

Marriage Equality Update

by
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I. Introduction

The marriage equality movement, also known as “same-sex marriage” or “gay marriage,” is changing the manner in which marriages and families are defined and recognized in this country and around the globe, and is one of the fastest evolving legal issues facing our country today. For example, when the United States Supreme Court announced on December 7, 2012, that it would be taking up two cases involving rights of persons in same-sex marriages in the upcoming spring term, only six states and Washington DC and 12 additional countries internationally allowed or recognized same-sex marriage. As of the preparation of this article just two years later, there are 36 states including the District of Columbia and 18 countries worldwide that allow or recognize same-sex marriage. The purpose of this article is to briefly review the legal, procedural and case law history of same-sex marriage in the U.S., to briefly analyze and discuss some of the various trial and appellate court decisions and procedural rulings, and to examine the impact of these changes upon matrimonial law as the definition and legal recognition of marriage evolves.

II. Marriage Equality Internationally

Thirteen and a half years ago, effective April 1, 2001, the Netherlands became the first country to allow same-sex marriage on April 1, 2001. Belgium followed effective June 1, 2003, Spain, July 3, 2005, Canada, nationally¹ effective July 20, 2005, South

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¹ Ontario became the first Canadian province to legalize same-sex marriage, by decision of the, Ontario Court of Appeal in *Halpern v Canada*, (No 2268 O.J.) 65 O.R. (3d) 161 (June 10, 2003)(on appeal from *Halpern v, Ontario*, 60 O.R. (3d) 321 (July 12, 2002)). The decision in *Halpern* mandated immediate

Africa, November 30, 2006, Norway, Jan. 1, 2009, Sweden, May 1, 2009, , Portugal, June 5, 2010, Iceland, June 27, 2010, Argentina, July 22, 2010, Denmark, June 15, 2012, Brazil, May 14, 2013, France, May 29, 2013, Uruguay, Aug. 5, 2013, New Zealand, August 19, 2013, United Kingdom, March 29, 2014 (excepting Scotland, effective December 31, 2014), Luxembourg, June 18, 2014, Finland (passed November 28, 2014, not yet effective), and in now 36 states and the District of Columbia in the United States, between 2003 and 2014.

III. Marriage Equality History State by State

As of December 4, 2014, same-sex marriage is legal in 36 states and the District of Columbia. Marriage equality has come to the various states in three ways: by court decision, by state legislature, and by popular vote.

A. *By Court Decision*

Marriage equality was obtained by court decision in Alaska on October 12, 2014, Arizona, October 17, 2014, California, June 28, 2013², Colorado, October 7, 2014, Connecticut, November 12,

provision of same-sex marriage rights throughout the province. Following, Ontario, equal marriage rights were enacted either by provincial law or court decision in much of Canada, province by province (or territory), beginning with British Columbia (July 8, 2003); Quebec (March 19, 2004); Yukon Territory (July 14, 2004); Manitoba (September 16, 2004); Nova Scotia (September 24, 2004); Saskatchewan (November 5, 2004); Newfoundland and Labrador (December 21, 2004); New Brunswick (June 23, 2005). In 2005, the federal government enacted the “Civil Marriage Act” (S.C. 2005, c. 33), declaring same-sex marriage legal throughout all of Canada, including the remaining provinces (Alberta, Prince Edward Island) and territories (Nunavut and Northwest Territories) that had not acted to date. Federal Law—Civil Law Harmonization Act, No. 1, SC 2001, c 4, <<http://canlii.ca/t/51zdl>>, from <http://www.canlii.org/en/ca/laws/stat/sc-2001-c-4/latest/sc-2001-c-4.html> (Jan 4, 2014); http://en.wikipedia.org/wiki/Same-sex_marriage_in_Canada (Jan 4, 2014)

² For the second time; California initially recognized same sex marriage effective June 16, 2008, *In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384, 76 Cal. Rptr. 3d. 683 (CA, 2008), to November 4, 2008, when Ballot Initiative Proposition 8 overturned the decision. Some 18,000 couples were married during these nearly five months, and the California Supreme Court ruled that these marriages were valid as having been lawfully obtained prior to the ballot initiative in Proposition 8. *Strauss v. Horton*, Nos. S168047, S168066, S168078 (Calif. Supreme Court, May 26, 2009); Proposition 8 was later deemed an unconstitu-

2008, Florida, August 21, 2014, effective January 5, 2015, Idaho, October 13, 2014, Indiana, October 6, 2014, Iowa, April 24, 2009, Kansas, November 12, 2014, Massachusetts, November 18, 2003, effective May 17, 2004, Montana, November 19, 2014, Nevada, October 9, 2014, New Jersey, October 21, 2013, New Mexico, December 19, 2013, North Carolina, October 10, 2014, Oklahoma, October 6, 2014, Oregon, May 19, 2014, Pennsylvania, May 20, 2014, South Carolina, November 12, 2014, effective November 20, 2014, Utah, October 6, 2014, Virginia, October 6, 2014, West Virginia, October 9, 2014, and Wisconsin, October 6, 2014.

B. By State Legislative Act

Marriage equality was enacted by state legislative act effective in Delaware, July 1, 2013, Hawaii, December 2, 2013, Illinois, June 1, 2014, Minnesota, August 1, 2013, New Hampshire, January 1, 2010, New York, July 24, 2011, Rhode Island, August 1, 2013, and Vermont, effective September 1, 2009.

C. By Popular Vote

Marriage equality was obtained by popular vote in Maine effective December 29, 2012, in Maryland, effective January 1, 2013, and in Washington D.C. effective December 9, 2012. Suits are pending in all remaining fifteen states, in federal and state courts.

IV. United States v. Windsor

Edith Windsor and Thea Spyer met in the early 1960's and shared their lives together for over 42 years, living in New York

tional violation of Federal Equal Protection, and overturned, *Perry v Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), 2010 Westlaw 3025614, 2010 U.S. Dist LEXIS 78817 (Case No. C 09-2292 VRW), but stay of the ruling was granted Aug 14, 2010, by the Ninth Circuit Court of Appeals, *Perry v Schwarzenegger*, 704 F.Supp.2d 921 (9th Cir, 2010), 2010 WL 3212786. Case was thereafter on certified question from 9th Circuit to California Supreme Court, *Perry v Schwarzenegger*, 628 F.3d 1191 (9th Cir Jan 4 2011, certified question accepted, Feb 16, 2011); Request to vacate stay denied, *Perry v Brown*, ___ F3d ___, (9th Cir Mar 23 2011), 2010 WL 3212786, and was affirmed on other grounds by the US Supreme Court on June 26, 2013, *Hollingsworth v Perry* (formerly *Perry v. Brown* and *Perry v. Schwarzenegger*), No 12-144, 5 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013)

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City. In 2007, after the State of New York announced it would recognize same-sex marriages validly obtained elsewhere by New York residents, the couple traveled to Toronto to marry, and thereafter returned to New York. Thea's health later began to decline due to multiple sclerosis, and she died in 2009. After Thea's death, the IRS billed Edith in excess of \$363,000 in federal estate taxes, treating Edith as a surviving spouse and not an heir because her marriage to Thea was not recognized under federal law—specifically Section 3 of the Defense of Marriage Act (DOMA). Edith paid the tax and sued the government, represented by Roberta Kaplan of Paul Weiss, and by the American Civil Liberties Union.

With the enactment of the Defense of Marriage Act (“DOMA”) in 1996³, the federal government created, in Section 3, an unprecedented exception to its longstanding, traditional, and nearly exclusive federal deference to state determinations of “marriage” and “spouse” for purposes of federal law—derived from and consistent with the exclusive prerogative of the states to license and permit marriage, reaffirmed in *Windsor*.⁴ Section 3

³ Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

⁴ The central issue in *Windsor* is the review of a claim of federal violation of fundamental, federal constitutional guarantees of equal protection where the interests at issue (definition, licensure and regulation of marriage and the rights and interests upon death based upon marital status) is and has traditionally and historically exclusively been a matter of state law, deferred to by federal law and procedure, and the right of the State to assert and maintain such exclusive prerogative and to rely on such federal deference without federal exceptions (here, refusal to recognize state-sanctioned same-sex marriages under federal law) colliding with state law and impeding fundamental federal constitutional guarantees:

[. . .] By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress has enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations, has a far greater reach. Its operation is also directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. Assessing the validity of that intervention requires discussing the historical and traditional extent of state power and authority over marriage.

Subject to certain constitutional guarantees, see, e.g., *Loving v. Virginia*, 388 U. S. 1, “regulation of domestic relations” is “an area that

of DOMA defined marriage as a “[. . .] only legal union between one man and one woman as husband and wife[. . .]” and spouse as only “[. . .] a person of the opposite sex who is a husband or a wife.”⁵ This created a sharp, and with the legalization of same-sex marriage beginning in 2001 and in the US in 2003, increasingly onerous, conflict between federal and state law, where programs, benefits or burdens governed either by federal law exclusively or dependent upon state determinations of marriage and spouse, denied equal access to federal benefits to same-sex couples and parties to same-sex marriages based solely on their gender, even though such interests were otherwise freely available to opposite-sex couples (married, and often otherwise), and as a result, more than 1,138 federal benefits available to heterosexual spouses were unavailable to same-sex married couples.

On June 26, 2013, in *United States v. Windsor*,⁶ the United States Supreme Court issued its landmark civil rights ruling addressing same-sex marriage, affirming the decision of the Second Circuit, declaring Section 3 of DOMA unconstitutional, and resulting in full federal recognition of same-sex marriages wherever obtained, if validly celebrated. Writing for the majority in the 5-4 decision, Justice Anthony Kennedy held that Section 3 of DOMA is “[. . .] unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment, [that . . .] the liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws [. . .]”⁷ and that the federal government may not—even in its prerogative as to exclusive federal law—define marriage and spouse in a manner

has long been regarded as a virtually exclusive province of the States,” *Sosna v. Iowa*, 419 U. S. 393, 404. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States,” *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383–384. Marriage laws may vary from State to State, but they are consistent within each State.

Windsor, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013)

⁵ 1 USC 7 (1996).

⁶ 133 S. Ct. 2675 (2013).

⁷ *Windsor*, 570 U.S. 12, 17, 133 S.Ct. 2675, 2691; 2013 U.S. LEXIS 4935 (Kennedy, J)(June 26, 2013).

that expressly conflicts with traditional state definition of both, and traditional federal deference to such definitions, effectively opening federal benefits to married same-sex couples even in states that may not afford recognition to the parties' marriage."⁸ The court in *Windsor* found that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities[.]'"⁹ The decision has significantly and rapidly advanced efforts to secure marriage rights for same-sex couples throughout the country.

The primary legal shift since *Windsor* has been from exclusively challenging state constitutional amendments and statutory prohibitions against same sex marriage in state courts, as a matter of state constitutional law, to nearly exclusively challenging these bans on federal constitutional grounds, chiefly equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution, relying on *Windsor*, in federal courts. These challenges acknowledge the right of the states to continue to define and regulate marriage by state law, but invoke *Windsor* to establish that the denial of marriage to same-sex couples nonetheless violates fundamental, federal constitutional rights and guarantees of equal protection. As is set forth below, nearly all of these challenges, post-*Windsor*, have succeeded, in the federal District Courts, have been affirmed on appeal in respective federal Circuits, and the Supreme Court has declined to review the decisions and lifted all stays entered pending either appeal or petition for writ of certiorari—except in the Sixth Circuit Court of Ap-

⁸ U.S. Const. art. V; *Windsor*, 133 S. Ct. at 2695.

⁹ *Windsor*, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935.(June 26, 2013) .n the other same-sex marriage suit before the Court, *Hollingsworth v Perry* (formerly *Perry v. Brown* and *Perry v. Schwarzenegger*), by another 5-4 majority but of a different arrangement of justices, the Court declined to reach the merits of the case from California challenging the validity of a voter initiative (Proposition 8) overturning state law providing for fundamental rights of equal protection to homosexuals, including the right to same-sex marriage, on federal constitutional guarantees of equal protection. *Hollingsworth v Perry* (formerly *Perry v. Brown* and *Perry v. Schwarzenegger*), No 12-144, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013)

peals¹⁰, and on a case from the US District Court in Louisiana¹¹, petitions for review of which are pending in the Supreme Court and scheduled for consideration at its next conference, January 9, 2015. The federal circuit courts of appeals are now split on the issue of same-sex marriage.

The changes brought by *Windsor* will likely result in significant change to the practice of family law, including a likely increase in unprecedented and potentially complicated factual and legal questions, not least where recognition is now all but assured under federal law, but where state law continues to define the rights and interests of parties to a marriage both while intact and upon dissolution. The post-*Windsor* federal recognition of same-sex marriages valid where celebrated, irrespective of whether the state where the parties reside recognizes or permits same-sex marriage combined with the uneven, inconsistent patchwork of legal recognition of same-sex relationships from one jurisdiction to another and the movement of persons from one jurisdiction to another—both with an intention to remain and for other reasons, including temporary work transfers but also merely for the purpose of marrying, will present increasing and often unique challenges to family law practitioners.

V. Impact of Windsor and Ensuing Litigation

The impact of the *Windsor* decision was immediate and broad. Edith Windsor received a refund of the estate tax she had paid, with interest. Federal agencies immediately began interpreting the decision and its voiding of Section 3 of DOMA, and through the rulemaking process immediately began revising and implementing federal rules, policies and procedures to comply

¹⁰ *DeBoer v Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297 and 5818, ___ F.3d ___, 2014 WL 5748990 (CA6, Nov. 6, 2014). Petitions for review pending and scheduled for consideration before the US Supreme Court on January 9, 2015, in *Obergefell v Hodges* (Ohio); No 14-556, *Tanco v Haslam* (Tenn.), No 14-562; *DeBoer v Snyder*, (Mich.), No 14-571; and *Bourke v Beshear* (Kentucky), No 14-574.

¹¹ *Robicheaux v George*, fka *Robicheaux v Caldwell*, 2 F.Supp.3d 910, (E.D.La., Sep 3, 2014), No 14-596 (E.D. La., Nov. 20, 2014). Petition for review pending and scheduled for consideration before the US Supreme Court on January 9, 2015, *Robicheaux v George*, No. 14-596.

with the demise of Section 3 of DOMA.¹² Meanwhile, by late spring 2014, suits were filed in federal courts in every remaining prohibition state—as well as in a few state courts—resulting in more than 30 decisions by October 6, 2014, all but two holding the remaining state same-sex marriage bans unconstitutional under federal constitutional guarantees of equal protection and due process, in light of and relying on *Windsor*.

A. Overview

Of the twelve federal circuits, four circuits (the Tenth, Fourth, Ninth, and Seventh, respectively) have affirmed district court decisions in favor of successful challenges to state constitutional amendments or statutes barring recognition of same-sex marriage, on claims of violation of fundamental federal constitutional guarantees of Equal Protection, or of Due Process, or both, relying chiefly on the U.S. Supreme Court's June 26, 2013, decision in *United States v. Windsor*.¹³ One Circuit, the Sixth, has an adverse ruling now before the Supreme Court on Petition for Writ of Certiorari.¹⁴ Four circuits (the First, Fifth, Eighth, and Eleventh) have district court cases on appeal, and three circuits have no cases on appeal. The Third and the D.C. Circuits have had no cases appealed.

The U.S. Supreme Court has affirmed, in *United States v Windsor*,¹⁵ the only decision from the Second Circuit, *Windsor v*

¹² U.S. Citizenship & Immigration Services, *U.S. Visas for Same-Sex Spouses*, <http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf>; I.R.S. Rev. Rul. 2013-17; U.S. Dept. of Veterans Affairs – Office of Public and Intergovernmental Affairs, *VA Provides Guidance to Same-Sex Married Couples Seeking Benefits*, Social Security Administration, SSI GN 00210.800 (Oct. 9, 2014).

¹³ The decision in the Second Circuit, *Windsor v U.S.*, 699 F.3d 169 (2d Cir. 2012), necessarily preceded and led to the Supreme Court decision in *U.S. v Windsor*, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013).

¹⁴ *DeBoer v Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297 and 5818, ___ F.3d ___, 2014 WL 5748990 (CA6, Nov. 6, 2014). Petitions for review pending and scheduled for consideration before the US Supreme Court on January 9, 2015, in *Obergefell v Hodges* (Ohio); No 14-556, *Tanco v Haslam* (Tenn.), No 14-562; *DeBoer v Snyder*, (Mich.), No 14-571; and *Bourke v Beshear* (Kentucky), No 14-574.

¹⁵ *US v Windsor*, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013).

*United States*¹⁶ and declined, on October 6, 2014, to grant any of the seven petitions for review of the decisions from the Seventh, Ninth and Tenth Circuits, by denial of all seven petitions for certiorari before it;¹⁷ denied application for stay in an Oregon case from June 2014;¹⁸ lifted stays issued by district court decisions, pending appeal to circuit courts, and denied applications for stay in others.¹⁹

B. *Current Federal Decisions, Pending Cases and State Marriage Equality Statutes by Federal Circuit*

i. *First Circuit, Boston MA (MA, ME, NH, PR²⁰, RI)*

In all four states in the First Circuit Court of Appeals (MA, ME, NH and RI), marriage equality existed at the time of the decision in *Windsor*, by state statute or judicial decision, none of which was appealed or otherwise challenged on the federal or state levels, and there were no cases filed or pending in the Circuit's federal District Courts after the decision issued June 26, 2013. New Hampshire and Rhode Island both permit same sex marriage by statute, New Hampshire since January 1, 2010, and Rhode Island since August 1, 2013. Massachusetts, the first state to recognize and mandate same-sex marriage, did so by court decision since 2003,²¹ while Maine acquired marriage equality on December 29, 2012, by popular vote. The exception is in the District Court for the Commonwealth of Puerto Rico where on Oc-

¹⁶ *Windsor v United States*, 699 F.3d 169 (2d Cir. 2012), affirming 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (DOMA Sec. 3 declared unconstitutional sub nom.).

¹⁷ IN, WI, OK, UT, VA, in *Bogan v. Baskin* (Indiana); *Walker v. Wolf* (Wisconsin); *Herbert v. Kitchen* (Utah); *McQuigg v. Bostic* (Virginia); *Rainey v. Bostic* (Virginia); *Schaefer v. Bostic* (Virginia); and *Smith v. Bishop* (Oklahoma); from 574 US (Order List) Monday, Oct. 6, 2014; see below.

¹⁸ *Geiger v Kitzhaber*, 994 F.Supp.2d 1128, (D.Or., May 19, 2014) No. 6:13-CV-01834-MC, 6:13-CV-02256-MC (state's Constitutional Amendment barring same-sex marriage constitutes sexual orientation discrimination in violation of Equal Protection under US Constitution; application for stay denied, 13A1173 Nat'l Organization for Marriage v Geiger, Deanna L., et al., 134 S.Ct. 2722 (Mem), 82 USLW 3707, U.S., June 04, 2014 (NO. 13A1173).

¹⁹ See below, by state.

²⁰ Puerto Rico.

²¹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

tober 21, 2014, in, *Conde-Vidal v Garcia-Padilla*,²² the district court upheld Puerto Rico's ban on same-sex marriage, and that decision is now before the First Circuit Court of Appeals.²³

ii. *Second Circuit, New York, NY (CT, NY, VT)*

*Windsor v United States*²⁴ came to the Supreme Court from the Second Circuit, but no other cases were appealed to the Second Circuit, and none are pending. All three states in the Second Circuit have marriage equality and no challenges are pending: Connecticut, effective November 12, 2008, by statute,²⁵ New York, effective July 24, 2011, by statute (Marriage Equality Act), and Vermont, also by statute, effective September 1, 2009.

iii. *Third Circuit, Philadelphia, PA (DE, NJ, PA, VI*²⁶)

The Third Circuit Court of Appeals has not issued any opinions on same-sex marriage and no cases are pending on appeal. On the District Court level, in *Whitewood v Wolf*²⁷ the District Court for the Middle District of Pennsylvania held that the state's ban against same-sex marriage violates federal constitutional guarantees of Due Process and Equal Protection. Three states in the Third Circuit have marriage equality, with no challenges pending: Delaware, effective July 1, 2013, by statute, New Jersey, on October 21, 2013, by court decision,²⁸ and Pennsylvania, on May 20, 2014, by court decision.²⁹ Same-sex mar-

²² *Conde-Vidal v Garcia-Padilla*, ___ F.Supp.3d ___, 2014 WL 5361987 (D.Puerto Rico, Oct. 21, 2014) No. 14-1253 (PG)(Perez-Gimenez, J.) (granting defendant's motion to dismiss for failure to state a claim).

²³ Notice of Appeal filed Oct. 28, 2014, (No. 3:14-cv-01253-PG), First Circuit Court of Appeals.

²⁴ 699 F.3d 169 (2d Cir. 2012), affirming 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (DOMA Sec. 3 declared unconstitutional sub nom.).

²⁵ Following *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008), resulting in state amendment of marriage laws granting full marriage equality.

²⁶ US Virgin Islands.

²⁷ 992 F.Supp.2d 410 (MD Pa, May 20, 2014).

²⁸ *Garden State Equality v Dow*, 82 A.3d 336, 434 N.J. Super 163 (2013).

²⁹ *Whitewood v Wolf*, 992 F.Supp.2d 410 (MD Pa, May 20, 2014)(state's ban against same-sex marriage violates Due Process and Equal Protection).

riage is prohibited in the Virgin Islands, and no known challenges are pending.³⁰

iv. *Fourth Circuit, Richmond, VA (MD, NC, SC, VA, WV)*

In late July 2014, the Fourth Circuit Court of Appeals ruled in *Rainey v Bostic*,³¹ affirming the district court's holding that Virginia's same-sex marriage ban violates federal constitutional guarantees Due Process and Equal Protection. The federal district court for the Middle District of North Carolina followed *Bostic*'s holding in *Fisher-Borne v Smith* in mid-October of 2014.³² The District Court for the District of South Carolina issued an opinion in *Bradacs v. Haley*,³³ filed August 28, 2013, holding the state's same-sex marriage ban unconstitutional. Several cases are pending in the District Court for the District of South Carolina: *Haas v. South Carolina Department of Motor Vehicles*, filed October 31, 2014, *McEldowney v. South Carolina Department of Motor Vehicles*,³⁴ filed October 24, 2014, and *Condon v Haley*,³⁵ filed October 15, 2014. The state of West Virginia announced that it would no longer defend its case in *McGee v Cole*,³⁶ filed October 1, 2013,³⁷ given the Fourth Circuit's deci-

³⁰ VI law currently permits marriages only between persons of the opposite sex. Further, by statute, same-sex marriage is forbidden (Virgin Islands Code 16 V.I.C. § 31). A "Marriage equality Bill" has been introduced. http://www.marriageequality.org/region_us_virgin_islands (Oct. 25, 2014).

³¹ 760 F.3d 362 (July 28, 2014), cert denied, ___ S.Ct. ___, 2014 WL 3924685 (Mem), 83 USLW 3102, U.S., October 06, 2014 (NO. 14-153), Affirming *Bostic v Rainey*, 970 F.Supp.2d 456 (E.D.Va.,2014) (February 13, 2014). Plaintiffs (two couples unable to obtain a license or have their marriage recognized in Virginia) challenged two Virginia statutes prohibiting same-sex marriage and a Virginia constitutional amendment prohibiting same-sex marriage. On Feb. 13, 2014, a federal judge granted summary judgment for the plaintiffs, holding that the statutes and amendment violated federal constitutional guarantees of equal protection and due process. The court enjoined the state from enforcing the laws, but, citing *Kitchen*, stayed the injunction pending any appeal of the case to the Fourth Circuit.

³² ___ F.Supp.3d ___, 2014 WL 5138914, MD NC, October 14, 2014 (NO. 1:12CV589, 1:14CV299).

³³ No. 3:13-CV-02351-JFA.

³⁴ No. 14-cv-04155-JMC (D SC).

³⁵ No. 2:14-cv-04010-RMG.

³⁶ No. 3:13-cv-24068 (SD WVA).

³⁷ State announces it will not continue to defend, given Fourth Circuit's decision in *Bostic*.

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sion in *Bostic*. On the state level in South Carolina, *Swicegood v Thompson*,³⁸ was filed March 13, 2014 and remains pending. In the Fourth Circuit, Maryland has marriage equality by popular vote and statute, effective January 1, 2013.³⁹

v. *Fifth Circuit, New Orleans, LA (LA, MS, TX)*

The Fifth Circuit has not issued any decisions on same-sex marriage, but consolidated appeals from each of the three states, *De Leon v. Perry*⁴⁰ (Texas), *Robicheaux v Caldwell*⁴¹ (Louisiana) and *Campaign for Southern Equality v. Bryant*,⁴² are pending. In *Robicheaux*, the District Court for the Eastern District of Louisiana upheld Louisiana's same-sex marriage bans under the Due Process and Equal Protection Clauses. An appeal to the Fifth Circuit Court of Appeals was filed and all parties asked the Fifth Circuit Court of Appeals to set an expedited briefing schedule to allow an appeal to be heard alongside *De Leon v. Perry*. The Fifth Circuit granted that request on September 25, 2014, and scheduled oral argument for the week of January 5, 2015. Thereafter, on November 20, 2014, counsel for plaintiffs filed a Petition for Writ of Certiorari before Judgment in the Supreme Court, seeking review of the decision in *Robicheaux*, arguing that the case should be considered along with the decision in the Sixth Circuit (below) in *DeBoer*. A response is due December 24, 2014, and the Petition has been distributed for the Court's consideration at its January 9, 2015 conference⁴³ Another case, *Campaign for Southern Equality v Bryant*,⁴⁴ is pending in Mississippi state court, filed October 21, 2014.

³⁸ No. 2014-001 109.

³⁹ Enacted March 1, 2012; ratified by popular vote November 6, 2012.

⁴⁰ 975 F. Supp. 2d 632 (W.D.Tx., Feb 26, 2014); No. 5:13-cv-00982-OLG, Doc 73, Feb 26 2014. Plaintiffs (two couples unable to obtain a license or to have their marriage recognized in Texas) challenged two Texas statutes and a Texas constitutional amendment prohibiting same-sex marriage. They sought a preliminary injunction alleging equal protection and due process violations.

⁴¹ 2 F.Supp.3d 910, (E.D.La., Sep 3, 2014); Nos. CIV.A. 13-5090, CIV.A. 14-97, CIV.A. 14-327.

⁴² No. 3:14-cv-818-CWR-LRA (D. Miss. Nov. 25, 2014).

⁴³ No 14-596 (E.D. La., Nov. 20, 2014); <http://www.scotusblog.com/case-files/cases/robicheaux-v-george/> (Dec. 19, 2014).

⁴⁴ No 3-14-cv-00818.

vi. *Sixth Circuit, Cincinnati, OH (KY, MI, OH, TN)*

Reversing six favorable same-sex marriage decisions from all four states in the Sixth Circuit on November 6, 2014, the Sixth Circuit Court of Appeals issued a decision in the consolidated appeals from all four states heard August 6, 2014, *DeBoer v. Snyder*,⁴⁵ upholding the states' bans on same-sex marriage. This was the first—and to date, only—federal appellate Circuit to hold same-sex marriage laws constitutional, opposing the otherwise uniformly favorable decisions in all other Circuits that had ruled post-*Windsor*, the Fourth, Seventh, Ninth, and Tenth Circuits, which had all held bans against same-sex marriage unconstitutional. The district courts in the Sixth Circuit had all uniformly held the bans unconstitutional: in Kentucky, in *Bourke v Beshear*,⁴⁶ and *Love v Beshear*;⁴⁷ in Michigan,⁴⁸ *DeBoer v. Snyder*;^{49/} ⁵⁰ in Ohio, in *Obergefell v Wymyslo*,⁵¹ and *Henry v Himes*;⁵² and

⁴⁵ Nos. 14-1341, 3057, 3464, 5291, 5297 and 5818.

⁴⁶ 996 F.Supp.2d 542 (W.D.Ky., Feb 12, 2014); No. 3:13-CV-750-H (held, (1) rational basis review applied; (2) Kentucky's failure to recognize marriages of same-sex couples validly married outside of Kentucky treated gay and lesbian persons differently in a way that demeaned them; and Kentucky's interest in preserving "state's institution of traditional marriage," standing alone, was not rational basis).

⁴⁷ 989 F.Supp.2d 536 (W.D.Ky., July 01, 2014).

⁴⁸ No. 3:13-CV-750-H (held, (1) homosexual persons constituted disadvantaged class, justifying application of heightened equal protection scrutiny; (2) homosexual persons constitute a quasi-suspect class for the purposes of equal protection analysis; and (3) Kentucky's constitutional and statutory provisions prohibiting same-sex couples from marrying did not withstand rational scrutiny under Equal Protection Clause).

⁴⁹ 973 F.Supp.2d 757 (E.D. Mich. 2014); No. 12-CV-10285 (held: (1) Michigan's Constitutional Amendment was not rationally related to government interest in providing optimal environment for child rearing; (2) asserted interests in tradition and morality were not rational bases; and (3) that Michigan had exclusive and inherent powers to define marriage did not preclude district court from finding state's Constitutional Amendment violated the Fourteenth Amendment of the U.S. Constitution.).

⁵⁰ Challenge to the adoption code prohibiting same sex couples from co-adopting or jointly adopting children. Federal Trial Judge urged the Plaintiff's to expand the lawsuit to challenge the Michigan marriage amendment (state constitutional ban on same-sex marriage from 2004). Trial commenced February 25, 2014 and ended March 7, 2014; the focus was on mental health experts testifying regarding impact on raising children by gay versus intact [married]

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in Tennessee, in *Tanco v Haslam*.⁵³ Three cases remain sepa-

heterosexual parents. Judge Bernard Friedman issued his 31 page Decision on Friday, March 21, 2014 late in the afternoon.

The Aftermath. Michigan's Attorney General immediately filed a Notice of Intent to Appeal and immediately petitioned the Sixth Circuit Court of Appeals for a Stay. The Court took several hours to respond, and then did so by granting the Plaintiffs until the following Tuesday to respond to the Emergency Petition for Stay. In the meantime, county clerks in four of Michigan's 83 counties opened on Saturday morning, issuing marriage licenses to same-sex couple applicants and between immediately available clergy and county clerks; over 300 marriages were performed by early afternoon, when the Sixth Circuit updated its earlier order and granted the stay request; an emergency Stay was issued Saturday afternoon and was extended pending the Appeal on March 25, 2014. Michigan's governor then stated that the more than 310 marriages were legal and valid (disagreeing with his Attorney General), but would nevertheless not be recognized by the State of Michigan pending the outcome of the Appeal, and state benefits would not flow to those legally married same-sex couples. On March 27, U.S. Attorney General, Eric Holder, declared that the federal government would recognize the 310 plus marriages for all purposes under federal law. This was the same result following the *Kitchen v Herbert* decision in Utah, where Utah refused to recognize the 1360 plus marriages performed during the 17-day window and U.S. Attorney General Eric Holder immediately announced that the federal government would recognize those marriages.

⁵¹ 962 F.Supp.2d 968, (S.D. Ohio, Dec 23, 2013); No. 1:13-CV-501 (held that Ohio's recognition bans as applied to "spouses" violates both Due Process and Equal Protection Clauses of federal Constitution); expands earlier decision in 980 F.Supp.2d 907, (S.D. Ohio, 2013.). November 01, 2013. Plaintiffs challenged two Ohio statutes and a constitutional amendment prohibiting both the granting and the recognition of same-sex marriages. Plaintiffs were two couples who had been married in other states, and since becoming married, one of the spouses had passed away. They sought recognition of their out of state marriages on the death certificates.

⁵² ___ F.Supp.2d ___, 2014 WL 1418395 (S.D. Ohio, Apr. 14, 2014), No. 1:14-CV-129 (held: (1) intermediate scrutiny applied; (2) Ohio's interest in "preserving the traditional definition of marriage" was not a legitimate justification; (3) Ohio's refusal to recognize same-sex marriages performed in other jurisdictions was not justified under heightened or rational basis review by its preference for procreation or childrearing by heterosexual couples; and (4) refusal to recognize same-sex marriages performed in other jurisdictions caused irreparable harm.); followed by *Henry v Himes*, Slip Copy, 2014 WL 1512541, S.D. Ohio, April 16, 2014 (No. 1:14-CV-129)(State ordered to issue amended birth certificate to children of validly-married same-sex parents from another state).

⁵³ 7 F.Supp.3d 759 (M.D. Tenn., Mar 14, 2014), No. 3:13-cv-01159 (held: Six plaintiff same-sex couples, lawfully married in another jurisdiction, were entitled to injunction barring state from enforcing its bar against recognition of

rately pending in Michigan: *Caspar v Snyder*, filed April 14, 2014,⁵⁴ *Blankenship v Snyder*, filed Jun 5, 2014,⁵⁵ and *Morgan v Snyder*, filed Jun 11, 2014.⁵⁶ And in *Borman v. Pyles-Borman*.⁵⁷ The Tennessee Circuit Court previously upheld the state's laws banning same-sex marriage and refused to recognize same-sex marriages from other states.

vii. *Seventh Circuit, Chicago, IL (IN, IL, WI)*

On September 4, 2014, the Seventh Circuit Court of Appeals issued an opinion in a consolidated appeal from district courts in Indiana and Wisconsin,⁵⁸ affirming District Court decisions in *Baskin v Bogan*⁵⁹ and *Wolf v. Walker*⁶⁰ each holding that the

same-sex marriages.) *Motion for Stay denied, Jesty v. Haslam*, Slip Copy, 2014 WL 1117069, (M.D.Tenn., March 20, 2014). Plaintiffs (three married same-sex couples who wanted marriages recognized in Tennessee) challenged a statute and constitutional provision prohibiting the recognition of same-sex marriages as unconstitutional. They sought a preliminary injunction pending the determination of the merits of their claims.

⁵⁴ PB-MI-0005, 4:14-cv-11499-MAG-MKM ((E.D. Mich.), seeking to compel State of Michigan to recognize the more than 310 marriages lawfully performed Mar 22, 2014 following the ruling in *DeBoer*.

⁵⁵ No. 14-cv- 12221 (E.D. Mich.), seeking to compel State of Michigan to recognize valid same-sex marriages from other jurisdictions, following the ruling in *DeBoer*.

⁵⁶ No. 1:14-cv-00632-GJQ (W.D. Mich.), seeking to compel State of Michigan to recognize valid same-sex marriages from other jurisdictions, following the ruling in *DeBoer*.

⁵⁷ Tenn. Cir. Ct. Roane Cnty. Aug. 5, 2014, No. 2014CV36.

⁵⁸ 766 F.3d 648, C.A.7 (Ind. and Wis.), September 04, 2014, (Nos. 14-2386 to 14-2388 (Ind.) and 14-2526 (Wis.)), *cert denied, Bogan v Baskin*, ___ S.Ct. ___, 2014 WL 4425162 (Mem), 83 USLW 3127, U.S., October 06, 2014 (No. 14-277);

⁵⁹ 41 ___ F.Supp.2d ___, 2014 WL 2884868, S.D.Ind., June 25, 2014 (No. 1:14-CV-00355-RLY, 1:14-CV-00404-RLY, 1:14-CV-00406-RLY). On June 25, 2014, US District Judge Richard Young found that Indiana's ban on same-sex marriage violates the equal protection clause in the US Constitution. Some Indiana counties began issuing marriage licenses to same-sex couples almost immediately, while others held off, waiting for further guidance. The state appealed Judge Young's decision to the US Seventh Circuit Court of Appeals, which issued a stay of the ruling on June 27, 2014, leaving the status of marriages performed before the stay in limbo. *Reversed, Baskin v Bogan*, 766 F.3d 648, C.A.7 (Ind.), September 04, 2014, *cert denied, Bogan v Baskin*, ___ S.Ct. ___, 2014 WL 4425162 (Mem), 83 USLW 3127, U.S., October 06, 2014 (NO. 14-277).

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state's ban on same-sex marriage were unconstitutional. No other appeals are pending. Illinois⁶¹ has marriage equality by statute effective June 1, 2014.⁶²

⁶⁰ 766 F.3d 648, C.A.7 (Wis.) *cert denied*, *Walker v Wolf*, ___ S.Ct. ___, 2014 WL 4425163 (Mem), 83 USLW 3127, U.S., October 06, 2014 (NO. 14-278)___ F.Supp.2d ___, 2014 WL 2693963, W.D.Wis., June 13, 2014 (No. 14-CV-64-BBC)(preceded by *Wolf v Walker*, 986 F.Supp.2d 982, W.D.Wis., June 06, 2014 (NO. 14-CV-64-BBC), and *Wolf v Walker*, Slip Copy, 2014 WL 1729098, W.D.Wis., April 30, 2014 (NO. 14-CV-64-BBC). *Reversed*, *Baskin v Bogan*, 766 F.3d 648, C.A.7 (Ind.), September 04, 2014, *cert denied*, *Bogan v Baskin*, ___ S.Ct. ___, 2014 WL 4425162 (Mem), 83 USLW 3127, U.S., October 06, 2014 (NO. 14-277).

On June 6, 2014, US District Judge Barbara Crabb struck down Wisconsin's same-sex marriage ban as unconstitutional. While some Wisconsin counties began issuing marriage licenses to same-sex couples immediately, others turned couples away, waiting for further guidance from courts or the state government before granting licenses. The state appealed Judge Crabb's decision to the Seventh US Circuit Court of Appeals, and Wisconsin Attorney General J.B. Van Hollen requested an emergency stay to prevent further marriages from taking place. On June 13, 2014, after more than 500 same-sex couples had applied for or had been granted marriage licenses, Judge Crabb ordered a temporary halt to same-sex marriages while the appeal process played out.

⁶¹ Less than a week after the Illinois Religious Freedom and Marriage Fairness Act was signed by Governor Quinn on November 20, 2013, the first of three federal court decisions in Chicago issued permitting same-sex marriage prior to its June 1, 2014 effective date. On November 26, 2013, the US District Court in Chicago, in *Gray v Orr*, 1:13-cv-08449 (ND Ill)(Durkin, J) Nov 26, 2013, found a right to immediate marriage to a specific couple, where one of the parties was terminally ill (Plaintiffs Vernita Gray, terminally ill, and Patricia Ewert were married the next day, November 27, 2013. Gray passed away March 18, 2014); on December 12, 2013, the decision was extended, by another Judge in a separate suit, to all who could show terminal illness, *Gray v Orr/Lee v Orr*, 1:13-cv-08719 (ND Ill) (Johnson Coleman, J), Dec 12, 2013. In the third, on February 21, 2013, the same judge, in a separate suit, held that Illinois' existing statutory bans on same-sex marriage were unconstitutional violations of equal protection in light of the holding in *Windsor*, and ordered the sole defendant, the Cook County Clerk, to issue licenses immediately. (*Lee et al v Orr*, No 1:13-cv-08719 (ND Ill)(Johnson Coleman, J), Feb 21, 2014 (“...[T]he provisions of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/201 (authorizing marriages ‘between a man and a woman’), 750 ILCS 5/212(a)(5)(prohibiting marriage ‘between 2 individuals of the same sex’), and 750 ILCS 5/213.1 (stating that same sex marriages are ‘contrary to the public policy of the state’), violate the Equal Protection Clause by discriminating against individuals based on their sexual orientation.”).

⁶² Illinois Religious Freedom and Marriage Fairness Act, PA 98-597 (eff 6-1-14), codified at 750 ILCS 80/1 et seq.

viii. *Eighth Circuit, St. Louis, MO (AR, IA, MN, MO, NE, ND, SD)*

The Eighth Circuit has case law that preceded Windsor, in 2006, holding that Nebraska's ban on same-sex marriage was not unconstitutional and reversing a District Court decision to the contrary.⁶³ No decision from Nebraska or elsewhere in the Eighth Circuit is pending seeking reversal of the decision in *Bruning*. Two cases are currently pending before the Eighth Circuit, seeking review of federal court decisions voiding state bans against same-sex marriage in Missouri, *Kelly v. Lawson*⁶⁴, and Arkansas, *Jernigan v Crane*.⁶⁵ District Court cases are pending in Federal courts in North Dakota, *Ramsay v Dalrymple*, filed July 22, 2014,⁶⁶ and *Jorgensen v. Montplaisir*, filed June 6, 2014;⁶⁷ and South Dakota, *Rosenbrahn v. Daugaard*, filed May 22, 2014.⁶⁸ None is pending in or from Nebraska. On the state level, Arkansas' ban on same-sex marriage was ruled unconstitutional by Pulaski County Circuit Judge Chris Piazza in *Wright v Arkansas*.⁶⁹ Arkansas had previously banned same-sex marriage by both state law and voter-approved constitutional amendment. A Missouri state court also held the state's ban on same-sex marriage unconstitutional in *Barrier v Vasterling*.⁷⁰ Iowa obtained

⁶³ *Citizens for Equal Protection v Bruning*, 455 F3d 859 (8th Cir 2006); *Nichols v. Nichols*, A-13-841(District Court), 288 Neb. 399, ___ N.W.2d___(Nebraska SCT), June 13, 2014. No. S-13-841. Appeal dismissed for want of jurisdiction.

⁶⁴ (W.D. Mo., filed Dec. 5, 2014), 4:14-cv-00622-ODS.

⁶⁵ (E.D. Ark., filed Jul 15 2014) No. 4:13-cv-00410-JLH.

⁶⁶ No. 3:14-CV-57-(RRE-KKK).

⁶⁷ No. 3:14-CV-58-(RRE-KKK).

⁶⁸ No. 4:2014cv04081.

⁶⁹ 2014 Ark. 25, 2014 WL 260993 (May 9, 2014), stay granted, May 24, 2014, No. 60CV-13-2662 (Pulaski Cnty. Cir. Ct. May 9, 2014). Arkansas' ban on same-sex marriage was ruled unconstitutional by Pulaski County Circuit Judge Chris Piazza. Arkansas had previously banned same-sex marriage by both state law and voter-approved constitutional amendment. Petition for cert denied, 134 S.Ct. 2705 (Mem) U.S. (June 02, 2014).

⁷⁰ (6th Cir. Mo, October 3, 2014); No. 1416-CV03892 (6th Div.). Applies to and compels recognition of valid out of state same-sex marriages. State has chosen not to appeal. State constitutional amendment barring recognition of same-sex marriages otherwise remains in effect. Also pending on the state level in Missouri are, *Messer, et al. v. Nixon, et al.*, No. 14AC-CC00009 (filed Jan 9, 2014); *In re Marriage of M.S. and D.S.* (Supreme Court, filed Mar. 13, 2014);

marriage equality in 2009, by court decision in *Varnum v. Brien*,⁷¹ and Minnesota has it by statute effective Aug 1, 2014.⁷²

ix. *Ninth Circuit, San Francisco, CA (AK, AZ, CA, GU,⁷³ HI, ID, MP,⁷⁴ MT, NV, OR, WA)*

The Ninth Circuit invalidated California's ban on same-sex marriage in *Perry v Brown*,⁷⁵ although the Supreme Court effectively affirmed the decision on standing grounds in *Hollingsworth v Perry*.⁷⁶ The Ninth Circuit has also issued opinions in favor of same-sex marriage in cases from Alaska, *Parnell v Hamby*,⁷⁷ and Idaho, *Latta v Otter*,⁷⁸ October 15, 2014. No others are pending.

The federal district courts within the Ninth Circuit have issued numerous opinions in cases challenging same-sex marriage bans: in Alaska, *Hamby et al. v. Parnell et al.*;⁷⁹ in Arizona, both *Connolly v. Jeanes*,⁸⁰ and *Majors v. Horne*;⁸¹ in California, *Perry v. Schwarzenegger*;⁸² in Hawai'i, *Jackson v. Abercrombie*;⁸³ in

and *Missouri v. Carpenter* (aka *Koster v. City of St. Louis*), No.1422-CC09027, filed June 26, 2014.

⁷¹ 763 N.W.2d 862 (Iowa 2009).

⁷² Licenses issue as of August 1, 2014; valid foreign same-sex marriages recognized effective July 1, 2014. Statute. Statute enacted following rejection of proposed Constitutional Amendment barring recognition, November 6, 2012.

⁷³ Guam.

⁷⁴ Northern Mariana Islands.

⁷⁵ 725 F.3d 1140, C.A.9, Aug 6, 2013, Nos. 14-35420, 14-35421. 14 Cal. Daily Op. Serv. 11,889, 2014 Daily Journal D.A.R. 13,997, C.A.9 (Idaho), October 15, 2014.

⁷⁶ 133 S.Ct. 2652, 186 L.Ed.2d 768, U.S., June 26, 2013; No. 12-144. 118 Fair Empl.Prac.Cas. (BNA) 1446, 186 L.Ed.2d 768, 81 USLW 4618, 57 Employee Benefits Cas. 1605, 13 Cal. Daily Op. Serv. 6646, 2013 Daily Journal D.A.R. 8314, 24 Fla. L. Weekly Fed. S 461.

⁷⁷ (Oct. 17, 2014), pet for Injunction denied, ___ S.Ct. ___, 2014 WL 5311581 (U.S.).

⁷⁸ ___ F.3d ___, 2014 WL 5151633, C.A.9 (Idaho), *pet for Stay denied*, *Otter v Latta*, ___ S.Ct. ___, 2014 WL 5094190 (Mem) U.S., October 10, 2014 (NO. 14A374).

⁷⁹ ___ F.Supp.3d ___, 2014 WL 5089399 (D.Alaska)(Oct. 12, 2014), No. 3:2014cv00089, filed May 12, 2014.

⁸⁰ 2014 WL 5320642, D.Ariz., (Oct. 17, 2014), No. 2:14-CV-00024 JWS (Not Reported in F.Supp.3d).

⁸¹ ___ F.Supp.3d ___, 2014 WL 5286743, D.Ariz., (Oct. 17, 2014), No. 2:14-CV-00518 JWS (signed Oct. 16, 2014; filed Oct. 17, 2014)

⁸² 704 F.Supp.2d 921, (N.D.Cal.,2010. Aug. 4, 2010).

Idaho, *Latta v. Otter*,⁸⁴ and *Taylor v. Brasuell*;⁸⁵ in Montana, *Rolando v. Fox*,⁸⁶ in Nevada, *Sevcik v. Sandoval*;⁸⁷ and in Oregon, *Geiger v. Kitzhaber*.⁸⁸

California has marriage equality, by court decisions in 2008,⁸⁹ 2010,⁹⁰ and 2014.⁹¹ Hawaii's marriage equality statute was passed on December 2, 2013, while Washington allows same-sex marriage after a popular vote in 2012. Nevada also has marriage equality as a result of a court decision, which the state did not appeal.⁹² Neither Guam nor the Northern Mariana Islands territory bans same-sex marriage nor restricts marriage to be between members of the opposite sex. Both jurisdictions are within the Ninth Circuit Court of Appeals and presumably subject to the Circuit's prevailing decision in *Latta v Otter*.⁹³

⁸³ ___ Fed.Appx. ___, 2014 WL 5088199 (C.A.9 (Hawai'i)), Nos. 12-16995, 12-16998. Argued and Submitted Sept. 8, 2014. Filed Oct. 10, 2014.

⁸⁴ ___ F.Supp.2d ___, 2014 WL 1909999 (D.Idaho) (May 13, 2014), No.1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho, May 13, 2014)(Idaho's ban on same-sex marriage violates the constitutional guarantee of equal protection under the law).

⁸⁵ 911 F.Supp.2d 996, (D.Nev., Nov 26, 2012), No. 1:2014cv00273 (Filed Jul 7, 2014).

⁸⁶ No. 4:2014cv00040. Hearing on Motion for Summary Judgment set for November 20, 2014.

⁸⁷ No. 2:12-CV-00578-RCJ; *following stay granted, Otter et al. v Latta, et al.*, Oct. 8, 2014; *stay lifted*, Oct. 14, 2014.

⁸⁸ 994 F.Supp.2d 1128, (D.Or., May 19, 2014), No. 6:13-CV-01834-MC, 6:13-CV-02256-MC (state's Constitutional Amendment barring same-sex marriage constitutes sexual orientation discrimination in violation of Equal Protection under US Constitution; *application for stay denied*, 13A1173 *Nat'l Organization for Marriage v Geiger, Deanna L., et al.*, 134 S.Ct. 2722 (Mem), 82 USLW 3707, U.S., June 04, 2014 (NO. 13A1173).

⁸⁹ *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (May 15, 2008).

⁹⁰ *Perry v Schwarzenegger*, 704 F.Supp.2d 921, (N.D.Cal.,2010. Aug. 4, 2010), appeal dismissed, *Hollingsworth v Perry*, 133 S.Ct. 2652, U.S. (June 26, 2013).

⁹¹ *Id.*

⁹² *Sevcik v Sandoval*, 911 F.Supp.2d 996, D.Nev., November 26, 2012 (NO. 2:12-CV-00578-RCJ); (October 10, 2014), *following stay granted, Otter et al. v Latta, et al.*, Oct. 8, 2014; *stay lifted*, Oct. 14, 2014.

⁹³ ___ F.3d ___, 2014 WL 5151633, C.A.9 (Idaho).

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x. *Tenth Circuit, Denver, CO (CO, KS, NM, OK, UT, WY)*

The Tenth Circuit Court of Appeals issued decisions affirming the first federal decision in favor of same-sex marriage post-*Windsor* in *Kitchen v. Herbert*⁹⁴ from Utah⁹⁵, on June 25, 2014, and soon thereafter on the second, *Bishop v. Smith*⁹⁶, from Oklahoma⁹⁷ on July 18, 2014, and the Supreme Court declined to review both in its October 6, 2014 denial of seven petitions for writ of certiorari.⁹⁸ Other than one case from Kansas, *Marie v Moser*⁹⁹ no other cases are currently pending on appeal before the Tenth Circuit. District Courts in Colorado, *Burns v. Hicklenlooper*,^{100/101} and Wyoming, *Guzzo v Mead*¹⁰² have issued deci-

⁹⁴ 961 F.Supp.2d 1181, D.Utah, December 20, 2013 (No. 2:13-CV-217). Same-sex marriage became legal in Utah on Dec. 20, 2013, when US District Judge Robert Shelby ruled that the state's same-sex marriage ban was unconstitutional. More than 1,300 same-sex couples were married before the US Supreme Court put a stay on the decision 17 days later, pending the state's appeal to overturn the ruling.

⁹⁵ 755 F.3d 1193, C.A.10 (Utah), June 25, 2014 (No. 13-4178); *pet for cert denied, Herbert v Kitchen*, ___ S.Ct. ___, 2014 WL 3841263 (Mem), 83 USLW 3102, U.S., October 06, 2014 (No. 14-124); *pet for leave to intervene denied, Herbert v Kitchen*, ___ S.Ct. ___, 2014 WL 5114073 (Mem), U.S., October 14, 2014 (No. . 14-124).

⁹⁶ [*Bishop v. U.S. ex rel. Holder*], 962 F.Supp.2d 1252, N.D.Okla., Jan.14, 2014 (No. 04-CV-848-TCK- TLW) (Jan. 14, 2014). Plaintiffs (two couples married elsewhere or desiring to be married in Oklahoma) challenged both sections of DOMA and two provisions of an Oklahoma constitutional amendment. One provision of the amendment prohibited recognition of same-sex marriages, the other provision defined marriage as between one man and one woman.

⁹⁷ Nos. 14-5003 & 14-5006, July 16, 2014 (C.A. 10) *pet for cert denied, Smith v Bishop*, (October 6, 2014); *stay lifted*, No. 14-5003, Doc. No. 01019321270 (10th Cir., October 6, 2014).

⁹⁸ *Id.*

⁹⁹ No. 14-3246 (10th Circuit, filed October 10, 2014); (from No. 2:14-cv-02518 (D. Kansas)

¹⁰⁰ [Not Reported in F.Supp.2d], 2014 WL 3634834 (D.Colo.)(Jul. 23, 2014 and Oct. 17, 2014), application for permanent injunction denied, but Temporary Restraining Order issued; [Not Reported in F.Supp.3d], 2014 WL 5312541, D.Colo., October 17, 2014 (application for permanent injunction granted); No. 14-CV-01817-RM-KLM

¹⁰¹ *Id.* Plaintiffs were same-sex couples who were married in other states and sought to have their marriages recognized in Colorado. The court granted the plaintiffs a preliminary injunction, stating that marriage was a fundamental right under *Kitchen v. Herbert* and the state bans violated those rights, thus the

sions in favor of same-sex marriage, and the states have not chosen to appeal.

Additionally, on the state level, in Colorado, in *Brinkman v Long*,¹⁰³ and Kansas, in *Nelson v Kansas Department of Revenue*, filed December 20, 2013,¹⁰⁴ Utah, in *Evans v. Utah*,¹⁰⁵ and Wyoming, in *Courage v Wyoming*, filed March 5, 2014, have all ruled on the issue. New Mexico has marriage equality by court decision in *Griego v. Oliver*.¹⁰⁶

xi. *Eleventh Circuit, Atlanta, GA (AL, FL, GA)*

One case is pending, before the Eleventh Circuit Court of Appeals, *Scott v Brenner*, from Florida which was appealed September 4, 2014.¹⁰⁷ On December 3, 2014, the Court denied Florida's request to extend a previously issued stay set to expire January 5, 2015¹⁰⁸. Absent any further rulings to the contrary, same-sex marriage will be available in Florida as of January 5, 2015, while the case remains pending on appeal. In the federal district courts, cases are pending in Alabama, *Hard v Bentley*,

plaintiffs were likely to succeed on the merits. Further, the "deprivation of constitutional rights" constituted an irreparable harm and the enforcement of the laws outweighed any harm to the defendants.

¹⁰² [Not Reported in F.Supp.3d.] 2014 WL 5317797, D.Wyo., October, 17, 2014 (No. 14-CV-200-SWS).

¹⁰³ No. 13-CV-32572 (Dist. Ct. Colo. July 9, 2014). State District court in Colorado followed the reasoning of recent decisions in finding Colorado's same-sex marriage ban was unconstitutional. The court acknowledged the long line of decisions finding marriage is a fundamental right, and looked to *Kitchen* for the position that marriage is a right "without any limitations." Applying strict scrutiny, the court dismissed the state's contention that the ban "encourage[s] procreation and marital commitment for the benefit of the children." The court further indicated that the ban was "mere pretext for discrimination against same-sex marriages." *Id.*

¹⁰⁴ No. 13 C1465 (Div. 7, Dist. Ct. of Shawnee County, KS).

¹⁰⁵ *Evans v. Utah*, ___F.Supp.2d___, 2014 WL 2048343, at *16, 18 (D.Utah May 19, 2014)(same-sex couples were entitled to a preliminary injunction requiring the state to recognize their marriages and the state was not entitled to a stay pending appeal of *Kitchen v. Herbert*).

¹⁰⁶ 316 P.3d 865 (N.M. Dec. 19, 2013).

¹⁰⁷ 999 F.Supp.2d 1278, (N.D.Fla., Aug 21, 2014); NO. 4:14CV107-RH/CAS, consol with *Grimsley and Albu v Scott*, No. 4:14CV138-RH/CAS (N.D. Fla.).

¹⁰⁸ No. 4:14-cv-00107-RH-CAS, November 5, 2014.

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filed February 13, 2014,¹⁰⁹ *Searcy v Bentley*, filed May 7, 2014,¹¹⁰ and *Aaron-Brush v Bentley*, filed June 10, 2014;¹¹¹ and in Georgia, *Inniss v Aderhold*, filed Apr. 22, 2014.¹¹² On the state level, there is one case pending in Alabama¹¹³ and more than six are pending in Florida.¹¹⁴

xii. *DC Circuit, Washington, DC (DC)*

The District of Columbia has marriage equality by statute enacted December 15, 2012. No cases are pending on appeal in the DC Circuit.

VI. 2014: A Tipping Point?

On October 6, 2014, in what has been widely reported as a surprise decision, the U.S. Supreme Court denied the requests in all seven petitions for certiorari before it, from cases in the Fourth, Seventh, and Tenth Circuits that had been submitted for consideration in its fall term. The result was that the same-sex marriage bans, which were held to be unconstitutional at the federal trial level, resulted in marriage equality coming to those states in those cases, immediately increasing the number of states permitting same-sex marriage from 19 to 25.¹¹⁵ On October 7, the Ninth Circuit Court of Appeals affirmed the trial court deci-

¹⁰⁹ No. 2:13-cv-00922 (M.D. Ala)(challenge to Alabama's constitutional amendment, to compel recognition of valid marriage by surviving same-sex spouse.

¹¹⁰ 1:14-cv-00208 (S.D. Ala.).

¹¹¹ 2:2014cv01091 (N.D. Ala.).

¹¹² No. 1:2014cv01180.

¹¹³ *Richmond & Richmond v. Madison County Circuit Clerk* (Madison Cty., Ala).

¹¹⁴ There are more than six state cases pending in Florida involving claims of rights to obtain or have recognized same-sex marriage including, *Dousset v Florida Atlantic University* (FL 4th Dist Ct App, filed May 14, 2014), petition to compel recognition of valid out of state marriage; *Shaw v Shaw* (FL 2d Dist Ct App, filed Aug 10, 2014) seeking recognition of marriage for purposes of divorce; *Pareto v Rubin*; *Brassner v Lade*; *Brandon-Thomas v Brandon-Thomas* (to compel recognition of an out of state marriage for purposes of divorce); and *In re Bangor Estate*. see, <http://www.freedomtomarry.org/litigation/entry/florida> (October 15, 2014).

¹¹⁵ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

sion in *Latta v. Otter*,¹¹⁶ holding that Idaho's same-sex marriage ban was unconstitutional. Justice Kennedy granted an emergency stay on October 8, and the full U.S. Supreme Court vacated that stay on Friday, October 10. On Sunday, October 12, a federal trial court judge in Nevada, following the Idaho decision, held the same-sex marriage ban to be unconstitutional. On October 17, federal judges in Arizona and Alaska held those same-sex marriage bans to be unconstitutional, citing recent decisions in the Ninth circuit. Issuance of marriage licenses to same-sex couples and same-sex marriages immediately followed in those states, and Arizona announced it would not further appeal the decision.

Statistically speaking, as of December 5, 2014, approximately 64% of Americans live in states with marriage equality. Approximately 25% of Americans reside in 11 states where lawsuits challenging their same-sex marriage bans are filed but no decisions have issued, or are expected immediately.¹¹⁷ And approximately 11% of the population lives in the Sixth Circuit consisting of Kentucky, Michigan, Ohio, and Tennessee, where the Sixth Circuit upheld bans on same-sex marriage.

VII. Matrimonial Law—Practical Considerations in Prohibition States

The challenges, difficulties and lack of access to equal protection of the laws to same-sex married couples residing in prohibition states are at least substantial and significant and at best, inconsistent from one jurisdiction to another. In the 13 years since same-sex couples have first been able to marry anywhere, they are now able to do so in 18 countries and in 36 U.S. states

¹¹⁶ No. 14-35420, ___F.3d___ (9th Cir. 2014).

¹¹⁷ *De Leon v. Perry*, 975 F.Supp. 2d 632 (W.D. Tex. 2014), *appeal granted*, No. 14-50196 (5th Cir. 2014); *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014), *appeal granted*, No. 14-31037 (5th Cir. 2014); *Brenner v. Scott*, 999 F.Supp.2d 1278 (N.D. Fla. 2014), *appeal granted sub. nom. Brenner v. Armstrong*, Nos. 14-14061, 14-14066 (11th Cir. 2014); *Inniss v. Aderhold*, 1:2014cv01180 (N.D. Ga. 2014); *Hard v. Bentley*, 2:13 CV-922-WKW-SPW, (M.D. Ala. 2013); *Ramsay v. Dalrymple*, 3:14-CV-57-(RRE-KKK) (D. N.D. 2014); *Rosenbrahn v. Daugaard*, 4:2014cv04081 (D. S.D. 2014); *Wright v. Arkansas*, 60CV-13-2662 (Pulaski Cnty. Cir. Ct. May 9, 2014), *stay granted sub. nom. sub. nom. Wright v. Smith*, No. CV-14-414 (Ark. May 16, 2014).

and the District of Columbia. Like opposite-sex couples, same-sex married couples have also faced marital difficulties that have led to dissolution, and to the resolution of attendant issues including property, support, access to and custody of children, and related questions that face other couples who divorce. However, the doors to the courthouse are closed to many couples who are married in a recognition jurisdiction but who reside in or move to a prohibition state.

As but one example, consider Michigan. Michigan's Same-sex marriage ban, which comes from a 2004 voter-approved state Constitutional Amendment prohibits recognition of both marriage and any other "similar union" as follows:

"To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."¹¹⁸

As such, same-sex couples cannot marry in Michigan. Neither can their valid marriages solemnized in recognition jurisdictions be recognized in Michigan. Michigan cannot recognize same-sex marriages, domestic partnerships, civil unions, or "similar union[s] for any purpose." The application of the constitutional amendment has had detrimental effect on families and has caused confusion, uncertainty and worse.

A. *Tax Filing Status*

In Michigan as in most states, state income tax returns are derivative of federal returns, and a state tax return cannot be prepared without first preparing a federal return, and with the same tax filing status and federal tax calculated based upon that status, transferred to the state return. With the change in recognition after *Windsor*, validly married same-sex couples are recognized under federal law irrespective of whether the state recognizes the marriage, and accordingly, same-sex couples must file as "married" (whether jointly or separately) on their Federal income tax returns. Same-sex married couples residing in Michigan cannot, however, file a state tax return in Michigan as married, because their valid marriage is not recognized by

¹¹⁸ "Michigan Marriage Amendment" or MMA, Mich. Const. Art. I, sec. 25 (2005).

Michigan.¹¹⁹ The couple must prepare a married- joint or married- single federal tax return and file it. They must prepare two “dummy” federal returns for each spouse as “single,” use that information to prepare their two “single” state tax returns, and then file their single state tax returns. However, they are not “single,” so query whether their state tax return is honest, accurate or compliant with the law? How do they share, divide or accurately claim various deductions such as property tax, charitable contributions, child dependency exemptions, federal adoption allowance, or similar but inconsistent items?

B. *Dissolution*

The same-sex married couple residing in Michigan cannot seek dissolution of their otherwise valid marriage in Michigan courts because the court cannot recognize their marriage, and therefore does not have subject matter jurisdiction to preside over a dissolution action. The couple has options:

- i. Return to the jurisdiction where they were married to seek dissolution. All states have minimum residency requirements before a couple can seek a divorce in that jurisdiction, and with few exceptions, the parties must have resided in the state for, typically, one year or longer. This option can be exceedingly costly to most families. Couples residing in prohibition states but married in certain marriage equality states such as California, Illinois and Washington D.C. can obtain a dissolution without meeting the minimum residency requirements subject to certain requirements of the state’s statute and in some instances, provided they have no disputes, and that they have a consent judgment resolving all issues.¹²⁰
- ii. Return to the jurisdiction of marriage or another recognition jurisdiction, establish residency, and then pro-

¹¹⁹ Michigan Dept. of Treasury, *Notice to Taxpayers: Same Sex Couples Filing Joint Federal Income Tax Returns Must File Michigan Income Tax Returns as Single Filers*, https://www.michigan.gov/documents/taxes/DOMAnotice_434103_7.pdf.

¹²⁰ D.C. Code §§ 16-901, et. seq. (2014).

- ceed with a dissolution action. Again, this is likely cost prohibitive to most families.
- iii. Try to work out an agreement without litigation but don't become legally divorced. Such an arrangement, without a Judgment, is not binding on third parties as it is not subject to recognition, full faith and credit, or any other enforceable right on the part of either party to the dissolution. Tax benefits incident upon divorce (such as neutral tax treatment under Section 1041, and taxability/deductibility of spousal support under Section 71, of the Internal Revenue Code, for example, would not be available. Division of retirement plans without tax consequences would not be available. Additionally, neither spouse could remarry without resulting in a bigamous marriage if the prior marriage was not dissolved.
 - iv. Seek an annulment of the marriage in the resident, prohibition state on the basis that the marriage is not recognized in the state, so it must be invalid *ab initio*, and therefore may be subject to dissolution under the provisions of the annulment statute.¹²¹ This approach is controversial and not widely used and has, in fact, been used to different results in the same state.

VIII. Conclusion

Since the U.S. Supreme Court's decision in *United States v. Windsor*,¹²² more than thirty challenges to state constitutional amendments and statutes barring recognition of same-sex marriages (and, where included in a particular state's law, other analogous or comparable relationships such as civil unions and domestic partnerships) have been brought in federal court (and in a few instances, in state court), in all states where bars remained, or where marriage equality did not exist. Nearly all (excepting decisions in the Sixth Circuit,¹²³ Louisi-

¹²¹ See *Surnamer, No. 1 CA-CV 11-0504, 2012 WL 2864412 (Ariz. Ct. App. July 12, 2012)*.

¹²² *US v Windsor*, 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 ([June 26,] 2013).

¹²³ *DeBoer v Snyder*, ___ F.3d ___, 2014 WL 5748990 (6th Cir. Nov. 6, 2014)(petitions for review pending and scheduled for consideration before the US Supreme Court on January 9, 2015, in *Obergefell v Hodges* (Ohio); No 14-

ana,¹²⁴ and Puerto Rico¹²⁵) have been successful.¹²⁶

Five of six federal circuits have affirmed lower court decisions in favor of same-sex marriage. Four federal circuits have yet to issue decisions. There is now a circuit split on the issue, although most observers of the courts, and the issue of marriage equality, predict that the remaining circuits will follow, and uphold lower court decisions in favor of marriage equality.

Meanwhile, on October 6, 2014, the U.S. Supreme Court declined all seven requests for review of circuit court decisions, and thereafter lifted stays of all others before it, resulting in the number of states permitting same-sex marriage to increase dramatically, from 19 to 35 from October 6 to December 5, 2014. Petitions for certiorari have been filed in the U.S. Supreme Court on behalf of plaintiffs in all four of the Sixth Circuit states, and on behalf of the plaintiffs in the Louisiana case, *Robicheaux v Caldwell*, seeking direct review by the Court before ruling by the Fifth Circuit; all five are to be considered at the Court's January 15 Case Conference. If the petitions are granted, the Supreme Court may likely hear the appeals in the spring 2015 term. Given the rapid change in recognition of same-sex marriage, mostly by federal court decisions on fundamental, constitutional bases, it is reasonable to conclude that same-sex marriage may well be universally available throughout the United States, and relatively quickly, with or without further action by the Supreme Court.

556, *Tanco v Haslam* (Tenn.), No 14-562; *DeBoer v Snyder*, (Mich.), No 14-571; and *Bourke v Beshear* (Kentucky), No 14-574.

¹²⁴ *Robicheaux v George*, fka *Robicheaux v Caldwell*, 2 F.Supp.3d 910, (E.D.La., Sep 3, 2014), No 14-596 (E.D. La., Nov. 20, 2014). Petition for review pending and scheduled for consideration before the US Supreme Court on January 9, 2015, *Robicheaux v George*, No. 14-596.

¹²⁵ *Conde-Vidal v. Garcia-Padilla*, ___ F.Supp.3d ___, 2014 WL 5361987 (D.Puerto Rico, Oct. 21, 2014) No. 14-1253 (PG)(Perez-Gimenez, J.) Notice of Appeal filed Oct. 28, 2014, First District Court of Appeals.

¹²⁶ Review of the decisions in Louisiana and Puerto Rico are before the Fifth, and First Circuits, respectively. *Robicheaux v Caldwell* (Louisiana), consolidated with *Perry v Leon* (Texas), Fifth Circuit; oral argument scheduled for January 5, 2015; *Conde-Vidal v Ruiz Armendariz et al*, No. 14-1253 (PG)(Notice of Appeal filed Oct. 28, 2014).

Addendum

Just as this issue of the Journal was going to press, several additional, key developments occurred, increasing the number of marriage equality jurisdictions in the United States to 37, and the percentage of Americans living in marriage equality jurisdictions to over 71%. These include the following:

- The U.S. Supreme Court announced, following its January 16, 2015 Conference—continued from January 9—that it granted the four petitions for writ of certiorari before it, from the Sixth Circuit Court of Appeals in Cincinnati in *DeBoer v Snyder*, 772 F.3d 388 (6th Cir. 2014). All four Petitions, separately filed from each of the four constituent states in the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee), were accepted and consolidated into one appeal to be heard likely in late April, 2015 (the specific date was not set by the order), and in its order the Court limited the grant of certiorari to two questions:

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth 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?

Order, 574 US ____, (Nos. 14-556, Obergefell, James, et al. v. Hodges, Richard, et al. [Ohio]; 14-562, Tanco, Valeria, et al. v. Haslam, Gov. of Tn, et al.; 14-571, DeBoer, April, et al. v. Snyder, Gov. of Mi., et al.; and 14-574, Bourke, Gregory, et al. v. Beshear, Gov. of Ky, et al., consolidated) January 16, 2015.

A briefing schedule has been set, with final reply briefs due by April 17, 2015. The date for oral argument was not set by the order, although it is widely assumed it will be set shortly and for sometime by the end of April or the very beginning of May, 2015.

The Court's January 16, 2015 order is here:

<http://www.supremecourt.gov/orders/courtorders/011615zrf2q3.pdf> (January 16, 2015)

- Additionally, on the same day, Friday, January 16, 2015, the U.S. District Court for the Eastern District of Michigan ruled in *Caspar v Snyder*, — F.Supp.3d —, 2015 WL 224741 (E.D.Mich., Jan. 16, 2015), that the State of Michigan must recognize the 300+ same-sex marriages licensed and solemnized on March 22, 2014, and denied the state's request to stay its ruling or to consolidate the case with two others pending in Federal court in Michigan.
- On January 12, 2015, the US Supreme Court denied the Petition for Writ of Certiorari in *Robicheaux v George*, — S.Ct. —, 2015 WL 133500 (Mem), 83 USLW 3332, U.S., January 12, 2015 (NO. 14-596). The case was at the time pending before the Fifth Circuit and had been argued there January 9, 2015 with the cases from the other two states in the Circuit, Louisiana and Texas
- On January 1, 2015, in *Brenner v Scott*, Slip Copy, 2015 WL 44260 (N.D. Fla.) January 01, 2015, the U.S. District Court reaffirmed and clarified its prior ruling on the stay in Florida due to be lifted January 5, 2015, and declined to extend the stay (earlier, on December 19, 2014, the U.S. Supreme Court denied a request for a stay from the State of Florida, via the 11th Circuit, in *Armstrong v Brenner*, — S. Ct. —, 2014 WL 7210190 (U.S.Fla.). On January 5, 2015, the stay expired and Florida became the 36th state to permit same-sex marriage.

