MARRIAGE EQUALITY ADVOCACY FROM THE TRENCHES*

MARY BONAUTO & JAMES ESSEKS**

James Esseks [JE]: Hi everybody. Mary and I thought that since we work together all the time, we would go back and forth to talk about the evolution of the marriage equality movement. We're going to try and cover a lot, and it's going to be a bit of a mad dash, but we will do our best to make it comprehensible. We've both been doing this for a long time but Mary has really been doing this for a long time. Mary, you've been gay for pay for how many years?

Mary Bonauto [MB]: Twenty-four later this month.

JE: And I'm only at thirteen, so I'm a youngster here. Mary actually is one of the people who created the modern Freedom to Marry movement. And so, in our tour through the marriage equality movement, we will begin with the early days and talk about how this got started. What's the plan, is there a plan, was there a plan? We'll then turn to the Defense of Marriage Act,[1] why it's a problem, what the plan was for getting rid of it, and then the

---

* These remarks are adapted from a conversation with Mary Bonauto and James Esseks on an insider's look into marriage equality advocacy, which took place at Columbia Law School on February 28, 2014, as part of the Center for Gender & Sexuality Law's Symposium on Marriage Equality and Reproductive Rights: Lessons Learned and the Road Ahead.

** Mary L. Bonauto is the Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD). Her practice concentrates on impact litigation, legislative lawyering, and policy initiatives related to the lesbian, gay, bisexual, and transgender communities, with a focus on the six New England states. Bonauto led GLAD's two challenges to the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), won the first District Court and Court of Appeals victories against DOMA in *Gill v. OPM*, and then coordinated amici briefs for the *Windsor* case at the Supreme Court. Bonauto was also lead counsel in *Goodridge v. Dep't of Public Health*, the landmark state supreme court decision that led to marriage in Massachusetts in 2004, co-counsel in the successful 2008 challenge to Connecticut's marriage laws (*Kerrigan v. Dep't of Public Health*), co-counsel in the challenge to Vermont's marriage restrictions (*Baker v. State* 1999), leading to the nation's first civil union law in 2000, and served on the executive committees of the two Maine marriage ballot campaigns in 2009 and 2012.

James D. Esseks is Director of the ACLU Lesbian Gay Bisexual Transgender & HIV Project. James oversees litigation, lobbying, policy advocacy, organizing, and public education work nationwide that aims to ensure equal treatment of lesbian, gay, bisexual, and transgender (LGBT) people by the government; equal rights and protections for LGBT couples and families; protection from discrimination in jobs, schools, housing, and public

Windsor[2] decision and a little bit about *Windsor* implementation.

Then we're going to talk about the current kind of crazy landscape that we're in at the moment. And how we may get to the Freedom to Marry in all fifty states. And then, if there is time, a little bit on the religious liberty, religious exemptions, license to discriminate aspect of the issue as it is showing up in the LGBT rights space.

MB: Although we were asked to focus on litigation, it's hard to focus exclusively on litigation because ideally you will first create a climate of receptivity for litigation. Both the public and the courts need a problem to be defined in both head and heart terms so they can understand the litigation is responding to and resolving real problems. So litigation works with public education, and whatever else may be happening in the culture and legislative branch.

So in this movement—like there was *Roe*[3] in the abortion rights context—there is Hawaii in the marriage context as a cultural turning point. Everyone was extremely surprised in 1993 when the Hawaii Supreme Court suggested that the state's marriage restriction was discriminatory based on sex and remanded to the trial court for the state to try to demonstrate its compelling interest in discriminating based on sex.[4] But even as Congress passed the Defense of Marriage Act shortly after the decision, so, so many good things came out of the case. In particular, the Hawaii case sparked a national conversation about the freedom to marry, government discrimination against gay people's families, and why marriage matters. But I will just say that I guess, as you know, the old person in the room—

JE: The experienced person.

---

accommodations; and fair treatment by the government of people living with HIV. Esseks was co-counsel in *U.S. v. Windsor,* in *In re Marriage Cases* before the California Supreme Court, in state court marriage litigation in MD, NY, and OR, and more recently in federal court marriage litigation against 13 states. He and the ACLU were also involved in legislative and ballot efforts for the freedom to marry in CA, DC, DE, HI, IL, MN, ME, MD, NH, NJ, NY, OR, RI, VT, and WA.

1 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013); and at 28 U.S.C. § 1738C (2012).

2 United States v. Windsor, 133 S. Ct. 2675 (2013).

3 Roe v. Wade, 410 U.S. 113 (1973).

4 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

MB: One overlooked point of Hawaii is that it was driven by the grassroots. Constituent pressure, if you will, has been important in advancing marriage all along. Even on my first week on the job at GLAD in March of 1990, I was approached by a couple from western Massachusetts who had been together ten years and wanted to get married. And I said, "I really understand, and of course you're totally right, but no. Not now." And I had those conversations many times with many people, because being right is not enough to get to a win, or to sustain a win. Timing matters. On marriage, there was so much to do in order to move the culture and the law to a place where people could even meaningfully engage with the issues.

Long before Hawaii, couples inspired by the Supreme Court's 1967 ruling in *Loving v. Virginia* filed marriage cases as well.[5] Nancy Polikoff and David Chambers have described the incredulous tone of the judicial opinions in those 1970s cases—each upholding the exclusion—as though a man was seeking the right to get pregnant.[6] Twenty years later, when Hawaii was the focus, marriage for same-sex couples was still an oxymoron, considered absurd, and most mainstream newspapers referred to marriage in quotes. We might have been claiming the language of marriage, but to most it was just impossible and unimaginable. So Hawaii was essential in terms of re-launching the conversation, because you have to start somewhere, and also because there were definite accomplishments in that litigation, too.

When Hawaii was marooned by events there, GLAD and two local attorneys—now Vermont Supreme Court Justice Beth Robinson and attorney Susan Murray—teamed up to bring a marriage case in Vermont in July of 1997 that we had been discussing and planning for several years. This was before any state had any legal status for same-sex couples, and certainly before we had any kind of comprehensive status for our families.[7] The "reciprocal beneficiaries" status came into effect in Hawaii July of '97,[8] after we had filed in Vermont. That, too, was significant because it showed how marriage could leverage our opponents to relent on their previous hard line stance of conceding nothing that would legally acknowledge our relationships. My recollection of Hawaii is that some of our opponents wanted to say they were reasonable by *giving* gay people *something*, but not

5 *See, e.g.*, Jones v. Hallahan 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

6 David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 525 (1999).

7 Baker v. State, 744 A.2d 864 (Vt. 1999).

8 1997 Haw. Sess. Laws 1211 (codified as amended at HAW. REV. STAT. § 31-572C (1997)).

something that was akin to marriage or something only for same-sex couples. So we would hear from them, "We are humane, and we don't want to discriminate," but all the while they maintained the discriminatory system and provided a tiny little package.

So ultimately GLAD filed marriage litigation in Vermont in 1997, and Massachusetts in 2001, and Connecticut in 2004.[9] These were each state constitutional cases because we wanted the focus to be on the State's decisions about how to treat people. In other words, "This is about Vermont. This is about Massachusetts. This is about how we treat people fairly in our state." We also did not want to federalize the issue at that time but instead to break through the historic barriers, get to a win and hold it, and show everyone what it looked like when same-sex couples married. Our hope was that judicial wins would lead to other wins, including legislative victories. Over time, we would develop a patchwork where some states allowed marriage, even as others didn't, and get to a point where we could ask for a national resolution. As the final arbiter in our national system, that most likely means the Supreme Court, because people should be treated equally by their government, and have this freedom of choice nationwide, no matter where they live.

So rather than go to federal court, where a ruling can affect multiple states or even the whole nation, we started litigation under state constitutions, some of which are more rights-protective than the U.S. Constitution, and where state courts would not have to worry about whether they were in or out of step with the Supreme Court. And for GLAD, it's always been extremely important to make sure that all three branches of government and the all-important "court of public opinion" participated in the discussion. Not just when the case was filed, but beforehand.

In each of those states, we worked in advance to ensure that people understood the realities of gay people and same-sex couples, who were their neighbors and in their communities, and the harms coming to same-sex couples from official disrespect of their relationships. Ironically, losing cases could sometimes be helpful, such as when courts ruled that cities were barred from extending family health insuance policies to the families of their LGBT employees and the state legislature wouldn't fix the underlying law. It wasn't great, but those cases could be used to say, "See! You think we can just enter into some private agreements and we'll be all set. We can't even get health insurance for our families!!"

---

9 *See Baker*, 744 A.2d 864; Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008). In Vermont, GLAD worked with Beth Robinson and Susan M. Murray of Langrock, Sperry & Wool. In Connecticut, GLAD was joined by Kenneth Bartschi and Karen Dowd of Horton, Shields & Knox; Attorney (now Judge) Maureen Murphy; and the local ACLU affiliate.

JE: And it happened a lot.

MB: And it happened a lot. The one other predicate I want to mention is the plaintiffs, who are the heart and soul of a case. They are the ambassadors to the public, helping people connect the dots as to why the laws must change. We can never thank them enough for courageously stepping up and then being so vulnerable and honest. When we filed in Vermont, we had three couples who were distinctly different from each other, but all from the same geographic area around Burlington. Stan Baker and Peter Harrigan, Lois Farnham and Holly Puterbaugh, and Stacy Jolles and Nina Beck—so beautifully conveyed the love and commitment infusing their desire to marry.

Thirteen months after oral argument, the court ruled in December 1999, and surprised us by saying in effect, "You didn't really ask for marriage, you asked for all the protections and obligations of marriage," and so the legislature can decide how to extend those to same-sex couples.[10] Happy as I was that we had a path forward, I was stunned by the court's assertion that the plaintiffs had not sought marriage, as we had certainly briefed it. We also didn't understand how you could separate marriage from the legal incidents accompanying it or the suggestion that it might be permissible to perpetuate the marriage exclusion and supposedly "remedy" that exclusion with something else. The *Baker* decision was the first to say that same-sex couples had to have the same benefits, protections and obligations as others, and requiring the legislature to address the issue[11] led to neighbor-to-neighbor and statewide conversations about marriage, in local communities and in the state legislature. At the legislature's public hearings, the State House was overflowing even in the middle of ice storms.

After the *Baker* ruling, I realized it would have been helpful to have plaintiffs from diverse geographic areas in the State, so when GLAD filed *Goodridge*[12] in Massachusetts, we had terrific plaintiffs in each of the big media markets. We needed the case to have a variety of plaintiffs with diverse demographics. A huge part of the plaintiffs' role was telling their personal story about who they were as a family, why they wanted to marry, and why it mattered to them. A mix was helpful because viewers and readers would have various reactions to them and their stories. It seems odd to say it now, but the plaintiffs introduced themselves in the context of their family—and in 2001, seeing gay people in

10 *Baker*, 744 A.2d at 886.

11 *Baker* also held that if the legislature failed to act in accord with the ruling, then the court would reconsider the case and potentially grant the relief the plaintiffs had originally sought. *Id.* at 867.

12 *Goodridge*, 798 N.E.2d 941 (Mass. 2003).

family contexts still seemed new to others. But it could not be only a "heart" conversation. To persuade people that the marriage laws were discriminatory, we also needed to demonstrate a problem to be solved, a double-standard that rankled with their principles. So it was important at that time in particular to talk about the harms from not being able to marry despite people's willingness to commit to and be responsible for one another. They needed to see that ordinary and humane protections were walled off, just for gay people, and that we were legal strangers to one another.

JE: So Mary, you file Vermont, you get civil unions as a booby prize.

MB: It was bittersweet. It was the first ever comprehensive legal status where same-sex couples had *all* marital rights and obligations, which was amazing at the time, but it was also a separate status just for same-sex couples. All the same, I think it allowed the larger public to remain engaged in thinking through the fairness issues, and whether it really solved the problem, or was really fundamentally fair for the government to deny marriage itself to same-sex couples. It was also a huge psychological boost to the LGBT community. People around the nation were thankful to Vermont, and it inspired confidence that we could win again.

JE: And then you filed *Goodridge*.[13] In the fall of 2003 you win *Goodridge*.[14] Exclusion from marriage violates the state constitution's equality and liberty guarantees. It becomes effective in May of 2004. Right?

MB: Correct. Some state had to be first in breaking that historic barrier. I believe Chief Justice Margaret H. Marshall's opinion for the *Goodridge* majority, along with the beautiful concurrence by Justice John Greaney, said it all. The Justices don't think of themselves as courageous, but it is extraordinary to see the words, "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens"[15] applied to you, to your community, for the first time ever in a marriage case from a final appellate court. At that time, it was also shocking; most expected it would never happen in their lifetimes.

JE: So then we're like, hallelujah, the first freedom-to-marry state in the country. People

---

13 Verified Complaint, Goodridge v. Dep't of Pub. Health, 14 Mass. L. Rptr. 591 (Mass. Super. May 7, 2002) (No. 20011647A), 2002 WL 1299135.

14 *Goodridge*, 798 N.E.2d 941 (Mass. 2003).

15 *Id.*

start actually getting married six months later in May 2004. The sky doesn't actually fall in.

MB: Yes, we had confirmation at last: the sky did not fall in. There was an outbreak of joy, and joy and justice are a contagious combination. Of course, there were ferocious attempts—in the courts and legislature—to stop marriages from happening in May of '04. The efforts to amend the state constitution were only finally defeated in June 2007.[16]

JE: But then you start thinking about something else.

MB: Yes.

JE: You start thinking about the Defense of Marriage Act.[17] Talk to us a little bit about that.

MB: Those of us who were around and paying attention in 1996 were extremely annoyed about the Defense of Marriage Act. We had not even won marriage anywhere, but the Congress in DOMA Section 3 was preemptively stating it would have nothing to do with "those marriages" if any state were foolish enough to allow same-sex couples to marry. DOMA Section 2 encouraged states to pass laws stating their public policies about "same-sex marriage" and states accepted that invitation with alacrity to pass discriminatory laws. What was the necessity for the federal DOMA? The official House of Representatives report on DOMA explains that DOMA was necessary to protect traditional marriage and traditional morality with Judeo-Christian norms.[18] They put this in writing and as a litigator you have to love it. They thought it was great. The House Report shows how smart people were able to rationalize what we now see as dramatic discrimination at that time. The House Report also states that the Supreme Court's 1996 *Romer*[19] decision—which decision begins with a quote from the *Plessy* dissent about how we don't have classes of citizens

16 Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES (June 15, 2007), http://www.nytimes.com/2007/06/15/us/15gay.html [http://perma.cc/XEU4-FYX2].

17 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013); and at 28 U.S.C. § 1738C (2012).

18 H.R. REP. 104-664, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920.

19 Romer v. Evans, 517 U.S. 620 (1996).

under our federal constitution[20]—had no significance at all to the DOMA legislation.[21] I want to give a little shout-out to Heather Sawyer who's in the room. She wrote a brief in the DOMA litigation on behalf of members of Congress, including members of Congress who regretted their votes in 1996.[22]

In terms of litigating against DOMA—which I had long dreamed GLAD would have the opportunity to do—timing was critical and that meant a certain amount of forebearance. We began hearing from married couples who were harmed by the federal disrespect prong of DOMA starting with the first month of marriage in May 2004. That year had been very raw in Massachusetts. Marriage for same-sex couples was new. There was plenty of drama in terms of attempts to derail the court ruling, the constitutional convention proceedings to amend the constitution, the political attacks within and outside of the state, and state and national elections in November. Although some predicted we would file a DOMA challenge right away, we thought, "That would be nuts." The very notion that these same-sex couples were really and truly married had not settled in. And even though people were marrying in Massachusetts, it was not clear if Massachusetts would continue to do so because of the fierce battles over amending the state constitution.[23] We knew we had to win that fight and secure marriage in Massachusetts before we could raise the issue of the federal government's discrimination against those married persons. And of course, had we filed prematurely, the uncertainty about the future could have clouded the litigation with judges wondering, "Why should the federal government respect a marriage that may not even be respected by the state?"

We had a lot to do in the legal advocacy and overall community to explain how federal disrespect of gay people's marriages harmed them and was wrong. We had to convince people that this fight was winnable because we were going to bring a marriage-related issue into federal court with potentially profound consequences nation-wide. The narrative

---

20 *Id.* at 623 ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'" (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

21 H.R. REP. No. 104-664, at 33 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2937.

22 Brief for 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae In Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840029.

23 *See* Belluck, *supra* note 17 ("Same-sex marriage will continue to be legal in Massachusetts, after proponents in both houses won a pitched months-long battle on Thursday to defeat a proposed constitutional amendment to define marriage as between a man and a woman.").

around DOMA was that it was untouchable. The federal government was simply defining marriage for purposes of federal programs. How in the world could we say that that is not permissible?

Well, we could say that. The federal government had always accepted state determinations of who was legally married for purposes of federal laws. But DOMA was a glaring exception. It took some time to convince people that DOMA was a law, and there was nothing magical about Congress defining "marriage" that meant the Equal Protection Clause did not apply If the federal government defined "person" as only Caucasian, or only female, everyone would understand the equal protection problem. We were saying the same about DOMA's definition of "marriage"—why should marriages of same-sex couples be considered off limits for federal respect? We had to get to the point where people could see a discrimination issue because disrespect of same-sex couples' relationships was the accepted norm at that time.

We also encouraged the Commonwealth of Massachusetts to file a case since DOMA made the marriage certificates issued to same sex couples something lesser than the marriage certificates issued to others. We thought the federal government's selective disrespect of a state's marriages would add an important dimension to the public's understanding of the case. Even before Attorney General Martha Coakley took office in 2007, a few of us from GLAD visited her while she was packing up her District Attorney office. We talked to her about our plans to file DOMA litigation. We wanted the state to come out and say, "Why should the marriages we certify be treated as less than other marriages certified by the Commonwealth, or other states?" It took two-and-a-half years of vetting and conversations before the Mass. Attorney General filed that litigation, and I am proud of them for doing so and being the only state that ever did so.[24] It was an important voice to bring forward.

We also had to deal with concerns, including concerns raised by our closest colleagues, about the case—

JE: Like me.

MB: It's okay, James. Our colleagues raised lots of concerns. Isn't every benefit the federal government gives really tied to children somehow? No. Does that mean avoid children, or do we embrace children? Embrace. Why can't the federal government just "prefer" married couples to be different-sex? After all, through the Spending Clause,

---

24 Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 6 (1st Cir. 2012).

couldn't the federal government get away with doing indirectly what it couldn't do directly, maybe even categorically preferring different-sex families? We had to answer those questions and more.

During all of this time, actually for years before we filed *Gill v. OPM*,[25] we were talking with people—well over a thousand—who had been affected by DOMA. We had a bevy of salt-of-the-earth plaintiffs who had sought but been denied tax, social security, and federal employment benefits only because of the government's discriminatory refusal to acknowledge their existing marriages. We learned a great deal about the basic structure and intricacies of federal programs implicated by DOMA, as well as historical research where we learned that the federal government has respected the marital status of individuals as long as they are certified by a state. DOMA stood out as the one and categorical exception to that rule. That set up beautifully the classic equal protection case: the federal government's providing federally-based marital protections to everyone who is married except gay and lesbian married persons violates the equal protection principles binding on the federal government.

Another difficulty in all of this was how to challenge DOMA without calling the question of the constitutionality of all state marriage bans. At the time we filed *Gill v. OPM* in March 2009, only Massachusetts and Connecticut were licensing marriages of same-sex couples, and Prop. 8 had stripped away California's ability to do so. We thought we'd sink if we were looking for a forty-eight state solution at that juncture. Among other things, we emphasized the distinction between the federal government's total disrespect of people's *existing marriages* and state bars on *joining in marriage*.

I realize it sounds obvious now, but it took some time to figure out how to successfully challenge DOMA and also leave us in a stronger position for getting to marriage. We thought winning against DOMA would be a critical stepping-stone to tackling marriage nationwide. A win would demonstrate the applicability of equal protection principles to our relationships, too. And we thought that comparing already married same-sex couples with already married different-sex couples was a great way to expose the paucity of the rationales invoked to justify different treatment of same-sex and different-sex couples generally. And clearly a win on DOMA would say there was no relevant difference between same-sex and other married couples and bring us very close to marriage itself.

---

25 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012). GLAD's team also consisted of Paul Smith, Luke Platzer, and other attorneys at Jenner & Block, as well as Boston-based Foley Hoag and Sullivan & Worcester.

In terms of defining the problems caused by DOMA, we needed to begin conversations about DOMA since so much of the country was focused on ending the exclusion from marriage. GLAD started deliberately doing press around the problems of DOMA in '07, two years before we filed *Gill*. We asked some of the many people who called us for help to talk publicly about their feelings of having a "fractured family," disrespect and undermining of their family from the federal government, and the losses to themselves, their spouses and their children. If you think about it, it is bizarre to be married for state purposes but unmarried for all federal purposes. Most people, including some LGBT people, did not realize that DOMA meant the federal government would treat married people as unrelated individuals, as though their marriages didn't exist.

Of course we were thinking about plaintiffs all along the way, and what federal programs we should target to show DOMA's discrimination. One of our clients in Massachusetts, postal worker Nancy Gill, was married on a Friday in '04. After a honeymoon at the Cape with her wife and their two children, she went to work on Monday and tried to sign up for health insurance to cover her spouse, just like all of her colleagues could do. She was absolutely shocked that she couldn't include her spouse on her existing family policy—they had two children so she was paying for a family plan already—even though she was married.

In terms of the scope of the litigation, we wanted to illustrate a range of harms imposed by DOMA and that allowed us flexibility in the event that the government advanced program-specific defenses that would knock someone out. So we decided to pick a number of big federal programs within most people's range of experience, such as how DOMA's disrespect forced our plaintiffs to pay extra income taxes, and how it deprived people of Social Security spousal and survivor protections in old age after paying into the system for all of their working years, and of course employment-based benefits like health insurance and pension survivorship. We wanted to make DOMA's discrimination relatable to the public: where married persons have these protections, why are only these married persons denied any and all federal respect as married people? Bracketing the extremely important discussion as to whether all of these protections *should* depend on marriage, within the marriage context, what justification could there be for disrespecting a state trooper and her wife and making them pay more in taxes,[26] or denying health insurance and pension benefits to the surviving spouse of a long-serving member of Congress[27]?

---

26 DOMA STORIES: FEDERAL MARRIAGE DISCRIMINATION HURTS FAMILIES, http://www.glad.org/doma/stories/doma-is-taxing-our-childrens-future (last visited Sept. 1, 2014).

27 *Dean Hara*, GLAD, http://www.glad.org/doma/plaintiffs-gill/dean-hara (last visited Sept. 1, 2014).

JE: People who had been together sixty years.

MB: Yes, a retired music teacher named Herb Burtis who had been together with his spouse sixty years and cared for him through fourteen years of Parkinson's.[28] These stories needed to be told to help people start thinking about how DOMA caused problems that contradict our basic values of fairness and equality.

JE: And the one thing I just want to add here with the litigation focus of the panel in mind, is I think Mary's absolutely right, that we needed to tell stories in a bunch of different contexts here. So she put together two cases—one in Massachusetts filed in 2009,[29] one in Connecticut filed in 2010[30]—that had a whole range of plaintiffs from different states in a whole range of different federal programs, that illustrated again and again, all these different problems.

In the Edie Windsor case that the ACLU litigated, and it's the case of a lifetime for me, we had one plaintiff. And you can do different things when you have one plaintiff. You have one story to tell, especially if it's a really—I gotta say—kickass story like that, it's a story that resonates and it's a story that the media will focus on and tell again and again.

In the cases that Mary brought, there are equally compelling, if not more compelling, stories. Of harm, of commitment, of love, of caring for each other for many, many years. But I bet most everybody in the room has no idea what those stories are. And that's because it's harder to tell *a* story when you have *many* stories because people start talking about the global issue that the case brings up, not the story at the center of it. And a lesson for me as an impact litigator is that it can be very effective to just pick a story and go with that. The challenge in some of these cases is—you know, we brought many cases in state court, won some of them, we lost some of them. In most of them, somebody broke up. It's challenging because look, hey folks, newsflash, we're just like everybody else. Right? We're not superhuman people, we don't have superhuman relationships. That's life.

MB: James has a good point, and the education points cut two ways. In the beginning, we needed to educate about DOMA's breadth and our plaintiffs helped illustrate the range of harms caused by DOMA. And also, when GLAD filed the first DOMA litigation in

---

28 *Herbert Burtis*, GLAD, http://www.glad.org/doma/plaintiffs-gill/herbert-burtis (last visited Sept. 1, 2014).

29 *Gill*, 682 F.3d 1.

30 Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294 (D. Conn. 2012).

March of '09, we didn't know how the federal government was going to litigate.[31] If we had picked one program, would the U.S. come back with reasons why in that particular program, the definition of marriage was legitimate? There were scholars arguing that there were justifiable policy reasons for DOMA's limitation in the tax context. So even though we thought there was no conceivable justification for any of DOMA's discrimination, we wanted to have a variety of programs in play in case the litigation went down a program-specific path.

Tactically, we were also framing up the case as an as-applied challenge, but with full knowledge of its broad impact beyond the specific benefits sought. We wanted to avoid the doctrinal morass about facial challenges, but we know if the definition of spouse was unconstitutional in Social Security, taxation, and as to the largest employer in the country—i.e, the federal government—we would have struck a deathblow to DOMA.

The first ruling striking down DOMA was in the *Gill* case in July of 2010.[32] That established a "doable" path for attacking DOMA and people were excited, so more challenges followed. And GLAD, of course, decided to press on as well. With more marriage states in New England, we filed in the District of Connecticut on behalf of people married there, and in Vermont and New Hampshire.[33] Vermont and New Hampshire passed marriage legislatively in 2009.[34] We coordinated with James and Robbie Kaplan and all filed our Second Circuit cases on the same day.[35]

So I just want to say, I get the benefits of one incredible plaintiff like Edie Windsor. But when you first pick a fight as big as the DOMA fight, as we did, you have to consider

---

31 Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09CV11156), 2009 WL 1995808.

32 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).

33 *Pedersen*, 881 F. Supp. 2d 294.

34 Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, No. 03, sec. 5, § 8, 2009 Vt. Acts & Resolves 244886.1 (codified as amended at 15 Vt. Stat. Ann. tit. 15, § 8 (2013)); Act relative to civil marriage and civil unions, 2009 N.H. Laws ch. 59 (codified as amended in scattered sections of N.H. REV. STAT. ANN. §§ 457, 457-A (2014).

35 Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 527 (U.S. 2012), and *aff'd*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (U.S. 2013), and *cert. denied*, 133 S. Ct. 2884, 186 L. Ed. 2d 932 (U.S. 2013), and *cert. denied*, 133 S. Ct. 2885 (U.S. 2013); *Pedersen*, 881 F. Supp. 2d 294.

the contingencies and plan on how to move forward regardless. In 2010 when we filed the *Pedersen*[36] case in Connecticut, we still saw value in educating the public about the many types of discrimination effected by DOMA, and has plaintiffs with the same issues as in Gill, and also private pensions and FMLA. At any particular time, the question is what do you need to build in order to get to a win.

JE: Absolutely. So *Windsor*. *Windsor* gets to the Court. An exciting moment, but as everybody clearly knows, it's not just *Windsor* that gets to the Court, it's the Prop. 8 case, the *Perry* case,[37] the full freedom to marry question. And Mary had framed the DOMA cases up and we came along and filed a case that mirrored the cases that she was filing, very much with the idea that this was the next step.

If you think about the marriage effort over time, and you think about it as starting in the states—as Mary did in New England[38], as the ACLU did in New York, Oregon, Washington, Maryland, California (as co-counsel with Lambda and NCLR),[39] as Lambda did in Iowa[40]—the idea was we were going to win where we can in the more progressive parts of the country. We're going to build the freedom to marry, or other forms of relationship protection, whatever we can get, to get a patchwork of protection across the country to build a foundation upon which we can ultimately build a federal solution. Because we know we could go state-by-state, and let's face it, we might have to, because we might lose when this issue gets to the Supreme Court. But we're hoping not, we're hoping we're going to have enough of a foundation, we're hoping we'll be able to say to the Supreme Court, "Look, you now have this issue and the country is ready because we have *x* number of states that allow the freedom to marry for same-sex couples and public opinion is here, and this is the percentage of the U.S. population that lives in a freedom to marry state."

---

36 *Pedersen*, 881 F. Supp. 2d 294 (D. Conn. 2012). GLAD added attorneys from Horton, Shields & Knox, based in Hartford, Conn., to its existing DOMA team when litigating Pedersen.

37 Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

38 *See supra*, note 9.

39 Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (New York case challenging DOMA); In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (California case challenging state same-sex marriage ban); Li v. State, 110 P.3d 91 (Or. 2005) (Oregon case challenging state same-sex marriage ban); Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (Washington case challenging DOMA); Conaway v. Deane, 932 A.2d 571 (Md. 2007), *opinion extended after remand*, No. 24-C-04-005390, 2008 WL 3999843 (Md. Cir. Ct. Jan. 7, 2008) (Maryland case challenging state same-sex marriage ban).

40 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

But the idea here was that the DOMA question was a stepping-stone to that ultimate question about 50-state marriage, marriage for same-sex couples in all fifty states. And it's one thing to argue to the Supreme Court, "Hey, folks, DOMA is easy, you can decide this, it doesn't decide the whole marriage question." It'd be a lot easier to argue that if the day before the DOMA case was going to be argued, the Court hadn't already heard argument in the full fifty-state marriage case.

So all of a sudden we had to be like, "Huh, how do we argue that DOMA's easy without disparaging the Prop. 8 case?" We absolutely don't want to do that, we absolutely share their goal. We would love to have won that. But that created a challenge for us in terms of how we talk about it, how we answer questions about it—well, can we rule for you and not for them—and those were difficult things to work through.

MB: Exactly. A lot of the pushback that we received before we filed any DOMA litigation was from our friends saying, "How do you set up a case that's about DOMA and not about marriage? How do you avoid challenging everything? And isn't it too early for that?" I believed, and GLAD believed, impatient as we were, that DOMA was the right next step. Remember that at the time we filed the first DOMA case in 2009,[41] we had marriage in Massachusetts for almost five years and in Connecticut for a few months. Lots of us were working to get to more marriage states, as James just referenced, and we hoped a DOMA victory would hasten the time to get to ending marriage bans nationally.

Part of how we tried to avoid the fifty-state ruling was to emphasize the distinction between the federal government's total disrespect of people's *existing marriages* from state bars on *joining in marriage*. We also advanced a "federalism overlay." With DOMA, Congress for the first time arrogated to itself the power to determine which state marital statuses were permissible. The federal government doesn't normally define marriage—it defers to state determinations of marital status once they exist. We didn't throw down the Tenth Amendment gauntlet and say Congress had no power to define marital status, but rather that Congress had drastically departed from the norm of respecting a state's determination of marital status. We thought this federalism piece was of some value in distinguishing DOMA from state restrictions on marriage itself, and also helped cast doubts about the federal government's interests in procreation and childrearing of already married couples. That's not the Congress's role. In the end, we said both DOMA's disrespect had to be justified in an equal protection analysis, and the same of course is true when states

41 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).

impose arbitrary restrictions on who may marry, as Windsor says twice.

JE: And just to add a little bit more context on this question about how different the DOMA case felt from a fifty-state marriage case at the time that this started, when Mary filed the first DOMA case, she said there were two states that allowed same-sex couples the freedom to marry. By November 1 of 2012 —which really, folks, is not that long ago— there were only six states that allowed same-sex couples to marry. At argument at *Windsor* in March 2013, there were nine. On the day before the decision came down June 2013, there were twelve. The decision in *Perry* gave us thirteen. Today there are seventeen, plus D.C.

That's an amazing change, but all of that change also changes the way we all feel about whether this is hard. It changes whether the Court thinks that this is hard. It changes whether they think the difference between DOMA and the freedom to marry for everybody in the country is a meaningful distinction. And when we started this, there was a humongous gap. That's part of what made the DOMA challenge seem really hard. And I'll give just a hat-tip to Mary, that GLAD had the vision to see where we would be and how it would be doable and manageable and conceivable that we could win.

MB: *Windsor* is fantastic. Some people say they want greater doctrinal clarity. But when I read *Romer*, read *Lawrence*,[42] read *Windsor,* in the broad brush I see that the Court does not condone government-legislated double standards that disadvantage gay people, including in the context of relationships. Where there are generally available programs or applicable principles, but then a law says, "not for gay people," then there is reason to believe the Court will be concerned. To James' point, the reaction to *Windsor* has been amazing. And quite appropriately so. As of today, there are forty-seven cases involving the laws of twenty-four, twenty-five states!

This is not fast enough for those who wait, but it is incredible to think that in 2004, just ten years ago, President Bush was saying, "We have to defend the sanctity of marriage from these activist judges." Now, ten years later, are the judges in the federal courts in Utah and Oklahoma who are striking down these restrictions activist or is it simply clearer that our venerable constitutional principles apply to LGBT people, too? More people now understand that LGBT people share our common humanity and our common citizenship. Once you're there, then the double standards are unacceptable. That is why I am optimistic. I would prefer a little more time, but I think we're going to be at the Supreme Court again

---

42 Lawrence v. Texas, 539 U.S. 558 (2003).

in 2015. And I can say more about that, but why don't you take a turn.

JE: So just in terms of the landscape, Mary's right. We've gotten to seventeen states, plus D.C. Some of that came about through litigation. A bunch of that came through legislative advocacy in the states. Some of it in November 2012 came through votes of the people, who in three states got us the freedom to marry[43] and in Minnesota stopped a bad constitutional amendment[44]. So the advocacy that we've used has been multifaceted. But we've gotten to a place where we are just about out of—in the short term—places where we can make progress other than through two advocacy means.

One is going back to the ballot to take back the state constitutional amendments, and there are twenty-nine states that still have amended their state constitutions to exclude same-sex couples from marriage. Or, federal court litigation. And we'd like to go back to the ballot. We could go in Oregon in November of 2014. There's a campaign ready to put that on the ballot, but it may well be that litigation in Oregon is going to get there first.[45] It's not a bad thing, it's just a different path to the freedom to marry.

But then, the next time that we collectively as a movement think we can get on the ballot is in 2016. The places we're looking at on an exploratory basis are Nevada,[46] Arizona,[47]

---

43 *See* Edith Honan, *Maryland, Maine, Washington approve gay marriage*, REUTERS (Nov. 7, 2012 4:42 PM), http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107 [http://perma.cc/5P2X-NPT8].

44 *See* Alexi Gusso, *Minnesota crushes proposed marriage amendment*, MINN. DAILY (Nov. 7, 2012), http://www.mndaily.com/2012/11/07/minnesota-crushes-proposed-marriage-amendment [http://perma.cc/WXG8-FR7C].

45 Litigation in fact got there first: a federal judge struck down Oregon's marriage ban in May. *See* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); *Love is the law in Oregon*, ORE. UNITED FOR MARRIAGE (May 27, 2014), http://www.oregonunitedformarriage.org/lovewon/ [http://perma.cc/6QB6-JGXQ].

46 *Freedom Nevada launches campaign to win marriage for same-sex couples in Nevada*, FREEDOM NEV. (Feb. 13, 2014), http://www.freedomnevada.org/launch/ [http://perma.cc/5V2S-JK7R].

47 Howard Fischer, *AZ Same-Sex Marriage Vote Likely On Hold Until 2016*, KNAU.ORG (Sept. 10, 2013, 1:07 PM), http://knau.org/post/az-same-sex-marriage-vote-likely-hold-until-2016 [http://perma.cc/ESF3-SNXX].

Colorado,[48] Ohio,[49] and Michigan.[50] Some of those are not going to be easy. I think by the time we get to '16, if we still have to do this, it's all going to be possible. But, as Mary said, the litigation—the other advocacy route here—is accelerating at an incredible rate. And it seems likely that the U.S. Supreme Court is going to get the ultimate fifty-state marriage question for decision in June of '15 and if not in June '15, well then it's going to be a decision that will come out by June of '16. We can all do the math, that's all before November of '16.

At this point there are federal court cases seeking the freedom to marry in five circuits. The Fourth, Fifth, Sixth, Ninth, and Tenth. And you know, that's just today. Tomorrow it could be something different because there are so many cases. There are somewhere in the mid-forties in terms of number of cases out there. There are going to be more decisions.

The striking thing about this is that the most recent decisions are from Utah and Oklahoma and Kentucky and Virginia and Texas.[51] That would not have been in my litigation plan, but it shows just how powerful the *Windsor* opinion has been—federal judges all across the country can see in that decision where the fifty-state marriage issue is

---

48 *Gay Rights Group Promise 2016 Marriage Initiative in Colorado*, CBS DENVER (Mar. 3, 2014, 1:10 PM), http://denver.cbslocal.com/2014/03/03/gay-rights-group-promises-2016-marriage-initiative-in-colorardo/ [http://perma.cc/PAV6-NLEU].

49 Wesley Lowery, *Same-sex marriage is gaining momentum, but some advocates don't want it on the ballot in Ohio*, WASH. POST (June 14, 2014), http://www.washingtonpost.com/politics/same-sex-marriage-is-gaining-momentum-but-ohio-advocates-dont-want-it-on-the-ballot/2014/06/14/a090452a-e77e-11e3-afc6-a1dd9407abcf_story.html [http://perma.cc/T5QM-7LPB].

50 Bill Laitner, *Group wants 2016 vote on gay marriage ban if court case fails*, WZZM13 (May 8, 2014, 7:12 PM), http://www.wzzm13.com/story/news/local/2014/05/08/gay-rights-advocates-want-2016-vote-on-marriage-ban-if-court-case-fails/8862999/ [http://perma.cc/V3J8-NC7R].

51 Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (overturning Kentucky's same-sex marriage ban); Bostic v. Schaefer, 970 F.Supp.2d 456 (E.D. Va. 2014) (overturning Virginia's same-sex marriage ban), *aff'd*, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.* Rainey v. Bostic, 135 S. Ct. 286 (2014), and *cert. denied*, 135 S. Ct. 308 (2014), and *cert. denied sub nom.* McQuigg v. Bostic, 135 S. Ct. 314 (2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (granting a preliminary injunction against Texas's same-sex marriage ban); Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (overturning Oklahoma's same-sex marriage ban), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); Harris v. Rainey, 299 F.R.D. 486 (W.D. Va. 2014) (granting class certification for unwed same-sex couples in Virginia and same-sex couples in Virginia that have married in another jurisdiction, for a challenge to Virginia's same-sex marriage ban); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013) (overturning Utah's same-sex marriage ban), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

likely to come out.

So it's clear that the pipeline is very full. Nobody can really handicap which one of these cases is going to get to the Supreme Court first. We can talk big picture like *when* there's going to be one of them, but just to give you a sense of the vagaries of federal court schedules—Mary mentioned earlier that her first DOMA challenge, the *Gill* case, got a decision from a federal district court in July of 2010. We filed Edie Windsor's case in November of 2010. Those two cases got to the U.S. Supreme Court at the same time and the Court picked *Windsor*. So we just don't know which of the current cases pending in the federal circuits is going to get there. And neither at this point does the Court.

MB: It's possible that the Court will have a menu of cases to choose from. I'm imagining they would prefer to have a case where the state itself is defending as opposed to states where the AG has stepped in to support the plaintiffs, so that there's sufficient adversity between the parties. And as to DOMA, I don't know if any of you already know this, but an issue we had with *Gill*—as we came to learn just before cert was granted in *Windsor*—was that Justice Kagan had to recuse herself from the case. So it was great Edie Windsor's case was there and that the full court—not just eight justices—could decide the issue.

JE: People always ask me, "So what's the future, what happens next?" And a piece of what happens next is finishing this work on marriage because a bunch of people, certainly in the circles that many of us probably run in, think, "Oh, this is done." Well, okay, it is not done. There's a lot of work still to be done, both on the litigation front and on the political front and the public education front.

But the other thing is that even when we win, as I am convinced that at some point we will get the freedom to marry in every state in the country—there is also going to be a backlash and the recent experience with a proposed religious exemptions bill in Arizona[52] is what that backlash looks like. The way I like to talk about this is that our opponents have been pursuing their Plan A. Their Plan A was simply to stop us, to stop us from passing freedom to marry laws, stop us from passing LGBT non-discrimination laws, and look, they've got twenty-nine state constitutional amendments. They wiped the floor with us, folks. They did a great job. Plan A was good.

But they can see their Plan A isn't working so much anymore, right? Because they

---

52 S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (passed by the legislature and vetoed by Governor Brewer, Feb. 26, 2014).

ran through the states where they could do it. They haven't been able to pass another amendment. They haven't even been able to get another amendment on the ballot yet. They just tried recently in Indiana and couldn't.[53] So they need another strategy to make it so that if they have to live in a world that does have LGBT equality laws, they want to find a way to ensure that our equality doesn't affect the way they live because they experience themselves as the victims of our equality.

And for that they want to ask for a license to discriminate against LGBT people in various different contexts. Sometimes it's narrow—just wedding-related services—sometimes, it's everything—like the law in Arizona[54]—and what I want to just make very clear is, this is not some separate fight about religious liberty issues that happens to marginally affect LGBT people. This is the core of our opposition's strategy. This is what they're putting their all into. And we collectively as a people who care about these issues need to put our all into fighting them. And for a cautionary tale all you have to do is look at the folks we're surrounded by in the reproductive freedom movement. They've been dealing with religious backlash, religious arguments, chipping away at the core of their wonderful Supreme Court protection from 1973. And it's a very ugly, dispiriting, disheartening story. We don't want to go there. And that means we have a lot of work to do.

Q&A

Kendall Thomas (moderator) [KT]: I'd like you now to talk about what you think some of the most salient crossover and points of connection are on the one hand, and what you think some of the differences and divergences are between the litigation challenges and strategies of the Freedom to Marry work and of the reproductive rights work.

And I'm going to take the liberty of putting a second question to you, which has emerged from the terms of the discussion this morning. And you can address it or not as you choose to. Where do you see some of the downsides or the limits of state and federal court litigation in your respective areas as a tool for some of the cultural and social change, of which law reform is a crucial part but only a part? Or do you think that litigation can do some of that cultural and social movement work at the same time as it's protecting and

---

53 H.R.J. Res. 3, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014). *See also*, Tony Cook & Barb Berggoetz, *Same-sex marriage ban won't be on November ballot*, INDYSTAR (Feb. 14, 2014, 8:05 AM), http://www.indystar.com/story/news/politics/2014/02/13/hjr-3-last-minute-maneuver-could-spare-2nd-sentence-/5455299/ [http://perma.cc/34FJ-PLAH].

54 Religious Freedom Restoration Act, 2014 Ariz. SB1062/HB2153.

trying to expand marriage equality and reproductive rights jurisprudence?

MB: The movement's legal organizations understand litigation is one tool, and it must be wielded alongside legislative lawyering and public education.

Take public education. GLAD decided not to litigate marriage in Maine for a variety of reasons. We won legislatively in 2009 but then lost a "people's veto" in November, which "veto" was the culmination of the law-making process.[55] A week after we lost in '09, we started talking about how to turn this around, and asking, why did we lose, how do you go forward? There is a long story there, but ultimately a lot of good thinking came out of a long process of engagement with Maine voters, and that information was shared with the other 2012 campaigns. In the end, it was somewhat simple: how do you have a conversation about shared values around marriage? The process of discovering what we have in common with others, and others discovering what they have in common with us, made an enormous difference in how people saw and felt about the ballot question.

At that historical point at least before the 2012 elections, as much as individual LGBT people could talk to voters, when it came to ads, it was best to show real gay people and same-sex couples in a larger context with their colleagues, or with their families, talking about what they have in common and the bigger values at stake. Our first ad in Maine featured a WWII veteran in Machias, ME, with four generations of his family at the dinner table, where he spoke of wanting his granddaughter Katie to be able to be married. He made it clear that it connected to his sense of what he fought for and what he stands for.[56] That kind of encounter gives people permission to rethink their views and say, if he can say that, well then maybe it's worth reconsidering. We had another TV ad featuring firefighters at the station, along with their gay colleague, talking about why it's important that he, too, have colleagues' freedom to marry.[57] And of course, these were unexpected messengers and very stereotypically "real guys.".

JE: And they were.

---

55 An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 150, *repealed by* referendum (*Question 1)* on Nov. 3, 2009.

56 Why Marriage Matters Maine, *The Gardner Family,* YOUTUBE (Jul. 25, 2012), http://www.youtube.com/watch?v=gvJrmMK8HI0 [http://perma.cc/GLA8-VJSP].

57 Mainers United, *Yes on 1: Mainers United for Marriage – Brotherhood,* YOUTUBE (Sept. 22, 2012), http://www.youtube.com/watch?v=y6E6v0XmSSM [http://perma.cc/Z78Z-9Y7C].

MB: It wasn't scripted, by the way, which is part of why it clicked. But in the course of these men all talking, the conversation hit on the right issues. When you're trying to persuade people to vote with you, this kind of effort is necessary.

The challenge in a country as diverse as ours is, how you find those shared values? We are moving to discovering more shared values on the marriage front, and we have many shared values as to non-discrimination in the workplace. That should help us on the religious liberty piece. So as we work through this attempt to cloak impermissible workplace or housing discrimination in the guise of corporate or individual religious views, we have to keep focusing on the values that matter to people.

JE: Just a little bit adding to what Mary was saying, I think that what we need to think about is—what are the stories that we're telling when we're in court? One of the really wonderful things about all of the marriage work is that it's a story that we're telling that is relatable. And the ultimate goal of all the work that we're doing is, on the LGBT side of things, to change the way America thinks about LGBT people. Because if we change that, all the policy goals that we have will happen, because they will simply accord with public opinion. And the discrimination on the ground that we're trying to get rid of will go away or dissipate or at least get very substantially lessened, again, because it's driven by public opinion.

And so what we're trying to figure out is, well, what can we as lawyers do that's going to change that? A piece of it is definitely changing the policies, changing laws, changing constitutions, changing court rulings. But it's all aimed at changing public opinion, and the wonderful thing about the marriage work is we get to talk to the country about the fact that same-sex couples want to get married and tell the stories of people who have lived marriage vows. Like Edie Windsor, for example. And that directly addresses and confronts and confounds the stereotypes and cultural assumptions that the country has about LGBT people that are the very problems and the very attitudes that we're trying to change.

We don't have to hit them over the head with the idea of this, berate them and say, "You're bigoted, you're prejudiced, you have these stereotypes of gay people as only being about sex and about being pedophiles and stuff like that." We can simply show them people who are living lives that they understand. And after a while—decades, but it works—they actually start to understand that and understand LGBT people through that lens. That's a way that litigation and the storytelling you can do through litigation actually changes public opinion, which is ultimately the goal.

KT: One important difference between reproductive rights and marriage work is that there was a settled body of law with *Roe* and its progeny that marriage equality/Freedom to Marry lawyers weren't working with. What's the difference that that difference makes?

MB: We've been in a situation for some time now where, for example, in Massachusetts, you have a teacher who works at a Catholic high school, marries, and is then fired. As to Massachusetts law, we probably can't help that teacher, but not every employee is a teacher. When we can't litigate, we are happy to see those disputes get public attention, and it is often the students who drive that attention. At least some people will react by thinking, "This person shouldn't be fired just for being gay, or just for getting married." I hope this helps people be more mindful of how and where we draw the lines, particularly when a government contractor or a private corporation tries to invoke its religious views to fire people.

We have a case now in Massachusetts on behalf of a food service worker who was hired at a Catholic school and his job offer was rescinded once he put down on his emergency contact form that he was married.[58] But he doesn't teach. Not to say that teachers should be walled off, but he doesn't teach, and so there's a different set of issues and we are going to litigate that and push back.

KT: I'm struck in that regard by the example Mary gave about the grandfather and his granddaughter because on the one hand, I think its absolutely crucial to frame reproductive rights in a way that centers women's experience and these questions of women's health and women's equality. At the same time, it is also true that the decisions women make about reproductive rights are made in a context, in a relational context, which is very complex and dispersed. And the success that the Right has had in many ways, is in representing that relational question as an adversarial one—between women and their partners for example. So I think there's some interesting lessons on the messaging and framing front that might be of value across the two movements.

I'm going to exercise the moderator's prerogative and take two, maybe three, very brief questions together and then give the speakers two minutes to respond to those. Very, very very quickly. Do we have some questions? Questions? We have hands up. Yes.

Question 1: My question is for James and Mary. When the marriage equality battle is

---

58 *Barrett v. Fontbonne Academy*, GLAD, *available at* http://www.glad.org/work/cases/barrett-v-fontbonne-academy [http://perma.cc/M73Z-5Z78] (last visited Jan. 15, 2014).

finally won, and we go back to some of the other issues we were facing before marriage equality really came to the forefront, like non-discrimination, we've seen that ENDA has sort of stagnated in Congress year after year. Has there been discussions on the part of the LGBT civil rights organizations about winning an ENDA-style victory at the Supreme Court, and if so, what have those conversations surrounded upon?

Question 2: You've all mentioned talk about religious liberties and how they're implicated and you specifically mentioned that there were some religious groups who actually filed on behalf of the government and could you talk about any support from religious communities and how that impacts things?

Question 3: My question is about the overlap between your work and especially given that Arizona—there was a repeal yesterday and there's an abortion restriction bill[59] in front of the governor today. And I was really struck by that because I was noticing you talked about values and what are the shared values versus strategy? And especially values around patriarchy, which have been used against both groups? I was very struck by the example where it was the firefighters and the grandfather that legitimized gay marriage. So how do we—and that seems to reinforce some of the values that we might not believe in? So I hope you could talk about that and your overlap, rather than just your differences.

KT: Okay. I'm going to give you—and I apologize in advance—one minute each.

MB: In our marriage litigation and the DOMA litigation, we also really thought it was important to bring forth religious voices. There is a lot of passion in religious communities in support of LGBT people—the dignity and equality of LGBT people—and it is a crucial voice. Religious faith matters to many people. Religious leaders are often opinion leaders. We cannot accede to the framing that the Right wants of "gays vs. religion." No. Faiths are diverse, and even when a faith opposes marriage, many of its adherents are with us.

I also want to make sure to say loud, as to the premise of the question about "going back to" the work we did before marriage, that we have been walking and chewing gum at the same time. We've been working on marriage *and* many other issues the whole time. While the media has been particularly interested in marriage, every single one of our organizations has done tons of other important work and moved the ball forward, whether that work is widely acknowledged or not.

---

59 H.B. 2284, 51st Leg., 2d Reg. Sess., 2014 Ariz. Sess. Laws Ch. 33.

In the ten years since *Goodridge*, six more states passed non-discrimination laws, six states added gender identity, and Delaware passed a sexual orientation-only law. We've moved forward in federal legislation, winning hate crimes,[60] the repeal of DADT,[61] and ending the HIV immigration exclusion[62]. Our movement overall now has 500 local, state, and national organizations, but we were just a fraction of that in 2003. All of our legal organizations remained committed to justice under law, for everyone.

JE: So on the question about can we get ENDA-type protections through the courts? Well, what we may get, probably in one of the marriage cases, is a ruling that when the government discriminates against gay people, that should be presumed to be unconstitutional, and the government should have to come up with a very good reason for why it needs to take sexual orientation into account. Heightened scrutiny. That would get us basically as far as we are on race or sex-classifications in terms of restrictions on the government.

We can't get that for private business. The only way to get that for private business is to pass laws, which is why it's so frustrating that we've been trying for over twenty years to get the Employment Non-Discrimination Act through Congress and are still stuck. And we're stuck why? Religious exemptions. And the religious exemption in the law that has passed the Senate and is sitting before the House is a terribly broad provision that would allow a religiously-affiliated organization like a Catholic hospital to fire a trans doctor because she is trans or a gay nurse because he is gay.[63] That is what that law we are fighting like crazy to pass would do. There are a bunch of voices saying, "That is wrong, that provision should be taken out of that law," and it's a piece of the Arizona issue that is very much unresolved that I'm worried about.

Just a couple more words on the patriarchy point. I'm with Mary on this. If what we're trying to do is to change the way America thinks about gay people, are we going to have to buy into a bunch of stereotypes and ways of thinking that maybe we would also like to change? Yes? Is that assimilationist? I'd say instrumental.

---

60 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified as amended at 18 U.S.C. § 249).

61 Don't Ask, Don't Tell Repeal Act, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

62 CDC Medical Examinations of Aliens Rule, 42 C.F.R. § 34 (2014).

63 Employment Non-Discrimination Act, H.R. 1755, 113th Cong. § 6 (2013).

But I also think this: that if we can use the marriage frame—the marriage tool—as a way to attack the stereotypes that mainstream America holds about gay people and our relationships, that is going to help us long-term. And it's not going to help us long-term just on relationships. It's going to help us on non-discrimination, it's going to help us on bullying and harassment of kids in schools, it's going to help us on restrictive parenting laws. It's going to help us on the entire range of LGBT rights policy issues that we're trying to change because it is a very effective tool to get at changing public opinion and that gives us incredible dividends down the road.