October 27, 2009

SIDEBAR

In Battle Over Gay Marriage, Timing May Be Key

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WASHINGTON

In a San Francisco courtroom two weeks ago, a prominent lawyer opposed to same-sex marriage made a concession that could mark a turning point in the legal wars over the purpose and meaning of marriage.

The lawyer, Charles J. Cooper, has studied the matter deeply, and his erudite briefs are steeped in history. He cannot have been blindsided by the question Judge Vaughn R. Walker asked him: What would be the harm of permitting gay men and lesbians to marry?

“Your honor, my answer is: I don’t know,” Mr. Cooper said. “I don’t know.”

A couple of hours later, Judge Walker denied Mr. Cooper’s motion to dismiss a lawsuit seeking to establish a constitutional right to same-sex marriage. The concession and the ruling that followed it have transformed a federal lawsuit that had been viewed with suspicion by many gay rights advocates into something with the scent of promise.

The suit, filed in May by Theodore B. Olson and David Boies, made the bold claim that California’s voters violated the federal Constitution last year when they overrode a decision of the state’s Supreme Court allowing same-sex marriages.

The suit was, gay rights advocates said then, the wrong claim in the wrong court in the wrong state at the wrong time. There was wariness about Mr. Olson, a former solicitor general in the Bush administration, and there was frustration about what some viewed as his meddling in a carefully plotted and methodical strategy focused on state-by-state litigation and lobbying.

Those objections are waning. The ship has sailed, said Kenji Yoshino, a law professor at New York University, and gay rights advocates “need to focus on getting it to the right destination.” He added that Judge Walker’s refusal to dismiss the case “was a major victory for Olson and Boies.”

In the courtroom, Mr. Cooper’s arguments seemed to fall of their own weight. The government should be allowed to favor opposite-sex marriages, Mr. Cooper said, in order “to channel naturally procreative sexual activity between men and women into stable, enduring unions.”

Judge Walker appeared puzzled. “The last marriage that I performed,” the judge said, “involved a groom who was 95, and the bride was 83. I did not demand that they prove that they intended to engage in procreative activity. Now, was I missing something?”

Mr. Cooper said no.

“And I might say it was a very happy relationship,” Judge Walker said.

“I rejoice to hear that,” Mr. Cooper responded, returning to his theme that only procreation matters.

Later in the argument, Mr. Olson added his own observation. “My mother was married three years ago,” he said. “And she, at the time, was 87 and married someone who was the same age.”

Still, it is one thing to persuade Judge Walker. The ultimate destination of Mr. Olson’s suit is the Supreme Court, and it is hardly clear that he will be able to convince five justices to see things his way. Andrew Koppelman, a law professor at Northwestern and the author of “Same Sex, Different States: When Same-Sex Marriages Cross State Lines,” said Mr. Olson would have trouble attracting votes from the current justices. Asked how many justices Mr. Olson could count on, Professor Koppelman said, “I have trouble getting to one.”

It is not obvious that even the more liberal justices will want a piece of this fight. Justice Ruth Bader Ginsburg, for instance, has long said that Roe v. Wade, the 1973 decision that identified a constitutional right to abortion, went too far too fast and might have been counterproductive.

“The court bit off more than it could chew,” Justice Ginsburg said of the case in remarks at Princeton last year.

In a new book called “The Will of the People,” Barry Friedman, a law professor at New York University, argued that the Supreme Court was quite responsive to public opinion in constitutional cases.

When the court found no constitutional problem with a Georgia law that made homosexual sex a crime in Bowers v. Hardwick in 1986, two-thirds of Americans supported such laws. By 2003, when the court overruled Bowers and struck down a similar law in Lawrence v. Texas, public support had dropped to about a third.

This was, Professor Friedman wrote, “a screamingly evident case of the court’s running right along the tracks of public opinion.”

Mr. Olson’s problem, then, is that he may reach the Supreme Court too soon. Public support for same-sex marriage is gaining ground, particularly among younger people. But a majority of Americans remains opposed to the practice.

At the argument, Judge Walker seemed to share this concern. “Aren’t you just getting ahead of yourself by asserting this claim under the federal constitutional provisions?” the judge asked.

Mr. Olson responded by comparing his case to Loving v. Virginia, the 1967 Supreme Court decision that held bans on interracial marriage to be unconstitutional. But 34 states permitted interracial marriage when Loving was decided. Only six states permit same-sex marriages.

The Loving decision, moreover, came almost two decades after the California Supreme Court struck down a state law banning interracial marriage in 1948 in Perez v. Sharp. The California Supreme Court’s same-sex

marriage decision is a little more than a year old, and it has been repudiated by the state's voters.

At the argument in San Francisco, the two sides did agree on one point. "The name 'marriage' means a lot," Mr. Cooper said. "It does have, by virtue of its ancient and venerable heritage, an imprimatur that is special."

Judge Walker has scheduled a trial in the case for January. He wants to hear about the history and purpose of marriage and the consequences of allowing same-sex couples to marry. And he has hinted that he may allow the proceedings to be televised.

"We should buckle our seatbelts," Professor Yoshino said. "A comprehensive vetting of the empirical issues by a judicial tribunal is welcome and long overdue. Walker's trial bids fair to be a trial in an almost scientific sense of the word."