

SPECIAL REPORT

The State of Marriage

Arizona could soon join the list of states where same-sex marriage bans have been struck down

By Glenn Gullickson

As judges across the country rule in favor of marriage equality, a decision on a lawsuit challenging Arizona's ban on same-sex marriage could be just months away. But if the ban is struck down, don't expect Arizona gays and lesbians to rush to marry, according to the attorney who has been leading the case. Shawn Aiken said a federal judge could decide the case as early as August or September, perhaps adding Arizona to a growing list of states where same-sex bans have been declared unconstitutional.

But during an interview with *Echo Magazine*, Aiken said if such a ruling is made, it's likely to be put on hold until it is reviewed by a higher court. In motions in the case, Aiken said attorneys defending the ban have already asked for a stay of such a decision.

In the year since the historic U.S. Supreme Court ruling striking down a key provision of the Defense of Marriage Act (DOMA), Arizona has seen an effort to put the marriage question on the 2014 ballot go bust and the establishment of an educational campaign supporting same-sex marriage.

Aiken's lawsuit, which is unrelated to any other efforts, appears to be the best hope for advancing the issue in the state.

Action on the lawsuit — one of two filed on the issue this year in U.S. District Court in Phoenix — has largely been taking place behind the scenes.

After dropping Arizona Attorney General Tom Horne — Aiken said at Horne's request — and Gov. Jan Brewer as defendants in the case, the lawsuit targets county clerks who have refused to issue marriage licenses to same-sex couples. The lawsuit claims those actions violate the couples' constitutional rights.

As co-counsel to defend the lawsuit, the state hired the Alliance for Defending Freedom, a Scottsdale-based conservative organization that Aiken said has been defending same-sex marriage bans around the country. "You've seen all their arguments before," said Aiken, who's bothered that taxpayer funds are going to the group. "The public is represented by these people," he said.

No courtroom drama

It's unlikely that Arizona will witness any courtroom drama over marriage equality — unlike the trial over California's Proposition 8 — because Aiken's plaintiffs as well as the defense have asked for a summary judgment. That means the judge overseeing the case would base his ruling on motions and briefs submitted by the parties, which were completed by the end of June.

Aiken said what he called "motion practice" has been done in many of the other lawsuits across the country where marriage equality cases have been decided. In the Arizona lawsuit the practice is useful because the judge hearing the case is based in Alaska and oversees Arizona cases as a visiting judge.

Aiken said the judge has been "attentive" to the case, leading him to believe that there won't be a long wait for a decision.

Others in the legal community have speculated that a ruling in the Arizona case could be delayed if the judge chooses to wait until the Ninth District Court of Appeals decides a case challenging Nevada's same-sex marriage ban. That case is expected to be heard in September, and a broad ruling could apply to Arizona, which is part of the court's jurisdiction.

Again, an appeals court ruling could be put on hold — as happened in June when the 10th District Court of Appeals struck down a same-sex marriage ban when it ruled against the Utah law.

The Nevada and Utah cases are among those at the appeals court level that could go to the U.S. Supreme Court in the next two years for what could be a final national ruling on marriage equality.

A decision to strike down the constitutional ban on same-sex marriage that Arizona voters approved in 2008 would be consistent with about 20 other rulings from judges around the nation tasked with sorting out the marriage equality issue in the year since the U.S. Supreme Court's DOMA decision.

Aiken said the ruling in the case known as *Windsor* provided a clear message to judges who have ruled for marriage equality in other states. Most of those rulings have been put on hold, although marriages started immediately after decisions in Oregon and Pennsylvania, where state officials declined to pursue appeals.

Another factor swaying the rulings is the swift movement in public opinion toward support of marriage equality, Aiken said. "Judges live in this community," he said. "In the same way public opinion has changed in Arizona in the last five years, they are more receptive. They want to join the conversation."

That has motivated some of the judges to produce eloquently written decisions. "I see

a real desire to speak out on one of the leading equality issues of our time,” Aiken said. “A lot of the judges are glad for the chance to write great pronouncements citing the Constitution and Declaration of Independence.”



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— *Shawn Aiken*

The attorney behind the case Aiken, a straight man who acknowledged that he had no ties to the LGBT community before filing the case, said he studies the decisions as they come down.

“I’m just another lawyer in Phoenix, not a member of any group,” said Aiken, a Midwestern transplant who has lived in the state for 34 years and earned his law degree at Arizona State University.

But Aiken and his four co-counsels have heard the complaint that they’ve stepped out of line to become involved in an issue that’s been owned by groups like Lambda Legal,

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MARRIAGE EQUALITY STATE BY STATE

Since 2004, same-sex marriage has been legalized in 19 states and the District of Columbia by court decisions, legislative action or voter approval.

As a result about 45 percent of the U.S. population lives in a state with same-sex marriage, according to Freedom to Marry, a national advocacy group promoting marriage equality.

Two cases in federal court in Arizona are among about 70 cases challenging same-sex marriage bans in 32 states and territories.

In several states, rulings in favor of marriage equality have been stayed while they are appealed they are appealed. In **Arkansas, Idaho, Michigan, Oklahoma, Texas, Utah, Virginia, Wisconsin** and **Indiana** judges have struck down marriage bans. In **Kentucky, Ohio** and **Tennessee** judges have issued more limited pro-marriage rulings.

In Utah, Wisconsin and Indiana, some marriages occurred before the rulings were stayed.

Here’s how the states achieved marriage equality, arranged by dates of when marriages started.

2004

MASSACHUSETTS

The state Supreme Judicial Court declared it was unconstitutional to allow only heterosexual couples to marry, making Massachusetts the first state to offer same-sex marriages on May 17, 2004.

VERMONT

Vermont became the first state to legalize same-sex marriage through legislative action when the state House and Senate overrode the governor’s veto of a marriage equality bill. Marriages started on Sept. 1, 2009.



2010

NEW HAMPSHIRE

Civil unions were replaced with marriage starting Jan. 1, 2010, after action by the New Hampshire Legislature.

DISTRICT OF COLUMBIA

Same-sex marriage started in the District of Columbia on March 3, 2010, after a bill was signed into law by the mayor.

2008

CONNECTICUT

Marriages started on Nov. 12, 2008, when the Connecticut Supreme Court declared the state’s civil unions law unconstitutional.

2009

IOWA

A ruling by the Iowa Supreme Court allowed same-sex marriages to start on April 27, 2009. Three of the justices involved in the ruling failed to hold their seats in the election following the decision.

2011

NEW YORK

After legislative action, marriages started on July 24, 2011, in New York.

2012

WASHINGTON

One month after a referendum approved marriage equality, weddings started on Dec. 6, 2012, in Washington state. The vote came after the Legislature passed a marriage equality bill that was signed by the governor.

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MAINE

Weddings started on Dec. 29, 2012, after voters approved marriage equality. Three years earlier voters had rejected a same-sex marriage law.

2013

MARYLAND

After voters rejected a referendum to repeal a marriage equality law, marriages started on Jan. 1, 2013, in Maryland.

DELAWARE

Marriages started July 1, 2013, after the Delaware Legislature approved marriage equality.

RHODE ISLAND

Marriages started on Aug. 1, 2013, after the Rhode Island Legislature approved same-sex marriage.



CALIFORNIA

Winning same-sex marriage rights in the Golden State is the most twisty and hard-fought of all the victories for marriage equality. Marriages started in May 2008 after a California Supreme Court decision lifted the ban on same-sex unions. But by November, voters had approved Proposition 8, which ended the practice. After years of court battles, on June 26, 2013, a U.S. Supreme Court decision allowed a lower court's ruling to stand, invalidating the ban and allowing marriages to resume.

MINNESOTA

Marriages started on Aug. 1, 2013, after action by the Minnesota Legislature. The tide in the state turned the previous year, when voters rejected a measure that would have banned same-sex marriage.

NEW JERSEY

Marriages started on Oct. 21, 2013, after a ruling by the New Jersey Supreme Court. In 2012, Gov. Chris Christie had vetoed a marriage equality bill approved by the state Legislature, but he declined to appeal the court ruling.

HAWAII

Couples started marrying on Dec. 2, 2013, after legislative action approved marriage equality in Hawaii, ending a 20-year battle in the state.

NEW MEXICO

The New Mexico Supreme Court ruled in favor of marriage equality on Dec. 19, 2013, with the decision taking effect immediately.

2014

OREGON

Marriages started in Oregon on May 19, 2014, when a federal judge struck down a constitutional amendment banning same-sex marriage. The decision came as marriage advocates were preparing for a campaign to ask voters to lift the ban.

PENNSYLVANIA

Pennsylvania became the last state in the Northeast region of the country to offer marriage equality when a federal judge struck down the state's same-sex marriage ban on May 20, 2014, and the governor declined to appeal the ruling.

ILLINOIS

Marriages started statewide in Illinois on June 1, 2014, but weddings were conducted in Cook County and some other jurisdictions as early as February, after legislative action legalized marriage equality in the Land of Lincoln.

ABOUT THE JUDGE

The man who will determine the constitutionality of Arizona's ban on same-sex marriage is a Republican appointee who is a judge on the U.S. District Court for Alaska.

Judge John Sedwick (below) was



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the national LGBT legal organization that has led litigation in other states and filed a similar lawsuit in Arizona two months after Aiken.

"I'm on their turf, I completely respect that," Aiken said. "[But] this is America, and I had some clients. I respect the fact that 40 to 50 years of work is at stake."

Aiken said that if he hadn't filed the lawsuit when he did, a number of other attorneys in the state were prepared to take on the issue.

"I like to win. I don't like to lose," Aiken said. "I don't intend to lose on this. I hope everyone can join hands."

Aiken said he started developing the case in December at the request of a same-sex couple he knows from his church in Tempe. They became one of the seven couples from metropolitan Phoenix, Tucson and Flagstaff who are plaintiffs in the

named to the court in 1992 by President George H.W. Bush and served as its chief judge from 2002 to 2009.

A native of Pennsylvania, Sedwick graduated from Dartmouth College, then served in the U.S. Air Force before getting his law degree from Harvard in 1972.

Before becoming a judge, Sedwick was in private practice in Anchorage and served as the director of the Division of Land and Water Management for Alaska's Department of Natural Resource.

Sedwick is a visiting judge to the court in Arizona, which has had an overload of cases.

Among Sedwick's rulings is a 2010 decision that blocked Arizona from denying family health insurance to state employees of same-sex partners.

Sedwick ruled that the legislation signed by Gov. Jan Brewer violated the equal-protection clause of the U.S. Constitution because employees in same-sex relationships do not have the right to marry in the state.

action that was filed on Jan. 6.

Since then, Aiken said he's reached out to the community by hosting a reception for LGBT leaders at his Phoenix law office and attending forums at ASU and in Flagstaff. He attended a Human Rights Campaign (HRC) dinner for the first time in March.

Aiken said his clients are involved in the case by participating in weekly team phone conferences and preparing video affidavits for the court. One plaintiff maintains a website with news about the case.

Aiken recently made news with a court victory when a judge ruled against a tax collected to finance the construction of the University of Phoenix Stadium in Glendale.

But the marriage equality case ranks as a career highlight "professionally and personally at the top, by a mile," Aiken said. "I am so lucky to be one of the lawyers trailing in the wake of a once-in-a-career issue."

Details of the case can be followed by visiting www.arizonaequality.org. **-E**

Why Marriage Matters appeals to the court of public opinion

An educational campaign building support for same-sex unions in Arizona isn't directly involved in lawsuits challenging the state's definition of marriage, but the group's project director said the effort could help sway a judge's decision.

Jeremy Zegas, of Why Marriage Matters Arizona, said his group is supportive of the lawsuits in federal court that seek to overturn the state's one man-one woman definition of marriage.

"Our campaign makes sure the public can see, that judges can see, that this issue enjoys broad public support," Zegas said.

He said that a show of support could influence the judge considering the Arizona cases. "No judge wants to be too far out front of public opinion," Zegas said.

Why Marriage Matters Arizona was launched last year by a coalition of local and national groups, including Equality Arizona, the Human Rights Campaign (HRC), American Civil Liberties Union (ACLU) and Freedom to Marry.

By sharing stories of same-sex couples and seeking signatures on a pledge of support, the effort seeks to move the needle for same-sex marriage, favored by 49 to 55 percent of Arizonans, according to polls done last year.

When the campaign started, it was thought that it would lay the foundation for putting the marriage equality question on Arizona's 2016 ballot after a petition drive to get the issue on the 2014 ballot failed to gain support. But since then the issue has had a change of venue from the ballot box to the courts after the U.S. Supreme Court struck down a key part of the Defense of Marriage Act (DOMA) and California's Proposition 8.

"There's been a cascade of positive rulings across the country. It's been incredible to be part of," said Zegas, who moved to Arizona in March from Washington state, where he was part of a successful campaign for marriage equality.

Zegas said it's difficult to predict if something could happen in the courts that could make a vote in Arizona unnecessary.

"Now it looks more likely that we'll have a positive decision from a court before 2016," he said. "But that can change. The work we're doing supports either outcome."

The group recently named a faith director and fundraising coordinator. Aided by interns and volunteers, they work out of offices provided by the ACLU in Phoenix.

The Rev. Debra Peevey, the campaign's faith director, is following up an event where Arizona religious leaders came out for the effort by working on a plan on how congregations can support the campaign, Zegas said.

Meanwhile, expect appeals for donations for the cause. Cynthia Leigh Lewis, who started work in June as a fundraiser, is putting together a plan for finding donors, Zegas said.

— Glenn Gullickson

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