3Qs: Obama administration fights gay marriage ban

March 5 2013, by Jason Kornwitz

The Department of Justice has filed an amicus brief asking the Supreme Court to strike down California's ban on same-sex marriage, arguing that it violates the Constitution's equal protection clause. Credit: Thinkstock

The Department of Justice has filed an amicus brief asking the Supreme Court to strike down California's ban on same-sex marriage, arguing that it violates the Constitution's equal protection clause. Northeastern University news office asked Martha Davis, a professor of law with expertise in constitutional law, to explain the brief's potential impact on

the case, which is scheduled to be argued on March 26.

The brief filed by the Department of Justice argues that California's ban on same-sex marriage is rooted in "impermissible prejudice" and violates the Constitution's equal protection clause, which provides that "No state shall deny to any person within its jurisdiction the equal protection of the laws." How do you think this argument will resonate with the Supreme Court?

As a practical matter, this argument must only resonate with five of the nine justices in order to prevail. The Court's most recent cases on sexual orientation and equal protection—Lawrence v. Texas and Romer v. Evans—suggest that a majority of the Court, led by Justice Kennedy, may be ready to take the next step and strike down California's ban. Indeed, the very fact that certiorari (an order by which a higher court reviews a decision of a lower court) was granted in the case is telling. Particularly given the posture of the case, the Court would not be forced to go out on a limb by striking down the California ban.

First, California's Proposition stripped away rights that had previously been accorded to same-sex couples as a result of a court ruling, so the issue is not necessarily whether the right to marry is affirmatively mandated but the terms on which it can be taken away once it's given. Second, there is a decades-long history of Supreme Court opinions holding that an effort to strip or deny rights based on "bare animus" against the affected group is impermissible. The Obama administration's brief is an effort to fit this case right into that line of decisions. Finally, the Court is not beyond responding to societal shifts and the trajectory of social movements. While the Court rarely wants to provide leadership in

an area where there is social disagreement, it also doesn't want to be left behind and seen as irrelevant. Sometimes, to maintain its authority, it must see which way the wind is blowing. In the healthcare litigation, Chief Justice Roberts proved especially adept at shoring up the Court's power while avoiding a constitutional confrontation. It will be interesting to see if any similar approach emerges here.

One law expert has called the administration's amicus brief the "tip of a much larger anti-discrimination iceberg." If the Supreme Court rules against the constitutionality of California's ballot initiative, do other state laws banning same-sex marriage stand a chance of survival?

The Ninth Circuit Court of Appeals, with its high reversal rate before the Supreme Court, took care to present only a very narrow question based on the specific procedural history of California's ban on marriage equality. The Court could resolve the case in a way that would affect only California, without making much of an immediate impact on the larger iceberg.

The Obama administration's brief also argues, however, that discrimination on the basis of sexual orientation should be given heightened scrutiny. If the Court adopts that standard—the same one applied to sex discrimination—it would not only expose even more state laws to legal challenge, it would give Congress greater power to impose non-discriminatory regimes on states as part of its 14th Amendment enforcement power.

In any event, even a narrow opinion striking down the California ban will feed the energy of the formidable social movement that has fueled

legislative successes in some states. As that movement strengthens, it will also have an impact on judicial decisions. We have seen this phenomenon before, particularly in the areas of civil rights and women's rights.

A group of prominent Republicans and dozens of corporations have either submitted or signed other amicus briefs against California's same-sex marriage ban, known as Proposition 8. Even the state of California has refused to defend the law, submitting its own amicus brief to the court last Thursday. What role do amicus briefs play in guiding Supreme Court rulings?

Amicus briefs play an extremely important role in Supreme Court litigation. The Court imposes strict page limits on the parties, so amicus briefs (which of course have page limits as well) often fill out the arguments that the parties simply do not have room to make. While it would be wrong to view amicus briefs like some sort of popularity poll, showing the Court which side commands the most support, the state's failure to defend the law certainly sends a signal to the Court. With only weak briefing in support of the ban, the Court simply won't be presented with the breadth and depth of arguments that it finds in support of striking Proposition 8. At the end of the day, it's the substantive arguments that matter most, and amicus briefs that add to that discussion will make a difference. Amicus briefs that play against type—for example, prominent Republicans in support of marriage equality—may have extra credibility and are especially likely to be noticed and read by the justices and their clerks.

Similarly, there is no doubt that the brief filed by the Obama

administration will receive special attention. The U.S. Solicitor General, who represents the Executive branch in the Supreme Court, is sometimes called the 10th Justice. The Solicitor General's office has built up credibility with the Court over many years. Like prior administrations, the Obama administration has often appeared as amicus in cases such as this one raising issues of constitutional construction. While the U.S. brief adds even more weight on the side of those seeking to strike down the California ban, the argument offered in the U.S. brief takes a middle ground and does not argue for a broad judicial statement on marriage equality. Instead, the U.S. urges the Court to find that laws like California's, which establish same-sex marriage in all but name, should be viewed as suspect and struck down. That approach, which would affect only eight states, may be the middle ground that will appeal to justices who want to take things one step at a time.

Provided by Northeastern University

Citation: 3Qs: Obama administration fights gay marriage ban (2013, March 5) retrieved 3 April 2024 from https://phys.org/news/2013-03-3qs-obama-administration-gay-marriage.html

This document is subject to copyright. Apart from any fair dealing for the purpose of private study or research, no part may be reproduced without the written permission. The content is provided for information purposes only.