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10th Circuit Court: Utah's same-sex marriage ban is unconstitutional

In landmark decision, 10th Circuit Court upholds federal judge's ruling declaring Utah's ban on gay marriage unconstitutional.

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Outlawing same-sex marriage violates citizens' rights, a federal appeals court said Wednesday in a historic ruling that rejected Utah's assertion that marriage between a man and woman best suits children and procreation.

By upholding a Utah judge's decision to strike down the state's ban on same-sex marriage, a three-member panel of the 10th Circuit Court of Appeals in Denver became the first appeals court in the nation to rule on the issue.

The appeals court set a precedent by finding that voter-approved bans on same-sex marriage — such as Utah's Amendment 3 — violate the constitutional rights of same-sex couples to equal protection and due process.

But the court immediately stayed the implementation of its decision pending an anticipated appeal to the U.S. Supreme Court — an appeal that will be initiated, the Utah Attorney's General Office confirmed Wednesday.

Despite the continuing uncertainty, attorney Peggy Tomsic, who represented the three same-sex couples who are plaintiffs in the Kitchen v. Herbert lawsuit that is the subject of Wednesday's decision, called the ruling "an absolute victory for fairness and equality" for the people of Utah and other states in the 10th Circuit.

"We are overjoyed by the court's decision, which means so much to us, our family and everyone who believes in justice and fairness," plaintiff Derek Kitchen said in a statement. "Since the lawsuit was filed last year, we have received so much support from so many people in our state, and we are now looking forward to the day when we will finally be married."

Joining Kitchen and Moudi Sbeity as plaintiffs in the lawsuit are Karen Archer and Kate Call and Laurie Wood and Kody Partridge. The Utah Attorney General's Office said in a statement that it will push to have the issue heard by the Supreme Court, but hasn't decided whether it will ask for a full-court review by the 10th Circuit.

"Although the court's 2-1 split decision does not favor the state, we are pleased that the ruling has been issued and takes us one step closer to reaching certainty and finality for all Utahns on such an important issue with a decision from the highest court," the statement reads.

The fact that Wednesday's ruling is the first on the issue from a federal appeals court makes it especially important, said Carl Tobias, a judicial appointment expert and professor at the University of Richmond School of Law.

"It just has more authority [than a district court ruling] because it's a three-judge panel in a higher court," Tobias said. "Other appeals court will be influenced by [the 10th Circuit Court's] reasoning."

University of Utah law professor Clifford Rosky called the ruling, "the most important victory of the entire gay rights movement." "Very few courts have embraced the fundamental rights argument and this court seems to have completely embraced it and applied 'strict scrutiny,' the highest standard recognized under constitutional law," said Rosky, chairman of the board of Equality Utah, which seeks to secure equal rights and protections for LGBT Utahns and their families.

Tobias said that when "strict scrutiny" is applied in this case, the state's arguments — centered largely around how same-sex marriage affects child-rearing and religious freedom — don't hold up.

"You give strict scrutiny to the state's reasoning, [the judges] just found that none of them could withstand that level of scrutiny," Tobias said.

The majority opinion attacked the state's arguments, which relied on a link between marriage and procreation. They said the argument failed because opposite-sex couples who do not or cannot procreate are still allowed to marry.

"Utah citizens may choose a spouse of the opposite sex regardless of the pairing's procreative capacity," the opinion reads. "The elderly, those medically unable to conceive and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah, apparently without breaking the 'conceptual link between marriage and procreation.'"

The judges pointed out that the only reference to reproduction in Utah's marriage law is a provision that allows first cousins to marry if they are over 65 years old, or are over 55 and cannot reproduce.

The court's ruling affirms U.S. District Judge Robert Shelby's Dec. 20 decision, which struck down Utah's ban on same-sex marriage and prompted more than 1,000 same-sex couples to marry during a 17-day window before the U.S. Supreme Court issued a stay, halting all such weddings.

Wednesday's decision "certainly lends legal clarity at this stage," Salt Lake County District Attorney Sim Gill said. But it remains unclear what practical effect it will have, if any, Gill said.



Chris Detrick | The Salt Lake Tribune Utah Governor Gary R. Herbert speaks during a press conference in the Gold Room at the State Capitol Wednesday June 25, 2014. Gov. Gary Herbert issued a statement saying he was disappointed. "I believe states have the right to determine their laws regarding marriage. I am grateful the Court issued a stay to allow time to analyze the decision and our options. But as I have always said, all Utahns deserve clarity and finality regarding same-sex marriage and that will only come from the Supreme Court."

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Utah now has 90 days to ask the high court to weigh in, Gill said.

The ruling disheartened many Utah conservatives, but they have not given up in their fight to keep marriage between a man and a woman.

Gov. Gary Herbert said he was disappointed with Wednesday's ruling.

"I believe states have the right to determine their laws regarding marriage," he said. "I am grateful the Court issued a stay to allow time to analyze the decision and our options. But as I have always said, all Utahns deserve clarity and finality regarding same-sex marriage and that will only come from the Supreme Court."

The ruling affects all states in the 10th Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

The court's majority opinion focused on the 14th Amendment, which gives equal protection to American citizens. The court said its reading of the Constitution shows that the legal rights of married couples have nothing to do with the gender of those in the union.

"We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union," the appellate court said.

The decision concludes: "Courts do not sit in judgment of the hearts and minds of citizens."

The judges emphasized that religious leaders are still free to practice their sacraments and traditions as they see fit, and are not required to allow same-sex marriage in their churches.

"We continue to recognize the right of the various religions to define marriage according to their moral, historical and ethical precepts," the opinion reads. "Our opinion does not intrude into that domain or the exercise of religious principles in this arena. The right of an officiant to perform or decline to perform a religious ceremony in unaffected by today's ruling."

The ruling split along the same lines formed during oral arguments in April, when the three judges — Paul J. Kelly Jr., Carlos F.

Lucero and Jerome A. Holmes — asked pointed questions about marriage studies, jurisdiction and standard of scrutiny.

At that time, Kelly — who was the dissenting judge in Wednesday's opinion — had asked the plaintiffs' attorney hard questions about state authority.

Kelly on Wednesday disagreed that the 14th Amendment requires Utah to extend marriage to same-sex couples or recognize such marriages from other states.

He noted that the U.S. Supreme Court has recognized a fundamental right to marriage but said every decision vindicating that right has involved two opposite-gender people.

"Indeed, the Court has been less than solicitous of plural marriages or polygamy," Kelly wrote. "If the States are the laboratories of democracy, requiring every state to recognize same-gender unions — contrary to the views of its electorate and representatives — [it] turns the notion of a limited national government on its head."

Marriage does not exist in a vacuum and states have the right to regulate it, the judge added. He said Utah should prevail because the state has shown a rational basis for its decision to ban same-sex marriage — responsible procreation, effective parenting and the desire to proceed cautiously with a new social phenomenon.

"Utah's justifications for not extending marriage to include same-gender couples are not irrefutable. But they don't need to be; they need only be based upon 'any reasonably conceivable state of facts,'" Kelly wrote.

He also wrote, "We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment."

During the April arguments in Denver, Tomsic had asked the judges to ensure marriage equality for all, while the state's lead attorney, Gene C. Schaerr, asked them to preserve marriage rights only for opposite-sex couples.

The state argued at that hearing that children benefit from being parented by a mother and a father, not two mothers or two fathers. But Tomsic also argued that the case is about family. She said couples want to provide for and protect each other legally, and children are demeaned and humiliated when their parents are unable to marry and provide them with the benefits and protections associated with the civil institution.

The American Civil Liberties Union had submitted a "friend of the court" brief in support of the plaintiffs in the Kitchen v. Herbert lawsuit.

The ACLU also has filed a lawsuit in Utah's federal court seeking recognition of the marriages of same-sex couples who were wed during the 17-day period when such marriages were legal.

Though U.S. District Judge Dale A. Kimball ordered Utah in May to honor and recognize all same-sex marriages performed during the 17-day period, the 10th Circuit halted any movement toward marriage recognition by issuing a stay after the state filed notice that it would appeal Kimball's order.

Reporters Marissa Lang, Pamela Manson and Kirsten Stewart contributed to this story.

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Same-sex marriage in Utah

Nov. 2, 2004 • Utah passes Amendment 3, which states that "marriage consists only of the legal union between a man and a woman."

March 25, 2013 • Three couples file a lawsuit alleging Utah's Amendment 3 violates the 14th Amendment to the U.S. Constitution.

June 26, 2013 • The U.S. Supreme Court strikes down the Defense of Marriage Act, which barred gay marriage, and declines to rule on California's Proposition 8, clearing the way for same-sex marriage in the Golden State.

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Dec. 20, 2013 • U.S. District Judge Robert Shelby strikes down Utah's Amendment 3 as unconstitutional, opening the door to same-sex marriage in the state. More than 1,000 same-sex couples obtain marriage licenses in the next 17 days.

Jan. 6, 2014 • The U.S. Supreme Court grants the Utah Attorney General's Office's request for a stay, ending same-sex marriage in Utah pending the 10th Circuit Court outcome of the state's appeal of Shelby's ruling.

March 12, 2014 • Utah decides to place same-sex marriages performed before the stay "on hold" rather than fully recognizing them or refusing to recognize them.

May 19, 2014 • U.S. District Judge Dale A. Kimball orders Utah to honor and recognize all same-sex marriages performed while Shelby's ruling was in effect.

June 6, 2014 • The 10th Circuit Court of Appeals temporarily stays Kimball's ruling, halting any movement toward marriage recognition. The case remains on hold.

June 25, 2014 • The 10th Circuit rules that states outlawing same-sex marriage are in violation of the U.S. Constitution but issues an immediate stay to its own ruling, anticipating an appeal by Utah to the U.S. Supreme Court.

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