

OBAMA'S "EVOLUTION" ACCELERATES: DOJ FORMALLY DECLARES DOMA UNCONSTITUTIONAL

Well the Obama Administration slid some pretty big news into the holiday weekend trash dump, and for once it is very good news. In a late filing in the Northern District of California (NDCA) case of *Golinski v. US Department of Personnel Management*, the Department of Justice has formally stated that the Defense of Marriage Act (DOMA) is unconstitutional:

Section 3 of the Defense of Marriage Act, 1 U.S.C. 7 ("DOMA"), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation, but it has established and repeatedly confirmed a set of factors that guides the determination whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a

group”, (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little in relation to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.” *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Careful consideration of those factors demonstrates that sexual orientation classifications should be subject to heightened scrutiny.

Here is the complete brief filed by the DOJ in *Golinski*

As much grief as Barack Obama has received for his “state of evolution” posture on granting full constitutional equality, in all respects, on LGBT issues, including more than a little from me, this is a very significant shift and should be applauded. The position staked out in *Golinski* is a follow on of the “new policy” announced by the Administration when it refused to continue defending the 2nd Circuit DOMA cases, but it is a quantum shift further.

The US government has gone from fighting to support DOMA, to refusing to support but standing on the margins, to entering the case and actively siding with the plaintiff seeking to declare the law unconstitutional. That is truly a wonderful evolution, and it is happening at warp speed now. This is far more reaching than just the pending DOMA cases in the 2nd Circuit. As I first said when the policy shift was announced by Eric Holder, this seismic change will filter into any LGBT Constitutional rights case pending in federal or state courts, most importantly *Perry v. Schwarzenegger* (Prop 8) and the other DOMA cases currently being litigated.

This is simply fantastic news for all those who believe in Equal Protection and marriage

equality for all. As I said exactly one week ago tonight when New York passed their marriage equality law in the dead of the night, the die is increasingly cast. The government's official, and strong, step forward in *Golinski* is yet another big step toward the goal, and toward Anthony Kennedy's wheelhouse. In conjunction with the Motion for Summary Judgment concurrently filed by Golinski herself, that should about seal the deal in the case. That is a beautiful thing.

Once the precedent is entered that "discrimination based on sexual orientation is subject to heightened scrutiny" the game is over across the board. The dawn is on the horizon.