

Oral History Center
The Bancroft Library

University of California
Berkeley, California

The Freedom to Marry Oral History Project

Kate Kendell

*Kate Kendell on Legal Strategy,
the National Center for Lesbian Rights,
and LGBT Legal Organizations*

Interviews conducted by
Martin Meeker
in 2016

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Kate Kendell, 2016
Photo courtesy of the National Center for Lesbian Rights

Kate Kendell is the Executive Director of the National Center for Lesbian Rights. Kendell was born in Portland, Oregon, and raised in Ogden, Utah. She attended Weber State University as an undergraduate and University of Utah Law School. After working for a private law firm in Salt Lake City, Kendell took a position with the ACLU of Utah in 1990 and began doing civil rights law. In 1994 she moved to San Francisco to become Legal Director for the National Center for Lesbian Rights, becoming Executive Director in 1996. In this interview, Kendell discusses the freedom to marry movement from the vantage point of the legal strategy to win marriage, including the ways in which the various organizations collaborated. Further, she details pivotal cases including *In re Marriage Cases* (2008), *Hollingsworth v. Perry* (2013), and *Tanco v. Haslam* (2015).

Table of Contents — Kate Kendall

Freedom to Marry Project History by Martin Meeker	vii
Freedom to Marry Oral History Project Interviews	ix
Interview 1: February 23, 2016	
Hour 1	1
<p>Birth in 1960 in Portland, OR, childhood in Ogden, Utah — Upbringing in the Mormon church, devout mother — Coming out, family’s acceptance — Early religious skepticism — Impact of radical current events teacher, identifying as a feminist, beginning to identify as a lesbian and reconciling with religious upbringing — College at Weber State College and first relationship: “I thought we were the only lesbians in Utah.” — Meeting first lesbian couple — Influential thinkers: Audre Lorde, Gloria Steinem — Decision to attend University of Utah Law School — Graduation in 1988, three years at a large law firm — Job at ACLU of Utah, 1990-1994 — 1993 meeting future wife Sandy at an ACLU conference in Atlanta — 1994 job as legal director at the National Center for Lesbian Rights (NCLR) — Primary work: family law, employment and youth issues — Shocking realization on starting NCLR job: “I had no idea of the pain that was out there for LGBT people.” — Using the Brandeis Brief approach to child custody cases — The case of Mary Ward in Florida — Using scientific data to argue and win custody cases — Referencing <i>Palmore v. Sidoti</i> (1984) — Newer custody issues: same-sex divorces, transgender kids, and parents — Awareness of <i>Baehr v. Lewin</i> (1993) in Hawaii — Initial rejection of marriage as a political goal — Being persuaded by Evan Wolfson’s arguments — NCLR work on marriage in Hawaii — Backlash in the form of DOMA and CA Prop 22, ongoing fight for marriage rights in Vermont and Massachusetts — Arguing sex discrimination — Work to defeat Prop 22 helped galvanize support for marriage as a political goal — Messaging: framing the freedom to marry as an issue of rights, neglecting the emotional argument</p>	
Hour 2	18
<p><i>Lawrence v. Texas</i> and <i>Goodridge v. Department of Public Health</i> in 2003 — Regional focus of NCLR — President George Bush calls for a constitutional amendment prohibiting the freedom to marry — Mayor Gavin Newsom responds by issuing same-sex couples marriage licenses in San Francisco — Worries over Newsom’s move — Scrambling to assemble legal support for the mayor’s decision — Asking Del Martin and Phyllis Lyon to be the first couple to marry on February 12, 2004 — 8000 couples rush to be married in six weeks — Preparing for the inevitable shut-down — Governor Schwarzenegger steps in — Choosing litigants to represent the diverse LGBT community — 2004 election backlash: 11 states pass constitutional amendments preventing marriage — Evan Wolfson starts Freedom to Marry — The 10-10-10-20 strategy — Dispute with city</p>	

attorney over whether or not to have a trial over marriage cases — 2008 *in re Marriage Cases*: “It felt to me that it was going to be much bigger than just winning marriage in California.” — The opposition puts Prop 8 on the ballot — Frustration during anti-Prop 8 campaign — Funding shortfalls — Polls and advertising

Hour 3

34

2008 presidential election, no support from the Democrats — Aftermath of Prop 8 passing: “It was probably six months before I felt back to normal.” — The widespread shock over Prop 8, galvanizing effect on supporters of the freedom to marry

Interview 2: March 16, 2016

Hour 1

37

More on the aftermath of Prop 8 passing in 2008 — Widespread shock and devastation — NCLR’s unsuccessful challenge to Prop 8 at the state level — Delaying federal challenge until more states had freedom to marry — Chad Griffin and the surprise Olson/Boies team’s federal challenge — Complex reactions to the case — The initial hearing before Federal District Court Judge Vaughn Walker — NCLR intervention when Ted Olson declines a trial, ensuing tensions, eventual success — Judge Vaughn Walker — Watching the Prop 8 challenge proceedings, relaying information to social media — The defense of Prop 8 lead by Charles Cooper — Judge Walker’s questioning — ACLU and GLAD take on DOMA in *Windsor* (2013) — A “perfect” plaintiff in Edie Windsor — Jockeying between legal teams: “It’s all good sport among people who all have healthy egos, some institutional interests, but ultimately really just care about winning for the community.”

Hour 2

54

Celebrating Prop 8 and DOMA defeats at San Francisco City Hall — DOMA’s defeat opens the floodgates — Planning an interim goal before a full challenge — Recognition claims and affirmative challenges — Choosing the right litigants, working with Abby Rubinfeld in Nashville — Changing focus from state to federal campaign, preparing for marriage nationwide — Addressing the societal context, creating a “drumbeat of inevitability” — NCLR’s communications team — Forming a narrative with journey stories told by couples — Messaging: focus on the emotional rather than practical reasons for marriage — *Tanco v. Haslam* (2015), marriage goes to the U.S. Supreme Court — Preparing, choosing Mary Bonauto to argue the case — Waiting for the decision, celebrating on the steps of City Hall — The backlash: religious exemption laws — Battles still being fought: child custody and transgender rights — The broader implications of the freedom to marry

Freedom to Marry Oral History Project

In the historically swift span of roughly twenty years, support for the freedom to marry for same-sex couples went from an idea a small portion of Americans agreed with to a cause supported by virtually all segments of the population. In 1996, when Gallup conducted its first poll on the question, a seemingly insurmountable 68% of Americans opposed the freedom to marry. In a historic reversal, fewer than twenty years later several polls found that over 60% of Americans had come to support the freedom to marry nationwide. The rapid increase in support mirrored the progress in securing the right to marry coast to coast. Before 2004, no state issued marriage licenses to same-sex couples. By spring 2015, thirty-seven states affirmed the freedom to marry for same-sex couples. The discriminatory federal Defense of Marriage Act, passed in 1996, denied legally married same-sex couples the federal protections and responsibilities afforded married different-sex couples—a double-standard cured when a core portion of the act was overturned by the U.S. Supreme Court in 2013. Full victory came in June 2015 when, in *Obergefell v. Hodges*, the U.S. Supreme Court ruled that the Constitution’s guarantee of the fundamental right to marry applies equally to same-sex couples.

At the very center of the effort to change hearts and minds, prevail in the courts and legislatures, win at the ballot, and triumph at the Supreme Court was Freedom to Marry, the “sustained and affirmative” national campaign launched by Evan Wolfson in 2003. Freedom to Marry’s national strategy focused from the beginning on setting the stage for a nationwide victory at the Supreme Court. Working with national and state organizations and allied individuals and organizations, Freedom to Marry succeeded in building a critical mass of states where same-sex couples could marry and a critical mass of public support in favor of the freedom to marry.

This oral history project focuses on the pivotal role played by Freedom to Marry and their closest state and national organizational partners, as they drove the winning strategy and inspired, grew, and leveraged the work of a multitudinous movement.

The Oral History Center (OHC) of The Bancroft Library at the University of California Berkeley first engaged in conversations with Freedom to Marry in early 2015, anticipating the possible victory in the Supreme Court by June. Conversations with Freedom to Marry, represented by founder and president Evan Wolfson and chief operating officer Scott Davenport, resulted in a proposal by OHC to conduct a major oral history project documenting the work performed by, and the institutional history of, Freedom to Marry. From the beginning, all parties agreed the Freedom to Marry Oral History Project should document the specific history of Freedom to Marry placed within the larger, decades-long marriage movement. Some interviews delve back as far as the 1970s, when a few gay activists first went to court seeking the freedom to marry, and the 1980s, when Evan Wolfson wrote a path-breaking thesis on the freedom to marry, and “domestic partner” legislation first was introduced in a handful of American cities. Many interviews trace the beginnings of the modern freedom to marry movement to the 1990s. In 1993, the Supreme Court of Hawaii responded seriously to an ad hoc marriage lawsuit for the first time ever and suggested the potential validity of the lawsuit, arguing that the denial of marriage to same-sex couples might be sex discrimination. The world’s first-ever trial on the freedom to marry followed in 1996, with Wolfson as co-counsel, and culminated in the first-ever victory affirming same-sex couples’ freedom to marry. While Wolfson rallied the movement to work for

the freedom to marry, anti-gay forces in Washington, D.C. successfully enacted the so-called Defense of Marriage Act in 1996. The vast majority of the interviews, however, focus on the post-2003 era and the work specific to Freedom to Marry. Moreover, OHC and Freedom to Marry agreed that the essential work undertaken by individual and institutional partners of Freedom to Marry (such as the ACLU, GLAD, Lambda Legal, the National Center for Lesbian Rights, the Haas, Jr. Fund, and the Gill Foundation) should also be covered in the project. Once the U. S. Supreme Court ruled in *Obergefell* in June 2015, the proposal was accepted and work began on the project.

After an initial period of further planning and discussions regarding who should be interviewed and for roughly how long, an initial list of interviewees was drafted and agreed upon. By December 2016, 23 interviews had been completed, totaling roughly 95 hours of recordings. Interviews lasted from two hours up to fourteen hours each. All interviews were recorded on video (except for one, which was audio-only) and all were transcribed in their entirety. Draft transcripts were reviewed first by OHC staff and then given to the interviewees for their review and approval. Most interviewees made only minimal edits to their transcripts and just a few seals or deletions of sensitive information were requested. Interviewee-approved transcripts were then reviewed by former Freedom to Marry staff to ensure that no sensitive information (about personnel matters or anonymous donors, for example) was revealed inadvertently. OHC next prepared final transcripts. Approved interview transcripts along with audio/video files have been cataloged and placed on deposit with The Bancroft Library. In addition, raw audio-files and completed transcripts have been placed on deposit with the Yale University Library Manuscripts and Archives, the official repository for the Freedom to Marry organizational records.

The collected interviews tell a remarkable story of social change, the rate of which was rapid (although spanning more than four decades), and the reach profound. Historians of social justice and social movements, politics and policy, and law and jurisprudence will surely pore over the freedom to marry movement and Freedom to Marry's role in that for explanations of how and why this change occurred, and how it could happen so rapidly and completely. Future generations will ask: What explains such a profound transformation of public opinion and law, particularly in an era where opinions seem more calcified than malleable? What strategies and mechanisms, people and organizations played the most important roles in changing the minds of so many people so profoundly in the span of less than a generation? Having witnessed and participated in this change, we—our generation—had an obligation to record the thoughts, ideas, debates, actions, strategies, setbacks, and successes of this movement in the most complete, thoughtful, and serious manner possible. Alongside the archived written documents and the media of the freedom to marry movement, this oral history project preserves those personal accounts so that future generations might gain insight into the true nature of change.

Martin Meeker
Charles B. Faulhaber Director
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December 2016

Freedom to Marry Oral History Project Interviews

Richard Carlbom, “Richard Carlbom on the Minnesota Campaign and Field Organizing at Freedom to Marry.”

Barbara Cox, “Barbara Cox on Marriage Law and the Governance of Freedom to Marry.”

Michael Crawford, “Michael Crawford on the Digital Campaign at Freedom to Marry.”

Scott Davenport, “Scott Davenport on Administration and Operations at Freedom to Marry.”

Tyler Deaton, “Tyler Deaton on the New Hampshire Campaign and Securing Republican Support for the Freedom to Marry.”

Jo Deutsch, “Jo Deutsch and the Federal Campaign.”

Sean Eldridge, “Sean Eldridge on Politics, Communications, and the Freedom to Marry.”

James Esseks, “James Esseks on the Legal Strategy, the ACLU, and LGBT Legal Organizations.”

Kate Kendell, “Kate Kendell on the Legal Strategy, the National Center for Lesbian Rights, and LGBT Legal Organizations.”

Harry Knox, “Harry Knox on the Early Years of Freedom to Marry.”

Amanda McLain-Snipes, “Amanda McLain-Snipes on Bringing the Freedom to Marry to Oklahoma, Texas, and the Deep South.”

Matt McTighe, “Matt McTighe on the Marriage Campaigns in Massachusetts and Maine.”

Amy Mello, “Amy Mello and Field Organizing in Freedom to Marry.”

John Newsome, “John Newsome on And Marriage for All.”

Kevin Nix, “Kevin Nix on Media and Public Relations in the Freedom to Marry Movement.”

Bill Smith, “Bill Smith on Political Operations in the Fight to Win the Freedom to Marry.”

Marc Solomon, “Marc Solomon on Politics and Political Organizing in the Freedom to Marry Movement.”

Anne Stanback, “Anne Stanback on the Connecticut Campaign and Freedom to Marry’s Board of Directors.”

Tim Sweeney, “Tim Sweeney on Foundations and the Freedom to Marry Movement.”

Cameron Tolle, “Cameron Tolle on the Digital Campaign at Freedom to Marry.”

Thomas Wheatley, “Thomas Wheatley on Field Organizing with Freedom to Marry.”

Evan Wolfson, “Evan Wolfson on the Leadership of the Freedom to Marry Movement.”

Thalia Zepatos, “Thalia Zepatos on Research and Messaging in Freedom to Marry.”

Interview 1: February 23, 2016

01-00:00:02

Meeker: This is Martin Meeker, interviewing Kate Kendell, for the Freedom to Marry oral history project. Today is Tuesday, February 23, 2016, and we are at the offices of the National Center for Lesbian Rights, of which you are the executive director. The way that we start all of these interviews is I ask you to tell me a little bit about when and where you were born.

01-00:00:29

Kendell: Great first question. I was born in Portland, Oregon, in 1960, April 15, 1960, and lived there until I was 3-years-old. I grew up and spent most of my life in Utah, before I moved, to San Francisco.

01-00:00:43

Meeker: Can you tell me a little bit about the circumstances in which you were raised?

01-00:00:46

Kendell: I was raised Mormon. My mother was a very devout Mormon. My biological father died when I was two, my mother to remarried my step-dad, who was not involved in the church, but his family was from Utah and he grew up Mormon, so that ended up moving us to Utah. I grew up Mormon, and when I came to consciousness about my sexual orientation, lucky for me, it was not a huge deal with my family and friends. I was lucky that way.

01-00:01:17

Meeker: Where in Utah did you grow up?

01-00:01:19

Kendell: In Ogden, which is about forty miles north of Salt Lake.

01-00:01:22:25

Meeker: And that's kind of a real center of Mormon culture, if you will.

01-00:01:28

Kendell: You know, Ogden was a railroad town, and so it's a little more liberal and a little more progressive and more diverse than some of the towns south of Salt Lake City, so I think I benefited from a little bit of that kind of live and let live mentality.

01-00:01:48

Meeker: I mean, is that what you think spurred your family to be more accepting than perhaps other Mormon families would have been?

01-00:01:56

Kendell: I think my mom, and she was the one who I was most concerned about, because she was so devout. She was just that sort of parent that just knew that your main job as a parent was to love your kid unconditionally, and she just did that. She was very devout, you know, a very low key kind of personality, not the sort of person to draw a lot of attention to herself, but, any time she went into a room, it just lit up the room. I think she just felt like, as she said to

me, that God gave her, her testimony of the church and me, and she knew her job was to love both and He could work out the rest.

01-00:02:47

Meeker: Growing up, how did you feel about religion, how did you feel about faith?

01-00:02:55

Kendell: I always was a doubter, I think. I remember, I had a current events teacher when I was in the eighth grade, who was a real radical, was not Mormon or involved in the church at all. She introduced me to Sojourner Truth and Frederick Douglass and Chief Joseph and Cesar Chavez, and all of a sudden I had this whole sense of whoa, that felt like a purposeful life more than religion. Religion was sort of my social network, because everybody in our neighborhood went to the Ward House, but I can't say I ever was a believer, and so for me, when I left the church, I really left the church actually because I came to my consciousness as a feminist, more than a lesbian. I feel very lucky that I wasn't as pulled in as many people are, who end up coming out as lesbian, gay, bisexual, transgender, and then leave the church. It's very hard for many people.

01-00:04:00

Meeker: What came first, coming to consciousness as a lesbian or a feminist?

01-00:04:06

Kendell: I think, well definitely the lesbian piece, I was more aware of, and I was actually in a relationship, but I just thought it was a phase, I didn't see it as the way I was going to live my life. The feminism definitely felt like oh, this is feminism and just progressive politics generally, and passion for civil rights. That really drove me and eventually, I think, I mean I definitely think I had internalized homophobia, even though I was lucky that my family and friends were accepting. I had to overcome cultural messages that something was wrong with me or that I was going to hell, even though you didn't really believe it, but if it's all you've ever been taught. Eventually, everything came together and my political life integrated with my sense of who I was, and by the time I was in my early twenties, I was pretty reconciled that I was going to be fine.

01-00:05:08

Meeker: Where did you go to undergrad?

01-00:05:10

Kendell: Weber State College, which is my hometown college. I was involved in a relationship at the time, I didn't want to leave town, and I'm really, I'm glad that I stayed. It was a fabulous place to get an undergraduate degree.

01-00:05:28

Meeker: And you said you were in a relationship, was it with another woman?

01-00:05:30

Kendell: It was.

01-00:05:33

Meeker:

Can you tell me the story about coming to consciousness and getting introduced to a wider circle of lesbians?

01-00:05:40

Kendell:

My very first relationship was with someone who was also involved in the Mormon Church. She was older than I was, married at the time, so that was a whole drama, and I remember feeling like we were the only lesbians in Utah. I didn't know anyone. When I started going to college, I would stop at a kind of coffee break room. I was taking history classes and English, I was definitely a liberal arts major, and every morning, there were a gathering of folks in this coffee break room, and I remember there was this woman there, very butch dyke, who talked openly about being a lesbian and about lesbianism and homosexuality generally, and gay rights. I made it a point to make sure that I was always in that coffee room in a time that I knew she would be there, and so mostly it was just a stealth relationship. I just couldn't believe that somebody else existed. I finally got up the courage to introduce myself to her and she did that fabulous thing which is like, "All right, come on," took me as a baby dyke, under her wing, and introduced me to her partner, and they had a whole network of friends. I'm not as close to the first woman, but her partner at the time is still very close to me and actually came and spent time with our family over the holidays. She says that she helped raise me, and in some ways it's true. I was nineteen when I met them, and I think it saved my life a little bit. I think that helped me know I was going to be fine and there was nothing for me to be ashamed of.

01-00:07:33

Meeker:

How is it that they did that?

01-00:07:37

Kendell:

They were just unapologetically queer and they were very politically progressive as well, and it just, there was never any question. It was just a matter of almost like meeting more people, and everybody I met was completely comfortable with who they were. I mean yes, they understand that they worked and lived in a larger ecosystem, where maybe they weren't out on the job, but that was the society's problem, it was not something that anyone was ever ashamed of, and it made just a huge impression on me. While it was still a long time before I was truly publicly out, I mean when I went to law school, I was still in the closet in law school, mostly just as a self-protecting measure. But the sense that it was society's problem, not mine internally, was really important to eventually being very comfortable, being well obviously now, sort of like paid for being a lesbian.

01-00:08:38

Meeker:

Was it through these women, you were introduced to feminism?

01-00:08:42

Kendell:

Feminism was actually introduced to me by—and you know, this is not unique, because Utah is just, you know, there are all kinds of Mormons—a

male Mormon history professor, who was an ardent feminist and talked a lot about feminism. I remember when I told him I was leaving the church, he said, "But wait you can't because the church needs people like us. We need to be on the inside, we can't just walk away." I didn't have the guts, at that point, to tell him that, "Well, it's not just feminism, I'm also a lesbian." I did eventually, but at that moment, I didn't feel comfortable coming out to him, but that stayed with me and I think it's true. I mean, I do think that every system that has elements of oppression needs those who are oppressed to stay in the game and try to change it from within, but it's also very hard to do, I mean the Audre Lorde quote, "You can't dismantle the master's house using the master's tools," I mean there is a lot of truth to that and everybody makes their own choice. Professor Sessions stayed in the church as far as I know, I obviously couldn't.

01-00:10:01

Meeker:

You just referenced Audre Lorde. Were there other thinkers or writers who were particularly influential as you developed your own ideas around feminism?

01-00:10:12

Kendell:

Well, Audre Lorde was seminal. Later, I mean I think later in my college life and early law school, bell hooks, Patricia Williams, obviously Gloria Steinem, Margaret Sloan. She was at Gloria Steinem's side and you know, really was one of the key people that helped feminism and the feminist leadership, which was mostly white at the time, come to terms with, there had to be a racial justice component if you were going to really be a true feminist. So yeah, it was a mix of women of all sorts of backgrounds, and also men. I felt like the sense that a common humanity is what drives feminism, I think that was the most resonant to me.

01-00:11:24

Meeker:

You know, a lot of people I've interviewed, a lot of women who were involved in feminism, kind of came of age in the 1970s, talk a lot about the ERA [Equal Rights Amendment] as something, as an issue they really participated in, and that was probably sort of resolved in a negative way, I think probably when you were in college. Were there, later on, other issues that were important to you as a feminist?

01-00:11:50

Kendell:

I was in Utah during the fight over the ERA and I missed it a little bit, just because I was young and a college student and not really aware of national politics in the way that I would become later, but it was really interesting because of course, the whole Mormon church's approach. The Mormon church hated the ERA and their sense of it was that because the Mormon church is very patriarchal, which is part of the reason that feminism drove me away from it, and that's what you heard in Utah. You heard very little about the possibility that the ERA could ever be an amendment to the constitution. It just felt like a fanciful idea and I think if I lived someplace else, a state that

perhaps ratified it or had a real ratification conversation. In Utah, you sort of felt like a lot of the progressive political issues, whether it's talking about the Black Panthers or the ERA or any of the key major movements, even when HIV [human immunodeficiency virus] first started, it's as if Utah views everything through this scrim. You know, it was a little bit out of focus, it just, it felt farther removed, because the joke that Utah is ten years behind everything else that's going on in the country in terms of conversation. It's probably not the only place that's like that, but it is a very parochial place, and the conversations and the news you get and the media, makes it hard to really be out front. So I feel like I was many years behind all of those sort of conversations.

I do remember in law school, getting very involved in the fight against the [Robert] Bork nomination to the U.S. Supreme Court. As a law student, there was a huge understanding about how important the Court was, and it was just clear that Bork would be an absolute disaster, and I think that's been confirmed by everything he's written and said ever since.

01-00:13:51

Meeker:

When and how did you decide that law school was the right path for you?

01-00:13:57

Kendell:

I had wanted to go to law school since I was a teenager. This current events teacher, Mrs. Miller, made a huge impact on me. I loved the law. I remember we got a *Time-Life Book* about know your rights. I don't even remember the title of it. Well, I read it cover to cover. It was just fascinating, about sort of a lay person's guide to how laws worked and the legal system, and how to resolve disputes. I got involved in debate when I was in high school, continued that in college, and that was really my passion. So I ended up, at the end of college, with a poor GPA and thought well that's it, there's just no way I can go to law school, but I couldn't get it out of my head and I ended up talking to a mentor of mine who was a lawyer, and told her I still really wanted to go to law school or maybe I was going to go on to graduate school. I wasn't sure what to do and she said, "You should go to law school, you would be a great lawyer." And I said, "Gosh, I don't think I'm going to be able to get in," and she said, "Just come on, you've got to try it." So I took the LSAT [Law School Admission Test], you know the law school entrance exam, did well but not well enough to overcome grades, and so I took it again and did very well, and between the two of them, I was accepted at the University of Utah Law School.

I applied to one other law school in Oregon, in Portland, Lewis and Clark, but again, I couldn't go because I was involved with—my partner at the time had a young child, and now my thirty-four year-old, almost thirty-five year-old daughter, and I wasn't going to move away by myself, and she was supporting me to go to school, so it's not like our family could move. So I ended up going to the University of Utah. Again, I have absolutely no regrets about it,

and I still knock on wood that I can't believe I actually got in, but boy, the best thing ever.

01-00:16:05

Meeker: Did you study public interest law there?

01-00:16:09

Kendell: They didn't have a public interest track at the University of Utah, but I did love all the public interest classes, whether it was environmental law or constitutional law, which focused on civil liberties issues. I remember taking a class on women and the law. The heavy classes around tax and property and contracts, I barely skated through. The classes that were focused on the law playing a meaningful role in addressing some wrong, yeah I loved all those.

01-00:16:46

Meeker: So, upon graduation, that was 1988, I know shortly thereafter, you're working as a staff attorney for the ACLU [American Civil Liberties Union], in Utah. Could you tell me about the process of getting that job and the kind of work you did there?

01-00:17:00

Kendell: When I left law school, I started at a firm, and it was really interesting, because I got an offer from what was then the largest firm in the state of Utah, and it just felt like an amazing opportunity, I would make more money than I've ever made in my entire life, looking back it wasn't that much, but it was more than I'd ever seen, and I thought it would be great training and it absolutely was. So, I was with that firm for about three years, but I remember when I took the job, there was a law school friend who heard that I'd accepted this position with this firm and she said, "That seems so weird to me. I always thought you would be at the ACLU." I remember thinking well, yeah, that would be a passion position, but this seems like the right thing. Then, about three years in I realized I was bored and I thought, "What am I going to do now?" And almost within two or three days, at least in my memory, the *Utah Bar Journal*, the magazine for the Utah Bar, landed on my desk, and I was thumbing through it and at the back they had job announcements, and there was a job announcement for the first staff attorney for the ACLU of Utah. I remember thinking, "Oh my God that is the job I want." I applied and again, I mean I just, I feel like if I didn't believe in God, the trajectory of my life would make me a believer, because it did feel like there was something divine about getting that position. Every single day was just a complete challenge and joy, and I pretty much skipped to work, I loved it.

01-00:18:54

Meeker: Would it be possible to characterize some of the main sort of pieces of litigation you were working on there?

01-00:19:00

Kendell: Utah is not wildly politically diverse, so on a whole range of issues that needed to be addressed, in terms of individual rights and liberties, the ACLU

was like the only game in town. It's not as if there were a prisoner's rights organization and an immigrant rights organization, an abortion rights organization and a church/state organization, an LGBT organization. Back then, it was all the ACLU, so we always had a TV crew in our office almost every day, sometimes a couple of times a day, covering church/state, prisoners rights, LGBT issues, reproductive justice, art and free speech, just the whole range of issues that one would think about, that could come up in terms of a dispute between the government or a predominant majority and a minority, and so it was everything.

We had a lawsuit against the Utah State Prison System, for denial of mental health and medical care. We had a lawsuit against the city council for prayer in public meetings. We had a lawsuit challenging a law that the state of Utah had passed to restrict access to abortion and to reproductive services. I mean in any given day, you never knew what was going to happen. I will say, I was never bored, and it was really great work, but I felt like my entire career, I don't think I could have been as effective at the ACLU if I hadn't had my training at the firm. And then I wouldn't have been in a position to end up at NCLR, if I hadn't been at the ACLU. The narrative makes sense when I look back.

01-00:21:06

Meeker:

What were the LGBT issues that you were encountering at that point in time in Utah?

01-00:21:11

Kendell:

There were some schools issues, around bullying in schools.

01-00:21:16

Meeker:

How did that become an ACLU concern?

01-00:21:19

Kendell:

Well, the ACLU's position was the schools needed to respond and protect LGBT students from bullying, and provide support to those who bullied. Later, there was the recognition of a gay/straight alliance at a local high school, which triggered a huge lawsuit. Mostly it was just recognizing the existence of LGBT people. I was always up at the statehouse testifying in favor of a whole variety of bills, some bills that included protections for LGBT people. It was mostly defensive work, something bad happens and you try to stop it or end the discrimination. Just a little bit of offensive work, because it was very hard to be in an offensive posture when you were just trying to keep your head above water.

01-00:22:30

Meeker:

So this was roughly 1990 to '94, that you were doing this work?

01-00:22:34

Kendell:

Yes.

01-00:22:35

Meeker:

Just a point of clarification then. You talk about LGBT work. Was there actually transgender law being practiced by the ACLU at this point?

01-00:22:45

Kendell:

When I was at the ACLU in Utah, as probably was in much of the country, there was very little visibility for transgender individuals, so we didn't have actual transgender work that we were doing. We were certainly aware the transgender identity existed, but there was no really meaningful transgender advocacy happening in Utah at the time.

01-00:23:09

Meeker:

Tell me about the transition to the National Center for Lesbian Rights in 1994.

01-00:23:14

Kendell:

In 1993, at an ACLU conference in Atlanta, I met my now wife, Sandy, at a gathering. It now sounds so provincial, but it was such a sweet thing to happen. The ACLU had all its LGBT members from all the affiliates all over the country, get together for drinks and dinner, at the various annual conferences they had. You know, you could put us all in one room, I mean I think there were probably thirty people. I met Sandy that weekend and we just immediately hit it off and over the next several months, I thought this is the real deal, and I want to be together. So we did a long distance relationship for a year and a half. She is the one who introduced me to the National Center for Lesbian Rights, because she was on the board. I remember when she first mentioned the organization, I thought wow, there's an organization that does lesbian rights work? And then it was very evident to me, over many conversations with her, that it wasn't just lesbian rights work. The organization represented gay men, bisexual, not so many transgender people then, but it was the lesbian leadership piece that they definitely held on to. The board was all lesbian identified women, the executive director was lesbian.

I remember distinctly one afternoon, at the ACLU offices, Sandy called me and said, "Go stand by the fax machine," and so I went up and stood by the fax machine. Keep in mind, this is before email and cell phones and all of this. So, I go stand by the fax machine and a fax comes through and it's a job announcement for the legal director at the National Center for Lesbian Rights. I had the same reaction I did when I saw that job announcement for the ACLU position, I thought, "Oh my God, I want this job!" I was really ready to kind of take everything that I had learned from civil rights advocacy and telescope it a bit, to focus on me and my community. And I wanted to be in San Francisco. I had never thought about moving before but, after a year and a half long distance relationship, it was long enough, and so I applied for the legal director position and got it, and started in October of 1994.

01-00:26:00

Meeker:

It's interesting, you said that you weren't aware, prior to this meeting with other ACLU folks, about NCLR. Were you aware of Lambda Legal or GLAD [Gay and Lesbian Advocates and Defenders] in Boston?

01-00:26:14

Kendell:

I was a little bit aware of Lambda Legal. I did not know about GLAD. I'd heard about Lambda before, had just run into people based on kind of the work that the ACLU was doing. I did become aware of NCLR through more than just Sandy. Sandy was the one who first introduced me to NCLR, but after that happened, after she made me aware of it, while we were doing this long distance relationship, I got a call from the youth project director at NCLR, Shannon Minter, who is now NCLR's legal director, saying "would you be willing to travel with me to this psychiatric facility in the middle of Utah, because there is a young lesbian who has been institutionalized by her parents and I want to go down and meet with her, and we want to see if we can get her out."

So, Shannon flew in to Salt Lake, I picked him up at the airport, and we drove to the middle of nowhere, Central Utah, to a facility called Rivendell, which no longer exists, to meet with this young woman and to meet with administrators, and to really try to begin ending the practice of young people, these are minors, being institutionalized by their parents because of their coming out to their parents as gay or lesbian, bisexual, or transgender. It used to be, a very common practice. Psychiatric facilities accepted young people on the basis that their sexual orientation or their gender identity was objectionable to their parents. That was my first actual opportunity to work with NCLR and with Shannon. So by the time the job description and the job announcement came across that fax machine, I knew the organization a bit better and had a sense of what kind of difference it could make.

01-00:28:24

Meeker:

Well, when you start here then, in 1994, can you give a job description? What kind of work were you supposed to be doing? Was it litigating cases or developing legal strategy, both?

01-00:28:37

Kendell:

The legal director was primarily responsible for leading the litigation. We were a very small organization at that point, we had only five employees. There was only one other staff attorney and that was Shannon, in addition to me. We wanted to do more direct litigation. We wanted to litigate cases ourselves, not just file amicus briefs. We wanted to develop some bigger strategy, particularly around parental rights, and so it was youth, elder. When I first started in '94, the main bodies of work were family law, employment and youth. Very shortly after I got here, we started doing more immigration work, elder work, and then a few years later, started doing our homophobia in sports work.

When I first started, you know and of course keep in mind, coming from Utah, I thought I'd seen the worst in terms of how you could treat LGBT people. It was a very rude awakening. I had no idea of the pain that was out there for LGBT people. I mean, we heard from men and women every single day who were losing their jobs, their communities, lost custody of their kids. That was such a common story, phone calls every single day, usually from women but often from men too, saying that a judge had just said they could never see their kids again, a judge just said they could never visit their kids again if their partner was around. They had been the primary caretaker and just lost custody of their kids, based only on their sexual orientation. The worst case, in terms of just the fact pattern, was a lesbian, Mary Ward in Florida, who was the primary caretaker of her daughter. She and her husband had been divorced for many years. When she sought an increase in child support, he sought custody, because he didn't want to pay. He wasn't even paying his original child support and he certainly didn't want to pay any more. So he challenged her for custody. The only charge that he made was that she was a lesbian, and she lost, and lost custody of her than eight year-old daughter. That is a very typical story, I'd heard it a million times, but the kicker to this story is that ex-husband had served eight years in prison for murdering his first wife. So that was the lay of the land for queer people in this country in the mid-1990s, which feels like yesterday to me. So yeah, there was a lot of pain out there. I remember Sandy saying to me, "Wow, are you okay?" Because I felt really traumatized by it, and it was about six months before I really gained equilibrium to be able to find a way to just, I don't know, cabin it a little bit or not have it feel like it's me. I projected a lot in those first few months, about what it was like for my brothers and sisters out there.

01-00:32:02
Meeker:

When you were presented with particularly all these cases around family law and custody, what was the particular legal strategy that you started to develop in order to try to make some headway?

01-00:32:16
Kendell:

Well, we adopted what is known as kind of a Brandeis Brief approach. Justice Brandeis was known for, when he was a litigator himself, for creating, presenting to courts briefs that weren't just about legal citations. It wasn't just *Smith v. Jones*, decided bla-bla-bla, so now you decide this way, or taking the legal theory from *Peterson v. Smith*, was this and now you should apply it here. A Brandeis Brief is setting out scientific or psychological or sociological data that says and therefore, you need to decide this way. And so we began relying on what was then, the very sort of nascent research that had been done on LGBT—well, it was mostly LGB, mostly LB, parents, which demonstrated that sexual orientation had nothing to do with parental ability, because there were no cases, or the cases were all against us, they just decided, ipso-facto, if you're queer, you are not fit to be a parent or to have custody of your children. So we had to prove those cases wrong by presenting data, and as long as we

could get a fair minded judge, we felt like we had a chance, and we started winning.

I remember, even though we lost the Mary Ward case on appeal, and it was one of the last cases that I went and argued myself, she was from Pensacola and the case was argued in Tallahassee, the court—it was clear to me within five minutes that we were going to lose. The court cared about one thing and one thing only, and that's that Mary Ward was a lesbian. It was the most rank bigotry I had ever seen and I feel like all three of those judges shame the institution, but it was what it was. I should just finish this story, just to honor Mary. Six months later, Mary dies of a heart attack and I'm sure it was a broken heart. She was so lovely. I remember calling Sandy later that night, after I'd met Mary for the first time, and I said I would send Emily—my daughter—to be raised by Mary, I mean she is such a lovely, wonderful person. The kicker to the whole thing is the daughter that ended up being the subject of the custody dispute, ended up being raised, not by her dad, who never really wanted to raise her. She ended up being raised by her older sister, who is a lesbian. But with Mary's case, we vowed, I vowed, "Never again, we are going to change this," and just a few months later, in another case in Florida, we represented a lesbian who had lost custody of her child and we won, and then we started winning.

It is now the case in this country, I mean it took probably fifteen, twenty years, that in probably only one state, Mississippi, will sexual orientation, in and of itself, be likely to cause you to lose custody of your children, and it used to be twenty-eight, twenty-nine, thirty states. So I do feel like that has changed markedly and yeah, I'm happy about that.

01-00:36:05

Meeker:

When you started winning some of these cases and you were marshaling sociological, psychological data, what did you find was most convincing to judges as far as this kind of research that was being presented?

01-00:36:21

Kendell:

The kids are fine, you know the kids really are all right. The argument that we would make is—and there was a Supreme Court case that involved a custody that was denied to a white woman when she remarried a black man, and that case fortunately, was reversed by the Supreme Court, in a really fabulous majority opinion, and I think, I think it was Marshall who wrote the majority opinion, but I might be wrong about that. I have in the back of my mind that that might not quite be right, but the majority opinion took the position that everyone is going to have private biases, so yeah, there are private biases that people don't like interracial relationships or private biases where people do not think LGBT people are fit, but private biases may not be within the reach of the law, but the law doesn't have to bow to them. That was the language that we used, *Palmore v. Sidoti* (1984) was that case and we used that case again and again to say that is what this is. It is an unreasonable, irrational

prejudice, that has nothing to do with a parent's ability to be a good parent, and you look at these longitudinal studies. Most of the studies at that point were pretty small, I mean now they're overwhelming. Now, other than totally discredited studies, there is no credible study that demonstrates anything other than sexual orientation is irrelevant. I would never take the position that every LGBT person is a good parent, any more than anyone would take the position that every heterosexual is a good parent, but good parenting has nothing to do with your sexual orientation. So we were able to make that argument and tie it to, and if you think that sexual orientation alone disqualifies you from being a parent, you're falling into a trap where you're allowing prejudices to control actual evidence.

So we did have a case we could use by extension and by extrapolation and I think courts, at least fair judges, really began to understand and say, "Okay, yeah, I might not want my own kid to be raised by a lesbian or a gay man, but I'm not going to allow my private prejudice to get in the way of clear data that says sexual orientation is irrelevant to parenting." Then we started to win on transgender parents as well. Now that's still a harder issue, and now we're seeing the latest chapter of these kinds of cases are lesbian versus lesbian, who have kids together, and then they split up and the biological parent is denying the other parent any continuing relationship with the child. That's the new generation of cases that we're seeing, and transgender kids, where one parent who is gender affirming loses custody to another parent who wants the child to be forced to behave and present in a way consistent with their sex assigned at birth. So we're not done by any means, with custody disputes and family law issues, but it's rare now. It still happens and we just got a case the other day, but it's rare that it's a heterosexual parent versus an LGBT parent.

01-00:40:02

Meeker:

You start here in 1994 and by that point in time, same sex marriage is already making its way through the courts in Hawaii. I guess the initial *Baehr* decision, *Baehr v. Lewin* comes down in 1993, that then results in this first trial. When did you first learn about this litigation going on in Hawaii and what did you think of it?

01-00:40:28

Kendell:

I became aware of the *Baehr v. Lewin* case while I was still at the ACLU of Utah, and I remember thinking how odd, that we were fighting for marriage. That was my first reaction. Then I started at NCLR, where I'm actually working at an organization that does LGBT legal advocacy, and I remember being at my first LGBT litigators roundtable, which was held in the offices of GLAD's office in Boston. This is actually before I formally start, so I think this is in September of 1994. I start October, 1994, but I wanted to go to the legal roundtable, and I'm still embarrassed by my behavior, you know you live and learn, right? I now tell my young staff, "You know when you're starting out in a new position and you hang out, you're going and hanging out with people who will be your colleagues, you should probably listen more and

talk less, and get a lay of the land, figure out what's really going on and learn." I totally rejected, did not pay attention to that advice and I remember Evan Wolfson, who was then at Lambda as a staff attorney, made a presentation about the *Baehr v. Lewin* case. There were maybe twenty of us, and some of my heroes in LGBT civil rights are around the table. Evan finishes talking about what the status of the case was and where things were going and I pipe up and say, "I don't understand why marriage is a goal we're pursuing. It seems to me to be very patriarchal and why would we want to pursue a system and thereby aid the patriarchy rather than undermining it," or some other equally ridiculous sentiment. I want to be clear. I know lots of people who have that critique of marriage. What I regret is that I feel like I had not earned the right to say such a thing, especially at my very first meeting with all of these colleagues. To this day, and Evan and I still joke about this, I truly thought that he was going to maybe climb over the table and come after me, I mean you could see the look on his face. I mean he'd had to deal with this a million times.

And the fact that he had to argue it again in this room. Paula Ettelbrick was there, Paula Ettelbrick, rest in peace, who had a whole critique of marriage and did it much better than I ever could have. Yeah, so the good news is, Evan and I can joke about it now, but at the time, I did question whether this was really a laudable goal and were we really going to go all in, because that's what it was obviously going to require. It just felt like the hurdle was too high in terms of where public attitudes were, and it even seemed oxymoronic for me as a lesbian, that this is what we were doing. So yeah, that was my first reaction.

01-00:44:23
Meeker:

Well at the time, you had already had long-term relationships and those relationships had involved children. Had you thought that there was a desirable alternative, legal arrangement to protect children or to protect the relationship in those cases, other than marriage as defined conventionally?

01-00:44:47
Kendell:

Not really, which is the problem. I hadn't thought about it enough to think, "Wait a minute, I have no legal relationship with my daughter, she has no relationship with me. If something happens to me, my partner at that point, long-term partner, gets no social security survivor's benefits, my daughter gets no benefits or protection." It was where, you know, sort of my feminist political frame, I had not really developed a true critique. I had a knee-jerk reaction and that's what I regret. There are many, many cogent, thoughtful analyses, you know Nancy Polikoff comes to mind, Paula Ettelbrick comes to mind, many others, but that was not where I was at that moment and I think Evan rightly, I mean he very patiently, he took a deep breath and very patiently explained why this was important and what it meant. But if I had it to do all over again, even though we do have a point to laugh about and a story to tell, if I had it to do over again, I would have kept my mouth shut.

01-00:46:11

Meeker:

Do you recall, when he was trying to educate you, what main points he was making? Do any of those things stick in your memory?

01-00:46:18

Kendell:

Well I think Evan is one of the most passionate and eloquent advocates for marriage equality and for the right of same-sex couples to marry, and he's gotten better and better and better. The essential point that he made then and I think still makes is there is a tremendous stigma attached to our exclusion from the freedom to marry. You are really marked with a badge of inferiority when your relationship, deeply as loving and as committed, is the only type of relationship between two people that the government not only refuses to recognize and protect, but actually disfavors, and thereby harms the individuals involved in the relationship, any children that they have. I think that was really his central point: why can't we have what everyone else automatically gets when they make a choice to commit to the person that they love? I remember when he finished, thinking, "Oh, God, I didn't think that through very much." Even now, even with a tremendous amount of scholarship on both sides, there are still many individuals who have a critique about marriage that is grounded in something to do with diversion of resources, shouldn't have been the goal, wasn't ever a primary goal of many people in the movement, and we should just, you know, we should have transformed marriage rather than becoming assimilated by it. And I think that's still a very worthwhile conversation to have, but I didn't have the benefit of all that scholarship when I said what I said.

01-00:48:33

Meeker:

So, basically what happens is, I guess NCLR does issue an amicus brief at one point in time, in the Hawaii case?

01-00:48:43

Kendell:

I think when the case was before the Hawaii Supreme Court, I believe we filed an amicus brief. I'd have to double check for sure but I think we did. I know we got involved at some point.

01-00:48:58

Meeker:

What then, was the conversation here at NCLR, about deciding if you were going to spend any resources on this at all?

01-00:49:08

Kendell:

Well you know, I will make mistakes, but I usually don't make them twice, and so after this conversation with Evan at the LGBT litigators roundtable, I really decided okay, I've got to educate myself, I've got to really know what I'm talking about. I can still have whatever critique I want, but I need to read what's out there. So, I read a bunch of the scholarship that was out there, you know Paula Ettelbrick and Tom Stoddard had sort of dueling *Law Review* articles, which was the place I started. I came to the conclusion that while I still felt like I still had a critique of marriage, just as an institution, in the same way, I kind of started to liken it to the way I felt about the military. I have a

critique about the military too, but our exclusion does create a tremendous amount of stigma and it actually provides people perfect cover for never checking their own biases, because all they have to say is, “Well, the government won’t even let them marry or be in the military, so something must be wrong with them.” And so we had to end the exclusion, we had to end the government sort of putting their thumb on the scales, and have the open dialogue about our place in civil society, but we had to get rid of the governmental barriers to our place in civil society. So that’s where I was when we started to get involved in the Hawaii case, and then the Massachusetts case and obviously then, we took a very, very significant role. I’ve had my own evolution on marriage and how I feel about it and how I feel about the different it’s made in LGBT liberation generally, but back then, it was really just a matter of yeah, this is just for all sorts of practical purposes; we’ve got to end discrimination against our relationships.

01-00:51:08
Meeker:

So what kind of resources was NCLR devoting to this at the time, and I say that kind of in the context of you know, there was initial success in Hawaii and then there was a referendum that overturned it, so therefore the supreme court comes back, I think by 1999 and decides that no marriage will happen. There of course is DOMA, Defense of Marriage Act, passed in, I think September of ’96, that then by 2000, in California, there was Prop 22, I think. This is all happening in the context of a real intense wall of opposition to this idea, from at that point not just the right-wing but also, apparently, mainstream Americans.

01-00:52:02
Kendell:

Yeah, yeah. We started to get more and more involved as we saw the opposition increase, because we realized we had to defend ourselves. It started with, I mean one of my favorite moments was when we did file an amicus brief that was authored by Shannon, in the Massachusetts marriage case, and when the supreme court issued their ruling in Massachusetts, affirming the right of same sex couples to marry and ending the exclusion of same-sex couples from the right to marry in Massachusetts. We saw threads of our amicus brief in that ruling. In Vermont, when I mean eventually Vermont settled on a civil union, but there was legal activity there.

One of the arguments that we made was a sex discrimination argument, and we started seeing that appear, not as the majority opinion, but we certainly saw it in concurring or dissenting opinions, where that a man could marry a woman but a man can’t marry a man, that being sex discrimination. We kind of wanted to lift up that piece of it, and so we saw that gaining a little bit of traction. It never ended up being the thing that won it, but we felt like it was an important principle to elevate.

I remember, we did a lot of public education here in California. Evan came out, we hosted Evan at a couple of forums; one was in Oakland, one was here

in San Francisco, talking about the Hawaii case, talking about why marriage matters, why marriage was an important fight. So we were doing, I guess kind of along three different lines. There was a small amount of legal advocacy, there wasn't a huge amount then, so we were doing mostly amicus briefs, and supporting our colleagues who were lead counsel in those cases. We were doing public education and we were doing legislative advocacy, particularly in California. We were pursuing both domestic partner protections, beating back anti-marriage amendments or bills in the legislature. I remember we testified a number of times against bills for recognition of same-sex couples in marriage. We helped draft broad domestic partner bills in California. So it was those three strands that began as a little bit of a trickle in the mid-1990s, and by 2000, we were very involved and when Prop 22 made it to the ballot, I became almost a full-time staff person for the campaign to defeat Prop 22.

01-00:55:09

Meeker:

Can you tell me about that campaign, maybe starting with the polling at the beginning and then how you tried to run a campaign against these very large odds.

01-00:55:21

Kendell:

Well, you know, we were like 35 percent down or something in the first polling. Mike Marshall was the campaign manager and I was the primary spokesperson for the campaign and was traveling the state, criss-crossing the state doing radio programs, live programs, community education, debating every anti-gay person on the planet it seemed. We were realistic. We knew that the chances of defeating Prop 22 were very long, but we didn't feel like—I mean there was an absolute intentional position that we couldn't not fight back, we had to do something, and so it became almost my full-time job, certainly for the last couple of months leading up to the election.

On election night, I think we ended up losing by maybe 27, 26 points, something like that, I don't remember exactly, so we felt like we narrowed it a little bit, I mean I think we won back maybe 8 percentage points, but there's no doubt that we got our hat handed to us. It was a statute, it wasn't a constitutional amendment, and I think that at that point there were maybe six, seven, eight other states that also passed statutes to forbid recognition of marriage between same-sex couples. But look, it was an honor to be involved. I remember it really was the first time that I'd actually been involved in any kind of ballot measure political campaign and I loved just the intensity of it. You knew it was going to end at a time certain, and up until that point if it meant twenty hours days, that's just the way it was. We went all in and even though the outcome was disappointing, it wasn't unexpected, and it did feel like we were able to at least elevate the dialogue and make an argument for our humanity, and that was you know, my evolution pushed even a little bit more, where I moved from well, I'll be an advocate because that's the right thing, to yeah, this actually is shameful, that couples do not have their relationships recognized.

01-00:57:57

Meeker:

You know, I was actually just up in Portland last weekend, interviewing Thalia Zepatos. One of the stories that she tells that I think is very instructive, is that over the course of the Prop 8 campaign, an anti-Prop 8 campaign, she feels like they really made some good progress on messaging and figuring out what might sway the electorate. It was sort of too little too late by the time the ads started to come out, but she says she got closer to cracking the code. I'm wondering, in the Prop 22 campaign, over the course of that, with debating the opposition and with going out into the field, did your ideas evolve at all, as far as arguments that might be more effective than maybe where you started out?

01-00:58:55

Kendell:

In Prop 22, I don't feel like we—the narrative arc of why we should not discriminate against same-sex couples did not evolve much. Because keep in mind, that's 2001 when Prop 22 passes, in 2008, when we face Prop 8, we're essentially making the same arguments, at least early on, which is a rights-based frame. It actually wasn't that persuasive to me, so I did, I always sort of pushed my argument a little bit more to the human side, I talked about my relationship. By this point, Sandy and I had a son and then I had my older daughter, so you know I did talk about the stigma and the discrimination against children of same-sex couples, but I really stayed in a lot of rights frames. The numbers of rights and protections denied to LGBT couples, why would we do that, how does that help anyone at all, that we're not meeting our promise as a nation that people are treated equally under the law. It was very cerebral and I think that what we've learned, but it took a long time to learn this lesson, because I think in some ways you look back and it feels so obvious now, but I actually think we treated the love piece, we treated the love and commitment piece as less persuasive, less powerful, too touchy-feely, you know? We had to win people in their intellectual frame, not understanding that the rejection of same-sex couples marrying was completely visceral, so you have to meet with a visceral argument, which is why did you get married? Well, because I fell in love with my wife. Guess what, that's why I got married. Look, there's nothing to be done about it at this point, it's all water under the bridge. It does feel like, I wish we could have come up with the message sooner, but I also feel like even if we would have come up with—because keep in mind, all this gets tested. So even if you had a whole cadre of people who said look, the best message is to have it really be about commitment and love. I bet if we would have tested those messages, they wouldn't have gone anywhere and people would have responded because it made people feel too uncomfortable, to think of love and commitment, well that's sex and intimacy. So, focus groups would have probably totally rejected those messages, and they say they respond better to the rights framing. So, you know, it all happens for a reason and it all happened exactly on the trajectory it probably needed to, but it does feel like we beat our head against a wall for a long time.

01-01:01:52

Meeker:

You had referred to Massachusetts, the Massachusetts State Supreme Court offers a decision in 2004. What did you think of that decision? My understanding, it was made on the basis of rational review as opposed to sort of strict scrutiny.

01-01:02:11

Kendell:

It was the lowest level of scrutiny, and that would have been September of 2003, right?

01-01:02:18

Meeker:

Okay, that's right.

01-01:02:19

Kendell:

So we had *Lawrence v. Texas*, decided—2003 was a banner year. This is really an important high water—up until that point that's the high water mark. I think there are a number of moments in the movement that get us to 2013 and then 2015. Two-thousand three is a huge year because, keep in mind, we're arguing for the right of same-sex couples to have our relationships afforded the same protections and embrace as marriage, and in eight states, we could still be thrown in jail for same-sex sexual intimacy. I now look back on that and I think wow, the fact that we could still be considered criminals for sex, certainly gets in the way of people thinking about our relationships in the same way they do any other marriage. So we needed *Lawrence v. Texas*, which was decided in June of 2003, striking down the remaining laws in thirteen states, eight of them same-sex only, thirteen states that criminalized so-called sodomy, and in eight of those states, same-sex only sexual intimacy. That had to happen, we had to have that, that was like a condition precedent to eventually winning marriage. Then, in the fall of 2003, we have the Massachusetts *Goodridge* decision, affirming the right of same-sex couples to marry under Massachusetts law. I remember thinking, between *Lawrence* and *Goodridge* that 2003, like whoa, what? You just feel the ground shifting under your feet just like whoa, things are never going to be the same. That's how I was feeling as we went into early 2004. Now I felt like everything had been thrown up in the air, the chessboard was totally still and pieces hadn't landed yet, and we were having the conversation here about, well should we bring a suit in California? We had just won a couple of key family law cases. California was way ahead for a while on family law, and then we were behind on co-parent recognition, on some adoption stuff, and so that felt a little weird, and then we won a couple of cases. So we were having an active conversation about boy, is the California Supreme Court, are we ready? And we came to the decision, in January of 2004, that the California Supreme Court wasn't ready yet, maybe another year, maybe another two years. I think we had something like that, maybe another year or two.

01-01:05:04

Meeker:

I'm curious, you had mentioned this legal roundtable. Were you aware that GLAD and Mary Bonauto were maneuvering to bring a case to the Massachusetts State Supreme Court?

01-01:05:20

Kendell:

Yes, yes. Well, the legal roundtable is not a place where everybody lays everything on the table that they're possibly thinking about or strategizing on. It certainly is a place where we have conversations about big things that are happening and big plans. So yes, we knew, with GLAD and Mary, we knew that they were planning a challenge in Massachusetts. There was a long conversation, a number of conversations. One thing that I think is important after I got over my initial faux pas, you know you do develop relationships. Many of us have been at our organizations for a very long time and so there really are conversations about well what do you think? There were very frank conversations about well, I think that's a good argument, I don't think you should do that, I think the timing on this—and then obviously, every organization does what they think is best for them. So we definitely know that GLAD was planning a challenge in Massachusetts and felt like, you know it's time, I mean it really felt like it was time and this was Evan's point. We can't only play defense, we have to start filing suits in states where we can have a chance of winning. We have to start winning marriage in some states, and Massachusetts felt like the perfect first place to start.

01-01:06:48

Meeker:

One thing of course that happens is the supreme court decision comes down affirming the right of same-sex couples to get married, which then results in a long and protracted and very difficult legislative battle about whether this is going to get sent to the population for a referenda.

01-01:07:10

Kendell:

Right, right.

01-01:07:12

Meeker:

This is political work, this is legislative work. What is the relationship between an organization like NCLR and Mass Equality, in doing this kind of legislative work?

01-01:08:28

Kendell:

We know what we going on with Mass Equality and communicated with them a bit. I don't think we played a big role because GLAD was playing the big role with Mass Equality.

01-01:07:43

Meeker:

It was a regional thing?

01-01:07:44

Kendell:

It was a regional thing. We were playing a big role with Equality California. So there are state organizations that we do a lot of work with. Obviously, Equality California has been our key partner in every strategy legislative

political battle ever, dealing with LGBT issues. But we also work super closely with Basic Rights Oregon, Equality Florida. There are many other states that we have very, very close relationships with. With Mass Equality, because GLAD has got their regional sort of sandbox, they knew we're available for anything they need and I think any other organization would be, but they really had it handled. So we knew what was happening, the maneuvering that was going on with the legislature, but we felt like, you know, you don't need any more cooks in that kitchen.

01-01:08:42
Meeker:

Were you reading the tealeaves at that point, did you feel like there was a pretty good chance that the legislative work would result in actual marriages?

01-01:08:49
Kendell:

Yes. I felt like Massachusetts had a really, really good chance of ending up with marriage licenses being issued, with it not being referred to the public, which it wasn't. The cascade of Massachusetts led to a whole series of unpredictable outcomes, principal among those being what Mayor Newsom did in San Francisco after attending the State of the Union in January of 2004, where then President George W. Bush, I still can't believe this, takes time from his State of the Union, when we're at war in Iraq, to endorse a federal constitutional amendment to ban recognition of marriage of same-sex couples, because five un-elected judges had just done what they'd done in Massachusetts. So you don't have to look very far in the rearview mirror to see that, I mean we were totally in the sights in the culture war and when Newsom heard that—I'd never met Newsom at that point, he was a newly elected mayor—he came back and decided, "I'm going to do something about this." To the extent that the chess pieces were all up in the air before, now it was like you couldn't even find the chess pieces. There was no way to reassemble the board in any way that looked like it had before.

01-01:10:27
Meeker:

These legal organizations, you know Lambda, GLAD and you, my understanding is you are very deliberative, you plan, you spend a lot of time finding the right litigants, you plan out many years in advance, you pay attention to who's actually sitting on various courts before you decide to take a case. What did you think when this newly elected young mayor of San Francisco comes to you? I understand that he did come to you and ask you about this.

01-01:11:05
Kendell:

The job of a lawyer is to represent their client to the highest ethical standards, which includes not being hotheaded, knee-jerk, pie in the sky, politically ignorant. It's just there's a sense for us who are in the legal organizations, first of all every one of us has lost a case and that haunts you, because you don't just lose it for your client, you lose it for the entire community, because we're taking impact litigation cases that affect everything in a state and could affect everything in the country. So you don't have the luxury, if you're the lawyer

for the community, to indulge your most radical impulses, because the outcome could be a setback that lasts twenty years, and look, we are all totally aware of that day in and day out. So the impulse to be more cautious is not just because lawyers have an ethical obligation to follow the rules, it's because the downside risk is enormous. So, one of the conversations we had, in addition to is California ready for a marriage case, is we thought about it. We've had the conversation about approaching the mayor's office, because I think what had happened is it was either the mayor in—there was a mayor in New York or maybe the mayor in Portland, had talked about issuing marriage licenses to same-sex couples. Nothing had really happened.

I remember we had a conversation with Jeana Frazzini at Basic Rights Oregon because she said, "Hey look, our mayor is talking about issuing marriage licenses to same-sex couples." I remember we said, "Well I don't think they have the power to do that," and so we thought, "Well gosh, what about, could Mayor Newsom do it, would he even be interested?" So, it was interesting that some of these conversations were happening on a parallel track, and the mayor was thinking about this, which we did not even know, until the Friday before Valentine's Day of that year, the mayor's chief of staff calls me. Steve is from Boston and has a very thick Boston accent, which I won't try to do because I'm terrible with accents, but just imagine.

01-01:13:46

Meeker:

Is this Steve Kawa?

01-01:13:47

Kendell:

Steve Kawa, yes. Steve and I don't know each other well but we've met each other a few times.

01-01:13:54

Meeker:

And he's gay too.

01-01:13:55

Kendell:

He's gay, yeah, and still the mayor's chief of staff, he's still Mayor Lee's chief of staff, so Steve is a major, major locus of power in the city of San Francisco and he tells me that beginning the following Monday—this is Friday. Beginning the following Monday, "I just want to let you know, the mayor is going to begin issuing marriage licenses to same-sex couples." I remember, I was outside my daughter's preschool, ready to pick my daughter up from preschool, and on the phone and I was like oh holy hell. "Steve, Steve, I think—gosh, you know, I so appreciate the mayor, I so appreciate his impulse to do the right thing, that's so meaningful, we were just having conversations about whether to approach him, but I actually, you know I'm not sure about that. Bush just called for a constitutional amendment, we don't want to stoke any of those fires, I think this would be very provocative, I'm not sure it's a good idea, I really want you to think about it. Appreciate it but really do not think it's the right time." Steve pauses, listens to all that and pauses and he said, "Okay, Kate, I hear you, I hear you. I just want to tell you

that beginning Monday morning, the mayor is going to begin issuing marriage licenses to same-sex couples.” So I was like okay. I said, “Well, all right, thanks for letting me know.”

So, I immediately called Mary Bonauto and I called Shannon Minter, our legal director, and we spend the weekend figuring out what we really think about this. Mary was all for it and I remember her response was something like, “Yeah, let’s open up a western front on this, let’s have Massachusetts not be the only place.” So that gave me a lot of relief. I was so relieved by that, because Mary’s opinion probably mattered more than anybody’s on this. There were other colleagues that were very dubious about it. We talked with city attorney’s office, they were dubious about it, but it was pretty clear that this was happening. I pretty much then had to channel Steve Kawa and say, “Okay, I hear all that, but I’m just telling you people, this is happening, so what do you want to do about it?”

By Sunday afternoon, again, you know you remember those moments when you just, you know a colleague from the mayor’s office called me, again. I’d been running errands, I was sitting outside my house, and she said, “Kate, what is your problem, just get onboard here.” So we talked it through and I hung up the phone and I sat back in my car and I thought you know what, game on. So then, what we were able to get was a pause for a few days. I said, “Look, does he know the law, you know he needs to have talking points, what’s the history in California of this?” California was the first state to ban anti-miscegenation laws and recognized marriages between interracial couples. So we want to give him all the ammunition that he needs, so we had a big powwow at the mayor’s office on that Monday and we were strategizing about what it was all going to look like and I said, “One thing for sure, the first couple has to be Del Martin and Phyllis Lyon.”

01-01:17:24
Meeker:

So you knew that right away.

01-01:17:25
Kendell:

Oh, it just came [snaps her fingers] you know, it’s was just, it’s so obvious, and Joyce Newstat, who was the mayor’s political director, she was like, “Yes, that’s brilliant, will you call them?” So, I called Del and Phyllis and they said yes and they would do it, even though they had a whole critique on marriage too, but they realized this was a political act. And so it wasn’t Monday but it was Thursday, Valentine’s Day, I think, on the dot, which was Del and Phyllis’s fiftieth anniversary as a couple.

01-01:17:55
Meeker:

It was the twelfth, I believe, Thursday the twelfth.

01-01:17:57
Kendell:

The twelfth, yes, that’s right, Thursday the twelfth, so a couple of days before Valentine’s Day, and then Valentine’s Day was their fiftieth anniversary as a

couple. Yeah, they were the first couple married and all hell broke loose but in the best way possible.

01-01:18:17

Meeker:

What was your best case scenario at that point in time?

01-01:18:25

Kendell:

The mayor's office had asked me, "So how many couples do you think are going to show up and get married?" And I think really, this whole narrative does not put me in a very good light but you know whatever, live and learn. I think my answer was, "Oh, two hundred." I didn't know what to think and you know, it turns out there was, what was it eight thousand? That was the most electrifying couple of weeks.

My best case scenario was a couple hundred couples would get married, it would be shut down in pretty quick order, either the antigay forces would come in and get an injunction or the supreme court would step in and say hey, you don't have the authority to do that. But then we were sort of figuring well but hey, this may accelerate filing an actual affirmative marriage case, which it totally, absolutely did. What we didn't anticipate, which truly was probably some of the best moments of my career, we didn't expect that the marriages would go on for what was it, six weeks, something like that, and that people would ring city hall and that city hall would stay open all weekend and through President's Day and that people would bring donuts and coffee and dry socks, because it was raining all weekend. It was the most amazing—it just made you feel like okay, we're doing something really important here and what a privilege to be involved. At the same time, Shannon is in court defending what the mayor is doing, along with the city attorney's office. I remember taking my kids, I said, "Okay, we've got to go to city hall." I don't think they were that aware of what they were seeing, but it was just to walk around and see hundreds and hundreds and hundreds of couples and families and kids in tow. Yeah, it was amazing.

01-01:20:35

Meeker:

People from all walks of life. Young couples, old couples, people coming in from the hinterlands.

01-01:20:44

Kendell:

Absolutely, people came in from all over the country, in addition to parts of rural California, and you couldn't go anywhere in this town as a couple without people saying—I mean, Sandy and I must have been asked, you know, two hundred times, "Did you get married?" Any time they figured you were a same-sex couple, everybody wanted to know, from taxicab drivers to wait staff at restaurants to your drycleaner. It was the entire city was like oh, look what we're involved in, and everybody was completely into it, at least everybody—yes, I'm sure there was some small minority that had a different view but boy, you never saw that, no matter where you went it was a total celebration.

01-01:21:33

Meeker:

As this is unfolding and as the marriages go on, what is the evolving legal strategy, because you know it will eventually be shut down. I'm sure you're looking a few steps ahead. What comes next?

01-01:21:48

Kendell:

We're preparing a complaint. We're preparing a complaint to challenge the exclusion of same-sex couples from the right to marry in California. We're finding plaintiffs, we're interviewing plaintiffs, we're lining up our co-counsel, which included our colleague organizations. We felt like there was no way we could do this without them. We wanted them to be involved, we wanted us all to be together in this moment, so Lambda, the ACLU, private law firms, and we were ready to go with a lawsuit. That's the work that we were doing in addition to showing up at court to defend what the mayor was doing and to fight back against the injunctions. It was interesting, because the antigay forces were seeking injunctions at all these hearings and they were being denied at every single level, because of course to get an injunction to stop what the mayor was doing, you had to show irreversible harm, you had to show immediate harm, and the only argument they had is well, couples are getting licenses that are going to be voided, and the judge would say, "Well, it seems to me, the couple probably is aware of that, where's the irreversible harm?" "Well, it's chaos." They made no headway.

Finally, the governor weighed in, [Arnold] Schwarzenegger, and he asked the supreme court to stop what was happening and they did but they, in words almost exactly this but I'm paraphrasing, "All right mayor, that's enough, knock it off, you don't have the authority to do this, but to the extent the exclusion of same-sex couples from the right to marry needs to be challenged under California law, we invite an appropriate lawsuit to do so." We were like okay, and so we filed our lawsuit the next morning.

01-01:23:52

Meeker:

When you were looking for potential litigants, what were you looking for? There's a whole kind of science to this and I'm curious about how, in regards to this case, you pursued that.

01-01:24:05

Kendell:

We wanted couples that represented the breadth of the diversity in the queer community. We wanted couples who had kids, we wanted couples who were older, we wanted couples who were younger, we wanted couples who were of color, and we got all of that. I think we ended up with six couples in total. Because time was compressed, I mean if we'd had months to prepare a lawsuit, you'd travel the state and you'd interview couples, and we didn't have that luxury. It was based on word of mouth, who do you know and who do they know and who do they know, and then who wants to do it. Who wants to put their name on a lawsuit, challenging their exclusion from the right to marry and open up their lives to at least three or four years of scrutiny and the stress of litigation. Even if you're not, you know, we weren't seeking a trial, because

California law, we didn't feel like we needed a trial in California. California law was clear and had the better protections.

01-01:25:22

Meeker:

And when you're talking about California law, you're talking about the California State Constitution?

01-01:25:27

Kendell:

Yes, this was under the California State Constitution only, this was not a federal suit, not a federal challenge, but because California law already had in place, very strong protections for couples as parents, for individuals as parents, against discrimination of full domestic partner benefits. We didn't need a trial to prove that LGBT people were good people. All we needed to prove was that based on a fair reading of the law, excluding same-sex couples from the right to marry was discriminatory under California's own established precedents and that, obviously we were able to do.

01-01:26:13

Meeker:

So as this is happening throughout 2004, it's an election year, George W. Bush is up for reelection, John Kerry is selected as the democratic candidate, and they are both very critical of marriage for same-sex couples. And then Bush is reelected, I think it's what eleven states that November, pass constitutional amendments.

01-01:26:45

Kendell:

Or something like that.

01-01:26:47

Meeker:

Or something like that, barring marriage for same-sex couples. Where are you when that's happening? Is there any sense of regret, maybe having pushed things too quickly? What are you thinking at that point in time?

01-01:27:08

Kendell:

Well it wasn't just John Kerry and Bush, which would be typical, that were spouting marriage to be between a man and a woman. Barney Frank and Dianne Feinstein both called Mayor Newsom and castigating him for what he was doing and for injecting this into the presidential election. I think Newsom took a lot of heat.

[break in recording, side conversation]

01-01:28:23

Kendell:

So Newsom was taking a lot of heat for what he had done and I guess I tried to take a historical long view, which was yes, what he had done was very disruptive and provocative, but that I really had to believe that you need a moment like that to provide the catalyst for real change. As long as you're sort of going along, trying to stay in people's comfort zone, I mean look, you might still get to whatever the goal is, but it's going to take longer. And in that moment, that whole feeling I had, sitting out in front of my house when I

finally was like all right let's do this, that kind of game on, this is part of the game. This is part of any civil rights struggle, where the predictable will happen, often championed by the attorneys or by political leadership, and then in every civil rights struggle, the unexpected visionary comes in and totally screws stuff up by doing something that is not per the script. I feel like as a historical matter, that almost always is a good thing. So in that moment, look I had my own doubts and insecurities about holy hell, you know, have we done the right thing here, but I just had to believe you know what, just if history is any guide, this is going to be a net benefit.

01-01:30:35

Meeker:

About this time, Evan Wolfson spins off from Lambda Legal, starts Freedom to Marry as a separate organization, campaign. What did you think of that move on his part? What did you think that that organization could contribute?

01-01:30:55

Kendell:

I thought it was a brilliant idea for Evan to start Freedom to Marry. It felt to me like we really needed an organization that was the sole focus, that that was the fixed goal, and to be laser-like. I remember a conversation after Freedom to Marry had been around for a couple of years, where I felt like they were being—I think Evan even felt like they were being underutilized, and I remember encouraging Evan to just, you know, you've got to be more bold, play this role, just insert yourself, really encouraging him to not wait for invitations, to be invited to provide assistance, but to just ramp up and just be the leader, lead the fight, and I think, you know, they really did.

01-01:32:04

Meeker:

Were you aware of the 10-10-10-20 strategy?

01-01:32:07

Kendell:

Yeah.

01-01:32:09

Meeker:

Can you explain that for people who may not know?

01-01:32:11

Kendell:

The 10-10-10-20 strategy was a document. Essentially, it was a white paper that put down on paper, the strategy for winning full marriage equality nationwide. It was a very deliberative strategy that had been discussed among a range of leaders, that had you winning marriage in ten states, legislatively, winning marriage in ten states through legal means. I don't remember what the third ten was, maybe beating back bad measure, anti-marriage measures, and then the rest of the twenty states would sort of fall, you know. Once you got to some sort of critical mass, that's when you take a case to the Supreme Court and that's when you'd win. I felt like the strategy was well thought out and it made sense. It just provided like a blueprint and a template, I mean we didn't really go that way, but it was true that we had a sense that we had to get states in the win column. We had to win marriage in more states if we ever had a chance of winning nationally. You weren't going to win either

legislatively in Congress or at the Supreme Court if it didn't appear inevitable that that's where the country was headed, and the only way you were going to get there is to win marriage in more states.

01-01:33:52

Meeker:

Did it ever seem like a possibility that any of this could have happened through the Congress?

01-01:33:58

Kendell:

No—I mean in the window of time where we had a Democratic controlled Congress, it was out of alignment with how much of the country had embraced the freedom to marry for same-sex couples. So if we'd had a functional Congress and a Congress that was democratic leaning, and I only use those partisan terms because the Republicans are so avowedly antigay and anti-marriage. Later, in the [Barack] Obama presidency, at a time when we'd won more states, you know I think it's possible we might have won in Congress, but I don't think there was ever any realistic possibility, given the makeup of Congress as the fight went along.

01-01:34:51

Meeker:

Back to what's happening in California, you know this four-year period of time between the marriages in February of 2004 and then the California State Supreme Court decision in, I think May of 2008 or something along those lines.

01-01:35:04

Kendell:

Exactly.

01-01:35:08

Meeker:

We don't need to walk through it step-by-step, thankfully there's a lot of documentation of that already. Are there any particular parts of that legal battle that maybe haven't really been discussed, that you think are pivotal or at least interesting enough to recount?

01-01:35:32

Kendell:

Early on, there was a disagreement with the city attorney's office about whether to have a trial in the marriage case, a trial that would present evidence about discrimination, a trial that would present evidence about gay people, LGBT people in California, and we really disagreed with that. We thought, "We don't want to give our opponents the stage to talk about how inhuman and subhuman we are, given that California law has already resolved these issues." By setting up a trial and presenting evidence and then counterevidence, you assume that you have to prove a fact that already, California has dispositively resolved in your favor. So that was an unpleasant disagreement. They eventually saw it our way and came around to our view, and I think the litigation makes clear that that was the right call, but that was yeah, that was not a lot of fun.

01-01:37:02

Meeker:

What was the city attorney arguing, what was their point?

01-01:3:05

Kendell:

They wanted to have a trial, because they wanted a full public airing of how strong our arguments were and how weak the other side's arguments were. We just felt like that would give too much of an opportunity for mischief making. Now, we eventually got a trial when the federal suit was filed, the federal challenge to Prop 8. The trial was a masterwork of demonstrating how strong we were and how weak they were, but you needed that at the federal level. In fact, it was totally switched then, because the advocates then didn't want a trial and we pushed them to have a trial, even though we weren't co-counseling the case. So we were on completely opposite sides when it got to the federal level, because in the federal level, you don't have any federal law that disposes of these questions in your favor as an LGBT person. In California, we didn't see anything that could be gained except a bigger spectacle, and we saw the opportunity for a lot of mischief from the other side that could potentially, depending on what panel we got and who the judges might be, particularly at the court of appeal, could just, could hurt us.

01-01:38:21

Meeker:

In re Marriage Cases, the 2008 decision, how did that actually proceed? I guess I'm unfamiliar with how the case is actually presented to the California justices. How was it presented to them?

01-01:38:44

Kendell:

We relied on the California Constitution and its guarantees of equal protection. California has a very muscular equal protection provision and that was the main thrust of the argument, that it is a violation of California's well settled principles. California actually has some better developed law on this than even the Federal Constitution, and it was a violation of equal protection under the California Constitution, to not permit same-sex couples to marry. So that was the bedrock of the argument and we were arguing, under the California Constitution, for a higher level of scrutiny, which we got. It was a very familiar kind of constitutional framing and constitutional analysis, and I thought, I mean certainly one of the high points of my career was Shannon's argument before the California Supreme Court. I thought he just did an incredible job and just talking about what he did so well and I think what our briefs did really well, was talking about that it's not just a denial of equal protection of the law, that whole rights frame; it actually does mark same-sex couples with a badge of inferiority. It creates a stigma to not have our relationships afforded the same rights and recognition and support, and the word marriage, because marriage because the—California has muscular domestic partner laws. Well why does marriage really matter? You know, it was Terry Stuart who said, "Well words matter." It was the chief justice himself that at one point quoted [William] Shakespeare and a rose by any other name. So the court really seemed to get that the denial of the word marriage was itself, deeply stigmatizing, and so the argument really did focus

on the kind of visceral piece that you know, it is the denial, it's not just about rights, but it is the denial of the common nomenclature and experience of what marriage is, that creates such a stigmatizing and discriminatory frame in which same-sex people must operate and exist in the state of California, and it's clear, from the majority and concurring opinions, that the court really got that.

01-01:41:32

Meeker:

So it was a four-three opinion, the chief justice, Ronald George, he was a [George] Deukmejian appointee right?

01-01:41:38

Kendell:

He was.

01-01:41:39

Meeker:

So there was some Republican legacy in that decision. Were you satisfied with the way that it came down, four-three?

01-01:41:50

Kendell:

I think every lawyer, particularly arguing a case of significant cultural import, where there's a contest for public opinion, wants it to be resoundingly on your side. So I would have much preferred a five-two, and I kind of thought we were maybe going to get a five-two, but in the end, you know obviously it's a win, and I thought the majority opinion was so beautiful and I thought George did just an amazing job. I remember vividly when you grab the opinion out of the box, and thumb through super quickly, to try to get key points. Sometimes it's at the beginning, sometimes it's at the end, and I think it was towards the end where I went to the end of the majority opinion and realized that we'd won, and then people started screaming in the courthouse, on the main lobby level. Yeah, it felt to me like that was a moment where we'd won so much more than the right to marry in California.

01-01:43:07

Meeker:

What do you mean by that?

01-01:43:08

Kendell:

I remember there's a picture that actually a friend of mine who was a photographer for the ACLU, that he captured on the front steps of the courthouse, and it was a beautiful spring day, sunny and gorgeous. I'd walked out and I thrust the opinion above my head and he captured the picture, and what I was thinking in that moment, I thrust the opinion above my head and I remember thinking so clearly, "This is for the queer kid in Alabama," and it just felt like oh, yes, we'd won marriage, that was great, okay we'd won marriage in California, but it felt like this was going to change everything for every LGBT person in the country, particularly the most vulnerable. I mean it felt to me that it was going to be much bigger than just winning marriage in California.

01-01:44:18

Meeker:

When you say change everything, are you referring to this kind of removal of stigma?

01-01:44:24

Kendell:

The removal of stigma is part of what I'm referring to, and just the sense of belonging, the sense that this nation is yours too, that your place in civil society matters and that it is not subject to debate. Everything that we do here is never really about just the issue. It really is about creating a climate and a discourse in this country where no queer person ever feels shame or stigma or degradation or harm or threat because of who they are, but they have full opportunity and a sense of belonging.

[break in recording; side conversation]

01-01:45:50

Meeker:

Okay, so this decision comes down in May, 2008. By June, marriages start again, but unlike what happened in 2004, they're endorsed by the state, and throughout that summer, thousands of people likewise get married. Were you aware of the opposition planning a constitutional amendment?

01-01:46:33

Kendell:

We'd been aware of the possibility of a constitutional amendment since the day we filed our lawsuit. We had been, NCLR and I, had been a part of a community organizing effort and a steering committee, to prepare the groundwork to fight and beat back any eventual constitutional amendment. We knew if we won, our opponents would attempt to get an amendment on the ballot and would probably succeed, because it's just so easy to get an amendment on the ballot if you have any sort of financial backing at all. So we knew all along that was coming and there was a lot of preparation. We'd had dozens of meetings, we'd even hired a campaign consultant. That didn't work out, so we ended up hiring somebody else down the road. But yeah, the backdrop for us, of a win, was knowing that it was going to be immediately challenged. So even when the weddings started in June and Del and Phyllis were again, the first couple to get married in California, like legally and real, thankfully, Del was still alive, there was a little bit of a cloud over it, because you just felt right over your shoulder that it was coming and yeah, sure enough. They qualified for the ballot, I think in July, and then we're off to the races.

01-01:48:08

Meeker:

Can you tell me the role that you played in that campaign?

01-01:48:13

Kendell:

I was on the early executive committee or the early steering committee, which was I think six or seven of us, and then there was a broader community committee of maybe thirty or forty organizations, that met a couple of times a year leading up to 2008. Once it was a real campaign, we became an executive committee that was, I think five of us at that point, and the executive

committee, I mean my main role was spokesperson for the campaign, fundraising for the campaign, community education, traveling around the state, exhorting people to support the campaign effort, involved in some of the strategy conversations but not with a whole lot of power to do much about the strategy or the messaging. In the summer of 2008, it became a full-time job and beginning in about September, I pretty much just moved into the campaign offices and I didn't even come into these offices.

01-01:49:30

Meeker:

The campaign was called "Let California Ring," is that correct?

01-01:49:34

Kendell:

No. That was the public education campaign that was spearheaded by Equality California. So that was the campaign that they envisioned, that was sort of going on from 2004 to 2008, to try to soften voters and to prepare voters to support marriage equality for same-sex couples.

01-01:49:55

Meeker:

So it was a 501c3?

01-01:49:56

Kendell:

Yes, it was a c3 effort. Knowing that a ballot measure, a constitutional amendment was coming, Geoff Kors, who was then the executive director of Equality California, and Equality California, led the Let California Ring campaign, but their messaging and talking points were things that we were using as part of our broader community and public education effort. July is when we moved from being a c3 to a full c4, where now we were really beating back something that was going to be on the ballot, and at that point it became the "No on 8" campaign.

01-01:50:36

Meeker:

So, I mean really, this is like a four-year public education effort. What were you learning during that period of time?

01-01:50:51

Kendell:

Actually, I guess the experience was reinforcing some stuff we already knew, and that is that California is wildly diverse and it's also enormous, and there is no way you can reach everybody who needs to be reached. I mean, you would need \$120, \$150 million campaign to do everything that needed to be done. In the c3 part of the campaign, until, because there wasn't an actual threat, raising money to do what needed to be done was just, I mean it was worse than pulling teeth. There's a few hundred thousand dollars here and there. Equality California developed an ad that was the garden wedding ad, I don't know if you've had a chance to see it, that actually really moved people, because they're like, "Oh, well I would never want that to happen to me." This young woman can't get to the altar and can't marry the man she loves. You know, where they tested it, it moved voters ten points, but we didn't have the money to actually show it statewide. So, I feel like the entire public education effort leading up to Prop 8, and the Prop 8 campaign itself was,

without a doubt, the most frustrating and discouraging time of my career, because it just felt like we could never get the traction we needed, we couldn't get the attention we needed, we couldn't get the money we needed, and then the threats here and now everyone thinks that we're going to win. Yeah, yeah, I feel my blood pressure even as I'm speaking about it right now, just start to rise a bit. It was a miserable experience.

01-01:52:44

Meeker:

Why do you think it was so difficult? You said that it sounds like the public really thought that there was a good chance of marriage being victorious and defeating Prop 8, but when you're talking about funding, typically that's coming from institutions, it's coming from large foundations or individual funders, did you get a sense of why it was that they were not stepping up in the way that they needed to if there was going to be a real serious campaign?

01-01:53:20

Kendell:

Some people did step up. We had a few hundred thousand dollars from different foundations. I remember lighting my hair on fire, it felt like you know, a couple of times a year, at meetings, to just say look, what are we going to do here, we're never going to be prepared if we don't have the resources that need to be done. We were never to scale, I mean we should have had anywhere from five to ten million, to do what needed to be done. We didn't even come close. I'm not even sure we hit a million, maybe we did.

We got two reactions from funders. Some funders stepped up for sure, but we also got reaction from funders that California is huge, California should be able to take care of this themselves, they should be able to raise this money in California. People in California felt like, "Hey, couples are getting married, this is awesome, we're going to be fine." And it doesn't help when you have a public poll that comes out that says voters support marriage equality. They were at like maybe, I think the polls were 57, 58 percent, and then once Prop 8 qualified, that Prop 8 was losing by 12 percent. I mean try raising funds in that kind of a climate. People had this completely sanguine, absolutely unrealistic perspective that Prop 8 was not a threat and that we were going to win. I heard that a million times as I'm trying to raise money. So, you know, I guess it's human nature to some degree, you know you want to believe it's all going to work out and please don't tell me bad news, but it was a very, very unsatisfying way to spend one's time.

01-01:55:10

Meeker:

Do you think that those campaigns, rather those polls, were accurate, or was it simply that by the time election day came around, the pro-Prop 8 side was just really successful in getting their message out?

01-01:44:25

Kendell:

I think the polls were wrong all along. I think we had a little bit of the [Los Angeles Mayor Tom] Bradley effect going on, where people felt like they had to say oh yeah, I'm supposed to like people getting married, because everyone

says it's so wonderful and all these couples are so happy, so of course I'm going to say okay, I support marriage. They didn't go any deeper than that. Our internal polling never showed us winning, but the public polls, I remember the day it came out, I remember the headline. I walk downstairs, get a cup of coffee, looked at the paper and think [sighs] this is terrible. Of course everyone else was like oh, this is awesome, look, but I mean I knew it was a house of cards. So, yeah, that was a really—I went in 110 percent. Even on election day I thought well maybe, you know maybe something, because we did, it got really tight, I mean we could see it really narrowing. And I think there was a moment in October when we were ahead. I remember I had just been at a fundraiser, a big fundraiser down in L.A., which was totally awesome and we raised a bunch of money from super big Hollywood types. We were at some amazing Hollywood estate. Mary J. Blige sang, and Melissa Etheridge, so that was all really fun, and we raised a bunch of good money. It was a little bit late but still, it was coming in. The next day, I had to get up at 5:00 a.m. to debate Frank Schubert, who was the campaign consultant on the "Yes on 8." And it was some news program being televised in D.C., so I think I got up like at five-thirty and took a taxi to some industrial part of L.A., had to borrow a jacket, because I had a much dressier jacket than would be appropriate at a Sunday morning talk show at 7:00 a.m. We're debating, and I'd done this a million times and was talking about you know, there's no way California voters are going to endorse excluding same-sex couples from the right to marry, and we had some very good talking points. So now we were very more towards you know, this is about love and embrace and acceptance. Frank Schubert seemed really upset. He seemed much more disagreeable than usual and he looked really angry, and I remember thinking to myself during the debate, *hmm, he's losing*. So, when I got back to San Francisco that afternoon, I emailed our data folks and said hey, what's the tracking polling showing today, and they said we're up by two, and I thought okay, wow, this might really work. And the next day, the Yes on 8 campaign put out a code blue for marriage and talked about marriage being in cardiac arrest and we're about to lose, and I thought okay. I felt like telling Frank, don't ever play poker, because it was like it was so obvious to me that they were losing. I think if that had been the end of it, we might have won.

The October surprise that every campaign gets was the one that went against us, and it was totally innocent but boy did it backfire, and that was the first graders who went to city hall to witness their teacher's marriage to her female partner.

01-01:59:17
Meeker:

Well before this, doesn't the princess ad come out before this or is that after?

01-01:59:21
Kendell:

Oh, the princess ad was before this. We were winning after the princess ad.

01-01:59:25
Meeker:

Really?

01-01:59:27

Kendell:

In that week. Now look, if nothing else had happened, it might just have been a little blip, but they knew they were losing and they were out in full force saying oh holy heck, something has gone bad here. I think we might have begun to turn the tide in the face of the princess ad and everything else, but when that—again, it was something I saw in the paper. In fact, Sandy and I were on our way—it was about five days later and Sandy and I were on our way to a wedding of a friend in Sacramento, and we had stopped at a Starbucks with the kids and we walked into the Starbucks, and she was ahead of me, and she turned around and she looked at me and she said, “Don’t look at the paper.” There was a newspaper rack there and I was like oh, hell, what? So I looked at the paper and there it was, “First Graders Attend Lesbian Wedding.” It was the *San Francisco Chronicle*. They put, on the front page of the paper, a wedding at city hall—I mean, I don’t know what the editorial decision was there. I have friends at the *Chronicle* I think a lot of, but I’m like really? In two days, that was the ad that the Yes on 8 campaign was using to say, this is what’s going to happen to your kid if you don’t vote yes on 8.

01-02:00:52

Meeker:

I mean it seemed to really support the accusations they were making in the princess ad.

01-02:00:58

Kendell:

It was the princess ad come to life and we were never ahead again.

01-02:01:11

Meeker:

Can you throw the 2008 election kind of into this mix, because the context for that his historic in the sense of, you know, Obama is running, first African American candidate for a major party, and he wins.

01-02:01:26

Kendell:

You mean Obama was on the ballot that year? [chuckles]

01-02:01:29

Meeker:

Did you not even know, I mean what was the relationship, I guess, between the national political landscape and the presidential campaign, and what was happening?

01-02:01:37

Kendell:

Well, we had a relationship, but the problem is, we were getting no help from them. We asked for help from the Democratic Party, to provide resources, to give us money to beat back Prop 8. We said look, this is really important, they totally blew us off. Obama did not help us at all, by making statements that God is in the mix and marriage should be between a man and a woman. They used that as a door hanger, that the Yes on 8 people spread all over the state. I was excited about Obama running. Our family supported Obama, I wanted to see him take the White House, but it really was, oddly enough, it was like a footnote, because everything I was living and breathing and doing twenty-four-seven, was trying to defeat Prop 8, and it was the bizarrest thing, to be at

the hotel the night of the election and Obama's victory party was going on in the big ballroom, two rooms down, and we were down the hall in our ballroom. I felt it and I was excited and I saw that he had won and that was great, but that was the worst night of my life, other than—I mean worst night of my career life. But it did, it felt like you know, it was clear that Prop 8 had passed, it did feel a lot like the grief of a family member dying.

01-02:03:08

Meeker:

You know, we should probably stop, because I know that you've got another event to attend to, but I'm just wondering if in the last couple seconds here, rather than ending on the worst night of your professional life.

01-02:03:22

Kendell:

Yeah, yeah, right, right.

01-02:03:25

Meeker:

After this happens, of course there are a lot of recriminations, there's all the conversation around race that is not maybe the most productive conversation that happens, yet there are people who sort of brush off the falling buildings around them and start to talk about what the next steps are. Where were you, you know, in the days and weeks after Prop 8? Were you thinking that we just need to back off from this for a while, this is a life shattering loss, or being an attorney, you lose some and then you win some too.

01-02:04:12

Kendell:

I feel like after Prop 8 passed, I had an inner narrative and an outer narrative. It was interesting, I mean the morning after it passed, Sandy and I and the kids had spent the night at the hotel venue where the campaign was hoping to celebrate defeating Prop 8. I finally made it back up to the hotel room by about two, and it was clear that we'd lost. I think Sandy and I both laid in bed completely awake and not saying a word. I finally got up at six, showered, and when I came out, she had ordered breakfast for the kids and it was clear she told them, because they both looked at me sort of sad faces. And I think Julian, our son, said, "I'm sorry, mom," and I was bound and determined, I wasn't going to cry in front of him and I said, "I know, I know," I said, "Thank you son. I'm sad but we're going to be okay. Our family is okay, mommy and I are still married, we're going to be fine." Ariana gave me a hug, she was only, I think six at the time, and Julian gave me a hug and he said, "That's right mom, and you just have to keep on going. Keep on fighting, you just have to keep on fighting." So that was the outer narrative that I definitely projected that look, you know, yeah this is terrible, but we're going to get through this. This was like the trajectory of every civil rights movement. We got the shit kicked out of us and we've got to get back up and fight on.

Internally, it really took a lot out of me and it was probably a good six months before I felt back to normal. I don't consider myself a depressive personality, I've never had depression, but I look back and think yeah, I was not, that was not a great period of time for me. And yet, I have to say, I could have never

imagined the reaction nationally, to the passage of Prop 8. It galvanized a whole new generation, and for every person who ever said to me oh, well of course we're going to defeat it or I don't need to give any money, hey we're going to win this, I mean it's California, every single one of those people had the reaction of oh my hell. People got involved, poured out in the streets. I ended up at a conference in Boston two days later, which is really hard to do, and Sandy called me and I think it was that, maybe Friday night, and she said—and there was a ton of noise and I was like, “Where are you?” She said, “We're in the Castro with like ten-thousand people, protesting the passage of Prop 8.” I had no idea that was happening and I turned on the TV and just, and I thought, you know okay. It actually made me feel much less alone. It really felt like this is going to be—this is not the end for sure, and while I will never say that the passage of Prop 8 was a good thing, I certainly, I actually don't think we would have won marriage as quickly as we did in this country if we hadn't lost.

01-02:08:01

Meeker:

All right, let's end there today.

01-02:08:02

Kendell:

All right, perfect.

Interview 2: March 16, 2016

02-00:00:39

Meeker:

This is Martin Meeker, interviewing Kate Kendell, for the Freedom to Marry Oral History Project. Today is Wednesday, March 16, 2016, and we are here at her offices at NCLR, National Center for Lesbian Rights, in San Francisco. Last time we wrapped up talking about the passage of Prop 8 in California, in 2008 and, you know, we didn't just necessarily leave you hanging at a really difficult moment in your personal and professional life, but we did start to talk about how you personally were starting to put the pieces together afterwards.

02-00:01:20

Kendell:

Right.

02-00:01:21

Meeker:

That's where we ended up. We didn't really get a sense of professionally, what the next steps were and the role that you and NCLR played in helping the movement recover from the defeat in Prop 8 and look forward to the next stage. So let's pick up there.

02-00:01:41

Kendell:

Okay. The passage of Prop 8, obviously devastating. Two key things happened after Prop 8 passed, that we were very much involved in: one I had not anticipated and the other we'd been planning on. The unanticipated one was just the huge reaction, not just in California and not just in the LGBT community but across the country and from everyone who was shocked and horrified that Prop 8 had passed. People didn't think it was going to pass, they put California in a special category, that this would never happen here, and it really did, it went a long way to making the huge devastation of the passage of Prop 8 feel like—it just didn't feel so lonely. It felt like we were all in this together, and so we were a part of a lot of different conversations about well what does this mean for the movement, how do we capture this energy? A lot of new organizations sprung up. There was a tremendous amount of reflection on what happened with Prop 8, some Monday morning quarterbacking, which is understandable.

And, you know, some vilification of me and other folks who'd been central in the campaign, even though we didn't run the campaign, we didn't decide on the ads, we didn't decide on the messaging. We were easy targets because we were the most visible. So all of that was stuff that NCLR was involved in, all the atmospherics around that. But what we did as a legal organization is we led the challenge to Prop 8 itself, as not being an appropriate constitutional amendment, and not being something that should ever have been on the ballot in the first place. I still think that's the right argument. I think it wasn't an appropriate initiative for the ballot. I think that we shouldn't have allowed it. The supreme court should have said no, this shouldn't have ever been on the ballot, but we knew it was a long shot, because the California Supreme Court just doesn't usually get involved, particularly after a measure has been on the

ballot and been voted on. So we knew that was a heavy lift, but we just felt like we had to make a final attempt to invalidate Prop 8 under state law.

02-00:04:17

Meeker:

So not bringing in the federal government or the U.S. Constitution.

02-00:04:20

Kendell:

We're not bringing in any federal claims at this point. This was simply attacking Prop 8 as, as not an appropriately placed initiative on the ballot. We lost at the supreme court. That got argued at the California Supreme Court, we lost, and then of course, the \$64 million question is: well what about challenging Prop 8 federally? And we knew that it was very likely somebody was going to do that. We, as the legal organizations, were very concerned about a premature federal challenge to Prop 8, because now you have to convince the U.S. Supreme Court and if you lose—you know, we have to just rewind the clock a little bit.

You look back with the benefit of hindsight and think oh, we had the wind at our backs, we were winning everything. No, we were losing everything, and we had a Court that was pretty conservative, so the chances of challenging Prop 8 federally and winning, we felt like were pretty dim, and we, as the legal organizations, made a decision that we didn't think the time was right to challenge Prop 8 federally, and we encouraged, actually through a joint paper that we all published, others to not file a federal challenge either, because we felt like it just was ill-advised.

02-00:05:44

Meeker:

Is this, do you think, an artifact of the fact that a lot of people, you know I'm thinking of Evan [Wolfson] and others, who have been in the legal movement for a long time, still looking back to *Bowers v. Hardwick* (1986), and then you've got what, about twenty years between that decision and then the Lawrence [*Lawrence v. Texas*, 2003] decision.

02-00:06:06

Kendell:

Well there's nothing that sobers your judgment more than a loss that ripples for a generation in your entire community, and that's on you. I mean look, no one would look back and say that *Bowers v. Hardwick* shouldn't have been brought. I mean this was a terrible situation with Michael Hardwick, in the privacy of his own home, in a sexually intimate relationship with another man, the police burst in and he's charged with violating Georgia's law prohibiting consensual sex between two men, two people of the same sex. Oh my gosh, that was a textbook challenge, and it came on the heels of winning all of these reproductive freedom cases. We won cases to protect the right to contraception, cases to protect the right to contraception for individuals and for married couples, and we'd won *Roe v. Wade* (1973) seven-to-two. It wasn't like it was five-four or close, so it felt like in a world where privacy, the right to sexual autonomy and privacy in sexual relationships was being protected. Challenging sodomy laws and bringing those down was the next

step and yet, *Bowers v. Hardwick* ran headlong into, you know what we called the gay exception: “You’re gay, we don’t understand it, we’re queasy about it, we think it’s weird and odd, and we are going to draw a bright light and say you are not the same as the rest of the human family.” And when you have a loss like that, and of course that’s the big one. We, at NCLR had had smaller ones, where the rights had been taken away from parents in the state of Utah, for example, in a case we were involved in. So you do feel a huge sense of responsibility to not be rash and to be very considerate and sometimes maybe a little laggard and a little slow, but boy, I just feel like that, you know that goes with the territory when your decisions affect the entire LGBT community.

02-00:08:12
Meeker:

So when you were coming up with this recommendation to not precipitously take this to the Supreme Court?

02-00:08:20
Kendell:

Right.

02-00:08:23
Meeker:

How are you thinking about it, like what are some of the things that are in motion here? I mean, was there an idea that yes, we could take it but argue on very narrow grounds, so it’s just about California, and then for instance, on the eligibility issue. Or, you know, let’s go for something that’s very narrow, as opposed to a national resolution on the issue at a time that, that it sounds like the legal groups didn’t think the Supreme Court was quite ready to rule. What was the nature of that conversation?

02-00:09:06
Kendell:

As I recall, I think we did talk about different ways to bring a case. California was in a unique position in that we’d won marriage, recognized as a fundamental right under the California Constitution, and then that was taken away at the ballot box by Prop 8. So there was a way to treat California a little bit differently. As best as I recall, I think we kind of came to the conclusion that that was sort of a distinction without a difference in the mind of the Supreme Court, and there was no way to really limit the Court’s consideration in a way that wouldn’t present the question of marriage for same sex couples squarely in their laps. So, it did, it felt like the best option would be to wait, to see if we could get some other states where we won marriage. You know keep in mind, up until this point, we’d only won in Massachusetts, we’d won it in California and now we’d lost it. So if you’re thinking [Anthony] Kennedy is your swing vote and you need him, Kennedy is not rash, and if he looks at the whole country and forty-nine states, one way or another, have either not considered the issue or considered it and rejected the freedom to marry, those odds don’t look good for getting him to vote in favor of the freedom to marry.

So, I think we just felt like let’s everyone calm down, let’s take some more time, let’s win in some states, let’s feel like we’ve got at least a little bit of

momentum, because the passage of Prop 8 just felt like it just brought everything to a screeching halt. So, that was the position that we held very strongly when we issued the—it was actually a re-issuing of an earlier paper around don't file imprudent lawsuits, and it was really focused on let's make change in other ways; public opinion, culture change, conversations, but let's not sue.

02-00:11:17

Meeker:

Is this coming out of the legal roundtable?

02-00:11:20

Kendell:

It came out of the groups involved in the legal roundtable, and then we included, I mean it ended up being signed by I think twelve or fifteen LGBT groups, including all the legal groups. The Human Rights Campaign, I think the taskforce, I mean I think there were a number of groups that ended up signing on to, we think we need to pursue other paths before we consider a lawsuit on the ultimate question before the Supreme Court.

02-00:11:50

Meeker:

And Evan was onboard with this as well, right?

02-00:11:52

Kendell:

You know, I'm sure of it. I don't have a specific recollection, but I'm sure Freedom to Marry was a signatory—I mean the document is easy enough to find at some point. I'm sure he was, but if he were to say no, I wasn't and I disagreed, I just, I don't think that's true. Evan was bold but also could see the same landscape we did, and I'm quite certain this was something we all agreed to together, but I can't say that I have a real specific recollection of that conversation.

02-00:12:25

Meeker:

So then you have Chad Griffin hanging out with Rob Reiner, down in Los Angeles. When did you start to hear rumblings that there was another effort being pursued?

02-00:12:43

Kendell:

I knew Chad from even before Prop 8, Chad and I had crossed paths. I don't even remember the context really, but in some context around policy issues in California or LGBT issues, and then we did have more interaction on the Prop 8 campaign. He came in as a consultant and helped with a couple of the later ads. So, I'd been around Chad quite a bit, considered Chad a good colleague and friend. He called me the day before they filed, the Olson/Boies team filed their federal challenge, under the Federal Constitution, to Prop 8. So I didn't know anything. We at NCLR did not know anything about a previous meeting at Rob Reiner's house. We didn't know this was in the offing at all. We had no conversations with folks at Lambda [Legal], who I think did actually know this might be coming. That was never mentioned to us as we were considering all of this, which in hindsight seems odd, and you know, what we were worried about—when I saw we, I can certainly speak for NCLR. What we

were worried about is a private attorney or firm, who hadn't dealt with LGBT issues before but who was righteous and on the right side of history, wanting to bring a challenge, a federal challenge, to Prop 8, but who didn't really know what they were doing.

I want to be clear here, not all law is created equal and not all attorneys are created equal. It's not as if just because you have the right intentions and a good heart, and even a law degree, that you can bring a Supreme Court case on an unprecedented issue, an issue of first impression, and be successful. So, while I appreciate, and we work with private attorneys all of the time, understanding what you're up against requires some humility and judgment, and we were concerned about private attorneys, and this paper was really directed at the community and private attorneys taking cases without considering all of the ramifications. But in signing off on that paper, it never occurred to me that some of those private attorneys might include Ted Olson and David Boies. That really upended the chessboard and I found out about their lawsuit the day before they filed.

02-00:15:17

Meeker:

What was your initial impression or response?

02-00:15:20

Kendell:

Well I was shocked that this had been going on and I hadn't known anything about it.

02-00:15:27

Meeker:

Is shocked the right word or were you upset?

02-00:15:31

Kendell:

No, no, it's interesting, NCLR was in kind of a unique position. I did feel like, "Gosh, Chad, why the hell didn't you tell me this before?" I didn't feel like, "Oh, this is ridiculous, stupid, I feel betrayed, we should have been included." I felt stunned that this had all been going on, and Chad and I had been seeing each other and he hadn't said anything, but I didn't know that he'd had previous discussions with Lambda and really got shot down. So, I think he figured look, I'm keeping my cards close to the vest, I'm not telling anybody what we've got planned.

I remember when he called me and told me, and then Shannon [Minter] and I talked about it, and then they had their big press conference, announcing the lawsuit. Shannon and I both took the position, and I think we were even in a phone call with our colleagues. Some of them were much more upset about it, still very concerned about the risk. I mean, the upside risk is huge, of course, no one could deny that, but Shannon, my legal director, and I, both had the—I felt like well, but wait a minute, we're talking Ted Olson and David Boies. I mean it just felt like you couldn't consider our previous position without taking account, this new information, that we were talking about the two most famous attorneys in the country, the most probably lionized conservative

lawyer in the country, and the most decorated liberal in the country, and I just felt like that was totally game-changing. So we made no critical statements about the filing, because I thought well, you know, it probably was inevitable that somebody was going to file a challenge, better it be two of the most storied attorneys in the country and their firms, and all of the resources they bring, people who we have relationships with and can talk to, than a private attorney somewhere who does not have the resources, does not have the depth, does not have the bandwidth, who totally will shut us out, might shut us out completely and we have no conversations with. So, I remember kind of thinking, you know it was sort of reminiscent of the feeling I had around [Gavin] Newsom issuing marriage licenses; all right, well game on. I remember thinking specifically, well if anybody could win a federal challenge to Prop 8, it's this team.

02-00:18:20

Meeker:

So, you know, then it becomes public. I think that the broader community, who doesn't pay that much attention to the different legal teams and their different strategies, I think that there was a broad feeling of optimism, that yes, this needs to happen. But then, as you mentioned, a lot of legal groups didn't feel the same way. Did you try to navigate those two poles? Did you try to bring some of your colleagues in the legal community around?

02-00:19:06

Kendell:

In the conversations we had, and it was probably, you know one conversation right after they filed and then maybe another conversation a little bit later. We then had a later involvement around intervention, which we'll talk about in a second, but just in the aftermath, just in the few hours after it was filed, or a couple of days, I mean I do think we had—I remember saying pretty explicitly with our colleagues, “Hey look, you guys, I feel like the fact that it's Olson and Boies kind of changes everything.” I feel like there was justified concern about timing, justified well, who are they to come in at the last minute, you know after we've been toiling for decades. And it's not that I'm not sensitive to all that, I mean I totally understand it, but you know, this is the story of every civil rights movement. You go along, you go along, you fight for yourselves, you fight for yourselves, you fight for yourselves, and then all of a sudden, bam!, some unlikely ally comes along and steals the limelight, but they help you really move your issue forward. So, taking that sort of 30,000-foot view, rather than a more parochial, self-interested view, I felt like it was going to be awesome, so we felt pretty good about it. We just had different opinions, it wasn't like it was a disagreement over something fundamental. We just, we had a different opinion.

02-00:20:40

Meeker:

What role did NCLR play in what becomes the *Perry* case?

02-00:20:47

Kendell:

Shannon and I actually flew to L.A. and met with members of the Olson/Boies legal team. David Boies was on the phone. I think the day they filed, that

afternoon, I was on a conference call with Ted Olson and other members of the team, and Chad Griffin, and I asked Ted right straight up, “Why are you doing this? You’re the founder of the Federalist Society, everything you’ve ever done up to this point I’ve hated, so what gives here?” He gave such an eloquent response—because he is a very eloquent guy and he became a hugely powerful spokesperson for the freedom to marry. He gave a very moving sort of declaration and at the end he said, “This is going to be the most important case of my life.” I was very moved by it, and so I famously, because I can do this, anointed him an honorary lesbian, which he laughed about and was very good natured about, and I said all right, let us know what we can do to help.

So, Shannon and I flew to L.A., we met with the Olson/Boies team. I will say, the meeting alarmed us a little bit, because I felt like they were naïve about just how hard it was going to be to get five votes. I mean at one point, somebody on the phone thought we could get [Samuel Anthony] Alito on our side, and I feel like Shannon and I both thought, okay, these guys are delusional and this is not grounded in reality. So, we had a very pointed conversation that said look, you’re carrying the entire community here. You can’t be cavalier about this, you can’t be sanguine about it. You have to be very, very mindful of just what an uphill battle this is going to be, and to their credit, I feel like they listened. That meeting, because we ended up now being a little bit alarmed, we went from thinking this is going to be game-changing, to whoa, wait a minute, I’m not sure they really know what they’re doing.

We went to the first hearing, before Judge [Vaughn] Walker, who was the Federal District Court judge that the case had been assigned to, and Ted Olson was there, and it was just, you know, the first initial hearing, kind of like a scheduling conference, to figure out how is everything going to roll out. I remember Walker asking if they wanted a trial and Ted Olson said, “No, we don’t want a trial, we just want to get this to the Supreme Court as fast as possible, we just want to do it on the briefs.” I was there with someone, I think Jenny [Jennifer C. Pizer] from Lambda Legal, I think Alan Schlosser from the ACLU, a couple of other colleagues from the ACLU, maybe somebody else from Lambda. We walked out of that hearing and we all huddled in a corner, and I remember Alan Schlosser saying, “Well now we have no choice, we have to intervene.” Because I thought to challenge Prop 8 federally and to not have the record that a trial would create, on an issue that the Supreme Court has never addressed before, meaning they can substitute their own opinion for whatever it is you present in your briefs. The only way you overcome a judge’s preconceived biases, is a trial that has evidence that forces them to look at the evidence and rule on the evidence, rather than their own opinion. So it seemed suicidal to challenge Prop 8 federally and not have a trial. That’s why we intervened. We didn’t want a piece of the glory, we didn’t want to have credit, we didn’t feel like oh, how dare you, we want to be in here. We really felt like they were going to screw it up, and so that led to our motion to intervene.

02-00:25:07

Meeker: Tell me about that.

02-00:25:11

Kendell:

We all filed a motion to intervene, all the legal groups. Chad was furious and sent an open letter to all of us, saying how dare you, we don't need you, you've criticized the case from the beginning and now you want to be a part of it, you know this feels like grandstanding and blah-blah-blah-blah-blah, ignoring the fact that of course, NCLR never did criticize the case. That later became public, and so everyone, you know that became sort of the narrative; the only reason the legal groups want to get involved is because we want credit and we want to be in the driver's seat. I feel we pretty much, we on the legal side, we pretty much held our powder, I mean we didn't respond by saying, "We are concerned about the competency of how these folks are proceeding." I just feel like there was still a lot of polarization, there was still a lot of hurt feelings, so emotions were running high.

Judge Walker denied the motion, so we were denied intervention, but it accomplished what I think we needed, and so we ended up being perfectly fine with not being a part of the case, which would have been just a nightmare, I think. It did force them to listen to us a little bit, and I think to their credit, I mean I've had members of the team say to me, you were right, the trial was the best thing we ever did. So I feel like it all worked out and we all made nice about it, but it was not a pleasant moment. They ended up having a trial and I think that's why they won.

02-00:26:57

Meeker:

How did they get to the trial? Did they go back and change their mind?

02-00:27:01

Kendell:

They did, they changed their mind. This is to Judge Walker's credit too. Judge Walker knew they needed a trial too. In fact, I remember when Ted Olson said, "No, we don't want a trial, we just want to do it on the pleadings," I remember the look on Judge Walker's face was some mix of you've got to be kidding me and do you know what you're doing. I mean you could tell he was just stunned by that, and so yes, they changed their mind and said after all, we think a trial is a good idea after all, and I think Walker pushed them in that direction: "Maybe you should think about this some more, counsel," you know that kind of thing. So they did and created that fabulous record, and then that master work opinion by Judge Walker that led to Prop 8 being struck down at the District Court, that affirmed by the 9th Circuit, and then it goes to the Supreme Court on the same, actually the same week that the *Windsor* argument was before the Supreme Court. That was all totally awesome and of course, Prop 8 ends up dying, not a death on the merits, but based on the sort of jurisdictional issue that the state didn't defend it and you can't have proponents of a ballot measure defend it. Such inside baseball. All I cared about was that Prop 8 was gone and it would never be able to come back again.

02-00:28:23

Meeker:

What do you know about Judge Walker during this whole period of time?

02-00:28:28

Kendell:

When the case was first assigned to Judge Walker, we heard that he was gay, you know that had been a widespread, known—I mean it wasn't even, I wouldn't even say it was a rumor. It was just known. It wasn't something Walker talked about but it was something people knew. I had many people say to me, "Oh, but that's not going to help you, he is conservative." I think that's why our opponents didn't seek to have him—you know, you can, I think you can do one change where you can say no, we don't want that judge, we want a different judge. I don't know exactly what the federal procedure is. I think you can do it once, but I think they were fine with Walker. They knew what we knew. They knew he was gay, but they had also heard that he was conservative, and so I think they felt like well you know what, we might be in better shape with him than with somebody else. It was only after the fact that they, you know, whined about the fact that he was gay and therefore, self-interested, and all of that.

We hadn't been before Walker before, but I'd known many people who had been. Everyone knew he was thorough, super-intelligent, had been on the opposite side of a gay issue in San Francisco before and was in many ways vilified by the LGBT community when he first sought appointment to the bench, because he represented the IRS [Internal Revenue Service] in a challenge.

02-00:30:09

Meeker:

Was it the Olympic copyright?

02-00:30:11

Kendell:

He represented the IOC [International Olympics Committee] in a challenge to the Gay Games, that Tom Waddell. Tom Waddell and Mary [?]. [side conversation deleted] Tom was in charge of the Gay Games, founded the Gay Games, and the IOC sued him because it was the Gay Olympics, and they sued him, to have him not use the word Olympic, and Judge Walker represented the IOC. This is all lore that I don't know directly from Walker, I know it from the same sources that everyone else has; press accounts and what people have said. When the IOC got a judgment against Waddell, said he couldn't use Olympics, there was some money judgments for the attorney's fees and they ended up putting a lien on Waddell's house. You know, HIV-positive gay man, I mean I don't know what all is actually true and I've never talked with Judge Walker about it, but safe to say, there were hard feelings on both sides. People did not want to see Walker confirmed to the District Court. Gay organization at the time, fought against him, he was confirmed anyway, for all we know that animosity lingered. Never talked to him about it. I have talked to him since and since the ruling, and not about all that previous history but about his amazing contribution to the jurisprudence around who we are in our relationships. We couldn't have had a better opinion from our most ardent

champion. He took all the evidence that was present at the challenge to Prop 8 and eviscerated the argument supporting Prop 8. And of course the proponents of Prop 8 did themselves no favors.

I attended many days of the trial, because of course it was right here in San Francisco. Boy, talk about all hat and no cattle. I mean, they had an opportunity to call anyone in the country they wanted, to support Prop 8, and what they ended up doing was appalling and embarrassing, and it demonstrated, I think for everyone who paid attention, that there actually were no justifications for discriminating against our relationships and denying us the right to marry. I think that would have been plain and obvious to any judge, and it was certainly obvious to Judge Walker.

02-00:33:17
Meeker:

Did you or NCLR play any consulting role in the trial?

02-00:33:23
Kendell:

Shannon talked with members of the Olson/Boies team, I think a couple of dozen times, may have even reviewed some of the pleadings. I know he was in relatively close contact. I had a couple of conversations with Ted Boutrous, who was one of the lead attorneys from Olson's firm, Gibson Dunn, but we didn't play any formal role. It was a behind the scenes role. We did help coordinate amicus briefs, I think we did put them in touch with some experts. We were essentially, we're here to help in any way you need, and I think there were a number of conversations.

02-00:34:06
Meeker:

You know, the trial obviously happens at the District Court and there is a bit of a media circus that surrounds it. People, particularly the gay community, but also their antagonists, have an investment in it, they are present, people are watching it fairly closely. Even though it's not broadcast, there are verbatim reports coming out of it. What role does the movement play outside of the courtroom, in big cases like this? What's the appropriate role to play?

02-00:34:52
Kendell:

During the challenge to Prop 8, I felt like what the movement did, I mean it was sort of the established movement and just the broader LGBT community, was created this sort of echo chamber. Because the proceedings weren't covered, weren't broadcast, you had to wait until the next day, I think, for transcripts, or maybe it was that night. I don't remember exactly when people got them, but I purposefully did not sit in the courtroom itself, so that I could do social media. You could sit in an annex and you could watch the trial on the screens, because they televised it and at any given time, there were multiple dozens of us sitting there watching, and you could do social media at the same time, and then that then could be broadcast out. I mean, I don't even know, even if the transcripts didn't get released, and again this is something that I just completely forget, we had staff that were in there reporting and it was almost as if reading a transcript. We were tweeting. We had a Twitter

feed that was every question and every answer, every question, every question, every answer, and then I would be there and I would sort of do color commentary, like something particularly absurd, I would just do a tweet about something that I had observed. I feel like if it were not for social media and essentially, you know the queer aptitude around social media and the fact that people then really amplified it, I'm not sure it would have been covered nearly at the level that it was, and I think there was a high level of aptitude around what was going on, and an understanding of how well we were doing and how badly our opponents we were doing, just from the daily Twitter feed. It was shocking, how badly our opponents litigated that case. I've really actually never seen anything like it. It was an utter collapse of any possible, plausible defense of Prop 8. I mean when your leading witness, David Blankenhorn, actually admits, under cross examination by David Boies, that we will be "more American." I don't know really, what he meant by that, but I think "we're a better country, we'll be more American the day same sex couples can marry." I mean it was just, it was extraordinary, it was the best theater I've ever been to and didn't even have to pay for it. It was really something else, and everyone got to see it and participate in it, even if it was through a Twitter feed or through Facebook, because everyone was commenting and seeing it. So I do feel like it ended up being this sense of inevitability that we were going to win got created, and that's how the media began covering it. I mean you needed no understanding of law to understand how horribly our opponents were doing in terms of their defending Prop 8, but still, that sense of inevitability, this is the way it's going, it prepares the country, higher courts get prepared for it, you know there's no one who wasn't paying attention. It was the biggest thing going on in our community at the time.

02-00:38:43

Meeker:

Did you ever get any insight into just what happened amongst the team defending Prop 8?

02-00:38:52

Kendell:

Charles Cooper is no slouch. The moment that I think we all realized they've got nothing is when Cooper was making some statement. I don't even remember the context. I don't think it was an opening statement, although it might have been as early as his opening statement, but he was making some defense of Prop 8 and Walker pressed him. Walker also was an extraordinary inquisitor himself, and I think this is a really important roles for judges to play, to really push the attorneys to make their best arguments. So, you couldn't just sloganize with Walker, you couldn't just engage in empty rhetoric, and so when Cooper was talking about the dangers of Prop 8 to traditional marriage, Walker was like, "Counsel, tell me exactly what you mean by that, like what are the dangers to heterosexual couples who marry?" Cooper blusters a little bit more, doesn't really answer it, and Walker said, "No, no, I'm really interested in this. How are heterosexual marriages harmed by same sex couples getting married?" And after a couple of tries, where Cooper sort of tries to slither out of it, Walker really just drills in and says, "Tell me

specifically, how heterosexual marriages are harmed,” and Cooper ends up saying something like, I don’t remember exactly, but something like, “Your Honor, I don’t really know.” I thought okay, well there you have it. Actually, two things were betrayed by that. First of all, Cooper is not as good a lawyer as his reputation. I feel like I could answer that question better than he did, simply based on being around this work for many years and knowing what all the arguments are on the other side. And, he was not a true believer, because if he was a true believer, he could have come up with things like marriage won’t be as valuable and men will be less committed, because they will not see marriage as being as valuable. And in ways, a little bit of a trap, because already under California law, we don’t say that LGBT are less than, we have full protection under the law. So it would be a little bit hard to say LGBT people are disordered and if they have access to marriage in the same way other people do, it will make them feel like marriage doesn’t matter as much and isn’t as valuable. So he was in a little bit of a box, but you know what, you’re now in federal court and a judge is asking you, so at least you can do is just parrot what you hear, what you’ve heard the opponents to marriage say, and he couldn’t even, he couldn’t even do that. That was an extraordinary admission that pretty much set the tone for the rest of the trial. I think it was a lack of preparation, really, really serious preparation. I think they dialed it in, in some ways, and it was just also the vacuousness of the position. It’s just unsupported by any rational, thoughtful, evidence based analysis, period. A thirty second commercial can vilify LGBT people, but in a court of law, not so much.

02-00:42:57

Meeker:

I’ve always wondered what kind of telephone calls Curtis received that night.

02-00:43:02

Kendell:

I think you’re absolutely right.

02-00:43:06

Meeker:

So, at the same time that Perry, which eventually becomes, I guess *Hollingsworth v. Perry*?

02-00:43:12

Kendell:

Yes.

02-00:43:13

Meeker:

Makes it to the Supreme Court. I guess the arguments are around April, 2013, a decision comes down in June, 2013. You simultaneously have the Windsor [*United States v. Windsor*] case, and there are a lot of other cases moving about this time, right?

02-00:43:27

Kendell:

Yeah.

02-00:43:28

Meeker:

That are, you know, I think once *Perry* starts moving, that kind of opens the floodgate and all of these other well-meaning individual, private attorneys, and you know, ACLU and GLAD [Gay and Lesbian Advocates and Defenders], start to move along that path.

02-00:43:49

Kendell:

And then especially after DOMA [Defense of Marriage Act] is struck down.

02-00:43:52

Meeker:

Sure, so after 2013, that's when NCLR comes along and you pursue the *Tanco* [*Tanco v. Haslam*] case, out of Tennessee. We'll get to the *Tanco*, is that said correctly?

02-00:44:03

Kendell:

Okay, mm-hmm.

02-00:44:03

Meeker:

We'll get to that in a second, but I'm curious, you know, what your thought was on *Windsor*, when that first started to emerge, because that was a DOMA case, right?

02-00:44:12

Kendell:

Yeah.

02-00:44:13

Meeker:

That was specifically addressed to one part of DOMA that had to do with federal recognition of state marriages. Did NCLR play any role in the *Windsor* case?

02-00:44:33

Kendell:

The *Windsor* case was one of a couple of potential cases that the Court could have taken, to consider striking down the Defense of Marriage Act. We had all thought, those of us who were in legal organizations, that it would be Gay and Lesbian Advocates and Defenders case in Massachusetts. They had teed up and been working for a number of years on a case that they had planned, very meticulously, would be the takedown of DOMA. Then the ACLU, along with Robbie Kaplan and her firm, bring the *Windsor* case, and the Supreme Court now is faced with a choice. There are now a couple of cases they can take, and they end up choosing the *Windsor* case. I think we felt a little bit badly about that and I think there were some issues around that, particularly with ACLU and GLAD, not because we shouldn't have multiple cases, I mean we even considered the possibility of a DOMA case. We decided not to because the other cases were farther along. But it just felt like, you know Mary [Banauto] had been such an international architect of taking DOMA down, and we did feel like that was the right next step, that it was just a quintessential denial of equal protection, to have the federal government refuse to recognize validly married couples. It felt like that would be the next interim step that Kennedy would be willing to take before a full on challenge to laws that excluded us from the right to marry.

So, when it was *Windsor*, it did feel a little bit like oh, that wasn't really the plan. GLAD's case had multiple couples, multiple different claims, so it told lots of different stories, and in some ways I think that might have hurt it. I don't know why the Court took the *Windsor* case. Some people speculate it was because, you know the single plaintiff just made it a really clean case. It's a single plaintiff, one issue presented, in New York, and [Associate Justice Elena] Kagan had had some early dealings, when she was at the Department of Justice, around some of the early stuff that had gone on with GLAD's case, and so there was some rumblings that she might have to recuse herself. Now I'm not sure that was really true. I don't know that there was any actual evidence of her being involved at the level that she would need to recuse herself, but there might have been the appearance of it. So they may have just decided, and when I say they, the Supreme Court, and Kagan may have had something to do with this, you know what, I would prefer that you don't take that case, take this one instead, so I don't even have to face the question of whether to recuse myself. I mean who knows, you have to be a fly on the wall to know.

02-00:47:37

Meeker:

That's what Robbie Kaplan says in her book at least.

02-00:47:39

Kendell:

Oh really, she says that had something to do with it?

02-00:47:42

Meeker:

She speculates.

02-00:47:43

Kendell:

Got it, got it, got it.

02-00:47:44

Meeker:

I don't think that she has any more information than you would, but that at least provides some justification for why her case was taken, as opposed to Mary's.

02-00:47:52

Kendell:

Yeah, and I think you know, and the only issue around that is that it just, it did feel, to some degree, like because Mary and GLAD had worked for so many years to frame up the case, and when you engage in all that planning, you really thought this is going to be the next case, so when that didn't happen, I just felt badly for a colleague that had worked very, very hard on that positioning. But again, you know, welcome to civil rights work. It's like, you know, it's a roller coaster, and there will be all sorts of twists and turns. You look back now and I feel like *Windsor* was the perfect vehicle, and Edie Windsor, the perfect plaintiff.

02-00:48:40

Meeker:

There was some criticism at the time that, "Oh, here we have a wealthy white woman." Did you share any of that concern at the time? I mean what is the

role of those kinds of considerations when balanced with the strength, the merits of the case?

02-00:49:02

Kendell:

I think you always want to present a case and a plaintiff that is sympathetic, where people see themselves reflected, especially if you're asking them to consider a new issue, but I do think that the criticism that *Windsor* was just about a rich woman, white woman, living in New York, was a little too shallow. I mean the point was she had lost the love of her life and was now facing a huge additional tax burden, simply because their marriage was not recognized. There are elements of that, that sort of injustice. It's a very simple story to tell, the injustice is really severe, and I do think there is a way in which many Americans were like wow, you mean she had to pay more taxes? So there is a really appeal, and she's older. So I feel like there was a lot there that was sympathetic once you just make even the barest of inquiries into who she really was.

02-00:50:19

Meeker:

Not to mention the way in which she had cared for her spouse.

02-00:50:21

Kendell:

Oh yeah, I mean you read her and Thea's story, or the film about their life, you know she spent the last twenty years of the relationship taking care of Thea [Spyer] as she was afflicted with MS [multiple sclerosis] and just lost more and more of her ability to take care of herself. You know, they met in the 1950s and Edie was in tech, at IBM and was a computer programmer at a time when you didn't think any women were in that field, and it turns out, as she tells the story, many women were in the field, but it was then you know, sort of well postwar, women were pushed out, because now it was like well men are back, they should be the ones in these jobs.

I've come to know Edie and have met with her and been with her many times, and I think she ended up being really, the perfect plaintiff with the perfect story, but at the time, I just felt badly for colleagues that I knew had put heart and soul into a case that they hoped would be the case that took down DOMA.

02-00:41:36

Meeker:

Can you tell me about the politics of that? You've got GLAD, you've got ACLU, NCLR, and then of course you have these private attorneys around the country. There is a lot of jockeying, I mean that was one thing that actually does come out of the Kaplan book, about the kind of jockeying, about getting first in line. For an attorney doing civil rights work, who doesn't want to be the one arguing the case before the Supreme Court? I mean you now become part of history, hopefully in a good way.

02-00:52:10

Kendell:

Exactly, exactly.

02-00:52:14

Meeker:

From leading NCLR, do you have thoughts on how that actually works, if it's made too much of, if it needs to be sort of addressed.

02-00:52:28

Kendell:

I haven't read Robbie's book, so I'll confess that. In fact, I just saw Robbie with Edie, a few weeks ago, and she gave me a copy of the book, which I appreciated, but I haven't had a chance to read it yet. I think people outside of our organizations make a lot more of the jockeying than we do in the organizations. Of course, I lead an organization that does LGBT legal civil rights work. I want NCLR to get credit for important work that it does and yet, many, many times, we write whole briefs and don't even put our name on them, because us getting credit is not going to help the case. Yeah, I want our legal director, Shannon Minter, to be arguing a case before the Supreme Court, and yet it turns out, we have a colleague at a firm that's done multiple cases before the Supreme Court and he is known by the Court, he should be the one arguing before the Court. You know, you have your hope for your organization and that you want your organization to have the profile and the attention and the credit that it deserves, and then a million and one reasons intervene for why, you know what, there's a bigger consideration. We're bigger than our organizations, and I think that's the way all of us feel. We want to win for the community. It's sort of why I was actually not resentful about the Olson/Boies case, because I thought look, we weren't going to take a case, we weren't going to challenge Prop 8 federally now. Now, I didn't want some yahoo, who doesn't know what they're doing, to challenge it, or some grandstander challenging it, but they know what they're doing. They did and we got to help them do it even better. So when push comes to shove, the thing that we most care about is: how do we advance the ball for our community? And we work out whatever the institutional interests are.

I do think people who are on the outside of the organizations imagine that there's more jockeying, and then there are some people who jockey more. Robbie tried to get into our Utah case, for example. I think she tried to get into one of the other cases and was told that's okay. I have a perfectly fine relationship with Robbie. Shannon, my legal director, dealt with her directly and said we don't need your help in the Utah case, and she tried to intervene anyway. So, you know, but you know what, it's all, it's just good sport among people who all have healthy egos, some institutional interests, but ultimately really just care about winning for the community and you work it out.

02-00:55:26

Meeker:

Were you in D.C. during the oral arguments?

02-00:55:27

Kendell:

I was.

02-00:55:29

Meeker:

So you attended them?

02-00:55:31

Kendell:

I got to be in the Court for the very first time, for both the Prop 8 and the DOMA challenges, and it was like, you know, better than a seven year-old at Disneyland, I mean it was the most amazing experience. I loved every second of it. It was freezing cold, waiting in line, but I mean you can't not feel like you are part of something that is so incredibly important. What a privilege to be there. It was remarkable.

02-00:56:15

Meeker:

What did you think of the actual arguments that you heard? I guess I should say—that's kind of a really big question. Was there anything that was particularly surprising, either the questions that were asked or you know, what the attorneys said in response?

02-00:56:34

Kendell:

I wasn't surprised by really, the arguments. I expected [Associate Justice Antonin] Scalia to be hostile and he lived up to my expectations. I thought, you know there were moments where you just fell in love with justices all over again. When Ruth Bader Ginsburg talked about civil unions being "skim-milk marriage," because it had this lesser status. I was just like, "Oh my God, I love you so much." You know there were times, because I care deeply about oral advocacy, it matters to me, and I love it when I see good oral advocacy, there were a couple of times where I was like, "Ah, say this instead!," you know, but every attorney in the audience is thinking that. I feel like until you're in that moment, which I've never been, I would never, ever criticize any advocate standing before that Court and making arguments, particularly arguments of such incredible importance to the lives of millions of people. I feel like we were very well represented across the board.

02-00:57:54

Meeker:

The decision comes down in June of 2013. Where were you when those decisions came down and tell me about your response to them.

02-00:58:07

Kendell:

I was here, in San Francisco. I decided I wanted to be here, rather than back in D.C. I had asked Phyllis Lyon if she wanted to go to city hall, because city hall was going to have a big celebration.

02-00:58:23

Meeker:

Del [Martin] had passed away by then.

02-00:58:24

Kendell:

Del had already passed away. Del passed away, actually in 2008, and so now it's 2013. So I went and got Phyllis, we went down to city hall. We were sitting back in the mayor's kind of anteroom, down the hall from his office, and the room was packed with people and it felt hot, it was a little muggy. We're watching TV, waiting for the announcements. This was probably, I don't know, seven o'clock in the morning, and the first decision is announced. I think the first decision was the Prop 8 decision, I don't remember exactly the

order. You go in that thinking you're going to win, because the arguments, you could kind of handicap, I thought we were going to win on both of them. I wasn't sure about Prop 8, whether it was going to be the jurisdictional issue or the merits, because Kennedy brought up kind of that weird jurisdictional thing, and that was sort of the first time that he asked that it be briefed, and then they really focused on well, do the proponents have the right to represent the state? And I thought, "Wow, Prop 8 could die on a technicality essentially." Well that's what happened, and then DOMA is struck down, and the room erupts, everyone is screaming. I feel like from that moment on, I am in a complete daze. I remember walking out with Phyllis. They had asked me if I would MC the celebration. I walked down the stairs of city hall, which is of course this magnificent building, just a beautiful, long marble staircase, walked down with Phyllis. There are maybe a couple thousand people there screaming and cheering. They put a card in my hand to say okay, introduce—you know, here's the people who are going to speak for the rally. I was just so relieved that Prop 8 was gone, so relieved that DOMA was now gone. Do you know what I did?

02-01:00:27

Meeker:

No, I don't.

02-01:00:31

Kendell:

Okay, things I regret, this would be number one of the list. I did not realize that we were on national television, I didn't realize that we were being broadcast live. I thought we were just having a rally in city hall. Now of course there's a huge bank of cameras. I don't know what I was thinking. I don't think I thought anything, I didn't even really see the cameras. So, I'm the very first person to speak and everyone is screaming. They introduced me and people scream and yell, and I get up there and the very first thing I say, unplanned, it just came right out of me, "Fuck you Prop 8!" And everyone of course, bedlam breaks out, people are screaming and clapping and hollering and cheering. I don't realize that the elected standing around me, pretty much their faces go ashen, and I also don't realize that Matt Lauer and half of the country that's covering this, they immediately cut away and apologize to their viewers and say, "Well this is live TV, I'm so sorry, we didn't know that was going to happen," and they pretty much never come back to the rally, to the press conference. Yeah, so that was a super big fuck-up, and I didn't even know it. So we go through the whole thing, you know then I speak a little bit more obviously, after saying that, but of course I have no idea that everybody has cut away. Dennis Herrera speaks, Gavin Newsom speaks, Mayor Lee speaks, you know, the electeds, and then we're done, and it's only as I'm getting ready to leave that someone comes up to me from one of the outlets and says, "You know we were live?" And I was like, "Wait, wait, what?" And he looks at me like I'm a total idiot and says, "Yeah, we were live." "Oh my God," I still, even just retelling it, I'm just like sick to my stomach. Yeah. So, I call my communications director and say, "You won't believe what I just

did,” and I told him and to his credit he laughed. So yeah, so there you go, yeah.

02-01:03:18

Meeker:

Now that you mention it, I do remember vaguely, something like this. I must have seen a clip of it. You know, it’s interesting, those kinds of moments, unscripted, off message, but you gave voice to probably what everyone at least there was thinking.

02-01:03:38

Kendell:

Well, if I could rewind the clock, I would have obviously never done it, and I do, I completely regret it. I did have, had dozens and dozens, I mean I had a dozen people email me and say you’re an idiot and should be fired, but for the next week, I probably had 200 people either stop me on the street or send me a message or call and say you’re awesome, that was great. In fact, *San Francisco Magazine* ran something, a little blurb that, you know, “As near as we can tell, if Kate Kendell wanted to be mayor, she could be mayor now.” So I was like oh yeah, because you used the F-word on TV. So I get it, I get it, but you know look, I understand I represent a community and missed an opportunity to really say something of import. I consider myself to be an articulate speaker and spokesperson, so yeah, that was what I did the morning that Prop 8 and DOMA were struck down.

02-01:04:56

Meeker:

Well now your *mea culpa* is official and recorded, and will be included in the Bancroft Library, but you know, it’s good to have that down. Like you had referenced before, once *Perry* and *Windsor* are decided, the floodgates really open and there is this sort of land rush to go to all the states, to find the case that will go to the Supreme Court.

02-01:05:23

Kendell:

Right.

02-01:05:24

Meeker:

And I know that a lot of organizations had been anticipating that and searching for these for a while. Why don’t you tell me the process by which NCLR tried to find the right case and the right litigants.

02-01:05:46

Kendell:

Even before DOMA was struck down, we figured that if we win on DOMA, which we thought we were going to, the next case that the Court is most likely to rule in our favor on is a case where a state refuses to recognize a marriage from another state. So we’ve now won DOMA, where they said it’s not constitutional and permissible for the Federal Government to not recognize marriages. Okay, the next step would be to find that it is unconstitutional for a state not to recognize marriages from another state, for couples who live in that state. So we were still thinking interim, we were still thinking what’s another intermediary step before we ultimately win marriage. So we were still

plodding along with our strategy, which look, I feel like was a perfectly valid and made sense strategy, but once—

02-01:06:41

Meeker:

In other words, you weren't looking for a case that the Supreme Court would have said to Tennessee, "You have to allow marriages by same-sex couples to be performed in your state."

02-01:06:52

Kendell:

In your state. We were not contemplating, at that point, a full-on challenge. We were looking for what we were calling a recognition case. We were calling these recognition cases, that to not recognize a marriage already performed in another state, for citizens now living in your state, is unconstitutional.

02-01:07:15

Meeker:

And the full challenge would come two years beyond that, or something like that.

02-01:07:17

Kendell:

That's what we were thinking; we win this one now and then the full challenge comes next. Of course, after DOMA was actually literally, and in actuality struck down, the floodgates opened and it was like forget that strategy, recognition is not going to be enough, we need to do full-on affirmative challenges. So we actually had, in Tennessee, we had both claims. We had both a recognition claim and an affirmative challenge to the marriage ban claim, and several of the cases were mixed. Some cases, like the Ohio case, was a recognition case, the [*Obergefell v. Hodges*, 2015] Obergefell case, the name case. The Michigan case was an affirmative challenge, I think.

02-01:08:11

Meeker:

Kentucky?

02-01:08:12

Kendell:

The Tennessee case was mixed. Kentucky, I think was an affirmative challenge case. I don't remember exactly, but of the six states, four states rather, it was a mix of both recognition cases and affirmative challenge cases. So we had a plan and then we totally, like the plan was thrown completely out the window and now it was just game on, to get the best cases in front of the Court as quickly as possible.

02-01:08:44

Meeker:

Even before you get to that, I'm curious about what your methodology was for finding the right litigants, the right people, because I know, apropos with what we were talking about with Edie Windsor, I mean there was some criticism but in the end, she had a really compelling story, a great litigant, no downside really.

02-01:09:07
Kendell:

We had an advantage because in Tennessee, we worked very closely for many years, with Abby Rubenfeld, who was a Nashville based attorney. Abby worked at Lambda years and years ago, was their legal director. We'd been working with Abby for gosh, twenty-five years, on cases. So it was really Abby's idea. Abby said, "Let's do a recognition case in Tennessee." I remember when she first suggested it, we thought, "Oh gosh, Tennessee, no, we're not going to be able to win there, in that circuit." And it just goes to show how we were still bounded by boundaries and incrementalism and the caution that movement lawyers, I think have to bring, but we hadn't really recognized how quickly events had just overtaken us.

Abby, along with—we had an attorney—there are three different districts in Tennessee. There's the East, Central, and West, and we had an attorney from each of those geographic areas, and we had couples from each of those areas. So, you know ideally, we wanted couples that had compelling stories, that was the very first and most important thing. We had a couple that had lived in California, got married here, was transferred to Tennessee, an interracial couple, they had kids. We had a lesbian couple, interracial couple, who had been married elsewhere as well and moved to Tennessee and were pregnant, and then we had a couple, one of the military, that could not get married obviously, and had all sorts of issues around that with regard to the military and recognition of the relationship. So we had three really compelling stories and how we found those plaintiffs was really talking to the attorneys there on the ground to say, this is what we're looking for, and then they used their networks and we ended up with gosh, just six amazing people.

02-01:11:13
Meeker:

Do you do personal background interviews? How do you make sure that there's no downside to the litigants, the plaintiffs?

02-01:11:21
Kendell:

You definitely do interviews. We don't do formal background checks, it's not like we do criminal background checks or anything like that, I mean we just ask questions. I don't know, I didn't do the interviews, but we probably ask, you know, "Have you ever been convicted of a crime? Is there anything about your history that we should know, that would impact how a court might view you? Are you ready to be in the limelight? Do you understand, are you willing to do interviews, media interviews? You're not going to have much privacy." It really takes a kind of special person and not everybody is up for all of that, so it's a matter of not only do they have a compelling story and do we feel like these are folks that are willing to tell their story and be effective communicators with the rest of the public, but they have to really be sure that this is something they want to take on, so it's like a mutual interview. Do they feel comfortable with us, do they feel comfortable this is our approach? We really take seriously, taking good care of our plaintiffs and they're our clients, I mean they're the most important part of a litigation. They're who we have an ethical obligation to. It's not to the rest of the community, it's not to the press,

it's not to even the courts; it is to these clients, and so we want to make sure, in every case, it's a really good match.

02-01:12:56

Meeker:

I understand the case was filed, *Tanco v. Haslam*, in October of 2013, so a few months after *Windsor* and *Perry* are decided. As you said, there's this big movement, cases are being filed everywhere at this point in time. You know, kind of looking at it from the vantage point of other interviews I'm doing around Freedom to Marry and the work that's being done on the ground and legislative work, I mean it kind of ends legislative work at this point in time, because everything on the legal front is moving so quickly. After *Windsor* was decided, basically the work in D.C. pretty much stops, because that federal question was solved. They talk about you know, the people who were doing work at Freedom to Marry, really pivoting to preparing people for marriage nationwide. So it's no longer running statewide legislative campaigns or initiative campaigns; it's preparing the population. What was the nature of your work with Freedom to Marry and the other organizations working on that issue, and how did you support them and vice versa?

02-01:14:17

Kendell:

Well, we were their stories, I mean they used our couples to tell the story of Matt and John, married in California, moved to Tennessee, raising two children, their relationship not recognized, and all the hardships that that creates for them and for their children. So, I feel like with all of the cases, Freedom to Marry was sort of a mutually beneficial relationship, where they elevated our stories, talked about our cases, talked about what was happening for our couples, used that as part of the public education campaign, and we got the benefit of having a greater level of visibility for our work. That symbiosis was very apparent.

02-01:15:05

Meeker:

You know, this is sort of an aside, but I ended up interviewing this guy, [Richard] Arnason, Judge Arnason, a few years ago, he just recently passed away. He was the presiding judge, in 1971 or '72, over the Angela Davis murder trial.

02-01:15:22

Kendell:

Really?

02-01:15:22

Meeker:

Yeah.

02-01:15:23

Kendell:

Wow!

02-01:15:24

Meeker:

You know it's interesting, I guess was it Bettina Aptheker, who wrote a book about the trial, and one of the things that was very apparent in her book, and I followed up on this in questions with him, was the role of what's happening

outside of the courtroom, on what happens inside of the courtroom. In the context of all this stuff that's happening, I mean really, when there's so much national attention this post-2013 especially, did you develop a sense of what that relationship was and how best to harness it?

02-01:16:08

Kendell:

Well, I mean those are two really different questions.

02-01:16:11

Meeker:

One at a time then.

02-01:16:14

Kendell:

We were definitely aware of how important it was to create, as Evan would say, "that drumbeat of inevitability," because it's important for, if you think about the audience of one, Kennedy, and anybody else on the Court, but particularly Kennedy, to know that it is time to rule in favor of the freedom to marry, that there is no dodging it. There is no getting around it, there is no stutter step, there is no half measure; the nation is ready. So that is an enormously important reason to have story after story after story, poll after poll that shows people are ready for this, commentators saying of course the Court is going to rule in favor of freedom to marry; sort of doing this fait accompli kind of gestalt, where you kind of create that whole ethos that this is going to happen and we are ready for it, a hundred percent aware of how important that is. Harnessing it and actually really having it follow the arc that you want it to follow is like grabbing a tiger's tail. Sometimes we hit the groove exactly right and I felt like *bam!* we really got the hits we needed and the narrative we wanted, and other times, I mean I just feel like in a 24/7 news cycle, with multiple social media platforms and an attention span of a second and a half, it's hard to feel like you really are making a difference. And we're small. We amped up in order to meet the challenge of being an organization that was bringing a marriage case. We hired additional communications staff, we devoted tremendous resources in the six months for sure, leading up to the marriage case, and I do feel like all four cases and all four organizations, all being involved together, really helped, reinforced each other. This is the way I ultimately felt about it. Even though there were times where I was like, "I wish we were getting more press for the Tennessee case." Press for the Michigan case helped the Tennessee case, press for the Ohio case helped the Kentucky case. Press for the Kentucky case helped Tennessee. You know, it's like as long as the drumbeat got created, we were in good shape.

02-01:18:51

Meeker:

When you say four organizations, you mean Lambda, GLAD and ACLU?

02-01:18:54

Kendell:

Lambda, GLAD, the ACLU and NCLR all had a piece of one of the cases, along of course with a huge cadre of private attorneys, which we couldn't have done it without, but it did feel great that we were all in the court together.

02-01:19:10

Meeker:

Can you tell me about the communication angle, particularly in the context of NCLR. What kind of people did you hire, what contribution were you hoping that they would make?

02-01:19:20

Kendell:

We have a communications director and we had a communications associate. We hired somebody to help us with web and social media stuff, and Erik would know this for sure. I think we hired somebody additionally, to just help do some of the coordination with the other organizations. This pretty much was Erik's full-time job for several months.

02-01:19:41

Meeker:

Erik?

02-01:19:42

Kendell:

Erik Olvera, who's our communications director. We have a pretty small team, it's not like we have twenty or thirty attorneys. We did have a little bit of a war room around the Supreme Court case. I think Erik was on weekly calls with GLAD and with our other colleagues, all the communications directors were talking weekly about okay, this is what we're keying up this week, this is what we're going to queue up next week, these are the issues that are getting discussed, this is what's out there right now. This is a narrative we need to respond to, this is a thread we want to jump on. So there was just a tremendous amount of coordination and sharing of information, unlike anything, I mean we've never been involved in anything like that before.

02-01:20:30

Meeker:

When you talk about narrative, it's a term that I constantly hear, and as somebody who works in oral history, which is narrative, I'm very interested in it. As I'm interviewing people like Thalia [Zepatos] and others, who were on the message front, they do talk a lot about narrative and the "journey story." Were you finding a way to bring what they were learning in their political research, into your legal work?

02-01:21:02

Kendell:

Yes. We had very clear talking points and themes we wanted our couples to talk about, you know particularly talk about what marriage meant to you. Why do you want to get married, what will it mean? What will it mean to your families? I mean, talking about how your parents came to terms with it. We used that all the time. Their research informed how I talk about it, how Shannon talks about it, how our couples talk about it. We didn't put somebody in front of a camera and say, you know, "Have fun!" We really, we wanted them to have guidance and the guidance had to be informed by what we felt like were the best and most powerful messages. Nobody ever said anything they didn't believe and know, but you could have a couple say we want to get married because I'm concerned that if anything ever happens to me, my husband won't get, my partner won't get social security survivor's benefits. I mean, that could be a perfectly valid thing to say, and it is a talking point we

used to give people. Now we're like no, no one cares about that, and what we say instead and now, actually I feel like we used to script people in a way that wasn't consistent with what they would say anyway. It almost feels like what the research taught us is what people's natural impulse was going to be when asked, why do you want to get married? And lo and behold, what was their answer? "Because I want to marry the person that I love and this is the person I want to spend my life with." We, I think got it totally backwards in our either early—I can't figure out if it was early research or just early thinking about how we should talk about it. Don't talk about each other and how much you love each other. I don't know if we were worried that that triggered, we're going to imagine them having sex, it feels too intimate. Our early messaging was all about up here and it wasn't about—so we divorced ourselves from—no pun intended—from the reason people think about why they get married.

02-01:23:22

Meeker:

Did you find that there was room to bring these narratives of love and commitment out from the public sphere, into the courtroom?

02-01:23:32

Kendell:

Oh yes. This is the thing we also, I think were fearful of, when we were initially litigating these cases; we made it all about rights and benefits, forgetting that we're actually talking to a human being who probably is married or has been married or has been to a wedding or wants his daughters to be married or wants his son to find love. Holy heck, we are dealing with people and this is the common human story about how to find most fulfillment in one's life; finding someone you can share your life with. So we absolutely imbued our pleadings, the oral arguments, with the story of who people were to each other. I think, in watching the federal challenge to Prop 8, the very first questions, after getting through the preliminaries, that Kris [Perry] and Sandy [Stier] were asked, and oh my gosh, I forget the name of the guy plaintiffs in the *Perry* case. Anyway, the first questions they were asked is tell me why you want to marry Kris, tell me why you want to marry Sandy. And of course they cry on the stand and talk about—and in fact one of them—if these guys walked in, I would totally give them a big hug and say I love you, because I know them. One of them said, "He completes me." You know, it's not legalese, it's how human beings speak, and Walker was moved by it, you could tell.

02-01:25:13

Meeker:

Kind of on the opposite side, did you feel like this was an opportunity and an opportunity that you really needed to take advantage of, to educate the American public or LGBT people, about the Fourteenth Amendment, about the finer points of the U.S. Constitution; heightened scrutiny versus strict scrutiny, and all that kind of stuff.

02-01:25:41

Kendell:

No. How boring. I mean, your average person doesn't care what level of scrutiny the Court is going to apply. If I'm speaking at a law school, of course

I'm going to talk about that stuff, but I felt like when I would talk in interviews, about why the freedom to marry was important, not only would I talk about love and commitment, but I would bring it to the 30,000-foot level. This is the promise our nation makes, that equality will be guaranteed to everyone, and to fence off an entire community of people because we deem their choice of partner to be inferior or wrong, violates everything we say we stand for as a country. That's all you need to say for people to understand that something is terribly wrong here, for us not to let these people marry.

02-01:26:30
Meeker:

So you didn't feel any impulse to kind of go into professorial mode and use this as an opportunity to educate LGBT people about the Constitution?

02-01:26:44
Kendell:

I never do. Every once in a while I might say something like, you know, depending on how long the interview is, how much time I have. Do I have more than just one sound byte? I might say, "Look, we have a constitution, it has a Fourteenth Amendment that guarantees equal protection of the laws. What does that mean? It means we're all going to be treated equally under the law and we're not going to pick and choose." I mean the only reason to do that is if I feel like people knowing that will somehow make a difference to their level of engagement, like what's the purpose. Usually, when you're talking about the Court, I don't want to talk about that level of detail because you can't lobby the Court. I might be more specific about things people could do if then there's an ask. So, because of that, you need to make sure you get out and vote, or you need to make sure you write your elected representative.

[pause in recording; side conversation deleted]

02-01:28:00
Meeker:

So, the district court in Tennessee rules in your favor, in the *Tanco* case, and then it gets appealed by, I guess the governor of Tennessee.

02-01:29:11
Kendell:

Right.

02-01:29:12
Meeker:

It ultimately goes to the 6th District. That is interesting and the one question I have about that is you know, it was a two-to-one decision and the dissenting judge, Judge Doherty?

02-01:29:31
Kendell:

I think that's right, yeah.

02-01:29:32
Meeker:

In her ruling, she speculates that it was a disingenuous ruling on the part of the two judges, basically ruling against marriage. Do you have any thoughts on that? I mean maybe explain it better than I can first of all.

02-01:29:54
Kendell:

In order for the Supreme Court, traditionally, to take a case for review, there needs to be a split among the lower circuit courts. If there's no disagreement among the lower circuit courts, everything goes on just fine, unless the Supreme Court thinks they should weigh in for some reason. Up until the 6th Circuit ruling, every circuit court that had considered our exclusion from the freedom to marry had struck down such bans. So we'd won, won, won, won, and now—and the Supreme Court had, up until the 6th Circuit ruling, had not reviewed any of these cases. In fact, a moment of huge shock that I experienced in late 2013, or no now we're in the fall of 2014, was when we were waiting to see if the Court was going to grant review in our Utah marriage case, even though we'd won, even though we'd won at the 10th Circuit, and there were several other cases that had won and marriage had been upheld. All those decisions were stayed, so couples weren't getting married, pending appeal to the U.S. Supreme Court.

I'm in a hotel room in Washington, D.C., with the gay reporter, Pete Williams. We knew that the Court was going to announce that day, what cases they were reviewing, and he announces that the Court has declined review in all pending marriage cases, and I think there were four of them. I remember my very first thought was well that's wrong, he's wrong, he's got his information wrong, I mean there's no way the Court is not going to grant review in any of these cases, because if they don't grant review in any of these cases, it means the circuit court ruling stands and we go from single digits of states that you can get married in to, like, I don't know, I think it was like thirteen or fourteen or fifteen states in which you can marry, because those are the states covered by the circuits in which we'd won marriage. And it seemed like so fantastical, that the Court would allow marriage to be won now, in almost a majority, and I think it was a majority. No, it wasn't quite a majority, but probably half the country and certainly, some of the most populous states, without weighing in. I mean, I think I called Shannon immediately and said, "This can't be right," he's like, "I know, I can't believe it." Nobody could believe it. Everybody thought they were going to take at least one of the cases but you know, this was wicked, wicked smart, because [snaps fingers] just like that, we now had marriage in, at least by population, a majority of the country. And so then at that point, of course it's all over but the final, sort of signing the final opinion, if there was ever going to be one. We actually speculated, well if we don't lose in any circuit, we could win marriage nationwide, without the Supreme Court ever saying a word about it.

So, that's the setup for the 6th Circuit to now say hold on, we are going to go against the tide to tee up the Supreme Court weighing in. Now look, do I think that's why they did it? I mean, unless they ever say so, I don't know that we will ever know for sure, but it meant that the Court did take that case and use the 6th Circuit's denial of the Freedom to Marry, to grant marriage nationwide.

02-01:33:42

Meeker:

It's interesting, the fact that the dissenting judge's opinion actually refers to that potential strategy, I don't know if that makes it more likely or less likely, that in fact it was deliberately teed up, as you say.

02-01:34:00

Kendell:

Well it makes you wonder, did somebody say that, did they admit it? Did they refuse to deny it, if she'd asked them explicitly.

02-01:34:14

Meeker:

You're right, because at that point in time, this meant that they were really kicking it upstairs.

02-01:34:21

Kendell:

Yeah, now the Court had to weigh in. Look, I do feel like for an issue like this, so important and still controversial, you need the Supreme Court. You need the gravitas and you need the authority of the Supreme Court, and it could be that those two 6th Circuit judges, I mean they may not be fans of marriage, but they also may feel like look, the way for this to get decided and done is for the Supreme Court to weigh in, so they forced their hand, absolutely, by ruling the way they did. Now, whether they did it to force their hand or whether that just happened to be the practical effect of what they did, we'll know at some point but not today.

02-01:35:07

Meeker:

And you also end with one decision; you don't end with you know, what are there nine different circuit courts?

02-01:35:14

Kendell:

Right, yeah. But by that point, the inevitability had been reaffirmed multiple times, so in some ways Kennedy's *Obergefell* ruling was actually, because it was so wildly, widely, and overwhelmingly anticipated, while it was still huge and amazing, I feel like for some people it was a little bit anticlimactic, because it was like well we totally knew this was going to happen. I mean we're still in the middle of a backlash, but I think the backlash has been tempered some by, people have been preparing for this for two years and they knew it was coming. No one can say they were surprised.

02-01:36:04

Meeker:

Backlash, you mean tempered?

02-01:36:09

Kendell:

Tempered the backlash.

02-01:36:10

Meeker:

Tempered the backlash. Let's get there in a second, but I guess before we get there, I'd like to hear about the packaging of these different state cases, into the *Obergefell* case that was brought before the Supreme Court just not even a year ago. It seems like ten years ago, right?

02-01:36:32

Kendell:

I still can't believe it, yeah.

02-01:36:34

Meeker:

Right, and so April of 2015. What was NCLR's role in that? I don't know what the process is. Is it simply all of these 6th Circuit cases go to the Court and they decide how it's going to be ordered?

02-01:36:57

Kendell:

I feel like I don't know as much of the answer to this as Shannon would, my legal director. What I do know is this. There were two questions. One was the straight up freedom to marry, that was presented by the Michigan case, and the second questions was the recognition question, and that was presented by our Tennessee case, and then both Kentucky and Ohio presented the questions as well. It ended up being our co-counsel, Doug Hallward-Driemeier, from Ropes Gray, argued the recognition question, which was question two, and Mary Bonauto, who was part of the Michigan team, ended up arguing question one, the straight up freedom to marry question. Now getting to who was going to argue took some time, I mean everybody, as you said, wants to be the person who argues the case before the Supreme Court, you know Doug just had such tremendous depth and experience, there was really kind of no contest that on question two it would be Doug. I think there was a lot more conversation about question one. We wanted Mary to argue it, because it just felt like this is a person who, other than Evan Wolfson, has done more to win marriage in this country than any other human being, and she is also a fabulous advocate who knows this issue inside and out.

I do feel like if I were to say anything about the arguments in *Windsor* and Prop 8, I think they suffered a little bit from just a lack of just depth, being steeped in LGBT civil rights litigation for two decades. There's no substitute for that. So, I really wanted to have an advocate up there who really had been in the trenches and knew everything about everything and had litigated multiple LGBT cases, and just knew issues inside and out. It's almost like you eat, sleep and drink it for you know, most of Mary's life, she'd done this work. So I really wanted the advocacy community represented. There were discussions and it kind of went back and forth, and then I think Mary just emerged as sort of just the clear person who definitely had the depth of talent and she should be the one to do it. That's how the oral argument thing sort of figured out.

Then, in each of the cases, we drafted our own briefs. The cases were consolidated with these two questions. We all drafted our own briefs, in each of our own cases. There were amicus briefs that were coordinated through... gosh, I can't even remember who coordinated the amicus briefs. Mary coordinated them actually during the *Windsor* challenge, but in this score, I think it was maybe a mix of organizations that helped coordinate the amicus participation. So yeah, we just all worked together. We all worked on our own cases and then where we had to come to joint decisions, worked it out.

02-01:40:54

Meeker: You attended the arguments then.

02-01:40:55

Kendell: I did, I did.

02-01:40:58

Meeker: This is your second time back at the Court. How is it different, how was the feel of it different?

02-01:41:05

Kendell: It felt a lot more like a party atmosphere, because it just felt like this is it. I also felt like gosh, I don't know when I'm going to get back here again, because it did feel like this is it, we're going to win, we're going to at least win five. I was kind of hoping we might get a sixth justice.

02-01:41:28

Meeker: Who, [Chief Justice John] Roberts?

02-01:41:30

Kendell: I was hoping we might get Roberts, yeah, knowing that this is history and we're going to win, what side of history do you want to be on? I think his dissent was terrible and gave very short shrift. It didn't talk about our plaintiffs at all, didn't talk about their claims, made fun essentially, of the majority opinion, acted as if the ideas of dignity and liberty were laughable. I mean it was a very poorly drafted dissenting opinion and I found it super offensive. So, the idea that he could have ever been a sixth was obviously preposterous, after you read his dissent. But it just felt like this is a good way to wrap this up, and the fact that Mary got to argue it, I thought Mary was fabulous. I thought Doug was spectacular. Yeah, I was delighted by the way the argument went.

02-01:42:33

Meeker: I'm not asking to criticize, and maybe I shouldn't even put this on tape, but I was not necessarily impressed with Mary's argument. There were a few things in there that I thought were extraordinarily missed opportunities. I can't remember who brought it up, but somebody said well marriage hasn't changed, and that would have been a great opportunity to bring in all the great research about well, yes it has changed. Women are no longer enslaved in marriage, right? I mean just from the very beginning, I thought that she was a little uneasy, and I was wondering, at that point in time, just personally, if this sort of idea to kind of bring it full circle was over-confidence on the part of the movement, that we had already won and this was kind of a pro forma victory lap. That was my own personal sort of glass half full read of it. Obviously, I was very happy when the decision came out, but yeah, I was always kind of worried and concerned and uncertain about that.

02-01:43:57

Kendell:

I don't think for one second that any of us considered it to be pro forma, and I certainly know Mary didn't. I mean this was the most important moment of her legal career.

02-01:44:10

Meeker:

Sure.

02-01:44:12

Kendell:

I think Mary stumbled a little bit in the beginning of her argument, when it started out with, "Well hasn't marriage been like this for a millennia?" I do think that that might have been a beginning kind of questioning that she wasn't prepared for. She might have been prepared for a different kind of beginning questioning and I think she was a little shaky in the beginning. I think she got stronger as the argument went on and I think her rebuttal kicked the other attorney's rear end out the door. So I understand what you're talking about. I don't think it was at all a sense of being cavalier or, "Hey, this is no big deal, we're going to win." I thought we were going to win, but of course I wanted the very best argument possible.

I think what happened with Mary is just sort of that human reaction of, "Oh, holy hell, this is the most important moment of my life and everybody is watching, and my community..." It's almost as if it's the double-edged sword of being so steeped in the movement that it's almost as if a hypersensitivity, you know I mean a pin drops down the hall and you hear it as a gunshot in your ear. I think that is what you saw and in some ways Doug, who's argued multiple times before the Court, you know, knows totally what's going on, been there a million times. He was so smooth and glib and well-spoken, and in some ways, he was just as passionate as Mary about winning and he was very, very well-prepared, I certainly attest to that, but his shoulders weren't bowed from this, I'm carrying my community on my back. So again, not being in that situation, I feel like I give her a little bit of a pass, and I do feel like she made a very strong recovery after that first two or three minutes where yeah, I think she was a little shaken. She stopped to think about where she was.

02-01:46:43

Meeker:

Not to mention the antagonism she was facing on the bench.

02-01:46:47

Kendell:

Oh yes. Well that's the other thing. I do feel like, you know, I feel like Ginsburg, [Associate Justice Sonia] Sotomayor or Kagan sort of jumped up to her defense a little bit, because they saw that she was struggling. I feel like Scalia and Alito and Roberts particularly, you know when they sensed a little bit of blood in the water they were all over it. So I also, because I just can't even imagine what that would feel like, so I'm very forgiving. I am not sure that I know anybody in that position, myself included, under those circumstances, that could have done any better. She brought it home when she needed to and I think finished really, really strong. That's what I remember.

I'm going to remember that rebuttal, I mean that rebuttal, she just, she was standing totally firm and really batted back, I mean the ridiculous arguments of the former Michigan attorney general. That was one of the worst arguments I've ever seen and once again, I feel like our opponents, like where did they find this guy, he is terrible. When she got up for the rebuttal, I feel like it's the best three minutes of an argument I've ever seen.

02-01:48:21

Meeker:

I think it would be interesting to actually interview some people on the opposition, mostly get a sense of, you know, I imagine they must have gone out to try to find people of the caliber of Boies and Olson, but they just weren't able to get people to sign on.

02-01:48:41

Kendell:

I guess, I guess, and so then they're like, you know, whoever raises their hand gets it. It felt to me, seriously, I mean the feeling I had that moment was that he woke up that morning and said oh yeah, that's right, I've got that Supreme Court argument this morning. That is the way it felt to me. I care so much about this stuff and I didn't feel this way with Mary, I just felt more empathy with Mary and I was like, "Girl, you've got this, you've got this." With him, it was actually physically painful to watch, because he was so bad, but we won, so hey.

02-01:49:21

Meeker:

Where were you when the decision came down that June?

02-01:49:24

Kendell:

I was sitting in front of my computer, having gotten up, showered, full makeup, dressed, because again, they gave me another chance to make a first impression. City hall had asked me again, to come and be the emcee for the press conference, and so I said well, that's really sweet of you to do this again, and so I said yes. So I was all ready to go, because I knew that as soon as the decision came down, I had to be at city hall. So, it's seven o'clock in the morning, I'm looking at SCOTUSblog and I remember vividly, a cup of coffee. A friend was staying with us, Dave was there, I think the dog was in the room with me, the kids were still asleep, because of course it's summer, and you see the one word. Here's the box, the boxes are coming in, you see how they're communicating, sort of the Tweets coming out. The boxes are coming in, several boxes, first case, marriage, and I thought oh my God, here it is, here it is, here it is, and then the next three words, "opinion by Kennedy," and I thought we've just won. So I screamed, the dog started barking, the kids woke up, it was pandemonium, but it was amazing.

02-01:50:54

Meeker:

Did you read the decision right away?

02-01:58:58

Kendell:

I glanced at it really briefly, because I didn't want there to be anything big that I had missed. I don't think I took anything from it, I just skimmed it super fast,

printed it out, took it with me, had it with me when I was at city hall, looked at some passages. I didn't really get a chance to read it thoroughly until later that night, so I mostly just saw commentary on it throughout the day, including Scalia's just reprehensible comment that if he had been a part of the majority opinion that wrote today's ruling, he would put a bag over his head. I mean, I understand rest in peace and all that, but I don't understand how people could see him as a decent and collegial colleague on the Court, writing stuff like that. I mean he was intentionally rude, inflammatory, disparaging. Kennedy's ruling was a beautiful piece of affirmation of our basic dignity and humanity, and Scalia just, I mean really just couldn't have been more dismissive of it.

02-01:52:33

Meeker:

He dispensed with any legal arguments, to be honest, I mean for somebody who supposedly was—

02-01:52:38

Kendell:

Zero legal argument, I mean he criticized Kennedy for having this unmoored opinion, unbounded by any constitutional principle. That's because discrimination against us is unbounded by any constitutional principle, and so he then, he eviscerates Kennedy's majority opinion, and then proceeds to engage in exactly the same things he accuses the majority opinion of doing. Where is the legal justification for excluding us from the right to marry? He comes up with nothing, so he decides to engage in just a barrage of personal insults. I know there are people who loved him and I feel badly for them, but I'm really glad he's no longer on the Court.

02-01:53:27

Meeker:

We were talking a bit about once the decision comes down, there's still a lot of work to be done, a recognition there will be some kind of backlash. Although, did you hear the news about the Pope today, vis-à-vis Kim Davis?

02-01:53:45

Kendell:

No, no.

02-01:53:48

Meeker:

He fired, basically, the ambassador from the Vatican.

02-01:53:54

Kendell:

Who arranged that meeting?

02-01:53:54

Meeker:

Yes. He's gone.

02-01:54:00

Kendell:

Well yeah, that was embarrassing for him.

02-01:54:02

Meeker:

I think it was. Apparently he didn't have anything to do with it.

02-01:54:05

Kendell:

I don't think he had any idea who she even was.

02-01:54:09

Meeker:

He got set up.

02-01:54:10

Kendell:

He got set up, which you don't do, but I love that the next day, I feel like the next day, even went out of his way to have this very public meeting with his former gay seminarian, student, I guess was a high school teacher or something? You know, of him shaking hands with him, a picture taken with him and his husband, you know? I feel like in some ways, that might have been a private meeting, and I think they turned it into a public meeting, because they were like oh no, no, no, this is who I am, I'm not that person. Wow, I did not hear that. I hope he's got good bodyguards that he can trust.

02-01:54:47

Meeker:

Right. So, you know, about this dealing with the backlash. Were there conversations amongst the legal groups, with Freedom to Marry, HRC, the Task Force? What was the preparation like for anticipating some sort of backlash.

02-01:55:10

Kendell:

Well, we've been talking for several years, about these religious exemption laws, because we'd seen a few of them raise their heads, and we'd seen threats about them. We'd been involved in cases. Our case was the photography case out of New Mexico, the Elane [*Elane Photography v. Willock*] case. So, we knew we were going to see a strategy to, as much as possible, limit the win. We might have to give them marriage licenses, but we don't have to serve them, we don't have to wait on them, we don't have to hire them, we don't have to work with them, we don't have to rent a house to them. You know, there really is the effort of the right is to continue with their hostility to LGBT people, regardless of what civil rights gains we made. Well, that is just not what happens in this culture. What happens is disfavored minorities make civil rights gains, they're more a part of the culture, people of goodwill accept that, embrace the change, care about these individuals, welcome them as part of the human family, understand that their previous prejudices and bigotry was wrong, reexamine it, and come to a different understanding. I'm perfectly fine with people believing, based on their religious tenets, that LGBT people are disordered, that I'm going to hell, that I'm a sinner. I will never quarrel with someone's right to believe that, but we are not a theocracy, and in a country that promises constitutional equality to all, that is the civic contract that we make. You can believe whatever you want, your church will never have to marry LGBT people, but you don't get to fence us off from involvement in civic life based on your religious beliefs. So, we're seeing a spate of these laws, so far very few have gained traction. I think we'll end up with a handful that we'll probably have to challenge, but I think far fewer than we expected or far fewer than might have been possible, largely because I

think the country prepared itself. I think the narrative has really worked. I think many people know someone who's LGBT, were in families. It's not like race, where you can avoid people of color your entire life if you wish to and never have a meaningful relationship. LGBT people are everywhere. And also, I feel like we've just benefited from both the narrative and the public education, and also, the numbers of unlikely allies showing up. Corporate leaders speaking out, Marc Benioff beginning this tide of corporate backlash against the Indiana bill that was proposed last year. So, I mean I feel like now it's not just the LGBT community that's out there marching; it's us, our friends, our family, corporate leaders, business leaders, politicians, people who have influence to really, when they say they have our back, it really makes a difference.

02-01:58:42

Meeker:

Well what then is the horizon?

02-01:58:48

Kendell:

All that said, and I do feel very positive about where we're headed, we are still in the middle of a backlash, and our commitment really has to be that we don't declare mission accomplished when most of the LGBT community is doing well, or people who live in big cities are doing well, or white LGBT people are doing well, but we really are here to make that promise of constitutional equality, cultural acceptance, a sense of belonging, freedom from stigma, true for everyone. We just won one of our most important cases before the Supreme Court a week ago, so in the space of two years, we've won two huge cases before the Supreme Court. This one got almost zero attention. I mean, it did get a lot of media attention, but far less than the marriage case, because there was no oral argument and no briefing. We represent a client, gets an adoption with her partner in Georgia, they move to Alabama, they're married, they split up. The now, biological mom, is in a new lesbian relationship, seeks to invalidate the adoption from Georgia, because it violates Alabama's public policy to recognize an adoption of a same-sex couple. And, because it's Alabama and Roy Moore is on the Alabama Supreme Court, he invalidates the adoption from Georgia. Now that's the first time that's ever happened in the history of the LGBT movement. We've never had an adoption refused to be recognized by another state, and we won these in North Carolina, Texas, Louisiana, Florida. We lose it after winning marriage, so we have to take that case to the Supreme Court; our client is not seeing her children. We win in what they call a summary reversal, a unanimous per curiam meaning for the whole court, not authored by any one justice, a unanimous opinion, repudiating Roy Moore's invalidation of the adoption, and stating very, very strongly that full faith and credit applies to other state actions, including adoption, and you must recognize the option. Now our client wrote us and said she's been having visitation with her children since the Supreme Court intervened a few months ago, and she wrote us and said, every time I've dropped my kids off, I've been worried that it's the last time I'm going to see them, and now, I don't have to worry about that

any more. But that's 2016, and we're going to see more of that. We're still going to have kids kicked out of their families, we're still going to have people who lose their jobs, we're going to have transgender women murdered. There's plenty to do, but it feels like to do it from a position of strength, to do it from a relative position of stronger sense of humanity. It feels like the outcome, the ultimate outcome that we will win, that full sense of belonging and protection and security for our entire community is much more likely to be the case.

02-02:02:23
Meeker:

I was interviewing Tim Sweeney the other day and he's great, and very thoughtful about these issues, and he was telling me it took him a while to really be convinced of not just a desirability of moving on marriage, but the fact that marriage might have implications that would perhaps be even broader than achieving nondiscrimination. What do you think about that notion, that achieving marriage actually is in fact a much bigger accomplishment and has much broader implications than same-sex couples who want to get married, having now the right to do so.

02-02:03:14
Kendell:

Right. I think the implications are enormous, because marriage, in and of itself, was never our goal. Getting the government out of the business of discriminating against our relationships was the goal, because as long as the government was saying our relationships are inferior and disfavored under the law, no one has to ever question their private prejudices. All they have to do is say, "Well the government won't let them get married, so something must be wrong with them." So, having the government play a role, as an active discriminator, puts private citizens in the position of never examining their own bigotry, and then it infects everything else they think about us. "Well, if they can't get married, then it should be fine to not hire them, it should be fine for them to be fired, of course that kid, we don't want that kid going to school with our kid in school," and subliminal messages around bullying. It's ubiquitous, but once the government says, "We were wrong, and these couples have every right to full dignity and security for their relationships, they marry for the same reason everyone else does, for love and commitment," now you have a narrative for somebody to question their own private prejudices, to say, "Oh, well hang on. Gosh, they fall in love, they form families, I just went to a gay wedding," and now there's a portal that's opening for considering, for thinking about things like transgender issues and how sexual orientation is formed and the corrosiveness of employment discrimination and the inability to buy a house in the neighborhood you want. It just, it makes it possible to have a really wide-ranging conversation that discrimination in marriage totally shut the door to.

02-02:05:33
Meeker:

Unless you have anything else to add, I think that might be a good spot to wrap up.

02-02:05:37

Kendell: Oh, God, that's awesome, cool.

02-02:05:38

Meeker: All right, thank you very much.

[End of Interview]