



Federal judge overturns Wisconsin's gay marriage ban

By [Jason Stein](#), [Patrick Marley](#) and [Dana Ferguson](#) of the Journal Sentinel
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Madison — A federal judge in Madison on Friday overturned Wisconsin's gay marriage ban, striking down an amendment to the state constitution approved overwhelmingly by voters in 2006 and prompting an emergency action by the state to halt the scores of weddings that began in the state's two largest cities.

In the [88-page decision](#), U.S. District Judge Barbara Crabb ruled that the prohibition on same-sex vows in the state violated the rights of gay and lesbian couples to equal protection under the federal constitution and fair treatment under the law.

She did not stay her ruling but also did not immediately issue an order blocking the enforcement of the ban, sparking a heated and hasty debate on whether the ruling meant that couples could immediately marry in the courthouses of Wisconsin.

Instead, Crabb asked the gay couples who had sued over the ban to say by June 16 exactly what they wanted done to enforce her ruling, with a further wait of one to two weeks for both sides in the lawsuit to file responses. Crabb, who was appointed by President Jimmy Carter, said she would then address whether to stay her decision while the matter is on appeal.

"Quite simply, this case is about liberty and equality, the two cornerstones of the rights protected by the United States Constitution," Crabb wrote in her decision.

Attorney General J.B. Van Hollen, a Republican, said that "current law remains in force" in Wisconsin and took immediate action to try to halt the surge of gay couples seeking to wed, [filing an emergency request for a stay](#) from Crabb. Van Hollen could also file a similar motion before the 7th Circuit Court of Appeals in Chicago.

"The United States Supreme Court, after a referral from Justice (Sonia) Sotomayor, stayed a lower court's decision striking down Utah's ban on same-sex marriage. There is no reason to believe the Supreme Court would treat Wisconsin's ban any differently," [Van Hollen said in a statement](#).

Licenses issued quickly

Dane County Clerk Scott McDonell, a Democrat, began issuing marriage licenses at 5 p.m. Friday as gay couples were married there throughout the night. He said state Department of Justice officials advised him not to issue the licenses but McDonell moved forward despite that.

"They don't get to tell me that," he said of DOJ. "A judge gets to....If someone comes to me, how could I say no to them?"

Milwaukee County Clerk Joe Czarnecki, also a Democrat, issued marriage licenses through Friday night and planned to do so again on Saturday.

"Personally, I'm pleased she struck the ban down," he said of Crabb. "It makes us proud to be in Wisconsin and a state that's standing up for marriage equality."

Milwaukee County Executive Chris Abele said he would personally pay for any overtime costs for keeping the courthouse open. Cheers erupted at PrideFest in Milwaukee as Abele announced the extended hours to the crowds.

For PrideFest attendee Perry Kaluzny, 24, of Milwaukee, the overturning of Wisconsin's gay marriage ban was liberating.

"This is a wonderful thing, and hopefully this will mean marriage one day for me," he said.

Within hours of Crabb's ruling, weddings were taking place in the Milwaukee courthouse and on the street outside the Dane County clerk's office as crowds cheered and passing cars honked their horns.

Legal questions

Carl Tobias, a law professor at the University of Richmond who has been tracking similar cases nationally, said that almost all of the decisions striking down marriage bans in other states have been stayed by the issuing judge or an appellate court.

"So my guess is the same thing could happen in this case. The question is the timing of this," Tobias said.

Tobias praised Crabb's overall decision but said that it didn't make clear whether gay marriages could take place immediately, leaving both sides with "plenty of arguments they can make."

The likelihood of a stay by a higher court cast doubt on the legal status of the marriages on Friday evening, he said.

"What's clear is they're in limbo (for now). What's not clear is what the courts will do ultimately," Tobias said. "It's a mess."

Tamara Packard, a Madison attorney who supports the right to marry but was not involved in the case, said she read the decision to mean same-sex couples could immediately marry.

"I think the clerk should comply with the declaration of unconstitutionality — we have a constitutional right," Packard said. "I think (Crabb has) declared what the law is and the clerks are required to follow the law. Whether there's an order saying you must issue, I don't think that's very relevant."

Larry Dupuis, legal director of the ACLU of Wisconsin and attorney for the four same-sex couples who are the plaintiffs in the case, said Crabb's decision was different from any of the others around the country. That's because she struck down Wisconsin's ban against same-sex marriage as unconstitutional but she did not immediately issue an order instructing county and state officials on what to do about that.

That left county clerks to decide that question for themselves.

On Monday, the ACLU plans to present Crabb with a proposed order that would require state officials to stop enforcing the marriage ban, Dupuis said. If she signs it, she also would have the option of granting a stay, meaning same-sex marriages would end, at least temporarily, until a higher court reviews her decision.

In that event, Dupuis said he hopes Van Hollen would not "be so small" as to refuse to recognize same-sex couples who have married in the interim.

A similar situation occurred in Utah last winter, when a federal court struck down the marriage ban there. For 17 days in December and January, about 1,300 same-sex couples exchanged vows. The U.S. Supreme Court put the order allowing the unions on hold until after the state's appeal was resolved.

A different federal judge ordered the state of Utah to recognize the 1,300 marriages in the meantime. The state has appealed that decision, as well.

One of the couples involved in Wisconsin's case, [Garth Wangemann and Roy Badger](#), celebrated the victory Friday night, declaring themselves "speechless" with pride. The couple followed ACLU advice and did not get married Friday, saying that three more days of waiting wouldn't hurt.

"This way we don't feel like we'll have to rush through," Badger said.

In her decision, Crabb said the state failed to show that the ban is "substantially related" to an important state goal. She questioned whether the state could even count as important public interests its stated goals of tradition, procreation and avoiding a "slippery slope" toward polygamy or incest.

She said that many other policies later found unconstitutional, such as segregation, were longstanding and popular among a majority of a state's voters.

She closed by quoting former Supreme Court Justice Benjamin Cardozo: "Justice is not to be taken by storm, but must be wooed by slow advances."

Sen. Glenn Grothman (R-Campbellsport), who is running for the U.S. House in the 6th Congressional District, initially said Friday that he hoped that some county clerks would refuse to issue marriage licenses to gay couples despite the ruling. But he pulled back from that after a few minutes' reflection, saying that would be too radical a response.

"It's very sad that something approved by voters and represented as the law in every state for the first 200 years of the republic is all of a sudden declared unconstitutional," Grothman said. "...This will further the complete lack of respect that the public has for the judiciary."

Former Supreme Court Justice Janine Geske said she believes this is the first time a federal judge has struck down a Wisconsin constitutional amendment.

"The thing is, we don't have that many new constitutional amendments," said Geske, who spent five years on the state Supreme Court and is now a professor at the Marquette University Law School.

Marquette University Law School professor Alan R. Madry noted that the U.S. Constitution was the highest law in the nation and trumped anything in the state's statute or charter.

"It is breathtaking that the federal courts would be moving...so rapidly. That would not have happened

15 or 20 years ago," Madry wrote in an email. "The constitution is obviously alive and growing."

Tobias, who believes there is a constitutional right for same-sex couples to marry, called Crabb's decision the "most thorough and probably most careful" treatment of the issue and one that other judges would look to as they decide similar cases.

A spokeswoman for Gov. Scott Walker, a Republican, did not comment on the substance of the ruling beyond backing Van Hollen's decision to appeal it.

"It is correct for the attorney general, on this or any other issue, to defend the constitution of the state of Wisconsin, especially in a case where the people voted to amend it," Walker said.

Walker's Democratic opponent in the governor's race, Mary Burke, was enthusiastic about the decision.

"Every loving couple should have the freedom to marry whomever they choose, and the fact that this freedom is now available in Wisconsin is something we all can and should be proud of," Burke said in a statement.

Critics denounce ruling

Julaine Appling, executive director of Wisconsin Family Action, said the issue of same-sex marriage will ultimately be decided by the U.S. Supreme Court. Appling's group helped lead the effort to put Wisconsin's ban in place and filed a friend-of-the-court brief defending it in the case before Crabb.

"We are disappointed but not surprised," she said. "I'm mostly disappointed for the people of this state who spoke loudly and clearly in 2006. What a travesty of justice to have their vote overridden by the stroke of an appointed federal judge's pen."

She said supporters of gay marriage should have to do what her group did — persuade lawmakers to back a change to the state constitution in two consecutive legislative sessions and then have voters approve it in a statewide referendum.

"They took the chicken's way out," she said of the plaintiffs. "They don't want a popular vote."

Milwaukee Catholic Archbishop Jerome ListECKI called it "disturbing" that a federal judge would overrule the "manifest will of the people."

"The decision does not change Catholic teaching that marriage is between one man and one woman," ListECKI said.

The Rev. Jeff Barrow, bishop of the 91,000-member Greater Milwaukee Synod of the Lutheran Church in America, said he was pleased by the ruling. However, he expressed some skepticism out of concern that it could be appealed, and added "laws don't change people's minds."

"I'm happy for the gay couples who have been faithful and unable to access all the benefits that families should be able to access," said Barrow, whose denomination allows same-sex blessings.

Nationwide, same-sex couples have the right to marry in 19 states and the District of Columbia. Judges in eight — now including Wisconsin — of the remaining 31 states have issued rulings striking down same-sex marriage bans, with those rulings stayed as they work their way through appellate courts.

In Wisconsin, voters in 2006 resoundingly approved the same-sex marriage amendment, 59% to 41%. Every county in the state except Dane voted for it.

But the most recent Marquette Law School poll, released May 21, found [55% of registered voters statewide now favor allowing gay marriage](#), while 37% oppose it and 6% say they do not know.

Last month, Van Hollen acknowledged he would not be surprised to lose the case. He had asked Crabb to immediately block her own decision if she struck down the ban. Normally, lawyers wait until a judge rules before asking for a stay.

Daniel Bice, Gina Barton, Bruce Vielmetti, Georgia Pabst, Megan Trimble and Annysa Johnson of the Journal Sentinel staff in Milwaukee contributed to this report.

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