

NOW Foundation Joins Amicus Briefs in Supreme Court Cases: Marriage Equality 2014-2015

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)

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 **14th 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 on 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.

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 of 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 security. "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."