

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

February 2013

GENDER REASSIGNMENT SURGERY

*4th Circuit Ruling Suggests a Potential Advance in
Recognition as Medically Necessary Treatment*

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4th Circuit Revives Inmate's Sex Reassignment Surgery Claim

A unanimous panel of the United States Court of Appeals for the 4th Circuit, based in Richmond, ruled that District Judge James C. Turk (Western District of Virginia) should not have dismissed an 8th Amendment complaint by Ophelia Azriel De'lonta, a Virginia state inmate who has been denied gender reassignment surgery by the Virginia Department of Corrections. The ruling may be the first by a federal appellate court to hold that an inmate may, under certain circumstances, have a right to gender reassignment surgery as a medically necessary procedure. *De'lonta v. Johnson*, 2013 WL 310350 (4th Cir., Jan. 28, 2013). As such, it could

described these ongoing urges to perform self-surgery as 'overwhelming.'" (The court's decision makes no reference to the recent decision by the American Psychiatric Association to change the terminology to describe this situation in the forthcoming publication of DSM-V.)

Here initial attempts to obtain any kind of treatment for her gender identity situation were rebuffed by Virginia prison authorities, leading her to file a lawsuit in 1999, claiming a violation of her right under the 8th Amendment to be free of cruel and unusual punishments. The Supreme Court has construed the 8th Amendment to require that prison authorities not be "deliberately

continued since 2004, but De'lonta has found them inadequate, continuing to feel the overwhelming urge to castrate herself. Indeed, in a letter to prison officials in 2010, she said that this urge is even worse after her sessions with the psychologist, Lisa Lang, and De'lonta repeatedly requested sex reassignment surgery, as prescribed by the Harry Benjamin Standards of Care, published by the World Professional Association for Transgender Health.

The Department's Chief Psychologist responded to De'lonta's request by stating, "in regards to gender reassignment surgery, I would request that you continue to work with Ms.

Taking as conceded that De'lonta's gender identity disorder is a serious medical condition, the court concluded that De'lonta's allegations were sufficient to ground a claim of deliberate indifference.

mark a significance advance in judicial recognition that sex reassignment surgery can be medically necessary treatment.

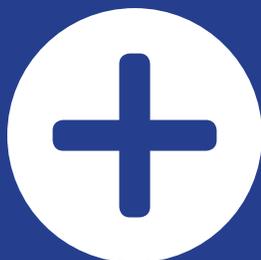
Named Michael A. Stokes at birth, De'lonta was convicted of bank robbery and sentenced to 73 years in prison. She began serving her sentence in 1983. De'lonta is, according to the opinion for the court of appeals by Circuit Judge Albert Diaz, "a pre-operative transsexual suffering from a diagnosed and severe form of a rare, medically recognized illness known as gender identity disorder (GID). GID is characterized by a feeling of being trapped in a body of the wrong gender. This belief has caused De'lonta to suffer 'constant mental anguish' and, on several occasions, has caused her to attempt to castrate herself in efforts to 'perform [her] own makeshift sex reassignment surgery.' De'lonta has

indifferent" to the serious medical problem of inmates. That is, if they know about a serious medical problem, they are supposed to provide treatment for it, although an inmate does not necessarily have a right to the treatment the inmate would prefer.

The federal district court dismissed De'lonta's 1999 suit, saying that she had failed to state a valid 8th Amendment claim. The court of appeals reversed that ruling in 2003, finding that De'lonta's need for treatment was adequately pled in the complaint. As a result, the Department of Corrections settled the case by agreeing to provide medical treatment. They consulted a GID specialist and provided De'lonta with psychological counseling and hormone treatment, and allowed her to groom and dress as female. The treatments have

Lang in individual therapy at this time." Despite her repeated requests, prison authorities did not call in a GID specialist to evaluate De'lonta concerning her request for gender reassignment.

De'lonta filed the present lawsuit in 2011, claiming that in light of prison authorities' knowledge about her situation, their continued denial to consider sex reassignment surgery for her constitutes "deliberate indifference" to her "serious medical need." District Judge Turk dismissed her complaint, agreeing with VDOC's argument that because they were providing counseling and hormone therapy, they could not be said to exhibit deliberate indifference to De'lonta's medical condition. Judge Turk concluded that because De'lonta had not been "approved" for sex reassignment surgery, she was "not entitled to it," and



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that this was just a case of an inmate not getting her preferred treatment, thus insufficient to state a valid 8th Amendment claim.

The court of appeals rejected this analysis. Taking as conceded that De'lonta's gender identity disorder is a serious medical condition, the court concluded that De'lonta's allegations were sufficient to ground a claim of deliberate indifference.

"De'lonta alleges that, despite her repeated complaints to Appellees alerting them to the persistence of her symptoms and the inefficacy of her existing treatment, she has never been evaluated concerning her suitability for surgery. Instead, despite their knowledge that De'lonta's therapy sessions with Psychologist Lang actually provoked her 'overwhelming' urges to self-castrate, VDOC's medical staff's only response to De'lonta's requests for surgery was a 'request that you continue to work with Ms. Lang in individual therapy at this time.' These factual allegations, taken as true, state a plausible claim that Appellees 'actually knew of and disregarded' De'lonta's serious medical need in contravention of the Eighth Amendment." The court was actually quoting the earlier court of appeals ruling in favor of De'lonta that led to the earlier settlement.

Judge Diaz rejected VDOC's argument that they were meeting their 8th Amendment obligations by continuing to provide counseling and hormone therapy, asserting that "just because Appellees have provided De'lonta with some treatment consistent with GID Standards of Care, it does not follow that they have necessarily provided her with

constitutionally adequate treatment." The court drew an analogy to a situation where the prison reacted to an inmate's serious injury in a fall by prescribing a painkiller instead of considering surgery that would be the medically appropriate response to the injury. "Accordingly," wrote Diaz, "although Appellees and the district court are correct that a prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need."

Similarly, the court rejected VDOC's argument that De'lonta's agreement to the settlement of her earlier lawsuit compelled the conclusion that the prison was not deliberately indifferent to her medical need.

The court was not ruling that De'lonta is entitled to sex reassignment surgery, but rather that she is entitled to pursue her 8th Amendment lawsuit, in which she will bear the burden of proving that the prison's failure to consider her for the next step in treatment under the Standards of Treatment is inappropriate in the circumstances. Implicit in the court's ruling, however, is that if a GID specialist were to determine that De'lonta needs sex reassignment surgery in light of her gender identity disorder, the prison would have to arrange to provide the procedure, otherwise it would be exhibiting deliberate indifference to her serious medical condition.

Bernadette Francoise Armand, of Victor M. Glasberg & Associates, Alexandria, Virginia, argued the appeal on behalf of De'lonta, with amicus support from the DC Trans Coalition and the national and Virginia ACLU. ■

"The treatment a prison facility does provide must [] be adequate to address the prisoner's serious medical need," wrote the court.

European Court Rules in Religious Liberty Cases, Affirming Protection for Gay Rights

The European Court of Human Rights (CHR) issued a decision on January 15th concerning whether British employers are violating the religious rights of their employees when they take certain disciplinary actions against those employees in four unique situations. In *Eweida and Others v. the United Kingdom*, CHR Fourth Section (Application Nos. 48420/10, 59842/10, 51671/10, and 36516/10), the applications from four Christian employees complaining that UK law failed to protect their religious freedoms were heard. Two cases involved religiously-based refusals to deal with same-sex couples.

The first case the court addressed involved the applicant Ms. Eweida. Ms. Eweida, a Christian, worked as a check-in employee for British Airways (BA).

to freedom of religion under Article 9 of the European Convention of Human Rights by rejecting her discrimination claims. The United Kingdom Court of Appeal had rejected Ms. Eweida's claim of discrimination against her employer, British Airways (BA), for its refusal to allow her to wear a cross around her neck at work. The CHR held that the Court of Appeal had not correctly balanced the interests of Ms. Eweida to express her religious beliefs in the workplace against the interests of BA to restrict this through its uniform policy.

The Eweida case was heard with the cases of three other British Christian employees who claimed the Court of Appeal breached their Article 9 rights by not upholding their discrimination claims.

The second case involved Ms. Chaplin,

Similarly, in the third and fourth cases of Ladele and McFarlane, restrictions on religious expression were held to be proportionate where the employers had the legitimate aim of protecting others from discrimination. These two cases differ from the first two in that the applicants felt that their rights as Christian were secondary to the rights of lesbians and gay men to be free of discrimination.

In the third case, a civil servant and registrar, Ms. Ladele, was against same-sex marriage and felt it went against her Christian beliefs to officiate same-sex unions. Initially, Ladele was able to make informal arrangements with coworkers to trade work and thus avoided officiating such unions. Ultimately though, she was fired for refusing to perform job duties relating to same-sex civil partnerships.

If employers have legitimate business reasons for their actions of restricting religious expression in the workplace they should end up on the right side of this ruling.

BA had a policy which prohibited the wearing of religious articles for staff with customer service roles, with some limited exceptions. Ms. Eweida began wearing a visible cross on the outside of her uniform in violation of company policy, and one day was sent home because of her decision to don the cross. BA offered her a different position where she could wear her cross without issue. Ms. Eweida was not interested in this position and instead opted to stay at home on unpaid leave. Several months later, BA changed its policy and Ms. Eweida went back to work. Afterwards, she filed a claim for compensation for indirect religious discrimination against BA on the basis that its policy had imposed a provision which adversely affected her right to freedom of religious expression.

The CHR in that case determined that the United Kingdom failed to ensure protection of Ms. Eweida's right

a geriatrics nurse. She, like Eweida, wanted to wear a cross around her neck at work. The hospital where she worked asked her to remove the cross to protect the health and safety of her hospital ward. The hospital had a standing policy preventing staff from wearing necklaces to reduce the risk of injury when handling patients, regardless of religious affiliation. The CHR in this case came out differently than in Eweida and held that where there was a sound health and safety reason for a decision, they could justify limitation of wearing religious items. The importance of the hospital's health and safety reason for imposing the restriction on Ms. Chaplin was of much greater magnitude than BA's interests had been in the case of Eweida. The hospital itself was best placed to make decisions about health and safety, and as such, the CHR held that the restrictions in this case were proportionate and did not infringe Ms. Chaplin's Article 9 rights.

Ladele's actions violated the local authority's equal opportunities policy. It appears that she felt that her ability to practice her Christian belief system was unfairly being treated as secondary to the rights of same-sex couples. However, the CHR found the local authority had legitimate reasons for enforcing their equal opportunity policy and dismissing Ms. Ladele.

The fourth case involving Christian employee Mr. McFarlane is similar to that of Ms. Ladele. He was a sex and relationship counselor who was fired for gross misconduct when he was perceived to be against providing counseling to same-sex couples. Supervisors for Mr. McFarlane were concerned about the level of patient care he would provide to clients that he discriminated against and were unwilling to continue to let him serve in his role. In the Ladele and McFarlane cases, the Court held that the employers

in both of these cases had the legitimate business reason of requiring their employees to act in a way that did not discriminate against the public or clients of the agency.

Two CHR judges, Vucinic and De Gaetano, authored a dissenting opinion and noted that while on the surface these last two cases are similar, they are in fact quite different. They note that Ladele never publicly voiced her viewpoints, nor did she receive complaints from service users, only from her gay and lesbian identified co-workers. Her failure to perform this one task of her job frustrated and offended her co-workers, who ultimately reported her. Ladele felt “she had suffered discrimination as a result of her Christian beliefs”. Mr. McFarlane, according to the dissenting opinion, must have known he would have to counsel same-sex couples when he entered into practice. They compared his actions with that of a volunteer soldier who when faced with combat opts out on the ground of being a conscientious objector. It is an interesting comparison.

The first and last two cases, while similar on the grounds of religious freedom and expression, differ tremendously when juxtaposed with outcome in the workplace. United Kingdom employers should take notice of these rulings and the reliance employees are basing on Article 9 to claim religious discrimination. However, it is clear from these CHR decisions that if employers have legitimate business reasons for their actions of restricting religious expression in the workplace they should end up on the right side of this ruling. Similarly in the United States, in discrimination cases under Title VII, employers must show that they have legitimate business reasons for actions taken against employees whose religious beliefs affect their workplace activities.

This conversation is ongoing in the UK. This decision is a chamber decision, so if any of the disappointed parties challenge the decision it will be referred to a larger body of judges. It will be interesting to watch how cases such as these will continue to develop in the UK, especially as the government has proposed a bill to provide civil marriage for same-sex couples. — *Tara Scavo*

Tara Scavo is an attorney in Washington, D.C.

Supreme Court to Hear Challenge to Federal Requirement That NGOs Working on HIV Prevention Affirmatively Oppose Prostitution

The Supreme Court announced that it will review the 2nd Circuit Court of Appeals decision in *Alliance for an Open Society International, Inc. v. U.S. Agency for International Development*, 651 F.3d 218 (2011), en banc review denied, 678 F.3d 127 (2012), which held that the federal government probably violated the 1st Amendment rights of the plaintiff agencies by conditioning their receipt of funding under the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 on the agencies having a policy expressly opposing prostitution and sex trafficking and taking no positions or actions inconsistent with such a policy. In so holding, the 2nd Circuit panel, by a vote of 2-1, upheld a preliminary injunction that the district court had issued against enforcement of the policy pending a full trial on the merits. The ruling arguably conflicts with a D.C. Circuit ruling rejecting a 1st Amendment challenge to the policy, *DKT Int'l, Inc. v. U.S.A.I.D.*, 477 F.3d 758 (D.C. Cir. 2007). The circuit split on the constitutionality of a federal statute has now captured the Supreme Court's attention. *U.S.A.I.D. v. Alliance for an Open Society*, No. 12-10, 2013 WL 135533 (cert. granted, Jan. 11, 2013).

At the heart of the case is the complicated doctrine of “unconstitutional conditions” that the Supreme Court has developed through a series of cases involving restrictions placed by Congress on the recipients of federal funds. Perhaps the most notorious of these cases is *Rust v. Sullivan*, 500 U.S. 173 (1991), which rejected a constitutional challenge to the requirement that federal family planning money not be “used in programs where abortion is a method of family planning.” Regulations issued under the relevant statute prohibited projects receiving federal funds from providing abortion counseling or referrals, or engaging in any activities that would encourage, promote or advocate abortion as a method of family

planning. The Supreme Court rejected the argument that this was unconstitutionally compelled speech, pointing out that the law authorized federal funding recipients to establish separate organizations that would not receive federal money and could undertake abortion-related activities, and that funding recipients were not required to articulate an anti-abortion message, but merely to remain silent about abortion if they wanted federal money. The Court's explanation was that Congress could dictate the content of speech that it was paying for as part of a federally-funded family planning program.

The majority of the 2nd Circuit panel, Circuit Judges Barrington Parker and Rosemary Pooler, found this holding, and other similar rulings by the Supreme Court and other 2nd Circuit panels, to be distinguishable from the HIV restriction case, primarily because the challenged statute goes beyond requiring silence and neutrality, instead conditioning federal money on the recipient agency articulating the government's position as if it was the agency's own position. Dissenting Circuit Judge Chester Straub rejected this distinction, arguing that this case was controlled by *Rust* and similar cases, and that the government was entitled to control the speech of HIV-prevention organizations that operated with federal financial assistance.

When the government unsuccessfully sought en banc review of the panel ruling, two other members of the circuit court joined with Judge Straub in dissenting from the denial of en banc review, arguing, among other things, that the split with the D.C. Circuit signified the importance of the issue, meriting reconsideration by the full circuit bench.

When the case was pending before the district court, the government argued that the plaintiffs did not have standing to seek a constitutional ruling because they had failed to take an alternative course offered by regulations to set up

separate affiliated organizations that could continue with non-governmental funds to undertake activities seeking to engage prostitutes in HIV-prevention measures, without being compromised in those efforts by having to articulate policy positions hostile to prostitution. The panel majority pointed out that this “affiliated organization” device for avoiding the restriction did not save the statute from constitutional challenge, because the statute went too far in requiring funding recipients to adopt an express policy position with which they may disagree.

“Furthermore,” the court said, “the targeted speech, concerning prostitution in the context of the international HIV/AIDS prevention effort, is a subject of international debate. The right to communicate freely on such matters of public concern lies at the heart of the First Amendment. The Policy Requirement offends that principle, mandating that Plaintiffs affirmatively espouse the government’s position on a contested public issue where the differences are both real and substantive. For example, the World Health Organization (“WHO”) and the Joint United Nations Programme on HIV/AIDS (“UNAIDS”) have recognized advocating for the reduction of penalties for prostitution – to prevent such penalties from interfering with outreach efforts – as among the best practices for HIV/AIDS prevention. Plaintiffs claim that being forced to declare their opposition to prostitution ‘harms their credibility and integrity as NGOs, which generally avoid taking controversial policy positions likely to offend host nations and partner organizations’ and risks ‘offending all of the groups whose approach to HIV/AIDS may differ from that of the government,’ not to mention some of the very people, prostitutes, ‘whose trust they must earn to stop the spread of HIV/AIDS.’”

The plaintiffs (now respondents in the Supreme Court) are represented by the Brennan Center for Justice and attorneys at Wilmer Cutler Pickering Hale & Dorr PC. Their lawsuit attracted amicus support from a large group of public health and human rights organizations. ■

Supreme Court Receives First Round of Briefing in Same-Sex Marriage Cases

On January 22, the parties seeking reversal of the decisions by the courts of appeals filed their opening briefs on the merits in the Supreme Court in *Hollingsworth v. Perry*, No. 12-144 (*California Proposition 8*), and *United States v. Windsor*, No. 12-307 (Defense of Marriage Act, Section 3). In *Hollingsworth*, this means that the proponents of Proposition 8 made their argument to the Court as to why they have standing to defend their state initiative amendment on appeal from the district court’s decision declaring it unconstitutional, as well as their argument that the 9th Circuit’s ruling (and the district court’s ruling) was an incorrect application of the 14th Amendment. In *Windsor*, the order of briefing is unusual in that the first brief was not filed by the Petitioner (the Solicitor General), but rather by a third party, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG), whose own petition for certiorari was filed in December but has not received any response from the Supreme Court. BLAG was an intervenor at the district court level, and presented the only argument for reversing the district court before the 2nd Circuit. Its status as a party before the Supreme Court is placed in question in the Court’s order granting certiorari. On January 24, the amicus curiae appointed by the Court to argue against jurisdiction in *Windsor*, Prof. Vicki Jackson of Harvard Law School, filed her brief (written with the assistance of attorneys at Akin Gump Strauss Hauer & Feld LLP), contending both that BLAG lacks standing to participate as a party in this case, and that the Solicitor General’s petition for certiorari did not present the Court with the kind of “Case or Controversy” necessary for the Court to rule on the merits.

In light of the rather unusual posture of the *Windsor* case, in which the Petitioner asks the Court to affirm the

decision below rather than to reverse or modify it, the Court set out an unusual briefing schedule in an Order dated December 14, in response to a letter from the Solicitor General suggesting how the briefing could unfold. Thus, BLAG files first, the Solicitor General files its brief on the merits by February 22, *Windsor*’s brief on the merits is due by February 26, and BLAG’s reply brief is due thereafter within the time provided by the Court’s rules for reply briefs. Focusing separately on the jurisdictional question, after Prof. Jackson filed her brief, BLAG, the Solicitor General, and *Windsor* would have until February 20 to file responding briefs on the jurisdictional questions, after which reply briefs could be filed by Jackson and all parties.

As of the end of January, in addition to the briefs noted above, amici in support of Proponents of Proposition 8 and BLAG’s defense of Section 3 filed their briefs towards the end of January. As of January 31, the Clerk of the Court had not posted links to the brief on the Court’s website, but SCOTUSblog.com had posted links to numerous amicus briefs in each case. In *Hollingsworth*, briefs were submitted urging reversal of the 9th Circuit by David Benkoff and two other self-identified gay men opposed to same-sex marriage, the Family Research Council, Dr. Paul McHugh, “Scholars of History and Related Disciplines,” Liberty Life and Law Foundation, Westboro Baptist Church (Rev. Fred Phelps’s outfit, urging the Court to make sure that the United States doesn’t offend God by allowing same-sex marriages), Professor Daniel N. Robinson, a group of international jurists and academics, Thomas More Law Center & Imperial County Clerk Chuck Story (persisting in his effort to bolster the Court’s jurisdiction despite the challenge to the Petitioners’ standing), Coalition for the Protection of Marriage, Foundation for Moral Law, U.S. Conference of Catholic

Bishops, Citizens United's National Committee for Family, Faith and Prayer, Center for Constitutional Jurisprudence, Patrick Henry College, and Eagle Forum Education & Legal Defense Fund. Filing in Support of BLAG's defense of DOMA were eleven of the groups who filed briefs in the Prop 8 case, plus the Chaplain Alliance for Religious Liberties. From the list, it appears likely that nobody is coordinating amici on this side of the cases and the Justice's clerks are going to face lots of repetitive arguments as they go through these briefs – if anyone is actually going through all of these briefs.

The standing argument that Proponents of Prop 8 advance in their brief in *Hollingsworth* is straightforward. After reciting the history of the litigation, they argue that the state of California has undoubted standing to appeal a decision by the federal district court that a provision of the California Constitution violates the 14th Amendment. Relying upon the California Supreme Court's

standing, asserted that the special role afforded to initiative proponents under the California Constitution would justify recognizing their standing to represent the people of the state in defending the initiative that the voters approved when those state officials normally charged with defending the state's interest declined to do so.)

On the merits, the Proponents emphasized the federalism aspect of the case, arguing that the decision about marriage equality should be made through the democratic process of the state of California rather than through a federal judicial ruling, and, taking an "originalist" position regarding constitutional interpretation, imply astonishment at the argument "that the issue was taken out of the People's hands in 1868, when the Fourteenth Amendment was ratified, and that our Constitution itself defines marriage as a genderless institution." (Emphasis in original) They also argued that the 9th Circuit's attempt

than by single parents, as if such studies had anything to do with the qualifications of married same-sex couples to raise children. They contend that the inability of same-sex couples to procreate without the assistance of a third party (a sperm donor or a surrogate mother) creates a difference between same-sex and different-sex couples sufficient to render them not similarly situated with respect to the marriage issue; even if a court were to find that they were similarly situated, the Proponents argue that the state has a particular interest in using marriage to channel accidental or unintended procreation into a stable unit to raise the resulting children, an interest that they argue is not present for same-sex couples whose acquisition of children results from intentional action (of donor insemination or adoption).

BLAG's brief in *Windsor* does not address the standing and jurisdictional issues, which are postponed until they file their brief in response to Prof.

A major premise of BLAG's argument is that the appropriate level of judicial scrutiny for Section 3 is "rational basis."

response to the 9th Circuit's certified question on standing, they argue that as a matter of California law, the initiative proponents have standing to represent the state of California's interest in defending that provision in case the usual officials who would mount such a defense (the governor and the attorney general) decline to do so, and contend that for purposes of Article III standing, this is sufficient to meet the Supreme Court's standards. On this theory, there is no need for the Proponents to show that they have a particularized interest that would confer standing on them individually. (In its certified question, the 9th Circuit had asked the California Supreme Court to address both bases of standing under California law, but that court only addressed the issue of representational

to evade the underlying question of the right to marry by repositioning the case to be about the "rescission" of the right to marry is unavailing: either same-sex couples have a right to marry as a matter of the 14th Amendment or they don't, regardless whether the question arises prospectively or retrospectively, they argue. They distinguish *Romer v. Evans* by emphasizing the sweeping nature of the Colorado amendment that was struck down in that case, compared to the "narrow" effect of Proposition 8, as it was subsequently construed by the California Supreme Court. They avoid any overt gay-bashing in their argument, although some will be put off by the continuing (and somewhat misleading) citation of studies showing that children are better off raised by intact traditional families

Jackson in February. The focus instead is on the merits. BLAG, like the Prop 8 proponents, raises the banner of federalism, providing a very selective account of the adoption of DOMA that makes it sound like a carefully thought-through rational response in 1996 to the possibility that one state – Hawaii – might be making same-sex marriages available, creating the possibility that same-sex couples from other states would go to Hawaii to marry and then demand recognition of their marriages by their home states and the federal government. Section 2 (not at issue in this case) was enacted so as to leave to each state the decision whether to recognize such marriages, unencumbered by any federal full faith and credit obligations, and Section 3, in this account, was

intended to preserve the status quo for the federal government of recognizing only different-sex marriages, in order to preserve uniformity of qualifications for federal rights and benefits throughout the country and avoid the sudden unanticipated accrual of an entire new class of federal beneficiaries. On this account, disapproval or dislike of gay people is not relevant to the equal protection analysis (even though the legislative history, partially ignored in this account, is rife with expressions of such disapproval or dislike). BLAG argues that the constitution has nothing to say, one way or the other, about whether the federal government is obligated to recognize marriages of same-sex couples, and that the policy question for Congress in 1996, before any state was authorizing such marriages but in anticipation that it might happen, was whether the federal government should recognize them or not recognize them. As to that, BLAG argues that it was rational to decide not to recognize them while the issue of who could marry was worked out state by state, and that if a large number of states eventually did allow same-sex marriages, Congress might rationally reconsider this policy decision. BLAG also reiterated the Prop 8 Proponents' argument that Congress could rationally prefer to bestow federal marriage rights on different-sex couples in order to channel procreative activity for the sake of the children, and judge that this would not be necessary for same-sex couples, who don't "accidentally" procreate.

A major premise of BLAG's argument is that the appropriate level of judicial scrutiny for Section 3 is "rational basis," under which the provision enjoys the presumption of constitutionality and the burden of showing irrationality is on the plaintiff. Because the 2nd Circuit decided that the case merited "heightened scrutiny," BLAG devoted a substantial part of its brief to arguing against that higher level of review. BLAG argued against the 2nd Circuit's conclusion as to each of the four prongs of the typical equal protection heightened scrutiny analysis that federal courts have engaged in for sexual orientation discrimination claims, after making the now-ritualistic assertion that in fact Section 3 does not

directly discriminate based on sexual orientation, because same-sex couples' marriages will not be recognized (and different-sex couples' marriages will be recognized) regardless of the sexual orientation of the parties (although they conceded in a footnote that as a practical matter Section 3 disadvantages gay people who want to marry their same-sex partners).

"This Court has had opportunities to declare sexual orientation a suspect class and has declined to do so," argued BLAG, characterizing the 2nd Circuit's ruling as "an outlier" because it "directly conflicts" with rulings in eleven other circuits. (Prior to its ruling in *Windsor*, the 2nd Circuit had been one of just a handful of circuits that had not previously issued an opinion on this issue.) BLAG led off its argument by focusing on the impressive gains that the gay rights movement has achieved in recent years, arguing that gays are not "politically powerless." They note the surge in public opinion in support of same-sex marriage, the recent ballot box victories in Maine, Washington State, Maryland and Minnesota, the recent legislative enactment of marriage equality in New York and other states, the embrace of marriage equality and gay rights generally by the Democratic National Platform (with the personal endorsements of the president and vice-president) in 2012, and contend that there is no need for the courts to subject federal policies that disadvantage gay people to heightened scrutiny, since gay people now have sufficient clout to protect their interests through the political process. Their peroration makes the gay rights movement sound like a juggernaut sweeping all before it: "Gays and lesbians are one of the most influential, best-connected, best-funded, and best-organized interest groups in modern politics, and have attained more legislative victories, political power, and popular favor in less time than virtually any other group in American history." BLAG argues that this alone would justify rejecting heightened scrutiny, stating: "This Court has never definitely determined which of the four factors is necessary or sufficient, but given that the ultimate inquiry focuses on whether

a group needs the special intervention of the courts or whether issues should be left for the democratic process, the political strength of gays and lesbians should be outcome determinative here."

Nonetheless, BLAG proceeds to address the other prongs, first briefly referring to the "channeling procreation" argument as supporting the contention that "whether a married couple is of the opposite sex is relevant to the government's interest in recognizing marriage." Then they argue that sexual orientation is not an "immutable characteristic," contending that it is a classification defined by behavioral propensities, to distinguish it from previously-recognized suspect classifications, and that scientific experts continue to state that the factors that cause people to have a particular sexual orientation as "not well understood" and not yet scientifically established, and that "for some persons, sexual orientation is fluid." As to the history of discrimination argument, they seize upon expert testimony offered in this case to suggest that the history of official discrimination is relatively short, noting testimony that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century," overt discrimination on this basis does not show up in federal law until the 20th century, and "more importantly, unlike racial minorities and women, homosexuals as a class have never been politically disenfranchised – the kind of pervasive official discrimination that most clearly supports suspect class treatment by the courts."

BLAG concludes this argument by reiterating its view that this is a political question that should not be decided in the courts, claiming that the democratic process "has substantial advantages over constitutionalizing this issue," noting the ongoing debate throughout the country at all levels of government and society. "This is how it should be," BLAG contends. "These for a require participants on both sides to persuade those who disagree, rather than labeling them irrational or bigoted." They urge the Court not to short-circuit the political debate, and to reverse the 2nd Circuit. ■

Sixth Circuit Revives Gay Couple's §1983 Claims Arising from Public Park Sex Sting Operation

On January 7, 2013, the U.S. Court of Appeals for the Sixth Circuit reversed in part and affirmed in part a case against Michigan law enforcement, the City of Westland and Wayne County in Michigan arising from the arrest of one of the plaintiffs in a public park sex sting operation. *Alman v. Reed*, 2013 WL 64370.

The Metro Street Enforcement Team (MSET), a task force comprised of officers from the Westland Police Department and the Wayne County Sheriff's Department, observed "used condoms along the trails" at Hix Park, a public nature park in Michigan. As a result, MSET conducted a decoy operation on October 12, 2007, with defendant Deputy Reed acting as decoy. Defendant Sergeant Robert Swope, who supervised MSET, explained that Reed was chosen because he "had experience working with the morality unit for the Sheriff's Department for about five years."

On October 12, 2007, plaintiff Randy Alman "decided to take a break from helping his mother move to a new apartment and go visit Hix Park." Reed noticed Alman sitting on a picnic bench under a pavilion located nearby a Parking Lot. Reed approached Alman, sat down at the table, and struck up a conversation. Alman testified that Reed asked him what he was doing in the park, and Alman told him that he was taking a break from helping his mother move. Alman also mentioned his partner, co-plaintiff Michael Barnes, noting that they had just moved to Indiana after previously living in California. Reed testified that this statement led him to

believe that Alman was gay.

The parties dispute what happened next. Reed testified that Alman stated he liked to visit Hix Park for "recreation"; Alman testified he had never been there before. Reed also stated that Alman asked if he had found the park through a website called "squirt.org" which Reed claims he never heard of before that day. Reed claimed he told Alman he was in the park to look for deer, and that Alman told him he often saw deer in his mother's yard nearby and invited him to "take a walk down the trail" to see if they could find a "big buck." Alman claims, however, that he simply got up and said he was going for a walk and then leaving the park, and claims that Reed followed him without invitation.

However, it is undisputed that Alman began walking down a trail, and Reed followed him. Alman claims that Reed asked him "if there was a more secluded spot they could go to" and Reed testified that Alman "veered off on his own into a small clearing after they had walked a short distance." Once in the clearing, the two men began to talk. Alman claims that he believed Reed was flirting with him, and that Reed told Alman that he "liked to watch." Reed testified that he told Alman "he was 'a little nervous' and 'new to this' type of activity." It is undisputed that at this point, Alman touched "the zipper area on the front of Reed's crotch." Alman claims he simply "brushed" his hand against Reed's zipper area and did not consider touching it. Reed testified that "Alman 'grabbed' his crotch with his 'whole cupped hand' for 'an instant, maybe a second or half a

second." Alman then "went down on one knee," claiming that he was positioned "sideways" and pretended to tie his shoe to "demonstrate that 'everything was okay.'" Reed did not recall what Alman was doing when he went down on one knee, and testified that he showed Alman his badge and arrested him.

Reed further testified that he told his boss, Sgt. Swope, that he arrested Alman after Alman had "grabbed me or touched my crotch." Swope testified that he did not ask Reed if Alman had used force, whether Alman propositioned him, or whether Reed had said or done anything that might have caused Alman to believe that he had consent to touch Reed. Further, on Swope's orders, the car that Alman drove to the park was towed and impounded. Alman was charged with: [1] Accosting and Soliciting; and [2] Fourth Degree Criminal Sexual Conduct (CSC4). Alman was released two hours later after he posted a \$150 bond.

The car that had been impounded belonged to Barnes. A few days after the arrest, Barnes drove to Michigan to "retrieve Alman and his car." On October 17, 2007, Barnes elected to redeem his vehicle without contesting the seizure by paying a \$900 redemption fee. Barnes also signed an acknowledgement of the vehicle's release and his payment, which included the following provision: "This precludes any action in this case regarding the vehicle and constitutes a final settlement of the civil nuisance abatement case. This settlement is independent and has no effect on any criminal charges that may arise from the same incident."

The Prosecution eventually voluntarily

The Prosecution eventually voluntarily dismissed the original charges against Alman because "the officer's conduct was designed to make the individual believe the act was invited or consensual."

dismissed the original charges against Alman. Assistant County Prosecutor Luke Skywalker testified that the dismissal was based upon the following policy statement, intended to provide, *inter alia* local police agencies, the standards used by the Prosecutor in deciding whether to prosecute cases involving allegations of sexual conduct in public places: “An unsolicited sexual act or exposure to a member of the public or an undercover police officer will bring a misdemeanor charge of indecent exposure... or disorderly person-obscene conduct... Charges will not be pursued by this office if the officer’s conduct was designed to make the individual believe the act was invited or consensual.”

After the original charges against Alman were dismissed, Officer Randy Thivierge of MSET issued Alman an appearance ticket for having violated two Westland municipal ordinances during his encounter with Reed: [1] Being a Disorderly Person (s 62-97); and [2] Battery (s 62-67). Alman moved to dismiss these charges on May 20, 2008 and a state court judge dismissed the s 62-97 charge on the basis that it required allegations of “exposure of bodily parts” which were absent here. The battery charge went to trial, but on the day of trial, the judge dismissed the case because none of the officers appeared in court. Alman’s state criminal case was now over. He then brought this federal suit against defendants, along with his partner and The Triangle Foundation as co-plaintiffs, for alleged violations of their constitutional rights. The Triangle Foundation is an LGBT advocacy organization that has since been renamed Equality Michigan.

In their federal complaint, plaintiffs asserted twelve causes of action: [1] Alman raised eight claims, based on the Fourth Amendment, the Fourteenth Amendment and Michigan state malicious prosecution law; [2] Barnes raised three claims based on the Fourth Amendment and state law abuse of process; and [3] plaintiffs together raised a First Amendment claim, alleging that defendant’s conduct would chill other members of The Triangle Foundation from engaging in protected activity. On October 7, 2010, the district

court granted defendants’ motion for summary judgment and dismissed the complaint. Plaintiffs appealed the dismissal of the claims brought by the individual plaintiffs only.

Writing for the 6th Circuit panel, Senior Judge Damon J. Keith held that the district court erred in granting summary judgment as to Alman’s claims that his Fourth Amendment rights were violated, because his initial arrest was not supported by probable cause. He found that the myriad disputed issues of fact could lead a fact-finder to conclude that there was no probable cause for an arrest. A violation of CSC4 occurs when an individual “engage[s] in sexual contact with another person and if any of the following circumstances exist: ... (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances: ... (v) When the actor achieves the sexual contact through concealment or by the element of surprise.” While there is no dispute that Alman touched Reed’s crotch without express consent or invitation, Judge Keith found that there was no probable cause to believe that Alman was about to use or did use force or otherwise surprised him, as is necessary to sustain a conviction under CSC4. Therefore, it was error for the district court to find that probable cause to commit CSC4 existed as a matter of law. Based on the same reasoning, the court reversed the district court on Alman’s claims relating to the other three charges that were brought against him.

On appeal, Sgt. Swope argued that he was entitled to qualified immunity shielding him from individual liability, even if the arrest was not supported by probable cause. The district court did not reach any of the remaining issues, because it found the arrest was supported by probable cause, but the 6th Circuit did. Judge Keith rejected Swope’s argument that his belief that probable cause existed was reasonable, because he did not hear the conversation between Alman and Reed and he did not ask any follow-up questions before completing Alman’s arrest after Reed told him that Alman had “grabbed me or touched my crotch.” Therefore, Swope could not have

a reasonable basis to believe that any of the offenses that Alman was charged with had occurred or were about to occur.

The other judges on the panel, Judge Danny J. Boggs and Judge Karen Nelson Moore, joined on all parts of the decision, with the exception of the court’s opinion on qualified immunity for Swope. Judge Boggs dissented, stating that “given the intricacy of the court’s analysis (albeit ultimately correct), I cannot agree that we must label Officer Swope as outside the ambit of ‘reasonably competent police officer’ because he made the judgment on the spot, under the circumstances, that there was probable cause.”

The court otherwise affirmed the district court’s dismissal of Alman’s remaining claims: a state law malicious prosecution claim against Thivierge for issuing the second set of charges he faced, because he did not establish the element of malice; and [2] municipal liability for failure to train, because Alman failed to establish that any government officials had specific awareness of the potential for constitutional violations arising from the failure to train Swope about the sexual activity laws or what “accosting” meant.

As for Barnes’ Fourth Amendment claim based upon the seizure of his car, since the arrest was not supported by probable cause, the court reversed the district court on this issue as well. Judge Keith noted in a footnote that the waiver contained in the acknowledgement form that Barnes received upon payment of the \$900 fee did not waive his constitutional-based claims since it did not specifically indicate that such claims would be waived and “such waivers are not presumed lightly.”

Barnes also raised a state law claim for abuse of process, but the court held that the record was devoid of any evidence that by requiring a settlement fee to release an impounded vehicle, Wayne County was engaged in a “form of extortion” necessary to establish a violation of the statute. Therefore, the court affirmed the dismissal of this claim as well. — *Eric J. Wursthorn*

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

A Loophole Permits Same-Sex Couples to Enjoy Employer Provided Health Benefits in Michigan

In *Attorney General v. Civil Service Commission*, 2013 WL 85805 (Mich. Ct. App. Jan. 8, 2013), the Attorney General of the State of Michigan contested the new policy by the Civil Service Commission to extend eligibility in the state sponsored health plan to co-residents of state employees. While the new eligibility policy is gender-neutral and benefits a broad range of different people, it seems that it was primarily intended to benefit same-sex couples. The Court of Appeals of Michigan saw no constitutional flaws with the new gender-neutral policy and affirmed the lower court's decision in favor of the Civil Service Commission.

The Michigan Civil Service Commission is responsible for setting the policies regarding state provided health insurance for state employees. The Commission and the employees' union negotiated a health benefits policy that allows an unmarried employee to enroll one other individual, provided that the individual is over 18 years old, not a blood relative, and shared a residence with the employee for at least 12 continuous months.

Realizing that the new policy extends benefits previously reserved to married couples to same-sex couples, the Attorney General brought suit seeking to have the new policy deemed unconstitutional.

First, the Attorney General argued that the new policy was an attempt to circumvent the Michigan Marriage Amendment, as interpreted by the Michigan Supreme Court. The Michigan constitution states: "The union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

In 2008, the Supreme Court of

Michigan interpreted the marriage amendment as foreclosing any domestic partnership policies that "specifically and explicitly intended to confer benefits on same-sex partners." The Attorney General argued that the Commission's new policy fell within the types of policies prohibited by the Supreme Court's decision.

The court rejected this argument, stating that the new policy only incidentally benefits same-sex couples. "There is no absolute prohibition against same-sex domestic partners receiving benefits through their relationship with an employee so long as that receipt is not based on the employer's recognition of that relationship as a 'marriage or similar union.'" As written, the policy may benefit a wide variety of other people, including an opposite-sex boyfriend or girlfriend, a nonromantic best friend, or a mere housemate.

Second, the Attorney General asserted that the policy violated Michigan's Equal Protection Clause. Having questioned the constitutionality of the policy, the court first considered which standard of review is appropriate. The court concluded that rational basis review should serve as the standard because the gender-neutral policy does not infringe on a fundamental right, discriminate against a "suspect" classification (race, ethnicity, or national origin), or discriminate against a "quasi-suspect" classification (gender or illegitimacy). Notably, the court stated that excluding married couples and close relatives from utilizing the new policy is absurd and unfair, but the Commission was required to limit the eligibility somewhere and this exclusion was negotiated with the employees' union.

Rational basis review provides an

"exceedingly low standard" whereby the "the question is only whether the policy could plausibly be said to possibly advance any legitimate government interest." Applying this standard, the court stated that the new policy did not violate the Equal Protection Clause because the new policy was set after negotiating and bargaining with the employees' union. As a product of negotiations, the policy cannot be considered arbitrary or unrelated to the state's interests.

Third, the Attorney General argued that the Commission lacked constitutional authority to implement the new policy. This argument seems to suggest that the Commission, as an entity created by the Michigan constitution, did not have the constitutional mandate necessary to implement policies regarding the health care benefits for state employees. However, the court noted that article 11, section 5 of the Michigan constitution vested exclusive power in the Commission to set compensation and conditions of employment for public employees.

Finally, the Attorney General argued that the new policy does not constitute "compensation" under the Michigan constitution, asserting that the term "compensation" in the Michigan constitution does not include providing health care benefits. The court quickly dismissed this argument by examining case precedent that included benefits as compensation.

The Court of Appeals demonstrated that despite the ongoing efforts to limit the societal benefits available to same-sex couples, many loopholes exist to circumvent these discriminatory practices. Granted, the Commission's new policy throws the baby out with the bathwater by extending benefits to a wide variety of other people, but it remains to be seen how many state employees can take advantage of the new policy.

As a final note, the Attorney General pledged to challenge the Court of Appeals decision to the Michigan Supreme Court. Given the Supreme Court's interpretation of the marriage amendment this may be an uphill battle for proponents of same-sex partner benefits. — *Gillad Matiteyahu*

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

Despite the ongoing efforts to limit the societal benefits available to same-sex couples, many loopholes exist to circumvent these discriminatory practices.

California Court of Appeal Rules on Presumptive Parentage Claim by Adoptive Parent's Former Same-Sex Partner

In a non-published decision by the California 2nd District Court of Appeal, a woman formerly in a relationship with a child's adoptive mother was determined to be the child's legal parent. *Beth C. v Marcia B.*, 2004 WL 143543 (Cal. App. 2 Dist., January 14, 2013)

In 2002, Beth and Marcia began a committed same-sex relationship, and though they never registered as domestic partners in any state, by 2003 Beth had moved from California to Illinois to live with Marcia. The couple looked into adoption after they tried to have a child through donor insemination of Beth.

In January 2007, Marcia formally adopted a four year old boy, Egor, from Russia, and the couple re-named him Ian. Beth was not listed as an adoptive parent because she was worried about how a DUI on her record might affect the adoption, and because Russia did not allow same-sex couples to adopt. After Marcia's adoption of Ian became effective, Beth began the process of legally adopting the child in California as well, but this process was never completed after several delays.

During 2007 and 2008, Beth remained a "stay at home mom" for Ian, while Marcia worked full time. Beth took Ian to his doctor appointments, and he called Beth "mommy." When the couple ended their relationship in August 2008, Beth and Ian continued living with Marcia in order to allow Ian to finish kindergarten, at which time Beth took Ian to live with her at her parents' in California. For 18 months, Ian lived with Beth, and saw Marcia for a few weeks of the year during holidays. Ian was enrolled in school in California, and on his medical and school records Beth was listed as his mother.

Beth and Marcia's relationship apparently remained amicable until February 2011, when Marcia picked Ian up at Beth's residence and did not return him. Marcia then sought a custody order limiting Beth's visitation rights with the child. In response, Beth filed a petition in order to establish her status as legal parent, and after a bench trial the

court found that Beth is Ian's presumed parent. Further, the trial court found that Marcia did not rebut this presumption of parentage, and entered judgment in favor of Beth. Marcia then appealed.

On appeal, Marcia argues that the lower court erred in determining that Beth is Ian's presumptive parent, primarily for reasons of policy. The court looked to the Uniform Parentage Act, which defines the relationship "existing between a child and the child's natural or adoptive parents." The code is written in terms of "mother" and "father," but the Act expressly provides that all provisions be applied, as is practicable, to each parent, in a gender-neutral manner.

Under the Act, a man is presumed to be the father of a child if "he receives the child into his home and openly holds out the child as his natural child." In Beth's case, the court reads this in a general-neutral way, looking at whether Beth received the child into her home and openly held Ian out as her natural child. If this presumption is met, the individual is presumed to be the parent of the child, and the opposing party must rebut the presumption with "clear and convincing" evidence to the contrary.

The reasoning behind this presumption is the state's interest in the welfare of the child, and the integrity of the family. It is not often that courts examine same-sex parentage in this light, and it is especially interesting that the court notes that the Act does not consider the relationship between the parents to be material. In fact, the Court specifically cites case law that the true test is the individual's relationship with the child, rather than with the other parent, if any. *E.C. v J.V.*, 202 Cal. App.4th. 1076 (2012).

Reviewing the lower court's finding, the Court determines that sufficient evidence does indeed exist to support the holding that Beth is Ian's presumptive parent. Primarily the Court looks to the fact that Ian lived with Beth ever since he was adopted by Marcia, including after Beth and Marcia split. Ian referred to Beth as "mom" or "mommy," and in

school records and social situations, Beth identified Ian as her son.

Marcia argues on appeal that the lower court's holding is counter to public policy, because it "encourages individuals to avoid taking responsibility for children," as Beth did not adopt or otherwise form a legal relationship with Ian. The Court points out, however, that this same policy would have allowed Marcia to seek child support from Beth, if Marcia had showed that Beth was a presumed parent. Further, the Court observes that Marcia's argument relies on the assumption that Beth did not want a legal relationship with Ian, and could have walked away at any point. Once Beth held Ian out as her son and received him into her home, she became a presumptive parent, with all the benefits and responsibilities that holds at law.

Marcia's next argument springboards off this last point, and she contends that "any person who spends considerable time with a child" and refers to the child in "the right terms" could claim parentage. Though Marcia admits that case law does not support this assertion, she nevertheless tries to distinguish this case based on the fact that the two parents are of the same sex. This doesn't hold any water, though, as the Court circles back around to the policy behind the Act. Rather than examine the relationship between parents, the Court is concerned with the relationship between the child and would-be presumptive parent(s).

Finally, the Court makes quick work of the argument that Beth should not be determined to be Ian's presumptive parent because she did not formally adopt him. In actuality, the Act is designed explicitly as an alternative method from adoption for an individual to establish parental status.

Accordingly, the Court affirms the lower court's holding, and underscores the true motivation behind parentage laws – the welfare of the child, not the relationship between the parents themselves. —*Stephen Woods*

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

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2ND CIRCUIT — A 2nd Circuit panel issued a summary order on January 29 in *Marku v. Holder*, 2013 WL 322914 (not selected for publication in Fed.3rd), denying a petition to review a decision by the Board of Immigration Appeals (BIA), which had affirmed a decision by an Immigration Judge to deny the petitioner's application for asylum, withholding of removal and relief under the Convention Against Torture. The petition is from Albania. The IJ determined that the petitioner's testimony concerning being beaten by friends at work when they discovered his sexual orientation and being "strangled" by a police officer in Albania was not credible, due to discrepancies between his statements at entry, his statements on his petition, and his statements in the hearing before the IJ. In particular, Marku did not describe the beating in his application, only in his hearing testimony, and he did not testify that he was strangled by the police officer until he was prompted by questioning from his attorney. The court also noted other discrepancies that it found to support the IJ's resolution of credibility issues under the REAL ID Act. Thus, the petitioner is now subject to deportation to Albania.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT — The first HUD enforcement action under the agency's Equal Access rule has yielded a payment of \$7,500 by Bank of America to a lesbian couple who complained that they were subjected to discriminatory treatment in their mortgage application. BoA had denied a mortgage application because the two women were not legally married, which they could not be in Florida where they applied (South Daytona Beach). HUD announced the settlement in a Jan. 2 news release. *National Law Journal*, Jan. 3.

CALIFORNIA — The city of Los Angeles is paying almost \$1.2 million to settle a discrimination lawsuit brought by a gay police officer, Sgt. Ronald Crump. As part of the settlement, Crump will resign from the force and the city will waive any right to appeal. A Superior Court jury awarded Crump \$1.16 million in May 2011, after the city, confident of its litigation position,

turned down his offer to settle the case for \$100,000, according to a January 25 article in Bloomberg BNA's *Daily Labor Report*. Since Crump is also entitled to attorney fees as prevailing party in the trial, the total cost to the city will amount to about \$1.5 million.

CALIFORNIA — In *Derr v. Kern County Fire Department*, 2013 WL 223736 (Cal. App., 5th Dist., January 22, 2013), the court of appeal affirmed a ruling by the Kern County Superior Court dismissing a discrimination claim by a retired firefighter who claimed constructive discharge, but reversing the dismissal as to the plaintiff's claim of unlawful harassment by a supervisor. The plaintiff's daughter is a lesbian, and he responded indignantly to anti-gay statements by his direct supervisor, Captain James Rummell. When Rummell learned that Derr's daughter was a lesbian, he began a campaign of verbal harassment that eventually seems to have driven Derr from the fire department, the harassment having escalated after Rummell learned of an anti-Proposition 8 sign planted on Derr's lawn. The court found that the Fire Department and the County could not be held liable on a constructive discharge claim because they had responded to the situation by transferring Rummell, and that a denial of Workers Compensation benefits to Derr for his medical condition had not been discriminatory because his problems were not shown to be work-related as such. However, the court of appeal found that the defendant employers could be held liable for harassment by a supervisor, and thus revived the harassment claim, taking Derr's allegations as true for purposes of the dismissal motion. Under the Fair Employment and Housing Act, who prohibits sexual orientation discrimination, an employer may be held liable for discrimination (including harassment) against somebody because of the sexual orientation of somebody with whom the victim is associated.

IDAHO — Businessman Frank VanderSloot has sued *Mother Jones* magazine, contending that he was defamed by an article that depicted him

as a "gay basher." VanderSloot, who is an outspoken opponent of gay rights (for example, a movie theater that he owned refused to exhibit "Brokeback Mountain" during its first release), claims that the term "gay basher" connotes one who engages in violence, harassment or intimidation based on the victim's sexual orientation, and that he has never engaged in any such activity. VanderSloot said, "I think it's particularly egregious to accuse somebody of a hate crime. . . In my opinion, that's what gay-bashing is. The accusation is that I have bashed gay people." *Mother Jones* stands by its reporting, claiming that it is factual, and pointing out that it withdrew an article from its website briefly and republished it with factual corrections when errors were brought to its attention. *Idaho Press-Tribune*, Feb. 1.

IOWA — Iowa's openly-gay Workers' Compensation Commissioner, Chris Godfrey, has filed a federal district court action against Governor Terry Branstad and five of his staff members, alleging a violation of Godfrey's constitutional rights. Godfrey was appointed for a six-year term that expires in 2015. Branstad, a Republican elected after Godfrey was confirmed, has been pressuring him to resign, and thought to back up the pressure by cutting his salary to the lowest level authorized by law, according to a Jan. 31 report in the *Des Moines Register*. Godfrey first responded to Branstad's 2011 action with a state court lawsuit alleging sexual orientation discrimination. Now he hedges his bets with a federal lawsuit based on both equal protection and due process.

KANSAS — National media attention focused on the Shawnee County District Court, which is considering an action by the state against William Marotta, who had responded to a Craigslist advertisement for a sperm donor by contributing to a same-sex couple who wanted to have a child and now finds himself the target of a support proceeding brought by the Kansas Department for Children and Families. Since the couple, Angela Bauer and Jennifer Schreiner, did not involve a doctor in their effort to have a child, the

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sperm donor is not insulated from support obligations, despite signing a contract with the women waiving parental rights and responsibilities. The state is going after Marotta because the women are seeking public assistance. The *Topeka Capital Journal* reported on January 25 that the court clerk had issued a subpoena compelling the women to submit to a deposition by Marotta's attorney.

MASSACHUSETTS — U.S. District Judge Mark L. Wolf issued an order on January 20 requiring the Massachusetts Department of Corrections head, Luis Spencer, to submit signed monthly reports concerning the Department's actions to comply with Wolf's ruling that Michelle Kosilek, a transgender state prisoner, is entitled to sex reassignment surgery. Although the judge stayed his ruling while an appeal to the 1st Circuit is pending, he has ordered the DOC to "make a good faith effort" to plan for performance of the procedure if the 1st Circuit upholds his ruling. Explaining why his order is needed, Wolf wrote, "The court is concerned that the pattern of resistance and delay [which was described in last year's decision] may be continuing."

NEW MEXICO — The ACLU of New Mexico and the ACLU's national LGBT rights project announced that a federal court had approved the settlement of a lawsuit under which about 180 gay and lesbian former U.S. military service members discharged for being gay are going to receive full severance pay totaling \$2.4 million. Since 1991 the military had been giving only partial severance pay to personnel who were dismissed under the policy then in effect, which was modified to the "don't ask, don't tell" policy by act of Congress in 1993. After Congress voted in 2010 to end the DADT policy, questions were raised about why those discharged under the now-abandoned policy should continue to suffer a reduction in separation pay, a form of compensation authorized for personnel who are involuntarily but honorably discharged after at least six years of service. The lawsuit was filed in 2012 on behalf of Richard Collins of Clovis, New Mexico, who was honorably

discharged in 2006 after some civilians reported seeing him kiss another man in a car while he was off-duty, ten miles away from his base. *Boston Globe*, Jan. 8.

NEW YORK — The New York Court of Appeals announced on January 9 that it would not review the decision by the Appellate Division, 3rd Department, in *Yonaty v. Mincolla*, 945 N.Y.S.2d 774 (May 31, 2012), which, abandoning existing precedents, held that the false imputation of homosexuality is no longer to be considered per se defamatory under New York law. The Appellate Division found that legal and social changes over the past decades have rendered the presumption of harm to reputation archaic, and noted that other jurisdictions (and some federal courts applying New York law) had predicted this move.

NEW YORK — New York City Housing Court Judge Sabrina B. Kraus issued a ruling January 9 in *Infinity Corp. v. Danko*, Index No.: L&T 66511/2010 (N.Y.C. Civ. Ct., Housing Part, N.Y. Co.), a holdover proceeding in which the landlord sought to evict a surviving same-sex partner of a rent-stabilized tenant. The case is notable because the landlord had subpoenaed the proprietor of Rentboy.com, a website advertising gay massage and escort services, about an advertisement for massage services placed by the surviving partner during the time of his relationship with the tenant. During the proceedings, the surviving partner testified "that he also worked as a masseur. Respondent placed ads on the internet under the alias Black Adonis, through various websites including EZ Rent Systems [Rentboy.com]. Respondent testified that these ads were offering his services as a masseur, however the ads put into evidence were explicitly sexual and suggested other services were being offered." Respondent's counsel had objected to the admission of these advertisements and associated emails, observing that the Rent Stabilization Code's tenant succession regulations specifically exclude reliance on evidence of sexual relationships in determining whether a surviving partner is a "family member" of the deceased

tenant, and the issue whether the decedent and the surviving partner had a sexually exclusive relationship was not relevant. There was a forty-year age difference between the survivor and the decedent, and the landlord sought to suggest that their relationship was commercial rather than familial, but the court wouldn't go there, in light of the overwhelming evidence of long-term familial relationship. "While Petitioner places heavy emphasis on the emails sent by Respondent related to Rentboy.com," wrote Judge Kraus, "and while the court did not find Respondent's testimony regarding the emails to be credible, the court finds it understandable that Respondent would be reluctant to readily testify about such activity. The court finds that the emails related primarily to Respondent's employment, and not to the nature of the relationship between Respondent and [decedent]. The Court credits Respondent's testimony that [decedent] was aware of Respondent's activity on said websites." More importantly, the court found that "the preponderance of credible evidence at trial supports a finding that Respondent and [decedent] were nontraditional family members as defined by the RSC and that they had a long term, loving relationship wherein each relied upon the other to provide what was needed. Respondent relied upon [decedent] financially and [decedent] relied upon Respondent for care and assistance with daily living. This was a relationship that went well beyond that of roommates or a caregiver, [decedent] and Respondent were each other's family and shared their lives for a period of approximately fifteen years. Based on the foregoing, the court finds that Respondent is entitled to receive a renewal lease and the petition is dismissed." LeGaL member Steven Rosen represents the Respondent.

OHIO — The *Columbus Dispatch* reported on January 26 that the Ohio Supreme Court had refused to hear an appeal by Maggie Gross from a Franklin County Court of Appeals ruling in 2012 that Gross has no rights to a child born to her ex-partner, Jennifer Herrick, because the child has been adopted by the man that Herrick married after they broke up. Herrick maintained throughout

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the litigation that Gross was never an intended parent of the child, even though Herrick adopted the child while they were together as a couple.

OREGON — Responding to a lawsuit filed by Lambda Legal on behalf of a state employee, Alec Esquivel, who had been denied coverage for gender transition surgery, state officials agreed to change their employee health care policy to remove language that denies coverage for such procedures. Alec, who was denied coverage after his doctor recommended the procedures, was clerking for the Oregon Court of Appeals when Lambda and cooperating attorneys Johnson Johnson Larson & Schaller PC filed suit in 2011. *Esquivel v. Oregon* (Marion County Cir. Ct., filed 6/2011).

CRIMINAL

CALIFORNIA — The 1st District Court of Appeal affirmed the San Francisco Superior Court trial conviction of Kimberley Brooks in a lesbian stalking case, *People v. Brooks*, 2013 WL 372566 (Jan. 31, 2013) (not reported in Cal.Rptr.3d). The Jane Doe victim in the case “met appellant in 2001 at a lesbian prospective mom’s group function. Doe and appellant saw each other on a regular basis at events and social gatherings over the course of the following two years. Doe described their relationship as one in which they would speak occasionally and sometimes share a ride after a function.” Things turned creepy after Doe gave birth to a daughter in 2003, and Brooks began giving Doe gifts that she considered “inappropriate” and showing up unannounced at Doe’s house. “Doe also received a lot of emails from appellant” and eventually told her to stop communicating. Doe alleged that Brooks began to make threatening remarks, leading her to call the police and eventually Brooks was charged with stalking and other crimes, to which she pled guilty with the understanding that she would be sentenced to probation. She continued to attempt to contact Doe in violation of probation terms, and was sentenced to prison briefly. The trial

court issued a criminal protective order that Brooks avoid contact with Doe, but Brooks attempted to contact Doe again in 2011, after being released from prison. After further incidents, Doe fled with her children to a hotel out of fear that Brooks might do them harm, and the District Attorney charged Brooks with felony stalking. The jury convicted her on four misdemeanor counts of contempt of court for violating the restraining order and deadlocked on the stalking count. The trial court sentenced her to two years in county jail and ordered other relief. The court determined that Brooks’ counsel’s brief on appeal identified “no potentially arguable issues,” just asking the court for an independent review of the record. The court affirmed without any explanation beyond its summary of the history and past proceedings in the case.

CALIFORNIA — *MyDesert.com* reported on January 18 that a three-judge appellate panel has ruled that the prosecution of four gay men who were arrested in 2009 in a sex sting operation was not discriminatory, rejecting Lambda Legal’s argument, submitted in an amicus brief, that the operation was discriminatory because it targeted only men, not different sex couples engaging in similar conduct in the Palm Springs area. The sting operation extended over four days in June 2009 and resulted in 19 arrests. The court criticized as “unprofessional and inappropriate” comments made at the time by Police Chief David Dominguez, referring to the arrested gay men as “a bunch of filthy (expletive deleted).” The ensuing public criticism of Dominguez led to his resignation, but the court said that the chief’s comments did “not demonstrate discriminatory intent on the part of the Department.” The new police chief insisted that the department will try to build a relationship with the community to regain public trust.

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COLORADO — The Senate Judiciary Committee voted 3-2 along party lines to approve a proposed civil union bill on

January 23, reported the *Denver Post*, which says that the outcome is “not in doubt” because Democrats now control both houses of the legislature and the governorship and the Democratic Party in Colorado supports the proposal. The next step for the measure was the Appropriations Committee, which approved the measure 4-3 later in January. The current expectation is that the measure will clear the legislature in time for Gov. John Hickenlooper to sign it into law in March with an effective date of May 1. Although Colorado voters rejected a civil union proposal in 2006, Democratic legislators claim that attitudes have changed in the interim. Unlike past versions of the bill, this year’s version does not exempt adoption agencies from having to deal with same-sex partners. One of the sponsors noted that the provision had been included in the past to placate religious adoption agencies, but their spokesperson had opposed the legislation nonetheless, so the sponsor decided to take that provision out.

DELAWARE — Equality Delaware, the state-wide LGBT rights organization that led the drive to pass a civil union bill two years ago, has indicated that it will push for the legislature to take up a marriage equality bill this year. A spokesperson for the governor indicated that he is supportive of the effort. When signing the civil union bill into law, Governor Jack Markell stated that same-sex marriage was inevitable. *DelawareOnline*, Jan. 29.

FLORIDA — County Commissioners in Pinellas County voted 6-1 on January 15 to create a domestic partnership registry that will be open to both same-sex and different-sex couples. Rights accompanying registration include hospital visitation and making medical decisions, and it was hoped that employers would use registration as evidence to support extension of domestic partnership insurance benefits. The county measure was passed after three cities in the county had already established such registries: Gulfport, St. Petersburg and Clearwater. Officials in Dunedin and Largo had been considering similar measures, but decided

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to wait for the county to act. *Tampa Bay Times*, Jan. 16.

HAWAII — The only Republican state senator in Hawaii, Sam Slom, says that he is opposed to same-sex marriage but that supporters have the votes to pass it through the legislature. Hawaii voters responded to a trial court ruling in favor of same-sex marriage rendered in 1996 in *Baehr v. Miike* by approving an amendment to the state constitution that took the issue of same-sex marriage away from the courts, providing that only the legislature has the power to decide whether same-sex couples can marry. At the time, the legislature had already passed a statute defining marriage in Hawaii as solely between a man and a woman. Hawaii recently enacted a civil union law, and a federal district judge ruled last year that the 14th Amendment does not require the state to extend marriage rights to same sex couples; that ruling is on appeal to the 9th Circuit. Meanwhile, Senator Slom predicts that S.B. 1369, the currently pending marriage equality bill, will be enacted. *hawaiinewsnow.com*, Feb. 1.

IDAHO — The Twin Falls City Council voted on January 14 to add sexual orientation to the City's antidiscrimination and anti-harassment policies for its own employees. The council also discussed the possibility of passing an ordinance that would extend such protection to private sector employees. The failure of attempts to pass a state gay rights law last year has inspired several communities to debate local measures, including Sandpoint and Boise (which have taken action) and Ketchum (which is still debating). *Times-News* (Twin Falls), Jan. 15. On the same night that the Twin Falls council acted, the City Council in Lewiston voted 5-2 to add sexual orientation to its city hiring policy. City Manager Jim Bennett told the council that there was an informal policy against discrimination, but he recommended that they put it in writing. *Lewiston Morning Tribune*, Jan. 15.

ILLINOIS — The *Chicago Sun-Times* reported on January 31 that State Senate President John Cullerton (D-Chicago)

was aiming to get the pending marriage equality bill through committee and on to the floor of the Senate for a vote on February 14, Valentine's Day. Cullerton asserted that at least thirty senators were now willing to vote for the bill, so it can pass his house.

INDIANA — Republican leaders in the state legislature who were planning to put a constitutional amendment banning same-sex marriage on the ballot are considering holding back pending a U.S. Supreme Court ruling in the pending same-sex marriage cases. House Speaker Brian Bosma (R-Indianapolis) told the *Evansville Courier Press* (Feb. 1), "Personally, I think it's inadvisable to move forward with the United States Supreme Court having the issue before it. This is not an issue of priority for us." The technical problem is that a proposed amendment has to be approved in two sessions of the legislature before it can go on the ballot, so passing a proposed amendment this year could be a wasted effort if the Supreme Court's decision might require a change in wording for the proposed amendment to be defensible under the 14th Amendment.

KENTUCKY — Tiny Vicco, Kentucky, with just a few hundred residents, may be the smallest municipality in the country to adopt an ordinance banning discrimination based on sexual orientation or gender identity, but perhaps the openly-gay mayor, Johnny Cummings, had something to do with the 3-1 vote by city commissioners on January 20. Until Vicco passed this measure, the only municipalities in Kentucky to ban such discrimination were the large cities of Louisville, Lexington, and Covington. *Louisville Courier-Journal*, Jan. 20. According to a January 14 press release by Kentucky's Fairness Coalition, Vicco's population, according to the 2010 Census, is 334, and the city is "nestled in the heart of coal country" and was named for the Virginia Iron Coal and Coak Company, which still operates in the area. Vicco City Attorney Eric Ashley told the Fairness Coalition, "Vicco is a community that believes all folks should be treated fairly. We believe everyone deserves the opportunity for life, liberty,

and the pursuit of happiness. Fairness is a Kentucky value, a Vicco value, and one of our most American values." Fairness Coalition reported that efforts are under way to enact similar measures in Bowling Green, Elizabethtown, Shelbyville, Berea, and Richmond. The strategy focuses on municipalities because the state legislature seems unlikely to advance such legislation on a statewide basis any time soon. * * * Kentucky's Fairness Coalition reported on Jan. 31 that Berea, Kentucky, Mayor Steve Connelly announced in his annual State of the City address that he planned to sign an executive order extending protection against discrimination on the basis of actual perceived sexual orientation to city personnel, based partly on a political consultants advice that cities must concentrate on entrepreneurship and civil rights in order to prosper economically.

MONTANA — The state supreme court declared the sodomy law unconstitutional (under the state constitution) as applied to private consensual adult sex in 1997, and the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas* would render it similarly unconstitutional under the 14th Amendment, but so far attempts to get the legislature to amend or repeal the statute have been unavailing, reported *Huffington Post* on Jan. 31. State Senator Tom Facey, a Missoula Democrat, has a repeal bill in the state Senate that he speculated could pass, only to be blocked in the House, where he thought passage was "dubious" in light of the lineup on the House Judiciary Committee. Does it matter that an unconstitutional law is still on the books? Even though the courts would undoubtedly reject prosecutions, the persistence of such a law on the books gives cover to law enforcement officials who may continue to arrest people and then claim immunity from civil damages on the ground that the statute is still on the books. (Such a situation has arisen in New York, where the Court of Appeals declared the sodomy law unconstitutional in 1980 but the legislature didn't clean up the statute books for several decades and even then some local police departments have never revised the statutory summaries that police officers use as reference guides.) The persistence of such unconstitutional statutes may also give cover to biased

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prosecutors and judges who claim to be unaware that the law is a nullity.

NEBRASKA — A church-led petition drive for a repeal referendum directed at the recently-enacted Omaha law banning discrimination based on sexual orientation and gender identity has fallen short of gather the requisite number of signatures to place the measure on the next general election ballot. Proponents of the petition had already missed the deadline for getting the issue onto the next primary ballot. Although the anti-discrimination measure passed last March by a narrow 4-3 vote in the city council after lengthy, divisive hearings, the steam may have run out of the repeal effort. *Omaha World-Herald*, Feb. 1.

NEW MEXICO — The legislature has received directly contrary proposals on the topic of same-sex marriage, according to a January 23 report in the *Albuquerque Journal*. Rep. Brian Egolf (D-Santa Fe) has introduced a resolution that calls for the state constitution to be amended to allow same-sex marriages, while House Republicans introduced a resolution calling for a proposed amendment that would limit marriage to a union of one man and one woman. Both proposals would have to pass both houses of the legislature before they could be put on the ballot. New Mexico is one of a handful of states that neither allows nor expressly prohibits same-sex marriages. In the past, the legislature has resisted both domestic partnership legislation and legislation seeking an express ban on same-sex marriages. Rep. Egolf told the newspaper that he believed his resolution would pass if it were placed before the state's voters.

OREGON — As predicted, the Oregon House of Representatives elected openly-lesbian Tina Kotek, a Portland Democrat, to be its Speaker, making her the first openly lesbian state legislator to be elected as leader of her chamber.

RHODE ISLAND — The state's House of Representatives voted 51-19 on January 24 to approve a Marriage Equality Bill that

had been unanimously voted out of the Judiciary Committee earlier in the week. The measure now goes to the State Senate, where it faces significant opposition, not least from Senate President Teresa Paiva Weed, a Newport Democrat. House Speaker Gordon Fox, an openly-gay Democrat, hailed the passage, stating, "Today is a great day. Today . . . we stand for equality; we stand for justice." In a prior session, Fox had pushed forward a civil union bill instead of a marriage equality bill, claiming that the votes were not there yet for marriage equality. As a result, same-sex couples in Rhode Island can register as civil union partners and receive the state law rights of marriage. If they want to marry, they can go to any of the neighboring New England states and, according to a Rhode Island attorney general's opinion from a few years ago, the Rhode Island state government will recognize their business. One assumes that the catering halls of Providence will support changing this situation. With the enactment of marriage equality in Maine by the voters in November, Rhode Island is the only remaining New England state that does not make same-sex marriage directly available to its residents.

TENNESSEE — The "don't say gay" bill is back. State Senator Stacey Campbell (R-Knoxville) has introduced a new version of her bill, called the Classroom Protection Act, that would prohibit instruction in grades K-8 that is "inconsistent with natural human reproduction." Grade school children will be sheltered from any instruction about alternative reproductive technology or the gross idea that same-sex couples might have and raise children. The bill does not forbid teachers from honestly "answering in good faith" any question related to the subjects they are teaching, and allows school nurses, counselors, principals and assistant principals to counsel students, reports the *Knoxville News-Sentinel* (Jan. 31). But the measure provides that if such counseling is provided to students, their parents "shall be notified as soon as practicable after such counseling has occurred." Critics of the notification provision contend that it will deter students struggling with sexual issues from seeking counseling out of fear that it will be reported to their

parents. But Sen. Campbell responds that parents should not be shielded from such information. * * * The office of the Attorney General issued Opinion No. 13-05 (January 11), responding to questions about the constitutionality of HB 3576/SB 3597, which would condition state funding for public and private universities on those organizations recognizing religious student groups that restrict their membership to members of the same religion. The A.G. opined that the measure was constitutional with respect to public institutions but raised constitutional concerns with respect to private institutions as a possible unconstitutional condition. The text of the Opinion can be found at 2013 WL 298339.

TEXAS — State Representative Rafael Anchia (Dem.-Dallas) announced that he would again introduce a bill to repeal a 1997 amendment of the Texas Health and Safety Code that provides that supplemental birth certificates issued to adoptive parents may include only the name of a mother and a father. The sponsor of the 1997 amendment, former State Representative Will Hartnett, a Dallas Republican, said the measure was adopted to reaffirm conservative values, but told a reporter for the *Texas Tribune* that it should be re-evaluated if there is evidence that it is "causing some hardship for the children" in not having both of their de facto parents listed on their birth certificate. The measure will be considered by the House Public Health Committee.

UTAH — The ACLU reports a settlement in *A.W. and C.W. v. Davis School District*, Case No. 1:12-cv-242-EJF (D. Utah), pending before Magistrate Judge Evelyn Furse, in which plaintiffs charged that the school district unconstitutionally removed from its elementary school library shelves a children's book about a family with two mothers. Several months after the suit was filed, the school district reconsidered its decision and agreed to restore the book to the shelves. The District had claimed that having the book openly available on the library shelves violated a Utah sex education law that prohibits schools from

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using instructional material containing “advocacy of homosexuality.” The ACLU argued that this statute did not apply to library books, and the district agreed to refrain from relying on that statute to remove books with gay content from the libraries. The settlement agreement provides that any student can move to enforce the agreement should the school district violate it in the future. The plaintiffs were represented by John Mejia of the ACLU of Utah Foundation and Joshua Block of the ACLU Foundation in New York.

VIRGINIA — On January 25 the Virginia Senate voted 24-16 to approve a bill that would ban sexual orientation discrimination by the state government in its employment policies. The measure passed because four Republicans crossed the aisle to vote for it together with all twenty Democratic members. According to a report in the *Winchester Star* (Jan. 26), this measure has passed the Senate in the past, but has never found support in the House of Delegates, and even were it to pass, it is uncertain whether Governor Bob McDonnell, a Republican, would sign it into law. After he took office, McDonnell reissued the governor’s executive order banning discrimination in state government, but omitting the category of sexual orientation which had been included by his immediate Democratic predecessor. However, the governor has stated that he believes the state government should not discriminate on this basis.

WYOMING — *Jackson Hole News & Guide* (Jan. 15) reported that two Republican state legislators had signed on to endorse the latest version of marriage equality and domestic partnership bills pending in the state legislature. Teton county Republicans Keith Gingery and Ruth Ann Petroff signed on to a measure introduced by Laramie Democrat Cathy Connolly, who filed her bill on January 14. House Bill 169 would change the definition of marriage to state that it is a civil contract between “two natural persons,” in place of current language that specifies “a male and a female person.” House Bill 168 would create

domestic partnerships that would include the same rights extended to marriage couples, designating a member of such a partnership as a “spouse” for purposes of all state laws and rules. Gingery suggested that many of the newly-elected legislators, regardless of party, were younger people who have “direct connections” to same-sex couples. “It’s hard for anyone to be against gay marriage when there’s a face to it and that face is a friend or relative,” he said. Similar measures have failed several times in prior sessions, but hope was expressed for more support this time around. * * * On January 28, the Corporations Committee of the Wyoming House voted 5-4 to reject HB 169, the same-sex marriage bill, but 7-2, in a bipartisan vote, to approve HB 168, a domestic partnership bill. *ThingProgress.org*, Jan. 28. However, the *Star-Tribune* reports that the domestic partnership bill was rejected, 35-24, by the full House on January 30. On the same date, however, the Senate Judiciary Committee approved and sent to the Senate a sexual orientation non-discrimination bill. This is reportedly the first time that any sort of “gay rights” measure has been passed out of committee for plenary consideration by either house of the Wyoming legislature.

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PRESIDENTIAL INAUGURATION — President Barack Obama’s inaugural address delivered on January 21 was inclusive on the subject of gay rights. Invoking “Stonewall” as a historic marker of American progress along with “Seneca Falls” and “Selma,” he reiterated his support for same-sex marriage, stating: “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law. For if we are truly created equal, then surely the love we commit to one another must be equal as well.”

CATHEDRAL WEDDINGS — Inasmuch as the District of Columbia and the neighboring state of Maryland now authorize same-sex marriages, the Washington National Cathedral announced that it would hold weddings

for same-sex couples, reported *The New York Times* on January 10. The Cathedral is the “seat of the presiding bishop of the Episcopal Church and the Washington Diocese.” The church’s governing body voted last summer to authorize an official liturgy for blessing same-sex unions. The Cathedral is sometimes described as the nation’s unofficial capitol of worship, reported *The Times*.

MILITARY EQUALITY — Although the DADT Repeal Act of 2010 led to a lifting of the ban on military service by openly lesbian, gay or bisexual individuals when it was implemented in September 2011, the statute did not formally mandate a policy against discrimination based on sexual orientation within the armed forces, and the Defense Department, claiming to be bound by Section 3 of the Defense of Marriage Act, has not formally recognized the same-sex partners (and, in some cases, civil union partners, domestic partnership partners, or legal spouses under state law) for a variety of rights and benefits. Groups lobbying on behalf of LGB Servicemembers have pressed outgoing Secretary of Defense Leon Panetta to end this discriminatory situation, so far without result, and some lawsuits are on file, but media attention became focused on the issue when a club for the spouses of officers at Fort Bragg, North Carolina, refused to extend membership to Ashley Broadway, who is married to Lt. Col. Heather Mack. Following media publicity about the refusal, Ms. Broadway won election as Fort Bragg’s military spouse of the year in a poll conducted by *Military Spouse* magazine and the club changed its policy, adopted a rule of non-discrimination based on sexual orientation, and invited Ms. Broadway to become a member. Progress sometimes comes in small steps. *Fayetteville Observer*, Jan. 27.

IMMIGRATION REFORM — The White House indicated that as part of comprehensive immigration reform President Obama would support recognizing same-sex couples for purposes of immigration. In a speech on January 29, the president praised the

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efforts of a bipartisan group of senators to propose a sweeping overhaul of the immigration system, but the senators' proposal did not address the issue of same-sex couples, and it was uncertain at the end of January whether the administration was going to insist on the inclusion of this issue as part of a congressionally-generated immigration statute. The president did indicate that he would propose his own draft legislation if congressional negotiators were unable to come up with a comprehensive bill. *New York Times*, Jan. 29. In the past, the Obama Administration has voiced support for the Uniting American Families Act, a stand-alone bill that would extend immigration recognition to non-traditional families.

BOY SCOUTS — Finally bowing to changed public attitudes and the demands of corporate sponsors (who were themselves receiving increasing pressure from gay rights advocates), the Boy Scouts of America indicated late in January that its board of directors would take up a proposal at their February meeting to abandon their national policy requiring discrimination against gay and bisexual boys and men. Instead, BSA officials indicated, the national organization would have no policy on the issue, leaving it to local chapters to decide whether to admit openly gay boys to membership and openly-gay men to volunteer leadership positions. *New York Times*, Jan. 29. In 2000, the Supreme Court ruled in *Boy Scouts of America v. Dale* that the organization had a First Amendment right to dismiss an openly gay college student from an adult leadership position, on the theory that the organization is entitled to define its "message." That was a 5-4 ruling that stoked an ongoing controversy and led some sponsoring organizations to drop their affiliation with the BSA.

FLORIDA — With some assistance from the ACLU of Florida, students seeking to form an officially-recognized Gay Straight Alliance at Booker T. Washington High School in Pensacola obtained formal recognition, the ACLU announced in a January 16 news releases. The ACLU of Florida had to file lawsuits under the

Equal Access Act to achieve this kind of result in some other Florida school districts, but at the point the accumulating legal precedents, embodied in a letter from the ACLU, seems to do the trick. (Perhaps knowledge about the legal fees and damages incurred by other resistant Florida school districts contributes to this success. If you're going to lose anyway, why go through the expensive and bad publicity of litigation?)

OREGON & CALIFORNIA — The Washington Post (Jan. 11) reported that state insurance regulators in Oregon and California have directed some health insurance companies to stop denying coverage for transgender clients. While the regulators are not directly requiring that insurers cover gender reassignment procedures as such, they are indicating that the private insurance companies are required to provide treatments for transgender patients that are available for non-transgender patients. Examples might include hormone therapy, breast reduction procedures, and cancer screening or other procedures deemed medically necessary that are sometimes provided for patients for reasons other than gender reassignment.

TEXAS — Parkland Health and Hospital Systems in Dallas has adopted its policies to prohibit discrimination on the basis of gender identity, gender expression and genetic information. The new policy responded to an incident nine months ago when a transgender woman visiting the hospital was issued a disorderly conduct ticket for using the women's restroom. Protest about this incident led the hospital to establish a task force to study how Parkland could address the health care needs of the gay, lesbian and transgender community. The Board unanimously adopted the policy, which applies to patients, employees or hospital visitors. *Dallas Business Journal*, January 22.

WASHINGTON — After Washington voters supported marriage equality at the polls in November 2012 and the new law went into effect, Judge Gary Tabor

announced that he will continue to perform different-sex marriages but will not officiate at same-sex ceremonies for "philosophical and religious reasons." His statement led to media comment about whether he should resign from the bench. State law authorizes that judges can perform marriage ceremonies but does not require them to do so, but Canon 1 of the rules for judicial conduct in Washington require that judges perform their functions impartially and avoid impropriety or the appearance of impropriety. Washington also has a law banning sexual orientation discrimination. The question posed is whether a judge who refuses to perform same-sex marriage ceremonies while continuing to perform different-sex ceremonies is, if not in violation of the law, then at least signaling a bias that could leave gay litigants believing that they would not receive impartial justice in his court. *Olympian*, Jan 18.

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CANADA — An openly lesbian member of the Ontario legislature has been elected by the Liberal Party to be their new leader and, for now, premiere of the province. Kathleen Wynne won election on the third ballot, after the front-runner, who was short of a majority, dropped out and endorsed her, joined by two other runners-up. Wynne will be on the sixth woman to be a state premier, the first woman to be premier of Ontario, and first openly LGBT person to be a Canadian premier of a Canadian province. Now she faces the challenge of leading her party into the next parliamentary election, challenging voters in the province to ratify the party's choice. *Digital Journal*, Jan. 27. * * * Leaders of Canadian legal education have raised objections to Trinity Western University's proposal to start the country's first religious law school. The Council of Canadian Law Deans distributed a letter criticizing, among other things, the evangelical Christian university's requirement that faculty and students refrain from any homosexual activity, which the Deans maintain would clearly subject LGBT students to expulsion for conduct that is entirely legal — indeed

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protected under the Canadian Charter of Rights. *Vancouver Sun*, Jan. 16. The university claims that its requirements are consistent with Canadian federal and provincial law, which allows religious organizations to follow the dictates of their faiths in their internal policies, the Supreme Court having ruled to that effect in a 2001 ruling involving the university and a legal dispute with the British Columbia College of Teachers. * * * On January 7, Ontario Superior Court Justice Ruth Mesbur ruled that two Canadian men who had formed a civil partnership in Britain should be treated as married under Canadian law for purposes of Canadian domestic relations law. She ruled in the case of Wayne Hincks, who is seeking financial support from his ex-spouse Gerardo Gallardo under Ontario law. The men met in Britain in August 2009 and formed a civil partnership. Hincks gave up his job in Britain and moved to Canada with Gallardo, a Toronto architect. The relationships “faltered” and the two men broke up, with Hincks seeking a financial settlement. Gallardo opposed on the ground that their U.K. civil partnership had no legal status in Canada, but the judge disagreed. The Ontario government had intervened on Hincks’ behalf, saying he should be treated as married under Ontario’s Family Law Act, while a federal government lawyer presented an opposing view. The judge ruled that failing to recognize the civil partnership as a marriage would amount to endorsing Britain’s inherently discriminatory “parallel” institution – one that the U.K.’s Cameron government is attempting to end through enactment of marriage equality legislation, soon to be debated in Parliament. Judge Mesbur held that since the men had a lawful union under U.K. law, “it meets the statutory definition of marriage in Canada.” *Ottawa Citizen*, Jan. 12.

CAMEROON — On January 8 the Court of Appeals overturned the convictions of two men who were reportedly sentenced to five years in prison for “looking gay.” The men had already been in jail for a year, where they claimed to have been subjected

to abuse from guards and other prisoners. *Advertiser* (Australia), Jan. 9.

CHINA — The First Intermediate People’s Court in Beijing reportedly ruled recently that women who have unwittingly married gay men may seek an annulment of their marriages, according to a January 18 report in the *Hindustan Times*.

CYPRUS — The *Cyprus Mail* reported Jan. 17 that the Interior Ministry is working on a bill that would make civil partnerships available for unmarried couples, both same-sex and different-sex. At present Cyprus, unlike many other European countries, provides no legal recognition for unmarried cohabitants. The present effort reportedly stems from a case involving a 93-year-old woman who complained to the state Ombudsman after she was denied a widow’s pension when her non-marital male partner of 67 years passed away. The couple had raised eight children together, but had never married. As of now, according to the news report, 16 countries in the European Union provide a legal status other than marriage for same-sex couples, while eight others have embraced marriage equality. The governments of the U.K. and France are also proposing to progress from a non-marital status to marriage for same-sex couples, although there is controversy in both countries, including recent large-scale demonstrations in France stirred up by Catholic Church authorities. (Are they worried that many gay priests would desert the Church to marry their sweethearts?) The opposition of the Church is expected to loom large in Cyprus, where decriminalization of consensual gay sex was fought by the Church for many years until it was finally achieved in 1998, long after many other European countries had taken that step.

FRANCE — The *Associated Press* reported on January 29 that the government had finally presented its proposed marriage equality law to the Parliament. Justice Minister Christiane

Taubira told the national assembly that the measure was an “act of equality. . . Finally, marriage will be a universal institution.” Huge street demonstrations in Paris both pro and con were held in the weeks leading up to the introduction. The parliamentary debate was expected to take about two weeks, leading to a vote in mid-February.

INDIA — *Digital Journal* (2013 WLNR 1389337) reported January 18 that Indian consulates worldwide have posted a notice of new rules circulated to Indian embassies late in 2012, prohibiting same-sex couples and single people from using surrogate mothers in India to become parents. The move responded to increasing media comment about the growing phenomenon of same-sex couples (particularly from Israel) and single people contracting with Indian women to bear their children. Under the new rules, foreign couples desiring to make a surrogacy contract in India must be a “man and a woman (who) are duly married and the marriage should be sustained at least two years” and recognized by their country of residence. The rules also require that there be no impediment to patriation of the result child to the country of the parents, which has turned into a problem in some cases where children of surrogate were stuck in a stateless position when their intended parents’ home country would not issue them passports.

IRELAND — The *Irish Independent* (Jan. 23) reported that an Equality Tribunal awarded damages of 24,000 euros to an office administrator at a credit union who claimed he was subjected to workplace harassment due to his sexual orientation. The newspaper report noted that the man had been allowed to proceed anonymously to protect his confidentiality. The news report relates a tale of ridicule, mocking, and insulting comments from co-workers, including about his “camp” accent and comments about homosexuality being “contagious,” as well as spreading rumors about purported gay affairs with other staff members. The plaintiff said that complaints to management brought no

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relief, as they never addressed the issue publicly. He filed a formal grievance but the company did not undertake any investigation, sending him a letter stating there were not sufficient grounds for his grievance. Although both the credit union and co-workers denied plaintiff's charges, the Equality Officer hearing the case found discrimination, awarding 8,000 euros for discrimination and 16,000 euros for the "victimization he suffered."

ISRAEL — Elad Aflalo Farber and Roni Farber Aflalo, recently married in New York, have registered their marriage with Israel's Population, Immigration and Border Authority, as Israeli same-sex couples married abroad are authorized to do pursuant to a ruling by the country's High Court of Justice, and have taken the next step of asking the Ramat Gan Family Court to validate a spousal support agreement, according to a report in the newspaper *Haaretz* picked up for international distribution on January 13 by the Jewish Telegraphic Agency. Because the religious authorities control marriage within Israel, many different-sex couples also marry abroad and then register their marriages at home. In that sense, same-sex couples in Israel have attained at least a portion of equality with different-sex couples who seek civil marriages. * * * *Israel National News* (Jan. 27) reported that a member of the Knesset, Nitzan Horowitz from the Meretz Party, planned to submit a bill in the newly-elected Knesset to allow civil marriage for any adult couple, regardless of sex. At present, only religious marriages are performed in Israel, and those desiring civil marriage must marry outside the country and then register their marriage with the government. Pursuant to a ruling by the nation's highest court, same-sex couples who marry outside Israel may similarly register their marriages, although it is unclear the degree to which those marriages are accorded equal treatment by the government or private sector actors. "A couple, any couple, that cannot or does not want to marry

in the Rabbinate, could choose a civil marriage," he said of his bill.

MEXICO — Before leaving office, President Felipe de Jesus Calderon signed into law a comprehensive reform of the nation's Federal Labor Law making numerous changes effective December 1, 2012, including outlawing discrimination in employment due to an individual's ethnicity, national origin, age, disability, socioeconomic status, health, religion, immigration status, political opinion, sexual orientation, or marital status. *Mondaq*, 2013 WLN 495565 (Jan. 8).

NEPAL — *Ekantipur.com* (Jan. 22) reported that the "Ministry of Home Affairs has instructed its district administration offices to grant citizenship to sexual and gender minorities in the 'others' category." According to the news report, this is a "key step towards implementing the Supreme Court's December 2007 verdict," in which that court ruled that LGBT individuals were 'natural persons' entitled to receive citizenship certificates indicating the gender identity of the individual's choice." The move was hailed by leaders of the nation's LGBT rights movement as a "landmark decision" towards recognition of diverse gender identities by the government.

POLAND — The Parliament voted Jan. 25 to reject bills that would have legalized civil unions. A majority also narrowly voted to reject a measure that would have given limited rights to unmarried partners, including property inheritance rights. Although Prime Minister Donald Tusk spoke in favor of the measures, enough members of his party voted with the conservative opposition to defeat them. *Reuters Blogs*, Jan. 26.

RUSSIA — The Russian parliament approved on January 25 a measure

backed by President Vladimir Putin and the Russian Orthodox Church that would in effect outlaw all gay rights public events in the country, under the guise of preventing "propaganda" in favor of gay sex to minors. Similar measures have been enacted in several Russian cities, despite a ruling by the European Court of Human Rights that peaceful gay rights demonstrators have a right to stage such events. Gay rights opponents in Russia frequently charge that such events are largely the work of outside agitators, and seize upon the occasional participation of gay rights advocates from other countries to condemn gay rights activism as unpatriotic. * * * Seizing upon cultural stereotypes, the Russian Defense Ministry announced a diabolical plan to root out gays in the military ranks – body inspections in search of tattoos indicating gay sexual orientation. Also, recruits would be quizzed about their sexual history and asked "whether they have a girlfriend and whether it is important for her to be faithful," according to an on-line report posted by *Advocate.com* on January 24, based on reporting in the Russian newspaper *Izvestia*. Evidently the Russians haven't discovered the penile plethysmograph yet.

SCOTLAND — St. Margaret's Children and Care Society in Glasgow has been found to discriminate against gay people by giving higher priority to heterosexual married couples in adoption placements. A complaint filed by the National Secular Society led to a review of St. Margaret's policies by the Office of the Scottish Charity Regulator (OSCR). Reported *Telegraph.co.uk* on January 23, the finding was released as the Scottish Parliament was preparing to consider a same-sex marriage bill being advanced by the government. An opponent of the bill argued that the decision about St. Margaret's was an example of "equality extremism" that would become common upon introduction of same-sex marriage. But, of course, this ruling was rendered based on non-discrimination principles

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that are already in effect, having nothing to do with same-sex marriage.

SINGAPORE — As the nation's High Court is soon to hear arguments against the constitutionality of Section 377A, the sodomy law, Prime Minister Lee Hsien Loong was asked about the law at the Singapore Perspectives Conference hosted by the Institute of Policy Studies. When asked why the law, a relic of colonial times, was still on the books, he responded: "Because it's always been there and I think we just leave it." He also contended that the struggle for gay rights in a country does not end just because homosexual acts are not criminalized. In reporting on this comments on the website asiancorrespondent.com (Jan. 30), Kirsten Han noted that the statute has not "always been there" but was only added to the statute books in 1938, then remained unchanged when Singapore adopted its Penal Code in 1955. Many former colonies still have sodomy laws that were absorbed into their statute books upon independence without any particular consideration, and are now the subject of attack as being inconsistent with evolving international human rights standards.

TAIWAN — According to a Jan. 6 article in the *International Herald Tribune*, the legislature has held its first hearings on the subject of same-sex marriage, and a group of senior judges certified to the country's constitutional court, referred to as the "Grand Justices," the question of how to rule on a lawsuit brought by two men, Nelson Chen and Kao Chih-wei, contesting the refusal of a local registration office in Taipei to allow their application to marry. The Taipei High Administrative Court had been expected to issue a ruling in the case, but instead it announced that it was seeking a constitutional interpretation before the judges hold further hearings on the issue. Mr. Chan at first reacted positively to these developments, telling the Taipei Times, "I think this is a good decision. I'm happy to see it. I am confident and hopeful of the outcome of the constitutional interpretation, because the

world is changing. I hope Taiwan would be the first Asian country to recognize same-sex marriages through a judicial ruling." Some judges had expressed the view that legislation would be needed rather than a judicial opinion, so the legislative hearings were seen as a hopeful sign by some. However, the litigants changed their mind, and subsequently withdrew their lawsuit, according to a report in the *Bangkok Post*, Jan. 23.

UGANDA — On January 2 a magistrate judge dismissed charges of "disobeying lawful orders" brought against British theater producer David Cecil for having put on two performances of the play "The River and the Mountain," a tale of a young businessman "coming out" as gay and encountering homophobia in Uganda, despite an order from the nation's media council to hold up the presentation while authorities reviewed the script. Cecil faced a potential prison sentence of up to two years. The magistrate dismissed the charges because the prosecution had failed through four court dates to disclose any of its evidence or to commit to a firm date for a trial. The charges could be reinstated at any time, however. *Guardian.co.uk*, Jan. 3.

UNITED KINGDOM — Member of Parliament Paul Flynn (Labour-Newport West) has proposed an amendment to the government's Succession to the Crown Bill that would allow a monarch to rule with a same-sex partner. The pending bill is intended to modernize the succession to the monarchy by ending sex discrimination and religious discrimination. Under the government's bill, the first-born child of Prince William will be first in line for the throne, regardless of sex and regardless whether they decide to marry outside the faith of the established church. Flynn stated, "I propose to future-proof the monarchy from charges of discrimination by giving same-sex and heterosexual partnerships the same validity in succession rights." One press report noted that history records four possibly gay English monarchs: William Rufus (1087-1100), Richard the Lionheart (1189-1199),

Edward II (1307-1327), and James I (1603-1625). * * * The leader of the House of Commons, Andrew Lansley, announced that the government's marriage bill will receive its first debate on February 5. The Conservative Party will give its members a free vote. A majority of the Conservatives are expected to vote for the measure, but with sizable dissent. The Labour and Liberal Democrat members are expected to support the measure overwhelmingly, although some have stated disappointment with the way the government is proposing to handle the issue of religious groups, exempting the established Church of England from performing same-sex marriage ceremonies, and giving other faiths the option to elect to perform them. Culture Secretary Maria Miller had told the Commons in December that the government's proposal was that no religious organization should be forced to conduct marriages that would violate their faith. The government announced that it would be up to the Church of England to decide whether it wants to participate in sanctifying same-sex marriages. The government released its draft bill late in January, immediately incurring criticism for having produced a lengthy, complex measure, rather than a simple amendment to the existing marriage law changing the qualifications for marriage.

UNITED KINGDOM — The *Guardian* (Feb. 1) reported on a January 31 court ruling that known sperm donors have a right to visitation with the children conceived using their sperm. According to the report, the court said that donors could pursue applications for contact orders, and in deciding whether to grant them, the court should take account of the nature of the application, the donor's connection to the child, if any, and potential disruption of the child's life, as well as the rights of the family that is raising the child. After the ruling was announced, attorneys specializing in the area urged gay and straight couples who are thinking of conceiving using a sperm donor to enter into co-parenting contracts specifying the rights of all parties.

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The LGBT Bar Association of Greater New York announced on January 28 that its 2013 Community Vision Awards will be presented at LeGaL's annual dinner on March 21 to **EVAN WOLFSON**, Executive Director of Freedom to Marry, and to Microsoft Corporation's **GREG MCCURDY**, Senior Policy Counsel. Wolfson, a longtime advocate of marriage equality, has been credited with a key role in devising and implementing the strategy that led to success in several ballot initiatives on same-sex marriage during the 2012 elections, and made his Supreme Court debut as an oral advocate in the important case of *Boy Scouts of America v. Dale*, in which the Court ruled 5-4 in favor of the BSA's right to exclude any openly gay man from a leadership position, fueling a national controversy that appears to have recently led the BSA to seriously consider changing its policy. McCurdy advises Microsoft's US government affairs team on state legislation and policy, and has been instrumental in getting Microsoft to take a leadership role in corporate support for LGBT equality, most recently in the passage of the marriage equality in the Washington legislature and at the polls in 2012.

The Connecticut General Assembly voted to confirm **ANDREW J. MCDONALD**, a former state senator and longtime friend and confidant of Governor Dannel Malloy, as the first openly-gay justice of the Connecticut Supreme Court. The January 23 vote was 30-3 in the Senate and 125-20 in the House, according to an on-line report by the Connecticut Mirror. McDonald will resign as Gov. Malloy's general counsel to take the seat on the court.

The *New York Law Journal* (Jan. 4) devoted a feature article to **MICHAEL JONES**, an associate at Loeb & Loeb in New York, who has done a series of

pro bono asylum projects, most recently winning an asylum case for C.R., a gay lawyer from Paraguay. In addition to his pro bono work, the article reports that Jones and his husband volunteer at the Saturday night dinner for homeless youth at the Church of St. Luke in the Fields in Greenwich Village, New York.

The White House announced on January 3 that President Obama has renominated four openly-gay federal judicial candidates who had been nominated but not confirmed during the prior session of Congress. They are: **PAMELA KIM CHEN** (E.D.N.Y.), **MICHAEL J. MCSHANE** (D. Or.), **NITZA I. QUINONES ALEJANDRO** (E.D.Pa.), and **WILLIAM THOMAS** (S.D.Fla.). They were renominated as part of a package of 33 renominations of judges whose appointments were pending in the Senate when the prior Congress adjourned early in January. Of the four, only Ms. Chen had already received a Senate Judiciary Committee hearing and positive vote prior to adjournment, and it was uncertain whether her nomination might advance without a need for new hearings, in light of changes of membership in the Judiciary Committee from the 112th to the 113th Congress.

The National LGBT Bar Association's honoree at a February 28 New York City reception for its Out & Proud Award is **MATTHEW MORNINGSTAR**, Executive Director, Legal & Compliance, at Morgan Stanley. The event will be held at the Sky Room Times Square, and all corporate counsel are invited to attend. Check the LGBTbar.org website for details. A February 7 reception in Dallas will honor the legal department of American Airlines.

TRACY THORNE-BEGLAND, who has been sitting as an appointed judge on

the Richmond (Virginia) Circuit Court since July 2012 after his candidacy was blocked in the House of Delegates, won formal confirmation on January 15, 2013, in both the House of Delegates and the Senate, to become Virginia's first openly-gay person to win confirmation as a state judge. The failure of his candidacy in the House last summer led to vociferous adverse comments in the state's media, challenging the announced statements by some members of that body that Thorne-Begland was disqualified due to his sexual orientation and his discharge from military service as well as his gay rights advocacy work as a civilian lawyer. Delegate Bob Marshall, a Republican from Prince William County who had led the opposition to Thorne-Begland's confirmation, accused Republicans who voted for confirmation of having abandoned "a significant portion of the social issues platform," making very open the basis of his opposition. *Virginia Pilot and Ledger-Star*, Jan. 16. *The Advocate* (Jan. 16) reported that some Republican Senators had absented themselves from the vote in that house, which was 28-0 with 12 absent. Eight Republican Senators joined with 20 Democrats to approve the nomination.

The National LGBT Bar Association organized a joint admission ceremony at the U.S. Supreme Court on January 22 for thirty members of the organization, whose admission to the bar of the court was sponsored by **PAUL SMITH**, a partner at Jenner & Block who is celebrated in LGBT rights law for having argued the Supreme Court appeal in *Lawrence v. Texas* in 2003. Openly gay **U.S. DISTRICT JUDGE MICHAEL FITZGERALD** attended the ensuing reception as a guest, and **JUSTICE RUTH BADER GINSBURG** also briefly attended and spoke at the reception. The event earned prominent coverage in the Jan. 30 issue of the *National Law Journal*. The Association claimed that

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this was the first such group-admission ceremony for LGBT lawyers, although those with long memories may recall that on the date when *Bowers v. Hardwick* was argued back in the 1980s, several LGBT lawyers arranged to be admitted to Court's bar that morning so that they could observe the argument from the section of the courtroom reserved for members of the Supreme Court bar.

The American Bar Association's Commission on Sexual Orientation and Gender Identity announced that its inaugural Stonewall Awards will be presented at the ABA midyear meeting on February 9. The first honorees will be LGBT rights attorneys **MARY BONAUTO**, **MATT NOSANCHUCK** and **MIA YAMAMOTO**.

The University of Mississippi Law School will hold its third annual LGBT Law Symposium on March 22, featuring three prominent speakers: **SHANNON MINTER**, legal director of the National Center for Lesbian Rights, **JAMISON GREEN**, a leading transgender rights advocate, and **ABBY RUBENFELD**, a civil rights attorney from Kentucky who is a past legal director of Lambda Legal and was a co-founder of the National LGBT Bar Association.

THE WILLIAMS INSTITUTE AT UCLA LAW SCHOOL in collaboration with Whittier Law School's summer program will offer a summer program on Sexual Orientation Law at the University of Barcelona, Spain, July 1-30, 2013. The American Bar Association has approved up to 6 academic credits for the programming (depending how many courses a participant takes). Information can be found on the Williams Institute's website. Applications must be submitted by March 1, 2013.

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PUBLICATIONS NOTED

1. Adams, Ryan J., *An Objective Approach to Obscenity in the Digital Age*, 86 St. John's L. Rev. 211 (Winter 2012) (argues that ubiquity of pornography on the internet makes current obscenity standard under 1st Amendment archaic due to the practical irrelevance of "local community standards"; suggests new approach).
2. Ayers, Chad, *The Need for Change: Evaluating the Medical Necessity of Gender Reassignment Through International Standards*, 18 Wash. & Lee J. Civ. Rts. & Social Just. 351 (Spring 2012).
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4. Cady, Honorable Mark S., *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133 (2012).
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15. Lin, Emily Y, and Patricia K. Tong, *Marriage and Taxes: What Can We Learn from Tax Returns Filed by Cohabiting Couples?*, 65 Nat'l Tax J. 807 (Dec. 2012).
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Editor's Notes

- *This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.*
- *All points of view expressed in Lesbian/Gay Law Notes are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.*
- *All comments in Publications Noted are attributable to the Editor.*
- *Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please address all correspondence electronically to info@le-gal.org.*

Specially Noted

*The Congressional Research Service has issued reports about the impact of the Defense of Marriage Act and legislative proposals to change or repeal it. Wendy Ginsburg & John J. Topoleski, *Federal Benefits and the Same-Sex Partners of Federal Employees*, CRS Report R42873; John J. Topoleski, *The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits, Pensions, and Individual Retirement Accounts (IRAs)*, CRS Report RS21897. These reports are available on the CRS website: www.crs.gov.*