United States Senate

Committee on the Judiciary

Hearing on the So-Called "Respect for Marriage Act of 2011"

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Thank you very much, Chairman Leahy and ranking member Grassley, for inviting me to testify before this Committee on S. 598, which is misleadingly titled the "Respect for Marriage Act of 2011."

I will briefly explain in my testimony why I oppose S. 598 and why I support the continuation in law of the Defense of Marriage Act ("DOMA"). S. 598 should also be understood in the broader political context of the Obama administration's stealth campaign to induce the courts to invalidate DOMA and to invent a constitutional right to same-sex marriage. I will therefore discuss more extensively how, even before its February announcement of its formal decision to abandon defending DOMA, the Obama administration's Department of Justice was systematically sabotaging its supposed defense of DOMA.

I offer my views in my capacity as president of the Ethics and Public Policy Center and director of EPPC's program on The Constitution, the Courts, and the Culture.[1] In that capacity, I have written and lectured widely on matters of federal law. I draw on my familiarity with the Department of Justice, including from my service as principal deputy assistant attorney general in the Office of Legal Counsel. I also draw on my broader experience over the past two decades in matters relating to constitutional law and other federal law: In addition to my program work at EPPC and my stint in OLC, that experience includes serving as a law clerk to Justice Antonin Scalia and as a senior staffer to the Senate Judiciary Committee.

[1] The views I express in this statement and at the hearing are mine alone and are not to be imputed to EPPC as an institution.

I

Far from respecting marriage, S. 598 would empty the term of any core content. In its section 3, S. 598 would redefine marriage for purposes of federal law to include *anything* that any state, now or in the future, recognizes as a marriage.

The inevitable effect, and the presumed purpose, of section 3 of S. 598 is to have the federal government validate so-called same-sex marriage by requiring that it treat as marriage for purposes of federal law any such union recognized as a marriage under state law. Section 3 would also require taxpayers in the states that maintain traditional marriage laws to subsidize the provision of federal benefits to same-sex unions entered into in other states.

Further, the principles invoked by advocates of same-sex marriage in their ongoing attack on traditional marriage clearly threaten to pave the way for polygamous and other polyamorous unions,[2] especially via the judicial invention of a state constitutional right to polyamory. If the male-female nature of traditional marriage can be dismissed as an artifact and its inherent link to procreation denied, then surely the distinction between a marriage of two persons and a marriage of three or more is all the more arbitrary and irrational.[3] The administrative burden of allocating the benefits of

[2] I use the term "polygamy" and its cognates to refer to the situation in which one man has two or more wives, and I use the term "polyamory" and its cognates to refer to any multipartner marital union.

[3] See, e.g., "Beyond Same-Sex Marriage," BeyondMarriage.org (July 26, 2006), available at http://beyondmarriage.org/full_statement.html (statement drafted by "nearly twenty LGBT and queer activists" calling for "[l]egal recognition for a wide range of relationships, households, and families" and praising "[c]ommitted, loving households in which there is more than one conjugal partner"; the thousand or more signatories include such leftist luminaries as Gloria Steinem, Barbara Ehrenreich, and Cornel West); Sherif Girgis, Robert P. George & Ryan T. Anderson, "What is Marriage?," 34 Harv. J. L.& Pub. Pol. 245, 272-274 (2010).

As it happens, the *New York Times* reported just last week on a lawsuit brought by a law professor to challenge a state's anti-polygamy law. See "Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law," *New York Times*, July 12, 2011. (The law professor contends that the suit seeks only to decriminalize

marriage among the members of a polyamorous union so that they would not exceed those of a two-member union is surely insignificant in the face of the polyamorists' asserted right (in the language of *Planned Parenthood v. Casey* (1992)) "to define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life." Indeed, it's doubtful that any further sliding down the slippery slope would be necessary to get to polyamory: unlike the novelty of same-sex marriage, the polygamous version of polyamory has been widely practiced throughout history (and is therefore arguably *up* the slope from same-sex marriage).

Under section 3 of S. 598, any polyamorous union recognized as a marriage under state law would have to be recognized by the federal government as a marriage for purposes of federal law. Thus, the foreseeable effect of S. 598 would be to have the federal government validate any state's adoption of polyamory and to require taxpayers throughout the country to subsidize polygamous and other polyamorous unions.

II

Section 2 of S. 598 would repeal the Defense of Marriage Act. That proposed repeal is wholly unwarranted.

The Defense of Marriage Act, approved by overwhelmingly majorities in both Houses of Congress (85-14 in the Senate and 342-67 in the House of Representatives) and signed into law by President Clinton in 1996, has two substantive provisions. Section 3 defines marriage for purposes of federal law to mean "only a legal union between one man and one woman as husband and wife." It thus reaffirms the longstanding understanding of what the term "marriage" means in provisions of federal law. In Section

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polygamy, not to require state recognition of polygamous and other polyamorous marriages, but one would have to be naïve or stupid not to discern the next step.)

2, Congress defends the prerogative of each state to choose not to treat as a marriage a same-sex union entered in another state. Section 2 is a genuine exercise in protecting federalism. It operates to help ensure that one state does not effectively impose same-sex marriage on another state. At the same time, it leaves the citizens of every state free to decide *whether or not* their state should redefine its marriage laws.

It is worth noting that of the eight current members of this Committee who voted on DOMA in 1996, seven voted for DOMA. Those seven include Chairman Leahy and Senators Kohl, Schumer, and Durbin (the latter two of whom voted for DOMA as members of the House). Among the many other prominent Democratic senators who voted for DOMA in 1996 were Vice President Joseph Biden, Tom Daschle, Chris Dodd, Tom Harkin, Frank Lautenberg, Carl Levin, Joe Lieberman, Barbara Mikulski, Patty Murray, Harry Reid, Jay Rockefeller, Paul Sarbanes, and Paul Wellstone. This list of supporters of DOMA suffices by itself to refute the empty revisionist claim that DOMA somehow embodies an irrational bigotry against same-sex couples. Nor should anyone who voted for DOMA have any reason to be surprised by the entirely foreseeable consequences that it has had. (On the broader substantive case for DOMA, I won't restate here the arguments presented by my fellow pro-DOMA panelists but will instead generally adopt them.)

DOMA has also been criticized for supposedly being inconsistent with values of federalism. This criticism is badly confused (and particularly brazen when offered by those who support invention of a federal constitutional right to same-sex marriage that would override all contrary state laws). As I've explained, Section 2 of DOMA advances values of federalism by helping to ensure that one state does not effectively impose same-

sex marriage on another state while at the same time preserving each state's freedom to define its marriage laws. Section 3 of DOMA merely defines the term "marriage" (and the term "spouse") *for purposes of federal law*. It is a profound confusion to believe that values of federalism somehow require the federal government to defer to, or incorporate, the marriage laws of the various states in determining what "marriage" means in provisions of federal law.

Moreover, it is wrong to assert, as some do, that even the state-law definition of marriage has always been purely a matter left to the states.

Our predecessors understood what too many Americans today have forgotten or never learned or find it convenient to obscure—namely, that the marriage practices that a society endorses have real-world consequences that extend far beyond the individuals seeking to marry and that shape or deform the broader culture. That understanding underlay the 19th-century effort to combat polygamy, which was recognized to be incompatible with democracy.[4] That is why Congress, in its separate enabling acts for the admission to statehood of Arizona, New Mexico, Oklahoma, and Utah, conditioned their admission on their including anti-polygamy provisions in their state constitutions.[5] That history makes it all the more jarring that supporters of S. 598 would require that federal law treat as a marriage—and require federal taxpayers to subsidize—any polygamous marriage recognized by any state.

[4] See, e.g., Stanley Kurtz, "Polygamy Versus Democracy," *Weekly Standard*, June 5, 2006.

[5] See Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108.

III

As a political matter, the effort to reconsider and repeal DOMA is obviously fueled by the Obama administration's recent decision to abandon defending—or, more precisely, as I will show, to abandon *pretending* to defend—DOMA. It is therefore important to recognize that that decision reflects a sharp departure from the Department of Justice's longstanding practice of defending congressional enactments. Further, the Obama administration's own explanation of that decision cannot be taken seriously. Rather, as its broader sabotage of DOMA litigation makes clear, the Obama administration has subordinated its legal duty to its desire to please a favored and powerful political constituency, and it is eager to obscure from the public its stealth campaign to induce the courts to invent a constitutional right to same-sex marriage.

A

I will first outline the general principles that should govern a presidential administration in deciding whether and when to decline to defend a federal law against a constitutional challenge brought in federal court.

At the outset, it is essential to distinguish between laws that an administration opposes or disfavors on policy grounds only and laws that it regards as unconstitutional. When a president opposes a law on mere policy grounds, he is nonetheless obligated to defend it vigorously from constitutional attack. That obligation flows directly from the president's duty under Article II of the Constitution to "take Care that the Laws be faithfully executed," for the duty to faithfully execute, or enforce, a law entails acting to preserve the law's vitality against improper judicial invalidation.

The president's "take Care" obligation does not apply to laws that are unconstitutional, as the Constitution is first and foremost among the "Laws" that the president is dutybound to "take Care … be faithfully executed." In other words, the president is not obligated to enforce unconstitutional statues. Indeed, he is obligated *not* to enforce unconstitutional statues.

It is worth emphasizing the parallels between the president's authority to decline to enforce unconstitutional statutes and the president's authority to issue so-called constitutional signing statements, which present constitutional objections to provisions of legislation that the president is signing and which state whether and how the executive branch will enforce such provisions. In both cases, the president's authority is rooted in his "take Care" obligation not to enforce unconstitutional provisions of law. In both cases, it would be wrong to contend (as some who should have known better did with respect to President George W. Bush's constitutional signing statements[6]) that no such authority exists. In both cases, one must carefully examine the particulars to determine the soundness of any specific exercise of that authority.

Recognizing the president's obligation not to enforce unconstitutional statutes leads to the difficult theoretical question how the president ought to go about deciding whether a particular law is unconstitutional and therefore ought not be enforced or defended. May he, for example, regard a law as unconstitutional only if the Supreme Court's precedents clearly dictate that it would so hold? Or may he form that judgment

[6] See, e.g., Report of American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, August 2006. Evidently indulging its political biases, the ABA task force, which included legal luminaries like Harold Koh, Kathleen M. Sullivan, and Judge Patricia M. Wald, somehow reached the widely discredited and badly confused conclusion that the longstanding practice of presidential constitutional signing statements is "contrary to the rule of law and our constitutional system of separation of powers." The ABA adopted the task force report, but has not seen fit to object to President Obama's continuation of the practice of issuing constitutional signing statements.

on his own, where the Court's case law is unclear or even where his judgment is contrary to, say, a recent unanimous ruling by the Court that the law is constitutionally permissible?

As it turns out, these questions have been much weightier in theory than in practice, at least insofar as the Department of Justice's duty to litigate in defense of a federal statute is at issue. Over the last several decades, presidential administrations with very different theoretical understandings of the president's authority to interpret the Constitution have embraced the general proposition that, with the exception of laws that intrude on the executive branch's constitutional prerogatives, the Department of Justice should vigorously defend the constitutionality of any law for which a *reasonable* defense may be made in the courts.

This "reasonable" standard sets a very low bar: it basically means that the Department of Justice will defend a federal law against constitutional challenge when it can offer *non-frivolous* grounds (or even a single non-frivolous ground) in support of the law. Given the wide range of accepted argument in the legal profession and the breadth of interpretive methodologies among federal judges, the "reasonable" standard is very easy to meet.

The consensus across presidential administrations on this easy-to-meet standard is nicely captured in the embrace by Drew S. Days III, Solicitor General in the Clinton administration, of testimony by Rex Lee, a senior DOJ official (and later Solicitor General) in the Reagan administration. In what Days described as possibly the "best formal statement of the Justice Department's policy of defending congressional statutes,"

Lee testified that the only situation (apart from a law intruding on executive-branch authority)

> in which the Department will not defend against a claim of unconstitutionality involves cases where the Attorney General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal [O]fficer of the United States, that a law is *so patently unconstitutional* that it cannot be defended. Such a situation is thankfully most rare.[7]

As Days explains, this consensus practice affords Congress "the respect to which [it] is entitled as a coordinate branch of government" and "prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes."[8]

To be sure, presidential practice has not absolutely complied with this general consensus. In rare instances, as Clinton Justice Department official Walter Dellinger outlined in an op-ed last fall,[9] an administration has determined not to offer a substantive constitutional defense of a defensible law. Instead, it has pursued only a nominal defense: It has set forth in its briefs its position that the law is unconstitutional but has also filed a formal appeal from a decision adverse to the law in order to ensure that the judicial hierarchy can operate to correct a wrong decision. Further, as Dellinger explains, in those rare instances when an administration pursues the option of making only a nominal defense of a defensible law, the courts can and should invite other interested and capable persons to defend the law.

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[7] Drew S. Days III, "In Search of the Solicitor General's Clients: A Drama with Many Characters," 83 Ky. L.J. 485, 500-501 (1994-1995) (emphasis added).

[8] Id. at 499, 502.

[9] Walter Dellinger, "How to Really End 'Don't Ask, Don't Tell,'" *New York Times*, Oct. 21, 2010; see also Letter from Assistant Attorney General Andrew Fois to Senate Judiciary Committee Chairman Orrin G. Hatch, March 22, 1996 (identifying instances in which the Department of Justice has declined to defend in court the constitutionality of laws that the executive branch has enforced).

B

On February 23, 2011, the Obama administration announced that it would no longer defend Section 3 of DOMA, which defines the word "marriage" for purposes of federal law to mean "only a legal union between one man and one woman as husband and wife." In a letter to congressional leaders[10] and in a separate prepared statement,[11] Attorney General Eric Holder undertook to explain the Obama administration's decision. According to Attorney General Holder, President Obama "has made the determination that Section 3 …, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment." What was said to have triggered President Obama's determination was the filing in November 2010 of two lawsuits against Section 3—*Windsor v. United States* and *Pedersen v. OPM*—"in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny." The Obama administration's previous defenses of Section 3 had come "in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and [the Department of Justice] has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases." The two new lawsuits, by contrast, "will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA in a circuit without binding precedent on the issue."

[10] Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The quotations in this Part II are from this letter.

[11] *Available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

Listing four factors that Supreme Court decisions have "set forth … that should inform" the judgment whether heightened scrutiny applies to a particular classification, Attorney General Holder asserted, "Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation," and he offered very brief assessments of the four factors. He acknowledged both that the Supreme Court "has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation" and that "there is substantial circuit court authority applying rational basis review to sexual-orientation classifications." Among the reasons he offered for discounting the "substantial circuit court authority" is that some of the decisions "rely on claims regarding 'procreational responsibility' that the Department has disavowed already in litigation as unreasonable."

President Obama, the Attorney General continued, "has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subjected to a heightened standard of scrutiny" and that Section 3 cannot meet that heightened standard. Therefore, "the President has instructed the Department not to defend" Section 3 in *Windsor* and *Pedersen*.

Attorney General Holder maintained that the Administration's decision not to defend Section 3 in *Windsor* and *Pedersen* was consistent with the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." Under the Department's longstanding practice, he asserted, the Department "does not consider every plausible argument"—or every "professionally responsible" argument—"to be a 'reasonable' one."

Attorney General Holder further stated that he "will instruct Department attorneys to advise courts in other pending DOMA litigation"—that is, the pending cases in jurisdictions that subject classifications based on sexual orientation to rational-basis review—of the Obama administration's new position that a heightened standard should apply to Section 3, that Section 3 is unconstitutional under that standard, and that the Department will no longer defend Section 3. At the same time, notwithstanding President Obama's determination that Section 3 is unconstitutional and shouldn't be defended in court, President Obama has instructed executive-branch agencies to continue to comply with, and enforce, Section 3.

C

Attorney General Holder's explanation of the Obama administration's supposed legal reasons for abandoning defense of DOMA's Section 3 cannot be taken seriously on its own terms.

Most starkly, the Attorney General's claim to be acting consistent with the Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense" is clearly wrong. Attorney General Holder can make that claim only by mistakenly asserting—without citing any supporting authority—that the "reasonable" threshold requires some undefined quantum of force beyond what "plausible" or "professionally responsible" arguments provide. That assertion does *not* accurately describe the Department's longstanding practice across different presidential administrations, as my discussion above shows.

In my judgment, there are compelling arguments in support of the constitutionality of Section 3 of DOMA—arguments that ought ultimately to prevail in

court. But for present purposes I will limit myself to the far more modest proposition that there are plenty of reasonable arguments that any competent lawyer could develop in defense of Section 3 in those few jurisdictions that haven't yet ruled that sexual-orientation classifications are subject to rational-basis review. Among the available arguments (which I will only summarize at a high level of generality here):

(1) The Supreme Court's jurisdictional dismissal of the appeal in *Baker v. Nelson* (1972) for want of a substantial federal question is binding precedent for the proposition that limiting marriage to a man and a woman does not violate equal-protection principles.[12]

(2) Section 3 does not in fact classify on the basis of sexual orientation.[13]

(3) Whatever weight is to be accorded the four factors that "should inform" the decision whether heightened scrutiny should apply can't possibly offset the fact that traditional marriage laws were universal at the time that the Constitution was adopted as well as when the Fourteenth Amendment was ratified (and that, with only a handful of recent exceptions, marriage has always been understood in every civilized society as limited to opposite-sex unions).[14]

(4) All eleven federal circuit courts to address the question have determined that classifications based on sexual orientation are subject to rational-basis review.[15]

(5) Consideration of the four factors that "should inform" the decision whether heightened scrutiny should apply doesn't support heightened scrutiny for classifications based on sexual orientation. Among other things, there is no scientific consensus on what even constitutes sexual orientation; sexual orientation is not an observable characteristic; gays and lesbians are not politically powerless; and, far from being a characteristic that is immutable at birth, there is no established understanding of the origins of sexual orientation and there is ample empirical evidence that sexual orientation can shift over

[12] Before it succumbed to political pressure and reversed course (see Part IV), the Department of Justice in the Obama administration made this argument in its opening brief in support of its motion to dismiss in *Smelt v. United States*, No. 09-286 (C.D. Cal. June 11, 2009).

[13] Here too, before it succumbed to political pressure and reversed course (see Part IV), the Department of Justice in the Obama administration made this argument in its opening brief in support of its motion to dismiss in *Smelt v. United States*, No. 09-286 (C.D. Cal. June 11, 2009).

[14] See Defendant-Intervenors-Appellants' Opening Brief, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Sept. 17, 2010), at 51-60.

[15] See id. at 70-71.

time and does shift for a significant number of individuals.[16]

(6) Even if heightened scrutiny were to apply, the level of increased scrutiny should be very modest.

(7) The same interests that would readily satisfy rational-basis review of Section 3—including the interests in supporting traditional marriage as the best vehicle for responsible procreation and childrearing[17]—would also suffice to satisfy any heightened standard of scrutiny.

By contrast, the Administration's argument for the proposition that Section 3 is unconstitutional is remarkably feeble and certainly comes nowhere close to establishing that Section 3 is "so patently unconstitutional" that it shouldn't be defended under the Department's longstanding practice. Attorney General Holder does not even present a complete argument: With very little intermediate reasoning, he bounces from the (highly contestable) assertion that the four factors that "should inform" the decision on level of scrutiny "all counsel[] in favor of being suspicious of classifications based on sexual orientation" to the statement that "[a]fter careful consideration, … the President has concluded that *given a number of factors*, including a documented history of discrimination, classifications based on sexual orientation should be subjected to a heightened standard of scrutiny." (Emphasis added.) What assessment did President Obama make of each of these factors? What weight did he give to them? How did he consider them in conjunction with other information that "should inform" a legal judgment? Attorney General Holder says nothing directly about President Obama's thinking on any of these matters. Even if the reader were to assume that President Obama assessed the four factors in the same way that Attorney General Holder did, Attorney

[16] See id. at 70-75.

[17] See id. at 77-93.

General Holder's own assessment is far too sketchy and conclusory to amount to a coherent, much less a persuasive, legal argument.

President Obama's determination that Section 3 fails to meet heightened scrutiny is equally conclusory. Again, even if the reader were to assume what is not stated—that President Obama's analysis on all points was identical to the Attorney General's—Attorney General Holder's own conclusion rests on cherrypicking snippets from the legislative record of DOMA's enactment and then tendentiously construing those snippets. There is no sign that it rests on a careful consideration of all relevant evidence and information. Further, in a brazen bit of bootstrapping, Attorney General Holder dismisses the public interest in the connection between traditional marriage and "procreational responsibility" because the Department has already (wrongly) disavowed that interest as unreasonable.

One advantage that President Obama might find in keeping as opaque as possible the reasoning underlying his conclusion that Section 3 of DOMA is unconstitutional is that that same reasoning would surely dictate a similar conclusion that traditional marriage laws are also unconstitutional. But President Obama won election to his office maintaining that he opposed same-sex marriage[18] (and keeping contrary evidence buried until it was too late[19]), and his supposed position in support of traditional marriage laws necessarily conveyed his belief that traditional marriage laws are constitutionally permissible. Indeed, that implication was particularly compelling given that he had taught

[18] See, e.g., "Barack Obama Answers Your Questions About Gay Marriage, Paying For College, More," MTV, Nov. 1, 2008 ("I believe marriage is between a man and a woman. I am not in favor of gay marriage."), *available at* www.mtv.com/news/articles/1598407/did-barack-obama-answer-your-question.jhtml.

[19] See "Obama changed views on gay marriage," *Windy City Times*, Jan. 14, 2009, at 6 (disclosing Obama's signed statement from 1996 that "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages"), *available at* www.politico.com/static/PPM110_wct_20090114_obama.html.

constitutional law, including equal-protection issues, for years. Nothing in the Supreme Court's constitutional landscape on the issue of same-sex marriage has changed since the 2008 election, so President Obama would have some considerable difficulty explaining how his constitutional thinking has flipped. And he might prefer not to give millions and millions of American voters ample cause to believe that he had bamboozled them on this fundamental question.

It is also noteworthy that President Obama does not have the courage of his supposed convictions about Section 3 of DOMA. If he genuinely believed that Section 3 is clearly unconstitutional, why would he continue to direct executive-branch officials to enforce it? One legal commentator offers this compelling explanation: President Obama "is the 'un-Lincoln.'" Whereas Abraham Lincoln compellingly explained the defects of the Supreme Court's notorious *Dred Scott* ruling and declared that the executive branch under his direction would not abide by the mistaken principles set forth in that ruling, Barack Obama embraces the notion that the Constitution means whatever five justices say that it means. President Obama "would rather hint, and wheedle, and pine for an eventual Supreme Court ruling in favor of same-sex marriage," for he is "the Court's courtier, surrendering the dignity of his office, and the legislative power of Congress, to a hope that the Supreme Court too will 'evolve' in its view, change the effective meaning of the Constitution, and foist same-sex marriage on the American people with an authority more difficult to challenge than that of a mere president"[20]—much less of a president who was elected to office while prominently claiming to oppose same-sex marriage.

[20] Matthew J. Franck, "Obama, DOMA, and Constitutional Responsibility," *Public Discourse*, March 1, 2011, *available at* www.thepublicdiscourse.com/2011/03/2827.

D

For all its flaws, the Obama administration's decision to abandon its formal defense of DOMA has the modest virtue of making overt a far greater scandal that the Obama administration has been attempting to obscure: namely, that the Department of Justice has only been pretending to defend DOMA but in fact has been actively sabotaging it.

Here is the overarching narrative (a similar version of which could be recounted for the Department's deliberate mishandling of "Don't Ask, Don't Tell" litigation[21]):

1. On June 11, 2009, in *Smelt v. United States*, No. 09-286 (C.D. Cal.), the Department of Justice in the Obama administration filed its first brief in defense of DOMA. In straightforward and unremarkable legal prose, that brief argued that the claim of plaintiffs, "a same-sex couple married under the laws of California," that DOMA is unconstitutional should fail for various reasons.

2. The Obama administration's opening brief in *Smelt* elicited a firestorm of opposition and outrage from gay and lesbian groups. As one gay publication put it (in an article titled "Gay Blogosphere Erupts Over Obama's DOMA Defense"[22]), "The gay blogosphere lit up like a firecraker [*sic*] Friday on news that the Obama administration was defending the Defense of Marriage Act … in a federal lawsuit." One "[p]rominent blogger" called the brief "despicable, and gratuitously homophobic"—among other things, because he somehow found it objectionable that "the brief argued that DOMA is reasonable…, is constitutional …, [and] wasn't motivated by any anti-gay animus."

[21] See Edward Whelan, "Don't Defend, Don't Tell," *Public Discourse*, Oct. 15, 2010, *available at* http://www.thepublicdiscourse.com/2010/10/1836.

[22] *Available at* http://www.ontopmag.com/article.aspx?id=4002&MediaType=1&Category=26.

Another labeled President Obama "the homophobe in chief." The head of the Human Rights Campaign wrote President Obama a letter stating that "this brief would not have seen the light of day if someone in your administration who truly recognized our humanity and equality had weighed in with you." And much, much more evidently went on behind the scenes in meetings between the Administration and gay and lesbian advocates.

3. In a stark demonstration of the power of a purportedly powerless group, the Department sharply altered the course of its advocacy. In its reply brief in *Smelt*, filed on August 17, 2009, the Department prominently stated (p. 2 (emphasis added)):

> With respect to the merits, this Administration does not support DOMA as a matter of policy, *believes that it is discriminatory*, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.

This halfhearted advocacy contradicts the promises made in confirmation testimony by the Department's political leaders. As a typical example, then-Solicitor General nominee Elena Kagan testified at her confirmation hearing that the "critical responsibilities" that the Solicitor General owes to Congress include "most notably the vigorous defense of the statutes of this country against constitutional attack."[23] She made clear the obvious point

[23] As for the situation in which the policy of a new Administration might differ from that of a previous Administration, Kagan declared (in response to a written question):

> The cases in which a change between Administrations is least justified are those in which the Solicitor General is defending a federal statute. Here interests in continuity and stability combine with the usual strong presumption in favor of defending statutes to produce *a situation in which a change should almost never be made.* [Emphasis added.]

that an effective advocate must give the impression that he believes his own arguments, whether or not he actually does.[24]

It gets much worse. In that same reply brief (pp. 6-7), the Department gratuitously repudiated grounds for defending DOMA, as it asserted that "the United States does not believe that DOMA is rationally related to any legitimate interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA's constitutionality." Never mind that these grounds had proven *successful* in previous litigation against DOMA[25] (as well as in challenges to traditional marriage laws). And never mind that, as the Department's opening brief had pointed out, the "United States," in the form of a report of the House Judiciary Committee, had invoked these very interests when Congress enacted DOMA.

A proponent of same-sex marriage promptly celebrated the Department's reply brief with these apt observations (emphasis added):

> *This new position is a gift to the gay-marriage movement, since it was not necessary to support the government's position*. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. *Indeed, some state court decisions have relied very heavily on procreation and*

[24] As Kagan put it, "I know that [former Solicitor General] Ted Olson would not have voted for the McCain-Feingold bill, but he … did an extraordinary job of defending that piece of legislation…. And that's what a solicitor general does." In response to then-Senator Feingold's joking observation that "I could have sworn he almost was believing what he was saying," Kagan replied: "For that day he was persuaded, and that's all you need."

[25] See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) ("Because procreation is necessary to perpetuate mankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government."), *reversed on standing grounds*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (applying Eleventh Circuit precedent that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest"); *In re Kandu*, 315 Bankr. R. 123, 146 (2004) (applying authorities recognizing that "the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern").

> *child-rearing rationales to reject SSM [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.*[26]

4. Thereafter (and up until its outright abandonment of DOMA), the Department took this same position in every DOMA case, and ultimately engineered the desired result. In *Gill v. OPM* (D. Mass. Jul. 8, 2010), the lone judge to rule against DOMA noted that "the government has disavowed Congress's stated justifications" for DOMA and stated that he would therefore address them "only briefly": "This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA."

5. In November 2010, Assistant Attorney General Tony West, the head of the Department's Civil Division, told a group of liberal bloggers that it was "difficult" for the Obama administration to defend DOMA (and "Don't Ask, Don't Tell"). West admitted that the Department was modifying and diluting its legal arguments in DOMA cases to comport with the Obama administration's "policy values." As one sympathetic account[27] put it (emphasis added):

> West said Monday that DOJ was discharging its responsibility to the tradition of the Justice Department while making adjustments to the arguments in line with the administration's views.
>
> "I think that the best example -- let me give you one -- in the Defense of Marriage Act -- you'll notice that we have not only discharged our responsibility to defend the constitutionality of a congressional statute, but *we've done so in a way which reflects the policy values of this administration*," West said.

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[26] Dale Carpenter, "DOJ Boosts the Cause of SSM," Aug. 17, 2009, *available at* volokh.com/archives/archive_2009_08_16-2009_08_22.shtml#1250541892.

[27] *Available at* http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php.

> "We disavowed some arguments that we believed had no basis in fact, and in fact we presented the court through our briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of that statute," West added.

According to the same account (emphasis added), West further revealed that the Civil Division "has worked with the Civil Rights Division's liaison to the gay, lesbian, bisexual and transgender community to *make sure that future briefings don't advance arguments that they would find offensive*." In other words, West was conceding that the Department was allowing the sensitivities of a favored political constituency to have extraordinary influence over how the Department defended, or pretended to defend, DOMA.

In sum, far from providing the vigorous defense of DOMA that it promised, the Obama administration undermined that litigation for the obvious purpose of pleasing a powerful and favored political constituency.

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S. 598 is ill-conceived legislation that should proceed no further. Legislators who genuinely want to respect marriage should defend traditional marriage, not undermine it.