

Same-Sex Marriage Battle Just Took On a Whole New Twist

The battle over same-sex marriage in the United States enters a new legal front on Thursday when a federal appeals court hears oral arguments on a Utah state law forbidding gays and lesbians from marrying.

The hearing in an ornate century-old building in Denver is the first at a regional U.S. appeals court since a **Supreme Court** ruling last June forced the federal government to extend benefits to same-sex married couples in states where gay marriage is legal.

In cases since, eight federal judges have used that decision to rule in favor of same-sex couples.

This new round at the next tier of the federal bench could alter that trend as cases move closer to resolution at the ideologically divided U.S. Supreme Court.

Unlike the landmark ruling on federal benefits, the cases making their way through the courts now raise a more fundamental question: Does the U.S. Constitution extend to same-sex couples the same right to marry opposite-sex couples have?

Hearing Thursday's case is a panel of the 10th U.S. Circuit Court of Appeals consisting of two Republican-appointed judges and one Democratic appointee.

Rapid Progress Through Courts

The legal fight over same-sex marriage has proceeded rapidly. In 2003 Massachusetts' top court declared a state constitutional right to **same-sex marriage**, and the next year Massachusetts became the first of the 50 states to begin

issuing licenses to gay couples. A total of 17 states plus the District of Columbia now permit same-sex marriage; 33 states do not.

This new battle testing whether the U.S. Constitution covers gay unions appears to be moving even faster. The 10th Circuit will hear a challenge to an Oklahoma same-sex marriage ban on April 17 and, separately, the Richmond-based 4th U.S. Circuit Court of Appeals in May is scheduled to take up a Virginia same-sex marriage ban.

By the end of the year the Supreme Court is likely to face several appeals from lower courts, including from the 10th Circuit, testing a nationwide right to same-sex marriage.

Before the judges on Thursday is a law adopted by Utah voters in 2004 defining marriage as exclusively between a man and a woman. Three couples, one gay and two lesbian, challenged the law. The lead plaintiffs are Derek Kitchen and Moudi Sbeity, who were denied a marriage license by the Salt Lake County clerk's office last year.

A decision in the case, and in the Oklahoma dispute, could take months.

The Kitchen case started in March 2013 and was among a handful of lawsuits seeking marriage rights pending when the Supreme Court last year granted federal tax and other benefits in *U.S. v. Windsor*. Most of the estimated 50 lawsuits now working their way through the courts were filed since.

Constitutional Questions

In December, U.S. District Judge Robert Shelby struck down the Utah law, saying it violated the U.S. Constitution's guarantees of equal protection and due process of law. Relying on the high court's reasoning favoring gays and lesbians, Shelby wrote that Utah's law known as Amendment 3 "places same-sex couples in an unstable position of being in a second-

tier relationship.

Utah's appeal will be argued by Gene Schaerr, among a group of private lawyers hired by the state. He is a former law clerk to Supreme Court Justice Antonin Scalia, a conservative who last June bitterly protested the 5-4 decision in *U.S. v. Windsor*.

In Schaerr's brief to the 10th Circuit, he argues the sociological value of opposite-sex couples, emphasizing "that moms and dads are different, not interchangeable, and that the diversity of having both a mom and dad is the ideal parenting environment."

Representing the gay couples and urging the 10th Circuit to affirm Shelby's decision will be Peggy Tomsic, a lawyer in a Salt Lake City firm. Her team is being aided by the National Center on Lesbian Rights, which like the ACLU and Lambda Legal have been coordinating much of the new nationwide litigation.

More than 200 groups and individuals have submitted "friend of the court" briefs, hoping to influence the judges.

The case is *Kitchen, et al v. Herbert, et al* in the 10th U.S. Circuit Court of Appeals, No. 13-4178

Reporting by Joan Biskupic; Editing by Howard Goller and Grant McCool

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