

# DADT MILITARY POLICY TO END SEPTEMBER 20, 2011

On July 22, President Barack Obama announced that Secretary of Defense Leon Panetta and Admiral Michael Mullen, chairman of the Joint Chiefs of Staff, had joined him in signing a certification to the designated chairs and ranking members of the armed services committees in Congress that the Don't Ask, Don't Tell Repeal Act of 2010 could be implemented. Delivery of the certification to Congress that afternoon set the 60-day period in motion for final repeal of the policy, which had been enacted by Congress in 1993 as a "compromise" between President William J. Clinton's campaign pledge that the existing ban on military service by gay people would be ended, and the position of military leaders who sought to preserve the existing policy, arguing that allowing gay people to service would seriously undermine good order, morale, unit cohesion, and military recruitment. The "compromise" was, in effect, that applicants for enlistment would no longer be asked about their sexual orientation and that gay people could serve as long as they did not engage in any "homosexual conduct," which was defined to include saying or doing anything that would communicate to others that they might have a "propensity" to engage in homosexual conduct. Enactment of the policy also left in place Article 125 of the Uniform Code of Military Justice, which made anal or oral sex a military crime. An individual who said they were gay was presumed to have a propensity to engage in homosexual conduct, and thus was to be discharged under the policy for having "told."

Although the DADT policy was expected to reduce the number of service members who were discharged for "homosexuality," it actually had the opposite effect during its

first decade, as discharges rose through the 1990s. However, with the advent of wars in Afghanistan and Iraq early in this century, the number of discharges declined as military commanders were less eager to remove satisfactorily-performing personnel from the theater of war. Legal challenges to the policy were ultimately unsuccessful during the 1990s, as the looming Supreme Court precedent of *Bowers v. Hardwick* (1986) made it difficult for courts to accept the argument that individuals who might engage in conduct that the government could – and did – designate as criminal, nonetheless had a constitutional right to remain in the service.

A turning point came after the Supreme Court's 2003 ruling in *Lawrence v. Texas* that criminal sodomy laws violated the Due Process rights of gay people, which led the 9th and 1st Circuits to rule in challenges to DADT that heightened scrutiny should be given to the government's justification for the policy in the context of a Due Process challenge. (Both circuit courts agreed with the government that heightened scrutiny would not apply to an Equal Protection challenge.) In a test case in the 1st Circuit, *Cook v. Gates*, 528 F.3d 42 (2008), the court found that the legislative record compiled in 1993, together with the deference that courts ordinarily give to the political branches and military leaders in matters of military personnel policy, were sufficient to sustain the statute against a facial challenge. But in *Witt v. Department of the Air Force*, 527 F.3d 806 (2008), the 9th Circuit ruled that heightened scrutiny held that discharging Major Witt, a highly-decorated Air Force nurse, would be unconstitutional unless the government could show that doing so served an important governmental

policy, and a district court concluded on remand, 739 F.Supp.2d 1308 (W.D.Wash. 2010), that the government was unable to meet that burden in an "as applied" challenge.

In another case pending in a district court in the 9th Circuit, brought by the Log Cabin Republicans, a gay political group suing as representative of two of its members, a trial judge ruled that the DADT policy was not sustainable under Due Process heightened scrutiny, and issued a worldwide injunction against its enforcement in October 2010, which was stayed by the 9th Circuit pending the government's appeal. 204. *Log Cabin Republicans v U.S.*, 716 F.Supp.2d 884 (C.D. Cal. 2010). Two months after the stay was issued, Congress passed the DADT Repeal Act, and the government pushed the 9th Circuit to delay briefing and argument.

The 9th Circuit moved ahead with a briefing schedule in light of the failure of the Repeal Act to provide any deadline for repeal, and the government responded by shifting its argument on appeal, contending that the question whether the policy as originally adopted was unconstitutional was mooted by the Repeal Act, leaving before the court only the question whether the Repeal Act itself, by keeping the policy in place through a transitional period prior to repeal, was itself unconstitutional. As to that, the government argued that its desire for an orderly transition accompanied by regulatory changes and instruction to service personnel, provided sufficient justification to keep the policy in place during the transitional period. Early in July, the 9th Circuit panel lifted the stay, but partially reinstated it in response to an "Emergency Motion" by the government, which urged

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## LESBIAN/GAY LAW NOTES

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patience as certification was said to be “imminent.” Shortly thereafter, the certification to Congress took place, initiating the final 60 day period leading to repeal.

As of the end of August, when this issue of Law Notes went to press, oral argument was scheduled to take place early in September, just weeks before repeal would go into effect. Log Cabin Republicans argued, contrary to the government, that the case should not be dismissed as moot, because the question whether the district court’s ruling on the merits was correct remained significant for damage claims relating to injuries suffered by lesbian and gay service members due to the application of DADT to them over a period of 17 years. There were other pending legal disputes concerning attempts by the Defense Department to recapture ROTC scholarship money from individuals who were dismissed under DADT, as well as attempts to recapture the value of military service academy tuition from officers who were dismissed under the policy. If the policy was unconstitutional, those claims would be strengthened.

Servicemembers Legal Defense Network, the advocacy organization formed in 1993 to lobby for repeal of the policy, issued a guide to assist LGBT service members in light of the impending repeal. Titled *Freedom to Serve: The Definitive Guide to LGBT Military Service*, it was downloadable from the organization’s website: [www.sldn.org](http://www.sldn.org). As the Defense Department announced that there was no intention to amend its non-discrimination policy to add “sexual orientation,” that due to the Defense of Marriage Act there would be no recognition of same-sex spouses of military personnel, and due to the persistence of Article 125 as a criminal prohibition of sodomy in the military, SLDN decided that there was work remaining to be done, so the organization would continue in business as an advocate for equal rights and fair treatment for LGBT service members. In the wake of *Lawrence v. Texas*, the military appeals courts had adopted an interpretation of Article 125 that would continue to apply it in any situation where the court determined that the special considerations of military service warranted an exception to the Due Process protection announced by the Supreme Court in that case. Prosecutions prior to implementation of the DADT Repeal Act usually found that it remained appropriate to impose criminal penalties

on personnel who engaged in conduct described in that provision, but it was possible that the repeal of DADT might lead the military appeals courts to reassess their position.

The final disappearance of “Don’t Ask, Don’t Tell” meant that many law schools that had barred military recruiters in the past because of that policy were rethinking their positions, on the ground that their students seeking potential legal jobs with the armed forces could no longer be disqualified based on sexual orientation. But the Society of American Law Teachers sent a letter to its members stressing that the lack of a non-discrimination provision in the Repeal Act, together with the continued influence of DOMA constraining benefits that can be provided to same-sex military spouses, meant that the military could still be considered a discriminatory employer. A.S.L.

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## LESBIAN/GAY LEGAL NEWS AND NOTES

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### 7th Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act

The U.S. Court of Appeals for the Seventh Circuit recently affirmed the Eastern District of Wisconsin’s finding that a state statute barring the Wisconsin Department of Corrections (“DOC”) from paying for hormone therapy or sexual reassignment surgery for prisoners diagnosed with Gender Identity Disorder (GID) is unconstitutional both facially and as applied. *Fields v. Smith*, 2011 WL 3436875 (Aug. 5, 2011). In the Seventh Circuit’s opinion, written by District Judge Gottschall (N.D.Ill.) who was sitting by designation, the court held that the district court did not err in invalidating the Inmate Sex Change Prevention Act (Act 105) on the grounds that it violates the Eighth Amendment’s prohibition against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment. However, the Seventh Circuit declined to address the Equal Protections issue, finding that as Act 105 is facially unconstitutional under the Eighth Amendment, it was unnecessary to find it unconstitutional on further grounds.

Enacted in 2005, Act 105 prohibits the DOC from providing state funding of any

kind towards the payment of hormone therapy or sexual reassignment surgery for inmates. The inmate plaintiffs, Andrea Fields, Matthew Davison (also known as Jessica Davison) and Vankemah Moaten, are male-to-female transsexuals who, prior to the enactment of Act 105, received hormonal therapy as treatment for GID. As inmates are not allowed to seek medical treatment of any kind outside of the prison, even if they can afford it, Act 105 removed the only means by which the plaintiffs could obtain hormone therapy. Initially, the three plaintiffs brought the suit as a class action on behalf of all DOC inmates requiring treatment for GID. Although the district court denied their motion for class certification, the suit, based on each plaintiff’s individual claims against the DOC, was allowed to go forward.

Judge Gottschall devotes the first portion of her opinion to summarizing the evidence presented to the district court concerning both GID and its treatment. Plaintiffs presented expert witnesses who specialize in the treatment of individuals diagnosed with GID and who testified to the psychological suffering experienced by people with GID, including severe depression which can lead to suicidal thoughts. The plaintiffs’ experts, one of whom specializes in the treatment of transsexuals in correctional facilities, also testified that hormone therapy is a standard form of care for GID when psychotherapy and living as the opposite gender alone are inadequate to alleviate the symptoms, and in some cases sexual reassignment surgery is the most appropriate treatment. Hormone therapy not only incites changes in a person’s physical appearance, but also eases psychological distress. If a patient stops taking hormone therapy, psychological symptoms reappear, often in a more severe form, and the person may experience physical symptoms such as high blood pressure, muscle wasting, and neurological complications. Each of the three plaintiffs experienced some of these complications when the DOC began to reduce their hormone levels in 2006.

To determine if Act 105 rises to the level of cruel and unusual punishment, the Seventh Circuit looked to the standard it applied in *Greeno v. Daley*, 414 F.3d 645 (2005). In *Greeno*, the Seventh Circuit stated that “prison officials violate the Eighth Amendment’s proscription against cruel and unusual punishment when they

display ‘deliberate indifference to serious medical needs of prisoners’ (quoting *Estelle v Gamble*, 429 U.S. 97 (1976)). Here, the Seventh Circuit stresses the serious psychological effects of GID when it is left untreated, or when treatment is withdrawn, and characterizes the refusal by the DOC to treat patients with the condition as “amount[ing] to torture.” District Judge Gottschall states that the DOC would never consider denying the most effective treatment to a person with another serious medical condition, and patients with GID should be treated no differently.

In defending the constitutionality of Act 105, the DOC did not contend that GID is not a serious medical condition, but rather asserted that the act does not prohibit the provision of all treatments for GID, only hormone therapy and sexual reassignment surgery. Relying on two Seventh Circuit decisions, the DOC argued that as long as other medical treatment options are available to prisoners, the prohibition of certain options does not rise to the level of cruel and unusual punishment. Both cases cited by the DOC address prison officials’ refusal to provide prisoners treatment for GID. In *Meriwether v. Faulkner*, the court held that prison officials could not deny all treatment to a transsexual prisoner, but stated in dicta that that did not mean that the prisoner had “a right to any particular type of treatment,” 821 F.2d 408 (1987). The DOC also relied on *Maggeert v. Hanks*, wherein the court stated, “again in dicta, that the Eighth Amendment does not require the provision of ‘esoteric’ treatments like hormone therapy and sexual reassignment surgery which are ‘protracted and expensive’ and not generally available to those who are not affluent.” 131 F.3d 670 (1997). While both of these decisions rely on the assumption that certain treatments for GID are expensive, and therefore prison officials should not be required to provide them if other more cost effective treatments are available, here, the district court determined that in 2004 the cost to the DOC of providing hormone therapy to two inmates was \$2,300, while the cost of antipsychotic medication commonly prescribed to inmates was \$2,500 per patient. In oral arguments before the Seventh Circuit, the DOC disclaimed the argument that cost was a legitimate purpose behind Act 105. The DOC also failed to produce any evidence that there are al-

ternative treatments for transsexualism as effective as hormone therapy.

The DOC also asserted that Act 105 serves the legitimate state purpose of ensuring prison security. The defendants argued that the physical changes that hormone therapy causes in male inmates, giving them a more feminine appearance, would cause an increase in sexual assaults against male-to-female transsexuals by other prisoners. The court rejects this argument, finding that the DOC failed to establish any connection between hormone therapy and a rise in prison violence against prisoners with GID. In fact, the DOC’s expert witness on prison security, Eugene Atherton, who worked at the Colorado Department of Corrections, stated that hormone therapy “had been implemented effectively in Colorado” and “that it would be ‘an incredible stretch’ to conclude that banning the use of hormones could prevent sexual assaults.”

Finally, the DOC argued that, even if Act 105 is unconstitutional, the district court erred in invalidating it on its face. By holding that no enforcement of the act can be constitutional, the DOC argued, the district court violated the Prison Litigation Reform Act (PLRA) which requires that “prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff.” The DOC contended that the facial invalidation of Act 105 is too broad to be within the scope of the PLRA. The district court rejected the argument that there are cases in which Act 105 can be applied constitutionally, holding that the defendants provided no evidence to support this assertion. Although the DOC admitted to the district judge at a status conference that the court’s order was as narrow as required by the PLRA, the Seventh Circuit addressed the assertion, finding that the district court did not err in invalidating the entire act as that was the most narrow means of correcting the constitutional violation. *Kelly Garner*

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### Nebraska Supreme Court Embraces “In Loco Parentis” Doctrine in Same-Sex Couple Custody/Visitation Dispute

The Nebraska Supreme Court has joined the growing list of state courts that have

adapted the common law doctrine of “in loco parentis,” which has been used to consider parental rights of stepparents and grandparents, to provide a basis for allowing same-sex co-parents to seek to preserve their relationships with children after the end of a relationship with a biological or adoptive parent. Ruling in *Latham v. Schwerdtfeger*, 282 Neb. 121, 2011 Westlaw 3763776 (August 26, 2011), six members of the court joined in Justice Lindsey Miller-Lerman’s opinion. One member of the seven-member court did not participate in the case.

According to the court’s opinion, Teri A. Latham and Susan Rae Schwerdtfeger met in college and began living together in 1985. After several years of living together, they began discussing having a child and, ruling out adoption, decided that Susan would be the birth mother. After several attempts at donor insemination failed, they successfully resorted to in vitro fertilization, and their son, P.S., was born in 2001. They shared parenting duties and expenses, and P.S. referred to Teri as “Mom.” Unfortunately, the relationship between the women broke down, and Teri moved out of the family home in 2006. She continued to maintain a relationship with P.S. through visiting and telephoning, but Susan began cutting down the frequency of contact and by 2009 it had become slight. After they terminated their joint bank account in 2007, Teri ceased contributing financial support.

Teri filed a lawsuit in Douglas County District Court in 2009, seeking an order of custody and visitation. District Judge Marlon A. Polk concluded that since Teri was neither the biological nor adoptive parent of P.S., she lacked standing to seek such an order, and dismissed the case, finding that Nebraska’s “in loco parentis” doctrine would not apply where the plaintiff had no legal relationship with the child’s parent. At the same time, Judge Polk also ruled that even if Teri had standing, the facts would not support her claim to parental rights, and granted Susan’s motion for summary judgment. Nebraska has no intermediate appellate court, so Teri’s appeal went directly to the state supreme court.

Justice Miller-Lerman pointed out that Nebraska courts have recognized the doctrine of “in loco parentis” in cases involving stepparents seeking to preserve a relationship with their former spouse’s children,

and have also used it in one case to grant parental rights to a grandparent who had formed a parental bond with a child. The court explained that “a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.”

The question the court confronted in this case was whether to extend that doctrine to a dispute between same-sex co-parents, where there was no legal relationship between the parents. As Nebraska forbids same-sex marriage and does not make available civil unions or domestic partnership for same-sex couples, Teri and Susan had no legal relationship recognized by the state.

To explore this question, the court conducted an extensive review of decisions from other states as well as scholarly articles, and concluded that the trend of legal authority was in the direction of applying the “in loco parentis” doctrine to same-sex couples who had been raising children together. The court cited and quoted extensively from appellate rulings in Pennsylvania, Washington, Wisconsin, and Arkansas, all of which concluded that it was appropriate to recognize the standing of a same-sex co-parent to seek custody or visitation after the break-up of a relationship with the child’s biological or adoptive parent.

“The courts that have applied the doctrine of in loco parentis in cases such as ours,” wrote Justice Miller-Lerman, “have looked to the purpose of the doctrine and noted that the focus of an in loco parentis analysis must be on the relationship between the child and the party seeking in loco parentis status,” in order to determine whether a parent-child bond had been formed during the time that the plaintiff had participated in parenting the child.

She quoted from a Pennsylvania ruling on the justification for applying the doctrine: “The in loco parentis basis for standing recognizes the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child’s best interest. Thus, while it is presumed that a child’s best interest is served by maintaining the family’s privacy

and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child’s eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child’s best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent’s objection.”

The court said that the doctrine “must be applied flexibly and is dependent upon the particular facts of each case.” In this case, the court said, the district judge clearly erred in concluding as a matter of law that the doctrine did not apply, since there was uncontradicted evidence that Teri had played a full parental role during the early years of P.S.’s life, and that her factual allegations would support her claim to standing under the doctrine of “in loco parentis.”

Of course, that doesn’t end the case, since the ultimate issue for the court is whether it is in the best interest of P.S. to order that Teri be allowed to re-establish and maintain her parental relationship with the child through shared custody or visitation. As to this, Teri and Susan had asserted different versions of the facts about Teri’s relationship with the child after she moved out of the family home. The Supreme Court decided that “there are genuine issues of material fact which preclude entry of summary judgment,” and that it had been “premature” for the district court to award summary judgment to Susan.

The trial judge’s error, said the court, was that the court focused on the relationship between Teri and Susan — and particularly on the breakdown of that relationship — rather than on the relationship between Teri and P.S. The court sent the case back to the trial court to sort out the factual allegations and determine whether Teri’s relationship with P.S. was sufficient to justify an order in her favor.

“We conclude that Latham has standing based on the doctrine of in loco parentis and that the district court erred when it concluded that the doctrine of in loco parentis did not apply to this case,” concluded the court. “Our opinion does not speak to Latham’s chance of success on the merits, but it merely affords her the opportunity to

fully litigate the issues. Latham has made a meritorious claim of standing to seek enforcement of her claimed right to custody and visitation of P.S.”

Tyler C. Block and Elizabeth Stuht Borchers of the firm of Marks, Clare & Richards represent Teri Latham. Angela Dunne Tiritilli and Susan A. Koenig of the partnership of Koenig & Tiritilli represent Susan Rae Schwerdtfeger. Kelle Westland of the law firm of Raynor, Rensch & Pfeiffer submitted an amicus brief on behalf of the National Center for Lesbian Rights, supporting Teri Latham’s argument for application of the in loco parentis doctrine to cases of this type.

In an interview with the Associated Press published shortly after the opinion was released, Tyler Block hailed the ruling, saying that the court “got it exactly right.” “They applied Nebraska law and helped give clarification on how it applies in these particular situations.” Angela Tiritilli agreed that the ruling would help clarify parental rights in the state, while commenting that her client was disappointed because this will probably mean several more years of court proceedings in the case. But, she said, “What we’re seeing here is a good trend; the court is not simply dismissing same-sex parental rights.” A.S.L.

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### **8th Circuit Takes a Narrow View of Actionable Anti-Gay Taunting Under Title IX**

A unanimous U.S. Court of Appeals 8th Circuit panel ruled in *Wolfe v. Fayetteville, Arkansas, School District*, 2011 Westlaw 3444555 (Aug. 9, 2011), that a public school student seeking to hold the school district liable for sexual harassment under Title IX, 20 U.S.C. Section 1681, must show that the harassment he suffered was motivated by his sex or his failure to conform to gender stereotypes. Rejecting a challenge to the trial judge’s jury instructions, the court affirmed a jury verdict in favor of the school district, despite uncontradicted evidence that the student was subjected to such a continuing barrage of anti-gay epithets and some physical attacks that he withdrew from school in the 10th grade to pursue a General Education Diploma through home study because he felt unsafe at school.

According to the opinion for the court by Judge Kermit Bye, William Wolfe was

“ridiculed at the hands of his fellow students on numerous occasions” between his sixth grade and tenth grade years in the Fayetteville school district. “Beginning in sixth grade, Wolfe was harassed several times per week including pushing, shoving, name-calling, and being falsely labeled as homosexual. The name-calling included gender-based epithets such as ‘faggot,’ ‘queer bait,’ and ‘homo,’ among others. Over the years the harassment escalated. In seventh grade, Wolfe was punched and had his head slammed into a window while riding the school bus. In ninth grade, his classmates created a Facebook page called ‘Every One [sic] That Hates Billy Wolfe.’ The picture for the Facebook group showed Wolfe’s face photo-shopped onto a figure in a green fairy costume with the word ‘HOMOSEXUAL’ written across it. Additionally, Wolfe’s classmates graffitied highly offensive, homosexual accusations about Wolfe on bathroom walls and in classroom textbooks. During Wolfe’s last year with FSD, his tenth grade year, Wolfe got in a fight with a classmate, and two days later the classmate jumped out of a car and punched Wolfe while he was walking home from school.”

Wolfe’s lawsuit claimed that the district failed to take adequate steps to deal with this harassment in violation of Title IX, which provides that “no person in the United States shall, on the basis of sex, be subjected to discrimination under any education program or activity receiving Federal financial assistance.” This provision has been invoked with some success in some other cases to hold schools to account for severe homophobic bullying of gay students. However, there is no settled Supreme Court precedent dealing with the precise proof requirements to apply the statute, apart from a holding that a school district which did not itself act in a discriminatory way could be held liable if it exhibited deliberate indifference to the known sexual harassment of a student.

In this case, Wolfe was proceeding on the theory that the harassment of him was sex-based because the anti-gay references were intended to impugn his gender or masculinity. In defense, the school district did not deny Wolfe’s factual allegations, but contended that his classmates were not taunting and harassing him because of his sex but rather because of his own bullying behavior and unpopularity. The jury, having

been charged by the trial judge that in order to find a violation of the statute it had to find that the harassment was motivated “by Wolfe’s gender or his failure to conform to stereotypical male characteristics,” drawing on precedents from workplace harassment cases under Title VII of the Civil Rights Act, concluded that Wolfe had not made out his case and rendered a verdict for the school district.

On appeal, Wolfe’s main argument was that the trial judge in the Western District of Arkansas had not correctly instructed the jury, having rejected Wolfe’s proposed jury instruction. Wrote Judge Bye, “Wolfe suggests it would be sufficient under Title IX to show the harassers used name-calling and spread rumors in an effort to debase his masculinity and thus contends the district court erred in instructing the jury it had to find gender or the failure to conform to gender stereotypes as the harasser’s motivation to hold FSD liable.”

The court of appeals disagreed with Wolfe, invoking the Supreme Court’s famous same-sex harassment ruling in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court held that same-sex harassment was actionable under Title VII if the plaintiff could prove that the harassment he suffered was “because of sex.” While conceding that the operative wording of Title IX and Title VII differs, nonetheless the 8th Circuit court found that the phrases used are virtually interchangeable and that a fair reading of Title IX also requires a showing of such motivation.

Wolfe had also argued that the trial judge incorrectly failed to instruct the jury on Wolfe’s theory of the case, but the 8th Circuit found that Wolfe’s proposed instruction on his theory of the case was not “consistent with the law,” and that Wolfe had failed to cite any legal authority supporting his theory that Title IX would be violated by showing that the plaintiff had been the subject of name-calling which “attacks the student’s masculinity.”

The court also rejected Wolfe’s argument that the trial court committed reversible error by empaneling a 12-person jury rather than the more usual 6-person jury for a federal civil trial. The trial court had responded to the defendants’ argument that because Wolfe had gone to the press with his story and generated significant media attention, it was possible that a 6-person

jury would be too easily swayed by the notoriety of the case, and a 12-person jury would be less subject to pressure. The court of appeals found that there was nothing in the law to support the argument that a plaintiff has some entitlement to a smaller jury.

Judge Bye does not comment about the facts beyond reciting them. However, it is noteworthy that when junior and senior high school students are angry at a fellow student and want to harass and embarrass him to punish him for bad behavior, they resort to homophobic epithets and taunts. The worst thing you can call somebody at that age is a “faggot.” This remains part of the public school culture that contributes to teen suicide. Unfortunately, Title IX as construed by this court does not necessarily incentivize schools to take sufficient action in such situations, because of the focus on the motivation of the harassers rather than the impact on the victim of the harassment. Some proposals have been made to amend federal law to place a legal obligation on school districts to take appropriate steps to protect students from harassment, regardless of the issue of motivation. This ruling could be Exhibit A in favor of the need for such legislation. Whatever sins this student committed in the eyes of his peers, one doubts they would justify permitting such intense harassment that he would feel compelled to withdraw from school due to feeling unsafe and unprotected after suffering physical attacks.

Wolfe was represented on the appeal by Arthur Benson of Kansas City. The school district was represented by Christopher Heller. A.S.L.

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### **6th Circuit Holds Anti-Gay Bias in Operating Union Hiring Hall May Violate Duty of Fair Representation under National Labor Relations Act**

The U.S. Court of Appeals for the Sixth Circuit held on August 2 that a gay employee who suffered discrimination at the hands of his union may have a claim against the union under the National Labor Relations Act’s Duty of Fair Representation. *Gilbert v. Country Music Association*, 2011 WL 3288655, 112 Fair Emp. Prac. Cases (BNA) 1711 (not recommended for full-text publication).

Marty Gilbert, an openly gay theater professional, organizes awards shows for a number of organizations through exclusive hiring agreements with Gilbert's union, Local 46. Gilbert's troubles began while working on the 2007 Country Music Association (CMA) Awards through a referral from the union, when he was threatened by a fellow union member named Milton Jones. Jones, already facing charges for attacking "several homosexuals," called Gilbert a "faggot" and threatened to stab him.

Gilbert claims that he brought the incident to the attention of Local 46, after which they stopped referring him for jobs altogether. Gilbert complained about the union's lack of referrals, and the organization responded by changing its referral process in an apparent attempt to legitimize their refusal to recommend Gilbert for employment. In 2008 the union did not refer Gilbert for his previous job with the CMA awards, forcing him to contract directly with the CMA for "less distinguished and lower paying" work, and after Gilbert was able to secure a job at the 2009 "Stellar Awards," the union president personally convinced the show organizers to rescind their employment agreement.

As if these incidents were not enough, Gilbert claims that the union also sent an "unsolicited forged letter...purported to be sent from [a] third party" to CMA, Country Music Television (CMT), and MTVN (the country music channel branded by MTV) describing Gilbert's purported "misconduct" at the 2008 CMA Awards. Gilbert denied any wrongdoing and asserts that the letter was sent in retaliation for his complaints. Nonetheless, the union filed internal charges against him based on the events detailed in the letter, and suspended him for six months.

His suspension was the last straw, and Gilbert filed suit against Local 46, CMA, CMT, MTVN and the Artists and Allied Crafts of the United States and Canada (IATSE) in the District Court of Tennessee. All of his complaints were dismissed by the lower court on motion by the defendants. Gilbert appealed the dismissal, but only as to the discrimination and duty of fair representation claims against IATSE and Local 46.

First addressing the discrimination claim, the opinion notes that the Tennessee Human Rights Act, like Title VII, distinguishes between sexual orientation

discrimination and discrimination based on sex and gender stereotypes. While discrimination based on the "degree to which an individual conforms to traditional notions of what is appropriate for one's gender," *Vickers v Fairfield Med. Ctr.*, 453 F.3d at 757 (6th Cir. 2006), is barred by both statutes, it is well settled that "sexual orientation is not a prohibited basis for discriminatory acts." *Id.* at 762.

The court points out that none of Gilbert's allegations point to discrimination based on his lack of conformity to sex stereotypes. Rather, the discrimination was based on the fact that Gilbert is, in fact, gay. While the opinion sympathetically notes that the events described in the complaint are "deserving of condemnation," it concludes that they cannot be the basis for a sex discrimination claim and that the dismissal of those claims by the lower court was proper.

Turning to Gilbert's claim of breach of duty of fair representation by Local 46 and IATSE, the court first establishes the standard of conduct required by all union activity as one to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v Sipes*, 386 U.S. 171 (1967).

This standard is especially important in Gilbert's case involving the union's hiring hall, because, as the court notes, by operating a hiring hall the union is assuming the mantle of an employer and has a heightened responsibility to ensure fairness in all its practices. Gilbert's allegations paint the union as engaging in arbitrary and irrational conduct by not referring Gilbert for employment despite his credentials, and, in regard to the forged letter sent by the union to various employers, the court notes, the actions could constitute fraud and bad faith. Accordingly, the opinion reverses the lower court dismissal of the breach of duty of fair representation claim against Local 46. As a final note, however, the court points out that Gilbert has provided no evidence that IATSE had any knowledge of Local 46's actions, and notes that the two organizations are separate entities. Since no link between Local 46's conduct and IATSE was established, the dismissal of the claim against IATSE is affirmed.

This will be an interesting case to watch, as it may set an important precedent for

union practices. It is a shame, then, that the case was not selected for official publication, although the text is available on Westlaw and in commercial reporters (such as BNA's Fair Employment Practice Cases). *Stephen E. Woods*

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### Deported Peruvian Civil Partner Wins New Hope In Appellate Ruling

A unanimous decision by a panel of the Philadelphia-based U.S. Court of Appeals for the 3rd Circuit gave new hope to Jair Izquierdo, a gay Peruvian who was deported and separated from his civil union partner last year after the Board of Immigration Appeals (BIA) upheld an Immigration Judge's decision to deny asylum and a different panel of the 3rd Circuit denied his petition for review. *Izquierdo v. Attorney General*, No. 11-1110 (U.S.Ct.App., 3rd Cir., August 24, 2011) (designated not precedential).

Izquierdo and his partner of five years, Richard Dennis, had been living together in New York City and had contracted a New Jersey civil union, and Izquierdo had petitioned for reopening of his case, presenting new evidence about the dangerous situation for gay people in Peru, but he was apprehended in a sting operation and deported to Peru - ironically, on the very day that the BIA denied his motion to reopen the case.

The August 24 ruling on his appeal of the denial of reopening criticized the BIA decision as "flawed," and ordered the case sent back to the agency so that it could reconsider based on the correct legal standard as instructed by the court. Immigration law specialist Paul O'Dwyer represents Izquierdo.

Gay foreign nationals seeking to remain in the United States as refugees can seek asylum, which would allow them to stay here and apply for citizenship. In order to gain asylum, they need to show that they have a reasonable fear of persecution on account of their membership in a particular social group if required to return to their home country. The government recognizes gay people as being part of a particular social group for this purpose. The problem is providing sufficient, up-to-date documentation about a pattern of persecution of gay people in the home country.

If the petition for relief is filed too late to seek asylum, or if the petition falls short for other reasons, a person can still seek relief in the form of “withholding of removal,” which would allow them to remain in the United States, but this requires strong proof that the individual is likely to be subjected to persecution if returned to his home country. Finally, if there is good evidence that the individual is likely to be subjected to torture (serious physical harm or death) if returned to their home country, they would be entitled to relief under the Convention Against Torture (CAT), a treaty to which the United States is a party.

Izquierdo arrived in the U.S. on a non-immigrant visa in October 2001, having left Peru to escape harassment from family members. He overstayed his visa, having met Dennis and begun a relationship, but removal proceedings were initiated against him. Conceding that he was removable, he applied for asylum or withholding of removal or relief under the CAT, based on his fear of encountering persecution as a gay man in Peru.

At a hearing before an Immigration Judge (IJ) in October 2006, he presented detailed documentary evidence about the situation facing gay people in Peru. Summarizing the evidence in a written decision denying relief, the IJ wrote that “(t)here are many instances where gays are not only discriminated against, but there’s actual physical beatings at the hands of the authorities. There’s also evidence that the authorities stand around and allow gays to be harmed.” This appears to meet the standard, but the IJ incorrectly concluded that he could not make a finding of a “pattern or practice of persecution” because, he said, he could not find any appellate court authority concerning such a situation in Peru.

The BIA upheld the IJ’s denial of relief, in a strangely contradictory opinion. While finding that the IJ was mistaken in thinking he could not grant relief in the absence of any appellate judicial precedent about Peru, the BIA decided that the evidence in the record was insufficient to establish the current situation there, because the incidents of beatings and persecutions were based on “older articles,” some dating back as far as twelve years, and the most recent documents “relate primarily to incidents against transvestite activists.” As of 2006, the most recent State Department country reports about Peru suggested some

improvement in conditions for gay people there. Izquierdo petitioned the 3rd Circuit Court of Appeals to review the BIA decision, but his petition was denied in 2009.

On October 20, 2010, he was apprehended by Immigration Control and Enforcement (ICE) agents when he responded to a fake business request, and he was placed in detention pending deportation. His co-workers alerted Dennis, who contacted his attorney, and a new petition was filed to reopen his case. A 2009 State Department report, which had not been available at the time of his prior asylum hearing, together with more recent articles, showed that conditions for gays remained very dangerous in Peru. But the BIA rejected his petition on the same date he was deported, December 17.

The BIA’s reasoning for denying the motion to reopen his case asserted that the new evidence he offered “does not reflect materially changed country conditions for homosexuals in his native Peru since this case was before the IJ in October of 2006. Rather, such evidence describes a continuance of the on-going and volatile circumstances that gave rise to [his] first claim, a claim that was previously denied by both the [IJ] and the [BIA].” The BIA went on to assert that a “generalized claim of increased harassment” was not sufficient to establish that “there exists a reasonable possibility that [he] would be targeted for harm rising to the level of persecution on account of a protected ground.” The BIA said that evidence of the likelihood of torture was lacking as well.

Finding that “the reasoning underlying” the BIA’s conclusion is “flawed,” the 3rd Circuit highlighted the internal contradictions. Whereas the BIA’s first decision rejected relief on the ground that the 2006 hearing evidence showed things were getting better, the new decision rejected more recent evidence on the ground that it “describes a continuance of the on-going and volatile circumstances” that gave rise to his original claim, and so added nothing new. Either the earlier decision was wrong in finding that things were getting better, or the new evidence is correct in showing that the “on-going and volatile circumstances” described in the older sources were continuing. Thus, it is possible that the newer evidence negates the BIA’s original decision, and should have been considered as a basis for reopening the case, because

current conditions in Peru are the relevant issue.

Furthermore, the court observed, the BIA was subjecting this evidence to the wrong legal test. As an asylum applicant, Izquierdo was claiming that there was a “pattern or practice of persecution” of gay people in Peru, but the BIA was subjecting this evidence to the “withholding of removal” test, which would require an individualized showing that he was likely to be targeted for persecution. Indeed, the court pointed out, even the government attorneys responding to this appeal had virtually conceded the BIA’s error on this point, by including a footnote in their brief suggesting that if the court disagreed with the BIA’s conclusion that the new evidence did not warrant reopening the proceedings, it should send the case back “for the agency to consider Izquierdo’s claim that he made out a prima facie case of a ‘pattern or practice’ of persecution.”

“Given the above-noted flaws in the BIA’s analysis,” concluded the court, “we cannot uphold its December 17, 2010, decision on either of the two grounds articulated by the agency.” But the court rejected Izquierdo’s request to rule on the merits that he is entitled to return to the United States, instead sending the case back to the BIA so it “can properly evaluate his motion to reopen,” and added, “We express no opinion on his ability to prevail on that motion.”

The court’s decision never mentions Izquierdo’s partner or his civil union status, but perhaps when the case is sent back to the BIA, the new approach announced by the Obama Administration to deal with the issue of same-sex binational couples might contribute to the reconsideration of the case. A few weeks ago, the Administration announced that it was refocusing its deportation efforts to concentrate on removing criminals, and directed that ICE use its prosecutorial discretion in a way that would avoid breaking up families, including LGBT families. Several IJ decisions in recent months have taken this approach, delaying or deferring deportation proceedings in light of established same-sex relationships (in some cases civil unions or marriages). Certainly, Izquierdo and Dennis, who lived together for five years and contracted a civil union, should qualify for such consideration. A.S.L.

## 9th Circuit Holds University Can Deny Recognition to Discriminatory Religious Student Groups

The 9th Circuit held that San Diego State University's policy of refusing to recognize student groups that restricted membership to students who met religious requirements such as "personal acceptance of Jesus Christ as Lord and Savior," "active participation in Christian service," and "regular attendance or membership in an evangelical church" did not run afoul of the First and Fourteenth Amendments of the Constitution in *Alpha Delta v. Reed*, 2011 WL 3275950 (August 2, 2011), but remanded the case for further proceedings to determine whether the constitutionally sound policy had been selectively enforced.

The issue decided by a panel of the 9th Circuit was that specifically reserved by the U.S. Supreme Court in *Christian Legal Society v. Martinez*, 130 S. Ct. 1971 (2010): whether that Court's holding that recognition of a student group based on an "all-comers" policy extended to "a narrower nondiscrimination policy that, instead of prohibiting all membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation."

Plaintiffs, Christian sorority Alpha Delta Chi and Christian fraternity Alpha Gamma Omega, had repeatedly been denied official recognition as student organizations by San Diego State University on the grounds that they failed to satisfy the University's non-discrimination policy forbidding recognition of any group "which discriminates on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability." Plaintiffs sued alleging violations of the First and Fourteenth Amendments of the U.S. Constitution.

A panel of the 9th Circuit applied a de novo standard of review, holding that such standard was applicable to university student groups, which the U.S. Supreme Court in *Christian Legal Society* had held were a "limited public forum." The panel held that the University's policy was "reasonable in light of the purpose of the student organization program," based on the school's "nondiscrimination policy aligned with the school's pedagogical goals" as well as the fact that San Diego State "allows

non-recognized groups like Plaintiffs to use campus facilities for meetings, to set up tables and displays in public areas, and to distribute literature."

Plaintiffs had argued that the policy "discriminates on the basis of viewpoint because it allows secular belief-based discrimination while prohibiting religious belief-based discrimination," stating that under the policy a student Republican organization could permissibly exclude a Democrat, but a Christian group could not exclude a Muslim because such exclusion would discriminate on the basis of religion. The panel held that the argument, "while seemingly compelling at first glance, does not survive closer scrutiny," noting that there was no evidence that San Diego State "implemented its nondiscrimination policy for the purpose of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all" and that Supreme Court precedent has held that nondiscrimination policies designed to "ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression' and are neutral as to both content and viewpoint."

The panel recognized that "content-neutral antidiscrimination laws can nonetheless violate the First Amendment right to expressive association when used to force a private group to accept members who materially interfere with the message the group wishes to express," but noted that here, the Plaintiffs "are free to express any message they wish, and may include or exclude members on whatever basis they like; they simply cannot oblige the university to subsidize them as they do so."

The panel held that a remand was necessary in this case because there was "evidence that San Diego State has granted official recognition to some religious student groups even though those groups, like Plaintiffs, restrict membership or eligibility to hold office based on religious belief." Finally, the panel held that although "as written, San Diego State's policy violates neither the Free Exercise Clause nor the Equal Protection Clause," "given the evidence that San Diego State may have granted certain groups exemptions from the policy, there remains a question whether Plaintiffs have been treated differently because of their religious status."

In his concurrence, Senior Circuit Judge Kenneth F. Ripple (7th Cir., sitting by designation), wrote separately "because this

case presents an important issue of First Amendment jurisprudence, which the Supreme Court explicitly reserved in *Christian Legal Society*." Judge Ripple stated that "under [the] policy, most clubs can limit their membership to those who share a common purpose or view... clubs whose membership are defined by issues involving 'protected' categories, however, are required to welcome into their ranks and leadership those who do not share the group's perspective" providing the example of "homosexual students, who have suffered discrimination or ostracism, may not both limit their membership to homosexuals and enjoy the benefits of official recognition."

Judge Ripple, however stated that while "most groups dedicated to forwarding the rights of a 'protected' group are able to couch their membership requirements in terms of shared beliefs, as opposed to shared status,... religious students, however, do not have this luxury – their shared beliefs coincide with their shared status." Judge Ripple concludes that "the net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based," and accordingly concurred in the judgment of the court. *Bryan C. Johnson*

## First New York Appellate Ruling Dissolving a Vermont Civil Union

New York courts have been nibbling around the issue of terminating out-of-state civil unions for a while now, but on July 21, a New York Appellate Division panel took the decisive step in *Dickerson v. Thompson*, 2011 WL 2899241, 2011 N.Y. Slip Op. 06009 (3<sup>rd</sup> Dep't.). Having previously held at an earlier stage in this case that Supreme Court has jurisdiction in law and equity sufficient to rule on the merits of a petition seeking dissolution of an out-of-state civil union entered by New York residents, the court disapproved the trial court's limited remedy and modified that court's ruling to provide that the civil union was dissolved.

Beginning in 2000, same-sex couples could go to Vermont to get civil unions without fulfilling any residency requirement, and many did so. The problem came in terminating those civil unions. Vermont, in common with almost every other state, has a real residency requirement for divorce cases, and when they passed the



Civil Unions Act, they adopted the same requirement for dissolving civil unions. Couples who returned to their home states were stuck if they wanted to dissolve their civil union. Either one member of the couple had to relocate to live in Vermont for a year, or they could just try to ignore the fact that they had a civil union, or they could try to get a home state court to dissolve it.

This was the problem faced by Audrey Dickerson. She and Sonya Thompson, her partner at the time, went to Vermont in April 2003 to get civilly united, and then returned home to New York. But their relationship subsequently deteriorated in substantial ways, to judge by the court's opinion. Writes Justice Karen K. Peters, "Here, the uncontested evidence submitted by plaintiff establishes that, during the course of the parties' relationship, defendant had subjected her to violent physical abuse on several occasions and was verbally abusive to both her and her autistic son on a daily basis. Defendant also stole from her, resulting in defendant's criminal conviction of grand larceny, and removed the license plates from plaintiff's vehicle to prevent her and her son from escaping defendant's abusive conduct. Furthermore, the parties have lived apart since April 2006 and plaintiff has alleged facts demonstrating that resumption of the civil union is not probable."

Dickerson filed a lawsuit against Thompson in Schenectady County Supreme Court, seeking a dissolution of her civil union. Thompson, who evidently had no interest in continuing the relationship, failed to respond to the complaint, and Dickerson moved for a default judgment granting the relief she requested. But Justice Vincent J. Reilly, Jr., dismissed the complaint, finding that he had no subject matter jurisdiction. Since New York did not have the legal institution of a civil union, and the divorce law was only available to dissolve marriages, Reilly opined that he lacked the authority to act on the complaint.

Dickerson appealed, and the Appellate Division reversed, see 73 App.Div.3d 52 (2010), finding that the Supreme Court can exercise its general equitable jurisdiction to deal with a legal issue such as this one. Without suggesting what the outcome should be, the Appellate Division sent the case back to Justice Reilly, with instructions to do equity between the parties.

Thus instructed, Justice Reilly decided that in this case equity would support issuing a declaration that Dickerson and Thompson were free of all the rights and responsibilities incident to their civil union, but he persisted in his view that "in the absence of any legislatively created mechanism in New York by which a court could grant the dissolution of a civil union entered into in another state, [the court] was powerless to grant the requested relief."

Dickerson brought the case back to the Appellate Division, arguing that the equity jurisdiction of the Supreme Court was broad enough to dissolve the civil union, and the Appellate Division agreed. "While plaintiff lacks a remedy at law," wrote Justice Peters, "the dissolution of a civil union falls squarely within the scope of the Supreme Court's broad equity jurisdiction." The court quoted numerous prior decisions demonstrating the breadth of equity jurisdiction, which is intended to give the court great leeway to try to achieve a just result between the parties to a legal dispute that is not controlled by specific statutory or established common law doctrinal rules.

The court found that "the exercise of Supreme Court's equitable powers to grant a dissolution of the civil union was clearly warranted here," because Dickerson needed a judicial remedy and, due to Vermont's residency requirement, could not obtain it in that state without moving there, effectively leaving her without a remedy for her problem as a New York resident who wished to remain a New York resident. The problem itself, as described by the court, was that an undissolved civil union could have serious consequences down the road because of its continuing potential effect on the rights and responsibilities of the parties. The court noted that somebody who is a party to a civil union is precluded from entering into a new civil union with anybody else, and presumably would also have problems getting married. It would certainly stand in the way of entering into a New York City domestic partnership and, after July 24, would preclude Dickerson from marrying a new partner. Also, the court pointed out, if Dickerson became pregnant through donor insemination, Thompson could automatically be considered the legal parent of that child under Vermont law, and there is New York precedent suggesting that she could be considered a parent of the child under New York law, even though Thomp-

son and Dickerson no longer considered themselves partners.

Thus, it was important for Dickerson to be able to get the civil union dissolved in order to get on with her life. "These chilling effects, both potential and actual, flowing from plaintiff's continued status as a partner to the civil union further support our conclusion that the exercise of the court's equitable power to dissolve the parties' civil union was warranted," wrote Justice Peters. "Indeed, it would be patently incongruous for the courts of this state to render civil unions more durable than marriages." The court noted that several New York trial courts had issued orders dissolving civil unions after the Appellate Division issued its first jurisdictional ruling in this case, so trial judges in Monroe, Erie, New York, Tompkins, Onondaga, and Westchester counties had not felt constrained by the concerns that Justice Reilly articulated.

While all five members of the Appellate Division panel agreed with the result, Justice John A. Lahtinen, writing for himself and Justice Bernard J. Malone, Jr., concurred separately, observing that they thought that Justice Reilly's decision was sufficient, since it declared that neither party was bound by the rights or responsibilities of the civil union. This, they opined, could be sufficient to prevent the problems identified by the majority. Yet they concurred because they agreed that the equity jurisdiction of the court was broad enough to dissolve the civil union.

Audrey Dickerson was represented by Amy Schwartz of the Domestic Violence Legal Project in Rochester, with amicus assistance from Thomas W. Ude, Jr., of Lambda Legal. As Sonya Thompson defaulted in this case and Dickerson has achieved the remedy she sought on appeal, there will be no further appeal in this case and the court's ruling is final. Under New York practice, a decision by a panel of the Appellate Division has statewide precedential effect on trial courts unless or until another Appellate Division panel disagrees with it or it is reversed or overruled by the Court of Appeals. A.S.L.

## McDonald's Franchisee on 42d Street in Manhattan May Face Liability for Harassment of Gay Customers

New York Supreme Court Justice Doris Ling-Cohan has rejected a motion to dismiss a discrimination claim brought by two gay men who claim to have been harassed by security guards at a McDonald's Restaurant on 42nd Street in Manhattan on November 26, 2008. The two men, Bowling and Barton, sought damages for discrimination and intentional infliction of emotional distress. Justice Ling-Cohan dismissed the emotional distress claim in her ruling filed on July 12, 2011. *Bowling v. 220 W. 42nd St., LLC*, 2011 N.Y. Slip Op 31938(U), Index No.: 104717/09 (N.Y. Sup. Ct., N.Y. Co., July 7, 2011).

According to their complaint, Bowling and Barton entered the McDonald's restaurant at 220 W. 42nd Street and placed their order. While waiting for their order to be filled, they exchanged kisses and found themselves confronted by two security guards, who subjected them to a stream of foul-mouthed anti-gay slurs.

According to the brief filed in opposition to the motion to dismiss their case, they claimed that they "were repeatedly and maliciously intimidated by the guards through their use of the slur 'faggot' and the threats made against them, and which forced them out of the McDonald's restaurant, including 'faggots aren't allowed in this McDonald's; faggots like you get killed in places like this; I'll kill you faggot; I'll kill you; I'll take you outside and kill your faggot ass; and get that faggot shit out of here.'" Some other customers called the police, who shortly arrived. Bowling and Barton claim that a McDonald's employee asked them to wait outside, and another employee later brought their order out to them.

They sued the franchise owners of the restaurant and the subcontractor that employs the security guards. Their primary claim was a violation of the State Human Rights Law provision forbidding sexual orientation discrimination against customers by places of public accommodation. They also charged a violation of another provision in the Human Rights Law concerning "boycotts, blacklisting and refusal to deal" based on sexual orientation, and

claimed damages for intentional infliction of emotional distress.

The McDonald's operator argued that it should not be held responsible for what happened to the two men, claiming that the complaint failed to specify any discriminatory acts perpetrated or condoned by the company. But, countered Justice Ling-Cohan, "If an employer fails even to discipline an employee in response to that employee's discriminatory conduct, the employer may be found to have condoned such improper conduct." She noted that the operator hadn't presented any evidence to contradict the story presented by the plaintiffs, "such as proof of a non-discriminatory policy being in place prior to the incident, or discipline of the guards who actually perpetrated the alleged improper conduct," so it would not be appropriate to dismiss the complaint prior to any pre-trial discovery.

The security contractor argued that it should not be held liable for the actions of its employees under the theory of "respondeat superior" (under which employers are usually held liable for harms committed by their employees while they are working), because the behavior alleged in this case was "not within the scope" of their employment and was personally motivated. Justice Ling-Cohan found that the contractor had failed to cite any cases supporting such an argument. "There is no evidence that Security did not condone the improper actions of the security guards in its employ," she wrote, and "it may be liable for its own inaction."

However, she found the statutory provision on boycotting and picketing was not intended to apply to this kind of case, a one-time occurrence of discrimination, and that the facts alleged were inadequate to support a claim of damages for intentional infliction of emotional distress, as a separate tort claim apart from the discrimination claim under the Human Rights Law. New York courts have set a very high bar for tort claims of intentional infliction of emotional distress, requiring outrageous conduct perpetrated over a period of time, a virtual campaign of harassment and humiliation. In this case, five minutes of offensive and threatening language was deemed insufficient to meet the test set by the state's appellate courts. Besides, the judge found, the emotional distress claim was first asserted against the franchise owner after the

one-year statute of limitations had passed. A.S.L.

## New York Court Dissolves Vermont Civil Union After Determining Parental Status Issues

In *Wesley v. Smith-Lasofsky*, 105819/10, NYLJ 1202508854947, at \*1 (Sup., NY, Decided July 18, 2011), New York County Supreme Court, in a ruling it termed as limited to the specific and unique facts of the proceeding, held that one partner to a Vermont civil union has no parental rights or obligations to a child adopted by the other partner when the couple separated prior to the adoption and no parental relationship was formed with the child by the non-adoptive parent. After reaching that issue, the court granted an order dissolving the civil union.

The plaintiff, Wesley, a New York resident, sought a declaratory judgment dissolving the Vermont civil union entered into between himself and the defendant, Smith-Lasofsky. The defendant joined in the application for the dissolution. Though the parties sought only the dissolution of the civil union, Justice Laura Drager determined that because the adoption of the plaintiff's biological niece took place during the term of the civil union, the court needed to consider the defendant's rights and obligations regarding the child before granting a judgment of dissolution.

Both Wesley and Smith-Lasofsky were New York residents at the time they entered into the civil union in Vermont in 2003. Later in 2003 the couple moved to Texas, and they subsequently ended their relationship without formally terminating their civil union. In 2005, Wesley adopted his biological niece in the state of Texas. Since 2006, Wesley has resided in New York, and Smith-Lasofsky in California. The latter has met the child on several friendly visits, but the child does not consider him to be a father figure.

The plaintiff did not request child support, and the defendant did not request custody or visitation rights. Accordingly, from the parties' perspective, the only issue before the court was the dissolution of their civil union.

The court, however, began its analysis by noting that under Vermont law, a civil union entitles a couple the same rights as a

married couple with respect to children either party becomes a natural parent of during the term of the civil union. The court also noted that the adoption order issued in Texas was entitled to full faith and credit.

As a result, the court then considered existing New York Court of Appeals decisions regarding Vermont civil unions and custody, most notably *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010).

In *Debra H.*, a woman became pregnant through donor insemination and then entered into a civil union with another woman. She subsequently gave birth to the child. The Court of Appeals held that the non-biological parent was entitled to custody rights. Justice Drager distinguished *Debra H.* in several ways. First, she noted that the present defendant is not seeking custody. Second, the court quoted Vermont's statutory language regarding civil unions to note that the law as written entitles both spouses to parental rights only when a child is naturally born to one of the spouses during the civil union. Adoption, which is what took place in the case before the court, is not covered by the statute. Third, unlike in *Debra H.*, the defendant is neither a biological nor an adoptive parent of the child.

The court also distinguished a second New York Court of Appeals case, *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006). In that case, the Court of Appeals imposed obligations of paternity on a spouse who was not biologically related to a child born to his former girlfriend, but who had "held himself out as the child's father" based on the mistaken belief that the child was his biological offspring. In this instant case, Justice Drager pointed out, the defendant had never held himself out as a parent to the plaintiff's niece, and she had never relied upon him as a parent.

For all these reasons, the court emphasized that its holding was a narrow one limited to the specific facts of the case.

In sum, the court, citing primarily to *Dickerson v. Thompson*, 73 A.D. 3d 52 (3rd Dep't 2010), easily determined that it had jurisdiction to dissolve the civil union, which was the basis for the action before the court. The court's additional consideration of rights with respect to an adopted child, even when the parties did not request such adjudication, provides another example of a New York court treating gay couples in civil unions or marriages in much the same

way we would expect opposite-sex couples to be treated. That is, resolving the potential rights and obligations with respect to a child adopted during the course of the civil union were considered an essential step before the dissolution would be granted. *John Teufel and Brad Snyder*.

### 3rd Circuit Affirms Denial of Private Cell for Transsexual Inmate

In *Louis v. Bledsoe*, 2011 WL 2938128 (July 22, 2011), the U.S. Court of Appeals for the 3rd Circuit affirmed per curiam a Pennsylvania district court decision denying the request of a federal prisoner identifying as "transsexual" who feared for his safety and sought a temporary restraining order and/or preliminary injunctive relief allowing him to cell alone for the remainder of his sentence.

The plaintiff-prisoner, Gerard Louis, had been raped twice before, albeit in a different prison, while in the custody of the Bureau of Prisons. The current action alleged that he was housed with an "aggressive homosexual inmate" who was sexually harassing him and engaging in sexually abusive behavior. After reporting this behavior to the prison authorities, he was almost immediately separated from his cellmate and transferred to the Special Management Unit ("SMU"), a more thoroughly policed unit with enhanced behavior restrictions.

Louis had testified that he still feared being raped within the SMU because dangerous inmates were also housed there. He also expressed dissatisfaction with the stricter restrictions imposed in the unit and considered them a punishment for speaking up about his victimization.

Accordingly, Louis requested his removal from the SMU and that he be allowed to finish the remainder of his sentence in a single cell assignment.

During lower court proceedings, prison officials testified that the sexual abuse protocol was immediately implemented upon hearing Louis's initial complaint, which included the separation from his current cellmate, and that the SMU was the only place in the prison where Louis's safety could be guaranteed.

The lower court held that because of this placement to a safer area in the prison, Louis could not show the irreparable harm required for preliminary injunctive relief

and that Louis's placement in the SMU was not unreasonable under the circumstances.

Louis filed an interlocutory appeal. The circuit court, issuing its decision per curiam, upheld the ruling of the district court, specifically finding that Louis could not point to evidence of any continuing danger beyond "speculation," and as such could not demonstrate the immediate irreparable injury required for preliminary injunctive relief to be afforded. *John Teufel*

### Trans Inmate Wins a Day in Court Against Rehab Center

U.S. District Court Judge Denise Cote ruled in *Wilson v. Phoenix House*, 10 Civ. 7364 (DLC) (S.D.N.Y., Aug. 1, 2011) [NYLJ 120251147, at \*1], that a transgender inmate could proceed with her constitutional and statutory discrimination claims against an in-patient substance abuse treatment center that denied her the opportunity to participate in the support group of her preferred gender. The opinion, published in the August 19 edition of the New York Law Journal, is particularly interesting in holding that the NY state human rights law's ban on housing discrimination could be applied to a residential treatment facility.

According to Sabire Wilson's complaint, she is a pre-operative male-to-female transsexual, who was arrested for drug possession on March 27, 2008. Under a plea agreement, she entered New York's Drug Treatment Alternative to Prison, under which she would voluntarily admit herself to a residential treatment facility instead of spending time in prison. She selected Phoenix House, allegedly because of its published policy of non-discrimination on the basis of sex or sexual orientation. When she was admitted to the facility on December 23, 2008, she told the staff about her gender identity. She was required to sleep in male facilities and use male bathrooms, but was allowed to dress as female.

Wrote Judge Cote, "In early January 2009, a senior counselor permitted Wilson to participate in a new gender-specific recovery group" that was all-female, but when the group started, some of the members complained about Wilson's participation and she was asked to leave. She appealed the decision to a counselor, who said she shouldn't have been given permission to participate in the first place, and refused to let her attend the group. When she asked

to speak to the counselor's supervisor, she was told that the supervisor supported the counselor's decision and it was final. She persisted in demanding admission to the group, and Phoenix House discharged her to the court. She currently resides at Southport Correctional Facility.

Wilson filed this federal court action on her own, alleging denial of equal protection of the law and violation of the state's Human Rights Law, as well as false advertising in violation of a federal statute. Phoenix House asserted that the case should be dismissed under the Prison Litigation Reform Act, which bans prisoner suits unless administrative remedies are first exhausted, and also claimed that as a private facility, it was not subject to constitutional suit. The defendant also sought dismissal of the false advertising claim as not being covered by the statute, and argued that the state human rights law did not apply to this situation.

Judge Cote agreed with Phoenix House that the advertising claim was not viable, finding that the federal statute was not intended to cover this kind of situation. But she rejected the argument that Phoenix House could not be sued on an equal protection claim, that the PLRA barred the suit, or that the human rights law did not apply.

Since Phoenix House was accepting criminal defendants under these plea bargain arrangements and was compensated by the state, there was enough of a "nexus" with the government to justify applying constitutional standards. As to the exhaustion requirement, it was up to the defendant to show that there were procedures available that Wilson did not use. She complained to her counselor, and her attempt to appeal to higher authority was rebuffed. There was no showing that the grievance and appeal system used by the NY Department of Corrections was applicable to this deferral treatment program.

Wilson's claim under the Human Rights Law was premised on a violation of the provision barring housing discrimination based on sex or sexual orientation, claiming Phoenix House failed to accommodate her gender identity. Phoenix House argued that the housing discrimination provision was aimed at landlords, not residential treatment facilities, but Judge Cote, relying on the statutory definition of "housing accommodation," pointed out, "Defendants

have not identified any support for their argument that Phoenix House is not the 'owner, lessee, sub-lessee, assignee, or managing agent of' a 'housing accommodation' within the meaning" of the relevant statutory provisions.

Judge Cote did not discuss the point, but it is important to this case that several New York courts have ruled that the state Human Rights Law's provisions on sex and sexual orientation discrimination include discrimination based on gender identity, even though that phrase is not expressed in the statute. Attempts to pass the Gender Identity Non-Discrimination Act (GEN-DA) have faltered in several sessions of the legislature. It is hard to understand why, when the courts have amended the law "de facto" to cover such cases, and don't seem to have taken the failure of the legislation as a reason to back away from their interpretation. To be on the safe side, however, where appropriate it would be a good idea in cases like these to also assert a claim under the New York City Human Rights Ordinance, which explicitly includes gender identity. That would depend, of course, on whether the defendant was operating within New York City.

In this case, as noted above, Wilson filed her court complaint on her own, without a lawyer. After all the papers were submitted on Phoenix House's motion, Wilson sent a letter to the court, asking that the case be dismissed without prejudice because she had limited access to the prison law library and was not in a position to fully oppose the motion. Judge Cote decided the motion anyway, since all the papers had been submitted, and commented, in a footnote: "Since Wilson filed her notice of voluntary dismissal after the defendant's February 9 motion to dismiss became fully submitted, she will be given three weeks from the date of this Opinion to indicate whether she still wishes to voluntarily dismiss the case."

Now that Wilson has largely defeated the motion to dismiss, she may want to reconsider if she can find voluntary counsel. The question whether a pre-operative transgender inmate of a residential treatment facility can participate in treatment as a member of her preferred gender strikes me as a significant legal issue. Perhaps a public interest firm concerned with transgender rights could take this case up, as a pro se prisoner is really not in a good position to conduct discover and litigate a sum-

mary judgment motion. Unfortunately, whoever made the decision to delay publication of the court's decision until virtually three weeks after it was issued may have precluded this option. A.S.L.

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### **National Organization for Marriage Strikes Out in Challenges to Maine & Rhode Island Disclosure Laws**

The National Organization for Marriage (NOM), a New Jersey-based non-profit political organization dedicated to fighting against same-sex marriage, has lost its constitutional challenges to campaign disclosure laws in Maine and Rhode Island. In a pair of opinions by Judge Kermit Lipez, the Boston-based U.S. Court of Appeals for the 1st Circuit ruled on August 11 that neither of the states' laws suffered from the constitutional defects alleged by NOM. *National Organization for Marriage v. McKee*, Nos. 10-2000 & 10-2049; *National Organization for Marriage v. Daluz*, No. 10-2304.

NOM's lawsuit parallels recent efforts by anti-gay forces in California and Washington State to avoid having to disclose the identity of donors and petition-signers in support of their efforts to oppose same-sex marriage and civil unions in referenda. Last year, the U.S. Supreme Court ruled in *Doe v. Reed*, 130 S. Ct. 2811 (June 24, 2010), that a state requirement to disclose the identity of petition-signers did not generally violate the 1st Amendment rights of advocacy organizations, finding that a state policy requiring speakers to identify themselves in electoral contests was sufficiently important to overcome whatever deterrent effect disclosure might have, in the absence of evidence of credible threats of harm.

In the Maine and Rhode Island cases, NOM made similar arguments that requiring disclosure of donors would deter political speech unconstitutionally, but it didn't get very far with District Judges Brock Hornby (Maine) or Mary Lisi (Rhode Island), neither of whom accepted the argument. Judge Hornby did grant NOM a small partial victory by finding one portion of the Maine statute unduly vague, but NOM lost that victory on appeal, because the court of appeals found, in light of the definition of the term "for the purpose of influencing" embraced by the Maine en-

forcement agency, that the term was not too vague to meet constitutional standards.

The court expended most of its effort on the opinion about Maine's law, and then produced a brief opinion on the Rhode Island law relying on its analysis in the Maine case. "After careful consideration of the parties' arguments and key precedents," wrote Judge Lipez for the court, "we conclude that Maine's laws pass constitutional muster. Central to our holding is the nature of the laws NOM challenges here. These provisions neither erect a barrier to political speech nor limit its quantity. Rather, they promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas. As the Supreme Court recently observed, such compulsory 'transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages,'" quoting from that court's ruling in *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010). "While we acknowledge that disclosure can, in some cases, unduly burden or chill political speech," Judge Lipez continued, "there is no evidence that the Maine laws at issue here have had such a deleterious effect on NOM or its constituents."

NOM attempted to use the *Citizens United* case, which struck down federal restrictions on expenditures by corporations in federal elections, to attack the Maine and Rhode Island statutes, attempting to use the "strict scrutiny" judicial review standard that the Supreme Court adopted for laws that curtail campaign expenditures. But the 1st Circuit found that this was not the appropriate standard, inasmuch as neither Maine nor Rhode Island was putting a limit on expenditures, much less prohibiting them. Rather, both states were merely trying to make the electoral process more transparent by ensuring that voters would have access to information about who was supporting particular efforts.

NOM played a significant role in helping to pass a referendum that repealed the Maine Marriage Equality Law, which was approved by the legislature and governor but never went into effect because petition signatures were filed before its effective date. In Rhode Island, NOM has actively lobbied the legislature to prevent enactment of a same-sex marriage bill, and was sufficiently successful that legislative

leaders withdrew the marriage bill, instead passing a civil union measure over the protest of gay rights forces in the state. These political successes by NOM undoubtedly undercut its credibility in arguing that the disclosure laws were curtailing its ability to influence policy decisions in either of those states.

Judge Lipez explained the rationale for requiring disclosure, derived from the Supreme Court's comments in *Citizens United*. That case was focused on expenditures to advocate against election of a particular candidate. "However, the information interest is not limited to informing the choice between candidates for political office," wrote Lipez. "As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages. In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the 'marketplace of ideas' has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus 'enables the electorate to make informed decisions and give proper weight to different speakers and messages,'" he wrote, quoting from *Citizens United*.

The court also found that the obligations imposed by the Maine and Rhode Island laws were not unduly burdensome, and that NOM could not challenge the dollar cutoff - set relatively low in both states - for reporting requirements, since that represented political judgments that the state legislatures were entitled to make, and that the judiciary should generally defer to such "plausible legislative judgments."

The court also rejected NOM's argument against attribution requirements — mandates that advertisements expressly identify their source of funding. "The requirements are minimal," wrote Lipez, "calling only for a statement of whether the message was authorized by the candidate and disclosure of the name and address of the person who made or financed the communication." The court pointed out that these "are precisely the requirements approved in *Citizens United*."

As to the dispute about the "vagueness" of requiring funding disclosure for measures intended to "influence" public

opinion, the court was satisfied by a Maine Commission interpretation, "in the context of ballot-question campaigns, to 'include communications and activities which expressly advocate for or against a ballot question or which clearly identify a ballot question by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the ballot question.'"

NOM was represented in these appeals by James Bopp, Jr., of the James Madison Center for Free Speech, a conservative litigation group. In the Maine case, state government attorneys enjoyed amicus support from the Maine Citizens for Clean Elections, and, in the Rhode Island case, from Gay and Lesbian Advocates and Defenders and Common Cause Rhode Island. A.S.L.

### **New Jersey Federal District Court Rejects Religious Discrimination Claim by Anti-Gay Supervisor**

U.S. District Judge Stanley R. Chesler granted summary judgment to defendant Pfizer, Inc., rejecting a religious discrimination claim brought by a "born again Christian" supervisor who was dismissed for making discriminatory remarks to employees. *Miller v. Pfizer, Inc.*, 2011 WL 3273620, 112 FEP Cases (BNA) 1637 (D.N.J., July 28, 2011) (unpublished opinion). Judge Chesler found that Garrett Miller's factual allegations fell short on two counts: he failed to satisfy the requirements to plead a prima facie case and he failed to show that the non-discriminatory reason articulated for the discharge by Pfizer was pretextual.

According to Judge Chesler's opinion, Miller began working for Pfizer in 1989 and was promoted to District Manager in 2007. In May 2007, an employee working under his supervision complained to her former manager about comments Miller made to her and other workers regarding sexual orientation, religion and gender. According to this employee, Miller had indicated, among other things, that he had "no respect for gays and lesbians," could not "believe that there are Jews in Paterson," characterized Jehovah's Witnesses as "a cult," spoke about preferences for hiring men, made negative comments about having children in interfaith marriages, and indicated management would not look favorably upon paternity leave. The company investigated

and determined that Miller had made the comments in question, some of which he readily admitted. The company's Employee Relations Panel recommended dismissal, and their recommendation was accepted because of Miller's "inappropriate and discriminatory remarks; continued failure to recognize the inappropriate and discriminatory nature of his remarks; and failure to show accountability for them."

Miller filed suit under the N.J. Law Against Discrimination in federal court (diversity jurisdiction) and during the pendency of the suit sought to raise Title VII claims as well, which were barred for failure to have filed a complaint with the EEOC. He claimed that the company discriminated against him based on his religious beliefs by wrongly terminating him and adopting policies that were more favorable to non-born-again Christians.

Applying the test adopted by the Supreme Court under Title VII (and followed by N.J. courts in construing their state's anti-discrimination law), Judge Chesler determined that in order to plead a *prima facie* case of religious discrimination, Miller would have to present evidence supporting the allegation that "others not within the protected class did not suffer similar adverse employment actions." "Defendant has met its burden at summary judgment by pointing to the absence of evidence to support the fourth requirement for a religious discrimination claim," wrote Chesler, "that similarly situated people not in his protected class were treated better than him." Although Miller made "conclusory statements" that such was the case, he did not offer any examples, and thus his "unsupported contentions are insufficient to defeat a motion for summary judgment."

Furthermore, Chesler found, Miller had not come forward with any evidence "that would negate or even cast doubt on Pfizer's legitimate and non-discriminatory reason for terminating his employment." In an employment discrimination case, the employer can rebut any inference of discrimination raised by the *prima facie* case by articulating a non-discriminatory reason for its action. In this case, Miller's violation of the company's Business Conduct and Harassment Policies was proffered as the reason for his discharge. The court found that Miller failed to provide any evidence that would permit a jury to believe that Pfizer's articulated reason was pretextual. A.S.L.

### **The Obama Administration's Temporary "Fix" for the Bi-National Same-Sex Couple Problem**

An important part of the federal-level gay rights agenda has been attempting to find a way around the failure of federal law to acknowledge the reality of bi-national same-sex couple families for purposes of immigration law. Nobody knows exactly how many people are affected by this, but there are enough bi-national same-sex couples for this to have emerged as a real issue. A foreign national comes to the U.S. on a student visa, temporary work visa or tourist visa and while here becomes involved in a serious same-sex relationship. In some cases, this leads to registration as a civil union or domestic partner or a marriage under the law of a jurisdiction that provides same-sex marriage.

Normally, when a foreign national marries an American citizen, the American citizen is able to sponsor them for permanent residency in the United States, eventually leading to citizenship. However, the law as written does not extend this right to non-marital couples, and under the Defense of Marriage Act same-sex couples who marry do not obtain any legal status for their relationship as a matter of federal law. As more and more jurisdictions are providing a recognized legal status for same-sex couples (in a matter of weeks this summer, New York enacted a Marriage Equality Act and Rhode Island enacted a Civil Union Act, amidst serious discussion about legislative activity on same-sex marriage next year in Maryland, new litigation seeking same-sex marriage in New Jersey, the first stage of an effort to re-enact same-sex marriage in Maine by petitioning for a ballot question, and perhaps the litigation end-game in the struggle to strike down Prop 8 and restore the right to same-sex marriage in California), the issue whether bi-national same-sex couples can stay together in the U.S. has become much more visible.

After several intimations over the past few months that the Obama Administration was inching towards an administrative solution to the problem, most prominently including a June 17, 2011, memorandum by Director John Morton of the U.S. Immigration and Customs Enforcement (ICE) agency on priorities in focusing enforcement activities, the administration finally

went public with a new approach on August 18, in a letter by the Secretary of Homeland Security, Janet Napolitano, to U.S. Senate Majority Leader Harry Reid. Reid had written on behalf of himself and a group of other senators who are co-sponsors of the DREAM Act, legislation intended to provide favored immigration status for foreign nationals who serve in the U.S. Armed Forces and for individuals brought to the U.S. as children who have grown up here and sought and obtained higher education in the U.S., inquiring about what could be done under existing law to protect these individuals in the absence of legislative action.

Napolitano's letter stresses that the administration has been shifting enforcement priorities to concentrate on deporting undocumented foreign nationals who were involved in criminal activity, and the proportion of such cases has increased sharply on the deportation case docket. The letter now says that Director Morton's memo is "being implemented to ensure that resources are uniformly focused on our highest priorities." Instead of merely being a policy expression for the guidance of regional offices in targeting enforcement actions, the memo will be the basis for a concerted effort to coordinate what is going on around the country and, on a case-by-case basis, to grant relief.

Wrote Napolitano: "Together with the Department of Justice (DOJ), we have initiated an interagency working group to execute a case-by-case review of all individuals currently in removal proceedings to ensure that they constitute our highest priorities. The working group will also initiate a case-by-case review to ensure that new cases placed in removal proceedings similarly meet such priorities. In addition, the working group will issue guidance on how to provide for appropriate discretionary consideration to be given to compelling cases involving a final order of removal. Finally, we will work to ensure that the resources saved as a result of the efficiencies generated through this process are dedicated to enhancing the identification and removal of aliens who pose a threat to public safety."

Napolitano cautioned that the new approach "will not provide categorical relief for any group," but instead will involve a case-by-case review to determine whether it serves enforcement priorities to deport

particular individuals. What Napolitano did not say in the letter, but what a spokesperson said in a nationwide press briefing after the letter was released, was that one priority under immigration law is to keep families together, and that pursuant to Morton's June 17 memo, the administration is taking the position that same-sex couples can constitute a family for this purpose. Avoiding the effect of DOMA means that they must avoid making some categorical rule of recognizing same-sex marriages and other legal statuses, such as registered civil union or domestic partners, as this would likely provoke a lawsuit from the usual anti-gay sources. What they can do within the broad requirements of existing law, which does delegate substantial discretion to the Secretary in terms of administration, is to embrace the broader concept of family - which does not rest on legal distinctions of marriage, civil union, DP - and to take the view that U.S. enforcement priorities would not be advanced by breaking up law-abiding families.

This is a temporary fix because it is not embodied in a formally adopted regulation, much less a legislated statute. It is more like an announcement of an approach for interpretation and the exercise of discretion. It doesn't really create an enforceable right of any kind, and like all administratively adopted policies, it will only continue in effect after the next presidential election if whichever administration is in place beginning January 21, 2013, wants to continue it. For now it appears likely to provide welcome relief to numerous bi-national same-sex couples. Inclusion of this protection as part of an immigration reform statute would need to remain a priority in order to "lock in" this protection to the extent possible for the long term. Striking down DOMA, ironically, while helping same-sex couples who are married and thus could claim equal rights under existing statutory law, would not necessarily help civil unions or domestic partnerships or cohabiting same-sex couples who have not sought a legal status, so the issue may remain alive even if current litigation ends up invalidating DOMA.

The new policy seemed immediately effective as several cases were quickly resolved to allow foreign national partners of gay U.S. citizens to remain in the country. Those receiving media attention included Alex Benshimol, who was facing deporta-

tion to Venezuela, and Manuel Guerra, facing deportation to Mexico. A.S.L.

## Federal Civil Litigation Notes

**Eighth Circuit** – A unanimous 8th Circuit panel ruled in *Lopez-Amador v. Holder*, 2011 WL 3557854 (Aug. 15, 2011), that a Venezuelan lesbian applicant was not entitled to asylum or withholding of removal based on her sexual orientation or political views. The petitioner, who lost before the Immigration Judge and the Board of Immigration Appeals, relied on one incident in which she and her same-sex partner were harassed by a police officer in a park, together with State Department Country reports about violence against gays by unidentified perpetrators, but the court agreed with the BIA and the IJ that these were not sufficient to show that she had suffered official persecution or had a reasonable fear of likely persecution on this ground if removed back to Venezuela. She also argued that she and her family were opponents of the Chavez regime, but in the view of the court she did not prove that she would be individually targeted for persecution on that account. Shortly before she came to the U.S. on a tourist visa in 2002, she had been at a political rally during which government forces had fired on the crowd, but she was not injured and there was no evidence she was singled out, either then or during the routine police checkpoints she encountered afterwards. There was no evidence her mother and other relatives left behind in Venezuela had encountered persecution due to their political views.

**Sixth Circuit** – A 6th Circuit panel ruled on August 9 that a man discharged by the City of Dearborn Recreation Department after he filed a series of sexual harassment complaints against his male supervisor had not alleged sufficiently severe or pervasive harassment to state a sex discrimination claim under Title VII of the Civil Rights Act of 1964, and that the man's long disciplinary record negated his claim that his discharge was in retaliation for filing the harassment complaints. *Galeski v. City of Dearborn*, 2011 WL 3568888 (not officially published). Galeski alleged that his male supervisor had flirted, complimented him on his hair, and made some inappropriate comments, but the court found that the su-

ervisor never directly solicited Galeski for sex or subjected him to unwanted touching, and that the incidents were isolated and sporadic over a two year period. As such, they did not adversely affect Galeski's terms and conditions of employment. While the court found that Galeski satisfied several prongs of the test for a retaliation claim, having been the target of various disciplinary actions in addition to discharge within close temporal proximity to his harassment complaints, nonetheless the court found that Galeski's admitted violation of work rules made it impossible for him to meet the fourth prong, which would require him to show that the reasons articulated by the city for his discharge were pretextual. Circuit Judge Damon Keith wrote the opinion for the court.

**Alaska** – U.S. District Judge Ralph R. Beistline ruled on June 30 that a statute enacted by Alaska in 2010 to attempt to make the Internet safe for children was unconstitutional. *American Booksellers Foundation for Free Expression v. Sullivan*, 2011 WL 2600734 (D. Alaska). The statute was similar to enactments in other states that had been ruled unconstitutional, making the decision easy for Judge Beistline, who asserted: "The government may not reduce the adult population to only what is fit for children." He found the statute easily distinguishable from an Ohio statute that had been upheld, as that one applied only to "personally directed communication between an adult and a person that the adult knows or should know is a minor," whereas the Alaska law applied to any communication on the internet that might be deemed "harmful" to a minor who might be able to access it, regardless whether the individual or entity that placed the communication on-line knew the ages of recipients. Commented Judge Beistline: "There are no reasonable technological means that enable a speaker on the Internet to ascertain the actual age of persons who access their communications."

**California** – U.S. District Judge Claudia Wilken (N.D.Cal.) issued an order July 15 certifying the requested plaintiff class in *Dragovich v. United States Department of the Treasury*, NO. C 10-01564 CW. The action challenges the refusal of the California Public Employees' Retirement System to allow state employees to enroll their same-sex domestic partners or spouses for long-term care coverage routinely available

to the different-sex spouses of public employees in the state. CalPERS has resisted extending access to the program for tax reasons, having been advised by the U.S. Treasury (lead defendant in the case) that due to Section 3 of the Defense of Marriage Act (DOMA), CalPERS would lose its favored status as a qualified plan under Tax Code Section 7702(B) if access were extended to plaintiffs. Earlier this year Judge Wilken denied the government's motion to dismiss the original complaint, and has opined that there is no need for the defendants to file a separate answer to the first amended complaint. "Without conceding arguments presented in their motion to dismiss Plaintiff's First Amended Complaint," she wrote, "Federal Defendants stated that they did not oppose the motion to certify the class," which includes "Present and future CalPERS members who are in legally recognized same-sex marriages and registered domestic partnerships together with their spouses and partners, who as couples and families are denied access to the CalPERS Long-Term Care Program on the same basis as similarly situated present and future CalPERS members who are in opposite-sex marriages, and their spouses." Because the Department of Justice will no longer defend Section 3 of DOMA against constitutional challenges, the Bipartisan Legal Advisory Group of the House of Representatives is an Intervenor-Defendant in the case. The sheer size of the class makes this a big-ticket DOMA challenge.

**California** – The U.S. Citizenship and Immigration Service denied an application by Anthony John Makk, a citizen of Australia who has a valid California marriage with U.S. citizen Bradford Wells, to be considered for permanent residency in the United States as a spouse of a U.S. citizen. Citing the Defense of Marriage Act, Section 3, the Service took the position in a decision issued July 26 that it could not recognize the spousal relationship between the two men, who have lived together for 19 years. Makk is the primary caregiver for Wells, who is living with HIV. The July 26 ruling also specified that Makk must depart the United States by August 25. Makk entered the U.S. legally and has remained lawfully under a series of visa extensions based on his business interests in the United States, but had applied for permanent residency as his visa authorization was expiring. Although the president and the attorney general have

determined that Section 3 of DOMA is unconstitutional, the executive branch is continuing to enforce it until that judgment is confirmed in a definitive court ruling. Although the director of Immigration Control and Enforcement issued a memorandum in June directing agents to make enforcement decisions in light of priorities for removing criminals in line with national security and public safety concerns, and to take various humanitarian factors into account, nonetheless the Service found no reason to use such discretion to allow Makk to remain in the United States. U.S. Rep. Nancy Pelosi has contacted immigration official on behalf of Makk and Wells, and her spokesperson indicated that she "will be working to exhaust all appropriate immigration remedies that are open to pursue. After deportation proceedings begin, it is possible for a "private bill" by a member of Congress to provide a mechanism for overriding enforcement in a particular case, but in light of the balance of power in the House of Representatives, it is uncertain that this method will be available. *SFGate.com*, Aug. 9. However, the subsequent announcement by Secretary of Homeland Security Janet Napolitano about case-by-case review of deportation decisions to, among other things, avoid breaking up families, suggests there may still be hope for Makk.

**California** – In the ongoing and seemingly never ending saga of *Perry v. Schwarzenegger*, now known as *Perry v. Brown*, U.S. District Judge James Ware heard oral argument on August 29 on a motion by the plaintiffs to allow the video recording of the trial to be made public. The original trial judge, now-retired, Vaughan Walker, had ruled with permission from the 9th Circuit that the trial proceedings could be broadcast live on a closed-circuit transmission to several federal courthouses around the country, in light of the intense national interest in the case, which concerned the constitutionality of Proposition 8, a California initiative amendment that placed a different-sex-only definition of marriage in the state constitution and effectively displaced the California Supreme Court's prior ruling that same-sex couples in the state were constitutionally entitled to marry. The defenders of Proposition 8 objected to televising the trial, suggesting that their expert witnesses would be intimidated and refuse to testify. The U.S. Supreme Court issued an order at the request of the Pro-

ponents blocking the televising, but Judge Walker had the trial videotaped for his own use. After he retired, Judge Walker used selected clips from the videotape to illustrate some lectures he was giving, leading the Proponents to seek an order that he return the videotape to the court and that its public exhibition be prohibited. The plaintiffs, on the other hand, sought to have the videotape made freely available, pointing out that the transcript of the trial was available, had been treated to a dramatic presentation on youtube.com, and was about to be presented publicly in live theatrical presentations with prominent actors. Judge Ware indicated at the end of the August 29 hearing that he would rule promptly on the various motions concerning the videotapes.

**Connecticut** – On August 15, counsel for the House of Representatives filed their response to the motion for summary judgment in *Pederson v. Office of Personnel Management*, Case No. 3:10-cv-01750 (VLB), pending in the U.S. District Court in Connecticut. At the same time, counsel for the House filed a separate motion to dismiss the action. Gay & Lesbian Advocates & Defenders (GLAD) represents the plaintiffs, six married same-sex couples and one widower from the states of Connecticut, New Hampshire and Vermont, who are challenging the denial of various specified federal rights and benefits to them due to Section 3 of the Defense of Marriage Act, which precludes federal agencies and programs from recognizing same-sex marriages for any purpose. GLAD's response to the motion to dismiss is due on September 14. The case is pending before District Judge Vanessa L. Bryant, who was appointed to the court in 2007 by President George W. Bush. GLAD's co-counsel on the case are Jenner & Block LLP (Washington, D.C.), Horton, Shields & Knox (Hartford), and Sullivan & Worcester LLP (Boston). Co-lead attorney Mary L. Bonauto of GLAD stated, "We see no new arguments in this brief that can possibly justify DOMA's discrimination against married same-sex couples. We are intent on moving this case forward and ending the serious harms that our plaintiffs and other families around the country are enduring because of DOMA." GLAD also represents plaintiffs in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010), pending in the 1st Circuit, in which U.S. District Judge Joseph L. Tauro ruled last summer



that Section 3 is unconstitutional. Counsel for the House has also intervened in Gill to defend Section 3, while the Justice Department now maintains that Judge Tauro's holding is correct.

**Florida** – The ACLU of Florida has reached a settlement in its suit on behalf of a gay man who was arrested by Miami police after phoning in a 911 call upon observing undercover police officers beating a gay man in South Beach. According to plaintiff Harold Strickland, the officers spotted him making the 911 call, approached him, took his cell phone, and arrested him false charges of loitering and prowling, taunting him with anti-gay epithets while transporting him in handcuffs to the police station, and telling him that he could be made to disappear. ACLU of Florida sued on Strickland's behalf in U.S. District Court for the Southern District of Florida, asserting that Miami Police have engaged in harassment of gay men on the beach and have a practice of retaliating against individuals such as Strickland who report police misconduct. Under the terms of the settlement, the City of Miami Beach will pay Strickland \$75,000 (including damages and attorney fees) and will enact new policies regarding reporting of police misconduct, as well as training of police officers to avoid harassment at Flamingo Park where this incident occurred. ACLU of Florida LGBT Rights Attorney Shelbi Day worked on the case. *ACLU Press Advisory*, Aug. 1. The *Miami Herald* previously reported on July 25 that City Manager Jorge Gonzalez announced that the two police officers involved in the case, Frankly Forte and Eliut Hazzi, would be dismissed, although they would have a right to hearing on the dismissal.

**Michigan** – On November 9, 2008, several activists disrupted a service at Mount Hope Church in Lansing to protest the church's anti-gay advocacy. The church filed suit in U.S. District Court naming several individuals and two organizational defendants, Bash Back! And Bash Back! Lansing, claiming violations of 18 U.S.C. sec. 248 and common law trespass. After the attorney originally representing defendants withdrew from the case, the court ordered defendants, now representing themselves, to provide contact information to the church's counsel by a certain date or risk default. All the individual defendants complied with the court's order, but

there was no response from the organizational defendants, so Judge Robert Holmes Bell declared the organizations in default and issued an order permanently enjoining them from conducting protests on the plaintiff's property and indeed on any church property in the U.S. The injunction also extends to impeding access or destroying property. The named defendants agreed to a consent order granting a permanent injunction against them as well, and also ordering various individual defendants to pay damages for their actions. *Mount Hope Church v. Bash Back!*, Case No. 1:09-CV-427 (W.D.Mich., orders entered July 11, 2011).

**Minnesota** – Minnesota's Campaign Finance and Public Disclosure Board issued two opinions on August 16 finding that neither the Minnesota Family Council nor the National Organization for Marriage had violated state law requiring reporting of lobbying expenses, even though the organizations had apparently collaborated on running television advertisements aimed at advancing the goal of enacting an anti-marriage constitutional amendment in Minnesota and using the issue of same-sex marriage to oppose liberal political candidates in the state. The Board determined that the expenditures did not involve legislative lobbying, as that concept is contained in the Minnesota law, so no reporting was required. The Board ordered the cases dismissed.

**Montana** – *Christian Legal Society Chapter at University of Montana School of Law v. Eck* has been settled. CLS was suing for official recognition, which had been denied by the law school on the ground that CLS's restrictive membership policy violates the school's anti-discrimination policy. The U.S. District Court had ruled against the plaintiffs, who had filed an appeal with the 9th Circuit. The appeal will be withdrawn as a result of a settlement agreement signed by the defendants on August 3. Under the terms of the settlement, CLS-UM will be treated as an "Independent Student Organization" and will enjoy the right to meet on campus and use campus channels of communication. It is not clear from the text of the settlement agreement what all the distinctions are between an ISO and an officially recognized student organizations, but from the details of the settlement agreement it looks as if CLS-UM will enjoy something close to virtual recognition,

including possible entitlement to funding, without having to modify its membership policies. The University also undertakes to commit the Student Bar Association to a viewpoint neutral approach to its decisions on funding activities and organizations. Of course, Alliance Defense Fund represented CLS-UM in the lawsuit and negotiating the settlement. ADF Press Release, August 10.

**New York & California** – New York Attorney General Eric T. Schneiderman has filed an amicus brief in the pending case of *Windsor v. United States*, No. 1:10-cv-8435-BSJ-JCF (S.D.N.Y.), in which plaintiff Edith Windsor is suing for a refund of the estate taxes paid upon the death of her spouse on the ground that she should have been entitled to the marital deduction, since they were married in Canada and New York recognizes the marriage. The Internal Revenue Service assessed the tax relying on the Defense of Marriage Act (DOMA), Section 3, which bars the federal government from recognizing same-sex marriages for purposes of federal law. Schneiderman's amicus brief argues, in line with the plaintiff's main brief, that Section 3 of DOMA unconstitutionally discriminates against gay people by refusing to recognize their marriages and imposing unequal treatment based on sexual orientation and sex. Ironically, in light of a DOJ amicus filing in a West Coast case, *Golinski v. Office of Personnel Management*, it seems likely that the Justice Department will be filing a similar brief in this case. (Preparation to file a motion to dismiss or answer in this case led the Justice Department to study the issue anew and recommend to the President that DOJ not defend Section 3.) The statute is being defended in both cases by an Intervenor, the House Bipartisan Legal Advisory Group (BLAG), represented by former Solicitor General Paul Clement. Clement filed a brief in *Golinski* in response to the DOJ brief, arguing that DOJ's argument for heightened scrutiny of an equal protection claim is improperly made at the district court level, because the court is bound by old circuit precedents that predate the Supreme Court's rulings in *Romer v. Evans* and *Lawrence v. Texas*, and that have never been overruled or disavowed by the 9th Circuit in the context of an equal protection challenge. He also argued that sexual orientation claims should not be subjected to heightened scrutiny, contending

that the tests used by the Supreme Court to determine whether heightened scrutiny should apply are not met in the case of sexual orientation. Clement contended that gays are not a politically powerless group, noting passage of the Hate Crimes Law and the DADT Repeal Act, and the Obama Administration's changed direction on defending DOMA. As a result, he argued, politically powerful gay people do not need the assistance of heightened judicial scrutiny, but can resort to the political process to secure the repeal of statutes that they find contrary to their interests. During August, the Obama Administration took the next step in this process by filing a brief supporting Edith Windsor's motion for summary judgment, arguing that DOMA Section 3 is unconstitutional, that Windsor's marriage should be recognized, and thus that she is entitled to judgment ordering the return of the estate tax she was required to pay. Also, on Aug. 22, counsel for Windsor filed with the court an affidavit by Lisa M. Diamond, a professor who asserted under oath that the brief filed by Clement in defense of DOMA Section 3, which cited her research findings on the nature of same-sex sexuality, had misconstrued and distorted her research findings, which, affirmed Diamond, "do not support the propositions for which BLAG cites them." Clement sought to argue that sexual orientation could not be characterized as an "immutable characteristic" for purposes of analyzing the level of judicial scrutiny for an equal protection challenge to the law. Diamond pointed out that her research went not to the issue of sexual orientation as such but rather to the issue of how individuals experience their sexual attractions and thus label themselves with respect to sexuality. Diamond points out in her affidavit that the BLAG brief takes quotations out of context in her published work, thus misrepresenting their meaning.

**Pennsylvania** – In *Cozen O'Connor v. Tobis*, now pending in the Eastern District of Pennsylvania, the law firm Cozen O'Connor seeks a declaration about how to dispose of money in a profit sharing plan in the account of a deceased partner, Sarah Ellyn Farley, who was married in Canada to Jennifer Tobits. Farley was estranged from her parents, but when she fell fatally ill, Tobits summoned the parents, who allegedly did the old "move in and take over routine," persuading Farley on the day be-

fore she died to execute a form designating them as beneficiaries on her profit sharing account, standing at a bit over \$40,000. After Farley died and the designation form came to light, Tobits protested that a married person could not execute such a designation with the permission of her spouse. The parents argued that because the profit-sharing plan was governed by the federal Employee Retirement Income Security Act (ERISA), Tobits could not be recognized as a spouse for purposes of the plan, and the firm, as a fiduciary, would not pay out the money unless a court would determine who is entitled to get it. The parents claim that Farley checked off a box on the form indicating she was single, and thus did not consider herself to be married, but there is some controversy about whether Farley was under "undue influence" at the time, whether Farley actually signed the form, and whether Tobits ever executed a relevant form concerning the plan. Settlement talks have resulted in several extensions of litigation deadlines, and meanwhile the case won national legal media attention. This account is based on articles that appeared on law.com and in the *Philadelphia Daily News* on August 3. A.S.L.

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## State Civil Litigation Notes

**California** – The California Supreme Court set oral argument in *Perry v. Brown* for September 6, the first day of its fall term. This is the certified question from the 9<sup>th</sup> Circuit of whether the Proponents of Proposition 8 have standing as a matter of California law to defend the constitutionality of Prop 8 in a federal constitutional challenge. The Proponents were granted Intervenor-Defendant standing by District Judge Vaughan Walker so that a defense could be mounted in the trial court, inasmuch as none of the original named defendants were willing to defend the constitutionality of the initiative amending the California Constitution limiting marriage in California to the union of one man and one woman. After Judge Walker struck down Prop 8 as violating the 14<sup>th</sup> Amendment, and none of the named defendants signified any interest in appealing, the Proponents filed an appeal, and the threshold question on appeal is whether they have standing to bring an appeal on their own without the participation of any

of the named defendants. After hearing oral argument in December, the 9<sup>th</sup> Circuit decided that before it could determine whether Proponents had standing, it needed a definitive answer from the California Supreme Court as to whether Proponents had standing as a matter of state law. The California Supreme Court accepted the certified question and set a briefing schedule, and has now scheduled oral argument. The constitutional amendment enacted by Proposition 8 remains in effect due to a stay of Judge Walker's decision issued by the 9<sup>th</sup> Circuit panel.

**Illinois** – Sangamon County Circuit Judge John Schmidt ruled on August 18 that Catholic Charities, which have operated foster care and adoption agencies by contract with the state of Illinois, were not entitled to have their contracts renewed. After Illinois enacted a civil union law that was to take effect in June, the issue arose whether it was appropriate for the state to continue contracting with Catholic Charities to provide these services, since they would not deal with same-sex couples as potential foster or adoptive parents. After ascertaining that the agencies operated by Catholic Charities would continue to take that position, the state made it known that it would remove children from those agencies and transfer them to agencies that would treat gay couples without discrimination, allowing Catholic Charities' contracts to lapse. Catholic Charities filed suit, asserting some sort of right to have their contracts renewed, for which the court found no basis in law. "Plaintiffs do not have a legally recognized protected property interest in the renewal of its contracts for foster care and adoption services," wrote Judge Schmidt. "Plaintiffs are not required by the State to perform these useful and beneficial services. There are no statutory terms creating a property interest in the Plaintiffs' contracts. Thus, the Plaintiffs' contract with the State, which is renewable annually, is a desire of the Plaintiffs to perform their mission as directed by their religious beliefs. The fact that the Plaintiffs have contracted with the State to provide foster care and adoption services for over forty years does not vest the Plaintiffs with a protected property interest... No citizen has a recognized legal right to a contract with the government." The court dissolved a preliminary injunction which it had issued to maintain the status quo pending deter-

mination of cross-motions for summary judgment, and granted summary judgment in favor of the State and against the plaintiffs. The court noted that since it had found no property right at stake, there was no need to determine the plaintiffs' claims that non-renewal of their contracts violated the Illinois Human Rights Act, the Illinois Religious Freedom and Protection and Civil Union Act, or the Illinois Religious Freedom Restoration Act. One suspects an appeal is in the works. *Catholic Charities v. State of Illinois*, No. 2011-MR-254 (7<sup>th</sup> Judicial Circuit, Aug. 18, 2011).

**Illinois** – Cook County Circuit Judge Michael Heyman has ordered that the state issue corrected birth certificates to Laruen Grey, Victor Williams, and Nicholas Guarino, co-plaintiffs in a lawsuit brought by the ACLU of Illinois contesting the refusal of the state to issue new certificates showing the preferred gender of transgender individuals in the absence of proof of surgical alteration of their bodies to the preferred gender. After the suit was filed in May, the state argued that the lawsuit was unnecessary because a new rule that would not require proof of surgery was in the works. The judge order issuance of the new certificates as an earnest of good faith by the state pending implementation of the new rule. The state's compliance would apparently end the plaintiffs' standing to contest the existing rule. John Knight, director of the ACLU of Illinois LGBT Project, who represents the plaintiffs, said in a press release that while ACLU was happy for their clients, it still sought some kind of written resolution of the case to make certain an appropriate new rule would be implemented, pointing out that the state has given assurances of a change in the past without following through. *Advocate*, July 20.

**Illinois** – The website *stltoday.com* reported on Aug. 15 that the Illinois Department of Human Rights has found "substantial evidence" that two bed and breakfast inns that refused to host civil union ceremonies for a gay male couple after the Illinois Civil Union Act went into effect on June 1 violated the state's human rights law. The allegation is that both facilities, when contacted in February to schedule the blessed event in June, indicated they only hosted marriage ceremonies for different-sex couples. The complainants, Todd and Mark Wathen of Mattoon, IL, instead had the ceremony on June 6 in their

back yard. They indicated that they gave up trying to book an event after being turned down by two establishments and failing to find a mutually agreeable date with a third that was willing to book the event.

**Indiana** – The tragic stage collapse incident at the Indiana State Fair on August 13 had many victims. One among the dead was Tammy Van Dam, who left a same-sex partner, Beth Urschel. The *Wall Street Journal* reported on August 23 that Urschel had filed a wrongful death action in Indiana against the state and several corporations associated with the event. The *Journal* article reported that the women were married in Hawaii and that the case would be a test of whether Indiana would recognize same-sex marriages. That struck this reader as absurd. Hawaii does not have same-sex marriages. They recently enacted a Civil Union Act, but were the first state to enact a legal status open to same-sex couples, reciprocal beneficiaries, which might be the status upon which Urschel is basing her claim. Reciprocal beneficiaries under Hawaii law have the right to sue for wrongful death. So the issue in the case may actually be whether an Indiana court would treat Urschel as a "widow" for purposes of the state's Wrongful Death Act under the doctrine of comity. Since reciprocal beneficiary status is not marriage or even like it, as reciprocal beneficiaries enjoy a rather short list of enumerated legal rights, the federal Defense of Marriage Act and Indiana's own mini-DOMA (IC 31-11-1-1) would appear to be irrelevant to this issue, unless a court were to decide that the mini-DOMA automatically limits the meaning of the term "widow" as used in the Wrongful Death Act, which provides that the proceeds of a wrongful death suit brought by the personal representative of the deceased shall be for the exclusive benefit of the widow or widower. It will be interesting to see how this turns out.

**Michigan** – With three justices dissenting, the Michigan Supreme Court refused to grant review in *Harmon v. Davis*, 2011 WL 2978041 (July 22, 2011), in which the Court of Appeals held (in an unpublished opinion) that a co-parent had no standing to seek custody of the children she had been raising together with her former partner, the children's biological mother. Although the Michigan Court of Appeals has recognized the concept of equitable parenthood, in *Atkinson v. Atkinson*, 408

N.W.2d 516 (1987), the Supreme Court, in the subsequent case of *Van v. Zaborik*, 597 N.W.2d 15 (1999), gave the doctrine a narrow construction, holding that it does not extend to parties who were never married to one another. In this case, Renee Harmon and Tammy Davis lived as partners for 19 years, during which Davis bore three children through donor insemination. Because Michigan does not allow second-parent adoption, Harmon could not adopt the children. After the relationship ended, they had some sort of parenting agreement under which Harmon continued to see the children for a time, but eventually that broke down, and Harmon sued for custody and visitation rights. The trial court, while rejecting the argument that Harmon could establish third-party standing to seek custody, opined that she might be able to have standing based on her past assumption of parental duties, and set a hearing. Davis appealed, and won a reversal from the court of appeals, holding that there was no available legal theory under which Harmon could establish standing to seek custody. Harmon sought to attack this ruling on constitutional as well as interpretive grounds. In dissenting from the Supreme Court's denial of review, Justice Marilyn Kelly wrote that the case "involves issues of great jurisprudential significance." After briefly describing the case and the legal issues, she concluded, "Plaintiff's application raises significant constitutional questions that this Court has not yet considered. Courts across the country are grappling with similar issues. Their jurisprudential significance is underscored by the fact that the ACLU Fund of Michigan and Family Watch International have already filed briefs amicus curiae. Yet the majority today declines to consider plaintiff's arguments and lets stand a peremptory order from the Court of Appeals that does not address plaintiff's constitutional claims. This case cries out for a ruling by the state's highest court."

**New York** – Opponents of marriage equality in New York filed a lawsuit in Livingston County Supreme Court on July 25, seeking nullification of the Marriage Equality Law that had been enacted by the legislature on June 24, based on the theories that various private meetings held prior to enactment violated the state's Open Meetings Law, and that the Message of Necessity issued by Governor Andrew

Cuomo so that he measure could be voted upon on June 24 was invalid. *New Yorkers for Constitutional Freedoms v. New York State Senate*. The plaintiffs are represented by Liberty Counsel, a right-wing litigation group based on Lynchburg, Virginia, the home of the late Rev. Jerry Falwell's Liberty University, with Joseph P. Miller of Cuba, New York, on the complaint as local counsel. The complaint makes the odd argument that dinner meetings held in the Executive Mansion by Governor Cuomo with Republican Senators at which the governor sought support for the bill are "public meetings," that meetings of the Senate Republican Caucus from which press and lobbyists were excluded were "public meetings" because the Republican Caucus constitutes a quorum of the Senate, and that closure of certain corridors in the capitol building that made it difficult for lobbyists to accost Senators during the final days of the process also violated the Open Meeting law – as if the anti-marriage equality lobbyists did not have means to communicate with Republican senators during that period. The state constitution provides that a printed version of proposed legislation in its final form must be in the hands of legislators at least three days prior to a floor vote, unless the governor certifies in writing and under "the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon." In this case, the bill had been in the hands of legislators for several months, but last minute amendments negotiated by representatives of the governor and a handful of Senate Republicans were not distributed in their final form until June 24, the date of the vote. The governor made the written certification, the vote took place, and the bill was signed into law that night. It seems unlikely that an action confided to the government to act based on his "opinion" would be subject to judicial review. It is also ironic that opponents of marriage equality would go to court to stop a bill enacted by a legislature from going into effect, inasmuch as opponents of marriage equality are most critical about same-sex marriage litigation, decrying it as undemocratic. On the other hand, one must acknowledge that the anti-marriage equality groups generally argue that the question whether same-sex couples should be allowed to marry should be decided by referendum, a process in which their propaganda machine would be at its most effective.

**Pennsylvania** – Lambda Legal has announced the settlement of a discrimination claim it filed with the Philadelphia Commission on Human Relations against the city's Department of Human Services and the Youth Study Center. The suit was filed on behalf of a transgender teen who had been remanded to DHS by a Family Court Judge to provide her with all appropriate medical treatment for Gender Identity Disorder. According to the allegations of the discrimination charge, the staff failed to treat the teen in accord with her gender identity, instead referring to her by her previous male name and using male pronouns, refusing her access to clothing and grooming materials necessary for her to live in her preferred gender, and subjecting her to verbal harassment. Under the terms of the settlement, the Department will revise policies and train staff, and will promise to accord gender-appropriate treatment to transgender individuals using the agency's services. Lambda staff attorney Flor Bermudez is handling the case, which was filed as *L.P. v. Philadelphia*.

**Tennessee** – In *K.B.J. v. T.J.*, No. E2010-01157-COA-R3-CV (Ct. App. Tenn., Knoxville, Aug. 26, 2011), the Tennessee Court of Appeals rejected a trial court's decision to award primary residential child custody to the husband in a divorce action, finding that the trial judge gave inadequate weight to evidence "that Husband had an uncontrolled problem with internet pornography and with extramarital relationships initiated through the internet, all of which he tried to falsely deny or portray as innocent." The court pointed out that despite the husband's denials of various details alleged by the wife, "Husband admitted visiting gay pornographic web sites and even admitted numerous private meetings with another male named Ron during which, according to him, the two of them watched pornography and masturbated but did not touch each other." Husband also admitted meeting with a woman he met through an adult dating site, and setting up a meeting with a mixed-sex couple for a possible sexual rendezvous, but then chickening out at the last minute. There were allegations that the husband also created profiles for himself on gay web sites. The wife claims she confronted him about these things many times, but his promises to stop were never fulfilled, so eventually she began withholding sex, and he filed for divorce.

Overruling the trial court, the court of appeals found that the husband's internet and related activities reflected on his "comparative fitness" as a parent, and ordered that the wife be given primary residential child custody, reducing the husband's contact time with the children, and shifting from husband to wife the right to the final say on educational and health decisions in the case of disagreement between them. Interestingly, however, in light of the court's concern about the husband's activities, the opinion by Judge Charles D. Susano, Jr., does not place any specific restrictions on the husband's activities when the children are staying with him, which includes several weekends a month.

**Texas** – In an action that local domestic relations lawyers considered to be unprecedented, a Houston judge has imposed an order that a gay man not leave his children alone with any man to whom they aren't related by blood or adoption. This would include the man's husband. William Flowers and his wife divorced in 2004, agreeing that their three children would live with her. William Flowers recently filed for custody in Harris County. A jury ruled that Flowers' ex-wife should retain custody, but his regular visitation rights should continue. Flowers and his partner, Jim Evans, married in Connecticut last year and live together. Following the trial, Harris County Associate Judge Charley E. Prine, Jr., issued a ruling that would, in effect, ban Flowers from leaving his children in the care of his husband at any time. Indeed, it would also prohibit Flowers from leaving the children with a male doctor, teacher, or pastor. While restrictive orders are sometimes imposed in cases involving evidence of abuse, there was no such evidence introduced in this case, and Flowers' ex-wife did not seek this restriction. *Houston Chronicle*, July 24.

**Vermont** – The ACLU of Vermont represents Katherine Baker and Ming-Lien Linsley in their suit against The Wildflower Inn, a Vermont bed and breakfast that refused to book a wedding reception for the couple. *Baker v. Wildflower Inn*, Civ. Div. Docket No. 187-7-11 CACV (Vt. Super. Ct., Caledonia Unit). In its answer to the complaint of discrimination under Vermont's public accommodations law, the Inn asserts that the individual who rejected the booking was not authorized to do so, but also argues that the owners of the Inn have a Vermont and U.S. constitutional right

of free exercise of religion and freedom of speech to refuse to host “expressive events” that violate their religious beliefs. While Vermont’s same-sex marriage law allows religious organizations to refuse to be involved with same-sex marriages, it provides no such exemption for commercial entities operating places of public accommodation. So the issue may be joined in this case as to whether businesses are entitled to refuse to provide goods and services based on their owners’ religiously-based moral objections to the customers, or whether it violates freedom of speech or association to require a place of public accommodation to provide services on a non-discriminatory basis regardless of the owners’ personal beliefs. A successful defense to the discrimination charge on this basis would effectively invalidate the operation of public accommodations laws. ACLU of Vermont staff attorney Dan Barrett is representing the plaintiffs, who reside in Brooklyn and sought to make these arrangements in October 2010, when same-sex marriages could not be contracted in New York but were recognized there. When they were turned down by Wildflower Inn, they arranged to hold their reception at another facility, but decided to file suit to prevent such incidents in the future. Their lawsuit seeks injunctive relief and only nominal damages. *National Law Journal*, Aug. 23. A.S.L.

### Criminal Litigation Notes

**Federal** – Lt. Dan Choi is on trial before U.S. Magistrate Judge John Facciola in the District of Columbia on charges deriving from his arrest as a participant in a demonstration almost a year ago in front of the White House to protest the “don’t ask, don’t tell” military policy. A big part of Choi’s defense is the argument that he was engaged in a peaceful political protest and is being subjected to vindictive prosecution because of the content of his message. The argument is that normally people arrested in connection with peaceful political demonstrations might be prosecuted in local D.C. courts on minor public disorder charges, but that Choi is being singled out for federal prosecution on more consequential charges because of the content of the political message in his protest and its symbolic location in front of the White House. On Aug. 31, the prosecution indicated it would seek an order from the D.C.

Circuit to block the vindictive prosecution argument, and Judge Facciola suspended the ongoing proceeding after three days of trial to give the government time to pursue its motion, according to reporting by Chris Geidner in *MetroWeekly*.

**Maryland** – Teonna Monae Brown, 19, pleaded guilty in Baltimore County Circuit Court on August 4 to one count of first-degree assault and one hate crime count in the April attack on Chrissy Lee Polis, a transgender woman, at a McDonald’s in Rosedale. The incident was captured on video and went viral on the internet, drawing international attention to the case. Sentencing was to be pronounced by Judge John Turnbull II on September 13. Prosecutors were seeking a ten year sentence, with five years suspended, out of a maximum possible sentence of 35 years, in light of the defendant’s first-offender status and her youth. Another girl, age 14, who participated in attacking Polis pled guilty and was sentenced as a juvenile, her name withheld by the court, and was sent to a juvenile facility. *Baltimore Sun*, Aug. 5. A.S.L.

### Legislative Notes

**Federal** – Shortly before the first scheduled Senate hearing on S.958, the **Respect for Marriage** bill on July 20, which would repeal the Defense of Marriage Act (DOMA) and mandate federal recognition of all lawfully contracted state marriages (including marriages of same-sex couples), as well as marriages contracted overseas that could have been contracted in a state, the White House announced that President Obama was endorsing the bill. He had previously stated that he favored repeal of DOMA, but this was the first time the president had endorsed a specific bill that would not only repeal DOMA but establish same-sex marriage recognition for the federal government. S. 958 was introduced by Senator Feinstein (D-Calif.) on March 16, with 18 co-sponsors. By the date of the hearing, the number of co-sponsors had grown to 27. The hearing provided national press exposure for the issue, but the measure is not likely to move forward in this session of the Senate, given the impossibility that the companion House bill will receive consideration in the Republican-controlled chamber, and the tendency of the political leadership in each house to avoid subjecting their members to politically-uncomfortable

votes on bills that are unlikely to move in the other chamber.

**Federal** – For the first time in its history, the U.S. Senate voted on July 18 to confirm an openly gay man for a position as a U.S. District Judge. J. Paul Oetken, nominated by President Obama, was confirmed by a decisive bipartisan vote of 80-13, for a seat on the Southern District of New York bench. Oetken, a Yale law graduate who clerked at the U.S. Supreme Court, worked in the Clinton White House, and was most recently in-house counsel at Cablevision Systems Corp., will be joining the only other openly-gay federal district court nominee to have been confirmed up to this time, the Honorable Deborah Batts, who has been serving in the Southern District of New York since her appointment by President Clinton in 1994. Waiting in the wings is another openly-lesbian nominee, Alison Nathan, who was approved by the Judiciary Committee on July 14. Much was recently made in the press about recently-retired U.S. District Judge Vaughan Walker, who presided over the Proposition 8 trial in California but did not “come out” to the press as gay until after stepping down from the bench. *National Law Journal*, July 18.

**California** – The California legislature sent S.B. 117, the Equal Benefits Bill, to Governor Jerry Brown’s desk on August 22. The measure would bar the state government from making contracts worth more than \$100,000 with any businesses or other entities that deny equal benefits to same-sex spouses of their employees. The bill tracks municipal ordinances in San Francisco, Los Angeles, Sacramento, Oakland, and several small California cities, and would apply to the same-sex couples who married in California prior to the enactment of Proposition 8. The bill passed the Senate by a vote of 22-13, its last legislative hurdle. *BNA Daily Labor Report*, 164 DLR A-4 (Aug. 24, 2011). \* \* \* The California Assembly approved S.B. 182 on Aug. 30, and sent it to Governor Brown, the measure having passed the Senate in July. It would add “sexual orientation” and “gender identity” to the list of optional demographic information provided to the Governor’s office as part of the judicial appointment process. The measure represents a judgment by the majority of the legislators that ensuring an increase in the number of openly LGBT judges in the state would be desirable as a diversity measure. Equality California’s

Executive Director, Roland Palencia, observed that out of more than 1600 judges at all levels in California, only a handful are openly LGBT. \* \* \* The California legislature has also approved A.B. 887, which is intended to enhance protection against discrimination on the basis of gender identity and expression. Called the Gender Non-discrimination Act, the measure passed the Senate 25-13 and the Assembly 54-24. The state's anti-discrimination laws had already covered such discrimination through a definition of "gender" to include gender identity and expression, but this legislation is intended to provide greater visibility and certainty by adding those terms directly to the list of forbidden grounds of discrimination in the state's various civil rights laws, thus following the example set by numerous California municipalities, including San Diego, Los Angeles, San Francisco, Santa Cruz, Oakland, and West Hollywood. *The Advocate.com*, Sept. 1.

**Florida** – State Senator Eleanor Sobel (D-Hollywood) filed S.B. 166, a measure that would establish a domestic partnership registry for same-sex couples in the state of Florida and that would provide that registered partners have the same status as married spouses for purposes of Florida law. The bill will be considered during the legislative session scheduled to begin in January, 2012. Sen. Sobel pointed out in her introductory remarks that despite opposition to same-sex marriage, a majority of Floridians now support "recognition of same-sex relationships. So many other Floridians are in long-term, unmarried relationships it no longer makes sense for the state to have just one category – married and everybody else." *Florida Together*, News Release, Aug. 2011.

**Florida** – Miami-Dade County schools will now expressly protect gay and trans students from bullying or harassment under an amended policy that references sexual orientation and gender identity, reports the lobbying group Save Dade. The new policy went into effect July 22.

**Iowa** – The Department of Administrative Services has announced that state employees in same-sex marriage would qualify for family leave to care for a sick spouse. The change was sparked by a challenge to the existing rules by a prison guard from Iowa City who needed time off to care for a same-sex spouse after she was diagnosed with ovarian cancer and was told that the family leave policy did not cover same-sex

spouses. She filed a discrimination complaint, and the Iowa Attorney General's Office agreed with her and advised the state that the rule needed to be changed. *Iowa City Press-Citizen*, July 22.

**Iowa** – Iowa State Senate Majority Leader Michael Gronstal told the Associated Press that he remains committed to blocking any attempt to put a proposal before voters to ban same-sex marriage in the state through a constitutional amendment. As Majority Leader of the slim Democratic majority in the Senate, Gronstal essentially controls the flow of legislation to the floor of the chamber. The other house, dominated by the Republicans, and the governor, who is a Republican, both support the proposed amendment. Gronstal's ability to block the amendment depends upon the Democratic Senate majority retaining him as speaker, and upon the re-election of a Democratic majority in 2012. *Associated Press*, Aug. 28.

**Maryland** – On July 22, Governor Martin O'Malley pledged to lead the fight for enactment of same-sex marriage in the 2012 session of the state legislature. O'Malley cited the recent enactment of marriage equality in New York as an example for Maryland to follow. "It is a fundamental truth that with every accomplishment further accomplishments appear possible," said O'Malley. An unsuccessful marriage equality measure in the last legislature had only lukewarm support from the governor, and was not listed as one of his program bills. It passed the Senate but failed to win sufficient support for a House vote. Now, following the example of New York Governor Andrew Cuomo, O'Malley stated that he would appoint a top legislative aide, Joseph Bryce, to lead the effort to move the bill. *Baltimore Sun*, July 23.

**Suquamish Tribe** – A tribe of Native Americans (American Indians) in the Pacific Northwest has decided to recognize same-sex marriages. On August 1, the Suquamish Tribal Council formally changed its tribal ordinance to open marriage to same-sex couples. The change was instigated by tribe member Heather Purser, who lives in Seattle, Washington, was raised in Kitsap County, and has been working to be able to marry her same-sex partner in a tribal ceremony for four years. The Tribal Council held a public hearing on the ordinance change in June and formally voted on August 1. Under the new

rule, the tribal court may issue a marriage license to two unmarried people, regardless of sex, if they are at least 18 years old and at least one of them is an enrolled member of the tribe. In taking this action, the Suquamish were following in the footsteps of the Coquille Indian Tribe in Coos Bay, Oregon, which married a same-sex couple in 2009. At present, the state of Washington has domestic partnerships for same-sex couples but does not yet recognize same-sex marriages. The tribal marriage is likely to be regarded as a domestic partnership by the state for legal purposes, but presumably could be recognized as a marriage in those jurisdictions (such as nearby Canada) where same-sex marriage is legally recognized. *Kitsap Sun* (Aug. 1). A.S.L.

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## Law & Society Notes

**Federal** – The Bureau of Labor Statistics of the U.S. Department of Labor issued its annual report on Employee Benefits in the United States on July 26. The report summarizes data from employer surveys asking about benefits in effect during March 2011. For the first time, BLS inquired about whether employers provided domestic partnership benefits, and found that a surprisingly large percentage of employers do provide such benefits. The survey looked at two kinds of benefits: defined benefit survivor benefits, and health insurance benefits. In a press release summarizing the results, BLS stated: "For unmarried domestic partner benefits, about half the workers in state and local government have access to survivor benefits, as compared to 7 percent of the workers in private industry, reflecting in part the difference in the availability of defined benefit plans between these groups. Thirty-three percent of state and local government workers and 29 percent of private sector workers have access to health care benefits for unmarried domestic partners of the same sex. Access to benefits varies by employer and employee characteristics and by whether the unmarried domestic partner is of the same or opposite sex." Although many DP plans are limited to same-sex partners, some employers have also made the benefits available to unmarried different-sex partners who can demonstrate financial interdependence.

**Federal** – President Obama issued a proclamation on August 4 titled "Suspend-

sion of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses." Under the proclamation, President Obama suspends entry into the United States of any alien who "planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigent group; language, religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so." The proclamation also bars entry of individuals implicated in war crimes, crimes against humanity, or other serious human rights violation. This is apparently the first time that the federal government has taken action to bar from the U.S. individuals (including political leaders) who are complicit in advocating, directing or engaging in anti-gay violence.

**Federal** – The Office of Personnel Management proposed some new regulations on July 28 to further extend recognition of domestic partners under federal personnel policy. See 76 Fed. Reg. 45,204, 45,208, 45,205. They are all technical and rather small-bore, but of course potentially very significant for partners who might benefit from them. One proposal would establish "authority to make noncompetitive appointments to competitive service positions in the United States for certain family members of federal employees and military personnel who have served overseas" for same-sex domestic partners of employees, according to BNA's Daily Labor Report of August 1. Another would change regulations on drug and alcohol abuse programs and child care subsidies to include domestic partners and their children. A third involves evacuation pay and allowances connected with postings on a remote Pacific island facility. The regulations also clarify the federal regulatory definition of domestic partners. The way they have been trying to include domestic partners is to treat them as dependent family members, but they are clarifying that as long as the partners are financially interdependent, the non-employee partner does not have to be actually financially dependent on the fed-

eral employee partner in order for them to qualify as domestic partners under the various regulatory changes that have been adopted since President Obama first issued his directive that OPM figure out how to extend equal treatment to same-sex partners of federal employees. Those interested in commenting on the proposed rules have already missed the deadline for the one on the drug and alcohol and child care subsidy programs, which expired late in August, but the others are open for comment until September 26. Check the Federal Register listings for details.

**Federal** – Gregory J. Junemann, President of the International Federation of Professional and Technical Engineers, AFL-CIO & CLC, which represents numerous federal employees, including many at the National Aeronautical and Space Administration (NASA), wrote to John Berry, Director of the U.S. Office of Personnel Management, to point out the failure of federal agencies to live up to their promise of non-discrimination based on sexual orientation by refusing to extend benefits to family members of gay employees. "IFPTE recommends that OPM establish a fund to compensate gay and lesbian federal employees who can supply evidence that they have applied [for family benefits] for their legally married spouses and been denied due to DOMA," wrote Junemann in his Aug. 26 letter. "The compensation would take the form of direct reimbursement in the amount of the difference between the out-of-pocket medical and dental expenses that are incurred by same-sex spouses of federal employees, compared to the lesser amount that the spouse would have incurred if he or she had been covered [by the federal employee benefits programs]." It was suggested that this mechanism would be a creative response to the inequality problem, without directly violating DOMA, a statute that the administration now agrees is unconstitutional and not defensible in court.

**California** – The Courage Campaign and Equality California and other LGBT rights organizations in the state are banding together in an attempt to stop a ballot referendum proposed to repeal SB 48, a recently enacted measure that is set to take effect in January, under which the social studies curriculum in California public schools must include historical treatment of the LGBT community. Proponent Paulo E.

Sibaja submitted the proposed referendum language to the Attorney General's office on July 15. If 504,760 valid signatures are collected and submitted by October 12, the measure proposing that the law be repealed would be on the ballot in June 2012, during the state's presidential primary elections. The LGBT groups are launching an educational campaign to persuade voters not to sign the referendum petitions.

**Iowa** – A scandal revealed? Documents obtained by the Associated Press under the Freedom of Information Act revealed that federal grant money to the Iowa Family Policy Center, provided between 2006 and 2010 for the purpose of providing education and counseling to Iowans with family problems, helped to pay salaries for five employees who devoted substantial time to IFPC's fight against same-sex marriage in the state, including efforts to deny reelection to members of the Iowa Supreme Court who had voted in favor of recognizing a state constitutional right to same-sex marriage and promoting adoption of a state constitutional amendment to override the court's opinion. The *Iowa City Press-Citizen* reported on August 26 that a University of Iowa researcher who was a consultant on the relevant federal grant also told AP that IFPC declined to provide services to same-sex couples. IFPC, which changed its name to Family Leader, is also the organization that has been pushing Republican presidential candidates to sign a pledge to oppose same-sex marriage and support a federal marriage amendment that would override state laws allowing same-sex marriages. The group reportedly declined to receiving the federal money that was due for the fifth year of the grant and is now solely reliant on donations to fund its activities.

**Maine** – Proponents of same-sex marriage in Maine announced that the Secretary of State approved the language of a proposed statute to be enacted by referendum, called "An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom." Although the Maine legislature and governor enacted a same-sex marriage law several years ago, it was repealed by referendum before it could go into effect. With the election of a Republican governor opposed to same-sex marriage, proponents determined to make a direct appeal to the voters to overturn the prior referendum result through the affirmative enactment of a law that stresses

respect for religious dissenters while authorizing marriage for same-sex couples. Joint Press statement issued Aug. 17 by GLAD, Equality Maine, and Why Marriage Matters Maine.

**New York** – On July 29, the New York State Department of Taxation and Finance went public with a webpage devoted to the Marriage Equality Act and its impact on state tax filers. The website is at the following URL: [http://www.tax.ny.gov/pit/marriage\\_equality\\_act.htm](http://www.tax.ny.gov/pit/marriage_equality_act.htm). The most important general point about the guidance is that the Tax Department takes the position that the Marriage Equality Act's mandate of equal treatment for same-sex and different-sex marriages means that married same-sex couples will be treated the same as married different-sex couples for all purposes of New York tax law, even though this is inconsistent with some express provisions of the state's tax statutes and even though the federal Internal Revenue Service does not recognize same-sex marriages for purposes of federal tax law.

**New York** – On July 10, singer Ari Gold and his boyfriend boarded a Short Line Bus Company vehicle to travel from the New York Port Authority to Monticello, New York, to visit Mr. Gold's parents. They sat in the front seat of the bus, physically touching and sharing music from a portable player through earphones. The driver stopped the bus and requested that they move to the back, stating that the way they were sitting made him "uncomfortable." When they refused the request, the driver summoned New York state troopers, having pulled off the highway. The troopers told the driver that Gold and his boyfriend were not violating any law and were within their rights, and to proceed with the trip. Gold informed the press about what had happened and contacted Lambda Legal, which wrote to Short Line on his behalf, pointing out the requirements of New York's Human Rights Law. After a telephone conference with Lambda attorney Hayley Gorenberg, Short Line's president sent a letter to Lambda dated August 5, indicating that the driver in question had been disciplined and counseled regarding compliance with the Human Rights Act, and that the company was having its labor and employment counsel provide training to all of its drivers. The company anticipated that all of its drivers would be trained within the next 60 days and that it would

provide ongoing training for new drivers and refresher training periodically for all drivers. The letters can be found on Lambda Legal's website.

**New York** – The New York Post reported on August 22 that New York City, having changed its marriage license forms to omit inquiries about gender, consequently had no records showing how many same-sex couples had obtained marriage licenses or married beginning July 24 when the Marriage Equality Act went into effect. City Clerk Michael McSweeney estimated that number during the period July 24-August 12 at about 1400, by the simple expedient of measuring the increase in business for his marriage bureau from prior years. During July 24-August 12, the bureau issued 5,587 licenses; the average number for those dates in prior years was about 2400. Thus, McSweeney estimated that approximately one in four marriage licenses issued during that time period when to same-sex couples. *New York Post*, Aug. 22.

**Utah** – On July 16, Democrats in Utah elected Jim Dabakis, an openly gay man, to be state party chairman. News reports did not claim that he was the first openly gay man to serve as the chairman of any state party, but did claim that he was the first openly gay man to serve as chairman of the Utah Democratic Party. Dabakis, an art dealer, defeated his principal opponent by a vote of 528-71, a real close shave!

**Wisconsin** – Milwaukee County Executive Chris Abele has signed a bill that was approved by the County Board (vote 13-5) to grant health benefits to domestic partners of county employees. As approved, the measure would extend to both same-sex and different-sex partners of employees, but County Board Chairman Lee Holloway indicated that if budgetary concerns require reducing the cost, the measure could be cut back to cover only same-sex partners. *JournalSentinel* (Aug. 5). A.S.L.

## International Notes

**United Nations** – The United Nations' Economic and Social Council voted on July 25 to restore to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (commonly known as ILGA) the consultative status as a non-governmental organization that was lost in 1994 when right-wing groups in the United States

successfully demonized ILGA because a handful of its 700 affiliated organizations advocated the elimination of age of consent laws for sex. Although ILGA promptly expelled from membership any organization that might be construed to support legalizing pedophile relations, it had to wage a 17 year struggle to restore its consultative status, which will allow it to attend U.N. conferences and meetings, submit written reports and oral statements, and host panels in U.N. facilities. An unofficial tally of the vote showed 29 nations in support, 13 opposed, and 6 abstaining. The U.S. supported ILGA's application for consultative status. *Wockner International News* #900, July 25.

**Inter-American Court on Human Rights** – On August 25 the Inter-American Court of Human Rights heard argument in the case of Karen Atala Riffo, a Chilean judge whose custody of her children was terminated by the Supreme Court of Chile in 2003 on grounds that her lesbian sexual orientation rendered her unfit to have custody. The Inter-American Commission on Human Rights reviewed the case and issued a decision in Judge Riffo's favor earlier this year. The decision to be rendered by the Inter-American Court will be binding on Chile, by agreement of its government. This is reportedly the first sexual orientation related case to be considered by the court, according to a news release by the International Gay and Lesbian Human Rights Commission.

**Australia** – The Refugee Review Tribunal was ordered by the Federal Magistrates' Court to reconsider its decision to deny a visa to a man from Lebanon who claims he would be subjected to persecution in his home country due to his past sexual liaison with a Saudi Arabian prince. According to the record before the court, the man, whose name was not disclosed, said he left his boyfriend in Lebanon in 2008 and travelled to Saudi Arabia at the instance of the prince, who arranged for a visa and paid for his travel, and they had a sexual relationship "in return for financial and material support." The man fled to Melbourne when the prince had him deported from Saudi Arabia after discovering that he was having an affair with a friend of the prince. Despite these circumstances, the prince offered a reference on his behalf due to his love for the man. The Immigration Department had ruled against his asy-



lum request, finding inconsistencies in his story, as did the Refugee Review Tribunal, but the court pointed out that the Tribunal had reached its conclusions without putting its doubts to the petitioner during his hearing. *The Daily Telegraph*, Aug. 2. In another case involving a gay man from Lebanon, the Refugee Review Tribunal ruled in favor of the applicant, who had married an Australian woman and whose immigration to the company had been sponsored by his wife. He began frequenting gay clubs and his marriage fell apart when his wife found out. The Tribunal found that the man's ex-wife had notified his family in Lebanon about his homosexuality, which the Tribunal found would lead to persecution if he was required to return to that country. *Herald Sun*, Aug. 26.

**Australia** – A man from Sydney whose donated sperm was used by a lesbian couple to conceive a child lost his battle to prevent the child's co-parent from having her name substituted for his on the child's birth certificate. According to press reports, the man had maintained a relationship with the child with the permission of its birth mother. After the lesbian couple split up, the other partner sought a court order against the New South Wales Registry of Births, Deaths and Marriages, to have her name put on the birth certificate, pursuant to a 2008 statute that authorizes same-sex co-parents to be listed on a birth certificate. The judge indicated that under current law the sperm donor does not have a right to remain listed as the child's parent. "I am not persuaded there is any contractual right which can affect this application," said NSW District Court Judge Stephen Walmsley. "I have considerable sympathy for (the man) – he has done what he considers has been his very best for the child." *ABC Premium News*, Aug. 17; *News.com.au*, Aug. 17.

**Chile** – President Sebastian Pinera has signed a legislative proposal to make civil unions available to same-sex partners. The measure would require legislative approval before it could go into effect. President Pinera, a conservative who faced opposition to this proposal within his own party, indicated that he was firmly committed to maintaining marriage in Chile as solely a different-sex union, but believed that same-sex couples should enjoy the same legal rights other than the right to marry.

**Colombia** – The nation's highest tribunal, the Constitutional Court, ruled on July 26 that the nation's legislature must accord equal marriage rights to same-sex couples by June 20, 2013, or else such couples will be entitled to formalize their unions before any judge or notary. Ruling in a case brought by Colombia Diversa, a gay rights organization, DeJusticia, a legal aid group, and several other organizations and individuals, the court accepted the argument that the constitutional requirement for equality of treatment was violated by a law providing that marriage is an exclusive contract between a man and a woman with the purpose of procreation. Colombia already provides civil unions for same-sex couples, but they do not carry all the legal rights of marriage. The legislature has rejected marriage equality bills six times so far, and is split on the issue, with conservatives clinging to a traditional definition, while liberals criticize conservative reliance on religious dogma to defend the existing definition. *Colombia Reports*, July 28; *The Advocate*, July 28.

**Ghana** – Paul Evans Aidoo, described as the minister for the Western Region of Ghana, reportedly has called for the Bureau of National Investigations to round up gay people and present them for prosecution under the nation's criminal code, which outlaws "unnatural carnal knowledge." This development was seen as a politically motivated gesture in the run-up to national elections next year. According to a report on this incident by *iNewspaper* (UK) on July 22, at present 38 African countries maintain criminal penalties for homosexual conduct.

**Italy** – The Chamber of Deputies voted on July 26 to reject legislation that would have banned discrimination on the basis of sexual orientation or gender identity. The vote was 293-250, and spurred calls by Italian activists for a reaction from the European Union, of which Italy is a member, where such non-discrimination protection is considered a normative part of national law. The Berlusconi government, which has a dominant position in the Chamber, is opposed to gay rights.

**Malaysia** – The High Court in Eastern Terengganu ruled that Ashraf Hafiz, a 25-year-old transgender individual who underwent male-to-female gender transition surgery, was not entitled to a change of sex on her national identity card. The court

opined that a person's sex is determined at birth and cannot be changed. *Daily Pak Banker* (Pakistan), July 19.

**Russia** – You are what you eat? There were press reports at the end of August about the arrest in Russia of a 21-year-old man who reportedly made an assignation with a gay man on the internet as a food source. The man was arrested a few days after human remains were found in the city of Murmansk, based on suspicions by investigators that the man met his victim through the internet, invited him to his house, stabbed him to death, cut him up, and ate the remains. Said Regional Investigative Committee Chief Fyodor Blyudonov, "The only motive for the murder was his desire to taste human flesh." Blyudonov speculated that the suspect sought victims from the gay community "since this category of people are private and prefer not to disclose their contacts. In this way, the cannibal intended to attract another dozen people to his house." This report takes the concept of hate crimes to a new level. *Windsor Star* (Canada), Aug. 30.

**Thailand** – Ruling in a case brought by LGBT rights advocate Natee Teeraratchanapong, the Chiang Mai Administrative Court found that it was unlawful for the municipality in Chiang Mai to adopt a rule governing the floats participating in a 2010 local festival that would exclude gay people and transvestites from participation. The court ruled that criteria adopted by the municipality for participation violated the nation's constitutional ban on discrimination. Natee, hailing the result as having broad application, urged that all state offices refrain from discrimination on any ground. *Nation* (Thailand), Aug. 10. \* \* \* *Nation* (Thailand) also reported on Aug. 31 that an administrative court had convened for the first time to hear arguments on a 5-year-old petition filed by the Sexual Diversity Network against the Ministry of Defense challenging the labeling of a former transgender service member as "suffering from permanent psychosis" on her military records. The notation has made it impossible for the service member, Samart Meecharoen, to find employment.

**Uganda** – The on-again, off-again proposed draconian criminal statute against gay people may be off again, according to recent press reports of action by Uganda's cabinet to block an attempt to reintroduce the bill in the Parliament. Local observ-

ers speculated that formal opposition to the bill from the cabinet meant it could not be passed in the near future. *National Post (Canada)*, Aug. 24.

**United Kingdom** – Robert Segwanyi, who claims to have been jailed and tortured in Uganda for being gay, has won a reprieve from deportation from the United Kingdom. Although he had been scheduled for deportation, appeals continued the Home Office stopped his deportation at the last minute. More than 3500 people had signed an on-line petition supporting his request for asylum in the U.K. *Change.org News*, Aug. 20. \* \* \* On July 28, High Court Justice Supperstone ruled that a woman who had claimed to be a lesbian should be allowed to appeal against her removal to Uganda from the U.K. Even though an Immigration Judge ruled that she was not a lesbian, denied her asylum claim and ordered her deported, the court said: “It is arguable that the claimant is at risk of persecution because she is ‘suspected’ of being a lesbian.” *Daily Telegraph*, July 29. A.S.L.

## Professional Notes

The National Lesbian and Gay Law Association has announced that Professor **Nancy Polikoff** of American University Washington College of Law will be the 2011 recipient of the Dan Bradley Award, which is presented to a member of the LGBT legal community whose work has led the way the struggle for LGBT equality under the law. Prof. Polikoff is best known for her important work on LGBT families and the law, with a particular emphasis on child custody and adoption. Her law journal articles and books are among the most frequently cited publications in the field, by courts as well as by legal advocates. She also maintains a blog that is a vital source for news about new developments in the field. NLGLA has also announced that the first place winner of this year’s Michael Greenberg Student Writing Competition is **Michael Stefanilo** from Northeastern University Law School. First runner up is Natalie Amato from University of Maryland, and second runner up is **Shawn Carol Casey** from University of Arizona. The awards will be presented during the Lavender Law Conference, being held this year in Los Angeles from September 8-10. \*

\* \* In addition to these award recipients, NLGLA has published its 2011 list of Top LGBT Lawyers Under 40, which can be found on the Association’s website.

Florida Governor Rick Scott has elevated an openly lesbian County Court judge, **Victoria Brennan**, to the 11th Judicial Circuit Court. Judge Brennan was originally appointed to the Miami-Dade County Court by Governor Jeb Bush in 2006, after having served as assistant general counsel to the governor. The April 5 press release announcing her appointment to the trial court of general jurisdiction did not mention that she is a lesbian who is raising children together with her same-sex partner, but an on-line report about her July 15 investiture by the Woodhull Sexual Freedom Alliance said that her partner and two children participated in the ceremony by placing a ceremonial hood over her head, and characterized her sexuality, which was not mentioned during the ceremony, as the “elephant in the room.” The governor’s press release lauded her for her dedication to public service throughout her career.

New York City Mayor Michael Bloomberg has designated **Ronald E. Richter**, an openly-gay New York City Family Court Judge, to be the new Commissioner of the Administration for Children’s Services of New York City. Judge Richter was a high-ranking official in ACS prior to his judicial career.

With **Brian Bond** leaving the White House staff to join the Democratic National Committee staff, the White House announced that **Raul Alvililar**, who has been serving as associate director for public engagement in the Office of the Vice President, will temporarily assume responsibility as LGBT liaison for the Obama Administration. A White House spokesperson announced that a permanent replacement for Bond will be announced in October.

The United States Senate unanimously approved the nomination of **Jennifer Di Toro** to be an Associate Judge of the District of Columbia Superior Court, making her the second openly-LGBT judge to serve on that court and the third openly LGBT judicial nominee of the Obama Administration to win confirmation. President Obama also appointed the first openly-LGBT judge to that court, **Marisa Demeo**. Di Toro was legal director of the Children’s Law Center, after having worked as a public defender and for a private firm. The

National LGBT Bar Association, reporting on Judge Di Toro’s confirmation in an Aug. 5 press release, noted that five other openly LGBT judicial nominees are awaiting action by the Senate: **Alison Nathan**, **Edward DuMont**, **Michael Fitzgerald**, **Albert Lauber**, and Tax Court Judge **Joseph Gale**, who was reappointed after his previous term ended in February.

Human Rights Campaign announced Aug. 27 that **Joseph Solmonese** had given notice that he would step down when his contract as executive director expires in six months. HRC has launched an executive search process. Solmonese served at the head of HRC for six years, during which two of the major goals on the LGBT federal legislative agenda were achieved: passage of a federal hate crimes law that is LGBT inclusive, and passage of legislation repealing the statutory “don’t ask, don’t tell” policy, returning to the Defense Department the discretion to change its policy on military service by gay people. (The Defense Department, as noted in our lead story this month, has certified to Congress that it has determined that gay people can serve openly without harming military readiness, and the ban will expire on September 20, 2011.) The other two items, not yet achieved, are passage of the Employment Non-Discrimination Act, and passage of the Respect for All Marriages Act (which would repeal the Defense of Marriage Act and establish a policy of federal recognition of same-sex marriages when they are lawfully contracted in a jurisdiction that allows them). Under Solmonese’s leadership, the membership numbers of HRC grew substantially, and the organization was generally seen by national media as an authoritative speaker for the LGBT rights movement, but not without controversy, including a firestorm in 2007 over HRC’s support of a version of ENDA that did not include protection against discrimination for transgender people.

The National LGBT Bar Association announced present of its 2011 Allies for Justice Awards to **Frederick J. Krebs**, president of the Association of Corporate Counsel, and **Robert J. Grey, Jr.**, executive director of the Leadership Council on Legal Diversity and a partner at Hunton & Williams in Richmond, Virginia. The awards ceremony was held on August 5 in Toronto in connection with the ABA Annual Meeting. Also at the ABA Annual

Meeting, the ABA Commission on Sexual Orientation and Gender Identity presented a CLE program, co-sponsored by the ABA Section of International Law, the ABA Center for Human Rights, and the National LGBT Bar Association, on LGBT rights from a global perspective. Panelists included NLGBTBA Executive Director *D'Arcy Kemnitz*, **Dixon Osburn** (director of the Security & Law Program at Human Rights First), **El-Farouk Khaki** (a refugee and immigration lawyer), **Shannon Minter** (legal director of the National Center for Lesbian Rights), and **Niaz Salimi** (director at the Iranian Queer Organization).

On August 8, the American Bar Association presented its ABA Medal for "exceptional and distinguished service to the law" to **David Boies** and **Theodore V. Olson**, co-counsel for the American Foundation for Equal Rights in *Perry v. Schwarzenegger*, the lawsuit challenging the constitutionality of California Proposition 8. The Medal is awarded by vote of the ABA's Board of Governors. Past recipients have included justices of the U.S. Supreme Court and major leaders of the profession. Boies and Olson are set to appear in the case again in September, when the California Supreme Court hears argument about whether the initiative proponents of Proposition 8 have standing to appeal the federal district court's decision (which held the measure unconstitutional under the 14<sup>th</sup> Amendment) to the 9<sup>th</sup> Circuit.

The Williams Institute at UCLA reported that **Jovan Kojicic**, a visiting scholar at the Institute, has been appointed adviser to the Prime Minister of Montenegro on Human Rights and Protection Against Discrimination. Kojicic has organized conferences on the Balkans and LGBT law and has helped Williams Institute organize training for judges and law enforcement officers in that region. A.S.L.

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## HIV/AIDS Legal Notes

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### Board of Immigration Appeals Grants Asylum to Gay, HIV- Positive Applicant

Finding that learning that one is HIV-positive is "a changed circumstance materially affecting his asylum eligibility," the U.S. Board of Immigration Appeals, an admin-

istrative tribunal within the U.S. Department of Justice, has reversed a decision by an Immigration Judge to deny asylum to a gay, HIV-positive man who had not filed his asylum petition within one year of arriving in the U.S., as normally required by the relevant statute. The July 14, 2011, decision by the Board has not been published, but the attorney for the successful asylum applicant, Paul O'Dwyer, circulated copies of the opinion to some immigration lawyers with the applicant's name and country of origin blacked out to preserve his confidentiality. O'Dwyer is happy to provide copies of the decision ([paulodwyer@earthlink.net](mailto:paulodwyer@earthlink.net)) and has posted it on the American Immigration Lawyers' Association website ([www.aila.org](http://www.aila.org)) under "recent postings" as AILA Doc. No. 11072631.

The immigration statute provides that a person has a one-year deadline after arriving in the United States to apply for asylum, unless a change in circumstances "materially affecting" the person's eligibility for asylum would justify extending the time. Eligibility for asylum is based on a reasonable fear of official persecution if the applicant were required to return to his country of origin. In this case, the applicant, a gay man, had filed for asylum based on his sexual orientation, arguing that he is a member of a "particular social group" of gay men who were subjected to persecution in his home country. Unfortunately, he filed more than a year after arriving in the United States. Shortly after filing his petition, he learned that he was HIV-positive and amended his asylum petition to argue that should he return to his home country, he would also be subjected to persecution for being HIV-positive.

An Immigration Judge concluded that the applicant had shown that he was likely to be persecuted on account of both his sexual orientation and his HIV status in his home country, but that due to the late filing of his application, he could not qualify for asylum. However, because the Immigration Judge found that such persecution would be "likely" to occur, thus meeting the higher standard for a form of relief called "withholding of deportation," the Judge ordered such relief, a status that would guarantee the applicant's right to remain in the United States, but not a right to a green card and eventual citizenship.

The Board of Immigration Appeals rejected the Immigration Judge's analysis of

the filing issue as to asylum, writing, "we disagree with the Immigration Judge's determination that, since the respondent had already submitted an asylum application . . . based upon a fear of persecution on account of his sexual orientation, his discovery of his HIV positive status . . . would not qualify as a change in the respondent's circumstances that materially affected his eligibility for asylum. We find that it is a changed circumstance materially affecting his asylum eligibility. We therefore conclude that despite his arrival in the United States in 1998, the respondent should have been permitted to apply for asylum due to his discovery of his HIV status."

"In light of the Immigration Judge's unchallenged conclusion that the respondent had shown a likelihood of persecution on account of his HIV positive status," wrote the Board, "we find that the respondent also met the lower burden of proof required to establish eligibility for asylum, i.e., a well-founded fear of persecution on account of a ground protected under the Act." Thus the Board ordered that asylum be granted to Mr. O'Dwyer's client. A.S.L.

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### HIV/AIDS Litigation Notes

**New York** - In *Carmona v. Connolly*, 2011 WL 1748694 (S.D.N.Y., July 12, 2011), U.S. District Judge Denise Cote adopted a report by Magistrate Paul E. Davison that recommended denial of a writ of habeas corpus sought by Jose Carmona, who was convicted of reckless endangerment and disorderly conduct after spitting at police officers and saying that he had AIDS and they would catch it. The main focus of the opinion was on Carmona's claim that his due process rights were violated when his medical records were admitted into evidence at trial. Judge Cote quoted Supreme Court authority that a habeas court's job does not involve reexamining "state-court determinations on state-law questions," and Carmona was relying primarily on a New York statute concerning HIV confidentiality. Even an erroneous evidentiary ruling would not support a habeas petition unless the evidence was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. Judge Cote found that Carmona had not explained how admission of his medical

records would have violated his constitutional or federal legal rights.

**New York** – The U.S. Court of Appeals for the 2nd Circuit ruled in *Goodrich v. Long Island Rail Road Company*, 2011 WL 3559997 (Aug. 15, 2011), that a railroad employee who claims to have suffered severe emotional distress as a result of unauthorized public disclosure of his HIV status could not assert a claim for intentional infliction of emotional distress under the Federal Employers' Liability Act (FELA), because his factual allegations do not satisfy the "zone of danger" test that the Supreme Court described in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), a case involving a claim against a railroad for negligent infliction of emotional distress. According to his complaint, Goodrich, who is HIV+, was absent from work due to flu and submitted a sick leave application in order to be compensated for his sick days. He alleges that a co-worker took the form from Goodrich's locker, added the words "and HIV positive" beneath the doctor's flu diagnosis, and posted it on a public bulletin board on the railroad's facility. Goodrich claims to have suffered severe emotional distress as a result and sued the railroad and the employee in federal court. District Judge Shira Scheindlin, finding that a zone of danger allegation was necessary to bring such a claim, dismissed the action against the railroad. (She also dismissed the action against the co-worker, finding that FELA only authorizes liability by the employer.) Although the Supreme Court has not addressed the question whether a "zone of danger" allegation is necessary to state an IIED claim under FELA, the 2nd Circuit panel, in an opinion by Judge Debra Ann Livingston, concluded: "In light of FELA's overall focus on physical injuries, the decisions of our sister circuits, the dearth of decisions holding that IIED claims may be brought under FELA without satisfying the zone of danger test, and the unsettled state of the common law on this point at the time of FELA's enactment, we hold that the zone of danger test applies to IIED claims brought under FELA. Because Goodrich failed to allege that he 'sustain[ed] a physical impact' as a result of the defendants' alleged conduct or was 'placed in immediate risk of physical harm by that conduct,' we affirm the district court's dismissal of his complaint." A.S.L.

## HIV-AIDS Law & Society Notes

**Blood Donation Policy** – The Food & Drug Administration is reportedly reconsidering its rule under which any man who has had sex with another man even once since 1977 is disqualified from donating blood. The rule, first adopted in the mid-1980s in the wake of strong epidemiological evidence that whatever was causing Acquired Immune Deficiency Syndrome seemed to be transmitted through blood exposure, is binding on all blood collection entities in the United States. The rule has been subjected to criticism ever since identification of a blood borne virus and the development of highly sensitive screening tests led to universal screening of donated blood for HIV in the late 1980s. Proponents of the existing rule have insisted that it remains necessary because the risk that tainted blood will not be detected before it is used for transfusion is higher than zero. Opponents of the rule have pointed out that the risk can be reduced to virtually zero by a less restrictive rule, for example, barring blood donation by anybody who has had unprotected fluid-exchange sex for some reasonably defined period prior to the donation. As a result of the rule, some institutions with policies banning sexual orientation discrimination have stopped holding blood drives, and the rule has proved an impediment to the success of blood collection campaigns. The rule also gives an incentive to closeted gay persons to misrepresent their eligibility.

**Insurance Coverage** – The U.S. Department of Health and Human Services has announced that as part of the required health insurance coverage under the Patient Protection and Affordable Health Care Act of 2010, eight preventive health services must be provided, including HIV counseling and screening for sexually active women. Secretary Kathleen Sebelius announced this requirement in a statement released on August 1. A.S.L.

## PUBLICATIONS NOTED & ANNOUNCEMENTS

### Events of Note

The Seton Hall Law Dean's Diversity Council is presenting "A Civilized Debate on Same Sex Marriage," co-sponsored by a variety of student organizations at Seton Hall Law School in Newark, N.J., on September 8 at 5 pm. Speakers include Dr. Stephanie Coontz (Evergreen State College), Sherif Gergis (a Ph.D. candidate in the Princeton University philosophy department), Andrew Koppelman (Northwestern University Law School), and Amy Wax (University of Pennsylvania Law School).

### Publications

#### LGBT & RELATED ISSUES

Aloni, Erez, *Cloning and the LGBTI Family: Cautious Optimism*, 35 N.Y.U. Rev. L. & Soc. Change 1 (2011).

Appleman, Laura I., *Oscar Wilde's Long Tail: Framing Sexual Identity in the Law*, 70 Md. L. Rev. 985 (2011).

Ball, Carlos A., *The Proper Role of Morality in State Policies on Sexual Orientation and Intimate Relationships*, 35 N.Y.U. Rev. L. & Soc. Change 81 (2011).

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

Blake, Valarie, *It's An Art Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 Minn. J. L. Sci. & Tech. 651 (Spring 2011).

Brower, Todd, *Twelve Angry – and Sometimes Alienated – Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669 (2011).

Burt, Robert A., *Belonging in America: How to Understand Same-Sex Marriage*, 25 BYU J. Pub. L. 351 (2011).

Busch, Patrick, *Is Same-Sex Marriage a Threat to Traditional Marriages?: How Courts Struggle With the Question*, 10 Wash. U. Global Stud. L. Rev. 143 (2011).

Caster, Austin, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 Conn. Pub. Int. L.J. 477 (Spring-Summer 2011).

Cohen, Harriet Newman, Bonnie E. Rabin and Tim James, *Marriage Equality Remains an Aspiration*, New York Law Journal, August 1, 2011.

Cullitan, Caitlin M., *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J. L. & Education 417 (July 2011).

Daly, Erin, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 Ohio N.U. L. Rev. 381 (2011).

Dent, George W., Jr., *Straight is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 Tex. Rev. L. & Pol. 359 (Spring 2011).

Di Silvio, Lorenzo, *Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations To Prevent Violence Against Women*, 99 Georgetown L.J. 1469 (2011).

Dolovich, Sharon, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1 (Winter 2011) (Critical examination of use of segregated unit for gay and trans inmates in Los Angeles County as a method of protecting inmates from sexual assault while avoiding the deprivations of individual protective custody).

Duncan, William C., *Marriage and Inevitability: A Lesson from Maryland*, 41 U. Balt. L.F. 99 (Spring 2011) (argues that the Maryland Court of Appeals' 5-4 decision rejecting a claim to same-sex marriage provides the correction constitutional analysis for courts facing this issue).

Edelman, Alex, *Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protections to Sexual Orientation or Gender Identity*, 79 UMKC L. Rev. 741 (Spring 2011).

Elrod, Linda D., *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. Pub. L. 245 (2011).

Epstein, Richard A., *The Constitutionality of Proposition 8*, 34 Harv. J.L. & Pub. Pol'y 879 (Summer 2011) (conservative libertarian takes issue with Judge Walker's decision while generally supporting the idea that the state should not, as a politi-

cal matter, discriminate against same-sex couples in access to legal marriage).

Goldberg, Erica, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 Tex. J. on C.L. & C.R. 129 (Spring 2011).

Halley, Janet, *What is Family Law? A Genealogy Part I*, 23 Yale J. L. & Humanities 1 (Winter 2011).

Hamzic, Vanja, *The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos*, 11 Hum. Rts. L. Rev. 237 (2011).

Harthill, Susan, *Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis*, 34 Hastings Int'l & Comp. L. Rev. 253 (Summer 2011).

Healy, James, *Band-Aid Solutions: New York's Piecemeal Attempt to Address Legal Issues Created by DOMA in Conjunction With Advances in Surrogacy*, 31 Pace L. Rev. 691 (Spring 2011).

Hennessey, Jennifer J., *University-Funded Discrimination: Unresolved Issues After the Supreme Court's "Resolution" of the Circuit Split on University Funding for Discriminatory Organizations*, 96 Iowa L. Rev. 1767 (July 2011).

Herzig, David J., *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 Akron L. Rev. 621 (2011).

Karlan, Pamela S., *Old Reasons, New Reasons, No Reasons*, 27 Ga. St. U. L. Rev. 873 (Summer 2011) (lecture on evolving standards of equal protection analysis).

Lalor, Kay, *Constituting Sexuality: Rights, Politics and Power in the Gay Rights Movement*, 15 Int'l J. Hum. Rts. 683 (June 2011).

Larson, Stacy, *Intersexuality and Gender Verification Tests: The Need to Assure Human Rights and Privacy*, XXIII Pace Int'l L. Rev. 215 (Winter 2011).

Lee, Man Yee Karen, *W. v. Registrar of Marriages: From Transsexual Marriage to Same-Sex Marriage?*, 40 Hong Kong L.J. 549 (2011).

Lewis, Browne C., *Three Lies and a Truth: Adjudication Maternity in Surrogacy Disputes*, 49 U. Louisville L. Rev. 371 (2011).

Likins, Bryan M., *Determining the Appropriate Definition of Religion and Obligation to Accommodate the Religious Employee Under Title VII: A Comparison of Religious Discrimination Protection in the United*

*States and the United Kingdom*, 21 Indiana Int'l & Comp. L. Rev. 111 (2011).

Lopez, William M., *Artificial Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers*, 86 Chicago-Kent L. Rev. 897 (2011).

Maazel, Ilann M., *Bullying and the Individuals With Disabilities Act*, NY Law Journal, July 22, 2011.

Malalis, Carmelyn P., and Sandra E. Pullman, *Expanding Legal Protections for Transgender Employees*, BNA Daily Labor Report, BNA Insights, August 12, 2011, 156 DLR I-1.

McClain, Linda C., and James E. Fleming, *Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights*, 91 B.U. L. Rev. 1311 (July 2011) (Distinguished Lecture and Symposium Justice: What's the Right Thing to Do? A Public Lecture and Symposium on Michael J. Sandel's Recent Book).

McConnell, Donald R., *Is Modern Legal Liberalism Still Compatible With Free Exercise of Religion?*, 33 Campbell L. Rev. 641 (Symposium 2011).

Menon, Yamuna, *The Intersex Community and the Americans With Disabilities Act*, 43 Conn. L. Rev. 1221 (May 2011).

Milstein, Daniel, *'Til Death Do Us File Joint Income Tax Returns (Unless We're Gay)*, 9 Cardozo Pub. L. Pol'y & Ethics J. 451 (Spring 2011).

Nagle, John Copeland, *Pornography as Pollution*, 70 Md. L. Rev. 939 (2011) (suggests that the problem of regulating internet pornography be considered from the aspect of pollution control laws rather than freedom of speech).

Nicholas, Peter, *Common Law Same-Sex Marriage*, 43 Conn. L. Rev. 931 (2011).

Ngo, Ray L., *The Elephant in the Room: A Critique of California's Constitutional Amendment Process That Gave Birth to the Baby Elephant (Proposition 8) and a Call for Its Reform*, 33 T. Jefferson L. Rev. 235 (Spring 2011).

Note, *It's Not Who Hires You But Who Can Fire You: The Case Against Retention Elections*, 44 Col. J. L. & Soc. Problems 589 (Summer 2011) (argues against retention elections for judges, on the ground that they pose a threat to judicial impartiality. See, e.g., Iowa).

O'Bryan, Kelly M., *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological*

Parent, 60 DePaul L. Rev. 1115 (Summer 2011).

Parkinson, Patrick, *Accommodating Religious Beliefs in a Secular Age: The Issue of Conscientious Objection in the Workplace*, 34 Univ. New South Wales L.J. 281 (2011) (discusses English cases of employees who lost their jobs due to their faith-based refusals to provide services to same-sex couples).

Parness, Jeffrey A., *Civil Unions and Parenthood at Birth*. Illinois Bar Journal, Vol. 99, October 2011. Available at SSRN: <http://ssrn.com/abstract=1885780> (urges that Illinois legislate to clarify the parental status issues created by the recently effective Civil Union Act).

Perrin, Andrew and McFarland, Katherine, *Social Theory and Public Opinion*, 37 Ann. Rev. Sociology 87 (2011) (focus on attempts to measure public opinion about same-sex marriage).

Pritchard, Billie, *Schoolhouse Rock: Lessons of Homosexual Tolerance in Keeton v. Anderson-Wiley from the Classroom to the Constitution*, 62 Mercer L. Rev. 1011 (Spring 2011).

Rempell, Scott, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 Admin. L. Rev. 283 (Spring 2011).

Robson, Ruthann, *Lesbians and Abortion*, 35 N.Y.U. Rev. L. & Soc. Change 247 (2011).

Saez, Macarena, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why 'Same' is so Different?*, 19 Am. U. J. Gender, Social Pol'y & L. 1 (2011).

Schmidtke, Eric, *Perry v. Schwarzenegger: Why the Federal Judiciary is the Right Course to Secure Marriage Equality, Remove Unnecessary Disparities, and Integrate Same-Sex Couples Into Society*, 32 Hamline J. Pub. L. & Pol'y 215 (Fall 2010).

Selected Human Rights Documents, *Advisory Council of Jurists' Final Report: Reference on Human Rights, Sexual Orientation and Gender Identity*, 11 Asia-Pacific J. on Hum. Rts. & L. 52 (2010).

Stine, Emily J., *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DePaul L. Rev. 1169 (2011).

Strader, Kelly, *Lawrence's Criminal Law*, 16 Berkeley J. Crim. L. 41 (2011) (argues that lower courts have failed to apply *Lawrence v. Texas* correctly to strike down

morality-based criminal laws that lack an objection harm justification).

Szwalbneist, Olivia, *Discrimination Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 Tex. J. Women & L. 75 (Fall 2010).

Tolchinsky, Abby, and Ellie Wertheim, *Creative Parenting Agreements Still Needed With Same-Sex Marriage*, New York Law Journal, Aug. 29, 2011, at 3.

Turney, C.T., *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. Rev. 1343 (June 2011).

Vaggione, Juan Marco, *Sexual Rights and Religion: Same-Sex Marriage and Lawmakers' Catholic Identity in Argentina*, 65 U. Miami L. Rev. 935 (Spring 2011).

Wardle, Lynn D., *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 BYU J. Pub. L. 287 (2011).

Wilkins, Herbert P., *The Massachusetts Constitution – The Last Thirty Years*, 44 Suffolk U. L. Rev. 331 (2011) (includes detailed discussion of *Goodridge*, the same-sex marriage case).

Wrubel, Eric I., *The Gay Divorcé: New York Will Have Many. Now What?*, NY Law Journal, Aug. 19, 2011, p. 4.

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## Symposia:

*From Page to Practice: Broadening the Lens for Reproductive and Sexual Rights*, 35 N.Y.U. Rev. L. & Soc. Change (2011) (individual articles noted above).

*Twelfth Annual Review of Gender and Sexuality Law*, XII Georgetown J. Gender & L. No. 3 (2011).

*Focus: What's so "unusual" about W?*, 41 Hong Kong L.J. Part 1 (2011), contains 8 articles commenting on various aspects of *W. v. Registrar of Marriages*, a case concerning gender identity that has received international attention.

International Journal of Discrimination and the Law (UK), Vol. 11, No. 1/2 (2011), is a special issue devoted to Equality and the Workplace, focusing attention on the UK's Equality Act 2010, which incorporates a ban on sexual orientation discrimination for the first time expressly stated in UK legislation.

## Specially Noted:

Christine Michelle Duffy, *Gender Identity and Expression in the Workplace – A Pragmatic Guide for Lawyers and Human Resource Professionals* (Association of Corporate Counsel, 2011), available as a download at [www.acc.com/accdocket/loader.cfm?csModule=security/getfile&pageid=1287371](http://www.acc.com/accdocket/loader.cfm?csModule=security/getfile&pageid=1287371). An abridged version will be published in the ACC's journal, *ACC Docket*. This is an extensive look at the law and practice of providing a non-discriminatory workplace environment for all employees regardless of gender identity and expression. It should prove to be a valuable resource, especially for those counseling employers on how to comply with the steadily increasing number of state and local laws banning discrimination based on gender identity or expression in the workplace.

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## HIV/AIDS & Related Issues

Bergallo, Paola, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 Texas L. Rev. 1611 (June 2011).

Durojaye, Ebenezer, and Annie Muchiri, *Addressing the Link Between Gender Inequality and Access to Microbicides in HIV/AIDS Response in Africa*, 16 African J. Int'l & Comp. L. 197 (2011).

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## CORRECTIONS:

We need to make corrections to two items reported in the Summer 2011 issue of Law Notes. 1. In reporting on the Richland County, South Carolina, Council's adoption of an anti-discrimination ordinance, we relayed misinformation from a careless reading of our source, referring to Charlotte incorrectly as the largest city in South Carolina when it is, indeed, in North Carolina. (The source referred to it as the largest city in "the Carolinas.") We also reported that Charlotte had not enacted such an ordinance, but we are advised that the City Manager, Curt Walton, issued a memorandum on March 29, 2010, administratively amending the city's Standards and Guidelines to forbid sexual orientation discrimination in employment policies by the city. The City Manager relied on a City Code provision delegating authority to the City

Manager to promulgate rules and regulations on city personnel policy. 2. In reporting on the 1st Circuit's decision in *Leavitt v. Correctional Medical Services, Inc.*, 2011 Westlaw 2557009 (June 29, 2011), we oversimplified a comment about legal liability of prison officials for inadequate medical care of inmates (in that case, an inmate living with HIV). Under the 8th Amendment, inadequate medical care is a constitutional tort if the court finds that the lack of care is due to deliberate indifference to a serious medical condition. Negligence, even amounting to malpractice in terms of ordinary tort law, does not subject prison officials to constitutional tort liability unless the deliberate indifference standard is met. We should not have used the phrase "totally immune," since it has a distinctly different meaning in the context of constitutional litigation. A.S.L.

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## **EDITOR'S NOTE:**

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