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The State Of Same-Sex Marriage In Florida

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In 1977, on the heels of Anita Bryant's "Save Our Children" campaign, Florida enacted statutes banning same-sex unions and adoption of children by same-sex couples. Initially, the ban on same-sex unions came in the form of an addition to the marriage license requirements that prevented a marriage license from being issued to two persons of the same gender. § 741.04, Florida Statutes. This statute remains in force today.

Twenty years later, in 1997, the Florida Legislature enacted Section 741.212 of the Florida Statutes defining "marriage" as only meaning "a legal union between one man and one woman as husband and wife." This statute further provides that marriages legally entered into in any other jurisdiction between two persons of the same sex shall not be recognized for any purpose in Florida. In 2008, this statute was essentially incorporated into the state constitution when 62 percent of Florida voters approved a conforming amendment to the Florida Constitution by adding Article I, Section 27.

Over the course of the last year, many federal and state courts have ruled on the constitutionality of state laws, like Florida's, banning same-sex marriages (either by state constitution or statute). Most notably, last year, the United States Supreme Court repealed Section 3 of the Federal "Defense of Marriage Act" (DOMA) in United States v. Windsor, 133 S. Ct. 2675 (2013). Section 3 provided that marriage only meant the legal union between a man and a woman as husband and wife. Section 2 of DOMA, which provides that the states are not required to give effect to same-sex marriages performed and recognized in another jurisdiction, remained untouched by the United States Supreme Court.

As is the case in other states, developments in Florida on this issue have been fast and numerous. Since July, at least five state courts have held that Florida's ban on same-sex marriage violates the United States Constitution. In addition, the United States District Court for the Northern District of Florida also ruled, in Brenner v. Scott, that Florida's ban on same-sex marriage violates the United States Constitution.

The Brenner ruling, which was combined with Grimsley v. Scott for pretrial purposes, concerns a total of 22 plaintiffs, including same-sex spouses lawfully married in other jurisdictions, the surviving spouse of a same-sex marriage lawfully performed in another jurisdiction, two individuals of the same sex wishing to

be married in Florida, and an organization asserting the rights of its members who legally entered into same-sex marriages in other jurisdictions. Because of Florida's ban on same-sex marriage, the plaintiffs have been unable to obtain equal opportunity retirement options, get health insurance under a spouse's insurance plan, obtain marriage licenses, or qualify for certain state support. These plaintiffs challenged both statutes discussed above as well as the constitutional provision.

The Brenner court held that the Florida ban on same-sex marriage violates the Fourteenth Amendment of the United States Constitution. The court held that the right to marry is a fundamental right, regardless of sexual orientation, and that right cannot be overridden except to the extent that the law is narrowly tailored to serve a compelling state interest. The court found none of the proffered rationales persuasive, particularly noting that the capacity to procreate is a particularly poor justification as Florida has never conditioned marriage on the ability or desire to procreate, and went on to find that the same-sex marriage ban was clearly the product of moral disapproval and any other rationale was simply pretext. As moral disapproval cannot sustain such a law, the court found that the Florida ban on same-sex marriage violates the Due Process and Equal Protection Clauses. However, the court stayed key parts of its order until 91 days after stays issued in cases stemming from Virginia, Utah and Oklahoma were denied or lifted.

Florida state courts examining a host of different issues conducted a similar analysis and came to the same conclusion. In re Estate of Frank C. Bangor (Aug. 15, 2014 – Palm Beach County) concerned a surviving, nonresident, same-sex spouse seeking appointment as personal representative of his deceased spouse's estate. In re the Marriage of Heather Brassner (Aug. 4, 2014 – Broward County) concerned the dissolution of a Vermont same-sex civil union. Pareto v. Ruvin (July 25, 2014 – Miami-Dade County) and Huntsman v. Heavlin (July 17, 2014 – Monroe County) concerned same-sex couples denied marriage licenses. In addition to the analysis connected to marriage as a fundamental right, all courts at issue held that the laws at issue failed to pass even the most lenient standard of review under the Equal Protection Clause, rational basis review, which would require only that the subject law have a rational relationship to a legitimate government purpose.

On Oct. 6, the United States Supreme Court declined to hear seven cases concerning same-sex marriage. The cases (three from Virginia, one from each of Wisconsin, Utah, Indiana, and Oklahoma) stemmed from Federal District Court decisions in which state bans on same-sex marriage were found to violate the Constitution of the United States. These cases were appealed to one of three different United States Courts of Appeal (the Fourth, Seventh and Tenth Circuits). In all seven cases, the Courts of Appeal upheld the lower court decision. Among these cases are the three cases cited by the Brenner court in connection with the stay issued by that court.

By declining to hear the cases, the United States Supreme Court allowed the rulings of the circuit and district courts overturning same-sex marriage bans in those five states to stand. This means that the Courts of Appeal rulings stand, but that the rulings are now persuasive authority for all of the states in the Fourth, Seventh and Tenth Circuits. If there are other states within those circuits that have state law bans on same-sex marriage, then it is likely that such bans will also be found to violate the United States Constitution.

In a surprise move, on Oct. 8, Supreme Court Justice Anthony Kennedy issued a one-page order staying the ruling of the Ninth Circuit United States Court of Appeal, which voided same-sex marriage bans in Idaho and Nevada. A second order was issued later that day clarifying that the stay did not apply to Nevada and the stay for Idaho was denied on Oct. 10. On Oct. 17, the United States Supreme Court denied Alaska's request for a stay halting same-sex marriages in that state.

Huntsman v. Heavlin and Pareto v. Ruvin have been combined in the Third District Court of Appeal. In the wake of United States Supreme Court inaction, on Oct. 13, Florida Attorney General Pam Bondi filed a request in the consolidated case for pass-through certification to the Florida Supreme Court to settle the question of whether Florida's ban on same-sex marriages is constitutional.

The Brenner ruling is currently on appeal to the Court of Appeal for the Eleventh Circuit (which encompasses Florida, Georgia and Alabama). Although the action (or inaction) by the United States Supreme Court spurred Bondi's office to act, it does not directly impact Florida and other states like it. If the Court of Appeal for the Eleventh Circuit upholds the Brenner v. Scott decision, then Florida's ban on same-sex marriage would be in violation of the United States Constitution unless and until the United States Supreme Court holds otherwise. However, the weight of recent case law indicates that Florida's ban would be found to violate the United States Constitution. Conversely, if the Court of Appeal for the Eleventh Circuit overturned the ruling in Brenner v. Scott, then Florida's ban would remain in place. If that were to happen, then it seems likely that the United States Supreme Court would hear the case, as such a ruling would make the Eleventh Circuit the only Court of Appeal to uphold such a ban.

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