

# On gay marriage, Supreme Court ponders not 'if' but 'how'

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WASHINGTON (RNS) Isn't it remarkable, attorney Ted Olson said after arguing for same-sex marriage before the Supreme Court on Tuesday (March 26), that the other side wasn't really arguing against it?

"No one really offered a defense," he said of his opponents' bid to uphold Proposition 8, the 2008 California referendum that effectively ended gay marriage in the state by defining marriage as between a man and a woman.

The question inside the courtroom was not so much can there be gay marriage, but "how do you establish marriage equality?" said David Boies, another attorney for Prop 8 opponents.

Indeed, the lawyer trying to prop up Prop. 8, which was struck down by federal trial and appeals courts, spent barely any time talking about the virtues of traditional man-woman marriage or the hazards of same-sex marriage.

And that, for supporters of gay marriage, shows just how far this debate has come in the U.S.: It's no longer "if" it will be accepted and legal, but "how" and "when."

Making the case for Prop. 8 to the court, lead attorney Charles Cooper referred to traditional man-woman marriage as a "bedrock social institution." Gay marriage, he argued, is an ongoing "experiment," and asked the Supreme Court to refrain from pre-empting the outcome.

When Justice Anthony Kennedy suggested that Prop. 8 could do immediate harm to the 40,000 California children whose parents are in gay unions, Cooper didn't talk about traditional families or social institutions. Instead, he responded: "Your Honor, there simply is no data."

For Olson and other supporters of gay marriage, such declarations are heartening admissions from the other side that the old arguments -- that such unions are inherently sinful and harmful to society -- aren't going to fly in court.

Rather, society is going to make a decision on this question, state by state. And that society, they note, is increasingly fine with gay matrimony. A recent Washington Post-ABC News poll found that 58 percent of Americans -- and 80 percent of adults under 30 -- approve of gay marriage.

Cooper asked the justices to sympathize with a hypothetical woman who voted "yes" on Prop. 8 in 2008 because she thought "it better for California to hit the pause button and await additional information from the jurisdictions where this information is still maturing."

Yet a "pause" is not what the thousands of activists had in mind as they rallied on either side of the marriage debate outside the high court. Both sides want an answer, and soon.

For Pietro and Gabriela Meli, who brought their three children from Virginia to a "March for Marriage" as the justices heard the case, same-gender marriage is simply wrong and should never be protected by law.

"We believe marriage is a holy institution, established by God," Gabriela Meli said. "It's not as simple as 'I like this person, so I'm going to marry this person,'" her husband said.

Earlier in the morning, an interfaith coalition representing more than 15 different religious traditions held a prayer service in support of gay marriage at a progressive Lutheran church blocks from the court.

"To have them all come together and (support gay marriage) -- that's pretty cool," said Kim Patton, a newly engaged lesbian who attended a "United For Marriage" rally after the service. She and her fiancée said it had been an emotional day.

Inside the courtroom, a more dispassionate discussion touched on the various issues the justices will ponder as they decide what to do about Prop. 8 and a sister case on the federal Defense of Marriage Act to be heard by the Supreme Court Wednesday.

Their options to strike down Prop. 8 are particularly plentiful:

- \* The court could rule that those who argued against Prop. 8 have no legal "standing" at the Supreme Court. California officials refused to defend Prop. 8, but that doesn't mean that any nongovernmental supporters can step in. Such a ruling would leave the lower court decisions in place, and Prop. 8 would be scrapped -- a victory for gay rights supporters.

- \* The ultimate victory for proponents of gay marriage would be a wholesale decision that declares same-sex marriage bans unconstitutional, the outcome Olson argued for and one that many court watchers consider unlikely.

- \* A less dramatic victory for gay couples would result from a decision that preserves same-gender marriage in California and other states that afford gay couples considerable rights.

- \* Or, the court could decide to strike down the ban in California only.

The other side wins if the court upholds the ban.

Cooper kept his remarks short after the court adjourned, and wouldn't venture as to how the justices might decide. Olson said he had "no idea" of the outcome.

But in some sense, he seemed to imply, his side had already won.