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Same-Sex Marriage On Trial

Five things to watch as Supreme Court hears arguments in historic cases.

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For 150 minutes on April 28, the U.S. Supreme Court will hear history-making arguments over the hotly contested issue of same-sex marriage, which made its way to the justices with remarkable speed.

The arguments are likely to be as much a debate among the justices as a chance for five lawyers to make their case to the court regarding whether the Constitution requires states to allow same-sex marriages and to recognize such marriages from other states.

Squaring off on the first issue for 90 minutes will be longtime gay rights advocate Mary Bonauto and U.S. Solicitor General Donald Verrilli Jr., in favor of allowing same-sex marriage; and John Bursch, a special assistant Michigan attorney general, against. For the hourlong debate on recognition, Ropes & Gray partner Douglas Hallward-Driemeier will argue for, and on the other side will be Joseph Whalen, a Tennessee associate solicitor general.

The four cases before the justices come from Michigan, Ohio, Kentucky and Tennessee. The U.S. Court of Appeals for the Sixth Circuit upheld those states' marriage bans in November.

For the vast majority of interested people who won't be able to see the arguments in person, the audio and transcript will be released later in the day. Here are five key aspects of the arguments to watch or listen for.

1. Whither the chief justice?

Some pundits and court scholars believe the position of Chief Justice John Roberts Jr. is the biggest mystery in the marriage-equality cases. In *United States v. Windsor*, striking down the definition of marriage as a heterosexual institution under the federal Defense of Marriage Act (DOMA), his dissent in 2013 did not tip his hand on states' authority to ban same-sex marriages, as the dissents of justices Antonin Scalia and Samuel Alito Jr. revealed their views. Roberts insisted *Windsor* turned on federalism — that Congress invaded the states' traditional role in regulating marriage. He wrote: "Thus, 'while the state's power in defining the marital relation is

of central relevance' to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." Everyone will be listening closely to his questions and comments during this week's arguments.

2. What level of scrutiny?

If the Supreme Court is to strike down bans on same-sex marriage, it may do so by applying some form of "heightened scrutiny" to the laws — a standard that makes it difficult to sustain laws that treat classes of people differently. A brief from constitutional scholars including Walter Dellinger and Laurence Tribe, as well as the United States' brief, detail the factors that make up the standard — factors that may come up during oral argument. Among them: the level of animus or discrimination the group has suffered: whether the group's common characteristic is "immutable," like race or gender; and how much political clout it has to protect its members. During the *Windsor* arguments, Roberts scoffed at suggestions that gay people lack political power, asserting that politicians are "falling over themselves" to support same-sex marriage. A brief against same-sex marriage argues that laws confining marriage to a man and a woman are not driven by animus and "satisfy any level of judicial scrutiny."

3. Two "isms."

Given his long history of writing opinions that have embraced gay rights, Justice Anthony Kennedy is regarded as a likely vote against bans on same-sex marriage. But Kennedy also has a soft spot for federalism, or respect for the sovereignty of states. During the 2013 *Windsor* arguments, Kennedy wondered aloud whether "the federal government, under our federalism scheme, has authority to regulate marriage." So if he or other justices dwell on this issue, it could be cause for concern for advocates of same-sex marriage.

The other "ism" to watch for is originalism, the principle espoused by Scalia that looks to the meaning of the Constitution — or in this case, the 14th Amendment — when it was enacted. A Cato Institute brief argues that the 14th Amendment was meant to prohibit a range of laws that treat classes of people unequally, even though "no one alive" when it was ratified in 1868 would have anticipated same-sex marriage. A countering brief by scholars on originalism rejects that view.

4. What about kids?

In the more than 140 briefs submitted by supporters and opponents of same-sex marriage, a number focus — and clash — over the effects of same-sex marriage on children, and over the states' defense of their bans based on their primary interest in procreation. One supporting brief states: "The clear and consistent social science consensus is that children raised by same-sex parents fare just as well as children raised by different-sex parents. An opposing brief counters: "The longer social scientists study the question, the more evidence of harm is found."

Children also figured in the *Windsor* decision, with Kennedy writing that the federal marriage definition "humiliates tens of thousands of children now being raised by same-sex couples." But Alito wrote, "it sometimes takes decades to document the effects of social changes — like the sharp rise in divorce rates following the advent of no-fault divorce — on children and society." Watch for similar disagreements over procreation as a constitutional justification for states' -marriage bans.

5. A precedent

In 1972, the Supreme Court summarily dismissed *Baker v. Nelson*, a challenge to Minnesota's same-sex marriage ban. Michigan and Tennessee emphasize the reliance on *Baker* by Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit in upholding their marriage bans. Michigan's brief says, "The Sixth Circuit aptly asked in this regard, 'Had *Loving* [*v. Virginia*, upholding interracial marriages] meant something more when it pronounced marriage a fundamental right, how could the court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question?' " But the states' opponents echo dissenting Sixth Circuit Judge Martha Craig Daugherty, who wrote, "If ever there was a legal 'dead letter' emanating from the Supreme Court, *Baker v. Nelson* … is a prime candidate. It lacks only a stake through its heart." Will the justices deliver a final blow? Will it even be mentioned?