Bloomberg BNA

The United States
Law Week
Case Alert & Legal News™

VOL. 83, NO. 18 NOVEMBER 11, 2014

Family Law—Marriage

Mich., Ky. Same-Sex Marriage Bans Upheld; 6th Circuit Decision May Ring in High Court

Same-sex marriage bans in Michigan and Kentucky were upheld Nov. 6 by a divided panel of the U.S. Court of Appeals for the Sixth Circuit, in a much-anticipated decision that put it on the lonely side of a circuit split (*DeBoer v. Snyder*, 6th Cir., No. 14-1341, 11/6/14).

The decision may mean that the U.S. Supreme Court will be forced to confront the issue—even as early as this term, one court watcher told Bloomberg BNA.

The newly emerged circuit split makes Supreme Court review much more likely, an attorney involved in the litigation said.

As Justice Ruth Bader Ginsburg said at a Sept. 12 event: If the lower courts already know how to rule, there is no reason for the high court to step in.

Decision Needed Now. The court has successfully sidestepped the contentious issue—so far.

It was presented in *Hollingsworth v. Perry*, 81 U.S.L.W. 4618 (U.S. June 26, 2013), but the court dismissed the case for lack of standing.

And on Oct. 6, 2014—the first day of the 2014-15 term—the court denied certiorari in seven cases that also put that issue squarely before the justices, possibly because there wasn't yet a circuit split.

But attorneys involved in the litigation indicated that Supreme Court review is much more likely, given the recent circuit split.

In a Nov. 6 statement, Kentucky Attorney General Jack Conway said he agrees with the district court judge that the bans were unconstitutional, noting that ''every circuit in the country has come to a similar conclusion, except for today's decision by the Sixth Circuit.''

Notably, the Fourth, Seventh, Ninth and Tenth circuits have all struck same-sex marriage bans since June (83 U.S.L.W. 548, 10/14/14).

Nevertheless, Conway said that it is ''likely this case will end up in the United States Supreme Court,'' settling ''this matter with certainty for all Kentuckians.''

Laura E. Landenwich of Clay Daniel Walton & Adams PLC, Louisville, Ky., who argued on behalf of the same-sex couples in the Kentucky case, agreed.

The ''split in the circuits caused by this ruling gives SCOTUS the justifications it needs to hear the case,'' she told Bloomberg BNA in a Nov. 7 e-mail.

''We will be filing a petition for cert, and recent statements from [Kentucky Gov. Steve Beshear (D)] indicate that he would not oppose that petition,'' Landenwich said.

Beshear said in a Nov. 6 statement that the Sixth Circuit's opinion was ''another step toward what Kentucky and this nation needs: a United States Supreme Court ruling that establishes clear direction for states across the country on this divisive issue.''

''I expect the plaintiffs to appeal this ruling quickly, and I urge the Supreme Court to take up this issue,'' he said.

And while some states have taken a wait-and-see approach—with Tennessee Attorney General Chief of Staff Leigh Ann Apple Jones, Nashville, telling Bloomberg BNA Nov. 7 that the attorney general's office is ''awaiting the plaintiffs' next steps and will respond accordingly''—Michigan Attorney General Bill Schuette said in a Nov. 7 statement that he, too, will support quick Supreme Court review.

''We have spoken with attorneys for the plaintiffs in *DeBoer*, and shared that we support a swift appeal to the United States Supreme Court,'' Schuette said.

''The Department of Attorney General will also work swiftly so that the nation's highest court can take it up as quickly as possible.''

''As I have said from the beginning, the sooner the U.S. Supreme Court rules, the better, for Michigan and for the nation,'' Schuette concluded.

Fast Action. Shannon Minter of the National Center for Lesbian Rights, San Francisco, who represented the Tennessee plaintiffs, echoed that urgency.

''Given the urgency of the issues for our plaintiffs and other same-sex couples in Tennessee, we will be asking the Supreme Court to review the Sixth Circuit's decision, and we very much hope the Court will do so this term.''

The plaintiffs ''cannot afford to wait to challenge this decision, which is so out of step with that of virtually every other court to rule on the issue,'' Minter said.

''This is one country, with one Constitution, and it is untenable for a couple's freedom to marry to disappear when they cross the Tennessee state line.''

''That is the opposite of equal protection of the laws, and we hope the Supreme Court will quickly correct

 ISSN 0148-8139

that error and ensure that all same sex couples are treated equally, regardless of where they live,'' he concluded.

And Kentucky plaintiff's attorney Landenwich added that although ''we will have to move quickly, we think it is certainly possible to get on the docket this term.''

Josh Blackman, assistant professor at the South Texas College of Law, Houston, explained: ''Historically, the latest a petition for certiorari could be granted, and heard in the same term, was by the beginning to middle of January.''

''Such cases are argued in April at the end of the Court's normal calendar for arguments.''

''If certiorari is granted at the end of January, or beginning of February, the case is scheduled for argument the following October,'' Blackman said.

''But this is not a normal case.''

''First, the plaintiffs have announced they will file a petition for certiorari really soon, perhaps in the next week,'' Blackman said.

''While the states would have 30 days to reply, and can request an extension that would usually be granted, I've heard that the states do not plan on waiting, and may file their brief in opposition to certiorari before the 30 days are up.''

''If the plaintiffs then waive their reply, or file something quickly, it is feasible that this case could be before the justices not too long after Thanksgiving, with a grant before Christmas,'' Blackman said.

''With such timing, the case would be argued in March or April, with a possible decision by June of 2015.''

''Second, even if the parties do not move this fast (which they probably will), the Court can always order expedited briefing, or add additional argument days as needed,'' Blackman said.

''In other words, it is possible this case will be heard this term if everyone moves really, really fast.''

Slow but Reliable. Regardless of when—or if—the Supreme Court does agree to hear the case, the Sixth Circuit's divided decision makes it the first federal appeals court to uphold a state same-sex marriage ban since the Supreme Court's landmark decision in *United States v. Windsor*, 81 U.S.L.W. 4633, 2013 BL 169620 (U.S. June 26, 2013).

Writing for the majority in the Sixth Circuit's 2-1 decision, Judge Jeffrey S. Sutton said that the issue is ''not whether American law will allow gay couples to marry; it is when and how that will happen.''

The court detailed the claims brought by the 16 gay and lesbian couples, noting that all the suits ''seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides?''

The court concluded that the matter is reserved for the ''less expedient, but usually reliable, work of the state democratic processes,'' rather than for federal courts.

The judiciary's role is limited to the question of whether the 14th Amendment prohibits ''a State from defining marriage as a relationship between one man and one woman,'' the court said, not ''whether gay marriage is a good idea.''

After applying rational basis review, the court answered that question in the negative.

''A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States,'' the court said.

In particular, the court said that the states could justify their bans on the procreative purpose of marriage.

''By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring,'' the court said.

''That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring.''

The appeals court also upheld Ohio, Kentucky and Tennessee laws that prohibited recognition of same-sex marriages validly entered into in other jurisdictions.

Judge Deborah L. Cook joined the majority opinion.

Betrayed Oath? Dissenting, Judge Martha Craig Daughtrey criticized what she called the majority's ''false premise—that the question before us is 'who should decide.' ''

''In the main, the majority treats both the issues and the litigants here as mere abstractions,'' she said.

''Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win 'the hearts and minds' of Michigan, Ohio, Kentucky, and Tennessee voters to their cause.''

Daughtrey also appeared to accuse the two judges who signed on to the majority opinion of betraying their judicial oath, saying: ''More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to 'administer justice without respect to persons' to 'do equal right to the poor and to the rich,' and to 'faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States.' ''

''If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.''

  LW ISSN 0148-8139

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Carole M. Stanyar of Ann Arbor, Michigan, Alphonse A. Gerhardstein, Gerhardstein & Branch Co. LPA, Cincinnati, Laura E. Landenwich, Clay Daniel Walton & Adams, PLC, Louisville, Kentucky, and William L. Harbison, Sherrard & Roe, PLC, Nashville, Tennessee, argued for the same-sex marriage proponents.

BY KIMBERLY ROBINSON

Full text at http://www.bloomberglaw.com/public/document/141341_APRIL_DEBOER_et_al_PlaintiffsAppellees_v_RICHARD_SNYDER_Go