

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

March 2013

**AUSTRIAN
SECOND-PARENT
ADOPTION BAN
STRUCK DOWN**

Violation of European Convention on Human Rights

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

Editor-In-Chief

Prof. Arthur S. Leonard
New York Law School
185 West Broadway
New York, NY 10013
arthur.leonard@nyls.edu

Contributors

Bryan Johnson, Esq.
Gillad Matiteyahu, NYLS '13
Tara Scavo, Esq.
Brad Snyder, Esq.
Prof. Matteo M. Winkler
Stephen E. Woods, Esq.
Eric Wursthorn, Esq.

Production Manager

Leah Harper

Circulation Rate Inquiries

LeGaL Foundation
799 Broadway
Suite 340
New York, NY 10003
(212) 353-9118
info@le-gal.org

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European Court Rules Austria Violated European Convention in Second-Parent Adoption Case

On February 19, 2013, the European Court of Human Rights, Grand Chamber, ruled that Austria could not deny second-parent adoptions to members of same-sex couples when it permitted such adoptions by heterosexual couples. (*Case of X and Others v. Austria*, Application no. 19010/07). The Court held, 10-7, that Austria had violated Article 14 taken in conjunction with Article 8 of the European Convention on Human Rights. According to the Court, Austria is one of five other member states that denies second-parent adoptions to same-sex couples (Portugal, Romania, Russia and

recognition of the *de facto* family unit” and have the mother’s partner replace the child’s biological father as the child’s second parent.

However, under Austrian law (Article 182 § 2 of the Civil Code [Allgemeines Bürgerliches Gesetzbuch]), a child cannot legally have two unmarried parents of the same gender. When a person adopts a child via second-parent adoption, the legal relationship between the child and the biological parent of the same sex as the adopting parent is severed. By comparison, as to heterosexual couples, one different sex partner could adopt the other partner’s child without

father’s refusal to consent.

The District Court refused to approve the adoption agreement pursuant to Article 182 § 2 of the Civil Code, noting that the law unambiguously provides that same-sex couples cannot both establish a legal parental relationship with a child. The court explained: “[the arrangement sought by the applicants, whereby [the child] would be adopted by a woman and the relationship with his biological father, but not with his biological mother, would cease, was incompatible with the law.”

The parties appealed to the Regional Court, an intermediate

The Court held that Article 182 § 2 treated same-sex couples differently, as compared to unmarried heterosexual couples, based solely on their sexual orientation.

the Ukraine are the other four) yet grants such adoptions to unmarried heterosexual couples.

The case involved two female same-sex partners; one partner was trying to adopt the other’s biological son who was born outside of marriage. Under Article 166 of the Civil Code, the mother of a child born outside marriage has sole custody. All three individuals live together. Upon request, their names were not disclosed by the court.

In 2001, the two women made a joint application to the District Court to transfer partial custody to the mother’s partner so that they could exercise joint custody. That application was dismissed. Then, in 2005, the women attempted to draft an adoption agreement that would create a legal relationship between the non-biological mother and the child. The couple’s “aim was to obtain legal

severing the latter’s legal relationship with the child.

Initially, the couple sought a declaration from the Austrian Constitutional Court that Article 182 § 2 was unconstitutional. That application was rejected on procedural grounds; the couple was directed to submit their adoption agreement to District Court for approval, and if such approval was denied, the couple could then challenge the constitutionality of the subject provision in the Austrian appellate courts.

The parties then submitted the adoption agreement to the District Court for approval. They indicated that the child’s father did not consent to the adoption, that “he had displayed the utmost antagonism towards the family,” and they also sought a finding that the adoption was in the child’s best interest, thereby overriding the

appellate court in Austria, arguing that the Article 182 § 2 of the Civil Code violated Article 14 and Article 8 of the European Convention on Human Rights because of the disparate treatment compared to unmarried heterosexual couples. That court dismissed the appeal on February 21, 2006, without a hearing, finding that no discrimination against same-sex couples “could be inferred” because the law was “in line with the biological reality” that “a parental couple should consist, as a matter of principle, of two persons of opposite sex.”

The parties then appealed to the Austrian Supreme Court, which on September 27, 2006, also dismissed the appeal. The Supreme Court noted that “Article 182 § 2 of the Civil Code imposes a general prohibition (that is, not just in the case of same-sex partners) on adoption by a man as long

as the ties of kinship with the child's biological father still exist, and by a woman where such ties still exist with the biological mother. Under Article 182 § 2, therefore, a person who adopts a child on his or her own does not take the place of either parent at will, but only the place of the parent of the same sex. The adoption of the child by the female partner of the biological mother is therefore not legally possible."

The European Court of Human Rights started its analysis by looking at who was permitted to adopt under Austrian Law. A married couple can jointly adopt a child, or one person can adopt a child. Single persons adopting may be: [1] heterosexual; [2] homosexual; [3] if heterosexual, married; [4] if homosexual, in a domestic partnership; [5] in an unmarried couple; or [6] alone. Second-parent adoptions are only permitted by members of heterosexual couples, whether married or unmarried, but not members of same-sex couples.

Because same-sex couples are not permitted to marry in Austria, but rather may enter into registered partnerships, they are not allowed to adopt a child jointly, nor are they allowed to apply for a second-parent adoption. Strangely enough, if a registered partner chooses to adopt a child on his or her own, his or her partner must consent under the Registered Partnership Act. This consent does not translate into any legal rights or obligations with respect to the registered partner over the adopted child.

Under Article 8 of the European Convention on Human Rights, "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection

of the rights and freedoms of others."

Under Article 14 of the Convention, "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court noted that the applicants showed that they were similarly situated to heterosexual couples raising children. The women cited scientific studies which confirmed "that children developed equally well in same-sex families and in different-sex families." The Austrian Government did not argue otherwise.

The applicants primarily contended that they were impermissibly discriminated against as compared to unmarried heterosexual couples. The parties argued that this case was distinguishable from *Gas and Dubois v. France* (no. 25951/07, 15 March 2012), which held that France's second-parent adoption scheme was permissible, where it limited such adoptions to married couples only, even though same-sex couples could not marry in France. (Both same-sex and different-sex couples in France can enter into a civil solidarity pact containing some legal recognition and rights, but not adoption rights.) In Austria, same-sex couples could not marry or have a second-parent adoption, but unmarried heterosexual couples could have a second-parent adoption. The Court held that Article 182 § 2 treated same-sex couples differently, as compared to unmarried heterosexual couples, based solely on their sexual orientation.

Austria's prohibition on second-parent adoptions by members of same-sex couples would not be in breach of Article 14 of the Convention read in conjunction with Article 8 if it pursued a legitimate aim, namely the protection of the child's best interests, and did not infringe the principle of proportionality between the means employed and the aim

sought to be achieved.

However, the Court found that Austria failed to make such a showing. The Government, as well as the Austrian courts, argued that Article 182 § 2 strengthened traditional notions of the biological family, relying on the unfounded assertion that a child should have both a male and female parent. Yet the Austrian Government was unable to prove the latter.

Additionally, Austria permitted one person who was homosexual to adopt a child, and required that person to obtain the consent of their registered partner if they had one. "[T]he existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples," wrote the Court.

While this is a monumental decision for same-sex couples and their families, including those in several other European countries who place similar discriminatory limitations on second-parent adoptions in same-sex couples as noted above, the Court did not disturb its prior holding in *Gas and Dubois v. France, supra*, which permits member states to limit second-parent adoptions to married heterosexual couples, only.

The petitioners were represented by Dr. Helmut Graupner, a Vienna-based litigator who heads Austria's leading gay rights organization and has frequently represented clients before the European Court in gay rights cases. — *Eric J. Wursthorn*

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

Prop 8 Case: The Respondents & Others Weigh In

With oral argument scheduled for March 26, briefs were filed on behalf of the Prop 8 Respondents, the two same-sex couples on whose behalf the lawsuit challenging California Proposition 8 was filed, and the City and County of San Francisco, which was allowed by District Judge Walker to intervene as a co-plaintiff in the case. These briefs, filed in *Hollingsworth v. Perry*, No. 12-144, on February 21, are different in their focus, reflecting the different roles of the plaintiffs and the intervenor, and the different motivations for bringing the case.

main fire on the underlying question posed by Petitioners and evaded by the 9th Circuit: Does it violate the 14th Amendment for California (or any state) to deny same-sex couples the same right to marry that different-sex couples have?

By contrast, the City of San Francisco brief focuses more extensive attention on the standing question, and then addresses the merits mainly to support the 9th Circuit's holding that there was no rational basis for California to withdraw the right to marry from same-sex couples.

In some respects, the merits

and should dismiss the appeal and, similarly, the 9th Circuit would also have lacked jurisdiction and should have dismissed the appeal. That leaves Judge Walker's 2010 decision as an unappealed district court decision. Some have speculated that, as such, it would be binding only for the four plaintiffs and the two county clerks who denied them marriage licenses. Petitioners argue this, contending that because the case was not brought as a class action on behalf of all unmarried same-sex couples in California, and because no attempt was made to certify a defendant class of all California

Both Respondent briefs point out that the concept of marriage described by the Petitioners is out of touch with reality, invented for the purpose of litigation.

For the four plaintiffs and their attorneys, who were hired by the American Foundation for Individual Rights with the ultimate goal of getting the Supreme Court to declare that same-sex couples have an equal right with opposite-sex couples to marry, anywhere in the United States, their brief is about getting the Supreme Court to that point. Although they argue, briefly, that the Proponents of Proposition 8, who are the Petitioners before the Supreme Court, lack constitutional "standing" to appeal the District Court's Order striking down Prop 8, and alternatively that if the Court finds that Petitioners do have standing, it should affirm the 9th Circuit's narrow ruling that Prop 8 is invalid because there was no rational justification for withdrawing the right to marry that same-sex couples in California enjoyed prior to its passage, they focus their

arguments are quite similar, since they hope to persuade the court that the Petitioner's purported justifications for Proposition 8 are pathetically inadequate. By taking these different orientations, however, the two Respondents (Plaintiffs below and Intervenors below) give the Court plausible alternatives for reaching a result that would revive same-sex marriages in California and, perhaps, make it available throughout the country.

Commentators have been speculating about what would happen if the Court agrees with Respondents that the Proponents of Proposition 8 — Dennis Hollingsworth and his three confederates and their campaign organization, ProtectMarriage.com-Yes on 8 — lack federal constitutional standing. In that event, the Supreme Court does not have jurisdiction

county clerks, the trial court would not have authority to award statewide relief. Both Respondent briefs attack this argument, but the City of San Francisco brief develops it at greater length, which is logical considering that the Plaintiff-Intervenor's main concern is reviving same-sex marriage in California (and, particularly, in San Francisco, whose city clerk was not one of the defendants). The Briefs argue, persuasively, that the case is a facial challenge to the constitutionality of Prop 8. If it is unconstitutional as to the plaintiffs, it is also unconstitutional as to all similarly situated people. Furthermore, argues the City of San Francisco brief, the county clerks are agents of the state when they issue marriage licenses and accept certificates for filing, so an order running against the state officials charged with supervisory authority

is sufficient to have statewide effect. These arguments are very convincing and should allay the fears of those who suggest that a victory on standing would have no immediate effect beyond the two couples who agreed to be plaintiffs in this case.

The plaintiffs' brief addresses standing briefly, because although they are bound to make the argument — after all, they raised it as soon as Proponents sought a stay of Judge Walker's Order — but they really don't want the Court to decide this as a standing case, because their goal is a ruling on the merits that extends the right to marry nationwide. Unless the Court has jurisdiction, it can't issue such a ruling, and unless the Petitioners have standing, the Court has no jurisdiction to rule on the merits.

By contrast, the City of San Francisco brief eagerly pursues the standing issue, since it is a potential big winner for their constituency — the LGBT community in San Francisco. And they have great arguments to make. Their research also uncovered a particularly helpful authority to cite: a law review article authored by Chief Justice John G. Roberts, Jr., back when he was a practicing lawyer, titled "Article III Limits on Statutory Standing," 42 Duke L.J. 1219 (1993). They quote Roberts: "[O]ne thing [Congress] may not do is ask the courts in effect to exercise . . . oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue." This is a c.f. cite, of course, but nonetheless on point to the main line of the argument. They also make the point, calculated to strike terror in the hearts of federal judges, that if Proponents' standing is upheld, then in future every initiative proponent will write into their constitutional amendment initiatives a provision authorizing the proponents to defend the initiative in court in case state officials decide not to do so, thereby automatically conferring standing. Furthermore, state legislature might insert such provisions into their statutes, in case a future administration should decide not to defend a prior enactment (see, e.g., DOMA Section 3!).

On the merits, the City of San

Francisco sharply disputes the Petitioners' attack on the logic of the 9th Circuit's narrowly-focused ruling, while taking on the merits of the purported justifications for Prop 8. At the heart of their argument is the irrefutable fact that the California Supreme Court has ruled that the only effect of Prop 8 is to deny same-sex couples the label of marriage, since the Domestic Partnership Law confers all state law rights of marriage on legally-partnered same-sex couples, and California family law has evolved to the point of treating same-sex couples and different-sex couples with just about total equality when it comes to parenting rights and responsibilities. The heart of the Petitioners' argument is that Prop 8 is justified as a means of encouraging responsible procreation, but the City of San Francisco brief cogently points out that Prop 8 did not affect California law relating to procreation and parenting in any way — other, of course, than to disadvantage the children being raised by same-sex couples who will be barred from marriage. They concentrate on showing that there is no rational basis for Prop 8 as a measure rescinding rights, and don't push for a higher level of judicial review.

The brief filed on behalf of the plaintiffs — Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo — makes the same points, but aims most of its firepower at a broad-ranging equal protection argument that seeks to place this case in the mainstream of the Court's equal protection jurisprudence. The argument is not, at its foundation, significantly different in its attack on the Petitioner's justifications for Prop 8, but the orientation is different, since the brief devotes little attention to defending the 9th Circuit's narrow approach. Their goal is a broader ruling. The City of San Francisco would be happy with a broader ruling, of course, and their brief would support it, but most of their emphasis goes towards arguing that this case, like *Romer v. Evans*, is about taking away rights that previously existed, making it California-specific. The City brief thus devotes more

attention to the nasty campaign waged by Proponents to enact Prop 8. Both briefs, however, do a brilliant job at skewering the logic of the "responsible procreation" argument.

And the Plaintiffs' brief also does a brilliant job at countering Petitioners' argument on the level of judicial review. This brief argues that strict scrutiny or heightened scrutiny would be justified in cases involving sexual orientation discrimination, perhaps even going a bit further than the Justice Department has gone in its arguments in the DOMA case. Although the heading for this part of the brief asserts that "Discrimination on the basis of sexual orientation triggers heightened scrutiny," they assert at the outside that "the undisputed fact that gay men and lesbians have been subjected to a history of discrimination based on a trait that bears no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation 'suspect' and to give rise to heightened scrutiny." This one sentence conflates the two levels of judicial review. If a classification is "suspect," then it gets strict scrutiny, which puts a heavy burden on the defender of the challenged enactment to show that it is necessary to achieve a compelling governmental interest — a burden that really cannot conceivably be met in this case, especially as we come up on the 9th anniversary of same-sex marriages in Massachusetts with no evidence of any of the horrible consequences hypothesized by the Petitioners in their defense of Prop 8. And yet, the brief ends the sentence by referring to heightened scrutiny. The argument deftly veers back and forth, pushing towards a strict scrutiny approach. Perhaps this like bargaining with the Court; showing that strict scrutiny would be justified by the form of analysis the Court has used in the past, which would make mere "heightened scrutiny" an "easier lift" for the Court. Either way, the Petitioner's arguments to justify Prop 8 would be unavailing were the Court to apply any form of "heightened scrutiny" to the case.

Perhaps most importantly, both Respondent briefs point out that the

concept of marriage described by the Petitioners is out of touch with reality, invented for the purpose of litigation, and has no relationship to the arguments that Proponents made in 2008 to get their measure approved by the voters. As I observed in my prior analysis of the Petitioners' brief, it conspicuously fails to acknowledge the personal aspect of marriage. For the Petitioners, marriage is all about children and not about the marital partners and their relationship. The Petitioners argue as if all marriages revolve around children, and same-sex partners don't have children. For the Respondents, marriage is about love, devotion, making a life together, forming a family (which may include children), taking responsibility for each other, etc. The City brief reiterates several times the record evidence of approximately 40,000 children being raised by same-sex couples in California, and forcefully makes the point that denying marriage to their parents disadvantages them. And on each point both briefs find support for the non-child-centered elements of marriage in prior rulings by the Supreme Court.

There is no doubt in reading these briefs that they were drafted by masterful appellate advocates, who should be acknowledged for their achievement. David Boies and his partners and associates at Boies, Schiller & Flexner LLP, and Theodore B. Olson and his partners and associates at Gibson, Dunn & Crutcher LLP, have turned out a brief that is a true masterpiece, precise, passionate, every word calculated to make its mark. S.F. City Attorney Dennis J. Herrera can be proud of the forceful brief produced by Chief Deputy City Attorney Therese M. Stewart and her team of Deputy City Attorneys. Both briefs could be models for courses on drafting appellate briefs, and deserve to be studied by anybody interested in the issues in these cases, procedural and substantive. Bravo! (But make no mistake, some of the briefs filed on the other side, standing on their own, appear quite strong and forcefully written. It's just that their arguments fall to pieces under the combined assault of the two Respondent's briefs.)

The next stage in the Prop 8 case was filing of amicus briefs in support of Respondents by the end of February, and then a Reply Brief from the Petitioners shortly thereafter, with oral argument to be held on March 26. The immediate drama at the end of February focused on the White House, where President Obama was under mounting pressure to authorize the Justice Department to file an amicus brief arguing that same-sex couples have a constitutional right to marry, and eventually succumbed and filed right at the deadline (see below).

Meanwhile, other amicus briefs drew particular attention in the last week of February. The openly-gay former Republican National Committee chairman, Ken Mehlman, organized a brief on behalf of Republicans supporting marriage equality that drew

was rejected on standing grounds, the Court should limit the scope of the ruling to the four named plaintiffs. She argued that when state officials decline to appeal a ruling invalidating a state law, "the state can no longer enforce that law," so Prop 8 would be invalid statewide. Another amicus brief, filed on behalf of "dozens of corporations," according to a February 28 report in the *San Francisco Chronicle*, argued that the California marriage ban harmed businesses by fostering discrimination. Another amicus brief was filed on behalf of more than 100 corporations, and yet another by pro football players Chris Kluwe and Brendon Ayanbadejo. Lambda Legal and Gay & Lesbian Advocates & Defenders filed a joint amicus brief. Groups of states have filed amicus briefs on both sides of

The arguments should allay the fears of those who suggest that a standing victory would have no immediate effect beyond the two couples who are plaintiffs in this case.

more than 100 signatories, including several former governors, present and former members of Congress, and many high level executive branch officials from the Reagan and Bush (I & II) administrations. Another amicus brief that attracted West Coast press attention was filed by California Attorney General Kamala Harris, successor in office to now-Governor Jerry Brown, who was a named defendant in the trial court but declined to defend the measure or to appeal the trial court ruling. In addition to supporting marriage equality on the merits, the Harris brief rejected the standing of Proponents to appeal the ruling, stating, "They are private citizens with no political accountability." Harris, in concert with Respondents, also rejected the argument that if the appeal

the issue. In all, close to 50 amicus briefs were filed in opposition to Proposition 8. A summary, broken down by the subject matter addressed by the briefs, can be found on the San Francisco City Attorney's website. This writer thinks that there are too many amicus briefs on file in this case. The sheer volume of filings may be a turn-off for the Justices, who are not going to read them in any event. The poor clerks are going to have to plow through them and summarize them for the Justices. Everybody and their aunt and uncle wants to "weigh in" and "go on the record" in this case, but it might have been better if there were more co-signing and fewer separate briefs. It's just as impressive to have 286 co-signers on one very well-written brief as to have 286 separate briefs. ■

Obama Administration Files Amicus Brief in Opposition to Proposition 8

On February 28, the Obama Administration weighed in on *Hollingsworth v. Perry*, No. 12-144, the pending challenging in the Supreme Court by the American Federation for Equal Rights (AFER) to California Proposition 8, by filing an amicus brief arguing that the Court should declare California's constitutional provision limiting marriage to the union of a man and a woman to be unconstitutional under the 14th Amendment. The government is the Petitioner in the companion case of *United States v. Windsor*, No. 12-307, contesting the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), which implicates many of the same constitutional issues, but it was not certain that the government would file a brief in *Hollingsworth*, and there was much lobbying and gay media pressure for them to do so, as a logical extension of President Obama's celebrated "evolution" on same-sex marriage last spring and certain statements from his Inaugural Address in January and State of the Union message in February.

The government needs to identify its interests in filing an amicus brief in a case to which it is not a party. Here the government articulates two interests. First, the government wants to achieve a consistent resolution of the level of scrutiny to apply to sexual orientation discrimination claims, referencing the simultaneous consideration of *Windsor*, in which the government is arguing for heightened scrutiny. The brief points out that the government has submitted amicus briefs in the past when the Supreme Court was considering what level of review to give to an equal protection claim in a case brought by private litigants against a state or local government, as the government has an interest in the resolution of that question because some of its own programs and policies

might be affected by the outcome. That is certainly true here. A holding on heightened scrutiny could affect the constitutionality of any federal law or policy that subjects gay people to unequal treatment, by making those laws presumptively unconstitutional and putting the burden on the government to justify them by showing that they substantially advance an important governmental interest.

The brief also notes as a government interest that many of the arguments made by the Proponents in support of Prop 8 have also been made in support of DOMA Sec. 3, and thus the government has an interest in consistent resolution of those issues as well, because the Court's treatment of them would affect the outcome in both cases.

On the merits, the brief basically replicates the argument from the government's *Windsor* brief about why heightened scrutiny is appropriate (but does so more concisely, with references to the other brief), and counters arguments to the contrary from Charles Cooper's brief for Proponents of Proposition 8. After pointing out that California law provides all the state law rights of marriage to same-sex couples and that Prop 8 does not withdraw any of those rights, the brief states, "Particularly in those circumstances, the exclusion of gay and lesbian couples from marriage does not substantially further any important governmental interest. Proposition 8 thus violates equal protection."

In other words, the brief, as an amicus brief in support of the AFER plaintiffs (Respondents in the Supreme Court), focuses on whether Prop 8 is constitutional, not more broadly on whether states can deny same-sex couples the right to marry. It is not pitched in the weight of its argument as a *Romer*-style "withdrawal of

rights" case, and so it differs in this respect from the brief filed by the City of San Francisco. Instead, its focus is on why there is no rational basis for giving same-sex couples all the rights of marriage and then denying them marriage itself. It is implying that the same argument could be made in all the other civil union/domestic partnership states; that resisting the next step to marriage violates Equal Protection after a jurisdiction has determined that same-sex couples should have all the rights and benefits in a state-sanctioned status similar to marriage. This would justify the government in submitting similar amicus briefs in the pending Hawaii and Nevada marriage cases, where the district courts have granted summary judgment against the plaintiffs and the cases are on appeal to the 9th Circuit. (Illinois is different, since the litigation there is pending in a state trial court under the state constitution, but the substantive legal arguments would be the same.) The brief lists the other states with civil union laws on page 11. After listing them, the brief says: "The designation of marriage, however, confers a special validation of the relationship between two individuals and conveys a message to society that domestic partnerships or civil unions cannot match." Thus, without citing the opinion, this brief is really channeling the argument accepted by the Connecticut Supreme Court in *Kerrigan v. State*, when it ruled that Connecticut civil unions violated state equal protection and the state had to open up marriage to same-sex couples to cure the violation.

This is not a brief that overtly advocates that same-sex couples have the right to marry as such. Rather, it advocates that if a state has resolved the policy issues in favor of providing the rights, benefits and responsibilities of marriage to same-sex couples, it

violates equal protection for the state to nonetheless deny same-sex couples the right to marry. And, focusing, as a brief in an actual case should, on the circumstances of the parties in the case, it argues that these particular circumstances, with the vote to amend the state constitution to end same-sex marriages, violates equal protection, as none of the arguments that were advanced in support of Prop 8 when it was enacted would suffice under heightened scrutiny to justify such unequal treatment for same-sex couples. When heightened scrutiny is the correct standard of review, the defenders of Prop 8 are theoretically limited to the justifications presented to the voters in 2008, not the various “new” arguments thought up by their attorneys for this lawsuit, but the government argues that those “new” arguments – particularly the “accidental procreation” nonsense – won’t suffice as even a rational basis for Prop 8, since Prop 8 does nothing to change existing California family law, under which same-sex domestic partners have all the parental rights and responsibilities of married couples, and has no logical effect on the problem of “accidental procreation” by heterosexuals.

The government brief points out, as other briefs filed in the case do, that in a heightened scrutiny equal protection case, the question for the Court is whether the defenders of Prop 8 have made valid arguments that would justify excluding same-sex couples from marrying, not whether the government might have some reason to encourage different-sex couples to channel their procreative activities within marriage. There is no logical connection between the two.

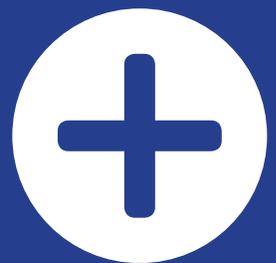
This is a subtly constructed brief. The arguments it makes could well support a challenge de novo against a state DOMA or the failure of a state to provide marriage (whether or not the state has adopted civil unions/domestic partnerships), by arguing against the constitutional salience of the justifications argued on behalf of Prop 8 (and Sec. 3 of federal DOMA), but

here those arguments are summoned specifically to support a consistent approach to the government’s position in the DOMA case and to knock the props out from under Prop 8.

It is helpful to have this brief on file making these arguments, because although it is similar in many respects to the arguments in AFER’s brief and the City of San Francisco’s brief, it provides a plausible alternative analytical route for the Court to strike down Proposition 8 without immediately invalidating all state DOMA laws and constitutional amendments. However, its analysis of the level of scrutiny issue and of the arguments usually made in support of denying marriage to same-sex couples seem to preordain the outcome in favor of same-sex marriage rights in a case presenting the broader argument. If a majority of the Court agrees with AFER’s arguments, we could have same-sex marriage nationwide immediately, but that seems a less plausible outcome. If the Court agrees with the government’s argument in this amicus brief, it would strike down Prop 8, perhaps in an opinion that would send a clear signal to the 9th Circuit to rule for same-sex marriage in the Hawaii and Nevada cases and to all lower federal courts on the likely outcome of federal constitutional challenges in states with civil union laws or perhaps even any state with a DOMA. Perhaps the result would not be as sweeping as *Lawrence v. Texas* (2003) was in the context of sodomy laws, but it could potentially have the same impact, and could accelerate the trend towards enactment of marriage equality laws by state legislatures, where efforts are now pending in several states.

Counsel of Record for the brief is Solicitor General Donald B. Verrilli, Jr. Other Justice Department lawyers listed on the brief are Principal Deputy Assistant Attorney General Stuart F. Delery, Deputy S.G. Sri Srinivasan, Assistant to the S.G. Pratik A. Shah, and DOJ attorneys Michael Jay Singer, Helen L. Gilbert, and Jeffrey E. Sandberg. ■

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DOMA Briefs in Supreme Court Join the Issue on Merits and Jurisdiction

On February 21 and 22 the parties in *United States v. Windsor*, No. 12-307, the pending challenge to Section 3 of the Defense of Marriage Act (DOMA), filed briefs in the Supreme Court in compliance with the expedited briefing schedule that the Court ordered shortly after granting the Solicitor General's petition to hear the case. The Justice Department (DOJ) filed two briefs, the first addressed to the merits (whether Section 3 violates the 5th Amendment's equal protection requirement) and the second addressed to jurisdiction (whether the case presents the Court

the Internal Revenue Service (IRS) relied on that statute in refusing to refund \$363,053 in federal estate taxes levied against the estate of Thea Spyer, Ms. Windsor's late wife. The women, New Yorkers, married in Canada in 2007 after being life partners for many decades. Ms. Spyer died in 2009, after several New York intermediate appellate courts had ruled that same-sex marriages legally contracted in other jurisdictions would be recognized in New York. The Internal Revenue Code exempts from estate taxes bequests to surviving spouses, and Ms. Spyer's will left her estate to Ms. Windsor.

as representative of the government, while notifying congressional leaders that it would not be defending Section 3 on the merits.

The Bipartisan Legal Advisory Group of the House of Representatives was convened by House Speaker John Boehner to respond to these developments, and by a party-line vote of 3-2 authorized the Counsel of the House of Representatives to seek to intervene in pending DOMA lawsuits to defend Section 3. The House Counsel then hired former Solicitor General Paul Clement to represent BLAG in these cases. BLAG has intervened

Windsor's merits brief gives a human dimension to a case that could easily devolve into an abstract proposition at the highest appellate level.

with a real 'case or controversy' and whether the Bipartisan Legal Advisory Group of the House of Representatives [BLAG] has constitutional "standing" to participate as a party). BLAG and counsel for Edith Windsor filed briefs on the jurisdictional questions as well. On February 26, counsel filed a brief on the merits for Windsor.

Section 3 of DOMA provides that the federal government will recognize only different-sex marriages for all purposes of federal law. It was enacted in 1996 in reaction to litigation brought by same-sex couples in Hawaii seeking the right to marry. Section 2 of DOMA, not involved in this case, purports to relieve states from any obligation to accord "full faith and credit" to same-sex marriages performed in other states.

Edith Windsor filed suit challenging the constitutionality of Section 3 after

After Windsor, represented by Roberta Kaplan of Paul Weiss LLP and the American Civil Liberties Union LGBT Rights Project (ACLU), filed suit for a tax refund in federal court, the Justice Department, which had been defending the constitutionality of Section 3 in litigation in other courts subject to circuit authority holding that sexual orientation claims receive rational basis review, studied the issue anew because the 2nd Circuit, with jurisdiction over New York claims, had not taken a position. DOJ concluded that sexual orientation claims merit heightened scrutiny, and that Section 3 could not survive such review. The President ordered that the Executive Branch continue to enforce Section 3, although DOJ would no longer defend its constitutionality in court. DOJ responded to Windsor's case with a motion to dismiss, however,

as a defendant in numerous cases in addition to the Windsor case. After granting BLAG's motion to intervene, the district judge ruled in favor of Windsor, issuing a decision last spring finding Section 3 unconstitutional using a form of "intensified" rational basis review (similar to the approach taken by the 1st Circuit Court of Appeals in a Massachusetts case) and ordering the government to refund the tax payment. Both DOJ and BLAG appealed to the 2nd Circuit. Windsor also filed a petition with the Supreme Court during the summer, seeking review before judgment by the 2nd Circuit, and DOJ followed suit early in September with a similar petition.

The 2nd Circuit rejected a suggestion to delay its argument pending a Supreme Court ruling on these pending petitions, instead scheduling an expedited argument in

September and issuing its decision affirming the district court before the Supreme Court had formally opened its October 2012 Term. The 2nd Circuit went a step further than the district court, holding that sexual orientation discrimination claims merit heightened scrutiny, as DOJ had argued, and that Section 3 fails that test.

After the 2nd Circuit's ruling, DOJ filed an additional brief with the Supreme Court urging that it review the 2nd Circuit's decision. The Supreme Court granted that petition on December 7, 2012. A few weeks later, BLAG filed its own petition with the Court seeking review of the 2nd Circuit's decision. To date, the Court has not ruled on the petitions filed by Windsor and BLAG.

DOJ's brief on the merits generated headlines as another major statement by the Obama Administration in support of same-sex marriage, but really broke little new ground legally, as it reiterated the arguments DOJ had made to the Court of Appeals concerning heightened scrutiny and the failure of BLAG to show that Section 3 met that standard. As in its arguments to the 2nd Circuit, DOJ argued that Section 3 would survive judicial review under the traditionally deferential rationality test, but it conceded that under a more demanding form of rational basis review, Section 3 should also be held unconstitutional. However, DOJ's brief forcefully rejected BLAG's arguments concerning the appropriate standard of review.

BLAG had argued in its merits brief filed in January against heightened scrutiny, claiming that gay people are now a politically powerful group that does not need special protection from the courts, citing the November 2012 electoral victories for same-sex marriage in Maine, Maryland and Washington State, and the increasing number of successful openly gay candidates for Congress. BLAG suggested that the past history of anti-gay discrimination by the government and by society was no longer a justification for heightened scrutiny in light of changing attitudes, and

urged that the Court allow the normal political process to determine policy questions about federal recognition of same-sex marriages.

DOJ rejected these arguments decisively. "Gay and lesbian people have suffered a significant history of discrimination in this country," said DOJ. "No court to consider the question has concluded otherwise, and any other conclusion would be insupportable." The brief goes on to cite chapter and verse on discrimination in employment, immigration, hate crimes, child custody, police enforcement, and anti-gay voter referenda. The brief observes that even BLAG concedes "that gay and lesbian people have endured discrimination in this country since the 1920s," and that the paucity of earlier documentation "is likely attributable to the fact that gay and lesbian people, by and large, kept their sexual orientation hidden for fear of discrimination or persecution." On the issue of "political power," DOJ distinguished between advances through litigation and through the ballot box, saying that BLAG's focus on recent electoral victories "ignores the broader context, which overwhelmingly demonstrates the political challenges faced by the gay and lesbian minority," pointing out particularly the epidemic of mini-DOMAs enacted by states as statutes or constitutional amendments since the passage of federal DOMA in 1996 and most recently in 2012 in North Carolina. BLAG had argued that the November ballot victories should be deemed "outcome determinative" on the question of heightened scrutiny, but DOJ pointed out that the Court continues to apply strict or heightened scrutiny in cases involving race and sex, despite the political advances of people of color and women, in light of historic discrimination.

As to the justifications offered for Section 3 by BLAG, DOJ pointed out that under heightened scrutiny new arguments long post-dating the 1996 enactment were irrelevant, the issue being the reasons why Congress acted when it passed the law. Even before DOJ changed its position on the constitutionality of DOMA, it had publicly rejected the reasons cited

in the legislative history of 1996 in its filings in the Massachusetts case. Responding to BLAG's argument that the Court should allow the democratic process to run its course and not cut short the debate by constitutionalizing the issue, DOJ wrote, "That approach would be very well taken in most circumstances. This is, however, the rare case in which deference to the democratic process must give way to the fundamental constitutional command of equal treatment under law. Section 3 of DOMA targets the many gay and lesbian people legally married under state law for a harsh form of discrimination that bears no relation to their ability to contribute to society. It is abundantly clear that this discrimination does not substantially advance an interest in protecting marriage, or any other important interest. The statute simply cannot be reconciled with the Fifth Amendment's guarantee of equal protection. The Constitution therefore requires that Section 3 be invalidated."

Windsor's merits brief begins with a detailed account of the life Edith Windsor and Thea Spyer led as a couple for more than forty years, giving a human dimension to a case that could easily devolve into an abstract proposition at the highest appellate level. The brief also devotes significant attention to supporting DOJ's argument that Section 3 discriminates based on sexual orientation and should be reviewed under the heightened scrutiny standard, but the brief also argues strongly that Section 3 would fail rationality review, as held by the district court. The brief makes the important point that in a challenge brought against a federal statute, "the government interest" that would support the law "must be a federal one." The argument closely tracks the reasoning of the Supreme Court in *Romer*, and is thus calculated to appeal particularly to Justice Kennedy, author of that opinion for the Court. Quoting from a law review article by Andrew Koppelman commenting on *Romer* shortly after that decision was announced, the brief makes the telling point that "a law can fail rationality review when it 'targets

a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationships to any legitimate governmental interest.” The brief points out that during the rushed process of enactment Congress made no attempt to study the potential impact of the law, the number of federal rights and benefits that would be protected, and any policy arguments that might be made as to whether a particular right, protection or benefit should be categorically denied to same-sex couples. Thus, the generalized policy rationales stated in the House Report on DOMA were not backed up by any data or analysis. Comments by Justice Kennedy in other cases are skillfully weaved into

“aggrieved party” in this case because it is subject to the district court’s order and will continue to enforce Section 3 and be faced by additional lawsuits until the matter is resolved. Thus, it argues, the parties have a “continuing controversy.” Furthermore, it notes that the statute describing the Court’s jurisdiction states that “any party” can petition the Court for review of a lower court decision. The Court has discretion to reject such a petition if it determines that it is being asked for an advisory opinion, but DOJ argues that there is an important live controversy about the constitutionality of Section 3 that needs to be resolved on a national basis.

On the other hand, DOJ argues that BLAG does not by itself have

statute. This case is different, argues DOJ, because no particular prerogative of Congress is at stake, and the Supreme Court has never recognized congressional standing in general to defend the constitutionality of a statute on an argument that Congress always has an interest in defending the statutes it has enacted. (BLAG argues, in opposition to this position, that a decision on the merits that sexual orientation claims merit heightened scrutiny, would impose a permanent restriction on the ability of the House to pass legislation, thus giving it a particularized interest. This argument is absurd, as it would confer standing on the House to bring to the Court any case in which a lower court upholds a due process or equal protection claim against a federal statute.)

In her brief on jurisdiction, a collaboration of the ACLU, the NY Civil Liberties Union, Roberta Kaplan and attorneys from Paul Weiss, and Pamela Karlan and Jeffrey Fisher and the Stanford Law School Supreme Court Litigation Clinic, Windsor expands on this point with particularity. It seems that under federal statutes a citizen seeking a tax refund must sue the United States government, so, she argues, the United States, as represented by DOJ, is a necessary party in this case. If the case itself is properly before the Court, the government must be a party before the Court, or else there is no statutory authority to order a tax refund. And, since the government has refused to refund the money, there is a genuine dispute between Windsor and the government. Windsor also argued that because her cause of action is against the U.S. government, the question whether BLAG has independent standing to bring this case before the Court is irrelevant to the question of the Court’s jurisdiction.

BLAG, as one might have anticipated, stakes out quite a different position in its new brief on jurisdiction. Its case is built in part on a measure enacted by the House of Representatives in January 2013, a month after the Court granted review in this case, by which

“Gay and lesbian people have suffered a significant history of discrimination in this country,” said DOJ. “No court to consider the question has concluded otherwise, and any other conclusion would be insupportable.”

the argument at several points.

In its separate brief on jurisdiction, DOJ responded to two questions posed by the Court: whether DOJ’s agreement with Windsor and the 2nd Circuit that Section 3 is unconstitutional deprives the Court of jurisdiction for lack of a real “controversy” and whether BLAG itself has standing to seek review of the lower court’s decision. DOJ strongly argued that it has presented a real controversy to the Court, pointing out that the government is continuing to enforce Section 3 pending a definitive ruling by the Court, and thus it has refused to comply with the district court’s order to issue a tax refund to Windsor. Even though DOJ agrees on the merits that Section 3 is unconstitutional, DOJ argues that the government remains an

standing under the Constitution to represent the interests of the United States in this case, asserting that neither BLAG, its members, nor the House of Representatives as a whole has suffered any particularized injury that would confer standing, and that under the separation of powers only the Executive Branch through DOJ is authorized to represent the United States in litigation. DOJ distinguished the main case upon which BLAG relies, *Chadha*, which involved the constitutionality of a statute giving either house of Congress the right to veto a decision by the Attorney General not to deport an alien. In that case, the Supreme Court allowed both houses of Congress to intervene as parties to defend their prerogatives under that

“DOMA” continued on page 83

Kansas Supreme Court Recognizes Right of Same-Sex Co-Parent to Enforce Parenting Agreement

The Kansas Supreme Court has unanimously ruled that a lesbian co-parent who entered into a written co-parenting agreement with her partner before her partner had a child through assisted reproductive technology (ART) can seek enforcement of the agreement in the Kansas courts, premised on a gender-neutral interpretation of the Kansas version of the Uniform Parentage Act. Ruling in *Frazier v. Goudschaal*, 2013 WL 646309, on February 22, 2013, the court also found that the trial court had authority to make a property distribution between the women. However, the court also agreed that further fact-finding is necessary to determine the best interests of the child and an appropriate distribution of property before a final order in the case can be given.

Marci Frazier and Kelly Goudschaal began their relationship in 1995. They first planned to start a family with children by each becoming pregnant and bearing a child through ART, but because Frazier was unable to become pregnant they agreed that Goudschaal would bear two children, who were born in 2002 and 2004. They signed a coparenting agreement before the first child was born, and another prior to the birth of the second child. The agreements identified Frazier as a “de facto parent” whose “relationship with the children should be protected and promoted,” and that the parties intended “to jointly and equally share parental responsibility” including financial responsibility and joint determination of “major decisions” affecting the children. In the event that the women separated, the agreements provided that the mother with physical custody would “take all steps necessary to maximize the other’s visitation.” They also executed consent for medical authorization and a durable power of attorney for health care decisions, and made wills naming each other as the children’s guardians.

They all lived together as a family unit for several years, but things started to break down and by September 2007 the women were occupying separate bedrooms. Goudschaal moved out with the children in January 2008, and in July

of that year began decreasing Frazier’s contact, limiting it to one day a week and alternate weekends. In October 2008, Goudschaal informed Frazier that she was moving with the children to Texas to take a new job. Frazier then filed suit in Johnson County (Kansas) District Court, seeking to enforce her rights under the co-parenting agreement and for a division of property.

The District Court found that it had jurisdiction, issuing an order dividing all of the women’s property equally, awarding joint legal custody of the children, designating Goudschaal as residential custodian, establishing unsupervised parenting time for Frazier, and ordering Frazier to pay child support. Goudschaal appealed, asserting that the court had improperly allocated some of her personal property to Frazier and that the court lacked jurisdiction and authority to make a custody and parenting time award to an “unrelated third person.”

The court, following the lead of state supreme courts in California and New Mexico (see *Elisa V. v. Superior Court*, 37 Cal.4th 108 (2005) and *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012)), ruled that the Kansas courts do have jurisdiction over all the issues raised in this case under the Kansas version of the UPA (and alternatively under the court’s general jurisdiction over suits to enforce contracts), but that the trial court needed to do more fact-finding concerning the best interest of the children. The court also ruled that the trial court erred in the method it used for allocating property rights, so the case was remanded with directions to the trial court for more fact-finding.

The most significant part of the ruling is undoubtedly the court’s determination that the Kansas version of the Uniform Parentage Act does give the court jurisdiction in cases of this type to entertain an action by the non-adoptive second parent to enforce a pre-birth co-parenting agreement. In some states, courts have held that any private pre-birth agreement concerning custody and visitation is not binding on the court on grounds of public policy, in light of the

state’s *parens patriae* role as protector of the interests of the child. Rejecting this approach, Justice Lee A. Johnson wrote that “the coparenting agreement before us is not rendered unenforceable as violating public policy merely because the biological mother agreed to share the custody of her children with another, so long as the intent, and effect, of the arrangement was to promote the welfare and best interests of the children.” The court found that “the coparenting agreement designates Frazier as a ‘de facto’ parent,” and the Kansas statute “permits the creation of presumptive motherhood through written acknowledgment.”

The court rejected Goudschaal’s argument that this interpretation of the statute would violate her federal constitutional rights as the biological mother of the children. She rested her argument primarily on *Troxel v. Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down a Washington state statute that allowed any person to petition the court for child visitation, even over the objection of a fit biological parent, grounding the parent’s right in the due process clause of the 14th amendment. The right at issue is the fit parent’s right, as an aspect of liberty protected by the due process clause, to decide upon the “care, custody, and control of her children.”

In this case, wrote Justice Johnson, Goudschaal had exercised that right “when she entered into the coparenting agreement with Frazier. If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference,” he wrote, “then that parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children.” Thus, “parental preference” for custody, as specified in the statute, can be waived and, “as Frazier points out, the courts should not be required to assign to a mother any more rights than that mother has claimed for herself.” Indeed, the court said that “the

children were third-party beneficiaries of that contract,” and their interest in maintaining a relationship with both of their mothers was also an important factor in the case. “Denying the children an opportunity to have two parents, the same as children of a traditional marriage, impinges upon the children’s constitutional rights,” wrote Johnson. “Here, the agreement effects equality by giving the children two parents. Moreover, the UPA and, in turn, the KPA are gender-neutral, so as to permit both parents to be of the same sex.”

However, the court found that the district court, which “was exploring new territory in this case,” had acted without sufficient evidence on the best interests of the children. The court noted that there was no explanation in the record for evidence that “the children allegedly began experiencing problems after recommencement of visitation with Frazier.” The court decided it was appropriate to send the case back for further exploration of this issue, and for the appointment of an attorney to represent the children’s interests in that proceeding.

Turning briefly to the property division issue, the lack of same-sex marriage in Kansas was salient. The court decided that the trial judge’s “blanket finding that the parties intended to share everything” was inappropriate, directing that on remand “the court should conduct an asset-by-asset determination of whether each item was jointly accumulated by the parties or acquired by either with the intent that each should have an interest therein.” Fact-finding remains to be done before a final property distribution can take place.

A concurring judge would have premised jurisdiction over the parenting issues solely on the Kansas version of the UPA.

Dennis J. Stanchik of Olathe, Kansas, represents Frazier. T. Bradley Manson of Manson & Karbank, Overland Park, argued the appeal for Goudschaal. Amicus briefs, all in support of Frazier, were filed by a group of LGTB/civil liberties groups (ACLU, NCLR), the Washburn University Law School’s Children and Family Law Center, and the National Association of Social Workers. ■

Feel Free to Defame: HIV Dissenters Fight Losing Battle in the Courtroom

In *Farber v. Jefferys*, 2013 WL 599163 (N.Y. App. Div., 1st Dep’t, Feb. 19, 2013), the N.Y. Appellate Division affirmed the decision of the trial court holding that a defendant was not liable for defamation after calling an HIV-denialist a liar in a letter that was circulated publicly. The court held that the plaintiff was a limited purpose public figure and could not prove that the defendant acted with actual malice—a necessary element for proving defamation of certain public figures. In addition, the plaintiff could not prove that the defendant acted in a grossly irresponsible manner—a necessary element for proving defamation in a debate regarding a matter of public concern where the public anticipates heated debate. The Appellate Division decision is brief, but it tracks the decision of the trial court at *Farber v. Jefferys*, 941 N.Y.S.2d 537 (Sup. Ct. 2009).

The background for this case is voluminous and dates back to 1987, when Dr. Peter Duesberg first published an article criticizing the cancer research community and claiming that HIV was a benign passenger virus incapable of causing AIDS. Dr. Duesberg was a rising star in the scientific community, but his ideas about HIV caused him to be widely discredited by the medical community at large.

The overwhelming majority of the medical community supports the idea that HIV causes AIDS. But there have always been HIV dissenters who contend that AIDS is caused by the impaired immune systems of individuals as a result of their lifestyle choices including sexual behavior, use of recreational drugs, malnutrition, and unsanitary living conditions.

The summary judgment motion at issue here involves plaintiff Celia Farber, a journalist who writes favorably about Dr. Duesberg’s theory, and defendant Richard Jefferys, an

employee of the Treatment Action Group, a nonprofit foundation involved with HIV/AIDS related advocacy work. Ms. Farber claims that she is neutral on the issue and believes that it is her job as a journalist to report the alternative point of view because the mainstream HIV theory has been accepted without question. Yet, Ms. Farber’s articles show “no love for the traditional HIV/AIDS community” and she regularly disparages its members in her articles.

In March 2006, Ms. Farber wrote an article entitled: “Out of Control: AIDS and the Corruption of Medical Science.” The article favorably discusses Dr. Duesberg’s belief that HIV does not cause AIDS and explains that “his work has been ignored and he himself marginalized almost to obscurity in his field because to consider his theories would threaten the profitability of pharmaceutical companies, to which AIDS groups and the government are beholden.” The article also details two stories. One story is about an HIV-positive pregnant woman who died shortly after the birth of her child. Ms. Farber alleged that the anti-AIDS treatment caused the mother’s death. The second story is about the efforts of pharmaceutical companies in Africa and their alleged fixing of scientific studies in favor of the conclusions they desire.

“Out of Control” was highly criticized, often pitching Ms. Farber as a racist and anti-gay. In rebuttal, several experts in the field, including Mr. Jefferys, joined to publish “56 Errors”—an exposition discussing the false, misleading, unfair, and biased statements in *Out of Control*.

In 2008, the Semmelweis Society International, an organization formed to support physicians, academicians and health care providers who are falsely accused of misconduct based on their status as whistleblowers, announced

that it would give awards to Ms. Farber and Dr. Duesberg for their stance as HIV dissenters.

In an effort to prevent Ms. Farber from receiving the award, Mr. Jefferys sent an email to a coordinator of the award ceremony stating, in part, that: “These individuals are not whistle blowers, they are simply liars who for many years have used fraud to argue for Duesberg’s long-discredited theory that drug use and malnutrition – not HIV – cause AIDS.”

According to Ms. Farber’s complaint, the letter was circulated to members of Congress and to the media. As a result the Semmelweiss Society dropped Ms. Farber from the list of scheduled speakers at the ceremony, but still gave her the award in a private setting.

A typical claim for defamation requires only that the plaintiff show that a false statement of fact was made which exposed the plaintiff to public contempt, ridicule, aversion or disgrace. However, Ms. Farber faces a greater burden than the typical defamation plaintiff for two reasons.

First, the court concluded that Ms. Farber is a limited purpose public figure in the HIV/AIDS world. In determining that Ms. Farber is a limited purpose public figure, the court evaluated whether “there was a particular public controversy that gave rise to the alleged defamation, the nature and extent of the plaintiff’s participation in that controversy, and the relation of the alleged defamation to the controversy.”

The court explains in great length that Ms. Farber is heavily involved in the HIV/AIDS controversy. Ms. Farber is a journalist who has covered AIDS for various publications since the 1980s. Her reputation is widespread enough that she speaks at various events, her works are used in courses, and she participates on panels related to the controversy. In addition, Out of Control generated enormous attention and publicity. The court writes: “Farber’s own complaint and the papers she submits in opposition to this motion establish that, in the limited context of issues surrounding AIDS and HIV dissenters and the question of whether HIV causes

AIDS, she is a public figure.”

Second, the court concluded that Mr. Jefferys’ statements were made with regard to a matter of public concern, which deserves special protection because of the potential chilling effect that threats of defamation actions can have on public debate. In determining that Mr. Jefferys’ statements were made in relation to a matter of public concern, the court considered the context of the writing as a whole and the content, form, and context of the writing.

The court explains that Ms. Farber does not argue that statements were not related to a matter of public concern and could not reasonably raise such an argument because she has devoted her career to this issue. Furthermore, Mr. Jefferys’ statements were made with regard to a matter of public concern because, as an international epidemic,

that Ms. Farber cannot raise an issue of fact as to malice. Mr. Jefferys did not exhibit malice or gross irresponsibility because he relied on academic, scientific and medical evidence in making his assertion. The court states that: “So long as the defendant relied on at least one authoritative source and had no good reason to doubt the veracity of that source or the accuracy of the information he or she provided, even if that information ultimately proved to be incorrect or false, the publisher has appropriately discharged its duty.”

Finally, the Ms. Farber points to Mr. Jefferys’ use of the term “liar” in his letter as grounds for the defamation action because her reputation as a journalist can be damaged by this contention. Mr. Jefferys counters that, in the context of a heated public debate,

The e-mail read, in part, “These individuals are not whistle blowers, they are simply liars who for many years have used fraud” to argue that drug use and malnutrition – not HIV – cause AIDS.

questions related to the cause of and treatment for AIDS are obviously a matter of public concern.

In light of the court’s conclusion that Ms. Farber is a limited purpose public figure and that the statement relates to a matter of public concern, Ms. Farber’s claim for defamation must demonstrate that: (1) Mr. Jefferys made the statement with knowledge of their falsity and that the statements were made with actual malice, and (2) Mr. Jefferys acted with “gross irresponsibility” in making his statements. The first proof overcomes Ms. Farber’s status as a limited purpose public figure, while the second proof overcomes the matter of public concern.

The court proceeds to analyze whether Mr. Jefferys acted with malice or gross negligence. The court states

his use of the words “liar” and “fraud” are non-actionable opinion. The court agreed with Mr. Jefferys, stating that in the context of a heated public debate the audience anticipates the use of epithets, fiery rhetoric or hyperbole. Furthermore, Ms. Farber engages in the same behavior and her articles constantly make accusations against the mainstream HIV theorists.

In conclusion, while the trial court endeavored to portray Ms. Farber in a favorable light, the implicit message is that publicly calling out and labeling HIV-denialists as liars will not result in defamation liability. — *Gillad Matiteyahu*

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

Defense Department Extends Benefits to Same-Sex Domestic Partners of Servicemembers

Finding a work-around for benefits that are not restricted by statute to federally-recognized spouses, the Defense Department (DoD) announced on February 11, in a Memorandum for Secretaries of the Military Departments issued from the office of the Secretary of Defense, Leon Panetta, to the Acting Under Secretary of Defense for Personnel and Readiness, that DoD would establish a domestic partnership system under which same-sex domestic partners of military personnel will have access to a substantial list of benefits in addition to those that have already been extended during the Obama Administration. The memorandum was released with three attachments, the

The description of criteria for a domestic partnership described in the third attachment is similar to the criteria used by many states and municipalities and private companies that have established domestic partnership systems. Significantly, domestic partners must either have a common residence or affirm that they would have a common residence “but for the requirements of military service.” The form also specifies that registered partners must notify the service within 30 days of a dissolution or termination of the partnership or failure to meet any of the continuing requirements to qualify. The benefits covered by the new policy include many

big-ticket items where Defense Department’s legal staff has determined that DOMA would create a problem. As to these, the memo states: “Additional benefits, such as health care and housing allowances, are by statute currently only available to spouses and therefore cannot be made available to same-sex domestic partners of Service members under current law. In the event that the Defense of Marriage Act is no longer applicable to the Department of Defense, it will be the policy of the Department to construe the words ‘spouse’ and ‘marriage’ without regard to sexual orientation, and married couples, irrespective of sexual orientation, and their dependents, will be granted full military benefits. In addition, the benefits changes directed by this memorandum will be re-assessed at that time to determine whether other changes are needed or appropriate, to include whether unmarried same-sex domestic partnerships should be a basis for eligibility for benefits in the future.” Even if DOMA is no longer a factor sometime in the future, until same-sex marriage becomes uniformly available throughout the United States there will still be a question whether DoD should continue to make same-sex domestic partner benefits available to assure equal treatment for military personnel with same-sex partners. The memo here signals that DoD will be open to that discussion.

The memo also explained that certain other benefits – on-base housing, burial, and benefits related to command sponsorship overseas,” are still being reviewed, but “present complex legal and policy challenges due to their nexus to statutorily-prohibited benefits and due to ongoing reviews about how best to provide scarce resources.” Thus, the new list of benefits announced on February 11 was not an exhaustive list of all benefits made available to service-members that are not expressly restricted by statute to federally-recognized legal spouses. ■

The benefits covered by the new policy include many that have been the subject of complaints and lobbying by Servicemembers with same-sex partners.

first listing member-designated benefits already in effect, the second listing new benefits for same-sex domestic partners and their children, which are to be implemented between August 31, 2013 and October 1, 2013, and the third providing a form for Declaration of Domestic Partnership that must be filed with the Department in order to establish eligibility for partner benefits. The memo indicated that an implementation plan would be drawn up and presented to the Secretary of Defense within 60 days. If he is confirmed by the Senate, that would be former Senator Chuck Hagel, who said at his confirmation hearing that he would strive to provide full equality for the families of gay Servicemembers.

that have been the subject of complaints and lobbying by Servicemembers with same-sex partners, including dependent ID cards, commissary privileges, exchange privileges, a variety of programs made available to families of Servicemembers, emergency leaves and leaves of absence, joint duty assignments, child care and legal assistance, and many others. As noted, these are in addition to the policy changes that have been in effect in recent years following the repeal of DADT, allowing Servicemembers to designate same-sex partners as beneficiaries for a variety of programs, exercise hospital visitation privileges and be listed for casualty notifications.

Omitted, of course, are some

New York Trial Court Issues Interim Ruling in Gay Male Relationship Breakup

A fascinating he-said / he-said between former gay male partners is making its way through the New York Courts, in *Massey v. Byrne*, 107935/10, NYLJ 1202588223263 (N.Y. Sup.Ct., N.Y. Co., January 15, 2013).

Plaintiff Craig B. Massey brought an action against his alleged former partner, Christopher Byrne and Byrne's company, Byrne Communications, Inc., claiming that their ten year relationship was not only romantic but "confidential and fiduciary," and that they "lived together as life partners" from 1997 until 2007, during which time he alleges that Byrne fraudulently induced him to move to New York, forego benefits and make financial sacrifices. Massey also alleges that his sacrifices for and contributions to the relationship unjustly enriched Byrne.

Further, Massey alleges that he and Byrne had an oral agreement to share equally in the assets and resources gained during their relationship, including a New York City condominium, which Byrne is now refusing to share with Massey after their relationship ended.

The case hinges on characterizations of essentially the same facts, and Justice Saliann Scarpulla denied all motions for summary judgment, except on Massey's claim for partition of the condo the couple shared, because at this stage it is impossible to tell which version of the story is correct.

What seems to be clear is that in 1997, Massey moved to New York, and was brought on as a freelancer to Byrne Communications, the business owned and maintained by Byrne. Massey moved in with Byrne, and in 2002 moved with him to a condo held solely in Byrne's name after being diagnosed with tuberculosis in 2002. Byrne Communications continued to pay Massey throughout his illness and both parties more or less agree that Byrne

himself cared for Massey throughout his bout with TB.

Massey's original complaint claims that Byrne induced him to move with him, agreed to share the couple's funds and resources equally, and that the condo was intended to be jointly shared, although it was bought in Byrne's name solely for tax reasons. According to Massey, throughout the relationship Byrne asked him to forego benefits and other financial gains so that the couple would fare better in the end with regard to taxes and other financial dealings.

Byrne, on the other hand, characterizes Massey as a "boarder" who "tagged along" to the condo with

contract, was entered into in 1997, it is far too late to bring this cause of action, by Byrne's reckoning. However, the court notes that it has not even been fully established that there was a contract of any kind to begin with, much less when one was breached. If a contract did indeed exist, it could very well have been breached at the end of the relationship in 2007, and an action would therefore be timely. Accordingly, the motion is denied as a question of fact exists as to whether an oral agreement existed and if so, when it was breached.

Byrne also moved for summary judgment on the question of constructive

The case is another reminder that when a relationship gets ugly sometimes the court has to sort it out.

him. According to Byrne, Massey was brought on to Byrne Communications to write articles and proofread, but did not pull his weight and even so was still allowed to live with Byrne rent-free. Massey was such a hanger-on, Byrne posits, that Byrne is counterclaiming for fraud in the inducement, alleging that Massey took the job at Byrne Communications with no intention of actually performing the work he was hired to do, and for unjust enrichment as he lived off Byrne rent free and did not pursue any other sublet opportunities that would clear the space for Byrne to bring in a paying lodger.

On top of his claims, Byrne moved for summary judgment, asserting that Massey's cause of action is time-barred because the statute of limitations for breach of contract is six years. Because the relationship, and the alleged oral

trust, which carries a six-year statute of limitations as well. He points to case law that the statute of limitations for constructive trust begins to run "upon the occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting fraud are discovered." *Knobel v. Shaw*, 90 A.D.3d 493 (1st Dept. 2011). Since Byrne purchased the condominium in 2002 and never hid the fact that the title was in his sole name, he asserts that Massey never had any right or expectation of ownership in the property.

Massey claims that when the condo was purchased the intent was that the asset be shared between the two, and accordingly the cause of action did not accrue when the condo was purchased,

"NY Trial Court" continued on page 83

Lesbian Catholic School Teacher Fired for Pregnancy

A Federal judge in Cincinnati has ruled against the Archdiocese of Cincinnati and granted a lesbian Catholic school teacher the right to a trial after she was fired for being pregnant via donor insemination. *Dias v. Archdiocese of Cincinnati*, 2013 WL 360355 (U.S. Dist. Ct., S.D. Ohio, Jan. 30, 2013).

Christa Dias was fired in 2010, when the Catholic school said the single woman violated Roman Catholic Church doctrine by using artificial insemination (AI). She was fired from her job as a computer technology coordinator for two parochial schools after telling the principal that she needed to go on maternity leave. Once fired, Dias sued claiming discrimination based on pregnancy. The school's position was that Dias was fired for violating a morals clause in her contract. The morals clause prohibits an unmarried woman to be pregnant, due to presumed premarital intercourse. Dias clarified that the conception was a result of AI and not premarital intercourse.

Adding to this, the Archdiocese found out during discovery that Ms. Dias was in a long term same-sex relationship that she had kept a secret. The Archdiocese believes Dias kept this secret because she knew discovery of it would be a violation of the morals clause in her contract. In this case, the court found that Ms. Dias had what they call "unclean hands." "Unclean hands" signifies that Ms. Dias could not breach the contract and then try and enforce it after already having breached the contract. *Midwest Payment Systems, Inc. v. Citibank Federal Savings Bank*, 801 F. Supp. 9 (S.D. Ohio, 1992). Due to this, she cannot bring a breach of contract claim. The Court differentiated between Ms. Dias' contract claim and her discrimination claim under Title VII.

The Archdiocese also tried to argue that the ministerial exception should be

applied to Dias' claim under Title VII of the Civil Rights Act of 1964. The school said that Dias was considered in a role of "minister" and with that title should act consistently with the Catholic Church's philosophy and teachings. Due to this ministerial exception the case should be dismissed. The courts disagreed.

The Supreme Court last year weighed in on the ministerial exception. In its January 11, 2012 decision in *Hosanna-Tabor Evangelic Lutheran Church and School vs. Equal Employment Opportunity Commission*, 132 S. Ct. 694, the U.S. Supreme Court held a religious school can claim a ministerial exception to a discrimination charge under the Americans with Disabilities Act for a teacher who also taught secular subjects. But the ruling did not make clear the extent to which the ministerial exception applies to other religious organization employees, said some observers.

Even with the Supreme Court ruling that churches and other religious groups must be free to choose their leaders without government interference, U.S. District Judge S. Arthur Spiegel held that Dias could proceed with a discrimination suit, even with the ministerial exception to employment discrimination laws. The court found that Dias, unlike the Lutheran schoolteacher at the center of the *Hosanna-Tabor* ruling, should not be considered a minister, and was therefore not barred from bringing her claim. This ruling is one of the first to interpret the ministerial exception under the new Supreme Court decision.

The teacher in *Hosanna-Tabor* had the professional title of "minister," taught religious courses, had significant religious training, and led the students in prayer. Dias, on the other hand, had no religious title or training and was not permitted to teach religious doctrine. Judge Spiegel concluded that the Supreme Court did not articulate a

test for determining who qualifies as a ministerial employee. In comparing the facts the Court used to determine that the teacher in *Hosanna-Tabor* was a minister against the characteristics of Dias' role in the school, Judge Spiegel held that Dias was not a minister within the definition and therefore was not barred by the exception.

Lower courts have recognized a ministerial exception before, but in *Hosanna-Tabor*, the lower courts concluded that it did not apply. Chief Justice Roberts, who authored the Supreme Court opinion overruling the lower court decisions, explained that while the court was not ready to apply a "rigid formula for deciding when an employee qualifies as a minister... [the church] held [the teacher] out as a minister... and tasked her with performing that office 'according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures.'"

In this case, filed before the Supreme Court's ruling, the Archdiocese moved to dismiss the suit, which was postponed until the decision in *Hosanna-Tabor* was announced. After the Supreme Court ruled that there was a ministerial exception to employment discrimination laws, the Archdiocese argued that Dias' case fit within the ministerial exception because of the schools' designation of their teachers as Catholic role models, which fits within the meaning of the exception. Judge Spiegel disagreed and Dias' employment discrimination case goes to trial.

The question remains as to whether the Supreme Court will find it necessary to create a rigid formula for the ministerial exception in the future in response to the varying applications at the lower court level. Dias wants compensation for medical bills and other expenses in a case that could set a national precedent.

This is a controversial Pregnancy Discrimination Act. An Archdiocese spokesman maintains that parents who pay to send their children to Catholic school expect them to be taught in an environment reflecting Catholic moral teaching and that employee contracts specify they will abide by church teachings. That's why their standard school contract specifies that employees will abide by the teachings of the Catholic Church. That's the contract that Ms. Dias signed and she violated the contract. The Archdiocese stands by its position.

Another interesting point to note, in an already interesting case, is the inequitable application of the "morals clause" as it relates to gender in the Archdiocese. In discovery, Ms. Dias demonstrated that only female employees were subjected to termination due to this clause. Male teachers would not signal their pre-marital sexual relationships through pregnancy like a woman might and thus would not trigger the "morals clause." If the policy is only enforced against women, then it is discriminatory based on sex. The clause, by virtue of its limited scope, limits its enforcement to only a few areas and presumes that pregnancy is the only indication of pre-marital sexual relationships and thus all sexual relationships are limited to heterosexual intercourse. The school took issue with Dias's utilization of AI, something that they would not have realized if she were in a married heterosexual union. It would be interesting to learn how much Dias's same-sex relationship played a role in the decision to terminate her. Was the school aware of her relationship prior to discovery? If they were, were they unwilling or uninterested in taking action to terminate her? This write would speculate that the school did not wish to take a termination action until there was a financial stake for the school. It will be fascinating to see if this information comes out during the jury trial. — *Tara Scavo*

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

The Italian Supreme Court Rules on Gay Parenting

On January 11, 2013, the Italian Supreme Court of Cassation has rendered a paramount decision on gay parenting in *S.E.T. v. I.B.*, No. 631/2013). The case concerned the custody right of a woman, who gave birth to a child from a relationship with a man and then established a relationship with a woman. The father, a Muslim alien who on one occasion committed aggression against the woman's partner, claimed exclusive custody of the child, arguing that the woman's lesbian relationship represented a harm for the child, that the mother's condition was contrary to the norms of the Constitution that protect family and marriage, and that the child must be educated according to the parent's — in this case the father's — religious views.

On first and second instances, the local courts denied the man's claims and ruled that the mother's homosexuality was an element not to be taken into consideration for determining custody and visitation. The justifications advanced by the man for seeking the denial of the mother's custody of the child were — both courts said — simply irrelevant, as they were exploited by the man to conceal his prejudice and violence against the woman's partner.

What is new in the Supreme Court decision is that, while all previous decisions limited their analysis on the parent and never qualified his/her

same-sex relationship as a "family" in a legal sense, in its reasoning the Court expressly mentioned a "family centered on a homosexual couple," and examined whether such a context was harmful for the child from an educational standpoint. In this respect, the Court established that the man's claims "are not based on science or experience, but on the mere prejudice that living in a family centered on a homosexual couple is harmful for the child's development. This view ignores what instead is to be demonstrated, i.e., that such a family context would harm the child." The ruling represents another small step toward the recognition of the rights of gay and lesbian families in Italy. The country today is an exception compared to Europe, where almost all nations have legislated on same-sex couples and families. Nevertheless, as a reaction to a Parliament which does not seem to take this task seriously, Italy is moving toward a court-created regime, articulated in general principles according to a case-by-case approach. The fact that same-sex families are not harmful for children seems now, after the above mentioned ruling, a well-founded principle. — *Matteo M. Winkler.*

Matteo M. Winkler is a Contract Professor of International Law at Bocconi University, Milan.



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CIVIL LITIGATION

SUPREME COURT – Solicitor General Donald Verrilli, Jr., filed a motion in *United States v. Windsor*, No. 12-307, on behalf of all parties asking the Supreme Court to increase the amount of time allotted for oral argument on March 27 from 60 minutes to 125 minutes. The rationale is twofold. First, the Court added two questions to be briefed and argued by the parties pertaining to the Court’s jurisdiction when it granted certiorari on December 7; and, second, the Court appointed amicus curiae, Harvard Prof. Vicki Jackson, to brief and argue the jurisdictional questions in opposition to jurisdiction. S.G. Verrilli suggests that the additional questions and additional party justify more time. He also suggested that the argument be bifurcated, the first 65 minutes devoted to jurisdiction, the remaining time devoted to the merits. He suggests that on jurisdiction Prof. Jackson get the first 25 minutes, with the U.S. and BLAG each allotted 15 minutes and Windsor allotted 10 minutes. (Windsor’s jurisdictional brief focuses on the Court’s jurisdiction to rule on the government’s petition, suggesting that the standing of BLAG, a non-party, isn’t particularly relevant. BLAG, on the other hand, argues that the only basis for the Court’s jurisdiction is BLAG’s appeal of the 2nd Circuit’s ruling. See above.) As to the merits, Verrilli suggested that BLAG be given the first half hour, with the remaining half hour evenly divided between the government and Windsor. Thus, Verrilli’s suggestion to the Court is that out of 125 minutes for oral argument, Windsor, the plaintiff in the case, should receive on 30 minutes. However, inasmuch as the government and Windsor will be asserting much the same arguments, the total time devoted to seeking affirmance of the 2nd Circuit’s decision would be 60 minutes out of 125.

U.S. COURT OF APPEALS – 2ND CIRCUIT – The 2nd Circuit revived a

same-sex harassment case, *Barrows v. Seneca Foods Corporation*, 2013 WL 656742 (Feb. 25, 2013) (not selected for publication in F.3d), finding that Jeffrey Barrows’ allegations that a male supervisor had engaged in verbal and sexually-oriented physical harassment of male (but not female) employees had met the pleading standard under Title VII of raising issues of material fact concerning a discriminatory hostile work environment. The district court erred in a too-narrow application of the Supreme Court’s precedent in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), paying insufficient attention to Barrows’ allegation that the supervisor’s conduct was directed not just at him but also at other male employees but not at any female employees, thus showing a potential claim of discrimination based on sex. The court also found that Barrows’ allegations were sufficient to reject any ruling as a matter of law that the employer was not liable for the supervisor’s actions, inasmuch as Barrows alleged that he had complained about the supervisor’s conduct to other supervisors.

U.S. COURT OF APPEALS – 8TH CIRCUIT – Affirming a ruling by U.S. District Judge Greg Kays, of the Western District of Missouri, a panel of the 8th Circuit found that American Family Mutual Insurance Company was not required to defend its insured, Brent Lambi, against a claim by Brian Potter that Lambda had infected Potter with HIV while they were having sex. *Lambi v. American Family Mutual Insurance Co.*, 2013 WL 490778 (Feb. 11, 2013) (not published in F.3d). When American Family refused to defend Lambi, claiming that their policy did not cover this alleged injury to Potter, Lambi sued in federal court to enforce the policy. Generally, insurance companies have an obligation to defend their insureds against claims the claims are even just arguably covered by the

policy, even if the claim turns out to be non-meritorious, but the defense obligation does not apply if the policy clearly excludes coverage. In this case, the policy insures Lambi against claims that his negligence has caused bodily injury to another, but the policy states that “bodily injury” does not include “a. any of the following which are communicable: disease, bacteria, parasite, virus or other organism with are transmitted by any insured to any other person.” The policy also has an “abuse” exclusion which would, said the court, apply to a bodily injury “arising out of or resulting from any actual or alleged sexual molestation or contact,” and the court said the policy also specifically excludes bodily injury “arising out of the actual or alleged transmission of a communicable disease.” It sounds like American Family’s lawyers drafted the insurance contract with the specific intention to avoid providing coverage for any sexually transmitted disease or condition. On the other hand, Lambi argued, the definition of bodily injury in the policy includes “sickness,” rendering it ambiguous, which might be sufficient to trigger the defense obligation. The court wasn’t buying this, because of the clear applicability of the policy’s express exclusions from coverage. “The policy excluded bodily injury arising out of the actual or alleged transmission of a communicable disease,” concluded the court, “and infecting another with the HIV virus clearly falls within the plain and ordinary meaning of the transmission of a communicable disease.”

CALIFORNIA – Ruling from the bench, U.S. District Judge Consuelo Marshall denied a motion by the government to dismiss Tracey Cooper-Harris’s lawsuit challenging Section 3 of the Defense of Marriage Act and two other statutes governing benefits for spouses of military veterans. Cooper-Harris,

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who suffers from multiple sclerosis, married her wife in California in 2008, and seeks to establish eligibility for her wife to share in disability payments and survivor's benefits. The Justice Department's motion to dismiss argued that Cooper-Harris' claims may only be heard within the Board of Veterans' Appeals, an administrative tribunal. Judge Consuelo indicated that she would issue a written opinion explaining her denial of the motion at a later date. The likely reasoning, we expect, is that an administrative tribunal would not have authority to entertain a constitutional claim, and an application for the benefits through the administrative process would be futile so long as DOMA and the benefits statutes remain in effect. - *Washington Post*, Feb. 25.

CALIFORNIA – Orange County Superior Court Judge Geoffrey T. Glass refused to issue an injunction to require the Vietnamese Federation of Southern California to allow a contingent of members from the Partnership of Viet Lesbian, Gay, Bisexual and Transgender Organizations to march in the annual Little Saigon Tet Parade. The February 7 ruling was premised on the 1st Amendment rights of parade organizers to determine the expressive content of their activity. - *Orange County Register*, Feb. 7.

FLORIDA – Miami-Dade Circuit Judge Antonio Marin has approved a plan for a gay man (sperm donor) and both members of a lesbian couple to be named on the birth certificate of their daughter. Maria Italiano and Cher Filippazzo, who were married in Connecticut, are longtime partners who sought to have a child with the assistance of professional fertility clinics, but without success. They then approached their acquaintance, Massimiliano Gerina, and asked him to

be their sperm donor. They did not make a formal agreement concerning legal rights, the plan being for Italiano to bear the child and Filippazzo to adopt. But Gerina sought to play a parental role and filed a paternity lawsuit after the child, Emma, was born on March 10, 2011. The case dragged on for two years, but a week before trial was set to begin, the parties settled. According to the Miami Herald (February 7), the parties negotiated an agreement approved by Judge Marin under which the birth mother, Italiano, has "sole parental responsibility," Filippazzo legally adopted Emma, and the state recognized Gerina as Emma's father and granted him a visitation schedule that will accelerate as the child grows older. "The mothers are in charge," said Gerina. "I'm just going to spend time with her. They are the parents." But all three will be named as parents on the official birth certificate. They also all agreed that it would be wiser for them to work out these arrangements with the assistance of counsel prior to the donor insemination.

ILLINOIS – The Thomas More Society, intervenors in lawsuits brought by Lambda Legal and the ACLU in Illinois state courts seeking marriage equality, moved to delay the cases pending U.S. Supreme Court rulings in *U.S. v. Windsor* and *Hollingsworth v. Perry*, but the Cook County Circuit Court rejected the motion on February 13, responding to plaintiffs' arguments that their cases were based on the state constitution, raising different claims from those being addressed in the Supreme Court cases premised on the 5th and 14th Amendments of the federal constitution. The Illinois Attorney General's Office responded to the filing of the lawsuits by agreeing that the existing ban on same-sex marriage is unconstitutional under the state's constitution, so the ban is being defended in court by some county

clerks and other intervenors. - *Lambda Legal News Release*, Feb. 13.

IOWA – After the Iowa Department of Public Health decided not to appeal the trial court's ruling in *Buntemeyer v. Iowa Department of Public Health*, Case No. CV 9041 (Dist. Court Polk County, Iowa, December 12, 2012), holding that a married same-sex couple whose child was stillborn had a right for both of them to be listed as parents on the child's death certificate, the Department issued an accurate certificate to the parents in February. Lambda Legal successfully represented the parents, arguing that the Department's action violated the Iowa Supreme Court's same-sex marriage decision, *Varnum v. Brien*, by failing to treat married same-sex couples the same as different-sex couples.

KANSAS – Responding to the Kansas Supreme Court's ruling on lesbian co-parent rights (see above), Angela Bauer sought to intervene in the state's lawsuit against William Marotta, the sperm donor who is the biological father of the daughter born to Bauer's former partner, Jennifer Schreiner. The state is suing Marotta for child support after Schreiner sought public assistance. Now Bauer is seeking to be declared a parent of the child and to intervene in the case, opposing the state's argument that Marotta is the child's legal parent. Bauer will seek to establish that she is the child's second legal parent, rendering Marotta a non-parent. Marotta had agreed to donate sperm in response to a Craigslist advertisement, and had signed an agreement with the women that he would not assert parental rights. Marotta's attorney has also filed a motion to have Bauer added as a "necessary party" in the case, which is captioned *Kansas Department of Children and Families v. Marotta* - *Topeka Capital Journal*, Feb. 28.

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MASSACHUSETTS – Bernard Baran was convicted in 1985, when he was 19 years old, of molesting five children at the Early Childhood Development Center in Pittsfield, Massachusetts, where he was employed. Baran, who has always maintained his innocence, served 21 years in prison (where he suffered assaults from other inmates), and was subsequently granted the right to a new trial when a court set aside his earlier conviction based on evidence that the prosecution had failed to reveal at the time, showing that videotapes introduced in his trial of children being interviewed by prosecutors were selectively edited to omit exculpatory evidence showing that the children had been led suggestively to make statements against Baran. Baran, who is openly gay, was apparently the victim of a vendetta by some parents who objected to a gay man being employed working with their children, and his case became caught up with a nationwide “sex panic” about daycare workers, some of whom are still serving prison terms as a result of questionable convictions. There is a strong suggestion of prosecutorial misconduct in connection with Baran’s case. After an appeals court affirmed Superior Court Judge Francis Fecteau’s decision to vacate the conviction, the Berkshire County District Attorney decided not to retry Mr. Baran, who subsequently negotiated a \$400,000 settlement with the state in exchange for his agreement not to sue for damages for wrongful prosecution and detention. (The case is particular sensitive because the county prosecutor later became a state judge.) Now Baran is suing to have the record of his conviction expunged, but the state is opposing this on the ground that he was never proven to be innocent. (We thought under American law that the burden was on the state to prove that somebody is guilty, and that once a court vacates a conviction, that person should be presumed

innocent as if he was not convicted... but maybe we were misinformed.) The *Berkshire Eagle*, the local newspaper that cheered on the prosecutors back in 1985, reported on the court hearing held on February 26 on Baran’s motion to expunge his conviction, and then editorialized on February 28 in favor of expunging the record. “The rulings by Judge Fecteau and the Appeals Court, coupled with the settlement, are all arguments in Mr. Baran’s favor,” wrote the newspaper, “and it is small-minded of the attorney general’s office to grasp at technicalities to deny a reasonable request that his name be cleared. The court should, like its predecessors, support Mr. Baran.”

MASSACHUSETTS – The *Boston Globe* (Feb. 5) reported that the City of Boston has agreed to pay \$20,000 to Brenda Wernikoff, a transgender woman, in exchange for her agreement to drop her lawsuit against police officers who arrested her on a disorderly conduct charge at a homeless shelter, and the officers are being investigated by the Police Department’s internal affairs division for their conduct in subjecting Wernikoff to humiliating treatment on account of her gender identity. Also, the Boston Public Health Commission, which runs the shelter, agreed to pay her an additional \$10,000 to drop her claim that shelter employees had improperly called the police. Wernikoff’s lawyer, Howard Friedman, told the *Globe* that the problem was deficient training of the police on how to deal with transgender people, particularly on how to conduct body searches.

NEW JERSEY – In *L.W. v. Toms River Regional Schools Board of Education*, 189 N.J. 381 (2007), the New Jersey Supreme Court upheld a right of action by a public school student who claimed to have suffered severe harassment

because of his perceived sexual orientation throughout his attendance in the Toms River Regional Schools. The case was remanded for consistent proceedings, which seem to have stretched out over an unconscionably long period of time, but on February 28, 2013, the New Jersey Attorney General’s Office announced that the school district should pay L.W. \$68,000 in compensatory damages for pain and suffering, plus interest. Although the School did take some steps in response to complaints by L.W. and his parents, the Division of Civil Rights concluded that the school district did not take “reasonable measures” in light of the problem. The school district’s attorney, Thomas Monahan, stated that the district might challenge the damages order in court. The longer they draw this out, the more interest will be awarded. - *Philadelphia Inquirer*, March 1.

PUERTO RICO – The Supreme Court of Puerto Rico ruled on February 20 against an application for second-parent adoption by a lesbian co-parent who sought to adopt the child conceived through donor insemination of her partner. The vote was 5-4, a majority of the court concluding that the commonwealth’s constitution does not prohibit discrimination due to sexual orientation, accepting the government’s argument that the “traditional family... best protected the well-being of minors.” The President of the court dissented, arguing that the constitution did not prohibit adoptions by same-sex couples and that the state should recognize second-parent adoptions. *Advocate.com*, Feb. 21. 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.

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UNITING AMERICAN FAMILIES

ACT – Rep. Jerrold Nadler (D-NY) as lead sponsor reintroduced the Uniting American Families Act in the new session of the House of Representatives (*Advocate.com*, Feb. 5), with the expectation that a Senate counterpart bill would also be introduced. If passed, the bill would extend recognition of family status for immigration purposes to various kinds of non-traditional families, including same-sex partners. Meanwhile, Sen. Patrick Leahy (D-NH), chair of the Senate Judiciary Committee, which will be considering comprehensive immigration reform proposals, indicated that he wants to include protection for binational same-sex partners as part of such a measure, even though some Republican Senators -- most prominently John McCain (R-AZ) – have indicated that inclusion of protection for same-sex partners might be a deal-killer. The White House proposal released in January, speaking in generalities, did not mention the same-sex couple issue, although the Obama Administration has signified support for the Uniting American Families Act. Although attempts at comprehensive immigration reform have not gotten off the ground in either house despite several prior introductions going back to the second term of George W. Bush, there was renewed optimism that the election results would convince Republican legislators that immigration reform would help them to win greater support in the Hispanics communities, which provided an important margin of victory for President Obama in November, who called for passage of comprehensive immigration reform during his State of the Union Address.

CHARLIE MORGAN MILITARY SPOUSES EQUAL TREATMENT

ACT – Rep. Adam Smith (D-Wash.) and Senators Jeanne Shaheen (D-NH) and Kirsten Gillibrand (D-NY) have introduced this measure in both houses,

seeking to provide full benefits for same-sex military families. The bill would change the definition of “spouse” in sections of the United States Code that involve recognition, support and benefits for married service members and veterans. The bill is named for New Hampshire National Guard Chief Warrant Officer Charlie Morgan, who died of breast cancer on February 10, and whose surviving spouse and family members are being deprived of benefits they would have received had the federal government recognized their marriage. Even if the Supreme Court affirms in *U.S. v. Windsor* (see above), this bill would be necessary because of specific definitions of spouses in relevant statutes governing military benefits. - *Metroweekly*, Feb. 15; *Congressional Documents*, Feb. 15, 2013 WLNR 3863188.

VIOLENCE AGAINST WOMEN ACT

– On February 12 the Senate voted 78-22 to re-enact and expand the Violence against Women Act (VAWA). One of the new features would explicitly extend victim rights and prosecution programs on domestic violence to include same-sex couples. A version of the measure proposed by House Republicans did not include this feature, and since the Republicans control the House, it was at first uncertain that a measure could be enacted that would include the protection for same-sex families. However, on February 28 the House voted 257-166 to reject the bill proposed by House Republicans, and then voted 286-138 to approve the version that had been passed by the Senate, which President Obama was expected to sign into law promptly. In the final House vote, all 199 Democrats present voted for the measure, joined by 87 Republicans to provide the majority to pass the bill. - *CNN.com*, Feb. 28.

ARIZONA – The Phoenix City Council voted 5-3 on February 26 to amend

the city’s anti-discrimination law to add sexual orientation, gender identity and disability to the list of prohibited grounds for discrimination in city contracts, housing, employment and public accommodations. Phoenix is the nation’s sixth largest city by population, and was one of the largest that did not previously ban discrimination on these grounds. - *www.kpho.com*, Feb. 26.

DISTRICT OF COLUMBIA

– The city council is considering a bill introduced by openly-gay member David A. Catania that would allow residents born in the District to change the sex designation on their birth certificates based on a signed affidavit from a doctor affirming the individual’s gender identity, thus dispensing with any requirement that surgical procedures be undertaken as a prerequisite. In addition, the measure specifies that a new certificate be issued showing the proper gender, ending the current process of marking the old certificate as “amended” to make the change. Catania stated that the new procedure recognizes that transgender individuals can change their sex with surgery, and that marking old certificates as “amended” rather than issuing new ones with the corrected gender was stigmatizing. - *Washington Post*, Feb. 19.

COLORADO

– The House Judiciary Committee voted 8-3 on February 28 to approve a civil union bill that is expected to pass the full House and be signed into law later this year by Governor John Hickenlooper. - *www.9news.com*, Feb. 28.

FLORIDA – On Feb. 8 the city council in Tavares (Lake County) voted to establish a Domestic Partnership Registry that provides visitation rights at medical facilities, emergency notification rights, and medical

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decision-making rights for registered partners. Reporting on this measure, the *Daily Commercial* (Leesburg, FL)(Feb. 8) noted that there is no residency requirement, and that the local Waterman Hospital was used by many people living beyond city limits, so the registry was potentially useful to same-sex partners living elsewhere in the county who might use the hospital facilities. * * * However, on February 21 the Hillsborough County Commission rejected a proposed domestic partnership registry, voting 4-3. The proposal was allow registered partnership for couples regardless of sex, and ran counter not only to the recent Tavares vote but also measures adopted in Tampa, Gulfport, Clearwater, St. Petersburg, and Pinellas County.

HAWAII – The House Judiciary Committee’s decision on February 11 not to schedule a hearing on a marriage equality bill means that the measure will not be considered during the current session of the legislature. *StarAdvertiser*, Feb. 11. The state, which provides Civil Unions for same-sex partners, is defending a lawsuit seeking marriage equality through a constitutional ruling, but the trial court granted judgment to the state.

IDAHO – Two Democratic legislators from Boise, Senator Cherie Buckner-Webb and Rep. Grant Burgoyne, announced that they would make another attempt to persuade the legislature to add “sexual orientation” and “gender identity” to the state’s Human Rights Act during the current session. The legislature has rejected similar proposals during the past six sessions, but several Idaho municipalities have embraced the issue, leading to enactment in Sandpoint, Boise and Ketchum, and pending measures in several more places. The

passage of local ordinances has given hope to proponents that attitudes in the state are changing, encouraging persistence in seeking to pass the bill. - *The Spokesman-Review* (Spokane, WA), Feb. 4.

ILLINOIS – The State Senate voted 34-21 on February 14 to approve a marriage equality bill, sending it on to the House. The House Executive Committee voted 6-5 on February 26 to advance the measure to the floor. Governor Pat Quinn, who supports the bill, pledged to do personal lobbying of House members to secure the necessary 60 votes, and it appeared possible that Illinois may become the tenth state to make civil marriage available to same-sex couples. However, a canvas of House members by *Chicago Magazine*, published on-line on March 1, suggested that the vote may be a real cliff-hanger, and groups on both sides of the issue were ramping up lobbying efforts in response to word that a full House vote might come during the first week of March. Even though Democrats have a majority in the House, some Democratic members have stated religiously-based objections, and there is scant support among Republican representatives.

INDIANA – Republican legislators who were considering proposing a bill to place an anti-marriage equality amendment on the ballot decided to wait until after the Supreme Court rules on the pending marriage cases. “Prudence dictates that we wait,” said House Speaker Brian Bosma (R-Indianapolis), pointing out that if the measure was approved for the ballot, “we could find ourselves in the very inadvisable situation of having a matter on the ballot in 2014 that has been ruled unconstitutional, and there is no means of removing it from the ballot” once it has been authorized by the legislature. - *Indianapolis Star*, Feb. 8.

MINNESOTA – In his state-of-the-state address on February 6, Governor Mark Dayton called on the legislature to enact marriage equality. A proposed constitutional amendment that would have defined marriages in Minnesota as solely between one man and one woman was defeated at the polls in November, fueling talk by activists about getting the legislature to enact a marriage equality bill. Now the governor has signified that he would sign such a bill. Said Governor Dayton, a Democrat, “I want Minnesota to be a state which affirms that freedom for one means freedom for everyone, and where no one is told that it is illegal to marry the person you love.” Republican leaders responded that the state’s budget issues and job creation should take priority, and that now was not the time to divert legislative energy into debating about same-sex marriages. *Duluth News Tribune*, Feb. 6. On February 27, Sen. Scott Dibble (DFL-Minneapolis), announced the introduction of a marriage equality bill intended the repeal the state’s 1997 mini-DOMA statute. The bill would exempt religious organizations from any obligation to perform ceremonies or provide facilities for marriage-related events. The bill’s chief House sponsor is Rep. Karen Clark (DFL-Minneapolis). Only one Republican legislator had announced support for the bill as of its introduction: Sen. Branden Petersen (R-Andover), who agreed to be a co-sponsor. - *Duluth News-Tribune*, Feb. 28.

NEW JERSEY – Assemblymember Reed Gusciora, an openly-gay member who is a sponsor of the marriage equality bill that was approved by the legislature but vetoed by Governor Christie, announced that he had a commitment from Senate President Steve Sweeney and Assembly Majority Leader Lou Greenwald to schedule an override vote. Since the bill’s majority in neither house was large enough for an override, marriage equality proponents

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are at work trying to persuade additional legislatures (3 in the Senate, 12 in the Assembly) to vote for the bill on the next go-around. Gusciora has advocated putting a Maine-style affirmative initiative on the ballot for marriage, but the legislative leaders have stated opposition to putting civil rights up to a general vote. - *PolitickerNJ.com*, Feb. 21.

NEW MEXICO – The Voters and Elections Committee of the House tabled a proposed amendment to change the state constitution to allow same-sex marriage by a vote of 7-4. Rep. Brian Egolf (D-Santa Fe), a marriage equality proponent, said that this effectively killed the issue for the current session. House Joint Resolution 3 was reportedly the first pro-marriage constitutional amendment to be brought before the New Mexico legislature, although there had been previous proposals for a marriage equality statute. The Resolution would have amended the Constitution to provide that a marriage license could not be denied on the basis that applicants were of the same sex, and that no church or religious institution would be required to perform or recognize a same-sex marriage. - *Albuquerque Journal*, Feb. 22.

NORTH DAKOTA – Senate Bill 2252, which would have added “sexual orientation” to the state’s Human Rights Act as a prohibited ground of discrimination, was defeated by a vote of 21-26. This was a backwards move, since a similar bill had been approved by the Senate in 2009, although it failed of passage in the House. Ah, bicameralism! - *InForum: The Forum of Fargo-Moorhead*, Feb. 14.

OREGON – Basic Rights Oregon, the state’s leading LGBT rights group, announced that it will launch a petition

drive to put a measure on the state ballot that would allow for same-sex marriages in the state. Buoyed by the success of the Maine ballot initiative last year, the group hopes to collect sufficient signatures to place a measure on the ballot in November 2014. A recent survey of Oregon voters showed that 54% support marriage equality, with 40% opposed and 6% undecided. Oregon voted in 2004 for an anti-gay marriage amendment, after the Multnomah County Clerk’s office briefly issued marriage licenses to same-sex couples as part of a nationwide surge of interest following on the Massachusetts Supreme Judicial Court’s *Goodridge* decision in 2003. If an Oregon initiative passes, it might be the first to repeal an anti-gay marriage amendment and substitute a constitutional authorization for marriage equality. - *OregonLive.com*, Feb. 11.

TEXAS – State Representative Garnet Coleman (D-Houston) introduced a resolution intended to repeal the state’s anti-marriage constitutional amendment, which was enacted in 2005. State Representative Lon Burnam (D-Ft. Worth) has introduced legislation that would remove statutory restrictions on same-sex marriage if the constitutional repealer were to be enacted. *Austin American-Statesman*, Feb. 18. * * * The El Paso City Council put a measure on the local election ballot for May 11 that would amend the City Charter’s anti-discrimination provisions to include gender identity, sexual orientation and marital status as prohibited grounds for discrimination. *El Paso Times*, Feb. 15. * * * In 2003, the Supreme Court ruled that Texas Penal Code Section 21.06, the “Homosexual Conduct” law, violated the Due Process Clause of the 14th Amendment. But Texas legislators dug in their heels and have refused to repeal the provision, or to amend it to avoid unconstitutional applications. (Technically, the Supreme

Court’s ruling was that the law could not be enforced in cases involving private conduct by consenting adults.) With the tenth anniversary of the Supreme Court’s decision looming, Texas Rep. Jessica Farrar (D-Houston) introduced H.B. 1701 to remove the unconstitutional language from the penal code. Endorsing the effort, Chuck Smith, Executive Director of Equality Texas, the state’s gay rights political group, pointed out that there have been recent cases where police officers have made arrests under this statute. A companion bill has also been introduced in the state Senate. - *www.myfoxaustin.com*, March 1.

UTAH – New support for passage of an amendment to add sexual orientation to the state’s human rights law is coming from a new source: the Mormon Church. According to a February 9 report in the *Idaho Press-Tribune*, relaying reporting by the *Salt Lake Tribune*, “attorneys for The Church of Jesus Christ of Latter-Day Saints are in quiet discussions with leaders of Utah’s gay and lesbian community, trying to hammer out language for a statewide ban on housing and employment discrimination that the church could support.” The Idaho newspaper was interested because of the large Mormon population in Idaho, with the hope that church approval (or at least non-opposition) would make enactment more likely both in Utah and Idaho.

VIRGINIA – The legislature has approved a bill that would allow student clubs at public universities to restrict their membership to those who share the club’s political or religious mission. Proponents of the bill argued that it was necessary to protect the freedom of association of student club members, while opponents said that it was intended to allow groups to exclude gay people from membership. The measure narrowly passed the Senate,

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21-18, on a heavily but not strictly party-line vote. Passage in the House was broadly bipartisan and overwhelming, 80-19. Governor Bob McDonnell took no public position on the bill while it was pending in the legislature. At press time, he had not yet taken action on it. *Washington Post*, Feb. 12. * * * State Delegate C. Todd Gilbert (R), arguing that no evidence had been presented that sexual orientation discrimination by government employers takes place in Virginia, successfully moved to block a bipartisan proposal that had passed the Senate, 24-16, to ban sexual orientation discrimination in employment by the state government. The vote in the General Laws Committee's subcommittee on Professions/Occupations and Administrative Process effectively tabled the bill for one year. - *thinkprogress.com*, Feb. 15.

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EXECUTIVE ORDER ON FEDERAL CONTRACTORS? – On the list of unfinished business from President Obama's first term is a proposed Executive Order requiring federal contractors to have non-discrimination policies that include sexual orientation and gender identity. Approximately sixteen million employees of federal contractors in the United States would be affected. Issuing such an executive order was part of Barack Obama's campaign agenda in 2008, but when queried about this during the first term, his spokespersons always stated that the president thought it would be better to cover this through enactment of the Employment Non-Discrimination Act (ENDA), a statute that would require all employers subject to federal employment discrimination statutes to refrain from discrimination based on these grounds. However, other legislation was higher on the administration's agenda, and the practical ability to pass ENDA evaporated

when the Republican Party won control of the House of Representatives in the 2010 midterm election. That generated renewed pressure on the White House to issue the order, but the White House resisted. When Democrats failed to take back the House in the 2012 general election, the pressure escalated, in light of the impossibility of enacting ENDA during the current session of Congress unless the majority of House Republicans suddenly have a mass conversion in favor of LGBT rights. Ratcheting up the pressure another step, thirty-seven Senators signed a letter to the President sent on February 14, calling for him to issue such an executive order. The administration has reportedly been reluctant to do this for fear of provoking a backlash in Congress that would make passage of ENDA more difficult, and also due to the possibility that resistant employers would mount a court challenge and win a ruling that such an order exceeds the president's administrative authority. This actually happened in New York State, when the state's highest court ruled in the 1980s that New York City Mayor Ed Koch's executive order requiring city contractors to have a policy against sexual orientation discrimination violated separation of powers by adopting a policy not supported by any city or state legislation. Subsequently the city enacted a gay rights ordinance, and the mayor was able to adopt a new order on contractors as a mode of enforcing the ordinance. However, similar executive orders have been issued in some other jurisdictions without serious incident. In their letter to the President, the Senators pointed out that the five largest federal contractors (all defense contractors) already have such a non-discrimination policy, and a majority of the top 25 contractors also have such a policy. Other lobbying efforts in support of such an Executive Order included a joint letter from 50 civil rights and related organizations submitted to the White House on February 20, according to a *Daily Labor*

Report article on the issue (35 DLR A-7 (2/21/2013)). The DLR article also quoted a spokesperson for the Professional Services council, which represents government contractors, expressing general support for anti-discrimination measures such as the pending ENDA bill, but objecting to a policy that would "single out" government contractors for special treatment not binding generally on private sector employers.

FINAL RULES ON EMPLOYEE HEALTH BENEFITS INCLUDE DISCRIMINATION BAN

– The Department of Health and Human Services released a "final rule" for publication in the Federal Register on February 25 describing benefits that must be covered beginning in 2014 by plans providing health insurance to comply with the requirements of the Affordable Care Act. The document includes a summary of comments submitted when the rule was proposed for public comments, noting that many commentators sought assurances of non-discrimination. The response from the agency stated: "The regulation as written prohibits benefit discrimination on the grounds articulated by Congress in section 1302(b)(4) of the Affordable Care Act, as well as those in 45 CFR 156.200(e), which include race, color, national origin, disability, age, sex, gender identity and sexual orientation." However, it was unclear from the materials issued by HHS whether plans will have to provide treatment for gender dysphoria, including hormone therapy and sex reassignment procedures. Recent case law suggests that courts and administrative agencies have come to understand that such treatments may be medically necessary for particular individuals.

BOY SCOUTS OF AMERICA – It was widely reported at the end of January that the executive board of the Boy Scouts

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of America was considering changing the organization's policy concerning participation by gay men and boys in scouting activities. According to news reports, the proposal to the board was to end the existing national policy against such participation, and to leave it up to the regional councils and local troops to decide whether they would allow openly gay people to participate as members or adult leaders. The news about a possible policy change provoked significant public comment, petitions, and dire warnings from some religious leaders about the imminent collapse of the organization if gay people were allowed to participate. (Lots of "viewing with alarm.") President Obama, responding to a television interviewer, said that he thought gay people should be entitled to participate in Scouting, which might be thought to carry some weight as the President of the United States is also the Honorary President of the BAS. As the executive board was meeting during the first week of February, more than a million petitions were delivered asking them to end the ban, and the dedicated phone line they had set up to receive comments was flooded with calls to the extent that it stopped taking voicemail messages. But instead of a policy change, the executive board released a statement on February 6 that "due to the complexity of this issue, the organization needs time for a more deliberate review of its membership policy." The board stated that it was directing its committees "to further engage representatives of Scouting's membership and listen to their perspectives and concerns." The officers will work on a resolution to present to "the approximately 1,400 voting members of the national council" which meets in May. Throughout February there were news reports about discussions of the issue being held by particular regional councils and advisory boards. The *New York Jewish Week* reported that a council of Jewish organizations that sponsor Scout troops

with about 40,000 participants had voted overwhelmingly to support ending the ban. One of the largest sponsors of Scout troops is the Mormon Church, which had not taken a formal position on the issue by the end of February.

ASSOCIATED PRESS – The Associated Press caused some consternation when an internal guidelines memo stated that same-sex spouses should be referred to as "couples" or "partners" rather than "husbands" or "wives" unless the words appeared in a quotation or the legally-married individuals involved had affirmatively stated that they referred to themselves using those words. A flood of adverse comment led the AP to amend its official Stylebook to include, for the first time, definitions of "husband" and "wife" as follows: "Regardless of sexual orientation, husband or wife is acceptable in all references to individuals in any legally recognized marriage. Spouse or partner may be used if requested." Case closed? Little battle in the culture wars won?

HEALTH STATUS STUDY – Reuters reported on Feb. 27 that a study published in the *Journal of Health and Social Behavior* found that heterosexual married couples were healthier than co-habiting unmarried same-sex couples. The researchers, Dr. Hui Liu (Michigan State University), Corinne Reczek (University of Cincinnati) and Dustin Brown (University of Texas), speculated that legalizing same-sex marriage could reduce the disparities that they identified. Their results were consistent with prior studies showing that married couples are generally healthier than single, divorced or separated individuals. Controlling for socio-economic status, cohabiting male couples reported poor or fair health 61% more often than men in heterosexual marriages; the comparable figure for cohabiting women and married women

was 46%. The next step, of course, would be to run a study looking at the health of married same-sex couples to see whether legalizing the relationships is associated with lesser disparity. Dr. Liu stated, "If marriage can promote health, it is reasonable for us to expect that if same-sex couples had the advantage of legalized marriage their health may be boosted."

PUBLIC SUPPORT FOR MARRIAGE EQUALITY – How times change! On Election Day in November 2008, 54% of California voters cast their ballots in favor of Proposition 8, placing in their state constitution the declaration that only marriage between one man and one woman would be recognized or valid in California. Now the highly-respected Field Poll reports that today Californian's support same-sex marriage by a margin of 61% to 32%, the remainder undecided. According to a February 28 report on the Field Poll results published in the *%Sacramento Bee%*, "Support has grown significantly in all age groups and regions of the state and among all ethnic groups." Even support among California Republicans has grown, from 26% in 2010 to 39% in 2013.

DOCUMENTATION ON GAY PARENTS – According to a report issued by the Williams Institute of UCLA Law School, approximately six million children and adults in the United States have an LGBT parent. The report, based on analysis of census figures and population surveys, is available on the Institute's website. According to the report's author, Williams Institute Distinguished Scholar Gary Gates, the states with the highest proportions of same-sex couples raising children include Mississippi (26%), Wyoming (25%), Alaska (23%), Idaho (22%), and

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Montana (22%), ironically all among the states that are least likely to provide recognition and support for families headed by same-sex partners.

OHIO MARRIAGE AMENDMENT – Ohio voters amended their constitution in 2004 to ban same-sex marriages in the state. Marriage equality activists now think that public sentiment has shifted sufficiently to justify a repeal effort. FreedomOhio is collecting signatures to put such an amendment on the ballot. They need 385,253 valid signatures by July 3 to qualify for the November 5, 2013, ballot, and they claim that they are on target to surpass that goal. Their proposed amendment would repeal the ban and would include a provision that no religious institution would be required to perform or recognize same-sex marriages and such organizations would enjoy legal immunity from any claims based on their refusals to do so. - *Columbus Dispatch*, Feb. 23.

WISCONSIN – The Milwaukee Police Department’s policies were amended by the Fire and Police Commission on February 7 to add “sexual orientation and gender expression” to the list of characteristics that police officers are not supposed to consider when enforcing the law. The policy commits the Department to “fair and impartial policing.” *Milwaukee Journal Sentinel*, Feb. 8. * * * The University of Wisconsin-Milwaukee has adopted a policy that “provides flexibility to accommodate students who are gender non-conforming, gay or have other aspects of their culture or identity that require certain considerations with room assignments and residence communities,” reported the *Milwaukee Journal Sentinel* on February 15. Incoming students can request an “inclusive housing assignment” under the policy approved by campus administrators and administrative units.

HONORING JEANNE MANFORD – President Obama awarded the 2012 Presidential Citizens Medal posthumously to Jeanne Manford at a White House ceremony on February 15, in recognition for her co-founding Parents, Families and Friends of Lesbians and Gays in 1972 after her son Morty was beaten by police during a gay rights demonstration.

VETERANS BURIAL RIGHTS – The U.S. Department of Veterans Affairs announced that Secretary Eric K. Shinseki had exercised discretionary authority to allow the burial of a veteran’s same-sex partner in a military cemetery. Lt. Col. Linda Campbell (retired) had requested to be able to bury her long-time partner, Nancy Lynchild, at Willamette National Cemetery, where Campbell’s own parents are buried. Lynchild died in December from cancer. According to the Department’s announcement, “this was the first non-Veteran partner of the same gender that [Shinseki] was asked to consider, this is the first he has approved.” Avoiding the problem posed by DOMA, the release indicated that “the Secretary did not base his decision on the individual’s marital status or state recognized relationship status, but rather based it, in part, on evidence of a committed relationship between the individual and the Veteran.” This decision is not precedential, applying just to Campbell and Lynchild. - *CNN.com*, Feb. 15.

MASSACHUSETTS SCHOOLS TRANSGENDER POLICY – The Massachusetts Department of Education has issued directives to public schools in the state concerning the rights of transgender students. The policy provides that transgender students can use restrooms and play on sports teams that correspond to their gender identity. The anti-gay Massachusetts

Family Institute promptly criticized the move, saying that it would create an invasion of privacy for non-transgender students to have to use the facilities with transgender students. Said Andrew Beckwith, general counsel for MFI, “Fundamentally, boys need to be using boys’ rooms and girls need to be using the girls’ rooms, and we base that on their anatomical sex, not some sort of internalized gender identity,” but the Department said that “discomfort is not a reason to deny access to the transgender student.” - *Associated Press*, Feb. 16.

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AUSTRALIA – Federal Court of Australia Justice Jayne Jagot ruled on February 20 that the Australian Human Rights Commission had appropriately dismissed complaints filed by Simon Margan, a gay activist, seeking an order directing the states of New South Wales and Queensland to register same-sex marriages. Jagot rejected Margan’s argument that failure to register marriages because of the genders of the participants was sex discrimination, stating, “There cannot be discrimination by reason of the sex of a person because in all cases the treatment of the person of the opposite sex is the same.” *Margan v. President, Australian Human Rights Commission*, NSD12013/2012 (Fed. Ct. of Australia [Sydney]). *Bloomberg.com*, Feb. 21. * * * The Family Court of Australia approved a mother’s application to begin administering puberty-blocking drugs to her child, who was born male but identifies as female. The approval is for “stage 1” drugs. Further litigation may be necessary to determine how soon the child can receive “stage 2” drugs to initiate gender transition. Justice Christine Dawe wrote that “the evidence is compelling and clearly indicates that the child is likely

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to suffer significant, detrimental, psychological and emotional effects” if stage 1 treatment is not begun. - *Courier Mail*, Feb. 21.

BELARUS – There were press reports in February that an application by a civil rights organization, GayBelarus, to legally register their organization with the government had sparked police reprisals against the gay community in the form of bar raids and disorderly conduct arrests of patrons. Although Belarus decriminalized gay sex with the fall of the Soviet Union and independence in 1991, anti-gay sentiment remains prevalent in the country, according to a February 15 report in the - *Evening Standard* (UK).

CANADA – The Supreme Court of Canada ruled in *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11 (Feb. 27, 2013), that a provision of Saskatchewan’s Human Rights Code prohibiting publications that expose persons to hatred and ridicule on the basis of their sexual orientation is a reasonable restriction on the rights of freedom of speech and expression under the Canadian Charter on Human Rights and Freedoms. In the particular case, an anti-gay extremist, William Whatcott, had produced and distributed anti-gay flyers in Saskatoon, encouraging people to contact the school board to protest the inclusion of gay-related materials in public school libraries and the curriculum, and to protest a conference at Saskatchewan University on gay issues in education. The flyers referred to “Sodomites and lesbians” and accused the schools of teaching students “how wonderful it is for two men to sodomize each other.” “We also believe that for sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them,” he wrote. The flyer about

the conference invokes Sodom and Gomorrah and asserts: “Canada in its quest for freedom from sexual restraint is following the path of ancient Rome. Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children.” Whatcott urges “sodomites” to seek redemption by turning to Jesus Christ. He also circulated copies of pages of personals advertising from a local gay publication, circling certain ads and writing his comments in the margins suggesting that “Saskatchewan’s largest gay magazine allows ads for men seeking boys!” In a helpful summary to its lengthy opinion, the court stated that “the term ‘hate’ contained in a legislative hate speech prohibition should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.” The court found that as to the two original flyers, the Commission’s conclusion that they violate the Code was reasonable, as “The expression portrays the targeted group as a menace that threatens the safety and well-being of others, makes references to respected sources in an effort to lend credibility to the negative generalizations, and uses vilifying and derogatory representations to create a tone of hate.” But as to the flyers consisting of pages of classified ads, the court found that they were merely “offensive,” but no, under an objective test, “likely to expose persons of same-sex orientation to detestation and vilification.” Under American law, it is likely that all of Whatcott’s publications would be held protected under the First Amendment, under the reasoning of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Indeed, Whatcott’s flyers sound mild compared to some of the anti-gay filth that the U.S. Supreme Court has seen fit to protect under the First

Amendment in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

CHINA – The *South China Morning Post* (Feb. 28) reported that the National People’s Congress has received an open letter from more than 100 parents with gay or lesbian children calling for the legalization of same-sex marriage. The letter stated, “We’re appealing to NPC deputies to take notice of calls from 120 million parents of gays and lesbians for a revision of the Marriage Law in order to grant our children equal rights to marriage.” The NPC was to convene for its annual session in Beijing on March 5. Press reports on the open letter related that parents had resorted to this format after individual messages to legislators through email and social media had elicited few responses.

CYPRUS – The Cabinet has approved a draft bill on civil partnership which will be advanced to the Parliament for consideration. The bill will provide a basis for unmarried couples – both same-sex and different-sex – to have a recognized legal status. The main contenders in the upcoming presidential have all stated support for establishing a legal framework for unmarried couples, and one candidate went beyond that to suggest that there should be a national plan to combat LGBT discrimination. - *Cyprus-mail.com*, Feb. 20.

FRANCE AND ENGLAND – Within days of each other, the lower houses of the legislatures in England and France voted by substantial margins to approve marriage equality measures proposed by the governments of those countries. On February 5, the United Kingdom’s House of Commons voted 400-175 in favor of the measure proposed by Prime Minister David Cameron, which would make same-sex civil marriage available but which would leave it up

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to various religious bodies to decide whether they will perform same-sex marriage ceremonies. Although more of Cameron's members from the Conservative Party voted against the bill than in favor of it, the margin among Conservatives was close, and the measure passed with overwhelming support from his Liberal Democrat coalition members and from the Labour Party opposition. The measure now goes through an additional review in committee with the possibility of amendments before a final vote in the Commons, after which it will be taken up in the House of Lords, where there was speculation that it might have a more difficult time, although there are pathways for eventually enacting the measure without the approval of the Lords. Cameron was predicting that same-sex marriage would pass the Lords and would become available in the U.K. by sometime in the summer. In France, the National Assembly voted 329-229 to approve measures proposed by President Francois Hollande and Prime Minister Jean-Marc Ayrault as leaders of the Socialist Party, which also controls the Senate, which will consider the measure in March with a vote expected early in April. The measures approved on February 12 will allow same-sex partners to marry and to adopt children. There was speculation that same-sex marriage would become available in France before it becomes available in England. England and France would be the largest countries (by population) in the European Union to allow same-sex marriages, joining with the Netherlands, Belgium, Norway and Spain. Other countries that authorize same-sex marriages include Canada, Argentina and South Africa. Same-sex marriages performed elsewhere can be registered with the government in Israel. Proposals to allow same-sex marriages are also under active consideration in several other countries. Nine states and the District of Columbia allow same-sex marriage in the United States, with

marriage equality measures pending in several state legislatures. Mexico City allows same-sex marriages, and recent litigation suggests it is only a matter of time before same-sex marriages are available throughout Mexico.

GERMANY – The Constitutional Court, the nation's highest appellate court, ruled on February 19 that a member of a civil partnership – the status available to same-sex couples – should be able to adopt his or her partner's stepchild or adoptive child, thus broadening the right to second-parent adoption. Under existing law, such adoptions could only take place of the biological child of a partner. According to press reports, the court was ruling on a case brought by a woman who was denied permission to adopt her partners adoptive daughter. The court ordered the government to enact new legislation authorizing such adoptions by June 2014. Presiding Judge Ferdinand Kirchhof's opinion stated, "In marriage as in a civil partnership, adoption provides the child in the same way with legal security and material advantages in terms of care, support, and inheritance law," according to a translation from the opinion reported by the *Associated Press* on February 19. In light of the ruling by the European Court of Human Rights in a case from Austria (see this month's lead story), a contrary decision by the German Constitutional Court would surely have been vulnerable to attack under the European Convention on Human Rights. *Boston Globe*, Feb. 20. * * * According to an on-line report, Germany has adopted a law that provides that when babies are born "intersex" – i.e., with genital abnormalities making sex classification unclear – the entry in the birth registry should be left blank. * * * The *New York Times* reported on February 28 that gay rights has become a campaign issue in the parliamentary elections this year, given additional impetus by the Constitutional Court's order to

revise adoption laws on second-parent adoptions. A new public opinion survey shows almost 75% of the electorate supports marriage equality, favoring upgrading the existing civil partnership law, which includes a limited list of rights for registered partners.

MEXICO – The Supreme Court of Mexico issued an opinion explicating its ruling in a case from the state of Oaxaca that three same-sex couples are entitled to get marriage licenses. The ruling had been announced on December 5, and opinion was made public on February 18. The opinion relied heavily on U.S. Supreme Court rulings in *Loving v. Virginia* and *Brown v. Board of Education* to ground its equality principles. In a translation distributed by BuzzFeed.com, the court's opinion by Justice Arturo Zaldivar stated: "The historical disadvantages that homosexuals have suffered have been well recognized and documented: public harassment, verbal abuse, discrimination in their employment and in access to certain services, in addition to their exclusion to some aspects of public life. In this sense when they are denied access to marriage it creates an analogy with the discrimination that interracial couples suffered in another era. In the celebrated case *Loving v. Virginia*, the United States Supreme Court argued that 'restricting marriage rights as belonging to one race or another is incompatible with the equal protection clause' under the U.S. constitution. In connection with this analogy, it can be said that the normative power of marriage is worth little if it does not grant the possibility to marry the person one chooses." The court also invoked the recent decision by the Inter-American Court of Human Rights, *Karen Atala Riffo y Ninon v. Chile*, which found that a denial of custody to a lesbian mother was a violation of human rights. Same-sex couples in Chile have already initiated

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litigation seeking a ruling from the Inter-American Court for marriage equality that could have wide effect in Central and South America. The Supreme Court's ruling is binding for the three couples who brought suit, but under Mexican jurisprudence it will not take on the status of a binding precedent for other cases in Oaxaca until at least two more couples have sued for marriage licenses, and the process may have to be repeated in other states. It is possible, however, that the government could react to this ruling by amending the law. The Supreme Court has previously ruled that same-sex couples married in Mexico City, which has legislated to allow same-sex marriages, should have their marriages recognized as valid throughout the country.

NEW ZEALAND – A marriage equality bill pending in the Parliament will come up for a second reading on March 13, having received approval on its first reading by a vote of 80-40 and been revised in response to public submissions by the Government Administration Select Committee. The bill has been amended to make very clear that religious ministers would not be obliged to marry same-sex couples against their will, and that preaching against gay marriage would not be considered a violation of law. If the measure passes its second reading, it would go back to committee for final adjustments, and could be finally enacted as early as April. After the law is passed, there would likely be a waiting period before it would go into effect, which would probably be about four months, so that marriages could take place beginning later in the summer. - *New Zealand Herald*, February 28.

UGANDA – Authorities continue to be perturbed about a production of a play that “exposed the plight of homosexuals” in the country. According

to press reports, David Cecil, a British theater producer had been seized for deportation and was sent back to the U.K. on February 21, and Keith Prosser, an actor who appeared in the play, was arrested and also faced deportation. - *Independent*, Feb. 22.

UNITED KINGDOM – The *Bangkok Post* (Thailand) reported on February 6 that Prince Saud bin Abdulaziz Bin Nasir, a grandson of Saudi Arabia's King Abdullah II, who was jailed for strangling a male sexual partner, was being deported back to Saudi Arabia to serve the rest of his prison term, despite his argument that he would be subject to the death penalty for homosexuality in his home country. The newspaper reported that a British justice ministry spokesman had stated that Britain has “a prison transfer arrangement with Saudi Arabia which allows nationals of either country to serve their prison sentence in their home state.” Evidently a refusal by the British government to return the prince to Saudi Arabia might endanger the right of British nationals convicted of crimes in Saudi Arabia from being able to request to serve their terms in British prisons. * * * Four different-sex couples whose attempts to register civil partnerships have been rejected are filing suit before the European Court of Human Rights, contending that the UK's civil partnership law discriminates on the ground of sexual orientation against heterosexuals who desire to be civilly united rather than married. The claimants are reportedly hopeful that their action could provoke legislation to amend the civil partnership law, obviating the need for a ruling by the European court. A group of MPs from several different parties are supporting the litigation, and gay rights leader Peter Tatchell stated support for efforts to “end the ban on heterosexual civil partnership.” *Daily Telegraph*, Feb. 16. * * * A Tribunal in Manchester has ruled that John Walker

suffered wrongful discrimination on the basis of sexual orientation when his employer, the chemical company Innospec, took the position that in the event of Walker's death his partner of 19 years, Abdul Jantan, would not be entitled to the equivalent of a full widow's pension. Although Walker has been employer for more than twenty years, the company takes the position that only money paid in to the pension plan after the Civil Partnership Act came into force would be counted towards a pension. The employer is expected to take the case before the Employment Appeals Tribunal. The ruling has no precedential effect unless it is affirmed at the appellate level. If it is, UK employers could face substantial unfunded pension liabilities for their employees who are in civil partnerships. - *Daily Telegraph*, Feb. 7.

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The LGBT Bar Association of Greater New York has announced its newly-elected officers: **KARL RIEHL**, President; **FRANK MARTINEZ**, First Vice President; **CAPRICE BELLEFLEUR**, Treasurer; **MATTHEW SKINNER**, Secretary & Second Vice President; Board Members **EDWARD E. AUGUSTINE**, **JANICE GRUBIN**, **CARLENE JADUSINGH**, **THOMAS MALIGNO**, **JAIME L. PIAZZA**, **KENNETH M. SANCHEZ**, **RICHARD WEBER**.

President Barack Obama has appointed **TODD HUGHES**, the openly-gay Deputy Director of the Commercial Litigation Branch in the U.S. Department of Justice Civil Division, to a seat on the United States Court of Appeals for the Federal Circuit. If Hughes is confirmed by the Senate, he will become the first openly-gay federal appeals court

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judge. The White House indicated that Hughes' work at Justice has included extensive experience litigating before the Federal Circuit, the U.S. Court of International Trade, and the Court of Federal Claims.

LAMBDA LEGAL is accepting applications for a **SENIOR STAFF ATTORNEY** position in its **SOUTH CENTRAL REGIONAL OFFICE IN DALLAS, TEXAS**. The position requires at least five years of experience as a practicing attorney, including litigation experience that prepares the applicant to handle law reform litigation. Full details about the position are available on Lambda Legal's website. The position is open until filled, and interviews will begin early in March. Those interested should send a resume, brief legal writing sample (preferably including discussion of a constitutional, discrimination, or other complex issue), and a letter or email explaining their interest in the position and where they learned of the job opening, to Katy Tokieda, Legal Administrative Manager, Lambda Legal, 120 Wall Street, 19th Floor, New York NY 10005, or via email to ktokieda@lambdalegal.org. Lambda requests that all applications be submitted by email or surface mail, not by telephone. Lambda is an equal opportunity employer. People of color, women, people of all gender identities and gender expressions, and people with disabilities, including HIV, are encouraged to apply.

LEIDEN LAW SCHOOL in the Netherlands (the Hague) is accepting applications for a PostDoctoral Researcher in Comparative Sexual Orientation Law, to work on a European Union-funded research project. An advertisement for the job, which would begin in May 2013, can be found at www.academictransfer.com/17402.

Lesbian/Gay Law Notes Podcast

Check out the Lesbian/Gay Law Notes Podcast each month to hear our Editor-In-Chief New York Law School Professor Art Leonard and Brad Snyder, the Executive Director of LeGal, weigh-in on contemporary LGBTQ legal issues and news.

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“DOMA” continued from page 62

the House expressly authorized BLAG to “continue” to represent its interest in defending Section 3 of DOMA in this and other cases. BLAG’s brief stresses the word “continue” and cites a history going back several decades of BLAG authorizing intervention in pending litigation on behalf of the House of Representatives, and courts (including the Supreme Court) allowing it to participate. BLAG argues in line with the arguments filed in January by Prof. Vicki Jackson of Harvard, who was appointed by the Court to present the case against jurisdiction, that DOJ does not have standing in the case because its view prevailed in the 2nd Circuit. BLAG disputes DOJ’s assertion that the government is an “aggrieved party,” arguing that the government got exactly what it was seeking from the lower court, and quoting prior Supreme Court decisions asserting that a party that got what it wanted from a lower court could not bring its case to the Supreme Court.

But BLAG does not argue that the Court should not decide the case. First, it contends that because it has standing it can bring the issue of Section 3’s constitutionality before the Court for resolution. Thus, BLAG argues that the Court should dismiss DOJ’s petition for certiorari as improperly granted, but should at the same time grant the petition that BLAG filed later in December. “This Court can grant the House’s petition in No. 12-785 and issue its merits decision in that case without need for further briefing and argument,” contends BLAG, since the questions presented in both petitions are the same and all parties will be arguing their cases to the Court on March 26. While this would be unusual, it does present a plausible roadmap for the Court to rule on the merits if it decides that DOJ’s agreement with the lower court’s decision would deprive the government, as represented by DOJ, of “appellate standing” to bring the case to the Court.

Thus, all the parties reject Prof. Jackson’s argument that because the Court lacks jurisdiction in this case, it should dismiss the petition and leave

matters to further development in the lower courts. Nobody agrees that it would be preferable to let the issue of Section 3’s constitutionality play out without a definitive resolution for several years. All parties agree that the result would be potentially thousands of individual lawsuits burdening the federal courts until at least one case generates an adverse court of appeals decision that can be appealed by the disappointed plaintiff. And each party argues that somehow an argument can be constructed that the Court has proper jurisdiction of the case so that it can rule on the merits. Nobody wants a delay in determining whether Section 3 is constitutional.

The DOJ briefs were filed under the signature of Solicitor General Donald B. Verrilli, Jr., the counsel of record. Also listed on the DOJ briefs are Principal Deputy Assistant A.G. Stuart F. Delery, Deputy S.G. Sri Srinivasan, Assistants to the S.G. Pratik A. Shah and Eric J. Feigin, and DOJ attorneys Michael Jay Singer, August E. Flentje, Helen L. Gilbert, and Adam C. Jed. Roberta A. Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison LLP, is Counsel of Record for Windsor. Other Paul Weiss attorneys who worked on the briefs include Walter Rieman, Jaren Janghorbani, Colin S. Kelly, Andrew J. Ehrlich, Julie E. Fink, and Joshua D. Kaye. Also participating in the briefing were Pamela S. Karlan and Jeffrey L. Fisher with the Stanford Law School Supreme Court Litigation Clinic, James D. Esseks, Rose A. Saxe, Joshua A. Block, Leslie Cooper and Steven R. Shapiro from the ACLU Foundation national LGBT Rights Project and Arthur Eisenberg and Mariko Hirose from the New York Civil Liberties Union. The jurisdictional brief on behalf of BLAG lists House General Counsel Kerry W. Kircher and members of his staff, and counsel of record Paul D. Clement with other attorneys from his law firm, Bancroft PLLC.

As the February 28 deadline for amicus briefs drew near, national media publicized an brief filed in support of Windsor by a large group of corporations, law firms, city governments, and other employer entities (286 in all), arguing that Section

3 “imposes serious administrative and financial costs on their operations,” according to a report in *The New York Times* on February 28. The brief, which was drafted by Sabin Willett, an attorney with Bingham McCutchen in Boston, devoted more pages to an appendix listing and describing all the signers than to the actual argument. A brief opposing DOMA on behalf of 172 members of the House and 40 Senators was filed, as well as many others, too numerous to mention here. Other amicus briefs in opposition to Section 3 were filed on behalf of military leaders, religious leaders, members of Congress, former Senators who had voted for DOMA and have changed their minds, psychologists and sociologists, political scientists, historians, and former cabinet secretaries. A group of fifteen states have joined in an amicus brief under the auspices of New York Attorney General Eric Schneiderman and Massachusetts Attorney General Martha Coakley urging the Court to strike down Section 3. A cert petition is still pending with the Court in the 1st Circuit ruling rejecting Coakley’s argument that DOMA Section 3 violates the 10th Amendment and the Spending Clause by requiring Massachusetts to treat married same-sex couples differently from married different-sex couples regarding programs subject to federal rules, such as Veterans cemeteries. Mary Bonauto and staff at Gay & Lesbian Advocates & Defenders played a key role in helping to organize and coordinate the production of amicus briefs representing the views of this wide range of constituencies. ■

“NY Trial Court” continued from page 83

but rather when the two split and Byrne failed to give Massey “his share” of the condo.

Again, the court denied the motion for summary judgment, since questions of fact exist as to whether the property was intended to be shared, and if so, when this intention was breached.

Similarly, the court dismissed Byrne’s motion for summary judgment on the merits. Byrne argued that Massey did not establish the necessary elements of a

constructive trust. However, as the court points out, should Massey's version of the facts be proven accurate, the elements of 1) a confidential or fiduciary relationship, 2) a promise, 3) a transfer in reliance thereon and 4) unjust enrichment may all be satisfied.

Similar fates befell Byrne's dismissal motions on the unjust enrichment and fraudulent inducement actions. Byrne argued that the causes of action are time barred, but there remain obvious questions of fact in terms of whether unjust enrichment and fraudulent inducement occurred, and if so, when they occurred.

Byrne's arguments are almost certainly not helped by presenting internally conflicting factual assertions. In his answer, he claims that Massey was a business associate and boarder in his home, while in his deposition and papers supporting his position, he states that he and Massey were in a romantic relationship, shared certain financial accounts and jointly held real property down south in Georgia.

The indecisive Byrne's only luck in his motions came when Justice Scarpulla granted the motion to dismiss Massey's claim for partition of the condo asset. Since Massey did not possess the condominium as a joint tenant or tenant in common, and had no inheritance right, Massey has no standing to a claim for partition. Byrne also scored another small victory in that Massey's motion for costs and sanctions was denied. Although he claimed that Byrne's statements are incomplete and indeed false, the heart of this case is which facts are false and which are true, so granting such a motion would be premature.

In a case involving a romantic relationship, the court notes, a dispute over facts "may be hurtful, but...does not rise to the level of frivolous conduct required for the imposition of sanctions." Perhaps this not the most romantic of notions relating to lost love, but rather an accurate reminder that when a relationship gets ugly, sometimes the court has to sort it out. — *Stephen Woods*

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

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

*A symposium on the jurisprudence of Supreme Court Justice Anthony M. Kennedy, the perennial swing vote in LGBT rights cases at the Court, has been published in Vol. 44, No.1, of the McGeorge Law Review (2013). Some individual articles are noted above. * * * The Sexuality and Gender Law Clinic at Columbia University in collaboration with the Society of American Law Teachers has issued a publication to provide information and assistance to LGBT students, faculty and staff facing discrimination at religiously-affiliated law schools. The publication, in the form of a policy paper, is available online at www.SALTLAW.org. * * * Associate Professor Deirdre M. Bowen of Seattle University Law School has posted a paper titled "I Wanna Marry You: An Empirical Analysis of the Irrelevance and Distraction of DOMA," on SSRN. This paper presents the first empirical analysis we have seen of the question whether the enactment of state Defense of Marriage Acts and Defense of Marriage Amendments actually has a positive effect on traditional families. Prof. Bowen has undertaken a detailed statistical analysis of marriage and divorce rates in DOMA and non-DOMA states, and has shown that actually marriage rates decline and divorce rates increase in DOMA states as compared to non-DOMA states, although these effects are slight enough to fail to achieve statistical significance. In other words, as a practical matter, the enactment of bans on same-sex marriage does not seem to have any effect in strengthening traditional different-sex marriages, and may even have an adverse effect based on these measurements. But many of the proponents of such statutes and constitutional amendments are acting out of ideological conviction and are likely uninterested in facts. These findings, however, suggest that in the context of legal analysis, if the articulated goal of passing these laws is to strengthen "traditional" marriage, they do not appear to be a rational means to accomplish this. Prof. Bowen suggests in her conclusion other social policies that could be more effective in bolstering traditional marriage, including taking measures to lessen economic inequality, provide educational opportunities, and create a climate of respect for human rights, as it seems that factors that most highly correlate with increased marriage rates and decreased divorce rates include economic well-being, educational achievement, and liberal social attitudes! (We are summarizing and drawing inferences here; the exact wording of our summary should not be attributed to Prof. Bowen.)*

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18. Kelso, R. Randall, *Justice Kennedy's Jurisprudence on the First Amendment Religion Clauses*, 44 McGeorge L. Rev. 103 (2013).
19. Klarman, Michael J., *How Same-Sex Marriages Came to Be*, 115 Harv. Magazine No. 4, 30-35 (March-April 2013) (exemplary concise history of the movement for marriage equality).
20. Knouse, Jessica, *Julie A. Greenberg, Intersexuality and the Law: Why Sex Matters* (book review), 46 L. & Soc. Rev. 929 (2012).
21. Kreis, Anthony Michael, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 Law & Ineq. 117 (Winter 2012) (appropriates "interest-convergence theory" from the race discrimination writings of Prof. Derrick Bell to analyze why LGBT rights claims became more successful beginning in the 1990s and cautions how stereotypes about LGBT privilege might detract from future progress).
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