



SUPREME COURT OF THE UNITED STATES

UNITED STATES V. WINDSOR, EXECUTOR OF THE ESTATE OF SPYER, ET AL., 570 U.S. 744 (2013)

EXCERPTS OF BRIEF OF 172 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 40 U.S. SENATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR, URGING AFFIRMANCE ON THE MERITS, MARCH 2013

"WHEN CONGRESS ENACTED DOMA, GAY AND LESBIAN COUPLES COULD NOT MARRY ANYWHERE IN THE WORLD. SOME STATES STILL CRIMINALIZED SAME-SEX RELATIONSHIPS, INVITING FURTHER DISCRIMINATION AGAINST GAY MEN AND LESBIANS IN EMPLOYMENT, FAMILY RELATIONS, AND HOUSING. GAY MEN AND LESBIANS WERE STILL OFTEN PORTRAYED AS MENTALLY UNSTABLE, SEXUALLY PROMISCUOUS, AND MORALLY DEFICIENT. IN SHORT, IT WAS A DIFFERENT WORLD FOR GAY MEN AND LESBIANS, AND MANY WERE UNDERSTANDABLY RELUCTANT TO SPEAK OPENLY ABOUT THEMSELVES OR THEIR FAMILIES. A NUMBER OF MEMBERS, LIKE THE CONSTITUENTS WE SERVE, DID NOT PERSONALLY KNOW MANY (IF ANY) PEOPLE WHO WERE OPENLY GAY, AND MAJORITY ATTITUDES TOWARD THAT MINORITY GROUP WERE OFTEN VISCERALLY FEARFUL AND NEGATIVE.

AS A RESULT, WHEN THE QUESTION OF SAME-SEX MARRIAGE AROSE IN 1996, REFLEXIVE BELIEFS AND DISCOMFORT ABOUT SAME-SEX RELATIONSHIPS DOMINATED CONGRESSIONAL DEBATE. FROM OUR PERSPECTIVE—including those of us who VOTED FOR DOMA — DEBATE AND PASSAGE OF THE LAW DID NOT NECESSARILY ARISE 'FROM MALICE OR HOSTILE ANIMUS,' BUT INSTEAD FROM 'INSENSITIVITY CAUSED BY A LACK OF CAREFUL, RATIONAL REFLECTION OR FROM SOME INSTINCTIVE MECHANISM TO GUARD AGAINST PEOPLE WHO ARE DIFFERENT IN SOME RESPECTS FROM OURSELVES.' Bd. of Trs. of Univ. of Ala. v. G., 531 U.S. 356 (2001) (KENNEDY, J., CONCURRING). WHILE FEAR AND DISTRUST OF FAMILIES DIFFERENT FROM OUR OWN MAY EXPLAIN WHY DOMA PASSED BY COMFORTABLE MAJORITIES IN 1996, IT DOES NOT OBIVATE THE NEED FOR A CONSTITUTIONALLY PERMISSIBLE JUSTIFICATION FOR THE LAW.

WE AGREE THAT HEIGHTENED REVIEW IS APPROPRIATE HERE, AND THAT DOMA MUST BE STRUCK DOWN UNDER THAT STANDARD. WE OFFER OUR UNIQUE PERSPECTIVE ON WHY GAY MEN AND LESBIANS LACK THE MEANINGFUL POLITICAL POWER THAT SOME (INCLUDING BLACK AMERICANS) HAVE ARGUED MIGHT JUSTIFY DENYING HEIGHTENED JUDICIAL SCRUTINY.

WE ALSO BELIEVE THAT DOMA MUST BE STRUCK DOWN EVEN IF IT DOES NOT TRIGGER HEIGHTENED REVIEW. VIRTUALLY EVERY ASPECT OF DOMA AND ITS LEGISLATIVE HISTORY — THE LACK OF OBJECTIVE, RATIONAL FACT-FINDING TO CONNECT THE EXCLUSION OF MARRIED SAME-SEX COUPLES TO A LEGITIMATE FEDERAL INTEREST; THE SWEEPING EXCLUSION OF GAY MEN AND LESBIANS BASED ON A SINGLE IDENTIFIABLE TRAIT; AND THE OPEN DESIRE OF SOME TO EXPRESS DISAPPROVAL OF THAT MINORITY GROUP — DISTINGUISHES IT FROM ROUTINE ACTS OF CONGRESS. NONE OF THE ARGUMENTS ADVANCED IN ITS DEFENSE IS SUFFICIENT. DOMA LACKS THE REQUIRED RATIONAL CONNECTION TO A LEGITIMATE FEDERAL INTEREST: 'IT IS A STATUS-BASED ENACTMENT DIVORCED FROM ANY FACTUAL CONTEXT FROM WHICH [THE COURT] COULD DISCERN A RELATIONSHIP TO LEGITIMATE [FEDERAL] INTERESTS.' ROMER V. EVANS, 517 U.S. 620, 635 (1996).

ALTHOUGH THE UNSUPPORTED CLAIMS THAT WERE ASSERTED TO JUSTIFY DOMA IN 1996 WENT UNCHECKED BY REALITY THEN, GAY AND LESBIAN COUPLES CAN NOW MARRY IN NINE STATES AND THE DISTRICT OF COLUMBIA, AND 18,000 SUCH COUPLES REMAIN LEGALLY MARRIED IN CALIFORNIA AS WELL. THE HARM THAT DOMA CAUSES THOSE COUPLES, THEIR FAMILIES, AND THEIR STATES IS VERY REAL TODAY. AS A RESULT — AND AS MORE AMERICANS HAVE COME TO REALIZE THAT THEY HAVE A LESBIAN OR GAY RELATIVE, FRIEND, OR COLLEAGUE — ATTITUDES HAVE SHIFTED.

WE ARE PART OF THE COMMUNITIES WE REPRESENT, AND OUR UNDERSTANDING REFLECTS THE SAME ARC OF EXPERIENCE, MAKING CLEAR WHAT SHOULD HAVE BEEN APPARENT IN 1996. PUT SIMPLY, DOMA IS ONE OF THOSE LAWS THAT WAS ENACTED WHEN 'TIMES * * * BLIND[ED] US TO CERTAIN TRUTHS,' BUT THAT 'LATER GENERATIONS CAN SEE * * * IN FACT SERVE ONLY TO OPPRESS.'" LAWRENCE V. TEXAS, 539 U.S. 558, 579 (2003). IT MUST BE STRUCK DOWN."

Julie Torres '23