

## How They Won It: Akin Gump Defeats Texas Gay Marriage Ban

By **Jeremy Heallen**

*Law360, Houston (March 14, 2014, 4:07 PM ET)* -- Armed with a landmark U.S. Supreme Court ruling, lawyers with Akin Gump Strauss Hauer & Feld LLP achieved a social and personal victory when they overcame Texas' same-sex marriage ban with a rapid assault in federal court that overwhelmed stiff conservative opposition and laid the foundation for advancing civil rights.

Pointing to the high court's decision in *U.S. v. Windsor*, which struck a limitation on federal marriage benefits to heterosexual couples, Akin Gump filed suit in October on behalf of Vic Holmes and Mark Phariss, who were denied a Texas marriage license, and Cleopatra De Leon and Nicole Dimetman, who want their out-of-state marriage recognized in Texas.

Akin Gump attorney Neel Lane said that the firm's decision to take up the case pro bono was driven by its desire to "advance the arc of social justice." But the battle also hit close to home for the firm, which has long extended fringe benefits to the same-sex spouses of its employees, according to Lane. Dimetman was an associate with Akin Gump from 2007 until 2009.

"We care deeply about the issue," Lane said. "We thought the time was right in light of *Windsor* and the need could not have been more urgent."

The *Windsor* decision set the stage for Akin Gump's fight last summer, when the Supreme Court invalidated a provision of the Defense of Marriage Act defining marriage for federal benefits purposes as "only a legal union between one man and one woman as husband and wife."

The challenged portion of DOMA, which denied same-sex spouses more than 1,100 federal benefits — including Social Security, estate tax exemptions and the ability to file joint tax returns — ran afoul of the Constitution's guarantee of equal protection, the high court ruled.

*Windsor*'s legal underpinnings apply with equal force to state laws and brought to the fore a "great constitutional injustice" occurring throughout the U.S. according to Lane.

"The decision made it clear that the Texas Constitution and amendments [prohibiting gay marriage] are unconstitutional," he said.

But it was going to take more than the strength of the *Windsor* ruling to change things in Texas. Conveying a sense of urgency to U.S. District Judge Orlando L. Garcia would also prove critical, according to Lane.

That's what sparked Akin Gump's decision to seek a preliminary injunction aimed at preventing the state from depriving the couples of their right to marry, Lane said. Although the standard for securing a preliminary injunction is often more difficult to achieve than winning a case on its merits, Lane said taking on the extra burden was key to fast-tracking a ruling that he knew would likely end up in the lap of the Fifth Circuit.

"If we didn't move for the preliminary injunction, the wheels of justice would just grind away and delay a decision," Lane said.

Citing Windsor and the Supreme Court's decisions in cases like Loving v. Virginia, which struck down a ban on interracial marriage in 1967, Akin Gump argued that gay couples are being unjustifiably discriminated against based on "long-standing prejudices" in violation of the due process and equal protection clauses of the 14th Amendment.

The Texas attorney general's office pushed back hard, arguing that the gay marriage ban — approved by voters in 2005 as a state constitutional amendment — was justified because it advanced the "state's interest in responsible procreation and child rearing."

One of the biggest potential hurdles to Akin Gump's case was the low burden the state had to meet to justify the ban. Under equal protection analysis, Texas only had to show that the law was "rationally related" to a legitimate government interest.

Lane, who argued the case to Judge Garcia in February alongside Akin Gump colleague Barry Chasnoff, said that the state's policy arguments fell flat. Largely rooted in "moral disapproval," the state's rationales for banning gay marriage couldn't withstand Akin Gump's logical rejoinders, according to Lane.

That the state possibly has an interest in "responsible procreation" ignores the fact that traditional marriage is not limited to people who are able to have children, Lane said, noting that a pair of octogenarians can marry in Texas.

And Lane says the idea that there is a correlation between rearing a well-adjusted child and the stability of his parents' marriage only supports the notion that Texas should support gay marriage, particularly in cases like that of De Leon and Dimetman, who have a son.

"If you think marriage is a good thing for children, why deny it to people who already have kids?" Lane said.

Finding Akin Gump's arguments compelling, Judge Garcia granted an injunction on Feb. 26 prohibiting Texas from enforcing its gay marriage ban. In his ruling, Judge Garcia said that Texas law demeaned the dignity of homosexual couples for no legitimate reason.

"Without a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution," the judge said. "These Texas laws deny plaintiffs access to the institution of marriage and its numerous rights, privileges and responsibilities for the sole reason that plaintiffs wish to be married to a person of the same sex."

Recognizing the likelihood the ruling would be appealed, Judge Garcia stayed his decision to allow the

Fifth Circuit to weigh in.

But Lane is undeterred and says he believes the ruling stands a good chance at being upheld.

“The Fifth Circuit has a reputation for being conservative, but also has a reputation for following the law,” he said.

The plaintiffs are represented by Barry A. Chasnoff, Daniel McNeel Lane Jr., Matthew E. Pepping, Jessica Weisel and Michael P. Cooley of Akin Gump Strauss Hauer & Feld LLP and Frank Stenger-Castro.

The case is De Leon et al. v. Perry et al., case number 5:13-cv-00982, in the U.S. District Court for the Western District of Texas.

--Additional reporting by Scott Flaherty, Jess Davis and Abigail Rubenstein. Editing by Andrew Park.

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