FURTHER REFLECTIONS ON THE OBAMA AMICUS BRIEF IN PROP 8

After the flurry of fast analysis on the fly, getting a post up for discussion and the crucible of discussion here and on Twitter – and a bit of sleep – I have some further thoughts on the amicus brief filed late yesterday by the Obama Administration in *Hollingsworth v. Perry*.

My ultimate conclusions on what the Obama amicus means and portends has not changed much, but there are several things that should be said both to explain my criticism and give a little more credit to the Administration where due. First an analogy explaining my criticism of the Obama brief.

Imagine if, when *Brown v. Board of Education* was being considered, the Eisenhower Administration had instructed it's Assistant Attorney General and OLC chief, J. Lee Rankin, to amicus brief that only Kansas and a handful of other similarly situated states, but not the rest of the country where the bigotry of segregation was at its most prevalent worst, should be granted desegregation. How would history have held Mr. Eisenhower and Mr. Rankin? That is, of course, not what happened in *Brown*; the Eisenhower Administration filed an amicus brief demanding equality and desegregation for all citizens, in all states.

Messrs. Obama, Holder and Verrilli, however, fell short of such a demand for equality for all

in the civil rights moment, the *Brown v. Board*, of their time. Let the record reflect they did have the courage to join the game, which is in and of itself a commendable thing, just that they did not muster the full courage to play to win for all Americans, regardless of their particular state of domicile – and especially not for those in the states with the most sexual orientation bigotry and discrimination.

In this regard, I think our friend at Daily Kos, Adam Bonin, summarized the duality of the Obama amicus quite well:

> To be sure, the brief argues all the right things about why laws targeting gays should be subject to heightened scrutiny, and that none of the proffered justifications for treating their relationships differently have merit ("Reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles.") Still, for those who were seeking a full-throated endorsement of 50-state marriage equality, you will find this brief lacking.
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> That said, from the day this suit was filed in May 2009, I have suggested that this limited path is the Court would ultimately take. And it can be dangerous to advance positions which the Court might reject, especially when they are not necessary for the resolution of the instant case. But, still, there was an opportunity for boldness here, and the Obama administration did not take it. As a great man once said:
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> > Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well.

Adam's point about the fear of overreaching when the *Perry* litigation was originally filed is a good one. As I think he has evolved to having less fear in that regard over time, the explanation for such a shift comes from the changed nature of the ground underneath the larger issue. It is a testament to the genius of the *Perry* litigation in its inception, and even more so to the way Judge Vaughn Walker framed an actual trial that laid bare, with both evidence and the inability for haters to provide credible evidence, the hollow immorality and rank bigotry of the Proponents of Proposition 8.

The space created by Judge Walker's amazing decision created the headroom for a cascade of events in DOMA cases, equality legislation in states and popular votes in other states, all in favor of marriage equality. This past election cycle provided the once unthinkable result of marriage equality going four for four in popular votes.

The ground has so seismically changed, the momentum of social conscience so strong, that we simply occupy a different place now than existed at the start of the *Perry* litigation. And that is the ground the Supreme Court will have to recognize when they hear oral arguments on March 26 in *Hollingsworth v. Perry* and March 27 in the DOMA cases.

Regardless of the messy way in which it did so, the Supreme Court (and its Chief Justice, John Roberts) proved in the ACA cases that they are aware of, and attend to, the legacy of the court. It is crystal clear that marriage equality, and equality for sexual orientation, is happening. The only question at this point is how complete, how fast.

This is the great civil rights measure of this period in American history; I find it hard to believe Justice Anthony Kennedy, who has already displayed his social conscience in *Lawrence v. Texas*, wants to be on the wrong side of history. In August of 2010, on the release of Vaughn Walker's historic trial court opinion, I quoted

Linda Greenhouse in laying out why I thought Justice Kennedy would swing the majority in favor of marriage equality when *Perry* made its way to the court for review:

> As the inestimable Linda Greenhouse noted recently, although the Roberts Court is increasingly dogmatically conservative, and Kagan will move it further in that direction, the overarching influence of Justice Anthony Kennedy is changing and, in some ways, declining. However, there is one irreducible characteristic of Justice Kennedy that still seems to hold true; she wrote of Kennedy:
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> > …he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action — which is what situates a case in a constitutional framework — between the fair and the not-fair.
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> The money quotes of the future consideration of the certain appeal and certiorari to come on Judge Walker's decision today in *Perry v. Schwarzenegger* are:
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> > Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote the majority opinion striking down such a measure in a 1996 case, Romer v. Evans) because "central both to the idea of the rule of law and to our own

> > Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."
> > ……
> > In a book titled "Justice Kennedy's Jurisprudence," a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an "ideal of liberty" that "independently considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person's standing in the community, or violate essential elements of human dignity." That is, I think, a more academically elegant way of saying fair versus not-fair.
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> > So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line.
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> I believe that Linda is spot on the money with her analysis of what drives Anthony Kennedy in his jurisprudence. And this is exactly what his longtime friend, and Supreme Court advocate extraordinaire, Ted Olson will play on and argue when the day arrives.

Well, that day is upon us now. Honestly, with the tide of momentum headed in the direction it

is, I am less and less convinced John Roberts wants to be on the wrong side of civil rights history either.

But giving the Justices the moral and sociological headroom to grant equality to *all* the citizens, in *all* the states, especially those in the discriminatory swaths of the country, is key to the cause. The *Perry* Plaintiffs have done their part. Yesterday, the Obama Administration had the opportunity to go the distance, and they pulled up slightly short.

I feared Obama might come up so short their brief could be counterproductive; that did not occur. The song could have been, and should have been, stronger; but credit where due, they hit the necessary notes. It is filed and done, and it is overall an important and powerful thing. Perry Plaintiffs' attorney Ted Boutrous put it well:

> Their arguments from start to finish would apply to other states," he said. "The argument of the day (against same-sex marriage) is the responsible pro-creation argument. The United States takes it apart piece by piece. It's those same types of arguments that are used in other jurisdictions to justify the exclusion of gays and lesbians from marriage.

And as Marcia Coyle observed in the National Law Journal BLT article the Boutrous quote above came from:

> And the heightened scrutiny analysis, he added, is "exceedingly important," not just in the marriage context but in other contexts where gay men and women face discrimination.

Marcia is exactly right (and her report well worth a read), and between the Perry Plaintiffs' merits brief and the Obama Administration amicus brief, there is a foundation from which to argue

to all the Justices, but especially Anthony Kennedy and John Roberts, for equality for all across the board.

Mr. Obama and Mr. Holder can help immeasurably in the coming days leading up to oral argument and decision by the Justices by using their bully pulpit to advocate for full heightened scrutiny equal protection for all, in all states. The cause endures and their duty maintains. And we, as citizens can give them the support and positive feedback to help them do so. Let the final push for full equality begin.