

**TESTIMONY OF ROBERT F. BACIGALUPI  
BEFORE THE NEW YORK STATE SENATE  
STANDING COMMITTEE ON THE JUDICIARY:**

**RE: UNDERREPRESENTATION OF THE LGBT COMMUNITY ON THE  
NEW YORK STATE APPELLATE COURTS**

**JUNE 5, 2009**

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**INTRODUCTION**

Members of the New York State Senate Standing Committee on the Judiciary.

My name is Robert F. Bacigalupi. I am testifying today at the request of the Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York, fondly known as LeGaL. LeGaL is a 25 year-old professional association of the lesbian, gay, bisexual and transgender (“LGBT”) legal community in the New York metropolitan area with over 600 members. From 2000 to 2002, I served as president of LeGaL. From 2003 to 2004, I served as Co-Chair of the National Lesbian Gay Bar Association, which is a national umbrella organization of local LGBT bar associations around the country. I am currently a staff attorney at Housing Works – a community based organization serving the needs of low-income people living with AIDS.

Thank you for the opportunity to speak to you today about the serious issue of the lack of diversity in the selection process for the New York State Court of Appeals. In particular, I will address today the virtual exclusion of the LGBT Community from the appellate courts of this state.

It is hard to imagine a discreet and insular minority that could be more concerned about diversity in the New York judicial system than the LGBT Community. On the one hand, judges in this State have decided whom an LGBT person can marry, whether LGBT folks can adopt children, whether they can work free from discrimination, to what extent insurance policies will cover them, how society will recognize the gender they choose for themselves, whether they can stay in their home after a significant other dies, and whether they will have basic protections from bias-related violence in school. While on the other hand, there is no representation of the LGBT Community either on the Court of Appeals itself or on the all important Commission of Judicial Nomination, which plays a key role in the appointment process. Let me repeat – there has never been a self-identified member of the LGBT Community who has served on the New York State Court of Appeals – ever. Until Governor Patterson appointed two self-identified lesbians to the appellate division earlier this year, there had never been a member of the LGBT community on any appellate bench in the State -- ever. To this day, no self-identified gay man has ever been appointed as an appellate judge in the State of New York -- ever.

**I. Introduction: The Problem.**

The exclusion of self-identified members of the LGBT Community was keenly felt when the recent New York State Court of Appeals decision, Hernandez v. Robles, upheld a New York State law that barred members of the LGBT Community from marrying each other. See Hernandez v. Robles, 7 N.Y.3d 338 (2006). In Hernandez, plaintiffs-appellants challenged the marriage law because it barred the LGBT Community from enjoying the

myriad of benefits that flow from marriage.<sup>1</sup> Finding that the same-sex marriage ban was rational, and therefore permissible under the Equal Protection Clause of the New York State Constitution, Judge Robert S. Smith found that it was acceptable for the Legislature to place more importance on the stability of opposite-sex couples than on same-sex couples:

The Legislature could also find that such [heterosexual] relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement – in the form of marriage and its attendant benefits – to opposite-sex couples who make a solemn, long-term commitment to one another.

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as the result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus promoting stability in opposite-sex relationships will help children more.

Hernandez, 7 N.Y.3d at 359.

Referring to this extraordinary line of reasoning, one legal scholar lamented, “[o]nly in the universe of formal appellate constitutional law would this be considered logical thinking. . . .”<sup>2</sup>

Judge Smith continued:

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<sup>1</sup> The Court noted that there were at least 316 identified benefits, of which the most important included: a) significant tax advantages; b) rights in probate and intestacy proceedings; c) rights to support from spouses both during marriage and after a marriage is dissolved; and d) rights to be treated as family members in obtaining insurance coverage and making health decisions. See Hernandez, 7 N.Y.3d at 358.

<sup>2</sup> See Professor Arthur Leonard, Lesbian and Gay Law Notes, Summer (July/August) 2006, available at [www.nyls.edu/pdfs/In0607.pdf](http://www.nyls.edu/pdfs/In0607.pdf). In her dissent, Chief Judge Judith Kaye objected to Judge Smith’s rationale, stating that, even if the State had a legitimate interest in encouraging procreation within a heterosexual marriage, excluding LGBT couples from getting married did not further that interest. Judge Kaye added that “[t]here are enough marriage licenses to go around for everyone.” Hernandez, 7 N.Y.3d at 391.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, everyday, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule – some children who never know their fathers, or their mothers, do far better than some who grow up with both sexes – but the Legislature could find that the general rule will usually hold.

Hernandez, 7 N.Y.3d at 359.

Not surprisingly, many members the LGBT Community were disappointed not only with Judge Smith’s ultimate decision, but also with his flawed reasoning, which they believed was based wholly on outdated notions of the LGBT Community. More members of the LGBT Community were left to wonder whether the Hernandez decision would have been based on reasoning so dazzlingly out of touch with reality if Judge Smith had some experience with a self-identified member of the LGBT Community. With such minimal exposure, Judge Smith might have been aware that: (1) many same-sex couples are raising children, who were born within prior opposite-sex marriages involving one member of the couple; (2) there is no legal basis for the proposition that same-sex couples have less need for legal support than opposite-sex couples; and (3) there is no factual support for the assertion that children raised in same-sex households have less need for stability than children raised in opposite-sex households.

The Hernandez decision has acted as a wake-up call with respect to the importance of diversity on the bench and the need to hone the definition of diversity to expressly include the LGBT Community.

## **II. Statistics on the Lack of Self-identified Members of LGBT Community on the Bench.**

Against the background of the Hernandez setback and the other recent LGBT-rights-related decisions,<sup>3</sup> the profound under-representation of the LGBT Community on the judiciary in New York State takes on a much greater significance. The following statistics -- the result of over ten years of inquiry and research -- reflect the scope of the problem.

### **A. New York State Appellate Courts.**

It is easy to provide statistics on the number of self-identified LGBT appellate judges in New York: two. Earlier this year, Governor Patterson appointed two self-identified lesbians to the New York State Appellate Division in the First Department. This was a huge step in the right direction, but more needs to be done. Prior to these recent appointments, ten years of vigorous investigation could not identify a single self-identified member of the LGBT Community that had ever sat on any appellate panel in the entire history of the State. To this day, no self-identified gay man has ever been an appellate judge in this State.

There are a number of reasons for this failure to diversify, to be sure. One of the most significant reasons, however, and one of the most easily remedied, is the complete exclusion of members of LGBT Community from a seat on the Commission of Judicial

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<sup>3</sup> See, e.g., Levin v. Yeshiva, 96 N.Y.2d 484 (2001)(university housing policy held unlawful because it gave priority to heterosexual couples over members of the LGBT Community); In the Matter of Jacob, 86 N.Y.2d 651 (1995)(members of the LGBT Community have standing to adopt); Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201 (1989)(same-sex spouse permitted to succeed to rights of primary tenant partner); Gay Teacher's Assoc. v. NYC Bd. of Ed., 585 N.Y.S.2d 1016 (1<sup>st</sup> Dep't 1992)(plaintiffs objected to employers' limiting health insurance benefits to heterosexual couples); Petri v. Bank of New York, 582 N.Y.S.2d 608 (N.Y. Sup. Ct. N.Y. County 1992)(employment protections for members of the LGBT Community and people living with HIV and AIDS); Barton v. NYC Comm. on Human Rights, 531 N.Y.S.2d 979 (N.Y. Sup. Ct. N.Y. County 1988)(landlord barred from denying office space to LGBT dentist); Mazart v. NYS, 441 N.Y.S.2d 600 (N.Y.Ct. Cl. 1981)(scope of a university's liability for a students anti-LGBT defamation); NYC Comm. on Human Rights v. Ancient Order of Hibernians, 1992 NYC HRC LEXIS 9, dated March 13, 1992 (right of LGBT groups to march in NYC's St Patrick's Day Parade).

Nomination or any of the other judicial screening panels that are critical in the appointment of appellate judges. The City Bar who will be issuing a report on these issues shortly did not find a self-identified LGBT folks on these screening panels either.

**1. Commission on Judicial Nomination.**

The screening body that reviews candidates for the New York State Court of Appeals is the Commission on Judicial Nomination (“CJN”). The nature and make up of the CJN are products of the New York State Constitution and statutes. See New York State Constitution, Article 6 §2 and New York State Judiciary Law §§61-68. The fundamental purpose of the CJN is to evaluate and nominate candidates for associate justice vacancies. The CJN consists of 12 individuals, each of whom has a term of four years. The Governor, the Chief Judge of the Court, and leaders of the State Legislature are entitled to appoint members to the CJN pursuant to strict rules. The Governor must appoint a judge from the CJN’s nominees within fifteen days of their having been “reported out,” and the Governor’s choice must be confirmed by the State Senate shortly thereafter. Notwithstanding repeated requests,<sup>4</sup> no self-identified member of the LGBT Community has ever been appointed to the CJN.

**2. The Governor’s Judicial Screening System.**

Appointments to lower appellate courts in the four appellate departments, the Court of Claims, as well as the creation of judicial screening panels and the rules and regulations that govern the entire judicial selection process in New York State are also within the

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<sup>4</sup> See, e.g., Letter to the Editor of the New York Law Journal, dated December 5, 2002; Letter from Robert F. Bacigalupi to Honorable George E. Pataki, dated April 20, 2005; Letter from Robert F. Bacigalupi to Paul Schectman, dated April 20, 2005; Letter from Bob Bacigalupi to Lloyd Constantine, dated October 30, 2006, with Exhibit attached. Copies of these letters are attached as Exhibit A.

discretion of the Governor. As an indication of how important the judicial selection process is to the current administration, one of the first actions former Governor Spitzer undertook upon his election was to establish an entirely new network of judicial screening panels designed to advise the Governor as to the appointment and designation of judges.<sup>5</sup> Executive Order No. 4 creates: (1) a State Judicial Screening Committee, set up to evaluate the qualifications of the candidates for Judge and Presiding Judge of the Court of Claims and to promulgate rules and regulations governing its proceedings and those of the Departmental and County Judicial Screening Committees; (2) four Departmental Judicial Screening Committees, one for each appellate department in the State, set up to evaluate candidates for the appellate divisions and the New York State Supreme Court; and (3) sixty-two County Judicial Screening Committees, one for each county in the State, set up to evaluate candidates for appointment to the offices of Judge of the County Court, Judge of the Surrogate's Court, and Judge of Family Courts outside of New York City. Strikingly, neither the former Governor Spitzer nor Governor Patterson, nor any of the legislators or judges empowered to appoint screening committee members, has ever appointed a self-identified member of the LGBT Community to any of the 883 openings on these committees.<sup>6</sup>

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<sup>5</sup> A copy of Executive Order No. 4 is attached as Exhibit B.

<sup>6</sup> The number of openings on these official judicial screening panels was calculated as follows: (a) CJN has 12 members; (b) the State Judicial Screening Committee has thirteen members; (c) the four Departmental Judicial Screening Panels have thirteen members each; and (d) the sixty-two County Judicial Screening Committees have thirteen members each, for a total of 883 openings.

## **B. New York State Lower Courts.**

### **1. The Number of LGBT Judges.**

Although the LGBT Community has made some progress in the lower courts of New York State, the number of LGBT judges remains dismally low.<sup>7</sup> For example, of the 326 current Supreme Court Justices in the State, there are only five self-identified members of the LGBT Community. There are an additional seven serving as Acting Justices. No self-identified member of the LGBT Community has ever served as a judge on the Court of Claims, Surrogates Court, or County Court outside New York City.

The most notable increase in LGBT representation in the New York State court system has occurred in New York City. Specifically, of the 81 Civil Court judges in New York City, there are three self-identified members of the LGBT Community; of the 34 judges in Family Court, three are self-identified as LGBT; of 49 Housing Court judges, two are LGBT, and of the 30 judges in Criminal Court, one is a self-identified member of the LGBT Community.

### **2. New York County's Independent Judicial Screening Panel.**

Although there are a number of contributing factors to the level of diversity in a judicial system, the most important factor in New York City is that the most influential judicial screening panel, the New York County Independent Judicial Screening Panel (“NYCIJSP”), has self-imposed strict rules with respect to diversity. These rules were formulated over twenty years ago and were primarily the work of Senator Thomas K. Duane and Assemblymember Herman “Denny” Farrell, Jr.

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<sup>7</sup> The sources for statistics in this section are the New York State Court of Administration and the New York Association of Lesbian and Gay Judges, current as of 2008. For a complete breakdown of LGBT representation in the New York State Judiciary, see the chart attached as Exhibit C.

One of the most important of these rules is the requirement that three organizations from virtually every minority group in the City be asked to identify a panelist. A typical group of LGBT organizations might include: the LGBT Law Association of Greater New York (“LeGaL”), the NYC LGBT Center, and the NYC Anti-Violence Project. Similarly, a typical group of African-American community organizations might include: the Metropolitan Black Bar Association, the Bronx Black Bar Association, and the NAACP.

This system of requiring diversity on the most important screening panel has resulted, albeit in only one county, in one of the most diverse judiciaries in the United States.

### **III. Recommendations.**

Two changes would significantly increase LGBT representation in the judicial system of New York State. First, any official statement that defines the term “diversity” as applied to the judiciary should expressly include the LGBT Community.<sup>8</sup> Second, all significant judicial screening panels in New York State must include self-identified members of the LGBT Community.

#### **A. The Definitions of Diversity Must Include the LGBT Community.**

Few disagree with the principle that, to be effective, a judicial system must be diverse. As the Judicial Selection Task Force of the New York City Bar recently stated:

A diverse judiciary is necessary to ensure that our populations are appropriately represented; to ensure a broad array of views and experiences are brought to the bench; to regain the public’s confidence in the judiciary; and to restore the judicial system’s credibility in the public’s eye.

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<sup>8</sup> See, e.g., OCA Rules and Executive Order No. 4.

See Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State, by The Judicial Selection Task Force of the Association of the Bar of the City of New York (December 2006) at 30.<sup>9</sup> Yet, there is a significant divergence of opinion about what the term “diversity” means when applied to the judiciary and the judicial selection process.

The recently published amendments to Part 100 of the Chief Administrator’s Rules of the Office of Court Administration (“OCA”) and the public comments that preceded its publication clearly manifest the confusion around the term diversity – a confusion that results in a veiled barrier to the full participation of the LGBT Community in New York State’s judicial system.

Before OCA issued its final judicial selection rules, it circulated the rules in draft form for public comment (the “Proposed OCA Rules”).<sup>10</sup> Section 150.2(2) of the Proposed OCA Rules required members of a judicial screening panel to reside or have an office in the judicial district where the screening panel was formed. Section 150.2(d) required the screening panels to be “diverse” and broadly representative of the communities they served, including the “geographic, racial, ethnic and gender diversity” of their communities.

In its comments on the Proposed OCA Rules, the NYCLA Task Force on Judicial Selection (“NYCLA Task Force”) strongly objected to the OCA’s limited definition of diversity. After agreeing that diversity was a key goal and necessary for an effective judicial

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<sup>9</sup> Available at [www.nycbar.org/TaskForceReport.htm](http://www.nycbar.org/TaskForceReport.htm). See also Judicial Selection in New York State: A Roadmap to Reform, a report approved by the Board of Directors of the New York County Lawyer’s Association on May 8, 2006. This report is available at [www.nycla.org/siteFiles/Publications248\\_0.pdf](http://www.nycla.org/siteFiles/Publications248_0.pdf).

<sup>10</sup> For a summary of the Proposed OCA Rules, see Comments by the NYCLA Task Force on Judicial Selection on the Proposed Amendments to Part 100 of the Chief Administrator’s Rules, approved by the NYCLA Board of Directors on December 6, 2004. This report is available at [www.nycla.org/siteFiles/Publications52\\_0.pdf](http://www.nycla.org/siteFiles/Publications52_0.pdf).

selection process, the NYCLA Task Force expressed doubt that the “limited characterization of diversity” that OCA adopted would accomplish that goal.

As an alternative, the NYCLA Task Force proposed an expanded definition of diversity that would include the LGBT Community and other groups that had been historically excluded from the process. The NYCLA Task Force continued:

Although the concept of diversity is a continually evolving one, it should be as inclusive as possible and encompass, without limitation, race, color, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, age, disability, and marital and parental status.

This broader definition is consistent with the New York City Human Rights Law. See Administrative Code of the City of New York §8-102(23), as well as the Association of the Bar of the City of New York’s Statement of Diversity to which 112 major law firms and corporations are currently signatories, See [www.abcnyc.org](http://www.abcnyc.org).

Comments by NYCLA Task Force on Judicial Selection on the Proposed Amendments to Part 100 of the Chief Administrator’s Rules, approved by the NYCLA Board of Directors December 6, 2004, at 6.

Notwithstanding the NYCLA Task Force’s objection, OCA made no change in its definition of diversity, which had the effect of excluding the LGBT Community from the judicial selection process. OCA’s failure to expand the definition of diversity led the NYCLA Board of Directors to sharply criticize OCA: “we were disappointed by [OCA’s] failure to reflect many of our proposed changes,” including the recommendation to “expand the definition of “diversity.” See Judicial Selection in New York State: A Roadmap to Reform, approved by the NYCLA Board of Directors on May 8, 2006, at 16 & n.11.

OCA's decision to exclude the LGBT Community from its concept of diversity was more than a failure of political correctness; its narrow definition of diversity is out of step with the mainstream of the legal profession in New York. Compare, for example, two starkly different systems that utilize a definition of diversity. On the one hand, OCA's definition of diversity is limited to geography, race, ethnicity and gender, see Chief Administrator's Rules, §150.2(d), and excludes any reference to sexual orientation or gender identity and expression. OCA currently presides over a judicial system that is virtually bereft of LGBT participation.

On the other hand, the top law firms in New York City have signed on to the New York City Bar's inclusive Statement of Diversity. Not surprisingly, this more expansive definition of diversity correlates to a dramatic increase in self-identified LGBT employees. To collect empirical evidence of this trend, NYCLA conducted an in-depth, two-year survey of the assimilation of the LGBT Community at the top twenty-five law firms in New York.<sup>11</sup> The NYCLA LGBT Report determined that virtually all of the firms surveyed: (1) include sexual orientation and gender identity in their definition of diversity; (2) offer benefits to same-sex domestic partners and their children that are equivalent to their opposite-sex counterparts; (3) have gender-neutral parental leave policies that include adoption; (4) generously and openly support LGBT organizations; (5) take on pro bono representation of LGBT clients and conduct impact litigation on issues affecting those clients; and (6) identified the number of self-identified LGBT partners, of counsel attorneys, and associates.

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<sup>11</sup> See Making Progress: How New York's Top Twenty Five Law Firms Address Issues of Concern to the LGBT Community, approved by the Board of Directors of The New York County Lawyer's Association at its regular meeting on January 10, 2005. This report is available at [www.nycla.org/siteFiles/Publications/Publications38\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications38_0.pdf).

Such a comparison emphasizes that the dearth of LGBT representation in the New York State judicial system is not part of a larger trend that is observable in the legal community at large. To the contrary, NYCLA’s LGBT Report demonstrates how far behind the curve New York State’s judicial system actually is. Further, it demonstrates that an inclusive definition of diversity is an important and fundamental step toward a judicial system that includes the LGBT Community.

**B. Every Judicial Screening Panel Must Include Members of the LGBT Community.**

A second recommendation that would have an ameliorating effect on the underrepresentation of the LGBT Community on the bench in New York State is to ensure appointment of members of the LGBT Community to each of the numerous judicial screening panels described above. As of the writing of this report, no self-identified member of the LGBT Community sits on the Committee on Judicial Nomination for the Court of Appeals or on any of the other 68 judicial screening committees that the Governor’s Executive Order No. 4 created.

This oversight is compounded by Executive Order No. 4’s admonition to all judicial screening panels to avoid any consideration of diversity when evaluating the qualifications of candidates for judicial office.<sup>12</sup> Moreover, Executive Order No. 4 does not recommend,

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<sup>12</sup> See Executive Order 4 ¶(b) at 2: “Review and evaluate the qualifications of all candidates for appointment or designation. In reviewing and evaluating the qualifications, each committee member shall give primary consideration to each candidate’s integrity, independence, intellect, judgment, temperament and experience, and shall not give any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation of the candidate.” *Id.* (Emphasis added.)

even as a goal, the appointment of self-identified members of the LGBT Community as judicial screening panelists.<sup>13</sup>

#### **IV. Conclusion**

If the dismal statistics of LGBT underrepresentation in Section II demonstrate anything, it is that New York State's judicial system will not diversify by chance. Thus, Executive Order No. 4's directive to ignore diversity when evaluating judicial candidates simply does not reflect the real world in which we live. Judicial diversification will only occur if people both within and without the LGBT Community become aware of the pervasive exclusion of the LGBT Community and decide to create a truly representative judicial system. I am confident that, as with any social struggle of this kind, the numerous barriers to diversity that exist today will be overcome at some point in time. I am also confident that the few simple steps discussed here will hasten the time when the LGBT Community can look to the judiciary in New York State and be confident that their interests and the interests of justice are one and the same. Only time will tell whether those charged with overseeing the New York State judicial system will take heed of the problem and begin taking those steps.

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<sup>13</sup> Various lobbying efforts have made some inroads with respect to various judicial screening panels that are not referenced in Executive Order No. 4. Mayor Michael Bloomberg, for example, appointed an openly gay man, Peter Sherwin, a partner at Proskauer Rose, to his Advisory Committee on the Judiciary, which screens candidates for Criminal, Family and Civil Courts in New York City. Finally, the New York City Bar Association appointed, for the first time, a self-identified representative from the LGBT community, Edward Davis, a partner at Davis Wright Tremaine LLP, to its influential Judiciary Committee, which evaluates most judicial candidates in New York City.