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Elections Produced Major Advances For LGBT Rights, Representation

The federal, state and local elections held on November 6, 2012, produced major advances for LGBT rights and representation, with unprecedented victories in same-sex marriage ballot questions, elections of numerous openly LGBT candidates (including the election of the first openly bisexual House member, first openly transgender state legislator, and first only LGBT U.S. Senator), in the wake of the re-election of President Barack Obama, the first presidential candidate of either major political party to run a platform supporting all the remaining federal legislative goals of the LGBT rights movement, including the right of same-sex couples to marry, for marriages of same-sex couples to receive equal recognition with different-sex couple marriages under federal law, and for a ban on workplace discrimi-

ployment Non-Discrimination Act, supporting a federal constitutional amendment banning same-sex marriage, vowing to defend the Defense of Marriage Act in the courts, and stating disagreement with the recent repeal of the Don't Ask, Don't Tell military policy. Nonetheless, the presidential vote was notable as a political and cultural signpost that the president's standing with voters did not seem to suffer from his announcement of support for same-sex marriage in May, shortly after Vice President Joseph Biden had stated support for same-sex marriage. Indeed, these announcements produced a slight upwards bump in the polls for the president, and undoubtedly helped him to achieve support from more than three-quarters of self-identified LGBT voters in exit polls. The Williams Institute (UCLA Law School) observed

ers supported marriage equality laws that had been approved earlier in 2012 by the state legislatures and governors, but whose implementation had been put on hold after sufficient voters signed petitions to place them on the ballot. In Maine, same-sex marriage proponents placed a measure on the ballot seeking to reverse a decision taken by voters a few years ago, when a marriage equality law approved by the legislature and the governor had been overturned in the voters. This time, a majority of voters supported same-sex marriage. In Minnesota, the legislature placed a state constitutional amendment banning same-sex marriage on the ballot, but it went down to defeat. As a result of the November 6 votes, by January 1, 2013, same-sex couples in at least nine states and the District Columbia will have the right to marry.

Ballot questions concerning same-sex marriage achieved historic majorities in four jurisdictions.

nation based on sexual orientation and gender identity under federal discrimination law.

Careful poll-watchers had expected the re-election of President Obama, as his opponent, former Massachusetts Governor Mitt Romney, had never achieved consistent polling leads in most of the "swing states" (states in which neither candidate had achieved double-digit leads in pre-election polling) and saw his support declining in most national polls during the final weeks of the campaign. Romney, who two decades earlier had run against Massachusetts Senator Ted Kennedy in a campaign during which he claimed he would be a stronger supporter of gay rights than Kennedy, had totally changed his position on gay rights by 2012, opposing enactment of the Em-

that President Obama's margin of support among LGBT voters exceeded his national popular vote margin over Governor Romney, thus giving the LGBT community a claim to have provided decisive support in re-electing the president. Of course, several other particular voting groups, especially African-American voters, whose support for the president neared unanimity, and Latino-American voters, whose level of support paralleled LGBT voters, could make similar claims.

Ballot questions concerning same-sex marriage achieved historic majorities in four jurisdictions, marking the first time that a state electorate in the United States has provided majority support at the polls for the right of same-sex couples to marry. In Maryland and Washington, a majority of vot-

ers supported marriage equality laws that had been approved earlier in 2012 by the state legislatures and governors, but whose implementation had been put on hold after sufficient voters signed petitions to place them on the ballot. In Maine, same-sex marriage proponents placed a measure on the ballot seeking to reverse a decision taken by voters a few years ago, when a marriage equality law approved by the legislature and the governor had been overturned in the voters. This time, a majority of voters supported same-sex marriage. In Minnesota, the legislature placed a state constitutional amendment banning same-sex marriage on the ballot, but it went down to defeat. As a result of the November 6 votes, by January 1, 2013, same-sex couples in at least nine states and the District Columbia will have the right to marry.

December 29. The Maryland statute confirmed in the vote there goes into effect on January 1, 2013. Maryland Attorney General Douglas Gansler issued a formal written opinion on Nov. 29 stating that county clerks could begin issuing licenses as early as December 6, provided none of the ceremonies are performed prior to January 1.

That voters gave small but clear majorities to same-sex marriage in four ballot measures simultaneously provided a clear sign of a turning point in public opinion on this issue. Previously, voters in 32 states had voted to approve constitutional amendments or statutes banning same-sex marriage, the only exception being an Arizona vote on an overly-broad amendment that was then narrowed and approved in a subsequent election. All four of the states in question on November 6 were “blue states” that provided majorities for the re-election of President Obama, but victories were not assured in light of this past record. Prior to November 6, 2012, there had never been an affirmative vote to support same-sex marriage in any state. Pre-election polls and exit polls confirmed that younger voters supported same-sex marriage overwhelmingly, further signaling the direction in which public opinion is going on this issue. Polling also confirmed that President Obama’s support for same-sex marriage had helped to increase support among African-American voters, who turned out in record numbers to re-elect the president. Even more interesting, as Walter Olson pointed out in an op-ed article published by the *Washington Post* on November 30, Republican voters – whose party strongly opposes same-sex marriage – provided part of the margin of victory, as the pro-marriage side enjoyed significant victory margins in many election districts where Governor Romney outpolled President Obama! So these votes might even lead some Republican Party leaders to begin reconsidering their position on the issue, although there was no immediate sign of that happening in the first wave of reaction from the Republican commentariat.

Congressional elections marked a significant advance for openly-LGBT representation in the nation’s legislature:

Senate – Tammy Baldwin, who had represented Madison, Wisconsin, in the House for many years, won her campaign to become the first openly LGBT

member of the United States Senate, defeating former Governor Tommy Thompson by a decisive margin in a hard-fought contest that attracted substantial out-of-state money from conservative Political Action Committees hoping to turn the Senate to Republican control by capturing a previously Democratic seat.

House – Jared Polis of Boulder, Colorado (District 2), and David Cicilline of Providence, Rhode Island (District 1), won re-election to become the senior openly-gay members of the House. Mark Takano, winning election in a California district representing Riverside (District 41), became the House’s first openly gay Asian-American. Kyrsten Sinema, from the Phoenix-Tempe area in Arizona (District 9), became the House’s first openly-bisexual member. Sean Patrick Maloney won election in an upstate New York district (District 18) to become that state’s first openly-gay House member. Mark Pocan, of Madison, Wisconsin, kept Tammy Baldwin’s House seat (District 2) in openly-gay hands, becoming the first openly-gay House candidate to be elected to follow an openly-gay member.

The only openly-gay Republican House candidate, Richard Tisei, lost his battle to unseat an incumbent Democrat in Massachusetts (District 6), thus preserving intact the failure of any openly-gay Republican to be initially elected to the House. (Some serving Republican members had “come out” or were “outed” in the past, and subsequently re-elected.)

Openly LGBT candidates also achieved widespread success in state legislative races. According to a morning-after report by the Gay & Lesbian Victory Fund, seven state legislatures gained their first or only openly LGBT state lawmakers, including North Dakota, South Dakota, West Virginia, New Mexico, Texas, Pennsylvania, and Florida. In Oregon (House Speaker-elect Tina Kotek), Colorado (House Speaker-elect Mark Ferrandino), Washington (Senate Majority Leader-elect Ed Murray), California and Rhode Island, openly lesbian or gay legislators were continuing in or were designated to assume leadership positions. Justin Chenette, an openly gay Maine Democrat, was elected to the state House of Representatives, becoming the nation’s youngest state legislator. Tim Brown,

an Ohio Republican elected to the state House or Representatives, became the nation’s only openly-gay Republican state legislator. Stacie Laughton, a New Hampshire Democrat, will be the nation’s only openly transgender state legislators as a member of the state House of Representatives if she takes office. After election results were announced, some Republicans called for her to decline election as a result of news reports that she had been convicted of a felony under her prior name in 2008. There was some confusion about whether state law would bar her from service, and conflicting reports about whether she was going to withdraw from the office to which she was elected. Openly bisexual state legislators, all Democrats, were re-elected in New York, Oregon, South Dakota and Wisconsin. When the dust finally settled on counting of absentee and provisional ballots and all races had been decided, it appeared that there would be openly LGBT state legislators in at least 40 states. The Victory Fund also reported scores of successful campaigns by openly-gay candidates for county and city legislative bodies, and a handful of successful judicial races as well. Openly-gay Republican Paul Babeu won re-election as sheriff in Pinal County, Arizona. Babeu had backed out of a primary contest for the House of Representatives after his sexuality became a public issue.

Also, in a closely-watched race, Iowa voters rejected a campaign to deny retention to Justice David Wiggins, a member of the Iowa Supreme Court who had been part of the unanimous ruling for same-sex marriage in 2009, *Varnum v. Brien*. Three other judges who had joined that opinion were denied retention in 2010. Democrats also retained their slim majority in the state Senate, which has been the firewall against a proposal by Republicans to overrule the court’s decision. Same-sex marriage in Iowa seems secure for now.

There were some setbacks, however, as voters in Salina and Hutchinson, Kansas, voted to repeal anti-discrimination measures that had been approved earlier by municipal councils in those cities. In both cases, substantial majorities of voters rejected the ordinances. ■

Fed. Ct. Rejects NV Same-Sex Marriage Suit

Lambda Legal's suit on behalf of sixteen lesbian or gay Nevadans seeking the right to marry or to have their existing marriages recognized in that state suffered a setback on November 26, when U.S. District Judge Robert C. Jones, concluding that the state had a rational basis for maintaining a distinction between domestic partnerships and marriage, entered judgment against the plaintiffs and ordered the Clerk to close the case. Lambda promptly announced that it would file an appeal with the U.S. Court of Appeals for the 9th Circuit. The lawsuit, *Sevick v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL (D. Nev.), is one of several pending around the country seeking a declaration that a state that has adopted domestic partnerships or civil unions for same-sex couples has failed to meet the 14th Amendment requirement of equal protection of the laws by not going the next step to allow same-sex couples to marry. A similar lawsuit in Hawaii was rejected by a trial court earlier this year, and lawsuits are pending in Illinois raising a similar challenge. The backdrop for all these cases is the existence of state laws—and in some cases constitutional amendments—denying the right to marry to same-sex couples, and recently successful moves to enact a civil status accessible to same-sex couples that would provide almost all of the state law rights identified with legal marriage.

Judge Jones' ruling was the first on this issue to take place after voters in three states had supported the right of same-sex couples to marry in ballot questions, and rejected an anti-marriage constitutional amendment in a fourth state. Judge Jones found that these electoral victories actually undermined the plaintiffs' legal claims, as they detracted from the argument that laws withholding the right to marry should be subjected to "heightened scrutiny" by the court due to the plaintiffs' "political powerlessness."

After rejecting an argument that the Nevada constitutional and legislative scheme discriminates based on gender and thus should be subjected to "heightened scrutiny," which would place on the state the burden of showing that excluding same-sex couples from marriage substantially advances an important state interest, Judge Jones identified as a central issue in the case whether discrimination based on sexual orientation is subject to heightened scrutiny or merely the less demanding "rational basis" review, under which the burden of proving unconstitutionality falls on the plaintiffs.

As to this, he pointed out that the 9th Circuit had ruled in 1990 in *High Tech Gays v. Defense Industrial Security Clearance Office* that sexual orientation discrimination claims should be subject

As many federal circuit and district courts have done, Judge Jones misconstrued the Supreme Court's equal protection methodology.

to rational basis review, and that the circuit has not moved away from this ruling, even though the decision relied in part on the Supreme Court's now-overruled 1986 decision upholding Georgia's sodomy law, *Bowers v. Hardwick*. As recently as 2008 the circuit court reiterated this stand in a case challenging the anti-gay military policy, and the ruling earlier this year against the marriage case in Hawaii made the same point: district courts within the 9th Circuit are still bound to apply the rational basis standard in reviewing cases involving sexual orientation discrimination.

Jones also credited the argument that *Baker v. Nelson*, a 1972 ruling in which the Supreme Court dismissed an appeal from the Minnesota Supreme Court in a same-sex marriage case with the comment that the case presented no "substantial federal constitutional question,"

remains a binding ruling on the question whether denying same-sex couples the right to marry violates the 14th Amendment. The Supreme Court has stated that such dismissals should be treated as rulings on the merits of the questions presented for review, "except when doctrinal developments indicate otherwise." Some courts have accepted the argument that such subsequent developments as the Supreme Court's pro-gay rulings in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003) would justify ignoring *Baker*, but Judge Jones was not willing to do so. First, neither *Romer* nor *Lawrence* concerned same-sex marriage; and, second, neither of those cases held that sexual-orientation discrimination claims should be subjected to heightened scrutiny.

Applying *Baker*, Judge Jones held that the state's motion to dismiss the case should be granted in part, to the extent that the complaint was premised on the argument that same-sex couples have a right to marry as a matter of Equal Protection.

However, he saw a slightly different argument in the case that required further analysis, because there was an important factual difference between the Minnesota challenge from 1972 and the current Nevada challenge. In

the Minnesota case, the state had not adopted an anti-marriage constitutional amendment and had not taken the affirmative step of creating an alternative civil institution to provide the state-law rights of marriage for same-sex couples. Nevada has done both, presenting questions not addressed in *Baker v. Nelson*.

Despite these conclusions, Judge Jones devoted a substantial part of his opinion to evaluating anew whether the Nevada constitutional amendment and marriage statute should be subjected to "heightened scrutiny." As many federal circuit and district courts have done—indeed, as the 9th Circuit did in *High Tech Gays*—Judge Jones misconstrued the Supreme Court's equal protection methodology by stating that in order to merit heightened scrutiny, the plaintiffs would have to show that gays "1) have suffered a history of discrimination, 2) exhibit obvious, immutable, or

distinguishing characteristics that define them as a discrete group, and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right." This is a quote from the erroneous *High Tech Gays* analysis.

Actually, careful review of the Supreme Court's reasoning in cases addressing the issue of the level of judicial review would show that the word "and" before the third item on that list should be "or". That is, the Supreme Court has itself never insisted that all three items on the list must be present in order for heightened scrutiny to apply. If all three tests must be met, there would be no heightened scrutiny for sex-based classifications, and there might not even be strict scrutiny for race-based classifications. The issue for the court is whether a law adopting a particular classification should be deemed suspect and thus subject to heightened scrutiny because it would be appropriate under the circumstances to believe that it might be based on bias, prejudice, moral disapproval or unjustified clinging to the way things have always been done. A history of discrimination against a group should, by itself, be sufficient

to raise the suspicion that a law discriminating against that group is a continuation of such historical discrimination, rather than one supported by a non-discriminatory policy goal. This is especially so if the characteristic at issue is "immutable" in the sense of being a defining characteristic and, of course, the court's solicitude for the plaintiffs should be greater when their position in the polity is weak.

Going through the three-factor test, Judge Jones saw little support for applying heightened scrutiny. First, he said, "Homosexuals have indeed suffered a history of discrimination, but it is indisputable that public acceptance and legal protection from discrimination has increased enormously for homosexuals, such that this factor is weighted less heavily towards heightened scrutiny than it was in 1990," when the 9th Circuit had accepted for purposes of analysis that gays suffered

a history of discrimination. Jones went on to propound a theory for rejecting the salience of old-time discrimination, comparing sexual orientation to race, which is "inherited." "In the context of a characteristic like homosexuality," he wrote, "where no lingering effects of past discrimination are inherited, it is contemporary disadvantages that matter for the purposes of assessing disabilities due to discrimination," and he proclaimed that "any such disabilities with respect to homosexuals have been largely erased since 1990."

As to "immutability," he pointed out that in the absence of any Supreme Court analysis of this factor, the 9th Circuit's conclusion in 1990 that sexual orientation was binding on the district court, despite changing public and scientific opinion. "Assuming for the sake of argument that the characteristic is immutable for the purposes of an equal protection analysis,"

The issue for the court is whether a law adopting a particular classification should be deemed suspect and thus subject to heightened scrutiny.

he wrote, "this factor would weight in favor of heightened scrutiny."

However, as to the third factor, Jones noted that recent events ended any argument that gays are politically powerless. For one thing, in the context of Nevada politics, the gay rights movement had achieved decriminalization of consensual sodomy, passage of a law banning discrimination, and the domestic partnership statute. While conceding that gay people are a tiny minority of the population and thus unable to advance their legislative interests on their own, he pointed out that gay people in Nevada had evidently found sufficient political allies to enact legislation, and their failure to win such a victory on the marriage question could not, on its own, justify a finding that gays are "politically powerless." Actually, he wrote, "That the homosexual-rights lobby has achieved this indicates that the group has

great political power." The recent ballot question victories in other states served merely to strengthen this conclusion.

This conclusion led to a lengthy jurisprudential essay about why it would undermine democracy for the court to extend the assistance of heightened scrutiny to such a "politically powerful" group. Among other things, he wrote: "The question of 'powerlessness' under an equal protection analysis requires that the group's chances of democratic success be virtually hopeless, not simply that its path to success is difficult or challenging because of democratic forces. . . . Plaintiffs' democratic loss on a particular issue does not prove that they lack political power for the purposes of an equal protection analysis. That homosexuals cannot protect themselves democratically without aid from other groups is a conclusion that is necessarily true for any minority group by definition, so treating this point as dispositive would avoid any meaningful analysis of the political powerlessness factor."

In this, Judge Jones confronted head-on the 2nd Circuit's recent *Windsor* ruling and openly disagreed with it. Anticipating the argument that sexual orientation

discrimination should be treated for equal protection purposes like sex, Jones pointed out that women had long been deprived of the vote, excluded from juries, and denied the basic right of property ownership. The only "homosexuals" historically subjected to such deprivations, he asserted, were those convicted under sodomy laws, undoubtedly a "miniscule" proportion of all gay people, and he argued that when the Supreme Court embraced heightened scrutiny for sex discrimination cases in 1973, "continued discrimination against women...was largely due to the high visibility of the sex characteristic, a visibility that the characteristic of homosexuality does not have to nearly the same extent as gender." In other words, the closet preserves privilege for those who can "pass" as non-gay, and this should make a difference, in Judge Jones' view, in rejecting the argument that in most relevant respects the constitutional analysis justifying heightened

scrutiny for sex also justifies heightened scrutiny for sexual orientation.

At any rate, having determined that this was a rational basis case, Judge Jones readily concluded that the state's interest in preserving the traditional definition of marriage was sufficient. He cited Justice Sandra Day O'Connor's statement to that effect in her concurring opinion in *Lawrence*, and imputed much the same meaning to Justice Anthony Kennedy's statement in the *Lawrence* majority opinion that the issue of the sodomy law's constitutionality did not require the Court to take on the question whether the state had to "recognize" same-sex relationships.

"The protection of the traditional institution of marriage, which is a conceivable basis for the distinction drawn in this case, is a legitimate state interest," he wrote. "Although traditional moral disapproval is not alone a valid state interest for prohibiting private, consensual activity," as the Supreme Court held in *Lawrence*, "civil marriage is at least partially a public activity, and preventing 'abuse of an institution the law protects' is a valid state interest." He provided no explanation of how opening up marriage to same-sex couples would constitute an "abuse" of the institution of marriage.

Jones relied on Nevada's decision to extend the essential state law characteristics of marriage to same-sex couples through its domestic partnership law, and asserted that "the State has not crossed the constitutional line by maintaining minor differences in civil rights and responsibilities that are not themselves fundamental rights comprising the constitutional component of the right to marriage, or by reserving the label 'marriage' for one-man-one-woman couples in a culturally and historically accurate way." He also rejected the salience of the 9th Circuit's ruling earlier this year in *Perry v. Brown* that Proposition 8 violates the 14th Amendment. Since same-sex marriage had not existed in Nevada before the constitutional amendment was passed or the statute limiting marriage to different-sex couples was adopted, this was not a case of the state withdrawing an

already recognized right from a particular group, the basis upon which the 9th Circuit struck down Proposition 8.

Furthermore, Jones rejected the salience of *Romer v. Evans*, the case upon which *Perry v. Brown* relied, by noting that *Romer* concerned a general state constitutional disqualification of gay people in Colorado from all protection by the state, a point emphasized by Justice Kennedy in his *Romer* opinion, whereas the Nevada amendment was not such a "sweeping" enactment but rather a narrowly targeted one, that had not stopped the legislature from adopting domestic partnerships (that are open, in Nevada, both to same-sex and different-sex couples).

Seeking to bolster his contention that the state had a rational justification for preserving the traditional definition of marriage, Jones asserted that there were "conceivable benefits to society from maintaining a distinction between tradi-

extension of the right to marry to same-sex couples.

An alternative ground for applying heightened scrutiny, briefly noted by Judge Jones, would be if the challenged policy denied a fundamental right. In this case, plaintiffs argue that they are denied the fundamental right to marry. Jones responds that because the state has made available to same-sex couples all the important state law rights associated with marriage, they have not been denied a fundamental right. This, of course, trivializes the argument at the heart of plaintiffs' case: that the label of "marriage," apart from any legal incidents accompanying it, carries social and legal import of its own, and denying it imposes a stigma and disqualification from equal treatment in society. Jones trivialized his as well, insisting that changing the law would not change any social stigma that might still attach to same-sex relationships.

Depending what the U.S. Supreme Court does with the pending petitions for review in the Proposition 8 and DOMA cases, and in any decisions it might issue upon review of these cases, Judge Jones' ruling could become little more than an interesting footnote

An alternative ground for applying heightened scrutiny would be if the policy denied a fundamental right. Plaintiffs argue the right to marry is fundamental.

tional marriage and same-sex domestic partnerships." Repeating a contention that opponents of same-sex marriage have frequently argued without any factual proof, he was willing to credit speculation that abandoning this distinction might cause different-sex couples to refrain from marrying. Proof of this contention has always been lacking, and to continue making it in light of the historical record in states that have allowed same-sex marriages is purely ignorant. Despite being the first state to allow same-sex couples to marry, beginning in May 2004 and extending now for more than eight years, Massachusetts continues to have one of the highest marriage rates and lowest divorce rates in the nation, and so far the proponents of this theory have failed to come up with any data showing a decline in the marriage rate among different-sex couples correlated with, much less caused by, any state's

in legal history. On the other hand, if the Supreme Court decides to avoid answering the underlying 14th Amendment question concerning a right of same-sex couples to marry—which it could do by disposing of these cases on other grounds—Judge Jones' decision, together with the Hawaii decision from earlier this year, would place the issue on the doorstep of the 9th Circuit Court of Appeals, a court that has also shied from the issue so far but signaled a disposition towards a more liberal analysis of the constitutional issues in both its Proposition 8 decision and its recent ruling rejecting a challenge to preliminary relief in the Arizona domestic partnership benefits case. Stay tuned for further developments.

Judge Jones, a graduate of Brigham Young University and UCLA Law School, was appointed to the district court in Nevada in 2003 by President George W. Bush. ■

Disclose or Get Hosed? The S.Ct. of Canada on Safe Sex Practices for HIV+ Individuals

This case is particularly interesting to the LGBT community considering the high rate of HIV transmission among men who have sex with men (“MSM”). The decision suggests what precautions or discussions an HIV-positive individual should take with their sexual partners in Canada. In *R. v. Mabior*, 2012 S.C.C. 47, the Supreme Court of Canada addressed the issue of when non-disclosure of HIV status amounts to fraud vitiating consent to sexual activity. The Supreme Court reaffirmed the test set forth in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (Can.), but added a “realistic possibility” of transmission requirement to prove the element of deprivation. The test still suffers from ambiguity, but Chief Justice C.J. McLachlin wrote an impressively well-reasoned decision that stands as a model for other jurisdictions to adopt.

Mr. Mabior is HIV-positive. During the period of time in question, Mr. Mabior lived in a party house and led a raucous lifestyle enjoying the pleasurable company of many women, including the nine complainants in this case. It is unclear what protective measures were taken against the transmission of STDs. Sometimes Mr. Mabior used a condom, but at other times he didn’t. Eight of the nine women testified that they would not have had sex with Mr. Mabior if they knew he was HIV-positive.

The trial judge convicted Mr. Mabior on six counts and acquitted on the other three, holding that sexual intercourse using a condom when viral loads are undetectable does not place the partner at significant risk of serious bodily harm.

Mr. Mabior appealed the six convictions. The Court of Appeal upheld two convictions, but acquitted on the other four, holding that either low viral loads or condom use could negate significant risk of serious bodily harm.

The Crown appealed the four acquittals. The Supreme Court of Canada used this opportunity to refine the test set forth in *Cuerrier*, which had been

criticized by many as uncertain and overbroad.

Sections 265 and 273 of the Canadian Criminal Code create a cause of action for aggravated sexual assault if an individual obtains consensual sex with another through fraud. The deceit practiced on the victim operates to vitiate consent, making the interaction nonconsensual and opening the door for criminal prosecution.

Section 265(3)(c) provides that consent is invalidated where the complainant submits or does not resist by reason of “fraud.” The Supreme Court of Canada defined “fraud” for purposes of section 265(3)(c) in *Cuerrier*. The *Cuerrier* test to prove fraud vitiating consent includes two elements: “(1) a dishonest act (either falsehoods or failure to disclose HIV status); and (2) deprivation (denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm).”

The Court began its analysis by discussing four considerations applicable to the interpretation of “fraud.” First, the Court acknowledged that the purpose of the criminal law is to identify, deter, and punish conduct that society deems morally blameworthy.

Second, the Court considered the common law and statutory history of fraud vitiating consent to sexual relations. Originally, the common law adopted a liberal approach where failure to disclose STD status vitiates consent. But from the late 19th century through the late 20th century, courts switched gears and adopted extremely conservative Victorian values. During this era, the only way to prove fraud vitiating consent was by proving deceit as to the sexual nature of the act (e.g., the victim believed she was undergoing a medical procedure and only later realized the sexual nature of the act) or as to the identity of the man. Considering the difficulty of proving either, the doctrine was rarely invoked.

A century later, the Canadian legislature, in an effort to eliminate sexual

discrimination in the Criminal Code, overhauled the laws regarding sexual offences to comport with the constitutional values stated in the Canadian Charter of Rights and Freedoms. As such, the Court expressly rejected the Victorian-era decisions emanating from the previous century.

Third, the Court stated that any law must be interpreted consistently with the Canadian Charter of Rights and Freedoms, which espouse values of equality, autonomy, liberty, privacy, and human dignity within the law. Despite the fact that the Charter values are not directly applicable, the Court stated that the values are a relevant consideration in interpreting the criminal law in question.

Finally, the Court examined the practices of other common law jurisdictions that have contended with this issue. Among the three jurisdictions examined—England, Australia, and New Zealand—none criminalize mere exposure to an STD without actual transmission. The Court discounted this point stating that “it sounds a note of caution,” but is not conclusive.

After discussing each of these four considerations at length, the Court reaffirmed its support for the test enunciated in *Cuerrier*, but with the intent to resolve the problems of uncertainty and breadth that have emerged in its application.

Before doing so, however, the Court discussed six other tests suggested by the parties. The six tests are: the active misrepresentation approach, the absolute disclosure approach, a case-by-case fact-based approach, judicial notice of the effect of condom use, relationship-based distinctions (only applying fraud to situations where the parties have a relationship of trust, quasi-trust, or confidence), and the reasonable partner approach. The Court rejected each one for various reasons, but most importantly because the test set forth in *Cuerrier* is the most effective in capturing an area that is neither too narrow nor too broad, that is adaptable to different facts and circumstances, and that is sensitive to technological developments.

The Court settled on “building greater certainty” into the *Cuerrier* test. Essentially, the *Cuerrier* test remains unchanged, as the Crown must still prove

the two elements of a dishonest act and deprivation, but the Court elaborated on the principles and facts relevant to determine when sexual relations with an HIV-positive person pose a “significant risk of serious bodily harm” (a part of the second element).

The determination of whether the facts establish a “significant risk of serious bodily harm” is a question of law. The term “serious bodily harm” means “any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim.” The Court stated that “significant risk of serious bodily harm” falls between the two extremes: any risk of transmission of HIV whatsoever or high risk of transmission of HIV. The Court dubbed this range the “realistic possibility” of transmission of HIV.

The Court stated six reasons for adopting the “realistic possibility” standard. First, adopting an “any risk” test is unacceptable because it would

of transmission and the precedent from the 19th century when only serious deceptions with serious consequences would operate to vitiate consent.

Fifth, the “realistic possibility” standard balances the complainant’s interest in autonomy and equality, while not increasing the breadth of the criminal law to encompass any slight with questionable culpability.

Finally, the “realistic possibility” standard is supported by case precedent that set the bar for risk of transmission above “any risk.”

The Supreme Court then proceeded to consider whether the *Cuerrier* test, as refined here, is satisfied. There are three relevant factors to determine whether there was a realistic possibility of transmission of HIV from Mr. Mabior to the complainants: (1) baseline risk for vaginal intercourse when the male partner is HIV-positive; (2) reduction in risk with condom use; and (3) antiretroviral therapy.

mission by 89 to 96%. But the Court also gave credence to expert testimony that antiretroviral therapy alone is not a safe-sex strategy and that a condom must still be used.

Based on the evidence presented, the Court stated that neither condom use nor antiretroviral therapy alone negate a realistic possibility of transmission. However, both condom use and antiretroviral therapy together reduces the risk to a speculative possibility.

Applying these determinations regarding the “realistic possibility” of transmission of HIV, the Court reinstated three convictions against Mr. Mabior because, despite having a low viral load, Mr. Mabior did not use a condom. The Court affirmed the acquittal where Mr. Mabior used a condom and possessed a low viral load.

The Court qualified its decision, and the relevant statistical analysis, only to HIV transmission. Because an inverse relationship exists between “significant risk”

The decision fell short of providing an unambiguous test for individuals to know what actions or inaction will lead to criminal culpability for HIV transmission.

convert the *Cuerrier* test into an absolute disclosure test.

Second, adopting a “high risk” test does not afford sufficient importance to the nature of the harm involved in HIV transmission. “Significant risk” and “serious bodily harm” are terms inversely related to one another because the more serious the STDs the lower the probability of transmission is necessary to achieve a significant risk.

Third, the “realistic possibility” standard fairly addresses the breadth issue of the *Cuerrier* test because it avoids the extremes of “any risk” versus “high risk” and makes the standard for culpability fall somewhere in between.

Fourth, the “realistic possibility” standard is consistent with the common law and statutory history of fraud vitiating consent to sexual relations because it strikes a balance between “any risk”

The evidence presented to the Court on the risk of transmission from an HIV-positive male with an unreduced viral load having unprotected sex with a female varied. Suffice to say, at worst there was a 0.26%, or 1 in 384, chance of transmission.

The evidence adduced indicates that consistent use of a condom reduces the risk of HIV transmission by 80%. The Court of Appeal held that use of a condom reduces the risk of HIV transmission “below the level of significance.” However, the Supreme Court disagreed and held that, according to expert testimony, “the risk might still fall above the ‘negligible’ threshold.”

The evidence presented to the Court on antiretroviral therapy indicates that treatment could reduce the quantity of HIV copies in the blood to an undetectable level and reduces the risk of trans-

and “serious bodily harm,” other, non-life threatening, STDs would be analyzed differently to determine if there exists a “realistic possibility” of transmission.

In conclusion, this decision carefully and meticulously expressed its reasoning, but fell short of providing an unambiguous test for individuals to know what actions or inaction will lead to criminal culpability. However, with respect to HIV-positive individuals in light of current knowledge, it seems to provide that male HIV-positive individuals who receive effective antiretroviral therapy and use condoms with their partners for vaginal intercourse will not need to disclose their HIV-status in order to avoid criminal liability.

—Gillad Matiteyahu

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WA State App. Ct. Affirms Division of Property for Separated Lesbian Couple

The Court of Appeals of Washington, Division 1, has held in *Rinaldi v. Bailey*, 2012 WL 5292816 (Wash. App. Div. 1, October 29, 2012) (not reported in P3d), that Linda Rinaldi was entitled to equitable division of her shared assets with Tamar Bailey, a woman with whom she had been in a relationship for 15 years.

Rinaldi and Bailey met in 1988 while living in Anchorage, Alaska. Rinaldi moved to California in 1991, while Bailey remained in Anchorage working as a pilot for FedEx, and the two remained in touch. In 1993, they started spending time together and decided “to move the relationship to a physical intimate relationship.” In September 1993, Rinaldi moved to Anchorage to live with Bailey. In 1994, they jointly moved to

In March, 2007, Rinaldi and Bailey each submitted applications to obtain insurance and checked the box indicating each was in a committed relationship, and executed new wills naming each other as the sole beneficiary.

Rinaldi and Bailey separated in October 2007 and Bailey moved to Alaska. Rinaldi filed with King County Superior Court a “Petition for Dissolution of Committed Intimate Relationship and/or Complaint/Petition for Equitable Distribution, Partition or Property and Other Relief.” When a trial was scheduled for May 24, 2010, Bailey sought to continue the case to a later date claiming her lawyer had recently undergone “emergency” surgery and further had a scheduling conflict; however, her lawyer emailed the court saying she would

court awarded Rinaldi their Seattle house, her IRA, and an “equalizing payment” of \$218,806, and awarded Bailey her IRA, her FedEx 401(k), and her FedEx pension.

Bailey appealed the decision to the Court of Appeals, arguing that the court erred in: 1) denying her continuance request; 2) ruling that she and Rinaldi were in a committed relationship; and 3) refusing to enter a QDRO awarding Rinaldi her share of the FedEx pension instead of the \$218,806 judgment.

On appeal, in an unpublished decision to which the other two members of a panel of the court concurred, Judge Ann Schindler first upheld the denial of Bailey’s continuance request, stating that Rinaldi had argued that several of her witnesses had already purchased

We not only have two individuals who did not file joint tax returns, there is a great deal of uncertainty as to whether federal law regarding same sex couples would permit a QDRO.

Seattle, and in 1995 bought a house together. In 1996 they each executed a will naming the other as the sole beneficiary. Rinaldi opened her own business account and designated Bailey as a co-signer on the account. They purchased cars together and were jointly insured on the cars. In 1999, they used their house as collateral for a loan to buy a share in an airplane.

In 2001, Rinaldi opened a joint bank account with her sister without telling Bailey, and between 2001 and 2006 deposited approximately \$25,000 of her earnings into that account. At trial, Rinaldi testified that she wanted to have money for living expenses if she and Bailey split up, and stated that “it gave me some feeling of that I could continue to try to work out the problems between us knowing that I was not as vulnerable as I was without the account.”

be available on that date, and the court denied the continuance request.

During a 6-day trial, Rinaldi, Bailey, an expert accountant, a sociologist, and other witnesses all testified about Rinaldi and Bailey’s relationship. The accountant valued Bailey’s FedEx pension for the period of time Rinaldi and Bailey were together at \$581,933, and this amount was not disputed. Following the trial, the court issued a decision concluding there was “overwhelming evidence” of a committed intimate relationship, and that an equal division of the property acquired during the relationship was just and equitable. Bailey sought entry of a Qualified Domestic Relations Order (“QDRO”) which would have assigned Rinaldi a portion of her FedEx pension; however, the court ruled that the facts and circumstances did not warrant a QDRO. The

plane tickets to travel to Seattle, and that Bailey’s attorney “represented that she was ready for trial.”

After noting that the committed relationship doctrine extends to same-sex couples, Judge Schindler stated that the court must consider five factors in determining whether a committed intimate relationship existed: continuous cohabitation; the duration of the relationship; the purpose of the relationship; pooling of resources and services for joint projects; and the intent of the parties. Bailey had argued that because Rinaldi refused to have a wedding or other ceremony and “secreted common funds,” the court had erred in concluding they were in a committed intimate relationship.

Judge Schindler upheld the court’s ruling, holding that “multiple bank accounts and credit cards were opened list-

ing both individuals as joint owners, [t]hey established each other as beneficiary on retirement accounts and insurance policies, [e]arnings were pooled to pay common debts and household expenses, [and] both women executed wills naming each other as the sole beneficiary and executed powers-of-attorney for both financial and health care decisions.” With regard to Bailey’s arguments regarding Rinaldi’s refusal to get married Judge Schindler held that “Ms. Rinaldi testified about... why a public wedding presented cultural, political, and religious challenges for her. In this circumstance and in this relationship, the court concludes that Ms. Rinaldi’s refusal to marry is not evidence of the absence of her intent to be in a committed relationship with Ms. Bailey.” Finally, Judge Schindler concluded that while the secreting of funds “might be evidence of a lack of commitment to a relationship, balanced against all of the other evidence offered at trial, the court does not find this one fact dispositive of how these women lived their lives together.”

With regard to Bailey’s argument that the FedEx pension was “marital property” that should be distributed to Rinaldi as her dependent and that a QDRO should have been entered awarding Rinaldi her share of the FedEx pension instead of the \$218,806 “equalizing payment,” Judge Schindler held that the trial court correctly concluded that under the facts, Rinaldi did not qualify as an “alternate payee under ERISA,” particularly because the leading case law relied upon the fact that a person was a “dependent” for tax purposes in order to find them an “alternate payee.” Here, Judge Schindler stated: “we not only have two individuals who did not file joint tax returns, there is a great deal of uncertainty as to whether federal law regarding same sex couples would permit a QDRO to be issued,” and noted that there was no indication in the record that FedEx would implement such an order.

Last, Judge Schindler rejected Bailey’s challenge to the valuation of property, stating that “a trial court has broad discretion in valuing property” and further, that the accountant’s testimony of the FedEx pension’s value had not been disputed. Accordingly, Judge Schindler affirmed the trial court’s decree and awards.

—Bryan Johnson

ME Superior Court Rejects Discrimination Claim on Behalf of Transgender Student

On November 20, Justice William R. Anderson of the Maine Superior Court in Penobscot dismissed a case brought by a transgender student’s parents and the Maine Human Rights Commission (MHRC) against the student’s school for discrimination in education and discrimination in public accommodation. The Plaintiffs alleged severe bullying by fellow students, and discriminatory practices by school officials. *Doe v. Clenchy* (Nov. 20, 2012).

The student, named Susan Doe in the complaint, is a biological male who has always identified as female. While in the third grade in the Orono, Maine, school system, Susan began using the female restrooms with permission of the school. When she reached the fifth grade, however, she began to be harassed by a male student identified in court documents as “JM.”

JM, acting on his grandfather-guardian’s instructions, followed Susan into the female restrooms at the school on September 28, 2007, and proclaimed that he “was a girl using the girls’ restroom.” JM was sent to the principal’s office and told school officials that his grandfather told him that if Susan could go into the girls’ restroom, so could he.

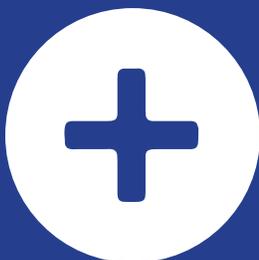
This was unfortunately not Susan’s last run-in with JM, although the Plaintiffs concede that the school disciplined JM and discouraged him from further harassment. Eventually things got bad enough that the school informed the police of JM’s actions, and the school resource officer accompanied the police to speak with JM’s grandparents directly. This prompted the grandfather to dig in his heels on his position that his grandson had the same right to use the girls’ restroom as Susan, and he agreed to stop sending JM into the restroom behind Susan only if she would use the gender-neutral staff facility instead. The grandfather contacted the Christian Civic League, and due to a flurry of press coverage, Susan was forced to stay home from school.

Rather than fight it out with JM, his grandfather, and the Christian Civic

League (and, likely to avoid a high-profile hot button issue), the school asked Susan to stop using the female restrooms and instead use the staff facility. Susan and her parents objected, but Susan complied. Eventually Susan resumed using the female restrooms, however, and while entering on one occasion noticed JM giving her a “creepy look.” Susan’s teacher also noticed JM’s staring problem, and noted that he would keep his eyes on Susan “even as he continued down the hall toward the boys’ room. He stood outside the boys’ room and continued to watch her as she stood in the hall with some of her friends near the girls’ room door.” JM would “stand and watch” as Susan walked down the hall, and would not go into the boys’ restroom until Susan had entered the area of the unisex bathroom.

The school does not dispute JM’s actions, and admits that JM chased Susan down the hall during an after-school event, and would loudly proclaim his grandfather’s views within earshot of Susan. JM was finally removed from Susan’s classroom in April of 2008, after which things appeared to get better for her.

After she had completed the fifth grade, the district determined that Susan should use the single stall unisex restroom when she transitioned to middle school, although once school started she occasionally used the female facilities. JM noticed her using the facilities, and once again followed her in and harassed her. After her daughter’s harassment by JM and an additional incident at a public pool over the summer, Susan’s mother agreed that an “eyes on” staff member would keep watch over Susan for a period of two months to ensure her safety and comfort, but soon the two months extended to an indefinite period. Susan’s mother specifically stated that she did not want the program, but that “something had to be done.” In her opinion, although a few other students also harassed Susan, JM was the problem and the school was responsible for fixing it.



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After Susan's sixth grade year, the family moved from the Orono area so that Susan could attend a different school. They subsequently filed suit (along with the Maine Human Rights Commission) against the school district, and each party eventually filed motions for summary judgment.

Justice Anderson's opinion began by agreeing with the Plaintiffs that the Maine Human Rights Act forbids discrimination in the regulation of restroom usage, because the Act states that it is unlawful to discriminate against any person on account of sex or sexual orientation in terms of public accommodations. However, Anderson pointed out that a later clarification explicitly stated that schools could legally separate restroom usage "by sex." Throughout his opinion, Anderson consistently took a narrow view of the definition of "sex," going so far as to quote the Black's Law Dictionary definition regarding biological gender.

Because the Maine Human Rights Commission clarified that schools may segregate toilet facilities based on sex, the court found that the only germane issue is whether the regulation is an adequate defense to the school's actions in relation to Susan and her use of the staff unisex bathrooms. Anderson concluded that the clarification is indeed adequate, as the school was only doing as the statute intended by separating each biological gender. The court also touched on the thorny issue of how biological sex intersects with sexual orientation in terms of discrimination laws, but in the end Justice Anderson relied largely on the assertion that the plain language of the law allowed the school to exclude Susan from using the girls' room because of her male genitalia.

Plaintiffs' next claim, that the school ran afoul of laws prohibiting education discrimination by harassment, also failed. Though Susan's parents and the MHRC claim that the school violated the law on its face, the statute bars "aiding and abetting" another in acts of discrimination. The court found that the district's actions do not represent enough of a question of fact as to whether they rose to the level of "aiding and abetting" JM necessary to survive summary judgment.

However, Plaintiffs also raised the issue of the application of federal dis-

crimination principles. Under these principles, the school could be liable for student-on-student bullying even without rising to the level of aiding and abetting. To survive the motion to dismiss, Plaintiffs must show that there is a genuine issue of fact as to whether the harassment was so "severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999). Through a convenient application of the more favorable of two emerging standards (Anderson applies the standard cited by defendants – that the school showed deliberate indifference to Susan's plight – opining that schools should be given a wider berth in these matters because, essentially, children will be children), the court found that Plaintiffs had not met their burden, even though the family had to move out of the district to get their child a bully-free education. The Plaintiffs argued that the standard should be on par with that applied to employment discrimination cases, under which a plaintiff must only show that the harassment is known or should be known and there has been a failure to take appropriate remedial action. Anderson rejected this standard, however, and found that no jury could conclude that the school was "deliberately indifferent" to the harassment of Susan, because they reprimanded JM. The court also noted that the "school" reported JM's grandfather to the police, although by the court's own recitation of the facts it appears it was not a high ranking school official or a district decision to contact the police, but rather that of a single "resource officer."

The suit is far from dead, regardless of Anderson's dismissal, as Gay and Lesbian Advocates and Defenders (GLAD) have vowed to take the issue to Maine's highest court. The day the case was dismissed they sent out a fiery press release, and are currently planning an appeal.

—Stephen Woods

Stephen E. Woods is a Licensing Associate at Condé Nast Publications.

Coast Guard App. Ct. Orders Sodomy Case Retrial

On November 7, 2012, the U.S. Coast Guard Court of Criminal Appeals overturned a sodomy conviction of a former Gunner's Mate First Class, in *U.S. v. Medina*, 2012 WL 5419353. Wilson Medina was tried by general court-martial in 2009, and pleaded guilty to an act of sodomy in violation of Article 125 of the Uniform Code of Military Justice (UCMJ) and assault consummated by a battery in violation of Article 128 of the UCMJ. Medina was sentenced to 13 months confinement, reduction to E-1 grade from E-6, and a bad conduct discharge.

In his first appeal, Medina argued that based on unreasonable and unexplainable post-trial delay, his conviction and sentence should be set aside. The U.S. Coast Guard Court of Criminal Appeals reduced his sentence to a period of confinement to eleven months, reduction of grade to E-2, and a bad conduct discharge, but otherwise

tion. Station Cape May is a small-boat station adjacent to Training Center Cape May. Medina was grade E-6 and Seaman JM was grade E-3.

About a week after Seaman JM arrived at Station Cape May, Medina invited him over to his off-base residence to watch a boxing match with him and his wife and children. Once the wife and kids went to bed, Medina pushed his hand down Seaman JM's pants and grabbed his penis, without permission. The court explains that both Medina and Seaman JM had drunk a significant amount of alcohol.

Seaman JM was able to "forcibly remove[]" Medina's hand from his pants. Seaman JM also expressed his disapproval, "stating that everything [Medina] had taught him at boot camp was 'out of the window.'" Medina then apologized.

However, Seaman JM asked if he could stay over at Medina's house, and Medina said

discipline, or Service discrediting." Medina responded: "Because I was ... Sir, because I was an E-6 and he was an E-3, and I was his former Company Commander." The appellate court characterized this inquiry as bare-bones and thus insufficient to bring the private consensual sexual activity at issue outside of *Lawrence*. Therefore, the appellate court set aside Medina's guilty plea as "improvident" and remanded for retrial of the sodomy charge.

A further issue, which resulted in disagreement amongst the panel, was whether the appellate court could resentence the defendant based solely on his conviction of assault consummated by a battery. Voting 2-1, the appellate court held that a sentence reassessment was not possible given the facts of the case and the procedural history, requiring the remand. Judge Duigan explained that although the offense occurred between a company commander and his former trainee, the

The App. Ct. found that the military judge had failed to discuss why the conduct was outside of the constitutionally protected liberty interests enunciated by *Lawrence*.

affirmed his conviction (*U.S. v. Medina*, 69 M.J. 637 [2010]).

Now, on his second appeal, Medina argued that there were two errors made by the military judge. First, the sodomy conviction was unconstitutional under *Lawrence v. Texas*, 539 US 558 (2008), as applied to the military in *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) and *U.S. v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004). Second, he argued that his plea was "improvident because the military judge failed to distinguish between constitutionally protected and criminal behavior, and thus failed to explain the distinction to (him) during the plea inquiry."

The underlying facts of the case are as follows: In October 2007, Medina was a company commander at Coast Guard Training Center in Cape May, New Jersey, responsible for training new recruits. Seaman JM, a graduate of Medina's company, was permanently assigned to Station Cape May after gradua-

tion. Later that night, Medina entered the bedroom he had offered to Seaman JM and performed oral sex on him.

Under *Marcum*, military courts ask the following three questions when a constitutional challenge to application of Article 125 is raised in a sodomy prosecution: [1] was the conduct of a nature to bring it within the liberty interest identified in *Lawrence*; [2] did the conduct encompass any behavior or factors identified in *Lawrence* as outside the analysis; and [3] are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? The Appellate Court reviewed the plea colloquy and found that the military judge had failed to discuss with or explain to Medina why his conduct was outside of the constitutionally protected liberty interests enunciated by *Lawrence*. One of the questions asked by the military judge was: "Tell me – you know, why this consensual sodomy was prejudicial to good order and

facts supporting conviction of the assault consummated by a battery were not aggravated. Seaman JM was able to resist Medina and Medina apologized. Seaman JM then asked if he could stay the night at Medina's house. Otherwise, there was no evidence that Seaman JM suffered any long-term harm, and based on those facts, the court was unable to reassess Medina's sentence.

Judge Havranek dissented because he did not believe the case needed to be sent back for resentencing. Judge Havranek stated that he was "reasonably certain that [Medina] would have received a sentence at least as severe as confinement for four months, reduction to E-2 and a bad-conduct discharge based upon his abuse of the trust and respect arising from the "special relationship between non-commissioned officers and trainees."

—Eric J. Wursthorn

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SCOTUS Rulings on Pending Cert. Petitions May Be Imminent

The suspense is killing us... Over the summer numerous petitions for certiorari were filed with the Supreme Court dealing with issues related to same-sex marriage and domestic partnership. The Court decides which petitions it is considering at its private certiorari conferences, and has listed these cases more than once on the agenda for discussion, but as of the beginning of December, there was no announcement of certiorari being granted or denied in any of the cases.

In the Proposition 8 case from California, a denial of certiorari would lead to the resumption of same-sex marriages in that state relatively quickly, as the 9th Circuit held that the vote on Proposition 8 violated the Equal Protection rights of same-sex couples in the absence of any rational basis for rescinding the marriage rights previously recognized by the California Supreme Court. After a denial of certiorari, the 9th Circuit would end the stay of its ruling and issue its mandate to the district court to put its Order into effect., and marriages could resume. The 9th Circuit has received requests from authorities in San Francisco and Los Angeles for 24 hours advance notice of when the mandate will issue, so they can prepare for the anticipated flood of marriage applications. If the Court grants certiorari, the case would likely be argued late in the spring, with a decision probably announced before the end of June. One possibility that nobody has been discussing is summary affirmance, but the Court does sometimes summarily affirm a lower court ruling with a citation to a controlling Supreme Court opinion. In this case, that would be *Romer v. Evans*, if a majority of the Court thinks the 9th Circuit correctly applied that precedent. But summary affirmance strikes us as unlikely, in light of the dissenting votes from the denial of en banc review in the 9th Circuit. *Hollingsworth v. Perry*, No. 12-144 (filed July 30, 2012).

The Arizona Domestic Partnership Benefits case is an appeal by Governor Jan Brewer of the 9th Circuit's affirmance of a district court's grant of preliminary relief to plaintiffs, pending

a trial of the question whether Arizona violated the Equal Protection rights of gay state employees by ending eligibility for partner benefits as part of a bill making cuts in state spending to close a budget gap. The benefits had been extended administratively by then-Governor Janet Napolitano, and were available to both same-sex and different-sex partners of state employees. When the legislature rescinded the benefits, notices were sent to employees that coverage for their partners would end. Lambda Legal promptly filed suit on behalf of gay employees who had been receiving benefits for their partners, and sought preliminary relief so that coverage could continue while the case was being litigated, as termination of benefits could cause irreparable injury to partners whose health would make it virtually impossible for them to obtain alternative coverage on the private market. As part of the grant of preliminary relief, the district court found that plaintiffs were likely to prevail on their Equal Protection claim, but there is no ultimate ruling on the merits in this case. The 9th Circuit affirmed the district court's grant of preliminary relief, ruling on an interlocutory appeal. *Brewer v. Diaz*, No. 12-23 (filed July 5, 2012).

Finally, the court faces petitions to review decisions by the 1st and 2nd Circuits and some federal district courts, all holding that Section 3 of the Defense of Marriage Act (DOMA), which forbids the recognition of lawfully contracted same-sex marriages by the federal government, violates the 5th Amendment Equal Protection rights of same-sex couples, who are denied numerous rights, benefits and privileges as a result. The 1st Circuit and the various district courts held that Congress lacked a rational basis for enacting Section 3. The 2nd Circuit, adopting the Justice Department's argument, held that Section 3 should be reviewed using the "heightened scrutiny" test, and that the provision did not substantially advance an important governmental interest. (The Justice Department's position, adopted in February 2011, was that Section 3 survives rational basis review, but not heightened scrutiny review.) The 1st

Circuit decision also rejected the state of Massachusetts' argument that Section 3 violated the 10th Amendment and Congress's power under the Spending Clause, and the state is petitioning the Supreme Court to review that ruling.

The continued postponing of rulings on these certiorari petitions gives rise to some speculation. Is the Court stuck on whether it would be premature to grant certiorari in the Arizona case, when the case is presented as an interlocutory appeal from a grant of preliminary relief pending trial? In the Proposition 8 case, is it possible that there are not four votes for a certiorari grant, but that an announcement is being held up because some of the conservative Justices are preparing dissents from the denial of certiorari? (This speculation originates with long-time journalist Lyle Denniston.) In the DOMA cases, are the Justices debating whether it makes more sense to take the 1st Circuit case, *Gill*, which found Section 3 to lack a rational basis but rejected the state's 10th Amendment and Spending Clause arguments, or the 2nd Circuit case, which held, in line with the Justice Department's argument, that DOMA was subject to heightened scrutiny, which it failed because it did not significantly advance any important state interest? Or are they concerned at the possibility that Justice Elena Kagan might feel an obligation to recuse in the 1st Circuit case because of her role as Solicitor General when that case was being litigated in the district court and initially appealed to the 1st Circuit? (Although the Solicitor General does not represent the government in the lower courts, this case was headed toward the Supreme Court so it is possible that the S.G. played a role in framing the Justice Department's position in the pending litigation.) The *Windsor* lawsuit was filed after Justice Kagan was no longer working in the Justice Department, so presumably there would not be a recusal problem were that case the vehicle for Supreme Court review, and the Solicitor General's office has suggested to the Court that the best case for it to take would be *Windsor*. There are also petitions from some district court rulings, seeking direct review bypassing the 9th and 2nd Circuits (cases from California and Connecticut).

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CIVIL LITIGATION NOTES

ILLINOIS – Cook County Superior Court Judge Sophia Hall ruled on November 30 that two churches and the Illinois Family Institute would not be permitted to intervene as defendants in pending litigation challenging the exclusion of same-sex couples from marriage. As to the churches, Judge Hall found that they would not have standing, since they would not be required to perform or recognize same-sex marriages if the plaintiffs prevail, due to their protection under the 1st Amendment's free exercise clause. As to the Illinois Family Institute, an organization formed to oppose same-sex marriage, Judge Hall ruled that their interest in the case is no greater than any member of the general public, so they lack the particularized interest for standing purposes. Although the attorney general declined to defend the lawsuit, county clerks from downstate Effingham and Tazewell counties have intervened as defendants, so government officials with standing are providing a defense to the marriage law, removing the need for a non-governmental intervenor to present the arguments. Judge Hall pointed out that the disappointed intervenor applicants could still submit amicus briefs to the court. *Chicago Tribune*, Dec. 1. Two cases have been consolidated for argument: *Darby v. Orr*, filed by Lambda Legal, and *Lazaro v. Orr*, filed by the ACLU.

KANSAS – The Court of Appeals of Kansas ruled on November 2 that a high school teacher could be subject to criminal liability for having consensual sexual intercourse with a student older than 16 years of age. Rejecting a constitutional challenge that was premised on the Supreme Court's due process ruling in *Lawrence v. Texas*, the court ruled in *State of Kansas v. Edwards*, 2012 WL 5373717, that the Supreme Court precedent did not apply to this situation. Judge Hill observed, "Because the statute applied in this case implicitly recognizes the disparity in power inherent in the teacher/student relationship, we conclude that the right of privacy does not encompass the right of a high school teacher to have sex with students enrolled in the same school system." The defendant, a 30-year-old male Wichita

high school choir director, had consensual protected sex in his home with A.C.A., an 18-year-old female student (who was also a single mother as of the date of their sexual activity). The district court found the defendant guilty of violating K.S.A. 21-3520(a)(8) in a bench trial, the defendant having waived a jury. While the court of appeals acknowledged that as a result of *Lawrence* "the constitutional right of privacy is now out of the shadows and has become clearer with each Supreme Court case dealing with the subject," it added the "caution that liberty must never be confused with license." Construing the statute, the court said, "When read in its entirety, it is clear that the intent of this statute is to prohibit sexual conduct of certain persons who have authority over other persons where the ability to freely consent is questionable." The court reviewed decisions from other jurisdictions noting a limitation on *Lawrence* in such cases, and concluded that there was no "fundamental right" at stake in this case, particularly noting the Supreme Court's comment in *Lawrence* that "the present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." The court found that the teacher/student relationship falls within this category.

CALIFORNIA – The 9th Circuit Court of Appeals Judicial Council ruled that the federal district court in San Francisco should pay an employee's costs for providing insurance coverage for his husband, citing past rulings within the Circuit requiring recognition of legal same-sex spouses for this purpose, according to *sf-gate.com* (Nov. 24). The ruling responded to a complaint by Christopher Nathan, a law clerk for U.S. Magistrate Maria Elena James, who sought coverage for his husband, Thomas Alexander. The couple wed during the "window period" in 2008 between the California *In re Marriages* decision and the passage of Proposition 8. The California Supreme Court subsequently ruled that such marriages remained valid under California law, and the Circuit Judicial Council has now ruled several times

that federal court employees in the 9th Circuit are entitled to recognition of such marriages for employee benefit purposes. The Office of Personnel Management disagrees, and if the district court fails to pay for the insurance, Nathan will have to file suit for damages. Of course, this entire farce could be quickly resolved were the Supreme Court to affirm the several district and appellate court rulings holding Section 3 of DOMA unconstitutional.

MAINE – The state's ethics commission has announced that it will impose a \$2,000 fine on the National Organization for Marriage, an anti-gay lobbying group, for missing a campaign finance reporting deadline in connection with NOM's expenditures to oppose the marriage equality initiative that was approved by the state's voters on Nov. 6. The Commission Executive Director noted that a key filing was 14 hours late. Normally, the fine would be \$8,000 due to failure to report an \$800,000 contribution to Protect Marriage Maine, which was coordinating opposition to the initiative, but the E.D. recommended that because the filing was eventually made, the amount of the fine should be reduced. *Portland Press Herald*; *Kennebec Journal* (Nov. 29).

NEW JERSEY – Some gay men who were subjected to "conversion therapy" – without success – have brought suit in Hudson County Superior Court against a group called Jews Offering New Alternatives for Healing (JONAH). The legal theory underlying *Ferguson v. JONAH*, filed on Nov. 27, invokes the New Jersey Consumer Fraud Act. According to the complaint, JONAH bases its conversion therapy "on the misguided and erroneous belief that being gay is a mental disorder – a position rejected by the American Psychiatric Association four decades ago." Describing allegations in the complaint, the *New Jersey Law Journal* (Nov. 28) stated, "Participants are allegedly required to strip nude during sessions, intimately hold other males, spend more time with other nude males in health clubs and bath houses, beat effigies of their mothers with a tennis racket, and absorb invectives such

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as ‘faggot’ and ‘homo.’” Just a minute – this sounds to us like Saturday night at the gay baths in the days before the AIDS epidemic, except we missed the part with the tennis racket. How this was supposed to “reorient” gay boys into being straight boys is beyond us. Regardless of how this particular lawsuit turns out, one hopes that the publicity surrounding it will embarrass the defendants into ceasing their activities.

NEW YORK – A settlement has been reached in *Equal Employment Opportunity Commission & Aksal v. Michael Cetta, Inc.*, Civ. No. 09-CV-10601 (S.D.N.Y.), pending same-sex discrimination case under Title VII brought by the EEOC on behalf of male waitstaff at Sparks Steakhouse complaining about hostile environment harassment by the male maitre’d of the establishment. The complaint filed by EEOC alleged that the employer allowed this individual to “create a sexually hostile and abusive work environment for male waiters, including by physically harassing them and making offensive sexual remarks.” The settlement includes a payment by the defendant of \$600,000 and agreement to undertake various remedial measures, although Sparks is not agreeing to dismiss the maitre’d, who will merely receive a “final warning.” Pretrial motions had been pending, and will now not be decided. Part of Sparks’ defense had been its claim that the EEOC had filed suit without thoroughly investigating the complaints they received. Sparks does not admit violating Title VII’s ban on sex discrimination as part of the settlement.

WEST VIRGINIA – A jury in Kanawha County Circuit Court found on Nov. 16 that three members of the Bob Burdette Center board violated public policy by rescinding a job offer to Jessica Hudson to be the Center’s executive director after discovering through her Facebook page that she was in a relationship with another woman, according to a Nov. 17 report in the *Charleston Gazette*. Hudson had not sought monetary damages, so the jury awarded none. She was merely seeking vindication and a declaration that her rights had been violated. The legal

theory underlying the suit was not clear from the newspaper report. West Virginia does not prohibit sexual orientation discrimination, actual or perceived, by statute, but the article reported that the jury found a violation of public policy without going into more detail. Circuit Judge Carrie Webster presided at the two week trial. While reporting its ruling on sexual orientation discrimination, the jury also reported finding that the board did not discriminate based on gender stereotypes and was not liable for intentional infliction of emotional distress. The three members of the board who voted to rescind the job offer were found individually liable, while the two who voted against rescission were absolved of liability. ■

NEW YORK – A Manhattan jury found Renato Seabra guilty of second-degree murder in the death of Carlos Castro, a Portuguese TV personality. Seabra murdered Castro in their hotel room in Manhattan, after Castro informed him that he was breaking off their relationship. Seabra did not deny killing Castro, but pleaded not guilty by reason of insanity, claiming to have been responding to a compulsion caused by mental illness, a defense rejected by the jury. The verdict was rendered Nov. 30, the day after Judge Daniel P. Fitzgerald charged the jury and deliberations began. *GayCityNews.com*, Nov. 30.

TEXAS – The Justice Department announced on Nov. 8 that ten years had been added to the prison sentence of John Hall, 27, after his guilty plea to a charge of assaulting a fellow inmate in the Federal Correctional Institution in Seagoville, Texas, because of the victim’s perceived sexual orientation. *U.S. v. Hall*. The FBI Dallas Division investigated after Hall assaulted the fellow inmate on December 20, 2011. According to the news release, as reported on Nov. 9 in the *Dallas Morning News*, Hall “repeatedly punched and kicked the inmate in the face, breaking his teeth, ‘while calling the victim gay slurs.’” The investigation uncovered no provocation for the attack. Prosecutors charged Hall with a violation of the Matthew Shepard and James Byrd Jr. Hate

Crime Prevention Act. Hall had previously been scheduled to be released from the low-security institution next August. ■

FEDERAL – U.S. Rep. Jackie Speier (D-Calif.) introduced a resolution titled “Stop Harming Our Kids,” co-sponsored by Rep. Ted Deutch (D-Fla.) and Rep. David Cicilline (D-RI). The resolution calls for action to protect LGBT youth from forced conversion therapy, and was inspired by the recent enactment of a state law in California forbidding such treatments of minors. At a press conference on Nov. 28 announcing the resolution, Rep. Speier expressed concern that federal funds may have been spent on these treatments, which have been rejected as scientifically invalid by the American Psychiatric and Psychological Associations. Hailing California’s passage of S.B. 1172 (which is currently under attack in the courts), Speier said: “Being gay, lesbian, bisexual, or transgendered is not a disease to be cured or a mental illness that requires treatment. Any effort to change sexual orientation is not medicine, it’s quackery, and we should not be supporting it with taxpayer dollars.” The resolution would urge states to follow California’s lead on this issue. *Congressional Documents*, 2012 WLNR 25315104 (11/28/2012). * * * Over the course of the current session of the House of Representatives, co-sponsorship of the Respect for Marriage Act, a bill that would repeal DOMA and mandate federal recognition of legally contracted same-sex marriages, has gone from 109 upon initial introduction in 2011 to 159, a record number. (218 votes are needed for passage of legislation in the House.) The newest co-sponsor is Rep. Maxine Waters (D-Calif.), who signed onto the bill on November 16. With the addition of Waters, 34 of the 42 members of the Congressional Black Caucus are co-sponsors. The only Republican co-sponsor is Rep. Ileana Ros-Lehtinen (R-Fla.). Waters’ addition to the bill brings Democratic co-sponsorship up to 80 percent of the party’s members in the House. Because there will be an increase in the number of openly gay members and Democrats in the next session, bill sponsors expect the

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number of co-sponsors to grow immediately upon reintroduction of the bill in the next session. *Washington Blade*, Nov. 29.

CALIFORNIA – The San Francisco Health Commission has voted to create a “comprehensive program for treating transgender people experiencing mental distress because of the mismatch between their bodies and their gender identities,” the *Associated Press* reported on November 9. The program will include sex reassignment surgery, including mastectomies, genital reconstructions, and other related surgeries. The Commission agreed to a request by the city’s Board of Supervisors and the Transgender Law Center to remove sex reassignment surgery from the list of procedures that were specifically excluded from the Healthy San Francisco plan. However, this policy change is at present hypothetical, since city clinics and hospitals do not at present have the “expertise, capacity or protocols in place” to perform such procedures. * * * The San Francisco Board of Supervisors voted 6-5 on Nov. 21 to adopted a measure expanding the ban on public nudity to most public spaces in the city. The controversial measure, which drew unclothed protesters at City Hall, was sponsored by openly-gay Supervisor Scott Wiener, who represents the heavily-gay Castro district. Wiener asserted that many of his constituents, including gay constituents, were disturbed by the degree of public nudity in their neighborhood. The measure provided that certain public events at which nudity has become accepted may continue to allow it. Legal challenges to the measure are expected.

COLORADO – With Democrats capturing the majority in both houses of the legislature on November 6, it appears likely that the state legislature will pass the stalled civil union bill when it convenes in January. Senator Pat Steadman, the openly-gay legislator who has led the fight for enactment, noted sadly that his own partner had died from cancer in September, having been denied the right to get legal recognition from the state for their 12-year relationship. With openly-gay Denver Democrat Mark Ferrandino

being elected Speaker of the Colorado House of Representatives, where Democrats will have a 37-28 majority, and the Senate having approved the measure in the past, passage seems inevitable. Achieving marriage equality in Colorado will be more difficult, since votes passed a constitutional ban on same-sex marriage in 2006 which would have to be repealed or held unconstitutional before a marriage bill could come to a vote in the legislature. *Denver Post*, Nov. 29. The irony of this kind of situation is developed in an article by Prof. Scott Titshaw (see publications noted), observing that supporters of the successful marriage amendment may now find their handiwork contributing to undermining traditional marriage in their state; if Colorado passes the kind of law that has been enacted in Illinois and Nevada, allowing different-sex couples to have civil unions or domestic partnerships with rights paralleling marriage, it is possible that a more than negligible number of different-sex couples will opt for the non-traditional status instead of traditional marriage!

FLORIDA – During November, Hallandale Beach commissioners voted to approve an annual \$500 tax reimbursement for city employees who receive domestic partnership health coverage, in order to mitigate federal income taxes assessed for the value of such benefits. Employees who receive coverage for legal spouses are not taxed for the value of those benefits. In Oakland Park, city commissioners voted to require companies with more than 25 employees that seek contracts with the city worth more than \$100,000 to provide equal treatment in terms of employee benefits between employees with spouses and employees with domestic partners. The requirement allows for some exceptions, however, including when there is only one bidder on a contract, if there is an emergency need for the contract, or if the bidder is a religious organization. Also, since the focus is on equality, not a mandate for benefits, bidders that don’t provide employee benefits to their married employees are exempt. *Sun Sentinel* (Ft. Lauderdale), Nov. 12.

MISSOURI – The Springfield City Council voted unanimously on Nov. 19 to establish a citizen task force to study a proposal to add sexual orientation and gender identity to the city’s non-discrimination ordinance, according to a Nov. 20 report in the *Springfield News-Leader*. The proposed amendment was introduced last summer and stirred considerable controversy, with city hall packed for several public hearings. The 15-member task force will have six months to study the issue and make a recommendation to the council. It strikes us as absurd, when some municipalities have had such ordinances for several decades and none of the terrible things that opponents predict have actually occurred, that Springfield councilors feels they need to spend six months of “study” before deciding whether to adopt such a policy. * * * St. Louis County Council voted 4-3 to add “disability, sexual orientation and gender identity” to the county’s anti-discrimination regulations covering employment, housing and public accommodations, and to its hate crime law on November 27.

NEBRASKA – The Grand Island City Council overrode a veto by Mayor Jay Vavricek, reaffirming its decision to protect LGBT people from discrimination by the city. The council voted 6-4 to add sexual orientation to its existing ordinance. Two opponents of the measure changed sides in the override vote, one stating that he believed this was a decision for the council to make, not the mayor. “I believe the council has spoken,” said Mitch Nickerson after he cast his vote to override. The override passed 8-2. *www.theindependent.com*, Nov. 13.

NEW YORK – The common council of the city of Syracuse voted 7-1 on November 19 to add “actual or perceived gender identity or expression” to the city’s civil rights ordinance as forbidden grounds of discrimination. Mayor Stephanie Miner was expected to sign the measure into law. Councilor Jean Kessner introduced the amendment, which puts Syracuse in accord with six other cities in the state – New York, Buffalo, Rochester, Albany, Binghamton, and Ithaca – as well as West-

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chester, Suffolk, and Tompkins counties. A measure to similarly amend the state's Human Rights Law has been approved in the State Assembly, which Democrats control, but has been blocked from a floor vote in the Senate, which Republicans control. *Gay City News*, Nov. 27.

WISCONSIN – The City Council in U.S. Rep. Paul Ryan's hometown, Janesville, Wisconsin, voted 6-1 on Nov. 12 to approve a measure that would extend domestic partnership benefits to city and library employees and their partners. Ryan, who was the unsuccessful Republican vice presidential nominee, is a staunch opponent of domestic partnership benefits or any form of legal recognition for same-sex couples, and has stated support for a federal marriage amendment that would outlaw same-sex marriage nationwide. He has not offered any comment on his hometown's action. Janesville joins the state of Wisconsin and the cities of Appleton, Racine, Eau Claire and Manitowic, as well as Milwaukee and Marquette University, in providing such benefits to their employees. *Wisconsin Gazette*, Nov. 12. ■

LOS ANGELES COUNTY, CALIFORNIA – Voters in this major center of film production (including pornographic film production) approved a ballot measure on November 6 that will require the use of condoms during the filming of sexual intercourse within the city limits. Almost 56 of the voters supported the measure, which will incentivize adult film producers to relocate their activities outside the county. AIDS Healthcare Foundation President Michael Weinstein, an outspoken supporter of the measure, described it as "a major referendum on the subject of safer sex." The industry was expected to mount a legal challenge to its constitutionality, arguing that it seeks to criminalize conduct that is protected under the 14th and 1st Amendments, thus posing to the courts the question whether engaging in unprotected sexual intercourse as a form of artistic expression (rather than

private passion) is constitutionally protected. *Los Angeles Times* (November 7); *Associated Press* (November 12).

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS – Connie Thacker and Richard Roane, both of Grand Rapids, Michigan, are co-chairs of the new LGBT/Alternative Family Committee of the American Academy of Matrimonial Lawyers, which recently held its first meeting in Chicago. The Committee hopes to intervene in pending cases challenging Section 3 of the Defense of Marriage Act, and to present education to members of the Academy on counseling and representing alternative families. *mLive.com*, Nov. 13.

PENNSYLVANIA – State Representative Michael Fleck (R-Huntingdon) won re-election and then "came out" as gay, making him the only openly gay Republican state legislator in the U.S., at least for another month until an openly-gay Republican elected in Ohio takes office. Rep. Fleck's past was lived deeply in the closet, as evidenced by his achievements as an Eagle Scout (the Boy Scouts of America mandate dismissal of any scout who is openly gay) and a graduate of Liberty University (founded by Rev. Jerry Falwell on anti-gay Christian fundamentalist principles and not hospitable to openly-gay students). He married in 2002, and recently separated from his wife. He was targeted for defeat by the conservative Citizens Alliance for Pennsylvania in 2011, but survived to be renominated and re-elected in his conservative district, despite his moderate voting record in the legislature. In addition to being the only openly-gay Republican, he is also the only openly-gay Pennsylvania legislator until January, when openly-gay Democrat Brian Sims (D-Philadelphia) will be sworn in. Sims retains the distinction of being the first openly-gay candidate to win election in Pennsylvania. ■

UNITED NATIONS – In a historic vote on November 21, the third committee of the General Assembly overwhelmingly approved a resolution that included 'sexual orientation and gender identity'

in the course of condemning extrajudicial, summary or arbitrary executions. The resolution passed by a vote of 108 in favor, 1 against, 65 abstentions, and 19 absent. Prior to the vote, attempts by various groups to have the resolution watered down by omitting a specification of grounds including 'sexual orientation and gender identity' were rejected. Several governments specifically spoke about the importance of including sexual orientation and gender identity in the resolution. The passage was considered particularly timely in light of pending legislation in Uganda and Nigeria that discriminatorily targets gay people for harsh penalties, including the death penalty in Uganda.

AUSTRALIA – The federal government is proposed to revise the nation's anti-discrimination laws, including adding express prohibitions on sexual orientation and gender identity discrimination. They are also proposed to adopt the U.S.-style requirement that the burden of proof to justify an alleged discriminatory act be placed on the defendant if the plaintiff succeeds in alleging facts supporting a prima face case of intentional discrimination. The proposal would consolidate five separate statutes that address different kinds of discrimination. The opposition generally supports consolidation, but expresses hesitancy about the provision shifting the burden of proof. *ABC Premium News*, Nov. 20. * * * Federal Magistrate Joe Harman has ruled that a transgender father, referred to in court papers pseudonymously as "Ms. Parer," will be entitled to equal parental rights and responsibilities with her former wife, regarding their three girls, aged 7, 12, and 17. The ruling culminated a 3-1/2 year custody battle. The parents were married for twelve years before they split up and the mother remarried. Magistrate Harman rejected a bit to condemn Ms. Parer for living in a same-sex relationship and for giving his teenage daughter a "tin containing condoms." *Courier Mail* (Australia), Nov. 30.

AUSTRIA – The Administrative Supreme Court has ruled that a man who was dismissed from the constabulary in

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1976 for engaging in homosexual activity and whose pension has been reduced by 25% as a result has a valid claim under the European Convention on Human Rights and the Anti-Discrimination Directive of the European Union. Reversing decisions by the Ministers of the Interior and of Finance, the court ruled that the plaintiff, U.H., is entitled to an award of back-pay and recalculation of his pension. The plaintiff, now 70 years old, is represented by Dr. Helmut Graupner, president of an Austrian gay rights organization based in Vienna (RKL), whose news release about the court decision is the basis for this report. * * * RKL reports that the Constitutional Court has rejected claims for same-sex marriage and for registered partnerships to be performed in the Civil Registry Office where civil marriages are performed. Two couples, Walter Dietz and Boontawee Suttasom, and Manfred Hormann and Felix Moser, had applied to have civil marriages at the Civil Registry Office, but were turned down and appealed to the Constitutional Court. Although in the past the court has opined in other contexts that maintaining distinctions between heterosexual and homosexual couples violates equality requirements, in this case the court referred to its past rejection of claims for same-sex marriage, and opined that registered partners could go to the regional administrative offices, which normally handle such matters as issuing drivers' licenses, industrial licenses, residence permits, and other matters having nothing to do with civil family status. Dr. Graupner reported that RKL will seek to appeal this ruling to the European Court of Human Rights.

CANADA – The *Vancouver Sun* reported on Nov. 13 that the Provincial Court in British Columbia had acquitted Gordon Street, a gay man, on charges of welfare fraud, after Judge Darrell O'Byrne found that the charges dated to a time when Street and the man with whom he was living could not have married under local law. The government had claimed that Street was overpaid benefits because he failed to disclose that he was in a common-law relationship with another man.

According to the news report, Judge O'Byrne said that Street and his friend may have been "buddies with benefits" but that the government had not shown beyond a reasonable doubt that the men were in a common-law relationship that would have required such disclosure when Street applied for welfare benefits.

FINLAND – The European Court of Human Rights ruled Nov. 13 in *H v. Finland* (Appl. No. 37359/09), that Finland did not violate the Convention rights of a transgender woman who application for official recognition of her change of gender was denied because she did not want to divorce her wife and have their relationship converted to a registered partnership. Noting that same-sex registered partners in Finland were accorded almost all the rights of married couples, the Court found that Finland's failure to treat such relationships as marriages did not offend Article 9 (respect for private and family life) or Article 14 (discrimination). This seems consistent with the position that the Court has been taking on the issue of legal recognition for same-sex relationships. A summary of the decision was reported online by ILGA Europe.

ITALY – The city council of Milan voted to suspend its 45-year-old relationship with the City of St. Petersburg, Russia, to protest anti-gay laws in that municipality – most notably the "anti-gay propaganda" law that has stirred up much recent protest. The vote means that the city council and the mayor will cease organizing cultural and other activities with officials from St. Petersburg. *i newspaper* (UK), Dec. 1.

MOLDOVA – A Moldovan court ruled that Vitalie Marian had violated the rights of individuals identified on his website, Moldova Noastra, as "promoters of homosexuality." The court found that this on-line publication violated the right to private life and encouraged hatred against those named, and ordered Marian to provide compensation to each of the half dozen individuals on the list who had filed complaints, according to a report by ILGA-Europe dated Nov. 27. The lead plaintiff was a freelance journalist named Denis Cenusa. Praising the court's decision, Cenusa said that "it creates a positive legal precedent against the hatred based on the discrimination of sexual minorities."

PAKISTAN – Representatives of the transgender community have announced a charter of demand for rights, addressing various types of biases and discrimination, according to a Nov. 29 report by the *Daily Times* (Pakistan). At a roundtable discussion held in connection with announcement of the charter, there was a specific focus on access to education and voting rights.

RUSSIA – The *New York Times* reported on Nov. 23 that a Russian court threw out charges against singer Madonna for pro-gay comments she made during a concert appearance in St. Petersburg in August. An anti-gay group brought the charges under a law making it a crime to propagandize in favor of homosexuality to children. Upon proof that the audience at Madonna's performance was limited to adults, the court concluded that the local ordinance did not apply in this case. * * * The Moscow Regional Duma (a legislative body) has rejected a bill prohibiting promotion of homosexuality, thus refusing to join other cities, such as St. Petersburg, that have enacted such measures. However, the national legislature is considering similar legislation, which seems to have the support of President Vladimir Putin.

SERBIA – The Gay Straight Alliance Litigation Service in Belgrade reports that the verdict of the First Basic Court in Belgrade in a hate speech action against Belgrade City Assembly councilor and conservative Democratic Party of Serbia official Nebojsa Bakarec has become final. The lawsuit is based on articles 11, 12, 13 and 21 of the Serbian Anti-Discrimination Law, which extends to anti-gay hate speech. Bakarec published an article on the website of *Vidovdan Magazine* in October 2011 maligning gay people as abnormal and needing treatment by psychiatrists and psychologists. GSA Litigation Service brought the case to secure a judgment against Bakarec under which he

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is prohibited from publishing such views, and is required to pay the litigation costs of the plaintiffs. The court defined hate speech as “every communication undermining and intimidating a person or a group on the basis of race, skin color, ethnicity or nationality, gender, sexual orientation, religion or other characteristics, which contributed to incitement of violence and prejudices toward an individual or a group.” Hate speech is distinguished from ordinary statements of political opinions: “the essential threat of the expression of opinion with the elements of hate speech is in the message with such content that has as a goal to provoke certain negative consequences for a particular individual or a group depending on their personal characteristic.” It is up to the speaker in any particular situation to discern to “estimate responsibly and conscientiously where are the boundaries between the freedom of speech and hate speech,” said the GSA release dated October 29.

SINGAPORE – A gay couple, Gary Lim and Kenneth Chee, filed a lawsuit on November 30 seeking a declaration that Section 377A of the penal code, a sodomy law derived from British colonial statutes, violates the national constitution. Theirs is the second challenge now pending, as a court of appeal judge, V.K. Rajah, ruled in August that Tan Eng Hong had standing to pursue his constitutional attack on the law, under which he had been arrested for “engaging in oral sex in a public toilet,” according to a Dec. 1 report concerning both cases in the *Straits Times* (Singapore). Lim and Chee have been partners for 15 years, and have undertaken activist work in the gay community, including gather petition signatures seeking the repeal of Section 377A in 2007. The Government takes the position that the law is constitutional but is not actively enforced as a matter of policy. Justice Rajah’s decision finding that Tan Eng Hong had stated a potential valid claim commented that to the extent that the law applied to private, consensual sex between men, it is “arguably unconstitutional for inconsistency with Article 12,” the equal protection

provision of the constitution. This would be because it does not apply to women. Justice Rajah also noted that the government’s policy against active enforcement did not deprive Hong of standing, since the government could change its mind and begin active enforcement so long as the law remains on the books.

SPAIN – The Constitutional Court rejected a challenge to the law authorizing same-sex marriages on Nov. 6 by a vote of 8-3. The law was passed by a socialist government, and the minority People’s Party filed a constitutional challenge. Since then, the People’s Party has become the governing party, but the law remains in effect, and Justice Minister Alberto Ruiz-Gallardon said that the government would respect the court’s decision and not attempt to change the law through legislation, according to a report on the decision by ILGA-Europe.

UGANDA – The controversial anti-homosexuality bill, inspired and encouraged by certain U.S. Evangelical ministers, is back again. Rebecca Kadaga, speaker of the Parliament, has indicated that the measure is being “demanded” by Ugandans and will be passed as a “Christmas gift” to the people, even if it might sour relations with many western countries that have provided aid to the Ugandan government in the past. The bill’s sponsor claims that the provision concerning the death penalty for “aggravated” cases was being dropped, but a version of the bill in circulation still has the death penalty language in it. There were also reports of a version that does not directly mention the death penalty, but includes it by classification of crimes and references to other criminal law provisions. An aggravated offense would be one where the “victim” is a minor or disabled or the offender is HIV+ or a “serial offender.” It was reported that a U.S. Assistant Secretary of State for Africa met with Ugandan government leaders during the last weekend in November and expressed strong concern about this measure, which had been approved in committee on Nov. 23 and was expected to be put to a floor vote during December. (The U.S. State

Department subsequently asserted that the amendment had not been approved in committee.) Enactment of the measure, which might occur during December, would place Uganda out of compliance with various international human rights documents to which it is a signatory.

UNITED KINGDOM – British newspapers were reporting late in November that Prime Minister David Cameron and his coalition partner Nick Clegg had agreed to fast-track the issue of same-sex marriage. Previously the government had vaguely indicated that a bill to permit same-sex civil marriages would be brought up prior to the next parliamentary election, not due to take place for several years. But now they were saying that Cameron and Clegg had agreed to bring up such a measure early in 2013. Labor Party leader Ed Milliband has indicated that his party would support expanding the measure to authorize the established Church of England to perform same-sex marriages, although most leaders of the Church of England have opposed such a move. Since a substantial proportion of Conservative members of the House of Commons are opposed to same-sex marriage, Cameron’s bill will rely on support from members of the other parties for passage.

UNITED KINGDOM – An employment tribunal has awarded damages to a 22-year-old married man who was discharged by the Stoke and District Horticultural Society after he resisted and complained about being falsely labeled gay and being subjected to a hostile environment, about which he had complained. According to a press report, “He claimed he was repeatedly groped by the club’s treasurer, a self-confessed ‘dirty old man’ who admitted to picking up men for sex via the internet behind the back of his wife and children.” Judge Vivienne Gay ordered four officials of the club, located in Guildford, Surrey, to pay a specified sum to the victim – whose anonymity was preserved in press reports – for unfair dismissal and compensation for hurt feelings. *Daily Mail*, Dec. 1. ■

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President Obama has nominated **William Thomas**, an openly-gay African-American Florida state court judge, to the U.S. District Court for the Southern District of Florida. If confirmed by the Senate, Judge Thomas would be the second openly gay African-American (and first openly gay African-American man) to sit as a U.S. District Judge, having been preceded by Judge Deborah Batts (S.D.N.Y.), appointed by President Bill Clinton. Judge Batts was also the first openly LGBT federal judge. Judge Batts recently took “senior status” after having served nearly two decades on the district court in New York City. * * * President Obama has also nominated openly-lesbian Nitza I. Quinones Alejandro, a Philadelphia Common Pleas Judge, to the U.S. District Court for the Eastern District of Pennsylvania. Judge Quinones would be the first openly lesbian Latina to serve in the federal judiciary if confirmed by the Senate. * * * Two other openly gay Obama nominees for federal district court positions are pending before the Senate, Pamela Ki Mai Chen and Michael McShane. The Senate has previously confirmed three other openly gay judges nominated by President Obama, while the one nomination for an appellate judgeship was withdrawn in the face of Republican opposition.

California Governor Jerry Brown has nominated his secretary for legal affairs, **James Humes**, to a seat on the California First District Court of Appeal. If confirmed, Humes will be the first openly-gay appellate judge in California. Humes has a long career in government service, including a top position in the Attorney General’s office when Brown was serving as California Attorney General. During her prior period as Governor of California in the 1970s, Brown made history by appointing the first openly gay judge in the state, Stephen Lachs, and the first openly lesbian judge, Mary Morgan, both to the Superior Court. *San Francisco Chronicle*, Nov. 22.

The Williams Institute at UCLA Law School announced that **David Codel**, a litigation attorney in Los Angeles, will be the Visiting Arnold D. Kassoy Senior

Scholar of Law and Legal Director. Codel has represented plaintiffs in In re Marriage Cases, the California litigation that led to a state supreme court decision in favor of same-sex marriage, and also filed an amicus brief in the Perry litigation challenging Proposition 8. Codel is a Harvard College and Law School graduate who clerked for Judge Tatel (D.C. Circuit) and Justice Ginsburg (U.S. Supreme Ct.). He practiced in Massachusetts in association with Prof. Laurence Tribe (Harvard Law School), and also worked as a partner at Irell & Manella LLP in Los Angeles prior to opening his own law office in 2003. He will continue his private practice while assuming the duties of the Kassoy Scholar. * * * Williams Institute also announced that UCLA Law School will offer an LL.M. degree in Law and Sexuality, which may be the first such advanced law degree in the United States focusing on this topic. The program will be open to both United States and foreign-trained lawyers and will be closely associated with the Institute and its research programs. In addition to working on institute projects, LL.M. students will also take classes on related subjects and participate in a workshop focused on sexuality and the law. Completion of the program will also require completion of an extensive writing project.

Immigration Equality has announced an opening in its Washington, D.C., office for a **Legislative Lawyer**, who “will engage in legislative, administrative and regulatory advocacy and policy work on behalf of LGBT and HIV-positive immigrants and their families.” This is a policy position – it does not involve direct representation or asylum work. Applicants should submit a detailed cover letter and resume, and later be requested to submit a writing sample if selected for an interview. Applications must be submitted via email to legal@immigrationequality.org, with “Washington staff attorney” on the subject line. For more details about the position, consult the organization’s website.

Among openly gay judges elected in New York City on November 6 were **George Silver** (Supreme Court, New

York County) and **Richard Montelione** (New York City Civil Court). ■

U.S. NAVY – The U.S. Department of the Navy has revised its policy concerning overseas service by HIV-positive Sailors and Marines, according to a Nov. 19 report on the website *thinkprogress.org*. Since the late 1980s, the policy has been to forbid assignments overseas and on large ships, due to concerns about availability of appropriate medical services and exposure to dangerous environments. However, in light of current treatments for HIV infection and better knowledge about risks, such personnel can have overseas and shipboard assignments, although they will be required to visit a stateside medical facility every six months to monitor their condition.

NEW YORK – In *Lewis v. Erie County Medical Center Corp.*, 2012 WL 5387361 (W.D.N.Y., Nov. 1, 2012), District Judge John T. Curtin granted summary judgment to the employer on claims of discrimination and retaliation brought by an HIV+ African-American social worker. In effect, the court found that the case largely involved a tyrannical and abusive supervisor who treated subordinates poorly, and the plaintiff had not shown that she was singled out on account of her race or disability (HIV+ status). Ultimately, complaints about the supervisor led to a Human Resources investigation and a reassignment of the supervisor to job duties that did not involve supervising employees. Many of the plaintiff’s complaints about specific actions had led to HR overruling her supervisor, thus vitiating most of her allegations concerning specific incidents. The court also found that the most plausible of plaintiffs’ retaliation claims involved a formal written warning that occurred six months after her filing of a discrimination charge, too long to support an inference of causality, especially where the warning related to an incident documented by testimony from co-workers. The court also found no support in the record for plaintiff’s allegation that the supervisor had inappropriately looked at her medical record.

INTERNATIONAL & PROFESSIONAL NOTES

NORWAY – A long-awaited report from the Law Commission concerning the current criminal laws involving sexual activity by HIV+ persons proved a disappointment for law reform advocates, as the Commission concluded that Norway should continue to criminalize unprotected sex by people living with HIV, regardless of the actual risk of HIV exposure and regardless whether there is proof of intent to harm. Indeed, the only defense the Commission would recognize in such a case would be for the HIV-negative partner to give informed consent to unprotected sex with

a health care professional witnessing the giving of such consent. Sounds incredible. The story about the report, dated October 22, was distributed by www.hivjustice.net.

SCOTLAND – The Criminal Injuries Compensation Authority has awarded 22,000 pounds compensation to Alex Valentine, who claims to have been infected with HIV by his former partner, Robert Wicksted. Valentine and Wicksted met in November 2003 and held a highly publicized partnership ceremony with Minister Iain Whyte presiding the following year.

They publicly renewed their vows in 2010. It seems that both men knew they were infected at the time of their ceremony, but it was not until they broke up that Valentine went to the police, claiming that Wicksted had concealed his HIV infection until several years after their relationship began. Local prosecutors decided not to proceed against Wicksted, but Valentine filed his crime compensation claim and was awarded the money. Wicksted insists that both men knew of each other's HIV-status at all relevant times. *Daily Record*, Glasgow, Nov. 30. ■



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PUBLICATIONS NOTED

LGBT & RELATED ISSUES

1. Balmer, Andrew S., and Ralph Sandland, *Making Monsters: The Polygraph, the Plethysmograph, and Other Practices for the Performance of Abnormal Sexuality*, 39 J. L. & Society 593 (2012).
2. Bennett, Kelsy, and Daniel Jasnów, eds., *Employment Discrimination Against LGBTQ Persons*, 13 Georgetown J. Gender & L 257 (2012) (13th Annual Review of Gender & Sexuality Law).
3. Byrn, Mary Patricia, and Morgan L. Holcomb, *Wedlocked*, 67 U. Miami L. Rev. 1 (Fall 2012) (the problem of divorce for married same-sex couples living in mini-DOMA jurisdictions).
4. Capers, I. Bennet, *ENRON, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 Fordham L. Rev. 715 (Nov. 2012) (Symposium: Defense of Marriage Act: Law, Policy, and the Future of Marriage).
5. Citron, Elanie J., *Transformation: The Progression of Immigration Petitions for Transgender Spouses*, 50 Fam. Ct. Rev. 666 (2012).
6. Colby, Thomas B., *In Defense of Judicial Empathy*, 96 Minn. L. Rev. 1944 (June 2012).
7. Crile, Susan, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Pre-empt the Enforcement of State Prostitution Laws Against Minors*, 61 Amer. Univ. L. Rev. 1783 (Aug. 2012).
8. Daly, Erin, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Watertown, Mass.: Newman Communications, 2012) (ISBN 978-0-8122-4440-3).
9. Dickson, Christopher W., *Inseparability, Religious Exemptions, and New York's Same-Sex Marriage Law*, 98 Cornell L. Rev. 181 (November 2012).
10. Fileff, Meredith, *Hospital Visitation: The Forgotten Gay Rights Struggle*, 45 J. Marshall L. Rev. 939 (Spring 2012).
11. Gong, LiJia, and Rachel Shapiro, eds., *Sexual Privacy After Lawrence v. Texas*, 13 Georgetown J. Gender & L. 487 (2012) (13th Annual Review of Gender & Sexuality Law).
12. Heyman, Steven J., *To Drink the Cup of Fury: Funeral Picketing, Public Discourse and the First Amendment*, 45 Conn. L. Rev. 104 (Nov. 2012).
13. Hoffman, Alina, and Margarita Varona, eds., *Sexual Discrimination Claims Under Title VII of the Civil*

Editor's Notes

- All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of LeGaL or the LeGaL Foundation.
- 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.

- Rights Act of 1964*, 13 Georgetown J. Gender & L. 523 (2012) (13th Annual Review of Gender & Sexuality Law).
14. Huq, Aziz Z., *Enforcing (But Not Defending) 'Unconstitutional' Laws*, 98 Va. L. Rev. 1001 (Sept. 2012).
 15. Jaffe, Elizabeth M., *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 Wayne L. Rev. 473 (Summer 2011).
 16. Johnsen, Dawn, *The Obama Administration's Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 Fordham L. Rev. 599 (Nov. 2012) (Symposium: Defense of

Marriage Act: Law, Policy, and the Future of Marriage).

17. Johnson, Paul, *Adoption, Homosexuality and the European Convention on Human Rights: Gas and Dubois v. France*, 75 Modern L. Rev. 1136 (2012).
18. Kim, Andrew, "Standing in the Way of Equality?: The Myth of Proponent Standing and the Jurisdictional Error in *Perry v. Brown*," 61 Amer. Univ. L. Rev. 1867 (Aug. 2012).
19. Kleinman, Mark, and Katelyn D. Wicks, eds., *Legal Recognition of Same-Sex Relationships*, 13 Georgetown J. Gender & L. 365 (2012) (13th Annual Review of Gender & Sexuality Law).
20. Kreis, Anthony Michael, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 Yale L.J. ONLINE 125 (2012), <http://yale-lawjournal.org/2012/11/12/kreis.html>.
21. Lain, Corinna Barrett, *Upside-Down Judicial Review*, 101 Geo. L.J. 113 (Nov. 2012) (examining cases in which Supreme Court got out front of public opinion; predicting it might happen with same-sex marriage if public support exceeds pro-same-sex-marriage legislation).
22. Macias, Steven J., *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 San Diego L. Rev. 791 (August-September 2012).
23. Malloy-Thorpe, Jessica, and David Hemken, eds., *Hate Crime Regulation and Challenges*, 13 Georgetown J. Gender & L. 289 (2012) (13th Annual Review of Gender & Sexuality Law).
24. May, Emily M., *Should Moving In Mean Losing Out? Making a Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 Duke L.J. 403 (Nov. 2012).
25. Milne, Elijah L., *Marriage and the Religion Clauses*, 85 St. John's L. Rev. 1451 (Fall 2011) (same-sex marriage issues addressed in the context of 1st Amendment religion clauses).
26. Moreira, Adilson Jose, *We Are Family! Legal Recognition of Same-Sex Unions in Brazil*, LX Am. J. Comp. L. 1003 (Fall 2012).
27. Nagle, Luz E., *Giving Shelter From the Storm: Colombians Fleeing Persecution Based on Sexual Orientation*, 48 Tulsa L. Rev. 1 (Summer 2012).
28. Piar, Daniel F., *Morality as a Le-*

Sorting all of this out and deciding how to proceed – when the issue is one that cries out for settlement by the Supreme Court—can be complicated, especially if the Court feels it would be premature to address the issue of same-sex marriage under the 14th Amendment on the merits in light of the sharp division in the country: On the one hand, nine states and D.C. will allow same-sex marriages as of January 1, 2013. On the other hand, a majority of states have constitutional amendments or statutes banning same-sex marriage and/or the recognition of same-sex marriages performed elsewhere. The example of abortion and the fall-out from the Court's *Roe v. Wade* decision would counsel prudence in attempting a definitive constitutional resolution to a very divisive issue of social policy by the Court. For example: The Court put off deciding whether miscegenation laws were constitutional until so many had been repealed or invalidated by state courts that a Supreme Court ruling would affect laws in fewer than a fifth of the states. At this point, a Supreme Court ruling finding a 14th Amendment right for same-sex couples to marry would invalidate laws in four-fifths of the states. Similarly, in the years between *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2003), the number of states with sodomy laws on the books had declined substantially as a result of state legislative and judicial action, so that *Lawrence* affected substantially fewer states than an earlier ruling would have done. The pending petitions are: *Bipartisan Legal Advisory Group of the United States House of v. Gill*, No. 12-13, No. 12-15, No. 12-97; *Massachusetts v. Department of Health and Human Services*, No. 12-97; *Office of Personnel Management v. Golinski*, No. 12-16; *Pedersen v. Office of Personnel Management*, No. 12-231 & 12-302; *United States v. Windsor*, No. 12-63 & No. 12-307 (several of these cases have multiple petitions on file from different parties and thus multiple docket numbers).

The Court's November 30 conference did not produce any decisions on these petitions. The next scheduled conference is December 7, and the Court has placed all of these petitions on the agenda for discussion at that meeting. A full discussion of any announcements that are made will probably be the lead story in the January 2013 issue. ■

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

Specially Noted

The *Georgetown Journal of Gender and the Law* has published its Thirteenth Annual Review of Gender and Sexuality Law, Vol. 13, No. 2 (2012).

Individual sections of particular note are listed separately in this month's Publications Noted.

* * * An international congress titled "From Safe Harbours to Equality" will be held in conjunction with the World Outgames being held in Antwerp July 31-August 2, 2013.

There will be an international expert group meeting to plan the event in January 2013.

The website of the congress is <http://www.world.outgames.org/>, and those wishing to make presentations at the congress may submit abstracts by January 9, 2013, to be considered for inclusion in the program.

Abstracts must be in English, French or Spanish to be considered, but abstracts in other languages can be submitted if accompanied by an "acceptable" translation into one of these languages.

Consult the website for information about the range of topics to be addressed and method of submissions.

- gitimate Government Interest*, 117 Penn St. L. Rev. 139 (Summer 2012).
29. Pollvogt, Susannah W., *Unconstitutional Animus*, 81 Fordham L. Rev. 887 (Nov. 2012).
 30. Portmess, Jessica, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar*, 61 Amer. Univ. L. Rev. 1825 (Aug. 2012).
 31. Prakash, Saikrishna Bangalore, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 Fordham L. Rev. 553 (Nov. 2012) (Symposium: Defense of Marriage Act: Law, Policy, and the Future of Marriage).
 32. Ranton, Duncan, and Chris McIntosh, *The Judicial Approach to Alternative Families: Discrimination or Vive la Difference?*, 42 Fam. L. (UK) 1135 (Sept. 2012).
 33. San'Ambrogio, Michael D., and Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. Haw. L. Rev. 705 (Summer 2011).
 34. Sarine, L. Elizabeth, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 Cal. L. Rev. 1359 (Oct. 2012).
 35. Titshaw, Scott, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. Va. L. Rev. 205 (Fall 2012).
 36. Van Dyke, Jon M., and Melissa Uhl, *Hawai'i's Right to Privacy*, 33 U. Haw. L. Rev. 669 (Summer 2011).
 37. Wagner, Benjamin K., and Matthew Van Volkenburg, *HIV/AIDS Tests as a Proxy for Racial Discrimination? A Preliminary Investigation of South Korea's Policy of Mandatory In-Country HIV/AIDS Tests for its Foreign English Teachers*, 11 J. Korean L. 179 (June 2012).
 38. Wardle, Lynn D., *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and 'Thick' and 'Thin' Conceptions of Marriage*, 81 Fordham L. Rev. 771 (Nov. 2012) (Symposium: Defense of Marriage Act: Law, Policy, and the Future of Marriage).
 39. Whitman, Molly E., *The Intersection of Religion and Sexual Orientation in the Workplace: Unequal Protections, Equal Employees*, 65 SMU L. Rev. 713 (Summer 2012). ■