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Marriage Vs. Civil Unions

State Supreme Court Hears Testimony Today On Whether Same-Sex Couples May Wed

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May 14 2007

Connecticut in the spring of 2005 became the first state in the nation to pass a civil union law without being ordered to do so by a court, and only the second to offer such status to same-sex couples.

Two years later, the creation of civil unions here is being used as ammunition by both sides in a monumental legal battle over same-sex marriage that will be argued today before the state Supreme Court.

Proponents of same-sex marriage say that civil unions only perpetrate the "separate but equal" assertion that the U.S. Supreme Court so resoundingly struck down in the landmark school desegregation case, Brown v. Board of Education, in 1954.

"The Connecticut Constitution requires equality among citizens - not near equality or approximate equality," Attorney Kenneth Bartschi wrote in a brief on behalf of the eight same-sex couples who were denied marriage licenses in 2004 and 2005 by Madison Town Clerk Dorothy Bean.

Opponents of expanding marriage to include same-sex couples say civil unions provide all the same state legal rights, responsibilities and benefits as marriage does for heterosexual couples.

"A difference in name alone between the state's identical statutory schemes for marriage and civil unions is simply not differing treatment of constitutional magnitude," Assistant Attorney General Jane R. Rosenberg wrote in a brief filed on behalf of the state commissioner of public health. "Merely saying that civil unions can never provide for any same-sex couple the same `profound personal meaning and value' as marriage simply does not suffice to constitute constitutional harm."

The eight couples, in a lawsuit forged by Gay & Lesbian Advocates & Defenders, a Boston-based gay rights group, claim their constitutional rights to due process and equal protection have been violated by not being allowed to marry. The state counters that excluding same-sex couples from marriage is not sex discrimination and that they have been deprived of no fundamental constitutional right enjoyed by their married counterparts.

If the same-sex couples prevail, the court will be able to fashion any number of remedies. It could order the case back to the trial court, with instructions to render judgment in favor of the couples, which could automatically open the institution of marriage to them. It could also order the legislature to overhaul the current marriage laws, which would postpone immediate access to marriage by same-sex couples.

21 Briefs Offered

No fewer than 21 friend-of-the-court briefs filed by scores of individuals and organizations have offered the panel of justices plenty of conflicting information. Each side has battalions of clergy, psychiatrists and family law experts weighing in. The briefs cover a range of topics, from the state's interest in procreation to whether sexual orientation is a genetic and immutable characteristic of one's makeup, thereby inviting heightened constitutional scrutiny.

The deans of all three Connecticut law schools - Harold Koh of Yale Law School, Kurt Strasser of the University of Connecticut School of Law and Brad Saxton of Quinnipiac University School of Law - have signed onto briefs supporting same-sex marriage, as has former governor and U.S. senator Lowell P. Weicker.

The Washington, D.C.-based Family Research Council offers up the dire prediction that redefining marriage to include same-sex couples "would eventually lead to the destruction of marriage." The Knights of Columbus say it would "stigmatize this older, conjugal marriage tradition as rooted in animus and bigotry." The Connecticut Catholic Conference said it would undermine a key purpose of

marriage, procreation, and argued there is no constitutional right to "transform the shared meaning of a word."

Attorney Daniel Klau, representing six law professors, said the case is about far more than the meaning of a word. "The [trial] court erroneously reduced this case to a debate over nomenclature," he wrote.

Barbara Levine-Ritterman, one of the plaintiffs, is raising two children with her partner of 18 years, Robin Levine-Ritterman. She said she wants her children "to know that their parents' commitment is part of the popular vocabulary - that they are married, and not `CU-ed,' an unrecognizable concept."

Not Just A Word

The case is not about a word but an institution practiced worldwide in one form or another. Opponents of same-sex marriage stress tradition and the age-old understanding that marriage is between a man and a woman. Proponents invoke history as well, to illustrate that marriage has always been a state-regulated function that has evolved dramatically over time.

When the jurisdiction of Connecticut was established in 1638, marriage was deemed to be exclusively a civil function. Only a magistrate could join two people in marriage. Clergy were not permitted to officiate over marriages "as an agent of the state" until 1694.

A brief filed by the American Academy of Matrimonial Lawyers emphasized that "like any successful institution, marriage has been resilient, changing to reflect and embody evolving societal norms of individual liberty and equality."

It wasn't until 1877 that married women in Connecticut were permitted to own property apart from a spouse. While Connecticut was among the few states that had no laws barring interracial marriage, the Supreme Court of Appeals of Virginia as recently as 1955 upheld a ban on marriage between whites and African Americans to prevent "corruption of the blood" and "a mongrel breed of citizens." In 1967, the U.S. Supreme Court struck down any remaining bans on interracial marriage.

Connecticut's highest court ruled in 1905 that the right to enter into marriage "is part of the right to life, liberty and the pursuit of happiness" guaranteed by the constitution.

A consortium of history professors wrote in their brief: "Civil unions as new mechanism for obtaining legal rights and responsibilities for one group of citizens do not have the social, legal or cultural significance of marriage. The time to jettison the remaining vestiges of discrimination against same-sex couples by allowing them to formalize their commitments through marriage is now."

The state counters that "there is no fundamental state constitutional right to marry a person of the same sex."

Only the Massachusetts Supreme Court, in a 4-3 decision in 2003, has said same-sex couples cannot be excluded from entering into civil marriage. The Vermont Supreme Court in 1999 ruled that same-sex couples must be afforded the same rights as married couples, leading to passage of the nation's first civil union law, which took effect July 1, 2000. New Jersey, in the wake of a state Supreme Court ruling, passed civil union legislation that took effect Feb. 19 of this year.

The New Jersey Supreme Court last year rejected the notion of a fundamental right to same-sex marriage, and the Massachusetts ruling did not hinge on the exercise of a fundamental constitutional right, but on the state's having no rational basis for limiting marriage to a man and a woman.

Civil unions are valid in the states that institute them, but rarely carry influence past its borders. The federal Defense of Marriage Act, which does not recognize civil unions or same-sex marriages, exempts same-sex couples from 1,049 federal laws that provide benefits, rights and privileges to married couples. In addition, 41 states have passed similar "defense of marriage" laws precluding courts from recognizing same-sex marriages performed elsewhere.

Legislature's Job?

The state urged the high court to steer clear of what it said should be a public policy debate in the legislature, and not "enshrine one policy choice as a matter of constitutional law," quoting a 1995 ruling of the court that welfare is not a fundamental right under the Connecticut Constitution.

GLAD's brief urges the opposite: "For this court, the question is not one of political courage, but constitutional principle to be vindicated both for [the couples] and for the integrity of the constitution itself," the brief states. "To permit this political compromise to trump the mandates of equality and liberty in the constitution would put the supreme law of the state or the nation under the control of the legislature. This is one of those occasions when the court must emphasize that equality under the constitution cannot be realized through separation."

State Sen. Andrew McDonald, D-Stamford, said the decision on Friday by him and state Rep. Michael Lawlor, D-East Haven - co-chairs of the legislature's Judiciary Committee - not to force a vote on same-sex marriage this session had nothing to do with the imminent Supreme Court arguments.

McDonald said many legislators had asked for more time to consider the issue and consult with constituents. The proposed bill was voted out of the Judiciary Committee by a bipartisan vote, 27-15.

Today's arguments begin at 10 a.m. and are scheduled to run three hours before a full panel of the court. That panel includes Justices David M. Borden, who will preside; Flemming L. Norcott Jr.; Joette Katz; Richard Palmer; Christine Vertefeuille; and Peter Zarella; and Appellate Judge Lubbie Harper Jr.

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