

Challenging Prop 8 :: Behind the federal lawsuit

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Like it or not, the federal courts will step into the marriage debate next month.

Chief Judge Vaughn R. Walker of the U.S. District Court's Northern District of California will be asked for a preliminary injunction on July 2 to suspend the recently upheld California ban on marriage for same-sex couples and once again allow gays and lesbians to tie the knot as the case will almost certainly work its way to the U.S. Supreme Court.

Many marriage activists cringed at the idea of a federal lawsuit filed immediately after the California Supreme Court upheld Proposition 8 late last month, but there appears to be growing support.

The injunction is being sought by American Foundation for Equal Rights, a hastily and recently formed non-profit organization created initially for the federal challenge. The legal arguments are being made by two high profile attorneys who represented the face of the liberal and conservative divide when they faced off in *Gore vs. Bush* following the contested 2000 presidential election. Theodore Olson, who served as the Solicitor General in the Bush administration, and David Boies, who represented Al Gore before the Supreme Court, have said they believe in marriage for gays and lesbians.

Chad Griffin, actor Rob Reiner, photographer Michele Singer Reiner, "Milk" producer Bruce Cohen and screenwriter Dustin Lance Black and Griffin's business partner, Kristina Schake, are the who's who of California notables who are on AFER board.

"For a gay Democrat, it was a very bittersweet election night," Griffin said as he described last November's election that elevated Barack Obama to the White House but saw the passage of three anti-gay bills in Arkansas, California and Florida. "But I rebounded and started talking to friends and colleague in the state and around the country about what to do next."

He had been aware of the pros and cons that had been considered for filing a federal challenge to Prop 8, but Griffin concluded the time was right. Noting the country remains almost evenly divided on marriage for gays and lesbians and that only 17 percent of the country supported interracial marriage when the federal courts struck down state laws barring them in 1967, he said, "I'm not one who believes one should wait for public opinion in order to demand and insist on full federal rights under the law. The 14th Amendment (due process and equal protection) is just as meaningful to me as it is to my father or my mother or my sister."

Griffin then had to come up with the right attorney for the fight.

"Someone suggested that Ted Olsen might surprise us in being both professionally and personally on our side of the issue," he said. "He was someone I loved to hate for some time and blamed for my eight tortuous years of George W. Bush. When I heard that, I saw this as a turning point. It would be a tremendous coup for our movement, as it was when Ronald Reagan came out against the Briggs initiative, if it were true. He's a prominent Republican and a prominent Solicitor General. If he both professionally and personally believed the ban was in violation of our Constitution, I saw it as being a real game-changing moment."

They spoke twice on the phone before a secret meeting in Washington, D.C. Olsen suggested his former nemesis Boies, for whom he has developed a healthy respect.

Almost immediately after the challenge was announced, lobbyists within the movement expressed alarm the challenge could set back and even distract from ongoing efforts to return to the ballot box. More conciliatory messages are being expressed since then.

"We very much want the lawsuit to be successful," Geoff Kors of Equality California told *EDGE*. "No doubt Prop 8 violates equal protection and due process. But it was also clear the state court should not have upheld it. That said, Prop 8 is such a unique circumstance."

Plans for a 2010 ballot initiative to restore marriage to same-sex couples continue to proceed. There are fears, however, that if that succeeded, it could all be undone within two years by another initiative, and then restored, and then undone yet again.

"In theory, that could happen," Joe Grodin, law professor at Hastings College of Law said. "It depends on what happens. If they are able to win by a large majority I don't think it would happen. But I don't think there is any way to insulate it from any ballot propositions."

He added he supports the federal suit.

"The federal case is very interesting," Grodin said. "The arguments are good. They deserve to win. Whether they will is uncertain."

Boies and Olsen must prove there is strong evidence the challenge will be successful and no great damage would be done by suspending the law.

"[Proposition] 8 can be sustained only if the State can prove that it is narrowly tailored to serve a compelling governmental interest," they wrote. But none of the purported state interests typically offered in defense of prohibitions on marriage by individuals of the same sex – preservation of tradition, expression of moral condemnation, or promotion of procreation – is a remotely legitimate basis for denying gay and lesbian individuals their constitutionally protected 'freedom of personal choice in matters of marriage' and for discriminating against them on arbitrary and invidious grounds. And, even if those interests were legitimate, Prop. 8 is not adequately tailored to further those interests because it is vastly under-inclusive."

The lawyers further argued their case for the court to act.

"Indeed, far from burdening the rights of third parties, a preliminary injunction would promote the public interest because 'all citizens have a stake in upholding the Constitution' and have 'concerns [that] are implicated when a constitutional right has been violated,'" Boies and Olsen wrote. "A preliminary injunction vindicating gay and lesbian individuals'

fundamental constitutional rights would advance the shared interest of all citizens in enforcing the Constitution's guarantees and reinforce this Nation's basic commitment... to foster the dignity and well-being of all persons within its borders."

Griffin remains optimistic.

"We all have the same goal," he said. "Now that this case is filed, I'm confident we'll all work together."

A copy of the suit and the request for the preliminary injunction are available at www.equalrightsfoundation.org. A video of a discussion of the case by Boies with Charlie Rose, in which he notes that the Supreme Court has already ruled against states that attempted to deny marriage rights to individuals who were in prison or had fallen behind in child support, is available [here](#).