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A fight over Houston municipal employee benefits could turn dangerous after two Trump high court picks

How Texas Governor Hopes to Undo Marriage Equality

BY ARTHUR S. LEONARD

Conservatives eager to bring the marriage equality issue back to the US Supreme Court after President Donald Trump has the opportunity to appoint some right-leaning justices may have found a vehicle in an employee benefits dispute from Houston.

On January 20, Inauguration Day, the Texas Supreme Court announced it had “withdrawn” its September 2, 2016 order refusing review of a lower court ruling that implied the city of Houston is required to provide the same spousal health benefits to same-sex and different-sex spouses of municipal workers. The state’s intermediate court of appeals’ ruling pointed to the 2015 US Supreme Court marriage equality rulings in Obergefell v. Hodges in sending the case back to a trial court.

The Texas high court has now scheduled oral argument on the appeal for March 1.

The plaintiffs in the Houston case, taxpayers Jack Pidgeon and Larry Hicks, filed a motion for rehearing with the active support of Republican Governor Greg Abbott and GOP Attorney General Ken Paxton, both ardent marriage equality opponents eager to chip away at the marriage equality ruling or even get it reversed.

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In any event, Devine’s argument rests on a very narrow reading of Obergefell. He interprets the Supreme Court’s decision to be sharply focused on the right of same-sex couples to marry, based on its conclusion that the right to marry is a “fundamental right.” The Supreme Court never explicitly said that the US Constitution requires state and local governments to treat all marriages the same, regardless whether they are same-sex or different-sex marriages, he noted.

And, Devine argued, public employees do not have a fundamental constitutional right to receive health insurance benefits from their employer. He contended that the state could decide who gets benefits based on its own policy considerations, which the courts should uphold if they satisfy the relatively undemanding judicial standard of “rationality” applied where a fundamental right is at stake. On that point, he argued, the state’s interest in procreation by married different-sex couples could justify extending benefits to them but not to same-sex couples.

Justice Kennedy’s opinion in Obergefell, however, specifically listed health insurance as one of the many benefits associated with marriage that contributed to the conclusion that marriage is a fundamental...
right because of its importance to the welfare of a couple and their children. And Kennedy did not consider the “procreation” argument persuasive in justifying the denial of marriage rights to same-sex couples.

Still, Devine is correct that Supreme Court did not say anywhere in its opinion that states are constitutionally required to treat same-sex and different-sex couples exactly the same in every respect, ignoring any factual distinctions between them. His argument, though strained, is not totally implausible, especially if considered by a conservative panel of judges.

Timing is everything, especially if the aim of Texas conservatives and their anti-LGBTQ allies around the country is to get the issue to the Supreme Court after Trump has made two appointments. Once the Texas Supreme Court hears oral argument on March 1, it can take as long as it likes to issue a ruling. That court could choose to be strategic about holding up a decision until it looks likely that any appeal to the US Supreme Court appeal would be considered after its 2017-18 term ends in June 2018.

If the Texas Supreme Court affirms the state court of appeals, it is highly likely that Pigden and Hicks, abetted by Abbott and Paxton, will seek US Supreme Court review. If the Texas Supreme Court reverses, the City of Houston will have to decide whether to seek Supreme Court review, or whether to adopt a wait-and-see attitude while the trial court proceeds to a final ruling on the case’s merits. And the trial court could well decide, upon sober reflection, that Obergefell compels a ruling against Pigden and Hicks, which would put the taxpayer plaintiffs back in the driver’s seat regarding any decision to appeal to the Supreme Court.

If a second Trump appointee were confirmed while all of this was playing out, the case would be heard by a bench with a majority of conservative justices appointed by Republican presidents — one by George H.W. Bush (Clarence Thomas), two by George W. Bush (Chief Justice John Roberts and Samuel Alito), and two by Trump. The president’s appointees would be joining three Republican colleagues who filed or signed dissents in the Windsor and Obergefell cases.

If a majority of the newly constituted Supreme Court is eager to revisit Obergefell, they could grant review on the question whether Obergefell was correctly decided.

Much of this is conjecture, of course. Devine was a lone voice dissenting from the September 2 order to deny review in this case. But that order was issued at a time when pollsters were predicting that Hillary Clinton would be elected and, consequently, filling the Scalia vacancy and any others that occurred through 2020.

If Trump appoints anti-Roe v. Wade justices, marriage equality could be at risk, as well.

The political calculus changed dramatically when Trump was elected. Even though he said he accepts marriage equality as a “settled issue,” his announced intention to appoint justices in the image of Scalia and to seek reversal of Roe v. Wade, the court’s seminal abortion decision from 1973, suggests that his nominees would likely agree with the Obergefell dissenters that the marriage equality ruling was illegitimate. (In his dissent, Roberts wrote it had “nothing to do with the Constitution.”)

After the election, many LGBT rights organizations issued statements to reassure people that marriage equality would not immediately disappear after Trump took office, which remains true. Any threat to that status quo is at least two years off. But in those reassurances — and in an earlier analysis where I argued the unlikelihood of any reversal — there were caveats that in the long run it was possible that Trump’s Supreme Court appointments and new appeals headed to the high court could come together to endanger marriage equality. This new development in the Houston benefits case and the enthusiasm Texas’ top two Republican officials have for the issue point to one way that could happen.