In the early morning hours of July 15, Argentina’s Senate concluded a 16 hour debate by voting 33–27 (with 3 abstentions) in favor of legislation that will provide full access to marriage for same-sex couples in that country. The Senate vote endorsed a bill that was approved by the lower house of the legislature on May 5, 2010, by a vote of 125–109, with 6 abstentions. President Cristina Fernandez de Kirchner is a strong supporter of the legislation, so final enactment is assured. The legislation will substitute the term “the marrying parties” for “husband and wife” in the existing laws governing marriage. It becomes effective upon publication in the official bulletin, which was expected to take place within a few days of the vote. Further legislation will be needed to make necessary adjustments in other statutes. The Argentinean action came just a month after Iceland’s Parliament had voted unanimously, 49–0, on June 12 to approve legislation allowing same-sex marriages, with the law coming into force on June 27.

Although Argentina becomes the first country in Latin America to provide marriage for same-sex partners, it is not the first to address the issue of providing a legal status for same-sex partners, as Uruguay and Colombia provide civil unions that afford some of the rights of marriage, and same-sex couples have some legal rights in Ecuador. Mexico City makes marriages available to same-sex partners, and some local jurisdictions in Latin-American countries have extended limited rights to same-sex couples.

The issue was forced in Argentina as several same-sex couples were able to find local officials willing to perform marriage ceremonies, generating litigation that was widely anticipated to result in a Supreme Court ruling that might have compelled the government to take this step. By legislating rather than waiting to see what the court would do, political leaders were responding to widespread popular sentiment in favor of same-sex marriage, with some media reporting 70% positive polling on the issue. Opposing groups, encouraged by the Roman Catholic Church, staged large demonstrations condemning the proposal, but ultimately did not deter a majority of legislators from taking the position that this was an issue of civil policy that should be resolved in favor of equal rights.

Argentina will not become a tourist marriage destination for same-sex couples from other countries, because it does not provide marriage licenses for non-residents, and establishing residency is reportedly a time-consuming process, so only those non-residents who are contemplating moving there permanently are likely to undertake this route to marriage. On the other hand, approving same-sex marriage is seen as bolstering Argentina’s reputation as a gay-friendly travel destination, which may pay substantial commercial benefits.

Prior to the legislative vote in Iceland, same-sex couples there were allowed to form civil partnerships that carried the same rights as marriage, but such partnerships had not attained the social status akin to marriage. The election of openly-lesbian Prime Minister Johanna Sigurardottir made the situation intolerable, and pointed to the absurdity of making a continuing distinction without a legal difference. As soon as the new law went into effect, the prime minister married her long-time partner, Jonina Leosdottir, with whom she had entered into a civil union in 2002. Iceland is generally counted a part of Europe, and is a member of the Council of Europe, governed by the European Convention on Human Rights. As indicated by the unanimous vote, this turned out not to be a controversial decision in a small, pervasively secular culture, with roots in Scandinavia where several countries now have same-sex marriage. Iceland’s “parent” country, Denmark, was the first in the world to provide registered partnerships for same-sex couples.

When Argentina’s legislation goes into effect, it will be the tenth nation to provide full marriage rights for same-sex couples, joining (in chronological order) the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal and Iceland. In addition, the U.S. states of Massachusetts, Iowa, Connecticut, Vermont, and New Hampshire, and the District of Columbia, afford same-sex couples the right to marry, although those marriages are not recognized by the federal government for purposes of more than 1,000 instances of federal law in which marital status is relevant. Many other countries, especially in Europe, provide a legal status other than marriage for same-sex couples. A.S.L.

**SUPREME COURT UPHOLDS LAW SCHOOL’S REFUSAL TO RECOGNIZE CHRISTIAN LEGAL SOCIETY UNDER DISCRIMINATION POLICY**

In a hotly-argued 5-4 ruling, the United States Supreme Court has rejected the Christian Legal Society’s First Amendment challenge to a decision by the Hastings College of Law of the University of California to deny “registered student organization” status to a CLS chapter at the law school. *Christian Legal Society v. Martinez*, No. 08-1371, 561 U.S. ___, 2010 WL 2555187 (June 28, 2010). Justice Ruth Bader Ginsburg wrote the opinion for the Court, which was joined by Justices John Paul Stevens, Anthony M. Kennedy, Stephen Breyer, and Sonia Sotomayor. Justices Stevens and Kennedy also wrote separate concurring opinions. Justice Samuel Alito wrote a dissent, joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas.

National Center for Lesbian Rights and Jenner & Block were co-counsel for the LGBT student group at Hastings, Outlaws, who intervened in the case as co-defendants.

The sharp arguments between the justices over their alternative conceptions of the case surfaced in some pointed language by Ginsburg, who accused Alito of “indulging in make-believe” and at one point describes the dissent’s analysis as “warped.” Alito, in turn, describes the majority opinion as “misleading” and states his hope that it will turn out to be an “aberration.” What the majority views as a straightforward application of its “limited public forum” First Amendment jurisprudence, the dissent sees as an important battle in the culture wars and an unfortunate victory for “politically correct views” on university campuses.

In 2004, a small group of Hastings Law Students petitioned the school to recognize their proposed chapter of the Christian Legal Society as a registered student organization. They submitted a copy of the by-laws, which incorporated the national Christian Legal Society’s requirement that members subscribe to a
Christian statement of faith and abstain from any sexual activity outside of heterosexual marriage. This later requirement was expressed, in part, as a rejection of anybody who engages in “unrepentant homosexual conduct.” In effect, students who were not willing to swear to a particular version of orthodox Christian belief or who identified as gay would be excluded from membership in the chapter.

The Hastings administration refused to designate CLS as a registered student organization, citing the school’s non-discrimination policy, which includes a prohibition on discrimination based on religion or sexual orientation. The administration informed the CLS students that only student organizations that made membership available without discriminating based on religion or sexual orientation could be officially registered. Registration is a prerequisite to various benefits, such as use of campus facilities and participation in various activities, such as participation in the annual student organizational fair, and eligibility for student organization funds. The administration informed CLS that they would be allowed to meet on campus, but would have to use general communications media and would not be eligible for student activity funds (which are drawn largely from activity fees paid by students).

When CLS representatives pointed out that there were other registered student organizations whose by-laws required students to share certain beliefs (such as the Hastings Democratic Caucus and the La Raza Student Association), the administration contacted those organizations and told them they would have to revise their by-laws to eliminate such requirements. No other organization was disqualified, and, according to Alito’s dissent, CLS is the only student organization in the history of Hastings Law School to have been denied registered student organization status. Alito also highlights record evidence showing that CLS’s attempts to use campus facilities have been thwarted at times by tardy responses from law school administrators.

CLS sued to compel their recognition, arguing that the school’s application of the non-discrimination policy in this instance amounted to discrimination against CLS on the basis of religion. As the argument goes, by imposing a requirement upon a religious organization that it open its membership to non-believers or those who defy the organization’s religiously-based sexual conduct code, the law school was violating the free exercise clause of the First Amendment, and discriminating against CLS.

The federal district court rejected CLS’s argument, finding that the law school’s non-discrimination policy in its application to this case was content-neutral. When CLS appealed the district court’s ruling to the 9th Circuit, that court saw the case as being governed by its relevant recent rulings on similar cases from other schools, and affirmed in an unpublished one-paragraph opinion, citing the other cases and characterizing Hastings’s policy as reasonable and content-neutral.

At an early point in the litigation, CLS and Hastings stipulated that Hastings requires registered student organizations to “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of status or beliefs.” This policy, which the Court characterized as the “all-comers” policy, proved a major point of contention between the majority and the dissenters, with Alito arguing that it is actually a “some-comers” policy because student organizations are allowed to impose membership requirements, so long as they don’t involve the characteristics listed in the non-discrimination policy. Thus, Alito argues, student organizations are allowed to discriminate on some grounds and not others, destroying the “neutrality” of the policy and falling afoul of the Court’s First Amendment jurisprudence. Indeed, Alito argued, the non-discrimination policy is itself discriminatory against religious groups since it requires them to admit into its ranks those who disagree with their religious doctrine and messages as a condition of participating equally in campus life.

Justice Ginsburg rejected this characterization of the case, arguing that CLS was seeking to be exempted from the school’s policy – which echoes California state law – banning discrimination based on religion or sexual orientation. This is reminiscent of the argument about “special rights” versus “equal rights” that conservatives raise in opposition to gay rights laws, claiming that gay people are seeking special rights to government support, while gay proponents argue that they are merely seeking equal treatment with non-gay people by the government. “CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings’ policy,” she wrote. “The First Amendment shields CLS against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.”

Under the Court’s “limited public forum” jurisprudence, a public university is deemed to be different from such traditional public forums as streets and town squares. In a traditional public forum, the government can seek to preserve order and prevent violence but basically must tolerate all kinds of speech, including offensive and hateful speech. A limited public forum is different. A government agency, such as a state-funded law school, may place certain limits on access to its property consistent with the mission of the institution. It is by now uncontroversial, for example, that public schools can require that only students in the institution are allowed to be members of recognized student organizations, and that student organizations not undertake activities that conflict with the mission of the school.

Justice Ginsburg noted the distinction between this case and Boy Scouts v. Dale, in which the Court ruled (by a 5-4 vote) that the state of New Jersey could not compel Boy Scout chapters in the state to admit gay people as members. Ginsburg pointed out that the CLS chapter at Hastings was free to exclude gays from membership, but it was not entitled to do so as a registered student organization eligible to use tax-payer funded facilities and receive funds drawn from activity fees paid by all students, including those who would be excluded from membership. The Boy Scouts, by contrast, is a private organization which the Court has ruled is free to exclude people whose inclusion would, in the Scouts’ judgment, undermine their expressive message. (In dissenting opinions in Dale, members of the Court pointed out the intellectual incoherence of this position. What if the Scouts felt that their message would be subverted by being required to include people of color in their membership? Would they then enjoy a First Amendment right to discriminate based on race? Thus, the majority of that Court in Dale was signaling its view that anti-gay discrimination is less problematical than race discrimination.)

In the CLS case, the Court found that the balance between the free speech and free exercise rights of the CLS members and the law school’s interest in having a non-discriminatory limited public forum among its registered student organizations was appropriately served by allowing the school to withhold registered status while allowing CLS to exist at Hastings without the imprimatur of official recognition or receipt of official benefits. The Court emphasized that Hastings did not prohibit CLS from meeting on campus, but denied them the privileges made available to registered organizations in using designated communications media and having priority on use of law school space for activities. The Court found that the school’s policy of requiring that registered organizations be open to “all students” was reasonable and content-neutral.

The dissenters, on the other hand, found the policy to be discriminatory because it conditioned full participation in the law school community on requiring the CLS members to accept unwanted members. One of CLS’s arguments was that requiring it to accept non-Christians and gays could open the organization to being subverted by a covert campaign of non-believers and gay people joining and then installing themselves as officers. The majority dismissed this as purely hypothetical, pointing out the unlikely that this would occur or could succeed, but the dissent treated it as a real concern.
One of the arguments CLS tried to make in defending its exclusionary policy was that it was not engaged in status discrimination on the basis of sexual orientation, because its policy disqualified people based on their conduct as "unrepentant homosexuals," not merely their sexual orientation status. Justice Ginsburg rejected this argument, citing to Lawrence v. Texas, where Justice Sandra Day O'Connor had rejected an identical argument in her concurring opinion on equal protection grounds. In that case, Texas argued that the sodomy law did not discriminate against gay people as a class because it also prohibited non-gay people from having gay sex. Said Ginsburg: "Our decisions have declined to distinguish between status and conduct in this context." As Justice Kennedy signed the majority opinion in CLS, this passage in the opinion may support the argument that a majority of the Court considers gay people a "protected class" under the 14th and 5th Amendment equal protection requirements, which could have important implications in other pending litigation, including constitutional challenges to DOMA, DADT, and Proposition 8 in California. The day after the decision was announced, counsel for plaintiffs in Perry v. Schwarzenegger sent a letter to U.S. District Judge Vaughan Walker (N.D.Cal.), making this argument and further refuting an argument that proponents of Proposition 8 had made in defending it at trial.

Stevens wrote separately to take on Alito's argument that the law school's non-discrimination policy was itself discriminatory, a point that Justice Ginsburg did not feel was necessary to take on in any detail in the majority opinion. "As written," wrote Stevens, "the Nondiscrimination Policy is content and viewpoint-neutral. It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all." In a footnote, he rejected the dissent's argument that "a rule excluding those who engage in 'unrepentant homosexual conduct' does not discriminate on the basis of status or identity," commenting, "Our First Amendment doctrine has never required university administrators to undertake the impossible task of separating out belief-based from status-based religious discrimination."

Stevens drew a telling parallel between the oppression that has sometimes been suffered by religious minorities and by sexual minorities as he took on Alito's argument that the Hastings policy was not really content-neutral because it banned some forms of discrimination and not others. Stevens wrote, "What the policy does reflect is a judgment that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors. This approach may or may not be the wisest choice in the context of a Registered Student Organization (RSO) program. But it is at least a reasonable choice. Academic administrators routinely employ antidiscrimination rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination, including sexual orientation discrimination. Applied to the RSO context, these values can, in turn, advance numerous pedagogical objectives." In a footnote aside, linked to his reference to sexual orientation discrimination, Stevens commented, "Although the dissent is willing to see pernicious anti-religious motives and implications where there are none, it does not seem troubled by the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are."

Stevens also noted that the dissent seemed to have lost sight of the Court's traditional distinction between intentional discrimination and the discriminatory side-effects of neutral policies. While it was true that Hastings' content neutral ban on religious and sexual orientation discrimination might incidentally burden CLS, this was not a burden that would be recognized as violating First Amendment norms, relating back to the Court's controversial Employment Division v. Smith case, in which it held that neutral laws of general application could be applied to religious organizations, even though they imposed an incidental burden on free exercise. Interestingly, this approach, adopted in a case involving Native American religious use of peyote, was the brainchild of conservative members of the Court, some of whom joined Alito's dissent.

Justice Kennedy's concurrence expanded on various points from the majority opinion without presenting any separate reasoning, which he acknowledged in his closing sentence, stating: "These observations are offered to support the analysis set forth in the opinion of the Court, which I join." Most of Kennedy's opinion amplified his view about the range of discretion afforded to educational administrators in their decisions about how to encourage a campus where alternative points of view are respected and thus contribute to the educational process.

Perhaps Kennedy felt a need to write separately because he was clearly the swing vote that made the majority opinion possible. All four of the major decisions released on June 28, the final date of the Court's 2009-2010 term, were 5-4 rulings with Kennedy in the majority, but this is the only one where he was abandoning his fellow conservatives to help the moderates make up their majority. (In the other cases, Kennedy joined in finding that state and local gun laws are subject to attack under the 2nd Amendment, that a key provision of the Sarbanes-Oxley law regulating the practice of corporate accounting was unconstitutional, and that patent law could be used to protect business methods, although the particular method at issue in the case did not qualify for such protection.)

Alito's lengthy dissent, longer than Ginsburg's opinion for the Court, sharply disputed the Court's view of the facts and the issues at stake, seeing the case as a major challenge to the full participation in campus life by Christian students. He argued, in effect, that campus policies banning religious and sexual orientation discrimination are an unconstitutional attempt by public universities to impose liberal political correctness on dissenting religious students. "I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country," he wrote. "Even those who find CLS's views objectionable should be concerned about the way the group has been treated -- by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration."

That four members of the Court signed Alito's dissenting opinion shows the narrow thread by which the Supreme Court supports gay discrimination claims in the face of religious opposition, helping to explain why LGBT political and legal groups submitted searching questions to the Senate Judiciary Committee to be posed to Supreme Court nominee Elena Kagan, whose confirmation hearings coincidentally began shortly after the Court closed its final public session of the Term. A.S.L.

LESBIAN/GAY LEGAL NEWS

Federal Court Finds That Section 3 of the Defense of Marriage Act Violates the Constitution

In a pair of rulings announced on July 8, U.S. District Judge Joseph L. Tauro found that Section 3 of the Defense of Marriage Act (DOMA), enacted in 1996 in reaction to same-sex marriage litigation in Hawaii, violates the Equal Protection requirement of the 5th Amendment, the Commonwealth of Massachusetts' reserved rights under the 10th Amendment, and imposes an unconstitutional condition on state eligibility for funding under various federal programs, so is not justified or supported by the Spending Clause, Article I, Section 8, Gill v. Office of Personnel Management, 2010 WL 2695652 (D. Mass., July 8, 2010); Commonwealth of Massachusetts v. U.S. Department of Health and Human Services, 2010 WL 2695668 (D. Mass., July 8, 2010).

Judge Tauro, who was appointed to the federal district court in 1972 by President Richard Nixon, was ruling on the government's motion
to dismiss and plaintiffs' motions for summary judgement in cases brought by Gay & Lesbian Advocates & Defenders (GLAD) on behalf of a group of same-sex couples who are married in Massachusetts, where such marriages became available beginning in May 2004, and by the Attorney General of Massachusetts, Martha Coakley, on behalf of the Commonwealth of Massachusetts, which has been hobbled in its ability to provide full marriage rights to its residents because of the restrictions on federal money imposed pursuant to Section 3 of DOMA.

Section 3 of DOMA provides that only a marriage involving one man and one woman will be recognized for any purposes of federal law, and that when the word "spouse" is used in federal law, it only refers to a party in a different-sex marriage.

GLAD's complaint detailed ways in which the plaintiff couples had been denied various rights and benefits because of DOMA, and the state's complaint spelled out the constraints that had been imposed upon it as a result of the federal prohibition. In both cases, the plaintiffs sought a judicial ruling that Section 3 was unconstitutional as applied to them in Massachusetts, so the court's decision has no immediate application outside the state, but could take on greater significance if appealed to and upheld by the U.S. Court of Appeals for the 1st Circuit, which has jurisdiction over the neighboring New England states of New Hampshire, Maine, and Rhode Island, as well as Puerto Rico, and the cases could of course take on even greater significance if the Supreme Court ultimately rules on the questions it presents.

In 1993, the Hawaii Supreme Court ruled that the state's denial of marriage to same-sex couples might violate the state constitution's Equal Rights Amendment as a form of sex discrimination. In the months leading up to the subsequent trial in Hawaii, same-sex marriage became a national issue in the midst of congressional and presidential elections. Senator Bob Dole, Republican Majority Leader and eventually unsuccessful presidential candidate, introduced the Defense of Marriage Act, which was promptly embraced by politicians of both parties, including President Bill Clinton. Both houses of Congress approved DOMA by overwhelming margins and President Clinton signed it into law shortly before the election.

Although there were Congressional hearings prior to passage of the bill, Congress made no attempt then to determine all the provisions of federal law that would be affected by an across-the-board ban on federal recognition of same-sex marriages. Most of the legislative history is concerned with Section 2, the provision purporting to relieve states of any obligation to accord "full faith and credit" to same-sex marriages contracted in other states, with arguments focusing on whether Congress had the authority to enact an exception to the Full Faith and Credit Clause of the Constitution. Language from the legislative history, quoted by Judge Tauro, suggests that the discussion was conducted mainly at the level of sloganeering rather than careful policy-making.

It was not until after the bill's passage that the General Accounting Office issued a report finding that at least 1,049 federal laws were potentially implicated. (A later study, released in 2004, found the number had by then increased to 1,138.) Thus, when Congress was considering the bill, it was acting in ignorance of its actual scope, and without considering whether denial of recognition to same-sex marriages was justifiable with respect to any particular federal right, benefit or obligation. Since then, every time Congress has enacted a new law where a person's marital status is relevant to some right, benefit or obligation, the impact of DOMA is increased, but Congress has made no effort to provide an independent justification for continuing to discriminate against same-sex marriages in newer legislation.

The House Report accompanying the 1996 bill identified four "interests" that Congress claimed to be advancing through its enactment: encouraging responsible procreation and child-bearing, defending and nurturing the institution of traditional heterosexual marriage, defending traditional notions of morality, and preserving scarce resources. Judge Tauro noted that the Justice Department does not rely on these four "interests" in defending the statute today, and has actually disavowed them, instead making new arguments devised in light of their realization that the original four "interests" are either invalid or constitutionally unacceptable.

Judge Tauro quickly disposed of them as well. After noting studies showing that children raised by gay parents "are just as likely to be well-adjusted as those raised by heterosexual parents," he commented, "But even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting," and, he pointed out, deprives the children of same-sex couples "from enjoying the immeasurable advantages that flow from the assurance of a stable family structure," quoting from the Massachusetts Supreme Court's same-sex marriage ruling. He also quoted Supreme Court Justice Antonin Scalia's famous comment that "the sterile and the elderly" have never been denied the right to marry, so clearly the ability to procreate has not been deemed a prerequisite for marriage in the United States.

The idea that DOMA was needed to nurture heterosexual marriage was also rejected, as "this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are already married to members of the same sex." The judge also found that "denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure." Defending traditional notions of morality can no longer be offered as a legitimate justification for official discrimination after Lawrence v. Texas, and while preserving scarce resources is a "legitimate government interest," Tauro was unwilling to credit it as a basis for upholding Section 3. "This court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapproval of same-sex marriage," and Congressional dislike of a particular group is not a reasoned justification for legislation.

Instead of the "interests" identified by Congress in 1996, the Justice Department, forced to come up with some new justification, devised the bizarre claim that DOMA was an attempt by Congress, as summarized in Judge Tauro's opinion, to preserve the status quo "pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage." The government argued that DOMA was necessary "to ensure consistency in the distribution of federal marriage-based benefits," and to avoid the disorder and disruption of having to deal with different definitions of marriage in different states.

Judge Tauro found this argument to be refuted by history. Marriage requirements have always differed among the various states, but the federal government has, until the passage of DOMA, never sought to impose uniformity or refused to provide federal recognition to a marriage that was lawfully contracted in a state. He particularly noted the history of interracial marriage, which was outlawed at various times in more than forty states, although that number had declined significantly by the time the Supreme Court invalidated miscegenation laws in 1967 in Loving v. Virginia. During the entire period, the federal government respected mixed-race marriages at a time when only a small minority of states allowed them, a situation analogous to the present when only a handful of states allow same-sex marriages.

The bottom line for Tauro was that under our Constitutional scheme marriage and family law has always been the prerogative of the states, within the minimal constraints imposed by the Constitution. Article I, which enumerates the powers of Congress, does not mention marriage, and history shows that proposals to federalize marriage law have been consistently rejected.
by Congress. This includes, of course, Congress’s repeated failure to approve and send to the states for ratification the proposed Federal Marriage Amendment that has been repeatedly introduced by same-sex marriage foes. Prominent Republican opponents of same-sex marriage, such as Senator John McCain, opposed the amendment on the ground that regulating marriage was up to the states and they did not want to intrude on states’ rights by dictating marriage policy. In applying federal law, the government has consistently, until 2004 when same-sex marriages first became available in one state, recognized lawful state-law marriages, even when some other states would not recognize those marriages.

This led the judge to his bottom line in both cases. In the case brought by GLAD, he found that it was not necessary to determine whether a fundamental right or a suspect classification was involved, because any federal law that discriminates among similarly situated groups must be supported by a rational, non-discriminatory justification, and he could find no rational justification for the federal government to single out same-sex marriages for across-the-board exclusion from recognition for any purpose of federal law, including many instances that did not involve expenditures of federal funds under benefit programs. (For example, testimonial privileges in federal court cases, or spousal rights to benefit from copyrights and patents held by a deceased spouse.)

In the case brought by the state government, he found that Congress had clearly overstepped and invaded the right reserved to the state under the 10th Amendment to decide who can marry in the state, and that Congress’s power under the Spending Clause could not justify DOMA, because it imposed an unconstitutional condition on Massachusetts, requiring it to discriminate against married same-sex couples in any program that involved federal money without any rational justification.

“In the wake of DOMA,” he wrote in GLAD’s case, “it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, ‘there is no reason to believe that the disadvantaged class is different, in relevant respects’ from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly never constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.”

Concluding in the state’s case, he wrote, “That the government views same-sex marriage as a contentious social issue cannot justify its intrusion on the ‘core of sovereignty retained by the States,’ because ‘the Constitution . . . divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.’ This court has determined that it is clearly within the authority of the Commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.”

Since Judge Tauro issued his orders denying the federal government’s motion to dismiss both cases and granting the plaintiffs’ motions for summary judgment in both cases simultaneously with the release of his opinions, the government’s sixty days to appeal began running on July 8.

Unless Congress moots both cases by passing pending legislation that would repeal DOMA, the court’s ruling would go into effect in Massachusetts unless an appeal is taken by early September, although the Justice Department might try to pursue a strategy that proved unsuccessful on the West Coast, where it asked U.S. District Judge Virginia A. Phillips to delay a trial in the Log Cabin Republicans’ challenge to the military ban on openly gay service on the ground that legislation was pending to repeal the ban. Judge Phillips was unwilling to accommodate them, given uncertainty about when that might come to a vote. In this case, the government might argue that having declared his opinion, Judge Tauro should agree to stay his ruling while the administration sought action from Congress on the pending DOMA repeal bill, but that bill is not as far along as the military policy repeal, which has received an affirmative House floor vote and Senate committee vote as part of a Defense Appropriations bill.

Any appeal would be to the U.S. Court of Appeals for the 1st Circuit. There are six active judges on the circuit, and three senior judges who continue to sit on some cases. Of the active judges, two were appointed by Clinton (Democrat) and one each by Presidents Ronald Rea-

U.S. Supreme Court Rules Petition Signatories Can Usually Be Disclosed

The U.S. Supreme Court upheld the constitutionality of a Washington state law authorizing public disclosure of the petitions that are submitted to the state to put referenda on the ballot, but was sharply divided over the circumstances under which petition signers might be constitutionally entitled to an exception from the disclosure requirement. The Court ruled 8-1 in Doe v. Reed, No. 09-559, 2010 WL 2518466 (June 24), that the federal district court in Washington State erred in striking down the statute as unconstitutional, but only six judges signed the opinion for the Court by Chief Justice John Roberts. The Court sent the case back to the trial court to give the plaintiffs an opportunity to seek an exception to the disclosure requirement.

Justice Clarence Thomas dissented, arguing that the statute placed an unconstitutional burden on the free speech rights of petition signers. There were concurring opinions by Justices Sonia Sotomayor, John Paul Stevens, Antonin Scalia, Stephen Breyer, and Samuel Alito, with Justice Breyer also signing Justice Stevens’ concurrence, and Justice Ruth Bader Ginsburg signing Justice Sotomayor’s concurrence, together with Justice Stevens. Neither Justices Stevens nor Scalia signed Chief Justice Roberts’ opinion.

The case arose out of Washington State’s 2009 enactment of a law expanding the state’s existing domestic partnership bill. Senate Bill 5688, referred to as the “everything but marriage bill,” built upon the state’s existing domestic partnership law to provide that registered domestic partners would have virtually all the state-law rights of married couples. This proved to be a step too far for some committed opponents of same-sex marriage, who promptly began circulating petitions seeking a referendum to repeal the law. Under Washington procedures, if the petitioners acquired sufficient signatures the law would be stopped from going into effect pending the referendum vote. They got the signatures, and the measure went on the 2009 general election ballot as Referendum 71.
Supporters of the partnership law promptly filed a request with the state to receive copies of the petitions, to which they were entitled under a state statute. The referendum proponents then filed suit in federal court, seeking an injunction against release of the petitions. They argued that the statute authorizing disclosure of the petitions was unconstitutional because such exposure could deter people from signing petitions about controversial issues, such as same-sex marriage. They also argued that even if the statute was constitutional, its application in this case would be unconstitutional due to the unusual circumstances. They relied on evidence that supporters of the partnership law planned to post the petitions on the internet and to encourage people to confront petition signers, and pointed to the experience in California after passage of Proposition 8, when some supporters of that measure suffered consumer boycotts, picketing, social ostracism and derogatory comments from supporters of same-sex marriage.

The federal district court quickly accepted their first argument, ruled that the statute was unconstitutional on its face, and preliminarily enjoined release of the petitions pending a full trial. The state appealed to the U.S. Court of Appeals for the 9th Circuit, which reversed, concluding that the plaintiffs were unlikely to prevail on their argument that the statute was facially unconstitutional. The plaintiffs promptly petitioned the Supreme Court to stay the 9th Circuit’s ruling and keep the injunction in place, pending a Supreme Court review of the merits of the case. The Court agreed to do this, so the petitions were not released prior to the election. The referendum was defeated and the state’s new domestic partnership law went into effect.

Meanwhile, the plaintiffs petitioned the Supreme Court to review the 9th Circuit’s opinion, and that petition was granted. The case was argued on April 28.

Apart from Justice Thomas, all of the Court’s members agreed that the Washington statute authorizing disclosure of the petitions (which would include the name and address of every signer) was constitutional. That was all that the Court had to decide directly, since technically the only question before the justices was whether the district court’s ruling was correct. However, having held that the statute was constitutional, the Supreme Court felt obliged to indicate whether the plaintiffs had enough of a First Amendment interest at stake to merit consideration of their second argument: that due to the nature of this case they were entitled to a constitutionally mandated exception to the disclosure requirement. Almost everybody on the Court agreed that they should have the opportunity to seek such an exception, with the surprising exception of Justice Scalia, but there was wide disagreement over the standard the district court should use to make that decision.

The Court’s ruling turned first on the question whether people who sign such petitions have any First Amendment interest in keeping their names and addresses secret from the public. The Court accepted the plaintiffs’ argument that there was a First Amendment interest here, but not an absolute one, and subject to balancing against the state’s interests in disclosure of such information. The Court found that the state’s interests in preventing fraud and providing transparency in its referendum process are strong enough to outweigh, in general, any free speech interests that petition signers might have in remaining anonymous, while conceding that publicizing the names and addresses of signers might have the incidental effect of deterring some people from signing petitions.

It was this approach of balancing interests that led the Court to conclude that in a particular case petition signers might have a valid claim that their First Amendment interests outweighed the state’s interest, requiring a constitutional exception to the disclosure requirement. When interests are to be balanced, of course, it makes a difference how much weight one assigns to the interests at stake. As to this, Chief Justice Roberts’ opinion is relatively non-committal, quoting prior cases to the effect that plaintiffs might prevail by showing a “reasonable probability” that disclosure would lead to “threats, harassment or reprisals” against the signers. Of course, this comment was dicta, not necessary to decide the specific question before the Court.

Roberts had to be non-committal in discussing the plaintiffs’ exception claim, since any attempt to be more specific would have lost several of his opinion signers, depending on how he would advocate weighting the interests at stake. Justices Sotomayor, Stevens, Ginsburg and Breyer, to judge by their various concurrences and the concurring opinions they signed, would lean towards rejecting an exception in the absence of strong evidence of serious consequences to petition signers, while Justice Alito suggested that the evidence the plaintiffs had already presented in support of their first claim would probably suffice. Justice Scalia found little support for the argument that the plaintiffs had a serious First Amendment interest at stake, and, as at oral argument, was sarcastic about the plaintiffs’ claims. Of course, as Justice Thomas found the statute to be unconstitutional, he would have upheld the district court’s injunction.

After plotting out the various concurrences and dissents, one comes to the conclusion that there is no majority view on the Court concerning the circumstances under which a constitutional exception to the statute would be required, but when Justice Scalia’s view that plaintiffs have no viable First Amendment claim is cumulated with the views of Justices Stevens, Breyer, Ginsburg and Sotomayor, it appears that the plaintiffs would probably fail on their second claim, since their evidence about potential harm was heavily speculative, the referendum is now long past, and tempers in Washington State have undoubtedly cooled since the November balloting. Sotomayor, Stevens, Breyer and Ginsburg all agreed that the plaintiffs could not prevail without presenting significant evidence of serious harm were the petitions to be disclosed. Roberts and Justice Anthony Kennedy signed the majority opinion but none of the concurrences, so presumably their views on this are somewhere between those of Alito and the liberal concurrers.

The most interesting opinion was, as is frequently the case, Justice Scalia’s. Scalia is a proponent of “originalism” in construing constitutional text, so he provides a history lesson about referenda and voting in America. He starts from the proposition that a referendum process devoted to enacting or repealing bills is actually a form of legislating, and when individuals sign petitions to put such referenda on the ballot, they are really acting as legislators, not just voters. In that case, the Constitution tips heavily towards disclosure, since there is no tradition of conducting legislative activities in secret. He points out that the Constitution requires each house of Congress to publish a journal of its proceedings, recording and reporting the votes of their members on questions before the house.

Scalia also points out that from the time the First Amendment became part of the Constitution in 1791 until well into the 19th century, there was no established practice of anonymous voting in the United States. Paper ballots came into use gradually through the 19th century, voting machines later still, and the custom in many parts of the country in the early years was for voters to come to the polls and announce their votes out loud. That being the case, if one accepts the proposition that the Constitution’s text should be construed to mean what the generation that adopted it would have thought it meant, it would be hard to find any sort of right to anonymous voting or legislating in the First Amendment.

“There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self governance,” wrote Scalia. “Requiring people to stand up in public for their political acts fosters civic courage, for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.” A.S.L.
European Human Rights Court Rejects Same-Sex Marriage Claim in Schalk & Kopf v. Austria

The case of Schalk and Kopf v. Austria, Application No. 30141/04 (ECHR, June 24, 2010), was brought in the European Court of Human Rights by an Austrian same-sex couple in 2004 to challenge that country’s refusal to grant them a marriage license. Plaintiffs argued that denying them marriage rights “constituted a violation of their right to respect for private and family life and of the principle of non-discrimination...[and that] there was no objective justification for excluding same-sex couples from concluding marriage, all the more so since the European Court of Human Rights had acknowledged that differences based on sexual orientation required particularly weighty reasons.” The Austrian high court had rejected their claim, holding that “Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by ‘men and women’ in Article 12) require that the concept of marriage as being geared to the fundamental possibility of parenthood should be extended to relationships of a different kind.” The European Court rejected their claim for relief, but seemed to open the door to the possibility that members of the Council of Europe may have to move towards providing some legal status for same-sex partners in order to meet their non-discrimination obligations under the European Convention.

Austria argued that plaintiffs lacked the European version of ‘standing’ under a European Convention provision that states: “The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that...the matter has been resolved.” Austria made this argument on the basis of the Registered Partnership Act that went into effect this year, which grants same-sex couples some measure of recognition. The court rejected this argument, holding that “the applicants’ complaint is that, being a same-sex couple, they do not have access to marriage. This situation still obtains following the entry into force of the Registered Partnership Act.”

First, the plaintiffs argued that the Austrian law violated their rights under Article 12 of the European Convention, which states: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” The plaintiffs argued that the evolution of marriage over time led to an understanding that this measure included marriage between same-sex couples. The government responded that this had never been the understanding, and that the original provision clearly referred to opposite-sex marriage. Amici non-governmental organizations argued that “The fact that different-sex couples were able to marry, while same-sex couples were not, constituted a difference in treatment based on sexual orientation...[and that] such a difference could only be justified by ‘particularly serious reasons’. In their contention, no such reasons existed.” Furthermore, the amici argued, “in the absence of any objective and rational justification for the difference in treatment, considerably less weight should be attached to European consensus.”

The court held with the government, ruling that — while the European court recognized evolving norms around marriage — “the Court notes that there is no European consensus regarding same-sex marriage.” Because “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.” While conceding that the term “marriage” no longer invariably refers to different-sex couples, in light of legislative developments in several countries within the Council of Europe, the Court was not yet ready to enforce a new gender-free definition on the entire Council membership.

Second, the plaintiffs argued that they should be granted equal marriage rights pursuant to Article 8 of the Convention: “Everyone has the right to respect for his private and family life...[and] [t]here shall be no interference by a public authority with the exercise of this right except...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.” They also cited to Article 14, “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground...”

The court held that in light of the evolution of attitudes towards homosexuality and same-sex couples, “it is artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership...fall within the notion of ‘private life’ as well as ‘family life’ within the meaning of Article 8.”

Despite that, the Court held that Austria’s Registered Partnership Act, which came into force at the beginning of 2010 — although it did not grant all the rights and responsibilities of marriage — was sufficiently within the European consensus to not violate plaintiffs’ rights under the Convention, without addressing the question, not presented in this case, whether all member states of the Council of Europe are obligated to adopt such legislation. “While there are only slight differences in respect of material consequences, some substantial differences remain in respect of parental rights. However, this corresponds on the whole to the trend in other member States.”

The Court rejected plaintiffs’ argument that they should be entitled to compensation because they were not able to enter into some sort of legal status at the time they originally applied. The majority of the Court were not willing to entertain this argument, finding that although Austria was not in the “vanguard” among nations establishing registered partnerships, it had nonetheless acted ahead of a majority of the members of the Council of Europe subject to the Convention. The partially dissenting judges, while agreeing with much of the Court’s opinion, parted company on this issue, finding that plaintiffs should be able to seek compensation for the failure of Austria to provide any legal status for same-sex couples prior to this year. Daniel Redman and A.S.L.

Wisconsin Supreme Court Rejects Single Subject Challenge to Marriage Amendment

The Wisconsin Supreme Court ruled that the state’s anti-marriage constitutional amendment, which bans both same-sex marriages and, arguably, civil unions or domestic partnerships that carry most of the state law rights of marriage, overwhelmingly adopted by voters in November 2006, does not violate the “single subject” rule. The opinion in McConkey v. Van Hollen, No. 2008AP1868, 2010 WI 57 (June 30, 2010), rejects a challenge that was filed in July 2007 by William McConkey, a voter who argued that he should not have been required to vote on both prohibitions in the same measure.

The court’s opinion, written by Justice Michael J. Gableman, affirms a ruling by Dane County Circuit Judge Richard G. Niess, finding that “both sentences of the marriage amendment relate to marriage and tend to effect or carry out the same general purpose of preserving the legal status of marriage in Wisconsin as between only one man and one woman.”

Frustratingly, the opinion dances around the real issue in the case without ever honestly taking it on, which is that opinion polls show that many voters who oppose same-sex marriage are willing to support civil unions for couples who are not allowed to marry. Thus, coupling the two issues in one vote basically forces those voters who want to “protect marriage,” whatever that means, to ban civil unions at the same time, even though they might be willing to allow the state to provide such a legal status for its unmarried couples. Perhaps the only saving grace of the opinion is that it doesn’t specifically hold that the amendment outliers civil unions, finding it unnecessary to address that question in this case.
The amendment that was placed on the ballot in 2006 consisted of two sentences: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” On its face, this presents the voters with two distinct questions: (1) should same-sex couples be allowed to marry? (2) should the state government be forbidden to create some legal status to make state law rights of marriage available to those who are not permitted to marry?

The legal challenge that McConkey originally filed argued that the amendment, as adopted, violated the federal and state constitutions’ due process and equal protection clauses, as well as the requirement under the state constitution “that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.” Judge Niess dismissed the constitutional claims, agreeing with the state that McConkey did not have standing as a plaintiff to challenge the amendment on substantive constitutional grounds, because as a heterosexually married man he had no individual stake in the matter. (By contrast, plaintiffs in the pending federal court challenge to California Proposition 8, Perry v. Schwarzenegger, have standing to raise the constitutional issues because they are two same-sex couples who desire to marry but are prevented from doing so by Prop 8.)

Niess found, however, that McConkey had standing as a voter to raise the question whether his rights were violated by having to vote on both provisions of the marriage amendment in tandem. As to that, Judge Niess, and the Supreme Court in agreement with him, found that “both propositions related to the subject matter of marriage and were designed to accomplish the same purpose: ‘the preservation and protection of the unique and historical status of traditional marriage.’”

Many states have adopted the single-subject requirement, but attempts to challenge some of the wide-ranging anti-marriage amendments that have been on state ballots over the past decade based on this requirement have been notably unsuccessful in state courts. The result turns, as is frequently the case, on how one characterizes the question. In this case, close scrutiny of the process by which this amendment was placed before the voters should have raised serious concerns by the court about deception and mislabeling, since the ballot title for this amendment focused entirely on limiting marriage to one man and one woman, and did not mention the ancillary purpose of forbidding any alternative legal status for unmarried couples. Furthermore, the campaign waged for its passage focused on preventing same-sex marriage, and largely ignored the second sentence. It was likely that only those voters who made the effort to acquaint themselves fully with the issue would be aware that they were voting to ban any legal status for same-sex couples, not just banning same-sex marriage, by voting yes.

Where the court gets hung up in this case is in its focus on “the purpose” of the amendment, while ignoring its effect. That is, the court says that the rule it has developed in its single-subject jurisprudence is to allow the linking of several propositions in a single amendment if they relate to the same subject and have a common purpose. Otherwise, it insists, it would be “absurd” to require voters to separately approve every individual aspect of an amendment that is intended to accomplish a particular purpose.

For example, at one time Wisconsin voters were presented with a proposal to substantially change the way the legislature was structured by changing the lengths of terms and various other details. In order to accomplish this, many individual changes had to be made, not least because the state has a bicameral legislature with different terms for the different houses. In a challenge to that amendment, the court had said that it made sense to present the entire package to voters, and not have them separately voting on each provision.

Thus, the standard the court embraces is that “the legislature may submit multiple propositions within one proposed amendment so long as those propositions tend to effect and carry out one general purpose and are connected with one subject.”

“A plain reading of the text of the amendment, in which both propositions expressly refer to ‘marriage,’ makes clear that the general subject matter of the amendment is marriage,” wrote Justice Gableman. “Before the marriage amendment was adopted, marriage in Wisconsin was already limited by statute to the unions of one man and one woman. This amendment was therefore an effort to preserve and constitutionalize the status quo, not to alter the existing character or legal status of marriage. The first sentence preserves the one man-one woman character of marriage by so limiting marriage entered into or recognized in Wisconsin. The second sentence, by its plain terms, ensures that no legislature, court, or any other government entity can get around the first sentence by creating or recognizing a ‘legal status identical or substantially similar to that of marriage.’ We need not decide what legal statuses identical or substantially similar to marriage are prohibited by this clause in order to understand its plan and general purpose.”

The court asserted that the motivation for this amendment, which was first introduced in the legislature in 2004, was to prevent Wisconsin from following the path that had been trod up to that point by Vermont, where the state’s supreme court had required the legislature to provide a legal status with the rights of marriage to same-sex couples, resulting in the nation’s first civil union law, and Massachusetts, where the state’s supreme court had recently required the state to allow same-sex couples to marry. This purpose is reflected in the memo that sponsors of the amendment sent to state legislators in January 2004.

Referring to this memo, the court said that the sponsors of the amendment “wanted to protect the current definition and legal status of marriage, and to ensure that the requirements in the first sentence could not be rendered illusory by later legislative or court action recognizing or creating identical or substantially similar legal statuses. The purpose of the marriage amendment, then, was to preserve the legal status of marriage in Wisconsin as between only one man and one woman. Both propositions in the amendment tend to effect or carry out this general purpose.”

The court never mentions the polling data showing that voters have differing views about the desirability or permissibility of same-sex marriage as against civil unions, and never really confronts directly the argument that by coupling the propositions in one ballot question, the legislature forced voters to make two policy decisions in one vote. To this court, the two are such closely related questions that there is no problem in requiring voters to approve or reject them as a package, although the court ignores their differential impact, because the overall purpose of the amendment, as identified by the court, is to preserve the “unique” status of traditional heterosexual marriage. A ballot title more accurately describing the amendment in terms of its effect might have been devised to signal to voters that it would deny any legal status carrying marital rights and responsibilities to same-sex couples, in order to reserve all those rights and responsibilities exclusively for traditionally-married heterosexual couples.

By not opining on whether a civil union law would violate the amendment, the court seems to leave that possibility open, depending on whether a legal status that would carry no legal rights under federal law would be adjudged sufficiently dissimilar to marriage to pass muster. In this connection, it is worth noting that several supreme courts of other states have recently discerned sufficient differences between marriage and either civil unions or domestic partnerships to make them different and unequal institutions for purposes of state equal protection analysis.

McConkey is represented in the lawsuit by Lester A. Pines, Tamara B. Packard, and Edward S. Marion. Attorney General J.B. Van Hollen, the named defendant, was represented by Assistant Attorney General Lewis W. Beilin.
Although this was a private voter lawsuit rather than an action instigated by LGBT public interest groups, the case attracted organization amicus briefs on both sides of the issue. ACLU and Lambda Legal and the League of Women Voters supported McConkey’s appeal, while the Wisconsin Family Council (represented by Alliance Defense Fund), and an organization calling itself “Community Leaders Dedicated to Children Raised by Married Mothers and Fathers,” filed briefs defending the amendment. A.S.L.

D.C. Court of Appeals Rejects Demand for Referendum on Marriage Definition

The District of Columbia Court of Appeals rejected an attempt by opponents of same-sex marriage to force a referendum on the subject, ruling 5-4 in Jackson v. D.C. Board of Elections and Ethics, 2010 WL 2771743 (July 15, 2010), that the defendants had correctly construed District laws to bar a referendum that would have the effect of mandating discrimination in violation of the District’s human rights law, which forbids sexual orientation discrimination. The court was unanimous in its view that the referendum would have that discriminatory effect, but divided over the validity of a District law forbidding referenda that would have such an effect.

The dissenters believed that the District Council exceeded its authority by establishing that subject matter limitation on referendum, reading language on the subject of referendum in the District’s charter more restrictively than the majority would do. The majority rested its ruling on the vagueness and ambiguity of the charter language on point, together with an analysis of the factual context in the late 1970s when these measures were adopted as part of the process of increasing home rule powers of the District’s government.

The proposed referendum would have placed into District Law a definition of marriage limited to different-sex couples. Last year, the District Council passed a measure early in the year providing that the District would recognize same-sex marriages contracted elsewhere and, after that measure survived the Congressional review process unscathed, passed a measure late in the year authorizing same-sex marriages. The referendum proposal was submitted by same-sex marriage proponents in response to the earlier District marriage-recognition measure, but was turned down by the Board of Elections.

An attempt by the plaintiffs to stay effectiveness of the marriage law pending resolution of this case was denied by the courts (including by Supreme Court Chief Justice John Roberts, who serves as circuit justice for appeals from the D.C. courts), and it went into effect in March.

The District’s same-sex marriage law took on important extra-territorial impact when Maryland’s Attorney General ruled that same-sex marriages contracted elsewhere would be recognized in Maryland, leading to a stream of gay Marylanders to D.C. for weddings. This represents lost business for Maryland, whose legislature has thus far refused to advance a same-sex marriage bill. A.S.L.

U.K. Supreme Court Rules in Gay Asylum Appeal that Assessment of Risk of Persecution in Home County Should Assume “Open” Rather Than “Discreet” Behavior

On July 7, in H.J. (Iran) & H.T. (Cameroon) v. Secretary of State for the Home Department, [2010] UKSC 31, the UK Supreme Court (successor to the Law Committee of the House of Lords) reviewed the U.K. Government’s policy of returning lesbian and gay refugees to their home countries if they were likely to be “discreet” (closeted about their sexual orientation) after their return, to avoid persecution, and if their “discretion” appeared likely to protect them against persecution (thus making their fear of persecution not “well-founded”). By 5 votes to 0, the Court rejected this interpretation of the “Convention relating to the Status of Refugees 1951, as applied by the 1967 Protocol.” The U.K. is a party to both the Convention and the Protocol; the U.S. is a party only to the Protocol, which has a slightly different definition of “refugee” and a provision on federal systems.

At para. 82, Lord Rodger (with the express support of 3 other judges) summarised the new interpretation as follows (and this interpretation should be highly persuasive for U.S. and other courts interpreting the Convention and Protocol): “... [1] the tribunal must first ask itself whether it is satisfied on the evidence that [the applicant] is gay, or ... would be treated as gay by potential persecutors ... [2] If so, the tribunal must then ask itself whether ... gay people who lived openly would be liable to persecution in the applicant’s country of nationality. [3] If so, the tribunal must go on to consider what the ... applicant would do if he were returned to that country. [a] If [he] would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution — even if he could avoid the risk by living ‘discreetly’. [b] If ... [he] would in fact live discreetly and so avoid persecution, [the tribunal] must go on to ask itself why he would do so. [i] If ... [he] would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them (nor against discrimination that falls short of persecution, which often involves imprisonment, or physical violence committed by state or private actors). ... [ii] If ... the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect — his right to live freely and openly as a gay man without fear of persecution. ... ”

In recognizing the right of lesbian and gay refugees to live openly in their home countries, the Supreme Court removed the inconsistency between asylum claims based on sexual orientation and those based on race, religion, or political opinion. Members of ethnic or religious minorities, and pro-democracy political dissidents, have never been asked to hide their ethnicity, religion, or political beliefs. Sir John Dyson made this clear at para. 110: “If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group [including lesbian and gay persons] or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him.”

Lord Rodger observed (at para. 76) that “[n]o-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor ... that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely ... Such an assumption about gay men and lesbian women is equally unacceptable.”

The fact that the lesbian or gay refugee, if returned to their home country, would be forced to live “discreetly” to avoid persecution is irrelevant, i.e., “discreet” behaviour coerced, even partly, by fear of persecution does not count. As Lord Rodger said at para. 59: “Unless he was minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly.” Several judges reinforced this point by citing the case of Anne Frank. At para. 107, Lord Collins described as “absurd and unreal” the argument that “had it been found that on return to Holland [from the UK] she would successfully avoid detection by hiding in the attic, then she would not be at real risk of persecution by the Nazis, and the question would be whether permanent enforced confinement in the attic would itself amount to persecution ... It is plain that it [was] the threat to Jews [who lived openly] of the concentration
camp and the gas chamber which constitute[d] the persecution."

What did the Court mean by being “open” about being lesbian or gay? Lord Hope referred (at para. 11) to “their fundamental right to be what they are – of the right to do simple, everyday things with others of the same orientation such as living or spending time together or expressing their affection for each other in public.” Lord Rodger described (at para. 77) living “discreetly” as “avoid[ing] any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man[,] ... be[ing] cautious about the ... the places where he socialised[,] ... constantly ... restrain[ing] himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he be not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man.”

He then illustrated (at para. 78) living openly “with trivial stereotypical examples from British society; just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie [Minogue] concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis – and in many cases [eg, Iran and Cameroon] the adaptations would obviously be great – the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.” However, he added (at para. 79) that “an applicant for asylum does not need to show that his homosexuality plays a particularly prominent part in his life.”

Sir John Dyson stressed (at paras. 128-30), that the hypothetical “right to be open back home” is based on “objective human rights standards,” not “the social mores of the home country.” He disagreed with Lord Justice Pill’s statement, in the reversed decision of the England and Wales Court of Appeal, [2009] EWCA Civ 172, that “...a degree of respect for social norms and religious beliefs in other states is ... appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable [by a lesbian or gay person] in a particular society, the fact-finding Tribunal is ... entitled to have regard to the beliefs held [by the majority] there.”

Unlike in the case of HIV+ persons who cannot access or afford medications in their home countries (N. v. U.K., European Court of Human Rights, 27 May 2008), none of the judges expressed any concern about “opening the floodgates,” ie, about millions of lesbian and gay persons leaving countries where they would risk persecution if they lived openly, and travelling to the U.K. to seek asylum. On the contrary, Lord Hope said (at para. 3): “The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies [eg, Western Europe vs. Iran, Uganda and Malawi] ... It is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem [of persecution in other countries], but it seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here ... It is crucially important that they are provided with the protection that they are entitled to under the Convention ...” Robert Wintemute, Faculty of Laws, King’s College, London

**United Kingdom Improperly Denied Transsexual Woman Pension Benefits**

On June 22, a transsexual woman from the United Kingdom won the right to receive pension benefits as a woman despite being married to another woman, in a ruling by the U.K. Court of Appeal. Timbrell v. Secretary of State for Work and Pensions, Case No: C3/2009/1903 (Court of Appeal [Civil Division]).

Christine Timbrell was born on July 17, 1951, as a male. She married and had two children with a woman named Joy while she was in her twenties. In the late 1990s, Christine began seeing a psychiatrist and was treated for gender dysphoria. In October 2000, with Joy’s consent, Christine underwent gender reassignment surgery, Joy and Christine remain married to this day.

On July 17, 2001, Christine turned 60. Because Christine was born before April 6, 1959, if Christine is legally recognized as a woman, she would be entitled to receive pension benefits at age 60. If she is recognized as a man, however, she can only begin receiving these benefits at age 65. On August 6, 2002, after Christine had turned 60, she applied to the Inland Revenue National Insurance Contributions Office (IRNICO) to receive her state pension. The UK Court of Appeals does not specifically note any decision made by the IRNICO, but states that Christine’s application was not “dealt with promptly.” In any event, in March 2006, Christine made a further claim to the Secretary of State for the Department of Work and Pensions (SSWP) to receive her state pension benefits from her 60th birthday. On April 11, 2006, the SSWP decided that Christine was entitled to a state pension, but only from her 65th birthday.

Christine appealed the SSWP decision to the Appeal Tribunal (AT). The AT decided on November 20, 2006 that because Christine had not obtained a full Gender Recognition Certificate under the Gender Recognition Act 2004 (GRA), she was not entitled to legal recognition of her new gender and so was not entitled to claim her state pension as a woman from the age of 60.

The GRA was passed on July 1, 2004 and became effective April 4, 2005. The GRA created a Gender Recognition Panel, to which an applicant may apply for a Gender Recognition Certificate, recording that the applicant has changed gender and intends to continue to live until death in the acquired gender. In order for a married person to receive a full Gender Recognition Certificate, in addition to various statutory requirements, he or she must have been granted a divorce.

Meanwhile, Christine appealed the AT’s decision to the Administrative Appeal Chamber of the Upper Tribunal (UT). However, prior to a hearing before the UT, the SSWP decided that Christine had made a valid claim for a state pension on August 21, 2002. On January 18, 2008 though, the SSWP decided that Christine’s claim from August 21, 2002 should be denied.

The Secretary of State nonetheless took a position on Christine’s appeal to the UT. Therein, the Secretary of State argued that: [1] Christine had made a valid claim in August 2002; [2] the AT’s decision that the requirements of the GRA had to be fulfilled before Christine could claim a pension was wrong; and [3] that Christine’s existing marriage should have no bearing on her right to a state retirement pension. The SSWP requested that the matter be remitted back to him.

The UT disagreed with the Secretary of State. In a decision dated March 12, 2009, UT Judge Jupp held that Christine was not entitled to a state retirement pension before her 65th birthday because “she does not satisfy the criteria to be treated as a woman in all respects which (subject to satisfaction of other legislated conditions) could entitle her to receive a Category A state pension at the age of 60 under Directive 79/7/EEC.”

Directive 79/7/EEC is a European Council Directive dated December 19, 1978, which directs member states (of which the UK is one) to ensure that men and women are treated equally in matters of social security and other “elements of social protection.” To wit, member states are required to ensure that there is no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. Further, member states must “take measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.”

Christine appealed the UT’s decision to the Court of Appeal. At this stage of the appellate
process, the SSWP did not adopt the same position it had before the UT, but instead opposed Christine’s appeal.

In a written decision by Lord Justice Aikens, the Court of Appeal reversed the UT, and held that the SSWP was obligated to recognize Christine as a woman eligible to receive pension benefits from her 60th birthday. The court rejected the UT’s reliance on the GRA as a basis for denying Christine’s pension, noting that the effective provisions of this statute were not retrospective. The legal underpinning to the court’s decision involved the interplay between Article 4(1) of Directive 79/7 and the European Court of Justice’s (ECJ) decision in Richards v. Secretary of State for Work and Pensions (April 27, 2006).

The facts in Richards are very similar to the facts in Christine’s case. The only real distinction was that Sarah Richards was not married. Sarah, a male to female transsexual, applied for pension benefits after turning 60 and after having undergone gender reassignment surgery. The ECJ held that under Directive 79/7/EEC, the refusal of a retirement pension to a male to female transsexual until the age of 65 was prohibited if that person would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law. The ECJ specifically noted that the scope of Directive 79/7/EEC was not limited to discrimination on the basis of gender, but rather, should “apply to discrimination arising from the gender reassignment of the person concerned.” Therefore, UK legislation, or the lack thereof prior to the GRA, was precluded by Article 4 of Directive 79/7/EEC because Sarah Richards was not equally treated like a woman as a matter of national law.

Relatedly, the court rejected the SSWP’s argument that Christine should simply be entitled to damages for the UK’s failure to implement Directive 79/7 fully. Lord Justice Aikens stated that this would not be in keeping with the “clear, precise and unconditional terms” of the Directive.

Because the Court of Appeal refused to retroactively apply the GRA to Christine’s case, the issue of whether the GRA is consistent with Directive 79/7/EEC has been left for another day. It is worth mentioning that in subsequent press stories, Christine has been quoted saying that the Department for Work and Pensions wanted her to divorce Joy in order to be eligible for her pension benefits at age 60 (Daily Mail [UK], June 23, 2010, 2010 WLNR 12692519). This argument was not raised or otherwise addressed in the court’s decision.

Sometimes Ignorance of the Law Is An Excuse; Uninformed Cop Accorded Immunity From Liability for Unconstitutional Loitering Arrest

An Ithaca, New York, undercover police officer could not be held personally liable for making an unconstitutional arrest, ruled the U.S. Court of Appeals for the 2nd Circuit on June 22, because the state legislature has not repealed or relevantly amended the statute criminalizing loitering for the purpose of soliciting oral or anal sex to cure its constitutional deficiencies and the unconstitutional statute continues to appear in penal law materials given to police officers for use in their job. Reversing a decision by U.S. District Judge Frederick J. Scullin, Jr., of the Northern District of New York in Amore v. Novarro, 2010 WL 2490017, the court ruled in an opinion by Circuit Judge Robert D. Sack that the ignorant police officer enjoys qualified immunity from liability.

According to Judge Sack’s opinion, plaintiff Joseph Amore encountered Officer Andrew Novarro in Stewart Park in Ithaca, New York, on October 19, 2001. Novarro was working undercover “watching for drug activity.” Not realizing that Novarro was a police officer, Amore “offered to perform a sexual act on him” and was arrested. Novarro called for back-up in order to get a ticket to fill out and to consult the statute book to determine the charge. Novarro told Amore that the police were “cracking down” on this kind of conduct. The statute book available to police officers includes the unconstitutional loitering statute, N.Y. Penal Law section 240.53(3), which was invalidated by the New York Court of Appeals in People v. Uplinger, 58 N.Y.2d 936 (1983). Officer Novarro charged Amore with a violation of this provision.

Of course, a lawyer researching the issue using the annotated statute or an on-line resource such as westlaw or lexis would immediately see that the statute was declare unconstitutional, but the version of the penal law given to police officers does not include case law annotations, just the plain text of the statute.

Amore moved in Ithaca City Court to dismiss the charge on the ground that the statute was unconstitutional. The city prosecutor agreed, joining in the motion. The city court granted the motion, observing that it was “puzzling” that a statute that had been declared unconstitutional continued to be published in the official New York statutes, “as if it is still a viable statute. It is hard to understand why the Legislature would continue this statute on the books, given that it is now close to 20 years since it was determined to be unconstitutional.”

The judge’s comments were rather naive (or perhaps ironic?), considering the lack of intestinal fortitude common among state legislators when called upon to clean up unconstitutional sex crimes statutes. It took more than two decades for the state legislature to get around to repealing the sodomy law, which was held unconstitutional in 1980. And it has still not acted to clean up the loitering statute. There are still some state legislatures that have not revised their sex crimes laws in response to the U.S. Supreme Court’s 2003 ruling in Lawrence v. Texas that the Constitution forbids criminalizing consensual sodomy in private between adults.

Several years after the charges were dismissed, Amore decided to seek compensation, filing a complaint in the U.S. District Court under 42 USC section 1983, a jurisdictional statute authorizing suits against the government for violations of constitutional rights. Amore sued two defendants: Officer Novarro, for false arrest, malicious prosecution, abuse of process, and violation of equal protection of the laws; and the City of Ithaca, for failure to train city employees and for maintaining an improper policy, custom or practice of permitting officers to make arrests under the unconstitutional loitering statute.

In pretrial motion practice, District Judge Scullin denied a motion for summary judgment by plaintiff Amore, while granting Novarro’s motion for summary judgment on the claims of malicious prosecution, abuse of process, and equal protection, and the City of Ithaca’s motion to reject the claim of maintaining an improper policy or custom. However, Judge Scullin rejected Amore’s motion for summary judgment on the false arrest claim, finding that because the Court of Appeals had invalidated the loitering statute, Novarro lacked probable cause to arrest Amore, and that Novarro’s claim of immunity from suit was invalid because Amore’s right to be arrested under the statute was “clearly established” as a matter of law. Judge Scullin also denied the city’s summary judgment motion on the failure to train claim, which is still pending before the court for trial.

Officer Novarro appealed the court’s refusal to grant him immunity from suit, arguing that based on what he knew at the time, he acted reasonably in arresting Amore because the statute was in the copy of the Penal Law available to him and Amore’s conduct fell squarely within the prohibition of the statute. The 2nd Circuit panel, which took eleven months from the time of argument until it issued its opinion, agreed with Officer Novarro.

“We conclude that Novarro is entitled to qualified immunity under these circumstances,” wrote Sack. “It was unreasonable to expect this police officer to know that a statute that was, and is, still on the books and being enforced had been held to be unconstitutional. We therefore reverse that part of the district court’s order dismissing Novarro’s motion for summary judgment on the false arrest claim based on qualified immunity, and remand the cause with instructions to grant the motion.”
The comment about the statute “still being enforced” is not inaccurate. On April 26, U.S. District Judge Shira Scheindlin held the City of New York in contempt for continuing to enforce the loitering statute, even in the face of a long-running lawsuit brought on behalf of people who have been constitutionally arrested. And, Judge Sack noted, the N.Y. City Parks Department issued two summonses for violations of the statute on April 6 of this year, citing Judge Scheindlin’s decision in Casale v. Kelly, which noted the recent enforcement activity in finding that New York City had failed to take adequate steps to end improper enforcement of the statute.

In light of the jurisprudence on qualified immunity, the court’s decision seems to make practical sense. Police officers are not legal scholars and cannot be expected to make up for the deficiencies of the Legislature, the Police Academy, and the criminal justice administrators who fail to incorporate appropriate changes into the law in response to final court rulings, and so it follows that police officers should not be held personally liable when they ignorantly enforce unconstitutional statutes under such circumstances. This does not mean, of course, that Amore should be without any redress for his unlawful arrest. He continues to maintain his claim against the City of Ithaca, which has failed to provide appropriate training to its police officers so they will not mistakenly enforce an unconstitutional statute.

Presumably, having suffered the dismissal of the charges against Amore and the notoriety of this resulting lawsuit, Office Novarro is now well-informed that the loitering statute is unconstitutional, but it remains for the City of Ithaca and, indeed, for all law enforcement agencies in the state to figure out an appropriate mechanism for re-educating law enforcement personnel when the courts invalidate penal laws, and for the state Legislature to take appropriate action in response to such court rulings to keep the statute books up to date. A.S.L.

Federal District Court Allows Constitutional Sex Discrimination Claim by Transgendered Employee Discharged by Georgia Legislative Office

On July 2, 2010, the U.S. District Court for the Northern District of Georgia granted summary judgment in part to a former employee of the Georgia General Assembly’s Office of Legislative Counsel (OLC) who was terminated from her position after informing her supervisor that she is transgendered and intended to begin presenting herself as a woman at work. Glenn v. Brumby, No. 1:08-CV-2360-RWS (N.D.Ga., July 2, 2010). The plaintiff, Vandiver Elizabeth Glenn, filed a motion for summary judgment on both her 14th Amendment sexual discrimination claim and her medical condition discrimination claim. The defendant, her former supervisor and the chief legal counsel to the Georgia legislature, Sewell R. Brumby, filed a cross-motion for summary judgment on each claim. District Judge Richard W. Story found in favor of Glenn on her sexual discrimination claim, but denied her motion for summary judgment on her claim for medical condition discrimination.

Born biologically male, Glenn was diagnosed with Gender Identity Disorder (GID) in the early part of 2005. Shortly afterwards, she began to take steps to transition from a man to a woman. She began hormone therapy, undertook cosmetic procedures in order to give herself a more feminine appearance, and began dressing and presenting herself as a woman outside of work. At the time she was hired by the OLC as an editor in October 2005, Glenn was still using her given name, Glenn Morrison, and presenting herself as a man in the workplace.

In the spring of 2006, Glenn’s therapist, Dr. Erin Swenson, recommended that Glenn begin to live life as a woman full-time. Glenn informed her direct supervisor and the senior editor at the OLC, Beth Yinger, that she was transgendered and was in the process of making the transition from male to female. However, Glenn continued to present herself as a man while at work. On only one occasion did she go to work dressed as a woman, on Halloween in 2006. In response to her appearance, Brumby asked Glenn to go home early because he found the way she was dressed inappropriate. Brumby stated that he thought it was “unnatural” for a man to dress as a woman and that “it’s unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing.”

In the fall of 2007, Glenn decided that she was ready to act on Dr. Swenson’s recommendation and continue her transition by living as a woman full-time. She informed Yinger that she intended to legally change her name and to begin attending work dressed as a woman. In order to help Yinger understand GID and what was involved in transitioning, Glenn provided Yinger with written materials describing GID and pictures of Glenn dressed as a woman. When Yinger presented these documents to Brumby and informed him that Glenn was transgendered and in the process of transitioning, Brumby told Yinger that he planned to fire Glenn. Brumby made no remarks indicating that he was dissatisfied with Glenn’s work performance. Rather, he made the express statement to Bradley Alexander, the Lieutenant Governor’s Chief of Staff, that Brumby’s decision to terminate Glenn was not based on poor performance but on the fact that Glenn is transgendered and intended to go to work presenting herself as a woman.

On October 16, 2007, Brumby asked Glenn if she still intended to transition from a man to a woman. When Glenn answered yes, Brumby fired her. The reasons Brumby gave Glenn at that time were that her transition would make other employees uncomfortable and that it may be viewed by members of the legislature as immoral, leading to a loss of confidence in the work being done by the OLC. Brumby also later cited a concern for possible lawsuits that could result from Glenn using the women’s restrooms at work as Glenn has not yet undergone sexual reassignment surgery. However, Brumby did not mention this concern to Glenn at the time she was terminated, doing so only afterwards in order to further his argument that he fired Glenn to protect government interests. Additionally, Glenn argues that such a concern is invalid because the OLC has four private, single occupancy bathrooms that she could use, and therefore avoid using the women’s restrooms altogether.

Following her termination, Glenn filed discrimination claims against Brumby and four other government officials: Glenn Richardson, Eric Johnson, Robyn J. Underwood and Lieutenant Governor Casey Cagle. However, after discovery, Glenn determined that Brumby alone made the decision to fire her. She then filed a motion for order of dismissal of the four other defendants which was granted by the court, leaving Brumby the sole defendant.

Glenn brought her claims under 42 U.S.C. sec. 1983, under which people can seek relief for actions that have “deprived [them] of a right secured by the Constitution and laws.” Glenn asserts that by firing her for being transgendered, Brumby violated her rights to equal protection under the 14th Amendment, discriminating against her based on her sex and her medical condition. In order to successfully bring a claim under the Equal Protection Clause, a person must establish that he or she is a member of an identifiable group, was treated differently than those similarly situated and that this treatment was because of his or her membership in that group.

The court held that Glenn is a member of an identifiable group for both of her discrimination claims. For the purposes of her claim for medical condition discrimination, Glenn’s diagnosis of GID places her within an identifiable class. Of greater dispute, however, was whether or not Glenn belonged to an identifiable group based on her sex. The defendant argued that Glenn was not discriminated based on her sex, but on her intent to transition sexes. Glenn was therefore, according to Brumby, not fired because of her sex, but because she is transgendered.

However, Glenn’s sex discrimination claim was not based on the argument that Glenn was fired for her sex per se, but that she was fired for not conforming to Brumby’s expectations of how a man should dress and behave. Gender stereotyping, as addressed in Price Waterhouse v. Hopkins, has been recognized by the Supreme Court as a form of sex discrimination...
within Title VII of the Civil Rights Act of 1964. 490 U.S. 228 (1989). In that case, Hopkins, a manager for Price Waterhouse, brought a sex discrimination claim against her employer, arguing that she had been denied partnership in the company because she did not conform to her supervisors’ idea of how women should dress, talk or act. Several comments were made to Hopkins by partners that if she behaved more “femininely,” she would have a better chance of being named partner. While Hopkins was not discriminated against directly because of her sex, the Supreme Court held that discrimination based on someone’s failure to conform to gender stereotypes based on that person’s biological sex is a form of sex discrimination. Although Glenn did not bring her claim under Title VII, the court held that it is appropriate to apply the same definition of sex discrimination to a claim brought under the Equal Protection Clause. While transsexuals are not generally viewed as a protected class for the purpose of discrimination based on sex, transsexuals who have experienced discrimination because of their failure to conform to gender stereotypes are “members of a protected class based on sex.”

A person asserting a sex discrimination claim under the 14th Amendment must also establish that the discrimination was done intentionally and based upon the person’s membership in an identifiable group. Here, the court followed the framework for analyzing a discrimination claim established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Although McDonnell Douglas was a Title VII case, the same process for determining if a person has a valid discrimination claim is applied to equal protection claims. Under McDonnell Douglas, the plaintiff must first establish that he or she was discriminated against intentionally by his or her employer. The burden then shifts to the defendant to prove that the actions taken against the plaintiff, though perhaps intentional, were taken for a legitimate reason. If the defendant meets the correct level of scrutiny in establishing that the apparent discriminatory action was taken for a legitimate reason, the plaintiff is then required to establish that the reason given by the defendant was merely pretext and that discrimination was the central motivation behind the action.

Here, the court held that Glenn established a prima facie case of discrimination by showing that Brumby fired her for no reason other than her intent to transition sexes. Brumby’s statement to Alexander that Glenn was not being terminated due to poor work performance but because she is transgendered was found by the court to be sufficient to meet the first step of McDonnell Douglas. The court then turned its attention to whether Brumby sufficiently established that his termination of Glenn was to protect a legitimate government interest. In evaluating Brumby’s actions in relation to Glenn’s sex discrimination claim, the court applied intermediate scrutiny, a heightened level of scrutiny applied to discrimination claims based on sex or illegitimacy. To meet this level of scrutiny, a defendant must establish that the apparent discriminatory actions were taken as part of an important government objective. Brumby argued that if Glenn were allowed to present herself as a woman at work, it would make the OLC vulnerable to lawsuits resulting from Glenn’s use of the women’s restrooms. Brumby did not argue in his reply brief that his actions met this standard of scrutiny, because his argument focused almost exclusively on Glenn not being a member of a protected class and therefore having no valid sex discrimination claim. Although Brumby did not make an express argument that his actions were based on a legitimate government objective, the court examined the evidentiary record for the reasons Brumby gave for Glenn’s termination to determine if a valid government interest was present at the time Glenn was fired.

The central argument Brumby made for validating Glenn’s termination is that if a person who is biologically male but who has not undergone sex reassignment surgery uses the women’s restroom, lawsuits for sexual harassment and invasion of privacy will result. The court held that this argument does not meet the level of scrutiny that is required of a sex discrimination claim. Under intermediate scrutiny, there must be evidence that the government interest was “genuine” and grounded in an “actual concern.” There was no evidence that Glenn used or attempted to use a women’s restroom at work prior to being terminated or that any employee who was informed of Glenn’s intent to transition expressed concerns about Glenn using the women’s restrooms. In contrast to Etsitty v. Utah Transit Authority, in which a transgendered bus driver did not always have access to private restrooms on her bus route, the OLC office does have four private, single occupancy restrooms which make it likely that Glenn could easily avoid using the women’s facilities while at work. 502 F.3d 1215, 1223 (10th Cir. 2007).

Also, in order for the action to be accepted as being motivated by a valid government interest in a heightened scrutiny case, the interest cannot first be expressed after the alleged discriminatory action has taken place. The government objective must be the motivation behind the action, not the excuse given after the fact. Brumby did not mention this concern to Glenn prior to her termination, nor did he express any such concern to other OLC employees.

In his motion for summary judgment, Brumby also briefly asserted two other reasons for his termination of Glenn. He argued that he was concerned that if Glenn was allowed to present herself as a woman in the workplace, it would impair the work environment of the OLC office and cause the legislators to lose confidence in the OLC. The court did not find either of these reasons to be “exceedingly persuasive justification” for Glenn’s termination. There was no evidence that Glenn presenting herself as a woman in the workplace would affect the work of others. Brumby asked two OLC attorneys prior to terminating Glenn how they would feel about working with someone who is transgendered and neither expressed any concerns. Also, when Brumby discussed firing Glenn with several government officials, including Lieutenant Governor Cagle, no one expressed any sentiment that would indicate their confidence in the OLC would decline if one of the employees was transgendered. While the opinion of a few people cannot be considered the view of the entire OLC office or the Georgia Legislature, the court does make it a point to differentiate between valid concerns about the work environment and negative opinions. Personal prejudices “cannot serve as a sufficient basis for discrimination and does not constitute an important government interest.” Some employees of the OLC, Brumby included, may have negative reactions to transgendered employees, but catering to these opinions is not a government interest and should not be protected by the courts.

While the court found that Brumby’s reasons for terminating Glenn did not survive the level of scrutiny applied to sex discrimination claims, the court held that these same reasons did meet the scrutiny applied to medical condition discrimination claims. Glenn argued that by not allowing her to present herself as a woman in the workplace, Brumby was denying her the real-life experience that is an accepted and common treatment of GID and therefore discriminating against her based on her medical condition. The court did not challenge Glenn’s assertion that the Equal Protection Clause protects those with a medical condition from being discriminated against based on that condition. Rather the court’s decision regarding her motion for summary judgment on this claim focuses entirely on whether Brumby satisfied the level of scrutiny required to establish that his firing of Glenn because of her medical condition was based on a government interest.

The level of scrutiny applied to a medical condition discrimination claim is the rational basis test. Less stringent than intermediate scrutiny, rational basis requires only that the defendant could have been acting to protect a government interest and that this possible motivation appears reasonable. In contrast to the standard applied to sex discrimination, the reason for the action does not have to be based on an actual occurrence. Rather it is enough that the occurrence sought to be avoided could reasonably occur.
While Glenn never used the women’s restrooms while at work and no OLC employee expressed concern over her using these facilities, the possibility that Glenn could use the women’s restrooms in the future does exist, even though there are private restrooms available. Rational basis scrutiny does not require that Brumby prove that Glenn will or ever did use the women’s restrooms. The mere possibility that it could happen in the future means that the situation that Brumby claims he was trying to avoid could reasonably arise. The court determined that it is a relational concern that allowing a person with male genitalia to use a women’s restroom could result in lawsuits against the OLC for invasion of privacy or sexual harassment. The attempt by Brumby to avoid possible legal action against the government was found by the court to represent a legitimate government interest, making Glenn’s termination on the basis of medical condition a non-discriminatory action.

Although the court granted Brumby’s motion for summary judgment on Glenn’s medical condition discrimination claim, the court held that because Glenn’s termination was also due in part to sex discrimination, Brumby violated Glenn’s rights under the Equal Protection Clause when he fired her for being transgendered. No mention was made in the decision as to whether Glenn was seeking to be reinstated in her previous position at OLC, but a hearing was scheduled for July 13, 2010 to determine the appropriate remedy. Kelly Garner

Federal Court Authorizes Continuation of 8th Amendment Litigation Over Denial of Hormone Therapy to Transgender Inmate

On June 7, 2010, U.S. District Judge Joseph L. Tauso, whose name we are all now familiar with (see DOMA ruling, above), ruled that a transgender inmate, whose name we are all now familiar with, Therapy to Transgender Inmate

Federal Court Rejects Claim of Unconstitutional Constructive Discharge by University Librarian Who Had Promoted Homophobic Book

Ohio State University officials were sued for issues surrounding their refusal to rehire a reference librarian who alleged that he was “constructively discharged”, in violation of the First Amendment, for promoting anti-gay literature. U.S. District Judge William O. Bertelsman granted the officials’ summary judgment motion and dismissed the case. Savage v. Gee, 2010 WL 2301174 (S.D. Ohio, June 7, 2010).

Scott Savage, a member of a conservative Christian denomination, was head of reference and library instruction at Ohio State University in Mansfield, OH, from August 2004 to June 2007, when he resigned. Savage had served on a committee that was charged with assigning all incoming freshmen a single book that they would all read. The committee members agreed that it was acceptable, maybe even advisable, to recommend a book that might be seen as controversial, even polarizing. Savage agreed with that idea, and recommend a few books, one of which was The Marketing of Evil: How Radicals, Elitists, and Pseudo-Experts Sell Us Corruption Disguised as Freedom, by David Kupelian, which describes homosexuality as aberrant human behavior that has become accepted because it is “politically correct.” Savage later said that he was not serious in suggesting this book; rather, he was making a sarcastic point about confronting orthodoxy, “Like students and young profs did in the 60’s, man!”

Savage’s suggestion did not go over well with other members of the committee, who did not get the sarcasm. One of them cited the book’s blatant homophobia and accused Savage of endorsing “homophobic tripe.” Savage defended the book and attacked his fellow committee members. An e-mail war ensued, and many members of the college community became aware of the controversy. Gay faculty members were alarmed, and stated that they felt uneasy, and harassed, by the presence of Savage.

Savage forwarded all the e-mails to a right-wing group called Foundation for Individual Rights in Education (FIRE), and later contacted a right-wing legal organization, the Alliance Defense Fund (ADF), for legal advice. The Savage controversy was discussed at a faculty meeting, and the faculty dubbed Savage’s actions sexual harassment, but did not recommend that the HR department take any action. Various individual members of the faculty did file charges with HR. The ADF wrote a letter insisting that OSU stop violating Savage’s right to freedom of speech.

HR instigated an investigation of the complaints, with which Savage did not cooperate on the advice of ADF. Savage filed his own complaint, accusing faculty members of filing false charges, and demanding that they be prosecuted. He also set up a library display on academic freedom.

An HR consultant employed by OSU found that neither Savage nor any of his accusers were guilty of any of the charges against them, but the faculty members were not satisfied by the decision, and continued their campaign against Savage.

Savage took two leaves of absence, saying that he intended to return. He filed a lawsuit against OSU officials in April 2007, which the OSU officials moved to dismiss. The type of arguments that OSU made in court convinced Savage that the university was not welcoming his return, thus, Savage resigned on June 27, 2007.

Savage’s lawsuit against the OSU officials in state court sought a determination whether OSU officials were immune from damages un-
nder an Ohio law, Ohio Rev. Code sec. 9.86, which only allows damages against state employees if they act outside the scope of their employment, or maliciously or recklessly. If the individual defendants were immune, then Savage sought damages against OSU and the State of Ohio. After various motions and discovery, Savage dismissed his state action on July 29, 2008. Meanwhile, Savage had, on March 10, initiated a federal lawsuit based on constitutional claims.

Claim for Damages. The OSU officials moved for summary judgment of the federal lawsuit based on an Ohio precedent. The Ohio Supreme Court had held that “a plaintiff who files an action in the Court of Claims of Ohio is deemed to have waived any state or federal claim for damages against state officials arising out of the same acts or omissions . . . in any subsequent action in federal court.” Leaman v. Ohio Dep’t of Mental Retardation & Dev. Disabilities, 825 F.2d 946, 954 (6th Cir. 1987) (en banc). The Leaman holding interprets a state statute, Ohio Rev. Code sec. 2743.02(A)(1), which calls for a “complete waiver” upon filing in the Court of Claims.

Based on Leaman, the court granted the OSU officials’ motion for summary judgment as to any claims for monetary damages by Savage, following a Sixth Circuit precedent, Thomson v. Harmony, 65 E3d 1314 (6th Cir. 1995), which held Leaman controlling for claims against state officials raised in federal court.

Claim for Declaratory and Injunctive Relief. The federal court then considered Savage’s non-monetary claims for injunctive and declaratory relief. Specifically, Savage asked for an order finding that he had been constructively discharged in retaliation for exercising his First Amendment rights, and requiring OSU to reinstate him to a position at a different campus. Further, Savage asked for a declaration that the OSU harassment and discrimination policies are unconstitutionally vague and overly broad. The district court rejected both claims.

The First Amendment issue was decided by asking whether Savage promoted The Marketing of Evil as a citizen, rather than as an employee, and whether his actions were on a matter of public concern. If he acted as a citizen on a matter of public concern, he is protected from retaliation by the First Amendment. If he acted as an employee, then he generally is subject to administrative sanctions. However, he may be protected by the academic freedom exception to this rule. Garcetti v. Ceballos, 547 U.S. 410 (2006) (Souter, J., dissenting). On a related issue, the district court needed to determine whether Savage, who had resigned, had in fact been constructively discharged.

First the court determined that the issues raised by Savage’s championing of The Marketing of Evil were clearly matters of public concern. However, his promotion of the issues was not “as a citizen,” but rather as a librarian at a state university’s library. He intended to foment a dialog within a school-sanctioned committee. “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Garcetti v. Ceballos, 547 U.S. at 421.

The district court noted that some federal courts have found an academic freedom exception to Garcetti v. Ceballos, based on Justice Souter’s dissenting opinion, and that decisions in the Southern District of Ohio have found such an exception. See, e.g., Kerr v. Hurd, 2010 WL 890638 (S.D. Ohio 2010). However, the exception only applies to “scholarship or teaching,” and Savage’s book recommendation was neither. Thus, Savage’s actions are not protected by the First Amendment.

The court went on to state that Savage was not constructively discharged, although it did not need to reach this conclusion because, even if it were true, Savage’s acts were not protected. Nevertheless, the court opined that Savage could not show that his working conditions were “so intolerable that a reasonable person in his position would have felt compelled to resign,” and his employer never suggested firing Savage, nor took any action to force him out of his job. When he took a leave from his job, Savage intended to return, implying that Savage felt he could and would return, belying Savage’s claim of constructive discharge.

OSU’s Policies. As to OSU’s harassment and discrimination policies, the district court treated Savage’s lawsuit as a court would treat any First Amendment lawsuit by one was not yet affected by an overly broad policy that might, in the future, “chill” free speech. Under Laird v. Tatum, 408 U.S. 1 (1972), a litigant alleging chill must establish that a concrete harm occurred or is imminent. Merely alleging a subjective “chill” is not an adequate substitute for a threat of specific future harm. Since Savage was no longer employed by OSU, he was no longer subject to any OSU policy, and thus could not allege future harm. He lacked standing to challenge OSU policies. And he had not even been disciplined under the policy, so there was no past action of the university that he could challenge.

This was more a case about standing than anything dealing with issues, although the plaintiff raised some serious issues, specifically about whether a state employee could promote, under the guise of freedom of speech and academic freedom, literature that demeaned a segment of the academic community. However, Savage’s deciding to quit his job rather than litigate while he was still employed, and his attorney’s decision to bring an action for damages in the Court of Claims which made the plaintiff ineligible to claim damages in any subsequent action, doomed the plaintiff’s cause. Savage was in no position to make the case that he, and his issue-oriented attorneys, wanted to make.

Alan J. Jacobs

Maine Supreme Judicial Court Orders New Hearing on Transgender Name Change Application

On June 24, the Supreme Judicial Court of Maine, ruling on the appeal in In re A.M.B., 2010 ME 54, 2010 WL 2521726, vacated and remanded to the Cumberland County Probate Court a petition by a transgender man for a name change. Probate Judge Joseph R. Mazziotti had denied the name change petition without a written opinion or any communication of reasons, other than “judicial discretion.” Zack M. Paakkonen and Alice A. Neal of West End Legal, LLC, in Portland, Maine, represent A.M.B. Patricia A. Peard, also of Portland, participated as amicus curiae on behalf of Gay & Lesbian Advocates and Defenders.

The opinion for the court by Justice Ellen Gorman reveals virtually none of the facts, briefly relating that A.M.B. had petitioned for a name change, stating in the petition this reason for seeking a name change was that “I no longer wish to have my current name,” had given the notice required by statute, and appeared for hearing. When A.M.B. received word that his petition had been denied, he filed an appeal, asserting that the Probate Court had committed an abuse of discretion and that Maine’s law against discrimination, which defines the ban on sexual orientation discrimination to include protection against discrimination on account of gender identity, evinced a public policy that would be violated by denying a name change whose purpose was to provide a legal name consistent with the petitioner’s gender identity and expression, raising constitutional issues.

The SJC found it unnecessary to address the later point, instead stating: “Because we cannot determine the basis for the Probate Court’s denial, we vacate the judgment and remand for further proceedings.” Justice Gorman explained that name changes can be denied if the petitioner is “seeking the name change for purposes of defrauding another person or entity or for purposes otherwise contrary to the public interest.” Gorman noted that A.M.B.’s petition recited that “he had no children, no pending bankruptcy or other insolvency proceeding, and was not attempting to avoid any legal obligation.” All procedural requirements had been met.

In the brief filed by A.M.B.’s counsel with the SJC, they relate that A.M.B. was classified female when born in Maine, had lived for some time in Florida but was recently living back in Maine, and had identified as a man and used

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male gender pronouns to refer to himself. A.M.B. was also receiving counseling and had been diagnosed as transgender. Because he had been given a distinctively female name at birth, he encountered difficulties due to his legal papers being inconsistent with his gender identity and expression, and sought a name change to a distinctively male name in order to avoid having to disclose his transgender identity whenever there is need to present a legal document. The brief noted that at the hearing the judge did not inquire into any issues of fraud, instead initiating questioning about A.M.B.’s transgender status and treatment.

The court observed, “The main purpose of the statute...is to provide petitioners with the certainty of a judicially-sanctioned name change, as long as the petition is not submitted with fraudulent intent and the change of name does not interfere with the rights of others.” There was no transcript of the brief hearing before Judge Mazzotti. A.M.B. had made notes of his brief colloquy with the judge, which were later typed up and made an appendix to the record. Justice Gorman observed that there was nothing in the record to show that the court had ordered any kind of background check, “the judgment contains neither findings of fact nor conclusions of law, and the court did not provide its basis for denying A.M.B.’s petition.” As a result, the SJG was “unable to determine a proper basis for denying A.M.B.’s petition.”

Thus, the judgment was vacated and remanded. “If, on remand, the court denies the petition, it should include findings explaining how the petition was fraudulent or otherwise contrary to the public interest,” wrote Gorman. “In the future, when the Probate Court denies a person’s petition for a name change, the basis for the denial and adequate findings of fact to support its decision should be included in order to permit effective appellate review.” A.S.L.

**Wisconsin Appeals Court Affirms Denial of Child Guardianship Petition by Lesbian Co-Parent Over Former Partner’s Objections**

The Wisconsin Court of Appeals has affirmed the dismissal of a woman’s petition for guardianship of two children she considers to be her daughters. *In re O.C.M-K*, 2010 WL 2519625 (June 24, 2010). After being together in a committed relationship for seven years, Wendy M. and Helen (Liz) E. K. adopted Olivia and Sofia. Both children are from Guatemala. Wisconsin law bars non-married couples from jointly adopting, and as same-sex marriages are neither legalized nor recognized in Wisconsin, Wendy and Liz could not adopt the children jointly. Wis. Stat. sec. 48.82/ Wis. Stat. sec. 765.001(2). The couple decided that Liz, an attorney, should adopt the girls, which would allow for them to be placed on Liz’s employer’s health insurance plan. While Liz supported the family financially, Wendy stayed home full time with Olivia and Sofia until 2008, when Wendy ended her relationship with Liz.

After the separation, Wendy filed a petition for guardianship. While at first Liz did not raise any objections to the petition, after an incident occurred while the children were under Wendy’s care, Liz challenged the petition. The court does not mention any details of the incident that caused Liz to change her position.

The Dane County Circuit dismissed Wendy’s petition on summary judgment, finding that she did not meet the requirements for granting a third party guardianship of children against the objection of the parent. Established in *Barstad v. Frazier*, the current standard in Wisconsin for an unrelated person to gain guardianship of a child is fairly high if the parent objects to the petition. 118 Wis.2d 549 (May 30, 1984). In *Barstad*, the petitioner sought custody of her eight-year-old grandson over the objections of her daughter, the child’s mother. The child had spent the majority of his life with his grandmother and the circuit court found that it would be in his best interest to remain in her custody.

The Wisconsin Supreme Court reversed, holding that removing a child from the custody of a parent if removal was found to be in the best interests of the child was not a stringent enough test to protect a parent’s legal rights against a third party under the Due Process Clause. The *Barstad* court held that a person’s parental rights could not be denied unless the parent was found to be “either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party.”

On appeal, Wendy argued that the *Barstad* standard should not be applied to her case because she is not a third party to the children, but their parent. Wisconsin law states that courts should name both parents of a child as guardians unless there are circumstances that indicate it would be in the best interest of the child that one or both parents not be given guardianship. Wis. Stat. sec. 54.15(5). Though seeming to contradict *Barstad*, this best interests of the child test is viewed by the courts as applicable when there is no third party attempting to assert parental rights over that of the parent.

The statute, however, does not define what it means to be a parent. Wendy argued that the word ‘parent’ should be understood in terms of its plain, ordinary meaning. To support this argument, she cites an entry of *The American Heritage Dictionary of the English Language*, which defines a ‘parent’ as someone who “begets, gives birth to, or nurtures or raises a child; a father or a mother.” Focusing on the concept of a parent as someone who “nurtures or raises a child,” Wendy argued that within this definition, she is a parent. However, the Court of Appeals states that if a term is defined in a related statute, then that is the definition that should be applied. The related statute defines a parent as a person who is either the biological or adoptive parent of a child. Wis. Stat. sec. 48.02(13). Perhaps of more importance to the court than the statutory definition, is that this is also the definition of parent that is implied in *Barstad*.

Broadening the definition of parent to include someone who is not the adoptive or biological parent would require a reexamining and altering of *Barstad*, which the intermediate appellate court “cannot do.” Wendy does not fit this narrow definition of what it is to be a parent, and is therefore classified by the court as a third party to the children.

However, Wendy also argued that the definition of a parent is irrelevant. Citing an agreement she and Liz made to serve as “equal parent[s],” Wendy asserted that Liz should be equitably estopped from stating that Wendy is not the children’s parent. Wendy interpreted the agreement to be “equal parent[s]” as assurance that Liz would not attempt to assert her rights as legal parent against Wendy and is one of the primary reasons why Wendy agreed to allow Liz to adopt the children. The court, however, interpreted the agreement as a promise by Liz to allow Wendy continuing access to the children. Following this interpretation, Liz has not violated the agreement as no evidence has been entered that Liz made any attempt to deny Wendy access to the children. In part, the court’s interpretation is based on the concern that if Wendy’s claim for equitable estoppel was applied, Liz would be precluded from asserting her parental rights against anyone, not only Wendy, who may try to infringe upon those rights.

The court also points to the “‘co-parenting’ arrangement” both women agreed to after their separation. As part of the arrangement, the children spend equal time with both Wendy and Liz. Wendy admitted that Liz had taken no action to keep the children from her.

In support of her equitable estoppel claim, Wendy cited *Randy A.J. v. Norma I.J.*, 270 Wis.2d 384 (April 7, 2004), in which a wife led her husband to believe that he was the biological father of their child, although she had reasons to suspect that this was not true. When he filed for divorce, she asserted that he was not the biological father. The court held that equitable estoppel was appropriately applied to prevent the wife and the biological father of the child from asserting the biological father’s parental rights over those of the petitioner.

In Wendy’s claim, the Court of Appeals held that the decision in *Randy A.J.* was based on “unique facts”, and estoppel was employed in that case as a means for the court to defend the petitioner’s rights to a child he was led to believe was his biological child. In contrast, the court here held that Wendy’s claim of equitable estoppel was being used as an offensive tool to assert parental rights over those of Liz, not to protect Wendy’s parental rights. Such an asser-
tion was viewed by the court as unnecessary as, unlike the mother in Randy A.J., Liz has made no attempts to sever Wendy’s parental relationship with the children. The court then turned to Wendy’s alternative argument that if she was found to be a third party, she met the requirements of the Barstad test. Wendy did not accuse Liz of being an unfit parent, but pointed to “compelling reasons” for granting her petition for guardianship. Barstad lists as possible compelling reasons for granting guardianship to a third party over a parent’s objections: abandonment, neglect, and “other similar extraordinary circumstances that would drastically affect the welfare of the child.” Prior to Wendy and Liz’s separation, they shared parental responsibility for the children and Wendy argued that by denying her access to the children, Olivia and Sofia would be deprived of a close relationship with one of the people who raised them and served as their parent.

The court does not consider how ending the parental relationship between Wendy and the children would affect Olivia and Sofia in the future, because such a consideration is beyond the scope of the Barstad standard. The test is not concerned with severing the relationship between a child and a third party, but with what harm the child could come to by being under the guardianship of their biological or adoptive parent. The actions of the parent, or inaction in the case of neglect, are the primary concern of the Barstad test. The main objective is to preserve a parent’s parental rights as long as the parent’s actions do not pose a threat to the child’s welfare. Wendy made no accusations that Liz had harmed or neglected the children in any way.

Besides a strict adherence to Barstad, the court does not consider the effects of separation on the children, because separation is not seen as a significant factor in this situation. While Wendy does not have legal parental rights to the children, the court again stresses the fact that Liz has not attempted to keep the children from Wendy. Wendy’s personal relationship with Olivia and Sofia is seen by the court as not being in jeopardy. No consideration is given, however, to the possibility that in the future Liz could choose to assert her parental rights and renege on the “co-parenting” arrangement. The opinion also briefly mentions Wendy’s assertion that denial of her petition for guardianship violates the children’s constitutional rights to Equal Protection and Due Process under the Fourteenth Amendment. The court does not discuss these claims in detail, stating that the arguments were not adequately developed in Wendy’s brief and that Wendy failed to alert the attorney general as to her constitutional challenge of a statute as required by Wisconsin law. Wis. Stat. sec. 806.04(11). For these reasons, the court declined to address these claims.

Kelly Garner

West Virginia Supreme Court Affirms Denial of Guardianship Appointment for Lesbian Co-Parent

There is no legal status for same-sex couples in West Virginia, and co-parent adoption is not an option in the state. Confronted with situations where the biological mother’s job made her unavailable from time to time, she petitioned the Family Court in Fayette County to appoint her same-sex partner as legal guardian of her two sons, ages 13 and 11. The children were born during her prior marriage. After the marriage ended, the father’s contact with the boys ceased after he was charged with molesting the boys. Petitioner, her partner and the boys have resided together since 1999, when the boys were very young, and Petitioner alleges that her partner is their psychological parent. But the Supreme Court of Appeals of West Virginia affirmed a ruling by the Fayette County Circuit Court denying the guardianship petition, even though it was endorsed by the state’s child welfare agency. In re Richard P., 2010 WL 2723185 (W.Va., July 9, 2010).

In the petition, biological mother alleged the facts concerning father’s abuse of the children in furtherance of jurisdiction under the guardianship statute, which caused the Family Court to transfer the case to Circuit Court. The Circuit Court judge, Paul M. Blake, Jr., questioned the necessity to appoint a guardian, in light of the fact that biological mother “was alive, healthy, and capable of caring for the children.”

Petitioner filed a post-hearing brief detailing several instances where her active young sons needed medical attention while she was unavailable due to her job as an ambulance driver, and health care providers had refused to accept authorization from her partner, even though she had a power of attorney. Despite this evidence, Judge Blake denied the petition, claiming that it was “not necessary at this time” to appoint a guardian, and that Petitioner could provide for future emergencies by including a provision in her will to designate her partner as guardian in the event of her death.

The Supreme Court, in an opinion by Justice Margaret Workman, treated this as an “abuse of discretion” case, finding that the guardianship statute gave the trial court discretion to decide whether a guardian should be appointed in a particular case. (The guardianship statute is rather vaguely worded, and does not expressly make it a prerequisite to a guardianship appointment that the court find that a child’s legal parent is incapable of caring for them or otherwise unfit.) And, the Supreme Court found, there was no abuse of discretion here because, as the trial court had concluded, the Petitioner could accomplish her most immediate aims through other steps.

In addition to the testamentary appointment proposal, the court noted that West Virginia had recently enacted a Caregiver’s Consent Act, under which Petitioner could designate her partner as having authority to give consent for medical treatment of her sons. Furthermore, the court noted that the power of attorney submitted as an exhibit in the case designated Petitioner’s partner to make decisions and act on behalf of Petitioner, but did not expressly name her sons, making it understandable that health care providers had refused to acknowledge the partner’s authority when presented with the document. The court “clarified” that “at common law, a parent or legal guardian may transfer medical, educational, and other legal decision-making authority for his or her child or ward, to another adult through the execution of a power of attorney,” which is revocable. The court shared Judge Blake’s concern that a guardianship might have legal consequences that could prove inconvenient to the parties in the future. A.S.L.

Tennessee Appeals Court Rejects Paramour Restriction Against Lesbian Mom

In a case that has been to the court of appeals twice because a stubborn trial judge seems either to be deliberately obtuse or just resolutely opposed to allowing custodial parents to have unrelated adults living with them, the Court of Appeals of Tennessee ruled that such a restriction was not supported by any evidence in the case of Barker v. Chandler, 2010 WL 2593810 (Tenn.Ct.App., Jackson, June 29, 2010).

The issue arose out of the 1998 divorce of Joseph Barker and Angel Chandler. At that time, they had two young children. Angel filed for divorce when she found out Joseph was having an affair with another woman. After the divorce, Joseph married the other woman and eventually Angel began a lesbian relationship.

 Custody of the children is shared, with the birth parents having various designations as primary residential parent, the children going back and forth at various times and being separated at various times. The current dispute reaches the court of appeals because of the insistence by Gibson County Chancellor George Ellis on including and enforcing a “paramour provision” in the court’s order governing custody and visitation, as part of the latest round of revisions in the parenting plan. This provision says that when a child is in residence, an unmarried partner of the parent may not be there overnight. This, of course, puts quite a strain on a lesbian mother in Tennessee, a state that does not allow or recognize same-sex marriages.

Chancellor Ellis’s attitude has been that paramour provisions are the norm in Tennessee custody and visitation orders, and that it has nothing to do with sexual orientation, as the order is phrased in gender neutral terms and would apply to any non-marital adult cohabitation of the parent, regardless of sex. He insisted
that he was not discriminating based on sexual orientation or gender.

On the first appeal, the court made clear that Tennessee law does not require inclusion of a paramour provision, but that one could be imposed if it was necessary to protect the best interests of the children. But the Chancellor did not, evidently, get the message, as he stated in his second order: “Court finds that though [Mother] found the clause to be inconvenient and had no concerns if her former husband should have a paramour overnight with his children present, the Court finds that the admonition in the other section of the permanent parenting plan is in the best interest of the children. A paramour overnight, abuse of alcohol and abuse of drugs are clearly common sense understanding that children can be adversely affected by such exposure, as found from legions of cases in Tennessee.” Thus, Ellis was continuing to base his ruling, contrary to the instruction from the court of appeals in its first opinion in this case, on general principles rather than specific evidence.

The court of appeals found that the appropriate standard to review this ruling is “abuse of discretion,” and that Chancellor Ellis had abused his discretion in placing the paramour restriction, because there was no evidence that it was in the best interest of the children, now teenagers.

“The record is devoid of any evidence whatsoever to support the finding that a paramour provision is in the best interests of the children,” wrote Judge J. Steven Stafford for the three-judge panel. “In fact, the record contains evidence demonstrating that a paramour provision is contrary to the best interests of the children. Mother testified that she has not been able to visit with the children at her home since July 2009 due to the paramour provision currently in effect. Mother testified that under the previous custody arrangement, the children would stay overnight while she and M.C. were living together in Tennessee and that the children never expressed any concerns about the situation.”

The expert appointed by the Chancellor to investigate the situation and report to the court had concluded that the children “view their relationship with M.C. as typical of adolescents with their parent/parent surrogate.” The expert, Dr. Pickering, found that “both children interacted well with M.C., and that ‘interacted with them in a positive and supportive manner.’” Indeed, Pickering had reported that M.C. was the “better surrogate parent” than Joseph’s wife, their stepmother. It didn’t hurt that M.C. is a social worker, and Dr. Pickering found that her training in that area was a “positive factor.”

To gild the lily, the Dr. Pickering’s report noted positive studies on gay parenting, as follows: “Further, research indicates that children raised in homes with same sex parents/parent surrogates tend to develop normal social relationships, and are no more likely to display same sex sexual orientation than children raised in more traditional two parent homes.”

In the absence of any evidence introduced by the father to the contrary — indeed, he had expressed indifference about whether the children were exposed to M.C. — the court found that it was wrong for Chancellor Ellis to insist on the paramour provision.

Rather than remand for further consideration by the trial court, the court of appeals reversed outright the trial court’s “finding” that a paramour provision was in the best interest of the children, and ordered that costs of the appeal be awarded to Angel. A.S.L.

Finding Former Lesbian Partners Were Family Members, Brooklyn Judge Dismisses Petition to Reclaim Apartment After Split-Up

New York City Civil Court Judge Laurie L. Lau ruled on June 2 that the owner of a four-apartment building in Brooklyn could not treat her former same-sex partner as a mere “licensee” who could be forced to vacate the apartment in which they had lived together at the owner’s option, since they were "family" members under the precedent of the 1989 New York Court of Appeals decision, Braschi v. Stahl Associates. Phelps v. Ray-Chaudhuri, No. 54177/10 (N.Y.City Civ. Ct., Kings Co., June 2, 2010) (NYLJ, 7/8/2010, p. 29).

According to the detailed recital of the testimony in Judge Lau’s opinion, Danica Phelps and Debi Ray-Chaudhuri became partners in 2002 and began living together in 2004. In 2006, Phelps sold some other property and bought the building on Franklin Avenue in Brooklyn where they occupied a ground floor apartment together for about three years.

Although they had not registered as New York City domestic partners or formed a civil union or same-sex marriage elsewhere, Judge Lau found that consistent with the Braschi ruling they should be considered family members based on numerous indicia, including most importantly the documentary evidence supporting Ray-Chaudhuri’s testimony that they planned to have and raise children together. Her cousin donated sperm pursuant to a written agreement so that Phelps could bear a child related to both of them, and their son was originally given a name that included both mother’s surnames. In addition, there was evidence of merged finances during their cohabitation, and of involvement of Ray-Chaudhuri’s family at various times. Ray-Chaudhuri also performed various chores around the building and shared parenting duties with Phelps.

Phelps testified that she moved out with the child after the relationship broke down and turned violent, and she and the child had been living with relatives in New Jersey. She asked Ray-Chaudhuri to move out of the apartment, but she refused to do so. Phelps then filed a summary proceeding, seeking to recover possession of the apartment, in which she characterized Ray-Chaudhuri as a licensee whose license to occupy the premises had been revoked. Ray-Chaudhuri had countered with the allegation that she was a “family member” who could not be removed through this summary proceeding.

“The Real Property Actions and Proceedings Law (RPAPL) provides that a petitioner may recover possession from someone who is ‘a licensee of the person entitled to possession of the property at the time of the license, and... the license has been revoked,’ (RPAPL 7137). A licensee is ‘one who enters upon or occupies lands by permission, express or implied of the owner, or under a personal, revocable, non-assignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser upon revocation of the permission or privilege (Rosensiel v. Rosenstiel, 20 AD2d 71, 76 1st Dept 1963). The court must therefore determine the nature of the relationship between the parties at the time Ray-Chaudhuri initially took occupancy of the Apartment as that would be the time any license to occupy the Apartment was created,” wrote Judge Lau.

“While their relationship has obviously deteriorated into one of animosity and hostility,” she continued, “the evidence establishes the parties had intended to form a lasting familial unit. It has been held that ‘lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence,’ (Braschi v. Stahl Associates Co., 74 NY2d 201, 211 1989) satisfy the definition of ‘family’ for purposes of the Rent Stabilization Code. The evidence here supports the same conclusion. That the parties entered into an agreement manifesting their intention to both act equally as parents to a child means that each undertook the responsibilities and obligations of parenting a single child. While the absence of a formal adoption might have significant legal impact in claims involving third parties, the issue here is how the parties regarded each other. Under the circumstances here, the court finds that respondent was not a licensee of petitioner, and that this proceeding cannot be maintained.”

The respondent is represented by Virginia Goggin of NY Legal Assistance Group. A.S.L.
that the company had actually waived its right to demand arbitration by litigating for 15 months (including substantial participation in discovery) before filing its motion. The case involves a gay employee who claims to have been constructively discharged on the basis of his national origin and gender. According to the court’s account of the complaint, plaintiff’s claims to have been falsely accused of “coming on” to a male co-worker, and the same co-worker had complained to management that plaintiff “acted and talked like a female” when interacting with the co-worker. The company supervisor “wrote up” both employees for being “disruptive.” After plaintiff decided to “come out” to his co-workers in order to put an end to all the gossip and speculation about him, he found that he was being treated worse than before, offensive comments mounting up to verbal and physical harassment. Then plaintiff was suspended, ostensibly for responding to his disciplinary write-up with a profane comment. Feeling he could not tolerate the situation any longer, he never returned to work, instead filing his discrimination claim in federal court. The district judge found that unconscionable aspects of the arbitration agreement could be severed, and that the company had preserved its right to arbitrate by raising the arbitration clause as one of its defenses in its answer to the complaint. The 3rd Circuit disagreed, finding unconscionability (both procedural and substantive) that was too substantial for severance, and finding that the company’s litigation activities over 15 months would constitute a waiver of its arbitration rights even if the court found the arbitration provision enforceable. The court studiously avoided making any comments going to the substance of the complaint. There is federal case law suggesting that employees who encounter discrimination due to failure to comport with gender stereotypes may state a sex discrimination. One would expect that the company will argue on the merits that the facts alleged by the plaintiff are not sufficient to invoke this doctrine.

7th Circuit — A 7th Circuit panel ruled in U.S. v. White, 2010 WL 2557762 (June 28, 2010), that the founder and content-provider of a right-wing website did not enjoy First Amendment protection against prosecution for posting extensive identifying information about the former of a jury in the trial of a white supremacist who was charged with soliciting the murder of a federal judge. The per curiam 7th Circuit opinion reversed a trial judge, Lynn S. Adelman (N.D. Ill), who had dismissed the indictment of defendant William White on the ground that it violated the First Amendment. Judges Posner, Flaum and Williams made up the 7th Circuit panel, which described the postings giving rise to the prosecution: “The September 11 entry by White was entitled “the Juror Who Convicted Matt Hale.” It identified Juror A by name, featured a color photograph of Juror A and stated the following: “Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].” The next day, White posted a follow-up entry noting that the previous day’s posting had been blocked and reposting the information. The per curiam court found no First Amendment violation in prosecuting White for making these postings. The court stated that First Amendment protection turned on White’s intent in posting the information. If it “was to request one of his readers harm Juror A, then the crime of solicitation would be complete. No act needed to follow, and no harm needed to befall Juror A. If, on the other hand, White’s intent was to make a political point about sexual orientation or to facilitate opportunities for other people to make such views known to Juror A, then he would not be guilty of solicitation because he did not have the requisite intent required for the crime.” If the government’s evidence at trial is not sufficient to sustain its burden on intent, the trial judge can grant judgment to the defendant on First Amendment grounds.

California — Final arguments were held before U.S. District Judge Vaughn Walker in Perry v. Schwarzenegger on June 16 in San Francisco. The argument was focused on a lengthy list of questions that the judge had released and sent to the parties a week before the argument. The defendants of Proposition 8, represented by Charles Cooper, insisted that a policy judgment that marriage should be limited to the kind of couples (i.e., different-sex couples) who can theoretically conceive children was a rational one, and that a rational basis was all that was necessary to reject the constitutional challenge. Ted Olson, representing the plaintiffs, argued that a fundamental right was at stake, requiring more in the way of justification. Press reports indicated that Walker reacted skeptical to Cooper’s argument. It was widely anticipated that Judge Walker would issue his decision during the summer, and that whichever side lost would appeal promptly to the 9th Circuit.

California — On June 28, 2010, U.S. District Judge Virginia Phillips (C.D.Calif., Riverside), denied a motion for summary judgment filed by the government in Log Cabin Republicans v. United States, No. CV04-8425 (VAP), a case challenging the U.S. Defense Department’s “Don’t Ask, Don’t Tell” policy on service by LGBT people. Rejecting the government’s argument that the case should be disposed of under the rational basis test, Phillips found that 9th Circuit precedent, exemplified by Witt v. Dep’t of the Air Force, shifted the burden to the government to show at trial that there is “an important government interest at stake to intrude on the personal and private lives of homosexuals,” which Judge Phillips characterized as “a much harder one for the government to prove.”

In a previous ruling, Phillips had rejected the argument that Log Cabin Republicans did not have standing to challenge the policy, finding that it was acting on behalf of members who were either in the military or had been separated under the policy. Phillips announced her ruling without a written opinion, but indicated that one would be subsequently issued. The opinion emerged a few weeks later, shortly before the trial began on July 13. At the start of the trial, government attorneys indicated they would not put in any evidence, urging the court to follow 9th Circuit precedents and defer to military judgment and the legislative history of the statute, while continuing to argue Log Cabin’s standing, a point they had lost in the pre-trial motion skirmishing. Daniel Woods of the Los Angeles office of White & Case represents Log Cabin Republicans in its challenge of the policy. In his opening statement to the court, he indicated that he would put in evidence on the standing point as well as much factual and expert testimony going to the irrationality of the policy. Log Cabin Republicans is an organization of LGBT rights supporters who identify with the Republican Party. Nat’l Law Journal, June 28, 2010 & numerous press reports on July 13-14 concerning the beginning of the trial.

Kentucky — U.S. District Judge John G. Heyburn II denied a motion by the defendants to dismiss a sexual orientation discrimination claim brought by a former employee of the state government in Stroder v. Commonwealth of Kentucky Cabinet for Health and Human Services, 2010 WL 2464913 (W.D.Ky., June 14, 2010). Milton Stroder alleges that he was terminated from his position due to his sexual orientation, and that there is no rational connection between his termination or position and his sexual orientation, and claims violations of the federal and state constitutions and an executive order of the governor. He seeks injunctive and declaratory relief only. The defendants moved to dismiss relying on an affidavit from J.P. Hamm, Executive Director of the department for which Stroder had worked, claiming that Stroder’s factual allegations are incorrect and state merely legal conclusions, that defendants enjoy qualified immunity under the 11th Amendment, and that there is no private cause of action under the state constitution and the executive order. Judge Heyburn pointed out that factual disputes are not resolved on a motion to dismiss; at this stage, plaintiff’s factual allegations are accepted for purposes of testing the viability of the complaint, and Stroder had made the specific allegations necessary to state a discrimination claim. Furthermore, Judge Heyburn rejected qualified immunity, stating: “It has been clearly established for some time
that government agents may not discriminate against an individual on the basis of his sexual orientation without some rational basis for doing so,” citing *Romero v. Evans*, 517 U.S. 620 (1996). “Without any discovery, if it is unknown exactly why Hamm terminated Plaintiff and, if it was because of his sexual orientation, whether there was a rational basis for that decision. With those facts in dispute, the Court cannot determine Hamm’s entitlement to qualified immunity at this time and must deny themotion to dismiss.” As to the co-defendant government’s motion to dismiss, immunity is irrelevant because the complaint does not seek monetary damages. Finally, Judge Heyburn put off the need to decide there is a cause of action on the state claims, since the federal claim is viable and gives the court jurisdiction, so discovery can proceed and state claims can be determined in a summary judgment motion or after trial.

**New York** — Some sex-panicked male NYC police officers who claim to have been subjected to unlawful sexual harassment when an openly gay officer grabbed his crotch in front of them have succeeded in getting New York City to pay them big bucks in settlement of their implausible federal Title VII lawsuit, according to a July 13 report in the *New York Daily News*. Sergeants Dominic Coppola and Sean Gallagher will reportedly receive $300,000 under the settlement. Lt. Kieran Crowe, who retired from the NYPD in 2008 after a departmental trial found that he had simulated masturbation while wiggling his tongue at the two sergeants, presented evidence at the departmental trial that he was treated for jock itch for a decade, while wiggling his tongue at the two sergeants, finding that he had suffered discrimination due to being gay.

**Pennsylvania** — A federal jury in Philadelphia decided on June 23 that the City of Philadelphia violated the First Amendment rights of the local chapter of the Boy Scouts of America when it moved to evict the Scouts from a city-owned building because the chapter would not repudiate the anti-gay membership and employment policies that its national body requires it to follow. *Cradle of Liberty Council of Boy Scouts of America v. City of Philadelphia*, E.D.Pa. The jury answered yes to the question whether the City’s action imposed an unreasonable unconstitutional condition on the Scouts’ continued use of the building under its existing sweetheart lease. However, the jury ruled in favor of the City on the two other claims in the case, finding that the City had not engaged in viewpoint discrimination and had not violated the Equal Protection clause because it had a rational basis for its actions. Unless the verdict is set aside in post-trial motions, it is expected that District Judge Ronald L. Buckwalter will convert his preliminary injunction against the City into a permanent injunction if the parties don’t settle. After announcing the verdict, Judge Buckwalter urged them to settle, while many of the jurors nodded their heads in agreement.[Law.com, June 24, 2010](http://www.law.com/jsp/lawcom/NriStoryView.jsp?ID=30106412). A few days later, after the Supreme Court issued its decision in *Christian Legal Society v. Martinez* (see above), the City filed a motion to set aside the verdict in light of the reasoning of that case, as well as inconsistencies in how the jury answered the eleven questions put to them.[Law.com, June 28, A.S.L.](http://www.law.com/jsp/lawcom/NriStoryView.jsp?ID=30106412)

**State Civil Litigation Notes**

**Arizona** — Stonewalling in discovery has backfired for the City of Phoenix, as the Arizona Court of Appeals upheld a default judgment against the City and a large attorney fee award in a suit brought by a man who was outraged at being improperly stopped and arrested while driving away from a gay bar. *Roberts v. City of Phoenix*, 2010 WL 2620802 (Ariz. App., Div. 1, July 1, 2010). Police Officer Michael Rogers stopped Randy Roberts moments after Roberts left “Charlie’s,” a popular Phoenix gay bar, in March 2001. Rogers claimed Roberts was speeding. Roberts denies speeding and claimed Rogers was unnecessarily aggressive, “pounded on the car windows with a flashlight, and threatened to pull him out of the car window. Additional officers arrived on the scene in response to Rogers’ request for backup and Roberts was arrested for failure to comply with the lawful order of a police officer.” After charges against Roberts were dropped, he brought a 42 USC 1983 suit against Rogers and the City, claiming selective enforcement, assault, failure to supervise, and malicious prosecution. Roberts claimed there was a pattern of police harassment of gay men leaving Phoenix bars, and sought Rogers’ personnel records in discovery. After in camera review, the trial judge, Maricopa Superior Court Judge Janet E. Barton, found the records irrelevant and refused to compel their disclosure, and after Roberts’ principal case, granted judgment to the defendants. Roberts’ attorney subsequently moved for relief from the judgment, based on newly-discovered documents, including records showing that there had been complaints against Rogers for making similar arrests in the past. The opinion for the Court of Appeals by Judge Michael Brown does not specify how Roberts’ attorney obtained the information, but over the course of the next few years there was a constant trickle of new information about materials omitted by the City or redacted from records disclosed, despite the court’s order to turn over unredeemed records. Judge Barton re-opened the case and finally became so frustrated with the City’s failure to comply with discovery requests that she defaulted the City, entered judgment for Roberts, and awarded him $10,000 compensatory damages, $2500 to reimburse his cost of defending the initial arrest case, $268,450 in attorneys fees, and over $17,000 in costs – about $280,000 in all. The Court of Appeals affirmed the default judgment and the remedy, finding that the record supported the finding that the City was acting in bad faith in failing to comply with discovery requests, but rejecting Roberts’ renewed requests for Rule 11 sanctions against the City’s attorneys, finding that the fault lay with the Police Department, not the attorneys. The City claimed Roberts should not get attorneys fees because he did not “prevail on the merits.” Rejecting this argument, Judge Brown pointed out that the trial court awarded compensatory damages. Brown also rejected the City’s proportionality argument against the fee award, quoting with approval Judge Barton’s statement: “It is ironic that the City contests the reasonableness
of the hours his attorneys spent on this matter. In essence, the City is contesting the reasonableness of hours that the City forced his attorneys to incur due to the unreasonable return of the City’s conduct in this matter.”

**Maine** — Maine Superior Court Justice William S. Brodrick has denied a motion to dismiss a sexual orientation discrimination complaint against a Denny’s Restaurant arising from a restroom dispute with a transsexual customer of the restaurant. *Freeman v. Realty Resource Hospitality, LLC, d/b/a/ Denny’s of Auburn, CV-09-199* (Maine Super. Ct., May 27, 2010). Plaintiff Brianna Freeman is described in the opinion as a male-to-female transgender individual who is undergoing transition. Freeman dresses as a woman and grooms and presents herself as such. In mid-summer 2007, she discussed her transitioning process with a Denny’s manager and was given permission to use the women’s room, but when she was back in the restaurant in late October, a different manager on duty ordered her not to use the women’s restroom because she was biologically male. In light of her appearance and gender expression, it was unacceptable to Freeman to use the men’s restroom, and she filed her claim alleging discrimination on the basis of sexual orientation, sex and disability. Maine’s human rights statute defines sexual orientation to include gender identity, and the Human Rights Commission’s interpretive rulings broadly construe the statute to prohibit discrimination based on transgender status. Judge Brodrick found that the sex and disability discrimination claims had to be dismissed, but that the sexual orientation claim was viable for trial. (Brodrick noted that some federal courts had expanded the reach of sex discrimination under Title VII to cover transgender cases, but rejected adopting such an interpretation for Maine’s law as unnecessary, since the legislature had amended the Human Rights Law to forbid such discrimination directly through the sexual orientation provision. Freeman is seeking only prospective relief, having dropped her claim for damages, and so the court agreed that a bench trial will be held.

**Maine** — The *Portland Press Herald* (July 15) reports that a jury in Cumberland County Superior Court found that Edward Russell, a resident of Buxton, was the victim of unlawful sexual orientation discrimination by his former employer, Express Jet Airlines, and has voted to award damages of $500,000 for emotional distress, $500,000 for punitive damages, and $47,000 for lost wages. The jury’s damage award is subject to damage caps that will be applied by the judge. Russell’s attorney, Guy Loranger, speculated that the final award would be in the neighborhood of $547,000, plus attorneys fees and costs. Attorneys for the employer have indicated that they intend to appeal the verdict. *Russell v. Express Jet Airways*. According to evidence presented at trial, Russell was qualified to fill a vacancy for the general manager position at the jetport, but after some female employees who had been turned down for an open supervisory job complained that there was favoritism to gay men in the company, the owner decided not to fill this position with a gay man. Russell had applied for the position several times over the years as it became vacant, but was told by regional managers not to waste his time by applying. On one of those occasions, the company hired a general manager who was described by a regional executive as a “real man,” his credentials for that description evidently being that he made disparaging comments about gay people. Russell quit working there in 2007, discouraged by discriminatory treatment, and filed his lawsuit. According to Russell’s attorney, he is working as general manager for a rival airline at the same jetport.

**Michigan** — The Michigan Court of Appeals issued a brief order in *Harmon v. Davis*, Docket No. 297968, LC No. 10-101368 (July 8, 2010), reversing a trial court’s decision to hold an evidentiary hearing on a same-sex co-parent custody claim while holding in abeyance a decision on whether the co-parent had standing to seek custody after the break-up of her partnership with the legal parent. The order signed by Presiding Judge Karen M. Fort Hood held that the standing issue must be resolved against the plaintiff, as she “cannot meet the third party standing requirements” under the Child Custody Act, and she “cannot be considered a ‘parent’ because she is neither a parent through nature (a natural or biological parent) nor through adoption, so the statute is not satisfied. Nor, for that matter, can plaintiff gain standing through the unrebutted presumption from the birth of a child born during a legal marriage... In other words, one becomes a parent under the Child Custody Act through procreation, or through adoption or the presumption (not rebutted) arising from a child born in a legal marriage. Plaintiff admits that none of these situations apply. And, because it is well-settled that one who is not otherwise a legal parent cannot gain standing through equitable principles, see Van Zahorik, 460 Mich. 320, 331-332; 597 N.W.2d 15 (1999), the trial court erred in concluding that plaintiff could establish that she is a ‘parent’ under the act based on an agreement between two unmarried and unrelated individuals. One cannot confer standing by agreement.” The trial judge, Wayne County Circuit Judge Kathleen McCarthy, had decided to keep the standing issue in abeyance while proceeding to a factual hearing, but the court of appeals held that this was improper, as standing is a prerequisite to the court’s jurisdiction over the case. So, once again legal formalism triumphs and Michigan courts signal that the best interests of children being raised by same-sex couples are no concern of the courts when their parents terminate their relationship.

**New York** — The New York Court of Appeals has decided, 4-3, that employment discrimination claims under the N.Y. Human Rights Law premised on decisions having been made at a company’s offices in New York State and communicated to a non-resident from New York are not actionable if the decision involves only non-residents employed outside the state and have no direct impact in the state. Reversing an Appellate Division ruling in *Hoffman v. Parade Publications*, No. 132 (July 1, 2010), a majority of the court rejected the notion that the state’s anti-discrimination policies could have extra-territorial application if the discriminatory decision itself was made in New York. This ruling is unfortunate for LGBT people who work outside New York for large companies that are headquartered in New York. Fewer than half the states forbid sexual orientation discrimination, and many of those who do forbid such discrimination provide less expansive remedies than are available under the N.Y. Human Rights Law.

**New York** — In *Levine v. Werboff*, NYLJ, June 7, 2010 (Sup.Ct., Westchester Co., May 21, 2010), Justice Nicholas Colabella found that a married man who contracted herpes from his wife, after she had contracted it from having sex with her doctor, could sue the doctor for negligence and gross negligence, but not for fraud or negligent misrepresentation or negligence per se. Ruling on an apparent issue of first impression in New York, Justice Colabella found persuasive the Ohio Supreme Court’s decision in *Mussvar v. David*, 45 Ohio St. 314, 544 N.E.2d 265, which stated: “If one negligently exposes a married person to a sexually transmissible disease without informing that person of his exposure, it is reasonable to anticipate that the disease may be transmitted to them by a person’s spouse.” Wrote Justice Colabella, “The extension here to a spouse is to a narrowly defined class of persons, not a broader undefined community at large. There is also nothing unfair about extending such a duty of care to a spouse of the infected person. The alleged tortfeasor is in the best position in both instances to prevent the transmission of a venereal disease. Further, the potential for harm to the married person who becomes infected and the spouse of the married person who thereafter becomes infected is the same.” One wonders whether a New York court would extend comity to a same-sex marriage contracted in another jurisdiction in the application of this principle? And would a court extend the duty of care to registered partners under, for example, the NYC Domestic Partnership Ordinance?

**New York** — The ruling in *Estate of Fallou Diba*, 2010 WL 2696611 (Surrogate’s Ct., Bronx Co., July 8, 2010), presents an interesting example of recognition of a foreign marriage that could not have been contracted in the United States for purposes of estate administra-
tion. The late Fallou Diba, a Senegalese man lawfully employed in the United States, died intestate in a tragic accident on September 13, 1997, when he fell down an elevator shaft at work. Surviving him were two wives in Senegal, on whose behalf a wrongful death action was asserted and settled, creating funds for an estate. At the time of his death, Diba remained a citizen and domiciliary of Senegal, where plural marriages are legal. The question before the court is how to allocate the proceeds, in light of New York Estate Powers & Trusts Law 5-1.2(a)(2), which disqualifies a “surviving spouse” from being a distributee if the marriage is bigamous within the meaning of the Domestic Relations Law. Under N.Y. law, Diba’s second marriage would be considered bigamous, but it was legal in Senegal. The court decided that Senegalese law should govern this question and the two widows should split the surviving spouse’s elective share, to ensure that the surviving minor children’s shares are not reduced or eliminated. There can be only one surviving share for an elective spouse. Diba also left numerous children, who will receive their share. “Of course,” wrote Surrogate Lee L. Holzman, “the result reached herein might very well be different if, at the time of either marriage, any of the three parties involved was not a domiciliary of a jurisdiction that recognizes a polygamous marriage.”

New York — On June 8, New York County Surrogate Judge Kristin Booth Glen granted an application by Cable News Network to film an adoption proceeding involving a gay couple and a child conceived with a surrogate mother. In the Matter of the Adoption of an Infant Whose First Name is Nicholas, File No. 2010-1032. New York law provides a multifactorial test for judges to consider in deciding whether to authorize filming, including whether any party to the case would be adversely affected. Judge Glen appointed Columbia University Law Professor Suzanne Goldberg as guardian ad litem to present a report to the court on whether allowing filming would be against the best interests of the child. Prof. Goldberg opined that the filming would not be harmful, and on the contrary would be in the best interest of the child. Film from the ceremony was used in a documentary about the gay men and their process of having a child that was shown later in June on CNN. Judge Glen noted that had the child been born in New York State, both fathers’ names would have been entered on the birth certificate so an adoption would not have been needed to secure the co-parent’s parental rights. She also opined that since the men were legally married in Connecticut prior to the child’s birth, and New York will extend comity to such marriage, an adoption should not have been necessary in any event, but because most states do not recognize same-sex marriages, an adoption is prudent to secure the parties’ relationship whenever they might travel together. “Both parties take great joy in this event and believe that sharing it publicly will demonstrate the loving familial relationships of a same sex couple and their child and work to dispel prejudices against same sex families and adoption by gay men and lesbians,” wrote Judge Glen.

New York — In Macula v. Board of Education, 2010 WL 2698786 (4th Dept. July 9, 2010), the court upheld the Geneseo Central School District’s decision to reject a request from the plaintiff, a parent of students at the school, to set up a “truth table” at the high school when military recruiters would be present, so that he could provide students with “negative information about military service that petitioner believed they should consider before deciding whether to enlist.” All but one of the five appellate judges agreed that the school district was not violating any constitutional rights of the petitioner, and had not acted in an arbitrary and capricious manner. Justice Fahey dissented, arguing that the school district had denied petitioner’s free speech rights in a manner that was arbitrary and capricious. A.S.L.

Criminal Litigation Notes

District of Columbia — D.C. Superior Court Judge Lynn Leibovitz acquitted three gay men — Victor Zaborsky, Dylan Ward, and Joseph Price — on charges of obstruction of justice, conspiracy, and evidence tampering in the mysterious murder of D.C. attorney Robert Wone, who was found stabbed to death in a town-house inhabited by the three men, who lived together in a polyamorous relationship. The men claimed that an intruder must have entered the townhouse and stabbed Wone, who was lying on a bed in a guestroom after having worked late and been invited to stay over the night rather than drive out to his suburban home. The police found no evidence of a break-in, and suspected that the men were covering something up. Prosecutors lacked evidence sufficient to charge the men with murder, and the judge found that the prosecutors had failed to prove any of the charged offenses beyond a reasonable doubt. The three men are also defendants in a wrongful death action on behalf of Wone’s widow and estate. This case was on hold during the pendency of the criminal proceedings. The lower civil standard of proof leaves the men vulnerable to liability, especially as Judge Leibovitz commented that it was “very probable” that the men knew more than they had told the police about Wone’s death. Having been acquitted in criminal court, the men would be open to questioning in a civil trial. Law.com, July 7.

District of Columbia — Federal prosecutors will do anything they can to avoid litigating about the “don’t ask, don’t tell” policy. They tried, unsuccessfully, to put off the Log Cabin Republicans case (which went to trial over their protest on July 13), and are hoping to avoid trying the Witt case, which is likely if the policy is repealed in this year’s Defense Authorization bill. The government certainly wasn’t looking forward to the possibility of litigating over a “necessity defense” that Lt. Dan Choi and Cpt. James Pietrangelo II were expected to raise when they showed up in D.C. Superior Court on July 14 to answer charges of failure to obey a lawful order stemming from their having chained themselves to the White House fence during a demonstration against the policy earlier this year. So the prosecutors dropped their charges before the scheduled 10 a.m. trial, according to a report later that day from Advocate.com. Choi and Pietrangelo, gay service members who have become leading campaigners against the policy, would provide just the kind of articulate critique of this blatantly unconstitutional policy that the government would rather avoid having articulated in open court.

Massachusetts — The Massachusetts Supreme Judicial Court divided 5-2 on the question whether a 16 year old boy charged with statutory rape and indecent assault and battery against a younger boy should be able to have discovery in support of his defense of selective prosecution, a majority finding that he should, but on narrow grounds than had been approved by the Juvenile Court. Commonwealth v. Washington W., 2010 WL 2523440 (June 25, 2010). Both the defendant and the complainant have been diagnosed with Asperger’s Syndrome, a developmental disability. When defendant was 15 and complainant 13, defendant initiated sexual activity with complainant. The conduct continued until after defendant’s sixteenth birthday, ending soon thereafter. The complainant told his parents, who complained to the police. Defendant was charged with statutory rape for the actions postdating his birthday, and indecent assault and battery for those prior, in light of the age spread of two years and the fact that defendant would be treated as an adult for activity after he turned 16. Complaint, who did not allege force or coercion, was not charged with any offense. At first the trial judge rejected the discovery request, but then became persuaded that plaintiff should be allowed access to juvenile court records to determine whether the police brought such charges in cases of homosexual sex but not heterosexual sex. The SJC approved the discovery request, opining it was not necessary to determine in this case whether homosexuals are a constitutionally protected class, at least at this stage of discovery. An adult charge with a sexual offense could obtain information in support of a selective prosecution defense by reviewing open court records, but when charged with a crime against a juvenile, the records were not accessible. This justified resort to discovery, so that the prosecutor could
compete the necessary information to respond to the questions authorized by the court. The dissenters basically argued that the discovery request was a fishing expedition and that the juvenile court’s decision to grant the request was an abuse of discretion. “Based on the rationale used by the court, there always might be, at least hypothetically, some evidence to support a statistical claim of selective prosecution in the confidential files of the Juvenile Court, if only the accused could get access to it. Because he cannot access those files directly, the court has concluded that the burden should be placed on the prosecutor to compile and provide that information to him. This articulated justification is unbounded. In sum, the order entered by the Juvenile Court judge was an abuse of discretion, and the grounds on which it has been affirmed represent a misapplication of our jurisprudence with significant implications for baseless and systematic intrusions into the exercise of constitutional powers that reside in another branch.” Yes, Justice Cordy, but what if, in fact, the prosecutors are tougher on gay kids than non-gay kids? This can only be documented through the kind of discovery ordered by the court, since Juvenile Court records are sealed.

New York — A jury in Brooklyn has convicted Keith Phoenix of second-degree murder as a hate crime in the death of Jose Sucuzhanay and attempted assault as a hate crime in an attack on Romel Sucuzhanay, Jose’s brother. Prosecutors presented evidence that Phoenix and an accomplice, Hakim Scott, used anti-Latino and anti-gay slurs during the assaults. Scott was previously convicted on manslaughter and attempted assault charges on May 6, but the jury in his case did not find a violation of the hate crime laws. Scott is scheduled to be sentenced on July 14, and Phoenix will be sentenced on August 5. Gay City News, June 28.

Oklahoma — Exile! That is the fate of James T. Fisher, Jr., who was twice convicted and twice sentenced to death in the 1982 murder of Terry Gene Neal of Oklahoma City, and who has served more than 27 years in prison. Both convictions were set aside by appellate courts based on concerns about the quality of legal representation Fisher received. (See, e.g., Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002), granting writ of habeas corpus.) Fisher’s convictions were based, in part, on testimony by a third party, who was the initial suspect in the case, that he and Fisher met Neal in a downtown Oklahoma City gay cruising area, and that Fisher killed Neal after having sex with him. Neal was murdered in his apartment by “an assailant who screwed the broken neck of a wine bottle into his throat,” reports the Daily Oklahoman (July 13), and his television and car were stolen. Prosecutors spent nine months after the most recent reversal considering whether they could retry such an old case, and finally decided they could not, negotiating a release agreement under which Fisher is barred from returning to Oklahoma and is required to complete an intensive Alabama program on reintegration into society sponsored by the Equal Justice Institute. Oklahoma County District Judge Kenneth C. Watson approved the release agreement on July 12. A.S.L. @H2 = Legislative Notes

Hawaii — Governor Linda Lingle (Republican) waited until the last day when she could take action, 45 days after the legislature passed a Civil Union bill, H.B. 444, and then announced she would veto the bill, on July 5. The governor said that in her view it was just a marriage bill under a different name, and she was opposed to same-sex marriage. She also made the rather absurd statement that she believed the issue should be decided by the people in a referendum, not by their elected representatives in the legislature. This is an odd position for the governor to have taken, since in 1998 the people amended the state constitution to make it clear that they wanted the same-sex marriage issue to be a legislative matter. The amendment, passed in response to a Hawaiian trial court’s ruling that the state was required to allow same-sex couples to marry, states: “The legislature shall have the power to reserve marriage to opposite-sex couples.” This amendment differs from all the other state constitutional amendments passed in response to the same-sex marriage issue in this respect, making the issue one for legislative politics rather than for constitutional amendments or referenda. Lambda Legal and the ACLU LGBT Project announced that a lawsuit would be filed shortly arguing that something like the civil union law is required to satisfy the Hawaii’s Supreme Court’s ruling in the same-sex marriage case, since the constitutional amendment adopted in 1998 did nothing to change the court’s sex discrimination analysis and, as every court that has considered the issue has found, civil unions are not marriages and thus the court would not be precluded by the amendment from order the state to adopt some form of legal recognition affording equal rights to same-sex couples. Illinois — Governor Pat Quinn signed into law an anti-bullying bill on June 27. The law is intended to instigate measures to curb harassment in schools, including harassment based on sexual orientation. The law creates a 15-member prevention task force on school bullying, which has a reporting mandate to the governor by March 1, 2011, requires Illinois schools to present gang-prevention training, and requires schools to adopt plans to address bullying on pain of losing state financial assistance. The Advocate, June 30.

New York — The final weeks of the legislative session in New York usually involve a variety of important votes on issues that had accumulated during the months of agonizing over the annual budget bill. On June 22, the Senate approved the Dignity for All Students Act, a measure intended to combat bullying in the primary and secondary schools. The measure had previously been approved by the Assembly and was expected to receive the approval of the governor. When approved, it would provide the first explicit protection for transgendered people in New York statutory law. The Senate also approved the Intimate Partners Adoption Act on June 24, which would specify that unmarried intimate adult partners can jointly adopt a child, thus short-circuiting the necessity for two separate proceedings when a same-sex couple is acquiring a child through adoption. Both measures were introduced and championed by the openly-gay New York state senator, Tom Duane. The Senate also approved, on a vote of 50-11, a measure spearheaded by Senator Velmanette Montgomery to amend the Human Rights Law to prohibit employers from discriminating in the granting of funeral or bereavement leave to employees who are in “committed same-sex relationships.”, according to a June 30 report in The Advocate, which indicated that the measure had previously passed the State Assembly and was expected to be approved by the governor. *** However, on June 8, the Senate Judiciary Committee tabled consideration of the Gender Expression Non-Discrimination Act, which had previously been approved by the State Assembly. As with many other LGBT issues pending in the sharply divided Senate, the solid opposition of Republican members plus the opposition of Rev. Ruben Diaz, a Bronx Democrat who is a staunch opponent of any legislation on gay rights, meant that there was no majority for the legislation, and rather than see it voted down in committee, supporters allowed it to be tabled.

Oklahoma — The Tulsa City Council voted 6-3 on June 17 to add sexual orientation to the list of protected classes under the city’s non-discrimination policy for personnel. The city’s Civil Service Commission has already stated support for banning sexual orientation discrimination in city employment. Tulsa World, June 18.

Rhode Island — Evidently eager to protect transphobic Rhode Island citizens who commit hate crimes against transsexuals and transvestites, Governor Donald Carcieri, a Republican, vetoed a measure passed by the legislature that would have added gender identity and expression to the state’s hate-crimes law. Carcieri claimed that the amendment was unnecessary because the hate-crimes law already covered gender and sexual orientation, thereby proving his inability to absorb and understand legislative history. In the past, Carcieri vetoed a bill that would have authorized domestic partners to make funeral arrangements for one another, a veto so egregious that the legislature overrode it
with a bipartisan vote. The governor is also a staunch opponent of proposed marriage equality bills, even though the state — the nation’s smallest — is totally surrounded by jurisdictions that allow same-sex marriage and it is an easy matter for gay Rhode Islanders to get married across the border. Evidently, he can’t abide gay people. Luckily, he is term-limited and will be gone in January.

Texas — The Dallas Area Rapid Transit board voted on June 22 to amend its non-discrimination policy to add “gender identity” to prohibited grounds of discrimination in its operations. According to a June 23 report in the <i>Dallas Morning News</i>, DART already employs a transgendered bus driver, who has had to litigate in the past for equal treatment.

Utah — The Summit County Council voted unanimously during June to pass two ordinances having adopted such protections are Salt Lake City and County, Park City, Logan, West Valley City, and Summit County. A Salt Lake Tribune poll in January showed that 2/3 of Utah residents support extending protection against discrimination to LGBT people, but the legislature has been reluctant to act, even though the Mormon Church has dropped its opposition to anti-discrimination measures. To date, the jurisdictions with adopted such protections are Salt Lake City and County, Park City, Logan, West Valley City, and Summit County.

Law & Society Notes

Supreme Court — Gay rights were front and center during confirmation hearings on President Obama’s nomination of Solicitor General and former Harvard Law School Dean Elena Kagan to fill the Supreme Court vacancy created by the retirement of Justice John Paul Stevens. The immediate prior occupants of the Stevens chair were William O. Douglas and Louis D. Brandeis — big shoes to fill!! Senators from both sides of the aisle questioned Kagan about her actions as Harvard Law dean regarding military recruitment. When Kagan became dean, she inherited a policy of denying use of HLS Career Services facilities to employers who discriminate based on sexual orientation. This policy actually dated back several decades, with HLS being among the first law schools to challenge the military over its exclusion of gay people from service. The policy went through a period of on and off again during Kagan’s deanship as the Bush Administration reinterpreted the policy in such a way that the University, in danger of losing significant federal grants, required the law school to admit military recruiters. Then, when the 3rd Circuit declared the Solomon Amendment — a federal law threatening cut-off of federal money to schools that discriminated against military recruiters — unconstitutional, Dean Kagan revived the ban, while allowing an organization of student military veterans to host military recruiters on campus. When the Supreme Court reversed the 3rd Circuit, the law school reverted to providing Career Services facilities. Some Republican Senators expressed the view that Kagan was hostile to the military and was acting illegally in excluding military recruiters, and at least one — Sen. Sessions — repeatedly misrepresented what she had one. On another controversial point, Kagan clarified that when she had testified that there was no constitutional right to same-sex marriage during her confirmation hearings as Solicitor General in 2009, she had been speaking about the state of the law at that time, and was not giving her opinion as to a future case raising that question. The Judiciary Committee was originally scheduled to vote on the nomination on July 13, but the vote was delayed at the request of Republican members of the Committee whose staff members were desperately scouring the hundreds of thousands of pages of documentary evidence for some smoking gun. Barring that, the nomination was widely expected to be confirmed before the Senate recessed for the summer.

Federal — During June, the U.S. Department of Justice issued made public a memo from its Office of Legal Counsel (dated April 27, 2010) opining that the criminal provisions of the Violence Against Women Act (VAWA) do apply to otherwise covered conduct when the offender and victim are the same sex. The criminal provisions referenced in the memo are 18 USC 2261 (interstate domestic violence); 18 USC 2261A (interstate stalking), and 18 USC 2262 (interstate violation of a protection order). The memo focuses on the fact that coverage provisions using the term “spouse,” which may not be construed to apply to same-sex partners because of the Defense of Marriage Act, also refer to “intimate partner,” which can be construed to include same-sex partners. The memo was issued over the signature of David J. Barron, Acting Assistant Attorney General. It is available on Westlaw: 2010 WI 2431395.

Federal — The State Department announced on June 9 that it was dropping the requirement that transgender applicants provide proof of sex-reassignment surgery in order to get passports issued in their preferred gender. Under the new policy, documentation that a doctor has provided treatment and diagnosed gender identity disorder will be sufficient to obtain a transitional identification, and certification that an individual is living in their preferred gender will merit a passport identifying the individual in their preferred gender. Obtaining passports that identify gender consonant with the individual’s gender presentation is, of course, very important for transgender individuals who use their passports for identification purposes and to engage in international travel.

Federal — The U.S. Department of Housing and Urban Development announced on June 7 that it was modifying the non-discrimination requirements attached to federal housing assistance provided to local governments. Under existing law, the rules banned discrimination covered by the Federal Fair Housing Act in any program or activity receiving federal housing money. Under the new rules, recipients will also have to comply with all state and local anti-discrimination laws. Since more than 20 states and more than 100 local governmental jurisdictions ban sexual orientation discrimination, and many of those also ban discrimination based on gender identity or expression, the effect of HUD’s new requirements is to provide federal backing for those state and local non-discrimination policies.

Federal — In a final rule published in the Federal Register on June 14, 75 Fed. Reg. 33491, the Office of Personnel Management has updated its definitions of “family member” and “immediate relative” for leave purposes in federal executive branch employment. The new definitions will apply for purposes of sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer, according to a June 15 report by BNA Daily Labor Report (113 DLR A-6). These definitions do not apply to FMLA leave, however, which is statutory and can’t be extended by regulatory redefinition of terms that are defined in the statute.

Federal — On June 22, the Wage & Hour Division of the U.S. Department of Labor published an “Administrator’s Interpretation” (No. 2010-3), construing the phrase “in loco parentis” in the Family and Medical Leave Act, 29 U.S.C. 2612(A)(1)(a), to make clear that employees who have a parental relationship with a child are entitled to FMLA leave to take care of the child (or bond with the newborn child) even if they have no biological or legal relationship with the child. The Interpretation specifically notes that it applies to same-sex couples who are raising children. Although FMLA was enacted at the beginning of the Clinton Administration in 1993, this is the first time the government has adopted a written interpretation making this apparently obvious application of the statutory provision to same-sex partners. It is another of many examples of recent actions by the Obama Administration to use existing statutes or regulations in a way that recognizes the reality of non-traditional families in America.

Federal — Addressing a Gay Pride event planned by LGBT State Department employees, Secretary of State Hillary Rodham Clinton...
announced on June 22 that the State Department was amending its non-discrimination policy to include “gender identity,” and that she was asking State Department offices around the globe to make LGBT rights advocacy a priority. There will also be a new emphasis on documenting LGBT human rights issues in foreign countries for the State Department country reports that are heavily relied upon in asylum proceedings to determine whether gay refugees have a reasonable fear of persecution in their home countries.

Employee Benefits — Because federal law forbids any agency of the federal government from recognizing a same-sex couple’s marriage or spousal status for any purpose, those who received domestic partnership benefits from their employers are stuck paying taxes on imputed income for the value of the benefits (which would be exempt from taxation for a federally recognized spouse). Some employers, noting the inequity or hardship of the extra tax burden, have quietly added to their benefits by covering the extra tax costs. Now the issue has gone very public with an announcement that Google, one of the most visible employers in the new information economy, had adopted this policy as of July 1. According to a June 30 report in The New York Times, employee benefits experts predicted that Google’s example would inspire many other employers to take the same step. Of course, if litigation to invalidate DOMA is eventually successful, this won’t be necessary.

Arizona — Responding to a decision by the state government to end domestic partnership benefits for state employees, University of Arizona came up with a new plan to subsidize insurance for domestic partners of its employees, “in order for us to be competitive, to be able to attract talented people, we need to be able to offer benefits that other employers are offering,” said Allison Vaillancourt, UA’s Vice President for Human Resources. Arizona Daily Star, June 4.

California — The California Fair Political Practices Commission has proposed that a fine be imposed on The Church of Jesus Christ of Latter-Day Saints (LDS — commonly known as the Mormon Church), for violations of California election finance law in connection with the Proposition 8 initiative vote in November 2008. The Committee found that LDS failed to report direct last-minute financial support to the Yes on 8 campaign. Investigations have also uncovered considerable in-kind contributions to the Yes on 8 campaign from the Mormon Church that were not reported. The Commission documented $36,928 in 13 unreported monetary donations, and recommended a penalty of 15%, or $5,539.00. FPPC No. 2008-0735.

Colorado — The Aurora Public School district has begun allowing domestic partners of employees to register for medical and dental insurance, effective July 1. Employees have to pay the entire premium for their partners, but have the benefit of buying into a competitively priced group insurance program. The district’s plan is modeled on a plan that went into effect July 1 for state employees. Denver Post, June 14.

Illinois — State Treasurer Alexi Giannoulias, candidate in a hotly contested primary for the U.S. Senate, signed an executive order on June 13 providing additional domestic partnership benefits for gay and lesbian employees of his office. They were already receiving health care benefits. The order adds other family and medical leave benefits that are routinely extended to married employees. Chicago Sun Tribune, June 14.

Marquette University — Marquette University announced on June 9 that it had reached a settlement with Jodi O’Brien, who was offered the job of Dean of Arts and Sciences at the university, only to have the offer rescinded, reportedly due to church pressures on the trustees of the university. O’Brien is an openly-Lesbian academic of national reputation who has published on the subject of lesbian sexuality. The university’s decision to rescind the offer, which had been made pursuant to the enthusiastic recommendation of a search committee, stirred outrage on campus and public advertisements by faculty criticising the university. The Rev. Robert A. Wild, president of the university, said that his decision to rescind the offer was based on his judgment about O’Brien’s writings in light of the university’s mission and identity. It seems quite surprising that Wild would not pay attention to these issues before such an offer was made, which suggests that somebody is not being forthright about what was going on.

University of Memphis — On June 16, the University of Memphis began offering family membership to its student recreation center to students who prove they are living in a family unit, regardless of the sexual orientation of the adults in the unit. The University took a week to change its policy after receiving a complaint from a concerned female student, who wanted to be able to bring her wife and kids to the recreation center, but had been told she could not get a family membership because she and her wife were not married. They are registered domestic partners in Eureka Springs, Arkansas, a jurisdiction that allows non-residents to register as domestic partners. The couple did not go to a same-sex marriage state due to the expense, requiring a trip of at least 800 miles. In reporting on this story, the Memphis Commercial Appeal (June 17) noted that East Tennessee State University in Johnson City was also offering domestic partnership memberships at its student recreation center. The Tennessee Board of Regents approved the change of policy.

New York — The New York State Department of Taxation issued an advisory opinion on May 12, asserting that due to the requirements of the New York State Tax Law, sections 607(a) & (b) and 651(b), married same-sex couples living in New York will be treated as unmarried for income tax purposes. The cited provisions, taken together, are construed by the Department of Taxation to mean that one’s marital status for state and federal tax purposes must be the same, and that a person’s marital status for New York State tax purposes is determined by their status for federal tax purposes. So long as the federal government refuses to recognize validly contracted same-sex marriages, therefore, the New York State Tax Department takes the position that they are not recognized for purposes of state tax law. TSB-A-10(2) (Petition No. 10090921A), May 12, 2010, signed by Jonathan Pessen, Director of Advisory Opinions, Office of counsel, New York State Department of Taxation and Finance. * * * There has been a below-the-radar report of at least one surviving same-sex spouse having been informed that he will be receiving a refund of taxes paid due to the non-recognition of his marriage, but we’ve been unable to secure any written evidence that the Tax Department has adopted any policy to this effect.

New York — Governor David Paterson issued Executive Order No. 8.1 on July 14, providing that the judicial screening panels that consider candidates for appointment by the governor “shall not give any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation” of candidates that they consider. The factors the screening panels are supposed to consider are “each candidate’s integrity, independence, intellect, judgment, temperament and experience.” In recruiting candidates to apply for appointments, “the Judicial Screening Committees shall strive to find candidates that reflect the diverse backgrounds and experiences of the citizens of this State.” The order is published in 9 NYCRR 7.8.1.

Lesbian Parenting — A long-term longitudinal study of lesbian parenting has concluded that children raised by lesbian couples seem to turn out better than their peers raised by different-sex couples or single parents, at least judging by various measures of positive achievement and adjustment and adverse personality characteristics. The U.S. National Longitudinal Lesbian Family Study results were released on June 7 by the Williams Institute at UCLA Law School. The study is headed by UC San Francisco Psychiatry Professor Nanette Gartrell. Copies of the study are available on the website of the professional journal Pedi- atrics, at tinyurl.com/2ea06cx1.

Texas — Trustees of the Alamo Colleges in San Antonio have voted to ban sexual orientation discrimination at the school at a June 22 meeting, but have hesitated to add gender iden-
Australian High Court Rejects Sexual Orientation Asylum Claim From Pakistani Man

The High Court of Australia has ended the attempts of a Pakistani applicant to gain refugee status when he claimed a well-founded fear of persecution on the ground of his homosexuality if returned to Pakistan. The case was Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 266 ALR 367 (“SZMDS”) is the appeal, unique to this claimant, of the kind required to be applied to all Migration Act litigants in Australia.

SZMDS was married with four children in Pakistan. He arrived in Australia in 2007. In support of his application for a protection visa he claimed that he had a homosexual relationship with an Indian boy and his boss in the United Arab Emirates from 2005 until 2007 and feared that if he returned to Pakistan he would face persecution and his family would be ashamed. The decision to reject his application was affirmed by the Refugee Review Tribunal on the basis of evidence that he had returned to Pakistan to visit his family for three weeks before coming to Australia and had failed to seek asylum when visiting the United Kingdom in 2006. The Tribunal considered these facts to be inconsistent with SZMDS’s asserted fear of persecution.

The Federal Court of Australia had quashed the Tribunal’s decision on the ground that its reasoning that he was not a homosexual was “based squarely on an illogical process of reasoning,” such that the Tribunal fell into jurisdictional error. In a 3-2 decision, the High Court held that neither the Tribunal’s decision nor the findings made on the way to its decision were irrational or illogical such that it fell into jurisdictional error. Two judges in the majority, Crennan and Bell JJ (both female), held that the test for illogicality or irrationality amounting to jurisdictional error involves asking whether reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. A decision will not be illogical, irrational or unreasonable simply because, on probative evidence giving rise to different processes of reasoning, one conclusion has been preferred to another possible conclusion. This restated long-standing Australian decisional law on the subject. They asserted that there was no sense in which the decision that SZMDS did not fear persecution could be said to be clearly unjust, arbitrary, capricious, not bona fide or unreasonable in the sense required to amount to jurisdictional error.

The Tribunal had not accepted SZMDS’s claim to have “engaged in the practice of homosexuality” in the UAE. Crennan and Bell JJ noted that while the applicant was having his homosexual affair in the UAE, homosexual sex was criminalised under both civil and Shari’a law. The Tribunal had accepted that homosexuals as a social group in Pakistan faced persecution. It also assumed that a person with a genuine fear of persecution for that reason would not go back to Pakistan and would seek asylum at the first available opportunity. The Tribunal concluded that, on the basis of his conduct, it was improbable that SZMDS feared persecution because of homosexuality as claimed. The Federal Court differed in finding that SZMDS’s claim of such a fear was plausible. Crennan and Bell JJ thought that, in this case, there was room for a logical or rational person to reach the same decision as the Tribunal. It was not the case that only one decision was open on the evidence or that there was no probative evidence for the decision. It was not the case that there was no logical connection between the evidence and the inferences or conclusions drawn. It could not be said that the Tribunal’s reasons were unintelligible.

The split in the decision essentially came down to the value judgment of the majority that there was not such gross irrationality or illogicality in deciding that SZMDS did hold the required well-founded fear of persecution when he had visited his family in Pakistan after his claimed relationship in the UAE and had failed to claim asylum in the UK as to warrant the conclusion that the decision was affected by jurisdictional error. Interestingly, Bell J, the most recent appointment to the bench and who has not hidden her lesbianism, sided with the majority. The minority included Gummow J, the Court’s senior puisne judge, who has a track record of writing the Court’s leading judgments. Gummow J was in the majority in the landmark decision in 2003 that it is error to reject a claim for refugee status made on the ground of homosexuality by saying that the applicant could avoid persecution by living a closeted life in their home country (Appellant S396/2002 v Minister for Immigration and Multicultural Affairs, [2003] HCA 71; 216 CLR 473). David Buchanan SC.

China — Advocate.com reports that a Beijing court dismissed a lawsuit brought by a man against the Red Cross when it refused to let him donate blood because he is gay. Wang Zizheng filed suit asking for an apology and permission to become a blood donor. According to the press report, the court ordered the case dismissed without issuing any explanatory opinion.

Costa Rica — The Constitutional Court has ordered the nation’s Elections Tribunal to suspend a ballot question on same-sex marriages that was to be included in December 2010 municipal elections, while the Court studies the question whether allowing the vote would violate any international treaty requirements. Opponents of the anti-marriage referendum have argued that it is improper to allow the majority of the population to vote on the rights of a tiny minority.

Ireland — The upper house of the parliament of the Irish Republic, called the Seanad, voted 48-4 in favor of a Civil Partnership Bill on July 8, it having previously been approved by the lower house, called the Dail. The vote came after a marathon 23-hour debate, according to a July 9 report in the Irish Times, with 77 amendments being offered by a small but outspoken group of opponents who sought to create all sorts of exceptions and exemptions, who now threaten to file a lawsuit claiming the law is invalid due to constitutional provisions protecting traditional marriage and the lack of various religious conscience objections. The bill would extend marriage-like treatment to same-sex couples who register as partners in the areas of property, social welfare, succession, maintenance, pensions and taxes. It has been fiercely criticized by many Irish gay rights advocates as sealing Irish gays into a second class status, and some have called for its rejection by President Mary McAleese who has the option of signing the measure into law or referring it to the Supreme Court if she has doubts as to its constitutionality. If it is approved, it would become effective in January 2011. In the meantime, the government would consider additional legislation necessary to adjust social welfare and taxation rules to accommodate the new law. Irish Times, July 15.

Ireland — The government withdrew its application to appeal a ruling by the High Court that found Irish law on transgender rights to violate the European Convention on Human Rights in case that was brought by Dr. Lydia Foy, who was registered as male at birth and fought for the right to live as a legally recognized woman. It is expected that the government will introduce legislation similar to that adopted in the U.K. to provide a mechanism for legally recognized gender identity. Irish Times, June 22.
**AIDS & RELATED LEGAL NOTES**

### Obama Administration Announces National Strategy to Combat HIV/AIDS

With advanced fanfare and a White House ceremonial roll-out on July 13, the Obama Administration announced that it was setting a series of specific targets and adopting a coordinated national strategy to combat HIV/AIDS that is unprecedented in the United States. In a letter introducing the report underlying the policy, President Obama stated that the country is “experiencing a domestic epidemic that demands a renewed commitment, increased public attention, and leadership.”

One of the targets is to lower the annual rate of new HIV infections in the U.S. by 25 percent, from 56,300 to 42,225, by 2015. Critics quickly pointed out that this seemed relatively unambitious as a goal, but was probably adopted because the policy may be criticized as more talk than targeted funds. Another target is to increase from 79 to 90 percent the percentage of HIV-infected people who know their status, through a stepped up program of HIV testing. Another goal is to increase the portion of newly-diagnosed people who get clinical care within three months from 65 percent to 85 percent.

The major change in emphasis from prior federal HIV prevention efforts is to acknowledge that special efforts need to be made focused on the communities most heavily hit by the epidemic, including gay and bisexual men, whose needs in this regard were not emphasized during the Bush Administration. The biggest criticism of the new strategy is that it does not propose increased federal funding, just a shuffling around of funding at existing levels, although this could have a salutary effect to the extent that existing priorities waste funds on ineffective programs, such as abstinence education for teens, rather than targeted safe-sex education and distribution of condoms where they will do the most good.

Aside from prevention efforts, however, activists pronounced disappointment that the strategy did not include any major ramping up of efforts to research a cure, although there have been recent reports of tantalizing leads in that direction. Only a tiny proportion of the national research budget has been allocated to cure-related research. Most federal spending on HIV/AIDS goes to subsidize state AIDS Drug Assistance Programs (ADAP) and thus far pathetically ineffective public health prevention programs. A.S.L.

### 8th Circuit Remands for De Novo Review of Disability Benefits Denial

Eric S. Ringwald will get a second chance to persuade a federal court that Prudential Insurance Company erred in rejecting his claim for long-term disability benefits, as a result of a ruling by the 8th Circuit U.S. Court of Appeals on June 21, finding that District Judge Lyle...

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**United Kingdom** — Theresa May, Home Secretary in the new coalition government headed by David Cameron (Conservatives) and Nick Clegg (Liberal Democrats), announced that men with convictions for gay sex with someone over the age of 16 will have those records expunged. Britain decriminalized gay sex for adults in 1967, but set the age of consent at that time at 21, so men continued to be prosecuted and convicted if they had sex when young. The age was dropped to 18 in 1994, and 16 in 2000. “It’s not fair that a man can be branded a criminal because 30 years ago he had consensual sex with another man,” explained May in announcing the change. “As a government we have made clear our determination to take concerted action to tear down barriers to equal opportunities and build a fairer society.” Cameron made a strong pitch for gay rights during the recent parliamentary elections, and held a Gay Pride reception at 10 Downing Street — the first such event to be held by a Conservative PM. Although he is committed to seeking certain changes in law that are sought by gay lobbyists, he remains opposed to same-sex marriage or to ending the ban on blood donations by gay men. *Daily Telegraph*, June 17; *Independent*, June 15.

**United Kingdom** — Justice Moylan of the High Court in Leeds, ruled on June 17 that a lesbian whose ex-partner had a child through donor insemination could not be ordered to pay maintenance for support of the child. The couple did not have a civil partnership ceremony so, opined the court, the defendant could not be deemed to be a “parent.” Although the defendant might be considered a “social and psychological” parent, said the judge, there was a difference between such status and the legal duties attached to parental status. Even though defendant had secured a court order to get continued contact, including shared residence, with the child, that did not suffice under existing statutes. “In my view it is for the legislature to determine who should be financially responsible for children if it is to extend beyond those who are legal parents,” wrote the court. *Daily Telegraph*, June 18.

**United Kingdom** — The British Medical Association has approved a motion at its annual conference condemning therapy to change sexual orientation. The motion called for the National Health Service to investigate cases where it appeared that such treatments were being funded by taxpayers, pointing to a recent survey showing that one out of six therapists admitted that they have attempted to “cure” patients from having homosexual feelings. A.S.L.

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**Professional Notes**

At its House of Delegates Annual Meeting in San Francisco August 9-10, the American Bar Association will consider Resolution 111, offered by its Section of Individual Rights and Responsibilities, joined by several other ABA internal bodies as well as the bar associations of New York State, New York City, San Francisco, Massachusetts, Vermont, Washington State, Beverly Hills, and the National LGBT Bar Association, urging state, territorial and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry. Now would be a good time for ABA members who support marriage equality to urge their state and/or organizational delegates to support Resolution 111.

Paula Ettelbrick, former executive director of the International Lesbian & Gay Human Rights Commission as well as former legal director of Lambda Legal, has been appointed executive director of the Stonewall Community Foundation, a charity that raises money to support non-profit community organizations and activities in the NYC metro area. The organization is the LGBT equivalent of United Way or United Jewish Appeal.

The National LGBT Bar Association will present its Dan Bradley Award to Lambda Legal’s Legal Director Jon Davidson during Lavernder Law 2010 in Miami. Davidson joined Lambda Legal in 1995 after working for many years as an LGBT rights staff attorney with the ACLU of Southern California. Before joining the ACLU, he was a partner at the firm of Irell & Manella, and has taught as an adjunct professor for USC, Loyola (LA), Whittier, and UCLA. He is a graduate of Stanford University and Yale Law School.

Retired Australia High Court Judge Michael Kirby has been awarded the Gruber Justice Prize by the Gruber Foundation of New York. This is an annual prize worth $500,000, recognizing the recipient’s contribution to human rights and justice issues. Judge Kirby emerged on the court as one of the most important and influential openly-gay jurists in the world, and has published and lectured widely on human rights and LGBT rights. The Prize will be presented in a ceremony in Washington, D.C. on October 11, according to a press release from the Law Council of Australia. A.S.L.

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**AIDS & RELATED LEGAL NOTES**

**Obama Administration Announces National Strategy to Combat HIV/AIDS**

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Strom applied the wrong standard of review in his earlier decision rejecting Ringwald’s appeal of the insurer’s claim denial. Ringwald v. Prudential Insurance Company of America, 2010 WL 2471702.

Ringwald worked as a game table dealer at Harrah’s Casino in the St. Louis area, covered by a group disability benefits policy that was sold to his employer by Prudential. The policy provides up to 24 months of short-term disability benefits for employees who become unable to perform their jobs, and can convert to long-term disability benefits when employees become unable to perform any gainful employment.

Ringwald became unable to work due to a combination of HIV, depression and fatigue, and was terminated by Harrah’s on April 16, 2004. He applied for and received 24 months of short-term disability benefits from Prudential. He also filed a claim for long-term benefits, which Prudential denied. Prudential noted that the disability benefits plan had a 24-month lifetime cap for disability benefits due in whole or part to a mental illness, and premised its denial on its conclusion that Ringwald’s disability was due, in part, to his depression. Ringwald also applied to the Social Security Administration for disability benefits, was found qualified, and was awarded benefits. Under the Prudential policy, any benefits he received from Social Security would be set off to reduce his benefits from Prudential.

Having exhausted internal plan appeals, Ringwald sued in the U.S. District Court for the Eastern District of Missouri. He argued that he was entitled to a de novo review of his claim by the court, because the insurance contract that Prudential sold to Harrah’s did not give discretion to the administrator (Prudential) to interpret the plan. Prudential argued that the court should use a more deferential “abuse of discretion” standard, because the Summary Plan Description (SPD) states that the administrator has “the sole discretion to interpret the terms of the Group Contract, to make factual findings, and to determine eligibility for benefits.”

Relying on an old 8th Circuit precedent, Judge Strom accepted Prudential’s argument and found that Prudential had not abused its discretion in denying the benefits. The Court of Appeals disagreed, in an opinion by Circuit Judge Kermit E. Bye, finding that Ringwald is entitled to a de novo review of his claim.

Judge Strom had focused on a 1994 8th Circuit ruling, Jensen v. SIPCO, Inc., 38 F.3d 945, in which the court of appeals had commented that “SPDs are considered part of the ERISA plan documents.” Following this logic, Strom found that he was in the position of reviewing a discretionary decision, and thus abuse of discretion would be the appropriate standard.

Judge Bye pointed out that many federal courts, including other circuit courts, have held that there is no effective grant of discretion to a plan administrator unless it is contained in the formal plan document, and that recently the 8th Circuit had fallen into line with the other circuits, in Jobe v. Medical Life Insurance Co., 598 F.3d 478 (8th Cir. 2010).

The SPD is prepared, as required by ERISA, to inform plan beneficiaries of their rights under the plan. Since most beneficiaries never look at the actual plan, the SPD, which is required to be written in plain language accessible to ordinary workers, is their primary source of information. A body of case law has grown up binding plans to provide benefits as described in the SPD, even though the SPD may not properly reflect a more narrow grant of benefits in the plan itself, thus the earlier 8th Circuit case relied upon by Judge Strom.

But the reasons underlying that body of case law do not pertain to issue of plan administration such as the scope of authority given to a plan administrator. “One context where the rationale behind the rule would be contradicted by a blanket ‘SPD prevails’ rule,” he wrote, “as other circuits have recognized, is the situation involved here and in Jobe, where the SPD purports to enlarge the rights of the plan administrator at the expense of plan participants when the plan itself does not confer those rights. . . . Here, there are no terms in the plan which allow it to be amended by inserting into the SPD such critical provision as the administrator’s discretionary authority to interpret the plan or to determine eligibility for benefits. Indeed, this particular plan wholly fails to comply with Sec. 1102(b)(3)’s requirement to include a procedure governing amendment of the plan. Thus, there is no basis for concluding that the purported grant of discretion in the SPD is a procedurally proper amendment of the policy, and therefore ‘the policy’s failure to grant discretion results in the default de novo standard.’”

On remand, Ringwald will be entitled to de novo review, so it will be up to the district court to determine whether a long-term disability attributable to HIV disease, which has depression as a complicating factor, is subject to the 24-month cap in the Prudential policy.

Ringwald is represented by Sophie Woodworth and Gregory A. Oliphant of St. Louis, Missouri. A.S.L.

**Social Security Disability Cases**

10th Circuit — In Musho v. Astrue, 2010 WL 2530728 (June 24, 2010) (not published in F.3d), the U.S. Court of Appeals for the 10th Circuit ruled that the agency had erred in assessing the plaintiff’s “residual functional capacity,” so the denial of disability benefits in his case “is not supported by substantial evidence.” Plaintiff claims disability resulting from HIV infection, back and neck problems, depression, and other impairments. The court found that the ALJ had failed to follow the necessary steps and make requisite findings concerning the impact of plaintiff’s depression on his ability to work. “On remand,” wrote Senior Circuit Judge Wade Brorby for the court, “the ALJ should ensure that any reasons for discounting the treating psychiatrist’s opinion are supported in the record.” The court noted that having discounted the psychiatrist’s opinion, the ALJ had then improperly omitted the element of Plaintiff’s depression from the hypothetical questions posed to the vocational expert who was called to testify on Plaintiff’s ability to engage in gainful employment. The court found that because Plaintiff’s depression was not necessarily irrelevant to the ultimate issue in the case, even if it wasn’t severe, its omission could not be considered harmless error. A.S.L.

**AIDS Legislative Notes**

New York — On June 25, the N.Y. State Senate approved a measure that would require routine offering of HIV tests to individuals age 13-64 in all health care settings. A few days earlier, the Senate approved Senator Tom Duane’s Expanded Syringe Access Program bill, which would authorize the expansion of “needle exchange” programs to combat the spread of HIV among injection drug users. And earlier in the month, the chamber also endorsed a Duane proposal to amend the penal law to provide that a person is not criminally liable for possessing syringes and drug residue in or on syringes when they are participating in New York’s Expanded Syringe Access Program or Syringe Exchange Program. A.S.L.

**AIDS Litigation Notes**

Indiana — Plaintiff in a John Doe action won a $1.25 million judgment against Internal Medicine Associates for disclosing his HIV status when they referred his past due medical bill to collection agents, who included the information in a court filing demanding payment, according to a June 7 on-line report on bilerico.com. At trial, the plaintiff testified that IMA had told more people that he was HIV+ than he had. The court rejected the argument for IMA that once Doe had told anybody that he was HIV+, he could no longer claim that the information was private. During discovery, they sought information about Doe’s sexual partners to try to make their case that he had revealed his HIV status to many people voluntarily. A.S.L.

**AIDS Law & Society Notes**

Federal — At its June 10-11 meeting, the Advisory Committee on Blood Safety and Availability of the U.S. Department of Health and Human Services voted 9-6 to continue the current policy, adopted in the 1980s, of rejecting blood
donations from any man who has had sex with another man since 1977, regardless of whether the individual prospective donor has repeatedly tested negative for STDs (including HIV and HBV). Although representatives of the blood banking industry, including the American Red Cross, have changed their former positions and now argue that this policy is too broadly exclusive, especially in light of the frequent shortages of blood supplies, a majority of the Advisory Committee apparently still adheres to the view that the existence of a window period in which a donor who has been infected may test negative for STDs, taken together with the less than perfect performance of blood screening procedures, leaves too high a risk to adopt a less restrictive donation policy. Of course, the current policy relies upon prospective donors honestly responding to screening questionnaires and, in effect, disqualifying themselves voluntarily. Under the circumstances under which blood drives are held, consequently, it may give incentives to “closeted” individuals to lie about their sexual practices on the forms in order that disguise their sexuality from co-workers, thus posing a greater risk to the blood supply. Thus, it is not surprising that the panel characterized the policy as “suboptimal” and recommended that research be undertaken to see whether a less exclusionary policy can be devised. A.S.L.

International AIDS Notes

Representatives from governments, labor unions, and employer groups meeting in Geneva on June 17 at the International Labor Organization’s annual governing conference voted to adopt new international standards aimed at preventing discrimination in the workplace against employees infected with HIV. The standards call for member governments to adopt express policies banning HIV-related workplace discrimination, and also oppose HIV testing as a mandatory condition for employment. In addition, the standards make disclosure of HIV status voluntary. In addition to adopting the standards, which will be sent to all member nations, the delegates approved a resolution calling on the ILO’s governing body to establish a global action plan to ensure widespread implementation and regular reporting from member governments. BNA Daily Labor Report, 116 DLR A-4 (June 18, 2010). A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Legal Positions

Attorney Employment Openings at Immigration Equality

Immigration Equality, a national organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of LGBT and HIV+ people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV+ status, has announced two staff attorney openings in their Washington, D.C., office, for a bilingual couple attorney and for a detention and regulatory advocacy attorney. Full details about the positions can be found on the organization’s website, immigrationequality.org. Both positions require that the applicant be a graduate of an accredited law school and admitted to practice in at least one state. There is a preference for multilingual capacity and immigration law experience. IE is an affirmative action employer and especially encourages immigrants and people of color to apply. Applicants should submit a detailed cover letter and resume. Applicants who are selected to receive an interview will be asked to submit a writing sample, such as a legal research memo or article, and three references. Applications must be submitted electronically to: legal@immigrationequality.org.

New York Civil Liberties Union Staff Attorney Position

The New York Civil Liberties Union seeks an attorney to conduct and supervise litigation, policy work, and advocacy in the areas of reproductive rights and the rights of LGBT individuals. The Litigation and Policy Counsel will have primary responsibility for legal and policy work in these two priority issue areas, reporting to the Legal Director and working in close consultation with the Directors of the Legislative, Advocacy, and Communications Departments. For full details, consult the NYCLU website. Candidates should have at least three years of relevant experience (or the equivalent). Applicants should email a cover letter (with salary requirements) and resume by email to jobs@nyclu.org, with Litigation & Policy Counsel in the subject line. NYLS is an affirmative action/equal opportunity employer and encourages applications from women, people of color, persons with disabilities, and LGBT individuals.

2010 Lavender Law Career Fair & Conference

The 2010 Lavender Law Career Fair & Conference, presented by the National LGBT Bar Association, will be held at the Loews Miami Beach Hotel on August 26-28, 2010. The program includes a full day career fair for law students and several days of plenary sessions, panel discussions and workshops. Special features include a workshop on LGBT Issues and the Obama Administration, for which the panel includes David Lat (moderator — founder of Above the Law blog), Jon Davidson (Lambda Legal), Matt Nosanchuk (US Department of Justice Civil Rights Division), Elaine Kaplan (U.S. Office of Personnel Management), Courtney Joslin (Chair of the ABA’s Commission on Sexual Orientation and Gender Identity), and Paul Smith (Partner at Jenner & Block, winner of the ABA’s 2010 Thurgood Marshall Award, and one of the nation’s premiere U.S. Supreme Court advocates). For information, email to: info@lgbtbar.org, or consult the National LGBT Bar Association website.

LESBIAN & GAY & RELATED LEGAL ISSUES:


Arader, Jared B., Chambers v. Ornstein: The Harmful and Discriminatory Avoidance of the Laws of Comity and Public Policy for Valid Same-Sex Marriages, 55 Roger Williams U. L. Rev. 187 (Spring 2010) (Argues that R.I. Supreme Court erred in failing to apply comity to hold that R.I. Family Court had jurisdiction over a divorce petition from a same-sex couple who had married in Massachusetts).

Banks, Tanya Lovell, Troubled Waters: Mid-Twentieth Century American Society on “Trial” in the Films of John Waters, 39 Stetson L. Rev. 153 (Fall 2009).


Byrn, Mary Patricia, and Jenni Vainik Ives, Which Came First: The Parent or the Child?, 62 Rutgers L. Rev. 305 (Winter 2010) (argues that state parentage statutes should provide that intended parents are the legal parents at time of birth when alternative reproductive technology and surrogacy are involved, to ensure that child has its legal relationship to its parents fixed at birth).


Chemerinsky, Erwin, Two Cheers for State Constitutional Law, 62 Stan. L. Rev. 1695 (June 2010) (cautionary note about using state constitutional law to seek to advance civil rights and civil liberties).


Eskow, Jocelyn (editor), Prostitution and Sex Work, 11 Georgetown J. Gender & L. 163 (Annual Review 2010).

Farber, Sara E., Presidential Promises and the UNITING AMERICAN FAMILIES ACT: Bringing Same-Sex Immigration Rights to the United States, 30 B.C. Third World L.J. 329 (Spring 2010).


Ginsburg, Wendy R., Federal Employee Benefits and Same-Sex Partnerships, Congressional Research Service (June 24, 2010) (accessible at www.crs.gov) (analysis of degree to which executive branch can extend benefits to same-sex partners of federal employees without passage of new legislation; considers policy issues to be resolved if Congress were to adopt pending legislation authorizing partnership benefits for federal employees).

Hickman, Anna, Born (Not So) Free: Legal Limits on the Practice of Unassisted Childbirth or Freebirthing in the United States, 94 Minn. L. Rev. 1651 (May 2010).


Kim, Suzanne A., Marital Naming/Naming Marriage: Language and Status in Family Law, 85 Indiana L.J. 893 (Summer 2010).


Olivo, Andrew, Secrets and Lies: The Intelligence Community’s “Don’t Ask, Don’t Tell”, 12 SCHOLAR 551 (Spring 2010) (St. Mary’s Law Review on Minority Issues — Critique of continuing restrictions on top security clearances for gay people).

Oppenheimer, David B., California’s Anti-Discrimination Legislation, Proposition 14, and the Constitutional Protection of Minority Rights: The Fiftieth Anniversary of the California Fair Employment and Housing Act, 40 Golden Gate Univ. L. Rev. 117 (Winter 2010).

Parsi, John, The (Mis)categorization of Sex in Anglo-American Cases of Transsexual Marriage, 108 Mich. L. Rev. 1497 (June 2010).

Pflaster, Jessica, and Tiffany V. Wynn (editors), Legal Recognition of Same-Sex Relationships, 11 Georgetown J. Gender & L. 1 (Annual Review 2010).

Prather, Raymond, Considerations, Pitfalls, and Opportunities That Arise When Advising Same-Sex Couples, 24 Probate & Property No. 3, 24 (May/June 2010).

Ramais, Colleen McNichols, ‘Til Death Do You Part... And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples, 2010 U. Ill. L. Rev. 1013.


Richards, Robert D., Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Pecuniary Torts?, 18 CommLaw Conspectus 349 (2010) (Author’s answer: No!)


Salsburg, Jacob, The Constitutionality of Iowa’s Offender Residency Restriction, 64 U. Miami L. Rev. 1091 (April 2010).

Scheburn, Daniel J., Challenging Ohio’s Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and Remedial Treatment of Sex Offenders 35 Univ. Dayton L. Rev. 277 (Winter 2010) (Precisely, And the Ohio Supreme Court had found a constitutional flaw as a result since this article went to press.)


Wangenheim, Melissa, ‘To Catch a Predator,’ Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders, 62 Rutgers L. Rev. 559 (Winter 2010).

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Womack, Katherine A., Please Check One – Male or Female? Confronting Gender Identity Discrimination in College Residential Life, 44 U. Richmond L. Rev. 1365 (2010).


Specially Noted:

Law Notes contributing writer Daniel Redman published an article on the website of The Nation about the problems faced by incarcerated LGBT youth. See Redman, Daniel, ‘I was scared to sleep’: LGBT Youth Face Violence Behind Bars, at http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars

AIDS & RELATED LEGAL ISSUES:

Anderson, Cheryl L., Ideological Dissonance, Disability Backlash, and the ADA Amendments Act, 55 Wayne L. Rev. 1267 (Fall 2009).

Hasken, Timothy J., A Duty to Kiss and Tell? Examining the Uncomfortable Relationships Between Negligence and the Transmission of HPV, 95 Iowa L. Rev. 985 (March 2010).


Nair, Pooja, Litigating Against the Forced Sterilization of HIV-Positive Women: Recent Developments in Chile and Namibia, 23 Harv. Hum. Rts. J. 223 (Spring 2010).


Tafzil, Ruly, HIV-Based Claims for Protection in the U.S. and the U.K., 33 Hastings Int’l & Comp. L. Rev. 501 (Summer 2010).

Taylor, John E., Family Values, Courts, and Culture War: The Case of Abstinence-Only Sex Education, 18 Wm. & Mary Bill of Rights J. 1053 (May 2010).


Specially Noted:

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