"IT'S ALL ABOUT EDIE, STUPID": LESSONS FROM LITIGATING *UNITED STATES V. WINDSOR**

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There is really only one thing that I know for sure. No human being knows what life has in store for them. My client Edie Windsor surely didn't. As a young, middle-class woman growing up in Philadelphia after the Depression and World War II, she obviously had no idea what her future would hold. When asked shortly after we filed our case what it felt like to be a plaintiff, Edie remarked that it's one thing to be "out" as a lesbian, but it's another thing entirely to be the "out lesbian who just happens to be suing the United States of America."[1]

The same, of course, is true for me. As a closeted lesbian high school student in Cleveland, Ohio, as a closeted college student at Harvard, or as a (slightly) less closeted law student at Columbia Law School in the late 1980s, if you had told me that that one day, as an out litigation partner at Paul, Weiss, I would marry a woman, have a child, and then win a landmark civil rights case before the United States Supreme Court, I would have told you that you were certifiably insane.

So when I received the telephone number of a then-eighty-year-old lady by the name

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1 *See* United States v. Windsor *Oral Argument, Edith Windsor Reaction*, C-SPAN (Mar. 27, 2013), http://www.c-span.org/video/?311793-1/united-states-v-windsor-oral-argument-edith-windsor-reaction [http://perma.cc/36PG-D8RK]; Stephanie Condon, *Supreme Court skeptical of DOMA*, CBS NEWS (Mar. 27, 2013, 4:32 PM), http://www.cbsnews.com/news/supreme-court-skeptical-of-doma/ [http://perma.cc/9Q5P-JUFU] ("I am today an out lesbian who just sued the United States of America, which is kind of overwhelming for me.").

of Edie Windsor, I obviously had no idea what would happen. Indeed, Edie at first wasn't so sure that she wanted to "hire" me.[2] In order to convince her, I had to play for her a video clip from my 2006 oral argument before the New York Court of Appeals in the New York marriage case. Keep in mind that perhaps this wasn't the best form of attorney advertising since that was a case that I lost. Badly. It wasn't even close, 4-2.[3] But fortunately for me, Edie was persuaded and ultimately, the Supreme Court issued its landmark decision that gay couples have the same right to be treated with dignity and respect that straight couples do.[4] Since I have had some time since the *Windsor* decision to reflect on that experience, I thought I would share with you some lessons that I learned from litigating the case.

It is worth noting that I did not build my career to become a Supreme Court practitioner. I did not clerk for a Supreme Court Justice. I did not work in the Solicitor General's Office. In fact, my oral argument in *Windsor* last March was my first appearance ever before the United States Supreme Court. Instead, I grew up as a trial lawyer in the Paul, Weiss litigation department.

I. Facts Matter

One of the most important lessons that every trial lawyer learns is that facts matter. They matter a lot. In fact, any litigator worth their salt knows that facts can be stubborn things. It is unwise, if not foolish, to bring or defend any case without paying very close attention to every detail of the facts before, during and after trial.

So what did this mean in the context of *United States v. Windsor*? First and foremost, it meant that we knew from the very beginning, to borrow a phrase from Bill Clinton's first presidential campaign, that "It's all about Edie, stupid."[5]

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2 While Edie certainly retained me and my law firm, Paul, Weiss, Rifkind, Wharton & Garrison LLP, the representation was entirely pro bono.

3 Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

4 United States v. Windsor, 133 S. Ct. 2675 (2013).

5 During Clinton's 1992 presidential campaign against George H.W. Bush, Clinton strategist James Carville came up with "It's the economy, stupid," to remind campaign workers to focus on the message that Bush was responsible for the then-current recession. *See* PETER B. LEVY, ENCYCLOPEDIA OF THE CLINTON PRESIDENCY 205 (2001).

This was significant not only because of who Edie Windsor is, but because in contrast to many of the LGBT rights cases that had been brought in the past, our case involved only one plaintiff. I think that what often got lost in previous gay civil rights cases with multiple plaintiffs are the stories of the plaintiffs themselves. After all, it is hard for a judge or jury to focus on several plaintiff couples at once. But it is much easier to focus on only one. Unfortunately, when the facts fade into the background, a gay civil rights case can look more like a debate between Fox News and MSNBC than a case about real people and their lives. Our view was that the best way to defeat DOMA was not to focus on lawyers or pundits, but instead to tell the story of how DOMA harmed two real people, Edie Windsor and her late spouse, Thea Spyer.

How did we do that? For one, we drafted what old-time New York practitioners would call a "speaking complaint."[6] That's a more lengthy complaint than what is required by the Civil Practice Rules that attempts to tell a story. Here, of course, we told the story of Edie and Thea's lives as the great love story that it was. Our goal, however, wasn't to write a "Harlequin romance." Rather, what we hoped to do was to show that Edie and Thea, who spent forty-four years together in sickness and in health 'til death did them part, lived their lives with the same decency and dignity as anyone else. By showing that truth, we demonstrated that Edie and Thea had the kind of marriage that any single one of us—straight or gay—would be so lucky to have.

So what facts mattered? For one, there is the fact that when Edie was called in by the FBI for an interview when she was working for the Atomic Energy Commission in the 1950s, she (rightfully) feared that if the FBI were to ask her if she were a lesbian, she would not only lose her job, but her career.[7] For most of Edie's career as a computer programmer, it was a felony to have any employment with the federal government if you were gay. Indeed, just recently, the New York Times published a newly discovered Civil Service memo from the Johnson administration[8] stating that "[i]n evaluating cases of homosexuality, we

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6 Complaint, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435); 1 MICHAEL H. BARR ET AL., NEW YORK CIVIL PRACTICE BEFORE TRIAL § 15:190 (2012) ("[A] so-called 'talking' or 'speaking' complaint . . . provides more substance than [CPLR 3013] requires . . . [it] tells plaintiff's story in a detailed, deliberate, and interesting manner.").

7 Supplemental Affidavit of Edith Schlain Windsor at 5–6, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435).

8 Matt Apuzzo, *Uncovered Papers Show Past Government Efforts to Drive Gays From Jobs*, N.Y. TIMES (May 20, 2014), http://www.nytimes.com/2014/05/21/us/politics/uncovered-papers-show-past-government-efforts-to-drive-gays-from-jobs.html [http://perma.cc/82CZ-WLSX].

automatically find the individual not suitable for federal employment . . . ."[9]

There were other facts too. Like the fact that Thea first asked Edie to marry her in 1967, two years *before* the "Stonewall Riots" that led to the modern gay rights movement.[10] Think about that for a second. That is a fact that never ceases to amaze me. Imagine two women who actually had the self-esteem, courage, and foresight to get engaged to each other two years before Stonewall. Thea actually proposed to Edie in 1967 with a circular diamond brooch instead of a diamond ring because she was afraid of "outing" Edie as a lesbian at her job. In fact, it was also illegal at the time to be a lesbian and to be working for a company like IBM that had contracts with the federal government.[11] And then there is the fact that when Thea was diagnosed with a particularly virulent form of multiple sclerosis, ultimately leading to Thea's paralysis, Edie said that the diagnosis "happened to both of them" and made sure that as little in their lives changed as possible.[12]

Facts like these speak for themselves. And the $363,000 federal estate tax bill that Edie received upon Thea's death certainly didn't hurt either. Any American, Democrat or Republican, straight or gay, can understand what it means to have to pay a huge tax bill simply because you are gay.

There are other facts about Edie's life even before she met Thea that also turned out to be quite significant. Perhaps the best example is the story of Edie's first marriage. I bet most of you didn't know that Edie had previously been married to a man. Indeed, the fact that our adversaries from the Bipartisan Legal Advisory Group of the House of Representatives, or "BLAG," pursued this issue is perhaps the best underhanded softball pitch I have ever received so far in the course of my legal career.[13] Let me explain why.

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9 Memorandum from John W. Steele to O. Glenn Stahl, Homosexuality and Government Employment 2 (Nov. 17, 1964), *available at* http://s3.documentcloud.org/documents/1164936/original-memo-from-1964.pdf [http://perma.cc/Q29N-KQFY].

10 Complaint at 7, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435).

11 *Id.*; *see also* GEORGE CHAUNCEY, WHY MARRIAGE: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 6 (2005).

12 Complaint at 8–9, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8453); Brief of Plaintiff-Appellee at 5, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) (No. 12-2435).

13 BLAG first requested information and documents relating to Edie's first marriage during the May 5, 2011, meet and confer. *See* E-mail from Roberta Kaplan to Christopher Bartolomucci (May 6, 2011) (on file with author).

One of the factors that courts look to in deciding what level of scrutiny to apply in an equal protection case is whether the group being discriminated against has "obvious, immutable or distinguishing characteristics."[14] In other words, do gay people comprise a distinct group or "class," and do they have a "choice" about being gay? Our adversaries sought to argue that because no one really knows what it means to be "gay," and because gay people supposedly have a "choice" about being who they are, it is okay to discriminate against them on that basis.[15]

Really? Call me crazy, but I think it's fair to say that when someone tells you that they are gay or lesbian, we all know what that means.[16] And, believe it or not, in order to develop this argument, our adversaries asserted that Edie's brief first marriage to a man proved that she had a choice about being a lesbian.[17] The facts, however, demonstrated that she did not.

Here are the facts. Years before Edie met Thea, shortly after she graduated from Temple University in 1950, she married a guy by the name of Windsor in Philadelphia.[18] He was the best friend of Edie's older brother. Edie's husband and her brother both served as soldiers together in World War II. Edie already knew that she was attracted to women. But, as she explained in her own words: "In the context of the homophobia that was so prevalent

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14 *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) ("[They] are not a 'suspect' or 'quasi-suspect' class . . . they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.").

15 Brief For Defendant-Appellant The Bipartisan Legal Advisory Group of the U.S. House of Reps. at 29, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) (No. 12-2435) ("Sexual orientation differs in multiple dimensions from any existing suspect or quasi-suspect class . . . sexual orientation is not determinable at birth; for many, sexual orientation is a fluid characteristic capable of changing over a person's lifetime; and the proposed class is difficult even to define.").

16 *See* Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 3, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435) ("When a relative, friend, or colleague says that he is gay, is it really credible (or even intellectually honest) for BLAG to argue that it is impossible to know what that person is talking about? Indeed, Congress itself has passed legislation using the terms 'lesbian' and 'gay.'").

17 Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 11–12, n.4, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435) ("[A]ccording to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction. . . . Indeed, the plaintiff in this case, at one time, was married to a man.").

18 Supplemental Affidavit of Edith Schlain Windsor at 2, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435).

in the 1950s, I certainly did not want to be a 'queer.'"[19] As a result, Edie, like so many other gay men and women during that era, agreed to get married. It did not take long, though, for Edie to realize that she couldn't love her husband the way he deserved to be loved, and, a few months after their wedding, she told him the truth and then moved to New York City (like so many others, myself included) "in order to be gay."

What is the relevance of Edie's first marriage? Here is what Edie had to say about it in the affidavit we submitted on our motion for summary judgment before the trial court: "What my [first] marriage . . . shows is that although I tried to make a 'choice' about my sexual orientation by getting married to a man, I was simply unable to do so. Thus, as a matter of fact, I really had no choice at all."[20] Of course she didn't. If Edie had had a "choice" about being a lesbian, she would still be married to Mr. Windsor and living in Philadelphia.

I'm pleased to say that the Supreme Court clearly appreciated this. Here is how Justice Kennedy described the facts of Edie and Thea's marriage in his opinion for the Court:

> Edith Windsor and Thea Spyer met in New York City in 1963 . . . . When at first Windsor and Spyer *longed* to marry, neither New York nor any other State granted them that right. . . . [Concerned about Spyer's health] they traveled to Ontario to be married there. . . . [U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same *status* and *dignity* as that of a man and woman in lawful marriage.[21]

Justice Ginsburg has since described Edie Windsor as "a well-chosen plaintiff."[22] And this is how Justice Ginsburg articulated the facts of our case during another interview:

> These were two people who lived together in a *grand partnership* and one of them was dying and wanted to have the official blessings of government on this union so they married . . . and then . . . one partner died and the

19 Id. at 6.

20 *Id.* at 2.

21 United States v. Windsor, 133 S. Ct. 2675, 2683, 2689 (2013) (emphasis added).

22 Jess Bravin, *Excerpts from WSJ Interview with Justice Ruth Bader Ginsburg*, WALL ST. J. WASH. WIRE BLOG (May 2, 2014, 6:26 AM), http://blogs.wsj.com/washwire/2014/05/02/excerpts-from-wsj-interview-with-justice-ruth-bader-ginsburg/ [http://perma.cc/QJ27-2DTM].

> other gets something like a $360,000 estate tax bill from the government. She would have no bill at all if her marriage were recognized . . . . So that was the DOMA case.[23]

Edie and Thea's "grand partnership," of course, was the whole point of our case.

While Justice Scalia has said that in his view, what the Court did in *Windsor* was to "invent a new minorit[y] that [got] special protections,"[24] I don't think that a majority of the justices agree with him that gay people constitute some amorphous class of people that had to be "invented" by the Court. As Justice Kennedy wrote in the majority opinion with respect to married gay people: "[t]he State's decision to give this *class of persons* the right to marry conferred upon them a dignity and status of immense import."[25]

One more example. I probably don't need to tell you that the issue of children being raised by gay parents was very much a contested issue in our case. Again, the issue for us was, what are the facts? In his separate dissent, Justice Alito argued that "no one—including social scientists . . . —can predict with any certainty what the long-term ramifications of . . . same-sex marriage will be."[26] The truth, however, is that there really is no longer any legitimate "debate" about gay parenting or its "ramifications" for children. In pursuing Edie's case, we put forth affidavits from the most qualified experts, including the head of Child Psychology at Cambridge University,[27] who offered competent expert testimony that the overwhelming scientific consensus, based on more than three decades of peer-reviewed scientific research, is that children raised by lesbian or gay parents are just as well-adjusted as those raised by straight parents. Each of our experts was deposed by the other side for several hours.

So what did the other side do in response? At the trial court, BLAG offered no affirmative witnesses at all. Instead, after the close of discovery, BLAG chose to go outside the

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23 *An Evening with Justice Ruth Bader Ginsburg*, NAT'L CONSTITUTION CTR. (Sep. 6, 2013), http://fora.tv/2013/09/06/An_Evening_with_Justice_Ruth_Bader_Ginsburg [http://perma.cc/AK95-3ZJR] (emphasis added).

24 *Antonin Scalia: Don't Invent Minorities*, POLITICO (Aug. 19, 2013), http://www.politico.com/story/2013/08/antonin-scalia-dont-invent-minorities-95692.html [http://perma.cc/AE5L-KHE5].

25 *Windsor*, 133 S. Ct. at 2681 (emphasis added).

26 *Id.* at 2716 (Alito, J., dissenting).

27 Expert Affidavit of Michael Lamb, Ph.D. at 1, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435).

record. In its statement of "facts" on summary judgment, BLAG simply referenced dozens of assorted books and articles. These documents alleged flaws in the existing studies of gay and lesbian parents.[28]

One example of BLAG's "evidence" was a book by David Popenoe. It was offered to establish that it is better for children to have both a male and female parent who assume traditional gender roles. According to a web search that we did ourselves because BLAG did not provide us with his resume, David Popenoe (now retired) was at the time a professor of sociology at Rutgers University in New Jersey.[29] Presumably then, BLAG could have submitted Mr. Popenoe's testimony in an admissible format, i.e., an affidavit, and he could have been made available for a deposition.[30] Yet BLAG did not make Mr. Popenoe or any of the other authors it referenced available for testimony. The potential danger from this is obvious—not only were we denied the opportunity to challenge Mr. Popenoe's premises and conclusions, but BLAG was free to take his work out of context or misinterpret it.[31]

Indeed, it is far from clear that several of the individuals whose work BLAG relied upon would even have qualified as experts under Federal Rule of Evidence 702.[32] One example of the documents cited by BLAG in opposition to Ms. Windsor's motion for summary judgment was a then-forthcoming law review article in the *Ave Maria Law Review* supposedly criticizing the methodology of the social science studies that have been done on gay and lesbian parents.[33] But that article was not written by a psychologist or sociologist.

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28 Reply Memorandum in Support of Motion to Strike Documents Referenced by Defendant-Intervenor in Opposition to Plaintiff's Motion for Summary Judgment, Windsor v. United States, 833 F. Supp. 2d 394 (2012) (No. 10 Civ. 8435).

29 RUTGERS SCHOOL OF ARTS AND SCIENCES DEPARTMENT OF SOCIOLOGY, *Retired Faculty: Popenoe, David*, http://sociology.rutgers.edu/faculty/retired-faculty/462-popenoe-david [http://perma.cc/5PR9-AM56].

30 FED. R. CIV. P. 27, 32.

31 In fact, BLAG did exactly that in the context of articles written by Professor Lisa Diamond. Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 10–11, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435) (citing Professor Diamond's work to support the proposition that sexual orientation is not an immutable characteristic). In a declaration she submitted after reading BLAG's submission, Professor Diamond testified, "BLAG misconstrues and distorts my research findings, which do not support the propositions for which BLAG cites them." Declaration of Lisa M. Diamond at 1, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435).

32 FED. R. EVID. 702.

33 George W. Dent, Jr., *No Difference? An Analysis of Same-Sex Parenting*, 10 AVE MARIA L. REV. 53 (2011).

Instead, it was written by a law professor at Case Western Law School who, according to the law school's website, teaches classes on Business Associations, Mergers & Acquisitions, and Business Planning.[34]

As a general matter, a party contesting summary judgment cannot rely on hearsay materials like these that are not otherwise admissible under the rules of evidence.[35] Significantly, BLAG did not dispute that the documents it sought to rely upon were inadmissible hearsay.[36] Instead, BLAG argued that Judge Jones should disregard the time-tested rules of evidence because under the so-called "constitutional facts" doctrine, the district court was permitted to rely on otherwise inadmissible facts outside the record.[37] Loosely defined, the "constitutional facts" doctrine distinguishes between "adjudicative" facts, which are those relevant to only the dispute between two adverse parties, and "legislative" or "constitutional" facts, which help a court make decisions about the broader application of legal doctrine.[38] Pursuant to this doctrine, a court, while confined by evidentiary rules as to adjudicative facts, is freed from them altogether when determining constitutional facts. As the Second Circuit has aptly observed: "so-called 'constitutional facts,' [are] a concept that has confounded courts and commentators alike."[39]

On its face, this is more than a little troubling. The "constitutional facts" doctrine was developed to make sure that appellate courts have a full record before them when making broad-based policy decisions, even if the parties did not develop such a record beforehand.[40] But then why should it apply at the trial court level, particularly in a case litigated

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34 *Faculty: George W. Dent, Jr.*, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW, http://law.case.edu/OurSchool/FacultyStaff/MeetOurFaculty/FacultyDetail.aspx?id=98 [http://perma.cc/WNF8-PCH9] (last visited Sept. 8, 2014).

35 FED. R. CIV. P. 56(c); *see also* Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.").

36 Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the U.S. House of Reps. in Opposition to Plaintiff's Motion to Strike, *Windsor*, 833 F. Supp. 2d 394 (2012) (No. 10 Civ. 8435).

37 *Id.*

38 Roberta Kaplan & Jaren Janghorbani, *Proof vs. Prejudice*, 37 N.Y.U. REV. L. & SOC. CHANGE 143, 146 (2013).

39 U.S. v. Cutler, 58 F.3d 825, 834 (2d Cir. 1995).

40 Kaplan & Janghorbani, *supra* note 38, at 146–47; John F. Jackson, *The Brandeis Brief – Too Little Too Late: The Trial Court As a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 8–10 (1993–94); *see also* Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 510–11 (1984).

between sophisticated, well-funded legal teams at Paul, Weiss and the Bancroft firm? Why should a court deciding whether having gay parents is harmful to children get to make that factual determination free from the constraints of the time-tested rules of evidence and procedure? Those rules, after all, have been developed over the centuries for good reason—they assure that the facts on which courts rely permit them to ascertain the truth and make just determinations. Judge Barbara Jones wisely resolved the issue by declining to strike BLAG's hearsay citations, but by allowing us to put in anything we wanted on rebuttal.[41]

By the time we got to the Supreme Court, however, there was suddenly a new "study" on the other side written by a sociology professor from the University of Texas named Mark Regnerus.[42] While BLAG did not cite the Regnerus study directly in its brief, many of the amici on its side of the case relied on it heavily.[43]

With respect to his study, Regenerus had compared the responses to an internet survey of two groups of young adults. The first group answered affirmatively to the question whether, at some point in their childhood, one parent had "*ever* ha[d] a romantic relationship with someone of the same sex."[44] To qualify as the child of a gay or lesbian parent for the purposes of Regnerus' study, participants merely had to report that one of their parents had a same-sex relationship of any duration, presumably even including a "one night stand." In most of those cases, the parents and the family subsequently split apart, probably since at least one of the parents was really gay. The second group that Regenerus studied

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41 Order on Plaintiff's Motion to Strike, Windsor v. United States, 833 F. Supp. 2d 394 (2012) (No. 10 Civ. 8435).

42 Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012). Substantial evidence has been developed that there was nothing coincidental about Mr. Regnerus' study appearing when it did since it had been deliberately planned to be used in the upcoming cases at the Supreme Court. *See, e.g.*, Sofia Resnick, *New Family Structures Study Intended to Sway Supreme Court on Gay Marriage, Documents Show*, HUFFINGTON POST (Mar. 10, 2013, 8:58 PM), http://www.huffingtonpost.com/2013/03/10/supreme-court-gay-marriage_n_2850302.html [http://perma.cc/LE72-XSZW].

43 *See, e.g.*, Brief for The Beverly LaHaye Institution & The National Legal Foundation as Amici Curiae Supporting Respondent Bipartisan Legal Advisory Group at 24, 29–32, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for Liberty Counsel as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group at 38, 39, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for Manhattan Declaration as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group at 9, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for National Association of Evangelicals et. al. as Amici Curiae Supporting Respondent Bipartisan Legal Advisory Group at 12, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

44 Regnerus, *supra* note 42, at 756 (emphasis in original).

were kids who spent their entire childhoods in stable, married, "mom-and-pop" families that had encountered no such disruptions or trauma.

You probably won't be shocked to learn that the second group of kids from stable families tended to do better than the first group. That's hardly a surprise since the study was pre-engineered to produce that result. In other words, the Regenerus study did not compare children raised by gay couples with those raised by their straight biological parents. And it did not compare stable straight households with stable gay households. The Regenerus study did not compare apples to apples, but apples to oranges, or perhaps more accurately, rotten apples to oranges. For this reason, although Mr. Regenerus calls himself a sociologist, the American Sociological Association, in its amicus brief submitted to the Supreme Court, condemned his work in no uncertain terms, stating that it "provides no support for the conclusions that same-sex parents are inferior parents."[45] And a federal district court in Michigan recently wrote that it "finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration. The evidence adduced at trial demonstrated that his 2012 'study' was hastily concocted at the behest of a third-party funder."[46] The court further observed that Regnerus and others who testified to the harmful effects of gay and lesbian parenting "clearly represent a *fringe viewpoint* that is rejected by the vast majority of their colleagues across a variety of social science fields."[47]

So what did the Supreme Court majority have to say about children being raised by gay parents in *Windsor*? In his opinion, Justice Kennedy observed that DOMA "humiliates tens of thousands of children now being raised by same-sex couples. . . . [I]t makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[48] That is hardly a conclusion that having gay parents is destructive to a child's "integrity" or well-being. Indeed, it is almost impossible to overemphasize the significance of this. For decades, gay people and their relationships have been vilified as, among other things, threats to children. As recently as in the Proposition 8 campaign in California in 2008, gay people were maligned as perverts and pedophiles.[49] At the very least, their suitability as optimal parents has

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45 Brief for the American Sociological Association as Amicus Curiae Supporting Respondent Perry and Respondent Windsor at 16, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

46 DeBoer v. Snyder, 973 F. Supp. 2d 757, 766 (E.D. Mich. 2014).

47 *Id.* at 768 (emphasis added).

48 United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

49 *See, e.g.*, Maura Dolan, *Prop. 8 Proponent Says He Argued That Gay Marriage Could Lead to Legalizing*

been repeatedly questioned. So it is really pretty stunning that this point of view was not even acknowledged by the Supreme Court majority in *Windsor*. Even Justice Alito in his dissent refrained from directly invoking the supposed harms to children caused by non-traditional parents.[50] Now, when courts talk about the welfare of children, they are doing so exclusively in terms of the harms that *discrimination against gay parents* may cause to *their children*. For example, in the recent case extending the right to marry to gay couples in Oregon, the court observed that "[c]reating second-tier families does not advance the state's strong interest in promoting and protecting all families."[51]

II. Words Matter

Not only do facts matter, but words matter as well. I'll begin at the most basic level. Those who know me well know that I have a stubborn streak. (It probably is not a coincidence that my favorite book to read to my son when he was little was called *A Dog Needs a Bone*.[52]) One of the things I was adamant about when we were writing our brief is the language that we used to describe gay people. Let me be specific. I absolutely refused to use phrases like "same-sex" or "opposite-sex," "homosexual" or "heterosexual," anywhere in our briefs.

"Why," you might ask? Because I believed that Americans who are comfortable with gay people don't refer to them using those terms. In other words, if, like so many Americans today, you have a neighbor, a friend, a colleague or a family member who is gay, you don't refer to that person as "a homosexual." And you certainly don't refer to their husband or wife as their "same-sex spouse." Thus, while it is true, as has been reported, that we were given advice to "de-gay" our case, that was not advice that we chose to follow because that's precisely what our case was all about.[53]

Standing here today, I don't know if this strategic decision had any impact on the Supreme Court. But while the majority did use the phrase "same-sex" in its opinion, the

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Pedophilia, L.A. TIMES BLOG (Jan. 21, 2010, 5:35 PM), http://latimesblogs.latimes.com/lanow/2010/01/an-official-proponent-of-proposition-8-testified-today-he-was-involved-in-disseminating-claims-that-same-sex-marriage-could-l.html [http://perma.cc/D5N6-9FD4].

50 *Windsor*, 133 S. Ct. at 2711–20 (Alito, J., dissenting).

51 Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1144 (D. Or. 2014).

52 AUDREY WOOD, A DOG NEEDS A BONE (2007).

53 Ariel Levy, *The Perfect Wife*, NEW YORKER (Sept. 30, 2013), http://www.newyorker.com/reporting/2013/09/30/130930fa_fact_levy?currentPage=all [http://perma.cc/VX2V-EKAY].

language from its previous gay rights opinions in *Lawrence*[54] and *Romer*[55] suggesting that gay people are very different from straight people is completely absent from *Windsor*, even in the dissents. Indeed, rather than criticizing either the gay "KulturKampf" as he did in *Romer*,[56] or the "so-called homosexual agenda" as he did in *Lawrence*,[57] Justice Scalia now criticizes the other justices instead. Indeed, during my oral argument at the Supreme Court, Justice Scalia himself used the word "gay."[58] That itself is a form of progress.

Another area where words really mattered was in the legislative history of DOMA from 1996. Not surprisingly, our adversaries sought to characterize DOMA as if it were some kind of ordinary reappropriation bill for a department of the federal government like the post office or national parks system. It was therefore very important for us to describe DOMA for exactly what it was—a statute whose sole purpose was to denigrate gay people.[59]

Now that the decision is out, I can admit that this was a tricky strategic issue for us. We knew that if we advanced this argument too directly, we would be met with what I have characterized as the "finger-pointing argument." In other words, our adversaries would argue that we were effectively calling anyone who supported DOMA, either now or in 1996, "a homophobe." And indeed, much of the space in the briefs on the other side was devoted precisely to this argument. Here is how BLAG put it in one of its briefs: "[W]ith an issue as divisive and fast-moving as same-sex marriage . . . there is a premium on persuading opponents, rather than labeling them as bigots motivated by animus."[60] One of the amicus briefs submitted to the Supreme Court had an entire section entitled "Defining Millions of Religious Believers as Bigots."[61]

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54 Lawrence v. Texas, 539 U.S. 558 (2003).

55 Romer v. Evans, 517 U.S. 620 (1996).

56 *Id.* at 636 (Scalia, J., dissenting).

57 *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

58 Transcript of Oral Argument at 106–07, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

59 Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

60 Brief on the Merits for Respondent Bipartisan Legal Advisory Group at 22, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

61 Brief of Catholic Answers et al. as Amici Curiae Supporting Respondent Bipartisan Legal Advisory Group at 32, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

So how did we deal with this issue? After much back and forth, we decided to present to the Court the actual words used by the legislators at the time of DOMA's passage in 1996. But instead of using standard *Bluebook*[62] citation form, we omitted the names of the individuals involved. So, for example, we cited the Congressman who predicted that "no culture that has ever embraced homosexuality has ever survived"[63] or the one who described being gay as "inherently destructive,"[64] or the person who testified that supporting DOMA was "no more homophobic than it is siblingphobic to oppose incest or animalphobic to want humans to make love to their own species."[65] But we didn't identify them by name.

As expected, this issue came up quite dramatically at my oral argument before the Supreme Court when Chief Justice Roberts asked me whether the "84 Senators [who voted for DOMA in 1996] based their vote on moral disapproval of gay people?"[66] I answered as follows: "No . . . what is true, Mr. Chief Justice, is that times can blind, and that back in 1996 people did not have the understanding that they have today. . . [that] there is no constitutionally permissible distinction [between gay people and straight people]."[67] The Chief Justice then pushed back: "Well, does . . . times can blind . . . mean they did not base their votes on moral disapproval?"[68] I persisted:

> No[;] some clearly did. [For others,] I think it was based on an . . . incorrect understanding that gay couples were fundamentally different than straight couples, an understanding that I don't think exists today. And that's the sense [that] I'm using [the phrase] that times can blind. . . . So I'm not

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62 THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

63 Brief on the Merits for Respondent Windsor at 10, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (citing 142 CONG. REC. 16,802 (1996)).

64 *Id.* (citing *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 237 (1996)).

65 *Id.* at 8 n.1 (citing *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 102, 132 (1996)).

66 Transcript of Oral Argument at 105, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

67 *Id.* at 105–06. On top of that, I even won a bet with my team that I would be able to get some of the language from prior Justice Kennedy decisions into my argument. The "times can blind" language that I referenced, of course, is from Justice Kennedy's opinion in *Lawrence*. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

68 Transcript of Oral Argument at 106, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

> saying it was animus or bigotry, I think it was based on a misunderstanding of gay people and their [relationships.][69]

Standing there before the Justices on March 27, I really did not want to get into a debate about which of the legislators who voted for DOMA in 1996 morally disapproved of gay people or not (although many of them clearly did). And while I could be wrong, I had the distinct impression that what the other side really wanted to ask was whether President Bill Clinton, who signed DOMA into law in 1996, was "homophobic."[70] So my response instead was that the reason for the dramatic change that we have all experienced in our lifetimes was not the moral *disapproval* of gay people expressed in the House Report in 1996, but actually its diametric opposite—a moral *understanding* today that gay people and their desire for lasting, committed relationships are no different than anyone else.

III. The Law Matters

Let me turn to my final theme—that the law matters, too. On the one hand, this seems obvious. Of course, the law matters. In the context of our case, just look at all the concrete harms, or what the Supreme Court called the "injury and indignity" that DOMA caused to so many gay couples for so many years.[71]

When writing our merits brief for the Supreme Court, there was one four-page section sandwiched in the middle of our brief that I obsessed over because I believed it could well be dispositive of whether the Court would rule our way.[72] I must have re-written it at least 752 times. I called it the "checklist section" because it catalogued the three reasons why we believed the Court should subject DOMA if not to a form of heightened scrutiny, at least to the kind of "careful consideration" that the Court employed in *Romer*.[73] (The idea of

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69 *Id.*

70 By the time of the oral argument, we knew the answer to this question. *See* William J. Clinton, *Op-Ed., It's Time to Overturn DOMA*, WASH. POST, Mar. 8, 2013, at A17, *available at* http://www.washingtonpost.com/opinions/bill-clinton-its-time-to-overturn-doma/2013/03/07/fc184408-8747-11e2-98a3-b3db6b9ac586_story.html [http://perma.cc/QV7M-Q9FA]. ("In 1996, I signed the Defense of Marriage Act. Although that was only 17 years ago, it was a very different time . . . . I have come to believe that DOMA is contrary to those principles [of "freedom, equality and justice above all"] and, in fact, incompatible with our Constitution.").

71 United States v. Windsor, 133 S. Ct. 2675, 2681 (2013).

72 Brief on the Merits for Respondent Windsor at 33–37, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

73 *Windsor*, 133 S. Ct. at 2693. *See generally* Linda C. McClain, *From* Romer v. Evans *to* United States v.

the "checklist" comes from the notion that we wanted the Justices to read the section and think to themselves "check, check, and check.") The three reasons we outlined for why the Court needed to scrutinize DOMA with special care were: (1) DOMA was enacted in order to "harm a politically unpopular group"[74] or at a minimum based on "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different";[75] (2) by amending the Dictionary Act for purposes of the entire U.S. Code, DOMA "impos[ed] a broad and undifferentiated disability"[76] on an entire class of people; and (3) by instructing the federal government to ignore state laws as to who was eligible to be married, DOMA radically altered the historic relationship between the federal government and the states in a way that should cause the Court to be suspicious as to Congress's motives.[77]

In the three months (that felt like three years) between oral argument and when the decision came down from the Supreme Court on June 26, 2013, I will admit that I was guardedly optimistic that we would prevail. I was pretty worried, however, about the grounds on which the Court would ultimately rely. It was very important for us that *Windsor* be grounded in the three theories outlined above in order to serve as a strong precedent going forward. Fortunately, my obsessive-compulsive behavior actually succeeded, since these three themes are interwoven throughout the majority opinion. For example, on the first moral disapproval or "animus" point, Justice Kennedy explained that "interference with the equal dignity of same-sex marriages was more than an incidental effect of [DOMA]. It was its essence,"[78] explicitly referencing the fact that the 1996 House Report expressed moral disapproval of homosexuality.[79] As for DOMA's breadth, the Supreme Court, noting that "DOMA writes inequality into the entire United States Code,"[80] observed that DOMA

Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and The Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351 (2013).

74 McClain, *supra* note 73, at 410 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

75 Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

76 Romer v. Evans, 517 U.S. 620, 632 (1996).

77 *Id.* at 633.

78 *Windsor,* 133 S. Ct. at 2693.

79 *Id.* (citing *Defense of Marriage Act: Report Together with Dissenting Views*, 104th Cong. 1, 15–16 (1996)).

80 *Id.* at 2694.

"touches many aspects of married and family life, from the mundane to the profound."[81] And with respect to our third and final point concerning the novel way in which DOMA upset traditional notions of federalism, the Court noted DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage."[82] As the Court explained, DOMA was "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[83]

The Supreme Court uses this word "dignity" ten times in its twenty-six-page opinion for the Court in *Windsor*.[84] According to the Oxford English Dictionary, the word "dignity" means "the state or quality of being worthy of honor or respect."[85] Sometimes, it's the simplest and most obvious things that say the most. The "state or quality of being worthy of honor or respect" is *exactly* what the *Windsor* case was all about. After all, now that the Supreme Court has recognized that gay people and their relationships are equally "worthy" of respect under the Constitution, the equivalent of the Battle of Normandy has been won. And you don't have to take my word for it. There have already been more than fifty decisions throughout the country in states as far apart in geography and culture as Ohio and Utah, New Jersey and Oklahoma, or Oregon and Arkansas relying on *Windsor* to extend rights to gay people.[86] Courts across the country are expanding the rights of gay people us-

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81 *Id.*

82 *Id.* at 2693.

83 *Id.* at 2696.

84 United States v. Windsor, 133 S. Ct. 2675, 2681, 2689, 2692–94, 2696 (2013).

85 DIGNITY, OXFORD ENGLISH DICTIONARY, *available at* http://www.oxforddictionaries.com/us/definition/american_english/dignity [http://perma.cc/BPC2-TCWV] (last visited Jan. 15, 2015).

86 Latta v. Otter, 111 F.3d 456, 2014 WL 4977682 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); Strawser v. Strange, No. 14-0424 (S.D. Ala. Jan. 27, 2015); Searcy v. Strange, No. 14-0208, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015); Caspar v. Snyder, No. 14-cv-11499, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015); Rosenbrahn v. Daugaard, No. 4:14-cv-04081, 2015 WL 144567 (D.S.D. Jan. 12, 2015); Campaign for S. Equal, v. Bryant, No. 3:14-cv-818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014); Jernigan v. Crane, No. 4:13-cv-00410, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014); Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014); Bradacs v. Haley, No. 3:13-cv-02351, 2014 WL 6473727 (D.S.C. Nov. 18, 2014); Condon v. Haley, 21 F. Supp. 3d 572 (D.S.C. 2014); Lawson v. Kelly, No. 14-0622-cv, 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014); McGee v. Cole, No. 3:13-24068, 2014 WL 5802665 (S.D. W. Va. Nov. 7, 2014); Marie v. Moser, No. 14-cv-02518, 2014 WL 5598128 (D. Kan. Nov. 4, 2014); Guzzo v. Mead, No. 14-cv-200, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); Hamby v. Parnell, No. 3:14-cv-00089, 2014 WL 5089399 (D. Alaska Oct. 12, 2014); Gen. Synod of the United

ing the very same language and concepts we articulated which are also reflected in Justice Kennedy's majority opinion.

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It is all too easy, in today's world of Twitter and Instagram and Politico, to become cynical—to assume that it's all one big inside game and that cases do not get decided on the law, but for other, less principled reasons. I'd like to offer *U.S. v. Windsor* as a kind of antidote to that kind of cynicism. What the *Windsor* decision means is that courts matter. What *Windsor* means is that the United States Constitution matters. And what *Windsor* means is that what we as lawyers do every day really, really matters a lot.

Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014); Majors v. Jeanes, No. 2:14-cv-00518, 2014 WL 4541173 (D. Ariz. Sept. 12, 2014); Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); Bowling v. Pence, No. 1:14-cv-00405, 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); Burns v. Hickenlooper, No. 14-cv-01817, 2014 WL 3634834 (D. Col. July 23, 2014), *perm. app. granted*, 2014 WL 5312541 (D. Col. Oct. 17, 2014); Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (U.S. Jan. 16, 2015); Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis.), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); Whitewoodv. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); Evans v. Utah, 21 F. Supp. 3d 1192 (D. Utah 2014); Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014); Baskin v. Bogan, 12 F. Supp. 3d 1137 (S.D. Ind. 2014) (granting temporary restraining order); Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio), *rev'd. sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted.* No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015); DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich.), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015); Tanco v. Haslem, 7 F. Supp. 3d 759 (M.D. Term.), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-562, 2015 WL 213648 (U.S. Jan. 16, 2015); DeLeon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex.); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va.), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 286 (2014); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky.), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (U.S. Jan. 16, 2015); Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla.), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (U.S. 2014); Lee v. Orr, No. 13-cv-8719, 2013 WL 6490577 (N.D. 111. Dec. 10, 2013); Gray v. Orr, 4 F. Supp. 3d 984 (N.D. 111. 2013); Cooper-Harris v. United States, 965 F. Supp. 2d 1139 (CD. Cal. 2013); Cozen O'Connor, P.C. v. Tobits, No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013); Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (granting temporary restraining order); Bassett v. Snyder, 951 F. Supp. 2d 939 (E.D. Mich. 2013). *But see* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015); Conde-Vidal v. Garcia-Padilla, No. 14-cv-1253 (PG), 2014 WL 5361987 (D.P.R. Oct. 21, 2014); Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014).

One of the great Hasidic rabbis, Rebbe Nachman of Breslov, taught his followers that: "All the world is a very narrow bridge. And the main thing to remember is not to fear at all."[87] These words are as true today as they were in Rebbe Nachman's world of crusades and pogroms, hundreds of years ago. So like Edie Windsor, be brave. Be yourself and be true to yourself. As *Windsor* co-counsel, Pam Karlan, would say: "You cannot choreograph a lifetime."[88] So even if you lose a case, or two, or three along the way (as I did), keep on walking across that narrow bridge. And, although it is often very hard, try your best to keep your fears to a minimum. You are about to enter the noblest of professions. Take on clients and cases because you know in your mind *and* in your heart that it's the right thing to do. As far as I can tell, that is what this crazy condition of being both a human being and a lawyer is all about.

87 Rebbe Nachman of Breslov, LIKUTEY MOHARAN II 48.

88 Stanford Law School, *Levin Center's Fall Public Service Awards Dinner*, YOUTUBE (Nov. 13, 2013), http://www.youtube.com/watch?v=I9b3NLLkZjo [http://perma.cc/7HRR-NYA6].