

# ERIC *FocusOn* Conference Call on the Impact of the DOMA Decision on Benefit Plans

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# Overview and Agenda

- Decision in *United States v. Windsor* (DOMA)
  - Standing
  - Constitutional analysis
- Decision in *Hollingsworth v. Perry* (Cal. Prop. 8)
  - Standing
- Interesting sideline points regarding the decisions
- Immediate questions and ramifications

# Windsor - DOMA

- Facts

- Same-sex couple married in Canada
- Marriage honored in New York, pursuant to state law
- Estate tax exemption dispute
- DOMA prevents surviving same-sex spouse from obtaining the benefits of the exemption for surviving spouses otherwise available
  - ❖ Section 3 of DOMA is at issue
- Surviving spouse seeks refund, challenges DOMA's constitutionality

# Windsor - DOMA

- District Court proceedings
  - Bipartisan Legal Advisory Group (BLAG) intervenes
  - District Court orders tax refund, finding DOMA to be unconstitutional
  - Contrived controversy?
    - ❖ President refuses to defend the law, but also refuses to award the refund
    - ❖ Plaintiff doesn't seek enforcement, and abides with appeal
- Second Circuit affirms
- Supreme Court grants certiorari
  - Some argued the Court “grabbed” a case too soon
  - Predictions after oral argument

# Windsor - DOMA

- Supreme Court decision
  - Predictable line-up
  - Short time to write
- Threshold issue: standing
  - The parties are not adverse
    - ❖ United States *agrees* with Windsor that the statute is unconstitutional
  - Court concludes that there is a “case” or “controversy” as is required by Article III, because Executive Branch still has refused to pay the refund

# Windsor - DOMA

- Standing - *continued*
  - Next the Court considers “prudential” standing issues
    - ❖ Is there sufficient adverseness for the Court to issue a sound judgment?
      - Yes, because of BLAG and an appointed *amicus*
    - ❖ Court recognizes that the merits issues will arise in a later case, but with added “costs, uncertainties, and alleged harm and injuries likely . . . continu[ing]”
    - ❖ Blockbuster: Court must decide the case or otherwise cede to the President the authority to say “what the law is”
  - Court limits standing holding, calling this an “extraordinary” case

# Windsor - DOMA

- The merits: constitutional issues
- Begins with this sentence: “When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right.”
- Federalism dimension?
  - Initial focus on marriage regulation being the exclusive province of the states
  - Ultimately, federalism (and Tenth Amendment grounds) are not relied upon by the Court
    - ❖ This may be important when the constitutional question arises later in a challenge to a state’s non-recognition

# Windsor - DOMA

- Asserted basis for decision: Fifth Amendment
  - Equal protection, or due process basis?
  - Rational basis scrutiny, or strict scrutiny?
    - ❖ “Unusual” discriminations require “careful consideration”
    - ❖ Court then parses Congress’s purpose to determine if it is weighty enough to survive careful scrutiny
    - ❖ Court says “no” because purpose was merely to injure, stigmatize, and demean a politically unpopular group
    - ❖ Key line: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”



# Windsor - DOMA

- Limitations on Merits Ruling
  - “This opinion and its holding are confined to those lawful marriages.”
  - Court goes out of its way to note that case does *not* involve DOMA § 2, which allows states to refuse to recognize another state’s same-sex marriages
    - ❖ Full Faith and Credit Issue

# ***Hollingsworth* - Proposition 8**

- Background

- California Supreme Court declared that limiting right to marry to opposite-sex couples violates state Constitution
- California voters override that decision with Proposition 8, thereby prohibiting same-sex marriages in the state
- Same-sex couples wishing to marry sued the state in federal court to void Proposition 8, on the grounds that it violates the federal Constitution
- District Court enjoins enforcement of Proposition 8
- Ninth Circuit affirms, after thorny standing issue surfaces

# Hollingsworth - Proposition 8

- Supreme Court decision
  - Unusual line-up of Justices
  - No standing at the appellate level
    - ❖ Absent state enforcement authorities appealing the injunction, there is no case or controversy
      - Governor had declined to appeal
    - ❖ Substitute defenders of the law – namely, the proponents of Proposition 8 – are insufficient for purposes of standing in *federal* court
    - ❖ Proponents had no “particularized” or “concrete” injury
      - Same injury as any citizen of the state: the harm of a state’s duly-enacted law being disrespected and unenforced

# Hollingsworth - Proposition 8

- Supreme Court decision - *continued*
  - Query: Does the standing ruling make the Governor of California the final arbiter of “what the law is,” even though the President (per *Windsor*) cannot be the final arbiter of “what the law is”?
  - Immediate consequence of decision is to leave in place the District Court’s injunction
    - ❖ District Court’s decision is effectively unappealable
    - ❖ Injunction is against state officials and their subordinates
    - ❖ Ninth Circuit must issue mandate

# Interesting Sidelines

- Some commentators have said that *Windsor* is “vintage Kennedy”
- Kennedy assigned *Windsor* to himself, as he has often done in major 5-4 decisions in which he sides with the liberal Justices
- There are some veiled insults by Justice Scalia against Justice Kennedy, in Justice Scalia’s dissent in *Windsor*
- Were particularly Justices Ginsburg, Breyer, and Kagan insisting on a measured step in the direction of same-sex marriage, but not too substantial of a step?

# Immediate Questions and Ramifications

- Must an ERISA plan now extend spousal health benefits coverage to same-sex spouses in states that recognize same-sex marriage?
  - Does it matter if the plan is self-funded or insured?
- What are the rules likely to be when a same-sex couple is married in a state that recognizes same-sex marriage but then moves to a state that does not?
  - Justice Scalia describes the dilemma in his *Windsor* dissent

# Immediate Questions and Ramifications

- Is the law now settled in California?
  - Can Proposition 8 be revived in a state court suit, where the proponents do have standing to defend the law?
  - Does the injunction extend state-wide?
- What about DOMA § 2?
  - Must a non-recognition state now accept the same-sex marriage of a state where the marriage was performed and recognized?
- And the big remaining question: What will be the outcome when a state's non-recognition is challenged as violating the U.S. Constitution?

# About the Presenter

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