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## Don't be so sure the court will decide marriage equality this term

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.



Contrary to all of the media stories, the Supreme Court may not decide the issue of marriage equality for gays and lesbians in 2013. In both cases in which review was granted, there are difficult jurisdictional questions that may keep the court from reaching the issue of whether laws requiring that marriage be between a man and a woman

violate the Constitution. In fact, in both *United States v. Windsor*, 699 F.3d 169 (2d Cir. Oct. 18, 2012), cert. granted, No. 12-307 (Dec. 7, 2012), and *Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012), cert. granted, No. 12-144 (Dec. 7, 2012), the court explicitly asked for briefing and arguments as to whether it had jurisdiction to reach the constitutional issues presented.

*Windsor* involves the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), which provides that for purposes of federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." There are more than a thousand references to marriage in federal laws. For example, Section 3 of DOMA prevents same-sex married couples from filing joint federal tax returns, prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits, and leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses.

The Supreme Court granted certiorari as to three questions in *Windsor*: "(1) Whether Section 3 of the Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State; (2) whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and (3) whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case."

The latter two questions raise very difficult jurisdictional issues. The Obama administration is not defending the constitutionality of Section 3 of DOMA. It is the prerogative, indeed the duty, of a president to refuse to defend a law that he believes is unconstitutional. The president takes an oath to uphold the Constitution and need not, and should not, defend laws that he deems unconstitutional. But since the parties to the lawsuit - Edith Schlain Windsor and the U.S. - agree that the law is invalid, is there a "case or controversy" sufficient to meet Article III of the Constitution?

Moreover, does the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives have standing to defend the law in the Supreme Court? The House BLAG, which consists of five individuals - the Speaker, the majority and minority leaders, and the majority and minority whips - voted three to two to intervene in the case. The three Republican members of the BLAG, including House Speaker John

### Intellectual Property

#### Apple's failure to get injunction may make smartphone peace more likely

Apple Inc. lost its shot at a decisive victory over smartphone adversary Samsung Electronics Co. Ltd. late Monday when a San Jose federal judge denied the Cupertino company's request for a permanent injunction.

### Labor/Employment

#### Kmart wins in cashier seating trial

A U.S. District Court judge found Tuesday that state law does not require seated workstations for cashiers in a Tulare Kmart.

### Criminal

#### AU Optronics executive convicted in price-fixing retrial

A San Francisco jury convicted AU Optronics Corp. executive Steven Leung Tuesday for his involvement in a massive cartel that fixed the prices of the liquid crystal display panels used in computers and flat screen televisions.

### Judges and Judiciary

#### Alliance leadership selection draws fire

The Alliance of California Judges' directors have picked the organization's leadership for the coming year, but some have criticized it for selecting officers without a member vote.

### Labor/Employment

#### Costa Mesa layoffs canceled, but outsourcing battle continues

After a two-year legal and political battle to outsource more than 100 city jobs, Costa Mesa rescinded the last layoff notices in letters sent to employees on Tuesday.

### Litigation

#### Calvo Fisher & Jacob wins nearly \$1 million in fee fight with estate lawyer

A fee fight between lawyers in Guam and San Francisco ended Monday night with a jury awarding nearly \$1 million to Calvo Fisher & Jacob LLP, which sought fees for defending an attorney involved in an half-billion dollar estate battle.

### Law Practice

#### Silicon Valley firms build tax practices

Firm leaders say they're responding to an increased demand for tax services as the latest crop of technology companies grows more

Boehner, voted to defend DOMA; the BLAG's two Democrats, including minority leader and former Speaker Nancy Pelosi, opposed intervention.

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Previously, in *INS v. Chadha*, 462 U.S. 919 (1983), Congress defended a federal law when the Executive Branch refused to do so. But I know of no case where *one* house of Congress was accorded standing to defend a law in the Supreme Court. Except where the Constitution specifies otherwise, congressional action always requires approval of both the House and the Senate.

On Tuesday, Dec. 11, the Supreme Court appointed Harvard Law Professor Vicki Jackson to brief and argue the two procedural questions as to whether the Supreme Court has jurisdiction to decide the constitutionality of Section 3 of DOMA in this case.

The procedural issues in *Hollingsworth* are no less difficult. The Supreme Court granted review to decide whether California's Proposition 8, which amends the California Constitution to define marriage as being between a man and a woman, denies equal protection. But the court also granted certiorari as to whether the defenders of Proposition 8 "have standing under Article III, [Section] 2 of the Constitution in this case."

Neither the governor nor the attorney general of California are defending the constitutionality of Proposition 8. The supporters of Proposition 8 intervened in the federal district court to defend the law. After Judge Vaughn Walker declared Proposition 8 unconstitutional, the supporters of Proposition 8 appealed.

The 9th U.S. Circuit Court of Appeals, after oral arguments, certified to the California Supreme Court the question of whether the defenders of an initiative have standing to represent the interests of the state when the governor and the attorney general will not defend an initiative in court. The court said that such standing would exist in state court. The court expressed the need to make sure that someone is available to defend the voters' will when an initiative is passed. The 9th Circuit then ruled that this was sufficient to provide the defenders of Proposition 8 standing to appeal.

But while California certainly can decide who may sue in California courts, standing under Article III is entirely a federal question which California law cannot resolve. The U.S. Supreme Court previously indicated that supporters of an initiative do not have standing to defend it if the government refuses to do so. In *Arizonaans for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court declared that "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." The court further stated: "Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated." The court said that it had "grave doubt" as to whether defenders of an initiative would have standing to appeal and defend its constitutionality.

If the Supreme Court adheres to this view, then the defenders of Proposition 8 lack standing to appeal. The result would be that the 9th Circuit's decision would be vacated, and Judge Walker's opinion striking down Proposition 8 and enjoining its enforcement would stand. Judge Walker's decision would be unaffected because there was no problem with standing in the federal district court; the lawsuit was brought by challengers to Proposition 8 who sought to marry and thus clearly had standing. The defenders of Proposition 8 intervened in federal district court, which was permissible since the standard for intervention under Federal Rule of Civil Procedure 24 is more permissive than that for standing under Article III. The issue is solely whether the intervenors had standing to appeal, and if not, Judge Walker's ruling and injunction stand.

The Supreme Court surely will be tempted to ignore these procedural issues and

complex and goes international.

### Litigation

**Defense bar weighs in on court budget cuts**  
Six prominent members of the defense bar weighed in on the coming slashes to the Los Angeles County Superior Court budget.

### Union busting lawsuit goes to jury

Lawyers delivered closing arguments on Tuesday in a federal lawsuit accusing former Los Angeles County District Attorney Steve Cooley and members of his administration of union-busting.

### U.S. Supreme Court

#### Don't be so sure the court will decide marriage equality this term

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### Large Firms

#### Law firm capital: what you see is *not* what you get

How did firms with so much capital fail? Because what was said, and what was happening, were very different things. By **Edwin Reeser**

### Labor/Employment

#### When law produces results at odds with common sense

After more than four-and-a-half years of expensive and time-consuming litigation, an employer is back to square one. Is this any way to run a legal system? By **Jeffrey W. Kramer**

### California employers rack up 'wins' in 2012 decisions

While *Brinker* received the most attention, it was not the only pro-employer decision that was handed down this year. By **David Ezra**

### Judicial Profile

#### Winifred Y. Smith

Superior Court Judge Alameda County (Hayward)

### Law Practice

#### State Bar study of continuing legal education may lead to more required hours

The State Bar is beginning a close look at continuing legal education requirements, including minimum hours, provider standards, exemptions and more.

reach the merits of whether there is a right to marriage equality for gays and lesbians. But the court's expressly granting review of these jurisdictional questions indicates they will be seriously considered. The enormously important decisions on whether gays and lesbians have a constitutional right to marry may not happen this term after all.

**Erwin Chemerinsky** *is dean and distinguished professor of law at the University of California, Irvine School of Law.*

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