



## ***Transgender People and the Federal Marriage Amendment***

### **Frequently Asked Questions**

Like most Americans, many transgender people are tremendously interested in and concerned about the ongoing debate regarding marriage for same-sex couples. The Federal Marriage Amendment (FMA), which was introduced in the United States Congress in May, 2003, would amend the U.S. Constitution to discriminate against same-sex couples by limiting marriage only to different-sex couples and by denying the “legal incidents” of marriage (all the rights and responsibilities of marriage) to unmarried couples. Similar state constitutional measures are also being considered in some places.

Transgender people are concerned about this debate for many reasons. First, as people who believe in equality, many transgender people are opposed to the amendment because it would add a discriminatory clause to our nation’s most important legal document. Second, many transgender people who are lesbian, gay, or bisexual would like the freedom to choose to marry their same-sex partners. Third, if this amendment passes, it will likely cause even transgender people who are in legally secure marriages to face increased scrutiny and discrimination. Finally, if this amendment passes, it would prevent individual states (like Massachusetts) from creating marriage laws that do not discriminate based on gender.

This publication offers basic information about the FMA. It does not offer legal advice. If you have a specific question about your relationship, you should send an email to the Transgender Law and Policy Institute ([query@transgenderlaw.org](mailto:query@transgenderlaw.org)). An attorney will attempt to provide you with relevant legal information.

### **Q. What does the proposed Federal Marriage Amendment say**

**A.** The Federal Marriage Amendment, or FMA, as currently written (S.J. Res 30), says the following:

*Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.*

A previous version (H.J. Res 56 in the House of Representatives and S.J. Res. 26 in the Senate) with slightly different wording was replaced on March 22 with the wording above. An identical resolution is expected to be introduced in the House of Representatives shortly. It is clear that the amendment’s sponsors intend to block not only marriage, but also civil unions and domestic partner benefits.

## **Q. How might the FMA affect my marriage?**

**A.** Neither the FMA nor similar state measures are specifically targeted at transgender people. They do not prevent states from continuing to recognize a transgender person's new legal gender, and they do not prevent states from continuing to permit transgender people from entering into heterosexual marriages. In practice, however, the enactment of the FMA (or an equivalent state measure) may generate confusion about marriages involving transgender people or cause some courts to discriminate against us.

The impact of the FMA on your marriage depends on your individual circumstances.

**Are you in a marriage in which you or your spouse came out as transsexual and transitioned after getting married (with the result that you and your spouse are now both men or both women)?** If so, the enactment of the FMA or an equivalent state constitutional amendment should *not* affect the validity of your marriage. Generally, the validity of a marriage is determined by the status of the couple at the time the marriage was performed. If the spouses were different genders at the time of marriage, the marriage should remain valid even if one spouse later transitions. Even without the FMA passing, some couples in this situation currently encounter discrimination from government officials, private employers or others who erroneously refuse to honor the marriage based on the mistaken view that events that happen after a couple marries can somehow retroactively invalidate a marriage that was lawful at the time it was entered. So long as a couple are legally entitled to marry when they enter into a marriage, they remain married until death or divorce. As a practical matter, though, the FMA could increase the likelihood that couples in this situation may have to defend the validity of their marriages.

**Are you a transgender person who married a person of another gender after you transitioned?** If so, the validity of your marriage should *not* be affected by the enactment of the FMA (or an equivalent state measure) if you live in a state that permits transgender people to obtain legal recognition of their new gender, and assuming you have taken the steps required to change your legal sex.

Currently, most states permit a transgender person who has transitioned to marry a person of the other gender. However, there are a handful of states (including Kansas, Texas, and Ohio) in which courts have ruled that for purposes of marriage, a transgender person cannot change their birth gender. The enactment of the FMA will not directly change this legal situation. As a practical matter, however, it could increase the likelihood that couples may have to defend the validity of their marriages.

**Finally, are you a transgender person who identifies as lesbian, gay or bisexual or who (regardless of how you identify) is in a same-sex relationship?** If so, current law prevents you from being able to marry your partner, if both partners are legally recognized as the same gender in your state. The FMA would prevent any state from making these same-gender marriages legal.

Despite important differences in how various segments of our community would be affected by the FMA, there is a broader way in which its enactment would have a negative effect on all transgender people, regardless of our individual circumstances. For all transgender people, the best outcome would be for states to abolish gender restrictions on marriage, which wouldn't be possible if the FMA passes. Removing gender restrictions would enable all transgender people – not just those who are able to meet the requirements for legal recognition in their new gender and who happen to be in heterosexual relationships – to marry. Moreover, even transgender people who are in legally secure marriages never know when the validity of their marriages may be challenged. We may be optimistic that they would ultimately prevail in any legal challenge; regardless, the psychological and financial stress of having to undertake such a legal battle is enormous and financially out of reach for many. For this reason, all transgender people have a strong incentive to oppose the FMA and to do all that we can to prevent its enactment.

## **Q. How likely is it that the proposed Federal Marriage Amendment will pass?**

**A.** For a Constitutional amendment to be enacted, it takes two-thirds (2/3) of the Senate and two-thirds of the House to vote for it; then, three-fourths (3/4) of the states (38) must ratify it. It does not require the signature of the President. This process would likely take at least several years to complete.

No one can be sure about the chances of the Amendment passing through Congress or getting ratified by 38 states. But there have already been multiple Congressional hearings with others planned, and experts predict that votes will occur in both the Senate and House before the November elections. Currently, Congressional leaders expect the votes to be very close, making predictions impossible.

## **Q. Why don't legislators understand that it is futile to legislate that marriage is between one man and one woman, given the fluidity of gender and sex?**

**A.** Some transgender activists have attempted to reason with anti-gay legislators by pointing out that there is no way to clearly define what gender a person is. Others have pointed out that some transgender people are legally married to persons of the same gender. While very true, these arguments unfortunately fail to understand how Congress works and what motivates anti-gay (and anti-trans) bigotry. The truth is that members of Congress don't see, or don't want to see, what we might see clearly.

Anti-gay legislators are unlikely to let science that supports gender diversity convince them to stop trying to ban marriage between same-sex couples. Often they are supporting the FMA for political reasons or due to their own religious views. This makes practicality or anyone else's views on morality irrelevant to them. Other legislators care only about the political consequences of taking one position or another and similarly will likely ignore science-based or any other arguments. The fact that some transgender people may be unfairly hurt by having their marriages invalidated is unlikely to alter their analysis. In fact, it is likely that some legislators will be further motivated to support the FMA if they discover that the amendment could invalidate or prevent marriages involving transgender people.

## **Q. How should we engage to fight against the proposed Constitutional amendment?**

**A.** We should be engaging in this fight as any other citizen would. We should talk about how wrong it is to amend the Constitution to discriminate against people. The most important thing you can do is to write or call your federal Senators and Representatives and tell them that you oppose amending the Constitution to discriminate against families. If you are heterosexual, write about how you believe that two consenting adults, regardless of gender, should have the right to be married. If you are gay or part of a same-sex couple who cannot legally marry, write your member of Congress saying how you would like to have your relationship legally recognized and why being refused these legal protections hurts you and/or your family.

You can find out who your representatives are and contact them through [www.congress.org](http://www.congress.org). Or you may find it easier to contact them through the website of the Human Rights Campaign ([www.hrc.org](http://www.hrc.org)) which has talking points and other resources.

## Related Documents

### **Transgender Persons And Marriage: The Importance Of Legal Planning**

By Shannon Minter, Legal Director  
National Center for Lesbian Rights  
<http://nclrights.org/publications/tgmarriage.htm>

### **Representing Transsexual Clients: Selected Legal Issues**

By Shannon Minter, Legal Director  
National Center for Lesbian Rights  
<http://www.transgenderlaw.org/resources/translaw.htm>

## Transgender Organizations

(alphabetical order)

### **National Center for Transgender Equality**

[www.NCTEquality.org](http://www.NCTEquality.org)  
202.639.6332

### **Sylvia Rivera Law Project**

[www.srlp.org](http://www.srlp.org)  
212.337.8550

### **Transgender Law Center**

[www.TransgenderLawCenter.org](http://www.TransgenderLawCenter.org)  
415.865.0176

### **Transgender Law and Policy Institute**

[www.TransgenderLaw.org](http://www.TransgenderLaw.org)  
917.686.7663

## LGBT Organizations

(alphabetical order)

### **Federation of Statewide LGBT Orgs.**

[www.FederationLGBT.org](http://www.FederationLGBT.org)

### **Freedom to Marry**

[www.FreedomToMarry.org](http://www.FreedomToMarry.org)  
212.851.8418

### **Gay & Lesbian Advocates & Defenders**

[www.GLAD.org](http://www.GLAD.org)  
617.426.1350

### **Human Rights Campaign**

[www.HRC.org/marriage](http://www.HRC.org/marriage)  
202.628.4160

### **Lambda Legal**

[www.LambdaLegal.org](http://www.LambdaLegal.org)  
212.809.8585

### **LLEGO**

[www.LLEGO.org](http://www.LLEGO.org)  
202.408.5380

### **National Black Justice Coalition**

[www.nbjcoalition.org](http://www.nbjcoalition.org)  
212.330.6599

### **National Center for Lesbian Rights**

[www.NCLRights.org](http://www.NCLRights.org)  
415.392.6257

### **National Gay & Lesbian Task Force**

[www.TheTaskForce.org/marriagecenter](http://www.TheTaskForce.org/marriagecenter)  
202.393.5177