MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

ELIZABETH M. KINNEY, Plaintiff-Appellee v. TANYA J. BUSCH Defendant-Appellant	Docket No. KEN-14-456

PLAINTIFF-APPELLEE'S MEMORANDUM OF LAW CONCERNING *OBERGEFELL V. HODGES*

Pursuant to the Court's Order to Show Cause of July 23, 2015 and its subsequent procedural order of August 4, 2015, Appellant Kinney hereby submits her memorandum of law regarding the impact of the decision in *Obergefell v. Hodges*, 576 U.S. ___, 2015 WL 2473451 (June 26, 2015) on the question reported to the Court pursuant to Maine Rule of Appellate Procedure 24.[1]

As discussed below, the Court should answer the question, and the decision in *Obergefell* provides further support that the answer is yes.

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[1] The reported question is:

> May property acquired between October 14, 2008 and Dec. 29, 2012 by a same-sex couple married in the State of Massachusetts on Oct. 14, 2008 be treated as marital property for the purposes of equitable division of property in a divorce action filed on January 18, 2013?

BACKGROUND

The reported question concerns the interpretation of a Maine statute enacted in 2012 that, among other things, provides for recognition of marriages between same-sex couples celebrated in other states. *See* 19 M.R.S. § 650-B ("A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this State.").

In the briefing on the reported question, Appellee Busch argued that section 650-B should be interpreted as requiring the parties' marital property to be divided as if the marriage occurred in 2012 and not its actual 2008 date, because, she claimed, not to do so would be to apply the statute retroactively, and the statute did not expressly provide for such application. In contrast, Kinney argued that (1) dividing marital property in a 2013 divorce based on the actual date of a marriage is not a retroactive application of the statute; (2) were it such an application, the Legislature clearly intended the actual marriage date be respected; and (3) not to so interpret section 650-B would be unconstitutional.

On June 26, 2015, after briefing concluded, the Supreme Court held in *Obergefell* that the Fourteenth Amendment to the United States Constitution requires states both to license marriages between two people of the same sex and to recognize marriages between two people of the same sex when the marriages were lawfully licensed and performed in another state. 2015 WL 2473451 at *23 ("The

Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character.")

Kinney moved for leave to file a supplemental memorandum to discuss the impact of the *Obergefell* decision on the reported question. The same day, the Court issued an Order to Show Cause requiring the parties to address why, in light of *Obergefell*, the Court should not discharge the reported question as improvidently granted. Shortly thereafter, the Court ordered the parties to address the issue by submitting legal memoranda on or by August 17, 2015. Kinney submits this memorandum in response to the Court's order.

DISCUSSION

The decision in *Obergefell* provides further support as to why section 650-B should be interpreted as Kinney contends and as the District Court agreed, but which Busch still contests. Indeed, the Court need never address the impact of *Obergefell* in its interpretation of the Maine statute. Pursuant to and following the December 29, 2012 enactment of section 650-B, Maine law recognizes marriages between persons of the same-sex "for all purposes," and there is no reason to probe the constitutionality of Busch's alternative interpretation. *See Bangs v. Town of Wells*, 2003 ME 129, ¶ 5, 834 A.2d 955 (the Court shall avoid giving opinions on constitutional issues where an issue may be resolved on non-constitutional grounds). While to Kinney it now

appears beyond peradventure that her interpretation is and must under the Constitution be correct, from conversations with Busch's counsel, she understands that Busch still contends otherwise, requiring a firm answer from the Court in this matter, which potentially affects many interests, as reflected in the amici brief filed in support of Kinney's position.

Because the parties' memoranda are being filed simultaneously, it is difficult to anticipate Busch's arguments as to why the *Obergefell* decision does not remove all doubt from this question. The following addresses (I) why, were there any doubt before, there should be none now; and (II) why the Court should accept the report and answer the question.

I. The answer to the reported question remains yes, as further supported by the decision in *Obergefell*.

A. Just as section 650-B requires Maine to recognize marriages lawfully entered into by persons of the same sex in other states, so too does the Constitution require Maine to so recognize such marriages.

As a threshold matter, as previously explained in the Red Brief, it is not a "retroactive" application of section 650-B to divide marital property, inchoate until division, in a divorce filed in 2013, recognizing the actual date of the marriage, whenever the marriage occurred. (*See* Red Brief at 11-19 (rebutting Busch's retroactivity argument).)

The decision in *Obergefell* additionally teaches that Busch's proposition – that marriages between same-sex couples should be treated as occurring on the date the

recognition ban was lifted – aside from having no support in the text, legislative history, logic or other indicia of the intent behind section 650-B, would be unconstitutional, because such an interpretation would today recognize marriages of same-sex couples disparately from those of heterosexual couples.

Just as the plain language of section 650-B requires Maine to recognize **all** of Kinney and Busch's lawful marriage, without regard to when it occurred, so too does *Obergefell* hold that the Constitution also requires Maine to recognize **all** of that marriage. Neither section 650-B nor *Obergefell* suggests that Maine may treat Kinney and Busch's lawful 2008 marriage differently from a heterosexual couple's 2008 marriage in a pending divorce proceeding. Indeed, the purpose of section 650-B, and the clear intent of the Supreme Court in *Obergefell*, was to end the legal regime that considered any aspect of a marriage between persons of the same sex to be unlawful or invalid or in any way treated disparately from marriages of heterosexual couples. *See Obergefell*, 2015 WL 2473451 at *23 (holding that the Constitution grants persons of the same sex "equal dignity in the eyes of the law"); 19 M.R.S. § 650-B (marriages of same-sex couples "recognized for all purposes"). Busch's proposed approach to Kinney and Busch's marriage cannot square with the Constitution's requirement that marriages between persons of the same sex receive equal treatment under the law, and the Court should reject it accordingly.

B. If somehow the answer to the reported question required "retroactive" application of *Obergefell*, *Obergefell* applies retroactively.

Setting aside that no "retroactive" application is involved here (or if it were, the Maine Legislature intended it), if somehow the answer to the reported question came down to the issue whether the holding in *Obergefell* applies retroactively, it does.

After a series of cases in which the Supreme Court refined and revised its view concerning retroactivity,[2] the Court held in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1992), that newly announced constitutional rules concerning civil matters "must be given full retroactive effect in all cases still open on direct review and as to all events, **regardless of whether such events predate or postdate our announcement of the rule.**" 509 U.S. at 97 (emphasis added). In short, the mere fact that the decision in *Obergefell* post-dated the parties' marriage, or even the commencement of their divorce proceedings, presents no barrier to the retroactive application of the constitutional rule announced by the Supreme Court. Accordingly, the Constitution requires Maine to recognize the entirety of Kinney and Busch's marriage, without the temporal slicing and dicing that Busch urges.

Busch has argued that retroactive application of section 650-B would be unfair because she relied on Maine's marriage ban with respect to actions she took prior to

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[2] In *Am. Trucking Assoc. v. Smith*, 496 U.S. 167 (1989), the Court began to reconsider the balancing test it previously used to determine retroactivity, adopted in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Court revisited the issue again in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1990), in *Harper v. Va. Dep't of Taxation, 509 U.S. 86* (1992), and finally in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), in which the Court made clear that it no longer would follow *Chevron.*

the repeal of that ban in December 2012. (*See* Blue Brief at 15 (retroactivity would lead to treatment of property "the parties never contemplated"), 17 (retroactivity would be "unfair" because it comes without Busch's "consent"), and 20 (alluding to property transfers made "with the expectation" that marriage would be treated as invalid).) Whatever merit this argument may have as a matter of the statutory construction or even logic (there is not a shred of evidence in the record to suggest that Busch did not fully consent to entering into a valid marriage in 2008), such an argument presents no barrier to the retroactive application of federal constitutional rules because "simple reliance" on the previous (unconstitutional) legal regime, and the consequences of that reliance, are insufficient to prevent retroactive application of a newly-announced constitutional rule. *Reynoldsville Casket*, 514 U.S. at 759.

In sum, even if the Court viewed this case as presenting an issue of retroactivity, the *Obergefell* decision would have full retroactive effect.

II. The Court should not discharge the reported question.

All the criteria for accepting a report under Rule 24 apply now as well as before. (*See* Red Brief at 8-10.) As noted above, neither this Court nor the District Court need apply the constitutional rule announced in *Obergefell* to answer the reported question. Indeed, the doctrine of constitutional avoidance dictates that the Court first should attempt to answer the reported question without reference to *Obergefell*. Accordingly, the decision in *Obergefell* does not change the existing need for the Court to resolve the issues of statutory interpretation giving rise to the reported question.

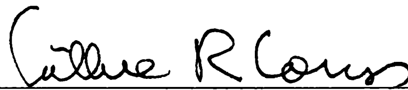
Kinney further understands from communications with counsel that Busch disputes the notion that the decision in *Obergefell* provides any additional support to Kinney's arguments. Hence, without an answer from this Court, Busch would likely perpetuate her views again in District Court – and presumably similarly situated persons could also keep making such "retroactive" arguments in myriad contexts – until the Court brings finality to those arguments. The added question of the impact of *Obergefell* is a pure legal question that implicates no factual question or other reason to delay answering the question by sending the matter back to the District Court without resolution. The issue whether a same-sex couple's marriage occurring prior to December 29, 2012, lawful under the laws of the jurisdiction where it took place, is treated under Maine law as occurring on that actual date or, as Busch argues, on December 29, 2012, is an important one to these particular parties and to many others, as it is capable of repetition, and affects many areas of the law beyond identification of marital property in a divorce proceeding.

That the decision in *Obergefell* underscores the constitutional dimension to the reported question does not dilute the need for the question to be answered, but rather the contrary.

CONCLUSION

For the reasons given above and in Kinney's previous submissions, the Court should accept the reported question and answer it affirmatively.

DATED: August 17, 2015



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CERTIFICATE OF SERVICE

I, Catherine R. Connors, Esq., hereby certify that two copies of Plaintiff-Appellee's Memorandum of Law Concerning *Obergefell v. Hodges* were served upon counsel at the address set forth below by email and first class mail, postage-prepaid on August 17, 2015:

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