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This monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, and current law students. Professor Leonard, LeGaL’s founder, has written numerous articles on employment law, AIDS law, and lesbian and gay law. Art is a frequent national spokesperson on sexual orientation law, and an expert on the rapidly emerging area of gay family law. He is also a contributing writer for Gay City News, New York’s bi-weekly lesbian and gay newspaper. To learn more about LeGaL, please visit http://www.le-gal.org.
T
he Bipartisan Legal Advisory Group of the U.S. House of Represen-
tatives (BLAG), Intervenor-Defendant, filed a petition for certiorari with the Supreme Court on June 29, seeking review of the 1st Circuit’s decision in Commonwealth of Massachusetts v. U.S. Department of Health and Human Services, 682 F.3d 1 (May 31, 2012), petition for cert. filed sub nom BLAG v. Gill, No. 12-13 (June 29, 2012) (petition available on Westlaw, 2012 WL 2586935). The 1st Circuit had ruled unanimously that Section 3 of the Defense of Marriage Act (which provides that for purposes of federal law “marriage” means the union of one man and one woman and “spouse” means a husband or wife of the opposite sex) violates the equal protection requirement of the 5th Amendment. BLAG moved with surprising speed; under the Supreme Court’s rules, it had 90 days to file a petition for certiorari, which would have given it until the end of August. The Solicitor General (S.G.), representing the government agencies sued in the case, also moved quickly, filing its own petition for certiorari on July 3, United States Department of Health and Human Services v. Commonwealth of Massachusetts, No. 12-15 (July 3, 2012) (petition available on Westlaw, 2012 WL 2586937), arguing that the court should affirm the 1st Circuit’s ruling and urging it to take the case for that purpose. The S.G. noted that there might be some question whether BLAG, as an Intervenor, had standing to seek Supreme Court review, but that any question of standing would have been the Court to grant the S.G.’s petition.

To make things more interesting, the S.G. filed a second petition for certiorari on July 3, seeking to expedite the appellate process and bring Golinski v. Office of Personnel Management, 824 F.Supp.2d 968 (N.D.Cal. 2012), app. pending, No. 12-15388; No. 12-15409 pending cases that Section 3 is unconstitutional.

Another shoe dropped on July 16, when the American Civil Liberties Union (ACLU) announced that it had filed a Petition for Writ of Certiorari before Judgment in Windsor v. United States, 2012 WL 2019716 (S.D.N.Y., June 6, 2012), petition for writ of certiorari before judgment, No. 12-63, filed July 16, 2012, in which the trial court held DOMA Section 3 unconstitutional. The ACLU articulated a compelling reason for by-passing the 2nd Circuit: Edith Windsor is 83 and in poor health. The 2nd Circuit has already agreed to expedite the appeals filed by BLAG and DOJ, with oral argument to take place the week of September 24, but time is of the essence in this case. Further discussion of the ACLU cert petition can be found below, in our article about the district court’s decision.

BLAG framed two questions for review in Commonwealth of Massachusetts: “(1) Whether Section 3 of the Defense of Marriage Act violates the equal protection component of the Due Process Clause of the Fifth Amendment; and (2) Whether the court below erred by inventing and applying to Section 3 of the Defense of Marriage Act a previously unknown standard of equal protection review.” The first question is unexceptionable; the second seeks to take the case beyond the issue of Section 3’s unconstitutionality to consider the method of legal analysis used by the 1st Circuit, which arguably departed from the three-tier approach that some legal scholars have derived from the Court’s equal protection decisions: rational basis, heightened scrutiny, and strict scrutiny.

The Solicitor General’s two petitions, by contrast, presented but one question for the Court: “Whether Section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.” This wording raises an interesting question: Does the S.G. mean to suggest that the Obama Administration concedes only that the federal government must recognize same-sex marriages if the married couple lives in a state that recognizes such marriages? If so, its formulation of the question falls short of the position staked out by the Respect for Marriage Act, pending in Congress, which would have the federal government recognize any same-sex marriage that was legal where it was performed, regardless of where the married couple actually resides. Presumably, the plaintiffs in both cases, now Respondents at the Supreme Court, would disagree with this narrow framing of the question, but the ACLU adopted a similar framing in its petition in the Windsor case (see separate story, below).

The 1st Circuit ruled, contrary to District Judge Joseph L. Tauro, that Section 3 would survive traditional rational basis review, under which a statute is presumed constitutional and is upheld if the court can imagine any rational justification for it. The 1st Circuit also ruled that Section 3 did not violate the 10th Amendment or the Spending Clause, thus reversing Judge Tauro’s ruling in favor of the Commonwealth of Massachusetts, which had attacked Section 3
under those provisions. However, the 1st Circuit panel decided that Section 3 should be examined for equal protection purposes using a “more searching” version of rational basis review, relying on the Supreme Court’s decisions in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). In each of these cases, the Supreme Court struck down a statute as violating equal protection, purporting to use rational basis review, under circumstances leading some commentators to suggest that the Court was using a more demanding standard of review, which some characterized after the *Cleburne* ruling as “rational basis with teeth.” The 1st Circuit panel in *Commonwealth of Massachusetts* conceded that it was barred by 1st Circuit precedent from applying “heightened scrutiny,” the standard that is used for sex discrimination claims, because a prior panel of the Circuit had rejected “heightened scrutiny” in ruling on a challenge to the “don’t ask, don’t tell” military policy in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009).

The BLAG petition’s reference to a “previously unknown standard of equal protection review” is slightly disingenuous, since this “more searching” review standard was articulated by Justice Sandra Day O’Connor in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), in her summation of prior Supreme Court equal protection rulings. She wrote, “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” She then went on to discuss the state of Texas’s “attempts to justify its law” in *Lawrence*. Under traditional rational basis review, the state has no burden to justify its law; the law is presumed to be constitutional and the challenger has a burden to prove that there is no rational basis for it. In *Romer*, a sexual orientation discrimination case, the Court acted as if the state of Colorado had a burden to justify Amendment 2, which broadly denied any protection against discrimination to gay people. Actually, the Court did not expressly use any of the three “tiers” of scrutiny in *Romer*, stating that Amendment 2 was such an unprecedented enactment that it defied the traditional method of equal protection analysis. But it is not quite accurate to state that the standard of review employed by the 1st Circuit was “previously unknown.”

The Solicitor General’s petitions reassert the Administration’s position that sexual orientation discrimination claims should invoke heightened scrutiny. Reviewing the various factors that the Supreme Court has used in the past to determine whether a classification is suspect or quasi-suspect, the S.G. argues that sexual orientation satisfies the test. Consequently, the question would be whether any of the reasons articulated by Congress for enacting Section 3 would substantially advance an important governmental interest, and the Solicitor General argues that Section 3 fails this test. The S.G. also made the point that most of the long string of court of appeals rulings holding that sexual orientation claims should be evaluated based on the rational basis test contain no real analysis of the question, no discussion of the various factors that the Supreme Court has used in deciding whether to treat a particular classification as suspect, many just assuming that rational basis is the correct standard for sexual orientation discrimination claims until the Supreme Court adopts a more demanding standard, or merely citing prior rulings without discussion. Some lower courts have erroneously asserted that the Supreme Court adopted the rational basis standard in *Romer*, despite the Court’s explicit statement that the challenged state constitutional provision “defied” traditional equal protection analysis due to its unprecedented nature. Other courts expressly relied on the now-overruled *Bowers v. Hardwick* decision.

Bringing the *Golinski* case to the Supreme Court simultaneously with the 1st Circuit case would broaden the range of lower court opinions in the record before the Supreme Court. District Judge Jeffrey S. White, ruling in *Golinski*, found that the 9th Circuit’s precedent on review of sexual orientation claims, *High Tech Gays v. DISCO*, 895 F.2d 563 (9th Cir. 1990)(rational basis), had been rendered invalid when the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), upon which *High Tech Gays* relied. He also found the reasoning of *High Tech Gays* to be inconsistent with the Supreme Court’s decision in *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010), where the Court rejected an attempt to distinguish between status and conduct in dealing with practices that discriminate based on sexual orientation. Judge White went on to hold that sexual orientation claims should receive heightened scrutiny, and that DOMA failed to survive such scrutiny. Seeking to assure that his ruling would survive were the 9th Circuit to disagree with this holding on the standard of review, he also found that DOMA failed to survive rational basis review. Thus, were certiorari granted in both cases, the

There could be the unusual situation of three different LGBT public interest advocacy groups simultaneously appearing before the Supreme Court to defend lower court gay rights victories, allied with the Solicitor General.
Court would have before it two district court rulings that Section 3 fails to survive traditional rationality review, the 1st Circuit’s holding that Section 3 fails to survive the “more searching” rationality review mandated by the Court’s precedents concerning social legislation that discriminates against disfavored groups, and Judge White’s holding that heightened scrutiny is the appropriate standard, which Section 3 clearly fails to survive.

BLAG and the Solicitor General agreed upon the urgency of a Supreme Court resolution of this case. As both point out, the Administration’s current policy of continuing to enforce Section 3 while declining to defend it (and actively attacking it) in court has created a situation where new potential plaintiffs are created every time Section 3 is relied upon to deny a right or benefit because of non-recognition of a same-sex marriage, and the number of lawsuits is mounting. BLAG observes that it has had to intervene in a considerable number of cases around the country, even beyond the substantial list already specified in the letter that Attorney General Eric Holder sent to House Speaker John Boehner in February 2011, informing him of the Administration’s change of position and of the pending cases that would be affected. So long as the Republicans control the House of Representatives, BLAG will continue to vote 3-2 to intervene in newly-filed cases until the Supreme Court has either upheld or struck down Section 3. Recently filed cases challenge Section 3 in the context of immigration law, tax law, military benefits, and federal employee benefits.

Meanwhile, back at the 9th Circuit, on July 10, 132 members of the House of Representatives filed a joint amicus brief in support of Karen Golinski’s claim, arguing in concert with the Justice Department that Section 3 should be subjected to heightened scrutiny, a test that it would fail. The brief noted that some of the signatories had voted for DOMA as members of Congress in 1996, but had changed their position and now opposed it. The brief asserted that BLAG did not represent the views of all members of the House, the leading signatories of the brief – House Democratic Leader Nancy Pelosi and House Whip Steny Hoyer -- being dissenting members of BLAG, and that Section 3 undermines the Congressional purpose behind the numerous federal laws whose interpretation and application it affects. Another joint amicus brief was filed with the 9th Circuit by the cities of Boston and Cambridge, Massachusetts; Los Angeles, San Francisco, Santa Monica and West Hollywood, California; New York City; and Seattle, Washington. It was also signed by several dozen corporate employers, including Microsoft and Starbucks, arguing that DOMA compelled them to afford unequal treatment to their married gay employees regarding benefits because of the effect of federal non-recognition on the administration of employee benefit plans. In all, 13 amicus briefs were filed in support of Golinski’s position, including briefs from businesses, state and local governmental bodies, professional associations, women’s rights groups, the state of California, public interest organizations, religious organizations, labor unions, academics (historians, family law and child welfare professors), gay legal associations and others.

Yet to be heard from on the certiorari petition front is the Commonwealth of Massachusetts, whose Attorney General filed the 10th Amendment/Spending Clause case that was consolidated before Judge Tauro and the 1st Circuit. Judge Tauro ruled in favor of the Commonwealth, finding that Section 3 unconstitutionally required Massachusetts to discriminate against same-sex married couples in some programs that received federal funding and were subject to federal eligibility rules (e.g., Medicaid), but the 1st Circuit rejected that finding. At the same time, however, the 1st Circuit opined that the federalism concerns reflected in the Commonwealth’s case contributed to the justification for using “more searching” review in applying the rational basis standard. Since the 1st Circuit disagreed with Judge Tauro’s 10th Amendment/Spending Clause ruling, Massachusetts Attorney General Martha Coakley could also file a petition for certiorari.

The Supreme Court seems certain to grant certiorari in the 1st Circuit case. Intervention in Golinski and Windsor seemed less certain, although perhaps the filing of the certiorari petitions will prompt the 9th and 2nd Circuits to delay oral argument in those cases, pending a Supreme Court ruling on the 1st Circuit petition. In addition, the case of Dragovich v. U.S. Department of the Treasury, 2012 WL 1909603, 115 Fair Empl.Prac.Cas. (BNA) 466 (N.D.Cal., May 24, 2012), in which another district court held Section 3 unconstitutional, is pending before the 9th Circuit, with oral argument expected to be scheduled to occur shortly after scheduled the argument in Golinski. All of these cases present the same ultimate question of constitutional law, whether Section 3 violates Equal Protection, but the facts of the individual cases may pose outcome-determinative issues in addition to that question, and each court took a slightly different analytical path toward its conclusion.

Reacting to the petitions for certiorari in the 1st Circuit case, Gay & Lesbian Advocates & Defenders, the Boston-based New England public interest law firm that conceived the case and assembled the plaintiff group, announced that it would be filing a response to the petitions in August. The Supreme Court’s rules do not require Respondents to file anything prior to the granting of a petition for certiorari, but they may do so within thirty days of the filing of the petition. GLAD might support the grant of certiorari, but could have things to say in response to the framing of the questions in both certiorari petitions and, of course, the arguments asserted. In addition, GLAD would undoubtedly maintain its view that Section 3 fails under any standard of judicial review that the Supreme Court might deem appropriate, thus disagreeing with the S.G. and the 1st Circuit on that point. The petition in Golinski brings Lambda Legal directly into the picture, since it represents Karen Golinski. As we went to press, Lambda Legal had not yet announced whether it would file a response to the DOJ petition.

Should the Court grant the certiorari petitions now on file and schedule arguments to be held on the same date, there would be the unusual situation of three different LGBT public interest advocacy groups, GLAD, Lambda Legal, and the ACLU LGBT Rights Project, simultaneously appearing before the Supreme Court to defend lower court gay rights victories, allied with the Petitioner, the Solicitor General, although the doctrinal arguments they advance could differ.
The U.S. Court of Appeals for the 9th Circuit denied a petition filed by the official proponents of Proposition 8 seeking re-hearing en banc in Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), petition for en banc review denied, 2012 WL 1994574, on June 5. However, the court stayed its mandate in the case "for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed," said the court, "the stay shall continue until final disposition by the Supreme Court." This means that it will be months, at least, and perhaps a year or more (if the Supreme Court grants the petition) before same-sex couples can marry in California.

The denial of rehearing en banc means that the 9th Circuit’s final word on Proposition 8 was spoken on February 7, 2012, by a three-judge panel. The panel affirmed Chief District Judge Vaughan Walker’s August 2010 ruling that Proposition 8 is unconstitutional as a violation of the Equal Protection Clause of the 14th Amendment. On Election Day in November 2008, California voters placed into their state constitution a provision that the only marriages "valid or recognized" in California were those between one man and one woman, thus rescinding the right of same-sex couples to marry that had been recognized by the California Supreme Court in May 2008. Several thousand same-sex couples were married in the months leading up to Election Day, and the California Supreme Court subsequently ruled that those marriages, which were valid when they were performed, remained valid, but that Proposition 8's enactment did not itself violate the California Constitution.

The American Foundation for Equal Rights (AFER), an organization formed to seek the invalidation of Proposition 8, filed suit immediately after the California Supreme Court’s decision was announced, seeking a declaration from the federal court that Proposition 8 violated the 14th Amendment. AFER retained Ted Olson, former U.S. Solicitor General, and David Boies, a leading advocate who had argued in opposition to Olson in the Supreme Court case that decided the 2000 presidential election, Bush v. Gore, as co-counsel to attack Proposition 8.

District Judge Walker’s decision held that same-sex couples have a right to marry, based on both the Due Process and Equal Protection clauses of the 14th Amendment. In a lengthy opinion based on a very full trial record, Walker adopted detailed findings of fact refuting all the purported justifications for denying same-sex couples the right to marry. Although he found that heightened or strict scrutiny might apply based on the argument that same-sex couples were being deprived of a fundamental right to marry or that discrimination based on sexual orientation was “suspect,” he ultimately concluded that Proposition 8 could not even survive the less demanding rationality test that had been approved by the 9th Circuit in earlier cases as the appropriate standard for evaluating sexual orientation discrimination claims.

After Judge Walker issued his decision, the Proponents of Proposition 8, who had been allowed to intervene as co-defendants when the state government officials who were named in the complaint refused to defend Prop 8, sought and obtained a stay of Judge Walker’s decision from the 9th Circuit. The 9th Circuit’s final decision on the appeal was delayed while the court sought an advisory opinion from the California Supreme Court about whether the proponents of a ballot proposition have legal standing to seek judicial review of a decision striking down their proposition. The California Supreme Court responded affirmatively, and the 9th Circuit’s three-judge panel then ruled on the merits.

The panel’s February 7 decision affirmed Judge Walker’s conclusion that the enactment of Proposition 8 was unconstitutional, but employed different reasoning. Unlike Judge Walker, the 9th Circuit did not rule that same-sex couples have a right to marry as a matter of federal constitutional law. Refocusing the case, the court instead asked whether the state had violated the 14th Amendment by voting to rescind the right to marry after it had been granted. The court likened this case to Romer v. Evans, the U.S. Supreme Court’s 1996 decision that struck down Colorado Amendment 2, a referendum measure that rescinded from gay people in Colorado the right to seek any protection from discrimination. The 9th Circuit concluded, as had the Supreme Court in Romer, that there was no rational, non-discriminatory reason to rescind the rights involved in the case.

The denial of rehearing en banc means that the 9th Circuit’s final word on Proposition 8 was spoken on February 7, 2012, by a three-judge panel.
By thus narrowing the case's scope, and making its decision turn heavily on Judge Walker's factual findings about the nature of the Proponents' campaign to pass Prop 8, the three-judge panel made it less likely that the U.S. Supreme Court would be interested in hearing the case.

The 9th Circuit's decision to deny en banc review was not unanimous. Circuit Judge N. Randy Smith, the dissenter on the three-judge panel, voted to grant the petition, and Circuit Judge O'Scannlain, joined by Judges Bybee and Bea, filed a dissent from the Order denying en banc review. O'Scannlain invoked President Barack Obama's recent public endorsement for same-sex marriage, and his comment that "one of the things" he would "like to see is -- that conversation continue in a respectful way." O'Scannlain argued that denying the petition had "silenced any such respectful conversation," at least among the 9th Circuit judges. He characterized the panel decision as being "based on a reading of Romer that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the judges from sister circuits who have since interpreted it." In a one-paragraph concurrence, the other two judges from the panel, Reinhardt and Hawkins, said they were "puzzled by our dissenting colleagues' unusual reliance on the President's views regarding the Constitution, especially as the President did not discuss the narrow issue that we decided in our opinion." They expressed the view that the underlying question whether same-sex couples have a constitutional right to marry "may be decided in the near future, but if so, it should be in some other case, at some other time."

Under the Supreme Court's rules, a party dissatisfied with the 9th Circuit's ruling has up to 90 days to file a petition for certiorari with the Supreme Court. After a petition for certiorari has been filed, anyone can file a brief with the Court within 30 days opposing the petition. It is possible, of course, for any party to the case to file a petition for a writ of certiorari. The top candidates to file in this case would be the Proponents of Proposition 8, formally named ProtectMarriage.com - Yes on 8, who are determined to defend their constitutional amendment and prevent same-sex marriages from being performed in California. Their counsel, Charles Cooper, probably began working on the certiorari petition as soon as the denial of rehearing en banc was announced.

Theoretically, AFER could also file a petition for certiorari, if they are eager to get the Supreme Court to consider the broader question that the 9th Circuit panel evaded by their repurposing of the appeal. When AFER filed this lawsuit in 2009, the organization's avowed purpose was to take the question whether same-sex couples have a constitutional right to marry to the U.S. Supreme Court. The 9th Circuit decision, which evaded answering that question, would re-instate the right of same-sex couples to marry in California if the Supreme Court either denies review or takes the case and affirms the panel ruling. But if AFER is after the bigger prize, it could file a certiorari petition asking the Supreme Court to affirm Judge Walker's original ruling. Such a ruling by the Supreme Court would potentially invalidate all the state bans on same-sex marriage throughout the United States. At a press conference after the 9th Circuit's announcement on June 5, however, Ted Olson said that AFER would file a brief opposing the grant of certiorari, presumably arguing that the very California-specific ruling did not merit Supreme Court review. (In addition, AFER might want to raise anew the question whether initiative proponents have Article III standing to appeal an adverse ruling on the constitutionality of their measure when the state does not seek to appeal.)

The Supreme Court is already highly likely to be considering issues raised by same-sex marriage during its October 2012 Term, since the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives filed a petition for certiorari seeking review of the 1st Circuit's May 31 decision holding that Section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional under the 5th Amendment's equal protection requirement. (See below.) Section 3 adopts a definition of "marriage" for all purposes of federal law as the union of one man and one woman, and limits the term "spouse" to a husband or wife of the opposite sex. The 1st Circuit found no justification for the federal government to distinguish between same-sex and different-sex marriages valid under state law, but did not rule on the underlying question of whether same-sex couples have a constitutional right to marry.

The Supreme Court is expected to grant review in the DOMA case, in which a provision of federal law was invalidated by an appeals court having jurisdiction over the New England states of Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico. Even the Justice Department, which argued in support of plaintiffs that Section 3 is unconstitutional, is likely to support (or at least not actively oppose) BLAG's petition for certiorari, since it would be desirable to have a ruling binding nationwide on the constitutionality of Section 3. It could be administratively awkward for the federal government to be recognizing married same-sex couples within the 1st Circuit but not in neighboring Vermont, New York or Connecticut (all states that allow same-sex marriage) or in other jurisdictions allowing same-sex marriage.

It seems less likely that the Supreme Court would be interested in reviewing the Prop 8 case, given its narrower scope and application to just one state. If the Court did grant review, it would be free to reframe the question more broadly to focus on whether same-sex couples have a right to marry, or it could practice judicial restraint and limit itself to determining whether the 9th Circuit panel correctly applied the reasoning of Romer v. Evans to find that Prop 8's rescission of rights was invalid.

Either way, these rulings promise to give even greater prominence to the same-sex marriage issue in this year's presidential and congressional elections, and may turn the Supreme Court term starting in October 2012 into one of great consequence for the course of gay rights in America.
Arizona has petitioned the U.S. Supreme Court to review the 9th Circuit’s decision in Diaz v. Brewer, 656 F.3d 1008 (2011), petition for rehearing en banc denied, 676 F.3d 823 (2012), in which the circuit court upheld a preliminary injunction that District Judge John W. Sedwick had issued to prevent same-sex partners of Arizona state employees from losing their domestic partnership health benefits. Channeling the arguments that 9th Circuit Judge Diarmuid O'Scannlain made in his dissent from the court's decision not to grant rehearing en banc, Arizona argues in its petition in Brewer v. Diaz, No. 12-23 (filed July 2, 2012), that Judge Sedwick misconstrued the Supreme Court’s equal protection precedents and has cast doubt on the constitutionality of traditional public sector employee benefits plans that limit participation to the legal spouses and children of employees.

In April 2008, when Janet Napolitano, a Democrat, was governor of Arizona, the state administratively adopted an amendment to its public employee health benefits regulations, expanding eligibility to domestic partners (both same-sex and different-sex) of state employees. About 800 employees have signed up their partners for health coverage, but the state has not provided data about how many of those are same-sex partners. In November 2008, Arizona voters approved an anti-gay marriage amendment for their constitution. In September 2009, in the midst of a budget crisis, the state enacted a budget reconciliation bill that included numerous changes to taxes, fees, and benefits, including overriding the administrative amendment and restricting public employee benefits eligibility to legal spouses of employees. This change was to go into effect in 2011, and state employees who had enrolled their domestic partners were informed that the coverage would end.

Lambda Legal filed suit on behalf of a group of state employees who had enrolled their partners and had been notified that the coverage would be lost. Lambda argued that because same-sex couples can’t marry in Arizona and their out-of-state same-sex marriages were not be recognized due to the marriage amendment, the change in eligibility rules discriminated based on sexual orientation.

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The judge found that Lambda was likely to prevail on the merits of its equal protection claim (although he dismissed a due process claim), and in light of the factual allegations concerning the same-sex partners of plaintiffs who would lose benefits, plaintiffs would suffer irreparable injury were the coverage terminated. (Each of the plaintiffs has a same-sex partner whose health status would make it difficult or impossible for them to obtain individual insurance unless it would not be recognized due to the marriage amendment, the change in eligibility rules discriminated based on sexual orientation. The state argued that the law was rationally related to its need to cut expenses in the midst of the budget crisis, and argued, as it had before Judge Sedwick, that the law was neutral on its face, disqualifying all domestic partners, not just same-sex partners. The 9th Circuit panel found convincing the argument that in light of the state’s failure to provide data on how many same-sex partners were receiving benefits and what those benefits cost, and the supposition that most of those affected by the change in policy were different-sex couples who could retain benefits by marrying before the deadline, there was no evidence that disqualifying same-sex partners would save the state any appreciable money, so barring them from covering their partners was not
rationally related to the state's fiscal concern. The plaintiffs had presented expert testimony, not rebutted by the state, that the cost of covering the domestic partners who had signed up was only a tiny proportion of the state's overall employee benefits cost. Lacking contrary evidence, Judge Sedwick drew the conclusion that this provision was not really a cost-saving measure.

Interestingly, the 9th Circuit panel opinion, by Judge Mary M. Schroeder, does not explicitly discuss the main point of Judge O'Scannlain's dissent from the denial of en banc review, presumably because the lawyers for the state of Arizona failed to make the argument that the trial court had misapprehended the scope of the Supreme Court's precedents on equal protection. If Judge Schroeder's opinion accurately reflects the arguments that the state's lawyers made, they seem to have missed the most obvious argument, at least according to Judge O'Scannlain's dissent.

O'Scannlain observes that the Supreme Court has construed the Equal Protection Clause to extend only to intentional discrimination. That is, the "disparate impact" theory, which was judicially developed as an interpretation of Title VII of the Civil Rights Law of 1964, does not generally apply to claims that a state has failed to provide equal protection of the laws.

Under the Title VII disparate impact theory, a facially-neutral policy that disadvantages employees of a particular race, religion, sex or national origin will be considered unlawful unless the employer can show that it is consistent with business necessity. In such a case, the plaintiff is not required to show that the employer intended to discriminate when it adopted such a policy that has a significant discriminatory effect. The Supreme Court accepted this theory based on its finding that Congress intended by enacting Title VII to level the playing field and eliminate barriers to workplace participation. If a particular policy erected such a barrier, it would have to fall unless there was a non-discriminatory business justification for it. Congress reaffirmed this policy in 1991, overruling a series of Supreme Court decision that had cut back on the disparate impact theory during the late 1980s, and explicitly incorporating the theory into the Civil Rights Act.

The Supreme Court has in the past rejected attempts to incorporate the disparate impact theory into the 14th Amendment. It has, however, accepted the proposition that a facially-neutral government policy may violate the Equal Protection Clause if it was intentionally adopted in order to disadvantage a particular group. Thus, for example, the Supreme Court found an equal protection violation when Congress amended the food stamp law to deny benefits to households with unrelated adults, based on evidence that members of Congress wanted to deny food stamps to "hippies" and "hippie communes" because of moral disapproval of their lifestyle. The Supreme Court found that this discriminatory effect, which Congress intended, was not rationally justified by the policies underlying the food stamp program, which is intended to increase demand for agricultural products while combating hunger by subsidizing food purchases by poor people.

Judge O'Scannlain argued that, unlike in the food stamp case, here there was no evidence presented, and no factual finding by Judge Sedwick, that Arizona had amended the qualification requirements specifically to exclude same-sex partners of its gay employees from eligibility. It had excluded all domestic partners and, he observed, as a result of the likelihood that most participants enrolled different-sex partners, it could not be argued that the legislature changed the rules specifically to disadvantage gay people. Thus, he contended, Supreme Court precedent did not support the trial court's conclusion that Lambda Legal was likely to prevail on the merits of the equal protection claim, and the preliminary injunction should have been denied.

O'Scannlain also observed that if the panel decision stood as Circuit precedent, it could potentially invalidate any government benefits program that limited eligibility to legal spouses of employees and, in effect, recognize a right of same-sex couples to marry, the ultimate question underlying the Proposition 8 case, which might be before the Supreme Court next term. (No petition for review has been filed in that case as of this writing.) He noted that the district judges in two challenges to Section 3 of DOMA, in the Golinski and Dragovich cases, had already cited the panel decision in the Arizona case in support of their conclusions that the federal government violated equal protection by failing to recognize same-sex marriages.

Arizona channels these arguments in the petition it filed with the Supreme Court on July 2. "Given the court of appeals' conclusion that Section O's adverse impact on same-sex couples violated the Equal Protection Clause without any evidence of discriminatory intent," the state belatedly argues, "the decision also threatens the validity of federal and state statutes that offer benefits only to employees' spouses. This Court should therefore grant review to clarify that the court of appeals erroneously inferred that the Arizona Legislature was motivated by a discriminatory intent when it limited healthcare benefits to state employees' spouses when there was no evidence to support that inference."

On July 10, an openly-gay appointee of Governor Janice Brewer, Edwin W. Leslie, submitted his resignation from the Tourism Advisory Council in an open letter to the governor, stating that her actions in filing the petition for certiorari "are in direct conflict with your reiteration [in a 4th of July speech] that all Americans are entitled to the same 'inalienable rights.'" Leslie contended that the state's action would have an adverse effect on gay tourism to Arizona, and that the cost of the benefits was tiny compared to the state's revenue from gay tourism. According to a report in the Arizona Republic quoted by Huffington Post in its July 11 article about Leslie's resignation, 230 state and state university employees and three retirees were receiving same-sex domestic partnership coverage under the court's order, at a cost to the state of approximately $1.8 million yearly. The article noted a claim by the publisher of the "Arizona Pride Guide" that LGBT tourism brings about $122 million to the state annually. A spokesperson for the governor accused Leslie of "politicizing" his resignation and asserted that the issue "isn't about gay domestic partners" but rather about saving money for the state.
Lesbian is a “Natural Mother”

On June 1, 2012, the Supreme Court of the State of New Mexico held that a lesbian co-parent had alleged sufficient facts to demonstrate standing as a natural mother in a custody dispute relating to her former partner’s adopted child. *Chatterjee v. King*, 2012 WL 2814117. The Supreme Court’s essential holding was that a woman could establish that she is a natural parent in the same manner that a man could, which meant here that Chatterjee had done so because she “openly [held] out the child as [her] natural child and ha[d] established a personal, financial or custodial relationship with the child” (see NMSA 1978, Section 40-11-5 [A] [4]).

The two women, Bani Chatterjee and Taya King, had been in a “committed, long-term domestic relationship” before deciding to raise a child, who is unnamed in the court’s decision. King adopted a child from Russia. Meanwhile, Chatterjee “supported King and Child financially, lived in the family home, and co-parented Child for a number of years. . . ” until the couple eventually split up. King thereafter moved to Colorado and “sought to prevent Chatterjee from having any contact with Child.”

Chatterjee filed a petition in District Court to establish parentage and determine custody and timesharing. She alleged that she was a presumed natural parent under the New Mexico Uniform Parentage Act (UPA), NMSA 1978 Section 40-11-3 (1986), Section 40-11-5 (1997) and Section 40-11-21 (1986). She also claimed to be a *de facto* parent of the child. King moved to dismiss, arguing that Chatterjee was only a third party, and as such, could only be granted custody benefits upon a showing that King was an unfit parent. The District Court granted King’s motion and dismissed the petition.

Chatterjee then appealed to the Court of Appeals, which affirmed in part and reversed in part, holding that Chatterjee was an unfit parent. The Court of Appeals, which affirmed in part and dismissed the petition.

Chatterjee’s argument that she could establish maternity using the “holding out” provision of the UPA. This “holding out” provision is found at Section 40-11-5 (A) (4), which provides in pertinent part that “[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal financial or custodial relationship with the child.” Chatterjee argued that she fell under the catch-all contained in Section 40-11-21 which provides that “[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of the Uniform Parentage Act applicable to the father and child relationship apply.” The Court of Appeals reversed the District Court’s dismissal only to the extent that it remanded the case with the instruction that the court “determine whether visitation with Chatterjee would be in Child’s best interests.”

The Supreme Court, in an opinion by Justice Edward L. Chavez for the unanimous court, rejected the Court of Appeals’ holding that the UPA provisions establishing paternity should not apply to women, based upon the plain language of the statute, the application of this portion of the UPA by courts in other jurisdictions, and public policy “that encourages the love and support of children from able and willing parents.” Specifically, the court held that “the plain language of the UPA instructs courts to apply Section 40-11-5 (A) (4) … to women, because it is practicable for a woman to hold a child out as her own...” As for public policy, the court noted that the child’s “nee[d for love and support is no less critical simply because her second parent also happens to be a woman.” The court also wrote that a contrary determination would “yield different results for a man than for a woman in precisely the same situation” and could be an unconstitutional gender classification.

Justice Richard Bosson wrote a concurrence, in which he aired his concern that the majority’s opinion “might be interpreted to expand the population of presumed parents in a manner that would shake settled expectations of custody rights and child support responsibilities.” However, all the justices agreed that the determination of whether a non-biological, non-adoptive parent is a natural parent should be made on a case-by-case basis and is dependent on the specific facts. An important fact that the court highlighted in its opinion was that Chatterjee and King were together when they brought the child into their home. Yet Justice Bosson explained his concern that the court’s opinion was worded too broadly through a fact pattern where a woman has two children with two different fathers who are no longer in the children’s lives. Then the woman has a relationship with a third man, and when that relationship sours, he attempts to obtain custody, or conversely, the woman demands child support from this third man.

Clearly, the facts in Chatterjee/King differ from the hypothetical posited by Justice Bosson, which is why the facts are so important in these custody decisions concerning non-traditional family arrangements. Moreover, the UPA has been amended so that the presumption of fatherhood only applies to persons who, for “the first two years of the child’s life, reside[s] … in the same household with the child and openly [hold] out the child as [his or her] own” (UPA Section 704 [1973]; accord NMSA 1978, Section 40-11A-704 [2009]).

The National Center for Lesbian Rights, together with local counsel Caren I. Friedman of Santa Fe, NM, and N. Lynn Perls of Albuquerque, NM, represented Chatterjee. Kerri Allensworth, of Albuquerque and the Patrick L. McDaniel of Atkinson & Kelsey, also of Albuquerque, represented King. Several amicus curiae briefs were filed in the case. — *Eric J. Wursthorn*

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NM App.Ct. Affirms Discrimination Ruling Against Photography Service

In an opinion filed May 31, 2012, the Court of Appeals of the State of New Mexico upheld the district court’s finding that Elane Photography, LLC discriminated against Vanessa Willock and her same-sex partner by refusing to photograph their upcoming commitment ceremony because the union was “non-traditional.” Elane Photography, LLC v. Willock, Docket No. 20,203 (Slip Opinion, May 31, 2012). Counsel for Elane Photography filed a petition for review by the New Mexico Supreme Court on June 27.

Willock emailed Elane Photography to inquire about photograph services for her impending commitment ceremony. In the email, she indicated that it would be a same-sex ceremony, and Elane Photography immediately replied that they would be unable to offer their services, as they only photograph “traditional weddings.” Willock asked for clarification, and Elane’s representative responded that they “do not photograph same-sex weddings.” Willock’s partner, referred to in the case only as “Partner,” emailed Elane separately the next day, but did not mention that her wedding was to another woman. Elane offered their services to Partner, and even offered to meet with Partner to discuss options and information.

In December 2006, Willock filed a claim with the New Mexico Human Rights Commission (NMHRC), based on the New Mexico Human Rights Act (NMHRA) prohibition on sexual orientation discrimination, alleging such unlawful discrimination by Elane when the business refused to offer services to Willock. The applicable language in the NMHRA prohibits “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services... to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation...” After investigating the complaint, NMHRC determined that Elane violated the Act and ordered Elane to pay Willock’s attorney fees.

Elane appealed to the district court, contending that the NMHRC’s application of NMHRA violated Elane’s First Amendment Rights to freedom of speech and free exercise of religion in violation of the First Amendment of the U.S. Constitution, and Elane’s religious rights under the New Mexico Religious Freedom Restoration Act (NMRFRA). Both Willock and Elane filed motions for summary judgment. The court denied Elane’s and granted Willock’s. Elane then filed an appeal.

The Court of Appeals notes that an appeal from a motion for summary judgment presents a question of law, and is therefore reviewed de novo. Accordingly, the court examines Elane’s initial arguments for summary judgment that it was not in violation of NMHRA.

First, the court disposes of Elane’s argument that under the meaning of the Act, Elane is not a “public accommodation.” Although Elane contends that photography services are not within the historical and traditional categories of that definition, only one New Mexico case ever examined the scope of “public accommodation.” In that case, Human Rights Commission of New Mexico v. Board of Regents of U. of New Mexico, 95 N.M. 576, however, the court did not address the extent to which NMHRA expanded the definition of “public accommodation” in its language that reads that a public accommodation is “any establishment that provides or offers its services... to the public, but does not include an establishment that is by its nature and use distinctly private.” Based on the lack of any guiding authority, the court finds that it must independently evaluate whether a business falls under NMHRA’s “public accommodation” definition in each individual case. In its independent analysis, the court looks to the plain language of the Act, and finds that, by its ordinary meaning, Elane Photography falls under the umbrella of “public accommodation.” Cases addressing this issue have consistently broadened the traditional definition of activity that constitutes a public accommodation.

As it falls under the definition of public accommodation, the court finds, Elane is barred from discriminating based on sexual orientation by the NMHRA. To determine whether Elane violated the Act in this way, the court looks to whether Elane’s actions were “motivated by impermissible discrimination.” While Elane argues that, because it would have photographed Willock in other contexts outside of a same sex wedding, their discrimination was based on the context of Willock’s event and not her sexual orientation, the court disposes of this argument by pointing out that courts have consistently refused to distinguish between status and conduct. Because a same-sex wedding or union, a logical result of being in a same-sex relationship, is closely correlated with the status of being homosexual, the court determines that directing discrimination to the “context” of a same-sex wedding is in reality directing that discrimination to homosexuals themselves. Accordingly, Elane’s argument fails, and the court finds that it violated the bar on discrimination based on sexual orientation contained in NMHRA.

Having found that NMHRC’s holding was correct, the court then moves to Elane’s claims that even if it did violate NMHRA, to apply NMHRA in this context would violate its constitutional rights. First, Elane posits that photography is a form of expression protected by the First Amendment. While this is true to some extent, the court notes that Elane’s primary motivation in photographing weddings is not predominantly art or expression, but rather commerce. Further, NMHRA does not regulate expression, but rather conduct. It defines what Elane must do, not what it may or may not say. Second, Elane contends that forcing the business to
DOMA’s Definition of Marriage Struck Down in NY Fed.Ct.

In an historic ruling in Windsor v. U.S., 2012 WL 2019716 (June 6th, 2012), the U.S. District Court for the Southern District of New York struck down the opposite-sex-only definition of marriage found in Section 3 of the federal Defense of Marriage Act (DOMA). This ruling by District Judge Barbara Jones is the first to be issued against DOMA within the Second Circuit, and is also the first legal victory for Edith Windsor, an 83-year-old widowed computer scientist and retired IBM executive, in her ongoing battle for equal treatment under federal law. The Bipartisan Legal Advisory Group of the House of Representatives (BL AG, Intervenor-Defendant), and the Department of Justice, representing the Defendant U.S. government, both promptly filed appeals in the 2nd Circuit, which has scheduled oral argument for the week of September 24 in response to a requisite by Windsor’s counsel, the ACLU LGBT Rights Project and cooperating attorneys, for expedition in light of their client’s age and poor health. On July 16, Windsor’s counsel filed a Petition for Writ of Certiorari before Judgment with the Supreme Court, seeking to by-pass the 2nd Circuit entirely to achieve a speedy resolution of the case. Petition available at 2012 WL 2904038, No. 12-63.

Windsor brought suit for the refund of more than $363,000 in federal estate taxes paid to the Internal Revenue Service as a result of the operation of Section 3 of Section 3, by defining the word “marriage” for purposes of interpreting federal law as “only a legal union between one man and one woman as husband and wife” and “the word ‘spouse’ [as] only a person of the opposite sex who is a husband or a wife,” excluded Ms. Windsor, the surviving spouse in a same-sex marriage with Thea Spyer, from the federal estate tax exemption granted to spouses. Ms. Spyer passed away in 2009, after the couple had been married for two years and partners for more than forty. An opposite-sex widow facing the same circumstances would have owed nothing. The difference in estate taxation for some types of couple amounts to a heavy federal tax – one that House Speaker John Boehner and other federal taxation opponents could still get behind – on being in a legal same-sex marriage, to be collected at the bitter moment of the marriage’s termination due to death. Because of the size of the estate and the lack of a federal exemption, Ms. Windsor also incurred a substantial New York estate tax, as New York’s Department of Taxation did not recognize same-sex marriages until after enactment of the N.Y. Marriage Equality Act in June 2011, even though various New York state trial and appellate courts began recognizing same-sex marriages performed out-of-state in 2008.

Despite the merit of Ms. Windsor’s sympathetic case, a threshold question of standing might have the potential to dispose of her suit on appeal. Windsor’s spouse, psychologist Thea Spyer, died in 2009, two years before the passage of the Marriage Equality Act in New York. This timing allowed for some controversy over the causal connection between the operation of DOMA Section 3 and Windsor’s injury, the discriminatory estate tax. The Court of Appeals held in Hernandez v. Robles, 855 N.E. 2d (N.Y. 2006) that “the New York Constitution does not compel recognition of same-sex marriages” such as the Windsor-Spyer union, which was formed in Canada. Judge Jones held that since the Hernandez ruling, this open question has tilted in favor of recognition of same-sex marriages legally performed outside New York. She observed that the New York courts of intermediate appeal have uniformly recognized such marriages under the principle of comity and that the governor, attorney general and comptroller of New York had all directed equal marriage recognition in 2008, prior to Ms. Spyer’s death. Judge Jones held that these numerous rulings and state actions outweighed the arguments against Windsor’s standing to pursue her claim, but the potential appellants can raise the issue again when appealing this ruling.

The success of Windsor’s claim depended upon the court’s finding unconstitutional the stark distinction DOMA

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draws between same-sex and opposite-sex spouses for the purposes of federal taxation and benefits. To be sure, the Equal Protection Clause of the Fifth Amendment does not forbid all distinctions or unequal treatment of citizens by the federal government. Rather, it requires that the government treat similarly-situated persons the same unless there is a rational and legitimate government interest in treating them differently.

Accordingly, the applicable level of scrutiny was one of many significant issues for the court to determine. Windsor argued that sexual orientation should be treated among suspect classifications, which have previously been limited to distinctions based on race, religion, ethnicity, or national origin. Windsor argued that being gay is, like race, an immutable characteristic, that the class has endured a history of discrimination and political powerlessness, and that the characteristic is immaterial to the class’s capacity to contribute to society. To survive strict scrutiny, legislative classifications must be “precisely tailored to serve a compelling governmental interest.” Intermediate or heightened scrutiny, which applies to classifications based on gender, requires that the classification must be “substantially related to a legitimate government interest.” Rational basis review, in contrast, would leave a statutory discrimination intact “if any state of facts reasonably may be conceived to justify it.”

Finding that the U.S. Supreme Court refrained in Romer v. Evans, 517 U.S. 620 (1996) from granting “homosexuals” the protected status of a suspect or quasi-suspect class, Judge Jones felt obliged to apply rational basis review rather than strict or heightened scrutiny. But Judge Jones followed Justice Sandra Day O’Connor’s watershed concurrence in Lawrence v. Texas, 539 U.S. 558, 579-80 (2003), in adjusting her review to the context of the case. There, Justice O’Connor distinguished between economic or tax legislation, which normally passes constitutional muster, and legislation that disadvantages a politically unpopular group, which therefore merits “a more searching form of rational basis review.” Rational basis review may thus vary by context, Judge Jones held, and this “rational basis review plus” is the linchpin of her finding DOMA unconstitutional. She noted further that the Supreme Court in Romer requires a judge to “insist on knowing the relation between the classification adopted and the object to be attained.” To strike down a law under these parameters, a judge must determine that it has no rational basis or that it serves a state interest that is, in the end, illegitimate.

Judge Jones ruled that these two considerations were sufficient to dismiss each of the four arguments put forward in favor of DOMA’s constitutionality by Windsor’s intervenor opponent, the “Bi-partisan” Legal Advisory Group of the House of Representatives (BLAG) (see below). In short, the court found that no reasonably conceivable state of facts could justify the statutory discrimination of DOMA Section 3.

Paul Clement, who represents BLAG’s three Republican members – Speaker Boehner, House Majority Leader Eric Cantor and House Assistant Majority Leader Kevin McCarthy – over the protest of the two Democratic members – House Minority Leader Nancy Pelosi and Minority Whip Steny Hoyer – failed to show to the court’s satisfaction that any justification was conceivable. The conservative counselor, who served as Solicitor General during President George W. Bush’s second term, proved primarily that he himself was not above the base arguments opposing Ms. Windsor’s claim to equal treatment for her marriage that had made the White House and Department of Justice cringe. (It was famously Ms. Windsor’s eloquent brief, penned by her counsel, ACLU cooperating attorneys Roberta Kaplan and Andrew Ehrlich of Paul, Weiss, Rifkind, Wharton & Garrison LLP, and James Esseks and Rose Saxe of the ACLU LGBT Rights Project, that helped prompt Attorney General Eric Holder and President Barack Obama to drop the government’s defense of Section 3 of DOMA.)

Clement, something of a 21st century John W. Davis (of Brown v. Bd. of Ed. infamy), unsuccessfully moved to dismiss Windsor’s suit for failure to state a claim for which the court could grant relief – despite the readily quantifiable sum of the estate tax extracted from Ms. Windsor by DOMA. Clement’s tenuous arguments in support of DOMA’s constitutionality on the merits fared no better.

To uphold DOMA, the court must have found at the very least that Congress passed the law for some reason that was not patently irrational. Clement used the $1.5 million in taxpayers’ money that Speaker Boehner lavished upon his firm to defend Section 3 to argue that there were four possible bases for DOMA that would not universally offend human rationality. He asserted first that in 1996 Congress had wished to proceed with caution in reassessing the “traditional institution” of marriage (identical to wishing to promote that institution, Judge Jones found); second, to promote a certain type of opposite-sex procreation and child-rearing; third, to keep federal benefits from being extended inconsistently (by entirely preventing them from being extended to same-sex spouses regardless of state law); and fourth, to conserve the public fisc by reducing the number of spouses to whom benefits would be extended (again, by excluding same-sex spouses). BLAG did not advance the fifth justification for DOMA offered by Congress during its passage in 1996, the promotion of heterosexuality.

The former two reasons, caution and procreation, are curmudgeonly and misguided at best. It is difficult to conceive of motivations for the latter two, consistency and saving money at the sole expense of the LGBT community, as based on anything nobler than religiously-inspired animosity. Against BLAG’s

Even if furthering a certain type of marriage were a legitimate state interest, the court held, the language of DOMA does not and cannot promote it.
tenuous pretexts for this means of federal non-recognition of committed same-sex relationships stood Windsor’s more elevated 5th Amendment claim to equal protection for her two-year marriage and forty-year engagement to Thea Spyer.

Concerning Clement’s first argument, that DOMA creates a space for the cautious reconsideration of opposite-sex-only marriage policy, Judge Jones held that DOMA has no legal mechanism for promoting a certain type of marriage or delaying changes to marriage in state law, because it has no effect on state law. DOMA’s “definition of marriage does not give content to the fundamental right to marry,” she wrote, because there is no federal law of domestic relations. Even if furthering a certain type of marriage were a legitimate state interest, she held, the language of DOMA does not and cannot promote it. The opinion does not address whether the 16 years since DOMA’s passage amount to caution enough.

Judge Jones was similarly unwilling to accept Clement’s argument that DOMA encouraged the production of offspring within marriages, since she was unable to identify any logical relationship between DOMA and the multiplication of opposite-sex, two-parent family units. DOMA has no legal effect on opposite-sex couples, but only denies benefits to same-sex couples. The denial of a tax privilege to one group of married persons could only indirectly incentivize unmarried or childless couples to have children in wedlock. Because opposite-sex couples decide to marry or procreate independent of restrictions on other groups, Judge Jones, citing Romer, found this justification so remote as to be “impossible to credit.” It may be implicit in the opinion that this indirectness fails the more searching review of Justice O’Connor’s Lawrence concurrence.

Clement’s arguments based on uniformity of distribution of federal benefits and conserving scarce government resources were at least logically linked to the language of Section 3, Judge Jones wrote. That section does plainly restrict the interpretation of federal law to a single federal definition rather than deferring to multiform state definitions of marriage, thus resulting in a lower net number of spouses to whom the federal government extends marital benefits. But under Judge Jones’ more searching review, these ends appear themselves to be an illegitimate government interest or financial policy arbitrarily executed.

Before DOMA’s passage, those who could receive federal benefits because of marriages, she held, were determined by state marriage law, and were uniformly practicing opposite-sex marriages by chance. The federal government has no legitimate interest in a particular kind of marriage to justify violating the basic principle of federalism of interfering with unequal effect in matters of historic state control, Judge Jones held. In creating a legal anomaly of couples that are legally married under state law but unmarried under federal law, DOMA complicates and inhibits the governmental experimentation that states have always practiced and which is “the virtue of federalism,” by means of damaging a politically unpopular group.

Judge Jones found BLAG’s final argument, that discriminating against LGBT relationships is a valid means of conserving the funds of the public fisc, essentially arbitrary because it was unsupported by any other rational basis. She dismissed this reasoning by observing that mere interest in conserving funds “can hardly justify the classification used in allocating those resources.”

BLAG immediately filed an appeal in the 2nd Circuit, and subsequently filed a petition with the U.S. District Court in Connecticut, where a similar challenge to Section 3 is pending, urging that court to put the Pedersen case “on hold” until the Windsor appeal is resolved. That court declined to do so, the judge indicating that she was already drafting her decision on cross-motions for summary judgment, perhaps signaling the immi-

dation of a ruling. —John-Paul Young

John-Paul Young is a law student at New York University (’14)

Editor’s Note: Counsel for Windsor, as noted above, filed a Petition for Writ of Certiorari before Judgment on July 16, seeking to by-pass the 2nd Circuit and take the case directly to the Supreme Court. This filing was made in the wake of certiorari petitions being filed in the Commonwealth of Massachusetts case (by BLAG and the Justice Department) and the Golinski case (by the Justice Department). The question posed by the Petition is similar to that framed by the Solicitor General in Petitions filed in Commonwealth of Massachusetts and Golinski: “Does Section 3 of the Defense of Marriage Act, 1 U.S.C. sec. 7, which defines the term ‘marriage’ for all purposes under federal law as ‘only a legal union between one man and one woman as husband and wife,’ deprive same-sex couples who are lawfully married under the laws of their states (such as New York) of the equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution?”

Windsor is represented on the Petition by Roberta A. Kaplan and other attorneys at Paul, Weiss, Rifkind, Wharton & Garrison LLP, and the Stanford Law School Supreme Court Litigation Clinic (Professors Pamela S. Karlan and Jeffrey L. Fisher), both as pro bono cooperating counsel for the ACLU LGBT Rights Project, which is also joined by the New York Civil Liberties Union in this case. Windsor’s counsel advanced several arguments supporting taking this case as the vehicle for determining the constitutionality of Section 3. One is the same argument they made seeking expedition in the 2nd Circuit: Windsor is old and ailing (she suffered a heart attack after Spyer’s death), and seeks resolution of this case while she lives. Another is calculated to appeal to the Court’s evident disposition, already exhibited in Romer v. Evans, to avoid deciding whether sexual orientation claims should receive heightened scrutiny. Judge Jones, as noted above, did not apply heightened scrutiny (as Judge White did in Golinski) or the particularized level of review applied by the 1st Circuit panel in Commonwealth of Massachusetts. She held that Section 3 did not survive rational basis review. The Court could affirm this holding without having to determine whether a more demanding level of judicial review applies to sexual orientation discrimination claims, and then affirm the judgments in the other two cases. This would be similar, as well, to the approach the Court took in Lawrence v. Texas, where it invalidated the state’s Homosexual Conduct Law without expressly addressing the question of heightened scrutiny in a Due Process analysis. Of course, the Court could do this without granting certiorari in Windsor, but the case would provide a convenient vehicle for doing so.

Opponents of the Marriage Equality Act (MEA) sued for a declaration that the law was not validly enacted because (1) the Republican caucus of the Senate held closed-door meetings at which NYC Mayor Michael Bloomberg and Governor Andrew Cuomo were present to discuss the bill, (2) the governor's issuance of a "message of necessity" so that the legislature could vote on the bill without allowing for three days for members to study the final text was *ultra vires* (beyond his authority), and (3) by locking down part of the state capitol building during deliberations, thus preventing the plaintiffs from accessing particular senators, the Senate violated their freedom of speech.

Supreme Court Justice Robert Wiggins (Livingston County) granted defendants' motion to dismiss the second and third claims, as well as dismissing the Attorney General as a co-defendant in the case, but had refused to dismiss the first claim, holding that the state's Open Meetings Law (OML) may have been violated. Justice Wiggins accepted the plaintiffs' argument that a meeting of the Republican caucus that also included non-Republicans lost the shelter of the exemption in the OML for private caucuses. The exemption states that a private party caucus does not lose the exemption if the caucus invites "guests" to its meeting, but the plaintiffs argued to limit the exemption for "guests" to those who belong to the same party as the caucus members.

In unanimously reversing Justice Wiggins and ruling that the Senate did not violate the law, Justice Eugene Fahey wrote for the court that the plain meaning of the statute did not in any way qualify the term "guests" to be limited to members of the same party as the caucus. A Senate party caucus can invite anybody as a guest other than a member of the legislature from a different party, said the court. Since neither Mayor Bloomberg nor Governor Cuomo were members of the legislature, they could be invited as guests without the caucus losing its exemption from the requirement that public business be conducted in public.

Furthermore, no public business was conducted at the meeting, Justice Fahey pointed out. There is no allegation that the Republican caucus -- which by itself constituted a quorum of the Senate -- took any votes at that meeting. The meeting was an occasion for the mayor and the governor to lobby the Republican Senators to support the bill. Nothing in the law designates lobbying as "public business," and there is no precedent requiring that meetings between groups of legislators and lobbyists to discuss pending legislation take place in public. "Nowhere does the verified complaint allege that the Republican Conference agreed to pass the MEA at those meetings," wrote the court, "nor does the verified complaint allege that the Republican Conference essentially arranged for a close vote on the MEA by issuing four of its Senators a 'pass' to support that legislation." One suspects that this statement responds to an argument made by plaintiffs in response to defendants' appeal.

Even if the OML was violated, said the court, that would not by itself justify invalidating the Marriage Equality Law. The statute says that the court has the power, "in its discretion, upon good cause shown," to declare that a violation of the law justifies declaring the subsequently enacted legislation "void." Here, the court said that the plaintiffs failed to show "good cause" for voiding the law.

"Plaintiffs' contentions on this point distill to claims of prejudice arising from the mere fact of the OML violations, and from the changes in the law that followed the passage of the MEA. Plaintiffs do not, however, contend that the alleged OML violations were the catalyst for the passage of the MEA. In fact, the various news articles attached as exhibits to the verified complaint detail the intense lobbying of individual Senators with respect to the MEA, and note that both proponents and opponents...
A transgender state inmate confined in Chemung County is entitled to a legal name change, ruled the New York Appellate Division, 3rd Department, on May 31. The unanimous five-judge panel reversed an order that Chemung County Supreme Court Justice Judith F. O’Shea issued on August 29, 2011, in which she denied Jhirard Tahiem Powell’s petition for a name change to Shaniece Nyasia Powell. In re Powell, 2012 WL 1948170.

According to the opinion for the Appellate Division by Justice Thomas E. Mercure, Powell “was born male but self-identifies as female.” Although none of the parties who were required to be notified of the name-change petition had raised any objection, Justice O’Shea denied it nonetheless, “on the grounds that the risk of confusion and deception was high, and there was no evidence demonstrating that ‘petitioner ... has undergone sex-reassignment surgery.’”

Justice Mercure observed, “A court’s authority to review an application for a name change is limited.” Indeed, by statute in New York, the court “shall authorize the name change unless there is some ‘reasonable objection to the change of named proposed.’” (Civil Rights Law sec. 63.) Thus, in this case, Powell’s petition should have been granted unless there was “a demonstrable reason” that made it necessary to be denied.

The court found the grounds that Justice O’Shea articulated to be “insufficient to warrant denial.” First, said the court, “any change of name” will involve some confusion. “Nor is the lack of medical evidence relevant,” wrote Justice Mercure, “inasmuch as petitioner seeks only to assume a different name, not a declaration of gender change from male to female.” Furthermore, wrote Justice Mercure, “The law does not distinguish between masculine and feminine names, which are a matter of social tradition,” quoting from Matter of Guido, 1 Misc. 3d 825 (2003). Since Powell had, as required by statute, notified the prosecutor, the sentencing court, and the Department of Corrections about his petition, none of whom had objected to the name change, the petition should have been granted in the absence of “any indication of fraud, misrepresentation or intent to interfere with others’ rights.” Interestingly, Justice Mercure was also the author of the opinion issued on the same date holding that falsely calling somebody gay is no longer “slander per se” under New York Law.

The Sylvia Rivera Law Project, which provides legal representation to transgender individuals, represented Powell in appealing Justice O’Shea’s ruling to the Appellate Division. Chase Strangio was counsel of record for Powell.

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Sharply Divided NY Ct. of Appeals Rules Human Rights Law Does Not Apply to Student Discrimination Claims Against Public Schools

The New York Court of Appeals, the state’s highest court, ruled 4-3 on June 12, 2012, that Section 296(4) of the N.Y. Executive Law, a provision of the state’s Human Rights Law, which bans discrimination in the use of its facilities by an “education corporation or association,” does not apply to the public schools of the state. North Syracuse Central School District v. N.Y.S. Division of Human Rights, 2012 N.Y. Slip Op. 04668, 2012 WL 2092954.

One practical impact of the decision is that public school students suffering discrimination will have to bring their complaints to federal education authorities or the state education department, which lacks an established mechanism for dealing with such complaints; as a result, only a tiny percentage of the state’s primary and secondary school students, attending private, non-sectarian non-profit schools, are left covered by the law. Another, unspoken in the opinion, is that public school students suffering sexual orientation discrimination (a category of discrimination expressly covered under the Human Rights Law but not under federal law) will be left to resort to constitutional litigation, denied an established administrative forum for their claims.

According to the opinion for the court by Judge Eugene F. Pigott, Jr., the legislature’s intention in using this phrase, which is not defined in the statute, was to take its meaning from the Real Property Tax Law, which first used it in 1896 to describe real property tax exemptions for private schools, and which, as amended in 1935, provided that a private school that held itself out to the public as “non-sectarian and exempt from tax” could not “deny the use of its facilities to any person otherwise qualified, by reason of his race, color or religion.” Public school property is, of course, government property, and thus automatically exempt from real estate taxes, but the 1896 enactment was intended to extend the tax exemption to private schools. The 1935 amendment to the Tax Law, said the court, was intended to impose a non-discrimination requirement on those tax exempt private schools that were non-sectarian. (Religious schools are exempted from the non-discrimination requirement, at least as far as the real estate tax requirements go.)

The court’s decision concerns appeals in two cases that were consolidated for hearing, arising from allegations of racial harassment by African-American students attend-
ing public schools in Syracuse and Ithaca. When the students filed complaints with the State Division of Human Rights (SDHR), the schools took the position that the SDHR lacked jurisdiction over the matter. In the Ithaca case, the Appellate Division, 3rd Department, upheld an award of damages to the complainant. In the Syracuse case, in which the school district affirmatively sued to block an SDHR investigation of the complaint, the Appellate Division, 4th Department, held that the district could not bring suit directly, but had to raise its jurisdictional argument as a defense in appealing a decision of the SDHR.

Judge Pigott's decision provides a detailed history of the tax law provision, which clearly deals with the issue of property tax exemption for private schools, and then pointed out that the language used in the Human Rights Law "was taken almost verbatim from Tax Law sec. 4(6). The term 'education corporation or association' is retained in Executive Law sec. 296(4) to this day. The Human Rights Law is silent as to what constitutes an 'education corporation or association,' but the fact that such language was taken directly from the Tax Law and move to Executive Law sec. 296(4) bespeaks the Legislature's intention that the term was to have the same meaning in the Executive Law as it did in former Tax Law sec. 4(6). Moreover, the use of the phrase 'non-sectarian' was plainly included in Executive Law sec. 296(4) to carve out an exception for parochial schools, while reserving for the SDHR the jurisdiction to investigate sec. 296(4) complaints against private, non-sectarian educational institutions or associations."

Judge Pigott also premised his ruling on differences between governmentally-operated schools and private schools. "The vicious attacks to which these students were subjected are deplorable," he wrote, "and our holding is not to be interpreted as indifference to their plight, since the merits of their underlying discrimination claims are not at issue on these appeals. Nor does our holding leave public school students without a remedy. In addition to potential remedies under federal law, public school students may file a complaint with the Commissioner of Education." Pigott also pointed out the recent enactment of the Dignity for All Students Act (DASA), without mentioning its lack of a private right of action by students for individual harassment claims. DASA is intended to require schools to adopt anti-harassment policies and implement appropriate training.

Dissenting, Judge Carmen Ciparick argued that "the exclusion of public school children from the full protection of the Human Rights Law contradicts the plain language of the statute, the Legislature's declared purpose and New York's fundamental public policy against discrimination." She pointed out that the phrase "education corporation or association" is not defined in the Human Rights Law, but observed: "It is beyond cavil that public school district are corporations organized for education purposes and public schools hold themselves out to the public as non-sectarian and are exempt from taxation pursuant to article 4 of the RPTL [Real Property Tax Law]. Section 296(4) brings within the protection of the Human Rights Law private educational institutions, which had not previously been covered. That it used identical language, as the RPTL, does not work to now exclude public school districts. Thus, a plain reading of the statute indicates that the Legislature intended to confer authority to SDHR over both public and private schools and the historical statutory analysis performed by the majority runs counter to the plain language of the statute."

She also observes that the statement of legislative purpose in the Human Rights Law supports a broad jurisdictional reading, noting that the purposes articulated in the statute itself included "to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." She further notes that the provision establishing the SDHR and describing the "places of public accommodation" to which its jurisdiction extends uses the phrase "educational institutions" rather than the phrase "education corporations or associations," clearly signaling, in her view, a broader reach to all educational institutions, not just private schools.

Although the cases arose from racial harassment complaints, the court's ruling is particularly harmful to LGBT students.

"This language clearly indicates that 'every individual' - including every school age child - has a right to adequate education and that the SDHR has the authority, on behalf of 'every individual,' to prevent discrimination in 'educational institutions.' The majority's limitation of the SDHR's jurisdiction to only private schools does little to promote the broad purposes of the Human Rights Law, which is to provide a bias free education for every individual." She also noted the specific provision of the statute providing for liberal construction "for the accomplishment of the purposes thereof."

Concluded Ciparick, "It is antithetical to the purpose of the Human Rights
Law to exempt public schools from its mandate... It is implausible that the Legislature intended to exempt public schools and the thousands of children who attend these schools from the protection of the Human Rights Law and the oversight of the SDHR.

Although the cases arose from racial harassment complaints, the court’s ruling is particularly harmful to LGBT students. Students with race discrimination claims can clearly take them to the U.S. Department of Education, which has jurisdiction to address claims of racial harassment in public schools that receive federal financial assistances -- which is pretty much all of them. But federal law does not expressly cover claims of discrimination based on sexual orientation by educational institutions, which are covered by the New York Human Rights Law. (Federal law does cover sex discrimination claims, and there is some authority that gender identity claims may come within the sex discrimination coverage; at least, several federal courts have accepted the argument that gender identity discrimination is sex discrimination, as did the Equal Employment Opportunity Commission in a recent jurisdictional ruling under Title VII of the Civil Rights Act of 1964.)

Michael K. Swirsky, an appellate attorney for the Division of Human Rights who is a longtime member of LeGaL, argued the case in the Court of Appeals on behalf of the agency, with amicus curiae participation by Cecilia C. Chang for the Attorney General. An amicus brief in support of SDHR was filed Lambda Legal on behalf of a dozen civil rights organizations. The New York State School Boards Association filed in support of the appellants. The North Syracuse Central School District was represented by Frank W. Miller; the Ithaca City School District by Jonathan B. Fellows. Decrying the result in this case, Lambda Legal attorneys Tom Ude and Hayley Gorenberg published an opinion article in the New York Law Journal on June 20, “Protect Public School Students,” calling for enactment of pending bills, A. 08094 and S. 5823, that would amend the Human Rights Law to make explicit its application to the state’s public schools.

9th Cir. Panel Upholds ID Crime Against Nature Conviction

In Cook v. Reinke, 2012 WL 1941928 (May 30, 2012)(not selected for publication in F.3d), the U.S. Court of Appeals for the 9th Circuit affirmed the denial of a petition for habeas corpus relief in which the petitioner, Jack Cook, argued that his conviction under the state’s “infamous crime against nature” statute is contrary to Lawrence v. Texas, 539 U.S. 558 (2003). The antiquated and offensively phrased law forbids essentially all non-heterosexual non-vaginal sex acts and carries a minimum five-year prison sentence.

Cook was charged with the unspeakable offense – notably not for sexual assault – after fellating another man in the sauna of a “local gym.” Fellatio has been held an “infamous crime against nature” under Idaho Code section 18-6605 since 1975. (Idaho is not for lovers.)

Cook pled guilty to the unnamable court found this argument gravely undermined by doubts that the requirements of consent and private activity were met.

First, T.F.’s capacity to consent was in doubt. The lower court decision noted that T.S. has Down syndrome and also cited the prosecutors’ claims of evidence that T.F. called his brother-in-law in a state of great agitation immediately after the incident in the sauna. Court records do not reveal whether T.F. was upset by the fact of fellatio or by any kerfuffle that followed an interruption of the act. Further uncertainties surround the actual apprehension of Cook, which may have occurred in the sauna itself or after a report to authorities by T.F. or his family.

Second, there is no controlling precedent in Idaho or the 9th Circuit categorizing the sauna (in this case, in a non-governmental gym that offers membership to the general pub-

Fellatio has been regarded an 'infamous crime against nature' under Idaho law since 1975.

offense after the denial of his motion to dismiss, but his guilty plea admitted neither the non-consent of the second party (named in court documents only as T.F.) nor that the act transpired in public.

On appeal, Cook argued that Lawrence v. Texas, which established a constitutionally protected right to intimate same-sex conduct that is both consensual and private, made his conviction unconstitutional. To show that Lawrence protected his action, Mr. Cook was required to prove either that the “infamous crime against nature” statute was unconstitutional on its face or as applied to his case. Based on earlier statements by Cook, the lic) as either a public or a private space. In his plea, Mr. Cook referred to the gym as a “club,” presumably in an attempt to resolve in his favor the question whether the space was private.

The court, unimpressed by Cook’s arguments, affirmed the district court’s ruling that it could rely on his statements during the plea colloquy in determining that the sauna was not clearly of a private character, and that it was not clear that T.F. could or did consent.

So, for at least the twenty-seventh time since 1913 by this author’s count, Idaho has heroically rushed to Nature’s aid. Estó Perpetua!

—J-P Y
Despite denying the existence of a male employee’s Title VII cause of action for same-sex harassment, the U.S. Court of Appeals for the 6th Circuit, ruling in Wasek v. Arrow Energy Services, 2012 WL 2330824 (June 20, 2012), suggested the possibility that men could raise a Title VII claim for sexual harassment by bisexual or homosexual men — an irony yet unheard. Judge Amul R. Thapar, a district judge sitting by designation, wrote the opinion for the 6th Circuit panel.

Harold Wasek was assigned to a four-man oil well service crew in a remote location in Pennsylvania. While working at the site, Mr. Wasek was harassed by his fellow rig worker, Paul Ottobre. Mr. Ottobre would tell sexually explicit stories of his purported sexual conquests, and began touching Mr. Wasek in a sexually inappropriate manner, including grabbing Mr. Wasek’s buttocks or poking him in the rear with the end of a hammer or a long sucker rod. Mr. Ottobre also made sexual innuendos towards Mr. Wasek, including statements such as “you’ve got a pretty mouth,” “boy you have pretty lips,” and “you know you like it sweetheart.” The rig boss was made aware of the situation, but refused to take any action and warned Mr. Wasek against complaining to the regional directors. After a minor physical altercation, the relationship between Mr. Wasek and Mr. Ottobre deteriorated even further, with Mr. Wasek’s property mysteriously disappearing and being discovered in dumpsters. Mr. Wasek finally contacted the regional directors to discuss the matter and informed them about the ongoing sexual harassment. The regional directors declined to take any action and Mr. Wasek left the worksite out of frustration.

A human resources representative from Arrow Energy contacted Mr. Wasek and made an appointment for him to meet with the regional director and regional supervisor. Given the time necessary to send a replacement to the site he had left, management chastised Mr. Wasek for leaving the site short-staffed. Management stated that Mr. Wasek would not be permitted to work at the Pennsylvania site again, but that he could continue employment with Arrow Energy. Mr. Wasek was scheduled to begin work at another oil rig within a few weeks, but the financial hardship on his family due to the delay in his reassignment forced him to find other employment.

Mr. Wasek sued Arrow Energy for hostile work environment and retaliation claims under Title VII of the Civil Rights Act and its Michigan equivalent, the Elliott-Larsen Civil Rights Act (ELCRA). The district court granted summary judgment in favor of Arrow Energy on all claims and Mr. Wasek appealed. The 6th Circuit affirmed the district court’s grant of summary judgment against Mr. Wasek with regard to both the hostile work environment and retaliation claims.

Mr. Wasek’s first cause of action was for hostile work environment under Title VII and ELCRA (the analysis under both is substantially the same). Title VII prohibits sex discrimination in terms or conditions of employment. According to precedent, same-sex sexual harassment can be a form of discriminatory treatment in violation of Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). But Title VII does not serve as a “civility code” for American workplaces, and “the conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim’s gender,” wrote Judge Thapar. Furthermore, the inference of discrimination — the assumption that the harasser would not have tormented a member of the same sex — is easily applicable in a male-female scenario, but more complicated to prove in a same-gender scenario. Based on Oncale, the 6th Circuit stated that Mr. Wasek could only raise the inference of discriminatory sexual harassment if he could prove that Mr. Ottobre was homosexual. Examining the record, Judge Thapar noted that Wasek presented no credible evidence that Mr. Ottobre was homosexual. The only possibly relevant evidence was from Mr. Wasek’s deposition, during which he speculated that Mr. Ottobre was “a little strange, possibly bisexual.” The court found this insufficient to serve as a basis for the inference that Mr. Ottobre was behaving in such a manner because he was sexually interested in Mr. Wasek.

Mr. Wasek’s second cause of action was for retaliation under Title VII and ELCRA, whereby an employer may not take adverse action against an employee for opposing an unlawful employment practice. The court examined the elements of a prima facie case for retaliation. Mr. Wasek satisfied the first three elements: he engaged in a protected activity by complaining about harassment, he was exercising his civil rights, and he suffered an adverse employment action. However, Mr. Wasek could not prove that there was a causal connection between the protected activity and the adverse employment action, because his reassignment from the Pennsylvania work site was due - at least in part - to his leaving a team short-staffed at a remote worksite. As a result, the court found, Wasek failed to allege a prima facie claim for retaliation.

The ultimate result of this 6th Circuit decision is uninspiring, but it leaves behind the ironic notion that heterosexual men can make a claim for same-sex sexual harassment by proving that the male harasser is gay. One wonders what standard of proof a court would require to make this determination? — Gillad Matiteyahu

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

Plaintiff brought hostile work environment and retaliation claims under Title VII of the Civil Rights Act and its Michigan equivalent.
Fed. Trial Ct. Dismisses Counseling Student’s Constitutional Claims

U.S. District Judge J. Randal Hall (S.D. Ga.) released an Order in Keeton v. Anderson-Wiley, C.V. 110-099, on June 22, granting the defendants’ motion to dismiss a claim by a student that her constitutional rights were violated when she was dropped from the graduate Counseling Program at Augusta State University. The court ruled that Jennifer Keeton, a self-described Christian who refused to undergo a Remediation Program aimed at equipping her to provide non-discriminatory professional counseling services consistent with the ethical requirements of the profession, did not suffer a violation of her First and Fourteenth Amendment rights. Keeton objected to a program that would require her to immerse herself in materials about counseling of LGBT clients, after she had made statements signaling her strong moral disapproval of homosexuality.

Keeton's professors were concerned - by statements she made in class, in written work, and in out-of-class comments to other students - that her strongly expressed anti-gay views could get in the way of her ability to provide appropriate counseling to students. The graduate Counseling Program, intended to prepare individuals to be professional school counselors in the public schools, incorporates the ethical codes of the American Counseling Association and the American School Counseling Association. Both Associations' ethical codes provide that counselors should not seek to impose their own moral views on their clients, and include sexual orientation and gender identity as forbidden grounds for discrimination in rendering professional services.

Wrote Judge Hall, summarizing the factual allegations of Keeton's complaint: "Keeton ascribes absolute truth to the proposition that homosexuality is an immoral lifestyle choice rather than an immutable state of being, and she endorses a universal moral prescription against homosexual behavior. According to Keeton, her opinions regarding homosexuality derive from her Christian faith. She occasionally communicated these opinions both in class discussions and written assignments, as well as to persons outside of the classroom. And while she communicated to faculty that she believes in the dignity of all persons, she also stated that she would not condone the propriety of homosexual relations or a homosexual identity in a counseling situation."

At the end of her first year in the program, Keeton met with some faculty members, who presented her with a remediation program "to address concerns about her ability to become an effective counseling practitioner" in compliance with the profession's ethical codes. The remediation program required her to attend workshops and various events, read various publications, and write reflective papers, all with the goal of equipping her to be able to provide appropriate counseling to LGBT students. Over a series of meetings, Keeton went back and forth as to whether she would accept and undertake the remediation program, but ultimately she concluded that she could not do it.

Keeton stated that regardless of any disclaimers by the professors, they were demanding that she "alter" her beliefs, but her position was that her "beliefs are about absolute truth."

"I understand the need to reflect clients’ goals and to allow them to work toward their own solutions, and I know I can do that," she insisted in her final written communication to the professors. "I know there is often a difference between personal beliefs and how a counseling situation should be handled. But in order to finish the counseling program you are requiring me to alter my objective beliefs and also to commit now that if I ever may have a client who wants me to affirm their decision to have an abortion or engage in gay, lesbian, or transgender behavior, I will do that. I can't alter my biblical beliefs, and I will not affirm the morality of those behaviors in a counseling situation. I don't want any more meetings. My final answer is that I am not going to agree to a remediation plan that I already know I won't be able to successfully complete."

As a result of her refusal to undertake the remediation plan, Keeton was dismissed from the graduate program. Successful completion of

Numerous cases involving LGBT teens seeking aid and assistance from school counselors show that such non-judgmental counseling is not always available, sometimes with tragic results.
an accredited graduate counseling program is an essential credential for somebody who seeks employment as a professional counselor in a public institution. Were Keeton to enroll in another school's accredited graduate counseling program, she would face the same issues. However, there are religious counseling programs available to people who are seeking to be counselors in a milieu compatible with their religious beliefs, but they would not provide the credentials for public institutional employment.

Keeton's lawsuit claims that the school's requirement of the remediation program, and its dismissal of her for refusing to undertake it, violates her First Amendment rights of freedom of speech and religion, and her Fourteenth Amendment rights of due process and equal protection. She claimed that the school was censoring her speech, compelling her to change her religious views, saddling her with compliance with a vague ethical code, discriminating against her for her Christian beliefs, and retaliating against her for her religious beliefs and their public expression, among various charges. When she first filed suit in the summer of 2010, she sought a preliminary injunction against her dismissal from the program, which Judge Hall denied. The 11th Circuit Court of Appeals upheld Hall's denial of the injunction in 2011, see 664 F.3d 865, and the case proceeded to consideration of the defendants' motion to dismiss Keeton's complaint.

The defendants raised immunity issues first, arguing that they are public officials carrying out a discretionary function of administering the graduate counseling program at a state university, for which they can't be held liable in the absence of a showing by Keeton that their conduct violated a clearly established constitutional right. Judge Hall found it unnecessary to resolve the immunity issue on behalf of the individual defendants; however, because he found that the faculty's insistence on the remediation program did not violate Keeton's constitutional rights.

The significant analytical move in this case is to distinguish between personal opinion and belief and its expression as a private individual, and the role of a professional rendering professional services under the auspices of a public program. A person employed by a public school as a counselor for students is not supposed to be engaging in personal political or religious expression when they speak to a student in a counseling situation. In that setting, a private setting, they are speaking as a professional rendering services, and the ethical codes of the profession state that they are supposed to render such services in a non-judgmental way, not imposing their personal moral views on their clients. As the 11th Circuit observed in affirming Judge Hall's denial of preliminary injunctive relief, a graduate counseling program incorporates the ethical standards of the profession, as required by accreditation standards. The remediation program that was presented to Keeton was intended to teach her how to provide appropriate professional services consonant with those ethical standards, an appropriate move when her speech and conduct signaled the likelihood that she would not be able to do so in the absence of successful remediation.

Judge Hall issued a lengthy opinion analyzing all of Keeton's constitutional claims in depth. His conclusion incorporates the analysis in a concise summary. "One conspicuous and abiding theme of the American story is that individuals like Jennifer Keeton are free to choose their own spiritual path, and need brook no government trespass thereon," he wrote. "The Constitution guarantees that the heart may pulse to meters of its own design, deaf to public cadence. But when affairs of the conscience ripen into action - either speech or conduct - government is granted leave to regulate in behalf of certain public interests, including education and professional fitness. Boundaries drawn through decades of case law establish the whither and when of such regulation, and, after carefully considering the factual content of Keeton's allegations, the Court concludes that Defendants acted within those bounds - there is no room to reasonably infer otherwise."

"The policies incorporated in the Counselor Program," he continued, "set the standards of conduct which govern the profession that Keeton chose to enter; Keeton was fairly apprised of what those policies demanded and she failed to show that they had an undue chilling effect on student speech. The remediation plan imposed on Keeton pursuant to those policies placed limits on her speech and burdened her religious beliefs, but, as the allegations show, the plan was motivated by a legitimate pedagogical interest in cultivating a professional demeanor and concern that she might prove unresponsive to certain issues and openly judge her clients. Furthermore, these concerns and the policies from which they were derived are applicable to all students in the Counselor Program. The allegations show, in sum, that while Keeton was motivated by her particular religious beliefs, Defendants are not."

Keeton is represented by the Alliance Defense Fund, which probably guarantees that she will have an appeal on the merits up before the 11th Circuit because this is not just an individual case but part of a larger movement to challenge the content of professional counseling programs. Thus, Judge Hall's order that all of Keeton's claims be dismissed and that the Clerk of the court "CLOSE the case" is not likely the end of the matter.

Indeed, this ruling is likely to throw more fuel on a fire already burning on this issue, as legislators in Michigan, reacting to a similar case that arose in the Midwest, have proposed (and approved in one house) a measure that would "protect" the "religious liberty" of counseling students by exempting religious dissidents from the prevailing professional requirements on matters of their own individual conscience. The stakes are high, as numerous cases involving LGB teens seeking aid and assistance from school counselors show that such non-judgmental counseling is not always available, sometimes with tragic results.
Discharged NYC Teacher Wins New Hearing in Alleged Sexual Misconduct Case

N ew York Supreme Court Justice Alice Schlesinger ruled June 11 that Alini Brito is entitled to a new administrative hearing on her claim that she was wrongfully discharged by the New York City Department of Education from her position as a Spanish teacher at James Madison High School in Brooklyn. Vacating a decision by Hearing Officer Mary Crangle in Brito v. NY State Department of Education, No. 100372/11, NYLJ 1202559879493 (N.Y.Sup.Ct., N.Y. Co.), Justice Schlesinger found that Ms. Brito's due process rights were violated by the hearing officer's handling of an issue involving spoliation of key evidence by the Department of Education (DOE), and that the penalty, termination, was excessive even if the charges against Brito were true.

Brito was discharged after an incident at the school on November 20, 2009. She and another female teacher were attending a musical event that evening in the school auditorium on the first floor. According to her account of what happened, she felt ill and her colleague accompanied her to the colleague's classroom on the third floor, where she was so faint she ended up taking off her sweater top to use as a pillow while she lay on the floor. She suffers from hypoglycemia, which had made her weak and glassy-eyed. After determining that this was the problem using a blood sugar test kit, she ingested sweets and recovered. However, janitorial staff passing by heard a noise, glanced in the classroom door, concerned that students were in an off-limits area after school hours, and called security. Security officers arrived, one of whom later claimed to have seen two women naked on the floor engaged in some kind of sexual activity. Administrators were called, the two teachers were suspended, an investigation ensued (which, as described by the opinion, was not very professionally done), and the teachers were dismissed. Both Ms. Brito and the other teacher are challenging the Hearing Officer decisions upholding their terminations.

The Hearing Officer found Brito's account of what happened not credible, and preferred on every disputed point the account offered by the school's investigators and various witnesses, even though there were conflicts in the witnesses' stories. The investigator and two other administrators had viewed a surveillance videotape of the hallway during the time in question. Although the video did not show the interior of the classroom, it clearly documented who went in and came out of that room. The investigator took notes while watching the video, but made no request that the video be preserved and did not make it available to Ms. Brito or her representative or counsel. Indeed, under standard operating procedures, since no request had been made to preserve it, the same tape was used 60 days later and recorded over, so the original recording did not exist by the time of the hearing. (Evidently, James Madison's security system has not advanced to the age of digital recordings.)

The investigator was allowed by the Hearing Officer to testify about who went into and came out of the classroom based on her notes from viewing the video, over objections. During direct testimony, the investigator said that her notes were an accurate record of everybody who went into and exited the classroom. The most damaging testimony was that of the security officer, who testified to seeing the two women naked engaged in sexual activity (which, from the description in the opinion, might be cunnilingus). None of the other witnesses who were alleged to have entered the room over the course of events claimed to have seen the women naked, although one mentioned seeing Brito putting on her top and zipping up a boot. Interestingly, the investigator's notes did not record the arrival of the security officer or her entry into or exit from the classroom. This was brought out on cross-examination. Then on re-direct, counsel for DOE led the investigator to impeach her own testimony and state that her notes were not a complete record of what she saw on the video, and that it showed the security officer entering and exiting the classroom. Counsel for Brito argued to the Hearing Officer that the unavailability of the video was a fatal flaw in the case, but the Hearing Officer ruled that because the video did not show inside the classroom, it was not material. The Hearing Officer, finding Brito guilty on three of the four charges (she did not find that Brito was drunk at the time), sustained the discharge, finding no mitigating factors, even though there was testimony that Brito had a clean record and was a highly rated teacher who had been promoted to Dean of her department.

Justice Schlesinger ruled that Brito's due process rights were violated because the videotape was key evidence that would either corroborate or discredit the security officer's testimony, and would also provide evidence on other disputed points that had seemed significant to the Hearing Officer. Even if spoliation of key evidence took place through inadvertence, nonetheless it had been within the control of the DOE, and at the least its unavailability should have led to adverse inferences about whether it would have corroborated the testimony offered against Brito about who went into and came out of the classroom. The judge also noted that the security officer's notebook contained no record of this incident, even though it was custom and practice to record every incident she observed.

Justice Schlesinger also found that imposing discharge in this case -- even if Brito and the other teacher had engaged in sexual activity at that time and place -- shocked the court as extreme. She reviewed other cases of teacher discipline for misbehavior and found the penalty here to be disproportionate to that imposed in other cases, although there was no other case that was factually closely on point.

Assuming, for purposes of discussion, that the charges against Brito were true, nonetheless the court found the penalty excessive by comparison to the case law. "What can be gleaned here from the disparate penalties [imposed in other cases]?" asked Justice Schlesinger. "It is that a hearing officer, at the very least, must consider multiple factors in deciding on a penalty and that the penalty must have a rational connection to the specifications that have been proved against the teacher. Hearing Officer Crangle failed to adequately do that in this case. Several factors existed that typically would weigh in favor of the teacher, such as Ms. Brito's..."
long, unblemished record, her outstanding performance as a teacher, the fact that no students had been involved in the incident, and the fact that the conduct was unlikely to be repeated. But the Hearing Officer discounted these factors. Why? As she repeatedly stressed, she found that the alleged conduct was serious and without justification and that Ms. Brito's excellence as a teacher simply could not be a mitigating factor. Everything was simply "outweighed by the seriousness of the conduct at issue here."

"Certainly to most people, the conduct of having sex in a school building with another teacher when students are present in the building, is outrageous or certainly very serious. All would agree that, at the least, it shows a real lack of judgment. But it is not even imaginable that conduct anything like this could ever happen again with Ms. Brito. And of course, it had never happened before. In fact, as previously noted, Ms. Brito's past record was unblemished, and she was described by her supervisor as one of the 'best', one who had recently been promoted to Dean. Arguably, Ms. Brito's conduct did not hurt anyone. Significantly, no inappropriate conduct with a student was involved. The Principal, who testified, said the reported conduct hurt the reputation of the school, and undoubtedly it did. Also, both the Principal and AP [Assistant Principal] Cohen testified that the incident and its press coverage were demoralizing to the students. But Dr. DiLorenzo testified that it hurt the students because they really missed their teacher. 'The students absolutely adored her!' It seems that press attention came because a custodial employee who was not even present at the time repeated the story of finding naked women in a classroom to a reporter, resulting in an explosion of mocking media coverage extending to national television (the Leno show, for example).

"So what are we left with here?" asked Justice Schlesinger. "We have children who are deprived of a first class, caring teacher and a teacher who, due to one sensational publicly-exploited incident where she exhibited extremely poor judgment, is deprived of continuing a career she loves and excels at. That is not a good balance, in the opinion of the Court. In fact, the imbalance is shockingly bad. Therefore, the penalty is annulled."

In remanding the case for a new hearing, Schlesinger specified that Brito receive "a new hearing before a different Hearing Officer consistent with the terms of this decision and, in any event, for the imposition of a lesser penalty."

Ms. Brito is represented by Michael A. Valentine of Altman Schochet LLP. Corporation Counsel's Daniel Gomez-Sanchez represented the Department of Education.

Press reports suggested that DOE will most likely seek to appeal the case. What would make more sense (and save DOE time and financial resources) would be to negotiate a settlement involving reinstatement, and to provide some retraining for Hearing Officer Crangle about rules of evidence in administrative hearings. It is easy to conclude, from reading Justice Schlesinger's summary of the evidence and proceedings below, that this is a case where a school employee speaking "out of school" based on rumors generated a media firestorm, as a result of which embarrassed administrators "circled the wagons" and railroaded an excellent teacher through an incompetent investigation with the cooperation of an unduly accommodating Hearing Officer. ■

Junk Science About Same-Sex Parents in Fed. Ct.?

Here's a way to impress a federal court – not! You want to make a factual assertion in support of your policy argument, but you don't have documentation of the fact you want to assert. Actually, numerous publications in peer-reviewed scientific journals all say the opposite of the point you want to make. What to do? Get some foundations to commission a "study" from an academic to document your point, get a friendly journal to publish it without the normal procedure of rigorous scientific vetting, and then cite it in your brief as "scientific fact." Are we imagining this scenario?

On June 10, the journal Social Science Research published a paper titled "New Family Structures Study" by Associate Professor Mark Regnerus of the University of Texas. The study purports to show that being raised by gay parents is detrimental to children, compared to being raised by heterosexual parents. Regnerus's study immediately attracted criticism for being scientifically bogus – an example of "junk science" because his comparators introduced too many variables for the result to support his conclusions. Indeed, Regnerus appeared to be stacking the deck to achieve a particular result, but this was not too surprising considering that Regnerus's main funding source for the study was the Witherspoon Institute, whose co-founder, Princeton professor Robert George, is also chairman emeritus of the National Organization for Marriage (NOM), an organization formed specifically to oppose same-sex marriage politically and in the courts.

One of the big stumbling blocks for "defenders" of "traditional marriage" has been the overwhelming weight of scientific studies published in peer-reviewed journals showing that children are not disadvantaged in terms of their life outcomes by being raised in stable same-sex families. Such studies were cited by the trial court in Golinski v. U.S. Office of Personnel Management, 824 F.Supp.2d 968 (N.D. Cal., Feb. 22, 2012), in which the court ruled that Section 3 of DOMA is unconstitutional, rejecting, among other things, one of the rationales stated by Congress in the legislative history: to promote traditional marriage as the best setting for raising children. The court found that the overwhelming weight of scientific evidence suggests that children are not disadvantaged by being raised by same-sex couples, and noted, furthermore, that denying federal recognition to same-sex marriages was not logically connected to achieving the articulated goal. The 9th Circuit has scheduled oral argument in Golinski for the week of September 10-14, and, as noted above, the Justice Department has asked the Supreme Court to leapfrog the 9th Circuit and review the district court decision directly.

Soon after the Regnerus article was published, the anti-gay American College of Pediatricians filed an amicus brief in the 9th Circuit in the Golinski case. The brief was produced by Alliance Defending Freedom (the new legal name for the Alliance Defense Fund, a right-wing non-profit organization that specializes in attacking gay rights in the courts). The
amicus brief cites the Regnerus study as rebuttal to the studies relied upon by the trial court, arguing that it demonstrates that same-sex couples are inferior to different-sex married couples at raising children. The problem is that Regnerus’ study does not support that contention because of its severe methodological flaws. In other words, it looks suspiciously like this “junk science” study was specifically commissioned and produced for the purpose of providing “evidence” for court and legislative battles against same-sex marriage, not as an impartial scientific investigation to determine whether parental sexual orientation has an adverse impact on children. One hopes that the court will see through this game and exercise its screening function under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), to exclude “junk science” from consideration. The filing of this brief sparks the necessity for somebody to file a reply brief explaining why the Regnerus study does not support the assertions for which it is being cited.

A group of scholars has complained to University of Texas President Bill Powers that Prof. Regnerus has engaged in scientific misconduct in publishing this study. On July 11, the Austin, Texas, American-Statesman reported that the University has responded by charging a panel of professors with making an inquiry into whether Prof. Regnerus has engaged in scientific misconduct, which the University defines as “fabrication, falsification, or plagiarism” or “practices that seriously deviate from ethical standards.” The panel will report to University Provost Steven Leslie, who will make the initial determination of how to proceed if the panel concludes that the charges against Prof. Regnerus are substantiated. The editor of Social Science Research, James Wright, has denied that the article did not receive the normal peer-review, attributing the unusually fast turn-around (five weeks rather than the more normal two to three months) to “prompt reviewers” and Regnerus’s speedy turnaround of revisions. One would certainly question the competence of the reviewers who approved this article, in light of its obvious methodological flaws. Wright says that the journal is conducting an audit of the review, whatever that means. ■

NY App.Div. Rules on HIV-Related Discovery Demand

A unanimous four-judge panel of the New York Appellate Division, 2nd Department, ruled on June 20 that a property-owner being sued by an HIV-positive individual who claims to have been injured in a fall on the owner’s property is entitled to a hearing on its demand for disclosure of HIV-related information in the plaintiff’s medical records. John Doe v. Sutlinger Realty Corp., 2012 WL 2330560, 2012 N.Y. Slip Op. 04969.

The court explained that “during discovery, the defendant inadvertently received information indicating that the plaintiff was HIV positive. The defendant then demanded medical information regarding the plaintiff’s HIV status, but the plaintiff refused to provide authorizations for such information and refused to answer questions regarding his HIV status at his deposition.” The plaintiff attempted to set matters in motion to close discovery and proceed to trial. The defendant opposed this, moving instead to compel the plaintiff to comply with outstanding discovery requests.

Kings County Supreme Court Justice Herbert Kramer responded by referring the discovery matter to a special referee, to “hear and report as to the statutorily required findings and to assess the relevance of the medical information sought.” The John Doe plaintiff appealed this ruling.

New York’s HIV confidentiality law, Public Health Law section 2785, sets forth specific findings that a court must make before it can order the disclosure of HIV-related information from medical records. The law requires that the court make written findings concerning a “compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding.” The court is supposed to weigh the need for disclosure against the individual’s privacy interest, and is also supposed to weigh the public interest “which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination.”

The Appellate Division does not specify how the defendant could have “inadvertently” learned that the plaintiff was HIV positive during discovery. One imagines that, as in all personal injury cases where plaintiff is seeking damages whose calculation would depend on a prediction of future health and lifespan, the defendant routinely sought discovery of medical records. Perhaps the custodians of such records (doctor’s office, hospital, clinic?) did not completely remove all HIV-related information in the records before turning them over. For example, the records might have referred to a medication prescribed for the plaintiff that would be the equivalent of disclosing that the plaintiff is HIV positive. Health care providers generally place HIV-related information into separate files to preserve confidentiality, but stray remarks entered in a patient’s general file or references to HIV-related medications or side effects may tip off somebody reviewing a general medical file that the patient is HIV positive. That’s the most likely scenario here.

A recurring issue is whether an HIV positive individual who has a personal injury claim that is, in itself, totally unrelated to their HIV status, such as this slip-and-fall case, should be required to disclose their HIV-related medical history in the context of civil litigation, on the theory that any factor that could affect their future health and potential lifespan is relevant when the plaintiff is claiming damages for loss of future income and/or enjoyment of life as a result of the particular injury for which they are suing.

To the Appellate Division panel deciding this case, the answer appeared obvious. “The Supreme Court properly found that the plaintiff put his HIV status in issue by commencing this action and alleging that he suffered permanent injuries and a total disability as a result of the accident. Furthermore, the Supreme Court properly found that the plaintiff's life expectancy would be relevant to an award of damages, and that ignoring the plaintiff’s HIV status would violate the defendant's right to a fair trial by seriously hindering the defendant's ability to mount a defense based on a claimed shortened life expectancy.”

The court noted that the Supreme Court had not ordered disclosure, but rather had ordered a hearing before a special referee to do the fact-finding necessary for the court to make the written findings that are statutorily required before it can order disclosure. Additionally, the statute mandates that the court's disclosure order, if and when it comes, include provisions to protect the confidentiality of HIV-related information by imposing a protective order governing its use and distribution. Allowing the plaintiff to appeal as "John Doe" is consistent with this concern for confidentiality. ■
CIVIL LITIGATION NOTES

BOARD OF IMMIGRATION APPEALS – The Board of Immigration Appeals may be reacting to the rapid accumulation of federal trial court decisions finding Section 3 of the Defense of Marriage Act unconstitutional. Without directly referring to such court decisions, and while noting that it does not have authority as an administrative body to entertain questions about constitutionality, the BIA issued a series of almost identically-worded decisions in May and June remanding pending appeals involving married same-sex couples for further investigation by Field Office Directors, rather than denying the appeals outright in reliance on DOMA. In each case, a U.S. citizen petitioner had appealed a decision by a Field Office Director to deny a visa petition on behalf of his or her foreign national same-sex spouse. The BIA stated, “we find it appropriate, in light of the Attorney General’s recent decision in Matter of Dorman, 25 I&N Dec. 485 (A.G. 2011), to remand this matter to the Director so he may address the following issues in the first instance: (1) Whether the petition and the beneficiary have a valid marriage under the laws of [state or jurisdiction where they married]; and (2) Whether, absent the requirements of Section 3 of DOMA, the marriage of the petitioner and the beneficiary would qualify the beneficiary to be considered a ‘spouse’ under the Immigration and Nationality Act.” Thus, the BIA may be engaged in a stalling tactic while anti-DOMA litigation continues, in light of the clear trend in decisions by federal judges – appointees of presidents from both political parties – finding Section 3 to violate the Fifth Amendment’s equal protection requirement. As it is likely that the Supreme Court will grant one or more of the pending Petitions for Certiorari in DOMA Section 3 cases (none of which directly involves immigration) and determine whether Section 3 is constitutional during its term beginning in October 2012, the BIA may be setting up a situation where married same-sex couples “in the pipeline” will be in a position to benefit immediately from a Supreme Court decision that affirms the lower court rulings, reflecting a pragmatic evaluation of the likely outcome. But BIA is not saying anything further than its decision to remand in light of action taken by the Attorney General in one such case last year. Thanks to Lavi Soloway of the firm of Masliah & Soloway, PC, which is representing several of the couples in such cases and provided copies of the redacted BIA decisions, from which names of parties and docket numbers have been removed. In a June 19 report in MetroWeekly, legal reporter Chris Geidner explained that on May 5, 2011, Attorney General Holder had intervened in a BIA case, vacating and remanding a determination regarding applicant Paul Wilson Dorman and his civil union partner, for a determination by the Field Office of whether the civil union partner would be considered a “spouse” under New Jersey law and thus qualified for marital beneficiary status “absent the requirements of DOMA.” Although neither the White House, the Justice Department, nor the Department of Homeland Security has announced a general policy of holding such petitions in abeyance pending a Supreme Court ruling on Section 3, this may be practically what is happening, consistent with recent instructions within DHS to exercise discretion in appropriate cases not to break up binational families through deportation proceedings.

CALIFORNIA – Peter Schey, executive director of the Center for Human Rights and Constitutional Law, has filed suit in the U.S. District Court for the Central District of California on behalf of Jane DeLeon, a Philippine woman who married her U.S. citizen same-sex partner, Irma Rodriguez, in 2008 during the period when same-sex marriages were available in California. Rodriguez and DeLeon’s son, Martin Aranas, are co-plaintiffs in the suit. Aranas v. Napolitano, 2012 WL 2864065 (C.D.Cal., Complaint filed July 12, 2012). The suit challenges the denial of recognition of the DeLeon-Rodriguez marriage for immigration purposes on account of Section 3 of the Defense of Marriage Act. Schey is seeking to have the case certified as a class action on behalf of all binational same-sex couples whose marriages are being refused recognition on this basis. Schey claims that although other suits have been filed on this issue, his will be the first to seek class certification. The complaint asserts the unconstitutionality of Section 3, and seeks nationwide relief against DHS. Schey points out that the president announced that the administration will exercise discretion not to deport certain people who were brought to the U.S. as minors by their parents without proper documentation, and asks why the administration will not similarly exercise its discretion categorically to refrain from breaking up same-sex families. Reuters, July 12.

CALIFORNIA – The 6th District Court of Appeal rejected an attempt by the Pacific Justice Institute to compel the San Jose Unified School District Board to give a public hearing to a parent’s proposal that the “Rainbow Day” presented by the Gay-Straight Alliance at Castillerio Middle School be changed to an “all inclusive
anti-bullying day” without a specific gay emphasis. *Mooney v. Garcia*, 2012 WL 2387019 (June 26, 2012). Norina Mooney is the mother of a child who attends the school, where the GSA hosted “Rainbow Day” to “promote anti-bullying awareness for gay, lesbian, bisexual and transgendered students.” The event was entirely “student-led” and “student-initiated.” After the event, Mooney submitted a request to have her proposal placed on the Board’s agenda, and they declined on the ground that it was not within the Board’s “subject matter jurisdiction” because the Board “does not direct specific activities at individual schools.” Mooney sought a writ of mandate from the Santa Clara Superior Court, but Judge Mark Pierce turned her down. The Court of Appeal affirmed Judge Pierce, finding that the Board had correctly defined its jurisdiction. Her proposal related to internal affairs at a particular school and, in fact, a student-run activity, which was completely outside the normal business of the Board. The court found that the Board had not acted in an arbitrary or capricious manner in declining to take up her proposal. Given the ideological bent of the organization supporting her case, her motivation is transparent: to so broaden the nature of the event as to downplay its LGBT content.

**CALIFORNIA** – The *San Francisco Chronicle* reported on July 9 that a woman has filed a Jane Doe lawsuit against the U.S. Food and Drug Administration, challenging their requirement that private sperm donors who do not charge for their sperm must undergo expensive testing prior to donating sperm for insemination. A government accountability group called Cause of Action filed the suit in the U.S. District Court for the Northern District of California. Under FDA rules, a sperm donor is required to undergo a medical exam and have his blood and urine tested in a medical setting within a week of every body-tissue transfer. The lawsuit argues that the rule is “unconstitutional to the extent that they operate to regulate noncommercial, sexually intimate choices and activity.” The lawsuit argues that the rule should not apply to private, non-commercial sperm donation arrangement. Violation of the rule can incur a civil penalty in the form of a fine. The FDA-required tests seek to determine whether the donor may be infected with HIV, hepatitis B or C, or syphilis, and are intended to protect the health of the recipient. The cost of required exams at the medical center at University of California at San Francisco are estimated to run about $800, according to the director of the UCSF Fertility Preservation Center, and if repeated donations are sought, new testing would have to be done for each one. Alternatively, a large sample could be frozen, but that process is also costly. A bill pending in the California legislature would ease the requirement for repeated testing, but might be preempted by the FDA regulations, and wouldn’t apply to Jane Doe’s case, since she is seeking an informal arrangement with her known donor that would bypass any contact with the health care system. The *Chronicle* reported that the FDA has told Trent Arsenault, a man who has been offering his sperm to women on the internet for free, that he must stop giving away his sperm without complying with the rules or face either a $100,000 fine or a year in prison. Arsenault has refused to comply, and told the *Chronicle* that seven women are currently pregnant with his sperm.

**CONNECTICUT** – The Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives, Intervenor-Defendants in *Pedersen v. Office of Personnel Management*, Civil Action No. 3:10-cv-1750 (VLB) (D. Conn.), a case pending in U.S. District Court in Connecticut challenging the constitutionality of Section 3 of the Defense of Marriage Act, filed a motion to say the proceedings pending the appeal in *Windsor v. United States*, in which a New York federal district court recently held Section 3 unconstitutional. BLAG is appealing the *Windsor* ruling to the 2nd Circuit, hoping to secure a reversal that would also be binding on the District Court in Connecticut. GLAD, which represents the plaintiffs, federal employees seeking to place their same-sex spouses on their health insurance plans, opposed the motion. “There is no burden on BLAG or the courts where any appeal can be consolidated efficiently with the Windsor case,” said Mary Bonauto of GLAD, lead counsel in the case. On July 4, District Judge Vanessa L. Bryant, working on a federal public holiday, issued an order denying BLAG’s motion. She found that BLAG failed to meet the criteria by which district courts determine whether to stay litigation in reaction to developments in other cases and, perhaps more importantly, she pointed out that she had already reviewed all the materials submitted by the parties in support of their cross-motions and had actually begun drafting her opinion on the motions. Having put in the time, she wasn’t about to put everything on hold. Besides, she observed, “the Court finds that public interest weighs against the entry of a stay in this matter, as the challenge to the constitutionality of Section 3 of DOMA presents an important issue to the nation as a whole such that the Second Circuit and potentially the Supreme Court would benefit from as many opinions and analyses as possible to enrich their review.” Does it sound like she is moving quickly to get her opinion out before any of the forthcoming appellate arguments take place? After all, if she dailies and the Second Circuit rules, lots of time and effort will be for naught. And, actually, BLAG’s certiorari petition in the 1st Circuit’s recent ruling striking down Section 3 (see lead story above) may make all of this lower court litigation academic before long...

**FLORIDA** – The 5th District Court of Appeal ruled in *Bilbrey v. Myers*, 2012 WL 2465242 (June 29, 2012), that Brevard County Circuit Court erred in dismissing with prejudice a claim by Darrel Bilbrey that his former pastor and mentor, Rev. David Myers of the First Pentecostal Church of Brevard, defamed him and violated a fiduciary duty to him by falsely calling him a homosexual. Bilbrey alleged that the consequences of these defamatory statements included that Bilbrey called off his pending marriage, moved out of state, and interfered with Bilbrey’s attempt to transfer his own pastor’s license from Florida to Michigan, his new residence, when My-
ers called Bilbrey’s new pastor and told him that Bilbrey was a “homosexual.” The trial judge, Tonya B. Rainwater, found that a “church autonomy doctrine” under the First Amendment shielded Myers from these claims, but a three-judge panel of the Court of Appeal disagreed, in an opinion by Judge Jay P. Cohen. “Courts nationwide typically agree that once the church autonomy doctrine is triggered, a civil court is precluded from further adjudicating the issue in question,” wrote Judge Cohen, who indicated that the court considered applicability of the doctrine to be an issue of subject matter jurisdiction. He noted that there are two views about the scope of this doctrine. While some states basically will not entertain most tort claims against religious institutions and ministers, most states, including Florida, “have adopted a narrower view of the doctrine and hold that the rights guaranteed by the First Amendment are not violated if the tort claims can be resolved through the application of ‘neutral principles’ of tort law, particularly where there is no allegation that the conduct in question was part of a sincerely held religious belief or practice.” Claims for defamation and breach of fiduciary duty (arising from a particular relationship between Bilbrey and Myers as his pastor/mentor) can be adjudicated “without implicating the First Amendment” by application of tort law principles, held the Court of Appeal. However, the court upheld the trial court’s dismissal of a claim of intentional infliction of emotional distress, finding that although Myers’ conduct was “deplorable,” it “does not rise to the level of outrageousness required by law.” The court also affirmed dismissal of an invasion of privacy count, finding that the allegations did “not establish enough publicity to make Myers’ conduct actionable for public disclosure of private facts.” This last ruling seems odd, since Bilbrey alleged that Myers called him a “homosexual” during a sermon in the church.

ILLINOIS – Illinois Attorney General Lisa Madigan reacted to the same-sex marriage lawsuits filed in May by Lambda Legal and the ACLU of Illinois against the Cook County Clerk by filing a motion for the State to intervene on behalf of the plaintiffs. Neither the County Clerk (who released a statement supportive of same-sex marriage) nor the Attorney General plan to defend the constitutionality of Illinois’s statute banning same-sex marriage. The lawsuits argue that the statute violates various provisions of the Illinois state constitution. *Windy City Times*, June 1.

* * * On June 14, the Cook County State’s Attorney’s office concurred, filing papers conceding that the ban on same-sex marriages violates the Illinois constitution, and at a hearing on June 21, Cook County Chancery Division Presiding Judge Moshe Jacobius granted a motion to combine the Lambda and ACLU cases into a single lawsuit to be heard before one judge. Filling the vacuum on the defense side, the Chicago-based Thomas More Society, a conservative Roman Catholic legal advocacy group, announced that it would provide support for defending the existing marriage law. *ChicagoTribune.com*, June 14, June 21. Subsequently, the Illinois Family Institute, another group opposed to same-sex marriage, indicated that it would help to defend the state’s Defense of Marriage Act, which forbids same-sex marriages, and the Alliance Defense Fund announced that it would provide counsel for defending the existing marriage law. *Southtown Star*, June 21. * * *

On July 3, Cook County Circuit Court Judge Sophia Hall granted a motion to intervene, filed by the Thomas More Society on behalf of Tazewell County Clerk Christie Webb and Effingham County Clerk Kerry Hirtzel. Peter Breen, executive director and legal counsel of the Thomas More Society, filed a motion to dismiss the complaints in the consolidated suit. Judge Hall set a hearing on the motion for September 27. *Darby v. Orr* (Cook County Circuit Court, filed May 30, 2012); *Lazar v. Orr* (Cook County Circuit Court, filed May 30, 2012).

KENTUCKY – Yes, the case of Pedreira v. Kentucky Baptist Home for Children, Inc., is still going on. On July 6, 2012, U.S. District Judge Charles R. Simpson III issued an opinion, 2012 WL 2681693 (W.D.Ky.), granting plaintiffs’ motion to file a proposed Second Amended Compliant, rejecting opposing arguments by Sunrise Children’s Services, Inc., the new name of the defendant. Alicia Pedreira was employed at the Kentucky Baptist Home for just seven months when she was discharged for being a lesbian. The ACLU represented her in the lawsuit filed in 2000, claiming that KBHC as a state contractor should be subject to constitutional requirements of equal protection, and that allowing it to discriminate in employment based on sexual orientation violated the establishment clause as well. Although Judge Simpson’s first opinion in the case rejected those arguments, the case stayed alive on the claim that KBHC’s activities proselytizing among the children committed to its care (and the state’s action of funding it and turning a blind eye to such activities) violated the constitution. The case has bounced back and forth between the district court and the court of appeals, and we had quite forgotten about it when this new ruling showed up. Judge Simpson found that plaintiffs had adequately reframed their complaint to meet the requirements set by the 6th Circuit in 2009 the last time it considered the case, and could proceed. He also rejected Sunrise’s objection that the amended complaint continued to refer to a discriminatory anti-gay employment policy, finding that the agency’s employment policies could be relevant to determining the Establishment Clause claim. The ACLU continues to represent Pedreira and other co-plaintiffs, together with Americans United for Separation of Church and State and pro bono attorneys from Arnold & Porter LLP. The defendant is represented by the Religious Liberty Advocates of the Christian Legal Society, the Thomas More Center for Law & Justice, and local cooperating attorneys.

NEW YORK – Lambda Legal claimed a victory in Friedlander v. Waroge Met, Ltd dba Sizzler Restaurant 0489 & Edgar Orellana, a public accommodations case that it filed on behalf of Liza Friedlander in New York Supreme Court, Queens County, in 2011. The case stemmed from an incident on September 18, 2010, when Ms. Friedlander and friends stopped in the Sizzler Restaurant in Forest Hills for the
breakfast buffet. According to Friedlander’s allegations, the restaurant manager, Edgar Orellana, shoved her in the chest, causing her to fall backwards, and then kicked her while yelling that she should get out of the restaurant and referring to her as a “fucking dyke.” This led other customers to assault Friedlander. A 911 call brought police and an ambulance to take her to a nearby hospital. The complaint alleged a violation of the state and city human rights laws on grounds of actual or perceived sexual orientation, gender identity or expression, and sex. On June 13, the court entered a judgment against Sizzler and Orellana, under which Friedlander receives damages of $25,000. The judgment was entered on consent of the parties, and counts the same as a judgment “rendered after trial and entered upon a verdict or decision,” according to a Lambda Legal news release (June 13). Lambda Staff Attorney Natalie Chin and cooperating attorneys from Willkie Farr & Gallagher represented Friedlander.

NEW YORK – The parents of teenager suffering from Asperger’s Syndrome who was so unmercifully harassed by fellow students that he could not continue to attend classes at Hilton Central High School defeated the School District’s motion to dismiss their federal disability discrimination claim, but suffered dismissal of a sex discrimination premise on the homophobic nature of the harassment. Preston v. Hilton Central School District, 2012 WL 2829452 (W.D. New York, July 11, 2012). According to District Judge David G. Larimer’s opinion on the motions to dismiss, the plaintiffs alleged that other boys in 17-year-old A.P.’s classes “harassed and mocked him on a daily basis, including calling him ‘fucking retard,’ ‘asshole,’ ‘faggot,’ and ‘bitch,’ and subjecting him to frequent comments of a sexual nature, as well as comments disparaging his cognitive abilities, such as ‘Fuck you, you autistic piece of shit.’” Teachers and administrators allegedly refused to take any effective action to curb this activity, despite frequent complaints by A.P.’s parents. Plaintiffs allege that administrators responded with a “teens will be teens” attitude, promised to address the problem, but did nothing and failed to punish the ongoing harassment. Judge Larimer found that plaintiffs had stated valid claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, but that the allegations concerning homophobic and sexually-inappropriate name-calling did not state a claim under Title IX of the Education Amendments of 1972, which bans sex discrimination in educational institutions that receive federal funds, or under the Equal Protection Clause of the 14th Amendment. Judge Larimer found that plaintiffs did not plead facts that would support the argument that the school did not take action to protect their son but would have protected a girl who was subjected to similar abuse, casting aside their argument that they could not provide such evidence without obtaining discovery, since relevant information was in the sole possession of the defendants. According to Judge Larimer, without such a comparator no sex discrimination or Equal Protection claim can be asserted, in the absence of evidence that plaintiff’s son was denied protection by school authorities because he is male (or harassed for that reason). Sounds like a game of Catch-22 to us.

NEW YORK – The New York Times reported on June 20 that a lesbian employee of St. Joseph’s Medical Center in Westchester County had filed a class action lawsuit on June 19 against the hospital and Empire Blue Cross Blue Shield, claiming a right to spousal benefits for her wife. New York has authorized same-sex marriage since July 2011, but St. Joseph’s, in common with some other religiously-affiliated employers, are refusing to recognize such marriages under their employee benefit plans. The lawsuit was filed in U.S. District Court in Manhattan, alleging a violation of ERISA. According to the news report, St. Joseph’s is self-insured and contracts with Empire to administer its employee benefits health plan. Counsel for the plaintiff, “Jane Roe,” is Debra S. Cohen of Newman Ferrara, who is seeking a class-action judgment to require Empire to recognize legal same-sex marriages in all the plans it administers.

NORTH CAROLINA – The ACLU has filed suit in the U.S. District Court for the Middle District of North Carolina seeking a declaration that North Carolina’s ban on second-parent adoptions violates the 14th Amendment rights of same-sex couples and their children. Fisher-Borne v. Smith, Civil Action No. 1:12-cv-589 (filed June 13, 2012). The action was filed on behalf of six same-sex couples and the children they are raising. In each case, one member of the couple is the legal parent of the child and the other has no legal relationship with the child, because North Carolina statutes do not allow adoptions by unmarried co-parents, and North Carolina does not allow or recognize marriages of same-sex partners. In Roseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010), the North Carolina Supreme Court definitively construed the state adoption statutes to ban such adoptions, thus ending a practice under which some lower courts had been granting them. In other jurisdictions, the litigation about second-parent adoption has been conducted as a matter of state law, trying to persuade courts to embrace innovative interpretations of their adoption statutes; in a few jurisdictions, legislation has been obtained making it clear that second-parent adoptions are authorized. This lawsuit appears to be the first major attempt to get a federal constitutional ruling on the question from a federal court, and poses the issues from the perspective of the children as well as the parents, arguing that the children are deprived of due process and equal protection because the lack of a legal connection to their second parent precludes eligibility for various government benefits and threatens the security of their families if something happens to their legal parent. Named defendants are John W. Smith, Director of the North Carolina Office of the Courts, David L. Churchill, Clerk of the Superior Court for Guilford County, and Archie L. Smith III, clerk of the Superior Court for Durham County. In addition to declaratory relief, the complaint seeks an Order that the defendants stop enforcing or applying current restrictions on second-parent adoptions, and accept applications from the plaintiff parents to initiate pro-
ceedings for adoption. In addition to attorneys with the ACLU LGBT Rights Project (NYC & San Francisco) and the ACLU of North Carolina, other attorneys in the case include Garrard R. Beeney of Sullivan & Cromwell LLP (NY), and local counsel Jonathan D. Sasser and Jeremy M. Falcone of Ellis & Winters LLP (Raleigh NC).

TEXAS – The U.S. Court of Appeals has affirmed U.S. District Judge David Godbey’s imposition of sanctions on Evan Stone, an attorney whom the court of appeals identified as one of several around the country engaged in shakedown schemes using the court system to extract money from individuals who view on-line porn. Ruling in Mick Haig Productions, E.K. v. Does 1-670, 2012 WL 2852502 (July 12, 2012), in an opinion by Circuit Judge Jerry E. Smith, the court found an egregious violation of the Federal Rules of Civil Procedure. Stone filed suit on behalf of Mick Haig Productions, a producer of pornographic films that claims individuals have violated its copyright through unauthorized downloads from the internet. Haig had information about the internet service providers and internet protocol addresses of 670 alleged unlawful downloaders, and filed suit against 670 John Does, seeking the get the identities of the John Does through discovery. Stone filed a motion with the court to subpoena the ISP’s to reveal the identities of the individual downloaders. The district court appointed organizations concerned with internet privacy to represent the interests of the John Does in discovery. Without getting approval of the court, Stone served subpoenas on the ISPs and began contacting individuals whose names were disclosed by the subpoenas companies. The record does not reflect whether monetary settlements have been extracted from any of the John Does yet. Responding to Stone’s argument that upholding the District Court’s sanctions against him would work a miscarriage of justice, the court stated: “We conclude, however, that no miscarriage of justice will result from the sanctions imposed as a result of Stone’s flagrant violation of the Federal Rules of Civil Procedure and the district court’s orders. Stone committed those violations as an attempt to repeat his strategy of suing anonymous internet users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars - a tactic that he has employed all across the state and that has been replicated by others across the country.” The court cited as a further example of this kind of scheme Raw Films, Ltd. v. Does 1-32, 2011 WL 6182025 (E.D. Va. 2011), quoting that court’s description of the modus operandi used to shakedown anonymous porn consumers under the pretext of suing to enforce copyright. The sanctions affirmed by the court include a requirement that Stone pay the attorney fees for the public interest groups that were appointed to represent the John Doe defendants and that he serve a copy of the court’s order on all the ISPs involved in this case as well as every party involved in any other case in which he is appearing as counsel in the United States, in addition to paying a fine of $10,000 to the District Court.

VIRGINIA – Roanoke Athletic Club rescinded the family membership of William Trinkle, Juan Granados, and their two-year-old son Oliver, after learning that they were a same-sex couple. The parent company of the club, Carilion Clinic, took the position that same-sex couples are not recognized as family members in Virginia, so their application should not have been accepted. (They had applied mainly to secure facilities rights for Oliver, as family membership was necessary to open the facilities to a child. Also, it would have been much more expensive for them to apply as two single adults.) When they filed suit in Roanoke Circuit Court, alleging breach of contract and a violation of the Virginia Consumer Protection Act, the Club backed down (probably bowing to adverse publicity, since the story had gone viral on-line), and announced that it will offer household memberships to cohabiting couples and their dependent children under age 22 who live with them, according to a posting on their Facebook page on July 5. A story in the local press on July 9 said that Trinkle’s lawyer, John Fishwick, Jr., said Trinkle was pleased about the change, but they hadn’t yet communicated with Carilion Clinic about the status of the lawsuit. Daily Press, Newport News, VA, July 9.

AIRC FORCE APPEALS – The U.S. Air Force Court of Criminal Appeals ruled in United States v. Bazar, 2012 WL 2505280 (June 29, 2012) (not reported in M.J.), that a “mistake of fact” defense was not available to a sergeant who was court-martialed for having sex with a teenage boy who falsely represented himself as being above the age of consent. Sergeant Timothy Bazar met DWS through MySpace. DWS was 15, but represented himself online as being 17. Bazar met DWS and they had sex together in a hotel room. The opinion does not specify how Bazar’s sexual activities came to the attention of military authorities, but he was prosecuted on several counts, including violation of Article 125 of the Uniform Code of Military Justice, the military sodomy law. Bazar sought to defend based on Lawrence v. Texas, arguing that the sexual activity was consensual and that he believed DWS was 17, which would make him an adult under the relevant state law. The court rejected the argument. “At the time of trial,” wrote Senior Judge Roan, “DWS was 5’3” and 113 pounds. He testified that he weighed about 102 pounds at the time of the incident. DWS also acknowledged that, though he was only 15 years old at the time, he told the appellant that he was 17 years old.” The court stated that “mistake of fact” has not been recognized as a defense under Article 125, so the court martial did not err by refusing to instruct on such a defense. “While an act of sodomy occurring in private between consenting adults may be constitutionally protected,” continued the court, “the conduct charged under Article 125 in this case remains criminal because DWS was in fact a minor.” The court affirmed the sentence of dishonorable discharge, reduction in rank, forfeiture of pay and allowances, and 8 years in prison.

ALABAMA – The Court of Criminal Appeals of Alabama rejected the argument that the liberty interest protected by Law-
ence v. Texas required overturning a conviction for possession of obscene matter, involving a photograph depicting the defendant, a 40-year-old man, having sexual intercourse with a 16-year-old girl whom he met through the internet three years earlier and with whom he had developed an ongoing sexual relationship. Cochran v. State of Alabama, 2012 WL 2481649 (June 29, 2012). Jeffrey Cochran argued that he couldn’t be prosecuted for possession of this picture of a consensual sexual act, noting that the age of consent for sex in Alabama was 16. The statute under which he was prosecuted, however, applied to depictions of sexual activity of persons under 17. Judge Burke wrote for the court: “Lawrence explicitly applied only to fully consenting adults who engaged in private sexual conduct. Lawrence did not apply to ‘minors’ or ‘persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.’ We further note that, although it is possible for a 16-year-old to consent to sexual conduct in Alabama, a sexual relationship between a 16-year-old female and a 40-year-old male that began when the female was 13 years old presents a situation where consent might not easily be refused. We conclude… that Lawrence is inapplicable to the present situation and that the legislative choice to proscribe the possession of a visual depiction of a person under the age of 17 years engaged in sexual conduct is rationally related to the State’s legitimate interest in protecting children and enforcing child-pornography laws.” Cochran’s conviction on charges of second-degree sodomy and unlawful possession of marijuana were also sustained by the court, which rejected an argument that the marijuana charge should have been tried separately from the sexually-related charges to avoid prejudicing his case.

ARIZONA – The Arizona Supreme Court ruled in State of Arizona v. Hausner, 2012 WL 2742174 (July 10, 2012), that Judge Roland J. Steinle of Maricopa County Superior Court did not commit an abuse of discretion when he allowed the prosecutor to question the defendant about his alleged bisexuality during the guilt phase of the proceeding. Hausner and his roommate, Samuel Dieteman, were separately tried in cases involving numerous capital and non-capital offenses. Dieteman made a plea agreement and testified against Hausner at trial. On direct examination, Hausner testified that Dieteman was bisexual but that he was not, and that sexually-themed text messages between the two men were intended to be humorous. The trial judge allowed the prosecutor to question Hausner about his sexuality on cross-examination, and to submit testimony by Hausner’s ex-wife that she had seen him kiss another man on the neck and that he once told her he thought that he was gay. Judge Steinle rejected a defense objection to this questioning and testimony on the ground that Hausner’s own testimony had opened up the issue. Judge Steinle instructed the jury: “a person’s sexuality does not make it any more or less likely that a person committed the crimes alleged in the indictment. You are not to consider any allegation of bisexuality to consider if Mr. Hausner committed the crimes alleged in the indictment.” Hausner was convicted and sentenced to death for six murders, and also convicted and sentenced for seventy-four non-capital offenses, for a series of “random shootings” committed in the Phoenix area between June 2005 and August 2006. The death sentences triggered an automatic appeal, and one of the issues raised on appeal was Hausner’s contention that Judge Steinle erred in allowing the state to submit evidence that he is bisexual. Justice Bales wrote for the Supreme Court that there was no clear abuse of discretion, “particularly given that Hausner himself placed his bisexuality at issue and attempted to distance himself from Dieteman by characterizing their respective sexual orientations.” The court emphasized that “trial courts must be cautious in admitting evidence of a witness’s sexual orientation in cases in which it is not directly relevant, given the danger that it may be unfairly prejudicial.” But any error in this case was “harmless” because of the judge’s instruction, concluded the court on this point. All but one of the convictions was affirmed, as the court rejected Hausner’s various issues raised on appeal.

CALIFORNIA – The 4th District Court of Appeal rejected an appeal in People v. Shareef, 2012 WL 2107273 (Cal.Ct.App., 4th Dist., June 12, 2012)(unpublished), in which a hate crime defendant claimed his conviction should be reversed because the judge ordered the deadlocked jury to continue deliberating on the hate crime charge. There was no dispute that Shareef committed an assault when he “struck a glancing blow on the victim’s right hand with a hammer as the victim, who had kneeled down in a mosque, was coming up after bowing to pray.” Wrote Justice Nares for the court, “When police officers arrested Shareef in his apartment, he said, ‘I am the guy.’ Shareef said he told the victim, ‘I don’t mess around with gay people.’ After the officers transported Shareef to jail, he volunteered the statement, ‘I always bring a hammer to prayer because there’s vicious faggots’ at the mosque. Shareef referred to the victim as a ‘faggot’ and said the attack on the victim was a ‘homosexual assault.’” Yet, at trial, Shareef denied making these statements and denied having animus against gay people. He insisted he just didn’t like being propositioned by the “homosexuals” who “were leading the prayers at the mosque” and were “hitting” on him. Wrote the court, “Given the number and relative complexity of the contested factual issues the jury was required to decide, the short amount of time it deliberated – less than three hours – before it reported it had reached an impasse on the hate crime allegation, and the fact that the jury reached that impasse after only one ballot, we conclude the court acted well within its discretion when it determined there was a reasonable probability the jury would be able to reach a verdict on that allegation if it continued its deliberations.”

NEW JERSEY – Dahrun Ravi, convicted of a hate crime against the late Tyler Clementi, who was briefly his freshman roommate at Rutgers University, served 20 days of his 30 day sentence in Middlesex County Jail in North Brunswick, earning time off for working and good behavior. Ravi served his sentence even though he is appealing the conviction, arguing on appeal that the NJ hate crimes
law is unconstitutionally vague. On June 18, federal authorities announced that they would not seek to deport Mr. Ravi to his native India, despite his conviction on felony charges. *New York Times*, June 20.

**FEDERAL** – The U.S. Senate’s Committee on Senate Health, Education, Labor and Pensions Committee held a hearing on the Employment Non-Discrimination Act (ENDA) on June 12. This bill would add a prohibition of employment discrimination on the basis of sexual orientation, gender identity or expression to federal civil rights law. The narrowly focused bill would not apply to disparate impact claims, and would not alter the federal definition of marriage contained in Section 3 of the Defense of Marriage Act (DOMA), in terms of workplace discrimination claims. It would apply to those private sector and public companies that are subject to coverage under Title VII of the Civil Rights Act of 1964, thus excluding from coverage very small companies. An even narrower version of the bill, which did not include coverage of gender identity or expression, was approved by the House of Representatives in 2007. The Senate has never approved the bill, although it came within a vote of doing so in 1996 as part of the debate over enactment of DOMA. The Obama Administration has endorsed the bill. Committee Chair Senator Tom Harkin (D-Iowa) indicated his intent to move the bill through Committee during this session, but he did not reveal a timetable for doing so. There is no movement on the bill in this session in the Republican-controlled House of Representatives, so a floor vote in the Senate would not lead to enactment in the current Congress. * * * Rep. Adam Smith (D-WA), ranking minority member of the House Armed Services Committee, introduced a bill on June 28 to “clarify and extend” the definition of “spouse” to include same-sex couples in sections of the United States Code dealing with recognition, support and protections for married members of the Armed Services and military veterans. The bill is a narrower version of the Respect for Marriage Act, a measure that would repeal Section 3 of the Defense of Marriage Act and substitute a requirement that the federal government recognize and treat equally all legally contracted marriages, regardless of the genders of the spouses. The measure is the Military Spouses Equal Treatment Act of 2012, H.R. 6046.

**CALIFORNIA** – California State Senator Mark Leno has obtained Senate approval of S.B. 1476, a measure intended to override the existing California rule that a child can have only two legal parents at the same time. The measure is pending in the Assembly. Leno gave two examples of situations where it could be appropriate to recognize three legal parents of a child: “A family in which a man began dating a woman while she was pregnant, then raised that child with her for seven years. The youth also had a parental relationship with the biological father; A same-sex couple who asked a close male friend to help them conceive, then decided that all three would raise the child.” There was also some discussion of situations where a child might have four legal parents, if two same-sex couples, one male and one female, came together to conceive and raise children together. *Herald and News* (Klamath Falls, Or.), July 3; *New York Times*, July 14.

**KANSAS** – The Hutchinson City Council voted 3-2 on June 5 to approve an ordinance banning discrimination on the basis of sexual orientation in employment and housing. The measure had been narrowed from the version proposed by the city’s Human Relations Commission, and opponents suggested they would seek petition signatures to get a repeal placed on the ballot. They would need only 327 valid signatures (25% of those who voted in the last city council election) to do so. *Hutchinson News*, June 5.

**MICHIGAN** – Responding to a district court ruling in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), rejecting a religious liberty claim against Eastern Michigan University for expelling a graduate counseling student whose religious objections prevented her from satisfactorily meeting the requirements of the program, the Michigan House of Representatives approved a bill that would, in effect, exempt counseling students with religious objections to homosexuality from having to comply with the ethical non-discrimination requirements of the program. In light of the Court of Appeals’ action of remanding the case for reconsideration on 1st Amendment grounds, the legislature’s action strikes us as precipitate. *Advocate.com*, June 18.

**NEW YORK** – Both houses of the New York State Legislature voted on June 18 to approve an amendment to the state’s Education Law intended to help combat “cyberbullying,” a practice by which individuals harass others through electronic media. The new provision requires school districts to adopt policies concerning cyberbullying, to provide education on the topic to students and staff, and to create mechanisms for dealing with it. The measure doesn’t create a private right of action for victims of cyberbullying, but does extend protection against retaliatory lawsuits for people who report cyberbullying to the authorities. The measure is S.7740/A.10712. *Advocate.com* reported on June 19 that New York will become the 15th state to have passed anti-bullying laws that particularly list sexual orientation and gender identity or expression as forbidden grounds for bullying. The report asserted that this was the first time the New York legislature approved a measure with specific protection for transgender individuals. A more general enactment, the Gender Identity Non-Discrimination Act, has been approved by the Democrat-controlled Assembly but stalled in the Republican-controlled Senate.

**BALLOT MEASURES ON MARRIAGE EQUALITY LAWS** – Preserve Marriage Washington, an organization opposed to same-sex marriage, succeeded in submitting sufficient petition signatures to put Resolution 74 on the general election ballot in November, giving Washington voters the decision whether the marriage equality law that was enacted this February will be allowed to go into effect. The Secretary of State announced on June 12 that a sampling review on the
signatures submitted indicated that valid signatures easily surpassed the statutory requirement. The law was originally supposed to go into effect the first week of June, but submission of petition signatures put it on hold, where it remains until after the voting in November. seattlepi.com, June 12. However, supporters of Initiative 1192, which would enact a measure that would define marriage as between “one man and one woman” were unsuccessful in obtaining sufficient signatures, so their measure will not be on the ballot, sparing Washington voters the confusion of having two differently-worded measures concerning marriage on the ballot simultaneously. News Tribune (Tacoma, WA), July 3. * * * Opponents of same-sex marriage in Maryland submitted sufficient valid signatures to place a referendum on the ballot November 6 to determine whether the state’s Marriage Equality law will go into effect in January. The Maryland State Board of Elections announced on July 10 that 109,313 valid signatures were submitted, far exceeding the 55,736 necessary. Frederick News-Post, July 12. Although most polling in the state showed majority support for the new law, the ease with which opponents were able to gather almost twice as many signatures as were needed suggests that the measure will be difficult to defeat. * * * There was controversy about the wording of the ballot question in Maine seeking to make same-sex marriage available. Proponents of the measure submitted a question that would incorporate the idea that religious organizations would not be required to perform same-sex marriages, but Secretary of State Charlie Summers proposed that the question state: “Do you want to allow same-sex couples to marry?” Proponents are concerned that the question thus worded would leave it open to opponents to campaign against the measure on the ground that it would require churches to perform same-sex marriages against their will, even though the proposed law would include a provision stating: “The refusal to perform or host a marriage under this subsection cannot be the basis for a lawsuit or liability and does not affect the tax-exempt status of the church, religious denomination or other religious institution.” The public comment period on Summers’ proposed wording ended July 16. The question submitted by the proponents was: “Do you favor a law allowing marriage licenses for same-sex couples that protects religious freedom by ensuring no religion or clergy be required to perform such a marriage in violation of their religious beliefs?” Summers claimed this was too complicated for a ballot question, evidently holding a low opinion of the reading comprehension of Maine voters. The Secretary of State is supposed to adopt language that is simple and unambiguous. Portland Press Herald, June 21.

NATIONAL COUNCIL OF LA RAZA – The United States’ largest Latino civil rights organization, the National Council of La Raza (NCLR), voted unanimously to approve a resolution supporting the right of same-sex couples to marry, just a month after the board of the National Association for the Advancement of Colored People (NAACP) passed a similar resolution. Other organizations within the Latino community that appear to be on-board with same-sex marriage include Mexican American Legal Defense and Education Fund and the Texas chapter of the League of United Latin American Citizens (LU-LAC). Washington Blade, June 22.

PROTESTANT CHURCHES – At its 77th General Convention held in Indiana Convention Center during July, 78 percent of the lay deputies and 76 percent of clergy in the House of Deputies of the Episcopal Church voted on July 10 to approve a resolution authorizing a form of blessing for same-sex unions. The House of Bishops had approved the resolution by a similar margin on July 9. The General Convention is the governing body of the church, which had 1.95 million active baptized members in 2010. The resolution leaves it up to individual bishops whether clergy under their jurisdiction are authorized to perform such ceremonies, but denominational law no longer stands in the way. The resolution goes into effect at the beginning of the denomination’s liturgical year, on December 2, 2012. The General Convention also voted to ban gender identity discrimination and authorize the ordination of transgender individuals. Indianapolis Star, July 11. * * * The Presbyterian Church is not so far along on this issue, its general convention voting 338-308 against a resolution to change the definition of “marriage” in the denomination’s constitution from “a woman and a man” to “two people.” Orlando Sentinel, July 14.

IMMIGRATION POLICY – On June 15, President Barack Obama announced that the Immigration Service would suspend deportation for foreign-born young people who had been brought illegally by their parents to the U.S. and who had subsequently graduated from high school, served in the military, or who were enrolled in college. In effect, the administration had decided to use the discretionary enforcement powers granted by immigration law in order to abate from deporting young people who had, in effect, grown up in the United States and made progress towards establishing themselves as de facto Americans. Lambda Legal issued a news release pointing out that many of the affected youth are LGBT, but that the continuing enforcement of Section 3 of DOMA still prevented the important step of recognizing same-sex spouses. Several lawsuits are under way challenging DOMA in this context, and LGBT advocates have been calling on the government to suspend deportations of same-sex spouses of American citizens and legal residents pending the outcome of these lawsuits.

WRONG EXIT – For three decades, Exodus International has been the flagship of the movement to “convert” individuals from homosexuality to heterosexuality, its leaders claiming that thousands of individuals had been helped to “change” but strangely never producing any scientific studies purporting to document this. Now a rift has opened up, as an “ex-gay” leader in the movement, Exodus’s current president, Alan Chambers, has gone public that in his opinion there is no cure for homosexuality and that “reparative therapy” offers false hopes to gays and can be harmful for them. According to an interview
reported in The New York Times on July 6, Chambers said that virtually every “ex-gay” he had met still “harbors homosexual cravings, himself included.” In other words, therapy does not change sexual orientation, and now the official position of Exodus International is to oppose it. Chambers, who is in an opposite-sex marriage, said that Exodus would abandon its slogan, “Change is possible.” However, he still believes that any extramarital sexual activity is sinful. Chambers’ statements have split the ex-gay movement, according to the Times report, with some not willing to follow his lead, others embracing it.

HETEROSEXUAL MARRIAGE – One of the arguments that opponents of same-sex marriage make is that changing the “definition of marriage” and disconnecting marriage from procreation will devalue “traditional” different-sex marriage, with the result that fewer heterosexuals will marry or remain married. On July 16, a British “think tank” called Policy Exchange, described as a favorite source of policy information for Prime Minister David Cameron, reported that after same-sex marriage became legal in the Netherlands, Belgium, Canada and South Africa, the rate of divorce among different-sex married couples in those countries declined. The report indicated that the rate of divorce rose slightly in Spain, but suggested that an “express divorce Bill” adopted around the same time as same-sex marriage was made legal, probably explained that phenomenon. The report also found that no country with same-sex marriage had forced churches to perform such marriages. Studying public opinion about same-sex marriage in Britain, the report found that the highest level of support for the proposed change to allow same-sex marriage in Britain actually came from several rural areas rather than, as expected from the London metropolitan area. The Australian, July 16.

U.S. DEPARTMENT OF DEFENSE – What a difference a year makes. In June 2011, the “Don’t Ask Don’t Tell” military policy was officially in place, and although Defense Department brass had put a hold on processing discharges for violation of the policy, LGB service members were still officially required to remain in the closet. In June 2012, by comparison, DoD was treating Pride Month as a big deal. Secretary of Defense Leon Panetta made a video, posted to the Pentagon website, commending LGB service members and their families, and an official Gay Pride Month observance took place at the Pentagon on June 26. Military leaders told the press that the ending of the DADT policy on September 20, 2011, had not caused any problems in the service. OutServe, a formerly-secretive organization of gays in the military, doubled in size to more than 5,500 members, according to an Associated Press report posted on June 14, and held its first national convention of gay service members in Las Vegas during fall 2011, with a conference on family issues for LGB military members taking place in Washington, D.C., earlier this year. The Pentagon’s fuss over Gay Pride Month was consistent with its hallway displays and activities for Black History Month and Asian-Pacific American Heritage Month. Chicago Tribune, June 27.

BOY SCOUTS OF AMERICA – James Turley, CEO of Ernst & Young and a member of the Executive Board of Boy Scouts of America, announced that he opposed the BSA’s membership policy forbidding participation of openly gay people, and would work to change the policy from within the organization. Ernst & Young under Turley’s leadership has scored highly on measures of gay friendly workplaces. The BSA responded to Turley’s statement with an “agree to disagree” statement. Boston Globe, June 14. There are conflicting reports about whether the BSA is serious about reexamining its policy in light of shifting public opinion on gay rights.

GOOGLE FOR GAYS – Google, one of the world’s largest internet operators, announced at conference in London on July 6 that it would launch a campaign in all the countries where it does business to get governments to end anti-gay policies. A spokesperson, Mark Palmer-Edgcumbe, stated, “We want our employees who are gay or lesbian or transgender to have the same experience outside the office as they do in the office.” He gave Singapore as an example. “Singapore wants to be a global financial center and world leader and we can push them on the fact that being a global center and world leader means you have to treat all people the same, irrespective of their sexual orientation.” Palmer-Edgcumbe indicated that apart from any altruistic motivation, Google had a business motivation for its campaign. “We operate in very many countries and have a very globally mobile workforce,” he explained. “We have had a number of instances where we have been trying to hire people into countries where there are these issues and have been unable to put the best person into a job in that country. Conversely we have had to move people out of countries where they have been experiencing homophobia to a different location. And we are also having to support staff in those countries in terms of relationships with the government and homophobia they are experiencing outside of the office.” Other corporate and governmental spokespersons present at the July 6 forum praised Google’s proposed campaign.
COLORADO – The Gay & Lesbian Victory Fund reported that seven openly-gay Democratic candidates will be on the ballot in Colorado this November seeking election or reelection to the state legislature. Openly-gay incumbents seeking reelection include Senator Pat Steadman and Representatives Sue Schafer and Mark Ferrandino. Other openly gay candidates for the House of Representatives are Joann Ginal, Dominick Moreno, and Paul Rosenthal. Seeking election to the Senate is Jessie Ulibarri. One openly-gay incumbent, Senator Lucia Guzman, is not up for reelection this year. None of these candidates faced primary contests. If they are all elected, the Colorado legislature would have one of the largest LGBT legislative caucuses in the country.

CALIFORNIA – Opponents of SB 48, the state law which requires California public schools in include LGBT history in their curriculum that was enacted last year and went into effect in January 2012, have fallen short in their effort to put a repeal initiative on the ballot for 2014. The Associated Press reports that opponents, faced with a January 16 deadline if they wanted to qualify for the 2014 ballot, had collected about 446,000 signatures towards the 504,760 that would be required under California law (based on the voter turnout in the most recent gubernatorial election). An earlier attempt to qualify a repeal initiative for the 2012 ballot was also unsuccessful. The news report indicated that most school districts have not yet implemented the law. MercuryNews.com, July 17.

EMPLOYEE BENEFITS IN THE PRIVATE SECTOR – The major international accounting and consulting firm, Deloitte LLP, began effective June 3 to adjust salaries of employees who have enlisted domestic partners in their benefits plans to offset the income taxes that result from the refusal of the federal government to recognize these relationships as “spousal” for tax purposes. The value of benefits provided to a legal spouse is not taxable to the employee, while the value of benefits provided to a domestic partner is taxable. Deloitte’s action brings it in line with other leading firms in the field, such as Ernst & Young and KPMG. Accounting Today, June 4.

** ** The Depository Trust & Clearing Corporation announced that it will offer its US-based employees transgender health benefits including coverage for sex-reassignment surgery and related prescription drug treatments effective June 1, 2012. The benefits will follow guidelines set by the World Professional Association for Transgender Health. A release announcing the benefits noted that DTCC was joining many other leading financial services firms in providing such benefits, including American Express, Bank of America, Barclays Capital, Credit Suisse USA, Goldman Sachs, JPMorgan Chase & Co., and Wells Fargo & Co. DTCC management made this policy decision in response to advocacy from the company’s LGBT Business Professional Network. Medical Devices & Surgical Technology Week, June 24.

** ** Bloomingdale’s, a major national retailer, has entered into a collective bargaining agreement with Local 3 of the Retail, Wholesale and Department Store Union (RWDSU) governing its 2,000-employee flagship store in Manhattan, under which gender identity and expression are added to forbidden grounds of discrimination and a new paternity benefit will be extended to gay men in marriages and domestic partnerships, which the union believes is a first for the retail sector. The Advocate.com, June 21.

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EMPLOYEE BENEFITS IN THE PUBLIC SECTOR – The Washington County, Maryland, government announced that beginning in July it would extend spousal benefits to county employees married to a same-sex spouse. Although Maryland’s Marriage Equality Law is not scheduled to go into effect until January 2013 (if it survives a referendum vote), the state government has begun to recognize same-sex marriages performed out-of-state as a matter of comity, and now the Washington County government will do the same. Lambda Legal News Release, June 13.

** ** The Bethlehem Area (Pennsylvania) School Board announced on June 18 that it would begin offering domestic partnership benefits to same-sex partners of school district employees, as a result of an administrative policy change made by Superintendent Joseph Roy, according to a press advisory issued by Equality Pennsylvania on June 19.Officials in Asheville, North Carolina, have concluded that the recently-enacted Marriage Amendment to the state constitution will not affect their domestic partnership benefits plan for municipal employees. However, no employees have enrolled for the benefits yet. The authorities indicated that they stand ready to extend benefits to any applicant who qualifies. Asheville Citizen-Times, July 13.

MARCUM LLP – The international accounting firm Marcum LLP has launched a Lesbian, Gay, Bisexual and Transgender and Non-Traditional Family Practice Group, to provide services in navigating changing tax and financial laws. The firm has offices in New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, California, Florida, Grand Cayman, China, and Hong Kong. Accounting Today, June 20.

GAY ASTEROID! – Canadian astronomer Gary Billings discovered several previously unnamed asteroids recently. After reading the obituary of Dr. Frank
Kameny, who had been an astronomer for the U.S. government before being dismissed for being gay during the 1950s, going on to become a leader of the gay rights movement, Billings determined to name one of the asteroids in honor of Dr. Kameny, and submitted a citation to the Paris-based International Astronomical Union and the Minor Planet Center in Cambridge, Massachusetts, to designate Minor Planet 40463 as Frankkameny. This designation was not necessary for us to conclude that Frank Kameny was a star, but it is welcome posthumous recognition that would likely have pleased him greatly. *Hamilton Spectator, July 11.*

**TEXAS** - Determined to do civil disobedience in the cause of same-sex marriage, Mark Jiminez and Beau Chandler went to the Dallas County Clerk’s Office on July 5 seeking a marriage license, and refused to leave the office when they were turned down. This was a deliberate, well-publicized, civil disobedience gambit, and they went to the office accompanied by friends, TV crews, and even some friendly police officers. “City police, county sheriffs and building security are all here,” Chandler said. “Nice to get their support.” Perhaps he was being sarcastic. The police were there to arrest the men when they refused to leave voluntarily and handcuffed themselves to each other, sitting on the floor blocking access to the clerk’s window for those lined up behind them to get licenses. A sheriff’s spokesman indicated that the men might be charged with criminal trespass, a misdemeanor. They had planned to marry on September 13 and then participate together in the Dallas Gay Pride march scheduled for September 16. They have already planned to have a sign on their car reading: “Just married, a couple who have a mutual commitment to a shared life.”

**AUSTRALIA**– The Queensland Court of Appeal has ruled that a bisexual woman can bring a complaint concerning a charge that a person incited hatred against gay people. The ruling in *Menzies & Bruce v. Owen* concerns a bumper sticker placed on his car by Ron Owen, former president of the National Firearm Owners of Australia. The bumper sticker stated: “Gay Rights? Under God’s law the only rights gays have is the right to die.” Richelle Menzies, a lesbian, and Rhonda Bruce, who identifies herself as bisexual, filed a complaint with the Queensland Anti-Discrimination Tribunal, accusing Owen of inciting hatred against gay people. The Tribunal ruled in 2008 that although a person is entitled to have homophobic views, their public expression would violate the law, at least in the case of Ms. Menzies. However, the Tribunal found that Ms. Bruce, as bi-sexual, did not have standing to seek a remedy for homophobic statements. The Tribunal awarded damages to Menzies but dismissed Bruce’s charge. On June 22, the Court of Appeal issued a written decision, finding that a bisexual person could have standing under the Anti-Discrimination Act to complaint about “vilification on grounds of homosexuality,” according to a report about the decision in the *Courier-Mail*. The President of the Court, Margaret McMurdo, said, according to the newspaper report, that an essential aspect of the definition of bisexuality was sexual feelings for a person of the same sex: homosexuality. “It follows,” she wrote, “that vilification of homosexual is also vilification of bisexual at least where, like Ms. Bruce, the bisexual person identifies with homosexuals.”

**AUSTRALIA** – Federal Magistrate Margaret Cassidy has awarded joint parenting rights of twin four-year-old boys to the...
two women who had been raising them together. One of the women is the birth mother of the twins, who were conceived during the women’s relationship through donor insemination. After the women split up, the birth mother sought to keep sole custody of the twins, over the protest of her former partner. Magistrate Cassidy found that “equal shared parental responsibility” was the appropriate order, as both children had a “close and attached” relationship with both women. Although the “primary” attachment was to the birth mother, she found that the boys had a “very strong” attachment to their other mother. The women had a “tense” separation, and the court commended the birth mother’s father for maintaining a positive relationship with his daughter’s former partner in order to facilitate “handovers” of the children for visitation. The court will permit the birth mother to relocate with the twins after 18 months in order for her to be closer to her extended family and for “professional development,” but suggested that Skype could be used to “potentially continue to develop a relationship” with the other mother. Under the terms of a settlement agreement approved by the court, the non-birth mother will have the boys every second weekend and one night on the intervening week; after relocation, she will have the boys for half the school holidays and will be allowed to speak with them via Skype three times a week. *Courier Mail*, July 6.

**CANADA** – Ontario updated its Human Rights Code on June 13 to add “gender identity” and “gender expression” to the list of forbidden grounds of discrimination. A similar amendment was expected to pass in Manitoba. *Globe and Mail*, June 14.

**CANADA** – A man from Nigeria will get a third chance to try to convince Canadian authorities that he is a gay man who should be given asylum, according to a report in the Canadian press on July 11. Francis Ojo Ogunrinde came to Canada in 2007 and sought to claim refugee status, on the ground that he would face persecution and worse if forced to return to Nigeria. Early in 2010, the Immigration and Refugee Board denied his claim for protection, concluding that he was neither credible nor gay. But he persisted and applied to Citizenship and Immigration Canada for a new determination, submitting a letter from the Toronto gay center about his participation in a “Coming Out Being Out” program, as well as a letter from a man who said that he was in a relationship with Ogunrinde. He also presented a letter from a friend in Nigeria, which said that police had come looking for Ogunrinde because of his “homosexual activities.” Nonetheless, a senior immigration official wrote to him in August 2011, again denying his claim. Acknowledging that conditions in Nigeria were “not favourable” for gay people, she said the letters submitted by Ogunrinde were not detailed enough about his sexual orientation or alleged relationship. In June, however, a Canadian federal judge, James Russell, set aside the immigration officer’s decision, asserting that the officer seemed to be guided by stereotypical beliefs. “It is inappropriate for officers to rely on stereotypes when evaluating whether or not a person has established any ground of risk, including sexual orientation,” wrote Russell, ordering that Ogunrinde have another opportunity to submit evidence in support of his claim. There seems to be no dispute that gay people face persecution in Nigeria, the only issue in the case being whether Ogunrinde can convince Canadian immigration officials that he is, indeed, gay. *Regina Leader Post*, July 11, *National Post*, July 11.

**CHILE** – On July 13, President Sebastián Piñera signed into law an anti-discrimination and hate crimes bill that was approved by the legislature in May. The measure was passed in response to the slaying of gay rights activist Daniel Zamudio. *Advertiser (Adelaide)*, July 14; *Montreal Gazette*, July 13.

**DENMARK** – Denmark was the first country to provide a legal status – registered partnership – for same-sex couples, in 1989, but ironically was late in the game to expand this to marriage. On June 7, the Danish Parliament approved a law on same-sex marriage that went into effect a week later, on June 15. Under the law, existing registered couples can choose to change their partnership to a marriage, but otherwise the registered partnership law is no longer available, although existing registered partnerships will still be recognized as such. Municipalities and churches may perform marriages. Individual priests can refuse to participate in a same-sex marriage, but the church is obliged to find another priest to perform the ceremony if a same-sex couple desires a church wedding rather
than a civil ceremony. ILGA Europe reported this development on June 19.

ESTONIA – ILGA Europe reported that an administrative court in Estonia ruled that a local authority erred in refusing to issue a civil status certificate to an Estonian citizen who wanted to enter a same-sex marriage in Sweden. The Estonian member of a binational couple sought the certificate because Sweden requires that anybody seeking a marriage license present a certification from the jurisdiction of their residence that they are single. The local authority refused to issue the certification because there is a specific Estonian statute providing that same-sex marriages are not valid and that only a marriage between a man and a woman can be registered. The administrative court said that neither of these laws was relevant; if the Estonian was single, he was entitled to a certification of his status. The fact that his Swedish marriage would not be recognized in Estonia was irrelevant.

FRANCE – The election of François Hollande as President and the subsequent election of a Socialist majority in the national legislature make it likely that various LGBT rights agenda items will be enacted over the next year, including same-sex marriage, joint adoption, and a modernization of rules for gender identity change on legal documents, including ending the requirement for surgery before gender identity can be legally changed. Addressing the parliament on July 3, the new Socialist Prime Minister, Jean-Marc Ayrault, announced the government’s legislative agenda, and stated, according to international news sources: “In the first half of 2013, the right to marriage and adoption will be open to all couples, without discrimination. Our society is evolving, lifestyles and mentalities are changing. The government will respond to that.” According to a July 3 article in the Bangkok Post, a recent survey showed that 6.5 of the French electorate self-identifies as gay, while only 4.5 percent of the electorate self-identifies as practicing Catholics!

GERMANY/CANADA – German police arrested Luka Rocco Magnotta in an internet café in Berlin on June 4. Magnotta is wanted by Canadian law enforcement authorities on suspicion of murdering his boyfriend, Jung Lin, in Montreal, dismembering Lin’s body, and mailing various body parts to Canadian political parties and public officials. There were also suggestions, based on a video that Magnotta apparently made and posted to the internet, that he had eaten some of the remains, and stuffed the portion that he didn’t mail into a briefcase that he left behind the building where he lived. CBC News, June 4.

ICELAND – On June 11, the Parliament adopted a new “Law on legal status of individuals with Gender Identity Disorder.” The new law provides a formal procedure for an individual with GID to complete the legal process of transition to be fully recognized in their preferred gender. Under the law, a person who has gone through the process will be guaranteed all the legal rights as people of their preferred gender enjoy, including change of name, identity documents, and so forth. According to a summary circulated by ILGA Europe on June 22, “Article 10 guarantees a status quo in the legal relationship between a child and a parent who has been confirmed as legally belonging to the opposite sex. Article 11 addresses the cases of those individuals who decide to return to their previous sex,” providing mechanism for obtaining medical treatment and a potential revocation of the gender change. The law took effect on June 27, 2012. Representatives of the Icelandic transgender community were appointed to the special commission that had been established by the Minister of Welfare to study transgender legal issues in Iceland and draft proposed legislation. The commission decided that a comprehensive bill was preferable to piecemeal amendments of existing legal provisions.

MALTA – ILGA Europe reported that Malta enacted an amendment to existing hate crimes legislation to include sexual orientation and gender identity, and extended the remit of the Commission for the Promotion of Equality to include discrimination on these bases.

MOLDOVA – ILGA Europe reported that the European Court of Human Rights ruled on June 12 that Moldova had violated a gay rights organization’s rights to peaceful assembly and to be free of discrimination when it refused to allow a peaceful gay rights demonstration in front of the Parliament building. The ruling in Genderdoc-M v. Moldova expressly rejected the government’s argument that majoritarian disapproval of “promoting homosexuality” could justify denying the right of a group to conduct a peaceful demonstration in support of gay rights.

RUSSIA – Defying European Human Rights Law, on June 7 the Moscow City Court upheld a district court’s decision to ban gay rights parades in Moscow for the next century! It seems that the existing law on rally applications does not state how far in advance events can be submitted for approval. Moscow gay activists applied for a permit to hold gay rights rallies up through 2112. The City Court dismissed the request, ordering that no such rallies can be held. Moscow gay rights activist Nikolai Alexeyev said that he would appeal the ruling to the European Court on Human Rights. However, on May 31, the Smolinsky District Court had found unlawful the local administration’s refusal to issue permits for peaceful LGBT rights rallies on March 7 (Day of Silence) and May 17 (International Day Against Homophobia and Transphobia). The court commented that one could not know in advance that an event would constitute forbidden “propaganda of homosexuality,” and that a federal law limits the ability of local jurisdictions to refuse to allow rallies, their only authority being to decide the appropriate time and place for an event. These developments were reported online by ILGA Europe.

UGANDA – The East and Horn of Africa Human Rights Defenders Project dared to schedule a workshop on gay rights in Kampala on June 18. Ugandan police raided the event, questioned participants, and “forced their way” into “some of the
activists’ hotel rooms,” according to one press report. Uganda maintains stiff criminal penalties for homosexual acts, and the government looks with disfavor on any organization or lobbying for gay rights. Responding to international pressure concerning its policies on homosexuality, the government issued a statement, signed by Ethics Minister Simon Lokodo, stating that the government does not discriminate against people “of a different sexual orientation. No government official is to harass any section of the community and everybody in Uganda enjoys the freedom to lawfully assemble and associate freely with others,” said the statement, which did not seem to reflect the reality on the ground. The statement was reported on June 23 by the Associated Press. However, on June 20, Reuters reported that Uganda had announced that it was banning 38 non-governmental organizations that it accused of promoting homosexuality and recruiting children. Minster Lokodo charges that “NGOs are channels through which monies are channeled to (homosexuals) to recruit.” Although Lokodo did not release the list of organizations that were being banned, it presumably includes all the major human rights organizations that have activities in Uganda.

UKRAINE – The national legislature was scheduled on July 6 to consider proposed Law 8711, modeled on some laws that have been enacted in Russian cities forbidding “propaganda of homosexuality.” These laws are intended to censor pro-gay speech and demonstrations, and have become the focus of intense criticism from international human rights organizations. Ukraine aspires to join the European Union, and it was forcibly pointed out to Ukraine’s political leadership that the political decision for same-sex marriage was 82%. Among people who described themselves as religious, support was at 58%. Government spokespeople indicated that Prime Minister David Cameron remained committed to bring the issue to a vote in the Parliament, allowing Conservative members to vote their conscience. Press speculation suggested that a majority of the Commons would vote for the bill, but that passage would count heavily on support from the other parties, as many Conservatives were likely to be in the opposition. The Liberal Democrats, governing as junior partners in coalition with the Conservatives, have same-sex marriage as a major position on their legislative agenda. The Daily Mail reported on July 7 that Dr. Rowan Williams, the outgoing Archbishop of Canterbury, had indicated that the Church might have to accept the political decision for same-sex marriage, since it had support from all three major parties in the Parliament, but that he doubted that the European Court of Human Rights would ever compel any church to hold a ceremony in violation of its theology.

UNITED KINGDOM – As the government concluded its “consultation” on a proposal to make marriage available to same-sex couples, spokespersons for the Church of England and the Roman Catholic Church sharply opposed the proposal, while the general public seemed to endorse it. The Gay Rights Group, Stonewall, released a poll of 2000 people, showing that approximately 70 percent support allowing same-sex couples to marry. The report on the poll in the Evening Standard on June 12 said nothing about the sampling methodology or statistical significance of the polling results. The poll also indicated that among residents under age 50, support for same-sex marriage was 82%. Among people who described themselves as religious, support was at 58%. Government spokespeople indicated that Prime Minister David Cameron remained committed to bring the issue to a vote in the Parliament, allowing Conservative members to vote their conscience. Press speculation suggested that a majority of the Commons would vote for the bill, but that passage would count heavily on support from the other parties, as many Conservatives were likely to be in the opposition. The Liberal Democrats, governing as junior partners in coalition with the Conservatives, have same-sex marriage as a major position on their legislative agenda. The Daily Mail reported on July 6 that Dr. Rowan Williams, the outgoing Archbishop of Canterbury, had indicated that the Church might have to accept the political decision for same-sex marriage, since it had support from all three major parties in the Parliament, but that he doubted that the European Court of Human Rights would ever compel any church to hold a ceremony in violation of its theology.

* * * History was made when the Queen’s Birthday Honors were announced and, for the first time, an openly transgender person was among those appointed Member of the British Empire (MBE). April Ashley, 77, is a prominent transgender rights activist whose own case made “bad law” long ago but who ultimately triumphed as an advocate for the Gender Identity Recognition Act, which provides a mechanism for transgender people to obtain official legal recognition of their gender identity and to marry as a member of the gender with which they identify. She played a significant role in helping to make the U.K. one of the world’s most progressive countries on gender identity issues. * * * Should gay people or women who are knighted or given peerages be able to confer honorary titles on their same-sex civil partners or spouses? Parliament is considering such a proposition. At present, the wife of a knight or peer is recognized through a title. For example, the wife of a knight becomes a “lady.” However, under existing rules the husband of a woman who is knighted or conferred a peerage receives no title, and same-sex partners of knights of peers receive no title. The proposal to confer titles is still at an abstract point, no specific titles having been suggested. Daily Mail, July 2.

The June 1, 2012, issue of the New York Law Journal included an interview with Kevin Cathcart, who is marking his twentieth year as Executive Director of Lambda Legal. Prior to taking this position, Cathcart was Executive Director of Gay & Lesbian Advocates & Defenders in Boston. He is undoubtedly the longest-serving executive director of any national LGBT organization, and he has presided over an extraordinary expansion of Lambda Legal, opening new offices around the country, adding numerous staff attorneys, and litigating important cases to the U.S. Supreme Court and the highest courts of many states. Lambda Legal’s biggest triumph under Cathcart’s leadership is undoubtedly Lawrence v. Texas, the 2003 Supreme Court decision holding that the right of gay people to have sexual relationships is a liberty interest protected by the Constitution. Several other publications, including Gay City News and Metro Weekly, have published interviews with Cathcart recently to mark the auspicious anniversary.

Virginia gets its first gay judge, after all. When the House of Delegates failed to summon a majority to appoint Tracy...
PROFESSIONAL NOTES

Thorne-Begland to the General District Court in Richmond, a vacancy was left on the court. This empowered the Richmond Circuit Court judges to appoint Thorne-Begland on June 14 to fill the vacancy on an interim appointment. Thorne-Begland had received a slim majority of those voting in May, but with ten abstentions and 26 not voting, he failed to achieve the absolute majority required for confirmation. Several prominent Richmond lawyers made a public statement of support for appointment to the interim vacancy. Governor Bob McDonnell (Republican) issued a statement that congratulating Thorne-Begland on the appointment and describing him as “well-qualified to serve on the bench.” Some opponents of his confirmation had argued that as a gay rights activist he lacked the impartiality necessary to be a judge. Thorne-Begland received national media attention two decades ago when he “came out” while serving in the Navy and resisted his discharge. Richmond Times Dispatch, June 15.

On June 22, openly-lesbian attorney Amelia Craig Cramer was named president of the Arizona State Bar. Craig is chief deputy attorney in the Pima County Attorney’s Office. Prior to this job, she was managing attorney in the Los Angeles Office of Lambda Legal, and before then served as Executive Director of Gay & Lesbian Advocates & Defenders in Boston. Cramer will be the first openly gay person to head the Arizona State Bar. Advocate.com, June 25. According to a congratulatory announcement from the National Lesbian and Gay Law Association, Craig becomes the fifth openly-gay leader of a state bar organizations; her predecessors at Melvin White and Bob Spagnolotti of the D.C. Bar, Mark Johnson of the Oregon State Bar, and Shane Vannatta of the Montana State Bar.

Openly gay attorney Sean Patrick Maloney won a five-candidate primary election on June 26 to become the Democratic nominee for the House of Representatives for the 18th Congressional District in New York. Maloney, a White House staff member during the Clinton Administration, will face incumbent Republican Nan Hayworth, who was elected in 2010 in a differently configured district that overlaps with the new 18th redefined due to the 2010 Census. The district includes all of Putnam and Orange Counties and portions of Dutchess and Westchester Counties along the Hudson River. When the new district lines were announced, Maloney, his partner and their children were living in neighboring Sullivan County, but moved into the new district. Maloney was not the only openly gay candidate: Mayor Matt Alexander of Wappingers Falls, Dutchess County, was actually the only one of the five candidates who was living in the district when the new lines were announced. Alexander came in third in the primary voting. Prior to Rep. Hayworth’s election in a year when Republicans swept the boards and retook the House, the former 18th had been represented by a Democrat, John Hall, who was first elected in 2006.

The American Constitution Society presented its David Carliner Public Interest Award to Janson Wu, staff attorney at Gay & Lesbian Advocates & Defenders, at the ACS National Convention in Washington, D.C., on June 16. Since joining GLAD in 2006, Wu has litigated several ground-breaking transgender rights cases, and has worked as co-counsel in GLAD’s challenge to Section 3 of DOMA, Gill v. Office of Personnel Management, which drew an affirmative ruling striking down Section 3 from the U.S. Court of Appeals and is likely headed to the Supreme Court. Wu, a graduate of Harvard College and Harvard Law School, was named a 2011 “Best LGBT Lawyers Under 40” by the National LGBT Bar Association. He is a member of the American Bar Association’s Commission on Sexual Orientation and Gender Identity, Vice Chair of the Sexual Orientation/Gender Identity Committee of the ABA’s Section on Individual Rights & Responsibilities, and serves on the Legal Committee of the World Professional Association for Transgender Health.

The American Bar Association’s AIDS Coordinating Committee, marking its 25th anniversary, announced that it would present the first round of Alexander D. Forger Awards for Sustained Excellence in HIV Legal Services and Advocacy at a ceremony during the ABA summer meeting in Washington D.C. on July 21. Forger, who will be one of the recipients, is former managing partner of Milbank Tweed in New York City, a former president of the Legal Services Corporation and former chairman of the Legal Aid Society in New York City, and a former president of the New York State Bar. He took a leading role in the early years of the AIDS epidemic to get the organized bar to focus on legal issues raised by the AIDS epidemic and also to volunteer legal services for people living with HIV, including prompting a pro bono effort at his own firm, and was a leader in the effort within the New York State Bar and the American Bar Association to have those organizations endorse non-discrimination policies based on sexual orientation. The other individual and institutional Forger Award recipients include: Scott Burris, Temple University School of Law, Philadelphia; Catherine Hanssens, Center for HIV Law & Policy, New York; Terry McGovern, Founder, HIV Law Center; Ford Foundation, New York; Brad Sears, Founder, HIV Legal Checkup Project, Los Angeles (and executive director of the Williams Institute at UCLA Law School); AIDS Legal Referral Panel, San Francisco; HIV/AIDS Legal Services Alliance (HALSA), Los Angeles; AIDS Legal Council of Chicago; HIV Law Project, New York; Whitman-Walker Health; Legal Services, Washington, DC; and AIDS Law of Louisiana, New Orleans.

The National LGBT Bar Association announced that Laurie Hasencamp, interim executive director of Equality California, has been named winner of the 2012 Allies for Justice Award, to be presented during the American Bar Association Annual Meeting in Chicago in August. The Allies for Justice Award is presented annually to recognize the work of a non-gay individual in advancing the rights of LGBT people. Ms. Hasencamp has served in leadership, advisory and board positions of numerous organizations working to advance LGBT rights, including Lambda Legal, GLSEN’s National Leadership Council, the Williams Institute, and Children Affected by AIDS Foundation.

The newest staff attorney at Immigration Equality is Cheryll J. Calaguio, who is a graduate of Ateneo de Manila School of Law in the Philippines. Before joining Immigration Equality, which provides counsel-

Catherine Hanssens, Center for HIV Law & Policy, New York; Terry McGovern, Founder, HIV Law Center; Ford Foundation, New York; Brad Sears, Founder, HIV Legal Checkup Project, Los Angeles (and executive director of the Williams Institute at UCLA Law School); AIDS Legal Referral Panel, San Francisco; HIV/AIDS Legal Services Alliance (HALSA), Los Angeles; AIDS Legal Council of Chicago; HIV Law Project, New York; Whitman-Walker Health; Legal Services, Washington, DC; and AIDS Law of Louisiana, New Orleans.

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ing and advocacy for LGBT people in the U.S. immigration and asylum process, she worked as a senior associate at a law firm based in New York City and as an associate at a law firm based in the Philippines.

On July 2, Servicemembers Legal Defense Network and Outserve announced that the two organizations would merge over the following three months. SLDN was established in the wake of Congress’s enactment of the “Don’t Ask, Don’t Tell” military policy in 1993, and specialized in providing legal counseling and representation for LGBT Servicemembers. Outserve was founded more recently as an organization representing the interests of openly LGB Servicemembers in the wake of DADT repeal. Over the June 30/July 1 weekend, the boards of the organizations met to seal the deal, having concluded that a merger would provide more effective leadership in the fight for equal treatment in the military for LGB Servicemembers by combining resources, eliminating redundant expenses, and providing a unified voice.

New York Governor Andrew Cuomo has appointed openly-gay LeGaL board member Richard Socarides, who is currently Of Counsel to the New York/Los Angeles law firm Brady Klein & Weissman, to be a trustee of the State University of New York. Socarides worked in the White House as an advisor to President Bill Clinton, and has held senior positions in the media and entertainment sector as well as government and law, according to an announcement issued by SUNY welcoming its new trustees. The trustees make up the governing body for New York State’s 64-campus state university network, enrolling nearly 468,000 students in more than 7500 degree and certificate programs, making it one of the nation’s largest institutions of higher education. Some gay activists in New York City were critical of the appointment, noting Socarides’ role as a Clinton advisor during the adoption of the “don’t ask, don’t tell” military policy and the Defense of Marriage Act. In recent years, Socarides has emerged as a frequent commentator in the media pushing the Obama Administration to make good on its campaign promises concerning federal policy on LGBT issues.

The Williams Institute at UCLA Law School announced two new staff members: Andrew R. Flores, a PhD candidate in Political Science, will be the Public Opinion Project Director, and Gwendolyn Leachman, a recent graduate of UC Law School at Berkeley who is working on a doctorate in Jurisprudence and Social Policy, will be the Sears Law Teaching Fellow for the coming academic year.

**ALABAMA** – A man who was claimed he was discharged “for failing to provide requested medical information concerning his HIV following an absence from work” was barred from suing under the Americans With Disabilities Act because he did not file a charge against his employer within 180 days, ruled the 11th Circuit in Equal Employment Opportunity Commission v. Summer Classics, Inc., 2012 WL 2094333 (U.S.Ct.App., 11th Cir., June 12, 2012) (not selected for publication in Federal Reporter). The EEOC took the position that its completed intake form should be considered sufficient to meet the filing requirement, but the 11th Circuit disagreed. The agency based its position on the Supreme Court’s decision in Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008), where an intake form on which the complainant indicated his desire to proceed with a case was held to be sufficient to toll the statute of limitations under the Age Discrimination in Employment Act. In this case, said the 11th Circuit in a per curiam opinion, the individual had not manifested an intention to set the wheels in motion on a discrimination claim under the ADA. The intake questionnaire and handwritten note indicated that he was “looking for counsel.” The court said that even if it construed “these documents in their most favorable light..., nothing in them indicates to an objectively reasonable reader that Mr. Lower wishes to activate the machinery and remedial processes’ of the EEOC.” The court characterized the questionnaire statements as “a request for information and answers about his rights, rather than a demand for agency enforcement.” The anti-plaintiff federal bench strikes again!

**CALIFORNIA** – In the course of affirming the conviction and sentencing (99 years) of a man for initiating sex with his two very young grandchildren (a boy and a girl) age 10 or younger, the California 4th District Court of Appeal affirmed the trial court’s order that the defendant submit to HIV testing. People v. Sierra, 2012 WL 2001969 (June 5, 2012). The court noted that the statutory standard for ordering HIV testing upon conviction of a sexual offense is “probable cause of a transfer of bodily fluid.” The testimony of the children provided “overwhelming evidence” of “transfer of bodily fluid,” since they testified to incidents where defendant initiated oral, anal or vaginal sex and “something white and wet” came out of defendant’s penis in the course of this activity.

**MISSOURI** – An HIV+ male couple, registered domestic partners in California and longtime residents of that state who moved to Missouri in 2003 to be near the ailing mother of one of them, but who frequently traveled back to California, staying with a friend, for periodic medical treatment that they could not obtain in Missouri, were found not to have falsified the “home address” on their health insurance application to PacifiCare Life and Health Insurance Company by using their friend’s address when they individually applied for policies to cover these California treatments, ruled the Missouri Court of Appeals (Western District) in Golden Rule Insurance Co. v. R.S., 2012 WL 2285193 (June 19, 2012). The men, identified in the opinion as R.S. and R.C.H., applied for individual policies when their group insurance coverage from former jobs, extended under COBRA, ran out. PacifiCare evidently intended to sell individual health insurance policies to California residents. The men also bought individual health insurance policies from Golden Rule Insurance Co., completing an application form that provided “continuation of other coverage existing [on effective date of policy] for more than 90 days after [effective date of policy] will void this coverage.” They did not disclose that they also purchased individual coverage from PacifiCare as well as Blue Shield. They applied for benefits under both policies depending on the nature of the claim to cover the costs associated with their HIV-related treatments. PacifiCare and Golden Rule are commonly owned, and the corporate owner, discovering that the men had policies with and submitted claims to both companies, undertook an investigation. The
insurers sought to cancel both sets of policies, PacifiCare on the grounds of fraud concerning “home address,” and Golden Rule on the ground of duplicate existing coverage. A Missouri trial court ruled in favor of the men, but the Court of Appeals issued a split ruling. While it agreed with the trial court and the defendants that an ambiguity was created by the “coverage existing” provision, because the term was not defined and the policy document itself spoke of coordinating coverage between different plans, it held that the ambiguity did not help defendants because, to the court, it was clear that the coordination provision applied to plans, such as the group insurance coverage they had enjoyed under COBRA, but not to individual policies. Thus, the court ruled for Golden Rule, finding those policies void. However, the appeals court agreed with the trial court that because the men were receiving their treatment in California, were long-time residents of the state and had registered their domestic partnership there and who expected to return from Missouri eventually and resume living full-time in California, were actually living at their friend’s home periodically when receiving treatment, and received all correspondence concerning this insurance at their friend’s address, they had not committed fraud in using that as their “home address” for the PacifiCare policies, so the PacifiCare policies would not be cancelled for that reason.

MISSOURI – The Missouri Court of Appeals, Eastern District, affirmed per curiam a decision by St. Louis Circuit Court Judge Dennis M. Schaumann denying a motion for judgment notwithstanding the verdict filed by plaintiff “John Doe” in an HIV disclosure case, Doe v. Quest Diagnostics, Inc., 2012 WL 2393684 (June 26, 2012), but unfortunately the court decided not to make public its reasoning, merely stating that the “evidence in support of the jury verdict is not insufficient” and that “an opinion reciting the detailed facts and restating the principles of law would have no precedential value.” However, the briefs filed with the court are available on Westlaw. Doe, an HIV+ gay man, was allegedly the victim of an error by a Quest employee, who misinterpreted a notation on the requisition form for his HIV blood work when entering the information into Quest’s computer system, as a result of which Quest’s system automatically faxed the results of the test to Doe’s employer. Doe was away on vacation when the fax arrived. When he returned, he was abashed to find the test report sitting on the top of his in-box messages, clearly accessible to anybody in the office. Doe was employed as an assistant to a church pastor. Does subsequently received negative anonymous phone calls referring to his HIV status. Doe’s employment was terminated six months later, the church stating that it had eliminated his paid position for economic reasons. The pastor had known about his HIV status prior to this incident. Doe continued to work at the church on a volunteer basis. According to evidence presented at trial, Doe had requested that his doctor’s office fax him the requisition form so that he could take it to the Quest lab where he was to have his blood drawn for the test; his doctor’s employee wrote the fax number that Doe gave her on the form; the Quest employee then mistakenly entered that number as one to which the results were to be faxed. When the testing was concluded, one copy of the report was mailed to Doe’s doctor and another was faxed to the number on the requisition form: the church office. Doe sued Quest on various theories, but at trial the case went to the jury on theories of breach of fiduciary duty and wrongful disclosure of HIV-related information. The jury rendered a verdict for Quest. In his unsuccessful post-trial motion and on appeal, Doe challenged the trial court’s handling of various evidentiary issues and the jury charge, particularly objecting to the idea that he should have to prove negligence by Quest employees to hold Quest liable.

HIV POLICY NOTE – On July 16 the U.S. Food and Drug Administration announced that it had approved the use of Truvada, a pill manufactured by Gilead Sciences, as a preventive measure for people who are at high risk for contracting HIV. This was the first time the FDA has approved a drug for prophylactic use against HIV infection by healthy people. Studies had shown that consistent daily dosing with Truvada, which has been in use for several years as part of an approved anti-retroviral cocktail for managing HIV infection, actually reduced transmission rates. The study showed that daily doses of Truvada cut the rate of HIV infection in healthy gay and bisexual men by 42 percent “when accompanied by condoms and counseling.” Another study found that daily dosing with Truvada cut the rate of infection within serodiscordant heterosexual couples by 75%. Truvada does produce side effects, some uncomfortable, some health-threatening, in some users. In other words, use of Truvada is not a simple replacement for following “safer sex” guidelines, but may cut the risk of transmission significantly in case of accidental exposure to HIV. Truvada is an expensive drug, there is uncertainty whether most pharmaceutical insurance plans would cover it for prophylactic use, and – as it does not eliminate the need to use barrier contraceptives for sexual intercourse and may generate unwanted side effects — it is hard to see why most healthy, sexually active gay or bisexual men would bother to use it. Indeed, the announcement by the FDA produced clashing comments from public health groups and HIV/AIDS policy groups, some of which were sharply critical about generating misleading headlines. (We saw one headline from an overseas paper that referred to the FDA approving an “AIDS Vaccine,” which is totally misleading.) Some who hailed the FDA announcement asserted that Truvada would be helpful in attempting to combat the continuing epidemic rate of HIV transmission in some undeveloped countries, but given the expense, the need for daily dosing, and the requirement to continue using barrier contraception, that seemed unlikely, at least in the short run, unless an inexpensive generic version were to be made available for that purpose. Based in part on reports from The New York Times and The Huffington Post.
Specially Noted


“Victory: The Triumphant Gay Revolution,” by Linda Hirshman (New York: Harper Collins, 2012), provides a somewhat breathless account of the dramatic story of the movement for LGBT rights in the United States over the past half century. Hirshman draws heavily on interviews conducted between 2009 and 2011 (and some Act-Up oral history recordings from 2002-2003) as well as documentary sources to provide a selective, illuminating history. The presentation style is more journalistic than academic, producing a very accessible text that draws the reader along with a focus on some of the movement’s most colorful characters. Hirshman’s premise is that the LGBT movement’s recent successes signal imminent victory, with only a handful of barriers heavily under assault and likely to fall, and that the movement’s accomplishments over a relatively short period of time are remarkable by comparison to the more prolonged struggles of other civil rights movements. In many instances, her interviews have turned up anecdotes and “inside” stories that have eluded prior writers, but due to the somewhat “hit or miss” nature of her interview list, there are interesting omissions as well. For anybody attempting to reconstruct the history of the movement for LGBT rights, this book provides many pieces of the jigsaw puzzle, and will be mandatory reading.

17. Fontana, David, and Donald Bram, Judicial Backlash or Just Backlash? Evidence from a National Experiment, 112 Colum. L. Rev. 731 (May 2012) (used reactions to hypothetical Supreme Court ruling on same-sex marriage as part of experiment to determine how public reacts to controversial decisions).
21. Groshoff, David, Child, Please – Stop the
All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of LeGaL or the LeGaL Foundation.

All comments in Publications Noted are attributable to the Editor.

Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.

PUBLICATIONS NOTED
LGBT / HIV/AIDS & Related Issues


Hernandez-Truyol, Berta Esperanza, A Need for Culture Change: GLBT Latinas/os and Immigration, 6 FIU L. Rev. 269 (Spring 2011).

Inazu, John D., Justice Ginsburg and Religious Liberty, 63 Hastings L.J. 1213 (June 2012)(particular focus on Justice Ginsburg’s opinion in Christian Legal Society v. Martinez, in which the Court rejected a 1st Amendment religious liberty challenge to a law school’s non-discrimination policy covering sexual orientation).


Levit, Nancy, Changing Workforce Demographics and the Future of the Protected Class Approach, 16 Lewis & Clark L. Rev. 463 (Summer 2012).


Menyawi, Hassan El, Same-Sex Marriage in Islamic Law, 2 Wake Forest J.L. & Pol’y 375 (2012).


Nation, George A., III, We the People: The Consent of the Governed in the Twenty-First Century: The People’s Unalienable Right to Make Law, 4 Drexel L. Rev. 319 (Spring 2012) (argues that federal law should be amended to use modern communications technology to allow national plebiscites to make federal law, asserting that judicial review will adequately protect individual rights in the process, citing Romer v. Evans and Lawrence v. Texas as exemplars).


Strasser, Mark, DOMA, the Constitution, and the Promotion of Good Public Policy, 5 Alb. Gov’t L. Rev. 613 (2012) (Symposium: LGBT Rights: Toward a More Perfect Union).

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Kaplan, Margo, Rethinking HIV-Exposure Crimes, 87 Ind. L.J. 1517 (Fall 2012) (a call for law reform in which criminalization of HIV-exposure would take into account offender knowledge, intent and real risk).


Sears, Brad, Christian Cooper, Fariba S. Younai, and Tom Donohue, HIV Discrimination in Dental Care: Results of a Testing Study in Los Angeles County, 45 Loy. L.A. L. Rev. 909 (Spring 2012).