

CALIFORNIA SUPREME COURT RULES PROONENTS OF PROPOSITION 8 MAY REPRESENT THE STATE IN DEFENDING THEIR AMENDMENT

The California Supreme Court unanimously ruled on November 17 that the proponents of Proposition 8, the voter initiative that amended the California Constitution in 2008 to provide that only the marriage of one man and one woman will be recognized or valid in California, have standing as a matter of state law to represent the state's interest in defending the constitutional amendment from a federal constitutional challenge. *Perry v. Brown*, 2011 WL 5578873 (November 17, 2011). Answering questions certified to the court by a three-judge panel of the U.S. Court of Appeals for the 9th Circuit last January, the court opined that where, as in this case, the named defendants in the underlying lawsuit, including the governor and the attorney general, were not providing a defense to a validly enacted initiative measure, it would be an abuse of discretion by a California court to refuse to allow the proponents of the measure to participate as parties to represent the interest of the state as expressed by its voters in adopting the measure. The next step is for the 9th Circuit panel to decide whether the Proponents have standing for purposes of Article III of the U.S. Constitution, and the panel issued an order on November 18, giving the parties a short time to file briefs on this question.

The California Supreme Court also observed that the 9th Circuit panel, in its certification opinion, had already indicated that if the Proponents had standing to represent the state as a matter of California law, they would most likely be found to have standing as a matter of Article III of the U.S. Constitution. Thus, this opinion means that, while the court will listen to what the parties have to say about the effect of the California Supreme Court's

opinion, it is almost certain that the 9th Circuit panel will eventually take up the Proponents' appeal on the merits, leaving open the road to possible review by the United States Supreme Court in a ruling that would have precedential weight nationwide either on the question whether states can amend their constitutions to ban same-sex marriages or, even more elementally, on whether same-sex couples have a right to marry pursuant to the due process and/or equal protection clauses of the 14th Amendment.

If the 9th Circuit were to conclude that Proponents have no standing, the district court's decision would most likely stand, restoring the right of same-sex marriage in California but not creating a binding precedent for any other state. The standing of the Proponents is not an issue in the trial court, where the issue is whether the plaintiffs have standing to bring the suit. The Proponents were allowed by the trial court to intervene as defendants as an exercise of discretion by the court, in light of announcements by then-Governor Arnold Schwarzenegger and then-Attorney General (now Governor) Jerry Brown that they would not defend Proposition 8 on the merits. Thus, the trial court had jurisdiction to decide the case on the merits.

Although the California Supreme Court had never previously directly addressed the issue of state law standing in precisely this context, wrote Chief Justice Tani Cantil-Sakauye for the court, the court's conclusion arose inevitably from a long history of litigation over the defense of statutes and constitutional amendments adopted by voter initiative. California courts have consistently allowed initiative proponents to participate in the ensuing litigation over the validity of the enacted initiative, re-

gardless of whether the named defendant (be it the governor, the attorney general, an agency head, or another public official) was mounting a defense.

One reason for this, wrote the Chief Justice, is that official government defendants might not present as vigorous a defense as proponents would, especially where the government officials had themselves been opposed to enactment of the initiative, as was true in the case of Proposition 8. In addition, proponents of an initiative enjoy a particular status under the state's Election laws in terms of supplying official arguments in support of their initiative in the voter pamphlets, and they generally play a leading role in the political campaign to enact the initiative and are thus likely to make the strongest possible arguments in its defense.

Echoing a concern that had been voiced by the 9th Circuit panel when it certified the questions to the California Supreme Court, the court pointed out that the initiative process itself would be undermined if the governor or the attorney general had a virtual "veto" over an amendment whose enactment they opposed if they could refuse to appeal an adverse trial court ruling on its constitutionality. The Chief Justice pointed out that high courts in two other states, Alaska and Montana, had reached the same answer to this question in similar cases.

The court rejected arguments by the *Perry v. Brown* plaintiffs that the California Constitution gives the Attorney General sole authority to represent the state's interest in defending legislative or constitutional provisions, pointing out that the courts have frequently allowed initiative proponents to do so in the state courts, and that in some cases other government officials have ap-

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peared as defenders, especially where the Attorney General was not providing a defense. Grounding the Proponents' standing in the California constitutional provisions establishing the initiative process, the court rejected the contention that letting Proponents represent the state's interest was a violation of separation of powers or would improperly intrude upon the prerogatives of the Attorney General or the executive branch of the state government.

The court emphasized both the narrowness and the generality of its holding, emphasizing that its opinion on this standing question had nothing to do with the subject matter of the challenged measure (same-sex marriage) and everything to do with the failure of the governor, the attorney general, or the other functionaries identified as defendants in the complaint, to mount a substantive defense. The certified question asked both whether the proponents of Proposition 8 had a "particularized interest" at stake as a matter of state law that would provide a basis for according them standing, or alternatively whether they were authorized by state law to represent the state's interest in defending a California law against constitutional challenge. The court decided that it was unnecessary to decide the "particularized interest" issue, having resolved the "state representation" issue in favor of the Proponents.

The court also discussed the likely outcome from its opinion. The 9th Circuit had already signaled in its opinion certifying the questions that if the California Supreme Court found that proponents had standing to represent the state's interest, that would likely be sufficient to satisfy the standing requirement under Article III of the United States Constitution, as it has been developed in Supreme Court cases. Had the California Supreme Court ruled against the representative interest but found that Proponents had the necessary "particularized interest" for purposes of state law, it is not quite so certain that the 9th Circuit panel would resolve the standing question in the same way.

Assuming now that the 9th Circuit panel will conclude that Proponents have standing, the next step would be to decide the case on the merits. At oral argument last December, the panel devoted the first half of the argument to the standing issue and the second half to the merits. It may be that the panel will decide that no fur-

ther briefing or oral argument is required on the merits, and can proceed to decide the merits and issue an opinion expeditiously. If the 9th Circuit panel affirms District Judge Walker's ruling holding that Prop 8 is unconstitutional, the Proponents may seek review from a larger panel of the 9th Circuit (11 judges sitting "en banc") or may directly petition the Supreme Court for review. The Supreme Court has discretion over whether to grant review. It seems likely that it would review a decision holding that a measure such as Proposition 8 violates the federal constitution, given the large number of states that have adopted similar constitutional amendments. (It is also likely that a petition for review by Proponents would be accompanied by amicus briefs from state Attorney Generals of states that have adopted such amendments in support of granting review.)

If the 9th Circuit reversed Judge Walker's decision, the question whether to appeal falls to the American Foundation for Equal Rights (AFER), which recruited the plaintiffs and hired the lawyers to bring this action. Since their announced goal from the outset was to bring the issue of same-sex marriage to the Supreme Court, one would expect that they would file a petition for certiorari without delay. Co-counsel for AFER, David Boies and Ted Olson, reacted to the California Supreme Court decision with eagerness to defend Judge Walker's ruling on the merits. Their case is now back on track after this diversion over the standing issue. Spokespersons for some of the LGBT public interest legal organizations, who had initially opposed the filing of this suit and whose attempt to intervene as co-plaintiffs was opposed by AFER and rejected by the trial court, bemoaned the ruling as bestowing on private parties the right to represent the state without the accountability of elective office.

On November 21, the 9th Circuit panel granted an application to consolidate the direct appeal of Judge Walker's decision on the merits with the appeal from District Judge Ware's ruling denying a motion by the Proponents to vacate Judge Walker's ruling. Proponents had argued unsuccessfully that because Judge Walker "came out" as being a gay man with a long-time same-sex partner after retiring from the federal bench, he should have recused himself from this case on the argument that he had a personal stake in the outcome. Judge Ware

forcefully rejected that argument. Consolidating the cases could give the 9th Circuit panel an "escape hatch" from deciding the appeal on the merits, and one hopes that they didn't grant the motion to consolidate in order to use that "escape hatch" (i.e., ruling that the decision should be vacated and the case retried before another judge). *A.S.L.*

LESBIAN/GAY LEGAL NEWS AND NOTES

U.S. District Court Turns Aside Title IX Claims of Victim of Gay Bullying Despite Prolonged Campaign of Homophobic Slurs

In *Rodriguez v. Alpha Institute of South Florida*, 2011 WL 5103950 (S.D. Fla., October 27, 2011), a case featuring many of the playground and classroom taunts that far too many LGBT young people are subjected to — from "fairy" to "she-he" to "faggot" and "queen" — the United States District Court for the Southern District of Florida granted the defendant's motion for summary judgment concerning plaintiff's Title IX claims premised on sex discrimination and pervasive harassment.

The decision by U.S. District Judge Kenneth A. Marra, which turned primarily on the court's finding that most of the abusive comments pertained to sexual orientation rather than sex, serves as another reminder that absent sexual orientation becoming a forbidden ground for discrimination under federal laws, effective remedies for harassment and bullying in our nation's schools and universities will be far more difficult to realize, if at all.

The plaintiff, Luis Rodriguez, was a 22-year old gay man who enrolled in the cosmetology program at Palm Beach Academy. (Yes, all of the offensive anti-gay rhetoric detailed by the court took place in a cosmetology school focused on a career path which, as plaintiff testified, "attracts people with different sexual orientations.")

Shortly after his enrollment, the anti-gay remarks began. Students asked about his sex life and hurled negative comments about homosexuals; several female students said he was "twisted and confused"; another said he was "gross" and "disgusting" and "sinful." This period of taunting lasted approximately two months.

According to Rodriguez, it was not just students who treated him poorly. Plaintiff testified that instructors criticized him for wearing his hair long and for wearing makeup, a combination that elicited the ever-so creative taunt from another student of “she-he.”

Indeed, if cruelty were an industry, it seems the atmosphere described at this cosmetology school would make it a market leader.

Rodriguez testified that he was scared to do anything about the comments made by students, as his teachers did not appear to be doing anything to stop them. Things took a further turn for the worse when one Sammy Rivera enrolled in the school. Rivera began with crude comments about gays and anal sex before progressing to “faggot” and “queen.”

One instructor, a lesbian, witnessed an incident involving Rivera’s use of the word “faggot” and told him such language was not acceptable. The school also had in place a policy providing that abusive or disruptive behavior was grounds for termination of enrollment, and all students signed an agreement acknowledging that termination could result from violations of the policy. But, in a country where using the word “faggot” is often brushed aside, Rivera’s taunts were apparently not enough to warrant immediate termination.

Plaintiff eventually fought back. On one occasion, he picked up Rivera’s Louis Vuitton bag (you cannot make this stuff up), put the straps over his shoulder and said, “Sammy, doesn’t this look cute on me?” to which Rivera responded with a “Get the f_ _ k off my bag!” and the hurling of a water bottle and pen at Rodriguez.

Rodriguez explained that he was, in fact, teasing Rivera as retaliation, given the anti-gay taunts that seemed especially odd coming from a guy with a designer “man bag.” Rodriguez also referred to Rivera as a “junkie,” apparently in reference to his alleged pre-rehab heroin use.

Both Rodriguez and Rivera apologized to an instructor who witnessed the Louis Vuitton bag incident and who allowed them to remain in class. Twelve days later, Rodriguez was greeted with the word “fag” written in yellow on his timecard. Rodriguez turned the card over to an instructor, who assured Rodriguez that it would be dealt with. By later in the day, however, an owner of the school, Ms. Creef, was en-

couraging Rodriguez to “talk to Sammy,” as if some sort of beer summit was going to make things right. Rodriguez declined and instead requested that the instructor speak with his godfather.

Creef agreed and she, Rodriguez and Rodriguez’s godfather held a meeting at which she explained to Rodriguez that she thought he had anger issues and, again, that he should speak with Rivera.. Rodriguez reiterated that he would not be speaking with Rivera and walked out of the meeting.

Creef then met with Rivera and asked him to prepare a written statement of the Louis Vuitton bag incident. Rivera acknowledged how upset he was by Rodriguez’s lifting of the bag and his “junkie” taunts. He admitted to throwing a water bottle and a pen at Rodriguez during the incident, confessed to calling Rivera a “fag” after school, but denied writing the word on Rodriguez’s timecard. Creef, rather than comparing the handwriting on the timecard to other writings by Rivera, relied on his word, advised him that a further incident could result in his termination and placed Rivera on probation.

Though there is no indication Creef literally provided a “slap on the wrist” for this conduct, it seems the phrase has continuing vitality.

The next day Creef intended to approach Rodriguez to also place him on probation for his conduct. Creef testified that Rodriguez was yelling and unapproachable and that she was fearful. At that point, she advised Rodriguez that he was being terminated from school and needed to leave the premises immediately. A formal letter of termination soon followed with the option of applying for readmission, which Rodriguez never did.

To recap: a student seems to have provided credible accounts of persistent anti-gay bullying and harassment; his primary tormenter confessed to using the word “fag” and to throwing items at him while in the classroom. But because Plaintiff responded with a taunt that implicitly called into question the tormenter’s own sexual orientation, while invoking an alleged prior drug problem of his tormenter, he was to face the same punishment — probation — as his tormenter.

The scenario overall calls to mind Detective Axel Foley (Eddie Murphy) being thrown through a plate-glass window in

Beverly Hills Cop and being charged with Disturbing the Peace.

After his termination, Rodriguez brought suit under Title IX, arguing that his harassment was based on sexual stereotyping and not sexual orientation. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681 (1984). As the court points out, Title IX precludes discrimination on the basis of sex in the context of schools, but that sexual orientation discrimination is not protected.

The court announced its view that the “vast majority of the comments made to Plaintiff pertained to his sexual orientation, and therefore cannot form the basis of his Title IX claim.” Additionally, the court noted that many of the comments based on sexual stereotyping were not made directly to the plaintiff. Because he was therefore unaware of the comments at the time they were made, they cannot form the basis of a claim.

Having placed some of the most offensive behavior into the box of sexual orientation discrimination, the court needed only to diminish the impact of being called a “fairy” or “she-he” to produce a ruling for the defendant. Here, Judge Marra found that the “comments simply do not rise to the level of harassment that was so ‘severe, pervasive, and objectively offensive’ that it ‘systematically deprived [Plaintiff] of access to educational opportunities of the school.’” This finding came although the comments here quite literally culminated in Rodriguez’s removal from the school.

Next, the court noted that schools may be liable under Title IX only when there has been “actual notice” as well as “an official decision by the [school] not to remedy the violation,” quoting *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1284 (11th Cir. 2003). In sum, liability would turn on whether the school was “deliberately indifferent” to acts of student-on-student harassment (quoting the U.S. Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

The court then gave the school a passing grade for the existence of a sexual harassment policy; for the school having “promptly investigated” the plaintiff’s claims; for the reprimand of Rivera for his

use of the word “fag” and for placing Rivera on probation. The court said that the standard does not turn on whether the interventions were effective, which is a good thing for the school, since many a reasonable person could conclude that there was little chance they would prove effective.

The court then catalogued additional reasons why the course of conduct could not demonstrate “deliberate indifference,” and even observed that Creef was “not in a position to conduct a handwriting analysis,” which, incidentally, might have easily exposed a potential lie by Rivera and additional acts of homophobia directed at Rodriguez.

In sum, the court delivered an unmistakable message: Title IX is virtually unavailable to plaintiffs who face anti-gay bullying in the classroom; and, if you’re a bully, just make sure your conduct is severe enough to elicit retaliation that will enable your school leaders to treat you and your victim as equally culpable. *Brad Snyder*

2nd Circuit Grants Partial Summary Judgment to NYC in Gay Prostitution False Arrest Suit

A unanimous three-judge panel of the U.S. Court of Appeals for the 2nd Circuit, reversing a ruling by District Judge Shira A. Scheindlin, has granted summary judgment to the City of New York, Mayor Mike Bloomberg, and individual defendants from the law enforcement community, finding that the officers enjoyed qualified immunity from liability for false arrest and malicious prosecution, asserted by a gay man caught up in an alleged sting operation carried out by the NYPD against gay men patronizing stores selling sexually-oriented materials for the purpose of supporting attempts to close the stores as “public nuisances.” *Pinter v. City of New York*, 2011 WL 5604689 (Nov. 18, 2011). However, the unofficially published November 18 opinion issued by a panel of Circuit Judges Ralph K. Winter, Joseph M. McLaughlin, and Jose A. Cabranes, upheld the denial of summary judgment on claims against the City of abuse of process, sexual orientation discrimination, and denial of the right of free association, the last two being constitutional claims.

The ruling on an interlocutory appeal stems from an arrest on October 10, 2008. Robert Pinter, a then-52-year-old gay man,

had stopped in at Blue Door in Manhattan to purchase a video in the adult section of the store. A young man was staring at him, flirted, and initiated conversation, asking Pinter “What do you like to do?” Pinter responded that the man was “good looking” and said he liked oral sex. The young man responded in kind, suggested hesitancy about doing anything in the store, and suggested his car was parked nearby. Pinter walked to the exit, followed by the young man (an undercover police officer, identified in the opinion as UC 31107).

As they were leaving the store, UC 31107 said he would pay Pinter \$50 for oral sex. Pinter made no verbal response, although he later testified that he immediately decided that any possibility of doing anything with the young man “was over.” But he said nothing to the young man, who continued to follow him. After they exited the store, the man gestured in the direction of his car, which was also, coincidentally, the direction of Pinter’s apartment. They walked in that direction, engaging in “flirtation,” when suddenly two plainclothes officers rushed up and arrested Pinter, spiriting him away in a police van. An officer told Pinter he was being arrested for prostitution, to which he responded “You’ve got to be kidding me... Your officer approached me, butted his nose into my business, and created this whole incident.”

A few days later, Pinter pleaded guilty to a reduced charge of disorderly conduct and was sentenced to conditional discharge, five counseling sessions, and a \$120 fine. But as more of these arrests took place over the following weeks and first the gay press and then the mainstream media focused attention on what appeared to be a pattern of entrapment of middle-aged gay men who were clearly not prostitutes, the District Attorney’s office dismissed some pending prosecutions, and Pinter filed a motion to vacate his conviction, which the District Attorney’s office announced it would not oppose, although it stoutly maintained that there was “probable cause” for his arrest.

Pinter then filed suit against the City, city officials and the police officers, asserting claims of false arrest, malicious prosecution, malicious abuse of criminal process, sexual orientation discrimination in violation of Equal Protection, and violation of his right to freedom of association. Pinter alleged a municipal policy (necessary to hold the City liable) of “making probable

cause lacking false arrests for the purpose of obtaining a data base of arrests which was to be utilized in independent nuisance abatement civil litigations instituted by the City of New York against certain targeted businesses, among them the Blue Door.” Pinter is represented by attorneys James I. Meyerson and Jeffrey A. Rothman.

The City and the individual defendants moved for summary judgment on all claims, arguing that the police officers enjoyed qualified immunity and that the City’s liability could not be premised on a single arrest. Judge Scheindlin denied the motion for summary judgment. Qualified immunity applies to an arrest when the police officer could have believed that he had probable cause to make the arrest (regardless of whether there was probable cause). In finding that qualified immunity did not apply in this case, Judge Scheindlin wrote:

“In sum, no competent officer could reasonably believe that it was probable that Pinter committed prostitution where the undercover knew that he (the officer): initiated the contact, steered the conversation toward sex, took steps toward the location where the sex act was to occur, raised the issue of cash-for-sex, faced silences as to whether Pinter meant to accept the cash, continued walking toward the specified location, initiated further conversation about sex, and knew that Pinter was 52 years old. And there was no impediment to prevent the undercover from quickly pursuing a simple inquiry to ascertain additional information about whether Pinter had accepted or declined a fee offer.”

The defendants successfully appealed from this very common-sense ruling, persuading the Court of Appeals to disagree with Judge Scheindlin’s “characterization of these events.” However, they were only partially successful, since the court decided to keep alive Pinter’s abuse of process and constitutional claims pending discovery to see whether there was an entrapment policy at work here for an ulterior motive — to attempt to close down adult stores that had restructured their layout and stock in order to stay open under the City’s draconian anti-adult-uses zoning ordinance.

The court opined that the standard for reasonable belief in probable cause by a police officer was much more lenient than the trial judge’s decision would suggest. The court stated that, while the undercover could have “been more explicit in ascertain-

ing whether Pinter was truly relying on financial remuneration in return for allowing the undercover officer to perform oral sex on him," the "qualified immunity analysis is not an inquiry into best practices or a reconstruction of events viewed in hindsight."

The court focused on Pinter's failure to communicate explicitly to the undercover that he was not interested in money for sex, and continuing to walk and flirt with him, and concluded: "In view of the totality of the circumstances, even as seen in the light most favorable to Pinter, we hold that defendants acted reasonably--that is, not incompetently or in knowing violation of the law--in arresting Pinter for a violation of New York Penal Law section 230.00."

The court backed away from analyzing whether this was an entrapment case, since entrapment is a defense in a criminal prosecution. This is not a criminal prosecution, but rather an attempt to obtain tort damages against government officials for their conduct. Government officials who could reasonably believe that their conduct is lawful and not unconstitutional enjoy qualified immunity from liability for their actions. So the issue on this summary judgment motion was not whether they had probable cause to arrest Pinter, but rather whether a reasonable police officer in those circumstances could have believed that he had probable cause to do so.

However, it is still open to Pinter to show that the City was misusing the criminal process in order to collect data for a different purpose, and that this was not an isolated arrest but rather part of a policy to target gay men who were merely out shopping for legally distributed matter (non-obscene gay porn, for example) in order to have the data to proceed against the Blue Door as being a location that was harboring male prostitutes. So this case is not over yet, and the City still has some explaining to do. *A.S.L.*

U.S. District Court Rules Gay Softball League's Rule Limiting Number of Non-LGBT Players Enjoys First Amendment Protection; Settlement Follows

In *Apilado v. North American Gay Amateur Athletic Alliance*, 2011 WL 5563206 (W.D. Wash., Nov. 10, 2011), the U.S. District Court for the Western District of Washington has ruled that a gay athletic organization's rule capping the number of

non-openly LGBT players on each softball team roster is protected under the First Amendment as expressive association that outweighs any state interest in eradicating discrimination.

The case, which settled just as this issue was going to press (more details below), was notable not only for the merits but also for, among other things: (1) the line-up of attorneys involved -- plaintiffs were represented by the National Center for Lesbian Rights (NCLR) and pro bono counsel from K&L Gates LLP, which meant that NCLR was litigating against an LGBT-oriented organization; (2) allegations concerning how the limitation at issue would disproportionately impact men of color; and (3) the process used by the organization to determine whether select individuals qualified as "gay."

The North American Gay Amateur Athletic Alliance ("NAGAAA"), organizers of the Gay Softball World Series, described its mission and purpose, in part, as promoting and demonstrating the participation in competitive team sports of "openly gay, lesbian and bisexual individuals." In furtherance of that goal, the organization enacted a rule, specifically Rule 7.05, which limits teams participating in the Gay Softball World Series to "[a] maximum of two Heterosexual players" per roster. Softball Code Section 1.18 defines heterosexual as "having a predominant sexual interest in a member or members of the opposite sex." In sum, the rule effectively limits each team's roster to two players who are not predominantly interested in the same sex.

The plaintiffs, a group of players whose team was eventually disqualified from play in the Gay Softball World Series for violating the rule, brought suit alleging that the rule unlawfully discriminated against them based on perceived or actual sexual orientation in violation of the Washington Law Against Discrimination ("WLAD"). The WLAD, broadly speaking, prohibits discrimination in public accommodations on the basis of, among other things, sexual orientation.

NAGAAA argued that the rule was protected by the First Amendment of the U.S. Constitution.

District Judge John C. Coughenour, relying on the three-pronged test found in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), noted that NAGAAA's decision to exclude someone from membership is protected by

the U.S. Constitution if NAGAAA can show three things: (1) NAGAAA is an expressive association, (2) forced inclusion of unwanted members would affect NAGAAA's ability to express its viewpoints, and (3) NAGAAA's interest in expressive association outweighs the state interest in eradicating discrimination.

At an earlier stage of the case, Judge Coughenour determined that the NAGAAA satisfied the first two prongs. That is, the organization's message of promoting sports competition for all individuals (with a special emphasis on participation by openly LGBT individuals) fell comfortably within the "wide boundaries" established by Supreme Court precedent and, moreover, its goals would be frustrated if the organization was not permitted to maintain its "gay identity."

The court, however, determined that more information was needed to resolve the third prong and requested additional briefing on the issue.

This determination, according to the district court, required it to "examine evidence of the impact that admitting players who do not meet NAGAAA's eligibility requirements" would have on the organization's expressive function. Here, the court, citing to evidence submitted by the organization, noted that NAGAAA's desire for exclusivity was born of the fact that many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation. Thus: "NAGAAA's efforts to promote an athletic, competitive, sportsmanlike gay identity, with a unique set of values, in response to a particular need, are protected by the First Amendment. Forced inclusion of straight athletes would distract from and diminish those efforts." (Emphasis added.)

In contrast, the court determined that the plaintiffs failed to show that the state interest in eliminating NAGAAA's exclusionary policies outweighs the organization's associational rights. The court noted that the parties disagreed over the scope of the relevant state interest. NAGAAA argued that the state has no particular interest in preventing discrimination against straight and closeted softball players. Plaintiffs, in turn, argued that the state is interested in eliminating all forms of discrimination, regardless of the particulars.

The court ultimately agreed with NAGAAA that the state interest cannot be

so broadly defined as to essentially render the freedom of association “toothless.” In other words, if the state’s interest could be defined so generally there would seem to be no way a group could ever lawfully exclude members in furtherance of its mission and purpose.

Accordingly, the court distinguished the present case from other state and federal cases relied on by plaintiffs, which struck down rules denying women from membership in Rotary clubs. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The court agreed with defendant that the line of cases clearly established that state interests should be “narrowly defined to a particular form of discrimination.” In those cases, the state’s specific interest in combating a specific type of discrimination — against female citizens — justified the burden on the organizations’ associational freedoms.

The plaintiffs, all men of color, also argued that the application of Rule 7.05 had a disproportionate impact on men of color, who are less likely to adopt the label “gay.” As a result, plaintiffs argued that the rule discriminates against men of color who are closeted or choose not to identify as gay. The court ruled that the plaintiffs do not have an independent claim for racial discrimination under the WLAD because of its ruling that NAGAAA had the right to exclude people who do not identify as predominantly interested in the same sex.

Plaintiffs also brought claims relating to the alleged emotional distress and invasion of privacy accompanying the organization’s application of Rule 7.05. Specifically, after a protest was lodged against the plaintiffs’ team for violation of the Rule (though the protest was made before the championship game was played, the actual protest hearing was held after plaintiffs’ team lost the game), the five players who were being protested were brought into a room with more than twenty-five people in attendance. There, the players were subjected to questions aimed at enabling the league to determine whether or not they were gay. This apparently consisted of questions of a private nature and certainly not ones most individuals are accustomed to answering in front of a crowd. At its conclusion, two white players were deemed “gay” based on their answers; the three men of color were deemed not gay and thus the team was disqualified for violating Rule 7.05 and sanc-

tioned, including seeing its second-place finish removed from the league’s records. The three plaintiffs have reportedly now indicated that they identify as bisexual.

These remaining claims were scheduled for trial in December when news of the settlement broke. As part of the settlement (details can be viewed on the NAGAAA’s website and NCLR’s), the organization expressed regret over the conduct of the protest hearing and will amend its records to record the team’s play and second-place finish. In a statement posted on its site, NAGAAA also stated, in part, that it has since “adopted new definitions that make clear that bisexual or transgender players are not subject to NAGAAA’s roster limits” and that “the Plaintiffs have acknowledged the positive changes that NAGAAA has implemented, and its commitment to the LGBT community as a whole.”

NAGAAA was represented by Davis Wright Tremaine (Seattle). *Brad Snyder.*

Federal Court Rules Favorably on Community Property Claim of California Same-Sex Partner In Forfeiture Case

On October 28, 2011, 2nd Circuit Judge Denny Chin, formerly on the U.S. District Court for the Southern Division of New York, ruled in *United States v. Peterson*, 2011 WL 5110246 (S.D.N.Y.), that the longtime lover of a gay man convicted of wire fraud was entitled to half the interest in the couple’s home under principles of California’s community property law.

Gregory Crew met Richard Peterson in 1980, and they moved in together less than a year later. The couple agreed in 1982 or 1983 that they would share everything they owned, and held themselves out as a committed couple ever since. Further, Crew listed Peterson as beneficiary to his 401k and life insurance, and registered Peterson for his medical benefit package immediately after his employer allowed same-sex benefits. Crew and Peterson registered as domestic partners in California shortly after the state passed the Domestic Partners Rights and Responsibilities Act, which mandated that same sex couples who register their partnerships be granted “the same rights, protections and benefits” as married couples.

The couple lived together until 2005, when Peterson pled guilty to wire fraud

and a number of other crimes and was incarcerated. As part of his plea, Peterson agreed to forfeit his rights in the couple’s San Francisco property, and their Grand Cayman vacation home. The government filed a notice of forfeiture, and Crew filed a petition asserting claims to both properties.

The government sought to take possession of the properties, based on laws that the U.S. may seek forfeiture of “any property constituting or derived from proceeds obtained directly or indirectly” as a result of a fraud offense. 18 U.S.C. s 982(a)(2) (A). With little discussion, the court notes that the government established its right to forfeiture of the properties, and Judge Chin turns to Crew’s petition claiming that (1) the properties were transferred to him prior to the vesting of the government’s interest, (2) that his California domestic partnership with Peterson trumped the government’s interest, or (3) that his relationship with Peterson established a community property interest that could not be forfeited.

The court makes quick work of Crew’s first assertion that both properties were transferred to him prior to any forfeiture, finding that the transfers were not valid since they were made in the midst of Peterson’s fraudulent activity, and the transfers were made for far less than the properties’ value.

Similarly, the court swiftly disposes of Crew’s second claim, that the couples’ domestic partnership created an interest superior to the government’s. After a discussion of when the government’s claims vested and when Peterson’s criminal acts began, the court determines that since the couples’ domestic partnership was entered into after Peterson’s indictment for fraud, the government’s claim in the properties vested before Crew’s interest did. Accordingly, title to both of the properties belonged to Peterson at the time of forfeiture, and according to his plea stipulation, Peterson forfeited all right, title and interest in these assets.

Finally, the Judge Chin turns to Crew’s claim that his long and constant relationship with Peterson created a community property interest that could not be forfeited.

The court notes that many claims under California’s community property law rest on oral or implied contracts, and it must be shown by clear and convincing evidence that (1) the parties intended to contract for a shared interest in the property; and (2) adequate consideration was provided for the

interest. Only then will the Court override the presumption that the true owner of a property is the person who holds title in it.

As far as the Grand Cayman property was concerned, the court found that Crew could not establish that he and Peterson intended to establish a community property interest. Peterson created a company to hold title to the condominium building, and Crew took little or no interest in the ownership and upkeep of the property. Perhaps most crucially, in Peterson's sentencing stipulation, he agreed not to assist any third party with any claim to property in the forfeiture order, except for the San Francisco property. The court notes that this seems to indicate his understanding of the ownership of the San Francisco property was different than that of the Grand Cayman property. Since there was no clear intent to share the property, the court does not examine whether there was adequate consideration, and Crew's claim of ownership in the Grand Cayman condo fails.

The analysis for the San Francisco property ends quite differently, however. Crew and Peterson lived in the property for over 20 years, and treated it as their shared home. They promised each other that "[w]hat was his was mine, and vice versa," and agreed to cohabit and combine their efforts and share all things equally. Clearly finding intent to share the property, the court then turns to the question of consideration.

Over the years, Crew oversaw the upkeep and renovations of the San Francisco property, and seemed to make more of a contribution to the everyday housekeeping. He also contributed substantial monetary amounts to the renovations of the property, although they were much smaller than those made by Peterson. However, the court notes that even "[t]he promise to perform ... domestic services is lawful and adequate consideration," *Chiba*, 67 Cal. Rptr.3d at 92, and accordingly Crew's contributions to the San Francisco property were more than adequate.

Having found both intent and consideration, the court rules that Crew has a community property interest in one-half of the San Francisco home. Unfortunately, though, Crew will receive very little monetary compensation for his interest, due to deductions from the property's value based on the fraudulent proceeds Peterson put into it. *Stephen Woods*

Internal Revenue Service Will Acquiesce on Deductibility of Gender Reassignment Treatment Expenses

The Internal Revenue Service announced that it has abandoned its long-held position that gender reassignment treatment is cosmetic (not eligible for deduction as a medical expense) rather than a medical treatment. The announcement responded to the U.S. Tax Court's ruling in *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010).

The Tax Court had concluded, based on extensive medical and case law evidence presented by Gay & Lesbian Advocates & Defenders (GLAD) on behalf of a transgender woman who had been denied a tax deduction for medical care costs incurred for her gender transition, that federal courts have come to recognize gender dysphoria as a serious medical condition, and that gender reassignment treatment, including the use of hormones and surgical alteration to bring the body in line with the individual's gender identity, is medical treatment that may be necessary depending on the individual case. Some recent federal court rulings to that effect in litigation against state prison systems that were denying various treatments laid the groundwork for this ruling.

The IRS released a formal memorandum written by Thomas D. Moffitt, Branch Chief, Branch 2 (Income Tax & Accounting), titled "Action on Decision," IRB No. 2011-47 (Nov. 11, 2011), summarizing the *O'Donnabhain* ruling, concluding: "The Service will follow the *O'Donnabhain* decision. The Service will no longer take the position reflected in CCA 200603025," and recommended formal Acquiescence rather than an appeal to the federal courts. Two reviewers approved the recommendation: William J. Wilkins, Chief Counsel of the IRS, and George J. Blaine, Associate Chief Counsel for Income Tax & Accounting.

In a news release reporting on this development, Human Rights Campaign (HRC) related that formal acquiescence in the *O'Donnabhain* decision had been among its recommendations to the Obama Administration, released under the title Blueprint for Positive Change, on ways that the administration could advance LGBT legal equality through administrative action. The practical impact of the decision will be significant, since public and private insurance

policies generally do not cover the costs for these treatments, so individuals incur significant costs (or debt) to finance them, and the tax deduction for those expenses will lessen the financial burden. *A.S.L.*

Upstate NY Trial Judge Refuses to Dismiss Open Meetings Law Challenge to NY Marriage Equality Law

After the Marriage Equality Law was enacted by the New York legislature last summer, some opponents of the law filed a lawsuit in Livingston County Supreme Court, seeking a declaration that the law was invalidly enacted and an injunction striking it from the statute books. Their lawsuit, titled *New Yorkers for Constitutional Freedom v. New York State Senate*, No. 807-2011, was assigned to Acting Justice Robert B. Wiggins. Their case rested on two contentions: first, that Governor Andrew Cuomo's "Notice of Necessity," a procedural device to allow the Senate to proceed to a vote immediately after the final negotiations over the language of the bill, was constitutionally defective; and, second, that a meeting of the Senate Republicans with Governor Cuomo behind closed doors to discuss the bill violated the Open Meetings Law, which requires official public business to be conducted in the open. In a decision signed on November 18 and made public on November 29, Justice Wiggins granted the defendants' motion to dismiss the first claim, but denied the motion to dismiss the second.

Justice Wiggins stated at the outset that his opinion was not about the issue of same-sex marriage. "This Court is limited to the questions raised concerning the procedures followed by the Legislature in passing this Bill," he wrote. "It would be easy to construe any decision as a statement on the ultimate issue, and this decision can not and will not make such a statement." But some of the heated language he used later in the opinion departs from the air of neutrality he sought to create at the outset, making the disclaimer ring false.

Justice Wiggins first addressed the alleged violation of the state constitutional requirement (Art. III, Sec. 14), that any bill considered by the legislature be put into print and placed on the desks of the legislators for three days prior to a vote, unless the Governor certifies facts requiring an imme-

diated vote. Last June, negotiations over the final language for the Marriage Equality bill continued right up to Friday afternoon, June 24, and a vote was taken that evening. Actually, two bills were voted upon in the Senate. One was the bill that had been introduced by the Governor much more than three days before and had been approved in the Assembly, and this bill easily meets the constitutional requirement. The second bill resulted from language and substance negotiations that continued until Friday afternoon. That bill was also put to a vote that same evening in both Houses, making various modifications and additions to the Governor's program bill. It is this second bill that raises issues under the 3-day rule, since its final form was not printed up and distributed to legislators three days in advance of the vote.

The Governor's certification stated: "The facts necessitating an immediate vote on the bill are as follows: This bill would amend the domestic relations law to grant same-sex couples the long overdue right to enter into civil marriages in New York. The continued delay of the passage of this bill would deny over 50,000 same-sex couples in New York critical protections currently afforded to different-sex couples, including hospital visitation, inheritance and pension benefits." The plaintiffs argued that this "certification" does not describe any sort of emergency, stating no reason why a vote could not be delayed for three days.

Justice Wiggins agreed with that argument. "Logically and clearly this cite by the Governor is disingenuous," he wrote. "The review of such concept-altering legislation for three days after generations of existing definitions would not so damage same sex couples as to necessitate an avoidance of rules meant to ensure full review and discussion prior to any vote."

He definitely has a point. The compromise language hammered out in the heat of negotiations in the final week of consideration of the same-sex marriage issue was presented with little opportunity for public scrutiny or substantive debate as to its effect or ramifications. Many of us were left puzzled and speculating about the impact the language would have, for example, on the interpretation and enforcement of the state's public accommodations law, out of which it appeared to carve a new exception. However, Justice Wiggins concluded, since the Senate voted to accept the Gov-

ernor's certification and proceed to an immediate vote on the bill, the court did not have authority to nullify it, pursuant to the Court of Appeals' ruling in *Maybee v. State of New York*, 4 N.Y.3d 415 (2005). In that case, the Court of Appeals said the determination whether there was a necessity for immediate legislative action was up to the Governor, not to be second-guessed by the courts. Essentially, it is a political rather than a legal question, and if the Senate agrees to proceed to a vote, the courts are not to question it.

However, that did not stop Justice Wiggins from blasting the State for the arguments it made in its brief supporting the motion to dismiss. "It is ironic," he wrote, "that much of the State's brief passionately spews sanctimonious verbiage on the separation of powers in the governmental branches, and clear arm-twisting by the Executive on the Legislature permeates this entire process." It is not clear what Justice Wiggins means by "arm-twisting," although the use of that term to characterize the lobbying that the Governor and others did to pick up a handful of Republican votes in the Senate necessary to bring the measure to a vote and pass it betrays some bias, in light of the lack of a hearing record on which to base it. Courts are not, after all, supposed to rely for their factual assertions on speculative media reports, but rather on evidence presented in open court under oath and subject to cross-examination. This was a motion to dismiss. The court is only dealing with allegations by the parties at this point, not evidence.

Turning to the Open Meetings challenge, Justice Wiggins commented, "There is no demonstration that the public welfare on this issue required secrecy. The question then before this Court is: does this apparent disregard for the open doors requirement authorize Judicial action?"

Justice Wiggins reviewed pertinent provisions of the Public Officers Law. Section 100 declares the necessity that public business "be performed in an open and public manner." Public Officers Law Section 103 exempts "Executive Sessions" of public bodies from this requirement, but Justice Wiggins found that the challenged meeting between the Senate Republican caucus and the Governor was not an "Executive Session," an uncontroversial conclusion, because no Democratic members of the

Senate were invited to be present, so it could not be a legislative session at all.

Section 108 provides more exemptions, including "the deliberation of political committees, conferences and caucuses defined as a private meeting of the Senate or Assembly of the State of New York,... who are members or adherents of the same political party, without regard to (I) the subject matter..., (ii) the majority or minority status..., or (iii) whether such political committee, conferences and caucuses invite staff or guests to participate." In other words, when the members of one party in the legislature meet to discuss pending business among themselves, they don't have to let in the press or the public. The plaintiffs' position is that a meeting of the Senate Republicans with the Governor, a Democrat, to discuss a pending bill, does not qualify for the caucus exemption, because a Republican Senate caucus meeting is, by definition, a meeting of just the Republicans. The State argued that the Governor was there at the invitation and as a guest of the Republicans, not as a member of their caucus.

Justice Wiggins wrote that this situation was "very similar to the case of *Warren v. Giambra*, 12 Misc.3d 650 (Sup.Ct., Erie Co., 2006), where the court held a meeting of eight Democratic legislators with the Republican County Executive regarding pending budget and funding issues was not exempt from the Open Meetings Law." At the meeting in question in Warren, the participants were attempting to negotiate their way out of an impasse over the 2050 county budget.

After rehashing the policy behind requiring that public business be conducted in open meetings, and remarking that the purpose of the party caucus exemption was to allow for "private, candid exchange of ideas and points of view among members of each political party concerning public business to come before the legislative bodies," Justice Wiggins pointed out that in ruling on a motion to dismiss, he had to treat as true the plaintiffs' allegations and to consider whether, if they could be proved at trial, they would provide the basis for a valid claim that the Open Meetings law was violated. The plaintiffs' allegations, as summarized by Justice Wiggins, are: "Plaintiffs allege that in a closed meeting between all Republican Senators and Governor Cuomo, Governor Cuomo actively engaged to persuade Republican Senators

to break with their party's position and vote for the bill."

"Considering Plaintiff's allegations, and without deciding the matter at this time," Wiggins concluded, "the Court feels there is a justiciable issue presented whether there was a violation of the Open Meeting law. There are not sufficient facts before the Court to determine the matter; thus, the case shall proceed on this issue." This preliminary ruling, given the holding in *Warren* as a "persuasive" precedent, might be justified.

Justice Wiggins dismissed the complaint as to all other issues, and also dismissed "in its entirety against the Attorney General," who had been named as a defendant but clearly had nothing to do, either personally or officially, with the Open Meetings Law issue.

What does this ruling mean? It keeps the case alive for now, giving the opponents something to crow about. But when one looks at the sole authority Justice Wiggins cited, *Warren v. Giambra*, it seems that even if Justice Wiggins concludes that there was a violation of the Open Meetings Law, it is unlikely that this would lead to invalidation of the Marriage Equality Law.

Warren is a trial court decision, and thus not a binding precedent. An impasse had developed in the Erie County legislature over the 2005 budget, particularly whether to seek permission from the state to raise some taxes to fill an anticipated budget gap, and in the course of trying to resolve the impasse there were some private meetings, including the one mentioned by Justice Wiggins, involving Democratic legislators, who were in the majority in the legislative body, and the County Executive, a Republican. There were also closed-door negotiations conducted in a judge's chambers involving legislators from both parties and the County Executive. Justice John P. Lane issued a declaration that some of these meetings violated the Open Meetings Law, and noted that Public Officers Law Section 107 gives the court discretionary power to "declare any action or part thereof taken in violation of [the Open Meetings Law] void in whole or in part." However, he wrote, the Court of Appeals has ruled that "not every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions." Citing various appellate precedents, Justice Lane concluded that "a sanction generally is not warranted" in the

absence of a "persistent pattern of deliberate violation of the letter and spirit of the Open Meetings Law by a public body." Even though more than one meeting was held during the budget negotiations that Justice Lane concluded violated the Open Meetings Law, he did not issue an injunction striking down the 2005 budget that was subsequently enacted by the legislature, or various other measures enacted partly as a result of the negotiations carried on in those meetings. "In the absence of aggravating factors, the courts of New York do not routinely award injunctive relief and impose sanctions for nonprejudicial violations of the Open Meetings Law," he concluded.

Thus, it appears, a single violation of the Open Meetings Law in the course of an intense week or two of public and private lobbying by proponents and opponents of the Marriage Equality Bill is unlikely to provide the basis for injunctive relief.

So this case will continue. The next step may be an attempt by the State to appeal Justice Wiggins' ruling on the motion to dismiss on the Open Meetings Law issue, and the plaintiffs might try to appeal the dismissal of their claim on the three-days rule.

If the case is still standing after appeals, discovery would come next, and presumably the plaintiffs will seek to depose Governor Cuomo and some of the Republican Senators about what went on in the closed-door meeting, so that they will have an evidentiary basis to argue that public business was being conducted in violation of the Open Meetings Law. Perhaps there will be a lively battle over whether Governor Cuomo submits to being deposed! This could prove interesting to watch. But, seriously, there is also the possibility that Justice Wiggins, whose sentiments as to the merits are, despite disclaimers, not very well concealed, could award injunctive relief of some sort, the details of which are beyond speculation at this point. *A.S.L.*

Media Company Wins Its Attempt to "Out" Thirty-Eight Defendants In Gay Porn Internet Downloading Case

Legal and social issues converged in a case brought by Liberty Media Holdings LLC ("Liberty"), which seeks damages for the alleged infringing acts of thirty-eight

anonymous defendants (see below). *Liberty Media Holdings, LLC v. Swarm Sharing Hash File AE340D0560129AFEE8D-78CE07F2394C7 B5BC9C05 et al.*, 2011 WL 5161453 (D.Mass Oct. 31, 2011).

Liberty alleges that the thirty-eight defendants, who are identified in the complaint only by their Internet Protocol addresses ("IP addresses"), infringed upon its copyrighted motion picture, "Corbin Fisher Amateur College Men Down on the Farm" (the "Motion Picture"), by reproducing and widely distributing the Motion Picture over the Internet. This was done by the defendants using the BitTorrent file transfer protocol ("BitTorrent"). BitTorrent is a peer-to-peer file-sharing protocol used to distribute and share files over the internet, and users such as the defendants are organized into groups known as a "swarm." According to the court, "being part of a swarm allows users to simultaneously download and upload pieces of the media file from each other, rather than download the entire file from a single source."

With this background of information, the court had previously decided a number of motions. The court granted Liberty's ex parte motion for an order authorizing the internet service providers ("ISP") servicing the defendants to disclose their subscriber information, after notifying the subscribers of the subpoenas. Subscribers were permitted twenty-one days after receipt of notice from their ISPs to challenge the subpoenas. If they failed to file a motion to quash or vacate the subpoena within twenty-one days, their names would be disclosed to Liberty.

After receiving notice from their ISPs of the subpoenas, three defendants filed motions to quash. In a consolidated memorandum decision, the court explained its rationale for denying the motions to quash and addressed interesting related requests for relief. In summary, in addition to denying the motions to quash, the court held that joinder of all 38 defendants was proper at this stage of the litigation, and denied the defendants' request to participate anonymously using pseudonyms.

At the heart of the case, the real question posed by these motions was whether the court would "out" these defendants as downloaders and sharers of gay pornography. Upon reading the court's decision, the reader can tell that the court struggled with the issues of anonymity and the fact that

the court's decision would potentially "out" the defendants in this case in what might be a very embarrassing and dangerous way. But the law as the court found it is that "[i]nternet subscribers do not have a reasonable expectation of privacy in their subscriber information—including name, address, phone number, and email address—as they have already conveyed such information to their ISPs," citing *First Time Videos, LLC v. Does 1–500*, No. 10 C 6254, 2011 WL 3498227, at *5 (N.D.Ill. Aug.9, 2011).

However, the court did seem somewhat callous as to the defendants' predicament in footnote 8: ... "The Court presently expresses no opinion on whether homosexuality continues to be a protected privacy interest warranting anonymity. If such a privacy interest exists, the Court will be careful to draw a line between the 'mere embarrassment' of being publicly named in a lawsuit involving hardcore pornography, which does not provide a basis for anonymity, and concern over the exposure of one's sexual orientation. The Court presently declines, however, to grant anonymity to all of the defendants based on the generalized concerns of public scorn expressed by only two of the thirty-eight defendants." It seems the court is somewhat oblivious to the fact that outing people, especially young people, can lead to disastrous results.

Another interesting facet of this case is dropped in footnote 7 of the court's decision: "[S]eventeen of the thirty-eight defendants have been voluntarily dismissed from this case, presumably as a result of settlement. The mere fact that such settlement occurred, however, does not prove that [the defendant's] allegation was correct that Liberty sought disclosure of the defendants' identities solely to force a settlement. Rather, Liberty may simply have validly vindicated its legitimate interest in the 'openness of judicial proceedings.'"

The legal issues themselves were a bit one-note. Liberty established a prima facie case of copyright infringement against the defendants to support the subpoenas themselves, and otherwise defendant's procedural challenges as to service of process and issuance were rejected. Moreover, while the three defendants who moved to quash the subpoenas argued that joinder was improper, the court disagreed, finding that at this stage of the litigation, the plaintiff's claims against the thirty-eight defendants were identical, thereby satisfying permis-

sive joinder under Fed.R.Civ.P. 20(a)(2). The court noted that at a later stage of the case, if factual differences merit severance, such relief may be available. Nonetheless, prospective factual distinctions did not, in the court's view, destroy the commonality of facts and legal claims that support joinder at this stage of the litigation. *Eric J. Wursthorn*.

Federal Civil Litigation Notes

U.S. Supreme Court (Washington State) — In *Doe v. Reed*, the appeal pending before the 9th Circuit of the U.S. District Court's order that the names of signers of petitions to put a measure on the ballot several years ago seeking repeal of a law expanding the status of registered domestic partners in the state, the U.S. Supreme Court denied an application for an injunction pending appeal of the district court's order on Nov. 21, 2011. The application had been made to Justice Anthony M. Kennedy, the Circuit Justice for such applications. He referred the application to the full court, which denied it, Justice Samuel Alito dissenting. Justice Elena Kagan did not participate. *Doe v. Reed*, No. 11A501. At this point the information has been made public, and the 9th Circuit might well conclude that the appeal of the district court's order is moot.

9th Circuit — Log Cabin Republicans — A panel of the 9th Circuit consisting of Judges Arthur L. Alarcon, Diarmuid F. O'Scannlain, and Barry G. Silverman announced on Nov. 9 that it had rejected the last-ditch effort by Log Cabin Republicans to reverse a prior decision to vacate the district court's ruling that the "Don't Ask, Don't Tell" military policy was unconstitutional. The 9th Circuit has found that repeal of the policy rendered the controversy moot, and ordered the trial court's decision vacated. LCR continues to argue that the decision should not be vacated, because of claims in other cases that may turn on the result. Even if the district court's decision were left in place, however, as a trial court ruling it be at best a persuasive precedent. In its order, the panel voted to deny the petition for panel rehearing or rehearing en banc. The order also stated that the full court had been advised of the petition, and no active judge of the circuit had requested a vote on whether to hear the matter en

banc. So, that's the end of the case. On the other hand, despite having their trial court victory vacated, LCR contributed mightily to achieving their ultimate goal, since it is clear that the trial court's decision played an important part in persuading Congress to authorize repeal of the policy in its vote last December. *A.S.L.*

State Civil Litigation Notes

District of Columbia — In *Pierson v. Washington Metropolitan Area Transit Authority*, 2011 WL 5245437 (D.D.C., Nov. 4, 2011), U.S. District Judge Ricardo M. Urbina denied a motion for summary judgment by defendant seeking dismissal of a claim of discrimination and retaliation by a former temporary employee of WMATA. The employee, a lesbian, claims that she was subjected to sexual harassment by a female employee to whom she was assigned for her training, and that she suffered retaliation and ultimately discharged when she complained. (It turned out that the employee she was accusing was a good friend of the supervisor to whom the complaint came.) The court found that plaintiff had stated a prima facie case, creating fact issues regarding WMATA's explanation for the termination (as to which the court expressed doubts in a footnote), precluding summary judgment. The court did grant summary judgment on a subsidiary claim relating to WMATA's attempt to get plaintiff to pay back some vacation pay, finding that the parties had already compromised that claim, as to which administration exhaustion had not occurred since it didn't come within the scope of the complaint plaintiff had filed with the Alexandria Office of Human Rights.

District of Columbia — The *Associated Press* reported on Nov. 29 that the District of Columbia's Office of Human Rights has rejected a complaint filed by George Washington University Law Professor John Banzhaf on behalf of Catholic University students who were upset that the new president of the University, former Boston College Law School Dean John Garvey, had reinstated single-sex as opposed to mixed-sex dormitories. Garvey wrote in a Wall Street Journal op-ed piece last spring that single-sex dorms would reduce binge drinking and "hooking up." Oh ye uni-

versity administrators of limited imagination, who can't conceive of guys hooking up with guys and gals hooking up with gals, after tossing back a few, maybe more than a few.... Anyway, Banzhaf alleged that sexually-segregated dorms constitute sex discrimination. Disagreeing, the Office ruled that there was no sex discrimination because single-sex dorms do not treat men and women differently. Where have we heard this kind of reasoning before? Oh yes, the Virginia Supreme Court ruling that upheld the state's anti-miscegenation law, later reversed by the US Supreme Court in *Loving v. Virginia*. . . , and countless ruling rejecting challenges to the ban on same-sex marriage. . . . Anyway, the ruling asserted that if this complaint were valid, then the University would be forced to abandon single-sex sports teams, locker rooms, and bathrooms. Do we hear any objections to these consequences from Law Notes readers? Oh, OK, we hear ya....

Georgia — The Georgia Supreme Court ruled on November 21 on a dispute concerning ownership of Christ Church in Savannah, a very old church building that has been in continuous use as an Episcopal church for almost 300 years. When the Episcopal Church voted to approve the election of the openly-gay Gene Robinson as Bishop of New Hampshire, a majority of the Savannah congregation voted to disaffiliate from the Episcopal Church USA and its Georgia Diocese and to affiliate instead with the anti-gay Diocese of Soroti in the Anglican Province of Uganda, which had offered to become the umbrella affiliation for U.S. Episcopal congregations who no longer wanted to be part of the American church due to its progressive views on homosexuality. A minority of the congregation, voting against disaffiliation, reconstituted itself as a new congregation affiliated with the American church, and brought suit to reclaim possession of the actual church building. In this ruling, the Georgia Supreme Court affirmed rulings by the trial and intermediate appellate courts that the building belongs to the minority group that remains affiliated with the Georgia Diocese and the national church, as the building was held by the congregation in trust for the Georgia Diocese. *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*, 2011 WL 5830140.

Maryland — Lambda Legal reported victory in a binding arbitration decision involving Baltimore County police officers Margaret Selby and Jaunika Ballard, who had been denied benefits coverage for their same-sex spouses. Selby married in Massachusetts, Ballard in the District of Columbia. Maryland's Attorney General had previously opined that the state would recognize same-sex marriages contracted in other states, but the County had rejected their benefits applications. The Baltimore County Fraternal Order of Police filed a grievance on their behalf, and the arbitrator ruled that denying spousal benefits to these married police officers is discriminatory and contrary to the County's agreement to give benefits to spouses legally recognized under Maryland law. Susan Sommer, Director of Constitutional Litigation at Lambda Legal, handled the matter for Lambda with co-counsel Peter M. Brody and Michael Laufert of Ropes & Gray LLP. The Fraternal Order of Police was represented by Matthew Clash-Drexler of Bredhoff & Kaiser, PLLC, according to the Lambda News Release about the case issued on November 22.

Maryland — Responding to a complaint filed with the Maryland Commission on Human Relations by Lambda Legal on behalf of Stacy Pipkin, a school administrator, the Anne Arundel County Public Schools have announced that Pipkin will receive employment benefits for her same-sex spouse. Pipkin and her spouse married in the District of Columbia in 2010 and adopted a child together. After they married, Pipkin attempted to enroll her spouse in the School District's health plan and was turned down. Susan Sommer, Lambda Legal's Director of Constitutional Litigation, is handling the matter for Lambda with co-counsel Peter M. Brody and Michael Laufert of Ropes & Gray LLP, and Richard Kovelant of Kovelant & Kovelant LLP. Lambda News Release, Nov. 16.

New Jersey — Ruling on the state's motion to get rid of the latest iteration of *Lewis v. Harris*, Lambda Legal's suit seeking same-sex marriage in New Jersey, Mercer County Assignment Judge Linda Feinberg ruled during a hearing in Trenton on Nov. 4 that all counts should be dismissed except the state constitutional equal protection claim, which will be allowed to proceed. Feinberg held that there is no fundamental due process right for same-sex couples to

marry in New Jersey, but that the complaint states a claim that the Civil Union Act does not provide the same benefits as marriage as it has been implemented. The lawsuit follows on an unsuccessful attempt to get the state's Supreme Court to rule that the Civil Union Act, passed in the wake of its prior ruling on the merits that New Jersey must accord equal rights to same-sex couples, was insufficient to that task, based on the findings of a Civil Union Review Commission that was created under the Act to report on its implementation. The Supreme Court took the position that any challenge to the Civil Union Act would have to go through a new fact-finding process in the Superior Court. Lambda Legal's Hayley Gorenberg is lead counsel for the plaintiffs. *NJ.com*, Nov. 4.

Pennsylvania — The Third Circuit affirmed a decision by Judge Lawrence F. Stengel of the U.S. District Court, Eastern District of Pennsylvania, to reject constitutional claims by Brian Skiles, the owner of residential properties and a gay nightclub in the city of Reading. *Skiles v. City of Reading*, 2011 WL 5101492 (Oct. 27, 2011). Skiles claimed the city had some sort of vendetta against him resulting in zoning disputes as to his residential properties and a dispute about the health permit for his club that resulted in closure for several months. Skiles asserted that the problems he experience about the club, Daddy's, were due to anti-gay bias by the city. His prime evidence as to this was the allegation that a city inspector referred to Skiles as a "faggot" during an inspection in 2006. The court affirmed Judge Stengel's ruling against Skiles, characterizing him as an "aggrieved property owner" who had failed to show unconstitutional conduct by the city.

Wisconsin — In a mixed-motive discrimination case, the Wisconsin Labor and Industry Review Commission ruled in *Bowen v. Stroh Die Casting Co., Inc.*, that the employer had violated the state's anti-discrimination law, which covers sexual orientation discrimination, when it failed to take appropriate action concerning anti-gay harassment of the plaintiff by co-workers. The *Milwaukee Journal Sentinel* (Nov. 29) reported that the plaintiff was repeatedly subject to anti-gay slurs, had a picture of Liberace left near his locker, and was once told that "homosexuals should be shot." The Commission found that the employer's response to Bowen's complaints

was ineffective, commenting: "It cannot be said that the respondent took any proactive role in ensuring that the atmosphere in its workplace was one where employees could work free from sexual harassment or harassment based upon sexual orientation." However, the Commission also found that Bowen's discharge was partly due to a physical altercation with a co-worker and "anger management issues." Although the Commission found the coincidence of timing of the discharge to be troubling, ultimately it treated this as a mixed-motive case, which means reinstatement and backpay was not a remedy. However, Bowen earned a declaration that his treatment violated the statute, and an award of \$148,000 for legal fees as prevailing party on the harassment claim. There was one dissenting vote, Republican Governor Scott Walker's appointee, Laurie McCallum (the wife of former Governor Scott McCallum, also a Republican). McCallum wrote that in her opinion the Wisconsin law "does not provide a separate cause of action for harassment based on sexual orientation," even though it expressly forbids discrimination on that ground. This was reportedly the first case in Wisconsin upholding a claim of sexual orientation harassment in the workplace under the state law. *A.S.L.*

Criminal Litigation Notes

California — Brandon McInerney, age 17, has entered a guilty plea to second-degree murder and voluntary manslaughter in the death of Larry King. McInerney, then 14, shot classmate King, an openly-gay student, to death at E.O. Green Junior High School, and was originally prosecuted for murder in Ventura County Superior Court, but the jury deadlocked. By accepting a plea bargain that will result in a 21-year prison sentence, McInerney avoided the possibility of being sentenced to life in prison. McInerney's defense had been that he was goaded into violence by King's sexual baiting of him.

Illinois — On November 7, Kendall County Judge John Barsanti passed sentence on Marquitta West, 18, who pleaded guilty to a felony hate crime in the brutal beating of Bryce Stiff, a gay man who was set upon by a group of teenagers on June 24, 2011. Stiff sustained nerve damages to

his face and legs, required reconstructive surgery on his lip, and has been undergoing psychological counseling three days a week to overcome the emotional trauma stemming from the incident. Barsanti sentenced West to two years in prison, and imposed restitution liability for the costs of Stiff's medical care, which so far amounts to \$6,527. The plea agreement between Kendall County prosecutors and West acknowledges that liability for the restitution would be divided with other defendants, Robert Franklin and Jabari Tuggles, whose cases are pending. In his victim impact statement to the court, West said: "I used to be a happy, caring and loving person who would do anything to help anyone. I was happy about me being gay . . . but now I'm filled with so much bitterness, hatred and I'm very depressed. I don't like leaving my home. I don't like doing things that excite me anymore. I feel like everyone is out to get me." Stiff indicated that West was the "ringleader" of the attack, calling Stiff derogatory names and offering the other men \$20 to beat Stiff. Ironically, Stiff said, he had been friends with West's brother and "knew of" West before the attack. This summary is taken from news reporting by Steve Lord for the *Beacon News* (Aurora, IL), November 8.

Minnesota — On November 17, Ramsey County Judge Rosanne Nathanson sentenced Demetrius Jermaine Miller to 27 years in prison for the rape and robbery of a transgender man. According to an account posted on *Advocate.com* based on reporting by the *St. Paul Pioneer Press*, Miller and the victim met when they shared a cigarette on the evening of May 18 at a St. Paul gas station. The victim reportedly offered Miller some marijuana, and they went behind the gas station to smoke it, but then Miller began beating the victim and tearing off his clothes to get at his iPod, phone and cash. Discovering that the victim had female genitals, Miller raped him. Miller's defense to the rape charge was that the sex was consensual, and that he agreed to it in order to commit the robbery. Miller discharged both of his attorneys during the course of the trial. A jury convicted on first-degree aggravated robbery and first-degree criminal sexual conduct in October.

New York — A Brooklyn jury convicted John Katehis on November 15 on a second-degree murder charge for killing George Weber, a gay journalist. Katehis,

who was 16 when the murder was committed in 2009, placed a notice on Craigslist offering to perform oral sex for money, and drew a response from Weber, then 47. Weber was reportedly looking for a bondage scene, to which Katehis agreed in their email correspondence. The mix of evidence presented at trial left much to speculation. Sentencing was scheduled for Dec. 7. *Gay City News*, Nov. 15, 2011.

New York — Queens County Criminal Court Judge Felicia A. Mennin ruled in *People v. Kleckner*, 2011 NY 024427 (Oct. 28), that people who formed a human chain that blocked traffic while conducting a demonstration in support of the pending Marriage Equality bill did not enjoy First Amendment immunity from arrest. While they were engaged in political expressive activity, ruled the court, the government has the right to impose reasonable time, place and manner restrictions on such activity, including requiring that there be unimpeded access to a crosswalk in front of a government building. (Reported in the *NY Law Journal* on November 25.)

Utah — The Utah Supreme Court affirmed the denial of a petition for habeas corpus in *Archuleta v. Galetka*, 2011 WL 5840556 (Nov. 22, 2011), rejecting more than 30 specifications of ineffective assistance of counsel in this first degree murder/death sentence proceeding in which the petitioner was found guilty of the brutal and wanton murder of a gay man he met at a 7-Eleven store on November 21, 1988. According to the facts related in the opinion for the court by Justice Lee, Michael Archuleta and a friend, Lance Wood, had been staying with their girlfriends in an apartment in Cedar City. Archuleta and Wood went to the 7-Eleven together, where they encountered Gordon Church, engaged in conversation, and left with Church to cruise about in Church's car. They drove to a secluded area in a nearby canyon. Church told Archuleta that he was gay and wanted to have sex with him. Archuleta started to engage in a "sex act" with Church, then changed his mind, then Wood attacked Church, throwing him to the ground, breaking an arm and dislocating an elbow. Archuleta and Wood then bound Church and placed him in the trunk of his car. They drove north to another secluded area, where they tortured him in various ways matter-of-factly described in the opinion, and then left him for dead,

bound, gagged, and partially buried under tree branches and dirt. They drove to Salt Lake City, abandoned the car and hitchhiked back to Cedar City, where Wood later contacted the police and confessed to his participation in the murder. The court found that the various specifications of ineffective assistance proffered by Archuleta fell far short of the standard it had set in prior habeas petition cases. The court affirmed the conviction and death sentence with no dissent.

Vermont — Advocate.com reported on October 31 that the Vermont U.S. Attorney, Tristram J. Coffin, has withdrawn a grand jury indictment against Timothy “Timo” Miller for kidnapping, in the ongoing interstate child custody battle between Janet Jenkins and Lisa Miller. Miller disappeared with, Isabella, the child born during her civil union relationship with Jenkins, after it became clear that all appeals had been exhausted from a Vermont Supreme Court ruling affirming parental rights of Jenkins. The U.S. Attorney had presented evidence to a federal grand jury that Miller, a Mennonite missionary, had assisted Miller in spiriting Isabella out of the country rather than comply with court custody and visitation orders. An order signed by Coffin and U.S. District Judge Christina M. Reiss stated: “In light of Timothy Miller’s role in the international parental [kidnaping], and his agreement to return to the United States and to provide truthful testimony as requested in any proceedings in this matter, further prosecution is not in the interests of the United States at this time.” All counsel involved in the case were declining comment to the press in the wake of this development. *A.S.L.*

Legislative Notes

Federal — A new push for enactment of the Employment Non-Discrimination Act (ENDA)? Tico Almeida, a civil rights attorney who served as the lead counsel on ENDA for the U.S. House Education and Labor Committee when Democrats controlled the House (2007-2010), has helped to start a new organization, *Freedom to Work*, which is focused on securing passage of the bill. Almeida will head the group, which will begin its efforts by development a speaker’s bureau of LGBT people who have experienced workplace discrimination,

following the example of the strategy of personalizing the issue that Servicemembers Legal Defense Network followed, ultimately succeeding in getting the “Don’t Ask Don’t Tell” military policy repealed. Almeida stated that the organization will dissolve after ENDA is enacted, and they hope that this will happen within two years. *Washington Blade*, Oct. 26. Of course, for this to happen the House of Representatives must return to Democratic control, the Democrats must retain control of the Senate with enough of a margin to overcome filibustering, and the White House must remain in Democratic hands after the 2012 election, unless Freedom to Work succeeds in effecting a massive conversion on gay rights in the Republican Party. ENDA was on the agenda for the Obama Administration, in third place after Hate Crimes and repealing DADT. As the House went Republican in 2010 and the Democrats did not retain enough of a margin in the Senate to bring anything strongly opposed by the Republicans to a vote, the Administration was able to achieve only the first two items on the list. Also on the “to do” list is passage of the Marriage Equality Act (MEA), which would repeal the Defense of Marriage Act and provide for federal recognition of all lawfully contracted marriages. Although the MEA was voted out of committee in the Senate during November on a party-line vote (see *BNA Daily Labor Report*, Nov. 10, A-10), there was no indication that the Democratic leadership intended to bring it up for a floor vote in the present Congress, given the adamant opposition of Senate Republicans and the lack of unanimity in support from Senate Democrats, which would make a cloture vote nearly impossible to obtain. Passage in one house of Congress for MEA would thus be mainly symbolic, as the House is unlikely to provide even committee hearings under Republican control. Along the same lines, Senator Joseph Lieberman (I-Conn.) and Senator Susan Collins (R-Maine) have reintroduced their bill to make federal employees’ same-sex partners eligible for health benefits, long-term care coverage, family and medical leave, and federal retirement benefits. This measure, called the Domestic Partnership Benefits and Obligations Act, was introduced in the last two sessions of Congress and passed out of committee in 2009 without receiving a floor vote. Since it would not prem-

ise benefits eligibility on marriage, instead setting up its own definition of domestic partnership, enactment would not require any change in the Defense of Marriage Act.

Defense Department Getting Defensive?

— Now that openly gay and lesbian people can serve in the U.S. military, the question arises of whether and to what extent they will enjoy equal treatment with respect to military policies and benefits. While litigation gets underway challenging the refusal of the Defense Department to treat married same-sex spouses of military personnel the same as married different sex spouses, due to the prohibition of Section 3 of the unconstitutional Defense of Marriage Act, the Defense Department issued a Quick Reference Guide on September 20, when repeal of DADT went into effect, subsequently amended, to inform service members about various benefits and programs that will be available for same-sex partners of military members. These are programs and benefits in which the member is free to designate anybody they want as a beneficiary or participant. Under the DADT regime, designating a same-sex partner might lead to discharge, but with DADT repeal, would not have such consequences. The benefits include Service Members Group Life Insurance beneficiary, Post Vietnam-era Veterans Assistance Program beneficiary, All-volunteer Force Educational Assistance Program Active Duty Death Benefit beneficiary, Death Gratuity beneficiary, Final Settlement of Accounts, Wounded Warrior Designated Caregiver, Thrift Savings Plan beneficiary, Survivor Benefit for retirees, Casualty Notification Designation, Escorts for Dependents of Deceased or Missing, Designation of Persons Having Interest in Status of a Missing Member, Veterans’ Group Life Insurance beneficiary, Person Eligible to Receive Effects of Deceased Persons, and Travel and Transportation Allowance: attendance at Yellow Ribbon Reintegration events for members leaving the service.

Florida — Broward County enacted a measure barring the county government from making contracts with companies that don’t provide spousal benefits to domestic partners of their employees. Broward has a partner registry that is open to both same-sex and different-sex partners, and the new policy would require contracting employers to recognize both relationships. *Ft. Lauderdale Sun Sentinel*, Nov. 17.

Kansas — The Topeka Unified School District 501 Board of Education voted on Nov. 17 to include sexual orientation and gender identity in the district's policies against discrimination concerning staff and students. The vote was 6-1. *Topeka Capital Journal*, Nov. 18.

Massachusetts — The legislature has approved a measure adding "gender identity" to the state's anti-discrimination laws with respect to employment, housing, education and credit. The bill originally proposed would also have covered public accommodations, but that category was removed due to controversy about access to public restrooms. The bill, which Governor Deval Patrick signed into law on November 23, goes into effect on July 1, 2012. The new law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, as part of a person's core identity; provided however, gender-related identity shall not be asserted for any improper purpose." That definition sounds to us like the proverbial camel: the horse that was designed by a committee. BNA Daily Labor Report, 222 DLR A-9 (Nov. 17, 2011); 227 DLR A-7 (Nov. 25, 2011).

Michigan — The Senate passed legislation early in November requiring school districts to develop anti-bullying policies, but requiring that such policies do not "prohibit a statement of a sincerely held religious belief or moral conviction of a school employee, school volunteer, pupil, or a pupil's parent or guardian." This evoked considerable public protest, as it would privilege religiously-based bigotry (particularly religiously-based homophobia), shielding bullies who harass gay students. Later in November, a deal was reached to omit this language from the bill. *Detroit Free Press*, Nov. 3; *Advocate.com*, Nov. 16. On November 29, the Senate approved the new version of the bill, 35-2, and sent it on to Governor Rick Snyder, who is expected to sign it. An attempt by Democratic sena-

tors to add a list of forbidden grounds for bullying, including sexual orientation, was rejected in a party-line vote, leading to the dissenting votes. *Detroit Free Press*, Nov. 30.

Oklahoma — The Oklahoma City Council voted 7-2 to add sexual orientation to the city's non-discrimination policy on Nov. 15. The policy extends to city employment and is not binding on the private sector. Opponents who spoke during the public hearing cited religious objections and opposition to adding categories not covered under federal or state law to the city's policy. *NewsOK.com*, Nov. 15.

Oklahoma — The Norman City Human Rights Commission has unanimously resolved to ask the city to add sexual orientation and gender identity to the City of Norman Personnel Manual section on discrimination and harassment. The recommendation goes to City Manager Steve Lewis.

Pennsylvania — Whitmarsh Township and Jenkintown Borough, both in Montgomery County, have enacted non-discrimination policies that include sexual orientation and gender identity, according to a report by Equality Pennsylvania. These are the 24th and 25th Pennsylvania municipalities to ban discrimination based on these grounds. In light of the impossibility of moving a state law discrimination ban through the legislature, the current focus in Pennsylvania has been on getting as many local policies enacted as possible, so that the state will eventually be blanketed by local laws banning anti-gay and anti-transgender discrimination. *A.S.L.*

Law & Society Notes

Same-Sex Marriage — U.S. Secretary of Housing and Urban Development Shaun Donovan became the first member of the Obama cabinet to endorse same-sex marriage in a November 15 interview with MetroWeekly reporter Chris Geidner. After delivering the keynote speech at the 8th annual National Center for Transgender Equality Awards Ceremony, Donovan told Geidner in response to a question about the passage of marriage equality in New York, "I was enormously proud to be a New Yorker on the day that it passed. I actually worked for Andrew Cuomo when he was Housing Secretary. I worked for Mike Bloomberg

who has been a constant support of the law — what is now law. . . We've got more work to do in the Obama administration in a second term." When he was asked if that included working on marriage equality, he responded affirmatively, saying "Like marriage equality." To date, President Obama has limited his support to endorsing civil unions and repeal of the Defense of Marriage Act, but has said that he is "still evolving" on the subject of same-sex marriage.

Civil Unions and Federal Tax Law — Mondaq reported on Nov. 17 (2011 WLNR 23800237) that an IRS official had opined in an informal letter to H&R Block, the tax preparation company, that different-sex civil union partners in Illinois would be treated as married for federal income tax purposes because the State of Illinois regards them as married for its tax purposes. However, because of the federal Defense of Marriage Act, which prohibits the federal government from recognizing same-sex couples as married, same-sex Illinois civil union partners will not be recognized as married. Here is an obvious Equal Protection violation! Commenting on the IRS letter, the Employee Benefits, Executive Compensation & ERISA Litigation Practice Center of the law firm Proskauer Rose LLP commented that this "informal guidance" raises more questions than it answers. For example, would this view extend to treatment under employee benefit plans, as well as for purposes of individual and marital income tax filing, including pension plans? Would the IRS extend similar recognition to different-sex civil unions in other states? Such informal guidance letters are not legally binding on the IRS and generally cannot be cited by other taxpayers, but may signal yet another instance that can provide fodder for the expanding number of lawsuits challenging the constitutionality of DOMA on Equal Protection grounds.

Civil Unions and State Tax Law — Illinois state tax authorities announced that civil union partners under the state's recently enacted Civil Union Law will be in the same tax-filing category as married persons, inasmuch as the state law was intended to provide equal legal treatment to those same-sex couples who enter into civil unions. As in states that authorize same-sex marriage, Illinois civil union couples will need to file their federal income taxes individually (due to the unconstitu-

tional Defense of Marriage Act, which the Obama Administration enforces despite its conclusion that the measure is unconstitutional), and then prepare a dummy federal joint return to generate the numbers necessary to file their joint Illinois return. The dummy federal return will need to be submitted to state tax authorities together with the joint state return. Got that? More work for accountants? Is this really equal treatment? Are the on-line tax services up to this task? (News reports indicate that because Illinois does not have a progressive income tax, but instead taxes everybody at a flat 5%, there is no “marriage penalty” and the different filing status may not make much of a difference.)

California — State Assemblywoman Cathleen Galgiani came out as a lesbian during an interview with *The Record* (Nov. 2). Galgiani indicated that she did not realize her lesbian sexual identity until after she was elected in 2006 to represent the 17th Assembly District. She also announced that in 2012 she will compete for the new 5th Senate District that will result from the decennial redistricting. *** They’re back. The group that failed to get sufficient signatures to put a repeal measure of SB48 — the gay education law recently enacted in California — up for a referendum repeal vote, has filed a new repeal proposal with the Attorney General, intending to make a second attempt to gather sufficient signatures for the 2012 ballot.

California — 2012 is shaping up to be potentially a big LGBT-related initiative year in California. Although they fell short the first time, opponents of SB48, the “Fair, Accurate, Inclusive, and Respectful Education Act” (which mandates the LGBT-related history and achievements be covered in the public schools), are back again with a new proposed repeal initiative. The proposed initiative would strike LGBT people from the list of groups whose history is supposed to be covered in social science instruction in the schools. In addition, although Equality California has backed away from an attempt to get an initiative repeal of Proposition 8 on the ballot, another group is stepping forward with such an effort: Love Honor Cherish. Eric Harrison, the former statewide Development Director for Equality California, has resigned to become Interim Executive Director of Love Honor Cherish, with the goal of submitting an initiative that would re-

place the Prop 8 constitutional amendment with one that will open up marriage to all couples regardless of sex, sexual orientation or gender identity. Although the effort to repeal Prop 8 could be rendered moot depending on how the 9th Circuit (and perhaps the Supreme Court) deal with the pending appeal in *Perry v. Brown*, a final, final, final decision in that case might not occur prior to the November 2012 general election.

Colorado — The Democratic minority in the State Senate has elected their openly-gay colleague, Mark Ferrandino, to be their Minority Leader in the upcoming session of the legislature. Ferrandino, 34, represents a district that includes part of the city of Denver. If the Democrats regain their majority in the 2012 election, Ferrandino would be a likely candidate for Speaker of the House.

2011 Election Results for Openly GLBT Candidates & LGBT-Related Ballot Measures — There were so many openly LGBT candidates running for re-election or newly-running, and so many of them won their races, that we can hardly begin to be exhaustive in the context of this Newsletter, and refer readers to the website of Human Rights Campaign and the Victory Fund for full details. In races that earned the most media attention, Adam Ebbin was the first openly gay candidate to be elected to the Virginia Senate, Houston Mayor Anise Parker was re-elected, Alex Morse, a 22-year-old recent college grad, knocked off an incumbent to become Mayor of Holyoke, Massachusetts, and the nation’s youngest mayor; Bruce Harris, elected mayor of Chatham Borough, NJ, may be the nation’s first openly gay African American Republican mayor; and Pedro Segara was re-elected Mayor of Hartford, CT. Numerous candidates won elections to be the first openly gay members of city councils. Traverse City, Michigan, voters overwhelmingly supported an ordinance prohibiting discrimination based on sexual orientation, and Maine voters retained election-day voter registration in a battle considered crucial for efforts to win a same-sex marriage initiative next year. (Maine has legislated in favor of same-sex marriage, but the measure never went into effect when opponents secured sufficient signatures for a voter referendum that then went against same-sex marriage; proponents of same-sex marriage are eager for a rematch in 2012.) In Fort Myers,

Florida, voters approved a charter amendment that prohibits the city from adopting any policy that discriminates against anyone age 18 or older based on his or her race, national origin, sex, sexual orientation, age, marital status or military status. *Ft. Myers News-Press*, Nov. 9.

Corporate Anti-Discrimination Policies — The past several New York State and New York City Comptrollers have been using the vehicle of their management of state and city pension fund investments to persuade corporations to add sexual orientation and gender identity to their corporate anti-discrimination policies. Sometimes these officials have participated in shareholder initiatives, but frequently a letter to the corporation mentioning the large shareholding position of the pension fund and inquiring about the issue are sufficient to effect change. *Gay City News* (October 27) reported on recent efforts on this front by New York State Comptroller Thomas DiNapoli. In response to the most recent round of efforts, seven new Fortune 1000 corporations had added policies covering by sexual orientation and gender identity, and three more had added more narrowly-focused sexual orientation policies. This campaign involved contacting more than 130 corporations. In some cases, corporations don’t change the policy until a credible shareholder resolution is introduced. The most resistant hold-out for many years has been Exxon-Mobil. Prior to the merger of the two corporations, Mobil had a non-discrimination policy covering sexual orientation, but the policy was vacated when Exxon took over. Since most of the other major international energy companies now ban such discrimination, it is difficult to know why Exxon-Mobil has been so resistant. But we all know where to purchase gasoline... Recent additions to the list of corporations with sexual orientation and gender identity policies: PolyOne Corporation, Sanderson Farms, Total System Services, Inc., Beckman Coulter, Plans Exploration & Production Company, Valmont, and Nextel Corporation. Those who added just sexual orientation policies were Pool Corporation, Packaging Corporation of America, and Cameron Corporation. Those who added policies after a shareholder resolution was launched included Amphenol, Lifepoint Hospitals, Werner Enterprises, Catalyst Health Solutions, and CF Industries Holdings (sexual orientation

and gender identity), and Quanta Services, Danaher, Roper Industries, and Noble Energy (sexual orientation only). Efforts are still pending at some other corporations.

* * * In negotiations over a new collective bargaining agreement, Major League Baseball has agreed with the players' union to include "sexual orientation" in its anti-discrimination provision. Since there are at present no openly-gay major league baseball players, this is an interesting gesture. Could it be aimed at encouraging closeted gay players, of whom there are reportedly plenty, finally to "come out"?

Judicial Appointments — After waiting 18 months for a hearing in the Senate Judiciary Committee on his nomination by President Obama to become a judge of the U.S. Court of Appeals for the Federal Circuit, WilmerHale law firm partner **Edward C. DuMont** wrote to the president on November 4, asking for withdrawal of his nomination. Had he been confirmed, DuMont would have been the first openly gay person to be nominated and confirmed for a United States Court of Appeals seat. In his letter, DuMont referred to the failure of the Committee to hold a hearing on his nomination, stating: "My understanding is that this inaction results from opposition on the part of one or more members of the Committee minority. While I regret this, I also recognize that any degree of opposition can be enough, as a practical matter, to prevent action by the full Committee or the Senate. Given the passage of time, that appears to be the case here." Acknowledging the importance of achieving a full complement of active judges for the busy court, "drawing the process out further does not seem either sensible to me or fair to the Federal Circuit," he concluded. * * * On November 3, the Senate Judiciary Committee favorably reported the nomination of **Michael W. Fitzgerald**, an openly gay nominee for the U.S. District Court for the Central District of California, by unanimous voice vote. If confirmed by the full Senate, Fitzgerald would be the first openly gay federal district court judge to be confirmed for a court other than the Southern District of New York.

Iowa — Same-sex marriage in Iowa is safe for now. In a special election, Democratic State Senate candidate Liz Mathis won a seat vacated by a Democratic senator who had accepted a state commission appointment from the Republican governor,

thus preserving a slim Democratic majority in the Senate and continuing to block Senate consideration of a proposed state constitutional amendment that would overturn the *Varnum* decision and end same-sex marriage in the state. Significant out-of-state money poured into the campaigns of both candidates from groups and individuals concerned with the issue of same-sex marriage, with the National Organization for Marriage (an anti-same-sex marriage group) heavily targeting this race.

New York — Voters in Ledyard, New York, reelected their controversial town clerk, Rose Marie Belforti, who had attracted media attention by refusing to issue marriage licenses to same-sex couples, in defiance of the recent enactment of marriage equality in the state. Belforti, who claimed religious objections to issuing such licenses, announced that same-sex partners seeking licenses should apply at times when her alternate is on duty. An unofficial count the day after the election gave her 305 votes to 186 votes for a last-minute opponent. She hailed the result as a victory for religious freedom. *Post Standard* (Syracuse), Nov. 9.

New Hampshire — With the Republican-controlled state legislature poised to take up in January a proposal to supplant the same-sex marriage law with a civil union law (more limited in some ways than the civil union law that was displaced when the previous Democratic-controlled legislature approved the same-sex marriage bill), pressure is building on Republican presidential candidates competing in New Hampshire's first in the nation primary election in January to take a position on the pending legislation. Nuances in the candidates' positions on this measure may influence the outcome of the primary, according to political pundits, who see the Republican primary voter base as being to the right of the Republican Party as a whole.

Higher Education Developments — **Mercer University** in Macon, Georgia, will extend a range of benefits to same-sex partners of employees, pursuant to a policy approved by University President Bill Underwood on October 28. The benefits include health and dental insurance, tuition waivers, and some other benefits commonly provided for employee spouses. In reporting on this development, the *Macon Telegraph* (Nov. 5) quoted Larry Brumley, the university's chief of staff, to the effect

that the policy resulted from a study of other private universities in the south in which Mercer competes in faculty hiring, among whom Emory, Vanderbilt and Duke already provide partner benefits. Brumley said that providing such benefits fits in with the university's core values, "affirming the value and dignity of each faculty and staff member." Mercer now becomes one of several universities with Baptist roots to have adopted this policy, others being Wake Forest and Furman. Formal ties to the Georgia Baptist Convention were dissolved in 2006. Brumley also pointed out that the policy was consistent with the university's non-discrimination policy, which includes "sexual orientation." * * * The **Florida Atlantic University** board of trustees vote on November 16 to add "sexual orientation" to the other forbidden grounds for discrimination under the university's non-discrimination policy, to be administered by the university's Office of Equal Opportunity Programs. The university already had a legal obligation not to discriminate, since it was subject to local ordinances banning sexual orientation discrimination and the existing policy prohibited discrimination on "any other basis protected by law," but proponents of adding "sexual orientation" explicitly argued that omitting a reference to sexual orientation made the school look less welcoming to gay people, when all but one of the other Florida public universities explicitly ban such discrimination. (The only outlier at this point is Florida A&M.) *Ft. Lauderdale Sun-Sentinel*, Nov. 17. * * * Some of the higher education news this month is negative, however. **Shorter University**, a Christian Baptist school in Rome, Georgia, sent a new "personal lifestyle pledge" to its 200 employees on October 26. Under the pledge, employees are required to "reject homosexuality" as well as premarital sex, adultery, and another other behavior that would violate a fundamental understanding of Biblical morality. The policy also bans drug use, consuming alcoholic beverages in the presence of students, and requires active church membership of all employees. Some employees told journalists they were concerned that the promulgation of this new pledge that employees must sign could signal some sort of "witch hunt" on campus. Presumably, Wiccan beliefs will not go down well with the university administration. *NYDailyNews.com*, Oct. 31. * * * The *Press-Enterprise* in

Riverside, California, reported Oct. 28 that **California Baptist University** expelled a transgender woman after discovering that her gender identity when a background check turned up her prior appearance on "True Life," an MTV reality show. According to Domaine Javier, she was told by university officials that the expulsion was because she falsely claimed that she was a woman on her application form. On the reality TV program, she revealed that she was born biologically male, but has identified as a woman since early childhood. She was dismissed a week before she was scheduled to begin a nursing program after transferring from Riverside City College. Javier re-enrolled at Riverside City College, but will be delayed a year in beginning her nursing training.

Difficulties of Prosecution in Teen Bullying Cases — The *Buffalo News* reported on Nov. 23 that Amherst City Police had concluded that they cannot file criminal charges against anyone in their investigation of the alleged bullying that occurred prior to the suicide of Jamey Rodemeyer, 14, a student at Williamsville North High School who took his own life shortly after the start of the fall semester. Although various allegations surfaced in response to the publicity about Jamey's suicide, investigations led to dead-ends, since most of the reports were hearsay, all of the perpetrators were minors who could not be prosecuted, Jamey is not alive to testify to incidents that were not witnessed by others, and ultimately, said Amherst Police Chief John Askey, "we can't make a case when the proof necessary to prosecute isn't there." Erie County District Attorney Frank A. Sedita III, who was briefed on the case and went to police headquarters to review the evidence from the investigation, commented: "Being charitable," he said, "the evidence, at best, was very thin." He added, "It's not a crime to be an obnoxious, teenage idiot."

Presidential Proclamation for National Adoption Month — On November 4, President Obama issued a Proclamation for National Adoption Month which included the following statement: "Adoptive families come in all forms. With so many children waiting for loving homes, it is important to ensure that all qualified caregivers are given the opportunity to serve as adoptive parents, regardless of race, religion, sexual orientation, or marital status." *Federal Government Documents*, 2011 WLNR 22795986.

Insurance Coverage for Gender Reassignment — The Transgender Legal Defense & Education Fund announced Nov. 16 a victory in its effort to secure disability leave coverage for Lina Kok, a transgender woman whose claim was denied by her insurance company, which asserted that the policy did not cover "cosmetic" procedures. TLDEF assisted in appealing the ruling, and on the third level of appeal attained a reversal and acceptance of gender reassignment procedures as medical treatment. The recent Tax Court ruling in the O'Donnabhain case, mentioned above, was helpful in securing this result. Now that the IRS and many courts have accepted that surgery in support of gender transition is medical treatment, not merely "cosmetic," such victories should be easier to win.

Catholic Adoption Agency Changing Identity — Catholic Social Services of Southern Illinois, eager to continue providing foster and adoption services, has decided to change its name to Christian Social Services of Illinois and disassociate from the Catholic Diocese of Belleville. The state of Illinois has declined to renew contracts with Catholic agencies that refuse to recognize same-sex civil union partners as suitable parents for foster care and adoption placements. *Belleville News Democrat*, Nov. 11. *Advocate.com* (Nov. 15) reported that three Catholic Charities groups that were suing the state over its refusal to renew their contracts had dropped their lawsuit "with great reluctance." After a trial judge ruled against them, they filed an appeal, but have now withdrawn it, evidently realizing they were unlikely to win a reversal.

Painful Asylum Denial — The *Jerusalem Post* reported on Nov. 13 that the U.S. government denied a petition for political asylum by Ali Ahmad Asseri, former first secretary of the Saudi Arabian consulate in Los Angeles. Asseri, who now identifies as gay, argued that he would face execution if required to return to his home country, which imposes the death penalty for gay sex. The problem seems to have been that when Homeland Security investigated his application, they determined that he had worked in the public prosecutor's office in Saudi Arabia, in which position he had supervised the imposition of judicial punishments, including lashings, which they determined was torture, thus disqualifying him for U.S. asylum. *The Jerusalem Post* provides a lengthy and detailed account of

Asseri's attempts to win asylum, which has surprisingly not received much attention in the U.S. press. *A.S.L.*

International Notes

Australia — The issue of same-sex marriage is causing considerable debate on the national level, as the Labor Party was prepared to hold its national conference early in December, at which supporters for same-sex marriage are pushing for the party to change its position, against the opposition of Prime Minister Julia Gillard, who opposes taking a party position and is advocating allowing party members a free conscience vote if the issue comes before the Parliament. Same-sex couples have the right to enter civil unions in much of the country, but these do not carry the full rights of marriage under national law, and the government has refused to give necessary permission for Australian nationals to enter into same-sex marriages abroad for those jurisdictions where such permission is necessary. National polling shows significant public support for opening up marriage to same-sex couples, but that the general public rates this a low priority issue compared to economic and environmental issues, many stating that Parliament should focus on higher priorities for now. The general attitude appears to be that same-sex marriage will come to Australia someday, but the public isn't ready for it quite yet. *Australian*, Nov. 23.

Australia — The Queensland Parliament voted 47-40 to approve a civil union bill, bringing Queensland into line with several other Australian jurisdictions: Victoria, Tasmania, and the Australian Capital Territory. In the December 1 vote, Labor MPs were allowed a conscience vote and four voted against the legislation, but the remaining Labor members provided the majority for the measure. The other parties opposed it unanimously, but were outvoted. *ABC Premium News*, Dec. 1.

Austria — The Constitutional Court issued a decision Nov. 11 concerning naming. It seems that under the law when different-sex couples marry and decide to keep their original surnames, the names must be connected by a hyphen, but the Interior Ministry was taking the position that same-sex partners forming civil unions may not use the hyphen. Jorg Eipper Kaiser

registered his partnership as the first such couple in the Syrian capital, Graz, acquiring the name of his partner and wanting to have a hyphenated double surname, but the City government ordered him not to use the hyphen. Represented by Dr. Helmut Graupner, Eipper Kaiser took his case to the Constitutional Court, which ruled in his favor, stating that same-sex couples enjoy the constitutional protection of the family, and that differential treatment by the state required serious reasons for justification. Differential treatment as an end in itself was forbidden. Dr. Graupner reacted to the ruling by calling for the government to eradicate all differences between civil partners and married couples under federal law.*** In another Nov. 11 ruling, however, the Constitutional Court refused a petition to open up the status of registered partnership to different-sex couples, finding that since heterosexuals were not a historically disadvantaged group, their exclusion from registered partnership would not exceed the legislature's "margin of appreciation" with regard to constitutional equality requirements. So ruling, the court rejected a petition on behalf of Helga Ratzenbock and Martin Seydl, who were represented by Dr. Graupner.*** Also, Dr. Graupner hailed a decision by the City of Vienna to reject the order of the Interior Ministry under which transsexuals would be "outed" by the order of names listed on their marriage certificates. In the absence of same-sex marriage in Austria, classification issues arise when a married person undergoes gender transition but wants to remain married. At first, the government's position was to require that despite name changes and gender transition the marriage license would continue to list a man and a woman; then they decided that the parties need not be identified by gender, but insisted that the man be listed first, thus effectively "outing" transsexual marriages in circumstances where certificates need to be presented. Vienna's latest move obviates this problem by disassociating name position from gender.

Brazil — The final word is not in on same-sex marriage, according to a Nov. 2 posting on Nan Hunter's "Hunter of Justice" blog, reporting on a communication from a lawyer in Sao Paulo. The lawyer indicated that the decision by Brazil's highest federal appeals court that same-sex couples can legally marry is subject to further appeal to the Supreme Court, where the outcome is

"uncertain." The Supreme Court had previously recognized civil union partners, but three of the justice who voted for that decision have since retired. It seems that there has not been much public attention to the ongoing litigation, as in common everyday parlance people in Brazil reportedly make little distinction between marriage and civil unions, however there are significant legal differences.*** The *Washington Post* (Nov. 14) reported that Brazil had granted Antonio Vega Herrera, a Spanish national, permission to live permanently in Brazil based on his relationship with his same-sex partner, a Brazilian national. The men live in the town of Aracatuba in Sao Paulo state. The news report did not include the name of Mr. Herrera's partner. The President of the Rio de Janeiro gay rights group Arco Iris, Julio Moreira, hailed the result, but said the next step must be to persuade the Congress to pass legislation on the subject so that individuals will not have to separately petition the courts in such cases.

Cameroon — Agence France Presse reported on Nov. 23 that a court in Yaounde sentenced three men to five years in prison and a substantial fine on charges of engaging in gay sex. Defense counsel, Michel Togue, immediately appealed the sentences, calling them "a blatant violation of the law" and criticizing the trial judge for interjecting homophobic comments into the trial proceedings. Increasing public condemnation of homosexuality in Cameroon follows a trend in central Africa, where many nations seem to be moving towards more stringent penalties.

Malaysia — Government authorities ordered gay rights activists to abandon plans to hold their annual cultural festival, on the ground that opposition for conservative politicians and religious leaders threatened disorder that would undermine "national security." The festival was to be held in the capital, Kuala Lumpur, early in November, and the government order came just shortly before it was to begin. The local police threatened to prosecute the festival organizers if the event took place.

Nigeria — The Senate voted overwhelmingly on Nov. 29 to criminalize same-sex marriage, the activities of gay advocacy groups, and any same-sex public displays of affection. Under the bill, same-sex couples who marry could face up to 14 years in prison, and even witnesses and celebrants of such ceremonies would face

imprisonment. The other bans could bring imprisonment up to 10 years. The bill still needed to be passed by the lower house of the legislature before consideration by President Goodluck Jonathan. Public opinion against homosexuality is very harsh in Nigeria, according to an Associated Press report about passage of the bill in the Senate.

Philippines — The Senate approved a Senate Bill 2814, titled "Anti-Ethnic or Racial Profiling and Discrimination Act of 2011," which defines unlawful discrimination as "the distinction, exclusion, restriction or preference made on the basis of ethnicity, race, religion or belief, sex, gender, sexual orientation, gender identity, language, disability or other status which has an effect or purpose of impairing or nullifying" a person's recognition. The measure will extend to employment, educational institutions, and provision of goods and services. The bill also provides that every person would have a duty to ensure that "there is equal opportunity for all persons in relation to actual or prospective employees, students, tenants, customers, clients, and that no discriminatory acts... is committed by them or their agents in the areas of employment, housing, education and delivery of basic goods and services." *Business World* (Philippines), Nov. 22.

Russia — LGBT rights advocates in Russia have called upon international human rights groups and governments to take a stand concerning legislation pending in Moscow and St. Petersburg that would outlaw public advocacy for LGBT rights, equating it to pedophilia. Responding to a question posed at a press briefing at the U.S. State Department, a spokesperson for the Department stated: "We are deeply concerned by proposed local legislation in Russia that would severely restrict freedoms of expression and assembly for lesbian, gay, bisexual, and transgender (LGBT) individuals, and indeed all Russians. As Secretary Clinton has said, gay rights are human rights and human rights are gay rights. We have called on Russian officials to safeguard these freedoms, and to foster an environment which promotes respect for the rights of all citizens. The United States places great importance on combating discrimination against the LGBT community and all minority groups." Unfortunately, similar measures have already been enacted in Arkhangelsk and Ryazan.
Scotland — Ruth Davidson, an openly lesbian member of the

Scottish Parliament, has been elected to be the Conservative Party leader in Scotland, the first openly gay person to be a major party leader in the United Kingdom. The Conservative Party is part of the opposition in the Parliament.

Uganda — The Mukono High Court sentenced Sidney Nsubuga Enoch on Nov. 10 to 30 years in prison for the murder of gay rights activist David Kato on January 26, 2011. The evidence presented by the prosecution was that Kato asked Enoch to engage in sex with him, and that Enoch's ultimate reaction was to get a hammer and beat Kato over the head, and then steal things from his home. *Daily Monitor*, Nov. 10. As depicted in the local press, the murder had nothing to do with Kato's gay activism as such.

United Kingdom — A controversy is playing out over the government's move to allow the solemnization of civil partnerships for same-sex couples in religious establishments. Under British law, civil partnerships carry all the legal rights and responsibilities of marriage, but are completely non-religious, a significant fact in a nation with an established church where marriages are performed. No church, temple, synagogue or mosque would be required to perform or host civil partnership ceremonies, but many more liberal denominations have indicated their willingness to do so. Under existing law, civil partnerships must be conducted in civil registry offices. The Church of England is deeply conflicted on the issue. The measure was set to be effective in December, but a move to debate the issue in the House of Lords could delay or defeat it. *The Guardian*, Nov. 25.

Zimbabwe — Gay rights threatens to become a national election issue in Zimbabwe next year. President Robert Mugabe stated strong opposition to including protection against discrimination based on sexual orientation in a new charter being considered by a constitutional commission, and denounced the UK for its recent threats to withhold British aid from countries that oppress gay people (characterizing such efforts as "Satanic"), while Prime Minister Morgan Tsvangirai, Mugabe's opponent, pushing for Zimbabwe to achieve acceptance in the international community, has stated his preference for including protection for gay people in the charter. *ZimOnline*, Nov. 24. *A.S.L.*

Professional Notes

Two member of LeGaL were elected to the New York City Civil Court on November 8, **Paul Goetz** and **Anthony Cannataro**. Judge-Elect Goetz is also a member of the LeGaL board of directors.

United States Representative **Barney Frank** (D-Mass.) announced that he will not stand for re-election in 2012. Frank, who was first elected to Congress in 1980 after a career in local politics in Massachusetts, earned his undergraduate and law degrees at Harvard, and is a member of the Massachusetts bar. He led several important battles in Congress concerning LGBT legal issues, and was the first gay member of Congress to "come out" voluntarily. He actively led the fight to end the gay immigration ban, pass the Americans with Disabilities Act, soften the Solomon Amendment (which tried to coerce law schools, colleges and universities to allow military recruiters on campus by threatening the cut-off of federal funding), oppose the Defense of Marriage Act, and repeal the "don't ask, don't tell" military policy. However, he was probably best known in the area of LGBT issues for his leadership in attempting to pass the Employment Non-Discrimination Act (ENDA), which he introduced during 1993 in the wake of the "gays in the military" debate. Prior federal "gay rights" bills had attempted to insert a ban on sexual orientation discrimination in all federal civil rights laws. Frank introduced the strategy of a narrowly focused employment discrimination bill that was more likely to win passage and pave the way for future expansion into other areas. ENDA came within one vote of passage in the Senate in 1996, during the debate over the Defense of Marriage Act, and passed the House in 2007, albeit in the wake of a storm of controversy within the LGBT community when Frank, who had introduced the bill in that session of Congress in a form that would cover both sexual orientation and gender identity, decided to push a narrower measure just covering sexual orientation, arguing that the broader bill could not pass the House and that passing something in the House was an important first step (while realizing that the bill couldn't pass the Senate in that session of Congress in any event). The current version of the bill, introduced in 2009 and reintroduced this year, includes gender identity as well as sexual orientation, but

passage is stalled at present with the House in Republican control and the Democratic majority in the Senate unwilling to expend political capital on a controversial measure that won't be considered in the House. Rep. Frank earned extensive national attention for his leadership in responding to the Great Recession of 2007-09 with highly-publicized hearings resulting in passage of the Dodd-Frank Act, imposing a new regulatory regime on financial institutions. (As a member of the House minority during the Bush Administration, he had proposed a tighter regulatory regime over the federal housing lending agencies, but the Republican majority and the Bush Administration were unreceptive.) Rep. Frank was a keynote speaker at one of the earliest LeGaL Annual Dinners, *before* he officially "came out," and was an active proponent of LGBT rights issues throughout his legislative career. He announced that the decennial redistricting in Massachusetts had placed him in a district with over 300,000 new voters living in areas he had never previously represented, and he had made the decision to devote the remainder of his career in the House to representing the interests of his current district rather than divert time to campaigning in a newly configured district covering many areas with which he was not familiar. He said that he would remain engaged in public policy debates after retiring from the House, and was looking forward to the opportunity to write and, perhaps, to teach. Given his reputation for witty and pungent commentary on policy issues, one suspects he will be a major media presence after leaving the House.

The National Center for Lesbian Rights noted that two of its staff attorneys, **Ilona Turner** and **Jody Marksamer**, have resigned effective January 2012. Turner, who will become the new legal director of the Transgender Law Center, a San Francisco-based organization, has been a staff attorney at NCLR since 2008, working on a wide range of issues in LGBT law. Marksamer, who will move to Los Angeles to pursue public criminal defense work, joined NCLR in 2003 and has been NCLR's Youth Project Director. As a result of these resignations, NCLR has staff positions open for two new attorneys. See the announcement below.

HIV/AIDS Legal Notes

9th Circuit Upholds Attempted Aggravated Murder Conviction of HIV-Infected Man for Having Unprotected Anal Sex with Non-Consenting Victims

The U.S. Court of Appeals for the Ninth Circuit affirmed the denial by the U.S. District Court in Oregon of a petition for habeas corpus, finding that an Oregon State court's determination that there was sufficient evidence to convict Andrew Lee Boyer of two counts of attempted aggravated murder, for having unprotected anal sex with two boys, a twelve-year-old and an eighteen year-old with the mental capacity of a first or second grader, when Boyer knew he was infected with HIV, was not objectively unreasonable, in *Boyer v. Belleque*, 2011 WL 5110120 (October 28, 2011).

In 1997, a jury convicted Boyer of more than 20 counts of sexual offenses including sexual abuse, sodomy, and attempted sodomy, for having sexually abused four victims without consent either because of their age or mental capacity. The jury also convicted Boyer of attempted aggravated murder for having had unprotected anal sex with two of his victims.

The evidence at trial, which included testimony from police, the victims, Boyer's treating physician, and an examining physician specializing in psychiatry, established that Boyer knew he suffered from AIDS, knew how HIV was transmitted and knew the dangers of unprotected anal sex even without ejaculation, and that he utilized "grooming" techniques, often employed by sexual abusers, to take advantage of his victims over a long period of time. Evidence in the record showed that Boyer had unprotected anal sex without ejaculation with two boys; one encounter was described as "painful," the other as rape.

Boyer moved at trial to acquit on the attempted aggravated murder charges, claiming that "intent is a very difficult thing to prove at best," and arguing that there was no proof presented that he actually intended to kill his victims by exposing them to HIV. The prosecution analogized Boyer's actions to "placing a time bomb in a city street and not knowing if someone would be there when it went off." The state court

denied the motion to acquit, and the jury found Boyer guilty of both charges in addition to the many other sexual offenses charged. The state appellate courts affirmed the trial court's decision without opinion.

Boyer filed a motion for habeas corpus in the U.S. District Court, arguing that the evidence was legally insufficient to sustain the conviction, in violation of Due Process. Senior District Judge Malcolm F. Marsh denied the motion, and Boyer appealed to the 9th Circuit. Reviewing the case *de novo*, a panel of the 9th Circuit described Boyer's burden to succeed: he must demonstrate that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt was objectively unreasonable.

Writing for the panel, Circuit Judge Ronald M. Gould stated that the panel must examine Oregon's law of "attempted aggravated murder" to determine what the prosecution was required to prove regarding intent to convict Boyer of the crime. Judge Gould pointed to an Oregon decision, *State v. Hinkhouse*, 139 Or.App. 446 (Or.Ct.App.1996), for Oregon's law on the issue of intent. In that case, the defendant, Hinkhouse, knew he was HIV positive and engaged in many acts of unprotected sex over a long period of time, including rough and violent intercourse, for which the Oregon court held that "a rational fact finder could conclude beyond a reasonable doubt that defendant did not act impulsively merely to satisfy his sexual desires, but instead acted deliberately to cause his victims serious bodily injury and death."

Judge Gould analogized Boyer's case, stating that "a rational jury could have concluded that Boyer knew that he had developed fullblown AIDS...; he understood that he could transmit the disease through even a single instance of unprotected sex...; he targeted extremely vulnerable victims over a period of several months...; he sexually abused two boys, anally penetrating each of them once without a condom; ... he concealed from his victims the fact that he had AIDS...; he knew his viral count was high...; the encounters were rough and violent...; and he bragged about the rape of [one of the boys]."

In light of the factual similarities to *Hinkhouse*, Judge Gould held that it was not unreasonable to conclude that "a rational jury could find beyond a reasonable doubt that Boyer intended to kill his vic-

tims based on proof that he anally penetrated several victims with knowledge that he could infect them with AIDS." Judge Gould stated that the panel's decision was made with "some reluctance because of the thin nature of the evidence of intent," but concluded that "state courts have a broad general entitlement to deference to define their own state criminal law." *Bryan Johnson*

New York Supreme Court Rejects Defamation Claim Against AIDS Activist for Calling Journalist Who Supports HIV Denialism a "Liar"

Recently, the New York State Supreme Court in New York County held that a journalist who brought a defamation claim against an HIV/AIDS activist for allegedly making libelous statements concerning her journalistic integrity, failed to establish that the defendant made the comments with actual malice. *Farber v. Jefferys*, 2011 WL 5248207 (Nov. 2, 2011) (published in *NY Law Journal*, Nov. 8, 2011). In his opinion, Justice Louis B. York granted summary judgment to the defendant after finding that the plaintiff failed to meet the heightened burden of proof applied in defamation cases involving matters of public concern and plaintiffs who are public figures.

Justice York dedicates a significant portion of his opinion to describing the parties and their relative viewpoints concerning HIV and AIDS in order to establish the context of the dispute. The defendant, Richard Jefferys, is an activist affiliated with the Treatment Action Group, an organization that researches and develops vaccines against HIV and works towards improving the current medications used to treat HIV. Jefferys is currently the coordinator of the organization's Michael Palm Basic Science, Vaccine and Prevention Project, where he "critiques vaccine and treatment interruption research." Additionally, Jefferys has testified at FDA committee hearings about the medical treatments of HIV and AIDS.

The plaintiff, Celia Farber, is a journalist who has achieved a certain amount of notoriety for her coverage, and support, of a group of scientists and physicians referred to in the opinion as HIV dissenters. While the majority of the "established medical, scientific and advocacy community," including Jefferys, have accepted the idea that HIV is the virus that causes AIDS and

that the most effective treatments for HIV are the medications currently being used, there is a minority community that asserts that HIV is not the cause of AIDS. Rather, these individuals argue that HIV is merely a “harmless passenger virus” and that AIDS is actually caused by illicit drug use and the medications used to treat HIV+ patients. Generally, the mainstream medical community dismisses this theory as simply conspiratorial, but a few scientists have adopted the theory and attempted to prove it. One such individual is Dr. Peter Duesberg. Previously highly respected for his work with cancer research, Dr. Duesberg has, in the last twenty years, become known for developing and promoting the concept that HIV has no relation to the development of AIDS. Since the mid 1980s, Farber has been a supporter of Dr. Duesberg. Through her interviews with Dr. Duesberg and her news coverage of his theory, Farber has become, in the eyes of the mainstream medical and advocacy community, closely tied with the HIV dissenters. She has also spoken on panels about the theory, given lectures on the topic and her articles are taught in college courses.

This case arose out of one of Farber’s most well known articles. In 2006, Farber wrote a piece for Harper’s Magazine entitled “Out of Control: AIDS and the Corruption of Medical Science” (“Out of Control”). The article argued that Dr. Duesberg’s theory that HIV does not cause AIDS has not been fully researched and considered by the medical community and the government because the pharmaceutical companies benefit from the production of HIV medication. Essentially, Farber claimed that the idea that HIV causes AIDS is part of a conspiracy by the pharmaceutical companies who often fund the work of HIV/AIDS advocacy groups.

While Farber insists that the article was carefully fact-checked before publication, it sparked immediate and passionate criticism in the “traditional HIV/AIDS community” who contend that the article is based on flawed research. One response to the article, published first on the web, is a list entitled “Errors in Celia Farber’s March 2006 article in Harper’s Magazine,” (“56 Errors”) which lists 56 purported errors in “Out of Control.” The contributors to the list included physicians, researchers and advocates. Jefferys also contributed to the list of errors. The negative reaction to

the article intensified when Semmelweis Society International (“SSI”), an organization that supports professionals accused of misconduct because they acted as whistleblowers, announced in 2008 that Farber, along with Dr. Duesberg, would receive the society’s Clean Hands awards during “Whistleblower Week in Washington” (“Whistleblower Week”) in recognition of their “stance as HIV dissenters, which put them at odds with the medical establishment.” The SSI’s decision to bestow the award on Farber and Dr. Duesberg appears to have been based largely on Farber’s article, “Out of Control.” Both of them were also asked to testify to their experiences as whistleblowers as part of the week’s events.

It is Jefferys’ response to this announcement that is at the heart of Farber’s defamation claim. Prior to her receiving the award, Jefferys sent an email to Walter Fauntroy, the coordinator of the testimony to be presented at “Whistleblower Week.” In that email, Jefferys accused both Farber and Dr. Duesberg of manipulating quotes from scientific publications and using cases of actual malpractice by physicians in the treatment of HIV+ patients to create apparent support for their theory that HIV has no connection to AIDS. He asserted that neither individual is a whistleblower of the medical community, but rather that both “are simply liars who for many years have used fraud to argue for Duesberg’s long-discredited theory that drug use and malnutrition—not HIV—cause AIDS.” The email did not remain private communication between Jefferys and Fauntroy, but was passed along to members of the media and Congress.

Generally, in order to bring a defamation claim, a plaintiff need only assert that an individual allegedly “[made] a false statement of fact which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace.” Farber appears, at least at first, to have brought a valid cause of action for defamation as she contends that the statements Jefferys made in his email to Fauntroy are false and will harm her reputation as a journalist. Additionally, Farber argued that, as a result of Jeffrey’s email, she was removed from the list of speakers to give testimony during “Whistleblower Week” and SSI presented the Clean Hands award to her in private rather than during the public award ceremony.

However, when a defamation claim concerns a plaintiff who is a public figure, a matter of public concern, or a defendant who is a member of the media, the claim will be held to a heightened level of scrutiny. Under one of these circumstances, the presence of actual malice is required on the part of the defendant. If the plaintiff is a public figure, then he or she must prove through clear and convincing evidence “that the defendant made the defamatory publication with knowledge of the falsity of the claims or reckless disregard for the truth.” When the allegedly libelous statement relates to a matter of public concern, the plaintiff must show that the defendant acted with “gross irresponsibility.”

In his response to Farber’s claims, Jefferys argued that the higher level of review should apply here based on two factors. He contended that not only is Farber a public figure, or at least a limited purpose public figure, due to her relative notoriety among the HIV/AIDS community, but also that the claim involves a discussion of HIV and AIDS which are matters of public concern. The court agreed with Jefferys, finding both that Farber is, to a certain degree, a public figure and that the claim involves a matter of public concern. While Justice York rejects the idea that Farber would be a public figure in all circumstances, he does find that she is a limited purpose public figure. The court defines a limited purpose public figure as an individual who, although they have not achieved the general influence and renown of a public figure, have gained a level of influence in relation to a “particular controversy.” Here, the court found that Farber has gained a reputation within both the HIV dissenting and the traditional HIV/AIDS communities, and has therefore become a public figure in relation to the discussion surrounding HIV and AIDS. Interestingly, Justice York’s conclusion is based in part on the evidence Farber provided establishing that she is journalist well known for reporting on HIV/AIDS related issues, such as the fact that her articles have been taught in college courses and that she has given lectures relating to this topic. The court also relies on the level of public response her article “Out of Control” generated in determining that Farber, at least for the purposes of discussions in this particular area, is a public figure.

The court goes on to state that even if Farber was not a limited purpose public fig-

ure, the higher level of scrutiny would still apply because the defamation claim deals with a matter of public concern. Generally, courts are reluctant to limit the discussion of areas of public concern as there are certain matters of such public importance that people should be able to fully discuss and express their opinions in order to further the public understanding of the issue. Here, Justice York states that “questions concerning the cause of and treatment for AIDS . . . are clearly of public concern.”

Finding that the higher level of scrutiny applies, the court determines that Farber failed to establish that Jeffery acted with actual malice when he made his statements about her honesty as a reporter. In order for a person to have committed defamation with actual malice, he or she must have known that the information being published was false or published it “with reckless disregard of whether it was false or not.” Jefferys argues that the assertions he made concerning the accuracy of Farber’s reporting are true and, therefore, he did not act in reckless disregard of the truth as he did not make any false accusations. While Justice York does not expressly address the question of whether or not Jefferys’ comments about Farber are true, he does state that the evidence Jefferys provided to support his statements indicate that his actions were not taken in reckless disregard for the truth. In defense of his statement, Jefferys presented numerous documents concerning HIV/AIDS research including “56 Errors,” medical publications, and The Durban Declaration, a statement signed by over “5000 respected members of the traditional HIV/AIDS community” in 2000 stating that HIV is the cause of AIDS.

In response to these documents, Farber contends that they are not definitive and that the purpose of journalism is to question and explore assertions that people readily accept. However, the court is not evaluating whether what Jefferys said is definitively true, but whether he acted with reckless disregard when he said it. The court held that he did not. When establishing that a statement was not said with reckless disregard to its truthfulness, a person need only provide one reliable authoritative source on which they relied. Here, the court found the number of sources Jefferys used in forming his opinion, as well as the reliability of the sources, sufficient evidence that he acted neither with malice nor gross

irresponsibility when he commented about Farber’s article in his email to Fauntroy.

As to Farber’s contention that it was the way in which Jeffery choose to question her accuracy as a reporter, by calling her a liar, that has the potential to damage her reputation to the greatest degree, the court held that as Jeffery did not act with actual malice in making his statements, he could express his views as he wished. While Justice York concedes that calling a person a liar does carry with it a much more damaging social connotation than saying that someone misquotes facts, he states that, generally, when the word liar is used in “heated public debates,” it is not actionable. Looking at the public discourse between the traditional HIV/AIDS community and HIV dissenters as a whole, the court finds that this is a public debate that qualifies as heated. The court draws attention to the fact that Farber herself uses dismissive and condescending language in referring to Jefferys and others who disagree with her views as “so-called activists.” In the context of a debate that raises powerful opinions and emotions, the word liar is only seen as passionate rhetoric that by itself is not enough to establish that a person acted with malice. *Kelly Garner*

Miscellaneous HIV/AIDS Notes

In *Daniel v. Astrue*, 2011 WL 5922887 (S.D.N.Y., Nov. 28, 2011), U.S. Magistrate Judge Andrew J. Peck recommended to District Judge George B. Daniels that a pro se challenge by Charles E. Daniel, a man living with HIV/AIDS, to denial of Social Security Disability Benefits should be rejected. Judge Peck reviewed in detail the ruling by Administrative Law Judge Sean Walsh. ALJ Walsh had undertaken a detailed review of the biographical and medical information in the case, concluding that although Daniel was not physically capable of performing his former job, he was capable of performing a wide range of sedentary jobs available in the national economy. Judge Peck found that this conclusion was supported by evidence in the record, including written medical evaluations by several different doctors who had concluded that although Daniel suffered various impairments incident to his HIV disease, his symptoms were not sufficiently severe to render him disabled within the meaning of the Social Security Act.

The South Carolina Supreme Court upheld disciplinary action, including a six-month suspension from legal practice, for an attorney who had, among other things, asked a witness in a deposition improper questions about the witness’s sexual orientation and whether he had been tested for HIV, and when the witness responded to a question by indicating he did not recollect something, the attorney asked whether he had Alzheimer’s Disease. Other serious behavioral issues were also noted in the court’s opinion. *In the Matter of Hammer*, 2011 WL 5922900 (Nov. 28, 2011).

The Centers for Disease Control and Prevention announced their estimate that about a quarter of U.S. residents living with HIV infection are getting medical care that maximizes their life expectancy. They estimate that 1.2 million in the U.S. have HIV infection, and about 28% are in treatment. CDCP also estimates that about 20% of those who are HIV+ are unaware of their serostatus. According to epidemiological data assessed by the CDCP, the average person in the U.S. with HIV survives about eleven years from point of infection if not treated. The availability of effective treatment, dating to the mid-1990s, is too recent to generate data on average survival rates with treatment, although a study published this month projected that a person who acquired HIV through gay sex at age 30 and started treatment before any significant damage to his immune system could expect to live for 45 years after infection. The researchers on this study compared the effect of HIV on life expectancy to the effect of smoking. An article on these studies published by the *Washington Post* on Nov. 30 reports on various other research results on the effects of treatment or lack of treatment. The relatively low percentage of HIV+ people who are receiving appropriate treatment is startling, and suggests that public health efforts around HIV are inadequate at present.

PUBLICATIONS NOTED & ANNOUNCEMENTS

The LeGal 2012 annual dinner will be held on Thursday, March 29, at the Ritz-Carlton Battery Park Hotel. 2012 honor-

ees have not yet been announced. During December, LeGaL marks the 25th anniversary of its Free Legal Clinic Program offered weekly with volunteer attorneys at the LGBT Community Services Center in Manhattan. LeGaL volunteer attorneys have also staffed other free clinical programs, but the program offered at the Center is the oldest of those efforts by LeGaL.

Immigration Equality is seeking a staff attorney for its District of Columbia office, to work primarily on administrative advocacy and policy issues, particularly relating to LGBT binational families. For a complete job description and application instructions, see <http://www.immigrationequality.org/jobs/staff-attorney-dc/>.

The Williams Institute at UCLA Law School is again sponsoring the Dukeminier Awards Student Writing Competition, intended to recognize the best student note on issues relating to sexual orientation and gender identity with an award of \$1,000 and publication in the annual volume titled Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review articles. The competition is open to students enrolled in an ABA-accredited law school during the 2011-12 academic year. The submission deadline is January 2, 2012. Details can be found at <http://williamsinstitute.law.ucla.edu/dukeminier-awards-journal/>, and questions concerning the competition can be directed to josol@lawnet.ucla.edu, with subject line "Writing Competition."

The National Center for Lesbian Rights has announced two staff attorney openings. One is a regular staff attorney position, while the other carries the title of Youth Project Director and is focused on NCLR's activities around the rights of LGBT youth. Information about the details of these openings can be found on NCLR's website: www.NCLRights.org. Applications including resume, cover letter, a 5-10 page legal writing sample, and three work references, should be sent to Josh Delfin, Senior Legal and Program Assistant, via email address to JDelfin@NCLRights.org. NCLR is an affirmative action employer and states: "All interested individuals, including people of color, women, persons with disabilities, and persons who are lesbian, gay, bisexual, transgender, or intersex are particularly urged to apply."

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

Alexander, Lisa, *The Fate of the Marital Union: Is DOMA Approaching Its Last Day?*, 4 Alb. Gov't L. Rev. 834 (2011).

Ansah, Tawia B., and Sharon Hoffman, *Surrogacy for the Single, Gay Man*, 22 Health Matrix: Journal of Law-Medicine, No. 1 (2012) (publication pending, available on SRRN and from Case Legal Studies Research Papers, No. 2011-27, and Florida International University Legal Studies Research Papers, No. 11-25).

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Specially Noted

The International Commission of Jurists has published "Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook," edited by a team headed by Alli Jernow. The paperback book brings together case law from around the world and would undoubtedly serve well for a comparative law course in Sexuality and Law, as well as for a reference work. For more information about the book, which has been assigned ISBN Number 978-92-9037-156-0, check the Commission's website: www.icj.org.

Prof. Nan Hunter (Georgetown) reports on her excellent blog, Hunter of Justice, that the International Labor Organization's web page has started an Employment Protection Legislation Database (EPLex). The database is term searchable and includes relevant text of laws, making it possible, for example, to identify counties with laws banning sexual orientation discrimination.

HIV/AIDS & RELATED ISSUES

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