Written by **Jack Kenny** on July 20, 2014

Federal Appeals Court Rules Against Okla. Same-sex Marriage Ban

A federal appeals court ruled on July 18 that Oklahoma's ban on same-sex marriage is unconstitutional. The case appears likely to join a growing list of appeals to the U.S. Supreme Court on the traditional power of states to define and regulate marriage. In a 2-1 decision, the same three-judge panel of the Tenth Circuit Court of Appeals that ruled Utah's ban on same-sex marriage unconstitutional less than a month ago declared that the Oklahoma law "sweeps too broadly" in denying "a fundamental right to all same-sex couples."

The Tenth Circuit Court, based in Denver, covers Colorado, New Mexico, Oklahoma, Kansas, Wyoming, and Utah, along with portions of Yellowstone National Park in Montana and Idaho.

Also on July 18, the U.S. Supreme Court granted an appeal from Utah to extend an injunction against enforcing the appeals court's ruling against that state's same-sex marriage ban, pending its appeal. The stay was granted by Justice Sonia Sotomayor.

The Colorado Supreme Court also issued a ruling on July 18, ordering the Denver County to stop issuing marriage licenses to same-sex couples as long as Colorado's marriage law remains in effect. Denver County Clerk Debra Johnson began handing out licenses to homosexual couples on July 10, Reuters reported, hours after a state judge ruled in favor of Boulder County Clerk Hillary Hall, who started issuing licenses to same-sex couples in late June, following the Tenth Circuit ruling on Utah's ban. Pueblo County has also been issuing licenses for same-sex marriages. Colorado Attorney General John Suthers said he hoped all Colorado's clerks would abide by the July 18 ruling without requiring more "wasteful" litigation.

In the Oklahoma case, the appeals court panel upheld a District Court ruling in favor of two female couples challenging an amendment to the state Constitution, adopted by the voters in a 2004 referendum. The amendment declares:

> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

The wording of part "A" mirrors language already in the state's marriage statute, stating "any unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of

contracting and consenting to marriage with a person of the opposite sex."

Mary Bishop and Sharon Baldwin, who exchanged vows in a church "commitment ceremony," claimed their inability to marry under Oklahoma law is "demeaning" and "signals to others that they should not respect our relationship." Susan G. Barton and Gay E. Phillips were married in Canada in 2005 and again in California in 2008. They claimed that "the State of Oklahoma," by refusing to recognize their marriage, "has said ours is not a real marriage, but something inferior to the relationships of married opposite sex couples."

Tulsa County Court Clerk Sally Howe Smith filed an appeal after the U.S. District Court in Tulsa found for the plaintiffs, ruling the ban in the state constitution unenforceable. The appeals panel rejected the argument made by Howe's lawyers that limiting marriage to one man and one woman reinforces traditional family bonds and encourages the raising of children by their biological parents.

"Oklahoma's ban on same-sex marriage sweeps too broadly in that it denies a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized regardless of their child-rearing ambitions," Judge Carlos F. Lucero wrote in the majority opinion. The state "has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry. Such a regime falls well short of establishing 'the most exact connection between justification and classification,'" wrote Lucero. The ban "impermissibly contravenes the fundamental right to marry protected by the Due Process and Equal Protection Clauses of the Constitution," Judge Jerome Holmes wrote in concurrence.

As in the Utah case, the dissenting opinion came from Judge Paul J. Kelly Jr., who faulted the majority for "analyzing marriage primarily as the public recognition of an emotional union," based on what Kelly called "an ahistorical understanding of marriage. Western marriage has historically included elements besides emotional support and public commitment, including (1) exclusivity, (2) monogamy, (3) non-familial pairs, and (4) gender complementarity, distinct from procreation." The limitation of marriage to opposite-sex couples "is derived from the fundamental elements of marriage," wrote Kelly, adding that any change in the state's definition of marriage "belongs to the people of Oklahoma, not a federal court."

According to Freedom to Marry, a group espousing a right of same-sex couples to marry, plaintiffs have won 25 and lost none of the 77 suits against traditional marriage laws filed in 32 states or territories since the 2013 U.S. Supreme Court decision in *United States v. Windsor*. That 5-4 ruling struck down the federal Defense of Marriage Act and requires the federal government to grant equality under federal law to same-sex married couples in states where such marriages are lawful. The Court said at the time, however, that it was not requiring states to grant marriage status to same-sex unions, a claim disputed in a strongly worded dissent by Justice Antonin Scalia.

"It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here," Scalia wrote. By its reasoning in *Windsor*, he argued "the majority arms well every challenger to a state law restricting marriage to its traditional definition." Such suits, he predicted would be the "shoe to be dropped later."

The shoes are indeed dropping, along with laws that define marriage in the way it has, until recently, been defined by every state in the union and every nation on earth.

Photo shows the Federal Courthouse in Denver in the background: AP Images


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