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OUR DAYS IN COURT

Supremes hear arguments in Prop 8 and DOMA

EXECUTIVE SUMMARY

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L E S B I A N / G A Y

LAW NOTES

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Supreme Court Holds Arguments on Proposition 8 & Defense of Marriage Act

On March 26 and March 27, the Supreme Court held oral arguments in *Hollingsworth v. Perry*, No. 12-144, and *United States v. Windsor*, No. 12-307. Both cases presented questions of jurisdiction as well as questions on whether state or federal laws excluding same-sex couples from marriage or benefits flowing from marriage violate the federal constitution. The Court, departing from its normal practice, posted transcripts and audio recordings of the arguments on its websites just hours after each argument had concluded, and the story dominated news media reporting for several days. After reviewing the transcripts, listening to the audio recording, and considering the numerous comments published by pundits of various stripes, this observer concluded that the plaintiffs who initiated these cases may end up winning some of the relief they sought, but that it is unlikely that the Court will produce a decision backed by a majority of the Justices that establishes a heightened standard of judicial review for sexual orientation discrimination claims. Indeed, it seemed possible that one or both of the cases would be resolved without the Court producing a majority opinion on the merits of the claims that either of the challenged measures violates the constitution, deciding on jurisdictional grounds that may default to the lower court decisions on the merits.

This discussion presumes familiarity with the history of these cases. A brief summary of that history is provided at the end of this article for those needing a refresher.

Predictions based on questions and comments by the Justices during oral arguments must be considered tentative, because active consideration of the cases continues behind the closed doors of the Court, preliminary votes are taken (on Friday of the week in which arguments are heard), opinions are assigned, drafts are circulated, revised, recirculated, and finally – most likely towards the end of the Court's term in June – the Court's decisions will be announced. Furthermore, the Justices occasionally pose questions or make comments in a "devil's advocate" mode, trying to draw out the lawyers to debate the issues raised by the case, and thus their statements don't necessarily predict how the Justices will vote.

If the Court resolves the standing question in favor of the Petitioners and decides to issue a substantive ruling, the outcome would probably depend on Justice Anthony Kennedy.

This observer's tentative conclusion is that the Court will most likely dispose of *Hollingsworth*, the case concerning a 14th Amendment challenge to California Proposition 8, either by finding that the Petitioners did not have Article III standing to appeal the district court's decision (which held the measure unconstitutional) or by announcing that the writ of certiorari had been "improvidently granted." The Court added the question of Petitioners' standing when it granted review in the case, in which the 9th Circuit had ruled the voters' enactment of Proposition 8 failed rationality review. Chief Justice Roberts cut short each lawyer's attempt to begin by addressing the merits, insisting that they first address the issue of standing. Solicitor General Donald Verrilli, participating at his initiative as an amicus, had not briefed the issue of standing in this case and sought to avoid addressing it, but being pressed by the Chief Justice asserted that Petitioners lacked Article III standing, a point made as well, albeit reluctantly, by Ted Olson for the Respondents, who brought this case to achieve a ruling on the merits and clearly did not want to lose that opportunity. Of course, Petitioners' counsel, Charles Cooper, insisted that they had standing in a representative capacity for the state of California, relying on the California Supreme Court's advisory opinion to that effect.

If the Court finds that the Petitioners lacked standing to appeal, that will leave the district court's Order standing as if it had not been appealed, binding the defendants to comply with the Order to treat Proposition 8 as a nullity. Thus, same-sex marriages could resume in California, although there might be further litigation in the district court over the scope of the Order, as some commentators have argued that relief should extend only to the two plaintiff couples who had been denied marriage licenses, or narrowly focused against the two county clerks named in their complaint. Judge Vaughn Walker, who decided the case, has retired, as has Judge James Ware, who inherited the case from Judge Walker and made some rulings prior to the 9th Circuit's decision,

so the case would have to be assigned to a new district judge to deal with any additional arguments about the court's Order, if counsel for the Proponents secured a further stay pending resolution of such questions. If the Supreme Court takes the second route of dismissing the writ as improvidently granted, that would leave the 9th Circuit's decision finding Proposition 8 unconstitutional in place as if it had not been appealed. In that case, the 9th Circuit's stay would be lifted and the district court's Order would go into effect, possibly raising the same questions about the scope of the Order as identified above. The difference would be that the 9th Circuit panel decision (which was denied en banc review) would stand, and could carry weight in the pending appeals of same-sex marriage cases from Nevada and Hawaii.

If the Court finds that the Petitioners did have standing to appeal, it might still avoid ruling on the merits by vacating the 9th Circuit's decision for reconsideration in light of the Court's ruling in *Windsor* (if the Court produces a majority rationale on the merits in *Windsor* that could logically be the basis for such a reconsideration).

If the Court resolves the standing question in favor of the Petitioners and decides to issue a substantive ruling, the outcome would probably depend on Justice Anthony Kennedy (author of the gay rights victories in *Romer v. Evans* and *Lawrence v. Texas*), whose comments during the argument suggested sympathy for the Respondents (Plaintiffs challenging Proposition 8) but reservations about adopting a rationale that would extend the right of same-sex couples to marry to all fifty states at once. Most commentators agreed that Chief Justice John Roberts and Justices Antonin Scalia and Samuel Alito did not appear ready to strike down Proposition 8, and assumed that Justice Clarence Thomas (who, as usual, said nothing during the argument) would vote with them. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonya Sotomayor and Elena Kagan appeared disposed to find Proposition 8 unconstitutional, but it appeared likely that one or more of these Justices may also have reservations about a far-reaching ruling on the merits, as their questions and comments probed whether it was possible to strike Proposition 8 in a principled way that would apply only to the particular circumstances of the California case. Most commentators were suggesting that if the Court ruled on the merits, it would figure out a way to render a ruling that would only apply to California, although some members of the Court questioned whether that was really possible. If there is no rational basis for Proposition 8, for example, what would be the rational basis for any other state's constitutional amendment or statute banning same-sex marriage? In framing the question for their cert petition, the proponents of Prop 8 had worded it broadly as seeking appeal of the district court's ruling, entirely bypassing the narrow focus of the 9th Circuit's affirmance. Thus, it seems to this observer that if a majority of the Court believes Proposition 8 is unconstitutional but there is no majority support for a ruling that would have any effect beyond California, the best solution may be to dismiss the writ as improvidently granted, which would not require the Court to say anything about the merits of the 14th Amendment claim but would leave the 9th Circuit's California-focused ruling intact. Such a dismissal would have the additional merit – from the point of view of the Justices – of not requiring any written opinion from the Court that might bear on same-sex marriage litigation pending in other states.

Of course, there remains the possibility that the Court will splinter so completely over how to resolve this case that there will be no majority for any proposition, jurisdictional or on the merits, which could to lead to a dismissal of the writ or to the issuance of a collection of opinions producing a particular result without committing the entire Court on any doctrinal point. Or, of course, Justice Kennedy and the "liberals" could resolve their doubts in favor of a majority opinion holding on the merits that Proposition 8 is unconstitutional, either for failing rationality review or heightened scrutiny.

In *Windsor*, argued on March 27, the Court specifically reserved a big block of time at the beginning of the argument to be devoted to issues of jurisdiction and standing, which it had added to the case when it granted the government's petition to review the 2nd Circuit's ruling in *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012). The 2nd Circuit had ruled that Section 3 of DOMA, establishing a federal definition of marriage as solely a union between a man and a woman, failed to survived heightened scrutiny review. (The 2nd Circuit panel intimated that Section 3 might survive rationality review, but concluded that Section 3 discriminated based on sexual orientation, and that applying the Supreme Court's methodology for determining the appropriate level of review in equal protection cases led to the conclusion that such claims were subject to heightened scrutiny.) The Justice Department had argued for this result, having abandoned defense of Section 3 before answering Windsor's complaint, ceding the defense role to Paul Clement, a former Solicitor General hired by the Counsel of the House of Representations on the orders of the Bipartisan Legal Advisory Group (BLAG) of the House, which voted 3-2 to authorize the House to intervene in defense of the statute. The Court raised the issue whether the Justice Department's agreement with the 2nd Circuit's ruling on the merits meant that the Petitioner (the government) was not presenting a real case or controversy for resolution by the Court, as required by its Article III jurisprudence. The Court also added the question whether BLAG had standing to intervene as a party to defend the statute. The Court appointed Prof. Vicki Jackson of Harvard Law School to argue against jurisdiction, correctly foreseeing that none of the parties in the case wanted to see the Court avoid the merits.

Questions and comments from the Justices during the prolonged portion of argument (running over the scheduled time) devoted to these jurisdictional questions suggested that many of the Justices seriously doubted whether the case was properly before the Court, although at times this appeared to be a strategic move by the Court's right wing to avoid a Supreme Court ruling on the merits. Presumably the Court felt constrained to grant a petition for certiorari by the government appealing from a ruling that held a

federal statute to be unconstitutional, but the conservatives may have added the jurisdictional issue (which was not raised by the parties in their respective cert petitions) as an "escape hatch" if it appeared that a majority was coalescing around a ruling in favor of Windsor on the merits. If they could not save Section 3 entirely, they might at least limit the "damage" to the 1st and 2nd Circuits and avoid having the Court issue a majority ruling holding Section 3 unconstitutional and, perhaps, setting a new heightened scrutiny standard of judicial review for sexual orientation discrimination claims.

The argument on the merits seemed to go in a different unanticipated direction, when Justice Kennedy, the presumed swing voter, started raising federalism concerns about Section 3. Pointing out that traditionally it had been the role of the states to define marriage, and that DOMA withheld rights under more than 1100 federal statutes from legally married same-sex couples in nine states and the District of Columbia, Kennedy suggested that there could be a serious problem of Congress invading the authority of the states. Although the moderate-to-liberal Justices raised various concerns going to the equal protection argument being pushed by the government and Windsor, Kennedy returned to his federalism concerns several times during the argument. It seemed clear that Kennedy was uncomfortable with Section 3, but he was not focused on an equal protection ruling. (Interestingly, in his opinion for the Court in *Lawrence v. Texas*, Kennedy also fought shy of an equal protection ruling, acknowledging the plausibility of such a challenge to the Texas Homosexual Conduct Law but preferring to overrule *Bowers v. Hardwick* and rule solely on due process grounds.) In *Windsor*, federalism would stand in for due process as a ground of decision that would avoid the external consequences of an equal protection ruling on other cases. (Indeed, if the Court wanted to avoid deciding the ultimate right to marry issue, it would want to refrain from establishing a heightened scrutiny standard by an equal protection ruling in *Windsor*, which would most likely lead to the speedy invalidation of bans on same-sex marriage in all the remaining states.) Solicitor General Verrilli maintained the government's position that Section 3 was unconstitutional under heightened scrutiny review, but might survive rationality review. Roberta Kaplan, arguing for Winder, maintained that Section 3 was unconstitutional under either standard. Clement sought to convince the Court that DOMA represented a non-discriminatory attempt by Congress to preserve a uniform definition of marriage for federal purposes in the face of potential division among the states on the grounds for marriage. He as much as conceded that if the Court found that anti-gay animus was the only ground for the legislation, it should be struck down.

Thus, depending which way Kennedy leans and which strategy the Justices opposed to Section 3 are inclined to follow, the outcome might be a ruling without a majority decision, in which four Justices find no rational basis for Section 3 or that the provision fails to meet the more demanding test of heightened scrutiny (or even dividing between these two approaches), Kennedy concurs in the result on federalism grounds, and the remaining four Justices dissent, either on the merits or on jurisdictional grounds or both. (There was some speculation that Justice Alito or Chief Justice Roberts might concur in a federalism ruling, in light of their focus on federalism in their questioning.) Kennedy might be looking for a result that allows same-sex marriages to resume in California and extends to legally-married same-sex couples the right to have the federal government recognize their marriages; his expressed concern for the children being raised by same-sex couples, who, he asserted, wanted their parents to be able to marry and could be harmed by the state's refusal (and, the federal government's refusal) to countenance same-sex marriage, would suggest that he would prefer such an outcome, even if it were to happen by default through jurisdictional dismissals.

Ironically, among the half dozen attorneys who argued to the Court over the two days, only one, Roberta Kaplan of Paul Weiss, representing plaintiff Edith Windsor in the DOMA case, is gay, and she was given only fifteen minutes to argue towards the end of the DOMA hearing.

BACKGROUND – In *Hollingsworth*, argued on March 26, the Petitioners, several of the proponents of the California constitutional amendment initiative approved by voters in November 2008 that provides that only different-sex unions will be considered marriages in California, asked the Court to decide whether the adoption of that amendment violated the 14th Amendment rights of same-sex couples, as held by the District Court in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), or the 9th Circuit Court of Appeals in *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *motion for rehearing en banc denied*, 681 F.3d 1065 (2012). When the named defendants in the trial court refused to mount a substantive defense of Proposition 8 (whose adoption they had opposed), proponents were allowed by the trial court to intervene and provide a defense of the measure. After the district court ruled that Proposition 8 violated both the due process and equal protection clauses of the 14th Amendment, the named defendants signified they would not

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appeal the ruling, and the proponents filed an appeal. The plaintiffs then argued that proponents lacked standing under Article III to appeal. The 9th Circuit referred the question of standing to the California Supreme Court, which opined that initiative proponents have standing as parties to defend the constitutionality of their initiative as representatives of the state, despite their lack of official status. The 9th Circuit then ruled that proponents had standing, and ruled on the merits that Proposition 8 violated the equal protection clause because, in the court's view, there was no rational basis for California voters to withdraw the right to marry from same-sex couples (who had been legally marrying in the state for five months prior to the vote pursuant to a 2008 ruling by the California Supreme Court on state constitutional grounds, and for whom California law already provided all the state law rights, benefits and responsibilities of marriage through its Domestic Partnership Act).

In *Windsor*, argued on March 27, the government petitioned the Court for review of the 2nd Circuit's decision holding that DOMA Section 3 violated the 5th amendment equal protection rights of Edith Windsor, plaintiff below, who had sued in her capacity as executor of the estate of her late wife, Thea Spyer, to whom she was married in Canada in 2007. *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012). Spyer passed away in 2009 and the Internal Revenue Service rejected the estate's claim for the benefit of the spousal exemption from estate tax on the bequest to Windsor. As noted above, the government was asking the Supreme Court to affirm the 2nd Circuit's ruling, which held that Section 3 discriminates based on sexual orientation, a classification that merits heightened scrutiny in an equal protection case, and that the defenders of Section 3 (in this case, BLAG) failed to show that it substantially advanced any important governmental interest. Windsor, Respondent, agreed with the 2nd Circuit's decision, but also argued that Section 3 would fail to survive rational basis review, parting company from the government on this point. ■

Third Circuit Rejects Brazilian Gay HIV+ Man's "Withholding of Removal" Claim

The U.S. Court of Appeals for the Third Circuit has denied the Petition for Review filed by a gay HIV-positive Brazilian of his application for withholding of removal and protection under the Convention Against Torture (CAT), which were denied by an Immigration Judge and the Board of Immigration Appeals, in *Ferreira v. Attorney General*, 2013 WL 518600 (3d Cir., February 7, 2013) (not published in F.3d).

Petitioner, a native and citizen of Brazil, overstayed a September 1997 tourist visa. After a pending employment-based case on his behalf was denied, he was placed in removal proceedings. Before an Immigration Judge, Petitioner sought asylum, withholding of removal, and protection under CAT. He claimed that he had suffered past persecution on account of his sexuality, specifically that when he was 15 years old, he was lured by another young man into the countryside where two other men were waiting to kill him, he believed, because he was gay. He further claimed he was robbed at knifepoint by a man with whom he had just had sexual relations, that he and other gay friends suffered harassment on the streets of Coronel Fabriciano, and that a transsexual friend of his had been murdered. Petitioner explained that he never called the police in Brazil because he believed they would refuse to protect him.

The Immigration Judge issued a decision denying Petitioner's applications for relief for two reasons: first that he had failed to file for asylum within one year of entering the United States; and second that he had failed to establish he had suffered past persecution, ruling that the incidents were "random criminal acts that did not result in serious injury." The Immigration Judge further ruled that the country condition reports failed to establish a systematic or pervasive persecution of gay men in Brazil, and that, based on his own admission, Petitioner could relocate to a safer part of Brazil to avoid the threats he claimed prevailed in his home state. Petitioner was granted voluntary departure, but instead appealed the Immigration Judge's decision, challenging only the determination that he failed to establish past or future persecution but not continuing to pursue asylum, conceding that he had failed to file a timely asylum application. Thus, his appeal concerned only his applications for withholding of removal and protection under CAT.

The Board of Immigration Appeals affirmed the Immigration Judge's denial, agreeing with the Immigration Judge that the evidence failed to prove past persecution on account of his sexual orientation, that the record was insufficient to show a clear probability of persecution pursuant to a pattern or practice of persecution of gay men, and that Petitioner could safely relocate to another area of Brazil. The Board did not reissue the grant of voluntary departure, and instead ordered Petitioner removed from the United States.

Petitioner sought review in the 3rd Circuit. The panel, finding that it had jurisdiction, stated that the Board's decision must be upheld if its factual determinations "are supported by reasonable, substantial, and probative evidence on the record considered as a whole," and that Petitioner could succeed only if he could show "that his evidence was 'so compelling that no reasonable factfinder could fail to find' in his favor."

The panel concluded that "substantial evidence supports the agency's conclusion that [Petitioner] failed to demonstrate a clear probability

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Ninth Circuit Holds Government Needs Reasonable Suspicion to Search Laptop at Border

The U.S. Court of Appeals for the Ninth Circuit has ruled that border agents need reasonable suspicion of illegal material before they may perform a detailed search of a laptop taken at a border crossing, in *United States v. Cotterman*, 2013 WL 856292 (9th Circuit, en banc, March 8, 2013).

The Defendant was stopped crossing the U.S.-Mexico border. After an investigative tool of the Department of Homeland Security returned a hit on Defendant, Border agents learned that he had a 1992 conviction for child molestation, which they mistakenly believed was a conviction for child pornography, and they also saw that he frequently traveled outside the United States to Mexico, a country known for sex tourism. After briefly examining the Defendant's laptop and seeing that it contained files which were password protected, the agents sent the computer to a field office over 170 miles away for a thorough forensic analysis, which eventually revealed child pornography on the computer.

Defendant was indicted for possession of child pornography and argued to the criminal court that all of the material found on his laptop should be excluded from evidence under the Fourth Amendment, arguing that this case should be considered an "extended border search," which would require that border agents have "particularized suspicion" that his laptop contained illegal material before seizing it for forensic examinatino. The District Court judge granted the motion to suppress. On appeal before the Court of Appeals for the Ninth Circuit, a majority of a three-judge panel ruled that it was permissible without reasonable suspicion for border agents to forensically search a laptop computer in another location so long as it continuously remained in their custody. Defendant requested en banc review, which was granted.

An en banc panel of eleven judges of the 9th Circuit noted that border searches form "a narrow exception to the Fourth Amendment prohibition against warrantless searches without probable cause," but that "even at the border, individual privacy rights are not abandoned but balanced against the sovereign's interests."

Defendant argued that this was an extended border search, which requires the government to prove reasonable certainty of a border crossing in addition to reasonable suspicion of criminal activity. The court held that since Defendant was stopped at the border, the mere fact that his laptop was taken away from the border did not transform the search into an extended border search "simply because the device is transported and examined beyond the border."

The court did, however, rule that while generally border agents may search papers and documents without having any suspicion of illegal activity, they must establish that they had "reasonable suspicion" of criminal activity in order to conduct a forensic examination of a laptop due to the examination's "comprehensive and intrusive nature," stating that the search conducted here "was essentially a computer strip search."

The court noted that the border agents (mistakenly) believed Defendant was previously convicted of child pornography.

In determining that border agents here did have reasonable suspicion that Defendant had engaged in criminal activity, the court noted that the border agents (mistakenly) believed Defendant was previously convicted of child pornography, that he traveled frequently outside the United States to Mexico, a country known for child sex tourism, and that the border agents were informed by Immigration and Customs Enforcement that Defendant's profile matched that of persons targeted in "Operation Angel Watch," which was a program "help[ing] ICE [to] identify travel patterns of convicted sex offenders who may attempt to exploit children in foreign countries." Accordingly, the court ruled that the motion to suppress was erroneously granted.

Circuit Judge Consuelo Callahan dissented on the issue of whether a computer forensic search required reasonable suspicion, stating that the rule limits border agents' ability to perform their duties, alerts criminals that they "can hide their child pornography or terrorist connections in the recesses of their electronic devices," and that now "instead of knowing that they may search any and all property that crosses the border for illegal articles, [border agents] must ponder whether their searches are sufficiently 'comprehensive and intrusive.'"

Circuit Judge Milan Smith dissented, stating that "the majority's holding cripples law enforcement at the border by depriving border patrol agents of the clear administrative guidance they need to carry out core law enforcement activities." Judge Smith stated, "as a practical matter, suspicionless border searches of property make sense, in light of the sheer number of individuals crossing the border with electronic devices each day," that national security concerns override privacy matters in this case, and that the fact that computer files contain substantially more data than papers, which may be searched at the border without suspicion of illegal activity, has nothing to do with whether persons have a higher expectation of privacy with their digital devices. — *Bryan Johnson*

Colorado Enacts Civil Union Act

On March 12 the Colorado House of Representatives voted 39-26 to approve a Civil Union bill that had previously passed the Senate in February by a vote of 21-14. The law, which was signed by Governor John Hickenlooper on March 21, will take effect on May 1, 2013. The new law makes Colorado the 19th U.S. jurisdiction (18 states plus the District of Columbia) to recognize a legal status for same-sex couples the same or equivalent to marriage in terms of state law rights and responsibilities.

Following a recent trend in civil union legislation, the Colorado measure is open to both same-sex and different-sex couples, and provides that those who enter into civil unions would enjoy the same status as different-sex married couples under state law. However, even if the federal Defense of Marriage Act's Section 3 is declared unconstitutional by the Supreme Court this term, Colorado's failure to make a status called "marriage" available to same-sex couples most likely means that Colorado's civil union partners will not enjoy federal rights and recognition, although it remains possible that upon the dismantling of DOMA, new litigation might establish such claims. The legislature was not in a position to pass a marriage equality bill, even were the votes available, because the state's voters approved an anti-marriage constitutional amendment seven years ago. Current strategy is to plan a campaign to repeal the amendment and then enact a marriage equality law.

Colorado's failure to make a status called "marriage" available to same-sex couples most likely means that Colorado's civil union partners will not enjoy federal rights and recognition.

The Colorado enactment may also affect the potential impact of an affirmative Supreme Court ruling in *Hollingsworth v. Perry*, No. 12-144, the pending Prop 8 case. The Justice Department's amicus brief in *Hollingsworth* argues that states that have extended all the rights and responsibilities of marriage to same-sex couples cannot show that depriving same sex couples of the right to marry significantly advances an important governmental interest, as all the governmental interests cited by defenders of Prop 8 (and of DOMA Section 3) would not be affected by retitling civil unions as marriages. Thus, enacting a civil union measure but falling short of marriage potentially violates the 14th Amendment, either under the Justice Department's theory or under the broader theory argued on behalf of Plaintiffs-Respondents by David Boies and Ted Olson. The Justice Department's argument has been called the "8 State Solution," giving the Supreme Court an intermediate path between a narrow ruling striking down Prop 8 without ramifications outside California and a broad ruling effectively invalidating all existing bans on same-sex marriage. The Colorado enactment will require a slight adjustment to the "9 State Solution." (Sourced from *Advocate.com*, March 12.)

Or course, this enactment may have a contrary effect of adding renewed weight to the arguments by Proponents of Proposition 8 and by the House of Representatives Bipartisan Legal Advisory Group (BLAG) that gays now have sufficient political power, as exemplified by recent referendum victories and legislative victories on civil unions or marriage in several statutes, to preclude adopting the heightened scrutiny standard for judicial review of sexual orientation discrimination claims. ■

4th Circuit Finds Virginia Sodomy Law Facially Invalid in Habeas Case

In *MacDonald v. Moose*, 2013 WL 935778 (March 12, 2013), the U.S. Court of Appeals for the 4th Circuit took a position on how *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court's seminal decision regarding anti-sodomy statutes, should be interpreted. The 4th Circuit panel interpreted *Lawrence* as invalidating Virginia's anti-sodomy statute as facially unconstitutional under the Due Process Clause of the Fourteenth Amendment. Courts differ in their interpretation of *Lawrence*. Some courts hold that *Lawrence* invalidates anti-sodomy statutes in their entirety, while others hold that *Lawrence* simply invalidates any prohibition against sodomy between consenting adults.

The Texas law that was struck down in *Lawrence* applied only to "homosexual" sodomy. The 4th Circuit's adoption of the former and broader interpretation of *Lawrence* prevents anybody from being criminally charged based on his or her choice of partner or sexual preference. But while the interpretation of *Lawrence* adopted by the 4th Circuit may be morally correct and long overdue, the reasoning underlying the opinion is deeply flawed and circular and the dissent convincingly points out that the majority jumped through hoops to arrive at its ruling.

In September 2004, William Scott MacDonald, then 47, telephoned Amanda Johnson, then 17, and the two met in a parking lot. MacDonald got into Johnson's car and they drove to the Johnson's grandmother's house, where Johnson picked up a book. Upon her return to the vehicle, MacDonald propositioned Johnson for oral sex, which Johnson refused.

Three months later, MacDonald involved the local police by reporting a falsified account of the incident where he maintained that Johnson had sexually assaulted him. After interviewing Johnson, the police saw through MacDonald's ruse and charged him with, among other things, the felony offense of violating Virginia's criminal solicitation statute, which provides that any person over age 18 who "commands, entreats, or otherwise attempts to persuade another person under age eighteen to commit [a predicate felony, i.e., a felony other than murder], shall be guilty of a felony." The predicate felony in MacDonald's case was Virginia's Crimes Against Nature statute, which prohibits carnal knowledge by one person of another by the anus or mouth, otherwise known as sodomy. At a bench trial, MacDonald was convicted for the criminal solicitation offense. The case ultimately arrived before the 4th Circuit in a habeas corpus proceeding.

After being convicted, MacDonald moved the state trial court to dismiss the criminal solicitation charge. The trial court denied the motion, ruling that the anti-sodomy provision was constitutionally applied to MacDonald. In *Ulster County v. Allen*, 442 U.S. 140 (1979), the Supreme Court of the United States stated that "if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations;" meaning, if a state may constitutionality prohibit sodomy between adults and minors, then MacDonald does not have standing to challenge the anti-sodomy statute. There is no question that *Lawrence* did not hold that sodomy between adults and minors is constitutionally protected. Thus, the Virginia trial court concluded that the anti-sodomy provision was constitutional as it was applied to MacDonald and MacDonald therefore lacked standing to challenge the statute.

MacDonald appealed to the Court of Appeals of Virginia arguing, as he did in the Virginia trial court, that the anti-sodomy provision could not serve as a predicate felony for the criminal solicitation offense because the Supreme Court's decision in *Lawrence* invalidated any law prohibiting consensual sodomy between unrelated individuals who reached the age of consent, and a 17 year old could consent to sex in Virginia. If MacDonald's argument were accepted, then the anti-sodomy statute would be unconstitutional and MacDonald could not be prosecuted for the criminal solicitation offense.

The Virginia appeals court, using the same reasoning as the trial court, affirmed the conviction. Interestingly, in its decision the court cited its prior decision in *MacDonald v. Commonwealth*, 48 Va. App. 325 (Va. Ct. App. 2006), where MacDonald was being prosecuted for a prior criminal solicitation offense under practically identical circumstances. The Virginia Supreme Court had denied review to that 2006 ruling.

MacDonald filed a petition for habeas corpus with the Eastern District of Virginia, challenging the constitutionality of his conviction. The district court applied a very deferential standard of review (for reasons explained below) to conclude that the Virginia Court of Appeals did not interpret *Lawrence* in a manner contrary to clearly established federal law. With regard to MacDonald's as-applied challenge, the district court held that the anti-sodomy statute could constitutionally serve as a predicate offense under the solicitation statute because 17-year-olds are minors and *Lawrence* noted that the case before the Court did not involve minors.

Finally, MacDonald appealed the denial of his petition to the 4th Circuit. Generally, an appellate court would review a denial of a habeas petition de novo, but under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and relevant case law, when a habeas petitioner's constitutional

claim has been adjudicated on the merits in state court proceedings, a federal appellate court may not grant relief unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding. This is a highly deferential standard of review.

The threshold issue for the 4th Circuit was whether Virginia's anti-sodomy statute was constitutional as-applied to MacDonald. The Virginia courts and the U.S. district court all held that the anti-sodomy statute was constitutional as-applied to MacDonald because MacDonald solicited a minor for oral sex and the Constitution has not been construed to protect sex between adults and minors. Additionally, the courts stated that the Supreme Court's decision in *Ulster County*—which provides that a defendant does not have standing to challenge the constitutionality of a statute if it was constitutionally applied to him or her—prevents MacDonald from pursuing a facial challenge to the anti-sodomy statute. Despite the holdings of the three prior courts, the 4th Circuit held that "as we explain below, the anti-sodomy provision is unconstitutional when applied to any person." What is "explained below" is that the 4th Circuit finds anti-sodomy statutes to be facially unconstitutional.

Writing for the majority of the panel, Circuit Judge Robert Bruce King explains that anti-sodomy statutes are facially unconstitutional for three reasons. First, in *Lawrence* the Supreme Court expressly overruled its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld an anti-sodomy statute as constitutional when applied to homosexual couples. Because the Supreme Court's decision in *Lawrence* effectively invalidated the anti-sodomy statute in question in *Bowers* (which was not limited on its face to penalizing same-sex conduct), the 4th Circuit concluded that *Lawrence* similarly caused all anti-sodomy statutes to be constitutionally invalid.

Second, Judge King explained that the decisions by the Virginia state courts conflicted with the Virginia Supreme Court's decision in *Martin v. Ziherl*, 269 Va. 35 (Va. 2005), where that court held that a statute outlawing ordinary sexual intercourse between unmarried persons was constitutionally invalid under *Lawrence*. In both cases, the statutes prohibited consensual sexual activity between adults without specifying gender.

There is no question that *Lawrence* did not hold that sodomy between adults and minors is constitutionally protected.

Third, the 4th Circuit concluded that the Virginia statute could not be construed to remove the unconstitutional prohibition against consensual sodomy between adults while leaving intact a constitutional prohibition against sodomy with a minor, for two reasons: the statute does not mention the word 'minor,' and there is no indication that the intended purpose of the statute was to prohibit sexual relations between adults and minors. In addition, Virginia has another statute prohibiting sodomy between adults and minors under the age of fifteen. Interpreting the general anti-sodomy statute to limit its application to include minors 15 and older would conflict with the other statute by increasing the age beyond what the Virginia legislature had thought appropriate when it enacted that statute.

To summarize, the majority opinion appears to hold that the anti-sodomy statute is unconstitutional as-applied to MacDonald because it is facially unconstitutional. The court's logic seems circular, and the dissenting opinion by Circuit Judge Albert Diaz points to the gaps in the majority's reasoning and the overwhelming obstacles they were required to side-step to arrive at this holding.

The dissent points out that under AEDPA a federal courts' review of a habeas corpus petition may be granted only under exceptional circumstances: where the state court decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law as set forth be the Supreme Court. Because lower courts are split on the interpretation of *Lawrence*, the Virginia state courts' decision is arguably not contrary to or an unreasonable applicable of *clearly established federal law*, Judge Diaz argues, and the majority should have deferred to the state court decisions.

Additionally, the dissent points out that the majority believes that the Supreme Court intended to make all sodomy statutes unconstitutional by its act of overturning *Bowers*. The dissent notes language in *Lawrence* that indicates a lack of intent by the Supreme Court to invalidate all sodomy statutes. Presumably, the Supreme Court would have expressly stated that all sodomy statutes are unconstitutional if it so intended, but instead it emphasized the specific context in which the case arose: allegations of consensual sodomy between two adult men in private. The precedential weight of the court's 2-1 decision appears questionable, and it will be interesting to see whether the state seeks en banc review. – *Gillad Matiteyahu*

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

Ohio Court of Appeals Finds No Sexual Orientation Protection under Ohio Law

An Ohio Court of Appeals panel rejected an employee's argument that sexual orientation is included within the meaning of the term "sex" under Ohio's employment discrimination statute in *Inskeep v. Western Reserve Transit Authority*, 2013 WL 979054, 2013-Ohio-897 (7th Dist. Ct. App., March 8, 2013).

Mathew Inskeep appealed a lower court's decision granting summary judgment in favor of Western Reserve Transit Authority (WRTA). Inskeep brought forth two claims that were dismissed. The first was a sexual harassment claim and the second was a claim of negligent infliction of emotional distress. With regard to his first claim, Inskeep wanted the court to hold that harassment based upon sexual orientation is actionable as a form of sex discrimination under the Ohio law R.C. 4112.02(A), which prohibits an employer from discriminating because of a person's sex. This is problematic, according to the court, because discrimination due to sexual orientation is not necessarily discrimination because of a person's sex. Inskeep would have to show that he was targeted because he was a male, said the court. And, with regard to his second claim, Inskeep argued that the trial court had ignored his attached affidavit in response to WRTA's summary judgment motion, expanding on his emotional distress claim. The court ruled that the affidavit was not something it could consider in its decision.

Inskeep filed his first complaint against WRTA after an incident at work. He explained that while he was driving a bus around the garage at work, another employee set off firecrackers, causing him great panic, fear and distress. He believed these firecrackers were an explosion. This, he claimed, demonstrates that he was subject to sexual harassment. He claimed to have experienced emotional distress resulting from the harassment. Many states have enacted legislation prohibiting discrimination against homosexuals, but Ohio is not one of them. Inskeep's "legal" argument is not really a legal argument. He cites *dictionary.com* as authority.

Unfortunately for Inskeep, he cannot prove that any underlying discrimination/harassment was due to his sex. It is not clear from the court's terse summary of the facts how he claims that he experienced discrimination/harassment due to his sexual orientation. Proving the latter would not have assisted him in Ohio, given the court's narrow construction of the sex discrimination provision, but it would have been interesting to know why he felt he experienced sexual harassment and not simply plain harassment from his coworkers and WRTA. The Supreme Court of Ohio has yet to address whether Ohio law's use of the word "sex" would include "sexual orientation." *See Retterer v. Whirlpool Corp.*, 89 Ohio St.3d 1215 (2000), which might have addressed the question had the court not dismissed the appeal. In another case decided the same day as *Retterer* was dismissed, *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000), the court concluded that one man could sexually harass another man if the actions were done because of sex. This theory of the case stems from the adoption of a United States Supreme Court decision, *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1997), which held that same-sex harassment could be actionable under Title VII of the federal Civil Rights Act if the plaintiff showed that he was harassed because of his sex.

Some states have decided to enact protections, so that sexual orientation discrimination claims are not actionable under state law. Ohio has yet to take that affirmative step. Until that time, the court of appeals was bound to rule that sexual orientation discrimination is not actionable under R.C. 4112.02(A) of the Ohio law.

Inskeep's "legal" argument is not really a legal argument. He cites *dictionary.com* as authority.

Inskeep did not have more luck arguing his negligent infliction of emotional distress (NIED) claim. His sole argument was that the trial court ignored his affidavit, which articulated that he feared physical consequences when someone lit firecrackers near the bus he was driving. He further argued that his employer failed to take action, which itself caused emotional distress. Under Ohio tort law, however, Inskeep would have a cause of action only if he witnessed or experienced a dangerous accident or was subjected to actual physical peril. – *Tara Scavo*

Tara Scavo is an attorney in Washington, D.C

N.Y. Appellate Division Reinstates Arbitrator's Award of Discipline for Gay School Librarian

Although Justice Manuel J. Mendez, New York Supreme Court, New York County, found that a labor arbitrator's decision to punish a gay male school librarian for engaging in conduct broadly similar to that allegedly engaged in by his heterosexual female counterpart was "shocking to the conscience" and vacated the award, his decision was reversed by the Appellate Division, First Department, in a decision released on March 5, 2013. *Asch v NYC Board/Department of Education*, 2013 WL 791252 (N.Y.A.D. 1 Dept.). The appellate panel found that "the hearing officer carefully took into account the seriousness of the charges, as well as the petitioner's lack of prior disciplinary history during his 20-year career with the DOE and the likelihood that petitioner would correct his inappropriate behavior. Having seen and heard the witnesses, he was in a far superior position than the motion court to make a determination as to an appropriate penalty to impose. Thus, it cannot be said, under all of the circumstances here, the penalty imposed is either shocking to the conscience or arbitrary and capricious as petitioner contends."

Christopher Asch had been a high school librarian in the New York City school system for over 20 years. In 2008, charges were filed against him for incidents that allegedly occurred between 2005 and 2008, and after investigations by the Office of the Special Commissioner of Investigations (SCI), the Department of Education (DOE) brought charges against him. The charges stemmed from two separate types of incidents.

The first involving a field trip with the school's quiz team during which Asch served as a last minute fill-in for a parent chaperone who was unable to attend, brought charges of neglect of duty. Apparently, as he joined the trip at the last minute, Asch was unaware of the need to, or neglected to, get permission from one of the students' parents.

The second charge stemmed from allegations of misconduct with students, involving "inappropriate" touching and actions. These allegations were brought to school officials' attention by a "problem" student, who cobbled together emails by cutting and pasting portions of other correspondence with students, which seemed to indicate that Asch touched the students inappropriately. The alleged touching included incidents where Asch touched the backs or shoulders of students and lifted the leg of one student while saying words to the effect of "open mouth, insert foot" after the student said something particularly politically incorrect.

The Appellate Division noted that there was no evidence of anti-gay bias on the part of the students who testified.

The charges were subject to mandatory arbitration, and the arbitrator, rejecting the BOE's call for discharge, recommended that Asch be suspended without pay for 6 months and required to attend seminars on appropriate conduct. The arbitrator found, based on student testimony, that Asch's touching of students was not "sexual" but failed to respect "boundaries." Some testimony suggested that a female heterosexual librarian also touched students, but the arbitrator found the details distinguishable.

Asch appealed, and Justice Mendez found that, for a number of reasons, the arbitration decision should be overturned as it "shocked the conscience" of the court. For the court to overturn an award resulting from mandatory arbitration, the arbitrator's decision must be "so disproportionate to the offense as to shock the conscience of the court."

The court, for a number of reasons, found this to be the case. The arbitrator dismissed the idea that the touching was sexual in nature, and simply found that some could find it inappropriate, wrote Justice Mendez. Additionally, regarding the field trip, the arbitrator found that Asch was responsible to obtain permission for his students even though he was a last minute fill in chaperone, and accordingly neglected his duties, but the court noted that Asch had no prior blemishes on his record and this seemed to be an understandable mistake, unworthy of suspension.

The bulk of the Supreme Court opinion is focused on the idea that homophobic bias by students played a role in the charges against Asch. Testimony from some students showed that rumors went around the school that Asch was a member of the North American Man-Boy Love Association, and that one of the complaining students called Asch a "faggot." Perhaps the greatest issue, however, was that testimony showed that a heterosexual female librarian also touched students to get their attention, and no charges or allegations were ever brought against her. Indeed, some of the students testified that the touching described in the allegations was generally acceptable as a means of communication in the quiet confines of the library.

Accordingly, the Supreme Court overturned the arbitration decision, ordered that Asch be paid back pay, reinstated, and axed the requirement that he attend counseling.

The Appellate Division, however, felt differently, largely due to the deference given to arbitration decisions, noting that "arbitration awards may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational,

or exceeds a specifically enumerated limitation on his power." *Matter of Wicks Constr. [Green]*, 295 A.D.2d 527 (2nd Dept. 2002). Additionally, an arbitration award can be overturned if it runs counter to well established and accepted constitutional ideas.

In this instance, the Appellate Division panel notes that the trial court based its decision at least in part on its determination that the effect of the award is to discriminate against Asch based on his sexual orientation. The Executive Law, section 296(1)(a), prohibits employment discrimination on this basis, and the Supreme Court expressly relied on this in overturning the arbitration decision.

However, the Appellate Division noted that there was no evidence of anti-gay bias on the part of the students who testified (even though the individual who solicited emails from other students detailing Asch's conduct had once called him a "faggot"). Perhaps most damningly, though, the Appellate Division pointed to testimony by students that while other librarians touched students to get their attention, Asch was the only one who "rubbed" students' backs or necks and touched their hair. Additionally, Asch's heterosexual female colleague testified that, if the alleged conduct were true, she would have found it inappropriate.

Accordingly the Appellate Division found that neither the charges nor the penalty were motivated by animus toward Asch's sexual orientation, and reinstated the arbitration award, stating that the Supreme Court erroneously substituted its own judgment for that of the arbitration hearing officer. Further, since the hearing officer was present at the time of testimony, the Court defers to him on interpretation of the facts and reliability of witnesses.

Since the award, in their view, is not arbitrary nor shocking, the Appellate Division held that Asch's suspension without pay stands, and that he must attend counseling to learn how to appropriately act around others. – *Stephen Woods*

Stephen E. Woods is a Licensing Associate at Condé Nast Publications. [Editor's Note: An irony of this case is that the hearing officer in this case is openly gay and totally "out" professionally.]

Threat against Gay Relative and Her Partner Posted on Facebook Page is Felony in Florida

On March 18, the First District Court of Appeal of Florida upheld the conviction of Timothy Ryan O'Leary under a Florida statute making it a felony to send a communication threatening to kill or do serious bodily harm to a person, finding that the statute applied to a threat he posted on his Facebook.com home page against a lesbian relative and her partner. O'Leary, who pled no-contest after the Duval County Circuit Court refused to dismiss the charges, was sentenced to ten years in prison followed by five years of probation (reduced to two in response to a post-trial motion). In upholding the trial court's refusal to dismiss the case, the court of appeal further developed Florida criminal law in relation to social media. *O'Leary v. State*, 2013 Westlaw 1091690 (Fla.App., 1st Dist.).

According to the opinion for the Court of Appeal by Judge William A. Van Nortwick, Jr., O'Leary posted the following message on his Facebook page: "In pertinent part, the posting identified the relative and her partner by name and stated that 'Fuck my [relative] for choosin to be a lesbian and fuck [the partner] cuz you're an ugly ass bitch … if you ever talk to me like you got a set of nuts between your legs again … I'm gonna fuck you up and bury your bitch ass. U wanna act like a man. I'll tear the concrete up with your face and drag you back to your doorstep. U better watch how the fuck you talk to people. You were born a woman and you better stay one.'" O'Leary's cousin Michael, one of his Facebook friends, saw the message and showed it to his uncle, who then informed the victims about the posting.

O'Leary was charged with two counts of violating Section 836.10, Florida Statutes, which says that "sending" such a threat to somebody is a felony. O'Leary moved to dismiss the charges, arguing that posting something on his Facebook page does not constitute "sending" it to anybody. In the absence of any similar prior case, the court had to determine whether the statute would apply to a posting on social media that was not specifically directed to the victims of the threat.

Judge Van Nortwick summarized the ruling by trial judge Adrian G. Soud, who found that the statute applied on two grounds. "First, the trial court noted that, at the time Michael viewed the posting, it was accessible by any member of the public who wanted to view appellant's Facebook page. Second, the trial court found that, even if it considered the Facebook posting to have been sent only to Michael, the facts still presented a prima facie violation of the statute. The trial court observed that the posting was an electronic communication, sent to Michael (the recipient), which threatened to kill or do serious bodily harm to a member of the recipient's family."

The court of appeal cited a prior decision, *State v. Wise*, 664 So.2d 1028 (Fla.App., 2nd Dist. 1995), that established a three-part test to analyze charges under this statute, holding that it is violated when "(1) a person writes or composes a threat to kill or do bodily injury; (2) the person sends or procures the sending of that communication to another person; and (3) the threat is to the recipient of the communication or a member of his family." The court noted that the statute as originally enacted had been amended specifically to apply to "electronic communication." Prior cases involved threats communicated by snail mail.

Judge Van Nortwick said that apparently no prior Florida decision has considered precisely the question presented by what O'Leary did, but "the existing Florida case law defining 'sending' under the statute is applicable to the instant appeal" since the statute includes "electronic communication." "Here," he wrote, "appellant composed a threat to kill or do serious bodily injury to the victims. Consequently, resolution of this appeal turns on the question of whether appellant 'sent' the threatening message by posting it on his personal Facebook page."

O'Leary argued that although he

had "published" the message, he had not "sent" it to anybody specifically, as he hadn't asked anybody to view it and hadn't directed it to any specific person. "However," wrote the judge, "a common sense review of the facts suggests that appellant has done more than he contends. When a person composes a statement of thought, and then displays the composition in such a way that someone else can see it, that person has completed the first step in the *Wise* court's definition of 'sending.' When the threatened individual, or a family member of the threatened individual, views and receives the thoughts made available by the composer, the second step in the *Wise* definition is completed. At that point, the statement is 'sent' for purposes of Section 836.10. Furthermore, Internet technologies 'generally do not involve communications sent directly to another. Rather, communications are posted for the whole world to see, or, in a closed network for a particular community to see, such as a community of 'Facebook friends,'" citing a law review article about "cyber-victimization" by Jacqueline D. Lipton. (See 26 Berkeley Tech. L.J. 1103 [2011].)

Since O'Leary had requested his cousin Michael to be his "friend" on Facebook, anything he posted on his Facebook page he presumably wished to communicate to his "friends," including Michael. "Given the mission of Facebook," wrote the judge, "there is no logical reason to post comments other than to communicate them to other Facebook users. Had appellant desired to put his thoughts into writing for his own personal contemplation, he could simply have recorded them in a private journal, diary, or any other medium that is not accessible by other people. Thus, by the affirmative act of posting the threats on Facebook, even though it was on his own personal page, appellant 'sent' the threatening statements to all of his Facebook friends, including Michael." Thus, the violation of the statute was complete, because the threat had been sent to Michael, and it concerned a relative of Michael.

Thus, the court affirmed Circuit Judge Soud's denial of O'Leary's motion to dismiss the charge, O'Leary's "no contest" plea stands, and so does the prison sentence. ■

New Mexico Marriage Definition Questioned

Santa Fe City Attorney Geno Zamora signed off on a memorandum dated March 19, 2013, stating that "same-sex marriage is permitted in New Mexico," according to reports in various newspapers, including the March 20 edition of the *Albuquerque Journal*. The memorandum cites the following evidence for this conclusion:

1. New Mexico has a marriage recognition statute, Section 40-1-4, under which the state's attorney general opined in 2011 (N.M.AG Op. No. 11-01) that same-sex marriages performed in other jurisdictions would be recognized in New Mexico.

Zamora concludes that if a same-sex couple is denied a license, they could file for a writ of mandamus in the district court ordering the county clerk to issue one.

Zamora's memorandum was persuasive to Mayor David Coss and City Council member Patti Bushee, who issued a public call for Santa Fe County Clerk Geraldine Salazar to begin issuing marriage licenses to same-sex couples. She has demurred for now, saying that she doesn't feel "free and clear" to do so because "the Legislature creates the laws in our state and our judges interpret these laws."

Attorney General Gary King, who issued the marriage-recognition opinion in 2011, has not received a request for an opinion on whether same-sex couples can marry under existing New Mexico law.

2. New Mexico's statutory definition of marriage is gender neutral, describing it as a "civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential."

3. The New Mexico statute setting out grounds upon which a marriage license can be denied does not mention the sex of the individuals, authorizing denial only when the applicants are closely related or at least one of them is a minor.

4. The New Mexico Constitution has an equal rights amendment banning sex discrimination by the state, which would take priority over any statute.

5. Although the marriage license application form, as specified by statute, is gendered, Section 40-1-12 allows sections of the marriage code to be waived.

She feels that her oath of office forbids her from acting "counter to the laws of New Mexico," and evidently the City Attorney's interpretation of those laws are not good enough for her.

Attorney General Gary King, who issued the marriage-recognition opinion in 2011, has not received a request for an opinion on whether same-sex couples can marry under existing New Mexico law, but a spokesperson indicated to the Journal that he would welcome the opportunity to respond for a request for his opinion. The state legislature has failed to advance a proposed marriage equality bill, but has also failed to advance a proposed constitutional amendment banning same-sex marriages, so it seems nothing is likely to get through the legislature on either side of the issue. ■

CIVIL LITIGATION

D.C. CIRCUIT – A panel of the U.S. Court of Appeals for the District of Columbia Circuit revived a federal Privacy Act claim on behalf of some lawyers who had applied as recent law graduates to the Justice Department's "Honors Program" in 2006 but were denied interviews, allegedly because of their protected First Amendment activities. One of the plaintiffs in the case, Matt Faiella, was actively involved in opposition to military recruiting at Cornell because of the "don't ask, don't tell" anti-gay military policy. Attorneys within the Justice Department filed numerous complaints about "political screening" in the Honors Program by political appointees seeking to eliminate candidates whose views were deemed "inconsistent" with those of the Bush Administration, resulting in a Congressional investigation and, ultimately, this lawsuit. (It also resulted in the discharge or reassignment of some Justice Department employees implicated in the improper screening activities.) The investigation uncovered, inter alia, that applicants whose records showed support for "gay rights" would be screened out. Many claims included in the original complaint have washed out of the case, but there remains a Privacy Act claim concerning materials that the "screeners" obtained through internet searches on the candidates and attached to the printouts of their applications. When these materials were sought through discovery, it turned out that one of the "screeners" had the documents destroyed after complaints about the program surfaced. The district court granted the government's motion to end the case on grounds of lack of evidence, refusing to draw an adverse inference from spoliation of documents. The D.C. Circuit said that the plaintiffs were entitled to the inference, and reversed in a March 29 decision. The court observed that under the Privacy Act, there was a requirement to preserve the records once it became likely that they would be relevant to litigation; in this case, once numerous complaints about the screening process had surfaced, reasoned the court, the resulting litigation was reasonably foreseeable. *Gerlich v. U.S. Department of Justice*, No. 09-5354.

2ND CIRCUIT – In an unpublished decision, a panel of the U.S. Court of Appeals for the 2nd Circuit has denied in part and dismissed in part a petition for review of denial of the petitioner's application for asylum, withholding of removal or protection under the Convention Against Torture. *Mukhamedjanova v. Holder*, 2013 WL 1188944 (March 25, 2013). The petitioner is a citizen of Uzbekistan. The short summary order by the court provides few facts, but suggests that the petitioner's case foundered due to inconsistencies in her testimony leading to adverse credibility determinations by the Immigration Judge, backed up by the Board of Immigration Appeals. The petitioner "argues that the agency's adverse credibility determination did not reach her fear of future persecution because it did not enter an explicit finding as to her sexual orientation," wrote the court, but continued, "However, the IJ explicitly cited her inconsistent testimony and lack of corroboration on this point as part of the adverse credibility determination." The court also found that the BIA did not abuse its discretion in refusing to remand the case to the IJ for reconsideration in light of additional evidence presented by the petitioner, because the evidence "did not rehabilitate her credibility and thus was not material to her claim." Although the court fails to provide pronouns to clarify its terse summary of the factual allegations, it seems that the petition claimed to have a same-sex partner and that the partner's husband had made threats against her, but that there were internal inconsistencies in her testimony about how and when she met her partner and the circumstances under which she claimed to have received various threats.

9TH CIRCUIT – A panel of the U.S. Court of Appeals for the 9th Circuit held in *Thomas v. Holder*, 2013 WL 792826 (March 5, 2013)(not selected for publication in F.3d), that an HIV+ bisexual man from Grenada who was targeted for removal from the United States in 2009 because of a 1999 state court guilty plea to the transportation or sale of a small amount of cocaine base, for which he had been sentenced in a California court to 180 days in county jail, three years' probation, and a $200 fine, should be entitled to a reconsideration of his case by the Board of Immigration Appeals (BIA). After the removal proceedings began, the man had his conviction expunged under California law, but the Immigration Judge held him to be removable nonetheless, stating that the conviction was still applicable for purposes of immigration law and, applying the presumption established in *Matter of Y-L-*, 23 I.&N. Dec. 270 (BIA 2002), all drug trafficking crimes are "particularly serious crimes" for purposes of removal. The BIA summarily affirmed this holding. The Court pointed out that under its own precedents it is improper to apply the presumption retroactively to conduct pre-dating *Matter of Y-L-*, and that the facts in this case are "virtually indistinguishable" from the facts in the case where the 9th Circuit established this non-retroactivity rule, *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007). Thus, the man is entitled to an individualized consideration whether the crime to which he pled was sufficiently serious to justify mandatory removal.

CALIFORNIA – With entry of a final order by District Judge Irma Gonzalez on March 15 and an announcement by the ACLU of Southern California that it will not be filing a petition for certiorari with the Supreme Court in *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012), long-

running litigation over city leases of park facilities to the local Boy Scouts of America units is finally at an end. The 9th Circuit ruled in December 2012 that the leases did not violate state or federal constitutional bans on establishment of religion, overturning a district court ruling. *San Diego Union-Tribune*, March 20.

CALIFORNIA - *Bloomberg Daily Labor Report,* 55 DLR A-1 (March 21, 2013), reported that the Los Angeles City Council has approved a settlement in *Gotham v. L.A. Police Department,* No. BC 465451 (settlement approved 3/20/2013), a discrimination suit pending in Los Angeles Superior Court. Two lesbian LAPD officers claimed they had been continually harassed by a supervisor and co-workers due to their sexual orientation and sex. The two plaintiffs will split a settlement reported at $1.25 million. The case was brought under the California Fair Employment and Housing Act, which forbids discrimination based on sex and sexual orientation, and Labor Code Section 1102.5, which has been construed to provide an alternative source of protection for openly LGBT employees. The plaintiffs, Linda Gotham and Lynn Whitey, are represented by Matthew S. McNicholas of Los Angeles.

MICHIGAN – U.S. District Judge Bernard Friedman announced on March 7 that he would abstain from ruling on a pending same-sex marriage/adoption case until after the Supreme Court announces its decisions in the Prop 8 and DOMA cases. April DeBoer and Jayne Rowse brought suit challenging the refusal under Michigan law to allow them to adopt each other's children in order to form one family unit. At Judge Friedman's suggestion, they broadened their suit to challenge the denial of marriage equality in Michigan, and hopes were high that he would issue a ruling from the bench on March 7. The women indicated that they would be delighted to marry in order to be able to do step-parent adoptions. Their lawyer, Dana Nessel, arguing that the marriage ban violates the 14th Amendment, said, "Other than to discriminate against gays and lesbians, this law serves no state purpose. Bigotry against a certain class of people is not a state purpose." State Attorney General Bill Schuette's office is defending the law in this case. *Detroit Free Press*, March 7.

NEW MEXICO – The ACLU's national LGBT Rights Project, the ACLU of New Mexico, and the National Center for Lesbian Rights have teamed up with local lawyers and same-sex couples to file *Griego v. Oliver* in the 2nd Judicial District Court, Bernalillo County, seeking a declaratory judgment that same-sex couples have a state constitutional right to marry and an injunction requiring the state to issue marriage licenses to same-sex couples. The March 21 lawsuit was filed just days after Santa Fe City Attorney Geno Zamora issued an opinion stating that same-sex couples have a right to marry under New Mexico law (see story above). Zamora's opinion was not binding on the local county clerk, however, who refused to issue marriage licenses without orders from the state. New Mexico is one of a handful of states that has neither enacted a constitutional amendment against same-sex marriage or a mini-DOMA statute. The suit argues that refusal to issue marriage licenses to the plaintiff couples violates the state constitution's due process and equal protection requirements in art. II, Secs. 4 and 18, and is inconsistent with an array of statues forbidding sexual orientation discrimination. The suit also alleges violations of the state's equal rights amendment, forbidding sex discrimination, and of provisions protecting freedom of speech and association, as well as the catch-all protection for inherent and inalienable rights. Local New Mexico counsel include Peter S. Kierst, Lynn Mostoller, Laura Schauer Ives, Alexandra Freedman Smith, N. Lynn Perls, J. Kate Girard, and Maureen A. Sanders. If the U.S. Supreme Court issues a broadly-worded marriage equality ruling in the Proposition 8 case, this litigation may become superfluous, but alternatively it might serve as a ready vehicle for quick implementation of any such ruling. In the event the U.S. Supreme Court decision proves disappointing, this case would provide a vehicle to proceed under state constitutional law, similar to pending marriage equality litigation in the state courts in Illinois.

NORTH CAROLINA – An attempt to challenge the constitutionality of North Carolina's marriage laws, including its ban on same-sex marriage, was halted by the Court of Appeals of North Carolina on March 5 when it determined that the plaintiffs had failed to name a proper defendant in the case. *Thigpen v. Cooper*, 2013 WL 791579 (N.C.App., March 5, 2013). The plaintiffs, a group of religious ministers and lay people brought suit seeking a declaratory judgment that several provisions of North Carolina's marriage law violated their rights under the state and federal constitution, citing 42 U.S.C. Sec. 1983 in support of their federal constitutional claims of free exercise of religion and separation of church and state. They named as defendant North Carolina's Attorney General, Roy A. Cooper, III, and, in an amended complaint, the state of North Carolina. Some parts of their state constitutional claims were abandoned after North Carolina voters passed their state marriage amendment banning same-sex marriage last spring. The trial judge Guilford County Superior Court Judge Judson D. DeRamus, Jr., granted a motion to dismiss, and the court of appeals endorsed Judge DeRamus's view that no proper defendant had been sued. Relying upon the U.S. Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), the court of appeals

pointed out that U.S. Supreme Court has rejected the argument that a state attorney general could be sued for declaratory relief on the theory that he stands as a "surrogate" for the state or as the state officer charged with defending the constitutionality of statutes. "Under *Ex Parte Young*," wrote Judge Geer, "plaintiffs must show that Attorney General Cooper has some connection with the enforcement of the marriage statutes alleged to be unconstitutional. Because plaintiffs have not made any showing that Attorney General Cooper plays any role in the enforcement of the statutes, they have failed to demonstrate that the Attorney General has engaged in an ongoing violation of the federal constitution and, therefore, have not established that he is a 'person' for purposes of Sec. 1983." Neither is the state itself a "person" for this purpose, as required under Section 1983, which makes liable "any persons who, under color of state law… subjects, or causes to be subjected, any citizen of the United States… to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…" In marriage litigation in other jurisdictions, this requirement is normally met by naming as defendants the clerks who deny marriage licenses and/or their superiors in the pertinent government agency that administers the marriage license system for the state, and standing is normally satisfied by the plaintiffs having applied for and been denied such a license.

OHIO – In what was reportedly the first prosecution for gender identity discrimination under the human rights law in the city of Columbus, Franklin County Municipal Court Judge H. William Politt, Jr., levied a fine of $1,000 against Columbus Hospitality Management, owners of the Capital Club, a private business club, based on a discrimination charge brought by Savanna DeLong (formerly Joseph Scott DeLong), a "contract employee" who alleged that she lost work after informing the Club that she was in the process of male to female gender transition. According to a report published on-line by LGBTQNationa.com, the company denied violating the law, but pleaded "no contest" in court, its president stating that it would have been too costly to litigate the case and accepting the fine was "the best business decision for us." The story states that DeLong filed a complaint with the EEOC that was dismissed because "federal anti-discrimination laws don't cover LGBT Americans." This is not entirely accurate, inasmuch as the EEOC now takes the position that gender identity discrimination is sex discrimination forbidden under Title VII; one speculates that this case was dismissed before EEOC embraced that position, or perhaps that DeLong's status as an independent contractor rather than an employee put her claim outside the EEOC's jurisdiction, which applies only to discrimination in employment. Columbus's human rights ordinance was amended to add gender identity discrimination in 2008, and apparently applies more broadly to business dealings, not just employment.

PENNSYLVANIA - *The Legal Intelligencer* a Philadelphia newspaper, reported on March 22 that Jeffrey Downs, a gay personal injury lawyer formerly associated with Anapol Schwartz Weiss Cohan Feldman & Smalley, has filed a suit in Philadelphia Court of Common Pleas against his former firm, another firm, Raynes McCarty, and one partner at each of those firms, concerning the circumstances under which Downs left Anapol Schwartz and sought employment at Raynes McCarty. The story told in the article by Zack Needles is complicated. Downs was a senior associate at Anapol Schwartz with a book of business worth several million dollars when a partner who was moving to Raynes McCarty invited him to follow along, which invitation Downs took up. Downs alleges in his complaint several incidents at Anapol Schwartz concerning his sexuality, including statements that he did not need certain benefits because as a gay man he did not have a "family" to support, and some derogatory, stereotypically anti-gay comments voiced by other attorneys at a firm meeting to discuss establishing Facebook pages for attorneys as a marketing tool. (Downs had expressed reservations about establishing Facebook pages and putting personal information on them, as suggested by the firm's marketing staff.) Downs alleges that his move to Raynes McCarty was scuttled when a partner communicated to Raynes incorrect information that Downs was planning to sue Anapol Schwartz, and that since then he has been unable to obtain comparable employment, working for much less pay at a PI defense firm. The suit alleges defamation, negligent misrepresentation, tortious interference with prospective business and negligence on the part of Raynes McCarty for withdrawing Downs' employment after it has already released promotional material about his joining the firm. A March 23 blog posting by Jane Genova on *Law and More*, 2013 WLNR 7197009, speculates that because this legal drama is set in Philadelphia, it won't garner as much press attention as the New York-centered *Charney v. Sullivan & Cromwell* case of about five years ago, which was settled before going to trial.

UTAH – The *Salt Lake Tribune* reported on March 25 that three same-sex couples filed suit in U.S. District Court, contending that Amendment 3 of the Utah Constitution, a measure banning same-sex marriages adopted in 2005, violates the 14th Amendment. The lawsuit is being supported by an organization called Restore Our Humanity, which hired the law firm of Magleby & Greenwood to represent the plaintiffs, who are identified in the article as Karen Archer and Kate Coll (married in Iowa but denied recognition of their marriage by Utah) and two same-

sex couples resident in Utah who seek to marry: Derek L. Kitchen and Moudi D. Sbeity, and Laurie Wood and Kody Partridge. They name as defendants Gov. Gary Herbert, Attorney General John Swallow, and Salt Lake County Clerk Sherrie Swensen.

CRIMINAL LITIGATION

DISTRICT OF COLUMBIA – Daniel Choi has been convicted with a criminal misdemeanor for his part in a demonstration at the White House against the don't ask, don't tell policy shortly before it was provisionally repealed by Congress in 2010. Choi and others chained themselves to the White House fence and resisted police orders to leave. Choi was fined $100 on March 28 by U.S. Magistrate Judge John M. Facciola in a proceeding in which Choi represented himself and did some acting out, bringing cautionary language from the judge. *Washington Post*, March 28.

MISSISSIPPI – Affirming a conviction of sexual battery of a mentally deficient person, the Court of Appeals of Mississippi upheld a sentence of 18 years in prison for Alberto Santos, who claimed that his sexual activity with the 17-year-old son of an acquaintance's girlfriend was consensual and that the state had failed to meet its burden of showing that the boy was "mentally deficient." *Santos v. State*, 2013 WL 791841 (March 5, 2013). Santos, his friend Timothy, Timothy's girlfriend, and the girlfriend's teenage son were sitting in the master bedroom of Timothy's house watching television together. Timothy closed his eyes, pretending to fall asleep, so that Santos would leave. The girlfriend asked her son to escort Santos to the door. "It became unusually quiet afterwards," wrote Judge Barnes for the en banc court, "so Timothy went to check on [the boy] in his bedroom" and walked in on the boy and Santos "with their pants down around their knees. The two quickly pulled their pants up. Timothy, who was shocked, just told Santos to leave," and ultimately called the police. The boy was taken to the hospital for a "rape kit" test, which found traces of semen on his pants, with DNA matching Santos. At trial, the boy's teacher and counselors testified that he had the mentality of a very young child, but Santos argued that the boy's own testimony showed that he understood what was happening and was not so deficient as to come within the prohibition of the statute. "We agree that [the boy] did appear to understand that he engaged in a sexual act and that he had some appreciation that what was happening was wrong," wrote the court, but nonetheless it found that there was "sufficient evidence presented at the trial from which a jury could find beyond a reasonable doubt that [the boy] suffered from a mental deficiency. Moreover, the testimony sufficiently showed that [the boy]'s mental age was that of a young child," as exemplified by the simplistic answer he gave when he was asked whether he understood the court's instruction to "swear to tell the truth."

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FEDERAL – On March 7 President Obama signed into law the version of the Violence Against Women Act (VAWA) that was passed after a year's delay over the inclusion, inter alia, of provisions extending domestic violence protections to LGBT families. The House of Representatives first voted down the Republican version of the measure, which omitted such protection, and then passed the version that had been sent over after passage by the Senate, which included the LGBT-specific provisions. Thus, for the first time, federal law will take account of the existence of LGBT families in addressing the issue of domestic violence. *metroweekly.com*, March 7.

ARIZONA – After Phoenix passed a measure banning discrimination on the basis of sexual orientation or gender identity, State Rep. John Kavanagh (R-Fountain Hills), introduced a bill the would prohibit cities and local governments from passing rules that might impair the ability of businesses and other facilities to exclude transgender people from restroom and locker room facilities that are normally designated for use by one gender. Kavanagh premised his bill as a form of privacy protection for individuals who would not want to share such facilities with transgender individuals. Opposing the measure, Rep. Andrew Sherwood (D-Tempe) stated, "There are over 160 cities and towns across the country that prohibit discrimination based on gender identity or expression. Other cities in Arizona have ordinances like the one the city of Phoenix just passed and they haven't resulted in people inappropriately using restrooms, putting public safety at risk or raising privacy concerns." Nonetheless, the measure received a favorable vote in committee, 7-4. *Phoenix Business Journal*, March 28.

FLORIDA – The Town Council of Bay Harbor Islands unanimously approved a Domestic Partnership Ordinance that guarantees town employees who are LGBT the same rights and benefits as all other city employees. *Save DADE* Press Release, March 20.

IOWA – They'll never give up. Even though marriage equality has been the law in Iowa for several years as a result of a unanimous state supreme court ruling and proposals to ban same-sex marriage through a state constitutional amendment have foundered in the

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legislature repeatedly, die-hard opponents of marriage equality in the Republican Party introduced a new proposed anti-marriage amendment in the House on March 5. Opponents of the measure predicted swift defeat, as it was introduced so near the end of the session as to be practically pointless. This leaves the logical conclusion that it was a "going on record" bill to reaffirm that the Iowa Republican Party remains firmly moored in the 1990s. *Des Moines Register*, March 6.

KANSAS – A bill proposing to shift authority to the state's Department of Health and Environment to determine whether persons with infectious conditions should be quarantined has raised fears that persons with HIV/AIDS might be subject to such action. Proponents of the bill argued that the main purpose of the legislation was to make it possible for the state to respond quickly to health emergencies through administrative action, rather than having to apply for court orders. The measure would give the Health Department discretionary authority to take such actions. The director of the state's Bureau of Epidemiology and Public Health Informatics, D. Charles Hunt, issued an "Open Letter Regarding Kansas House Bill 2183" stating, "Isolating persons with HIV infection or quarantining persons exposed to HIV would not be reasonably or medically necessary, and, therefore, would not be legal." *Fox4KC.com*, March 27.

KENTUCKY – Kentucky legislators approved H.B. 279, a measure intended to protect the right of individuals to discriminate against people based on their sincerely-held religious beliefs. The main purpose of the bill, apparently, is to exempt those with religiously-based anti-gay views from having to comply with local ordinances forbidding sexual orientation or gender identity discrimination, but presumably it protect any religiously-motivated discrimination. It was presented as a bill to protect religious liberty. Gay rights supporters in the state mounted a campaign to persuade the governor to veto it.

MARYLAND – The Senate Judicial Proceedings Committee voted 6-5 to reject SB 449, which would have amended the state's anti-discrimination statute to designate gender identity as a prohibited basis of discrimination. The March 14 vote was unexpected, in light of Democratic control of the committee. *Washington Blade*, March 14.

MICHIGAN – The city commission in Royal Oak approved a human rights ordinance prohibiting discrimination on numerous grounds, including sexual orientation, gender identity and HIV status. The vote was 6-1, reversing the results of a referendum held a dozen years ago, according to *The Detroit News* (March 6). The measure was drafted by City Attorney David Gillam at the request of the commission. The report noted that other municipalities in Michigan that ban such discrimination include Birmingham, Ferndale, Detroit, Ann Arbor, and Ypsilanti.

MINNESOTA – The Senate Judiciary Committee voted 5-3 on March 12 to approve a marriage equality bill, sending it to the Senate floor for debate. On March 11, the House Civil Law Committee began to take testimony on the marriage equality bill. This activity comes in the wake of the public's rejection in the November 2012 general election of a proposed anti-marriage constitutional amendment. In the same election, Republicans lost control of both houses of the legislature, inspiring marriage equality activists in Minnesota to push for a bill in the new Democrat-controlled legislature.

NEW JERSEY – The Senate's Health Committee voted 7-1, with 2 abstentions, to approve a bill that would prohibit minors from being subjected to so-called "conversion therapy" intended to change their sexual orientation from gay to straight. The measure, patterned on a recently enacted California law that is currently under attack in the federal courts on free speech grounds, was sponsored by Senator Ray Lesniak (D-Union), and will now be considered by the full Senate. A companion bill in the Assembly, sponsored by Tim Eustace (D-Maywood), has not been heard in committee yet. *Herald News* (West Paterson, NJ), March 19.

NORTH CAROLINA – Buncombe County Commissioners voted 4-3 on March 20 to approve a measure extending health and other benefits to domestic partners of county employees. The vote was strictly along party lines. The measure covers all domestic partners, regardless of gender or sexual orientation, and applies to health insurance, dental insurance, life insurance, family medical leave and other leave benefits. providing coverage to long-term domestic partners. Eligibility requires proof of a cohabiting relationship of at least 12 months and shared financial responsibility. The commissioners also voted to approve a workplace policy designed to create a "safe, supportive, and inclusive work environment that is free of offensive remarks, material or behavior," according to a March 20 report in the *Ashville Citizen-Times*.

PUERTO RICO – The Popular Democratic Party, which is the majority party in the legislature, is supporting a bill that would outlaw discrimination on account of gender or sexual orientation, and is backing another bill that would extend the protection of the commonwealth's domestic violence law

to same-sex couples. Shortly after taking office in January, Governor Alejandro Garcia Padilla signed an executive order extending health insurance coverage to unmarried cohabiting partners of executive branch employees, regardless of gender. *Huntsville Times* (Alabama), March 6.

RHODE ISLAND – The Senate Judiciary Committee held an extraordinarily long hearing on Senate Bill S-038, the pending marriage equality law, beginning early on March 21 and ended at 4:56 a.m. the following morning. The measure was approved in the state House of Representatives in January on a vote of 51-19, but the result in the Senate is not considered foreordained, even though Rhode Island remains the only New England state without marriage equality, and same-sex marriages performed elsewhere are recognized pursuant to an attorney general's opinion relying on comity in the absence of an express legislative or constitutional ban on such recognition. The high point of the hearing, to judge by media attention, was the testimony of 12-year-old Matthew Lannon, a 6th-grader with two mothers and two fathers. "Both my moms and my dads have been together for 14 years," said Lannon to the Senators. "Although they can't legally marry, their commitments are very, very real. Even though I'm only 12, I want to be someone who doesn't know discrimination. If there's one thing you don't mess with in life, it's love." This testimony, of course, went viral on youtube.com immediately. *Fall River Herald News*, March 23.

VERMONT – The House voted 139-5 to approve a bill that would require companies that have employees in Vermont to extend health care benefits to same-sex spouses of their employees on the same basis as benefits are provided to different-sex spouses. Same-sex marriage is available in Vermont, but some employers based outside the state have refused to treat employees with same-sex spouses as qualified for such benefits coverage, relying on the federal definition of marriage and the pervasive federal regulation of employee benefit plans under the Employee Retirement Income Security Act (ERISA). Although supporters of the bill concede that in a court challenge the measure might be held to be preempted by federal law, they are hoping that upon its passage employers will voluntarily comply rather than challenge it in the courts. As the vote count indicates, the measure enjoyed broad bipartisan support, with most House Republicans joining with Democrats in voting for the measure. All "no" votes came from Republicans. *Times Argus, Rutland Herald*, May 16.

WEST VIRGINIA – Representative Stephen Skinner (D-Jefferson), the legislature's only openly gay member, asked that the House Energy, Industry & Labor/Economic Development & Small Business Committee not proceed to consideration of his measure, H.B. 2856, a sexual orientation and gender identity discrimination bill, because he believes the votes are not there for committee approval. A similar bill passed the Senate in the previous session of the legislature, but died in the House. Skinner was concerned that in the course of committee consideration amendments might eliminate gender identity coverage and widen the religious exemptions, and preferred to defer consideration. *Charleston Daily Mail*, March 28.

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CONGRESSMEMBERS ASK FOR EXECUTIVE ORDER - *Advocate.com* reported on March 20 that 110 members of Congress had joined in a letter to President Barack Obama asking him to issue an executive order prohibiting federal contractors from discriminating in employment based on sexual orientation or gender identity. A similar letter went to the White House last year over the signatures of 72 members of Congress. The president has publically supported enactment of the Employment Non-Discrimination Act, which would ban sexual orientation or gender identity discrimination generally in the private and public sectors (and would necessarily include all federal contractors, since it is unlikely that firms so small as to avoid coverage under the federal law would have significant federal contracts), but White House spokespersons have insisted that the president favors the more permanent protection of a statute over the an executive order, which could be rescinded unilaterally by a subsequent administration. On the other hand, the president has sounded more assertive about using executive powers in the face of Congressional obstruction since the beginning of his second term in January, and the Republican-controlled House of Representatives is unlikely to bring ENDA to a vote during the current session. The Williams Institute estimates that 16.5 million American workers would be covered by such an executive order, as "federal contractors are one of the largest employer subsets in the country," according to *The Advocate* story. The EEOC has recently taken the position that gender identity discrimination is generally prohibited under Title VII of the Civil Rights Act of 1964, which would be binding on federal contractors, and federal courts have begun to be more receptive to that positions, as well as the assertion that in some cases LGBT employees may be protected against discrimination based on failure to conform to gender stereotypes, but federal courts continue to assert that straight-forward sexual orientation discrimination claims are not covered by Title VII, leaving a major gap in federal statutory protection against discrimination.

LAW & SOCIETY

A DOZEN MORE MARRIAGE EQUALITY STATES? – Ned Flaherty, Project Manager for Marriage Equality USA, posted an article online on March 11 asserting that a dozen more states would probably legalize same-sex marriages before the end of 2014, either through legislation or court decisions. The states on his list, in predicted order, are Illinois, Rhode Island, Delaware, New Jersey, Minnesota, Hawaii, Michigan, Oregon, Colorado, New Mexico, Nevada, and California. Of course, several of these hinged on the Supreme Court's expected rulings in the coming months in the Prop 8/DOMA cases, which could have an immediate impact in California and rapid effect in Hawaii and Nevada (where marriage litigation is pending before the 9th Circuit Court of Appeals). If all of these states fall into line, more than half of the population of the United States would be living in marriage equality jurisdictions within two years. But this could all happen much more quickly if the Supreme Court adopted the arguments being advanced by plaintiff-appellees in *Hollingsworth v. Perry*, proclaiming a national right of same-sex couples to marry under the Equal Protection Clause of the 14th Amendment. Few commentators were predicting such a result in that case, however.

CATHOLIC CHURCH DEVELOPMENTS – The Catholic Church continues to exert significant influence in political debates about LGBT rights, so developments within the Church remain highly pertinent to issues of LGBT law. Thus, the election of a new Pope held great fascination for those concerned about LGBT rights. The College of Cardinals elected Cardinal Jorge Mario Bergoglio, 76, of Argentina, to serve as Pope after the resignation of Pope Benedict (the former Cardinal Joseph Ratzinger of Germany), who became "Pope Emeritus" upon his retirement. Although Cardinal Bergoglio, who will rule the Church as Pope Francis, was vehemently outspoken in public against marriage equality legislation in Argentina, there were press reports that he had urged at a meeting of Argentine bishops while the measure was pending that the Church support civil unions, stating that same-sex couples should be entitled to same legal rights, and that he had met with a leading LGBT rights proponent to discuss the issue. He was rebuffed by the bishops, however, and publicly made extreme statements in opposition to the legislation, such as that same-sex marriage was a "destructive attack on God's plan," and that adoption of children by gay people was a form of discrimination against children, leading to alarmed public comments by gay rights groups after his election. Some saw in Cardinal Bergoglio's private position the possibility that Pope Francis may eventually lead the Church to a less confrontational position on LGBT rights. See Michelangelo Signorile, Is Pope Francis Secretly Pro-Gay?, *Huffpost Gay Voices*, March 21. There was also speculation that Pope Benedict's surprise retirement announcement, unprecedented in the modern history of the Church in which pontiffs die in office, may have come in response to an internal report concerning blackmail of gay priests in the Vatican staff. * * * One Cardinal who did not participate in the conclave that elected the new Pope was Cardinal Keith O'Brien, Scotland's most senior Roman Catholic cleric, whose retirement, submitted last fall to Pope Benedict, was hurriedly and somewhat surprisingly accepted shortly before Pope Benedict's own retirement. There were press reports that O'Brien was rushed into retirement because of embarrassing stories that the publicly outspoken anti-gay O'Brien had privately approached various seminarians for sexual favors, and late in March there were press reports that O'Brien had a long-term affair with a priest who complained to the Vatican late in 2012, leading Pope Benedict to accelerate O'Brien's contemplated retirement. O'Brien publicly admitted that he had engaged in inappropriate conduct without getting into details, but some of the men involved spoke anonymously to the press. *Guardian.co.uk*, March 23.

A SIDESHOW ON JUDICIAL ETHICS – Some amicus briefs filed with the Supreme Court in *Hollingsworth v. Brown*, No. 12-144, the Proposition 8 case, press the argument that the Court should reverse the 9th Circuit and vacate the district court's ruling because U.S. District Judge Vaughn Walker, a gay man with a long-term same-sex partner, did not specifically disclose these facts or recuse himself from trying the case on the ground of actual or apparent conflict of interest. In addition, the same amici, the Ethics and Public Policy Center and Citizens United's National Committee for Family, Faith and Prayer, charge that Circuit Judge Stephen Reinhardt should have granted a motion to recuse himself, because his wife was executive director of the ACLU of Southern California, an organization that had taken a position in opposition to Proposition 8. Judge Walker, now-retired, has taken the position that disclosure about his private life was not required, and Judge Reinhardt took the position, in denying the motion, that his wife's professional life should not be imputed to him for purposes of determining conflicts of interest. A group of legal ethics professors, joined by retired New York Chief Judge Judith Kaye, filed a brief responding to the ethics issues, arguing that Walker was not required to disclose or recuse, asserting that the argument to the contrary would come "dangerously close" to requiring minority judges to recuse in civil rights cases or female judges to recuse in sex discrimination cases. Wrote Ethan Schulman, a partner at Crowell & Moring who wrote the amicus brief for the professors, "In cases involving fundamental rights, recusal has never turned on the conjectural prospect that the judge may one day exercise the right at issue." Responding

to the challenge to Reinhardt, the brief argued that "a spouse's views and actions, however passionately held and discharged, are not imputed to her spouse." The *National Law Journal* focused on this ethics controversy in an article about the dueling amicus briefs published on March 25, from which these quotations are taken.

OHIO MARRIAGE SHIFT? – In 2004, 62% of Ohio's voters approved a constitutional amendment banning same-sex marriage. According to a poll commissioned by the *Columbus Dispatch* (March 24), now 54% of the state's voters would support a proposed new amendment that would repeal the 2004 amendment and replace it with one that would "allow two consenting adults to marry, regardless of their gender," and would "allow religious institutions to determine who they will or won't marry, and protect such institutions that refuse to perform a marriage." Pollster Martin D. Saperstein said that the religious liberty provisions are a key element of the support for the proposed new amendment. The telephone poll of 1003 randomly selected Ohio adults was taken March 5-10, and has a margin of sampling error of plus or minus 3.1 percentage points, and had a response rate of 28%. The poll was taken before Ohio U.S. Senator Rob Portman, a conservative Republican, announced his support for marriage equality, and thus would not take account of any effect flowing from that announcement.

NATIONAL FOOTBALL LEAGUE – Reports that some teams were interrogating draft picks to determine whether the men might be gay led New York Attorney General Eric Schneiderman to urge the National Football League to investigate possible violations of law concerning sexual orientation discrimination in employment. NFL teams are based in several major cities in states and municipalities whose laws ban sexual orientation discrimination in employment. The NFL issued a statement on February 27 in response to these press reports, stating that all its teams were obliged to "follow applicable federal, state and local employment laws." The statement also asserted that "it is league policy to neither consider nor inquire about sexual orientation in the hiring process" and noted that the collective bargaining agreement with the players' association bans sexual orientation discrimination. *Pittsburgh Post-Gazette*, March 17.

FLORIDA OFFICIALS "GROSSING UP" FOR PARTNER BENEFIT RECIPIENTS – The *Orlando Sentinel* reported on March 29 that Orange County Tax Collector Scott Randolph had announced that he would offer up to a $1,300 annual stipend to any employees in his office with same-sex partners who suffered extra tax liability because they were receiving domestic partnership insurance coverage. According to the article, similar policies are being followed by Palm Beach County's Property Appraiser Gary Nikolits and Tax Collector Anne Gannon, although they are offering rather smaller stipends.

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AUSTRALIA – The government has backed off from a pending proposal to consolidate and expand the nation's various anti-discrimination laws into one overall statutory scheme. On March 19, Attorney General Mark Dreyfus confirmed that the effort to consolidate five existing anti-discrimination laws was being shelved as there was a "lot more work to be done" on the measure. However, the government suggested that it would instead introduce a simple amendment to the Sex Discrimination Law to add sexual orientation and gender identity. *Australian*, March 20.

CANADA – The Canadian House of Commons voted 149-137 to approve a private member's bill to ban discrimination based on gender identity on March 20. *Huffpost Social News*, March 20. The measure had been recommended by the Canadian Human Rights Tribunal. Prime Minister Stephen Harper and most members of the slim Conservative majority voted against the bill, but party discipline is not imposed on private member bills and sixteen Conservative MPs joined with the opposition to support the measure, which was sponsored by New Democrat Randall Garrison. Several cabinet ministers were among those crossing the aisle on this measure, including Foreign Affairs Minister John Baird, who has taken an aggressive stance in support of LGBT rights in dealings with other countries. Opponents argued that the bill would give license to men to victimize women in public restrooms, as well as giving cover to pedophiles to victimize children in such facilities; both are, of course, absurd contentions in light of the failure of such problems to emerge in the many other jurisdictions that already forbid discrimination on this ground. It amazes us when legislators raise such arguments as if their own jurisdiction exists in a vacuum and the experience under similar laws in other jurisdictions is irrelevant.

FINLAND – After the parliament's Legal Affairs Committee decided not to advance a proposed marriage equality law, supporters of the measure resorted to a petition procedure to place the measure on the Parliament's agenda. In just one day after beginning the campaign, they obtained more than the necessary 50,000 signatures to bypass the committee process, according to an internet report posted on March

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19. Finland is the only Scandinavian country that does not at present provide for or recognize same-sex marriages.

FRANCE – Opponents of marriage equality mounted a large protest in Paris on March 24, seeking to influence the upper house of the Parliament, which has still to vote on the marriage equality measure that was approved by a majority in the lower house earlier this year. Police estimated that 300,000 protesters took part, but protest organizers claimed to have attracted 1.4 million people, so the actual number probably lies somewhere between. The Catholic Church and the Union for Popular Movement, a center-right opposition party, called on members and supporters to protest, but the rowdy crowd provoked some use of tear gas by police, generating international headlines. Interestingly, the prospect that marriage equality will be enacted across the Channel in England has not provoked similar demonstrations, undoubtedly because of the bipartisan nature of Parliamentary support, with the Conservative government proposing marriage equality (even though a majority of its members in the Commons did not support the measure) and the coalition members and opposition Labour Party strongly in support, and the Church of England is divided on the issue and not inclined to call for mass protests, so there is not a significant organized political or institutional opposition to inspire mass demonstrations. In France, by contrast, the measure is supported almost entirely by the majority Socialist Party, lacking the imprimatur of significant bipartisan support.

MEXICO - The Supreme Court of Mexico ruled 3-2 on March 6 that a reporter's use of the terms "punal" and "maricone" in a derogatory sense to describe another journalist was unprotected hate speech and subject to judicial remedy. Both words have been used as derogatory labels for gay people. "Even though they are deeply rooted expressions in Mexican society," wrote the court, "the fact is that the practices of the majority of society can't validate the violations of basic right." This translation is from an *Associated Press* report circulated on March 7.

NEW ZEALAND – The second reading vote on the marriage equality bill was 77-44 in favor. More votes will be taken before the measure is finally enacted, but it is expected to take effect later this year. *New Zealand Press*, March 14.

SCOTLAND – Ruling on a complaint brought by the National Secular Society, the Office of the Scottish Charity Regulator concluded that St. Margaret's Children and Family Care Society, a Catholic adoption agency, was violating the law by matching potential carers for children in need in a process prioritizing placements with heterosexual couples who have been married for at least two years, thus categorically excluding potential gay adoptive parents. St. Margaret's vowed to appeal the ruling. *Glasgow Herald*, March 7.

SINGAPORE – Justice Quintin Loh heard arguments on a constitutional challenge by Tan Eng Hong to Section 377A of the Penal Code, which makes gay male sex a crime under the heading of "gross indecency between men." This statute, pointed out Tan's lawyer, M. Ravi, was derived from British law during the colonial law, and laws banning sodomy are not part of Singapore's pre-colonial history and tradition. He argued that 'gross indecency' is an ambiguous term in the modern context: "Rooted in 19th-century Victorian morality, the parameters of gross indecency in 21st-century Singapore have understandably eluded any clear judicial definition." Mr. Tan is challenging the law by arguing that it undermines equal treatment required by the nation's constitution.

TURKEY – A courageous judge, Mahmut Erdemli, ruled that a man who was apprehended selling DVDs depicting gay and group sex could not be prosecuted under a statute that bans owning, trafficking, distributing and publishing depictions of "unnatural sex," because, said the judge, gay sex was not "unnatural." According to a local newspaper reporting on the case, Judge Erdemli wrote, "Today, it is possible to have gay marriages in modern countries. International regulations prohibit discrimination regarding peoples' sexual preference, and it is therefore an obligation to respect their sexual orientation. In this respect, most of the European countries see gay relationships as equivalent to marriage." The government was expected to appeal the ruling, which clashed with prior decisions finding that any medium depicting gay activity potentially comes within the statutory ban. *GayStarNews*, Feb. 19.

UNITED KINGDOM – Equal treatment? The gay lobbying group Stonewall was allowed to place advertisements on London buses emblazoned with its slogan: "Some People Are Gay. Get Over It!" Then a Christian charity called Core Issues sought to place ads on buses stating "Not gay! Ex-gay, Post-gay and Proud. Get Over It!" In his capacity as chair of Transport of London (TfL), Mayor Boris Johnson vetoed the Christian charity's ad, and the charity suited. Mrs. Justice Lang of the High Court (a trial court) ruled on March 22 that TfL had acted "unfairly" in allowing the one advertisement and not the other, but on the other hand she found, "On the evidence before me, the Mayor did not abuse his position as chair of TfL in order to advance his re-election campaign" as charged by the plaintiffs. Although she found

that TfL's application of its advertising policy was "inconsistent and partial," she concluded: "The decision to refuse to display the ads was justified and proportionate in furtherance of the legitimate aim of protecting the rights of others and therefore was not a breach of the Trust's rights. The advertisements would have caused grave offence to a significant section of the many inhabitants of London and for those who are gay it was liable to interfere with the right to respect for their private and family life. They were perceived as homophobic and thus increasing the risk of prejudice and homophobic attacks. They were not a contribution to a reasoned debate." Although she ordered the charity to compensate TfL for its costs in defending the case, she also conceded that the plaintiffs had an "arguable" human rights claim and gave permission for an appeal, since, she said, the case raised a freedom of speech issue of "fundamental importance." *Boston Globe*, March 23; London *Evening Standard*, March 22.

UNITED KINGDOM – An Employment Tribunal is considered a sex discrimination claim against Andrew Rodgers, the proprietor of Funky Divas hair salon in Sheffield, who is accused of discriminating against women in order to avoid having to pay for maternity leaves. Rodgers has allegedly stated that he will only employ "fat, gay and lesbian" hair stylists, since gay people are less likely to have children, and he included fat heterosexuals since he believe "no one would have a baby with a fat person." He is alleged to have bullied female employees who became pregnant, and reprimanded them for taking maternity leave. *Melbourne Herald Sun*, March 22.

LITTLE TRAVERSE BAY BANDS OF THE ODAWA INDIANS – Native American tribes in the United States enjoy the status of sovereign nations within their reservations, and, as such, can legislate on matters such as marriage. The Little Traverse Bay Band of the Odawa Indianas, with a reservation in northern Michigan, has voted in favor of marriage equality. Tribal Chairman Dexter McNamara, who could have vetoed the measure, instead signed it into law and then performed a wedding ceremony for Tim LaCroix, a member of the tribe, and his longtime partner Gene Barfield. A Michigan state constitutional amendment forbids recognition of same-sex marriages, so LaCroix and Barfield will not be considered married in their state of residence when they are outside the reservation, but presumably their marriage will be recognized under comity principles in the nine U.S. marriage equality states and the District of Columbia, and also as a legal partnership in the other nine U.S. jurisdictions with civil union or domestic partnership laws. According to news reports, other Native American tribes that have embraced marriage equality are the Coquille Tribe in North Bend, Oregon, and the Suquamish Tribe in Suquamish, Washington. Oregon also has a constitutional amendment banning same-sex marriage, but Washington state is one of the nine U.S. marriage equality jurisdictions.

PROFESSIONAL

The U.S. Senate made history on March 4 by confirming the nomination of **PAMELA KI MAI CHEN** to the U.S. District Court for the Eastern District of New York, based in Brooklyn. Judge Chen is the firstly openly lesbian or gay Asian-American to be confirmed for federal judicial office.

The National Law Journal's annual listing of the 100 most influential lawyers in the United States this year includes **MARY BONAUTO**, of Gay and Lesbian Advocates and Defenders (Boston), who successfully litigated against the Defense of Marriage Act in the 1st Circuit in the *Gill* case, and **ROBERTA KAPLAN** of Paul Weiss, who similarly successfully litigated against DOMA in the 2nd Circuit and on March 27 defended her victory in the Supreme Court in the *Windsor* case.

GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD). GLAD, New England's LGBTQ and HIV public interest legal organization, seeks a full-time attorney to expand its attorney resources for its work focused on advocacy for the transgender community. Toward that end, at least 50% of this attorney's time will be devoted to work within GLAD's Transgender Rights Project. Therefore, experience advocating on behalf of the transgender community or individuals or a serious, demonstrable commitment to these concerns is essential. GLAD prefers an attorney with 3 or more years of litigation and legal research and writing experience who also has strong legal skills to apply across the range of advocacy, legislative, coalition, education, and community projects that span the work of our Transgender Rights Project. Other qualifications include: a familiarity with other LGBTQ and HIV issues or a willingness to learn; strong analytical skills; creativity; open-mindedness; and public speaking. This position anticipates a full-time presence in GLAD's Boston office. Eventually, location elsewhere within the six New England states is a possibility. Salary depends on experience; excellent benefits. Send confidential resume, cover letter and writing sample to Gary Buseck, GLAD, 30 Winter St., Suite 800, Boston, MA 02108 or by email to gbuseck@glad.org. Applications will be considered on a rolling basis until **MAY 1, 2013** or until the position is filled.

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of future persecution in Brazil." In so finding, the panel noted that "[a]lthough the materials [Petitioner] submitted in support of his application indicate that violence against gay men, including even murder, continues to be a problem in Brazil, it does not establish that the Brazilian government is unable or unwilling to control those who are responsible for such violence." The panel lastly noted that Petitioner had previously admitted he could relocate to an urban and more progressive area of Brazil, so it was reasonable to expect him to do so, ruling him ineligible for the requested relief. Accordingly the panel denied the petition for review, and affirmed the Board's final order of removal against Petitioner. - *Bryan C. Johnson*

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

All points of view expressed in Lesbian/Gay Law Notes are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

All comments in Publications Noted are attributable to the Editor.

Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please address all correspondence electronically to info@le-gal.org.

PUBLICATIONS NOTED

1. Adams, Ryan J., *An Objective Approach to Obscenity in the Digital Age*, 86 St. John's L. Rev. 211 (2012).
2. Alemzadeh, Sheerine, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 Mich. J. Gender & L. 339 (2013) (legalization refers to prostitution).
3. Borger, John P., et al., *Recent Developments in Media, Privacy, and Defamation Law*, 48 Tort Trial & Ins. Prac. L.J. 359 (Fall 2012) (includes section titled "Homosexual Misidentification Is Not Necessarily Libel Per Se").
4. Boso, Luke A., *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. Rev. 562 (Feb. 2013).
5. Clavert, Clay, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 Denv. U. L. Rev. 131 (2012).
6. Cusack, Carmen M., *To-Get-Her Forever: A Man Hater's Right to Same-Sex Marriage*, 10 Rutgers J. L. & Pub. Pol'y 63 (Spring 2013) (argues that freedom of choice in marriage should extend to desires by heterosexual women to marry other women).
7. Difonzo, J. Herbie, and Ruth C. Stern, *Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 Fam. Ct. Rev. 104 (Jan. 2013).
8. Elias, Rainier, *Identity, Law, and Essentialism: What's Love Got to Do With Same-Sex Marriage?*,6 the crit: Critical Stud. J. 1 (Winter 2012).
9. Friedman, Lawrence M., and Joanna L. Grossman, *A Private Underworld: The Naked Body in Law and Society*, 61 Buff. L. Rev. 169 (Jan. 2013) (not about porn).
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11. Kilburn, Corey, Case Note, *Massachusetts v. U.S. Dep't of Health and Human Servs*., 44 Urb. Law. 910 (Fall 2012) (analysis of 1st Circuit's ruling finding Section 3 of DOMA unconstitutional).
12. Kuykendall, Mae, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. Pa. J. of Const. L. 377 (Nov. 2012).
13. Lenta, Patrick, *The Right of Religious Associations to Discriminate*, 28 South African J. Hum. Rts. 231 (2012).
14. Levinson, Rosalie Berger, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder*, 46 Suffolk U. L. Rev. 45 (2013).
15. McGovern, Ashley E., *When Schools Refuse to "Say Gay": The Constitutionality of Anti-LGBTQ "No-Promo-Homo" Public School Policies in the United States*, 22 Cornell J. L. & Pub. Pol'y 465 (Winter 2012).
16. Mottet, Lisa A., *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373 (2013).
17. Nelson, Ryan H., *Affirmative Action for LGBT Applicants & Employees: A Proposed Regulatory Scheme*, 30 Hofstra Labor & Emp. L. J. 179 (Fall 2012).
18. Nordberg, Erica, *Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon*, 27 Amer. Univ. Int'l L. Rev. 439 (2013).
19. Note, *The Benefits of Unequal Protection*, 126 Harv. L. Rev. 1348 (March 2013) (suggests that heightened scrutiny for sexual orientation claims may backfire by subjecting policies favoring gay people to potential constitutional invalidation).
20. Nguyen, Anh "Annie", *"There's No Place Like Home" DOMA Deportation: The Forced Expatriation of Bi-National Same-Sex Couples from the United States to Canada*, 14 San Diego Int'l L.J. 225 (2012).
21. Oetomo, Dede, *New Kinds on the Block: Human Rights, Sexual Orientation, and Gender Identity in Southeast Asia*, 14 Asian-Pac. L. & Pol'y J. 118 (2013).
22. Ostler, Duane L., *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 Fed. Cts. L. Rev. 35 (2013) (argues that the 9th Amendment incorporates by reference the panoply of "natural rights" that would have been familiar to the founding generation, which would include concepts of equal protection later expressed in the 14th Amendment).
23. Penrose, Meg, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 Vill. L. Rev. 169 (2013).
24. Petersen, Carole J., *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*,14 Asian-Pac. L. & Pol'y J. 28 (2013).
25. Pierce, Yariv, *Put the Town on Notice: School District Liability and LGBT Bullying Notification Laws*, 46 J. L. Reform 303 (Fall 2012).
26. Possolo, Manuel, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 Stan. L. Rev. 565 (March 2013).
27. Sample, James, *Supreme Court Recusal from Marbury to the Modern Day*, 26 Geo. J. Legal Ethics 95 (Winter 2013) (discusses 9th Circuit Judge Reinhardt's decision not to recuse from deciding the appeal in Hollingsworth v. Perry despite participation by ACLU of Southern California at district court level, when his wife had recently retired as Executive Director of that organization).
28. Schroeder, John D., *Who are My Real Mommy and Daddy? Third Party Child Custody Determinations and the Need for Legislative Guidance in North Dakota with this Policy-Laden Area of Law*, 88 N.D. L. Rev. 235 (2012).
29. Siegel, Max D., *The Future of Family*, 23 Geo. Mason U. Civ. Rts. L.J. 177 (Spring 2013).
30. Sompayrac, Joanie, and Victoria Rose Burge, *Does the Defense of Marriage Act Prevent the Internal Revenue Service from Treating All 'Married' Couples Equally?*, 14 J. Accounting, Ethics & Pub. Pol'y No. 1 (2013).
31. Stannard, Atli, *When Failure to Disclose HIV-Positive Status Vitiates Consent to Sex in Canada*, 2012 J. Commonwealth Crim. L. 366 (2012).
32. Stoll, David J., *Is DOMA Gone? Gift and Estate Tax Returns and Same-Sex Couples*, NYLJ, 3/27/2013, pp. 2, 9.