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With Respect for Marriage Act about to become law, same-sex South Florida couples relieved but not sanguine

Susan Walsh/Associated Press

FILE — In this Oct. 8, 2019, file photo, protesters gather outside the Supreme Court in Washington where the Supreme Court is hearing arguments in the first case of LGBT rights since the retirement of Supreme Court Justice Anthony Kennedy. As vice president in 2012, Joe Biden endeared himself to many LGBTQ Americans by endorsing same-sex marriage even before his boss, President Barack Obama. Now, as president-elect, Biden is making sweeping promises to LGBTQ activists, proposing to carry out virtually every major proposal on their wish lists. (AP Photo/Susan Walsh, File)

By **AP MCCLATCHY** | wordpress@medianewsgroup.com |

PUBLISHED: December 4, 2022 at 8:36 a.m. | UPDATED: December 4, 2022 at 9:05 a.m.

By Anthony Man | South Florida Sun-Sentinel

FORT LAUDERDALE, Fla. — The Respect for Marriage Act, which is on the verge of becoming federal law, is alleviating some of the concern same-sex couples have felt in recent months. But, legal experts and LGBTQ advocates warn, it's not a panacea and it isn't time to pop the champagne corks.

"I'm sort of divided. There's certainly a part of me that sees this as a win," said Todd Delmay, whose marriage to husband, Jeff, was one of the first two same-sex marriages legally performed in Florida. "I do see this as a positive step. I don't think we should celebrate too much."

The legislation would put protections for same-sex and interracial marriages in federal law, something that's been hailed as a major achievement by many Democratic and some Republican elected officials — and vehemently opposed by others.

The measure passed the Senate on Nov. 29. The House, where an earlier version passed in July, is expected to approve the latest version on Tuesday. After which, President Joe Biden said in a statement, "I will promptly and proudly sign it into law."

Behind the law

The proposed law is a response to concerns that erupted in June when the U.S. Supreme Court overturned the 1973 *Roe v. Wade* decision that established a constitutional right for pregnant women to choose to have abortions.

As the Supreme Court overturned what had been in place for close to five decades, the senior Supreme Court Justice, Clarence Thomas, wrote a concurring opinion taking aim at three other rights the court has said are protected by the Constitution: access to contraception, for people to legally engage in same-sex consensual relations and for same-sex couples to marry.

Thomas wrote that the court "should reconsider" decisions in all three areas *Obergefell v. Hodges*, the 2015 case in which the Supreme Court said the right to same-sex marriage is protected by the Constitution, invalidating state bans on same-sex marriage.

Florida's same-sex marriage ban — which is still in the state Constitution — had been overturned by state and federal trial courts. Until *Roe* was overturned, the U.S. Supreme Court had — seemingly — settled the issue, permanently, in favor of same-sex marriage.

Immediate reaction

The reaction to the Dobbs v. Jackson decision overturning Roe — fueled by Thomas' comments — was immediate and widespread.

"I have had many people freaked out," said Elizabeth Schwartz, a South Florida lawyer who was part of the legal team that litigated one of the original challenges to Florida's ban on same-sex marriage.

Sharing those concerns were Joanne Stiger and Delmay, of Hollywood, who married his husband on Jan. 5, 2015.

"There was an immediate chill," Delmay said. "When Roe was overturned, it was within minutes that I was already hearing people saying, 'They're coming after same-sex marriage next.' That was an immediate thought."

The majority opinion in overturning Roe included a statement that the decision applied only to abortion. But that didn't allay concerns among LGBTQ+ people and their allies about a possible future threat to marriage rights. "He [Thomas] writes it and just shows his cards. And clearly they have the votes. They have the mechanism now," Delmay said.

The three justices nominated by former President Donald Trump give the Supreme Court a conservative 6-3 majority to advance conservative causes if they choose.

Stiger and Melissa Keller were the first same-sex couple married in Broward County, just after midnight on Jan. 6, 2015, when a federal district court judge invalidated Florida's ban on same-sex marriage about six months before the Supreme Court ruled in Obergefell. Now residents of Miami-Dade County, Stiger and Keller lived in Pembroke Pines at the time.

After Roe was overturned and Thomas issued the concurring opinion they "started making plans to possibly leave the United States if they didn't give us protection," Stiger said.

"People were very worried," said Stephen Gaskill, president of the Florida LGBTQ+ Democratic Caucus. "The overturning of Roe, a 50-year precedent, by Supreme Court justices who swore in their confirmation testimonies that they would not overturn Roe, just opened the floodgates of concern because it means everything is on the table. Clearly, the precedents that they testified that they would uphold didn't really matter anymore."

New law

The Respect for Marriage Act also requires recognition of legally performed same-sex marriages and adds legal protections for interracial marriages. In 1967, the Supreme Court ruled in the *Loving v. Virginia* case that laws banning interracial marriage violated the Constitution.

Schwartz said the law would also make clear that the federal government has to recognize all marriages and treat them the same, including for benefits such as Social Security.

States would have to recognize marriages from other states. So a couple married in New York or Massachusetts and living in Florida would be OK.

She said couples legally issued marriage licenses before any potential ruling overturning *Obergefell* would be protected. So a Florida couple married in Florida and living in the state should be OK even if the Supreme Court reversed itself on the issue.

"Anyone who is already married, their marriages will remain intact. The Respect for Marriage Act will secure the marriages of all same-sex and interracial couples who have already gotten married," Schwartz said.

Tobias Barrington Wolff, a law professor at the University of Pennsylvania and widely recognized authority on same-sex marriage, via email said that's not guaranteed.

"When it comes to couples in Florida who are already married under Florida law, the situation would be more uncertain. The Respect for Marriage Act would not give them any protection in Florida. But couples who are already married in Florida might be able to argue that their marriage became a vested right under Florida law.

"In other words, they could argue that even if the Florida constitutional provision and statute that prohibit couples from marrying were to snap back into effect, they should be interpreted not to apply to couples who are already married because of the special hardship it would cause to deprive people of a status and rights that they were already lawfully enjoying," he said.

Uncertainty

The big shortcoming of the Defense of Marriage Act, advocates for same-sex marriage said, is that the law wouldn't protect new marriages that take place after any Supreme Court ruling overturning *Obergefell* in states where same-sex marriage wasn't legal or where a state decides to ban it.

"If the Supreme Court were to overrule *Obergefell v. Hodges*, couples living in states like Florida would no longer be able to get married," Wolff said

Schwartz said she's also concerned that some conservatives might try to utilize religious freedom provisions to say, "Well we're not going to issue your marriage licenses here," adding that, "It's only a matter of time until one of those homophobes takes a position like that. And then we'll see how that looks on appeal."

Delmay, who unsuccessfully sought the Democratic nomination for a Broward seat in the state House of Representatives this year, said he has no doubt if Obergefell is overturned that Florida, given the conservative leanings of the Republicans who control state government, would "run with glee the next bill they could to make sure that Florida is no longer a state that is approving same-sex marriages."

Stiger echoed that sentiment, pointing to the political direction of the Republicans who control state government and who passed the controversial law — officially known as the "Parental Rights in Education" law and as "don't say gay" law to critics — that limits public school discussion of sexual orientation or gender identity.

In Delmay's view, the federal legislation "doesn't go far enough to establish once and for all in writing that same-sex marriage is a right."

Stiger agreed, adding that she's happy the legislation is moving forward. "I'm somewhat disappointed that the bill did not give us everything that Obergefell did," she said. "I feel disappointed in the fact that it doesn't give everybody total protection. . . . When and if Obergefell does fall, we will be second-class citizens again."

Opposition

Even with its limitations, it goes too far for some.

U.S. Sens. Marco Rubio and Rick Scott, both Florida Republicans, voted no.

In the years since he was first elected to the Senate in 2010, Rubio has been increasingly outspoken about his traditional, conservative views on social issues such as abortion and same-sex marriage. When the idea of the Respect for Marriage Act first came up in the summer, Rubio said there was no threat to same-sex marriage and considering the legislation was "a stupid waste of time."

Days later, he emphasized that view. "I'm gonna focus on the real problems. I'm not gonna focus on the agenda that [is] dictated by a bunch of affluent, elite liberals, and a bunch of Marxist misfits who sadly today control the agenda of the modern Democratic Party," Rubio said in a video posted to social media.

When the Senate took up the measure in November, he said the exemption for faith-based nonprofits didn't do enough to ensure that some people and organizations with religious objections to same-sex marriage won't be forced to violate their beliefs, suggesting, for example, that, "Nuns running orphanages will find themselves in court if it becomes law."

Before the final version of the legislation came to the Senate, Scott said in a statement that "I proudly support the gay community in Florida and across the nation and will aggressively fight any attempt to take away the ability for same-sex couples to marry and live their dreams in our great country. Unfortunately, the bill under consideration by the U.S. Senate does not adequately protect the religious liberties of all Americans, as guaranteed by the Constitution."

Archbishop Thomas Wenski, the spiritual leader of Roman Catholics in Broward and Miami-Dade counties, devoted most of his homily at the annual Red Mass for people in the legal profession on Thursday, to detailing his objections to the Respect for Marriage Act.

Wenski called it a "misleading labeled piece of legislation" that is "both unnecessary and harmful."

He said it would not "sufficiently protect religious freedom" and said "the Respect for Marriage Act seeks to shunt our idea of marriage aside."

"A number of religious groups and senators are asserting that the amended version passed by the Senate will sufficiently protect religious freedom. We bishops disagree," Wenski said.

Besides Catholic bishops, leaders of the Southern Baptist Convention opposed the legislation. But the Church of Jesus Christ of Latter-day Saints supported the legislation.

Change in opinion

There's been a rapid change in public attitudes toward same-sex marriage.

Gallup reported in June that its 2022 Values and Beliefs poll showed 71% of Americans believe same-sex marriages should be legally recognized as valid. Ten years earlier, support was at 53%; in 1999, it was 35%.

The Senate passed the Respect for Marriage Act 61-36 with 49 Democrats and 12 Republicans voting "yes," 36 Republicans voting "no," and three senators not voting.

The July version passed the House 267 to 157. All House Democrats supported it. So did 47 Republican members of the House, about a quarter of the party's representatives, with 157 voting no.

When the earlier version passed the House in July, the four southeast Florida Republicans — U.S. Reps. Mario Diaz-Balart, Carlos Gimenez, Brian Mast and Maria Salazar — voted for it, along with U.S. Reps. Kat Cammack, R-Fla., and Mike Waltz, R-Fla. The support from Florida Republicans, six out of 16, was higher than the overall Republican caucus.

State Sen. Shevrin Jones, D-Miami Gardens, the first openly LGBT person elected to the Florida Senate, said Senate passage of the Respect for Marriage Act was a historic moment and said bipartisan support was significant.

And U.S. Rep. Debbie Wasserman Schultz, D-Fla., an early supporter of LGBT rights, said it would “provide critical safeguards for same-sex and interracial marriages” and “lift the anxiety felt by families across America who built their lives around the legal recognition marriage affords, and genuinely fear for its future.”

Delmay said supporters of same-sex marriage shouldn’t assume it will last forever because of the Respect for Marriage Act. “Yes, we’ve won this day. We’ve won this moment. We have to continue to be vigilant and we have to be working for total and full equality.”

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