

## **NOW Foundation Joins Amicus Briefs in Supreme Court Cases** **April 10, 2015**

### **Marriage Equality**

***Obergefell v. Hodges, Tanco v. Haslam, DeBoer v. Snyder, Bourke v. Beshear***

**Docket Numbers Respectively: (14-556), (14-562), (14-571), (14-574)**

**Argument: April 28, 2015**

**Opinion: TBD (Possibly late June)**

**(LISTEN IN: The Supreme Court posts an audio recording of the arguments on their website at the end of the week during which the arguments have been heard, [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx) )**

The Supreme Court will hear a challenge to state bans on same-sex marriage in Ohio, Michigan, Kentucky, and Tennessee on April 28 – an historic event for marriage equality advocates and for the nation. Arguments are scheduled to last 150 minutes. The Court will decide if same-sex couples have a constitutional right, specifically whether denying marriage to same-sex couples violates the 14<sup>th</sup> Amendment's Equal Protection Clause, to marry nationwide and whether states must recognize marriages of same-sex couples performed legally in other states.

The district courts ruled that the marriage laws discriminated in violation of the Equal Protection Clause and three of the four courts held that heightened scrutiny applies to sexual orientation classifications. The Sixth Circuit reviewed these decisions and upheld the bans on marriage and marriage recognition for same-sex couples, making the Sixth Circuit Court the first federal appellate court to do so.

The government is not allowed to enforce laws that make sex classifications based on gender stereotypes or gender-role expectations. Laws that expect an individual's relationship to be only with a person of the opposite sex discriminate based on sexual orientation and communicate the idea that there is something wrong with the way they identify and they do not measure up to society's expectation of what a man or a woman "should be."

Gender roles are at the heart of the discrimination against LGBTQIA couples in their fight for marriage equality. Marriage laws that do not allow same-sex marriages discriminate based on gender-role expectations that men love women and women love men. These laws also perpetuate the thought that same-sex couples make for inferior parents as they are unable to fulfill the expected gender roles of parents.

The argument in the case from the marriage equality perspective says the Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny. Furthermore, the laws challenged in this case do not withstand such scrutiny.

The NOW Foundation signed on to the amicus brief submitted for the *Obergefell v. Hodges* case when it was *Obergefell v. Himes* in the U.S. Court of Appeals for the Sixth Circuit.

In 2004, Ohio voters approved a state ban on same-sex marriage. Michigan banned recognition of same-sex unions in any form since a 2004 popular vote added this as an amendment to the state constitution. Previously, a statute enacted in 1996 banned both the licensing of same-sex marriages and the recognition of same-sex marriages from other jurisdictions. Kentucky does not recognize same-sex marriages. Marriage is defined by statute to exclude same-sex couples since 1998. Recognition of same-sex relationships under the term marriage or any other designation has been prohibited by the state constitution since 2004. In 1996, Tennessee enacted a statutory ban on same-sex marriage. After the Tennessee state legislature adopted a constitutional ban of same-sex marriage in 2005, voters approved (by 81 percent) the amendment in November, 2006. (Source: wikipedia.org)

In recent years, polls have indicated that a growing majority nationwide supports same-sex marriage.

## **Pregnancy Discrimination**

### ***Young v. United Parcel Service***

**Docket Number: (12-1226)**

**Argument: December 3, 2014**

**Opinion: March 25, 2015**

Peggy Young, a former employee of UPS, became pregnant in 2006 and was instructed by her doctor to not lift more than 20 pounds. Her normal duties at UPS, consisting mostly of delivering letters, very rarely required her to lift anything heavier than 20 pounds. However, UPS forced her to take unpaid leave as she was "too much of a liability" and she had to go without her employer-sponsored health insurance while pregnant. Other employees, those with disabilities, people with on-the-job injuries and even employees who had lost their commercial drivers' licenses as a result of DUI convictions, received "light duty," which was an accommodation UPS refused to provide Peggy Young.

The case posed the question of whether the UPS violated the Pregnancy Discrimination Act of 1978 (PDA) by forcing Peggy Young to take unpaid leave instead of offering the same accommodations given to other employees. The Court ruled that denying pregnant workers accommodations available to a large percentage of non-pregnant workers can violate the Pregnancy Discrimination Act. The law requires that pregnant women be treated the same as other workers who are "similar in their ability or inability to work." Peggy Young's case was sent back to the lower courts – if she can prove UPS denied accommodations given to other employees similar in their ability to work and that UPS' policies imposed a significant and unjustified burden on pregnant workers, she will win. The Supreme Court also acknowledged that pregnant workers have expanded rights under the Americans with Disabilities Act.

The case did not solve the problems of pregnant workers who do not have the power of knowing about the accommodation policies in their workplaces. The Court failed to define what constitutes a large-percentage of workers and failed to state whether the employer had to be already accommodating a large percentage of non-pregnant workers or had policies that could potentially accommodate a large percentage of non-pregnant workers.

Measures to protect pregnant women in the workplace are necessary. It is estimated that 75 percent of women currently entering the workforce will become pregnant while they are employed. Additionally, 41 percent of families with children rely on the mother as the primary breadwinner. In denying a pregnant woman income and employment-sponsored health insurance during a time when she needs them most, society is undermining the health of women and equality for women in the workplace.

An answer to the lingering problems with pregnancy discrimination, unsolved by the Supreme Court decision, is the Pregnant Workers Fairness Act (S. 942/H.R. 1975 – 113<sup>th</sup> Congress). This piece of legislation would prohibit employers from forcing pregnant employees from taking leave and instead provide a reasonable accommodation.

## **Women's Access to Health Insurance Coverage**

### ***King v. Burwell***

**Docket Number: (14-114)**

**Argument: March 4, 2015**

**Opinion: TBD (possibly June)**

Only 13 states set up a state-facilitated Health Exchange in accordance with the Affordable Care Act (ACA), leaving 37 states with a federally-facilitated Health Exchange. Health Exchanges are where individuals and families can apply to receive health insurance coverage under the ACA and where many can also qualify for subsidies via tax credits to help pay premiums. If the Supreme Court decides “wrongly” (in our view) in *King v. Burwell*, some eight to 10 million persons would likely lose their health insurance in these states because many would lose the subsidies that have made their insurance affordable.

The case poses the question to the Supreme Court as to whether the ACA text allows for tax credit-subsidies to be extended by the IRS to people in states with federally-facilitated exchanges. Plaintiffs claim that four words within the text, "established by the state," mean that tax-credit subsidies can *only* go to people insured through state-run exchanges and that those individuals and families insured through federally-facilitated Exchanges in the 37 states may not receive subsidies.

Historically, women have been far more likely than men to forgo health care, including preventative care, because of cost. Prior to the ACA, four in 10 low-income women were uninsured. Many medical issues pertinent to women previously qualified as a "pre-existing

condition." In fact, before the ACA, in nine states, insurance companies were able to deny coverage to domestic violence survivors. A woman who previously had a Caesarean delivery could be denied coverage as having had the procedure could be considered a "pre-existing condition." "Gender-rating" was common in health insurance plans; this meant a woman could be charged more for health insurance solely on the fact that she was a woman. The ACA limited rating factors to age, geography, and smoking status – women can no longer be charged higher premiums just because they are women.

The ACA prohibits discrimination in health care and health insurance on the basis of sex, pregnancy, gender identity, and sexual stereotyping, along with others. The act also requires that new plans cover recommended gynecological services and screenings at no cost to the woman. The ACA guarantees access to all FDA-approved methods of contraception, sterilization, and related education and counseling for women without cost. In 2013, the average woman saved \$269 on out-of-pocket costs for contraceptives.

The majority of participants in the federally-facilitated Exchanges are low- and moderate-income women. More than nine million women in the United States are eligible to benefit from the tax credits, seven million of whom live in states with federally-facilitated Exchanges.

Communities of color are also benefitting from the ACA. Since the beginning of the ACA first enrollment period in October 2013, 14.1 million adults gained coverage, thus reducing the national rate of uninsurance to 13.2 percent. African-Americans and Latinos/Latinas have experienced the most dramatic improvements. According to Families USA, African-Americans' uninsurance rate fell by 9.2 percent points and Latinos'/Latinas' by a dramatic 12.4 percentage points.

Striking down the tax credits in states with federally-facilitated Exchanges would result in large increases in premiums, significant decreases in ACA enrollment, chaos in private insurance markets and, some say, would deal a death blow to the Affordable Care Act. Experts say that the loss of tax credits would also result in the closing of some hospitals. Certainly, persons with pre-existing health conditions would not be able to obtain insurance coverage and women would be returned to an era when they paid more for less coverage and provision of maternity coverage was rare.

This lawsuit was mounted by conservative politicians and right wing legal advocacy firms who have been gunning for the ACA since before it was signed into law in March, 2010.

## **Domestic Violence and Housing**

***Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.***

**Docket Number: (13-1371)**  
**Argument: January 21, 2015**  
**Opinion: TBD**

This court case will decide whether plaintiffs can bring claims under the Fair Housing Act challenging policies and practices that have a disproportionate and negative effect on a protected class of people. This case will consider whether the Fair Housing Act prohibits policies that have a discriminatory effect, regardless of whether the policy was adopted with intent to discriminate.

Domestic violence survivors suffer under discriminatory housing policies such as zero tolerance policies which subject all members of the home to eviction if any member of the household has committed a crime. Municipal nuisance ordinances subject tenants to eviction if they call the police too frequently, placing a risk on those suffering from domestic violence as they could be kicked out of their homes for protecting themselves. Congress even recognized that "[v]ictims of domestic violence often return to abusive partners because they cannot find long-term housing." Women should not be forced to choose between their safety and shelter.

The case argues that subprime lenders targeted and exploited minority communities where conventional lending institutions did not exist. The U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury issued a joint report that found since 2000, even when controlling for income, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods."

## **Marriage Equality Cases That Have Been Decided**

**1. *Kitchen v. Herbert***  
**U.S. Court of Appeals for the Tenth Circuit**  
**Argument: April 10, 2014**  
**Decision: June 25, 2014**

**2. *Bishop v. Smith***  
**U.S. Court of Appeals for the Tenth Circuit**  
**Argument: April 17, 2014**  
**Decision: July 18, 2014**

1. The case challenged the constitutional ban on same-sex marriage in Utah. The Tenth Circuit affirmed the decision of the U.S. District Court for the District of Utah, which found the state's ban on same-sex marriage unconstitutional. The Court stayed their mandate pending a petition to the Supreme Court, which denied the petition. The Tenth Circuit lifted the stay in October 2014, putting into effect an end to Utah's enforcement of the same-sex marriage ban.

2. The case posed the question of whether the ban on same-sex marriage licenses in Oklahoma was unconstitutional. The Tenth Circuit court affirmed the decision of the lower court, the Northern District of Oklahoma, which ruled that the same-sex marriage ban in Oklahoma was unconstitutional. The decision used the court's previous decision in *Kitchen v. Herbert*.

The amicus brief, filed to address both cases, argued that sexual orientation classifications should be subjected to heightened scrutiny due to the fact that these classifications should be recognized as suspect or quasi-suspect classifications. The brief points out that nearly all courts agree that homosexuality has no bearing on one's ability to perform or contribute to society. Therefore, homosexuality is no different than race, gender, alienage, and national origin in respect to the achievement of any legitimate state interest that laws are grounded on and laws discriminating against homosexuality should be held to heightened scrutiny.

***United States v. Windsor***

**Docket Number: 12-307**

**Argument: March 27, 2013**

**Opinion: June 26, 2013**

Edith Windsor, married to Thea Spyer, was left Spyer's entire estate upon Spyer's death. Windsor tried to claim the federal estate tax exemption for surviving spouses. She was not allowed to do so according to Section 3 of the federal Defense of Marriage Act (DOMA), which provided that "marriage" and "spouse" be only applicable to heterosexual marriages. As a result, Windsor was forced by the Internal Revenue Service (IRS) to pay \$363,053 in estate taxes. The Supreme Court held that the U.S. federal interpretation of "marriage" and "spouse" application to only heterosexual unions by Section 3 of the DOMA was unconstitutional under the Due Process Clause of the Fifth Amendment. The Court held that the federal government was not allowed to treat state-sanctioned heterosexual marriages differently from state-sanctioned same-sex marriages.

The amicus brief argued that the Court always afforded heightened scrutiny to discrimination against groups, such as gay people, that have experienced a history of purposeful discrimination based on a factor that had no bearing on or relation to their ability to perform in or contribute to society. The discrimination faced by gay people is deep-seated and hostile because throughout history, the discrimination has been based on deeply-felt moral views. The brief urged the Court to hold that sexual orientation classifications are subject to heightened scrutiny. "Discrimination against gay people bears the same features that earlier led to heightened scrutiny of other classifications such as those based on sex or race."

***Bostic, et al. v. Schaefer, et al.***

**U.S. Court of Appeals for the Fourth Circuit**

**Docket Number: 14-1167**

**Argued: May 13, 2014**

**Decided: July 28, 2014**

The court case challenged the state of Virginia's ban same-sex marriages. The U.S. District Court ruled that Virginia's ban was unconstitutional and marriage is a fundamental right and therefore, a limitation on the right to marry should be held to strict scrutiny. The Fourth Circuit Court of Appeals upheld the ruling and in August of 2014, the U.S. Supreme Court stayed enforcement of the Fourth Circuit's ruling pending the outcome of further litigation. In October of 2014, the Supreme Court denied a writ of certiorari and let the circuit court decision stand.

The amicus brief urged the Court to rule that laws discriminating against gay people, including gay, lesbian, and bisexual persons, should be subject to heightened scrutiny under the Equal Protection Clause. Such laws would include state laws preventing same-sex couples from marriage. "Heightened scrutiny is required where, as here, there has been a history of discrimination against a group based on a characteristic that is unrelated to one's ability to contribute to society."