

THE OBAMA DOJ FILES A TIMID BRIEF IN PERRY/PROP 8!

The news was broken, right around 2:00 pm EST by NBC's Pete Williams, that the Obama Administration would indeed file a brief in support of



marriage equality in *Hollingsworth v. Perry*. Here was the original tweet by NBC's Williams:

Obama Justice Dept to file Supreme Court amicus brief today opposing Prop 8 in Calif and expressing support for same-sex marriage to resume.

Here was Williams' followup story at NBCNews.com. The inherent problem with the original report was that it tended to indicate the Obama Administration was briefing only on the restricted *Romer v. Evans* posture heinously crafted by Judge Stephen Reinhardt in the 9th Circuit.

So, we were left hanging wondering exactly how the Obama Administration really briefed the issue, was it a limited *Romer* brief, or one for full marriage equality and heightened scrutiny under the equal protection and due process clauses that would give all citizens, nationwide, equality as I argued for earlier this week?

We now have the answer, and the brief, and here it is the brief in all its not quite glory:

The Obama Administration has, shockingly (okay, I do not mean that in the least), tried to nuance its way and split babies. Typical cowardly bunk by Mr. Obama. Lyle Denniston at SCOTUSBlog depicted it thusly:

The historic document, though, could give the Court a way to advance gay marriage rights, without going the full step – now being advocated by two California couples who have been challenging Proposition 8 since 2009 – of declaring that marriage should be open to all same-sex couples as a constitutional requirement.

Administration sources said that President Obama was involved directly in the government's choice of whether to enter the case at all, and then in fashioning the argument that it should make. Having previously endorsed the general idea that same-sex individuals should be allowed to marry the person they love, the President was said to have felt an obligation to have his government take part in the fundamental test of marital rights that is posed by the Proposition 8 case. The President could take the opportunity to speak to the nation on the marriage question soon.

In essence, the position of the federal government would simultaneously give some support to marriage equality while showing some respect for the rights of states to regulate that institution. What the brief endorsed is what has been called the "eight-state solution" – that is, if a state already recognizes for same-sex couples all the privileges and benefits that married couples have (as in the eight states that do so through "civil unions") those states must go the final step and allow those couples to get married. The argument is that it

violates the Constitution's guarantee of legal equality when both same-sex and opposite-sex couples are entitled to the same marital benefits, but only the opposite-sex couples can get married.

Honestly, I think Mr. Denniston is being kind. President Obama's position bears the mark of a full throated coward. Clearly, when Mr. Obama said this to ABC News, he was blowing smoke up the posterior of the American public:

...obviously, my personal view, which is that I think that same-sex couples should have the same rights and be treated like everybody else. And that's something I feel very strongly about and my administration is acting on wherever we can.

That statement would say that Obama actually supports full equal protection for ALL Americans. But the position staked out today in the Administration's brief filed by his Solicitor General puts the lie to Obama's rhetoric.

Mr. Obama has consistently lied about his dedication to civil liberties, privacy and the Fourth Amendment, I guess it should not be shocking that he would lie about his dedication to civil rights for all, across all the states, in the form of marriage equality. And that is exactly what he has done. And as Denniston's article makes clear, this decision bore the active participation and decision making of Obama personally. The cowardice is his to bear personally. Thanks for the fish Mr. Obama.

That is the biggest of the *Hollingsworth v. Perry* briefing news today, but certainly not the entirety of it. Also filed today, among others, was a brief by a group of 14 states led by Massachusetts and New York and an interesting brief by NFL players Chris Kluwe and Brendon Ayanbadejo. The brief by the 14 states is

helpful in the way it portrays marriage in the states, both straight and gay, and in that it, on page four, adopts the position of Olson, Boies and the Prop 8 Plaintiffs that the Supreme Court must find for full heightened scrutiny protection for sexual orientation under the Equal Protection and Due Process Clauses. The Kluwe and Ayanbadejo brief, frankly, is not particularly helpful in that regard as it only discussed the limited *Romer* based finding that would leave marriage equality up to the states.

The same group of American businesses who weighed in on the DOMA cases also filed a brief today in *Hollingsworth v. Perry*. In a more negative development, former Solicitor Walter Dellinger also filed an amicus brief today that is literally loathsome and dangerous in its argument against even giving standing for appeal to the Supreme Court. Dellinger embarrassed himself, but so too did Barack Obama. Must be something in the water of centrist Democratic thought.

So, there you have it. It was a rather important, if not quite as fulfilling as should have been, day in the life of the *Hollingsworth v. Perry* litigation. I guess credit should be given to Mr. Obama even for weighing in at all, and undoubtedly most media and pundits will slather him with praise for just that. Somehow, I cannot. The full measure of greatness was there for the taking, and Barack Obama, Eric Holder and Donald Verrilli, Jr. whiffed at the full mark of greatness. They will be remembered for their support, and their failure to truly step up will likely dissipate with time; but let it be said here and now.

In spite of the cowardly and restrictive actions by the "liberal President Obama" the cause of true heightened scrutiny protection for ALL Americans endures and lives on. Just not with the support of the President of the United States of America. that "leader" took the cheap "states rights" cowardly way out. Let us hope Anthony M. Kennedy and the majority of the

Supreme Court have higher morals and muster as men.

[As always on these Prop 8 posts, the absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]