

Lambda Legal's State of the Law 2011

From the end of "Don't Ask, Don't Tell" to the passage of marriage equality in New York, 2011 was another momentous year of progress for LGBT rights and the rights of people with HIV. Here are the biggest events in the state of the law in 2011, according to Lambda Legal—as well as a tipsheet for what to watch for in 2012.

President Obama and the Department of Justice Say: No Defense for DOMA

In February 2011, Attorney General Eric Holder sent a [game-changing letter](#) to Congress saying the Obama administration considered the federal Defense of Marriage Act (DOMA) to be unconstitutional—and would no longer defend it in court. Jon Davidson, the Legal Director of Lambda Legal, told the *Wall Street Journal* that the letter “will have a very significant impact because it is easier for the courts to say ‘we think this law is unconstitutional’ if another branch is already saying that.” Just as important was Holder’s broader message that all laws that single out people based on their sexual orientation should get “heightened scrutiny” in court. As Davidson told the *New York Times*, the Department of Justice concluded that such laws “should be presumed to be unconstitutional and those laws should be struck down by the courts unless the government can prove that those laws are necessary to advance an important and legitimate government interest. That, in and of itself, is something we have been fighting for since we opened our doors.” The effects of these decisions were soon evident as the Department of Justice ceased defending DOMA challenges, including cases brought by Lambda Legal, GLAD and the ACLU, and filed powerful briefs detailing the historic discrimination against LGBT people and arguing that DOMA should be struck down. The Republican leadership of the House of Representatives has hired counsel and continues to defend DOMA in court.

Farewell, “Don’t Ask, Don’t Tell”

In the summer of 2011, lesbian, gay and bisexual (LGB) members of the U.S. military were finally allowed to serve openly when the 18-year-old U.S. military policy known as “Don’t Ask, Don’t Tell” (DADT) finally ended, following its repeal by Congress after much effort from groups like Servicemembers Legal Defense Network. It was an exciting and important victory that ended one very visible kind of large-scale government-sponsored discrimination against LGB people and allowed them to serve their country openly. But Lambda Legal and others were frustrated by a federal appeals court decision in September 2011 vacating the 2010 *Log Cabin Republicans v. United States of America* ruling that had

declared DADT unconstitutional. Lambda Legal’s Jon Davidson told [Towleroad.com](#), “It is wrong to require the more than 14,000 service members who were unconstitutionally discharged to start from square one in obtaining the military benefits they lost, getting their military records corrected, and fighting government efforts to collect educational loans they were prevented from working off, among other harms.”

New York Says, “I Do”

In June, thanks in part to the efforts of New Yorkers United for Marriage, New York joined the growing list of jurisdictions—including Massachusetts, Connecticut, Iowa, New Hampshire and Vermont plus the District of Columbia—where same-sex couples can marry, and the number of Americans living in states allowing such unions instantly doubled. And public opinion is moving steadily in the direction of support for marriage equality: A Gallup poll taken in May showed that 53 percent of Americans were in favor of full legal recognition of the marriages of same-sex couples, and polls released this year by CNN and ABC/Washington Post also showed majority support for the freedom to marry. Still, difficult questions remain for those same-sex couples who marry but face discrimination in federal laws and the laws of other states. For example, “There are certainly people with certain immigration statuses [who] might want to think very



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—Lambda Legal’s Legal Director
Jon Davidson in the *New York Times*

carefully before getting married,” Lambda Legal Marriage Project Director Camilla Taylor told the [New York Times](#). Taylor also deplored announcements from some firms that employees covered for health insurance under domestic partner policies would have to get married to keep it. She argued that protections for domestic partners should remain, especially in light of discriminatory policies at the federal level and from certain states and international adoption agencies, which might cause gay or lesbian couples to think twice before marrying.

Add Four: Four More States Have Civil Unions, and Four More Added Protections for Transgender People

Civil union statutes were enacted or took effect in Hawai'i, Illinois, Delaware and Rhode Island, raising the number of states providing some form of recognition to relationships of same-sex couples to 18, plus the District of Columbia. Similar civil union or comprehensive domestic partnership laws were already in place prior to this year in California, Nevada, New Jersey, Oregon and Washington, and more limited domestic partnership protections are available in Colorado, Maine, Maryland (which recognizes out-of-state marriages) and Wisconsin. Connecticut, Massachusetts, Nevada and Hawai'i also added explicit antidiscrimination protections on the basis of gender identity and expression, bringing the total number of states with such express protections to 15.

Two Critical Victories for Transgender Rights

Wisconsin's 2005 Inmate Sex-Change Prevention Act, which barred transition-related health care for transgender prison inmates, was deemed unconstitutional in August 2011 by a federal appeals court. The victory in *Fields v. Smith*, a case litigated by Lambda Legal and the ACLU, was applauded as critical at a time when the need for recognizing transition-related health care as medically necessary is on the national radar. The court affirmed that medical care for transgender inmates should be left in the hands of doctors, not legislators who may be operating on bias and misinformation. Lambda Legal's Transgender Rights Attorney Dru Levasseur told the Milwaukee [Journal Sentinel](#) that the now-discarded law showed “a history of animus to a tiny, marginalized population



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—Lambda Legal Transgender Rights Attorney Dru Levasseur in the Milwaukee [Journal Sentinel](#)

of people.” And in December, a federal appeals court in Georgia upheld a lower court ruling that the Georgia General Assembly violated the Constitution and discriminated against Vandy Beth Glenn, a legislative editor fired from her job after she told her supervisor that she planned to transition from male to female. The decision underscored the need for laws explicitly protecting LGBT people in the workplace. “Employers do want guidance about what they can do and what they can't do,” Lambda Legal Supervising Senior Staff Attorney Greg Nevins told the [Associated Press](#). “That guidance came today.”

New Hospital Visitation Rules Take Effect

In January 2011, [federal hospital guidelines](#) went into effect to significantly strengthen same-sex couples' visitation rights, finally addressing a tragic injustice faced for years by many same-sex couples and their families. The new guidelines were the result of a Lambda Legal lawsuit on behalf of Janice Langbehn, whose partner Lisa Pond collapsed on a family vacation. Langbehn and her children were kept from visiting Pond at Miami's Jackson Memorial Hospital while Pond lay dying. Lambda Legal's 2008 lawsuit against the hospital was not successful in court, but the case sparked a campaign that ultimately prompted President Obama to personally contact Langbehn and to issue a presidential memo urging changes in the law. “Is this strong enough to ensure there will never be discrimination against same-sex couples? Of course not. But this should be a powerful statement,” Lambda Legal's Tara Borelli



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—Staff Attorney Tara Borelli in the [Orlando Sentinel](#)

told the [Orlando Sentinel](#) of the new guidelines. This October, Langbehn went to the White House to receive the 2011 Presidential Citizens Medal, one of the nation's highest civilian honors, awarded to her in recognition of the difference she helped make by standing up for her family's rights.

Schools in the Spotlight

Increased attention to the epidemic of school bullying—highlighted by several tragic youth suicides—led to signs of progress in 2011. In June, the federal Department of Education issued a directive clarifying that schools allowing student groups must permit gay-straight alliances to form and meet. And in July and

August, Minnesota's Anoka-Hennepin School District was [sued](#) by the Southern Poverty Law Center (SPLC) and the [National Center for Lesbian Rights](#) (NCLR) on behalf of students subjected to anti-LGBT and gender-based slurs, threats, and assaults at schools operating under a policy that has blocked effective protection. The U.S. Department of Justice is investigating as well. In New York, a [Lambda Legal case](#) involving school harassment and suppression of a gay-straight alliance (*Pratt v. Indian River School District et al.*) got the [go-ahead](#) in March to proceed, bolstered by an amicus brief submitted in 2010 by the federal Department of Justice.

Deportations Delayed

While the constitutionality of DOMA is being challenged, a range of marriage-related immigration proceedings have been [put on hold](#) pending an outcome, at the urging of the Obama Administration itself, to delay "low-priority" deportations. However, [a handful of cases](#) are proceeding, including the deportation order of New York City resident Christina Ojeda, a Venezuelan citizen married to U.S. citizen Monica Alcota. "Immigration authorities are grasping at straws" by using outdated case law to pursue Ojeda's deportation, Lambda Legal's Iván Espinoza-Madrigal told the [Seattle Lesbian](#) when Lambda Legal filed an amicus brief in the case in July 2011. "As courts chip away at DOMA, the U.S. Citizenship and Immigration Services must end discrimination in immigration law."

Rights of Parents and Children Still at Risk

LGBT parents, whether in relationships that have ended or in current relationships, still face legal barriers to proper recognition and protection of their parental relationships with their children.

- A long-running international [custody dispute](#) between ex-spouses Lisa Miller and Janet Jenkins became a [federal criminal matter](#) in 2011 when the FBI [arrested a man](#) for allegedly helping Miller leave the United States in 2009 with Miller and Jenkin's daughter Isabella.
- In July, the Ohio Supreme Court ruled against [Michelle Hobbs](#), a lesbian mother who sought shared custody of her child in a case disputed since December 2007. In a tragic



The Supreme Court's decision not to hear Adar v. Smith "leaves adopted children and their parents vulnerable in their interactions with officials from other states."

—Lambda Legal Supervising Senior Staff Attorney Kenneth D. Upton in the *Wall Street Journal*

ruling, the Court found that Hobbs had no parental rights or responsibilities for the daughter whom she and Kelly Mullen, the biological mother, jointly raised from birth.

- In October, the U.S. Supreme Court decided not to review a Fifth Circuit Court of Appeals decision in a Lambda Legal case on behalf of a same-sex [couple](#) seeking an accurate birth certificate for their Louisiana-born son, whom they adopted in New York. The Louisiana state registrar has refused to recognize the adoption and issue a birth certificate listing both fathers as the boy's parents. The Appeals Court decision carves out an exception to the Full Faith and Credit Clause of the U.S. Constitution and to the uniformly recognized respect for judgments that states have come to rely upon. "This decision leaves adopted children and their parents vulnerable in their interactions with officials from other states," said Lambda Legal Supervising Senior Staff Attorney Kenneth D. Upton to the *Wall Street Journal*.

The Battle Over Prop. 8 Continues

In 2011, the [court battle](#) over California's anti-same-sex-marriage Proposition 8 continued amid a web of procedural disputes, including a claim that the trial court judge in *Perry v. Brown* should have been disqualified because he is gay and in a same-sex relationship. In October, in response to a request for advice from the U.S. Court of Appeals for the Ninth Circuit, the California Supreme Court ruled that California law would empower initiative proponents to appeal a decision that invalidates a measure they supported when government defendants do not do so. The case is now back at the Ninth Circuit, which will decide whether the proponents have standing to appeal under federal law, and if so, will go on to rule on the merits of the case in 2012. The case is being litigated by Ted Olsen and David Boies. In the meantime, marriage rights for same-sex couples are on hold in California. Speaking of the California Supreme Court's decision, Jon Davidson, Legal Director for Lambda Legal, told the *Los Angeles Times* that, "while a disappointing ruling, this case is now back in federal court, where we expect a quick victory."



Efforts to invalidate a 2010 ruling striking down California's anti-gay-marriage Proposition 8 simply because the presiding judge is gay and in a relationship with a man were an "outrageous attack on the integrity of Judge [Vaughn R.] Walker, not to mention judges in general."

—Lambda Legal Staff Attorney Peter Renn in the *Los Angeles Times*

What to Watch For in 2012

These four areas of LGBT civil rights are likely to see some courtroom, legislative or ballot-box action in the year ahead:

SAME-SEX RELATIONSHIPS: While much progress has been made, same-sex couples in many parts of the country still have little or no legal protections or recognition for their relationships and families. In 2012, keep an eye out for:

- Several key lawsuits challenging the constitutionality of the federal Defense of Marriage Act (DOMA), including [Golinski v. U.S. Office of Personnel Management \(OPM\)](#), [Gill v. OPM](#), [Pedersen v. OPM](#) and [Windsor v. United States](#).
- Increasing legislative support in Washington, D.C., for the repeal of DOMA.
- Legislative and ballot fights for marriage equality in states such as Maryland, Maine and Washington.
- Ballot measures opposing equality in states such as Minnesota, Indiana and North Carolina.
- Litigation to secure marriage equality in California ([Perry v. Brown](#)) and New Jersey ([Garden State Equality et al. v. Dow et al.](#)).

FAIR COURTS: Lambda Legal expects some extreme political candidates around the country to continue attacking the authority of the judiciary branch of government and proposing what would be fundamental changes to our constitutional system of checks and balances. Lambda Legal is anticipating another retention election attack in Iowa in 2012 against the fourth Iowa Supreme Court justice who ruled in favor of marriage equality in the unanimous *Varnum* decision (this comes two years after three of the justices were successfully ousted in the 2010 retention election by an anti-LGBT group funded by out-of-state special-interest funders.) More than 100 federal judge vacancies remain unfilled because the Senate has not confirmed nominees, leading to crises in some circuits.

TRANSGENDER RIGHTS AND HEALTH CARE: Efforts to secure fair and equal health care coverage for transgender people will grow stronger next year, especially following the 2011 decision in Wisconsin's [Fields v. Smith](#) that threw out the state's ban on receiving transition-related health care in prison. The December federal appeals court ruling in [Glenn v. Brumby et al.](#) that the Georgia General Assembly had violated the Equal Protection Clause by firing a transgender employee, will strengthen demands for nondiscrimination laws and workplace protections for LGBT employees. Lambda Legal will continue to litigate on behalf of Alec Esquivel, a transgender man denied equal health care coverage.

LGBT YOUTH: Among the crucial issues expected to be at the forefront of LGBT youth work in 2012 are efforts to fight harassment and discrimination in school. California may see a voters' initiative to make big changes in statewide school curricula, for instance. Lambda Legal's New York State school harassment case [Pratt v. Indian River School District et al.](#) will be proceeding. And reports published by the [Family Acceptance Project](#) have the potential to shift public thinking and to focus more attention on building supportive families for LGBTQ youth.



"It is clear Vandy Beth Glenn was fired because her boss didn't like her as she is. That is unfair and illegal. The law is on our side here but transgender employees are still vulnerable to sex discrimination from their employers who don't understand it."

—Lambda Legal Senior Staff Attorney Greg Nevins in the *Atlanta Journal-Constitution*