LESBIAN/GAY

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This monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, and current law students. Professor Leonard, LeGaL's founder, has written numerous articles on employment law, AIDS law, and lesbian and gay law. Art is a frequent national spokesperson on sexual orientation law, and an expert on the rapidly emerging area of gay family law. He is also a contributing writer for Gay City News, New York's bi-weekly lesbian and gay newspaper. To learn more about LeGaL, please visit http://www.le-gal.org.

L E S B I A N / G A Y

LAW NOTES

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http://www.nyls.edu/jac

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of the LGBT Bar Association
of Greater New York
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ISSN
8755-9021

9TH CIRCUIT PANEL RULES PROP 8 UNCONSTITUTIONAL

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit ruled by a vote of 2-1 on February 7, 2012, that the enactment of Proposition 8 by California voters on November 5, 2008, violated the 14th Amendment of the United States Constitution. *Perry v. Brown*, 2012 Westlaw 372713. The panel majority adopted the narrowest available constitutional argument, avoiding addressing the question whether same-sex couples have a federal constitutional right to marry. Instead, the court ruled that there was no rational basis for passing a state constitutional amendment that *revoked* the right of same-sex couples to call their legally-recognized relationships a "marriage." Judge Stephen Reinhardt wrote for the majority. Judge N. Randy Smith dissented. The Appellants filed a motion for rehearing en banc on February 21, just before their time to do so would expire under circuit rules. The filing for en banc review will delay implementation of former Chief District Judge Vaughn Walker's Order enjoining the enforcement of Proposition 8. (A few days prior to releasing this decision, the panel released a separate decision about the recording of the trial, which is reported separately, below.)

Ruling on subsidiary issues in the case, this time unanimously, the panel held that the Proponents of Proposition 8, who entered the lawsuit as intervenor-defendants, had federal constitutional standing to appeal the district court's ruling, because the California Supreme Court has ruled that initiative proponents are authorized to represent the state's interest in defending its constitutional provisions. The panel also held that Chief District Judge James Ware did not commit an abuse of discretion when he rejected a motion by the Proponents to vacate the ruling by former Chief District Judge Vaughn Walker on the ground that Walker, a gay man in a ten-year relationship with another man, should have recused himself from deciding the case. In a separate opinion, the panel unanimously rejected a new attempt by the Imperial County Clerk to intervene as a defendant-appellant in the case and to file a separate petition for rehearing en banc.

Proposition 8 placed into the California constitution, effective November 6, 2008, an amendment providing that only the marriage of a man and a woman is valid or recognized in California. The immediate effect of the amendment was to carve a limited exception out of the California Constitution's equal protection requirement, depriving same-sex couples from attaining a civil status called "marriage," according to a May 2009 decision by the California Supreme Court in response to a state constitutional challenge to Proposition 8's enactment. California's domestic partnership law provides same-sex couples with almost all the state law rights and benefits of marriage, and the California Supreme Court's May 2008 ruling on same-sex marriage held that same-sex couples are entitled to a legal status, called "marriage," that would afford all the state law rights and benefits of marriage. In its May 2009 ruling, the California Supreme Court said that the only part of its May 2008 ruling affected by Proposition 8 was the ability of same-sex couples to call their status "marriage." Since the rest of the May 2008 ruling remained in effect, said that court, domestic partnership must provide all the rights and benefits of marriage, except the right to claim the term "marriage" itself. The court also ruled that the marriages contracted prior to the passage of Proposition 8 remained valid and recognized as marriages.

Days before the May 2009 ruling, and correctly anticipating its outcome, the American Foundation for Equal Rights (AFER) filed *Perry v. Schwarzenegger*, attacking the federal constitutionality of Proposition 8. Because none of the named defendants (Governor Arnold Schwarzenegger, Attorney General Jerry Brown, and the two state officials charged with operating the agency that administers marriage licenses, as well as the two county clerks who had denied marriage licenses to the two plaintiff couples because of the barrier created by Proposition 8) were willing to defend Proposition 8 on the merits, the Proponents of the initiative, who had formed an organization to gather petition signatures and to campaign for its enactment, were allowed to intervene as defendants, and the city of San Francisco, which had been a plaintiff in the *In re Marriage Cases* litigation, was allowed to intervene as co-plaintiff.

District Judge Walker ruled in August 2010 that Proposition 8 violated the 14th Amendment on two grounds: it denied same-sex couples a fundamental right without any showing of a compelling government interest to do so, and it singled out same-sex couples for exclusion from marriage without any rational justification. Had the 9th Circuit panel affirmed Judge Walker's ruling on either of those theories, its opinion would mark the first time that a federal appellate court had ruled that same-sex couples have a constitutional right to marry. And, most likely, had the panel majority chosen that path, upon internal circulation of the opinion among the judges of the 9th Circuit, a decision would have rapidly emerged among the judges of the circuit to vacate the opinion and grant rehearing en banc by an expanded panel of eleven judges, following a well-established practice in the circuit when a panel issues a controversial opinion on an issue of first impression.

Instead, however, the panel majority chose a narrower approach, avoiding the ultimate constitutional question, instead considering a question presented by the City of San Francisco in its response to the appeal and also argued before the court: whether it violated the Equal Protection Clause for the people of California to vote to rescind from one group of citizens a right that was otherwise available to all. In other words, once the California Supreme Court had ruled in 2008 that same-sex couples had a right to marry under the California constitution, then same-sex and different-sex couples in California had an equal right to form legal unions that were called "marriages." Passing Proposition 8 kept that right intact for different-sex couples and took it away from same-sex couples. In order to treat one group differently from the other in this way, the government has to have at least a rational basis for the differential. "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and

Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.

to officially reclassify their relationships and families as inferior to those of opposite-sex couples," wrote Judge Stephen Reinhardt in the majority opinion.

The panel thus defined its task as deciding whether there was a rational basis for rescinding the right of same-sex couples to call their legal status under California law a "marriage." And in looking for a precedent to deal with this question, the majority of the panel saw the U.S. Supreme Court's 1996 ruling, *Romer v. Evans*, as the most applicable precedent. In *Romer*, the Supreme Court held that Colorado voters had violated the Equal Protection Clause when they enacted through an initiative a state constitutional amendment providing that the state and its political subdivisions were prohibited from treating gay people as a protected class for purposes of discrimination law. The Supreme Court found that no rational justification supported singling out a particular group of people in this way, giving rise to the inference that animus motivated the decision, and such animus is not a legitimate grounds for making public policy.

The panel majority found that despite the more limited scope of Proposition 8, it was closely analogous in relevant ways to what Colorado Amendment 2 did. "Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason," wrote Judge Reinhardt.

When analyzing the various reasons argued in support of Proposition 8, the majority concluded that even if those reasons were credited as stating legitimate interests of the government, enacting Proposition 8 did not advance any of them. The Proponents and writers of amicus briefs in their support offered four justifications for Proposition 8: "(1) furthering California's interest in childrearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools." The majority of the panel concluded that enacting Proposition 8 did not advance these interests, regardless whether they would be considered legitimate. Because California, through judicial decisions and legislation, has recognized equal parental rights for same-sex couples, a situation unaffected by Proposition 8, the Proposition really has nothing to do with childrearing policy. Furthermore, there is no logical connection between denying same-sex couples the right to marry and encouraging different-sex couples to procreate within marriage.

As to religious freedom, there was no showing how granting same-sex couples the right to call their civil unions "marriages" impeded religious freedom in any way. Nothing in California law compels any religious organization to perform any marriage of which its theology disapproves, and Proposition 8 did not directly affect any of the existing anti-discrimination laws of California, which already included sexual orientation as a prohibited ground of discrimination long before the *In re Marriage Cases* decision.

The majority found the reference to "proceeding with caution" rather odd, since this might be a relevant consideration in deciding whether to allow same-sex couples to marry, but seemed irrelevant to deciding whether to rescind that right after it had been recognized and acted upon by 18,000 couples. Finally, Proposition 8 had no direct effect on school curriculum, although the majority conceded that to the extent the curriculum in the schools involves instructing students about the reality of the world, when same-sex couples can marry it is likely that this fact will be noticed in their education. Blocking students from knowledge of reality does not seem like a legitimate state interest.

Judge Smith's dissent was focused on the procreation point, and it seemed incredibly weak. Indeed, reading the dissent one suspects that the judge was grasping at straws, for it seemed to concede most points of the analysis to the majority and to fall back on the notion that as long as it was "arguable" or contested that children are or are not better off being raised in a particular kind of family, the state could rationally bar same-sex couples from marrying. This seemed quite contradictory in light of the hearing record showing the large number of children being successfully raised by same-sex couples, and who would continue to be raised by same-sex couples regardless of whether their parents could marry, and who would be disadvantaged in various ways because their parents' unions were not recognized as marriages.

By ruling on the narrowest constitutional ground available to it, the court limited the immediate effect of its ruling to California. As the rationale was that the state must have a legitimate reason for rescinding from a particular group of citizens a previously recognized right, its logic would be important for challenging any attempt in Iowa, for example, to put an amendment initiative on the ballot to rescind the right to marry proclaimed by the Iowa Supreme Court. Perhaps it would also be relevant if the marriage laws enacted during February in Washington state and Maryland are repealed by referendum this November, or if the New Hampshire legislature repeals the law on same-sex marriage that was enacted a few years ago, as Republican legislators in that state are proposing to do.

The petition for rehearing en banc takes its cue from Judge Smith's dissent, argu-

ing that the panel majority misapprehended and misapplied *Romer v. Evans.* They argue that *Romer* turned on the breadth and sweep of Colorado Amendment 2, which disabled the state government from providing any protection against discrimination for "homosexuals," and thus was completely distinguishable from a constitutional amendment narrowly targeting the right to label a domestic partnership as a marriage. They also argue, as they had before Judge Walker, that the institution of marriage is so deeply rooted in procreation and child-rearing (concepts that they implicitly treat as inextricably linked) that it is rational to confer its status only on heterosexual couples who can engage in procreation without assistance and, sometimes, by accident, to strongly incentivize them to marry and stay married to raise their children. This was an argument refuted by Justice Scalia in his dissent in *Lawrence v. Texas*, and conveniently overlooks the significant minority of same-sex couples that are raising children who suffer from the exclusion of their parents from the institution of marriage. Proponents argue that because California has conferred all the state law rights and benefits of marriage on their parents in the guise of domestic partnership, the deprivation of the name of marriage is insignificant to them. The report of New Jersey's Civil Union Review Commission gives the lie to such an assertion.

The 9th Circuit panel majority left in place the stay of Judge Walker's order that had been issued in August 2010 pending appeal. The stay is likely to remain in place as the appellate process continues to unfold, but at this point the defenders of Proposition 8 have exhausted their appeals "as of right" and can only move forward with the permission of the 9th Circuit (by granting the en banc rehearing petition) or the Supreme Court. In considering what might happen, an en banc *reversal* of the panel decision would end the case, unless at least four members of the Supreme Court deemed the matter significant enough to justify establishing a national precedent on referenda rescinding state constitutional rights and thus voted to grant a petition for certiorari that AFER is likely to file. This seems unlikely, however. If the en banc panel were to *affirm* Judge Walker's decision on the Judge Walker's reasoning, holding that same-sex couples have a constitutional right to marry, the chances that the Supreme Court would grant a petition for certiorari from the Proponents of Proposition 8 would seem very high. Either way, it will be a while before California officials will be able to issue marriage licenses to same-sex couples. Ironically, these legal developments continue to play out against a backdrop of public opinion in California shifting strongly in support of same-sex marriage, according to press reports on February 29, which showed that the latest Field Survey found that 59% of registered voters support same-sex marriage, with 34% opposed and 7% on the fence. Proposition 8 was enacted with 52.3% of the vote. The pollsters said that this was the largest margin of support detected so far in California, leading some to second-guess the decision by gay politicos not to place an initiative on the ballot this year to repeal Proposition 8. ■

WA, NJ and MD Legislatures Approve Same-Sex Marriage Bills

In an amazing one-month "trifecta," the state legislatures of Washington, New Jersey and Maryland completed approval of bills that would recognize a right to marry for same-sex couples during the month of February. Washington Governor Christine Gregoire was a supporter of the legislation and promptly signed it. Maryland Governor Martin O'Malley was also a supporter of the legislation signed it into law on March 1, a week after passage. New Jersey Governor Chris Christie, who had run for office as an opponent of same-sex marriage, vetoed the measure the day after the legislature completed work on it (see New Jersey story below).

The vote in Maryland was 25-22 in the Senate on February 23, after approval in the House of Delegates by a vote of 72-67 on February 17. The vote in the Washington house was 55-43 and 28-21 in the Senate.

Although the governors' signatures made Washington and Maryland theoretically the seventh and eighth states to approve same-sex marriage (actually, the ninth and tenth if one counts Maine and California, where referenda took away the right to marry after legislative passage in Maine and a pro-marriage state Supreme Court decision in California), neither new state law was expected to go into effect unless it could survive a determined effort at referendum appeal. In Washington, the measure would go into effect on June 7, 2012, unless opponents file sufficient valid petition signatures by June 6, in which case its effect would be stayed until after the general election in November. In Maryland, the legislature agreed to make the effective date of the law January 1, 2013, so it will not go into effect before opponents have a shot at getting a measure on the ballot for this November. Opponents of same-sex marriage need 120,577 valid signatures in Washington, but only about 55,736 in Maryland. In both states, political observers expect the measures to qualify for the ballot. In Washington, a similar ballot question seeking repeal of the state's "everything-but-marriage" domestic partnership law qualified for the ballot but then was rejected by approximately 53% of the voters, so same-sex marriage proponents in Washington were hopeful that they have a chance to beat back the repeal effort. In both Washington and Maryland, attempts to secure the right to marry through the courts eventuated in narrow defeats at the highest courts in the state, driving proponents to the alternative course of legislative reform.

If repeal referenda qualify in Washington and Maryland, they will be joined on the November ballot by an anti-same-sex-marriage constitutional amendment in Wisconsin and a pro-same-sex-marriage initiative in Maine (see below). There will also be an anti-same-sex-marriage amendment on the ballot in North Carolina, but legislators set the vote for the primary election this spring, expecting that the turnout will be overwhelmingly Republi-

can because of the presidential primary. (In the event, it appears that a hot contest for the Democratic gubernatorial nomination may also bring out Democrats, giving pro-same-sex-marriage forces in the state some hopes of evening the playing field.)

The likelihood that same-sex marriage questions will be on the ballot in five states this year (four of them in November) brought up memories of 2004, when strategists for the re-election of President George W. Bush encouraged ballot measures on same-sex marriage in numerous "swing states" in hopes that this would bring out conservative Republican voters and help provide the margin for reelection. In the end, the 2004 presidential election appeared to come down to Ohio, where an anti-marriage ballot question passed and Bush edged out Senator John Kerry in the state popular vote to secure his bare electoral majority. Political scientists were divided as to whether the marriage ballot question was decisive, however, pointing to other factors in Ohio that had the effect of suppressing voting in minority communities as well as some hotly contested down-ballot races. There was some hope that so many coinciding ballot questions might over-stretch the ability of the National Organization for Marriage, the main conduit for anti-gay funding of ballot question campaigns, to fund the barrage of hysterically anti-gay advertising that characterized its previous efforts, especially with the large sums expected to be spent by NOM's usual funders on the furious campaign by Republicans to unseat President Barack Obama. ■

11th Circuit Rejects Anti-Gay Counselor's First Amendment Claims

In *Walden v. Centers for Disease Control & Prevention*, 2012 WL 371871 (C.A.11, Feb. 7, 2012), the U.S. Court of Appeals, Eleventh Circuit, ruled that the removal of a counselor who raised religious objections to providing relationship counseling to gay and lesbian clients, and who essentially shared her objections with a client, did not violate her First Amendment or other federal rights. The decision, written for the court by Circuit Judge Stephanie Seymour, is at least the third in recent months to tackle the scope of the protections available to counselors or counseling students whose religious beliefs affected their willingness to counsel gay clients (see Jan. & Feb. issues of *Law Notes* discussing *Keeton* and *Ward*, respectively). In ruling against the counselor, the Eleventh Circuit focused squarely on the manner in which the counselor sought to withdraw from the counseling.

Marcia Walden was a counselor employed by Computer Sciences Corporation (CSC), which administered an employee assistance program for the Centers for Disease Control and Protection (CDC), a federal agency based in Atlanta. Under contract with CDC, CSC provided health and wellness services to CDC employees. Although CSC managed and staffed the clinics at which services were provided, CDC retained the right to request the removal of any CSC employee. Additionally, CSC policies required its employees to adhere to principles of inclusion and diversity.

Walden described herself as "a devout Christian who believes that it is immoral to engage in same-sex sexual relationships." She also stated that her religion prohibits her from encouraging or supporting same-sex relationships through counseling. As a result, in July 2006, Walden referred a gay client to an outside counselor rather than providing counseling herself. Although Walden then discussed her religious objections with her supervisor, there was no discussion of how such conflicts should be handled in the future.

Inevitably, the conflict surfaced again. In August 2007, Walden began a counseling session with a CDC employee referred to as Jane Doe. Doe described her long-term relationship with her same-sex partner, with whom she was raising a son, and explained that she was seeking help with trust issues that had emerged in their relationship.

Walden concluded that her religious beliefs conflicted with Doe's need for same-sex relationship counseling. This time Walden made the equivalent of a noisy withdrawal, explaining to Doe that she could not provide her counseling because of her "personal values." Doe, upset at Walden's actions and discerning that her sexual orientation might have something to do with the withdrawal, complained to Walden's supervisor and suggested that she was homophobic.

It is worth pausing for a moment here, as the court ultimately does in recounting some of the testimony, on the damage that could result from a person in need of help seeking out that help only to be turned away and explicitly told that the personal values of the counselor is the reason. Walden's supervisor suggested to Walden that in future, rather than citing personal values, she should instead indicate that she was inexperienced with relationship counseling. Walden refused to embrace this approach because she considered it to be lying to the client.

CSC's program manager told CDC's Director of Health and Safety about Doe's complaint. After learning that Walden was generally unwilling to change the way she approached future conflicts, CDC exercised its contractual rights and requested that Walden be removed. Walden was then laid off from her position. She was not terminated for cause and was provided with resources to help look for another job within the company. After taking one occasion to access a database to look for other positions, Walden took no further action.

Instead, Walden filed suit against CSC, CDC and individuals involved in the events, claiming violations of her free exercise rights, discriminatory retaliation, violations of the Religious Freedom Restoration Act ("RFRA") and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on an employee's religious practices or beliefs. The district court dismissed all of Walden's claims and she appealed to the Eleventh Circuit.

As an initial matter, the Eleventh Circuit quickly affirmed the dismissal of Walden's claims for lack of standing against CDC and CDC employees in their official capacities. Simply put, Walden's claims sought relief from these defendants

only for *past* injuries, which meant that there was no longer any "case or controversy" to satisfy standing requirements.

The court then proceeded to the core claims against CDC employees for actions allegedly taken in their individual capacities, including the request to remove Walden from her counseling work under the CSC contract. On this front, the court noted that it typically must balance the First Amendment rights of an employee or contractor against the interest of the government "as an employer, in promoting the efficiency of the public services it performs through its employees," citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). The court concluded, however, that there was no need to apply the balancing test in this case because there was no evidence that CDC employees burdened any of Walden's "sincerely held religious beliefs."

That is, Walden was removed from her position not because of her religious beliefs but instead because of the manner in which she handled Doe's referral. That is, Walden conceded that nothing in her religious beliefs compelled her to *tell* clients that her "personal values" prevented her from providing counseling. This determination proved crucial to the failure of her remaining claims. CDC officials' decision to request her removal was, therefore, reasonable under the circumstances.

For similar reasons, the court agreed that Walden failed to support either a free exercise retaliation claim or a RFRA claim. The RFRA generally prohibits the government from substantially burdening a person's exercise of religion, even by applying ostensibly neutral laws, absent a compelling interest. Again, Walden's claims failed because she did not make a threshold showing that her free exercise rights were burdened at all.

Walden's claims against CSC also included free exercise and RFRA claims, which the court rejected on both standing grounds and for reasons substantially similar to the above, her claims under Title VII. Title VII requires an employer to make reasonable accommodations for the employee's religious practices. The court determined that CSC did just that. Rather than terminating her, CSC provided her with resources to seek other opportunities within the company. Her layoff became permanent only as a result of Walden's own decision to abandon that effort.

If there is a lesson from this and similar cases, it is that although religious belief may serve as a valid basis to seek a recusal from counseling, the manner in which that right is exercised may prove dispositive in a subsequent discrimination claim. *—Brad Snyder*

Brad Snyder is the Executive Director of LeGaL.

9th Circuit: Housing Discrimination Laws Do Not Apply to Online Service

In an opinion filed on February 2, 2012, in *Fair Housing Council of San Fernando Valley v. Roommate.com*, 2012 WL 310849, the U.S. Court of Appeals, 9th Circuit, reversed the U.S. District Court, Central District of California, and held that online roommate matcher Roommate.com did not violate state and federal housing discrimination laws by allowing its members to filter roommate options by sex, sexual orientation, and familial status. In typically colorful fashion, Chief Judge Alex Kozinski's majority opinion details how Roommate.com's questionnaire form asking users' sexual orientation, familial status and sex, did not violate either the federal Fair Housing Act, 48 U.S.C. sec. 3601 et seq. (FHA) or California's Fair Employment and Housing Act, Cal. Gov't Code sec. 12955 (FEHA), due largely to readings of the laws necessitated by the doctrine of Constitutional Avoidance.

Roommate.com is an online service for people looking for house and apartment mates, and asks potential candidates a number of personal questions in a registration questionnaire. Roommate.com then uses the answers to those questions to sort, filter and match potential roommates, and also allows other users to search potential matches using the given criteria. This case arose out of the fact that the site asked users seeking housing accommodations their sex, sexual orientation and familial status. Each of those criteria are considered discriminatory when used as a basis on which to offer (or not offer) rental housing.

The Fair Housing Council of San Fernando Valley (FHC) sought to bar roommate.com from sorting potential house- and apartment-mates on bases prohibited by federal and state laws. FHC contends that roommate.com violated the Acts when they asked potential roommates for that information and used it to help match candidates. Initially the claims were dismissed, after the district court found that the Communications Decency Act granted roommate.com immunity. However, after that decision was reversed and remanded by the 9th Circuit, the district court determined that roommate.com was indeed immune, but only as to its "Additional Comments" section and not as to its posting of questionnaires requiring sex, familial status and sexual orientation disclosure, and sorting and matching candidates based on those criteria. The court granted summary judgment to FHC, and permanently enjoined roommate.com from asking for and process-

It's hard to imagine a relationship more intimate than that between roommates who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

ing the forbidden information. Roommate.com appealed the ruling.

"There's no place like home," begins Kozinski's opinion, and it is that premise on which the case hinges. Specifically, there is no place like *inside* one's own home, where roommates must live alongside one another and share the most personal information, spaces and vulnerabilities. Accordingly, each Act's application to Roommate.com's services is viewed through the lens of the constitutional right to freedom of association, and whether each Act applies to the selection of a roommate at all.

Judge Kozinski first discusses how the roommate relationship falls under the protection of the right of intimate associate. Primarily, the opinion states, the court looks to "the size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537. As Kozinski notes, the roommate relationship easily qualifies, as "it's hard to imagine a relationship more intimate than that between roommates who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms." Further, the opinion points out that one is exposed to a roommate's habits, way of life, and belongings, including "pornography… drugs, firearms…, messy cooks," and "bathroom hogs."

Since application of the Acts to selection of a roommate would raise constitutional concerns, the court looks to the doctrine of Constitutional Avoidance - the "well -established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474. Essentially, this dictates that if one acceptable construction of a statute would raise serious constitutional problems but another alternative acceptable construction would not, the court is obligated to construe the statute in the least problematic way.

Applied to the FHA, this means that because application of the statute to the roommate selection process would implicate serious constitutional questions regarding the right to intimate association, and a plausible alternative reading of the statute - that it was not intended to apply to the roommate selection process - exists, the court must adopt the least problematic view. Accordingly, the court finds that the FHA, and its anti-discrimination bar, does not apply to the roommate relationship.

Kozinski looks to a reading of the language of FEHA in order to reach a similar conclusion that the state law's bar on discrimination does not apply to a roommate relationship. The statute defines "housing accommodation" as "any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families." Cal Gov. Code sec. 12927. Kozinski finds this description ambiguous, and again looks to Constitutional Avoidance to read the Act in a way that would not impinge on freedom of intimate association.

The partially concurring, partially dissenting opinion, written by Judge Sandra Ikuta, points out some quibbles with the majority's analysis of whether the Fair Housing Councils have standing in the case, but more importantly focuses on a somewhat problematic 1995 amendment to FEHA, which carves out an allowance for the advertising of shared living accommodation that is only available to one sex. Such an amendment would only be necessary if FEHA's definition of "housing accommodation" does indeed include a shared living space – which would mean roommates would be covered. Accordingly, Judge Ikuta feels it is inappropriate to apply the doctrine of Constitutional Avoidance to a statute which is, in her mind, unambiguous as to whether roommates are covered.

While the majority contends that the FEHA amendment is irrelevant to whether the statute is ambiguous because "acts of a subsequent legislature tell us nothing definitive about the meaning of laws adopted by an earlier legislature," Judge Ikuta notes that there is even case law indicating that FEHA applies to roommates in a shared living situation. *Dep't of Fair Emp't and Housing v. Larrick*, 1998 WL 750901 (July 22, 1998), a ruling by the California Fair Employment and Housing Commission, found that two roommates who decided not to rent to a third potential roommate because she was black were prohibited by FEHA from rejecting the applicant based on her race.

In Ikuta's reckoning, FEHA is unambiguous, and the majority should not have read it to avoid the constitutional question. Rather, she would remand the case and allow the district court to hear arguments on the constitutionality of FEHA covering the roommate relationship.

When reading Kozinski's opinion as a whole, it certainly appears to be reasoned on the logical argument that an individual should be free to choose with whom they will live without government intrusion. It is certainly possible that had Judge Ikuta's view prevailed, the district court would have determined the same on remand. But Kozinski's view won the day, and, for now, at least, the anti-discrimination provisions of FHA and FEHA do not apply to selection of roommates. —*Stephen Woods*

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9th Circuit: Prop 8 Trial Video Recordings to Remain Under Seal

On February 2, 2012, the three-member panel of the U.S. Court of Appeals for the Ninth Circuit that was dealing with the Proposition 8 case reversed a district court order which had directed that the Proposition 8 trial video recording of *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal., 2010) be unsealed. *Perry v. Brown*, 2012 WL 308539 (9th Cir. Feb. 2, 2012). The Court of Appeals decision was highly critical of Chief District Judge James Ware's decision to unseal the recordings. The panel found that he had abused his discretion by ordering the videos be unsealed because his findings were without support in the record and he otherwise applied the law in an "illogical" and "implausible" fashion. Judge Ware replaced Chief Judge Vaughn R. Walker, the trial judge

The common law right of access is not absolute, and can be overridden given sufficiently compelling reasons for doing so.

in *Perry*, who had retired. The panel reasoned that by unsealing the recordings, Chief Judge Ware failed to honor his predecessor's commitments and obligations to the litigants in the case: "[t]he integrity of our judicial system depends in no small part on the ability of litigants and members of the public to rely on a judge's word."

Before the Proposition 8 trial, Judge Walker decided it would be appropriate "to broadcast a video feed of the proceedings to several courthouses and online." Consequently, the district court issued an order permitting the trial to be broadcast live via streaming audio and video to a number of federal courthouses around the country. The order was issued pursuant to an amendment to the district court's Local Rule 77-3. Prior to the amendment, trials were not permitted to be broadcast outside of the courthouse where they take place. The district court effected the amendment via several postings on its website in the days leading up to the trial. On the morning of the trial, January 11, 2010, the proponents of Proposition 8 ("Proponents") obtained a temporary stay of the video recording (*Hollingsworth v. Perry*, 130 S.Ct. 705 [2010]). A few days later, the Supreme Court issued a 5-4 decision which effectively prohibited the recording of the trial for broadcast, finding that the district court "did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting."

The district court had been recording the trial for two days before the Supreme Court had issued its decision in *Hollingsworth* on the basis that the Supreme Court might lift its stay. After the stay became permanent, the Proponents asked that the recording be stopped. Judge Walker ruled that the recording would continue and would be for his own use in chambers pursuant to a local rule which permits recording for such purposes. Judge Walker specifically stated that the recording would not be used "for purposes of public broadcasting or televising." Proponents dropped their objection at that point.

Later in May 2010, Judge Walker made the recording available to any parties to the proceeding who wished to use excerpts during their closing arguments, subject to a strict protective order. Plaintiffs and the City and County of San Francisco obtained copies. After closing arguments, Proponents moved to require the return of the copies.

On August 4, 2010, Judge Walker issued his decision on the merits, wherein he specifically stated that the trial proceedings were recorded, and that those recordings were used by the court in preparing its findings of fact and conclusions of law. The clerk was directed to file the trial recording under seal as part of the record. The parties were allowed to retain their copies of the trial recordings pursuant to the terms of the protective order and the Proponents' motion to order the copies' return was denied.

On September 19, 2011, Judge Ware granted the plaintiffs' cross-motion to unseal the video recordings. He held that the "common-law right of public access applied to the recording, that neither the Supreme Court's decision in *Hollingsworth* nor the local rule governing audiovisual recordings barred its release and that Proponents had made no showing sufficient to justify its sealing in the face of the common-law right."

The panel framed the issues on this appeal as narrowly as possible. They specifically stated that the only issue that they were dealing with was whether a video recording made for the sole purpose of aiding a trial judge in the preparation of his or her decision, and then sealed, may shortly thereafter be made available to the public by the court. The court refused to address whether the First Amendment right of public access to judicial records applies to civil proceedings, and assumed that the common-law presumption of public access applies to the recording at issue here and that it is not otherwise abrogated by the local rules.

With that narrowly framed issue in mind, the court analyzed it as follows: the common law right of access is not absolute, and can be overridden given sufficiently compelling reasons for doing so (see *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 [9th Cir 2003]). In this case, the 9th Circuit clearly found that the Proponents reasonably relied on Judge Walker's representations that the video recordings would not be made public. "Had Chief Judge Walker not made the statement he did (about taking the recording for purposes of use in chambers and not for purposes of public broadcasting or televising) Proponents would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured."

Insofar as Judge Ware found that no such assurances had been given by Walker, this finding was without support in the record. The court further held that Judge Ware's conclusion of law that he was not bound by Judge Walker's representations to the parties concerning sealing was "an 'implausible' and 'illogical' application of the 'compelling reason' standard to the facts at issue here." The panel largely admonishes Chief Judge Ware, writing that "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly." Judge Ware's order unsealing the recordings would essentially undermine judicial integrity. It is based on these reasons that Judge Ware abused his discretion. *—Eric J. Wursthorn*

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7th Circuit Denies Refugee Status to Gay Man from India

In an unpublished ruling, the U.S. Court of Appeals for the 7th Circuit rejected an appeal of a decision by the Board of Immigration Appeals to deny refugee status to a gay man from India. The court agreed with the BIA that the harassment the man had suffered at the hands of family and classmates during his youth in India did not amount to "persecution" under U.S. immigration law, and that the petitioner had failed to show he would likely face persecution should he be deported back to India. *Patel v. Holder*, 2012 Westlaw 562612 (Feb. 22, 2012).

The case shows the distinction drawn by the relevant laws between private persecution and public persecution. The concept of asylum (and withholding of removal as a possible remedy for those who are not qualified for asylum) is to protect people from oppression by governmental forces and institutions in their native country. The emphasis is on "official" persecution. In the case of gay people, that would require active discrimination by the government, oppressive criminal laws, assaults by law enforcement agents, and similar sorts of persecution. (One 9th Circuit case ruled years ago that the Soviet Russian practice of subjecting gays to shock therapy to "cure" their homosexuality would stand as persecution, even though it was "intended" as a "medical treatment" rather than a punishment.)

In this case, the court states, the petitioner entered the U.S. with his aunt and uncle in 1999 at age 17, and the record is unclear whether his entry was lawful. But the court asserts that when he was discovered by immigration officials in Chicago in 2007, his presence was unlawful and removal proceedings were begun against him. He applied for asylum, but it was far too late because such applications must be filed within one year of entry in the U.S. There is a lesser form of relief, withholding of removal, which lacks many of the benefits of asylum but allows the individual to remain in the United States. To qualify, a person has to show a history of past persecution underlying a reasonable fear of future persecution based on, in the case of gay people, membership in a particular social group. U.S. immigration authorities treat gay people as being part of a particular social group, so the case would focus on whether actual persecution took play or would likely occur in the future.

The petitioner claimed that his family had "disowned" him because he was gay, and one of his uncles threatened to report him to the police. At the time he was still in India, of course, the 2009 High Court ruling striking down the Victorian-era sodomy law had not yet been issued. Reflecting the time when he was trying to prove his case on withholding of removal, the petitioner had introduced U.S. State Department Country Reports on India from 2007 and 2008, as well as a UK Border Agency Report. These sources all agreed that anti-gay discrimination and assaults by private citizens occur, and sometimes the police join in. As well, arrest threats under the sodomy law, Section 377, have been made. On the other hand, the reports show that arrests under Section 377 are rare and generally do not involve private consensual sexual activity, and that the Indian government's "stated policy is to tolerate homosexuality practiced in private."

The petitioner's testimony focused on his personal experiences, said the court, including beatings and ridicule from schoolmates, being kicked out of the house by his parents, and his uncle threatening and slapping him. However, he admitted under questioning that he had never suffered any harm from the government.

The Immigration Judge in his case, denying the petition after hearing his testimony, concluded that he had not established past official persecution or a reasonable fear of future persecution. The private harassment he endured just doesn't count for this area of the law, it seems. Societal intolerance as such is not enough to constitute "persecution." Otherwise, said the court, every gay person in India would be entitled to seek refuge in the United States. The BIA approved the IJ's order to proceed with removal from the U.S.

"The record here does not compel overturning the Board's order," wrote the court, "because the record lacks evidence of widespread police abuse or government-sanctioned intolerance of homosexuals." Although there was testimony that police sometimes harm gay men or threaten arrest, "the record reveals scant information about the prevalence of these acts; we know neither how often nor where in India they occur. To the contrary, we know from these reports that the Indian government has proclaimed tolerance of private homosexual conduct and that police arrests under Section 377 are rare." Ultimately, the court commented, "Private acts without state acquiescence, let alone knowledge, is not persecution."

In a footnote, the court notes the July 2009 High Court of Delhi decision on the sodomy law. By interesting coincidence, this decision was issued as the nation's Supreme Court is considering an appeal filed by various anti-gay groups, whose main argument

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is that homosexuality is a western phenomenon disapproved by traditional Indian culture and that the High Court was wrong to cite and rely upon decisions by western courts (such as the European Court of Human Rights and the U.S. Supreme Court's Lawrence v. Texas decision), as being culturally inapposite. Early press reports of the oral argument suggest that the bench is very skeptical about the appellants' arguments and seems inclined to uphold the High Court's ruling. (See below for a fuller account of the ongoing case before the Supreme Court of India.) ■

Rulings Against Section 3 of DOMA Accumulate with *Golinski*

Karen Golinski and Lambda Legal are the winners in another round of the lawsuit attempting to win for Ms. Golinski the ability to obtain insurance coverage for her same-sex spouse, Amy Cunninghis, from her employer, the U.S. Court of Appeals for the 9th Circuit. On February 22, U.S. District Judge Jeffrey S. White (N.D.Cal.) granted summary judgment to Golinski on her claim that Section 3 of the Defense of Marriage Act, as applied to her, violates her 5th Amendment right to equal protection of the law from her government employer. *Golinski v. United States Office of Personnel Management*, 2012 WL 569685 (N.D.Cal., Feb. 22, 2012).

In the course of making this ruling, Judge White determined that Section 3 embodies discrimination based on sexual orientation and thus is subject to judicial review using "heightened scrutiny." To reach this conclusion, Judge White concluded that the 9th Circuit's standing precedent on sexual orientation discrimination claims, *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (1990), is no longer good law.

High Tech Gays, which rejected a claim for heightened scrutiny of the anti-gay procedures used by the Defense Department to grant security clearances to employees of defense contractors, was squarely based on the proposition that because sodomy laws were constitutional, gays could not claim heightened or strict scrutiny for equal protection claims against the government, and relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected a due process challenge to the Georgia sodomy law, to reach that holding. *Bowers* was overruled in 2003 by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, but lower federal courts in the 9th Circuit have continued to treat *High Tech Gays* as binding precedent simply because the 9th Circuit has never overruled or modified its holding. (In the litigation against the "don't ask don't tell" policy in the 9th Circuit, heightened scrutiny was premised on due process rather than equal protection, the courts continuing to hold to *High Tech Gays* as a precedent on equal protection but finding that some sort of heightened scrutiny should be used because the military policy burdened the liberty interest in sexual autonomy identified by the Supreme Court in *Lawrence*.)

Judge White concluded that *High Tech Gays* is no longer good law, not only because *Lawrence* overruled *Bowers*, but also because the developments subsequent to *High Tech Gays* - *Romer v. Evans* and *Lawrence* most significantly -- undermined its reasoning. White cited 9th Circuit authority holding that when subsequent rulings by the Supreme Court or the 9th Circuit itself undermine one if its precedents, district courts are no longer bound by the undermined precedent. See *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003).

Thus, he concluded, the question of what the appropriate level of judicial review should be for sexual orientation discrimination claims is an "open question" in the 9th Circuit. Proceeding from that point, White evaluated the various factors that the Supreme Court has discussed in equal protection cases and concluded that sexual orientation claims should be subjected under that analysis to heightened scrutiny, which shifts the burden to the government to show that the discriminatory policy significantly advances an important government interest. Then taking his cue from the recent spate of rulings on DOMA claims by other district judges, he concluded that Section 3 could not survive heightened scrutiny. Hedging his bets and armoring his decision against appeal, he also concluded that Section 3 could not survive less demanding rational basis review, either.

The policy reasons for adopting Section 3, taken from the legislative history, pointed to moral disapproval of gay people and their relationships as the main inspiration for the statute, which was passed in 1996 in the wake of same-sex marriage litigation in Hawaii. Finding these justifications, as well as arguments about procreation and child-rearing, inadequate even to meet the less stringent rational basis test, Judge White also rejected the new arguments raised by Paul Clement, counsel for the House "Bipartisan" Legal Advisory Group (BLAG), which has intervened as a defendant in light of the Justice Department's announcement last year that it would no longer defend Section 3 because DOJ had concluded that Section 3 violates Equal Protection, as well as arguments raised by anti-gay amicus parties. Most of the "newer" arguments had actually been raised by the Justice Department in the pending appeal of the *Gill* ruling in the 1st Circuit in Boston, but then abandoned when DOJ changed its position on the constitutionality of DOMA, only to be reasserted by counsel for BLAG.

This case began when Golinski and Cunninghis married in California during the summer of 2008, and Golinski quickly applied to have Cunninghis covered as a spouse under her work-related health benefit plan. As a 9th Circuit employee, her benefits were provided from a private insurance company under contract with the federal Office of Personnel Management (OPM). The plan administrator refused to enroll Ms. Cunninghis on the ground that DOMA Section 3 prohibited recognizing the marriage. Golinski filed a grievance with the 9th Circuit's internal dispute resolution system, and Chief Judge Alex Kozinski, sitting in an administrative capacity, ruled in her case that the relevant federal statutes on benefits could be construed in such a way that Ms. Cunninghis could be covered as a family member. OPM resisted this conclusion and refused to comply with Judge Kozinski's order.

Subsequent new litigation in the regular Article III courts was commenced when an attempt to get direct judicial enforcement of Judge Kozinski's order faltered on jurisdictional grounds.

Judge White concluded that Judge Kozinski's findings as to the interpretation of the statute were based on "unpersuasive" reasoning, as the statute carried an unambiguous and limited definition of "family member" that could not be stretched to cover a same-sex spouse in light of Section 3. Thus, the case rose or fell based on whether Section 3 was constitutional. Having concluded that it is not, Judge White issued a permanent injunction against OPM and its Director, openly-gay John Berry, preventing them "from interfering with the enrollment of Ms. Golinski's wife in her family health benefits plan." (The insurer, Blue Cross, could not take action so long as OPM refused to authorize the coverage.) Presumably Paul Clement, the lead attorney hired by BLAG to defend DOMA, will file an appeal in the 9th Circuit, where a petition for en banc review in *Perry v. Brown*, which held Proposition 8 unconstitutional, is now pending as well. ■

District Court Finds School's Internet Filter Discriminates Against Gay Groups

The U.S. District Court for the Western District of Missouri ruled on February 15 that internet filtering software used by a school district to control websites accessible by students discriminates based on viewpoint by blocking websites expressing positive views of LGBT issues while allowing students to access websites expressing anti-LGBT views. Consequently, the court ruled that the district is violating the First Amendment rights of freedom of expression of publishers of the blocked websites. *Parents, Families, and Friends of Lesbians and Gays, Inc., et al. v. Camdenton R-III School District* , 2012 WL 510877 (Feb. 15, 2012). In her opinion, District Judge Nanette K. Laughrey granted the plaintiff's motion for preliminary injunction requiring that the district cease blocking these websites.

The suit, brought by the Parents, Families, and Friends of Lesbians and Gays ("PFLAG"), DignityUSA, Campus Pride, and the Matthew Shepard Foundation, which all publish "websites that provide supportive resources directed at LGBT youth," and a student referred to as Jane Doe, claimed that the software used by the Camdenton School District ("Camdenton") unconstitutionally discriminates against certain websites based on viewpoint. Camdenton asserts that it uses the software program, URL Blacklist, to comply with the Children's Internet Protection Act ("CIPA"), which requires that public schools block students from accessing material that is "obscene, child pornography, or harmful to minors."

URL Blacklist blocks online material by classifying websites according to subject matter. School districts using the program can then determine which subject matters to block. Camdenton has chosen to block websites categorized as pornography, mixed adult, advertisements, and sexuality. While school administrators do not determine what subject classification a website receives, they can unblock a website if a student makes a request and the site is deemed appropriate.

The plaintiffs asserted that Camdenton discriminates based on viewpoint by continuing to use URL Blacklist, which categorizes websites that express a positive view of LGBT issues as "sexuality," and therefore blocks the websites as inappropriate, even though the content of these sites does not include material prohibited by CIPA. Because viewpoint discrimination violates the 1st Amendment, plaintiffs requested a preliminary injunction to stop Camdenton from blocking these.

Judge Laughrey first addresses the issue of viewpoint discrimination. The court began held URL Blacklist engages in viewpoint discrimination because the program does not block all websites containing LGBT-related subject matter. Under its classification system, websites expressing positive views of LGBT issues are classified as "sexuality," while websites that express a negative view of LGBT issues are classified as "religion." Since "religion" is not blocked, the result is that websites expressing anti-LGBT views are accessible, but those portraying LGBT issues positively, such as the plaintiffs' websites, are blocked. The court further found that the blocked websites are not being filtered out because they contain material prohibited by CIPA, as none of the forty-one blocked sites expressing positive viewpoints are blocked by five other internet filtering systems used by other school districts.

The court determined that because the ACLU placed Camdenton on notice prior to the suit that URL Blacklist discriminates based on viewpoint but the district continued to use the program, Camdenton "intended to discriminate based on viewpoint." Besides unblocking four of the sites, Camdenton did nothing to take steps to address the discrimination.

Camdenton's main defense is that the program protects students from material prohibited by CIPA. Judge Laughrey found this unconvincing, as the evidence shows that URL Blacklist is poorly designed and actually fails to block a large number of sites that CIPA prohibits. David Hinkle, developer of another system used by school districts called CIPAFilter, randomly tested 500 sites prohibited by CIPA using URL Blacklist and found that nearly 30% of them were accessible. Bt contrast, "CIPAFilter failed to block only 3.2%" of these sites., indicating to the court that Camdenton's decision to keep the program was driven by "an ulterior motive."

Camdenton argued that the district does not burden the freedom of expression of these websites because students can request that a site be unblocked, but Judge Laughrey noted that a policy stigmatizing access to a particular viewpoint, even if access is eventually granted, is enough to burden the speaker's freedom of expression. The court rejected the district's claim that the procedure is truly anonymous, since students had to complete a request form seeking their "username." The form advises students to "please use your Novell Username Below (Example: jdoe for John Doe, otherwise you will not receive email responses!)." This procedure "appears to require, or at least encourage, students to enter a

username that is a derivation of their real name," which would discourage students from asking for access. Jane Doe testified "that she is 'afraid' that requesting to have a site unblocked 'will draw attention to [her] and make [her] the subject of further taunting.'"

Judge Laughrey's determined that the tests for granting a preliminary injunction weighed in favor of the plaintiffs. Because a policy that discriminates against speech based on viewpoint must withstand strict scrutiny, it is likely that the plaintiffs will succeed on their claims. Although a school can control access to its library's internet system based on subject matter as a public school library is a non-public forum and traditionally the state can control access to these forums, it cannot deny access based on a particular viewpoint unless it establishes that the policy is narrowly tailored to serve a compelling state interest. The only compelling interest Camdenton put forward for using URL Blacklist is compliance with CIPA, but URL Blacklist is not narrowly tailored to achieve this purpose. Additionally, Camdenton's use of URL Blacklist would likely fail to withstand the standard applied in *Board of Education v. Pico*, which also prohibits viewpoint discrimination (457 U.S. 853 (1982)). In *Pico*, the Court held that while public schools "'possess significant discretion to determine the content of their school libraries[,] . . . that discretion may not be exercised in a narrowly partisan or political manner.'"

Finally, Laughrey found that the plaintiffs would suffer irreparable harm if Camdenton continued to discriminate against LGBT websites based on viewpoint as "the loss of First Amendment freedoms . . . constitutes irreparable injury" and that the continuing violation of the plaintiffs' rights if Camdenton is not enjoined tips equity in the plaintiffs' favor (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Lastly, the court states that allowing the injunction is in the best interest of the public because viewpoint discrimination is "antithetical to the First Amendment, one of our country's most cherished constitutional rights" and, therefore, prohibiting such discrimination is in the public interest. *—Kelly Garner*

Kelly Garner is a law student at New York Law School ('12).

District Court Allows Bi-National Couple to Challenge Section 3 of DOMA

U.S. District Judge Harry D. Leinenweber (N.D. Ill.) ruled on January 5, 2012, in *Revelis v. Napolitano*, 2012 WL 28765, that an action by a married same-sex couple seeking a declaration that Section 3 of the Defense of Marriage Act is unconstitutional in the context of their application for a spousal visa meets the requirements for Article III jurisdiction, even though their application has not yet been denied by the United States Citizenship & Immigration Service (USCIS), a unit of the Homeland Security Department. Judge Leinenweber also granted an application by the Bipartisan Legal Advisory Group of the House of Representatives to intervene as a defendant in the case, inasmuch as the named defendants, pursuant to last year's determination by the Department of Justice, will not defend the constitutionality of Section 3.

The plaintiffs are Demos Revelis and Marcel Maas, Chicago residents. Revelis is a U.S. citizen. Maas is a native and citizen of the Netherlands. Maas entered the U.S. through the Visa Waiver Program in 1999. He and Revelis began dating and began living together in 2002, and were married in Iowa in 2010. They want to live together permanently in the U.S., so Revelis filed a visa petition, I-130 Petition for Alien Relative, on behalf of Maas. If the petition is approved by USCIS, Maas could apply for lawful permanent residency in the U.S., and eventually for citizenship. However, USCIS is bound by Section 3 of DOMA to reject the petition, under the Justice Department's current policy that DOMA will continue to be enforced by the executive branch until it is either repealed by Congress or finally declared unconstitutional by the courts. Understanding that USCIS will be bound to reject their application, Revelis and Maas brought suit seeking the court's order that USCIS evaluate their application as a lawfully married couple on the same basis of any different-sex married couple that would file an I-130 Petition.

Usually, a couple whose I-130 is denied would appeal through the administrative process within the federal bureaucracy, only getting to a point where their constitutional arguments could be considered once they appeal a final administrative determination to the federal courts. But Revelis and Maas, considering the futility of their I-130 petition under current policy, brought suit instead, represented by Chicago attorneys Erin Christine Cobb, Heather M. Benno, and Justin Russell Burton of the firm Kriezelman Burton & Associates.

While conceding the unconstitutionality of Section 3, the U.S. Attorney's Office nonetheless filed a motion to dismiss, arguing that plaintiffs lack standing because their I-130 hasn't yet been denied and thus they have not yet suffered any tangible harm and their case does not present a justiciable controversy for the court; on the same grounds, they also argue that the dispute is not yet ripe for judicial resolution. Rejecting these arguments, Judge Leinenweber cut through to the reality of the situation. "Given the current state of the law," he wrote, "it seems clear that DOMA precludes the granting of Revelis' spousal

It's hard to imagine a relationship more intimate than that between roommates who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

visa petition for Maas. While it is true that the petition could be denied for a variety of reasons having nothing to do with DOMA, that could happen to any couple. While perhaps inartfully pleaded, the injury that Plaintiffs allege is broader than the expected denial of the petition. They contend that because of DOMA, they will not be treated like any other couple. There is a thumb on the scale against them, and even if they are otherwise qualified, it is a practical certainty that Revelis' petition will be denied. This is a government-imposed barrier to obtaining a benefit available to other legally married couples, and it confers standing upon Plaintiffs." The court found that defendants' argument to the contrary "misapprehends the nature of the injury," which is not, at this stage, a denial of the petition, but rather the right to have the petition considered on equal grounds with similar petitions presented by different-sex binational married couples.

As to ripeness, the court similarly rejected the government's argument, finding that "the record is adequate to decide the issues presented here." Since plaintiffs are not requesting an order granting them the visa, but rather an order precluding USCIS from giving effect to Section 3 of DOMA in evaluating their petition, the court found that they had presented "a legal question that is fit for judicial review."

Plaintiffs had opposed BLAG's motion to intervene, but the court found that the motion was "as of right" under the circumstances, since otherwise there would be no party in the case to defend the constitutionality of Section 3. "Because of the magnitude of the interest at stake here," he wrote, "and because no other party in this litigation will represent the interests of BLAG, the Court finds that intervention as of right is appropriate." The court directed BLAG to file its answer to the complaint, or otherwise plead, within 30 days of the court's order. This case thus joins pending DOMA challenges in the First Circuit Court of Appeals and district courts in Connecticut, New York, and California, but may be the first to proceed past a motion to dismiss in the immigration context. ■

MA Appeals Court Affirms Parental Status of Married Lesbian Co-Parent

The Appeals Court of Massachusetts held that the state statute creating the presumption that the husband of a woman who gives birth to a child as a result of artificial insemination is the father of the child, even if he is not biologically related to the child, also applies to same-sex couples. *Della Corte v Ramirez*, 2012 WL 285026 (Feb. 2, 2012)). In the unsigned opinion, the court found that the non-biological mother of a child born to a married lesbian couple through artificial insemination is a legal parent, thereby affirming the modification judgment of the Suffolk Division of the Probate and Family Court Department maintaining an order of joint legal custody of the child.

In the opinion, the Appeals Court includes only a brief outline of the facts concerning the custody dispute between Gabriella Della Corte and Angelica Ramirez. The holding states that two months after the women married, Della Corte gave birth to the couple's child. Conceived prior to the marriage through artificial insemination using the sperm of an anonymous donor, the child is not biologically related to Ramirez and Ramirez did not adopt the child. However, the court found that Ramirez played "an integral part [in] the couple's decision to conceive" the child and was "involved in the insemination process." Upon the dissolution of the marriage, the Probate and Family Court entered a judgment for joint legal custody of the child and later denied Della Corte's motion to modify the custody judgment.

Appealing the denial of her request to modify custody, Della Corte asserted that since Ramirez is neither the biological nor adoptive mother of the child, she is not a legal parent and therefore should not have been granted custody. The Appeals Court rejected this argument, finding that as Ramirez was married to Della Corte when the child was born, neither a biological connection nor an adoption is required to make Ramirez a legal parent of the child. Under the Massachusetts statute, "any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband." While the statute refers only to the "husband" of a married woman, the court "do[es] not read 'husband' to exclude same-sex married couples, but determine[s] that same-sex married partners are similarly situated to heterosexual couples in these circumstances." Therefore, Ramirez's status as Della Corte's legal spouse conferred to her parental rights of any child born during the marriage.

Interestingly, Della Corte's primary argument that the statute does not apply here is not that it only applies to heterosexual couples by virtue of the word "husband," but that the statute only applies when the child is conceived during the marriage. The court found no support for this assertion in the statute. Rather, the statute plainly states that the child must be born during the marriage in order to create the presumption of paternity, or in this case maternity, of the wife's spouse. No mention is made in the statute as to when the child must be conceived. The court further supported its determination that Ramirez is a parent by noting that Della Corte referred to Ramirez as a parent in the separation agreement and admitted in the divorce complaint "that the child was born of the marriage." Also, both women are named on the child's birth certificate as parents and the court notes that "facts contained on a birth certificate 'shall be prima facie evidence of the facts recorded.'" *—KG*

Ramirez's status as Della Corte's legal spouse conferred to her parental rights of any child born during the marriage.

Same-Sex Marriage Struggle in NJ Both Advances and Retreats

The New Jersey Assembly and Senate voted during February to approve a Marriage Equality bill that would open up the right to marry for same-sex partners. It was the first time either house of the legislature had voted in favor of same-sex marriage, but both votes fell short of the number that would be sufficient to override a promised veto by Governor Chris Christie. In both houses a handful of Republicans joined with almost all the Democrats to support the bill. The final vote in the Assembly was 42-33, in the Senate 24-16. On February 17, the day after the Assembly vote, the Governor announced his veto. Responding to complaints that same-sex couples in New Jersey Civil Unions are not accorded rights equal to those enjoyed by married couples, Christie suggested establishing a new state ombudsman's office to deal with such complaints. As to the underlying policy issue, Christie continued to insist that the voters of New Jersey should have an opportunity to vote in a referendum as to whether same-sex couples should be allowed to marry.

Because the legislature that voted in February had just taken office in January and its life extends to January 2014, proponents of same-sex marriage in New Jersey expressed hope that sometime over the next two years they would be able to secure enough affirmative votes to override the governor's veto, but the effort appeared daunting.

On the other hand, the litigation route to marriage equality is alive and well. Less than a week after the governor's veto was announced, Mercer County Superior Court Judge Linda Feinberg granted Lambda Legal's motion to reconsider her earlier ruling dismissing a federal equal protection claim in *Garden State Equality v. Dow*, 2012 Westlaw 540608 (Feb. 21, 2012), and ruled that the claim will be reinstated as part of the case. In *Garden State Equality*, plaintiffs are arguing that the New Jersey Civil Union Act, enacted in response to the New Jersey Supreme Court's 2006 ruling in *Lewis v. Harris*, 188 N.J. 415, does not provide same-sex couples with true equal protection as compared to married different-sex couples, but instead creates an unequal and inferior status, in violation by the *Lewis v. Harris* ruling. Judge Feinberg's decision foreshadowed a likely ruling in favor of plaintiffs on the merits, but.... at the end of January, Judge Feinberg announced that she would be retiring in March, so she will not be presiding over the trial in this case. Her position as Assigning Judge in Mercer County will be taken by Judge Mary Jacobson. (As it relates to LGBT legal issues, it is noteworthy that Judge Jacobson has previously ruled in 2009 that a same-sex couple married in Canada can divorce in New Jersey, so she has previously encountered and ruled on issues of same-sex marriage recognition.) It is not certain, but at least likely, that Judge Jacobson will take over the trial of this case.

The state's arguments against the federal Equal Protection claim were essentially threefold: First, that the U.S. Supreme Court's 1972 dismissal of a federal same-sex marriage suit on the ground that it did not present a "substantial federal question" (*Baker v. Nelson*) mandated dismissal; Second, that even if an Equal Protection Claim could be pressed, it would easily be defeated by the state under rationality review; and Third, that there was insufficient "state action" to make this a federal Equal Protection issue.

As to the first argument, Judge Feinberg accepted the plaintiffs' response that Baker v. Nelson is no longer binding on the court, because it has been superseded by developments in the law since then. This is actually a rather obvious argument, as all the advances in LGBT legal rights that are relevant to this case post-dated *Baker v. Nelson*, most significantly the Supreme Court victories in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003). But Judge Feinberg noted other Supreme Court decisions as significant, including *Loving v. Virginia* (even though it predated *Baker* and in fact had provided the main precedent argued by the *Baker* plaintiffs in seeking a marriage license in Minnesota) and *Frontiero v. Richardson*, a 1973 case in which the Supreme Court applied heightened scrutiny under Equal Protection to a federal policy that discriminated against women. At the time of *Baker*, the Supreme Court had not yet applied heightened scrutiny to sex discrimination claims.

"Quite simply," wrote Judge Feinberg, "*Baker* has been undermined by subsequent Supreme Court precedent. . . The *Baker* case was brought at a time when 'the history of systemic and harsh discrimination against lesbians and gay men had barely been challenged," citing a 2009 law review article by Bennett Klein (of GLAD) and Daniel Redman (of NCLR). "While in *Baker* the Supreme Court dismissed the appeal for want of a substantial federal question, based on the evolution set forth herein, subsequent developments support the conclusion that the issues raised in *Baker* would no longer be considered unsubstantial. Accordingly, in today's legal arena, *Baker* is not controlling."

The judge then went on to consider the significance of the recent three-judge panel decision in the 9th Circuit in *Perry v. Brown*, affirming a trial court ruling that California Proposition 8 is unconstitutional. She quoted Judge Vaughn Walker's conclusion that Proposition 8 "fails to survive even rational basis review" under the Equal Protection Clause, and then notes Circuit Judge Stephen Reinhardt's conclusion, affirming Judge Walker's holding on the ground that Proposition 8 "singled out a certain class of citizens for disfavored treatment."

"Here, under the third count, plaintiffs assert that the Civil Union Act violates the Equal Protection Clause of the Fourteenth Amendment by denying them access to marriage and relegating them to a separate and arguably second class status, while not serving any legitimate state interest," wrote the judge. "The Civil Union Act, unlike Proposition 8, was intended to confer more benefits on same-sex couples, rather than take any away. However, the Civil Union Act is arguably similar because it singles out a certain class of citizens, namely gays and lesbians, for allegedly disfavored treatment. While the Civil Union Act does bestow certain benefits on same-sex couples, it also denies them the designation of marriage for their committed relationships and it allegedly does not bestow upon plaintiffs all of the same benefits enjoyed by their het-

erosexual counterparts." Consequently, she ruled, plaintiffs can proceed on both federal and state constitutional equal protection grounds in their lawsuit.

It seems clear that the panel decision in *Perry* helped to create a "tipping point" for the judge in backing away from her earlier ruling rejecting the federal Equal Protection claim.

Judge Feinberg refrained from specifying what standard of proof would be applicable upon trial of this claim, pointing out that the New Jersey Supreme Court in *Lewis* had already found that there was "no legitimate governmental purpose for denying same-sex couples the same benefits and responsibilities afforded to their heterosexual counterparts." Thus the purpose of this proceeding going forward is to make a trial record from which the court can determine whether the Civil Union Act, as charged by the plaintiffs, fails to provide the same benefits and responsibilities as married couples enjoy.

Judge Feinberg observed, "For the most part, the justification offered by the State to support the distinction between heterosexual and same-sex couples in the Civil Union Act is 'tradition.' Since marriage has historically been defined as the union between a man and a woman, the State argues this is a sufficient basis to distinguish between heterosexual and same-sex couples." But she points out that courts have rejected "tradition" as a justification for unequal government treatment.

Turning to the last part of the state's argument against the 14th Amendment claim, she found there was a sufficient basis in the record to find "state action," at least for purposes of determining whether the Equal Protection claim can be pursued. The guarantee of equal protection of the laws is ultimately a guarantee of equal treatment by the government and its agents, so a remaining issue in the case is whether whatever inequalities exist under the Civil Union Act are attributable in some way to the government and are not entirely the result of decisions by private actors, such as businesses and individuals who are not acting in a governmental capacity. Here the documentation gathered by the Civil Union Review Commission shows both private and public forms of unequal treatment, and the emphasis of the Plaintiffs going forward will need to document the public forms of inequality and to show how the private forms of inequality actually flow from a governmental action - the determination by the legislature to confer a separate and unequal status on same-sex partners.

But Plaintiffs will have to devise their trial strategy in the light of Judge Feinberg's pending retirement, since their proof will be submitted to and evaluated by a different judge. ■

Terminated Anti-Gay University Official Loses Constitutional Claims

The U.S. District Court for the Northern District of Ohio has denied summary judgment to a former Toledo University interim Associate Vice President for Human Resources and granted summary judgment to the two University Officials she had sued claiming they had terminated her employment in violation of her First Amendment right to free speech and her Fourteenth Amendment right to equal protection, in *Dixon v. University of Toledo*, 2012 WL 370577 (N.D. Ohio February 6, 2012).

Dixon, as interim Associate Vice President for Human Resources for all campuses of the University of Toledo, was in charge of firing and hiring decisions for the University and reported directly to Logie, the Vice President of Human Resources and Campus Safety, and to Jacobs, the University President. The University had an Equal Opportunity Policy which prohibited discrimination on the ground of sexual orientation, and the University had taken steps to "reach out to homosexuals and make them welcome."

On March 4, 2008, the Toledo Free Press ran an opinion which Dixon felt compared the modern movement towards LGBT rights to the historical struggles of the African-American civil rights movement. Dixon wrote a response, identifying herself as "an alumnus of the University of Toledo's Graduate School, an employee and business owner," signing her name, and including her University photo. Her response objected to the idea that homosexuals are "civil rights victims," and asserted that homosexuality is purely a choice. Since she intended to write as an unaffiliated citizen, she did not present the article to her University superiors for approval. Shortly after the article aired, Dixon was suspended. At a disciplinary hearing, Dixon did not claim her opinion had been misinterpreted and defended her speech. She was terminated shortly thereafter.

Dixon filed suit against the University, Logie, and Jacobs. Her claims for equal pay discrimination were dismissed and dropped. Dixon, Logie, and Jacobs cross-filed for summary judgment on the remaining claims: First Amendment Free Speech Retaliation and Fourteenth Amendment Equal Protection.

Judge David Katz, writing for the court, stated that "the primary issue presented by this case is the distinction between how a government entity relates to its employees and how it relates to citizens in general." Judge Katz noted that while Dixon "repeatedly emphasizes her religion," "she never alleged a claim of violation of either her Free Exercise rights or her Establishment rights. Thus, the Court will only consider her Free Speech and Equal Protection claims."

Judge Katz explained that to succeed in a First Amendment employment retaliation claim, a plaintiff must show "that the speech was constitutionally protected, that the retaliation at issue would deter an individual of 'ordinary firmness,' and that the speech motivated the employer's retaliation." Logie and Jacobs (Defendants) presented three theories justifying Dixon's termination: "that she spoke pursuant to her job duties, that she occupied a position demanding special loyalty, and that the University's interests outweighed her interest in saying what she said."

Finding that Dixon was "not attempting to fulfill any job duty in writing her article" but instead presented a "personal opinion," Judge Katz held it was clear Dixon did not speak pursuant to her job duties and that this theory by Defendants did not defeat her First Amendment claims.

Next Judge Katz considered the

The primary issue presented by this case is the distinction between how a government entity both relates to its employees and how it relates to citizens in general.

claims that Dixon spoke "on job-related issues in a manner contrary to the position of [her] employer." Finding Dixon in a position "to which a significant portion of the total discretionary authority available to [primary decision makers] has been delegated," Judge Katz stated that "the presumption of insubordination will only apply if her statement related her policy view on a matter related to her employment." Judge Katz held that "not only does [her] statement directly contradict the University's policies granting homosexuals civil rights protections… but as an appointing authority, [Dixon] was charged with ensuring that the University maintained those protections in employment actions," especially since she was characterized by Defendants as "an ambassador" for the University. Judge Katz pointed out that her statements "could disrupt the Human Resources Department by making homosexual employees uncomfortable or disgruntled," "could have interfered with the University's interest in diversity," and "could lead to challenges to her personnel decisions" which could lead to lawsuits "from homosexuals alleging sexual orientation or sexual harassment discrimination."

Judge Katz rejected Dixon's claims that her article stated she did not discriminate, especially since she defended the article and was provided an opportunity to claim that she had been misunderstood but did not. Judge Katz further rejected Dixon's academic freedom claim, stating that her speech "was not related to classroom instruction and was only loosely, if at all, related to academic scholarship." Finally, Judge Katz rejected Dixon's claim that her termination impedes diversity, stating that her claim "only restricts those who cannot hold their tongues about their beliefs" and further "would likewise restrict liberal atheists as well."

Concluding that the balance of Dixon's interest in making a comment of public concern is clearly outweighed by the University's interest as her employer, Judge Katz held that Dixon failed to establish that her speech was protected.

In assessing Dixon's Equal Protection claim, Judge Katz concluded that Dixon "has not presented any sufficiently similarly-situated comparisons" of employees who were similarly situated and not subject to adverse employment action. Dixon had focused on a published statement by a faculty member describing opponents of homosexual civil rights as "religious bigots." Judge Katz stated that while the statement may be sufficiently similar conduct, the faculty member, a vice provost, was a member of the faculty, "and thus subject to very different standards from those applicable to [Dixon] as an associate vice president" which included recruitment and employment.

Further, Judge Katz dealt with Defendants' defenses of qualified immunity and Logie's lack of involvement in Dixon's termination. Finding that Dixon had failed to demonstrate her constitutional rights were violated, the court "need not consider whether such rights were 'clearly established' at the time of her termination." Judge Katz noted that Dixon had presented no evidence that Logie had any input in Jacobs' decision to terminate, without ruling on the issue of whether Logie could be responsible for Dixon's termination. Finally, having concluded that there were no triable issues of fact, Judge Katz ordered that Logie and Jacobs' motion for summary judgment be granted and Dixon's be denied. *—Bryan Johnson*

European Court of Human Rights Upholds Prosecution of Swedish Anti-Gay Leafletters

Ruling on February 9, 2012, the Fifth Section of the European Court of Human Rights rejected the free speech claims of four Swedish men who had been convicted of violating a Swedish statute making it a crime to distribute a statement or communication that "threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, color, national or ethnic origin, religious beliefs or sexual orientation," on the ground of "agitation against a national or ethnic group." *Vejdeland & Others v. Sweden*, Application No. 1813/07. The case provided the Court with its first occasion to determine whether anti-gay speech is protected from criminal prosecution under the European Convention's protection for freedom of speech. The eight-member international panel rejected the challenge to the convictions, in an opinion that stressed the particular circumstances and did not adopt a more general approach to anti-gay hate speech.

The applicants were convicted of violating the Swedish law after they "went to an upper secondary school and distributed approximately a hundred leaflets by leaving them in or on pupils' lockers." The leaflets contained anti-gay statements, quoted below. The Applicants were ordered off the premises by the school principal. The leaflets, originated by a right-wing group called "National Youth," included the following statements that were the basis of criminal charges: "Homosexual Propaganda. In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances to embracing this deviant proclivity. Your anti-Swedish teachers know very well that homosexuality has a morally

The court considered significant that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.

destructive effect on the substance of society and will willingly try to put it forward as something normal and good. Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold. Tell them that homosexual lobby organisations are trying to play down paedophilia, and ask if this sexual deviation should be legalized." (The original flyers were in Swedish, of course.)

A trial court convicted the men, imposing variously brief prison sentences, fines, probation and community service. An intermediate appellate court reversed the convictions, finding that the men's conduct was protected against prosecution under Article 10 of the European Convention, which states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the reputation or rights of others." The Supreme Court of Sweden reversed the intermediate appellate court, reinstating the convictions but reducing the sentences of three of the men to suspended sentences with fines, and the fourth to probation. Then the appeal was taken to the European Court.

The court rejected the Applicants' contention that the law was unduly vague to comply with Article 10's requirement that conduct be "prescribed by law," and proceeded to the merits of the case. The court found that the Swedish statute served a "legitimate aim," namely "the protection of the reputation and rights of others" as mentioned in Article 10. As to whether this interference with speech was necessary, the court found that "although these statements did not recommend individual to commit hateful acts, they are serious and prejudicial allegations. Moreover, the court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the court stresses that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or color.'" The court also considered significant that "the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access." They noted the Swedish Supreme Court's finding that the statements in the leaflets were "unnecessarily offensive" to achieve the Applicants' asserted goal of stimulating a debate about "the lack of objectivity in the education dispensed in Swedish schools. (The Applicants disavowed any intent to provoke hatred against gay people.)

The court also stressed that the punishments ultimately imposed by the Supreme Court decision were "not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient," thus meeting the Convention test of being "necessary in a democratic society for the protection of the reputation and rights of others."

Although the court's ruling was unanimous on the merits, several judges filed concurring decisions. Some expressed reluctance about constricting freedom of speech, but premised their vote on the fact that the leaflets were distributed at a secondary school to impressionable youth. Another contrasted the much higher tolerance for anti-gay speech by the U.S. Supreme Court in its ruling last year in *Snyder v. Phelps*, which extended 1st Amendment protection against tort damages for emotional distress in the context of offensively anti-gay picketing at a military funeral. Finally, two judges concurred in a statement of "regret that the court missed an opportunity to 'consolidate an approach to hate speech' against homosexuals, as commented by the third-party intervener. Further, it was recognized that 'although the Court has not yet dealt with this aspect, homophobic speech also falls into what can be considered as a category of "hate speech", which is not protected by Article 10. The writer of this concurrence, after quoting phrases from the leaflets, asserted that "such accusations clearly match" the definition of hate speech contained in Recommendation No. R(97) 20 of the Committee of Ministers of the Council of Europe. ■

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UNITED STATES SUPREME COURT – The Supreme Court denied a petition for certiorari filed by the National Organization for Marriage, which was seeking to escape the requirements under Maine law that organizations spending money seeking to influence legislation in Maine register as political action committees and report on their fund-raising and expenditures. NOM sought to appeal the 1st Circuit's ruling last year in *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, 2012 WL 603080 (Feb. 27, 2012), in which the court rejected a constitutional challenge to the state law. The circuit court disagreed with the district court's conclusion that one phrase used in the law was unconstitutionally vague, and affirmed the district court's ruling that the law as a whole did not impose an unconstitutional chill on political speech. NOM, which is dedicated to battling against same-sex marriage in legislatures and ballot initiative struggles, wants to be able to channel large sums of money into anti-same-sex marriage lobbying activities and advertisements without having to disclose the source of its money. In addition to last year's circuit court ruling, we reported last month a subsequent 1st Circuit ruling involving the same parties, 2012 Westlaw 265843 (Jan. 31, 2012), upholding the same registration and disclosure requirements in ballot campaigns. This, together with the Supreme Court's certiorari denial from the earlier ruling, is particularly timely, as Maine officials have now certified that sufficient signatures were submitted to place on the ballot this November an affirmative same-sex marriage initiative, which seeks to reverse the effect of the prior initiative that had repealed a same-sex marriage law approved by the prior legislature and governor. Under these 1st Circuit rulings, NOM's attempt to oppose the new initiative will be subject to the state's registration and disclosure laws.

FIRST CIRCUIT COURT OF APPEALS – The U.S. Court of Appeals for the 1st Circuit has announced that oral argument will be held in *Gill v Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010) and *Commonwealth of Massachusetts v U.S. Department of Health and Human Services*, 698 F.Supp.2d. 234 (D.Mass., July 8, 2010) on April 4, 2012, in Boston. In *Gill* and *Commonwealth*, the U.S. District Court for Massachusetts held that Section 3 of the Defense of Marriage Act of 1996, under which lawfully-contracted same-sex marriages will not be recognized for any purpose by the federal government, is unconstitutional. *Gill* is a test case brought by Gay & Lesbian Advocates & Defenders on behalf of individual denied federal rights or benefits due to the government's refusal to recognize their same-sex marriages contracted in Massachusetts, and *Commonwealth* is a case brought by Massachusetts Attorney General Martha Coakley, asserting that the measure unconstitutionally interferes with the state's ability to accord full marital rights to same-sex partners as required by the state constitution. As of now, this is the court challenge to Section 3 of DOMA that has advanced the furthest, and is most likely to bring the issue to the Supreme Court, unless the 9th Circuit decides to expedite the government's expected appeal of the *Golinski* ruling (see above).

NINTH CIRCUIT COURT OF APPEALS – The 9th Circuit upheld the Board of Immigration Appeals' determination that a man from Ethiopia who had been convicted of lewd acts of a homosexual nature with a child was not entitled to protection under the Convention Against Torture as a basis of blocking his deportation. *Agonafer v. Holder*, 2012 WL 363112 (Feb. 6, 2012)(not selected for publication in F.3d). The brief memorandum opinion states that "the evidence does not compel the conclusion that [petitioner] will more likely than not be tortured in Ethiopia. Although there is a potential for imprisonment as a result of homosexual activity, there is no evidence in the record of any violence directed against homosexuals in Ethiopia, either inside or outside of the prison system." The court noted that the petitioner's evidence was directed toward treatment of political prisoners, "but none of the evidence established the required connection between prisoner mistreatment and homosexuals." The court also upheld denial of withholding of removal, finding that "the BIA expressly state that it considered all of the evidence in concluding that the equities did not alter the nature and seriousness of [petitioner's] conviction for lewd acts involving a minor. . . Further, the BIA appropriately looked to the gravity of the underlying act," so its decision was not an abuse of discretion. As usual with short memoranda issued in refugee appeals, the court did not got into any further detail about the nature of the petitioner's criminal offenses.

CALIFORNIA – The Southern Poverty Law Center and the law firm WilmerHale filed suit on February 1 in the U.S. District Court for the Central District of California on behalf of Tracey Cooper-Harris, an Army veteran, and her wife, Maggie Cooper-Harris, challenging the failure of the government to recognize their marriage in the context of benefits generally available to military veterans and their spouses. *Cooper-Harris v. United States*, CV12-887-CBM. The case has been assigned to District Judge Consuelo B. Marshall, and Magistrate Judge Andrew J. Wistrich has been assigned to supervise discovery. Cooper-Harris, who was honorably discharged in 2003, served for twelve years, including tours of duty in Iraq and Afghanistan, receiving more than two dozen medals and commendations. She was diagnosed in 2010 with multiple sclerosis. The Department of Veterans Affairs denied her request for benefits for her partner that are routinely available to spouses of veterans, citing Title 38 of the U.S. Code, which incorporates the Defense of Marriage Act's anti-gay definitions of "marriage" and "spouse." In a letter to Congress issued on February 17, Attorney General Eric Holder indicated that DOJ will not provide a substantive defense for the challenged statutes in this case, having concluded that they violate the 5th Amendment's equal protection requirement, once again leaving it up to Congress to decide whether to direct counsel retained by the House Republican leadership (through the transparent device of a so-called "Biparti-

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san Legal Advisory Group") to intervene in the case. This is the second lawsuit that has been filed on behalf of military veterans and/or active service personnel seeking equality in benefits administered by the Department of Veterans Affairs and the Defense Department. *Press Releases from Southern Poverty Law Center.*

IOWA – The current Republican administration in Iowa seems resolved to fight against the logical implications of legal same-sex marriage as much as possible. The state is appealing the ruling in *Gartner v. Iowa Dept. of Public Health*, Case No. CE 67807 (Jan. 4, 2012), in which the trial court ruled that the spousal presumption of legitimacy applies equally to children born to married same-sex couples, such that both parents should be listed on the birth certificate without need for the non-biological parent to go through an adoption proceeding. On top of that, state officials have provoked a new lawsuit by denying an accurate death certificate to a married same-sex couple for their stillborn baby. After the loss of their son, who died in utero, Jenny and Jessica Buntemeyer submitted paperwork to the Iowa Department of Public Health seeking a death certificate, indicating that they were married, but the Department returned the certificate with Jenny's name erased. The certificate was issued a week after the Department received the trial court's ruling in *Gartner*! Lambda Legal represents Jenny and Jessica, as it represents the *Gartner* plaintiffs, in a new case, *Buntemeyer v. Iowa Department of Public Health*, seeking a court order to compel the issuance of an accurate death certificate.

NEW YORK – The New York Court of Appeals was scheduled to hear oral argument February 8 on the question whether public employers in the state violate the state's ban on employment discrimination based on marital status or sexual orientation by providing domestic partner health benefits for unmarried same-sex domestic partners of employees but not for unmarried different-sex domestic partners. The Westchester County Human Rights Commission was appealing last year's decision by the Appellate Division, 2nd Department, in *Putnam/Northern Westchester Board of Cooperative Educational Services v. Westchester County Human Rights Commission*, 917 N.Y.S.2d 635 (N.Y.App. Div., 2nd Dept., Feb. 8, 2011), in which the court had annulled the Commission's determination that the school district violated the Human Rights Law by rejecting an application by an unmarried teacher for benefits for her different-sex partner. The appellate court had found that same-sex and different-sex couples were not similarly situated with regard to the right to marry in New York, thus the school board had a legitimate basis for extending benefits only to same-sex couples. Just a few months after the decision was issued, New York passed the Marriage Equality Act, rendering same-sex couples similarly situated to different-sex couples, at least with regard to the right to marry under state law and to enjoy the state-law benefits of marriage. At present, married same-sex couples in New York do not enjoy any federal recognition of their marriages, which thus remain unequal to marriages of different-sex partners. What to do about existing same-sex only benefits plans after same-sex couples could marry immediately became a question for employers – and whether keeping the plans only for same-sex couples violated the Human Rights Law became a particularly pressing question for public employers. (Private employers are not subject to the N.Y. Human Rights Law's sexual orientation and marital status discrimination provisions due to federal ERISA preemption.) However, the question will not be answered in this case, because the parties agreed to withdraw the appeal on February 7. Lawyers declined to tell the *New York Law Journal*, which reported this on February 8, how the parties had resolved the issue.

NEW YORK – In *Casale v Kelly*, 710 F.Supp.2d 347 (S.D.N.Y. 2010), District Judge Shira Scheindlin held New York City in contempt of court because of the New York City Police Department's continued enforcement of New York State loitering statutes that had been held unconstitutional by the New York Court of Appeals decades earlier. This case, and a related case, *Brown v. Kelley*, had been brought as class actions, and on February 6, 2012, Judge Scheindlin gave preliminary approval to a class action settlement under which the City will pay $15 million into a fund to compensate approximately 20,000 individuals who were charged in New York City under the three unconstitutional statutes at issue in the case. (A contributing factor to the continued prosecutions was that the legislature took no action to clean up the constitutional flaws in the Penal Code for many years, and even after the legislature acted, police officers continued to use "cheat sheets" – simplified lists of penal code provisions – that failed to incorporate changes in the law. Attempts by the NYPD to get its officers up-to-date proved futile for a long time, to the extent that even after Judge Scheindlin had first ruled against the City in these cases, police officers continued to arrest and book people under these long discredited laws, thus incurring contempt fines under her ruling.) The laws in question were Penal Code 240.35(1) (loitering for the purpose of begging), Penal Code 240.35(3) (loitering in a public place for the purpose of engaging in "sexual behavior of a deviate nature"), and Penal Code 240.35(7) (loitering in a transportation facility and "unable to give a satisfactory explanation of his presence"). The common constitutional flaw of these statutes is that they make it a crime to "hang out" with no requirement of criminal intent, and they empower the police to stifle constitutionally protected speech and conduct. Anybody who was arrested under these statutes and seeks compensation must file a claim by September 4, 2012. Details for claim filing can be found at the web site http://nycloitering.com, or call 1-800-846-0798. Attorneys who represented people charged with these offenses may want to go back through their records and notify clients about the opportunity to seek compensation.

OHIO – Columbus residents Jonathan Baize and Stephen Wissman went to New York City to get married on September 1, but back home in Columbus things just

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didn't work out and they decided to seek an amicable divorce in the Franklin County Domestic Relations Court. The clerk of the court accepted their filing, reported the *Columbus Dispatch* on February 12, but as of then the case had not been assigned to a judge. Both men executed affidavits stating their awareness that Ohio does not recognize same-sex marriages performed in other states, asserting that they were not asking for recognition of the marriage, but that it was essential for them to get a judicial determination that they were not married so they could go on with their lives. Each of them asserted that denying them a divorce in these circumstances would leave them in an "untenable legal situation" as they would be considered married in several states, which could affect their retirement benefits, ability to buy and sell property, adoption rights, and opportunity to remarry. ■

MASSACHUSETTS – Is it a hate crime? Three lesbians were arraigned on hate crime charges in Suffolk County District Court for assaulting a gay man at a public transit station in Forest Hills. According to the Boston Herald (Feb. 25), the defendants "viciously beat the man, repeatedly punching and kicking him after he bumped them with his backpack on a stairwell." The victim, who suffered a broken nose, told police that the attack was "motivated as a crime because of his sexual orientation" since the women "called him insulting homophobic slurs." Counsel for one of the defendants said, "They don't know what his sexual orientation is, just like he doesn't know what theirs is." A spokesperson for the District Attorney said, "The defendants' particular orientation or alleged orientations have no bearing on our ability to prosecute for allegedly targeting a person who they believe to be different from them."

NEW JERSEY – During February, the Middlesex County Superior Court began the trial of *State v. Ravi*, concerning charges of invasion of privacy and anti-gay bias that could produce a prison sentence of up to ten years and possible deportation for the former Rutgers University freshman, Dharun Ravi, accused of using a webcam on his dormitory room computer to spy on his gay roommate's assignation with another man, and then tweeting about seeing him "making out with a dude" and inviting others to join him in spying the next day. The roommate, Tyler Clementi, subsequently complained about his roommate's conduct, seeking a change in housing assignment, but before anything was done committed suicide by jumping off the George Washington Bridge, making a local controversy internationally notorious. (Because Ravi was born in India and could be deported if convicted of a felony, the case has occasioned comment from the *Times of India*, speculating that Ravi's ethnicity had something to do with his prosecution. As the trial commenced, the First Assistant Prosecutor for Middlesex County, Julia McClure, told the jury in her opening statement, "It was not an accident, not a mistake. Those acts were meant to cross one of the most sacred boundaries of human privacy – engaging in private sexual human activity." She asserted that Ravi's actions "were planned to expose Tyler Clementi's sexual orientation, and they were planned to expose Tyler Clementi's private sexual activity." Ravi's counsel, Steven D. Altman, argued that his client was not anti-gay and had not engaged in any intimidation. "We do stupid things, we make mistakes, especially when we're young," he told the jury. "It doesn't mean we're hateful, we're bigoted, or we're criminal. In fact, Dharun never intimidated anyone… He's not homophobic. He's not antigay." Ravi's intent will be a central issue in the case. The identity of the man who was with Clementi when the spying took place has been withheld from the public, but provided to the defense under a requirement of confidentiality, and the parties and Superior Court Judge Glenn Berman are working out a mechanism for the man to testify without his privacy being compromised. *New York Times*, Feb. 25.

NEW YORK – Would it violate the rights of a man charged with strangling his purportedly gay roommate to death to introduce into evidence his statement to police that he had previously strangled another purportedly gay man to death? No, if the purpose of introducting the testimony was to rebut the defendant's contention that his mental state was impaired at the time he committed the charged offense, ruled the New York Court of Appeals in *People v. Cass*, 2012 WL 488094 (Feb. 16, 2012). Mickey Cass strangled Victor Dombrova to death on September 25, 2003, during an argument in Dombrova's Brooklyn apartment, after Dombrova asked Cass to leave. Cass claims that he "just lost it" and "snapped" after Dombrova grabbed his genitals and made other sexual advances during their argument. He fled the jurisdiction. Police investigating the murder found a copy of Cass's resume in Dombrova's apartment, and discovered he was wanted for a similar murder committed in Buffalo, N.Y., in 2002. They located Cass's former girlfriend and were able to track him down to Florida after he phoned her. When police interrogated Cass, he admitted to committing both crimes, stating that he had strangled the Buffalo man, Kevin Brosinski, having "completely lost control" when he awakened in Brosinski's apartment to find Brosinski on top of him, kissing and grabbing him. Prior to the jury trial in the Dombrova murder, Cass announced he would raise an affirmative defense of extreme emotional disturbance, hoping this would mitigate his crime from second-degree murder to first-degree manslaughter with a reduced sentence. The state moved to admit his statement about the Brosinski murder to rebut the extreme emotional disturbance claim, seeking to prove a premeditated intent to target gay men. The trial judge admitted the evidence, but the jury convicted on the second-degree murder charge. On appeal, Cass argued that the evidence was prejudicial and improperly admitted. "By asserting the defense of extreme emotional disturbance, defendant necessary put his state of mind at the time of the Dombrova killing at issue," wrote Judge Theodore T. Jones for the unanimous court. "We have held that where a defendant puts an affirmative fact – such as a claim regarding his/her state of mind – in issue, evidence of other uncharged crimes or prior

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bad acts may be admitted to rebut such fact." The court concluded that the evidence "is directly relevant to defendant's extreme emotional disturbance defense in that it has a logical and natural tendency to disprove his specific claim that he was acting under an extreme emotional disturbance at the time of the Dombrova homicide. The evidence arguably shows that defendant had a premeditated intent to target gay men for violence, thereby tending to rebut the loss of control he claimed as part of his extreme emotional disturbance defense. Thus, the evidence tends to estabablish that the subjective element of the defense has not been made out." The court also rejected a claim that Cass received ineffective assistance of counsel when his attorney did not object to the prosecution's statement in summation that Cass was "predatory," finding this was consistent with the prosecution's theory of the case and the evidence presented.

TEXAS – Upholding a sentence of life imprisonment without parole in the murder of a gay man, the Court of Appeals of Texas rejected a claim by the defendant that his theft of the victim's car was "an afterthought" and not the motivation for the murder. *Alcala v. State*, 2012 WL 586733 (Tex.App.-Eastland, Feb. 23, 2012) (not published in SW3d). Roberto Alcala became drunk at a social event and asked his aunt for a ride home because the person who brought him had previously left. She had no room for him in her car, but arranged for him to ride with Jessie Villarreal. When police responded to a report of a shooting at a 7-11, they found Villarreal lying on the ground in a large pool of blood outside the front door of the store, having been shot twice, with a trail of blood leading out to the parking lot. The clerk of the store said he saw a small, red car pull up and then heard a popping noise and a loud noise against the front door. When he got to the door, he saw a young man up against the door bleeding, so he called 911, unlocked the door and attempted to help the young man. The store's security camera showed the car pulling up, Villarreal (the driver) getting out, the passenger following him out through the driver's side door and grabbing something from him, and then showed the passenger firing shots towards the driver and the store, then driving away in the car. Through a chain of subsequent events the police apprehended Alcala, who told them he passed out in the car and then awoke to find that his zipper was down, his penis was pulled out and Villarreal was performing oral sex on him. Villarreal said that then he "lost it" and told Villarreal to get out of the car. Villarreal pulled into the 7-11 parking lot, and Alcala shot him as he was getting out of the car, then shot him again as he was heading to the store. Alcala testified that he did not intend to steal the car, but was just trying to get home. Villarreal's sister testified that he was gay. Toxicity tests showed that Villarreal was drunk at the time of his death, and testimony of several eyewitnesses attested to Alcala's drunken state that night. The jury convicted Alcala of capital murder, and the trial judge exercised discretion under Tex. Penal Code sec. 12.31 to impose punishment of life imprisonment without parole. Alcala argued that since he had not killed Villarreal in order to steal the car, his crime was simple murder, not capitol murder, and thus the sentence was excessive. "While appellant may not have had the intent to rob Villarreal when he got in Villarreal's car," wrote Chief Justice Jim Wright, "we hold that a rational jury could have found that appellant formed the requisite intent to take Villarreal's car before or during the commission of the murder and that taking the car was not an afterthought," so the appeal was overruled. ■

COLORADO – The Senate Judiciary Committee voted 5-2 in support of a bill that would establish civil unions for same-sex couples in Colorado on February 15. The vote was expected with Democrats controlling the Senate, but the bill faces an uncertain fate in the Republican-controlled House, even though several Republicans testified in favor of passage at the Senate committee's hearing, and one Republican on the committee supported it. *Denver Post.com*, Feb. 26.

FLORIDA – County legislators in Orange County have reached tentative agreement to enact a county ordinance that would expand the effect of Orlando's domestic-partner registry to be county-wide. In addition to providing a mechanism for registration of unmarried same-sex and different-sex couples as domestic partners, the Orlando measure provides certain visitation and end-of-life rights for such couples at hospitals, jails, and funeral homes. *Orlando Sentinel*, Feb. 22.

NEW JERSEY – The State Senate voted 24-16 on February 13 to approve S.1, a bill that would open up marriage to same-sex couples. Twenty-two Democrats and 2 Republicans voted for the bill; 14 Republicans and 2 Democrats opposed it.

PENNSYLVANIA – Cheltenham Township in Montgomery County became the 27th Pennsylvania municipality to adopt legislation banning discrimination in housing, employment and public accommodations on the ground of sexual orientation or gender identity or expression on Feb. 15, according to an email bulletin from Equality Pennsylvania.

TENNESSEE - Legislative consideration of the so-called "Don't say gay" bill continues, as Governor Bill Haslam, a Republican, told reporters that he had "concerns" about the legislation and did not think it should be a priority of the Legislature. The bill as passed last year by the state Senate would in effect ban any teaching about homosexuality in grades K through 8. An amended version of the bill being considered in the House Education Committee would make clear that local school policies should not prohibit "any instructor from answering in good faith any question or series of questions, germane and material to the course, asked of the instructor and initiated by the student." The alleged purpose of the bill is to make sure that any teaching about human sexuality in the public schools is "age appropriate," and to designate as inappropriate any material "inconsistent with natural human reproduction" in grades K-8. This means, of course, that the legis-

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lature would deem inappropriate, presumably, any discussion with students in those grades of donor insemination, surrogacy, or contraception. *Chattanooga Times Free Press*, Feb. 22. This seems reasonable to us. No reason to bother 13 and 14 year old students with information about contraception, after all, since everybody knows they're not interested in having sex.

TEXAS – Activists in Houston are attempting to obtain 20,000 valid signatures on petitions to place a referendum on the city's election ballot in November that would enact a ban on sexual orientation and gender identity discrimination and authorize the city to grant health insurance benefits to unmarried domestic partners of city employees. Both questions have been on the ballot before, and both have been voted down by Houston residents. Anti-discrimination initiatives were rejected by voters in 1985. In 2001, the voters approved a measure banning partner benefits. With Houston having elected and re-elected a lesbian mayor, activists hope the public is finally ready to endorse gay rights in the city. *Houston Chronicle*, Feb. 12.

VIRGINIA – The changeover from Democratic to Republican control of the Virginia Senate led to a reversal of last year's committee vote in favor of adding sexual orientation to the state's anti-discrimination law. By a party-line vote of 8-7, the Senate General Laws and Technology Committee rejected S.B. 263 on February 1. According to a report on *HamptonRoads .com*, opponents argued "that the bill is unneeded because there is no evidence that gays and lesbians face discrimination now." Odd, given the next news item….

VIRGINIA – The legislature gave final approval on Feb. 21 to a bill on adoption that would give private agencies that right to limit their services consistent with their moral and religious beliefs. Modeled on a law enacted in North Dakota, the intent of the legislature is to give the green light to adoption services that don't want to deal with gay prospective adoptive parents. Governor Bob McDonnell had stated his support for the measure and was expected to sign it promptly. According to press reports, Virginia and North Dakota are so far the only states that have adopted such legislation. The Virginia measure codifies regulations that were adopted in December by the Virginia Board of Social Services, with the intent that a subsequent administration would not be able to change them without getting the approval of the legislature. *Bismarck Tribune*, Feb. 22. ■

FEDERAL IMMIGRATION - At a meeting with LGBT advocates at the Justice Department on January 30, government officials rejected a proposal to put a "blanket hold" on deciding green card petitions from married binational same-sex couples. The advocates argued that with Section 3 of DOMA on the ropes in the courts, it would make sense to defer deciding these cases (which at present would usually be decided against the petitioner based on the lack of a federally-recognized spousal relationship). Although the Obama Administration has taken administrative steps that should assist binational couples in avoiding deportation, the administration continues to take the position that until Section 3 is either repealed or definitively declared unconstitutional, it is bound to decide pending green card petitions consistently with existing federal law. A Department of Homeland Security spokesperson, responding to media inquiries, said, "Pursuant to the Attorney General's guidance, the Defense of Marriage Act remains in effect and the Executive Branch, including DHS, will continue to enforce it unless and until Congress repeals it or there is a final judicial determination that it is unconstitutional." DHS refused to comment further about the possible exercise of administrative discretion in the matter. *Advocate.com*, Feb. 24.

DEMOCRATIC PARTY – The organization "Freedom to Marry" has drafted a proposed plank for the Democratic Party's 2012 national election platform that would put the party on record supporting marriage equality, specifically calling for passage of the Respect for Marriage Act and repeal of the Defense of Marriage Act. Their main effort now is to gain endorsements for the proposed plank from the party's leading lights in Congress and state governments. The campaign was launched on February 13. By the beginning of March, they had already enlisted 19 Democratic Senators, numerous members of the House of Representatives, including Minority Leader (and former Speaker) Nancy Pelosi, and was beginning to attract support from elected state officials, such as California Attorney General Kamala Harris. Of course, since President Obama is still "evolving" on the issue of marriage, a big question is whether he will have "evolved" sufficiently by the date of the Convention to be willing to accept same-sex marriage as a campaign plank on which to run for re-election. Toward that end, enlisting official co-chairs of the President's re-election campaign has been a priority, and so far Pelosi, Harris, and Representatives Jan Schakowsky (D-IL) and Charles Gonzalez (D-TX) have signed on. * * * In addition, and reaching across party lines, Human Rights Campaign and Freedom to Marry have fostered a broad-based coalition of organizations in support of these two legislative goals, and have made a special effort to enlist municipal government leaders.

ARIZONA – On February 17, the *Phoenix New Times* reported claims by Jose Orozco that he had been threatened with deportation by his former boyfriend, Pinal County Sheriff Paul Babeu, if Orozco made public the facts of their relationship as Babeu campaigned for a Republican nomination for Congress. Actually, the Feb. 17 report did not reveal Orozco's surname, but he subsequently went public as the case gained notoriety when Babeu held a press conference denying that he had made the threat, but confirming that he is gay. Babeu claimed that Orozco had taken steps to undermine his campaign, including instances of identity theft, and called for an investigation by the State Attorney General's office. Babeu quickly gained support from former Rep. Jim Kolbe, who had previously held the same House seat, and who had come out as gay in response to information that he was about to be "outed" in a gay publication. Babeu is a

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politically conservative military veteran who campaigned for office as a strong opponent of illegal immigration, but ironically his former boyfriend was at one time an illegal migrant from Mexico, inspiring some cries of hypocrisy as the matter became public. Some pundits immediately wrote Babeu off as a serious Congressional candidate in the socially conservative district, but Babeu insisted that he was staying in the race, although he had resigned as the Arizona co-chairman of the Romney presidential campaign, in order to avoid entangling his preferred presidential nominee in his own problems. *Los Angeles Times*, Feb. 26. In a subsequent interview with the *Washington Blade*, Babeu stated that he had received supportive contacts from the Log Cabin Republicans and that, if he was elected to Congress he would be supportive of the Employment Non-Discrimination Act and other gay rights legislation and would work to persuade House Republicans to support such measures. He also stated that he approved the repeal of the "Don't Ask, Don't Tell" military policy, which had forced him to stay in the closet during his military service. He said that he had commanded many gay soldiers who gave excellent service despite the official anti-gay policy. Babeu is now the only openly gay member of the Pinal County Sheriff's office, but all his presumably non-gay colleagues rallied around him. The *Los Angeles Times* quoted one adoring woman who was attending a Maricopa County Republican luncheon: "I don't care if he's gay," she said. "I love him because he's honest, he's sincere, he's drop-dead gorgeous. I mean, come on, darn it anyway." Will the handsome gay sheriff capture the hearts of enough female Arizona Republican activists to win a House seat? Stay tuned.

CALIFORNIA – California's Administrative Office of the Courts sent a memo to the state's judges requiring them to report their gender identification and sexual orientation, as part of an effort to ensure diversity on the bench. According to a report in *The Weekly Standard*, Romunda Price of the AOC wrote in the memo: "Providing complete and accurate aggregate demographic data is crucial to garnering continuing legislative support for securing critically needed judgeships." Thus, we conclude, the AOC thinks that by documenting an underrepresentation of LGBT people in the judiciary, it will be able to persuade the insolvent state government to create new judgeships to which LGBT lawyers can be appointed. Can we be permitted some skepticism toward this reasoning?

MAINE – Secretary of State Charles Summers announced on Feb. 23 that same-sex marriage advocates had submitted sufficient valid signatures to qualify their ballot measure that would extend the right to marry to same-sex couples if it is approved by voters in November.

MINNESOTA – The controversy in the Anoka-Hennepin School District about the district's response – or lack of response – to several teen suicides, some of which were attributed to anti-gay bullying in the public schools – continued during February, as School Superintendent Dennis Carlson issued a statement on the District's website acknowledging that "there can be no doubt that in many situations bullying is one of the contributing factors," contradicting a prior statement denying that any of the suicides were tied to bullying. This is the state's largest school district, and is notoriously situated in the Congressional district of Michelle Bachmann, ultra-conservative Republican representative who is outspokenly anti-gay and who attracted particularly comment during her aborted Presidential campaign about her failure to address this issue. The district had adopted a "Sexual Orientation Curriculum Policy" which had precluded school employees from providing any supportive counseling to LGBT students for fear of running afoul of District policy, which was to ignore the issue for fear of alienating conservative parents. Now there is a "Respectful Learning Environment Curriculum Policy," which allows discussion of homosexuality under a somewhat vague banner of neutrality. (Based on *Star-Tribune* press reports during February 2012).

TENNESSEE - Are school administrators totally clueless, or terminally frightened of controversy? *The Tennessean* (Nashville) reported on February 25 that the Wilson County school district is resisting a request by an openly gay Wilson Central High School senior, Chris Bauman, to form a GLBT student support group at the school. Bauman argues that recent suicides by two Tennessee teenagers who were being bullied for being gay, as well as a continuing debate in the legislature about a bill that would forbid teachers from saying anything to students about sexuality, showed the need for such a club, but the school's principal has failed to act on his request, and a school board member told the newspaper, "If I had to vote, just from my own Christian values – nothing against those folks – it would be hard for me as a board member to support it." Since when were public school board members elected to vote make policy based on their religious views? The newspaper reported that the principal referred the question to the district's Director, one Mike Davis, who said he "doesn't see how the proposed club would add value to the school," and that he "doesn't want exclusive clubs." As an example, he said, "the Fellowship of Christian Athletes, for instance, is open to non-athletes." (We're not making this up, dear readers. We wonder whether the Fellowship of Christian Athletes welcomes atheists to their meetings – even athletic atheists?) We suspect that Chris Bauman would welcome any non-disruptive student who wants to attend a meeting of the LGBT student support group, even if the student is a Christian athlete (and therefore, in the limited mind of District Director Davis, presumptively non-gay)! Davis referred the issue to the district's legal counsel. If their lawyer is capable of doing legal research, he or she will discover that almost every school district that has been sued for refusing a request by LGBT students to form such a club has been disgraced in federal court (sometimes at the hands of district judges appointed by conservative Republican presidents) and have been stuck with significant legal fees, as well as being required to pay damages and legal fees to the student plaintiffs for violating their federal statutory rights under the Equal Access Act. This is some-

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thing that can be easily ascertained by simple on-line research that should be within the capabilities of anybody entrusted with responsibility for directing the operations of a public school district, even without the assistance of a lawyer.

UNIVERSITY OF PENNSYLVANIA – The University announced at the end of February that employee health plans would henceforth include an option that would cover sexual reassignment surgery for transgender employees, according to a report published March 1 by *InsideHigherEd.com*. Such coverage was characterized as "rare for higher education employers."

TEXAS A&M UNIVERSITY – For the first time, on January 20, 2012, Texas A&M's president, R. Bowen Loftin, added sexual orientation, gender identity and gender expression to the list of prohibited grounds of discrimination in the yearly non-discriminatory employment memorandum issued by the University. Although the University's Regents had not acted on a 2011 proposal to adopt such a policy, the President made it, in effect, an executive order, according to *The Battalion* (Feb. 17).

CORPORATE POLICIES - KPMG LLP, an international accounting and consulting firm, announced on Feb. 12 that it would join the growing trend of major employers offering to compensate LGBT employees for the extra tax burden associated with their domestic partnership benefits due to the lack of federal recognition of same-sex partners for tax purposes. KPMG LLP Chairman and CEO John B. Veihmeyer issued a statement explaining the move: "We are committed to a culture of inclusiveness and value the contributions of all of our people. Diversity is a business imperative. For our firm to continue to be a great place to work and build a career, we must be able to attract and retain the best people with the skills and determination to deliver above and beyond regardless of their sexual orientation." The benefit takes effect immediately and will cover the 2012 tax year. Employees in the U.S. who pay for medical and dental benefits for same-sex domestic partners who do not meet the IRS definition of "dependent" will be credited at the end of the year with additional tax withholding funded by KPMG. *Accounting Today*, Feb. 13. * * * DynCorp International LLC, a major Defense Department contractor, has amended its internal code of ethics to ban discrimination based on sexual orientation or gender identity. The *Washington Blade* reported on Feb. 2 that the company came under pressure to change its policy after news reports about an internal complaint by a non-gay employee who claimed about being subjected to homophobic harassment by co-workers; when the worker obtained no relief from management, he filed a complaint with the EEOC, resulting in an ultimate settlement for the employee of $155,000. Then Freedom to Work, an LGBT advocacy group, launched an on-line petition urging the company to amend its policy. By the time the policy change was announced, the petition had attracted almost 55,000 signatures. ■

UNITED NATIONS – The U.N. Human Rights Council met on February 29 to consider action on a report that was prepared by U.N. High Commissioner for Human Rights Navi Pillay recommending that the body take a stand against continued persecution of sexual minorities around the world. The report documented that at least five countries continue to impose the death penalty for gay sex, and 76 countries continue to treat such activity as a criminal offense. The report also indicated that gay people are disproportionately targeted for torture in prisons. Archbishop of Canterbury Rowan Williams, head of the global Anglican Communion released the text of an address he was to deliver to the World Council of Churches endorsing the report's recommendations, threatening to exacerbate existing tensions over homosexuality within the Anglican Communion, as African members have stated strong disagreement. Also, the 57-nation Organization for Islamic Cooperation has stated opposition to the U.N. Human Rights Council meeting and have insisted that they would not accept any recommendations it might issue, arguing that gay right has "nothing to do with fundamental human rights" because "abnormal sexual behavior" was a matter of personal behavior and preferences. *New York Times*, Feb. 28.

AUSTRALIA – Queensland's Deputy Premier Andrew Fraser announced that the Governor had approved implementation of the Civil Partnership Act effective February 23. Due to the 10-day waiting period under the law, the first partnership ceremonies would take place on March 5. Ceremonies will be held at the Births, Deaths & Marriages Registry as well as various magistrate courts. *Northern Miner*, Feb. 14.

CHINA – The Court of Final Appeal will consider whether a Hong Kong transsexual is entitled to marry her male partner. The transsexual woman, identified as "W" in court papers, was identified as male at birth, but considered herself female from an early age and went through gender reassignment, including surgery, receiving a name change and identification as female on her identity documents. Nonetheless, the Registrar of Marriages blocked the marriage, and the Court of Appeal affirmed the Registrar's ruling that only a person's gender at birth counts for purposes of marriage and a union of two persons of the same biological sex may not be performed in China. According to a news report in the *South China Morning Post* (March 2), "the Court of Final Appeal will determine whether the words "woman" and "female" in sections of the Marriage Ordinance include a person who is a post-operative male-to-female transsexual. And if it does not include a transsexual, it will rule whether the ordinance is unconstitutional and infringes on W's right to marry as guaranteed by the Basic Law and her right to privacy under the Hong Kong Bill of Rights."

CROATIA – The Ministry of Health has issued new rules under which transgender individuals will be able to obtain identification documents reflecting the gender they are living in, even if they have not undergone surgical alteration, according to a March 1 report in *Croatian-*

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times.com. The article did not specify what proof will be required by the rules.

INDIA – The Supreme Court of India has begun considering various appeals filed from a ruling by the Delhi High Court that Section 377 of the Penal Code (the sodomy law) violates the nation's constitution. The government did not itself appeal the ruling, but appeals were filed by a variety of organizations and individuals opposed to the toleration of same-sex sexual conduct on religious or moral grounds. The unfolding oral arguments before a bench consisting of Justices Singvi and Mukhopadhaya resulted in some embarrassment to the government, when the attorney who had represented the government before the Delhi High Court made arguments that were not endorsed by the Cabinet during its consideration whether to appeal the case. Additional Solicitor General Malhotra, as described in a February 24 report by *Times of India*, "launched into a sharp attack on homosexuality, calling it immoral." He said, according to the press report, "It is against the order of nature. The order of nature is that a man's genital is meant to be inserted in the female's biological genital. But if it is to be inserted in another man's organ meant for exretion of waste, will it be proper?" We suspect this loses something in the translation into English. Questioned by the Bench as to "who decided what was moral and immoral when the legislature had not provided a proper comment, Malhotra said, 'Homosexuality is highly immoral. How can society tolerate it?'" The Home Ministry subsequently "clarified" that Malhotra had improperly relied upon arguments made in the Delhi High Court, and another Additional Solicitor General, Mohan Jain, told the court that Malhotra's argument did not reflect the government's current position, as the government now took no official position on the morality of homosexuality, and the government took no position on whether Section 377 is constitutional. Said Jain, "The decision of the Cabinet was that central government may not file an appeal against the judgment to the Supreme Court; however, if any other party to the case prefers an appeal, the attorney general may be requested to assist the SC to examine the matter and to decide the legal questions involved." Various counsel argued before the court about whether the Constitution's ban on discrimination due to gender was properly construed to forbid discrimination based on sexual orientation. The arguments were continuing at the end of February. On February 27, the Home Ministry informed the court that Mr. Malhotra would no longer be presenting its position, responding to the court telling the government: "Don't make mockery of the system and don't waste court's time," according to a Feb. 28 report in *Hindustan Times*. The Home Ministry also informed the Supreme Court that the Cabinet decided to accept the Delhi High Court's ruling, which is why the government did not appeal. All of the appellants are nongovernmental. On February 29, Union Home Minister P. Chidambaram stated that the government was "ashamed" of what had happened in the Supreme Court, and apologized for Malhotra's presentation. "Unfortunately, the counsel who handled the brief took a position which I am sure inconvenienced the Supreme Court," said Chidambaram. "I regret this. That position also embarrassed the government." *Mail Today*, March 1.

LIBERIA – The House of Representatives was expected to take up a bill forbidding same-sex marriage as a criminal offense at the end of February. The Senate has already passed the bill. Although its passage was expected based on strong public sentiment in its favor, some lawmakers pointed out that it appeared inconsistent with provisions of the Liberian Constitution calling for freedom of association, although these individuals asked not to be identified in the press due to fear of reprisals. *Monrovia New Dawn*, Feb. 27.

PORTUGAL – The Portuguese Parliament has rejected proposals to allow same-sex couples to adopt children and to extend access to medically-assisted reproductive services for single women and lesbian couples. The majority of the legislators was not impressed by arguments that same-sex couples are already raising children and allowing second-parent or joint adoptions would be in the best interest of those children. The voting split largely along party lines, with the Communist Party and most MPs from "right-wing" parties voting against the proposals, while member of the Left Bloc and the Greens and most of the Socialists supported the proposals. The right-wing parties currently hold a majority position in the Parliament. *ILGA Portugal*, Feb. 27.

RUSSIA – The municipal legislature in St. Petersburg gave final approval to a law that gay rights group see as providing a basis to prohibit public gay rights activities, such as rallies and parades. Under the law, passed by a vote of 29-5, "Public actions directed at the propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors" will be punishable by fines. According to a Feb. 29 report posted by *The New York Times*, the law defines "propaganda of homosexuality" as "the targeted and uncontrolled dissemination of generally accessible information capable of harming the health and moral and spiritual development of minors," and particularly singled out information that could create "a distorted impression" of "marital relations." The Russian LGBT Network, a St. Petersburg-based LGBT rights group, had given extensive publicity to its campaign to oppose this measure, seeking statements of support from foreign governments and individuals. According to the *Times* article, public opinion polling in Russia shows that only 45 per cent of a group of 1600 respondents to the survey thought that gay men and lesbian were entitled to the same rights as other Russians, with 41 per cent opposed and 15 per cent undecided.

SERBIA – The Court of Appeal in Belgrade rejected an appeal by the newspaper "Press" from a conviction under the hate crime law, in a case brought by the Gay Straight Alliance complaining about anti-gay comments published by the defendant's internet site. This was reported to be the

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first time the Serbian courts have sustained a conviction for anti-gay hate speech under the Serbian Anti-Discrimination Law. *Euro_Letter/February/2012*, Feb. 20.

UGANDA – The anti-homosexuality bill that drew so much adverse international comment over the years is once more pending before Uganda's Parliament, but in a revised form, according to its author, David Bahati, removing the draconian death penalty for repeated homosexual acts as well as removing the requirement that citizens report homosexual acts to police within 24 hours. It remains difficult, however, to rely on statements in the press, as the measure's final wording has not been released. Proponents of the measure now emphasize that Uganda should not sacrifice its traditional values in the face of threats of loss of aid from the United States and the United Kingdom, and are touting the measure as an assertion of traditional values. One clause in the bill, according to press reports, prohibits organizations that support gay rights from working in Uganda, which technically could require the expulsion of various foreign aid organizations, including those linked to governments that have denounced the bill. The parliamentary committee to which the bill has been referred has 45 days to consider its recommendation, but may request an extension. *New York Times*, Feb. 29.

UNITED KINGDOM – The Court of Appeal in London upheld the conviction of Peter and Hazelmary Bull, Cornwall innkeepers who had denied accommodation to a gay male couple. They were convicted of violating anti-discrimination laws on public accommodations, the court rejecting their defense based on their Christian belief that non-marital sex is a sin that they could not allow to occur in their establishment. One judge was quoted in a press account as saying, "I do not consider that the appellants face any difficulty in manifesting their religious beliefs. They are merely prohibited from so doing in the commercial context they have chosen." The court awarded damages of approximately $5800 to Martyn Hall and Steven Preddy, who were told upon arriving at the Inn that they could not share the double room that Mr. Hall had booked. News of the judgment stimulated much comment in the U.K. press, including outcries against persecution of Christians. *Daily Mail*, Feb. 11.

UNITED KINGDOM – *BBC News* reported Feb. 10 that three men were found guilty by Judge John Burgess in Derby Crown Court of stirring up hatred on grounds of sexual orientation by distributing leaflets titled "Death Penalty?," "Turn or Burn", and "God Abhors" during the build-up to a Gay Pride event in Derby in July 2010. Ihjaz Ali was jailed for two years, while Kabir Ahmed and Razwan Javed were given 15-month sentences. This was reportedly the first prosecution under the recently enacted statute. The leaflets included an image of a wooden mannequin hanging from a noose, accompanied by Islamic texts concerning capital punishment for homosexual acts. The men defended their actions by claiming that they were doing their duty as Muslims to condemn sinful behavior.

UNITED KINGDOM – Lord Doherty of the High Court in Glasgow sentenced Craig Roy, 19, to serve a minimum 18-year prison term for stabbing to death Jack Frew, 20. Roy's defense included asserting that he suffered a personality disorder and that he could not remember the slaying. Both boys were openly gay, the testimony offered in court suggested that Roy slew Frew to prevent him from telling Roy's boyfriend, Christopher Hannah, 20, that Roy and Frew had a sexual encounter. Roy claimed that he was blackmailed for sex by Frew after their encounter three months prior to the murder. Sentencing Roy on March 1, Lord Doherty said, according to a March 2 report in *The Daily Express*, "You armed yourself with a knife which you brought to the scene of the crime. Using it, you carried out a brutal, sustained and merciless attack which left your victim dead and mutilated." Frew was described as "flirtatious and flamboyant" and a "sex pest" who threatened to tell Hannah, whom Roy dreamed of marrying and raising children with, that Roy had cheated on him. Roy claimed that he brought the knife only to "scare" Frew, not to murder him. He said that during their meeting in the woods, Frew "touched him on the bottom and exposed himself." Roy remembers removing the knife from his pocket, but the next thing he claims to remember was Jack lying on the ground seriously injured. Whom to believe? ■

The National LGBT Bar Association will honor **Christopher Murphy**, Vice President and Deputy General Counsel of DirecTV Satellite Television, at its Out & Proud Corporate Counsel Award Reception in West Hollywood, California, on March 29. On March 1, the Association honor ed the **Legal Department of Shell Oil Company** at an Out & Proud Corporate Counsel Award Reception in Houston, Texas.

Thomas Hoff Prol has been nominated to be Secretary of the New Jersey State Bar Association. Under the Association's normal succession procedures, this means that he is expected to become the first openly-gay president of the New Jersey State Bar Association in 2017. Prol is an alumnus of New York Law School, where he has served as a member of the adjunct faculty.

The National Center for Lesbian Rights announced the appointment of **Arcelia Hurtado**, a civil rights attorney, as its new Deputy Director. Prior to this appointment, Hurtado served as executive director of Equal Rights Advocates, an organization advocating for equal opportunity for women and girls. Hurtado is a graduate of the law school at University of California at Berkeley. Prior to her public interest jobs, she was a deputy public defender for San Francisco County and Santa Clara County, and she has taught constitutional and criminal law at several Bay Area law schools. NCLR Press Release, Feb. 6.

In a special election to fill a vacant state senate seat, Oklahoma State Representative **Al McAffery** won a landslide victory on February 21, becoming the first openly-gay person to be elected to the Oklahoma Senate. McAffrey, a Democrat, received 66% of the vote.

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He had previously been elected three times to the state House of Representatives. *Huffingtonpost.com*, Feb. 21.

Dallas County (Texas) District Court Judge **Tonya Parker**, a lesbian who was elected to the bench in 2010, told a "political gathering" that she does not perform marriage ceremonies because the law denies her the right to marry, reported the *Dallas Morning News* on February 23, sourcing its article from *The Dallas Voice*, a gay community publication. The article indicates that Judge Parker was the "first LGBT person elected judge in Dallas County" and probably "the first openly LGBT African-American elected official in the state's history."

On February 29, New York Law School announced the appointment of **Anthony Crowell**, an openly gay attorney serving as Counselor to New York City Mayor Michael Bloomberg, as its 16th Dean and President. Crowell is a graduate of American University Law School and was employed as an attorney in the New York City Law Department before being appointed to various positions in the Giuliani and Bloomberg Administrations, including a leadership role in coping with the aftermath of the 9/11 terrorist attacks on the World Trade Center. New York Law School's Justice Action Center is the internet host of *Lesbian/Gay Law Notes*. Mr. Crowell will be the first openly-gay law school dean in the New York metropolitan area. (The first openly-gay dean of a law school in New York State was Craig Christensen, at Syracuse University School of Law during the 1980s.)

Human Rights Campaign announced that its new executive director will be **Chad Griffin**, a political consultant and founder and board president of the American Foundation for Equal Rights, an advocacy organization that was formed to bring the legal challenge against Proposition 8 that is now pending before the 9th Circuit Court of Appeals. ■

U.S. COURT OF APPEALS, 2ND CIRCUIT – The 2nd Circuit judges voted to deny en banc review of the panel decision in *Alliance for Open Society International, Inc. v. U.S. Agency for International Development*, 651 F.3d 218 (2nd Cir. 2011), in which the panel let stand a preliminary injunction by the district court against operation of a requirement that organizations receiving funding under the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the Leadership Act) must have an affirmative policy against prostitution in order to receive such funding. The panel majority had opined that the requirement amounted to compelled speech in violation of the First Amendment rights of such organizations, while the dissent had argued that the organizations in question were not compelled to speak because they did not have to apply for or accept federal funding under the Act. Under the dissent's theory of the case, when the government pays for speech, the government has the right to dictate the content of the speech, and that is all that is going on here. The vote to deny en banc review drew a dissent from three judges of the circuit, who joined in a dissenting opinion by Judge Jose A. Cabranes. Judge Rosemary Pooler filed a concurrence with the decision to deny en banc review, in order to publish a response to the arguments made by the dissenters. The dissenters contended that as the panel decision opened up a split with the D.C. Circuit, which had found this provision of the Leadership Act to be constitutional, it presented an important question sufficient to justify en banc review. Judge Pooler responded that it is the Supreme Court, not the 2nd Circuit, that resolves circuit splits. Furthermore, this is still pre-trial, the injunction is merely preliminary, and, she contended, the serious questions the case raises should be decided on a proper trial record.

U.S. COURT OF APPEALS, 11TH CIRCUIT – Rejecting a claim that an HIV+ woman had a reasonable fear that she would be subjected to persecution if deported from the U.S. to her home country of Argentina, the U.S. 11th Circuit Court of Appeals affirmed the Bureau of Immigration Appeals' denial of asylum or withholding of removal, pointing out that "she has not provided evidence that she will be denied access to all medications or that she will be persecuted because of her disease. Considering that all inferences from Petitioners' evidence are drawn in favor of the BIA [for purposes of judicial review], Petitioner's fear is not objectively reasonable." *Da Silva v. U.S. Attorney General*, 2012 WL 638524 (Feb. 29, 2012).

U.S. COURT OF APPEALS, 11TH CIRCUIT – Finding, in effect, that the U.S. District court had totally screwed up an HIV-discrimination case, the 11th Circuit Court of Appeals reversed a summary judgment order and remanded the case of an HIV+ applicant for a position with the Atlanta Police Department. *Roe v. City of Atlanta*, 2012 WL 281766 (Feb. 1, 2012) (not selected for publication in F.3d). The "Richard Roe" plaintiff, who is represented by attorneys from the Atlanta and Chicago offices of Lambda Legal, was required to submit to a physical exam prior to being offered employment, and the doctor told him he was disqualified due to his HIV status. In granting summary judgment to the City on Roe's Americans with Disabilities Act claim, the district judge found that Roe could not establish that he was qualified for the job on two grounds, as explained in the circuit court's per curiam opinion: "1) he cannot prove he does not pose a direct threat because of his HIV status, and 2) because he failed to prove that he is a qualified individual wholly aside from whether he posed such a direct threat." The court of appeals found merit in Roe's argument that the court should not have ruled on the second ground because the only argument the City made in its motion for summary judgment was the "direct threat" argument, so he did not have an opportunity to introduce evidence on his qualifications for the job. Furthermore, the court found merit to Roe's argument that the City had in fact admitted that HIV+ status is not an automatically disqualifying factor. In its Answer to the

complaint, the City had specifically denied having a policy of not hiring HIV+ people as police officers, and had also asserted throughout the discovery process that it did not require HIV testing of current police officers. "We hold that the City's admission, at the very least, lulled Roe into believing that he need not adduce evidence to distinguish his HIV status as non-serious, and that Roe is entitled to further evidentiary development in this regard," wrote the court. The court also pointed out, in a footnote, that the City had never complied with the statutory requirement to do an individualized assessment of Roe's qualifications and ability to perform essential job functions safely. Finally, the court pointed out that the district court should address the question whether the City violated the ADA by requiring a medical examination before making a conditional job offer. Roe had raised that issue, but the district court ignored it in the summary judgment opinion. Looks like somebody on the federal bench needs a remedial course on the ADA.

MISSOURI – The Missouri Court of Appeals, Western District, affirmed a jury award of $6,284,759.00 in favor of Dr. Gary Edwards, a chiropractor, who sued the members of the Missouri Board of Chiropractic Examiners for gross negligence in connection with proceedings they took against him based on spurious charges that he had told an HIV+ patient that he was "cured" and it was safe for him and his wife to have a baby. *Edwards v. Gerstein*, 2012 WL 265886 (Jan. 31, 2012). Edwards was treating Duane Troyer, a young Mennonite man who had contracted HIV from a blood transfusion. This was in 1989, at a time when treatment options were limited, and the only drug available was AZT, which it turned out Troyer could not tolerate. Edwards had several Mennonite patients, one of whom referred Troyer to him on some theory that HIV could be treated through chiropracty, a belief held by some Mennonites who reject medical treatment. According to Edwards, he advised Troyer that chiropractic methods could not cure HIV and agreed to monitor Troyer's nutrition while advising him to continue treatment with medical doctors. Troyer and his wife went ahead and had a child. As a result of their unprotected sexual intercourse, Mrs. Troyer and the child were both infected with HIV, and Duane passed away from AIDS after the child was born. Subsequently, according to the court's findings, Mrs. Troyer's mother attempted to blackmail Dr. Edwards by threatening to go to the press with the story that Dr. Edwards had told Duane that he was cured and it was safe for him and his wife to have a baby. Dr. Edwards refused to be blackmailed, and the mother's story made its way into the press and came to the attention of the Board, which retained an investigator, who interpreted his task as being to substantiate the charges. His investigation as described by the court was totally biased and overlooked obvious evidence that would be relevant to an impartial investigation. Based on this investigator's report, the Board took action against Dr. Edwards, and a Hearing Officer found him guilty on 5 out of 6 counts of unprofessional conduct. Edwards got this decision remanded for a new hearing by the Court of Appeals, but then the Board dismissed the case without any further hearing, and Edwards sued the Board members, resulting in the substantial verdict in his favor. The Court of Appeals rejected the appellants' argument that they could not be personally liable to Edwards because they had no duty to him to conduct an impartial investigation, a contention the court found contrary to a Missouri statute providing that board members were shielded from any liability except for gross negligence, and that their duty did not run solely to the public at large. The board also complained that the jury charge on "gross negligence" was inaccurate, but the court found that they had not properly preserved an objection to the charge at the time the trial court gave it. (Furthermore, although not directly relevant, at trial their counsel had objected to a charge proposed by Edwards' lawyer that tracked language from prior Missouri decisions, as a result of which the trial judge used a charge that the court of appeals found was inappropriate rather than the one that the court of appeals would have approved!) The court also rejected an immunity argument, both as to liability and as to the substantial attorney fee award included in the damages. The court said that in this case, attorney fees were actually "consequential damages" flowing from the appellants' tortious conduct. Reading the facts portion of Judge James Edward Welsh's opinion was like reading a soap opera plot summary!

TENNESSEE – U.S. District Judge William J. Haynes awarded a preliminary injunction in behalf of Planned Parenthood organizations in Tennessee whose grants to run HIV prevention programs were withdrawn by the state government after a change of administration. Members of the new Republican state administration openly campaigned to "defund" Planned Parenthood, not just from performing reproductive health services including abortion, but from any funding at all. Planned Parenthood organizations in Tennessee had been doing extensive HIV prevention and education work with federal funds administered through the state's Department of Health, and had already been approved for the grants in question to continue funding these programs, but the grants were suddenly revoked when John J. Dreyzehner became the new Commissioner of the Department. Ruling Feb. 17 in *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 2012 WL 529811 (M.D.Tenn.), Judge Haynes found that the plaintiffs were likely to prevail on the merits of their First and Fourteenth Amendment claims that the revocations were motivated by their constitutionally-protected advocacy for reproductive choice, that defunding of the programs would cause irreparable injury to the organizations and the public, and that the balance of equities weighed with the plaintiffs. Judge Haynes noted other cases in which politically-motivated defunding of Planned Parenthood programs had been found to involve unconstitutional censorship of speech and discrimination, finding that this case fell into that pattern, writing, "the Court concludes, as have other courts in similar circumstances, that here the State engaged in an exercise of 'raw' political power to penalize Plaintiffs for their activities and advocacy unrelated to these federal grants and programs. To do so obviates the necessity of any balancing approach." ■

PUBLICATIONS NOTED & ANNOUNCEMENTS

LGBT & Related Issues [25]

1. Caballero, Mauricio Albarracin, Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia, 8 Sur Int'l J. Hum. Rts. No. 14, at 6 (June 2011).
2. Cardinale, Jessie R., *Chief Justice Margaret Marshall: A Lifetime Devoted to Defending Liberty and Justice for All*, 74 Albany L. Rev. 1789 (2010/11) (celebrating the career of the author of the first decision by the highest court of a state holding that same-sex couples are entitled to marry).
3. Cardinale, Jessie R., *Chief Justice Marsha Ternus: An Inside Look into the Tenure of Iowa's Former Chief Justice*, 74 Albany L. Rev. 1811 (2010/11) (exploring the career of the Chief Justice whose court was the first highest court of a state to vote unanimously that same-sex couples are entitled to marry).
4. Cho, Candice, *Language and Limits of* Lemon*: A New Establishment Clause Analysis of* Catholic League for Religious and Civil Rights v. City of San Francisco, 45 Colum. J. L. & Social Prob. 225 (Winter 2011).
5. Cohen, I. Glenn, *Regulating Reproduction: The Problem with Best Interests*, 96 Minn. L. Rev. 423 (Dec. 2011).
6. Comment, *Constitutional Law – Eighth Amendment – Seventh Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act*. – Fields v. Smith, 653 F.3d 550 (7th Cir. 2011), 125 Harv. L. Rev. 650 (Dec. 2011).
7. Conrey, Sarah Camille, *Hey, What About Me? Why Sexual Education Classes Shouldn't Keep Ignoring LGBTQ Students*, 23 Hastings Women's L.J. 85 (Winter 2012).
8. Hagedorn, Audrey K., *"Don't Ask, Don't Tell, The Supreme Court, and Lawrence the "Laggard"*, 87 Ind. L.J. 795 (Spring 2012).
9. Hanna, Cheryl, *State Constitutional Decision-Making and Principles of Equality: Revisiting* Baker v. State *and the Question of Gender in the Marriage Equality Debate*, 74 Albany L. Rev. 1683 (2010/11).
10. Hansen, Hillary, *Fundamental Rights for Women: Applying* Log Cabin Republicans *to the Military Abortion Ban*, 23 Hastings Women's L.J. 127 (Winter 2012).
11. Hazeldean, Susan, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. Davis L. Rev. 373 (Dec. 2011).
12. Hunt, Stephen, *A Turn to the Right: UK Conservative Christian Lobby Groups and the 'Gay Debate'*, 6 Religion & Hum. Rts. 291 (2011).
13. Kalb, Johanna, *Litigating Dignity: A Human Rights Framework*, 74 Albany L. Rev. 1725 (2010/11).
14. Kramer, Zachary A.,*Of Meat and Manhood*, 89 Wash. U. L. Rev. 287 (2011)(developing a coherent gender stereotyping theory under sex discrimination law).
15. Long, Justin R., *State Constitutions as Interactive Expressions of Fundamental Values*, 74 Albany L. Rev. 1739 (2010/11).
16. Mubangizi, John C., and Ben Kiromba Twinomugisha, *Protecting the Right to Freedom of Sexual Orientation: What Can Uganda Learn from South Africa?*, 2011 Stellenbosch L. Rev. (No. 2), 330.
17. Reyes, Ren, *The Supreme Court's Catholic Majority: Doctrine, Discretion, and Judicial Decision-Making*, 85 St. John's L. Rev. 649 (Spring 2011) (how might the presence of a Catholic majority – actually, 6 out of 9 justices – affect decision-making on legal issues as to which Catholic religious doctrine might dictate a particular result?).
18. Rosenblum, Darren, *Unsex Mothering: Toward a New Culture of Parenting*, 35 Harv. J. of L. & Gender 57 (2012).
19. Sandefur, Timothy, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283 (Winter 2012).
20. Schneider, Mark R., *In Defense of Marriage: Preserving Marriage in a Postmodern Culture*, 17 Trinity L. Rev. 125 (Fall 2011) ("Natural Law" compels rejecting any claim of same-sex couples to the right to marry).
21. Schwartz, Victoria, *Title VII: A Shift from Sex to Relationships*, 35 Harv. J. of L. & Gender 209 (2012) (argues that sexual orientation discrimination claims should be cognizable under Title VII).
22. Stehr, Emily, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 Hastings Int'l & Comp. L. Rev. 253 (Winter 2012).
23. Stein, Edward, *What Role for Women, Men, and Transpeople/Intersex People in Gender Equality?*, 31 Pace L. Rev. 821 (2011) (Symposium Issue).
24. Strozdas, Jay, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families*, 44 Loyola L.A. L. Rev. 1339 (Summer 2011).
25. Tinkler, Justine E., *Resisting the Enforcement of Sexual Harassment Law*, 37 L. & Social Inquiry 1 (Winter 2012).

Editor's Notes

- All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc.
- All comments in Publications Noted are attributable to the Editor.
- Correspondence pertinent to issues covered in *Lesbian/ Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.

PUBLICATIONS NOTED & ANNOUNCEMENTS

HIV/AIDS & Related Issues [6]

1. Chen, N., E. Erbelding, H-C. Yeh & K. Page, *Predictors of HIV Testing Among Latinos in Baltimore City*, 12 J. Immigratn & Minority Health 867 (Dec. 2010).
2. Gama, A., and S. Fraga & S. Dias, *Impact of Socio-Demographic Factors in HIV Testing Among African Immigrants in Portugal*, 12 J. Immigrant & Minority Health 841 (Dec. 2010).
3. Mathen, Carissima, and Michael Plaxton, *HIV, Consent and Criminal Wrongs*, 57 Crim. L. Q. 464 (2011).
4. Odunsi, Babafemi, *When Prisons Become Breeding Grounds and Warehouses for HIV: A Paradox of Criminal Law Intervenion in HIV/AIDS Control in Developing Countries*, 22 Sri Lanka J. Int'l L. (No. 1), 31 (2011).
5. Rice, E., S. Green, K. Santos, P. Lester & M.J. Rotheram-Borus, *A Lifetime of Low-Risk Behaviors Among HIV-Positive Latinas in Los Angeles*, 12 J. Immigrant & Minority Health 875 (Dec. 2010).
6. Wohl, A.R., W. Garland, S. Cheng, B. Lash, D.F. Johnson & D. Frye, *Low Risk Sexual and Drug-Using Behaviors Among Latina Women with AIDS in Los Angeles County*, 12 J. Immigrant & Minority Health 882 (Dec. 2010).

Specially Noted

- *Flagrant Conduct*, by Dale Carpenter (W.W. Norton & Co. 2012), provides an in-depth look at *Lawrence v. Texas*, the 2003 Supreme Court ruling finding that gay sex is protected by the 14th Amendment Due Process Clause. Carpenter, a professor at the University of Minnesota Law School, investigated the circumstances leading the case and renders a vivid depiction of the personalities, including the Texas defendants, the attorneys on both sides, and the Texas judicial officials, as well as providing an eye-witness account of the oral argument. For those in the NYC area, Carpenter will be making a presentation about the book at Barnes & Noble at Broadway & 82nd Street on Monday, March 26 at 7 pm. He will also be speaking earlier that day at an event at New York University.

- *Same-Sex Unions Across the United States*, by Mark Strasser (Carolina Academic Press [paperback] 2011), takes on and discusses in depth the issue of same-sex marriage recognition in the United States, including analysis of the various legal theories that might be advanced to overcome the effect of state constitutional and statutory restrictions on recognition of same-sex marriages performed in other jurisdictions.

- ABA Books has announced the second edition of *Estate Planning for Same-Sex Couples* by Joan M. Burda, revised to take account of the extraordinary growth in the number of jurisdictions providing for same-sex marriage, domestic partnerships and civil unions since the first edition was published. As a result of all these developments, the 460 page book is twice the size of the first edition. Members of the ABA's GP Solo and Small Firm Division get a discount from the general purchase price of $119.95.