

Marriage Watch: California — FAQ

What the California Supreme Court's Decision in *Strauss v. Horton* (the Prop 8 Legal Challenge) Means

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WHAT WAS STRAUSS V. HORTON?

Strauss v. Horton was the lesbian, gay, bisexual and transgender (LGBT) community's challenge to Prop 8, the California constitutional ballot measure that passed on November 4, 2008. Prop 8 aimed to negate the sweeping and historic decision we won in the California Supreme Court in May 2008 that same-sex couples have the constitutional right to marry, which opened the door for more than 18,000 same-sex couples to marry in the state before the election. Lambda Legal and our co-counsel at the National Center for Lesbian Rights and the ACLU filed *Strauss* the morning of November 5. Other challenges were filed later that day. All cases were decided together.

WHAT DID THE CALIFORNIA SUPREME COURT DECIDE ABOUT PROPOSITION 8?

The Court disagreed with our understanding of California's initiative process and equal protection guarantees, and ruled that a majority *can* take basic rights away from a minority through a simple popular vote. That means Prop 8 did effectively close the door as of November 5, 2008, on same-sex couples who want to marry in California.

WHAT ABOUT COUPLES WHO GOT MARRIED IN CALIFORNIA IN 2008?

The Court agreed with us that same-sex couples who married in California with a valid license between June 16 and November 4, 2008, remain married, and must be respected as married within California. This is because married couples have constitutionally protected, vested rights in remaining married unless and until *they* decide otherwise, and Prop 8 was not written to eliminate those rights retroactively. We are concerned that some married same-sex couples may experience discrimination because others

mistakenly may believe Prop 8 does operate retroactively. To help fight discrimination against married same-sex couples if it occurs, Lambda Legal is launching a campaign called Marriage Watch: California, which invites those whose married status is disrespected to contact us. See below for more information.

WHAT ABOUT COUPLES WHO GOT MARRIED OUTSIDE CALIFORNIA?

The Court declined to answer this question, but we believe that same-sex couples who married outside California before November 5, 2008 should be treated as married in California. Same-sex couples who married outside California after November 5, 2008 should be given all California spousal rights and responsibilities, though without the designation of marriage. The Marriage Recognition and Family Protection Act (California Senate Bill 54), currently awaiting signature by the governor, confirms this understanding.

If you have a legal problem because your marriage is disregarded within California, we invite you to contact Lambda Legal's Marriage Watch team. Contact information is below.

IF WE ENTERED INTO A CIVIL UNION IN CONNECTICUT, NEW HAMPSHIRE, NEW JERSEY OR VERMONT OR A REGISTERED DOMESTIC PARTNERSHIP IN OREGON OR WASHINGTON, WILL IT STILL BE RESPECTED IN CALIFORNIA?

Yes, out-of-state civil unions and broad registered domestic partnerships are honored in California and are treated like domestic partnerships registered there. Prop 8 does not affect this rule.

DID THE COURT ABANDON ITS MAY 2008 RULING THAT DOMESTIC PARTNERSHIP IS NOT CONSTITUTIONALLY ADEQUATE BECAUSE IT'S SEPARATE AND UNEQUAL TO MARRIAGE?

No. The Court reaffirmed last year's ruling that California's registered domestic partnership system does not treat lesbian and gay couples equally because it is separate for no valid reason and lacks the common meaning and esteem of marriage, as well as several legal protections. As our country continues to address the problem of discrimination against same-sex couples and their families, it is very important that the high court has reemphasized that domestic partnership and civil union schemes are not equal to marriage. While those schemes reduce the harms inflicted on

PLEASE NOTE: This document offers general information only and is not intended to provide guidance or legal advice regarding anyone's specific situation. This is an evolving area of law in which there is bound to be uncertainty, and we will be working with California attorneys to promote the best results. If you have additional questions or are looking for contact information for private attorneys who might advise you, contact Lambda Legal's Marriage Watch team through our Help Desk at 213-382-7600 ext. 300 (toll-free: 866-542-8336) or <http://www.lambdalegal.org/marriagewatch>. Se habla Español también.

same-sex partners and their families, such “less than” systems are inconsistent with the promise that everyone is to be equal before the law.

DOESN'T THE COURT'S DECISION CREATE A BASIS FOR A NEW LEGAL CHALLENGE BECAUSE NOW SOME SAME-SEX CALIFORNIA COUPLES ARE MARRIED, BUT OTHERS CAN'T MARRY? HOW CAN CALIFORNIA DIVIDE ITS GAY RESIDENTS INTO TWO GROUPS LIKE THAT?

Prop 8 has created a blatantly unfair and nonsensical situation. And that is where the court has left us by deciding that initiatives can be used to withdraw basic rights from a minority. The California Constitution's guarantees of equality now have an antigay exception and can no longer be grounds for a suit in state court challenging discriminatory exclusion of same-sex couples from marriage.

SHOULD PROP 8 BE CHALLENGED NOW IN FEDERAL COURT?

Litigation challenging Prop 8 is already pending in federal court and many in the community also are making plans to undo Prop 8 at the ballot box. Winning equality state by state, as we have been doing, continues to be an extremely important goal. These victories not only advance equality for residents of those states but also expand the foundation of state support that is important for winning a federal challenge.

IF WE CAN'T MARRY IN CALIFORNIA NOW, SHOULD WE REGISTER AS DOMESTIC PARTNERS, ENTER A CIVIL UNION OR GET MARRIED OUTSIDE CALIFORNIA?

In many ways, the answer is the same as it is for different-sex couples deciding whether to marry: such very serious decisions are up to you. Both marriage and California's registered domestic partnership are important commitments entailing state-law rights, protections and responsibilities that affect a great many aspects of your life. Couples who enter a civil union or broad domestic partnership in another state are treated in California as registered domestic partners, with all the same rights and duties under California law. It is easy for same-sex couples to register as domestic partners in California, but a court proceeding (like a divorce action) is usually necessary to dissolve that status. Before formalizing your relationship with a legal status under state law, it is important to consider the legal implications and make an informed decision that is right for both of you.

WHAT ARE THE RIGHTS AND RESPONSIBILITIES OF MARRIED COUPLES AND REGISTERED DOMESTIC PARTNERS UNDER CALIFORNIA LAW?

Married couples, civil union spouses and registered domestic partners all have the many diverse rights and duties state law confers on legally recognized couples. This complex web of state-based rights and responsibilities includes, for example:

- rights relating to emergency medical decisions and hospital visitation
- economic protections upon death of a spouse or partner, such as inheritance rights
- rights regarding a spouse's or partner's burial, autopsy and disposition of remains
- rights to bring wrongful death and other kinds of claims that depend upon a state-conferred status
- rights to receive workers' compensation benefits if a spouse or partner dies in the workplace
- health insurance and pension benefits for spouses and partners of public employees
- joint ownership of income earned and, in most cases, property bought during the relationship
- entitlement to file joint state tax returns, take certain deductions on state income taxes, and receive tax benefits when transferring interests in property within the relationship
- access to court and the legal procedures for managing the ending of a relationship, any duties to provide spousal or partner support to each other and responsibilities regarding any children of the relationship.

Never forget that benefits under state law come with legal responsibilities, such as liability for each other's debts, limitations on the ability to make unilateral decisions about property and inheritance, and potential obligations to provide financial support both during the relationship and after a divorce or dissolution.

DON'T MARRIAGE AND DOMESTIC PARTNERSHIPS ENTITLE EMPLOYEES TO HEALTH INSURANCE AND OTHER EMPLOYMENT BENEFITS TO PROTECT A WORKER'S SPOUSE AND/OR REGISTERED DOMESTIC PARTNER?

Under California law, public sector employees with a same-sex spouse or registered domestic partner are entitled to employment benefits equal to those their co-workers receive for a heterosexual spouse. These benefits usually include spousal health insurance, eligibility for continued health insurance after the employee or retiree dies and death benefits.

Due to a federal law that limits states' power to ensure that private sector employee benefit plans are fair, California law often cannot force private employers to treat married or registered gay employees the same as married heterosexual employees for purposes of spousal health insurance, surviving spouse pensions and certain other benefits. Private employers, of course, can choose to provide equal health insurance coverage for the spouses and domestic partners of their lesbian and gay employees. Many private employers recognize that providing equal family benefits is

an important part of valuing their employees and honoring their own promises not to discriminate based on sexual orientation and marital status. For information about advocating for equal employment benefits, see Lambda Legal's "[Out At Work Took Kit](http://www.lambdalegal.org/take-action/tool-kits/out-at-work)" (<http://www.lambdalegal.org/take-action/tool-kits/out-at-work>).

If you do receive spousal or domestic partner health insurance from your employer, be aware that your employer must report the value of that benefit as additional income to you that will be taxable by the federal government unless your spouse or domestic partner qualifies as a dependent under federal tax law. If you are considering enrolling for family benefits, consider asking your employer about the value of the benefits and whether your spouse/domestic partner will qualify as a dependent under federal law so you will know how much more you will have to pay in federal income taxes.

WHAT DOES BEING MARRIED OR REGISTERED MEAN FOR FEDERAL BENEFITS AND PROTECTIONS?

The federal government does not presently respect same-sex couples' marriages, civil unions or registered domestic partnerships for purposes of federal benefits, protections, and obligations tied to marriage. These include income and estate taxation rules, certain immigration protections, Social Security protections and many others.

For example, as noted above, for employees married to or registered with a same-sex life partner, the value of health insurance benefits provided by an employer for a same-sex spouse or partner is counted as income to the employee on which federal income tax must be paid. In contrast, for married heterosexual employees, the value of health insurance for a spouse is not taxable income.

Likewise, where U.S. citizens and permanent residents can adjust the immigration status of a foreign-national partner based on a heterosexual marriage, it is not possible to do so for a same-sex spouse or domestic partner.

Also, registering and/or getting married disqualifies some people from state income-based assistance programs, because a spouse's income and assets often are counted in with those of the applicant. Our sister organization, Gay & Lesbian Advocates & Defenders (GLAD), has challenged certain aspects of the federal government's refusal to honor and treat equally same-sex relationships that are formalized under state law, and the Commonwealth of Massachusetts has filed its own lawsuit challenging this discrimination. As long as federal law discriminates, there will be unfair and confusing legal and financial implications for many same-sex couples. It is wise to get both financial and legal advice regarding the likely implications for you and your partner before getting married and/or registering as domestic partners.

WHAT OTHER UNCERTAINTIES DO SAME-SEX COUPLES FACE THAT MAY AFFECT WHETHER TO MARRY OR REGISTER AS DOMESTIC PARTNERS?

In addition to the fact that same-sex couples who marry and/or register their domestic partnerships are not treated as family by the federal government, the fact that many states refuse to respect same-sex relationships poses additional challenges. For example, when couples travel or move to a hostile state, it often is uncertain how they will be treated in a crisis. Also, many states that deny legal recognition to same-sex relationships do not allow married and registered lesbian and gay couples to file a court action for divorce or dissolution if the relationship ends — as happens with roughly half of all heterosexual marriages.

For some people, there are other special issues to consider before marrying or registering:

- The military may view marrying or registering with a same-sex partner as grounds for a discharge under its discriminatory policies towards lesbian and gay personnel.
- If one member of a couple lacks legal status in this country, marrying or registering with a same-sex partner could pose problems. For more information, consult Immigration Equality at www.immigrationequality.org.
- If a person wishes to adopt a child, it is important to note that some states and countries allow adoptions by unmarried individuals but not same-sex couples (whether in formalized relationships or not). Depending on where a gay person or couple hopes to adopt, marriage or domestic partnership registration could complicate matters.

CAN AND SHOULD CALIFORNIA RESIDENTS WHO ARE IN SAME-SEX RELATIONSHIPS MARRY OUTSIDE CALIFORNIA?

Connecticut, Iowa, Massachusetts, New Hampshire (as of January 1, 2010) and Vermont all allow nonresident same-sex couples to marry in their states, although the marriage must be performed within the state that issues the marriage license. Maine has enacted a marriage equality law and it will take effect if state voters approve it in a referendum on the November 2009 ballot. It is important to be aware, however, that these states do have residency requirements to bring a court proceeding to end a marriage. California Senate Bill 54, currently awaiting the governor's signature, aims to clarify that same-sex couples married in other states and who meet California's residency requirements should be permitted to dissolve their legal relationships in California courts notwithstanding Prop 8. Note that the legal landscape of marriage and family relationship protection for same-sex couples is evolving steadily. Check Lambda Legal's Status of Same-Sex Relationships Nationwide for updates: <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html>.

WHAT ARE THE DIFFERENCES BETWEEN MARRIAGE AND REGISTERED DOMESTIC PARTNERSHIP? WHY ISN'T DOMESTIC PARTNERSHIP ENOUGH?

The overriding difference is that everyone understands marriage. That common understanding and the widespread esteem for the institution of marriage generally ensure that married people's family relationship and the accompanying legal rights are honored. In contrast, everyone understands that domestic partnership is neither the same nor equal to marriage. Equal access to marriage leads to equal and respectful treatment of same-sex couples, while exclusion of gay couples from marriage tacitly endorses antigay discrimination. That is the essence of the California Supreme Court's 2008 *In re Marriage Cases* decision, an analysis the Court reaffirmed in the *Strauss* decision. The *Strauss* decision also indicates that Prop 8 only restricted access to the licensing and language of marriage, and did not otherwise change the California Constitution's numerous equality guarantees. Therefore, it appears that the state-law rights and duties of spouses and of registered domestic partnerships should be seen as the same despite the handful of minor legal differences still existing in the state's law books.

CAN AND SHOULD MARRIED SAME-SEX COUPLES LIVING IN CALIFORNIA ALSO REGISTER AS DOMESTIC PARTNERS?

Yes. Being both married and in a registered domestic partnership is double the protection for traveling because some states respect same-sex couples' domestic partnerships but not their marriages, and others honor their marriages but do not recognize domestic partnerships.

SHOULD COUPLES WITH A SECURE LEGAL STATUS LIKE MARRIAGE AND/OR A REGISTERED PARTNERSHIP TAKE OTHER PRECAUTIONS?

Yes. This is a rapidly evolving legal area with much uncertainty. While some states now respect same-sex couples' legal relationships, the federal government and many other states do not yet do so. It is especially important to consider whether you have taken sensible steps to secure legal protections when you are traveling outside California. You should consult an attorney, if possible, about steps you can take to provide more security to your family — in addition to being married and/or registered if those steps are wise for you. For example, legal documents like wills, health care proxies or advance directives and powers of attorney provide additional protection. Married heterosexual couples often prepare these documents to provide greater security for their families. Such documents are even more important for same-sex couples whose relationships are respected in some states but not others. More details are in Lambda Legal's life-planning publication "*Take the Power*" (<http://www.lambdalegal.org/publications/take-the-power>).

WHAT IF SOMEONE REFUSES TO TREAT ME OR US AS MARRIED BECAUSE OF PROP 8?

Lambda Legal is concerned that married gay people may encounter unlawful discrimination and disregard of their marriages — contrary to the Court's decision in *Strauss* — just as we have seen domestic partnership rights and protections too often disregarded in California. We encourage anyone whose married status is disregarded based on Prop 8 to contact Lambda Legal's Marriage Watch team at 213-382-7600 ext. 330 (toll-free: 866-542-8336) or <http://www.lambdalegal.org/marriagewatch>.

WHAT IS LAMBDA LEGAL'S MARRIAGE WATCH: CALIFORNIA?

Marriage Watch: California is a monitoring and support program designed to ensure that married same-sex couples in California are treated fairly despite Prop 8's passage. Through Marriage Watch: California, Lambda Legal:

- provides information and support to married same-sex couples who experience discrimination
- brings appropriate legal test cases to clarify and enforce the law when married same-sex couples' legal status is not respected
- and helps married same-sex couples speak out about how being married provides greater legal security and protection to their families, so Californians can understand that targeting and discrimination against some families is harmful and wrong.

COLLABORATION TO SERVE THE DIVERSE LGBT COMMUNITY

Lambda Legal is pleased to launch Marriage Watch: California in collaboration with the following community-based groups working to advance marriage equality within communities of color in California and across the state's diverse faith communities and traditions:

- API Equality-LA
- California Faith for Equality
- the Jordan/Rustin Coalition
- the Latino Equality Alliance

CALL TO ACTION

If you or anyone you know experiences discrimination or disregard of a legal marriage based on Prop 8's passage, or if you have additional questions or are looking for contact information for private attorneys who might advise you, contact Lambda Legal's Marriage Watch team through our Help Desk at 213-382-7600 ext. 300 (toll-free: 866-542-8336) or <http://www.lambdalegal.org/marriagewatch>. *Se habla Español también*. For California residents seeking information about these issues in Chinese, Khmer, Korean or Vietnamese, please contact our partners at the Asian Pacific American Legal Center at 213-977-7500 or <http://www.apalc.org>.