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How Texas Governor Hopes to Undo Marriage Equality

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

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On January 20, Inauguration Day, the Texas Supreme Court announced it had "withdrawn" its September 2, 2016 order refusing review of a lower court ruling that implied the city of Houston is required to provide the same spousal health benefits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 ruling 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.

The Texas Supreme Court's original order denying review last fall had been issued over a fervent dissent by Justice John Devine, who argued for a limited reading of Obergefell. Abbott and Paxton's amicus brief in support of review channeled Devine's arguments.

Trump's nomination of a conservative to fill the seat left vacant when Justice Antonin Scalia died last February would not change the Supreme Court line-up on marriage equality. Obergefell was decided by a 5-4 vote, with Scalia dissenting. However, it is possible — even likely, if rumors of a possible retirement by Justice Anthony Kennedy at the end of the Court's 2017-18 term are accurate — that Trump will get an opportunity to replace the Obergefell decision's author with a more conservative justice in time for the Court's 2018-19 term.

Regardless of how the Texas Supreme Court rules on this appeal, its interpretation of the scope of the Obergefell decision could set up a federal constitutional law question that could be appealed to the US Supreme Court. If the issue gets to that court, it is possible that the Obergefell dissenters, strengthened in number by the net addition of a new conservative appointee, could take the opportunity to narrow or even overrule the marriage equality decision.

The Houston dispute dates back to 2001, when Houston voters reacted to a City Council move to adopt same-sex partner benefits by approving a City Charter amendment that rejected city employee health benefits for "persons other than employees, their legal spouses, and dependent children."

After the Supreme Court's 2013 ruling on the Defense of Marriage Act, Houston Mayor Annise Parker, an out lesbian and longtime LGBTQ rights advocate, announced the extension of health benefits to same-sex spouses of city employees. Although same-sex couples could not then marry in Texas, they could go to other states to get married, and Parker and her city attorney concluded that under the DOMA ruling Houston's city government was obligated to recognize city workers' lawfully contracted same-sex marriages and provide them the same benefits accorded to other employees.

Pidgeon and Hicks filed suit in state court, contending that Parker's action violated the Texas Constitution and statutes, as well as the City Charter amendment. A trial judge issued a temporary injunction against the benefits extension while the case was pending. The city appealed that ruling to a state appeals court, which sat on the issue as marriage equality litigation exploded across the nation. When Texas began issuing marriage licenses in the wake of the Obergefell ruling in 2015, that court, the 14th District Court of Appeals, finally reversed the temporary injunction and sent the case back to the trial court to consider the issue in light of the US Supreme Court's action.

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Texas' Republican governor, Greg Abbott, is a fierce opponent of marriage equality, as is the state's GOP attorney general, Ken Paxton.

The appeals court, then, did not rule on the merits and left the question of what impact Obergefell had on city employee benefits policy a matter of some dispute.

Pidgeon and Hicks petitioned the Texas Supreme Court to review the court of appeals' lifting of the injunction, but the high court initially denied them last September, at which point Justice Devine issued his dissent. Devine argued the appeals court's majority incorrectly "assumed that because the United States Supreme Court declared couples of the same sex have a fundamental right to marry, the Equal Protection Clause of the Fourteenth Amendment requires cities to offer the same benefits to same-sex spouses of employees as to opposite-sex spouses."

From his perspective, however, "Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review. Because the court of appeals' decision blurs these distinctions and threatens constitutional standards long etched in our nation's jurisprudence, I would grant review."

Devine was mistaken, however, regarding what the appeals court decided. That court did not find that same-sex spouses of Houston employees are entitled to health benefits from the city, but instead ruled that because of "substantial change in the law" since the temporary injunction was issued, the issue should be litigated "consistent with" the Obergefell ruling. That left open the chance the trial court would still rule in favor of Pidgeon and Hicks.

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 not 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

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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 Pidgeon 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 Pidgeon 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.