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Supreme Court to hear Prop 8 and DOMA cases: Game On

If there is anything that is certain about the Supreme Court's announcement from last Friday, it is this: a new story is being told to the nation about LGBT life.

On Friday, the Supreme Court of the United States announced that it would hear two important cases that raise constitutional questions concerning the rights of LGBT citizens: Hollingsworth v. Perry, (the "Prop 8" case), and United States v. Windsor, (the "DOMA" challenge). In Perry, the Ninth Circuit had previously ruled that there was no legitimate reason for the enactment of Proposition 8, which stripped same-sex couples of a right that had been granted before it was taken away. In short, the Ninth Circuit held that Prop 8 failed rational basis, the lowest level of scrutiny available under the Equal Protection Clause of the Fourteenth Amendment. The "Yes on 8 Campaign" stood in the shoes of the Governor of California to defend the State after the Governor refused to defend the law.

In Windsor, the Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives appealed a Second Circuit decision that repealed Section 3 of the Defense of Marriage Act, which defines marriage for federal purposes. In this case, Edie Windsor was slapped with a federal estate tax of $363,000 after her partner of 40 years, Thea Spyer, died from a long battle with multiple sclerosis. Thea had left Edie, who is 83 years old, her estate – including the home they shared together. Edie and Thea were legally married in Canada, and although their marriage was recognized in the State of New York, the federal government did not recognize them as a family due to DOMA. The Second Circuit ruled that DOMA failed intermediate scrutiny, a heightened standard of review under the Equal Protection Clause previously reserved for sex-based classifications. BLAG stood in the shoes of the Department of Justice when the Obama Administration refused to defend the law.

Less sexy but still important, the Supreme Court, by agreeing to hear both cases, has acknowledged that issues concerning the rights of LGBT Americans do, in fact, raise substantial federal questions. This is indeed a shift. In the 1972 case of Baker v. Nelson, a gay couple appealed the decision of the Minnesota Supreme Court that laws limiting marriage to different-sex couples did not violate constitutional rights. There, the Supreme Court dismissed the appeal "for want of a substantial federal question." Although predicting Supreme Court behavior is much like reading tea leaves, that the Court even granted review in the first place is some indication that 40 years later, times have indeed changed.

Nothing is certain about what it means for the Supreme Court to have granted cert in Perry and Windsor, except this: a new story is being told about what it means to be a gay American in the 21st century.

The courage of the likes of Edith Windsor, who was out before schools in the South desegregated, cannot be understated. She and Thea Spyer were engaged before Robert Kennedy was assassinated, two years before Stonewall, and 19 years before the Supreme Court upheld laws that criminalized private, consensual sex between gay adults. Marinate on that for a minute: they were engaged. When gay sex was a crime in many states. Nor does Edith slip into vanilla statements about marriage. In the 2009 documentary, *Edie and Thea*, Edie remembered: "We immediately just fit, our bodies fit." Peel back the layers, and although legal briefs drone on drably about death, marriage, and taxes, the lives of real people are infinitely more complicated.

Twenty-six years after Justice Lewis Powell, the deciding vote in Bowers v. Hardwick, told his gay clerk that he'd never known a homosexual, these are the stories being told to the Supreme Court.

Without a doubt, these subtexts are part of the story that will someday be told future generations about a movement that led to full equality for lesbian, gay, bisexual, and transgender citizens under the law. But the likes of an 83-year-old woman do not have time to wait for the next generation. Here, we get down to brass tax.

In both Perry and Windsor, the Supreme Court announced that it will take up the issues of "standing." Standing is a legal concept that effectively means the parties appearing in court must have a live controversy, or skin in the game, so to speak. As noted earlier, the named defendant in each case did not actually defend the state or federal government, respectively. In both cases, the government has refused to defend these laws, which itself speaks to how we have evolved on these issues. For that reason, the Yes and 8 Campaign and BLAG stepped in the shoes of the real parties in interest. What happens, however, when the real party in interest refuses to defend a law it agrees is unconstitutional? This is a threshold question the Supreme Court has chosen to take up before it reaches fundamental constitutional questions. Should the Court rule that one or neither defendant had standing, one or both cases would be kicked back to lower courts. As for Perry, that could effectively wipe out the Ninth Circuit's ruling and reinstate the U.S. District Court's substantively broader but jurisdictionally more narrow ruling. Interesting issues could be raised concerning whether the Yes on 8 Campaign has a "direct stake" in laws that seemingly have no direct effect on the interests and lives of straight couples under an important case, Arizonans for Official English v. Arizona, but only time will tell. As for Windsor, should the Supreme Court find that BLAG did not have standing to defend the case, it is possible that DOMA would be left with no one to defend it.

If the Court moves past standing hurdles in each case, a range of outcomes are possible. First, we'll start with Perry, which is probably the case with wider-ranging possibilities.

The Perry Plaintiffs, since first filing their Complaint in 2008, have sought to narrow the issues presented from the "big kahuna" fundamental right to marry question to the particularly odd set of circumstances presented by the passage of Prop 8, a law that revoked a right that had been granted. It is within the world of possibility that the Supreme Court will decide whether

the fundamental right to marry extends to gay citizens. Justice Kennedy, the likely swing vote on the Court, has authored the two key cases on this topic: Romer v. Evans and Lawrence v. Texas. Still, history overwhelmingly shows that the Court tends not to get out in front of public opinion. Currently, 30 states have laws on the books that explicitly deny gay citizens the right to marry, and the Court will undoubtedly be mindful of this fact as it considers its own institutional legitimacy and the potential for a constitutional crisis. The tide of public opinion is, however, turning, as the recent results in Maryland, Maine, Minnesota, and Washington indicate. Shy of a sweeping decision, the Court could decide that states cannot offer "everything but marriage" – i.e. civil unions and domestic partnerships that offer all the rights of marriage without recognizing marriage itself – but that states which choose to withhold relationship recognition of any type may continue to do so. Such a decision would limit the effect of a ruling in favor of equality. Still narrower than that, the Court could also adopt the Ninth Circuit's logic, which would limit a ruling to the odd facts presented by the passage of a law that stripped a previously recognized right.

In practical terms, the effect of a Supreme Court ruling could be this, ranging from the "best" possible outcome to the "worst" from an equality point-of-view:

* The Supreme Court could decide that all gay Americans should have the right to marry in all 50 states (a 50-state solution);
* The Court could decide that states which recognize everything but marriage must also recognize marriage, which could add 8 more states to the equality list (an 8-state solution);
* Prop 8 could be repealed but the decision could be limited only to California (a 1-state solution);
* The standing issue could prohibit the Supreme Court from deciding the constitutional issue, probably leading to marriage equality only in Alameda and Los Angeles County, where the Plaintiffs reside (a 2-county solution);
* The Court could uphold Prop 8, enshrining bigotry in the California Constitution but limiting its decision solely to Prop 8 (and possibly laws like it);
* The Court could decide that the fundamental right to marry does not include gay Americans.

If Perry is sweeping, the DOMA challenge is surgically precise. The brilliance of Windsor and several analogous cases, including Gill v. Office of Personnel Management, Massachusetts v. Dept. of Health and Human Services (both 1st Circuit Cases) and Pederson v. Office of Personnel Management (another 2nd Circuit case) is that it forces the hand of the so-called conservative bloc of Justices who tend to side with states' rights. These cases explicitly do not challenge Section 1 of DOMA, which allows states not to recognize lawful marriages performed in other states. In Windsor, the fundamental issue is whether Section 3 of DOMA, which defines marriage for federal purposes as "only a legal union between one man and one woman as husband and wife," deprives same-sex couples who are lawfully married under state law of equal protection of the laws as guaranteed by the Fifth Amendment. Here, the substantive outcomes are likely a menu of two, in the alternative: the Court could repeal Section 3 of DOMA, or it could affirm the constitutionality of DOMA.

The kicker with Windsor is that family law is traditionally an area of law left to the domain of the states. The Constitution creates a floor, so to speak, of minimum rights, below which states cannot infringe. If DOMA were repealed on constitutional grounds, certainly the reasoning could be applied more broadly to LGBT rights cases. However, the repeal of DOMA would not automatically lead to a fundamental right to marry. It may, however, create fascinating questions, such as whether a couple lawfully married outside their home state could be recognized as married under federal law, but not under the laws of their home state? If DOMA were repealed, the grounds are likely to be that Congress exceeded the bounds of federalism when it encroached on states' rights to define marriage, which would also have the effect of cutting off at the pass the potential for Congress to enact federal legislation recognizing marriage equality – an unlikely path to equality in any event.

Additionally, it is notable that unlike other DOMA challenges pending elsewhere in the country, Windsor applied a heightened standard of review typically reserved for constitutionally "protected classes." That the Court is considering this particular case, rather than taking up other DOMA cases that do not raise heightened scrutiny, is reason for pause. By reviewing Windsor, the Court could decide that gay people are - or are not - a constitutionally protected class. Simplified, heightened scrutiny means that laws which discriminate on a certain basis (i.e. sexual orientation) are not given the deference typically given to lawmakers.

Taken together – and, again, assuming the Court moved beyond the threshold standing issue – a sweeping equality ruling in Perry would likely repeal DOMA, but a repeal of DOMA would not necessarily lead to a sweeping victory in Perry. The Court could reverse the Ninth Circuit's ruling on Prop 8, keeping Prop 8 intact, while declaring DOMA unconstitutional. It could affirm the Ninth Circuit's ruling on Prop 8 (i.e. recognizing the right of gay Californians to marry) simultaneously while repealing DOMA. Or, in a worst-case scenario, it could reverse the Ninth Circuit, finding Prop 8 to be a constitutional enactment of California citizens, while upholding the constitutionality of DOMA.

Questions about the timing of bringing these cases abound. Are these lawsuits premature? Is the Court ready to rule in favor of equality? Is the nation ready for it? Could a negative ruling set the movement back? Without question, the potential for adverse rulings exist in equal measure to the potential for sweeping victories. It is precisely this risk that makes the Supreme Court's announcement exhilarating and disquieting. But if only one thing is certain about last week's announcement, history is certain about another: the law does not change without a demand. As a former professional soccer player, I muster every ounce of restraint I can to avoid sports analogies, but every now and again, there is truth in their simplicity. No one has ever won by forfeit.

No matter one's opinion as to the wisdom of bringing these two cases before the Supreme Court now, the fact remains that the Court will decide issues critical to LGBT Americans in 2013.

The Theas and Ediths of the world do not have time to wait. Game on.