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Love and Marriage: The Evolving Landscape

Last November, the Sixth Circuit Court of Appeals became the first federal appeals court to uphold state bans on same-sex marriage since the Supreme Court decided *US v. Windsor* in 2013. On April 28, the Supreme Court will hear oral argument on same-sex marriage cases from the four states covered by that circuit — Kentucky, Michigan, Ohio, and Tennessee. At issue is whether a state has to issue marriage licenses to same-sex couples and recognize same-sex marriages performed elsewhere. Because the ruling will have nationwide ramifications, employers will want to monitor developments closely.

Background

Initially, court rulings were the driving forces behind legalizing same-sex marriage — Massachusetts in 2004, Connecticut in 2008, and Iowa in 2009. For the next few years, state legislatures often took the lead in extending marriage rights to same-sex couples — enacting laws in states such as: Vermont and New Hampshire in 2009; New York in 2011; Maryland and Washington in 2012; and Delaware, Hawaii, Minnesota and Rhode Island in 2013. As courts continued to take an active role, voters were asked to approve — or reject — same-sex marriage statutes or constitutional amendments in states like Maine, Maryland and Washington. As a growing number of states legalized same-sex marriage, California law permitting same-sex marriage was reinstated.

In June 2013, the Supreme Court struck down the section of the Defense of Marriage Act (DOMA) that prohibited federal recognition of same-sex marriage. In its landmark *US v. Windsor* decision, the Court held that the prohibition deprived same-sex couples of the equal liberty protections of the Fifth Amendment. (See our January 29, 2014 *For Your Information*.) However, the ruling left standing another section of DOMA that allows states to refuse to recognize same-sex marriages lawfully entered into in other states. Soon after the *Windsor* decision, laws allowing same-sex couples to marry in Rhode Island, Delaware, Minnesota and Hawaii took effect as marriage laws in other states were challenged.

Volume 38 | Issue 61 | April 27, 2015

2014 was a watershed year for same-sex marriage. When 2014 began, two-thirds of the states prohibited same-sex marriage, largely by constitutional amendment and/or state law. Legal challenges to state marriage bans became widespread as the year progressed. Federal and state courts dealt with a flood of litigation, and issued a string of decisions in favor of "marriage equality." Now, roughly three-quarters of the states are issuing marriage licenses for same-sex couples.

Federal Courts Weigh In

Four federal courts of appeals — and more than thirty federal district courts — have already ruled in favor of same-sex marriage. Some states challenged those decisions while other states decided not to. Largely because of those rulings and the Supreme Court's decision not to review them, same-sex marriage is now legal in more than 35 states and in the District of Columbia.

Lower Court Rulings

Same-sex couples who filed federal lawsuits in 2014 challenged the constitutionality of state laws that prohibited:

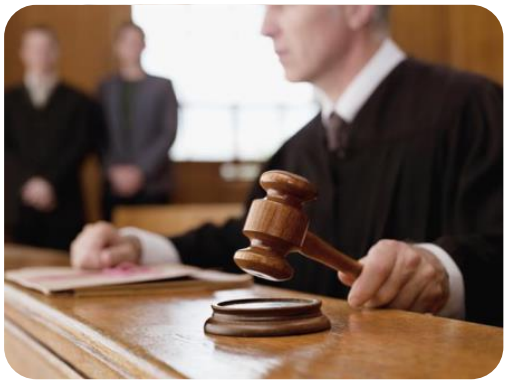
- Same-sex couples from marrying and/or
- Legal recognition of lawful out-of-state marriages

Federal district courts that considered these issues were nearly unanimous in concluding that state prohibitions on same-sex marriage were unconstitutional and should be struck down. Some rulings were put on hold as states challenged them, while other states opted not to appeal. As the year unfolded, it became clear that efforts to legalize same-sex marriage were gaining momentum across the country.

In the first quarter of 2014, federal courts struck down state marriage bans in states such as Oklahoma, Virginia and Texas, and required recognition of same-sex marriages performed in other states. A federal court decided that same-sex couples in Michigan had the right to marry, but did not address recognition of out-of-state marriages. Each of the rulings was stayed pending appeal.

In 2013, Illinois passed a law allowing same-sex marriage to begin June 1, 2014. But a federal court accelerated the timeline when it ruled that same-sex couples in Cook County had the right to marry in February and required the state to recognize out-of-state same-sex marriages. Federal courts ruled that neighboring Kentucky and Tennessee had to recognize marriages between same-sex couples legally performed elsewhere, but the rulings were put on hold pending appeal.

In the second quarter of 2014, the trend toward eliminating restrictions on same-sex marriage continued. Federal judges in states like Idaho, Oregon, Pennsylvania, Wisconsin, and Indiana issued rulings requiring the states to allow same-sex marriage and to recognize same-sex marriages legally performed elsewhere. The rulings took effect immediately in Oregon and Pennsylvania, while other rulings were stayed pending appeal.

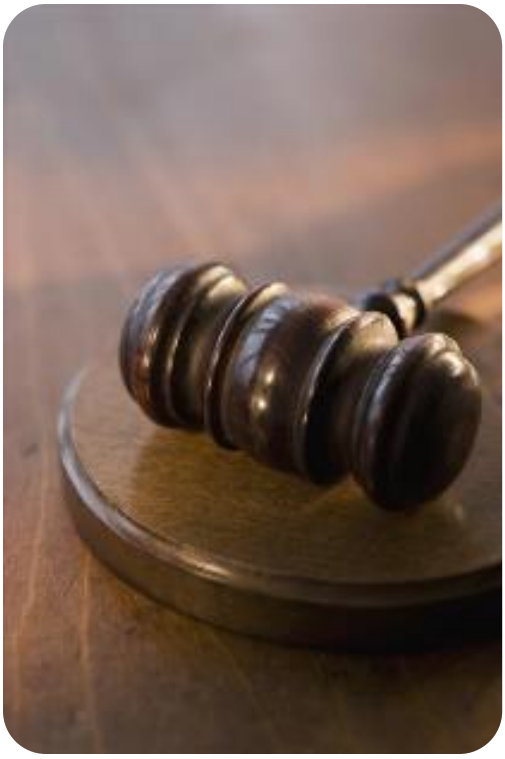


An Ohio federal court ruled that the state must recognize marriages between same-sex couples legally performed out of state. A federal court in Utah decided that the state had to recognize nearly 1,300 marriage licenses that were issued to same-sex couples before a

decision striking down its same-sex marriage ban was put on hold in January 2014. The rulings were stayed pending appeal.

Even as federal courts were striking down restrictions on same-sex marriage across the country, bans were also being challenged and overturned in state courts. For example, an Arkansas state court ruled in May that same-sex couples have the right to marry and the state must recognize marriages of same-sex couples legally performed in other states. That ruling was stayed pending appeal to the Arkansas Supreme Court.

In the third quarter of 2014, federal courts continued to upend state marriage laws. In states like Colorado and Florida, rulings that struck down same-sex marriage bans and required the recognition of out-of-state same-sex marriages were temporarily put on hold. The Colorado ruling took effect when the Supreme Court declined to review a decision by the Tenth Circuit Court of Appeals (that covers Colorado) that recognized a constitutional right to same-sex marriage, albeit in Utah. The Florida ruling went into effect in 2015, allowing same-sex couples to marry even as an appeal proceeds at the Eleventh Circuit Court of Appeals.



Following an earlier ruling requiring Kentucky to recognize legal marriages of same-sex couples performed out of state, a federal court decided that same-sex couples in Kentucky have the right to marry. The state appealed. Another federal court held that Indiana must recognize marriages between same-sex couples legally performed in other states, but the ruling was stayed pending further action from the Seventh Circuit Court of Appeals.

In the first post-*Windsor* federal court ruling to reject a constitutional challenge to a same-sex marriage ban, a judge in New Orleans upheld Louisiana's prohibition against same-sex marriage and the recognition of same-sex marriages performed elsewhere. Largely relying on the *Windsor* decision's recognition of the states' broad authority to regulate state domestic relations laws, the court concluded that the state was "acting merely within the scope of its traditional authority." An appeal is currently pending in the Fifth Circuit Court of Appeals, which is also weighing an appeal of a federal court decision striking down the Texas ban on same-sex marriage.

> **Comment.** In contrast, a Louisiana state court later ruled that state law prohibiting same-sex marriage violates the 14th Amendment's due process and equal protection clauses as well as the full faith and credit clause. The state appealed to the Louisiana Supreme Court.

In the fourth quarter of 2014, the pace at which prohibitions on same-sex marriage fell increased as federal courts across the country found state bans unconstitutional. Rulings struck down marriage laws in states such as Alaska, North Carolina, Wyoming, Arizona, Kansas, Missouri, West Virginia, Montana, Arkansas and Mississippi, and required them to recognize same-sex marriages performed in other states. Wyoming, Arizona, North Carolina, Montana and West Virginia effectively legalized same-sex marriage by electing not to pursue appeals. Other states chose a different path.

When the Tenth Circuit denied Kansas' request for a stay, same-sex marriages began in that state. In contrast, the Eighth Circuit Court of Appeals put the Missouri and Arkansas rulings on hold pending appeals. The Mississippi ruling was temporarily put on hold to allow the state to appeal to the Fifth Circuit, where conflicting rulings from Louisiana and Texas are pending.

> **Comment.** As federal courts considered the patchwork of state marriage laws, state courts were considering challenges to those laws. Some courts, like the Kansas Supreme Court, initially blocked the issuance of same-sex marriage licenses, but later decided to defer to the federal courts. Other state courts, like those in Missouri, found the state's prohibition on recognizing same-sex marriage unconstitutional before a federal judge struck down the ban.

In South Carolina, federal district courts ruled that same-sex couples have the right to marry and have to recognize lawful out-of-state marriages for all purposes. After the Fourth Circuit Court of Appeals and the Supreme Court denied the state's request to block same-sex marriages from proceeding, South Carolina became the 35th state in which same-sex marriage is legal.

> **Comment.** The Supreme Court's prior decision not to hear an appeal of the Fourth Circuit ruling that allowed same-sex marriage in Virginia opened the door for same-sex marriages in other states in the circuit, including South Carolina.

In the first quarter of 2015, federal courts continued to issue rulings invalidating state marriage laws. Federal judges in South Dakota and Nebraska found state bans on same-sex marriage and the recognition of same-sex marriages lawfully performed elsewhere to be unconstitutional. Both rulings were appealed to the Eighth Circuit. In February, a federal judge in Alabama found that state's marriage laws violated the 14th Amendment and struck them down, paving the way for same-sex couples to wed. Soon after, the Alabama Supreme Court ordered probate judges to stop issuing marriage licenses to same-sex couples, making the legal status of same-sex marriage in that state unclear.

Four Federal Appeals Courts Invalidate State Bans

By the end of 2014, four different federal appeals courts had invalidated same-sex marriage bans in seven states — Indiana, Idaho, Nevada, Oklahoma, Utah, Virginia and Wisconsin. Although each of these courts found a constitutional right to same-sex marriage, they reached that conclusion in various ways.

The Tenth Circuit. On June 25, 2014, the Tenth Circuit issued the first federal appellate court decision on same-sex marriage post-*Windsor*. In *Kitchen v. Herbert*, the Tenth Circuit held that Utah's same-sex marriage ban violated federal constitutional guarantees of equal protection and due process. Three weeks later, in *Bishop v. Smith*, the Tenth Circuit struck down Oklahoma's ban on same-sex marriage. The court stayed its opinion in both cases, pending expected challenges.

States in these Judicial Circuits

Tenth Circuit

Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming

Fourth Circuit

Maryland, North Carolina, South Carolina, Virginia and West Virginia

Seventh Circuit

Illinois, Indiana and Wisconsin

Ninth Circuit

Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington

> **Comment.** On August 5, 2014, Utah petitioned the Supreme Court to review the Tenth Circuit's decision. Although 32 states (15 that allow same-sex marriage and 17 that had bans) and 30 major companies urged the Court to take the case, it declined.

The Fourth Circuit. On July 28, 2014, the Fourth Circuit became the second federal appeals court to find state bans on same-sex marriage and on recognizing out-of-state same-sex marriages to be unconstitutional. In *Bostic v. Schaefer*, the Fourth Circuit found Virginia's marriage laws "violate[d] the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they … prohibit Virginia from recognizing same-sex couples' lawful out-of-state marriages."

> **Comment.** When this decision came down, three other states located in the Fourth Circuit — North Carolina, South Carolina, and West Virginia — had similar bans, and challenges had already been filed against both North Carolina's and West Virginia's restrictions on same-sex marriage.

The Seventh Circuit. On September 4, 2014, the Seventh Circuit became the third federal appeals court to find state bans on same-sex marriage unconstitutional. Wisconsin and Indiana challenged lower court rulings that found their same-sex marriage bans as well as Indiana's ban on recognition of same-sex marriages performed outside the state were unconstitutional. In a combined ruling in *Baskin v. Bogan* (the Indiana case) and *Wolf v. Walker* (the Wisconsin case), a three-judge panel of the Seventh Circuit upheld the district court decisions striking down Wisconsin's constitutional ban and Indiana's statutory prohibitions.

Supreme Court Denies Review. On October 6, 2014, the Supreme Court denied *certiorari* in seven cases challenging decisions of federal appeals courts that recognized a constitutional right to same-sex marriage. The Court's refusal to hear challenges to the Fourth and Seventh Circuits' decisions allowed rulings that struck down bans on same-sex marriage in Virginia, Wisconsin, and Indiana to stand. Similarly, the Court's decision not to review the Tenth Circuit ruling that struck down Utah's marriage ban for same-sex couples allowed that decision and a decision striking down Oklahoma's ban to stand.

The Ninth Circuit. On October 7, 2014 — the day after the Supreme Court denied review of the Fourth, Seventh and Tenth Circuit decisions — the Ninth Circuit Court of Appeals ruled that same-sex marriage bans are unconstitutional. In *Latta v. Otter*, the plaintiffs challenged Idaho and Nevada statutes and state constitutional amendments that prohibited same-sex marriage and recognition of same-sex marriages validly performed elsewhere. Lower federal courts had come out on different sides of the issue. One judge ruled against Idaho's ban, while another upheld Nevada's ban. The Ninth Circuit — the same court that overturned California's Proposition 8 recognizing only opposite-sex marriage — struck down bans in both states, ruling that they violate the Equal Protection Clause of the 14th Amendment.

As a result of rulings by these four appellate courts — and the Supreme Court's decision not to review them — same-sex marriage was recognized in Alaska, Arizona, Colorado, Idaho, Indiana, Nevada, North Carolina, Oklahoma, Utah, Virginia, West Virginia, Wisconsin and Wyoming.

Volume 38 | Issue 61 | April 27, 2015

Three Federal Appeals Courts Have Cases Pending

Three federal courts of appeals have same-sex marriage cases pending. However, two of those courts have now put those cases on hold.

The Fifth Circuit. In *De Leon v. Perry,* the plaintiffs challenged Texas laws prohibiting same-sex couples from marrying. A federal trial court ruled that the prohibition was unconstitutional, but stayed the ruling pending appeal. In *Campaign for Southern Equality v. Bryant,* a federal judge struck down Mississippi's same-sex marriage bans. In *Robicheaux v. Caldwell,* a federal judge in Louisiana issued one of the few federal rulings upholding state prohibitions on same-sex marriage. On January 9, 2015, the Fifth Circuit heard oral arguments in these three federal marriage cases. A ruling is still pending.

States in these Judicial Circuits

Fifth Circuit

Louisiana, Mississippi and Texas

Eighth Circuit

Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota and South Dakota

Eleventh Circuit

Alabama, Florida and Georgia

The Eighth Circuit. Three same-sex marriage cases from Missouri, Arkansas and South Dakota are on expedited appeal to the Eighth Circuit. For these purposes, the court consolidated the cases — *Lawson v. State of Missouri*, *Jernigan v. McDaniel,* and *Rosenbrahn v. Daugaard* — and set oral argument for early May. Proceedings in other federal court challenges to North Dakota's and Nebraska's same-sex marriage bans have been stayed pending the Supreme Court's decision.

The Eleventh Circuit. Federal rulings from two states are on appeal to the Eleventh Circuit — Florida's *Brenner v. Scott* and Alabama's *Searcy v. Strange and Strawser v. Strange*. The court's refusal to stay the lower court rulings pending appeal paved the way for same-sex couples to begin to marry in both states. The appeals are on hold pending the Supreme Court's decision. In the meantime, the Alabama Supreme Court's order stopping probate judges from issuing marriage licenses to same-sex couples has created uncertainty as to the legal status of same-sex marriage in that state.

Sixth Circuit Takes a Different View

By a 2-1 decision on November 6, 2014, the Sixth Circuit reversed a lower court ruling and upheld bans on same-sex marriage in all four states in its region. In *DeBoer v. Snyder*, the court refused to strike down same-sex marriage bans in Kentucky and Michigan and upheld prohibitions on the recognition of same-sex marriages in Ohio and Tennessee. Citing the 1972 Supreme Court decision in *Baker v. Nelson* as controlling precedent, the majority took the view that the issue of same-sex marriage should be left to the voters and state legislatures. The ruling created the first split in the circuits on the recognition of same-sex marriages.

States in the Sixth Circuit

Kentucky, Michigan, Ohio and Tennessee

Supreme Court Review Sought

The parties challenging the Sixth Circuit's ruling elected to bypass review by the full circuit court and appeal directly to the Supreme Court. While each of their petitions raised constitutional issues, the specific questions they asked the Court to review differed.

Volume 38 | Issue 61 | April 27, 2015

Ohio. Plaintiffs in the two Ohio lawsuits — *Henry v. Hodges* and *Obergefell v. Hodges* — jointly petitioned the Court to rule on whether:

- Ohio's constitutional and statutory bans on recognition of marriages of same-sex couples validly entered in other jurisdictions violate the Due Process and Equal Protection Clauses of the 14th Amendment to the US Constitution.
- Ohio's refusal to recognize a judgment of adoption of an Ohio-born child issued to a same-sex couple by the courts of a sister state violates the Full Faith and Credit Clause of the US Constitution.

Tennessee. In their petition, plaintiffs in the Tennessee suit — *Tanco v. Haslam* — raised a new constitutional issue — the right to travel between the states. Plaintiffs asked the Court to rule on whether:

- A state violates the Due Process or Equal Protection Clauses of the 14th Amendment to the US Constitution by depriving same-sex couples of the fundamental right to marry, including recognition of their lawful, out-of-state marriages.
- A state impermissibly infringes upon same-sex couples' fundamental right to interstate travel by refusing to recognize their lawful out-of-state marriages.
- The Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is binding precedent as to petitioners' constitutional claims.

Kentucky and Michigan. The sole issue raised in the Michigan petition — *DeBoer v. Snyder* — was whether a state violates the 14th Amendment to the US Constitution by denying same-sex couples the right to marry.

> **Comment.** The question echoes the question raised by opponents of same-sex marriage in *Hollingsworth v. Perry* — "Whether the Equal Protection Clause of the 14th Amendment prohibits the State of California from defining marriage as the union of a man and a woman." Finding that the sponsors of California's Proposition 8 did not have a legal right to appeal, the Court never answered the question.

The Kentucky petition — *Love and Bourke v. Beshear* — urged the Court to decide whether:

- A state violates the Due Process and Equal Protection Clauses of the 14th Amendment by prohibiting gay men and lesbians from marrying an individual of the same sex.
- A state violates the Due Process and Equal Protection Clauses of the 14th Amendment by refusing to recognize legal marriages between individuals of the same sex performed in other jurisdictions.

Supreme Court Will Decide

On January 16, 2015, the Supreme Court granted the petitions for certiorari, agreeing to review the cases from four states — Kentucky, Michigan, Ohio and Tennessee. The Court consolidated the cases and limited its review to the following two questions:

1. Does the 14th Amendment require a state to license a marriage between two people of the same sex?
2. Does the 14th Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

Volume 38 | Issue 61 | April 27, 2015

Potential Implications

The *Windsor* decision did not make same-sex marriage the law of the land, but it did redefine "marriage" for purposes of federal law. Since then, federal agencies have issued guidance and updated regulations to ensure that married same-sex couples enjoy the same status under federal law as married opposite-sex couples. Federal courts have cleared the way for same-sex marriage in many states, while other states have retained their traditional view of marriage — leaving employers and sponsors of employee benefit plans to deal with differing definitions of "spouse" and "married" under federal and applicable state laws.

If the Supreme Court finds there's a constitutional right to same-sex marriage, then what? Existing state bans would be nullified, and states would be required to grant marriage licenses to same-sex couples. In that case, employers with operations in those states would need to review and make any necessary adjustments to their employment policies and employee benefit plans or offerings. Regardless of the Court's decision, the case is expected to have significant social, legal, political and tax implications across the country.

In Closing

The majority of federal district courts that have considered challenges to state laws that prohibit same-sex marriage and its recognition — and four federal appellate courts — have decided that the laws are unconstitutional. The Sixth Circuit's ruling that upheld state marriage laws with similar prohibitions created a split among the federal circuits. The Supreme Court has agreed to weigh in, and scheduled oral argument for April 28. A decision is expected in June. Because the ruling will have nationwide ramifications, employers will want to monitor these developments closely.

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