Oral History Center
The Bancroft Library

University of California
Berkeley, California

The Freedom to Marry Oral History Project

James Esseks

James Esseks on Legal Strategy, the ACLU, and LGBT Legal Organizations

Interviews conducted by
Martin Meeker
in 2015

Since 1954 the Oral History Center of the Bancroft Library, formerly the Regional Oral History Office, has been interviewing leading participants in or well-placed witnesses to major events in the development of Northern California, the West, and the nation. Oral History is a method of collecting historical information through tape-recorded interviews between a narrator with firsthand knowledge of historically significant events and a well-informed interviewer, with the goal of preserving substantive additions to the historical record. The tape recording is transcribed, lightly edited for continuity and clarity, and reviewed by the interviewee. The corrected manuscript is bound with photographs and illustrative materials and placed in The Bancroft Library at the University of California, Berkeley, and in other research collections for scholarly use. Because it is primary material, oral history is not intended to present the final, verified, or complete narrative of events. It is a spoken account, offered by the interviewee in response to questioning, and as such it is reflective, partisan, deeply involved, and irreplaceable.

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James Esseks, 2013
Photo courtesy of Molly Kaplan, ACLU

James Esseks is Director of the ACLU Lesbian Gay Bisexual Transgender & HIV Project. Esseks was raised in Long Island, New York, and attended Yale as an undergraduate and then Harvard Law School. After clerking for U.S. Circuit Judge James R. Browning on the Ninth Circuit Court of Appeals and U.S. District Court Judge Robert L. Carter in the Southern District of New York, he worked for the law firm of Vladeck, Waldman, Elias & Englehard. In 2001 he was hired by the ACLU as Litigation Director for the Lesbian Gay Bisexual Transgender & HIV Project. In this interview, Esseks 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, he details the pivotal cases on which he worked, including *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015).

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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
Oral History Center
The Bancroft Library

December 2016

Freedom to Marry Oral History Project Interviews

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: November 11, 2015

01-00:00:00
Meeker: Today is the eleventh of November, 2015. This is Martin Meeker interviewing James Esseks for the Freedom to Marry Oral History Project, and we are here at his offices at the ACLU. Thank you very much for agreeing to participate in this project. The way in which we begin all of these interviews is you saying your name and when and where you were born.

01-00:00:28
Esseks: James Esseks. I was born in January 1965, in Southampton, New York.

01-00:00:36
Meeker: Tell me a little bit about the life and family and community into which you were born. Maybe start out with the kind of work that your parents did. I don't know if your mom worked outside of the home or not.

01-00:00:51
Esseks: My mother was a kindergarten teacher, but stopped teaching before she had my older sister. I'm one of three kids. My dad recently retired, but was a lawyer in private practice on Eastern Long Island, mostly a real estate and land use litigation practice. I grew up in a kind of bougie upper-middle class family.

01-00:01:21
Meeker: You said Southampton?

01-00:01:23
Esseks: I was born in Southampton. I grew up in Riverhead, which is a town on the eastern end of Long Island, which is not as fancy as Southampton is.

01-00:01:34
Meeker: Tell me about your family. What sort of religious background was there? Did faith play a role in your lives?

01-00:01:46
Esseks: Not a whole lot of faith. My dad has a strong identity, cultural identity, as a Jew, but not a religious identity at all. My mom went to a Congregationalist church for a good while when I was a kid. Didn't really take us much. I was, I think, raised with a strong sense of values, but not religiously-inspired or religiously-based values.

01-00:02:18
Meeker: Tell me about those values.

01-00:02:21
Esseks: Equality. Integrity. It's hard to, I guess, figure out where that comes from or what it all is. Trying to figure out how to do the right thing and what that is.

01-00:02:42
Meeker: Were your parents involved in the community in any way? Were they active in organizations, anything like that?

01-00:02:51
Esseks: My mother was on the school board for virtually the entire time I was in school, from, I think, first grade or so until after I graduated from high school. She was very involved in that. My dad just worked all the time.

01-00:03:09
Meeker: What about politics?

01-00:03:11
Esseks: In terms of my folks?

01-00:03:13
Meeker: Yeah.

01-00:03:14
Esseks: Good Democrats in a community that was very conservative. Old-fashioned liberals. Not to say leftists. I think I got a bunch of my politics from them and from aunts and uncles, who were maybe a little bit more progressive.

01-00:03:40
Meeker: Is there an early election cycle that you remember as being impactful that—

01-00:03:49
Esseks: I was, what, seven, eight years old when President Nixon was in the middle of all of his mess. That was a big topic of conversation in the household, and it's the earliest political conversations that I remember. I remember my dad having a great time with all the troubles that President Nixon was having. Let me just put it that way.

01-00:04:20
Meeker: Were there any lessons that you were learning at that point in time about how to be successful as a politician and how not?

01-00:04:35
Esseks: I'm not sure how to answer that. I was certainly absorbing values through that lens and from them, but at that age, I wasn't making independent judgments about all of that. In terms of politics, it certainly didn't inspire me to want to be in politics myself. It may have been the beginning of wanting to be able to affect policy.

01-00:05:12
Meeker: I guess by the time that you were in high school, this is when the 1980 election happens?

01-00:05:17
Esseks: Yeah. I graduated from high school in '83. The 1980 election was something that I paid some attention to.

01-00:05:27
Meeker: What did you think about it as you were paying attention to it?

01-00:05:34
Esseks: This is wild that we're talking about this. I certainly was a partisan for Carter. I was worried about the fear mongering and war mongering that I heard from Reagan as a candidate, and then Reagan as a president. He invaded Granada my freshman year in college. It was like, really? I was concerned about a country that seemed like its values was going in a direction that was different from my own.

01-00:06:16
Meeker: Tell me about your high school education. Did you go to public school or private school?

01-00:06:20
Esseks: Went to a public high school, Riverhead High School. I spent a year in Italy as an exchange student my junior year, which was a great time.

01-00:06:31
Meeker: Where did you go?

01-00:06:32
Esseks: Sardinia. A city of about 100,000 on the southern end of the island of Sardinia. Gorgeous place. You didn't have a whole lot of choice about where you went. You said, "Hey, I want to go abroad," and they're like, "Okay, here's where you're going." It was a wonderful experience.

01-00:06:52
Meeker: What did you get out of that experience?

01-00:07:04
Esseks: Being a foreigner was both cool and challenging. It was cool because people were interested in talking to you. It was an initial experience into being some kind of other. Obviously, at this point, I already knew I was gay. I knew I was gay from a very early time, and I was not out at that point. I was not out to anybody in Italy. So I had that sense of being other, but this was a different sense of being other. Then just—it sort of fits in the theme. In college, I spent a semester in Tokyo. I had been studying Japanese and I went to a Japanese language institute over there, and that was also a fascinating experience. But that was also a very different sense of being other. It was a racial outsider experience that was kind of eye-opening for me. I got the concept before then as an intellectual matter, but this made me feel it in a much more visceral way, in terms of being insider or outsider. I was like, wow. I had a couple of light-bulb moments.

01-00:08:19
Meeker: At what point did you come to recognition or terms with your homosexuality?

01-00:08:27
Esseks: Well, I knew from elementary school, but I didn't come out until—well, I mean, coming out, it was a little bit of a process. It started at the end of high school, but I didn't come out to my parents until I was my third year in law school. So it was a long time.

01-00:08:51
Meeker: When you say the process started in high school, were you talking to good friends about it, or were you connecting with other gay people?

01-00:08:57
Esseks: Yeah. Connecting with other people at the end of high school, and then that resulting in disclosure to other people, and snowballing a little bit. An experience that I think probably a lot of people have. Then just grappling with the fallout from all that. And that continued through college.

01-00:09:31
Meeker: Was this not a positive experience, then?

01-00:09:34
Esseks: Parts of it were very positive, parts of it were very difficult. I, in college, had a relationship early on in the beginning of college, and then that didn't go so well, and I went running back into the closet, and came out to many more people junior year in college.

01-00:09:59
Meeker: So you attended Yale as an undergrad?

01-00:10:02
Esseks: Yeah.

01-00:10:05
Meeker: Obviously a very excellent university. What was it that you hoped to accomplish, say, thinking late high school? You're looking forward to your life. I'm sure that friends were talking about what they want to do when they grow up. What was the story that you would have told people?

01-00:10:22
Esseks: At that point, I think I was thinking about two things. I was thinking about law and I was thinking about international relations stuff. I'm not sure I had any real sense of what in the world that was. I just knew that I had been abroad, I liked languages, and had had a really interesting time being in another country, and I was trying to figure out what that could turn into. That led me to spend more time on language study and on travel. I spent a summer in France after my freshman year in college, and then I did time in Tokyo, learning language skills. But clearly did not end up doing that in terms of a professional sense. The other piece was law, and I think, at that point, a whole lot of that was basically, well, it was something I knew about, it was something my dad did. Then I thought of it also as some way to start to do some kind of policy advocacy, social change work. But I think that, truth be told, early in college,

that was somewhat a nascent idea. It was not fully formed. It was not something that I was really super directed at.

01-00:11:36
Meeker: What did you study at Yale?

01-00:11:38
Esseks: Linguistic anthropology.

01-00:11:41
Meeker: Interesting. You didn't go the history/political science/economics route?

01-00:11:46
Esseks: No, I didn't. I think I took a political science class fall of freshman year and did not connect with it, was not inspired by it, was kind of lost, and enjoyed the language-related stuff much more.

01-00:12:04
Meeker: Were there any particular classes or professors there that were influential to you?

01-00:12:09
Esseks: In terms of what I'm doing now?

01-00:12:12
Meeker: Well, yeah. I mean, in terms of what you're doing now, or the person that you became.

01-00:12:20
Esseks: There's nothing that I would pull out.

01-00:12:29
Meeker: Did you go directly from undergrad to law school?

01-00:12:33
Esseks: No, I took a year off. I applied to law school when I was a senior in college, got in, and deferred, so that I had license to do whatever. I went to work for an architecture firm for a year in New York City, doing drawings. The summer after I graduated from college, I took an architecture—I think they called it career discovery program—at the Graduate School of Design at Harvard. It was designed for people who—everybody from high school students to people in the middle of their career who wanted to think about a design career. I had a great time working for this architecture firm. I took a design class at Columbia that fall. I was, at least to a certain extent, thinking about architecture and design as a career. Then I ended up kind of wimping out, in the sense that I—for whatever reason, I had confidence that I thought I could be a good lawyer. I had analytical skills, and I think had confidence that I could do that. I was like, I don't know that my aesthetic is something that is so great or that I could sell to anybody. So I took what for me was the easier path.

01-00:13:56
Meeker: Tell me about Harvard Law, then.

01-00:14:02
Esseks: Law school was kind of tough. The first year in law school was very difficult, just in terms of intensity and pressure and stuff. I met a whole lot of people. I was coming out much more. I mean, I was out by that point. There was a community of people who were interested in social change issues. I remember going to a meeting, and I forget exactly who it is that called it, but it was for people who were interested in public interest work. They completely packed a classroom, lecture hall, and they just went around the room and had everybody introduce themselves in a sentence or two to talk about what they had done and what they were interested in doing. I remember being blown away by the backgrounds and the interests of the people in the room. I was like, wow, this is quite a place to be.

01-00:15:11
Meeker: Do you recall some of the things that people were interested in working on?

01-00:15:15
Esseks: There were people who had spent time in, I think, Bangladesh. There were people who had spent time doing human rights work all over the world. There were people who had spent time doing work on capital punishment issues, fighting the death penalty. There were people who had spent a whole lot of time working in prisons. I was like, I drew pictures last year for an architecture firm. [laughter] And had a great time, but it was a different thing.

01-00:15:51
Meeker: Did you say what you had hoped to work on? What your interests were?

01-00:15:54
Esseks: Yeah, interesting, I remember—I don't know why I remember this—I remember saying that I was interested in employment discrimination work, which is what I ended up doing for eight years after law school, before coming to the ACLU.

01-00:16:08
Meeker: I'm not as familiar about curriculum at law school. How is it that, over that period of three years that you're there, you gain an expertise in that particular area of law?

01-00:16:26
Esseks: I'm not sure I did gain an expertise in that area of law, but law school is—there's a pretty set curriculum. Most schools, for the first year, and for the second and third years, there may be one or two required courses, but other than that, you just get to do whatever you want to do. I did take a class on employment discrimination, and that gave me some basic stuff, but I did learn most of what I needed to know to do that job once I got to the firm, and I think that's true for many people in many different fields. We did succeed in getting the law school to offer a class on sexual orientation and the law that happened

the January term of my last year in law school. It was taught by a guy named Bill Rubenstein, who actually used to have the job that I have now. He was the second director of the LGBT and HIV Project at the ACLU. It was a coup for us to get him to teach it, and also to get the class taught at all. That was a wonderful class, and it was really empowering to have that be something that you got credit for, that the law school endorsed. I just remember the first day of that class, with all of these other students that had been part of the activism to get the university to take the class, just thrilled to be sitting in that room, ready to start talking about this stuff.

01-00:18:09
Meeker: What was the content of that class? What were some of the issues that were central to the education?

01-00:18:17
Esseks: As I remember, it walked through the range of issues that were challenges for LGBT people. I think the class was called Sexual Orientation and the Law. I don't remember at this point if gender identity—it certainly wasn't the title. I don't even remember how much it was in the curriculum. This was January of 1991, so a little earlier in the evolution of our movement. Spent a bunch of time on criminal sodomy laws, which were still a big problem. The ACLU had lost a challenge in 1986 to Georgia's criminal sodomy law in the *Bowers vs. Hardwick* decision, and the advocacy movement, including the ACLU, was in the process of trying to whittle away at the remaining twenty-four or twenty-five state sodomy laws, to get them down to a point where it would make sense to go back to the court, which is what the movement ultimately did in the *Lawrence* case, which was decided in 2003. I remember there being a discussion of sodomy laws at that point. Massachusetts, in 1991, still had a criminal sodomy law. I remember Bill saying, just joking, that he lived in New York City, but he was up in Boston for the month to teach this class. He's like, "Well, I haven't had sodomy since I've been in Massachusetts." Which got a laugh. So we talked about those.

Look, I bet you that marriage was on the list of things, but it was on the list of things not because it was something that, to certainly most of us, seemed like it was really possible. I'm sure this is where I read this stuff for the first time. Two leaders at Lambda Legal, Paula Ettelbrick and Tom Stoddard, who were the legal director and the ED, had a schtick, parallel talks that they went around and gave together. Paula saying, "Why in the world do we want marriage? Why do we want to assimilate? Why do we want to buy into an institution that is about gender roles and oppression?" and Tom being like, "This is what acceptance looks like." That was a debate that was already very fully-formed then. But that was the way the way in which the marriage discussion—that I remember the marriage discussion being introduced and taught and discussed, as opposed to, here's the plan for how we're going to get there, or any sense of, this is around the corner. It was still not clear when

we were going to get rid of sodomy laws. So marriage just seemed much further distant.

01-00:21:20
Meeker: Also during this period of time, late eighties, early nineties, this is the heyday of ACT UP, this is Queer Nation, sort of anti-assimilationist if you will, sort of far left, gay politics. Where did you situate yourself vis-a-vis that strand of the queer movement?

01-00:21:46
Esseks: You're right, it was very much that time, and I thought that was a really cool part of that time. I was not part of ACT UP or Queer Nation. I was not an activist in that sense. I'm an impact kind of guy, as opposed to a direct services kind of guy, which doesn't totally map onto your question. I think it's important for people to know where they're comfortable and figure out where they can contribute. I think the kind of direct activism work that ACT UP did, and Queer Nation did, is essential to making progress and raising the profile of issues. That's just not me. I saw all that stuff going on. I thought it was cool. I wore T-shirts. But that was the extent of my involvement. I kind of look back at some of that now and be like, James, why didn't you get involved in that? That was amazing work that people were doing. It may just be that that's not the way I'm built. It may be that it was too gay, too out there, for me at that point, because I was still working through stuff. I'm not really sure.

01-00:23:34
Meeker: The question of same-sex marriage, or marriage rights for same-sex couples, goes back. There's discussion of it in homophile press in the 1950s. Maybe a new threshold is sort of crossed in 1989, when Andrew Sullivan writes his article for *The New Republic*. Which is interesting. This is an extraordinarily well-argued paper written by a very smart guy, coming from what he describes as a conservative vantage point, which, at the time, was not particularly fashionable in the gay community. Then you mentioned the Stoddard versus Ettelbrick piece. Did you have an opinion on these different perspectives on the desirability and/or viability of marriage rights?

01-00:24:47
Esseks: I'm having trouble answering for the following reason. I remember Andrew Sullivan's article. I remember the Stoddard and Ettelbrick discussions. I remember thinking, on the Stoddard/Ettelbrick, two well-argued, well-reasoned positions. I don't remember coming out as a strict partisan on either side, in part because it seemed very interesting, but very academic. It didn't seem to me at that time that this was something that you needed to take sides on, because it didn't seem like it was going anywhere, at least not any time soon. It seemed like we had to work through other issues first in order to get there. Clearly, other people took a very different attitude towards viability and whether starting the conversation now was essential. Kudos to Evan and others, and Andrew, who were doing that. I didn't engage to that level.

01-00:25:54
Meeker: What did you think when the Hawaii cases were filed and started to make it into the news? The first positive decision comes down in ’93, and then it’s sort of remanded to trial court—

01-00:26:12
Esseks: Trial, and then it goes to trial in ’96, and DOMA happens in ’96. I didn’t follow it super closely. At that point, in ’93, I was finishing up a clerkship and then starting private practice, and I was in that private practice through 2001. I was doing pro bono work, mostly with the ACLU on LGBT rights stuff, and then a bit having to do with marriage stuff. I remember Hawaii stuff happening. I remember thinking that that was exciting developments. I don’t think I was looking at this from a movement insider perspective at the time, because I wasn’t a movement insider. So I don’t remember having thoughts that were either like, oh, this is fabulous, or, oh, this is crazy. I remember thinking, that would be amazing to be able to get married in Hawaii, and what a perfect place to do it. But thinking also, hey, people are going to be upset, and people were upset. Obviously, DOMA is one of the ways that that came out. I don’t remember thinking, therefore we shouldn’t be doing this. But I do remember being worried, like, oh, this is going to be hard.

01-00:27:53
Meeker: What kind of volunteer work were you doing with the ACLU? What sort of cases were you taking on?

01-00:27:59
Esseks: I did a friend-of-the-court brief in *Dale* [2000], the Boy Scouts case, when it was in the New Jersey state court system. I did some cases on behalf of service members who were being discharged under Don’t Ask, Don’t Tell. First, actually, under the policy that was prior to Don’t Ask, Don’t Tell, and then under Don’t Ask, Don’t Tell. In one of those cases, the client that I and a colleague of mine at my firm had ended up becoming an ACLU client, because his case was folded into a case that the ACLU and Lambda did, challenging Don’t Ask, Don’t Tell, called *Able vs. The United States*, which ended up going to the Second Circuit twice and losing. Worked together with Matt Coles here on those things. I did a case called *Levin vs. Yeshiva* [2001] *University*. It was a case about housing discrimination. We represented two students who were lesbians, who were med students at the Albert Einstein School of Medicine. The university provided married student housing, but you had to be married. These women were obviously not married, but they had signed domestic partner registry forms in the city of New York, and we said, hey, this is partner housing, and you’re discriminating based on sexual orientation, in terms of whose partners you recognize. We said that was disparate impact, discrimination in violation of New York City’s law about public accommodations. Oh, and housing discrimination, sorry. It went to the high court in New York, which is called the court of appeals. I did that as a cooperating attorney for the ACLU, and we won that in the spring of 2001.

01-00:30:09
Meeker: As you're doing that case in particular, are you starting to develop a sense of the need, and perhaps viability, of marriage litigation moving forward?

01-00:30:21
Esseks: Yeah, certainly. This was incrementalism in the extreme. This is like, "We just want housing benefits based on domestic partnership." Obviously, that case was part of a strategy to get towards relationship protection. Yes, it felt at the time, even when I was not on staff, that this was a strategic thing to do and this was the building block. That was not lost on the judges. At oral argument in the intermediate appeals court, they were like, "Doesn't this lead to marriage?" It did not take an Einstein to understand what we were trying to do and that this was connected. But at the time that the question was asked, there were no marriage states. By the time the ultimate decision comes out, there were no marriage states. So it was easier to make the argument at that point that we're just asking for this, and you can go this far and not have to go any farther, because no one had succeeded in getting to the farther thing. Later on in the movement, when there are marriage states, bringing cases—and we tried to bring a whole lot of them—to force states to create domestic partnership systems for various public benefits. The states could no longer see a distinction, and the courts could no longer see a distinction, between going that far and having to go all the way to marriage, and they started to say no.

01-00:31:57
Meeker: You had mentioned that you clerked after law school. Are there any interesting sort of constitutional issues that come up in that clerkship?

01-00:32:07
Esseks: I clerked twice. I clerked for a federal district court judge, a trial judge, here in Manhattan in the Southern District of New York, and for a guy in San Francisco, on the Ninth Circuit Court of Appeals out there.

01-00:32:22
Meeker: Who was that?

01-00:32:23
Esseks: In the ninth circuit, it was a guy named James Browning, who was seventy-five when I clerked for him and has since died, who was an interesting, inspiring figure in the law. The guy I wanted to mention is Robert Carter, who was the district judge in New York, who was also seventy-five the year that I clerked for him. I learned a lot from him, but instead of talking about any of the cases that were before his court, he was a lawyer with the NAACP, and he argued *Brown vs. Board of Education*. *Brown* was five cases, and he argued *Brown*, and Marshall argued, I think, two of the other ones. He was with the NAACP for a good, long, long time. Was part of the planning to get to *Brown*, and did a whole series of cases after that about racial justice, and I think was in the Supreme Court, argued twenty-five, twenty-seven cases, something like that, almost all of them on race issues. He was just an incredibly inspiring figure in the law and mentor in terms of a public interest career.

01-00:33:49
Meeker: What was about it? Was it the cases that he took on and the success that he had, or?

01-00:33:57
Esseks: It was certainly the way in which he had managed to make change through the law, although he was very aware and very frustrated by the fact that all of the legal victories that he had had a hand in creating hadn't turned out to change, in a serious way, the sort of on-the-ground reality for African Americans in much of the country. But still, I don't think he felt that the work that he had done and the tools that he had used had been in vain. He was just like, okay, you've got to do that, but you've got to do more. Part of what was inspiring for me about him was the work that he had done and the changes that he had made. Part of it was also his personal commitment and personal dignity around fighting for these issues was a story that I actually have trouble telling without crying. [crying]

Sorry. He grew up in Jersey City or Newark or someplace in northern New Jersey, and it was a time when the schools in New Jersey were still—some of them were segregated. He went to a school that was integrated, somewhat, and there was a pool. The white kids were in the pool Monday through Thursday. The black kids were allowed in the pool on Friday. Over the weekend, they drained the pool. They cleaned it. And they—sorry. [crying] And they filled it again. He read in the paper that the New Jersey Supreme Court came out with a decision that race discrimination in education violated the state constitution. God, I'm sorry. I'm having a real hard time with this. So Bob Carter goes to school the next day and tells the gym teacher that he's going to get in the pool, and the gym teacher says, "No, you can't do that." He says, "I'm going to do that." Then the gym teacher starts begging him, because Bob says, "I read in the paper the New Jersey Supreme Court says you can't do this to me." The gym teacher starts begging him, "Don't do this. I'm going to lose my job." And Bob does it anyway. He can't swim. He gets in the pool, holding onto the side. He asks the other black kids to get in the pool with him, and they don't. None of the white kids will get in the pool. He does it every gym class until the end of the year. He's a junior in high school. It's amazing.

01-00:37:32
Meeker: That's amazing courage.

01-00:37:35
Esseks: [crying] Wow. Sorry. I tried to tell that story at a speech one time, and you can see how it probably went.

01-00:37:43
Meeker: Did he tell you this story at one point in time?

01-00:37:45
Esseks: Yeah, he told me the story. He told me the story. He also wrote a book, and it's in the book, but I remember him talking about that when I was clerking—

01-00:37:53
Meeker: When he told the story, was he telling it in a—

01-00:37:58
Esseks: He was angry.

01-00:38:00
Meeker: He was angry?

01-00:38:05
Esseks: Yeah. At seventy-five years old, he was still angry. There was a lot to be angry about.

01-00:38:10
Meeker: Right. Did you ever talk with him about sexual orientation and the law, about—

01-00:38:19
Esseks: I don't think I talked—I was out to him. He knew I was gay, and he was totally fine with that. I don't remember talking with him. During the clerkship, I don't remember talking with him about sexual orientation and legal issues. I did talk to him about the work I did in private practice on gay rights and other stuff, and also talked to him when I was at the ACLU, before he died, about the work I was doing, and he was very interested. I was talking to him about how to use the courts, and what the limits of using the courts are, and I talked to him about the challenges of being in a space where there are a lot of people who—there are a lot of people working in a space. How do you coordinate? How do you coordinate with other organizations? How do you coordinate with private lawyers who bring cases, and what were the challenges that he faced in the work that he did over several decades to do similar work.

01-00:39:33
Meeker: Were there any particular lessons learned that came out of it that continue to inform your work today?

01-00:40:03
Esseks: The lesson that I have learned, but not from Judge Carter, is that you've got to work in coalition, and that's really hard, but you've just got to keep at it and you've just got to keep making it happen. I don't think I learned that from him, because he did that, clearly, but he was also—I think that the NAACP had a degree of resources, compared to most of the other actors in that space, that put it in a very different position, and so that he was in a position to get a handle on a whole lot of things and get ahead of a bunch of other people, so that he had—he and others there. Obviously it wasn't just Judge Carter. No one in a movement like this is ever in control of things, but I think he and his colleagues may have been more in control of how the legal questions were presented to the courts than later civil rights movements have been, in part because the African American Civil Rights Movement taught the rest of us how to do this, and taught America what civil rights looks like, and what civil rights progress looks like, and what equality can look like. That inspired lots

of people and lots of different movements to just be like, hey, I'm going to go do this.

01-00:41:34
Meeker: So you were in private practice for, what, about eight years?

01-00:41:39
Esseks: Yeah.

01-00:41:41
Meeker: Is there anything about that particular period of time that you think is relevant and important to talk about here? I know it's hard to encapsulate the eight years of professional work into—

01-00:41:55
Esseks: From that period, I worked for a firm called Vladeck, Waldman, Elias & Engelhard. It was a firm that did two things. It represented unions in labor law negotiations and arbitrations and stuff, and also represented plaintiffs in employment discrimination cases. The woman who was the head of the firm at that time, Judith Vladeck, the firm had been founded by her husband as a labor firm, and she joined a few years later, and she really created the employment discrimination practice when Title VII became a law, and then the Civil Rights Act of 1964 became effective. I think one newspaper called her the grande dame of the plaintiff's employment bar. She was an incredible figure in the law and an incredible advocate. I learned so much from her about advocacy, about negotiation, and about just pushing. Pushing for more, pushing for what you thought was right. That firm was technically a business. It wasn't run strictly as a business. It was an advocacy organization for individuals, and it was a great place.

01-00:43:28
Meeker: So you did take on some sexual orientation cases there, yes?

01-00:43:31
Esseks: Some sexual orientation discrimination cases, some cases about discrimination based on HIV status. Yeah. It was a part of the practice. It was not a huge part of the practice. But I was perfectly free to do that, and I was also perfectly free to do a range of pro bono cases, which I did, and a bunch of them with the ACLU, doing LGBT right stuff.

01-00:44:04
Meeker: When you're talking, whether it's sexual orientation and non-discrimination in employment, or HIV, or the work that you were doing pro bono with ACLU, as a litigator, taking this into the courtroom. I assume some of them would have been jury trials, and some of them would have been just before a judge?

01-00:44:28
Esseks: Yeah, so did a whole series of trials at Vladeck. Some of them were jury trials and some of them were bench trials or arbitrations. None of the sexual orientation or HIV discrimination cases that I had actually ended up in trial.

The vast majority of civil cases in general settle, and employment discrimination cases fit that pattern as well. They may go to trial a little bit more. Vladeck had an active trial practice, and that was one of the things that I loved about working there and learned a whole lot about being a lawyer, by getting the chance to do trials there. I don't know why it is that those sexual orientation and HIV cases didn't get there. Maybe the stronger cases settle, because the employers don't want to run the risk of having a jury go against them.

01-00:45:27

Meeker: Was there anything that you were learning about the best way to represent your clients in the sexual orientation cases? Was there any kind of understanding about, okay, we need to emphasize the difference, or we need to deemphasize difference? What is the best way to bring forth a gay or lesbian client for success?

01-00:45:56

Esseks: Interesting question. I take back what I said. Didn't go to trial, and certainly not jury trial, on a sexual orientation discrimination case, but we did go to an arbitration hearing on behalf of a guy who had a very senior position at a big bank and was hired. Our case was that it was based on sexual orientation, and I think it was. But it was before an arbitration panel, and an arbitration before—I think at the time, it was the National Association of Securities Dealers, so this is the sort of self-regulatory body for the securities industry. They get everybody who works for the securities industry to sign agreements that any disputes will go to arbitration, because they don't want them in court. And so you invariably end up in front of—and I think this was three old white guys who have some background in the securities industry, because they're there to decide securities-related fights, and then they end up with all these discrimination cases, or I-want-my-bonus cases, in front of them. This was not the audience I would have picked. Try to figure out how we package this guy so that these decision makers aren't threatened by him, and can sort of empathize with him, was hard. The advantage was he came from their world. He was a wealthy guy who was very well-educated, whose job was finance stuff that they understood in a way that I probably never did or would. So there was a lot of relatability there, but then the problem is, we're talking about him being gay, and it being discrimination. We did not win that case. I remember that being a difficult experience.

01-00:48:13

Meeker: In retrospect, was that case not won because he didn't have a good case, or because you felt like it was not an optimal place to—

01-00:48:30

Esseks: I think he did have a good case. I think it was sexual orientation discrimination. I think they were not comfortable with him in this particular bank at this particular time. I think the challenge of the arbitration setting was particularly acute for a sexual orientation claim at that time. Sort of the

context is discrimination claims in the arbitration context are really hard, period. It's not like sex discrimination claims are easily won in that forum, or age, or race, certainly. It's just a difficult place to try to do that work.

01-00:49:15
Meeker: Tell me about your decision to come to the ACLU in 2001.

01-00:49:20
Esseks: It was a very easy decision, because I had actually been trying to get a job at the ACLU, or Lambda Legal, basically since I got out of law school. Getting out of clerkships, I applied for a series of fellowships that would have had me work at the ACLU, doing LGBT rights work in San Francisco, and I came close to a couple, didn't get any of them, was devastated, and went to work for Vladeck, which was a good thing, because I learned a whole lot that I couldn't have learned elsewhere. But I kept applying for jobs at the ACLU or Lambda Legal, for staff attorney jobs. Every year or two, I'd apply for a job, and got some interviews, didn't get any jobs. But I wasn't giving up. I had been working closely with the ACLU on the *Levin vs. Yeshiva* housing case, and it was a time when the guy who had the job that I applied for and ended up getting left, and he was the guy who had been my primary contact at the ACLU. I applied and hoped to get it, and I think I got the job just after we got the decision—just after arguing, but just before we got the decision in the *Levin vs. Yeshiva* case. I was thrilled. I was sad to leave Judith Vladeck and the Vladeck firm, but there was no question that this was what I wanted to do.

01-00:50:59
Meeker: You were coming here as a litigator, and specifically work on sexual orientation and AIDS cases, yes?

01-00:51:06
Esseks: Yeah.

01-00:51:09
Meeker: At this point in time, Hawaii had already come and gone. Defense of Marriage Act had been passed. I guess Vermont had already been decided.

01-00:51:18
Esseks: Vermont had been decided.

01-00:51:22
Meeker: Was it clear that more marriage cases were going to be on your docket?

01-00:51:27
Esseks: It was clear that relationships cases were going to be on the docket. I walked into ongoing discussions about—relationships was definitely one of the big areas that we were working on. Obviously, still, we were in a place where we were still trying to get rid of sodomy laws. *Lawrence* hadn't been taken by the court yet. We were exploring ways to get at that. But on the marriage and the relationships front, relationships was definitely on the agenda, but I think that we were thinking about whether to bring marriage cases and where to bring

them, but we were, I think, putting probably more time into thinking about domestic partnership-related issues. Thinking of that as stepping-stone cases.

01-00:52:24
Meeker: Did the LGBT and AIDS Project—I'm not quite sure what it would be called at that time. Was that what it would have been called?

01-00:52:31
Esseks: That time, it was Lesbian and Gay Rights and AIDS.

01-00:52:36
Meeker: Lesbian and Gay Rights and AIDS at that point in time. Was there a project-based policy on marriage and marriage cases going forward? Was there an idea that, "We're just not going to take these now; let's focus on a more incremental approach"?

01-00:53:02
Esseks: It was not that explicit. The ACLU National Board has had board policy on the marriage question since the mid-seventies, saying that the ACLU opposes any restrictions on the freedom to marry for same-sex couples. So as an institutional matter, there was no question that the organization was committed to this issue, not just having brought marriage cases starting in the seventies, but had board policy. Which doesn't quite get to your question, which is a strategy question, not an, in principle, "what are we for?" question. I don't think there had been a decision we're not going to bring marriage cases, but we hadn't brought any marriage cases to that point. There was already a conversation going about marriage, but I think we thought it needed to be deepened. But look, this is the first years of the Bush administration. You've got the 9/11 sort of overlay, which was just part of a sense of where the country was on things. We did not have a marriage case ready to file. I'm trying to remember what it is that we were doing at the time on relationships. When I started, we had just finished the *Levin* case. We were trying to figure out, "Okay, where can we take this disparate impact theory and use it in a relationships context?" I can't remember what else we were doing on relationships at the time. In short order after *Lawrence* [2003] comes out, we ended up with a mountain of marriage cases. That was in the aftermath of *Lawrence* and the aftermath of *Goodridge* [2003], but I don't remember right now what the relationships docket was before that.

01-00:55:32
Meeker: So 2001 was the year that Evan leaves Lambda and starts Freedom to Marry. Had you met him prior to coming here? Were you aware of the work that he was doing?

01-00:55:43
Esseks: I don't think so. I was aware of Evan, that's for sure. [laughter] In a very good way. But I don't think that I had met him until I came to the ACLU.

01-00:56:00
Meeker: At what point do you become aware that he departed Lambda to start this new initiative?

01-00:56:04
Esseks: I think probably about when it happened, because I remember that he was going off to do that. I'm such a lawyer. I remember thinking, well, someone's got to do that, but that wouldn't be what I would choose to do, because I like litigating. Certainly at that point, I was so excited to just finally have gotten into this movement, and in a role that was supposed to be primarily about litigation. I was like, I don't know why anyone would leave this. I've been fighting for a long time to get into this.

01-00:56:54
Meeker: When did you first engage with him about the work that he was doing? Do you recall?

01-00:57:02
Esseks: It depends on—

01-00:57:05
Meeker: You know, in a substantial way.

01-00:57:15
Esseks: I'm hesitating just because I didn't start having one-on-one meetings with Evan about marriage stuff probably until I ended up in the director position starting in 2010. Prior to that, I interacted with Evan at roundtables, and also I'm sure there were some meetings. I don't have a specific recollection that I was in that was about marriage-related strategy and policy. But a whole lot of it was Matt Coles, who was director at the time, my boss, was very involved in those discussions, and I heard about them through Matt, and to the extent I had input, I had input through Matt.

01-00:58:06
Meeker: The *Goodridge* case comes down. What was that, in 2004?

01-00:58:10
Esseks: Yeah, the fall of 2003, and the marriages start in May of '04.

01-00:58:14
Meeker: And then it takes them a year or two to solidify that decision, which is a pretty remarkable story in its own right. But 2004 is a very interesting year, because not only does marriage start in Massachusetts, you have California, under Gavin Newsom, get going, which is kind of a very wildcat, if you will, approach to change. Then that November is the nadir of the gay movement, the marriage movement, if you will. You have ultimately thirteen states passing some—

01-00:58:55
Esseks: Amendment.

01-00:58:56
Meeker: —amendment or profound restrictions. Here you are at the ACLU. This is, in essence, within your area of work. What were you thinking in 2004 when you're seeing these things happen on different ends of the spectrum?

01-00:59:17
Esseks: Clearly, with the breakthrough in *Goodridge* in Massachusetts, we're like, okay, game on. We've got a court decision that Mary [Bonauto] and GLAD got that said, okay, got a court to agree with us on the principles. The same principles, by the way, that people have been writing about since 1970. You go back and you read the briefs from the 1970 case. The arguments aren't any different. It's just the background context in which the judges can receive it. We were finally at a place where at least some judges and some courts can accept that, and then we have the two things happen that you mentioned. One is an explosion of litigation by us in the good states, or what we thought of as the good states, and then an explosion of reaction by our opponents in mostly conservative states, but also in Oregon, which we lost in November 2004. This was absolutely a game-on moment that substantially shifted the resource allocation and focus of work within the ACLU, and I think within the movement more broadly, in a couple of different ways. One is we were co-counsel in the California case with the National Center for Lesbian Rights and Lambda Legal. There had been a meeting of movement leaders I think a year beforehand about should we bring a marriage case in California. It was, A, can we win it? Can we win in court? And B, if we win in court, can we stop it from getting on the ballot, or if it goes to the ballot, can we win? I wasn't at that meeting. I'm sure Evan was. I know Matt was. I believe that that group of people came out saying, we shouldn't do this, because we're not confident that we could win the—we think we have a decent shot at winning in the California Supreme Court, but we're very worried about keeping that at the ballot. That was a calculus that we looked at in every state, that we and everybody else looked at in terms of filing a marriage case.

I think Newsom had won election as the conservative, or the conservative for San Francisco candidate, and activists were calling him to task about marriage, and he was like, I am not going to take the hit for this one. You want marriage licenses? I'll give you marriage licenses. Here we go. At that point, there was no way not to engage. And so we were happy, but worried, to join that effort. The same thing was happening in Oregon, Multnomah County, the county that Portland is in. They started issuing licenses. We were involved in giving them advice and setting up a lawsuit there. We were counsel in a lawsuit that got put together there that was filed in February or March of 2004, and decided in December of 2004 by the Oregon Supreme Court, after the marriage amendment passes. We had brought a marriage case and ended up with the most we could get was civil unions, because marriage had been taken—couldn't get marriage based on the marriage amendment. The court just said, "You didn't ask for civil unions in your complaint, so you can't get it from us." Clearly, a court completely spooked by the vote in that election. A court that

was otherwise a good court, and there's no reason that they couldn't have given a different form of relief if they had wanted to. But they just were like, "We are not going out on that limb for you." Part of the consequences of that series of votes was even good courts in, quote, "good states," felt shut down.

The California case and the Oregon case, and we filed a case in New York, building off of the Jason West, the mayor of the village of New Paltz in upstate New York, who was also issuing licenses. That's a case we brought Robbie Kaplan in because of her connection to the high court in New York. Also, we filed a case in Maryland. So we had, in short order, four marriage cases. The ACLU of Connecticut was counsel in a case in Connecticut as well, and we were not on the papers but giving advice behind the scenes. We all of a sudden had a huge marriage litigation docket, and then also got involved in campaigns fighting the ballot initiatives in not all but a number of the states that fall, and were doing our best to mobilize ACLU affiliates in all of these different states, give them messaging materials and get them to pay attention to this issue, as many of them did and were independently motivated to do. It was kind of a firestorm feeling. I remember there was a litigator's roundtable, maybe in early March of 2004. It was a crazy moment of all hands on deck.

I remember there was a guy, David Buckel, who, at the time, was the director of the Marriage Project at Lambda, had taken that position from Evan when he left. David had been on vacation for two weeks in February, and he's like, "I came back and the world had changed." Just because, all of a sudden, what I think many of us—and this is actually something that happens later on in the movement as well. We were like, okay. We had been on a trajectory, a plan, where—the movement, so this isn't the ACLU—the movement was pushing the marriage issue, in various different ways, but litigation was the thing that was going to start the conversation, pick the fight with the country, put this issue on the public agenda, whether people wanted it there or not. Hawaii was absolutely part of that, and the Vermont case was part of that, and the Massachusetts case obviously was part of that in a big way, because they won. This was in the interval between the win in October/November of '03, from the high court in *Goodridge* in Massachusetts, but the marriages didn't start until May, and here we are in February and the world is exploding, because there's all this pent-up demand. People were like, everybody wants to get married. If you can win it in Massachusetts, well why can't we win it in—name your state.

I remember there being a meeting, sort of a side meeting, during that round table of leadership from Lambda and Gay and Lesbian Advocates and Defenders and the National Center for Lesbian Rights and the ACLU about trying to figure out, how can we manage the influx of all of these people who want to sue in all kinds of places, some of which may really not be strategic? Can we create some kind of a system to parcel things out in a way that spreads the work across different organizations? We came up with something that lasted for a little while, but there was a crush for a little while, and then it sort

of dissipated. But out of that came a whole series of cases, and we lost more than half of those cases that we filed in 2004. We lost in New York. ACLU of Washington also brought a marriage case in the Washington state. Lambda Legal brought a separate one as well. The Washington state cases lose in the state supreme court. The New York cases lose in the high court. The Maryland case, we lose in the state high court. The Oregon case, I said, we lost. And so—

01-01:08:26
Meeker: California wins.

01-01:08:27
Esseks: California wins, but it takes until 2008. The only other thing that happens in the interim there, the New Jersey case, Lambda's case in New Jersey, gets a civil unions booby prize, which, in context, felt like a great win, because we had been losing so much that even getting just that was so much better than just another decision that says, you don't have any claim here at all. The New York and the Maryland and the Washington decisions didn't just say you guys have no claim at all. We lose based on the parenting argument. We lose based on the court saying, "it's rational for a legislature to think that kids would be better off with a married mom and dad," suggesting that gay people are pedophiles, or were going to make the kids gay, or were going to make the kids trans. That was a particularly damaging way to lose.

01-01:09:29
Meeker: After 2004, after the losses, you start to get a real vocal sort of gay, anti-marriage contingent, suggesting that the movement needs to back off and to spend its resources elsewhere. Were any of these kind of conversations happening within ACLU, in which there were people suggesting that, let's not take any of these cases? Let's focus on our non-discrimination work. By that point in time, *Lawrence* had come down, so sodomy had been decided, but there were other areas of litigation.

01-01:10:14
Esseks: The topic was discussed. By that, I don't mean that there were serious advocates internally for not doing the marriage work. I certainly remember, coming off of the decision in *Lawrence* that governed the sodomy laws in June of '03, thinking, obviously, fabulous, wonderful victory. This was great for the movement in so many different ways. And thinking—and this was also before the *Goodridge* decision had happened—thinking, marriage is on the agenda, but we're going to do other things. We're going to do a bunch of employment discrimination stuff, et cetera, on the way to marriage. I'm not sure that I thought of that in a prescriptive way, like that's the way it should happen. It's just the way I thought it would happen, because I thought of marriage as harder and later, and I thought of employment discrimination and a bunch of other things as just easier things for the country to deal with. So if we can make progress there, it's all going to build towards the marriage work.

Then *Goodridge* happens, and then all of the 2004 lawsuits and stuff like that happen.

There were absolutely people outside the ACLU and the movement more generally, and discussions within the ACLU about, why are we doing this, and is this the right thing to do? Look, it wasn't as though the decision about whether marriage was going to be the issue, the gay issue, that the country talked about was something that any of the advocacy groups could control. Even if we had all decided in March of 2004, "just kidding, we're going to pull all of those lawsuits back," all twelve or thirteen or whatever it is of those ballot initiatives in the fall would have happened, and we would have lost them. The other side wanted to talk about marriage, because they had been able to talk about, "you folks are criminal, or what makes you you is criminalizable." *Lawrence* took that away. When they no longer could talk about that, they went to what they saw as their strong suit and their high ground, marriage, because they could do opinion polling just as we did, and they could see where the national opinion was, and they had a solid, solid lead on that issue at that time. So they started talking about it, and we started talking about it some, too. But we could not have changed that conversation, even if we had all wanted to, and we did not all want to.

01-01:12:46
Meeker: It's also interesting, this notion that somehow the gay movement is in control of the gay movement, the gay movement organizations are in control of gay people. Obviously Robbie Kaplan had been involved previously in the New York case, but what's to stop any gay couple in South Dakota, Nevada—

01-01:13:15
Esseks: Nothing.

01-01:13:15
Meeker: —Texas from finding an enterprising, ambitious attorney in that state to take on their case? The ACLU, Lambda, GLAD in Boston, they don't have any real control over what actually transpires.

01-01:13:35
Esseks: That's absolutely true. Don't have real control. We collectively did spend a bunch of time on the phone with prospective plaintiffs, couples who were facing real problems in their lives, with private lawyers who were putting together cases and wanted to do stuff. We would explain, "Hey, here's why we don't think it makes sense to do that in federal court at this point," or in this state, or whatever, and here are other things that you could do. That's stuff that the staff lawyers here at the ACLU, and I know, at Lambda and GLAD and NCLR, spend a bunch of time on. In a sense, we were trying to minimize what we saw as things that would likely be losers, and building up additional case law against us, wasn't something that we thought was going to be a great thing, and we were trying to focus on the states where we thought the court system was most likely to go our way, and where we faced no or

very little chance that we'd have to go to the ballot. We were trying to steer stuff to those places. I don't want to say we had no control and didn't try to exert control. We did try to exert some control. But as your question suggests, none of us is in control of a whole lot of what happens. You've just got to take advantage of the opportunities. That's what Newsom's thing was, and Jason West in New Paltz, and the Multnomah County counsel, when they were all like, we are inspired by Massachusetts, and we don't want to be complicit in this discrimination anymore. So we're just going to do stuff on our own.

Now, it turned out that that frame didn't resonate well with the public. That Newsom and Multnomah County and Jason West were seen by many people as lawbreakers, as people who just were following a political agenda and not caring about the rule of law. Not the greatest frame, because we didn't want to talk about whether this was something that Newsom could do or couldn't do. We wanted to talk about why same-sex couples needed the freedom to marry. It ended up being a distraction, but it was also something that changed the sort of advocacy landscape in a very serious way. We could have sat on our hands. There still would have been cases. Because in California, there were, I think, seven cases that ended up together in the state supreme court. Maybe it was five, I can't remember. But there were more that started, and a whole lot of them were brought by private lawyers.

01-01:16:25
Meeker: So 2010, you become project director. Does Matt—he goes down to D.C., or what's—

01-01:16:33
Esseks: No. Matt gets a promotion within the ACLU to run a center. So he supervises the ACLU's programs on race, disability, immigration, and voting. So he moves on to bigger and better things, after having spent most of his life in the LGBT rights movement and made incredible contributions.

01-01:17:08
Meeker: And you get his position?

01-01:17:09
Esseks: Yes.

01-01:17:10
Meeker: Can you describe what that position is?

01-01:17:19
Esseks: The ACLU is multiple organizations. The national organization, headquartered in New York and D.C., and then there are ACLUs in every state that are separately incorporated organizations that are affiliated with the national group. The national legal staff is divided into thirteen different projects or programs that are subject matter-based. One of them is LGBT and HIV. This is a portion of the national legal staff that are specialists on LGBT rights and HIV-related issues. We work with ACLU lawyers and other staff

and all of the state affiliates on litigation, on lobbying in state legislatures, with people in our Washington office on lobbying in Congress, with advocacy staff, within the national ACLU and in the affiliates, to do organizing and education work. It is very much a matrix organization, and so my duties within the ACLU are to supervise the lawyers and other staff that are part of the LGBT Project, but also to work with the communications folks, the advocacy folks, the lobbying folks, on LGBT and HIV-related work, and to promote, actually, within the ACLU, more focus on these issues. But at the same time that I'm trying to get the ACLU in, let's say, Arkansas, to work on an LGBT rights issue, my colleague next door is trying to get those same people to work on a criminal justice issue, both of which are ACLU priorities. Sometimes it works really well, and sometimes it can be a challenge, just because there are so many demands on the affiliates and on the national staff.

01-01:19:09
Meeker: When you take over the position as project director, what is your personal agenda vis-a-vis the marriage issue?

01-01:19:21
Esseks: In 2010—let's see where we are. We have lost Prop 8 in 2008. Which was really a terrible moment. But bounced back in a way that I had not seen coming, in the sense that in the spring of 2009, a couple things happened. Lambda wins their case, marriage case, in Iowa. So we have the freedom to marry in the middle of the country all of a sudden, and a real question about whether it's going to the ballot. But also, legislatures pass marriage in '09 in Vermont and in New Hampshire and in Maine. The Maine issue ends up on the ballot that fall, and we lose again, because we picked the wrong year. But we've got three new marriage states, after what had seemed like a movement-stopping loss in California. And so just feel incredibly energized about the possibility going forward, and focused on, hey, litigation started this discussion, and it continued through litigation and through the ballot initiative stuff, but all of a sudden we were at a point where public opinion, especially in some of the more progressive states, has moved enough that legislative work makes a lot of sense and is actually the thing that can probably get us more states, because the whole plan, the whole movement plan, is based on the idea that we are going to start in the states and stay in the states as long as possible, because the states are the entities that marry us. And we can use the federal system to our advantage by going to the more progressive places, and if we lose, it's not like that shuts down advocacy in other states. Also based on the idea that civil unions and domestic partnerships, while not our goal, are stepping stones to marriage, we thought, and this starts to become true, because Maine had a limited domestic partnership system, and that's one of the things that helped us get the marriage bill passed. But all of it is aimed at building the foundation for an ultimate federal solution, that we want to build out the map of the marriage states. So in the spring of '09, going into '10, there's renewed—at least I have renewed optimism that maybe we can start to actually build this map out a little bit more, despite the fact that we lost in

Prop 8, and despite the fact that we then go on to lose the Maine ballot initiative in the fall of ’09.

01-01:22:25
Meeker: I guess also New York, then, has an unexpected potential win and then loss.

01-01:22:29
Esseks: And then loss. That was obviously a depressing moment as well. Even there, okay, so we came close. We didn’t come as close as we thought we did, but we also knew that there were a bunch of no votes in there that were likely fixable, because people were just like, okay. But I think on the second person that voted, everybody knew how it was coming out, because it was, I think, [State Senator Joseph] Addabbo, and after he voted no, said, okay, there’s no way to win. So a bunch of down alphabet votes dropped out. That was a bad thing, but it was like, okay, this is New York. Albany politics are crazy, but there’s going to be a way to make that happen. It took a couple of years, but there was a sense then that that could happen. Going into 2010, we wanted to put more energy and effort into the legislative work, and were getting more advocacy resources for the work at that time, but also we were looking at the litigation context and very much wanted to get into the DOMA work. Because at this point, the other thing that happened in, I think, the spring of ’09, was that Mary Bonauto of GLAD filed the first federal DOMA challenge.

01-01:24:14
Meeker: Was the *Gill* case?

01-01:24:15
Esseks: The *Gill* case. Which had been the subject of extensive discussions over many years, about whether and when to file it. Not that it was anyone’s decision but Mary and GLAD’s, but they were talking to the rest of us about that, and there was anxiousness by other organizations, including by me, about could we win that case, because we thought—it was a righteous case. No question that you should win it, and no question that it was an incrementalist case in the sense that it didn’t call the question about whether every state in the country had to allow same-sex couples to marry. It just called the question of whether the federal government could discriminate between marriages that already existed. There is a distinction there, but it’s also easy to see the consequences for the ultimate marriage question of a ruling for us on DOMA, which of course is—we know how that story ends, but the question was, could we see the court taking that step, knowing that it was absolutely putting the country and the court on the road to an ultimate marriage victory? That was a scary prospect at a point where you have four or five states that have the freedom to marry. If you look at what is the landscape context that you think is enough to make the court feel like it can do this, I don’t think anyone is going to say four or five cases, four or five states, is that landscape. The question was, okay, if you file it now in ’09, how long is it going to take to get to the Supreme Court, and what is the other work that’s going to happen, and what’s the plausible progress between now and then? What do you think the map of the country is

going to look like when we get there? That was a hard thing to see and to forecast in ’09.

To go back a moment on a similar question about the Prop 8 case, the ACLU was part of a public statement saying, prior to the filing of the Prop 8 case, that a case like that was not a good idea, because we didn’t think it made sense to call the federal question at a point where, at that point, we had three—maybe we had four—three or four marriage states. Same question. So the same reason to be concerned about the Prop 8 case was a reason to be concerned about the DOMA case, even though recognized the serious differences between DOMA and Prop 8, and just the question of is the court going to think those differences are significant.

01-01:27:29
Meeker: I’m wondering if you can tell me a little bit about your interaction with Evan and Freedom to Marry vis-a-vis all of this, because it sounds like what you’re describing to me is the notion that the movement really needed to adhere to this 10-10-10-20 program, and that is—what is it?—marriage in ten states, civil union in ten states, progress in ten others, and then, hopefully by 2020, that we get to the point of it being resolved on a national level.

01-01:28:06
Esseks: I definitely think that the 10-10-10-20 plan was a framework for thinking about how we get from where we were when that plan was written, which was marriage in Massachusetts and nothing else, and a whole lot of onslaught of activity by our opponents, to marriage in fifty states. I think that the 10-10-10-20 thing came from a moment in the discussion—and again, I was not there, but this is Matt telling me about it—because it’s hard with that landscape, one marriage state, to think, how do we get to the end? But they were like, can we conceive, within a future that we could conceptualize, a place where we had ten marriage states, and ten civil union or full domestic partnership states, and ten limited domestic partnership states, and then twenty states where we have made some progress on non-relationships issues? People were like, huh, I can see that. I can see that we might get there and I can see what the work is we might do to get to those different things. That may or may not be a turning point where it would make sense to go federal and to start filing federal—presenting the marriage question to the federal courts. I don’t think that people thought of the 10-10-10-20 as prescriptive because the original paper actually had some states put into the boxes just to try and see is this plausible, which caused enormous amount of grief and political problems with state leaders who were in what they thought was the wrong box. We were like, “This is not a plan for this state or that state.” The later version just took all the states out of the box and just said, “here’s the concept.” We think we could probably get there and we can come up with strategies to get there. This is an overall framework. So it wasn’t like we need to make sure we get to those things. It was just a question of, okay, let’s build the map of the country. Let’s build the map of the country in terms of marriage states. Let’s build public opinion. At

a certain point, it started to also be let's—another way to count it is not just states, but percentage of the US population that lives in a freedom to marry state, because, since we started getting more populous states, we started getting to more impressive numbers earlier on.

01-01:30:37
Meeker: And public opinion as well.

01-01:30:38
Esseks: And public opinion as well. Certainly, there was enormous buy-in within the ACLU to that framework, and to a commitment to building the map of states, and commitment to building the map not just on marriage, but on domestic partnerships and civil unions, if that's what we could get in places. A lot of the domestic partnerships and civil union stuff happened through the legislatures, and we were part of some of that. I think probably part of all the legislative work at the state level. We also were involved in some litigation, trying to force some states to create domestic partnerships and civil union systems that succeeded in some places, but not to get a statewide system, but just to get a domestic partnership system created for X benefit or Y benefit. That was something that we put a lot of time into because we were like, "how were we going to build relationship protections in really conservative places, and how were we going to build relationship protection in states that had marriage amendments?" So we couldn't get to marriage, but we could say to Montana, we know you can't give us marriage, but your marriage amendment doesn't say anything about civil unions and domestic partnerships, so you can give us that, and you have to. That was a strategy that could have worked in a movement that was moving more slowly. It's a strategy that got completely overtaken by the progress that we started to make by leaps and bounds on marriage.

01-01:32:11
Meeker: When did you see it start to get overtaken? Was there a particular moment at which it seemed like that well-thought-out strategy was going to be overtaken by events?

01-01:32:35
Esseks: Probably in 2012, in the lead-up to the ballot initiatives there. I think we get New York in '11, and I think New York makes us six marriage states, I think counting D.C. Then the ballot initiatives in '12 give us three more.

01-01:33:15
Meeker: Four. There's—

01-01:33:17
Esseks: Yeah, but Minnesota, the ballot initiative was stopping a bad amendment. So we get Maine, Maryland, and Washington state, which brings us to nine. Then we get three more the next spring, Rhode Island, Delaware, and Minnesota, which brings us to twelve. Certainly by that time, the civil union and domestic partnership stuff—those cases are taking a long time, and we had cases in

Montana and in Missouri and in Alaska, and I think we were putting together a case in West Virginia that got also completely overtaken, and thinking about the same case in Florida, and that also got overtaken by the marriage stuff. We lost some of those and we put some of those on hold, because the rest of this is moving so quickly. Certainly, by the time you get to the *Windsor* [2013] decision and the aftermath of that, these other things were just old-fashioned things that had just been completely outdated.

01-01:34:46

Meeker: In 2010, when you become project director, you're no longer really focused on litigation, although that's within your purview. You're working on these statewide campaigns, whether they're at the ballot or legislative. This requires a lot more engagement and participation with the statewide campaigns, the statewide organizations, as well as the national organizations like Freedom to Marry. Can you tell me about how it was that you established a working relationship with these different organizations? Determined what the distribution of work would be. How did that happen?

01-01:35:41

Esseks: The legislative campaign in New York, which had been going in one form or another from the time we lost to the fall of '09. Then picks up steam in the winter and spring of 2011, leading to passage that June. The New York Civil Liberties Union, the New York part of the ACLU, was very involved in that legislative campaign. I think they had four lobbyists working on the bill. They have chapters all over New York state, relationships with a bunch of the upstate and Republican legislators that—the support from some of those people, we needed. They were doing a lot, and we were helping them with a lot of that legislative work. New Yorkers United for Marriage was formed. It was a coalition that didn't include the NYCLU. I think that was an effort that was Freedom to Marry, Empire State Pride Agenda, Human Rights Campaign, and I think it may have been Marriage Equality in New York. That model of having a joint campaign and an MOU is something that was either created or worked well for the first time in New York, and then became a model for working together going forward in other states. I think it was shortsighted of that campaign not to put the NYCLU and the ACLU into that campaign.

01-01:37:38

Meeker: Were they not invited?

01-01:37:39

Esseks: They were not invited. Which I don't think was an intentional slight. It reflected two things. I think that the campaign was probably done in part to pull together some groups that were not working well together in order to try to make everybody work well together, which is the dynamic in every coalition that has ever existed. I'm not saying that in any critical way. Part of it is it may have been that we were not the people, the problem. I think part of it was also that, for some of the other advocates in that space—and I think this includes Freedom to Marry—they did not yet have an appreciation for the role

that the ACLU had been playing, and could play, in state legislative fights. Part of that is probably that, in the state legislative fights that had happened to date -- the ACLU was very involved in the California legislative work, where the legislature passed a marriage bill twice and Schwarzenegger vetoed it twice, saying he couldn't do it based on Prop 22 out there. But in the legislative fights in Vermont and New Hampshire, the ACLU was there, but not a big presence. I think the ACLU was a big presence in the Maine fight, and so I don't understand why the other movement organizations were slow to understand the role that the ACLU had been playing and could play, and quite frankly, from my perspective, the need to engage the ACLU and its connections both with legislators and with other communities that we, within the LGBT rights community, need to get other communities on board to help us on our issues that are also their issues. The ACLU is uniquely situated as a multi-issue organization with connections to many other communities, based on real work that we've done with them to bridge those gaps and bring other groups in. That is something that the ACLU can bring to the table, has brought to the table in a bunch of places. So in New York, I was not happy that that campaign was publicly announced without the ACLU or the NYCLU being a part of it. We obviously kept doing the work—

01-01:40:19
Meeker: Was there a sense that—a perception—that ACLU really focused on litigation, and that this was out of their area of expertise, do you suppose?

01-01:40:28
Esseks: It totally could be, and that is a perception that dogs us as an institution, with the public, with funders, quite frankly, and with other advocates. I think that we have gotten to a place—but this is five years later—gotten to a place where other advocates within the LGBT advocacy space very much understand the ACLU in a very different way, and understand the ACLU now as lobbyists and organizers in state legislatures around the country, and that, these days, the campaigns are focusing on LGBT non-discrimination and on fighting religious exemptions that would dilute LGBT equality laws. I think other movement organizations now look around and are like, okay, so if we're going to do something in any state—name the state—the place you start is the state equality organization that is actually on the ground and the ACLU affiliate on the ground. They call me to say, "Is your affiliate good? Does your affiliate have capacity? Does your affiliate have connections? Can you give them money to make them bigger?" Those are not the kinds of conversations that happened in the 2010, 2011 time period when we were talking about legislative campaigns on marriage. After New York, I think the movement came to a different understanding of the ACLU, what we could contribute and what we did contribute, so that when you get to the campaigns in 2012, we were on the steering committee of the campaigns in Maine and in Maryland and in Washington state. We were not on the steering committee in Minnesota, although our affiliate there did some work on the issue, but was focused more

on another ballot initiative that was on that year, and I can't remember what it was.

There were discussions in the movement, led by Evan, around the four ballot initiatives in '12, because we had not yet won a ballot initiative other than Arizona in 2006, which doesn't count for various reasons. There was real concern, "Hey, public opinion has moved a lot, but we haven't won one of these yet. We lost in '09. We lost in '08. We should not be trying to do four campaigns. We need to pick and consolidate." I totally understand where that came from, but for the ACLU, being an organization that is both a national organization and a local organization everywhere, from the perspective of the ACLU of Maryland—and Maryland was, I think by consensus, the weakest campaign, the least prepared, had the least amount of money, had the most tenuous polling numbers. Some organizations, and Freedom to Marry is one of them, said they were going to invest in, and encourage other people to invest in, Minnesota, and Maine, and Washington state, but not Maryland. They came in towards the end of Maryland, and it was a very big help. From our perspective, we were like, well, we can't walk away from Maryland, because Maryland is a place that we live, and the ACLU of Maryland is there. So the ACLU put, actually, a disproportionate amount of our resources into Maryland, both personnel and money, because we needed to sort of help make up for otherwise what would have been an imbalance in movement resources going to the campaign.

Interview 2: April 12, 2016

02-00:00:12

Meeker: Today is the twelfth of April, 2016. This is Martin Meeker, interviewing James Esseks for the Freedom to Marry Oral History Project. We are here at his offices at the ACLU in Manhattan, and this is interview session number two. About six months ago, when we left off in our interviews then, we were coming up to the campaigns in 2012. But before we get to that point, there's a couple things that we kind of needed to turn back the clock a little bit. And I know that we had talked a bit about the defeat of Prop 8, and some of the difficulties and attempts to rebuild after that defeat. One thing that I'm kind of looking at, particularly vis-à-vis the Freedom to Marry organization is this concept paper that circulated around October of 2009. And it was this idea that, I think in conversation with funders, and certainly other organizations, there was a desire for a central organization to step forward to kind of be the center of messaging. Like an online campaign to help—you had to coordinate a lot of the state legislative and referendum campaigns that were going to be happening in the coming years. I know that Matt Coles was heading up the project here at ACLU at that point in time, but from your vantage point, can you give me a sense of what the ACLU thought about that prospect of—an organization that wasn't ACLU, or wasn't HRC, or wasn't the Task Force, stepping forward and trying to play that central campaign role?

02-00:01:58

Esseks: Sure. Well, that idea, the idea that the movement needed much more significant capacity to do public education, more significant capacity to raise (c)(4) money to do the legislative work, was not new in our mind. And I don't think people are even suggesting that. In the original 10-10-10-20 paper, if memory serves, it was discussion saying we need all those things. And if we're going to make progress, if we're actually going to be able to achieve, and to fill those different buckets of different kinds of protections that we would want to create over time, we're going to need to have a bigger capacity and a more coordinated capacity. I think that earlier paper didn't say specifically, well, is that going to be a separate organization? Is it going to be a table at which a lot of different organizations sit, and contribute, and coordinate their work? I think the reality is that between—what was it, '05 when the first paper was written and '09?—there hadn't been the kind of increased capacity that we needed. Which isn't to say that a lot of people didn't do a lot of work, but it is to say that we didn't have what was needed because we were not making as much progress as we wanted to be making.

There was, I think, something called the Collaborative, which was, in essence, a table of funders and advocacy organizations trying to think through, okay, where are we going to invest? Which of the states that has the best prospect of being able to make progress on marriage in the near-term? And I think that that was helpful and we made progress through that, but I do think that from the beginning, there was a sense that we needed something more, and it just didn't appear, it didn't gel, in the first few years and after the first paper. And

I think that part of the point of the second paper was to say hey, it's been five years, four years, what do we do now? What needs to change?

I think that even in '09, there were questions about, "Okay, well, we need this capacity. Is that Freedom to Marry, or is that some enhanced table concept?" And I know where we ended up, which was it was basically that Freedom to Marry had taken that on, and I know that Freedom to Marry is proud of that, and I think they did a good job with that. I think that Freedom to Marry grew as an organization from '05 until '09, and then since then, because I think that it's not just that the movement wasn't ready in the '05 to '09 period for Freedom to Marry to take on that role. I think it was also that it's not clear to me that Freedom to Marry was ready to take on that coordinating role and that "doing" role in that period of time. And part of it is capacity and personnel at Freedom to Marry, and part of it was also, I think, Evan came to greater clarity about what needed to happen, and I think Evan also got to a place where he was working well with other groups and other people. I love Evan. He's got a strong personality, and it's not always the easiest interaction. And I think movements that are trying to do big things need big personalities like his. Doesn't make it all easy.

So I think there was an evolution on the Freedom to Marry side and evolution on the movement side. And so we got to a place where it made sense. It was what we needed. And I also think that what really created a model for multiple organizations to work together was really, the New York campaign in the spring of 2011. And there was an earlier campaign, I think, in the fall of '09, I think it was. But that was the first state legislative campaign in '11 that was successful, and that had an MOU with a table that people could pay into and work together in. And that became the model for how we all worked together in state legislative work going forward, and that work go forward.

02-00:07:02
Meeker: Is that campaign something that the ACLU participated in in a substantial way?

02-00:07:06
Esseks: In the New York campaign? We did. And we talked a little bit about this the last time around. So, yes, we did. And through the New York Civil Liberties Union we were a part of that. We were not part of the table that formed then. But we were, subsequent to that, part of the tables in, I think, every legislative campaign that happened after that, and all but one of the ballot campaigns that happened after that.

02-00:07:34
Meeker: And when you say "the table," you're referring to the MOU, pay-to-play kind of arrangement?

02-00:07:37
Esseks: Exactly. Yeah.

02-00:07:39
Meeker: And the table's also kind of a board, right? So it's people who are sometimes literally sitting around a table talking about messaging strategy, fundraising, budgeting, et cetera.

02-00:07:50
Esseks: Yes. And organizing. Yeah, exactly. How are we going to win this?

02-00:07:56
Meeker: That kind of does bring us up to some of the campaigns—referendum campaigns that happened in 2012. But before we get there, the legal side is something we should talk about. Because here we are, a year after the crushing defeat in Prop 8, and actually less than that. I think that it's GLAD's challenge to DOMA starts up around March or April of 2009, and so just six months later. And you were also at the table at that point in time—of their legal roundtable, right?

02-00:08:39
Esseks: Yes.

02-00:08:40
Meeker: Can you tell me about those meetings and about the conversations that were had leading up to the filing, really, of the first federal challenge to anti-marriage legislation, in this case, against DOMA?

02-00:08:54
Esseks: Sure. So, the DOMA case—and also, we talked a little bit about this last time, so there are some things I think I didn't say, but I'll try not to repeat. So there had been conversations that GLAD had with the other legal groups, really from the period when marriage first became a reality Massachusetts in May of 2004, right through the filing in March or April, whatever it was—I think it was March—of '09. And the focus of GLAD had been: a) they were the only people—Massachusetts, for that entire period of time, until California happens—was the only place where same-sex couples are getting married. And for most of that time, Massachusetts would only respect the marriages of people who lived in Massachusetts. So if you lived in Alabama, and you went there, or whatever, Massachusetts was going to say you weren't married.

That also gave GLAD some breathing room, because they had incredible connections in Massachusetts, because they're based there, and the rest of the organizations doing LGBT rights work, didn't have access to plaintiffs who could bring a DOMA challenge because you had to be married, and you had to be respected by your state as married. They had the luxury—and I'm glad they had the luxury—of sitting and waiting. And both building up an amazing set of plaintiffs, but also not being worried that all of a sudden they're going to get outflanked and someone else was going to take this initiative from them.

02-00:10:39
Meeker: This is interesting. The way in which, of course, one usually would think about this is there's a lot of handwringing over this law. I mean, it was Romney enacting a slave-era law, right?

02-00:10:51
Esseks: Yes. It helped create a space. That terrible law helped create a space. And, look, there was a lot of handwringing. And to GLAD's very great credit, they were very open to discussions with other movement people about: how do we frame this? What are the weak spots? If we lose, how are we going to lose? Do you think we can win? Do you think we're going to lose? All of that. And that's part of what delayed the filing of that lawsuit from '04, '05 until '09. But also, one of the things that I bet pushed GLAD to file in the end was the reality that—now, I forget the number, but—twenty-seven or so thousand same-sex couples, or may it was 18,000? Some large number of same-sex couples had gotten married in California, and in March of '09, we didn't have a ruling from the California Supreme Court yet on this, but I think we were all pretty confident the court was going to say that those people were still married. They hadn't been unmarried because of Prop 8. And so all of a sudden, there's a very big reservoir of people who can bring a federal DOMA challenge. And I'm sure the folks at GLAD, understandably, were like, "We put a lot into this. We think now is the time."

So I was nervous about whether our side was going to win that case. As I said before, I think it was a completely righteous case. They were just right on the law, but we had been right on the law in lots of marriage cases over many years, and lost them. It's not enough to be right on the law if you've got to have a country and a court that is ready to sort of recognize your humanity and apply just basic equal protection rules to you. And the question was, okay, are we there? Because this was a case that clearly just could go to the U.S. Supreme Court.

02-00:13:00
Meeker: Could you tell me a little bit more about those conversations? I imagine, here was a group of attorneys sitting around kind of hashing this out. GLAD's going to do what they're going to do, but the way that I understand this roundtable works is there's a long, respectful, serious conversation about the strategy, including the legal strategy. What were some of the issues that were brought up? Were there legal issues being brought up, in addition to broader strategic issues?

02-00:13:28
Esseks: There were legal issues. The strategy piece of it is, what's the map of the country going to look like in terms of marriage states when the court gets a DOMA question? And through that lens, are we likely to win or not? And we talked some about that. The legal stuff is like, okay, well, what are the arguments the other side is going to make about what the rational bases are for treating the marriages of same-sex couples different from the marriages of

different-sex couples, and do they have to do with parenting or not? Is the parenting stuff going to freak people out? The series of marriage cases that we lost in New York, and in Maryland, and in Washington state, and the federal case out of Nebraska, all lost based on the court saying, "Married moms and dads are best for kids, and that's enough of a justification to say that gay people shouldn't be able to get married." And we're like, okay, is that going to come up here? What are our answers to that? How can we try to frame the DOMA case in a way that minimizes the parenting-related issues because there are benefits programs that DOMA affected were largely not about kids.

So there were discussions like that. And I think it's fair to say that people's comfort level with the idea of bringing in people outside of GLAD—comfort level increased over time, but I do remember them filing that case, and I remember being like, I don't know how this is going to come out. But that was at a time when I think we had two marriage states or three marriage states. And we had Massachusetts, and Connecticut, and we may have won in Iowa. I'm not sure. And I don't think the legislative wins in New Hampshire and Vermont had happened yet. So we had a very restrictive map at that point and, of course, by the time the DOMA issue gets to the court in '13, we have twelve states. But it wasn't clear in '09 that that's what the map was going to look like. So that's where the concern came from.

But in the revised paper—the revised strategy paper that you talked about a little while ago—I know that there was one particularly debated passage, or series of passages, that were about what litigation is okay here. And the language that's in that paper is written in a way that says a DOMA challenge is okay because it's not putting the question before the Supreme Court about whether the Constitution requires every state in the country to allow its same-sex couples to marry. It's just the narrower question of whether if you have that existing marriage, that's respected by the state, whether the federal government can disrespect it or not on equal terms.

As that strategy paper gets revised, the question about DOMA litigation is very much in the forefront of people's minds. I think the others went back and forth in terms of there's some people who didn't think that was a good idea, and there were other people who think it's a good idea, and the consensus document, I think, has language that makes it clear that a DOMA case is okay, but also says—I think it says—we're not ready. We don't think right now is the time to file a full-on federal marriage case. And there's a separate document that was to specifically address that question. I think it was called "Make Change, Not Lawsuits." It was originally called "Make Love, Not Lawsuits," but that didn't survive.

02-00:17:49

Meeker: Where were you personally on this? Were you looking for certain metrics before any federal cases moved ahead?

02-00:17:58
Esseks: On the marriage case thing, yeah, I was very much in a place of thinking we need a good context. We need a map that has a bunch of marriage states. Not sure I ever had a particular number, but I think I thought that three was not the number. And we needed public support numbers that were fifty percent or higher. And we were not there. And we were not close. Well, we were getting closer, but we were not on the verge of fifty percent in '09. So I thought we needed that. And what wasn't clear in '09 was, okay, are we about to get there? Or in two years, what is it going to look like? And of course, you have to think through that lens, because by the time this lawsuit gets there, I think that GLAD was talking about, okay, we may be in the Supreme Court in 2011. And I was like, yeah, you might be. Because you could win or lose quickly, and then you could win or lose quickly in the circuit court, and then you could be up there. I was like, hmm, 2011. Are we going to be ready? And I was not sure that we were going to be ready. I wasn't sure that we weren't going to be ready. But also, they decided to file their lawsuit, and that's the reality that you're dealing with.

02-00:19:35
Meeker: Who were the plaintiffs? What was the name of that lawsuit?

02-00:19:37
Esseks: *Gill.*

02-00:19:38
Meeker: Oh, that was the *Gill* case, right. And then within a year, the *Windsor* case comes along.

02-00:19:47
Esseks: Yeah. Yes. And we file in the fall of 2010.

02-00:19:52
Meeker: All right. So it's actually about 18 months later. Can you talk me through the process from your perspective about how the *Windsor* case comes to be? I know there's a book out there written by Robbie Kaplan that gives her perspective on it. But I'd like to hear it from your perspective, because I know that you and the ACLU were the co-plaintiffs on this, or the—

02-00:20:14
Esseks: Yeah, we were co-counsel.

02-00:20:16
Meeker: The co-counsel, rather. Sorry.

02-00:20:17
Esseks: Robbie Kaplan, a partner at Paul Weiss, a big firm here in New York City. We had worked—I and the other folks at the ACLU—had worked with Robbie in the mid-2000s in the New York marriage case. There were, I think, four cases that went up before the high court in New York. All consolidated. And one of them was an ACLU case that we did with Robbie Kaplan, and we went to her

because she had clerked for the Chief Judge of the New York Court of Appeals, and she also knew a bunch of the other judges, and was an out lesbian, and a smart litigator. And so we're like, okay. Here's someone who can make this issue personal for the judges on that court. This case was filed in '04, a point where it was not at all clear that we were going to win these cases, and in fact, we didn't. We lost that case four to two in the summer of '06.

02-00:21:18
Meeker: This was in some ways parallel to the cases in California post-Gavin Newsom that go through the state supreme court.

02-00:21:26
Esseks: Exactly. And the same thing with the Washington state case and the New Jersey case, and Maryland. So it was one of the series of state cases where we were pushing this issue in state courts. Connecticut wins. Iowa wins later on. California wins. And then we lose in Prop 8.

Okay. So, but at any rate, the point of this detour is, we had worked together, and we had worked together on marriage. And it was a good partnership. And we had brought the marriage case to her, because of her connection. Because she was a good lawyer and because of her connection with the court. And so she basically returned the favor by coming to us with a case that did walk in her door, which was Edie Windsor. And I remember I talked to her when she first got Edie as a client, and she still ribs me about this—Robbie does. Because when she calls me, and it's probably in the spring of '09, because I think Thea—Edie's wife—dies in January, February of '09, and then Edie finds her way to Robbie. And Robbie calls me about the case. About like, hey, she wants to do this. And I think what I said to her was, "Interesting. Important. It's an estate tax case. She's a rich old lady. I'm not sure this is the story we want to tell to America about who same-sex couples are." But I didn't know a whole lot about the case. All I knew was it was an estate tax thing. I had not met Edie.

And Robbie's like, "Okay, well, whatever. We have a whole lot of stuff we have to do before we could possibly go to court anyway." Because it was a tax refund case, and you have to file some stuff, with request for a refund, and all kinds of stuff. And that was going to take a little while. And it took a year and a half.

I didn't talk to her again about it until like September of 2010. By September of 2010, a bunch had changed in the world. We had, I guess, five marriage states. And in the summer of 2010, Mary and GLAD had won the DOMA case in the trial court in Massachusetts, and the *Perry* folks had won—*Perry versus Schwarzenegger*—in the federal district court in California. And they were still district court opinions, but it's feeling a little bit more like we're making some progress.

And by that point, we at the ACLU were out there looking for plaintiffs to bring a DOMA challenge. Knowing that GLAD's case was a great case, but adding more stories and more plaintiffs to the public discussion around the problem is a way to continue the education that is needed. And you never know how the litigation is going to fare. So we wanted to get into that game as well.

02-00:24:50
Meeker: So was that the idea? It's kind of an insurance policy for the broader issue?

02-00:24:54
Esseks: Yeah. It's an insurance policy to make sure there's a case that can go up. And when we file Edie's case, we file it because it turns out, when I learn more about it, it's going to be a great story. So Robbie calls me, and I remember that I was in a meeting with a bunch of people in D.C., and I step out to take the call, and she's like, "Hey, remember that DOMA case? Well, we're about to file. Would you do this with us?" And I was like, "Actually, we're in the market for a DOMA case, so tell me more about it." And the more I learned, the more I realized that it was a wonderful story because for the reasons that I think we now know that Edie Windsor's story is a wonderful story. But this is in the post-Prop 8 period where we've kind of realized that the love, commitment, family message is a message that resonates, is a constructive way to talk about it, a way that people can relate to. And Edie's story is all about love and commitment over forty-four years, and taking care of a partner, and then a spouse who has a degenerative disease, and ends up a quadriplegic. You're like, "wow, that's what I hope my relationship can be like." And I think everybody looks and them is like, "oh, I hope that's what I can be like. Or I wish that's what my relationship were like." But that's love and commitment. That's good. And just the length of the time.

And the concern that we had, even then, was okay, but she's a wealthy woman living on 5th Avenue in New York, who has to pay $363,000 in estate taxes. And she does, because she can. So she's genuinely—and maybe from the New York perspective she's not super wealthy. From the rest of the country, she's super wealthy. So the question was, "Okay, is the case going to play like this privileged woman from 5th Avenue, or is it going to play like this wonderful old woman who has taken care of her partner in all of these wonderful ways for forty-four years?" And before we filed it, we weren't sure how it was going to work out. We thought that the building blocks were there. It was a good story. But you don't know. And it turned out to play very, very well. But that was something that we were concerned about.

02-00:27:39
Meeker: The wealth is one angle. But taxes are more or less universally despised. That in and of itself, regardless of the personal angle, could have, perhaps, have brought appeal, too.

02-00:27:54
Esseks: Yeah. I think that was part of it. We could talk about it as a death tax case, using it against Republicans, especially when BLAG—the Bipartisan Legal Advisory Committee of the House ends up representing the Congress in the case, led by Republicans. You could talk to them, that the Republicans have decided that they're going to close the federal budget gap on the backs of lesbian widows who have to pay estate tax when the straight folks wouldn't have to pay estate tax. So there were some fun ways to try to take advantage of the tax piece.

We were interested in filing a DOMA case, and were thrilled to join Robbie as counsel for Edie.

02-00:28:48
Meeker: What was the rationale for combining? Why would she want ACLU on board anyway?

02-00:28:56
Esseks: I think we had done the stuff together in the past. What we do is constitutional litigation. And Robbie's a smart lawyer. Robbie does a whole lot of different things. She had done some constitutional litigation with us in the marriage cases, and I think she's had some other stuff on her own, but we brought depth on that. And also, I think, especially at the beginning of the case, it was not clear how the case was going to play in the media. And I think that it was helpful to Paul Weiss to have a partner. So, yeah, so I think that's the stuff that went into that.

02-00:29:40
Meeker: So having ACLU on board sort of mitigates some of those concerns that we brought up early on.

02-00:29:26
Esseks: Yeah. Helps them being counsel for the individual and for an organization that is at least somewhat representative of the movement.

02-00:29:58
Meeker: Can you kind of walk me through the process by which this gets to the Supreme Court? Why it's not the GLAD case, and the legal strategies along the way. There must have been pivotal decisions. It's been a few months since I've read the case.

02-00:30:17
Esseks: We file in November of '10. Basically eighteen months after GLAD had filed *Gill*, and several months after they had gotten a decision from a federal district court in Boston. With that as background, there isn't a lot of reason to think that *Windsor*'s going to be the case that goes to the Supreme Court, because *Gill* is very far ahead. We'll go for it anyway. One of the reasons that we decided to do *Windsor* is that it was here in New York, which means that it's in the Second Circuit Court of Appeals. There are different appellate districts,

appellate circuits in the federal system, and so you go from a trial court, called a district court, to an appeals court called a circuit court. And from there you go to the Supreme Court. They're regional circuits, and many of the federal circuit courts had already decided a piece of law that was very bad for us. And the Second Circuit hadn't decided that question. And the question is this: when government discriminates based on sexual orientation, do the courts presume that that discrimination is constitutional, or do they presume that it's unconstitutional? Many circuits had said, well, we presume that it's constitutional, and it's up to the plaintiff to show that there's no rational basis for that distinction, that discrimination. Which is a hard thing to do. The burden is on you, and you have to show there's no rational basis. Okay.

02-00:32:09
Meeker: The other circuit courts, then, had decided that there could be a rational reason to discriminate against LGBT people in that sense, right?

02-00:32:19
Esseks: Yes. And they had certainly decided that the standard was that the plaintiff had to prove that there was no such thing. And the rule we wanted was a rule that said that government discrimination based on sexual orientation is presumed to be unconstitutional, and it's up to the state to come forward and say, "Well, this is why, in this circumstance, we need to take sexual orientation into account." The presumption of constitutionality is called rational basis review. The presumption of unconstitutionality is called heightened scrutiny. We wanted to get heightened scrutiny. It's a better test. It also reflects what we think the law should be.

That question was open in the Second Circuit. That question was not open in the First Circuit where the *Gill* case was headed. The First Circuit had said, "No, rational basis is the rule. It's presumed constitutional." So the Second Circuit was the place we wanted to be on this. One of the reasons we wanted to do this was: a) we have a chance of making better law in the second circuit. But also b) because the U.S. Department of Justice was going to have to defend this law. It's a federal statute. And we thought it was going to be harder for them—much harder for them—to defend the constitutionality of DOMA in a circuit where this legal question about heightened scrutiny was open. Because in the First Circuit, what they'd already managed to do in the other circuits where they have already had to file briefs—the Justice Department had had to file briefs—they didn't say, "Heightened scrutiny or rational basis is the right answer to the legal question about what the standard should be." Instead, they simply said, "The circuit has already decided that it's rational basis, and under rational basis, we have a justification." And that's what they said in Boston.

02-00:34:10
Meeker: So it's the problem of the precedent there, right?

02-00:34:12
Esseks: Yes. And the problem with the precedent there, and the opportunity of the lack of precedent in the Second Circuit. Because that opportunity is, as soon as we sue the government, and the Justice Department has to come and defend in the Second Circuit, they have to actually tell the court what they think the right answer is to that question of constitutional law. Is it presumed constitutional, or is the discrimination presumed unconstitutional? And we thought if they had to answer that question, they might well come out our way. And if it came out our way, either they wouldn't defend the law, or, at a minimum, it would be a whole lot easier for us to win.

And we actually had gone to the Justice Department starting in like June of '09, in a series of meetings, saying, "Hey folks. Here's the deal. A case challenging DOMA is coming your way. And it may happen in more than one place. And there are circuits, like the Second, where this is an open question. And so you're going to be asked a very hard question. Not hard on the law, we don't think, but hard politically. And so, go do whatever the stuff is you've got to do internally. Run stuff up the flagpole. Figure this out. But you can't answer this question the wrong way when it gets asked. And we're giving you lots of notice."

And they didn't have to do that in *Gill*, in Boston, in the trial court, because again, the circuit had said that rational basis was the standard. It was going to be more difficult for them when they had to file something on appeal. But the reason that I jumped at the chance to join as Edie's counsel in *Windsor* was that this was something that was going to present this question to the Justice Department right quick. And that, we thought, could be transformative, and it turns out that it was.

02-00:36:14
Meeker: What role does the Justice Department then play in this question of heightened scrutiny versus rational basis? Did they decide how they're going to defend DOMA based on it, or does it relate to the judges on the circuit?

02-00:36:29
Esseks: Well, ultimately, the judges have to decide what the rules are. But the Justice Department had to decide what it was going to do. How, and whether, it was going to defend DOMA. So we filed in November of '10. And we file in *Windsor*, and on the same day, GLAD files a case called *Pedersen*, in the district of Connecticut, which is also in the Second Circuit. So they had a different set of plaintiffs, and they were doing exactly the same thing we were doing. And we had coordinated the filing dates so that we filed on the same day, and had coordinated press. So both *Windsor* and *Pedersen* are vehicles to say to the Justice Department, "What are you going to do here, guys? What's your legal analysis of how the constitutional law should work?" And the Justice Department asked for and got a series of extensions on their time to answer our complaint.

And we went in, I think, between some time in December or early January. We went to the Justice Department to say, "Once again, let's talk about this." And we're saying, "We think you should not defend, because we're saying you should say that the right answer to this legal question is that government discrimination based on sexual orientation is presumed unconstitutional. And if presumed unconstitutional, you don't have a good reason for taking sexual orientation into account. And how in the world would you say that publically, even if you did?" They clearly don't. So this is a legal problem and it's a political problem. You shouldn't do that. You should say that you're not defending.

And what they did in February of 2011 was [Attorney General Eric] Holder writes a letter to Congress and says, "I'm not defending the constitutionality of DOMA because heightened scrutiny applies, and we don't have a justification for this kind of discrimination." That was completely transformative in terms of the prospects of Edie's case and the *Pedersen* case as well. And also for *Gill*. Because having switched the government's legal position in *Windsor* and *Pedersen*, they switched sides in *Gill* as well. And so we had the single best ally in our lawsuit against the government, which was the government itself.

02-00:38:59
Meeker: Can you talk about who in the Justice Department you were working with? Is that something that's possible to—

02-00:39:04
Esseks: Sure. So, the person that we were talking with was, primarily, was Tony West, who was an Assistant Attorney General for the civil division. And there were a bunch of different parts of the Justice Department. The civil division is the part of the Justice that is charged with defending the government in civil lawsuits. So it's a big part of what they do. And so a lawsuit like DOMA fell within the portfolio of the civil division, and this was a guy who—was a great guy—and took this issue very seriously. Pulled in people from all different parts of the Justice Department for a series of meetings about this stuff. And, I believe, personally went to bat for the result that ultimately came out. That the decision that happened at the end, I've been told, was a decision that involved Holder, and the President together, deciding what they were going to do.

02-00:40:05
Meeker: Is there precedent for this? The federal government—

02-00:40:10
Esseks: Not defending the constitutionality of a federal statute?

02-00:40:13
Meeker: Right.

02-00:40:14
Esseks: Yes. Not a lot. But there is some. Because, as you can imagine, the Justice Department, and Obama, got a whole lot of criticism for doing this as a clearly political move. And look, I'm sure politics were a part of it, but I genuinely believe the right answer under the constitution is the answer they gave. And it was simply politics that had prevented this Justice Department, and earlier Justice Departments, from taking that position in the past. So I think the politics were involved, but it goes the other way. So we were prepared, and many others were as well, to point out the various different instances—and I can't remember them right now. But there was a whole series. And again, it's not, not commonplace, but not exactly rare either, that the Justice Department's like, "We have no reasonable argument that we can make to a court that would allow us to defend the constitutionality of this statute."

02-00:41:20
Meeker: Even in the face of other circuit courts saying that there was?

02-00:41:24
Esseks: Yup. And the reality was that almost all of the circuit courts that had ruled the other way had done it with no analysis. And most of them had done it relying on an earlier Supreme Court case. A Supreme Court case from 1986 that was about the constitutionality of criminal sodomy laws. And that constitutional ruling from '86 was overturned by the U.S. Supreme Court in 2003.

02-00:41:57
Meeker: The *Lawrence* decision.

02-00:41:58
Esseks: The *Lawrence* decision. Exactly. There are a bunch of cases prior to *Lawrence* that decided that rational basis applied. And they cited *Bowers* [1986]. *Bowers* was the '86 sodomy law decision. And there were circuit court decisions from after *Lawrence* that didn't mention *Lawrence*. Instead, cited to pre-*Lawrence* decisions that cited to *Bowers*. We're like, this is not good precedent. This is crazy stuff where people just wrote stuff without thinking about it. This shouldn't be persuasive to you guys at all. It's still court decisions, and still court decisions that district courts have to respect if they're governed by that circuit precedent, but the Justice Department doesn't have to take that seriously. And in the end, they didn't.

02-00:42:51
Meeker: So, we're kind of entering into new territory now that's a bit on the frontier of my understanding of the law. But I remember this a bit from reading about the case, and perhaps from Robbie Kaplan's book. That there is this question that comes up, sort of a difficult question, right? What happens when the Justice Department doesn't want to defend one of its laws? One, who's going to defend it? And then, if the Justice Department isn't fighting this decision, is there, in fact—

02-00:43:24
Esseks: Still a fight?

02-00:43:25
Meeker: —is there still a fight?

02-00:43:26
Esseks: Is there still a live case to go up?

02-00:43:28
Meeker: Right.

02-00:43:29
Esseks: Yes. And that question goes all the way to the Supreme Court. Because when we get there, we're on the merits of the constitutionality of DOMA, and also the question of is there jurisdiction here? Is there a live fight between the parties for the Court to even adjudicate?

Justice switches sides in February. There's a bit of pandemonium and chaos, trying to figure out what in the world's going to happen. The Bipartisan Legal Advisory Committee of the House, which is, I think, five people—three Republicans and two Democrats—votes on party lines to defend, to move to intervene. They move to intervene. District judge lets them in. And we proceed to go through discovery. And we have a whole series of experts that we put on, and brief the dispositive motions there, and sit and wait for a ruling.

There's no question that there's a lot of controversy through the end of the district court proceeding. The briefing was done by early September in '11. But we don't get a decision from Judge Jones in the district court here in Manhattan until, I think, June of '12. And by that point, it's after the First Circuit in *Gill* has issued its decision on the appeal from Mary's case from the Boston ruling. So we are still absolutely behind *Gill*, because *Gill*'s at a place where they're ready to file a cert petition seeking review by the U.S. Supreme Court.

02-00:45:31
Meeker: Their decision in *Gill* from the First Circuit was—

02-00:45:36
Esseks: It was positive. Right? Yeah, no, absolutely. It was positive. It was in our favor. And I think the Justice Department files a cert petition. I think I have this right. And they do that, even though they agree with the result, because they're like, "Look, we are keeping the case alive." The Justice Department says, "The only people who can actually file a legitimate notice of appeal or cert petition is the government. BLAG, for the House. You're in it. We're not sure that you're really in it. We're not sure that you have the authority to do this. So we're going to file these papers that are going to make sure that the case continues. Because you guys want it to continue, and we want the Supreme Court to actually answer this question."

So they do that. And meanwhile, like a week or two later, we get a decision from Judge Jones in the district court. And we're all happy. Because we got a win. But then, we know that there are several things going on. There's a cert petition in *Gill*. There's a cert petition from the *Perry* case in California.

02-00:47:07
Meeker: Which has the potential to resolve marriage—

02-00:47:10
Esseks: And DOMA.

02-00:47:11
Meeker: And DOMA. Right.

02-00:47:12
Esseks: Yes. It could. A win there would have taken DOMA down, too. Absolutely. I wasn't sure we were going to win, but who knows? We file an unusual thing called a petition for cert before judgment. Which is as soon as an appeal is filed from the district court to the circuit court, which BLAG obliged us by filing quickly. I have no idea why. We're in the circuit court, and we don't have a ruling from the Second Circuit, but we're in the circuit court, and you don't have to wait. You can file a cert petition. And so we said, "Hey, here we are. We've got this fact pattern. This fabulous fact pattern. And if you're looking for a way to address the constitutionality of DOMA, we're here too." There are few times that the Court has granted cert before judgment, much rarer than the number of times that the Justice Department has decided to not defend the constitutionality of a federal statute.

02-00:48:24
Meeker: Can you give me a sense what cert before a judgment is?

02-00:48:29
Esseks: A petition for cert, or *certiorari*, is a petition saying to the Supreme Court, "Look, we want you to take this case." Usually, it happens when you've gotten a decision from the district court, and the loser appeals to the federal appeals court, and you get a decision from the federal appeals court, and the loser is like, "Okay, I'm not happy with this. I'm going to ask the Supreme Court to take it, and I file a cert petition." Okay. The thing that was different here is we're not at the end of the circuit court process where we've gotten a decision, because we haven't even filed the briefs yet. All we have is—

02-00:49:07
Meeker: To the appeals court?

02-00:49:08
Esseks: To the appeals court. All we have is a case where our opponents have filed a notice of appeal, so we're now technically before the Second Circuit. We haven't filed the briefs. We haven't argued it. We don't have a decision. And we file something saying to the Supreme Court, "Hey, here we are. You should take our case." And it's because we knew that, okay, well, *Gill* is there.

And Prop 8 is there. And what do we have to lose? They could decide for some reason that they want to take us, too, or they want to take us instead. We wanted to give the Court options.

And there were, quite frankly, there were some concerns at this point that the *Gill* case might not be an appropriate vehicle for the Supreme Court to take the case. Not because there was anything wrong with the plaintiffs, or the litigating, or anything like that. The question's about is Justice Kagan going to be able to sit in the case because she was solicitor general for a period of time before she got on the Court, and the question was, was she consulted? So *Gill* was in the trial court, but it wasn't in the circuit court. But did people talk to her about it? Because if they talked to her about it, she's supposed to recuse. But you don't know that in advance. So I think that one of the reasons that GLAD filed Connecticut was that they were like, "Well, we need a vehicle." I think they wanted a vehicle to go into the Second Circuit to do just what we ended up doing. And they also wanted a second vehicle in case *Gill* was not able to be a case that would have a nine-justice court. It might have an eight-justice court, and we weren't sure we could win with an eight-justice court. Which turns out to have been true.

02-00:50:55

Meeker: Can you describe the process by which, obviously it's behind the scenes, but by which the justices decide against cert in these different cases? I mean, are they sitting in a room, the nine of them, Kagan says, "Listen, I'm going to have to recuse myself. Can we choose another case that there will be nine justices? A full Court weighing in on it?" This is speculation, though.

02-00:51:25

Esseks: With the very big caveat that I wasn't—not only wasn't in those rooms, but there are a bunch of people who have clerked on the Supreme Court and will have more insight into this than I do, and I'm not one of those guys. So, I think, yes. There's discussion among the justices about the various legal maneuvers. So the reason we did the cert before judgment petition was we're like, "We want to be in this." We wanted the Court to know that they have options. And it may be an unusual option, but there are options here. I think it stands to reason that they're talking, and that Kagan might well say, "This looks like a great case, *Gill*, and the facts are great, and the plaintiffs are great, but I can't vote on that." And I don't know what the politics are among the justices about this, but it doesn't serve anybody to have a case before an eight-justice Court, because you can end up with a tie. And a tie resolves the issue for the particular litigants. And it's called "affirmed by an equally divided Court," in which case Mary and her plaintiffs would have won, but it's not precedent for anything else. And so it is a complete waste of time, is what it is. And waste the justices' time and waste everybody else's time. So I think there's a bunch of pressure to be like, okay, let's not do that.

And there's also the *Golinski* case, which is that case that Lambda Legal was litigating. And they filed a petition for cert before judgment as well, I think. Because they also were before the Ninth Circuit. I think they actually had briefed the appeal, but it hadn't been argued. I think they had an oral argument date in September or something like that, but then the court takes it away.

02-00:53:21
Meeker: They had an oral argument before the Court?

02-00:53:23
Esseks: Set an oral argument date before the Ninth Circuit. The appeals court, yes. And it gets taken away. Not before the Supreme Court. The Court makes the decision in December of 2012 to grant review in both *Perry* and in *Windsor*. By the time that happens, our petition for cert before judgment has been replaced with a petition for cert because through really aggressive litigating, led by Robbie, no question, we get the Second Circuit to give us a very accelerated briefing schedule, and then it's argued in September. Decided in our favor in October, and then we convert our petition for cert before judgment to a regular petition for cert, because we have a ruling going our way, on the heightened scrutiny question, from the Second Circuit, with a great plaintiff. And the Justice Department, which had earlier said to the court, and especially in a situation where there's a series of different potential vehicles, the court often looks to the Justice Department for advice about which vehicle to pick. And they don't have to follow that, but that's the kind of advice they're looking for. Over the summer, the Justice Department, I think, had said the *Golinski* case from California is our preferred vehicle. And after we get the decision from the Second Circuit in *Windsor* in October, the Justice Department says, "*Windsor* is our preferred vehicle."

02-00:55:14
Meeker: What do you mean by aggressively litigated?

02-00:55:17
Esseks: We get a decision in June from the district court, Judge Jones. BLAG files a notice of appeal within a week. The next day, or maybe the day that they filed their notice of appeal, we went a letter to the court saying, "This is urgent. It's a matter of great national importance, and constitutional importance." The plaintiff at that point was eighty-one, with a heart condition. She had, over the course of the prior year, had a series of small heart attacks. So we're like, "Look, she actually could die. And we filed the petition for cert before a judgment." I think we may have said that. "And we propose an incredibly aggressive briefing schedule." We're like, "We'll file our brief in like two weeks, and then you guys get two weeks, and then we'll reply a week after that. And then it's ready for argument in September." And the court didn't quite give us that. They gave us something that was almost that. And that's unheard of. That doesn't happen. It was a combination of very aggressive maneuvering and asking by our legal team, and a receptive court. Because they did not treat this as a regular appeal. And it usually takes months to get

an oral argument, and they gave us the briefing schedule, and I think in the same order they said it's set for argument on September tenth or something like that.

02-00:56:57

Meeker: Well, this is some of the mystery, to me, which is the oppostion, BLAG, right? They're moving so quickly on it. What's in it for them to move quickly? I mean, I guess I can understand the court responding because of the rationale that you provided them, particularly around Edie Windsor's health, but why wouldn't the opposition drag their feet in some of these cases?

02-00:57:20

Esseks: Look, I don't know why BLAG filed that notice of appeal right away. It may be that they didn't think that it made any difference. They may have been caught unawares by the fact that we filed the petition for cert before judgment, and that we asked for the crazy expedited schedule. They probably thought, "Well, that's not going to happen." And so I'm not sure that they knew what they were getting into. And certainly, they responded and said, "This is way too aggressive. We can't do this. We've got a lot. We're still trying to get up to speed with all these different DOMA cases." Because there were a lot of them around the country that they were still in the process of getting into. And they said, "We don't have the bandwidth." And the court said, "We don't care."

It turns out we had friends on the Second Circuit. I am blanking on the name of the chief judge of the Second Circuit who wrote this opinion.

02-00:58:12

Meeker: We can just look it up. We can add it in the transcript.

02-00:58:19

Esseks: Did great by us. And he was the presiding judge on the panel. He wrote the opinion. Well-respected, conservative guy who totally related to this issue, and wrote that the heightened scrutiny rule was the right rule. Did it on this crazy, expedited timeline. He absolutely knew—and obviously I don't know this from him—but he has to have known the context in which he was ruling. And he had to have known by having the argument quickly and deciding it quickly, a month after argument, which is also quick, that he was likely setting Edie's case up to go to the Supreme Court.

02-00:59:12

Meeker: Well, I want to talk about the hearing at the court and the decision that comes down, but you had mentioned the *Perry* decision. Or the *Perry* case, rather. Can we go back to the point in time—

02-00:59:24

Esseks: Sure. So here we are in the spring of '09. And we're waiting for a decision from the California Supreme Court. In May of '08 we win the *In re Marriage Cases* case that gets us the freedom to marry for same-sex couples under the

state constitution. That leads to Prop 8. And then the morning after Prop 8, after we lose, we file—and several other people file as well—lawsuits challenging that proposition under the state constitution saying this is not the kind of thing that could have been on the ballot in the first place. We have the argument in, I don't know, February, March. It's clear from the argument we're going to lose. The court's like, "We went out on this big limb for you, and we're not doing this again."

02-01:00:22
Meeker: They felt like they got their hat handed to them by the electorate.

02-01:00:26
Esseks: You know, we did this. And think part of it was also like, "You guys didn't protect us. You didn't run a campaign that got the populus to a place where they backed us up. And we're not doing this again." It was clear to us from the argument that we were going to lose. It was clear to the folks who mobilized to become AFER, the American Foundation for Equal Rights, that we were going to lose. And so they put together a federal constitutional challenge to Prop 8. And filed it and announced it basically at the time that we got the ruling on the state constitutional challenge.

02-01:01:10
Meeker: When were you made aware of the national issues behind the scenes?

02-01:01:13
Esseks: We knew a little while before, as in, probably a couple weeks before, that there was a serious effort underway. And some people—I was not in any of the meetings with the AFER folks. Jon Davidson from Lambda Legal, and I think Jenny Pizer from Lambda Legal, and two people from the ACLU of Southern California. Mark Rosenbaum, who was the legal director then, and the long-time executive director whose name I'm blanking on [Ramona Ripston]. I'm having quite a day today. It'll come back to me. Went and met with Chad Griffin and —

02-01:02:00
Meeker: Rob Reiner.

02-01:02:01
Esseks: Rob Reiner, and stuff, to talk about what makes sense and what didn't make sense. And they had clearly made up their mind. But what we were saying was like, "Look, yes, we think that Prop 8 is unconstitutional. Of course we think that Prop 8 is unconstitutional. The question is: does it make sense to bring a case to court now or not?" And they clearly thought that it was the time. And we thought it wasn't the time. And so what happens is that when we win the California marriage case in the spring of '08, we put out a document that says—this is this "Make Change, Not Lawsuits" thing—that says now is not the time to bring a federal marriage challenge. Because we knew that people were going to be wanting to do this.

And as we came up to what we knew was going to be the bad decision in the post-Prop 8 state constitutional challenge, we sort of updated that document, which said don't sue. We issued it on the day that they announced their lawsuit. We didn't know that they were announcing their lawsuit that day, so they took this very personally. Here we were dumping on their big new thing. In fact, we kind of did want to dump on their big new thing, but the timing was not what it seemed to be. But anyway, it led to a very acrimonious fight between the AFER people on the one hand, and a whole bunch of LGBT advocacy groups and legal groups on the other.

The story ends up okay, and I actually think that the *Perry* lawsuit made really significant contributions to the public discussion and the public debate around this issue. But it's in part because that lawsuit didn't follow the path that they intended it to follow. There's a transcript of the first hearing in early July of 2009, before Judge Walker, where Ted Olson has filed a preliminary injunction motion, and the judge is like, "Counsel, I see that you have a preliminary injunction motion here, but I don't—" I think actually a couple days before the hearing, he issued an order. He says, "Here are the ten or fifteen different factual questions that I think need to be tried. And I know this case is not stopping with me. And I think my job is to do what district courts do, which is hear the facts and make findings." And Ted Olson's like, "No, Your Honor. We don't need a trial. We don't want a trial. We want you to rule on the preliminary injunction." And their plan was, rule on the preliminary injunction, get a ruling right away, take that to the Ninth Circuit on an emergency basis, get a ruling. And they wanted to be in the Supreme Court right away. They wanted to be in the Supreme Court at the time when maybe we would have had—at that point we had five marriage states. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. On their timeframe, maybe we would have—as things worked out, we would have had five.

02-01:05:55
Meeker: They were looking for a 2011 slot perhaps.

02-01:05:57
Esseks: Yeah. Or sooner. Twenty ten—ten would have been hard. But yeah, they were looking for an eleven slot. And they were in this crazy rush. And I think there were two things that made the case as impactful as I think it was. One is, simply, Ted Olson. Having a serious conservative who had been Solicitor General under [President George W.] Bush be such a passionate, informed, eloquent spokesperson for the freedom to marry for same-sex couples was great. He could get on Fox News and he would stick to his guns, and people would listen to him. And that opened up a whole new realm in the conversation.

But also, the other thing was that they put on a trial. They didn't want to go to trial. They were forced to do a trial by the judge. And they were forced to do a trial in part because we moved to intervene to represent a series of

organizations saying to the judge, “Judge, you said you want a trial. Olson says he doesn’t want a trial. We’ve done these trials. We’re ready to do this, and we’re going to help you do it.” Now, he didn’t want us, because he’s like, “I don’t think I need you.”

But in response to our motion to intervene, Olson and company changed their tune and said, “Okay, Judge, you want a trial? We’ll do a trial.” And so then they had a trial in January of ’10, and they did a good job. And we helped them. I’m not taking responsibility for this at all, but we connected them with a series of experts. Not all of them, but a bunch of the experts. And they did a good job. Because there’s a great factual and expert case to put together. And they did it. And, in part, because of who those guys were, they got incredible exposure and attention to the trial, and the country understands trials. Trials are when you get to make your case. And the other side didn’t have a case to make. And I think that helped us move the public, too.

02-01:07:59
Meeker: Thank you. That was a good explanation for that, and runs very much parallel to what Kendall talked about. And she did say, “Listen, Olson and Boies. I guess Boies to a lesser extent because I think that he didn’t really grow as much in the role as—

02-01:08:14
Esseks: He did in the trial—

02-01:08:15
Meeker: He did in the trial?

02-01:08:15
Esseks: —but not—yeah.

02-01:08:16
Meeker: Not in the preparations for it.

02-01:08:17
Esseks: I don’t think he was as much as a public presence, but Olson’s an appellant lawyer, and after the trial is over, Olson did everything, I think, going up. But Boies did, I think, a bunch of the examinations of witnesses, and the cross-examinations of witnesses at trial. And he is very talented.

02-01:08:36
Meeker: Well, then, tell me about the argument of this in front of the Supreme Court. I assume you were in the chamber and in the court.

02-01:08:43
Esseks: For *Windsor?*

02-01:08:43
Meeker: Yeah, for *Windsor*.

02-01:08:46
Esseks: So, yes, I was there. Robbie argued. And we had spent a lot of time working with her to prep. And there had been a whole serious of moot arguments. You know, practice arguments. I had been in the Supreme Court before, but I hadn't been in the Supreme Court at the counsel table. And it's kind of surreal. You spend all this time preparing, and it's all about—on this case as on many cases—it's all about Justice Kennedy. Where is he going to be? And I remember just sitting at counsel table. You stand up. The justices walk in. And I was like, "Oh my God. Here we are. We've worked for such a long time, and it's all about what are they going to say. And we're about to hear this." And I remember feeling butterflies and everything. And I wasn't going to have to open my mouth. I was just going to sit there and take notes. But I remember being nervous, and excited, and feeling a sense of a moment.

And then, I'm sitting there with everybody else. Hanging on everybody's words. Taking notes about, "Oh, so, these folks are in our corner." And then Kennedy starts saying stuff that is not unambiguously positive. He starts talking about federalism stuff. And I'm like, "Oh, shit." So I was worried for a while in the middle of that. But got to a place where I thought it was going to come out okay.

02-01:10:19
Meeker: So you thought that he probably, perhaps, could have ruled on federalism grounds that marriage has always been with the states, and let's leave it there.

02-01:10:27
Esseks: Yes, yes. So there was a bunch of the commentary, including my own commentary after the argument. It was basically, "We're hopeful that we're going to win. But it could be five votes on equality our way. Or it could be four votes on equality our way, and a vote on federalism—Kennedy. And then four votes against us. Which would be a win, and would be a win that takes down DOMA, but it wasn't going to give us a case where there's five votes for one theory, and one sort of development of doctrine that we're then going to be able to use in the rest of the marriage movement and the rest of the of LGBT rights movement.

And what we got was five votes on equality without a whole lot of doctrine in it. In part because that's kind of Kennedy. He's not super into doctrine. But also, because, I think, he didn't want us to have a whole lot to work with in the sense that he wasn't ready. He's no dummy. He knows that striking down DOMA—he knows that we're going to turn it around and argue from that that the state bans on marriage for same-sex couples violated the Constitution. It's not that he was trying to not give us a tool, but he wasn't going out of his way to give us a tool that we could use. And if he had done a separate opinion on federalism, that would have been an even clearer way for him to not give us a tool that could be used, but actually would have been something that would have been used against us, because it would have been like, okay. If the

federalism principles mean that marriage is something that states get to decide, that cuts against us on the freedom to marry.

02-01:12:24
Meeker: Right. So they would have struck down DOMA on federalism grounds, but, again, like you just said, that would have prevented a national resolution in the Supreme Court around marriage.

02-01:12:34
Esseks: Yes. Yes, it would have made it harder. So that's what was concerning about this federalism thing popping up at argument. We knew it was an issue. We knew it was something that he had spoken about and written about in the past, but I didn't expect that that's where he was going to start.

02-01:12:52
Meeker: Did you have any surprise about the way that the *Perry* case worked out? Basically on a technicality, more or less.

02-01:13:03
Esseks: Yeah, on a technicality and—people going back and forth about whether that technicality was right or wrong. I'm not sure I even have a strong view either way. It did seem to me that the Court was like, "Okay. We had to take this case. We had to grant review because we couldn't just leave the Ninth Circuit ruling out there." But I read it as like, "Okay. We're ready to decide DOMA. We're just not ready to decide Prop 8 and the broader question." And so that's what got, at least some of them, five of them, to say, "This doesn't work." I think there's something to the argument that they decided about lack of jurisdiction, but I think big picture—

02-01:14:00
Meeker: That was a six-three, right? Didn't Scalia join, or something?

02-01:14:04
Esseks: I think it was five-four.

02-01:14:06
Meeker: Okay.

02-01:14:10
Esseks: I think it was five-four. And I think Kennedy voted to say that there was a case or controversy, which is weird, because so then maybe some other folks were like, "Okay, well, we don't think the Court's ready for this." Maybe they didn't want Kennedy to have the opportunity to rule on the marriage question because maybe they thought he wasn't ready. But I don't know that. I can't quite figure out what was going on there. Stepping back from it, it seems like they're ready to decide DOMA, not ready to decide Prop 8.

02-01:14:50
Meeker: Were you surprised at all on the ratcheting up of the discourse, particularly amongst Scalia and Alito? Thomas never spoke.

02-01:15:00
Esseks: That's kind of, I think, par for the course. So I wasn't surprised. It was disturbing the way it is, but having sat through oral arguments in state supreme courts, and state lower appellate courts on marriage cases in the 2000s, we were used to hearing all kinds of awful stuff. And to reading in their opinions all kinds of awful things about gay people. So this was just par for the course.

02-01:15:37
Meeker: When *Windsor* comes down, where are you, and what was your response to it?

02-01:15:42
Esseks: I was here, in my office. Or in Steve Shapiro's office just down the hall. And connected by phone with Robbie and Edie who are at Robbie's apartment. And Pam Karlan who is co-director, or something like that, of the Stanford Law School Supreme Court Litigation Clinic who is our co-counsel at the Supreme Court stage. And her students, who were students in that clinic. And we find out on SCOTUS blog, along with the rest of the world.

02-01:16:30
Meeker: You're just refreshing, right?

02-01:16:32
Esseks: Yes. And I think it may have been a live blog thing so you didn't have to refresh. So you're just waiting for the clicky-click-click sound of somebody typing, and then it says what happens. That's also how we found out that cert was granted in December '12. An amazing moment. And look, by that point, we had sort of convinced ourselves that the chances were good that we were going to win. So it's not like it was a complete surprise. But still, to have the reality be that oh my God, DOMA is gone, and Edie won her case, and this is going to be something that is going to move our movement forward. And I knew it was going to move the movement forward in incredible ways. I did not understand what was about to happen.

02-01:17:24
Meeker: Well, we'll get to what was about to happen in a minute. But now we need to back up again, because I would like to talk to you about the 2012 campaigns in the states. Big wins in Maine, Maryland, Minnesota, and Washington state. Although Minnesota was the defense against a negative amendment. Within a handful of months it becomes a positive one. We're talking about ACLU's involvement in litigation, but this is also a broader campaign that ACLU's on the ground and helping campaigns, I guess, in Maine, and Maryland, and Washington?

02-01:18:07
Esseks: In Maine, Maryland, and Washington, the ACLU, through our state affiliates, we're on the steering committee of those three campaigns. I think the ACLU of Minnesota did some work on the Minnesota campaign, not on the steering

committee, and they didn't sort of contribute in the same way that we did in the other places.

02-01:18:27
Meeker: I know that ACLU is very decentralized when it comes to the states, which is a national office. Were you or your team here involved in any of those state campaigns?

02-01:18:38
Esseks: Yes. So we were. Decentralized, that does describe some aspects of ACLU, yes.

02-01:18:49
Meeker: Federal?

02-01:18:50
Esseks: Yeah, no, no. Yes, I mean, we have separate organizations in each state, and we don't do anything in a state without working through the affiliates. The national office, both through staff lawyers and through people in our advocacy department who do lobbying and organizing were very involved in those campaigns. And so there were staffers here who were working with affiliate staffers and others to manage the ACLU's involvement in those campaigns. And participating by phone on steering committee calls. And part of it was also sharing information across campaigns. And in some contexts, we put national staff into the state campaigns. Selene Kaye was one of the advocacy people here. Was the Deputy Communications Director for the Maryland campaign.

02-01:19:53
Meeker: Who's that?

02-01:19:54
Esseks: Selene Kaye. S-E-L-E-N-E. Kaye. K-A-Y-E. So there were times when people were involved at that level from the national office, and there were a bunch of people from the state affiliates who were involved in those three campaigns as well. So I can't give you chapter and verse about how those different campaigns built up. I was involved in some discussions with Evan, and other people from Freedom to Marry, and some funders in the spring of '12, trying to figure out are we really going to go to the ballot in four states? Can we control this at all? Is that the smart thing to do? Which ones should we pick? Or which ones should the funders pick?

And the challenge for us as an organization—as both a national organization and an organization that's local in each state—it's one thing for a foundation or an organization like Freedom to Marry to say, "Four states is crazy. We don't see how we can win that. We're going to pick the best three." I can't pick the best three, because I got people who are local in each place. And the decision where we were not going to invest in a serious way in Minnesota was following the lead of the Minnesota affiliate. And I'm not throwing them

under the bus. There was other stuff. I think there was a voter ID ballot initiative that they were putting serious time into. I think, in part, because they looked around and they're like, "There's a bunch of LGBT folks working on the marriage thing." And they did some stuff, and added value where they could, but they're like, "Okay, there are not a lot of people focusing on this other ballot campaign happening in the state." So that's how it was possible and it made sense for us not to invest there.

02-01:21:57
Meeker: Maryland had some marks against it. There was the legal case right there. Wasn't there also a family legislative campaign if I remember correctly?

02-01:22:06
Esseks: Yeah. In Maine, we didn't go through the legislature and just put the issue on the ballot. In both Maryland and in Washington state, there were legislative campaigns that were finally successful in '12. And the legislatures passed them. The governors signed the bills. And the response was, in both cases, for the bad guys to put the issue on the November ballot for a referendum. In both places, the strategy discussions really were about—in the legislative process—"Okay, folks, even if we think we can pass this, can we save it at the ballot? Are the chances good that they're going to put it on the ballot? Yes, the chances are good they're going to put it on the ballot. They probably have the resources. Can we win? And if we can't win at the ballot, do we really want to push this through the legislature?" And, of course, it's very hard to just sort of stop a legislative campaign and be like, "No, we don't want to win."

And I'm not sure there's anybody who was super-serious about that, but there were those conversations being like, "If we're going to continue to push this legislatively in Maryland or in Washington state, where are the resources going to come from? We need to start a campaign now that's about educating the public about this issue." And, I think, in Maryland, we were the farthest behind, compared to Washington and Maine. Because Maine was always about a ballot campaign. And Washington was, I think, better resourced. Yeah, better resourced in terms of money, and resourced in terms of organizations on the ground that had done ballot campaigns, because in Washington state, they're like California. They had ballots all the time. Maryland, I think, hadn't done a ballot campaign, a referendum, for years. It's hard to find somebody in Maryland who had actually done one of them. So it was a different order of magnitude in terms of putting together a team.

02-01:24:16
Meeker: There was some question I heard raised around the racial dimension. That Maryland was more of an African American predominant state. It had concerns about how to turn that corner and there was, it sounds like, some resentment that not a lot of money was put into that state, and concern that that had something to do with it.

02-01:24:37
Esseks: Well, so, yes. So there's a whole series of issues there. On the investment side of things, I think that what came out of a process that Freedom to Marry managed, and it was trying to inspire funders to put money, and trying to focus the campaigns on what would be needed to win. Out of that process came a decision by Freedom to Marry and some of these funders that they were going to invest in Maine, Minnesota, and Washington state, and not Maryland.

Now, Freedom to Marry came in and invested in Maryland in the last month or two of the campaign, and made a significant investment, and that was very helpful. But the sense that Maryland was the outlier and the orphan child that wasn't getting shoes came in part from that decision. I understand where the decision came from. The polling, I think, was worse in Maryland than it was elsewhere. The infrastructure was smaller and less well-developed in Maryland as compared to the other places. So based on a number of more or less objective criteria, Maryland was a longer shot.

We put a bunch of money. We put more in money into Maryland, probably, than the other two campaigns combined because they needed more. And because we were there. We lived there. We couldn't walk away from that.

On the racial piece of this, I think the opinion polling in communities of color showed us with lower support than we had in other racial communities. But what happened that it wasn't clear was going to happen was that Obama comes out for marriage in May or so of '12. Pushed, but does it. And I remember seeing polling in Maryland from two weeks before Obama's announcement that he's in favor of Freedom to Marry, and two weeks after, and the support for the Freedom to Marry in the African American community in Maryland moves like ten points in that period, largely based on Obama. And so it was no question to me that if Obama hadn't come out in favor of Freedom to Marry, then, or sometime before the election, we very likely would have lost that election in Maryland.

02-01:27:19
Meeker: Also during this period of time there's the point in time in which people are talking about cracking the code, which is a whole series of approaches to influencing public opinion. Thinking about Obama, you start to think about the journey narrative. There's a strategy developed in which you're, in many ways, allowing people to start with their opposition to it, or saying that this is something new that they're not comfortable with. And modeling the journey, which is a journey to acceptance and believing that this is the right thing. You start to bring in the discourse around love and commitment. You start to feature a lot of unexpected messengers. At least those three things combined, I think, play a big role in the transformation of public opinion in these four states. Tell me how the ACLU is engaging with this, and what kind of sharing of ideas is happening at this point in time.

02-01:28:30
Esseks: Around the messaging stuff?

02-01:28:31
Meeker: Right.

02-01:28:33
Esseks: I think we were consumers of that information in the sense that the movement as a whole sort of gradually absorbed a different way to talk about this stuff that was, by the way, additive. It doesn't necessarily replace the earlier way of focusing on rights and benefits, but clearly this was something that connected with a broader swath of people. I think we absolutely adopted that. Integrated it. It was central to the messaging in all of the ballot campaigns that year, including the campaigns that were a part of.

02-01:29:19
Meeker: Was that something that was hard for the ACLU to do? Because I imagine that ACLU, constitutional rights: Rights, rights, rights. And to then kind of talk about something which is extralegal, which is soft. Love and commitment.

02-01:29:37
Esseks: It may be harder for people like litigators like me. But there's a whole lot of people. The people working on the campaigns were organizers. Our campaign people are communications people. They don't fit your stereotype of super rational, focused, ACLU kind of lawyer person. I do remember my own sense. I don't remember resistance once the research was in circulation. I don't remember myself having resistance to it. I do remember having resistance to talking about love earlier on, before all of that research.

In connection with a New York marriage litigation, a New York state court marriage litigation, which went from '04 to '06, we worked with the Empire State Pride Agenda which was the New York state LGBT advocacy group. It was a guy named Ross Levi. And I heard him speak a bunch, and I did some town hall things with him where we were talking about marriage. And Ross always mentioned love. He's like, "It's about love." And I remember being like, "Ugh, Ross, when you talk about it's about love, people are going to think about gay people having sex. And that makes people uncomfortable." And I remember thinking, "That's not the easy way in here." He was completely right, and I was completely wrong. But I didn't know it at the time. But so, later on, when the research comes out—so then, okay, well, this is why you do research.

02-01:31:18
Meeker: What was the actual mechanism for sharing this research and sharing of results? And polling as a result of the research? The degree to which the new messages and the new messengers were, in fact, moving the dial?

02-01:31:37
Esseks: Freedom to Marry and Thalia Zepatos were central to that in terms of doing, and assembling, and collecting a research document and then disseminating it. It was in the ACLU. We do briefing calls for state affiliates around the country about a whole range of topics. We did one about marriage advocacy, and about marriage messaging, and how to talk about this stuff. Because these were live issues in many, many states around the country. And Thalia, I think, helped us with a couple of those as well. We have ACLU conferences where all the staff gets together, and we did sessions on this stuff there. So there were a range of different ways that we got the messages out to our networks. But then a whole lot of the important places for the messaging guides to get disseminated was to the campaigns. And I think that Freedom to Marry was involved in all those campaigns. And even in Maryland, their messaging that they had to put together was a core part of what came out of that campaign.

02-01:32:45
Meeker: Do you recall in Maryland? Every state's a bit different. And I remember—God, who was I talking to?—maybe Thomas Wheatley. He was doing a lot of work in Minnesota. And more of the kind of freedom frame played a little bit better there in Washington. It had a little more to do with love, and rights, and equality.

02-01:33:09
Esseks: I think Maryland was a little more on the rights side. I think so. I'm not sure I'm right about that. Yeah.

02-01:33:25
Meeker: How was Obama's support mobilized in that campaign?

02-01:33:33
Esseks: You know, good question. I don't know. I wasn't close enough to the day-to-day to know what people did, but it didn't take much. I think that was big news, and that was big news everywhere. So I'm sure there was amplification by the campaign. I don't know what it looked like. But I don't think they needed to do a ton to amplify that. That was kind of an earthquake.

02-01:34:05
Meeker: Free media, really.

02-01:34:07
Esseks: Yes, absolutely.

02-01:34:08
Meeker: Earned media.

02-01:34:08
Esseks: Yes. Earned media. And so I'm sure there was stuff that that campaign did to push that out to every corner of the state. I think that either every spokesperson or all the major spokespeople for that campaign were African Americans. Many of them in the ministry. Because we needed to have trusted

messengers that people could relate to. And we knew that the primary argument—the primary spokespeople on the other side—were going to be African American preachers. And they were. And so we needed a campaign that was going to be able to meet that. I bet you that those people were talking about Obama.

02-01:34:57
Meeker: You know, so we've talked about the 2012 wins. And just to follow-up, November 2012 wins in all four of these campaigns. Going into that election, obviously Obama is running against Romney at that point, and there are a couple of other important things happening. I guess, a Senate campaign in Wisconsin as well [for Tammy Baldwin]. And these four—as you said—are these four referendums. Going into that day, were you feeling optimistic?

02-01:35:33
Esseks: Well, so, I remember thinking, over the course of that summer, that if we won two out of the four, that would be amazing. And this is a context where we had lost thirty-two, thirty-three ballot initiatives in a row. We had one—we defeated—one marriage amendment in Arizona, but that was only because it was so broad that it was going to take domestic partner benefits away from straight people, and that was the singular message of our side's campaign. And so we defeated it, narrowly, and two years later they came back with a narrower amendment and we lost. Because it wasn't a message that actually built towards anything.

So I kind of discount that and say we basically lost the thirty-two, thirty-three, whatever it was, ballot counts. So even though we were optimistic, and we had started winning in state legislatures a little bit more, it still is like, okay, well, it's not clear that we cracked the code here. It's not clear that we can actually win when the people go into the voting booth, close the curtain, and do whatever they're going to do. In the couple of days leading up to the election, I was more optimistic. But I think, even then, I didn't think we were going to win all four. I was like, "Wow."

I remember the day after the election—this was after Superstorm Sandy, which was that fall. And downtown New York had been flooded. Our building was evacuated. We were working in temporary spaces all over the city. And the day after the election, had a conference call for all the national staff to call in to talk about the election results. And the hooting and hollering on the phone when we started talking about the marriage amendments. The whole organization was just so excited about the issue, about winning, about the ACLU's ability to contribute in a serious way. It was great. So it felt wonderful to win those, and it felt also wonderful to have the support of the organization to that degree.

02-01:38:07
Meeker: Let's talk about the final—

02-01:38:13
Esseks: Chapter.

02-01:38:14
Meeker: —final chapter, thank you. Now, I know that ACLU—you were not involved in the *Obergefell* case, correct?

02-01:38:24
Esseks: No.

02-01:38:24
Meeker: Oh, you were? Oh, that's right. I'm sorry. You were. I'm thinking of NCLR. They were involved in, I think, the Tennessee case. Right. You were involved in the *Obergefell* case.

02-01:38:33
Esseks: We were counsel to Jim Obergefell in the Ohio case.

02-01:38:37
Meeker: I apologize.

02-01:38:38
Esseks: No, no, no. No worries. No worries. It's a complicated landscape. And we were also counsel in the Kentucky case. In the Supreme Court. Not earlier.

02-01:38:49
Meeker: Okay. Well, there's this quickening of pace right after *Windsor* and *Perry*. The dominos just start falling very regularly. Really quickly. Was ACLU involved in any of these cases sort of in that period of time before the *Windsor* and *Perry* cases come down? What is the preparation then that is moving towards a national resolution?

02-01:39:18
Esseks: In the lead-up to argument and then a decision in *Windsor* and *Perry*, we know that if we win in *Perry*, okay, it's over. That's great. If we lose in *Perry*, and depending on how we lose, it could be terrible. But if *Perry* goes off on the jurisdictional thing, which is what happened, and we win in *Windsor*, we're like, okay, so we need the next act. What is the next act? What's going on? And it was quite clear the next act is federal court marriage litigation, very much like *Perry*, but having won DOMA, which we thought of as the stepping stone to marriage. We said, okay, so that's the next thing to do.

The other reason that we knew we needed to do that is the following. That we're sitting there, along with other people in the movement, looking at the map of the states. And by the time we get to just before decision in *Windsor* and *Perry*, we get up to twelve states. And we're making progress. We add three states in November of '12, and then we add three more states. In that case it's to nine. And then we add three more states in May of '13.

02-01:40:57
Meeker: So that's what? Rhode Island, Minnesota, and—

02-01:41:00
Esseks: Rhode Island, Minnesota, and Delaware.

02-01:41:01
Meeker: And Delaware.

02-01:41:03
Esseks: And so we have twelve. But then you start looking at the map, and we're like, okay. If you look at the map of where we have marriage and where we don't have marriage, and you also look at the map of where there are state constitutional amendments that say that marriage is a man and a woman, you end up with a small number of states where we can make progress without going either back to the ballot or to federal court. And so we had New Jersey, and New Mexico. There was already litigation pending in both of them. We had a case in New Mexico with NCLR, and Lambda had a case in New Jersey. Illinois and Hawaii were places we could make progress with the legislature. We tried in New Jersey as well, but it was resolved by court. And then you ended up with West Virginia, Indiana, and Wyoming that didn't have state constitutional amendments. But we're not making political progress through the legislatures in any of those three states. And the only other place you can go are places where, again, you have to go to the ballot or you have to go to federal court. So we're like, we're running out of places to play. So that was another push to get into a federal court marriage business in a serious way.

Within less than two weeks from the decision in *Windsor*, we filed a federal court marriage case in Pennsylvania. We added a marriage claim to an existing federal court case that we had going in North Carolina that was about second parent adoptions, and we added marriage. And we announced, along with Lambda Legal, that we were going to file a federal court marriage case, shortly, in Virginia. Because we had decided—we at the ACLU had decided—that we wanted to focus on federal appeals courts, circuits where we were most likely to win when the case got there because we wanted to win, and have the bad guys ask the Supreme Court to take it, because we wanted to force the issue. We didn't want to come up from a loss. Our strategy was let's go to the place where we can win. Let's not go to places where it's more likely that you are not going to win in the federal appeals courts. Because the case is then likely to just end there.

02-01:43:29
Meeker: Why would it end there?

02-01:43:30
Esseks: Well, because if we lose, and there's no appeals court that has gone the other way where we've won, there's no reason for the Supreme Court to take the case. The Supreme Court can take the case. We would file a cert petition, say, "Hey, take this." And they could. But they're like, okay. That's the status quo.

The status quo is gay people don't get married. And they could just sit there and wait for the case law to develop, which is a normal thing that they do.

So losing in a federal appeals court, it doesn't necessarily mean that you're dead in the water, but it's not the way forward. Or, at least, that's what was argued. The Pennsylvania case, we go to the Third Circuit, which is pretty good. And the Virginia and North Carolina cases would go to the Fourth Circuit, which had been reshaped by Obama. Had been a terrible court. So the Fourth Circuit is Maryland, West Virginia, Virginia, North Carolina, South Carolina. The Third Circuit is Pennsylvania, Delaware, and New Jersey.

02-01:44:33
Meeker: And Ohio's the Sixth.

02-01:44:38
Esseks: So, we're like, okay. We need a next act. We filed three cases. Or announced we're going to file them. Announce we're going to file three cases. And, I kind of thought that that's what we were going to do. We had sort of set the table, and it was going to take a while to work through those cases. And I remember being in a car with Evan. We were at some fundraising thing. And I'm telling him about the litigation that we are thinking of putting together. It's like, "Well, we're going to do one in Pennsylvania, and then we're thinking about doing it in Virginia, too." And he laughs at me. He's like, "You're being a little excessive." So he, too, thinks, it's still in a mindset. And it's not criticism of him. It's just a little window into where our heads were at back then. That the idea of filing two lawsuits was kind of crazy. And then, of course, we end up with thirty-something. Insane. So that was our plan. Let me put aside for the moment the question of how does that change over time.

02-01:46:03
Meeker: Can I actually interrupt? Your mentioning of these thirty different cases is remarkable. Obviously it's some of the big players. It's ACLU, and Lambda, and GLAD, and NCLR. But there are also a lot of other enterprising attorneys and couples around the country. How did you—

02-01:46:19
Esseks: Yeah. The ACLU files in the three places I mentioned. Lambda files in Virginia with us, and in West Virginia. And they already had a case in Nevada. And NCLR I think files in Tennessee.

02-01:46:41
Meeker: And Kentucky, right?

02-01:46:42
Esseks: They're not in Kentucky. They're in Tennessee. The Kentucky case was private lawyers until the end.

02-01:46:48
Meeker: Tennessee was the *Tanco* case.

02-01:46:49
Esseks: Yes. Tennessee was *Tanco*. And they were in Idaho, and they were—

02-01:46:54
Meeker: Are they Utah, too?

02-01:46:56
Esseks: They got into Utah after. But that was brought by private lawyers. And that actually had been brought by private lawyers prior to the *Windsor* and *Perry* decisions. I talked before about sort of setting the table. We set the table with several place settings that we put on there. And then Lambda had a few. And NCLR had a few. GLAD wasn't in a position to do things other than they ended up co-counsel in Michigan, but their region already had marriage in all the states.

But then what starts to happen is private lawyers start filing cases all over the place. And I think what's going on here is there's been pent-up demand by people who had wanted to get married for a long, long time. And had been putting it off, and putting it off. But then you get the decision in *Windsor*, and people, completely logically, are like, "Well, if Edie can win, and the Court can see that DOMA is unconstitutional, well, the stupid marriage ban that prevents me from getting married is also unconstitutional." And it just gave an incredible push to people to be like, "Oh, well why should we wait?" And, in some sense, why should people wait? But I was still—at the beginning of this phase—I'm still in a place where assuming, okay, well, the litigation is going to continue at a rough pace, that it's continued for since the early 2000s, which is that cases take several years to litigate.

So what happens is we start getting more and more private cases getting filed. One of the early ones was Jim Obergefell's case, filed by Al Gerhardstein, who's a private lawyer, civil rights lawyer, in Cincinnati that the ACLU had worked with a whole bunch. He had done gay rights work in the past. He had been on the board of the ACLU of Ohio. And so we started providing help to Al in the litigation from the beginning. We were not co-counsel with him in the district court, and he gets a good decision. He gets a good preliminary injunction ruling on behalf of Jim before his husband dies. And then after his husband dies, he gets a good ruling in the district court. And then when it goes on appeal, we join up as co-counsel.

02-01:49:20
Meeker: About these thirty cases total, and a lot of the private—

02-01:49:23
Esseks: And I think it was actually more. I think it was more like fifty or sixty. I don't have the numbers. But yes, there's an incredible number of cases.

02-01:49:30
Meeker: Was there a lot of consternation in the movement? The litigators are so deliberate. Not just—

02-01:49:38
Esseks: Persnickety.

02-01:49:39
Meeker: Well, I don't know. Let's say deliberate.

02-01:49:41
Esseks: Yeah, deliberate.

02-01:49:42
Meeker: Because there's a lot at stake. One, there's getting the right legal case. And then there's also finding the right litigants, because all of the sudden, if you get a litigant who maybe has some difficult things in their background, that could—

02-01:49:57
Esseks: Yes. Look, we're here. We've been doing this work for a long time. We've got a plan. We think our plan is great. And we think it's going to take a while. We start out where I said. I want the cases to happen in these circuits, not in these circuits, because I think we're going to win, and I think that sets it up better. And yes. I remember hearing about Jim Obergefell's case and being like, "It's in the Sixth Circuit. That's a dumb idea. You're going to lose in the Sixth Circuit."

But I also remember thinking, seeing the video. I don't know if you've seen the video. It's a wonderful video. You should look for it. It is a video of Jim and John getting on the plane, going to Maryland, getting married, and coming back. It's done by the—whatever the paper is in Cincinnati. I forget the name. And they did a great job. So I remember seeing that, and like, this is a story that is as powerful as Edie's story. If there's any case that could win in the Sixth Circuit, this is the case that could win in the Sixth Circuit. But I still thought that the Sixth Circuit was a dumb thing to do. What I'm imagining in all these contexts is if that's the first case to get to an appeals court and we lose, that just doesn't help anybody. It doesn't help the litigants. It doesn't help all the other cases that we're trying to push forward in circuits where we're more likely to win because a circuit court ruling against us makes it less likely we're going to win someplace else. This doesn't help.

02-01:51:33
Meeker: What was wrong with the Sixth?

02-01:51:34
Esseks: That's a pretty conservative Court. And in fact, at the end of the day, we lose in the Sixth. So I was right about that. I was wrong about the timing, about when that was going to happen. But I was right that we were likely to lose in the Sixth. But what I didn't understand, and what I didn't see coming, was I didn't see the depth and breadth of the demand, and how there was just no stopping this. And I also didn't understand how powerful *Windsor* was going to be. How powerful it turned out to be. Because what starts to happen in Utah

in December of ’13—that’s a Friday, and then the next Tuesday is Al’s decision—Al and Jim Obergefell’s decision in Ohio—and then I don’t remember the chronology, but we end up with conservative judges—not all of them are conservatives, but many of them—conservative judges in very conservative parts of the country ruling for same-sex couples in marriage cases again, and again, and again, and again. In places I was sure were the wrong places to do it. On one of the judges—I think this was an Oklahoma judge—writes something that says, “Look, the state says that *Windsor* is a different statute.” He’s like, “Maybe it is, maybe it isn’t. But I can recognize a paradigm shift when I see it.” And that’s not good legal analysis, but he was just saying, “If DOMA is unconstitutional, this sure seems like it is, too. And I don’t care whether Kennedy wrote a decision that gives me the doctrine to get there or not. This is going down.”

And as more of those decisions happen, more new cases get filed. And not only do private lawyers file the new cases, we file new cases. So we filed a case in Wisconsin in early February of ’14. And we file a case in Alabama. And we file a case in Florida. In places that I hadn’t thought were good places to file. But we end up with, I think, seventeen lawsuits about marriage. That we were joint counsel on.

02-01:54:09
Meeker: Was the strategy just sort of like a tidal wave strategy?

02-01:54:12
Esseks: It didn’t start out as a tidal wave strategy. It started out as a continuation of the old strategy, like we’re going to pick our places. It turned into a tidal wave strategy. And it turned into something where it’s just like, okay, here’s a wave. It is happening. We need to ride it, and we need to do whatever we can to keep it—I don’t know how to keep the metaphor going—but keep it going in the right direction. So we did that both by filing cases wherever we thought made sense, as the sort of sense of the landscape evolved.

But also we had, I think, weekly coordination calls with the legal groups where we’re like, “Okay. So here’s a list of all the cases in the country. A bunch of these, one of the legal groups is counsel in. But then here are all the cases where we’re not counsel in. Who has talked to these people? If no one has talked to these people, who’s going to talk to these people? And who’s going to reach out and say, ‘Hey, we have these resources. We’d love to talk to you about this.’” And we weren’t trying to say, “Stop it, don’t do this.” Because that was never going to be a message that was going to work. But it was like, “Here are sample briefs. Here we are as a resource. We can talk about what’s working and what hasn’t worked. If you just want to talk stuff through, we’re there.” And we didn’t form a relationship with all of those private lawyer teams. But we formed a relationship with a bunch of them. And in some situations, movement lawyers ghostwrote things. In others we just

gave them stuff and we commented on drafts. And there was stuff they did all on their own. But it worked out, obviously, it worked out pretty well.

02-01:55:55
Meeker: So you did get involved with the *Obergefell* case?

02-01:55:58
Esseks: We got involved with *Obergefell* on appeal.

02-01:56:04
Meeker: Appeal from the district—

02-01:56:05
Esseks: Appeal from the district court to the Sixth Circuit. But chronologically, what happens that year in ’14 is the Utah case, and the Oklahoma case go to the Tenth Circuit. A court that was absolutely on my bad court list. A place not to bring a case. So much for my crystal ball, because that’s the first circuit to rule for same-sex couples. In a case that’s brought by private lawyers. Argued by a private lawyer in the Tenth. But NCLR is counsel. And I think they’re counsel on the appeal. I don’t think they were counsel in the trial court. I don’t think they were counsel until after they had won their amazing, wonderful decision from the federal district judge that December. But so that gets argued and then decided.

In the Virginia case, here we are. So it’s AFER, the American Foundation for Equal Rights—the poor folks who did Prop 8—they got into a private lawyer marriage case in Virginia. Lambda Legal and the ACLU had a separate marriage cases in a different federal district in Virginia. We end up together in the Fourth Circuit. And I argue our piece of that case in the Fourth Circuit. And that comes out very well, which was kind of exciting.

02-01:57:36
Meeker: Was this the one piece of marriage litigation that you did?

02-01:57:39
Esseks: I argued that, and I argued a case in the Seventh Circuit as well. So the Tenth Circuit comes out. The Fourth Circuit ruling comes out. Then in August of ’14, the four cases that ultimately go to the Supreme Court from the Sixth Circuit get argued before the Sixth Circuit. So that’s the Ohio case, *Obergefell*, and the Kentucky, Tennessee, and Michigan cases. And they get argued all by private lawyers. We—the ACLU, Lambda Legal, NCLR, and GLAD—all put together sort of a Q&A document to help prep the oralists. We’re like, “Okay, all of these people are going to stand up in front of the same panel of judges, on the same day. We want to make sure they’re singing from the same handbook. And so we put together documents and offered them to them, and we organized a practice argument—a moot court—in Nashville. And the Tennessee, Kentucky, and Ohio lawyers all came to that. The Michigan folks decided they didn’t want to. But that was an effort by the movement—by the legal orgs—to try and make sure that these folks were going to as good a job

as they could, and they did a great job at the oral argument. And then the Indiana and Wisconsin cases get argued before the Seventh Circuit in Chicago. And I argued that—the Wisconsin part of that as well. And we win a week later.

02-01:59:10
Meeker: What were those arguments like? The ones that you did before the Seventh and the—

02-01:59:16
Esseks: They were terrifying and thrilling.

02-01:59:18
Meeker: Is arguing before the circuit court a lot like our experience of what happens before the Supreme Court?

02-01:59:26
Esseks: It's the same idea, but the stakes are lower. There are three judges, not nine. The courtroom is fancy, but not as intimidating. There was a packed courtroom in both of those arguments, and a lot of pressure. It was great fun. It was scary, but great fun. I've been thinking about and litigating these cases for over a decade at that point. So I should be ready for this. And I feel like I was. And certainly the arguments came out well.

02-02:00:11
Meeker: In a different trajectory, either of these could have gone before the Supreme Court.

02-02:00:15
Esseks: Yeah. So the Supreme Court finishes its term at the end of June.

02-02:00:31
Meeker: Twenty fourteen.

02-02:00:33
Esseks: Fourteen. Yup. And then people keep filing petitions for cert for Supreme Court review. But the Court doesn't act on the ones that come in over the summer until the Monday before the first Monday in October. So there's a scramble over the course of the summer of '14 to get cert petitions in from all these different marriage cases. So there are cert petitions into the Court from Utah and Oklahoma, and from Virginia. Three different versions of the two different cert petitions from Virginia. So we were in Virginia, but not in the first two.

And then, because we get a decision from—and this going back to the Chief Judge in New York, Jacobs, Judge Jacobs. And I'm talking about the *Windsor*, the Chief Judge. Dennis Jacobs. I mentioned he was very cognizant of sort of the landscape and the calendar. And sped up a decision so that way we could be in the running for the Supreme Court. Judge Posner, who is a very well known Seventh Circuit judge who wrote the opinion in the Seventh Circuit, he

does the same thing. Because we argue at the end of August, and within a week, we have a decision from him. And we get a decision. It may have been a Friday, or maybe it was a Thursday or a Friday? We've won. So the states of Indiana and Wisconsin file a cert petition like that Monday. And we file our response—our opposition, or our response to the cert petition—the same day in order to get it fully briefed in a time that it can be distributed so that the Court can decide the issue—whether to grant cert or not—with Oklahoma, Utah, Virginia, Wisconsin, and Indiana all together.

So they have cert petitions from five states. All about marriage. Three circuits. Yeah, three circuits. Five states. All on their calendar. And everybody is convinced—this shows how much we know—everybody's convinced, I'm convinced, that the Court's going to take one of them, or two of them, and all of the handicapping and speculation is like, well, which is it going to be? Is it going to be Utah? Is it going to be Ohio? Is it going to be Oklahoma? What's it going to be?

02-02:03:21
Meeker: What did you think?

02-02:03:23
Esseks: I thought they were going to take at least one, and I thought they were likely to take Utah, because it had been first. And then after that, I wasn't sure. And obviously I wanted the Court to take one of ours. But we had three out of five, so I was like, mm, come on. We should not be shut out of this. And I'm on a call with various movement people, I think briefing the non-legal organizations about the cert petitions on the Friday before the Monday when the orders come out. And I remember someone says, "Well, you know, it's also possible that they just don't grant in any of these cases." I'm like, "Yes, it's possible. When pigs fly, they will not grant review in all these cases." And of course, then the next Monday, they deny cert in all those cases.

And what's just astounding about that—the reason I was like that's not going to happen—is that in that one single order, they created eleven new marriage states. And people just started getting married. And that's changing facts on the ground. And that is a signal that they're going to go our way. And in retrospect, it's clear that that's exactly what was going on. But I didn't expect that to happen. And here you have five states—the attorneys general of five states—say to the U.S. Supreme Court, "We want you to review this because we think this ruling is wrong." And they change the law without hearing merits briefs from any of those people. I can't tell you that it's unprecedented, but it feels like amazing, and feels like it's unprecedented that they would do something like that. You could say it's disrespectful to the states. I think it's very respectful of same-same couples, but the states wouldn't agree.

02-02:05:27
Meeker: I suppose that in the counterfactual, the Supreme Court, if the Sixth didn't rule in the way in which it did, the issue could have been resolved at the circuit courts, and the Supreme Court would have never had to—

02-02:05:44
Esseks: Yes, no. No, you're totally right because in the aftermath of the denial of cert in all these cases, the next day the Ninth Circuit rules in favor of the plaintiffs in the Idaho and Nevada and Hawaii cases, making five more marriage states. And so at this point we have thirty-five or thirty-six marriage states. I think it's thirty-five at that point, which is like seventy-something percent of the country. Going back to the map in terms of number of states and in terms of percentage of the population, and even without looking at the public opinion, all of a sudden we had the context. We had a better context than we ever thought we could get. We thought—I thought—the best we were ever going to get before we get a resolution from the Supreme Court is the nineteen states that we had gotten to in December of 2013 when we got New Mexico as a marriage state, because we got New Mexico and—

02-02:06:51
Meeker: California?

02-02:06:52
Esseks: Well, yeah, no. We got to seventeen in December of '13. California was thirteen. New Jersey. New Mexico. Illinois. Hawaii. That gets us to seventeen. And then we had Oregon and Pennsylvania because they're based on federal court litigation. But these were situations—they're both ACLU cases—wonderful situations for us because we win, and the governors decide not to appeal. And the Oregon governor's a Democrat, but the Pennsylvania governor is a Republican. And he decides he's in a re-election bid, and he's like, "It's not going to help me to appeal this." So it is a no. And marriage becomes a reality.

But I didn't think we could get past nineteen. And here we are with thirty-five states. And so we are all like, "Okay, well, that's exactly the context we wanted in order to present the issue to the Supreme Court.

02-02:07:50
Meeker: And that's about the same place we were when *Loving* [1967] was decided, right?

02-02:07:55
Esseks: Yeah. So I think there were sixteen states that still had interracial marriage bans when *Loving*—and that was like sort of a level, a map that we thought was unattainable throughout most of the planning in the movement. I got off on a tangent. Of course, he was like, "Okay, well, your counter-factual." We're like, "Well, if the Sixth hadn't ruled against us, we could just have gotten to a place where all the circuits ruled our way, and the Supreme Court didn't have to touch the issue." And there was a period of time, before the

Sixth Circuit ruled against us, where that's exactly what we were saying. Well, this is possible, and there were reporters writing about this, and just trying to scope this out. So how's this going to work, and would that be okay? And I'm like, "Well, if they all rule our way, yeah, it's okay. I mean, I'd like a Supreme Court decision that says this, and I'd like a Supreme Court decision that clarifies the doctrine some, because it'll help us in the rest of the work we need to do. But, sure. If we can win in every circuit, then we have some version of good law in every circuit as well."

02-02:09:01
Meeker: Well, and by the time you get to *Obergefell* in the circuit court, I guess there was a two-one decision, and the one dissenting justice basically suggests that the other two judges only ruled in that way because they wanted to kick it upstairs. What do you think of that?

02-02:09:23
Esseks: No, I don't know. I think that the guy—I'm doing terribly with names today—the guy who wrote the majority opinion in the Sixth Circuit—I think is a true believer, in the sense that I think that I don't think he believes in the freedom to marry. He certainly doesn't believe that the Constitution requires it. And so I don't think it was just creating an opportunity for the Supreme Court to rule on it. I think he believed it too. At that point, it was like okay, well, there's a clear split between the Sixth Circuit and four others. There's no question the Court's going to take the issue. The question is, which of these is it going to take? And again, the speculation was all over the place in terms of which ones are they going to do.

And an additional complication here is that the cases out of two states, Tennessee and Ohio, were just about recognition of out-of-state marriages. And Kentucky had recognition plus marriage, and Michigan had just marriage. And so if they were going to question like, okay, are they just going to take a recognition case? And just take another little baby step? Is that going to make sense? And I didn't think that made a lot of sense. But then, okay, well, they don't have to take recognition, they could just take marriage, and if they're just going to take marriage, they could take the Michigan case. And obviously they ended up taking all four, which was great. It put a bunch, and it put a series of wonderful stories before the Court. And just on a personal level, it allowed the four legal groups that had spent a whole lot of time working on this stuff to each be a part of the Supreme Court briefing process, and to be a part of bringing it over the finish line.

02-02:11:25
Meeker: What role were you playing in all of this?

02-02:11:28
Esseks: So I was lead counsel for the ACLU in the Ohio case and the Kentucky case, which doesn't mean lead counsel in either of those cases because they were multi-partner legal teams. And in Ohio it was Al Gerhardstein and his

colleagues in the firm, plus Lambda Legal, plus the ACLU. And in Kentucky it was two different firms. Local Kentucky firms, plus the Stanford Supreme Court Litigation Clinic. Again, and Jeff Fisher there. The same clinic that had helped us out in *Windsor*, plus the ACLU. And so I was working on briefs, managing the ACLU team that was writing some of the briefs. Emceeing large conference calls.

02-02:12:19
Meeker: When you're saying "writing the briefs," these are *amicus* briefs, right?

02-02:12:22
Esseks: No, these are the party briefs.

02-02:12:23
Meeker: The party briefs, okay.

02-02:12:25
Esseks: So, because there were four sets of party briefs, one for each of the states. And so there's a brief from the plaintiffs in Kentucky, and a separate brief from the plaintiffs in Ohio. And so we were part of putting in two opening briefs for those, and then there were separate briefs in Tennessee and from Michigan filed by the legal teams there. We obviously spent a bunch of time coordinating, showing drafts, and talking to each other about what was in them. And making sure that we were not making arguments that were inconsistent to any of them. You mentioned *amicus* briefs. So, the friend of the court array was something that I didn't spend a lot of time on myself. There were lawyers on my team here at the ACLU who spent a lot of time on that. Mary Bonauto was riding point on that effort, sort of big picture, and managing that team. Just as she had done in *Windsor*.

02-02:13:23
Meeker: Can you characterize what the combined legal strategy was in the briefs? There's a lot of speculation. Are these things just basically written for Anthony Kennedy? And understanding his, initially, his history and his concerns?

02-02:13:45
Esseks: Everybody knew that this was all about Kennedy. That was no great insight. So yes, we and everyone else were trying—on both sides—were trying to write for Kennedy. And so we wanted to write following up on *Windsor*. *Windsor* was about equal dignity. I think one of the last lines in *Obergefell*, in the majority opinion that Kennedy writes, talks about equal dignity. And so that was clearly central to how he decided it. But equal dignity is a concept that he also talks about in *Windsor*. And so we were all trying to milk everything we could out of *Windsor* and make him see the parallels between the DOMA situation and the marriage situation.

The briefs that the four legal teams produced were different in noticeable, serious ways. And without going into sort of the details—I'm not sure I can

even recreate all the differences—but I remember after the opening set of briefs were filed, reading through each of them and thinking that the combination of them was enormously powerful. Because we weren't just repeating arguments that others had made. Well, obviously, there's some overlap. But the framing, the focus, the question about what the order was of the arguments differed across all the briefs. And I thought that was actually really good because it gave the justices really different takes on the issue. So you hoped that one of these is going to work for that. One of these is going to fit with the way they're thinking about it. It'll give them a way that works for them.

02-02:15:44
Meeker: How was it decided that Mary Bonauto was going to lead the argument?

02-02:15:49
Esseks: Lots of discussions.

02-02:15:55
Meeker: Is that all you have to say?

02-02:15:59
Esseks: Has Mary talked to you about that?

02-02:16:00
Meeker: Nope. She's not on the docket to be interviewed. I would love to interview her, however. And remember, you can seal portions of this interview if you want. And not to have it released right away. It's up to you.

02-02:16:21
Esseks: Let me just leave it at this. That there was, I would say, a selection in process that involved—I mean, you can imagine. You've got four legal teams that each have lots of lawyers on them. Large numbers of whom would be entirely equipped and well-qualified to argue, all of whom want to argue. Each of the legal teams wants to have its person stand up at the podium. And so that's a difficult thing to resolve. And to figure out how. We can't have twelve people. We can't even have four people stand up. We can have two people stand up. And so there was a bunch of discussion, and a bunch of process to work through that. And we got to wonderful decisions.

02-02:17:19
Meeker: All right. Fair enough. If I get the opportunity to speak with her, I'll try to get her perspective on it. I'm sure that it must have been difficult for you. Your cases are right up there. And no doubt you would have done an excellent job.

02-02:17:38
Esseks: She and Doug both did fabulous jobs. I think we came out a really good place.

02-02:17:45
Meeker: I thought that she had a bit of a rough start. I thought that she could have really picked up on the question on historicization of marriage and the way in

which the justices didn't have a very nuanced view of that. In other words, they said marriage has not changed over thousands of years, when in reality, it's changed drastically. Still, you can't put yourself in someone's position as they're sitting there arguing before the Supreme Court. How intimidating could that be?

02-02:18:23
Esseks: I was sitting in the courtroom, just a row behind her. I think she wasn't sure where that question was coming from. And I think she also was trying to push back and wasn't given a whole lot of space. But the challenge in oral argument is to take the space. But I remember sitting there, listening to her talk, but also being puzzled about how I would have, myself, gotten to a different place. I'm not sure what I would have said.

02-02:19:18
Meeker: What an amazing, difficult position to be in. Kate Kendall described it. And she's like, "It must be like one of those moments where time stands still, and somebody drops a pin down at the end of the hall and it sounds like an explosion." That kind of thing.

02-02:19:37
Esseks: Yeah. You're in a courtroom. You had to focus at attention. And you prep for this for a long time. And the questions are coming at you, and some are the things that you've been asked before, and some of them are not. Like that one. And so I'm sitting there thinking, "Oh. Things are coming up that we didn't go through. We fucked up. We didn't think of all the different, crazy things that people could ask." And we covered a lot. And we had a lot of people thinking up all the different things, and figuring out what the answers were. But you never get it all.

02-02:20:16
Meeker: What did you think of the questioning?

02-02:20:24
Esseks: I haven't read the transcript in a while. I remember Scalia had a series of questions that were about religious liberty. Were about whether priests could—something about whether—I don't remember. But I remember thinking that he was asking ridiculous questions. You sit there, and you work through a whole lot of case law, and doctrines, stuff like that. The questions don't go in detail into a whole lot of doctrine. Because that's not what it's about for them. They're like, well, we'll come up with the doctrine later. They're trying to figure out what the right answer is. What the right answer is policy-wise, and—even though they're not supposed to be doing policy stuff—and I think they're trying to figure out is this something the Court can do? And not all their questions go to that, but I think that's what's going on in their heads on a case like this. Because each of them know how to write a decision that goes our way and that goes the other way with the doctrine that

exists, and moving it where they want to go. This was a question of are they comfortable with the result.

02-02:22:00
Meeker: Was there anything in the questioning that, like in *Windsor*, made you question Kennedy's direction?

02-02:22:06
Esseks: Where Kennedy was? The answer to that question is yes, and I don't remember what it was. And I don't remember if it was body language or a specific question or what, but I remember coming out thinking, "I think this is good." But I didn't come out solid. "Oh my God, of course we won this." I continued to be uncertain until we got the decision at the end of June.

02-02:22:45
Meeker: I think one thing that happened in the interim period of time was what happens in Ireland. And here you have a nation that's pretty heavily Catholic. Anthony Kennedy is Catholic. I can't help but speculate if that might have come just sort of at the right time. You don't necessarily have anything to say about that, but, I remember it was—

02-02:23:10
Esseks: It's part of the growing context. And growing context in terms of public opinion in the U.S., and the number of marriage states, and the percentage of the population that lives in a marriage state in the U.S. But also the international context. And I think that the little I know about Kennedy is that he is reputed to be someone who travels in Europe every summer, and he thinks about international law more than—and relies on international law more than—a bunch of the other justices do. And his decision in *Lawrence v. Texas* in '03 about sodomy laws, he talks about international law. He talks about foreign law. And actually some international. The European Court of Human Rights, I think, decisions about those issues. So I think it stands to reason, given that background, that the Ireland situation would make a difference to him.

02-02:24:06
Meeker: Tell me where you were when the *Obergefell* decision comes down.

02-02:24:10
Esseks: I was in the courtroom. I and a number of other advocates started going to court in the second half of June. So the Court tells you when decision days are. When it's going to issue decisions. But it doesn't tell you what decisions are coming out on those days. And so, if you want to be there, you got to be there. *Obergefell* was argued in the second to last week of the term. And so it stood to reason that the decision was going to take a while to write. We thought there was going to be some conflict, and it wasn't going to be a simple thing to write. So that all pointed to it coming out towards the end of the term. So for several decision days in a row, I was there, and Mary was there. And

Kevin Cathcart from Lambda was there. And Susan Summer from Lambda was there. And other folks.

02-02:25:26
Meeker: What do you do? Do you actually go into one of the—

02-02:25:29
Esseks: You stand in line to make sure that you can get in. Because we weren't sure whether there'd be crowds. It was hard to get in for the argument, but since you don't know when the decision's coming out, it's not like there's crowds. So you stand in line. Wait around. Wait around. And then they let you into the courtroom.

And the justices come out on the bench, just as they do before argument. And then the Chief says, "Justice Kennedy has our opinion today in number of blank, blank, blank, *Obergefell v. Hodges*." And you grip the chair. And you're like, okay. We're like, okay, Kennedy, good. And then he starts talking. And he starts telling us about the facts. They read, not the whole opinion, but they read a little summary that they've put together. And he starts telling us about the facts. And I'm like, "Dude. No one in the room needs to know the facts of this case." We want to know who wins. And I forget what it is he says, but at some point fairly early on, he says something that makes it clear that we won.

02-02:26:43
Meeker: What was that like?

02-02:26:44
Esseks: I was crying. I was crying. There were a lot of people crying. The guy sitting next to me. I met him, talked to him. I don't remember his name. I think he was just a gay guy who was involved in the movement in some way, but not in the organizations that I'm closest to. Bawling. Just completely bawling. Uncontrollable. Which I totally, totally got. But so then you sit there and listen to him—Kennedy—finish reading. And then the Chief reads a dissent from the bench. Which, I'm told, is the first time he's done that in the ten years he's been on the Court. And that's a sign that you're pissed. That you really disagree. And his summary ends with the line that ends his opinion which is something along the lines of, "Go and celebrate marriage and all of this, but don't celebrate the Constitution, because the Constitution had nothing to do with it."

02-02:28:03
Meeker: Were you surprised? Because there was some speculation that Roberts would have ruled in favor of marriage.

02-02:28:08
Esseks: Yes, there was a lot of speculation that he would rule in favor of marriage. That if there were five votes for it, he would be a sixth. That he would not want to be on the wrong side of this issue. That he wants to lead the Court.

That he was going to do here what he did in the Affordable Care Act cases. I did not think that was going to happen. My read of him at oral argument was, "This is not a man who's comfortable with us. He's not comfortable with this issue." So I was not surprised. I was not surprised that he wasn't in the majority. I was surprised at the—at what I experienced to be—the venom that he displayed.

02-02:28:51
Meeker: What did that feel like after having this moment of catharsis and acceptance?

02-02:28:56
Esseks: Yeah. Yeah. It's a reminder. It's not over. So part of it was like, okay, well, hey, big buy, Mr. Chief Justice, you didn't win. And so on some real, basic level, it doesn't matter. But it still, yes, it felt nasty. It felt really dispiriting to have that level of obvious frustration come from him. And I expected Scalia to read from the bench. But he didn't. I was expecting that there would be a dissent from the bench, but it would be Scalia, not Roberts.

02-02:29:51
Meeker: Well, his written dissent was—

02-02:29:54
Esseks: This was plenty. It was plenty.

02-02:29:57
Meeker: This may seem like a strange question, but you mentioned that other guy in the courtroom who had worked in some gay organizations having kind of really a profound emotional response to it. Of joy and crying uncontrollably. Would you speculate what that intensity of emotion is about?

02-02:30:28
Esseks: I think that I felt a version of the same thing. Where you grow up being told that you're different, and lesser, and defective in a certain way because you don't have relationships that are important. You don't have relationships the way other people do. And that gets under your skin. And that just becomes part of how you see yourself. And that's part of what the marriage ban said to lesbian, gay, and bisexual people, and some transgender people, across the country. You guys are defective. And to have that lifted on a nation-wide basis by a court that is revered as a protector of individual rights—whether it is or not—it has that role and that status in the country—is validating, in such a profound way. That's why the marriage issue is so important to so many people, and also so important to LGBT rights more generally. There's a lot of criticism. And understandable criticism in the LGBT advocacy moment about, "Ugh, why did you guys spend all this time on marriage? Isn't that a bougie issue? How is it changing people's lives?"

I think civil rights movements go through phases. And I think that there are different steps or stages that you have to go through. And the beginning is you've got to get rid of laws that require discrimination. That require the

government to discriminate against you. *De jure* discrimination. In the race context, it's slavery. It's Jim Crow segregation laws. It's explicit voting bans, and poll taxes, and stuff. In the sex discrimination context, it's coverture where women are property of men and can't vote, or can't sign contracts because they have no legal existence outside of their husbands. Or not having the right to work, et cetera. And then you go on to other things that you got to do. But the foundational thing that you got to do is get rid of the laws that require discrimination. DOMA was one of those. The marriage bans were one of those. The don't ask, don't tell law was one of those. The immigration ban. Gay people used to be banned from immigrating into the country.

We've gotten rid of most of those for lesbian, gay, and bisexual people. This was the last big one. That's why I think it was worthwhile for the movement to focus as much as we did on this issue, because it's important to get rid of *de jure* discrimination. And again, I'm not saying that slavery is the same as the marriage ban, at all. Obviously very different things. But I'm saying there are certain kinds of discrimination, certain kinds of barriers, that it's important to get rid of, and I think marriage is one of those things. And I think idea of official discrimination, an official statement by the state and by the federal government that you're different and lesser is something that is a prerequisite to making any other progress.

And so, just to get back to your question about the guy who's breaking down beside me, that's what's been removed. And it's something that he lived with all his life. That I've lived with all my life. And it's hard to appreciate how deeply that gets inside you.

02-02:34:51
Meeker: I think maybe we should just end there. Is there anything else you'd like to add? Undoubtedly there's still a lot we can talk about, right?

02-02:35:03
Esseks: No. I think we're good.

02-02:35:11
Meeker: All right. Well, thank you very much. I really do appreciate that, and that was a real remarkable way to end. I think it will encapsulate quite a bit. So, thank you so much, James.

[End of Interview]