

Libertarians' Relationship With Same-Sex Marriage Gets Serious

In the 5th Circuit Court of Appeals, the Cato Institute makes new arguments for limits on states' rights in a brief filed in the Louisiana marriage case with the progressive Constitutional Accountability Center.

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WASHINGTON — The Cato Institute, a libertarian think-tank, made a vigorous case for same-sex couples' marriage rights on Friday — going further than it ever has in supporting the constitutional claims making their way across the nation.

In a brief filed in support of same-sex couples challenging Louisiana's marriage ban at the 5th Circuit Court of Appeals, the Cato Institute joined the progressive Constitutional Accountability Center in arguing that the court should strike down the ban.

“The Fourteenth Amendment guarantees to all people—regardless of race, sexual orientation, or other group characteristics—equality of rights, including the fundamental right to marry,” the groups argue. “These protections are the ‘supreme Law of the Land,’ overriding laws enacted through the democratic process, whether adopted by state legislatures or by the voters.”

The “odd couple” pairing of the two groups — similar to Ted Olson and David Boies' leadership in fighting California's Proposition 8 and Virginia's similar ban — is not new. They've filed joint briefs opposing the bans in most of the recent marriage challenge appeals, including in [the Prop 8 case](#). In Friday's filing, however, they made two new arguments — both of which could have an impact beyond the marriage landscape.

The groups argued that the federal trial court decision upholding Louisiana's ban was wrong, calling out U.S. District Court Judge Martin Feldman's deference to the “democratic process” as a misreading of the 14th Amendment. Additionally, they argued that the recent Supreme Court decision upholding Michigan's voter-approved ban on affirmative action in higher education, *Schuette v. Coalition to Defend Affirmative Action*, does not back up the trial court's decision.

Ilya Shapiro, the scholar who signed the brief for the Cato Institute, told BuzzFeed News that the brief was consistent with the group's long-held interest in “wanting an engaged judiciary to enforce individual rights.” As to the changes in this brief, Shapiro pointed to [a recent paper](#) put

out by the Constitutional Accountability Center that was written by David Gans as forming some of the underlying basis for the changes in Friday's filing.

In the filing, the groups argue, "The district court here lost sight of ... foundational equal protection principles, instead empowering the people of Louisiana to 'disparage and to injure' loving, committed same-sex couples, 'whose moral and sexual choices the Constitution protects,'" quoting from the Supreme Court's decision striking down the Defense of Marriage Act. "That is a majoritarian bridge too far."

After detailing the history of the Equal Protection Clause of the 14th Amendment, the brief concludes that the amendment "established equality under the law and equality of rights for all persons as a constitutional mandate, forbidding the people of a state from using the democratic process to subject minorities to adverse, discriminatory treatment and take away their fundamental rights. The district court's contrary conclusion is sharply at odds with the Fourteenth Amendment's text and history."

Then, the groups addressed the decision by the trial court — that has been made by supporters of marriage bans across the nation — that the *Schuette* Supreme Court decision "stand[s] for the proposition that a majority of the people of Louisiana could use the democratic process to single out same-sex couples for adverse treatment and deny them the right to marry." To the contrary, they argue, "This is an unsupportable reading of *Schuette*, divorced from its context and inconsistent with its reasoning."