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PERSPECTIVE

A day in court for same-sex marriage

By Theane Evangelis

Exactly five years ago, in a federal courthouse in San Francisco, we listened to the proponents of Proposition 8 — California's constitutional same-sex marriage ban — opine on the "dangers" posed by the marriage of two loving, consenting adults. The proponents testified that Prop. 8 was motivated by the fear that allowing couples to marry "will cause states one-by-one to fall into Satan's hands." But their scare tactics crumbled at trial, and the district court struck down Prop. 8 because "[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians."

Today, 36 states allow gay and lesbian couples to marry. We have seen this dramatic shift primarily because gay and lesbian couples were brave enough to knock on the doors of federal courthouses, and demand equality and respect for their fundamental rights.

Now, the time to fulfill the promise of this basic civil right to *every* American in *every* state has finally come. On Jan. 16, the U.S. Supreme Court granted certiorari from the 6th U.S. Circuit Court of Appeals' decision upholding laws of Michigan, Ohio, Kentucky and Tennessee that deny marriage to same-sex couples as well as recognition of those marriages validly performed in other states. The 6th Circuit split from the 4th, 7th, 9th and 10th Circuits, which all had struck down state marriage bans based on the Supreme Court's 2013 decision in *United States v. Windsor*. Windsor invalidated the so-called Defense of Marriage Act, which denied federal recognition and its benefits to same-sex couples legally married under state law. Earlier this term, the court declined to hear the marriage cases from the 4th, 7th and 10th Circuits, allowing thousands of gay and lesbian couples in those circuits to marry.

The 6th Circuit case presents the Supreme Court with the opportunity to explicitly and unequivocally confirm that the Constitution protects the fundamental right to marriage for all Americans, and that discrimination against gays and lesbians is unconstitutional. And it is clear that precedent and principle compel this result.

As an initial matter, the 6th Circuit's opinion rests upon a legal and historical fallacy: that the rights of a protected class — like women, ethnic or racial minorities, or in this case, gays and lesbians — should be subjected to popular vote, not protected by the courts. The 6th Circuit explained that "the goal [is] to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices." While that certainly is the ideal, we don't live in a utopia.

Leaving minority rights to the democratic process is an open invitation for tyranny of the majority to reign. In the first decade of the 21st century, we saw what this reign looked like — state after state enshrined discrimination in its constitution by banning same-sex marriage. Indeed, in 2008, even *after* the California Supreme Court held that the state constitution protected the rights of gays and lesbians to marry, voters stripped away that right.

This is why individual liberty depends on judicial review. As the Supreme Court explained in *Trop v. Dulles*, "The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights ... If we do not, the words of the Constitution become little more than good advice." The Supreme Court is not lauded for walking lock-step with the majority, such as in *Plessy v. Ferguson* — it is respected because it safeguards the rights of all, especially disfavored groups, in decisions like *Brown v. Board of Education*. As Justice Ruth Bader Ginsburg wrote in striking down the ban on admitting women at the Virginia Military Institute, "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded."

The 6th Circuit's decision to throw up its hands and let the majority rule is therefore destined to be overturned. Under any level of judicial scrutiny, every single marriage ban — including the four at issue in the 6th Circuit's case — must fall on both due process and equal protection grounds because there is no legitimate, let alone compelling, justification for these plainly discriminatory laws.

In more than a dozen cases since the 1800s, the Supreme Court has confirmed that marriage is a fundamental liberty protected by the due process clause. In *Loving v. Virginia*, which struck down anti-miscegenation laws, the court explained that "[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival." In addition, gay men and lesbians meet the criteria for suspect class status: They have historically faced discrimination, they possess an immutable characteristic, and their sexual orientation does not prevent them from meaningfully contributing to society.

If the Supreme Court agrees on either the fundamental right or suspect class, it must apply strict scrutiny and determine whether state bans on same-sex marriage are narrowly tailored to serve a compelling governmental interest. And these laws don't come close to satisfying this standard. In fact, they inflict severe harm not only on gay and lesbian couples, but also on the tens of thousands of children they are raising across the country.

These tangible and immediate harms are evident from the 6th Circuit case. For example, plaintiffs April Deboer and Jayne Rowse, both nurses and state-licensed foster parents, are raising three foster children, two of whom have special needs. Yet they cannot adopt their children together as a couple and obtain legal recognition for their family because Michigan law permits only married couples to adopt, and won't allow them to marry. There is no justification for this absurd and abhorrent treatment.

Michigan's laws — and all those like them — are as discriminatory as DOMA, which Justice Anthony Kennedy, writing for the court in Windsor, condemned as "plac[ing] same-sex couples in an unstable position of being in a second-tier marriage," and "humiliate[ing] tens of thousands of children now being raised by same-sex couples ... mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." It is difficult to see how such reasoning would not extend to same-sex couples currently denied the right to marry by state law. Kennedy was the author of every major decision protecting the rights of gay and lesbian Americans over the past 20 years — *Romer v. Evans*, *Lawrence v. Texas*, and Windsor — and his view is likely to carry the day.

But don't take my word for what the Supreme Court will do, take Justice Antonin Scalia's. Dissenting in *Windsor*, Scalia observed, "In my opinion ... the view that this court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion ... is that DOMA is motivated by 'bare ... desire to harm' couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."

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