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*Obergefell v. Hodges*, No. 14-556 (previously described in the January 20, 2015, Docket Report)

Two years ago, in *United States v. Windsor*, No. 12-307, the United States Supreme Court invalidated Section 3 of the federal Defense of Marriage Act, which provided that federal law did not recognize the marriages of same-sex couples. The Court held that the statute violated the equal-protection and due-process guarantees of the Fifth Amendment. Relying in part on *Windsor*, plaintiffs in a number of states filed lawsuits contending that state officials violate the Fourteenth Amendment when they decline to license marriages between same-sex couples or to recognize the marriages of such couples that were performed in other states. Reviewing consolidated cases from Michigan, Kentucky, Ohio, and Tennessee, the Sixth Circuit held, in conflict with decisions of the Fourth, Seventh, and Tenth Circuits, that states had no federal constitutional obligation to license or recognize marriages between same-sex couples.

Today, in *Obergefell v. Hodges*, No. 14-556, the Supreme Court reversed the Sixth Circuit's opinion by a 5-4 vote, holding that the Fourteenth Amendment requires the states to license marriages between two people of the same sex and to recognize marriages between two people of the same sex that were licensed and performed out of state.

The Court's opinion, written by Justice Kennedy, noted that "the right to marry is fundamental under the Due Process Clause" and then observed that "the reasons marriage is [a] fundamental [right] under the Constitution apply with equal force to same-sex couples." First, the Court stressed that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Second, the Court stated that the "right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." Third, the Court noted that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." Fourth, the Court emphasized that both the Court's own "cases and the Nation's traditions make clear that marriage is a keystone of our social order" as well as "the basis for an expanding list of governmental rights, benefits, and responsibilities." For these reasons, the Court explained, "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."

The Court also concluded that the Equal Protection Clause of the Fourteenth Amendment protects the right of same-sex couples to marry. The Court did not engage in the traditional analysis of levels of scrutiny, but instead focused on its prior cases recognizing the right to marry and invalidating laws that restrict intimacy among lesbians and gay men.

The Chief Justice and Justices Scalia, Thomas, and Alito each wrote dissenting opinions. The dissenters forcefully expressed their views that the issue of the right of same-sex couples to marry should be left to the democratic process rather than decided by the Court.

Both the majority opinion and the dissents mention, but do not resolve, issues relating to the applicability of state and local antidiscrimination laws. For example, Justice Thomas expressed concerns that the Court's opinion could result in conflicts between religious liberty and antidiscrimination laws "particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."

These questions are likely to recur in future cases. Indeed several cases are already pending in state and federal courts in which same-sex couples claim that they suffered unlawful discrimination on the basis of their sexual orientation or marital status under state or local public-accommodations laws, and the defendants argue that they should be entitled to exemptions from those antidiscrimination requirements based on religious objections to marriage by same-sex couples. In several of these cases, Mayer Brown has argued on behalf of business interests and civil-liberties organizations that fair and evenhanded enforcement of laws that require same-sex married couples to be treated with the same dignity as other married couples benefits businesses, their employees and customers, their communities, and the economy as a whole.

In the proceedings in the Supreme Court, Mayer Brown filed an amicus curiae brief in support of the Petitioners. Any questions about this case should be directed to Charles Rothfeld (+1 202 263 3233), Miriam Nemetz (+1 202 263 3253), or Richard Katskee (+1 202 263 3222) in our Washington office, or Hannah Chanoine (+1 212 506 2151) in our New York office.