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GOP Senators Weigh In on DOMA Fight Before the 9th Circuit

In an amicus brief, Senator Orrin Hatch and nine colleagues, who voted for the 1996 Defense of Marriage Act, challenge the "judicial psychoanalysis" of their motives for passing the law.

Scott Graham

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SAN FRANCISCO — Throwing a party for Orrin Hatch and other GOP U.S. senators? Better not invite U.S. District Judge Jeffrey White of San Francisco.

Hatch and nine other senators who voted for the Defense of Marriage Act in 1996 filed an *amicus curiae* [brief](#) Monday in a constitutional challenge to the law before the U.S. Court of Appeals for the Ninth Circuit. In it they have a bone to pick with White — and not just because they disagree with [his ruling](#).

In striking down DOMA in February, White had observed that "the legislative history is replete with expressed animus toward gay men and lesbians." Specifically, White noted that some congressmen during floor debate had called homosexuality "immoral," "depraved," "unnatural," "based on perversion" and "an attack on god's principles." Quoting Justice Anthony Kennedy, White said prejudice may be caused by "simple want of careful, rational reflection," among other things.

With the Justice Department declining to defend the law, the GOP-controlled House has stepped in to appeal, filing a nuts-and-bolts-type brief earlier this month. But on Monday the 10 GOP senators filed an *amicus* with a bit more *ad hominem* flavor.

Nothing in Supreme Court jurisprudence, the senators contend, "authorizes a court to strike down an otherwise constitutional law based on the belief that legislators individually, or the Congress as a whole, were motivated by 'animus,'" states the brief, which is signed by Michael Stern of Fairfax, Va.

"Judicial 'psychoanalysis' of legislative motives, to use Justice Cardozo's phrase, is a highly subjective exercise, which threatens needless friction between the branches," the brief continues. "Scouring the congressional record for 'sound-bites' to divine and disparage the motives of individual legislators also chills the freedom of legislative speech that is the hallmark of robust democratic debate."

In a footnote, the senators added that they didn't appreciate White's comparison of the arguments for DOMA with historical arguments against interracial marriage, either.


Hatch, chairman of the Senate Judiciary Committee when DOMA was passed, received written assurances from the Clinton Justice Department that the legislation was constitutional, the brief states.

Along with Hatch the senators joining as *amici* were Saxby Chambliss of Georgia, Dan Coats of Indiana, Thad Cochran and Roger Wicker of Mississippi, Mike Crapo of Idaho, Charles Grassley of Iowa, Lindsey Graham of South Carolina, Mitch McConnell of Kentucky and Richard Shelby of Alabama. A handful of current GOP senators who voted for DOMA did not sign onto the filing,

including Jon Kyl and John McCain of Arizona, Richard Lugar of Indiana, Olympia Snowe of New Hampshire, James Inhofe of Oklahoma and Kay Bailey Hutchinson of Texas.

White is a 2002 appointee of George W. Bush who in February granted summary judgment to Karen Golinski, a Ninth Circuit staff attorney seeking federal benefits for legally married same-sex couples. White ruled that gays and lesbians are a suspect class and that DOMA failed heightened scrutiny. Alternatively, he held that DOMA failed even rational basis review.

In a separate challenge, Massachusetts U.S. District Judge Joseph Tauro, an appointee of Richard Nixon, has also ruled that DOMA lacked a rational basis. The First Circuit affirmed that ruling last week, although it held that a slightly higher standard of review than traditional rational basis was required.

U.S. District Judge Claudia Wilken of Oakland also has ruled that DOMA failed to meet rational basis review. She did not escape the wrath of the senators either. Wilken wrote in [Dragovich v. U.S. Department of the Treasury](#) that "there is no principled distinction between anti-gay animus and a conception of civil marriage as an institution that cannot tolerate equally committed same-sex couples." The senators' *amicus* brief calls this reasoning "entirely circular" and "little more than an attempt to win an argument by disparaging the motives of the other side." 

Interestingly, both the House and Senate briefs note that Golinski's challenge to DOMA can fail even if the U.S. Supreme Court leaves in place the Ninth Circuit's decision earlier this year in [Perry v. Brown](#), the Proposition 8 case. "Perry addressed a 'wholly different question: whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others,'" states the House brief, quoting Judge Stephen Reinhardt's majority opinion in *Perry*. "That question is not presented in this case: Because same-sex married couples have never been eligible for federal benefits, DOMA did not 'strip' such couples of any 'previously enjoyed' right or benefit."

Also among those filing *amicus* briefs in the Golinski case Monday were former U.S. Attorneys General Edwin Meese III and John Ashcroft; 14 state attorneys general; the National Association for Marriage; and the American College of Pediatricians.

The Meese/Ashcroft brief, signed by Jay Sekulow of D.C.'s American Center for Law and Justice, is focused on the Justice Department's decision to drop its defense of DOMA. Quoting liberally from two opinions written by former Solicitor General Theodore Olson, now a same-sex marriage champion in the Prop 8 litigation, while he was with the Office of Legal Counsel, the brief argues that the Justice Department must defend any law so long as it is not "patently unconstitutional" and does not pose a separation of powers issue. Because there's legitimate debate over the constitutionality of DOMA, the ex-AGs argue, the DOJ's decision is "transparently political" and therefore deserving of less weight than a typical Justice Department position.

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