Briefs

Marriage Battle Update, the Boy Scouts, and Prayer

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Supreme Court Rules on Marriage

The U.S. Supreme Court issued its long-awaited decisions in two pivotal marriage cases in June, and there are two key points from the rulings that pro-family citizens can celebrate: the high court did NOT legalize same-sex "marriage" nationwide, and it did NOT strike down California's marriage amendment. Despite this good news, the Supreme Court handed marriage redefinition proponents a partial victory in its decision to strike down part of the federal Defense of Marriage Act (DOMA) as unconstitutional, and in its refusal to recognize the rights of millions of California voters by finding that the proponents of Proposition 8, the state's marriage amendment, did not have standing to defend it in federal court. While both sides of the marriage debate differ in their interpretations of the implications of the high court's decisions, what is certain is that the battle for the institution of marriage is far from over and will continue to play out at all levels.

DOMA Ruling. On June 26, the Supreme Court struck down the constitutionality of Section 3 of the federal Defense of Marriage Act (DOMA) in a 5 to 4 decision in *United States v. Windsor*.[1] The majority opinion, which was authored by Justice Anthony Kennedy and joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, found that Section 3 of the federal DOMA violates the Equal Protection Clause of the 5th Amendment because, the court said, "it deprives some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State." The majority opinion points to the fact that same-sex "marriage" is now legal in New York (where the *Windsor* case originated) and 11 other states, and argues that by not recognizing these same-sex unions as "marriages," the federal government was violating "basic due process and equal protection principles."

The good news in the *Windsor* decision is that the Supreme Court limited its ruling to the federal DOMA, which defined marriage for federal purposes as the union of one man and one woman. In the majority opinion, Justice Kennedy recognized the authority of the states to define and regulate marriage, and made it clear that "this opinion and its holding are confined to those lawful marriages" under state law. Importantly, the Court did not declare same-sex "marriage" to be the law of the land, nor did it attempt to force all states to recognize the same-sex "marriages" of other states where it is legal, which is good news for states, such as North Carolina, where marriage is defined as the union of one man and one woman in both statute and in the constitution.

Chief Justice John Roberts emphasized the limited impact of the Court's decision in his dissent in *Windsor*, joined by Justices Scalia, Thomas and Alito. "[W]hile I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further," Roberts noted. "The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."

Despite the fact that the Court recognized the right of the states to determine their own marriage laws, Justice Antonin Scalia warned of the *Windsor* ruling's far-reaching impact in his dissent from the majority. According to Justice Scalia, the majority opinion, "accuses the Congress that enacted [the federal DOMA] and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with malice … to disparage and to injure same-sex couples. It says that the motivation for DOMA was to 'demean,' to 'im-

pose inequality,' to … brand gay people as 'unworthy,' and to 'humiliat[e]' their children." Scalia continued, "to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution."

Finally, Scalia issued a strong warning about how the Court's DOMA decision negatively portrays traditional marriage advocates. "In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with the purpose to 'disparage,' 'injure,' 'degrade,' 'demean,' and 'humiliate' our fellow human beings, our fellow citizens, who are homosexual," Scalia writes. "All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race."

The Alliance Defending Freedom (ADF) explains that the Supreme Court's decision to strike Section 3 of DOMA "effectively means we will no longer have a national definition of marriage. The federal government may now be required to accept any legal definition of marriage that a particular state invents. This leads to many unanswered questions, [and] new government burdens…" However, ADF notes that the decision "will not end the national debate over marriage."[2]

Proposition 8: The high court also issued its decision in *Hollingsworth v. Perry*, the case involving California's marriage amendment, Proposition 8, on June 26. In another 5 to 4 ruling, the Supreme Court declined to rule on the constitutionality of Proposition 8, instead determining that the proponents of Proposition 8, who were leading its defense in court, did not have "standing" to defend the amendment.

Chief Justice John Roberts, who wrote the majority opinion in the decision joined by Justices Kagan, Scalia, Ginsburg, and Breyer, argued that Proposition 8 proponents "have no 'personal stake' in defending [the marriage amendment's] enforcement that is distinguishable from the general interest of every citizen in California." Justice Roberts goes on to emphasize that, "The Court does not question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts. But standing in federal court is a question of federal law, not state law. No matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override this Court's settled law to the contrary."[3]

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> — *Justice Kennedy*

The majority opinion concludes by noting that the Court has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here." It continues, "Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction."

In his dissent from the majority opinion in *Hollingsworth*, Justice Kennedy wrote, "The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government." Justice Kennedy also warned that the majority's ruling "has implications for the 26 other states that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation."

Almost immediately after the Supreme Court's decision, the U.S. Court of Appeals for the Ninth Circuit issued an order on June 28, dissolving a stay it had previously placed on a district court order that found Proposition 8 unconstitutional. That order from the Ninth Circuit Court of Appeals allowed officials in California to begin issuing marriage licenses to same-sex couples. In response, the Alliance Defending Freedom (ADF) filed an emergency application with Supreme Court Justice Anthony Kennedy, who decides certain matters related to the Ninth Circuit. ADF asked Justice Kennedy to vacate the order by the Ninth Circuit and halt the issuing of marriage licenses to same-sex couples until the Supreme Court's ruling is officially certified. According to ADF, "[c]ourt rules require the 9th Circuit to wait for a certified copy of the judgment from the Supreme Court before taking action, and the high court has not yet issued its certified judgment." The emergency application to the high court described the Ninth Circuit's order as "the latest in

a long line of judicial irregularities that have unfairly thwarted Petitioners' defense of California's marriage amendment… Failing to correct the appellate court's actions threatens to undermine the public's confidence in its legal system."[4] Unfortunately, Justice Kennedy denied ADF's request.

"It is extremely unfortunate that the United States Supreme Court did not take a definitive stand in defense of marriage as one man and one woman in the two opinions the court issued on June 26," said John Rustin, president of the North Carolina Family Policy Council. "However, we can rejoice in the fact that the High Court did not redefine marriage nationwide, nor did it overturn California's marriage amendment. Both of these facts are good news for North Carolina. The High Court's opinions do not impact the status of marriage law here, including the Marriage Protection Amendment passed by 61 percent of North Carolina voters last year." Rustin emphasized, "Marriage in North Carolina remains the union of one man and one woman."[5]

State Marriage Battle Continues

Efforts to make Illinois the 13th state to redefine marriage have been stymied for now as the state legislature adjourned without taking a vote on a marriage redefinition bill that was thought to be inevitable. On May 31, Representative Greg Harris (D–Chicago) announced on the floor that there would not be a vote on S10—Civil Law-Tech due to a lack of support.[6] Harris was the bill's sponsor in the Illinois State House.

S10—Civil Law-Tech would enact the Religious Freedom and Marriage Fairness Act to allow same-sex "marriage" in Illinois by redefining the legal definition of marriage from "between a man and a woman" to "between two persons."[7] The Senate passed the bill, which was sponsored by 11 State Senators and 19 State Representatives, by a 34-21 vote on February 14. Governor Pat Quinn has vocally supported the bill and stated his intention to sign it into law, should it pass the Legislature. Opposition to the bill has been strong among the state's black pastors and Catholic bishops.

The bill would also have implemented a process for Illinois residents in a currently-legal civil union relationship to convert those to marriages within a year. Illinois legalized civil unions in 2011. The bill does include some religious protections, such as not requiring religious organizations to perform same-sex "marriages" or make their facilities available for such events. The no-vote on S10 is not necessarily the last word on the issue in Illinois. The measure is expected to be brought up for a vote in the House when lawmakers return in the fall.[8]

So far in 2013, three states—Delaware, Rhode Island, and Minnesota—have redefined marriage to include same-sex couples. In May, lawmakers in Delaware approved a measure to grant marriage licenses to same-sex couples. In addition to Delaware, Rhode Island, and Minnesota, nine other states—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—plus the District of Columbia also allow same-sex "marriage." Thirty states, including North Carolina, have approved constitutional amendments preserving marriage as only between one man and one woman. North Carolinians approved a Marriage Protection Amendment in May 2012 by a 61 percent to 39 percent margin.

BSA Changes Youth Membership Policy

In a move that could lead to the exodus of hundreds of thousands of Scouts, the Boy Scouts of America (BSA) will grant membership to boys who identify as homosexual, under a controversial resolution adopted on May 23 by a majority of the BSA National Council. According to the BSA's *Scouting* magazine, 61.44 percent of the National Council's 1,400 members voted in favor of the policy change, while 38.56 percent voted against it.[9] The vote changes the BSA's long-standing membership standards policy that prohibited youth and adult membership to "open and avowed homosexuals," by removing the prohibition for openly homosexual youth. The approved policy change, which will go into effect beginning January 2014, states in part: "No youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone."[10]

In a statement following the vote, the BSA emphasized that in addition to "removing the membership restriction regarding sexual orientation … the resolution also reinforces that Scouting is a youth program, and any sexual conduct, whether heterosexual or homosexual, by youth of Scouting age is contrary to the virtues of Scouting. A change to the current membership policy for adult leaders was not under consideration; thus, the policy for adults remains in place."[11]

While homosexual advocacy groups celebrated the vote as a "historic moment," they plan to continue their campaign to pressure the BSA to allow openly homosexual adults to serve as leaders. Zach Wahls, Founder of the pro-homosexual Scouts for Equality, which has led the campaign to pressure the BSA into changing its membership policy, applauded the vote in a statement, but added, "We look forward to the day where we can celebrate inclusion of all members and are committed to continuing our work until that occurs."

Pro-family organizations called the vote a "sad day for Scouting," and announced that they would discuss plans for a potential exodus from the Scouts. "It is with great sadness and deep disappointment that we recognize on this day that the most influen-

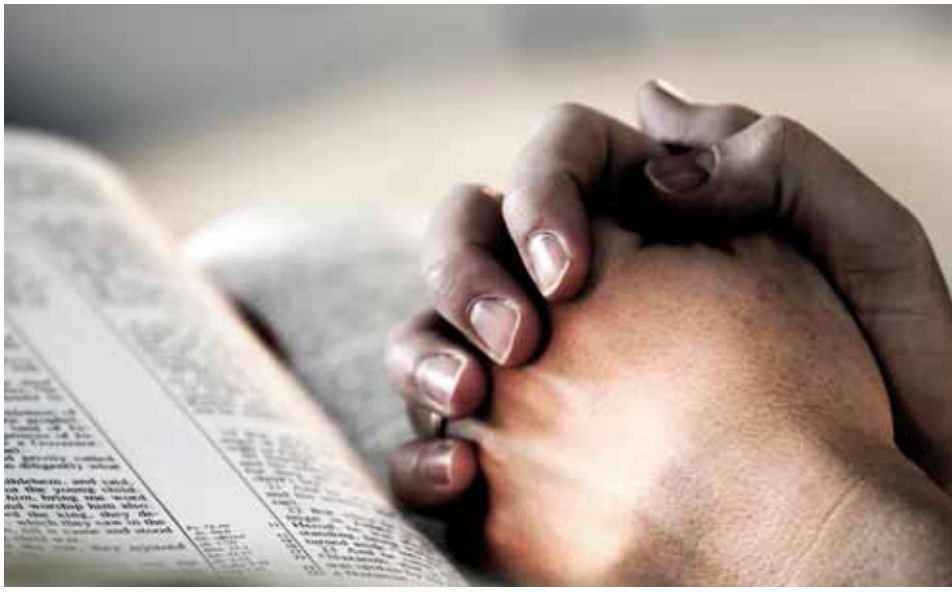
tial youth program in America has turned a tragic corner," said John Stemberger, president of OnMyHonor.net, a coalition of BSA members, parents, Eagle Scouts, and other Scouting leaders. "The vote today to allow open and avowed homosexuality into Scouting will completely transform it into an unprincipled and risky proposition for parents. It is truly a sad day for Scouting." Stemberger, along with other pro-family leaders, hosted a meeting in June in Louisville, Kentucky, to "discuss the creation of a new character development organization for boys."[12]

High Court to Review Public Prayers

The American tradition of prayer before government meetings will once again be considered by the United States Supreme Court, which has agreed to review a case involving the constitutionality of a New York town's public invocation policy. The high court agreed on May 20 to review a federal appeals court decision in *Town of Greece v. Galloway*, which involves a legal challenge to the town's public prayer policy brought by Americans United for Separation of Church and State (the same group that has targeted various North Carolina localities for their prayer policies). The last time the Supreme Court considered public prayer was 1983 in *Marsh v. Chambers*, when it upheld the constitutionality of the long-standing practice. How the Court rules in the New York case could help clarify conflicting lower court rulings in cases involving similar challenges to public prayer policies, including previous and current challenges in North Carolina.

The present case before the high court began in 2008, when Americans United (AU) filed a lawsuit against the Town of Greece over its public invocation practices, which allow clergy members from the community to open government meetings in prayer. AU argued in the lawsuit that the policy violated the Establishment Clause. A district court upheld the prayer policy as constitutional, citing the Supreme Court's ruling in *Marsh*. AU appealed the district court ruling to the U.S. Court of Appeals for the Second Circuit, which reversed the decision, finding that "the [T]own's prayer practice had the effect, even if not the purpose, of establishing religion."

The Town of Greece is being represented in the case by D.C.-based attorney Thomas Hungar, along with attorneys from the Alliance Defending Freedom (ADF). In a petition for review, they ask the Supreme Court to consider "[w]hether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity." The petition argues that the Second Circuit's decision in *Town of Greece* "conflicts with this Court's decision in *Marsh*…." It goes on to cite several conflicting lower court



decisions (in the Eleventh, Second, and Fourth Circuits) where the appeals courts have used different legal tests to either uphold or strike down the prayer policies of various localities. One such case is the 2011 ruling by the Fourth Circuit Court of Appeals in *Joyner v. Forsyth County*, which involved a challenge to the public invocation policy of Forsyth County, North Carolina. The Fourth Circuit upheld a lower court ruling that struck down the application of the prayer policy as unconstitutional. In 2012, the Supreme Court declined to hear an appeal of the Fourth Circuit's decision.[13] The petition goes on to argue that because "the courts of appeals are divided … This Court's intervention is necessary to resolve this conflict and to clarify the proper legal standard for evaluating legislative prayer."

In an open letter on the legality of public invocation policies, ADF explains that "Elected officials in cities, counties, and states across the country have received correspondence from activists groups such as the American Civil Liberties Union, Americans United for the Separation of Church and State, and The Freedom from Religion Foundation making the extraordinary demand that public invocations be censored or altogether prohibited." The letter presents an in-depth legal analysis of the constitutionality of public prayer, emphasizing that, "the Constitution clearly protects public invocations, even those that include a prayer."[14]

This year, a number of counties in North Carolina are facing challenges to their public prayer policies, including Rowan County, where the Board of Commissioners recently voted to fight a lawsuit filed by the American Civil Liberties Union of North Carolina (ACLU-NC), which demands that it "stop its unconstitutional practice of opening government meetings with prayers that are specific to one religion." Additionally, government leaders in both Union and Stokes Counties are facing threats by groups over their long-standing practices involving public prayer.[15] ❖

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Endnotes

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