FEDERAL COURT DECLARES CALIFORNIA PROPOSITION 8 UNCONSTITUTIONAL; DECISION STAYED BY 9TH CIRCUIT PENDING APPEAL

U.S. District Judge Vaughn R. Walker ruled that Proposition 8, the 2008 California ballot measure that enacted an amendment to the California Constitution providing that only the union of one man and one woman would be valid or recognized as a marriage in California, violates the 14th Amendment of the U.S. Constitution. In a 136-page opinion in *Perry v. Schwarzenegger*, 2010 WL 3025614 (N.D.Cal., Aug. 3, 2010), summarizing the trial record in excruciating detail, Judge Walker found that there was absolutely no rational basis for California to exclude same-sex couples from the same right to marry that is provided for different-sex couples, thus violating the plaintiffs' fundamental right to marry as well as their right to equal protection of the laws. However, same-sex marriages could not resume immediately in California because Walker's order has been stayed by the 9th Circuit pending appeal.

The official proponents of Proposition 8, ProtectMarriage.com-Yes on 8, who were allowed to intervene as defendants at the trial after California Attorney General Jerry Brown indicated that he agreed with plaintiffs, and the other named defendants, including Governor Arnold Schwarzenegger, refused to take a position on the merits of the case, had filed an application for a stay even before the ruling was announced, and indicated their intention to appeal promptly, which they subsequently did Judge Walker's opinion ended with a directive to the clerk to enter judgment against the defendants, in the form of a permanent injunction against the enforcement of Proposition 8, but he delayed the effect of the ruling while he considered the motion.

On August 12, Judge Walker prospectively dissolved his temporary stay, effective August 18, having concluded that the grounds for a stay pending appeal had not been met. The Proponents, who had been joined in filing appeals papers in the 9th Circuit by Imperial County (which had been denied intervenor-defendant status in the trial by Judge Walker), then sought a stay from the 9th Circuit, whose motion panel on Aug. 16 granted the Proponents' motion for a stay pending resolution of the appeal, but agreed with the plaintiffs' request to expedite the appeal, directing that oral argument be held before a merits panel during the week of December 6. Later in the week, the same motion panel consolidated the appeal filed by Imperial County with the Proponents' appeal, putting them on the same fast track. The appellants will first have to satisfy the merits panel (whose composition will not be revealed until a week before the argument) that they have standing to appeal Judge Walker's ruling without the participation of the government defendants, who opposed the stay and were not expected to appeal the court's ruling on the merits.

The case was filed by the American Foundation for Equal Rights (AFER) on behalf of two same-sex couples (Kristin M. Perry & Sandra B. Stier; Paul T. Katami & Jeffrey J. Zarrillo), eager to marry but denied that right as a result of the passage of Proposition 8. The Foundation enlisted two of the most prominent litigators in the country, Ted Olson and David Boies, with their respective law firms, to present the plaintiffs' case. The Proponents secured the services of Charles Cooper, a leading conservative appellate litigator, on their behalf. (Cooper and Olson served together in the Reagan Administration; Olson and Boies opposed each other in the Supreme Court in *Bush v. Gore*, the case that decided the 2000 presidential election.) The trial was conducted in January 2010, and additional post-trial arguments were submitted in June. The Supreme Court cut off Judge Walker's plan to have the trial web-cast or at least closed-circuit broadcast at several federal courthouses, based on the defendants' argument that such broadcasting could deter their witnesses from testifying due to their perception of danger at the hands of same-sex marriage proponents. In the event, however, Judge Walker noted somewhat acerbically, most of the witnesses on the defendants' pretrial list were never presented in court.

The nub of Judge Walker's ruling can be found in his one-paragraph Conclusion: "Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional."

Walker began his opinion with a history of the same-sex marriage issue in California leading up to the enactment of Proposition 8, including the California Supreme Court's ruling earlier in 2008 that denying marriage rights to same-sex couples violated California constitutional protection of fundamental rights and guarantee of equal protection of the laws. He noted the California Supreme Court's subsequent ruling that the enactment of Proposition 8 did not violate the state constitution's procedures for enacting initiative amendments, observing that the state court had ruled that Proposition 8 deprived same-sex couples of the right to marry but not of the rights accompanying marriage, leaving the state's domestic partnership law intact and retaining recognition for the approximately 18,000 same-sex couples who had married prior to its enactment.

Then Walker described all the parties and summarized the trial record at great length, concluding with a detailed list of factual findings, each documented with references to the record. He paid particular attention to the "expert" testimony presented by the proponents, because he found that neither of those witnesses, David Blankenhorn nor Kenneth Miller, was actually qualified to offer relevant expert testimony on the central questions in the case. As a result, Walker concluded, their testimony lacked credibility should receive no weight, although in summarizing the testimony later in the opinion he noted that at many points their testimony actually bolstered the plaintiffs' case.

The factual findings cut against the defendants' case in every particular, especially as defendants had focused heavily on the contention that the state could be concerned to protect children by seeking to privilege different-sex couples with the right to marry. In this regard, Walker's findings were consistent with those of several state supreme courts that have ruled on the same-sex marriage question, including

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Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NYC 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or arthur.leonard@nyls.edu

Contributing Writers: David Buchanan, SC, Australia; Bryan Johnson, Esq. NYC; Daniel Redman, Esq., San Francisco; Stephen E. Woods, J.D., NYC; Eric Wursthorn, Esq., NYC; Kelly Garner, NYLS '12.

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California, Connecticut, Massachusetts and Iowa.

In this sense, the long section of factual findings may seem redundant, but Walker had indicated several times during the proceedings his concern to compile a detailed record, realizing that the case would be appealed no matter which side won, and by pinning down a wide range of potentially relevant factual findings, he would be providing a strong basis for the winning party to defend his ruling on appeal. Appellate courts rarely reject factual findings that are documented by extensive references to a detailed trial record, and factual findings can be a crucial part of a case involving significant disputes about public policy.

Among the key factual findings were that California has always treated marriage as a "civil matter," that capacity to procreate has never been required as a prerequisite, that throughout the history of marriage, the question of who could marry has evolved, that various aspects of marriage were heavily gendered until recently, but now it has evolved into an egalitarian institution in which the two parties do not have different legal roles. Most significantly: "California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependents." He found no demonstrated interest of the state in denying the benefits and responsibilities of marriage to same-sex couples, and in fact that the state is disadvantaged in various ways by not making marriage available to same-sex couples, just as the couples themselves are disadvantaged. The disadvantage also extends to their children, as even Proponent's expert Blankenhorn testified that children being raised by same-sex couples would be benefited if their parents were allowed to marry.

After finding that sexual orientation is a relatively stable phenomenon of the individual, he found that "California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California. Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex." Since California encourages gays to have kids by adoption, foster care or donor insemination (finding that about 18 percent of same-sex couples in California are raising children), the welfare of children is strongly implicated in the question whether same-sex couples can marry. He also found that domestic partnerships are insufficient to provide the same advantages and benefits as marriage, and that letting same-sex couples marry "will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability opposite-sex marriages." This finding was rooted particular in studies of Massachusetts, where same-sex couples have been marrying since May 2004 to no discernible adverse impact on different-sex marriage in that state.

He also found that Prop 8 enacted "a private moral view without advancing a legitimate government interest," in that "Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society," this to counter the Proponents' assertion that because Prop 8 does not mention gays, merely adopting an exclusively different-sex definition of marriage, it has no adverse impact on gay people. He also credited the testimony that Prop 8 actually "has had a negative fiscal impact on California and local governments," and cites chapter and verse in support of this conclusion. He notes studies showing that developmental outcomes for children raised by same-sex couples have been shown to be basically the same as outcomes for children raised by married different-sex couples, and that studies cited by the Proponents' experts were not on point in terms of their comparator groups.

He also made all the findings necessary to conclude that sexual orientation should be treated as a "suspect classification," such that a government policy disadvantaging gay people should be subjected to strict scrutiny, capsuling extensive testimony in several pages of summary on this point.

Finally, at page 109 of the opinion, Walker reached his legal analysis, divided into two parts: Due Process and Equal Protection.

Walker rejected the defendants' argument that plaintiffs were asking for the court to recognize some new right of same-sex marriage. "Plaintiffs do not seek recognition of a new right," he wrote. "To characterize plaintiffs' objective as the right to same-sex marriage' would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy — namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages."

This conclusion follows several pages tracing the legal history of marriage in American law, noting how it has evolved from an institution based on distinctly different gender rules and racial exclusion into an egalitarian institution. Having embraced the idea that plaintiffs were seeking essentially the same thing that is made available to different-sex couples, Walker concluded that this was a "fundamental rights" case, because the Supreme Court has frequently spoken of marriage in terms of a fundamental right. Consequently, it is a "strict scrutiny" case, in which the state can only deprive a group of citizens of a fundamental right if it has a compelling interest that can only be achieved through this exclusion.

"That the majority of California voters supported Proposition 8 is irrelevant," wrote Walker, "as fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections," citing the Supreme Court's 1943 decision *West Virginia State Board of Education v. Barnette*, the famous World War II flag salute case.

"As explained in detail in the equal protection analysis," Walker continued, "Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by the plaintiffs' due process claim. The minimal evidentiary presentation made by Proponents does not meet the heavy burden of production necessary to show that Proposition 8 is narrowly tailored to a compelling governmental interest. Proposition 8 cannot, therefore, withstand strict scrutiny. Moreover, Proponents do not assert that the availability of domestic partnerships satisfies plaintiffs' fundamental right to marry; Proponents stipulated that there is a significant symbolic disparity between domestic partnership and marriage.' Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment."

Walker then turned to the alternative argument, Equal Protection. He could have simply found that since Proposition 8 discriminates based on sexual orientation with respect to a fundamental right — the right to marry — the Equal Protection analysis is also a strict scrutiny analysis. Or he could have found that sexual orientation is a "suspect classification," mandating strict scrutiny on that basis. But his opinion was written with a canny regard for the appellate process and the possibility that as this case goes up through the appellate route, possibly landing before the Supreme Court, it is possible that higher courts would disagree as to both the fundamental right and suspect classification conclusions. Thus, although he indicated that the trial record would support a finding that sexual orientation is a suspect classification, he decided to conduct his analysis using the rational basis test, making his ruling defensible under that standard as well.

This is where the detailed factual findings were crucial to the outcome, because they provided a firm basis for rejecting all the arguments that Proposition 8 might serve some rational policy goal of the state. "Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not

rationally related to a legitimate state interest," he wrote. "One example of a legitimate state interest in not issuing marriage licenses to a particular group might be a scarcity of marriage licenses or county officials to issue them. But marriage licenses in California are not a limited commodity, and the existence of 18,000 same-sex marriage couples in California shows that the state has the resources to allow both same-sex and opposite-sex couples to wed."

Walker systematically considered and rejected the six different rationales that had been proposed by the proponents of Proposition 8: (1) reserving marriage as a union between a man and woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest. In brief, Walker found most of these arguments were merely another way of saying that the state could legitimately seek to treat same-sex couples as inferior to different-sex couples, and that the arguments were contrary to the overwhelming weight of the record showing that children raised in households headed by same-sex couples turn out as well as children raised in households headed by different-sex couples.

Walker's conclusions were not novel. As indicated above, they followed the now well-worn path blazoned by several state supreme courts. But they are stated with such clarity and directness that they take on enhanced effectiveness and authority, especially since many of the state court decisions were not based on extensive trial records but instead were decided on motions for summary judgment based on affidavits and legal arguments. Walker's conclusions, bolstered by a lengthy trial record featuring eminent experts on the most salient points, have added weight as a result. Among other things bearing on the rationality argument, he found that the record showed that California as a whole and gay and lesbian couples as a class would be benefitted by allowing same-sex marriage, and would be disadvantaged by forbidding it.

After rejecting the proponent's argument, Walker devoted a brief section of his opinion to what, at bottom, seems the real objection to same-sex marriage by the defendants. "In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men and or two women, this belief is not a proper basis on which to legislate."

Walker reviewed the evidence about the campaign to enact Proposition 8, showing that it was really about moral disapproval, which has been discredited as a ground for discriminatory legislation, in a series of Supreme Court cases. "Proponents' purported rationales are nothing more than post-hoc justifications," Walker asserted. "While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported state interests fit so poorly with Proposition 8 that they are irrational, as explained above. What is left is evidence that Proposition 8 enacts a moral view that there is something wrong' with same-sex couples."

Walker concluded that the campaign was all about advancing the belief "that opposite-sex couples are morally superior to same-sex couples. The campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians.. . . The evidence shows. . . that Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual."

"Moral disapproval is an improper basis on which to deny rights to gay men and lesbians," wrote Walker. "The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment."

After noting that California officials had not sought to defend Proposition 8 on the merits, Walker imposed his remedy: "Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors."

As noted above, the government defendants were not expected to appeal the ruling and were opposed to staying its effect, but the Proponents of Proposition 8, who defended the measure as intervenors, were able to obtain a stay from the motions panel of the 9th Circuit, after being turned down by Judge Walker in an opinion that relief heavily on Supreme Court standing precedents to reach the conclusion that movants were unlikely to succeed on the merits. Their standing to appeal has been sharply questioned, based on *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), in which the Supreme Court expressed "grave doubts" about whether initiative proponents may intervene on appeal to defend their initiative's constitutionality after the real defendant, the state government, decides not to appeal an adverse ruling. The Supreme Court unanimously disposed of that case on other grounds, but in strongly worded dicta suggested that initiative proponents would lack Article III standing to proceed on their own, as they had no official role in enforcing the measure and would suffer no personal injury if it was invalidated. Also at issue will be Imperial County's standing as an appellant, since it was not a named defendant and its attempt to intervene at trial was rejected by Judge Walker on standing grounds. A.S.L.

LESBIAN/GAY LEGAL NEWS

Same-Sex Marriage to Spread in Mexico

Last December, the municipal government in Mexico City, capital of Mexico and one of the largest cities in Latin America, enacted laws allowing same-sex couples to marry and to adopt children. In Mexico, the various state governments determine marriage law — in common with the United States — and the federal district of Mexico City, like Washington, D.C., has the juridical status of a state with authority to make local laws on domestic relations. That law went into effect in the spring of 2010. But the federal government applied to the Supreme Court, seeking a ruling that these Mexico City laws were not valid, premised on a provision in the federal constitution that was intended, argued the government, to defend traditional marriage.

In a series of opinions doled out one at a time over three weeks in August, the Supreme Court of Mexico rejected the government's arguments, holding first by a vote of 8-2 that Mexico City could enact a law allowing same-sex couples to marry, then holding by a vote of 9-2 that marriages of same-sex couples validly performed in Mexico City were bound to be recognized and accorded legal status throughout the country, and third, holding by a vote of 9-2 that

the measure authorizing adoptions by same-sex couples was also valid.

The federal government was basing its attack against the Mexico City laws on a constitutional clause that provides, in rough English translation: "Men and women are equal before the law. This protects the organization and development of the family." The government argued that the conjunction of these two sentences meant that only the union of a man and a woman could constitute a family in Mexican law, and only a different-sex couple should be allowed to adopt children. Disagreeing with this argument, the court found that the provision in question did not adopt a definition of family, that the ability of a couple to procreate was not an issue, and that Mexico City had acted within its jurisdictional authority to decide who could marry within its borders. The first decision was issued on August 5.

On August 10, the court ruled that in accordance with established practice in Mexico, marriages that are lawful where they are performed are valid and recognized throughout the country. Finally, on August 16, the court rejected the government's challenge to the adoption measure.

Thus, as of August 16, the situation for same-sex marriage on the continent of North America was as follows: In the northernmost country in North America, Canada, same-sex couples have full marital rights throughout the country by virtue of a federal law. In the United States, the geographically central country in North America, same-sex couples can marry in a handful of states as a result of judicial decisions or local legislation, but their marriages are only partial in effect because all federal recognition is withheld and most states do not recognize same-sex marriages contracted outside their borders, the most prominent exception being New York, where same-sex couples may not marry but where same-sex marriages contracted out of state are recognized for many legal purposes. Finally, in the southernmost country on the continent, Mexico, same-sex couples can marry only in Mexico City, but their marriages carry full rights and are recognized throughout the country.

A new legal controversy was stirred up after the Supreme Court's ruling when Cardinal Juan Sandoval Iniguez of Guadalajara stated that the justices of the Supreme Court must have been bribed by the mayor of Mexico City in order to render the three decisions described above. Referring to gays as "faggots," Cardinal Sandoval reiterated the Catholic Church's strong opposition to same-sex marriage. When he was sharply criticized for the statements by Mayor Marcelo Ebrard, whose left-wing party had championed same-sex marriage and passed the municipal law last December, Cardinal Sandoval repeated his charges, and was supported by the archdiocese of Mexico City and the Bishops' Conference of Mexico. Sandoval claimed to have documentary proof. On Aug. 18, Mayor Ebrard file a civil defamation action against the Cardinal.

We are indebted to on-line journalist Rex Wockner for timely reporting on the developments in Mexico, and also relied on reporting by the *New York Times* (Aug. 5, Aug. 10, Aug. 16), and the *Los Angeles Times* (Aug. 18), for this story. A.S.L.

Federal Court Stops Withdrawal of Partner Benefits from Gay Arizona Employees

U.S. District Judge John W. Sedwick, Jr., has issued a preliminary injunction barring the state of Arizona from enforcing an amendment to its employee benefits law that would disqualify same-sex domestic partners of state employees from continuing to receive family health care coverage. *Collins v. Brewer*, 2010 WL 2926131 (D. Ariz., July 23, 2010). Ruling on pre-trial motions in an action brought by Lambda Legal on behalf of ten state employees, Judge Sedwick found that plaintiffs were likely to prevail on their argument that the state's action of withdrawing coverage from same-sex couples violates the Equal Protection Clause.

The state had enacted eligibility for family health coverage for unmarried domestic partners under the administration of Governor Janet Napolitano, a Democrat. With a change of administration and Gov. Napolitano's move to Washington to serve in the Obama Administration, the new governor, Republican Janice Brewer, and the legislature moved to amend the program to disqualify domestic partners by revising the definition of "dependent" in the statute. The implementation of this amendment was delayed several times, but was finally announced to take place at the end of 2010, at which time health insurance coverage for domestic partners of Arizona employees would cease, while it would continue for spouses of employees. Arizona by statute and constitutional amendment denies same-sex couples the right to marry, and denies recognition to same-sex marriages of Arizonans contracted elsewhere.

Lambda Legal brought suit on behalf of a group of lesbian and gay state employees who are participants in the program, the majority of whom are raising children with their same-sex partners. The state moved to dismiss the suit, arguing that its action did not violate the 14th Amendment because it was rationally justified based on cost factors, administrative convenience, and the state's legitimate interest in promoting marriage and directing resources to married couples and their children. Lambda countered with a motion for preliminary injunctive relief, arguing that the amendment violated both due process (by burdening same-sex families) and equal protection, and that plaintiffs would be irreparably injured were the amendment to go into effect while the case is pending.

Although Judge Sedwick granted the state's motion to dismiss on the due process claim, he found that plaintiffs' allegations were sufficient to deserve trial on the equal protection claim, that they were likely to prevail, and that they would be irreparably injured were the amendment to go into effect, so he denied the state's motion to dismiss the equal protection claim and issued a preliminary injunction against enforcement of the amendment as it affects lesbian and gay state employees. Under the terms of the injunction, not only will employees already enrolled in the family health care program be entitled to continue, but the staete must continue to make the program available to lesbian and gay employees who satisfy eligibility criteria "to the same extent such benefits are made available to married State employees." Sedwick also rejected an immunity claim asserted on behalf of Governor Brewer, who was sued as first named defendant in her official capacity.

Responding to plaintiffs' argument that their equal protection claim should be subjected to heightened scrutiny, Sedwick wrote, "Some form of heightened scrutiny might apply to plaintiffs' claim, but it is unnecessary to decide whether or which type of heightened scrutiny might apply to plaintiffs' claims because plaintiffs have averred in their complaint sufficient factual matter, accepted as true, to state an equal protection claim that is plausible on its face even under the rational basis standard of review."

Plaintiffs had alleged that the state's cost argument was irrational because the amount of direct savings attributable to eliminating benefits for same-sex partners was trivial in relation to the state's overall expenditure for employee health benefits, especially when considered in light of reduced call on Medicaid funds that might be needed to cover uninsured domestic partners. (Sedwick also noted that one of the justifications articulated by the state, promoting heterosexual marriage, was hardly a cost-saver, since eliminating the partner benefit incentivized straight state employees to marry their partners in order to get the benefits.)

Sedwick accepted plaintiffs' arguments that the courts have generally rejected claims that cost savings and administrative convenience could justify categorical discrimination, and that the state's remaining justifications were discriminatory on their face. Indeed, he disputed the state's argument that eliminating benefits for same-sex couples was a rational way to promote marriage. " The Supreme Court has characterized marriage as the most important relation in life,' but construing the facts of the complaint as true it cannot be said that Section O's distinction between heterosexual and homosexual employees is legitimately, ration-

ally, and substantially related to promoting that interest," he wrote. "Certainly, that aspect of Section O which is challenged, the denial of benefits to State employee's same-sex domestic partners, cannot promote marriage because gays and lesbians are ineligible to marry. It is only by denying benefits to heterosexual domestic partners that marriage might be promoted. However, denying benefits to heterosexual partners (who can marry in order to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry). It is possible that the State's proffered interest in promoting or protecting marriage and procreation is a post hoc justification in response to litigation."

On the due process point, however, Sedwick found that the state "has the more persuasive argument," pointing out that same-sex couples sustained relationships long before the state ever adopted a domestic partnership benefits plan, and observing that the main precedent relied upon by plaintiffs, *Lawrence v. Texas*, involved government intrusion into the relationship through the criminal law. Further, he noted, the state was not obliged to provide benefits to anybody, employee benefits are not a fundamental right, and so he found that the amendment did not impose an unconstitutional burden on same-sex families.

As to the injunctive relief, Sedwick found that plaintiffs were likely to prevail at trial and that the denial of a constitutional right — in this case, equal protection — imposes an irreparable injury. Furthermore, he wrote, "Plaintiffs have also demonstrated that they are likely to suffer extreme anxiety and stress in the absence of an injunction enjoining the State from enforcing Section O to eliminate family health insurance eligibility for lesbian and gay State employees." He also noted that plaintiffs' allegations "substantiate the stress of incurring greater financial burdens to provide private insurance coverage for their domestic partners and their children."

While acknowledging the state's interest in saving money at a time of fiscal stringency, Sedwick wrote: "On the other hand, it would not be in the public's interest to allow the State to violate the plaintiffs' rights to equal protection when there are no adequate remedies to compensate plaintiffs for the irreparable harm caused by such violation." And, perhaps most memorably, he wrote: "Contrary to the State's suggestion, it is not equitable to lay the burden of the State's budgetary shortfall on homosexual employees, any more than on any other distinct class, such as employees with green eyes or red hair. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' Based on the record, the court concludes that the balance of equities tips in favor of plaintiffs."

Plaintiffs are represented by Desmund Wu, Jennifer Pizer and Tara Borelli from Lambda Legal's Western Regional Office in Los Angeles, and local counsel James Evans Barton, Rhonda Lorraine Barnes and Daniel Clayton Barr, from Perkins Coie Brown & Bain PA of Phoenix. A.S.L.

European Court of Human Rights Awards Damages to Same-Sex Partner of Austrian Civil Servant Denied Insurance Coverage

The European Court of Human Rights has ruled that the denial of insurance coverage from 1997 to 2007 under Austria's Civil Servants Insurance Corporation to the same-sex partner of an Austrian civil servant violated Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in *Case of P.B. and J.S. v. Austria*, Application No. 18984/02 (July 22, 2010). JS, an Austrian public servant, resided in Vienna with his same-sex partner PB. In 1997, PB and JS applied to extend JS's accident and sickness insurance coverage to PB, but coverage was denied because same-sex relationships were not one of the enumerated relationships defined by statute in the insurance law, which included close family members and certain opposite-sex partners. The case ultimately came before the European Court of Human Rights, which held that because the statute defining which persons were eligible for insurance coverage had changed several times since 1997, the Court was required to conduct an analysis of the law during each period to determine whether the Convention had been violated. At the time JS and PB applied to extend coverage to PB in 1997, the statute only allowed the extension of coverage to close family members or "persons of the opposite sex living with the principally insured person and running the common household without receiving any payment." In 2006, the statute was modified to allow coverage to some same-sex partners, but only those raising one or more children. In 2007, the statute was again modified, narrowing coverage and removing all distinctions between same-sex and opposite-sex couples, but providing a transitional period allowing a brief period of continued coverage for persons previously covered but now made ineligible. The Court stated that in assessing whether Article 14 of the Convention (non-discrimination) in conjunction with Article 8 (respect for private and family life) has been violated, a violation occurs when "a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized." For the period from 1997, when JS and PB had applied to extend coverage, until 2006 when the statute was modified, the Court, by a vote of 5 to 2, noted that the Constitutional Court, in affirming the denial of coverage, had stated that in the absence of any possibility to register a homosexual partnership it was difficult to assess whether same-sex applicants were cohabiting in a partnership or merely living together in the same household; however, the Government itself proffered to the Court of Human Rights no justification for the difference in treatment. Absent justification from the Government, the Court held that there had been a breach of Article 14 during the period. Two judges disagreed with the majority, stating that in 1997, when JS and PB initially attempted to gain coverage, "there was no European consensus as to whether homosexual couples should be treated on equal footing with heterosexual couples [I]n these conditions we find it difficult to accept that the decision by the various competent Austrian authorities rejecting the applicants' request , may be regarded as contrary to Articles 8 and 14 taken together." For the period from 2006 until 2007, when the statute was again modified, the Court unanimously held that "even though the situation improved as a result of that amendment because homosexual couples were in principle no longer excluded there remained a substantial difference in treatment for which no sufficient justification had been advanced by the Government." Finally, from the period from 2007 to present, the Court unanimously held that even though the newly amended statute made eligibility for coverage more restrictive, the statute was "formulated in a neutral way concerning the sexual orientation of cohabitees." The Court rejected JS and PB's argument that the law remained discriminatory because persons who were previously covered continued to benefit from coverage for a transitional period, stating that áthe Court cannot find that it is incompatible with the requirements of Article 14 for those who have previously been entitled to a specific benefit under the law in force at the time to be given sufficient time to adapt to changing circumstances." Pursuant to Article 41 of the Convention allowing the Court to "afford satisfaction to the injured party," the Court awarded JS and PB 5,000 Euros in pecuniary damages, 10,000 Euros in non-pecuniary damages, and 10,000 Euros in legal costs. *Bryan Johnson*

New Jersey Supreme Court Avoids Deciding Marriage Question

After the state's Civil Union Review Commission issued its report documenting the many ways in which N.J. civil union partners were experiencing unequal treatment from state and private entities, Lambda Legal filed a motion on behalf of the *Lewis v. Harris* plaintiffs, requesting the Supreme Court to reopen the case and reconsider its original remedy. On July 26,

the Court turned down that request, finding that it could not rule on the merits without a "trial-like record" upon which to base its analysis. *Lewis v. Harris*, 2010 WL 2891687 (September Term 2009).

In *Lewis v. Harris*, 188 N.J. 415 (2006), the court had ruled unanimously that denial of the rights and benefits of marriage to same-sex couples violated the state constitution, but the court was divided at that time as to the remedy. A majority determined that the legislature should act to address the issue, while a minority would have ordered the state to allow same-sex couples to marry. According to the *Lewis* majority, the legislature might adopt a civil union law similar to the one then in effect in Vermont, and this might be presumptively sufficient to meet the constitutional requirements. The legislature accepted that suggestion with alacrity, rushing a civil union law into effect within months of the Supreme Court ruling. Bowing to arguments that the civil union law might not be sufficient to meet equality requirements, the legislation established the Civil Union Review Commission to hold hearings and report to the legislature. In both interim and final reports, the Commission documented the disparities between marriage and civil unions encountered by New Jersey couples.

Lambda's motion argued to the court that the plaintiffs would meet the burden of showing that the Civil Union Act had fallen short of providing true equality, and sought argument to persuade the court to revise its remedy in *Lewis*. But the court decided to evade the question. In an Order that is being attributed to Chief Judge Stuart Rabner, the court stated: "This matter cannot be decided without the development of an appropriate trial-like record. Plaintiffs' motion is therefore denied without prejudice to plaintiffs filing an action in Superior Court and seeking to create a record there. We reach no conclusion on the merits of plaintiffs' allegations regarding the constitutionality of the Civil Union Act, N.J.S.A. 37:1-28 to -36."

The six-member court was unanimous in concluding that it could not rule on the merits based on the plaintiffs' motion papers, but was divided 3-3 on what the next step should be. (The court is down to six members at the moment as a result of a dispute between Governor Chris Christie, who refused to re-appoint a Democratic incumbent whose term had expired, and the Democratic legislature, which is balking at confirming his new appointee.) Three members would have granted the motion to reopen at least to the extent of holding a hearing to determine how to quickly compile the appropriate record upon which to base a ruling on the merits. But a majority would be needed to order a hearing, and three members of the court, whose views are represented in the Order, thought the matter should go back to the Superior Court.

The dissent, signed by Justices Long, LaVecchia and Albin, after briefly reciting the history and the allegations in the complaint, as well as the conclusions of the Civil Union Review Commission, stated: "However, plaintiffs' record has not been tested in the crucible of a litigated matter. Thus, we realize that we do not have a sufficient basis for debating the merits of the application, which raises a matter of general public importance and one of constitutional significance. The next step should be the development of a record on which those important issues can be resolved quickly. At the very least, oral argument would have helped to guide us on the best procedural course for creating such a record. We are disappointed that three members of the Court have voted to deny the motion without oral argument and that plaintiffs must now begin anew and file a complaint in the Superior Court seeking the relief to which they claim they are entitled. If plaintiffs' allegation are true — and we will not surmise whether they are or are not — then the constitutional inequities should be addressed without any unnecessary delay. Therefore, we would hope that the proceedings in the Superior Court will be conducted with all deliberate speed."

That hope voiced by the dissent strikes this writer as doubtful of being achieved. While the Supreme Court might have appointed a special master to conduct a hearing quickly, compile a factual record, and report directly back to the Supreme Court, the process of starting anew in the Superior Court promises to be time-consuming, especially when confronted by a new defendant, the administration of Governor Christie, who strongly opposed same-sex marriage in his election campaign and had sworn to veto a same-sex marriage bill if it were to pass the legislature. (Actually, in the waning days of the Corzine Administration, the legislature failed to enact the bill that Governor Corzine would have signed.) One suspects the Christie Administration will want to put in a full factual record in contravention of whatever the plaintiffs present, a resulting Superior Court decision will be appealed by the losing side to the Appellate Division, and it might be years before the matter works its way back to the Supreme Court, by which time Gov. Christie will have perhaps appointed more of its members. A more speedy result would be a welcome surprise, but is hard to expect.

Thus, although nobody on the six-member court has taken a position on the merits, and *Lewis v. Harris*, requiring equality of rights, continues to stand as a precedent, same-sex marriage in New Jersey may still be way off — unless pending federal litigation in other parts of the country produces an overriding decision under the federal constitution opening up marriage to same-sex couples nationwide.

In an interesting political side note, some Democratic state legislators observed that the split on the court about how to proceed was between those justices who might fear that Governor Christie will refuse to reappoint them, and those whose elective status insulates them to some extent from such fears. As such, they contended, the split may be in part a legacy of the current battle over the governor's refusal to reappoint an incumbent. See Bob Braun, *N.J. Supreme Court's Refusal to Hear Gay Marriage Case Raises Question of Christie's Influence*, NJ.com, Aug. 16, 2010. A.S.L.

Federal Court Rules Christian Counseling Student Not Exempt from Complying With Non-Discrimination Policy

In *Ward v. Wilbanks*, 2010 WL 3026428 (E.D.Mich. July 26, 2010), a graduate counseling student represented by attorneys for the anti-gay Alliance Defense Fund brought suit against Eastern Michigan University officials for dismissing her from the school's counseling program for actions stemming from the plaintiff's Christianity-based opposition to homosexuality. Plaintiff brought a variety of federal constitutional claims under the First and Fourteenth Amendments, with her underlying argument centered on the contention that university officials had required her to affirm homosexual behavior contrary to her religious beliefs, and that they wrongfully dismissed her when she refused to comply. Defendant Judge George Caram Steeh held for defendant university officials and granted their motion for summary judgment.

Plaintiff was referred for discipline when, two hours before an appointment with a gay client, plaintiff requested that the client be referred to another counselor because "she could not affirm the client's homosexual behavior." Her supervisor canceled the appointment and referred plaintiff for an informal review which ultimately led to a formal hearing. She made clear that she would refuse to see any gay client if she were required to affirm his or her sexual orientation. After this hearing, the counseling program dismissed plaintiff for "violat[ing] the [American Counseling Association] Code of Ethics" and — by her refusal to counsel gay clients in an affirming way — for "behaviors [contrary to those] expected by the profession."

The court first rejected the plaintiff's contention that Eastern Michigan's policy incorporating the American Counseling Association's nondiscrimination clause violated her Free Speech rights. First, the court considered whether the disciplinary policy "reaches a substantial amount of constitutionally protected speech." The court held that it didn't — it only addressed students in the counseling program and it only pertained to the counselors' interactions with a client.

Second, the court stated the legal principle of granting public colleges and graduate schools wide latitude "to create curricula that fit schools' understandings of their education missions." The court held that "the evidence in this case supports the University's claim that the policy is part of the curriculum It is the University's prerogative to define its own curriculum, and it has given sufficient rational reasons for including the ACA Code of Ethics in its curriculum." Because the ACA Code of Ethics will govern the students once they graduate, the policy was not a speech code but a valid part of the University curriculum. As a result, the court held that its incorporation into the EMU counseling curriculum did not violate the Due Process Clause of the Constitution.

Next, the court rejected the plaintiff's argument that the defendants violated her Free Speech rights by "requiring her to change her beliefs regarding homosexuality and by requiring her to express a particular viewpoint." After surveying the circuit courts' views on Free Speech in an educational context, the court held that so long as a school's policy is "reasonably related to legitimate pedagogical concerns," it does not violate First Amendment Free Speech rights. In the present case, the court reasoned that "EMU could not confer a counseling degree on a student who said she would categorically refer all clients who sought counseling on topics with which she had contrary moral convictions" and that "clinical educational experiences" — such as the one plaintiff failed to undergo — were necessary to "deal with situations in a non-harmful, ethically appropriate manner."

The court also rejected plaintiff's Free Exercise claim, holding that EMU's incorporation of the ACA Code of Ethics nondiscrimination policy 1) was generally applicable, 2) did not intend to prohibit any particular religious practice or belief, and 3) did not establish a particularized system of exemptions that discriminated against plaintiff's religious beliefs. The court found that "while defendants may have been indelicate in their inquiry into [plaintiff's] beliefs, they never demonstrated a purpose to change her religious beliefs." Instead, the court found that "Defendants were at all times concerned with plaintiff's refusal to counsel an entire class of people whose values she did not share." The court distinguished a "limited-time referral to accommodate a counselor coming to terms with personal issues" to plaintiff — who wanted to "always refer all clients who seek counseling for sexual relationships she believes to be against the teachings of the Bible." This violated the ACA Code of Ethics nondiscrimination policy, incorporated for "purely pedagogical reasons" into EMU's curriculum. She was not asked, the court found, to "change her views or religious beliefs; she was required to set them aside in the counselor-client relationship — a neutral, generally applicable expectation of all counselors-to-be."

Plaintiff's refusal also did not constitute protected behavior for purposes of her First Amendment retaliation claim, which the court also rejected.

Under the First Amendment's Establishment Clause, the court held that defendants had not acted improperly. Following the test set down in the Supreme Court's opinion in *Lemon v. Kurtzman*, the court analyzed the defendants' actions as to whether 1) the policy had a secular purpose, 2) the principal effect neither advanced nor inhibited religion, and 3) it fostered excessive government entanglement with religion. On all three prongs, the court held that defendants' actions were constitutionally permissible. The court found that EMU's actual motivation in incorporating the ACA Code of Ethics' nondiscrimination policy into its counseling curriculum centered on educating students in national standards, professional ethical guidelines, and state licensing requirements — a decidedly secular goal. Regarding the inhibition of religion, the court held that "a reasonable member of the community would understand that defendants, in preparing students for the counseling profession, had a right and a duty to enforce compliance with these ethical rules" and that these regulations were "facially neutral regarding religion." Finally, regarding "excessive entanglement," the court found that the curriculum was "far more secular and neutral toward religion than a holiday display that includes a crSche" — a permissible government action.

The court next addressed whether the actions of EMU established a "religion of secularism" in violation of the Establishment Clause by showing "hostility to religion, thus preferring those who believe in no religion over those who do believe." While granting that "defendants demonstrated hostility, arrogance, and offensiveness during the formal and informal reviews," the court found that plaintiff failed to show a "level of hostility required to establish a religion of secularism." In contrast to the actions of program officials, "the Program curriculum, itself, attempts to foster an atmosphere of neutrality through policies that prohibit discrimination" on the basis of religion, among other factors.

The court also held that plaintiff's Equal Protection Clause claim was without merit. Under a rational basis analysis, the court found that plaintiff had failed to show that EMU lacked a conceivable basis for its actions or that it had acted with animus towards her. The court reiterated that EMU's incorporation of the ACA Code met the legitimate pedagogical goal of preparing its students for the counseling profession. Plaintiff, the court found, was welcomed by the EMU program without reference to her religious beliefs "until she explicitly refused to comply with the academic requirements of the Practicum." Even if plaintiff had succeeded in her free exercise claim, defendants demonstrated "a compelling interest" — namely, "to design and maintain a counseling program meeting [national] accreditation standard[s]" — and a "narrowly tailored means" for achieving it — "not so under-inclusive that it only targets plaintiff's religion, nor so over-inclusive that it substantially regulates students' personal lives outside of their professional conduct." *Daniel Redman*

N.Y. Appellate Division Affirms Hate Crime Conviction Without Discussion of Disputed Point

On Friday, July 16, the *NY Law Journal* published a ruling by the NY Appellate Division (2nd Dept.) in *People v. Fortunato*, NYLS, 7/16/10, p. 37, upholding the conviction on a charge of manslaughter as a hate crime of Anthony Fortunato, described in the Law Journal as a bisexual man who lured a gay man to his death. This was an appeal from the much-publicized trials arising from the death of Michael Sandy.

Evidence showed that Mr. Sandy was identified as a potential victim because he was a gay man, and, in a subsequent robbery scheme gone awry, Sandy ran from a bunch of young men who were plotting to rob him and was struck by an automobile and died. Fortunato argued against being prosecuted on a hate crime charge, based on his own bisexuality and avowed lack of hatred for gay people.

The trial judge ruled that if the evidence showed that a victim was selected because of his sexual orientation — in this case, according to testimony, Sandy was picked because the young men thought that a gay man would be an easy mark — the requirements of the hate crime statute were met, as the statute did not require that the perpetrator be personally biased against gay people. The focus of the statute was solely on whether the victim was selected because of one of the listed characteristics.

In affirming the verdict, the Appellate Division did not issue a detailed opinion discussing the trial court's analysis of this issue, merely stating that "viewing the evidence in the light most favorable to the prosecution, we find that it was legally sufficient to establish the defendant's guilt of that crime beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence."

Thus, the Appellate Division has implicitly agreed with Justice Jill Konviser's reasoning, but without expressly articulating her theory of the case. Unfortunately, this leaves the trial courts without express guidance from the Appellate Division, on a possibly controversial issue as to which there is no definitive interpre-

tive ruling by the state's highest court, the Court of Appeals. One can understand issuing cryptic memorandum affirmances in cases that do not present significant interpretive issues, or which concern points that constitute well-settled law, but in this case one has the sense that the panel is shirking its duty by failing to explain its reasoning, or at least by failing more clearly to adopt the trial judge's reasoning by at least mentioning the point of contention. Perhaps Mr. Fortunato will seek review from the Court of Appeals and the issue can be addressed out in the open in an appellate decision that can guide trial judges. A.S.L.

Lesbian Ex-Partner Prevails on Appeal of Visitation Order in Ohio Appeals Court

On August 5, the Ohio Court of Appeals for the Eighth Appellate District, County of Cuyahoga, affirmed a trial court order which fashioned a "companionship/visitation schedule" in favor of the former partner of the biological mother of two children. *In re LaPiana*, 2010-Ohio-3606. Writing for the majority of a three-judge panel, Judge Mary J. Boyle stated: "[w]hen a [custody] dispute arises, as it did in here, courts must do what they have always done — decide what is in the best interest of the children. This is exactly what the trial court did in this case." Judge James J. Sweeney concurred, and Judge Kenneth A. Rocco dissented.

The biological mother, Siobhan LaPiana, was in a committed relationship with Rita Goodman for approximately ten years. During that time, LaPiana gave birth to two boys via artificial insemination. Six years after the couple separated, Goodman filed an application to determine custody and/or companionship with the children under R.C. 2151.23.

The trial court held that LaPiana was the children's residential and legal custodian and had all rights to make decisions regarding the children's religion, medical treatment and education. It then ordered that Goodman have visitation with the children every other weekend, one day per week, and three weeks of summer vacation. It further directed that Goodman be notified of school events and activities as well as reports of the children's academic progress.

LaPiana raised three arguments on appeal: [1] that the trial court violated LaPiana's rights under the Fourteenth Amendment to the US Constitution and the Marriage Protection Amendment of the Ohio Constitution; [2] that the trial court lacked jurisdiction to interfere with her custodial and parental rights absent a finding that she was an unsuitable parent; and [3] that the trial court otherwise exceeded its authority in granting Goodman visitation rights.

The majority plainly gave short shrift to LaPiana's argument that Ohio's anti-gay marriage amendment prevented courts from permitting a former lesbian partner to share custody or that the trial court's order violated LaPiana's fundamental right to raise a child without state interference. The Court of Appeals stated that the Ohio Defense of Marriage Amendment says nothing about parenting or children. Judge Rocco does not reach this argument in his dissent.

Both the majority and the dissent agreed that the trial court had the authority to order visitation in this case. Judge Boyle rejected LaPiana's remaining arguments, finding that under recent precedent, the trial court properly concluded that LaPiana had relinquished sole custody of the children and therefore a visitation schedule could be set based upon the best interests of the children. The majority relied on *Masitto v. Masitto*, 22 Ohio St.3d 63, 488 N.E.2d 857 (1986) and *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241. In *Masitto*, the Ohio Supreme Court held that if a parent contractually relinquishes custody of a child to a nonparent, then in a subsequent custody proceeding between the parent and nonparent, "the general rule is that such award will not be modified unless necessary to serve the best interest of the child.' R.C. 3109.04(B)."

In *Bonfield*, the Ohio Supreme Court held that under R.C. 2151.23(A)(2), 2 the juvenile court had jurisdiction to grant shared custody of five children to a lesbian parent and her partner, a non-biological co-parent.

Here, the Appellate Court found ample conduct on LaPiana's part to find that she had contractually relinquished sole custody in favor of shared custody. Before their first child was born, LaPiana and Goodman entered into a written "Agreement to Jointly Raise Our Child. In that agreement, they sought to "set [their] rights and obligations regarding [their] child who'll be born to [them] by Siobhan." They agreed to "jointly and equally parent," to have "equal power to make medical decisions" for the child, and to both "be responsible for [his] support". Moreover, the parties agreed that if they separate they "will do [their] best to see that [their] child maintains a close and loving relationship with each of [them and] will base all decisions upon the best interests of [their] child." Upon a separation, the custodial parent was to take all necessary steps to maximize the other's visitation and "help make visitation as easy as possible."

In addition to this document, the court noted that Goodman and LaPiana chose the same sperm donor for both children to impregnate LaPiana. The donor matched Goodman's religious and ethnic heritage and had similar educational interests to both LaPiana and Goodman. The parties chose first names for the children after Goodman's relatives who had passed away, and they gave the children Goodman's last name. The children were also given Hebrew names, with both LaPiana and Goodman listed as parents on the naming certificates. The court stated that "[t]he record is replete with many more exhibits, establishing that not only did the boys know Goodman as their mother, so did everyone else, including friends, teachers, health insurance carriers, and doctors. Several documents also evidenced that LaPiana referred to Goodman as the boys' 'other parent' to teachers and others in the community."

However, Judge Rocco disagreed with the majority's analysis. He claimed that since Goodman was not awarded custody by the trial court, the majority's analysis based upon whether LaPiana had relinquished custody was a misapplication of the law, since custody was not at issue in the instant appeal. Rather, for Judge Rocco, the only issue was visitation, and under Ohio law, Goodman lacked standing to request visitation as a non-biological "stranger" to the children. Nor would Judge Rocco extend the "relationship by affinity" concept to Goodman's case, since "Ohio does not recognize the relationship between unmarried partners in its domestic relations laws." His reasoning for this is that any visitation orders awarded to non-biologically related persons were otherwise sound because there is a relationship with one of the child's parents by marriage to the person seeking visitation. Therefore, Judge Rocco "do[es] not believe the concept of affinity relationships can be stretched to include unmarried domestic partners" despite " the lasting psychological and emotional impact my opinion would have on the parties and the children alike". However, Judge Rocco assuages his conscience by noting that he "cannot in good conscience approve the mistaken analysis the majority has followed to reach its more humane result. This is [a] government of laws, and not of men.' "

Lambda Legal represents Goodman, through staff attorney Camilla B. Taylor and cooperating attorney Pamela J. MacAdams of Morganstern, MacAdams & Devito Co., LPA, of Cleveland. The case drew amicus briefs from the American Academy of Matrimonial Lawyers, the National Association of Social Workers, and the National Center for Lesbian Rights. *Eric Wursthorn*

N.Y. Appellate Division Revives Child Support Order Against Lesbian Co-Parent

A five-member panel of the New York Appellate Division, 2nd Department, unanimously ruled on August 3 that a woman is obligated to make child support payments to her former same-sex partner. Reconsidering the case after the state's highest court, the Court of Appeals, had reversed the appellate division's previous ruling that the Family Court did not have jurisdiction over the child support claim because New York State did not recognize the non-biological mother as a parent of the child, the Appellate Division panel now endorsed the use

of the doctrine of equitable estoppel to resolve the case. In the Matter of H.M. v. E.T., 2010 N.Y. Slip Op. 06313, 2010 WL 3023919 (Aug. 3, 2010).

H.M. and E.T. were living together as partners when they decided to have a child through donor insemination. H.M. became pregnant and bore the child. Several months after the child was born, the relationship dissolved, and H.M. moved with the child to her home country of Canada. Years later, needing financial help in raising the child, H.M. filed an action in a Canadian court seeking a declaration that E.T. was a parent of the child and obligated to provide financial support. Applying the Uniform Interstate Family Support Act, H.M.'s claim was transferred to Family Court in Rockland County, New York, and assigned to a magistrate to rule on E.T.'s motion to dismiss the petition on jurisdictional grounds.

The jurisdictional argument seemed straightforward to the magistrate, who agreed with E.T. that she is not recognized as a parent of the child, under the Court of Appeals' 1991 precedent, *Alison D. v. Virginia M.*, so the Family Court did not have jurisdiction of the claim. H.M. appealed this ruling to the Family Court, which reversed, found jurisdiction, and ordered support payments in reliance on an estoppel theory. Simply stated, the court would find that estoppel precludes E.T. from resisting the support claim, because when the women were living as a couple she had represented to H.M. that she would be jointly responsible for the child's welfare, and H.M. became pregnant and bore the child on reliance on that representation.

E.T. appealed the support order and won a reversal in the Appellate Division, which ruled that Family Court did not have jurisdiction, affirming the magistrate's original ruling dismissing the case.

This time H.M. appealed to the state's highest court, which reversed on May 4, 2010, in *H.M. v. E.T.*, 14 N.Y.3d 521. According to the majority in the Court of Appeals, the issue of jurisdiction turns on the allegations of the complaint. In her complaint, H.M. alleged that E.T. was a parent of the child. That is enough to confer jurisdiction and overcome the motion to dismiss, so the case should be remanded for consideration on the merits.

A dissent in the Court of Appeals pointed out that on the same day, the court had ruled in another same-sex couple case, *Debra H. v. Janice R.*, 2010 WL 1752168, refusing to overrule *Alison D. v. Virginia M.*, so E.T. could not be considered a parent, even for purposes of the motion to dismiss. In a concurring opinion in both rulings, however, Judge Robert Smith suggested that the court should adopt a new test of parental status, recognizing such status in the typical lesbian co-parent case where the parties had jointly planned to have and raise a child together using donor insemination.

Taking the case back from the Court of Appeals, the Appellate Division disposed of it in a brief, unsigned opinion, that nonetheless sets out a theoretical basis for its ruling. "H.M.'s petition seeks an order of support predicated upon a determination, through the doctrines of equitable estoppel and implied contract, that E.T. is chargeable with the support of the subject child, and is not entitled to disclaim that obligation," wrote the court. "We evaluate this claim for relief in accordance with the Court of Appeals' holding that such a claim lies within the Family Court's article 4 jurisdiction,' pursuant to which the Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent.' We now conclude that H.M. has stated a viable cause of action for the invocation of equitable estoppel to determine whether her former same-sex partner should be compelled to pay child support pursuant to Family Court Act articles 4 and 5-B."

The court explained that equitable estoppel has been used in various other contexts to hold somebody who had been acting as a parent to be obligated to provide support, even though they were neither a biological nor adoptive parent of the child in question, and that the "paramount concern" in such cases has always been "the best interests of the child." Since the Appellate Division had used equitable estoppel in the past to hold a man to a support obligation even though he had no biological or adoptive connection to a child, where he had impliedly promise his female partner to provide support and the promise was relied upon, the court found it would be appropriate to do so in this case.

"By parity of reasoning," wrote the court, "we hold that where the same-sex partner of a child's biological mother consciously chooses, together with the biological mother, to bring that child into the world through AID [artificial insemination by donor], and where the child is conceived in reliance upon the partner's implied promise to support the child, a cause of action for child support under Family Court Act article 4 has been sufficiently alleged."

Since this was the test that had been applied by the Family Court initially when it overruled the magistrate, asserted jurisdiction, and issued its prior support orders, there was no need to remand this case for a new proceeding to test the allegations of the complaint. Rather, the court did what it should have done when the case first came to it; it reinstated the rulings by the Family Court finding jurisdiction and ordering child support payments.

H.M. was represented in the Appellate Division by Proskauer Rose LLP (Robyn Crosson and Justin Heinrich, of counsel). E.T. was represented by Rosenthal & Markowitz (Adrienne Orbach and Lisa Solomon, of counsel). Peter Sherwin of Proskauer represented H.M. at the Court of Appeals, and David Tennant of Nixon Peabody represented E.T. At the Court of Appeals, the NY County Lawyers Association and the NYC Bar Association provided amicus support for H.M. Tennant told the *New York Law Journal* (Aug. 6) that E.T. would probably seek to appeal again to the Court of Appeals. A.S.L.

New York Legislators Supports Marriage Recognition While Legislating No-Fault Divorce

On August 14, New York Governor David Paterson signed into law A9753/S3890, making New York the last state in the union to authorize divorces without a judicial finding of fault attributable to one or both of the spouses. The no-fault divorce bill amends Section 170 of the N.Y. Domestic Relations Law to add a seventh ground for divorce: that a marriage has irretrievably broken down for a period of at least six months. In an Assembly committee memo accompanying the bill, the committee in which it originated took care to avoid any implication that by passing new domestic relations legislation that uses the terms "husband" and "wife," the legislature might be seen as casting any doubt upon or seeking to undermine recent court opinions in New York providing recognition for same-sex marriages contracted outside the state. (New York at present does not authorize same-sex marriages to be contracted within the state.)

The pertinent paragraph of the committee's memo states, in full: "It is the intent of this legislation to grant full recognition and respect to valid marriages of same-sex couples to obtain relief under New York State laws and in New York's courts. While the Domestic Relations Law uses the terms "husband and wife" in some places and "plaintiff and defendant" in others, in using the terms "husband and wife", it is not the intent of this legislation to preclude access to relief under the Domestic Relations Law by same-sex couples with valid marriages performed outside the state. Current New York law, written to apply to "husband and wife," has been properly interpreted by New York courts to allow relief for same-sex couples with valid marriages. It is not the intent of this legislation to alter the interpretations of this case law including *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), *Beth R.V. v. Donna M.*, 19 Misc. 3d 724 (Sup.Ct., N.Y. County 2008), and *C.M. v. C.C.*, 867 N.Y.S.2d 884 (Sup.Ct., N.Y. County 2008), nor is it the intent of this legislation to alter New York State's policy to recognize out-of-state same-sex marriages."

Although technically this memorandum, accompanying specific legislation, serves as legislative history to counter any adverse inferences against marriage recognition that might

be drawn by courts confronting cases involving married same-sex couples under the Domestic Relations Law, the last sentence signals a more general endorsement of the actions that both the courts and Governor Paterson and other executive government officials have taken in New York to provide recognition to same-sex partners. While not part of the statute itself, the memorandum serves as official legislative history, to which courts and administrators would resort for the purpose of determining legislative intent when asked to interpret the statute. A.S.L.

Georgia to Settle Glenn Discrimination Claim

Apparently conceding that its action dismissing an employee upon learning that she was transgender and would be presenting as female in the future was not constitutionally defensible after the trial court ruled that heightened scrutiny would apply to the pending Equal Protection claim in *Glenn v. Bumbry*, 2010 WL 2674413 (N.D. Ga., July 2, 2010), state officials have agreed to provide monetary compensation to the plaintiff in lieu of reinstatement. District Judge Richard W. Story had ruled on July 2, finding in a case of apparent first impression that a constitutional employment discrimination claim brought by a transgender state employee should be treated as sex discrimination for analytical purposes, subject to the same heightened scrutiny that is applied to sex discrimination claims. On August 3, Judge Story held a hearing to discuss an appropriate remedy, and issued an order that plaintiff Vandiver Elizabeth Glenn be reinstated, but the parties negotiated an alternative solution, the she receive the economic benefits of reinstatement rather than actually return to the job. This agreement was incorporated into a new order accepting the terms of the parties' settlement, issued on August 9. Glenn is represented by Lambda Legal from its Southern Regional Office in Atlanta, with Cole Thaler and Greg Nevins working on the case. 157 *Daily Labor Report* (BNA), A-4 (July 17, 2010).

Missouri Executive Order Broadly Bans Sexual Orientation Discrimination in Executive Branch of State Government

Missouri Governor Jeremiah W. (Jay) Nixon issued Executive Order 10-24 on July 9, updating prior gubernatorial executive orders in the state to add sexual orientation and veteran status to the list of characteristics covered by the executive branch's non-discrimination policy. The broad-ranging order applies to state government employment and job referrals, state services and facilities, public education, financial assistance programs, health care services, job training programs, state licensing and regulatory functions, and unions representing state government employees. The Order establishes a state Equal Employment Opportunity Officer to oversee compliance by state agencies, a Workforce Diversity Council consisting of the agency diversity officers, and a Workplace Diversity Program and Plan for the executive branch. A.S.L.

Nation's Largest Bar Association Endorses Same-Sex Marriage Rights

The House of Delegates of the American Bar Association, meeting on August 10, voted overwhelming to support a resolution proposed by 14 groups, including the New York State Bar Association and the New York City Bar Association, calling for the elimination of state, territorial and tribal laws restricting marriage between same-sex partners. One of those speaking in favor of the resolution was Stephen Zack, incoming ABA President, who is a partner at Boies, Schiller & Flexner, a firm that served as co-counsel in the case of *Perry v. Schwarzenegger*, in which U.S. District Judge Vaughn Walker ruled that California Proposition 8 was unconstitutional. See the lead story in this month's issue of *Law Notes*, above, for details of the court's ruling. *New York Law Journal*, Aug. 11.

New Developments in GLAD's Challenge to Section 3 of DOMA

There have been some new developments in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass., July 8, 2010), a constitutional challenge to Section 3 of the federal Defense of Marriage Act, 1 U.S.C. sec. 7 (DOMA) that was brought in the U.S. District Court in Massachusetts by Gay & Lesbian Advocates & Defenders, New England's Boston-based LGBT public interest law firm. GLAD brought the case on behalf of a group of plaintiffs who had encountered various kinds of discrimination from the federal government because their lawful same-sex marriages are denied recognition pursuant to Section 3. U.S. District Judge Joseph Tauro ruled that Section 3 violated the Equal Protection rights of the plaintiffs and held that they were entitled to an injunction blocking its enforcement against them. (In a companion case brought by the Massachusetts Attorney General on a different legal theory, Judge Tauro also ruled on July 8 against the federal government, ordering that the state not be required to comply with Sec. 3 in administering state programs that might be subject to federal rules.)

By mid-August, the future direction of GLAD's case began to be sorted out. A decision by a federal district judge does not take effect until the formal "entry of judgment" on the record. Although Judge Tauro issued his opinion in the Gill case on July 8, he did not enter his judgment formally until August 12. That set the clock ticking on the Justice Department's time to appeal, which runs for 60 days, so they have until early in October to file an appeal. The Justice Department had not reacted to the July 8 ruling with a vow to appeal, and presumably there is some internal debate going on. Judge Tauro's opinion effectively shredded all of the arguments they made in defense of DOMA, and their case was undercut politically by the President's stated position that he considers DOMA to be discriminatory and urges Congress to repeal it. A bill is pending in the House with about 100 co-sponsors intended to do that, although nobody is predicting it will come to a vote in this session.

As to when the decision goes into effect, that normally happens upon the official entry of the judgment, but in this case, GLAD has announced that it reached an agreement with the Justice Department to stay the effect of the ruling while the Justice Department decides whether to appeal. If no appeal is filed within the 60-day deadline, the decision goes into effect. If an appeal is filed, it is likely that the stay will continue pending the conclusion of the appellate process.

In a Q&A posted on its website, GLAD explains the rationale for this: "We agreed to a stay for two reasons. First and foremost, it is in our clients' best interest. They want the certainty of knowing that their awarded Social Security payments, health insurance costs, or tax refunds are not potentially subject to repayment to the government. Only a final victory ensures that. Secondly, we think the stay actually provides clarity for married couples around the country who are looking at their own situations and wondering whether the Gill decision allows them to apply for Social Security benefits, for example, or sponsor their spouse for citizenship. The answer, even without a stay in Gill, is: no, not yet."

On August 18, Judge Tauro entered an Amended Judgment in the record, spelling out in detail the relief to which each plaintiff in the Gill case is entitled when/if the judge's decision goes into effect. From the wording of the judgment, it appears that the relief that is ordered in this case is very particular to the plaintiffs. There is no general statement that the various governmental defendants are enjoined from continuing to enforce Section 3 of DOMA in general, but rather that they are enjoined not to enforce it against these named plaintiffs in considering their applications for various federal benefits. One assumes, however, that if the court's judgment goes into effect, Section 3 will be effectively unenforceable in Massachusetts and, perhaps (a question yet to be answered) with respect to any same-sex marriage entered in Massachusetts, even though the couple resides in some other jurisdiction?

The text of the amended order is available on GLAD's website, together with the Q&A. A quick search of the Massachusetts Attorney General's website showed no new references to the case, the latest being a press release hailing the court's opinion on the merits from July. So it is not certain what the status is of the Commonwealth of Massachusetts' case in terms of entry of judgment, stay, or appeal. The Commonwealth's complaint was focused on particular specific ways that Section 3 affected the ability of the Commonwealth to administer its programs without violating its state constitutional duty to treat same-sex marriages the same as different-sex marriages, because of the involvement of federal money or federal rules governing particular programs. Thus, it seems likely that narrowly tailored relief in the state's case would focus on blocking the application of Section 3 as it might affect state programs.

Thus, it remains unclear whether Judge Tauro's decisions, if not appealed, would have any effect outside of Massachusetts. Of course, if the decision is upheld on appeal to the 1st Circuit, it would become an appellate precedent carrying weight in all the New England states within the 1st Circuit, and at that point would most likely be appealed to the Supreme Court by the government, unless political developments intervened to render it moot. A.S.L.

Federal Civil Litigation Notes

3rd Circuit — A 3-judge panel of the U.S. Court of Appeals for the 3rd Circuit ruled on August 18 that a speech code adopted by the University of the Virgin Islands violated the 1st Amendment. *McCauley v. University of the Virgin Islands*, No. 09-3735. The court found that the university's policy swept too broadly in prescribing penalties for "offensive" speech that might be emotionally harmful to maligned persons, in a ruling that echoed decisions from other circuits.

California — A settlement was reportedly reached in the case of *Sheldon v Dhillon*, 2009 WL 4282086 (N.D. Cal., Nov. 25, 2009), where a community college professor alleged that her First Amendment rights were violated when she lost her teaching position after making controversial statements in class about homosexuality. She is represented by Alliance Defense Fund. According to a press release from ADF, they were able to obtain a $100,000 settlement for the plaintiff and a removal of any mention of her termination from her personnel file at the school. ADF is stalwart in defending teachers who make offensive or "politically incorrect" statements about gay people in the classroom. *San Francisco Chronicle*, July 23.

Georgia — In a case that is a virtual constitutional "copy-cat" of *Ward v. Wilbanks* (see above), U.S. District Judge J. Randal Hall refused to grant a preliminary injunction against Augusta State University, whose counseling faculty have imposed a remediation program on the plaintiff, Jennifer Keeton, a self-described Christian who is unwilling to meet professional ethical standards when it comes to dealing with potential LGBT clients. *Keeton v. Anderson-Wiley*, CV 110-099 (S.D.Ga., Aug. 20, 2010). Relying heavily on the constitutional analysis employed by Judge Steeh in *Ward*, Judge Hall concluded that Keeton was unlikely to prevail on the merits of her 1st and 14th Amendment claims, and that it was inappropriate for the judge to tamper with apparently legitimate curricular concerns by the faculty, as the school as a legitimate interest in complying with ethical standards imposed by organizations that accredit its graduate counseling program. Judge Hall emphasized that the faculty is not trying to get Ms. Keeton to modify her religiously-based views on homosexuality, but rather to require her to expose herself to differing points of view expressed in peer-reviewed journal articles in the field and to learn how to provide unbiased professional service to clients despite whatever personal views she might hold. Hall emphasized that he was ruling based on a limited record at a very early stage in the litigation.

Louisiana — U.S. District Judge James J. Brady granted a defense motion for judgment as a matter of law, rejecting a jury verdict that was rendered in favor of a male employee who claimed to have been subjected to hostile environment sexual harassment by a male co-worker *Cherry v. Shaw Coastal, Inc.*, No. 08-228-JJB (M.D.La., Aug. 3, 2010). Plaintiff Cherry presented evidence of numerous instances of conduct by a co-worker, Michael Reasoner, which Cherry found to be harassing. The trial judge sent the case to the jury, which found for Cherry, but Judge Brady concluded that the evidence did not meet the high standard set by the 5th Circuit for a finding of hostile environment sexual harassment, finding that much of it constituted male-on-male horseplay and that there was no evidence that Reasoner was gay or sexually interested in Mr. Cherry. "The fact that Cherry is overly sensitive to homoerotic teasing, if not homophobic, does not change teasing into severe or pervasive sexual harassment," wrote Judge Brady, noting: "At least one witness testified that Cherry was homophobic. A reasonable person is not homophobic, just as a reasonable person is not racist, anti-Semitic, anti-Papal, nor a person holding any number of beliefs that would make him overly sensitive to certain conduct. . . When suggested that Reasoner's conduct amounted to horsing around, Cherry responded that it was not horsing around to him and that he did not want to horse around. Title VII is not, however, a general civility code and simply because Cherry did not like Reasoner's conduct does not make it severe or pervasive." Brady also noted that when Cherry brought the matter to the attention of the company, the company acted promptly and ultimately Reasoner was terminated. Thus, the court held that the company should not have been held liable for Reasoner's conduct. However, the court did not set aside the jury verdict in favor of Cherry on a supplementary state tort law claim of battery against Reasoner, finding that record evidence of unwanted touching supported that verdict.

Mississippi — The ACLU has announced a settlement in *McMillen v. Itawamba County School District*, 2010 WL 1172429 (N.D.Miss., March 23, 2010), in which U.S. District Judge Glen H. Davidson ruled that the school district's refusal to allow a graduating senior to bring her girlfriend to the prom or to wear a tuxedo for that occasion was a violation of the plaintiff's 1st Amendment rights. Judge Davidson refused to order the district to hold the prom — which they had cancelled rather than to accommodate McMillen — upon counsel's representation that a group of parents was organizing a prom which McMillen and her date could attend. The representation turned out to be bogus, as there were in the event two separate dances, the smaller of which McMillen attended. On July 19, McMillen's attorneys notified the court that they intended to accept a settlement offer from defendants of $35,000 plus attorney's fees, and an agreement by the district not to discriminate based on sexual orientation in any educational or extra-curricular activities. The settlement also specified that the district would not allow harassment based on sexual orientation or gender identity. *Boston Globe*, July 21.

New York — Lambda Legal announced settlement of *DeWolf and Watts v. Countrywide Financial*, pending in the U.S. District Court for the Southern District of New York. Lambda's clients, Adola Dewolf and Laura Watts, have been in a committed relationship since 2004, and have been living together since 2005 in a house that DeWolf had purchased and financed through a mortgage. They sought to add Watts's name to the deed and mortgage, but Countywide, claiming that Federal National Mortgage Association ("Fannie Mae") rules prohibited adding an unrelated adult to the mortgage. Countrywide claimed that the attempt to add Watts was a breach of the loan agreement, and sought to accelerate payment on the mortgage, threatening to foreclose if the balance of $80,000 was not paid off within 30 days. Luckily, the women were able to refinance the mortgage and avoid foreclosure. Lambda filed suit in 2007, leading to settlement discussions with Fannie Mae, which has agreed to revise its policies. Under the new policy, a homeowner will be able to add another person who lives in the home, whether related or not, to a mortgage and title. This change will affect all lenders that deal with Fannie Mae, and should have a salutary effect on the ability of same-sex couples to

access credit jointly for home financing. Lambda Senior Staff Attorney Thomas W. Ude, Jr., worked on the case with cooperating attorneys Beau W. Buffier, James L. Garrity, Jr., and David M. Sollors of Shearman & Sterling LLP. *Lambda Legal News Release*, Aug. 20.

Pennsylvania — U.S. District Judge Michael M. Baylson (E.D. Pa.) has rejected a constitutional challenge to 18 U.S.C. sections 2257 and 2257A, which impose strict record-keeping requirements on producers of sexually oriented material that move in interstate commerce and have proven burdensome to producers of sexually oriented materials. *Free Speech Coalition v. Holder*, 2010 WL 2982985 (July 27, 2010). Judge Baylson accepted the government's argument that the legitimate interest in combating child pornographic provided sufficient justification to require formal documentation of the identity and age of every person depicted in sexually-explicit materials, and to require that they be retained for a substantial period of time and be subject to immediate inspection without warning by government agents. The opinion, running over 100 pages, provides a detailed discussion history of statutory attempts to deal with child pornography and the wide leeway that the Supreme Court has granted to Congress in adopting methods of discouraging its production and distribution. Judge Baylson was appointed to the federal bench by President George W. Bush.

Washington — In continuing litigation in *Doe #1 v. Reed*, 2010 WL 2518466 (June 24, 2010), in which the U.S. Supreme Court ruled that generally initiative petition signers do not have a right to remain anonymous, but that their identities might be protected on proof that revealing them would subject the signers to significant risk of harm, U.S. District Judge Benjamin Settle on August 11 ordered the State of Washington to continue to keep private the names of signers of the petitions that sought an initiative repeal of the state's domestic partnership law. Judge Settle ruled that the names should be kept confidential while plaintiffs attempt to meet the burden set by the Supreme Court of proving the need for confidentiality in this case, and urged the parties to agree to an expedited trial schedule. Voters rejected the repeal initiative in 2009.

Wyoming — The Associated Press reported on Aug. 24 that a male same-sex couple, Ryan W. Dupree and David Shupe-Roderick, have filed suit pro se in U.S. District Court in Cheyenne, Wyoming, asking the court to order the state of Wyoming to issue them a marriage license. The case has been assigned to U.S. District Judge Alan B. Johnson, who was appointed to the bench in 1985 by President Ronald Reagan. The men applied for a marriage license and were turned down by a local clerk, thus establishing their standing to file the suit. Isn't this just a great idea in the current circumstances? — for same-sex couples to bring pro se federal marriage litigation in states with statutes and/or constitutional amendments banning same-sex marriage. Now that legal biggies Ted Olson and David Boies have blazed a path in the U.S. District Court for the Northern District of California in the Proposition 8 challenge, *Perry v. Schwarzenegger* (see lead story above), there seems to be no need for further expenditure of legal talent on this issue. Aggrieved gay couples can represent themselves. After all, this isn't brain surgery. Federal district courts all over the country will immediately grant injunctive relief due to Judge Vaughn Walker's persuasive opinion (see above). If Olson and Boies think this issue is winnable in the Supreme Court, why should anybody hesitate? A.S.L.

State Civil Litigation Notes

Alaska — The ACLU of Alaska Foundation has filed suit on behalf of same-sex couples challenging the denial of favorable real estate tax treatment for same-sex couples on the same basis that such treatment is extended to married couples. The case is *Schmidt v. State of Alaska*, filed in the 3rd Judicial District Court in Anchorage, and seeks to build on prior litigation in which the Alaska Supreme Court has accepted the claim that state constitutional guarantees of equal protection extend to same-sex couples. The case is part of the new trend of using state equal protection to get around state law bans on same-sex marriage by seeking equality of treatment with respect to particular policies. Co-counsel in the case are David Oesting, of the Anchorage firm of Davis Wright Tremaine LLP, and Thomas Stenson, of the ACLU of Alaska Foundation, also located in Anchorage.

California — The National Center for Lesbian Rights announced that a settlement may have been reached in the suit by Clay Greene, a 78-year-old gay man, against Sonoma County and a nursing home in which Greene was held against his will. Greene alleged that the County's Public Guardian improperly separated him from his 88-year-old partner (who subsequently died) after an accident in their home. County officials, claiming to believe that Greene had abused his partner, whose relationship they refused to acknowledge, placed the two men in separate nursing homes, sold off their possessions, and kept Greene from seeing his partner, who died in the other nursing home. Under the terms of the settlement, the county would pay Greene $600,000 and the nursing home would pay $53,000. The county continues to insist that it was in the right and was paying just to avoid having to go through a trial. NCLR indicated that under the terms of the proposed settlement, the public guardian's office agrees not to move people from their homes against their will. Settlement hinged on the county government approving the settlement payment. *San Francisco Chronicle*, July 25.

Illinois — In *Mitchell v. Bremen Community School District No. 228 and Gleason*, the Cook County Human Rights Commission has found "substantial evidence" to support the allegation that School Superintendent Richard Mitchell has been the victim of sexual orientation discrimination by the Board of Education and its president, Evelyn Gleason, who has forthrightly told inquiring parents that the reason Mitchell's contract was disputed and he was terminated was because he is gay. Evidence shows that the board under Gleason's leadership took action to sabotage Mitchell's attempts to achieve goals set by the board, and then inexplicably cut short a "remediation period" during which he was expected to meet the goals. The substantial evidence finding will lead to a full hearing on the discrimination charge unless the matter is settled. Lambda Legal's Midwest Regional Office in Chicago represents Dr. Mitchell, with senior staff attorney Christopher Clark in charge of the case. *Lambda Legal News Release*, July 27.

Mississippi — The ACLU has filed suit in U.S. District Court in Jackson, Mississippi, on behalf of Ceara Lynn Sturgis, a high school student whose photograph was rejected for the school yearbook because she insisted on having her picture taken in a tuxedo rather than the feminine drapery insisted upon by school authorities. Ms. Sturgis, who prefers to dress in clothing "that is traditionally associated with the male gender," according to her complaint, identifies as female but is uncomfortable wearing clothing traditionally associated with the female gender. When she showed up for the portrait, apprehensive about the requirement for formal dress, she felt very uncomfortable when the drapery was placed on her for the photo, and inquired whether she could wear a tuxedo instead. The photographer's assistant said yes, and the photo was taken with the tuxedo, but when her mother inquired of school authorities, they said the picture would not be used. She was shocked to discover that not only was her photograph barred from the yearbook by school authorities, but even her name was omitted from graduating senior section of the book. In *Sturgis v. Copiah County School District*, filed on August 16 (S.D.Miss.), she claims a sex discrimination violation of Title IX of the Educational Amendments of 1972 and of her right to Equal Protection under the 14th Amendment. Counsel in the case include ACLU of Mississippi Acting Legal Director Bear Atwood, ACLU Foundation LGBT Rights attorney Christine Sun, and cooperating attorneys Norman C. Simon, Joshua Glick and Jason Moff from Kramer Levin Naftalis & Frankel LLP in New York.

Montana — The ACLU has filed suit against the state of Montana on behalf of a group of

same-sex couples complaining that they are deprived of equal protection of the law in violation of the state's Constitution because, having prohibited them from marrying in the state or recognizing same-sex marriages contracted elsewhere, the state is providing a wide array of benefits, rights and protections to different-sex couples that are withheld from same-sex couples. *Donaldson v. State of Montana*, filed in Montana First Judicial District court, Lewis and Clark County. The theory of this case, part of a new litigation trend, is to seek the rights and benefits of marriage without directly seeking marriage itself, on the theory that state marriage amendments and mini-DOMA statutes should be narrowly construed to apply only to the term and legal status of marriage, but not to the rights, benefits and protections that accompany it. This builds on the California Supreme Court's ruling in *Strauss v. Horton*, 207 P.3d 48, 46 Cal.4th 364 (2009), that the passage of Proposition 8, limiting marriage in California to the union of one man and one woman, did not otherwise limit the application of California's constitutional equal protection requirement in terms of the rights, benefits and protections accompanying marriage. Local counsel James H. Goetz and Benjamin J. Alke of Goetz, Gallik & Baldwin, PC (Bozeman, Montana) are joined by cooperating attorneys from Morrison & Foerster LLP (San Francisco office: Ruth N. Borenstein, Philip T. Besirof, and Neil D. Perry), the ACLU Foundation staff attorney Elizabeth O. Gill (based in San Francisco), and ACLU Foundation of Montana Legal Program Director Betsy Griffing.

New Mexico — For a brief period in February 2004, reacting to the national news about same-sex marriages in San Francisco, Sandoval County (NM) Clerk Victoria Dunlap began issuing marriage licenses to same-sex couples, only desisting after being threatened with a lawsuit by the state's attorney general, Patricia Madrid. One of the women who obtained a license and married her partner at that time is now seeking a divorce, raising the question whether their marriage was ever valid and whether the court has jurisdiction over the case. On August 9, Santa Fe District Judge Sarah Singleton ruled in *Carrejo v. Haught* that the licenses that County Clerk Dunlap had issued are "not void from the inception, but merely voidable." Singleton rejected Karla JaNelle Haught's argument that because the marriage was void, she could not be sued for divorce. Haught had argued, representing herself on a motion to dismiss, that because New Mexico law does not specifically authorize same-sex marriage, the marriage must be treated as void, leaving the court with nothing to decide. But Angela Maria Carrego's lawyer, Amber Train, responded that New Mexico does not expressly ban same-sex marriages, and that because Clerk Dunlap desisted from issuing licenses, there has been no litigation determining the validity of the 66 licenses that she issued. According to Judge Singleton, the only kind of marriage that would be void *ab initio* in New Mexico would be an incestuous marriage. She also held that due to the passage of time, it was too late to "void" the marriage retrospectively. The issues in the divorce involve division of community property and spousal support sought by Carrejo. *Albuquerque Journal*, *Santa Fe New Mexican*, Aug. 10.

New York — N.Y. State Supreme Court Justice Randy Sue Marber ruled on cross-motions for summary judgment in *Finkel v. Dauber*, 012414/09 (N.Y.Sup.Ct., Nassau Co., July 22, 2010), ruling that plaintiff, who claimed to have been defamed on a private Facebook group, had failed to state a cause of action because the comments posted about her (although not using her name, but illustrated with a doctored photograph) were not actionable. The comments suggested that plaintiff had become infected with HIV while touring Africa and engaging in sexual activity with animals, or alternatively after having had sex with a male prostitute costumed as a firefighter. Wrote Justice Marber, "While the posts display an utter lack of taste and propriety, they do not constitute statements of fact. An ordinary reader would not take them literally to conclude that any of these teenagers are having sex with wild or domestic animals or with male prostitutes dressed as firemen. The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact." The judge also rejected a cause of action against defendants' parents for negligent supervision, and found in addition that there is not cause of action for "cyber bullying" in New York.

New York — Refusing to dismiss a defamation action brought by a male professor against a 39-year old undergraduate student who was allegedly spreading a story that the professor had a sexual relationship with a 17-year-old male student, New York Supreme Court Justice Charles J. Markey asserted in *Rosen v. Robinson*, No. 6896/2010 (Queens Co., Aug. 13, 2010), that "Despite today's tolerant attitudes on same sex preferences, statement ascribing homosexuality, in the State of New York, are still considered defamatory." Most of the statements alleged in Timothy Rosen's complaint were found not to be actionable on various technical grounds, but his allegation that James Robinson told another person that Rosen was "having sex with a seventeen year old Queens College Student" and that the sexual activity was occurring on the campus was actionable. The opinion, published in the *New York Law Journal* on August 19, is a bit clumsily written, but it appears that Justice Markey may have rejected the motion to dismiss based on his judgment that "false statements of a teach having sex with a student can be ruinous to a member of a college faculty member's [sic] career or his ability later to secure tenure," citing cases from other jurisdictions involving teachers who got into trouble because of sexual relationships with students. The statement itself did not specify the gender of the student, although it seems clear from other references in the opinion and an article in the *New York Daily News* that reported on the filing of the case that Robinson was referring to a 17-year-old male. Markey commented: "Paragraph 3 of the complaint has a quotation of the statement alleged to have been made by the defendant that the plaintiff allegedly had sex with a student. Since that statement in paragraph 3 does not state that the student was a male, an allegation made in other paragraphs of the complaint, the better course is to allow the plaintiff to amend the complaint to make such an allegation, to the extent that plaintiff would like to maintain a slander action predicated on the false imputation of homosexual activity with a student." Markey gave the plaintiff until October 1 to file such an amended complaint. Overall, it appears that Rosen would have a potentially valid claim without making such an amendment, as his claim could rest on the proposition that it is defamatory to falsely accuse a professor of having sex with a student, regardless of gender, presently registered at the school where the professor teaches, as impugning his professional ethics and judgment. The gay angle need not enter into it. The cases Markey cited to support his assertion that imputation of homosexuality is defamatory rely on a chain back of old cases that predate the modern gay rights movement's accomplishments in New York of getting the sodomy law declared unconstitutional and enacting affirmative protection against discrimination for gay people. Some other jurisdictions have abandoned the presumption that it is defamatory to call somebody gay; it is long past the time for New York courts to do so.

Texas — Deja vu all over again? Texas District Judge Randy Clapp (Wharton County) ruled on July 23 that Nikki Araguz, widow of Thomas Araguz III, a firefighter who died in the line of duty, could not spend any of the death benefit she was entitled to receive, because, as it turns out, Nikki was born male and her right to be treated as a surviving spouse is being contested by her late husband's parents. The refusal of Texas courts to recognize the validity of marriages involving transgender individuals has reared its head in the past, when the Texas Court of Appeals ruled in *Littleton v. Prange*, 9 S.W.3d 223 (1999), that such a marriage was void as the union of two men, refusing to recognize any legal effect to gender reassignment (even when a new birth certificate had been issued recognizing the transgender individual as female). In that case, the result was to deny a widow the right to sue for the wrongful death of

her husband. There have been plenty of legal developments since 1999, and Nikki's attorneys hope to persuade the court that she is entitled to be treated as a surviving widow. Thomas Araguz had two sons from a prior marriage, and his parents are seeking to claim the entire benefits award for the sons. *Houston Chronicle*, July 23. The Transgender Foundation of America has set up a Nikki Araguz fund to help with legal expenses in the case. (Transgender Foundation of America, 604 Pacific, Houston TX 77006)

Wisconsin — The Wisconsin Supreme Court has rejected an insurance company's attempt to deny coverage for maternity-related medical expenses to two women who served as gestational surrogates. *Mercycare Insurance Co. v. Wisconsin Commissioner of Insurance, 2010 WL 2791999 (July 16, 2010). The insurer had denied the claims based on provisions of their insurance policies, but the state Insurance Commissioner ruled that the provision did not unequivocally exclude the claims, and any such exclusion would violate non-discrimination requirements under the state's insurance laws. A circuit judge reversed the Commissioner, but the Supreme Court reversed the circuit judge. The court was unanimous in finding that the insurance contract provisions did not clearly exclude the coverage, while a majority of the court agreed with the Insurance Commissioner's interpretation of the statute as well. "We conclude," wrote Justice Ann Walsh Bradley, "that the statute permits an insurer to exclude or limit certain services and procedures, as long as the exclusion or limitation applies to all policies. However, an insurer may not make routine maternity services that are generally covered under the policy unavailable to a specific subgroup of insureds, surrogate mothers, based solely on the insured's reasons for becoming pregnant or the method used to achieve pregnancy." This ruling undoubtedly upsets the insurer's actuarial calculations, one argument against coverage being that in evaluating the risk of incurring maternity expenses, the insurer did not take into account that an insured woman would become pregnant for purposes of bearing a child for somebody else. Insurers selling health insurance in Wisconsin will now need to recalculate their risks and adjust their premiums, although one suspects that the incidence of surrogacy is low enough that the impact on premiums charged to insureds will not be significant. Alternatively, of course, the legislature could decide to change the statute to accommodate the industry's position, but that might raise constitutional equal protection and due process issues, in light of the court's treatment of the discrimination issue in this case.*

Wisconsin — The Alliance Defense Fund has filed a lawsuit on behalf of Wisconsin Family Action, challenging the constitutionality of the state's domestic partnership registry and benefits for same-sex partners of state employees. In 2006, Wisconsin voters adopted a state constitutional amendment banning same-sex marriages and any "legal status indentical or substantially similar to marriage" for same-sex couples. The governor and legislative leaders agreed in 2009 to include in the state budget a partnership benefits program for qualifying couples, which covers a range of standard employee benefits. They took the position that it was not precluded by the state constitutional amendment, because it fell far short of conferring all the rights of marriage on those who registered. ADF responded by filing an action directly in the state supreme court seeking to block it, which was dismissed without comment by the court. This time, ADF is filing in a trial court, seeking to litigate its challenge through the system, basing the standing of its taxpayer plaintiffs on the contention that the program imposes administrative costs on the state. *Milwaukee Journal Sentinel*, Aug. 21. A.S.L.

Colorado Federal Court Lets Transgender Plaintiff Pursue Title VII Sex Discrimination Claim

In a recent discrimination case brought by a transgender federal employee under both Title VII and the Constitution, the Colorado U.S. District Court granted the defendant's motion as to some claims but allowed others to continue. *Michaels v. Akal Security, Inc.*, 2010 WL 2573988 (D.Colo., June 24, 2010). The plaintiff, Sue Anne Michaels, brought the action against her employer, Akal Security, Inc., and Attorney General Eric Holder on behalf of the United States Marshal Service (USMS). The USMS employs Akal to provide security officers for Alfred A. Arraj Federal Courthouse in Denver where Michaels is currently still employed as a Court Security Officer.

In her opinion, Senior District Judge Zita Leeson Weinshienk focuses only on the claims brought against Attorney General Holder and the USMS as Akal Security did not file any motions for dismissal. In her complaint, Michaels asserted that USMS violated Title VII by discriminating against her based on sex and participating in retaliation resulting in a hostile work environment. She also asserted an Equal Protection and Due Process claim under the 5th Amendment and discrimination based on a perceived disability in violation of the Rehabilitation Act. Judge Weinshienk denied the defendant's motion to dismiss Michael's sex discrimination claim, but granted the motion on the remaining claims.

Born biologically male, Michaels has been diagnosed with gender dysphoria and in February 2007 began her transition from male to female, which included taking female hormones. Michaels has not yet undergone sex reassignment surgery. In October 2007, Michaels informed Akal that she had been diagnosed with gender dysphoria and shortly afterwards began presenting herself as a woman at work. She also asked her co-workers to address her by her female name. Less than a month later, Michaels' supervisor informed her that several courthouse employees had complained about her use of the female restrooms at work.

In reaction to the complaints, Michaels sent a written statement to her Akal supervisor and the USMS stating that she felt that the work environment had become tense since she began her transition. Michaels requested that a question and answer session be conducted so that she would have an opportunity to explain more fully to her co-workers what is involved in transitioning. Akal did not hold the requested question and answer session, but rather instructed Michaels that she was required to use the men's restrooms until she underwent sex reassignment surgery. Michaels' supervisor also placed her on involuntary leave from January 4, 2008 until April 18, 2008 while Akal conducted further investigation into her use of the female restrooms. The majority of Judge Weinshienk's opinion is devoted to Michael's sex discrimination claim and whether a person's transgender status can form the basis of a sex discrimination claim under Title VII. In *Etsitty v. Utah Transit Authority*, the U.S. Court of Appeals for the 10th Circuit found that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." 502 F.3d 1215 (10th Cir., 2007). In Etsitty, the plaintiff, a bus driver who was transitioning from male to female and had not yet undergone sex reassignment surgery, was terminated by her employers for using female restrooms on her bus route, which her employer argued was a liability for possible lawsuits in the future. Under *Etsitty*, Michaels is barred from making a sex discrimination claim based on her status as transgender, as transgender individuals are not considered a protected class as such for purposes of Title VII.

However, Michaels' claim was not based solely on her status as a transsexual, but also on the fact that she did not conform to her employer's perception of how men should dress or act in the workplace. In *Price Waterhouse v. Hopkins*, where a female employee was denied a promotion for her failure to behave more feminninely, the court recognized gender stereotyping by an employer as evidence of sex discrimination under Title VII. 490 U.S. 228, 250-51 (1989). Here, the District Court does not determine if gender stereotyping occurred, but for the purposes of evaluating the defendant's motion to dismiss, assumes that such discrimination did take place. To survive a motion to dismiss, Michaels did not need to establish that such discrimination actually took place, but only to show that her employer's actions were more than likely motivated by discrimination. Also, Michaels' complaint details other dis-

criminatory incidents besides the disciplinary action taken for her use of the women's restrooms, such as excessive medical evaluations. Such actions were not addressed by Attorney General Holder's reply brief, and thus the court could not adequately determine if there was a legitimate reason behind these actions. Determining that Michaels did meet her burden for establishing a prima facie case of sex discrimination based on gender stereotyping, the court denied the Attorney General's motion to dismiss the entire case.

Michaels also made another claim under Title VII, arguing that the USMS took retaliatory action against her which resulted in a hostile work environment. To have a valid retaliation claim under Title VII, a plaintiff must establish that he or she participated in a protected action and that the employer's alleged retaliation is causally connected to the protected action. Michaels asserted that she undertook a protected action when she wrote her request that USMS and Akal hold a question and answer session in hopes that explaining her transition to her coworkers would lessen a tense work environment. However, it is not sufficient to establish retaliation in violation of Title VII to assert that a work environment became merely tense. The court must find that either the work environment was severely hostile, or that specific acts of discrimination took place against the plaintiff in reaction to the protected action. There is no evidence that Michaels was harassed in reaction to writing the statement or that the tense work environment ever became openly hostile.

Equally important to a retaliation claim is that the plaintiff establish that the employer was on notice of the harassment. The written statement by Michaels to her employers makes no mention of specific discriminatory actions taken by other employees. The court determined that USMS was never put on notice of any retaliatory action and therefore dismissed the claim. In addition to her Title VII claims, Michaels also argued that USMS violated the Rehabilitation Act and her constitutional rights under Equal Protection and Due Process. Judge Weinshienk briefly discusses the court's reasons for dismissing both claims.

Michaels argued that USMS discriminated against her based on a perceived disability. Though Michaels did not name the perceived disability in her claim, the court assumes she is referring to her gender dysphoria as a perceived disability. While the Rehabilitation Act bars a federal agency from discriminating against an individual based solely on a disability, the act also states that "transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments" are excluded "from the definition of disability" under the Act. As a form of gender identity disorder, gender dysphoria is therefore excluded from being a perceived disability under the Rehabilitation Act, barring Michaels from having a valid claim under the act. Finally, Michaels asserted an Equal Protection and Due Process claim under the 5th Amendment. However, much like her claim brought under the Rehabilitation Act, the court found that she was precluded from bringing this claim. When the employer in a Title VII action is a federal agency, any constitutional discrimination claim brought against that agency is preempted by the Title VII claim.

Although Michaels argued that her constitutional claims fell outside of the scope of her claims brought under Title VII, the court held that "the clear rule is that Title VII is the *only* source of relief for discrimination in federal employment, no matter how the claims are presented." (emphasis in original)

While Akal did not file a motion to dismiss, the court determined that the reasoning behind dismissing the claim against USMS for retaliation under Title VII equally applies to the same claim Michaels asserted against Akal. The court dismissed this claim in its entirety. *Kelly Garner*

Criminal Litigation Notes

Maine — In *State v. Rackliffe*, 2010 ME 70, 2010 WL 2901620 (July 27, 2010), the Supreme Judicial Court of Maine upheld the defendant's conviction of one count of gross sexual assault that was entered on a jury verdict in Androscoggin County Superior Court. Defendant was accused of forcing himself on another man in the men's restroom at a shopping mall. *Once the victim was confronted by Rackliffe, who had forcibly entered the bathroom stall he was using, there was no evidence that the victim cried out or physically resisted Rackliffe's advances," wrote Justice Alexander for the court. "The incident was reported to law enforcement promptly after it occurred. Rackliffe was initially questions by police while at the scene." On appeal, Rackliffe argued that he should have been allowed to cross-examine the victim about his sexual orientation, in support of Rackliffe's argument that the sex was consensual. Rejecting the argument, the court asserted, "Evidence of a victim's sexual orientation, taken alone, is irrelevant to the issue of whether or not a victim consented to a sexual encounter." The court also rejected Rackliffe's contention that the state had failed to prove compulsion, pointing out that under Maine law, "the uncorroborated testimony of a victim is sufficient to sustain a verdict for a sex crime." The court commented that the state was not required to prove that the victim cried out or physically resisted an assault to prove compulsion, and that the evidentiary record was sufficient to support the jury verdict.*

New York — Two men convicted of beating an Ecuadorean immigrant to death while shouting anti-gay slurs have been sentenced to lengthy prison terms under the hate crimes law. Keith Phoenix, convicted of murder, and Hakim Scott, convicted of manslaughter, were both sentenced to 37 years. They assumed their victim, Jose Sucuzhanay, was gay because he was walking late at night arm-in-arm with his brother, who was not seriously injured in the December 2008 incident. A.S.L.

Legislative Notes

California — The state legislature has approved a measure to amend a provision of the Welfare and Institutions Code under which the state is committed to funding research aimed at finding a "cure" for homosexuality. Assembly Bill 2199, which has passed both houses of the legislature, rewrites an existing statute to make its focus research on sex crimes against children and methods of identifying potential sex offenders. At press time, the governor had just received the bill and had not indicated whether he would sign it. *Sacramento Bee*, Aug. 27, 2010.

Colorado — The Denver City Council voted on August 16 to adopt a proclamation stating: "The city of Denver respects the proper legal rights of all immigrant groups and families, including gay, lesbian, bisexual and transgender family structures." The measure was intended to provide support for pending legislation in Congress that would allow gay people to apply for legal residency in the U.S. for their same-sex partners who reside in other countries. The vote on the proclamation was 11-0, with two members absent and not voting. *Denver Post*, Aug. 17.

New York — We reported recently on a ruling by the 2nd Circuit, *Amore v. Novarro*, 2010 WL 2490017 (June 22, 2010), holding that an Ithaca police officer was immune from suit for arresting a gay man on a loitering/solicitation charge in a public park because the legislature had not removed the underlying statute from the books, even though it was declared unconstitutional by the Court of Appeals long ago. Over recent years, the failure of the legislature to revise NY Penal Law 240.35 to reflect the judicial invalidation of several of its subdivisions has been a continuing sore point with the criminal defense bar and the courts. Finally, a recent ruling holding New York City in contempt for continued enforcement of invalidated provisions caught the attention of our dysfunctional legislature, and a bill sponsored in the Assembly by Danny O'Donnell and the Senate by Eric Schneiderman, A5537/S4593, won unanimous consent in both chambers and was signed into law by Governor David Paterson. Section 1 of the bill provides: "Subdivisions 1, 3 and 7 of section 240.35 of the penal law are REPEALED." The remainder of the bill goes through the penal code making adjustments to reflect the removal of these subdivisions from the statute on loitering for various purposes.

The most relevant of the subdivisions for our purposes is subdivision 3, which made it a crime for a person to loiter in a "public place for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse or other sexual behavior of a deviate nature." This is the provision usually cited by police when arresting somebody in a public restroom or park in a cruising sting. It was invalidated by the Court of Appeals in *People v. Uplinger*, 58 N.Y.2d 936 (1983). The Republicans, long controlling the State Senate, had resisted repealing the provision, but the weight of judicial scorn seems to have overtaken them, since none of them voted against repeal. A.S.L.

Law & Society Notes

Don't Ask, Don't Tell — With a vote pending in the Senate this fall on whether to join the House in giving the U.S. Defense Department permission to end the exclusion of openly-gay members from the uniformed forces, the issue continued to receive significant mass media attention, fueled further by the announcement that Lt. Col. Victor Fehrenbach, a highly decorated Air Force flight officer who was one of the highest-ranking military personnel to have been dismissed under the policy, had filed a lawsuit contesting his discharge. Fehnrenbach's suit is in the federal district court in Idaho, within the 9th Circuit, where there is now precedent requiring heightened scrutiny of anti-gay personnel actions by the military. In response to his request for a temporary restraining order against his discharge, the Air Force agreed to stay its hand for a time as the case gets under way. Newspapers around the country continued to run feature articles about the waste of resources generated by the policy. For example, in the Pacific Northwest, the press reported on the discharge of Jonathan Hopkins, an honors graduate of the U.S. Military Academy at West Point who received several service decorations in connection with his leadership of combat missions in Iraq and Afghanistan, who was dismissed as he was being recommended for promotion to Major. Hopkins was scheduled to appear Aug. 18 on the Rachel Maddow Show on msnbc to discuss his situation. Editorial opinion around the country seemed solidly behind repeal of the policy, with only political cowardice by the White House and congressional leadership standing in the way of a vote prior to the November 2 congressional midterm elections.

Marriage "Tipping Point"? — The news that some national polls now show a majority of the public supporting the right of same-sex couples to marry has caused speculation that some "tipping point" has been reached on the issue. On August 22, the *New York Times* published an op-ed article by Andrew Gelman, Jeffrey Lax and Justin Phillips, professors of political science at Columbia University, titled "Over Time, A Gay Marriage Groundswell," which examined trends in public opinion tracked against the actual legal progress towards same-sex marriage in the U.S. Among their observations: "According to our research, as recently as 2004 [when same-sex marriage first became available in the U.S., in Massachusetts], same-sex marriage did not have majority support in any state. By 2008, three states had crossed the 50 percent line. Today, 17 states are over that line (more if you consider the CNN estimate correct that just over 50 percent of the country supports gay marriage)." They conclude, "The trend will continue. Nationally, a majority of people under age 30 support same-sex marriage. And this is not because of overwhelming majorities found in more liberal states that skew the national picture: our research shows that a majority of young people in almost every state support it. As new voters come of age, and as their older counterparts exist the voting pool, it's likely that support will increase, pushing more states over the halfway mark."

Impact of Marriage on Judicial Elections — Three members of the Iowa Supreme Court are up for retention elections this November, and are being targeted by same-sex marriage opponents for their participation in the unanimous decision by the Iowa Supreme Court, *Varnum v Brien*, 763 N.W.2d 862 (Iowa 2009), in which the court declared a state constitutional right for same-sex couples to marry. Chief Justice Marsha Ternus and Justices Michael Streit and David Baker, who feel precluded by judicial ethics from making public statements about their votes in the case, are being subjected to sustained attack by a recently formed organization, Iowa for Freedom, started by Bob Vander Plaats, who lost the Republican primary for governor this spring, and seems intent on riding this issue to a revival of his political career. News reports indicate that retired U.S. Supreme Court Justice Sandra Day O'Connor, a committed foe of judicial elections, will be making a statement about the situation when she speaks in Iowa in September. *Washington Post*, Aug. 27.

Presbyterian Church — Despite any such "tipping point" as described above, some people are getting into trouble about same-sex marriage. On Aug. 26, an ecclesiastical trial convened to determine the fate of Reverend Jane Adams Spahr, charged with performing weddings for same-sex couples in California when such events were legal from June to November 2008. The trial began just weeks after the U.S. District Court in San Francisco declared unconstitutional the state constitutional amendment banning such marriages. Ironically, the church rule under which Rev. Spahr is being tried is in the process of a strong repeal effort, having been approved by the church's General Assembly, but still awaiting the concurrence the requisite number of local church bodies to be official. *Los Angeles Times*, Aug. 24.

Stockholder Pressure — After gay rights groups raised a fuss about political donations by Target Corporation to a Republican gubernatorial candidate in Minnesota with a strong anti-gay rights record and platform, and Target — which scores highly on its pro-gay personnel policies — faced a potential consumer boycott, several large investors in Target stock indicated they would present a shareholder resolution to change the method by which Target decides on political donations. According to an article published Aug. 20 in the *Chicago Tribune*, Calvert Asset Management, Trillium Asset Management, and Walden Asset Management, which hold $57.5 million in Target stock between them, wer co-sponsoring the resolution, and it was expected that institutional investors such as the New York State pension fund might also join in sponsoring the resolution. The resolution calls for the firm's independent directors to review criteria for and risks involved in making donations related to politics. The Supreme Court's decision earlier this year finding that corporations have a 1st Amendment right to make such donations without restriction suggests that more incidents of this nature will surface, point out the need for transparency requirements for corporate donations.

Gay Adoption — The August issue of the journal *Applied Developmental Science* includes a report on a study conducted by researchers at the University of Virginia, which concluded that the sexual orientation of prospective adoptive parents should not be an issue in determining qualifications to adopt. The researchers studied in depth 106 adoptive children living in a variety of family settings, including those with lesbian or gay parents. Their study sought comment from parents and teachers on the development and adjustment of the children, and found that parents and teachers agreed, on average, that the children were experiencing typical development, regardless of parental sexual orientation. Authors of the study are Charlotte Patterson, Rachel Farr, and Stephen L. Forssell. *Daily News Leader* (Staunton, VA), July 26.

Police Park Sex Stings — As a result of unfortunate incidents and public outcries stemming from police sting activities in Warm Sands Park (Palm Springs, California) and Branch Brook Park (Essex County, N.J.), law enforcement officials have indicated they will stop using plainclothes police officers for that purpose and will deploy uniformed officers. The Essex County situation, in which an African-American business executive was shot and killed by a plainclothes officer, provoked particular public outrage and media attention. See Richard

Perez-Pena, *Questions in Officer's Killing of C.E.O. in Newark*, NY Times, July 20, 2010.

Arizona — The Dysart Unified School District revised its student handbook to provide protection against hate or bias-related incidents for LGBT students. The governing board approved the changes in May, after the ACLU had sent a letter on behalf of a gay student activist who complained being harassed and finding school staff to be unhelpful in dealing with the situation. *Arizona Republic*, Aug. 9.

Pennsylvania — Equality Pennsylvania reports that as a result of much negotiation, the Pennsylvania Department of Transportation has agreed to jettison its requirement that transgender applicants to modify their gender designation on drivers licenses will not have to provide proof of sex-reassignment surgery. Instead, they will be permitted to chage the designated gender on their drivers license when they are living full-time in their new gender and this can be verified by a licensed medical or psychological caregiver. *Equality Pennsylvania Press Release*, Aug. 25. A.S.L.

International Notes

United Nations — After a lengthy struggle extending over many years, the International Gay and Lesbian Human Rights Commission (IGLHRC) has finally achieved consultative status to the United Nations Economic and Social Council. In a big change, the United States became the lead sponsor of the resolution. The vote of the Council was 23 in favor, 13 against, 13 abstentions, and 5 absences. The vote of the Commission came in the face of a "no-action" vote in the NGO-committee charged with vetting applications for consultative status. Consultative status gives IGLHRC standing to participate in the work of the ECOSOC by attening meetings, submitting statements on pending issues, and colaborating with the U.N. and governmental representatives on international human rights issues. *IGLHRC Press Advisory*, July 19.

Austria — Austrian gay rights attorney Dr. Helmut Graupner reports that the Vienna Prosecution Services has instituted criminal charges of transmitting child pornography against three underage teenagers who transmitted images of their own genitals using cellphones. The Austrian criminal code treats production and distribution of child pornography very severely. This case involved three teens, ages 15 and 16, who were inmates of a juvenile prison. In exchange for receiving (illegal) delivery of cell-phones, they sent out nude pictures of themselves via messaging. (Other older teens also sent images, but because they were over the age of consent, their images are not covered by the child pornography law.)

China — A Hong Kong business guild, Community Business, issued a 50-page guide in June with recommendations to employers about how to accommodate the needs of their LGBT employees. The guide recommends providing employee benefits for same-sex partners, developing policies to deal with anti-gay bullying and harassment, encouraging formation of LGBT employee interest groups, and tracking career development for LGBT employees. The guide is sponsored by the local branch of Goldman Sachs. *South China Morning Post*, Aug. 23.

Costa Rica — On August 10, the Supreme Court blocked a proposed December 5 referendum that could have banned same-sex marriages in the nation. The court found that it was unconstitutional to put the rights of minorities up for popular vote, and that the question who could marry was a legislative question.

Germany — The leading national magazine, *Der Spiegel* (Aug. 13), was critical of Foreign Minister Guido Westerwelle's announcement that he would not have his same-sex partner accompany him on foreign trips to countries that penalize homosexual conduct, as a matter of prudence. *Der Spiegel* called this a "disgrace" for Germany, contending that Westerwelle should bring his partner wherever a top German diplomat would bring a spouse. After all, diplomats and their families enjoy immunity from local laws, and bowing to local prejudices was seen as unbecoming for the chief diplomatic representative of a country that accords legal status to same-sex partners and bans sexual orientation discrimination.

Ireland — President Mary McAleese signed Ireland's new Civil Partnership Bill into law on July 19. The LGBT community in Ireland was reportedly divided about the bill, some hailing it as progress to have a legal status carrying a large number of rights and responsibilities, others bemoaning the distinctions between civil partnership and marriage. Supporting legislation comes into force in January.

Russia — U.S. and Russian officials began negotiating in July towards some agreement to govern the adoption of Russian children by U.S. citizens. One of the first things they agreed upon was that same-sex U.S. couples would be banned from adopting Russian children. Only different-sex married couples will be allowed to adopt. The Russians expressed concern, since several U.S. states allow same-sex marriage and joint adoption by gay couples. Russia does not allow any legal status for same-sex couples, and wanted to be sure that only couples whose marriages would be recognized in Russia would be allowed to adopt Russian children. *Moscow Times*, July 22.

Scotland — A recent survey of its membership by the Law Society of Scotland uncovered the data that about 4 percent of the members are "currently living and working in the opposite gender assigned to them at birth." Can it be that 4% of Scottish lawyers are transgender? An additional 3-4% self-identify as lesbian or gay or bisexual. The Society is thinking of creating a special support group for its LGBT members, and was trying to measure the degree of interest for such an organization. *Daily Record* (Glasgow), Aug. 27.

United Kingdom — The Charity Commission, finding that sexual orientation discrimination is a "serious matter" because it "departs from the principle of treating people equally," has ruled that religiously-inspired anti-gay bias does not justify allowing an exemption from non-discrimination requirements for Catholic Care, an adoption agency that sought to keep its charitable status intact while denying service to same-sex couples seeking to adopt children. Commission Chief Executive Andrew Hind stated: "In certain circumstances, it is not against the law for charities to discriminate on the grounds of sexual orientation. However, because the prohibition on such discrimination is a fundamental principle of human rights law, such discrimination can only be permitted in the most compelling circumstances. We have concluded that, in this case, the reasons Catholic Care have set out do not justify their wish to discriminate." The likely result is that Catholic Care will close, as have eleven other Catholic adoption agencies since the new gay rights law went into effect in the U.K. in January 2009. *Daily Telegraph*, Aug. 19.

United Kingdom — District Judge Nicholas Sanders has opined that Jan Krause, a transgender individual who has been convicted of harassment due to stalking activities, should not be sent to prison because it would be too dangerous for her to be placed in general prison population and it would be unfair for her to placed into solitary confinement for the duration of her sentence. Said Judge Sanders at sentencing: øWhat I'd prefer is a custodial sentence today, but it is quite clear that you are a particularly vulnerable person in a prison environment. In your case a prison sentence would have a greater impact than it would on other people. For that reason, and that reason alone, I propose a suspended sentence today." *Daily Mail*, Aug. 5. A.S.L.

Professional Notes

On July 21, the Massachusetts Supreme Judicial Court announced the retirement of Chief Justice Margaret Marshall, who has the distinction of being the author of the court's ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. Sup.Ct. 2003), the first ruling by the highest court of any state in the United States to hold that same-sex couples have the same right as different-sex couples to be legally married, making Massachusetts the first jurisdiction in the United States to authorize same-sex marriage.

Lambda Legal has hired Peter Renn to be a staff attorney in its Western Regional Office in Los Angeles. Renn is a graduate of Harvard Law School and the University of Texas at Austin. He was co-president of the Law School's LGBT student organization, and has worked as a legal intern at Lambda's New York office, at the LGBT Project of the ACLU, and at Gay and Lesbian Advocates and Defenders in Boston. He also interned at Lambda's Southern Regional Office in Dallas before attending law school. He comes to Lambda from the L.A. office of Munger, Tolles & Olson, where he was a litigation associate.

Human Rights Watch has announced that Dr. Scott Long, founding director of the LGBT Rights Program at Human Rights Watch, has resigned. Having suffered medical problems over the summer, Dr. Long plans to focus on writing and teaching while convalescing. HRW has not yet announced who will be designated as the new director of the program.

At a ceremony in San Francisco on August 6, held during the ABA Annual Meeting, the National LGBT Bar Association presented its Allies for Justice Awards to Wayne Watts, Sr. Executive VP and General Counsel of AT&T, and Llewelyn G. Pritchard and Helsell Federman LLP. A.S.L.

AIDS & RELATED LEGAL NOTES

AIDS Litigation Notes

Missouri — In *Ziolkowski v. Heartland Regional Medical Center*, 2010 WL 3118526 (Mo.App., W.D., Aug. 10, 2010), the Missouri Court of Appeals, Western District, affirmed a trial verdict from the Buchanan County Circuit Court dismissing an HIV confidentiality claim brought by a woman who asserted that a nurse in the hospital where she was being treated had inappropriately revealed plaintiff's HIV+ status to her brother and her aunt, who had not previously known her status. The evidence as summarized by the court shows some ambiguity as to what was said to whom at what point. The jury, having concluded that it had not been proved that the nurse had inappropriately revealed plaintiff's HIV status, did not answer the remaining questions about liability of the medical center and level of damages on the jury form. On appeal, the court unanimously rejected plaintiff's points, including that the trial court had incorrectly barred testimony by a patient advocate from the hospital and that the trial court had allowed the plaintiff to be impeached as a witness through inconsistent statements about a collateral matter. The court of appeals found no error as to the first point, and concluded that any error was not outcome determinative.

Germany — On August 26, a German court in Darmstadt convicted a female singer of causing bodily harm to her boyfriend by having unprotected sex with him without disclosing her HIV+ status. News reports did not name the victim or the defendant. The boyfriend became infected, he said, during a brief relationship they had in 2004. Her expression of deep remorse during the trial earned her a 2 year suspended sentence from the court. *New York Times*, Aug. 26. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

The National Center for Lesbian Rights announced on August 10 that it is accepting applications to fill a senior staff attorney position in its San Francisco office. A full description of the position can be found on the organization's website. A minimum of five years law practice experience "that prepares the applicant to manage ongoing litigation independently, conduct legal research, and draft high quality legal briefs and memoranda" is required, among the many listed qualifications. This is advertised as a full-time position available immediately, with competitive non-profit sector salary and benefits. To apply, send a cover letter, resume, 5-10 page legal writing sample, and three work references by email or fax to: Joshua Delgado, Legal Assistant, National Center for Lesbian Rights, jdelgado@nclrights.org or fax 415-392-8442. NCLR is an equal employment opportunity/affirmative action employer.

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Woods, Jordan Blair, *Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act*, 34 NYU Review of L. & Social Change 373 (2010).

Yoshino, Kenji, *The Gay Tipping Point*, 57 UCLA L. Rev. 1537 (June 2010).

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Specially Noted:

Symposium, *Sexuality and Gender Law: Assessing the Field, Envisioning the Future*, 57 UCLA L. Rev. No. 5 (June 2010). Individual articles are noted above.

Symposium Transcript, *Sacred: Religion, Sexuality, and the Law*, 16 Cardozo J.L. & Gender 637 (Spring 2010) (Transcribed symposium discussions about polygamy — with incidental references to same-sex marrige — and homosexuality & Islam).

Symposium, *Transgender Issues and the Law*, 8 Seattle J. for Soc. Just. (Spring/Summer 2010). Individual articles are noted above.

Stein, Marc, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (University of North Carolina Press, 2010). This forthcoming book, despite the somewhat bland title, is being promoted by the publisher as the first in-depth scholarly treatment of the Supreme Court's decision in *Boutilier*, a 1960s case that rejected a constitutional challenge to the anti-gay exclusion in U.S. Immigration law, at the heart of the author's revisionist treatment of the sequence of Supreme Court decisions that are usually cited in recounting the legal impact of the sexual revolution of the 1960s. Stein is an associate professor York University in Toronto, Canada.

The Williams Institute at UCLA Law School has published its annual volume titled *The Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review Articles of 2008*. This is Volume 8, with a cover date of 2009. The four articles selected for reprint in

this volume are: Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 Colum. J. Gender & L. 343; David Alan Slansky, *"One Train May Hide Another":* Katz, *Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. Davis L. Rev. 875; Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731; Rhonda Wasserman, *Are You* Still *My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 Am. U.L. Rev. 1. The issue also includes a student note, Tia Frances Koonse, *"There Is No There, There": How Anti-Discrimination Successes for Trans Litigants Under the Categories of Sex and Disability Can Further the Intersex Rights Movement*, 8 The Dukeminier Awards 333 (2009).

AIDS & RELATED LEGAL ISSUES:

Klemm, Sara, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. Health Care L. & Pol'y 495 (2010).

Lyman, Princeton N., and Stephen B. Wittels, *No Good Deed Goes Unpunished*, 89 Foreign Affairs No. 4, 74 (July/Aug 2010) (How commitments by donor companies to fund HIV-related treatment is limiting U.S. leverage over recipient countries).

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EDITOR'S NOTE:

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