rights and any future claims to custody or visitation. Before the child was born, Mullen executed a will naming Hobbs as guardian of her child, as well as a health-care power of attorney and a general du-

rable power of attorney, identifying Hobbs as the "child's co-parent in every way" and authorizing her to have the same authority as a parent for decision-making. When the child was born, the hospital prepared a "ceremonial" birth certificate on which Hobbs and Mullen were listed as the parents; the legal birth certificate filed with the state listed Mullens as the mother and Liming as the father.

Shortly after Lucy was born, Liming moved from Atlanta back to Ohio and began visiting the child. When Lucy was two years old, the relationship between her mothers was deteriorating and fell apart in October 2007, when Mullen and Lucy moved out of the house. Soon thereafter, Hobbs filed a complaint seeking shared custody in Hamilton County Juvenile Court. Liming also petitioned the court for a shared custody order. Ultimately Liming was dropped from the case, as he was negotiating his own visitation arrangement with Mullen.

The case was referred to a magistrate. After hearing from the parties and conducting fact-finding, the magistrate issued the only sensible decision in this case, finding that Mullen had effectively agreed to sharing custody with Hobbs before the child was born, and that it was in the best interest of Lucy to maintain ties with Hobbs, so the magistrate's report recommended granting Hobbs' petition. But the juvenile court rejected the magistrate's recommendation, focusing instead on legal relationships. Contrary to the magistrate, the juvenile court concluded that although there was evidence on both sides of the question, "a preponderance of the evidence did not conclusively demonstrate that Mullen's conduct created a contract that permanently gave partial custody rights of the child to Hobbs." The juvenile court dismissed Hobbs' complaint for shared custody, and was affirmed by the court of appeals, which found that the juvenile court's decision was supported by "competent, credible evidence." The Supreme Court granted discretionary review.

Writing for the court, Justice Robert Cupp observed that under Ohio law dating back to the 2002 case of *In re Bonfield*, 780 N.E.2d 241, Ohio does not recognize an informal "shared parenting" arrangement as being legally binding in the event of a break-up of a same-sex couple who are raising a child together. "Rather," he wrote,

"a parent may voluntarily share with a non-parent the care, custody, and control of his or her child through a valid shared-custody agreement," which involves "the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child." In the event there is such an agreement, it is only enforceable to the extent that the juvenile court determines that enforcement is in the best interest of the child.

Thus, in this case, the majority of the court took the position that Hobbs would only have a legal claim to shared custody if she could show that Mullen had "purposefully relinquished" her right to exclusive custody by making an express agreement to that effect with Hobbs. While the court reiterated several times that such an agreement did not have to be in writing, it insisted that it was not sufficient to establish the existence of such an agreement to bring together various bits of evidence from which such an agreement could be found by implication. Thus, it was not enough to bring forth the ceremonial birth certificate, or the reference to Hobbs as a "co-parent" in various legal documents, or the actual evidence of day-to-day shared parenting activity during the first two years of the child's life.

Justice Cupp commented that "the best way to safeguard both a parent's and a non-parent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent, or to apply to a juvenile court for an order under R.C. 2151.23(A) (2) establishing the scope of the legal custody that the parent desires to share, or both," but he noted that past decisions had not invariably required a writing.

Hobbs had argued that the references to her as "co-parent" in various legal documents should be construed as creating the necessary express agreement, but the court was not persuaded. "Finally, we do not agree with appellant's argument that 'coparent' equals 'shared custody' and that because the parties' statements and various documents used the 'coparent' terminology, the parties therefore clearly agreed to 'shared legal custody,'" wrote Cupp. "Coparenting" is not synonymous with an agreement by the biological parent to permanently relinquish sole custody in favor of shared legal parenting. 'Coparenting' can have many different meanings and can refer to many different

arrangements and degrees of permanency. The parties' use of the term, together with other evidence, however, may indicate that the parties shared the same understanding of its meaning and may be considered by a trial court in weighing all the evidence." In this case, however, the juvenile court had stressed that the documents containing that term were "revocable" and, indeed, were revoked by Mullen after the relationship fell apart.

The majority concluded that "competent, credible, and reliable evidence supports the juvenile court's conclusion that Mullen did not create an agreement to permanently relinquish sole legal custody of her child in favor of shared legal custody with Hobbs. Consequently, the juvenile court may not reach the questions of whether Hobbs is a suitable person to be a custodian of the child or whether shared legal custody is in the child's best interests."

Chief Justice Maureen O'Connor and Justice Yvette McGee Brown joined in a dissent, arguing that the appeal should have been dismissed as improvidently granted because, as it turned out, in their view "the law governing this case is well settled and the majority establishes no new law or governing principle." They did stress, in their dissent, that Ohio precedents do not require a written agreement for a biological parent to relinquish sole custody, but, "as the facts of this case show, prudence now dictates that the agreement be documented." In other words, between the four-member majority and these two dissenting members, there seems to be a strong intimation that same-sex couples having children would be well advised to make a written shared custody agreement that uses the precise terminology suggested by the court's discussion.

Justice Pfeifer's dissent focuses on the human tragedy at the heart of this kind of case. "Is filial love something to be dangled and then snatched away, promised and then reneged upon?" he began. "Once a natural parent promises a coparenting relationship with another person and acts on that promise, she has created a relationship between the coparent and the child that has its own life. The natural parent cannot simply declare that relationship over. That is what Kelly Mullen attempts to do in this case and what the majority decision allows. Now, no court will ever determine whether it is in Lucy Mullen's best interests to have

a continuing relationship with the woman she calls 'Momma,' Michele Hobbs. Because the juvenile court in this case at the very least should have gotten to the point of making that best-interests determination, I dissent."

To a significant extent, Justice Pfeifer's disagreement with the majority concerns the quality of fact-determination by the juvenile court, and especially the conclusions that court drew from uncontested facts. "Can an agreement that another person is a coparent in every way possibly not include a right to custody," he asks, and answers: "It cannot. The trial court seems to agree, and thus turns its emphasis on the fact that the documents were revocable. But the question before the court was whether Mullen agreed to share custody of her child with Hobbs, not whether she eventually came to regret that decision. Whether the documents were revocable is a red herring. The true question is when they were revoked. Executed before Lucy was born, they were not revoked when Lucy was born, when she was one year old, or even when the couple sought counseling because of difficulties in the relationship. Not until the pair separated after Lucy's second birthday did Mullen revoke the statement, 'I consider Michele Hobbs as my child's co-parent in every way.' Any reliance on what Mullen did after she separated from Hobbs was error."

Thus, Pfeifer concluded that "the trial court's judgment is not based upon competent, reliable evidence. Instead of being based upon the facts of what actually happened during Mullen and Hobbs' relationship and their parenting of Lucy, the decision was based almost entirely on how Mullen felt after the termination of her relationship with Hobbs." Pfeifer questioned how same-sex couples planning to have children could comply with the court's suggestion to spell out everything in a shared-custody agreement. "Can they not let the circuitous path of family life determine how they together raise the child? Must they define roles? Must they establish a visitation schedule to use after an eventual break-up, before a baby is even brought home from the hospital?"

Pfeifer bemoaned the lost opportunity for the court to use this case to "present a more workable analysis for lower courts to employ in cases of disputed custody between a natural parent and a nonparent, an analysis rooted in the intent of the parties as

evidenced by the nature of the familial relationship." He argued that they should have followed the lead of the Wisconsin court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (1993), a widely-followed precedent setting out a four-prong test for determining whether a co-parent should be treated as having a legal right to contest custody and seek visitation after a break-up. The Ohio court had specifically refrained from adopting this test in the *Bonfield* case, expressing reservations on invading the province of the legislature. But as the majority even noted, the legislature did not take the hint of *Bonfield* to enter the arena and revise Ohio's family law statutes to reflect the emergence of "nontraditional" families. So, Justice Pfeifer opines, the court should step up.

Pfeifer asserted that the record in this case would support the conclusion that the *H.S.H.-K.* test had been fully met in this case and Michele Hobbs should have been entitled to a "best interests" determination and, if appropriate, a shared custody decree. "The majority's decision today is the last step in this saga," he commented, "and sadly, the best interests of Lucy will never have been considered at any level. Instead, Mullen's self-interest will be the sole determining factor."

Pfeifer concluded: "Besides Hobbs and Lucy, common decency is another victim in this case. Mullen was able to use the law as a weapon because same-sex coparents lack legal rights. The law has not caught up to our culture, and this court has failed to craft a rule that addresses reality. Mullen and Hobbs employed a well-versed lawyer who represents people in their situation, and with his advice did all they could do to protect Hobbs. A maternal relationship existed between Hobbs and Lucy. Mullen taught her daughter to call another woman 'Momma' and to love her as a mother. She now wishes she hadn't, and for the majority, that's enough. It shouldn't be."

Hobbs was represented on this appeal by Lisa T. Meeks of Newman & Meeks and Lambda Legal and Christopher Clark. Mullen was represented by Douglas B. Dougherty of Dougherty, Hanneman & Snedaker. There were numerous amicus curiae. The anti-gay right wing groups were well represented by the Alliance Defense Fund and Liberty Counsel, who urged the court to reject the appeal. Supporting Hobbs were amicus briefs from the

National Center for Lesbian Rights, the ACLU of Ohio and the ACLU national LGBT Rights Project, and the National Association of Social Workers. A.S.L.

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### **California Appeals Court Rejects Argument That Mother's Failure to Protect Gay Teen From Abusive Father Could Subject Mother to Liability for "Physical Harm" to Her Son**

In *Los Angeles County Department of Children and Family Services v. R.G.*, 2011 WL 2206846 (Cal. App. Dist. Ct. June 8, 2011), California's Second District Court of Appeals issued a ruling on a narrow statutory interpretation question: whether a parent's "failure to protect" a child from abuse was sufficient to sustain a charge that a parent had directly physically harmed the child under Cal. Welf. & Inst. Code sec. 300(a) (as opposed to subd. (b), which specifically addresses "failure to protect"). The court held that "failure to protect" evidence was not sufficient to sustain a violation under the "physical harm" provision.

More importantly, however, this case demonstrates that the Department of Children and Family Services in California is now willing to go after parents who abuse their children for being LGBT. The case was referred to the Los Angeles Department of Children and Family Services after the child walked into a local police station and reported that his father had struck him with a fist, called him anti-gay slurs, threatened his life, and that his parents had pulled him out of school to home-school him, isolated him from friends, and sent him to conversion therapy. S.G. stated that "both parents physically hit him," but his mother denied to investigators that she had ever been physically abusive.

The case details the parents' abusive actions. The father struck the child with a fist while calling him a "fag," telling him "You're disgusting," and threatening both that "You're going to die at a young age," and "I'll stir your insides with a knife." The father removed the lock from S.G.'s bedroom door and would not allow him any privacy. The child told investigators that he "fear[ed] for his life." The night before S.G. went to the police, his father had "cornered" him on a couch and struck him with his fists. The father denied hitting S.G. He



appealed the findings against him, but his appeal was dismissed.

After completing their investigation, DCFS officials filed a petition under Cal. Welf. & Inst. Code sec. 300 on behalf of S.G. and his sister, alleging four counts of child abuse against S.G.'s parents: direct physical harm, failure to protect, emotional damage, and that S.G.'s sister was at risk because of the abuse being directed at S.G. The dependency court dismissed the charge that S.G.'s sister was at risk due to the abuse directed at S.G., but sustained the other charges regarding danger to S.G. posed by parental abuse. The court ordered family reunification services consisting of individual and conjoint counseling.

S.G.'s mother appealed the dependency court's finding on the narrow theory that she had not caused physical harm to S.G., and thus she shouldn't be charged under subd. (a). Mother argued that the "failure to protect" evidence submitted was insufficient to show that she had directly harmed S.G. or posed a risk of physical harm to him. The court of appeals held for the Mother, finding that "evidence does not show Mother has in the past, or may in the future, personally inflict physical harm on S.G...[And] the finding is unsupported by the evidence and warrants clarification." The court stated that it disagreed with the Department's argument that a violation of subd. (a) could be "based on a non-offending parent's failure to protect against a current or future risk posed by the offending parent's physical abuse." The court remanded the case to the dependency court "with directions to continue the dependency proceeding, as to Mother, in accord with its jurisdictional findings under" the other charges.

Linda J. Vogel represented appellant Mother. Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Frederick Klink, Deputy County Counsel, appeared for the Los Angeles County Department of Children and Family Services. *Daniel Redman*

### Justice Department Sides With Plaintiffs in *Golinski* Pretrial Motions

How often does the Defendant in pending civil litigation file a brief supporting the Plaintiff's opposition to the Defendant's motion to dismiss the case, on the ground

that the statute underlying the Defendants' position in the case is unconstitutional? We would guess that such occasions are about as rare as hen's teeth, but on July 1 the U.S. Department of Justice filed a brief in opposition to the motion to dismiss that had been filed on behalf of the government in *Golinski v. U.S. Office of Personnel Management*, No. C 3:10-00257-JSW (N.D.Cal.), arguing that Section 3 of the Defense of Marriage Act of 1996, the statute underlying the Defendants' case, is unconstitutional. In addition to its explicit role with respect to the pending dismissal motion, the DOJ brief is likely to weigh heavily in the court's consideration of Plaintiff's Motion of Summary Judgment, which was also filed on July 1 with a request for a September 16 hearing date.

The case dates back to the summer of 2008, when Karen Golinski, a longtime staff attorney at the Motions Unit of the U.S. Court of Appeals for the 9th Circuit, married her registered California domestic partner on August 21, taking advantage of the opportunity presented by the California Supreme Court's decision several months earlier in *In re Marriage Cases*, 183 P.3d 384. On September 2, 2008, Golinski sought to add her spouse, Amy Cunningham, to the Blue Cross/Blue Shield family coverage that she already had for herself and their son as an employee benefit at the Circuit Court. She was turned down, on the ground that under Section 3 of DOMA, her marriage could not be recognized by the federal government for any purpose. Golinski filed a complaint on October 2, 2008, with the 9th Circuit's Employment Dispute Resolution Plan, and 9th Circuit Chief Judge Alex Kozinski, ruling on her complaint, found that it was possible to construe the relevant federal employee benefits law to allow her to enroll her spouse in the plan, despite DOMA. (In a parallel case involving another 9th Circuit employee, another judge of the Circuit ruled for the complainant on the ground that Section 3 of DOMA was unconstitutional.) Judge Kozinski ordered the Administrative Office of the Courts (AOC) to accept Golinski's application, but AOC was instructed by the federal Office of Personnel Management (OPM) not to comply due to DOMA. Golinski filed suit in the U.S. District Court for the Northern District of California, seeking to enforce Judge Kozinski's order. U.S. District Judge Jeffrey

S. White granted the government's motion to dismiss on March 16, 2011, finding that Judge Kozinski did not have authority to order AOC to allow Golinski to enroll her spouse for the benefit unless Section 3 of DOMA was unconstitutional, a question that had not been directly raised in Golinski's district court complaint. Judge White indicated that despite his dismissal of the complaint, he would allow Golinski to file an amended complaint raising the constitutional issue provided she did so quickly. White's ruling came just weeks after Attorney General Eric Holder had announced in February that the Justice Department considered Section 3 of DOMA to be unconstitutional, and White took note of this in suggesting that the constitutionality of Section 3 be raised in an amended complaint.

Golinski filed her amended complaint in April. The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) retained former Solicitor General Paul Clement to intervene on behalf of the House of Representatives in defense of Section 3 in pending cases around the country, in light of the Justice Department's announcement that it would no longer defend Section 3 in court, although it would remain counsel of record on behalf of federal government defendants in pending cases. (To avoid misleading those who have not been keeping up with all the details on this, BLAG consists of the Speaker of the House and the two leaders from each party in the House — five members in all — who voted 3-2 along party lines to retain Clement to defend Section 3. Thus, although the Group is called "Bipartisan" due to its composition, the defense of Section 3 is actually being undertaken by the Republican majority in the House over the opposition of the Democratic minority, which has questioned the use of House resources for this purpose.) Clement filed a motion to dismiss Golinski's amended complaint, relying on prior federal case law upholding Section 3, upon the reasons for enactment of the law articulated by Congress in 1996 (all of which the Justice Department had disavowed in its defense of Section 3 in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010)), and upon additional reasons advanced by DOJ in *Gill* that had been rejected by the district court in that case. The DOJ brief filed on July 1 opposes Clement's motion, while

Golinski's July 1 motion seeks to move the case forward by advancing to the summary judgment phase.

Anticipating that Clement will argue that summary judgment is premature until Judge White rules on the motion to dismiss, Golinski argues that there are no material factual disputes, that ongoing discovery in other pending DOMA Section 3 litigation makes further discovery in her case unnecessary (since it is all scheduled to be concluded before Clement will have to respond to the motion for summary judgment, and Clement has not signaled any intent to proceed with discovery in Golinski's case), and that in fact the only real contested issue pending before the court is the legal question whether Section 3 is constitutional. As to that, Golinski's brief in support of her motion for summary judgment covers familiar territory about why heightened scrutiny is appropriate in this case, but acknowledging that existing 9th Circuit precedent adopts the rational basis test for sexual orientation discrimination claims. Heightened scrutiny is appropriate nonetheless, argues Golinski, because the refusal to allow her to enroll her spouse is also sex-discrimination, which has been held by the Supreme Court to merit heightened scrutiny. In any case, Golinski argues that Section 3 does not survive either standard of review.

The Justice Department brief in opposition to the pending motion to dismiss takes things further by arguing that the existing 9th Circuit precedents are no longer valid, inasmuch as they predate recent Supreme Court precedent overruling *Bowers v. Hardwick*, 478 U.S. 186, the 1986 Supreme Court sodomy case that was cited and relied on by the 9th Circuit in its leading precedent on this point, *High Tech Gays v. Defense Industrial Security Clearance Office*, 909 F.2d 375 (9th Cir. 1990). The Justice Department argues that the Supreme Court has never definitively ruled on the correct standard of review for a 5th Amendment equal protection challenge to a federal law that discriminates based on sexual orientation, and joins with Golinski in arguing that the correct standard is heightened scrutiny, which Section 3 would not survive.

In support of its argument, the Justice Department has included a substantial section in its brief documenting in detail the history of discrimination against gay peo-

ple by the federal and state governments as well as private actors, recalling express statutory and administrative federal discrimination from the 1950s onward, and the continuing politically difficult position faced by a tiny minority group that continues to lose referenda on subjects such as same-sex marriage. "The federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals," wrote DOJ, and "Like the federal government, state and local governments have long discriminated against gays and lesbians in public employment," recounting "aggressive campaigns to purge gay and lesbian employees from government service as early as the 1940s." The brief recounts the long history of state sodomy laws being used to justify anti-gay discrimination, not just in employment but also in access to public accommodations. In support of the point about political disabilities suffered by LGBT people, the brief recites the sorry history of anti-gay referenda, repealing civil right laws as well as amending state constitutions expressly to authorize anti-gay discrimination. The brief notes that the 9th Circuit has already ruled, in the context of asylum cases, that sexual orientation is an "immutable characteristic" as that term is relevant to equal protection analysis, and that sexual orientation "bears no relation to legitimate policy objectives or ability to perform or contribute to society." Thus, in line with the Supreme Court's equal protection case law concerning discrimination on other grounds, a statute that discriminates based on sexual orientation should be subjected to heightened scrutiny, which throws the burden on the government to provide a non-discriminatory justification for it.

Asserting that "DOMA fails heightened scrutiny," the DOJ brief basically adopts the reasoning of the DOJ's February 2011 letter to House Speaker John Boehner, setting forth its analysis of the unconstitutionality of Section 3, finding that the justifications articulated by Congress in 1996 failed to satisfy the government's burden to justify the statute. "In sum," concludes this section of the brief, "the official legislative record makes plain that DOMA Section 3 was motivated in substantial part by animus toward gay and lesbian individuals and their intimate relationships, and Congress identified no other interest that is materi-

ally advanced by Section 3. Section 3 of DOMA is therefore unconstitutional." The DOJ brief does not bother to refute the arguments that DOJ itself advanced in support of Section 3 in the *Gill* case; having now conceded that heightened scrutiny applies, *post hoc* rationalizations become irrelevant and only the actual motivations of Congress in adopting the statute need be considered.

It is one thing for DOJ to disavow defending Section 3, but quite another for it to actively argue in pending litigation, in opposition to counsel retained by the House, that Section 3 is unconstitutional. The Obama Administration has taken the next step towards an outright argument that same-sex couples are constitutionally entitled to marry.

Golinski is represented by Lambda Legal and cooperating attorneys from Morrison & Foerster, LLP. A.S.L.

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### **U.S. Bankruptcy Court Finds Section 3 of Defense of Marriage Act Unconstitutional; U.S. Trustee Abandons Opposition to Joint Filings by Same-Sex Married Couples**

In *In Re Balas and Morales*, 2011 WL 2312169 (Bkrptcy.C.D.Cal., June 13, 2011), U.S. Bankruptcy Judge Thomas Donovan refused to dismiss the joint bankruptcy petition of a married same-sex couple that was challenged by the U.S. Trustee solely on the ground that Section 3 of the Defense of Marriage Act (DOMA) barred such a joint filing, because it prohibited any recognition of a same-sex marriage in the context of federal law. Nineteen other bankruptcy judges in the Central District of California also signed Judge Donovan's decision, which found application of Section 3 to be unconstitutional in this context. Subsequently, the U.S. Trustee has abandoned the practice of filing such dismissal motions, and has withdrawn similar pending motions in other bankruptcy cases.

In reaching its decision, the court provided a devastating critique of DOMA, and ultimately determined that the couple (the Debtors in this proceeding) demonstrated that DOMA violates their equal protection rights afforded under the Fifth Amendment of the United States Constitution, either under heightened scrutiny or under rational basis review. Further, the

court concluded that there is no valid governmental basis for Section 3 of DOMA. The decision adds to a growing line of recent federal court decisions holding that gay couples legally wed in their home state may file jointly for bankruptcy, but is the first to rule on constitutional grounds.

Gene Balas and Carlos Morales were legally wed under California law prior to the passage of Proposition 8 in November 2008, which outlawed gay marriage in the state. The California Supreme Court subsequently ruled that marriages contracted prior to the passage of Proposition 8 remained valid as a matter of California law. The couple later sought Chapter 13 bankruptcy protection jointly as a married couple. The United States Trustee filed a motion to dismiss the petition, based not on any of the statutory grounds provided in the Bankruptcy Code itself but instead on Section 3 of DOMA, which defines for all matters of federal law a "spouse" as "a person of the opposite sex who is a husband or wife." The Trustee argued that DOMA bars Balas and Morales from being recognized as each other's "spouses" under the federal Bankruptcy Code. Joint filing for personal bankruptcy under the Code is authorized only for married couples. The Trustee's argument and the debtors' opposition placed the constitutionality of Section 3 of DOMA squarely before the court.

The court acknowledged at the outset the heavy burden borne by the Debtors in challenging the constitutionality of a duly enacted act of Congress. Nonetheless, as applied in the context of a "simple bankruptcy case," the court easily disposed of both the justifications for DOMA offered during enactment of the statute (e.g., encouraging responsible procreation) and post-hoc justifications (e.g., "preserving the status quo"). For example, the court did not find credible the assertion that allowing the claimants to proceed jointly harmed a governmental interest in "encouraging responsible procreation and child-bearing," as the Debtors have no children, and any they may have in the future would not be affected by a joint bankruptcy filing any more than a heterosexual married couple's children would be.

More significantly, the court noted that the defense and nurturing of "the institution of traditional heterosexual marriage" would also not be harmed by a joint filing, given that the complainants are already le-

gally married under the law. This reasoning seems significant in that DOMA was intended to preserve the institution of so-called "traditional marriage" by disallowing the federal government from recognizing a same-sex marriage that may be valid in a given state. If, as this court has reasoned in the bankruptcy context, no harm can follow from the recognition of same-sex marriages already entered into, DOMA's continued viability seems in further doubt.

Indeed, the court quoted liberally from what it referred to as the "Holder Letter," — the letter from Attorney General Eric Holder to House Speaker John Boehner declaring that President Obama had decided, in consultation with the Justice Department, that Section 3 of DOMA, in targeting the minority class of gays and lesbians, should be subjected to heightened scrutiny by the courts, and would not meet such a test under the Fifth Amendment. The brief also announced that the Justice Department would no longer defend DOMA in the courts.

Consistent with the heightened scrutiny standard relied upon in the Holder Letter, the court detailed some of the reasons why heightened scrutiny applies: California precedent has found evidence of significant private and public discrimination against gay individuals and that lesbians and gays face significant hurdles in the political arena.

The court, however, went a step further. Rather than simply declaring that DOMA must be void under a heightened review in the bankruptcy context, the court explicitly noted, in reference to justifications offered for DOMA, that "none of these interests stands up to any level of scrutiny." Even under a simple rational basis review, then, this court would strike the statute down.

To be sure, the court does ostensibly cabin the reach of its decision with references to the specific context in which the case arises. For example, the court noted that the couple's creditors did not object to the joint filing and that the creditors "simply hope to be paid what they are owed." Nonetheless, the reasoning and occasionally sweeping language — "the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land" — is certainly significant.

The court ended its opinion with a significant quotation from the majority opinion in *Griswold v. Connecticut*: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not in political faiths; a bilateral loyalty, not commercial or social projects." The decision, signed by twenty of the Central District of California's 24 bankruptcy judges, certainly reinforces the message the court appears to want to deliver.

Finally, while the Trustee initially sought to appeal the court's decision, it later reversed this decision in consultation with the House Bipartisan Legal Advisory Group (the Advisory Group), the legislative body that has assumed the defense of DOMA in the courts. The Trustee announced that this decision was in keeping with the President's decision to instruct the Justice Department not to defend DOMA.

But there is no doubt something more driving the Trustee's decision not to appeal. Interestingly, Balas and Morales did not initially join in the Trustee's motion to withdraw his appeal, having themselves sought to have an expedited appeal heard before the 9th Circuit, in anticipation of the circuit court affirming the decision that Section 3 of DOMA was unconstitutional in this context. Possibly, they hoped the case would make it to the Supreme Court, potentially placing them in the history books as the plaintiffs who helped end DOMA. The Advisory Group, in turn, likely had no interest in potentially helping that possibility along, although the reason it articulated for declining to intervene in defense of the statute in this case was that it was concentrating its resources on pending challenges to DOMA in the 1st Circuit Court of Appeals and several federal district courts. A few days after the Trustee filed the petition to withdraw the appeal, the Debtors filed their agreement to withdraw the appeal, having ascertained that in light of the Advisory Group's decision that it will not intervene to defend DOMA in bankruptcy cases, the U.S. Trustee has decided as a matter of policy not to file dismissal motions against future joint bankruptcy filings by married same-sex couples, and has withdrawn such motions in several other pending cases. *John Teufel*



## Wisconsin Circuit Judge Rejects Challenge to State Domestic Partnership Registry Law

Dane County Circuit Court Judge Daniel R. Moeser has rejected a constitutional challenge to the validity of Wis. Stats. Chapter 770, the Domestic Partner Registry Act, finding that it does not create a "legal status" that is "identical or substantially similar" to marriage. Judge Moeser granted a motion for summary judgment filed by the Intervenor-Defendants, Fair Wisconsin, Inc., and a group of same-sex couples. Although the state defendants, former Governor James E. Doyle and two other officials, had originally filed this motion to dismiss, the new, anti-gay governor, Scott Walker, had informed the court that the state was no longer defending the statute, so the intervenors, represented by Lambda Legal, provide the defense and triumphed on the motion. The court rendered the decision in *Applying v. Doyle*, No. 10-CV-4434, on June 20, 2011.

The Marriage Amendment, adopted by Wisconsin voters in 2006, provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Several years after the amendment was adopted, the state legislature passed a law establishing a domestic partnership registry for unmarried partners to signify to their state that they are partners. Couples pay a fee to register and receive a certificate attesting to their domestic partnership. Domestic partnership status also brings a list of rights: victim notification by the Department of Corrections, spousal evidentiary privilege, the right to sue for wrongful death, the right to apply for crime victim compensation, the presumption that real property acquired in their relationship is held in joint tenancy, certain rights regarding estate administration, protection against eviction while a partner is serving in the National Guard, visitation rights in care facilities and consent rights regarding institutionalization, rights to access various records, power of attorney rights, right to consent to autopsy and certain insurance subsidy rights, waiver of real estate transfer fees, family and medical leave rights, workers compensation death benefits and other

benefit rights comparable to spouses. The list is extensive but falls far short of the rights accorded to married couples.

Individuals who were active in the campaign to pass the marriage amendment filed suit against Governor Doyle (who had signed the DP Registry bill into law), alleging that it violated the marriage amendment. By withdrawing his support for the summary judgment motion that was filed on behalf of Gov. Doyle, Gov. Walker indicated his agreement with the plaintiffs.

But Judge Moeser strongly disagreed. Although he found that the plaintiffs had taxpayer standing to sue, based on the minimal level of state expenditure that might occur in connection with the DP Registry, he found that the legal status created by the DP Registry Act fell so far short of marriage that it could not be found to be prohibited under the amendment.

An important part of Judge Moeser's analysis concerned a detailed examination of the legislative history of the amendment. He found that throughout its consideration in the legislature and the resulting campaign, it was clear that the proponents sought to ban same-sex marriages and Vermont-style civil unions, which carried virtually all the state law rights of marriage. Thus, the phrase "identical or substantially similar" was intended to prevent the state from getting around the marriage ban by setting up a parallel legal institution with the same or almost the same list of rights. The judge noted specific statements by various proponents that the measure was not intended, for example, to prohibit the state from providing partner benefits to state employees.

A news release put out by proponents said, "significantly, though, the language does not prohibit the legislature, local governments or private business from extending particular benefits to same sex partners as those legal entities might choose to do." Based on this legislative history, Judge Moeser found that "the drafting files also show that legislative proponents did not intend for the Marriage Amendment to prevent the state from creating a legal construct to provide benefits to same-sex couples, or for it to prevent the legislature from packaging together a bundle of rights for same-sex couples," so long as the result was not "substantially similar" to marriage.

The judge also found that the legislature did not ignore the Marriage Amendment

in 2009 when it was considering the DP Registry bill, even specifically referencing the amendment in the declaration of policy contained in the bill. The judge found that the legislature "carefully considered the constitutionality of Chapter 770 in light of the Marriage Amendment prior to enacting the domestic partnership registry." Comparing marriage and domestic partnership in Wisconsin, the judge found that "the vast majority of rights provided to domestic partners are rights that the law also grants to parents, children, family members, and sometimes 'close friends.' Other rights given to registered domestic partners can be obtained by any two people by executing certain documents."

Plaintiffs had argued that even if — as found — the DP status did not provide most of the legal incidents of marriage, it violated the Amendment because "it is calculated to confer the same social status of marriage." But the court found that accepting this argument would require it to "ignore the evidence of the plain language, constitutional debates, and earliest interpretations by the legislature," instead adopting some sort of "general purpose" interpretation.

The court rejected this argument on two grounds: "First, as this court has repeatedly stated, the Marriage Amendment prohibits a legal status that is identical or substantially similar to the legal status of married individuals. As stated above, the legal status of domestic partners is substantially different than that of married spouses." Second, "assuming, arguendo, the purpose of marriage is to accommodate the potentially procreative nature of heterosexual relationships, then it is undisputed that domestic partnerships do not have the same purpose because there is no potential for a homosexual relationship to be procreative. Therefore, Plaintiffs' argument about the purpose of marriage supports the conclusion that domestic partnerships are not substantially similar to marriage."

Indeed, the court concluded, "The state does not recognize domestic partnership in a way that even remotely resembles how the state recognizes marriage." The judge also found that the package of rights accorded domestic partners "is not even close to similar to a Vermont-style civil union," which is what the Amendment sponsors sought to prevent. The court found that the DP registry was "simply a legal construct

created to provide some benefits to same-sex couples,” exactly what the Amendment proponents had stated would be appropriate if the Amendment was enacted.

It is likely that the Plaintiffs will seek to appeal, perhaps joined by Gov. Walker. Lambda Legal provided representation to Fair Wisconsin and the individual intervenors. The text of the decision is available on Lambda Legal’s website. A.S.L.

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### **New Jersey Appellate Division Rejects Fraud & Bad Faith Claims by Surviving Domestic Partner**

In a per curiam decision by Judges Axelrad and Harris, the Appellate Division of the Superior Court of New Jersey held that the sister of a woman who died intestate did not act fraudulently or in bad faith when she failed to disclose the existence of additional assets to her sister’s surviving domestic partner. In the Matter of the Estate of Fischer, 2011 WL 2314353 (June 14, 2011) (unpublished opinion).

Lillian Fischer died in December, 2008 at the age of eighty six, only four years after she and her partner of nearly sixty years, Catherine S. Richards, registered as domestic partners. Richards was appointed administratrix of Fischer’s estate in February, 2009. Shortly afterwards, Fischer’s sister, Emma Hinman, filed a complaint challenging the appointment of Richards as administratrix. Through court-sponsored mediation however, Hinman and Richards reached a settlement concerning the allotment of Fischer’s assets. Hinman received title to property Fischer and Richards had held as joint tenants in Pennsylvania, while Richards received title to a listed series of securities. Additionally, Hinman was given rights to any assets other than those securities specifically granted in the settlement to Richards.

Problems arose with the settlement in early 2010, when Hinman claimed sole rights to several stock certificates belonging to Fischer. Hinman stated that she became aware of the existence of the certificates several years prior to Fischer’s death, but had not discussed the certificates during the mediation with Richards as no one had asked her any questions concerning those particular assets. Richards asserted to the Chancery Division that the settlement only granted Hinman rights to additional assets discovered after the signing of the settle-

ment, not assets that Hinman knew about but failed to disclose prior to the settlement. In addition, Richards claimed that by not disclosing the existence of the stock certificates during the mediation, Hinman acted in bad faith. The Chancery Division ordered the stock certificates transferred to Hinman, holding that her understanding of the settlement, that she had rights to all assets not specifically listed as belonging to Richards regardless of when she or Richards became aware of the existence of those assets, was the “more logical interpretation” of the agreement. As to Richards’ claim that Hinman acted in bad faith, the court held that as the parties never entered into discovery during the mediation process, Hinman had no duty to disclose knowledge of the certificates to Richards.

On appeal, Richards asserted that Hinman breached the covenant of implied good faith and fair dealing present in all contracts in New Jersey and failed to disclose the existence of the certificates, resulting in harm to Richards. The Superior Court rejected both claims and affirmed the lower court’s grant of title to the certificates to Hinman.

After asserting that contract principles do apply here, as a settlement agreement is a contract, the court briefly addressed each of Richards’ claims. In determining if Hinman breached the covenant of implied good faith and fair dealing, the court first defined the common law principle of good faith. Importantly, the court asserts that while good faith and fair dealing requires that parties act in a fair and reasonable manner so as not to infringe on the other party’s rights to the benefits of the contract, the covenant does not require one party to disclose all of its information to the other party during the negotiation of the contract. Here, Richards’ contractual benefit was title to the securities listed in the settlement agreement. By not disclosing that she knew of other securities owned by Fischer, Hinman in no way kept Richards from taking title of the securities allotted to her in the settlement agreement, and therefore did not act in bad faith in performance of the contract.

In addressing Richards’ second claim, that Hinman intentionally withheld information concerning the certificates from Richards during mediation, the court considered whether Hinman’s actions constituted fraud. In order for a defendant’s actions to constitute legal fraud, a defen-

dant must knowingly make a material misrepresentation of fact with the intent that the plaintiff will rely on that representation. The plaintiff must then actually rely on the representation, and the reliance must cause damage to the plaintiff. Although Hinman made no “affirmative misrepresentation” to Richards, if there existed a duty to disclose, then her failure to mention the certificates would still constitute fraud. For a duty to disclose to be present, either a fiduciary relationship must exist between the parties, or the nature of the transaction must be fiduciary. Here, the court held that as no fiduciary relationship existed between Hinman and Richards, Hinman was under no duty to disclose any information to Richards. The transaction was not fiduciary as it dealt with a dispute over assets, and this dispute resulted in an adversarial relationship between Richards and Hinman. Given the nature of the relationship, the court determined that both parties were “on notice to conduct [their] own due diligence.” While Richards may not have taken proper measures to ensure that her own interests were protected by the settlement, she did enter into the agreement willingly and was represented by counsel, who could have inquired about the existence of any other assets. Therefore, Judges Axelrad and Harris held that the court should not “make a better contract” for Richards than she contracted for herself. *Kelly Garner*

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### **Ohio Appeals Court Holds That Juvenile Court Lacks Power to Grant Temporary Visitation to Non-Biological Mom**

A three-judge panel of Ohio’s Tenth District Court of Appeals (Franklin County, encompassing Columbus and vicinity) has ruled, 2-to-1, against a non-biological mother attempting to enforce a temporary visitation order to see Maddie, the biological daughter of the woman with whom she formerly had a relationship. Maddie was born while the two women were together, and the women remained together for about five years after Maddie’s birth. The issue in the case, *Rorwell v. Smith*, 2011-Ohio-2809, 2011 WL 2407746 (10th Dist., June 9, 2011), is rather simple: does an Ohio juvenile court have subject matter jurisdiction over a non-relative’s visitation rights to a child? However, surrounding the visitation issue is a public dispute over

whether the lesbian partner of the biological mother should have any rights at all, considering Ohio's anti-gay laws.

The respondent/appellant in the case, Julie Smith, is battling her former partner, Julie Rowell, by inviting public sympathy with her, portrayed as a mother whose child is being snatched from her by the state. Smith's website, [www.BringMaddieHome.com](http://www.BringMaddieHome.com), invokes the homophobic provisions of Ohio's Constitution, which bans gay marriage, and its statutes, which prohibit gay couple adoptions. The website notes that, despite these laws, "The Ohio Supreme Court created a way for same-sex couples to voluntarily and consensually share custody of their children through written contracts certified by courts. Yet, even when same-sex parents have not entered into these consensual written contracts, activist Ohio courts are now forcing them into judicially-created common law adoption." The website emphasizes that Smith and Rowell never entered a contract, but that activist courts are creating common-law adoption, "forcing instability, inconsistency and conflict into the lives of innocent children all to advance their agenda."

Smith is represented by an attorney, Gary J. Gottfried, whose website, [www.gottfriedlaw.com](http://www.gottfriedlaw.com), promotes his specialization in same-sex domestic relations, and says, "Unfortunately, Ohio has approved a ban on same-sex marriage and toughened their stance on this issue with a marriage protection amendment." Thus, the attorney would appear to be a proponent of custody rights for lesbian, non-biological mothers.

In its very limited decision, the appeal court sidesteps the emotional issues. After listing the numerous motions, orders and appeals filed by the two women, the court arrives at the relevant issue: whether a juvenile court magistrate can issue an order granting the non-biological mother, Rowell, temporary visitation and custody rights. If so, can the magistrate hold the biological mother, Smith, in contempt for refusing to allow visitation, and order her to pay Rowell's legal expenses?

The court held that juvenile court was without jurisdiction to issue the temporary visitation order, thus, could not hold Smith in contempt for failing to obey it. The court found the relevant custody statute to be section 2153.23 of Ohio's Revised Code, which grants juvenile courts authority "to determine the custody of any

child not a ward of another court of this state." However, the statute does not give the court jurisdiction over visitation. The relevant Ohio statute on visitation is section 3109.051 of the Revised Code, which allows the court to grant visitation rights in cases of "divorce, dissolution of marriage, legal separation, annulment, or a child support proceeding that involves a child." The court found that the legislature intended this list to be complete, and nowhere does it state that a person not in one of these categories can be granted visitation rights. Hence, juvenile court was without any authority to grant visitation, and Smith may not be held in contempt for violating the visitation order.

Justice Susan Diane Brown disagreed, and filed a dissent. (Justice Brown is a Republican re-elected to her judgeship in 2010.) Justice Brown saw visitation as an integral part of the judicial determination of custody, citing *In re LaPiana*, 2010 -Ohio- 3606, 2010 WL 3042394 (8th Dist. Cuyahoga County 2010) (juvenile court has jurisdiction to determine whether it is in best interest to have visitation with non-biological parent). Thus, Justice Brown would have held that the juvenile court had jurisdiction over visitation.

Justice Brown further found that the juvenile court had authority to issue temporary visitation orders under the Ohio Rules of Juvenile Procedure, which give the court "broad authority to issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest may require."

Thus, the dissenter would have upheld the juvenile court's visitation order, as well as the contempt order stemming from Smith's violation of the visitation order.

[BringMaddieHome.com, on its "Upcoming Events" page, states that a trial on the issue of custody would begin on July 6, 2011.] *Alan J. Jacobs*

### **Statutory Rape Conviction of Twelve Year Old Boy For Having Sex With Male Peer Overturned by Ohio Supreme Court**

On June 8, 2011, the Supreme Court of Ohio held that a statutory rape law was unconstitutional, as applied to a twelve year old boy who had sexual contact with an

eleven year old boy. *In re D.B.*, 2011 WL 2274624.

According to the complaint, D.B. was charged with nine separate counts of rape in violation of R.C. 2907.02 (A)(1)(b), arising from conduct occurring between him and M.G., an eleven year old boy. D.B. was also charged with one count of rape under the same statute in connection with alleged sexual activity occurring with A.W., who was twelve.

R.C. 2907.02 (A)(1)(b) provides that: "No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: ... (b) The other person is less than 13 years of age, whether or not the offender knows the age of the person."

D.B. filed a motion to dismiss the complaint on the grounds that the State could not establish the charges against him and that RC 2907.02 (A)(1)(b) as applied to him violated his federal and state rights to due process and equal protection. It is unclear from the Supreme Court's decision how the trial court disposed of this motion. However, via an amended complaint filed by the People, the charge concerning A.W. was voluntarily withdrawn, and the State added a separate legal basis for eight of the nine charges concerning M.G., in addition to R.C. 2907.02 (A)(1)(b), to wit, forcible sexual conduct under R.C. 2907.02 (A)(2).

At a adjudicatory hearing held by the trial court, A.W. testified that he observed D.B. and M.G. engage in anal sex, that "D.B. 'bribed' M.G. with video games to engage in sexual conduct", that D.B. always initiated the sexual contact, and "would either bargain with, or use physical force on, M.G. to convince M.G. to engage in sexual conduct." A.W. did state that M.G. did not engage in sexual conduct with D.B. until he had agreed to do so. D.B.'s father also testified, saying that D.B. was not an aggressive child, even though he was "big" for his age.

At the conclusion of the State's case, D.B. moved for acquittal, and the court dismissed four counts of rape against D.B., as well as all counts to the extent that they were based on the theory that D.B. had engaged in forcible sexual conduct. D.B.'s motion to dismiss the counts alleging a violation of R.C. 2907.02 (A)(1)(b) was denied and the court ultimately adjudicated D.B. delinquent based on the violation of R.C.



2907.02 (A)(1)(b) set forth in the five remaining counts. D.B. was then committed to the Department of Youth Services for a minimum of five years to the maximum period of his 21st birthday, the court then suspended the commitment, and placed D.B. on probation for an indefinite period of time. The court further ordered D.B. to attend counseling and group therapy.

On appeal to the Fifth District Court of Appeals, D.B. argued, *inter alia*, that application of R.C. 2907.02 (A)(1)(b) violated his federal rights to due process and equal protection. That court upheld the constitutionality of the challenged statute as applied, and the Supreme Court of Ohio accepted jurisdiction over the same issue.

Before the Supreme Court, D.B. argued that the statute was vague as applied to children under the age of 13, and thus violated his due process rights. The court reversed the trial and intermediate appellate courts, and held that as applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute “authorizes and encourages arbitrary and discriminatory enforcement.” The court compared the instant case to the usual case where an adult engages in sexual conduct with a child under the age of 13. In the usual case, “it is clear which party is the offender and which is the victim.” However, in D.B.’s case, the distinctions between offender and victim were “blurred,” and in a strong statement, the court said that “[t]he prosecutor’s choice to charge D.B. but not M.G. is the very definition of discriminatory enforcement.”

The court cautioned that R.C. 2907.02(A)(1)(b) may be constitutionally applied to a child under the age of 13 if: the offender substantially impairs the other person’s judgment or control, R.C. 2907.02(A)(1)(a); the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or advanced age, R.C. 2907.02(A)(1)(c); or the offender compels the other person to submit by force or threat of force, R.C. 2907.02(A)(2).

The court also found D.B.’s equal protection argument persuasive, noting that all three boys at issue were under the age of 13, had engaged in sexual contact with each other, and only D.B. was charged with violating R.C. 2907.02 (A)(1)(b). “Application

of the statute in this case to a single party violates the Equal Protection Clause’s mandate that persons similarly circumstanced shall be treated alike.” *Eric Wursthorn*

### **New York Trial Court, Bound by Appellate Division Precedent, Refuses to Dismiss Gay Defamation Claim**

In *Yonaty v. Mincolla*, 2011 WL 2237847 (N.Y. Sup. Ct., Broome County, June 8, 2011), Justice Phillip R. Rumsey of the New York Supreme Court followed prior Appellate Division precedent in holding that the imputation of homosexuality constitutes defamation *per se* and, accordingly, that a plaintiff alleging defamation is not required to prove that any economic harm resulted from the imputation.

Plaintiff Yonaty, a male, was in a relationship with one Kara Geller, a female. Defendant Mincolla, an acquaintance of Kara Geller’s, was told by a third party that Yonaty was gay or bisexual and “actively engaging in homosexual conduct,” unbeknownst to Geller. Mincolla, who averred that the news left her concerned for Geller’s physical and emotional health, did not feel sufficiently close to Geller to inform her of the news, instead informing third-party defendant Koffman, a long-time friend of Kara Geller’s mother, who then told Geller’s mother, who, in turn, told her daughter. Kara Geller then ended her relationship with Yonaty.

Yonaty brought suit for defamation, intentional infliction of emotional distress and *prima facie* tort, based on the statements concededly made by defendant Mincolla to third-party defendant Koffman. Responding to the defendant’s motion to dismiss for failure to allege special damages, Yonaty argued for an instruction of defamation *per se*. He contended that under governing New York appellate precedent, falsely claiming that an individual is gay constitutes defamation as a matter of law, and, therefore, a plaintiff need not point to or allege any special damages (i.e., the loss of something with economic or pecuniary value). The court agreed, citing New York Appellate Division precedents from the 1980s through a 2007 2nd Department ruling, *Klepetko v. Reisman*, 41 App.Div.3d 551 (observed in dicta).

However, in reaching its decision, the court used language indicating that it was

so holding because it had a duty to do so in light of the appellate precedents, but noting that “the law may, at some point, change in response to evolving social attitudes regarding homosexuality” but, essentially, that its hands were tied.

The court also noted that the state’s highest court has never explicitly ruled that an allegation of homosexuality is defamation *per se*. The court cited to the federal Southern District case *Stern v. Cosby*, 645 F.Supp.2d 258 (S.D.N.Y. 2009), in which a federal court was asked to decide whether under New York law Howard K. Stern, former lawyer and companion of Anna Nicole Smith, had been defamed by author Rita Cosby when she wrote that Stern had sexual relations with Smith’s then-boyfriend, Larry Birkhead, and videotaped it.

While then-District Judge Denny Chin did in fact find that the plaintiff may have been subjected to defamation by Cosby, the court did not conclude that allegations of homosexuality are, on their own, libelous as a matter of law. Rather, the court found that defamation *per se* attached in that case because of the nature of the alleged homosexual relationship. Stern was, at the time, Smith’s attorney. The allegation that Stern was thus involved in a sexual relationship with his client’s significant other is one that could have severely damaged his professional reputation.

In effect, the defamation derived from the allegation that implied that Stern had breached his professional responsibility as a lawyer through the choice of his sexual partners. Presumably, the court would have identified the allegations of ethical impropriety to be potentially defamatory regardless of the genders of the parties involved.

Moreover, the Stern case is notable for its explicit nod to changing social norms regarding homosexuality. Specifically, Judge Chin noted the widening social acceptance of gay individuals in modern society, citing to *Lawrence v. Texas*, the 2003 Supreme Court case invalidating anti-sodomy statutes, and asserted in dicta that calling an individual a “faggot” should not be considered slander *per se*, as it purports to describe conduct that is no longer punishable under the law. The Stern court went on to cite public support for marriage equality in finding that the New York Court of Appeals would likely not treat imputations of homosexuality as defamatory *per se*. Judge Rumsey’s citation of Stern appears to indi-

cate discomfort with the notion that imputations of homosexuality are properly treated as defamation per se, despite his ruling.

Nonetheless, the plaintiff's cause of action could not be dismissed for failure to state a claim based on the fact that he did not allege any special damages.

The court, however, granted summary judgment dismissing plaintiff's other causes of action premised on intentional infliction of emotional distress and for prima facie tort. With respect to the former, the court noted, among other things, that it must fail because alleging someone to be a homosexual is "not so outrageous in character or extreme in degree as to be 'regarded as atrocious, and utterly intolerable in a civilized community.'" (quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993)). For similar and additional grounds, the prima facie tort claim was likewise dismissed. The court also rejected the plaintiff's claim of "privilege" based on common interest or friendship. *John Teufel*

### **NY Trial Court Overturns Arbitrator's Suspension of Openly Gay High School Librarian**

Finding that a labor arbitrator's imposition of a 6-month suspension without pay was "shocking to this court's sense of fairness," New York Supreme Court Justice Manuel J. Mendez vacated the arbitrator's decision and ordered that an openly gay high school librarian be restored to full employment status with back pay and without any requirement for counseling or training. The decision, *Asche v. New York City Board of Education*, 108528/10, NYLJ 1202498891395 (N.Y. Supreme Court, N.Y. County), was reported in the New York Law Journal on June 30, 2011.

According to Justice Mendez's opinion, Christopher Asche, "an openly gay man," has more than twenty years of service and holds a tenured appointment as a librarian with the New York City Department of Education (DOE). He was employed at Stuyvesant High School. The DOE brought charges against him in June 2009 based on two issues. The first involved a claim that he violated rules by failing to obtain parental permission before taking a group of students on a field trip to Boston. The other involved allegations by some students that he had been touching them improperly in the library.

After an investigation by the Office of the Special Commissioner of Investigations (SCI), criminal charges were filed against Asche, which received some publicity in the press, but the district attorney's office, upon its own investigation, determined that there had been no criminal activity warranting prosecution. Nonetheless, DOE sought Asche's dismissal, and he was reassigned to the infamous "rubber room" pending the outcome of his case. Under the Education Law, the issue of his discharge was subject to mandatory arbitration. A hearing stretching over twelve days between November 2009 and January 2010 was held by Arbitrator David Hyland, designated as a "hearing officer" for this purpose under the Education Law.

Evidence presented at the hearing was conflicting. It seems that Asche was a last-minute substitute for a parent chaperone on the Boston trip, which did not involve a school-sanctioned club activity, but Hearing Officer Hyland found that Asche was still responsible for obtaining appropriate permission for the students, at least one of whose parents had indicated that the student could not go. The issue involving touching was more complicated. There was evidence at the hearing that it was customary in the library for librarians to touch students to get their attention without having to raise their voices, in order to maintain quiet in the library. There was specific testimony that a heterosexual female librarian engaged in the same conduct as Asche and was never cited or disciplined for it.

Hearing Officer Hyland found that none of the touching that students complained about was sexual in nature, but that some of it was "inappropriate," and Asche claimed that Hyland had inappropriately rejected attempts to show that there was some sort of conspiracy by homophobic students to get him fired. Wrote Justice Mendez, "The hearing officer did not find substantial cause rendering petitioner unfit to perform his obligations of service, but found he had neglected his duty and that some of the charged conduct was unbecoming to his position or was prejudicial to the good order, efficiency or discipline of the service."

Although Hyland rejected the DOE's demand that Asche be terminated, he ordered a six-month suspension without pay, and that Asche be required to "attend counseling and/or training to understand appropriate professional and physical boundaries

between himself and the students, whether in management of student behavior in the library or otherwise."

Representing himself, Asche appealed his suspension, complaining that his right to be free of sexual orientation discrimination under the state's Human Rights Law was violated. He argued that Hyland's conclusions were "arbitrary and capricious," in light of the testimony that his conduct was no different in kind from that of a heterosexual female librarian who had not been charged with misconduct or subject to discipline. He argued that the penalty imposed on him was "shocking to one's conscience" and would "have a chilling effect on gay, lesbian and transgender individuals employed in the education system because they would be subject to actions by students based on their sexual preferences and not their actual conduct."

Justice Mendez sided with Asche, concluding, "The public policy considerations embodied in [the Human Rights Law] were violated by the finding that petitioner, an openly gay man, engaged in inappropriate touching when his actions, i.e., touching, whispering and standing silently next to students, were the same as the heterosexual female librarian. . . . No charges were brought against the female librarian, and she was not required to attend counseling or training."

"Hearing Officer Hyland may not have intended to discriminate against the petitioner," Mendez continued, "but the opinion and award has that effect. Petitioner has the right not to be discriminated against or abused by students based on his sexual orientation." Justice Mendez noted that the SCI investigator had testified at the hearing that "whispering and touching students on the shoulder was generally acceptable to get their attention in the library." Mendez concluded that "there is no rational basis for a finding that his touching of students, which was done in the same manner as a heterosexual librarian, constitutes an inappropriate touching; especially given his history of 20 years of exemplary service."

Normally a court is not authorized to substitute its judgment for that of an arbitrator on the merits of a case, but Mendez noted that a ruling that was "shocking to one's sense of fairness" could be set aside. "The nonexistence of a prior disciplinary record in twenty years and the financial impact of the six month suspension with-

out his salary, is clearly disproportionate to petitioner's conduct," wrote the judge. "He was forced to defend himself against criminal charges and was exposed to the stigma of being described as a 'pervert' in the press. It is shocking to one's sense of fairness that petitioner is required to attend counseling or training to understand appropriate professional or physical boundaries, when touching and whispering is acceptable practice, and was done in the same manner that was permissible if performed by the heterosexual female librarian." Indeed, Mendez noted evidence in the record that among all the librarians employed at Stuyvesant High, Asche was deemed the least physically intrusive with students to maintain order in the library.

Mendez concluded that Asche, representing himself in the appeal, had met the burden required to overturn the arbitrator's award. "A legally recognizable cause of action can be identified even if it is not skillfully prepared," he wrote, denying the Education Department's motion to dismiss Asche's petition on technical grounds, and ruling for Asche on the merits.

The Education Department was represented by the City Corporation Counsel's Office, which will have to decide whether to appeal. A.S.L.

### **NY Upstate Appeals Court Finds Public Schools Are Subject to Human Rights Law**

This may sound like an arcane issue, but actually it is quite significant because of the anomalies and peculiarities of New York State Law. Does the state's Human Rights Law (Executive Law Section 296) apply to the public schools (K-12), so that a student who has been subjected to bullying that their school refuses to address effectively can file a claim with the State Division of Human Rights and seek monetary and injunctive relief if the bullying is due to one of the characteristics listed in the Human Rights Law?

In an opinion announced on June 30, *Ithaca City School District v. New York State Division of Human Rights*, No. 510106 (*NY Law Journal*, July 8), a five-judge panel of the Appellate Division, 3rd Dept., ruled by a vote of 4-1 that the Ithaca School District is covered by the law, and affirmed the Division's award of damages and injunctive relief on behalf of an African-American

student who had been frequently harassed by white students on the school bus. The ruling is notable because it opens up a split of authority on the jurisdictional question, disagreeing with the 2nd Department's ruling in *East Meadow Union Free School District v. New York State Division of Human Rights*, 65 App.Div.3d 1342 (2009), leave to appeal denied, 14 N.Y.3d 710 (2010).

The Human Rights Law is codified in the New York Executive Law. Executive Law Section 296(4) makes it "an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to . . . permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status."

In this case, Justice Robert C. Mulvey of the Tompkins County Supreme Court had ruled in favor of the School District, following the 2nd Department precedent. (Under New York practice, an uncontradicted ruling by any Department of the Appellate Division is binding on all the trial courts in the state.) In reversing, the majority of the Appellate Division panel, in an opinion by Justice Leslie E. Stein, directly rejected the reasoning of the 2nd Department, which had relied on the state's General Construction Law to find that the term "education corporation or association" — a term not defined in the Human Rights Law — does not include the state's primary and secondary public schools. The 2nd Department premised this ruling on the contention that school districts are "municipal corporations," not "education corporations," and that the terms "education corporations" and "education associations" was meant by the legislature to refer to private schools and institutions of higher education (colleges, universities, professional schools).

"Even assuming, arguendo, that the tortured legislative history underlying General Construction Law sections 65 and 66 — as well as various other statutes — supports petitioner's argument that the definitions of 'education corporation' and 'education association' therein do not embrace public school districts," wrote Justice Stein, "the fact remains that this does not, as petitioner contends, necessarily mean that these definitions are applicable to Executive Law

Section 296(4). The approach advocated by petitioner completely ignores General Construction Law Section 110, which provides that the General Construction Law is not intended to supply a missing definition in a particular statute when the 'general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by [the General Construction Law.]"

Justice Stein pointed out that the Human Rights Law is a remedial statute that "must be liberally construed to accomplish its beneficial purposes — one of which is to eliminate discrimination in 'educational institutions' (Executive Law sections 290, 300) — 'and to spread its beneficial results as widely as possible,'" citing to a recent decision by the state's highest court, *Rizzo v. New York State Division of Housing and Community Renewal*, 6 N.Y.3d 104 (2005).

Justice Stein also observed that the school district's contention would require concluding that the legislature "intended to provide its protection against discrimination only to the relatively minuscule percentage of students whose families can afford to send them to private, non-religious schools, relegating public school students to other more onerous and/or less comprehensive remedies." The court found that this would be "clearly contrary to the express purpose of the Human Rights Law."

The sole dissenting judge, Justice Robert S. Rose, agreed with the 2nd Department, arguing that it seemed clear from the wording that the Human Rights Law provisions were intended to apply to post-secondary education and not to the state's public primary and secondary schools.

On the merits of the case, the court found that the Division's finding of a violation was sustained on the record and upheld the award of \$200,000 damages to the student and the grant of injunctive relief against the school district, requiring it to take various steps to deal with the harassment problem. The court did cut down the amount of damages awarded to the student's mother, from \$200,000 to \$50,000, finding that the record concerning emotional distress she suffered was not sufficient to sustain the larger amount.

Michael K. Swirsky of the State Division of Human Rights (and a LeGaL member) argued the case for the Division, with the Ithaca attorney Raymond M. Schlather (of



the firm Schlather, Stumbar, Parks & Salk) appearing for the complainants, Amelia Kearney and her daughter. Cecilia Chang of the Attorney General's office supported the Division's position as amicus curiae, as did Lambda Legal on behalf of Advocates of Children of New York and other organizations. Jonathan B. Fellows of the Syracuse law firm Bond, Schoeneck & King, represented the school district.

One might ask why there is no reference in the court's decision to the Dignity for All Students Act (DASA), enacted last year to deal with the problem of bullying in the public schools. The answer is twofold: first, DASA was not in effect at the time of the incidents that gave rise to this case (2005-2006). Second, and perhaps more importantly, DASA does not authorize student victims of bullying to file lawsuits for damages and injunctive relief. DASA imposes obligations on school districts to adopt policies to deal with bullying, to institute training programs, and to facilitate mechanisms to respond, as well as to report their actions to the State Education Department, but it does not focus on individual claims — perhaps because the legislature could believe that students with individual complaints could resort to the provisions of the Human Rights Law for relief. DASA was intended to be proactive in requiring school districts to address the problem, and it would be up to state education authorities, presumably acting through the Attorney General, to take action against school districts that fail to fulfill the requirements of DASA.

Now that there is a split of authority between the Departments, trial courts in the 3rd Department will be bound by this ruling, while courts in the 2nd Department will be bound by that Department's ruling (and, in a footnote, Justice Rose points out that the Division does not accept complaints against public school districts from within the boundaries of the 2nd Department at present due to that ruling). The trial courts in the 1st and 4th Departments will be free to choose which precedent to follow for now, and presumably the Division will continue to accept complaints coming from those parts of the state. If the City of Ithaca seeks review in the Court of Appeals, one suspects review would be granted in order to reconcile the difference and adopt a unitary approach for the state. Such would certainly be advisable. A.S.L.

### Michigan Court of Appeals: Rejecting a "Gay Panic" Defense?

The headline in a Michigan newspaper reported this case as the court rejecting a "gay panic" defense, which may be overstating things slightly. Nonetheless, the decision by the Michigan Court of Appeals to uphold the verdict in *People v. Cutler*, No. 296078 (June 16, 2011)(unpublished disposition), is certainly welcome.

Dale Cutler was convicted of assault with intent to do great bodily harm and was sentenced as a habitual offender-fourth offense to serve 11-25 years and to make financial restitution to his victim, a man named Ryan Young. According to the trial record, Young's version of the story was that he was out at a bar with friends celebrating his birthday. Cutler, not an acquaintance, ended up sitting and drinking with him and they got friendly. Somebody dropped off Young and Cutler at Young's apartment. When they got inside, Young testified, he went into his bedroom to change and asked Cutler, "Did you want to do anything or did you just want to go to bed?" Cutler responded, "Yeah, I'm going to do something, you fucking faggot," and proceeded to beat up Young so badly that he ended up in the hospital, going in and out of consciousness for several days, his face bashed in from repeated hard punching.

Cutler's version is different, of course. He claimed that when they got back to the apartment, Young told him he could sleep in the bedroom and Young would crash on the couch. But Cutler claims the next thing he remembers after passing out on the bed, fully dressed, was waking up "to a very bad smell in my face, really bad alcohol. And there was wetness on my ear and my pants were unzipped and there was pressure in my genital area." Cutler claimed he was "in shock" to discover that Young had "his mouth on my neck" and "his hand in my pants." Cutler claims he shoved Young away, then Young tried to get on top of him and punched him in the face, to which Cutler responded with a struggle. "I think it was my momentum that threw him off the bed but we ended up rolling off the bed and I ended up on top. I think the hold broke when we fell to the ground. Then I was on top then and I punched him... Probably about four or five times... Then I got up and left."

Cutler admitted in his testimony that he was a "pretty good size guy" (the court later comments that Young is short and slightly built and Cutler is large), that he had been an unofficial bouncer at a bar and had trained for cage fights so he "did strike pretty hard." Cutler claimed that the hitting was "an explosive burst" and admitted that Young was unconscious on the ground when he left. He did not call for medical assistance. Evidently a neighbor found Young and took him to the hospital.

At trial, Cutler requested that the judge charge the jury on self defense. The trial judge rejected the request. After reviewing the evidence, the trial judge said, "It really is somewhat clear from his testimony later on that he did this because he was sexually molested by someone else and just as he never thought about reporting it, he was surprised that Mr. Young would report it. In essence that he got what he deserved and I'm not seeing anything that indicates that Mr. Cutler was in any way in any fear of being assaulted or any type of harm that would justify what he did. The request is noted but it is denied."

The jury then took 23 minutes to convict Cutler, who appealed claiming error in the denial of the self-defense charge. The court, *per curiam*, characterized this as a "close question," but then said, "However, having reviewed the record, and the trial court's reasoning for denying the instruction, because the testimony in the record supports the trial court's characterization of the evidence, and the question whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion, we find no abuse of discretion in the trial court's decision to deny the instruction."

The court noted the physical disparity between the short, slight Young and the big bruiser, Cutler. "Even accepting defendant's testimony that the victim sexually assaulted him and punched him once in the head, defendant cannot assert self-defense because he used excessive force to repel the attack he claims was mounted by the victim. Indeed, defendant did not try to merely subdue the victim, but punched the victim in the face hard enough to knock out teeth until the victim was unconscious. Given defendant's fight training and the size difference between him and the victim, this far exceeded the force necessary for defendant to defend himself."

The other issue raised by Cutler on appeal had to do with a statement he made while in police custody that was admitted in evidence, from which the jury would learn that he had gotten into similar scrapes in the past. The court rejected the argument that the trial judge erred by admitting the statement, or that the failure of Cutler's defense attorney to get it excluded constituted ineffective representation.

Traditionally, the so-called "gay panic defense" has been that the defendant's psychological reaction to a sexual advance from another man resulted in involuntary violence on his part - that he lost control under circumstances that should be held to reduce or eliminate the culpability for the results of his conduct. That wasn't quite the argument in this case. In any event, there are two versions of the facts to deal with. If the jury believed Young's testimony, Cutler engaged in an extremely violent response to a verbal solicitation that involved no physical aggression by Young. If Cutler's version was believed, Young's sexual assault of Cutler provoked a grossly disproportionate response. Either way, the trial court would not instruct the jury on self-defense in light of the circumstances, and the Court of Appeals found that refusal of the self-defense instruction was within the reasonable discretion of the trial court. A sexual solicitation, and even some sexual contact, does not give license for the kind of violent response documented in this case. *A.S.L.*

## Federal Civil Litigation Notes

**Supreme Court** — On July 11 Lambda Legal filed a cert petition on behalf of plaintiffs Oren Adar and Mickey Smith in their question to get Louisiana officials to issue an appropriate birth certificate for their son, who was born in Louisiana but adopted by Adar and Smith in New York State. The men live with their son in Florida. When they applied to Louisiana officials for a birth certificate listing both of them as parents pursuant to the adoption decree, as a Louisiana statute mandates, the officials refused, citing the state's ban on adoptions by unmarried couples. Lambda filed suit on their behalf in U.S. District Court, invoking the Full Faith and Credit Clause and the Equal Protection Clause of the U.S. Constitution. The district court

and a three-judge panel of the 5th Circuit ruled in favor of plaintiffs, finding that the FFCC mandated that Louisiana recognized the adoption decree and issue a new birth certificate in accordance with the pertinent Louisiana statute. Resting their ruling on the FFCC, these courts did not opine on the Equal Protection claim. The state obtained en banc review and a reversal by a divided panel, the majority holding that the FFCC was binding only on courts, and could be enforced only in the courts of the state, and a smaller majority holding that there was no Equal Protection violation. The cert petition in *Adar v. Smith* focuses mainly on the FFCC issue, noting that the case opens a circuit split on several issues in the case, but also makes a brief equal protection argument. Lead counsel on the case has been Kenneth D. Upton, Jr., from Lambda Legal's Dallas office; counsel of record on the brief is Paul M. Smith of Jenner & Block LLP, a Lambda board member who argued *Lawrence v. Texas* in 2003 and is a leading advocate at the Supreme Court bar. Also on the cert brief are Jon Davidson, Lambda Legal Director, Greg Nevins of Lambda's Atlanta office, Jenner & Block attorneys Scott Wilkens, Mark Gaber, and Andrew H. Bart, and Louisiana local counsel Regina O. Matthews and Spencer R. Doody of Martzell & Bickford in New Orleans.

**Board of Immigration Appeals** — Lambda Legal filed a request to appear as amicus curiae in a case pending before the Board of Immigration Appeals, *In the Matter of Monica Liliana Teodora Alcota* (I-130 Petition for Alien Relative), File No. A 087 547 138 (filed July 11, 2011), arguing that an ancient precedent, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), should no longer be relied upon by the BIA in determining whether to take account of lawful same-sex marriages. In *Adams*, a case that predates most of the significant precedents establishing constitutional rights for LGBT Americans, the 9th Circuit ruled that a purported Colorado same-sex marriage could not be recognized by immigration officials in determining whether to allow a same-sex spouse of an American citizen to remain in the U.S. and be sponsored for citizenship as the spouse of a U.S. citizen. (This was an unusual case in which a local municipal clerk in Colorado was briefly issuing marriage licenses to same-sex couples, so Adams and his partner were

married. A complicating factor in the case was the subsequent determination that the marriage was not valid under state law.) In this case, the U.S. citizen married her same-sex partner in Connecticut in 2010, and has filed a petition requesting that her spouse be classified for immigration purposes as the spouse of a U.S. citizen, which provides preferential treatment for remaining in the country and eventually becoming a citizen. The I-130 petition was denied on May 11, 2011, the immigration authorities indicating that even if DOMA were struck down, prior case law, *Adams v. Howerton*, would dictate a refusal to recognize this marriage. The brief argues that *Adams* has been "superseded by intervening and dispositive legal and legislative developments, and does not stand as precedent on the issue before the Board," and that if DOMA is invalidated the immigration authorities could recognize same-sex marriages consistent with the established practice of recognizing marriages that are valid under state law for immigration purposes.

**Equal Employment Opportunity Commission** — The Office of Federal Operations of the Equal Employment Opportunity Commission has reversed a decision by the Agency dismissing a hostile environment harassment claim brought by a gay postal worker, finding that a gay worker who is harassed because he is going to marry a same-sex partner may be able to prove that the harassment was due to sexual stereotyping. *Veretto v. Donahoe*, 2011 WL 2663401 (EEOC, July 1, 2011). The case arose in Connecticut. The complainant said a co-worker began harassing him after an announcement appeared in a local newspaper about his planned marriage. He complained to management, which instituted an investigation and took administrative action against the co-worker, who was then absent from complainant's workplace for three months. But the co-worker then returned, and management blew off complainant's protest. The Agency had dismissed complainant's sex discrimination charge, stating that this was a sexual orientation discrimination case not covered by Title VII. Disagreeing, the OFO said, "In this case, we find that Complainant has alleged a plausible sex stereotyping case which would entitle him to relief under Title VII if he were to prevail. He alleges that he was subjected to a hostile work environment because [Co-

worker 1] learned that he was marrying a man. He has essentially argued that CW1 was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype by announcing his marriage to a man in the society pages of the local newspaper. In other words, Complainant alleges that CW1's actions were motivated by his attitudes about stereotypical gender roles in marriage. Complainant further alleges that the Agency should be held liable for CW1's actions because it failed to take appropriate corrective action once the harassment was reported to management. These allegations are sufficient to state a viable hostile work environment claim under Title VII."

**2nd Circuit Court of Appeals** — On July 6, the court ruled in *Alliance for Open Society International, Inc. v. United States Agency for International Development*, 2011 WL 2623447, that 22 U.S.C. section 7631 (f), which establishes a condition for receipt of federal funds appropriated under the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that recipient organizations have an express policy against prostitution, places an unconstitutional condition upon receipt of federal funds. The 2nd Circuit panel found that the provision "compels recipients to espouse the government's viewpoint" and thus goes beyond the limits of what the Supreme Court has previously held in the way of imposition of conditions for receipt of such funds by non-governmental organizations. Among those joined in challenging the law were organizations battling the HIV/AIDS epidemic, who argued that it was crucial to be able to work in a non-judgmental way with prostitutes to promote safer sex practices as a means of curtailing the spread of the virus, but an organization dedicated to doing such work was, in effect, blocked from receiving federal funds.

**California** — U.S. Bankruptcy Judge Michael S. McManus (E.D. Cal.), citing a May 4 decision by Bankruptcy Judge Cecilia G. Morris in *In re Somers*, 2011 WL 1709839, has rejected a motion by the U.S. Bankruptcy Trustee to dismiss a petitioned filed jointly by same-sex partners who were married in California in 2008. Ruling on May 31 in *In re Ziviello-Howell*, No. 11-22706-A-7, Judge McManus found, first, that the motion was filed much too late in the proceeding, as the meetings with credi-

tors had already taken place and the case was close to final resolution. More to the point, however, he observed that none of the criteria for dismissing a bankruptcy petition as specified in the statute had been met, and as a practical matter it made no sense to dismiss the petition, since the assets and debts were joint and a dismissal would require filing of separate petitions, then a motion to consolidate, then doing the case all over again. "Whether or not the debtors are spouses under DOMA," he wrote, "because they are legally married, because their assets and liabilities belong to their community, and because it will not make any practical difference to anyone if this case proceeds as one or two cases, the court concludes that there is no cause for dismissal of this joint case. . . the court concludes that dismissal is not in the best interest of the debtors or their creditors and insufficient cause exists to dismiss their joint petition."

**California** — The U.S. Departments of Justice and Education have reached a settlement agreement with Tehachapi Unified School District, resolving an investigation into charges concerning harassment of a middle school student due to his failure to conform to gender stereotypes. The student, Seth Walsh, committed suicide in September 2010 at the age of 13. Subsequently, the Education Department received a complaint that resulted in a joint investigation by the two departments, which found that Walsh suffered sexual and gender-based harassment by his peers due to nonconformity with gender stereotypes, and that the district did not adequately investigate or respond to it. The resolution agreement obligates the district to take various steps involving revising policies, training staff, initiating climate surveys to attempt to detect problems, and taking appropriate action to address issues raised in the surveys, according to a July 1 press release issued by DOJ.

**North Carolina** — In *United States v. Timms*, 2011 WL 2610566 (E.D.N.C., July 2, 2011), U.S. District Judge Terrence W. Boyle found that the Adam Walsh Child Protection and Safety Act of 2006, which provides for civil commitment of dangerous sex offenders in federal custody after their criminal sentences have been served, was unconstitutional in its application to Gerald Timms, who served a 100 month sentence for receiving child pornography in

the mail. The court found both due process and equal protection violations. As to due process, the court faulted the government for failing to provide a meaningful hearing on the issue of Timms' dangerousness within a reasonable period of time after his criminal sentence ended. Timms was retained in civil detention for 31 months as of the time of the court's decision, without having had any substantive hearing. While Judge Boyle found no constitutional violation in a system that allows civil commitment to continue for some reasonable period of time while the government prepares its case to present to a neutral magistrate, he also found that the Supreme Court has never approved such a procedure that would hold somebody in confinement for years with a hearing. As to equal protection, the court found that there was no rational basis for Congress to have imposed different evidentiary standards to support civil confinement depending upon whether the respondent was already confined in a federal prison on criminal charges or confined in some other kind of facility or not confined at all. The court ordered that Timms be released to the custody of the U.S. Probation Office.

**New York** — A motion for summary judgment on behalf of the plaintiff was filed on June 24 in *Windsor v. United States*, 10-Civ-8435 (S.D.N.Y.), asserting that the imposition of federal estate tax on Edie Windsor's inheritance from her same-sex spouse, Thea Spyer, was an unconstitutional application of Section 3 of the Defense of Marriage Act (DOMA), the 1996 federal statute that provides that only different-sex couples can be married for purposes of federal law. The case is pending before U.S. District Judge Barbara S. Jones, who has referred the matter to Magistrate Judge James C. Francis IV for supervision of discovery and decision of pretrial motions. The legal team represented Windsor consists of Roberta A. Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison as a cooperating attorney for the ACLU LGBT Rights Project (James Esseks, Legal Director), and Melissa Goodman of the NY Civil Liberties Union. Although the U.S. Justice Department is nominally representing the government, in light of DOJ's announcement in February that it concedes the unconstitutionality of Section 3 of DOMA, the defense is now in the hands of Paul Clement, former Solicitor



General hired by the House of Representatives Bipartisan Legal Advisory Group for the purpose of defending Section 3 in pending litigation. The brief in support of summary judgment contends that Section 3 is subject to heightened scrutiny in an Equal Protection challenge under the 5th Amendment, and that the justifications for the statute articulated by Congress in the legislative history are insufficient to survive such a challenge. As the 2nd Circuit has not yet decided what level of scrutiny should be used in a non-military equal protection case, the plaintiffs hedged their bets by arguing in the alternative that Section 3 also would not survive rational basis review. Mr. Clements' response to the motion for summary judgment is due on August 15. *New York Law Journal*, July 12, 2011.

**Utah** — The Utah Civil Rights and Liberties Union, an ACLU state affiliate, has filed an amicus brief on behalf of Immigration Equality in the pending challenge to Utah's Illegal Immigration Enforcement Act, HB 497, arguing that it improperly criminalizes the conduct of lesbian and gay U.S. citizens who "harbor" foreign-born same-sex spouses or partners. The brief is signed by Utah CRLF attorney Brian M. Barnard and cooperating attorney Alan E. Schoenfeld at Wilmer Cutler Pickering Hale and Dorr LLP. The constitutional argument rests on the right to intimate association located in the Due Process Clause as an aspect of liberty, and the argument that some conduct covered by the statute involves constitutionally protected conduct that is not intended to frustrate law enforcement. The brief argues that in the absence of any intent to frustrate law enforcement, the state of Utah lacks a compelling interest to use its criminal law against U.S. citizen members of binational couples.

**Washington** — We reported last month on U.S. District Judge John C. Coughenour's decision in *Apilado v. North American Gay Amateur Athletic Alliance*, 2011 WL 2148816 (W.D.Wash., May 31, 2011), based on media reports. The court's decision has since become available on Westlaw, affording us an opportunity to review it and note, particularly, how the U.S. Supreme Court's ruling in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), widely seen as a gay rights defeat, is now used by Judge Coughenour as a source of authority to defend a gay association from a discrimination charge by non-gay individuals.

In terms of doctrine, the central holding of *Dale* was that an expressive association cannot be forced by the government to take in members whose participation would undermine the association's ability to express its message. In *Apilado*, the court found that a gay softball league, formed for the purpose of promoting "the idea of athletic competition and good physical health in support of the gay lifestyle," could plausibly assert that limiting the number of non-gay competitors on any of its teams was an appropriate policy in support of this goal, and that its 1st Amendment right of expressive association, as articulated by the majority in *Dale* (a 5-4 decision), would trump the state of Washington's statutory ban on sexual orientation discrimination in public accommodations. Thus, the rule limiting participation on the basis of sexual orientation was constitutionally protected. The court's refusal to grant injunctive relief against enforcement of the rule does not end the case, however, since a part of the plaintiffs' complaint relates to the manner in which the rule was applied to them, assertedly involving a quasi-public hearing at which they were subjected to intrusive and hectoring questioning about their sexual orientation and activities. Thus, a portion of the case remains alive. A.S.L.

## State Civil Litigation Notes

**Illinois** — Catholic Charities for the Illinois archdioceses of Springfield, Peoria and Joliet jointed in a lawsuit filed in Sangamon County Circuit Court, seeking a judicial declaration (enforceable by injunction against the state) that the adoption services they operate should not be required to provide adoption services to same-sex couples who have formed civil unions under the Illinois law that went into effect at the beginning of June. Their suit was provoked by a letter issued by the state's Attorney General in March, announcing that it had "received notice that Catholic Charities discriminates against Illinois citizens based on race, marital status and sexual orientation" in providing foster care and adoption services, and demanding documents from Catholic Charities concerning its service policies. The lawsuit seeks a declaration that family service agencies operated by Catholic Charities are privileged under the

1st Amendment to maintain their policy of limiting foster and adoptive placements to married couples and single non-cohabiting individuals, and referring civil union couples to other agencies. *Los Angeles Times*, June 8. Early in July, Governor Pat Quinn announced that the state would not be renewing contracts with Catholic Charities to provide foster care and adoption services because of the agency's refusal to deal with same-sex couples in civil unions. Catholic Charities sought temporary relief from the court, arguing that children should not be removed from their foster care placements while the issue was being litigated, and won a ruling from Sangamon County Circuit Judge John Schmidt that contracts between the state and Catholic Charities of Joliet, Peoria and Springfield should remain in effect past the June 30 expiration dates while the matter is litigated. Judge Schmidt set an August 15 hearing date, and ruled in the meantime that children placed through Catholic Charities in foster care settings should remain and not be shifted to other agencies, as the state had announced it would do, because that could cause "irreparable injury" to the children. *Chicago Tribune*, July 13.

**Maine** — Gay & Lesbian Advocates & Defenders has announced a "common sense" settlement of a lawsuit brought on behalf of Brianna Freeman against Denny's Auburn, Maine, restaurant, which had denied Freeman, a transgender person, access to the women's restroom. The agreement was jointly announced on July 11 by Realty Resources Hospitality, which owns six Denny's restaurants in Maine, the GLAD's Transgender Rights Project. Under the agreement, all customers may use restrooms consistent with their gender identities. Freeman had been using the women's restroom as a regular Denny's customer for some time without objection, and had discussed her situation with the restaurant manager to avoid trouble. But after the manager received a complaint, he told her that since she was pre-operative she would have to use the men's restroom. Freeman, who presents as a woman, asserted that using the restroom appropriate to her gender identity was part of her medically recommended gender transition process, and filed a complaint with the Maine Human Rights Commission, whose investigator made a probable cause finding. Freeman filed suit when no settlement eventuated at the

Commission, and Justice William Brodrick rejected Denny's motion to dismiss, finding that Freeman had adequately pled a sexual orientation discrimination claim under the Maine Human Rights Act. With a trial looming, Denny's agreed to a settlement. A spokesperson for Realty Resources Hospitality stated that Freeman's "transition and this lawsuit presented a new issue for us," reported the Lewiston Sun-Journal (July 12), and "we believe the resolution in this case will work well for all of our customers and preserve the dignity and safety of all." Publicity about the case led to legislative debate on a proposal to give schools and businesses authority to decide restroom usage issues, but both houses of the legislature defeated the proposed bill, with many members stating that the bill was discriminatory.

**Maryland** — In *In re Adoption/Guardianship of Cross H.*, 2011 WL 2590244 (Md.App. 2011), the Maryland Court of Special Appeals affirmed termination of parental rights of the biological parents in a case where the child is in the foster care of a male same-sex couple. The child was born to an HIV+ and hepatitis-C+ woman with a history of drug and alcohol abuse, and suffered numerous impairments at his birth, at which time the identity of his father was undetermined. The father, a man with a significant criminal record, was subsequently identified through DNA matching. After numerous studies and proceedings, state authorities determined that the child should not be placed with either biological parent, and after relatives who had temporary custody became unavailable due to medical problems, the child was placed with Christopher and David. In this opinion, the court rejected an attempt by the biological parents (who are not in any sort of relationship, the mother having married somebody she met in rehabilitation) to get the termination of their parental rights reversed, finding support in the record for the adverse ruling by the lower court. The court never makes anything out of the same-sex status of the couple providing foster care to the child.

**Michigan** — Former Assistant State Attorney General Andrew Shirvell, who was dismissed from his job amidst allegations that he used his office computer as part of a scheme of "stalking" against openly-gay University of Michigan student body president Chris Armstrong, lost his

bid to require that the deposition he gave in support of charges he filed with the state's Civil Service Commission be sealed against public exposure. Shirvell alleges in his complaint that the charges leading to his discharge for "conduct unbecoming a state employee" were unsubstantiated and that his discharge was improper and "arbitrary and capricious." Armstrong has sued Shirvell in federal court, claiming harassment. *Detroit Free Press*, June 30.

**Minnesota** — The Minnesota Campaign Finance and Public Disclosure Board ruled on June 30 that the Minnesota Family Council and the National Organization for Marriage, groups advocating for an anti-marriage state constitutional amendment, must publicly disclose the identity of corporate donors to the campaign. The two organizations had argued that it was necessary to keep donor identities confidential to avoid chilling free speech. In other words, they fear that corporations are becoming sensitive to the possibility of being labeled as anti-gay if their donations are made known, possibly subjecting them to public criticism and consumer boycotts, and so corporations may be deterred from donating if they cannot do so secretly. But the Board responded affirmatively to arguments by those favoring disclosure that it was essential to a healthy democracy, and voters should know who is funding the campaign. *Minnesota Independent*, June 30.

**New Jersey** — They never give up in New Jersey. On June 29, Garden State Equality and a group of same-sex couples determined to marry (including some who were co-plaintiffs in the earlier *Lewis v. Harris* marriage case) marched into Mercer County Superior Court and filed a new lawsuit seeking marriage rights for same-sex couples in the Garden State. *Garden State Equality v. Dow* is the name of the case, and Lambda Legal with local attorneys Lawrence S. Lustberg and Eileen M. Connor of Gibbons PC (Newark) are counsel on the complaint. In *Lewis v. Harris*, 188 NJ 415 (2006), the New Jersey Supreme Court ruled that same-sex couples are entitled to the rights and benefits of marriage, but left it to the legislature to come up with a remedy, opining that civil unions would be presumptively constitutional so long as they provided equal rights. The legislature passed a civil union law, which included a provision setting up a commission to study its implementation and report back to the

legislature. The Commission reported back, concluding that civil unions did not provide equal rights. When Lambda Legal went back to the Supreme Court seeking a new order in light of the commission report, the court's response was to say that a new trial would be needed to make the necessary factual findings. The court was unwilling to rule based on the commission report. So here we all are again, back in the trial court. Perhaps with all the data compiled in the commission report, it will not take too long to get this trial under way. The complaint filed with the Superior Court sets out in exquisite detail the commission findings of inequality in treatment encountered by civil union couples in New Jersey.

**Tennessee** — A lawsuit was filed on June 13 challenging the constitutionality of Senate Bill 632/House Bill 600, the "Equal Access to Intrastate Commerce Act," recently passed by the legislature and signed into law. The EAICA provides that political subdivisions of the state may not adopt policies providing more expansive protection against discrimination than appear in state law. Since Tennessee does not ban sexual orientation or gender identity discrimination, this measure is intended to prevent counties, cities, school boards or other government entities from banning such discrimination. The measure was enacted specifically to override a recently adopted Nashville ordinance that prohibits contractors doing business with the city from discriminating based on sexual orientation and gender identity, in addition to the other forbidden grounds specified in the state's civil rights law. The transparently anti-gay motivation of the legislation provides some of the constitutional argumentation for invalidating it.

**Washington** — Reviving a hostile environment sexual orientation discrimination claim, the Court of Appeals of Washington held that the 2006 amendment to the state's Law Against Discrimination adding sexual orientation as a forbidden ground of discrimination was prospective only, thus the plaintiff's claim would be actionable only if the last event that is a basis of the claim occurred after the effective date of the statute. *Loeffelholz v. University of Washington*, 2011 WL 2535515 (June 27, 2011). The plaintiff asserted that her then-supervisor asked her shortly after he became her supervisor whether she was gay. She alleges

that after she responded in the affirmative, she received adverse treatment and the supervisor made derogatory comments about her to others based on her sexual orientation. This was a controversial supervisor who “frequently spoke about revenge and expressed his hatred for certain people.” He told plaintiff that he “had a gun in his vehicle and that he was trying to get information on people to use against them later.” The supervisor is in the Army Reserve and was called up for deployment to Iraq effective June 25, 2006, his last day of work at UW being June 23. Prior to his deployment, he allegedly told a group meeting that included the plaintiff that he expected to come back from Iraq “a very angry man.” The plaintiff filed her hostile environment claim, premised on the cumulated problems with this supervisor, on May 13, 2009. Washington’s Law Against Discrimination has a three-year statute of limitations. The Superior Court dismissed the complaint as time-barred. The Court of Appeals found based on the allegations in the complaint that it was possible the last group meeting took place between May 13, 2006 and June 23, 2006, so the matter was not necessarily time-barred. The more critical aspect of pinpointing when that meeting took place is the effective date of the sexual orientation amendment to the Law Against Discrimination. For the plaintiff’s claim to be actionable, the meeting must have taken place after June 6, 2006, because this is the only event alleged in the complaint that could possibly post-date the effective date of the statute. The case was remanded for fact-finding. A.S.L.

## Criminal Litigation Notes

**California — 9th Circuit** — Here’s a case of bad timing by the Justice Department. On February 17, the U.S. Attorney for the Central District of California filed a brief in a pending appeal, *United States v. Osazuwa*, No. 10-50109, arguing that a convicted federal defendant could not mount a Batson challenge to the U.S. Attorney’s use of a peremptory strike that kept a lesbian off the defendant’s jury, because sexual orientation is not a classification that merits “heightened scrutiny” for Equal Protection purposes. On the date the brief was filed, that was an accurate summation of how

things stood in the 9th Circuit, where an old precedent, *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), is still routinely cited for that proposition. But then a week later, Attorney General Eric Holder announced that the Justice Department had concluded that sexual orientation classifications *do* merit heightened scrutiny, in the context of deciding that DOJ would no longer defend the constitutionality of Section 3 of the Defense of Marriage Act. And, on July 1, as reported above, DOJ filed a brief in the pending appeal in *Golinski v. U.S. Office of Personnel Management*, arguing that Section 3 of DOMA is subject to heightened scrutiny and flunks that test. The DOJ’s July 1 brief argues that *High Tech Gays* is no longer good law and should not be treated as controlling by the district court. A few days later, citing the DOJ July 1 brief, a panel of the 9th Circuit lifted the stay on injunctive relief in *Log Cabin Republicans v. United States*, thus putting a stop to enforcement of the “Don’t ask, don’t tell” military policy. Less noticed, on July 6 the Clerk of the 9th Circuit issued an Order to DOJ in the *Osazuwa* case, asking whether DOJ still adheres to the position that Batson does not apply to the issue of sexual orientation in peremptory jury challenges, in light of its position that *High Tech Gays* is not good law and sexual orientation classifications merit heightened scrutiny. The Clerk demanded a response in 15 days. What goes around comes around and vice versa... The *Osazuwa* order was brought to light by Chris Geidner in a July 12 posting on *MetroWeekly’s* polyglot blog.

**California** — In *People v. Groux*, 2011 WL 2547022 (Cal.App., 5th Dist., June 28, 2011) (not officially reported), the court of appeal rejected an appeal by a California prison inmate of his conviction of sodomy (oral sex) with another inmate and sentencing, as a “third striker,” to a 27-year-to-life sentence. The victim claimed that defendant, who had just become his cellmate, began sucking his penis while he was asleep, that he had never consented to it, and that he told the guard in the morning in order to get defendant transferred from his cell. Defendant contended, on the other hand, that the oral sex was totally consensual, that it was initiated after conversation and not while the victim was asleep, and he thought the victim was interested based on their conversation. Defendant asserted

that his constitutional rights were violated by the conviction, arguing not only privacy but also equal protection, asserting that California specifically singled out consensual sodomy between inmates while not criminalizing other kinds of sexual conduct without any rational justification. Rejecting these claims and noting defendant’s extensive criminal conviction record, including some sex crimes, the court concluded that the state was justified in imposing harsher sentencing on a recidivist for what might be characterized as a minor offense, and that there was sufficient penological justification for prohibiting inmates from having oral sex with each other. The court did find that the trial court had mischaracterized defendant’s prior criminal record slightly, such that a one-year enhancement added on to the sentence should be removed. The court rejected the argument that the sentence was disproportionate to the offense, pointing out that under the “three strikes” law a recidivist is not being punished just for the most recent offense.

**Florida** — An Orlando jury acquitted Brock Boston, a former airline flight attendant, on four counts of lewd and lascivious molestation on a minor. According to a July 1 report in the *Orlando Sentinel*, Orlando police arrested Boston in January 2010 after a 14-year-old boy accused him of engaging in sex acts after meeting each other on the internet. Boston disputed the boy’s account of their meeting, stating that he met the boy at a shopping mall after they established contact on-line, brought the boy to his house, where they met with Boston’s ex-boyfriend, a counselor for gay and lesbian youths, and had dinner together. Boston said he was never alone with the youth, who he described as a person in need of counseling, and did not engage in sex with him. As a result of the criminal charges filed against him, Boston lost his flight attendant job and, as a result, his home. He said his only intention in meeting the boy was to give him resources he would need to deal with his sexuality. Boston has contacted the flight attendants’ union for help in getting his job back.

**Maryland** — In an early court test of the 2010 opinion by Maryland Attorney General Doug Gansler that the state’s marriage recognition rules should be interpreted to mandate recognition of same-sex marriages lawfully formed in other jurisdictions, a Washington County Circuit Court judge



ruled from the bench on June 23 that the spousal testimonial privilege was applicable to a case involving a same-sex couple who married in Washington, D.C. This was a criminal prosecution against one member of the couple, in which the State's Attorney sought to compel testimony by the other member of the couple over the defendant's protest. The State's Attorney argued that because Maryland does not yet authorize same-sex marriage, the women should not be considered "spouses" for purposes of the statute that establishes the privilege. The court rejected that argument, responding to a brief filed on behalf of the non-defendant spouse by the ACLU of Maryland and Lambda Legal, with David R. Rocah of the ACLU and Susan Sommer of Lambda as counsel on the brief. The case is *State of Maryland v. Snowden*, No: 21-K-11-45589.

**New Jersey** — The Appellate Division of the Superior Court affirmed the murder conviction of Dara Woodall, finding that the Superior Court in Atlantic County did not err in refusing to charge the jury on a lesser-included manslaughter charge. *State of New Jersey v. Woodall*, 2011 WL 2582556 (July 1, 2011). Woodall accused her partner, Ashley Biscardi, of being unfaithful to her while they were staying at a hotel in Atlantic City. After Biscardi left their hotel room, Woodall ran after her and got into a fight on the street, while being heckled by a group of men about her sexual orientation and relationship with Biscardi. Another friend pulled Biscardi out of the fight. Woodall turned to confront the heckling men, pulled out her cellphone and made a telephone call. A car drove up and Woodall "retrieved a gun from one of its occupants," and set off after some of the hecklers, shooting two of them, one of whom died. She was convicted of a variety of offenses, including murder, and sentence to 70 years. She claimed on appeal that the trial judge should have charged the jury on manslaughter, but the Appellate Division found that in order to merit such a charge she would have to show that a jury could have reasonably concluded that manslaughter was the appropriate offense based on the evidence at trial. The evidence at trial showed that after wounding two of the men, one got away while she shot the other through the head, execution-style. Not a very good record for arguing manslaughter... She had relied on appeal on witnesses who had observe her in pursuit of

the hecklers, but none of those upon whom she relied were eyewitnesses to the final shooting.

**New Jersey** — A grand jury in Essex County declined to indict Detective Edward Esposito in the death of DeFarra Gaymon, who was shot to death by Esposito in a Newark park where Esposito was investigating "public sexual activity." Gaymon, a married man who lived in Atlanta, was in Newark to attend a school reunion, and was apparently cruising for sex in the park. According to Esposito's account, he came upon Gaymon when Gaymon was engaged in sexual activity and tried to arrest Gaymon, who actively resisted, tried to flee, then lunged at Esposito in an attempt to take away his gun. Esposito claimed he shot Gaymon in self-defense, and evidently the jury believed him. *Gay City News*, June 28.

**Texas** — In *Jackson v. State of Texas*, 2011 WL 2320819 (Tex.App.-Dallas, June 14, 2011), the court of appeals rejected the argument that the Supreme Court's ruling in *Lawrence v. Texas* (2003), which struck down the Texas Homosexual Conduct Act (making same-sex anal or oral sex a misdemeanor) as a violation of due process, mandated that heightened or strict scrutiny be used to review the validity of the state's law against prostitution. The appellant, arrested under Tex. Penal Code Ann. Sec. 43.02(c), which designates prostitution a felony if the defendant has been convicted of prostitution three or more times, did not raise her constitutional challenge until her appeal. Under Texas doctrine, her appellate constitutional challenge would be deemed untimely unless it involved a fundamental right. The court quoted from a U.S. District Court decision from Indiana, *U.S. v. Thompson*, 458 F.Supp.2d 730 (N.D.Ind. 2006), for the proposition that *Lawrence* is limited to the narrow proposition that states may not criminalize consensual gay sex, and that "the majority was not commenting on, or concerned with, governmental regulation of sexual acts in the commercial marketplace." That court deemed it "an untenable stretch to find that *Lawrence* necessarily renders (or even implies) laws prohibiting prostitution unconstitutional." The court thus found the constitutional challenge untimely, concluding: "Jackson has no fundamental right protected by the Fifth and Fourteenth amendments to the United States Constitution to engage in

consensual commercial sex. Therefore, an as-applied challenge to the constitutionality of the Texas penal code provision criminalizing prostitution must be preserved for appeal by first raising the issue at the trial court level. This, Jackson failed to do." A.S.L.

## Legislative Notes

**Federal** — U.S. Rep. Jim McDermott (D-Wash.) has introduced the *Tax Parity for Health Beneficiaries Act*, which would take care of the problem concerning taxability of the value of domestic partnership benefits that currently imposes inequality in tax treatment on same-sex couples in the United States. Although it is unlikely that this could pass as a stand-alone bill, McDermott indicated that his strategy is to attempt to attach it as an amendment to a broader federal income tax reform bill that might emerge this year, as tax reform is one of the articulated subjects on the agenda for the Ways & Means Committee during this Congress. *Washington Blade*, June 9.

\* \* \* U.S. Senator Robert Menendez (D-NJ) and six other senators introduced the *Comprehensive Immigration Reform Act of 2011* on June 22. The bill includes as Part II, Chapter 2, Sections 315-325, the *Uniting American Families Act*, versions of which have been introduced in prior sessions of Congress. Under the UFAA, "permanent partners" would be accorded the same status under U.S. immigration law as legally married couples. "Permanent partners" are adult couples (age 18 or older) who are in a "committed, intimate relationship" that includes "financial interdependency." An individual may only have one "permanent partner" at a time, may not be related to his or her partner closer than three degrees of relationship, and must be unable to legally marry the partner. (Because of the federal Defense of Marriage Act, same-sex partners who are married under the laws of those states or jurisdictions that allow same-sex marriage would not be counted as married or able to marry for purposes of this bill.) Permanent partners of legal U.S. residents would have the same rights to be sponsored as federally-recognized spouses of U.S. residents for all purposes of immigration law, were this bill to be enacted. The bill also includes the text of the "Dream Act," under which

individuals brought to the U.S. as children without proper documentation who grew up here, served in the military and/or graduated from college here, would be entitled to apply for legal status. Introduction of comprehensive immigration reform in this session of Congress is mainly symbolic, since passage in the Republican-controlled House is impossible with inclusion of the UAFSA and the Dream Act provisions, and even bringing the measure to a vote in the Senate would probably be impossible given the small margin by which Democrats control the chamber, as under the Senate's rules a minority of more than 40 members can block consideration of any bill. 120 Daily Labor Report at A-16 (June 22, 2011). \*

\* \* Senator Richard Durbin (D-Ill.) and Rep. Carolyn Maloney (D-N.Y.) have introduced the **Family and Medical Leave Inclusion Act** late in June. The House version has been assigned the number H.R. 2364. The measure would expand the reach of the Family and Medical Leave Act to allow employees to take unpaid leave to care for a same-sex spouse or partner, parent-in-law, adult child, sibling, grandchild, or grandparent. In states or political subdivisions that have domestic partnership or civil unions or legal same-sex marriage, employees would have to be in such a legally-recognized relationship in order for their relationship to qualify; in jurisdictions lacking such a mechanism, the law would extend to "an unmarried adult person of the same sex as the employee who is in a committed, personal relationship with the employee, is not a domestic partner to any other person, and who is designated to the employer by such employee as that employee's domestic partner." The measure would not change any of the substantive features of the existing FMLA (size of employers covered, length of leave authorized, etc.), merely interpolating in the new classes of people to be covered. \* \* \*

The Senate Judiciary Committee was planning to hold hearings on the **Respect for Marriage Act**, a measure intended to repeal the **Defense of Marriage Act** and substitute a provision mandating federal recognition of marriages that are valid under state law. *The Washington Blade* reported on July 7 that hearings would be held within "the next few weeks." These would be the first hearings on the bill, and the first time since DOMA was enacted in 1996 that either house of Congress has held hearings on a proposal

to repeal it. However, in the same issue, the *Blade* reported that the House had voted 248-175 in favor of an amendment to the pending Defense Appropriations Bill that would mandate that the Defense Department comply with DOMA. This amendment seems to have been sparked by the since-withdrawn announcement that Naval personnel could hold same-sex marriage ceremonies on Naval bases located in states where same-sex marriage is authorized. A similar amendment had been placed in the Defense Authorization Bill, which is now in conference with the Senate (which did not include such a provision). The House and the Senate are two distinctly different worlds these days, on LGBT issues and on much else. \* \* \*

Rep. Jackie Speier (D-CA) introduced the **Equal Access to COBRA Act of 2011**, H.R. 2310. The bill, with 47 bipartisan co-sponsors, is intended to extend to LGBT couples and families the same rights to continuation coverage under employment-related group health insurance policies as are enjoyed by traditionally married couples. COBRA makes it possible for employees who lose their jobs to elect continued health insurance coverage by paying a premium for a set period of time after their job ends. It also extends coverage to spouses and children, which is especially valuable if the triggering event is the death of the employee.

**California** — On July 14, Governor Jerry Brown signed into law Senate Bill No. 48, the FAIR Education Act, which passed the Senate on April 14 and the Assembly on July 5. The bill amends the state's Education Code to provide that the public schools of the state will include in their curricula the contributions of LGBT Americans, persons with disabilities, and members of other cultural groups. In several places in the Education Code, there are provisions promoting inclusivity and visibility for women and minorities, while prohibiting bias and discrimination. The new law accomplishes its purpose by adding to the list of characteristics already in the law the new categories specified in the bill. The sections of the Education Code to be amended include 51204.5, dealing with social sciences curriculum, 51500, dealing with prohibiting bias in instruction, 51501, dealing with textbooks adopted for use in the public schools, 60040 and 60044, dealing with instructional materials adopted for use in the schools. The bill also signals the

intent of the legislature that alternative and charter schools be guided by the provisions of the bill, even though they are not directly regulated by the state, in light of Section 235 of the Education Code, which prohibits discrimination in the operation of alternative and charter schools. The Assembly's passage of the bill sparked a spirited campaign by anti-gay groups to persuade the governor not to sign it, which was countered by a spirited campaign spearheaded by Equality California to generate positive comments about the bill to the governor. The campaign for enactment stressed the importance for LGBT youth in the state to see themselves reflected in the curriculum in a positive light. California becomes the first state to mandate that public school curricula incorporate affirmative references to LGBT history and eliminate texts and other materials that exhibit anti-LGBT bias.

**Connecticut** — On June 3 the Senate voted 20-16 to approve H. 6599, which adds "gender identity or expression" to the list of prohibited grounds of discrimination in employment, public accommodations, housing, credit, and other areas of law within the jurisdiction of the state's Commission Human Rights and Opportunities. According to a report in the June 8 issue of BNA Daily Labor Report, 110 DLR A-2, the measure "would codify a ruling issued by CHRO in 2000 holding that the prohibition against sex discrimination in the areas over which CHRO has jurisdiction covers discrimination on the basis of gender identity or expression." Gov. Dannel P. Malloy announced in a June 4 statement that he would sign the measure, which had previously passed the House by a vote of 77-62, and did so on July 5.

**Maine** — The Senate voted on June 8 to reject a bill that would have amended the state's ban on gender identity discrimination by preventing transgender people from suing over restroom privileges. The proposal went down by a vote of 23-11, having previously been rejected by the House. Proponents of the measure contended that letting transgender people use a restroom consistent with their gender identity violates the privacy of non-transgender users and could place vulnerable children at risk of sexual assault. *Portland Press Herald*, June 9. \* \* \*

Same-sex marriage advocates in Maine, inspired by the victory in New York, announced that they would begin

a petition drive to place the question of same-sex marriage before the state's voters again. The Maine legislature had enacted a same-sex marriage bill in 2009, about the same time that other New England states were passing such measures, but the measure was repealed in a subsequent referendum in which out of state money and political consultants played a large role, and the television ads were startlingly similar to the ad campaign run in support of California Proposition 8 the previous year. Supporters believe that the national conversation on same-sex marriage has moved far enough to warrant some optimism that a well-fought affirmative campaign could win a marriage referendum. If the measure passed, Maine would become the first state to adopt same-sex marriage by an affirmative vote of the people. *Portland Press Herald*, July 1.

**New Jersey** — Inspired by the intensive activity around pending marriage equality legislation in New York, New Jersey's only openly-gay state legislator, Assemblyman Reed Gusciora (D-Mercer), has introduced a Marriage Equality bill in the Assembly. The State Senate rejected a similar bill in January 2010, shortly before Governor Christ Christie, a firm opponent of same-sex marriage, took office. New Jersey has a civil union law that provides almost all of the legal rights of marriage under state law, but a commission established under the civil union law to study its impact issued a report in 2009 maintaining that civil union partners were not receiving recognition equal to marriage for their relationships. A co-sponsor of the Senate bill defeated last year, Sen. Loretta Weinberg (D-Teaneck), said she would not re-introduce the measure in the Senate unless she thought there was a veto-proof majority for it, in light of the governor's position. *Bergen Record*, June 16.

**New York** — In all the excitement over the passage of the Marriage Equality Bill, the Gender Identity and Expression Bill rather got lost. It passed the Assembly on June 14, 78-53, but never came to a vote in the Senate. Opponents continue to argue that the bill would create dangers to women using public restrooms by providing cover to rapists and pedophiles. Now that fifteen states have adopted similar laws and they have been in effect for many years in some of those states with no indication that these problems have occurred, it is clear that the

opponents are making it all up (unless they have reliable information that New York is unique among the states in its hordes of pedophiles and rapists just waiting to cross-dress in order to access restrooms and assault women). Do we suspect some bad faith going on? Do we?

**Pennsylvania** — The State College Area Board of Education approved expanding health care benefits to include employees' same-sex domestic partners in a vote on July 11. The measure was spurred by a consent decree in pending litigation before U.S. District Judge John E. Jones, III, in which school officials agreed to expand the district's health care benefits program. The litigation was initiated by Kerry Wiessmann, a longtime school district employee who sought insurance coverage for her partner of 25 years, Beth Resko. They had alleged an equal protection violation by the district. *Centre Daily Times*, July 12.

**South Carolina** — The Richland County Council voted unanimously on June 7 to pass a new LGBT-inclusive non-discrimination ordinance governing public accommodations and housing. The state capital, Columbia, is situated within Richland County. The previous month, the county amended its personnel policies to forbid discrimination based on sexual orientation and gender identity, also by a unanimous vote. According to a news report, Richland County and the cities of Columbia and Charleston are the only local governments in South Carolina that have addressed housing and public accommodations discrimination based on sexual orientation and gender identity. So far, the state's largest city, Charlotte, has not undertaken to protect its LGBT residents from discrimination. *QNotes*, June 8.

**Texas** — The El Paso City Council voted on June 14 to restore benefits for unmarried partners of city employees, with Mayor John Cook casting a tie-breaking vote. The measure was particularly controversial at this time because the lame-duck Council was voting shortly before new members would be taking office, and it was anticipated that the reconstituted Council would not have passed the measure. In addition, the measure was throwing down the gauntlet to voters, who had previously approved a referendum to rescind such benefits. During May, U.S. District Judge Frank Montalvo had rejected a constitutional equal protection challenge to the initiative, not-

ing that it had repealed benefits for all partners, not just same-sex partners, and thus was not facially discriminatory with respect to sex or sexual orientation. *El Paso Times*, June 15.

**Virginia** — The state's Board of Juvenile Justice, which oversees the state's juvenile correction facilities, voted on June 8 to ban discrimination based on sexual orientation in such facilities, despite being advised by Attorney General Ken Cuccinelli II that only the legislature can designate protected classes of citizens. In so doing, the Board lined up with the state's Board of Corrections and the public colleges, all of whom have resisted the attorney general's attempts at preventing Virginia agencies from respecting the equal protection rights of gay Virginians. One agency that caved, however, is the Board of Social Services, which followed Cuccinelli's guidance and rejected a proposal to end an exemption for faith-based adoption agencies from having to comply with non-discrimination policies in making adoptions. *Washington Post*, June 9. On June 29 the Board reaffirmed its support of the non-discrimination policies on a vote of 4-1, in response to a request from the ACLU of Virginia and Equality Virginia to reaffirm its position in the wake of adverse statements by Governor Bob McDonnell and Attorney General Cuccinelli. Board members emphasized that the policy was about protecting people from discrimination, not some sort of gay rights agenda. *Richmond Times Dispatch*, June 30. A.S.L.

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## Law & Society Notes

**Obama Administration** — *Partner Recognition in Medicaid* - The Centers for Medicare & Medicaid Services of the US Department of Health and Human Services sent a letter to all state Medicaid directors on June 10, advising them as to three circumstances where HHS believes that states can voluntarily decide to recognize same-sex partners of Medicaid recipients without running afoul of the federal Defense of Marriage Act. The letter is titled "Re: Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery." As the title indicates, these are circumstances where Medicaid is authorized to take action against the assets of a benefits recipient, either by filing a lien against real property, by seeking to void an asset trans-



fer that was undertaken before the individual applied for Medicaid, or to recover against the estate of a Medicaid beneficiary. In all these instances, federal law makes an exception to Medicaid's authority where there is a legal spouse in the picture. For example, no lien can be filed against the real property of a Medicaid recipient where the real property is occupied by a spouse, transfer of assets to spouses are protected against forced recovery, and actions to recover against an estate are precluded where there is a surviving spouse. HHS advises state directors that they can recognize same-sex partners of Medicaid recipients under the "undue hardship" rubric provided by the statute. Of course, this is the opinion of the Obama Administration. Whether it would stand up if challenged in court is an open question.

**Obama Administration — Discretion in Deportation Proceedings** — John Morton, the Director of U.S. Immigration and Customs Enforcement in the Department of Homeland Security, sent a memorandum to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel on June 17, concerning exercising prosecutorial discretion in the apprehension, detention, and removal of aliens from the United States. The emphasis was on prioritizing the use of the agency's resources in a setting where "the agency is confronted with more administrative violations than its resources can address." The memorandum listed "factors to consider when exercising prosecutorial discretion." Among them, as seem particularly pertinent to the alien same-sex partners of U.S. legal residents, are "the person's ties and contributions to the community, including family relationships," "whether the person has a U.S. citizen or permanent resident spouse, child, or parent," whether the person or an immediate relative has served in the U.S. military, whether the alien came to the U.S. as a young child, and so forth down the list of criteria, many of which have actually been argued in bi-national couple cases and cases involving gay aliens. There was some speculation that the memorandum was at least in part a response to heavy lobbying by gay rights advocates to get ICE to exercise discretion not to break up same-sex couples. The question of exercise of discretion is likely to be very much present in the situation presented by Jose Antonio Vargas, a Pulitzer-prize winning journalist who

was sent to the U.S. at the age of 12 without proper documentation to live with his grandparents, graduated from American high school and college and has gone on to a distinguish journalistic career. Vargas "came out" as a gay undocumented alien in an autobiographical article in the June 26 (Gay Pride Day) issue of the *New York Times Magazine*. Will Homeland Security exercise discretion to avoid seeking his deportation? In line with this new emphasis on discretion, there were news reports of several cases in which Immigration officials signified they would abandon ongoing proceedings to deport some same-sex spouses of U.S. citizens. One such celebrated case involved Henry Velandia, a Venezuela native married to Josh Vandiver, a Princeton University graduate student. The couple married in Connecticut in 2010, while Velandia was under threat of deportation. The *Trenton Times* reported July 1 that on June 29 the chief counsel of the Newark office of Immigration and Customs Enforcement informed Velandia's attorney that the deportation case had been closed, responding to a petition filed in April asking ICE to use prosecutorial discretion to close the case. Looming constitutional challenges to DOMA are undoubtedly contributing to the willingness of ICE officials to consider such requests. In another case pending in California, Immigration Judge Marilyn Teeter delayed the deportation of Alex Benshimol, also a Venezuelan citizen, who married Doug Gentry in Connecticut in 2010. The couple had applied for a green card for Benshimol, who had moved to the U.S. in 1999 on a visa that has since expired, in order to provoke a constitutional challenge to DOMA. Judge Teeter set the next hearing in the case for September 2013, and instructed ICE to inform the court within 60 days whether it planned to pursue deportation or dismiss the case. *Contra Costa Times*, July 13.

**Obama Administration — More Than Purely Symbolic Gestures?** — As the time approached for certification leading to final repeal of the "Don't Ask, Don't Tell" Policy, President Obama appointed Brenda "Sue" Fulton, an openly lesbian graduate of the U.S. Military Academy at West Point, to be a member of the Board of Visitors, which has a role of providing independent advice and recommendations on military academy policy to the president. Another recent appointment to the Board is for-

mer Congressman Patrick Murphy, a military veteran who was lead sponsor of the DADT Repeal Act in the last Congress. After graduation from the Academy, Fulton served as an Army Captain and a company commander, graduated from West Point's first class to include women cadets, and is currently the executive director of Knights Out, the LGBT alumni group of West Point.

**Military Policy** — Last fall, as the Obama Administration sought congressional approval of repeal of the "Don't Ask, Don't Tell" policy on military service by lesbians and gay men, the Defense Department revised its procedure for administering the policy, requiring that decisions to discharge individual members under the policy be subject to final approval by the chief civilian officer of each of the Services. In effect, the actual discharges ground to a halt as everybody waited to see what would happen. In December, Congress passed a provisional repeal of the policy, which would not take effect until 60 days after certification in writing to Congress by the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff that the all necessary steps had been taken for the new policy of allowing openly gay people to serve, and that implementing the policy would not adversely affect the ability of the military to fulfill its mission. The repeal measure did not add "sexual orientation" to the non-discrimination policy governing the military. New regulations were drafted and training programs were begun. By early June, outgoing Defense Secretary Robert Gates was stating that it was possible that he could agree to certification before stepping down at the end of that month, but he did not do so. However, at the White House Gay Pride Reception on June 29, President Obama stated that he expected that certification would take place "in a matter of weeks, not months." Then came news that an Air Force member had been discharged under the policy, and questions arose in the gay media about the good faith of the Defense Department. These concerns were partially allayed when the discharged officer, Airman 1st Class Albert Pisani, gave an exclusive interview to *The Advocate* (published on their website on June 16), indicating that he had voluntarily "come out" to his commanding officer and requested discharge last fall. Pisani indicated that he had suffered from anti-

gay harassment within the military, had become fed up, and just wanted out at that point, having decided, evidently, that he did not want to be part of the experiment of serving as openly gay. But his discharge got “stuck” together with all the others as a result of the Defense Department’s new procedures. Seeing that the DADT Repeal Act did not provide express protection against discrimination for gay service members, and reflecting on his experiences, Pisani directly emailed the Secretary of the Air Force asking that his discharge be expedited, and it was finalized shortly thereafter. Pisani asserts that the lack of an express non-discrimination policy makes service by openly-gay individuals problematic. Pisani is seeking employment in the private sector using the information technology skills he developed in the Air Force — skills that are now lost to the military because of the incomplete nature of DADT repeal. Shortly after DOD confirmed the Pisani discharge, it also announced that a handful of other military personnel had also been processed for discharge recently, at their own requests.

**Federal Health Data Collection** — The Department of Health and Human Services announced that starting in 2013, the National Health Interview Survey (NHIS), the main tool for collecting health-related data by the government, will include questions about sexual orientation. There are also plans at some future point, not yet specified, to add questions about gender identity and expression. The Department released a statement by Secretary Kathleen Sebelius: “We are taking critical steps toward ensuring the collection of useful national data on minority groups, including for the first time, LGBT populations.” The annual survey hits 40,000 households, collection information on about 100,000 individuals, and is the main source of information about the health and medical needs of the public for use in policy planning by the federal government. *Washington Post*, June 30. More health-care related data than previously will be collected by the Department of Health and Human Services as provisions of the 2010 Affordable Health Care Act come into effect.

**Anti-Gay Violence** — In sobering news, the National Coalition of Anti-Violence Programs announced that there was a 23% increase in reported murders of LGBT and HIV-affected people in the U.S. from 2009 to 2010, and total incidents of anti-LGBT

and HIV-related violence were up 13% in that period.

**Colorado** — A pair of college students has submitted a proposed ballot question to the state title board to get clearance for petitioning to put a same-sex marriage constitutional amendment on the ballot in 2012. The measure is intended to reverse a 2006 ballot measure that amended the Colorado constitution to ban same-sex marriage. The proposal would adopt the following amendment in its place: “Marriage will have the same requirements and effects regardless of whether the parties are the same or different sex.” The proponents, both 19 years old, are Mark Olmstead and Emily Rhodes. An attempt to put such a measure on the ballot in 2010 faltered due to insufficient petition signatures. The state legislature stalled out on a civil union bill recently as well. *Denver Post*, July 14, 2011.

**Cambridge, Massachusetts** — The *Boston Globe* reported on June 9 that Cambridge city officials have decided to provide a stipend to city employees who are incurring extra federal tax liability due to the imputed value of partner benefits being provided by the city to their same-sex spouses. Because federal law forbids the Internal Revenue Service from treating same-sex couples as married, the value of benefits for same-sex partners is imputed to the employee as extra taxable income, while employees with different-sex spouses are not required to pay any tax on the value of benefits provided to their spouses, another inequity required by the federal Defense of Marriage Act. Many private employers have begun “equalizing” benefits for their gay employees by providing extra compensation to cover the tax burden, but the *Globe* reported Cambridge’s claim that it is the first municipality to do so.

**Atlanta, Georgia** — A massive report prepared by former U.S. Attorney Joe Whitley and the law firm Greenberg Traurig, at the request of city officials, has concluded that allegations of police misconduct in lawsuits arising out of a police raid at the Ponce de Leon gay bar on September 10, 2009, were accurate. The city has settled the litigation by agreeing to compensate the plaintiffs, but the issues of measures to be taken within the police department and with respect to officer accused of misconduct are still pending. The Atlanta Citizen Review Board had previously investigated specific allegations and sustained many of

them. Those arrested during the raid had their cases dropped or dismissed. The report found extensive lying by police officers about what happened during the raid. Reported the *Atlanta Journal and Constitution* on June 30, “According to the independent review, officers lied about things big and small, including details easily verified. Some officer told varying versions of the same events to the Citizen Review Board, to internal affairs investigators and in court filings and testimony. And they tried to cover up details, the report said, with ‘mass deletions’ of emails, text messages and photographs just days after a federal judge ordered them turned over. Greenberg Traurig said its investigation also revealed the ‘potential prejudice and bias’ against homosexuals.” The report did not recommend specific punishment, as the mandate was fact-finding. The matter is back in the hands of Police Chief George Turner, who will review the findings and decide what disciplinary measures to take. A spokesman for the Department said that Chief Turner considered this a “high priority.”\*\* Responding to the report, the Atlanta Police Department fired six officers for lying about what happened that night in subsequent investigations. *Ajc.com*, July 8.

**San Joaquin, California** — Episcopal Bishop Chester Talton of the Diocese of San Joaquin has advised clergy in the diocese that they may perform blessings of “same-gender civil marriages, domestic partnerships and relationships which are lifelong committed relationships characterized by fidelity, monogamy, mutual affection and respect and careful, honest communication.” The statement issued by the diocese stressed that they respected couples who decided not to enter into state domestic partnerships because they considered that status inferior to marriage, and that the diocese would “extend to these couples the generous pastoral response necessary to meet their needs as members of this church.” The diocese does not authorize the performance of marriage ceremonies, since at the present time neither California state law nor canons of the church, authorize such ceremonies. *The Guardian* (UK), June 10.

**Domestic Partner Tax Costs** — The Depository Trust & Clearing Corporation announced in June that it would reimburse all of its U.S.-based employees for any federal tax paid on same-sex domestic partner-

ship benefits coverage. The announcement was immediately effective, applying to the 2011 tax year. The president of DTCC, Donald F. Donahue, said that the reimbursement would “mirror the favorable tax treatment for same-sex domestic partners that the law now provides for married couples recognized by the federal government.” The policy was worked out in negotiation between senior management and DTCC’s LGBT Business Professional Network. *Managed Care Weekly Digest*, June 27, 2011.

**American Medical Association** — The American Medical Association has adopted on June 20 a written policy, No. H-65.773, titled “Health Care Disparities in Same-Sex Partner Households.” The policy is based on evidence that denying the right to marry to same-sex couples is disadvantageous from the point of view of health. The policy states: “Our American Medical Association: (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families; (2) recognizes that exclusion from civil marriage contributes to health care disparities affecting same-sex households; (3) will work to reduce health care disparities among members of same-sex households including minor children; and (4) will support measures providing same-sex households with the same rights and privileges to health care, health insurance, and survivor benefits, as afforded opposite-sex households.”

**Wisconsin** — The West Bend School Board voted on June 13 to rescind its prior decision against formally recognizing Gay-Straight Alliances at East and West High Schools. The May 9 vote on a resolution to approve the groups was 3-3, while the June 13 vote was 4-3. The vote came in response to a federal law suit, accompanied by advice to the board that their position was legally indefensible. The groups had been meeting informally, but sought formal recognition in order to have the same access as other student clubs to use the school’s public address system and other equipment and resources, to raise funds for club activities, and to be included as a recognized student organization in the yearbook. The president of the board, who cast the tie-breaking vote, said he did so to avoid a lawsuit, not because he thought the group should be approved. *Milwaukee Journal Sentinel*, June 14. A.S.L.

## International Notes

**United Nations** — The Human Rights Council of the United Nations voted 23-19 with 3 abstentions in favor of the organization’s first resolution in support of LGBT human rights on June 17. The Resolution, expressing “grave concerns” about abuses and discrimination against gay people, calls on the High Commissioner for Human Rights to organize an international study on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, with recommendations on how human rights law can be used to deal with these problems, authorizes convening a panel discussion on this issue during the 19th session of the Human Rights Council, indicates that appropriate follow-up will be taken and that the council “decides to remain seized of this priority issue.” While the Resolution does not make any substantive recommendations, it is a hard-fought first step for the world body, which includes many member states that retain serious criminal penalties for gays. Not surprisingly, there was a distinct breakdown in the vote between Islamic countries, in opposition, and secular states, generally in support. The United States and the European Union took leading roles in securing passage of the resolution, a significant change from the prior administration, and most of the countries voting in the opposition were part of the Islamic bloc, but Russia joined with them. Abstainers included China and several small countries. *Boston Globe*, June 18.

**Organization of American States** — At its 41st General Assembly held in San Salvador on June 7, the member countries of the Organization of American states unanimously approved a resolution titled “Human Rights, Sexual Orientation, and Gender Identity,” which condemns discrimination, urges countries to adopt measures against discrimination, and condemned acts of violence against members of sexual minorities. The main lobbying against the resolution was done by the Roman Catholic Church, which is prominently present in most South American and Central American countries.

**Australia** — The South Australia Parliament has approved the Family Relationships (Parentage) Amendment Bill of 2010, under which South Australia will become

the last Australian state to recognize non-biological same-sex parents on birth certificates of children born to same-sex couples, according to a June 9 report posted on *star-observer.com.au*.

**Brazil** — The *Associated Press* reported on June 27 that Sao Paulo State Judge Fernando Henrique Pinto had granted a petition by a same-sex couple, Sergio Kauffman Sousa and Luiz Andre Moresi, to convert their civil union into a marriage. Judge Pinto reportedly relied on a provision of the Brazilian Constitution dealing with civil unions, referred to as “stable unions,” which states that a couple “living together can, by mutual agreement and at any time, request the conversion of a stable union into a marriage.” The nation’s high court had previously ruled that same-sex couples were entitled to enter into civil unions. Now the trial court has taken the next step of saying that civil union partners can request to have their union recognized as a marriage. The court sought an opinion on the petition from the Sao Paulo State Attorney General’s Office, which told the court that the marriage would be legal. The State Attorney’s Office also opined that this union, if recognized as a marriage, would be the first same-sex marriage in Brazil. However, the decision is subject to appellate review, so the last word has probably not been spoken on this subject.

**Canada** — In July, Canada marks six years since the Parliament codified a series of provincial court rulings on same-sex marriage by amending the national marriage statute to change the definition of marriage to accommodate those decisions. Opponents of the legislation predicted that changing the traditional definition of marriage would lead to a decline in heterosexual marriage, an increase in divorce, pedophilia, and attempts to legalize polygamy. Opponents also warned that priests would be compelled to officiate at same-sex marriages and that general social chaos would ensue. In an article marking the anniversary published on July 13 in the *Calgary Herald*, Naomi Lakritz summons statistics showing that the nay-sayers were wrong on all counts. The very appropriate title of the article is “Six Years of Gay Marriage and Canada Hasn’t Crumbled.”

**Chile** — Bloomberg News reported on July 11 that the government of Chile was preparing legislation to recognize civil unions for same-sex couples. The bill was



expected to be presented to Congress this summer. It would require one year of cohabitation as a prerequisite to the recognition of civil unions, which would carry a panoply of specified legal rights but would not be fully equivalent to marriage.

**France** — The National Assembly, the lower house of the Parliament, voted 293-222 against a proposal to allow same-sex marriage. The bill was supported by the Socialists and other small parties of the left, while it was opposed by President Nicolas Sarkozy's governing UMP. Supporters claimed that France has fallen behind the other countries in this issue, pointing to the Netherlands, Spain, Portugal and Belgium, the U.K. (where civil partnership carries all marital rights) and the Scandinavian countries. France now has the institution of the civil solidarity pact, open to both different-sex and same-sex couples, providing a menu of rights but falling short of the full rights of marriage. It has proven very popular among different-sex couples who want a legal status less formal and binding than marriage, but same-sexers in France continue to agitate for full marriage rights. Earlier this year, the country's Constitutional Court rejected a claim that same-sex couples are entitled to marry by virtue of constitutional equality guarantees, holding that the definition of marriage was a legislative issue. *Associated Press*, June 15.

**India** — The nation's Health Minister caused an uproar on July 4 while speaking at a conference about HIV/AIDS when he said that sex between men is "complete unnatural" in the context of discussing HIV transmission. Ghulam Nabi Azad tried to step back from his statement in response to adverse commentary, claiming he had been misquoted, but the event was recorded and his words were unmistakable. The minister's statement was widely considered out of step with developments in India, where a High Court decision setting aside the sodomy law has led to extended public discussion about modernizing Indian law concerning homosexuality. *NY Times*, July 6.

**Leichtenstein** — A registered-partnership law for same-sex couples won overwhelming support in a referendum, receiving 68.8 percent of the votes. Registered partners will receive some but not all rights accorded to married different-sex couples, such as inheritance, social security, immigration, and tax status. They will not be accorded a right to adopt children jointly

or to access reproductive medical services within the country if they want to conceive children. *Sacramento Bee*, June 19.

**Nepal** — It was reported on June 21 that a lesbian wedding ceremony had been conducted in Nepal, following traditional Hindu Nepalese traditions. The happy couple on this occasion were visitors, Courtney Mitchell and Sarah Welton from Denver, Colorado. A Hindu priest performed the ceremony. Nepal is in the process of revising civil rights laws to include sexual orientation. *Hindustan Times*, June 21.

**Pakistan** — A gay pride reception hosted by the US Embassy in Islamabad on June 26 caused great consternation among government officials, religious leaders and the media. The *Daily Post* (Pakistan) reacted to the controversy by publishing an article on July 10 reviewing the legal status of homosexual conduct. Reporters found that 113 countries now have "legalized and decriminalized homosexuality," but that such conduct remains unlawful in 76 countries, of which five officially prescribe the death penalty: Iran, Saudi Arabia, Mauritania, Yemen and Sudan. The newspaper report also pointedly noted that at least nine "Muslim countries" now tolerate homosexuality, at least to the extent of having repealed criminal prohibitions: Mali, Jordan, Indonesia, Kazakhstan, Turkey, Tajikistan, Kyrgyzstan, Bosnia and Herzegovina, and Azerbaijan. (This does not mean, of course, that these are all gay paradises by any means.) The newspaper report also notes the claim that the Iranian revolution has executed more than 4,000 persons charged with homosexual acts. The newspaper particularly notes the passage of a United Nations declaration in support of gay rights. \*\*\* On July 8, a demonstration at the U.S. Embassy in protest against the Pride reception got out of hand when police attempted to block the march to the Embassy, resulting in a melee in which four police officials were injured and twenty-five persons were arrested. *Daily Times*, July 9.

**Spain** — Online gay journalist Rex Wockner reported that Carla Antonelli, a transgender actress, took her seat in the Madrid Assembly on June 7, "thus becoming the highest-ranking openly transgender elected official in Spanish history."

**United Kingdom** — Immigration judges ruled that a lesbian woman from Jamaica, whose name was not released, should be granted asylum in the U.K. Immigration

judges agreed with the applicant's lawyer that Jamaica is a "deeply homophobic society" and that to be openly gay in that environment is to be at serious risk of serious physical injury — in the form of "corrective rape." The applicant had come to the U.K. on a student visa, "came out" and entered a long-term relationship. She argued to the Immigration court that after living openly as lesbian in the U.K. for seven years she could not go back to her old closeted life, and her same-sex partner refuses for obvious reasons to move to Jamaica. *Advocate.com*, July 9. A.S.L.

## Professional Notes

Gay & Lesbian Advocates & Defenders announced that the recipients of this year's Spirit of Justice Award, to be presented at GLAD's annual dinner on October 21, will be **Massachusetts Governor Deval Patrick**, his wife **Diane** and their two daughters, **Sarah and Katherine**. Katherine Patrick "came out" as a lesbian in a joint interview with her father in *Bay Windows* in 2008. Gov. Patrick has been an ardent proponent of LGBT rights, and his family has provided leadership on LGBT issues in the state. Diane Patrick, a partner at Ropes & Gray, chairs the firm's diversity committee.

*The Recorder*, a California legal newspaper, reported on June 7 that San Diego County Superior Court Judge **David Rubin** has been elected by his peers to the presidency of the California Judges Association, and will be the first openly-gay judge to hold that position when he assumes office on September 18. Rubin was a San Diego County prosecutor for twenty years prior to his election to the bench in 2006. Judge Rubin's husband, Todd Stevens, is a partner at the San Diego law firm of Keeney, Waite & Stevens. Horrors! A two-lawyer family...

**Jarrett Barrios**, a former Massachusetts state legislator who was serving as Executive Director of the Gay and Lesbian Alliance Against Defamation, resigned his position on June 18 after a controversy blew up about letters sent by GLAAD to the Federal Communications Commission endorsing the proposed AT&T/T-Mobile merger and appearing to side with AT&T's opposition to proposed net neutrality regulations. The controversy related not only to the substance of the letters, but also to the

fact that an AT&T executive was a member of GLAAD's board and that the corporation had made substantial donations in support of GLAAD's work, with a suggestion of undue influence in the air. Even the *NY Times* got into the act, with an editorial questioning why GLAAD and other civil rights groups (which had also received AT&T donations) had submitted letters to the F.C.C., on topics apparently unrelated to their own corporate missions. Was AT&T attempting to buy the influence of seemingly independent public advocacy groups, and succeeding? A.S.L.

## HIV/AIDS Legal Notes

### US Court of Appeals (1st Circuit) Revives Inmate's Damage Claim for Denial of HIV Meds

A unanimous three judge panel of the U.S. Court of Appeals for the 1st Circuit has revived a claim by a state prison inmate that his constitutional rights were violated when he was deprived of HIV medication for an extended period of time in custody. Ruling in *Leavitt v. Correctional Medical Services, Inc.*, 2011 Westlaw 2557009 (June 29, 2011), the court partially reversed a decision by U.S. District Judge John A. Woodcock, Jr., of the U.S. District Court in Maine. Judge Woodcock had granted summary judgment on behalf of all defendants in the case. The court of appeals found that Leavitt's complaint against Alfred Cichon, a physician assistant who was responsible for health care at the York County Jail while Leavitt was confined there, should be allowed to proceed, but affirmed the other summary judgments.

It was unclear to the court of appeals whether Leavitt's status at the York County Jail was that of a pretrial detainee or that of a convicted criminal, thus the court was uncertain whether his claim rested on the 14th Amendment Due Process Clause (pretrial detainee) or the 8th Amendment's prohibition of cruel and unusual punishment (convicted prisoner subject to punishment). Either way, however, the court found, the constitutional standard was actually the same: whether it could be claimed based on Leavitt's factual allegations that the defendants were deliberately indifferent to his serious medical condition

when he was deprived of HIV meds while confined in the county jail and, subsequently, the state prison?

The story set out in the court's opinion is lengthy and complicated. The essence of it is that when Leavitt was placed in the county jail, he had a medical intake interview with Cichon during which Leavitt stated that he was HIV+ and had been taking medications which he wanted to continue taking. According to Leavitt, Cichon said that the county jail did not provide HIV meds because it was too expensive. Although Cichon did order blood tests on Leavitt, he made no effort to provide medications for him, and, of course, prisons do not allow inmates to bring their own medications or have them sent from external sources. As a result, Leavitt was deprived of his HIV meds for his entire 167-day stay at the York County Jail.

He was then sent to the Maine State Prison, where he was deprived of antiretroviral therapy for almost seventeen more months, even though he informed prison health officials upon his arrival that he was HIV+ and in need of treatment. Various prison health officials employed by Correctional Medical Services, Inc., the state prison's health care subcontractor, allegedly set in motion various procedures to get Leavitt his meds, but the description of what happened sounds like a sequence of incompetence, neglect, dropping the ball, failing to follow through, until his condition got so bad that somebody was finally alarmed into taking action and he eventually got his meds.

Unfortunately for Leavitt and anybody else who is HIV-positive and confined in prison, under the crabbed interpretation of the 8th Amendment by the U.S. Supreme Court, prison officials and health care workers are totally immune from constitutional liability for malpractice, incompetence, and negligence in the provision of health care to prisoners. In order to establish constitutional liability, a prisoner has to demonstrate that there was deliberate indifference to his serious medical condition. Feckless bumbling is not enough, even though it leads to serious medical complications for the inmate. In this case, that meant that CMS, its employees, and the Maine State Prison were all let off from liability, the court of appeals sustaining Judge Woodcock's grant of summary judgment as to them.

But Mr. Cichon was not so lucky. He was a shareholder of the company that had the contract to provide health care at York County Jail while Leavitt was confined there, and with his own license as a physician's assistant he provided the on-site service, under which he was supposed to refer inmates to the hospital in case they needed a doctor's services. (According to the court, Cichon was disciplined for providing medical treatment without a license on occasion, and had his physician's assistant license suspended at various times for failing to meet standards.) As a shareholder, he had the incentive to avoid expenses of providing HIV meds, since all costs of providing health care to inmates were supposed to be covered out of his contract with the jail, and he believed that renewal of his contract depended on him keeping health care costs low for the jail. And if, as Leavitt alleged, Cichon denied meds to save money even though he knew that Leavitt was HIV+ and had been taking anti-retroviral medications prior to his incarceration, his conduct may have fallen within the "deliberate indifference" rule. At least, the court found, a contested issue of material fact existed on the question of deliberate indifference, so summary judgment was not appropriate.

The court's opinion is particularly significant because it reviews in some detail the evidence that has accumulated about the dangers of interrupting anti-retroviral treatment for those who were undergoing such treatment. Not only can interruption result in the development of drug resistance, but it can cause significant detriment to the individual over the long term, even if eventual restoration of treatment has a short-term effect of reviving their immune response. In the case of Leavitt, the interruption of treatment led him to become symptomatic, including development of oral thrush and various other symptoms of immune depression, but his immune system apparently bounced back when treatment was belatedly resumed. Based on this, the defendants argued that he had not suffered any serious consequence from the interruption of medication, and finding serious injury, they argued, is necessary to establish constitutional liability. The court found this assertion contestable, based both on the symptoms Leavitt experienced during his forced drug hiatus as well as upon statistical evidence that long-term prognosis is significantly harmed by significant

treatment interruptions. The court's findings as to this can be very useful for others who find themselves in similar situations. A.S.L.

### **D.C. Appeals Court Abandons "Zone of Danger" Rule in Emotional Distress Claim for HIV Misdiagnosis**

In *Hedgepeth v. Whitman Walker Clinic and Mary Fanning, M.D.*, 2011 WL 2586720 (D.C. Ct. App., June 30, 2011), the District of Columbia Court of Appeals found that a patient misdiagnosed as HIV+ had presented sufficient evidence to support a claim of negligent infliction of emotional distress, thereby modifying the existing District of Columbia common law rule applied in claims of emotional distress where in the plaintiff suffered no physical harm. In the opinion, written by Judge Ruiz, the Court of Appeals reversed the Superior Court's grant of summary judgment to the defendant clinic and physician, and remanded the case for a ruling consistent with the opinion.

In December 2000, the appellant, Terry Hedgepeth, went to the Whitman Walker Clinic (WWC). He informed the intake worker at WWC that he recently learned that his girlfriend was HIV+, and therefore he wanted to be tested for HIV. Prior to the appellant being tested, the intake worker marked in his file that he was HIV+. Although the results of a HIV-1/HIV-2 Antibiotics ELISA test conducted by an offsite facility, American Medical Laboratories, Inc., stated that appellant tested negative for HIV, a worker at WWC completed his "Client Lab Results" form incorrectly, marking that he tested positive. Although the physician at WWC who met with appellant to discuss his test results, Dr. Mary Fanning, had access to appellant's file, which contained both the accurate results from American Medical Laboratories, Inc. and the inaccurate "Clinic Lab Results" form, she informed him that he was HIV+.

For the next five years the appellant believed that he was HIV+, although he never took any medication related to the treatment of HIV. The false diagnosis led to prolonged depression and suicidal thoughts, resulting in two separate stays in psychiatric hospitals. Appellant's depression eventually contributed to the loss of his job and the deterioration of his relationship

with his daughter, as well as self-destructive behavior, including drug abuse and sexual intercourse with a woman he knew to be HIV+. Appellant stated that he believed "there was no reason for [him] to live." In 2005, appellant was retested for HIV at the Abundant Life Clinic, and tested negative. These results were confirmed by another test done a few weeks later at John Hopkins Bayview Medical Center.

After learning that he was in fact not HIV+, appellant brought a negligence claim against both WWC and Dr. Fanning, asserting that their negligence in incorrectly informing him that he was HIV+ caused him severe emotional distress. The trial court granted the appellees' motion for summary judgment, finding that the appellant did not establish the facts required by the "zone of physical danger" test adopted in *Williams v. Baker*, 572 A.2d 1062 (D.C. Ct. App., April 9, 1990). In *Williams*, the mother of a young boy brought such a claim on behalf of herself and her son against the doctor who misdiagnosed the child's illness. The doctor diagnosed the child with a less serious condition than that which he actually suffered. As a result of the misdiagnosis, the child stopped breathing for a short period of time and was hospitalized. The mother asserted that she suffered severe emotional distress during her son's hospitalization, caused by the stress of not knowing if he would survive. To determine if she could seek remedies for the doctor's negligence, the Court of Appeals adopted the zone of physical danger test, which requires that, in order for a plaintiff to have a cognizable claim, the emotional distress must result from the plaintiff's fear of physical harm to themselves. The court held in *Williams* that the mother did not meet this standard as she herself had been in no physical danger due to the doctor's negligent diagnosis.

Here, the trial court held that the appellant experienced no threat of physical harm as a result of WWC and Dr. Fanning's negligence, and therefore failed to prove the facts required to bring a valid claim of negligent infliction of emotional distress. A three-judge panel of the Court of Appeals affirmed, but the appellant successfully petitioned for rehearing en banc. The Court of Appeals granted the petition to determine if the zone of physical danger rule precluded the appellant's claim.

The court held that the rule should not be applied in this case, instead adopting a new rule to be applied in limited circumstances. Referred to by the court as the Special Relationship or Undertaking Rule, the court asserts "that a duty to avoid negligent infliction of serious emotional distress," absent the threat of physical harm, "will be recognized only where the defendant has an obligation to care for the plaintiff's emotional well-being or the plaintiff's emotional well-being is necessarily implicated by the nature of the defendant's undertaking to or relationship with the plaintiff," and negligence on the part of the defendant will likely cause the plaintiff severe emotional distress. In her opinion, Judge Ruiz states that the court's decision to adopt a rule that creates a narrow exception to the zone of physical danger test is based on the court's consideration and understanding of the development of the courts' approach towards claims of negligent infliction of emotional distress, and the policy reasons behind these approaches. The majority of the opinion focuses on the development of this area of law within the District of Columbia, with only a small portion of the opinion addressing the principles as they pertain to the facts in this case.

Beginning with outlining the basic principles of a claim for negligence, requiring that a defendant breach a duty owed the plaintiff and that breach proximately causes the plaintiff's harm, the court discusses the policy reasons behind why "claims of negligence that seek damages for only mental pain and suffering (independent of any physical injury) historically have been analyzed under a different framework." Concerned that allowing people to bring claims of emotional distress without any evidence of physical harm would create limitless liability in which no one could act without concern that their actions caused some type of emotional distress in someone else, the District of Columbia originally adopted the physical impact rule, requiring that a plaintiff's emotional distress must result from actual physical harm caused by the defendant's negligence. However, with its decision in *Williams*, the Court of Appeals abandoned the physical impact rule for the zone of physical danger rule.

While *Williams* does allow for a more expansive approach to liability for claims of emotional distress, Judge Ruiz agrees with



the appellant's assertion that the zone of physical danger test should not be relied upon by courts as the only means of determining if a person has a valid claim of negligent infliction of emotional distress. Primarily, Judge Ruiz expresses concern that the current test fails to account for the existence of situations where, although no physical threat to the plaintiff is present, it is "especially likely that the defendant's negligence will cause serious emotional distress to the plaintiff." Certain types of relationships place the defendant in charge of the plaintiff's emotional well-being, and, in such relationships, the plaintiff should be able to seek remedies for serious emotional distress caused by the defendant's negligence. The court stresses, however, that the Undertaking Rule is designed to serve as a supplement to, not a replacement for, the zone of physical danger rule. Additionally, this new rule does not apply to every relationship in which a defendant owes a plaintiff a duty. Specifically, the court attempts to assuage the concern that it will create limitless liability, particularly in the area of doctor/patient relationships. Judge Ruiz asserts that the Undertaking Rule will apply only to relationships where the emotional well-being of the plaintiff is "at the core" of the relationship, and it is "especially likely that serious emotional distress will result from negligent performance" (original emphasis). As an example of a relationship that would meet the requirements of a "special" relationship, the court cites *Bond v. Ivanjack*, 740 A.2d 968 (D.C. Ct. App., Nov. 18, 1999), where a doctor's late diagnosis of cancer led to the patient suffering "dread and uncertainty about the consequences of delayed treatment."

Similarly, in this case, the court determined that there is sufficient evidence to indicate that the appellees undertook a special duty to the appellant, and therefore this relationship likely falls within the Undertaking Rule. Judge Ruiz asserts that the duty WWC and Dr. Fanning had to the appellant, to inform him of his HIV status, essentially implicated his emotional well-being, and given the seriousness of the diagnosis, as HIV is "a potentially fatal infection that [still] carries a significant social stigma," a misdiagnosis would be especially likely to cause severe emotional distress in a patient, as it did to the appellant.

The appellees did not contest that they owed the appellant a certain duty of care,

but instead focused primarily on larger policy arguments for why the court should not adopt the Undertaking Rule at all. In addition to the general concerns that the rule will create limitless liability, the appellees asserted that it would have a negative effect on the medical treatment of serious illnesses like HIV/AIDS. Dr. Fanning and WWC argued that holding those physicians who diagnose patients with serious illnesses to a higher duty of care than required by the zone of danger rule will discourage the early diagnosis and treatment of HIV, leading ultimately to a lower standard of care. The court rejected this argument. Although the Undertaking Rule allows patients to seek remedies for emotional distress not arising out of the threat of physical harm, the other factors to establish the tort of negligence are still required. Principally, an essential element of a negligence claim is that the physician breached the national standard of care. Without this breach, even if the relationship qualifies as a special relationship for purposes of the Undertaking Rule, the negligence claim will fail. Here again the court stressed that this rule is not creating an entirely new cause of action, but only an exception to the principles generally applied to negligence claims, thus allowing plaintiffs in specific circumstances to seek remedies for severe emotional distress.

*Kelly Garner*

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### AIDS Law & Society Notes

**Prevention** – The press reported on July 14 that two new studies conducted in Africa had shown that certain HIV-related medications may have a significant prophylactic effect in preventing HIV infection if they are taken faithfully by uninfected people at risk. Reported the *Washington Post*, "In the past 12 months, research has shown that antiretroviral drugs in a vaginal gel can protect women from infection and that in pill form they can protect male homosexuals. A study also showed that when an HIV-positive person starts antiretroviral therapy, the chance of transmitting the virus to someone else falls steeply. The two newer studies asked a simpler question: If uninfected heterosexuals take the pills daily and then go about their lives in places where HIV is prevalent, are their chances of getting infected reduced? The answer is yes." The studies showed significant reduction, but not total elimination of transmission risks.

Hope was expressed that eventually widespread availability of meds for this purpose will finally lead to a significant reduction in new HIV infection. A.S.L.

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## PUBLICATIONS NOTED & ANNOUNCEMENTS

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### Movement Legal Positions

**Philadelphia - Mazzoni Center**, a comprehensive LGBT Health & Wellness Center located in Philadelphia, is seeking to hire a dynamic and knowledgeable lawyer to head its legal department. The legal director reports directly to the executive director and their duties involve: (1) direct legal representation, (2) supervision of legal staff and management of legal clinic, (3) assistance in grant writing and associated activities, and (4) publicity and community outreach. Candidates should have at least 3-5 years of experience, including direct client representation, supervision, and public speaking. Bar admission in PA is preferred. *Email pdunne@mazzonicenter.org for a full job description or with any inquiries.* Mazzoni Center Legal Services receives approximately 400 requests for assistance each year. Traditionally, the largest practice areas included employment discrimination, discrimination in public accommodations, and family law. The work is challenging, as PA lacks statewide protection against discrimination based upon LGBT status, and much of the work involves the enforcement of local county and municipal anti-discrimination ordinances. The work has also involved an interesting mix of both "direct service" and "impact" litigation, and the Center is the home of Temple Law School's "Sexual Orientation & Gender Identity Law Clinical Course" which is taught on-site by the legal director. Legal Services also has standing relationships with both the University of Pennsylvania Law School and Rutgers School of Law—Camden.

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### Conference Announcements

An international conference on the recognition of foreign same-sex marriages and partnerships between European countries will be held in Strasbourg on November 18-19, 2011. For details about this con-

ference, see the conference website: [www.mutualrecognition.eu](http://www.mutualrecognition.eu).

## LGBT & RELATED ISSUES

Ashcroft, Eric B., *Distilling Ashcroft: The Ninth Circuit's Application of National Community Standards to Internet Obscenity in United States v. Kilbride*, 2011 Brigham Young Univ. L. Rev. 1.

Barnes, Mario L., and Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059 (May 2011).

Biegel, Stuart, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. of Legis. & Pub. Pol'y 357 (2011).

Briffault, Richard, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 Wm. & Mary Bill of Rights J. 983 (May 2011).

Brocco, Maureen, *Familiar Stories: An International Suggestion for LGB Family Military Benefits After the Repeal of "Don't Ask, Don't Tell"*, 67 Nat'l Lawyers Guild Rev. 156 (Fall 2010).

Brownstein, Alan, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. Rev. 389 (Fall 2010).

Bunker, Matthew D., Drew E. Shenkman, and Charles D. Tobin, *Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 Fordham Intell. Prop. Media & Ent. L.J. 581 (Spring 2011).

Cain, Patricia A., *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. Rev. 481 (Fall 2010).

Carbone, June, *What Does Bristol Palin Have to Do With Same-Sex Marriage?*, 45 U.S.F. L. Rev. 313 (Fall 2010).

Carmella, Angela C., *Exemptions and the Establishment Clause*, 32 Cardozo L. Rev. 1731 (May 2011) (Symposium: Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History).

Carter, Ian, *Respect and the Basis of Equality*, 121 Ethics 538 (April 2011).

Chemerinsky, Erwin, *The Roberts Court and Freedom of Speech*, 63 Fed'l Communications L. J. 579 (May 2011).

Chomsky, Daniel, and Scott Barclay, *The Mass Media, Public Opinion, and Lesbian and Gay Rights*, 6 Ann. Rev. L. & Social Science 387 (2010).

Cullitan, Caitlin M., *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & Educ. 417 (July 2011) (focuses on case of high school student who sued over principal's disclosure to her mother that she was engaged in a homosexual relationship).

Davis, Adrienne D., *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker's) Art and 'Jante Halley's) Law*, 23 Yale J. L. & Feminism 1 (2011).

Dawson, Matthew, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of "Local Community Standards"* Online, 60 Cath. U. L. Rev. 719 (Spring 2011).

DeMitchell, Todd A., *Immorality, Teacher Private Conduct, and Adverse Notoriety: A Needed Recalculation of Nexus?*, 40 J. L. & Educ. 327 (April 2011).

Dempsey, Brian, *Strange Bedfellows in the Pro-Marriage Campaigns*, 2011 SCOLAG 162-164 (July 2011) (Scottish online legal journal).

Edger, Robin, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 Amer. Univ. Int'l L. Rev. 119 (2010).

Farrell, Robert C., *The Two Version of Rational-Basis Review and Same-Sex Relationships*, 86 Wash. L. Rev. 281 (May 2011).

Forster, Paul, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 Gonzaga L. Rev. 687 (2010/11).

Gamble, Natalie, and Louisa Ghevaert, *International Surrogacy: Payments, Public Policy and Media Hype*, 41 Fam. L. (UK) 504 (May 2011).

Gardner, James A., *Anonymity and Democratic Citizenship*, 19 Wm. & Mary Bill of Rights J. 927 (May 2011).

Glazer, Elizabeth M., *Sodomy and Polygamy*, 111 Colum. L. Rev. Sidebar 66 (May 26, 2011).

Goldberg, Suzanne B., *Open Service and Our Allies: A Report on the Inclusion of Openly Gay and Lesbian Servicemembers in U.S. Allies' Armed Forces*, 17 Wm. & Mary J. of Women & L. 547 (Spring 2011).

Gottry, James M., *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of*

*Speech*, 64 Vanderbilt L. Rev. 961 (April 2011).

Gray, Eliza, *Transitions: What will it take for America to accept transgender people for who they really are?*, The New Republic, Issue No. 242 (July 14, 2011), pp. 10-18.

Greene, Jamal, *The Rule of Law as a Law of Standards*, 99 Georgetown L.J. 1289 (June 2011) (The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens) (Uses Stevens' dissent in *Bowers v. Hardwick* as one illustration of his approach to constitutional decision-making).

Halpin, Stanley, *Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law Upon the Law of the United Kingdom and the United States*, 94 Marq. L. Rev. 463 (Winter 2010).

Hayward, John O., *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 Cleve. St. L. Rev. 85 (2011).

Hendricks, Jennifer S., and Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. Pa. J. Const. L. 587 (March 2011).

Hertz, Frederick, *Review of Cynthia Grant Bowman, Unmarried Couples, Law, and Public Policy*, 31 California Lawyer No. 6, 28 (June 2011).

Hewlett, Sylvia Ann, and Karen Sumberg, *For LGBT Workers, Being "Out" Brings Advantages*, Harvard Bus. Rev., July 1, 2011 (2011 WLNR 13084158).

Hojem, Petter, *Fleeing For Love: Asylum Seekers and Sexual Orientation in Scandinavia*, 14 ASIR L. Rev. 1 (2011).

Ivan, Florin V., *Revising Judicial Application of the Single Subject Rule to Initiative Petitions*, 66 N.Y.U. Ann. Survey of Amer. L. 825 (2011).

Joyce, Michael, *The Regional Compromise: A Solution to the Debate Between Local Community and National Standards for Evaluating Internet Obscenity Cases*, 49 Duquesne L. Rev. 61 (Winter 2011).

Karlan, Pamela S., *Old Reasons, New Reasons, No Reasons*, 27 Ga. St. U. L. Rev. 873 (Summer 2011) (Critique of rational basis review in, among other contexts, constitutional challenges involving same-sex marriage and DOMA).

Karlan, Pamela S., *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 Sup. Ct. Rev. 159 (2010).

Kardon, Alex, *Damages Under the Privacy Act: Sovereign Immunity and a Call for Legislative Reform*, 34 Harv. J. L. & Public Pol'y 705 (Spring 2011).

Karst, Kenneth L., *Through Streets Broad and Narrow: Six "Centrist" Justices on the Paths to Inclusion*, 2010 Sup. Ct. Rev. 1 (2010).

Keatley, E. Benton, *The Liberty of Innocent Delights: Obscene Devices and the Limits of State Power After Lawrence v. Texas*, 16 Wash. & Lee J. Civil Rts. & Soc. Just. 257 (Fall 2009).

Kelso, R. Randall, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433 (2011).

Kim, Lisa Kye Young, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 Loyola J. Pub. Int. L. 495 (Spring 2011).

Kornbluh, Felicia, *Queer Legal History: A Field Grows Up and Comes Out*, 36 Law & Soc. Inquiry 537 (Spring 2011) (Review Section).

Lau, Holning, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. Davis L. Rev. 773 (February 2011) (Symposium — The Asian Century? Human Rights Under Stress).

Lawrence, Michelle S., and Simon N. Verdun-Jones, *Sentencing Hate: An Examination of the Application of s. 718.2(a)(i) of the Criminal Code on the Sentencing of Hate-Motivated Offences*, 57 Crim. L. Q. 28 (2011).

Lloyd, Harold Anthony, "Original" Means Old, "Original" Means News: An "Original" Look at What "Originalists" Do, 67 Nat'l Law. Guild Rev. 135 (Fall 2010) (critical analysis of how self-labeled "originalists" on the Supreme Court purport to decide constitutional claims by reference to "original" intent, in the specific context of Scalia and Thomas dissents in *Lawrence v. Texas*).

Marshall, William P., Smith, Christian Legal Society, and *Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 Cardozo L. Rev. 1937 (May 2011).

McClain, Linda C., *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society*, 32 Cardozo L. Rev. 1959 (May 2011) (Symposium:

Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History).

McKay, Bernard L., *When Saying "I Do" Does Not Do It: Estate Planning for Same Sex Couples*, 21 No. 5 Ohio Prob. L.J. 7 (May/June 2011).

McKay, Heather L., *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 Quinnipiac L. Rev. 493 (2011).

McMahon, Brittnay M., *The Science Behind Surrogacy: Why New York Should Rethink its Surrogacy Contracts Law*, 21 Albany L. J. of Science & Technology 359 (2011).

Murphy, Timothy F., *Surrogate Health Care Decisions and Same-Sex Relationships*, 41 Hastings Ctr. Report No. 3, 17 (May-June 2011).

NeJaime, Douglas, *Convincing Elites, Controlling Elites*, 54 Studies in L., Politics & Society 175 (2011) (analysis of the role of "elite" support in social movements, using the marriage equality struggle as subject matter).

Niedrich, Anastasia, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 Mich. J. Gender & L. 25 (2011) (suggests abandonment of the "protected classes" model of employment discrimination law in favor of an approach that stresses job qualifications and outlaws employer reliance on extraneous considerations in making personnel decisions; focuses on employment discrimination against transgender workers as prime example of failure of the current system).

Noonan, Bethan, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. Contemp. Health L. & Pol'y 330 (Spring 2011).

Peck, Robert S., *For Trailblazers, When the U.S. Constitution is Not Enough*, 45 New Eng. L. Rev. 855 (Summer 2011) (Symposium: The Law of American State Constitutions).

Perdue, Abigail Lauren, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. Contemp. Health L. & Pol'y 279 (Spring 2011).

Pettys, Todd E., *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. Kan. L. Rev. 715 (May 2011).

Powell, H. Jefferson, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 Wash. L. Rev. 217 (May 2011).

Price, Louise, *The Treatment of Homosexuality in the Malawian Justice System: R v Steven Monjeza Soko and Tivwonge Chimbalanga Kachepe*, 10 African Hum. Rts. L. J. 524 (2010).

Recent Development, *The Loss of Freedom of Association in Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), 34 Harv. J. L. & Public Pol'y 805 (Spring 2011) (Correction: The alleged loss of freedom of association....).

Richman, Kimberly D., PhD, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. Rev. 357 (Fall 2010).

Schacter, Jane S., *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363 (June 2011).

Schragger, Richard, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 Cardozo L. Rev. 2009 (May 2011) (Symposium: Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History).

Segall, Eric J., *Is the Roberts Court Really a Court?*, 40 Stetson L. Rev. 701 (Spring 2011) (The author's answer: No, the conservative majority is doing politics, not law).

Shaman, Jeffrey M., *State Constitutional Law: The Right of Privacy and Same-Sex Marriage*, 59 U. Kan. L. Rev. 747 (May 2011).

Smith, Anna Marie, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. Rev. 517 (Fall 2010).

Strasser, Mark, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 Pepp. L. Rev. 1021 (2011).

Strasser, Mark, *Same-Sex Marriage and the Right to Privacy*, 13 J. L. & Fam. Stud. 117 (2011).

Titshaw, Scott, *A Modest Proposal to Deport the Children of Gay Citizens, & ETC.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 Georgetown Immigration L.J. 407 (Winter 2011).

Underkuffler, Laura S., *Odious Discrimination and the Religious Exemption*



*Question*, 32 Cardozo L. Rev. 2069 (May 2011) (Symposium: Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History).

Wagner, Catherine, *The Good Left Undone: How to Stop Sex Offender Laws From Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am. J. Crim. L. 263 (Spring 2011).

Wardle, Lynn D., *The "Constitution" of Marriage, and the "Constitutions" of Nations*, 45 U.S.F. L. Rev. 437 (Fall 2010).

Willenbrink, Zachary, *Conflicts of Law and Policy Relating to Same-Sex Marriage Recognition in Wisconsin*, 94 Marquette L. Rev. 721 (Winter 2010).

Wintemute, Robert, *Same-Sex Love and Indian Penal Code § 377: An Important Human Rights Issue for India*, (2011) 4 NUJS L. Rev. 31.

Yecies, Sharon, *Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights*, 11 Chi. J. Int'l L. 789 (Winter 2011).

Zirkel, Perry A., *Introduction — Nexus and Notoriety for Teacher Conduct: Off-Campus Be Off-Putting?*, J. L. & Educ. 323 (April 2011).

## Specially Noted

Symposium: The Future of Same-Sex Marriage, 45 Univ. of San Fran. L. Rev. No. 2 (Fall 2010) (individual articles noted above by author).

Symposium: Diving into the Gene Pool: How Assisted Reproductive Technology is Making a Splash in the Law, 21 Albany L.J. of Science & Technology, No. 2 (2011). Edited transcripts of live symposium presentations and articles, including one advocating that New York rethink its current law making surrogacy contracts illegal (see above).

The article titled "Transitions" by Eliza Gray, noted above, was the cover story for the July 14 issue of *The New Republic*. The cover shows a photograph of a man with the text: "He was born in a woman's body. Now he is a second-class citizen. Welcome to America's next great civil rights struggle." The lengthy article marks a major advance on the treatment of transgender issues by the mainstream media.

The Spring/Summer 2011 issue of *The International Review* (Vol. 13, Issue 2),

published by the New York Law School Center for International Law, includes a lengthy descriptive article titled "Same-sex marriage around the world: Overview and status of debate," which includes a table on same-sex marriage, a summary of legal recognition for same-sex couples, and a detailed analysis of the European Court of Human Rights' recent ruling regarding Austria.

## AIDS & Related Legal Issues

Befort, Stephen F., *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvalidate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 Utah L. Rev. 993.

Colker, Ruth, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 2010 Utah L. Rev. 1029.

Gómez, Eduardo J., *How Brazil Outpaced the United States When It Came to AIDS: The Politics of Civic Infiltration, Reputation, and Strategic Internationalization*, 36 J. Health Politics, Pol'y & L. 317 (April 2011).

Miller, Carol J., *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 Mo. L. Rev. 43 (Winter 2011)

Satz, Ani B., *Disability Discrimination after the ADA Amendments Act of 2008: Forward*, 2010 Utah L. Rev. 983 (Forward to Symposium).

Spindelman, Marc, *Unlimited Intimacy: Reflections on the Subculture of Barebacking*, by Tim Dean. Chicago: The University of Chicago Press. 2009. PP. XIV, 212. \$20.00, 23 Yale J.L. & Feminism 179 (2011) (review essay, including extensive comments by the reviewer on the ethics of cruising and bareback sex).

## EDITOR'S NOTE:

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