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Officials in three states bank on states' rights argument to stop gay marriage spread

By Cheryl Wetzstein

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With a clean sweep in more than a dozen battles in state courts in less than a year, some see the movement to legalize same-sex marriage as an unstoppable juggernaut.

But officials in three states are fighting back, banking on the founding principle of states' rights to set up a legal breakwater to preserve laws in defense of traditional marriage.

States have "sovereign authority" — so the theory goes — over their own domestic policies, including marriage laws, and just as the federal government can't deny state laws recognizing same-sex marriage, neither can Washington impose same-sex marriage on the states that choose not to adopt it. That is the argument state officials in Oklahoma and Utah have made in briefs to a federal appellate court considering their marriage laws.

"There is no fundamental 14th Amendment right to a State marriage certificate allowing two people of the same-sex to marry," Idaho Gov. C.L. "Butch" Otter, a Republican, said in his own brief to a federal judge.

These states' rights views are bolstered by two bills in Congress that would require federal agencies to defer to state laws — not ignore them — when it comes to deciding marital status.

That argument is the most direct challenge to date to gay plaintiffs and a slew of federal judges in recent months who have argued that the 14th Amendment's due process and equal protection clauses trump state laws and guarantee same-sex couples the right to marry.

State officials may argue that states have exclusive authority to regulate marriage, but even states have to "respect the constitutional rights of persons," Utah gay-marriage plaintiffs Derek Kitchen and Moudi Sbeity said in a legal brief to the 10th U.S. Circuit Court of Appeals.

Seven state law officials, all Democrats, have said they wouldn't defend their states' marriage laws because they have concluded the bans on same-sex marriage are unconstitutional. "The United States Constitution is designed to protect everyone's rights, both the majority and the minority groups," said Kentucky Attorney General Jack Conway, a Democrat who recently joined attorneys general in California, Pennsylvania, Illinois, Virginia, Nevada and Oregon in taking a stance that also has been adopted by U.S. Attorney General Eric H. Holder Jr.

Equal rights asserted

The states' rights legal argument is one of many employed in the two dozen gay-marriage court battles that have broken out since the Supreme Court's landmark decision in June striking down the federal law against same-sex marriage. Just this month, challenges against traditional marriage statutes have been filed in Wyoming, Indiana and Florida.

But the legal strategy represents a striking escalation of the constitutional fight, pitting the 10th Amendment, which gives states all legal powers not specifically delegated to the federal government, against the 14th Amendment, which was enacted in 1868 to ensure that post-Civil War blacks and other minorities were treated equally under state law.

Many constitutional scholars see the 14th Amendment prevailing.

"I take the position that when a state passes a law, it has to apply equally to everyone unless there's some very good reason why it shouldn't," said Ilya Shapiro, senior fellow of constitutional studies at the Cato Institute. "For example, people have the right to keep and bear arms. But if you are mentally ill, you might not have that right, or if you are a convicted, violent felon, you might not have that right."

In regard to marriage, he said, the arguments to recognize only man-woman unions are simply not strong enough to deny such rights to same-sex couples.

Several federal courts have embraced this view, handing victories to same-sex couples in 13 straight court cases since the Supreme Court's ruling, even in "red" states where even gay-rights activists once saw little chance of quick victory.

A federal judge Friday took a step toward making a Tennessee lawsuit to become the 14th such case, ruling that the state must recognize the marriages of three out-of-state same-sex couples while their challenge to the state marriage law is litigated. Though the ruling by U.S. District Judge Aleta Trauger is temporary and applies only to the three couples bringing the lawsuit, such injunctions can be granted only if a judge finds that a plaintiff likely will win the case.

Gay couples in Utah expect to use the 14th Amendment to strike down all marriage laws that ban same-sex marriage.

It prohibits enactment of laws "that have the primary purpose and effect of treating a disfavored group unequally," Mr. Kitchen and his fellow plaintiffs said in their brief. "Indeed, the entire

purpose of the 14th Amendment is to prohibit states from exercising their traditional authority in ways that deprive their citizens of liberties guaranteed by the federal Constitution."

State authority over marriage is limited — it is "subject to constitutional guarantees," added a brief filed March 4 by attorneys general from 16 states and the District of Columbia, which have all legalized same-sex marriage.

States' rights defended

But top legal officials in at least 11 other states are rallying to the sides of Utah and Oklahoma in keeping their marriage laws.

Because marriage "falls within the state's dominion," courts should not overturn the people's decisions on marriage and impose their own vision, said the brief filed by Michigan Attorney General Bill Schuette. His arguments were echoed by top law officers in Alabama, Alaska, Arizona, Colorado, Indiana, Idaho, Montana, Nebraska, Oklahoma and South Carolina.

In their brief on behalf of Utah's law, Gov. Gary Richard Herbert, a Republican, and Utah state Attorney General Sean Reyes argued that the Supreme Court explicitly upheld states' rights to set marriage policy even as it was overturning the federal traditional marriage law.

Nothing in the U.S. Constitution "prohibits" the 17 states with same-sex marriage from "adopting that marriage policy" — and "nothing in the Constitution forbids" the people in 33 states who decided "to preserve marriage as a man-woman unit" from "affirming that marriage policy," Mr. Herbert and Mr. Reyes said.

As a purely legal issue, "the claim that states are constitutionally required to legalize same-sex marriage is specious. It is just unfounded," said Lynn D. Wardle, law professor at Brigham Young University. "There is nothing in the text or the history of the Constitution that would support that."

Mr. Wardle said a uniform gay-marriage policy imposed by the courts would block the ability of the individual states to serve as "laboratories" on same-sex unions. Massachusetts could allow same-sex marriage and Utah could forbid it: "You can see what happens — in which state do children flourish the best."

Conversely, he said, if states' rights on marriage are overruled, it "opens the floodgates" to attacks on other state laws and more second-guessing and supervision by federal judges on other issues as well. "That is very troubling," especially to those who believe in the principles of federalism, Mr. Wardle said.

With same-sex marriage lawsuits making their way through appellate courts — the Utah and Oklahoma cases have hearings in April before the 10th Circuit — the gay-marriage issue could be back before by the Supreme Court later this year or in 2015.

Defenders of traditional marriage in Congress are trying to boost the legal firepower of states trying to preserve their traditional marriage laws and statutes.

Rep. Randy K. Weber Sr. and Sen. Ted Cruz, both Texas Republicans, have introduced bills to require federal agencies to honor state marriage laws when determining marital status for federal benefits. The bills are supported by an array of pro-family and traditional values groups, who say that man-woman marriage laws are legal.

Although attitudes toward same-sex marriage have been shifting dramatically in the polls, public opinion slightly favors the states' rights argument. Asked whether legalizing gay marriage should be decided "at the national level" or by "each state" for itself, 52 percent of Americans chose the states, according to a survey by the Public Religion Research Institute. This was up from 2006, when only 46 percent said they wanted the states to be able to set their own marriage policies.