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Reporter

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Preview on same-sex marriage — Part I, The couples' views

This is the first post in a four-part series on the written arguments that have been filed in the same-sex marriage cases at the Supreme Court. This post covers the briefs of the couples who are challenging the state bans. At the oral argument on April 28, Mary L. Bonauto of Boston, the civil rights project director for Gay & Lesbian Advocates and Defenders, will argue for the couples on the issue of state power to forbid same-sex couples to marry, and Douglas Hallward-Driemeier of the Washington office of Ropes & Gray LLP, will argue for the couples on the issue of state power to refuse to recognize existing same-sex marriages. Each will have thirty minutes of time. Later posts in this series will cover the state governments' defenses of their bans, the arguments of amici supporting the couples, and the arguments of the amici supporting the state bans. The federal government, which filed a brief in the case as an amicus supporting the couples, will take part in the hearing on the marriage ban question but not on the recognition issue; its brief will be reviewed along with those of other amici on that side.

Gay rights advocates have been pressing in the courts for the right to marry since the early 1990s, beginning with a test case in Hawaii, *Baehr v. Lewin*. Although they won a temporary victory in that case, that was later taken away, and the first lasting victory for them did not come until 2003, when the highest state court in Massachusetts established a marriage right under that state's constitution.

With the Supreme Court assembling on April 28 to hear four combined cases on the issue, there are now thirty-six states in which same-sex couples may legally marry. Lawyers for the couples involved in those four cases will be asking the Court to open marriage nationwide to all such couples — that is, to nullify the bans still in effect in fourteen states, and to preserve the victories that have been won in federal courts, most of which have come in the past twenty-two months. The victories already won in state courts, state legislatures, and state ballot measure elections are not at issue.

The couples in each of the four separate cases under review have filed their own briefs on the merits. When the four cases reached the Court separately, each phrased the issues somewhat differently. When the Court granted review on January 16, it composed on its own the form of the two questions it will seek to answer. The questions are constitutional in nature, and there is nothing the Court needs to decide on the scope of each state's laws: they are flat bans and are understood and have been enforced that way.

The merits brief filed in the Kentucky case (*Bourke v. Beshear*) is the only one that discusses both questions: the validity of state bans on same-sex marriage, and the validity of state bans on the recognition of existing same-sex marriages. The brief filed in the Michigan case (*DeBoer v. Snyder*) discusses only the marriage question, and each of the briefs filed in the Ohio (*Obergefell v. Hodges*) and Tennessee (*Tanco v. Haslam*) cases deals only with the recognition question. (When a final decision is issued, it will have the *Obergefell v. Hodges* title, simply because that case was the first to reach the Justices.)

On both questions before the Court, these are the common issues:

** Will the Supreme Court feel bound by a one-line ruling it issued in 1972, in *Baker v. Nelson*, saying that a claim of a right to same-sex marriage does not raise a "substantial federal question"?

** Does the Constitution leave the definition of marriage to state legislatures or to the voters of a state — that is, to be decided as an issue of public policy, rather than a question for courts to resolve under the federal Constitution?

** If the Court treats the issue as one of constitutional law for it to decide, what constitutional test should be used to judge the validity of either kind of state ban? Will it be the easy-to-satisfy test of "rational basis," or something more demanding than that? (The test it chooses may depend upon whether the Court rules on the marriage bans under the Fourteenth Amendment's protection of legal equality, for which the test is more flexible, or under that Amendment's broader protection of "due process," a test that is harder for a state to meet.)

** What public policy arguments by a state may or may not justify either ban?

** On the recognition issue, does one state have any constitutional obligation to officially respect marriages performed in other states for same-sex couples and to extend equally to such couples as residents all of the benefits of marriage — for example, the right to file tax returns jointly? (Some of the same arguments on the marriage question are being made on the recognition issue.)

The couples' arguments on the marriage question

A core argument in the merits briefs on the marriage question is what the couples are *not* seeking — a constitutional right to same-sex marriage,

or, in other words, a new right created especially for same-sex couples, never before recognized in American constitutional history. What they are seeking, they stress, is an equal right to enter the long-standing institution of marriage, with access to that institution being a “fundamental right.”

This simple emphasis on equality of access to an existing right is intended, in the briefs, to support both a right to equal protection under the Fourteenth Amendment and inclusion in the existing marriage right as a matter of “due process” under that same amendment. And, in that sense, this argument is an invitation to the Court not to see what is at issue as a bold plea to fashion a new right out of whole cloth — one of the main arguments made against same-sex marriage.

The briefs for the Kentucky and Michigan couples note that the Supreme Court has been talking of a right to marry as constitutionally protected since the 1888 decision in *Maynard v. Hill* and has been treating it as a “fundamental right” since at least the 1978 decision in *Zablocki v. Redhail*. The briefs, as expected, place much emphasis on the Court’s 1967 decision in *Loving v. Virginia*, striking down a ban on interracial marriage, which the briefs treat as a clear example of opening up the institution to new partners.

Even if the Court were now to switch and treat access to marriage as something less than a “fundamental right,” the Kentucky brief argued that the institution holds such a “crucial place in American society” that it “would still require courts to closely examine laws categorically excluding same-sex couples from that institution.”

That brief went on to assert: “Marriage is a foundational means in our society of seeking personal fulfillment and acquiring community esteem. Excluding a class of people from that institution, therefore, can hardly be considered rational unless it furthers some substantial goal of the state.”

That line of argument could make it possible for the Court to rule in favor of same-sex marriage without having to spell out — for the first time — a constitutional test for judging anti-gay laws or other government action. Indeed, the Court has made a series of gay rights decisions in recent years without settling on a specific test. It did not do so, for example, in its most recent ruling in a major gay rights case — the 2013 decision in *United States v. Windsor*, striking down a key part of a federal law that denied federal marital benefits to same-sex couples who already were married under state laws allowing such unions.

The couples’ merits briefs also rely upon a theme that has reappeared in several of the Court’s gay rights rulings, including the *Windsor* decision. That is the idea that, if a state does not really have a good reason for excluding gays and lesbians from equal rights or benefits, a state will be understood to have engaged in a form of “animus” or disapproval, based solely on the gender identity of homosexual persons.

For example, the Kentucky brief argued that the Kentucky ban on such marriages has the “purpose and effect” of branding same-sex couples and their marriages “as less worthy than other families,” making their marriages “second-class” in rank without the option of “participating in the normalcies of adult, family, and community life.”

The briefs seek to put a vivid human face on the constitutional controversy over marriage, just as Justice Anthony M. Kennedy had done in the *Windsor* decision. The Michigan couples’ brief opens its argument section this way: “Michigan’s exclusion of same-sex couples from the freedom to marry profoundly affects the lives of [the couple who sued in this case] and thousands of other same-sex couples in Michigan who seek to make a binding commitment to the unique institution of marriage. This exclusion deprives same-sex couples of the dignity and common understanding that comes only with marriage as well as the substantial network of protections and reciprocal responsibilities afforded to married persons and their families. It harms children financially, legally, socially and psychologically.”

Both the Kentucky and Michigan couples’ merits briefs do not settle on a specific constitutional test for judging the marriage ban, suggesting that they would prefer the standard to be a more rigorous one than simple “rational basis” review, but go on to argue that none of the state’s attempts to justify that ban can satisfy even that low level of scrutiny.

The briefs take on the states’ arguments one by one, dismissing them as unfounded in law or in social science. They particularly challenge the common state argument that marriage should be reserved for a man and a woman, to encourage such opposite-sex couples to have children within the close family unit.

That justification for the ban on same-sex marriage is dismissed harshly by the Kentucky brief, which argues that the idea of encouraging “responsible procreation” was so unfounded that it would not have been offered seriously in any place outside of a court case. “Marriages are celebrated and honored in our society,” the filing said, “regardless of whether couples have, intend to have, or are even capable of having children.”

Why, that brief asks, would one support the denial to children of an opportunity to have married parents solely to regulate the activities of opposite-sex couples? That is not morally defensible, it contends.

The same-sex couples are similarly dismissive of social science data which purportedly shows that same-sex couples do not make good parents. That argument is so lacking in reliable support, the Kentucky brief says, that it was rejected even by the one federal appeals court that has upheld a state marriage ban — the U.S. Court of Appeals for the Sixth Circuit.

Both the Kentucky and Michigan briefs rejected an argument that the Sixth Circuit did accept as justification for a marriage ban: the supposed value of leaving the marriage question to be explored further in public debate and in legislatures. A flat ban, those filings contend, does not further debate, but chokes it off entirely.

And the Michigan brief roundly condemns another argument on which the Sixth Circuit relied: that the issue of same-sex marriage is so hotly controversial that it should be approached with caution, lest it loose unspecified harms on human culture. Denying a long-disfavored minority access to equal rights, because of “unforeseen consequences,” that filing says, would doom any attempt to recognize such rights.

Neither of those briefs discusses at length the question whether the Court's 1972 summary ruling against same-sex marriage, in *Baker v. Nelson*, remains a valid precedent in the modern era. The Sixth Circuit had deemed itself bound by that ruling. The Kentucky brief dismisses that case in a footnote, commenting that it is not binding on the Supreme Court, especially because rulings in more recent cases undermine that holding.

The couples' arguments on the recognition question:

The Kentucky brief, the only one to address both issues before the Court, uses much of the argument on the marriage question as equally applicable to the recognition issue. However, it does add another point about recognition: once a state has given its approval to a given form of marriage, that form acquires a "dignity and status of immense import" — a direct quotation from Justice Kennedy's opinion for the majority in *Windsor*.

In addition, the Kentucky brief adds that there is a "long-standing tradition" among the states of recognizing marriages based upon what the law is in the state where the marriage was performed, rather than on the law of a state to which a married couple may move. Again quoting from *Windsor*, the filing said that a failure to follow that tradition "imposes a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriage" that has been made legal by another state.

The Ohio and Tennessee cases before the Court are confined to the recognition question. While the Ohio brief urges the Court to use a "heightened" constitutional test to strike down the ban on recognition, the Tennessee brief goes further, contending that the Court should apply the most stringent constitutional test: "strict scrutiny." The Court itself applies that test sparingly; when it is used, it leads to the invalidation of almost any public policy that does not have the sturdiest justification behind it.

The Tennessee couples make that argument amid a more fulsome reliance on the "fundamental right to marry" argument, under the Fourteenth Amendment's Due Process Clause. In making that argument, the Tennessee brief makes heavy use of the rhetoric of Justice Kennedy's *Windsor* opinion, even though the Court in that ruling did not apply a "strict scrutiny" standard in nullifying the non-recognition policy of the Defense of Marriage Act.

The Ohio couples do draw heavily upon the language of the *Windsor* opinion, but they also seek to draw close parallels between the DOMA provision nullified in that decision and Ohio's non-recognition policy. The parallels between them, it says, "are striking," with both bans having the discriminatory effect of marking marriages performed elsewhere for same-sex couples as "unequal."

The Tennessee brief moves somewhat beyond the Ohio brief in adding a right-to-travel argument as a reason for nullifying that state's ban on recognition. What the Tennessee ban does, the brief suggests, is to turn the legal marriage of a same-sex couple into an illegal institution the moment such a couple crosses into Tennessee to live, or even to pass through the state on a trip.

In another argument closely related to that one, the Tennessee brief contends that a recognition ban violates the concept of federalism. In doing so, that brief relies upon Justice Kennedy's 2011 decision in the case of *Bond v. United States*, marking the first time that the Court had declared that the division of powers among government levels furthers individual liberty. No one level of government, the brief said, quoting from the *Bond* opinion, has "complete jurisdiction over all the concerns of public life."

None of the briefs on the recognition question seek to rely upon the Constitution's Full Faith and Credit Clause, which generally requires one state to respect the court orders and decrees of sister states. That argument appears to have fallen out of favor in the same-sex marriage litigation, and does not seem likely to arise on the couples' side in the Supreme Court's review.

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