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LAWbriefs is a public education publication of the Human Rights Campaign Foundation, highlighting recent developments in sexual orientation and gender identity law. Inclusion of cases and legislative actions in LAWbriefs should not be construed to indicate involvement by the Human Rights Campaign or the Human Rights Campaign Foundation unless otherwise noted. HRC and the HRC Foundation applaud the work of the many national, state and local litigation, legislative, policy and advocacy organizations working for equal rights for gay, lesbian, bisexual and transgender people.

RECENT DEVELOPMENTS IN SEXUAL ORIENTATION & GENDER IDENTITY LAW MARRIAGE

Massachusetts Court Upholds Law Barring Out-of-State Same-Sex Couples from Marriage. On March 30, 2006, the Massachusetts Supreme Judicial Court upheld a Massachusetts law ("the 1913 law") used to prevent out-of-state same-sex couples from marrying in Massachusetts. By a 6-1 vote composed of two three-justice pluralities, the court rejected constitutional and selective enforcement challenges to the law, which bars marriage for out-of-state couples who would be prohibited from marriage in their home states. The court remanded the cases of the two plaintiff couples from Rhode Island and New York, providing them the opportunity to prove that their home states do not expressly prohibit the issuance of marriage licenses to same-sex couples. If these couples are successful in demonstrating that no express provision against marriage for same-sex couples exists in their states' statutes, constitutions or "controlling appellate decisions," then couples from those states would be eligible to marry in Massachusetts. *Cote-Whitacre v. Dept. of Pub. Health*, ___ N.E.2d ___, 2006 WL 786227 (Mass. 2006).

Discriminatory Marriage Amendments Defeated in Several States. Legislation sending to voters proposed amendments to state constitutions that would deny marriage equality to same-sex couples was defeated in state legislatures in Iowa, Maryland, New Hampshire, Washington and West Virginia. Bills remain pending in Alaska, Delaware, Illinois, Massachusetts, Minnesota, New Jersey and Pennsylvania. S.J. Res. 2 / H.J. Res. 1, 2005 Gen. Assem., 2005 Sess. (Iowa 2006) (passed House Mar. 15, 2005; session ended without passage out of Senate cmte. Jan. 9, 2006); H.B. 1637, 2006 Gen. Assem., 2006 Reg. Sess. (Md. 2006) (opposite chamber deadline passed without passage out of House cmte. Mar. 27, 2006); Const. Amend. Concurrent Res. 34, 159th Gen. Court, 2006 Reg. Sess. (N.H. 2006) (defeated Mar. 21, 2006); H.J. Res. 102 / H.J. Res. 106 / S.J. Res. 2, 77th Leg., 2d Reg. Sess. (W. Va. 2006) (session ended without passage Mar. 19, 2006).

Florida Supreme Court Clears Discriminatory Marriage Amendment for Ballot Placement. In an advisory opinion issued on March 23, 2006, the Florida Supreme Court ruled that a proposed ballot

measure to amend the Florida Constitution to bar marriage and other legal recognition for same-sex couples did not breach formal requirements for placement on the ballot, including the requirement that amendments address only a single subject. The court did not address the amendment's substance. Proponents of the discriminatory amendment failed to gain the required number of signatures by the Feb. 1 deadline for inclusion on the November 2006 ballot, but signatures already gathered remain valid. They must gather 155,000 additional signatures to place the measure on the ballot in 2008. *Advisory Opinion to Att'y Gen'l re Fla. Marriage Protection Amend.*, ___ So. 2d ___, 2006 WL 721779 (Fla. 2006).

Idaho, Virginia and Wisconsin Legislatures Approve Discriminatory Marriage Amendments. The legislatures of Idaho, Virginia and Wisconsin passed proposed amendments to their state constitutions denying marriage and other forms of relationship recognition to same-sex couples. All three amendments will be presented to state voters for ratification in the November 2006 elections. Four other states — Alabama, South Carolina, South Dakota and Tennessee — will also be voting to ratify amendments in 2006. *H.R.J. Res. 2, 58th Leg., 2d Reg. Sess. (Idaho 2006) (passed Feb. 15, 2006)*; *S.J. Res. 92, 2006 Gen. Assem., 2006 Reg. Sess. (Va. 2006) (passed Mar. 7, 2006)*; *S.J. Res. 53, 2005-06 Leg., 2005 Reg. Sess. (passed Feb. 28, 2006)*.

New York Appeals Court Upholds Denial of Marriage to Same-Sex Couples. In companion cases decided Feb. 16, 2006, a panel of the New York Appellate Division for the Third Department upheld two lower court decisions holding that the New York Constitution does not require marriage equality for same-sex couples. The Appellate Division characterized the plaintiffs' claims as attempts to "redefine" marriage, and recognized a state interest in procreation within marriage as a rational basis for the discriminatory law. The decision joined another New York appellate decision two months prior reaching the same result. *Samuels v. N.Y. State Dept. of Health*, 811 N.Y.S.2d 136 (N.Y. App. Div. 2006); *Kane v. Marsolais*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006). See also *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

Maryland Court Invalidates Discriminatory Marriage Law. On Jan. 20, 2006, a Maryland court struck down a state law restricting marriage to opposite-sex couples. The court held that the law violated the equal protection guarantee of the Maryland Constitution by discriminating on the basis of gender. Although the court concluded that the marriage law classified on the basis of gender and was therefore subject to a heightened standard of review, it also held that the marriage law could not survive even rational basis review, the most deferential standard, because it bore no relation to any legitimate state interest. The court stayed its decision pending appeal. *Deane & Polyak v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006).

RELATIONSHIP RECOGNITION

Colorado House Passes Domestic Partnership Bill. On March 27, 2006, the Colorado House of Representatives passed a bill presenting a ballot question to voters on whether to create a statewide domestic partnership program for same-sex couples. Domestic partners under the proposed law would have access to many of the state law rights and obligations of civil marriage, including the right to inherit an intestate partner's property, the right to initiate a wrongful death action, the right to adopt a partner's child, protection in state domestic violence laws and the right to make medical decisions for an incapacitated partner. The bill is now under consideration in the state Senate and, if passed, would appear on the ballot in November 2006. A rival "reciprocal beneficiaries" measure, which would have provided only limited rights and obligations, was defeated in a Senate committee on Feb. 27. *H.B. 06-1344, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006) (passed House Mar. 27, 2006) (domestic partnership bill)*; see also *S.B. 06-166, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006) (postponed indefinitely in Senate Cmte. on Business, Labor and Technology Feb. 27, 2006) (reciprocal beneficiary bill)*.

Utah Senate Rejects Law Voiding Agreements That “Violate Public Policy.” On March 1, 2006, the Utah Senate rejected a bill that would have voided any agreement or transaction that “violates public policy.” The measure, which had passed the Utah House, would likely have voided any agreements between same-sex couples (such as partnership and custody agreements) and prohibited domestic partner benefits for public employees. *H.B. 304, 2006 Leg., 2006 Gen. Sess. (Utah 2006)*.

New York High Court Strikes Down Equal Benefits Law. On Feb. 14, 2006, the Court of Appeals, New York’s highest court, struck down a New York City law requiring certain companies contracting with the city to provide benefits to the domestic partners of their employees equal to those benefits provided to the spouses of their employees. In a 4-3 decision, the court ruled that the Equal Benefits Law was pre-empted by state government contracting law and by federal law regulating employee benefit plans. Because the state and federal laws were intended to “corner the market” on their respective areas of law, the court ruled that the city could not mandate contractual terms or employee benefits that exceeded the terms of the state and federal laws. *Council of City of N.Y. v. Bloomberg*, ___ N.E.2d ___, 2006 WL 346293 (N.Y. 2006).

California Court Upholds State Domestic Partnership Law. On Jan. 27, 2006, a unanimous panel of the California Third District Court of Appeal ruled that the state Legislature, in extending to California domestic partners “the same rights, protections and benefits, and ... responsibilities, obligations and duties under law ... as are granted to and imposed upon spouses,” did not unconstitutionally amend a statute adopted by referendum (known as Proposition 22) that plaintiffs argued bars marriage for same-sex couples in California. The court held that the domestic partnership law did not run afoul of California’s constitutional ban on amending initiative measures without voter approval, because Proposition 22 did not address access to all marriage-related rights for same-sex couples, but only marriage itself. The constitutionality of Proposition 22 itself was not addressed by the court, but is being litigated in a group of cases now pending appellate review. *Campaign for Cal. Families v. Schwarzenegger*, No. C048303, 2006 WL 205118 (Cal. Ct. App. Jan. 27, 2006); see also *Knight v. Schwarzenegger*, No. C048596, 2006 WL 650659 (Cal. Ct. App. Mar. 16, 2006) (rejecting separate challenge to domestic partnership law); *Coordination Proceedings, The Marriage Case*, No. 4365, 2005 WL 583129 (Cal. Sup. Mar. 14, 2005) (holding that denial of marriage to same-sex couples violates equal protection; stayed pending appeal).

Ohio Appellate Courts Split on Effect of Discriminatory Amendment on Domestic Violence Law. On Jan. 11, 2006, the Court of Appeals for the Ninth District of Ohio ruled that the state’s domestic violence law, which provides increased criminal penalties for persons who cause harm to a person “living as a spouse,” was not invalidated by the passage of a discriminatory amendment to the state constitution that abrogated any “legal status ... that intends to approximate the design, qualities, significance or effect of marriage.” The court ruled that the domestic violence law’s language was “merely descriptive” and that invalidating it would not conform to the intent behind the amendment: to deprive same-sex couples of marriage equality. Four other state appellate courts have reached similar conclusions. However, on March 24, 2006, the Court of Appeals for the Second District issued a contrary opinion, holding the domestic violence law unconstitutional. That court concluded that the broad language of the constitutional amendment barred the recognition of any “quasi-marital” relationship, and that the court must uphold the amendment, part of the “fundamental, organic law of Ohio,” without regard to the court’s views of the “wisdom of the electorate” in adopting it. *State v. Nixon*, ___ N.E.2d ___, 2006 WL 52251 (Ohio Ct. App. 2006) (holding domestic violence law constitutional); *State v. Ward*, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App. Mar. 24, 2006) (holding the opposite).

Montana Supreme Court Upholds Domestic Partnership Benefits Policy. On Jan. 4, 2006, the Montana Supreme Court rejected a procedural challenge to a county’s policy extending dependent benefits to the domestic partners of county employees. The court ruled that the Missoula County

government had provided sufficient public notice of its pending decision to grant domestic partnership benefits to comply with the Montana Public Meeting Act, finding that anti-gay activists opposed to the benefits had been given sufficient opportunity to comment on the county's policy. *Jones v. County of Missoula*, 127 P.3d 406 (Mont. 2006).

HATE CRIMES

Judiciary Committee Chair Strips Hate Crimes Language from House Bill. In a parliamentary maneuver, U.S. House Judiciary Committee Chair Rep. James Sensenbrenner, R-Wis., removed hate crimes protections for gay, lesbian, bisexual and transgender individuals from a child safety bill. The hate crimes language, which had been passed as an amendment to the bill in a bipartisan 223-199 vote, provides for federal prosecution of hate crimes based on disability, gender, gender identity and sexual orientation, and allows the federal government to assist local authorities who lack the resources to effectively respond to hate violence. House Republican leaders allowed Sensenbrenner to introduce a version of the bill omitting the hate crimes provisions under a suspension of House rules that eliminated the opportunity to amend the bill. If the Senate approves the hate crimes language when it takes up the bill later this year, it would then go to a House-Senate conference committee which would decide whether the provision remains in the bill that is sent to the president for his signature.

DISCRIMINATION

Cincinnati Extends Anti-Discrimination Protections. On March 13, 2006, the city council of Cincinnati enacted an ordinance prohibiting discrimination in employment, housing and public accommodations based on sexual orientation or gender identity. Until its repeal by voters in November 2004, Article XII of Cincinnati's city charter had prohibited the city from enacting legislation to combat discrimination on the basis of sexual orientation. Article XII, enacted by referendum in 1993, had been the only discriminatory municipal law of its kind in the nation. Though the U.S. Supreme Court had found a similar amendment to the Colorado Constitution invalid in *Romer v. Evans*, 517 U.S. 620 (1996), the court declined to review Article XII, which had been upheld by a federal appeals court. *Cincinnati Ord. No. 0065-2006 (Mar. 13, 2006)*. See also *Cincinnati Ord. No. 271-2004 (Nov. 2, 2004) (repealing Article XII)*; *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (*holding that Article XII did not violate Equal Protection clause of U.S. Constitution*), *cert. denied*, 525 U.S. 943 (1998).

Federal Court Concludes Hawaii Youth Correctional Facility Violated Detainees' Civil Rights. On Feb. 7, 2006, a federal district court in Hawaii ordered the state youth correctional facility to stop its pervasive practice of abusing the rights of its gay, lesbian, bisexual and transgender minor wards. In extensive findings of fact, the court found that the detainees had been subjected to severe mistreatment and abuse, including physical and sexual assault, ongoing verbal harassment (by staff and other wards) and housing of transgender wards by biological sex rather than gender identity. The court issued an injunction against the abusive practices, which it found violated the minors' constitutional due process rights and demonstrated deliberate indifference to the minors' welfare. *R.G. ex rel. A.W. v. Koller*, No. Civ. 05-00566, 2006 WL 291637 (D. Haw. Feb. 7, 2006).

Washington Governor Signs Civil Rights Protections into Law. On Jan. 31, 2006, Democratic Gov. Christine Gregoire signed into law H.B. 2661, a bill which adds protections based on sexual orientation and gender identity to state human rights law. The law, which becomes effective June 6, 2006, prohibits discrimination in employment, rental housing, public accommodations, insurance and financial and real estate transactions. Opponents of the law have already begun to collect signatures in order to put it to a popular referendum. *Act of January 31, 2006, H.B. 2661, 2006*

Virginia Governor Renews Executive Order Barring Sexual Orientation Discrimination. On the day of his inauguration, Jan. 14, 2006, newly elected Democratic Virginia Gov. Tim Kaine issued an executive order barring discrimination in state employment against gay, lesbian and bisexual employees. Kaine had promised to issue the order after his predecessor, Democratic Gov. Mark Warner, had issued a similar order in December 2005. *Va. Exec. Order No. 5 (issued Jan. 14, 2006).*

PARENTING

Utah Governor Vetoes Bill Barring Petitions for Custody or Visitation by Non-Biological Parents. On March 21, 2006, Republican Utah Gov. John Huntsman Jr. vetoed a measure passed by the Utah Legislature that would have prohibited a grant of custody, visitation or any other parental rights to any person without the consent of a biological or adoptive parent, and allowing a parent to terminate custody or visitation of a non-parent at any time. Huntsman stated that he worried about the “unintended consequences” of the bill, which was passed in response to a still-ongoing dispute between the members of a same-sex couple over custody of their child. *H.B. 148, 2006 Leg., 2006 Gen. Sess. (Utah 2006) (passed Mar. 1, 2006, vetoed Mar. 21, 2006).*

Arizona Legislation Creating Adoption Preference for Opposite-Sex Married Couples Advances. On March 9, 2006, the Arizona House of Representatives passed a bill that would only allow an unmarried person to adopt a child if no qualified married couple has submitted an adoption application. The bill is now being considered by the Arizona Senate. Because same-sex couples are not permitted to marry in Arizona, the bill would discriminate against same-sex couples as well as gay, lesbian, bisexual and transgender individuals. *H.B. 2696, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (passed House Mar. 9, 2006).*

Delaware Supreme Court Upholds Joint Custody Award. On March 7, 2006, the Supreme Court of Delaware upheld a family court decision awarding joint custody of triplets to their non-biological and non-legal parent. The high court issued a narrow ruling that did not address the merits of the plaintiff’s claim that she was a “de facto” parent of the children; rather, the court ruled that because the defendant had sought and accepted child support payments from the plaintiff based on the lower court’s decision, she could no longer challenge that decision’s validity. The court thus left the rights of same-sex co-parents in future cases unclear. *Smith v. Smith*, ___ A.2d ___, 2006 WL 560614 (Del. 2006).

Missouri Court Invalidates Discriminatory Foster-Parenting Policy. On Feb. 17, 2006, a state trial court held that the state Department of Social Services’ policy barring gays and lesbians from serving as foster parents was without legal or factual support. The court ruled that the department could not rely on Missouri’s sodomy law to support its conclusion that the plaintiff was not of “reputable character” because that law was invalid in light of the U.S. Supreme Court’s decision in *Lawrence v. Texas*. The court also rejected rationales of permanency –holding that no legal authority in Missouri prohibited permanent adoptive placement with gays or lesbians— and social stigma –holding that the department had impermissibly given effect to private bias rather than focusing on plaintiff’s qualifications as a parent, which the department conceded were exceptional. The department is appealing the decision. *Johnston v. Mo. Dept. of Social Servs., Children’s Div., No. 0516CV09517 (Mo. Cir. Ct. Feb. 17, 2006)*, available at http://www.aclu.org/images/asset_upload_file618_24194.pdf.

Speaker of Ohio House Blocks Discriminatory Adoption Ban. On Feb. 9, 2006, a bill to prohibit adoptive placement of children with gay, lesbian, bisexual or transgender parents was introduced in the Ohio House of Representatives. However, Speaker of the House Rep. Jon Husted, R-Kettering, refused to refer the bill to committee, essentially killing the measure. Husted, himself an adopted

child, observed, “Many children never get adopted. They need people to love and nurture them. I don’t want to restrict those opportunities; I want to expand them.” *H.B. 515, 126th Gen. Assem., Reg. Sess. (Ohio 2006) (introduced Feb. 9, 2006).*

Florida Court Holds Co-Parenting Agreement Unenforceable, Denies Visitation. On Jan. 24, 2006, a Florida appellate court held that Florida law does not recognize contracts granting parental rights or visitation between a biological parent and a non-legal co-parent. The court refused to enforce sperm donation and co-parenting agreements between a woman and her former partner, the biological mother of their children. One of the three judges hearing the case issued a separate opinion agreeing that Florida law did not permit non-parents to seek visitation or custody, but urging the Legislature to revisit the law to protect the interests of children raised in “non-traditional” households when breakup occurs. *Wakeman v. Dixon*, 921 So. 2d 669 (Fl. Dist. Ct. App. 2006).

PRIVACY

California Supreme Court Invalidates Discriminatory Provision of Sex Offender Registry. On March 6, 2006, the California Supreme Court invalidated a provision of the state’s sex offender registry law that unequally required mandatory lifetime registration for adults convicted of voluntary oral or anal sex with a teenager, but gave sentencing courts discretion to exempt from registration adults convicted of voluntary vaginal intercourse with a teen. The court, in a 6-1 decision, held that there was no rational basis upon which to distinguish between the two classes of offenders, and therefore ruled that discretionary registration for both classes of offenders was required by the equal protection guarantees of the U.S. and California constitutions. *People v. Hofsheier*, 129 P.3d 29 (Cal. 2006).

Upon Third Review, Federal Court Upholds Alabama Sex Toy Ban. On March 15, 2006, a federal district court in Alabama upheld the state’s ban on the sale of sex toys, after previously invalidating it twice, only to be twice overturned on appeal. In the most recent appeal, on July 28, 2004, the Eleventh Circuit ruled that the district court had erred in finding the existence of a fundamental right to sexual privacy and remanded to the district court to determine whether there remained any legitimate purpose for the ban after the U.S. Supreme Court’s 2003 decision in *Lawrence v. Texas* invalidating state sodomy laws. On remand, the district court upheld the statute, reasoning that although the ban was motivated by considerations of public morality, the Supreme Court’s rejection of morals legislation in *Lawrence* did not apply. The court ruled that unlike the GLBT people affected by Texas’ sodomy ban in *Lawrence*, purchasers of sex toys were not a discrete and insular minority targeted for discrimination based on bare animus. *Williams v. King*, ___ F. Supp. 2d ___, 2006 WL 691184 (N.D. Ala. 2006), on remand from *Williams v. Att’y Gen’l of Ala.*, 378 F.3d 1232 (11th Cir. 2004).

Revisions Raise Concerns Over Sexual Orientation Protections in Security Clearances. On Dec. 29, 2005, National Security Adviser Stephen J. Hadley released, without fanfare, revised guidelines for granting of governmental security clearances. Previous versions of the guidelines, issued pursuant to an executive order from then-President Clinton, had dictated that sexual orientation “may not be used as a basis for or a disqualifying factor in determining a person’s eligibility for a security clearance.” The revised guidelines instead state that a security clearance may not be denied “*solely* on the basis of the sexual orientation of the individual” (emphasis added). Bush administration spokespeople defended the revised guidelines during the week of March 13, when they came to national attention, characterizing them as non-substantive revisions that do not reflect a change in government policy. *Memorandum of Stephen J. Hadley, Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (Dec. 29, 2005), available at <http://www.archives.gov/isool/pdf/hadley-adjudicative-guidelines.pdf>.

IMMIGRATION

Federal Appeals Court Upholds Denial of Asylum to Gay Victim of Police Abuse. On Jan. 18, 2006, a panel of the U.S. Court of Appeals for the Second Circuit unanimously ruled that a gay male Costa Rican citizen could not claim asylum or withholding of removal under the United Nations Convention Against Torture. The court held that although the man had been raped by a police officer in Costa Rica, and on a second occasion had been detained by another police officer because of his sexual orientation, the two “isolated events” did not satisfy the standard for award of asylum or relief under the convention. *Joaquin-Porras v. Gonzalez*, 435 F.3d 172 (2d Cir. 2006).

FIRST AMENDMENT

California Supreme Court Upholds Termination of Sea Scout Subsidy. On March 9, 2006, the California Supreme Court, in a unanimous decision, ruled that the city of Berkeley could revoke free marina berths provided to the Sea Scouts, a maritime affiliate of the Boy Scouts of America. A city council resolution provided free berths to nonprofit community organizations on the condition that recipients comply with the city’s non-discrimination ordinance, which forbids discrimination on the basis of sexual orientation and religion. Because of the Boy Scouts’ policy of excluding gay and atheist members and leaders, the city requested an affirmation from the Sea Scouts that they would not discriminate. Although the Sea Scouts contended they had never discriminated on the basis of either sexual orientation or religion, they did not disclaim any future non-discrimination, and the city terminated their free berths. The court ruled that the berth was a government subsidy to which the city could attach conditions of compliance, and that revocation of the subsidy did not constitute an unconstitutional condition on the Scouts’ exercise of free speech or association. *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006).

U.S. Supreme Court Upholds Anti-Gay Solomon Amendment. On March 6, 2006, the U.S. Supreme Court, in a unanimous 8-0 decision (newly appointed Justice Samuel Alito did not participate), reversed the U.S. Court of Appeals for the Third Circuit and held that Congress has the authority to require law schools to give military recruiters campus access that is at least equal to what is provided to any other recruiter. The Court upheld the federal statutes, known collectively as the “Solomon Amendment,” which deny all federal funding to colleges and universities that do not grant equal access to military recruitment. The Forum for Academic and Institutional Rights, an umbrella group of law schools, students and faculty, had argued that the Solomon Amendment violates the First Amendment by forcing schools to choose between receiving federal funds and applying their own non-discrimination policies barring potential employers that discriminate on the basis of sexual orientation from recruiting on campus. The Court rejected the arguments that the amendment interferes with law schools’ expressive association and compels them to facilitate the military’s discriminatory message. The Court focused on the military context, emphasizing that this is an area where courts must be their most deferential to Congress, but did not address the military’s discriminatory “Don’t Ask, Don’t Tell” policy itself. *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S. Ct. 1297 (2006).

Federal District Court Rejects First Amendment Claim by Anti-Gay Protesters. On March 1, 2006, a federal district court in Columbus, Ohio, dismissed a claim by anti-gay protesters who burned a rainbow flag at Columbus’ gay pride parade and were convicted of violating the city fire code. The court ruled that the protesters’ claims of selective prosecution and civil rights violation were without merit. *Daubenmire v. City of Columbus*, ___ F. Supp. 2d ___, No. C2-04-1105, 2006 WL 485147 (S.D. Ohio 2006).

Federal Court Dismisses Same-Sex Couple's Libel Suit Against Right-Wing Attack Advertiser. On Jan. 20, 2006, a federal district court rejected libel and related claims brought by a gay male couple against the defendants, who had run a political attack ad against the American Association of Retired People featuring the plaintiffs' photograph. The ad, which ran on the website of the conservative *American Spectator* magazine in February 2005, was captioned "The Real AARP Agenda," and contained a picture of an American soldier with a red "X" across it and a picture of the plaintiffs kissing at their March 2004 marriage in Multnomah County, Ore., with a green check mark across it. The defendants had used the picture without permission of plaintiffs or of *The Portland Tribune*, from which the photo originated. The district court held that the defendant's use of the image was not defamatory, and was protected by First Amendment exceptions to liability. *Raymen v. United Senior Ass'n*, 409 F. Supp. 2d 15 (D.D.C. 2006).

TRANSGENDER

Federal Court Allows Transgender Job Applicant's Discrimination Claim to Proceed. On March 31, 2006, a federal district court in Washington, D.C., denied a motion to dismiss a Title VII sex discrimination suit brought by an applicant for a position at the Library of Congress who was denied the position because of her transgender status. The court declined to endorse recent decisions by the U.S. Court of Appeals for the Sixth Circuit holding that discrimination against transgender employees is a form of sex stereotyping in violation of Title VII. However, the court ordered the case to proceed to trial, holding that "[modern] scientific observation may well confirm [that] 'sex is not a cut-and-dried matter of chromosomes,'" and that scientific evidence may compel the court to reject a large body of prior case law and conclude that discrimination on the basis of transsexuality is discrimination because of sex. *Schroer v. Billington*, ___ F.Supp.2d ___, 2006 WL 845806 (D.D.C. 2006) (memorandum order denying motion to dismiss for failure to state a claim). See also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

Bills Adding Gender Identity to Civil Rights Laws Advance in Connecticut and Vermont. On March 1, 2006, the Vermont House of Representatives passed a bill to add protection from discrimination on the basis of gender identity to state law. The bill would prohibit discrimination in employment, insurance, financial transactions, public accommodations and housing, and would also add protection against hate-motivated crimes and harassment. On March 27, 2006, a similar bill was passed out of the Connecticut House Judiciary Committee, for consideration by the full House. The Connecticut bill would bar discrimination in housing, education, employment, government contracts and public accommodations and utilities. *H.B. 865, 68th Leg., 2005-06 Sess. (Vt. 2006)* (passed House Mar. 1, 2006); *H.B. 5597, 2006 Gen. Assem., February Sess. (Conn. 2006)* (passed out of House Judiciary Cmte. March 27, 2006).

Federal Appeals Court Upholds Disparate Treatment of Transgender Inmates. On March 3, 2006, a unanimous panel of the U.S. Court of Appeals for the Tenth Circuit upheld the Colorado Department of Corrections' policy of denying hormone therapy to transsexual inmates who had not been taking hormones prior to incarceration. In a cursory opinion, the court upheld a lower court's ruling that the policy of not allowing inmates diagnosed with gender identity disorder to initiate transition while imprisoned did not constitute unconstitutionally unequal treatment of the inmates either with respect to inmates who had transitioned prior to imprisonment or to inmates with other health conditions generally. *Qz'etax v. Ortiz*, No. 05-1316, 2006 WL 515612 (10th Cir. Mar. 3, 2006).

Court Allows Prison Abuse Lawsuit Brought by Transgender Inmate to Proceed. On Feb. 27, 2006, a federal district court in Sacramento County, Calif., ruled that a transgender inmate's civil rights case could proceed against the county sheriff's department. The inmate, a Mexican national,

had been held at the county jail as a pre-deportation detainee. She alleged that while she was detained at the jail, she was physically abused by guards, subjected to verbal harassment by other prisoners and held in total separation with nearly round-the-clock confinement. The court castigated the sheriff's department for its non-compliance with a previous court order invalidating its policy of classifying all male-to-female transsexuals for total separation, allowed the plaintiff's federal civil rights claim to proceed and concluded that the sheriff could be held personally liable if the plaintiff's claims were proved at trial. *Medina-Tejada v. Sacramento County*, No. CIV.S-04-138FDC/DAD, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006) (*memorandum order granting in part and denying in part motion for summary judgment*).

SCHOOLS

Legislation Limiting Gay-Straight Alliances Defeated in Utah and Virginia; Advances in Arizona and Georgia. On March 1, 2006, the Utah House of Representatives withdrew a bill imposing new requirements on student organizations in public schools after the Utah Senate stripped the bill of discriminatory provisions denying authorization for clubs that "involve human sexuality." A similar bill passed the Virginia House but was killed in committee in the Virginia Senate on March 2. However, similar bills were passed by the Georgia House of Representatives on Feb. 15 and introduced in Arizona on Feb. 2. *H.B. 2730, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (introduced Feb. 2, 2006)*; *H.B. 661, 2005-06 Gen. Assem., 2006 Reg. Sess. (Ga. 2006) (passed House Feb. 15, 2006)*; *S.B. 97 / H.B. 393, 2006 Leg., 2006 Reg. Sess. (Utah 2006) (enacting clause struck in House Mar. 1, 2006)*; *H.B. 1308, 2006 Gen. Assem., 2006 Reg. Sess. (Va. 2006) (defeated in Senate Cmte. on Education & Health Mar. 2, 2006)*.

Court Rules Mandatory Attendance at Diversity Training Does Not Violate First Amendment. On Feb. 17, 2006, a federal district court in Kentucky rejected a First Amendment challenge to mandatory attendance at a school diversity training brought by students who alleged the training was incompatible with their religious belief that homosexuality is immoral. The training had been instituted by the Boyd County Board of Education pursuant to a consent decree in a previous case brought by gay and lesbian students at a county school seeking to enjoin the board from denying their student group official club status. As part of the consent decree, the board had instituted written harassment policies and diversity training on the issue of sexual orientation. The court rejected plaintiffs' claims that mandatory attendance at the diversity training amounted to unconstitutional viewpoint discrimination, holding that the training did not attempt to inculcate beliefs in the students, but simply furthered the state's legitimate goal of maintaining a safe educational environment free from harassment. *Morrison v. Bd. of Educ. of Boyd County, Ky., Civ. A. No. 05-38-DLB, 2006 WL 385314 (E.D. Ky. Feb. 17, 2006)*. See also *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky., Civ. A. No. 03-CI-17-DLB (E.D. Ky. Feb. 3, 2004) (granting consent decree and order mandating diversity training)*.

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