

LESBIAN / GAY LAW NOTES

September 2012

227 DOMA Sec. 3
*Conn. USDC Declares
Unconstitutional*

229 Prop 8
SCOTUS Appeal

232 HI Marriage
*Challenge Rejected
by Fed. Ct.*

235 MA S.J.C
*Unions & Marriages
Similar in Divorce*

236 6th Cir. Rejects
*Challenge to Federal
Hate Crimes Act*

237 3rd Cir. Rejects
*Constitutional Claims
by Trans Inmate*

238 5th Cir. Rejects
*Title VII Workplace
Harassment Claim*

239 CA Ct. of Appeal
*Rules for Lesbian
Second Parent*

241 CA Ct. Recognizes
*Possible Interference
w/ Inheritance Claim*

242 Miller-Jenkins
Back in the News

242 NY Trial Ct.
*NYC Adult Zoning Ord.
Violates 1st Amendment*

243 Dist. of Columbia
*Lesbian Police Officers'
Title VII Claims*

DEPARTMENTS

245 Civil Litigation Notes

250 Criminal Litigation Notes

252 Legislative Notes

254 Law & Society Notes

260 International Notes

265 Professional Notes

266 HIV/AIDS Legal Notes

268 Publications Noted

Law Notes welcomes contributions. To explore the possibility of being a contributor, please contact info@le-gal.org.

THIS MONTHLY PUBLICATION IS EDITED AND CHIEFLY WRITTEN BY PROFESSOR ARTHUR LEONARD OF NEW YORK LAW SCHOOL, WITH A STAFF OF VOLUNTEER WRITERS CONSISTING OF LAWYERS, LAW SCHOOL GRADUATES, AND CURRENT LAW STUDENTS. PROFESSOR LEONARD, LEGAL'S FOUNDER, HAS WRITTEN NUMEROUS ARTICLES ON EMPLOYMENT LAW, AIDS LAW, AND LESBIAN AND GAY LAW. ART IS A FREQUENT NATIONAL SPOKESPERSON ON SEXUAL ORIENTATION LAW, AND AN EXPERT ON THE RAPIDLY EMERGING AREA OF GAY FAMILY LAW. HE IS ALSO A CONTRIBUTING WRITER FOR GAY CITY NEWS, NEW YORK'S BI-WEEKLY LESBIAN AND GAY NEWSPAPER. TO LEARN MORE ABOUT LEGAL, PLEASE VISIT [HTTP://WWW.LE-GAL.ORG](http://www.le-gal.org).

**Join LeGaL Today by Pointing
Your Browser to www.le-gal.org!**

L E S B I A N / G A Y LAW NOTES

Editor-in-Chief

Prof. Arthur S. Leonard

New York Law School

185 West Broadway

New York, NY 10013

(212) 431-2156 | arthur.leonard@nyls.edu

Contributors

Bryan Johnson, Esq.

Brad Snyder, Esq.

Stephen E. Woods, Esq.

Eric Wursthorn, Esq.

New York, NY

Gillad Matiteyahu, NYLS '13

John-Paul Young, NYU '14

Production Manager

Bacilio Mendez II, MLIS

Circulation Rate Inquiries

LeGaL Foundation

799 Broadway

Suite 340

New York, NY 10003

(212) 353-9118

info@le-gal.org

Law Notes Archive

<http://www.nyls.edu/jac>

Law Notes Podcast

To listen to/download the Lesbian/Gay Law Notes Podcast launch iTunes, or point your browser to <http://legal.podbean.com>.

© 2012

The LeGaL Foundation

of the LGBT Bar Association

of Greater New York

<http://www.le-gal.org>

ISSN

8755-9021

U.S. DISTRICT COURT FOR CT DECLARES DOMA SECTION 3 UNCONSTITUTIONAL

The U.S. District Court for Connecticut has struck down the Federal definition of marriage found in Section 3 of the Defense of Marriage Act (DOMA) in *Pedersen v. Office of Personnel Management*, 2012 WL 3113883 (July 31, 2012). Section 3, which defines marriage as between one man and one woman for all purposes of federal law, has effectively denied benefits and recognition to thousands of same-sex couples lawfully married in marriage equality jurisdictions. Gay & Lesbian Advocates & Defenders (GLAD), representing the plaintiffs, promptly filed a petition with the U.S. Supreme Court to take the case for direct review, anticipating that counsel defending Section 3 would appeal this ruling to the U.S. Court of Appeals for the 2nd Circuit.

The plaintiffs were six same-sex couples and one widower, legally married under the laws of Vermont, New Hampshire or Connecticut, who claimed that Section 3 denied them marriage-related federal benefits to which the Equal Protection requirement of the 5th Amendment entitles them. The married status of these sets of plaintiffs was denied federal recognition under the Family and Medical Leave Act, Federal Employees Health Benefits Program, Internal Revenue Code, Social Security Act, and the New Hampshire Retirement System's contribution to Medicare Insurance. Although the court noted that only five federal statutes or programs were specifically implicated in this case, Section 3 is a wide net that catches and excludes married LGBT couples from 1,138 distinct federal rights, benefits, privileges or obligations.

In her opinion finding Section 3 unconstitutional, District Judge Vanessa Bryant critically examined the arguments pertaining to the status of homosexual persons as a suspect or quasi-suspect class deserving heightened judicial protection. Though she found that legislative classifications of homosexuals are indeed suspect – a step not taken by another district judge in the 2d Circuit, Judge Barbara

Jones of the Southern District of New York in *Windsor v. U.S.*, 833 F.Supp.2d 394 (SDNY, June 6th, 2012) – she, like Judge Jones, held that Section 3 fails even the most deferential judicial standard of rational basis review.

Because the Department of Justice and President Obama declined to defend a law they judged to be unconstitutionally discriminatory, the Intervenor-Defendant in this case was, as usual, the “Bipartisan” Legal Advisory Group (BLAG) of the U.S. House of Representatives. The three Republican votes in this group unilaterally retained, and the House generously funded, Paul Clement, a former Solicitor General under President George W. Bush and arguably the premier legal opponent of equal treatment of LGBT persons under the law, to defend Section 3 in pending litigation. (When Mr. Clement is not promoting legal discrimination against gays, lesbians and their children in court, his occupations include a failed Supreme Court challenge to the Affordable Care Act and teaching in the law faculties of Georgetown and New York Universities, both of which, paradoxically, purport to have a vigorous non-discrimination policy toward the LGBT community.)

Before reaching the merits, the court addressed two challenges to the plaintiffs' standing. The standing of the “tax plaintiffs” was challenged on the ground that the joint filing statute of the Internal Revenue Code, which states that “husband and wife may make a single return jointly of income taxes,” would prohibit joint filing by a married same-sex couple even absent DOMA. BLAG argued that these plaintiffs were not necessarily aggrieved by DOMA in the first instance, and thus lacked the injury required to confer standing to challenge Section 3.

The court, however, found that BLAG's argument was undermined on a number of fronts: by the policy of the IRS to interpret gender specific terms in the tax code as gender neutral (“husband” or “wife” equaling “spouse”); by its policy prior to DOMA of deferring the question of mari-

tal status to state law; and by two letters from the IRS submitted into the court's record that specifically cite Section 3 of DOMA as the law preventing the plaintiffs' joint tax filing.

Next, BLAG argued, as it had in *Windsor*, that the plaintiffs' case must be dismissed because of the U.S. Supreme Court's summary dismissal of *Baker v. Nelson*, 409 U.S. 810 (1972). *Baker* is a Minnesota case in which the Court dismissed an appeal from a Minnesota Supreme Court decision that held that the state's marriage statute “does not authorize marriage between persons of the same sex” and that the “equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry.” The Supreme Court did not write an opinion in *Baker*, merely stating that the appeal was dismissed “for want of substantial federal constitutional question.”

Here, however, Judge Bryant determined that *Baker* was of limited relevance. Among other reasons, the court noted that the question in *Baker* was whether a state may ban same-sex marriage. The court viewed that question as distinct from the question presented here: whether the federal government may abridge states' rights to prohibit or permit such marriages. Moreover, the court noted that the Supreme Court's summary treatment of the case supplied no precedent requiring dismissal of the current plaintiffs' different legal claim.

Having decided these arguments in favor of plaintiffs, the court then considered at length whether the plaintiffs and “homosexuals” generally should be afforded enhanced judicial protection from discriminatory legislation as a suspect or quasi-suspect class.

The plaintiffs argued that homosexuals should be treated as a suspect class because they display all four elements of suspect classes reflected in the Supreme Court's equal protection decisions – a history of discrimination, uncompromised ability to contribute to society, an immu-

table characteristic on which the discriminatory treatment is based, and minority status and political powerlessness.

Each of these attributes of homosexuals as a class was contested, more or less, by BLAG.

The evidence Mr. Clement introduced to show that gays and lesbians should not be considered a suspect class deserving judicial protection consisted significantly of quotations of social scientists so extracted from their contexts as to give them an opposite meaning. For example, BLAG offered a “sweeping argument” that the history of discrimination against homosexuals stretched back only to the twentieth century. In support of this argument BLAG cited an interview with an expert on the history of homosexuality, who “note[d] that affirmative legislative proscriptions against homosexuals as an identity group

was warranted. Nonetheless, the court applied rational basis review because, as Judge Bryant noted, the U.S. Supreme Court has yet to afford suspect status in a sexual orientation case, opting instead to apply rational basis review rather than definitively address whether sexual orientation constitutes a suspect or quasi-suspect class. The court’s conclusion regarding Section 3 under this forgiving standard? “It fails to pass muster under even th[is] most deferential level of judicial scrutiny.”

In the course of reaching this determination, the court methodically addressed and refuted the arguments presented by BLAG in this case and in DOMA cases throughout the country (space does not permit full consideration of each of these justifications though the below is illustrative).

Foremost among BLAG’s argument was that Congress restricted federal mar-

riage into the workforce and a welfare state that “renders each individual independent.” The judge also noted that the legalization of gay marriage in Scandinavia was unlikely to have caused a change in the social attitude toward marriage that had begun decades before it.

Concluding that BLAG had offered no credible evidence that same-sex marriage affected the behavior of opposite-sex partners, the court found that mere speculation could not supply a rational basis for Section 3. Judge Bryant found further that the denial of marital benefits to married parents of the same sex was directly and palpably harmful to their children, and therefore “inimical to its stated purpose of protecting children.”

Could it be that a genuine but unstated aim of the financial restrictions imposed by DOMA was to dissuade same-sex partners from rearing children in the first place? The plaintiffs made this allegation expressly and pointed out that DOMA provides opposite-sex married couples without children the same benefits as those with offspring. Further, they noted that Section 3 of DOMA affects over a thousand other statutes with no relation to rearing children. But since DOMA cannot preclude same-sex couples from adopting, bearing, begetting, or rearing children – a fundamental feature of the right to privacy – it can only add the genuine disadvantage of denied federal benefits to the illusory disadvantage of being the child of a same-sex marriage. The judge therefore dismissed BLAG’s argument that Section 3 of DOMA was intended to promote the rearing of children by two opposite-sex parents.

The court dealt more summarily with the remaining four arguments BLAG proposed.

Section 3 is also unsupported by a Congressional desire to uphold traditional notions of “Judeo-Christian” morality, Judge Bryant found, because there is no single stance that the Judeo-Christian faiths all share regarding same-sex marriage. Many churches and synagogues bless such marriages, and Supreme Court precedent clearly discounts “moral disapproval of a group” as a rational basis for legislation. (And, one might ask, what business does the U.S. Congress have in trying to advance the moral code of a particular religious tradition, in light of the Establishment Clause of the First Amendment?)

Similarly, a Congressional will to preserve the public fisc alone does not

In the course of reaching this determination, the court methodically addressed and refuted the arguments presented by BLAG in this case and in DOMA cases throughout the country.

were implemented in the twentieth century consequent to the emergence of the concept of homosexual as a distinct category of people in the nineteenth century.” Before the 1920s, this expert testified in affidavit, anti-gay discrimination targeted homosexual conduct rather than identity, since there was almost no openly gay community to constitute such an identity.

The judge found that BLAG had “clearly taken out of context” this expert’s claim that anti-gay discrimination was “unique and relatively short-lived,” and, after this not-too-subtle admonition, she discussed in detail the overwhelming evidence of such discrimination over many centuries.

Indeed, the most frequent descriptions that the judge applied to Mr. Clement’s arguments on behalf of BLAG were “unavailing” and “curious.”

In a thorough assessment of the factors, the court concluded that a suspect classification entitled to heightened judicial scru-

riety benefits to opposite-sex couples to “avoid creating a social understanding of bearing, begetting, and rearing children separate from marriage.” Plaintiffs objected that the capacity to procreate has never been a legal prerequisite for marriage; though this does not directly answer the concern whether same-sex marriage might create an impression on opposite sex couples that discourages their procreation in wedlock.

Under rational basis review, however, a court must “insist on knowing the relation between the classification adopted and the object to be attained.”

To show such a link, Clement cited a study on the decline of Scandinavian marriage as evidence that same-sex marriage tends to degrade the social expectation of procreation confined to wedlock. The court dismissed this as owing, according to the study’s own terms, to a host of other factors, including the entrance of women

justify the drawing of any particular classification or the burdening of any particular group. Nor can Section 3 of DOMA be rationally based on a desire to protect state sovereignty and democratic self-governance free from the control of unelected judges, since Connecticut, Vermont and New Hampshire have all democratically enacted statutes authorizing same-sex marriage as part of their domestic law, which is within the traditional prerogative of the states.

Nor can Section 3 keep the allotment of federal benefits uniform, because it cannot determine which types of couples marry; instead, it privileges some marriages over others, eliminating the uniformity that would follow from the former rule of recognizing all marriages legal under state authority.

Finally, DOMA cannot be justified by a concern for caution in altering an ancient definition of marriage, since it “frustrates” the gradual adoption of same-sex marriage as a state experiment by a federal intrusion into the realm of domestic law, “by permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted.”

In sum, the court determined that under any level of review, the absence of any legitimate justifications, meant Section 3 must fall.

On August 22nd, the plaintiffs’ counsel, Gay & Lesbian Advocates & Defenders (GLAD), filed a “Petition for Certiorari before Judgment” in the U.S. Supreme Court, seeking to skip the step of preserving their victory in an expected appeal by BLAG to the 2nd Circuit. This follows the petitions of the Department of Justice and BLAG, who each requested the court to review *Gill v. Office of Personnel Management*, the 1st Circuit’s ruling holding Section 3 unconstitutional. Similar petitions have been filed for *Golinksy v. Office of Personnel Management* (N.D.Cal.) and *Windsor v. U.S.* (S.D.N.Y.), in which other district judges ruled against Section 3, making it almost a certainty that the highest court will rule on the constitutionality of Section 3 during its October 2012 Term, and perhaps too on the classification and level of review applicable to laws discriminating against members of the LGBT community. —John-Paul Young

John-Paul Young is a law student at New York University ('14).

Prop 8 Supporters File SCOTUS Appeal; Respondents File Opposition

Proponents of Proposition 8, who intervened as defendants in a federal lawsuit to defend their initiative amendment to the California Constitution banning same-sex marriage, have asked the U.S. Supreme Court to review the 9th Circuit’s decision that their initiative violates the 14th Amendment of the U.S. Constitution. *Hollingsworth v. Perry*, No. 12-144 (Petition for a Writ of Certiorari filed July 30, 2012). Attorneys for the plaintiffs, who challenged the constitutionality of Prop 8 in the trial court, filed a brief in opposition to the Petition on August 24, arguing that the case fails to meet the Supreme Court’s traditional tests for determining whether a case merits review by the high court. Meanwhile, U.S. District Judge James Ware, who took over primary responsibility for the case at the trial level after the retirement of Chief Judge Vaughn Walker, whose decision is the subject of this appeal, issued an order on August 27 closing the file at the district court level, so that Judge Walker’s original Order barring the state of California from enforcing Proposition 8 would presumably go into effect immediately upon a denial of certiorari by the Supreme Court. If certiorari is granted, of course, the 9th Circuit’s Order that Judge Walker’s injunction be stayed until the Supreme Court has finally disposed of the case will remain in effect.

The Proponents’ Petition frames the question presented to the Court as: “Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.” The Respondents see things differently, telling the Court that the correct question is – as framed in the 9th Circuit’s opinion – whether California violated the Fourteenth Amendment by amending its state constitution to rescind same-sex couples’ existing state constitutional right to marry.

Proposition 8 was enacted by California voters in November 2008, less than five months after same-sex couples

began marrying in California as a result of a ruling by the California Supreme Court that denying marriage rights to same-sex couples violated the California Constitution. Proposition 8 inserted a provision into the California Constitution stating: “Only marriage between a man and a woman is valid or recognized in California.”

Prop 8’s enactment was immediately challenged in the state courts, but was upheld by the California Supreme Court as validly enacted in *Strauss v. Horton*, 207 P.3d 48 (2009). However, the California court said that Prop 8’s enactment had no effect on its own prior state equal protection and due process ruling, holding that same-sex couples were entitled to all the rights and benefits of marriage, and that marriages conducted prior to its enactment remained valid. Thus, the only tangible effect of Prop 8 was that same-sex couples in California could not from November 2008 going forward form newly recognized same-sex relationships called “marriages,” but they could form “domestic partnerships” that had all the state law rights of marriages.

The same week that the California Supreme Court upheld Prop 8, the American Foundation for Equal Rights (AFER) filed suit in the federal district court in San Francisco, claiming that Prop 8 violated the 14th Amendment of the U.S. Constitution. The following year, U.S. District Judge Vaughn Walker ruled for the plaintiffs. The Proponents of Proposition 8, who had been allowed to intervene as defendants when all the state government officials named in the complaint refused to defend Prop 8, appealed that ruling to the 9th Circuit. Earlier this year, the 9th Circuit affirmed Judge Walker’s ruling, but on narrower grounds.

Judge Walker ruled that same-sex couples have a right to marry as a matter of Equal Protection and Due Process under the 14th Amendment. Under his ruling, the state must allow same-sex couples to marry on the same basis that it allows different-sex couples to marry.

The 9th Circuit panel, in a 2-1 ruling, held that the enactment of Prop 8 violated the Equal Protection Clause because the majority of the panel could discern no rational basis for California to rescind from same-sex couples the right to marry that had previously been recognized by the state Supreme Court, while at the same time continuing to provide same-sex couples with the state law rights and benefits of marriage. Withholding the word "marriage" would do nothing to advance any of the interests argued by Proponents of Prop 8, wrote the court of appeals majority, since it didn't affect the state's policy of extending all marital rights to same-sex couples through the Domestic Partnership Law. The panel majority concluded that Prop 8 "serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."

The Proponents of Prop 8 sought to have the case reconsidered by a larger panel of judges from the 9th Circuit, called "en banc review," but their request was denied in June.

The request for review takes the form of a Petition for a Writ of Certiorari. The Supreme Court has discretion to grant or deny the writ. Under the Court's rules, the Petition is granted if at least four out of the nine Justices vote in favor of review. The Petitioner frames a question or questions for decision by the Court, but the Court is free to reframe the question if it grants review. In this case, the Petition asks the Court to decide the question that Judge Walker decided, seeking, in effect, to by-pass the repositioning of the

case by the 9th Circuit panel majority, which had disclaimed any decision on whether same-sex couples have a constitutional right to marry in the first place.

The Petition takes the form of a legal brief intended to persuade the Court that it should exercise its discretion to take the case. The Court is most likely to take a case if the lower court ruling conflicts with other federal appellate rulings or past rulings by the Supreme Court, or the Court concludes that the case raises a question of national significance that urgently requires a definitive answer from the Court. The attorneys for the Proponents of Prop 8 argue that this case meets all of these criteria.

Picking up an argument made by judges from the 9th Circuit who dissented from the panel decision and from the decision to deny en banc review, the Petitioners argue that the 9th Circuit panel misconstrued the Supreme Court's 1996 decision in *Romer v. Evans*, which the panel majority relied upon to rule that Prop 8's enactment was unconstitutional.

Romer involved a Colorado initiative amendment that prohibited the state from providing any protection against discrimination for gay people. The Supreme Court held it unconstitutional as an unprecedented violation of equal protection of the laws. The 9th Circuit panel, noting the similarity of state initiative amendments depriving gay people of rights, reasoned that the result should be the same. The panel held that the court should ask why the people of a state would withdraw rights from a specified group of citizens; what policy goals would be advanced by rescinding

an existing right? In the case of *Romer*, the people were withdrawing the right to seek protection from discrimination through normal political means, which gay people in Colorado had achieved in several cities through the enactment of anti-discrimination ordinances. In the Prop 8 case, the people were withdrawing the right to marry, which same-sex couples enjoyed in California for almost 5 months prior to the vote on Prop 8. In both cases, said the court of appeals panel, the challenged initiative amendments did not advance any legitimate policy goal, since taking away or diminishing rights was not by itself a legitimate policy goal, and thus did not meet the minimal requirements of rationality imposed by the 14th Amendment Equal Protection Clause.

In their Petition, Proponents claim that this is a misapplication of *Romer*, pointing out that the Supreme Court emphasized in *Romer* the sweeping nature of the amendment, while characterizing Prop 8 as narrowly focusing on marriage, and, as a consequence of the California Supreme Court's subsequent ruling, only applying to the term "marriage" and not to the legal rights associated with it. The Petition argues that this broad use of *Romer* as a precedent threatens state marriage amendments, all enacted by popular vote, that are on the books in all the other states in the 9th Circuit, and in many other states (more than 30 in all), presenting an issue beyond the borders of California and taking on national significance.

They also argued that the 9th Circuit ruling is inconsistent with the Supreme Court's action in 1972 in *Baker v. Nelson*, in which it dismissed a same-sex marriage appeal

If certiorari is granted, the 9th Circuit's Order that Judge Walker's injunction be stayed until the Supreme Court has finally disposed of the case will remain in effect.

Petitioners argue that the 9th Circuit panel misconstrued *Romer*, which the panel majority relied upon to rule that Prop 8's enactment was unconstitutional.

from Minnesota on the ground that the right of same-sex couples to marry does not present "a substantial federal constitutional question." On the issue of contradictions with other federal appellate rulings, they pointed out that the 8th Circuit had rejected a federal constitutional challenge to a similar state constitutional amendment that went even further than California's, banning both same-sex marriage and civil unions or domestic partnerships. They also noted several state high court rulings rejecting similar equal protection challenges raising the issue of same-sex marriage.

In short, the Petition does everything possible to try to persuade the Court that it is necessary for it to review this case in order to resolve inconsistencies in federal constitutional rulings on same-sex marriage amendments, inconsistencies with the Court's own prior rulings, and to restore to the voters the right to decide who can marry in their states. As is frequently done, they also incorporated many of the substantive legal arguments that they made before the trial court about why it was rational for California voters to deny "marriage" to same-sex couples, emphasizing the idea that the state could use marriage as a means of "channeling" reproductive sexual activity.

On July 31, the American Foundation for Equal Rights issued a press release reflecting the mixed emotions of the attorneys. On the one hand, this lawsuit was brought with the goal of getting the U.S. Supreme Court to strike down bans on same-sex marriage, so the attorneys really want the case to go to the Supreme Court. On the other

hand, their first duty to their clients is to defend the victory in the lower court so that same-sex couples will be able to marry in California as soon as possible. The lawyers' comments in the press release reflect this tension.

David Boies, lead co-counsel together with Ted Olson, stated the following reaction to the Proponents' filing: "Today's Petition presents the Justices with the chance to affirm our Constitution's central promises of liberty, equality, and human dignity." But Theodore Boutros, Jr., another attorney who took a major role in the case for the plaintiffs, said, "Because two federal courts have already concluded that Proposition 8 is unconstitutional, gay and lesbian Californians should not have to wait any longer to marry the person they love. We therefore will oppose the petition for a writ of certiorari. However, we recognize that this case presents constitutional issues of national significance, and are ready to defend our victories before the Supreme Court." In their responsive brief filed on August 24, the Respondents clearly hedge their bets, arguing that the Court should reject the Petition because the 9th Circuit's opinion does not create a circuit split on the question presented and faithfully applies *Romer v. Evans* to produce a result consistent with the Court's 14th Amendment jurisprudence. They also revive the argument that Proponents of Proposition 8 lack Article III standing to bring this case to the Supreme Court. And, they take the opportunity to summarize the argument that same-sex couples have a right to marry under the 14th Amendment.

It is clear from the tenor of the Respondents' brief that they have mixed emotions in arguing against the grant of Petition for Certiorari. Indeed, they point out to the Court that the fortuitous simultaneous arrival at the Court of petitions in the Prop 8 case and several DOMA Section 3 cases would make it a good opportunity for the Court to begin addressing the issue of same-sex couples and federal constitutional law in cases where full trial records have been compiled. (All too often the Supreme Court decides important issues of constitutional law without the benefit of a full trial record. Prime example: *Bowers v. Hardwick*, which was decided on an appeal from an order granting dismissal of the Complaint.

If the Court denies the petition when it reconvenes from its summer recess at the end of September, District Judge Walker's ruling will go into effect and Proposition 8 will no longer be an operative provision of the California Constitution, so same-sex couples will be able to resume marrying in California. If the Court grants the petition, the stay on Judge Walker's ruling will remain in effect until the Supreme Court decides the case. Argument would probably be held sometime in the winter, and the decision would not be rendered until sometime in the spring or early summer of 2013.

When AFER's attorneys file their response to the Petition, they are likely to point out that the question proposed by the Petition is not the question decided by the 9th Circuit, but one suspects they will not be arguing too passionately that the Court should refuse to review the case. ■

Fed. Ct. Rejects HI Marriage Challenge

Senior U.S. District Judge Alan C. Kay ruled on August 8 that Hawaii's law excluding same-sex couples from marriage does not violate the 14th Amendment of the U.S. Constitution. Ruling in *Jackson v. Abercrombie*, 2012 WL 3255201, Judge Kay granted a motion for summary judgment filed by Loretta J. Fuddy, Director of Health for the State of Hawaii, who defended the statute along with an intervenor, the Hawaii Family Forum. Lead defendant Governor Neil S. Abercrombie agreed with the plaintiffs and supported their motion for summary judgment. Plaintiffs Natasha N. Jackson, Janin Kleid and Gary Bradley are represented by John D'Amato, a leading Hawaii trial attorney, who announced that they would appeal to the 9th Circuit.

Judge Kay's conclusion, stated in his opening "synopsis" of a lengthy (120 page) opinion, is that "Hawaii's marriage laws are not unconstitutional. Nationwide, citizens are engaged in a robust debate over this divisive social issue. If the traditional institution of marriage is to be restructured, as sought by Plaintiffs, it should be done by a democratically-elected legislature or the people through a constitutional amendment, not through judicial legislation that would inappropriately preempt democratic deliberation regarding whether or not to authorize same-sex marriage."

Judge Kay based his ruling on alternative grounds.

First, he held that the U.S. Supreme Court's 1972 dismissal of a same-sex marriage appeal from Minnesota was binding on his court. In *Baker v. Nelson*, 409 U.S. 810, the Minnesota Supreme Court ruled against a claim to the right to marry by a gay male couple, holding that the state's refusal to issue them a marriage license did not violate their rights to due process or equal protection of the laws under the 14th Amendment or parallel provisions of the Minnesota Constitution. The men appealed to the Supreme Court. Under rules then prevailing, the Supreme Court was required to rule on the merits of a federal constitutional challenge to a state statute, but frequently resorted to the device of dismissing an appeal where the Court determined that the case did not present

a "substantial federal question."

The Supreme Court took that dismissal route in *Baker v. Nelson*. As usual in such cases, the Court provided no explanation for its action. Under Supreme Court rules, such a dismissal is deemed to be a ruling on the merits of the questions presented to the Court. The plaintiffs presented two questions in *Baker*: Whether denying same-sex couples the right to marry violates (1) due process or (2) equal protection. Judge Kay concluded that these were the same questions presented to him by the plaintiffs challenging Hawaii's marriage law, and thus, since the Supreme Court has not subsequently ruled on these precise questions, they are foreclosed to any lower court as a matter of federal constitutional precedent.

Judge Kay found that nothing that has taken place since 1972 would indicate that *Baker v. Nelson* is no longer a valid Supreme Court precedent, rejecting the argument that either *Romer v. Evans* or *Lawrence v. Texas*, gay rights victories, had in any relevant way changed the calculus of judicial review for a same-sex marriage claim. In particular, he wrote that in *Lawrence* the Supreme Court stated that it was not ruling on whether the state was required to provide legal recognition to same-sex relationships, but only that the state could not subject such relationships to criminal penalties. He pointed out that the Court expressly refrained in *Lawrence* from any ruling on equal protection, basing the decision solely on due process. He also pointed out that in *Romer v. Evans*, the Supreme Court did not use heightened or strict scrutiny to strike down Colorado Amendment 2, so *Romer* did not, in his opinion, establish any departure from rationality review in its traditional form for sexual orientation discrimination claims.

Hedging his bets, however, Judge Kay, who was appointed to the district court by President Ronald Reagan in 1986 and retired from active full-time status in 2000, provided a lengthy alternative analysis on the merits of plaintiffs' claims.

Addressing the argument that heightened scrutiny should apply because the right to marry is a fundamental right,

Judge Kay rejected the claim that this case was about, broadly speaking, the right to marry. In his view, Supreme Court and 9th Circuit precedent requires a narrower framing of the issue, and the correct question is whether same-sex couples have a right to marry. As to that, he rejected the argument that there is a fundamental right for same-sex couples to marry, seeing no support in American history or tradition for such a claim. Confronted by the argument that there was no history or tradition supporting interracial marriage when the Supreme Court invalidated the Virginia miscegenation statute in *Loving v. Virginia*, Kay responded that *Loving* involved a suspect racial classification, not a challenge to the traditional definition of different-sex marriage.

He also found that the recent decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), striking down California Proposition 8, was irrelevant to the questions before him. In *Perry*, the 9th Circuit panel stated that it was not deciding whether same-sex couples have a right to marry, but rather whether a state could constitutionally rescind the right to marriage after it had been extended to same-sex couples.

Judge Kay observed that the history of this issue in Hawaii is very different from California. Same-sex couples have never had a right to marry in Hawaii. The current version of the Hawaii marriage amendment and statute were both approved by the legislature in 1997 in response to a trial court ruling in favor of same-sex marriage that was then pending on appeal to the Hawaii Supreme Court. Unlike Proposition 8, which placed a ban on same-sex marriage in the California Constitution after same-sex couples had been marrying for about five months, the Hawaii marriage amendment merely states that only the legislature can decide whether same-sex couples can marry, which led the Hawaii Supreme Court to consider the marriage lawsuit to be moot. The legislative history of the Hawaii marriage amendment shows the intent of the legislature not to foreclose the possibility of making same-sex marriage available in the future through legislation. It did not enact a prohibition on same-sex marriage,

merely a reservation of that issue to the political process.

At the same time that the legislature put the marriage amendment on the ballot, it passed a Reciprocal Beneficiaries Law, the first of its kind in the United States, which extended a limited number of marital rights to same-sex partners. More recently, the legislature enacted a Civil Union Act, effective in 2011, that allows both same-sex and different-sex couples to register as civil union partners and enjoy all the state law rights of marriage (without the name of marriage). Thus, in Hawaii there has been an unfolding political process of gradually extending more rights to same-sex couples. Judge Kay said it would be inappropriate for the court to intervene in this process by declaring a federal constitutional right to same-sex marriage.

In light of this history, Judge Kay said that the *Perry v. Brown* case, which was about rescinding existing rights, was not relevant. That was a case about "taking away" rights that a particular group enjoyed, not a case about extending rights to a previously-excluded group.

As to equal protection, Judge Kay said he was bound by 9th Circuit precedent -- *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir., Feb. 2, 1990) -- to apply the rationality test because sexual orientation is not a "suspect classification" for purposes of the 14th Amendment. Although the *High Tech Gays* opinion cited and relied upon the now-overruled Supreme Court decision in *Bowers v. Hardwick*, Judge Kay found that this did not undermine the continued validity of *High Tech Gays*, observing that the 9th Circuit has continued to cite *High Tech Gays* as a precedent even after *Lawrence v. Texas* overruled *Bowers*. Kay asserted that Supreme Court decisions since 1990 have not undermined *High Tech Gays* as a precedent binding on trial judges in the 9th Circuit, disagreeing with the recent contrary ruling by Judge Jeffrey S. White in *Golinski v. Office of Personnel Management*, 824 F.Supp.2d 968 (N.D.Cal., Feb. 22, 2012). (Judge White's ruling was appealed to the 9th Circuit, which has put off oral argument while the Supreme Court considers a petition for certiorari filed by Lambda Legal on behalf of Karen Golinski.) In particular, Judge Kay pointed out that the 9th Circuit had

continued to cite *High Tech Gays* in recent litigation over the "don't ask, don't tell" military policy, and has not questioned its continuing validity.

Having found that neither a fundamental right nor a suspect classification was at issue in this case, Judge Kay determined that Hawaii had a rational basis for excluding same-sex couples from marriage. The dye was cast for this outcome when Judge Kay determined that the most deferential form of rationality review was appropriate for this case. At the beginning of his opinion, he spoke about the importance of "judicial restraint" and the danger of constitutionalizing hotly disputed questions of public policy, and emphasized that under rationality review, a classification "will be upheld when 'the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not,'" quoting from *Johnson v. Robinson*, a 1974 Supreme Court decision.

Thus, in Judge Kay's view, the Hawaii exclusion survives judicial review if the court can hypothesize a rational reason for the state to provide marriage for different-sex couples. "Thus," he wrote, "the state is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage. Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry."

Using this standard, Judge Kay concluded that the state's interest in incentivizing different-sex couples to marry so as to provide a stable family unit in which to raise children they might ac-

identally conceive provided a sufficient basis to sustain the law against constitutional challenge. He also found that it was fairly debatable that children benefit from being raised by their two biological parents in a marital relationship.

In the course of his analysis, Judge Kay became the first judge, so far as we can tell, to cite as evidence the controversial -- now infamous -- Regnerus study, which the Intervenor, Hawaii Family Forum, cited in its brief. After summarizing the plaintiffs' evidence of scientific studies showing "that there is no support for the assertion that children fare better when raised by opposite-sex rather than same-sex couples," he wrote, "On the other hand, HFF presents evidence that children do best when raised by their two biological parents," and cited University of Texas Professor Mark Regnerus's article in 41 Soc. Sci. Research 752 (2012), described in a parenthetical as "finding that children raised by married biological parents fared better than children raised in same-sex households in a range of significant outcomes." Presumably this parenthetical is taken from the HFF brief. It misrepresents the Regnerus study, and Prof. Regnerus would concede as much. His study did not compare children raised in same-sex households with children raised in households headed by married biological parents. Rather, its comparison was to households in which either parent had at some time engaged in a same-sex relationship with another adult, including many single-parent households and households affected by divorce, and few households in which the children were actually raised by a same-sex couple comparable to the married parent households. A recent internal "audit" conducted by Social Science Research concluded that the study was not properly peer-reviewed and was not

Judge Kay found that nothing that has taken place since 1972 would indicate that *Baker v. Nelson* is no longer a valid Supreme Court precedent.

scientifically credible, and the University of Texas is now considering a professionalism charge against Prof. Regnerus.

Judge Kay goes on to state: "Both sides point out flaws in their opponents' evidence," citing a contention in the brief filed by Gov. Abercrombie that the Regnerus study was flawed and an article by Loren Marks cited in the HFF brief criticizing positive social science studies on same-sex parenting as being based on small, non-random convenience samples. In other words, Kay equates the criticisms of each side, and treats them as if they cancel each other out, because under his brand of rationality review it doesn't make any difference! "In applying rational basis review," he wrote, "if 'the question is at least debatable,' the Court must uphold the classification." That is, legislatures need not base their policy judgment on established facts; they can hypothesize -- or courts can hypothesize for them -- any justification that would be "at least debatable." As long as a party submits "junk science" - in the form of a published journal article - contradicting the findings of valid scientific inquiry, the question becomes "debatable" and a legislative judgment can be based on the "findings" of either side.

This can't be correct -- and the Supreme Court's *Daubert* ruling requiring federal trial courts to exclude "junk science" from admission as evidence says as much -- but the Supreme Court's equal protection rulings lend themselves to this kind of interpretation, unfortunately. Judge Kay was ruling on summary judgment motions; there was no trial, and no opportunity for plaintiffs to raise a formal objection to any consideration of the Regnerus study, so it gets cited by the court and treated as "evidence" despite the lack of any foundation for its introduction as such. This is an example of the abuse to which the summary judgment process has been put by license of a conservative Supreme Court majority that has been eager to empower federal district judges to dispose of an ever higher percentage of cases without affording plaintiffs the right to a trial.

Judge Kay also pointed to the 11th Circuit's infamous decision in *Lofton*, the Florida gay adoption case, which similarly relied on the proposition that the impact of being raised by gay parents on kids was "debatable" to justify reject-

ing a constitutional challenge to a Florida statute disqualifying "homosexuals" from adopting children. And he cited the New York Court of Appeals ruling, *Hernandez v. Robles*, which rejected a same-sex marriage claim based on the same dubious "rationality" justification relying on "assumptions" about what was best for children, regardless of any social science evidence to the contrary.

Judge Kay devoted a section of his opinion to HFF's argument that Hawaii is "entitled to experiment with its social policy to determine what is in the state's best interest." Judge Kay bought their argument. "Throughout history and societies, marriage has been connected with procreation and childrearing," he wrote. "The legislature could rationally conclude that on a societal level, the institution of marriage acts to reinforce 'the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other,'" citing the *dissenting* opinion in the Massachusetts marriage case, *Goodridge*. "It follows that it is not beyond rational speculation to conclude that fundamentally altering the definition of marriage to include same-sex unions might result in undermining the societal understanding of the link between marriage, procreation, and family structure." For this proposition, he cited a publication by the Witherspoon Institute, the right-wing foundation that provided funding for Prof. Regnerus's "study" so that defenders of traditional marriage would have a published article in a "respectable" social science journal to cite.

"Under rational basis review," Kay continued, "the state is not required to show that allowing same-sex couples to marry will discourage, through changing societal norms, opposite-sex couples from marrying. Rather, the standard is whether the legislature could rationally speculate that it might. It is at least debatable that altering 'that meaning would render a profound change in the public consciousness of a social institution of ancient origin.'" Here, Judge Kay drops a footnote raising the specter of incest, writing, "Once the link between marriage and procreation is taken away, and encouraging a socially desirable family structure is deemed irrational, there is no rational limiting principle for other types of re-

lationships," then citing some old cases of incest prosecutions.

Judge Kay concludes that the state can decide to proceed "cautiously" in dealing with such issues, as Hawaii had done by enacting the Reciprocal Beneficiaries Law in 1997 and then the Civil Union Law in 2011. "By doing so, it may observe the effect of the reciprocal beneficiaries and civil union laws before deciding whether or not to extend the title marriage, along with the already conferred legal rights, to same-sex couples," he continued. Kay reiterated his opening remarks about judicial restraint, asserting that "to suddenly constitutionalize the issue of same-sex marriage 'would short-circuit' the legislative actions that have been taking place in Hawaii. The Court reiterates that rational basis review is the 'paradigm of judicial restraint' and the Fourteenth Amendment 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choice.'"

Plaintiffs' counsel, John D'Amato, will appeal this ruling to the 9th Circuit. Although Judge Kay is correct that the 9th Circuit's decision in *Perry v. Brown* refrained from deciding whether same-sex couples have a right to marry, that court's opinion did take on and reject many of the same arguments that Judge Kay accepted as satisfying the rationality requirement in this case. By the time this appeal comes before the 9th Circuit for decision, there will likely be a ruling by the Supreme Court on whether it is granting review in *Perry v. Brown* and rulings on the pending petitions for review in several challenges to Section 3 of DOMA, the statute banning federal recognition of same-sex marriages. Just as the 9th Circuit has put off oral argument in the *Golinski* case while waiting to see what happens in the Supreme Court, it is possible that the circuit court would delay deciding this case if the Supreme Court agrees to review *Perry*, since one question presented to the Court in *Perry* is, at its heart, the same question presented in this case: whether a state violates the 14th Amendment by reserving marriage for different-sex couples while providing all the state law rights of marriage to same-sex couples through another legal construct (civil unions in Hawaii, domestic partnerships in California). ■

MA S.J.C. Holds Civil Unions & Marriages Have Similar “Status” in Divorce

The Supreme Judicial Court of Massachusetts held in *Elia-Warnken v. Elia*, 2012 WL 3023981 (July 26, 2012), that a civil union contracted in another state must be dissolved before either party to that civil union can enter into a valid marriage with a third party in Massachusetts. The case was transferred from the Appeals Court on a question referred by the judge in the Probate and Family court, ruling on a motion to dismiss a divorce action. The justices sat en banc to determine the issue, and Chief Justice Roderick L. Ireland wrote the opinion for the court, which stands as Massachusetts’ unanimous ruling of first impression on the issue.

In 2003, Todd J. Elia-Warnken, plaintiff, and his former same-sex partner entered into a civil union in the State of Vermont. The couple separated, but never dissolved the Vermont civil union. In 2005, Todd married Richard A. Elia, defendant, in Massachusetts. In 2009, Todd filed for divorce, and Richard counterclaimed for divorce. During the divorce proceeding, Richard discovered that Todd was still party to a Vermont civil union that was not dissolved prior to their marriage. Richard then sought to dismiss the action, arguing that the marriage was void *ab initio* under Massachusetts’ polygamy statutes.

Both Massachusetts and Vermont now recognize same-sex civil marriages. However, from 2000, when it enacted a Civil Union Act, until 2009, when it enacted marriage equality legislation, Vermont provided only civil unions, which granted same-sex couples the attendant benefits, protections, and responsibilities of a civil marriage. In 2009, Vermont simultaneously redefined its civil marriage statutes to allow same-sex couples to marry and repealed its civil union statutes, although civil unions formed under that statute, if not converted to marriages or dissolved, remain in effect and continue to be recognized as such in Vermont.

Before reaching the issue of whether the marriage between Todd and Richard was void, the court first considered whether Massachusetts should recognize the Vermont civil union in the same manner as any other out-of-State marriage. The court provides two reasons for recognizing the Vermont civil union as the equivalent

of marriage under Massachusetts law: (1) the principles of comity, and (2) the potential uncertainty and chaos that may result from a contrary holding.

The principles of comity provide that a State has the option to respect and defer to the legislative enactments and public policy pronouncements of other jurisdictions. While doing so is not mandatory, it is an acknowledgment of the equality of legislative power among the States. Here, the principles of comity would permit Massachusetts to acknowledge the legal relationship created in Vermont, despite Massachusetts not having a similar enabling statute and even if Massachusetts prohibited same-sex marriages at the relevant time.

To merit the application of the principles of comity, Judge Ireland compared Vermont civil unions to Massachusetts marriages. Both states define the legal relationship as “the voluntary union of two persons as spouses, to the exclusion of all others.” The court considered this sufficient to apply the principles of comity to acknowledge Vermont civil unions as the equivalent of Massachusetts marriages for this purpose.

Judge Ireland then discounted three arguments against applying the principles of comity. First, he acknowledged that, at the time the civil union statutes were in effect, Vermont did not consider civil unions the absolute equivalent of marriages. There was an underlying belief that civil unions possessed a different “status.” What differences were envisioned by this different “status” is a mystery and the court discounted this argument because the legislative intent was to create legal equity between civil unions and marriages.

Second, Ireland rejected the plaintiff’s argument that Vermont did not consider civil unions as the equivalent of marriages because when the civil union statute was repealed the Vermont legislature did not automatically convert all civil unions into marriages. The court stated that this fact is not determinative of Massachusetts’s ability to recognize civil unions as marriages.

Finally, Ireland rejected the argument that recognition of Vermont civil unions in Massachusetts would create an alternative to marriage in Massachusetts and deny these couples equal protection and due process rights. Judge Ireland stated that, in ac-

tuality, recognition of civil unions removes any discriminatory treatment because both civil unions and marriages will be treated as equivalent legal relationships.

Judge Ireland then stated the second reason for applying the principle of comity to recognize the Vermont civil union: avoiding uncertainty and chaos. Not recognizing the civil union in the context of this divorce proceeding would mean that person could otherwise simultaneously have two legal spouses with all of the corresponding benefits and obligations, such as spousal or child support, inheritance, and healthcare coverage. The court stated that, “preventing complications such as these is one of the purposes of the polygamy statutes.”

Having established that pursuant to the principles of comity Massachusetts may recognize Vermont civil unions as marriages, the court addressed the second issue regarding whether the defendant’s marriage to the plaintiff was void *ab initio* pursuant to the polygamy statute. Massachusetts law provides that if either party to a marriage has an ongoing legal spousal relationship, then any subsequent marriage is void *ab initio*. The court held that the marriage between the plaintiff and the defendant was void *ab initio* because the plaintiff was party to a civil union that had not been properly dissolved.

The court explicitly rejected the plaintiff’s argument that the polygamy statute only applies if one of the parties has a “husband” or “wife,” neither of which applies to a same-sex couple. The court stated that, according to precedent and statutory provisions on interpretation, the statute must be construed in a gender-neutral manner as simply referring to a legal spousal relationship, even though it used the terms “husband” and “wife.”

The Supreme Judicial Court of Massachusetts did not seem to struggle with this issue, and the decision seems solidly based in both law and public policy. It will be interesting to see how other states cope with similar issues arising from the disparities in laws that enable same-sex couples to enter into legal spousal relationships. —*Gillad Matiteyahu*

Gillad Matiteyahu is a law student at New York Law School ('13).

6th Cir. Rejects Constitutional Challenge to Federal Hate Crimes Act by Anti-Gay Clergy

A unanimous panel of the U.S. Court of Appeals for the 6th Circuit ruled on August 2 in *Glenn v. Holder*, 2012 WL 3115683, that anti-gay clergy in Michigan lacked standing to assert a federal constitutional challenge to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The law, enacted early in the Obama Administration, added to existing federal hate crimes law a provision making it a federal hate crime to commit a battery against a person because of the person's religion, national origin, gender, sexual orientation, gender identity, or disability. The law existing prior to this enactment already covered such crimes motivated by the victim's race or color.

In a complaint framed by lawyers from the Thomas More Law Center, a Catholic lawyers group, as summarized in his opinion for the panel by District Judge James S. Gwin, the plaintiffs alleged "that the expression and practice of their anti-homosexual religious beliefs will lead to federal investigation and prosecution under the Act, in violation of their First Amendment rights."

But, commented Judge Gwin, "Plaintiffs' underlying complaint is with the government's heightened protection of homosexuals from criminal violence – this lawsuit is really a political statement against the Hate Crimes Act." In a footnote, Judge Gwin said, "Plaintiffs have a (sincere, apparently) belief that the Hate Crimes Act 'is all about elevating certain persons (homosexuals) to a protected class under federal law based on nothing more than their choice to have sex with persons of the same gender, while marginalizing strong religious opposition to this immoral choice.'"

Since the plaintiffs disavowed any personal intent to commit acts of violence against people because of their sexual orientation, the court found that they were not able to satisfy federal standing requirements

to maintain the lawsuit. "Plaintiffs oppose the Hate Crimes Act," wrote Judge Gwin. "Somewhat inconsistently, they also say they oppose 'crimes of violence.' They say the Act will allow government officials to deem certain (i.e., Plaintiffs') ideas, beliefs, and opinion as criminal and to undertake 'inherently divisive' prosecutions." They also claimed that the existence of the law would have a chilling effect on their ability to preach against homosexuality for fear of being prosecuted, speculating that if a congregant reacted to their anti-gay speech by actually going out and committing violence against a gay person, the plaintiffs themselves might be subject to prosecution.

The court rejected these arguments totally, finding that the plaintiffs failed

to allege that they intended to violate the Act, as both the text and the legislative history made clear that only the perpetrator or facilitator of an act of violence was subject to prosecution. The court also rejected the idea that a minister preaching a sermon condemning homosexuality, or even including a quotation of the Biblical death penalty for sodomy, could be subject to prosecution under the Act. Speculation that some overzealous prosecutor might use the Act for that purpose was not sufficient to confer standing, said the court. Plaintiffs have to show a likelihood that they could be prosecuted under the law for engaging in constitutionally protected activity if they want to challenge a law on First Amendment grounds.

"So why are Plaintiffs here?" asked the court. "If the Hate Crimes Act prohibits only willfully causing bodily injury and Plaintiffs are not planning to willfully in-

jure anybody, then what is their complaint? Plaintiffs answer that they fear wrongful prosecution and conviction under the Act. Not only is that fear misplaced, it's inadequate to generate a case or controversy the federal courts can hear."

In a concurring opinion, Circuit Judge Jane B. Stranch pointed out that plaintiffs had misrepresented the legislative history in their attempts to bolster their standing argument, by quoting legislators partially and out of context to distort their remarks. She noted that the legislative history "reveals that Congress did, in fact, have individuals such as Plaintiffs in mind when it passed the Hate Crimes Act. And it intended to protect their constitutional expression of religious beliefs.

See H.R. Rep. No. 111-86, at 16 (2009). Thus, I find no evidence in the legislative history arguments offered that the Act was 'aimed directly' at religious leaders such as Plaintiffs." Judge Stranch also noted that the very hypothetical situations described by plain-

tiffs had been raised and dealt with in the legislative history, and were also reflected in statements by the named defendant, Attorney General Eric H. Holder, Jr., who testified that the law would not be used to prosecute ministers who say "negative things about homosexuality." Testified A.G. Holder, "The person who actually committed the physical act of violence would be the person – assuming that all the jurisdictional requirements were met, it is the person who commits the actual act of violence who would be the subject of this legislation, not the person who is simply expressing an opinion." Judge Stranch found "wholly groundless" the claim that "statements by federal prosecutors and the Attorney General constitute threats of enforcement of the Hate Crimes Act against religious leaders for their religious speech." ■

Plaintiffs claimed that the existence of the law would have a chilling effect on their ability to preach against homosexuality for fear of being prosecuted.

3rd Cir. Rejects Constitutional Claims by Self-Identified Transgender Inmate

In an opinion filed July 25, 2012, the U.S. Court of Appeals for the 3rd Circuit dealt a final blow to the pro se case brought by James Smith, an incarcerated man who identifies himself as having Gender Identity Disorder (GID). *Smith v Hayman*, 2012 WL3024429 (not selected for publication in F.3d).

Smith brought claims against a number of staff and supervisors at the New Jersey State Prison, alleging that they subjected him to cruel and unusual punishment by denying adequate medical care, violated his Equal Protection rights, violated his right of privacy, and retaliated against him for complaining about the conditions and treatment he encountered in prison.

Smith, while incarcerated, told prison staff that he suffered from GID. He informed prison officials of his feelings, and was displeased when they failed to provide him medication to assist him in transitioning from male to female. He asked for privacy while discussing his problem, to avoid alerting his fellow inmates or prison guards to his self-described condition, but was again unhappy when the circumstances surrounding his discussions were more public than he desired. The prison medical team determined, after examination, that Smith did not fit the criteria for having GID, so continued to deny him medication. Around this time, Smith began visiting the prison library and mounting a case against the prison and its officials. In retaliation, Smith alleges, officials moved him into a “double-lock” (a dual occupancy cell), to try to coerce him into an altercation and thereby have an excuse to confine him and discourage his actions in the legal library. Eventually, Smith filed a pro se claim, pursuant to 42 U.S.C. sec. 1983, alleging a number of violations of his rights.

The case followed a winding road of unfavorable decisions, during which Smith’s claims were chipped away one by one, and eventually he appealed to the U.S. Court of Appeals, Third Circuit.

As these claims include complaints against some of the defendants in their official government capacities, the district court, in its first examination of Smith’s case, exercised its “screening process” – a process designed to shield the government from frivolous and unnecessary cases. In the screening process, the court asked whether Smith had alleged enough facts to allow the case to survive under a standard similar to that in a “failure to state a claim” motion.

Smith’s claim of denial of medical care and violation of his equal protection right was the first to fall, as it hinged on the fact that prison officials refused to supply Smith with hormone therapy and other treatment for his alleged GID. Smith had never received a formal diagnosis of GID,

Siding with the prison officials, the court denied the injunction, noting that Smith failed the first two requirements to obtain such an injunction: that he was likely to succeed on the merits, and that denial of an injunction would result in irreparable harm. Smith provided no evidence that vital medical information was deleted from his record, and did not show that the medical records required to pursue his case would no longer be available in the absence of the injunction.

The remaining claims were resolved in a grant of summary judgment in favor of the Defendants. The court, under the standard of “whether there are any genuine issues of material fact such that a reasonable jury could return a verdict for the plaintiffs,” found that Smith had not put forward any argument that satisfied that requirement. Smith then appealed the district court’s opinion.

In reviewing the appeal, the Court of Appeals first noted that the courts are encouraged to liberally construe pleadings of pro se liti-

gants such as Smith. Accordingly, although there are issues of Eleventh Amendment immunity in Smith’s pleadings against several defendants in the official capacities, the court chooses to review the pleadings as if the claims were raised against them in their individual, non-official capacities, thereby sidestepping those issues.

The court then dismisses the appeal of the district court’s “screening” of the medical treatment neglect and Equal Protection claims, on essentially the same grounds as the district court. Since no actual treatment for Smith’s alleged GID was prescribed, the defendants cannot be held liable for withholding any medication or treatment. Further, they note, it is not the place of the courts to second guess treatment decisions, when the initial decision about treatment (or lack thereof) was made by a medical professional.

As to the Equal Protection claim, the court agreed with the district court that Smith

Smith told prison staff that he suffered from GID and was displeased when they failed to provide him medication to assist him in his transition.

and medical staff at the prison determined that he did not meet the criteria for such a diagnosis. Accordingly, the court determined that no untoward denial of treatment could have occurred, even if, as all parties conceded, no treatment was given.

After his initial setback, Smith filed for a preliminary injunction to stop prison officials from what he viewed as “deleting medical diagnoses” from his file. It appears, though, that Smith was referring to information that was not diagnosis-related, but rather notes on his condition at a given time. The examples provided to the court involved notes about possible issues Smith might have been dealing with that were included in his March, 2010, medical record, but did not appear in his July record. Prison officials maintained that the information simply was not included in the July report because the issues were not present in July as they were in March.

was not treated any differently from similarly situated persons. He was treated in the same manner as the other inmates, and although he argues that he should be considered in a class with the female inmates, the court dismisses this argument as “conclusory.”

The court also affirms the district court’s decision to do away with claims against a supervisor (who was not directly involved with the circumstances discussed in Smith’s claim) and Smith’s Failure to Protect claim. As to the latter, Smith had argued that placing him in a “double-lock” cell with a fellow inmate put him in harm’s way. However, he offered no evidence or even suggestion that he was particularly vulnerable or that any harm actually happened. Though a transgender individual in a male double-lock cell may have been in quite a bit of danger, Smith was dressed in men’s clothing and presented as a male at all times, so he was in no more danger than any other person locked in a cell with a fellow prisoner.

Smith also raised claims of retaliation and violation of privacy, each of which the court of appeals disposes of by noting that none of Smith’s constitutional rights were violated. Smith claimed that officials retaliated against him for using the law library, but nothing in his claim showed that any adverse action was taken against him as a direct response to his use. Likewise, Smith claimed that officials speaking to him about his gender identity issues within hearing distance of other inmates violated his privacy, but the court sides with the officials, who claim they made efforts to avoid allowing any other parties to hear conversations with Smith, and in any case, Smith does not claim that his discussions were actually overheard.

Finding no substantial questions to address, the Court affirms the judgment of the District Court, and once again leaves us wondering whether a prisoner’s claims, if properly presented, held more merit than was communicated by Smith on his own. Pro se cases rarely succeed, and, unfortunately for Smith, this was no exception. —*Stephen E. Woods*

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

Editor's Note: We have used the court's terminology (i.e., referring to Smith with male pronouns) in the interest of reflecting the court's decision-making process, which emphasized the absence of a GID diagnosis.

5th Cir. Rejects Title VII Sex Discrimination Claim Involving Same-Sex Workplace Harassment

The U.S. Court of Appeals for the 5th Circuit in *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*, 2012 WL 3055985, rejected the harassment claims of a male construction worker who faced repeated harassment on the job from his male supervisor. In reaching its decision, the court, in an opinion by Circuit Judge E. Grady Jolly, declined to determine whether same-sex gender stereotyping could support a claim of same-sex harassment under Title VII.

The case concerned plaintiff Kerry Woods, a male construction worker on an all-male team repairing a bridge from New Orleans to Slidell damaged by Hurricane Katrina. Woods was continually harassed on the job, including being called “faggot” and “princess.” He was also subjected to Silvio Berlusconi-style humping and the repeated, unwelcome exposure of genitals by a supervisor, Chuck Wolfe, whom the court termed a “world-class trash talker.”

Despite such conduct, the court, reviewing the case *de novo*, unanimously overturned a jury verdict that had awarded Woods \$250,000 in damages. After complaining about the conduct, Woods was first removed from the work crew and then eventually laid off entirely. Woods filed a claim with the U.S. Equal Employment Opportunity Commission (EEOC) alleging sexual harassment and retaliation. The EEOC, in turn, brought an enforcement action in district court on behalf of Woods. The jury determined that the conduct amounted to sex discrimination.

As an initial matter, the 5th Circuit panel noted that there was no evidence to suggest that either Woods or Wolfe were “homosexual.” The court also determined that there was insufficient evidence to suggest that Woods was effeminate (i.e., that he failed to conform to gender stereotypes.) Rather, the court noted that the only evidence of alleged “effeminate” behavior by Woods was the ap-

parent use of “Wet Ones” rather than dry toilet paper, which, although described by Wolfe as “girly” and the source for some of his mockery, was not, according to the court, “overtly effeminate.”

This latter determination was critical to the court’s ruling. As the court put it: “It is a circular truth that a plaintiff may not recover based on nonconformance to gender stereotypes unless the plaintiff conforms to nonconformance gender stereotypes.” One may wonder why nonconformance to a gender stereotype requires conformance to some other stereotype, or what sets of characteristics would even constitute nonconformance. (Not to mention the court’s determination that simulated anal rape and indecent exposure by a male supervisor directed toward his male supervisee amounted to “no evidence that either man was homosexual or attracted to homosexuals.” But we’ll mention it anyway. The court appears to simply assume heterosexuality absent rather compelling proof to the contrary.)

The 5th Circuit relied heavily on the U.S. Supreme Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 US 75 (1998), which was the first Supreme Court case to address whether workplace harassment violates Title VII when the harasser and the harassed employee are of the same sex. There, the Court held that “[a] professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.”

The 5th Circuit characterized *Oncale* as covering same-sex harassment situations in which either the harasser is gay or there is evidence that the harasser is motivated by “general hostility” to the presence of members of the same sex in the workplace, or where evidence shows disparate treatment by the harasser of members of both

sexes in a mixed-sex workplace.

Here, the court sees the basis for Woods' claims – sex stereotyping – as falling outside of the categories expressly covered by *Oncale*. The court contrasts Woods' sex-stereotyping claim from that of *Price Waterhouse v. Hopkins*, 490 US 228 (1989), in which the evidence of sex stereotyping was more substantial. There, a woman alleged she was denied partnership in her accounting firm because some of the partners felt, in words attributed to them, that she was "macho," needed "a course at charm school," and should walk and talk "more femininely."

The 5th Circuit concluded: "The case before us today stands in sharp contrast to *Price Waterhouse*, in which there was considerable evidence that the plaintiff did not conform to the female stereotype."

Since the court determines that there is insufficient evidence to support the asserted sex stereotyping theory of same-sex harassment asserted by the EEOC, it need not decide whether such a theory is cognizable in the 5th Circuit. Moreover, because it also concludes that Wolfe's conduct did not constitute discrimination in violation of Title VII, it does not reach the question of whether it was sufficiently severe or pervasive to create a hostile work environment. In sum, Woods is out of luck.

It may be that the appeal would have turned out differently if the EEOC had taken a different path to proving discrimination, since there is somewhat slender, though not necessarily insufficient, evidence that Wolfe's offensive acts were spurred by Woods' gender nonconformance.

All told, the 5th Circuit thus inadvertently reminds us of the baneful inadequacy of Title VII to provide Federal protections to workers facing discrimination in states that have made no genuine legislative progress in this area of law. The panel's decision thus highlights again the need for a federal Employment Non-Discrimination Act that might provide Mr. Woods the access to justice that the panel foreclosed by banning discrimination based on actual or perceived sexual orientation. —JPY

CA Ct. of Appeal Rules for Lesbian Second Parent

Marking a slight extension of California precedent concerning lesbian second-parent status, a panel of the 4th District Court of Appeal ruled in *L.M. v. M.G.*, 2012 WL 3125123 (August 2, 2012), that the former same-sex partner of an adoptive parent may seek joint custody and visitation rights with the child. Applying the Uniform Parentage Act, the court held that the paternity provisions apply, and that the original single-parent adoption decree does not detract from the claim of parental rights by the former partner.

According to the decision for the three-judge panel by Justice Joan Irion, M.G. and L.M. lived as same-sex partners from 1998 to the end of 2003. They each brought a child into the relationship born before the two women became a couple. M.G. wanted to have another child and unsuccessfully tried to conceive again using donor insemination, taking sperm from the same donor who was the progenitor of her first child, but it didn't work, and she ended up adopting a child. At that time, 2001, it was not yet definitely established under California law that same-sex couples could jointly adopt, or that the same-sex partner of an adoptive parent could subsequently adopt under the "step-parent" procured. The two women brought the adoptive child into their home and shared parental duties. The child regarded both women as his parents.

The women's relationship ended in 2003, but L.M. continued seeing the child regular-

ly with M.G.'s approval and encouragement. M.G. testified that she allowed regular contact after the relationship between the women had ended because the child had lived in the same house with L.M. since his birth and "knew and loved her." M.G. explained, "The more people that love you the better. [L.M.] loves him.. He's been given a gift... I can't just take it away. It would be wrong."

But in October 2009 M.G. told L.M. that she planned to relocate to Europe with the child for 18 months the following summer because M.G.'s registered domestic partner would be temporarily reassigned there for her job. L.M. was opposed to this, and filed a petition on May 3, 2010, seeking to establish her parental relationship to the child under the U.P.A. and to obtain joint custody and visitation orders. Specifically, she sought a determination from the court about whether the child should be relocated to Europe.

San Diego Superior Court Judge Susan D. Huguenor, applying the U.P.A. as it has been construed by the California Supreme Court in cases involving lesbian couples and their children, determined that L.M.'s parental rights should be recognized by the court under Section 7611 of the California Family Code, because L.M. "received the Child into her home and held him out to the world as her natural child." The concept of "natural child" under the U.P.A. as adopted and construed in California (and now several other states) makes a distinction between biological parent and natural parent.

The court noted, "It is now well established that a child raised in a same-sex relationship may have two mothers, and our Supreme Court has announced a 'public policy favoring that a child have two parents rather than one.'"

For purposes of paternity (which includes maternity because of gender-neutral construction of the statutory language), a same-sex co-parent of a birth mother was considered a "natural parent" in the landmark California Supreme Court ruling in *Elisa B. v. Superior Court*, 37 Cal.4th 108 (2005). Judge Huguenor saw no reason to treat the situation differently when one of the women had adopted the child and the other had not, and the Court of Appeal panel agreed.

M.G.'s main argument, stated various different ways, was that the adoption presents a different case, because it involves a judicial determination to establish a family consisting of the adoptive parent and the child, thus creating, in effect, a legal single-parent family. As such, she argued, her former partner, who never adopted the child, should not be entitled to seek a declaration of parental rights. The court would not accept this argument, however, noting that in *Elisa B.* the California Supreme Court had cut through various formalities of statutory language to advance the policy preference that a child have two legal parents if that is consistent with the facts of the child's life.

"The record contains no evidence," wrote Justice Irion, "that the issue of whether the Child could have only one parent was raised or decided in the adoption proceedings. Thus, although the adoption decree obtained by M.G. implicitly served as an adjudication that the Child's best interests were served by conferring parental status on M.G. and

severing the Child's legal ties with his birth parents, there is no basis to characterize the adoption decree as establishing that, *regardless of future developments*, the child should be limited to only one parent. It is now well established that a child raised in a same-sex relationship may have two mothers, and our Supreme Court has announced a 'public policy favoring that a child have two parents rather than one.' Against this background, we reject M.G.'s interpretation of the adoption decree as a judgment establishing that the Child may have only one mother." (Emphasis in original).

Also, because L.M. was not seeking to change M.G.'s status as the Child's parent, there was no need to examine "conflicting presumptions" about parentage, because the court saw no conflict. Since a child can have two mothers under California law, the parental claims of M.G. and L.M. were not "mutually exclusive." Furthermore, the single parent adoption decree was not, in the court's opinion, a reason to rebut the parentage presumption in favor of L.M. that arose from the circumstance of her accepting the child in her home, providing parental care and holding the child out to the world as her natural child. "The state policy in favor of providing a child with two parents has led courts to conclude that it would not be an 'appropriate action' to rebut a parentage presumption when that presumption arises in favor of a second parent of a child raised by a same-sex couple and there is no other person competing for the second parent position," Justice Irion commented, and

the court rejected the idea that this case should be decided differently from cases in which one member of the couple was a birth mother.

Thus, the court of appeal affirmed Judge Huguenor's ruling grant joint legal custody to M.G. and L.M., and designating M.G.'s residence as the Child's primary residence. As to the European relocation, the judge permitted M.G. to travel to Europe with the child for the 2010-11 school year, noting certain visitation rights for L.M. during that time, and ordered a follow-up hearing to determine whether the stay in Europe should be extended "to the full intended period of 18 months." Thus, although L.M.'s original motivation for bringing the proceeding - to try to block the relocation - had failed, she did obtain recognition of her parental status and joint-custody, which would entitle her to maintain contact with her son and have a continuing say in his upbringing.

L.M. is represented by Sandler, Lasry, Laube, Byer & Valdez LLP and Edward I. Silverman. M.G. is represented by Stephen Temko, Jeffrey W. Doeringer and David Lee Moore. Justice Aaron concurred with Justice Irion's opinion, and Justice Huffman added a brief statement concurring with the "majority opinion" as "an accurate statement of California law" and "consistent with the direction provided by *Elisa B.*" Justice Huffman thus "concurred in the result," without explaining a failure to just sign Justice Irion's opinion, leaving a slight puzzle for this reader. ■



Check out the **Lesbian/Gay Law Notes Podcast** each month to hear our editor-in-chief, New York Law School Professor **Art Leonard**, comment on the news of the day. Subscribe, via this **iTunes** link <http://itun.es/iVX66B> or listen-in via the **Web**, by pointing your browser to <http://www.legal.podbean.com/>

CA Court Recognizes Possible Intentional Interference with an Expected Inheritance Claim by Surviving Same-Sex Partner

The Court of Appeal for the Fourth District of California has ruled in *Beckwith v. Dahl*, 205 Cal.App.4th 1039 (May 3, 2012), that a surviving same-sex partner might be able to establish a prima facie claim of Intentional Interference with an Expected Inheritance (“IIEI”) and deceit by false promise and remanded the case for further proceedings.

Beckwith and his partner MacGinnis were in a committed relationship for almost 10 years. MacGinnis had one sister, Dahl, his sole living relative, with whom he had been estranged for some time. At some point in the relationship, MacGinnis showed Beckwith a will on his computer which stated that upon MacGinnis’s death, half the estate would go to Beckwith and the other half to Dahl. As MacGinnis’s health deteriorated and he was in the hospital awaiting surgery, he asked Beckwith to bring him the will to sign. Beckwith couldn’t find the computer file and created a new will to present to MacGinnis which equally divided the estate between Beckwith and Dahl.

Beckwith called Dahl to tell her about the will and emailed her a copy. Dahl replied to Beckwith’s email suggesting that he consider a trust over a will and stated she had friends who were attorneys and she could call them. Dahl called Beckwith and told him not to present the will to MacGinnis because one of her friends would prepare the trust “in the next couple of days.” Beckwith did not present the will to MacGinnis, who had surgery on his lungs two days later. Although there was a chance MacGinnis would not survive the surgery, the doctors did not discuss the matter with Beckwith, since he was not legally a family member. Following the surgery, MacGinnis’s condition worsened and he eventually died without ever having signed the will. Dahl initiated probate proceedings, became administrator of the intestate estate, and was awarded the entire estate, as the probate judge concluded that Beckwith was “not a creditor of the estate” and had “no intestate rights.”

Beckwith filed a civil action of IIEI, deceit by false promise and negligence against Dahl. Dahl demurred to all three causes of action, pointing out that no court had previously recognized an IIEI claim in California. The trial court sustained the demurrer without leave to amend as to all three causes

of action. Beckwith appealed. Presiding Justice Kathleen O’Leary of the Fourth District Court of Appeal stated that the trial court decision could only be reversed if facts were alleged showing entitlement to relief under any possible legal theory and only if the trial court abused its discretion by sustaining the demurrer without leave to amend.

In deciding whether to allow a claim for IIEI under California common law, Justice O’Leary considered the policy reasons behind allowing such a claim, and concluded that “a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy” and that the rule adopted should “strike the appropriate balance between respecting the integrity of the probate system, guarding against tort liability for inherently speculative claims, and protecting society’s interest in providing a remedy for injured parties.” Justice O’Leary stated the five elements necessary to make a cause of action

tancy in MacGinnis’s estate that would have been realized but for Dahl’s intentional interference... Beckwith did not allege Dahl directed any independently tortious conduct at MacGinnis. The only wrongful conduct alleged in Beckwith’s complaint was Dahl’s false promise to [Beckwith].” However, Justice O’Leary stated that “under the circumstances here, Beckwith did not have a fair opportunity to correct the deficiencies with regard to his IIEI cause of action” since the trial court found the cause of action insufficient “based on its conclusion the tort was not legally recognized in California.”

With regard to Beckwith’s claim of promissory fraud, Justice O’Leary stated that Beckwith’s complaint “sufficiently alleged each of the elements of fraud with the requisite specificity and particularity”: Beckwith alleged Dahl promised him she would promptly prepare and deliver trust documents to MacGinnis which would equally divide his

Following the surgery, MacGinnis’s condition worsened and he eventually died without ever having signed the will.

for IIEI: 1) complainant had an expectancy of an inheritance; 2) the complaint must allege causation; 3) the complainant must plead the defendant had knowledge of the expectancy and took deliberate action to interfere with it; 4) the complaint must allege that the interference was conducted by independently tortious means, “i.e., that the defendant had knowledge of the complainant’s expectancy of inheritance and took deliberate action to interfere with it”; and 5) complainant was damaged by the interference. Justice O’Leary stated the additional requirement that an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff.

In applying the standard to Beckwith’s complaint, Justice O’Leary concluded that while Beckwith “alleged he had an expect-

estate between Dahl and Beckwith; Beckwith stated that Dahl’s promise was false at the time she made it; the complaint stated that Dahl intended Beckwith to rely on her promise by refraining from delivering the will to MacGinnis before his surgery; that Beckwith actually relied on the promise; Beckwith was damaged because he did not get half of the estate; and that his reliance on Dahl’s promise was justifiable.

Since she concluded that Beckwith’s complaint sufficiently alleged all of the elements of promissory fraud, Justice O’Leary held that the trial court erred in sustaining Dahl’s demurrer. Accordingly, the promissory fraud ruling was overruled, the case was remanded to give an opportunity to amend his complaint for IIEI, and Beckwith was awarded costs on appeal. —*Bryan Johnson*

Miller-Jenkins Case Back in the News

On July 29, the *New York Times* published *Which Mother for Isabella? Civil Union Ends in an Abduction and Questions*, by Erik Eckholm, a lengthy investigative article about the ongoing Miller-Jenkins litigation in the Vermont and Virginia courts. The article began on the front page for the print edition of the Sunday newspaper (the *Times*' largest circulation day); and was featured on the home page of the newspaper's website. At present, there has been a final judgment by the Vermont Supreme Court holding that lesbian co-parent Janet Jenkins is entitled to custody of Isabella Miller-Jenkins, who was born while Jenkins and Lisa Miller were united in a Vermont civil union in 2000. Miller, the birth mother, who became an Evangelical Christian after the civil union was dissolved, fled the United States with Isabella rather than comply with court rulings requiring her to allow visitation by Jenkins. The Vermont Supreme Court ultimately affirmed a ruling awarding sole custody to Jenkins, largely due to Miller's defiance of the court's visitation order. The *Times* reported that Kenneth Miller, a Mennonite pastor, was about to be tried in federal court in Vermont on aiding and abetting kidnapping charges arising from Lisa Miller's flight with her daughter from the United States.

A federal jury in Burlington found Kenneth L. Miller guilty of abetting international parental kidnapping on August

14. *United States v. Miller* (D. Vt.). Miller was charged with assisting Lisa A. Miller (not related to him) in fleeing the U.S. with her daughter, Isabella Miller-Jenkins, in order to evade court orders that Janet Jenkins, Ms. Miller's former Vermont civil union partner and Isabella's other mother, be allowed visitation with the child. Kenneth Miller did not deny assisting Lisa Miller in leaving the U.S., but claimed he was unaware that she was subject to any court orders at the time, a defense the jury evidently did not believe in light of evidence of the media publicity that had been given to the custody/visitation case, as well as testimony at trial concerning Kenneth Miller's actions. Lisa Miller and Isabella are believed to be living in Nicaragua, which does not have an extradition treaty with the U.S., with the assistance and protection of the Mennonite community there.

Miller and Jenkins were Vermont civil union partners when Isabella was born in 2002. The women split up when Isabella was 17 months old, and Miller, the birth mother, moved with Isabella to Virginia, but filed an action to dissolve the civil union in a Vermont court, thus giving Vermont primary jurisdiction over ensuing child custody and visitation litigation. (Miller's attempt to involve the Virginia courts in the ensuing dispute ultimately failed, as the Virginia Supreme Court ruled that Vermont had jurisdiction to determine parental rights and responsi-

bilities.) Miller claimed to have become an evangelical Christian, renounced her homosexuality, and drew support from anti-gay religious groups, such as Liberty Counsel, which provided her legal representation in the custody/visitation matter. Building on the trial testimony, Janet Jenkins filed suit in U.S. District Court on August 14 while the jury was deliberating, alleging that Jenkins, Rev. Miller and others had conspired beginning in 2008 to violate Jenkins' civil rights in violation of several federal statutes, including RICO (the Racketeer Influenced and Corrupt Practices Act). *Jenkins v. Miller*, No. 2:12-cv-184 (D. Vt., filed Aug. 14, 2012), by kidnaping Isabella and taking her out of the country to evade the jurisdiction of Vermont and Virginia courts. The complaint seeks damages for emotional distress and loss of companionship of Jenkins' daughter, and punitive damages for the commission of the intentional tort of kidnapping and violation of civil rights, as well as a court order requiring Miller to bring Isabella back to the United States to comply with outstanding custody and visitation orders. The RICO count, which involves tripling the actual damages, is premised on kidnapping, money laundering, and mail fraud, all of which figure in the detailed factual recitation in the Complaint. The complaint also seeks attorney and expert witness fees. *Advocate.com, New York Times, Boston Globe*, Aug. 15. ■

NY Trial Ct. finds NYC Adult Zoning Ordinance Violates 1st Amendment

New York Supreme Court Justice Louis B. York ruled on August 30 that the 2001 amendments to New York City's zoning law dealing with adult businesses violates the 1st Amendment rights of those businesses. Changing course from some prior rulings he had issued in the case, Justice York found that the City failed to show that the additional restrictions on adult businesses enacted in 2001 to supplement the restrictions first enacted in 1995 were supported by any evidence showing that they were substantially related to advancing any important city policy. Thus, they were stricken as unjustified content-based restrictions on

constitutionally protected speech. *For the People Theatres of N.Y., Inc. v. City of New York*, Index No. 121080/02 (N.Y. Sup. Ct., N.Y.Co., Aug. 30, 3012).

The New York City Council commissioned a study more than twenty years ago about the effects of adult businesses on the communities in which they were located. That study was intended to provide support for proposed zoning restrictions that would sharply reduce the geographical area in which adult businesses could operate, basically excluding them from residential and business districts with high pedestrian traffic and making them much less visible as part of the New York City streetscape. The

study purported to show that such businesses attract crime, lower property values, and expose minors to sexually explicit images (mainly through their external signage).

Such documentation is necessary under U.S. Supreme Court precedents holding that zoning regulations to exclude adult businesses are content-based regulations of speech that can only be justified by documentation of serious "secondary effects" on the community. Based on the 1994 study the Council, with the urging of Mayor Rudolph Giuliani, passed the 1995 amendments, which, according to Justice York's opinion, "caused the dispersal and elimination of many adult establishments by requiring them to be 500

feet from each other, residences, houses of worship and schools." The 1995 provisions also required that if a business wanted to provide sexually-related goods and services and remain in an area where adult businesses were excluded, it would have to devote "a substantial portion" of the establishment to "non-adult uses."

To implement this requirement, the City adopted an administrative rule, referred to as the 60-40 rule, meaning that "less than 40% of the entities' business could be devoted to adult activities." Many adult businesses did undertake to restructure their premises and diversify their stock and services so as to avoid being classified as an adult business and remain operating in residential and business districts. The City sent in inspectors to monitor compliance, and determined based on their reports that there were cases of "sham compliance." That is, there was literal compliance with the 60-40 rule but, according to the City, the establishments were still predominantly dealing in adult goods and services. The City moved to try to shut down the alleged "sham" establishments, and several lawsuits resulted.

When it appeared that the City's enforcement effort went beyond the authorization of the statute, the Council passed the 2001 Amendments that are the subject of this new ruling. These amendments imposed a variety of requirements that were intended to make it exceedingly difficult for any establishment to sell adult goods or services and continue to operate in the areas covered by the adult-uses zoning ordinance. More litigation ensued as the City attempted to enforce the 2001 amendments.

Justice York had previously upheld the amendments, finding that they survived constitutional review under the "rational basis" test, but higher courts disagreed, concluding that they were a content-based regulation of free speech activity and thus should be subject to the more demanding heightened scrutiny that free speech deserves. The cases were sent back to Justice York for a new look under this heightened test. In addition to receiving descriptions of the operations of these 60-40 businesses, Justice York received testimony by experts retained by the businesses to document the secondary effects—or, more accurately, lack of secondary effects—attributable to their operation.

One study, conducted by Dr. Bryant Paul of Indiana University, surveyed neighborhood opinion, and found that according to residents living near 60-40 businesses, "the

overall quality of life in the 60-40 club's areas was better, the 60-40 neighborhoods were safer, the 60-40 neighborhoods were a more preferable place to live, and the 60-40 neighborhoods were a preferred shopping area." Another expert whose testimony was credited by Justice York, Dr. Daniel Lenz of University of California at Santa Barbara, testified that "60-40 clubs are not associated with negative secondary crime effects, 60-40 clubs were not 'hot spots' for crime in their neighborhoods, crimes did not increase with the opening of a 60-40 club, and crimes did not decrease after the closing of a 60-40 club." Another expert looking at property values concluded that "proximity to a 60-40 club does not result in a diminution in value." In fact, it seems that property values went up near 60-40 clubs! Justice York also found that the 1995 law had achieved its objective of reducing the number of adult establishments in the city and breaking up the then-existing concentrations of such clubs in particular neighborhoods.

The city presented an "expert witness" as well, but Justice York found that he was not credible and gave no weight to his testimony, because his only study involved a survey of real estate brokers that drew a pitifully small response, and "his ipse dixit opinions" lacked any "real world corroboration."

Having found that the 1995 zoning ordinance provisions had effectively led to reduction in number and dispersion of adult businesses and that the businesses involved in this lawsuit had reconfigured to come within the original 60-40 requirements, Justice York found that the 2001 amendments had not been justified by the City. There was no study showing that these allegedly "sham" 60-40 clubs had generated the kind of secondary effects that are necessary to justify a zoning exclusion in light of First Amendment free speech protection against content-based regulation.

"This decision certainly does not prevent the defendant [the City] from removing sham entities," wrote Justice York. "The City need only change its guidelines to turn the 60-40 test into a rebuttable presumption. Then, even if less than 40% of the entity is devoted to adult purposes, the characteristics discussed can establish sham compliance. This Court finds significant and distinct differences between the 1994 adult entities and the 60-40 entities, so that the current establishments no longer resemble their 1994 predecessors. Given their current arrangements and secondary characteristics, these entities no longer op-

erate in an atmosphere placing more dominance of sexual matters over non-sexual ones. According, there is no need for the 2001 amendments. On their face, therefore, they are a violation of free speech provisions of the U.S. and State Constitutions."

Justice York added that he "cannot understand how an 18 year old study of the negative effects of the 100% entities can be applied to the current 60-40 entities without determining the actual negative secondary effect of these institutions today." Given New York's history of strong protection for freedom of speech, and the constitutional limitation on regulating adult businesses to situations with documented secondary effects, the lack of a more recent study by the City was hard to understand. "Without an actual study," wrote Justice York, "the 2001 legislation should have been struck down" in earlier litigation, as dissenters in the New York Court of Appeals had argued in an earlier case. Justice York concluded that the City should have made a new study if it wanted to go against entities that had converted their premises and businesses to comply with the 60-40 rule promulgated under the 1995 zoning measure. Otherwise, the City would be engaging in regulation of "the content of expression, clearly a violation of the plaintiffs' rights to freedom of speech."

Justice York issued a permanent injunction against enforcement of the 2001 provisions. Reporting on the decision on August 31, the New York Law Journal commented that the decision would have no immediate practical effect, "because the 2001 law that it overturned was not enforced while lawsuits challenging its constitutionality wended through the courts." Ironically, because of the pending lawsuits, the 60-40 clubs were able to operate for many years, making it possible for the new expert studies commissioned by their lawyers to demonstrate the lack of adverse secondary effects from their operations.

However, the City is expected to appeal Justice York's ruling. A spokesperson for the New York City Law Department, Robin Binder, told the Law Journal, "We believe the court was right the first time when it ruled that 60-40 establishments have a predominant sexual focus," referring to York's earlier rulings in this case. "The City's ability to regulate adult establishments is critical to preserving neighborhood quality of life." In other words, the Law Department has reflex reaction against any case in which it loses. Perhaps they would be wise to commission a new study documenting secondary effects before going back to court. ■

Lesbian Police Squad Car Partners' Discrimination Claims Largely Narrowed to Title VII Violations

On July 25, 2012, the US District Court for the District of Columbia dismissed the bulk of the claims brought by two female police officers in the DC Metropolitan Police Department arising from alleged sex and sexual orientation discrimination. *Jones v. District of Columbia*, 2012 WL 3024970. Most of the plaintiffs' claims were dismissed on procedural grounds, but the defendant conceded that plaintiffs' Title VII claims should proceed.

The two women, Tonia L. Jones and Kenniss M. Weeks, became squad car partners for the Metropolitan Police Department (MPD) in early 2006. In July of that year, the women "began a lesbian relationship," according to the opinion by District Judge Rosemary M. Collyer. In September, the women notified one of their supervisors, Sergeant Jon Podorski, of their relationship. The plaintiffs claim that "[a]lmost immediately thereafter, the Sergeants began harassing them and subjecting them to a hostile working environment on a frequent and continuing basis," and subjected them to harassment and disparate treatment "due to their sexual orientation and gender." The plaintiffs complained to the MPD in January 2007, and allege that they were "blatantly retaliated against."

Jones and Weeks alleged that they were called derogatory names based upon their sex such as "drama queen," "the butch one," and the "femme one" by the sergeants. They also claim that they were harassed based upon their perceived roles in their relationship and were subjected to sexual comments and solicitations from male members of the MPD. Otherwise, the "[s]ergeants collectively harassed [them] about their work performance, leave and attendance, overtime requests, vehicle assignments and work assignments" and that they were treated differently from heterosexual and male officers.

In October 2007, the plaintiffs filed MPD "Injury and Illness Reports" which described stress-related injuries they suffered as a result of the conduct. The MPD Human Resources Office found that these injuries were not "work related". They also filed complaints with MPD's Internal Affairs Division (IAD) about

the alleged harassment and hostile work environment. The IAD declined to prosecute and directed the women to file a complaint with the DC Office of Human Rights (OHR), which they did in March 2008. The OHR found that the plaintiffs "had established prima facie claims of sexual harassment, hostile work environment based on sexual orientation (lesbian), and reprisal." The OHR charges were cross-filed with the Equal Employment Opportunity Commission.

The plaintiffs claim that the harassment and hostility escalated after they filed these complaints and that they were retaliated against because of it. Jones claims that she received a lower performance evaluation in late 2007, which prevented her from applying for a promotion to Detective Class. Jones alleged that she wasn't able to grieve the evaluation because Sergeant Podorski didn't give her a copy until February 2008. Jones also claimed that she was denied numerous training opportunities throughout 2010. Weeks claimed that she was called the "EEO queen" frequently, and after she made Detective Class in October 2008, she received discriminatory assignments and counseling.

In their complaint, the Plaintiffs alleged sex and sexual orientation discrimination in violation of the DC Human Rights Act (DCHRA), sex discrimination in violation of Title VII, retaliation for protected employment activity in violation of the DCHRA, reprisal for protected EEO activity in violation of Title VII, and 42 USC section 1983 claims for violation of their First and Fifth Amendment rights.

The defendant moved to dismiss all but the Title VII claims. It argued that all claims brought under the DCHRA must be dismissed for failure to provide sufficient notice under DC Code Sec. 12-309. The plaintiffs argued that the reports made to the MPD during the course of their alleged harassment constituted sufficient notice, but Judge Collyer disagreed. The statute specifically provides that in order for the defendant to waive its sovereign immunity in an action for unliquidated damages, a claimant must provide a "written notice or police report" that "must disclose both the fac-

tual cause of the injury and a reasonable basis for anticipating legal action as a consequence" within six months after the injury or damage was sustained. Judge Collyer looked at each report and found that they did not provide sufficient notice of the cause or circumstances of plaintiffs' injuries. Therefore, the plaintiffs' claims for unliquidated damages were dismissed. Only Jones' liquidated damages claim stemming from having not received a promotion to Detective Class remains.

As for the plaintiffs' Section 1983 claims, Judge Collyer rejected the plaintiffs' argument that the continuing violations doctrine should apply and found that all discrete acts that the plaintiffs alleged were time-barred. The court also held that the plaintiffs had failed to state a cause of action for a First Amendment violation because each of the instances of "speech" as alleged was merely a personnel complaint rather than a statement on a matter of public concern. Therefore, they did not warrant First Amendment protection.

Finally, the plaintiffs' Fifth Amendment claims alleged a denial of due process and equal protection. The only claim that was within the three year statute of limitations was based on an AWOL designation in Weeks' disciplinary record. Weeks allegedly took sick leave in October 2007 during a disciplinary investigation. She claims that the MPD did not provide notice to her of the investigation and did not comply with department procedure. Judge Collyer rejected this claim, finding that the MPD's process and procedures do not present a basis for a constitutional claim for violation of the Fifth Amendment right to due process.

The plaintiffs' constitutional claims for discrimination under Section 1983 also failed because they did not "show a course deliberately pursued by the city 'as opposed to an action taken unilaterally by a non-policymaking municipal employee'" and Title VII was their exclusive remedy with respect to their retaliation claims. —Eric J. Wursthorn

Eric J. Wursthorn is a Senior Court Attorney in the New York State Unified Court System.

CIVIL LITIGATION NOTES

SUPREME COURT – Lambda Legal, representing Karen Golinski, filed a Brief in Support of the Petition for a Writ of Certiorari Before Judgment in *Office of Personnel Management v. Golinski*, No. 12-16. Lambda’s brief can be found at 2012 WL 3027182 (July 25, 2012). Although the district court’s opinion, 824 F.Supp.2d 968 (N.D.Cal. 2012), holding Section 3 of the Defense of Marriage Act unconstitutional, is pending on appeal before the 9th Circuit Court of Appeals (which has scheduled oral argument to take place during the first week of September), the Solicitor General filed a Petition for Certiorari on July 3, suggesting to the Supreme Court that the 9th Circuit be bypassed in light of the pending petitions for certiorari from the 1st Circuit’s ruling holding Section 3 unconstitutional. See *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1 (May 31, 2012), petition for cert. filed sub nom *BLAG v. Gill*, No. 12-13 (June 29, 2012) (petition available on Westlaw, 2012 WL 2586935); *United States Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15 (July 3, 2012) (petition available on Westlaw, 2012 WL 2586937). In support of its argument that the case was of sufficient importance and public interest to merit such expedited review, Lambda noted that more than 20 amicus curiae briefs have already been filed with the 9th Circuit on both sides of the question from a wide array of groups, including bar associations, public interest organizations, and other professional associations. Lambda, in concert with the Solicitor General, defends the district court’s conclusion that Section 3 is subject to heightened scrutiny and fails to meet that test. Since the Supreme Court normally does not rule on cert petitions filed over the summer until shortly before it resumes its deliberations in the fall, the 9th Circuit announced that it had vacated its order that the appeal be argued the first week in September. * * * On July 20, counsel for the Massachusetts attorney general filed a response in the Supreme Court to petitions for certiorari filed by the Bipartisan Legal Advisory Group of

the House of Representatives (BLAG) and the Solicitor General, *BLAG v. Gill*, Nos. 12-13, 12-15 (petition available on Westlaw, 2012 WL 3027166.) The A.G. supports the request for the Supreme Court to take the case, and reaffirms its arguments (which were accepted by the district court but rejected by the 1st Circuit) that Section 3 also violates the 10th Amendment’s allocation of powers between the states and the federal government and improperly requires Massachusetts to violate the equal protection rights of married same-sex couples in the administration of the joint federal-state Medicaid program as well as the veterans cemeteries program. “The Commonwealth believes that it is important that the Court address the matter in a case that presents the full complement of DOMA’s constitutional infirmities, including the Tenth Amendment and Spending Clause issues that are best raised by a State and, to date, have only been raised in this litigation. Accordingly, the Commonwealth agrees that certiorari should be granted in this case.”

SUPREME COURT - The City of New York has filed an *amicus curiae* brief in the United States Supreme Court in support of the ACLU’s petition that the Court grant a Writ of Certiorari before Judgment in the case of *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y. 2012), in which the District Court ruled that Section 3 of the Defense of Marriage Act violates the 5th Amendment’s requirement of equal protection of the laws. In the usual course, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) and the Solicitor General filed an appeal to the U.S. Court of Appeals for the 2nd Circuit, but Edith Windsor’s attorneys at the ACLU petitioned the Supreme Court on July 16, Sup. Ct. Docket No. 12-63. The amicus brief, filed on July 25, a day after the first anniversary of same-sex marriage in New York State, was filed by the Corporation Counsel’s Office on behalf of the City, the City Council, and Mayor Michael R. Bloomberg and Council Speaker Christine C. Quinn (in their official capacities). In explaining its interest in the case, the City’s brief points out that

Section 3 of DOMA “forces the City to be the unwilling agent of federally-required separate treatment of lawfully-married employees and undermines the City’s strong non-discrimination laws,” and asserts that a majority of the approximately 10,000 same-sex couples married in New York live in the City. “As an increasing number of New York City residents enter into same-sex marriages, a timely and definitive ruling on the constitutionality of Section 3 of DOMA is of exceptional practical importance to these New York City residents in same-sex marriages who, like Edith Windsor, are being deprived of federal recognition of their legal marriages.” The brief points out that DOMA requires the City to “administer dual systems of benefits and imposes on the City the burden of the workarounds necessary to protect married employees,” mainly due to denial of recognition to same-sex marriages under federal tax and employee benefits law. The brief proclaims that DOMA “is the last remaining obstacle to achieving legal equality between the City’s married couples.” On August 10, BLAG filed a brief with the 2nd Circuit, arguing that the district court’s decision should be reversed and the case dismissed “with prejudice.” Part of BLAG’s argument goes to the question of Windsor’s standing to sue for a tax refund. BLAG argues that Windsor’s wife died before New York enacted marriage equality, at a time when the Appellate Courts of New York had not definitely resolved whether out-of-state same-sex marriages would be recognized in New York. Thus, BLAG argues, even if, hypothetically, the IRS was required to recognize same-sex marriages that were valid under state law for estate tax purposes at the time of death, it was not clear that Windsor’s Canadian marriage would have been required to have been recognized, placing in doubt her standing to seek a refund of the estate taxes that were paid under protest. BLAG also rehashes its arguments made to the district court in this case and in numerous other cases around the country concerning the alleged rational basis for Congress to have enacted a blanket denial of recognition for same-sex marriages in

CIVIL LITIGATION NOTES

1996. Despite the pending cert petition filed by the ACLU, the 2nd Circuit has rejected a proposal to put off oral argument, which is now scheduled for September 27.

SUPREME COURT – Gay & Lesbian Advocates & Defenders (GLAD) filed a response on August 2 to the petitions for certiorari in *Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill*, No. 12-13, and *U.S. Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15, seeking review from *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1 (1st Cir., May 31, 2012), in which the 1st Circuit ruled that Section 3 of the Defense of Marriage Act violates the 5th Amendment’s equal protection requirement. Agreeing with BLAG and the Solicitor General that the 1st Circuit decision dealt with issues meriting Supreme Court review, GLAD urged the Court to affirm the lower court ruling, but also asked that the Court take up the question whether laws that discrimination based on sexual orientation should receive heightened scrutiny. GLAD pointed out that many lower courts are still following circuit decisions that rejected heightened scrutiny based on the now-overruled *Bowers v. Hardwick* decision, and that a ruling by the Supreme Court was necessary to override these outmoded cases. Cooperating attorneys from Foley Hoag LLP and Sullivan & Worcester LLP (Boston) and Jenner & Block LLP (Washington DC) are working with GLAD to represent the respondents.

SEVENTH CIRCUIT COURT OF APPEALS – A panel of the U.S. Court of Appeals for the 7th Circuit vacated a preliminary injunction that U.S. District Judge John Grady had issued against myVidster.com on behalf of Flava Works, Inc., the producer of gay porn with an African-American focus, in a copyright infringement action. *Flava Works, Inc. v. Gunter*, 2012 WL 3124826 (Aug. 2, 2012). Judge Grady had accepted, in the context of a request for preliminary relief, Flava Works’ argument that it was likely to prevail on the merits of its claim that

myVidster.com was abetting copyright infringement by maintaining a website on which individuals could embed links to copyrighted videos on other servers, including about 300 produced by Flava Works, such that people going onto the site could use myVidster.com to view the videos without paying anything to Flava Works. Writing for the panel, Judge Richard Posner analyzed the technology and copyright issues and concluded that Flava Works’ allegations failed to allege an actual copyright infringement by myVidster.com. Not being so well versed in copyright law, I ran this one by a friend who is a specialist in the field. He characterized it as an “astonishingly sloppy opinion, even for Posner. It ignores relevant precedent, introduces new and badly-theorized tests, wanders off topic, and carries out judicial fact-finding on appeal.” My friend referred me to a specialist blogger’s posting, which characterized Posner’s opinion as “a train wreck.” Well, what more can I add? My colleague (and the blogger) agreed with me that Flava Works should petition for rehearing en banc.

CALIFORNIA – The state’s Fair Political Practices Commission imposed a \$49,000 fine on ProtectMarriage.com, the organization that proposed and waged the campaign for enactment of Proposition 8. The Commission found that the campaign committee failed to report various contributions and to disclose various funding sources. The committee conceded the accuracy of the charges and agreed to pay the fine, according to an August 16 story posted by the *Los Angeles Times*. It shows how slowly administrative wheels grind, as these charges arise from an election that took place almost four years ago.

FLORIDA – The ACLU of Florida reported that the parties in *Vanguard High School Gay-Straight Alliance v. Yancey*, No. 5:12-cv-268 (M.D. Fla.), had signed a Consent Decree and Order, under which the Vanguard School Board commits to allow a student gay-straight alliance to get organized and meet at the high school. The Consent Decree and Order was signed by U.S. District Judge Marcia

Morales Howard on August 14. Under the Order, the plaintiffs – students who sought to form a GSA – are the prevailing parties and are awarded attorneys’ fees as well as nominal damages. Under the Order, school officials “are permanently enjoined from failing to grant the Vanguard DSA (a) access to the forum for noncurricular student clubs, (b) official recognition as a student club, and (c) the ability to operate the Vanguard GSA at Vanguard High with all attendant rights, privileges, and benefits afforded any of its non-curricular clubs.” The school officials had been holding out during negotiations for the right to require parental approval for a student to join the GSA. Under the Order, the school may only impose such a requirement to the extent that it requires parental consent for students to join any noncurricular student club at Vanguard H.S. The Order includes a no-retaliation provision to protect the individual plaintiffs and any other students involved with the GSA, as well as its faculty advisor. The Order also requires that the parties attempt to work out any difficulties between themselves before returning to the court, which retains jurisdiction over the case if judicial intervention is needed to enforce the Order. ACLU of Florida attorneys Benjamin James Stevenson and Randall C. Marshall are counsel to the plaintiffs.

ILLINOIS – The Civil Rights Clinic at DePaul University College of Law announced the settlement in *Feliciano v. City of Cicero*, pending in the United States District Court, Northern District of Illinois. According to press accounts from August 7 and 8, Bianca Feliciano charged that Cicero police officers violated her constitutional rights by their conduct towards her on February 6, 2011. Feliciano, a transgender Latino woman, alleged that she was illegally searched and harassed, subjected to abuse and taunting due to her gender identity. Stopped by police officers while walking with another transgender woman, Feliciano says that the officers wrongfully accused them of being sex workers and, after seeing her identification, subjecting her to transphobic verbal abuse. The city will pay Feliciano

CIVIL LITIGATION NOTES

\$10,000 and has agreed to enact an appropriate policy and provide training for police officers on how to treat transgender people. One of her attorneys, Joey Mogul, a partner at People's Law Office and director of the Civil Rights Clinic at DePaul, whose students assisted with the case, emphasized the creation of a policy as an important achievement, noting that it would make Cicero one of the few municipalities to establish a policy and train police officers on its implementation. *The Advocate*, Aug. 7; *Chicago Tribune*, Aug. 7.

KENTUCKY – U.S. Bankruptcy Judge Alan Stout approved a reorganization plan filed by Bob Joles and Joey Lester, a gay Louisville couple who married in Buffalo, N.Y., on May 9, 2012, and filed their joint bankruptcy petition in June. Although Kentucky does not recognize their marriage, the Bankruptcy Clerk for the Western District of Kentucky accepted the petition for filing after being informed by Assistant U.S. Trustee Joseph Golden that the Justice Department no longer objects to joint filings by married same-sex couples. Under the Bankruptcy Code, joint filing is only authorized for married couples. Although the Obama Administration is officially still enforcing Section 3 of the Defense of Marriage Act, under which same-sex marriages may not be recognized for purposes of federal law, the U.S. Trustee has adopted the position of recognizing same-sex marriages for bankruptcy purposes since a series of rulings last year by Bankruptcy Judges, including a ruling signed by almost all of the Bankruptcy Judges in Los Angeles, held that refusing to recognize such marriages violated the 5th Amendment equal protection requirement. According to an August 6 article in the Louisville *Courier-Journal*, the Joles-Lester case was the first joint bankruptcy filing by a married same-sex couple to be allowed in Kentucky.

MICHIGAN – A federal jury ruled for the plaintiff and awarded \$4.5 million in damages August 16 in *Armstrong v. Shirvell*, Case No. 2011-369 CZ (E.D.Mich., filed April 1, 2011). Christopher Armstrong, the openly-gay student body president

at the University of Michigan, sued former Assistant Attorney General Andrew Shirvell on charges of defamation, invasion of privacy, and stalking. Shirvell, a University of Michigan alumnus, became obsessed with Armstrong after learning of his election as student body president, and established a blog devoted to attacking Armstrong as having a “radical homosexual agenda” and engaging in perverted activity. The *Detroit Free Press*, reporting on the jury verdict, noted that the blog referred to Armstrong as “Satan’s representative on the student assembly” and a “privileged pervert.” The blog accused Armstrong of various forms of immoral conduct and sexual misbehavior. Former Attorney General Michael Cox, who was Shirvell’s employer when the blog became a subject of controversy, discharged him on grounds of misusing state property and lying during the investigation, and University of Michigan police banned Shirvell from the campus after reports surfaced that he had shown up at odd hours apparently spying on Armstrong. (The ban was later modified to allow Shirvell on the campus as long as he stayed away from Armstrong.) Shirvell’s administrative appeal of his discharge was denied. Armstrong has also filed a disciplinary complaint against Shirvell with the Michigan state bar, but no action has been taken on that, pending the trial outcome. Shirvell’s response to the verdict was that he would never be able to pay it, as he has been unemployed since Cox fired him.

MINNESOTA – Ballot titles for initiatives may significantly influence their success at the polls, given the state of literacy in the United States and the likelihood that some voters don’t read beyond the ballot title in casting their vote. A dispute about ballot titles has resulted in a bizarre *per curiam* opinion by the Minnesota Supreme Court, issued on August 27. The ruling in *Limmer v. Ritchie*, No. A12-1148, A12-1258, determined that when the legislature designates a ballot title as part of a measure placing a proposed constitutional amendment on the ballot, the legislature’s ballot title must appear on the ballot, despite a statute that provides that the Sec-

retary of State is supposed to provide an “appropriate” ballot title approved by the Attorney General. The legislature put two proposed amendments on the ballot that gave rise to the present dispute: one provides that only the union of one man and one woman will be valid or recognized as a marriage in Minnesota. The other provides that individuals have to present government-issued photo identification in order to vote. In both cases, the legislature specified a ballot title, but in both cases the Secretary of State adopted a different ballot title, provoking state legislators to file suit. The dissenters point out that the court seems to have manufactured an unnecessary separation of powers issue in order to strike down the Secretary of State’s ballot titles, by suggesting that construing the statute to allow the Secretary of State to reject the legislature’s proposed ballot title is akin to the Secretary assuming legislative powers. The dissenters point out that under this reading of the statute, the legislature could adopt a totally misleading ballot title and there would be no way to prevent it from being placed on the ballot. Clearly, the provision that the Secretary of State provide an “appropriate” title approved by the Attorney General was intended to make sure that the ballot title would correctly represent the import of the proposed amendment. Of immediate interest to *Law Notes* readers is that the marriage definition measure, which the Secretary of State would have titled “Limiting the Status of Marriage to Opposite Sex Couples,” will appear on the ballot in November under the title specified by the legislature: “Recognition of Marriage Solely Between One Man and One Woman.” Will the choice of title affect the outcome? Has somebody done some polling to see how the votes stack up depending on which of these two ballot titles is used?

NEW JERSEY – On August 9, New Jersey Superior Court Judge Mary Thurber ruled that Anthony Galde may relocate to Georgia together with the adopted son over whom he shares joint custody with his former same-sex partner, even though doubts have been raised whether Georgia courts would enforce the court’s visita-

CIVIL LITIGATION NOTES

tion order on behalf of Richard Rinko, according to a report on *NorthJersey.com* on August 11. According to the news report, Rinko and Galde jointly adopted the boy in New Jersey in 2004. Their ten-year relationship ended in 2008, but they retained joint custody of the boy. Galde, who was granted residential custody, lives with the boy in New York. He petitioned the New Jersey court for permission to relocate with the boy to Georgia, where he has found employment. Rinko opposed the move, pointing out that Georgia's legal climate is inhospitable to same-sex couples, and that if a dispute over visitation arises he could not rely on the Georgia courts to enforce a New Jersey visitation order on behalf of a gay adoptive parent. Judge Thurber's ruling authorizing the relocation did not explain her reasoning, but she indicated she would subsequently issue an opinion. Judge Thurber's decision provides that Rink be allowed to visit his son for at least seven weeks during winter and spring school breaks and the summer, and that Galde must pick up Rinko's costs in connection with the visits. Rinko announced that he would appeal the ruling to the New Jersey Appellate Division. Galde is represented by Seth Parker, Rinko by Stephanie Cangialosi.

NEW MEXICO – The New Mexico Supreme Court has agreed to review the court of appeals ruling in *Elane Photography, LLC v. Willock* (New Mexico Ct. App., Docket No. 30,203, Slip Opinion, May 31, 2012). The court of appeal upheld a finding that the appellant, a photography company, violated the state's ban on sexual orientation discrimination by public accommodations when it decline a job photographing a same-sex commitment ceremony based on the owner's religious objections to same-sex marriage, and rejected the argument that it should recognize a free speech exception to the non-discrimination requirement. The court found that requiring a commercial photographer to take a picture was not a case of compelled speech.

NEW YORK – New York County Surrogate Kristin Booth Glen ruled in *Matter*

of the Adoption of a Child Whose First Name is Chan, No. 2006-2875, NYLJ 1202563667450 (July 11, 2012), that a woman who has been the de facto custodial mother for eight years of a nine-year old child from Cambodia who had earlier been adopted the woman's former boyfriend would have standing to adopt as a "second parent" of the child. The facts recited in the opinion make fascinating reading, but are a bit convoluted for this brief report. Suffice it to say here that Surrogate Glen built on the New York Court of Appeals precedent of *Matter of Jacob*, 86 N.Y.2d 651 (1995). In that case, the court broadly construed N.Y. Dom. Rel. L. Sec. 110 to authorize second-parent adoptions in a consolidated matter involving a same-sex couple and an unmarried different sex couple. In *Jacob*, both couples were living in intimate relationships, and the legislature subsequently amended Sec. 110 specifically to authorize joint adoptions by unmarried partners living in "intimate relationships." This case goes a step further into new territory by taking up the question of a child having two adoptive parents, a mother and a father, where the two adoptive parents are not in an intimate relationship and do not live together. Surrogate Glen found that the statute could be construed to apply to this situation, calling upon the policy justifications cited by the Court of Appeals in *Jacob* for construing the statute to allow second-parent adoptions in the cases then before the court. The opinion also takes a pragmatic view of family life, noting that the child will continue to reside with the petitioner, ERJ, regardless whether the court approves the adoption, but that the lack of an adoption is standing in the way of normalizing his U.S. residence status and possible future citizenship and also standing in the way of his enrollment in a good private school that has condition such enrollment on regularization of his immigration status. The child's adoptive father and ERJ had made a written co-parenting agreement that the court found to be consistent with the goals of the adoption statute. "While logistical difficulties are no doubt posed by the fact that family members span two separate households,"

wrote Surrogate Glen, "such difficulties make this no less of a functioning, loving, stable family unit for William [the child's American name]. If the legislature's goal is to ensure that children such as William are placed in permanent, stable families, that goal is no less attained here than it was in *Matter of Jacob*. At any rate, refusal to permit adoption of a child either by an unmarried couple or by two unmarried individuals serving as the child's parents would pose a much greater threat to the stability of family life: it would permit the child's psychological parent to walk away from the child with impunity, in direct contravention of the legislative mandate to serve the child's best interest." The court also noted that finding standing to petition for adoption by the de facto mother in this case was not necessarily "opening the door to all manner of petitioning parties," as the court would still have to determine whether it was in the best interest of the child to approve the petition. In this case, Surrogate Glen found that it was.

NEW YORK – The Appellate Division, 2nd Department, affirmed an award of \$100,000 in compensatory damages for mental anguish, \$10,000 in punitive damages, and a civil fine and penalty of \$25,000 in a sexual orientation discrimination case brought under the New York Human Rights Law in *State Division of Human Rights v. Stennett*, 2012 WL 3104235 (Aug. 1, 2012). The brief decision does not go into the facts of the case, merely stating that "substantial evidence in the record supports the determination of the Commissioner of the NYSDHR that the respondent discriminated against the complainant on the basis of her sexual orientation in violation of Executive Law sec. 296(5)(a)(1) and (2)." The court found that the damage award is "reasonably related to the wrongdoing, is supported by substantial evidence, and is similar to comparable awards for similar injuries." The court also found no abuse of discretion by the imposition of the civil fine and penalty. There is absolutely no hint in the opinion about the underlying facts in the case. However, the opinion is worth noting as an example of the type of damages and penal-

CIVIL LITIGATION NOTES

ties available under the state human rights law for sexual orientation discrimination claims, showing why counsel should avoid bringing sexual orientation discrimination claims in federal court in vain attempts to invoke Title VII's ban on sex discrimination, so long as federal case law generally rejects such claims in the absence of strong evidence that gender stereotype non-conformity was the cause of the discrimination. For most sexual orientation discrimination cases that arise in New York, state court is normally the place to be.

NEW YORK – New York County Supreme Court Justice Joan Madden ruled on July 23 that plaintiffs in a lawsuit challenging the rejection of their applications to change the sex designation on their birth certificates are entitled to some discovery concerning the adoption and interpretation of New York City's current policy for dealing with such requests. *Prinzivalli, Berkley & Harrington v. Farley*, No. 114372/09, NYLJ 1202566591317 (N.Y. Sup. Ct., N.Y. Co.) (decision posted on NYLJ.com on August 13). The point of contention in the suit is the city's insistence that genital surgery is a necessary prerequisite to an official change of sex designation on a birth certificate. This is the city's current interpretation of the phrase "convertive surgery" in a City Board of Health Regulation adopted many years ago. Some of the discovery requests concern an amendment that was proposed in 2006 but ultimately abandoned that would have changed this requirement. Transgender rights advocates have argued that individuals who have claimed a gender identity different from the sex designation on their birth certificate should be able to get a change of the official sex designation without having to undergo surgical alteration, noting the expense of such procedures, which generally are not covered by private health insurance, group insurance or Medicaid. They argue that evidence of hormone treatment and other physical treatments to affect gender presentation should be sufficient as supplementation to certification by a medical expert. The case pending before Judge Madden joins together proceedings brought by three in-

dividuals, which the court is treating as a combined Article 78 and declaratory judgment case, thus making it appropriate to allow discovery that might not ordinarily be granted in the context of an Article 78 proceeding (a proceeding authorized under the NY Civil Practice Law & Rules to seek judicial review of an administrative determination, which would normally be conducted solely on the basis of the record compiled before the administrative decision-maker). Plaintiffs are particularly interested in uncovering records of internal deliberations within the Board of Health that led to its decision to require surgical alteration of genitalia as a prerequisite for changing sex designations on birth certificates. Although Judge Madden found that some of the discovery requests were "irrelevant, unnecessary or overbroad," she concluded that the main requests should be approved, and required the city defendants to respond to them. "Relevant information includes materials related to the basis for the Board of Health's rejection of the recommendations of the 2006 committee, convened by the Board of Health, to amend Section 207.05(a)(5) to eliminate the convertive surgery requirement and replace it with other medical proof, and the basis for the Board of Health's consequent decision to withdraw the amendment and retain the convertive surgery requirement," wrote the judge. "The recommendations of the 2006 committee are not in dispute, however, and no need for further discovery with respect to the 2006 committee has been shown. Nor have petitioners made a showing that what took place in 1965 or 1971 is material and necessary. Petitioners also have not shown how the names of all employees and physicians who review applications is relevant." The court also authorized plaintiffs to depose city officials involved in the decision-making process that took place in 2006, and required the city to disclose the names of such individuals.

NEW YORK – In *Caravantes v. 53rd Street Partners*, 2012 WL 3631276 (S.D.N.Y., Aug. 23, 2012), U.S. District Judge Robert P. Patterson awarded compensatory damages of \$150,000 and pu-

nitive damages cumulating to \$40,000 to Arturo Caravantes, a former busboy at Remi, an "upscale" Italian restaurant on 53rd Street in Manhattan, on a claim of sexual harassment by a male supervisor in violation of Title VII of the federal Civil Rights Act of 1964 and the New York State and City Human Rights Laws. Evidence showed that a gay supervisor, Oscar Velandia, subjected Caravantes, who is not gay, to unwanted sexual demands, including getting him to engage in oral and anal sex, to which Caravantes acceded out of fear of losing his job and a hope that he would be given a position as a waiter. Judge Patterson found not credible Velandia's testimony that Caravantes initiated their sexual activity. There was evidence of a culture of male-on-male simulated sex-play among the restaurant staff, which the employer set up as a defense to the charge that this conduct was unwanted by the plaintiff, but Judge Patterson noted that the charges concerning Velandia's treatment of Caravantes went beyond the general playful touching engaged in before and after work shifts by members of the staff. Because the restaurant did not have a posted policy against sexual harassment and did not offer any training or have a formal grievance procedure, it could not insulate itself against liability for the unauthorized acts of its supervisory employee. In addition, although individual supervisors cannot be held personally liable for damages under Title VII, they can be sued under state and local law. Although Title VII has a tight damages cap, New York state and local law do not. Taking everything together, Judge Patterson held the restaurant and the supervisor jointly and severally liable for the compensatory damages, but assessed the punitive damages at \$25,000 from the employer and \$15,000 from the supervisor. To the extent that the damage award exceeds the federal cap, the balance is attributed to liability under state and local law.

NEW YORK – The *New York Post* reported on August 19 that a gay New York City Criminal Court judge is litigating over a provision in his father's will that would deny the judge's son a share in a trust that

CIVIL & CRIMINAL LITIGATION NOTES

was left for the testator's grandchildren. Judge Robert Mandelbaum's son, Cooper, was conceived with a surrogate mother. Mandelbaum and his longtime partner, Jonathan O'Donnell, were married shortly after Cooper was born. Former New York State Chief Judge Judith Kaye, for whom Mandelbaum had clerked after law school, officiated at the ceremony, which was held in her apartment. Judge Mandelbaum's father, Frank Mandelbaum, a wealthy businessman who died in 2007, provided in his will that none of his money should go to any offspring of his son Robert if Robert "not be married to the child's mother within six months of the child's birth." Judge Mandelbaum argues that this restriction should be set aside because it "imposes a general restraint on marriage by compelling Robert Mandelbaum . . . to enter into a sham marriage," according to the *Post* report. Judge Mandelbaum also asserts that Frank Mandelbaum knew his son was gay and was acquainted with O'Donnell, who was included in family dinners and vacations. The law guardian appointed to represent the child's interest filed a statement supporting Judge Mandelbaum's request, which is being opposed by Frank Mandelbaum's widow. The question whether such a provision, clearly intended to induce Robert Mandelbaum to marry a woman, violates New York public policy is pending in New York County Surrogate's Court.

NEW YORK – Classify this one as "litigation avoided." In January 2012, Regina Hawkins-Balducci, a rent stabilized tenant in New York City, married her same-sex partner in a ceremony in Spring Valley. Then she presented a copy of the marriage certificate to her landlord, Nicholas Place LLC, and its management company, DSA Management, Inc., requesting that her spouse be added to the lease. The landlord refused, "berated the couple, saying that the companies would not recognize their marriage and Regina's spouse would never be added to the lease," according to a press release from Lambda Legal (August 1). You know the rest of the story. Balducci went to Lambda, which sent a letter to DSA Management, explaining

their obligations under New York State law, and the matter was properly resolved by the addition of Balducci's spouse to the lease. Lambda Legal staff attorney Natalie Chin represents Balducci.

TEXAS – After the U.S. District Court denied Tarrant County College's motion for judgment on the pleadings in *Gill v. Devlin*, 2012 WL 2152832 (N.D. Tex., March 12, 2012), the court directed the parties to attempt mediation, which resulted in a settlement of Jacqueline Gill's sexual orientation discrimination claim. The settlement was announced by her counsel, Lambda Legal, on July 17. As usual in such cases, under the settlement agreement Tarrant County College does not admit having discriminated against Gill, but she will receive more than \$160,000 and a positive letter of recommendation. Earlier in the litigation process, the College had added "sexual orientation or gender identity" to its policy prohibiting employment discrimination. According to her complaint, Gill was hired as a temporary full-time instructor in the English Department, but was discouraged from applying for a permanent position, being told by the English Department Chair Eric Devlin that "Texas and Tarrant County College do not like homosexuals." Devlin probably likes homosexuals even less now that he's been sued and the College had to pay out a significant settlement on account of his brazen homophobia, but at least Gill has been compensated and the college has adopted a formal non-discrimination policy. The remaining questions are whether Devlin has learned anything from this experience (or will suffer any consequences), and whether the college itself will change its ways? Lambda Legal Senior Supervising Staff Attorney Ken Upton represented Gill with Benjamin D. Williams (Gibson, Dunn & Crutcher) as pro bono co-counsel, in the suit filed in September 2011.

TEXAS – *Advocate.com* reported on July 17 that a lesbian couple's request to hold their same-sex commitment ceremony at Fort Belknap led to a confrontation between Young County Judge John Bullock and the Young County Commission.

Bullock denied the application on the ground that Texas does not allow same-sex marriages and the couple had put on their application that they wanted to use the fort for a "wedding." The County Commission voted to countermand the judge's ruling. Then the judge responded by submitting a policy proposal to the Commission that would authorize him to restrict the use of county-owned property on the basis of "legal, ethical, or practical" grounds. The Commission rejected the proposal as too "vague." Meanwhile, the couple, not identified by name in the news report, had tired of the struggle and held their ceremony elsewhere.

VERMONT – The Vermont ACLU announced that a settlement had been reached in the discrimination case brought on behalf of a lesbian couple whose bid to hold their wedding reception at the Wild-flower Inn had been rejected by the owners based on their personal objections to same-sex marriage. Under the terms of the settlement, the proprietors of the Inn, Jim and Mary O'Reilly, will make a charitable donations to a pro-gay non-profit group, to be designated by the plaintiff couple, the Inn will pay a \$10,000 civil penalty to the Vermont Human Rights Commission, and the Inn will withdraw entirely from the wedding reception business in order to avoid future obligations not to discriminate in offering accommodations for such events. The Alliance Defending Freedom (formerly known as the Alliance Defense Fund), which had provided assistance to the O'Reillys, issued a press release titled "Vermont government ends religious persecution of family business, admits Wild-flower Inn acted in good faith." Presumably this spin was based on the fact that the O'Reillys will not be required to host any same-sex wedding receptions, but it sounds like a peculiar spin on the final results. *Caledonian Record*, Aug. 24. ■

DISTRICT OF COLUMBIA – Floyd Lee Corkins II was arrested and held without bail after he shot a security guard in the lobby of the building housing the Family Research Council. At a subsequent hearing, he was charged with as-

CRIMINAL LITIGATION NOTES

sault with intent to kill and transporting firearms across state lines, and was appointed a public defender after stating that he had only \$300 in his bank account. Corkins allegedly said to the guard that he disagreed with the organization's "politics" before shooting him. Because Corkins has been a volunteer at D.C.'s LGBT community center and had a backpack full of Chick-fil-A sandwiches at the time of his arrest, there was immediate speculation that he was a gay man seeking revenge against the anti-gay FRC, which has been listed as a "hate group" by the Southern Poverty Law Center because of FRC's ongoing and vitriolic anti-gay campaigning. Tony Perkins, head of the FRC, responded to the shooting by accusing the SPLC of inciting violence by labeling FRC to be a hate group. This started media debates about whether SPLC had crossed some kind of line by labeling FRC as a "hate group," conservative commentators asserting that FRC did not advocate violence against gays. Then pro-gay spokespersons pointed out that FRC's repeated lies about gay people appropriately placed it within the sphere of organizations seeking to incite anti-gay hatred. That debate continues. Corkins merely wounded the guard, who was able to disarm Corkins before the police arrived.

FLORIDA – The 1st District Court of Appeal concluded that the prosecutor's closing argument in a case involving attempted murder and robbery of a gay man was so incendiary that the defendant was entitled to a new trial. Ruling on July 24 in *Toler v. State*, 2012 WL 3000605, the court stated: "In this case, the prosecutor's references to the appellant as being a liar, to appellant's race, and to matters for which there was absolutely no support in the record, in a manner both pejorative and sarcastic – all of which formed the basis for appellant's motion for mistrial – were so invasive and inflammatory, 'it is questionable whether the jury could put aside the prosecutor's character attacks, and decide the case based strictly upon the evidence.'" The victim claimed that defendant Sedecki Toler pulled a gun on him, ushered him into his home and

demanded his money, then shot at him grazing his head and beat him on his forehead with his gun. Toler denied the story, claiming he had no intent to steal; that the victim invited him into his home and offered him money to have sex, initiating a fight when Toler rejected his proposition. The prosecutor claimed that the defendant was trying to assassinate the character of the victim as a "bad person. He's gay. He likes young men. He basically uses prostitutes. He's some sort of sexual deviant. I'm honestly surprised that you didn't hear that he makes meth in his bathtub" – at which point defense counsel objected and subsequently moved for a mistrial, which was denied. Defendant was convicted and sentenced to concurrent 25-year prison terms on each count, with a twenty year mandatory minimum.

FLORIDA – Better late than never? On July 23, a grand jury indicted Mickey Lee Wilson in the 1985 murder of Donald Lamar Tidwell, who was found stabbed to death in a hotel room on Okaloosa Island. Wilson, who is serving a life sentence in Georgia for a 1991 homicide, was identified through DNA evidence found by the Sheriff and sent to the crime lab many years after the last suspect had been questioned in the case. Among the items found at the scene were a movie projector and canisters of sex films. At the time, the Sheriff had referred to the killing as "homosexual-related." Tidwell, the murder victim, had been arrested for sexual solicitation in the past and had stayed at the hotel where his body was found on prior occasions. *Northwest Florida Daily News*, July 24.

TEXAS – Rejecting an appeal from a man convicted of having sex with a child under the age of 14 years, the Court of Appeals of Texas (Waco) found that the state's statutory rape statute was not constitutionally deficient in failing to recognize a defense of mistake of age. *Fleming v. State*, 2012 WL 3115904 (August 2, 2012). The appellant claimed that he had genuinely believed that his sexual partner was of the age of consent, but the trial court ruled that out as a defense, finding that statutory rape is a strict liability crime in Texas. If

a person's sexual partner is below the age of consent, the crime has been committed regardless of what the defendant believed to be the victim's age. Fleming sought to invoke the liberty interest protected by *Lawrence v. Texas* to challenge the lack of a *mens rea* requirement under the statute, but the court wouldn't accept the argument, pointing out that in *Lawrence* the Supreme Court said it was not ruling on the question of sex between adults and minors. Justice Bill Meier wrote for the court, "Strict liability regarding the age of the minor furthers the legitimate government interest in protecting children from sexual abuse by placing the risk of mistake on the adult actor. Although sound reasons might be advanced on either side of the argument of whether a *mens rea* component should exist or whether a mistake-of-age defense should exist in section 22.021, determining the line that separates what is criminal from what is not lies peculiarly within the sphere of legislative discretion – especially, as here, where no fundamental right is at question. We have no authority to substitute our judgment for that of the legislature unless we find the classification to be arbitrary, capricious, and without reasonable relationship to the purposes of the statute." The court concluded there was no violation of federal or state due process requirements, upholding the sentence imposed by the trial court of ten years imprisonment and ten years community supervision upon release.

WASHINGTON – In *State v. Sumaj*, 2012 WL 2989254 (Wash.App.Div. 1, July 23, 2012) (unpublished opinion), the Washington Court of Appeals affirmed the conviction of Muhamet Sumaj for felony harassment and malicious harassment of Antonello Maddalena, a transgender woman, as well as Donald Tidd, a security staff member of a Seattle bar that "caters to the gay and transgender community." According to Judge Schindler's opinion for the court, Maddalena had seen Sumaj staring at her inside the club on several occasions, but never had any conversation with him. Late on Sunday, January 24, 2012, Maddalena left to the club to check on her car, and as she was walking back, encountered

CRIMINAL LITIGATION & LEGISLATIVE NOTES

Sumaj on the street. He said, "I like real ladies. I hate fags. You're a fucking nigger, and I would never go for you." When Maddalena asked why he went to that bar if he hated fags, Sumaj said, "I'm going to cut your throat" and approached her with menacing gestures, screaming "Fucking nigger, I will kill you wherever you go. You're a nigger. I find you." Maddalena ran towards the club's entrance, Sumaj in pursuit. Tidd was alerted to what was happening and told Sumaj to stop, getting between the two of them. Sumaj "lunged at Maddalena over Tidd's shoulder, yelling 'faggot'." As Sumaj continued yelling and trying to push past him to reach Maddalena, Tidd radioed for additional security personnel to help and sent Maddalena back into the club. Two security personnel responded and Tidd told Sumaj to leave. Sumaj backed away but remained combative and yelled "I'm going to my car and get my gun and kill you." Tidd called 911 and ultimately the Seattle police responded and arrested Sumaj. On appeal, Sumaj claimed that the allegations of the charge did not exactly track the requirements of the statute in alleging all the elements of the specific offenses, but the court rejected his argument, affirming the conviction, finding the factual allegations sufficient to ground the charges despite the omission of certain words. ■

CONGRESS – As Supreme Court consideration of the constitutionality of Section 3 of the Defense of Marriage Act seems highly likely during the Court's 2012-13 Term, Human Rights Campaign decided to survey Congressional opinion, since the cases challenging Section 3 could be mooted if Congress were to repeal it. HRC sent a survey to all 100 Senators, 431 presently-serving House members (there are some vacancies), and the 6 Delegates representing territories. HRC researched published statements and campaign positions of those members who did not respond. HRC found that among Democrats serving in Congress, 72 percent support the right of same-sex couples to marry, 9 percent are opposed, and 19 percent unclear or unknown. Startlingly, HRC found that only one serving member from the Republican Party

supports same-sex marriage: Rep. Ileana Ros-Lehtinen of Florida. Thus, overall, a majority of serving members of Congress oppose same-sex marriage. In this, Congress is a bit behind their constituents, as recent polls suggest that a majority of the public now supports same-sex marriage. Announcing their survey results on August 2, HRC mentioned a June 2012 CNN poll showing support at 54 percent. Some other polls have shown only plurality support, but virtually all recent national polls have shown more respondents in support of same-sex marriage than opposed. This may explain why the drive to include same-sex marriage in the Democratic platform for 2012 appears to be relatively uncontroversial after President Obama's statement in May that he supports same-sex marriage. Although Republican sources indicated that the GOP platform will include the ritualistic assertion that marriage should only be available to different-sex couples, the Romney campaign is not expected to make same-sex marriage a major issue. The GOP platform endorses the Defense of Marriage Act and reiterates support stated in past GOP platforms for the enactment of a constitutional amendment restricting marriage throughout the United States to the union of one man with one woman.

PICKETING MILITARY FUNERALS

– President Barack Obama signed into law the "Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012) on August 6. The measure expands benefits for veterans and their federally-recognized families (but not, of course, same-sex spouse until Section 3 of DOMA is repealed or invalidated by the courts). One part of the statute, a form of pushback by Congress against the Supreme Court's decision in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), limits picketing in the vicinity of military funerals. Any protests must be distanced at least 300 feet from military funerals, and are prohibited two hours before or after the service. In *Snyder v. Phelps*, the Court found First Amendment protection for Rev. Fred Phelps and his anti-gay church members who picketed military funerals with homophobic signs, blaming military deaths on U.S. support

for homosexuality. However, the Court normally recognizes the right of authorities to impose reasonable time, place and manner restrictions on expressive conduct, and the *Snyder* decision turned on the Court's characterization of the facts in that case, in which picketers complied with placement and time restrictions that had been imposed by local authorities, and the plaintiff – father of the deceased military member – did not become aware of the picketing until after the fact when he saw news reports. A spokesperson for Phelps' Westboro Baptist Church said that the new law was not "really going to change our plans at all."

CALIFORNIA – The legislature approved and sent to Governor Jerry Brown a measure that would protect LGBT youth from being subjected to "conversion therapy" to change sexual orientation or gender identity. Under the measure, parents could not force their children to submit to such treatment, which has been declared fraudulent and potentially harmful by mainstream psychological and psychiatric associations. The State Senate has approved a measure that would ensure that single women and women in same-sex relationships cannot be denied fertility services that are offered to married women and women in different-sex relationships. The Assembly has approved a measure that would reaffirm the freedom of clergy to make faith-based decisions about whether to perform marriages, and would shield them from loss of tax-exempt status for their religious institutions should they refuse to perform particular marriages.

DELAWARE – Governor Jack Martell stated on August 7 that it was "inevitable" that marriage equality will come to Delaware, which legalized civil unions in April 2011. He speculated that the legislature may take up a marriage equality measure in 2013, and indicated that he was willing to provide leadership in persuading the legislature to pass such a measure, but he emphasize the importance of a lobbying effort from the community, noting how important such lobbying was in attaining passage of the civil union measure. *Huffington Post*, Aug. 7.

LEGISLATIVE NOTES

FLORIDA – After extensive debate over many months, the Jacksonville City Council voted 10-9 on August 15 against approving a bill that would have added sexual orientation to the city’s anti-discrimination law. The bill was originally proposed to include gender identity as well as sexual orientation, but gender identity was dropped to pick up a few more votes. In the end, the decisive vote came down to John Gaffney, a member who had voted yes in committee but then voted no on the floor, announcing that he had been flooded with statements of opposition to the bill by constituents in the weeks leading up to the vote. Gay rights advocates charged betrayal, as Gaffney had been endorsed by gay groups after stating that he would vote to outlaw sexual orientation discrimination. Opposition to the measure was spearheaded by religious leaders, while the measure drew statements of support from the Chamber of Commerce and the Jacksonville Civil Council. Some opponents on the Council claimed that no evidence had been provided that there was a significant problem with anti-gay discrimination in Jacksonville, so the law was not needed. Mayor Alvin Brown had refused to take a public position on the bill, leaving open the question whether he would have vetoed it had it passed. *Florida Times-Union*, Aug. 16, 17, 18.

IDAHO – Sandpoint has become the first jurisdiction in Idaho to adopt a non-discrimination ordinance that makes sexual orientation or gender identity unlawful grounds for discrimination in employment, housing or public accommodations. Similar measures are expected to be taken up by city councils in Pocatello and Boise. The state legislature has resisted efforts to adopt a statewide ban on discrimination. Reporting on the Sandpoint development, *The Spokesman Review* (Spokane, Washington) observed on August 5 that Idaho may follow the same path as Oregon and Washington, where attempts to enact statewide legislation were only successful after many municipalities had adopted such laws.

INDIANA – The City-County Council in Indianapolis voted on August 13

to approve a proposal to provide health-care benefits to domestic partners of city employees. The measure would provide benefits to both different-sex and same-sex couples who document their relationship. The bipartisan vote on the ordinance was 20-8, but it was uncertain at the time of passage whether Mayor Greg Ballard, a Republican, would approve the measure that was proposed by the Democratic majority on the Council. *Indianapolis Star*, Aug. 14. However, the mayor announced on August 23 that he had approved the measure, without specifically mentioning it! He released a twitter message stating that he had signed all the pending measures approved by the council. *Indianapolis Star*, Aug. 24.

KANSAS – Both anti-gay and pro-gay forces in Hutchinson, Kansas, are unhappy about the limited ban on sexual orientation discrimination adopted by the City Council on June 5 by a 3-2 vote. The original bill was heavily compromised to secure passage, resulting in providing protection only against being fired from a job or evicted from an apartment. Pro-gay activists seek a referendum to add sexual orientation to the City’s broader human rights ordinance providing protection against any discrimination in employment, housing or public accommodations. Opponents seek to repeal the limited protections in the bill that was passed. *Hutchinson News*, Aug. 18. On Aug. 23, the Reno County Clerk’s office certified that *both* petitions had sufficient valid signatures, confronting the City Commission with a situation where it will have to decide whether to adopt the proposals in one or both of the petitions. Presumably, whichever petition it rejects would then go on the ballot. Given the timing, this would likely be the general election ballot on Nov. 6. *Hutchinson News*, Aug. 24. * * * The Kansas Family Policy Council, a group opposed to LGBT rights, submitted more than 2300 signatures to the city of Salina seeking a referendum to repeal a new ordinance banning sexual orientation discrimination that was enacted in June by the Salina City Commission, which voted 3-2 on the measure. On

August 23, the Salina County Clerk said that 1321 signatures were accepted, more than enough to validate the petition. The next step is for the City Commission to consider whether to repeal the sexual orientation discrimination provision. If the Commissioners refuse to repeal it, it must be placed before the voters within the following 90 days. *Salina Journal*, Aug. 24.

KENTUCKY – The Fayette County Board of Education voted to approve new policy language on July 23 banning discrimination on the basis of sexual orientation or gender identity by the school district. According to a July 23 report in the *Lexington Herald-Leader*, this action makes Fayette County’s school district one of about half a dozen in Kentucky to have adopted such a policy. School Superintendent Tom Shelton said the board took the matter up at the request of community groups, responding to reports about bullying or harassment on these bases in the schools. Existing school policy prohibits discrimination or harassment based on race, creed, color, religion or sex. Acknowledging U.S. Department of Education statements that the ban on sex discrimination in educational institutions extends to sexual orientation or gender discrimination claims, Shelton said that “technically” these groups were already covered by law, but “we just felt this new language makes a stronger statement so that people understand what our stance is.”

MISSOURI – The Creve Coeur City Council voted 7-0 on July 23 to amend the city’s anti-discrimination law to add the categories of “sexual orientation” and “gender identity.” The law covers housing, employment, and public accommodations. With this enactment, the city joins St. Louis, University City, Olivette, Richmond Heights and Clayton as Missouri jurisdictions banning such discrimination. The state’s anti-discrimination law does not ban discrimination on these grounds. *St. Louis Post-Dispatch*, July 25.

NORTH CAROLINA – Buncombe County Commissioners voted 3-2 against a proposal to add language to the county’s non-

LEGISLATIVE NOTES / LAW & SOCIETY NOTES

discrimination ordinance that would have banned sexual orientation discrimination. The vote came after a closed session for the commissioners to hear from the county attorney about legal issues that might be raised by passage of the ordinance. The minutes of the meeting at which the Aug. 7 vote was taken do not relate what was said during the closed session, provoking a charge from the local League of Women's Voters chapter that the process violated the state's open meetings law. *Citizen-Times*, Asheville, N.C., Aug. 17.

OKLAHOMA – The Oklahoma City School Board voted 6-1 on October 20 to authorize inclusion of “sexual orientation” on the list of forbidden grounds of discrimination in the District’s official policies. This was not the first time the board had voted on the issue. In 2006, a motion to include “sexual orientation” was defeated. However, the staff revising the policy included “sexual orientation” anyway, and the board then voted to remove it. In 2009, the Board voted to add “sexual orientation” to the list, but this time the staff failed to include it, so the new vote was taken on October 20. They can’t seem to coordinate what the Board does and what the Staff does. *The Daily Oklahoman*, August 21. This story struck us as particularly interesting because of the history of this issue in Oklahoma City. In 1981, Oklahoma passed a statute authorizing the discharge of any teacher, student teacher or teacher’s aide who engaged in “public homosexual activity or conduct,” which was defined to include “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.” The measure also established standards for determining whether a person had been rendered “unfit” for employment in the public schools due to violation of this provision. The National Gay Task Force brought suit to enjoin the statute on 1st Amendment grounds, winning a partial victory in the 10th Circuit that was affirmed when the Supreme Court deadlocked 4-4 on the state’s appeal, with

Justice Lewis Powell not participating due to illness. See *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), *affirmed without opinion by equally divided court*, 470 U.S. 903 (1985).

TEXAS – El Paso County Commissioners Court voted 3-1 on August 14 to provide access to health benefits for unmarried partners (both same-sex and different-sex) of county employees, beginning during the county’s next fiscal year. Administration of the benefits will be placed in the hands of the county’s Risk Pool Health Benefit Plan, and about two dozen county employees are expected to apply for the benefits for their partners. According to an Aug. 14 article in the *El Paso Times*, proponents showed that the fees the county pays for an uninsured patient for one visit to the emergency room substantially outweigh the annual cost of providing health insurance to an individual. Thus, said County Judge Veronica Escobar, a member of the Court who voted for the measure, “It makes business sense. It makes fiscal sense, competitive sense and frankly is, in terms of equity, the right thing to do.” ■

DEMOCRATIC PLATFORM WILL ENDORSE SAME-SEX MARRIAGE

– Several news sources reported on July 30 that the Platform Drafting Committee for the Democratic National Convention had approved including provision supporting the right of same-sex couples to marry. Rep. Barney Frank (D-Mass.), a member of the drafting committee, told *The Advocate* in a telephone interview on July 30 that although specific language had not yet been drafted, there was unanimous agreement on the drafting committee after several days of hearing testimony from various constituencies within the party, that the platform proposed to the full Platform Committee during August should include a specific endorsement of same-sex marriage. If the platform is ultimately approved at the Democratic National Convention in September, this will be the first time that one of the two major parties has gone on record as endorsing same-sex marriage. Frank emphasized,

however, that votes in Congress were more significant than the plank, pointing to a recent vote in the House in which Democrats opposed the Republican’s proposal to reaffirm support for the Defense of Marriage Act. * * * Subsequently, the platform committee approved the proposed language on same-sex marriage, and the Convention meeting in Charlotte, N.C., early in September, was expected to follow suit. This would be the first time that a major American political party has endorsed the right of same-sex couples to marry. The Republican platform, adopted during the last week of August, rejected marriage rights for same-sex couples and urged passage of a Constitutional amendment to end same-sex marriages at the state level. Closeted gay Republicans at the Convention did not “come out” in protest. * * * According to an August 31 announcement by the national Stonewall Democrats organization, the 2012 Democratic National Convention would have at least 486 openly gay delegates, 23 openly-gay alternates, 20 openly-gay standing committee members, and five openly-gay pages. This would make the 2012 Convention the “most LGBT inclusive event in the history of the Democratic Party.” As far as we can tell, nobody has released a count of openly-gay delegates to the Republican National Convention. . .

DEFENSE DEPARTMENT - After the refusal of the Navy to allow personnel to wear their uniforms while marching in the San Diego Pride Parade had exploded into a topic of media conversation, the Defense Department issued a directive on July 19 to all the uniformed services stating that personnel would be allowed to wear their uniforms to march in this parade, making an exception to the usual rule that military personnel are not authorized to wear their uniforms while engaging in political activities. “It is our understanding that the event organizers plan to have a portion of the parade that is dedicated to military members,” wrote Deputy Assistant Secretary of Defense for Community and Public Outreach Rene C. Bardorf. “Service members do not need approval to wear civilian clothes and march or ride in

LAW & SOCIETY NOTES

nonpartisan parades. However, we further understand organizers are encouraging service members to seek their commander's approval to march in uniform and to display their pride. Based on our current knowledge of the event and existing policies, we hereby are granting approval for service members in uniform to participate in this year's parade, provided service members (1) participate in their personal capacity and (2) ensure adherence to Military Service standards of appearance and wear of the military uniform. This approval is applicable for individual participation in the 2012 San Diego Pride Parade only." The event went off without a hitch, but after pictures appeared in media reports, Senator James Inhofe (R-Okla-homa) and Rep. J. Randy Forbes (R-Va.), members of the armed services committees in their respective House, stated their objections. Wrote Inhofe to Secretary of Defense Leon Panetta, "If the Navy can punish a chaplain for participating in a pro-life event or a Marine participating in a political rally, it stands to reason that the Defense Department should maintain the same standard and preclude service members in uniform from marching in a gay pride parade." Wrote Rep. Forbes, "I am calling on the Defense Department to halt these dangerous exceptions to policy for political purposes. This decision was outrageous and blatantly political determination issued solely to advance this administration's social agenda." Whew!

HEALTH AND HUMAN SERVICES

– The U.S. Department of Health & Human Services is charged with enforcement of Section 1557 of the Patient Protection and Affordable Care Act (usually called the ACA or Obamacare), the statute whose constitutionality was upheld by the Supreme Court in June. Section 1557 provides that individuals shall not be excluded from participation in, be denied the benefits of, or subjected to discrimination on the grounds prohibited under various federal statutes, including Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in educational institutions that receive federal financial assistance. Section 1557

applies to any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA or its amendments. HHS's Office of Civil Rights is the office charged with investigating complaints of discrimination under Section 1557. In June, a coalition of 12 LGBT rights organizations sent a joint letter to DHHS Secretary Kathleen Sebelius, asking the Department to provide guidance in advance of formal rulemaking on the applicability of Section 1557 to claims of discrimination based on gender identity or expression, pointing out that the EEOC had recently ruled, in *Macy v. Holder*, EEOC Appeal No. 012012082 (April 23, 2012), that Title VII's ban on sex discrimination in employment included claims of discrimination based on gender identity or expression, and that several federal courts had so construed sex discrimination bans under various other federal statutes. The letter was referred to Leon Rodriguez, Director of DHHS's Office of Civil Rights, for a response, which was sent to the twelve organizations on July 12. "We agree that Section 1557's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation," wrote Rodriguez, who went on to state: "Section 1557 also prohibits sexual harassment and discrimination regardless of the actual or perceived sexual orientation or gender identity of the individuals involved." Although some parts of the ACA don't go into effect until 2014, significant provisions, including Section 1557, are already in effect, and Rodriguez stated that OCR "is currently accepting and investigating complaints filed under Section 1557." The letter does not address whether an insurer's failure to cover medical costs associated with gender transition would be considered a violation of 1557, a question not raised in the letter from the civil rights organizations. The question would be whether such procedures would be deemed necessary medical treatment.

After many years of resisting, the I.R.S. recently accepted the argument that gender transition procedures are medically necessary treatment in response to a ruling by the U.S. Tax Court to that effect, and thus can be deductible from federal income tax as medical expenses to the extent they exceed the annual threshold amount. Whether that approach will be followed under Section 1557 is yet to be determined.

HOMELAND SECURITY – Responding to gay rights advocates and a group of members of the House of Representatives, the U.S. Department of Homeland Security announced that it will avoid deporting foreign same-sex spouses of United States residents as litigation continues over the unconstitutionality of Section 3 of the Defense of Marriage Act, a 1996 statute that withholds recognition of same-sex marriages for all purposes of federal law. Peter Boogard, a spokesperson for DHS, told reporter Chris Geidner of BuzzFeed on July 30, "When exercising prosecutorial discretion in enforcement matters, DHS looks at the totality of the circumstances presented in individual cases, including whether an individual has close family ties to the United States as demonstrated by his or her same-sex marriage or other longstanding relationship to a United States citizen." By expanding the focus to "longstanding relationships" (of which same-sex marriages would be a subset), DHS could claim it is not violating Section 3 of DOMA, but rather exercising prosecutorial discretion in light of the practical limitations of dealing with the large number of persons technically subject to deportation present in the U.S. at any given time and the need to prioritize enforcement resources on deporting those who present a danger due to their criminal activity in the U.S.

DEFENSE DEPARTMENT – President Obama announced that he will appoint Eric Fanning, an openly gay man presently serving as Deputy Under Secretary and Deputy Chief Management Officer of the Department of the Navy, to be Under Secretary of the Air Force. In that position, Fanning would be responsible for "the or-

LAW & SOCIETY NOTES

ganizing, training, equipping and providing for the welfare of ... more than 333,000 active duty men and women, 178,000 Air National Guard and Air Force Reserve members, 182,000 civilians, and their families,” according to a gaypolitics.com release on August 3 quoting from the U.S. Air Force website. The Under Secretary is essentially the Air Force’s chief management officer. The nomination would be subject to confirmation by the U.S. Senate. Whether that will take place prior to the elections in November is anybody’s guess.

FEDERAL AVIATION ADMINISTRATION

– The Federal Aviation Administration has announced that it will no longer routinely require transgender pilots to submit to an extra battery of psychological and other tests to retain their flight certification. Such extended testing requirements had caused considerable problems for transgender pilots due to the delays in obtaining the new certification, as a result of which some people lost employment. Medical certification for transgender pilots is still required to obtain issuance of flight certification documents reflecting gender transition. Under the revised procedures, “Gender Identity Disorder (GID) and gender reassignment require a complete review of the individual’s relevant medical history and records,” including information about medications and their side effects, copies of medical records documents GID diagnosis, work-up, and treatment, surgical records if there has been any surgical treatment, psychological and psychiatric evaluations. Among those who participated in discussions leading to the revised procedures were the National Center for Transgender Equality, the Transgender Law Center, Drs. George Brown and Randall Ehrbar, the National Gay & Lesbian Task Force, and U.S. Representatives Mike Honda (D-Calif.) and Barney Frank (D-Mass.).

FEDERAL REGULATIONS

– The *Washington Post* reported on July 20 that the Obama Administration is finalizing new proposed regulations dealing with same-sex partners of federal employees. Among other things, according

to the *Post*’s summary, the regulations would allow low-income workers to obtain child-care subsidies for children of same-sex domestic partners, would permit domestic partners to participate in employee assistance programs covering substance abuse, stress, family problems and psychological disorders; would provide evacuation pay to cover same-sex partners in overseas emergencies; would treat domestic partners like spouses for purposes of choosing an “insurable interest” option at retirement; and would make same-sex domestic partners eligible for noncompetitive U.S. government jobs when a staffer returns from a foreign posting. Another proposed regulation would allow extension of health, dental and vision insurance coverage to the children of same-sex domestic partners of federal employees (but not to the domestic partners themselves – DOMA stands in the way of that). Although a Senate committee has approved the proposed Domestic Partnership Benefits and Obligations Act, which would treat domestic partners of federal employees as spouses for insurance and retirement benefits, the measure has not come to the Senate for a vote and has no chance of passage in the House, where the Republican leadership is throwing millions of dollars into defending Section 3 of the Defense of Marriage Act, which prohibits such benefits, in the federal courts.

MARYLAND MARRIAGE REFERENDUM

– Maryland voters will be asked on November 6 whether they approve the state’s marriage equality law. Passed in the spring, the measure will not go into effect on January 1, 2013, unless a majority votes yes on the following question: “Establishes that Maryland’s civil marriage laws allow gay and lesbian couples to obtain a civil marriage license, provided they are not otherwise prohibited from marrying; protects clergy from having to perform any particular marriage ceremony in violation of their religious beliefs; affirms that each religious faith has exclusive control over its own theological doctrine regarding who may marry within that faith; and provides that religious organizations and certain related entities are not required

to provide goods, services, or benefits to an individual related to the celebration or promotion of marriage in violation of their religious beliefs.” The ballot question title will be the same as the title of the statute: “Civil Marriage Protection Act.”

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

– The EEOC has formed an LGBT Work Group within the agency to advise the General Counsel on enforcement issues under Title VII and other civil rights statutes that EEOC enforces. This is a follow-up to the EEOC’s decision in *Macy v. Holder*, in which the agency asserted jurisdiction over gender identity discrimination claims as a form of sex discrimination prohibited by Title VII. According to an August 8 report in *CCH WorkDay* (2012 WLNR 16726394), the agency made a video of a Brown Bag Session for staff at which there was a discussion titled “What Does the Macy Decision Mean for Title VII?” The CCH report also said that the work group is “looking at federal districts and circuits around the country to identify areas where they may be able to bring some cases applying Macy, or theories of sex-plus or associational discrimination. While federal courts still hold that sexual orientation discrimination claims are not actionable, as such, under Title VII, some courts have been willing to entertain sex discrimination claims by gay employees where there is evidence of sex stereotyping.

REGNERUS “STUDY”

– *Social Science Research*, the journal that published the controversial “study” by University of Texas Associate Professor Mark Regnerus purporting to document adverse impact on children of being raised by gay or lesbian parents, commissioned an internal audit to determine whether objections that have been raised to the validity of the study are accurate and whether the journal’s review process had failed in allowing the study to be published. According to a July 26 article in *The Chronicle of Higher Education*, a draft of the audit, which was performed by Professor Darren E. Sherkat of Southern Illinois University, a member of the editorial board of *Social Science Research* who

LAW & SOCIETY NOTES

had not participated in the peer review process, found that the peer review process failed to identify “significant, disqualifying problems” with the study, and also noted “conflicts of interest” among those who were asked to review the manuscript prior to publication, arguing that “scholars who should have known better failed to recuse themselves from the review process.” *The Chronicle’s* reporter interviewed Prof. Sherkat after reading the draft, and wrote: “According to Sherkat, Regnerus’s paper should never have been published. His assessment of it, in an interview, was concise: ‘It’s bullshit.’” Sherkat said that the definition of “lesbian mothers” and “gay fathers” used by the study should have “‘disqualified it immediately’ from being considered for publication.” Sherkat also said that the peer-review system failed because of “both ideology and inattention” by the reviewers, who were “not without some connection to Regnerus,” thus flagging conflicts of interest. The “study” has been cited in briefs filed by the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) in pending litigation challenging the constitutionality of Section 3 of the Defense of Marriage Act, and was also cited in an amicus brief filed by an anti-gay “professional association” in one of those cases. In our Summer issue, we characterized the Regnerus “study” as “junk science” of the type that courts are supposed to reject as part of their function of screening opinion evidence for scientific validity. Former Solicitor General Paul Clement should be ashamed that papers filed in federal court over his signature cite the “study” as authority. * * * Late in August, the University of Texas announced that it would not pursue a formal proceeding in the case of Prof. Regnerus, and informal inquiry having determined that the charges against him involved a difference of opinion concerning the validity of his study rather than actual professional misconduct. One can be permitted, perhaps, to find this decision political rather than academic.

BOY SCOUTS OF AMERICA – While publicly maintaining that the issue was not under reconsideration, the Boy Scouts of America had actually formed an

11-member special committee in 2010 to study the issue of membership and leadership by gay and bisexual boys and men. On July 17 the organization went public with a new statement, reiterating its view that openly gay and bisexual boys and men should not be part of the Boy Scouts of America. The BSA’s Chief Executive, Bob Mazzuca, stated: “The vast majority of the parents of youth we serve value their right to address issues of same-sex orientation within their family, with spiritual advisers and at the appropriate time and in the right setting. We fully understand that no single policy will accommodate the many diverse views among our membership or society.” The organization’s official statement, reflecting awareness that the man scheduled to become president of the BSA’s national board in 2014, AT&T CEO Randall Stephenson, is a public opponent of the current policy, explained: “Scouting believes that good people can disagree on this topic and still work together to achieve the life-changing benefits to youth through Scouting. While not all board members may personally agree with this policy, and may choose a different direction for their own organizations, BSA leadership agrees this is the best policy for the organization.” One wonders whether the July 17 announcement was a preemptive strike by BSA homophobes to fortify the organization against internal advocacy for change by Stephenson and fellow-board member James Turley, CEO of Ernst & Young. In other words, BSA does not want to risk losing the sponsorship of religiously-affiliated groups who underwrite a large proportion of Scout troops around the country (and who undoubtedly are well-represented on the organization’s board), and so will continue to exclude openly gay boys and men from the “life-changing benefits.” Since those “benefits” include preserving the closet of gay boys, they also undoubtedly include imposing psychological harm and losing the opportunity to teach non-gay boys to respect their gay peers. From all this, one concludes that the retrograde BSA will become an increasingly irrelevant organization as American society (as reflected in public opinion polling) continues to move

towards acceptance and respect for sexual minorities. * * * The *Sacramento Bee* reported on July 25 that ten members of a BSA summer camp staff in the Sacramento region resigned to protest the dismissal of a gay staff member. Tim Griffin, a 22-year-old Eagle Scout, was fired on July 20 after eight years of working on the seasonal staff at Camp Winton in Amador County. Although the program director for Golden Empire Council denied that Griffin was fired because he is gay, contending that the problem was Griffin’s failure to comply with the appearance code, co-workers who resigned asserted that it was all about Griffin’s sexual orientation. Griffin said that most people on the staff at Camp Winton had known for years that he was gay, but it became an issue recently when an adult troop leader accompanying a group of Scouts to the camp pulled him aside and chided him for “being too gay,” and the local administrators claimed they had received several similar complaints about Griffin. Although California law prohibits sexual orientation in places of public accommodation, the California Supreme Court ruled many years ago that the public accommodations law does not apply to the BSA, and even if it did, any state enforcement action would be constitutionally barred under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Supreme Court ruled by a 5-4 vote that the BSA is an expressive association entitled to exclude individuals whose inclusion would interfere with the organization’s expression. * * * Responding to the recent announcement by the BSA that it was standing by its policy of excluding openly gay men and boys from participation in its activities, both President Barack Obama (who as President of the United States is the Honorary President of the Boy Scouts of America) and his Republican rival for the White House, Mitt Romney, stated that they opposed discrimination by the BSA. However, President Obama said that he would not resign as Honorary President of the BSA over this issue.

AMERICAN PSYCHIATRIC ASSOCIATION ON GENDER TRANSITION – The American Psychiatric As-

LAW & SOCIETY NOTES

sociation announced a position statement advocating the removal of barriers to care for gender transition treatment and for the protection of civil rights for transgender and gender variant people, according to a news release from the APA dated August 16. Details of the statement can be found on the APA's website. One big barrier to treatment is the expense, which is not covered by many health insurance policies and public programs. As part of the statement, the APA calls for coverage of gender transition procedures by health insurance programs.

SAME-SEX MARRIAGE IN NEW YORK

– Marking the first anniversary of implementation of New York's Marriage Equality Law, New York City Mayor Michael Bloomberg and City Council Speaker Christine Quinn held a press conference to release a report on the effect of the law. Bloomberg announced that at least 7,184 same-sex couples had received marriage licenses in New York City, and the State Health Department estimated that at least 3,424 same-sex couples had received licenses outside the City, for a total of more than 10,000 same-sex marriage licenses. (The numbers are estimates because the license form does not require the applicants to list their gender, so marriages were classified using the names of the parties.) According to Mayor Bloomberg, the City government estimates that allowing the performance of same-sex marriages generated \$259 million for the City's economy, including \$16 million in tax revenue. The Mayor said that 35 percent of those issued licenses lived outside the Middle Atlantic States and 7 percent lived outside the United States, so the availability of licenses for non-residents has helped to stimulate tourism to the City. *New York Times*, July 25.

FINAL WORDING FOR MAINE BALLOT QUESTION

– Maine Secretary of State Charlie Summers, charged by law to devise the wording of the ballot question on same-sex marriage that will be posed to voters in November, agreed to revise his original proposal, which had been "Do you want to allow same-sex couples to marry?"

Both proponents and opponents of same-sex marriage were disappointed with the original wording. Proponents preferred that the question make clear that religious organizations would not be required to perform marriages for same-sex couples. Opponents wanted a question asking whether the voters wanted to "redefine" marriage. In the end, Summers proposed the following question: "Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?" Proponents expressed satisfaction, feeling that this language communicates that the referendum is solely about whether the state should issue marriage licenses. When Summers was asked why he omitted any language about religious organizations, he said he "wanted to be careful how he answered as not to 'color opinion around it,'" according to a July 26 article in the *Portland Press Herald*. Proponents continued to express dissatisfaction, but expressed contentment that there was no "misleading" language about protection for religious liberties. The question is on the ballot because proponents of same-sex marriage submitted sufficient signatures to force the issue. The state of Maine legislated same-sex marriage several years ago, but it was repealed by referendum before it could go into effect. Proponents hope that shifting public opinion – most recently exemplified by President Obama's endorsement for same-sex marriage – may produce a different outcome, and have begun a TV/Internet/YouTube campaign combined with volunteers confronting voters individually, hoping to turn around the result. The usual suspects are expected to pour millions into an anti-same-sex marriage advertising campaign close to the election, enlisting churches in the effort. However, quite a few Maine churches have now allied themselves with the proponents.

OPENLY LGBT JUDGES IN NEW YORK

– With some recent appointments to interim vacancies on the Civil Court of the City of New York, the number of openly LGBT judges sitting in the federal and state courts in New York has increased by nine over the course of a year, beginning with the Senate confirmation of District Judge **Paul Oetken** (SDNY)

in July 2011, followed by the confirmation of District Judge **Alison Nathan**, appointment of NYC Housing Court Judge **Laurie Marin**, elections of NYC Civil Court Judges **Anthony Cannataro**, **Paul Goetz** and **Franc Perry**, appointment of NYC Family Court Judge **Sarah Cooper**, and Mayor Bloomberg's recent appointment of Judges **Stephen Antignani** and **Curtis Farber** to fill Civil Court interim vacancies. Judges Antignani and Farber have been initially assigned to sit in the New York City Criminal Court (the frequent first assignment fates of interim Civil Court judges) in Brooklyn. Thanks to Acting Supreme Court Justice Michael R. Sonberg, President of the Association of Lesbian & Gay Judges, for pointing out this gratifying increase to us. * * * The increase will continue when the Senate ratifies President Obama's nomination on August 2 of **Pamela Chen**, an openly lesbian Assistant U.S. Attorney in the Eastern District of New York, to a vacant seat on the U.S. District Court there. If confirmed, Ms. Chen would become the first Asian-American woman to sit on the Eastern District Court, and its first openly LGB member as well. She is a graduate of the University of Michigan and Georgetown University Law Center. After graduating from law school she worked at Arnold & Porter and Asbill, Junkin, Myers & Buffone, before joining the Special Litigation Section of the U.S. Department of Justice Civil Rights Division in 1991. She has been at the U.S. Attorney's Office for the Eastern District of N.Y. since 1998, with the exception of a brief stint as Deputy Commissioner for Enforcement at the New York State Division of Human Rights in 2008. During her time at the U.S. Attorney's Office, she has served as Chief of the Civil Rights Section and as Deputy Chief of the Public Integrity Section. Announcing her appointment, President Obama stated: "Pamela Chen has a long and distinguished record of service, and I am confident she will serve on the federal bench with distinction."

CALIFORNIA CAMPAIGN RULES – The enforcement staff of the California Fair Political Practices Commission has

LAW & SOCIETY NOTES

proposed fines totaling \$49,000 against ProtectMarriage—Yes on 8, the organization that proposed and campaigned for passage of Proposition 8, the state constitutional amendment banning same-sex marriage, enacted by California voters in November 2008. The 9th Circuit recently affirmed a ruling holding that Proposition 8 violates the 14th Amendment, and a petition for certiorari has been filed with the Supreme Court on behalf of ProtectMarriage—Yes on 8. Meanwhile, however, the Commission staff found that the organization failed to properly report and handle contributions that it received, amounting to potentially 18 counts of violating state laws on campaign finance. According to an Aug. 7 article in the *Los Angeles Times*, the Commission was to consider the staff recommendation on August 16.

PSYCHIATRY – The 5th edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, will abandon the idea that transgender identity is a mental disorder. The 4th edition refers to “gender identity disorder,” and has been used to characterize transgender people as suffering a mental disorder. In the 5th edition, known as DSM-V, persons who display “a marked incongruence between one’s experienced/expressed gender and assigned gender” will be diagnosed with “gender dysphoria,” not a mental illness. This term is said to imply “a temporary mental state” rather than “an all-encompassing disorder,” which would help to remove any stigma that might be associated with being labeled as “disordered.” The terminology in DSM-IV has had both negative and positive effects. Negatively, it has been used to stigmatize transgender parents in child custody cases, with the argument that they have a mental disorder that could be harmful to the child. On the other hand, being labeled as having a mental disorder has sometimes been useful in claiming insurance coverage for treatment. It is difficult to know in advance all the possible effect of the removal of “gender identity disorder” from the official lexicon of American psychiatry, and there is not unanimity among those who advocate on

behalf of transgender individuals in legal cases about whether this is a good development. However, it does respond to the argument of some transgender advocates that labeling them as disordered is stigmatizing and underlies some prejudice and discrimination. *Advocate.com*, July 23.

MOST LARGE EMPLOYERS BAN ANTI-GAY DISCRIMINATION – Equality Forum reported that 95.4% of the 2012 Fortune 500 largest U.S. companies have policies banning sexual orientation discrimination in their organizations. *CCH Workday*, Aug. 16. This is up from 64.6% in the 2004 survey. Although many of the Fortune 500 companies employee people in states that ban such discrimination, a majority of states do not, and neither does the federal government, so the adoption and enforcement of such policies in a majority of states is voluntary on the part of the employer unless it has published the policy in a form that might be contractually enforceable under state law. (However, as a practical matter, most published employer policies come with prominent disclaimers making them non-contractual, and many states do not recognize the “implied contract” exception to the “employment at will” rule.)

UNIVERSITY DRESS CODE – Few universities enforce formal dress codes, but one notably traditionalist school, Oxford University in England, has long required formal academic dress for various occasions – men in dark suits and socks, black shoes, white bow ties and a plain white shirt and collar under black gowns; women in dark skirt or trousers, white blouse, black stockings and shoes and a black ribbon tied in a bow at the neck. But the school’s LGBTQ Society presented a motion to the Student Union seeking change, arguing that the dress code was oppressive to transgender students. The Student Union agreed and passed the issue to the University’s administration, which announced that starting August 4, “The regulations have been amended to remove any reference to gender, in response to concerns raised by Oxford University Student Union that the existing regula-

tions did not serve the interests of transgender students.” An interesting sign of the changing times... *BBC News*, July 29.

ALABAMA – The Alabama Democratic Party acted to disqualify Harry Lyon, who had been its candidate for election as Chief Justice of the Alabama Supreme Court, on Aug. 17. The action came in response to Lyon’s Facebook postings of various comments, including homophobic remarks, which Party leaders believe disqualify him from serving on the high court. Lyon said he would challenge the Party’s action in court, likening the committee that made the decision to “a Communist Politburo.” Mischaracterizing the motivation behind the Democratic Party’s action, the state’s Republican Party Chairman put out a statement accusing the Democrats of removing Lyon from the ballot because he opposes same-sex marriage. Since the Alabama Democratic Party has not endorsed same-sex marriage, that’s an odd statement. The Democratic Party Chairman responded that the problem was the Lyon had defamed so many different groups in his Facebook postings that he would have to recuse himself from any case he confronted as Chief Justice. “He’s defamed almost every person he would come in contact with,” said the Democratic Chairman. *Montgomery Advertiser*, Aug. 18.

ARIZONA – Arizona may produce the first openly-bisexual member of Congress. Kyrsten Sinema won the Democratic primary to become the candidate in a district representing the Tempe, Arizona, metropolitan area. Pollsters evaluating the race with Republican nominee Vernon Parker are calling it a “toss-up,” according to an August 31 report by *Advocate.com*. * * * Paul Babeu, a gay Republican who withdrew his bid to seek a congressional nomination after his sexual orientation became public, won his primary contest for re-election as sheriff of Pinal County. He defeated three Republican challengers in the primary, and faces Democrat Kevin Taylor, a former sheriff’s deputy from Ohio who moved to Arizona in 1999 to run a private security company. *Associated Press*, Aug. 28.

LAW & SOCIETY NOTES / INTERNATIONAL NOTES

INDIANA – A gay high school student who was expelled by the Indianapolis Public Schools because he brought a stun gun to school for self-defense has won reinstatement, according to an Aug. 8 story in the *Indianapolis Star*. Darnell “Dynasty” Young was the victim of sustained anti-gay harassment and threats of physical assault, including a physical attack in the Tech High School cafeteria, during which police used pepper spray to subdue a student who was punching Young. On April 16, 2012, when a group of students approached him and threatened to beat him up, he brandished a stun gun and fired it into the air to scare them away. School officials then expelled Young for bringing the stun gun to school and firing it. Chris Stoll, a senior staff attorney at the National Center for Lesbian Rights, represents Young in seeking redress from the schools. Although an arbitrator rejected Young’s appeal of his expulsion, IPS Administrator Dexter Suggs announced that it would be reversed, but Young could not resume attending Tech High. Young has enrolled at a charter school to complete his high school education, but sought the reversal of the expulsion to clear his disciplinary record. Because Young did not know the names of the group of students who threatened him on April 16, they have not been apprehended or punished.

IOWA – Continuing the Iowa Republican Party’s campaign against Iowa Supreme Court justices who voted for same-sex marriage, Party Chairman A.J. Spiker issued a press release on August 1 calling on Iowa voters to remove Justice David Wiggins from office in the retention vote this November. The 2009 decision finding that same-sex couples have a state constitutional right to marry, *Varnum v. Brien*, was unanimous, and three members of the court were removed by the voters in November 2012 after a campaign instigated by Iowa Republicans but largely funded by out-of-state conservatives. It may be more difficult for the marriage opponents to prevail this year, since Justice Wiggins will be on the ballot together with three other justices, all of whom were appointed in 2011 to replace the justices

who were removed by the voters in 2010. In 2010, the anti-marriage campaigners had a simple message for the voters: Vote No on all the judges up for retention on the Supreme Court. This year, it will be more complicated. But it will be less complicated in 2017, when the other three members of the *Varnum* court, Chief Justice Mark Cady and Justices Daryl Hecht and Brent Appel, will face their retention votes. *Des Moines Register*, August 2. ■

EUROPEAN UNION – Responding to an inquiring concerning Armenia’s interest in becoming a member of the European Union, the European Commission responded in writing that LGBTI rights are a necessary consideration in evaluating nations applying for membership. Citing the 1993 Copenhagen criteria and provisions of the European Charter and the European Convention on Human Rights, the Commission stated: “Rights of LGBT people thus form an integral part of both the Copenhagen political criteria for accession and the EU legal framework on combatting discrimination. They are closely monitored by the EU commission, which reports annually on the progress made by enlargement countries with regard to the situation of the LGBT community.” Although at times specific criteria have been waived for particular applicants, LGBT rights activists within Europe are vigilant about enforcing the requirement that applicants for membership have appropriate legal protections in place, particular concerning employment rights. *euobserver.com*, July 13.

INTERNATIONAL LESBIAN & GAY HUMAN RIGHTS COMMISSION – The ILGHRC honored U.S. Representative Tammy Baldwin (D-Wis.) and the Honorable Karen Atala, a Chilean judge who won a ruling from the Inter-American Court of Human Rights concerning custody of her children, which had been denied by the Chilean courts on account of her sexual orientation. ILGHRC honored Baldwin for her work in establishing the LGBT Equality Caucus in the House of Representatives, which has enlisted as members many gay-supportive members

of the House in addition to the handful of openly gay members. Baldwin is contending for the Democratic nomination for United States Senate from Wisconsin.

ARGENTINA – A spokesperson for the Argentina’s LGBT Federation announced on July 30 that a gay male couple who have conceived a child with a surrogate mother in India would be registering the birth of the child with both fathers indicated without any distinction between the biological father and his partner in Buenos Aires on July 31, the first time this has been done in Argentina. The Civil Registry Office was reportedly reluctant to do this, but legal counsel from the Federation persuaded them. Legislation is pending in the Congress to modify the Civil Code to make this procedure standard throughout the country.

AUSTRALIA - The Court of Appeal of the Australian state of New South Wales has held that a law prohibiting homosexual vilification does not infringe the implied freedom under the Australian Constitution of communication about governmental or political matters. In *Sunol v Collier (No 2)* [2012] NSWCA 44, the applicant challenged the validity of the anti-homosexual vilification provision of the Anti-Discrimination Act 1977 (NSW) – sec. 49ZT. He had published material which, amongst other things, disparaged the Sydney Mardi Gras as being full of pedophilia and being “this bloody faggots Parade”. When the respondent sought to enforce a conciliation agreement preventing the applicant from publishing such material, a question arose whether sec. 49ZT breached the freedom implied in the Australian Constitution of communication about governmental or political matters. The Court of Appeal held that, while sec. 49ZT effectively burdens the implied freedom, it was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution. Specifically, seeking to end homosexual vilification was a legitimate end of government. Debate, however robust, does not need to descend

INTERNATIONAL NOTES

to public acts which incite hatred, serious contempt or severe ridicule of a particular group of person (this being the statutory definition of 'vilification'). Further, sec. 49ZT provided adequate protection of legitimate political debate by providing an exemption for a "public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including debate about and expositions of any act or matter." In this circumstance, the Act provided an appropriate balance between the legitimate end of preventing homosexual vilification and the requirement of freedom to discuss and debate government or political matters required by the Constitution. The decision can be accessed at <<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/44.html>>. —*David Buchanan SC, Sydney*

AUSTRALIA – On August 30 the lower house of Tasmania's parliament became the first chamber of an Australian parliament to approve a measure to legalize same-sex marriages, according to a report published August 31 in *The Age*. Views are divided as to whether same-sex marriage can only be legislated at the national level, but this bill, co-sponsored by Labor Premier Lara Giddings and Green Party leader Nick McKim, passed by 13-11. Labor MPs had a free vote, and all but one supported the measure. All of the Greens voted in favor, and all of the Liberals, bound by their party's opposition, voted against. Tasmania was, ironically, the last Australian state to decriminalize gay sex, in 1997. The upper house will consider the measure in September, and the outcome is uncertain, as 13 of its 15 members are independents and few have indicated their disposition publicly.

AUSTRALIA – A Veterans' Review Board has ruled that Jennifer Jacomb, a transgender individual who had served in the Australian Navy between 1983 and 1985 as William Jacomb, was entitled to claim military medical treatment or a pension, according to a July 30 article in the *Moreland Leader*. The Review Board overturned a 2011 ruling by the

Repatriation Commission. The Review Board found that Jacomb suffered bullying, harassment and "bastardization" while assigned to NSW naval base HMAS Cresswell, resulting in undiagnosed post-traumatic stress disorder that cause her resignation from the service. The Repatriation Commission had rejected her claim on the ground that she didn't serve a full three years. Ms. Jacomb, who has lived as a woman since 2006, called the ruling a "major victory" and said that it was likely the first judgment in any jurisdiction that acknowledges that such misconduct in the Australian military and its adverse effect on the individual should be taken into account in determining eligibility for benefits for resigned military veterans. The newspaper report also stated, "A review into abuse in the Australian Defense force released by the Federal Government this month found more than 700 allegations dating back over half a century."

BELGIUM – ILGA/Europe reported (July 18) that Belgium's constitutional court has broadened co-parent adoption rights in two recent rulings. Since 2006, Belgium has allowed cohabiting same-sex couples to adopt children, and has allowed for second-parent adoptions by cohabiting same-sex partners of biological parents. In the recent rulings, the court has said that requiring cohabitation is unconstitutional in cases where a partner seeks to adopt children she has shared in raising but she is no longer cohabiting with the child's biological mother.

BRAZIL – By statute, new parents have paid leave rights from work in Brazil. New fathers are entitled to five days leave, while new mothers are entitled to four months "maternity leave." What happens if a same-sex male couple adopts a child? It's already been established that when a lesbian couple has a new child, both parents are "mothers" entitled to four months leave. But if a male couple adopts a child, are both parents limited to five days a piece? The nation's social security agency has ruled that one of the men can have "maternity" leave, the *Associated Press* reported on August 30. Lucimar da Silva

and his partner adopted a child, and Lucimar applied for four months "maternity leave." He argued that it would be discriminatory to deny him the longer leave, in light of the prior decision that approved a four-month leave for lesbian couples with new children. The agency's statement said it was not setting a general precedent, and that male couples who adopt child will have to individually petition for a four-month leave, which will presumably be granted if it is shown that the petitioning partner is serving in the place of a mother.

CANADA – The British Columbia Human Rights Tribunal ruled in *Eadie and Thomas v. Riverbend Bed and Breakfast and others* (No. 2), 2012 BCHRT 247 (July 17, 2012), that the owner-operators of Riverbend Bed & Breakfast, Les and Susan Molnar, violated the Canadian Charter of Rights and Freedoms by refusing accommodation to a gay couple, Shaun Eadie and Brian Thomas. The Molnars had canceled the couple's reservation at their B&B on learning that they were gay, the Molnars claiming that their sincerely held evangelical Christian beliefs forbade them to condone or permit same-sex intercourse in their Grand Forks home. They considered this home, which they also operated as a business, to be a gift from their god, and it had repeatedly been ritually consecrated by their pastor. Susan Molnar took Shaun Eadie's reservation for two by phone and upon asking for his "wife's name" was given the name "Brian." Les Molnar, after learning from his wife that she believed she had just made a reservation for a gay couple, called Eadie back, asked if he was gay (he confirmed he was), and told him it wasn't "going to work out." Eadie hung up with a "wow" and the couple filed a complaint with the Human Rights Tribunal. Tribunal Member Enid Marion determined that the B&B, albeit run by particularly rigid believers, did not have a religious function that could justify discriminatory treatment of particular groups. Rather, the B&B was open to and intended for the general public. She found further that the Molnars had made no attempt at alternative arrangements for the couple and that their attempt to distinguish

INTERNATIONAL NOTES

same-sex *intercourse* from same-sex *orientation* for purposes of discrimination (the Molnars argued that they would “perhaps” have accommodated the couple if they agreed not to have intercourse in their room) was unconvincing and had been roundly rejected in Canadian case law. The Tribunal awarded damages of \$3,000 to the couple, with costs. The Molnars say they have no wish to violate the *Charter* and have closed their B&B to avoid any such future dilemmas. To their credit and in keeping with their asserted beliefs, the Molnars have said that they bear no ill will toward the plaintiffs. —JPY

CANADA – Justice Norman Karam of Ontario Superior Court rejected a motion by Rene deBlois, a sperm donor, for visitation with the 22-month-old child conceived from his sperm donation to a lesbian couple. DeBlois, who made an agreement with the couple under which he would not assert parental rights or seek visitation, now seeks a declaration of paternity rights, claiming that the couple breached their agreement with him, which he asserts included their commitment to have a second child for him. Resisting the demand for visitation pending a ruling on the merits, the mothers argued that their son, who has never met deBlois, might become insecure and confused if he met the sperm donor. Agreeing with their argument, Judge Karam wrote, “Despite the child’s young age, it is impossible to know what disclosure of his status as his parent might mean. All circumstances considered, the risk of there being an adverse effect to the child is too great to ignore.” Karam also found “very convincing” the mothers’ argument that allowing access could inadvertently affect the outcome of the trial. An article in the *National Post* reporting on the case pointed out that Canadian law on the rights of known sperm donors is unsettled. “A smattering of mostly lower-court rulings has addressed the question,” says the article, “but most of the cases have had complicating factors, such as a past relationship between the donor and the recipient.” Still pending is a motion by the mothers to reconsider an earlier ruling by the court to

treat the sperm-donation contract as void.

CANADA – The United Church of Canada, the country’s largest Protestant denomination, elected an openly-gay man, Reverend Gary Paterson, to be the Church’s Moderator, which is the chief leadership position in the Church. On August 16 the 350 commissioners of the Church’s general council voted unanimously to confirm Paterson’s election. In a statement after the vote, Paterson said he was “encouraged” that his sexual orientation was a non-issue during the campaign for his election. *Advocate.com*, Aug. 17.

CHINA (TAIWAN) – The *China Post* reported on August 22 that the Taipei District Court ordered Mackay Memorial Hospital to pay damages to Chou, a male employee, and not to discharge him after the employee claimed that he was dismissed for cross-dressing. The plaintiff testified that he began cross-dressing on the advice of psychologist who he had consulted about his gender identity issues. After he began cross-dressing, he was transferred out of the information technology department and then fired. The City Government determined in response to Chou’s complaint that the hospital had violated labor regulations forbidding discrimination based on gender and sexual orientation, leading to the civil suit. The court rejected the employer’s argument that the employee was dismissed because of attendance issues. The plaintiff may take the case to the Taiwan High Court, since the District Court awarded only a fraction of the damages he sought, and the employer may also appeal the finding of liability.

DUBAI – The *KhaleejTimes* reported on August 30 that the Court of Appeal had reduced a one year prison sentence given to a male Belgian visitor who had a sexual relationship with a male Filipino worker to six months, and upheld an order that the Belgian visitor be deported upon completion of his sentence. The original sentence was imposed by the Court of Misdemeanours in June, upon a charge of an illegal consensual homosexual relationship, which came to light

when the Filipino fell to his death from a fourth-floor balcony while the Belgian was elsewhere in the apartment they were sharing. At first the Belgian man was arrested for murder, but the lack of evidence led to a conclusion that the Filipino man had committed suicide, and the Belgian was referred to the criminal court on the charge of unlawful consensual sex. The defendant had admitted to the consensual relationship, testifying that he met the deceased online and accepted an invitation to stay in the Filipino man’s apartment and share a sexual relationship.

FRANCE - French Prime Minister Jean-Marc Ayrault said that the government planned to submit a bill opening up marriage to same-sex couples to the Parliament in October, with hopes for enactment during 2013. *Wall Street Journal*, Aug. 25.

GERMANY – The nation’s highest court ruled on August 8 that same-sex couples in registered partnerships are entitled to the same exemption on land-transfer tax as married different-sex couples. The court ruled in the case of two men who ended their partnership in 2009, one purchasing their jointly-owned property from the other. In cases where married couples divorce and one buys out the other’s share of jointly own property, there is an exemption from the usual transfer tax on the sale of property. The court ruled that the same-sex couple should enjoy the same exemption. According to various sources quoted on *Advocate.com* on August 9, there are several cases pending in German courts challenging unequal treatment of registered partners regarding taxes and other legal rights. This ruling addresses only one of many pending issues.

HUNGARY – A new Criminal Code that will take effect on July 1, 2013, includes hate crime and hate speech provisions that reference sexual orientation and gender identity and remove offensive terminology on same-sex relations, according to a Hungarian gay rights group reporting through ILGA-Europe. The President of Hungary signed the new Code on July 13. The new code in effect decriminal-

INTERNATIONAL NOTES

izes consensual sex with the age of consent being the same for both same-sex and different sex conduct—fourteen [14]. ■

ITALY – Milan’s City Council has approved a civil union registry, open to same-sex and different-sex couples, that will grant all rights under municipal law that are afforded to married couples. The original proposal had been to call this a family register, but Catholic members were vehemently opposed to using the term “family” for unmarried partners, so the term civil union was substituted. The measure passed 27-7-4 after a marathon session that began at 4:30 pm and ended at 4:30 am on July 27. Milan’s mayor, Giuliano Pisapia, welcomed passage, stating “We have narrowed Europe’s civil rights spread.” Italy has so far fallen behind most of Western and Southern Europe in dealing with same-sex unions, as marriage, civil unions or registered partnerships are now available in neighboring Spain, Switzerland, and Austria, and many other countries in the European Union afford some form of legal recognition and rights for same-sex partners. ILGA-Europe.

LIBERIA – The Senate unanimously voted on July 20 to amend the Constitution to ban same-sex marriages in Liberia. However, the bill was subject to approval by President Ellen Johnson Sirleaf, who had previously stated that she would veto any legislative measure involving homosexuality. The bill was sponsored by Senator Jewell Taylor, ex-wife of former President Charles Taylor, who was sentenced by the International Criminal Court recently for war crimes and crimes against humanity. A measure was pending before the House of Representatives to make gay sex a first-degree felony. The sudden interest in legislating on homosexuality seems to have been provoked by an attempt by an activist group to lobby the legislature to allow same-sex marriages.

NETHERLANDS – Responding a Parliamentary enquiry in March concerning the situation facing LGBT people in Iraq, Dutch Immigration Minister Geert Leers has announced that the government

will grant asylum to gay Iraqis. He had announced a temporary halt to deportation of gay Iraqis in June in response to an alert from the Ministry of Foreign Affairs. A spokesperson for COC, the Dutch national gay rights organization, indicated that research shows at least 750 people have been murdered for being gay in Iraq since 2003, and that religiously-inspired anti-gay campaigns are frequent there. The government has expressed no interest in protecting gays from persecution and murder. *Netherlands Radio.com*, July 13.

NEW ZEALAND – The Parliament approved by a vote of 80-40 on a first reading a proposal to allow same-sex marriages in New Zealand on August 29. This was the first of three votes that must be taken before the measure is enacted into law. A simple majority would be required to pass the second vote. New Zealand law already provides civil unions for same-sex couples that confer many rights but not all the rights of marriage. Prime Minister John Key attributed U.S. President Barack Obama’s declaration in favor of same-sex marriage as what prompted him to abandon his silence on the issue and state that he was “not opposed.” If the measure survives subsequent votes and is enacted, it will make New Zealand the twelfth country to authorize same-sex marriage, unless the French get there first. As noted above, the new Socialist government in France expects to enact a marriage equality bill early in 2013. *Edmonton Journal* (Canada), Aug. 30.

RUSSIA – It was reported that at least 73 people have now been prosecuted under the recently-enacted municipal law in St. Petersburg that outlaws public homosexual or pedophilic “propaganda.” The police chief was quoted as saying that only one of the people was prosecuted for pedophilic propaganda. Carrying a gay rights sign at a demonstration would be considered a violation of this ordinance, with carries a penalty of a fine up to about \$15,600. No details were released concerning the actual fines being levied. The law was enacted at least in part in response to repeated attempts

by activists to secure permits to hold gay rights demonstrations in St. Petersburg, some of which have been held without permits and encountered severe reactions from police and anti-gay agitators. * * * Pointing to the Russian government’s crackdown against gay rights advocacy, gay activist Alexei Kiselev is seeking political asylum in Spain, according to an August 2 report in the English-language edition of *El Pais*. Kiselev had been detained several times by law enforcement for participating in gay rights protests and demonstrating against election irregularities last December. Kiselev arrived in Spain in July and was expecting a decision on his application on August 24. * * * Several media sources reported that the Trade Union of Russian Citizens and the organization Narodny Sobor filed suit in a Russian court against U.S. pop star Madonna and the promoters and venue of her August 9 concert in St. Petersburg, seeking damages for her statements that they characterized as “offensive” to the feelings of religious believers and the cultural traditions of local citizens. Among those statements were support for LGBT rights and criticism of various local laws that have been adopted by Russian municipalities to criminalize “propaganda of homosexuality.” The suit seeks damages of 333 million rubles (about US\$10.4 million). * * * *Huffington Post* (Aug. 17) reported that an appellate court affirmed a ruling rejecting a challenge to the Moscow City Council’s adoption of a measure banning all gay pride demonstrations in the city for the next century. Local LGBT rights leader Nikolai Alexeyev announced that an appeal would be filed in the European Court of Human Rights. Russia has officially declared that it acceded to the European Convention on Human Rights. The Moscow measure – and similar measures recently adopted in other Russian municipalities – clearly violates the protection of political expression under the Convention. Because decisions by the European Court about violations of the Convention are not self-executing, a question remains whether Moscow officials would take any action in response to a ruling against them by the Court.

INTERNATIONAL NOTES

SCOTLAND – In a press announcement released on July 25, the Scottish Government announced its intention to legislate to allow same-sex marriages. The proposed legislation will include “important protections for freedom of speech and religion,” said the Government release, so that no religious body “will be compelled to conduct same-sex marriages” and those who speak out against such marriages will not be subjected to any penalty. Even if a religious body were to decide to allow such marriages to be performed, the Government’s legislative proposal would protect “individual celebrants who consider such ceremonies to be contrary to their faith.” The Government’s protracted deliberations on this issue have sparked heated public discussion, with several religious leaders speaking out strongly against the proposal. The Government noted, however, that there was support for same-sex marriage among the leadership of all the parties in the Scottish parliament. The announcement stated that “a draft Bill will be published for consultation later in the year.” The likely timetable would aim for enactment sometime in 2014, for the measure to take effect early in 2015. The Government noted that among those who responded to its public consultation on the question using the standard form, 65 percent of Respondents from within Scotland were in favor of same-sex marriage, but when all the letters, postcards and petitions were factored in, only 36 percent were in favor. The postcards and petitions, of course, most likely originated from organized efforts by social and religious groups who were opposed. *Glasgow Herald*, July 26.

SOUTH AFRICA – Reacting to the spate of anti-gay violence – especially violence directed against lesbians – in South Africa, representatives of the LGBTI community met with leadership of the African National Congress, the governing political party, to discuss ways to work against homophobic violence. As a result of the meeting, a joint committee has been established with ANC and LGBTI community representatives to design a

campaign of educating our communities about the rights of gays and lesbians as fellow South Africans whose rights need to be respected and protected,” according to a news release from the ANC National Spokesperson, Jackson Mthembu.

TAIWAN - *Huffington Post* reported on Aug. 13 that two women in Taiwan had been married in a Buddhist ceremony, presided over by a female Buddhist master. The religious ceremony has no legal standing in Taiwan, where a bill to authorize same-sex civil marriages has been pending since 2003. However, the Buddhist master told a reporter, “We are witnessing history. The two women are willing to stand out and fight for their fate... to overcome social discrimination.”

UNITED KINGDOM – Participating a reception for LGBT community representatives held at 10 Downing Street, the Prime Minister’s Office/Residence, Prime Minister David Cameron reiterated his personal pledge to bring same-sex marriage to a vote in Parliament during his administration, which runs to 2015. The P.M. advocates passage of a marriage equality law, which was part of the campaign platform of the Liberal Democrat party with which he governs in a coalition. The big question is whether the P.M. can convince a substantial number of his Conservative Party members to vote for the bill. The opposition Labor Party is expected to support the bill in large numbers. Cameron said that the coalition was “committed to both changing the law and also working to help change the culture and the Conservative Party absolutely backs that.” *Daily Telegraph*, July 25. Of course, if the Coalition comes apart or loses a confidence vote, all bets are off. Some Clergy of the Church of England, and Catholic officials in England, have voice strong opposition, and the question whether same-sex couples can marry in Church of England ceremonies is very much part of the debate, in light of the historic role of the established church in the English institution of marriage.

UNITED KINGDOM - The U.K. Supreme Court agreed to hear an appeal

from the Court of Appeal ruling against the Christian owners of a guesthouse that refused accommodations to a gay couple. The appeal court upheld Bristol County Court Judge Andrew Rutherford’s decision awarding 3600 pounds in damages to Martyn Hall and Steven Preddy, who are civil union partners (a legal status in the U.K. akin to marriage), on grounds of sexual orientation discrimination. The defendants, Peter and Hazelmary Bull, assert their religious objections to homosexuality and state that their policy of restricting occupancy of double beds to married couples does not constitute discrimination based on sexual orientation, but rather based on sexual practice. The court of appeal, rejecting this argument, said that the policy constituted an “absolute” restriction with respect to gay couples, and thus “must constitute discrimination on grounds of sexual orientation.” *Herald* (Glasgow), Aug. 15.

UNITED KINGDOM – An employment tribunal at Newcastle-upon-Tyne awarded substantial damages to Michael Austin to compensate for homophobic and religiously based harassment by co-workers and boss at his former employer, the Samuel Grant packaging firm at Jarrow. Austin was hired as a sales executive in September 2010, and discharged in March 2011, shortly after complaining to management about the harassment. The company claimed he was fired for inferior work, but the tribunal rejected the argument. It seems that Austin, married and the father of one, was asked by a co-worker soon after hiring if he was interested in football, and when he responded negatively, was quickly labeled gay in the workplace and subjected to repeated harassment on that score. His interest in the arts was taken as confirmation of his sexual orientation. The tribunal found that Austin’s boss was responsible for fostering a workplace culture of sexism, racism, and inappropriate religious discussion. *Daily Telegraph*, July 16.

VIETNAM – The *Associated Press* (July 30) reported that Justice Minister Ha Hung Cuong said on July 24 in an online chat broadcast on national TV and radio that

INTERNATIONAL & PROFESSIONAL NOTES

the government was considering whether to recommend to the National Assembly a proposal to provide either same-sex marriage or some form of registered partnership for same-sex couples. According to the news report, he said, "I think, as far as human rights are concerned, it's time for us to look at the reality. The number of homosexuals has mounted to hundreds of thousands. It's not a small figure. They live together without registering marriage. They may own property. We, of course, have to handle these issues legally." According to the article, the government will seek comments from various sectors of society and will frame a proposal for the National Assembly to consider next spring. If Vietnam adopts same-sex marriage or registered partnership, it may be the first Asian nation to do so. The article noted eleven other nations and 7 jurisdictions within the United States now authorizing same-sex marriage. The number of nations with some form of registered partnership, mainly in Europe, is even higher. * * * On August 5, Vietnam experienced its first gay pride parade, as 100 demonstrators rode bicycles and motorbike through Hanoi, inspired by Justice Minister Cuong's statement. According to an *Associated Press* report, "Demonstrators trailed rainbow-colored streamers and shouted "Equal rights for gays and lesbians" and "We support same-sex marriage!" ■

THE NATIONAL LGBT BAR ASSOCIATION presented its Dan Bradley Award to **Jennifer F. Levi** on August 24 at the 2012 Lavender Law Conference. Levi, director of the Transgender Rights Project at Gay & Lesbian Advocates & Defenders and a Professor of Law at Western New England University, has been a leading advocate and scholar on the rights of transgender and gender-nonconforming people. She serves on the Legal Committee of the World Professional Association for Transgender Health, is a founding member of the Transgender Law & Policy Institute, and the Transgender Political Coalition. She worked as a GLAD staff attorney prior to joining the faculty at Western New England, and has continued to work with GLAD in various volunteer capacities. A graduate of Wellesley and the University

of Chicago Law School, Levi clerked for Judge Michael Boudin, U.S. Court of Appeals for the 1st Circuit. * * * The Association has published its third annual award list of "Best LGBT Lawyers under 40." The award was established to recognize "lesbian, gay, bisexual and transgender legal professionals under the age of 40 who have distinguished themselves in their field and demonstrated a profound commitment to LGBT equality." The awardees were recognized at an Awards Luncheon held during the 2012 Lavender Law Conference and Career Fair at the Washington (DC) Hilton Hotel on August 25. A full list of the award recipients can be found on the Association's website: lgbtbar.org. * * * On August 24, the National LGBT Bar Association presented its 2012 Frank Kameny award to Professor **Stephen Whittle**, OBE, Ph.D., of Manchester Metropolitan University in the United Kingdom. Prof. Whittle transitioned from female to male in 1975 and has spent decades advocating for the legal rights of transgender people in the U.K. and internationally. In 2002 he received the Sylvia Rivera Award and, in 2005, was named on the Queen's New Year's Honours List as an Officer of the Order of the British Empire for his advocacy work. The Association presents the Kameny Award to "a member of the lesbian, gay, bisexual and transgender community who has paved the way for important legal victories." The recipient need not be an attorney. The award honors the memory of Frank Kameny, an astronomer who was discharged by the federal government for being gay and brought his case to the federal courts, initiating more than a half century of fervent advocacy for LGBT rights. * * * Keynote speaker at the Lavender Law Conference this year was United States Attorney General Eric Holder, Jr.

THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE has opened a search for a new Legal Director. The **Legal Director** is responsible for leading the organization's legal program, which includes building a robust docket, and ensuring that it advances the ACLU's strategic priorities. According to the press release announcing the opening, the docket

in recent years has included "cutting edge litigation on a range of issues including religious freedom, LGBT equality, freedom of speech, voting rights, immigrant rights, and reproductive freedom." Qualifications include at least five years litigation practice, license to practice in Tennessee or in another state and qualified to apply for admission in Tennessee, the usual excellent legal skills credentials for such a position, demonstrated leadership and supervisory skills, etc. The press release also specifies: "Sense of humor in order to maintain perspective and balance." Applications will be treated as confidential. Directions for those interested: "Please send 1) a letter describing interest in the position; 2) resume; 3) a writing sample; and 4) salary history by email to hedy@aclu-tn.org – reference Legal Director in subject line – or by mail to: ACLU of Tennessee, RE: Legal Director, P.O. Box 120160, Nashville, TN 37212. No phone calls please. Applications will be reviewed on a rolling basis. Start date no later than October 1, 2012."

NEW JERSEY – After the New Jersey Senate Judiciary Committee refused to advance openly-gay appointee **Bruce Harris** for a seat on the New Jersey Supreme Court, Governor Chris Christie announced that Harris had been appointed general counsel of the New Jersey Turnpike Authority. "We've been without a general counsel at the Turnpike Authority for the better part of over a year and a half because we've been looking for the right person," said the governor. "I never thought Bruce Harris would want to do that, but after his adventure in front of the Senate Judiciary Committee, he's decided he wants to stay inside government and try and change some of the ridiculousness that happened during that hearing by being a participant in government." The Committee voted down Harris as unqualified, based on his lack of litigation experience. Harris had worked as a transactional lawyer, and was elected Mayor of Chatham, a part-time position, as a Republican. If he had been confirmed, he would have been the court's first openly gay member. *Herald News* (West Paterson, NJ), Aug. 1.

HIV/AIDS LEGAL NOTES

NEW YORK – The Appellate Division, 1st Department, ruled on July 24 in *Budano v. Gurdon*, 2012 WL 30000451, that the plaintiff in a personal injury case was not entitled to discovery of medical records of the plaintiff “pertaining to alcohol and drug treatment, mental health information, and HIV-related information, if any.” This is literally a “slip and fall” case. Budano claimed that he “sustained physical injuries when he slipped and fell on a staircase in a building owned by defendant,” claiming in his complaint that his injuries “are believed to be permanent in their nature and/or consequences.” During discovery, defendant requested that the court order plaintiff to authorize release of his medical records from Lincoln Medical and Health Center, where he was treated after the accident, relating to Budano’s “substance abuse and/or substance treatments,” and subsequently also sought disclosure of any records related to mental health or HIV. In support of the discovery request, defendant argued that “plaintiff’s alleged substance abuse could ‘have an effect on his prognosis, present health condition, and future medical care,’” but did not assert that the plaintiff was HIV+ or specify how that would be relevant to the litigation. Noting that the “the affirmation was completely silent on the issue of HIV,” the court said, “even if defendant had established that plaintiff suffered from chemical dependency and mental illness and had HIV, the requested discovery would not be warranted. Defendant failed to submit an expert affidavit or any other evidence that would establish a connection between those conditions and the cause of the accident, nor did he make any effort to link those conditions to plaintiff’s ability to recover from his injuries or his prognosis for future enjoyment of life. Without such support, ‘we are presented with nothing other than ‘hypothetical speculations calculated to justify a fishing expedition.’”

The court noted the recent decision on confidentiality of HIV-related information in civil litigation in *Del Terzo v. Hosp. for Special Surgery*, 95 App.Div.3d 551 (1st Dept. 2012).

3RD CIRCUIT – A panel of the 3rd Circuit affirmed the Board of Immigration Appeal’s determination that it did not have jurisdiction to reopen a removal case on the petition of an HIV-positive man who had been deported back to India. *Desai v. Attorney General*, 2012 WL 3570718 (Aug. 21, 2012). According to the opinion for the court by Circuit Judge Hardiman, the petitioner, a native and citizen of India, entered the U.S. as a lawful permanent resident in 1980, but “embarked on a prolific criminal career” which included numerous convictions. After a 2002 conviction for theft and possession of a controlled substance, Desai was processed for removal from the U.S. as a criminal in 2008. He did not contest removability but sought relief under the Convention against Torture (CAT), arguing that “his HIV-positive status made him vulnerable to discrimination and persecution in India.” The Immigration Judge denied CAT relief, and was affirmed by the Board of Immigration Appeals. In 2010, after Desai had been deported back to India, his pending appeal of the controlled substance conviction was granted based on trial errors and his case was remanded for a new trial. Since that conviction was the basis for his deportation, Desai filed a motion asking the BIA to reopen his removal case. BIA denied the motion, relying on a regulation that stated that motions to reopen such proceedings may not be entertained after movant has been removed from the United States. BIA also noted that were it to rule on the merits, it would rule against Desai, presumably in light of his considerable record of criminal convictions predating the 2002 controlled substance conviction. Desai challenged the jurisdictional ruling

on appeal, but the 3rd Circuit panel unanimously backed up the BIA, concluding that the Board “did not err when it concluded that it lacked jurisdiction to consider Desai’s motion to reopen *sua sponte*.”

DISTRICT OF COLUMBIA – Terry Hedgepeth and Whitman Walker Health have settled litigation concerning an incorrect HIV diagnosis. The parties filed a notice of dismissal on August 8, just days before a scheduled trial after a ruling last summer by the District of Columbia Court of Appeals concerning the limits of emotional distress claims in such cases. Hedgepeth was mistakenly told that he was HIV+ as a result of a clerical error by a laboratory employee, and suffered from emotional distress and suicidal feelings as a result. Retesting five years later showed that he was not infected, and he sued for emotional distress damages. A trial judge threw out the case, but the D.C. appeals court reversed en banc, creating a new standard to apply to such cases that rejected the old “zone of danger” test to embrace a new test for situations where a the plaintiff’s emotional well-being could be affected, it is “especially likely” that negligence could cause “serious emotional distress,” and such distress did result from the defendant’s negligence. The amount of the settlement was not disclosed. D.C. Superior Court Judge Erik Christian approved the notice of dismissal and dismissed the case on August 9. Washington solo practitioner Jonathan Dailey represented Hedgepeth in the lawsuit.

GEORGIA – On August 22, Lambda Legal announced a settlement in *Roe v. City of Atlanta*, pending in the U.S. District Court for the Northern District of Georgia, resolving the charge that Lambda’s client was denied a position as a police officer due to his HIV+ status. “Roe” had applied to join the Atlanta Police Department early in 2006, but was rejected when a pre-

HIV/AIDS LEGAL NOTES

employment physical disclosed his HIV status and the doctor informed him that he was disqualified on that basis. The City argued that an HIV+ police officer would present a “direct threat” to the health or safety of others, and thus would not be protected under the Americans with Disabilities Act. The district court granted summary judgment to the city, allocating Roe the burden of proof on the issue of “direct threat.” “Direct threat” is supposed to be an affirmative defense under the statute. The 11th Circuit held that the district court wrongly granted summary judgment and that Roe should have been given a trial of his discrimination claim. The district court then directed the parties to attempt a settlement. The settlement announcement did not disclose the monetary terms, and the city has not formally admitted to discriminating based on HIV status. At one point in the litigation, the City was taking the position that being HIV+ was not an automatically disqualifying factor, but subsequently it decided to back up the doctor’s statement by arguing “direct threat.” Lambda attorneys Scott Schoettes and Gregory Nevins and cooperating attorney Steve Koval worked on the case.

ILLINOIS (7TH CIRCUIT) – The 7th Circuit affirmed a ruling by Judge Joan B. Gottschall (N.D.Ill) that the federal government was immune from damage claims brought by an entrepreneur seeking compensation for the spoilage of HIV+ blood and saliva specimens that were confiscated from his laboratory by a federal investigator. *On-Site Screening, Inc. v. United States*, 2012 WL 3027392 (July 25, 2012), affirming 2011 WL 3471068 (N.D.Ill.). According to the opinion by Circuit Judge Tinder, in October 2004 a local fire inspector had alerted the Food & Drug Administration that “materials labeled HIV-positive were in a Bedford Park laboratory that made over-the-counter products

like shampoos and deodorants.” An FDA special agent responded to the notice, removing the specimens from the refrigerator in the lab and placing them in an Illinois Health Department laboratory freezer while an investigation continued into whether plaintiff Ronald Lealos and his company had violated any laws. Lealos claimed to have obtained and possessed the samples as part of his attempt to develop “a rapid, self-administered test to determine a person’s HIV status” which he hoped to market through his business. After a four-year investigation, the FDA and the US Attorney decided not to prosecute Lealos or his company, and the FDA contacted Lealos to see whether he wanted his samples back. They should have checked the freezer before offering. It seems that the freezer had malfunctioned at some point and the samples were spoiled, useless for Lealos’s purpose. Lealos sued for compensation under the Federal Tort Claims Act, but Judge Gottschall found that this case fell within an exception to the government’s waiver of sovereign immunity; apparently the government has no financial liability to a private citizen if property is seized by a law enforcement officer as part of an investigation and is rendered valueless as a result of negligence in its storage. The only real ground of dispute is whether the FDA special agent could be deemed a law enforcement officer for purposes of construing the FTCA exception. Judge Gottschall resolved that dispute in favor of the government and the 7th Circuit agreed. Wrote Judge Tinder, “The government presented uncontroverted evidence that Ellis [the agent] detained the specimens as a law enforcement officer for a criminal investigation and not for purposes of forfeiture,” and cited a Supreme Court ruling holding that the exception from tort liability “for law enforcement detentions covers property storage and handling.” See *Kosak v. United States*, 465 U.S. 848 (1984). ■



Are you reading this in the stacks of your law library?
Wouldn't you rather be reading it at your desk?
Members of LeGal receive each month's issue directly in
their email inboxes. Join today at www.le-gal.org!

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

1. Aden, Steven H., and Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 Engage: J. Federalist Soc'y Prac. Groups 4 (Sept. 2010).
2. Alsgaard, Hannah, *Decoupling Marriage & Procreation: A Feminist Argument for Same-Sex Marriage*, 27 Berkeley J. Gender L. & Just. 307 (Summer 2012).
3. Araiza, William D., Book Review, *Back to the Future – Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*. By David Bernstein, 28 Const. Comment. 111 (Spring 2012).
4. Arshagouni, Paul G., *Be Fruitful and Multiply, By Other Means, If Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DePaul L. Rev. 799 (Spring 2012).
5. Aviram, Hadar, and Annick Persinger, *Perceiving and Reporting Domestic Violence Incidents in Unconventional Settings: A Vignette Survey Study*, 23 Hastings Women's L.J. 159 (Summer 2012).
6. Ballard, Amy, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 Cardozo J. L. & Gender 775 (2012).
7. Banner, Francine, *'It's Not All Flowers and Daisies': Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of 'Don't Ask, Don't Tell'*, 24 Yale J. L. & Feminism 61 (2012).
8. Bannerman, Sara, *Same-Sex Marriage, Social Cohesion, and Canadian Values: A Media Analysis*, 36 Canadian J. Comm. No. 4 (2011).
9. Barker, Nicola, *Civil Partnership: An Alternative to Marriage? Ferguson and Others v. UK*, 42 Fam. L. (UK) 548 (May 2012).
10. Baude, William, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371 (June 2012).
11. Bible, Jon D., *The Jerk at Work: Workplace Bullying and the Law's Inability to Combat It*, 39 Emp. Rel. L. J. 32 (Summer 2012).
12. Blank, Yishai, and Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. Rev. 955 (May 2012) (observes that most of the legislative and administrative regulation of sexuality takes place in the U.S. at the municipal level).
13. Blocher, Joseph, *Rights To and Not To*, 100 Cal. L. Rev. 761 (Aug. 2012).
14. Boucai, Michael, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (Spring 2012).
15. Byrn, Mary P., and Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23.1 Colum. J. Gender & L. 1 (2012).

Specially Noted

Veteran LGBT rights activist Urvashi Vaid has published a book intended to prod LGBT rights activists into taking a broader view of the campaign for human equality. *Irresistible Revolution: Confronting Race, Class, and the Assumptions of LGBT Politics*, was published in July by Magnus Books.

The 2012 Dukeminier Awards for the best sexual orientation and gender identity law review articles of 2011 have been announced by UCLA Law School's Williams Institute, which has awarded prizes for articles – previously noted in *Law Notes* – by Sharon Dolovich, Douglas NeJaime, and Clifford J. Roskey. They also awarded a student writing prize to Julie Anne Howe of NYU Law School.

Gay & Lesbian Advocates & Defenders, New England's Boston-based public interest law firm, has published *Social Security Benefits and the Defense of Marriage Act: Can I Do Anything Now to Preserve My Rights? Yes!* This is valuable reading for all legally-united same-sex couples, and is available as a download from GLAD's website. The publication reviews the various benefits available under the Social Security Act for legal spouses, and provides information to help calculate benefits eligibility. Although the Social Security Administration does not now recognize same-sex legal relationships in light of Section 3 of DOMA, litigation brought by GLAD, Lambda Legal and the ACLU has produced a series of decisions holding Section 3 unconstitutional, and petitions are pending before the Supreme Court to review all of those cases, so this is a very timely publication.

16. Byrn, Mary P., and Morgan L. Holcomb, *Same-Sex Divorce in a DOMA State*, 50 Fam. Ct. Rev. 214 (April 2012).
17. Calixte, Leodyne, *Condoms: The New Medium of Expression Protected by the First Amendment: People v. Andujar*, 28 Touro L. Rev. 649 (2012).
18. Calvert, Clay, *Too Narrow of a Holding? How -- and Perhaps Why – Chief Justice John Roberts Turned Snyder v. Phelps into an Easy Case*, 64 Okla. L. Rev. 111 (Winter 2012).
19. Carpenter, Catherine L., and Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L. J. 1071 (May 2012).
20. Dent, George W., Jr., *Perry v. Schwarzenegger: Is Traditional Marriage Unconstitutional?*, 12 Engage: J. Federalist Soc'y Prac. Groups 161 (Nov. 2011) (opponent of same-sex marriage holds forth by framing the question nonsensically).
21. Developments in the Law—Presidential Authority, 125 Harv. L. Rev. 2057 (June 2012) (includes section on “Presidential Involvement in Defending Congressional Statutes”).
22. Dicklitch, Susan, Berwood Yost, and Bryan M. Dougan, *Building a Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals*, 34 Hum. Rts. Q. 448 (May 2012).
23. Dunton, Elise S., *Same Sex, Different Rights: Amending U.S. Immigration Law to Recognize Same-Sex Partners of Refugees and Asylees*, 50 Fam. Ct. Rev. 357 (April 2012).
24. Eskridge, William N., Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 Geo. L.J. 1881 (August 2012) (Symposium: Family Law Pluralism).
25. Falletti, Elena, *Homosexual Single Individuals' Right to Adopt Before the European Court of Human Rights and in the French Legal Context*, 18 Human Rts. Brief No. 2 (Winter 2011).
26. Finerty, Courtney E., *Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws*, 45 Cor-

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

- nell Int'l L.J. 431 (Spring 2012).
27. Forde-Mazrui, Kim, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. Chi. L. Rev. 281 (2011).
 28. Forman, David M., *A Room for Adam and Steve at Mrs. Murphy's Bed and Breakfast: Avoiding the sting of Inhospitality in Places of Public Accommodation*, 23 Colum. J. Gender & L. 326 (2012).
 29. Frost, Amanda, *Congress in Court*, 59 UCLA L. Rev. 914 (April 2012) (Noting the defense of Section 3 of DOMA as an example, argues for a more active role by Congress litigating in federal statutory cases).
 30. Gabry, Leora I., *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 Colum. J. L. & Social Prob. 415 (Spring 2012).
 31. Gelsinger, Sara A., *Right to Exclude or Forced to Include? Creating a Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 Penn St. L. Rev. 1155 (Spring 2012).
 32. Ghai, Ritu, *Deciphering Motive: Establishing Sexual Orientation as the "One Central Reason" for Persecution in Asylum Claims*, 43 Colum. Hum. Rts. L. Rev. 521 (Spring 2012).
 33. Harrison, Jack B., *The Strange Intersection Between Law, Religion, and Government in the Regulation of Marriage*, 6 Charleston L. Rev. 547 (Spring 2012).
 34. Hausman, David, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 Stanford L. Rev. 1343 (May 2012).
 35. Hawkins, Stacy L., *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 Colum. J. Race & L. 75 (2012).
 36. Hewlings, Cassandra R., *With Adar v. Smith, the Fifth Circuit Opens a Hole in the Full Faith and Credit Clause*, 86 Tul. L. Rev. 1359 (June 2012) (critical discussion of 5th Circuit ruling that federal district court could not compel Louisiana officials to extend full faith and credit to a New York adoption decree involving a same-sex couple).
 37. Ho, Jocelyn, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 Fla. L. Rev. 789 (May 2012).
 38. Howard, A.E. Dick, *The Constitution and the Role of Government*, 6 Charleston L. Rev. 449 (Spring 2012) (Symposium).
 39. Hulstein, Matthew J., *Recognizing and Respecting the Rights of LGBT Youth in Child Custody Proceedings*, 27 Berkeley J. Gender L. & Just. 171 (Summer 2012).
 40. Hunter, Nan D., *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 Geo. L.J. 1855 (August 2012) (Symposium: Family Law Pluralism).

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.

41. Infanti, Anthony C., *Bringing Equal Protection Out of the Tax Closet* (chapter in A. R. Oakes, Ed., *Controversies in Equal Protection in America*, Ashgate Publishing, 2012).
42. Joshi, Yuvraj, *Respectable Queerness*, 43 Colum. Hum. Rts. L. Rev. 415 (Spring 2012) (exploring tensions between the gay movement as a liberation movement vs. a civil rights movement).
43. Kaplan, Margo, *Rethinking HIV-Exposure Crimes*, 87 Indiana L.J. 1517 (Fall 2012).
44. Kelly, Alicia Brokars, *Actualizing Intimate Partnership Theory*, 50 Fam. Ct. Rev. 258 (April 2012).
45. Kelly, Alicia Brokars, *Navigating Gender in Modern Intimate Partnership Law*, 14 J. L. & Fam. Studies 1 (2012).
46. Klug, Heinz, *Access to Medicines and the Transformation of the South African State: Exploring the Interactions*

of Legal and Policy Changes in Health, Intellectual Property, Trade, and Competition Law in the Context of South Africa's HIV/AIDS Pandemic, 37 L. & Social Inquiry 297 (Spring 2012).

47. Ladomato, Dominique, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 Hastings Women's L.J. 245 (Summer 2012).
48. Lewis, Browne C., *Papa's Baby: Paternity and Artificial Insemination* (New York: New York University Press, 2012) (proposal for reforming paternity and child custody law in the context of donor insemination, including consideration of same-sex parents).
49. Malloy, S. Elizabeth, *What Best to Protect Transsexuals From Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 Women's Rts. L. Rep. 283 (Summer 2011).
50. Monshipouri, M., and T. Trapp, *HIV/AIDS, Religion, and Human Rights: A Comparative Analysis of Bangladesh, Indonesia, and Iran*, 13 Hum. Rts. Rev. 187 (June 2012).
51. Mortazavi, Sarah, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Geo. L.J. 2249 (Aug. 2012).
52. Myott, Stephanie D., *The United States Military and its Anti-Gay Discriminatory Policies: Impact on the Elderly LGBT Community*, 20 Elder L.J. 199 (2012) (despite repeal of DADT, persisting anti-gay policies disadvantage elderly LGBT veterans).
53. NeJaime, Douglas, *The Legal Mobilization Dilemma*, 61 Emory L.J. 663 (2012) (uses *Perry v. Schwarzenegger* for discussion of dynamic between LGBT movement legal organizations and activists who organized AFER to bring federal marriage litigation).
54. Nichols, Joel, *Marriage: Civil, Religious, Contractual, and More*, 50 Fam. Ct. Rev. 222 (April 2012).
55. Nosanchuk, Mathew S., *Response: No Substitutions, Please*, 100 Geo. L.J. 1989 (Aug. 2012) (Symposium: Family Law Pluralism).
56. Pasek, Daniel, *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 Harv. L. & Pol'y Rev. 459 (short essay) (Summer 2012).
57. Pearson, Kim H., *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 Mich. J. Gender & L. 149 (2012).
58. Pearson, Kim H., *Sexuality in Child Custody Decisions*, 50 Fam. Ct. Rev. 280 (April 2012).
59. Polikoff, Nancy D., *Response: And Baby Makes ... How Many? Using In re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and*

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

- Born to a Lesbian Couple*, 100 Geo. L.J. 2015 (Aug. 2012) (Symposium: Family Law Pluralism).
60. Prescott, J.J., *Do Sex Offender Registries Make Us Less Safe?*, 35 Regulation No. 2, 48 (Summer 2012).
 61. Probbler, Benjamin K., *Diaz v. Brewer and the Equal Protection Clause: A Roadmap for the Retention of Same-Sex Public Employee Benefits*, 14 U. Pa. J. Const. L. 1351 (April 2012) (examines equal protection litigation strategies for employee benefits for same-sex partners of government workers).
 62. Raban, Ofer, *Capitalism, Liberalism, and the Right to Privacy*, 86 Tul. L. Rev. 1243 (June 2012) (uses Supreme Court sodomy opinions as one example of how the Court has failed to articulate a coherent privacy doctrine under the Due Process Clause).
 63. Raban, Ofer, *Conflict of Rights: When the Federal Constitutional Restricts Civil Liberties*, 64 Rutgers L. Rev. 381 (Winter 2012).
 64. Rabinowitz, Aaron, *The Executive as Advocate: Moral Constitutional Interpretation in Enforcement Decisions and the Ethical Obligations of the Take Care Clause*, 25 Geo. J. Legal Ethics 751 (Summer 2012) (evaluating the ethical issues raised by the Obama Administration's decision that Section 3 of DOMA is unconstitutional but must continue to be enforced until either repealed or ruled unconstitutional by the Supreme Court).
 65. Robertson, Sean, *Exception to Excess: Tactical Use of the Law by Outgroups in Bias Crime Legislation*, 37 L. & Social Inquiry 456 (Spring 2012).
 66. Roy, Lisa Shaw, *The Evangelical Footprint*, 2011 Mich. St. L. Rev. 1235 (2011) (examination of constitutional litigation by Christian Evangelical advocates, including gay rights cases such as *Christian Legal Society v. Martinez*).
 67. Shay, Giovanna, and J. Kelly Strader, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, Book Review, 102 J. Crim. L. & Criminology 171 (Winter 2012).
 68. Simson, Gary J., *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23.1 Colum. J. Gender & L. 132 (2012).
 69. Skougard, Erika, *The Best Interests of Transgender Children*, 2011 Utah L. Rev. 1161.
 70. Stein, Edward, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 Fam. Ct. Rev. 181 (April 2012).
 71. Strasser, Mark, *Perry, Same-Sex Marriage, and Federal Constitutional Guarantees*, 12 Engage: J. Federalist Soc'y Prac. Groups 166 (Nov. 2011).
 72. Terry, Pamela K., *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 Fordham L. Rev. 3093 (May 2012) (explores split between 10th and 5th Circuits on whether states must issue revised birth certificates recognizing out-of-state adoptions by same-sex couples).
 73. Tran, Stevie V., and Elizabeth M. Glazer, *Transgenderless*, 35 Harv. J. L. & Gender 399 (Summer 2012) (suggests a broader view of transgender identity than that put forward in existing case law involving individuals who were diagnosed with gender identity disorder and contemplating or engaging in reassignment procedures, to more broadly encompass a range of gender stereotype non-conformity).
 74. Vandervoort, Lucinda, *"Too Young to Sell Me Sex?!" Mens Rea, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker*, 58 Crim. L. Q. 355 (May 2012).
 75. Waldman, Ari Ezra, *Hostile Educational Environments*, 71 Md. L. Rev. 705 (2012) (Special Feature: Cyberlaw).
 76. Walker, Vaughn R., *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. Ill. L. Rev. 1207 (2012) (Lecture about judging by the retired federal judge who rendered the decision in *Perry v. Schwarzenegger* holding California Proposition 8 unconstitutional).
 77. Wendt, George J., and J. Carlton Sims, Jr., *The Vanishing Trial: A Hayekian Perspective*, 2 Faulkner L. Rev. 287 (Spring 2011) (uses the example of *Lawrence v. Texas* overruling *Bowers v. Hardwick* to illustrate the point that court decisions reflect changing societal attitudes).
 78. Widiss, Deborah A., *Changing the Marriage Equation*, 89 Wash. Univ. L. Rev. 721 (2012).
 79. Widiss, Deborah A., *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 Fam. Ct. Rev. 205 (April 2012).
 80. Wiener, Richard L., Sidney Bennett, Carrie Cheloha, and Nolt Nicholson, *Gender Policing: Harassment Judgments When Men Target Other Men*, 18 Psychology, Pub. Pol'y & L. 245 (May 2012).
 81. Worthen, Meredith G.F., Susan F. Sharp and Forrest R. Rodgers, *Gay and Lesbian Individuals' Attitudes Toward the Death Penalty: An Exploratory Study of the Roles of Empathic Concern and Political Beliefs*, 37 Crim. Just. Rev. 239 (June 2012).
 82. Yoshino, Kenji, *The "Civil" Courts: The Case of Same-Sex Marriage*, 54 Ariz. L. Rev. 469 (Summer 2012). ■