LOG CABIN REPUBLICANS WIN CONSTITUTIONAL RULING AGAINST MILITARY BAN

The U.S. District Court for the Central District of California has held that the "Don't Ask, Don't Tell" policy (DADT), found at 10 U.S.C. 654, which restricts military service by openly lesbian or gay individuals, violates substantive due process and freedom of speech under the Fourteenth and First Amendments of the U.S. Constitution, respectively, in *Log Cabin Republicans v. United States of America*, 2010 WL (C.D. CA, Sept. 9, 2010). In issuing her decision, U.S. District Judge Virginia A. Phillips also ordered the plaintiffs to submit a proposed judgment, including a proposed permanent injunction, no later than September 16, 2010. [Editor's Note at end of this story covers subsequent developments during September 2010.]

Initially, the court had to determine whether the Log Cabin Republicans (LCR), a non-profit corporation, had established standing to bring the suit. LCR was required to establish that at least one of its members "would have standing had to sue in his own right," that the interests it sought to protect are "germane to the organization's purpose," and neither the claim nor the relief requested "required participation of individual members."

The court held that LCR met its burden because the interests it sought to vindicate are germane to LCR's purposes ("assisting in the development and enactment of policies affecting the gay and lesbian community"), that the suit would not demand participation of individual members, and that at least one member, John Nicholson, had standing and could have pursued the action individually. The court held Nicholson could have brought the action himself because he had been made an honorary member of LCR prior to the date the amended complaint in the case was filed and had suffered "injury in fact" caused by the defendants which could be redressed by the relief sought (that he would rejoin the Army if the policy was no longer in effect.). The court also held that unnamed plaintiff John Doe, currently serving as a lieutenant colonel in the Army, had standing because he joined LCR using another name in September 2004 prior to the filing of the amended complaint and faced likely injury (discharge) under the policy.

In determining whether DADT violates the U.S. Constitution, the court stated initially that LCR showed that the Act does not have a "plainly legitimate sweep," stating that "[LCR] has proven that the Act captures within its overreaching grasp such activities as private correspondence between servicemembers and their family members and friends, and conversations between servicemembers about their daily off-duty activities. Plaintiff has proven that the Act prevents servicemembers from reporting violations of military ethical and conduct codes, even in outrageous instances, for fear of retaliatory discharge."

The court rejected Defendants' argument that the only evidence the court should consider was the statute itself and its "bare legislative history," stating that the cases cited by Defendants related to facial challenges of First Amendment grounds, that those cases nonetheless permitted consideration of "evidence regarding the effect of the challenged statute," and that the cases considering facial challenges on due process grounds, notably *Lawrence v. Texas*, 539 U.S. 558 (2003), considered the history and legislative intent of the statute, the effect of the statute, facts surrounding the enactment of the statute, and comparison with other laws.

LCR presented several witnesses, and the court summarized each individual's testimony.

Michael Almy, who served thirteen years in the Air Force with an "impressive record" and who attained the "highest level of security clearance," was discharged after an unauthorized user searched his private email messages and discovered an email to a man discussing homosexual conduct.

Joseph Rocha testified that he was harassed, hazed, and humiliated in shocking and "unconscionable" ways by his commanding officer and others, that he refused to report the mistreatment to superiors out of fear of retaliation if his sexual orientation was revealed, and that when his commanding officer was investigated on apparently unrelated grounds, he only answered questions after he was threatened with a court martial.

Jenny Kopfstein, who had a distinguished career in the Navy, stopped concealing her sexual orientation more than two years and four months before she was discharged; however, there were "no complaints about the quality of her work or about being assigned to serve with her."

John Nicholson, a language specialist, was discharged for having written a personal letter in Portuguese to a man with whom he had shared an intimate relationship prior to volunteering in the Army in 2001.

Anthony Loverde was discharged for revealing his sexual orientation after a remarkable 7-year career in the Air Force, despite recommendations from his superiors that the Air Force retain him for being "nothing less than an outstanding [officer] and a strong asset" to the Air Force.

Steven Vossler chose not to re-enlist in the active duty Army after having been forced to lie to other servicemembers about the sexuality of his gay roommate (with whom he stated he shared a "great living situation"), and to conceal the gender of his roommate's partner, stating that he believes the Act "doesn't seem in line with American values."

The court next established the standard of review for the due process challenge, stating that to survive constitutional scrutiny, the Act must: "1) advance an important governmental interest, 2) the intrusion on individual rights must significantly further that interest, and 3) the intrusion must be necessary to further that interest." Relying on *Witt v. Department of Air Force* 527 F.3d 806 (9th Cir. 2008), the court held that the Act advances an "important governmental interest," and instead focused on the second and third prongs.

The court examined the legislative history of the Act, finding that the reports and testimony which were presented during hearings on the proposed Policy concluded or assumed, without investigation or evidence, that "the presence of homosexuals had a negative effect and their inclusion was undesirable," that unit cohesion would be damaged by openly homosexual servicemembers, that at the time the policy was enacted, over 80% of servicemembers opposed integration of homosexuals, and that "military training on tolerance could not overcome the innate prejudices of heterosexual servicemembers."

In support of their claim, LCR submitted evidence which included reports, exhibits, and expert and lay testimony. LCR established that from 1993 through 2009, over 13,000 men and women were discharged under the Act, and that servicemembers with critically needed skills and training were discharged. They established that after the United States began fighting in Af-

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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: Aeyal Gross, Tel Aviv University, Israel; Bryan Johnson, Esq., NYC; Daniel Redman, Esq., San Francisco; Eric Wursthorn, Esq., NYC; Kelly Garner, NYLS '12.

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ghanistan, the number discharged fell sharply, and LCR proffered expert testimony that the Act negatively impacted recruitment efforts, as many schools banned military recruiters due to non-discrimination policies, and that many who would otherwise join were deterred by the policy. Further, LCR introduced evidence that the military began admitting more convicted felons and misdemeanants, and were forced to lower their physical fitness standards for admission, in order to meet staffing needs.

Moreover, LCR introduced evidence that the discharge of suspected violators of the Act was often delayed until the servicemembers had completed their overseas deployment, which the court held "directly undermines any contention that the Act furthers the Government's purpose of military readiness, as it shows Defendants continue to deploy gay and lesbian members of the military into combat, waiting until they have returned before resolving the charges arising out of the suspected homosexual conduct."

Based on the evidence submitted, the court concluded that LCR proved the Act does not further military readiness, but also that the Act: contributes to recruiting shortages; causes discharge of otherwise qualified servicemembers with critical skills; contributes to lower admission standards; that the delays in investigations until servicemembers return from combat deployment show that the Policy is not necessary to further military readiness or unit cohesion; that it harms rather than furthers unit cohesion and morale; and that military housing already provides sufficient protection of privacy of servicemembers. Therefore, the court held that the Defendants failed to show the Act was necessary to significantly further the Government's important interests in military readiness and unit cohesion, and found the Act violated substantive due process under the Fourteenth Amendment.

In assessing LCR's First Amendment Challenge and determining a standard of review, the court held that it must first assess whether the Act constitutes a content-based restriction on speech. The court held that since the Act requires a servicemember's discharge if "he or she has stated that he or she is a homosexual or bisexual," and since the Act does not prohibit servicemembers from discussing their sexuality in general since heterosexual members are free to state their sexual orientation, the Act "discriminates based on the content of the speech being regulated."

The court held that although "regulations of speech in a military context will survive constitutional scrutiny if they restrict speech no more than is reasonably necessary to protect the substantial governmental interest" at stake, the Act was "far broader than is reasonably necessary to protect the interest." The court cited as examples that many of the witnesses who testified stated that the Act forced them to create a certain "distance" from other servicemembers in not being able to discuss their personal lives, and that to conceal information created a level of distrust, undermining the trust among servicemembers that was critical, "especially in emergencies or crises."

In light of the overbroadness of the speech regulated, the Court held that the Act violated the First Amendment of the U.S. Constitution's guarantees of freedom of speech and petition.

After having concluded the Act violated both substantive due process of the Fourteenth Amendment and the freedom of speech under the First Amendment, District Judge Virginia A. Phillips provided NCR until September 16, 2010 to submit a proposed judgment including a proposed permanent injunction, and permitted Defendants to submit any objections no later than seven days thereafter. *Bryan Johnson*

[Editor's Note: LCR submitted a proposed order that would amount to an injunction against operation of DADT anywhere in the world that the Defense Department has uniformed personnel. Toward the end of September, the government responded, urging a very narrow injunction, perhaps applicable only to members of LCR. The Justice Department argued that an abrupt change of policy in wartime would harm the national interest, and noted that proposals to allow the Defense Department to modify the policy were pending in Congress as a Pentagon Task Force prepares to report on how to change the policy in December. The government also noted that there have been appellate rulings in other circuits rejecting constitutional challenges to the policy, and argued that it is beyond the authority of a trial judge within the 9th Circuit to enjoin worldwide operation of a policy whose constitutionality has been upheld in other circuits — most recently, in the 1st Circuit in a case purporting to use the same heightened scrutiny to evaluate the policy that Judge Phillips had used, and previously in the 2nd Circuit in a pre-*Lawrence* ruling using rational basis review. At month's end, the court had not indicated how it would finally rule on the remedy, although it seemed likely that the government would seek a stay of any final order pending appeal to the 9th Circuit in any event. Given the closeness in timing, it also seemed possible that if the government appeals both this ruling and the ruling a few weeks later in *Witt* from the U.S. District Court in Washington State, see below, the cases might be consolidated at the 9th Circuit. A.S.L.]

LESBIAN/GAY LEGAL NEWS

Florida Appeals Court Invalidates Gay Adoption Ban; Governor Hesitates to Appeal

A unanimous three-judge panel of the Florida 3rd District Court of Appeal ruled on September 22 that Florida's statute providing that a person who is "a homosexual" may not adopt a child, Subsection 63.042(3), is unconstitutional. Ruling on the state's appeal of a decision by Miami-Dade County Circuit Judge Cindy S. Lederman granting Martin Gill's petition to adopt his two foster children, the court found that there was no rational basis for the state to categorically exclude gay people from being adoptive parents. Governor Charlie Crist promptly announced that the state would stop enforcing the ban and would not appeal the ruling to the Florida Supreme Court without consulting first with Mr. Gill. *Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G.*, No. 3D08-3044.

The ban was enacted in 1977, as a legislative reaction to singer Anita Bryant's referendum campaign to repeal a gay rights ordinance that had been adopted by the City of Miami. Bryant had based her campaign on a claim that gay people were dangerous to children, and that under the Miami ordinance gay people would have a right to be employed as public school teachers where they would have access to young children. A ban on adoptions by gay people then swept through the legislature, without any input from the state agency responsible for administering the adoption system.

Although both the Florida Supreme Court and the U.S. Court of Appeals for the 11th Circuit, based in Atlanta, have rejected federal constitutional challenges to the adoption ban in the past, there had never been a direct appellate ruling on whether the ban violated Section 2 (Basic Rights) of the Florida Constitution, which incorporates an equal protection requirement. In its 1995 ruling upholding the ban, *Cox v. Florida Dept. Of Health & Rehabilitative Services*, 656 So.2d 902 (Fla. 1995), the court had found that the record in that case contained insufficient evidence to rule on the equal protection point, leaving it an open question.

Although adoptions by gay people were forbidden with the passage of the statute, there was no prohibition on gay people acting as foster parents or legal guardians of children, and gay people who were biological parents were not deprived of custody. The result was a growing body of evidence over time, as more and more gay people were raising children in these other capacities, that in fact gay people were perfectly capable of being good parents and providing good homes for children. The professional staff at the state's Department of Children and Families came to the view that only the statutory ban stood in the way of granting an

adoption for an otherwise qualified gay applicant.

In this case, Martin Gill and his partner had taken in two youngsters as foster parents at the request of the Department, after they were removed from their birth parents due to neglect and abuse. Gill, his partner, and their son took these children into their home and hearts and nurtured them back to physical and psychological health. When the state moved to terminate the parental rights of the biological parents, Gill petitioned to adopt. A positive home study concluded that although adoption by Gill would be in the best interest of the children, he could not adopt because of the statutory ban. Gill then brought his adoption petition to the Miami-Dade Circuit Court, challenging the ban with the assistance of a team of volunteer attorneys from the ACLU and other organizations.

Circuit Judge Cindy Lederman held an extended trial with numerous fact and expert witnesses, compiling a voluminous record supporting her conclusion that there was no rational basis for a categorical ban, and that Gill was well qualified to adopt the children. The appeals court concurred completely with her conclusions.

Writing for the court, Judge Gerald B. Cope, Jr., observed, "Given a total ban on adoption by homosexual persons, one might expect that this reflected a legislative judgment that homosexual persons are, as a group, unfit to be parents. No one in this case has made, or even hinted at, any such argument. To the contrary, the parties agree that gay people and heterosexuals make equally good parents'. . . Thus in this case no one attempts to justify the prohibition on homosexual adoption on any theory that homosexual persons are unfit to be parents."

The state's only real substantive argument — an argument that had been accepted as intuitively obvious if unprovable by the U.S. 11th Circuit Court of Appeals — was that children adopted by gay people or same-sex couples would be deprived of having adult role models from both sexes, which the state argued was preferable for the child's healthy psychological development.

If this were indeed the state's goal in banning gays from adopting, the court pointed out, it made no sense because more than a third of adoptions approved by Florida courts involve single parents, not different-sex couples, so all those children will also lack parental role models of both sexes. Furthermore, the ban made no sense as part of a system that allows gay people to be foster parents, frequently in long-term placements, or even legal guardians, a long-term setting in which state oversight ceases as it does in adoptions.

"It is difficult to see any rational basis in utilizing homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons," wrote Judge Cope. "The Department contends, however, that the basis for this distinction can be found in the social science evidence." Unfortunately for the state, the social science evidence, presented to the circuit court by numerous experts, all pointed in the opposite direction, in favor of letting gay people raise children. The only contrary expert testimony presented by the state was found to be flawed and unpersuasive by Judge Lederman, and the appeals court ruled that she "was entitled to reach the conclusion, which she did, that the Department's experts' opinions were not valid from a scientific point of view."

The Department also trotted out various stereotypes about gay couples (instability, prone to domestic violence) that were effectively shot down by Gill's experts, and — in a move that has to be embarrassing for the state — the court pointed out that the state had selectively quoted from and misrepresented the testimony of Gill's expert witnesses in its arguments to the court of appeal.

Having concluded that there is no rational basis for the statute, the court affirmed Judge Lederman's decision to grant Martin Gill's adoption petition and to find the statute unconstitutional.

In a concurring opinion, Judge Vance E. Salter emphasized the important role of Gill's partner and their son in the lives of the two foster children, referring to them as a family, pointing out that the case involves "five persons and associated relationships, not just the adoptive parent and the two children.. . .The continued use of the legal system to attempt to unwind these relationships is simply inexplicable," he commented.

Judge Salter also pointedly noted that the professionals at the Department of Children and Families were opposed to the ban, and two of them had testified at trial in support of Gill's adoption petition. "The categorical ban was enacted in haste and reaction in 1977," he wrote, but the statute was also subsequently amended to add a requirement that the "best interest of the child" be "of foremost concern" in the court's determination of adoption petitions. "By the time of the trial below, the application of the statutory ban was contrary to both the professional judgment of the Department and the legislative directive to assure the best interest of the child' in every' adoption. Confronted with two irreconcilable provisions, the trial court properly followed the later and foremost' directive."

While noting that the court was not called upon to consider "the larger controversy regarding same-sex marriage," Judge Salter also made note of the recent ruling in *Perry v. Schwarzenegger* by the federal district court in San Francisco, observing that "many of the same equal protection arguments, and two of the expert witnesses who testified in the adoption case here, were cited in the court's order."

Under Florida procedure, the state has a right to appeal to the state supreme court any court of appeal ruling holding a statute to be unconstitutional. But, as noted above, Governor Crist, currently an independent candidate for the U.S. Senate, recently changed his position on gay adoption, now arguing that adoption petitions by gay people should be decided on a case-by-case basis rather than under a categorical exclusion. Consequently, it is not surprising that he quickly announced that the state would the ruling and that he wished to hear from Mr. Gill before deciding on an appeal. Gill reacted publicly to the decision by calling on the state not to appeal so he can finalize his adoption. This has the drawback, however, in leaving in place an opinion that may have precedential sway over trial courts statewide for now, but as to which no other district court of appeal would be bound. A.S.L.

Federal Judge Orders Reinstatement of Lesbian Air Force Nurse

U.S. District Judge Ronald B. Leighton ruled on September 24 that the government had failed to justify the decision to discharge Major Margaret Witt, an Air Force Reserve flight nurse, under the "don't ask, don't tell" policy (DADT) on military service by gay people. Judge Leighton concluded that the Air Force should be required to immediately reinstate Major Witt, who had been given an "honorable discharge" after admitting during an investigation that she was a lesbian. *Witt v. U.S. Department of the Air Force*, 2010 WL 3732189 (W.D.Wash.).

Judge Leighton, appointed to the federal district court in Tacoma, Washington, by President George W. Bush, had initially dismissed Major Witt's case in 2006, finding that the military policy "was subject to rational basis scrutiny, and that the evidentiary hearings held, and factual findings adopted, by Congress provided a sufficient foundation to support the regulation." In so ruling, Judge Leighton was faithfully following older cases from the 9th Circuit Court of Appeals, which would have jurisdiction over appeals from Washington State, that had rejected challenges to the policy.

However, when Major Witt, represented by the ACLU, appealed to the 9th Circuit, that court decided that legal developments since its earlier rulings required a new consideration of the constitutional issues. The U.S. Supreme Court had ruled in *Lawrence v. Texas* (2003) that the right of gay people to engage in sexual activity came within the protection of liberty under the Due Process Clause, striking down the Texas homosexual sodomy law. The 9th Circuit panel reasoned in Major Witt's case that since homosexual conduct enjoys constitutional protection, it would violate Due Process

to allow the military to discharge a person for homosexuality if the government could not show that the discharge substantially furthered an important governmental interest, the test of heightened scrutiny.

The full 9th Circuit, in a sharply divided vote, refused to reconsider the three-judge panel decision, and the Obama Administration decided not to seek Supreme Court review at that point, accepting the 9th Circuit's order to send the case back to Judge Leighton for consideration under this heightened standard of judicial review. These events were playing out during the early days of the Obama Administration, with President Obama having pledged during his campaign to repeal DADT. In those optimistic early days, the government may have expected that the policy would be changed before a trial could be held, since there would have to be time for pre-trial discovery that might last a year or more before a trial could be scheduled.

But repeal of the policy has taken much longer than the Administration expected, discovery was concluded, and the trial was conducted from September 13 through September 21, 2010. Ironically, the House of Representatives having approved a Defense Authorization bill that included a provision authorizing repeal of DADT, the Senate could not summon sufficient votes to break a Republican filibuster against the bill on the same date that Judge Leighton concluded the hearing on Major Witt's case, September 21. Judge Leighton took just a few days to compose and release his 15-page opinion on September 24, ruling against the government.

Judge Leighton found that the 9th Circuit panel had "clearly enunciated the Constitutional test that must be applied to DADT. Because DADT constitutes an intrusion upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, it is subjected to heightened scrutiny.' To survive plaintiff's constitutional challenge, the statute must (1) advance an important governmental interest, (2) the intrusion must significantly further that interest, and (3) the intrusion must be necessary to further that interest." As Major Witt's case is an individual challenge to an individual discharge, it does not present the broader issue of whether DADT is unconstitutional on its face, recently addressed by District Judge Virginia Phillips in a case brought by the Log Cabin Republicans that resulted in a ruling against the government as well. The 9th Circuit treated this as an "as applied" challenge to DADT, so the trial focused more narrowly on the question whether discharging Major Witt was necessary to achieve the goals Congress articulated when it adopted DADT: to safeguard unit cohesion and good order, which Congress found would be endangered by allowing gay people to serve openly.

Judge Leighton found that the trial record supported the conclusion that discharging Major Witt did not advance these goals, and actually detracted from them. She compiled a stellar record in the service, was widely respected, and had avoided bringing the issue of her sexuality into the open while on duty, conducting her personal life off duty and far from the military base. She had an extended relationship with a civilian woman that was conducted hundreds of miles away from where she was based and never came to the attention of military officials while it was going on. Unfortunately, after that relationship terminated, she began a relationship with a married woman, whose outraged husband contacted military officials, leading to the investigation in which Major Witt was found to have a propensity to engage in homosexual conduct, mandating her discharge from the service.

While adultery violates military law and could subject Major Witt to disciplinary penalties, it was clear throughout the investigation and discharge proceedings that she was being discharged because she had engaged in homosexual conduct with civilians, and had eventually admitted to this during the investigation. She has never been charged by the Air Force with adultery, and it was not the ground for her discharge. (Had it been, it would not likely have been an honorable discharge.)

Judge Leighton found that the revelation about Major Witt's sexuality had not adversely affected the esteem in which she was held by her unit, but that her suspension and then dismissal from the service did have an adverse effect. Indeed, Leighton reached more general conclusions extending beyond the sole case of Major Witt.

"The evidence produced at trial overwhelmingly supports the conclusion that the suspension and discharge of Margaret Witt did not significantly further the important government interest in advancing unit morale and cohesion," wrote Judge Leighton. "To the contrary, the actions taken against Major Witt had the opposite effect. The 446th AES is a highly professional, rapid response, air evacuation team. It is comprised of flight nurses and medical technicians who are well-trained, well-led and highly motivated. They provide a vital service to our fighting men and women around the world. Serving within that unit are known or suspected gay or lesbian service men and women. There is no evidence before this Court to suggest that their service within the unit causes problems of the type predicted in the Congressional findings of fact. . . These people train together, fly together, care for patients together, deploy together. There is nothing in the record before this Court suggesting that the sexual orientation (acknowledged or suspected) has negatively impacted the performance, dedication or enthusiasm of the 446th AES. There is no evidence that wounded troops care about the sexual orientation of the flight nurse or medical technician tending to their wounds."

Judge Leighton went on to find that Witt "was an exemplary officer. She was an effective leader, a caring mentor, a skilled clinician, and an integral member of an effective team. Her loss within the squadron resulted in a diminution of the unit's ability to carry out is mission. Good flight nurses are hard to find." Further, he found that the evidence supported Witt's argument that her reinstatement "would not adversely affect the morale or unit cohesion of the 446th AES."

The government had argued that the court should not base its decision narrowly on the 446th AES, but rather more broadly on the military as a whole, relying on polls showing substantial preference among military personnel against serving with openly gay people, but Leighton was dismissive of this evidence, pointing out that the military had shown its ability to accommodate diversity in the ranks.

While acknowledging these polls, wrote Leighton, "The possibility of such push back is off-set by the known negative impact of DADT upon the military: the loss of highly skilled and trained military personnel once they have been outed and the concomitant assault on unit morale and cohesion caused by their extraction from the military. In this regard, the Court notes the Army's policy of deploying openly gay or lesbian personnel if the discharge process has not yet begun when the order to deploy issues," a reference to the so-called "stop-loss" policy that produced a decline in gay-related discharges after the initiation of hostilities in the Middle East. "In this time of war," he commented, "the Army, at least, has decided that allowing openly gay service is preferable to going to war without a member of a particular unit."

Leighton also rejected the government's attempt now to rely on the adulterous nature of Witt's affair with the woman whose husband had turned her in to the military authorities, pointing out that the Air Force had not relied on this in its discharge decision.

"For the reasons expressed," wrote Leighton, "the Court concludes that DADT, when applied to Major Margaret Witt, does not further the government's interest in promoting military readiness, unit morale and cohesion. If DADT does not significantly further an important government interest under prong two of the three-part test, it cannot be necessary to further that interest as required under prong three. Application of DADT therefore violates Major Witt's substantive due process rights under the Fifth Amendment to the United States Constitution. She should be reinstated at the earliest possible moment."

This is an historic ruling because it is the first time that a federal district judge has ruled after

a full trial that the evidentiary record does not support discharging an individual service member under DADT, even if one were to assume that the policy — viewed in the abstract — is constitutional. Unlike the numerous prior cases in which courts have upheld the policy under the less demanding rational basis test and thus dismissed the individual plaintiff's challenge to his or her discharge, this ruling, if allowed to stand, would mandate that every gay-related discharge be evaluated on its individual facts to determine whether discharge of the servicemember in question is necessary to preserve unit morale in light of the circumstances of their training and service and value to the military. As such, it would vastly increase the administrative expense of enforcing the policy, rendering it practically unworkable.

While much attention has been focused on whether the Obama Administration would appeal Judge Phillips' ruling on the facial challenge, ultimately the decision whether to appeal Judge Leighton's ruling may be more weighty, since his ruling came in response to a direct remand from the 9th Circuit and he followed their instructions to the letter. One can't predict how the 9th Circuit would deal with a facial challenge, but it is entirely predictable that an appeal of this as-applied challenge would be futile for the government, in light of the evidentiary record.

The ruling also explodes any stereotype one might still have about how federal judges appointed by George W. Bush will rule in gay rights cases. In this instance, a judge appointed early in the Bush Administration has effectively repudiated the same rationale repeatedly invoked by Republican supporters of DADT, such as Senator John McCain, who led the filibuster effort that prevented a vote on repeal on the day the Witt trial ended. Let's see whether Republican critics will charge Judge Leighton, one of their own, with being a "judicial activist," bearing in mind that he originally dismissed this case, only to reach a different conclusion once he had immersed himself in the factual record and discovered for himself the severe illogic of the challenged policy. A.S.L.

Texas Appeals Court Rules Against Divorces for Same-Sex Couples Resident in Texas Who Married in Other Jurisdictions

In *In the matter of the Marriage of J.B. and H.B. in re State of Texas*, 2010 WL 3399074 (Tex. App. Ct. August 31, 2010), a Texas appellate court held that trial courts in the state lack subject-matter jurisdiction to hear a same-sex divorce case, and that Texas's laws compelling this result do not violate the Equal Protection Clause of the Fourteenth Amendment.

The case concerned a same-sex couple that had legally married in Massachusetts in 2006 but separated after they moved to Texas in 2008. One of the spouses petitioned for divorce, and the state of Texas intervened to oppose the petition and "defend the constitutionality of Texas and federal laws" barring recognition of marriages entered into by same-sex couples. The State argued that since the couple's marriage was not recognized by Texas, the trial court could not grant a divorce without violating Texas law. The trial court rejected the State's argument and held that it had subject-matter jurisdiction to hear the suit so long as the persons involved were legally married in another jurisdiction and met Texas's prerequisites concerning residency. Subsequently, the trial court also held that Texas's statutory ban on marriage rights for same-sex couples violated the federal Constitution.

The appellate court gave a variety of reasons for holding that the trial court lacked subject matter jurisdiction over the divorce. First, the court asserted that because Texas law rendered "same-sex marriages void," the trial court was not permitted to use the marriage certificate to establish that the parties were indeed married. To do so would "give legal effect" to the marriage. In addition, the court held that because petitioner's divorce suit involved a claim that constituted "a demand of a right" predicated on the existence of a same-sex marriage, the court could not grant the right without giving legal effect to the marriage. The court reasoned that, "A person cannot seek a divorce without simultaneously asserting the existence and validity of a lawful marriage." As a result, "a Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."

The court also rejected petitioner's invocation of the place-of-celebration rule' as a basis for subject-matter jurisdiction. Under that rule, a state — even though not required by law — gives deference to the laws of another state out of comity. In holding to the contrary, the court pointed out that Texas law specifically designated same-sex marriage to be "against public policy" and thus, beyond the bounds of comity.

The court next addressed petitioner's argument that Texas's laws barring recognition of same-sex marriage violated the Fourteenth Amendment. Petitioner asserted that gay people comprise a suspect class due to: 1) the fact that gay people have suffered past persecution (as described in *Lawrence v. Texas* and other cases); 2) that gay people comprise a politically powerless minority; 3) that sexual orientation is immutable; and 4) that sexual orientation has no bearing on a person's ability to perform in society.

The court rejected all of these arguments. 1) First, the court rejected petitioner's argument that Texas excluded gay people from the protections of its laws. The court cited the ability of gay people to seek a protective order for same-sex domestic violence as one example. 2) To show that gay people were not politically powerless, the judge cited to several recent near-loss ballot initiatives as evidence of disproportionate influence given the small size the community. 3) The court rejected the argument for immutability out of hand. 4) Finally, the court rejected petitioner's argument that sexual orientation bears no relation to a person's competence, and held that the trumping state interest was "to foster[] relationships that will serve children best." In addition, the court addressed the fundamental rights issue as well, holding that since same-sex marriage was relatively "new" (i.e., not recognized in any state before 2003), it could not be said to be "deeply-rooted" in our history and traditions.

Next, the court applied the rational basis test, and held for the State there as well. The judge asserted that "[t]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy" and that because "Texas's marriage laws are rationally related to the goal of" promoting procreation and providing children with both a mother and a father, it is constitutional. The judge disagreed that this constituted discrimination. *Daniel Redman*

11th Circuit Vacates Asylum Denial Tainted by Homosexual Stereotyping

The U.S. Court of Appeals for the 11th Circuit, based in Atlanta, has vacated and remanded for reconsideration the Board of Immigration Appeals' decision affirming a denial of asylum to a gay man from Serbia, finding that the Immigration Judge had relied on improper stereotypes about gay men in questioning the credibility of the petitioner, and that the BIA had failed to disavow the IJ's reasoning. *Todorovic v. U.S. Attorney General*, 2010 WL 3733999 (September 27, 2010).

In his opinion for the unanimous three-judge panel, Judge Stanley Marcus related the petitioner's horrific story of his mistreatment in Serbia and the generally adverse atmosphere for gay people in that country. Beginning in high school, the petitioner was identified by others as gay and subjected to harassment and abuse. When he came out to his parents, his father "beat him, threw him out of the house, and declared that he would rather Todorovic be dead." In addition, the petitioner alleged that his father "used personal connections" to have him conscripted into the Army, where he suffered further harassment and abuse. The petitioner also described abuse at the hands of law enforcement officials, including sexual assault.

After he had recovered from a particular vicious beating, he contacted a cruise line and applied for a job. This occupation brought him to the U.S., where he decided to stay and eventually applied for asylum. There are difficulties with his asylum application having been filed too long after his entry into the United States,

but the court focuses more on the credibility determination by the Immigration Judge (IJ), presumably because the petitioner could still qualify for withholding of removal given the appropriate factual findings. At his asylum hearing, he submitted "a number of background articles regarding the treatment of homosexuals in Serbia. Some of them referenced the attack on the gay pride parade, and one noted that in the aftermath of the attack, the Serbian Prime Minister and Belgrade's Chief of Police said that Serbia was not ready to tolerate homosexuality." Other articles documented violent attacks on gay people by the police and youth gangs, and the 2006 State Department country report noted that "violence and discrimination against homosexuals was a continuing problem in Serbia, and that gays and lesbians were reported to experience widespread threats, hate speech, verbal assault, and physical violence."

The transcript of the IJ's oral decision denying the petition contains the following statement to which the appeals court strongly objected: "The Court would first note that the respondent says he is singled out for persecution because he is gay in his home country. The Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay. The Court does not know whether he is or not, his testimony is that he is overtly gay and has been since he was 17 years old. Be that as it may, it is not readily apparent to a person who would see this gentleman for the first time that, that is the case, since he bears no effeminate traits or any other trait that would mark him as a homosexual."

Is it absurd that an Immigration Judge in the U.S. in the 21st century would make such a stupid statement on the record? Wrote Judge Marcus, "After thorough review, we conclude that the IJ's decision was so colored by impermissible stereotyping of homosexuals, under the guise of a determination on demeanor,' that we cannot conduct meaningful appellate review of that decision, or of the BIA's opinion essentially adopting it. In determining an applicant's credibility, an Immigration Judge must consider the totality of the circumstances, including the applicant's demeanor, the inherent plausibility of the applicant's story, and the consistency among the applicant's written and oral statements and other evidence of record. . . . The IJ alone is positioned to make determinations about demeanor — by observing the alien and assessing his or her tone and appearance — and in that sense is uniquely qualified to decide whether an alien's testimony has about it the ring of truth.'"

"At the same time," Marcus continued, "because of the immense discretion' conferred on those, such as an IJ, who find facts on the basis of oral testimony and demeanor, we require that credibility determinations made by an IJ rest on substantial evidence, rather than on conjecture or speculation. One clearly impermissible form of conjecture and speculation, sometimes disguised as a demeanor' determination, is the use of stereotypes as a substitute for evidence. Indeed, a number of our sister circuits have rejected credibility determinations that rest on stereotypes about how persons belonging to a particular group would act, sound, or appear."

Judge Marcus illustrated this point by citing decisions from the 2nd, 8th, and 10th Circuits where courts had rejected IJ credibility determinations based on the IJ's assertion that gay asylum petitioners were not effeminate enough to meet the IJ's stereotyped image of a homosexual man. "This case presents similar problems," wrote Marcus, "inasmuch as the IJ relied on impermissible stereotypes about gay people as a substitute for substantial evidence. Notably, Todorovic never testified that he was overtly gay' or that this was the reason for his persecution; rather, the abuses to which he testified were the result of hostility by people who appeared to know he was gay for reasons other than his appearance or behavior."

Marcus asserted that the IJ's demeanor determination "rests on wholly speculative assumptions made by the IJ; it is untethered from any evidential foundation; and it is thoroughly vague in its reference to other traits' that would mark the petitioner as a homosexual. Whatever else these offensive observations made by the fact-finder were, they were not credibility findings based on demeanor, but instead were driven by stereotypes about how a homosexual is supposed to look." Marcus commented that such stereotypes "would not be tolerated in other contexts, such as race or religion." "We see no reason to tolerate them here," he asserted.

The court found that the BIA's decision to affirm the IJ's opinion "is similarly unreviewable because we cannot tell whether it, too, was tainted by the IJ's improper stereotyping of homosexuals." The BIA endorsed the IJ's conclusion on credibility, citing a few other questionable points in the petitioner's testimony. "Rather than distancing itself in some obvious and pronounced way from the IJ's so-called demeanor' determination," wrote Marcus, "the Board appears to have broadly embraced the IJ's credibility determination." The court acknowledged that the BIA might have based its conclusion on other points in the record, but "it is not too much to ask the fact-finder to make its credibility determinations without the stain of this stereotyping, utterly unconnected to any evidence. Quite simply, we cannot tell with any degree of confidence what the basis for the Board's opinion was. As a result, we are precluded from engaging in meaningful appellate review. Accordingly, we vacate the agency's decision and remand for a new factual hearing, free of any impermissible stereotyping or ungrounded assumptions about how gay men are supposed to look or act."

The incompetence and political bias of some members of the IJ corps in dealing with gay asylum petitions during the Bush Administration was notorious. It is difficult to tell whether this is yet another delayed example, since the court does not mention the date of the IJ opinion, but the pace at which these cases move through the administrative process to judicial review is such that it is most likely that the IJ in question (who is not identified by name in the opinion) rendered his decision several years ago. One hopes that the process of change under the new administration has rendered this case a window into the unfortunate past rather than a look at continuing dysfunction. One can only hope. A.S.L.

9th Circuit Appeal in Proposition 8 Litigation Raises Possibility of Default Judgment

On August 4, U.S. District Judge Vaughn Walker ruled in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal.), that Proposition 8, the 2008 ballot initiative that amended the California Constitution to provide that only the union of one man and one woman would be valid or recognized as a marriage in California, violated the Equal Protection Clause of the 14th Amendment. When the Proponents of Proposition 8, who had participated in the trial as the chief defenders of the measure in the capacity of Defendant-Intervenors, sought a stay of the ruling pending appeal, counsel for the plaintiffs included in their responding papers a strong argument that the Proponents lacked Article III standing to appeal the decision, inasmuch as the government defendants had stated their agreement with the ruling and were not planning to appeal. Judge Walker rejected the motion for a stay, 702 F.Supp.2d 1132 (Aug. 12), but subsequently the motion panel of the 9th Circuit granted the stay, instructing the Proponents to address the issue of standing in their appellate brief.

That brief was filed on September 17, arguing that Proponents do have standing, in part because they were recognized by the California Supreme Court as a legitimate party to participate in defending Proposition 8 in the litigation that was filed shortly after the measure was enacted, challenging the propriety of its passage as an amendment rather than a constitutional revision.

However, the Proponents argued, in the alternative, that if they lacked standing, then the federal district court should not have held a trial and ruled on the merits, because no party with standing as a defendant was actually defending Proposition 8. As a result, they argued, there was no real case or controversy, so instead of issuing a ruling on the merits, the trial judge should have granted a default judgment to the

plaintiffs, under which they would be entitled to an order directing that they receive marriage licenses, the plaintiffs being two same-sex couples who sought to marry in California but who could not do so due to Proposition 8. Under this scenario, Judge Walker's lengthy opinion finding Proposition 8 in violation of the Equal Protection Clause and ordering that it not be enforced would be vacated and have no effect.

Of course, if the Proponents are found to have standing to bring the appeal (or if Imperial County, which also seeks to appeal the ruling although it was denied intervenor-defendant status by Judge Walker, is found to have standing), the possibility of the decision being converted into a default judgment disappears and the appeal on the merits can proceed.

As the lawsuit was filed with the idea of getting Proposition 8 stricken from the California constitution, a default judgment with a remedy limited to the named plaintiffs would be an unsatisfactory outcome. Perhaps the Proponents are bluffing with their alternative argument. If the goal of the plaintiffs was to bring this controversy on the merits to the Supreme Court, they should not now be arguing against standing for the appellants, since an appeal on the merits is the only way they are going to get to their destination. Perhaps they assumed that they would lose at trial while building an excellent record, and then win the case by appealing it through an adverse ruling from the 9th Circuit to the Supreme Court. But then they got "lucky" and won at trial, against government officials who actually refused to defend the measure and exhibited no inclination to appeal their loss. What to do?

Could it be that ace appellate litigators Ted Olson and David Boies (representing the plaintiffs) have outsmarted themselves by raising the standing issue in their opposition to the stay? Only time will tell. A.S.L.

9th Circuit Finds No Basis for Christian Student's Challenge to College Sexual Harassment Policy

In a recent decision written by Circuit Judge Sandra Ikuta, the U.S. Court of Appeals for the 9th Circuit remanded the case of a college student who claimed that the college's sexual harassment policy was unconstitutional because it violated his First Amendment right to freedom of speech by forcing him to self-censor his religiously based opinions against same-sex marriage. *Lopez v. Candaele*, 2010 WL 3607033 (Sept. 17, 2010). The court found that the student, Jonathan Lopez, did not have the standing required to bring a claim against the school, Los Angeles City College, based on its sexual harassment policy, and reversed the lower court's holding granting Lopez's request for a preliminary injunction barring the enforcement of the policy.

While attending Los Angeles City College, Lopez enrolled in a speech class during the 2008 Fall Term. Near the end of the semester, the students were required to give an informative speech to the class on any topic he or she selected. Lopez, a "devout Christian," chose to give a speech detailing his relationship with God and the principles of his faith. During his speech, Lopez read passages from the Bible and "a dictionary definition of marriage as being a union between a man and a woman." After Lopez read the definition, the professor, John Matteson, stopped Lopez from continuing and informed the class that anyone offended by Lopez's statements could leave. Matteson also referred to Lopez as a "fascist bastard" in front of the class.

The next day, Lopez reported the incident to the Dean of Academic Affairs, Allison Jones. After learning that Lopez had filed a complaint against him, Matteson threatened to have Lopez expelled. Despite the threats, Matteson still gave Lopez an "A" for his next assignment, a paper outlining prospective topics for a persuasive speech. One topic that Lopez proposed was the right to free speech. However, Matteson did include in his comments on the assignment a reminder to Lopez that, as a student of the college, he had agreed to abide by the school's standard of conduct.

Lopez again contacted Jones, this time through his lawyer, insisting that his work in the class be graded fairly and that Matteson be disciplined by the college. Jones responded, stating that disciplinary actions were being taken against Matteson but she was not authorized to tell Lopez what those actions entailed. Jones also stated that other students in Lopez's speech class had made written statements expressing offense at the statements Lopez had made in class. One of his classmates referred to his speech as "hateful propaganda." However, Jones stated that the school was not planning to take any action against the two students for their statements as the college sought to preserve the First Amendment rights of its students.

In addition to his claim that the college's sexual harassment policy is unconstitutional, Lopez asserted that Matteson had violated his constitutional rights under the First Amendment and the Equal Protection Clause. These claims, however, were dismissed by the district court. While Judge Ikuta expresses in the opinion strong disapproval of Matteson's behavior, the court was confined to considering Lopez's assertion concerning the college's sexual harassment policy.

Lopez argued that the sexual harassment policy violates the First Amendment because it is "overbroad and vague." However, the court found that Lopez does not have standing to bring a claim against the college alleging violation of his First Amendment rights under the sexual harassment policy, making a discussion by the court of the merits of the case unnecessary. In order to establish standing, a party must establish that he or she has suffered some injury due to the conduct of the defendant. Although injury is often defined in cases as something that has already occurred, a party can assert standing based on injury that has not yet occurred if that party can establish that there exists "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Allowing parties to bring claims against policies that potentially violate free speech permits people to challenge the constitutionality of such policies without having to actually violate them. The concern of the courts is that, if a person had no way to challenge a policy unless it was actually enforced, people would self-censor in order to avoid coming under the enforcement of the policy and this would have a "chilling effect" on free speech. Establishing injury prior to the actual enforcement of a contested policy requires a party to prove that the policy applies to them, that they intend to violate the policy and that there is a "reasonable likelihood" that the policy will be enforced.

As evidence of the college's alleged likeliness to enforce the policy against him, Lopez pointed to the statements made by Matteson, both in the classroom and on Lopez's topic assignment, and Jones, as "credible threats" of enforcement. Matteson's comment written on Lopez's proposed speech topics was interpreted by Lopez as a threat that he would be disciplined under the code. Lopez's contention that it was the sexual harassment policy the college intended to enforce, rather than another conduct regulation, was based almost entirely on both Matteson and Jones' use of the word "offended." The college's sexual harassment policy states that "unwelcome" conduct of a sexual nature violates the policy when it "[has] a negative impact upon the individual's work or academic performance, or [it creates] an intimidating, hostile, or offensive work or educational environment." After Matteson interrupted Lopez's speech in class, he told the rest of the "class that anyone who was offended could leave." Also, in her letter to Lopez in response to his demands for Matteson to be disciplined, Jones stated that other students in the class had been offended. Lopez argued that by stating that Lopez's speech offended or could have offended other students, Matteson and Jones were indicating that Lopez had violated the sexual harassment policy by creating an "offensive . . . educational environment" and therefore, could be disciplined under the policy.

The court determined that while Lopez could have reasonably interpreted the statements by Matteson, specifically his written mention of the school's conduct code, as a warning that the

college may take some disciplinary action against Lopez, the connection between Matteson's statements and the sexual harassment policy is too tenuous to establish that Matteson made a "direct threat of punishment" under the policy. At best, the comments can be viewed as a "general threat" to discipline Lopez in some manner for a violation of the college's code of conduct. The sexual harassment policy is never referenced by Matteson and any connection Lopez draws between these "general threats" and the contended policy is "insufficient to establish an injury in fact." Additionally, the court determined that the reference made in Jones' letter to the students who were offended by Lopez's speech could not be read as an "implicit threat" to enforce the sexual harassment policy against Lopez. In her letter, Jones expressly stated that the students were offended by the aggressive and "hateful" tone of Lopez's speech. Also, Jones stated that the school did not intend to discipline the students for expressing their opinions. Although Jones specifically referred to the rights of the other students to express their disapproval of Lopez's speech, the court interpreted the statement as implicitly including Lopez. There was no indication in Jones' letter that the school intended to discipline Lopez in any way based upon the statements he made in his speech, let alone under the sexual harassment policy.

The court also found that in addition to the school displaying no intention to enforce the sexual harassment policy, Lopez himself had neither violated the policy nor shown any intention to do so in the future. To violate the policy, a person must engage in "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature." In his informative speech, Lopez discussed his Christian beliefs and read a definition of marriage as being between one woman and one man. These statements, even broadly construed, are not sexual in nature. The court was unsure of the connection that Lopez was attempting to make between his comments concerning marriage and the language that the policy prohibits.

There was also insufficient evidence that Lopez intends to violate the policy in the future. In a future speech for class, Lopez intends to speak more about his Christian faith and how it influences his views on other topics such as politics and culture. No details of the speech were provided to the court, and Lopez offered no explanation for why he thinks he will be disciplined under the policy if he gives this proposed speech. Based on the information provided concerning the subject matter of the future speech, the court held that nothing in the speech could be considered sexual in nature. Although the argument could be made that the policy can be read to include negative statements made about sexual orientation or same-sex marriage, because Lopez does not make this argument nor has the school shown any indication that the policy should be read to include such speech, the court declines to broaden the policy and interpret it as such.

Lopez contended that the threat of discipline under the policy would cause him to self-censor his statements in the future and therefore violate his right to speak freely. However, because the court found that there was neither a reasonable threat that the school intended to bring Lopez under enforcement of the policy or that Lopez even intended to violate it, there was no evidence that Lopez would have to alter his speech in order to come into compliance with the policy. Lopez also attempted to bring a claim on behalf of other students whose freedom of speech may be infringed upon in the future by the enforcement of the policy, but due to his failure to establish that he himself had suffered or will likely suffer such an injury in the future, Lopez did not have standing to bring a claim on his own behalf, and therefore could not bring the same claim on behalf of anyone else. *Kelly Garner*

Federal Court Refuses to Dismiss False Arrest Suit Against NYC in Gay Prostitution Busts

Part of the fallout from the New York City Police Department's strategy to shut down adult businesses as public nuisances by documenting on-site solicitation for prostitution is a lawsuit against the city by Robert Pinter, a middle-aged gay man who claims he was subjected to false arrest, malicious prosecution, and other forms of mistreatment by undercover NYPD personnel when he was arrested on October 10, 2008. On September 13, U.S. District Judge Shira A. Scheindlin rejected the city's motion for summary judgment in the case, finding that Pinter's factual allegations described "circumstances" that "reek of entrapment" and are "unsettling and inappropriate." As such, the defendants could not win a pretrial motion on the ground of qualified immunity. *Pinter v. City of New York*, 2010 WL 3702439 (S.D.N.Y., September 13, 2010).

According to Pinter's account in his complaint, he was minding his own business shopping for DVDs at Blue Door Video when a handsome young man came on to him and they discussed going to Pinter's apartment for some friendly oral sex. As they were leaving the store, claims Pinter, the young man said he wanted to pay Pinter for the sex, to which Pinter made no reply, although he thought it odd that a hot young man would offer to pay him for sex and figured nothing was going to come of it. After the men had proceeded together a short way, Pinter was pushed to a wall by a bunch of police officers and placed under arrest for soliciting prostitution. The terrified man, held in confinement, agreed to plead to a lesser charge and was sentenced to a counseling program, where he encountered other gay men who claimed to have been arrested under similar circumstances. Pinter suddenly became an activist, went public with his claims of entrapment and improper conduct, and created a cause celebre that included encounters between police and prosecution officials and gay elected officials and a virtual admission by prosecutors that there was a strategy that was not working.

Judge Scheindlin, noting that the undercover officer painted a different version of events in his official report of the arrest, found that there was a dispute over material facts that warranted trial on the merits, but that taking Pinter's allegations as true — which was necessary to determine the city's motion for summary judgment on immunity grounds — she found that a reasonable police officer in the circumstances described by Pinter would know that he was violating established constitutional rights and thus could not enjoy immunity from liability.

This sounds like a case that the City should try to settle as promptly as possible rather than have its officers subjected to discovery under oath and the possibility of perjury charges. A.S.L.

First Amendment-Based Challenge to the Federal Hate Crimes Act Rejected

Three Christian pastors and the President of the American Family Association of Michigan (AFAM) lost their bid to challenge the constitutionality of the criminal provisions of the Matthew Shepherd and James Byrd, Jr., Hate Crimes Prevention Act (Hate Crimes Act), 18 U.S.C. Sec. 249 (a) (2). U.S. District Judge Thomas L. Ludington granted the Attorney General's motion to dismiss the complaint for lack of jurisdiction. *Glenn v. Holder*, 2010 WL 3504750 (E. D. Mich., September 7, 2010).

The plaintiffs are: [1] Gary Glenn, the President of the AFAM, an organization that promotes the "Judeo-Christian ethic and ... all things necessary to promote ... the traditional and natural family in our society"; [2] Levon Yuille, a Michigan resident and pastor of The Bible Church in Ypsilanti, Michigan, the National Director of the National Black Pro-Life Congress, and the host of a radio talk show known as "Joshua's Trail"; [3] Rene Ouellette, a Michigan resident and the pastor of the First Baptist Church of Bridgeport, Michigan; and [4] James Combs, a pastor at Faith Church, The Point Church, The Rock Church and The River Church, all of which are located in Michigan.

According to the court, each of the plaintiffs believe two things: [1] that violence should not be condoned; and [2] that "homosexuality is biblically prohibited by provisions in both the Old and New Testaments and that the complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such

by all the major cultures and religions of the world.'

With that backdrop, the plaintiffs sought to challenge the Hate Crimes Act. In their complaint, the plaintiffs claimed that their First Amendment rights to express their opposition to homosexuals and homosexual behavior was violated because the Act was vague, overbroad, had a chilling effect on anti-homosexual speech and violates their rights under the Free Exercise Clause of the First Amendment.

Judge Ludington, however, never reached the merits of the plaintiffs' claims. Instead, he held that the plaintiffs lacked standing, and that the claims were otherwise not ripe for judicial review. The plaintiffs lacked standing to challenge the Act because they had not alleged that they intended to "willfully cause" any "bodily injury", and therefore there wasn't a credible threat of prosecution under the Hate Crimes Act.

Additionally, Judge Ludington held that the plaintiffs' claims were not ripe either. Aside from some hypothetical scenarios where the plaintiffs might be prosecuted, the only proffer by the plaintiffs involving actual facts pertained to statements made by U.S. Attorneys in Michigan being "eager" and "excited about" the Hate Crimes Act and generally pursuing enforcement activities. The plaintiffs claimed that these statements chilled the exercise of their constitutionally protected rights, thus resulting in irreparable injury. However, Judge Ludington held that such facts do not establish "situations that are of substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," especially in light of the plaintiffs' assertions that they disavowed violence. The court rejected speculation that the pastors might be prosecuted if somebody committed a hate crime claiming to have been inspired by their preaching. *Eric J. Wursthorn*

Federal Civil Litigation Notes

9th Circuit — On February 22, 2010, a panel of the 9th Circuit ruled in *Cooper v. Federal Aviation Administration*, 596 F.3d 538, that the government's violation of the Privacy Act (sharing information about an airplane pilot's HIV+ status among various federal agencies without his consent) gave rise to a claim for non-pecuniary damages (emotional distress). The Privacy Act itself waives federal sovereign immunity for claims for "actual damages" for injury caused by violation of the Act, but the government had argued that only economic injury was covered. The government sought rehearing or en banc review. On September 16, in *Cooper v. Federal Aviation Administration*, 2010 WL 3584055, the 9th Circuit announced that the government's petitions were denied. Judge Milan D. Smith, Jr., the only "active" member of the original panel (which included two senior judges of the Circuit) filed an opinion defending the panel's decision, and Judge Diarmuid O'Scannlain filed a dissent for himself and Chief Judge Kozinski and Judges Gould, Tallman, Bybee, Callahan, Bea and N.R. Smith. There is thus significant dissent on the circuit for the proposition that violations of the Privacy Act can subject the government to claims for non-pecuniary damages, and thus to the degree to which the Privacy Act waives sovereign immunity. It is possible that the degree of dissent would make a certiorari petition by the government a viable proposition. Interestly, the case now goes back to the district court for a hearing on damages. The original trial judge in this case was Vaughn Walker of the Northern District of California, but he has announced his retirement from the bench effective early next year, so it is possible the matter will end up before a different judge.

NOM Suits in Multiple Jurisdictions — The National Organization for Marriage (NOM), a group formed for the purpose of opposing same-sex marriage, has filed federal lawsuits in New York, Florida and Rhode Island, represented by Alliance Defense Fund, seeking declarations that the advertisements they plan to run in those states opposing candidates who support same-sex marriage enjoy First Amendment protection against any state laws restricting candidate-oriented campaign spending. Reporting on the suit filed in Rhode Island, where the race for governor is seen as crucial in light of expected legislative support for a same-sex marriage bill like those enacted in other New England States (Connecticut, Vermont, New Hampshire), the *Providence Journal* reported on September 28 that NOM plans to spend undisclosed large sums on campaign advertising in support of anti-same-sex marriage candidates, and seeks to be held free of any limitations placed on such spending, claiming a First Amendment rights, presumably based on the *Citizens United* ruling by the Supreme Court, to do such advertising free of any regulatory restraints.

New York — District Judge Paul Crotty (S.D.N.Y.) granted summary judgment to defendants in *Jovanovic v. City of New York*, No. 04 Civ 8437 (PAC), in which Dr. Oliver Jovanovic, who was prosecuted in a sensational trial on charges of abducting a woman he met through an AOL chat board and putting her through a sadomasochistic scene against her will. Jovanovic was convicted on several counts by a Manhattan state court jury and sentenced to 15 years to life, but his conviction was set aside by the Appellate Division on the ground that the trial judge had inappropriately invoked the rape shield law to prevent Jovanovic from presenting evidence about consent to the jury. (The Appellate Division ruling is one of the few judicial decisions suggesting that consensual S&M may not be subject to criminal prosecution.) Upon remand, the prosecution offered several plea deals to Jovanovic, but he rejected them all, asserting his total innocence. Then it developed that the woman refused to go through testifying at a second trial, so all charges against Jovanovic were dismissed, after he had served 20 months of his sentence. Jovanovic then brought suit against a police detective, the prosecutor, and the City of New York, on a variety of tort claims including malicious prosecution and abuse of process, and claimed that his right to a fair trial had been destroyed by the prosecutor's public statements about the case. Judge Crotty's decision in favor of defendants turned heavily on the fact that a grand jury indicted Jovanovic, that some minor fabrications by the detective were not apparently outcome determinative, and that the jury chosen in the case and accepted by the defense was apparently free of pretrial press influence.

Wyoming — David Shupe-Roderick and Ryan W. Dupree have withdrawn the lawsuit they filed in August in federal court seeking to compel the State of Wyoming to issue them a marriage license. The suit was seeking a declaration that the state's statutory ban on same-sex marriage violates the federal constitution. Wyoming does not have a constitutional amendment banning same-sex marriage, and gay rights forces in the state expressed alarm that this lawsuit could undo their success in keeping a constitutional amendment proposal from being placed on the ballot by the legislature. The plaintiffs had planned to represent themselves. It had appeared that their suit might have failed on various procedural grounds without reaching a ruling on the merits in any event, as state officials denied that the men had ever applied for a marriage license prior to filing suit. It also emerged that Shupe-Roderick has a criminal record, and has filed several lawsuits in connection with child support disputes with his ex-wife. *Trib.com*, Sept. 19. A.S.L.

State Civil Litigation Notes

California — A quick crash and burn... The Pacific Justice Institute, a right-wing litigation group, filed an action in the California 3rd District Court of Appeal, *Beckley v. Schwarzenegger and Brown*, seeking a writ of mandamus to compel Governor Arnold Schwarzenegger and Attorney General Jerry Brown to file a notice of appeal in the U.S. Court of Appeals for the 9th Circuit in *Perry v. Schwarzenegger*, the case in which U.S. District Judge Vaughn Walker declared that Proposition 8, which amended the California Constitution to forbid same-sex marriages, was unconstitutional. The governor and the attorney general had greeted Judge Walker's decision favorably, and neither had expressed any inclination to appeal. Although

these officials were named defendants in *Perry*, neither had participated in the trial to defend Proposition 8, that role falling to defendant-intervenors, Proposition 8 Official Proponents and their campaign organization. These individuals have appealed, and even obtained a stay of the ruling from the 9th Circuit motion panel pending their appeal (which stay had been opposed by the governor and the attorney general), but the motion panel had expressed doubt whether defendant-intervenors possessed the requisite Article III standing to pursue their appeal without the participation of the actual named defendants. Thus this mandamus action, seeking to compel the named defendants to join the appeal. But within days of the filing, the court of appeal denied the petition on September 2, without explanation, assuring that the question whether this case can be appealed lies in the hands of the U.S. Court of Appeals for the 9th Circuit. The 9th Circuit motion panel specifically ordered that Proponents address the question of standing in their pre-hearing brief, and it seems likely that a major portion of the argument scheduled to take place in December will focus on standing.

California — Claudionor Fernando Sampaio has filed an action in California Superior Court, Alameda County, claiming that he was harassed and then discharged after he inquired about obtaining medical coverage for his same-sex partner. *Sampaio v. Seaside Refrigerated Transportation, Inc.*, No. HG10-538707 (filed 9/28/2010) [reported in BNA Daily Labor Report No. 188, A-8 (September 29, 2010)]. Sampaio claims that retaliatory acts commenced after he spoke in confidence to HR manager Dianna Johnson-Beggs. He claims that his confidential inquiry was leaked to coworkers and supervisors, who began making comments to him about his sexual orientation, calling him names, and blocking him from using the restroom. The suit was brought on his behalf by the San Francisco Legal Aid Society-Employment Law Center and the firm of Rukin Hyland Doria & Tindall. Stories like this should disabuse us of any notion that San Francisco is some sort of pay mecca paradigm for the nation. At least for blue collar workers, it sounds like homophobic in the workplace as ususal. . .

Maine — The Maine Human Rights Commission ruled that the Orono school district had violated the state's human rights law by requiring a sixth-grader who is transgender to use a separate bathroom and locker room, rather than the girl's bathroom. Her parents had claimed on her behalf to the commission, arguing that the school's policy was isolating and alienating her from other students, and thus endangering her safety. The student, who had experienced bullying from fellow students, withdrew from school there. *Advocate*, Sept. 22.

New York — On September 2, the New York Court of Appeals denied leave to appeal in the case of *Mangus v. Niagara County Department of Social Services*. Rhoda Mangus withdrew her openly gay son, Michael from attending school in the North Tonawanda School District and assumed the burden of providing home-schooling when the school proved unable or unwilling to protect Michael from aggressive bullying by other students. Mangus claims that school officials filed false reports of absenteeism concerning Michael, resulting in the County bringing charges of educational neglect against Rhoda. Her suit against the county has been unsuccessful in the lower courts. With the Appellate Division, 4th Department, having rejected her appeal of an educational neglect adjudication, and the Court of Appeals denying review, she is considering bringing a federal suit. She is represented pro bono by Jay Paul Deratany, a Chicago lawyer. *Tonawanda News*, Sept. 8. A.S.L.

Criminal Litigation Notes

Georgia — The Atlanta Citizen Review Board, which rules on complaints about police misconduct, has ruled that police officers involved in a gay bar raid at the Atlanta Eagle on September 10-11, 2009, were guilty of false imprisonment for detaining bar patrons without probable cause to believe they were violating the law. The Board also fixed responsibility on police supervisors involved with the raid for inappropriate conduct by officers under their command, including use of profanity (including racist and anti-gay slurs), forcing patrons to lie on the ground while searching them for drugs and checking their ID cards against outstanding warrant lists. These findings came in response to complaints filed by bar patrons. An earlier ruling in response to complaints filed by bar employees determined that police officers involved in the raid were guilty of misconduct against the employees. The Board will be undertaking a further investigation to fix management blame and impose penalties as warranted. *Gay City News*, September 20.

New York — Erie County Judge Thomas Franczyk has sentenced Joshua Holts to four years in prison for beating up Scott Wright, a gay man, outside a gay bar in the Buffalo area in 2008. According to news reports, Holts was convicted of second degree assault. Video surveillance tapes from the bar showed that Holts, 26, repeatedly struck the 47-year-old man in the head and face. News reports relate allegations that Holts shouted anti-gay slurs during the attack, but taht Judge Franczyk determined there was insufficient evidence to support a hate crime conviction that would have led to lengthening of the sentence. *Advocate.com*, Sept. 30. A.S.L.

Legislative Notes

Federal — On September 21, the Senate voted 56-43 on a cloture motion on the National Defense Authorization Bill, which includes provisions allowing the Defense Department to end the "don't ask, don't tell" policy on military service by lesbians and gay men. Unfortunately, a cloture motion requires 60 votes to pass, so the Senate could not proceed to vote on the merits of the bill. There was speculation that the matter might be raised again after the midterm elections during the lame duck session. In Illinois, the winner of the Senate election will also be the winner of a special election to fill out the remainder of President Obama's Senate term, which means that a Republican Senate victory on November 2 would increase the Republican membership of the Senate immediately during the lame duck session, making the possibility that the DADT repeal is passed in this session even less likely. Of course, if the Republicans take control of one or both houses of Congress, repeal of DADT (and the rest of the LGBT rights federal legislative agenda) would be off the table for the next two years, and the issue would become whether President Obama could be counted on to veto anti-gay legislation. * * * Also apparently off the table for now, or at least until after the midterm election, are the widely-co-sponsored Employment Non-Discrimination Act, which would ban intentional discrimination on the basis of sexual orientation or gender identity by employers who are subject to the other federal employment discrimination laws, and measures to repeal the Defense of Marriage Act and to recognize committed same-sex couples for immigration purposes. All the major pieces of the remaining LGBT federal legislative agenda seem to be on hold pending the midterm Congressional election. With most prognosticators suggesting that Democrats will lose some seats in the Senate (but probably not control) and many seats in the House (and possibly control), it appeared that the limited lame-duck session of the current Congress may provide the only opportunity to pass any of these measures until after the elections in 2012.

California — It's official! The state of California is no longer dedicated to researching "the causes and cures of homosexuality," as Gov. Arnold Schwarzenegger has signed into law A.B. 2199, which repeals a 1950s-era statute. On a more affirmative note (!), the governor also signed into law A.B. 2700, which will establish a method for same-sex couples who are both registered as domestic partners and also married to dissolve both relationships simultaneously, rather than have to go through two separate procedures in the event they decide to end their relationships. The law is necessitated by the strange situation that thousands of couples who married during the 2008 window pe-

riod between the California Supreme Court's same-sex marriage decision and the passage of Proposition 8 are still considered married, but many of those couples had previously registered as domestic partners as well, so carry a dual legal status as a result of the California Supreme Court's decision in 2009 holding that although Proposition 8 had been validly enacted, those couples who had legally married when it was lawful to do so remained legally married.

California — Governor Arnold Schwarzenegger vetoed AB 633, the Lesbian, Gay, Bisexual and Transgender Prisoner Safety Act, which had passed the legislature with bipartisan support. The governor commented that the measure was similar to a prisoner safety bill he had vetoed last year. It would have codified various steps intended to cut down on the problems of anti-gay and and anti-trans assaults in California prisons. In his veto message, the governor characterized the bill as simply requiring the state to take a prisoner's sexual orientation or gender identity into account in deciding where to house the prisoner, and said the measure was unnecessary because those factors are already taken into account. This sounds totally disingenuous. If the factors are already taken into account, and that's all that the bill is about, why would bipartisan majorities in both houses of the legislature think it worth passing the measure. Clearly it involves much more than that. One wonders whether the governor was seeking an easy out from approving a common-sense measure that will cost money to administer?

Connecticut — As of October 1, all those same-sex couples in the state who had formed civil unions and have not dissolved them in the face of the same-sex marriage law will find themselves to be married. A provision of the law automatically converts all remaining civil unions to legal marriages as of that date. *Hartford Courant*, September 30.

New York — On August 31, Governor David Paterson signed into law A. 2563, a bill that originated in the New York State Assembly, which requires employers that provide funeral or bereavement leave to married employees to provide the same benefit to same-sex committed partners, defined as "those who are financially and emotionally interpendent in a manner commonly presumed of spouses." This bill is an example of the alternatives-to-marriage strategy now being carried on by LGBT rights supporters in the state legislature, as the State Senate rejected a marriage equality bill last year and there seems to be little impetus to seek a civil union or domestic partnership law on the state level. Many public employers in the state already provide this benefit as part of their domestic partnership policies. This bill extends that coverage to the private sector, and avoids conflict with ERISA preemption since such benefits are normally not provided as part of an "employee benefits plan" within the definition of ERISA.

New York — On September 8, Governor David Paterson signed into law S. 1987B, the Dignity for All Students Act, establishing a state policy to "afford all students in public schools an environment free of discrimination and harassment." The term "harassment" is defined to include a wide variety of adverse conduct based on the victim's "actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex." The measure prohibits harassment of students by employees or other students on school property or at a school function, requires boards of education to adopt appropriate policies and guidelines to ensure a school environment free of such harassment, and mandates the establishment of procedures to deal with complaints, while authorizing appropriate discipline for offenders. The law does not apply to religious schools, and takes affect July 1, 2010, with a mandate that any rules or regulations necessary for its "timely implementation" are to be promulgated "on or before such date."

New York — On September 17, Governor David Paterson signed into law S.1523A, a bill that originated in the New York State Senate, which amends the state's Adoption Law (Section 110 of the Domestic Relations Law) to make clear that same-sex couples can jointly adopt children. The first sentence of the section is amended to read as follows: "An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person." Of course, same-sex couples who married out of state are now generally recognized by New York State courts as being married, and presumably could adopt jointly as a married couple in New York. New York State Senator Thomas Duane was lead sponsor of the bill, which first passed the Senate on June 24, passed the Assembly on July 1, nad was delivered to the governor on September 7.

Pennsylvania — As the state legislature has remained resistant to including sexual orientation in the state's civil rights law, more and more small jurisdictions in the state are taking that step on their own. The latest is the borough of Bellevue, where the city council voted to add "sexual orientation" to the city's personnel code, thus forbidding discrimination on that basis by the local government. A.S.L.

Law & Society Notes

Federal — On September 10, Director John Berry of the U.S. Office of Personnel Management issued a memorandum directing the expansion of the 24-hour leave-without-pay family support policy to same-sex domestic partners of federal employees. The memo was characterized as coming in response to President Obama's June 2, 2010, directive to federal agencies to extend to same-sex partners of federal employees those benefits that could be extended through re-interpretation of existing statutes. Some benefits, which are subject to statutory definition, cannot be extended by the Executive Branch without legislative authorization, but this leave policy was evidently an administrative creation that the OPM determined could be changed by directive.

Presbyterian Church — The Permanent Judicial Commission of the Presbytery of the Redwoods, based in Napa, California, decided on August 27 that Dr. Jane Spahr, who has been an ordained Presbyterian minister since the 1970s, had violated her ordination vows by performing marriages for same-sex couples during the "window period" when such marriages were legal in California. While praising her for her long service, the Commission stated that it was bound by church doctrine, under which ministers may provide blessings for same-sex couples but may not perform marriages for them. So far, attempts to alter the doctrine have stirred divisive debate within the church. In July, a legislative committee of the church had voted 34-18 to change the definition of marriage in church doctrine to embrace unions between any two adults regardless of gender, but the church's General Assembly voted to table the recommendation by 439-208 to put off what was expected to be a bitter and divisive debate. The issue will not come up against before the General Assembly until 2012. The Commission voted to rebuke Dr. Spahr but not to impose any stronger sanctions than to command her not to perform such marriages as long as the church doctrine does not allow it. *Alameda Times-Star* (Aug. 27); *New York Times* (Aug. 29).

Diplomatic Corps — There were press reports on September 11 that Ali Ahmad Asseri, first secretary of the Saudi Arabian consulate in Los Angeles, had contacted federal authorities to seek political asylum in the United States on the ground that Saudi officials had refused to renew his diplomatic passport and were trying to force him to return to Saudi Arabia because he is gay and has formed a close relationship with a Jewish woman. Asseri asserted that his life is in great danger and that he would most likely be killed if her were removed back to Saudi Arabia, where homosexuality is a capital offense. *NBC News*, September 11.

Michigan — Incensed that the students of his alma mater, the University of Michigan, had elected an openly gay student to be their student body president, Michigan Assistant Attorney General Andrew Shirvell has launched a blogging campaign against Chris Armstrong, calling him a "radical homosexual activist" and claiming to be a "Christian citizen exercising my first amendment rights." Shirvell started his blog, which focuses on calling Armstrong

offensive names and attacking his probity in April, and has supplemented his blogging activities with what sounds like stalking activities. Confronted during a CNN interview by Anderson Cooper with complaints about his actions, Shirvell said it was "nothing personal" and likened his activity to a political campaign. (To which Cooper pointed out that Shirvell was not a student running for office against Armstrong; in fact, the election is long since over.) Among Shirvell's complaints is that Armstrong seduced a right-wing student and converted him into a pro-gay activist. When asked about Shirvell's activities, his employer, Attorney General Mike Cox, released a statement that Shirvell's views do not reflect those of the office, but "his immaturity and lack of judgment outside the office are clear." Let's see how long Cox continues to employ an attorney whom he considers immature and lacking in judgment. . .

Oklahoma — The Tulsa Board of Education has voted unanimously to add sexual orientation to its non-discrimination policy for students, staff and parents. The September 20 vote, which a gay lobbyist said had taken "decades of behind-the-scenes work," was claimed by the school district to have been done in according with requirements imposed by the U.S. Department of Education's office of civil rights. This is a bit surprising, since federal statutory law does not protect gay people from discrimination. . . *Advocate*, Sept. 21. A.S.L.

Israel Supreme Court Issues Historic Gay Rights Decision

On September 14 2010, the Israel Supreme Court (officially called the High Court of Justice) gave its judgment in *The Jerusalem Open House for Pride and Tolerance vs. The Municipality and the Mayor of Jerusalem*, Administrative Petition Appeal 343/09, ruling that the municipality could not discriminatorily deny funding to Jerusalem Open House, the city's LGBT community center. For the first time in Israeli law, the court employed the concept of a "suspect group" to find that governmental discrimination against gay people is subject to "strict scrutiny" judicial review by the court.

The Jerusalem Administrative Court(2008) had rejected JOH's challenge to the Municipality's denial of requests for financial support in the years 2005, 2006 and 2007. JOH, represented by Gilad Barnea and Einat Hurvitz, argued that the different departments within the municipality created criteria for support to organizations which in reality blocked the GLBT community from receiving such support.

The Supreme Court mentioned that the case under appeal followed on a few previous rounds of litigation involving the parties. In the past, as a result of an out-of-court settlement reached in one of the previous rounds, the Municipality provided some financial support to JOH, but later its requests for support were rejected. JOH argued that the Municipality chose criteria intended to exclude the GLBT community from public life in Jerusalem. This argument was based on a series of facts such as the Municipality's decision to stop financial support for certain types of activities for which JOH was requesting support. Other minority groups, argued the JOH, such as Arabs and ultra-orthodox Jews, do receive support in different ways, while the special needs of the GLBT community are not addressed by the Municipality. JOH additionally argued that looking at the results of the funding decisions points to the existence of discrimination.

The Supreme Court cited to the Budget Foundations Law 1985, under which public authorities must give out funds based on equality and reasonableness according to clear, transparent and relevant criteria which fulfill the above values. While no organization has a vested right to get public support, when an authority has decided to support groups and create criteria for that, the criteria can be examined according to the principle of equality.

Discrimination based on sexual orientation, added Justice Amit, writing for the Court, is a form of discrimination based on "suspect" group belonging, and thus is within the "core" of the right to equality, and should be examined within a standard of strict scrutiny. In using these terms, Justice Amit borrowed from American constitutional law. The concepts of "suspect" groups and "strict scrutiny" review are rooted in American law, and are not fully established in Israeli constitutional law, although this case may be considered as a step in that direction.

Justice Amit mentioned that Israeli GLBT law reflects the changes that happened within Israeli society, which today believes that law should not discriminate on the basis of sexual orientation, just as should be the case with age, race, nationality, gender, etc. The court considered that there is a broad agreement that members of the GLBT community should not be discriminated against and this is apparent also from looking in the legislation and case law on this issue. In order to prove this point, Justice Amit offered a review of the major relevant Israeli legislation and litigation. The various points did not constitute isolated "islands" of rights, he wrote, but rather pointed to a comprehensive constitutional concept of the right not to suffer governmental discrimination based on sexual orientation. This is within the core of the general prohibition on discrimination. The relative political weakness of the GLBT community was also mentioned by Justice Amit as relevant, as well as the fact that GLBT people are often subject to hostility.

Based on this background and on other evidence including public expressions of Jerusalem's previous mayor against the JOH's activities, and on the fact that other municipalities in Israel support activities for the GLBT community, the court determined that the JOH's "suspicion" of intended discrimination against it is "understandable."

Addressing the specific headings under which the JOH's support applications were rejected, the court found that in some cases the rejections were justified, but at the same time it held that the criterion that requires that for a community center to get municipal support it must be active in a given geographical area is discriminatory. The court found that given the fact that the JOH activates a community center whose audience is a "spread" community whose members do not reside in a specific geographic area, then this criterion amounts to a violation of substantive equality, as it gives exclusive weight to the regional geographical concentration, ignoring the special needs of the GLBT community.

The other head under which the court found discrimination was that of support given to activities for "detached youth." The court held that GLBT youth, even if not "detached" from their families, is "youth at risk," given the existence of homophobia, and that excluding support to GLBT youth amounts to prohibited discrimination. However, since 2008 the Municipality decided to focus its support for youth activities on organizations working against drug use. Thus no operative order was given by the court regarding this issue, which became moot.

In the operative part of its judgment, the court ordered the Municipality to pay the JOH 65,000 NIS for support in the funding for Pride Parade 2006 (this specific payment was agreed upon in a settlement between the parties regarding this issue only), and to pay 100,000 for each year between 2005-2008 under the "community center" heading.

In a concurring opinion, Justice Hayut mentioned that alongside the developments in Israeli law, one should recall the hatred towards the GLBT community is still present, as is apparent in the stabbing of participants in Gay Pride in Jerusalem in 2006, and the murder of two young people in the attack on gay youth in Tel-Aviv in 2009. Justice Meltzer also concurred and noted that in the 21st Century the issue of equality should have been obvious to all.

The JOH case is significant in its recognition of a comprehensive right to equality for GLBT people and its determination that discrimination against GLBT people warrants "strict scrutiny." Moreover, the court made it clear that hostility and objection to GLBT people cannot justify discrimination against them by the government, but quite the opposite. These determinations may be useful in further cases which address discrimination. *Aeyal Gross, Tel Aviv University*

Other International Notes

United Nations — United Nations Secretary-General Ban Ki-moon issued a statement on September 17 calling for the repeal of laws that criminalize gay sex and gender transgender identity. "Cultural considerations should not stand in the way of basic human rights" he said, in a message delivered in Geneva by U.N. High Commissioner for Human Rights Navanethem Pillay, while the 15th regular session of the U.N. Human Rights Council was taking place there. Pillay noted that 78 countries still impose sanctions on sexual minorities. *Wockner International News*, No. 857 (September 27).

Australia — The Tasmanian legislature has approved an amendment to the Relationships Act under which the state will recognize same-sex marriages contracted lawfully elsewhere, at least on a par with other partnership relationships that are legally recognized. *ABC Premium News*, September 29. * * In New South Wales, the lower house of the legislature voted 46-44 to approve a measure allowing same-sex couples to adopt children, but a further vote was expected to approve an amendment allowing faith-based adoption agencies to continue to refuse adoption services to gay couples. *ABC Premium News*, Sept. 2. A revised version passed the Assembly by a vote of 64-43, exempting faith-based adoption agencies. *Mt. Druitt Standard*, September 15. * * * The Court of Appeals has sided with the Attorney General of Western Australia on the issue whether the state should recognize a gender transition prior to surgical alteration of genitals. An administrative tribunal had granted such recognition to two female-to-male transgender individuals, even though they had not undergone surgical sex reassignment. In reversing that ruling, the court agreed with the Attorney General's argument that it would cause confusion in the law to allow somebody still capable of bearing a child to have a male gender designation. *ABC Premium News*, Sept. 2.

Cuba — Better late than never? Fidel Castro, the retired President of Cuba, told interviewers that the persecution of homosexuals under his communist revolution was an injustice for which he bore responsibility. He indicated that his preoccupation with other issues led him to ignore the injustices being suffered by gay people under his regime. Cuba under Castro did join the international trend towards decriminalization of consensual sodomy, however, discrimination and persecution of gay people was severe and many gay prisoners were exiled to the U.S. in the Mariel boatlift. There are reports of liberalization of public attitudes towards gay people in recent years, mainly through the championship of younger members of the Castro family.

Honduras — On September 9, a three-judge panel sentenced a police officer, Amado Rodriguez Borjas, to 10-13 years in prison for participating in a stabbing attack on a transgender woman. According to a press report from Human Rights Watch, which had been observing the trial, this was the first conviction of a police officer in Honduras since 2003 for a specifically anti-transgender crime. HRW reports that anti-trans abuse by police is common in that country, and the case was "fraught with intimidation" as threats were in the air against prosecutors, witnesses, and police officers, who received anonymous threats during the trial. *HRW Press*, Sept. 10.

Russia — One of the staunchest opponents of gay rights in Russia has been Moscow Mayor Yury Luzhkov, whose response to requests for permits for gay pride marches and demonstrations has normally been a burst of negative invective. According to September 28 news reports, President Dmitry Medvedev announced that he had lost confidence in Luzhkov and was removing him from office. Medvedev did not immediately announce a replacement, but Vladimir Resin, a deputy to Luzhkov, was designated acting mayor pending an appointment. *Bloomberg Business Network*, Sept. 28. Initial reports indicated that Resin is not a fan of gay rights, either. * * * Some drama erupted during September concerning the whereabouts of Nikolai Alexeyev, a leading Russian gay rights activist, who later claimed he had been briefly kidnapped by state security agents who were intent on persuading him to withdraw charges that have been lodged with the European Court of Human Rights challenging the suppression of gay rights activity in Russia. Alexeyev staunchly refused to withdraw the charges. After some days of mystery and fear that he would vanish entirely, Alexeyev emerged unbowed and immediately moved to take up his gay rights activism again. That his chief protagonist, Mayor Luzhkov, was shortly thereafter removed from office is an interesting coincidence not generally remarked upon in the press.

Switzerland — On remand from the European Court of Human Rights in *Schlumpf v. Switzerland*, the Swiss Federal Supreme Court has reversed its position and now rules that transsexual individuals do not have to undergo two years of psychotherapy as a prerequisite for health insurance coverage for gender reassignment surgery, according to a news bulletin from ILGA-Europe on September 28. The judgement of the court was announced on September 15. A.S.L.

Professional Notes

Openly lesbian attorney Monica Marquez has been appointed to the Colorado Supreme Court by outgoing Governor Bill Ritter, whose announcement on September 8 acknowledged but downplayed her sexual orientation. "It is not because Monica is a Latina or because she is gay," he said; "I chose her because of her analytical ability and her keen intellect." Marquez has been serving as Deputy Attorney General of Colorado. She is a graduate of Stanford University and Yale Law School, where she was an editor of the Law Journal. Marquez is the second member of her family to break barriers as a judicial appointee, as her father, now-retired Judge Jose D. L. Marquez, was the first Latino appointed to the Colorado Court of Appeals. *Denver Post*, Sept. 9.

On September 24, the ACLU of Eastern Missouri presented a Civil Liberties Award to Arlene Zarembka, a prominent lesbian attorney who has been a leader in the fight for LGBT legal rights in Missouri for many years.

Bebe J. Anderson, who has been serving as HIV Project Director at Lambda Legal in New York, has left to become Senior Counsel at the Center for Reproductive Rights, where she had worked as a staff attorney before joining Lambda Legal.

U.S. District Judge Vaughn R. Walker, Chief Judge of the U.S. District Court for the Northern District of California, who ruled in favor of the plaintiffs in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (Aug. 4, 2010), announced that he would be retiring from the bench shortly after his term as chief judge expires. Judge Walker apparently does not intend to retire from law practice, as he indicated an interest in returning to the private sector, where he was a notable litigator in San Francisco at Pillsbury Winthrop Shaw Pittman LLP for many years prior to his appointment to the court. The media widely reported in connection with his presiding over the *Perry* case, which contested the California constitutional ban on same-sex marriage, that Judge Walker is gay, but he has not spoken openly about the subject of his sexual orientation. At least one *amicus* brief filed with the 9th Circuit in connection with the appeal of the *Perry* ruling argues that if Judge Walker is gay, then he should have recused himself from hearing the case, and his opinion should be vacated for reconsideration by a different judge. Of course, we all know that non-gay judges are presumed to be unbiased in ruling on gay rights claims. . . A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Government Not Responsible for Deficient Subcontracted AIDS Care of Immigration Detainees

U.S. District Judge Charles Breyer has granted a motion to dismiss by federal co-defendants in an action seeking redress for alleged grossly deficient medical care for HIV+ federal immigration detainees. *Baires v. United States*, 2010 WL 3515749 (N.D. Cal., Sept. 8, 2010). Although the inmates were detained pursuant to enforcement activities by the U.S. Immigration and Customs Enforcement agency (ICE), they are confined in state or private contract facilities. Federal law requires that such facilities provide minimally adequate health care. But Judge Breyer found that as the housing and health care for these detainees is subcontracted, 8th Amendment claims could not be brought against the various federal agencies named in the complaint. The case was brought by survivors of an immigration detainee whose deprivation of HIV-related medication may have contributed to his death, and by another detainee whose condition sharply deteriorated due to deprivation of medication but whose health was restored when he finally was able to resume treatment.

Breyer found that the complaint "fails to alelge a connection between the wrongdoing of various federal actors and the injuries suffered by Plaintiffs," noting that most of the individual federal defendants in the case were policymakers rather than employees with operational responsibility for management of detainees. The official policy is to provide adequate care, and the case involves gross deviations from the official policy by the subcontractors involved in housing the detainees. The court found that "the callous behavior alleged in the [complaint] appears to be entirely independent of the policies in question. Either Plaintiffs must allege some different policy that is implicated by the facts alelged, or they must allege some factual connection between the policies and the mistreatment." In addition, the complaint did not allege that the individuals identified as having provided substandard care were actually federal employees. "The federal government is not liable for torts committed by independent contractors, nor can federal officials be held vicariously liable under *Bivens*," he wrote.

The dismissal of federal defendants does not end the case, as the complaint also names the contractors and their employees. A.S.L.

AIDS Litigation Notes

Arkansas — Lambda Legal announced a settlement in *Franke v. Parkstone Living Center, Inc.*, a case it brought on behalf of a man who was ejected from an assisted living facility as soon as they found out he was HIV+. Reverend Dr. Robert Franke had relocated to Little Rock to live near his daughter, and moved into Fox Ridge after completing all necessary paperwork and submitting medical evaluation forms completed by a local physician. After he had moved in, somebody at the facility reviewed the medical forms and noted that Dr. Franke was HIV+. He was promptly ejected from the facility. The suit alleged unlawful HIV-related discrimination in violation of the Fair Housing Act, the Americans With Disabilities Act, and parallel state anti-discrimination laws. After the trial judge, U.S. District Judge Garnett Thomas Eisele (E.D.Ark.) denied the defendant's motion to dismiss and set the case for trial, settlement discussions ensued. The terms of the settlement are confidential, but attorneys involved in the case expressed satisfaction that the result will be to raise awareness about the non-discrimination rights of HIV+ people in Arkansas. Lambda Legal attorneys on the case are Scott Schoettes, HIV Project Staff Attorney, and Kenneth Upton, Supervising Senior Staff Attorney. Local counsel is Gary L. Sullivan of Little Rock. A.S.L.

HIV/AIDS Legislative Note

New York State Governor David Paterson vetoed a measure that would have placed a percentage cap on the portion of their income that public assistance recipients who are HIV+ would have to spend on their housing. The State Division of the Budget estimated that the measure would increase the state's costs for such housing by about $20 million. The state is facing a budget gap of billions of dollars, and the governor vetoed many spending measures and has signaled plans to lay off several thousand state employees by the end of the year because the state employee unions have refused to renegotiate terms in public employee bargaining agreements to give the state some monetary relief. Paterson has long been a champion of people living with HIV, and described this as "my most difficult veto," but said he was "duty bound" to veto the measure in light of the large number of meritorious bills that he was vetoing due to the budget crisis. The measure had passed both houses of the legislature by large margins after its lead sponsor, Sen. Thomas Duane, made an emotional middle-of-the-night plea on the floor of the Senate. *The Advocate*, Sept. 20. A.S.L.

AIDS Law & Society Note

The media alarmingly reported new data from the Centers for Disease Control and Prevention late in September suggesting that 19% of gay men in America were HIV+, although many were not aware of their status. The media reports and alarming headlines were the result of incompetent reporting, however, for closer examination of the CDC report showed that it was based on a survey of men who frequent venues identified as sexual contact points for men who have sex with men (gay bars and dance clubs), in selected major metropolitan areas that have high reported rates of AIDS, and did not purport to measure the prevalence of HIV infection among all gay men in the United States, or even all gay men residing in urban areas, figures that would be impossible to determine not least due to difficulties in defining categories and gathering information outside of major metropolitan areas. Alarming enough, however, to learn that such a high percentage of men who frequent gay bars and dance clubs in major metropolitan areas are HIV+. There is surely much more work to be done in halting the spread of HIV infection in the U.S. The epidemic is not over by any means. A.S.L.

International AIDS Notes

Canada — On September 9 the Ontario Superior Court ruled that the Canadian Charter of Rights does not require the Canadian Blood Services to resume taking blood donations from gay men. Following the lead of American public health authorities in the early 1980s when AIDS was first associated with blood-borne pathogens, Canadian blood collection practice has been to reject blood donations from men who have had sex with men since 1977, the date when it appears the first AIDS cases were surfacing in North America. The court did not rule on the underlying merits of the policy, instead focusing on whether the Blood Services was a government entity whose operation is subject to the Charter. The court also ruled that giving blood is not a right afforded by the law. However, writing for the court, Justice Catherine Aitken stated that if the Charter had applied, the Blood Services would be hard-pressed to justify a 33-year deferral period that increases each year because the starting point of 1977 has never been adjusted. At some point, it seems ludicrous to bar a donation from somebody who tests negative and has not engaged in any fluid-exchange sexual activity for decades. The ruling was criticized as showing the government a way to exempt public programs from the dictates of the Charter by subcontracting them to non-governmental bodies. Blood collection was seen by critics as a public function that should be subject to the non-discrimination requirements of public policy. Attorney R. Douglas Elliott, a gay activist who

co-founded the International LGBT Bar Association, represented the Canadian AIDS Society in challenging the policy. *Hamilton Spectator*, September 10.

China — Although China has adopted legislation and policies banning HIV-related discrimination, there was no sign of any enforcement activity despite reports of widespread discrimination, until late August, when the *New York Times* reported that a district court in Anhui Province had agreed to here a complaint by a man who was rejected for a teaching job because he is HIV+. This case is predicated on a regulation issued in March 2006 by the State Council, which provides that "no institution or individual shall discriminate against people living with HIV, AIDS patients and their relatives. According to local commentators, this case seems to have been accepted for hearing because it received newspaper publicity in the legal press in China. A spokesperson for an advocacy group for people living with HIV said that about 15 other discrimination lawsuits had been filed, but none was accepted for court consideration until the newspaper publicity about this new case of discrimination. *New York Times*, Aug. 31, 2010. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions Available

Lambda Legal is accepting applications for the position of HIV Project Director. Details are available on their website: http://www.lambdalegal.org/about-us/jobs/all_20100920_hiv-project-director/html.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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Ardia, David S., *Reputation in a Networked World: Revising the Social Foundations of Defamation Law*, 45 Harv. C.R.-C.L. L. Rev. 261 (Summer 2010) (uses the example of false imputation of homosexuality on a celebrity's wikipedia entry to explore the adaption of defamation law to deal with "reputation in a networked world").

Barnett, Larry D., *The Public-Private Dichotomy in Morality and Law*, 18 J. L. & Pol'y 541 (2010).

Bernstein, Gaia, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 Boston Univ. L. Rev. 1189 (June 2010).

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Brown, Jennifer Gerarda, *"For You Also Were Strangers in the Land of Egypt": How Procedural Law and Non-Law Enable Love for "Strangers" and "Enemies"*, 28 Quinnipiac L. Rev. 667 (2010) (symposium: Conference on Law and Love).

Collins, Allison L, *"I Will Not Pronounce You Husband and Husband": Justice and the Justice of the Peace*, 61 Alabama L. Rev. 847 (2010).

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Gomez, Eduardo J., Review of *Boundaries of Contagion: How Ethnic Politics Have Shaped Government Response to AIDS* by Evan S. Lieberman, 35 J. Health Politics, Pol'y & L. 294 (April 2010).

Langley, Erin E., and Dominic J. Nardi, Jr., *The Irony of Outlawing AIDS: A Human Rights Argument Against the Criminalization of HIV Transmission*, 11 Georgetown J. Gender & L. 743 (2010).

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Robinson, Russell K., *Racing the Closet*, 6 Scholarly Perspectives (UCLA Law School) 46 (Fall 2010) (explores how the media have exploited and distorted the issue of closeted black men allegedly spreading HIV to their different-sex partners).

Young, Donna E., *The Jurisprudence of Vulnerability: Property Rights, Domestic Violence and HIV/AIDS Among Women in Uganda*, 9 Int'l Rev. Of Constitutionalism 327 (2009).

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