9TH CIRCUIT CERTIFIES STANDING QUESTION IN PROP 8 CASE TO CALIFORNIA SUPREME COURT AND MAY AVOID RULING ON THE MERITS

In *Perry v. Schwarzenegger*, 2011 WL 9633 (9th Cir. Jan. 4, 2011), the U.S. Court of Appeals for the 9th Circuit certified to the California Supreme Court the question of whether the official proponents of Proposition 8, which prohibited same-sex marriages in California, have standing as a matter of state law that would enable them to intervene and appeal the district court's decision against constitutionality. At the same time the court, in *Perry v. Schwarzenegger*, 2011 WL 9576 (9th Cir. Jan. 4, 2011), affirmed the district court's denial of a motion to intervene brought by the County of Imperial, its Board of Supervisors, and a Deputy Clerk for the County.

The two decisions present the real possibility that no party will have standing to appeal the trial court's ruling declaring Proposition 8 unconstitutional. Indeed, the named official defendants, including California's Governor and Attorney General, did not defend the measure in the trial court and did not file an appeal of the district court's order. Only the Proposition 8 proponents, who were permitted to intervene in the trial court, appealed the order to defend the measure's constitutionality before the court of appeals. While noting there was some question about what the next steps would be if nobody has standing to appeal, the court pointed refrained from addressing that question pending a decision on jurisdiction.

Before having an opportunity to reach the merits of the proponents' appeal, the circuit court panel noted its obligation to ensure that it has jurisdiction over the matter. Citing the standards enumerated by the U.S. Supreme Court, the court first explained that the fact that the proponents had been "granted intervention in the district court is not enough to establish standing to appeal." Rather, the right of proponents to continue with the appeal in the absence of the party on whose side intervention was permitted in the first instance (*i.e.*, the government defendants) is "contingent upon a showing by the intervenor that he fulfills the requirements of Article III", citing *Diamond v. Charles*, 476 U.S. 54 (1986), of being a real party of interest in a genuine case or controversy.

Since the Supreme Court has indicated in past rulings that the question whether initiative proponents could have standing to defend on appeal a popularly-enacted measure whose defense has been abandoned by state officials may turn on whether the law of the state authorizes them to undertake such a defense, the 9th Circuit certified the question of whether "the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so." Ultimately, of course, the question of Article III standing is one of federal constitutional law for the 9th Circuit panel to decide after receiving an answer from the California Supreme Court as to the state law question.

In other words, the 9th Circuit has asked the California Supreme Court to determine whether, as a matter of state law, the proponents of Proposition 8 have suffered "concrete injury" as a result of the trial court's ruling striking down Proposition 8, and the California court has been asked to determine whether proponents may assert the State's alleged interest in defending the validity of a citizen initiative. The answers will help the 9th Circuit to determine whether any party has standing to defend the initiative.

On the first point, the proponents contend that the trial court ruling harmed their interest in the validity of the voter-approved initiative itself, a measure the proponents sponsored. On the second point, proponents argue that the State of California has an interest in defending the constitutionality of its laws and that the proponents, as "agents of the people," have the authority to defend that State interest, despite the unwillingness of the official State defendants to do so, as sponsors of Proposition 8.

The 9th Circuit appeared troubled by the prospect of public officials holding the power, through inaction, effectively to invalidate a citizen initiative. The court noted, "[a]lthough the Governor has chosen not to defend Proposition 8 in these proceedings, it is not clear whether he may .achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend or appeal a judgment invalidating it, if no one else including the initiative's proponents is qualified to do so."

Thus, to the 9th Circuit, the case now implicates more than the potential fundamental rights under the U.S. Constitution asserted by the plaintiffs challenging Proposition 8. The "fundamental right" of the State's electorate to participate directly in the governance of their State may also be at stake.

The answer to the certified question is made all the more significant by the court's affirmance, albeit on slightly different grounds, of the trial court's denial of the motion to intervene brought by the County of Imperial, its Board of Supervisors, and a Deputy Clerk for the County. The 9th Circuit, therefore, dismissed the parties' corresponding appeal for lack of standing.

Imperial County is among the California counties a large majority of whose residents voted in favor of Proposition 8. However,

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the court ruled that none of the Imperial County movants had demonstrated a "significant protectable interest' relating to the property or transaction that is the subject of the action." The court noted that the Board of Supervisors plays no role with regard to marriage, which is a matter of "statewide concern rather than a municipal affair." As for Imperial County, the court ruled that it failed to demonstrate any interest of its own apart from those claimed by the Board and the Deputy Clerk.

In reaching its conclusion, the Ninth Circuit deemed waived a convoluted argument raised by the County for the first time on appeal that it had a "direct financial interest" in assuring that Proposition 8 is upheld because of its responsibility to provide various social welfare programs: according to the County, the promotion of opposite-sex marriage will benefit the public welfare and reduce a variety of problems ranging from teenage pregnancy to incarceration rates.

That left only the claims of the Deputy County Clerk, who is also the deputy commissioner of civil marriages for Imperial County. The Deputy Clerk argued that her intervention should be allowed because "[a]ny injunctive relief granted by [the district court] would directly affect the Clerk's performance of her legal duties." The court easily disposed of this argument because any powers and duties exercised by the Deputy remain those of the principal (i.e., her employer, the County Clerk). As a result, to the extent the final judgment causes any injury, it would be suffered by the Clerk and not the Clerk's Deputy. The court noted that were Imperial County's elected County Clerk the applicant for intervention, the argument for intervention might have merit, but such argument could not be considered since that party was not before the court.

The court concluded its standing analysis with the determination that the district court's denial of permissive intervention was also not an abuse of discretion. The district court found that the relevant factors weighed strongly against allowing permissive intervention because (a) the movants conceded that they had no new evidence or arguments to introduce into the case and (b) the only stated interest of being able to ensure appellate review of the plaintiffs' constitutional claims was one they could not fulfill because they lacked standing to appeal the judgment in the plaintiffs' favor.

Finally, Judge Reinhardt, in a separate concurrence to the unsigned panel opinions, noted his exasperation with both the "standing" requirements and the litigation strategies of all the parties involved.

Judge Reinhardt noted with dismay a trend in the judicial system over the past few decades in which technical rules are emphasized at the expense of actually deciding cases on the merits. Judge Reinhardt referred to these rules standing, mootness, ripeness, abstention and others as "obstacles" that limit access of individuals to the courts. It is clear that Judge Reinhardt would prefer that courts have the freedom (some might infer he also means courage) to readily determine the important issues at stake in this case and in others.

Judge Reinhardt seems particularly troubled here by the plaintiffs appearing to capitalize on the issue of standing. He notes that it was clear at the outset that the plaintiffs filed the case with the goal of obtaining a U.S. Supreme Court decision establishing a constitutional right to marry (he calls it a "constitutional right to gay marriage"). Judge Reinhardt expresses puzzlement at plaintiffs' subsequent assertion at oral argument in the 9th Circuit that the trial court's injunction of Proposition 8 applies only in two of California's fifty-eight counties; that the injunction may not be appealed because of standing issues; and that the injunction can then be extended Statewide by subsequent filings by the State Attorney General against all the other County Clerks.

To Judge Reinhardt, all of this is gamesmanship that could have been avoided if the plaintiffs had simply filed against a broader set of defendants. But he's no happier with the proponents-intervenors. Judge Reinhardt is equally puzzled by Imperial County's attempt to intervene through its Deputy Clerk rather than the County Clerk and by the failure to enlist at least one of the Clerks of the other forty-two counties that voted in favor of Proposition 8. He sums up the parties' litigation conduct as "inexplicable."

For all those who have ever found it maddening that our courts can't simply get on with the show, Judge Reinhardt certainly makes for a fine protagonist.

Judge Reinhardt's say is not limited to his concurrence, however. In *Perry v. Schwarzenegger*, 2011 WL 17699 (9th Cir. Jan. 4, 2011)), Judge Reinhardt denied the proponents' motion for his recusal based on an alleged conflict of interest resulting from his wife's position as Executive Director of the American Civil Liberties Union of Southern California (ACLU/SC) for thirty-eight years.

In an opinion that must be purposefully ironic, Judge Reinhardt described the motion for recusal brought by the proponents of Proposition 8 as "based upon an outmoded conception of the relationship between spouses." Tracing his long history of pushing the legal profession to abandon standards of recusal sometimes informed by ignorance of the "realities of modern marriage," Judge Reinhardt blasts the idea that his wife's opinions on the topic of same-sex marriage constitute an "interest" in the case that would warrant his recusal. In particular, Judge Reinhardt notes that the ACLU/SC declined to support the lawsuit brought by the plaintiffs and that its later decision to join two amicus briefs submitted on behalf of 122 organizations provides no cause for his recusal. He also emphasizes that the amicus briefs were not cited in any way in the district court's findings of fact and law, and that the ACLU/SC had no further connection with the case. Accordingly, Judge Reinhardt asserted that there are no grounds warranting his recusal. *Brad Snyder*

LESBIAN/GAY LEGAL NEWS

U.S. District Court Gives Green Light to New West Coast DOMA Suit

With a motion for class certification having been filed on January 19 and scheduled for hearing on February 24, and having just survived the federal defendants' motion to dismiss, six Californians are poised to strike a heavy blow at the federal Defense of Marriage Act, Section 3, which mandates that only different-sex unions be recognized as marriages for all purposes of federal law. U.S. District Judge Claudia Wilken's January 18 decision on the motion in *Dragovich v. U.S. Department of the Treasury*, 2011 Westlaw 175502 (N.D.Cal.) appears to forecast an easy victory for the plaintiffs at the trial level. The plaintiff couples are Michael Dragovich and Michael Gaitely, Elizabeth Litteral and Patricia Fitzsimmons, and Carolyn and Cheryl Light, who filed the suit on behalf of themselves and all others similarly situated.

Three California public employees and their same-sex spouses filed the lawsuit. These couples were registered as California domestic partners and then married in 2008 during the "window period" when marriage was available prior to the passage of Proposition 8. The California Supreme Court subsequently ruled in *Strauss v. Horton*, 46 Cal.4th 364 (2009), that such "window

period" that were valid when they were contracted would remain valid.

After Michael Dragovich married Michael Gaitley, he inquired about signing up Gaitley for coverage under the state-maintained plan providing long-term care insurance for state employees and their families. The program administrators refused to send him an application, stating that the plan would lose its favorable federal tax status if they were to extend eligibility to somebody who was not recognized as a spouse under federal law. They relied on Section 7702B(f) of the Internal Revenue Code, which specifies in detail the family relationships that will qualify. Domestic partners are not listed. Spouses are listed, of course, but the IRC must be construed in tandem with the Defense of Marriage Act (DOMA), which limits the definition of spouse under federal law.

Dragovich and his husband, as well as two lesbian married couples who are interested in participating in the insurance program, joined as plaintiffs, suing both the state administrators of the program and the U.S. Treasury and the Internal Revenue Service, seeking a declaratory judgment that failure to allow them to participate violates the 5th and 14th Amendments. They presented evidence about the significance of long-term care insurance as a family financial planning tool, and showed that the plan offered for state employees was far superior in various respects to the less affordable plans available directly from private insurance companies. The federal defendants moved to dismiss based on alternative grounds of standing and failure to state a claim. The state defendants did not move to dismiss, but are defending on the ground that they cannot expand the program with jeopardizing its favorable tax status for all the participants.

The standing argument contends that none of the plaintiffs actually applied and was turned down for the plan, and thus that they lacked an actual case or controversy with the federal government, but this is a totally spurious argument, as the California administrators are so spooked about the danger to the tax status of the plan that they would not even provide an application to the plaintiffs. Judge Wilken cut through the nonsense, finding that the plaintiffs do have a personal stake and a real controversy with the government concerning their eligibility. There are strong 9th Circuit precedents supporting the proposition that when a person's exclusion from a program is clear on the face of the program qualifications, they have standing to challenge those qualifications, even though they have not actually applied and been turned down.

On the merits, Judge Wilken found that plaintiffs had the makings of a valid claim of denial of equal protection and due process. Assuming one uses the rational basis test to evaluate these claims — the lowest level of constitutional scrutiny — there still must be some rational connection between a legitimate government purpose and the denial of the benefit in question to these plaintiffs. Judge Wilken noted the DOMA decisions from last summer by U.S. District Judge Joseph Tauro (Massachusetts), finding that there was no rational basis supporting the denial of various federal benefits pursuant to DOMA, and concurred with his analysis.

The Justice Department has disavowed reliance on the various policy statements underlying DOMA that were articulated in Congressional reports and debate in 1996 when the measure was passed, instead relying on the argument that Congress could have rationally decided in 1996 that with the possibility looming that some state (at that time, Hawaii) might authorize same-sex marriages, the federal government should "preserve the status quo" and maintain national uniformity for eligibility for federal programs by freezing into federal law the then-universal definition of marriage as the union of one man and one woman.

Describing their argument, Judge Wilken wrote: "According to Federal Defendants, preserving the status quo allows states to resolve the issue of same-sex marriage for themselves, and provides uniformity in the federal allocation of marriage-related rights and benefits. Section three of the DOMA, however, alters the status quo because it impairs the states' authority to define marriage, by robbing states of the power to allow same-sex civil marriages that will be recognized under federal law."

She continued, "Federal Defendants concede that section three of the DOMA effected a departure from the federal government's prior practice of generally accepting marriages recognized by state law." She noted that the House committee report even points out that deciding who can marry was traditionally "uniquely a function of state law." Therefore, adopting a federal definition was a departure from the status quo, not its preservation. Indeed, as she points out, the inability of California to extend eligibility for the long-term care insurance program is a prime example, deterring the state from providing full-scale marriage rights by placing in jeopardy the preferred tax status of the program for all its other participants.

Judge Wilken found that there was such an obvious lack of rational justification for the application of DOMA in this case that there was no need to consider whether heightened or strict scrutiny should be applied, and thus no need to consider whether sexual orientation is a suspect classification or whether the government policy burdens a fundamental right.

Her analysis of the government's case leaves little doubt that the government would most likely lose on a summary judgment motion by the plaintiffs, but the next step is to broaden the potential impact of the case by certifying a class of all similarly situated California public employees with same-sex spouses, which will be on the agenda when the court hears the class certification motion on February 24.

Lori Rifkin of the Legal Aid Society-Employment Law Center in San Francisco represents the plaintiffs. A.S.L.

9th Circuit Allows Title VII Retaliation Claim Premised on Sexual Orientation Discrimination Complaint

The U.S. Court of Appeals for the 9th Circuit has partially reversed and remanded a decision by the U.S. District Court in Oregon that had dismissed a gay man's claims against his employer under Title VII of the Civil Rights Act of 1964 and Oregon's anti-discrimination and tort laws, in *Dawson v. Entek International*, 2011 WL 61645 (C.A.9 (Or.), Jan. 10, 2011). While agreeing that Dawson's sexual orientation discrimination complaint was not actionable under Title VII's ban on sex discrimination, the court ruled that the allegation that the company discharged him two days after he filed a complaint of sexual orientation discrimination (which is forbidden under state but not federal law) could be actionable under Title VII's anti-retaliation provision, apparently breaking new ground.

In April, 2007, Plaintiff Shane Dawson was hired by Entek as a temporary production line worker. Two of his coworkers were acquaintances who already knew Petitioner was gay. Petitioner's "direct trainer" and coworkers frequently made derogatory comments about his sexual orientation. Petitioner began experiencing "stress and work deterioration" as a result of the comments,

and took a day off in response; however, he failed to comply with the company's policy that he call his supervisor one hour before his shift began, even though he did call the company's main line and advised them that he would be absent. On his return the next day, Petitioner complained of the derogatory comments to human resources, but he was terminated two days later. Entek claimed Dawson was terminated due to his failure to comply with their absence policy.

Dawson brought suit in federal court based on federal question jurisdiction for his Title VII claim of discrimination and retaliation, and also brought supplemental state law claims of sex discrimination and unlawful retaliation under Oregon anti-discrimination employment laws, as well as a claim for intentional infliction of emotional distress. U.S. District Judge Ann Aiken granted summary judgment to Entek on all claims, and Dawson appealed to the Ninth Circuit.

District Judge David C. Bury, sitting by designation on the three-judge panel, held that both the state and federal employment discrimination claims could be analyzed together, since the Oregon laws were modeled after Title VII. Judge Bury held that the district court erred in granting summary judgment against Petitioner's Title VII retaliation claims, stating that he engaged in "protected activity" when he visited human resources to file a complaint, and that the "proximity in time" between his complaint and his termination "[is one way] a jury could logically infer that [Dawson] was terminated in retaliation." Judge Bury held that the district court did not err in granting summary judgment to Entek on the appellant's claims that the derogatory comments were based on gender, as he had "presented no evidence that he failed to conform to a gender stereotype." Thus, far, the 9th Circuit has ruled that gender stereotyping may ground a sex discrimination claim under Title VII, even when the plaintiff is gay, but that a straighforward sexual orientation discrimination claim is not actionable.

Judge Bury further held that the district court erred in granting summary judgment to Entek on Petitioner's hostile work environment sex discrimination suit under Oregon law, since although "sexual orientation" was not expressly included in the Oregon statute at the time of his termination, Oregon courts had ruled that "sex" discrimination, which was prohibited at the time, included discrimination based on sexual orientation. (The law was subsequently amended to add sexual orientation expressly.)

Further, Judge Bury held that Entek might have been found liable for a sexual orientation-based hostile work environment because there were issues of fact of whether Dawsonr's "direct trainer" was his "supervisor," and of whether the company was liable for failing to undertake "reasonably calculated" "remedial measures" to end harassment, as their only actions were firing Dawson and offering some counseling and training sessions to employees.

Finally, Judge Bury rejected Dawson's claims alleging intentional infliction of emotional distress, stating that he failed to prove conduct constituting "an extraordinary transgression of the bounds of socially tolerable behavior."

Of particular note in this case is that sexual orientation discrimination is not protected by Title VII, yet Judge Bury's decision appears to hold without discussion that a person may bring a Title VII claim of unlawful retaliation based on a complaint for employment practices which a person believes to be, but are not, actionable under Title VII. *Bryan Johnson*

U.S. Supreme Court Refuses to Meddle With Same-Sex Marriages in District of Columbia

Continuing with its general policy of refraining from getting involved with questions of local law in the District of Columbia, the Supreme Court denied without comment a petition for certiorari in *Jackson v. District of Columbia Board of Elections and Ethics*, No. 10-511, 2011 WL 134291 (Jan. 28, 2011), decision below, 999 A.2d 89 (D.C., July 15, 2010), an action by some District residents asserting a right to place an initiative on the D.C. local election ballot that would define marriage as solely between a man and a woman.

On May 5, 2009, the D.C. City Council passed a local law under which the District's government would recognize same-sex marriages contracted in other jurisdictions. This was actually a test by same-sex marriage proponents to see whether local legislation on same-sex marriage could survive the Congressional review process. (Congress has a veto on local legislation, but must act promptly after such legislation is passed.) When Congress failed to veto the recognition law, the Council took the next step, passing a law authorizing same-sex marriage in the District in December 2009. An attempt by House Republicans to move a veto measure died in committee, and the District's marriage law went into effect in the spring of 2010.

Opponents of same-sex marriage in the District moved quickly to challenge these developments. Led by Reverend Harry R. Jackson, Jr., they proposed an initiative to allow the voters in the District to determine whether same-sex marriage should be recognized or available, by voting on a proposition to define marriage in the district as consisting only of the union of a man and a woman. The District's Board of Elections ruled that such an initiative was not authorized by District law, since it would conflict with the District's Human Rights Law, which forbids sexual orientation discrimination. Superior Court Judge Judith N. Macaluso upheld the Board's ruling, and the District's Court of Appeals affirmed Judge Macaluso's decision on July 15 in a 4-3 decision. The court's ruling engaged in what might be characterized as a somewhat innovative interpretation of the federal and local laws governing the initiative process in the District. In light of the split vote and the vehement dissenting opinion, there was at least some suspense about whether the Supreme Court would take the case.

As usual, the Supreme Court did not provide any explanation for denying the petition. Sometimes members of the Court will openly dissent from such cert denials and file dissenting opinions, but none were filed in this case. That doesn't necessarily mean that the vote within the Court was unanimous, merely that there were not at least four votes in favor of granting the petitition to review the lower court's ruling, and that none of the Justices, if any, who favored review were interested in noting their views publicly. The Court's cert denial should not be construed as a vote on the merits in favor of same-sex marriage. Depending what happens in the Proposition 8 litigation pending in the 9th Circuit, the Court might be called upon to address the issue a few years down the line....

The upshot is that the right of same-sex marriage in the District of Columbia is secure for now, and it is noteworthy that such availability has immediate extra-territorial consequence because the Attorney General of Maryland issued a formal opinion last year that same-sex marriages contracted elsewhere will be recognized in that neighboring state. A measure to authorize same-sex marriages in Maryland is expected to receive consideration in the legislature

during 2011, with high hopes for passage. Of course, the other states that allow same-sex marriages (Vermont, New Hampshire, Connecticut, Massachusetts, Iowa) will recognize as marriages the same-sex marriages contracted in the District of Columbia, and other states with civil union or domestic partnership laws will extend some form of recognition to such marriages. Additionally, at present New York recognizes same-sex marriages contracted elsewhere, and earlier in January the Attorney General of New Mexico issued a formal opinion arguing that such marriages should be recognized in that state as well (see below). A.S.L.

New Mexico Attorney General Says State Would Recognize Same-Sex Marriages From Elsewhere

New Mexico Attorney General Gary K. King issued a formal opinion (No. 11-01) on January 4 taking the position that under principles of comity New Mexico would recognize same-sex marriages validly performed elsewhere, even though the state's laws do not provide for same-sex marriages to be contracted within the state. King's formal opinion was co-signed by Assistant Attorney General Elaine P. Lujan, who is presumably the principal author of the document. The opinion was requested by New Mexico State Representative Al Park.

King hedged his bets, however, by stating in his "Conclusion" that "we cannot predict how a New Mexico court would rule on this issue," but that this was the A.G.'s opinion "after review of the law in this area." A key element of that law is actually the absence of law: unlike all but a handful of states, New Mexico has never adopted a statute that specifically prohibits the recognition of same-sex marriages.

After observing that under the federal Defense of Marriage Act, New Mexico would not be required to recognize same-sex marriages performed elsewhere if it did not want to, King's opinion went directly to the "principle of comity," observing, "Ordinarily, as a matter of comity, a marriage valid when and where celebrated is valid in New Mexico," a proposition supported by a 1990 New Mexico Supreme Court ruling, *Leszinske v. Poole*, 110 N.M. 663.

Indeed, King points out, New Mexico has actually codified this general rule in a statute, Section 40-1-4, which provides that "all marriages celebrated beyond the limits of the state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state."

King also pointed out that there is a "general exception" to this recognition rule, in cases where a marriage is "contrary to a state's public policy," and said that New Mexico would recognize a "valid out-of-state marriage pursuant to Section 40-1-4 as long as the marriage does not offend a sufficiently strong or overriding public policy." King rejected the idea that the failure of New Mexico to affirmatively authorize the performance of same-sex marriages would qualify as such a state policy, noting that under the principles of comity New Mexico has recognized a variety of marriages performed elsewhere that could not have been performed within the state, such as, for example, an uncle-niece marriage or a common law marriage.

King referred to the recent opinion issued by the Maryland Attorney General reaching a similar conclusion, noting that the lack of a statute expressly forbidding such recognition suggested the lack of a strong public policy basis to deny recognition. "The federal DOMA authorizes states to prohibit the recognition of out-of-state, same-sex marriages," wrote King. "While many states have enacted such a prohibition, New Mexico has not. Without an explicit statute, the principle of comity, codified in New Mexico in Section 40-1-4, would likely guide the analysis in this area."

He also discounted the weight of an "advisory letter" that had been sent by an earlier attorney general, Patricia Madrid, to a state senator seeking clarification of the issue in 2004, at time when the same-sex marriage issue had come to a boil in many states as a result of the Massachusetts marriage decision going into effect and the brief "outbreak" of same-sex marriage licenses being issue by local authorities without state authorization in California, Oregon, New York and New Mexico. "We do not believe that the reasoning in the advisory letter is enough to establish a strong or overriding public policy against same-sex marriages in New Mexico," wrote King, concluding: "Without an identifiable adverse public policy in this area, we conclude that a court addressing the issue would likely hold, pursuant to Section 40-1-4, that a valid same-sex marriage from another jurisdiction is valid in New Mexico." A.S.L.

Federal Court Rejects Constitutional Claims Against Municipality by Gay Businessman

U.S. District Judge Lawrence F. Stengel has granted a motion by municipal defendants to dismiss a complaint alleging that they violated the 1st and 14th Amendment rights of Brian Skiles, a gay businessman, through various zoning enforcement activities that diminished the value of his real estate investments and resulted in the shutdown of his restaurant in downtown Reading, Pennsylvania, for a substantial period time. Skiles alleged that the officials were motivated by animus against him as a gay man and against his restaurant because it catered to gay people. *Skiles v. City of Reading*, 2011 WL 53069 (E.D.Pa., Jan. 7, 2011).

According to Judge Stengel's summary of the case, Skiles owned several multi-family residential properties as well as a commercial building with a bar and restaurant that includes "Daddy's" nightclub. Skiles alleges that Mayor Thomas McMahon and other officials had undertaken a downtown revitalization project in anticipation of the proposed location of a commuter rail station in Reading, an 80,000 population community situated within long commuting distance of the Philadelphia metropolitan area. As part of this project they were trying to eliminate multi-family residences and other property uses that they deemed undesirable in proximity to the proposed station location. Skiles claims that they issued improper permits indicating that his properties, which he was attempting to sell, were only permitted for single family use, and that they connived to deprive him of an active health permit to operate his nightclub. Skiles' description of the ordeal of getting his health permit renewed makes it sound as if municipal officials were attempting to use the permitting process to shut down a gay establishment that they sought to eliminate from the neighborhood they were re-developing.

Skiles' allegations regarding the nightclub asserted that this establishment "catering to homosexuals" was protected by the 1st Amendment right of expressive association, and that the biased actions of municipal officials against him offended the 14th Amendment. Judge Stengel was dismissive of both claims.

He found that the 1st Amendment's associational protections extend either to intimate or expressive association. Intimate association refers to close non-commercial

personal associations, not relevant to this case, and expressive association "occurs when individuals engage as a group in constitutionally protected activities like speech, worship, and petitioning the government for redress of grievances."

Stengel found that purely social associations would not be protected. While rejecting the defendants' argument that no commercial establishment could qualify for protection, Stengel held that "activities that are purely social in nature and do not implicate moral development, community engagement, religious expression, political discourse, or some civic or cultural purpose are not deserving of constitutional protection under the line of cases defining expressive association. . . Skiles has not claimed that either his restaurant or his bar somehow function as an organization for the purpose of engaging in political speech, activism, or any other social or cultural end. Again, he asserts simply that his bar caters to homosexuals.' The controlling legal authority does not support the proposition that owning a bar that caters to a certain clientele, in and of itself, constitutes expressive activity. It is apparent from the amended complaint that Daddy's is, first and foremost, a commercial enterprise with no expressive purpose. Although it may be one that attracts a particular class of individuals based on their sexual orientation, there is no allegation that it excludes others or exists for the purpose of engaging in speech, activism, worship, or any other protected First Amendment activity."

Perhaps there was a failure here by Skiles' counsel to provide an adequate description of the important functions that a gay-oriented business of this sort may serve in a relatively small community like Reading. (Consultation of on-line sources suggests that Reading is not exactly over-served with gay-oriented community resources.) Historically, gay bars in smaller communities have served important functions as a locus of association and community organization. Had this been true of Daddy's, and had Skiles presented some sort of argument along these lines, perhaps his 1st Amendment claim could have survived the dismissal motion.

As to the 14th Amendment argument, Stengel found that the standard for evaluating zoning and permitting decisions by municipal authorities in the context of a due process challenge is whether there is gross official misconduct that "shocks the conscience." Against this standard, Stengel opined, Skiles' allegation that he was targeted for adverse action because of his "affiliation with the homosexual community" was insufficient to be actionable. At least, it apparently did not shock Judge Stengel that local municipal officials, one of whom allegedly had referred to Skiles as a "faggot," would target his businesses for adverse action. Stengel focused in on the fact that after all the wrangling back and forth, Skiles eventually did obtain his renewed health permit which would allow him to re-open Daddy's, which Stengel construed as undermining Skiles' allegation that the officials were motivated by bias rather than a sincere concern about health violations in his establishment. There is no discussion of equal protection in the opinion.

Judge Stengel was appointed to the bench by President George W. Bush. Skiles is represented in the litigation by Brian C. Legrow and Paul J. Toner of the Law Offices of Vincent B Mancini & Associates of Media, Pennsylvania. A.S.L.

Brooklyn Judge Rejects Constitutional Challenge to NYC Gender Identity Discrimination Law

A New York State trial judge in Brooklyn rejected the New York City Transit Authority's argument that the city's law banning gender identity discrimination in places of public accommodation is unconstitutional as applied to a claim that a transit worker directed transphobic language at a member of the public seeking assistance in using a Metrocard. In a decision in *Bumpus v. New York City Transit Authority*, No. 3512/2007 (N.Y. Supreme Ct., Kings County), dated December 29 but not released to the parties until January 21, Supreme Court Justice Kenneth P. Sherman denied a motion for summary judgment by the Transit Authority and the accused transit worker, while granting a motion by the New York City Law Department to intervene in the case in order to defend the constitutionality of the city law.

The lawsuit arose from two incidents during July 2006 when Tracy Bumpus claims to have been the victim of transphobic verbal harassment by Lorna Smith, a transit worker then on duty at the Nostrand Avenue A Train subway station in Brooklyn. Bumpus claims that on July 16 she asked Smith for assistance in using a Metrocard, and Smith responded with "a steady stream of discriminatory, transgender-phobic epithets at Ms. Bumpus, verbally harassing her and haranguing her with vicious transphobic language in an extremely loud voice, pointedly doing so publicly to humiliate and harass Ms. Bumpus."

Bumpus made a formal complaint and spoke with a Transit Authority superintendent on July 20 about this incident, but when she entered the same station on July 25, she claims, Smith was there, recognized her, pointed at her and again verbally harassed her with transphobic language. Bumpus then filed a claim against the TA, testified at a hearing, and finally in January 2007 filed her lawsuit against the Transit Authority and "Jane Doe," later identified as Smith. Attorney Armen H. Merjian represents Ms. Bumpus on behalf of Housing Works.

Bumpus claimed to have suffered mental and emotional injuries due to conduct that she characterized as a violation of the city's ordinance forbidding gender identity discrimination in places of public accommodation. The Transit Authority, pointing out that it has a non-discrimination policy, argued that it could not be held liable for Smith's actions, but Bumpus argued in response that the TA was negligent in not training its employees in response to the enactment of the gender identity provision several years ago. The TA also argued that as a public authority it was not subject to the city's human rights ordinance, and Smith argued that holding her personally liable for speech would violate her First Amendment free speech rights. The defendants also argued that the anti-discrimination provision was unconstitutionally vague, and that Smith could not be liable for discrimination because she never specifically told Bumpus that she was unwelcome in the subway system.

Cutting through the various arguments back and forth, Justice Sherman found that the TA did not enjoy any exemption from having to comply with the non-discrimination provisions in the city ordinance, and that the ordinance, by its terms, clearly applies both to employers and employees who might violate its provisions. The judge rejected the argument that directing transphobic comments at a customer who had requested help from a transit worker was not a denial of services. "Given the broad goals of the New York City Human Rights Law," he wrote, "and the language in section 8-107(4)(a) prohibiting conduct 'to the effect that' a transgender person (among others) is not welcome at the subway, it is not dispositive that Smith did not make an explicit statement that plaintiff was not

welcome in the subway system because of her gender identity."

As to the negligent training argument against the TA, Justice Sherman noted evidence that there had been 16 past complaints against Smith by TA customers, and that "there is evidence that the NYCTA simply failed to respond to complaints about Smith," so that "a trier of fact could properly conclude that Smith had a long history of mistreating subway customers." Under the circumstances, the TA could be found negligent for failing to take action against Smith. "There is no indication that the NYCTA reacted to the amendment [that added gender identity to the city law]. A reasonable trier of fact could reasonably conclude that by failing to instruct Smith about sensitivity to gender identity, NYCTA's failure to train proximately caused the alleged incident." The court also found it irrelevant that none of the past incidents involving Smith concerned transphobic speech, since what was at issue was the employee's "propensity to cause injury" that would put the TA on notice about its obligation to protect its customers.

Finally, Justice Sherman rejected the argument that the law was unduly vague or overbroad or wrongly punished constitutionally protected speech. He found that the law's application to the facts of this case was clear, and that the language of the statute was not such that it was likely to be applied to constitutionally protected conduct or speech. In light of the "public service functions" of the TA, the court would have to consider how Smith's alleged speech affected the ability of members of the public to access a public service. "The prohibition of bigoted behavior in the public accommodation context contained in [the law] does not violate the constitutional guarantee of free speech," he wrote. He found that the city has a "compelling interest in combating invidious discrimination," and that U.S. Supreme Court precedents suggest that the city law as applied in this case "would survive the most exacting scrutiny." He noted that the transit system, as a limited public forum, can impose time, place and manner restrictions on speech.

This reader found surprising the court's failure to mention *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that public employees are not protected under the First Amendment when they are speaking as employees rather than as individual citizens on a matter of public interest. In this situation, Smith was in uniform, on duty at a subway station in her capacity as an employee, responding to a request by a member of the public for assistance. Her speech in response to that request would seem to be exempt from First Amendment protection under *Garcetti*.

The court's denial of summary judgment means that the case will go forward against the Transit Authority and Ms. Smith unless the parties settle. A.S.L.

State Lacks Standing To Intervene In Gay Divorce Case

On January 7, 2011, a Texas appellate court dismissed an appeal brought by the State of Texas arising from a final divorce decree obtained by a lesbian couple. *State v. Naylor et. al.*, 2011 WL 56060 (Tex. App.- Austin).

Angelique Naylor and Sabina Daly, both residents of Texas, married in Massachusetts in September 2004. Thereafter, they adopted a child identified as J.D. and started a real estate business together. However, the couple later separated, and in January 2009, Naylor commenced an action requesting that she and Daly be named joint managing conservators of J.D. and that she be given the exclusive right to designate J.D.'s primary residence. On December 3, 2009, Naylor filed a pro se petition for divorce. Daly moved to declare the marriage void under Texas Family Code Section 6.204. Under Section 6.204 (b), "[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state." Under Family Code Section 6.307, either party to a void marriage "may sue to have the marriage declared void."

The parties continued to engage in motion practice, and the court granted Naylor a continuance to hire an attorney. On February 9, 2010, the trial court held a hearing on issues related to modification of the parent-child relationship and property division. On the record, the court repeatedly urged the parties to settle as many issues concerning the parent-child relationship as possible. The trial court noted repeatedly that there were numerous financial accounting problems in connection with the real estate business, and hinted at possible tax consequences if the parties continued to litigate. The trial court adjourned several times over the course of the two-day hearing for the parties to attempt to settle the case. By 2 pm on the second day, the parties did indeed reach a settlement of all issues in the case. That settlement was put on the record, the judge granted the divorce from the bench, and the hearing was concluded. By this time, the State had not made any attempt to intervene in the case, nor had either of the parties made any argument related to the constitutionality of the Family Code.

The next day, on February 11, 2010, the State filed a petition in intervention, arguing that the trial court lacked jurisdiction to grant the divorce because the parties were of the same sex. Rather, the State argued that the only way the parties could dissolve their marriage was via an action for voidance under Family Code Section 6.307. Naylor and Daly opposed the petition.

The trial court held a hearing on March 31, 2010 and limited the issues at the outset to Daly's motion for entry of final judgment and the timeliness of the State's petition to intervene. The trial court ultimately held that the State's petition was not timely since the State was not a party of record on February 10 when the divorce judgment had been entered on the record. The trial court signed the written divorce decree and the State appealed.

The appellate court agreed with the trial court on the issue of timeliness. The appellate court held that the State may still appeal the divorce decree if it can show that it has standing under the virtual representation doctrine. A party claiming virtual representation must show that: "it is bound by the judgment, (2) its privity of estate, title, or interest appears from the record, and (3) there is an identity of interest between the appellant and a named party to the judgment (citations omitted)." The appellate court found that the State failed each prong of this test.

The State claimed that it was virtually represented by Daly until she abandoned her defense of the Family Code the day she settled the case. The appellate court rejected this argument because Daly had never defended the constitutionality of the Family Code. The court reasoned that Daly's request to declare the marriage void under Section 6.204 is just a request, and not a defense of that statute's constitutionality. The court also rejected the State's related argument that Naylor's petition for divorce was an "implied" constitutional attack on Section 6.204.

But the appellate court did not bind the state's hands on future same-sex divorce cases: "[a] divorce proceeding between two private parties, where no constitutional issues were raised or decided and the State was not a party of record, could not be

used to successfully argue that the State has waived its right to intervene in future litigation involving an actual, direct challenge to the constitutionality of section 6.204." *Eric J. Wursthorn*

Connecticut Supreme Court Authorizes Parenthood Through Surrogacy Contracting

In *Raftopol v. Ramey*, 2011 WL 169409 (January 5, 2011), the Connecticut Supreme Court affirmed a trial court ruling that held that a non-biological parent may obtain legal parentage recognition by being named the intended parent in a valid gestational surrogacy agreement. In its ruling, the trial court order validated a gestational agreement entered into by the plaintiff same-sex male couple and defendant gestational carrier, and in so doing 1) named the partners in the same-sex couple as the child's legal parents despite only one of them having a biological relationship to the child and 2) ordered the Department of Public Health to issue a birth certificate naming them as parents pursuant to General Statutes section 7-48a. Justice Ian McLachlan wrote the opinion for the court.

The facts of the case are as follows: The male same-sex couple and the gestational carrier, who is a Connecticut resident, entered into a written agreement that she would carry fertilized embryos (sperm from the father and an egg donated by a third-party) to term, and that she would sign papers terminating her parental rights and/or consent to adoption as necessary. Twins were conceived after three embryos were implanted in the surrogate. The couple brought their action seeking a declaratory judgment of parentage before the children were born, asking that the court to recognize the validity of the gestational agreement, to name them both as legal parents, and to order the Department of Public Health to issue a birth certificate listing the same-sex couple as the parents. The trial court held for plaintiffs on all requests, over the opposition of the Department, which argued that the non-biological father should have to go through an adoption proceeding to be named on the certificate.

The Department of Public Health appealed the trial court ruling. First, DPH argued that the trial court lacked subject matter jurisdiction to grant parental rights to the non-biological father. It reasoned that only three methods of assuming parental rights existed by biology, by artificial insemination, and by adoption. The court summarized it thus: "[T]he department asks us to infer that, because the Probate Court has original jurisdiction over adoption proceedings, it has original jurisdiction over all claims to parentage, except for claims advanced by persons who are the biological parents." The court rejected this argument.

As to the rights of the surrogate, the court held that, by law, a gestational surrogate who is not biologically related to the child whom she carries has no parental rights to terminate in the first place. As for granting parental rights to the non-biological father, the court held that there was, in fact, a fourth way to assume parental rights via section 7-48a. This law states that "[i]f a birth is subject to a gestational agreement, the Department of Public Health shall create a replacement [birth] certificate in accordance with an order from a court of competent jurisdiction." The court held that "the declaration of law sought by [the non-biological parent] required the trial court to engage in a statutory interpretation of section 7-48a to determine whether that statute creates an alternate means by which a non-genetically related, intended parent may attain legal parentage." The court held that it did.

Second, as to statutory interpretation of section 7-48a, DPH argued that the statute did not support the trial court's ruling that being an intended parent in a gestational agreement was a sufficient status to confer legal parental status. The court in line with the trial court rejected this argument. It held that "section 7-48a allows an intended parent who is a party to a valid gestational agreement to become a parent without first adopting the children, without respect to that intended parent's genetic relationship to the children." The court emphasized that the replacement birth certificate only followed the finding of the validity of the gestational agreement. The birth certificate "must accurately reflect legal relationships between parents and children it does not create those relationships."

In large part, the court rejected DPH's interpretation of the statute because it led to an absurd result the possibility of a legally parentless child. If, for example, a child was carried to term by a genetically non-related gestational carrier who had entered into a gestational agreement with the intended parents and had been conceived *in vitro* with both donor eggs and anonymous donor sperm, under the Department's view that section 7-48a only confers parental status to a *biological* intended parent, the child would be born legally parentless. The court argued that "[t]he legislature cannot be presumed to have intended this consequence, which is so absurd as to be Kafkaesque." The court, nonetheless, urged the legislature to address explicitly the many issues arising out of artificial reproductive technologies because the present statutory framework "provide[s] few answers and raise[s] many questions."

Concurring, Justices Zarella and Vertefeuille agreed with the result reached by the majority, but challenged the majority's view that the legislative history or statutory text were ambiguous. "When the tools of statutory construction are properly applied, there is no ambiguity in section 7-48a." Furthermore, they expressed concern that the majority included analysis of the legislative history even after finding that no alternative plausible interpretation existed for the statute.

The Attorney General's office represented appellant Department of Public Health, and Victoria Ferrara and Jeremy Hayden represented appellees (plaintiff same-sex partners). *Dan Redman*

Federal Civil Litigation Notes

Supreme Court — William S. McDonald has brought his challenge to the Virginia sodomy law to the U.S. Surpreme Court, filing a petition for a writ of certiorari to appeal his conviction of having oral sex with some teenage girls. (Mr. McDonald is several years older than his sexual partners.) The Virginia legislature has thus far refused to repeal or revise the sodomy law to respond to the federal constitutional holding in *Lawrence v. Texas* (2003) that a state sodomy law may not constitutionally be used to prosecute consenting adult gay people who carry on their sexual activities privately. The Virginia courts have taken the view that *Lawrence* just cuts a little piece out of their sodomy law, leaving the rest of it in robust effect. Because McDonald's sexual partners were under 18, he is subject to felony penalties and the requirement to register as a sex offender, with consequent limitations on where he can live. Had McDonald engaged in vaginal rather than oral sex with the young women, his offense would have been a misdemeanor and would not require registration as a sex offender. McDonald is asking the Supreme Court to reverse the Virginia courts and find that the sodomy

law may not constitutionally be applied to his situation.

1st Circuit — Briefing is under way in the Justice Department's appeal of District Judge Joseph L. Tauro's decisions in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010) and *Commonwealth of Massachusetts v. U.S. Department of Health & Human Services*, 699 F.Supp.2d 234 (D. Mass. 2010), in which Judge Tauro held that the Defense of Marriage Act violates the 14th and 10th Amendments of the U.S. Constitution. The Justice Department filed its briefs on January 13. The deadline for filing amicus briefs in support of the appeal passed late in January, and Gay & Lesbian Advocates & Defenders, representing the plaintiffs in *Gill*, announced that sixteen amicus briefs had been filed by various organizations and individuals who support the constitutionality of DOMA. The respondents' briefs are due for filing on March 1. The government's argument on appeal is that DOMA was enacted in 1996 as a legitimate response to the unfolding marriage litigation in state courts by a Congress concerned to "preserve the status quo" and preserve national "uniformity" of the eligibility rules for federal benefits premised on marital status. The DOJ expressly disavowed the justifications for DOMA actually articulated by Congress at the time of its passage, as those justifications appear flimsy in the light of subsequent doctrinal developments and evolving political sentiment. At least some of the amicus briefs argue for DOMA based on religious views of marriage, suggesting serious deficits in training in U.S. constitutional law on the part of their authors. GLAD's challenge to Sec. 3 of DOMA in the context of claims involving specific benefits under specific federal policies is being litigated in collaboration with cooperating attorneys from the firms of Foley Hoag LLP, Sullivan & Worcester LLP, Jenner & block LLP, and Kator, Parks & Weiser PLLC.

9th Circuit — Responding to the Justice Department's motion to put the appeal in the case of *Log Cabin Republicans v. United States* on hold in light of the enactment of the "Don't Ask, Don't Tell Repeal Act of 2010" during the final days of the lame duck 111th Congress, Log Cabin Republicans filed a brief urging the court to dissolve the stay on Judge Virginia Phillips's order so that the Defense Department will be blocked from processing gay personnel for discharge while the implementation of the repeal of the policy is pending. Although Defense Secretary Robert Gates and Joint Chiefs Chairman Admiral Michael Mullen have both said that they would move quickly on implementation, it seems unlikely that the end of the current policy would be implemented for at least several months, since the legislation mandates a 60-day waiting period from the time the Administration certifies to Congress that the necessary policies are in place until the date of implementation. Log Cabin argues that as the policy has both been unconstitutional by the trial court and repealed by Congress, there is no valid justification for allowing the Defense Department to continue to discipline and dismiss personnel for its violation. On January 18, the 9th Circuit panel filed an order temporarily staying the briefing schedule while the court considered the government's "opposed motion to stay appellate proceedings." The court said the motion would be decided "in due course." * * * In a statement reported in the press on January 9, Admiral Mullen advised gay servicemembers to be patient and not come out, saying: "Now is not the time to come out. We certainly are focused on this and we won't dawdle." Neither the White House nor the Defense Department has announced a target date for implementation, prompting Log Cabin Republicans to proclaim that the lawsuit is not moot.

California — A new DOMA challenge looms, as U.S. District Judge Claudia Wilken rejected the government's motion to dismiss in *Dragovich v. U.S. Department of the Treasury*, which was filed in the U.S. District Court, Northern District of California, on April 13, 2010. In this case, three married same-sex couples are seeking to participate in the state's longterm disability insurance program, but are being blocked by failure to recognize their marital status. *New10.dom* The government's motion to dismiss was premised on the same arguments it is making in a pending challenge to DOMA in the 1st Circuit: that Congress could have reasonably concluded that a federal law ban on recognizing same-sex marriages for any purpose of federal law was necessary to achieve uniformity in federal marriage recognition across state lines. In effect, the government argues that DOMA was a bill intended to "preserve the status quo" and not to discrimination *against* anybody. Unfortunately for the government, however, this law would be viewed as discriminatory on the basis of sexual orientation. Wilken totally rejected the government's arguments as to why the claim should not be litigated, pointing out that contrary to "preserving the status quo," DOMA actually changed the status quo by "robbing states of the power to allow same-sex civil marriages that will be recognized under federal law." *San Francisco Chronicle*, Jan. 20, 2011. A.S.L.

Indiana — Lambda Legal has announced a settlement in *Logan v. Gary Community School Corporation*, No. 2:07 CV 431 (U.S.Dist.Ct., N.D. Ind., complaint filed 12/12/2007), a long-running dispute over the refusal of a school district to allow a transgender student to attend her senior prom while dressed in feminine attire. The plaintiff, Kevin Logan, attempted to enter the prom on May 19, 2006, wearing a dress, and was physically blocked by the school's principal, who refused to allow Logan to enter despite vocal advocacy from other students. The school maintained that it had a policy forbidding students from wearing clothing or accessories that "advertise sexual orientation" or "portray the wearer as a person of the opposite gender." A fancy way of saying no cross-dressing allowed. Lambda Legal's complaint charged that this violated Logan's freedom of expression protected by the First Amendment. Under the settlement, Logan receives an undisclosed damage payment and the school district revises its dress code and non-discrimination policies to include specific protection for lesbian, gay, bisexual and transgender students, and agrees to conduct training for administrators and school board members about LGBT issues and respectful treatment for sexual minorities. The School Board recently approved a resolution embodying an apology to Logan and a promise that such events will not recur. Lambda staff attorney Christopher Clark, based in the organization's Chicago regional office, handled the case with cooperating co-counsel from the Chicago office of Sonnenschein Nath & Rosenthal LLP.

New York — In *Garside v. Hillside Family of Agencies*, 2011 WL 32582 (W.D.N.Y., Jan. 5, 2011), a lesbian plaintiff sued her former employer, a social service agency, alleging sex discrimination (hostile environment) and retaliation in violation of Title VII of the federal Civil Rights Act of 1964 and sexual orientation discrimination and retaliation in violation of the New York State Human Rights Law. District Judge Charles J. Siragusa granted the defendant's motion

for summary judgement. In effect, it appears that the judge concluded that this was a situation where a supervisor and subordinate just didn't get along very well, communicated poorly, and failed to establish a good working relationship, but Judge Siragusa found that based on the summary judgment record (including extensive quotations from deposition testimony) the plaintiff had failed to allege facts that would lead to an inference of discrimination, and failed to document retaliation against her for engaging in statutorily protected activities. From the extensive deposition testimony quoted in the opinion, it appears that the plaintiff was a rather ineffectual witness in her depositions, failing to pin down the points that are necessary to meet the proof requirements of federal discrimination law. In addition, her attempt to shoe-horn her case into Title VII appeared ill-advised from the court's recounting, in that her allegations did not meet the rather demanding test proscribed by the 2nd Circuit for using Title VII to redress hostile environment cases involving gender nonconformity. This case might better have been brought in state court solely under the New York Human Rights Law, given the general hostility of the federal trial courts to employment discrimination cases and the lack of express coverage for sexual orientation discrimination under federal law. A.S.L.

State Civil Litigation Notes

@T1 = **Arkansas** — The Arkansas Supreme Court has scheduled oral argument for March 17 in the state's appeal from *Cole v. Arkansas Department of Human Services*, No. 60CV-08-14284, in which the Pulaski County Circuit Court ruled on April 16 that the Arkansas Adoption & Foster Care Act, a law adopted by initiative vote, violates the Arkansas Constitution. The law bans unmarried heterosexual and homosexual couples from being foster parents.

California — In *Thul v. Thul*, 2011 WL 18841 (Cal.App., 4th Dist., Jan. 5, 2011), the court of appeal upheld the imposition of $80,000 sanctions against the appellant, the ex-wife of the respondent, payable at a rate of $800 per month, "stemming from her uncooperative and unreasonable conduct during the course of the litigation dissolving her marriage to James Thul." The Thul marriage fell apart, according to James, when a third party told his wife that he was gay. The court sets out in horrific and excruciating detail the history of the litigation that led the trial court to impose sanctions on Tamara. Evidently, the knowledge that her husband was gay inspired visceral disgust on her part and every attempt to try to use his sexual orientation against him in the subsequent hard-fought battle over division of assets and child custody and visitation. The trial court in Orange County finally lost all patience with her and imposed the sanctions at the conclusion of the case, which the court of appeals found to be merited. In explaining its ruling, the judge who decided the sanctions motion (a different judge than the one who had conducted most of the proceeding stretching over several years) explained that the court "has spent a considerable amount of time carefully reviewing the extensive file and observing petitioner's persistent pattern of prosecuting the respondent based on his sexual preference. The petitioner's open and clear bias and prejudices have driven, fueled and directed this litigation and tactics. It appears at-a-glance that petition has attempted to redress her psychological injuries from a failed marriage by means of this family law litigation and attempted to damage and interfere with the father's relationship with his daughters based on his sexual orientation. In that regard, the petitioner has embarked on a scorched earth campaign to blast, harass, retaliate and discriminate based on the respondent's sexual orientation and to expunge him from the lives of the two children." During the course of the case, the court awarded joint custody and ordered the mother to undergo a course of anger management. A.S.L.

Criminal Litigation Notes

New Jersey — Rejecting the narrow view of the state's domestic violence law that had been taken by a Superior Court judge, a panel of the New Jersey Appellate Division ruled in *S.Z. v. M.C.*, 2011 WL 222116 (N.J.Super.A.D., Jan. 25, 2011), that the court should not have dismissed S.Z.'s petition for an order of protection on jurisdictional grounds when the defendant, a gay man charged with stalking S.Z., had lived in S.Z.'s house for seven months as a guest. S.Z., a self-identified heterosexual married man, had invited M.C., a bookkeeper in his business, to stay in his guest room when M.C. needed a place to live. While S.Z.'s wife and kids were away for a week, S.Z. claims that he discovered M.C. standing on a ladder outside the house peering into the bathroom window as S.Z. was coming out of the shower. S.Z. insisted he had no dating relationship with M.C. and was not gay, and that when he confronted M.C. about spying on the bathroom, M.C. explained that "he had not engaged in sexual relations in a long time." S.Z. demanded the keys and required M.C. to leave his house. More recently, S.Z. discovered that M.C. had surreptitiously mounted an audio-video camera in S.Z.'s truck, after which S.Z. sought an order of protection from the court. The trial court held that M.C. was not a "household member" and thus not encompassed within the domestic violence law, but the Appellate Division disagreed, pointing out that jurisdiction had been found in opposite-sex cases involving roommates who had lived together for briefer periods of time. "The fact that defendant was so focused on plaintiff that after ten months of living apart he allegedly planted a hidden camera in plaintiff's truck is evidence of the type of preoccupation often found in relationships in which domestic violence occurs," said the court, noting that it was not expressing any view as to the ultimate merits of the case, since the appeal was from a dismissal for lack of jurisdiction and so far S.Z.'s allegations are merely that allegations to be proven on remand.

New York — World media reported early in January on the brutal murder of Carlos Castro, a Portuguese journalist, at a Times Square Hotel on January 7. Castro was traveling with a young Portuguese model, Renato Seabra, who has been charged with second degree murder after confessing to the crime to police. Seabra, who contends he is not gay, says that Castro approached him after Seabra appeared on a reality TV program. Seabra reportedly told the police that he thought he might be gay and began a relationship with Castro, but ultimately concluded he was not gay and, when Castro sought to continue the relationship, bludgeoned and castrated him to "get rid of the homosexual demons." If Seabra doesn't cop a plea, this may turn out to be a rather spectacular trial, but the confession suggests that he will likely plead out. *New York Times*, Jan. 11; *New York Daily News*, Jan. 10. A.S.L.

Legislative & Administrative Notes

DADT Repeal — The Defense Department announced its planned schedule for implementing the repeal of the "don't ask, don't tell" military policy on January 28.

Under the schedule they envisage, full implementation would occur by midsummer. First, new regulations would be adopted to deal with the myriad policy issues involved and then three stages of training would be undertaken, for troops, for commanders and key administrators, and for recruiters and others who will need to implement the new rules. Once all of these activities have been undertaken, it was announced, the president, secretary of defense, and chairman of the joint chiefs of staff will be in a position to provide the written certification to Congress that will trigger the 60-day countdown to final repeal of the policy, which was made conditional on these steps in the law signed by President Obama on December 22. *Associated Press*, Jan. 26.

Arizona — Responding to the announcement that the Westboro Baptist Church planned to send members to picket and protest at the funerals of victims of a shooting spree on January 8 the resulted in the deaths of the chief federal district judge of Arizona and five others, and wounding of several others including a U.S. Representative from Arizona who was evidently the main target of the shooter, the legislature quickly enacted a new law, S.B. 1101, which creates a "funeral protection zone" banning protesters within 300 feet of a funeral service, in effect from one hour before a funeral to one hour afterwards. The so-called Reverend Fred Phelps and his Westboro gang take the position that all violent deaths are due to divine vengeance on America for tolerating homosexuality and abortion, and they have specialized in picketing funerals for military members killed in the current Middle East wars. They show up in small numbers at funerals bearing offensive signs and chanting their slogans. The U.S. Supreme Court is pondering the question whether it violates the First Amendment for court to award damages against Phelps and his disciples for causing emotional distress to the surviving family members of those whose funerals are picketed. *Arizona Republic*, Jan. 12.

Hawaii — The state Senate Judiciary Committee voted on Jan. 26 to approve SB 232, a civil union bill that is substantively similar to the measure approved by the legislature last year but vetoed by Republican Governor Linda Lingle. In November, Democrat Neil Abercrombie, a supporter of civil unions, was elected governor, and most candidates who supported civil unions were returned to the legislature by voters. Another, more expansive bill, SB 231, which was drafted jointly by gay activists, some legislators, and policy advisors of the governor, has also been introduced but not yet scheduled for a hearing. Expectations are strong that some form of civil union legislation will be passed in this session and signed into law. *Honolulu Star-Advertiser*, Jan. 25 & 26.

Illinois — The Civil Union Act approved the legislature late in December was scheduled to be signed into law by Governor Pat Quinn on January 31, shortly before we close this issue of *Law Notes*.

Iowa — Republicans won a majority in the Iowa House of Representatives in the fall and have moved quickly upon convening of the new legislature to consider a proposal to amend the Iowa Constitution to add the following provision: "Marriage between one man and one woman shall be the only legal union valid or recognized in this state." Nobody has revealed yet the identity of the one man and one woman whose union will be the sole one to be legally recognized in Iowa. Presumably the lucky couple will be named later. On January 24, the House Judiciary Committee voted 13-8 to approve this language and place it before the full House. The vote was largely along party lines, with 12 Republicans and one Democrat voting for the proposal, and all the remaining Democrats voting against. In the Senate, where Democrats hold a majority, their leader, Michael Gronstal, has vowed to block any vote on the measure, and an attempt by Republicans to force a suspension of the rules for a Senate vote on January 26 fell short. Were the measure placed on the ballot and passed, Iowa would be set for federal litigation virtually identical to *Perry v. Schwarzenegger*, the case in which a federal district court in San Francisco declared unconstitutional a similar marriage amendment that was enacted by California voters after a decision by that state's supreme court that same-sex couples were entitled to marry as a matter of state constitutional law had gone into effect. Unlike California, where the Supreme Court's marriage decision was 4-3, in Iowa the Supreme Court's decision was unanimous, leading to the defeat for retention of three justices last November after an expensive media campaign waged largely by anti-same-sex marriage groups from outside of Iowa, with threats to mount a similar campaign when the remaining members of that unanimous court come up for retention elections in subsequent years. *Des Moines Register*, Jan.25, and other sources.

Maryland — LGBT rights advocates expected that the drive for a same-sex marriage bill would proceed quickly, with the possibility of introduction, quick hearings, and a vote in the Senate by the end of February, and final passage by both house by April. The governor is a supporter of marriage equality. Of course, these advance fast-track timetables do have a way of breaking down in practice, but as of late January things seems to be on track. On January 25, a respected statewide political poll showed that 51% of voters supported same-sex marriage, and an even larger 62% stated approval of same-sex civil unions. The Democratic leaders of the two houses of the legislature were announced as co-sponsors of the same-sex marriage legislation. *Annapolis Capitol*, Jan. 25.

New Hampshire — Unusually among the states that have legislatively opened up marriage to same-sex couples, New Hampshire did so with the stimulus of a lawsuit. (In Vermont, a lawsuit led to civil unions, and the legislature subsequently moved based on the experience with civil unions to open up marriage for same-sex partners.) This was done by Democratic majorities in the legislative houses and a Democratic governor. Alarm bells went off in November, however, when Republican seized decisive control of both houses of the legislature, with such large margins that they could override a veto of a marriage repeal bill by the Democratic governor. Since repeal of the same-sex marriage law was an articulated goal of many Republican legislators, it appeared that same-sex marriage in New Hampshire might be quickly repealed. However, leaders of the incoming Republican majority indicated that a repeal was rather low on their agenda. "The social issues must take a back seat," said House Republican Leader D.J. Bettencourt to the Associated Press on January 12, who said that his caucus had decided to prioritize the state budget, retirement benefits for public workers, and education reform, leaving social issues like same-sex marriage for a future session. Sighs of relief all around.... *Associated Press*, Jan. 12.

New Jersey — On January 6, Governor Chris Christie signed into law the "Anti-Bullying Bill of Rights Act," claimed to be

the toughest measure yet passed at the state level to deal with the problem of bullying in educational institutions. The measure requires schools subject to the supervision of the state's Education Department to take active measures to prevent bullying and to respond promptly and appropriately to complaints, and specifies that bullying because of the actual or perceived sexual orientation or gender identity of the victim is expressly covered by the law. As many victims of bullying are kids who are perceived by others to be gay, passage of this measure was high on the agenda of New Jersey gay rights advocates, and enactment received a boost — unfortunately, given the circumstances — from the suicide of Tyler Clementi, a gay Rutgers University student. The measure will be codified in chapter 3B of Title 18A of the New Jersey Statutes. Two New Jersey members of Congress, Senator Frank Lautenberg and Rep. Rush Holt, have introduced a federal bill named for Clementi to establish national standards for educational institutions dealing with bullying, but it was introduced too late in the 111th Congress to receive consideration. It was reintroduced in the 112th Congress in January.

New York — After newly-elected Governor Andrew Cuomo announced in his 2011 state-of-the-state address that same-sex marriage was on his agenda, State Senator Tom Duane announced that he was preparing to reintroduce the marriage equality bill in the State Senate. The bill has passed the Assembly in several past sessions, but was voted down in the Senate in December 2009. As a result of the November 2010 election, the Republicans reclaimed a slim majority in the Senate, but the new Majority Leader,Dean Skelos, a Long Island Republican, has indicated he would allow a floor vote on the measure even if it did not enjoy the support of a majority of his caucus and even though he is personally opposed on the merits. As the number of New York state agencies, employers, and courts that recognize same-sex marriages contracted in the contiguous jurisdictions of Connecticut, Massachusetts, Vermont, and Canada continues to increase, the failure of the legislature to authorize performance of such marriages within the statute becomes increasingly absurd, especially in light of recent polls showing a firm majority of New Yorkers now support same-sex marriage. (A Quinnipiac University poll released Jan. 27 showed 56% support statewide; a week earlier, a Siena Research Institute Poll showed support at 57%. This is by contrast to polling in April 2004 by Quinnipic, which found only 37% support and 55% oppositive to same-sex marriage in New York.) In times of fiscal stringency, keeping same-sex marriage ceremonies and their attendant celebrations within the state seems like a policy no-brainer, unless, of course, in league with the more vocal opponents of same-sex marriage, one believes that allowing it would signal the fall of civilization as we know it, which has already begun happening in Iowa and the New England states that allow same-sex marriages.

Ohio — Newly-elected Governor John Kasich, a Republican, signed Executive Order 2011-05K, establishing anti-discrimination policy for the executive branch of the state government. The new Order lists the same categories identified by the prior governor, Democrat Ted Strickland, including sexual orientation. However, the Order does not mention "gender identity," which has been commonly included in more recent executive orders and anti-discrimination regulations and legislation in other jurisdictions. CCH Workday, Jan. 26.

Pennsylvania — Allentown — The City Council voted on January 19 to approve same-sex domestic partnership medical benefits and partner medical leave benefits for city employees represented by the Service Employees International Union. The Council also hopes to extend such benefits to its police and firefighters, but that is pending further negotiations with their unions. San Francisco Chronicle, Jan. 20.

Rhode Island — Amidst talk of good prospects for its enactment, Rep. Arthur Handy introduced a bill to open up marriage in Rhode Island to same-sex couples. The prior governor was hostile to the idea, but newly inaugurated Lincoln Chafee is a same-sex marriage supporter who would sign the bill if passed, which ramped up pressure on the lobbying groups to go to work on the legislature, where there is generally believe to be sufficient support for passage in the House while the Senate remains a bit questionable.

Texas — El Paso — Legislation by amateur initiative can have unforeseen consequences. Some "Conservative Christians" who were upset when the city granted health-care benefits to same-sex partners of city employees that they decided to put a measure on the ballot to restrict benefits. According to a Dec. 8 report in the *Wall Street Journal*, they couldn't find a lawyer to advise them, so they produced their own "home-made" initiative, petitioned, got it on the ballot, and won 55% of the vote. The measure limits benefits to "city employees and their legal spouses and dependent children." What they didn't realize, of course, was that this wording would terminate benefits for retired city employees and their spouses, as well as for elected city officials, who are not technically "employees" but who are also provided with benefits. The ordinance went into effect January 1, and the city attorney was tasked by the council with coming up with a way to deal with the situation. A proponent of the measure scoffed at the idea that retirees would lose benefits, claiming that they were required by a state statute.

Virginia — A committee in the state Senate has approved a bill that could make it possible for state employees to add same-sex partners to their health benefits plan. The measure, sponsored by Sen. Donald McEachin (D-Henrico), would not mandate provision of such benefits, but would remove any obstacle in existing state public employee benefits law for a jurisdiction that wants to make such benefits available. Sen. McEachin pointed out that this would be revenue-neutral for the state, since it could require that the insured employee pay any additional premiums associated with extending the coverage.

Wyoming — The Wyoming House of Representatives voted 32-27 on January 24 to approve H.B. 74, which is intended to prevent the recognition by the state of same-sex marriages contracted elsewhere. State law defines marriage as a contract "between a male and a female person," a bit of grammatical legerdemain that might suggest to the literal-minded that the only marriages recognized in Wyoming are those in which intersexuals marry themselves! The problem identified by same-sex marriage opponents is that current state law provisions on recognition of marriages performed elsewhere suggests that any marriage valid where it was performed would be recognized in Wyoming, a result they do not desire because of Wyoming "traditions and values," whatever that is supposed to mean. *Star-Tribune*, Jan 24. * * * The Associated Press reported that the State Senate voted

on January 27 to approve a constitutional amendment barring recognition of same-sex marriages performed elsewhere, by a vote of 20-10. The AP article did not report the exact language of the amendment that was approved, but indicated several bills are floating about in both houses of the legislature on the issue of marriage, including some proposing recognition, and quoted Governor Matt Mead as cautioning against enacting measures that would provide Wyoming citizens of access to the courts to resolve serious issues like child custody and property division. In other words, it appears that the governor would not like to see a situation where same-sex couples living in Wyoming after having married elsewhere would be stuck without access to the courts in case they need judicial assistance in terminating their marriages. A case is reportedly pending before the Wyoming Supreme Court on that jurisdictional question. A.S.L.

Law & Society Notes

U.S. Department of Housing and Urban Development — HUD announced on January 20 the publication of proposed regulations to address housing discrimination on the basis of sexual orientation or gender identity. Legislation for this purposes was introduced but died in the 111th Congress. Despairing of quick passage, the Administration now proposed to proceed by regulation to expand the score of existing discrimination law. The new rule needs to go through a public comment period and any needed adjustments brought to the light from the comments before it can go into effect. The proposed rule can be viewed at: portal.hud.gov/hudportal/documents/huddoc?id=LGBTR.PDF.

Yale Errs, Gays Pay — Yale University notified 61 of its employees during December that the university's payroll office had mistakenly failed to withhold taxes due for the imputed value of the domestic partnership health insurance benefit provided to the employees' same-sex partners for all of 2010. Yale's solution to the problem? Unlike those employers who have voluntarily agreed to increase compensation of employees to cover the extra tax liability due to the inequitable refusal of the federal government to recognize same-sex partners as family members for any purpose, Yale will pay the extra money to the feds up front and then claim reimbursement by withholding it from the employee's paychecks over the first three months of 2011. Due to the sums involved, and the fact that some of these employees are clerical staff who are not highly compensated to begin with, this will reportedly reduce take-home pay for some of those employees by as much as 1/3 for those months. The explanation for what happened is that Connecticut has a civil union law for several years and then adopted a same-sex marriage law pursuant to an order of its state supreme court, and thus same-sex married couples are treated the same as different-sex couples for purposes of state tax law; the payroll system treated them as married for federal purposes as well, thus extending to them the same tax-preferred treatment for spousal benefits enjoyed by their non-gay colleagues. *New York Times*, Bucks Blog, January 11.

State Department Birth Certificate Changes — When American citizens abroad have children, they can apply to the State Department for a birth certificate evidencing that the foreign born child is an American citizen. The form long used for this purpose requires a designation of father and mother. In line with the continuing process of adjusting executive branch policies to accommodate LGBT Americans, Department officials proposed to change the form to list the parents without using the terms father and mother. The subsequent brief outburst from anti-gay forces led to a slight retreat, under which the forms will contain both the traditional terms and the neutral term "parent," with the option being for the applicant to indicate the term of choice. *Washington Post*, Jan. 9.

Gill Adoption Finalized — In *Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G.*, 45 So.3d 79 (Fla.Ct.App., 3rd Dist., Sept. 22, 2010), the court declared unconstitutional Florida's statutory ban on "homosexuals" adopting children, and the state announced it would not appeal. Martin Gill, the gay foster parent who initiated the litigation, promptly applied to adopt the two brothers who have been living with him as foster children. On January 19, Gill and his partner formally adopted the boys. Complying with the court's decision, the florida Department of Children and Families has changed its adoption forms so that applicants are no longer asked about their sexual orientation. *Orlando Sentinel*, Jan. 21.

Congress — When the 112th Congress was sworn into office on January 5, the number of openly gay members of the House of Representatives went from three to four. Rep. David Cicilline, formerly the mayor of Providence, Rhode Island, joined Barney Frank (Massachusetts), Tammy Baldwin (Wisconsin) and Jared Polis (Colorado) as part of the all-Democratic openly-LGBT contingent. Cicilline was elected to the seat vacated by the retirement of Rep. Patrick Kennedy. Nobody knows for certain the number of closeted members of the House. . . or the Senate, for that matter, which has no openly-gay members.

Cost of DADT — According to an article published January 21 by the *Washington Post*, the Defense Department spent approximately $193.3 million dollars from fiscal year 2004 through 2009 to replace approximately 3,600 service members who were discharged under the "don't ask, don't tell" military policy. The figure was released by the Department in response to an information request by U.S. Representative Susan Davis (D-Calif.), who supported the repeal measure in the 111th Congress. Nonetheless, despite this substantial costs, some Republicans members are pushing a bill that would expand the number of military officials who would have to join in the certification before the 2010 Repeal Act would take effect.

California — Palm Springs — Sometimes described as one of America's gayest cities, Palm Springs was rocked by the arrest of nineteen men during a police department sting operation in June 2009 in the Warm Sands neighborhood. The latest fallout from the controversy was the resignation under fire of Police Chief David Dominguez on January 5, after it came to light that he had made homophobic remarks in praise of the police officers who carried out the entrapment strategy that led to the arrests.

Massachusetts — Archdiocese Changes Schools Policy — Responding to adverse public criticism of a decision by St. Paul School in Hingham to rescind an admissions offer to an 8-year-old boy because his parents are a lesbian couple, the Archdiocese of Boston announced on Jan. 132 a new policy under which parochial schools will not "discriminate against or exclude any categories of students." However, the policy does require parents to "accept and understand that the teachings of the Catholic

Church are an essential and required part of the curriculum." In other words, gay parents can send their kids to parochial schools, but are warned that their children will be instructed that their parents are sinners and condemned to damnation because of their sexual relationships and will be denied instruction about barrier contraceptive use to avoid unwanted pregnancy and STDs. *Boston Globe*, Jan. 13.

Belmont University — The Board of Trustees of Belmont University in Nashville, Tennessee, voted on January 26 to add sexual orientation to the school's non-discrimination policy. The decision came in the wake of city-wide controversy over the resignation of Belmont soccer coach Lisa Howe, who resigned after telling the soccer team that she and her same-sex partner were expecting a child, setting up speculation about whether the university had forced her to resign. *The Tennessean*, January 27. A.S.L.

International Notes

Australia — A gay male couple who contracted with an Indian woman resident in Mumbai to be the surrogate mother for their children succeeded in obtaining a final order of adoption for the non-biological father in Family Court in Melbourne, reported the *Herald Sun* on January 22. Wrote Justice Paul Cronin, "In this case, the children do not have the benefit of a mother, but they have the good fortune of having two fathers. As a matter of law, the word parent' tends to suggest some biological connection, but. . . biology does not really matter; it is all about parental responsibility." The article reported that the Family Court actually made "parenting orders" in three international surrogacy cases last year where two couples and one single gay man had returned to Australia seeking citizenship for the children born through surrogacy with a non-Australian woman. At this point, the article said, India is the most popular source of surrogates for Australians.

Canada — The Court of Appeal for Saskatchewan ruled on January 10 that a proposed Saskatchewan law that would allow marriage commissioners with religious objections to avoid performing weddings for same-sex couples was unconstitutional. *In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995, S.S. 1995, c. M-4.1*, 2011 SKCA 3. The court took the position that constitutional equality trumps the personal objections of civil servants to performing part of their prescribed function. When a civil servant is acting in his or her official capacity, the court indicated, personal objections or reservations to the legal rights of citizens are not a basis for refusing to perform their job in a non-discriminatory manner. Since nobody is forced to be a marriage commissioner, this is not an improper intrusion into religious liberty.

France — On January 28, the Constitutional Council, which rules on legal questions under the French Constitution, rejected a claim by Corinne Cestino and Sophie Hasslauer that they should be entitled to upgrade their civil solidary pact (pact civile) into a full marriage. According to an Associated Press report, the court took the position that legislators had identified differences between different-sex and same-sex couples that justified differential treatment under the law, making it a legislative policy question whether to afford same-sex couples access to the same institution of marriage provided to different-sex couples. "It's not up to the Constitutional Council to substitute its assessment for that of lawmakers," said the Council. Recent polls show that a majority of French voters would support same-sex marriage, but at present the government is led by a conservative party that is opposed. The Socialist Party in France has sponsored legislation on the subject, and pointed out the growing gap between France and other western European countries in the European Union that allow marriage, now including the Netherlands, Belgium, Spain, Norway, Sweden, Portugal and Iceland. They also noted that the U.K. provides civil partnership that equates to the legal rights of marriage, unlike the French pacts that provide a limited list of rights.

Iran — Human Rights Watch has issued a 100+ page report on the plight of sexual minorities in Iran, documenting persecution and abuse at the hand of both governmental and private actors in the Islamic state. This document should be extraordinarily valuable for anybody representing a sexual minority asylum seeker from Iran, providing the kind of thorough documentation that is quite difficult for individual asylum applicants to compile on their own.

Ireland — Effective January 13, a provision of the Irish Civil Union law went into effect under which same-sex couples resident in Ireland who have married or entered into marriage-like relationships in other countries will be recognized in Ireland as being in a civil union. Ireland will not recognize a legal status that falls significantly short of full marriage rights, however, so couples united under the French pact civile system will not be recognized. *PinkNews*, Jan. 13.

Mexico — Rex Wockner reported (Jan. 10) that a lesbian employee of Mexico City has won the right to insure her wife using the national health-care system. In 2010 a court ordered the Mexican Institute of Social Security to treat Judith Vazquez as the legal wife of Lol Kin Castaneda. At first the Secretariat of Labor and Social Security appealed the order, but then it reversed course, dropped the appeal, and indicated that it would treat as married all same-sex couples who married under Mexico City's new statutory provisions authorizing same-sex marriages.

Nepal — The Nepal national census, set to get under way in May, will have three gender categories: male, female, and third gender (for transgender individuals). This comes in response to a decision by the Nepal Supreme Court a few years ago ordering the government to extend equal treatment to transgender people.*AFP*, Jan. 9. It was also reported, without direct confirmation, that India would use a separate transgender category for its upcoming national census enumeration.

Uganda — The High Court in Kampala ruled January 3 that the *Rolling Stone* newspaper (a local publication not affiliated with the U.S. publication of the same name) violated constitutional rights to life and privacy when it published the names and home addresses of gay people as part of an article that advocated hanging gays in order to protect children from being "brainwashed towards bisexual orientation." Three persons named in the articles sued for damages and injunctive relief. The court authorized an injunction against future publication of the names of gay people without their consent, and awarded damages to each of the plaintiffs. *Wockner International News*, #872, Jan. 10, 2011; *Boston Globe*, Jan. 5, 2011. In a tragic development that sparked calls for international investigation, one of the three plaintiffs in the *Rolling Stone* case, David Kato, was attacked in his home on January 26 and died en route to the hospital. The police informed Kato's attorney that

they have leads they are pursuing. Kato was a leading campaigner against the vicious anti-homosexuality bill pending in Uganda's legislature. *Human Rights Watch* Bulletin, January 27.

United Kingdom — Judge Rutherford of the Bristol County Court set off a stream of media chatter and outrage from religious organizations by ruling that a gay couple who were denied the right to share a bedroom by a bed & breakfast near Penzance (no pirates in sight, as far as we are informed) because of religious objections by the owners to unmarried couples sharing bedrooms were entitled to damages under the nation's anti-discrimination laws. Martyn Hall and Steven Preddy charged "direct discrimination," but Peter and Hazelmary Bull, the devout B&B owners, indicated they would appeal the ruling. *BBC News*, Jan. 18 & 26.

United Kingdom — Judge Richard Hawkins has imposed sentences on three young people involved in a fatal homophobic attack on Ian Baynham, a gay civil servant, in Trafalgar Square in front of a crowd of horrified tourists. Most attention focused on Ruby Thomas, then 17, who in an intoxicated homophobic rage screamed "fucking faggots" as she brutally stamped her foot on Baynham's head after he was knocked to the ground by Joel Alexander, then 18. Baynham had been holding hands with another man when he was set upon by Thomas and Alexander and Rachel Burke, who was also found guilty as a participant. A jury convicted Thomas of manslaughter and she was sentenced to seven years in prison, one year of which was an enhancement of sentence due to the homophobic nature of the crime. Alexander was sentenced to six years and burke to two years. *Express*, Jan. 27. A.S.L.

Professional Notes

The White House announced on January 26 three significant presidential appointments of openly gay individuals. The president has nominated *J. Paul Oetken* to a seat on the U.S. District Court for the Southern District of New York. Oetken served as an associate White House counsel in the Clinton Administration, and then in the Justice Department's Office of Legal Counsel. He was associated with several large law firms before becoming vice president and general counsel of Cablevision. He graduated from Yale Law School and held three judicial clerkships, culminating with a Supreme Court clerkship with Justice Harry Blackmun. Oetken is nominated to fill the seat vacated by Denny Chin upon his appointment elevation to the 2nd Circuit Court of Appeals. If confirmed, Oetken will be the second openly gay judge in the Southern District, joining Deborah Batts, who was appointed by President Clinton. If he is confirmed before Edward DuMont, whose nomination to the U.S. Court of Appeals for the Federal Circuit is still pending, he would become the first openly gay man to be confirmed as a United States Article III judge. DuMont, if confirmed, would be the first openly gay nominee to a federal appellate court to be confirmed. * * * President Obama has appointed *Roberta Achtenberg* to be a commissioner on the U.S. Civil Rights Commission. Achtenberg, a prominent attorney who co-founded the National Center for Lesbian Rights and served as a member of the San Francisco Board of Supervisors, was the first openly gay person to be confirmed by the U.S. Senate upon a presidential appointment when she became an Assistant Secretary in the Department of Housing and Urban Development during the Clinton Administration. She is a member of the California State University Board of Trustees and Vice Chair of the Board of the Bank of San Francisco. * * * *Jeffrey Levi*, a former executive director of the National Gay & Lesbian Task Force, has been appointed to the newly-created Advisory Group on Prevention, Health Promotion, and Integrative and Public Health at the U.S. Department of Health & Human Services. He was Deputy Director of the White House Office of National AIDS Policy under President Clinton, and has been working professionally in the field of public health policy, currently as Executive Director of the Trust for America's Health and as a professor of health policy at George Washington University..

On January 25, Hawaii Governor Neil Abercrombie announced his appointment of *Sabrina Shizue McKenna* to a vacancy on the Hawaii Supreme Court. She will be the first openly gay member of that court. According to an article in the *Star-Advertiser*, the state's leading daily newspaper, Judge McKenna is currently serving as senior judge of Oahu's Family Court, and has been a state judge in various capacities for the past 17 years. She was reportedly on a list submitted by Hawaii's senators for consideration by President Obama for district court appointments. The chair of the Senate Judiciary Committee, Clayton Hee, said that his initial reaction was that she was "eminently qualified" and that he expected the Senate "would probably be supportive."

James M. Humes, an openly-gay lawyer who was the chief administrator in the California attorney general's office for Attorney General Jerry Brown, was appointed on January 5 by Governor Brown to be Executive Secretary for Administration, in effect chief of staff for the governor. According to a January 6 report in the *Los Angeles Times*, Humes had applied for a judgeship and was expected to be appointed by Gov. Arnold Schwarzenegger, but withdrew his application to take up Brown's offer to be chief of staff in the new administration. It is widely expected that at some point Gov. Brown will appoint him to the bench. * * * Brown will immediately have an opportunity to affect the composition of the California Supreme Court. Justice Carlos Moreno announced that he would retire, giving Brown an immediate opening. Moreno was a reliable vote for gay rights on the court, and was the only member who dissented from the court's ruling that Proposition 8 had been validly enacted.

Gay & Lesbian Advocates & Defenders announced that Vickie Henry, a partner at the prestigious Boston firm of Foley Hoag LLP, joined GLAD as a senior staff attorney on January 11. Henry has volunteered with GLAD for more than 20 years, since her law school days, and wrote amicus briefs for GLAD's marriage litigation in Massachusetts as well as the pending challenge to DOMA. Henry became a partner at Foley in 2002, and specialized in intellectual property, commercial litigation, and product liability disputes. Henry is married to Claire Humphrey with whom she is raising two children. "Our children do not recall a time when we were not married," said Henry in a GLAD press release, "because of the work GLAD has done."

Lambda Legal announced that Scott Schoetes, who has been working as the organization's HIV Project Staff Attorney since October 2007, has been promoted to be HIV Project Director. Schoetes, who is openly HIV+, has litigated several HIV discrimination cases for Lambda, worked on the repeal of the HIV travel ban, has presented on HIV and aging issues at the White House, and recently testified at a Congressional briefing on HIV criminalization.

AIDS & RELATED LEGAL NOTES

AIDS Litigation Notes

New York — District Judge Roslynn Mauskopf (E.D.N.Y.) has approved Magistrate Judge Steven M. Gold's recommendation to grant summary judgment to the City of New York on a discrimination claim brought by an HIV+ former employee who claims to have been wrongly denied an accidental disability retirement pension in violation of her due process rights and based on gender and disability discrimination. After reviewing the record, Judge Mauskopf found support for the Magistrate's conclusion that the Jane Doe plaintiff contracted HIV from her opposite-sex partner through heterosexual intercourse, thus her HIV infection was not work-related and did not qualify her for the type of pension in question. Furthermore, the court joined the Magistrate in finding no evidence in the record suggesting discrimination based on any grounds specified in state and city laws. *Doe v. City of New York*, 2011 WL 37131 (Jan. 5, 2011). A.S.L.

International AIDS Notes

The Canadian Blood Services is asking the government to rethink the current policy banning gay men who have had sex at least once since 1977 from donating blood. Although a court upheld the ban last year, that decision expressed various reservations about the policy in light of developments since it was adopted in the 1980s, leading the Blood Services to reconsider the issue. A change in the policy will require new direction from the government, as the current policy is embodied in regulations binding on the Blood Services. *Toronto Star*, January 27. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conferences & Symposia

The Committee on LGBT Rights and the Committee on Sex & Law of the New York City Bar Association will present a program titled "LGBT Youth In Crisis: Causes, Impact and Prevention of Bullying," at the Bar Association, 42 West 44th Street, on Wednesday, February 9, 2011, beginning at 6:30. The program is free, but an RSVP to the Association of the Bar is requested. Their website is www.nycbar.org.

American University Washington College of Law is sponsoring a 1-1/2 day symposium on Friday and Saturday, March 25-26, 2011, titled "The New Illegitimacy': Revisiting Why Parentage Should Not Depend on Marriage." The conference will explore legal issues raised by the contrary trend in the law: on the one hand, an axiom of modern American family law is that children should not suffer as a result of being born to unmarried parents, but in several states children born to lesbian couples fin that their status depends upon whether their parents are married or in a civil union/domestic partnership, and courts have yet to extend to children of such couples this modern axiom, some even relying on the concept of "illegitimacy" to justify their rulings. For more information about the conference, contact Prof. Nancy Polikoff at npoliko@wcl.american.edu. Free registration is available at http://www.wcl.american.edu/secle/founders/2011/210110325.cfm.

2011 Lavender Law — The 2011 Lavender Law Conference & Career Fair, sponsored by the National LGBT Bar Association, will be held in Los Angeles at the Hollywood Renaissance Hotel on September 8-10. The Career Fair is expected to enlist recruiters from more than 130 legal employers, and will be on the first day of the event. The Conference will also include a meeting of the LGBT Family Law Institute, co-sponsored with National Center for Lesbian Rights, and the Transgender Law Institute. Early registration for the conference and hotel reservation information can be accessed now on the NLGLA website.

Movement Positions

The National LGBT Bar Association is accepting applications for the new full-time position of Director of Programs and Membership Services. This position involves responsibility for helping to organize programmatic components of Lavender Law, among a variety of programmatic and administrative duties. Minimum qualifications specified in the job announcement: "Have transferable experience in LGBT issues, legal trainings and membership development; preferable to have a law degree from an accredited law school and be a member in good standing of a bar association. Send a cover letter, resume, writing sample and salary requirement to HR@LGBTbar.org with Director of Programs and Membership Services in the subject line.

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Chasen, Jerry Simon, *Is DOMA Doomed?*, 25-FEB Prob. & Prop. 22 (Jan/Feb 2011).

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Sanders, Steve, *Where Sovereigns and Cultures Collide: Balancing Federalism, Tribal Self-Determination, and Individual Rights in the Adoption of Indian Children by Gays and Lesbians*, 25 Wis. J.L. Gender & Soc'y 327 (Fall 2010).

Schwartz, Justin, *Less Than Meets the Eye: Anti-Discrimination and the Development of Section 5 Enforcement and Eleventh Amendment Abrogation Law Since City of Boerne v. Flores*, 38 Hastings Const. L.Q. 259 (Winter 2011).

Thro, William E., and Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 Ed. Law Rep. 473 (Dec. 23, 2010) (The "freedom" referred to in the title is, of course, the freedom to discriminate against gay people based on religious belief, which the authors believe should be protected and subsidized by state institutions).

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White, Michael J., *The First Amendment's Religion Clauses: Freedom of Conscience' Versus Institutional Accommodation*, 47 San Diego L. Rev. 1075 (Nov-Dec. 2010).

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Yoshino, Kenji, *The New Equal Protection*, 124 Harv. L. Rev. 747 (January 2011) (Argues that the Supreme Court's focus in civil rights cases has moved decisively from Equal Protection to a Due Process dignity paradigm, using *Lawrence v. Texas* as a prime example).

EDITOR'S NOTE

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