A Delicate Balance

Religious exemptions have become common in laws opening marriage to same-sex couples. Here, we unpack the myths advanced by opponents of our equality. By Director of Constitutional Litigation and Senior Counsel **Susan Sommer**

PHOTO: ALEX CHOHLAS-WOOD

◀ While New York State provides civil marriage licenses to same-sex couples, religious organizations remain free to decide whether to participate in their marriage ceremonies. Here, **Nevin Cohen** and **Daniel Hernandez,** plaintiffs from Lambda Legal's suit *Hernandez v. Robles,* hold their long-sought marriage license at the New York City Clerk's Office.

PASSAGE OF NEW YORK'S MARRIAGE law brought much reason to rejoice. Yet some of the spotlight on this victory went to those arguing for an array of religious exemptions as a condition for marriage equality for same-sex couples. The debate over religious exemptions plunges into the roiling cross-currents of the fight for marriage equality for same-sex couples, strongly held religious convictions, anti-LGBT prejudices and old-fashioned politics. In reality, however, claims that religious freedoms will be trampled by giving same-sex couples the freedom to marry are misguided and serve only to divert focus from what is truly at stake—ensuring that same-sex couples have access to the enormous web of protections for their families that come only with civil marriage. Let's cut through the myths clouding this subject.

First, those who support government recognition of same-sex relationships are not, as some opposition has held, motivated by hostility to religion. Many people of faith, congregations and clergy embrace the right to marry for same-sex couples. Proponents of marriage equality understand that state-conferred civil marriage rights are separate from religiously-sanctioned unions, and aim solely to eliminate the severe harms inflicted on lesbian, gay and bisexual individuals when they're deprived the freedom to enter into civil marriage. For example, a majority of New York Catholics surveyed in a recent poll support the right of same-sex couples to marry, and Governor Andrew Cuomo, raised Catholic, led the effort in Albany to pass the Marriage Equality Act.

Second, with or without an explicit religious exemption written into a marriage bill, without a doubt no religious clergyperson would be required to participate in civil marriage ceremonies inconsistent with his or her religious beliefs. Settled First Amendment protections already ensure freedom of religious choice for clergy and religious institutions, and prevent state and federal government from intruding into a faith's determination of who is eligible to marry.

Third, marriage opponents cite a handful of conflicts between those with antigay religious beliefs and same-sex couples as a reason to deny marriage rights altogether or condition rights on a broad array of religious exemptions. In fact, the examples they cite have little or nothing to do with marriage. Instead, opponents point to examples of businesses and organizations attempting to decline services to unmarried same-sex couples in violation of laws generally barring discrimination based on sexual orientation. Enactment of a law permitting same-sex couples to marry does not change the outcome in these cases.

Fourth, many non-discrimination laws enacted in states and locales already provide exemptions for religious and certain other organizations, allowing them to refuse membership or services. These exemptions may likewise apply in the context of marriage rights for same-sex couples, allowing religious organizations with religious objections to decline participation in marriage ceremonies, celebrations and related services.

Fifth, many of the religious exemptions written into marriage equality laws simply

Continued on page 18

"A Delicate Balance," continued from page 13

reiterate these pre-existing exemptions. Thus, for example, religious exemptions in New York's Marriage Equality Act largely reiterate First Amendment and statutory religious exemptions.

Sixth, more sweeping proposals for religious exemptions should be rejected as out-of-step with core non-discrimination principles. It is not acceptable, for example, to exempt government employees from the requirement that they process marriage licenses for same-sex couples. Businesses and their employees engaged in public commerce or government-funded faith-based social service providers cannot refuse to provide services to married couples because of religious beliefs. Such proposals open the door to discrimination in the public sphere not only against same-sex couples but also against others whose relationships might conflict with certain religious beliefs—including inter-faith and interracial couples and those who marry after a spouse's divorce. No couple should have to face such discrimination when accessing a government service or in the public marketplace.

Finally, despite the sometimes contentious legislative debates over religious exemptions, there has been notably little actual conflict between religious objectors and couples seeking services in places where same-sex couples have the freedom to marry. There is no shortage of wedding industry vendors happy to do business with these couples.

The reality is that same-sex couples planning their weddings and seeking to live as married spouses are not looking to pick fights with religious objectors. All they want is what other Americans enjoy—a day to celebrate their commitment with friends and family, equal rights from their government and legal protections for their families.

MEET OUR LAWYERS

SUSAN SOMMER

DIRECTOR OF CONSTITUTIONAL LITIGATION AND SENIOR COUNSEL

How did you come to work at Lambda Legal?

I had gone to law school with the intention of doing public interest work someday, but one thing led to another along the way, and I first found myself a partner at a New York City law firm. Then I had children, and I felt more strongly than ever that I should use my law degree and training to help make our country a better place for new generations (corny, but true). I heard about a job opening at Lambda Legal from my law school classmate, and I jumped on it.

What is your role at Lambda Legal?

My title is a bit of a mouthful: Director of Constitutional Litigation and Senior Counsel. I litigate an array of impact cases, supervise Lambda Legal lawyers and engage in the public education and advocacy that are other important aspects of our work. I've also supervised our Youth in Out-of-Home Care project since its inception.

What have been the highlights of your work since you arrived here? Or, what have you been especially proud of?

There's so much to be proud of about Lambda Legal's work. Some particular stand-outs for me personally include being a member of the *Lawrence v. Texas* Supreme Court team; arguing in appellate courts in New York and elsewhere to set new precedents; getting to know courageous, inspiring and just plain nice LGBT clients who have stood up against injustice; and celebrating the successes of my Lambda Legal colleagues.

It was especially sweet to see couples we had represented marrying in New York a few weeks ago. This is so much more than just a job. I feel incredibly fortunate to be able to work for a cause I know is just, and at work that never ceases to be interesting. Not every lawyer can say that.

Is there anything that the Lambda Legal community might be surprised to learn about you?

Yes, and I won't be the one to tell!

What do you do to unwind when you're not at work?

I've been trying to stave off a mid-life crisis by spending more time running. I've made it to half-marathons, thanks to a Lambda Legal colleague who has been coaching me and doesn't accept age as an excuse. But I do think mid-life will keep me from going any further. I also read a lot, including books on my iPod while I run. And I have a terrific spouse and kids, and two nutty dogs.

"Necessary Care," continued from page 12

to treat his GID and to prevent other health risks, including a serious risk of ovarian and uterine cancer. When Alec submitted a request for health insurance coverage to the State's self-funded plan, he received a denial letter citing the plan's categorical exclusion for all services related to a "sex-change operation." Oregon law prohibits discrimination in employment on the basis of gender identity. The procedure Alec requested is routinely covered for other plan participants. The only factor that distinguished him from others who receive this coverage is that he was denied the care based on his gender identity.

After representing Alec in an internal and administrative appeal, Lambda Legal filed on his behalf in Oregon state court arguing that the State's plan discriminates on the basis of gender identity in violation of Oregon's Equality Act. This case is significant because it is the first to apply a state nondiscrimination law to discrimination on the basis of gender identity in health insurance coverage.

Also contributing to the growing movement to understand transition-related health care as medically necessary is our recent victory in *Fields v. Smith,* which set a ground-breaking legal precedent for incarcerated transgender people seeking care in the hands of the government. In this case, Lambda Legal and the ACLU challenged the constitutionality of a 2005 Wisconsin state law—"the Inmate Sex-Change Prevention Act"—which barred transition-related health care for transgender inmates. After hearing testimony of medical experts at trial, in 2010 the Wisconsin District Court found in our favor, ruling that the law violates both the 8th Amendment and Equal Protection Clause of the Constitution. On August 5, 2011, the 7th Circuit upheld this ruling based on the 8th Amendment. The appeals court wrote: "Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture." The court understood that medical care should be left in the hands of doctors, not legislators who may be acting based on bias and misinformation about the medical needs of a marginalized population.