



## Make Change, Not Lawsuits

**Now that we've won marriage in California, should we be bringing cases in other states or suing the federal government? If not, what can we do to help secure the freedom to marry nationwide?**

**Bottom Line. If you're ready and it's right for you, get married in California. If you do, claim the name and act like what you are—married. But don't go suing right away. Most lawsuits will likely set us all back. There are other ways to fight which are more likely to win.**

**Summary:** The fastest way to win the freedom to marry throughout America is by getting marriage through state courts (to show that fairness requires it) and state legislatures (to show that people support it). We need to start with states where we have the best odds of winning. When we've won in a critical mass of states, we can turn to Congress and the federal courts. At that point, we'll ask that the U.S. government treat all marriages equally. And we'll ask that all states give equal treatment to all marriages and civil unions that are celebrated in other states.

Couples who want to should get married, call themselves married, and ask (sometimes demand) that family, friends, neighbors, businesses, employers and the community treat their marriages with respect. Making the marriages of same-sex couples a conspicuous part of American society will help us get something we'll need to win ultimately: public acceptance of equal treatment for lesbian and gay families. [A word to the wise: getting married could have unintended and damaging consequences for some people. If you are in the military, on a visa, thinking about adopting or getting government benefits, you should talk to a lawyer who knows that area, or get in touch with one of the legal organizations]

There are many things people can and should do—urgently—to get marriage nationwide. Working together we can defend the transformative wins in Massachusetts and California and build on them until we win equality, liberty and justice for all.

But one thing couples shouldn't do is just sue the federal government or, if they are from other states, go sue their home state or their employer to recognize their marriage or open up the health plan. Pushing the federal government before we have a critical mass of states recognizing same-sex relationships or suing in states where the courts aren't ready is likely to get us bad rulings. Bad rulings will make it much more difficult for us to win marriage, and will certainly make it take much longer.

## 1. Should we use the California decision to get marriage in other states?

**Absolutely, but not necessarily by filing a lawsuit.** We all need to be smart about how we go about making progress on this issue. We've now won marriage in two state courts (MA and CA) and civil unions in two others (NJ and VT). But marriage cases have also been lost, for now, in five others (AZ, IN, WA, NY and MD). So far, we've gotten civil unions and domestic partnerships from legislatures (without court orders) in seven states (CA, CT, HI, ME, NH, OR, WA) but only one legislature has passed a marriage bill (CA), and the governor vetoed it.

So, going forward, we'll use the California Supreme Court's brilliant reasoning and stirring language to try to persuade legislatures to end marriage discrimination in several states that are nearly ready to pass marriage laws. We'll show the opinion to courts in Connecticut and Iowa that are already considering marriage cases. We'll work to identify other state legislatures and courts that may be ready to do the right thing. And we'll need everyone to help create the climate that helps judges and legislators to do the right thing.

Right now, we need to choose the courts and legislatures where we have the best chance of winning for two reasons. First, these efforts take time and money, and we don't have unlimited resources. We have to pick. Second, as answer number 3 (below) explains in a bit more detail, losses hurt. Courts and legislatures pay attention to what is going on in other states. When we lose in one state, the loss makes it tougher to win in others. A loss on the initiative in California—a loss at the hands of voters—would be particularly damaging to work in other state legislatures and other state courts. That makes the California campaign of prime importance.

## 2. Should folks from other states get married in California and then sue to get our home states and employers to recognize the marriages?

**Probably not.** Courts have already said that New York will respect marriages from other states and Canada. The problem is, most states have passed laws or constitutional amendments saying that they will refuse to respect the marriages of same-sex couples. It will be tougher to win in those states. We need to lay the groundwork by changing the climate—convincing community leaders, moving public opinion—before we rush into court.

Since states generally do honor marriages from other states, people tend to think the federal constitution, through "full faith and credit," requires that. Actually, for the most part, states honor out-of-state marriages voluntarily, for common-sense reasons. Occasionally states refuse, for example with marriage among couples too young to marry in their home state. So far, the U.S. Supreme Court hasn't said the constitution requires "full faith and credit" for things like marriage licenses. Using state laws on honoring other marriages (the legal doctrines of "comity") is the better place to start.

And in a state with a law against honoring the marriages of same-sex couples, suing a private employer or other institution that isn't part of the government over its refusal to honor your marriage is almost always a really bad idea. They don't make the law, so they are likely to seem like an innocent bystander to many juries and judges. That makes the odds of winning even more remote. And unnecessarily angers a public whose support we ultimately want to have. That doesn't mean, though, that you shouldn't try to convince employers to honor marriages from out-of-state. See question 7.

**3. What's the problem with losing a few cases? Since we can't marry now, we're no worse off, right?**

**Wrong.** Losses hurt, for three reasons.

**1. It will take longer to win the right to marry in states where we first lose cases, than it would if we waited.** As society gets more used to gay and lesbian couples being married, it will be easier to win cases in states that look iffy now. In a few years, the cases just won't seem like such a big jump. If we plunge ahead and lose cases in those states now, the courts will have to overrule themselves later to go our way. That usually takes a few years at least, and often much longer. That means it is likely to take longer to get a good decision than it would have taken if we hadn't brought a case early on and lost it.

**2. It will slow us down in stronger states.** It will be easier for us to convince courts and legislatures that the marriage ban should be ended if we win a series of cases – and we win by defeating the California initiative. Courts pay attention to what courts in other states do. If we win most cases, that will confirm that we have the stronger constitutional argument. And while legislatures don't have to agree, court rulings that say the exclusion is unfair and unequal are a major help to our political arguments. Courts still have considerable moral authority in America, especially on the constitution's requirements of fairness and equal treatment. By contrast, early and unnecessary losses in Arizona and Indiana hurt our other cases, including in New York, Washington, and Maryland, where we lost by close margins and the courts adopted contorted reasoning from those decisions. And because, so far, more marriage cases have been lost than won, taking on a principled but long-shot case and racking up more losses now just makes it harder to convince other courts and legislatures.

**3. It will hurt gay people on other issues.** The constitutional arguments that we make in the marriage cases also appear in our cases about other issues, such as employment, adoption, or custody. If we bring a marriage case in which a court says that the constitution does not protect us, those arguments will be harder.

**4. Shouldn't we try to get a case to the U.S. Supreme Court as soon as possible to settle the issue once and for all?**

**No.** The history is pretty clear: the U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states. For example, few states still had laws requiring segregation or outlawing interracial marriage by the time the Court struck those laws down. Most states had already struck down or repealed their own laws against same-sex intimacy when the Supreme Court invalidated Texas's law.

Right now, we need to make gains in both public opinion and state law. The current court has been taking a pretty narrow view of civil rights and civil liberties. Even the strongest gay rights case the Court has decided—the Lawrence case striking down laws against intimacy for gay couples—said it was not going to say anything about formal recognition of same-sex relationships.

There are also serious risks if we go to the Supreme Court and lose, especially if we've asked it to set aside state limits on marriage. We could still ask state courts to strike down marriage bans

under state constitutions, and we could still ask state legislatures to pass marriage laws. But most state courts and legislatures pay attention to what the U.S. Supreme Court says about constitutional principles of fairness and equality. It will be harder for us to get state courts to strike down laws excluding same-sex couples from marriage if the U.S. Supreme Court has said they are okay under the federal constitution.

A loss now may make it harder to go to Court later, and we may need to. It will take us a lot longer to get a good Supreme Court decision if the Court has to overrule itself. Let's not forget: it took 17 years to undo *Bowers v. Hardwick*, the 1986 Supreme Court case that upheld Georgia's sodomy law. And that was fast for the Supreme Court.

**5. Should we get married in California and then sue the federal government to get it to honor our marriages, say for example, for immigration, tax, or social security?**

**Not yet.** In 1996, Congress passed a law saying that the federal government would discriminate against the marriages of same-sex couples (the so-called "Defense of Marriage Act" or DOMA) by denying them all the protections that the federal government gives to all other validly married couples. As a result, the federal government for four years has been discriminating against the marriages of Massachusetts same-sex couples. It will, as things now stand, continue to deny equal treatment to same-sex couples that marry in California.

One way to get rid of "DOMA" would be to have Congress repeal it (something many of the leading candidates for President have said they favor) or repeal parts of it. Another option would be to sue, but suing is complicated. A case like this could easily wind up at the U.S. Supreme Court. Our chances of winning could well depend on how the case is put together. For example, a case would have little or no chance if your home state doesn't honor your marriage. A case would not be a very good shot unless you had suffered serious harm because of the federal government's refusal to honor your marriage. Narrow focused cases are likely to have a better shot than broad, diffuse ones. We'll need to work closely with experts who study the Supreme Court to build a case with a reasonably good chance of success. And last, but not least, we'd need to make sure that a case wouldn't have unintended consequences for you. For example, a case focused on immigration could lead to the deportation of the non-American member of a binational couple.

**6. If we're not going to win by suing more states or the federal government now, how are we going to win?**

There are two things we need to do to win the freedom to marry nationwide. First, we need to change the law. Like other civil rights movements, we are doing that state by state, starting with the states where we have the best shot. In some states, we'll get marriage through the state legislature, to show that it has popular support. In other states, we'll go to the courts, to show that excluding same-sex couples is inconsistent with basic principles of fair play. When we've been successful in the states most likely to go our way, it will be easier to win in other states.

When we've built significant support we'll ask the federal government to give our marriages the same treatment it gives all other marriages—including them in federal laws and programs. Congress could do that in a single bill.

Even as America embraces, state by state and in the federal government, the view that it is unfair to exclude same-sex couples from marriage, a few states may hold out against the emerging

consensus. Ultimately, the key to national equality may be the federal government, as it has been in all the other civil rights movements – but national resolution comes after groundwork, not in one roll of the dice.

The second thing we need to do, as explained more in the answer to question 7, is convince America to accept the change, to accept the idea that our constitution does not allow discrimination. Equal treatment under the law is all we are asking – not more, not less.

## **7. So if we shouldn't generally be suing, what should we be doing?**

Neither court decisions nor legislatures can make effective, enduring change in a democratic republic as diverse as this one unless people either come to agree with the change or accept that it is required by an important higher principle. That was true with segregation, it was true with sex discrimination, and it will be true with discrimination in marriage.

Changing the law through Court decisions based on fundamental principles of fairness and equality helps persuade people that change is the right thing. But the most powerful agent of change in America is people.

Nothing moves Americans more on LGBT rights generally and marriage in particular more effectively than conversations that all LGBT people can have with our friends and family members about how it feels to be treated differently and why that is so unfair. Believe it or not, many of our friends and family members don't realize the burdens and barriers we face, but most would agree that our constitution guarantees the same equal protections to everyone, and that no one should be treated differently.

We'll win marriage because individual couples get married, tell their family, friends, co-workers and community that they are married, and talk in very practical terms about why it is so important. And about what it means to be same-sex and married, with all the fundamental freedoms that others have.

Simply getting married and telling people will help get those conversations going. But you shouldn't stop there. The win in California was no accident. Cities in California started adopting Domestic Partnership policies in the mid 80s. The state adopted its first law in 1999, and expanded it over the next six years. Courts in California have been deciding important cases about discrimination since the 70s. With the victories in Massachusetts and California, we should be able to win marriage more quickly in other states. But we still need to lay the groundwork. Ask your employer to include your spouse in the health and benefit plans; ask them to do a domestic partnership policy if they decline. Ask your town to establish a local domestic partnership registry. These are some of the concrete tasks and tactics that people can do that will create the climate for the advances we all want, rather than rolling the dice on litigation.

Doing those things will have practical benefits. But maybe more important, they'll spark the conversations we need to make the changes in law enduring and real at a day-to-day level.

**8. The most important thing now is to hold on to the win in California.**

Marriage in California will transform the national debate on the freedom to marry. It will do that because the decision is well-reasoned constitutional law from the most influential state court in the nation. It will do that because California is an American trendsetter.

But marriage in California will do those things only if we can hold onto it. There is a proposal on the November ballot to ban marriage between lesbian and gay couples. That proposal would put into the California Constitution a clause that only allows heterosexual marriages . The fundamental freedom to marry would be denied to lesbian and gay couples, and the concept of treating people differently would be written into the California Constitution. We think we can beat this because Californians don't want unnecessary government intrusion into their lives and don't want people treated unfairly under the Constitution

So please, send whatever you can to Equality for All (<http://www.equalityforall.com>), the campaign to defeat the initiative and preserve the freedom to marry in California.