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Will Supreme Court Rule on DOMA?

At justices' invitation, Harvard Law Professor Vicki Jackson raises strong doubts

BY ARTHUR S. LEONARD

When the Supreme Court accepted the petition by the US solicitor general that it take up Edie Windsor's lawsuit against the federal Defense of Marriage Act (DOMA), it posed two questions that could derail any quick resolution about the 1996 law's constitutionality.

First, the solicitor general must address whether the federal government's "agreement" with the Second Circuit ruling that DOMA is unconstitutional deprives the Supreme Court of "jurisdiction to decide this case." The high court also asked whether the Bipartisan Legal Advisory Group of the US House of Representatives (BLAG) — which includes the three most senior Republicans and the top two Democrats, split along party lines in their view of the case, and intervened at the trial court to defend DOMA when the Obama administration declined to do so — has legal standing to participate in the case.

Since the court assumed neither Windsor, the government, nor BLAG would argue to the high court that it lacks jurisdiction, the justices appointed Harvard Law School Professor Vicki Jackson as a "friend of the Court" to make that argument. Her brief, written with attorneys from Akin Gump Strauss Hauer & Feld LLP, was filed on January 24.

Though complex, the jurisdictional questions raise a serious possibility the court will not actually decide whether DOMA is unconstitutional in the Windsor case.

The Supreme Court has interpreted the Constitution's provision that "judicial power" extends to "cases" and "controversies" as a limitation on the jurisdiction of federal courts — they are barred from issuing "advisory opinions," but instead can only rule on issues disputed between parties who have something personally at stake.

Windsor, a widow who lives in New York, had to pay $363,053 in federal estate taxes that would not have been owed had the government recognized her Canadian same-sex marriage to Thea Spyer, who died in 2009. She clearly has a stake in this lawsuit, so it presented a real "controversy" to the US District Court for the Southern District of New York in Manhattan.

The brief argues the solicitor general's petition doesn't present a real "controversy" because the government doesn't disagree with rulings from the Second Circuit and the district court.

BLAG argues that since New York State did not adopt a marriage equality law until 2011, Windsor's marriage would not have been recognized by the state had a case gone to its highest bench. Without state recognition, BLAG asserts, Windsor cannot argue the federal government must recognize her marriage. Lower courts, however, concluded otherwise, pointing to intermediate appellate courts in New York and state officials who agreed such a marriage would be recognized even absent a gay marriage law.

BLAG continues to hold to its argument that Windsor has no valid claim, though the assertion is made only in a footnote in its January 22 brief to the Supreme Court.

The real jurisdictional issue facing the high court relates to the roles the government and BLAG have played in the case. Prior to Windsor's lawsuit going to court, President Barack Obama and Attorney General Eric Holder reconsidered their position on whether the ban on federal recognition of same-sex marriages in DOMA's Section 3 was constitutional. When they concluded it was not, Holder informed Republican House Speaker John Boehner the administration would not defend DOMA in court, at which time BLAG intervened, while the Senate, under Democratic control, expressed no interest in doing so.

Paul Clement, solicitor general under President George W. Bush who represents BLAG as outside counsel, opposed Windsor's motion for summary judgment, the Justice Department argued in favor of it, and the district court granted it.

Despite the administration's support for Windsor's suit, the Justice Department, having doubts about BLAG's standing to appeal, filed an appeal of its own to the Second Circuit Court of Appeals to ensure the issue would continue making its way through the courts. Though the Justice Department argued before the Second Circuit that it should affirm Windsor's district court victory, even before the appeals court ruled, both the solicitor general and Windsor filed petitions asking the Supreme Court to review the case. Even though the district court had ruled in their favor, they argued the DOMA question needed a definitive answer from the highest court.

After the Second Circuit affirmed the district court, the solicitor general filed an additional statement with the Supreme Court, arguing that this case, rather a ruling from the First Circuit that had earlier struck down DOMA's Section 3, would make the best vehicle for ruling on its constitutionality. On December 7, the high court granted the solicitor general's petition — but not Windsor's — adding the questions about jurisdiction.

Professor Jackson's brief argues the solicitor general's petition does not present the court with a real "controversy" because the government does not disagree with the rulings from the Second Circuit and the district court. In effect, the government is simply asking the Supreme Court to affirm the lower court rulings.

If there is an adversary party, there is a real controversy to decide, and that's where BLAG comes in. But does it have standing to argue for reversal of the Second Circuit decision?

A party has standing if they have a personal stake in the outcome of the matter that is distinct from the general interest any citizen has in the correct interpretation of the law. Windsor has a $363,053 stake in the matter, since she had to fork over the money. The government always has a stake in the question of whether a statute is constitutional,

▶ JACKSON, continued on p.11

▶ COOPER & CLEMENT, from p.8

ment, citing gay historians to the effect that most overt discrimination dates back to the early 20th century, since the concept of homosexuality itself emerged only in the mid-19th century. Clement's assertion conveniently overlooks the capital punishment that traditional English law prescribed for "sodomites," whether or not they were called homosexuals.

Like Cooper in his Prop 8 brief, Clement adopts the view that the government's "legitimate" interest in distinguishing between same-sex and different-sex couples is based on the need to channel heterosexual procreation.

What is striking about both the Prop 8 and DOMA briefs is what is missing. Neither goes in for gay-bashing, asserts that prohibitions on same-sex marriage can be justified by moral disapproval, or contends that gay couples are inadequate as parents. Both briefs are carefully written to project a matter-of-fact tone about rational decision-making.

What they also leave out is any reference to love and affection having anything to do with marriage. Both briefs essentially argue that marriage is about children, not about the spouses, and that the great "danger" of "redefining" marriage to be "genderless" is in putting the prime focus on the marital partners instead of the family. Neither brief acknowledges the substantial percentage of same-sex couples raising children and the ways in which their exclusion from a marital home may be harmful to them. Instead, Cooper and Clement harp on studies showing the disadvantages suffered by children raised by single mothers whose fathers have abandoned them.

Both briefs, for the most part, ignore the huge structure of legal rights and responsibilities attached to modern marriage in America, paring the institution down to its rudimentary essentials in the pre-modern state. In other words, they are appealing to the "originalists" on the high court, as Cooper makes clear when he expresses incredulity that anyone would contend that the generation that enacted the 14th Amendment in 1868 intended to confer the right to marry on gay and lesbian couples. Those on the high court who regard the 14th Amendment as establishing general concepts of fairness and equality rather than a specific image based on mid-19th century life will, one hopes, reject this view.

There is a reasonable prospect that Justice Anthony Kennedy, the swing vote on the court, may be among that group. In the conclusion of his opinion in the 2003 Lawrence v. Texas sodomy case, he wrote, "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment [1791] or the Fourteenth Amendment [1868] known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

A month from now, those challenging Prop 8 and DOMA will file their briefs, and Cooper and Clement will receive their responses. The cases will be argued on March 26 and 27.