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High court reviews two same-sex marriage cases this week

As the marriage equality debate continues across the nation, on appeal before the U.S. Supreme Court are two cases that have grabbed national headlines: *Hollingsworth v. Perry* and *United States v. Windsor*.

The court will hear oral argument in these two cases on Tuesday and Wednesday, respectively, and will render decisions by the end of the term in mid-June.

Individual states have grappled with whether to recognize or prohibit same-sex marriage, civil unions or other forms of domestic partnership.

Effective June 1, 2011, Illinois allows same- and opposite-sex partners to enter into a civil union. In February 2013, the Illinois Senate passed Senate Bill 10 that would allow same-sex marriage in Illinois, but the House has yet to vote on the bill. If it passes the House, Gov. Patrick J. Quinn is expected to sign the bill into law.

Nine states, in addition to the District of Columbia, permit same-sex marriage: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington.

Six states permit civil unions: Colorado (effective May 1), Delaware, Hawaii, Illinois, New Jersey and Rhode Island. Four states permit other unions such as domestic partnerships: California, Nevada, Oregon and Wisconsin.

On Tuesday, the U.S. Supreme Court will hear oral argument in *Hollingsworth v. Perry*. The substantive issue presented in that case is whether California's Proposition 8, which amended the California Constitution to prohibit same-sex couples from marrying, violates the U.S. Constitution. More than 100 amicus curiae briefs have been filed with the case, with authors ranging from law professors to individual states to organizations. The sheer number of briefs evidences the high level of interest the case has garnered.

In May 2008, the California Supreme Court, in *In re Marriage Cases*, 183 P.3d 384 (2008), applied a strict scrutiny standard in holding that state statutes limiting marriage to opposite-sex couples

violated the California Constitution. Following the ruling, same-sex couples were permitted to marry in California. Later that year, through a ballot proposition known as Proposition 8, the California voters passed a constitutional amendment stating that "only marriage between a man and a woman is valid or recognized in California." Since then, same-sex couples have been unable to marry in California.

In August 2010, the U.S. District Court for the Northern District of California held that Proposition 8 was unconstitutional as it violated the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution. In February 2012, a three-judge panel of the 9th U.S. Circuit Court of Appeals upheld the lower court's ruling, but limited its decision to couples in California.

Proponents of Proposition 8 filed a motion requesting that the 9th Circuit rehear the case en banc, which that court denied.

In December 2012, the U.S. Supreme Court agreed to hear the case and oral arguments are scheduled for Tuesday. As a threshold matter, the high court must first decide whether the proponents of Proposition 8 have standing to bring the suit. If so, the court may then turn to consider the constitutionality of Proposition 8.

The following day, on Wednesday, the U.S. Supreme Court will hear oral argument in *United States v. Windsor*. The issue in that case is whether the Defense of Marriage Act (28 U.S.C. Section 1738C) is unconstitutional.

DOMA was enacted on Sept. 21, 1996. It defines "marriage" as "a legal union between one man and one woman as husband and wife" and defines "spouse" as "a person of the opposite sex who is a husband or a wife." Pursuant to Section 3 of DOMA, the federal government need not recognize same-sex marriages for the purpose of federal laws or programs, including insurance benefits for government employees, Social Security survivors' benefits, immigration and the filing of joint federal tax returns, even if the cou-

ON APPEAL



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ple's home state or country recognizes their marriage.

In *Windsor*, two women were married in Toronto, Canada, in 2007. In 2009, one of the women died, leaving her estate to her widow. Although the marriage was recognized in the women's home state of New York, the widow was required to pay more than \$363,000 in federal estate taxes on her inheritance. It is undisputed that if the federal government would have recognized their marriage, the widow would have paid no taxes. The widow filed a lawsuit and challenged Section 3 of DOMA.

In February 2011, while the suit was pending, President Barack

Obama and Attorney General Eric Holder concluded that Section 3 of DOMA is unconstitutional and declined to enforce the act. Thereafter, the Bipartisan Legal Advisory Group (BLAG) intervened in the lawsuit to defend DOMA. BLAG is a standing body of the U.S. House of Representatives comprised of five members of the House leadership (the speaker; the majority and minority leaders; and the majority and minority whips) which directs the activities of the House Office of General Counsel.

The U.S. District Court for the Southern District of New York found Section 3 of DOMA unconstitutional as applied, in that it violated the widow's rights under the equal protection component of the due process clause of the Fifth Amendment of the U.S. Constitution.

The 2nd Circuit affirmed the lower court's ruling, also holding Section 3 of DOMA unconstitutional. In doing so, it applied a heightened standard of review to claims of discrimination based on sexual orientation.

As in the *Hollingsworth* case, before addressing the merits in *Windsor*, the high court must initially rule upon the issue of standing: Whether BLAG has the authority to defend the suit. If it does, the court can then determine whether DOMA is constitutional.

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