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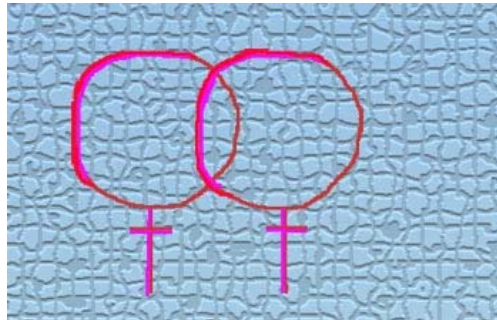
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7/23/2014 12:41:00 PM

Arizona cites reproductive ability to support gay marriage ban



Howard Fischer
Capitol Media Services



PHOENIX -- Attorneys for the state are telling a federal judge there's a good reason Arizona won't let gays marry: They can't reproduce, at least not without the help of a third person.

Papers filed in federal court defending the ban say voters, in approving the constitutional amendment in 2008, are entitled to 'define marriage for their community.' But the lawyers also are arguing to U.S. District Court Judge John Sedwick there's a public purpose in the state getting into the business of regulating private relationships: Ensuring that children are, whenever possible, raised by a biological mother and biological father.

"Only man-woman couples are capable of furthering the state's interest in linking children to both of their biological parents,' argued attorneys from the Alliance Defending Freedom. And they said the vast majority of such couples produce their own biological children.

But gay marriages, the lawyers said, "do not advance that compelling state interest' because they "can never provide a child with both her biological mother and her biological father.' About the closest they can come, the legal papers argue, is by involving a third person who will be a biological parent.

While the lawsuit is against the state, the case is being defended by the Alliance Defending Freedom, a self-described 'legal ministry' formed by Christian leaders to advocate for religious liberty and marriage. Attorney General Tom Horne agreed to let that organization take the lead, naming their lawyers as special assistant attorneys general.

Among arguments by challengers is that the procreation argument holds no water, at least in part because the state recognizes marriage between couples who are infertile or do not wish to procreate. But that, the defense attorneys argue, is irrelevant.

"For instance, many man-woman couples who do not plan to have children may experience unintended pregnancies or may simply change their minds,' the legal brief says. It also says "modern medical advances' might affect otherwise infertile couples.

Anyway, ADF attorney Caleb Dalton said the state has to start from the premise that heterosexual couples have the potential to produce children.

"It would be impossible, absurd even, for the state to mandate fertility testing or something for a marriage,' he said. "That would probably violate the constitution right there.'

Yet Arizona has, in fact, sanctioned marriages designed specifically not to produce children: A state law lets first cousins marry if both are at least 65 years old or if proof has been presented to a judge that one of them is unable to reproduce.

But Dalton said allowing such marriages reduces the risk that one of the partners will have a child out of wedlock with someone else. "It helps bind them together in a union,' he said

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And while the ADF brief mentions possible scientific advances that might allow infertile couples to reproduce, Dalton brushed aside as a "far-fetched hypothetical" questions of whether his arguments fall apart if science allows two women, each with her own egg, to form a child.

This lawsuit is one of two in front of Judge Sedwick challenging both the 2008 voter-approved state constitutional amendment and a statutory ban which existed for years before. Attorney Shawn Aiken, representing four couples, charges the ban is "arbitrary and invidious discrimination."

The lawsuit has a fallback position of sorts: Aiken argues that if Sedwick won't allow gays in Arizona to wed, he should at least force the state to recognize same-sex marriages performed legally elsewhere for people now living here.

A second lawsuit has been filed by Lambda Legal Defense and Education Fund with similar arguments. But that case has some broader claims including the right to be recognized as a parent and inheritance rights.

Sedwick is not likely to rule in either case until the 9th U.S. Circuit Court of Appeals makes a decision on similar lawsuits from other states where trial judges already have ruled. The appellate court has scheduled arguments on three of those cases -- from Hawaii, Nevada and Idaho -- for September.



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The argument the state is making has already been refuted. It won't gain traction in courts, and even if it does, the Ninth Circuit will overturn the regional court's decision. It just makes Arizona look uneducated and backward.

My wife and I are an opposite sex couple, but we can't have children. Is Arizona going to void our marriage, too?

The truth is that the state has no interest whatsoever in making sure couples can reproduce. The state's argument is simply a last ditch effort to legally justify a bad status quo.

Posted: Wednesday, July 23, 2014

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