

States slow to enforce laws they say are unconstitutional

By Juliet Eilperin, Washington Post

Once state legislation is passed, it's usually up to the governor and attorney general to see that the law is implemented.

But in a number of high-profile cases around the country, top state officials are balking at defending laws on gay marriage, immigration and other socially divisive issues – saying the statutes are unconstitutional and should not be enforced.

In Pennsylvania, for example, Attorney General Kathleen Kane (D) says she won't defend the state's ban on same-sex marriage in federal court. In Hawaii, Gov. Neil Abercrombie (D) filed court papers calling that state's gay marriage ban unconstitutional.

And in Indiana, Attorney General Greg Zoeller (R) has come under fire from conservatives for refusing to defend a portion of that state's immigration law. He said a recent Supreme Court ruling on a similar Arizona provision means that Indiana's law is unconstitutional.

The moves have put officials in both parties under attack from opponents, who accuse them of basing their decisions on political, rather than legal, motives. As a result, groups on both sides of the spectrum are laying plans to target the officials in upcoming elections.

"There's no doubt that there's more public pressure as we defend on issues of this social magnitude," Zoeller said in an interview this week.

Attorneys general routinely have to decide whether laws facing

legal challenges are constitutional. But in recent years, the high-profile nature of political battles over same-sex marriage and other social issues have put many of their decisions in the spotlight.

The phenomenon appears likely to spill over into the 2014 elections, with attorneys general in Colorado, Ohio, Michigan, Illinois, New Mexico and Nevada facing the possibility of being targeted by groups embroiled in the gay-marriage fight.

Gay activists are looking at putting money into a handful of such races next year, though they have not decided which ones they will target.

The issue garnered widespread attention in 2011, when U.S. Attorney General Eric H. Holder Jr. decided that the Justice Department would no longer defend the 1996 Defense of Marriage Act, which denied marriage-based federal benefits to same-sex couples. The Supreme Court struck down a key portion of the law last month.

Several academics, including former Maine attorney general James E. Tierney, said attorneys general are obligated to scrutinize laws that might be politically popular but legally flawed.

"The simple truth is that AG refusal to defend happens all the time," Tierney, who directs the National State Attorneys General Program at Columbia Law School, wrote in an email. "Legislatures are comprised in most states by non-lawyers trying to do the right thing, but they do not understand the complexity of constitutional limits. They are advised, but often plunge ahead – both liberals and conservatives – and make constitutional mistakes. It then falls to the AG to clean this mess up."

Rick Pildes, a constitutional law professor at New York University, said state officials should tread very carefully before deciding not to defend statutes.

"There's always a very strong political temptation for elected officials – whether they're attorneys general, governors or chief executives – not to defend laws they disagree with politically, or whose defense will alienate powerful political constituencies," Pildes said.

In Pennsylvania, Kane said that last month's Supreme Court rulings made her state's same-sex marriage ban "wholly unconstitutional" and that it would be up to the Republican governor's counsel to defend it.

Kane said in an interview last week that state law and regulations allow her to recuse herself if she believes she could not represent her client.

"If there is a law that I feel that does not conform with the Pennsylvania constitution and the U.S. Constitution, then I ethically cannot do that as a lawyer," she said.

It is unclear whether there will be immediate political repercussions for Kane, who doesn't face reelection until 2016. State Rep. Daryl Metcalfe (R), who opposes same-sex marriage, has raised the possibility of invoking impeachment proceedings against her because of the decision.

Kane had also raised the prospect of not defending the state's controversial voter-identification law, but her office decided to defend the law at trial this week.

Democratic attorneys general say they are not pursuing a coordinated strategy on same-sex marriage. But gay rights lawyers have spent the past six years advising them on how they might handle these challenges once they reach their desk.

"There isn't going to be one cookie-cutter approach to this," said Ted Trimpa, a Denver-based lawyer who said shifts in public opinion can assist attorneys general in same-sex marriage cases if they want to "be bold."

In Illinois, Democratic officials including state Attorney General Lisa Madigan have declined to oppose a lawsuit filed last year seeking same-sex licenses from the Cook County clerk. The Thomas More Society, a conservative law firm, has intervened on behalf of five clerks from other Illinois counties who are opposed to gay marriage.

"The people rely on the executive branch of doing its job of defending the laws, enforcing the laws," said Peter Breen, the Thomas More Society's vice president and senior counsel. "It strikes at the heart of our representative system of government."

Evan Wolfson, president of the gay rights group Freedom to Marry, said the spate of decisions on same-sex marriage bans are an exception rather than the rule. "It's almost a once-in-a-career moment for attorneys general who have sworn to uphold the Constitution and are being told to uphold these measures that are blatantly unconstitutional," he said.

Zoeller, who has challenged aspects of the Affordable Care Act and defended Indiana's right-to-work statutes, said groups frequently try to persuade him to walk away from certain cases.

"I tell them, if you object to a policy, you need to speak to the policymakers," he said, adding that he is obligated to fight in court for any state law if "I have a good-faith basis to defend it."

In Wisconsin, Gov. Scott Walker and Attorney General J.B. Van Hollen, both Republicans, refused to defend the state's domestic partnership registry law when it came under attack from conservatives, prompting the gay rights group Fair Wisconsin to step in. A state appeals court upheld the law in December.

Stanford University Law School professor Michael McConnell, who directs the school's Constitutional Law Center, said the

only reason an attorney general should opt out of a case is if it conflicts with the executive branch's authority or if there's no reasonable argument that can be made for the law.

When McConnell served in the solicitor general's office in the Reagan administration, he said, he defended a Labor Department minimum-wage rule he disagreed with personally in arguments before the Supreme Court. "I thought it was unconstitutional, but we prevailed nine to nothing," he said.

Cardozo Law School professor Kate Shaw said that it was "appropriate" for attorneys general to decline to defend cases in some instances but that they should be transparent about their reasons and make sure another party is prepared to take up the case.

"If exercised too cavalierly, this power is somewhat troubling and could be dangerous," she said.

Several experts warned that while Democrats seem more predisposed not to defend certain laws, Republicans could exercise the same option on issues including health care and hate crimes.

"You start down this path, and it simply breeds more partisan warfare, and it provides more precedents for doing it more," said Norman J. Ornstein, a senior fellow at the American Enterprise Institute, a Washington-based conservative think tank.