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Sixth Circuit Upholds Ban On Same-Sex Marriage and Poses the Question: Who Should Decide?

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Based on a surprising ruling by the Sixth Circuit Court of Appeals last month, the validity of state bans on same-sex marriage appears headed to the Supreme Court after all. In a 2-1 decision, the court upheld state laws prohibiting same-sex marriage in Tennessee, Kentucky, Ohio and Michigan, creating a split among the nation's circuits and virtually assuring the Supreme Court will review the issue. The decision runs counter to recent rulings by the Fourth, Seventh, Ninth and Tenth Circuits which cleared the way for marriages in Virginia, Indiana, Wisconsin, Oklahoma, Utah, Idaho, Nevada and other states. The ruling represents a rare defeat for the proponents of same-sex marriage, which is now legal in 32 states, and ends a winning streak of decisions by nearly every Federal Court that had taken up the issue since the Supreme Court decided *Windsor* last year.

The opinion, written by Judge Jeffrey Sutton and joined by Judge Deborah Cook, argues that the electorate and not the courts are in the best position to decide whether same-sex marriages should be allowed. "When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers," he wrote. "Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." Judge Sutton wrote extensively about traditional marriage "shared not long ago by every society in the world" and rejected each of the petitions' Constitutional arguments for striking down the bans, finding that procreation met the rational basis test for the state laws that restricted marriage to a man and a woman. Virtually every court since *Windsor* rejected that argument.

Judge Martha Craig Daughtrey issued a 22-page dissent with a biting opening:

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal. … Instead, the majority sets up a false premise - that the question before us is "who should decide?"- and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for 'proceeding with caution' (otherwise known as the 'wait and see' approach), I dissent.

Judge Daughtrey disputed the majority's conclusion that the issue was best left up to the voters: "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 systems of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams."

Daughtrey's primary objection to Sutton's opinion is that he treats the plaintiffs as "mere abstractions" rather than living, breathing human beings:

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. But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples, many of them heading up *de facto* families, who want to achieve equal status.

Attorneys for the losing plaintiffs immediately sought review in the Supreme Court, hoping to have their cases heard before the term ends in June next year. An *en banc* hearing with the full Sixth Circuit panel would have slowed the process, according to Abby Rubenfeld, Nashville attorney representing the Tennessee plaintiffs, who said, "Given the significance of the issue, the reality that it will end up in the Supreme Court ultimately, and the harms that all of our clients are suffering each day that their marriages are not recognized, we want to get to the Supreme Court sooner rather than later."

Susan Sommer, director of constitutional litigation for Lambda Legal, which represents the Ohio plaintiffs, released the following statement:

The Sixth Circuit Court of Appeals' ruling upholding discriminatory marriage bans across four states has placed thousands of families back in harm's way. We will ask the U.S. Supreme Court to review this aberrant ruling as soon as possible. These couples, their children, and the whole nation need a final - and better - resolution to this matter of critical importance to so many American families. The Sixth Circuit's decision dramatically departs from the path of justice that other circuits have followed. These families deserve better than to be told that their marriages, entered into with love and commitment, do not exist in the eyes of these states and are unworthy of the protections that come with marriage. We will not stop our work to change this.

With the appeals courts split, nearly all experts on both sides expect the Supreme Court Justices to enter the fray – most likely by considering one or more of the Sixth Circuit cases. The Michigan case, which went through a two-week trial last winter, looms as a particular favorite. The Tennessee case is also appealing because it involves whether non-recognition states like Tennessee are compelled by the U.S. Constitution to recognize valid, same-sex marriages performed in other states.

But to date, most predictions about what the nine justices would do have proven wrong. Nearly everyone involved thought they would agree last month to hear one or more of the cases from the other circuits. Proponents of same-sex marriage, however, are willing to predict victory if the Supreme Court hears one of the Sixth Circuit cases. They expect Justice Anthony Kennedy, the court's swing vote, to come down on the side of gays and lesbians, just as he did in 1996, 2003 and 2013 in cases involving anti-gay discrimination, sodomy laws and marriage rights. "Justice Kennedy does understand and will understand that these bans to marriage are fundamentally unfair and deny same-sex couples a basic human dignity that they are entitled to," said Steven Shapiro, legal director of the American Civil Liberties Union.

If the court finds a constitutional right to same-sex marriage, that would bring on board the remaining 15 states where bans remain in effect – Ohio, Michigan, Kentucky, Tennessee, Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas, Missouri, Nebraska, South Dakota and North Dakota. If the court upholds the state bans – an outcome considered unlikely, but not out of the question – same-sex marriage would remain unavailable in those 15 states, and hundreds of marriages performed in other states in recent months via court order would be questioned. Then it could get complicated.