Same-Sex Marriage and the Supreme Court: *United States v. Windsor* and *Hollingsworth v. Perry*

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Summary

Recently, the Supreme Court agreed to weigh in on an issue that has long been a subject of controversy in the United States, namely, what types of restrictions, if any, may the government place on the ability of gay couples to enter legal marriages. The origin of the debate over same-sex marriage can be traced back to 1993, when the Hawaii Supreme Court issued a ruling that appeared likely to lead to recognition of same-sex marriage under the state's constitution. In response, Congress enacted the Defense of Marriage Act (DOMA). Section 3 of DOMA created a new federal definition for the terms "marriage" and "spouse" that includes heterosexual couples only. Thus, any federal law that uses those terms automatically excludes same-sex couples from any rights, benefits, or protections that flow from the statute.

Meanwhile, in the nearly two decades since DOMA was enacted, the state legislatures and courts have become increasingly enmeshed in questions about the extent to which marital rights and benefits can or must be offered to same-sex couples. Currently, nine states and the District of Columbia permit same-sex couples to marry, while the vast majority of the remaining states have statutes or constitutional provisions that bar such marriages. (For a detailed discussion of these state laws, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.) One such provision is California's Proposition 8, which amended the state constitution to prohibit same-sex marriage. Proposition 8 was adopted shortly after the California Supreme Court ruled that the state's ban on same-sex marriage violated the state constitution.

On December 7, 2012, the Supreme Court agreed to hear challenges to two laws that impose restrictions on same-sex marriage. The first case, *United States v. Windsor*, involves questions about the constitutionality of DOMA. The second case, *Hollingsworth v. Perry*, involves a similar challenge to California's Proposition 8. These cases are discussed in detail below.

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Introduction

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Meanwhile, in the nearly two decades since DOMA was enacted, the state legislatures and courts have become increasingly enmeshed in questions about the extent to which marital rights and benefits can or must be offered to same-sex couples. Currently, nine states and the District of Columbia permit same-sex couples to marry, while the vast majority of the remaining states have statutes or constitutional provisions that bar such marriages. (For a detailed discussion of these state laws, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.) One such provision is California's Proposition 8, which amended the state constitution to prohibit same-sex marriage. Proposition 8 was adopted shortly after the California Supreme Court ruled that the state's ban on same-sex marriage violated the state constitution.[5]

On December 7, 2012, the Supreme Court agreed to hear challenges to two laws that impose restrictions on same-sex marriage. The first case, *United States v. Windsor*,[6] involves questions about the constitutionality of DOMA. The second case, *Hollingsworth v. Perry*,[7] involves a similar challenge to California's Proposition 8. In both cases, the plaintiffs allege that the laws at issue violate the equal protection guarantee of the Constitution. Before turning to an analysis of the two cases, which are discussed separately below, this report begins with a brief discussion of equal protection doctrine.

The Constitutional Guarantee of Equal Protection

The Fourteenth Amendment provides, in relevant part, that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."[8] The Fifth Amendment guarantees due

[1] Baehr v. Lewin, 74 Haw. 530 (1993) (holding that a state law that denied marriage licenses to same-sex couples must be strictly scrutinized).

[2] P.L. 104-199.

[3] 28 U.S.C. §1738C.

[4] 1 U.S.C. §7.

[5] In re Marriage Cases, 43 Cal. 4th 757 (2008).

[6] 2012 U.S. LEXIS 9413 (Dec. 7, 2012).

[7] 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

[8] U.S. Const. amend. XIV, §1.

process of law to individuals in their dealings with the federal government,[9] and this due process requirement has been interpreted to incorporate the Fourteenth Amendment's equal protection guarantee.[10]

Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[11] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger, if not compelling, state interest to justify the classification.[12]

Traditionally, the courts have not considered sexual orientation to be a suspect category. In theory, therefore, the government need only advance a rational reason for enacting a statute that treats individuals differently depending on their sexual orientation. However, there have been several Supreme Court rulings that have raised questions about how this standard is applied to classifications involving sexual orientation.

For example, in *Romer v. Evans*, the Court held that Amendment 2 of the Colorado Constitution, which barred localities from enacting civil rights protections on the basis of sexual orientation, violated the equal protection clause.[13] The Court used rational basis review to reach this result. According to the Court, the Colorado amendment violated the guarantee of equal protection because the law was motivated strictly by animus and because there was otherwise no rational basis for enacting such a sweeping restriction on the legal rights of gays and lesbians.

Several years later in *Lawrence v. Texas*, the Court considered an equal protection challenge to a Texas state statute that made it a crime for individuals to engage in homosexual sodomy.[14] Ultimately, the Court based its decision on broader privacy grounds, ruling that the due process privacy guarantee of the Fourteenth Amendment extends to protect private, consensual gay sex.

United States v. Windsor: The Challenge to the Federal Defense of Marriage Act

In *United States v. Windsor*, the Court will consider a constitutional challenge to DOMA brought by Edith Windsor, the surviving spouse of a same-sex couple who married in Canada in 2007 and who appears to have had a valid marriage in New York when her spouse died in 2009. After being denied an estate tax spousal exemption, Windsor sued, claiming that Section 3 of DOMA violates the equal protection clause of the U.S. Constitution. Initially, the Department of Justice (DOJ) defended the constitutionality of DOMA, but several months after Windsor filed suit, the agency announced that it would no longer defend a statute it believed to be unconstitutional. In response, the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives intervened to defend the constitutionality of DOMA.

[9] U.S. Const. amend. V.

[10] Bolling v. Sharpe, 347 U.S. 497 (1954).

[11] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[12] Id.

[13] 517 U.S. 620, 635 (1996).

[14] 539 U.S. 558 (2003).

The district court agreed with Windsor, ruling that Section 3 of DOMA was unconstitutional.[15] In its ruling, the district court relied on rational basis review to declare that DOMA was not rationally related to the asserted governmental interests in maintaining the traditional institution of marriage or promoting responsible parenting. On appeal,[16] the U.S. Court of Appeals for the Second Circuit (Second Circuit) agreed with the district court that DOMA was unconstitutional, but applied intermediate scrutiny, a more rigorous standard of review. The Supreme Court subsequently agreed to review three separate questions in the case: (1) whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection; (2) whether the executive branch's agreement that DOMA is unconstitutional deprives the Court of jurisdiction to decide the case; and (3) whether BLAG has Article III standing to sue.[17] Each of these questions is explored in greater detail below, as is the Second Circuit's analysis of the issues.

Article III Requirements

Of the three questions presented in *Windsor*, the second and third questions, both of which pertain to Article III of the Constitution, raise jurisdictional issues that the Court must resolve before it can consider the merits of the DOMA challenge. Under Article III, the jurisdiction of federal courts is limited to actual "[c]ases" or "[c]ontroversies."[18] The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving plaintiffs who have "a personal stake in the outcome of the controversy."[19]

One aspect of the Article III case-or-controversy requirement is that plaintiffs must demonstrate that they have standing to sue. In general, standing requirements are concerned with who is a proper party to raise a particular issue in the federal courts. Under the Supreme Court's jurisprudence, a plaintiff appearing before an Article III court must show three things in order to meet constitutional standing requirements: (1) he/she has suffered an "injury in fact" that is concrete and particularized (not common to the entire public), and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision.[20]

Does the Court Have Jurisdiction?

As noted above, after Windsor filed suit but before the district court ruled in her favor, DOJ announced that it would no longer defend the constitutionality of DOMA. Nevertheless, DOJ remained active in the litigation by changing its stance to argue that the statute is unconstitutional. After DOJ's position prevailed in the district court, both BLAG and DOJ appealed, but BLAG sought to have DOJ's appeal struck in light of the fact that the United States had succeeded in the lower court. The Second Circuit denied BLAG's motion, noting that the government continues to

[15] Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

[16] Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

[17] United States v. Windsor, 184 L. Ed. 2d 527 (2012).

[18] U.S. Const. art. III, §2, cl. 1.

[19] Baker v. Carr, 369 U.S. 186, 204 (1962).

[20] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

enforce DOMA even though it no longer defends the statute. As a result, the court held that DOJ was a proper party to appeal the district court's ruling.[21]

The Supreme Court agreed to consider whether it has jurisdiction to decide the case given that DOJ already got the result it wanted in the lower courts. The Court has confronted jurisdictional questions of a similar nature on previous occasions, including in *INS v. Chadha*, a case challenging the constitutionality of a law allowing one house of Congress to veto an executive agency's decision to suspend the deportation of certain aliens.[22] As in *Windsor*, the court of appeals, the original plaintiff, and the United States were all in agreement that the statute at issue in *Chadha* was unconstitutional, but the Court did not appear to view this factor as a jurisdictional hurdle. Thus, the issue of whether the Court has jurisdiction to consider the appeal in *Windsor* may turn on the applicability and precedential value of the *Chadha* decision.

If the Court holds that it does not have the authority to hear *Windsor*, then the Second Circuit's ruling would stand, at least for the moment, while the Court considers whether to take up a separate petition for review filed by Windsor herself. If the Court rules that it does have the authority, then it would turn its attention to the question of whether BLAG has standing to defend DOMA.

Does BLAG Have Standing?

The Court will also consider a second jurisdictional issue: whether BLAG has Article III standing in this case.[23] If the Court finds that a case or controversy exists between Windsor and the DOJ, the Court may be able to avoid determining whether BLAG has standing by deciding that an intervenor need not establish an independent basis for standing when a case or controversy already exists. The *Windsor* district court adopted this argument as the required outcome according to Second Circuit precedent.[24] However, if the Court finds that no case or controversy exists between Windsor and DOJ, it may need to determine if BLAG has independent standing so that the Court can reach the merits.

Members of Congress are not exempt from the Article III case or controversy requirements when they seek to participate in litigation.[25] The Supreme Court discussed what kinds of injuries can satisfy the standing requirement for individual Members of Congress in *Raines v. Byrd*.[26] The Court held that a Member must allege either a personal injury, such as the loss of a Member's

[21] Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012).

[22] 462 U.S. 919 (1983).

[23] This issue was briefly addressed by the district court, but was not disputed at the appeals court. Thus, the Court appointed an *amica* to argue that BLAG lacked standing to participate in the suit.

[24] Windsor v. United States, 797 F. Supp. 2d 320, 325 (S.D.N.Y. 2011) ("The Second Circuit does not require intervenors to establish independent Article III standing as long as there is an ongoing case or controversy between the existing parties to this litigation. See *United States Postal Service v. Brennan*, 597 F.2d 188, 190 (2d Cir. 1978).").

[25] Raines v. Byrd, 521 U.S. 811, 820-26 (1997).

[26] Id.

seat, or an institutional injury[27] that is not "abstract and widely dispersed" and amounts to vote nullification.[28]

Additionally, the courts have allowed congressional institutions, such as a full house or committee, to participate in litigation based on institutional injuries suffered by the parties. Most commonly, these cases involve a congressional committee that has been authorized to enforce a committee subpoena in federal court.[29] In these cases, the committees have arguably suffered a concrete and particularized harm because their duly-issued subpoenas have been ignored, which frustrates Congress's constitutionally based right to conduct oversight.[30] It appears that several other courts have authorized the House and/or Senate to intervene as parties to defend the constitutionality of a statute; however, most of these cases do not address the question of congressional standing.[31]

In *Chadha*, the Court stated: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[32] In that case, the challenged statute dealt directly with separation of powers by authorizing the House and Senate, acting alone, to veto specific executive branch decisions.[33] It appears likely that BLAG may rely on this statement from *Chadha* to argue that it satisfies the standing requirements, as it did in its reply brief on its motion to intervene in the district court.[34] There it argued that the facts in *Windsor* regarding DOJ's refusal to defend DOMA were indistinguishable from *Chadha*, and, therefore, the *Chadha* precedent applied, giving BLAG standing. In her brief, the Court-appointed *amica* challenged a broad reading of this statement. *Amica* argued that Congress should have standing to defend a law the executive deems unconstitutional only when the law implicates specific congressional prerogatives. In her estimation, because DOMA does not impact congressional power or the balance of power between the political branches, Congress has no greater stake in it being upheld than any other citizen. Therefore, she argued that BLAG is asserting a widely shared grievance that does not confer standing under current Court precedent.[35]

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[27] *See* Chenoweth v. Clinton, 997 F. Supp. 36, 38-39 (D.D.C. 1998) (holding that personal injury claims are more likely to result in a grant of standing, but mere institutional injury is sufficient under *Raines*), *aff'd*, 181 F.3d 112 (D.C. Cir. 1999).

[28] *See* Raines, 521 U.S. at 826. The Court pointed to *Coleman v. Miller* as an example of an institutional injury rising to the level of vote nullification, which can confer standing for an individual legislator. Coleman v. Miller, 307 U.S. 433 (1939). The legislators in *Coleman* alleged that an improperly cast tie-breaking vote by the Lieutenant Governor for ratification of a constitutional amendment caused their votes to be nullified, because the amendment was ratified even though it should have been defeated. *Id*. at 436-37.

[29] *See, e.g.*, United States v. Am. Telephone & Telegraph Co., 551 F.2d 384, 391 (D.C. Cir. 1976) ("[i]t is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.") [hereinafter AT&T]; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

[30] *Miers*, 558 F. Supp. 2d at 71; U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998).

[31] *See, e.g.*, In re Koerner, 800 F.2d 1358, 1360 (5th Cir. 1986); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986).

[32] INS v. Chadha, 462 U.S. 919, 940 (1983).

[33] Id. at 924-25.

[34] Reply of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Defendant's Response to the Motion to Intervene at 4 Windsor v. United States (No. 10-CV-8435) ("[I]t is clear from *Chadha* that the House indeed does have standing.").

[35] Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction at 8-15 United States v. Windsor (No. 12-307).

If the Court determines that a congressional institution must meet the same rigorous injury-in-fact requirements as other parties, even when attempting to defend a law the executive branch has refused to defend, it may find *amica*'s argument persuasive. However, ultimately, it is unclear whether *Chadha*'s apparent statement about Congress being a proper party to defend these statutes has been impacted by the Court's shifting understanding of legislator standing as articulated by *Raines*, which was decided 14 years after *Chadha*.

The Court may also need to address whether a congressional party must be expressly authorized to intervene in litigation in order to represent the congressional interests at stake and have standing. In the subpoena enforcement context, it seems well settled that a Member or committee must be authorized by a full house resolution in order to establish standing.[36] In *Chadha*, both the House and Senate passed resolutions authorizing the chambers to intervene in the ongoing circuit court proceedings.[37] It is unclear whether these authorizations factored into the Court's conclusion that Congress was the proper party to defend the challenged statute.

Alternatively, outside of the subpoena enforcement context, it appears congressional litigants have been deemed to have standing even without being specifically authorized to participate in litigation. The necessity of this authorization remains unclear, especially given that courts often allow congressional actors to participate in suits without another party questioning their standing or the court directly affirming the bases for their standing.[38]

Before filing a motion to intervene in *Windsor*, BLAG held a vote of its five members. It did not attempt to gain full House approval via resolution. It does not appear as though BLAG had existing specific authorization from the House to represent its interests in court. The House rule creating BLAG delegates authority to "provid[e] legal assistance and representation to the House" to the Office of General Counsel, which works in consultation with the Speaker of the House and BLAG.[39] After the Supreme Court agreed to hear the case and at the start of the 113th Congress, the House formally authorized BLAG to represent its interests in the DOMA litigation.[40] If authorization is required to establish standing, the Court may have to determine if either: (1) the majority vote of BLAG's five Members before intervening represented authorization from the full House to intervene in the suit or (2) if an authorizing House resolution passed a year and a half after BLAG intervened in the suit can satisfy the standing requirement.

Finally, even if BLAG has suffered a cognizable injury and meets any authorization requirement that allows it to represent the House, the Court may also need to determine if the whole Congress

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[36] *See, e.g.*, In re Beef Industry Antitrust Litigation, 589 F.2d 786 (5th Cir. 1979); AT&T, 551 F.2d 384; Miers, 558 F. Supp. 2d 53 (explaining that the House resolution authorizing litigation was "the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines*, *Walker [v. Cheney]*) to the permissible category of an institutional plaintiff asserting an institutional injury (AT&T ...)").; Waxman v. Thompson, No. 04-3467, slip op. at 29 (C.D. Cal. July 24, 2006) ("[L]egislative branch suits to enforce requests for information from the executive branch are justiciable if authorized by one or both Houses of Congress.").

[37] S.Res. 40, 97th Cong., 1st Sess. (1981); H.Res. 49, 97th Cong., 1st Sess. (1981).

[38] *See, e.g.*, In re Koerner, 800 F.2d at 1360; Ameron, Inc., 787 F.2d 875.

[39] House Rule II(8).

[40] H.Res. 5, 113th Cong., 1st Sess. (2013) ("The House authorizes the Bipartisan Legal Advisory Group of the One Hundred Thirteenth Congress ... to act as successor in interest to the Bipartisan Legal Advisory Group of the One Hundred Twelfth Congress with respect to civil actions in which it intervened in the One Hundred Twelfth Congress to defend the constitutionality of section 3 of the Defense of Marriage Act... including in the case of Windsor v. United States... Pursuant to clause 8 of rule II, the Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears, including in Windsor v. United States.").

must participate in this type of suit in order for congressional representatives to have standing. In *Chadha*, both the House and Senate chose to intervene in the suit.[41] *Amica* places great emphasis on the *Chadha* Court's use of the word "Congress," instead of House or Senate, to identify the proper party allowed to intervene.[42] However, the Court did not specifically state that both houses' participation was crucial to its determination of the proper party. The Senate has made no attempt to participate in *Windsor* and has not authorized BLAG to represent its interests. If the Court determines that Congress as a whole, as opposed to the House and Senate as separate institutions, suffered a cognizable injury, the lack of Senate participation could prove fatal to BLAG's ability to establish standing.

Merits

If the Court determines that it has jurisdiction and that BLAG has standing, then the Justices will consider the case on its merits. In evaluating the constitutionality of Section 3 of DOMA, the Court will consider many of the same arguments heard by the court of appeals. As a result, it is useful to examine the Second Circuit's decision in greater detail.

The Second Circuit began its analysis by discussing the applicability of *Baker v. Nelson*,[43] a 1971 summary ruling in which the Court dismissed an appeal from a Minnesota Supreme Court decision holding that there was no Fourteenth Amendment right to same-sex marriage. In its one-sentence ruling, the Court dismissed the Minnesota case "for want of substantial federal question."[44] One preliminary question for the Court, therefore, is whether *Baker* should govern its disposition of *Windsor*.

In *Windsor*, the Second Circuit determined that *Baker* did not compel the court to uphold DOMA. According to the Second Circuit, *Baker* controls only if it shares with *Windsor* "the precise issues presented and necessarily decided by the dismissal" and if there have been no intervening doctrinal developments.[45] The Second Circuit held that the two cases did not involve precisely the same issue, noting that *Baker* involved a state restriction on marriage, while *Windsor* involves a federal restriction. In addition, the court cited the Court's rulings in *Romer*, *Lawrence*, and other equal protection cases as evidence that equal protection doctrine had changed significantly in the years since *Baker* was decided. As a result, the court reasoned, *Baker* was not controlling.

After addressing the precedential value of *Baker*, the Second Circuit next sought to determine what standard of scrutiny should apply to its review of DOMA. As noted above, the court ultimately relied on intermediate scrutiny to find that DOMA was unconstitutional. In doing so, the Second Circuit became the first appellate court in the nation to find that heightened scrutiny applies to classifications based on sexual orientation.

In reaching its conclusion, the Second Circuit determined that classifications based on sexual orientation merit intermediate scrutiny because individuals who are gay meet the traditional criteria for such classifications. These criteria include the following factors: (1) whether the class

[41] *See* Chadha, 462 U.S. at 903 n.5.

[42] Brief for Court Appointed *Amica Curiae*, *supra* note 35, at 15-17.

[43] 409 U.S. 810 (1972).

[44] Id.

[45] Windsor, 699 F.3d at 178-79 (internal quotes omitted).

of individuals has been subject to a history of discrimination; (2) whether the class has a defining characteristic that bears a relationship to its ability to contribute to society; (3) whether the class exhibits obvious, immutable, or distinguishing characteristics that identify them as a discrete group; and (4) whether the class consists of minorities or the politically powerless. The court concluded that individuals who are gay meet all four criteria and thus are entitled to heightened scrutiny. According to the court:

> A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.[46]

Once it found that intermediate scrutiny applied, the court evaluated whether DOMA could pass muster under this test, which requires the legislative classification in question to be substantially related to an important governmental interest. BLAG articulated several rationales for why Congress enacted DOMA, including a unique federal interest in maintaining a uniform definition of marriage, protecting the federal budget, preserving a traditional understanding of marriage, and promoting responsible procreation.[47]

The Second Circuit, however, rejected the arguments advanced by BLAG. First, the court found that DOMA does not advance an interest in a uniform definition of marriage, noting that the federal government has "historically deferred to state domestic relations laws, irrespective of their variations." Indeed, found the court, DOMA represents "an unprecedented intrusion into an area of traditional state regulation."[48] The court was similarly unpersuaded by the argument that DOMA was enacted to preserve federal resources, noting that DOMA affects an array of statutes that have no budgetary impact.[49]

Likewise, the Second Circuit rejected the argument that DOMA was enacted to preserve traditional marriage, given that it is the states, not the federal government, that establish the laws that define who is eligible to marry. Finally, although the court agreed that promotion of responsible procreation may be an important governmental objective, the court found that DOMA is not substantially related to that objective because it does not provide any additional incentives for heterosexual couples to marry and procreate.[50] After concluding that DOMA is not substantially related to any of the alleged important government interests, the court held that Section 3 of DOMA violates the equal protection clause of the Constitution.

Despite this conclusion, the Second Circuit's decision was not unanimous. Although the dissenting judge agreed that DOJ was a proper party to file an appeal, he would have held that DOMA was constitutional for several reasons outlined in the dissenting opinion. First, the dissent would have held that *Baker* was binding precedent. Consistent with *Baker* and other Supreme Court rulings, the dissent would have therefore applied rational basis review. Because the dissent was persuaded that DOMA is rationally related to the legitimate governmental interests of

[46] Id. at 182-83.

[47] Id. at 185.

[48] Id. at 186.

[49] Id. at 187.

[50] Id. at 187-88.

preserving the traditional institution of marriage, promoting procreation, and protecting government resources, the dissent would have upheld DOMA.[51]

As illustrated by the majority and dissenting opinions in the Second Circuit's ruling, the Supreme Court will have to grapple with several significant questions when it takes up review in *Windsor*, including the extent to which *Baker* should control and what standard of review, if any, to apply to classifications based on sexual orientation. If the Court follows the Second Circuit by ruling that *Baker* does not control and that such classifications are entitled to heightened scrutiny, then the Court would likely strike down DOMA. Such a ruling could make it more difficult for federal, state, or local governments to justify other laws that may single out gay individuals for differential treatment, including state laws barring same-sex marriage. Alternatively, the Court could determine that rational basis review is the appropriate standard. DOMA could conceivably be upheld or struck down under rational basis review.

Of course, there is always the possibility that the Court will avoid the question about which standard of review to apply. The Court could, for example, decide instead to invalidate Section 3 based on the federalist principle that regulation of marriage is the province of the states. On the other hand, the Court may not even reach the merits of the case if it determines that the jurisdictional issues discussed above require dismissal. Under this latter scenario, a ruling on the constitutionality of DOMA would presumably wait until another day.

Hollingsworth v. Perry: The Challenge to California's Proposition 8

In *Hollingsworth*, the Court will consider whether a voter-approved amendment to the California state constitution violates the equal protection clause of the federal Constitution. The amendment, known as Proposition 8, declares that the only marriages that are valid are those between one man and one woman. Proposition 8 was adopted shortly after the California Supreme Court ruled that the state's ban on same-sex marriage violated the state constitution,[52] but not before over 18,000 marriage licenses were issued to same-sex couples in California. Notably, the dispute in *Hollingsworth* centers exclusively on the use of the word "marriage," since gay couples who are domestic partners are otherwise entitled to all of the same rights, benefits, and responsibilities that heterosexual couples have in California.

After Proposition 8 was enacted, several same-sex couples who were denied marriage licenses sued the state. In a broad decision, the district court ruled that Proposition 8 violated both the due process and equal protection clauses of the federal constitution.[53] On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) agreed that the measure was unconstitutional, but did so on far narrower grounds.[54] The Supreme Court subsequently agreed to review two distinct questions in the case: (1) whether the equal protection clause prohibits California from defining marriage as the union of a man and a woman; and (2) whether the proponents of Proposition 8

[51] Id. at 188-90.

[52] In re Marriage Cases, 43 Cal. 4th 757 (2008).

[53] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[54] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

have Article III standing to sue.[55] Each of these questions is explored in greater detail below, as is the Ninth Circuit's analysis of these issues.

Standing

Like *Windsor*, the *Hollingsworth* case involves a question about standing, namely whether proponents of Proposition 8 may, under Article III of the Constitution, be parties to the case. After the lawsuit was filed, the defendants, including the Governor and Attorney General of California, appeared in district court but refused to argue in favor of Proposition 8. The court, however, allowed the proponents of Proposition 8 to intervene in defense of the measure. When the proponents subsequently lost on the merits, they appealed the ruling to the Ninth Circuit. The appeals court, in turn, certified the question of standing to the California Supreme Court, which responded that the proponents of the proposition had a right to intervene to defend the integrity of the initiative process.[56] Finding that it was bound to accept the determination of the California Supreme Court,[57] the Ninth Circuit then affirmed the district court, holding that Proposition 8 was unconstitutional. The Supreme Court has requested briefing on the question of whether the proponents of Proposition 8 have standing to challenge the district court's decision.

As noted above, Article III provides that federal courts may only hear actual cases or controversies, so plaintiffs must prove they have standing by showing that they have suffered a concrete and particularized injury. In the Ninth Circuit opinion, however, the standing inquiry was limited to an examination of whether the State of California, as a defendant, had standing to defend the constitutionality of its laws. The Ninth Circuit then considered whether that interest could be delegated to private parties. Under this analysis, a court need only consider if a state had suffered a sufficient injury, and then whether the party before the court was authorized by the state to represent its interests.

The most relevant Supreme Court case on this issue appears to be *Arizonans for Official English v. Arizona*,[58] a case that considered whether the proponents of an Arizona initiative had standing to defend that initiative. In the Arizona case, the Supreme Court expressed "grave doubts" as to the standing of those proponents to defend the initiative's constitutionality. In that case, however, the Court suggested that an important part of the analysis was that there was no Arizona law authorizing the proponents of an initiative to represent the state's interest. In contrast, California law does provide for such representation. Thus, the question arises as to why the Court would seek additional briefing on this matter.

It would appear that, at a minimum, the Court will need to explore the issue of whether, once Article III standing has been established by a state, a state can designate non-governmental persons or entities to represent that state's interest. A further possibility is that the Court might examine whether a state's alleged interest in defending the constitutionality of its laws is obviated by the decision of the state executive branch not to defend the proposition. In this case, the Court might find that the non-governmental entities or individuals assigned to represent state interests must establish their own injury. If this line of reasoning is followed, it might be more difficult for

[55] Hollingsworth v. Perry, 184 L. Ed. 2d 526 (2012).

[56] Perry v. Brown, 52 Cal. 4th 1116, 1165 (2011).

[57] Perry, 671 F.3d at 1072.

[58] 520 U.S. 43 (1997).

petitioners in this case to establish such injury, and the Court could remand to the Ninth Circuit to dismiss the appeal to that court. Since the State of California did appear at the district court level, however, that court's decision overturning Proposition 8 would arguably stand. This possibility could potentially allow California to resume issuing marriage licenses to same-sex couples.

Merits

If the Court determines that the Proposition 8 proponents have standing, then the Justices will consider the case on its merits. In evaluating the constitutionality of Proposition 8, the Court will consider many of the same arguments heard by the court of appeals. As a result, it is useful to examine the Ninth Circuit's decision in greater detail.

Notably, the Ninth Circuit based its ruling on narrow grounds. Rather than evaluating the broader question of whether same-sex couples have a constitutional right to marry, the court instead focused on whether it was constitutional for California to grant marriage licenses to same-sex couples, only to subsequently rescind that official recognition. As a result, the decision focused on California's elimination of a right—the legal designation of marriage—that had previously been available.[59]

In addition, the Ninth Circuit emphasized another unusual feature of the Proposition 8, namely, that it denied same-sex couples the right to the official designation of "marriage," but left intact all their legal rights and responsibilities, which are identical to those of married heterosexual couples. According to the court, this denial holds "extraordinary significance" because "the word marriage has a unique meaning and there is a significant symbolic disparity between domestic partnership and marriage. It is the designation of marriage itself that expresses validation, by the state and the community, and that serves as a symbol ... of something profoundly important."[60]

The court next considered whether California had a rational basis for enacting a constitutional amendment that withdrew a previously available right from same-sex couples. In its analysis, the Ninth Circuit relied heavily on the Supreme Court's decision in *Romer*. According to the Ninth Circuit, Proposition 8 is "remarkably similar" to the Colorado amendment at issue in *Romer* because it "withdraw[s] from homosexuals, but no others, an existing legal right."[61] Nor was *Baker* relevant precedent, held the court, because it involved a "wholly different question."[62]

Applying the rational basis test, the court next sought to determine whether California had expressed any legitimate state interest that was rationally related to its enactment of Proposition 8. The court evaluated several possible reasons for Proposition 8, including (1) promoting responsible procreation; (2) making incremental changes to the law; (3) protecting religious freedom; and (4) preventing schools from teaching about same-sex marriage. The court considered and rejected each of these rationales, holding that even if they were legitimate state interests, they did not further any of these interests and therefore could not have been a rational basis for enacting the measure. For example, the court found that withdrawing the official designation of marriage from same-sex couples would not affect procreation by opposite-sex

[59] Perry v. Brown, 671 F.3d 1052, 1063-64 (9th Cir. 2012).

[60] Id. at 1078 (internal quotes omitted).

[61] Id. at 1080-81.

[62] Id. at 1082.

couples, nor would enacting a constitutional amendment permanently barring same-sex marriage further an interest in exercising caution when changing the law. Likewise, the court dismissed the argument that Proposition 8 would have any effect on religious freedom or academic requirements.[63] Having rejected these arguments, the Ninth Circuit inferred that the only motive remaining for stripping same-sex spouses of the right to marriage was animus, which can never be the sole constitutional basis for enacting legislation. According to the court:

> By withdrawing the availability of the recognized designation of marriage, Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class. Just as a desire to harm cannot constitute a legitimate governmental interest, neither can a more basic disapproval of a class of people.[64]

The Ninth Circuit's ruling, however, was not unanimous. Although the dissenting judge in *Hollingsworth* agreed with the majority's decision regarding standing, the dissent raised several objections to the court's decisions regarding the merits of the claims.

Specifically, the dissent argued that *Romer* should not govern the disposition of the case because the Colorado amendment at issue in *Romer* was not sufficiently similar to California's Proposition 8. In particular, the dissent noted that Proposition 8 "lacks the 'sheer breadth' that prompted the Supreme Court to raise the inference of animus in *Romer*."[65] In addition, the dissent argued that such animus is not sufficient to invalidate the measure if there is also a rational basis for its enactment. Indeed, the dissent found that Proposition 8 could be rationally related to a legitimate governmental interest in promoting responsible procreation and parenting.[66] Thus, the dissent would have concluded that Proposition 8 was constitutional.

Questions about whether California had a rational basis for enacting Proposition 8 or whether animus was the sole rationale for the measure are among the issues the Supreme Court is expected to confront when it takes up review in *Hollingsworth*. As noted above, the Court must also consider just how broadly or narrowly to rule. Several options suggest themselves.

One possible path the Court could choose is to adopt the Ninth Circuit's narrow ruling. Such a holding would invalidate Proposition 8 and make same-sex marriage legal in California, but would not affect the marriage laws in other states. Also possible is a slightly broader decision striking down the state law because it grants the same rights and benefits to heterosexual and homosexual couples but denies same-sex couples the official designation of the word "marriage." This approach would make gay marriage legal only in a very limited number of states with laws similar to California's. A third option would be for the Court to rule broadly by applying a stricter standard of judicial review to laws that target people on the basis of sexual orientation. Such an approach would potentially invalidate all state laws that prohibit same-sex marriage.

At the opposite end of the spectrum, the Court could rule that California's ban on same-sex marriage is constitutional, thus upholding Proposition 8. Alternatively, the Court could avoid ruling on the merits of the claims if it dismisses the case for the jurisdictional reasons discussed

[63] Id. at 1086-92.

[64] Id. at 1093-94 (internal citations and quotes omitted).

[65] Id. at 1104.

[66] Id. at 1105-10.

above. Under that scenario, a ruling on the constitutionality of state laws that prohibit same-sex marriage would presumably wait until another day.

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