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Obama Supreme Court Brief Attacks DOMA on the Merits

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Obama Supreme Court Brief Attacks DOMA on the Merits

Justice Department responds to House’s outside counsel as all parties answer jurisdictional queries

BY ARTHUR S. LEONARD

A r g u i n g t h a t a l l
government policies
that discriminate
based on sexual
orientation should
be treated by the federal courts as
presumptively unconstitutional,
the Obama administration has filed
its brief with the Supreme Court in
the Defense of Marriage Act case in
which oral arguments are scheduled
for March 27.

The case was brought by New
York widow Edie Windsor, who is
challenging DOMA’s ban on federal
recognition of her Canadian mar-
riage, which saddled her with estate
taxes of more than $360,000 follow-
ing the 2009 death of her spouse,
Thea Spyer.

The February 21 brief, authored
by Solicitor General Donald B.
Verrilli, Jr., is a response to last
month’s filing by former Solicitor
General Paul Clement, who repre-
sents the Bipartisan Legal Advi-
sory Group of the House of Rep-
resentatives. BLAG, controlled by
Republican Speaker John Boehner,
stepped into the DOMA litigation in
2011 when the Obama administra-
tion announced it would no longer
defend the statute.

The day after Verrilli’s brief, the
Department of Justice filed a sec-
ond brief addressing jurisdictional
issues the Supreme Court posed on
December 7 when it granted DOJ’s
petition to review this case. The
federal district court in New York
had ruled in favor of Windsor’s law-
suit, and the Second Circuit Court
of Appeals, based in New York,
affirmed that ruling last September.

Attorneys for Windsor and for
BLAG also filed briefs on Febru-
ary 22 addressing the jurisdictional
questions.

The Merits of the Case

Verrilli’s February 21 brief on the
merits of the case restated argu-
ments now familiar from lower court
proceedings. DOJ argues that “sex-
ual orientation” meets the criteria
the Supreme Court has used in
the past to identify classifications
that should be considered “suspect”
for equal protection purposes. In
reviewing cases alleging discrimi-
nation based on a suspect class,
the government has the burden
of showing that important policy
interests justify the measure. The
Obama administration argues that
the policy justifications Congress
stated for DOMA in 1996 fail to meet
that test and that new rationales are
now being articulated in a rearguard
action to defend the statute.

When DOMA litigation first sur-
aced, DOJ had not yet concluded
that the law was unconstitutional.
In keeping with arguments it made
in federal district court in Boston
in 2010, the administration contin-
ued to assert that the ban on federal
recognition would survive judicial
review under the traditionally defer-
ential “rational basis” test that some
people have achieved some politi-
cal gains does not tilt this factor
against, let alone preclude, height-
ened scrutiny.”

The DOJ brief also blasts
BLAG’s reliance on the so-called
“responsible parenting and child-
rearing” theory, which posits
that the purpose of marriage is to
courage heterosexuals to raise
their offspring in stable family
environments.

“Even apart from expert consen-
sus that children raised by gay
and lesbian parents are as likely to
be well adjusted as children raised
by heterosexual parents,” DOJ argues,
DOMA “does nothing to promote
responsible opposite-sex parenting
or to prevent irresponsible same-sex
parenting. Denying federal benefits
to married same-sex couples creates
no additional incentive for hetero-
sexual couples to marry, procreate,
or raise children together; nor does it
disturb any state-conferred parental
rights for same-sex couples.”

It is striking to read such
arguments in a brief filed by the
federal government, considering
that early in President Barack
Obama’s first term a DOJ brief filed
in then-pending litigation caused a
firestorm of protest by making the
same arguments that BLAG makes
now and that this newest brief
rejects. The president’s “evolution
on same-sex marriage, as reflected
in the arguments now being made
by his administration, seems nearly
complete.

Jurisdictional Issues

The jurisdictional issues raised
by the Supreme Court in December
may seem arcane and a bit of a side-
show, but they may yet result in the
court abstaining from deciding this
case on the merits.

The high court may decide that
since DOJ agrees with the Second
Circuit’s opinion in the Windsor
case, Verrilli’s petition for review
presents no real “case or contro-
versy,” a requirement for judicial
review. It could also conclude that
BLAG, as a committee of Congress,
has no “standing” to defend DOMA
before the Supreme Court, since no
House member has any personal
financial or liberty interest in ensur-
ing the law is upheld.

It is unusual for the government
to appeal a lower court ruling it
agrees with. And BLAG did not file
argues that it is the exclusive repre-
circuit Court of Appeals, as well.

miss the petition and possibly vacate
is not properly before it, it may dis-
misce and research on HIV/AIDS for

sentative of the interests of the gov-

government. Since the government con-
tinues to enforce DOMA but has been
ordered to pay Windsor a tax refund, it
has an actual stake in the litigation. The Obama administration argues
that BLAG’s role in the case should be
limited to filling a “friend of the court”
brief rather than as an actual party
with a stake in the outcome.

BLAG, in contrast, argues that the
institutional interest of Congress in
being free to pass laws regarding sex-

 York, who, its opinion said, “properly
determined that plaintiff was a lim-
ed public figure because, through her
publication of countless articles, she
voluntarily injected herself into the
controversial debate on whether HIV
causes AIDS with a view toward influ-
encing the debate and projected her
name and personality before readers
of nationally distributed magazines
to establish her reputation as a leading
authority in this area.”

The appellate panel also found that
“Jefferys met his burden of demon-
strating that plaintiff could not show
by clear and convincing evidence that
he made the challenged statements
with actual malice or with gross irre-
sponsibility.” Jefferys explained his
statements were based on “his/exp-
itise and research on HIV/AIDS for
many years, on an article signed by
prominent experts in the field, as well
as on the many articles in the record
which critiqued plaintiff’s 2006 article
as being filled with misquotes or mis-
representations.”

The panel noted, as well, that “Jef-
ferys also provided documentation
to support why he believed what he wrote
about the plaintiff was true and com-
pared in detail plaintiff’s journalism to
the articles and studies she cited and
explained why he believed her work to
contain misrepresentations.”

This case illustrates that robust
debate on issues of public importance
depends on a wide degree of toleration
for argument and rhetoric. As long as
somebody is not deliberately publish-
ing falsehoods or making statements
harmed to the reputation of others
without regard for whether or not they
are true, they will be protected from li-
ability for defamation. Farber’s assertion
that “Jefferys was biased against her or
bore her ill will does not aid her cause,”
the panel found, since that is not the
issue in determining “actual malice” in
the context of free speech constitution-
al law.

The court also agreed with York’s
carriage of the panel that Jefferys’ use of
the word “liar” to describe Farber was not
subject to legal liability.

“The full context of the statement,
including its tone and apparent pur-
pose, and the broader context of the
statement and surrounding circum-
cstances lead to the conclusion that
what was being read was likely to be
opinion, not fact,” the panel noted.
Generally, legal liability for defama-
tion is limited to factual assertions. As
a result, the appellate court concluded
York acted appropriately in dismissing
the case rather than subjecting Jef-
ferys to discovery and trial on the defa-

NEWS BRIEFS

BY JOSEPH EHRMAN-DUPRE, ANDY HUMM, and PAUL SCHINDLER

Jets, said that he had been “looking forward to sharing
a message of hope and Christ’s unconditional love with
the faithful members” of the Dallas congregation and would “con-
tinue to use the platform God has blessed me with to bring
Faith, Hope and Love to all those … needing a brighter day.”

In a statement released by the congregation, Jeffress
claims Tebow told him he would like to appear at the
mega-church at a later date.

“The reason for this firestorm is not because the word
of God has changed,” the statement read. “It’s because society
has changed.”

In a written statement, Hudson Taylor, who founded
Athlete Ally to promote a welcoming attitude toward
LGBT athletes in sports, said, “I applaud Tim Tebow’s
decision to cancel his appearance. Regardless of his
reasoning, his absence serves as a reminder that the
discrimination of gay and lesbian athletes and individu-
als has no place in sports or society. I hope Tim will take
this opportunity to speak out for respect and acceptance
of all people, regardless of a person’s sexual orienta-
tion.” — PS

Suspect Apprehended
in Queens Gay Murder
Reportedly Knew Victim Well

Police have arrested Lleuyel Garcia in connection with
the murder of Joseph Benzinger, whose body was found at
the Crown Motor Inn in Queens on February 9. The Febru-
ary 14 arrest comes in one of three cases of gay men, two
in Queens and one in Manhattan, found murdered between
January 26 and February 9. Published reports noted lack of
forced entry in the three cases and that the apparent cause
of death was strangulation. The other two victims
were murdered in their homes.

The New York Post, citing police sources, said that Garcia,
23, who lives in the Inwood neighborhood of Upper Manhat-
tan, is alleged to have strangled Benzinger after the two men
argued and to have then stolen his wallet and other posses-
sions. One source told the Post, “The two had known each
other for several years, and it was not a random attack.”

Garcia has been charged with second-degree murder, rob-
bery, possession of stolen property, and evidence tampering.

The Post account contradicts a narrative that had
emerged earlier that the three killings may have been
linked to online hook-ups. The New York City Anti-Violence

Project along with out gay City Councilman Daniel Dromm
made statements in the days following the murders about
the safety of gay men who meet strangers online or in bars.
After the NYPD’s apprehension of Garcia, Dromm released a
statement saying, “Despite the arrest, it is vitally important
that we continue to remain vigilant. The other murders com-
mitted against gay men remain unsolved but I am hopeful
that the NYPD will capture the perpetrators. Again, I want to
urge everyone that it is always important to practice safety
whether meeting someone online or in person.” — JE-D

NYer Gregory T. Angelo to Head National Log Cabin Republicans

Gregory T. Angelo, who has served as interim executive
director of the Log Cabin Republicans since the first of the
year, has been named to the post on a permanent basis, the
group’s board of directors announced on February 15.
Angelo replaces R. Clarke Cooper, an Iraq war veteran
who had previously worked in the Bush administration and

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