At last, Supreme Court hears same-sex marriage cases. Will history be made?

The US Supreme Court on Tuesday will hear arguments on whether the Constitution requires state governments to license and recognize same-sex marriages. A landmark decision is expected by late June.

By Warren Richey

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In a dispute that could yield one of the most important judicial decisions of this generation, the US Supreme Court on Tuesday is set to hear arguments examining whether the Constitution requires state governments to license and recognize marriages between persons of the same-sex.

The issues arise in four consolidated cases from same-sex couples in Ohio, Tennessee, Michigan, and Kentucky. The couples are challenging state laws and state constitutional amendments that limit marriage to its traditional definition – a union of one man and one woman.

The dispute arrives at the nation's highest court at a time of greater acceptance of gay marriage – with 61 percent of Americans expressing support in a recent poll. But it also arrives amid an increasingly bitter clash between gay rights activists on one side and religious and social conservatives on the other.

Supporters of same-sex marriage are hoping that the high court issues a sweeping decision akin to a gay rights version of Brown v. Board of Education, the landmark opinion that declared racial segregation unconstitutional.

Opponents of same-sex marriage say a ruling that redefines marriage nationwide would be similar to the high court's divisive 1973 abortion decision in Roe v. Wade. Rather than ending the dispute, the ruling gave a focus to anti-abortion activism that continues to this day.

Some conservative critics even say a same-sex marriage ruling would be the worst Supreme Court action since the reviled Dred Scott decision in 1857 propelled the country toward civil war.

Resolution of the marriage cases will depend on how a majority of justices interpret key provisions of the Constitution's 14th Amendment.

The amendment, ratified in 1868 in the aftermath of the Civil War, was designed to enforce the rights of freed slaves in the face of discriminatory state laws. It has since been applied in a wide variety of contexts, including in support of gay rights and in challenges to restrictive marriage laws.

The amendment prohibits states from depriving any person of "life, liberty, or property" without due process of law. It also bars states from denying any person the equal protection of the laws.

Same-sex couples argue that the 14th Amendment guarantees them the freedom to marry and receive the same recognition, benefits, and protections as heterosexual married couples. They say there is no rational reason to exclude same-sex couples from marriage.

In defending their traditional marriage laws, state governments argue that the process of changing a state's definition of marriage should rest with elected lawmakers and voters, not judges.

The case is significant because a broad constitutional ruling would greatly expand civil rights protections available to the lesbian, gay, bisexual, and transgender (LGBT) community in a single judicial decision that would apply in every jurisdiction nationwide.

On the other side, if the high court rules for the states, the case would be significant because it would uphold the authority of individual states to decide divisive issues of social policy through democratic channels on a state-by-state basis rather than by decrees issued by federal judges and Supreme Court justices.

The nine-member Supreme Court is itself sharply divided over which of those two approaches it should follow.

Legal analysts expect the deciding vote to be cast by Justice Anthony Kennedy. The conservative centrist is considered a champion of states' rights and federalism, but he has also authored three major decisions substantially expanding gay rights in America.

Many analysts believe that Justice Kennedy, having laid that groundwork, will now draw on those three earlier decisions and issue a keystone ruling in favor of same-sex couples challenging the state marriage laws.

"The very strong conventional wisdom is that there are five votes supporting the challengers," Ilya Shapiro, a constitutional scholar at the Cato Institute, told reporters during a recent teleconference sponsored by the Federalist Society.

Not all constitutional law experts agree with that conventional wisdom.

"I think the arguments in favor of a constitutional right to marriage are very weak. If the court follows the law it should be a very easy case [for the states to win]," Washington Appellate Lawyer Gene Schaerr said in a panel discussion at the Family Research Council.

Two years ago, the high court took up a California case that raised the same question about same-sex marriage. But the justices never reached the merits of that case.

That same year, the court issued its decision in US v. Windsor, invalidating the federal Defense of Marriage Act (DOMA). Although Justice Kennedy's majority opinion included a disclaimer that the decision applied only in the context of DOMA, more than 30 judges and four federal appeals courts have interpreted the Windsor decision broadly to invalidate restrictive state marriage laws and state constitutional amendments.

At the time DOMA was struck down in late June 2013, 36 states had enacted statutes and/or constitutional amendments limiting marriage to one man and one woman. In contrast, 12 states and the District of Columbia allowed same-sex marriages.

In the nearly two years since the DOMA decision, the tally of same-sex marriage states compared to traditional marriage states has reversed.

Today, 37 states permit same-sex marriages, while 13 maintain traditional marriage laws. But how each state got to that status is markedly different.

Of the current same-sex marriage states, only three achieved that status through state-wide ballot initiatives. Eight passed statutes embracing a broader definition of marriage. An additional three resulted from state supreme court decisions.

Most states achieved their same-sex marriage status by having it imposed upon them by a federal judge or appeals court judges who invalidated state laws and ballot initiatives in 23 states.

Against this tidal wave of contrary opinions, two federal judges (in Louisiana and Puerto Rico) upheld traditional marriage laws, and the Cincinnati-based Sixth US Circuit Court of Appeals affirmed similar laws in four states. It is those Sixth Circuit cases that are now before the high court.

The justices have set aside two and half hours for argument on Tuesday. Lawyers will first address whether the 14th Amendment requires states to issue marriage licenses to same-sex couples.

The final hour will be devoted to whether the 14th Amendment requires states with restrictive marriage laws to recognize the validity of same-sex marriages performed in other states.

At the center of it all is the overarching issue of how such disputes are to be resolved, in the courts or by the states.

Lawyers for the couples argue that the 14th Amendment protects a fundamental right to marry regardless of sexual orientation. They also argue that the Constitution mandates that same-sex couples seeking to marry be treated the same as opposite-sex couples.

In defending traditional marriage laws, lawyers for the four states argue that their marriage laws are the product of legislative action or the direct participation of the electorate through the ballot initiative process.

Judges should defer to democratic action in such areas, they say.

They note that voters in 35 states have cast more than 74 million ballots on the same-sex marriage issue. Some 28.8 million favored same-sex marriage, while 45.4 million voted to retain the traditional marriage definition.

"This case is not about the best marriage definition," Michigan Special Assistant Attorney General John Bursch wrote in his brief to the court.

"It is about the fundamental question regarding *how* our democracy resolves such debates about social policy," he said. "Who decides, the people of each state, or the federal judiciary?"

Lawyers for the same-sex couples disagree. They say there is a fundamental right to marry that is broad enough to include all couples, regardless of their sexual orientation.

"The state's insistent refrain is that the question whether same-sex couples have a right to marry is one for voters and legislators, not for this court," Carole Stanyar, an Ann Arbor lawyer, wrote in her brief on behalf of a same-sex couple in Michigan. "But it is the office of this court to enforce petitioners' constitutional rights to liberty and equality."

She added: "The state … suggests that this case is about liberty to engage in self-government. But ours is a constitutional democracy, and citizens do not enjoy the right to equal treatment or the substantive guarantees of liberty only when they persuade political majorities such rights exist."

Ms. Stanyar quoted a 1943 landmark Supreme Court decision: "Fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Whether this argument will resonate with Justice Kennedy is unclear.

"Kennedy is a big believer in popular democracy," Washington Appellate Lawyer Paul Smith told a recent gathering of the American Constitution Society.

"On the other hand," he said, "the popular vote argument is particularly weak in this situation where the majority votes to say 'We can get married and you can't.' "

Mr. Smith added: "That doesn't seem like a very appealing argument to make."

Mr. Schaerr says the alternative is worse. “These cases are really an attempt to tempt the court to take away from the people their ordinary right to decide policy issues through democratic means,” he says.

Schaerr says American voters and elected representatives are more competent than judges to decide such thorny issues.

Of the 17 countries in the world that recognize same-sex marriage, only one – Brazil – imposed same-sex marriage by judicial decree, Schaerr says.

“Every other place where [same-sex marriage] was presented for a decision, the courts said it is a decision for the people to make,” he says.

In their briefs, lawyers for the states argue that under the nation’s system of federalism, the states should be free to adopt different policies concerning marriage and to serve as laboratories of democracy to test which policies work and which don’t. As such, they urge the Supreme Court to allow them to proceed with caution on the marriage front.

Lawyers for the same-sex couples reject such arguments, saying that same-sex couples and their children have waited too long already to be treated with equal dignity.

“While states have considerable leeway to function as laboratories of experimentation,” Cincinnati lawyer Alphonse Gerhardstein wrote in his brief, “they do not have leeway to function as laboratories of discrimination.”

The cases are Obergefell v. Hodges (14-556), Tanco v. Haslam (14-562), DeBoer v. Snyder (14-571), and Bourke v. Beshear (14-574).

A decision is expected by late June.