



# AMERICAN BAR ASSOCIATION

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**Statement of**

**CHRISTOPHER NUGENT**

**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**before the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**for the hearing on**

**“The Uniting American Families Act: Addressing Inequality in Federal Immigration Law”**

**June 3, 2009**

Mr. Chairman, Senator Sessions and Members of the Committee:

My name is Christopher Nugent. I am a Senior Counsel with Holland & Knight LLP and Co-Chair the Rights of Immigrants Committee of the American Bar Association's Section of Individual Rights and Responsibilities. I appear today at the request of H. Thomas Wells Jr., President of the American Bar Association (ABA). On behalf of the ABA and its over 400,000 members, I would like to thank you for this opportunity to express our strong support for the Uniting American Families Act.

## **Introduction**

As the national voice of the legal profession, the ABA has a strong interest in ensuring that our immigration laws are fair and effective, as well as in supporting efforts to combat legal discrimination on the basis of race, gender, ethnicity, religion, nationality and sexual orientation.

In the area of immigration, the ABA has adopted numerous policy recommendations relating to the administration of our system of legal immigration. Central among these recommendations is the principle that the basis upon which foreign nationals may seek lawful permanent resident status should be humane and equitable, and should reflect the historic emphasis on both family reunification and the economic and cultural interests of the United States.

The ABA also has adopted numerous policy recommendations that oppose discrimination based upon sexual orientation and recognize the importance of providing committed same-sex couples and their families with basic legal protections to help those families stay together. For example, the ABA has supported enactment of laws that prohibit discrimination on the basis of sexual orientation in employment, housing and public accommodations, adoption, and child custody and visitation. These policies reflect the ABA's determination that sexual orientation is not, by itself, a legitimate basis for discrimination, particularly when the basic needs of families headed by same-sex couples are concerned.

In February of this year, the American Bar Association adopted a policy that supports the enactment of legislation to enable a United States citizen or lawful permanent resident who: (1) shares a committed, intimate relationship with another adult individual of the same-sex; (2) is not married to or in any other legally-recognized partnership with anyone other than that individual; and (3) is unable to enter into a marriage with that other individual that is cognizable under the Immigration and Nationality Act, to sponsor that individual for permanent residence in the United States. The Uniting American Families Act accomplishes this goal, while retaining and strengthening important protections against potential fraud and abuse, and we urge that Congress enact this legislation as soon as possible.

## **Background**

Family unification is an express and central goal of immigration policy in the United States and has been for more than fifty years. Currently, however, this principle does not protect the families U.S. citizens and permanent residents form with same-sex partners who are foreign nationals. U.S. policy allows foreign spouses and fiancé(e)s to immigrate and live with their U.S.

partners. But it does not allow U.S. citizens and permanent residents to sponsor their same-sex partners for residence in the U.S. As a result, thousands of lesbian and gay bi-national couples and their children are kept apart, driven abroad, or forced to live in fear of being separated.

This policy damages not only those families, but U.S. society generally. Data from the 2000 U.S. Census reported 35,820 same-sex bi-national couples live together in the U.S. Because current law and policy prevents overseas same-sex partners from immigrating to the U.S., many of these bi-national couples are forced to leave this country, depriving our nation of the economic, cultural, social and other contributions these individuals could make here.

### *Exclusion under United States Law*

Most Americans may take it for granted that if they fall in love with a foreigner, they will be able to maintain their relationship and live together in the United States. American citizens and lawful permanent residents in most circumstances are allowed to sponsor a family member for residency, subject to established rules and procedures that filter out engagements and marriages that are not *bona fide*. However, the definition of “family member” in immigration law currently does not include a same-sex permanent partner of a U.S. citizen or lawful permanent resident. Additionally, the federal Defense of Marriage Act, enacted in 1996, defines marriage for all federal purposes as the union of one man and one woman.<sup>1</sup> Accordingly, American citizens and lawful permanent residents are denied the ability to sponsor their same-sex partners for residency in the U.S.—even if they have been together for decades, even if their relationship is incontrovertible and public, even if they have married or formalized their partnership in a place where that is possible—as can a member of a different-sex couple. Countless gay and lesbian Americans and their children suffer prolonged or even permanent separation because the law does not recognize their relationship for immigration purposes.

Until 1991, gay and lesbian foreigners were excludable from the U.S. solely on the basis of their sexual orientation. While that *per se* exclusion has been repealed, same-sex bi-national couples still face substantial discrimination because a U.S. citizen or lawful permanent resident cannot sponsor his or her same-sex partner for residency in the U.S. This inability of same-sex partners to access immigration status on an equal basis with that available to different-sex spouses and other family members is contrary to the ABA’s longstanding opposition to discrimination based upon sexual orientation.

While Connecticut, Iowa, Massachusetts, Belgium, the Netherlands, Canada, Spain and South Africa now permit same-sex couples to marry,<sup>2</sup> and several additional jurisdictions recognize civil unions or domestic partnerships, couples legally joined in these jurisdictions are not

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<sup>1</sup> Because the federal Defense of Marriage Act (DOMA), Pub. L. No. 104-199, provides that marriage is only the union of one man and one woman for all federal purposes, it makes clear that, even if a marriage between two people of the same sex is valid under the law of a state or foreign country in which the marriage occurs, it will not be considered valid for purposes of federal law, including immigration law.

<sup>2</sup> In addition, in May 2009 the governor of Maine signed a bill approving gay marriage, but the law will not take effect until September 2009. Also in May 2009 the District of Columbia City Council voted to recognize same-sex marriages performed in other states that approve them, but Congress must approve the measure.

recognized as spouses for purposes of U.S. immigration law.<sup>3</sup> In fact, legally marrying in another country may actually impede a same-sex couple's ability to remain together in the United States, even when one of the spouses is an American citizen. Since one requirement for obtaining a non-immigrant visa (such as a student or tourist visa) is a demonstrable lack of intent to remain permanently in the United States, any evidence of a relationship as a permanent partner of a United States citizen or permanent resident—including a marriage or civil union or other legal partnership—can be and has been used to deny a non-citizen partner's entry into or continued stay in the United States.<sup>4</sup> Same-sex partners therefore are ineligible to access immigration opportunities that are routinely extended to fiancés and married spouses, regardless of the depth of their love and the permanency of their commitment to one another.

The Committee today will no doubt hear first-hand accounts of the adverse consequences the current law has on U.S. citizens, permanent residents and their children. Many sad stories have been documented of a U.S. citizen reluctantly moving abroad when a longtime partner's visa expires. Others are forced to live apart for months or years at a time, or live together in the U.S. under constant fear of deportation.<sup>5</sup> Non-resident partners who could be sponsored for U.S. residency, offer their job skills to U.S. employers, become taxpayers, and contribute to society—as non-resident partners in different-sex relationships are able to do—are excluded from these opportunities simply because their relationship is between individuals of the same-sex.

### **Impact on Current Law and Protections from Abuse**

The Uniting American Families Act would not repeal or affect the Defense of Marriage Act in any way. Rather, the Act simply seeks to provide a mechanism by which same-sex permanent partners of U.S. citizens and lawful permanent residents have access to immigration status on an equivalent basis to married different-sex couples.

The Act also would not limit or affect the government's ability to prohibit fraud and abuse in the immigration context. Specifically, the Act would not prevent the government from requiring that unmarried partners meet the stringent eligibility criteria that are imposed upon spouses and fiancés (for example, that neither member of the couple is married to anyone other than the other member of the couple).

Moreover, same-sex couples would be subject to exactly the same documentation criteria that are imposed upon different-sex spouses, including being subject to the requirement that the parties demonstrate that the relationship is bona fide through documents like a joint lease or mortgage, joint bank account, family photos, and the like. The petitioning American partner also would be required to sign an Affidavit of Support, a legally binding contract that would obligate him or her to financially support the beneficiary for ten years.

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<sup>3</sup> As noted above, the federal DOMA makes clear that marriages between two people of the same sex are not considered valid for purposes of federal law, including immigration law.

<sup>4</sup> See "Important Information for Binational couples contemplating same-sex marriage in Canada," Lesbian and Gay Immigration Rights Task Force Q&A Paper (June 18, 2003).

<sup>5</sup> See HUMAN RIGHTS WATCH et al., *supra*; Joe Dignan, *Going to Germany for Love*, GAY CITY NEWS, Jan. 1-7, 2004, at [http://www.gaycitynews.com/gcn\\_301/goingtogermany.html](http://www.gaycitynews.com/gcn_301/goingtogermany.html).

In addition, the current penalties—five years imprisonment and a \$250,000 fine—for marriage fraud in the INA and the U.S. Code would apply with equal force to same-sex couples. For these reasons, the Act would not increase the opportunity for marriage fraud.

### **The Law in Other Countries**

In maintaining the current immigration restrictions that discriminate against same-sex couples, the United States' policy is in direct contradiction with many of our closest allies.

At least nineteen countries recognize same-sex couples for immigration purposes, affording rights that are the same as or similar to those afforded to different-sex couples. They are Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. Many jurisdictions have granted same-sex couples immigration rights even without establishing a comprehensive partnership policy, let alone the right to marry.<sup>6</sup>

### **Conclusion**

Central to this nation's long history of immigration law and policy is ensuring that Americans and their loved ones are able to stay together in the U.S. The current failure to recognize same-sex permanent partnerships for immigration purposes is cruel and unnecessary, and critical protections should be available to help same-sex partners maintain their commitment to one another on an equal basis with different-sex spouses.

Thank you, again, for inviting the ABA to convey its support for the Uniting American Families Act. The American Bar Association stands ready to work with the Committee towards ensuring enactment of this or similar legislation during the 111<sup>th</sup> Congress.

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<sup>6</sup> See HUMAN RIGHTS WATCH et al., Appendix B.