



Written by [Jack Kenny](#) on September 20, 2012

High Court Will Rule on Gay “Marriage,” Ginsburg Predicts

Associate Justice Ruth Bader Ginsburg predicted Wednesday that the U.S. Supreme Court will tackle the issue of same-sex marriage some time during the next term, which will begin next month and end in June of next year. Speaking at the University of Colorado in Boulder, Ginsburg said the court would likely hear an appeal of one or more federal rulings on the constitutionality of the federal Defense of Marriage Act, which defines marriage as a union of one man and one woman. Several federal courts have ruled the definition a denial of equal protection rights guaranteed by the U.S. Constitution.



Asked by a student if she believed laws prohibiting same-sex marriage denied homosexuals and lesbians equal protection rights guaranteed by the Constitution, Ginsburg smiled and declined to answer, the Associated Press [reported](#), because the issue may soon be before the high court. “I think it’s likely we’ll have that issue before the end of the current term,” she said.

The Defense of Marriage Act was passed by Congress and signed into law by President Bill Clinton in 1996, after it appeared that a 1993 ruling by the Supreme Court of Hawaii would give legal status to same-sex marriages in that state. That did not happen, but the federal law has remained in effect while eight states, starting with Massachusetts in 2003, have granted marital status to same-sex unions, either by court ruling, legislative action, or both. In addition to Massachusetts, same-sex marriages have been made legal in Vermont, Connecticut, New York, New Hampshire, Iowa, Maryland, and the state of Washington, though Maryland’s and Washington’s laws are not yet in effect and might be subject to referenda, the AP reported. A law granting marriage status to same-sex marriage in Maine was overturned by referendum in 2009, only months after it was enacted.

In passing the Defense of Marriage Act, Congress was addressing concerns that under the “full faith and credit clause” in Article IV, Section 1 of the federal Constitution, a same-sex marriage license in any one state would have to be recognized as a legal marriage in all other states. But in June of this year, a federal judge in New York [ruled](#) the Act unconstitutional.

An appeal from that ruling has been scheduled for hearing by the Second U.S. Court of Appeals in New York on September 27. The plaintiff in the case has requested an expedited hearing before the Supreme Court, citing her age, health, and the number of petitions before the court on the same issue. While the court has complete discretion over what cases it will hear, Ginsburg’s prediction is a pretty solid indication that the justices are prepared to hear a challenge to the Defense of Marriage Act.

The ruling in New York was not the first to find DOMA unconstitutional. The First Circuit Court of Appeals in Boston has upheld a district court ruling against the Act and two federal judges in California



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and one in Connecticut have also ruled the law unconstitutional. In the New York case, *Windsor v. United States*, plaintiff Edith Windsor filed suit after being forced to pay \$363,053 in federal estate tax following the death in 2009 of her female partner, whom she had married in Canada in 2007. Windsor [contended](#) that DOMA prevented her from qualifying for an exemption available under federal law to a widow or widower from a heterosexual marriage. Judge Barbara S. Jones of the U.S. District Court in Manhattan ruled that defining marriage in federal law was an effort by Congress to “intrude upon the states’ business of regulating domestic relations.”

In February 2011, President Obama and Attorney General Eric Holder instructed the Department of Justice to no longer defend the Defense of Marriage Act from legal challenges. Instead, the Justice Department filed a brief in support of Windsor, opposing DOMA because the legislation was “motivated in substantial part by disapproval of gay and lesbian people.”

The Bipartisan Legal Advisory Group of the House of Representatives is defending the law, though the decision was far from unanimous. The two Democrats in the five-member group, House Minority Leader Nancy Pelosi of California and Minority Whip Steny Hoyer of Maryland have joined 145 other members of the House in a brief against DOMA.

Briefs submitted to the Second Circuit Court last month included arguments in defense of DOMA by former attorneys general John Ashcroft and Edwin Meese III, both Republicans. They challenged, among other things, the propriety of the Justice Department opposing, rather than defending, an act of Congress.

“The administration’s change of position marks an unprecedented and ill-advised departure from over two centuries of Executive Branch practice,” they wrote. “Historically, the president’s constitutional obligation to ‘take care that the laws be faithfully executed’ has been understood to include the vigorous defense of acts of Congress when they are challenged in court.” The Justice Department position, they added, “fails to accord due respect to Congress and threatens to undermine the proper functioning of the judicial process.”

In her ruling, Judge Jones found no rational basis for the definition of marriage Congress added to the federal statutes, a finding that did not sit well with the majority of House members in the Bipartisan Legal Action Group.

“It is no small step for a federal court to conclude that a coordinate branch of the federal government has acted irrationally,” the BLAG brief stated.

Photo: Supreme Court Justices Ruth Bader Ginsberg, left, and Stephen Breyer talk prior to a ceremonial swearing-in ceremony for new Supreme Court Justice Samuel Alito in the White

House, Feb. 1, 2006: AP Images



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