ANATOMY OF A COMPLAINT

How Hollywood activists seized control of the fight for gay marriage

BY CHULEENAN SVETVILAS

IT WAS NEARLY 3:25 P.M. ON MAY 22, 2009—the Friday before Memorial Day weekend—when Enrique Monagas approached the counter at the court clerk's office in San Francisco's Federal Building to file a complaint. Although Monagas tried to appear nonchalant, his heart was pounding.

The Gibson, Dunn & Crutcher associate had been told by his firm that secrecy was absolutely critical. Monagas hadn't revealed to anyone—not even his secretary or family—anything about the case. Secrecy was the reason he was filing in person rather than using Gibson Dunn's regular service. His instructions were to wait until the last possible moment, and the deadline for presenting new matters was 3:30 p.m. Dressed in his usual casual Friday clothes, Monagas nervously handed over the short stack of papers.

"This must be an important filing," the clerk said.

"I haven't even read it," Monagas quickly replied.

After all the copies were stamped, the clerk entered the filing information into the computer, which assigned a case number and randomly selected a judge. Monagas saw the initials "VRW" and realized that the case—*Perry v. Schwarzenegger,* 09-2292—had been assigned to Chief U.S. District Judge Vaughn R. Walker. Monagas walked out of the building hoping that no reporter would pick up the story over the long weekend. No one did.

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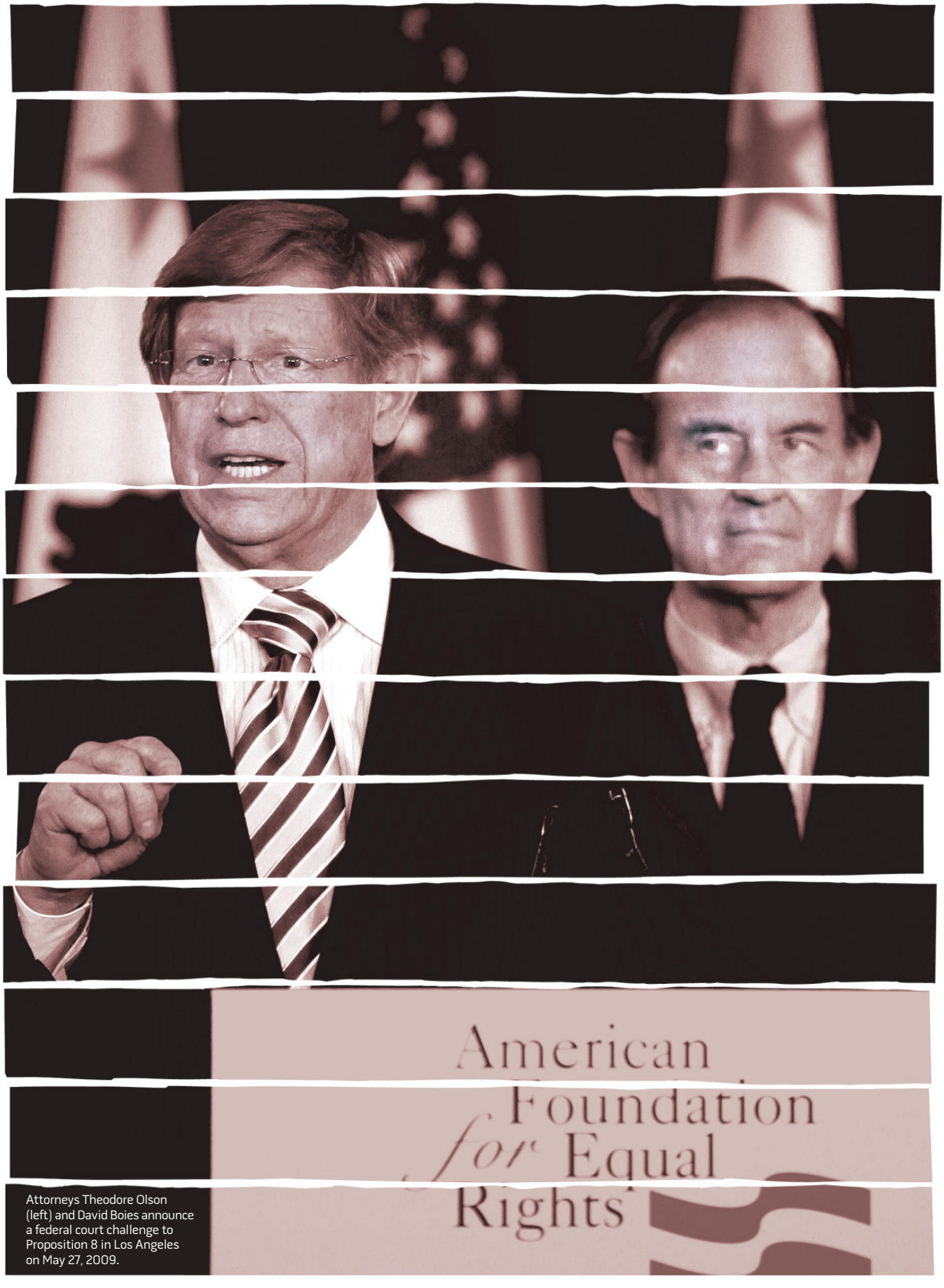

Attorneys Theodore Olson (left) and David Boies announce a federal court challenge to Proposition 8 in Los Angeles on May 27, 2009.

AP Photo/Damian Dovarganes

For months, the people backing the *Perry* suit had worked in the shadows. They wanted the complaint to be *the* challenge to the constitutionality of Proposition 8, the November 2008 statewide ballot initiative that declared, "Only marriage between a man and a woman is valid or recognized in California." (Cal. Const., Art. I, § 7.5.) That measure effectively repealed the right of same-sex couples to marry, which California's Supreme Court had recognized under the state constitution's privacy clause in June 2008 (*In re Marriage Cases,* 43 Cal. 4th 757 (2008)).

"We didn't want there to be an explosion of lawsuits around the country," says Theodore Boutrous Jr., a partner in Gibson Dunn's Los Angeles and Washington, D.C., offices who helped draft the complaint. The litigation group was mindful, however, that many lesbian, gay, bisexual, and transgender (LGBT) advocacy groups were pursuing a different strategy to legalize same-sex marriage, taking a state-by-state approach and avoiding a federal challenge. "We did not want to have a big debate about what we felt was the right strategy," Boutrous explains. "We did not want that debate to break out before we launched our suit."

Anticipating an adverse ruling by the state Supreme Court in a case challenging the validity of Prop. 8, the Gibson Dunn team had planned to file its complaint just before the scheduled announcement of the court's decision on May 26, and to reveal its star litigators—former U.S. Solicitor General Theodore Olson and celebrated trial lawyer Davis Boies—at a press conference the following day.

The plan worked perfectly. On May 26 the court upheld Prop. 8, though it declared valid the 18,000 same-sex marriages performed from June to November 2008 (*Strauss v. Horton,* 46 Cal. 4th 364 (2009)). The next day, leaders of a freshly minted organization called the American Foundation for Equal Rights (AFER) stood before the national press at a hotel in downtown Los Angeles to announce its lawsuit and reveal that Olson and Boies—opposing counsel before the U.S. Supreme Court in *Bush v. Gore*—would be leading the trial team. "We're taking this fight to the federal courts in order to protect the equal rights guaranteed to every American by the United States Constitution," declared Chad Griffin, AFER's board president.

The announcement produced the national headlines AFER had hoped to generate. But it caught many LGBT advocacy groups by surprise. "It was a very high-stakes move," said attorney Kate Kendell, executive director of the San Francisco–based National Center for Lesbian Rights (NCLR). Kendell's group had worked closely with the American Civil Liberties Union and the Los Angeles office of Lambda Legal, the nation's oldest and largest LGBT legal organization, in litigating both *In re Marriage Cases* and *Strauss*. "This federal case has the potential to be a total game changer," she added. "But it also has the potential to have devastating consequences. You hope that it will be the former."

Nan Hunter, founder of the ACLU's LGBT Project, shared Kendell's concerns. She called the lawsuit "reckless" because "there is a significant chance of failure if the case reaches the U.S. Supreme Court." Hunter, now a professor at Georgetown University Law Center in Washington, D.C., also noted that LGBT legal groups had been following a "very careful and deliberate, collaborative" strategy for many years, only to have it "thrown off by an organization with a small number of people who are wealthy enough to pay for a major litigation effort."

Of course, advocating social change is as much a political issue as a legal one. So it's not surprising that measures to advance gay civil rights in the courts, in state legislatures, or at the ballot box can provoke strong disagreements. But in this case, the moving party operated with an astonishing degree of independence from the LGBT groups that had litigated the issues for decades.

The dozens of individuals interviewed for this story share a belief that Prop. 8 is discriminatory, that it violates the U.S. Constitution, and that same-sex couples should have the right to wed. They have publicly united in support of the federal suit. But after some tense weeks of discord, they remain divided about the suit's wisdom and timing.

This is the story behind the filing of *Perry v. Schwarzenegger*.

AS CHAD GRIFFIN TELLS IT, THE IDEA for filing a federal challenge to Prop. 8 took shape ten days after it passed with 52 percent of the vote. Griffin and Kristina Schake, his business partner in the Los Angeles communications firm Griffin/Schake, had joined director Rob Reiner and his wife, Michele, for lunch at the Polo Lounge in the Beverly Hills Hotel. Griffin had produced three television ads and raised money for the "No on 8" campaign; the Reiners were contributors, as well as Griffin's longtime clients. The four discussed the failed campaign and other election results.

After Griffin left, an acquaintance of the Reiners, Kate Moulene, stopped by and learned that they had discussed Prop. 8. Moulene later phoned Michele Reiner to suggest they talk to her former brother-in-law, Ted Olson, because, she said, he supported gay marriage. Though Olson has a long history as a prominent Republican lawyer—he served in both the Reagan and George W. Bush administrations—his leanings tend to be more libertarian than socially conservative.

The Reiners phoned Griffin about contacting Olson. "I would have been crazy not to talk to him if it were true that such a prominent conservative and legal scholar was on our side," Griffin says.

Theodore Boutrous, Gibson, Dunn & Crutcher

Chad Griffin, American Foundation for Equal Rights

S. Todd Rogers

Because Olson's involvement would be major news, secrecy was imperative. On November 21, a week after the Polo Lounge lunch, Griffin met Olson at Gibson Dunn's Washington, D.C., office. There, Olson declared his interest in taking a case challenging the constitutionality of Prop. 8.

It was "terribly unfortunate" that Prop. 8 passed, Olson said, particularly because "Californians have always been in the forefront of liberty and individualism." His own support for gay marriage, he said, dates back more than a decade.

Griffin was thrilled at the coup. "This could make same-sex marriage be seen as a *non*partisan issue—forget bipartisan. This impacts all people," he said.

In December 2008 Olson discussed strategy and tactics with the Reiners and Griffin in Los Angeles. He also held talks at Gibson Dunn's offices with managing partner Kenneth Doran and Boutrous, whom he quickly tapped as his captain in California.

Boutrous and Olson began their research. "You couldn't have a better factual pattern, with the California Supreme Court finding a fundamental state constitutional right of all citizens to marry, and a majority [at the polls] then voting to take that right away," Boutrous says.

Meanwhile, Griffin launched what he calls the most challenging part of the case: deciding whether to move forward with the litigation. Joined by Schake and Bruce Cohen, a Hollywood producer who had worked closely with him on the No on 8 campaign, Griffin embarked on a three-month vetting process involving off-the-record discussions about the proposed federal case.

Cohen—who had produced the film *Milk,* the Oscar-winning biopic of slain gay San Francisco Supervisor Harvey Milk—was happy to sign on. "Entertainment industry people tend to have a very go-for-it attitude," Cohen says. "If you have a big, huge idea and you've got the right people and have all the pieces in place, 'Oh my God, let's go for that.' And that's really what this case is."

Griffin focused on their small group's two assumptions: that the state Supreme Court would uphold Prop. 8, and that "a host of other lawsuits" would be filed in response. In talking with people familiar with the issues, he said, sentiment for a federal constitutional challenge was "overwhelmingly positive," though he admits a few people said they thought a federal case was likely 10 to 20 years away.

However, the executive directors of several major LGBT groups—including Equality California (EQCA); the Equality Federation; Freedom to Marry; Gay & Lesbian Advocates & Defenders (GLAD); and NCLR, the lesbian rights group—maintain they didn't learn of the proposed suit until after it was filed.

Griffin counters that he and other AFER board members consulted with dozens of individuals, including LGBT leaders and lawyers. But because those talks were confidential, he says, many of those organizations didn't know the discussions were taking place.

NATIONALLY, THE LGBT LEGAL groups—ACLU, GLAD, Lambda Legal, and NCLR—have a strong tradition of sharing resources, knowledge, and strategy that dates back to the beginning of the gay civil rights movement. "We maintain a constant flow of information among us," says Jennifer Pizer, Los Angeles–based senior counsel and marriage project director for Lambda Legal. In California, the ACLU, Lambda Legal, and NCLR have

worked together closely, especially during their successful defense of California's 2003 domestic partnership law (Cal. Fam. Code §§ 297–299.6).

"It's a movement with lots of opinions and lots of people engaged in different work," says Pizer. "The challenge and the reward is trying to use your best judgment about the pace of change: the different arguments and types of cases, and the time and place to bring them, that moves things forward as quickly as possible while doing as little harm as possible."

Same-sex couples in the U.S. first went to court seeking marriage rights in the 1970s. But it wasn't until the early 1990s that the issue exploded onto the national stage, when three same-sex couples in Hawaii filed suit after they were denied marriage licenses.

"None of the legal groups at the time was supportive of being formally involved," says Evan Wolfson, formerly a lawyer with Lambda Legal and currently executive director of Freedom to Marry. When the Hawaii couples asked Wolfson to take their case, he says, he was "required to decline" the offer because Lambda Legal was internally divided.

"A very careful strategy was thrown off by an organization with people wealthy enough to pay for major litigation."
—LAW PROFESSOR NAN HUNTER

But in 1993, the Hawaii Supreme Court ruled in the couples' case that if the state is to prohibit same-sex marriage, it must show a compelling interest (*Baehr v. Lewin,* 74 Haw. 530, 582). "The Hawaii decision seemed like a miracle," says Shannon Price Minter, NCLR's legal director. "At the time, the thought of being able to achieve marriage equality for my generation really seemed impossible."

The ruling quickly produced a backlash in Congress. Wolfson, who became co-counsel in the remanded *Baehr* case, says, "I was in trial in Hawaii [in 1996] when Congress passed the Defense of Marriage Act (DOMA). Before the trial court even had a chance to look at the evidence, Congress was shoving DOMA through." The new law defined marriage as a "legal union between one man and one woman," and declared that states need not recognize same-sex marriages deemed valid by any other state (1 USC § 7, 28 USC § 1738C). The federal definition effectively excluded same-sex couples from the legal rights and benefits associated with marriage.

These developments pushed national LGBT legal organizations to file same-sex marriage cases and support legislation only in states where success seemed likely. In 2000 Vermont became the first state to enact a law permitting same-sex civil unions. Three years later GLAD won a Massachusetts Supreme Court ruling that struck down marriage restrictions for same-sex couples. Those victories led to further court decisions and some legislation favorable to same-sex couples.

Fast-forward to June 2008: Nine LGBT legal and advocacy organizations spelled out their evolving strategy in a statement entitled "Make Change, Not Lawsuits." "We were encouraging people to continue to work in the states," Pizer says, "and to not think that the federal courts were going to be a quick route" to success.

The six-page joint statement specifically warned same-sex couples against filing federal cases, or suing "their home state or their employer to recognize their marriage or open up the health plan" until there is a "critical mass of states recognizing same-sex relationships." Losing court cases, the groups argued, would actually make it "take longer to win the right to marry" in those states than if they had waited.

Their statement cited a landmark U.S. Supreme Court ruling, won by Lambda Legal, that struck down the sodomy law in Texas (*Lawrence v. Texas,* 539 U.S. 558 (2003)). Hailed as a victory for gay rights, *Lawrence* overturned *Bowers v. Hardwick* (478 U.S. 186 (1986)), which had upheld Georgia's statute criminalizing consensual sodomy between adults. The Supreme Court in *Bowers* observed that 24 states and Washington, D.C., had similar statutes; by the time of *Lawrence,* only 13 states did. Public opinion had shifted, and so had the Court.

EARLY IN 2009 THE CALIFORNIA SUPREME Court announced its schedule for hearing oral arguments and delivering an opinion in *Strauss v. Horton*. That gave the Gibson Dunn litigation group a deadline for determining whether to go forward, and for preparing the complaint.

According to Boutrous, by April the legal team had examined the issues from all angles and concluded it could win a majority ruling at the U.S. Supreme Court. "I think there's a degree of stereotyping that goes on concerning the justices," Boutrous says. "Everyone thinks they know exactly how they're going to vote, based on who appointed them. We reject that kind of rigid analysis."

The litigation sponsors decided to proceed if they could get the necessary elements in place—including enough money to support the case all the way to the U.S. Supreme Court.

Boutrous describes Gibson Dunn's fee arrangement

Kate Kendell, National Center for Lesbian Rights

Jennifer Pizer, Lambda Legal

with AFER as a "hybrid." "We agreed to make a pro bono contribution of the first $100,000 of our services and then flat fees for the various phases, to be augmented and adjusted in our collective discretion," he said.

Millions of dollars in fees and expenses would be required. To raise it, Griffin gathered people from the business and entertainment industry for a series of private meetings in Los Angeles and New York. Olson attended nearly every fund-raiser, and Boutrous all the Los Angeles events. The foundation met its goals, though Griffin won't identify the donors, saying he'll reveal them only when the Prop. 8 proponents disclose their supporters.

By this time, the Gibson Dunn legal team included partners and associates in the Los Angeles, San Francisco, and Washington, D.C., offices. They were drafting a motion for a preliminary injunction to stop enforcement of Prop 8., as well as the complaint. But the litigation still lacked plaintiffs. Griffin contends there was no formal search. "As a gay person, I had many people in my life—close friends, acquaintances, or associates—who I knew weren't able to get married during that brief window when gay marriages were legal," he says.

Griffin heard about a gay Burbank couple through a mutual friend who had appeared in the couple's YouTube video "Weathering the Storm"—a response to the "Gathering Storm" television ad warning of the dangers of same-sex marriage. Paul Katami and Jeffrey Zarrillo had wanted to marry for some time, but feared that, because of the legal uncertainties, the emotional and financial commitment would be in vain.

Schake made the initial contact. Says Zarrillo, "We had to digest the magnitude of what potentially could happen: how long this [case] could last, where this could go, and how historic it could be." After meeting with the Gibson Dunn lawyers and thinking it over for a few weeks, the pair signed on as plaintiffs.

The second couple—Kristin Perry and Sandra Stier—Griffin knew of through his media work for Rob Reiner. The Hollywood director had hired him in 1998 to run a statewide ballot campaign on an initiative to fund early childhood development programs; Perry is now executive director of First 5 California, the commission established by that initiative.

Griffin recalled that Perry had wed Stier in 2004 in a civil ceremony in San Francisco, only to have their marriage invalidated later that year by the state Supreme Court. Upon learning that the couple had not attempted to remarry in 2008, Griffin asked Perry if the two wanted to become plaintiffs, and the women agreed.

TED OLSON—KEENLY AWARE OF HIS REPUtation as a prominent conservative—says he knew from the beginning that he would need to try the *Perry* case with co-counsel. "I wanted to have someone who would have credibility with people who might be suspicious of what I'm doing here," he says. "I wanted people to be comfortable with the lawyering, and the judiciary to feel that this was not a liberal or a conservative issue; that it wasn't a political issue, it was a legal issue."

For candidates, Olson considered prominent trial lawyers, Supreme Court practitioners, and gay lawyers. He also discussed with Boutrous the marquee possibilities of David Boies, his opponent in *Bush v. Gore* and name partner in the Armonk, New York, office of Boies, Schiller & Flexner. "I thought, 'Boy, this would be perfect,' " recalls Olson. "Lawyers who were on opposite sides, someone who is well-identified in prominent Democratic circles."

In a May 10 conference call with Boutrous and the AFER principals, Olson presented his idea. "Everyone on the call said, 'Oh, my God, do you think he would do it? That would be fantastic,' " Olson says. When he spoke by phone with Boies a few days later at his New York office, Boies immediately said yes. The following week Griffin flew to New York to meet with Boies and Theodore Uno, an associate at Boies, Schiller's Oakland office. "We talked about timing," Boies says. "We talked about the fact that there were obviously people in the gay and lesbian community who were concerned about bringing a federal challenge, and why we thought a federal challenge made sense."

Photos courtesy of Kate Kendell and Jennifer Pizer

Plaintiffs Jeffrey Zarrillo (left) and Paul Katami

Plaintiffs Kristin Perry (left) and Sandra Stier

Earlier that month, Boutrous, Griffin, and Cohen had opened confidential discussions with Pizer and Jon Davidson, Lambda's legal director; Ramona Ripston, executive director of the ACLU of Southern California; and Mark Rosenbaum, its legal director.

Pizer would confirm only that the talks took place, though in a later interview she said it was clear that Gibson Dunn's lawyers were thinking seriously about filing a federal case. Rosenbaum also declined to reveal the content of the confidential discussions. After Boutrous listened to their views, he says, he "spent hours and hours doing my own analysis, because we take those things very seriously." In the end, Boutrous says, he felt even more strongly that filing was the right thing to do.

The pressure was on: Under the state Supreme Court's given schedule, June 3 was the last possible date to announce its decision in *Strauss*. "We thought the court ruling would come down any day," recalls Monagas at Gibson Dunn's office in San Francisco. But before *Perry* could be filed, the plaintiffs would have to attempt to register to marry in their respective home counties.

On May 20, Katami and Zarrillo met a Gibson Dunn associate at the Los Angeles County Clerk's office. Katami nervously filled out the paperwork for a marriage license. "I felt a mix of sadness because I knew what the outcome was going to be," he says. "The experience brought out all these emotions." The men handed over their completed forms, and the clerk very politely told them: "Gentlemen, at this time I cannot issue you a license."

"It was still emotional to be denied," recalls Zarrillo. "But in all fairness [to the clerk], she handled it really well. [Her words] reiterated that we were denied equal rights. It made us feel that we made the right decision to be a part of this case."

The next day, things went much the same way at the Alameda County Clerk-Recorder's office. "We knew what to expect," says Stier. "But there's still a bit of humiliation in the exercise."

On Friday, May 22, the state Supreme Court gave notice that the court would issue its opinion in *Strauss* the following Tuesday. After months of planning, the Gibson Dunn team assembled the filing papers and sent Monagas to the courthouse.

Following the court's announcement on Tuesday, May 26, Griffin and Cohen spoke with a selected group of people—including a reporter from the *Advocate*—about the foundation's lawsuit filed four days earlier. Perry and Stier flew to Los Angeles, where Olson met the plaintiff couples for the first time. Later that evening, AFER's board, the plaintiffs, and the attorneys had dinner together.

As AFER prepared for its press conference, the nine LGBT groups that had circulated "Make Change, Not Lawsuits" were polishing their own response to the *Strauss* ruling. Much had happened during the previous year: GLAD won a Connecticut Supreme Court case legalizing same-sex marriage (*Kerrigan v. Comm'r of Pub. Health,* 289 Conn. 135 (2008)) and filed a federal suit challenging the Defense of Marriage Act (*Gill v. Office of Personnel Mgmt.,* No. 09-10309 (D. Mass. filed March 3, 2009)). In addition, Lambda Legal prevailed before the Iowa Supreme Court to secure same-sex marriage rights (*Varnum v. Brien,* 763 N.W. 2d 862 (2009)).

Ever since the oral arguments in *Strauss,* the nine groups had debated how they would respond to an adverse ruling. "We decided to update the June 2008 statement because whatever the court did, many people were likely to be considering federal litigation," Pizer says. "If Prop. 8 were upheld, we decided the better course would be to seek to repeal it, because we had lost [the statewide vote] by only a few percentage points."

The LGBT organizations exchanged emails on May 27, confirming that they had all read and agreed with the latest statement. They also traded information about the *Perry* case, since some people had just received courtesy calls informing them of the filing. But their new joint statement, titled, "Why the Ballot Box and Not the Courts Should be the Next Step on Marriage in California," made no mention of *Perry.*

Even so, because the new statement was released on May 27—the same day as AFER's press conference—it appeared to be a direct response to the *Perry* filing. "It

S. Todd Rogers

had absolutely nothing to do with the *Perry* case," says NCLR's Minter, who concedes that he can understand why people might think the two were related. "I'm only sorry we didn't think of that, because it might have prevented some of the initial friction and misunderstandings."

Griffin says he'd been shown a version of the revised joint statement a few weeks earlier. "I was aware the statement had been written before their knowledge of our case," he says. Asked whether it amounted to a criticism of the *Perry* case, Griffin says, "Hey, I made this decision with full knowledge that not everyone was going to agree, and some might vehemently disagree, and perhaps some still do. If no one disagrees, you might not be doing anything that's very significant."

On the morning of May 27, the *Perry* plaintiffs and their lawyers assembled at the Millennium Biltmore Hotel in Los Angeles, in a ballroom packed with local and national media, including reporters for the *New York Times,* CNN, Fox News, and NPR. Griffin stepped to the podium behind a red, white, and blue placard that proclaimed "American Foundation for Equal Rights." Dressed in dark suits, Olson and Boies quickly followed to flank him on the dais. Then came the plaintiffs—Perry and Stier next to Olson, and Katami and Zarrillo beside Boies. Behind them, against a royal blue backdrop, stood a long row of alternating American and California state flags. It was a camera-ready moment. In brief remarks, Griffin and both trial lawyers stayed on message: The case would be a nonpartisan effort to obtain the equal rights guaranteed *all* Americans under the Constitution.

The following day, the lead story for many newspapers and TV reports was that opposing counsel in *Bush v. Gore* were joining together to fight for gay marriage. It was an irresistible, odd-bedfellows story. But alongside those articles were reports that some major LGBT groups opposed filing the case, citing "Why the Ballot Box and Not the Courts" as evidence of a rift.

THE *PERRY* FILING SET OFF A NEW ROUND of discussions about the case. The plaintiffs' team discussed its legal theories with Kendell and Minter of NCLR, Geoff Kors of EQCA, Pizer and Davidson of Lambda Legal, Rosenbaum of the ACLU, and Dennis Herrera and Therese Stewart of the San Francisco City Attorney's office. Boutrous encouraged the groups to submit amicus briefs.

Three of the organizations—the ACLU, Lambda Legal, and NCLR—subsequently filed a joint brief on June 25. The San Francisco City Attorney's office and EQCA also filed separate amicus briefs in June.

In preparation for a July 2 court hearing on the motion for a preliminary injunction, Gibson Dunn attorneys invited the ACLU, EQCA, Lambda Legal, and NCLR to participate in a moot court proceeding with Olson. But that was cancelled on June 30 when Judge Walker granted a request by proponents of Prop. 8 to intervene in *Perry.* (State officials chose not to defend the initiative. Instead, Attorney General Jerry Brown declared that it violates the 14th Amendment.)

More urgently, Walker also converted the scheduled July 2 hearing to a case-management conference, stating that he was inclined to proceed "expeditiously to the merits of plaintiffs' claims and to determine, on a complete record, whether injunctive relief may be appropriate."

Walker's order suggested more than a dozen issues for the parties to consider. He named potential factors needed to "establish the appropriate level of scrutiny under the Equal Protection Clause," such as "the history of discrimination gays and lesbians have faced" and "the relative political power of gays and lesbians, including successes of both pro-gay and anti-gay legislation." He suggested further that the record may need to establish evidence such as "the longstanding definition of marriage in California [and] whether a married mother and father provide the optimal child-rearing environment … whether excluding same-sex couples from marriage promotes this environment," and "the history and development of California's ban on same-sex marriage."

The *Perry* case was no longer simply a matter of law. It was taking on the feel of another historic civil rights case: *Brown v. Board of Education.*

Walker's order prompted the ACLU, Lambda Legal, and NCLR to consider formally intervening in the case. The three groups advised the plaintiffs' lawyers of their intent: "Between our organizations, we've litigated in a trial setting almost every single one of those issues," Kendell said. "That's invaluable experience, and these issues are difficult."

On July 2, Walker opened the case-management conference by emphasizing that his court was a *trial* court, not the U.S. Supreme Court. Later in the proceeding he asked Olson, "There certainly is some discovery that is going to be necessary here, isn't there?"

"I'm not sure," Olson replied. "Is there discovery necessary? If there is, what is it? What form would it take?"

The hearing convinced the ACLU, Lambda Legal, NCLR, and—separately—the San Francisco City Attorney's office that they *must* intervene. But the plaintiffs' legal team strongly opposed it. "I respect their interest in intervening, and we told them that we very much wanted their help and their support," Olson later said. "But we represent clients, and we have to retain control of the case—not only the strategic decisions but also the pace of litigation. As soon as you have five captains of the ship, it's very hard to control the ship."

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On July 8, Griffin wrote a startling three-page letter addressed to Kendell, Pizer, and Rosenbaum in an attempt to stop them. "You have unrelentingly and unequivocally acted to undermine this case even before it was filed," Griffin stated. "In light of this, it is inconceivable that you would zealously and effectively litigate this case if you were successful in intervening."

Pizer calls Griffin's letter, "an extremely negative, combative rewriting of history" that "most of us working in this movement wouldn't do because we're all in this together. We do have opponents, but they're not each other."

Ignoring Griffin's letter, the ACLU, Lambda Legal, and NCLR moved to intervene on behalf of Our Family Coalition; Lavender Seniors of the East Bay; and Parents, Families, and Friends of Lesbians and Gays. They asserted a "unique ability to develop a factual record." The city of San Francisco separately requested to join the case, citing "its interest as a public entity required to enforce an unconstitutional law."

None of the legal groups responded to Griffin's letter. After he released it to the media, blogs and news accounts concluded that gay legal groups were "not welcome" in AFER's litigation.

The Gibson Dunn lawyers opposed both motions to intervene, but argued that if any party were allowed, "it should be the City alone that is permitted to join."

Three days before a scheduled August 19 hearing on the motions, Griffin invited all the would-be interveners to lunch after the court session at Gibson Dunn's San Francisco office. He said the meeting was to "discuss ways of working together and moving forward, regardless of what the judge's decision was."

Pizer felt it was a particularly gracious gesture. "Everybody who was going to be there for the hearing was pleased," she says. "We're all on the same side. And none of this is personal."

But Walker denied the LGBT groups' motion, stating that their interests were "indistinguishable from those advanced by the Plaintiffs." He granted the city of San Francisco's motion, however, citing its position as "the only governmental entity seeking to present evidence on the effects of Proposition 8 on governmental services and budgets." Walker then set a trial date of January 11, 2010.

Though spurned by the court, the LGBT legal groups chose to cooperate with the *Perry* team. They have provided background material that includes expert witnesses who had been used in other cases, and briefs from gay-rights litigation. "We are interested in doing whatever we can to make sure their case is as successful as possible," says James Esseks, co-director of the ACLU's LGBT Project. "And we wish the plaintiffs' legal team the best. We know they're doing everything they can to put together a great case."

But does he *support* the litigation? "What I'd say is: We think they've got it right about the law," Esseks replied. "We think that Prop. 8 violates the federal Constitution. We think that is crystal clear."

The LGBT legal groups also agree that Olson's involvement is a significant and positive development. Kendell says, "Seeing this person, who was a star of the conservative right, speaking out for the rights of LGBT couples to marry really did feel like, 'Gosh, this really could help change people's hearts and minds.' " In one of her early conference calls to discuss the complaint, Kendell jokingly named Olson an "honorary lesbian."

Whatever strong feelings remain, the LGBT legal groups insist they have all moved on. Asked at the end of September if she supported AFER's case, Kendell paused for a few seconds before answering. "I think there's nothing I want more than for this lawsuit to succeed. And we are committed to doing whatever we are asked to do to help ensure its success."

Pizer echoed Kendell: "I am doing my best to be supportive, with all of us eagerly hoping that [the case] will be successful. The plaintiffs deserve the right to marry." CL