



## Why the ballot box and not the courts should be the next step on marriage in California.

Now that the California Supreme Court has refused to strike down Proposition 8, we need to go back to the voters. Since we lost Proposition 8 just six months ago, and since a ballot initiative to repeal is likely to require a huge investment in time and money, it is tempting to at least try a federal lawsuit first. But it's a temptation we should resist. It is by no means clear that a federal challenge to Prop. 8 can win now. And an unsuccessful challenge may delay marriage even longer, not only in California but in other states, and seriously damage the rights of LGBT people on many other important issues.

Rather than filing premature lawsuits, we need to talk to our friends, family and neighbors, and help them understand why denial of the freedom to marry is wrong. We need to build a vigorous, aggressive campaign to overturn Prop 8 and restore the freedom to marry in California. This is the moment to convince California and America that we should have the freedom to marry.

### **History says the odds at the Supreme Court now are not so good.**

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 racial 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 Most states had already struck down or repealed their own laws against same-sex intimacy when the Supreme Court finally invalidated Texas's law.

Right now, we need to make gains in both public opinion and state law. The current Supreme Court has been taking a pretty narrow view of civil rights and civil liberties. Even the strongest gay rights decision the Court has issued—the *Lawrence v. Texas* case striking down laws against intimacy for gay couples—explicitly commented that it was not saying anything about formal recognition of same-sex relationships. The arguments in the briefs are not the only thing that influences the Court's decisions. The climate of receptivity and momentum in the country on these issues matter as well. There

is much we can and should do together to strengthen our hand before we put a federal marriage case before the justices.

**There is a lot to lose.**

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 (and many from civil unions, too) if the U.S. Supreme Court has said they are okay under the federal constitution (take a look at how much the Connecticut and Iowa Supreme Courts relied on analysis from the U.S. Supreme Court in their marriage decisions).

There is a very significant chance that if we go to the Supreme Court and lose, the Court will say that discrimination against LGBT people is fairly easy to justify, and that same-sex couples can be denied the right to marry based on mistaken, antigay assertions that LGBT people make bad parents. Indeed, we have recently lost marriage cases on that very basis in the state high courts of New York, Maryland, and Washington, and in intermediate appellate courts in Arizona and Indiana. Such a ruling from the U.S. Supreme Court could hurt us badly in cases about parenting, schools, and government jobs.

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 decision that upheld Georgia's sodomy law. That was fast for the Supreme Court. And during that time, many LGBT Americans lost jobs, lost custody of their children, and suffered other harms because the *Bowers* decision was taken as a license to discriminate against us.

**The limited DOMA challenge filed by Massachusetts couples is less risky.**

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 five years has been discriminating against the married same-sex couples of Massachusetts. It will, as things now stand, continue to deny equal treatment to same-sex couples that marry in Connecticut, Iowa, Vermont, and Maine, and to those who married in California in 2008.

There are two ways to get rid of "DOMA": going to court to have the law declared unconstitutional or getting Congress to repeal it (something President Obama has said he supports). These approaches can work together, and we are doing both. We're working with members of Congress on repeal legislation now. In addition, Gay &

Lesbian Advocates & Defenders (GLAD) has filed a thoughtfully constructed lawsuit in federal court on behalf of a diverse group of plaintiffs married for years in Massachusetts. These plaintiffs are eligible for a range of federal benefits, applied for those benefits, and were denied following extensive administrative procedures. If that lawsuit succeeds, it should establish a principle that will be fatal to DOMA, and we can bring other lawsuits addressing other federal protections to build on it.

GLAD's lawsuit challenging DOMA is more modest than a case claiming there is a federal constitutional right to marry. Until DOMA was passed, the federal government deferred to the states' determinations of marital status. DOMA creates a "gay exception" and says the federal government will not honor a state's marriage of same-sex couples. GLAD's legal challenge to DOMA simply asks that the courts tell the federal government to go back to doing what it did before—recognizing all marriages that a state has approved. In contrast, a federal case arguing that it is unconstitutional not to let same-sex couples marry would ask the courts in effect to order that couples be allowed to marry in every state, overthrowing most state marriage laws. That case asks for much bolder action from the courts, and it requires a much bigger development in constitutional law. We think the courts aren't ready to do that yet.

**The bottom line.**

A marriage case based on the federal constitution may well not win the right to marry back in California. A loss would likely set back the fight for marriage nationwide, and hurt LGBT parents, employees, and students all over America.

We lost the right to marry in California at the ballot box. That's where we need to win it back. Reversing Prop 8 at the ballot in California will set a powerful political precedent and help change the national climate. We can persuade the hundreds of thousands of fair-minded but still-conflicted voters we need, if we do the work. So let's get started now.

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