



## Once-vocal Indiana now silent on gay marriage bans

[Maureen Groppe](#)

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Despite vigorously defending a state's right to prohibit same-sex marriages for years, the Indiana attorney general's office is not weighing in on the case that is expected to settle the issue.

Indiana is not among the 17 states asking the U.S. Supreme Court to side with Michigan, Ohio, Kentucky and Tennessee in the challenges to those states' gay marriage bans to be argued before the court Tuesday.

Indiana Attorney General Greg Zoeller says he no longer has a duty to defend that position after fighting for the state's ban all the way to the Supreme Court last year.

But Indiana's silence is quite a change from two years ago, when the high court last debated the issue. Zoeller's office was the primary author of briefs submitted by states in support of California's gay marriage ban and of a federal law defining marriage as the union between a man and a woman.

"The state of Indiana has been a leader in advocating generally for the legality of states to determine their own marriage license definitions and specifically for the traditional marriage definition of one man and one woman," Zoeller said at the time.

Indiana was an early advocate, according to a research paper from the University of San Francisco School of Law, of the argument that marriage primarily exists to encourage couples to procreate responsibly. Because gay couples can't get pregnant by accident, the argument goes, states shouldn't have to allow them to marry. (That justification was ridiculed by the federal judges who struck down Indiana's ban last year but was used by the federal judges upholding the state bans being reviewed by the Supreme Court.)

Zoeller's office in recent years wrote briefs in defense of other states' bans and defended challenges to Indiana's law filed after the Supreme Court ruled unconstitutional a ban on providing federal benefits to married gay and lesbian couples.

Although some attorneys general have declined in recent years to defend their state's bans, they had a duty to do so, Zoeller argues in a recent article in the Indiana Law Journal. Attorneys general should always defend a state statute, even if it's a weak defense, unless there is no chance of prevailing based on past court rulings, he wrote.

"At best, these attorneys general are applying their own independent judgment as an attorney general would when asked to provide an advisory opinion," Zoeller wrote. "At worst, they are abandoning their duty for purely political reasons."

But Zoeller's obligation to defend Indiana's statute ended last year when the Supreme Court rejected the state's appeal of the 7th U.S. Circuit Court of Appeals' decision, according to his spokesman.

"Attorney General Zoeller decided after the Supreme Court declined to hear Indiana's case that we had fulfilled our duty to defend the statute and our office would not join in the amicus briefs in Obergefell v. Hodges," spokesman Bryan Corbin said of the pending case.

That decision was a surprise to Steve Sanders, an Indiana University Maurer School of Law professor who co-wrote a brief supporting the challenge to the bans in Michigan, Ohio, Kentucky and Tennessee.

"The Indiana attorney general's office had been sticking its nose into marriage cases that it had no direct connection to for years," Sanders said. "So the fact that they now have finally thrown in the towel, when the issue is on the brink of a Supreme Court decision, really does surprise me."

Michelle Bowling, an Indianapolis resident who with her wife, Shannon, successfully challenged Indiana's refusal to recognize their 2011 marriage in Iowa, said the recent backlash over Indiana's "religious freedom" law showed state officials that Hoosiers support gay marriage.

"The percentage of people that agree that we have the same right as every other citizen has increased," she said.

But Jim Bopp, a Terre Haute lawyer who authored a brief supporting state bans that was submitted by conservative members of the Republican National Committee, said Zoeller should not have given up the fight.

"If the court rules in favor of traditional marriage, then Indiana's law will go back into effect," Bopp said. "The whole future of Indiana's current law will be affected by the decision of the court in this case."

While the court in 2013 sidestepped the issue of whether states can ban gay marriage, the justices will decide by summer whether the 14th Amendment's guarantees of due process and equal protection make gay marriage bans unconstitutional.

Most federal district and appeals courts have said those guarantees trump the rights of states and voters to make their own laws. A contrary decision from the 6th U.S. Circuit Court of Appeals is the case before the court.

Although Zoeller and other elected Indiana Republicans declined to file briefs in this case, more than 140 have been filed from around the nation arguing both sides.

Sen. Dan Coats, R-Ind., who signed a 2013 brief defending the federal law, did not join the 57 Republican members of Congress who submitted a brief supporting states' bans in the pending challenge. But that's only because Coats wasn't aware of the brief, his spokesman said.

"Had he been asked, he would have signed it," said spokesman Matt Lahr. "He continues to believe that marriage is between a man and a woman."

The national Republican Party's platform backs amending the Constitution to define marriage as the union of one man and one woman.

Bopp, a member of the 2012 committee that drafted the platform, said the brief he wrote shows that Republicans have defended traditional marriage since the party's first platform in 1856 — not because of opposition to homosexuals, but because when the family breaks down, the government has to help provide child care, housing, food and other needs.

"If you want to have a small government, the very first thing you would want to do is support family and marriage," Bopp said. "And heterosexual marriage provides unique benefits that homosexual marriages don't."

Likewise, a brief filed by 100 scholars, including a theologian and two political scientists at the University of Notre Dame, argues that allowing gays to marry leads to a decline in heterosexual marriage rates, which leads to an increase in children born out-of-wedlock and an increase in abortions.

A number of religions organizations, including the Indianapolis-based Wesleyan Church and the Fort Wayne-based Missionary Church and the Fellowship of Evangelical Churches, argue that requiring states to recognize same-sex marriages imperils religious liberties.

That fear is echoed in a brief filed by the conservative Texas Eagle Forum, which wrote that a decision striking down the bans would split the nation as some states would then move to protect their religiously led businesses, schools and churches from being forced to recognize gay unions.

"Will northeastern and West Coast states then try to punish Texas, just as they have acted against Indiana?" the group asks, referring to the moves by governors in Connecticut, New York and Vermont to ban official travel to Indiana before state officials revised the "religious freedom" law.

Many of the businesses that spoke out against Indiana's law are part of a brief filed by 379 employers and organizations asking the Supreme Court to strike down state gay marriage bans.

Indiana University wrote its own brief — the only school in the country to do so — saying a return of Indiana's gay marriage ban would hurt the school's efforts "to make its academic environment welcoming to diverse students, faculty and staff."

Mayors from Bloomington, West Lafayette, Gary and South Bend joined more than 200 mayors across the country in backing gay marriage.

A brief on that same side filed by more than 2,000 clergymen included 20 from Indiana.

Sen. Joe Donnelly, D-Ind., and Rep. Andre Carson, D-Indianapolis, joined 209 other Democratic members of Congress on a similar brief.

The brief Sanders, of the Indiana University Maurer School of Law, helped write for the Human Rights Campaign argues that gay marriage bans have been fueled by a moral disapproval of gays, which is not legally defensible.

The Human Rights Campaign, the nation's leading gay rights organization, collected tens of thousands of signatures from around the country on the brief, including from more than 4,600 Hoosiers.

"It got a lot of attention," Sanders said. "I think it sends a message that over 200,000 people certify that they read the brief and agree with the argument. I don't know that anything like it has been done before."

Ilya Shapiro, a scholar at the libertarian Cato Institute who co-authored a brief arguing gays and lesbians have the same constitutional right to marriage as others, said he doubts any of the briefs will sway the court.

"The very strong conventional wisdom is that there are five votes supporting the challengers," Shapiro said. "So I would think that the briefs are more going to be buttressing the views that are probably already set in the minds of the justices."

Although Shannon and Michelle Bowling know the expectation is that their side will win, they're still nervous until that happens. That's one of the reasons the couple signed onto a brief expressing the views of 92 plaintiffs who have challenged their states' gay marriage bans.

When Indiana's ban fell, Shannon Bowling said, it was a huge relief.

"I could go to a school board meeting and say, 'This is my kid,' " she said of the couple's three children. "The thought of that being overturned terrifies me because it makes me think the country would be telling me that my family is lesser than anyone else's. And I know darn well that it's not."