

RECENT OR PENDING STATE AND FEDERAL COURT CASES OF INTEREST TO THE GLBT COMMUNITY

The following are brief summaries of pending cases in state and federal courts across the nation involving issues of relevance to the gay, lesbian, bisexual and transgender community. Cases are organized by subject area and by state within each subject area. This document was last updated **June 21, 2007**. Questions? Email justiceforall@hrc.org.

Criminal Justice

Hawaii

R.G. et al. v. Koller et al.

Plaintiff: R.G. and other teens incarcerated at Hawaii Youth Correctional Facility

Defendant: Lillian Koller, director of the State Department of Human Services, et al.

Pending Court: n/a

Status: Settled - injunction in place by District Court of Hawaii on Mar. 1, 2006

Recent Cite: 2006 U.S. Dist. LEXIS 21254 (D. Haw. 2006)

Details: The plaintiffs are teenagers confined at the Hawaii Youth Correctional Facility who alleged they were abused and harassed because they are or are perceived to be gay, lesbian, bisexual or transgender (GLBT). The facility is designed to rehabilitate non-violent offenders sent to the facility for offenses like drug use, truancy or running away from home. Defendants told one plaintiff that she would go to hell because being gay was not “of God.” Another plaintiff was subjected to anti-gay ridicule on a daily basis, had semen rubbed in his face and was subjected to pantomimed anal rape. When he reported the abuse, defendants did nothing. Defendants also told the third plaintiff—a transgender girl—that she was really a boy, threatened to cut her long hair, and allowed and encouraged harassment by other wards. A Department of Justice investigation concluded that conditions, policies and practices at the facility violated the constitutional and statutory rights of the juvenile wards. The investigation revealed widespread staff-on-youth abuse, as well as youth-on-youth abuse.

The District Court of Hawaii found that the conditions at the facility were “physically and psychologically unsafe for the plaintiffs” and that the defendants acted with “deliberate indifference in allowing pervasive verbal, physical, and sexual abuse to persist.” The district court concluded that the youth at the facility had a “liberty interest in personal security and well-being that was protected by the Due Process Clause of the Fourteenth Amendment.” The court ordered the defendants to institute policies and procedures that would ensure that the defendants would: not discriminate against, harass, or abuse any youth based on his or her sexual orientation; not isolate youth based on actual or

perceived GLBT status; not use terms or slurs during course of employment that are commonly used to convey hatred, contempt, or prejudice toward GLBT persons; and protect LGBT youth from discrimination or verbal, sexual, or physical harassment or abuse based on their sexual orientation by other youth. Parties eventually settled with defendant paying \$625,000 plus fees and costs to the victims in addition to the injunctive relief.

Wisconsin

Timmerman v. Waite & Urias

Plaintiff: Brett Timmerman

Defendant: Oden Waite & Enove Urias

Pending Court: Circuit Court of Grant County, Wisconsin

Status: complaint filed in September 2006; awaiting trial date

Recent Cite: n/a

Details: Plaintiff suffered a vicious antigay assault by defendants, Oden Waite and Enove Urias, outside a local sandwich shop. Defendants called the plaintiff a “faggot,” then slapped and spit in Timmerman’s face and struck him in the head before pushing him to the ground. When the police arrived, defendant Waite had to be pulled off of the plaintiff. Plaintiff is suing defendant to recover for damages that he suffered under Wisconsin’s hate crimes law, which allows civil suits after someone engages in conduct that would trigger a hate crime penalty even if the person was not charged with or convicted of a hate crime. The case marks the first time that a hate crime law has been used to allow the plaintiff to recover for damages in a civil suit.

Sundstrom v. Frank et al.

Plaintiff: Kari Sundstrom, Andrea Fields, and Lindsay Blackwell

Defendant: Matthew J. Frank, Secretary, Wisconsin Dept. of Corrections

Pending Court: U.S. District Court for the Eastern District of Wisconsin

Status: Complaint filed Jan. 24, 2006; judge denied certifying class on Feb. 16, 2007

Recent Cite: 2006 WL 2038204 (E.D. Wis. 2007)

Details: Plaintiffs are transgender women incarcerated in Wisconsin. Plaintiffs state that they have been diagnosed with gender dysphoria and have undergone hormone therapy, which was provided to them by the state. As of Jan. 24, 2006, such therapy was prohibited by new state law (plaintiffs' therapy was phased out and scheduled to completely end in or around March 2006). Plaintiffs brought claims under 42 U.S.C. §1983 for violation of the Eighth Amendment to the U.S. Constitution (cruel and unusual punishment) as well as the Fourteenth Amendment (equal protection).

Employment

District of Columbia

Schroer v. Billington

Plaintiff: Diane J. Schroer

Defendant: James H. Billington, Librarian of Congress

Pending Court: U.S. District Court for the District of Columbia

Status: Defendant's motion to dismiss denied.

Recent Cite: 424 F.Supp.2d 203 (D.D.C. 2006)

Details: Plaintiff is a transgender woman and retired colonel with 25 years of highly decorated military service, which included leading a classified national security operation. In 2004, the Library of Congress offered her a job as senior terrorism research analyst. Schroer had interviewed for the job using her birth name, "David," and did not dress in traditionally feminine clothing. However, she was about to undergo medical treatment, planned to change her name to Diane, dress in feminine attire and otherwise present as a woman. After defendant offered her the position, Schroer explained that she was under a doctor's care for gender dysphoria and would be presenting as a woman once she started the job. The defendant rescinded the job offer the next day. Plaintiff brought suit for sex discrimination under Title VII of the Civil Rights Act of 1964. Plaintiff stated that defendant refused to hire her because she failed to conform to social gender stereotypes. Plaintiff also brought due process and equal protection claims under the Fifth Amendment and a claim under the Library of Congress Act. The due process claim stated that defendant refused to hire plaintiff because of decisions she made regarding medical treatment for her gender dysphoria. Defendant filed a motion to dismiss.

The District Court for the District of Columbia held that Schroer had stated a claim that the Library of Congress refused to hire her solely because of her sexual identity, and thus discriminated against her "because of sex" in violation of Title VII. The court denied the motion to dismiss because discrimination against a transsexual may violate Title VII's prohibition of discrimination "because of...sex," and thus a full trial was required.

Nevada

Jespersen v. Harrah's Operating Co.

Plaintiff: Darlene Jespersen

Defendant: Harrah's Operating Co. Inc.

Pending Court: U.S. Court of Appeals for the Ninth Circuit

Status: Appeal denied, affirmed *en banc* on rehearing by Ninth Circuit on Mar. 14, 2006

Recent Cite: 444 F.3d 1104 (9th Cir. 2006)

Details: Defendant terminated plaintiff from her position as a bartender for failing to conform to the company's new sex-stereotyped dress code, which required all women in the beverage department to wear specified makeup, and prohibited men from wearing any makeup. Jespersen worked for defendant for two decades and her work had been praised by supervisors. Plaintiff argued that Harrah's dress code places an unequal burden on women because it compels them to conform to stereotypes of an ultra-feminine appearance. The plaintiff asserted that this constituted illegal sex discrimination. The district court in Nevada ruled against Jespersen on summary judgment.

The Ninth Circuit upheld the district court's ruling *en banc* against Jespersen. The court held that requiring only female employees to wear makeup was insufficient to establish a prima facie Title VII sex discrimination case because the makeup requirement was one small part of an overall apparel, appearance, and grooming policy that largely applied the same to both men and women. The court found that this policy did not constitute impermissible sex stereotyping, stating that the makeup requirement was “reasonable” given the context of the overall standards imposed on employees in the workplace. The dissent argued that facial makeup has no corresponding requirement for men, making the “overall policy” more burdensome on women than men.

Utah

Etsitty v. Utah Transit Authority

Plaintiff: Krystal Etsitty

Defendant: Utah Transit Authority and Betty Shirley

Pending Court: U.S. Court of Appeals for the Tenth Circuit (on appeal)

Status: Summary judgment granted by District Court of Utah on Jun. 24, 2005

Recent Cite: 2005 U.S. Dist. LEXIS 12634 (D. Utah. 2005)

Details: Plaintiff, a pre-operative transsexual born biologically male, brought suit under Title VII of the Civil Rights Act of 1964, for sex stereotyping and gender discrimination, and for violations of the Fifth and Fourteenth Amendments of the U.S. Constitution. Plaintiff interviewed for a position with the Utah Transit Agency. At the time of her interview, she had medium-length hair, wore minimal makeup and dressed in gender-neutral clothing. Plaintiff applied as “Krystal Etsitty” but said she could be called “Mike.” UTA hired plaintiff as a bus driver. After starting work, plaintiff told her supervisor she was transitioning from male to female. She had undergone medical care, was receiving hormone therapy, and began wearing more makeup to work. Although there were no complaints about her work performance, plaintiff was told she either had to resign or be fired because she looked female, and there were concerns about what the public and other employees might think and about which bathroom she would use (though plaintiff never used restrooms at UTA's facility because she was always out driving buses). UTA terminated plaintiff's employment, but indicated on the termination form that she could be re-hired after completion of her surgery when she no longer had male genitalia.

Defendants moved for summary judgment, which was granted. The district court noted that it “does not condone discrimination in any form, and is sympathetic toward Ms. Etsitty,” but concluded that the current status of the law forced its ruling against her. The court noted that the question of how Title VII applies to transsexuals is “complex,” but observed that every federal court that has dealt directly with the issue has concluded Title VII does not prohibit discrimination based on gender identity. The court noted that there have been unsuccessful attempts to amend Title VII to cover sexual orientation, concluding that this shows Congress intended a “narrow” definition of “sex” under Title VII. The court noted that the Sixth Circuit has applied sex-stereotyping case law to transsexuals, thus permitting similar actions under Title VII. However, the court distinguished sex change from failure to conform to sex stereotypes and refused to follow

the Sixth Circuit, noting that the plaintiff was not terminated for failing to conform to a sex stereotype but because defendants had legitimate non-discriminatory concerns about liability if she used women's restrooms. The decision has since been criticized by the District Court of the District of Columbia in *Schroer v. Billington, supra*.

Military (“Don't Ask, Don't Tell”)

California

Nicholson & Doe v. United States

Plaintiff: Log Cabin Republicans, on behalf of Alexander Nicholson and John Doe

Defendant: United States and Robert Gates, Sec’y of Defense

Pending Court: U.S. District Court for the Central District of California

Status: Hearing scheduled for Jun. 18, 2007

Recent Cite: n/a

Details: Plaintiff is a nonprofit organization dedicated to the interests of the gay and lesbian community and associated with the Republican Party who brought suit on behalf of members who are gay service members. Plaintiff argues the “Don't Ask, Don't Tell” (DADT) policy, as codified at 10 U.S.C. § 654, is unconstitutional in light of the Supreme Court's decisions in *Romer v. Evans* and *Lawrence v. Texas*. They also cite *Hamdi v. Rumsfeld*, for the principle that the U.S. government does not have unfettered authority to infringe on Americans' constitutional due process rights, even during wartime. Plaintiff argues that the DADT policy violates constitutional guarantees of due process, free speech and equal protection. Plaintiff seeks a declaration that 10 U.S.C. § 654 and the regulations issued under it are unconstitutional. The case was dismissed in March 2006 pending the naming of a member injured by DADT; plaintiff was given permission to re-file and has re-filed the case with two named plaintiffs, Alex Nicholson & John Doe. A hearing on the case was announced for June 18, 2007.

Massachusetts

Cook v. Gates

Plaintiff: Thomas Cook and 11 other gay former service members

Defendant: Robert Gates, Sec’y of Defense

Pending Court: U.S. District Court for the District of Massachusetts

Status: Defendant’s motion to dismiss granted on Apr. 24, 2006.

Recent Cite: 429 F.Supp.2d 385 (D. Mass. 2006)

Details: Plaintiffs are gay service members who were forced to leave the military because of their sexual orientation, pursuant to the “Don't Ask, Don't Tell” (DADT) policy, as codified at 10 U.S.C. § 654. Plaintiffs wanted the opportunity to return to military service and asked for a declaratory judgment that DADT and the regulations issued under it were unconstitutional, both on their face and as applied to plaintiffs. Plaintiffs challenged that the DADT policy as violates the plaintiffs’ rights to due process and equal protection in light of the Supreme Court's decision in *Lawrence v. Texas*.

The district court found that constitutional doctrine evaluates substantive due process and equal protection challenges to the DADT policy under the rational basis standard, noting that *Lawrence v. Texas* did not change this standard of review. Accordingly, the court concluded that DADT was constitutional because it was rationally related to the legitimate government interest of efficiency in the armed forces. The court found that Congress's stated reasons for enacting DADT, even if misconceived or unconvincing, represented more than just a "bare congressional desire to harm a politically unpopular group." Instead, the court found that Congress's purpose was to assure the effectiveness of the armed forces and that it felt that the presence of "active homosexuals" in the armed forces would create an unacceptable risk to morale, good order, discipline, and unit cohesion. The court noted that Congress's stated purpose was an issue about which reasonable people have disagreed. In order to show that the government's purpose was not legitimate, however, the plaintiff must show that no legitimate disagreement was possible and that there was only one legitimate position to take on the issue. The court noted that deciding that Congress has made a rational choice is not the same as deciding it has made a wise choice. The court noted that the Military Readiness Enhancement Act has been introduced in the House of Representatives and if enacted into law would repeal DADT and establish a policy of non-discrimination based on sexual orientation. The repeal would require the armed forces to re-admit otherwise qualified former service members who were separated due to DADT.

Parenting

Arkansas

Dep't of Human Servs. v. Howard

Plaintiff: Matthew Howard and other prospective gay foster parents

Defendant: Arkansas Department of Human Services

Pending Court: n/a

Status: The Arkansas Supreme Court affirmed on appeal on June 29, 2006

Recent Cite: 2006 Ark. LEXIS 418 (Jun. 29, 2006).

Details: Plaintiffs are gay Arkansans who want to be foster parents but were barred by a 1999 Child Welfare Agency Review Board regulation providing that "no person may serve as a foster parent if any adult parent of that person's household is a homosexual." Plaintiffs' counsel asserted that the board's discriminatory policy violates plaintiffs' right to equal protection under the state and federal constitutions. The board relied on reprehensible stereotyping, including beliefs that gay foster parents would be prone to violence, sexual abuse, disease, instability and substance-abuse. A board member who made the initial proposal leading to the challenged regulation testified that she believed homosexuality was a sin and violated her biblical convictions. Another board member testified that his religious beliefs influenced his decision to support the regulation stating that he believed "gay militants" aimed to "convert" new gay "recruits."

The trial court found that the board violated separation of powers doctrine in its attempt “to legislate public morality.” It also found that the blanket prohibition of gay foster parents was contrary to the board’s responsibility to promote the health, safety and welfare of foster children because it precluded individual consideration of the child’s needs. The court rejected the equal protection claim, recognizing that rules or regulations related to further “public morality” as a legitimate state interest are constitutional. The Arkansas Supreme Court upheld the trial court’s finding that the regulation was unconstitutional for violating the separation of powers because the General Assembly had not delegated authority to the Child Welfare Agency Review Board to legislate. The Court also held that the regulation does not promote the health, safety, or welfare of foster children but rather acts to exclude a set of individuals from becoming foster parents based upon morality and bias. All other questions were found moot.

California

North Coast Women's Care Medical Group v. S.C. (Benitez)

Plaintiff: Guadalupe T. Benitez

Defendant: North Coast Women's Care Medical Group, Inc.

Pending Court: California Supreme Court

Status: California Supreme Court granted certiorari on June 14, 2006

Recent Cite: 46 Cal. Rptr.3d 605 (2006)

Details: Plaintiff, a lesbian patient receiving infertility treatment from defendant, was refused treatment after 11 months. A doctor with the North Coast Women’s Care Medical Group told Benitez that another doctor (who had previously treated Benitez) and other staff members were uncomfortable with her sexual orientation and would not be able to treat her fairly or provide timely care. Plaintiff brought suit under California's Civil Rights Act and a variety of common law claims. Defendants claimed, *inter alia*, that they had a right not to comply with the Civil Rights Act because they are fundamentalist Christians, and because of their religious belief, they object to treating plaintiff in the same way as other patients. A three-judge panel of the California Court of Appeal ruled that, for purposes of this case, the state Civil Rights Act permits discrimination based on marital status as distinguished from sexual orientation (Benitez has a partner, but is not married). The California Supreme Court granted certiorari on June 14, 2006.

Maryland

In re Roberto D.B.

Petitioner: Roberto d.B.

Pending Court: Court of Appeals of Maryland

Status: Case remanded to the Circuit Court for Montgomery County to grant petition to issue a birth certificate without the surrogate’s name.

Recent Cite: 2007 WL 1427451 (Ct. App. Md. May 16, 2007).

Details: In a case of first impression, the Court of Appeals of Maryland, reversing a lower court judgment, held that a genetically unrelated surrogate need not be listed as the mother on a birth certificate. In December of 2000, Roberto D.B., an unmarried male, initiated in vitro fertilization, with his sperm being used to fertilize eggs from an egg

donor. The two resulting fertilized eggs were then implanted in a gestational surrogate who had no genetic relationship to the fetuses she carried. In August of 2001, the surrogate delivered twins. The father and surrogate contend that she had never intended nor wished to be listed as a mother for the children with whom she has no genetic relationship. The father and gestational surrogate joined to petition the Circuit Court for Montgomery County to issue an accurate birth certificate. The court rejected the petition, reasoning that Maryland case law did not give the court power to remove the mother's name from a birth certificate, and that it would be against the best interest of the child.

The Court of Appeals reversed, reasoning that the Maryland Equal Rights Amendment prohibited an unequal treatment of parenthood that allows men to deny parentage, but not women. The court also cited numerous cases rejecting the premise that sex could be determinative of parental rights. The court rejected the lower court's application of the 'best interest of the child' standard, stating that the standard was misapplied, that there was no controversy over parental rights, and that the father has not been shown in any way to be an unfit parent. The court held that such a petition can be granted by a court even through adoption or a proceeding to determine parentage. This case breaks new ground for Maryland in adapting to the changing circumstances and new technologies available for having a child. It also eliminates a possible hurdle for two men who desire to become parents, as they seek legal recognition for their family.

Oklahoma

Finstuen v. Edmondson

Plaintiff: Heather Finstuen et al., including three same-sex couples with children

Defendant: Drew Edmondson, Attorney General of Oklahoma & Brad Henry, Governor

Pending Court: U.S. Court of Appeals for the Tenth Circuit

Status: Oral arguments heard by the Tenth Circuit on Nov. 13, 2006 – decision pending

Recent Cite: 2006 U.S. Dist. LEXIS 32122 (W.D. Okla. May 19, 2006)

Details: In 2004, the Oklahoma legislature enacted the Adoption Invalidation Law, which stated that Oklahoma "shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." Plaintiffs are three same-sex couples with children adopted in Washington, New Jersey and California respectively. Two of the families moved to Oklahoma. The third lived out of state but wished to travel to Oklahoma. Plaintiffs argued that the law violated the guarantees of equal protection, due process and right to travel under the U.S. Constitution, as well as the Full Faith and Credit Clause. The district court struck down the law and prohibited its enforcement, finding that the statute singled out a specific group for discrimination. The court upheld all claims in the suit except the right to travel. The court dismissed the claims of one couple because the State of Oklahoma granted the couple a birth certificate for their adopted daughter. The certificate listed the two men as her parents prior to the passage of the law and they did not face immediate harm. The court also ordered the Oklahoma Dep't of Health to issue birth certificates for the other two children listing both parents. The case was appealed to the Tenth Circuit, which held oral arguments on November 13, 2006.

Pennsylvania

Jones v. Jones

Plaintiff: Patricia Jones

Defendant: Ellen Boring Jones

Pending Court: n/a

Status: Supreme Court of Pennsylvania denied petition for appeal on Nov. 28, 2006

Recent Cite: 884 A.2d 915 (Pa. Super. Ct. 2005), *appeal denied*, 912 A.2d 838 (Pa. 2006)

Details: The parties were a lesbian couple who had ended their relationship and were vying for custody of the couple's twin children, who were biologically related to the plaintiff. The trial court found clear and convincing evidence that the best interests of the children favored giving primary custody to the non-biological parent. The trial court emphasized that the mother tried to sabotage the non-biological parent's relationship with the children in several ways over many years, including moving out of the home with the children, trying to change the children's name to her maiden name, and trying to move away from the non-biological parent that disrupted the children's schooling. The court noted that the non-biological parent did not interfere with the mother's role as a parent and that the children wanted to see both parents. Even though the mother was the historic caregiver, the children were in a day care with the non-biological parent when the mother went to work. The trial court relied on an opinion of a custody evaluator agreed to by the parties, who found that the non-biological parent was psychologically healthy and stable, while the mother had employability, psychological, and drinking problems. As a result, the trial court gave custody to the non-biological parent.

The appellate court stated that the trial court used the correct standard of proof, clear and convincing evidence and did not abuse its discretion in determining that the award was in the best interests of the children. The appellate court affirmed the decision, and an appeal to the Supreme Court of Pennsylvania was denied.

Vermont/Virginia

Miller-Jenkins v. Miller-Jenkins

Plaintiff: Janet Jenkins (formerly Miller-Jenkins)

Defendant: Lisa Miller (formerly Miller-Jenkins)

Pending Court: n/a

Status: U.S. Supreme Court denied certiorari of Vermont decision on April 30, 2007

Recent Cite: 637 S.E.2d 330 (Va. Ct. App. 2006), *remanded by* 2007 Va. App. LEXIS 158 (Va. Ct. App. April 17, 2007), *cert. denied*, 2007 U.S. LEXIS 4557 (Apr. 30, 2007)

Details: The parties entered into a civil union in Vermont in 2000. Lisa gave birth in 2002 in Virginia, and the parties moved to Vermont thereafter. The couple separated and worked out a custody agreement. Lisa moved to Virginia and filed suit in Vermont to dissolve the civil union and requesting custody, while the plaintiff filed a counter-claim. The Vermont court issued a temporary order naming Lisa the custodial parent and Janet the non-custodial parent. Janet tried to visit child in Virginia as per the court order but Lisa refused her access. In July 2004, Virginia's "Marriage Affirmation Act" went into effect and Lisa filed action in Virginia court, seeking recognition as the child's sole

parent. The Virginia court entered a temporary visitation order and asserted jurisdiction citing the Virginia Act. The Virginia court entered a "Final Order of Parentage" naming Lisa the sole parent and denying visitation to Janet. The Vermont courts rejected the "Final Order," citing the federal Parental Kidnapping Prevention Act, which states that court orders regarding custody and visitation enacted in one state must be enforced in other states as well. The Vermont Supreme Court affirmed the decision unanimously.

On appeal, the Virginia appellate court decided that Virginia had no jurisdiction to entertain Lisa's suit, ordering the Virginia courts to give full faith and credit to the Vermont visitation order. Lisa asked for discretionary review by the Virginia Supreme Court, and petitioned for writ of certiorari with the U.S. Supreme Court seeking review of the Vermont decision. Both reviews were denied, and the Virginia appellate court remanded the case to the trial court, ordering it to register the custody arrangement.

Youth and Schools

California

C.N. v. Wolf

Plaintiff: Charlene Nguon

Defendant: Garden Grove Unified School District and Wolf (the high school principal)

Pending Court: U.S. District Court for the Central District of California

Status: Motion to dismiss granted in part and denied in part on Nov. 28, 2005

Recent Cite: 410 F. Supp.2d 894 (C.D. Cal. 2005)

Details: Plaintiff is an openly lesbian student at Santiago High School who was punished for public displays of affection with her girlfriend. Similar behavior by straight students was not punished. Wolf, the principal, suspended Nguon and told her parents, who did not know about her sexual orientation. He also told Nguon that either she or her girlfriend would have to transfer to another high school. Plaintiff brought suit with numerous claims seeking to clear any record of discipline from her file. The lawsuit also seeks to create a district wide policy and guidelines to ensure that gay students are treated equally. Defendants filed a motion to dismiss, which was granted in part. The court permitted some of plaintiff's claims to proceed, and the case is still pending.

Sandoval v. Merced Union High Sch.

Plaintiff: Armando Sandoval

Defendant: Merced Union High School

Pending Court: U.S. District Court for the Eastern District of California

Status: Awaiting trial

Recent Cite: 2006 U.S. Dist. LEXIS 28446 (E.D. Cal. May 3, 2006)

Details: Plaintiff, a minor student, claimed that he was discriminated against, harassed, and assaulted because of his sexual orientation. Plaintiff claimed that he was called various names, such as "faggot," and that his classmates threatened to assault, injure and

kill him. Plaintiff claimed that he was assaulted with a knife outside the school cafeteria, received life-threatening notes on his locker, and was suspended from school after defending himself from physical attack on school grounds. He claimed that school employees harassed and discriminated against him by preventing him from taking classes in which he was enrolled, suspending him without justification, taking unwarranted disciplinary actions against him, failing to allow him the same privileges as other students, and unfairly seeking to have him evaluated as “learning impaired.” Plaintiff further claimed that defendants had knowledge of these incidents and did nothing to protect the plaintiff or prevent the abuse. Defendants specifically sought to have the sex discrimination claim dismissed. The district court found that plaintiffs could assert a private cause of action for sex discrimination against defendants and thus denied the motion to dismiss the sex discrimination claims.

Georgia

White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.

Plaintiff: White County High School Peers Rising in Diverse Education

Defendant: White County School District and individual school officials

Pending Court: U.S. District Court for the Northern District of Georgia

Status: Permanent injunction put in place by court on July 14, 2006

Recent Cite: 2006 U.S. Dist. LEXIS 47955 (N.D. Ga. 2006)

Details: High school students in Cleveland, Georgia sought to form a gay-straight alliance (GSA) club in order to address rampant anti-gay harassment at the school. Initially, school officials would not permit the club to form before relenting and permitting the club to hold several meetings in early 2005. A few months later, school officials decided to ban *all* extracurricular clubs, including the GSA. The GSA has not met since then, although a few other extracurricular clubs have continued to meet despite the “ban.” Plaintiffs brought suit in February 2006, asserting claims under the federal Equal Access Act, the First and Fourteenth Amendments to the U.S. Constitution and Article I of Georgia’s state constitution. They also filed a motion for a preliminary injunction that would require the school to permit PRIDE to meet.

The district court held that the high school had violated the Equal Access Act, which prohibits schools that have created limited open forums and that receive federal financial assistance from discriminating against any students based on the religious, political, philosophical, or other content of the speech at such students’ meetings. The court found that the school district had created a limited public forum when it allowed other student groups whose main purposes were not curriculum-related to meet on school premises. The court found that the plaintiffs were denied equal access and ordered that the school district: (1) not deny plaintiffs equal access or a fair opportunity to conduct a meeting on school premises during non-instructional time; and (2) not discriminate against student groups on the basis of the religious, political, philosophical, or other content of their speech. The court found the remaining issues moot.

Kentucky

Boyd County High School Gay Straight Alliance v. Board of Ed.

Plaintiff: Boyd County High School Gay-Straight Alliance

Defendant: Board of Education of Boyd County, Kentucky

Pending Court: U.S. District Court for the Eastern District of Kentucky

Status: Plaintiff filed motion to reopen case due to noncompliance with settlement

Recent Cite: n/a

Details: High school students sought to form a gay-straight alliance (GSA) club in Ashland, Kentucky. The school initially refused to approve the club and suspended all student clubs rather than recognize the GSA club. Plaintiff brought suit seeking approval of the proposed club. The court issued a preliminary injunction in plaintiff's favor, and noted specific examples of harassment at the school, including threats by students to "take all the fucking faggots out in the back woods and kill them." The parties agreed to a settlement in 2004, requiring the defendant to treat all student clubs equally, including the GSA, and to conduct anti-harassment trainings for all students and staff at the high school and middle school. The plaintiff filed a motion in 2005 to re-open the case, stating that half the student body was permitted to skip training, and the hour-long training video used by defendant only included 10 minutes directly addressing sexual orientation and gender identity discrimination issues. There is no further resolution on this case; however, the related case of *Morrison v. Bd. of Education* seems to suggest that the parties have since settled. 419 F. Supp. 2d 937 (E.D. Ky. 2006). In this case, parents brought an action claiming that the training program violated their children's constitutional rights of free speech, their right to exercise their religious beliefs, and their parental rights to direct the ideological and religious upbringing of their children.

The *Morrison* court dismissed the claim on summary judgment, finding that the school district had not violated the students' free speech rights because the trainings were viewpoint neutral. In addition, the opportunity to speak on comment cards regarding the training with no threat of punishment allowed the plaintiffs to express their views. The court rejected the First Amendment claim of alleged interference with the students' right to free exercise of their religion, stating that the training leaves religion to the students and their families. The court held that the school district had not interfered with the plaintiffs' parental rights because the purpose of the training was to address the issue of harassment at school. It found this purpose rationally related to the legitimate goal of maintaining a safe school environment. Thus, the plaintiffs neither had the right to impede the school district's prerogative, nor the right to opt-out of the same.

Minnesota

Straights & Gays for Equality v. Osseo Area Schs.

Plaintiff: Straights and Gays for Equality

Defendant: Osseo Area Schools

Pending Court: U.S. Court of Appeals for the Eighth Circuit

Status: Eighth Circuit affirmed on Dec. 22, 2006; possible appeal to U.S. Supreme Court

Recent Cite: 471 F.3d 908 (8th Cir. 2006)

Details: Plaintiffs, students of a school group addressing sexual orientation issues, sued school officials, alleging that the officials discriminated against the group in violation of

the Equal Access Act. The district court granted the plaintiffs a preliminary injunction. The student group was designated as non-curricular, rather than curricular, and thus had limited access to school avenues of communication. Plaintiff contended that other non-curricular groups, i.e., cheerleading and synchronized swimming, were classified as curricular and granted communication access. Defendants argued that these activities were related to the school's curriculum for physical education.

On appeal, the Eighth Circuit held that the students showed a likelihood of success on the merits to warrant preliminary injunctive relief, since cheerleading and synchronized swimming were non-curricular groups that were not subjects of regularly taught courses, did not concern school's courses as a whole, did not grant academic credit, and were not required for a particular course. Even though the student group had some communication access, the Eighth Circuit presumed irreparable harm from the loss of expressive liberties and affirmed the preliminary injunction.

Transgender

New York

Hispanic AIDS Forum v. Estate of Bruno

Plaintiff: Hispanic AIDS Forum

Defendant: Estate of Joseph Bruno

Pending Court: Supreme Court of New York, Appellate Division, First Department

Status: Reargument denied on Sept. 22, 2005

Recent Cite: 16 A.D.3d 294 (N.Y. 2005)

Details: Landlord evicted plaintiff, an HIV/AIDS center offering services to New York City's Latino/a community, based on complaints that plaintiff's transgender clients were using the "wrong" restrooms. Plaintiff brought suit for sex and disability discrimination under state and city human rights laws against transgender individuals and those who associate with them. Defendant argues that these laws do not apply to transgender individuals. The state supreme court (New York's trial court) permitted causes of action for sex discrimination to proceed. On appeal, the Appellate Division, First Department held that assigning restrooms based on biological gender (i.e. sex assigned at birth) was permissible and not discriminatory, although it granted leave for plaintiff to replead allegations related to other discrimination.

People v. Lomiller

Plaintiff: People of the State of New York

Defendant: Stephen Lomiller (also known as Steph Miller)

Pending Court: n/a

Status: Court of Appeals of New York dismissed appeal on September 21, 2006

Recent Cite: 818 N.Y.S.2d 27 (Sup. Ct. 2006), *appeal dismissed*, 823 N.Y.S.2d 779 (2006)

Details: Plaintiff appealed an order by the New York County Supreme Court adhering to order suppressing physical evidence recovered from defendant. Plaintiff's detectives were stopped in traffic, when one observed the defendant bent over in a doorway, rifling through a woman's pocketbook while nervously looking up and down the street. The detectives pulled their vehicle over, approached defendant and inquired as to where he got the purse. Defendant first claimed he found it in the garbage and then said he took it from a nearby restaurant. The detectives arrested defendant and recovered three stolen credit cards from his pocket. The trial court granted defendant's motion to suppress on the basis that he was "unquestionably" a person of transgender appearance and display.

The appellate court found, although defendant was wearing eyeliner, an earring, a ponytail, and a woman's sweater, he looked like a man when he was arrested. Therefore, the trial court's finding that defendant maintained a transgender appearance was unsupported by the record. The stop of defendant and his subsequent arrest, were lawful given defendant's evasive and contradictory answers. Therefore, the trial court erred in granting the motion to suppress. The order was unanimously reversed, defendant's motion to suppress was denied.

Miscellaneous

California

Butler v. Adoption Media

Plaintiff: Michael Butler

Defendant: Adoption Media, LLC

Pending Court: U.S. District Court for the Northern District of California

Status: Parties agreed to settlement

Recent Cite: 2007 U.S. Dist. LEXIS 29732 (N.D. Cal. Mar. 30, 2007).

Details: Plaintiffs were registered domestic partners that sued the defendant, an adoption-related website, after plaintiffs' application to post their profile was rejected. Plaintiffs were seeking to adopt a child and had been certified and approved to adopt in California. Defendants, located in Arizona, adopted a policy allowing only couples in an opposite-sex marriage to post profiles. Plaintiffs alleged various violations of the California code against defendant. Both parties filed motions for summary judgment. The district court found that failing to apply California law would have undermined the Unruh Civil Rights Act, giving California a significant interest to protect while Arizona's interests would not be seriously impaired by applying California law. The district court found that there was an issue of fact as to whether the policy of not allowing unmarried couples to post profiles on the website amounted to marital status discrimination. The court also found that, given the uncertainty of California law at the time, the defendants should not be subjected to damages but allowed the claim for injunctive relief to go forward. The court found that the defendants had not actually stated any legitimate business reason for its policy. The Unruh Act claim was allowed to stand, but all other claims were dismissed.

The parties agreed to settle on May 22, 2005, avoiding a lengthy trial. According to the settlement, Adoption.com and ParentProfiles.com have agreed to either comply with California antidiscrimination laws or stop providing services to Californians, stating that: “no Defendant shall post biographical data of California residents seeking to adopt directed to prospective birth parents unless the Service is made equally available to all California residents qualified to adopt in California.” In addition to its profiling service for parents, the defendants agreed that the Adoption.com photo listing of children in foster care waiting to be adopted does not discriminate and is available on an equal basis to anyone seeking to adopt. (*365gay.com*)

West Virginia

Green v. City of Welch

Plaintiff: Helen Green, administrator of the estate of Claude Green Jr.

Defendant: City of Welch, W.V., and Police Chief Robert K. Bowman

Pending Court: U.S. District Court for the Southern district of West Virginia

Status: Motion to dismiss granted in part, denied in part on Dec. 22, 2006.

Recent Cite: 467 F. Supp. 2d 656 (S.D. W.Va. 2006).

Details: Claude Green Jr. suffered a heart attack while driving his car in June 2005. The complaint alleged a friend traveling with him began performing CPR, but was stopped by Police Chief Robert Bowman, who said Green was HIV-positive. Bowman prevented CPR from being performed until an ambulance arrived. Green, who was in fact not HIV-positive, died. It is alleged that Bowman believed or assumed Green was HIV-positive because he was gay. Green's mother brought suit on behalf of Green's estate pursuant to the Americans with Disabilities Act, alleging discrimination based on perceived disability, and under 42 U.S.C. §§ 1983 and 1988, alleging violation of equal protection and due process rights under the Fourteenth Amendment.

The district court denied the defendant’s motion to dismiss the § 1983 claim, which provides a remedy for the violation of federal constitutional rights by state actors. The court dismissed the decedent’s claim under West Virginia Human Rights Act because it was a personal injury action that could not be brought after his death. The court refused to dismiss the decedent’s ADA claim for his wrongful death because the claim satisfied the purposes of the ADA.

Marriage

“Senator, when you took your oath of office, you placed your hand on the Bible and swore to uphold the Constitution. You didn't place your hand on the Constitution and swear to uphold the Bible.” American University Washington College of Law Professor Jamie Raskin testifying in early 2006 before the Maryland Senate Judicial Proceedings Committee responding to an assertion that the Bible supported marriage discrimination. Later that year, Raskin won the race for the District 20 seat of the Maryland State Senate.

State Cases Challenging Marriage Statutes/Denial of Marriage Licenses

California

Lockyer v. City and County of San Francisco et al

Plaintiffs: Bill Lockyer, attorney general of California

Defendants: City and County of San Francisco

Court: n/a

Status: Marriage licenses ruled invalid by California Supreme Court on Aug. 12, 2004.

Recent Cite: 95 P.3d 459 (Cal. 2004).

Details: The California Supreme Court ruled that San Francisco Mayor Gavin Newsom exceeded his authority in issuing marriage licenses to same-sex couples and invalidated the marriages of more than 4,000 couples. The court did not rule on whether excluding same-sex couples from obtaining marriage licenses violates the state's Constitution.

In re Marriage Cases (Woo v. Lockyer)

Plaintiffs: Lancy Woo and Christy Chung, along with 11 other same-sex couples

Defendants: Bill Lockyer, Attorney General of California and the state of California

Court: California Supreme Court

Status: Review granted, no date set for oral arguments as of June 20, 2007

Recent Cite: 143 Cal. App. 4th 873 (Cal. Ct. App. 2006).

Details: Plaintiffs filed suit challenging the constitutionality of California's law banning same-sex marriage. Six cases were consolidated into what is now called the "Marriage Cases." The trial court ruled that the exclusionary definition of marriage in California law violated the equal protection and due process provisions of the state constitution but stayed his decision pending appeal. The appellate court upheld the state's marriage statute only allowing marriage to opposite-sex couples, stating that limiting marriage to opposite-sex couples did not deprive individuals of a fundamental right or discriminate against a suspect class. The court held that the opposite-sex requirement was rationally related to the state's interest in preserving the institution of marriage in its historical opposite-sex form, while also providing comparable rights to same-sex couples through domestic partnership laws. The court noted that the legislature's power to regulate marriage was exclusive and subject only to constitutional restrictions. If marriage were extended to same-sex couples, such a change must come from the people—either through a voter initiative or through their elected representatives in the legislature. The California Supreme Court has granted review and has been hearing a series of motions; the latest on April 4, 2007, but has yet to set a date for oral arguments. On June 20, 2007, the court ordered additional supplemental briefs to be filed by July 18, 2007.

Connecticut

Kerrigan & Mock v. Connecticut Department of Public Health (Kerrigan v. State)

Plaintiffs: Beth Kerrigan and Jody Mock, along with six other same-sex couples

Defendants: Connecticut Department of Health

Court: Connecticut Supreme Court

Status: Oral arguments were held on May 14, 2007

Recent Cite: 904 A.2d 89 (Conn. Super. Ct. 2006)

Details: Plaintiffs filed suit challenging the denial of marriage licenses to same-sex couples under the Connecticut Constitution. The trial court granted the defendant's motion to dismiss, concluding that parties to a civil union were entitled to all of the same rights, benefits and responsibilities as parties of a marriage in the state of Connecticut stating that the "Connecticut constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process." The court noted that the Equal Protection Clause doesn't forbid classifications, but instead keeps the government from treating alike persons differently. The plaintiffs argued that "separate but equal" is never equal, but the court rejected "the argument that the rhetorical separation of marriage vs. civil union is enough to invoke an equal protection or due process analysis." The court noted that even if the plaintiffs had to define or explain their civil unions to others, this did not amount to legal harm.

The court did note that the lack of legal recognition of Connecticut civil unions by other states and the looming inequity embodied in the federal Defense of Marriage Act did amount to a real injury. The court noted that the lack of recognition creates a host of ills and uncertainty for the plaintiffs in their attempt to avail themselves of federal and interstate rights and benefits. However, the court held that whether Connecticut called the same sex unions marriage or civil union would not alleviate or lessen the harm the plaintiffs face in jurisdictions outside Connecticut, which neither the Connecticut legislature nor its courts has any power. The Connecticut Supreme Court has since granted review and heard oral arguments on May 14, 2007.

Iowa

Varnum v. Brien

Plaintiffs: Kate Varnum and Trish Hyde, along with five other same-sex couples

Defendants: Timothy Brien, Polk County recorder and registrar

Court: Iowa District Court for Polk County

Status: Hearing for summary judgment on May 4, 2007, decision pending

Recent Cite: n/a

Details: On Dec. 13, 2005, plaintiffs filed a lawsuit challenging the denial of marriage licenses as a violation of the due process and equal protection provisions of the Iowa Constitution. All parties and amici have submitted briefs in the case. The trial court's decision on a motion for summary judgment is pending.

Maryland

Deane & Polyak v. Conaway

Plaintiffs: Gitanjali Deane and Lisa Polyak, along with several other same-sex couples

Defendants: Frank M. Conaway, Baltimore City Circuit Court clerk, and others

Court: Maryland Court of Appeals

Status: Oral arguments heard on December 4, 2006, awaiting decision as of May 9, 2007

Recent Cite: 903 A.2d 416 (Md. Ct. App. 2006)

Details: Plaintiffs filed suit on July 12, 2004, challenging the validity of Maryland's statute barring same-sex couples from marriage under the state constitution. The Baltimore Circuit Court trial judge ruled that the statutory prohibition of marriage for same-sex couples discriminates on the basis of gender in violation of the Maryland Constitution's Equal Rights Amendment, stating that "Maryland's statutory prohibition against same-sex marriage cannot withstand this constitutional challenge. Family law §2-201 violates Article 46 of the Maryland Declaration of Rights because it discriminates, based on gender against a suspect class, and is not narrowly tailored to serve any compelling governmental interests." The trial judge immediately stayed the decision pending appeal by the office of the Maryland Attorney General. On July 27, 2006, the Maryland Court of Appeals, the state's highest court, agreed to hear the appeal directly, bypassing an intermediate court. Oral arguments were heard on December 4, 2006, a decision is expected in late 2007 or early 2008.

Massachusetts

Cote-Whitacre v. Department of Public Health

Plaintiffs: Sandra and Roberta Cote-Whitacre, along with seven other same-sex couples

Defendants: Department of Public Health

Court: Superior Court of Massachusetts

Status: Trial court allows same-sex Rhode Island couples to marry on Sept. 29, 2006

Recent Cites: 844 N.E.2d 623 (Mass. 2006); 2006 Mass. Super. LEXIS 670

Details: Plaintiffs filed suit on June 18, 2004, challenging the constitutionality of Massachusetts General Laws ch. 207, § 11 – the so-called “1913 law” – which the state has used to bar out-of-state same-sex couples from being married after the *Goodridge v. Department of Public Health* decision legalized marriage for same-sex couples in that state. On Aug. 18, 2004, the trial court judge denied the plaintiffs' motion to enjoin enforcement of the “1913 law” and dismissed the case. Plaintiffs petitioned the Supreme Judicial Court granted review and heard oral arguments on Oct. 6, 2005. The Supreme Judicial Court, by a 6-1 margin, upheld the “1913 law” as constitutional, permitting the commonwealth to continue to refuse to issue marriage licenses to nonresident same-sex couples if the marriage would not be valid under the laws of their home state. The court remanded the question of whether state law barred same-sex couples from marrying in Rhode Island and New York for a determination by the trial court.

On remand, the trial court determined that same-sex couples from Rhode Island should be allowed to marry since there was no explicit law against same-sex marriage in the state. Same-sex couples from New York were not allowed to marry. In addition, the trial court, in its amended and final judgment, determined that all New York same-sex couples that were married in Massachusetts prior to the *Hernandez v. Robles* decision were still validly married. Of particular note: Rhode Island Attorney General has stated in an

opinion that he believes that same-sex marriages contracted in Massachusetts should be recognized in Rhode Island.

New Jersey

Lewis v. Harris

Plaintiffs: Mark Lewis and Dennis Winslow, along with six other same-sex couples

Defendants: Gwendolyn Harris, commissioner of Dept. of Human Services

Court: n/a

Status: New Jersey Supr. Ct. rules 7-2 for plaintiff (rejects marriage 5-4) - Oct. 25, 2006

Recent Cite: 908 A.2d 196 (N.J. 2006)

Details: Plaintiffs filed suit challenging the validity of the denial of marriage licenses to same-sex couples under the New Jersey Constitution. A trial court judge ruled against the plaintiffs. The appellate court upheld the trial court decision. The New Jersey Supreme Court found that the New Jersey Domestic Partnership Act did not provide to committed same-sex couples a number of the rights and benefits provided to married couples. The court reversed the appellate ruling and held that the laws did violate the equal protection guarantee because government officials did not articulate any legitimate public need for depriving same-sex couples of the benefits and privileges of marriage.

But the New Jersey Supreme Court affirmed the intermediate appellate court's ruling by a vote of 5-4 in stating that New Jersey's marriage laws did not violate the New Jersey Constitution's substantive due process guarantee. The court held that the legislature needed to remedy this violation within 180 days by either amending the marriage statutes to include same-sex couples or enacting a parallel statutory structure which provides same-sex couples with the rights, benefits, burdens and obligations of civil marriage. The New Jersey legislature chose to create civil unions instead of granting full marriage equality.

New York

Funderburke v. New York State Dep't of Civ. Serv.

Plaintiffs: Duke Funderburke and Brad Davis

Defendants: New York State Dept. of Civil Services, Uniondale Union Free School Dist.

Court: Supreme Court of New York, Nassau County

Status: Defendant's motion for summary judgment granted on July 11, 2006

Recent Cite: 822 N.Y.S.2d 393 (Sup. Ct. 2006)

Details: Plaintiff previously filed a marital status discrimination claim under New York state antidiscrimination law, based on the school district's failure to extend benefits to his then-unmarried partner. Plaintiffs lost at the trial level and on appeal. Funderburke and Davis later married in Canada in October 2004, changing the facts of the case and their legal position. On March 16, 2005, plaintiffs filed a notice of claim challenging the Uniondale Union Free School District's failure to extend Funderburke's retirement health benefits to his spouse Davis. The case also sought a ruling that Canadian (and other out-of-state) marriages between same-sex couples be recognized by New York.

Trial court granted defendants' summary judgment motion and dismissed the case. The court applied a recent N.Y. Court of Appeals ruling that stated that there are rational grounds for limiting the definition of marriage to opposite sex couples and that any expansion of the traditional definition of marriage should come from New York's legislature. Thus, the court held that under New York law, plaintiff and his partner were not married and have no right to spousal insurance benefits.

Hernandez v. Robles

Plaintiffs: Daniel Hernandez and Nevin Cohen, along with four other same-sex couples

Defendants: Victor L. Robles, city clerk of New York

Court: n/a

Status: New York Court of Appeals rules 4-2 in favor of defendant on July 6, 2006

Recent Cite: 821 N.Y.S.2d 770 (N.Y. 2006)

Details: Plaintiffs filed suit challenging the denial of marriage licenses as violation of the New York Constitution. The trial court ruled that the denial of marriage licenses to same-sex couples violates the state constitution and ordered that the state domestic relations law be construed to include same-sex couples, but stayed its judgment pending appeal. The Appellate Division overturned the lower court's decision, holding that the trial judge had overstepped her bounds into the realm of the Legislature and that denying marriage equality to same-sex couples did not violate either the equal protection or due process provisions of the New York Constitution.

The New York Court of Appeals, New York's highest court, held that limiting marriage to people of the opposite sex did not violate the state constitution. The court defined the issue as the right to marry someone of the same sex and determined that this right is not fundamental because it is not "deeply rooted in our Nations' history and tradition." The court held that the legislature could have rationally decided to limit marriage to opposite sex couples for the welfare and stability of children and because it stated that "it was better for children to grow up with both a mother and a father." The Court noted that there was no conclusive scientific evidence for its second reason, but the legislature could rationally conclude such on the "common-sense premise that children [do] best with a mother and father in the home." With respect to the equal protection claim, the court acknowledged that both same-sex and opposite-sex couples may have children but found that this did not make restricting marriage to opposite sex couples under-inclusive. The court also found that the marriage ban was not over-inclusive because not all opposite sex married couples plan to have or are able to have children. The court also rejected plaintiff's equal protection claim under both the New York and U.S. Constitutions. Lastly, the court held that New York's marriage ban did not constitute sex discrimination because it treated men and women the same in that neither is allowed to marry someone of their own sex. All other marriage cases in New York were rendered effectively moot.

Washington

Andersen v. King County

Plaintiffs: Heather Andersen and Leslie Christian, and seven other same-sex couples

Defendants: King County and the state of Washington

Court: n/a

Status: Washington Supreme Court rules 5-4 in favor of defendants on July 26, 2006

Recent Cite: 138 P.3d 963 (Wash. 2006).

Details: Plaintiffs filed suit to challenge the denial of marriage licenses to same-sex couples under the Washington Constitution. The trial court ruled that the plaintiffs were being denied a fundamental right to marry in violation of the state's constitution. Plaintiffs filed motions for direct expedited review by the Washington Supreme Court. The court accepted direct review but denied any expedited action, holding oral arguments in a consolidated appeal with *Castle v. State of Washington*.

The Washington Supreme Court reversed the trial court, holding that state's Defense of Marriage Act ("DOMA") did not violate the state constitution. The court concluded that limiting marriage to opposite-sex couples was rationally related to the state's legitimate interests in procreation and encouraging families with a mother, father, and children biologically related to both. The court rejected the plaintiffs' argument that marriage is a fundamental right and that they have the right to marry the person of their choice and noted that neither the nation nor the state has a history of same-sex marriage. The court rejected the plaintiffs' argument that DOMA was motivated by animus towards homosexuals despite the legislative record containing numerous examples of anti-gay sentiment. By plaintiff's request, the court did not "consider whether the denial of statutory rights and obligations to same-sex couples, apart from the status of marriage, violates the state or federal constitution." Lastly, the court rejected claim that DOMA violated the state's Equal Rights Amendment because it treated women and men the same since neither is allowed to marry someone of their same sex.

State Cases Challenging Validity/Scope of State Marriage Amendments

Georgia

O'Kelley v. Perdue

Plaintiffs: Judith R.T. O'Kelley, three other clergy members and two state legislators

Defendants: Sonny Perdue, governor of Georgia

Court: n/a

Status: Supreme Court of Georgia reversed – constitutional amendment is valid

Recent Cite: 632 S.E.2d 110 (Ga. 2006)

Details: On Oct. 26, 2004, the Supreme Court of Georgia refused a pre-election challenge to the wording of Georgia's proposed constitutional ban on marriage for same-sex couples; plaintiffs argued that it dealt with more than one subject, in violation of constitutional limitations on ballot measures. After the amendment was adopted by voters on Nov. 2 by 77% of voters, the plaintiffs filed their case again in Fulton County Superior Court. The lower court ruled that the amendment violated the single-subject rule because it required voters to vote on a ban of both marriage for same-sex couples and civil unions.

The Georgia Supreme Court reversed the trial court's decision, finding that the amendment is "germane to the accomplishment of a single objective."

Massachusetts

Schulman v. Attorney General

Plaintiffs: Johanna Schulman

Defendants: Thomas Reilly, Attorney General of Massachusetts

Court: n/a

Status: Appeal denied on July 10, 2006 – same-sex marriage petition may be certified

Recent Cite: 850 N.E.2d 505 (Mass. 2006)

Details: Plaintiff filed suit challenging the attorney general's approval for circulation of a citizen-initiated petition to amend the state constitution to undo the *Goodridge v. Department of Public Health* decision and bar same-sex couples from marrying in Massachusetts. Plaintiff maintains that Article 48 of the Massachusetts Constitution bars citizen-initiated constitutional amendments that "relate ... to the reversal of a judicial decision." The Supreme Judicial Court of Massachusetts in a single-justice session held neither the plain meaning of the words in Article 48 nor its intended meaning in the context of constitutional debates supported an interpretation barring the petition's certification. It did not bar "overruling" the future application of a court decision by amending the Constitution. The initiative process could be used to amend the Constitution prospectively, changing the substantive law and effectively "overruling" the effect of a prior court's precedent.

Michigan

Nat'l Pride at Work, Inc. v. Governor of Mich.,

Plaintiffs: National Pride at Work and 21 same-sex couples

Defendants: Jennifer Granholm, Governor of Michigan, and the City of Kalamazoo

Court: Michigan Supreme Court

Status: Michigan Supreme Court grants appeal on May 23, 2007 – denies motion to stay

Recent Cite: 2007 Mich. App. LEXIS 240 (Ct. App. Feb. 1, 2007).

Details: After Michigan voters approved a state constitutional amendment banning marriage between same-sex couples in 2004, the state attorney general issued an opinion stating that the amendment prohibits state and local government entities from offering domestic partner benefits in future employment contracts. Plaintiffs filed suit in trial court seeking a declaratory judgment invalidating the opinion. Governor Granholm, as a defendant, filed a brief supporting the plaintiffs. The trial court ruled that health benefits were "not among the statutory rights or benefits of marriage;" thus, the amendment did not bar state and local governments from offering those benefits to unmarried couples.

The Michigan Court of Appeals reversed the trial court. The court found that a public employer recognizes the union of a same-sex couple when it requires proof of a "formal domestic partnership agreement" to obtain health coverage for a partner. The court held that this violates the plain language of the amendment because it prohibits recognition of "such unions...for any purpose." The court held that the amendment did not violate

Michigan's Equal Protection Clause because Michigan citizens could rationally decide that societal welfare and morals would benefit from protecting "traditional marriage," and that this act constituted a legitimate government interest. The court rejected the plaintiffs' argument that the amendment targeted same-sex couples for loss of protections under state law, finding that it also barred unmarried heterosexual couples from obtaining employment benefits "as a couple on the basis of an agreement recognized as a marriage or similar union for any purpose." On May 23, 2007, the Michigan Supreme Court granted review of the case, but denied a motion to stay the judgment of the Michigan Court of Appeals by a vote of 5-2.

Ohio

Brinkman v. Miami Univ.

Plaintiff: Thomas Brinkman, as state legislator, taxpayer, and citizen

Defendant: Miami University

Pending Court: Ohio Court of Appeals

Status: Trial court rules against plaintiff on November 22, 2006, plaintiff has filed appeal

Recent Cite: 861 N.E.2d 925 (Butler Co. Ct. 2006)

Details: Plaintiff taxpayer/citizen sought declaratory judgment and injunctive relief alleging that the university's provision of medical-insurance benefits to those it classified as same-sex domestic partners of its employees violated the article XV, § 11 of the Ohio Constitution—the state constitutional amendment banning same-sex marriage—which states that "only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions." Defendant, a state university, filed a motion for summary judgment. Defendants stated that the taxpayer lacked standing to assert the claim. The trial court found that the taxpayer lacked the legal interest in the dispute to maintain standing because he was not a member of a special class that funded the particular expenditures, and was not damaged individually and concretely. As a citizen, he failed to show that he had public-rights standing. Plaintiff's request for relief was not within the type of writ subject to public-rights standing. The issue of whether tax money was used to make the payments at issue was irrelevant, as standing was necessary to hear the merits of the claim. The trial court granted the university's motion for summary judgment. The plaintiff filed notice of appeal in December 2006.

State v. Carswell

Plaintiff: State of Ohio

Defendant: Michael Carswell

Pending Court: Supreme Court of Ohio

Status: Oral arguments were held on Dec. 12, 2006 – a decision is still pending

Recent Cite: 2005 Ohio App. LEXIS 5903 (Ct. App. Dec. 12, 2005)

Details: Defendant was indicted for one count of domestic violence in violation of state statute. Ohio had previously passed a state constitutional amendment banning same-sex marriage or recognition of any type of married status for unmarried individuals. The trial court amended the domestic violence count to an assault count, having accepted defendant's argument, because the domestic violence statute was unconstitutional as it

applied to him and his victim because they were unmarried cohabiting individuals. On appeal, the Ohio Court of Appeals for Warren County reversed, finding that Ohio's state marriage amendment did not "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage." Given widespread conflict from state appellate courts on this issue, the Supreme Court of Ohio accepted review and heard oral arguments on Dec. 12, 2006. A decision is pending.

NOTE: The result of the Ohio marriage amendment has resulted in numerous challenges beyond the effect of simply denying marriage rights but may possibly affect the above two matters as well as custody disputes (*In the Matter of J.D. Fairchild*).

Oregon

Martinez v. Kulongoski

Plaintiffs: Juan Martinez and Byron Beck, other same-sex couples and clergy members

Defendants: Ted Kulongoski, governor of Oregon, and the state of Oregon

Court: Marion County Circuit Court

Status: Appeal process still pending as of February 28, 2007

Recent Cite: No. 05C-11023 (Ore. Cir. Ct. Nov. 4, 2005).

Details: Oregon voters approved a state constitutional amendment banning marriage between same-sex couples in 2004. Plaintiffs filed suit alleging that the amendment violated several provisions of the amendment procedure to the Oregon Constitution, namely that the amendment: (1) was a revision, not an amendment; (2) contained multiple amendments (single-subject rule) requiring a separate vote; and (3) was merely a policy statement and not the proper subject of a ballot initiative. The trial court held that the amendment was not an improper "revision" and that the changes made by the amendment were closely related to each other and did not run afoul of the separate-vote requirement. Last, the court concluded that the policy argument was previously answered adversely to the plaintiffs by the Oregon Supreme Court in *Li v. State*, 110 P.3d 91 (Ore. 2005).

Tennessee

ACLU v. Darnell

Plaintiffs: ACLU of Tennessee, Tennessee Equality Project, and other legislators

Defendants: Riley Darnell, secretary of state of Tennessee, and others

Court: n/a

Status: Tennessee Supreme Court permits same-sex marriage amendment

Recent Cite: 195 S.W.3d 612 (Tenn. 2006)

Details: The Tennessee General Assembly re-approved a constitutional amendment to ban marriage for same-sex couples for approval at the 2006 gubernatorial election on March 17, 2005. Under the Tennessee Constitution, a constitutional amendment must be approved by two legislatures with an intervening legislative election. Plaintiffs filed suit alleging that the amendment's text was not published six months prior to the intervening election as required by art. XI, § 3 of the state's constitution. Plaintiffs argued that the

state constitution provided for a mandatory sequential process that required publishing the amendment six months prior to the 2004 election. Thus, the Amendment should have been precluded from appearing on the November 7, 2006 ballot. The trial court ruled against the plaintiffs, concluding that the publication requirement was satisfied.

The Tennessee Supreme Court held that the plaintiffs did not have standing to challenge the alleged untimely publication of the marriage amendment because the plaintiffs failed to show an injury from the untimely publication of the amendment. The plaintiffs did not show that the late publication of the Amendment impaired their rights to vote in the 2004 election or precluded them from supporting candidates who opposed the amendment. The Court also held that the plaintiffs who were legislators also did not have standing because they failed to establish that the effectiveness of their vote or any of their other legislative powers was impeded by the alleged untimely publication.

Other State Cases Related to Marriage

Alaska

ACLU v. Alaska

Plaintiffs: Alaska Civil Liberties Union and nine same-sex couples

Defendants: State of Alaska and municipality of Anchorage

Court: n/a

Status: Alaska Supreme Court rules denial of benefits unconstitutional

Recent Cite: 122 P.3d 781 (Alaska 2005).

Details: Plaintiffs filed suit alleging that the state of Alaska and municipality of Anchorage, by failing to extend benefits to the same-sex partners, violated the state's equal protection clause. The Alaska Supreme Court held that the programs were facially discriminatory because they only provided benefits to married couples while same-sex couples were barred from marrying under the state's constitution. The court found that the absolute denial of benefits to public employees with same-sex partners was not substantially related to the legitimate government interests of cost control, administrative efficiency and promoting marriage. The court noted that the state constitution's definition of marriage as "one man – one woman" did not prevent same-sex couples from challenging government policies that discriminated between married and unmarried couples. The court invited supplemental briefing from the parties on the issue of remedy and permitted the benefits program to remain in effect until this issue was resolved.

Michigan

Rohde v. Ann Arbor Public Schools

Plaintiffs: Teri Rohde and 16 other Michigan taxpayers

Defendants: Ann Arbor Public Schools

Court: Michigan Supreme Court

Status: Oral arguments were held on January 11, 2007 – decision pending

Recent Cite: 722 N.W.2d 895 (Mich. 2006).

Details: Plaintiffs filed suit arguing that the Ann Arbor Public Schools' provision of domestic partner benefits amounted to recognizing a same-sex relationship in violation of the state's "defense of marriage" law. After voters adopted a constitutional amendment prohibiting marriage for same-sex couples in 2004, plaintiffs amended their complaint to argue that the domestic partner benefits program violated the state constitution. The trial court judge found that the plaintiffs lacked standing, which was affirmed by the appellate court. Plaintiffs appealed and the Michigan Supreme Court held oral arguments on January 11, 2007. A decision in this case is still pending.

New York

Godfrey v. Hevesi

Plaintiffs: Margaret Godfrey and three other New York taxpayers

Defendants: Alan Hevesi, New York State Comptroller

Court: New York Supreme Court, Albany County

STATUS: Motion to dismiss denied on April 5, 2007 – still in state trial court

Recent Cite: n/a

Details: Plaintiffs filed suit arguing that Hevesi exceeded his constitutional authority by declaring that the New York State and Local Retirement System (NYSLRS) would recognize marriages between same-sex couples lawfully performed in other jurisdictions. Plaintiffs contend that the New York Court of Appeals decision in *Hernandez* (see above) requires the plaintiff to refuse to recognize such marriages. On September 13, 2006, Hevesi's office issued a press release announcing his intent to mount a "vigorous defense" of its recognition of those marriages. On April 5, 2007, the trial court denied a motion to dismiss the suit because taxpayers have the right to challenge any illegal action by a state official that expends state funds.

Godfrey v. Spano

Plaintiffs: Margaret Godfrey and three other New York taxpayers

Defendants: Andrew Spano, Westchester County Executive

Court: New York Supreme Court, Westchester County

Status: Appeal to state intermediate appellate court filed on April 27, 2007

Recent Cite: 2007 NY Slip Op 27105; 2007 N.Y. Misc. LEXIS 853 (Mar. 12, 2007)

Details: Plaintiffs filed suit arguing that Spano exceeded his constitutional authority by issuing a county executive order that all Westchester County departments and officials would recognize marriages between same-sex couples lawfully performed in other jurisdictions. Plaintiffs contend that the New York Court of Appeals decision in *Hernandez* (see above) requires the plaintiff to refuse to recognize such marriages. On March 12, 2007, the Supreme Court of Westchester County denied plaintiff's motion for a preliminary injunction and dismissed the plaintiff's complaint, ruling that the county executive order was legally issued and consistent with New York law. Plaintiff's notice of appeal was filed on April 27, 2007.

Rhode Island

Chambers v. Ormiston

Plaintiff: Margaret Chambers

Defendant: Cassandra Ormiston

Pending Court: Supreme Court of Rhode Island

Status: Supreme Court of Rhode Island accepts review on May 21, 2007

Recent Cite: 916 A.2d 758 (R.I. 2007).

Details: Rhode Island's Family Court certified a question of law to determine if it had subject matter jurisdiction under Rhode Island laws to hear a same-sex divorce complaint of individuals lawfully married in Massachusetts. The state's highest court found it premature to answer the certified question and required additional proceedings before the family court. The court specifically asked Family Court to find out whether a license was issued and solemnized and whether the domicile and residence requirements set forth under Rhode Island laws was satisfied. The court also requested copies of the actual Massachusetts marriage license and certification of solemnization with the factual findings. The justice of the family court was to determine whether there was an actual case or controversy and whether the Full Faith and Credit clause of the U.S. Constitution and the Defense of Marriage Act were pertinent. The certified request was to be reworded to clarify that what was being sought was a ruling as to whether or not the family court could properly recognize a foreign same-sex marriage for purposes of granting a divorce under Rhode Island laws. The Supreme Court of Rhode Island, despite its earlier remand, agreed to hear the case anyway on May 21, 2007, stating that it would accept written briefs on or before August 1, 2007.

Virginia

Stroud v. Stroud

Plaintiff: Joseph Anthony Stroud

Defendant: Debra Lyn Stroud

Pending Court: Circuit Court of Fairfax County

Status: Remanded by Court of Appeals of Virginia

Recent Cite: 641 S.E.2d 142 (Ct. App. Va. 2007)

Details: The parties appealed an order by the Circuit Court of Fairfax County that found their property settlement agreement (PSA) ambiguous, asking whether the parties intended, by the use of the word "person" in the PSA, only individuals of different sexes, or individuals of both sexes. The PSA provided that spousal support would terminate, upon the wife's cohabitation with any person to whom she was not related in a situation analogous to marriage for 30 or more straight days. The husband presented evidence that the wife and another woman shared a common residence, were involved in an intimate relationship, and that the wife was providing financial support to the other woman.

The appellate court found that uncontested evidence of the parties' negotiations before executing the PSA made clear that the word "person" included individuals of both sexes. The appellate court rejected the trial court's reliance on the fact that the wife and the other woman did not present themselves to the public in general as a couple. The court held

that the evidence showed that the wife's relationship with another woman constituted cohabitation in a situation analogous to marriage and remanded the case to the trial court.

NOTE: Remarkably, the case characterized the woman as being in a marriage-like relationship when the state of Virginia had previously passed an amendment banning recognition of same-sex marriage or any relationship similar to same-sex marriage.

Federal Cases Involving Federal Defense of Marriage Act Challenges

California

Smelt v. Orange County

Plaintiffs: Arthur Smelt and Christopher Hammer

Defendants: Orange County and Michael Rodrian, Orange County clerk

Court: n/a

Status: writ of certiorari denied by U.S. Supreme Court

Recent Cite: 447 F.3d 673 (9th Cir. 2006).

Details: Plaintiffs who were denied a marriage license filed suit, challenging the constitutionality of California's discriminatory marriage law and the federal Defense of Marriage Act (DOMA). The trial court ruled against the plaintiffs, upholding the constitutionality of the federal definition of marriage portion of DOMA. The trial court abstained from considering the federal constitutionality of California's marriage laws because they are currently being reviewed in state courts. The court also found that the plaintiffs did not have standing to challenge the interstate recognition portion of DOMA.

The Ninth Circuit held that the trial court properly abstained from hearing claims that parts of the California Family Code were unconstitutional because state courts were reviewing these issues (see *In re Marriage Cases, supra*). The court ruled that abstaining was proper because: the issues surrounding same-sex marriage involved sensitive social policy considerations; if the California courts determined that the sections violated the state's constitution there would be no need for federal adjudication; and the court could not predict with any confidence how the California Supreme Court would decide the state constitutional questions. The court also affirmed the trial court's holding that the plaintiffs lacked standing to challenge § 2 of DOMA because they were not married in any state and thus could not show actual injury as opposed to a mere hypothetical one. The court reversed the district court's holding that the plaintiffs had standing to challenge the section § 3 of DOMA (defining "marriage" and "spouse") along the same reasoning, namely that the plaintiffs were not married under the laws of any state, and their former status as registered domestic partners did not trigger application of DOMA. The court noted that the plaintiffs did not suggest that they had applied for federal benefits, much less been denied; thus, they failed to allege a particularized injury caused by DOMA. The fact that they might someday be married under state's law or denied a federal benefit for

which they applied was insufficient for standing. Plaintiff's writ of certiorari was denied by the U.S. Supreme Court on October 10, 2006.

Washington

In re Kandu

Plaintiffs: Lee Kandu and Ann Kandu

Defendants: United States of America

Court: U.S. Bankruptcy Court, Western District of Washington

Status: Petition dismissed

Recent Cite: 315 B.R. 123 (Bankr, W.D. Wash. 2004).

Details: U.S. bankruptcy court ruled that principles of comity governing recognition of foreign marriages do not permit the court to allow a same-sex couple married in Canada to file a joint bankruptcy petition as spouses. Finding that the federal Defense of Marriage Act (DOMA) required dismissing the petition, the judge also rejected several arguments that DOMA's application in this case violated the applicant's federal constitutional rights.

Federal Cases Challenging State Marriage Amendments

Nebraska

Citizens for Equal Protection Inc. v Bruning

Plaintiffs: Citizens for Equal Protection Inc. and other groups

Defendants: Jon Bruning, Attorney General of Nebraska, and Dave Heineman, Governor

Pending Court: U.S. Court of Appeals for the Eighth Circuit

Status: Eighth Circuit reversed on July 14, 2006 – state marriage amendment is valid

Recent Cite: 455 F.3d 859, 870 (8th Cir. 2006)

Details: In 2000, Nebraska voters adopted a state constitutional amendment prohibiting marriage or any other relationship recognition for same-sex couples. Plaintiffs filed suit in challenging the validity of the amendment under several federal constitutional provisions. The district court ruled that the Nebraska amendment unconstitutionally infringed on plaintiffs' First Amendment rights to association and to petition the government, violated the Fourteenth Amendment's guarantee of equal protection and constituted an unconstitutional bill of attainder. The state attorney general appealed.

The Eighth Circuit Court of Appeals reversed, finding no difference between states' laws and a state constitutional amendment that limit marriage to opposite-sex couples. It found that both were rationally related to the government legitimate interest in steering procreation into marriage and thus did not violate the Equal Protection Clause. The court rejected the argument that the amendment raised an insurmountable political barrier to same-sex couples in obtaining the many benefits of marriage. The court held that there was no fundamental right to be free of the validly enacted state amendment. The court distinguished the case from *Romer v. Evans*, where the U.S. Supreme Court found that a

Colorado amendment barring preferential policies based on sexual orientation violated the Equal Protection Clause because its "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affect[ed]." The Eighth Circuit differentiated the case from *Romer* by finding that the Nebraska amendment only limited same-sex couples from entering into valid marriages and other similar relationships, meaning that its focus was not so broad as to render Nebraska's reasons for its enactment "inexplicable by anything but animus" towards same-sex couples.

Oklahoma

Bishop v. Oklahoma

Plaintiffs: Mary Bishop, Sharon Baldwin, Susan Barton and Gay Phillips

Defendants: State of Oklahoma, state and U.S. attorneys general, and the Governor

Pending Court: U.S. District Court for the Northern District of Oklahoma

Status: Motion to dismiss granted in part and denied in part on Aug. 14, 2006

Recent Cite: 447 F. Supp.2d 1239 (N.D. Okla. 2006).

Details: Plaintiffs filed suit challenging the validity of the federal Defense of Marriage (DOMA) Act and a state constitutional amendment prohibiting marriage for same-sex couples under the U.S. Constitution. The district court granted in part and denied in part the state's motion to dismiss. The issue was whether the plaintiffs had the standing to challenge DOMA and Oklahoma's marriage amendment. The court ruled that the couple that had obtained a Vermont civil union and married in Canada lacked the standing to challenge Section 2 of DOMA. The court found that Vermont did not treat civil unions as marriages, noting that Vermont law still recognizes marriage as limited to one man and one woman and "does not bestow the status of civil marriage." The court cited a legal commentator who stated that the "statute by its own words does not apply, and therefore, no DOMA challenge should arise under the Civil Union Law." With respect to a couple married in Canada, the court held that the couple also lacked standing to challenge Section 2 of DOMA because the term "state" in DOMA and in the full faith and credit clause does not include foreign countries. The court held that DOMA's definitional section (§ 3) did not violate the Full Faith and Credit Clause of the U.S. Constitution because the Clause did not impose any obligation on the federal government and instead required states to give full faith and credit to the public judicial proceedings of other states. The court denied to rule on the plaintiff's standing to challenge DOMA's definitional section until the court had a factual record and had heard legal arguments. The court also reserved ruling on the plaintiffs' equal protection and substantive due process challenges and denied the motion to dismiss with respect to these claims.

The court also ruled that the couple did not have standing to challenge Part B of the state amendment which refuses to honor same-sex marriages performed in other states for the same reasons they lacked standing to challenge section 2 of DOMA. The court found that all plaintiffs did have standing to challenge Part A of the state amendment that prohibits same sex couples from being legally married in Oklahoma. The court found that all the couples desired to marry in Oklahoma but were prevented from doing so, so they could

all show actual personal injury as a result of the ban. The dismissed claims have been appealed to the Tenth Circuit and the trial court has been stayed pending appeal.

INDEX OF CASES

<p>—A—</p> <p><i>ACLU v. Alaska</i>..... 25</p> <p><i>ACLU v. Darnell</i>..... 24</p> <p><i>Andersen v. King County</i> 20</p> <p>—B—</p> <p><i>Bishop v. Oklahoma</i> 30</p> <p><i>Boyd Co. High School Gay Straight Alliance v. Board of Ed.</i>..... 11</p> <p><i>Brinkman v. Miami Univ.</i>..... 23</p> <p><i>Butler v. Adoption Media</i>..... 14</p> <p>—C—</p> <p><i>C.N. v. Wolf</i>..... 10</p> <p><i>Chambers v. Ormiston</i> 27</p> <p><i>Citizens for Equal Protection Inc. v Bruning</i> 29</p> <p><i>Cook v. Gates</i> 5</p> <p><i>Cote-Whitacre v. Dep't of Public Health</i> 18</p> <p>—D—</p> <p><i>Deane & Polyak v. Conaway</i>..... 17</p> <p><i>Dep't of Human Servs. v. Howard</i> 6</p> <p>—E—</p> <p><i>Etsitty v. Utah Transit Authority</i>..... 4</p> <p>—F—</p> <p><i>Finstuen v. Edmondson</i>..... 8</p> <p><i>Funderburke v. New York State Dep't of Civ. Serv.</i>..... 19</p> <p>—G—</p> <p><i>Godfrey v. Hevesi</i>..... 26</p> <p><i>Godfrey v. Spano</i>..... 26</p> <p><i>Green v. City of Welch</i> 15</p> <p>—H—</p> <p><i>Hernandez v. Robles</i> 20</p> <p><i>Hispanic AIDS Forum v. Estate of Bruno</i> 13</p> <p>—I—</p> <p><i>In re Kandu</i> 29</p> <p><i>In re Marriage Cases (Woo v. Lockyer)</i> 16</p> <p><i>In re Roberto D.B.</i>..... 7</p> <p>—J—</p> <p><i>Jespersen v. Harrah's Operating Co.</i> ... 3</p>	<p><i>Jones v. Jones</i>..... 9</p> <p>—K—</p> <p><i>Kerrigan & Mock v. Conn. Dep't of Pub. Health (Kerrigan v. State)</i>..... 17</p> <p>—L—</p> <p><i>Lewis v. Harris</i>..... 19</p> <p><i>Lockyer v. City and County of San Francisco et al</i> 16</p> <p>—M—</p> <p><i>Martinez v. Kulongoski</i> 24</p> <p><i>Miller-Jenkins v. Miller-Jenkins</i> 9</p> <p>—N—</p> <p><i>Nat'l Pride at Work, Inc. v. Gov. of Mich.</i> 22</p> <p><i>Nicholson & Doe v. United States</i> 5</p> <p><i>North Coast Women's Care Medical Group v. S.C. (Benitez)</i> 7</p> <p>—O—</p> <p><i>O'Kelley v. Perdue</i> 21</p> <p>—P—</p> <p><i>People v. Lomiller</i>..... 13</p> <p>—R—</p> <p><i>R.G. et al. v. Koller et al.</i> 1</p> <p><i>Rohde v. Ann Arbor Pub. Schs.</i>..... 25</p> <p>—S—</p> <p><i>Sandoval v. Merced Union High Sch.</i> . 10</p> <p><i>Schroer v. Billington</i> 2</p> <p><i>Schulman v. Attorney General</i> 22</p> <p><i>Smelt v. Orange Co.</i> 28</p> <p><i>State v. Carswell</i> 23</p> <p><i>Straights & Gays for Equality v. Osseo Area Schs.</i> 12</p> <p><i>Stroud v. Stroud</i> 27</p> <p><i>Sundstrom v. Frank et al.</i>..... 2</p> <p>—T—</p> <p><i>Timmerman v. Waite & Urias</i>..... 2</p> <p>—V—</p> <p><i>Varnum v. Brien</i> 17</p> <p>—W—</p> <p><i>White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.</i>..... 11</p>
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