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Supreme Court Paves Way For Gay Marriage In Five States

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(New York Times) -- WASHINGTON — The Supreme Court on Monday denied review in all five pending same-sex marriage cases, clearing the way for such marriages to proceed in Indiana, Oklahoma, Utah, Virginia and Wisconsin.

The move was a major surprise and suggests that the justices are not going to intercede in the wave of decisions in favor of same-sex marriage at least until a federal appeals court upholds a state ban.

The move will almost immediately increase the number of states allowing same-sex marriage from 19 to 24, along with the District of Columbia.

The justices had earlier acted to stop same-sex marriages in Utah and Virginia, issuing stays to block appeals court rulings allowing them. Other appeals court decisions had been stayed by the appeals courts themselves.

The all but universal consensus from observers of the Supreme Court had been that the stays issued by the justices indicated that the justices wanted the last word before federal courts transformed the landscape for same-sex marriage. But in recent remarks, Justice Ruth Bader Ginsburg said there was no urgency for the court to act until a split emerged in the federal appeals courts, all of whose recent decisions have been in favor of same-sex marriage.

The justices last agreed to hear a constitutional challenge to a same-sex marriage ban, California's Proposition 8, in December 2012. But a majority of the justices said it was not properly before the court. That move indicated that the Supreme Court may have wanted to stay out of the fray until the number of states allowing same-sex marriage was much higher.

There is precedent for such an approach. The court waited until 1967, for instance, to strike down bans on interracial marriage, when the number of states allowing such unions had grown to 34, though it was still opposed by a significant majority of Americans.

Popular opinion has moved much faster than the courts on same-sex marriage, however, with many Americans and large majorities of young people supporting it.

If the court took pains to avoid a resolution of whether there was a constitutional right to same-sex marriage in the California case, *Hollingsworth v. Perry*, it set the groundwork for a definitive answer in a second decision issued the same day. That ruling, *United States v. Windsor*, struck down the part of the federal Defense of Marriage Act that barred federal benefits for same-sex couples married in states that allowed such unions.

The decision was based on a muddle of rationales. In dissent, Justice Antonin Scalia challenged readers of Justice Anthony M. Kennedy's majority opinion to follow its "disappearing trail" of "legalistic argle-bargle."

But lower courts seemed to have no trouble understanding what the *Windsor* decision had to say about a constitutional right to same-sex marriage. In a remarkable and essentially unbroken line of about 40 decisions, state and federal courts have relied on *Windsor* to rule in favor of same-sex marriage.

In his own dissent in the *Windsor* case, Chief Justice John G. Roberts Jr. cautioned that the decision was a limited one, buttressing his assertion with a quotation from the majority opinion.

"The court does not have before it, and the logic of its opinion does not decide the distinct question whether the states, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage," he wrote.

"We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples," he added. "That issue, however, is not before us in this case."

But lower-court judges seemed inclined to agree with Justice Scalia's assessment of where things were heading.

"By formally declaring anyone opposed to same-sex marriage an enemy of human decency," Justice Scalia wrote, "the majority arms well every challenger to a state law restricting marriage to its traditional definition."

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