THE OCEAN GROVE BOARDWALK PAVILION: A PUBLIC ACCOMMODATION?

NEW JERSEY FINDS A LESBIAN COUPLE'S COMPLAINT OF DISCRIMINATION BY A RELIGIOUS ORGANIZATION IS SUPPORTED BY PROBABLE CAUSE:

Bernstein v. Ocean Grove Camp Meeting Association (December 29, 2008).[1]

By David M. Estes[2]

I. Introduction

Justice Holmes is often attributed for remarking "the right to swing your arm ends where the other man's nose begins." The simplicity of this maxim belies the difficulty of balancing competing rights. Only through centuries of trial and error has common law jurisprudence reached equilibrium between these overlapping rights. However, because of our society's dynamic norms, this equilibrium requires constant recalibration. This process of calibrating the scope of overlapping rights can be observed in the state legal system, Justice Brandeis' laboratories of democracy.

Today, our society's norms with respect to gay marriage are in transition.[3] As more states legalize gay marriage and same-sex civil unions, a variety of rights and obligations must be adjusted.[4] *Bernstein v. Ocean Grove Camp Meeting Association* serves as a microscope to examine one state-laboratory in the process of recalibrating the rights and obligations between conflicted segments of our society. In *Bernstein* two

[1] Bernstein v. Ocean Grove Camp Meeting Ass'n, DCR Docket No. PN34XB-03008 (Division of Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf.

[2] Associate Editor, New Developments, Rutgers Journal of Law and Religion; *Juris Doctorate* Candidate May 2011, Rutgers University School of Law – Camden; http://www.linkedin.com/in/davidmichaelestes.

[3] In 2003, Massachusetts was the first state to legalize same-sex marriage. Since 2003, five states have followed suit, while twenty-nine states have amended their constitutions to ban same-sex marriage. The Pew Forum on Religion & Public Life, *State Policies on Same-Sex Marriage*, July 9, 2009, *available at* http://pewforum.org/docs/?DocID=421; *see also* The Pew Forum on Religion & Public Life, *Majority Continues To Support Civil Union*, Oct. 9, 2009, *available at* http://pewforum.org/docs/?DocID=481 (report surveying national views on same-sex marriage, civil unions, and discrimination).

constitutional principles are in tension. On one side of the scale, the First Amendment guarantees of free speech[5] and the free exercise of religion.[6] On the other, New Jersey's Laws Against Discrimination proscribe discrimination, in the spirit of the Fourteenth Amendment's equal protection guarantee. In *Bernstein*, New Jersey's Division of Civil Rights[7] held that a discrimination complaint, filed under New Jersey's Law Against Discrimination ("LAD"),[8] was supported by probable cause[9] when a religious organization denied a lesbian couple access to its property based on the organization's religious beliefs, which oppose same-sex marriage or civil union.[10]

This article will (1) summarize the factual and procedural background of *Bernstein*, (2) examine the Division of Civil Rights' analysis in support of a finding of probable cause, and (3) provide religious entities and their attorneys with guidelines on what type of activities may result in liability under LAD, despite an organization's religious identity and sincerely held religious beliefs.

II. Statement of the Case & Procedural History

A. Two Complaints for Discrimination on the Basis of Sexual Orientation

[4] *See, e.g.*, Kareem Fahim, *In Civil Unions, News Challenges Over Benefits*, N.Y. TIMES, Aug. 1, 2007, *available at* http://www.nytimes.com/2007/08/01/nyregion/01civil.html.
[5] U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech").
[6] U.S. CONST. amend. I. ("Congress shall make no law . . . prohibiting the free exercise [of religion]").
[7] The Division of Civil Rights ("DCR") is part of the New Jersey Office of the Attorney General and is an administrative body created to investigate allegations of discrimination and enforce New Jersey's Laws Against Discrimination. *N.J.S.A.* 10:5-6 (providing broad "power[s] to prevent and eliminate discrimination"); *see N.J.S.A.* 13:4; http://www.nj.gov/oag/dcr/index.html.
[8] *N.J.S.A.* 10:5-1, *et seq*.
[9] A DCR finding of probable cause is not a final adjudication on the merits, but a preliminary determination of whether a civil rights complaint is supported by sufficient evidence under the relevant legal standards to support a colorable claim. Bernstein, DCR Docket No. PN34XB-03008 at 7; *see also* Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, No. 07-3802, 2007 WL 3349787, *4 (D.N.J. Nov. 7, 2007) (detailing DCR procedure for a LAD complaint).
[10] Bernstein, DCR Docket No. PN34XB-03008 at 5.

The issue before Division of Civil Rights ("DCR") in *Bernstein* was whether a lesbian couple's rights, under New Jersey's Law Against Discrimination ("LAD"), were violated when Ocean Grove Camp Meeting Association ("OGCM") denied access to its boardwalk pavilion for a civil union ceremony because of its religious beliefs.[11]

At the crux of this dispute is a pavilion located on the boardwalk in Ocean Grove, New Jersey. The pavilion is owned by OGCM.[12] OGCM is a non-profit Christian organization formed in 1869 to provide a seaside summer retreat for the spiritual renewal of Christians.[13] OGCM owns all the land in Ocean Grove,[14] but leases most of it to private homeowners and businesses.[15] However, OGCM retains control of several facilities, parks, the beach, the boardwalk, and the pavilion at the center of this controversy.[16] Like most activity along the New Jersey shore, OGCM's religious program and use of its other facilities peak during the summer tourist season.[17] During the summer, the pavilion is "used for a variety of events, including worship services, bible school programs, gospel music programs, and a summer band concert series."[18] Additionally, OCGM allows the pavilion to be rented by the public for a fee, generally for weddings or memorial services.[19] When renting the pavilion for weddings, OGCM did not distinguish between Christian and non-Christian or even secular wedding ceremonies.[20] When the pavilion is not in use by OGCM or rented for an event, OGCM

[11] *Id.* at 1.
[12] Bernstein, DCR Docket No. PN34XB-03008 at 2; *see* http://www.ogcma.org (Respondent's website).
[13] Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, Nos. 07-4253, 07-4543, 2009 WL 2048914, at *1 (3d Cir. July 15, 2009).
[14] Bernstein, DCR Docket No. PN34XB-03008 at 2.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 3.
[18] Ocean Grove Camp Meeting Ass'n, 2009 WL 2048914, at *1.
[19] Bernstein, DCR Docket No. PN34XB-03008 at 2-3.
[20] Bernstein, DCR Docket No. PN34XB-03008 at 3.

allows the general public to use the pavilion as a shelter from the weather and a place to sit.[21]

During the mid-1990s, gay and lesbian couples began moving into Ocean Grove; so, by the mid-2000s approximately one-fourth of Ocean Grove's residents were same-sex couples.[22] By all accounts, Ocean Grove's Methodist and gay communities shared a peaceful coexistence.[23] On February 19, 2007 New Jersey's Civil Union Act took effect,[24] legalizing civil unions and purporting to grant gay and lesbian partners who enter into a civil union the same rights and obligations extended by New Jersey law to partners in a heterosexual marriage. Additionally, the Act expanded the scope of LAD's prohibitions on public accommodation discrimination to include discrimination on the basis of "civil union" status.[25]

Approximately two weeks after the Civil Union Act took effect, Harriet Bernstein and Luisa Paster ("Complainants"), lesbian partners residing in Ocean Grove, requested permission from OGCM to rent its seaside pavilion for a civil union ceremony.[26] OGCM's president, Mr. Rassmussen, denied the Complainants' request, explaining that OGCM's facilities could not be used for purposes that conflict with the religious beliefs of the organization, as defined by the United Methodist Church.[27]

[21] Bernstein, DCR Docket No. PN34XB-03008 at 3-4.
[22] Marc R. Poirer, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 52 (Fall 2008).
[23] *Id.*; *see also* Jill P. Capuzzo, *Civil Union Dispute Pits Methodist Retreat Against Gays Who Aided in Its Rebirth*, N.Y. TIMES, Sept. 3, 2007, *available at* http://www.nytimes.com/2007/09/03/nyregion/03ocean.html ("The Methodists' sway over the community remains significant. . . . But since the end of blue laws, [Ocean Grove] has seen a commercial rebirth, driven largely by gay-owned business. The two constituencies have coexisted peaceably . . .").
[24] *N.J.S.A.* 37:1-30, *et seq.*
[25] *Id.*
[26] Bernstein, DCR Docket No. PN34XB-03008 at 5.
[27] *Id.* (" . . . United Methodist Church policy recognizes marriage only in terms of a covenant relationship between one man and one woman, and provides that civil union ceremonies shall not be conducted . . . in our churches") (internal quotations omitted).

Shortly thereafter, around April 1, 2008, OGCM discontinued all future rentals of the pavilion by the public for weddings and other events.[28] Within a day or two of this policy change, a second Ocean Grove lesbian couple, Janice Moore and Emily Sonnessa, submitted another application to rent OGCM's pavilion for a civil union ceremony.[29] Once again, OGCM rejected the application on the basis of religious beliefs.[30]

Subsequently, both Bernstein/Paster and Moore/Sonnessa filed complaints with the DCR, respectively on June 19, 2007 and July 7, 2007.[31] These two complaints were essentially identical; each couple contend that OGCM violated the LAD's prohibition on public accommodation discrimination on the basis of sexual orientation or civil union status when OGCM denied access to its pavilion for a civil union ceremony after it had made the same property available to the public for heterosexual wedding ceremonies.[32]

One of the goals of the LAD is to "eradicate the cancer of discrimination,"[33] including discrimination in places of public accommodation. In relevant part, LAD provides,

> All persons shall have the opportunity . . . [to] obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation . . .[34]

Further, LAD prohibits a manager or employee,

> . . . of any place of public accommodation [to] directly or indirectly [] refuse, withhold from or deny to any person any of the accommodations . .

[28] *Id.*
[29] Moore v. Ocean Grove Camp Meeting Ass'n, DCR Docket No. PN34XB-03012 at 1 (Division of Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Moore-v-OGCMA-NPC.pdf.
[30] *Id.* at 3.
[31] Bernstein, DCR Docket No. PN34XB-03008 at 1; Moore, DCR Docket No. PN34XB-03012 at 1.
[32] Bernstein, DCR Docket No. PN34XB-03008 at 1; Moore, DCR Docket No. PN34XB-03012 at 1.
[33] Thomas v. County of Camden, 902 A.2d 327, 332 (App. Div. 2006).
[34] *N.J.S.A.* 10:5-4.

> . to any person on account of the . . . civil union status, domestic partnership status . . . or sexual orientation . . .[35]

In its response to these complaints, OGCM argued that (1) LAD "[does] not apply to religious organizations in connection with the rental of real property,"[36] and alternatively (2) OGCM "[can] not [be] required to permit civil union ceremonies in its Boardwalk Pavilion based on its rights under the First Amendment."[37] Simultaneously, OGCM initiated a collateral challenge in the United States District Court for the District of New Jersey.[38]

B. District Court Rejects OGCM's Collateral Challenge to State Proceedings

On August 13, 2007, OGCM filed suit in District Court, seeking a declaratory judgment exempting *all* OGMC property from LAD prohibitions and enjoining the DCR's ongoing investigation.[39] OGCM argued that its First Amendment rights of free speech, free association, and free exercise were violated by the DCR because the ongoing investigation and subsequent administrative order may compel OGCM to use its property in a manner that conflicts with its religious beliefs.[40]

The DCR responded by filing a motion to abstain, arguing that the District Court must defer to an ongoing state proceeding and emphasizing New Jersey's strong interest to remediate discrimination.[41] The District Court limited the scope of its inquiry to the status of the pavilion and found that there was a substantial question of fact as to whether the pavilion was a place of worship or a place of public accommodation, thus precluding

[35] *N.J.S.A.* 10:5-12(f).
[36] Bernstein, DCR Docket No. PN34XB-03008 at 1-2.
[37] *Id.*
[38] Ocean Grove Camp Meeting Ass'n, 2007 WL 3349787, at *2.
[39] *Id.*
[40] *Id.*
[41] *Id.*

OGCM's request for injunctive relief.[42] Additionally, the District Court held, under the *Younger* abstention doctrine,[43] that the federal court must defer to an ongoing state proceeding; therefore, the District Court granted the DCR's motion to abstain and dismissed the lawsuit.[44] OGCM immediately appealed this ruling to the United States Court of Appeals for the Third Circuit.[45]

C. Division of Civil Rights Issues Finding of Its Investigation

On December 29, 2008, while OGCM's appeal to the Third Circuit was pending, the DCR issued the findings of its investigation of the Bernstein/Paster and Moore/Sonnessa discrimination complaints. The DCR concluded that there was "strong evidence"[46] supporting the Bernstein/Paster complaint and issued a finding of probable cause.[47] By contrast, because OGCM had changed its rental policy for the pavilion days before the Moore/Sonnessa application,[48] the DCR concluded there was no probable cause supporting the Moore/Sonnessa complaint[49] even though the Moore/Sonnessa incident occurred within weeks of the Bernstein/Paster incident. Accordingly, the DCR only forwarded the Bernstein/Paster complaint for an administrative proceeding on the merits.[50]

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[42] Ocean Grove Camp Meeting Ass'n, 2009 WL 2048914, at *2.
[43] *Id.*; *see also* Younger v. Harris, 401 U.S. 37 (1971) (*Younger* Abstention Doctrine).
[44] Ocean Grove Camp Meeting Ass'n, 2009 WL 2048914, at *2.
[45] *Id.*
[46] *Id.* at *12.
[47] The standard for a finding of "probable cause" under LAD is "a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and the matter should proceed to a hearing." Frank v. Ivy Club, 548 A.2d 1142, 1150 (App. Div. 1988), *rev'd on other grounds*, 120 N.J. 73 (1990), *cert. denied*, 498 U.S. 1073 (1991).
[48] Bernstein, DCR Docket No. PN34XB-03008 at 5-6.
[49] Moore, DCR Docket No. PN34XB-03012 at 4.
[50] If the DCR determines, after an investigation, that there is "probable cause" supporting a complaint, then it will forward the case to the Office of Administrative Law for a hearing before an Administrative Law Judge. If the Judge determines that unlawful discrimination has occurred, then the Director of DCR can grant relief by ordering the respondent to take affirmative remedial action. Parties may appeal the

D. Third Circuit Affirms in Part and Remands in Part

On July 15, 2009, the Third Circuit affirmed the District Court's holding regarding the status of the pavilion, and the District Court's deference to New Jersey state proceeding.[51] However, the Third Circuit remanded OGCM's request for a declaratory judgment regarding its right, under the First Amendment, to limit the use of and access to the rest of its property on the basis of its religious beliefs.[52] This remanded proceeding is pending before the District Court.[53]

III. Is the Boardwalk Pavilion a Place of Public Accommodation?

In light of the Third Circuit and District Court's deference to New Jersey's DCR proceeding, the threshold question in balancing the interests and rights of the parties under the First Amendment and New Jersey's antidiscrimination law is whether OGCM's pavilion is a place of public accommodation.

A. The Division of Civil Right's Legal Analysis

The finding of probable cause for the Bernstein/Paster complaint turns on whether the pavilion is construed as a private rental property or a place of public accommodation.[54] In order to justify its finding of probable cause, the DCR had to demonstrate that the pavilion fell within the scope of LAD's definition of "public

Administrative Law Judge's determination to the Superior Court of New Jersey, Appellate Division. Ocean Grove Camp Meeting Ass'n, 2007 WL 3349787, *4.

[51] Ocean Grove Camp Meeting Ass'n, 2009 WL 2048914, at *6.

[52] *Id.*

[53] *Id.*

[54] Ocean Grove Camp Meeting Ass'n, 2007 WL 3349787, at *1 ("At the center of the issue in this case is a . . . pavilion located on Ocean Grove's boardwalk").

accommodation;"[55] and thus OGCM would be subject to LAD's proscription of public accommodation discrimination, despite the organization's religious nature.

In reaching this conclusion, the DCR relied on an "extremely broad"[56] reading of the statutory language, emphasizing that LAD's non-exhaustive list of public accommodations[57] is only "illustrative"[58] and that any exceptions should be construed narrowly.[59] The DCR also relied on *Wazeerud-Din v. Goodwill Home and Mission, Inc.*[60] for the proposition that the standard for determining whether the pavilion is a public

[55] Bernstein, DCR Docket No. PN34XB-03008 at 7.
[56] *Id.*
[57] Under LAD's definition section,

> [a] place of public accommodation" *shall include, but not be limited to*: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; *any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place*, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. *Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution . . .*

N.J.S.A. 10:5-5(*l*) (emphasis added).
[58] Bernstein, DCR Docket No. PN34XB-03008 at 7.
[59] *Id.*
[60] Wazeerud-Din v. Goodwill Home and Mission, Inc., 737 A.2d 683 (App. Div. 1999), *certif. denied*, 163 N.J. 13 (2000) (holding that a "[religious organization's residential addiction program] is not covered by the basic definition of a 'place of public accommodation' under the LAD because it is a religious program").

accommodation is its "uses and functions . . . rather than the [religious] nature of [OGCM]."[61]

Under this broad construction of the statutory language and the *Wazeerud* functional test, the DCR easily found "strong evidence that [OGCM] intentionally [made] the [p]avilion available for public use."[62] In its analysis, the DCR noted that: (1) OGCM did not limit the use of the pavilion to its members, (2) OGCM's summer use for religious and educational purposes was insufficient to conclude the pavilion is exempt as an educational facility or place of worship, (3) OGCM did not prevent the public from using the pavilion as a place to sit or shelter from the weather, and (4) OGCM's 1989 disclosure to the New Jersey Department of Environmental Protection, on an application for Green Acres program,[63] that the pavilion "would be open to all persons on an equal basis"[64] and "was not restricted to religious uses."[65]

B. A Critique of the Division of Civil Right's Legal Analysis

The DCR overestimated the scope of "public accommodation" under LAD. The DCR accurately noted that LAD's definition of public accommodation, compared to other states, is an "extremely broad,"[66] non-exhaustive list.[67] However, the "illustrative"[68] quality of this list is limited by the principle of *ejusdem generis*.[69] Under this maxim of statutory construction, a general term – like "public accommodation" – followed by a list

[61] Bernstein, DCR Docket No. PN34XB-03008 at 7.
[62] *Id.* at 12.
[63] *Id.* at 4-5 (New Jersey's Green Acres program provides a property tax exemption when a party opens its land to the public on an equal basis).
[64] *Id.* at 8.
[65] *Id.* at 8-9.
[66] *Id.* at 7.
[67] *Id.* at 7; *see also* Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000).
[68] Bernstein, DCR Docket No. PN34XB-03008 at 7.
[69] BLACK'S LAW DICTIONARY 236 (3d ed. 2006).

is only illustrative of accommodations of the same kind, class or nature as those in the list.[70]

Under this reasoning, the Appellate Division concluded that religious organizations are not within the scope of the LAD because they are not of the same species of accommodation provided in LAD's broad list.[71] The *Wazeerud* court explained,

> The Legislature could not reasonably have intended coverage under the LAD to extend to accommodations and facilities which are fundamentally dissimilar from the ones enumerated in [the LAD]. Although churches, seminaries, and religious programs are not expressly excluded from the definition of 'place of public accommodation,' the *Legislature clearly did not intend to subject such facilities and activities* to the LAD.[72]

The DCR's analysis fails to reconcile its forceful conclusions, such as "[there is no] blanket exemption covering all types of facilities operated by religious organizations," with the broad exemption laid out in *Wazeerud*, the relevant precedent.[73]

In addition to interpreting the relevant statutory language, the *Wazeerud* court lays out a test to determine when an ambiguous organization may fall within the scope of LAD's public accommodations provision. In contrast to the DCR's "uses and functions" test,[74] the Appellate Division found that the "principal characteristic of public accommodation"[75] is whether the religious organization

[70] *See also* Fraser v. Robin Dee Day Camp, 44 N.J. 480, 486 (1965) (finding that "public accommodation" should be construed to include, "other accommodations, *similar in nature to those enumerated* . . .") (emphasis added); Doe v. Div. of Youth and Family Services, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) ("The list of places of public accommodation . . . has been used . . . as a *benchmark* for determining whether the unlisted entity should be included") (emphasis added).
[71] Wazeerud-Din, 737 A.2d at 686-87.
[72] *Id.* at 687 (emphasis added).
[73] Bernstein, DCR Docket No. PN34XB-03008 at 7.
[74] *Id.* at 8.
[75] Wazeerud-Din, 737 A.2d at 687.

solicited or invited the general public's participation.[76] In *Evans v. Ross*,[77] the Appellate Division propounded a similar standard, finding that an organization may be subject to LAD's prohibition on public accommodation discrimination by inducing patronage through "advertising and other forms of invitation."[78] In a recent opinion, the Appellate Division echoed this test: "[f]or non-public entities, the existence of a *broad* public solicitation has consistently been a principal characteristic of public accommodation."[79] Accordingly, a diligent 'public accommodations' analysis requires a thorough examination of whether OGCM *broadly* invited or solicited the general public to rent its pavilion for weddings and other ceremonies.

Unfortunately, the DCR's finding did not provide sufficient evidence of an affirmative broad invitation to the general public to use or rent its pavilion. For example, if the DCR had thoroughly documented OGCM's attempts to market the pavilion to the general public in order to attract more clients, then the DCR's finding would be supported conclusively. Perhaps the strongest evidence of invitation is OGCM's declaration on its Green Acres application, but standing alone the application hardly constitutes the broad public invitation contemplated by the courts. . Moreover, case law does not provide guidelines for the possibility of an implicit or constructive invitation. So, it is unclear whether OGCM's failure to affirmatively limit access to its pavilion, or its awareness and consent to regular public use of the pavilion as a shelter may constitute a constructive invitation.

[76] *Id.*
[77] Evans v. Ross, 154 A.2d 441, 445 (App. Div. 1959) *certif. denied*, 31 N.J. 292 (1959).
[78] *Id.* at 445; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (finding an organization is a public accommodation under LAD when it solicits the general public through advertising and public promotions).
[79] Thomas, 902 A.2d at 331 (internal quotations omitted) (emphasis added).

To determine the status of the pavilion, the DCR's analysis focused solely on the use and function of that structure, even though it is part of a collection of buildings and properties owned and operated by OGCM. This analytical approach may run afoul of the "integral and symbiotic relationship" approach.[80] In *Frank v. Ivy Club*,[81] the Supreme Court of New Jersey held that an "eating club"[82] was a public accommodation because it shared an "integral and symbiotic relationship"[83] with a university that was a public accommodation. The *Wazeerud* court suggested the converse may also be true: a religious organization's secular component can have such an "integral and symbiotic relationship" with the religious organization that it is not truly "public," and thus not subject to the LAD.[84] Therefore, under the "integral and symbiotic relationship" approach, it could be argued that OGCM's pavilion is not subject to LAD's public accommodation laws because, like the university and eatery in *Frank*, the camp complex and pavilion share a symbiotic relationship and thus the camp's religious exemption can be attributed to the pavilion. Finally, *Wazeerud* also addressed the appropriate equilibrium between a religious organization's First Amendment rights vis-à-vis New Jersey's interest in combating and remediating discrimination. In the context of applying LAD to a religious organization, the Appellate Division concluded that,

> . . . in the absence of a clear expression of legislative intent to extend the coverage of the LAD [to religious organizations, it]

[80] Wazeerud-Din, 737 A.2d at 688, *citing* Frank v. Ivy Club, 120 N.J. 73, 104 (1990), *cert. denied*, 498 U.S. 1073 (1991).
[81] Frank, 120 N.J. at 104.
[82] *Id.* at 105-06, 110-111 ("The [eating club] and Princeton, which is undisputably [sic] subject to LAD, have an integral relationship of mutual benefit. The relationship between the [eating club] and Princeton can be derived . . . [from] . . . the present functional interdependence between the [club] and the University).
[83] *Id.*
[84] Wazeerud-Din, 737 A.2d at 688.

> should be construed to avoid governmental entanglement with religion in order to preserve [LAD's] constitutionality.[85]

Therefore, because of all the foregoing reasons, the DCR probably should have concluded that the pavilion was not a public accommodation and issued a finding of no probable cause.

IV. Recommendation

In light of New Jersey's recognition of same-sex civil unions and likely future of legalizing gay marriage,[86] religious organizations need to recognize that the balance of legal rights and obligations in New Jersey is being recalibrated. *Bernstein* suggests that New Jersey is extending the interpretation of public accommodation to focus on the primary use and function of a discrete facility or program, instead of the religious nature of the organization as a whole.[87] Consequently, religious organizations that currently rent facilities to the public for weddings or other events but would deny access for same-sex ceremonies based on religious beliefs need to reevaluate how they operate their facilities and programs to avoid liability under LAD.

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[85] *Id.*, *citing* Market St. Mission v. Bureau of Rooming & Boarding House Standards, 110 N.J. 335, 341, *appeal dismissed*, 488 U.S. 882 (1988).

[86] David Kocieniewski, *New Jersey Senate Defeats Gay Marriage Bill*, N.Y. TIMES, Jan. 7, 2010, *available at* http://www.nytimes.com/2010/01/08/nyregion/08trenton.html ("supporters of same-sex marriage vowed to focus their efforts on the state's highest court"); Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 7, 2009, *available at* http://www.nytimes.com/2009/04/08/us/08vermont.html (reporting that same-sex marriage has "gained legislative support in recent months" and that there is a "strong possibility" of legalization of same-sex marriage in New Jersey); *see also* Kareem Fahim, *In Civil Unions, New Challenges Over Benefits*, N.Y. TIMES, Aug. 1, 2007, *available at* http://www.nytimes.com/2007/08/01/nyregion/01civil.html.

[87] Memorandum in Support of Motion for Preliminary Injunction at 8-9, Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, No. 07-3802, 2007 WL 3349787 (D.N.J. Nov. 7, 2007) (No. 3:07-cv-03802) (Comparing the Director of DCR's narrow interpretation of the religious organization exemption from LAD, to the previous broader interpretation of the religious organization exemption propounded by former Attorney General Rabner).

First, religious organizations that continue to rent their facilities, but do not want to allow uses that conflict with their religious beliefs, need to actively and explicitly qualify access to the facility. Religious organizations can no longer *passively* allow general access and use of their rental properties under the presumption that they may draw the line when public use conflicts with religious beliefs. Rather, an organization that is renting its facility, or even allowing passive use, needs to provide affirmative notice to potential patrons of any limits on use. For example, the religious organization in *Wazeerud* limited access to its addiction program to only individuals open to Christian beliefs. This notice of limited or qualified access should reduce the likelihood of a religious facility being construed as a public accommodation for the purposes of LADIn addition, religious organizations need to be aware of when their behavior may be construed as an invitation to the general public to use their facility. Advertising or promoting their facility may constitute a public invitation resulting in that facility or program being classified as a public accommodation, and thus subject to LAD's prohibitions against discrimination on the basis of sexual orientation or civil union status.[88] For example, the DCR noted OGCM's promotion of its facilities, including the pavilion, for public use on its website.[89] In particular, *Bernstein* suggests organizations need to carefully monitor their interaction with the government. The DCR's analysis emphasized OGCM's participation in New Jersey's Green Acres program, because OGCM derived a financial benefit from the government and declared its property to be open to the public. Participation in this type of government program increases the probability that a facility will fall within the scope of LAD's public accommodation provision.

[88] Boy Scouts of Am., 530 U.S. at 656.
[89] Brief of Defendant at 6, Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo, No. 07-3802, 2007 WL 3349787 (D.N.J. Nov. 7, 2007) (No. 3:07-CV-3802 JAP-JJH).

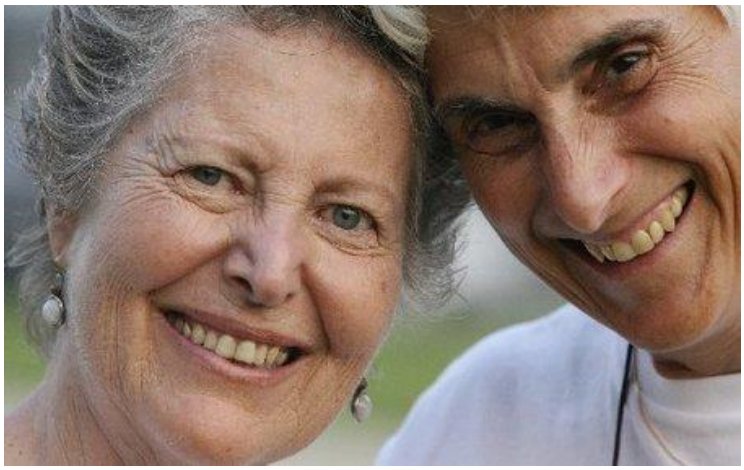
Finally, religious organizations can eliminate liability immediately by closing or severely limiting access to their facility. The effectiveness of this approach is illustrated by the outcome of the Moore/Sonnessa complaint. In contrast to the Bernstein/Paster complaint, the DCR found no probable cause supported in the Moore/Sonnessa complaint simply because OGCM made an internal policy decision to stop renting its facility to the public one or two days before they applied.[90] Thus, organizations that cease all or almost all public renting and carefully document this policy change should avoid future liability under LAD for excluding on the basis of sexual orientation or civil union status.

V. Conclusion

The final outcome of this dispute is probably years away, especially in light of the involvement of legal advocacy groups like the American Civil Liberties Union[91] and the Alliance Defense Fund.[92] Nevertheless, the clear trend in New Jersey is towards a broader enforcement of LAD, especially to remediate discrimination against same-sex couples. Therefore, the leaders of religious organizations and their attorneys need to adjust the use of their facilities to conform to New Jersey's evolving norms by either making them available to the general public, including same-sex couples, or carefully limiting access in conformity with sincerely held religious beliefs.

[90] Moore, DCR Docket No. PN34XB-03012 at 3-4.
[91] http://www.aclu-nj.org/legal/legaldocket/pastervogcma.htm.
[92] http://www.alliancedefensefund.org/news/story.aspx?cid=4206.

The Complainants: Bernstein & Paster (Source: www.nj.com/starledger)



The Ocean Grove Pavilion (Source: www.nytimes.com)

The Respondent: Ocean Grove Camp Meeting (Source: www.ogcma.org