

Building the Resistance to Same-Sex Marriage
(fifteenth in a series of articles)

An Open Letter: The Duty of the States to Seek Rehearing of *Obergefell*

by Herbert W. Titus & William J. Olson; July 17, 2015

**To the Attorneys General, Governors, and Legislatures of
Michigan, Ohio, Tennessee, and Kentucky:**

On June 26, 2015, the U.S. Supreme Court issued its decision in the *Obergefell* case, purporting to overturn all state constitutional amendments and laws in your four states defining marriage as a covenant union between two people of the opposite sex. Since then, numerous efforts have been made, urging each state to file a Petition for Rehearing of that decision, as permitted in the Rules of the Supreme Court before the deadline of Tuesday, July 21, 2015. Apparently, to date, every such effort has been rebuffed. In response, various of your offices have stated that such a Petition would be: (i) unlikely to succeed; (ii) a waste of time: and (iii) a waste of money.

We know of two draft Petitions for Rehearing that have been prepared by outside lawyers. One of these was prepared by the U.S. Justice Foundation and has been circulated over the last week. The U.S. Justice Foundation's Draft Petition for Rehearing can be found at www.usjf.net.

Here is why a Petition for Rehearing must be filed. Since the Supreme Court's decision, it has been assumed that the "rule of law" requires not just your four states, but every State, to recognize the "fundamental right" of same sex couples to marry. However, this assumption overlooks two critical factors: (i) whether some of the Justices who participated in issuing that decision did so unlawfully; and (ii) the nature of the express limitations set out by Justice Kennedy in that decision. Because of these two critical factors, we urge all of you as Attorneys General, or at least one of you, file a Petition for Rehearing of this decision. Additionally, we urge all elected officials in those four states to impress on you the need to file a Petition for Rehearing. Although the Court's decision purports to apply to all states — including the states that did not have an opportunity to present their arguments to the Court — only your four states can seek rehearing.

First, the Issue of "Recusal" by Justices Ginsburg and Kagan.

The participation by Justices Ginsburg and Kagan in the *Obergefell* decision violated federal judicial ethics, and a federal statute. These Justices were under a duty to recuse and not participate in that decision. Without their two votes in favor of same sex marriage, the traditional marriage laws in your states would have been upheld on a vote of four to three, with two justices not participation. Until the decision was issued, the American people had no way to know if these two justices were going to recuse. Now that the decision is issued, we know that they did participate — unethically and unlawfully.

There is no regular means to enforce the law against the U.S. Supreme Court Justices. The matter of recusal has generally been considered a personal matter, to be evaluated by each Justice for himself or herself. The other Justices do not try to enforce the law against their colleagues. Neither the President nor the Attorney General of the United States seek to enforce the law of recusal against the High Court. The Congress has not taken action to ensure that its laws are followed by the Supreme Court. In other words, each Justice of the U.S. Supreme Court is a law unto himself or herself.

Two Motions for Recusal was filed with the U.S. Supreme Court, but never ruled upon. Indeed, neither was even posted to the Supreme Court docket sheets until the Court was embarrassed for failure to post them. Even then, only one of the motions shows on those docket sheets, mis-labeled a “request” rather than a “motion.”

Properly understood, without Justices Ginsburg and Kagan participating, the decision of the U.S. Supreme Court in *Obergefell* actually was in favor of traditional marriage, by a vote of 4-3 with two judges not participating. Even if only Justice Ginsburg was disqualified, the vote would have been 4-4, and the decision of the U.S. Court of Appeals for the Sixth Circuit upholding traditional marriage would be left standing.

A Petition for Rehearing must be filed challenging the legality of the votes purportedly cast against the constitution and laws of your state by Justices Ginsburg and Kagan.

Second, the Issue of the “No Risk” Limitations in the Decision.

A careful reading of the holding of the Kennedy opinion reveals that the right to marry recognized by the Supreme Court is not at all what has been assumed.

At the end of a lengthy review of the Court’s due process and equal protection precedents, in which he concluded that same-sex couples could no longer be denied the liberty to marry, the “fundamental right to marry,” Justice Kennedy pronounced that “the State laws challenged [by the same-sex couple] Petitioners **in these cases** are now **held** invalid **to the extent** they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”

In the very next section of his opinion, Justice Kennedy addressed the States’ counterclaim that the Court should withhold its decision to allow more “democratic discourse” before rendering its decision. On the basis of the record, including the perceived urgency of the petitioning couples’ needs, Justice Kennedy declined to “stay [the court’s] hand,” noting specifically that, while the four State respondents, had claimed “that allowing same-sex marriage will cause the **harmful outcomes** they describe,” the States had failed to “show a foundation for that conclusion.” In anticipation, however, that if such a foundation could be laid in a future case, Justice Kennedy was prompted to “observe [that these cases **involve only** the rights of two consenting adults whose marriages would pose **no risk** of harm to themselves

or third parties.”

In light of the Justice Kennedy’s own words, there is no doubt that the Court acknowledged that the absence of any “risk of harm” to either the two persons in the marriage or to third parties is an important predicate for its decision. Indeed, the Court’s own due process and equal protection jurisprudence allows for discriminatory treatment of enjoyment even of a fundamental right based upon whether the right would be subjected to strict scrutiny, to determine if there might be a legitimate overriding governmental interest to deny access to that right. Significantly, the Court did not engage in any such inquiry in the four cases before it because of the lack of a foundation showing “harmful outcomes” should same-sex marriage be permitted. Thus, Justice Kennedy limited the Court’s holding to those cases that involve **no risk of harm** to the married couple or to third parties. To that end, the Petition for Rehearing that we have drafted contains an Appendix documenting many of the “harmful outcomes” that Justice Kennedy stated were never considered by the Court in *Obergefell*.

We urge you to do your duty according to your oaths to the Constitutions of your State and of the United States to defend your state constitutions and state laws. The People of your State deserve no less.

If you believe a Petition for Rehearing should be filed, you can contact the following state Attorneys General:

[Michigan Attorney General Bill Schuete](#)

(517) 373-1110

[Ohio Attorney General Mike DeWine](#)

(800) 282-0515

[Tennessee Attorney General Herbert H. Slatery III](#)

(615) 741-3491

[Kentucky Attorney General Jack Conway](#)

(502) 696-5300

Herbert W. Titus taught Constitutional Law for 26 years, and concluded his academic career as the Founding Dean of Regent Law School. William J. Olson served in three positions in the Reagan Administration. Together they have filed over 80 briefs in the U.S. Supreme Court, and dozens more in lower courts, addressing important public policy issues. They now practice law together at [William J. Olson, P.C.](#) They can be reached at traditionalmarriage@lawandfreedom.com or twitter.com/Olsonlaw.

This article is part of a series on “Building Resistance to Same-Sex Marriage.” Please support this important work with a contribution to the [U.S. Justice Foundation](#). Permission is freely granted to publish, copy, reproduce, distribute, or excerpt from this article for any purpose.