

December 30, 2010

Hon. Governor-elect Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Dear Governor-elect Brown:

As you and your administration begin to consider appointments to the California judiciary, Lambda Legal would like to share with you our thoughts about considerations we believe need to be taken into account in selecting future judges and in choosing those who will advise you in the judicial selection process. As the nation's largest and oldest national impact litigation organization committed to achieving the full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV, which has long had an office in Los Angeles serving LGBT people in California, we respectfully offer our legal expertise as you approach your inauguration.

In recent years, a number of key issues have arisen in California's courts that have significantly impacted LGBT and HIV-affected individuals and their families. Ensuring that our state's judges are fair-minded and approach the decisions they make without prejudice is of utmost importance both for our legal system and for the rights of those more vulnerable people whom our legal system has the highest obligation to protect. When selecting individuals for the bench, we respectfully ask that you take a variety of considerations into account.

The first and foremost consideration should be the judicial philosophy of the judges, which should include a commitment to render decisions impartially and in accordance with the U.S. and California Constitutions, as well as the laws governing our nation and state. Specifically, we ask that all those you decide to appoint commit to rule fairly and impartially in cases involving LGBT and HIV-positive litigants and, in particular, to adhere to the legal precedents established in:

- *Lawrence v. Texas*, 539 U.S. 558 (2003), that the right to liberty under the federal Constitution's due process clause gives individuals the right to engage in private, adult, consensual, noncommercial sexual intimacy without interference by the government, and that this right belongs as much to lesbians, gay men and bisexuals as it does to heterosexuals;
- *Lawrence v. Texas*, that under our U.S. Constitution, religious beliefs about sexuality and "traditional" notions about family life cannot be the sole basis for the enactment and enforcement of criminal laws. Judicial nominees also should adhere to *Lawrence's* holding that lesbians, gay men and bisexuals are entitled as part of the U.S. Constitution's protection of liberty to the same autonomy as heterosexuals in making

personal decisions relating to marriage, reproductive choice, family relationships and the raising and education of children;

- *Romer v. Evans*, 517 U.S. 620 (1996), that, when a law can be explained only by antigay bias, it violates the equal protection clause;
- *In re Marriage Cases*, 43 Cal. 4th 757 (2008), that government discrimination based on sexual orientation must be given strict scrutiny by the courts;
- *North Coast Women's Care Medical Group v. Superior Court*, 44 Cal. 4th 1145 (2008), that discrimination prohibited by California's Unruh Civil Rights Act cannot be excused on the ground that it was religiously motivated;
- *Evans v. City of Berkeley*, 38 Cal. 4th 1 (2006), that government entities may condition subsidies on recipients' agreement not to discriminate based on personal characteristics such as sexual orientation;
- *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005), that businesses in California must treat registered domestic partners equally to spouses;
- *Kristine H. v. Lisa R.*, 37 Cal. 4th 156 (2008), *K.M. v. E.G.*, 37 Cal.4th 130 (2005), and *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005), recognizing the rights of lesbian co-parents;
- *Sharon S. v. Superior Court*, 31 Cal. 4th 417 (2003), upholding the validity of second parent adoptions; and
- *Munson v. Del Taco*, 46 Cal. 4th 661 (2009), that disabled Californians injured by violations of the Americans with Disabilities Act are entitled to the remedies provided by Cal. Civ. Code section 52 without the necessity of proving "intentional" discrimination.

As a non-profit, public interest legal organization, we are ever aware of the importance of access to justice for all people, including the necessity that judges who will decide the cases that come before them be prepared to do so without bias, but instead based on evidence and precedent. We urge you, and those you select to assist you, to scrutinize every judicial candidate's record closely and ask pertinent and comprehensive questions to best assess each one's ability to be a fair and impartial jurist.

In order to seek the highest level of judicial integrity, we also urge you and your staff to seek potential judicial candidates who not only are qualified and thoughtful jurists, but also are reflective of our state's diversity. In your prior service as Governor, you appointed the first openly gay judges to serve on the bench in the nation, which had tremendous positive impact and for which we remain very grateful. In recent years, California has shown further initiative in its efforts to increase diversity on the bench. Indeed, California law provides for a mechanism that tracks the diversity of judicial candidates, as well as requiring the disclosure of those advising the Governor on judicial selection.

Some administrations that followed yours, however, did not follow your course. As a result, openly LGBT individuals, people of color, and women are underrepresented at all levels of the state judiciary. We call on you to appoint other qualified LGBT judges, as well as other underrepresented minorities and those with public defender and public interest legal backgrounds, to the state bench. Finally, we urge that you select a Judicial Appointments Secretary who recognizes the value of a diverse bench, and can fairly assess the qualifications of judicial candidates based on the considerations discussed herein.

Congratulations on your election. Thank you as well for the unwavering commitment you showed to equality for LGBT people in the ways in which the California Attorney General's office, under your leadership, addressed the *Strauss v. Horton*, 46 Cal. 4th 364 (2009), and *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), cases. We look forward to working closely with your administration over the coming years.

Very truly yours,

Jon W. Davidson, Legal Director
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