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“TWO PARTS OF THE LANDSCAPE OF FAMILY IN AMERICA”: MAINTAINING BOTH SPOUSAL AND DOMESTIC PARTNER EMPLOYEE BENEFITS FOR BOTH SAME-SEX AND DIFFERENT-SEX COUPLES

*Nancy D. Polikoff**

INTRODUCTION

In 2008, by administrative regulation, Arizona extended health benefits to the domestic partners of state employees.¹ The criteria included living together for at least a year and demonstrated financial interdependence.² Same-sex and different-sex partners were eligible.³ Keith Humphrey, a University of Arizona administrator, enrolled his partner of six years, Brett, a stay-at-home dad to the couple's two foster children and Brett's fifteen-year-old son.⁴ Tracy Collins, a senior highway patrol officer, enrolled her partner of nine years, Diana, whose debilitating disease early in their relationship had precipitated Tracy filing for bankruptcy.⁵ Beverly Seckinger, a University of Arizona professor, enrolled her partner of twenty years, Susan, a freelance website designer with primary responsibility for the care of her eighty-nine-year-old mother and a history of life-threatening asthma attacks.⁶

* Professor of Law, American University Washington College of Law; 2011–12 McDonald/Wright Visiting Chair of Law, UCLA School of Law and Faculty Chair of the Williams Institute. This essay is dedicated to the memory of Paula Ettelbrick (1955–2011), whose expansive vision of family animated her 25 years of activism, advocacy, and litigation on behalf of LGBT individuals and families. Paula would have read a draft of this Article and offered suggestions to improve it. I miss her counsel and her friendship. The quotation in the title is from Press Release, Nat'l Gay and Lesbian Task Force, Joint Statement in Favor of Maintaining Domestic Partner Benefits (June 20, 2004), *available at* http://thetaskforce.org/press/releases/pr705_063004. For further discussion, see *infra* Part III.C.

1. *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011).

2. ARIZ. ADMIN. CODE § R2-6-101(19)(b),(k) (2012).

3. *See id.*

4. Amended Complaint for Injunctive and Declaratory Relief at 15, *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010) (No. CV09-2402-PHX-JWS).

5. *Id.* at 13–14.

6. *Id.* at 19–21.

In September 2009, Arizona governor Jan Brewer signed legislation eliminating the benefits by limiting eligibility to spouses.⁷ Before the rescission could take effect, Lambda Legal, the nation's largest LGBT rights legal organization, challenged the constitutionality of the legislation on behalf of state employees with same-sex partners, including Keith, Tracy, and Beverly.⁸ Lambda won a preliminary injunction against the rescission of benefits in the district court under the name *Collins v. Brewer*,⁹ which the Ninth Circuit affirmed last year under the name *Diaz v. Brewer*.¹⁰ After the Ninth Circuit denied the State's petition to hear the case en banc,¹¹ Arizona filed a petition for a writ of certiorari with the U.S. Supreme Court,¹² which will decide this fall whether to review the case.

But wait.

Let me start over, and begin this narrative at a different point in time and with a less selective set of facts.

In 2006, an Arizona referendum that would have barred both same-sex marriage and any legal recognition of unmarried partners, gay or straight, *failed* at the polls.¹³ Prop. 107, as it was known, is the only ballot measure against same-sex marriage that has ever been defeated.¹⁴ The text of the initiative read:

To preserve and protect marriage in this state, only a union between one man and one woman shall be valid or recognized as a marriage by this state or its political subdivisions *and* no legal status for unmarried persons

7. See *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011). For a strong opinion piece against passage of the legislation, see Barbara A. Atwood, *Preserve Domestic Partner Benefits*, ARIZ. DAILY STAR, Feb. 3, 2009, available at <http://www.law.arizona.edu/news/Press/2009/Atwood020309.pdf>.

8. *Diaz*, 656 F.3d at 1010–11.

9. 727 F. Supp. 2d 797 (D. Ariz. 2010).

10. 656 F.3d 1008, 1010 (9th Cir. 2011). To avoid confusion, I refer to this litigation as *Diaz* in the body of this Article, even though the arguments and opinion at the district court level, and the briefs filed at the Ninth Circuit, came under the case's previous name of *Collins v. Brewer*.

11. 676 F.3d 823 (9th Cir. 2012).

12. See generally *Petition for Writ of Certiorari, Brewer v. Diaz*, No. 12-23 (U.S. July 2, 2012).

13. Christina Borrego, *Staying on Message Brought Arizona Together*, EQUALITYNY (Feb. 17, 2007), http://www.equalityny.com/site/index.php?option=com_bookmarks&task=detail&id=431.

14. Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, FIVETHIRTYEIGHT (June 29, 2011, 10:35 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures/> (predicting the future of same-sex marriage ballot measures using the "results of 34 ballot initiatives to limit same-sex marriage rights, all but one of which, Arizona Proposition 107, were approved"). Four ballot measures will be decided in 2012. Voters in Washington and Maryland will decide whether to affirm or reject marriage equality bills passed by their state legislatures. Maine will become the first state in which voters decide whether to proactively pass marriage equality. Minnesotans will vote on a constitutional amendment banning same-sex marriage. 2012: *The Year of Marriage*, HRC BLOG, <http://www.hrc.org/blog/entry/2012-the-year-of-marriage> (last visited Oct. 20, 2012). After these votes, Prop. 107 may well no longer be the only ballot initiative against same-sex marriage that has ever been defeated.

shall be created or recognized by this state or its political subdivisions that is similar to that of marriage.¹⁵

The campaign against Prop. 107 prominently featured different-sex couples who feared losing domestic partner benefits offered at the time by some Arizona municipalities.¹⁶

In fact, the poster couple against Prop. 107, Al and Maxine, were so widely known that a story about them appeared in *The Washington Post*.¹⁷ A lawsuit filed to stop the ballot measure, while ultimately unsuccessful, included as plaintiffs two Phoenix firefighters who feared losing domestic partner benefits for their different-sex domestic partners.¹⁸ The message of the campaign against the initiative explicitly focused on the health care benefits that domestic partners would lose.¹⁹

Returning now to the narrative that began this introduction, in 2008, by administrative regulation, Arizona extended health benefits to the domestic partners of state employees. The criteria included living together for at least a year and demonstrated financial interdependence. Same-sex and different-sex partners were eligible. Without question, had Prop. 107 passed, it would have been unconstitutional to extend such benefits to any unmarried partners.

In September 2009, Arizona Governor Jan Brewer signed legislation eliminating the benefits by limiting eligibility to spouses.²⁰ Before the rescission could take effect, Lambda Legal challenged the constitutionality of the legislation, but only on behalf of those state employees with same-sex partners.²¹

So Keith, Tracy, Beverly, and their fellow plaintiffs had domestic partner health benefits in the first place only because of a coalition effort that depended on different-sex domestic partners, but Lambda, on their behalf, abandoned, and indeed trivialized, that constituency when it came time for litigation. This Essay examines that choice and asserts that it was a mistake.

15. 2006 *Ballot Propositions & Judicial Performance Review*, ARIZ. DEP'T ST. (Sept. 2006), <http://www.azsos.gov/election/2006/info/pubpamphlet/english/prop107.htm> (emphasis added).

16. Amanda J. Crawford, *Consistent Message Doomed Prop 107; Loss of Benefits to Unwed Pairs Loomed Large*, ARIZ. REPUBLIC, Nov. 9, 2006, at 21; see also Borrego, *supra* note 13.

17. Sonya Geis, *New Tactic in Fighting Marriage Initiatives: Opponents Cite Effects on Straight Couples*, WASH. POST, Nov. 20, 2006, at A3.

18. Press Release, Ariz. Together, Couples Protected by Domestic Partner Benefits File a Lawsuit Against "Protect Marriage Arizona," (July 12, 2006), available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/07-12-2006/0004396019&EDATE=> (describing Phoenix firefighters Paul Knobbe and Glen Cromer who stood to lose benefits for their different-sex domestic partners). The lawsuit was unsuccessful. See *Ariz. Together v. Brewer*, 149 P.3d 742, 750–51 (Ariz. 2007).

19. See KYRSTEN SINEMA, *UNITE AND CONQUER: HOW TO BUILD COALITIONS THAT WIN—AND LAST* 59 (2009).

20. ARIZ. REV. STAT. § 38-651(O) (2011).

21. See *infra* Part II.A.

In Part I, I briefly describe the history and importance of domestic partner employee benefits, documenting both original and contemporary practices extending eligibility to same-sex and different-sex partners. In Part II, I describe Lambda's arguments in *Diaz* and contrast them to its approach ten years earlier in *Irizarry v. Board of Education of the City of Chicago*,²² where Lambda argued not only in favor of benefits for unmarried heterosexual partners but for the unconstitutionality of excluding such couples from benefits. I also place the approach in *Irizarry* in the context of other advocacy, including the numerous LGBT organizations that ten years before *Irizarry* participated in *Braschi v. Stahl Associates*.²³

In Part III, I describe recent examples of gay rights groups eliminating or minimizing their support for unmarried couples who have the option to marry. In recent litigation in New York, a female employee challenged the denial of benefits for her male domestic partner when similarly situated same-sex partners were receiving those benefits. I consider it a missed opportunity that neither Lambda nor any other LGBT organization weighed in on behalf of the plaintiff in that case. I also illustrate two instances of overtly backing away from unequivocal support for unmarried couples. In one, Lambda framed a case that was squarely about unlawful marital status discrimination as instead a case that illustrates the harm of denying access to marriage. The other involves comparing 2004 and 2011 public statements opposing elimination of domestic partner benefits even when same-sex couples can marry. The 2004 statement explicitly supports diverse family structures, while the more recent one offers only instrumental justifications for not requiring same-sex couples to marry. In conclusion, I suggest how and why unmarried same-sex couples in marriage equality states, and therefore unmarried heterosexual couples everywhere, must remain on the agenda of gay rights groups.

I. DOMESTIC PARTNER BENEFITS THEN AND NOW

The first domestic partner benefits were offered in 1982 by the Village Voice.²⁴ In 1985, Berkeley became the first public employer to offer such benefits.²⁵ Eligibility for coverage extended to both same-sex and different-sex couples, as did all such eligibility throughout the 1980s.²⁶ Advocates and employers alike did not distinguish between those who could not marry and those who chose not to marry.²⁷ Domestic partner

22. See 251 F.3d 604, 611 (7th Cir. 2001).

23. 543 N.E.2d 49 (N.Y. 1989).

24. NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 49 (2008). For a history of domestic partner benefits in the 1980s, see *id.* at 49–51.

25. *Id.* at 50. West Hollywood instituted a domestic partnership registry in 1985, but health insurance benefits did not become available until 1989. Ron Russell, *W. Hollywood Will Insure Partners of Single Employees*, L.A. TIMES, Feb. 22, 1989, at B3.

26. POLIKOFF, *supra* note 24, at 49.

27. *Id.*

benefits consciously reflected the numerous changes in the previous two decades that made marriage matter less, both legally and culturally.²⁸

The first domestic partner benefits only for same-sex couples emerged in 1991, and they were explicitly not about diminishing the significance of marriage.²⁹ Rather, they were framed as an equity issue for same-sex couples who could not marry. This turned what had previously been a reform in the name of deprivileging marriage into an issue of gay rights, based on formal equality between married heterosexual couples and gay and lesbian couples who were denied access to marriage.³⁰

This shift in focus and framing has had an enormous impact, but it has not entirely supplanted the original impetus for domestic partner benefits. Most employers who provide such benefits cover both same-sex and different-sex couples. In the most comprehensive assessment available, a 2011 report from the U.S. Bureau of Labor Statistics found that roughly 30 percent of U.S. workers have access to health care benefits for same-sex domestic partners; 25 percent have such benefits for their different-sex unmarried partners.³¹ Of especial relevance to Lambda's approach in *Diaz*, almost all public employers who extend benefits to same-sex partners also offer them to unmarried different-sex partners.³² The Human Rights Campaign Foundation (HRC), which rates private employers through its Corporate Equality Index (CEI), has found that 64 percent of employers who have same-sex domestic partner benefits also cover unmarried different-sex partners.³³ In 2007, a Hewitt Associates survey found a similar percentage.³⁴

28. These included widespread acceptance of sex outside marriage, easing the legal distinction between marital and nonmarital children, inscribing a norm of equality between men and women that lessened the dependence of women upon husbands, and instituting no-fault divorce. *Id.* at 23–33.

29. *See id.* at 61.

30. *Id.*

31. News Release, Bureau of Labor Statistics, Employee Benefits in the United States—March 2011 (July 26, 2011), available at <http://www.bls.gov/ncs/ebs/sp/ebnr0017.pdf>. For a description of the breakdown by, among other things, type of employer, job category, and geographical location, see Nancy Polikoff, *New Government Report Tells Us How Many Employees Can Include Same and Different-Sex Domestic Partners on Their Health Benefits*, BEYOND (STRAIGHT & GAY) MARRIAGE BLOG (July 27, 2011, 9:38 PM), <http://beyondstraightandgaymarriage.blogspot.com/2011/07/new-government-report-tells-us-how-many.html>.

32. Paul Richter, *Partner Benefits: Just What is Equality?*, CHI. TRIB., Dec. 27, 2009, at A32 (citing Ilse de Veer of the consulting group Mercer). Mercer releases annually a publication entitled *National Survey of Employer-Sponsored Health Plans*. *See, e.g., Employers Accelerate Efforts to Bring Health Benefit Costs Under Control*, MERCER (Nov. 16, 2011), <http://www.mercer.com/press-releases/national-survey-employer-sponsored-health-plans>.

33. Email from Deena Fidas, Deputy Dir., Corp. Programs, Workplace Project, Human Rights Campaign Found., to author (May 16, 2012, 3:19 PM) (on file with author).

34. Thirty-two percent of surveyed firms offered benefits to both same and different-sex couples; 17 percent offered benefits to same sex only. EMP. BENEFIT RESEARCH INST., *FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS* 400 (6th ed. 2009).

Unions support benefit plans that go beyond same-sex couples. In 1992, AFSCME endorsed domestic partnership benefits, asserting that “[e]mployers should not have the right to discriminate on the basis of marital status.”³⁵ In 1991, the AFL-CIO passed a resolution in support of extending benefits to “all persons living together in a household as a family.”³⁶ In 2008, SEIU adopted a resolution entitled “Valuing All Families” that opposes limiting the definition of family to legally married adults and states, in part, “Government and employer-provided benefits should support individuals with day-to-day responsibilities to care for and financially support minor children and dependent adults in all family forms, and should protect interdependent adult relationships.”³⁷ At a 2008 hearing on extending domestic partner benefits to same-sex partners of federal employees, Maine Senator Susan Collins gave opening remarks suggesting the benefits should extend to heterosexual couples as well, and NTEU national president Colleen Kelley departed from her written testimony to support the expansion suggested by Senator Collins.³⁸

Given the prevalence of more inclusive partner benefits and the opportunity to work in coalition with other organizations to obtain and preserve such benefits, it is disturbing that the formula HRC uses in its CEI considers only same-sex partner benefits and does not penalize an employer that fails to extend benefits to unmarried different-sex partners.³⁹ Indeed, HRC also takes the position that when an employer’s entire workforce is within a state that allows same-sex marriage, the CEI will not penalize the employer for eliminating partner benefits and requiring all employees to marry.⁴⁰

Coupling HRC’s rating criteria with Lambda Legal’s abandonment of unmarried different-sex partners, even when that constituency—as in Arizona—made benefits for same-sex couples possible, the nation’s largest gay rights advocacy organization and the nation’s largest gay rights legal organization appear to have written off their agenda the needs of same-sex couples who can marry but choose not to.

I hope they will reconsider.

35. *Domestic Partner Benefits*, AFSCME, <http://www.afscme.org/members/conventions/resolutions-and-amendments/1992/resolutions/101-domestic-partner-benefits> (last visited Oct. 20, 2012).

36. Brandy Davis, *In Defense of Equality: Unions Stand Up for LGBT Families*, LAB. FAM. NEWS (Winter 2009), <http://www.working-families.org/publications/newsletter/LPWFinsidestoryWinter09.pdf>.

37. Nancy Polikoff, *SEIU Resolution Values All Families*, BEYOND (STRAIGHT & GAY) MARRIAGE BLOG (May 27, 2009, 4:55 AM), <http://beyondstraightandgaymarriage.blogspot.com/2009/05/seiu-resolution-values-all-families.html>.

38. Nancy Polikoff, *Hearing Today on Domestic Partner Benefits for Federal Government Employees*, BEYOND (STRAIGHT & GAY) MARRIAGE BLOG (Sept. 24, 2008, 10:23 AM), <http://beyondstraightandgaymarriage.blogspot.com/2008/09/hearing-today-on-domestic-partner.html>.

39. See Email from Deena Fidas, *supra* note 33.

40. *Id.*

II. THE *DIAZ V. BREWER* LEGAL THEORIES AND THE PATHS NOT TAKEN

In the first sentence of the statement of the case in its Ninth Circuit brief, Lambda asserted that the Arizona legislation, if allowed to take effect, would end the partner health benefit for “only lesbian and gay State employees, and not their heterosexual co-workers.”⁴¹ Lambda could make this patently inaccurate statement because it took the position that heterosexual employees had not, in fact, lost their benefits because they could access them by marrying their partners.

Lambda later acknowledged in a footnote that domestic partner benefits had been extended to heterosexual employees, but referred to those employees as ones who had “chosen not to marry their different-sex domestic partner.”⁴² On the same page, the brief alleged that all the plaintiffs would marry their same-sex partners if permitted to by Arizona law.⁴³ The brief repeatedly reminded the court that the plaintiffs were not challenging the elimination of benefits to unmarried different-sex partners and characterized the relief they were seeking as only what their heterosexual coworkers already had.⁴⁴

The framing of this litigation throws into question the contours of the same-sex relationships and families that Lambda envisions as its constituency. One can speculate about the conversation between the prospective Arizona plaintiffs and their lawyers at Lambda. I wonder if the lawyers asked in any open-ended way whether the couples involved wanted to marry, and whether they offered their services to all gay and lesbian employees, even those who did not want to marry. I wonder if they instead simply told prospective clients that they planned to litigate the case on a theory that heterosexuals had a path to benefits by marrying and that, therefore, those who wished to be plaintiffs would need to say that they, too, would marry if permitted to do so.

In this section I critique Lambda’s approach in *Diaz* and, by contrast, describe its earlier advocacy that either explicitly or implicitly eschewed the argument that couples must or would marry if marriage is available.

A. *The Path Taken: The Legal Theory of Diaz*

Lambda’s first cause of action in *Diaz* was an equal protection claim alleging a classification based on an employee’s sexual orientation or the sex of the employee’s partner.⁴⁵ This theory required that the plaintiffs compare themselves with heterosexual employees and then assert that they were “similarly situated in every relevant respect to the heterosexual State employees who Defendants permit to qualify their different-sex life partners

41. Plaintiffs-Appellees’ Response Brief at 2, *Collins v. Brewer*, 656 F.3d 1008 (9th Cir 2011) (No. 10-16797), 2010 WL 5813343.

42. *Id.* at 4 n.3.

43. *Id.* at 4.

44. *See id.* at 11, 17, 18, 43, 46–47.

45. Amended Complaint, *supra* note 4, at 34–41.

and partners' children for family coverage *through marriage*.”⁴⁶ Obviously, this articulation could not support a claim to block the rescission of benefits for unmarried heterosexual partners, and Lambda did have reason to consider it a strong legal theory.⁴⁷

The theory has been successful in a handful of state court cases, under state constitutions.⁴⁸ In none of the cases, however, did the state eliminate domestic partner benefits previously available to all unmarried couples.⁴⁹ Rather, in each case, the state extended benefits only to spouses, and the gay and lesbian plaintiffs argued the unconstitutionality of assigning benefits on a basis unavailable to them.⁵⁰

It is extraordinarily unlikely that Lambda would have represented gay and lesbian Arizona state employees in such an affirmative lawsuit, seeking partner benefits where none existed. Lambda has not filed suit, for

46. *Id.* at 35 (emphasis added).

47. Lambda knew this case would go to the Ninth Circuit, which had issued two opinions in 2009 supportive of the rights of same-sex couples. *See In re Golinski*, 587 F.3d 956 (9th Cir. 2009); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009).

48. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Bedford v. N.H. Cmty. Technical Coll. Sys.*, No. 04-E-229 (N.H. Super. Ct. 2005), *available at* <http://www.glad.org/uploads/docs/cases/bedford-and-breen-v-new-hampshire-technical-college-system/2006-bedford-decision.pdf>; *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). The ACLU is currently litigating a case in Alaska following up on the win cited above. In *Schmidt v. Alaska*, No. S-14521 (Alaska 2012), same-sex couples are challenging their inability to qualify for a property tax exemption available to married heterosexual couples. *See Schmidt and Schuh v. Alaska—Case Profile*, ACLU (May 9, 2012), <http://www.aclu.org/lgbt-rights/schmidt-and-schuh-v-alaska-case-profile>.

49. I can find only one case in which an LGBT legal organization is representing only gay and lesbian employees even though both gay and straight employees lost domestic partner benefits. The ACLU LGBT Rights Project represents plaintiffs in *Bassett v. Snyder*, No. 2:12-cv-10038-DML-MJH (E.D. Mich. filed Jan. 5, 2012), challenging a Michigan statute limiting benefits to spouses and family members who can inherit by intestate succession. *See* MICH. COMP. LAWS §§ 15.581–.585 (2012); *Bassett et al. v. Snyder*, ACLU (Aug. 7, 2012), <http://www.aclu.org/lgbt-rights/bassett-et-al-v-snyder>. This statute effectively eliminated benefits to “other eligible adults,” a category that encompassed more than unmarried partners. That category had been created by numerous public employers in Michigan to get around the Michigan Supreme Court’s ruling that providing benefits specifically to unmarried partners violated Michigan’s super-DOMA. *See Nat’l Pride at Work, Inc. v. Granholm*, 748 N.W.2d 524, 543 (Mich. 2008). The term “super-DOMA” is one way to describe state constitutional amendments that ban not only recognition of same-sex marriage but of all unmarried couples. Although a full discussion of *Bassett*, and the history of partner benefits in Michigan, is beyond the scope of this Article, I would note that the complaint in *Bassett* does not allege that the employees would marry their partners if permitted under Michigan law, nor do the briefs and pleadings claim that only gay employees lost benefits as a result of the challenged statute. *See, e.g.*, First Amended Complaint, *Bassett*, No. 2:12-cv-10038-DML-MJH (E.D. Mich. Feb. 17, 2012).

50. This theory also lies at the heart of another case being litigated by the ACLU, *Glossip v. Missouri Department of Transportation*, No. 10-CC00434 (Mo. Cir. Ct. filed Dec. 2, 2010), challenging Missouri for extending survivor benefits to the spouse, but not the same-sex partner, of a state trooper killed in the line of duty. *See Glossip v. Missouri Department of Transportation and Highway Patrol Employees’ Retirement System*, ACLU (Apr. 12, 2012), <http://www.aclu.org/lgbt-rights/glossip-v-missouri-department-transportation-and-highway-patrol-employees-retirement-sys>.

example, on behalf of gay and lesbian state employees in Idaho, who lack access to benefits because they cannot marry and whose claim would also wind up before the Ninth Circuit.⁵¹

Lambda picked Arizona because the employees *had* the benefits and were going to lose them. This distinct fact allowed Lambda to demonstrate that the provision of benefits had been running smoothly⁵² and also to show concrete harm to individuals about to lose those benefits.⁵³ But every single Lambda client had benefits only because the defeat of Prop. 107 allowed a sympathetic governor to institute them. And Prop. 107 was defeated only because images of different-sex domestic partners persuaded Arizona voters to reject a super-DOMA.⁵⁴

Gay and straight employees with domestic partners were allied in Arizona, and Lambda severed that alliance.

B. The Path Not Taken: Comparing Diaz with Irizarry

Lambda also claimed a violation of the plaintiffs' substantive due process rights,⁵⁵ alleging that "[e]ach Plaintiff has a protected, fundamental right and liberty interest in his or her private intimate conduct and family relationship with his or her committed same-sex life partner."⁵⁶ Any such right extends equally to Arizona state employees with different-sex partners.⁵⁷ The exclusion of such employees from the group of plaintiffs in *Diaz*, therefore, was not a product of an inability to find a legal theory in support of their claim.

51. The Idaho Constitution states that "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." IDAHO CONST. art. III, § 28. Concerned that affording domestic partner benefits would violate the Idaho Constitution, University of Idaho faculty voted earlier this year to support extension of benefits to household members who meet certain criteria. Holly Bowen, *Faculty OKs Health Benefits for Shared Households*, MOSCOW-PULLMAN DAILY NEWS (Apr. 25, 2012, 1:00 AM), http://dnews.com/local/article_7cad630c-52e4-5605-9413-ad263865bbd6.html. The university president has yet to approve this plan.

52. In support of its motion for a preliminary injunction, plaintiffs submitted a report prepared by the state of Arizona on its health benefits plan for 2008–09, the first year domestic partner benefits became available. The plaintiffs quoted the portion of the report noting that the state had provided "comprehensive and affordable insurance coverage," and "effectively controlled the rise in health care costs through quality benefit design, administrative oversight, strategic audit planning, and efficient contracts management." *Collins v. Brewer*, 727 F. Supp. 2d 797, 811 (D. Ariz. 2010).

53. The district court opinion included a finding that "several plaintiffs' domestic partners have medical conditions requiring daily medication and consistent treatment that if left untreated will likely lead to irreversible health consequences." *Id.* at 812.

54. Although Prop. 107 did not pass, in 2008, Arizona enacted a constitutional amendment recognizing marriage as only between one man and one woman. *See* ARIZ. CONST. art. 30, § 1.

55. Amended Complaint, *supra* note 4, at 41–43.

56. *Id.* at 42.

57. For example, in a case litigated by the ACLU, the Arkansas Supreme Court relied on such a Due Process ground under the Arkansas Constitution to strike down a ban on foster parenting and adoption by unmarried couples. *See* Ark. Dep't of Human Servs. v. Cole, No. 10-840, 2011 Ark. 145, at *24 (Apr. 7, 2011).

Surely among the heterosexual Arizona employees who lost coverage there were some with circumstances as compelling and sympathetic as those of the gay plaintiffs. At the district court hearing in *Diaz*, the judge challenged the State's assertion that it could promote marriage by spending scarce dollars on married persons by asking whether that reasoning would mean that the State could pay a higher wage to a married woman than an unmarried woman in order to favor marriage.⁵⁸ Arguing on behalf of the State, Assistant Attorney General Charles Grube, after some hedging, said, "under an appropriate circumstance, I'll bet they could." "Really," commented the judge. "Yes. Yes," replied Grube. "Interesting," responded the judge.⁵⁹ Had Lambda pursued a claim for all employees, it could have used discovery to draw out such constitutionally suspect reasoning. In addition, Lambda could have brought an equal protection claim on behalf of the unmarried couples.

Lambda made a version of such arguments over ten years ago before the Seventh Circuit where it argued in *Irizarry v. Board of Education of the City of Chicago* that it was unconstitutional to extend partner benefits to same-sex couples without including different-sex unmarried couples as well.⁶⁰ Because the heterosexual Arizona employees had plausible legal claims, it is appropriate to consider why Lambda spoke dismissively of their choice not to marry and so forcefully distanced the gay and lesbian employees from those making that choice. A closer examination of *Irizarry* can shed some light on the more profound significance of this strategic decision.

In July 1999, the Chicago Board of Education extended spousal health benefits to the same-sex domestic partners of its employees.⁶¹ Shortly thereafter, Milagros Irizarry filed a challenge on equal protection grounds to the constitutionality of excluding her different-sex partner of more than twenty years from the benefit scheme.⁶² Although only heterosexual employees would have profited from Irizarry's success, Lambda filed an amicus brief in the Seventh Circuit supporting the extension of benefits to different-sex domestic partners.⁶³

In describing its interest as amicus curiae, Lambda asserted that "it is unjust to use marriage as the sole trigger for familial employment benefits, denying to unmarried families fundamental protections of which they have equal need."⁶⁴ "In the course of its work," the brief continued, "Lambda has consistently and strongly advised that partner benefit plans should not be limited to same-sex couples as a matter of policy and principle, even

58. Plaintiffs-Appellees' Response Brief, *supra* note 41, at 39.

59. *Id.*

60. 251 F.3d 604, 608-09 (7th Cir. 2001).

61. *Id.* at 606.

62. *Id.*

63. See generally Brief Amicus Curiae of Lambda Legal Defense and Education Fund, Inc. in Support of Neither Party and in Support of Reversal, *Irizarry v. Bd of Ed. of the City of Chi.*, 251 F.3d 604 (7th Cir. 2001) (No. 99 C 6991).

64. *Id.* at 1.

while recognizing that such limited plans often are passed with the good intentions of remedying other, pre-existing discrimination.”⁶⁵

Of course, the Board of Education defended its program by asserting that heterosexual couples had the option to obtain benefits by marrying.⁶⁶ Lambda addressed this defense as follows:

For plaintiff, the structural exclusion from benefits on the basis of marriage is primarily a matter of whether the state can force her to marry—that is, to change her decision about the exercise of a fundamental right that is available to her—as a condition of providing equal employment compensation and greater health security for her family. Lambda is very sympathetic to this dilemma and expects that many lesbian and gay citizens may one day share her predicament and be put to the same choice. No one’s family health and security should depend on their constitutionally protected choice of whether to marry or not.⁶⁷

Lambda criticized the district court’s conclusion that unmarried couples had not historically faced “invidious social and political prejudice and stereotyped prejudgments,”⁶⁸ citing

an evident and unfortunate historical record of civil and criminal legislation, legal discrimination and social and political condemnation directed at this group of citizens. They are derisively characterized as “living in sin” or “shacking up,” or as selfish and uncommitted to each other and their children. They have been historically penalized in child custody cases . . . , left unprotected by property distribution laws, and specifically targeted by fornication, cohabitation and sodomy laws from which married couples are exempt.⁶⁹

Lambda argued that classifying on the basis of such sentiments furthered no legitimate government interest. The brief also presented evidence that discrimination against unmarried persons had a disparate racial impact.⁷⁰

Irizarry did not prevail. The Seventh Circuit found the cost of covering unmarried heterosexual couples a rational basis for extending benefits only to same-sex couples.⁷¹ In *Diaz*, the plaintiffs alleged that only a small fraction of those receiving benefits were same-sex partners, as a way of countering the State’s alleged interest in cost savings.⁷²

65. *Id.* at 2.

66. *Irizarry*, 251 F.3d at 606.

67. Brief of Lambda Legal, *supra* note 63, at 12.

68. *Id.* at 17.

69. *Id.* at 17–18 (citations omitted). See generally CYNTHIA BOWMAN, UNMARRIED COUPLES, LAW & PUBLIC POLICY (2010) (providing an extensive review of the history of discrimination against unmarried couples).

70. Brief of Lambda Legal, *supra* note 63, at 5 n.4.

71. *Irizarry*, 251 F.3d at 610.

72. Economist Lee Badgett provided written testimony estimating that of the 893 employees covering their domestic partners, only 63 to 298 were likely to be same-sex partners. She estimated that the fractional cost of covering only same-sex partners was between 0.06 percent and 0.27 percent of the State’s spending on health benefits. Plaintiffs-Appellees’ Response Brief, *supra* note 41, at 9–10. For a discussion of the cost of domestic partner benefits, see *Domestic Partnership Benefits: Cost and Utilization*,

But the cost of covering the domestic partners of both gay and straight employees has not deterred most employers from adopting more inclusive criteria. In the years since *Irizarry* there has been much data on the costs of domestic partner benefits for both same-sex and different-sex partners, and “[e]xperience has shown that the costs of domestic partner coverage are lower than anticipated.”⁷³

The *Diaz* complaint actually cited several municipalities in Arizona for the claim that “[p]ublic employers in Arizona have confirmed the lack of disproportionate costs of domestic partner health coverage, the related cost-savings, and the positive effects on employee retention and positive morale.”⁷⁴ All the cited municipalities, however—Phoenix, Tempe, Scottsdale, and Tucson—extend benefits to different-sex as well as same-sex partners. Indeed, it was the threat of losing those very benefits that galvanized unmarried heterosexual couples to oppose Prop. 107.⁷⁵

It is of course possible that Lambda’s claim on behalf of the heterosexual employees would have been unsuccessful, but that cannot fully explain its decision to pretend that heterosexual employees had not lost their benefits rather than attempt an argument modeled on the one it articulated in *Irizarry*. For that, an examination of some dicta in *Irizarry* is necessary.

The Seventh Circuit did not stop at articulating cost as a rational basis for excluding different-sex couples from partner benefits. Rather, writing for the panel, Judge Posner’s opinion was dismissive and derisive of *Irizarry*’s and Lambda’s arguments.

Posner took special aim at Lambda’s amicus brief, which he called “surprising[.]”⁷⁶ He explained Lambda’s involvement as reflecting its concern that state and national policy encourages marriage. “Lambda wants to knock marriage off its perch,” he wrote, “by requiring the board of education to treat unmarried heterosexual couples as well as it treats married ones, so that marriage will lose some of its luster.”⁷⁷

These days no one would accuse Lambda or any other national LGBT rights organization of wanting to “knock marriage off its perch” or cause it to “lose some of its luster.” And therein likely lies the core of the decision by Lambda to abandon the unmarried heterosexual couples in Arizona as well as the decision by HRC to approve of employers that require that

HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/domestic-partner-benefits-cost-and-utilization> (last visited Oct. 20, 2012).

73. EMP. BENEFIT RESEARCH INST., *supra* note 34, at 401. It is typical for plan cost to increase 0.25 percent when adding same-sex domestic partners and 0.50 percent to 1 percent if both same-sex and different-sex partners are covered. James Campbell et al., *Health Care Reform: The Impact to the LGBT Community*, OUT & EQUAL SUMMIT—DALL. 1, 5 (Oct. 26, 2011), <http://www.outandequal.org/documents/2011summit/Health%20Care%20Reform%20-%20The%20Impact%20to%20the%20LGBT%20Community%20-%20James%20Campbell.pdf>.

74. Amended Complaint, *supra* note 4, at 32.

75. See *supra* notes 15–19 and accompanying text.

76. *Irizarry*, 251 F.3d at 608–09.

77. *Id.* at 609.

heterosexuals marry to protect the health and economic welfare of their families. Having argued forcefully for nothing less than marriage equality based precisely on marriage's "luster" and "high perch," neither Lambda nor HRC wishes to risk the equivalent of Posner's tongue-lashing, especially in the political sphere, where unmarried women who have children appear to have even less support than gay and lesbian families.⁷⁸

The State in *Diaz* predictably argued that it had a legitimate interest in promoting marriage.⁷⁹ To this the plaintiffs replied that there is no rational relationship between eliminating benefits for same-sex domestic partners and promoting marriage, because same-sex couples cannot marry and a benefit scheme only for married couples will not serve as an incentive for a gay employee to marry someone of a different sex.⁸⁰ This argument, of course, does not work for unmarried heterosexual couples.

Instead of more fully taking on this proffered justification, the rhetoric and language of Lambda's pleadings and oral argument dismissed the heterosexuals who would not marry in the face of the new Arizona statute every bit as forcefully as Judge Posner dismissed Milagros Irizarry.

Lambda successfully rebutted, in both the district court and the Ninth Circuit, Arizona's marriage promotion rationale. But it succeeded at a steep price. The district court held that promoting marriage was a legitimate state interest.⁸¹ Because it only represented couples who said they would marry were it recognized in Arizona, Lambda threw its lot in with a "marriage promotion" rationale as long as same-sex couples can marry. This is the polar opposite of arguing, as Lambda did in *Irizarry*, that "[n]o one's family health and security should depend on their constitutionally protected choice of whether to marry or not."⁸²

*C. Another Path Not Taken: Advocating Family Diversity in
Braschi v. Stahl Associates*

Lambda's position in *Irizarry* was not an anomaly. For example, it was fully consistent with that asserted by parties and amici, including Lambda, in the iconic 1989 case from the New York Court of Appeals, *Braschi v. Stahl Associates*.⁸³

Miguel Braschi and Leslie Blanchard lived together for eleven years in a New York City rent-controlled apartment whose lease was in Blanchard's name.⁸⁴ When Blanchard died of AIDS, the landlord sought to evict

78. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 62 (Nov. 18, 2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (69 percent of respondents surveyed believe that single women having children is a "bad thing;" 43 percent say that about gay and lesbian couples having children).

79. See *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).

80. Plaintiffs-Appellees' Response Brief, *supra* note 41, at 40–41.

81. *Collins v. Brewer*, 727 F. Supp. 2d 797, 806–07 (D. Ariz. 2010).

82. See Brief of Lambda Legal, *supra* note 63, at 12.

83. 543 N.E.2d 49 (N.Y. 1989).

84. See *id.* at 50–51.

Braschi.⁸⁵ Braschi had a right to remain in the apartment only if he was a member of the deceased tenant's family.⁸⁶

On Braschi's behalf, the ACLU Lesbian and Gay Rights Project argued that family member should be defined in a functional way and should include a long-term same-sex couple.⁸⁷ The landlord argued that family should be restricted to those with ties of blood, marriage, or adoption.⁸⁸ Over a dozen amici joined in several briefs supporting Braschi's call for a functional definition of family.⁸⁹ They presented staggering data on the number of households that would be affected by the court's decision. They stressed the impact on the poor, people of color, senior citizens, immigrants, people with AIDS, people with disabilities, foster families, stepfamilies, and tens of thousands of same-sex and unmarried different-sex couples.⁹⁰

Braschi prevailed when the Court of Appeals ruled that "protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."⁹¹ Because the court ruled for Braschi on statutory grounds, it did not address his constitutional arguments, but the ACLU had made an equal protection claim, invoking two Supreme Court cases, *U.S. Department of Agriculture v. Moreno*⁹² and *New Jersey Welfare Rights Organization v. Cahill*,⁹³ for the principle that "the United States Constitution forbids discrimination between different types of families and living arrangements when such distinctions are not related to the purpose of the government program at issue."⁹⁴ *Moreno* found unconstitutional the denial of food stamps to households containing unrelated individuals, a restriction Congress had enacted because it did not want assistance going to hippie communes.⁹⁵ *Cahill* struck down a New Jersey scheme providing benefits to couples with children only when the couple was married.⁹⁶

No one argued that Braschi's threatened eviction was either unwise or unconstitutional because he had been prohibited from marrying Blanchard. Such a contention would have been out of step with the interests of the many constituencies represented by the amici. It also would have been out

85. *Id.*

86. *Id.* at 52 (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6 (1989)).

87. See generally Brief of Plaintiff-Appellant, *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87).

88. *Braschi*, 543 N.E.2d at 52-53.

89. The New York Reporter helpfully summarizes the points of counsel. See *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 202-05 (1989) (summarizing the arguments made in the amici briefs).

90. For a more detailed description of the arguments of several amici, see Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 533-35 (2009).

91. *Braschi*, 543 N.E.2d at 53-54.

92. 413 U.S. 528 (1973).

93. 411 U.S. 619 (1973).

94. See Brief of Plaintiff-Appellant, *supra* note 87, at 48.

95. *Moreno*, 413 U.S. at 537-38.

96. *Cahill*, 411 U.S. at 620-21.

of step with the constitutional protection afforded the Cahills, who could have obtained assistance from the state of New Jersey had they just married, or, for that matter, free-loving heterosexual hippies, who also had the option to marry. While the subject in *Diaz* differed from that in *Braschi*, *Diaz* did have the potential to involve multiple constituencies, a potential Lambda squandered with its narrower framing and dismissive tone.⁹⁷

Although the outcome in *Braschi* was met with widespread acclaim by gay rights advocates, there was a lone dissenter. Andrew Sullivan argued that *Braschi* was wrongly decided and that domestic partnerships should not exist.⁹⁸ The answer, he asserted, was marriage for same-sex couples, and a bright line between those who marry—gay and straight—and those who don't. Sullivan's 1989 article, subtitled *A (Conservative) Case for Gay Marriage* reads today as just that and is no longer an outlier position.⁹⁹

III. RELUCTANCE TO CHAMPION THE RIGHTS OF UNMARRIED COUPLES WHEN MARRIAGE IS AVAILABLE: A SHIFT IN THE APPROACH OF LGBT RIGHTS GROUPS

I do not claim that Lambda Legal as an organization or any of its individual lawyers subscribe to Sullivan's point of view. Rather, I assess Lambda and other gay rights groups by the arguments they make and the cases and positions they do and do not take. In this section, I examine a case that could be described as "*Irizarry* redux" in which all the LGBT legal organizations remained silent; a case squarely about marital status discrimination that Lambda framed publicly as a case about denial of access to marriage; and a disturbing reworking of the argument for maintaining domestic partner benefits after same-sex couples can marry.

97. In contrast to the numerous amici in *Braschi*, the only amicus brief in support of the plaintiffs in *Diaz* was filed on behalf of two Arizona gay rights organizations. See Brief of Amici Curiae Wingspan and One Voice Community Center Supporting Plaintiffs-Appellees and Affirmance of the District Court Decision, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (No. 10-16797).

98. Andrew Sullivan, *Here Comes The Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC (Aug. 28, 1989, 1:00 AM), <http://www.tnr.com/article/79054/here-comes-the-groom>.

99. See *id.* For a more contemporary articulation of the conservative case for same-sex marriage, consider the explanation offered by Theodore Olson, former Solicitor General under President George W. Bush, for his role as co-counsel in the challenge to California's ban on same-sex marriage. In 2010, in an article of the same name as the subtitle of Sullivan's 1989 piece, Olson wrote that:

Many of my fellow conservatives have an almost knee-jerk hostility toward gay marriage. This does not make sense, because same-sex unions promote the values conservatives prize. . . . The fact that individuals who happen to be gay want to share in this vital social institution is evidence that conservative ideals enjoy widespread acceptance. Conservatives should celebrate this, rather than lament it.

Theodore B. Olson, *The Conservative Case for Gay Marriage*, DAILY BEAST (Jan. 8, 2010, 7:00 PM), <http://www.thedailybeast.com/newsweek/2010/01/08/the-conservative-case-for-gay-marriage.html>.

A. *Silence in the Face of “Irizarry Redux”*

Six years after the Chicago Board of Education extended domestic partner benefits to employees with same-sex partners, the Health Benefits Consortium serving employees of school districts within New York’s Putnam Northern Westchester Board of Cooperative Educational Services (PNW BOCES) also extended benefits to the same-sex domestic partners of employees.¹⁰⁰ In a lawsuit reminiscent of *Irizarry*, Kathe McBride, a teacher in the Croton-Harmon School District for over thirty years, filed a complaint with the Westchester Human Rights Commission (WHRC).¹⁰¹ The Westchester Human Rights Law prohibits discrimination on the basis of marital status and sexual orientation, and McBride alleged such discrimination when the plan denied her coverage for the man she had lived with for thirty-six years.¹⁰²

Discrimination in compensation or terms of employment because of an employee’s group identity is one of the unlawful practices under the law.¹⁰³ The Westchester County Human Rights Law also contains numerous legislative findings. “In the County of Westchester, with its diverse population,” it begins:

there is no greater danger to the health, morals, safety, and welfare of the County than the existence of prejudice, intolerance, and antagonism among its residents because of their actual or perceived differences, including those based on race, color, religion, ethnicity, creed, age, national origin, alienage or citizenship status, familial status, gender, marital status, sexual orientation or disability.¹⁰⁴

It continues that the County has the duty “to act to assure that every individual . . . is afforded an equal, fair and timely opportunity to enjoy a full and productive life,” and that the law’s purpose is to ensure that “individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives with existing law.”¹⁰⁵ McBride argued explicitly that penalizing her for choosing not to marry was inconsistent with that purpose.¹⁰⁶

The WHRC held a hearing on McBride’s claim on three dates in 2007 and 2008. The Administrative Law Judge (ALJ) ruled in favor of McBride on both grounds.¹⁰⁷ He found sexual orientation discrimination because she would have received benefits had she been in a same-sex partnership, and

100. Putnam/N. Westchester Bd. of Coop. Educ. Servs. v. Westchester Cnty. Human Rights Comm’n, 917 N.Y.S.2d 635, 637 (App. Div. 2011).

101. *See id.*

102. McBride and Carroll met all the other eligibility requirements for coverage. *See* Brief for Respondents at 6–7, *PNW BOCES*, 917 N.Y.S.2d 635 (No. 2009-08960).

103. WESTCHESTER COUNTY, N.Y. HUMAN RIGHTS LAW § 700.03(a)(1) (2009).

104. *Id.* § 700.01.

105. *Id.*

106. Reply Brief of Appellant Kathe McBride at 6, *PNW BOCES*, 917 N.Y.S.2d 635 (No. 2009-08960).

107. Brief for Respondent-Appellant Westchester County Human Rights Commission at 12, *PNW BOCES*, 917 N.Y.S.2d 635 (No. 2009-08960).

marital status discrimination because the denial of benefits was the result of her choice not to marry.¹⁰⁸ The WHRC accepted and approved the ALJ's findings.¹⁰⁹

PNW BOCES raised cost as a justification for its policy. One of its witnesses was David Stern, the risk manager who had researched the costs of offering domestic partner coverage.¹¹⁰ The report he prepared estimated that extending benefits to both same-sex and different-sex domestic partners would result in ten to twenty additional enrollments per 1,000 employees, costing between \$63,600 and \$190,800 per 1,000 enrollees.¹¹¹ Stern also estimated the cost would be half that amount if the benefit were extended only to same-sex partners.¹¹² At the hearing, Stern testified that his further research suggested that there would be two to three times as many additional enrollees if different-sex partners were included.¹¹³

Thomas Higgins, a member of the board that voted on the domestic partnership benefits policy, also testified.¹¹⁴ At that time there were twelve same-sex domestic partners receiving benefits.¹¹⁵ He testified that the board discussed extending coverage to different-sex partners and rejected it both because those partners could get married, and because the board wanted to contain costs.¹¹⁶ In ruling for McBride, the Commission found those reasons insufficient to justify the discrimination.¹¹⁷

Pursuant to the procedure for appealing decisions of the Human Rights Commission, PNW BOCES sought review in the New York Appellate Division. That court annulled the determination of the HRC.¹¹⁸ The court held that there was no marital status discrimination because the individuals treated differently from McBride had the same marital status as she.¹¹⁹ The court did agree that McBride had presented a *prima facie* case of sexual orientation discrimination, but it found that the fact that same-sex partners could not marry in New York was a legitimate, nondiscriminatory basis for granting the benefits only to those partners.¹²⁰ The court did not base its ruling on the alleged cost of covering different-sex couples.

The New York Court of Appeals accepted review of the case and McBride, the WHRC, and PNW BOCES all filed briefs. Among other

108. *Id.*

109. *Id.* at 13.

110. *See id.* at 10–11.

111. Brief for Respondents, *supra* note 102, at 9. In 2004, the plan covered 7,730 enrollees. *Id.* at 9 n.2.

112. *Id.* at 10.

113. Brief for Respondent-Appellant Westchester County Human Rights Commission, *supra* note 107, at 11.

114. *Id.* at 10.

115. *Id.*

116. *Id.*

117. *See id.* at 12–13.

118. Putnam/N. Westchester Bd. of Coop. Educ. Servs. v. Westchester Cnty. Human Rights Comm'n, 917 N.Y.S.2d 635, 637 (App. Div. 2011).

119. *Id.* at 639.

120. *Id.*

things, McBride argued that even if three times as many different-sex as same-sex partners were covered by the plan, as Stern had testified was likely, there would have been no, or only a slight, cost increase.¹²¹

This litigation presented an opportunity for Lambda Legal and other LGBT rights groups to assert an argument similar to the one they presented in *Irizarry*, this time in the context of a statutory claim of marital status and sexual orientation discrimination. McBride made no constitutional claims, and there was no need for amici to do so. They could instead have argued for a robust interpretation of a local law that, unlike federal law or the federal Constitution, places sexual orientation and marital status discrimination on an equal footing with race, sex, and other protected categories. But no amicus briefs were filed in the case.

The parties in the McBride case settled on the eve of oral argument in February 2012.¹²² This may be because, effective July 24, 2011, the day same-sex couples obtained the right to marry in New York, PNW BOCES eliminated its domestic partner benefits.¹²³ This deprived McBride of her argument for equal access to those benefits. Same-sex couples in the PNW BOCES plan who do not marry are now in a situation identical to that of Kathe McBride. The prediction articulated in Lambda's *Irizarry* brief that one day gay employees would be forced to marry if they wanted to provide their partners with adequate access to health care has come true.¹²⁴

*B. DeWolf v. Countrywide: Framing a Case Against Marital Status
Discrimination As If It Were About the Harm of
Denying Access to Marriage*

In the dozen years that span *Irizarry*, *Diaz*, and *McBride*, the focus of gay rights advocacy has been obtaining access to marriage. This focus can even skew how a litigation group frames cases that offer protection for a wider range of family forms. Consider one case in which Lambda represented a same-sex couple explicitly seeking protection as an *unmarried* couple, but in which it nonetheless made the public face of the case about lack of access to marriage.

121. Although the Appellate Division did not base its ruling on the cost of covering different-sex partners, PNW BOCES pursued that argument in the Court of Appeals, prompting further attention to it by McBride. Brief of Appellant Kathe McBride at 23–24, *PNW BOCES*, 917 N.Y.S.2d 635 (No. 2009-08960); Brief for Respondents, *supra* note 102, at 30, 34.

122. Arthur S. Leonard, *A Near Miss? Domestic Partnership Benefits in the Age of Marriage Equality*, LEONARD LINK (Feb. 10, 2012), <http://newyorklawschool.typepad.com/leonardlink/2012/02/a-near-miss-domestic-partnership-benefits-in-the-age-of-marriage-equality.html>.

123. Brief for Respondents, *supra* note 102, at 11 n.3.

124. Of course there are numerous other examples going back more than a decade. See Tara Siegel Bernard, *Some Companies Want Gays to Wed to Get Health Benefits*, N.Y. TIMES, July 9, 2011, at B1. Indeed, after Vermont enacted civil unions in 2000, the University of Vermont ended domestic partner benefits and required gay and lesbian employees to enter civil unions to retain health insurance for their partners. Nancy Remsen, *UVM Benefits Require Civil Union*, BURLINGTON FREE PRESS, Sept. 28, 2000, at 1.

Adola DeWolf and Laura Watts decided to live together in the home that DeWolf owned.¹²⁵ They wanted to share responsibility for the home and to protect the right of each in the event of the death or illness of the other. The couple contacted the mortgage holder, Countrywide, for guidance, and the lender sent instructions to DeWolf for adding another name to the mortgage and note.¹²⁶ Following those instructions, DeWolf executed a quitclaim deed transferring title to herself and Watts as joint tenants with right of survivorship.¹²⁷

When the couple submitted a copy of the recorded deed and other requested materials to Countrywide, the lender sent DeWolf a letter requiring payment in full of the mortgage and threatening foreclosure on the ground that she had violated a portion of the loan agreement prohibiting transfer of a right in the property without prior written permission.¹²⁸ When DeWolf called to discuss the content of the letter, Countrywide stated that it did not recognize domestic partnerships, although it would have allowed DeWolf to add the name of a spouse.¹²⁹

The couple refinanced the home with a different lender at a higher interest rate, and Lambda brought an action on their behalf against Countrywide alleging a violation of the federal Equal Credit Opportunity Act (ECOA), which prohibits discrimination on the basis of marital status.¹³⁰ The complaint alleged that “[Countrywide’s] actions and policy of treating married couples differently from unmarried couples constitutes an ongoing violation of [the ECOA].”¹³¹ The complaint also alleged state tort and contract claims.¹³²

In spite of the actual legal claim in the case, Lambda announced the lawsuit with a press release containing the following heading: “If these two women had been able to marry in New York, this would never have happened.”¹³³ The press release further quoted Lambda Legal’s Marriage Project Director, David Buckel, saying, “Everyone from kids to creditors knows what it means when two people say they are married.”¹³⁴ In describing the potential impact of this case, the Lambda website stated that “[a] victory in this case would help remind home loan lenders throughout

125. Information about this case comes from the Lambda Legal website. *See DeWolf & Watts v. Countrywide*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/dewolf-and-watts-v-countrywide> (last visited Oct. 20, 2012).

126. *See id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Complaint at 9, *DeWolf v. Countrywide Fin. Corp.*, No. 2:07-cv-04072-SAS (S.D.N.Y. May 24, 2007).

132. *Id.* at 10.

133. Press Release, Lambda Legal, Lambda Legal to File Lawsuit on Behalf of Lesbian Homeowners in Federal Court Against Self-Described “America’s #1 Home Loan Lender” (May 24, 2007), available at http://www.lambdalegal.org/news/ny_20070524_lambda-to-file-suit-behalf-lesbian-homeowners.

134. *Id.*

the country that they must treat unmarried same-sex couples as they do married different-sex couples.”¹³⁵

In other words, a case that Lambda could have championed for the imperative of respecting family heterogeneity, in the manner of *Braschi*, was instead proclaimed another example of the harm of denying same-sex couples access to marriage. Lambda made this choice in spite of the fact that the legal basis for the claim was a federal statute prohibiting marital status discrimination.¹³⁶

The lawsuit settled after discussions with Fannie Mae prompted that organization to revise its policies to permit a homeowner to add the name of another person who will live in the home, related or not, to a title and mortgage.¹³⁷ In the press release announcing the settlement, Lambda Senior Staff Attorney Thomas Ude stated, “We applaud the nation’s largest mortgage-buyer for reviewing its policies and updating them so that homeowners can tell lenders ‘we are a family,’ and know that their family will be respected.”¹³⁸ Plaintiff Adola DeWolf is quoted as saying that “Fannie Mae’s new policies ensure that other couples, whether married or not, will be able to share home ownership without risking the loss of the very home they share.”¹³⁹

In the end, therefore, the settlement of the case tracked the legal theory in the complaint and even improved upon it. Unmarried couples, gay and straight, may become joint owners without risking loss of the existing mortgage. And the additional individual need not be a romantic partner; the original homeowner may make any arrangement she wishes to fully share her home with another person, and that choice will be respected by the mortgage holder as fully as the choice to marry.

The case stands, then, as a triumph for the principles I support. My quarrel is with the way Lambda framed the case for public consumption, as an example of the harm of denying access to marriage rather than the harm of discriminating against families other than married couples. In *Diaz*, that very same perspective allowed Lambda to inaccurately characterize the State’s decision to end all domestic partner benefits as one in which only gay employees lost benefits, and to thereby exclude unmarried different-sex partners from its advocacy.

C. GLAD Narrows the Reasons to Support Domestic Partnership Benefits

Gay rights groups have weighed in against terminating domestic partner benefits once same-sex couples achieve marriage equality. But their arguments have changed over time in telling ways. In May 2004, the first

135. See LAMBDA LEGAL, *supra* note 125.

136. See Complaint, *supra* note 131, at 8–9.

137. Press Release, Lambda Legal, Lambda Legal Announces Settlement in Lawsuit on Behalf of Lesbian Homeowners: Fannie Mae Mortgage Policies Change (Aug. 20, 2010), available at http://www.lambdalegal.org/news/ny_20100820_fannie-mae-policies.

138. *Id.*

139. *Id.*

same-sex couples began marrying in Massachusetts as a result of successful litigation by Gay and Lesbian Advocates and Defenders (GLAD) in *Goodridge v. Department of Public Health*.¹⁴⁰ A month later, all the leading gay rights legal and advocacy groups, including GLAD, Lambda, and HRC, issued a joint statement on the importance of retaining domestic partner benefits, even after marriage equality.¹⁴¹

The statement offered six reasons why employers should not eliminate domestic partner benefits.¹⁴² The number one reason stressed the original purpose of such benefits: recognizing family diversity.¹⁴³ The statement also unequivocally recommended that “employers who are among the small minority offering domestic partner benefits only to same-sex partners consider expanding their policies to be inclusive, the approach which is becoming standard business practice, rather than eliminating domestic partner benefits entirely.”¹⁴⁴ The statement further articulated the low cost of the benefits and the advantages to be gained in recruiting and retaining employees.¹⁴⁵ Under the reason entitled, “Employers should provide equal pay for equal work,” the statement asserted that:

There is no logical reason why civil marriage should be the dividing line between which employees’ families are eligible for benefits, and which . . . are not. If an employer recognizes the value of supporting employees’ families, demonstrations of caregiving and emotional and financial interdependence . . . are a more accurate way to define who is ‘family’ than marriage licenses.¹⁴⁶

The statement also offered two final reasons grounded in the uncertainty of marriage equality: the refusal of many states to recognize same-sex marriage and the possibility of a future constitutional amendment barring it.¹⁴⁷

Lambda Legal’s unsympathetic posture towards the unmarried different-sex couples in Arizona is inconsistent with the reasoning of this 2004

140. 798 N.E.2d 941 (Mass. 2003).

141. See Press Release, Nat’l Gay and Lesbian Task Force, Joint Statement in Favor of Maintaining Domestic Partner Benefits (June 20, 2004), available at http://thetaskforce.org/press/releases/pr705_063004. The signers were Children of Lesbians and Gays Everywhere (COLAGE); Family Pride Coalition (now known as Family Equality Council); GLAD; Human Rights Campaign; Institute for Gay and Lesbian Strategic Studies (now merged with the Williams Institute); Lambda Legal; National Center for Lesbian Rights; National Gay and Lesbian Task Force; Parents, Families and Friends of Lesbians and Gays (PFLAG); Pride at Work; AFL-CIO; and Alternatives to Marriage Project. The statement also appears on the website of the Alternatives to Marriage Project. See *Joint Statement in Favor of Maintaining Domestic Partner Benefits*, ALTERNATIVES TO MARRIAGE PROJECT (June 2004), <http://www.unmarried.org/dp-joint-statement.html>.

142. See Press Release, Nat’l Gay and Lesbian Task Force, *supra* note 141.

143. *Id.* (“[T]hese benefits were originally intended as a way to provide fair and equal treatment to the growing diversity of employees’ families, both married and unmarried, and to reduce marital status discrimination.”).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

statement. A more recent statement by GLAD, in December 2011, reveals a shift consistent with Lambda's decision as well as the criteria HRC uses in its Corporate Equality Index.¹⁴⁸ While GLAD still asks employers to maintain domestic partner benefits, it no longer endorses family diversity, an end to marital status discrimination, expansion of benefits to unmarried different-sex couples, or the wisdom of basing benefits on functional family ties.¹⁴⁹

Instead, GLAD relies on the vulnerabilities of same-sex couples who marry.¹⁵⁰ Not marrying is the right choice for some same-sex couples, the 2011 statement asserts, but only because of the tangible difficulties caused by uneven laws and lack of federal recognition.¹⁵¹ These include restrictions on international adoption by married same-sex couples; fear of exposing an undocumented spouse to immigration officials resulting in deportation; concern that marriage amounts to outing the two individuals and that they might face employment discrimination if they later move to a state that does not forbid such discrimination; understandable reluctance of couples to embrace the uncertain legal status caused by federal nonrecognition of same-sex marriages; and the possible problems with portability of insurance based on same-sex marriage.¹⁵²

The final take-away in the GLAD statement is as follows: "Until there is more respect for marriages of same-sex couples as marriages, employers need to understand that marriage can be risky business for same-sex couples. Forcing same-sex couples to marry for health insurance may have unintended negative consequences."¹⁵³ Entirely absent from this statement is respect for family diversity, including the decision of both gay and straight couples not to marry. This is a far cry from the final sentence of the 2004 Joint Statement: "We hope employers . . . will understand that marriage and domestic partnership can and will continue to exist side by side, two parts of the landscape of family in America."¹⁵⁴

CONCLUSION

I have yet to find an unequivocal contemporary statement by a major LGBT rights legal or political organization that no one—same-sex couples

148. *Domestic Partnership Benefits Still Matter in the Age of Equal Marriage: Marriage Does Not Mean Instant Equality for Lesbian and Gay Employees*, GLAD (Dec. 2011), <http://www.glad.org/uploads/docs/publications/dp-benefits-post-goodridge.pdf>.

149. *See id.*

150. *See id.*

151. *Id.*

152. *See id.* Although this statement does not appear on the Lambda website, the website does link to an article about employers terminating domestic partner benefits in which Lambda attorney Camilla Taylor cites only immigration and adoption concerns as reasons why a same-sex couple might choose not to marry. *See As Same-Sex Marriage Becomes Legal, Some Choices May Be Lost*, LAMBDA LEGAL (July 8, 2011), http://www.lambdalegal.org/news/nyt_20110708_as-same-sex.

153. GLAD, *supra* note 148.

154. *See* Press Release, Nat'l Gay and Lesbian Task Force, *supra* note 141.

included—should have to marry to provide for the economic and emotional security of his or her partner.

This should change. An affirmative public position that all unmarried partners should be eligible for domestic partner benefits is neither fringe, utopian, or unattainable. Fortunately, there are many employers whose policies gay rights groups could hold up as examples. I offer one inspiring example from my own employer, American University.

When originally instituted, American University limited coverage to same-sex partners. In the late 2000s, one newly hired member of my law faculty reluctantly married her long-time male partner because it was the only way he would have health insurance.

In 2010, the District of Columbia extended the ability to marry to same-sex couples.¹⁵⁵ D.C. also retained the status of registered domestic partnership, which has never been restricted to same-sex couples.¹⁵⁶ These circumstances prompted a reassessment of the university's domestic partnership coverage and resulted in an *expansion* of eligibility. Same-sex and different-sex couples are eligible immediately if they marry or register. Two people who do not formalize their status in either fashion can still qualify for coverage if they have lived together for at least twelve months, intend to live together indefinitely, and satisfy a set of criteria demonstrating financial interdependence.¹⁵⁷

Other examples of admirable policies can be found among private and public employers who, often to avoid explicitly favoring same-sex and/or unmarried couples, have instituted “plus one” policies.¹⁵⁸ Typically, such policies allow the employee to include another adult living with the employee if the two individuals can show financial interdependence.¹⁵⁹ The children of the other adult are also often eligible for coverage. Even though these policies eschew a “gay rights” rationale, the results can be

155. *Relationship Recognition for Same-Sex Couples in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE (June 28, 2011), http://thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11_color.pdf.

156. *Id.* Domestic partnership in the District of Columbia is in fact not limited to intimate partners. The two individuals must live together and have a “committed relationship” characterized by “mutual caring.” D.C. CODE § 32-701 (2012). This legislation was passed in 1992 and was explicitly the product of a coalition effort to recognize the city's diverse families. See POLIKOFF, *supra* note 24, at 51.

157. For a review and analysis of these criteria, see Nancy Polikoff, *Kudos to American University for Expanding Domestic Partnership Benefits to Include Different-Sex Couples*, BEYOND (STRAIGHT & GAY) MARRIAGE BLOG (Nov. 22, 2010, 10:26 AM), <http://beyondstraightandgaymarriage.blogspot.com/2010/11/kudos-to-american-university-for.html>.

158. For example, the University of Nebraska approved such a policy. Kevin Abourezk, *Regents Approve Plus-One Benefits for NU Employees*, LINCOLN J. STAR (June 8, 2012, 11:55 PM), http://journalstar.com/news/local/education/regents-approve-plus-one-benefits-for-nu-employees/article_6c2ed992-fb67-50d2-860d-6d56a9389707.html.

159. Other examples include Salt Lake City, Utah, which uses the term “adult designee,” and allows that person's children to be covered as well. See POLIKOFF, *supra* note 24, at 153–55. Georgetown University, a Jesuit institution, uses the term “legally domiciled adult.” *Id.* at 155.

terrific for encompassing the diverse forms of gay and straight family arrangements.

Just as the change in mortgage modification policies that resulted from *DeWolf* validates a household created by two people who are not in an intimate, sexual relationship, so “plus one” employee benefit schemes recognize family structures beyond the conjugal norm. A gay man and a lesbian, for example, may raise a child together in one home. Two unpartnered mothers, gay or straight, may commit to pooling their economic and caregiving resources to raise the children of both in a common household. “Plus one” benefits mean that, in such instances, one adult can protect the health and resulting economic well-being of the entire household.

Gay rights groups should develop model policies for extending employee health benefits beyond spouses, post them prominently on their websites, and advocate for them as forcefully as they advocate for access to marriage. The HRC should factor the existence of more comprehensive policies into its Corporate Equality Index.

Legal groups, including Lambda, should never trivialize or disrespect the choice not to marry as they have in *Diaz*. They should also be vigilant for opportunities to expand legal doctrine to protect the economic and emotional wellbeing of those, gay or straight, who make that choice. This includes further developing the reasoning of *Moreno* and *Cahill* that animated Miguel Braschi’s lawyers and the marital status discrimination arguments highlighted by Kathe McBride. When they take such cases, as they did with *DeWolf*, the legal groups should frame the issue publicly as furthering the principle that discrimination against unmarried couples is wrong.

Requiring a couple to marry, or say they would, deprives those who do not want to marry, gay and straight, of a path to benefits. A demand for formal equality that is framed as give-a-same-sex-couple-who-cannot-marry-exactly-what-you-give-a-married-different-sex-couple, is a cramped vision of family that distances the gay rights movement from much of its earlier advocacy and much of its constituency.¹⁶⁰

In signing the 2004 statement on retaining domestic partnerships, Lambda and the other gay rights groups included families created outside of marriage—even when marriage is available—within their ambit. *Diaz*, HRC’s Corporate Equality Index criteria, and GLAD’s 2011 statement on retaining domestic partnership portend a different direction, one which

160. For examples of those who disagree with advocacy that privileges marriage over other relationships, see AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE (Ryan Conrad ed., 2010), and the website of the ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/about-us.html> (last visited Oct. 20, 2012) (“The Alternatives to Marriage Project (AtMP) advocates for equality and fairness for unmarried people, including people who are single, choose not to marry, cannot marry, or live together before marriage. . . . We oppose [marital status discrimination] and advocate for the equal rights of unmarried people.”).

divides the LGBT community into those who do or would marry and those who do not or would not marry, with the needs of the former group alone falling in the domain of “gay rights.”

Elsewhere, I have speculated about what will happen the next time a surviving member of a same-sex couple faces eviction in a state that offers marriage or a marriage-equivalent status.¹⁶¹ If the couple did not marry, I fear a gay rights litigation group will not represent the survivor, and that a gay rights advocacy group will remain silent. I consider such a possibility tragic.

An increasing number of same-sex couples will have the ability to marry but will choose not to. Winning political campaigns or lawsuits at their expense should be considered an example of “winning backward,” a circumstance I define as “a victory whose legal basis sets back a goal greater than the immediate outcome.”¹⁶² Before the Village Voice, before *Braschi*, before Arizona’s 2008 extension of employee benefits, marriage was the bright line dividing relationships that mattered from those that were expendable. Marriage equality for same-sex couples does not justify a return to those days.

161. Polikoff, *supra* note 90, at 553–55.

162. See Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 721, 722 (2012) (arguing that obtaining parental rights for a nonbiological mother married to a woman who bears a child, without simultaneously creating parentage for a partner not married to the birth mother, revives the discredited distinction between “legitimate” and “illegitimate” children and is an example of winning backward).