

# Gay couples seek court case that might reach the Supreme Court

by [Richard Wolf](#)

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NORFOLK, Va. (RNS) Whenever Tim Bostic would lament that he couldn't marry his partner, Tony London, in Virginia, his sisters had a ready solution: Move to Maryland, where same-sex marriage is legal.

Carol Schall and Mary Townley, also Virginia residents, were legally married in California, but that doesn't do them much good back home.

The two couples are as committed to Virginia as they are to each other. Bostic and London, who live along the Lafayette River, have been together for almost 25 years; Schall and Townley, residents of Richmond, for nearly 30. Moving isn't in the cards. And, therefore, neither is gay marriage in Virginia — yet.

The two couples have decided to stay and fight a legal skirmish over same-sex marriage — one that could wind up, like its predecessors, at the Supreme Court.

Despite two landmark Supreme Court decisions in June that vastly expanded same-sex marriage rights in states from Maine to California, gay and lesbian couples in 35 states remain outside the bonds of holy matrimony. For them, the battle is ongoing.

"I don't need to do this for recognition. I need to do this for my family," Bostic said, glancing toward London. "We've stood by each other through thick and thin for almost 25 years. How dare you say that our relationship isn't as valuable as somebody else's."

Across the nation, more than 40 lawsuits seeking marriage rights for gays and lesbians are pending in 20 states. Hearings are scheduled this month in Arkansas, Ohio and Utah. Trials are set for February in Michigan and June in Pennsylvania. A

case in Nevada already has been lost and appealed to the 9th Circuit Court of Appeals.

In addition to basic marriage rights, some plaintiffs are seeking to adopt children, divorce spouses they married in other states, get their names on partners' death certificates or avoid inheritance taxes.

And in several cases, couples legally hitched in one of the 16 states and the District of Columbia where same-sex marriage is legal are seeking to have those marriages recognized in one of the 34 states where it remains taboo.

The blizzard of same-sex marriage lawsuits has led to an informal race among the lawyers, law firms and advocacy groups vying to handle the Next Big Case to reach the Supreme Court — something that's likely to happen in the next few years.

"To the extent there's competition to achieve marriage equality, that's a healthy thing," said Theodore Bostic, one of the lawyers involved in the case brought by Bostic, London, Schall and Townley.

Advocates on both sides of the debate think a rush back to the Supreme Court could backfire, however, because the justices may not be ready to extend gay marriage rights nationwide.

John Eastman, a law professor at Chapman University and chairman of the National Organization for Marriage, which opposes same-sex marriage, said the rash of new cases could foster a backlash in more conservative states.

"The politics of this are significant," Eastman says. "That could prove as a check on the court."

## A CASE WITH ALL THE ANGLES

The case of *Bostic v. Rainey* could become the standard-bearer for the same-sex marriage movement as it emerges from last summer's victories at the Supreme Court.

For starters, it challenges a state constitutional amendment that's all-inclusive in its exclusions. The purpose of the amendment, the state said in its brief at the U.S. District Court for the Eastern District of Virginia, was "to prevent Virginia judges from changing the definition of marriage under the state Constitution as state judges

had done elsewhere.”

The addition of Schall and Townley to the original lawsuit adds other relevant issues — parenthood, thanks to their 15-year-old daughter, Emily; and denial of legal marriages, because they wed in California after that state’s Supreme Court briefly legalized same-sex marriage in 2008.

Since Townley is the birth mother, Schall has faced a lengthy list of snubs. She was denied visiting rights when Townley became sick during pregnancy. Her name was crossed off Emily’s passport application. She carries a child custody order wherever she goes.

And despite being the family’s major breadwinner, Schall can’t list Townley as the eventual recipient of her retirement benefits or Emily as the one to get her Social Security survivor’s benefits. To the state, Emily has a single parent.

Finally, the foursome has something none of the other same-sex marriage plaintiffs from South Carolina to Oregon can claim: the bipartisan pair of super-lawyers that returned same-sex marriage to California in June after a five-year hiatus, Theodore Olson and David Boies.

“We have the best legal team that anyone could ever hope for,” said Bostic, 48, an assistant professor of English at Old Dominion University. “We have people on our side who don’t get into a fight to lose it.”

## VIRGINIA’S CHALLENGE TO MARRIAGE

Virginia, home to several of the nation’s founders and early presidents, already has a historic place in the pantheon of marriage litigation. The 1967 case of *Loving v. Virginia* struck down the last bans on interracial marriage.

Olson and Boies won their case restoring gay marriage rights in California when the Supreme Court said their opponents lacked standing to challenge lower court verdicts. But the justices’ other ruling that day — its 5-4 opinion against the federal Defense of Marriage Act — looms even larger among the new breed of lawsuits.

That’s exactly what dissenters predicted, despite Justice Anthony Kennedy’s assurance that his ruling was confined to legally married couples accessing federal benefits. “I promise you this: The only thing that will ‘confine’ the court’s holding is its sense of what it can get away with,” Justice Antonin Scalia seethed in his dissent.

Five days after the Proposition 8 and DOMA decisions were handed down, Bostic and London, a 55-year-old Realtor and Navy veteran, walked into a Norfolk courthouse to get a marriage license. Their application went through the computer system just fine. But when they tried to pay the fee, they ran into a same-sex roadblock.

The lawsuit quickly followed, filed by the local firm of Shuttleworth, Ruloff, Swain, Haddad and Morecock. The firm then lured Schall, 53, director of the Virginia Autism Resource Center at Virginia Commonwealth University, and Townley, 52, a former educator who works for a health management company, as additional plaintiffs.

In September, Shuttleworth brought in the conservative Olson and liberal Boies, odd bedfellows who fought on opposite sides during the Bush v. Gore presidential case in 2000.

Many legal authorities predict the Supreme Court could rule against a same-sex marriage case if the issue gets there too soon, noting the justices might prefer to let the issue percolate in the remaining states. But Schall insists they're not trying to be first to the high court's marble palace.

"We're not in a race against each other," she said. "We're in a race against a legal system that treats us so differently. And so whoever wins that race is good for all of us."