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20 UNITED STATES DISTRICT COURT

21 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

22 CHARLENE NGUON, et al.,

23 Plaintiffs,

24 v.

25 BEN WOLF, et al.,

26 Defendants.

CASE NO. SACV-05-868 JVS (MLGx)

**PLAINTIFFS' BRIEF RE: FEDERAL
CONSTITUTIONAL PRIVACY
RIGHTS**

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1 The United States Supreme Court has long recognized that the federal
2 constitutional right to privacy not only protects an individual's right to bodily
3 autonomy but also the right to control the nature and extent of highly personal
4 information released about that individual. *Whalen v. Roe*, 429 U.S. 589, 599-600
5 (1977). This right to informational privacy restricts the government's ability to
6 disclose information about an individual's personal matters, especially those
7 matters that are protected by the federal Constitution from unwarranted
8 government intrusion, such as contraception, abortion, marriage, family life, and
9 sexual associations. *Thorne v. El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983); *see*
10 *also Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Publicly revealing
11 information about sexuality exposes an aspect of our lives that we regard as highly
12 personal and private.").¹

13 Accordingly, courts have repeatedly held that the federal Constitution
14 prohibits government officials from disclosing information about a person's gay,
15 lesbian, or bisexual orientation except under limited circumstances. *See, e.g.*,
16 *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 n. 4 (3d Cir. 2000) (holding
17 that information about one's sexual orientation is "intrinsically private");
18 *Hirschfeld v. Stone*, 193 F.R.D. 175, 186 (S.D.N.Y. 2000) (enjoining disclosure of
19 "Fitness Report" that included information about a prisoner being bisexual because
20 "[c]ourts recognize a privacy interest in sexual orientation and preference.");
21 *Johnson v. Riggs*, 2005 WL 2249874, n. 7, *12 (E.D. Wis. Sept. 15, 2005) (holding
22 that prison guard's alleged disclosure of prisoner's same-sex conduct with another
23 inmate stated claim for violation of constitutional right to privacy).² At a

24
25 ¹ *See also Eastwood v. Dept. of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to
26 privacy "is implicated when an individual is forced to disclose information
27 regarding personal sexual matters"); *Doe v. Blue Cross*, 794 F. Supp. 72, 73
(D.R.I. 1992) ("Homosexual plaintiffs have been permitted to litigate their
cases pseudonymously to protect their privacy and to shield them from social
stigmatization.").

28 ² In its 2003 decision striking down Texas's statute criminalizing same-sex
sodomy, the Supreme Court resolved any lingering doubt about whether gay

1 minimum, prior to disclosing information about an individual's sexual orientation,
2 the government must prove that "its use of the information would advance a
3 legitimate state interest and that its actions are *narrowly tailored* to meet the
4 legitimate interest." *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (in the
5 context of Social Security numbers) (emphasis added); *see also Sterling*, 232 F.3d
6 at 195-96 (in the context of sexual orientation, holding that the government's
7 interest must be "genuine, legitimate, and *compelling*") (emphasis added).

8 *Sterling v. Borough of Minersville, supra*, is particularly instructive. In
9 *Sterling*, a police officer discovered two male teenagers drinking alcohol in a
10 parked car. 232 F.3d at 192-93. The officer's search of the car uncovered two
11 condoms. *Id.* at 192. At the police station, the officer warned one of the teenagers,
12 Marcus Wayman, that if Wayman did not inform his grandfather about his gay
13 sexual orientation, the officer would take it upon himself to disclose this
14 information. *Id.* at 193. Based on the officer's threat to disclose his sexual
15 orientation, Wayman confided to his friend that he would commit suicide – which
16 he did once he was released from custody. *Id.* Wayman's mother subsequently
17 sued the officer for violating the teen's federal constitutional right to privacy. *Id.*

18 The Third Circuit upheld the lower court's denial of qualified immunity.
19 Although the Court recognized that the Supreme Court had not at that time – since
20 this was pre-*Lawrence v. Texas* – definitively extended the right to privacy to one's
21 sexual orientation, it "readily conclude[d] that Wayman's sexual orientation was an
22 intimate aspect of his personality entitled to privacy protection under *Whalen [v.*
23 *Roe]*." *Id.* at 196. The Court further held that because the "confidential and

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25 conduct was within the constitutionally protected zone of privacy. *Lawrence v.*
26 *Texas*, 539 U.S. 558, 578 (2003) (holding that same-sex conduct is within "the
27 realm of personal liberty which the government may not enter.") Thus, the sole
28 case that the Plaintiffs are aware of that held that an individual did not have a
right to keep his sexual orientation private was not good law during the school
year 2004-2005, as that decision was premised on *Bowers v. Hardwick*, which
was overturned by *Lawrence*. *See Walls v. City of Petersburg*, 895 F.2d 188,
194 (4th Cir. 1990) (holding individual did not have the right to keep gay
conduct private because *Bowers* was "controlling").

1 private nature of the information was obvious, and because the right of privacy is
2 well-settled,” the defendants were not entitled to qualified immunity even though
3 the “very action in question had not previously been held to be unlawful.” *Id.* at
4 197-98.

5 *Sterling* and the above cases make clear that the federal Constitution protects
6 against the involuntary disclosure of an individual’s sexual orientation. Indeed,
7 courts have long recognized that an individual’s privacy interest in her sexual
8 orientation is particularly compelling because of the undeniable stigma attached to
9 homosexuality. It is overwhelmingly clear that “homosexuals have historically
10 been the object of pernicious and sustained hostility.” *Watkins v. United States*
11 *Army*, 875 F.2d 699, 724 (9th Cir. 2004) (Norris, J., concurring). Gay individuals
12 have falsely been stereotyped as pedophiles and security risks, and been
13 “wrongfully accused of having impaired judgment, stability, reliability and general
14 social and vocational capabilities.” *Snetsinger v. Montana Univ. Sys.*, 325 Mont.
15 148, 161-165 (2004) (describing the widespread societal discrimination against
16 gays and lesbians). Gay persons have also historically been the target of
17 workplace discrimination and hate or bias-related crimes. *Id.* at 163.³ Yet only 16
18 states currently prohibit employers from discriminating on the basis of sexual
19 orientation, and only 21 states address hate crimes against gays and lesbians.⁴

20 The risk of discrimination and violence against youth on the basis of sexual
21 orientation is no less great. It is an unfortunate reality that lesbian, gay, bisexual,
22 and transgender (“LGBT”) youth commonly experience parental rejection because
23 of their sexual orientation.⁵ Indeed, studies have shown that approximately one-

24 ³ See also Federal Bureau of Investigation, *Hate Crime Statistics 2004*, Table 1
25 (attached as Ex. 1 to the Declaration of Christine P. Sun (“Sun Decl.”) ISO
26 Plaintiffs’ Brief Re: Federal Constitutional Privacy Rights).

27 ⁴ See Lambda Legal, *Summary of States Which Prohibit Discrimination Based on*
28 *Sexual Orientation* (2005) (Sun Decl., Ex. 2); see also Human Rights
Campaign, *Statewide Hate Crimes Laws* (2005) (Sun Decl., Ex. 3).

⁵ See Wardenski, J., *A Minor Exception?: The Impact of Lawrence v. Texas on*
LGBT Youth, 95 J. Crim. L. & Criminology 1363, 1377 (2005).

1 third of LGBT youth are victims of physical violence by a family member after the
2 teen “comes out” or their sexual orientation is disclosed.⁶ A recent Child Welfare
3 League of America study found that a high proportion of LGBT youth in state-run
4 foster care facilities leave home or are ejected from their homes as a result of
5 conflict related to their sexual orientation or gender identity.⁷ Further, the rates of
6 suicide for gay and lesbian youth, ranging from 20 to 42 percent, are consistently
7 found to be greater than among the general population of adolescents.⁸

8 Here, the Defendants have never contested that Charlene had a legally
9 protected privacy interest with respect to information concerning her sexual
10 orientation.⁹ Instead, the Defendants claimed that Wolf did not invade Charlene’s
11 privacy interest because he purportedly did not “know” her sexual orientation.¹⁰

13 ⁶ *Id.* (noting that many LGBT teenagers are kicked out of their homes because of
14 parental conflicts about their sexual orientation); *see also Chambers v. Babbitt*,
15 145 F. Supp. 2d 1068, 1073 (D. Minn. 2001) (recognizing that teenagers
identified as gay face the “added pressures of potential alienation from friends,
family, and community, and the potential for ridicule or even violence.”).

16 ⁷ Marksamer, J., Wilber, S. & Ryan, C., *CWLA Best Practice Guidelines:
17 Serving LGBT Youth in Out-of-Home Care*, at p. 4 (Child Welfare League of
America, Inc.) (2006) (Sun Decl., Ex. 4); *see also Wardenski, J., supra*, at 1376.

18 ⁸ Huwiler, S. & Remafedi, G., *Adolescent Homosexuality*, 33 Rev. Juridica U.
19 Inter. P.R. 151, 163-64 (1999); Nappen, L., *Why Segregated Schools For Gay
Students May Pass A “Separate But Equal” Analysis But Fail Other Issues and
20 Concerns*, 12 Wm. & Mary J. Women & Law. 101, 116 (2005) (noting that
LGBT youth are three times more likely to attempt suicide than other youth).

21 ⁹ Opening Brief on Motion for Summary Judgment at 16:20-18:6 (stating that
22 Wolf knew that “it is a violation of school policy to disclose one’s sexual
orientation.”). Further, although Defendants’ counsel argued that the individual
23 school board member defendants were not aware of the equal protection and
24 privacy violations against Charlene prior to the filing of the September 7, 2005
lawsuit, the minutes for the school board’s meeting on September 6, 2005 show
25 that the board members were aware of, and rejected, Charlene’s pre-lawsuit
complaint to Superintendent Schwalm. *See* Sept. 6, 2005 Garden Grove
Unified School District Board of Education Minutes at page 10 (attached as Ex.
5 to Sun Decl.).

26 ¹⁰ In addition to Wolf’s descriptions of Charlene’s same-sex conduct, Wolf also
27 told Charlene’s mother that she was “gay.” S.J. Oppo. at 10: 11-18. In any
28 event, the Defendants’ strained attempts to distinguish between same-sex
conduct and sexual orientation is a “distinction without a difference.” *See
Christian Legal Society v. Kane*, 2006 WL 997217, *7, n. 2 (N.D. Cal. May 19,
2006) (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J.,
concurring)).

1 Defendants also admitted that Wolf had no reason to disclose the gender of the
2 other student, as Charlene was allegedly not punished for same-sex conduct, and
3 that he had no idea whether Charlene’s family knew of her relationship with
4 another female student. Nevertheless, the Defendants claim that Wolf’s gratuitous
5 and repeated disclosures should be excused as “common communication style.”¹¹

6 The Court should reject Principal Wolf’s self-professed ignorance of
7 Charlene’s sexual orientation and of the effect of his disclosures. Not only is the
8 law clear that the constitutional right to privacy restricts the disclosure of an
9 individual’s sexual orientation, a high school principal entrusted with the safety
10 and well-being of his students does, or should, know that LGBT teenagers face the
11 risk of serious – and sometimes violent – ramifications at home once their sexual
12 orientation is disclosed. School officials should not be permitted to cavalierly
13 subject students to those risks out of supposed conversational habits.

14 In conclusion, the Plaintiffs respectfully request that the Court rule that if
15 Wolf disclosed Charlene’s sexual orientation to her family without her permission,
16 and if Charlene had a reasonable expectation that her sexual orientation would
17 remain private vis-à-vis her parents (both of which are fact questions to be tried),
18 then Wolf violated Charlene’s right to privacy under the federal Constitution.¹²
19 Even if the Court finds that the Defendants are entitled to qualified immunity or
20 discretionary immunity, those immunities apply only to the Plaintiffs’ claims for
21 damages, and not to claims for injunctive and declaratory relief against policies
22 and practices that permit the disclosures made by Wolf.¹³

23 ¹¹ Defendants’ Opening Brief on Motion for Summary Judgment at 6:4.
24 ¹² SJ Oppo. at 10:2 – 11:16. Of course, the Plaintiffs also controvert the
25 Defendants’ contention that Charlene was engaged in conduct that was
26 similarly punished when engaged in by straight couples, as well as Defendants’
27 exaggerated characterization of the “cold hands” affection and baseless claim
28 ¶¶ 14 – 63; Plaintiffs’ Opening Brief and Reply In Support of Motion In Limine
No. 2 Re: The Phrase “Doggie-Style.”
¹³ See, e.g., Complaint (filed Sept. 7, 2005) ¶¶ 35, 42, 49, 91-96.

1 Dated: October 16, 2006

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RESPECTFULLY SUBMITTED,
ACLU OF SOUTHERN CALIFORNIA

By 
CHRISTINE P. SUN
Attorneys for Plaintiffs

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, CA 92626-1925.

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PLAINTIFFS' BRIEF RE: FEDERAL CONSTITUTIONAL PRIVACY RIGHTS

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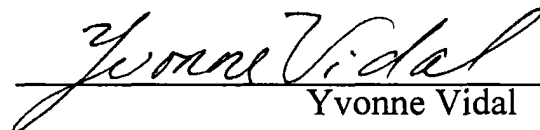
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 16, 2006**, at Costa Mesa, California.



Yvonne Vidal