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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 KAREN GOLINSKI)
15 Plaintiff,)
16 v.)
17 THE UNITED STATES OFFICE OF)
PERSONNEL MANAGEMENT and)
18 JOHN BERRY,)
19 Defendants.)

No. C 4:10-00257-JSW

**DEFENDANTS' RESPONSE TO
ORDER TO SHOW CAUSE
OF FEBRUARY 23, 2011**

1 As to the questions posed by the Court's Order to Show Cause of February 23, 2011,
2 Defendants reiterate at the outset that the issue of the constitutionality of Section 3 of the
3 Defense of Marriage Act ("DOMA") need not be reached to resolve this case. As we have
4 previously stated, the Employee Dispute Resolution ("EDR") Plan order at issue here is not
5 enforceable through mandamus under 28 U.S.C. § 1361. As Defendants stated in their
6 Supplemental Brief in Response to Court's Order of October 15, 2010 [Docket No. 76], "[f]or an
7 order to be enforced through the extraordinary remedy of mandamus, it must at a minimum
8 impose a clear duty to execute a ministerial act, one that does not involve the exercise of
9 judgment. The order at issue here – entered by the Honorable Alex Kozinski, Chief Judge for the
10 United States Court of Appeals for the Ninth Circuit, not in his Article III capacity but rather in
11 his administrative capacity as an EDR hearing officer – did not impose a ministerial obligation
12 upon the Office of Personnel Management ("OPM") and therefore cannot be enforced through
13 mandamus on its own terms."

14 Defendants nonetheless respectfully submit the following responses to the questions
15 regarding the issue of the constitutionality of DOMA posed by the Court in its Order to Show
16 Cause of February 23, 2011 [Docket No. 94].

17 **I. Question 1: Does the OPM intend to reassess its position on its original instruction**
18 **to Plaintiff's insurer to decline to extend benefits to her same-sex spouse?**

19 As reflected in the Statement of the Attorney General on Litigation Involving the Defense
20 of Marriage Act ("Statement"), referenced in the Court's Order and submitted by Plaintiff in a
21 Notice of Supplemental Authority [Docket No. 93, Exhibit A(1)], "Section 3 of DOMA will
22 continue to remain in effect unless Congress repeals it or there is a final judicial finding that
23 strikes it down, and the President has informed me that the Executive Branch will continue to
24 enforce the law." Statement at 2. Moreover, as reflected in the Letter of the Attorney General to
25 the Honorable John A. Boehner, Speaker of the U.S. House of Representatives ("Letter")
26 [Docket No. 93, Exhibit A(2)], "[t]o that end, the President has instructed Executive agencies to
27 continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take
28 care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the

1 judicial branch renders a definitive verdict against the law’s constitutionality.” Letter at 5.

2 Pursuant to the instructions of the President, OPM will continue to enforce Section 3 of DOMA
3 until it is repealed or there is a final judicial finding striking it down.

4 **II. Question 2: How does the Executive reconcile the position that it intends to enforce**
5 **a statute that it has affirmatively declared to be unconstitutional and deemed**
6 **inappropriate to defend?**

7 As noted above, while the President has determined that the Executive Branch will not
8 defend the constitutionality of Section 3 of DOMA, he has instructed agencies to continue to
9 comply with Section 3 “consistent with the Executive’s obligation to take care that the laws be
10 faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a
11 definitive verdict against the law’s constitutionality.” Letter at 5. As the Attorney General has
12 stated, “[t]his course of action respects the actions of the prior Congress that enacted DOMA,
13 and it recognizes the judiciary as the final arbiter of the constitutional claims raised.” Id.

14 Moreover, through the Attorney General, the Executive Branch has notified Congress pursuant to
15 28 U.S.C. 530D of the President’s determination that Section 3 of DOMA is unconstitutional and
16 his decision not to defend the statute. Letter at 1. The Attorney General indicated to Congress
17 that “[o]ur attorneys will also notify the courts of our interest in providing Congress a full and
18 fair opportunity to participate in the litigation in those cases,” including this one. Id. at 6. See
19 also Letter from Ronald Weich, Assistant Attorney General, U.S. Dep’t of Justice, to the Hon.
20 John A. Boehner, Speaker, U.S. House of Representatives, Feb. 25, 2011 (Attached at Tab 1).

1 **III. Question 3: Should the Court remand this matter to the Ninth Circuit’s**
2 **administrative process for proper adjudication of Plaintiff’s access to benefits for**
3 **her wife?**

4 As Defendants have explained in prior submissions, the authority to administer the
5 Federal Employees Health Benefits Program (“FEHBP”) has been statutorily conferred upon
6 OPM under the Federal Employees Health Benefits Act of 1959 (“FEHBA”); that authority
7 encompasses all Federal employees, including those of the Judicial Branch. See Transitional
8 Learning Cmty. at Galveston v. OPM, 220 F.3d 427, 429 (5th Cir. 2000); Kobleur v. Group
9 Hospitalization & Med. Servs., 954 F.2d 705, 709 (11th Cir. 1992). And, as Defendants have
10 previously explained, there is no grant of authority to the federal courts that would allow an EDR
11 panel to issue binding directives to OPM in the latter’s statutorily delegated administration of the
12 FEHBP. Thus, a remand to the EDR process for the purposes of directing OPM in its
13 administration of the FEHBP would be wholly inappropriate and ineffectual.

14 **IV. Question 4: On what basis can OPM defend its position to decline to extend benefits**
15 **in a case in which such declination was based on the defense of unconstitutional**
16 **legislation?**

17 As discussed above, the President has determined that Executive agencies will continue
18 to enforce Section 3 of DOMA, a course of action that accords appropriate deference to the
19 Congress that enacted DOMA and allows the judiciary to be the final arbiter of DOMA’s
20 constitutionality, as stated by the Attorney General. Moreover, as discussed, the Executive
21 Branch has fulfilled its statutory obligation to notify Congress of the decision not to defend the
22 statute and is committed to urging the courts to provide Congress with a full and fair opportunity
23 to participate in the litigation of DOMA cases.
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1 Dated: February 28, 2011

Respectfully Submitted,

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