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Stop Draggin' My Heart Around

The Supreme Court is harming people with its inscrutable gay marriage actions.

By Dahlia Lithwick and Sonja West



Cathy Grimes (L) and Tara Traynor wait to find out if they will be issued a marriage license at the Clark County Marriage License Bureau on Wednesday in Las Vegas, Nevada.

Photo by Ethan Miller/Getty Images

The Supreme Court's decision Monday to decline the appeals of decisions striking down same-sex marriage bans in five states was, to most court-watchers, a huge surprise. It was also a deeply strange move given the magnitude of the constitutional issue and the general confusion about what a non-decision actually means. While Monday's denial of certiorari was not technically a decision on the merits, most supporters of same-sex marriage celebrated the move as part of the justices' inexorable crawl toward marriage equality. And in Virginia, Oklahoma, Colorado, and other affected states, gay couples who have waited—in many cases for years—queued up to get licenses to marry their partners. Not all of them succeeded.

Only two days later, there was another surprise. Justice Anthony Kennedy issued a one-paragraph emergency stay Wednesday on the **9th Circuit Court of Appeal's ruling that same-sex marriage bans in California, Idaho, and Nevada** are unconstitutional. Yet more confusion ensued. Did this apply just to Idaho, which had sought the stay? Or did it sweep in Nevada too, as the order implied? A few hours later a follow-up order "**upon further consideration**" from Kennedy brought the stay back just to Idaho. Including Nevada, we were told this morning, **was a mistake**. Never mind. And so gay marriages could once again be cleared for landing in Las Vegas.

What does this latest step mean? Who on Earth knows? The most sophisticated legal minds in America are poring over every word in the emergency stay and the Idaho petition for clues. Maybe it's merely a procedural step to give the state time to file its brief. Maybe it's an attempt to show respect for the state by considering its appeal before denying it, as the court did with the five states' appeals denied at the beginning of the week. Maybe it's due to a difference between the 9th Circuit's and the other appellate courts' view **on the correct standard** to apply. (Idaho cheerfully admits in its brief that it is discriminating on the basis of gender, not sexual orientation, with its marriage ban.) Or maybe it's a sign that the Supreme Court is still looking for the right case with the right set of facts to decide the issue once and for all. But we do know one thing the Idaho stay is *not*, which is an answer to the question everyone is asking: Is same sex marriage a constitutional right or isn't it? And how are the states and **lower court judges** supposed to figure that out?

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This week's legal zigs and zags afford very little consolation to people like Amber Beierle and her partner, Rachael Robertson, who were "**just a few feet away** from the clerk" on their way to getting their Idaho marriage license when Justice Kennedy's minimalist order was handed over. They, of course, don't know what the stay order means. All they know is that if you are lucky enough to live in Virginia you

could get married starting this week (at least for now). And if you are unlucky enough to live in Idaho you have will to wait a little longer (we think). And if you are super-unlucky enough to live in Texas, well too bad. Apparently the 14th Amendment works only for the geographically fortunate this week.

Consider, as well, the hot mess that is Kansas. The state is presumably under the jurisdiction of the 10th Circuit, which also covers Utah, whose appeal was batted away by the Supreme Court on Monday. The 10th Circuit ruling that same-sex marriage bans are unconstitutional should therefore be the law in Kansas. Moreover, state **law provides that a clerk who issues a license to “unqualified”** people could be found guilty of a misdemeanor. So on Wednesday, Chief District Judge Kevin Moriarty of Johnson County issued an order directing the district court clerk to issue licenses to same-sex couples without fear of prosecution, reasoning that state laws—statutory or constitutional—are void if they contradict federal law, and that after Monday Kansas is bound by the 10th Circuit decision. But other judges in the same county disagree. And a judge in a different county has already denied a couple seeking a license because, in her view, Kansas’ ban on same sex marriage has not been explicitly struck down.

Meanwhile, Kansas Attorney General Derek Schmidt and Gov. Sam Brownback declined to accept the Johnson County ruling. Brownback issued a **statement** Wednesday night indicating that “An overwhelming majority of Kansas voters amended the constitution to include a definition of marriage as one man and one woman.” The statement asserted, “Activist judges should not overrule the people of Kansas.” Is Judge Moriarty an “activist Judge”? Or is he merely aware of the existence of the Supremacy Clause? Who knows?

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