

If Obama won't fight gay marriage, conservatives will

by [Adelle M. Banks](#)

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WASHINGTON (RNS) If President Obama and the U.S. Department of Justice no longer want to defend the Defense of Marriage Act from challenges by gay rights activists, who will?

Leading conservative law firms say they're eager to defend the 1996 law that defines marriage as between a man and a woman, but that may not be so easy.

Could a conservative firm like Liberty Counsel, a Florida-based group that often opposes the administration, be the stand-in for the U.S. attorney general before a judge hearing DOMA challenges?

"That's what we're pursuing," said Mathew Staver, founder of the firm and dean of Liberty University School of Law. "Somebody has to step in and do the job when the attorney general and the president will abandon theirs."

Liberty Counsel had filed friend-of-the-court briefs in two DOMA court cases and is now strategizing with members of Congress to intervene on their behalf to defend the law that bans federal recognition of same-sex marriages.

"It's early in the process," said Staver, whose firm has litigated

dozens of cases related to marriage -- including DOMA -- and represented Congress, state legislators and private organizations on other issues.

"We're still doing a lot of preliminary discussion."

Staver and other conservative lawyers have harshly criticized the announcement Wednesday (Feb. 23) by Attorney General Eric Holder that Obama had determined that DOMA is unconstitutional when applied to same-sex couples married legally under state law.

Last month, the Alliance Defense Fund submitted a brief on behalf of House Judiciary Committee Chairman Lamar Smith, R-Texas, in response to a Massachusetts challenge of DOMA being heard in a federal appeals court. Now it could be turning its attention to the cases in Connecticut and New York that prompted the administration's new decision.

"I have no doubt that the Alliance Defense Fund and other organizations will involve themselves in these cases," said Austin R. Nimocks, senior legal counsel for the Arizona-based firm. "The question is what is going to be the nature of the role. If somebody with (legal) standing to intervene in these cases wants ADF to represent them, we will certainly explore that with them."

California's Proposition 8 -- which ended same-sex marriages in the state but was later ruled unconstitutional by a federal judge -- offers some clues to the road ahead.

The ADF is representing the group ProtectMarriage.com to defend the 2008 voter referendum after the state's governor and attorney general opted not to defend it; the California Supreme Court is weighing whether the group has legal standing to step in as the case heads to a federal

appeals court.

The American Center for Law and Justice, a law firm founded by religious broadcaster Pat Robertson, also is mulling its role in the fight over DOMA.

Jordan Sekulow, a lawyer and policy director with the Washington-based firm, said attorneys are in private discussions with members of Congress and could represent some by filing amicus briefs or more directly representing them in court.

"It's possible that because of the politically charged nature of this that it's more likely for organizations who have taken a stand on this issue to lead the defense," he said.

His firm has represented dozens of members of Congress in recent cases, from opposing Obama's health care plan in Virginia and Florida to supporting the National Day of Prayer and disputed crosses erected in California.

But do these groups have a chance if they try to pick up where Justice Department lawyers left off?

John Witte, director of the Center for the Study of Law and Religion at Emory University, said conservative activists simply don't have the firepower or the "unrivaled" political power of administration lawyers.

"There's just no substitute for having the federal government's attorney general and Office of Legal Counsel involved in these cases," he said.

"Maintaining DOMA once the administration steps away ... is going to be much harder."